



LEGAL PROTECTION FOR MUSLIM WOMEN
PRISONERS IN MALAYSIA

BY

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for the degree of Master of Comparative Law

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بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

وَيُطْعَمُونَ اَلطَّعَامَ عَلٰی حُبِّهِۭۙ مَسْكِيْنًَا وَيَتِيْمًا وَّاَسِيْرًا ﴿٨﴾

8. And they feed, for the love of Allah, the indigent, the orphan, and the captive.

Sūrah al-Insān: 8

ABSTRACT

This study examines the adequacy, or the lack of it, of legal protection for women prisoners from three different perspectives – Islamic law, International law and Malaysian law. The aim is to examine the consistency of these laws in addressing the rights of women prisoners and the compliance of the Malaysian authorities in the implementation of the provisions to protect the rights and interests of women prisoners. The study embarks on the premise that the current laws regulating the rights of women prisoners are inadequate to protect their interests. The study adopts a qualitative and comparative analysis when dealing with statutory laws as stipulated in the international and Malaysian laws. The provisions are meticulously selected on the merit of their relevancy to the context of the research in assessing the acceptable standard on legal protection for Muslim women prisoners' rights. Interviews with a hand-picked number of Muslim women prisoners from Kajang Women Prison were carried out to support the primary data. Inadvertently, the finding is also relevant to concurrently examine the implementation of Malaysian Prison Regulations, the only law that deals with the rights of prisoners in Malaysia; in terms of their strength and weaknesses. The study reveals that the laws - Islamic, international and Malaysian, all have adequate provisions governing women prisoners' rights and the protection of their well being contrary to the initial assumption of the research and much to the delight of the researcher. However, in the context of the Malaysian law, there are certain minor aspects where improvements are much needed such as the adoption of non-custodial measures for women prisoners with children and pregnant women as practiced under international law. In addition, wider engagement of NGOs should be encouraged to expedite the process of rehabilitation, reformation and skills training within the prison institution.

خلاصة البحث

تتناول هذه الدراسة مدى كفاية الحماية القانونية للنساء السجينات، وذلك من خلال ثلاث جهات نظر مختلفة هي: القانون الإسلامي والقانون الدولي والقانون الماليزي. والهدف من ذلك هو البحث عن مدى التوافق والاتساق بين هذه القوانين في تناولها لحقوق النساء السجينات، ومدى امتثال السلطات الماليزية في تنفيذ أحكام حماية مصالح النساء السجينات ورعايتهن. وتنطلق الدراسة من فرضية أن القوانين التي تنظم حقوق النساء السجينات غير كافية لحماية مصالحهن. تعتمد هذه الدراسة على التحليل النوعي المقارن عند التعامل مع القوانين الوضعية كما في القوانين الدولية والقانون الماليزي. وقد تم اختيار الأحكام بعناية طبقاً لأهميتها وعلاقتها بمحتوى البحث لتحديد معايير مقبولة من الحماية القانونية لحقوق النساء المسلمات السجينات، وقد تم إجراء مقابلات مع عدد مختار من السجينات في سجن كاجنغ للنساء وذلك لدعم بيانات البحث الأولية. وقد كانت النتائج متعلقة أيضاً بدراسة مدى تطبيق "تعليمات السجون الماليزية، القانون الوحيد الذي يتعامل مع حقوق السجناء، من خلال نقاط الضعف ونقاط القوة التي تتميز بها. وتكشف الدراسة أن الشريعة الإسلامية والقانون الدولي، والقانون الماليزي تحوي جميعاً على أحكام وافية بما يتعلق بحقوق النساء السجينات ورعايتهن، ومع ذلك وفي سياق القانون الماليزي، فإنه ما زال هناك مجال للتوصية بتحسين بعض الجوانب، ومنها تبني تدابير غير تحفظية للنساء السجينات الحوامل أو برفقة أطفالهن كما يتم في إطار القانون الدولي، كما ينبغي تشجيع مشاركة أوسع للمنظمات الأهلية غير الحكومية لتسريع عملية التأهيل والإصلاح والتدريب.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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LEGAL PROTECTION FOR MUSLIM WOMEN PRISONERS IN MALAYSIA

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*To our Prophet (pbuh), who had reminded us to convey from him even if it is just
going to be a verse;*

*To those who keep the truth alive by upholding the flag of truth at all the time and
avoid falsehood;*

*To those who reflect positively on their brothers and sisters and observe their duties
sincerely and respect other's rights;*

To everyone who has played a role in nurturing and guiding me on the right path;

*I humbly dedicate this work with a view that it will benefit who will make good use of
it.*

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Shariah Criminal Procedure (Federal Territories) Act 1997 (Act 560)
The Prison Act 1995 (Act 537)
The Prison Regulations 1958 of Sabah
The Prison Rule 1999 (UK)
The Prison Rules 1953
The Prison Rules 1956 of Sarawak
The Prisons Regulations 2000

LIST OF ABBREVIATIONS

ASSTC	Arab Security Studies and Training Centre
AWEC	Afghan Women's Education Centre
CAC	Compulsory Attendance Centre
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DBP	Dewan Bahasa & Pustaka
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JAIN	Jabatan Agama Islam Negeri
JAKIM	Jabatan Kemajuan Islam Malaysia
JPA	Jabatan Perkhidmatan Awam Malaysia
MA	Medical Assistant
MAIN	Majlis Agama Islam Negeri
NGO	Non-Government Organization
NKRA	National Key Result Areas
SMR	Standard of Minimum Rules for the Treatment of Prisoners
SUHAKAM	Suruhanjaya Hak Asasi Malaysia
TC	Therapeutic community
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UN	United Nations
USA	United States of America

TRANSLITERATIONS

ء	'
ب	b
ت	t
ث	th
ج	j
ح	ḥ
خ	kh
د	d
ذ	dh
ر	r
ز	z
س	s
ش	sh
ص	ṣ

ض	ḍ
ط	ṭ
ظ	ẓ
ع	'
غ	gh
ف	f
ق	q
ك	k
ل	l
م	m
ن	n
ه	h
و	w
ي	y

Short Vowels	
اَ	a
اِ	i
اُ	u

Long Vowels	
اَ + اَ	ā
اِ + اِ	ī
اُ + اُ	ū

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF STUDY

Negative treatments towards women prisoners have been discussed widely at the international level but the problem does not receive much attention domestically where the discussion on the issue is not widely publicised. As a matter of fact, women prisoners are questioning their rights, both positive and negative, and admittedly there is an urgent need to improve the treatment provided for them. Besides choosing this study as a matter of interest, the subject on women prisoners' rights needs to be addressed seriously by the authority in tandem with the global concern in protecting human rights.

One of the important aspects of positive rights that needs to be given due attention is to maintain social contact with the outside world, particularly with the family members and children while in custody. Efforts have been taken in some countries like United States of America, where upon realizing such feature, the story book project was introduced and managed by volunteers and supported by Texas Department of Criminal Justice known as Women's Storybook Project of Texas. It collects new children's story books and records female inmates reading the stories and mails them to their children or grandchildren who live freely in the world.¹ The project also helps to improve inmates' conduct or behaviour as the participation in the programme only involved those who are well-behaved. It is advisable for Malaysia to

¹ S. Diel, *Story project gives prisoners a chance to keep family ties*, <<http://www.thefreelibrary.com>> viewed 24 October , 2010, 3.00 pm.

emulate such project, in order to benefit women who are in the same predicament like their American counterparts.

Amongst the negative rights claimed by the women inmates is protection from ill-treatment or torture. There are lawsuits filed by several of them charging prison correctional officers on sexual abuse and assault towards them. As such, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee against Torture have taken proactive approach to deal with various kind of sexual violence in prisons.² Apart from extensive reforms on prisoners' welfare, recent development indicates a more positive effort to improve further their rights.

As is well-known, prisoners of both sexes – male and female, are entitled to equal treatment. Nevertheless, the female prisoners have special needs which require special consideration and attention. However, this has been routinely neglected. One of the reasons that contributed to this situation is that women's prisons are mere adaptation of men's prison. As a result, prisons tend not to meet the needs of women prisoners who are affected by imprisonment in a particularly harsh way.³ As for Muslim women prisoners, they may have more specific needs in terms of spiritual enhancement, counselling and rehabilitation which may help to reform and prevent them from repeating the crimes. This in line with the reformative (*al-iṣlāḥ wa al-tahdhīb*) objective of punishment in Islamic law. Disciplinary and reformative punishment can deter the offender from committing further crimes if he or she would be enlightened by the religious awareness, and coupled with self-consciousness of the repugnance due to the crime committed, but not due to the punishment itself, would

² Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, Quaker United Nations Office, at 20.

³ *Ibid.*, at 1.

seek Allah's pleasure as the crime is considered as *ma'siyah* which leads to His wrath. This religious awareness is the best way to deal with the crime at its root, when a person believes that all of his actions is in the knowledge of Allah the Almighty and Omnipresence and will be requited in the Hereafter. The basis for concept of reformation of the offender lies in the principle of repentance or *tawbah* mentioned in the Qur'an.

Based on the above premise, this study analyses women prisoners' rights in Malaysia and other selected jurisdictions with the intention to provide necessary reformation on domestic law governing women prisoners and to contribute to the enrichment of literatures concerning women prisoners in general and Muslim women prisoners in particular.

STATEMENT OF PROBLEM

The laws regulating women prisoners in Malaysia are not adequate and comprehensive enough to safeguard their interests and well-being. This specifically involves women prisoners who are in need of different kinds of treatments while serving their sentences particularly for those who have special needs such as pregnant and nursing inmates.

OBJECTIVES

The objectives of this research are:

1. To study the laws and regulations governing rights of women prisoners;
2. To examine the strength and weaknesses of the various laws governing women prisoners and to compare with other jurisdictions including the international conventions to serve as an international standard.

3. To address specific problems facing Muslim women prisoners with regard to facilities and needs available in prison.
4. To suggest for reform on the existing laws regulating women prisoners in line with Islamic law and international standard.

HYPOTHESIS

This research is carried out based on the following hypothesis:

1. The protection provided by the Malaysian laws for Muslim women prisoners is insufficient;
2. Poor treatment towards Muslim women prisoners (and their children) is due to poor implementation of the law and inadequate details in the existing regulations.

SCOPE AND LIMITATION

Though the discussion on women prisoners' rights is quite extensive at the international level but for the purpose of this study the focus is confined on Muslim women only. As such the data collection which involved the interviews are carried out only with Muslim women inmates in order to address the compatibility with Islamic law standards as well as those of the international law standards. The sample to be interviewed is subject to the approval from the prison authority. Thus, it is anticipated that only a small number of women inmates who would be interviewed.

METHODOLOGY

This study embarks through two approaches; one is library research and the other is fieldwork. For library research, references are comprised of statutory laws and

regulations, international conventions, textbooks, journal articles, paperwork, and the like. In expounding the materials, this study adopts qualitative analysis to assess the adequacy of laws and regulations regarding women prisoners' rights. In expounding further the statutory laws in Malaysia governing women prisoners' rights, this study adopts content analysis particularly on the Prisons Regulations 2000. Conversely, the comparative analysis will be adopted when dealing with the law applicable to other countries including international conventions especially on the Standard of Minimum Rules for the Treatment of Prisoners (hereinafter known as SMR) which is the main reference for an international standard on the treatment of prisoners. This is further supported by various United Nations country reports in terms of their compliance with the international standard. Fieldwork is another form of study apart from the library research which includes interviews held in prison. The respondents are comprised of 40 female prisoners as well as eight prison officers. However the prison authority managed to gather only 25 inmates due to several constraints. The purpose of fieldwork is to address specific problems faced by prisoners where this information normally is not available in statutory form. It also aims at examining the implementation of day to day handling of prisoners' daily activities. The interviews are conducted using structured question based on prison regulations.

Data collected from the interviews will not constitute the primary data but it is useful to assess the effectiveness of the Prisons Regulations and the specific needs of the women prisoners held in custody. It is also aimed at investigating whether protection of needs and well-being of the inmates is compatible with the available Prisons Regulations, and whether there are special needs to be discovered and duly suggested.

LITERATURE REVIEW

There are few important works discussing the rights of the detained persons or prisoners. Abū Yūsuf (d. 182H), in his great work, *Kitāb al-Kharāj*, discussed the obligation of the state to provide the protection and particular treatment for prisoners. Amongst others, the state shoulders the responsibility to provide them with nutritious food to ensure their good health. He also stated that prisoners cannot be locked up in a very small place where it prevents them from being able to stand up to perform the prayer. Besides, their feet cannot be chained unless they are to be executed with a death penalty. In terms of clothing, the state has the duty to provide the prisoners; male and female alike, with suitable clothes according to seasons that is for winter or summer. If a prisoner dies and he leaves no relatives, it is the duty of the state to prepare his burial and its expenses will be incurred by *Bayt al-Māl*. Another duty of the state is to provide prisoners with a source of income, else when they are discharged they are left without any means to support themselves; and this will cause them to live a poverty-stricken life and force them to beg from other people.⁴

Aḥmad Faṭḥī Bahnasī⁵ stressed that fundamental rights of a detained person must be protected as the purpose of detaining and punishing him or her is to cause him agony, pain and suffering in order to educate (*ta'dīb*) and prevent him or her from repeating the crime and to deter others from committing the crime. This is called the short term objective while the long term objective is to protect the public interest. In other words, the punishment is not meant to deny his or her human dignity. Thus, the prisoners; men and women alike are entitled to have their basic needs and rights to be

⁴ Abū Yūsuf Ya'qūb ibn Ibrāhīm, *Kitāb al-Kharāj*, (Bayrūt : Dār al-Ma'rifah, n.d.), 150-151.

⁵ Aḥmad Faṭḥī Bahnasī, *Al-Uqūbah fī al-Fiqh al-Islāmī*, (Dār al-Shurūq, 1989) at 18.

fulfilled such as having sufficient food and nutritious diet, proper clothing, health treatments, education, performing acts of worship and such.

Due to scattered discussion on the subject of detention and related matters in classical Arabic works, a group of compilers under the sponsorship of Kuwaiti government, the Ministry of Endowment⁶ took an initiative to compile the topic of detention under one stand alone chapter and one special publication. Among issues highlighted in the book include the forms of detention or imprisonment, particular issues pertaining to imprisonment as a discretionary punishment such as its combination with other forms of punishment, its period, the reason for its dismissal such as due to death, insanity, pardon, intercession, repent, and others. The discussion further focused on general guidelines provided by Muslim jurists to determine the application of imprisonment as a form of punishment such as in the case of attacking the soul, i.e. murder; for example, the killing of a *dhimmī* by a Muslim or the murder of a slave by a free person. According to the Malikis, the punishment for this offence is imprisonment for a year and 100 lashes while the Hanafis opine that the punishment is *qisās* and the Shafi`is and Hanbalis are of the opinion that the punishment is *diyāt*. Meanwhile in the case of attacking or infringement of the *deen*, for instance, apostasy – the person who apostates is compulsory to be detained until he or she repents before he or she is killed. This is the opinion of the Shafi`is, Malikis, and Hanbalis. The Hanafis opine that it is encouraged for a person who apostates to be imprisoned.

For the offence of neglecting prayers whether it is due to laziness or reluctance to accept its obligatory ruling, the punishment of imprisonment is imposed on the offender for the purpose of making him or her repent. Muslim jurists differ on the period where two of the three opinions hold that it is three days and the third opinion

⁶ Wizārah al-Awqāf wa al-Shu`ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiqhiyyah*, (Kuwait : Wizārah al-Awqāf wa al-Shu`ūn al-Islāmiyyah), 286-330.