

Search Procedure and Children in Conflict With The Law According To Islamic Law

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Abstract

Rules and principles of due process in criminal law including search procedure appear in the main sources of Islamic law, the Quran, the Sunna, and classical jurisprudence. It is proven then Islamic laws contains privacy protections which is closely related to search procedure enforcement. However, it is doubtful and questionable criminal procedure when it comes to children in conflict with the laws. Children who are vulnerable and deserve more protection with just and fair treatment. Their physical vulnerability and mental immaturity leave children unable to cope with harsh treatment in any criminal procedure. They need to be treated differently from adults. There are no clear provisions in the main sources of Islamic law relating to the issue. This article approaches the general rules and principles applied by the Islamic scholars in search procedure. These rules and principles are being applied to the children in conflict with the laws. The analysis shows the enforcement of search procedure towards the children is not in contrary to the general rules and principles of Islamic law. They should be under separate jurisdiction of the state criminal justice and differ from the adult's search procedure. The enforcement of search procedure must be in line with *Maqasid shariyyah* and the role of parents' permission is taken into consideration to validate the children permission. Last but not least, the rule of manifestness by al-Ghazali is seemed to be the appropriate scholarly principles to be applied.

Keywords: Search Procedure, Children, Islamic law

Introduction

In general, Islam does not encourage implementation of search procedure because this procedure involves personal privacy, a serious violation on personal freedom rights and concerns with personal dignity which is guaranteed in Islam and any legal system around the world. However, this procedure has to be conducted when a person is dubious and substantiated with allegation against him which being corroborated with sufficient evidence and *qarinah*. In other words, such requirement has its exception when it comes to certain circumstances. Mostly criminal jurisdiction has determined certain method, regulation and laws to manage conduct on this procedure as a measure to minimize violation of rights that

may occur and at the same time ensuring justice for all parties. For instance, this procedure is not enforced upon all criminal categories. Usually implementation and enforcement of this procedure merely applicable in certain crimes only and this procedure is not necessary except for the purpose to acquire criminal evidence. Moreover this procedure has to be conducted by parties with jurisdiction to investigate criminal cases and therefore its enforcement is different according to change of time, place and also the related criminal categories. Ahmad bin 'Abd al-Karim summarised in his research whereby the Islamic jurists has divided matters related to crime into two, which is considered under *siyasah shariyyah* and what is under legislation matters. Investigation procedure and criminal charge is considered under *siyasah shariyyah* while punishment enforcement after conviction of a criminal penalties is considered under legislation (Al 'Uthman, 2014). Resolution on criminal categories, method of conviction and criminal punishment is determined by the law. While any form of enforcement procedure and implementation law is determined by *siyasah shariyyah* which includes the search procedure. Therefore, laws related to search procedure usually define certain circumstances which allows such implementation. Among others is that the crime must occurred, the search must give benefit to investigation procedure, there were concrete indications that search is necessary to transpire the truth, involves *flagrante delicto* case, there were arrested person being searched and the search is conducted after permission been requested from owner of the body or premise. These permissible circumstances does not mean that the procedure can be easily conducted. Besides the search is equipped with certain procedure, safeguard and guarantee which protects a person from violation and abuse of power by authorities.

Muslim Scholar Views on Sharia Criminal Search Procedure

Consent from a person whose body or premise being searched is among the highlighted requirement for search procedure by Islamic jurists. The issue, on what is the position when the relevant person is uncooperative? Are the law enforcers is allowed to enter a premise without consent from its owner even when there is admissible evidence or statement that a criminal offence has occurred or some evidence being concealed or a person is being hidden in the premise? There were difference of views and opinion among contemporary Muslim scholars being analysed from several books on *fiqh* and writings. This analysis discovered that their discussion is more focused on premise search procedure. Whereas personal body search on an adult or a child is not being discussed explicitly or in detail by the writers. These constraints does not prevent formation of relevant laws and regulation on body search procedure in Islamic criminal justice system. Besides, it is being submitted to the Islamic government to establish and implement bodily search procedure based on *siyasah shariyyah* and for general public interest. Each different opinions are based on various justifications and conditions stipulated by the Islamic jurists.

Consent and protection on domestic privacy rights

There were several view and issue on consent from owner to conduct search on body or premise. Many Islamic jurists were strict in requirement to obtain consent before a search is conducted. This demand does not only refer to express consent but also relate to protection of domestic and personal privacy rights which is guaranteed in Islam. Ibn Hanbal for instance, strictly opines to guard and protect a person's domestic privacy rights. He prohibits his followers from trying to enter and search a premise without consent because one must not search what is concealed in a house. The law enforcers should not be involved so long the crime occurred within their premise. This matter was explicitly discussed and argued by him relating

to the issue between domestic privacy and valid occupancy which also indirectly related to the issue on search procedure enforcement in sharia criminal matters.

Ibn Hanbal substantiated his argument based on several report and practice of the companions. For instance, Abu Bakr al-Khallal al-Baghdadi in his writing mentioned that Ibn Hanbal has taken the same approach with action of 'Uqbah b. Amir, Governor of Egypt. 'Uqbahb. 'Amir is said to prohibit his assistant from informing the authorities about some neighbour who continuously consume alcohol in their own residence even though they have been warned several times (Al Baghdadi, 2003). 'Utbah is said to have a nonchalant attitude towards such violation of laws. He did not want to involve the authorities so long the criminal offence is restricted within private premise even their neighbours were aware about it (Ibn Hanbal, 1994). Similar approach is displayed when Ibn Hanbal allows a man to inflict blindness upon his slave due to his immoral act which occurred on his premise even he is being pressured from his fellow friends to report such matter to the government (Al Baghdadi, 2003). In another case, Ibn Hanbal also instructed his followers not to find a house that produce some prohibited musical noise which was obviously heard and present around the streets because a person is not permitted to search whatever being protected within a house (Ibn Hanbal 1981).

Eli Alshech stated in his research that some scholars of Hanbali Madhab differed in views from the earlier scholars of Hanbali Madhab. The earlier scholars of Hanbali Madhab clearly offered protection on wrongful action even it was transpired to public knowledge outside their residential boundaries. This situation may indicate that earlier Hanbali Madhab were in view that a wrongful act that occur within private premise shall be protected. However, earlier view of Hanbali Madhab may indicate that protection given to the offence is due to its occupancy. Therefore, immunity only be given if the wrongful act occurred in a home that is legally occupied. They were protected when the wrongful act is not totally transpired to general public because they were aware that certain nature of a wrongful act cannot be contained within a premise, for instance the sound of a loud music can be heard from outside even when the occupant has taken necessary measures to contain it (2004). Eli Alshech summarised in his study that Hanbali has expanded such protection to nearest area surrounding the premise thus in this context they consider its surrounding as part of the premise. Ibn Hanbal prohibits his followers from investigating something that is not made clearly obvious. He use this method to prohibit any effort to confirm a suspicion of a wrongful act. However at the same time he allows an exception to the rule when there were some clear indication that a wrongful act has occurred. For instance, someone saw something is hidden and he knew what is being concealed thus one must take action upon it (Cook, 2000).

This is different from a renowned Hanafi scholar who strictly views that the act of entering a premise without consent is allowed in the above situation. Hanafi allows law enforcers to enter a premise without permission from its occupant if the authority identifies a criminal offence occurred in the premise (Al Mawsili, 1966). This Hanafi stand meets the enforced laws and search procedure practice in most criminal jurisdiction including the one in Malaysia. While Al-Shafii suggests an uncertain approach to this issue. Al-Shafii ordered a guest whom being invited to a wedding ceremony to leave the event when he saw a wrongful act occurred that he is incapable to prevent (1993). Al-Shafii did not advise the guest to call upon authorities to

stop the offence. So long the wrongful act occur in a domicile/resident without considering witness being present in it, it is considered part of the premise and therefore it is protected because by nature a legally occupied premise always be protected from unnecessary invasion (1993). Maliki Madhab hold the same view with Al-Shafii. They stated that the guest we aware of the criminal offence that occurred need not to report the matter to authorities but only leave the event (Al Baji, (n.y.)).

Imam al-Ghazali affirms that investigation on a wrongdoing which occur behind closed door should be avoided by those who are responsible to prevent indecency (Al Ghazali, 1998). He said *"It is not allowed to spy someone's home that concealed his sin in his house and close its door."* This practice demonstrates that the act of premise search effort to investigate criminal cases is not reasonable to be implemented. Al-Ghazali presume that when a perpetrator closes the door shows that it is his effort to contain the wrongdoing within the premise and also a sign to the people that the perpetrator wish to be beyond reach of other people. For every protection and guarantee provided by laws, however it is not applicable on the perpetrator who opens the premises door and expose his wrong doing to other people. His valid occupancy in this situation is not sufficient to protect his privacy rights according to the law. Al-Mawardi and Al-Shirazi hold the same view as Al-Ghazali. Therefore, if a pedestrian saw inside someone's house through an opened door or window while passing through, he is not to be criticised. A house owner should close the door and window of his house if he wish to hide his actions or protect his own privacy (Al Mawardi, 1999). Occupants who are reckless cannot take legal action. Scholars placed the fault on the occupants and barred the capacity to take any action against a transgressor.

Same view held by Al-Ghazali, it is not allowed to conduct a body search on who is suspected to conceal prohibited items under his clothes. Moreover the authorities cannot stop a person or prevent him from moving. Al-Ghazali explains that a person is prohibited from searching for information, eavesdrop to listen to a musical sound from a premise, sniff to trace alcoholic scent, touch or grab to find something on someone's clothes or enquire neighbors about someone's wrongdoing. Law enforcers however may conduct a body search on a suspect that met them and there were clear evidence towards his wrongdoing (1998). For instance alcoholic scent from someone allows the law enforcers to come forward and caution him. Identification by tracing its scent is the same as seeing some wrongdoing occur. Law enforcers is allowed to interrupt if they know from the shape of concealed items being considered as prohibited items. These exception also allows law enforcers to enter any premises to perform their task to prevent indecency. Law enforcers is allowed to enter any premise when a wrongdoing or a criminal act occurred in the premise which is clearly transpired from outside. Moreover when witnesses voluntarily come forward reported the criminal offence occurred in the said premise.

Al-Ghazali statement illustrates how search procedure is allowed when a reasonable and strong suspicion arise. A mere suspicion, then a body or premise search is considered as contradicting to laws. However the writer opines what is meant by Al-Ghazali does not necessarily need to achieve the level of certainty which only then allows law enforcers to conduct search procedure upon a person. A reasonable doubt is sufficient because such level must be supported by several factors. The requirement for these factors will strengthen the

existence of evidence or statement which enable a search procedure to be conducted. To determine whether a reasonable doubt exist, several factors must be considered including the information obtained by the law enforcers, existence of the suspect nearby the crime scene that just happened, the suspect's reaction towards presence of law enforcers such as run away, personal observation by law enforcers, the time when a crime is committed either day or night and knowledge of law enforcers about previous criminal record of the suspect. However, some of these factors contradicts with Islamic jurists' views such as Hanbali, Al-Shafii and Maliki which hold strict viewson issues pertaining to a person's domicile privacy rights and requirement for permission from owner of the premise.

The above discussion among Islamic jurists clarifies that a wrongdoing action that is protected behind a premise cannot be taken legal action except when it is transpired by its occupants in any manner. A wrongdoing that occurs in a premise does not qualify surrounding community as a licence to trespass. A premise privacy is maintained and compels other occupants to knock on the door before entry of the house. Moreover this practice is considered as an effort to convince the offender to change their mind. According to study by Eli Alshech, Islamic jurists mainly Al-Ghazali besides emphasize on location of the wrongdoing they also examine the extent how such action is exposed to the public (Eli Alschech, 2004). Whereas from perspective whether consent has taken place was not being discussed in depth among Islamic jurists. A consent is defined by Islam as an expressed consent. Relevant parties who refused permission for authorities to enter their premise must be respected except with warrant.

Reputation on suspect's involvement of a crime

Previous criminal record and history of a person may determine someone is shortlisted as the main suspect when a crime occur. This circumstances justifies the action of law enforcers to conduct investigation on a person including body and premise search. Analysis on views by Islamic jurists illustrates how reputation on suspect's involvement of a crime eases law enforcers' tasks. For instance Maliki, prohibits search conduct except when the premise or its occupant is known to have been involved in criminal offence. Madhab Maliki allows authorities to act upon a person that is well known with criminal status based on information that may convict him with the crime and also search his residence. Someone with reputation on criminal involvement will make the status of his private rights, deeds and action become public status even though it cannot be traced from outside (Al Qayrawani, 1999). However, Eli Alshech in his study explained that Maliki only offers protection to offenders who commit the wrongdoing where he commonly reside. This illustrates that that protection by Maliki depends on validity and honor of the premise thus not the wrongful act itself. Therefore, legal action may be taken if the same offender left his premise (2004).

Reputation on involvement of certain location with a crime also determines the validity of a search action by law enforcers. Authorities according to Ibn Abi Zayd and Malik b. Anas, need not act on information that a person has break a law within his home boundaries if the home is not known to the public as the location of a wrongdoing (Al Qayrawani, 1999). The same opinion by Mautarrif Abu Mus'ab al-Madani that prohibits such action even though information relevant to the wrongdoing is presented by two witnesses that can be trusted except when the occupant involved already been identified as a suspect (Al Qayrawani, 1999).

Analysis Evaluation on Views of Islamic Jurists Related to Search Procedure Application

Analysis on views of Islamic jurists related to search procedure had brought the writer to the application of principle as presented by al-Ghazali and the study done by several Islamic scholars such as Sadiq Reza in order to produce a formulation. Prohibition on premise and body search is not something definite. Exception from the prohibition on body and premise search due to several circumstances is formulated from discussion among the Islamic scholars. Authorities is permitted to conduct search on a person or a premise when a crime occurred in a premise being transpired and noticed by the public. Some Islamic jurist disagree with this exception as discussed previously. They have jurisdiction to conduct a search when evidence points to existence of a wrongdoing among occupants of a premise. A person's status is not considered to determine validity of the search done on a body or premise which is suspected to commit a crime as execution of arrest and detention. Previous criminal record is insufficient to justify a body and premise search except with existence of evidence which indicates his involvement in a crime. This condition is illustrated in two events among the Companions. Saidina 'Umar has abstained himself from spying on Abu Mihjan al-Thaqafi and Rabi'ah bin Umaiyyah who were well known alcoholic because there were no concrete evidence. The same goes to Ibn Mas'ud who did not spy on Walid bin 'Uqbah even when he knew about Walid's bad habit who likes to drink alcohol (Al Awani & DeLorenzo, 1995). Furthermore, emergency situation verifies action of authorities to conduct search. This situation according to the writer, should include if there is concern that the suspect will abscond or destroy criminal evidence, or the suspect refuse to surrender when authorities want to arrest. These condition require sufficient and reasonable doubt for an action to take place.

The above exception is based on fundamental principle of clarity (*the rule of manifestness*). This principle is indirectly being adapted by fellow Islamic jurists in implementation of Islamic criminal procedure which includes search procedure. This principle asserts that each action particularly search and investigation is not permitted unless a crime is present and clearly occurred. Al-Ghazali considers this principle of clarity while determine the validity of search done on a body or a premise. This application is clearly been discussed as a basic requirement of criminal conduct under the *muhtasib* jurisdiction thus among its conditions is the conduct must actually form an offence, the wrongful conduct must clearly occurred before a *muhtasib*, the *muhtasib* must know that the conduct is an offence without the need to exercise his *ijtihad*, the *muhtasib* can act upon if the wrongful conduct is present and the wrongdoing must be "clear to the *muhtasib* without spying" in other words, it must be clear and present. Discussion by Islamic jurists also formulates an exception to this principle which allows search and investigation be conducted even when a crime is concealed while evidence were sufficient to indicate that a criminal offence been committed. Ibn Hanbal, Al-Ghazali and Al-Mawardi were among scholars that accept principle of clarity in order to intervene in an offence or criminal conduct together with exception when sufficient evidence is present.

The same view by Sadiq Reza who formulates similar view with Al-Ghazali in his legal research related to search procedure according to Islam. Research by Sadiq Reza illustrates difference of opinion among Islamic jurists with regard to the search procedure. There were collective opinion that prohibits any form of effort to expose a criminal conduct and wrongdoing except when it is present and clearly occurred or principle of clarity is applicable. Some Islamic jurists suggest that principle of clarity (*the rule of manifestness*) application is different according to

relevant authorities. For instance, investigation power usually concentrated on enforcement body such as law enforcers, police and government as compared to judiciary body. In other words, enforcement body is allowed to disregard the above prohibition on the basis of investigation requirement. Some Islamic jurists stated that the same mandate is given to persons besides the authorities because each Muslim person is subjected to limitation to investigate as outlined by Allah. However, some Islamic scholars discussed or omit regarding consequence on non-compliance of these search rulings.

Search Procedure and Children in Conflict with the Law

It is clear that, the implementation of search procedure is not contradict with Islamic rulings and did not exclude children suspects. However, Islamic *fiqh* did not regulate or provide specific provisions with regard to circumstances that permits search on children suspects be conducted. However, laws regarding search procedure on children in conflict with the law can be formed and implemented according to the *maqasid shariyyah* and *siyasah shariyyah*. Legislative drafting with regard to search procedure on children and its conduct being authorised to every Islamic government criminal jurisdiction must consider the position of children as a minor. They would require a more specific procedure similar to how Islam specifies search procedure on female suspect. A search procedure which is more suitable and appropriate with their level, as well as certain safeguard which emphasize priority on children welfare must be ascertained.

In Islam, while some circumstances permits conduct of search procedure, it does not refer to total permission, similar to position on its prohibition that is not meant as a definite one. Moreover some safeguard and restriction should be the basis of its conduct which guarantees protection from abuse of power. The same approach can be applied to children suspects thus more emphasize on safeguard and restriction in its conduct. Enforcement of search procedure by implementation and restriction is considered incomplete without existence of laws or regulation that oversees maintenance upon this procedure. Mainly body search, its conduct must come with wisdom and consider well-mannered and *maqasid* for the search being conducted. The extent of necessity for the search being conducted must be a priority when it comes to children suspect. For instance, law enforcers is permitted to conduct body search on children when he refuse to cooperate in the effort to ascertain his identity. However such action must consider limits outlined by Islamic jurists such as consent from the person and the search is conducted by officers with same gender.

The rule on clarity (the rule of manifestness) which was suggested by Al-Ghazali is not contradict for application in conducting search procedure on children suspect. This principle guarantees that body search on children suspect cannot be easily done except when it is clear that the child involved are in possession of something that may convict him for a criminal offence. This principle provides a safety measure in the search conduct on a child as a protected person where his general welfare is a priority.

In writer's view while analyzing various opinion by Islamic jurists regarding conduct of the search procedure, it truly expands horizon and opportunity in forming relevant laws on its implementation towards children in conflict with the laws. Majority of Islamic jurists opined that authorities who conducted body or premise search should be handed by officers with

jurisdiction. This effort may avoid from misperception, violation of personal rights of the person being searched and abuse of power particularly when it involves children. Guarantee and protection towards children is to ensure conduct of search procedure is done in fairness and appropriate to their level. For instance the search must be a well-mannered event and conducted by same gender officer.

The validity of consent by a child suspect to be searched must be clarified. Islamic jurists did not discuss in detail about it. Children by nature are person under age thus people that deals with them should obtain consent from his parents or guardian. However, the extent of necessity for consent in writer's view should be considered according to its present circumstances. The writer opines that consent from parents in usual unanticipated search is not a necessity thus failure to obtain such consent should not have any impact on validity of the search conduct itself. Moreover law enforcers acting with a valid jurisdiction to prevent any indecency even towards children in conflict with the laws. Many Islamic jurists agree that conduct of the search procedure by law enforcers is in accordance with Islam in these four circumstances: in *flagrante delicto*, there were clear and present concrete indications that search procedure can reveal the truth, when an arrest occurred and when consent is obtained from the person who will be searched.

Conclusion

According to the extensive debate among Islamic jurists regarding the propriety of enforcing and implementing search procedures shows that the procedures towards the children is not in contrary to the general rules and principles of Islamic law. Adherence to the principles set by Islam allows this search procedure to be carried out on these children fairly and without violating their rights. They should have special treatment due to their right to be treated in a manner consistent with the promotion of the child's sense of dignity. The procedures for body searching of a child and an adult differ because the child's sensitivity has to be considered with respect to his dignity and tender age. It is recommended that shariah criminal jurisdiction of the states in Malaysia to regulate laws regarding the pre trial procedures towards the children in conflicts with sharia criminal laws including the search procedures. Children should be under separate jurisdiction of the state criminal justice and differ from the adult's search procedure.

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