

Contemporary and Emerging Issues in

SYARIAH *And* LAW

Edited by
Dina Imam Supriat
Ahmad Zaki Satten
Zahari Mahad Musli

2018

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Editors:

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PENERBIT USIM

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PREFACE

Alhamdulillah, all praise to Allah, by whose grace and blessings the publication of this special book entitled ‘Contemporary and Emerging Issues in Syariah and Law.’ This book reflects the journey of learned minds that work relentlessly to uphold the Syariah and law and their importance in the creation of social order.

Contemporary and Emerging Issues in Syariah and Law is an outcome of the International Seminar on Syariah and Law 2018 (INSLA 2018) organised by Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM). It comprised of selected papers presented at INSLA 2018 that aims is to promote the harmonisation of syariah and law in every aspects of human life.

The issue of harmonizing the syariah law and the common law has become exponentially important and has been consistently addressed in various platforms to comprehend and appreciate the methodology and principles employed by jurists in Syariah and law. Better understanding on the syariah and law are built through the appreciation of the conflicts, interfaces and convergence in both the legal system.

As indicated in the title of the book, the chapters encompass diverse issues and subjects in the area of syariah and law and the application of syariah and law principles. The book portrays contemporary and emerging syariah and law issues in Southeast Asia, and selected countries in the Middle-east and Africa.

Noteworthy and challenging debates are presented in 31 chapters covering Syariah and law matters in financing, banking, negligence, privacy, communication technology, criminal justice, family, society, work ethics, gamification and education, enforcement, terrorism, consumer protection, land and environment.

We wish to express our appreciation to all authors for the contribution of broad spectrum of articles in this book. We pray that this book becomes part of a continuous charity and the knowledge shared are beneficial to human kind.

The Editors
2019

CHAPTER 26

THE PHILOSOPHY OF CRIMINAL ACT OF APOSTASY (*MURTAD*) IN ISLAMIC LAW

Zainuddin
Bustamar

Mualimin Mochammad Sahid

Introduction

There are seven most serious crimes discussed by Islamic Law experts (*fuqaha*) referenced to the Qur'an (Allah SWT) and Sunnah (Rasulullah SAW) which are known as *hudud* criminal acts. There is no authority of the judge or ruler to determine or change the provisions of this sanction. Those criminal acts are adultery, *qazf* (adultery accusation), *hirabah* (robbery), *sariqah* (theft), *syurb al-khamr* (liquor), *al-baghy* (rebellion) and apostasy (renouncing Islam). Unlawful acts other than those seven criminal acts are called *ta'zir* criminal acts of which punishment provisions are stipulated by a judge or *ulil amri*.

Six of the seven serious criminal acts in Islamic criminal law can be accepted by the law scholars as criminal acts because they meet the elements and criteria of a criminal act. However, one of them, apostasy, cannot be categorized as a criminal act. How is it to explain that an apostasy is a criminal act in Islamic Law? Why can not the concept of positive criminal law and human rights accept it? This requires a deep study. This paper will try to study the legal philosophy so it can reveal that an apostasy is a criminal act, both in the view of law scholars and especially Sharia scholars. Inability to reveal a legal philosophy can lead to imbalance, which is in Zainuddin (2016: 756-757) called as the legal dichotomy that leads to disharmony of Sharia and positive laws (Zainuddin, 2017).

Apostasy In *Fiqh* Perspective

In terminology, apostasy is renouncing Islam. People who apostatize means they abandon Islam as the religion they embrace. On the other hand, apostasy means back. In the early age of Islam, some people who had embraced Islam converted back to their original religion, such as Judaism, Christianity or Paganism (polytheists). The case happened much after the death of Rasulullah PBUH because there was a perception that the agreement to embrace Islam was only with Rasulullah. Therefore, the main assignment of Abu Bakar as the first Caliph was to crush the apostates, people who are reluctant to pay zakat, and the false prophets.

In Islamic terminology, apostasy has some perspectives. There are at least two important perspectives on apostasy. The first one is from the theological perspective and the second one is from the criminal perspective. These two perspectives have a very strong linkage.

In the theological perspective, Abdul Qadir Audah mentions three categories that can cause someone to be called an apostate, namely: deeds, words, and beliefs (Audah, n.d.). Wahbah a-Zuhayli concludes that there are three major causes of a person to be called an apostate, namely: adhering the laws that have been agreed in Islam, doing parts of

disbelieving deeds and breaking away from Islam. Someone is declared as an apostate if he or she does *al-fi'l* (act) which is forbidden in Islam and says that the act belongs to Islamic teachings. On the other hand, it is also an apostasy when someone abandons (*at-tark*) something ruled in Islam and declares that it is not the teachings of Islam. Words (*al-qaul*) can also cause someone to become an apostate, such as the statement "The Qur'an is not the words of God". Besides, it is also considered as apostasy if someone changes his or her belief (*al-i'tiqad*) into other than Allah SWT or not believing Rasulullah SAW, Kitabullah, the Angels, Doomsday and the destiny of Allah SWT (*al-qadha' wa al-qadar*) (Az-Zuhayli, n.d.).

In the Islamic criminal perspective, an apostasy is a criminal act that is threatened with certain sanctions (*hudud*). In a Hadith received from 'Ikrimah, Rasulullah PBUH said "Whoever substitutes his/her religion is sentenced to death (Al-Bukhari, n.d.), (At-Turmuzi, n.d.), (As-Sijistani, n.d.). The death penalty for apostasy is the ultimate punishment (*al-'uqubah al-ashliyah*). Besides, an apostate is also given an additional penalty (*tabi'iyah*) namely not getting the inheritance. If the ultimate punishment falls because of the apostate's repentance, then he/she gets *ta'zir* as a substitute punishment (*al-'uqubah al-badaliyah*) which equals to his/her faults in accordance with the judge's view, such as whips, prisons or fines.

Islamic scholars agreed, both in the books of classical *fiqh* and contemporary *fiqh*, to include apostasy in *fiqh jinayah* or Islamic criminal law that is categorized as the most serious crime with certain sanctions (*hudud*). The scholars have consensus (*ijma'*) over the death penalty for the apostates, both male or female provided that the apostates are *baligh*, sane, and do apostasy as their own choice, not because of coercion. The exception is for Hanafi school which do not agree with the death penalty for women (As-Sammara'i, 1983). They reasoned with the Hadith received from Ibn Umar that forbade killing woman and children (Hanbal, n.d.). Although this prohibition came out in warfare, Hanafiah enforces it in general. In contrast to the classical scholar, Abdullah Ahmad Na'im, a contemporary thinker from Sudan, criticized the grouping of apostasy in *hudud* crime (An-Na'im, 1994). He argued that only the Qur'an which can serve as the basis determine sanctions of *hudud*. This happens for four kinds of *hudud*, namely adultery, *qazf* (accusing someone of doing adultery), *sariqah* (theft), and *hirabah* (robbery). While the three other *hudud* types, namely: *syurb* (liquor), *baghyu* (rebellion) and apostasy (renouncing Islam), the sanctions are based on *hadits ahad* which has the chance of different opinions occurrence. Naim tends to include apostasy into the *ta'zir* group, but he still places it as a criminal form.

There are three conditions a person is said to have committed a criminal act of apostasy. First, the perpetrator is *baligh*; second, he/she is sane; third he/she does it as his/her own choice or willingness, not because of coercion. Children who have not yet had a complete sense of thinking, crazy or drunk people, can not be responsible if they do apostasy. It is also for the people who are forced or threatened to renounce Islam, they can not be punished (Az-Zuhayli, n.d.).

Before being executed, the perpetrators of the criminal act of apostasy were told to repent first. *Jumhur Ulama* argued that it is obligatory to ask them to repent, while for Hanafiyah, it is *sunat*. The apostates are imprisoned for three days to give them a chance to repent and every day they are reminded of getting back to Islam by saying *syadahat*. If after the three days there is no decision to repent, the execution is done by the executor, such as *Imam* or the person appointed to be the representative of *Imam* (Az-Zuhayli, n.d.).

According to Sayyid Sabiq, an apostate has denied the righteous nature, out of the truth and logic. This person has fallen to the lowest level and been in a dangerous setback.

Such people are not worthy of life because they do not have a noble purpose in life. Furthermore, Sabiq explains that Islam is a comprehensive universal system for life and a protective shield. All subsystems of life are placed on this system. If the system is broken, then the Islamic building in life breaks down as well. The best way to maintain the system of Islam is by preventing its people from getting out of Islam because it will damage the existence of Islam. Renouncing Islam by doing apostasy is a treason that must be punished. The positive law also implies the same thing. Anyone who came out of the state system, whether they are communists or capitalists, it means they have betrayed the state and is entitled to death. Therefore, when Islam establishes the death penalty for the apostates, it is very logical and in line with the legal system in other countries (Sabiq, n.d.). Related to this, A. Hanafi mentions that the death penalty of convicted apostates is because they have damaged the religion as a social system that can cause turmoil in the system (Hanafi, 1967).

Based on the theory of *maqasid al-sharia*, the most ultimate goal of Islamic law (Sharia) is to maintain the order of people life (*maslahah ammah*). This order can be maintained by denying harm, slander and hostility by strictly enforcing the law and giving punishment for the perpetrator of a crime or offence. Muhammad Thahir (At-Tunnisiy, 2004) sees the purpose of the punishment prescribed by Allah SWT from three dimensions. First, it is from the perpetrator's dimension; that is to make the perpetrator admit his guilt. Second, it is from the victim's dimension; that is to calm the victim's heart down over the suffering. Third, it is from the third party's dimension; that is to warn others not to commit the same crime.

In the theory of *maqasid al-sharia*, there are five main things to maintain, namely religion, soul, mind, wealth and honour. Maintenance of a religion is a top priority in human life. Burgerstone, as quoted by Muhammad Thahir, said: "I found a group of people living without knowledge, art and philosophy, but I never found a group of people living without religion". Much earlier than Burgerstone, Islamic law (Sharia) has made a religion an important thing in life, because religion has grown since the beginning of human life as their nature (At-Tunnisiy, 2004). Therefore, the sustainability of a religion in human beings needs to be maintained. In addition, the existence and sustainability of a religion (Islam) in this world must be preserved. The way to preserve it is by enforcing the law for those who break the rules and giving punishment to those who abandon it (apostasy).

Based on a contextual study by Ja'far Assagaf about the hadiths of apostasy crime, the sanctions given are not solely due to the apostasy, but for committing a political crime that creates chaos and discomfort in society such as the case of 'Ukl and 'Uraynah tribes. Abdullah bin Khatal and Miqyas bin Subabah were executed not solely because of apostasy, but because of murder and propaganda that harassed Islam. Meanwhile, the Prophet SAW once gave an amnesty to a convicted apostate so that he was not executed as in the case of Abdullah bin Abi Sarh due to his great merit of once being a revelation writer. Assagaf said that death execution for apostasy done by Muaz and Abu Musadi Yaman towards a Jew after converting to Islam was not as serious as the case of Abdullah bin Abi Syarh. The Jew was not an important person but an ordinary person who had no social and political influence for his people. Had the case faced with the Prophet SAW, Assagaf assumed that the Prophet would have also granted an amnesty to him (Assagaf, 2014). The argument of the criminal act of apostasy which was sentenced to death for non-religious reasons was also explained by Dedy Sumardi quoting Abdullah Ahmad an-Na'im, Quraish Shihab and 'Abid al-Jabiri. It is only Dedy who said that An-Na'im tends to argue that limiting freedom of choosing religion does not fit the tolerant Qur'anic mission and violates human rights (Dedy Symardi, 2011).

Assegaf further explained that the death execution for convicted apostates which has become a consensus of the scholars can be understood contextually (Assagaf, 2014). On the era of the Prophet PBUH, apostasy was very closely related to the socio-political threat of Muslims. It means that Islam as the ideology at that time became a commitment in the life of the state. If someone opposed to the ideology, it means that he/she had betrayed against the state. Thus, it is reasonable if an opponent of the ideology is punished with the heaviest punishment or death penalty. Islamic teaching does not force someone to embrace Islam, but when Islam has already been someone's choice, so its law applies to him/her. International human rights should provide autonomy for Muslims to manage their own internal issues without intervention. This also applies to all countries in the world. However, in certain cases, the death penalty can be granted an amnesty and be replaced with other punishment if there is no indication of political and social crime, such as in the case of Abdullah bin Abi Sarh that was granted an amnesty by the Prophet PBUH.

Apostasy In Criminal Act Perspective

According to Moeljatno, a criminal act is an act prohibited by a rule of law, a prohibition which is accompanied by a threat (sanction) in the form of a certain penalty for anyone who violates the rule (Moeljatno, 1984). Pompe, as quoted by Ide Prima Hadiyanto, argues that a criminal act is a violation of the norm (interference toward the legal order) that has intentionally or unintentionally been committed by a perpetrator, in which punishment is necessary in order to maintain the legal order and to guarantee the legal interest. Furthermore, Ide Prima Hadiyanto quotes Van Hamel who explained that a criminal act is an attack or a threat toward the rights of others. The substance of those several definitions; first, unlawful act; second, the threat of punishment; third, threatening the rights of others (Hadiyanto, 2017).

An act can be defined as a criminal act if it meets the criminal elements. According to Simons quoted by Amir Ilyas, elements of a criminal act are (Ilyas, 2012):

1. Human actions (positive or negative, doing or not doing or letting)
2. Threatened with penalty
3. Against the law
4. Committed with fault
5. Committed by responsible people

From the perspective of law studies, apostasy can be considered as a crime because it covers the definition of a criminal act, that is an act of violating or against the law, there is a threat of punishment and it threatens the rights of others. It is unlawful since it violates the law established by Allah SWT and Rasulullah SAW. It threatens the rights of others since it disturbs the Muslims (public) convenience due to the apostasy. While the threat of punishment is the death penalty. These criminal criteria are explained as well in the criminal elements proposed by Amir Ilyas stated above.

In the perspective of Islamic Law (Sharia), apostasy has clearly been categorized as a criminal act. The terminology of crime in Islamic Law is called *jarimah*. Abdul Qadir Audah defines *jarimah* as prohibitions of Sharia the punishment of which is *hadd* or *ta'zir* punishment. *Hadd*, the plural form is *hudud*, means a crime the punishment of which is determined by Allah SWT while *ta'zir* is determined by *ulil amri* (government) (Audah, n.d.). Zainuddin cites Abu Zahrah who says that *hudud* is punishments determined by dalil from the Qur'an and Hadith of the Prophet SAW about the matter of crime which contains the elements of violating or being against. An act is called *jarimah* (crime) if it violates the

rules which have been set in the provisions of Allah and/or Rasulullah SAW (Zainuddin, 2011).

To be able to give punishment, a criminal act must meet the elements and conditions. Abdul Qadir Audah suggests the elements of a criminal act consist of formal, material and moral elements. Material element is the element related to the perpetrator and his/her action. The formal element is related to the rules governing it, whether there is a rule or not. Whereas moral element is related to the responsibility of the criminal act. Abdul Qadir Audah explains the main criteria of a criminal act is to abandon the order and do the prohibition. Those three elements are called general elements that cover all criminal acts. (Audah, n.d.) Besides, there are other specific elements that must be fulfilled depending on the type of each criminal act, such as stolen property which becomes the element of a theft crime (Zainuddin, 2011).

In terms of criminal elements, the positive law (*hukm wadh'i*) and Islamic criminal law have in common. If the criminal elements have been fulfilled in an act, so the act is categorized as a criminal act. The fundamental difference is on a *ta'zir* penalty in Islam. Acts related to moral or religious offences may be sentenced to *ta'zir* penalty such as being alone between a man and a woman (*khalwat/seclusion*) or violate the honour of Ramadhan by intercourse between husband and wife during the day. Another difference is in the terms of sources of law. Islamic criminal law comes from Allah SWT dan Rasulullah SAW, it is because criminal law is an inseparable part of a religion. All actions that violate the provisions of Allah SWT and Rasulullah SAW is called, in terminology, as iniquity). The word iniquity is not popular in criminal terms though. However, Audah mentions iniquity in the context of crime by categorizing it into three kinds. The first one is iniquity threatened with *had* such as adultery; the second one is iniquity threatened with *kaffarat* such as intercourse with wife during the day on Ramadhan, and the third one is iniquity threatened with a *ta'zir* penalty such as being alone between a man and a woman (*khalwat*) or seclusion. (Audah, n.d.).

Apostasy In Human Rights Perspective

Musdah Mulia states that freedom of religion issues other than those contained in the Universal Declaration of Human Rights are also included in various historical documents on human rights, such as the Rights of Man France (1789), Bill of Rights of USA (1791) and International Bill of Rights (1966) (Mulia, 2007). The Government of Indonesia has ratified this article through Law No. 12 of 2005. The law article 18 states: (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice ("Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 Tentang Pengesahan International Covenant On Civil And Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil dan Politik)," n.d.).

According to the concept of human rights, freedom of religion is a fundamental right for humanity. Musdah Mulia says that the right is a non-derogable right in the state. It means that choosing or converting to a religion cannot be blocked or postponed by anyone under any circumstances (Mulia, 2007). Thus, apostasy is a human rights that can not be viewed as a crime or a criminal act. Indeed, people who block others to do it are considered as violating human rights.

In addressing the right to embrace a religion as mentioned in human rights, Islam through Al-Baqarah (2) verse 256 explains: "There shall be no compulsion in (acceptance

of) the religion. The right course has become clear from the wrong” (“Al-Qur’an Terjemahan,” n.d.). Muhammad Thahir when interpreting this verse explains that Jews who had embraced Islam wanted to force their children to embrace Islam with them, while in fact, Allah SWT did not accommodate it (At-Tunnisiy, 1984). Here shows the tolerance of Islam. The scholars have agreed to understand this verse that the believers of other religions should not be forced to convert to Islam. This means that Islam accommodates the plurality of religion that happened as well during the reign of Prophet Muhammad PBUH. Islam accommodates others' freedom to embrace and worship according to their own religion. The problem is only on the faithfulness in embracing religion itself. When someone has embraced a particular religion, should he/she be consistent with the religion? Islam states that people should be consistent in embracing Islam, so it is said in Ali Imran (3) verse 85: "And whoever desires other than Islam as religion, never will it be accepted from him, and he, in the Hereafter, will be among the losers". When a Muslim chooses another religion to embrace, it means he/she is an apostate, because of coming out of his/her commitment. It is not accommodated by human rights. Actually, in general definition, the consistency in embracing a religion is the same as the consistency in embracing an ideology, including the ideology of the state such as Pancasila ideology. When someone has declared him/herself as a citizen, he/she must be consistent and obey the ideology of the state. If he/she is against the ideology of the state, he/she will deal with the law of the state. This is considered as a treason or defiant to the state. It is agreed by the legal experts that this kind of activity is a criminal act. International human rights should treat the same to those who embrace Islam or other religions.

Conclusion

From the discussion above, it can be concluded that apostasy meets a criminal act like any other criminal acts, both in the positive law perspectives and especially Islamic law perspectives. Apostasy does not only affect the perpetrators but also the order of religious life in general. Apostasy also cannot be separated from political and social crime, because it can damage the system in society. The commitment to follow Islam consistently is almost the same with the commitment to follow the ideology in a state. When someone deviates from the ideology that has been agreed upon, it means he/she has committed a treason and is entitled to be punished. Thus, apostasy as a most serious criminal act can be sentenced to death. However, if it can be proven that the apostasy does not cause a political or social turmoil, then the perpetrator can be sentenced to *ta'zir* penalty.

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