

**Reconstructing the Theory of *Ḥudūd* and Its Application within the Malaysian  
Legal Framework: A Case Study of the *Syariah* Criminal Code (II) 1993, State of  
Kelantan**

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## **DECLARATION**

The candidate confirms that the work submitted is his/her own and that appropriate credit has been given where reference has been made to the work of others.

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## ABSTRACT

This study is primarily concerned with the two unsuccessful attempts to enforce *Hudūd* law by PAS, an Islamic political party in the state of Kelantan, Malaysia through their *Hudūd* bill known as *Syariah Criminal Code (II) 1993* in that year and again in 2015. While previous studies have largely focused on legal technical issues and how to overcome them, this study takes a different approach by critiquing the *Hudūd* bill itself. In the light of the above, the key feature of this study is the reappraisal of the historical development of *Hudūd* law followed by a critical review on its feasibility in the modern-day climate, specifically within the context of Malaysia. Additionally, this study endeavours to provide a comprehensive view of the efforts to enforce *Hudūd* law in the state of Kelantan, in order to understand these events. Subsequently this study employs the doctrine of *ijtihād*, in an attempt to offer fresh interpretation of *Hudūd* laws, as well as exploring other efficient ways of introducing revised *Hudūd* laws into the Malaysian legal framework. The outcome of this study seeks to demonstrate that any efforts to implement *Hudūd* law in present day Malaysia must consider the political, legal and social climate of contemporary reality. Furthermore, that the principle aspects of Sharia can be maintained, whilst substantial revisions and necessary reforms are made to certain aspects of *fiqh*, which have been formulated by the classical jurists from a pre-modern period.

Within the context of Malaysia, the core issues behind approaches such as those that have been taken by the state of Kelantan in legislating the *Hudūd* bill, are revealed by this study. It illustrates a tendency to equate the *Hudūd* bill with Sharia, whilst in reality the *Hudūd* bill is merely a replication of the classical jurists' *Hudūd* law. Consequently, this understanding leaves no room for criticism or improvement, (which would be viewed as tantamount to questioning the divine will). This study suggests that the polarisation of the discourse of *Hudūd*, principally between the PAS and UMNO Party leaders, has led to a lack of intellectual debate on the issue. In order to overcome this, this study proposes that any legal reform to introduce *Hudūd* law should be advocated on a basis of public interest (*maṣlahah*). This is imperative to provide a middle ground between both parties- the opponents and proponents- including all factions of society to freely debate and discuss the process of law making or reform. Finally, this study proposes that the discourse of *Hudūd* in Malaysia must go beyond partisan politics in order to stimulate and enhance intellectual discussions between all parties, and all concerned.

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*Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003*

*Enakmen Pentadbiran Agama Islam (Negeri Sembilan) 2003*

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## LIST OF ABBREVIATIONS

*Angkatan Belia Islam Malaysia (ABIM)*  
*Barisan Jemaah Islamiah Se-Malaysia (BERJASA)*  
*Barisan Nasional (BN)*  
Convention against Torture and Other Cruel, Inhumane and Degradation Treatment or Punishment (CAT)  
Convention for the Elimination of All Forms of Discriminations against Women (CEDAW)  
*Enakmen Kanun Jenayah Syariah (EKJS)*  
International Covenant on Civil and Political Rights (ICCPR)  
Islamic Criminal Law (ICL)  
*Jabatan Kemajuan Islam Malaysia (JAKIM)*  
*Jamaah Islah Malaysia (JIM)*  
*Majlis Agama Tertinggi (MATA)*  
*Majlis Gerakan Negara (MAGERAN)*  
Muslim Women Lawyers for Human Rights (KARAMAH)  
*Pakatan Harapan (PH)*  
Pan-Malaysian Islamic Party (PAS)  
*Parti Amanah Negara (AMANAH)*  
*Parti Hizbul Muslimin Malaysia (HAMIM)*  
The New Economy policy (NEP)  
The Zamfara State Poverty Alleviation Agency (ZAPA)  
United Malays National Organisation (UMNO)

## ARABIC transliteration GUIDE

Letter	Symbol	Letter	Symbol
ا	A	ض	ḍ
ب	B	ط	ṭ
ت	T	ظ	ẓ
ث	Th	ع	‘
ج	J	غ	gh
ح	ḥ	ف	f
خ	Kh	ق	q
د	D	ك	k
ذ	Dh	ل	l
ر	R	م	m
ز	Z	ن	n
س	S	هـ	h
ش	Sh	و	w
ص	ṣ	ي	y

## CHAPTER 1

### INTRODUCTION

#### INTRODUCTION

This chapter is intended to provide the reader an overview of the study. In this chapter, the background of the study, the research questions, the aim and objectives, the methodology, the scope and limitation, the literature review and finally the structure of the study will be discussed. In sum, this study aims to examine the historical development of *Hudūd* law during the formative stages of Islamic legal system and discuss its relevancy in a modern nation state framework, particularly in Malaysia. Apart from that, this study aims to explore the development of *Hudūd* law in Malaysia with special attention given to the effort to legislate *Hudūd* law by the state of Kelantan through their *Hudūd* bill known as *Syariah Criminal Code (II) 1993*, and the amendment version in 2015.

#### 1.1 BACKGROUND OF THE STUDY

In the late of the 20<sup>th</sup> century, with the strong wave of Islamic resurgence sweeping throughout the Muslim world, Muslims or more precisely Islamists<sup>1</sup> began to demand the establishment of Islamic law entirely (Hallaq, 2005; Martin Lau, 2014). This event, which scholars describe as the ‘rebirth of the Sharia’ was quite perplexing as some scholars such as Anderson (1960) and Coulson (1964) predicted

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<sup>1</sup> Islamist is a term refers to “Muslims who believe that Islamic theology and law should serve as an authoritative frame of reference in any social and political condition”. However, as suggested by Abou El Fadl (2007, p.20), it is a very broad and vague term. “It does not necessarily mean that believing in a theocratic state, but it also can mean drawing inspirations from Islamic ethics and moral in matters of public concern”. Thus, by employing the word Islamist throughout this study, it does not necessarily connote a negative connotation.



that the Sharia would be subsumed by secular modern legal systems and gradually disappear. With respect to re-establishment, attention and efforts have been given largely to the reintroduction of Islamic criminal law (Reza, 2013; Sidahmed, 2001).

In describing this event, during the 1970s, there were a number of Muslim countries, which began to enact legislation to reintroduce Islamic criminal law in tandem with western codes. The first country that began to incorporate Islamic criminal law particularly *Hudūd* offences in their penal code was Libya<sup>2</sup> when Gaddafi seized power in 1969 (Mayer, 1990). Then, in 1979, Pakistan<sup>3</sup> followed suit when Ziaul-Haq came into power (Jamal Shah, 2012; Martin Lau, 2007). The same trend can also be traced in other Muslim countries such as in Iran<sup>4</sup> after the victory of the Islamic Revolution, and Sudan<sup>5</sup> after Al-Nimeri came to power (Fluehr-Lobban, 1990; Nayyeri, 2012). One similar trend that one can notice in all of these countries is the reintroduction of Islamic criminal law was done coercively by the Islamist regimes after they seized power. In other words, the reintroduction was merely a top down process. In terms of application, it is reported that, although the Islamic criminal law was enacted in these countries, in reality it was rarely enforced, most probably due to the stringent conditions that needed to be fulfilled before

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<sup>2</sup> As part of Gaddafi Islamisation project, four *hadd* offences were introduced; *sariqah*, *hirābah*, *zinā*, *qadhf* and *shurb* between 1972 to 1974 (Mayer, 1990). The four laws are as follows; theft and robbery (Law 148 of 11 October 1972); illegal sexual intercourse (Law 70 of 20 October 1973); unfounded accusations of fornication (Law 52 of 16 September 1974); and, finally, the drinking of alcoholic beverages (Law 89 of 20 November 1974).

<sup>3</sup> On 10 February 1979, Ziaul-Haq declared the enforcement on six new ordinances; the Offences against Property (Enforcement of Hudood) Ordinance 1979, the Offence of *Zinā* (Enforcement of Hudood) Ordinance 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance 1979, the Prohibition (Enforcement of Hadd) Order 1979 and The Execution of the Punishment of Whipping Ordinance, 1979 and Zakat and Ushr Ordinance.

<sup>4</sup> In Iran, in 1983 and 1984, four laws were enacted to codify Islamic criminal law.

<sup>5</sup> Al-Nimeri issued a presidential decree on 8 September 1983 and it brought into force the 1983 Sudanese Penal Code, the Criminal Procedure Act, the Judgement Act and the Evidence Act.

any application was possible (Peters, 2005).

Unlike most Muslim countries, whose reintroduction of Islamic criminal law was done through a coercive order, in Malaysia, the reintroduction was done through a democratic process. The first attempt to reintroduce Islamic criminal law in Malaysia was in 1990, initiated by the PAS-led State government in the state of Kelantan when the PAS<sup>6</sup> coalition party, *Angkatan Perpaduan Ummah* won a landslide victory over United Malays National Organisation (UMNO)<sup>7</sup> in the state election (Steiner & Lindsey, 2012). In the election, the *Angkatan Perpaduan Ummah* coalition won all the 39 state assembly seats in the state of Kelantan (Kamali, 1995, 1998; Salleh, 1999). Under the new Chief Minister, Nik Abdul Aziz Nik Mat<sup>8</sup>, deploying the slogan of ‘Developing with Islam’<sup>9</sup>, he introduced a large scale of Islamisation projects in various sectors such as in administration, legal, economic, education and social (Che Ibrahim & Mohamad, 2018; Mohamed & Mohamed, 2016; Salleh, 1999; Yusoff, 2017).

As part of the Islamisation project was the reintroduction of ICL in the state. In describing the state government’s efforts to reintroduce and legislate the ICL, the Chief Minister of Kelantan, Nik Abdul Aziz Nik Mat (1993), expressed that this effort was initiated as part of the duty and the responsibility of the ruler to uphold the sovereignty (*ḥākimiyyah*) of God, to achieve justice and to attain the pleasure of Allah (*marḍātillah*). Additionally, he also claimed that the existing law failed to

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<sup>6</sup> Pan Malaysian Islamic Party (PAS) is an Islamic political party and one of the oldest and prominent opposition parties in Malaysia.

<sup>7</sup> The ruling national party during this time was UMNO, the leading member of the coalition, *Barisan Nasional*. BN coalition has ruled the national government of Malaysia since Independence (1957) until May 2018.

<sup>8</sup> Nik Abdul Aziz Nik Mat is a local respected scholar who received a traditional Islamic legal training from al-Azhar University and Darul Ulum, Deoband.

<sup>9</sup> Initially, there is no official blueprint of the Islamisation project. It was only in 2005, an effort to compile the documentation of the project began.

become a deterrent in eradicating evil and curbing crimes in society and argued that the *Hudūd* law was already in place prior the advent of foreign power in Malaya. Thus, he views that the reintroduction of ICL is part of the Malay Muslim's long-lost right to legal self determination (*Urusetia Penerangan Negeri Kelantan, 2011*)<sup>10</sup>.

In order to realise this goal, a *Hudūd* committee to draft the *Hudūd* bill was set up. The committee consisted of both experts from civil and Islamic law. Among them were Dato' Hj Daud bin Muhammad<sup>11</sup>, Abu Bakar Abdullah Kutty<sup>12</sup>, Dato' Muhamad Shukri Bin Mohamad<sup>13</sup>, Prof Dr Ahmad bin Mohamed Ibrahim<sup>14</sup>, Prof Dr Mahmud Saedon<sup>15</sup>, and Tun Mohamed Salleh Abbas<sup>16</sup> (Azhar et al, 2015; Mohamed Fadzli, 2015). Finally, in 1993, a *Hudūd* bill known as *Syariah Criminal Code (II) 1993* was successfully enacted. The *Hudūd* bill consists of 72 clauses and is divided into six parts. In Part I, the *Hudūd* prescribes six type of offences (*sariqah, hirābah, zinā, qadhf, shurb* and *riddah*) and their punishments. Part II is the *qiṣāṣ*, outlines the various form of killing and wound. Part III contains the evidential procedure for each of the offences while part IV provides the procedural law for the infliction of

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<sup>10</sup> All of this information is extracted from the Chief Minister's speech delivered in a special ceremony in front of the public to launch the *Hudūd* bill. This event took place at *Balai Islam*, Kota Bahru on 17 November 1993.

<sup>11</sup> Datuk Daud Muhammad is the Chief Judge of the *Syariah* court of Kelantan since 1989 until December 2019.

<sup>12</sup> Abu Bakar Abdullah Kutty previously was the *Syariah* Public Prosecutor and currently holds the position of Kelantan *Syariah* Court Department's High Court judge.

<sup>13</sup> Dato' Muhamad Shukri Bin Mohamad is the state *muftī* of Kelantan

<sup>14</sup> Prof Dr Ahmad bin Mohamed Ibrahim is a Singaporean law professor who received legal training in St John College, University of Cambridge. He was the first Attorney-General in Singapore. Later, he moved to Malaysia and served as a professor of law in University of Malaya and International Islamic University Malaysia (IIUM).

<sup>15</sup> Prof Dr Mahmud Saedon is an Islamic Law Professor. He obtained his Degree, Master and Doctorate from the Al-Azhar University, Cairo.

<sup>16</sup> Tun Mohamed Salleh Abbas is the former Lord President of the Malaysian Supreme Court.

whipping and amputation. Part V and VI set the general provisions including the establishment of the Special *Syariah* court and Appeal Court. Apart from this, the *Hudūd* bill is also supplemented with five schedules: glossary and transliteration for Arabic terms, the regulation for whipping, and tables of compensation for injury.

Prior to tabling the *Hudūd* bill in the State Assembly Meeting, road tours and talk across the state was initiated in order to educate and spread awareness to the public on the *Hudūd* bill. Finally, on 25 November 1993, during the State Assembly Meeting, the *Hudūd* bill, *Syariah* Criminal Code (II) 1993, was tabled and received unanimously support by the entire state legislature comprising 24 from PAS, 13 from *Semangat 46*, 1 from *BERJASA* and 1 from *HAMIM* (Mohamed Fadzli, 2015; Nasran *et al.* 2015). However, this first attempt failed due to constitutional issues and political resistance from the federal government (A. Aziz, 2007; Kamali, 1995, 1998; Ismail, 2014). As a result, the *Hudūd* bill remained in abeyance.

After nearly twenty-two years, in 2015, effort to reintroduce the *Hudūd* bill by the state of Kelantan rematerialised. At first, a technical *Hudūd* committee at state level comprising a group of lawyers, academicians and Islamic scholars was set up to revise the *Syariah* Criminal Code (II) 1993 (Azhar *et al.* 2015; Mohamed Fadzli, 2015). Finally, on March 2015, amendments to the *Syariah* Criminal Code (II) 1993 were passed unanimously by the state Legislative members in the State Assembly Meeting (Awani, 2015; Razali, 2015). Since the *Hudūd* bill passed by the State Assembly Meeting of Kelantan was merely a slightly modified model of the *Syariah* Criminal Code (II) 1993, it still faces the same issues as it did back in 1993.

Despite all the issues and controversies, the effort to implement the *Hudūd* law in Kelantan continued until May 2018, just prior to Malaysia's 14<sup>th</sup> general election. This general election witnessed the change of the ruling party of the federal government from *Barisan Nasional* (BN) coalition to the *Pakatan Harapan* (PH) coalition; the first time in the history of Malaysia's 60 years of independence (Funston, 2018; Nadzri, 2018; Chin & Welsh, 2018). At the state level, PAS retained

their power in the state of Kelantan (Tayeb, 2018). However, it remains unclear on their stance regarding the *Hudūd* bill, whether they will still push for its implementation or not, as there was no official statement made by any of the State's officials after the change of Federal Government in 2018.

## 1.2 STATEMENT OF PROBLEM

Mainly, the *Hudūd* bill proposed by the state of Kelantan raises two significant issues. First is the literal adoption of *Hudūd* law from the classical jurists' treatises, and secondly the incompatibility of the *Hudūd* bill within the Malaysian legal framework. Each of the issue will be discussed in the following section.

### I. Literal Adoption of *Hudūd* Law from The Classical Doctrines

Reading the *Hudūd* bill of Kelantan at first glance one can, with a basic knowledge of Islamic law notice that the *Hudūd* bill was merely an adoption of *Hudūd* law from the classical doctrines. By scrutinising the categorisation of crime (*hudūd*, *qisās* and *ta'zīr*), the number of *hudūd* offences prescribed in the code, and the amount of threshold of the *nisāb* in the offence of theft (it was specified in *dinār*), indicated that all of the provisions was an extraction without any modification from the classical jurists' treatise.

The adoption of the *Hudūd* law from the classical jurist books in fact was affirmed clearly by the *Hudūd* state technical committee themselves. In explaining this, the drafter claimed that any legislation of Islamic law must be based on the established four schools of thought as the four great *imāms* are classified as *mujtahid*. Thus, in legislating the *Hudūd* bill, the drafter mainly referred to the main books of the Shāfi'i, followed by other school Ḥanafī, Mālikī and Ḥanbalī (Azhar et al. 2015; Wan Nik Wan Yusof, 2011).

The literal adoption of *Hudūd* law in the *Hudūd* bill proposed by the state of Kelantan was also highlighted by other scholars. For instance, in describing the *Hudūd* bill of Kelantan, Fathi Osman (in Kamali, 1995) stated that,

*“The bill is a product of undiluted imitation taqlid, failing to acknowledge the contemporary realities of society and make necessary adjustment to some of the fiqhi formulations of pre-modern times.”*

Another remark was given by Hooker (2003, p.86)

*“It is in fact a minimalist document. The whole fiqh on crimes is condensed into fifty short sections. The obvious question, therefore, is whether such a text can ever be accurate view of 1,400 years of legal thought. The answer must be no, because to isolate a ‘rule’ from its jurisprudence is to ignore the justifications on which the rule depends.”*

In both statements of the statement, it indicated the high degree of literal approach employed by the State of Kelantan in enacting the ICL. This approach is believed to ignore the historical context of the law when it was systematised by the classical jurists during the 9<sup>th</sup> century.

Apart from that, this literal approach arguably created a number of issues (An-Naim 1990, p.121). In his book, *Towards an Islamic Reformation*, he stated that,

*“Sharia principle of Islamic criminal law were formulated by the early jurists in three separate categories of hudūd, jinayat and ta’zīr. The ingredients of each offence were specified, and the applicable rules were discussed separately without attempting to develop general principles applicable to all offences. This approach is too complex and fragmented to sustain a modern penal system.”*

From this statement, An-Naim points out the complexity of the classical structure of Islamic criminal law developed by the classical jurists. Apart from that, An-Naim also highlighted the inadequacy of the classical doctrine with regards, to procedural and practical aspects of criminal law enforcement. As described by An-Naim (1990), this aspect is *“extremely rudimentary and informal”*. Thus, as he further argued, implementing this classical Islamic criminal law without making substantial revision will probably create problems and issues such as injustice when it is applied to a contemporary setting.

The literal adoption of *Hudūd* law in legislating ICL by the state of Kelantan is not an isolated case. The same trend can also be traced in other Muslim countries which reintroduce ICL. For instance, in Libya, five *ḥadd* offences were introduced; *sariqah*, *ḥirābah*, *zinā*, *qadhif* and *shurb* between 1972 to 1974. All of these codes were essentially based on the school of Mālikī; the *madhhab* prevailing in Libya (Peters, 2005). Another example can be seen in Pakistan when the Hudood Ordinance was established in 1979. The Hudood Ordinance largely follows the school of Ḥanafī (Masud, 2006). This also the case in Northern Nigeria, when twelve of the states reintroduce ICL. Although each of the codes differs in detail, in general all of the codes referred closely to the school of Mālikī doctrine (Peters, 2005). Through observation over all these Islamic penal codes, although one can notice that there are some slight modifications in certain provisions, all of the codes are still largely based on the classical school doctrine.

Based on the previous discussion, interestingly, it raised us with a question on why did the Muslim countries in general and Malaysia in particular follow a literal approach to the classical doctrine in legislating the ICL in their countries? Is this due to the prevalent belief that the *Hudūd* law is divinely ordained, thus immutable and not subject to debate, or to change by other means? This will be explored throughout this study.

## **II. The Incompatibility of *Syariah* Criminal Code (II) 1993 within the Malaysian Legal Framework**

Vast studies on the *Hudūd* bill of Kelantan pointed out that the main reason behind the inapplicability of the *Hudūd* bill is due to legal issues. These legal issues were discussed extensively by local academics and legal experts such as Shamrahayu (2007), Abdul Hamid Mohamad (2015a, 2016), Siti Zubaidah (2014), Aziz Bari (2002) and Nasran et al. (2015). Primarily, the *Hudūd* bill of Kelantan transgressed the Federal Constitution of Malaysia in two aspects. First, the *Hudūd* bill enacted criminal offences which were hitherto under the jurisdiction of the Federation.

These were the offences of theft and robbery. In Table IX, List I (Federal List), Federal Constitution, it mentions that,

*“The Federation has jurisdiction to make law for internal security and civil and criminal law, and procedure and the administration of justice.”*

Thus, in the case of conflict between the State and the Federation, article 75, Federal Constitution declares that,

*“If any State law is inconsistent with a federal law, the federal law shall prevail, and the State law shall, to the extent of the inconsistency, be void.”*

By referring to both provisions mentioned above, it could be understood that the *Hudūd* bill passed by the State of Kelantan is considered null and void.

Secondly, the *Hudūd* bill prescribed punishments, which exceeded the limit given by the Federal law, namely the *Syariah* Criminal Court Act 1965. The act prescribes that the maximum sanction that the *Syariah* court can mete out is only “to the maximum of three years of jail terms, five thousand *ringgits* fine or six strokes of (Sharia) whipping or any of combination.” However, the *Hudūd* bill exceeded this limitation by prescribing *Hudūd* punishment such as death penalty for apostasy, limb amputation for theft and robbery, whipping over six strokes for *zinā*, *qadhif*, and *shurb* offences. As a result, although the *Hudūd* bill was successfully passed at the state level, due to this constitutional issue, the *Hudūd* bill remained in abeyance.

The move made by the state of Kelantan in enacting the *Hudūd* bill against the Federal constitution in 1993 is quite perplexing as the *Hudūd* bill committee who was responsible for drafting the *Hudūd* bill consists of legal experts and is supposed to be aware of these legal limitations. What more perplexing is after nearly twenty-two years, again the state of Kelantan proposed the same *Hudūd* bill with only slight modification to the previous one.



Based on the discussion illustrated above, the question of why the State of Kelantan failed to acknowledge the shortcoming of the previous *Hudūd* bill and went on to propose the same model after nearly twenty-two years is raised. Was there any attempt to reform the *Hudūd* bill prior tabling it in the State Assembly Meeting of Kelantan on 19 March 2015? This study seeks to answer all of these questions in the following pages.

### **1.3 THE SIGNIFICANCE OF THE STUDY**

This study is undertaken to shed light on the issues illustrated above related to the *Hudūd* bill proposed by the State of Kelantan in 1993 and 2015. To date, numerous studies have focused on the technical legal issues presented by the *Hudūd* bill. Various ways to overcome the legal issues such as a suggestion to amend the Federal Constitution and re-interpreted some provisions in the Federal Constitution to give special position to Islam, has been provided. However, few studies have been done to critically analyse the *Hudūd* bill itself. This situation is arguably a result of the prevalent belief among the majority of Muslims who hold *Hudūd* law as divinely ordained, and therefore immutable, and cannot be debated or challenged.

Having said this, in this study I attempt to get a comprehensive view on the whole process of the reintroduction of *Hudūd* law by the state of Kelantan, in order to reveal the root problem behind the issues illustrated in the previous section. Subsequently, I attempt to engage in a personal critique of the *Hudūd* bill itself. Throughout the study, I will illustrate that the restoration of *Hudūd* law largely based on classical doctrine, without taking substantial revision and critical assessment, is problematic. In the final part of this study, I proposed that while maintaining the foundation principles of the Sharia, some parts of *Hudūd* law (known as *fiqh*) are open to modification and reform in order to adapt to the changes of time and place in the modern era. Thus, in this study, instead of proposing ways to overcome legal issue through legal amendment, in order to

implement the *Hudūd* bill proposed by the state of Kelantan, this study seeks to explore other ways to reintroduce ICL in Malaysia, taking into account the existing legal framework, multi cultural, and multi-religious nature of the country. This evolutionary approach is believed to be more feasible compared to the revolutionary approach taken by the state of Kelantan.

#### **1.4 AIM AND OBJECTIVES OF THE STUDY**

This study argues that the literal adoption of *Hudūd* law in Muslim countries and Malaysia in particular is due to the prevalent belief that *Hudūd* law is a divinely ordained law, thus immutable. This study seeks to examine whether this belief is true or not. In order to seek the answer, the historical development of *Hudūd* law during its formative stages is explored. This discussion will reveal the amount of divine authority and human agency in establishing the *Hudūd* law, which eventually reveals whether the application of *Hudūd* law in modern times is open for reformation or not.

Additionally, the study also attempts to examine the applicability of *Hudūd* law in current political and legal framework in general and in Malaysia in particular. Thus, in order to seek the answer, the modern discourse on *Hudūd* will be examined. This part will highlight the political and legal system which existed in the premodern and modern period. Subsequently, the historical development of *Hudūd* law and efforts to implement it within the context of Malaysia will be discussed and analysed. In this study, focus is given to efforts to reintroduce Islamic criminal law by the state of Kelantan through the *Hudūd* bill passed in 1993 known as *Syariah Criminal Code (II) 1993*, and the amended version in 2015. Through analysing the process of the reintroduction, it is hoped that this study can identify the root problem of the issues raised above and finally contribute to solving them.

In summary, the aims and objectives of this study are as follows:

1. To investigate the historical development of *Ḥudūd* law during the formative period of the Islamic legal system.
2. To examine the feasibility of *Ḥudūd* law within the nation state framework, with Malaysia in particular.
3. To analyse the development of *Ḥudūd* law in Malaysia with special reference given to the *Syariah Criminal Code (II) 1993 and Amendment 2015*, state of Kelantan.
4. To propose reform and suggest feasible way to introduce *Ḥudūd* law within the context of the Malaysian legal framework.

### 1.5 RESEARCH QUESTIONS

In order to achieve these objectives, this study aims to address the following research question:

1. Is Islamic criminal law, particularly *Ḥudūd law* fully divine and immutable?
2. How was *Ḥudūd* law applied during the formative stages of Islamic legal system?
3. Is the framework and structure of classical Islamic criminal law compatible within a nation state framework in general, and Malaysia in particular?
4. Why did the PAS-led state government introduce *Ḥudūd* in the state of Kelantan?
5. How did the PAS-led State government introduce *Ḥudūd* in the state of Kelantan?
6. Why did the state of Kelantan fail to acknowledge the shortcomings of the *Ḥudūd* bill and respond to it accordingly?
7. Can *Ḥudūd* law be given a fresh interpretation? Is there any room for scholars to make new interpretations of the text, or reform the system without violating the Divine Will?
8. Are there other feasible ways to implement *Ḥudūd* law within the context of the Malaysian legal framework?

## 1.6 METHODOLOGY OF THE STUDY

This paper employs a historical research study design. Historical study is an analysis of the relationships between issues that have influenced the past, continue to influence the present, and will certainly affect the future (Glass, 1989). According to Berg (2012), historical research study is specifically undertaken to reveal or uncover the unknown, to answer questions which have yet been answered, to search and identify the relationships of past happenings and their links with the present, to record and assess past activities and achievements of individuals, agencies and institutions, and to assist in the understanding of human culture.

According to historiographers, historical study involves a process of collecting data from both primary and secondary sources. Primary sources refer to the oral or written testimony of eyewitnesses. They are original artefacts, documents, and items related to the direct outcome of an event or an experience (Salkind, 1996). On the other hand, the term secondary sources refer to the oral or written testimony of people not immediately present at the time of a given event. They are documents written or objects created by others that relate to a specific research question or area of research interest (Berg, 2012; Leedy, 1999).

By employing this approach, this study attempts to examine the historical development of *Hudūd* law during the formative period of Islamic legal system. This discussion will help to shed light on the issue of its relevancy in a modern setting, namely the nation state framework. This approach is also employed to provide a comprehensive view on the efforts pertaining to its reintroduction in Malaysia. In this study, particular attention is given to the efforts initiated by the state of Kelantan to legislate ICL through a *Hudūd* bill known as *Syariah* Criminal Code (II) 1993 and 2015. To understand this event, this study refers to the primary sources, such as the letters from the Chief Minister of Kelantan to the Prime Minister, meeting reports of the *Hudūd* Technical Committee, public records such as the collection of speech and talk by the Chief Minister, official publication by the

Information Bureau State of Kelantan and government documents. In addition, secondary sources such as academic journals and newspaper reports were also referred. All of the information gained by the primary and secondary sources were utilised in order to gain a comprehensive view on the efforts to reintroduce *Hudūd* in the State of Kelantan.

In order to provide the theoretical background of the study on the theory of *Hudūd*, the main books of the Sunni schools of law namely Ḥanafī, Shāfi'ī, Mālikī and Ḥanbalī are consulted. Others such as the Shī'ī and Zāhirī schools are not necessary for consultation because the Malaysian fatwa enactments are based on the Sunnis school of law with priority given to Shāfi'ī school. The adherence to the Sunnis school of law is proclaimed in most of the state's administration of Islamic law enactment. In these provisions, it outlines the steps a *muftī* must follow to derive a *fatwā*. First, the *muftī* must refer to the *qawl mu'tamad* in the Shāfi'ī, school. If following that opinion is against the public interest, then the *qawl mu'tamad* of another Sunni school may be referred to.

Each of the school is represented by up to two or three prominent jurists and their books. From the Ḥanafī School, I have selected al-Sarakhsī (*al-Mabsūṭ*), al-Mawṣilī (*al-Ikhtiyār li Ta'līl al-Mukhtār*), al-Marghīnānī (*al-Hidāyah*) while from the Ḥanbalī school, I have chosen Ibn Qudāmah al-Maqdisī (*al-Mughnī* and *al-Kāfi*) and Ibn Mufliḥ (*al-Furū'*). The Shāfi'ī school is represented by al-Shāfiī (*al-Umm*), al-Māwardī (*al-Hāwī al-Kabīr*), Imām al-Haramayn (*Nihāyat al-Maṭlab fī Dirāyat al-Madhab*), Taqī al-Dīn (*Kifāyat al-Akhyār*) while the Mālikī school is represented by Imām Mālik (*al-Mudawwana*), al-Qarāfi (*al-Dhakhira fī Furū' al-Mālikiyyah*) and al-Dasūqī (*Hashiah al-Dasūqī 'alā al-Sharḥ al-Kabīr*). I also consulted books of contemporary scholars on this subject. Among the books are *al-Jarīmah wa al-'Uqūbah fī al-Fiqh al-Islāmī* (Muhammad Abū Zahrah), *al-Tasyrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Wāq'ī* ('Abd al-Qādir 'Awdah), *al-Mawsū'at al-Jinā'iyah fī al-Fiqh al-Islāmī* (Aḥmad Fathī Bahnasī) and *Falsafat al-Tashrī' fī al-Islām* (Ṣubḥī Maḥmaṣānī).

In this study, for Qur'an translation, I used the Qur'an English Translation by M.A.S Abdel Haleem. For ḥadīth, I largely referred to the Sunnah.com website. For English-Arabic transliteration, I used the Library Congress Convention except for the Arabised Malay terms, I kept the original version as it is used in the Statute and Bill.

## 1.7 THE SCOPE OF THE STUDY

Traditionally, scholars divided Islamic criminal law into three different categories: *ḥudūd* (fixed punishment), *qiṣās* (retaliation) and *ta'zīr* (discretionary punishment). In this study, due to the vast literature on the subject of Islamic criminal law, we will cover only the discussion of *ḥudūd*. Of the other elements of Islamic criminal law, *qiṣās* is omitted from the discussion due to its perceived irrelevance, it being deemed unfeasible in the context of Malaysia at the moment. As for *ta'zīr*, it will be discussed accordingly when it is necessary. Although the topic of discussion herein will mainly be focusing only on *Ḥudūd*, it is possible that other parts of Islamic criminal law might share the same concerns raised in this study. Thus, some structural reforms and suggestions, which are proposed throughout this study, could also be beneficial, and can be reconsidered to be extended to other part as well.

Within the context of Malaysia, to date, there were two attempts to reintroduce ICL. The first was in November 1993, by the PAS-led State Government of Kelantan (Kamali, 1995, 1998; Salleh, 1999). The second was in July 2002, by PAS-led State Government of Terengganu (Funston, 2006; Steiner, 2012). However, this study will discuss and analyse the *Ḥudūd* bill proposed by the state of Kelantan as the effort to reintroduce *Ḥudūd* in the state of Kelantan is still on going at least until 2018. Conversely, the *Ḥudūd* bill proposed by the state of Terengganu is not discussed in this study because of the insignificance of the subject. The PAS-led of state government in Terengganu retained their power only for one term (1999-2004) and loose to UMNO in the next election. No further development of the *Ḥudūd* bill is traced after that. Although PAS gained back control in the state of Terengganu at

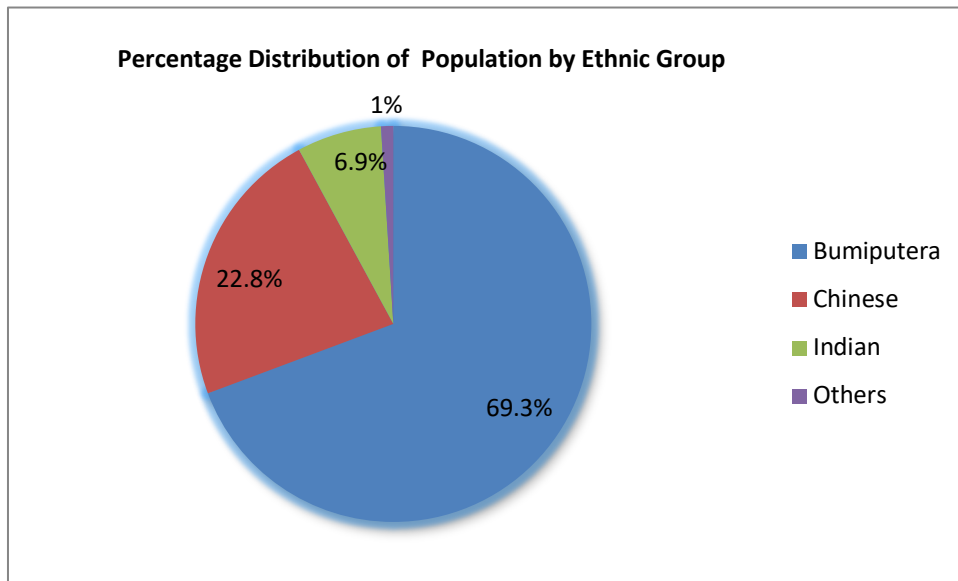
the last election (2018), to date there is no indication shown by the state government to enforce ICL.

## **1.8 A GLIMPSE AT THE BACKGROUND OF MALAYSIA**

Malaysia, formerly known as The Federation of Malaya gained independence from the British in 1957. Geographically, Malaysia is located in the Southeast Asia and consists of two regions; Peninsular Malaysia (also called West Malaysia) and East Malaysia, which is on the Island of Borneo. Malaysia is a federation comprising thirteen states, namely: Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu, Sabah and Sarawak. Apart from the 13 states, there are three Federal territories: Kuala Lumpur, Putrajaya, and Labuan. Malaysia has an estimated population of 32.6 million (Department of Statistics Malaysia, 2019). Demographically, Malaysia is a multi-ethnic, multi-cultural and multi religious society. The largest ethnicity is formed by Bumiputera (69.3%), followed by Chinese (22.8%) and Indian (6.9%)<sup>17</sup>.

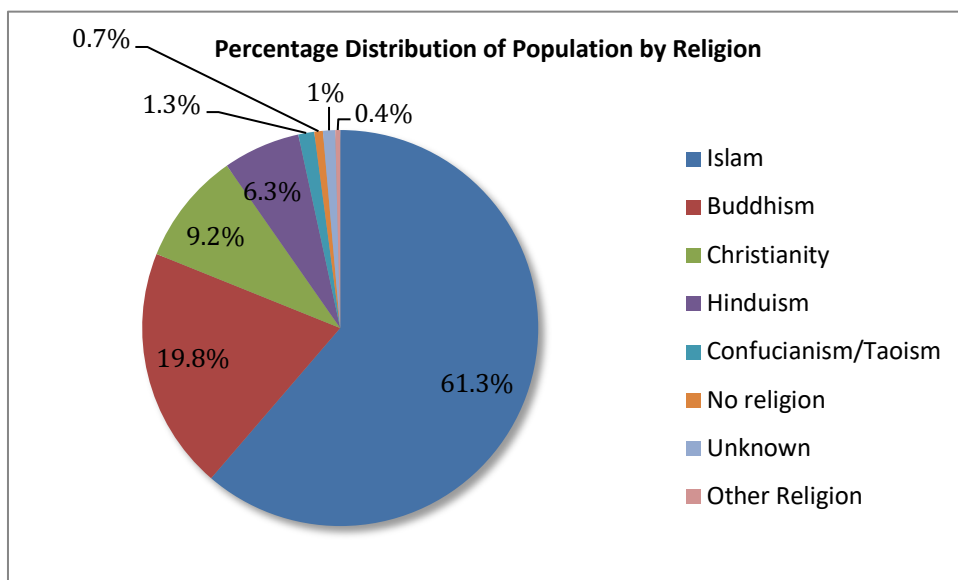
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<sup>17</sup> Initially, Malays and natives of Sabah and Sarawak, collectively known as the Bumiputera are the indigenous people in the Malay land. Between 1800-1941, Chinese were brought by the British to work as labourers, planters, miners and merchants and the Indian were imported as the workforce of Malayan Rubber State (Britannica, n.d.).



**Diagram 1.8.1: Percentage distribution of population by ethnic group**

With respect to religion, Islam is the most professed religion in Malaysia with the proportion of 61.3%. Other religions embraced are Buddhism 19.8%, Christianity 9.2%, Hinduism 6.3% and Confucianism/Taoism 1.3% (Department of Statistics Malaysia, 2011)



**Diagram 1.8.2: Percentage distribution of population by religion**



The system of government in Malaysia is largely modelled from the Westminster system, which practices Parliamentary Democracy and constitutional monarchy (Faruqi, 2011; Wan Ali et al, n.d.). The Head of State is the *Yang Dipertuan Agong* (YDPA), who is elected by the Council of Rulers, based on a five-year rotation system from among the hereditary rulers of the nine states (Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan) in the Federation. In the other states, namely Melaka, Pulau Pinang, Sabah and Sarawak, the Head of State is the *Yang di-Pertua Negeri*, or Governor of the State. The *Yang di-Pertua Negeri* is appointed by the *Yang di-Pertuan Agong* for a four-year term.

Primarily, The Federal Government of Malaysia is organised into three main branches; the legislative, the executive and the judiciary. The first branch, the legislative is the body which is responsible for creating, amending and repealing laws. As Malaysia practices federalism, the legislative power is divided between the Federal (The Parliament) and the State (the State Legislative Assembly). The Federal Constitution, Ninth Schedule outlines the division of jurisdiction between the Federal and the State in Article 74-79. Mainly, there are three lists set out in the Ninth Schedule of the Federal Constitution; the Federal List (List I), the State List (List II) and the Concurrent List (List III).

NINTH SCHEDULE, FEDERAL CONSTITUTION		
<p style="text-align: center;"><b>FEDERAL LIST</b></p> <p>citizenship, defense, internal security, civil and criminal law, finance, trade, commerce and industry, education, labour, tourism and etc.</p>	<p style="text-align: center;"><b>CONCURRENT LIST</b></p> <p>scholarship, social service, culture and sports, housing , water supplies and etc.</p>	<p style="text-align: center;"><b>STATE LIST</b></p> <p>local government, land, agriculture and forest, Islamic law, personal and family law of persons professing the religion of Islam and etc.</p>

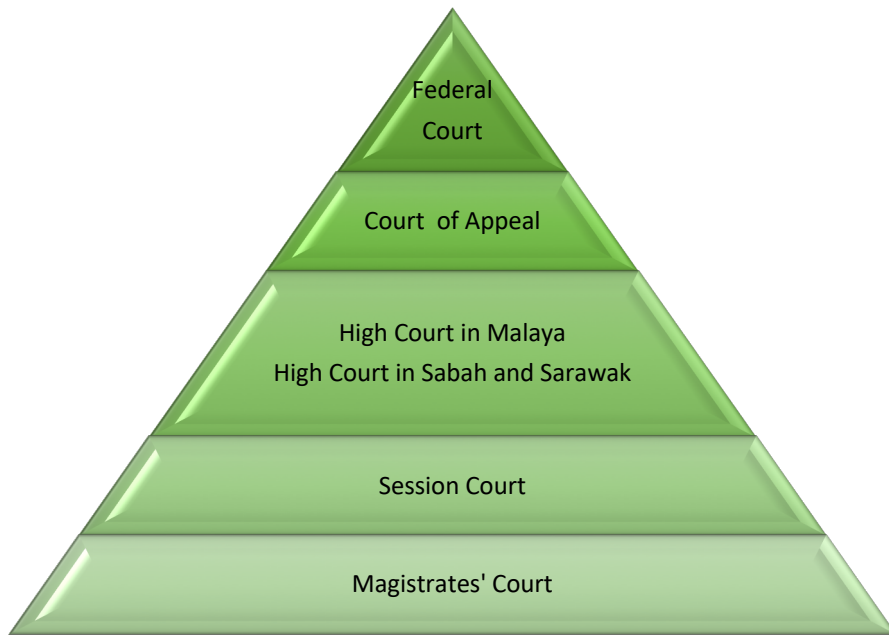
**Table 1.8.3 Jurisdiction of Federal and State**

Based on the table above, the Federation, through the Parliament has the exclusive power to make law over the matters under the Federal list. On the other hand, the State through its Legislative Assembly has legislative power over the matters under the State list. Both the Parliament and the State share legislative power over the matters under the Concurrent List such as scholarship, social service, culture and sports, housing and water supplies. However, if there is conflict between the both, Federal Law will prevail over State Law.

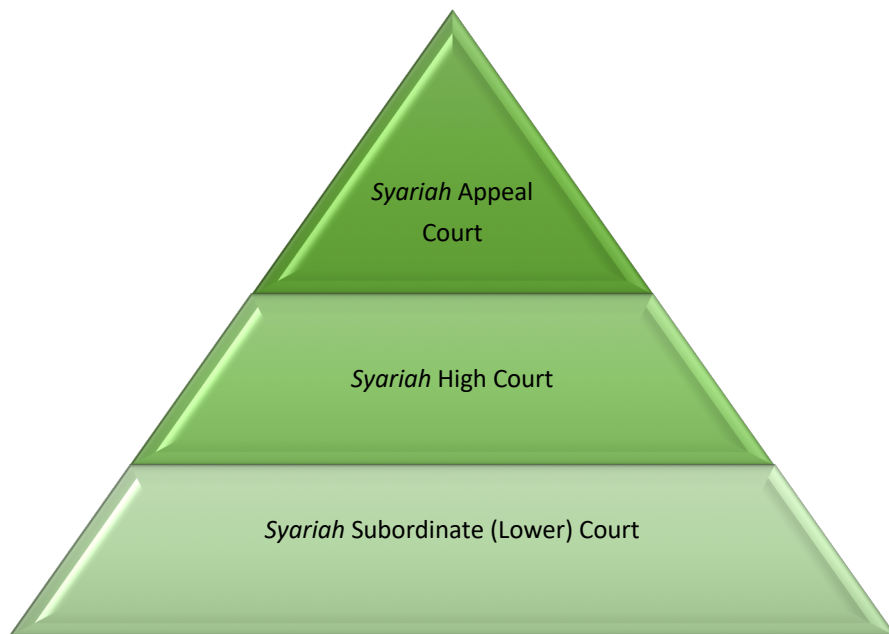
At the Federal level, The Parliament of Malaysia consists of the upper house, House of Senate (*Dewan Negara*) and the Lower House, House of Representative (*Dewan Rakyat*) (Joned & Ibrahim, 2015). The House of Senate has 70 members known as the Senators. Of this number, 44 members are appointed by the YDPA and the rest are elected by the State Legislative Assembly from the 13 states for a 3 years term. The House of Representative has 222 members, known as the Members of the Parliament, elected by the citizens in the general election once every five years. Of this number, 209 of the members are from the states in Malaysia, 11 from the Kuala Lumpur Federal Territory and one each from Labuan and Putrajaya Federal

Territory. Apart from the primary role, the Parliament is also a channel to examine government policies, approve new tax revenues and approve a national budget for each year.

The second branch is the executive. This body is led by the Prime Minister appointed by the *YDPA* who must be a member of the lower house and from the party that holds the majority in Parliament. The Cabinet of Ministers headed by the Prime Minister is responsible for executing government policies at the Federal level. The third body is the judiciary which constitutes the body of judges in a constitutional system. According to the Federal Constitution, the judges have power to interpret and execute the law. To implement the judicial duties, a system of courts was created. Uniquely, Malaysia has a dual parallel court structure; civil courts and *Syariah* courts. The civil courts have jurisdiction on all civil and criminal matters, applicable to all citizens. Whereas, the *Syariah* courts under the jurisdiction of each state, has jurisdiction only to the Muslims mostly in matters of personal and family law (Joned & Ibrahim, 2015). The next diagram illustrates the hierarchy of the civil and *Syariah* courts in Malaysia.



**Diagram 1.8.4: The hierarchy of civil courts in Malaysia**



**Diagram 1.8.5: The hierarchy of *Syariah* courts in Malaysia**

In regards to its political structure, Malaysia has a multi-party parliament and practices a first-past-the-post electoral system (Yusof, 2016; Ayub et.al, 2017). The

most prominent coalition is the *Barisan Nasional* (BN); a coalition formed by the United Malays National Organisation (UMNO), Malaysian Chinese Association (MCA) and Malaysian Indian Association (MIC). This coalition (formerly known as the Alliance) held power from 1957 until 2018. The 10<sup>th</sup> Malaysia general election, in May 2018, marked the first time since independence, that a non-BN coalition namely *Pakatan Harapan* formed the Federal Government (Funston, 2018; Nadzri, 2018; Chin & Welsh, 2018).

### 1.9 LITERATURE REVIEW

Extensive literature on the early theory of Islamic criminal law by the classical jurist can be discovered in the main books of every school of thought. All of these writing in regard's to Islamic criminal Law shared main principles but exclusively varied in the branches due to different methodology of interpretations and different context surrounded by them. Later on, the discussion of Islamic criminal law was put down in the books of politics and governance such as in *al-Aḥkām al-Sulṭāniyyah* by al-Māwardī (n.d.) and Abū Ya'lā (2000), *al-Siyāsah al-Shar'iyyah* by Ibn Taimiyyah (n.d.). All of these early writings by the classical jurists were all not in the form of code of law as we have in today's law books. It was rich with discussion, elaboration and conflicting opinions not only intra, but also inter-schools of thought. Another distinctive feature is, unlike other criminal law, which is organised according to the nature of offences, Islamic criminal law is organised according to the nature and sources of the punishments. Interestingly, all of these classical literatures are still being taught in most universities that offer Islamic studies as part of their degree programme.

There is also a significant amount of literature written on the theory of Islamic criminal law by contemporary scholars. Among the books are *al-Jarīmah wa al-'Uqūbah fī al-Fiqh al-Islāmī* (Muhammad Abū Zahrah), *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī* ('Abd al-Qādir 'Awdah), *Niḡām al-Islām: al-'Ibādah wa al-'Uqūbah* (Muhammad Oqla'), *al-Mawsū'ah al-Jinā'iyyah fī al-Fiqh al-Islāmī*

(Aḥmad Fathī Bahnasī), *Falsafat al-Tashrī' al-Islāmī (Ṣubḥī Maḥmaṣānī)*, Punishment in Islamic Law: A Comparative Study (Mohamed Salim El-Awa, The Islamic Criminal Justice System, The Sharia and Islamic Criminal Justice in Time of War and Peace (Cheriff Bassiouni), Islamic Penal System and Philosophy (Muhammad Qadri), The Penal Law of Islam (Muhammad Iqbal Siddiqi). Through scrutinisation, most of these books are written by authors from a legal background - academicians, judges and lawyers and were comparative in nature.

In the western academia, previously, Islamic criminal law has been a neglected field of study. Attention has only been given to study Islamic law as a whole. It was only until late of the twentieth century, it began to attract the attention of Muslim scholars and western scholars alike. The reason behind this was the event of what scholars describe as 'the rebirth of Sharia'. Numerous studies have been undertaken to explore and understand this event.

One of the most important themes discussed by the scholars related to this event is the impetus behind the reestablishment of Sharia. Scholars suggest that there are at least four perspectives to view this phenomenon and arguably each of them is interrelated. Some scholars view this as part of Muslims' assertion of their cultural and religious identity (Othman, 2006). Using the expression of self-determination, Muslims strive to re-establish Islamic law, the law that was previously in place prior to European colonialism. Most Muslims view this as part of the supreme duty and responsibility to uphold Divine Law, as there are injunctions regarding crime and punishment prescribed in the Qur'an. Additionally, on a practical level, Muslims hold a view that Islamic Criminal Law offers a panacea for the social evils in society (Elisa Giunchi, 2012; Peters, 2005b). Alternatively, Sayyid, (2015) portrays this event as a political reassertion by Muslims against the Western power hegemony. He imagined this reintroduction as a bigger picture and saw it as a sign of the decline of Eurocentrism, and part of the mobilisation in the name of Islam, which he terms 'Islam as a master signifier'.

Another point of view is proposed by scholars such as Jamal Shah (2012) and Peters, (2005). They describe this event as part of political legitimisation under the name of religion, either from the incumbent regimes or from the religious opposition. This is due to the strong wave of Islamic resurgence during the 1970s. As a result, to stay in power, the politicians have to keep up with the demand of the Muslim society who argue for more 'Islamisation'. This view coincides with Salim (2008). However, he asserts that associating this event solely on the perspective of 'Islamisation' is superficial and unfair and claims that one must also take account other motives such as the religious, psychological and economic aspects.

Another view that relates to this perspective is put forward by Abou El Fadl (2007) and Tibi (2002). Both of them view this event as a symptom of the emergence of fundamentalist or puritan movements. To some fundamentalists and Islamists, they hold the opinion that, "*The notion of re-establishing the Ḥudūd became both the symbol and substance of a longed-for restoration of an authentic past and an independent future*". Based on this discourse, an interesting question is raised for us. What best explains the impetus for the reestablishment of Sharia, within the context of Malaysia? Is it a single cause, or multiple causes, pressing for the reestablishment of Islamic law, particularly Islamic criminal law?

Another important theme related in this study is the compatibility of Sharia within the nation state framework. Vast works have been done on this theme and different standpoints, including proponents, moderates and opponents have been presented. One of the important work has been undertaken in particular is by Hallaq (2014). He argues that the Sharia and nation-state is irreconcilable because of the different nature between both legal systems. Unlike Hallaq, An-Naim (1990) while maintaining the possibility of Sharia in a nation state framework, he urges a dire need for reformation. However, the methodology that he proposed was unlikely to be accepted by the conservatives. Through examining the literature on the discourse of Ḥudūd in Malaysia done by the local scholars and academicians, I

realised that the issue of compatibility of Sharia within a nation-state framework is missing and most of the time ignored in the discourse.

Within the context of Malaysia, the discourse on *Hudūd* began to spark only when the State Assembly Meeting of Kelantan passed a *Hudūd* bill known as *Syariah Criminal Code (II) 1993*. However, since the passing of the bill, until present, the discourse on *Hudūd* or the *Hudūd* bill of Kelantan in particular has been largely focusing on the aspect of legal issues. Prominent legal academics such as Shamrahayu (2007, 2017), Siti Zubaidah (2008, 2014), Abdul Hamid (2009, 2016) have pointed out that the main impediments to implementing *Hudūd* in Malaysia are legal constraints. Discussion on Article 3 and Ninth Schedule in Federal Constitution, debate on whether Malaysia is a secular or Islamic State has been the main theme in the studies. Additionally, in their studies, various legal suggestions to overcome this legal issue have been presented such amending the Federal Constitution by using Article 76A to give special jurisdiction to the state to enact criminal laws.

However, as illustrated above, due to the excessive attention given to the legal issues, other important discussion such as identifying and rectifying the shortcoming of the *Hudūd* bill itself had been sidelined and did not receive much interest and attention. The substantive, procedural and evidential problems associated with the application was rarely discussed by scholars, academicians and legal experts. As far as this work is concerned, there are two important studies, which touch upon this neglected aspect. The first is by Hashim Kamali, a prominent Islamic Law scholar who is currently based in Malaysia and the other is written by Sikandar. Initially, both of them criticised the literal approach taken by the state of Kelantan in legislating the *Hudūd* bill and asserted that adopting the classical doctrine without substantial revision into the contemporary setting will create a lot of issues and problems (Kamali, 1995, 1998; Sikandar, 2010). The same concern has been expressed earlier by An-Naim (1990) in his book, *Toward an Islamic Reformation*.



In deliberating his appraisal of the *Ḥudūd* bill of Kelantan, Kamali wrote a book, *Punishment in Islamic Law: An Enquiry into Ḥudūd Bill of Kelantan* in 1995 and an article, *Punishment in Islamic Law: A Critique of the Ḥudūd Bill of Kelantan, Malaysia*. In both works, apart from pointing out the judicial problems as highlighted by many other scholars, Kamali emphasised on the shortcoming of the *Ḥudūd* bill itself. Firstly, Kamali claimed that the literal approach of the drafter in enacting the *Ḥudūd* bill had led to an undermining of the main objectives of the Sharia specifically in upholding justice. As for Kamali, he believes that the prescription of *Ḥudūd* punishment by God is not merely an end itself but a tool to serve justice and curb crime in the society. Having said that, he further argued that the so-called *Ḥudūd* verses in the Qur'an must be read comprehensively as each of the verses, apart from specifying the punishment, is followed by the encouragement of repentance and reform in the very same verse. Apart from that, Kamali also illustrates other substantive problems in the bill such as the application of the *Ḥudūd* bill to the non-Muslims, the issues of rape resulting in pregnancy as evidence of *zinā* for unmarried women, the issue of the definition of *muḥṣan* and so forth. At the end of his book, Kamali suggested several substantive reforms to improve the existing *Ḥudūd* bill. However, without denying the huge contribution of this work to the discourse, the principal shortcoming of this book is that it offers scant explanation for why these problems occurred in the first place (literal approach). Apart from that, Kamali did not offer a concrete solution on how to accommodate the call to implement *Ḥudūd* law within the Malaysian legal framework. Thus, this study endeavours to fill that gap and can be considered as an extension for Kamali's work.

Another significant work in discussing the shortcoming of the *Ḥudūd* bill of Kelantan as mentioned previously is done by Sikandar (2010). In his article, *Discourse on Ḥudūd in Malaysia: Addressing the Missing Dimension*, Sikandar argues that apart from legal issues, the application of ICL in Muslim countries raises numerous juridical problems of substantive law, procedure and evidence. In regard to the *Ḥudūd* bill proposed by the state of Kelantan, he points out several issues. First, he

claimed that the *Ḥudūd* bill ignores the existences of divergent opinions among the classical jurist in several issues such as on the number of *Ḥudūd* offences. In advancing his argument, he also illustrates some of the contemporary scholars' views on the number of *Ḥudūd* such as by al-Awwā' and An-Naim's. Secondly, sharing the view with An-Naim he points out the inadequacy of the classical law of evidence and procedure in serving the modern penal system. Thus, he suggests, "*a viable code of procedure in the light of general principle of Sharia*" must be developed prior any reintroduction (Sikandar, 2010, p.143). At the end of his work, he proposed for enacting an Islamic code based on *ta'zīr*. However, he did not elaborate on this idea at length. Thus, in this study, this idea will be explored and discussed in more detail.

#### **1.10 STRUCTURE OF THE STUDY**

In order to achieve the aims and objectives of the study, the structure is designed as below:

#### **CHAPTER 1: INTRODUCTION**

Chapter one provides the reader an overview and context to the study. It contains the background, the statement of problem, the aim and objectives, the research questions, the literature review, and the methodology employed in the study.

#### **CHAPTER 2: THE HISTORICAL DEVELOPMENT OF ḤUDŪD LAW AND ITS APPLICATION DURING THE FORMATIVE STAGES OF ISLAMIC LEGAL SYSTEM**

Chapter two examines the historical development of *Ḥudūd* law during the formative period of the Islamic legal system. At the beginning, this chapter provides the historical background of the formative period and explores the application of *Ḥudūd* punishment during these stages. Afterwards, this chapter continues with the discussion on the etymology of the word *Ḥudūd* by exploring the usage of the word

by the language scholars, the usage of the words *ḥadd* and *Ḥudūd* in the Qur'an and *ḥadīth*, and finally the usage of the word *Ḥudūd* by the classical jurists. This chapter also covers the discussion of the substantive, evidential and procedural of Islamic criminal law according to the classical jurists' treatise.

### **CHAPTER 3: MODERN DISCOURSE ON THE APPLICATION OF SHARIA AND ISLAMIC CRIMINAL LAW WITHIN A NATION STATE FRAMEWORK**

Chapter three explores the modern discourse on the application of Sharia and Islamic criminal law within a nation state framework. The first part of the chapter highlights the distinctive features between the pre-modern and modern legal system. The next part presents the the divergent views of the scholars; the proponents and the opponents of Islamic law on the applicability of Sharia in modern nation state framework. Finally, the last section provides the issues and controversies associated with the application of Islamic criminal law in Muslim countries.

### **CHAPTER 4: HISTORICAL BACKGROUND OF THE MALAYSIAN LEGAL SYSTEM: THE IMPACT OF EUROPEAN IMPERIALISM ON ISLAMIC LAW**

Chapter four provides a historical background to the Malaysian legal system. The discussion covers the period prior to the advent of any foreign power into Malaya, until after Malaysia gained independence in 1957. Focus will be given on the position of Islamic law in Malaysia prior, during and after the colonial era. This preliminary information is important to help the reader to understand how the history had shaped the current legal framework and to understand the reason and motivation behind the struggle to reestablish Islamic Criminal Law by the Malay Muslims in the context of Malaysia.

## **CHAPTER 5: *ḤUDŪD* LAW IN MALAYSIA: AN ANALYTICAL REVIEW OF SYARIAH CRIMINAL CODE (II) 1993 AND 2015, STATE OF KELANTAN**

Chapter 5 aims to provide a comprehensive view of the process of reestablishment of Islamic criminal law by the state of Kelantan through the *Syariah* Criminal Code (II) 1993 and 2015. This chapter provides a full account of the efforts from 1993 until present and subsequently analyses the bill. In the final part, challenges and problems to implement Islamic criminal law in Malaysia are discussed.

## **CHAPTER 6: RECONSTRUCTING *ḤUDŪD* LAW WITHIN THE CONTEXT OF MALAYSIA; UTILISING *IJTIHĀD* AS A TOOL FOR REFORM**

This chapter begins by outlining the doctrine of *ijtihād* according to the scholars. Then, by utilising the doctrine of *ijtihād*, a critical reassessment to the theory of *Ḥudūd* and its application within the context of Malaysia is endeavoured.

## **CHAPTER 7: CONCLUSION**

This chapter presents and summarise all the key findings discovered in the study. This chapter also specifies several recommendations and suggestions for further research and finally provides the conclusion of the study.

## CHAPTER 2

### THE HISTORICAL DEVELOPMENT OF *ḤUDŪD* LAW AND ITS APPLICATION DURING THE FORMATIVE STAGES OF ISLAMIC LEGAL SYSTEM

#### INTRODUCTION

This chapter forms the theoretical background of the study. It aims to examine the historical development of *Ḥudūd* law and its application during the formative period of the Islamic legal system<sup>18</sup>. To achieve this aim, this chapter is divided into several sections. Beginning with a brief background on the formative stages of Islamic legal system and followed by a detailed description of the application of *Ḥudūd* during this stage. Then, in next part of the chapter, the etymology of the word *Ḥudūd* is examined through exploring the usage of the word in the Quran, the *Sunnah*, and in the classical jurists' treatises. Finally, at the end of this chapter, the substantive, evidential and procedural aspects of *Ḥudūd* according to the classical jurists' treatises is explored.

#### 2.1 BRIEF BACKGROUND ON THE FORMATIVE STAGES OF ISLAMIC LEGAL SYSTEM

Initially, there is no clear agreement by the scholars on the periodisation of the historical development of Islamic legal system. For instance, Kamali (2008), Asyqar (1982) and al-Zuhaylī (2001) divided the development of the Islamic legal system

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<sup>18</sup> By using the term 'formative period', this study refers to the definition given by Hallaq (2005, p.3) in his book, *The Origins and Evolution of Islamic Law*. He defines this period as historical period in which the legal system "arose from rudimentary beginnings and then developed to the point at which its constitutive features had acquired an identifiable shape". The formative period covers from the seventh century, beginning from the life of the prophet until to the middle of the tenth century.

into six phases while al-Zarqā'<sup>19</sup>, (2004) divided it into eight. Kamali and Asyqar organised the phases into the prophetic period, the era of the companions, the era of the successors (*al-tābi'ūn*), the era of independent reasoning, the era of *taqlīd* and finally the current phase. On the other hand, while al-Zuhaylī similarly divided the first three phases to be the same as Kamali and Asqar, he divided the three subsequent stages into three different periods: the era of the great *imām*, the era after the death of great *imām*, and the era of revival.

Conversely, Western scholars such as Schacht, (1995) and Hallaq (2005) divided the historical development of the Islamic legal system into two distinctive periods: the formative and post-formative. The formative refers to the historical period in which the legal system "*arose from rudimentary beginnings, and then developed to the point at which its constitutive features had acquired an identifiable shape*", while the post formative period covers the time after that (Hallaq 2005). With regard to the dating, according to Schacht, the formative period begins from the 7<sup>th</sup> century and ends in the 9<sup>th</sup> century. However, some recent work argued that this dating is inaccurate. In commenting on this, Hallaq (2005) contended that the formative period ended a century later, in the 10<sup>th</sup> century, when the schools of thought become fully developed. In the following section, I will provide a brief background on each of the stages during the formative period.

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<sup>19</sup> Al-Zarqā' in his book, *al-Madkhal* divided the historical development of Islamic legal system into eight. The eight phases are 1) Era of revelation, 2) Era of the *khulafā' al-rāshidūn*, 3) Era from mid of 1st-early of 2nd century, 4) Era from the early of 2nd century-mid 4th century, 5) Era from the mid of 4th century to the sacking of Baghdad, 6) Era from mid 7th century until the emergence of *the Mejelle*, 7) Era after the emergence of *the Mejelle* until World War 2 ended. and 8) The current era.

### 2.1.1 PROPHETIC PERIOD (610-632CE)

This period begins when the Prophet (pbuh) received his first revelation and ends with the death of the Prophet (pbuh). This period is also known as the revelation period. During this period, the Prophet (pbuh) acted both as a political and religious leader to the Muslim community. When any Muslim believers need guidance on a particular subject, they went directly to the Prophet. The Prophet (pbuh) would wait for divine guidance and give his answer based on it. If there were no revelation, he would answer the questions of his own accord (al-Zarqā', 2004).

The two main sources during this time were the Qur'an and the Sunnah. The Qur'an was revealed gradually within two distinctive phases: the Makkan verses and the Madinan verses (al-Zuhaylī, 2001). Each category has its own unique characteristics, which distinguished them from each other. The Makkan verses, focus on building ideological faith, thus the recurrent themes were about the existence of Allah, afterlife, heaven and hell and the stories of the previous people (al-Qaṭṭān, 1989; Asyqar, 1982). Conversely, the Madenan verses were concerned with strengthening the foundation of Islam and the organisation of Muslim State. Thus, it provides more complex legislation on practical matters such as legal rulings on families, crimes, inheritance, ritual and worship (al-Sāyis, n.d.; al-Zarqā', 2004). Apart from the Qur'an, the Sunnah became second in line as the main source during this era. The Sunnah acts as a supplementary to the Qur'an as it explains general statements, and unclear injunctions, specifying details in so many ways for the laws found in the Qur'an. However, at this time, the Prophet (pbuh) prohibited the compilation of *ḥadīth* for fear that it would be mixed with the Qur'an (Asyqar, 1982).

During this period, the Prophet (pbuh) and the companions already exercised independent reasoning. The Prophet (pbuh) allowed his companions to exercise independent reasoning (*ijtihād*) either during his presence or absence (al-Sāyis, n.d.; al-Zuhaylī, 2001). For instance, in the case of the captives of Badr, the Prophet

(pbuh) consulted his companions. Abū Bakr suggested that the captives should be released against a ransom, while ‘Umar insisted on putting them to death. The Prophet (pbuh) preferred Abū Bakar’s suggestion over ‘Umar’s and accepted the ransom. However, the verse (8:67-69) was revealed and rebuked the Prophet’s choice (Kamali, 2003).

Another example that displayed the encouragement of the Prophet (pbuh) for his companions to exercise independent reasoning, is in the case of ‘Asr prayers during the Battle of Bani Quraizah. The Prophet (pbuh) sent some of his companions to enemy territory and asked them not to perform the afternoon prayers until they arrived at their destination. However, it happened that the time of prayer came on the way. Therefore, some of the companions performed their prayers on the way arguing that the prophet had not meant to postpone the prayers whilst others performed their prayers on reaching their destination, taking the prophet’s command literally. When the incident was reported to the prophet, he approved of both courses of action (al-Sāyis, n.d.; Asyqar, 1982).

The encouragement of *ijtihad* by the Prophet (pbuh) can also be seen when he sent Muadh Ibn Jabal as a ruler and judge in Yemen. The Prophet (pbuh) asked Muadh how he should judge between people and Muadh responded by stating that he would refer to the Qur'an and the Sunnah. When the Prophet asked if he might fail to find his answers there, Muadh stated: *“I will use my best judgement”*. The Prophet did not object and was very pleased to Muadh's answer (al-Qaṭṭān, 1989). This encouragement to exercise independent reasoning was particularly valuable to the companions after the Prophet’s death.

### **2.1.2 ERA OF THE COMPANIONS (632-661CE)**

Moving to the next phase, with the death of the Prophet, the first generation of Muslims established the order of succession by caliph. The joint religious-political leadership continued and passed to the four caliphs; Abū Bakr, ‘Umar, ‘Uthmān and



'Alī collectively known as the 'rightly guided' (*khulafā' al-rāshidūn*) caliphs. During this period, the companions relied on two main sources- the Qur'an and the Sunnah- to answer enquiries and problems from Muslims at that time. Yet, due to the expansion of the Muslim empire, they had to deal with different social, political, and economical contexts, hence making these two resources insufficient to provide solutions of the increasingly complex circumstances. This is when independent reasoning (*al-ra'y*) came into place and became an important tool in the early history of Islamic law (al-Zarqā', 2004; Asyqar, 1982). Apart from the Qur'an and the Sunnah, the caliph also relied on mutual consultation to arrive at a ruling. When an issue came to light, the caliph would gather the companions, consult them and finally act collectively. This later became known as *ijmā'*. Hence, during this time, the early caliph did not allow the companions to move far from Medina. One example of the companion consensus is the compilation of the Qur'an (al-Qaraḍāwī, 2008; Ibn Qayyim, 1991).

Another interesting characteristic during this period is the companions began to take a rational approach towards the text. Their understanding of the text was not confined to the literal meaning of the word but also into its underlying reasons (Kamali, 2008b). This can be seen through several judgements taken by 'Umar. For instance, regarding the suspension of *zakāh* to the new Muslim converts (*muallafata qulūbuhum*). During the Prophet (pbuh) time, he gave the newly converted Muslims cash, property and food. However, during his time, 'Umar suspended this practice. He argued that Islam was well established, and the Muslims' situation had changed (al-Zarqā', 2004). Another remarkable judgement implemented by 'Umar was the reform relating to agricultural land. After the conquest of Iraq (14H), 'Umar wanted to make some changes that he considered necessary for the economic development and welfare of the community. 'Umar took into consideration the impact of land distribution among the army and, perhaps, also the problem of the resulting unemployment of the old peasants. He therefore decided to leave the land under the cultivation of its previous landowners and to impose a land tax (*kharāj*) on them, a move that would not only benefit the

whole community but would also provide good economic prospects for future generations (al-Zarqā', 2004). Although there was strong opposition to his point of view, particularly from the army, because it went against earlier tradition, 'Umar was able to convince the people by way of reasoning and interpretation ('Izz al-Dīn, 2004).

### 2.1.3 ERA OF THE SUCCESSORS (*AL-TĀBI'ŪN*)<sup>20</sup> (661-750CE)

This era started when the Umayyad Dynasty come into power until it declines (Asyqar, 1982; al-Zuhaylī, 2001). With the forced acceptance of Yazīd as crown prince imposed by Caliph Mu'āwiyah in the year 679 CE, it marked the beginning of a new government system; the office of Caliph which was based on selection from merit was converted to hereditary succession. This era witnessed the division of the Ummah into various sect and fractions and also the deviation of the Umayyad Caliphs. As a result, scholars avoided sitting with the caliph, and some fled to other cities. Gradually the link between state and *fiqh* was broken, and this marked the beginning of the Islamic legal system where it was developed independently by the scholars, and often in opposition to the power of the state (Philips, 2003)

The second generation of scholars, known as the successors (*al-tābi'ūn*) continued the existing legacy left by the companions. The complex development during this period, contributed to by several events such as territorial expansion, emergence of foreign influence, and the division of Ummah into various sects and schools was seen by the *tābi'un* as a threat to the unity of muslim society and the sharia. Thus, they felt a need to collect and compile the *fiqh* (Kamali, 2008a). As a result, two distinctive schools of legal thought, the *Ahl al-Ḥadīth* (also known as the *Ḥijāzī* scholars) and the *Ahl al-Ra'y* (also known as the '*Irāqī* scholars) began to emerge.

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<sup>20</sup> *Al-tābi'ūn* are the generation of Muslims who followed the companions (met them at least once according to the Sunni definition) and died in that state.

Essentially the *Ahl al-Ḥadīth* were mainly based in Mecca and Medina and the *Ahl al-Ra'y* were based in Kufa and Basra (Asyqar, 1982). While the former relied heavily on deduction from the text, the latter were inclined to a more liberal approach: extensive use of deductive reasoning and *ijtihād*. The different approaches employed between the two groups was mainly down to different social, cultural and political backgrounds that surrounded the two areas. Hijaz was home of the Prophet and the first Islamic State, thus there was abundance of *ḥadīth* as well as the wealth of legal rulings by the first three caliphs. On the other hand, Iraq was a new land, with various culture and social background, a limited number of *ḥadīth* were available compared to in Hijaz, as only small number of the companions settled down here. During this period, the fabrication of *ḥadīth* also started to emerge in Iraq. For this reason, the scholars tended to depend more on reason and logic than on the *ḥadīth* (al-Zuhaylī, 2001).

#### **2.1.4 ERA OF INDEPENDENT REASONING**

This stage covers from the rise of Abbasid Dynasty, when Caliph Abū 'Abbās came into power, until at the beginning of its decline. During this period, although the scholars worked independently from the state, the early 'Abbasid Caliphs show great respect for Islamic law and its scholars (Philips, 2003). This period witnessed a significant development of the Islamic legal system. A large number of schools began to establish themselves, such as the Thawrī, Zaydiyyah, and Laythī, and including the four schools of law: the Ḥanafī, Mālikī, Shāfi'ī and Ḥanafī (Al-Zarqā', 2004). All of the schools were equally orthodox and authoritative. These schools have been interacted in legal debates over the centuries (Alam, 2007; Quraishi-Landes, 2015). The significant feature of this period is the absence of rigidity and dogmatism. Each issue was analysed and discussed objectively in order to arrive at a conclusion based on the proofs presented (Philips, 2003).

During the later part of this period, the *ḥadīth* was compiled systematically, and on a large scale. The development of *fiqh* during this time clearly influenced the

compilation of *ḥadīth*, indeed, in order to resolve the problem of *fiqh*, scholars began to compile *ḥadīth*. This effort was initiated by Aḥmad Ibn Ḥanbal. He travelled to Hijaz, Sham and Yemen in order to collect the *ḥadīth* and compile it into a book: al-Musnad. His students, Bukhārī and Muslim, followed in Aḥmad Ibn Ḥanbal's footsteps. Both of them traveled in order to collect all the authentic *ḥadīth* and compiled the *ḥadīth* in their book, *al-Jāmi' al-Ṣaḥiḥ* (Asyqar, 1982). The chapters therein were organised according to the format of the books of *fiqh*. Later on, other branches of study in *ḥadīth* were established such as *Ilm al-Rijāl* and '*Ilm al-Jarḥ wa al-Ta'dīl*. Similarly, this period witnessed a systematic compilation of *fiqh* book. During the early period, the *fiqh* book was written with a large mix of *ḥadīth*, such as the book of al-Muwaṭṭā by Mālik, *al-Jāmi' al-Kabīr* by Ṣufyān al-Thawrī and *Ikhtilāf Al-Ḥadīth* by al-Shāfi'ī. During the later period, book of *fiqh* was written and compiled by the student of the great *imām* (Asyqar, 1982). By the end of this period, *fiqh* was clearly divided into *uṣūl* (foundation) and *furū'* (branches), sources of Islamic law were identified, and each school has their own distinctive methodology.

## **2.2 THE APPLICATION OF ḤUDŪD PUNISHMENT DURING THE FORMATIVE STAGES OF THE ISLAMIC LEGAL SYSTEM**

To describe in a precise manner the application of *Ḥudūd* during its formative stages is challenging, if not impossible. This is due to the paucity of sources which could provide us with a comprehensive view on what really occurred during those stages (An-Naim, 1990; Hallaq, 2005). As Hallaq (2005, p.2) points out,

*"We possess no court records or any other source that can inform us of how the judiciary operated during the formative period, or what went on in courts of law. We have no clear idea of the types of problems that were litigated, how they were resolved, what legal doctrines were applied, how the parties represented themselves, how accessible courts were for women, how the judges used social and/or tribal ties to negotiate and solve disputes, and so forth".*

In regard to *Ḥudūd* cases, the only prevalent and accessible source for us is the abundance of *ḥadīth* and historical reports by the historians that reported the

cases that occurred during this period. By analysing these, it is hoped that the salient features of the application of *Ḥudūd* during the formative stages can be provided.

### 2.2.1 THE APPLICATION OF *ḤUDŪD* PUNISHMENT DURING THE PROPHETIC ERA

The Qur'anic verses on *Ḥudūd* punishment were revealed to the Prophet (pbuh) during the Medinan period. After these verses were revealed, the Prophet began to enforce the *Ḥudūd* punishments in society. This event directed us to a vital point that the *Ḥudūd* punishment was applied only after society had undergone a substantial period (nearly 13 years) of spiritual training. The wisdom behind the gradual process of legislation is to provide ample time for the Muslim society to purify and strengthen their faith and to avoid resistance (Al-Qaṭṭān, 1989). This approach is evidently shown beneficial through the prohibition of wine (*al-khamr*) which occurred in three gradual stages. When the final verse on the prohibition was revealed, which meant that wine was totally prohibited, the companions received this verse with an open heart and without resistance. In describing one of the events, Anas narrated a report in *Ṣaḥīḥ al-Bukhārī*:

*“Narrated Anas: I was the butler of the people in the house of Abū Ṭalḥah, and in those days drinks were prepared from dates. Allah's Messenger (pbuh) ordered somebody to announce that alcoholic drinks had been prohibited. Abū Ṭalḥah ordered me to go out and spill the wine. I went out and spilled it, and it flowed in the streets of Medina. Some people said, "Some people were killed, and wine was still in their stomachs." On that the Divine revelation came: "On those who believe and do good deeds. There is no blame for what they ate (in the past)." (5.93)”* (*Ṣaḥīḥ al-Bukhārī, Chapter Spilling Wine on the street*)

From this report, we can observe the immediate action taken by Abū Ṭalḥah when he received the news of the wine prohibition. He ordered Anas to spill the wine to the street without hesitation. This reflects the high level of faith of the companions which shows the outcome of years of spiritual training by the Prophet (pbuh).

As mentioned earlier, during the lifetime of the Prophet, he alone held multiple roles: political leader, *muftī*, and *qāḍī* (Al-Zarqā', 2004). It is also important to highlight that, during this period, there is neither an organised body of authority, nor an official court. The *ḥudūd* punishment applied was based on communal consensus. Regarding all of the law including *ḥudūd*, it was yet to be systematised (Al-Zarqā', 2004). Thus, all of the cases are judged ad-hoc and on a case-to-case basis. There is also a *ḥadīth* which reported that the Prophet did not inflict the *ḥudūd* punishment. This story is mentioned in the *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim* as follows:

*"Anas bin Mālik (May Allah be pleased with him) reported: A man came to the Prophet and said, 'O' Messenger of Allah, I have committed a sin liable of ordained punishment. So execute punishment on me". Messenger of Allah did not ask him about it, and then came the (time for) Salat (prayers). So he performed Salat with Messenger of Allah. When Messenger of Allah finished Salat, the man stood up and said: "O 'Messenger of Allah! I have committed a sin. So execute the Ordinance of Allah upon me". He asked, "Have you performed Salat with us?" "Yes," he replied. Messenger of Allah said, "Verily, Allah has forgiven you"."*

Based from this report, we can see that the Prophet did not inflict any punishment to the man despite his confession. In fact, the Prophet did not ask any further question regarding the sin committed by the man and only as to whether the man had performed prayer with him.

Another important feature of the application of *ḥudūd* during the prophetic era is that it reflects the mercifulness of the Prophet (pbuh). This can be seen in several aspects. Firstly, prior litigating a case, in many occasions the Prophet (pbuh) would find excuses or doubts in order to waive the punishment either by asking many questions such as in the case of man from the tribe of Aslam, and Mā'iz. Both *ḥadīth* are reported in *Ṣaḥīḥ al-Bukhārī*:

*"Narrated Jābir: A man from the tribe of Aslam came to the Prophet (pbuh) and confessed that he had committed an illegal sexual intercourse. The Prophet (pbuh) turned his face away from him till the man bore witness against himself four times. The Prophet (pbuh) said to him, "Are you mad?" He said "No." He said, "Are you married?" He said, "Yes." Then the Prophet (pbuh) ordered that he be*

*stoned to death, and he was stoned to death at the Musalla. When the stones troubled him, he fled, but he was caught and was stoned till he died. The Prophet (pbuh) spoke well of him and offered his funeral prayer.” (Şāḥiḥ al-Bukhārī, The Book of Limits and Punishments set by Allah, Chapter: The rajm at the Musalla)*

*“Narrated Ibn `Abbās: When Mā’iz bin Mālik came to the Prophet (in order to confess), the Prophet (pbuh) said to him, “Probably you have only kissed (the lady), or winked, or looked at her?” He said, “No, O Allah's Messenger (pbuh)!” The Prophet said, using no euphemism, “Did you have sexual intercourse with her?” The narrator added: At that, (i.e. after his confession) the Prophet (pbuh) ordered that he be stoned (to death). “(Şāḥiḥ al-Bukhārī, The Book of Limits and Punishments set by Allah (Hudood), Chapter: ‘Can’t be that you have only touched the lady or winked at her?’”)*

In both instances, it is noticeable that the Prophet (pbuh) asked the offender a number of questions in regard to the sanity of the offender and the offence of *zinā* itself. As in the case of Māi’z, in another report in *Şāḥiḥ Muslim*, the Prophet (pbuh) also asked other questions, whether he is mad or drunk. Not only that, the Prophet asked one of them to stand up and smell Māi’z’s breath, but no smell of wine is noticed. All of these instances showed that the *Ḥudūd* punishment could only be inflicted if full certainty can be established. This encouragement by the Prophet to dismiss a *ḥudūd* punishment when there is doubt can also be traced in other report such as in *Jāmi’ al-Tirmidhī*:

*“Narrated 'Aishah: that the Messenger of Allah (pbuh): “Avert the legal penalties from the Muslims as much as possible, if he has a way out then leave him to his way, for if the Imām makes a mistake in forgiving it would be better than making mistake in punishment.” (Jami` al-Tirmidhī 1424, Chapter: What Has Been Related About Averting Legal Punishments, The Book on Legal Punishments (Al-Ḥudūd))*

Similarly, another ḥadīth is reported in *Sunan Ibn Mājah*,

*“It was narrated from Abū Hurairah that the Messenger of Allah (pbuh) said: Ward off the legal punishments as much as you can.” (Sunan Ibn Mājah, The Chapters on Legal Punishments (Al-Ḥudūd))*

Both of the reports showed that the Prophet ordered avoidance of the *ḥudūd* punishment when there is doubt.

The mercifulness in the application can also be seen by the encouragement of the Prophet to conceal the wrongdoings, and his recurrent advice for to the persons to repent, such as in the case of Māi'z and Al-Ghamidiyyah. In both cases, the Prophet turned his face away showing his reluctance to inflict the *Ḥudūd* punishment and ask them to repent. It was only after the forth confession that the prophet finally ordered a judgement. The situation might have been different if they had retracted their confession earlier. This had been pointed out by a report which recorded the discussion among the Companions in *Sunan Abī Dāwud*:

*“Narrated Buraydah Ibn al-Hasīb: We, the Companions of the Messenger of Allah (pbuh), used to talk mutually: Would that al-Ghamidiyyah and Mā'iz ibn Malik had withdrawn after their confession; or he said: Had they not withdrawn after their confession, he would not have pursued them (for punishment). He had them stoned after the fourth (confession)” (Chapter Stoning of Māi'z Bin Malik, Book of Ḥudūd)*

Another case that reported the encouragement to conceal wrongdoing and repent privately is a *ḥadīth* reported in *al-Muwaṭṭā'*:

*“Mālik related to me from Zayd Ibn Aslam that a man confessed to fornication in the time of the Messenger of Allah, may Allah bless him and grant him peace. The Messenger of Allah, may Allah bless him and grant him peace, called for a whip, and he was brought a broken whip. He said, "Above this," and he was brought a new whip whose knots had not been cut yet. He said, "Below this," and he was brought a whip which had been used and made flexible. The Messenger of Allah, may Allah bless him and grant him peace, gave the order and he was flogged. Then he said, "People! The time has come for you to observe the limits of Allah. Whoever has had any of these ugly things befall him should cover them up with the veil of Allah. Whoever reveals to us his wrong action, we perform what is in the Book of Allah against him." (Al-Muwaṭṭā', Kitāb al-Ḥudūd)*

Based on this *ḥadīth*, right after inflicting the punishment, the Prophet announced publicly the preference to conceal any wrong doings and repentance.

Additionally, apart from that, the above-mentioned *ḥadīth* also illustrated the mercifulness of the Prophet in inflicting the punishment by choosing an appropriate tool (in this case, the whip) to avoid excessive cruelty and harm to the offender. Another occasion that reflects this is in the case of an offender with a physical defect brought to the Prophet. The *ḥadīth* is reported in *Sunan Ibn Mājah*:



*“It was narrated that Sa'id bin Sa'd bin `Ubādah said: “There was a man living among our dwellings who had a physical defect, and to our astonishment he was seen with one of the slave women of the dwellings, committing illegal sex with her. Sa'd bin 'Ubādah referred his case to the Messenger of Allah (pbuh), who said: 'Give him one hundred lashes.' They said: 'O Prophet (pbuh) of Allah (pbuh), he is too weak to bear that. If we give him one hundred lashes he will die.' He said: “Then take a branch with a hundred twigs and hit him once.” (Sunan Ibn Mājah, Chapters on Legal Punishment)*

Based on this *ḥadīth*, it showed how the Prophet revised the standard punishment taking into account the offender’s situation. Instead of using a standard whip, the Prophet opted for a bunch of twigs with a single hit. This is also manifested in inflicting the *ḥudūd* punishment for the case of pregnant women who was caught with adultery. In this case, infliction of punishment is done only after the women gave birth as in the case of al-Ghāmidīyah. In *Sunan Abī Dāwud*, it is reported:

*“A woman of Ghāmid came to the Prophet (pbuh) and said: I have committed fornication. He said: Go back. She returned, and on the next day she came to him again, and said: Perhaps you want to send me back as you did to Mā'iz b. Malik. I swear by Allah, I am pregnant. He said to her: Go back. She then returned and came to him the next day. He said to her: Go back until you give birth to a child. She then returned. When she gave birth to a child, she brought the child to him, and said: Here it is! I have given birth to it. He said: Go back, and suckle him until you wean him. When she had weaned him, she brought him (the boy) to him with something in his hand which he was eating. The boy was then given to a certain man of the Muslims and he (the Prophet) commanded regarding her. So a pit was dug for her, and he gave orders about her and she was stoned to death. Khalid was one of those who were throwing stones at her. He threw a stone at her. When a drop blood fell on his cheeks, he Abused her. The Prophet (pbuh) said to him: Gently, Khālid. By Him in whose hand my soul is, she has reported to such an extent that if one who wrongfully takes extra tax were to repent to a like extent, he would be forgiven. Then giving command regarding her, prayed over her and she was buried.”*

Based on this *ḥadīth*, it is clearly seen that the Prophet (pbuh) ordered the punishment to be executed only after the woman gave birth to her child and weaned him.

All of above-mentioned instances showed the mercifulness of the prophet throughout the whole process; procedural, due process, infliction of punishment

and after the infliction of punishment. In relation to the stoning to death, the Prophet ensure that the infliction is done with mercifulness by ensuring the welfare of the child and preventing the offender being Abused until the last breath, as in the case of al-Ghāmidiyah. It also evident throughout the discussion that the infliction of the *Hudūd* punishment is not aimed to bring excessive harm to the offender but it is aimed to reform and purify the offender and prevent from future wrongdoing.

Regardless of the mercifulness shown by the Prophet (pbuh) in many occasions, the Prophet (pbuh) is always strict and impartial in observing the rule of law. For instance, although pardon (*afw*) is encouraged, when the case is already brought to the authorities, there is no intercession (*syafā'ah*). This is evident in the case of Fāṭimah Bin Aswad, famously known as al-Makhzūmiyyah from Quraisy nobility who committed theft. When the case was brought to the Prophet, some of her relatives ask Usāmah Ibn Zayd to persuade the Prophet (pbuh) to pardon her, however, the Prophet (pbuh) refused and firmly ordered the hands of the women to be cut off. Not only that, the Prophet (pbuh) declared a statement that if her daughter Fāṭimah is caught of theft, he will cut off her hand. This case was reported in *Ṣaḥīḥ Ibn Mājah*:

*“It was narrated from 'Aishah: that Quraish became concerned about the case of the Makhzumi woman who had stolen, and they said: “Who will speak to the Messenger of Allah (pbuh) concerning her?” They said: “Who would dare to do that other than Usāmah bin Zayd, the beloved of the Messenger of Allah (pbuh)?” So Usāmah spoke to him, and the Messenger of Allah (pbuh) said, “Are you interceding concerning one of the legal punishments of Allah (SWT)?” Then he stood up and addressed (the people) and said: “O people! Those who came before you were only destroyed because when one of their nobles stole, they let him off, but when one of the weak people among them stole, they would carry out the punishment on him. By Allah, if Fāṭimah the daughter of Muhammad were to steal, I would cut off her hand.” (Sunan Ibn Mājah, The Chapters on Legal Punishments)*

Other *ḥadīth* that recorded other instances of the prohibition of intercession after the case is brought to the court is the case of stolen *burdah* of Ṣafwān Ibn Umayyah. In this case, Ṣafwān brought the man who stole his *burdah* to the

Prophet. After the Prophet ordered the verdict, Ṣafwān said that he would let the man to have his burdah. However, the Prophet firmly proclaimed that intercession is no longer available, and ordered the hand of the man to be cut off. This story is reported in the *Sunan al-Nasā'ī*:

*"It was narrated from Safwan bin Umayyah, that a man stole a Burdah of his, so he brought him before the Messenger of Allah, who ordered that his hand be cut off. He said: "O Messenger of Allah, I will let him have it." He said: "Abū Wahb! Why didn't you do that before you brought him to us?" And the Messenger of Allah had (the man's) hand cut off." (Sunan al-Nasā'ī, The Book of Cutting off the Hand of the Thief, Chapter: If A Man Lets A Thief Have What He Stole, After Bringing Him Before the Ruler)*

### **2.2.2 THE APPLICATION OF ḤUDŪD PUNISHMENT DURING THE COMPANION ERA**

The application of *ḥudūd* commenced during the era of the companion under the four 'rightly guided' caliphs following the trajectory of the Prophet except the minor developments which can be traced to one aspect: the official appointment of *qādī* by the caliph. During the time of Abū Bakr, apart from himself, he also appointed 'Umar as a judge<sup>21</sup> (al-Ṭabarī, 1967). The next period, during the era of 'Umar, the official appointment of *qādī* was made. 'Umar appointed a number of companions such Zayd Ibn Thābit and Abū Dardā' as a judge in Madinah, 'Abdullāh Ibn Mas'ūd and Shurayh Ibn al- Ḥārith as judge in Kufah (al-Balawī, 1994a). This practice continues during the era of 'Uthmān and 'Alī. For instance, 'Uthmān appointed Ka'ab as judge in Basra, while 'Alī appointed Ibn 'Abbās as a judge in Medina and other judges in each of the territory ('Umri, 2016).

Apart from this minor development, which has been mentioned above, other judicial matters and administration remained, as it existed before, during the Prophet era. There is no systematisation of law, including *Ḥudūd* law as there is no need for it due to the vastness of knowledge and understanding of the companions

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<sup>21</sup> Another historical report mentioned that it was 'Umar himself who volunteered to take this responsibility in order to help Abu Bakr (al-Ṭabarī 1967).

to the text (Ba'yun, n.d.). The companions, or the judges in particular, derived their judgement directly from the Qur'an, Sunnah, *ijmā'* and *ijtihad*. There is no official court; in most occasions, the judgement took place in the mosque or sometimes at the houses. There is also no divided jurisdiction of the job scope for the judges. Therefore, the judges litigate all type of cases; marital disputes, money disputes, including *ḥudūd* cases.

Regarding the application of *ḥudūd* during this era, there are a lot of *ḥadīth*, which reported the *ḥudūd* cases that occurred during this time. Some of the reports that illustrated these events are as follows:

I. *Ḥudūd* cases during the time of Abū Bakar

*"Mālik related to me from Nāfi' that Ṣafiyya Bint Abī Ubayd informed him that a man who had had intercourse with a virgin slave-girl and made her pregnant was brought to Abū Bakr. He confessed to fornication, and he was not muḥṣan. Abū Bakr gave the order and he was flogged with the ḥadd punishment. Then he was banished to Fadak, (thirty miles from Medina)." (Al-Muwatṭā', Book of Ḥudūd)*

II. *Ḥudūd* cases during the time of 'Umar

*"Mālik related to me from Yahyā Ibn Sa'id from Sulaymān Ibn Yasar from Abū Waqid al-Laythī that a man came to 'Umar while he was in al-Sham. He mentioned to him that he had found a man with his wife 'Umar sent Abū Waqid al-Laythī to the wife to question her about that. He came to her while there were women around her and mentioned to her what her husband had mentioned to 'Umar, and informed her that she would not be punished on his word and began to suggest to her by that, that she should retract. She refused to retract and held firm to confession. 'Umar gave the order and she was stoned." (Al-Muwatṭā' Malik, Book of Ḥudūd)*

III. *Ḥudūd* cases during the time of 'Uthmān

*"Hudain b. al-Mundhir Abū Sasan reported: I saw that Walid was brought to 'Uthmān as he had prayed two rakaah of the dawn prayer, and then he said: I make an increase for you. And two men bore witness against him. One of them was Humran who said that he had drunk wine. The second one gave witness that he had seen him vomiting. 'Uthmān said: He would not have vomited (wine) unless he had drunk it. He said: 'Alī, stand up and lash him. 'Alī said: Hasan, stand up and lash him. Thereupon Hasan said: Let him suffer the heat (of Caliphate) who has enjoyed its coolness. ('Alī felt annoyed at this remark) and he said:*

*'Abdullāh b. Ja'far, stand up and flog him, and he began to flog him and 'Alī counted the stripes until these were forty. He ('Alī) said: Stop now, and then said: Allah's Apostle (pbuh) gave forty stripes, and Abū Bakr also gave forty stripes, and 'Umar gave eighty stripes, and all these fall under the category of the Sunnah, but this one (forty stripes) is dearer to me.*" (Ṣāḥīḥ Muslim, Book of Legal Punishments, Chapter Ḥadd punishment for drinking alcohol)

IV. *Ḥudūd* cases during the time of 'Alī

In *Ṣāḥīḥ al-Bukhārī*, *zinā* case is reported:

*"Narrated Al-Shu'bī: from 'Alī when the latter stoned a lady to death on a Friday. 'Alī said, "I have stoned her according to the tradition of Allah's Messenger (pbuh)." (Ṣāḥīḥ al-Bukhārī, Book of Limits and Punishments set by Allah, Chapter: The Rajm of a married person)*

In *Sunan Abī Dāwud*, *riddah* case is reported:

*"'Ikrimah said: 'Alī burned some people who retreated from Islam. When Ibn 'Abbas was informed of it, he said: If it had been I, I would not have burned them, for the Messenger of Allah (pbuh) said: Do not inflict Allah's punishment on anyone but would have had killed them on account of the statement of the Messenger of Allah (pbuh). The Apostle said: Kill those who change their religion. When 'Alī was informed about it he said: How truly Ibn 'Abbas said!". (Sunan Abī Dāwud, Book of Prescribed Punishments, Chapter: Ruling on one who apostatizes)*

All of the reports mentioned above showed that all of the four caliphs applied *Ḥudūd* law during their time. There is also report that mentioned that the number of cases and disputes (not limited only to *Ḥudūd* cases) during this period are minimal. This is written in *Tārīkh al-Ṭabarī* which mentioned that during the time of Abū Bakr, 'Umar stayed in the judge's office over a year, but not even two men came (al-Ṭabarī, 1967). As the number of cases is relatively small, there is no need for a system of record as each case can be memorised by the judge easily. In explaining the reason behind this, some viewed that this is because of the high state of faith of the Muslims during this time along with the encouragement of the caliph to conceal their wrongdoing and repent privately. This encouragement was manifested in one of the above-mentioned *ḥadīth* in the case of *zinā* during the time of 'Umar.

Based on this *ḥadīth*, it can be clearly seen that in this case, ‘Umar gave an opportunity for the offender to retract her confession. ‘Umar inflicted the *Ḥudūd* punishment only after advice given to retract. However, if the offender insisted and full certainty was established, then *Ḥudūd* punishment would be inflicted upon them.

Another significant event that must be highlighted during this period is the systematic suspension of *Ḥudūd* by ‘Umar during the time of famine (al-Zarqā’, 2004). This suspension is reported in *al-Muṣannaf*:

*“Yaḥyā Ibn Abī Kathīr reported: ‘Umar Ibn al- Khaṭṭāb, may Allah be pleased with him, said, “Do not cut the hand of the thief who steals dates in the year of famine.” (al-Muṣannaf)*

Based from this report, ‘Umar ordered the theft punishment to be suspended and this order reflected his wisdom of understanding the text and the prophet’s advice to avert away *Ḥudūd* whenever there is doubt. ‘Umar understood that applying *Ḥudūd* under these circumstances when people are in need of basic supplies for their survival would be unjust (Auda, 2013)

## **2. 2.3 THE APPLICATION OF ḤUDŪD PUNISHMENT DURING THE UMAYYAD DYNASTY**

Initially, the administration of justice during the Umayyad dynasty was a continuation of the system which was established during the period of the rightly guided caliphs (*khulafā’ al-rāshidūn*). Similarly, the appointment of the judges was based on their high credibility, piety and deep understanding of the Qur'an and the Sunnah. Among the famous judges during this time were Abū Dardā’ (Dimashq), Yazīd Ibn Mālīk (Al-Shām), and Abū Idrīs al-Khulāni (Al-Shām). All these judges enjoyed full authority to derive their judgement based on the Qur'an and Sunnah just like during the previous period, without the political interference from the Caliph. However, in certain events, which saw political interference by the caliph, the judge would leave the position as a sign of protest (al-Balawī, 1994a).

During this period, the rule of law applied to all including the caliph (al-Kindī, 1908). In terms of development, one of the salient features of administrative justice during this period is the caliph and the governors were not involved in the judicial matters except that their roles were limited to appointing and dismissing judges, and executing the verdict made by them. Apart from that, this period witnessed the beginning of the systematisation of a judicial system. Some of the *qādī* began to record their judgement in books due to the increase of cases during this period, compared to the period of the rightly guided caliphs (al-Balawī, 1994b).

In regard to the application of *ḥudūd* during this time, there is a historical report found that shows the application of *ḥudūd* was commenced during this time. The historical report was written by al-Kindī in his book, the book of the governors and the judges (*Kitāb al-wulāt wa al-quḍāt*), in which he commented on a case of *shurb*. In this case, *Qādī* 'Imrān Ibn 'Abdullāh al-Ghasānī, *qādī* of Fusfat convicted a scribe of 'Abdullāh Ibn Mālik for wine drinking. The governor accepted the verdict, but he refused to allow the judge to inflict the punishment. Due to the political interference, *Qādī* Imran resigned from the position of judge (al-Kindī, 1908). Based on this report, it can be concluded that the *Ḥudūd* law was still in place during this time, despite witnessed political interference on some occasions, such as mentioned in the report above.

#### **2.2.4 THE APPLICATION OF ḤUDŪD PUNISHMENT DURING THE ABBASID DYNASTY**

The emergence of schools of thought during the Abbasid period had significant impact to the judicial system. During this period, in deriving a judgement, the judges based their ruling on the *maddhab*, followed by the locals. For instance, in Iraq, the verdict is based on the Ḥanafī doctrine, in Sham, the verdict is based on al-Awza'ī doctrine, in Maghrib, followed the Mālikī doctrine and in Iraq followed the Shī'ī doctrine (al-Balawī, 1994a). In regard's to *Ḥudūd*, its application commenced

during this period was based on historical reports found. Some of the examples are as follows:

- I. In the case of *zinā*, Caliph Hārūn al-Rashīd requested a fatwa from Abū Yūsuf regarding a *zinā* case of his son, al-Ma'mūn. However, Abū Yūsuf refused, as *Ḥudūd* punishment cannot be enforced through a *fatwā* (Ibn al-Wardī, 1996).
- II. In the case of theft, a *ghulām* was caught committing theft and was brought to 'Abdullāh Ibn al-Ḥasan al-Anbarī. However, as one of the rules to inflict *Ḥudūd* punishment is puberty, he was punished according to *ta'zīr*. His face was blackened, a bone was put around his neck and was asked to go around with it. Apart from that, he was also beaten on his back (Wakī', 1950).
- III. In the case of apostasy, it is reported that Hārūn al-Rashīd sent an apostate to prison and persuaded him to repent for two years. After that, due to the reluctance to repent, the apostate was killed (al-Anbari, 1991). Another example is Caliph al-Mu'taṣim burned an apostate to death despite the Prophet's prohibition not to use fire as a mean to punish an offender. Caliph al-Mu'taṣim also put 'Aṭṭar to death. He was a Christian and converted to Islam. After two years, he renounced his faith and refused to repent (Ibn Jawzi, 1976).
- IV. In the case of *qadhf*, a slave (*jāriah*) told to her master that she is distressed by an accusation made by a poet, Abū al-'Atahiyah through his poem. The poet was called by *Qādī* al-Mahdī and he confessed it. The poet was punished by a number of floggings (al-Mas'udī, n.d.).

Based on the historical report illustrated above, it clearly shows that the application of *ḥudūd* was commenced during the Abbasid period.



## 2.3 THE SYSTEMATISATION OF *ḤUDŪD* LAW

In the previous section, the application of *ḥudūd* during the formative stages has been explored. Although the reports which had been used to describe the application of *ḥudūd* clearly did not provide a full account of the incidents that occurred during that time which might have its own specific context, it is evident that the *Ḥudūd* punishments were enforced from the beginning of the early formative stages. However, it is suggested that although the application of *ḥudūd* had already been implemented throughout this period, the *Ḥudūd* law has yet being systematised during the three earlier stages. The systematisation of *Ḥudūd* law is argued to establish during the 9<sup>th</sup> century by the classical jurists. This will be elaborated in more detail in the next section which will explore the usage of the word *Ḥudūd* in the Qur'an, the ḥadīth and the classical jurists' treatises.

### 2.3.1 *ḤUDŪD* IN THE ARABIC LANGUAGE

*Ḥudūd* is the plural form of the word *ḥadd*. Linguistically, it carries several different connotations. *Ḥādd* means to limit and to prevent. Traditionally, security or entrance guard are called *ḥaddād* (another derivative of the word *ḥadd*) due to their roles in safeguarding and preventing people from entering the area they look after. The same title is also used for wardens due to their responsibilities in stopping prisoners from escaping. Alternatively, *ḥādd* can also mean a barrier to keep two different matters from being mixed or a boundary for each of them so that they may not transgress each other's boundary. Hence, a land or country border is called *ḥadd* or *ḥudūd* because it separates lands, territories or countries. Apart from that, there are some tools that use the word *ḥadd* to their parts for example the points of a knife, sword and spears are called *ḥadd al-sikkīn*, *ḥadd al-ṣayf* and *ḥadd al-sunnan* respectively. All the aforementioned are the literal meanings of the word *ḥadd* as defined by Ibn Manẓūr (1966), Ibn Fāris (1979), Fayrūz Abādī (2008) and al-Azharī (2001).

### 2.3.2 ḤUDŪD IN THE QUR'AN

In the Qur'an, the word *Ḥudūd* is mentioned 14 times as follows:

I. Al-Baqarah (2:187)

*You [believers] are permitted to lie with your wives during the night of the fast: they are [close] as garments to you, as you are to them. God was aware that you were betraying yourselves, so He turned to you in mercy and pardoned you: now you can lie with them, seek what God has ordained for you, eat and drink until the white thread of dawn becomes distinct from the black. Then fast until nightfall. Do not lie with them during the nights of your devotional retreat in the mosques: these are the **bounds set by God**, so do not go near them. In this way God makes His messages clear to people, that they may guard themselves against doing wrong.*

II. Al-Baqarah (1:229-230)

*Divorce can happen twice, and [each time] wives either be kept on in an acceptable manner or released in a good way. It is not lawful for you to take back anything that you have given [your wives], except where both fear that they cannot maintain [the marriage] within the **bounds set by God**: if you [arbiters] suspect that the couple may not be able to do this, then there will be no blame on either of them if the woman opts to give something for her release. These are the **bounds set by God**: do not overstep them. It is those who overstep **God's bounds** who are doing wrong (229). If a husband re-divorces his wife after the second divorce, she will not be lawful for him until she has taken another husband; if that one divorces her, there will be no blame if she and the first husband return to one another, provided they feel that they can keep within the **bounds set by God**. These are **God's bounds**, which He makes clear for those who know (230).*

III. Al-Nisā' (4:13-14)

*These are the **bounds set by God**: God will admit those who obey Him and His Messenger to Gardens graced with flowing streams, and there they will stay—that is the supreme triumph!(13). But those who disobey God and His Messenger and overstep **His limits** will be consigned by God to the Fire, and there they will stay—a humiliating torment awaits them! (14)*

IV. Al-Tawbah (9:97)

*The desert Arabs are the most stubborn of all peoples in their disbelief and hypocrisy. They are the least likely to recognise the **limits** that God has sent down to His Messenger. God is all knowing and all wise*

V. Al-Tawbah (9:112)

*[The believers are] those who turn to God in repentance; who worship and praise Him; who bow down and prostrate themselves; who order what is good and forbid what is wrong and who observe **God's limits**. Give glad news to such believers.*

VI. Al-Mujādalah (58:4)

*But anyone who does not have the means should fast continuously for two months before they touch each other, and anyone unable to do this should feed sixty needy people. This is so that you may [truly] have faith in God and His Messenger. These are the **bounds set by God**: grievous torment awaits those who ignore them.*

VII. Al-Ṭalāq (65:1)

*Prophet, when any of you intend to divorce women, do so at a time when their prescribed waiting period can properly start, and calculate the period carefully: be mindful of God, your Lord. Do not drive them out of their homes—nor should they themselves leave—unless they commit a flagrant indecency. These are the **limits set by God**— whoever oversteps **God's limits** wrongs his own soul—for you cannot know what new situation God may perhaps bring about.*

Based on the above verses, to summarise, the word *Ḥudūd* in the Qur'an is employed repetitively in different occasions as follows:

SURAH	VERSE	OCCURENCE	MEANING
Al-Baqarah	187	1	Legal rulings regarding marital relations during the fasting month of Ramadan
	229	4	Legal rulings regarding <i>ṭalāq</i> (divorce) and <i>rujū'</i>
	230	2	Legal rulings regarding irrevocable divorce
Al-Nisā'	13	1	Legal ruling regarding inheritance
	14	1	
Al-Tawbah	97	1	Narrating the state of the people of <i>kuffār</i> and the hipocrites whose transgress the limits/boundaries prescribed by Allah
	112	1	Describing the characteristics of the believers; the one who did not transgress the limit
Al-Mujādalah	4	1	Legal rulings regarding <i>ḡihār</i> and <i>kaffārah</i>
Al-Ṭalāq	1	2	Legal rulings regarding <i>'iddah</i>

**Table 2.3.2: Words of *Ḥudūd* in the Qur'an**

Based from the table above, it can be observed that the word *Ḥudūd* in the Qur'an is employed in various occasions mostly after prescribing legal ruling in regard to marital relations (*ṭalāq*, *rujū'*, *'iddah*, *ḡihār*, *kaffārah*) and inheritance. According to the exegesis of scholars, the word *Ḥudūd* in the Qur'an can bring two type of meanings: either deeds prohibited by Allah, or rules commanded by Allah which cannot be altered or have their boundaries transgressed (al-Zuhaylī 1985; al-Azharī, 2001). For instance, the word *Ḥudūd* in verse (2:187) connotes the meaning of the deeds prohibited by Allah.

*“You [believers] are permitted to lie with your wives during the night of the fast: they are [close] as garments to you, as you are to them. God was aware that you were betraying yourselves, so He turned to you in mercy and pardoned you: now you can lie with them, seek what God has ordained for you, eat and drink until the white thread of dawn becomes distinct from the black. Then fast until nightfall. Do not lie with them during the nights of your devotional retreat in the mosques: these are the **bounds set by God**, so do not go near them. In this way God makes His messages clear to people, that they may guard themselves against doing wrong.”*

In this verse, al-Qurṭubī (1964) explains that the word *Ḥudūd* in this verse is used to signify the prohibitions of sexual intercourse during the days of fasting or during *i'tikāf* at the mosque. Al-Qurṭubī also emphasises that *Ḥudūd* is something that is mandated by Allah and cannot be adjoined with something external or having its stipulation contravened. This opinion coincides with Ibn Kathīr's (1999), Jalal al-Dīn's (n.d.) and Rāshid Riḍā (1990) in his *Tafsīr al-Manār*.

In another example, in verse (65:1),

*“Prophet, when any of you intend to divorce women, do so at a time when their prescribed waiting period can properly start, and calculate the period carefully: be mindful of God, your Lord. Do not drive them out of their homes—nor should they themselves leave—unless they commit a flagrant indecency. These are the **limits set by God**— whoever oversteps **God's limits** wrongs his own soul—for you cannot know what new situation God may perhaps bring about.”*

Regarding this verse, Riḍā (1990) defines *Ḥudūd* as something that restricts, in this case someone from crossing into a certain restricted area. With regard to this verse, *Ḥudūd* refers to the laws in the verse which commands that if a husband needs to divorce his wife, it should be done while the wife is in purity (not in menstruation). The same definition is also provided by al-Baydāwī (n.d.) and al-Qurṭubī (1964). Throughout the discussion above, it can be concluded that the word *Ḥudūd* in the Qur'an is employed either to signify deeds prohibited by Allah, or rules commanded by Allah.

### 2.3.3 HUDŪD IN THE ḤADĪTH

In the previous section, in illustrating the application of *Ḥudūd* during the formative stages, an Abundance of *ḥadīths* employing the word *Ḥudūd* has been provided. The word *Ḥudūd* in the afore-mentioned *ḥadīth* mostly referred to the meaning of crime or punishment. However, there are also several instances that illustrate the Prophet employed the word *Ḥudūd* in a general sense. In this section, a few instances of *ḥadīth* which mentions the word *Ḥudūd*, but does not mean crime or punishment is provided:

#### I. Used in the sense of literal meaning which means boundary

أَخْبَرَنَا هِلَالُ بْنُ بَشِيرٍ، قَالَ حَدَّثَنَا صَفْوَانُ بْنُ عَيْسَى، عَنْ مَعْمَرٍ، عَنِ الرَّهْرِيِّ، عَنْ أَبِي سَلَمَةَ، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ " الشُّفْعَةُ فِي كُلِّ مَالٍ لَمْ يُسَمَّ فَإِذَا وَقَعَتِ الْخُدُودُ وَعُرِفَتِ الطَّرِيقُ فَلَا شُفْعَةَ "

*It was narrated from Abū Salamah that the Messenger of Allah said: "Pre-emption takes effect in all cases where land has not been divided. But if the boundaries have been sent, and the roads lay out, then there is no pre-emption."(Sunan Nasai, Book of Financial Transaction, Chapter: Pre-Emption and Its Rulings)*

#### II. Used in the sense of limits

وَحَدَّثَنِي عَنْ مَالِكٍ، عَنْ يَحْيَى بْنِ سَعِيدٍ، أَنَّ عَبْدَ اللَّهِ بْنَ مَسْعُودٍ، قَالَ لِإِنْسَانٍ إِنَّكَ فِي زَمَانٍ كَثِيرٍ فُقَهَاؤُهُ قَلِيلٌ فَرَأَوْهُ يُحْفَظُ فِيهِ حُدُودُ الْقُرْآنِ وَتُضَيِّعُ حُرُوفَهُ قَلِيلٌ مَنْ يَسْأَلُ كَثِيرٌ مَنْ يُعْطِي يُطِيلُونَ فِيهِ الصَّلَاةَ وَيُقْصِرُونَ الْخُطْبَةَ يُبَدُّونَ أَعْمَالَهُمْ قَبْلَ أَهْوَائِهِمْ وَسَيَأْتِي عَلَى النَّاسِ زَمَانٌ قَلِيلٌ فُقَهَاؤُهُ كَثِيرٌ فَرَأَوْهُ يُحْفَظُ فِيهِ حُرُوفُ الْقُرْآنِ وَتُضَيِّعُ حُدُودَهُ كَثِيرٌ مَنْ يَسْأَلُ قَلِيلٌ مَنْ يُعْطِي يُطِيلُونَ فِيهِ الْخُطْبَةَ وَيُقْصِرُونَ الصَّلَاةَ يُبَدُّونَ فِيهِ أَهْوَاءَهُمْ قَبْلَ أَعْمَالِهِمْ

*Yahya related to me from Malik from Yahya ibn Said that 'Abdullāh ibn Masud said to a certain man, "You are in a time when men of understanding (fuqaha) are many and Qur'an reciters are few, when the limits of behaviour defined in the Qur'an are guarded and its letters are lost, when few people ask and many give, when they make the prayer long and the khutba short, and put their actions before their desires. A time will come upon men when their fuqaha are few but*

*their Qur'an reciters are many, when the letters of the Qur'an are guarded carefully but its limits are lost, when many ask but few give, when they make the khutba long but the prayer short, and put their desires before their actions." (Al-Muwaṭṭā' Malik, in Chapter Shortening the Prayer, Book 9, Ḥadīth 423)*

### III. Used in the sense of God's laws/commands

حَدَّثَنَا أَحْمَدُ بْنُ مَنِيعٍ، حَدَّثَنَا أَبُو مُعَاوِيَةَ، حَدَّثَنَا الْأَعْمَشُ، عَنِ الشَّعْبِيِّ، عَنِ النُّعْمَانَ بْنِ بَشِيرٍ، قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " مَثَلُ الْقَائِمِ عَلَى حُدُودِ اللَّهِ وَالْمُدْهِنِ فِيهَا كَمَثَلِ قَوْمٍ اسْتَهَمُوا عَلَى سَفِينَةٍ فِي الْبَحْرِ فَأَصَابَ بَعْضُهُمْ أَعْلَاهَا وَأَصَابَ بَعْضُهُمْ أَسْفَلَهَا فَكَانَ الَّذِينَ فِي أَسْفَلِهَا يَصْعَدُونَ فَيَسْتَفُونَ الْمَاءَ فَيَصُبُّونَ عَلَى الَّذِينَ فِي أَعْلَاهَا فَقَالَ الَّذِينَ فِي أَعْلَاهَا لَا نَدْعُكُمْ تَصْعَدُونَ فَنُؤْذُونَنا فَقَالَ الَّذِينَ فِي أَسْفَلِهَا فَإِنَّا نَنْقُبُهَا مِنْ أَسْفَلِهَا فَتَسْتَقِي فَإِنِ أَخَذُوا عَلَى أَيْدِيهِمْ فَمَنَعُوهُمْ نَجَوْا جَمِيعًا وَإِنِ تَرَكُوهُمْ غَرِقُوا جَمِيعًا "

*Translation: An-Nu'man bin Bashir narrated that the Messenger of Allah (s.a.w) said: "The parable of the one who upholds Allah's laws and the one who breaches them, is that of a people who drew lots on a ship at sea. Some of them got the upper part, and some of them the lower part. Those on the lower part ascended to get water, spilling it upon those upper part. So those in the upper part say: 'We will not leave you to come up here and bother us.' Then those on the lower part say: 'We should make a hole in the lower part, so we can get water.' If they take them by the hand and stop them, then they will save all of them, and if they leave them, they will all drown.'" (Jāmi' al-Tirmidhī, in Chapter Al-Fitan, Ḥadīth no: 2173)*

According to the *ḥadīth* mentioned above, it can be observed in the first *ḥadīth*, the Prophet (pbuh) used the word *Ḥudūd* in a literal sense which means boundary. In the other two instances, the Prophet (pbuh) used the word *Ḥudūd* to connote a broader meaning, in the same sense as in the Qur'an. Based on this discussion, it can be concluded that the word *Ḥudūd* in the *ḥadīth* is used interchangeably either to signify specific crime and punishment, or the literal meaning of *Ḥudūd*, or the limit of God's laws.

#### 2.3.4 ḤUDŪD IN THE CLASSICAL JURISTS' TREATISES

The utilisation of the word *Ḥudūd* which limits itself to the concept of punishments prescribed by the *syara'* can be traced in the books of the classical jurists. In this

section, the definition of *Ḥudūd* according to the main four schools of thought will be explored.

### I. Ḥanafī scholars

According to al-Sarakhsī (1993, p.36) in his treatise *al-Mabsūṭ*, he defines *Ḥudūd* as:

*“Ḥadd is a punishment which is determined by shara’ and its implementation is compulsory. Therefore, ta’zīr is not ḥadd because its sentence is not pre-determined. It is also not classified as qiṣāṣ since it (qiṣāṣ) is related to rights between humans”.*

This definition is also applied by other Ḥanafī scholars such as al-Mawṣilī (1998) in *al-Ikhtiyār li Ta’līl al-Mukhtār* and al-Marghīnānī (n.d) in his book, *al-Hidāyah*. Nevertheless, Al-Marghīnānī amended the definition by adding the purpose of the implementation of *Ḥudūd* in his definition as stated below:

*“Ḥudūd are punishments which are determined in line with rights of Allah. Therefore, qiṣāṣ is not called Ḥudūd because it is related to rights between humans. Similarly, ta’zīr because the punishment is not specified by shara’. The main objectives are to prevent things that bring harm towards human beings”.*

In *Badāi’ al-Ṣanai’ fī Tartīb al-Sharāi’* by al-Kāsānī (1986, p.33), it is stated that:

*“Ḥudūd is a specified punishment or sentence which is closely related to the rights of Allah. It is different from ta’zīr of which punishments are not specified and include hitting, imprisonment etc. Besides, it is also different from qiṣāṣ since qiṣāṣ involves the rights between humans (the victim and the offender) whereby the victim can choose to pardon with or without compensation being paid. This punishment is called ḥadd because it prevents the offender or the people who observe the punishment being conducted from replicating the offence”.*

In the definition proposed by al-Kāsānī, he specified that the main characteristic of *Ḥudūd* is there is no pardoning after the conviction is brought forward towards the judge.

Based on the definitions provided by the Ḥanafī scholars, it can be summarised that two elements are quite prevalent – *Ḥudūd* are punishments that are specified by



*shari'a* and the implementation of *Ḥudūd* is compulsory in order to uphold the rights of Allah.

## II. Ḥanbalī Scholars

Most Ḥanbalī scholars do not specifically define *Ḥudūd* in their works. Instead, they would write a book or allocate a specific chapter to discuss on *Ḥudūd*. The discussion however is directly focused on the details of the offences without defining the word of *Ḥudūd* itself. To state some examples, Ibn Qudāmah (1968) in *al-Mughnī*, and Maj al-Dīn Ibn Taimiyyah (1984) in *al-Muharrar fī al-Fiqh 'alā Madhhab al-Imām Aḥmad Ibn Ḥanbal* both discussed *zinā* in a chapter related to *Ḥudūd* without defining what *Ḥudūd* is prior to the discussion. Another example is in the book of *al-Furū'* by Ibn Mufliḥ (2003), he discussed the pre-requisites for the implementation of *Ḥudūd* in the introduction of the *Ḥudūd* chapter without defining the word *Ḥudūd* itself. However, there are some Ḥanbalī scholars who define *Ḥudūd* in their works. For example, Ibn Ḍawwān (1989, p.360) defines *Ḥudūd* as:

*“Ḥudūd is a punishment specified for a certain vice. It is prescribed by the shari'a to prevent the act from being replicated in the future. Ḥudūd-u-Allah refers to Allah's prohibitions. Other than that, ḥadd also refers to other affairs that Allah commands such as laws regarding inheritance (mirāth) and the permission for polygamy for men. Consequently, everything that is ordained by Allah should not be altered, whether being increased or reduced.”*

Al-Ḥajjāwī (n.d. p.244) provides an almost indistinguishable definition on *Ḥudūd* as follows:

*“Ḥudūd is a punishment specified for a certain vice. It is mandated by shari'a to prevent the act from being replicated in the future”.*

Based on what has been mentioned above, we see that the two definitions provided by Ḥanbalī scholars of *Ḥudūd* are more general than those provided by the Ḥanafī scholars.

### III. Shāfi'ī Scholars

Al-Māwardī (1999, p.184) in *al-Ḥāwī al-Kabīr* defines Ḥudūd as:

*“Ḥudūd is a punishment decreed by Allah in order to prevent His servants from disobeying His prohibitions and to encourage them to be more obedient. It is called Ḥudūd because the levels of punishment are determined by Allah”.*

According Imām al-Ḥaramayn (2007, p.177) in *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*:

*“Ḥudūd is punishment meted out upon those who committed specific offences (outlined by Ḥudūd). It is called Ḥudūd because it is prescribed by shari'a to prevent people from committing such offences”.*

While, Taqi al-Dīn (1994, p.473), in *Kifāyat al-Akhyār*, states that:

*“Ḥudūd is the plural form of ḥadd. It is called Ḥudūd because it is meant to prevent someone from committing vice acts. It is also called ḥadd because the amount of punishment is specified and cannot be increased or reduced. Ḥudūd in the beginning was in the form of fine, later on, was superseded and substituted with the other forms of Ḥudūd (as what is outlined by shari'a in the Qur'an)”.*

Through observations, most of Shāfi'ī scholars incorporate the purpose of Ḥudūd in their definitions which is meant to prevent the offences from being repeated in future.

### IV. Mālikī Scholars

Mālikī scholars did not define Ḥudūd. In some cases, they do not even have a specific book or chapter related to Ḥudūd. For example, Ibn Farhūn (1986) discusses Ḥudūd offences in the same chapter on retaliation (*qiṣāṣ*) and wound (*diyyah*). Al-Dusūqi (n.d.) includes Ḥudūd in the chapter on testimony (*shahādah*). Other than that, most Mālikī scholars include Ḥudūd in chapters for mandatory crimes.

### 2.3.5 ANALYSIS ON THE DEFINITION OF ḤUDŪD

In the previous section, we can observe that the development of the word *Ḥudūd* which began to be confined it to a very narrow and strict meaning: fixed punishment, which was initially propounded by the classical jurists. Based from the technical definition of *Ḥudūd* given by the classical jurists, all the definitions subsumed two important elements. First the fixed nature of the punishment which meant that a punishment cannot be increased or decreased, and secondly that the penological justification for the punishment which was aimed at deterrence. Additionally, Ḥanafī scholars included the rights of Allah as another main essential characteristic for *Ḥudūd*. However, it is argued that the concept of *Ḥudūd* in the sense of fixed punishment did not originate from the Qur'an (Kamali, 1995; Rahman, 1965). As elaborated earlier, the word *Ḥudūd* in the Qur'an is employed to connote a general meaning: deeds prohibited by Allah, or rules commanded by Allah. Although the Qur'an mentions several crimes and punishments, none of the verses employed the word *Ḥudūd*. The verses used by the classical jurists to establish this concept are as follows:

I. Verse of *zinā* (Al-Nūr 24:2)

*Strike the adulteress and the adulterer one hundred times. Do not let compassion for them keep you from carrying out God's law—if you believe in God and the Last Day—and ensure that a group of believers witnesses the punishment.*

II. Verse of *qadhf* (Al-Nūr 24:4-5)

*As for those who accuse chaste women of fornication, and then fail to provide four witnesses, strike them eighty times, and reject their testimony ever afterwards: they are the lawbreakers, (4) except for those who repent later and make amends—God is most forgiving and merciful (5).*

III. Verse of *sariqah* (Al-Mā'idah 5:38-39)

*Cut off the hands of thieves, whether they are man or woman, as punishment for what they have done— a deterrent from God: God is almighty and wise (38). But if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving, most merciful (39).*

IV. Verse of *ḥirābah* (Al-Mā'idah 5:33-34)

*Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter (33), unless they repent before you overpower them— in that case bear in mind that God is forgiving and merciful(34).*

V. Verse of *shurb* (Al-Mā'idah 5:90-92)

*You who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts— Satan's doing— – shun them so that you may prosper (90). With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer. Will you not give them up? (91). Obey God, obey the Messenger, and always be on your guard: if you pay no heed, bear in mind that the sole duty of Our Messenger is to deliver the message clearly (92).*

Based on these verses, it can be observed that in the verse of *ḥirābah* and theft, the word used is *jaza'* or *nakala* to describe the punishment and none of the verses use the word *Ḥadd* or *Ḥudūd*. Another aspect that the classical jurist neglect in establishing the concept is the marginalisation of repentance and reform despite the fact that this aspect has been highlighted in most of the verses mentioned above (Kamali, 1995, 1998). Apart from that, despite having common agreement on the most basic concept and definition of *Ḥudūd*, however they hold different view on which offences constitute under the category of *Ḥudūd*, the details of the offences and punishment, and the stipulated conditions of each of the offences. This will be discussed in the next section.

## **2.4 CLASSIFICATION OF ḤUDŪD**

If one delves into the discussion of *Ḥudūd* by the classical jurists in regard to its classification, one can discover divergent opinions among the classical jurists on the number of *Ḥudūd* offences, not only between the schools of thought, but also from within a school of thought. To illustrate this more, several instances are provided as follows:

### **I. Shāfi'ī school**

Al-Māwardī (1999) categorised four offences as *Ḥudūd* namely illicit sexual relations (*zinā*), theft (*sariqah*), drinking alcohol (*shurb*) and slanderous accusation (*qadhf*). Al-Ghazālī on the other hand added three more on top of what al-Māwardī listed and they are rebellion against government (*baghy*), apostasy (*riddah*) and highway robbery (*qat'u ṭarīq*).

### **II. Mālikī school**

Ibn Rushd (2004) categorised five offences as *Ḥudūd*: illicit sexual relations (*zinā*), slanderous accusation (*qadhf*), theft (*sariqah*), drinking alcohol (*shurb*) and highway robbery (*ḥirābah*). Besides, Ibn Juzayy (n.d) included rebellion against government (*baghy*) and apostasy (*riddah*) together with the five.

### **III. Ḥanbalī School**

Ibn Qudāmah (1968) categorised seven offences as *Ḥudūd* – illicit sexual relations (*zinā*), slanderous accusation (*qadhf*), drinking alcohol (*shurb*), theft (*sariqah*), highway robbery (*ḥirābah*), rebellion against government (*baghy*) and apostasy (*riddah*).

### **IV. Ḥanafī School**

According to Ibn 'Abidīn (1992), there are six *Ḥudūd* offences – illicit sexual relations (*zinā*), drinking wine (*shurb al-khamr*), drinking intoxicating drinks (*shurb al-muskir*), slanderous accusation (*qadhf*), theft (*sariqah*) and highway robbery (*qat'u ṭarīq*). Whereas al-Kāsānī, (1986) only categorised five, excluding highway robbery (*qat'u ṭarīq*). However, he discussed this in a separate chapter about theft (*sariqah*).

### **V. Zāhirī School**

Ibn Ḥazm, (n.d.) categorised seven offences as *Ḥudūd* – highway robbery (*ḥirābah*), apostasy (*riddah*), illicit sexual relations (*zinā*), slanderous accusation

(*qadhf*), theft (*sariqah*), *'ahd al-āriyah* (malicious denial of borrowed property) and drinking alcohol (*shurb*).

From these instances, the divergent opinions among the jurists demonstrated that although it is true that the *Hudūd* punishments are deduced based from the Qur'an and the Sunnah, it is evident that the concept of *Hudūd* itself is a human convention. This concept is established through a process of deduction of the text and not a divinely ordained concept as claimed by some. In the following section, I will illustrate this further by displaying how jurists constructed their own understanding of each of the offences, by giving a specific definition and stringent conditions.

#### **2.4.1 ILLICIT SEXUAL RELATIONS (ZINĀ)**

*Zinā* is defined as illicit sexual intercourse between a man and a woman outside legal matrimony. The punishment for *zinā* offence is categorised into two, depending on the legal status of the offender. For an unmarried (*ghayr muḥṣān*) person, the punishment is one hundred lashes of the whip. This punishment is mentioned in the Qur'an, verse (24:2),

*The woman and man guilty of adultery or fornication, -flog each of them with a hundred stripes; Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day; and let a party of the Believers witness their punishment.*

Based on this verse, the classical jurists are in agreement that punishment for the offence of *zinā* for the unmarried is one hundred lashes of the whip. However, the classical scholars differ their view on the punishment of banishment which has been specified in the *ḥadīth* below. According to Ḥanbalī, Shāfi'ī and Mālikī scholars the punishment of whipping must be followed by a one-year period of banishment (al-Nawawī, n.d.; al-Zarqānī, 2002; Ibn Qudāmah, 1968). However, Ḥanafī scholars view that the *ḥadd* punishment for the unmarried is only 100 lashes of the whip and argued that the punishment of banishment which has been specified in the

*ḥadīth* can be understood as *ta'zīr* which depends on the discretion of the *qādī*, if there is *maṣlahah* (al-Kāsānī, 1986; Ibn al-Humām, n.d.).

For the married person, all the classical jurists except a small fraction from Khawārij stipulated that the punishment is stoning to death ('Awdah, 1964). This punishment is derived from the following *ḥadīth*:

*'Ubādah al-Ṣamit reported: Allah's Messenger (pbuh) as saying: Receive (teaching) from me, receive (teaching) from me. Allah has ordained a way for those (women). When an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death. (Ṣaḥīḥ Muslim, The Book of Legal Punishment, Chapter: The Ḥadd punishment for Zinā (fornication, adultery))*

This punishment is also supported by a number of *ḥadīth* which reported that the Prophet (pbuh) ordered stoning to death for a married person, such as the *ḥadīth* of Mā'iz, al-Ghāmidīyah, and two Jews who committed *zinā* which has been mentioned previously.

Scholars stipulated that there are conditions that must be fulfilled before inflicting the punishment upon the offender. Among the agreed conditions are the offender must be Muslim, he/she is sane and has reached puberty, he/she commits *zinā* with his/her own will, the intercourse took place between humans (not with animals), no doubt surrounding the intercourse, and the offender must be aware of the prohibition of *zinā* (al-Zuhaylī, 1985).

From the discussion above, it can be concluded that the jurists deduced the punishment for unmarried people from the Qur'an, while for married people from the *ḥadīth*. The Qur'an did not define *zinā* and did not stipulate the conditions of the offender, but the classical jurists deduced this based on the reports from the Sunnah.

#### **2.4.2 SLANDEROUS ACCUSATION (QADHF)**

*Qadhf* means to accuse an adult and sane Muslim with unlawful intercourse or refuse the legitimacy of a child. The purpose of this punishment is to preserve the dignity and honour of a Muslim (al-Kāsānī, 1986). The punishment for the offence is mentioned in verse (24:4-5);

*“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors;- Unless they repent thereafter and mend (their conduct); for Allah is Of-Forgiving, Most Merciful.”*

Based on this verse, the punishment for the offence of *qadhf* is eighty lashes and the removal of their right to testify. While the classical scholars unanimously agreed for the first punishment, they disagree on the latter punishment whether it is temporary, if the offender repents or permanent. The Shāfi’ī, Ḥanbalī and Mālikī views that their testimony is accepted once they repent, while Ḥanafī views that their testimony be rejected forever even if they repented (‘Awdah, 1964).

The classical jurists also stipulated certain conditions for offenders: the person is sane, has reached puberty and *muḥṣān*. The connotation of *muḥṣān* here carries a different meaning than that of *zinā*, which means the person is a freeman (not a slave), Muslim and pure from (has never committed) extramarital sexual intercourse. The accusation must also be made clearly and specifically towards a particular individual. If someone says, “all of you are not fornicators or adulterers except one person” and pointing towards a group of people, the accusation cannot be taken as a basis for imposing *ḥadd qadhf* (al-Zuhaylī, 1985).

#### **2.4.3 THEFT (SARIQAH)**

The definition of theft is to take away the property of another person surreptitiously or by stealth without his knowledge or consent (al-Kāsānī 1986, Ibn



Qudāmah 1968). The punishment for the offence of theft is the amputation of the hand. This punishment is derived from the Qur'anic verse (5:38);

*“As to the thief, male or female, cut off his or his hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power.”*

A majority of scholars agree that the amputation of the (right) hand from the joint of the wrist. As for second-time offenders, scholars agree that the punishment is to amputate the left foot up to the ankle. This is based on the punishment that was practiced by prophet Muhammad (pbuh) upon al-Makhzūmiyyah, and also from the practice of the companions of the Prophet. However, for third-time offenders, scholars disagree about the punishment that should be imposed. Ḥanafī and Ḥanbalī scholars view that the third-time offenders must be fined (*dhammān*), confined and flogged until they regret what they have committed. In contrast, scholars of Mālikī and Shāfi'ī dictate that for third-time offenders, the left hand must be amputated, and so therefore for fourth-time offenders, the right foot must be amputated. Subsequently, if they still commit the crime, they must be confined and imposed of *ta'zīr* (discretionary punishment) ('Awdah, 1964).

Similar to other offences, scholars also lay out the conditions in order to convict a person under this *ḥadd*. The conditions are the offender is sane and has reached puberty, not coerced to steal (free consent) and must be aware of the prohibition of theft. Furthermore, there are also conditions put upon the stolen item which are movable property, valuable property as per Islam's view (*māl al-mutaqawwim*), kept in custody and guarded, and reaches *niṣāb* (the minimum threshold value) specified by the law (al-Zuhaylī, 1985).

Regarding *niṣāb*, Ḥanafī scholars state that one *dinār* or ten *dirhams* are the minimum threshold values for the stolen property. This has been based on the following *ḥadīth*, “A thief's hand should not be cut off except for a quarter of a *dinār* or more”. On the other hand, Mālikī, Shāfi'ī, and Ḥanbalī scholars viewed that the *niṣāb* for the stolen property is equivalent to a quarter of *dinār* or three *dirhams*. The ruling has its basis from a *ḥadīth* by Ibn 'Umar, “Ibn 'Umar narrated that the

*Messenger of Allah (pbuh) cut off the hand of a thief for stealing a shield that was worth three dirhams” (al-Jazirī, 2003). The purpose of fixing the niṣāb is to make sure that the punishment is served upon those who steal only valuable properties.*

#### **2.4.4 HIGHWAY ROBBERY (HIRĀBAH)**

*Hirābah* is an act of terrifying people, or armed robbery (Ibn Rushd 2004). Several scholars use the terms *qaṭ’u al-ṭarīq* and *sariqah al-kubrā* in the discussion of this offence. *Hirābah* is different from the theft on the basis that theft is about stealing another person’s possessions secretly while *hirābah* is about taking another person’s property by force. The punishment of this offence is mentioned in verse (5:33-34),

*The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; Except for those who repent before they fall into your power: in that case, know that Allah is Oft-forgiving, Most Merciful.*

Scholars have different opinions on whether the types of punishments mentioned in the verse are for choice or in according to the level of severity of the offence committed. Ḥanafī, Shāfi’ī, and Ḥanbalī scholars are of the view that the type of punishment must be according the level of severity of the offence. This means, if the offender killed another person, he must also be killed as a punishment. If it was theft, then the right hand and the left foot must be amputated. If the offence was the combination theft and seizing another person’s property, the offender must be executed and crucified. If the offender was known to only terrify the victim, he must be exiled from the country or imprisoned. On the contrary, Mālikī scholars agree that, the types of punishments mentioned in verses (5:33-34) are options provided for the judge so that he can choose the most suitable punishment based on the public interest (‘Awdah, 1964).

#### **2.4.5 DRINKING ALCOHOLIC DRINKS (SHURB AL-KHAMR)**

The prohibition of drinking alcoholic drinks happened in three stages before it was prohibited in total. As for the first stage of the prohibition, verse (2:219) was revealed to indicate that drinking alcoholic drinks brings more harms than benefits,

*“They ask you [Prophet] about intoxicants and gambling: say, ‘There is great sin in both, and some benefit for people: the sin is greater than the benefit.’ They ask you what they should give: say, ‘Give what you can spare.’ In this way, God makes His messages clear to you, so that you may reflect”*

Then, at the second stage, Allah revealed the verse prohibiting from being intoxicated while coming for prayer. This ruling is found in verse (4:43).

*“You who believe, do not come anywhere near the prayer if you are intoxicated, not until you know what you are saying; nor if you are in a state of major ritual impurity- though you may pass through the mosque- not until you have bathed; if you are ill, on a journey, have relieved yourselves, or had intercourse, and cannot find any water, then find some clean sand and wipe your faces and hands with it. God is always ready to pardon and forgive.”*

At the final stage, a revelation was sent down to completely prohibit consumption of alcoholic drinks. It is mentioned in verses (5:90-91),

*“You who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts- Satan’s doing-shun them so that you may prosper. With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer. Will you not give them up?”*

With the revelation of this verse, consumption of alcoholic drinks is completely prohibited in any circumstances except in state of emergency (*ḍarūrah*).

##### **2.4.5.1 DEFINITION OF ALCOHOLIC DRINKS (AL-KHAMR) BY SCHOLARS**

Scholars have differing views to what alcoholic drinks really means. According to Mālikī, Ḥanbalī and Shāfi’ī schools, *al-khamr* is any drink deemed to be intoxicating whether it is produced from brewing grapes or anything else such as dates, dried

grapes, grains, barley and rice, and whether in a low or high level of intoxication (al-Zarqānī, 2002; Ibn Qudāmah, 1968; al-Anṣārī, n.d). The majority of the jurist scholars founded their view based on the *ḥadīth*,

*“Ibn ‘Umar narrated that the Messenger of Allah said: “Every intoxicant is khamr, and every intoxicant is prohibited.” (Ḥadīth Muslim).*

While, according to Ḥanafī school, *al-khamr* is only an intoxicating drink produced from brewing grapes only. Other intoxicating drinks are called ‘*muskir*’ or ‘*nabīdh*’ and are not called ‘*al-khamr*’ (al-Kāsānī 1986).

Differences in definitions by the majority and Ḥanafī scholars have led to some important implications. According to the majority of scholars, those who are found guilty of consuming any type of alcoholic drinks, must be punished with *ḥadd* punishment whether they consumed it in a small or large quantity. As for Ḥanafī scholars, they classify alcoholic drinks into two types of: alcoholic drinks produced from grapes and alcoholic drinks produced from other ingredients. Those who are found guilty of consumption of alcoholic drinks produced from grapes, whether in a small and or large quantity must be punished based on *ḥadd* punishment. Whereas, for other types of alcoholic drinks, only those who are found guilty of consumption of alcoholic drinks until they become intoxicated are punishable by *ḥadd* (‘Awdah, 1964).

#### **2.4.5.2 PUNISHMENT FOR CONSUMING ALCOHOLIC DRINKS: IS IT ḤADD OR TA’ZĪR?**

The prohibition of consuming alcoholic drinks is explicitly mentioned in the Qur’an. However, there is no specific punishment for the offence mentioned in the Qur’an. The classical jurists deduced the punishment for this offence based on several *ḥadīths*. Among the *ḥadīths* that outline the punishment for this offence is,

*“Narrated Anas Ibn Mālik: The Prophet (pbuh) beat a drunk with palm-leaf stalks and shoes. And Abū Bakr gave (such a sinner) forty lashes.”*

In another *ḥadīth*

*“Narrated Abū Salamah: Abū Hurairah said, “A man who drank wine was brought to the Prophet. The Prophet Pbuḥ said, “Beat him!” Abū Hurairah added, “So some of us beat him with our hands, and some with their shoes, and some with their garments (by twisting it) like a lash, and then when we finished, someone said to him, “May Allah disgrace you!” On that the Prophet Pbuḥ said, “Do not say so, for you are helping Satan to overpower him.”*

The punishment for the offence is also reported in the practice of the Prophet’s companion,

*“Narrated al-Sa’ib Ibn Yazīd: We used to strike the drunks with our hands, shoes, clothes (by twisting it into the shape of lashes) during the lifetime of the Prophet, Abū Bakr and the early part of ‘Umar’s caliphate. But the last period of ‘Umar’s caliphate, he used to give the drunk forty lashes; and when the drunks became mischievous and disobedient, he used to scourge them eighty lashes.”*

Through meticulous study from the reports, it is clear that there is a variation of how the punishment is carried out – the types of materials used for giving out lashes and the number of lashes. Thus, scholars deduced that the form of punishment is determined by *Sunnah*, while the number or provision for lashes is determined by the consensus of scholars (al-Zuhaylī, 1995). Due to the unclear punishment prescribed by the Prophet (pbuḥ) in regard to this crime, scholars are divided into two opinions in determining the classification of this offence; the first view is that this offence falls under *ḥadd* jurisdiction and the second view says that it falls under the *ta’zīr* jurisdiction. For the first opinion, scholars of the four main schools of law categorise the offence of consumption of alcoholic drinks as punishable by *ḥadd* and the punishment is in the form of lashing. However, they hold different views regarding the number of lashes. Ḥanafī, Mālikī and Ḥanbalī scholars say that it is 80 lashes. While Shāfi’ī, along with Zāhirī and Zaydiyyah scholars and an opinion from Ḥanbalī school state that the number of lashes should be 40 (al-Zuhaylī, 1995). The difference in opinion arises since the Prophet (pbuḥ) did not mention specifically the number of lashes in any *ḥadīth*, for example;

*“Abū Hurairah said: When a man who had drunk wine was brought to the Messenger Allah, he said: Beat him. Abū Hurairah said: Some struck him with their hands, some with their garments. When he turned his face, some people*

*said: Allah put on you shame! The Messenger of Allah said: Do not say like that and help the devil to get power over him.” (Ḥadīth Sunan Abī Dāwūd)*

In many or all the *ḥadīths* available to date, the word or phrase commonly used to signify punishment is “*beat him*” without any clear number of lashes mentioned. Furthermore, there was not any clear instruction by the Prophet (pbuh) as to what material should be used exclusively to carry out the lashing. As far as the aforementioned *ḥadīths* are concerned, the materials used include garments (being twisted), hands, shoes, tree twigs (branches) and palm tree branches (with the leaves stripped off). In addition to that, the different views in terms of the number of the lashes, whether 40 or 80, also came about due to the different practices of Abū Bakr (40 lashes) and ‘Umar (80 lashes). It is also said that what was implemented by Abū Bakr was his own estimation and discretion, not what was prescribed or instructed by the Prophet (pbuh).

On the other hand, scholars such as Ibn Farḥūn, Ibn Qayyim and al-Shawkānī views that the offence of consumption of alcoholic drinks falls under the the category of *ta’zīr* (‘Awdah, 1964). They argued that the Qur’an did not specify any form of punishment for such offence. Moreover, it is further supported by the many *ḥadīths* that different forms of punishments instructed by the Prophet (pbuh) in different occasions whenever a drunken person is brought to him. Having different forms of punishment demonstrated by the Prophet (pbuh) is a strong proof that there is no specific punishment for this offence.

In order to determine which opinion is more accurate, reference towards the definition of *ḥadd* is required. The definition of *ḥadd* given by scholars is the specific punishment for certain offences determined by the Sharia with no permissible variation. If observed clearly, there is no specific evidence found in the Qur’an and Sunnah regarding the exact type of punishment for this offence. Besides, scholars also disagree on the number of lashes required. So, if this offence clearly fell under the *ḥadd* category, there should not be any dispute regarding the number of lashes required because the punishment for *ḥadd* cannot be increased

or decreased, nor can it have its form changed (hands, shoes etc.). The Prophet (pbuh) also did not set a specific form of beating or flogging for this offence as he did for the *ḥadd* punishment for *zinā* offence. Thus, it is argued that the punishment for this offence falls under the category of *ta'zīr*, not *ḥudūd*.

#### 2.4.6 APOSTASY (*RIDDAH*)

The definition of *riddah* is to consciously move away from Islam into disbelief whether by *i'tiqād* (feeling), words or deeds ('Awdah 1964; al-Zuhaylī 1995). Examples of how *riddah* can take place through words and deeds are consciously and intentionally denying the existence of Allah, the status of prophets, considering the prohibited acts such as *zinā*, consuming alcoholic drinks, taking usury interest as permissible, and discarding the obligations as a Muslim, such as the five daily prayers and *zakāh* (the compulsory charity). In verse (2:217), Allah says;

*“If any of you revoke your faith and die as disbelievers, your deeds will come to nothing in this world and the Hereafter, and you will be inhabitants of the Fire, there to remain.”*

In this verse, it portrays the deeds of a person being eliminated if the person turns away from Islam and will remain in the hell fire eternally. Apart from that, the specific punishment for apostasy is also nowhere to be found in the Holy Qur'an. The only reference found is from *ḥadīth* and there are two main *ḥadīths* used by scholars on meting out punishment for apostasy. The first *ḥadīth* says,

*“Whoever changes his religion, kill him”*

While, the second *ḥadīth* says,

*“The Prophet Pbh said: ‘The blood of a Muslim who confesses that there is no god but Allah and that I am the Messenger of Allah cannot be shed except in three cases: a life for life, a married person who commits illegal sexual intercourse, and the one who turns away from Islam and leaves the community.’”*  
(*Bukhārī and Muslim*)

Essentially, there are two main opinions of scholars regarding the punishment for apostasy. The consensus of scholars agreed that the punishment for apostasy is the death penalty. This is based on the two *ḥadīths* mentioned previously. With

exception of Abū Ḥanīfah, he was of the view this sentence is only meant for male offenders. He used Prophet's (pbuh) instruction not to kill female disbelievers in battles or wars as an evidence to his argument. The second opinion, coming from Ibrāhīm Nakha'ī and Ṣufyān al-Thawrī states that an apostate must be persuaded through counselling to return to Islam and should not be executed. This divergent of opinion will be discussed in more detail later in chapter five and six.

## **2.5 ISLAMIC LAW OF EVIDENCE**

In Islamic criminal justice, the conviction for any punishment is strictly subjected to stringent procedures, and a process of acceptance of evidence, especially in cases related of *ḥudūd*. The purpose of this is “*aimed at the establishment of the truth which can be claimed with a higher degree of certainty*” (Coulson n.d). Even more interesting, as per al-Awwā' (2003), it is “*not solely meant to establish the guilt of a criminal; equally it endeavours to determine the possible innocence of the accused.*”

Specifically, for *ḥudūd* cases, there are two means of proof agreed upon by scholars. They are *al-iqrār* (confession) and *al-shahādah* (testimony). The other means of proof which is not agreed upon is the use of *qarīnah* (circumstantial evidence) (Abū Bakar, n.d). Strict requirements are stipulated in order to ensure that the objective of justice can be realised to both the victim and the accused. Every means of proof will be thoroughly discussed in the next part.

### **2.5.1 CONFESSION (AL-IQRĀR)**

Literally, *al-iqrār* goes with *al-ithbāt* which means conviction. By definition, it means a confession made by a person, who testifies that he has the obligation or liability towards another person's rights (al-Zuhaylī 1985). Confession is the most authoritative form of evidence in Islamic criminal justice. However, the application of confession is only limited to the person concerned, without having implications towards someone else's rights or punishment. For example, if a person committed



adultery and made confession in court, the punishment of adultery should only be applied upon that person, not his or her adultery partner.

Scholars accept confession as one of the means of proof based on an evidence in the Holy Qur'an verse 3:135,

*"You who believe, uphold justice and bear witness to God, even if it is against yourselves, your parents, or your close relatives. Whether the person is rich or poor, God can best take care of both. Refrain from following your own desire, so that you can act justly—if you distort or neglect justice, God is fully aware of what you do."*

In the verse mentioned above, Allah commands the believers to become people who uphold justice and truth even against themselves. Al-Qurtubī (1964) and al-Ṭabarī (2000) interpreted this verse by stating that the way for a person to uphold justice towards his own self is by testifying the truth upon himself, known as *al-iqrār*. The argument that confession is a form of proof can be observed from the act by Prophet Muhammad (pbuh) in which he accepted the confession of adultery by Mā'iz and al-Ghāmidīyah. Besides, it was also narrated in a *ḥadīth* regarding the case of al-'Asīf,

*"A Bedouin came to the Prophet (pbuh) while he (the Prophet) was sitting, and said, "O Allah's Messenger (pbuh)! Give your verdict according to Allah's Laws (in our case)." Then his opponent got up and said, "He has told the truth, O Allah's Messenger (pbuh)! Decide his case according to Allah's Laws. My son was a labourer working for this person, and he committed illegal sexual intercourse with his wife, and the people told me that my son should be stoned to death, but I offered one-hundred sheep and a slave girl as a ransom for him. Then I asked the religious learned people, and they told me that my son should be flogged with one-hundred stripes and be exiled for one year." The Prophet (pbuh) said, "By Him in Whose Hand my soul is, I will judge you according to Allah's Laws. The sheep and the slave girl will be returned to you and your son will be flogged one-hundred stripes and be exiled for one year. And you, O Unais! Go to the wife of this man (and if she confesses), stone her to death." So Unais went in the morning and stoned her to death (after she had confessed)"*

All the evidence above suggests that confession is accepted as an authoritative evidence in Islam. Nevertheless, to ensure that confession is accepted, it must adhere to certain conditions as outlined by scholars. Among the main requirements

are that the confession must be made by a person who is sane and has reached puberty, it is made out of the person's will without being forced by any other person or party and must be free from prejudice (al-Kāsānī 1986, Ibn Qudāmah 1968). Therefore, confession made by an insane person or a child cannot be taken as a basis in determining a right or making judgement.

Apart from that, there are also debates among scholars related to the number of confessions that must be made in order to prove a case. For cases involving *qisās* and *Ḥudūd* (except *zinā*), only one confession is required because one confession alone is sufficient to prove those offences. Scholars differ on the number of confessions required for the case of *zinā*. Ḥanbalī, Ḥanafī and Zaydiyyah took a position that confession in the case of *zinā* must be repeated four times. This is based on the *ḥadīth* of Mā'iz in the front of Prophet (pbuh). Furthermore, they also support their position with the analogy of four witnesses required in the conviction of a *zinā* case in the Qur'an. Whereas, scholars of Mālikī, Shāfi'i and Zāhirī schools hold the view that only one confession is required. The reasoning behind that is, since confession is a recognition that one gives to oneself, there should be no issue of integrity because it is impossible for a person to lie to himself. Therefore, one confession is sufficient for the conviction to take place (al-Zuhaylī, 1995).

More interestingly, a person who already made confession in *ḥudūd* cases is allowed to retract the confession in certain situations. If the case involves the rights of humans (*ḥuqūq al-'ibād*) such as *qadhf* and theft, majority of scholars agreed that the confession cannot be retracted since it affects and expires the rights of other people. In cases involving the rights of Allah (*ḥuqūq al-Allāh*) such as *zinā* and drinking alcohol, scholars are divided into two different opinions. Ḥanafī and Shāfi'i scholars, Imām Aḥmad and an opinion of Imām Malik state that the confession can be retracted. It can be retracted at any time – before or after judgement, before or after the punishment is executed. As for Abū Laylā, Abū Layth, a say from Shāfi'i and Mālikī, they are of the view that confession cannot be retracted after it is made (al-Zuhaylī, 1995).

## 2.5.2 STATEMENT OF WITNESSES (AL-SHAHĀDAH)

Technically, *al-shahādah* means an authentic statement to convict a person's right through *al-shahādah* pronouncement in the court (Ibn al-Humām n.d, Ibn Qudāmah 1968). Scholars stipulate the phrase "I bear witness" (ash-ha-du; with imperfect tense: *fi'il muḍāri'*, not with perfect tense; *fi'il māḍī*) because the excerpts from the Holy Qur'an have specified the use of this phrase while also giving more assertion towards the phrase itself (al-Zuhaylī 1995). *Al-shahādah* is also recognised by the term *al-bayyinah* by scholars, except that Ibn Qayyim differs in this matter. According to him, *al-bayyinah* is a term which is only applied to highlight truths and *al-shahādah* is only a part of it.

The argument that *al-shahādah* can be used as evidence is supported by verse 2:282,

*"Call in two men as witnesses. If two men are not there, then call one man and two women out of those you approve as witnesses, so that if one of the two women should forget the other can remind her"*

In another verse 65:2,

*"Call two just witnesses from your people and establish witness for the sake of God. Anyone who believes in God and the Last Day should heed this: God will find a way out for those who are mindful of Him"*

Generally, the ruling of giving *al-shahādah* is a collective responsibility (*farḍ kifāyah*). This collective responsibility shall be discharged if a member of the community comes forward to give evidence. However, if none of the member of the community comes forward to give evidence, the whole community shall be tainted with sin since it has become compulsory (*farḍ 'ayn*) for every Muslim in the community to fulfil such an obligation. Though, in cases relating to individual rights, it becomes compulsory for a person when he is compelled to testify before the judge. While, in cases concerning the rights of the public or also mentioned as the rights of Allah, a person must come forward to testify even without being asked to.

As far as *ḥudūd* cases are concerned, the witness can choose whether to testify under the provision of *ḥisbah* or not giving testimony at all with the intention to safeguard the dignity of another Muslim (al-Zuhaylī, 1995; Bakar, n.d.). Ibn al-Hummām from the Ḥanafī school is of the opinion that it is encouraged (*afḍal*) for the evidence not to be revealed, a view also shared by al-Shirāzī from the Shāfi'ī school, who says that since it is commendable (*mandūb*), it is better to conceal the evidence in *ḥudūd* cases for those who have the evidence. This is based on the *ḥadīth* of the Prophet (pbuh),

*“Whoever preserves the dignity of another Muslim, Allah will preserve his dignity in this world and the hereafter.” (Narrated by Ibn Mājah)*

The difference exists because the testimony for cases related to individual rights must be obtained so that that right is not neglected. On the other hand, there is no such thing as perished (individual) rights with *ḥudūd* cases (only Allah's rights are involved). Hence, the preservation of personal dignity and worthiness is more significant. In spite of what has been mentioned earlier, the opinion must be examined more thoroughly when it comes to an environment with different cultures and norms. If everyone chose not to testify with the basis of preserving one's dignity, most probably, worse social setbacks would come about, such as a failing family institution, which is usually related to widespread promiscuity in the community.

Scholars have set some requirements as a bases for the acceptance of a testimony. Amongst others are that the person must be sane and reach puberty, Muslim, able to talk (not mute or deaf), just (does not commit minor and major sins endlessly) and free from prejudice and bias. Several scholars from Ḥanafī dan Shāfi'ī schools have also made being able to see (not blind) as one of the requirements though disagreed by Mālikī and Ḥanbalī scholars since witnessing can also take place through listening (provided that the person is certain). The majority of jurists also agreed that the person must be a free man, but this requirement is no longer relevant in the context of our modern age (al-Zuhaylī, 1995).

### 2.5.3 CIRCUMSTANTIAL EVIDENCE (QARĪNAH AL-AḤWĀL)

Jurist scholars did not specifically define what *qarīnah* means. As per al-Jurjānī, *qarīnah* means evidence which leads to something that had been intended. As for al-Zuhaylī (1995), *qarīnah* is evidence which is clear and strong that is derived from hidden detail. In proving a case, it is clear that the applicability of *qarīnah* is not explicitly mentioned by the Qur'an. Nonetheless, the applicability of *qarīnah* can be found through some references towards several Qur'anic verses along with analogical deduction by scholars, though its application as a means of conviction is deduced from speculative meaning (*dhannī al-dilālah*), such as surah Yūsuf (12:18),

*“And they showed him his shirt, deceptively stained with blood. He cried, ‘No! Your souls have prompted you to do wrong! But it is best to be patient: from God alone I seek help to bear what you are saying.’”*

And from the same surah, verse (12:25-27),

*“So they both raced each other to the door, and she tore his shirt from the back: they both found her lord near the door. She said: “What is the (fitting) punishment for the one who formed an evil designed against thy wife, but prison or grievous chastisement?” He said: “It was she that sought to seduce me from my (true) self.” And one of her household saw (this) and bore witness, (thus) “If it be that his shirt is rent from the front, then is her tale true, and he is a liar!” “But if it be that his shirt is torn from the back, then is she the liar, and he is telling the truth*

The first aforementioned verse tells the story of the conspiracy of Prophet Yūsuf's A.S brothers to separate him from his father, Prophet Ya'qūb A.S. Prophet Yūsuf A.S was brought along to join his brothers on a journey. Later on, his brothers threw down a well and went home without him. To corroborate their fabricated story of Prophet Yūsuf A.S being eaten by a wolf, they also brought home his shirt with false blood (sheep blood) stains, which was shown to their father. The father however rejected the claim. His deduction was based on the condition of the shirt which was in proper condition and had no sign of it being torn apart by a wolf. The blood-stained shirt alone without any tear was clear indication and evidence for Prophet Ya'qūb A.S that his sons were concocting a lie.

Then, the second verse tells the false accusation thrown upon Prophet Yūsuf A.S by the wife of al-‘Azīz. She accused him of trying to molest her while they two were in private. There was a third person involved in this matter who proposed a judgement whether the accusation was true or false. He argued that, if the shirt was torn from the front, the accusation was true. However, if it was torn from the back, the accusation was false. By that evidence, it was then proved that the wife of al-‘Azīz had made a false accusation against Prophet Yūsuf A.S.

Historical sources also suggested that Prophet Muhammad (pbuh) recognised *qarīnah* as a means of proof. It is based on the *ḥadīth*,

*“There were two women who had small sons. A wolf came and took away the son of one of them; One of them said to other, “It was your son”. The other said, “No, it was your son”. They brought their dispute to Prophet David A.S and he decided in favour of the elder. Then they went to Prophet Solomon A.S. and related to him their dispute for decision. He ordered to provide him a knife to make two pieces of the child so as to give one piece to each of them, on this, the younger one said, “Don’t cut him into pieces, this is the son of the elder one.” Hearing this Prophet Solomon (pbuh) decided in favour of the younger one.” (Narrated by Abū Hurairah)*

Regarding the admissibility of *qarīnah* in *ḥudūd* and *qiṣās* offences, scholars are divided into three distinctive opinions which are (Anwarullah, 2004): -

- I. Ḥanafī and Shāfi’i scholars do not accept the use of *qarīnah* in all cases involving *ḥudūd* and *qiṣās*. The ruling is based on the *ḥadīth*,

*“Prophet Muhammad S.A.W has said to the effect, “If I had wanted to stone someone without any proof, I would have stoned the woman who had raised suspicions as to her chastity due to her speech, the circumstances surrounding her and people who had approached her (residence)”*

- II. Mālikī scholars accept *qarīnah* as a basis of conviction in certain cases (not all) related to *ḥudūd*. For example, pregnancy of an unmarried woman is accepted as an evidence of *zinā*. The woman must be given a chance to explain the situation. If there is no explanation as to show that she was coerced to commit *zinā*, or raped and all doubt-bound situations, the

woman can then be punished under *ḥudūd* provision. For alcohol consumption, Mālikī scholars also accept the smell of liquor from the person accused as evidence for conviction.

- III. The third opinion is rather more liberal in approach. They accept the use of *qarīnah* in all cases related to *ḥudūd* and *qiṣās*. Ata' Sid is among others who is in this position. For them, the evidence based on testimony by witnesses is more prone to concoction and fabrication. Hence, *qarīnah* may be seen as more compelling and stronger than *al-shahādah* (statement of witnesses) and *al-iqrār* (confession) because the real fact does not tell lies

To discuss further, among the aspects that must be taken into consideration of whether *qarīnah* should be accepted or rejected in *ḥudūd* and *qiṣās* cases is the element of doubt. This is because, only evidence which is of the degree of beyond any doubt (*yaqīn*) is accepted in *ḥudūd* and *qiṣās* cases. If there is doubt, event in very small amount, the evidence is automatically rejected. This follows the *ḥadīth*,  
“Drop *ḥudūd* punishment in case there is doubt.”

Therefore, what has to be analysed is, if the evidence is very strong, with no doubt, it should be accepted. Otherwise, it must be rejected. Discarding the use of *qarīnah* completely, without analysing it is unjust because, probably, with the use of *qarīnah*, justice is better served in the criminal justice system. Furthermore, Ata' Sid (1995) states that the rejection of *qarīnah* by the respective scholars does not have a strong basis.

## **2.6 BASIC RULES AND PRINCIPLES IN ISLAMIC PROCEDURAL LAW**

Aside from stringent conditions regarding evidential procedure, discussions regarding the implementation of Islamic criminal law must come with the meticulous and just procedure stipulated in the Qur'an and the Sunnah. This set of laws, known as procedural law in modern penal systems, outlines the basic

principles and rules regarding the whole process of investigation, prosecution, and punishment. It seeks to accommodate a balance between protection for the accused, and safeguarding society's interest in crime detection. However, unlike substantive law where there are relatively well-established details written by the classical jurists, there is no formal framework of criminal procedure found in the classical jurists' treatises (Reza, 2013).

In explaining this matter, An-Naim (1990) argued that the classical jurists were "*naturally unaware of the currently much-appreciated need to regulate and control the powers of arrest, search and seizure and so forth*". This is true, as during that time, criminal procedures were not governed under the jurists but under the executive authorities and rulers. By delving into the classical jurists' treatises, one might observe that the discussion pertaining to this subject was rudimentary, informal, and can be found scattered in the books of *adāb al-qādī* (code of conduct for judges), *adāb al-ḥisbah* (manuals to guide inspectors of markets and morals) and *siyāsah al-shar'iyah*.

Additionally, in explaining the absence of a systematic framework in regard to this subject, other scholars suggested that the reason behind this was because this subject is left to the discretion of the ruler who is responsible for public welfare (Lippman, 1989). This also implies that there is no specific structure or framework that must be followed by each ruler, but that it must be guided by the rules and principles from the Qur'an and the Sunnah. Among the basic principles and guidelines stipulated from these sources are, respect for individual privacy, equality before the law, presumption of innocence, the principle of legality, the right to due process in law, the right to a fair and public trial before an impartial judge, freedom from compulsory self-incrimination, and protection against arbitrary detention.



## CONCLUSION

In this chapter, I attempt to examine the historical development of *Ḥudūd* law and its application during the formative period of the Islamic legal system. In the earlier part of the chapter, I illustrate that what is previously known as *Ḥudūd* law is essentially made up of two elements: Sharia, which form the basis and foundation of the law, and the *fiqh* which was a product and outcome of human interpretation of the divine text. Thus, throughout the chapter, I illustrate that despite *Ḥudūd* law having a basis in the divine text, it also contains a significant amount of human agency in its development and systematisation.

Initially, it must be highlighted that although *Ḥudūd* law was applied from the beginning of the formative stages, during the prophetic era (Medinan period) and later, in subsequent stages, the Prophet (pbuh), the companions and the successors did not develop the theory of *Ḥudūd*. During these stages, legal rulings were derived on an ad hoc basis and did not follow an elaborate methodology and procedure. The legal rulings were deduced directly from the sources: the Qur'an, Sunnah and other instruments, such as *ijma'* and *qiyas*. The establishment of *Ḥudūd* law as a systematic concept, and in the sense of fixed punishment, arguably begins during the 9<sup>th</sup> century by the classical jurists.

The argument that *Ḥudūd* law is a concept established by the jurist is demonstrated through the definition itself. The technical definition of *Ḥudūd* in the sense of strict punishment is not rooted in the Qur'an. In the Qur'an, the word *Ḥudūd* is used to connote deeds prohibited by Allah, or rules commanded by Allah. Additionally, all the so-called *Ḥudūd* verses in the Qur'an, none of them mentioned the word *Ḥudūd*. In the *ḥadīth*, the word *Ḥudūd* is used generally to refer to the literal linguistic meaning, or to crime and punishment or similarly in the same sense in the Qur'an. The earliest concept of *Ḥudūd* in the sense of strict punishment can only be traced in the classical jurists' treatises. It was the jurists during the era of *tābi' al-tābi'īn* whose responsible for expanding these divine injunctions into a theory,

categorising punishments, and adding specific definitions and stringent conditions to each of the *Hudūd* crimes. This is also supported by the existence of divergent opinions among the jurists on the classification of *Hudūd*, evidential requirements and the stipulated conditions of each crime and punishment. The divergent of views of these matters illustrate the utmost effort of the classical jurists in articulating the divine will of God. Apart from the divergence of opinions in the details, inconsistency traced in establishing the theory itself can also further support this argument. One example is by classifying the offence of *shurb* as *Hudūd*. Despite unanimously agreeing that the basic characteristic of *Hudūd* punishment is fixed in nature, the classical jurists differed in their view on the number of lashes and, at the same time, subsumed this offence under *Hudūd*.

In this chapter, I also illustrate the salient features of the *hudūd* application during the formative period. First, the *Hudūd* law was enforced during the Medinan period, only after substantial years of spiritual training. This gradual approach in legislation was believed to be beneficial to the believers during that particular period such as in the prohibition of wine. Secondly, the application of *hudūd* during this period reflected mercifulness, at the same time strict observance of the rule of law. This mercifulness can be traced throughout the whole process; prior and during adjudicating the case until the administering of punishment. This can be seen through the encouragement by the Prophet (pbuh) to conceal wrongdoing and repent privately, to avert punishment by asking many questions, in some occasions the Prophet would turn away his faces from the confessor. In inflicting punishment, the Prophet ask to administer it with mercy, by using only a specified whip, the prohibition of insulting the offender, and allowing time for giving birth and lactation.

The emerging question arising from the discussion in this chapter is, could the structure and framework of ICL, as developed by the classical jurists be sustained, and made to fit into a current, modern nation state framework, and a modern penal system? This discussion will be explored in the next chapter.

## CHAPTER 3

### MODERN DISCOURSE ON THE APPLICATION OF SHARIA AND ISLAMIC CRIMINAL LAW WITHIN A NATION STATE FRAMEWORK

#### INTRODUCTION

In the previous chapter, we explored the historical development of *Hudūd* law during the formative period of the Islamic legal system. In this chapter, we try to determine whether this *Hudūd* law, established during the 9<sup>th</sup> century, can be sustained in a modern legal framework. This chapter constitutes the literature review chapter of the study. It explores the modern discourse on the application of Sharia and Islamic criminal law within a nation state framework. The chapter begins with a brief introduction of the pre-modern Sharia based legal system. Following on, the impact of European imperialism on it is illustrated. This preliminary discussion is essential to understand the recurrent theme among modern scholars regarding 'the crisis of authority' and its effects on the application of Sharia in contemporary Muslim countries. Afterwards, the discussion continues by presenting various views of the scholars, and Muslim thinkers, regarding the application of Sharia in a modern nation state framework. Additionally, this chapter will also provide the different impetuses and perspectives behind the application of Sharia in Muslim countries. Finally, in the last part of the chapter, the issues and problems on the application of Islamic criminal law will be examined and discussed.

#### 3.1 THE PRE-MODERN SHARIA-BASED LEGAL SYSTEM IN THE MUSLIM WORLD

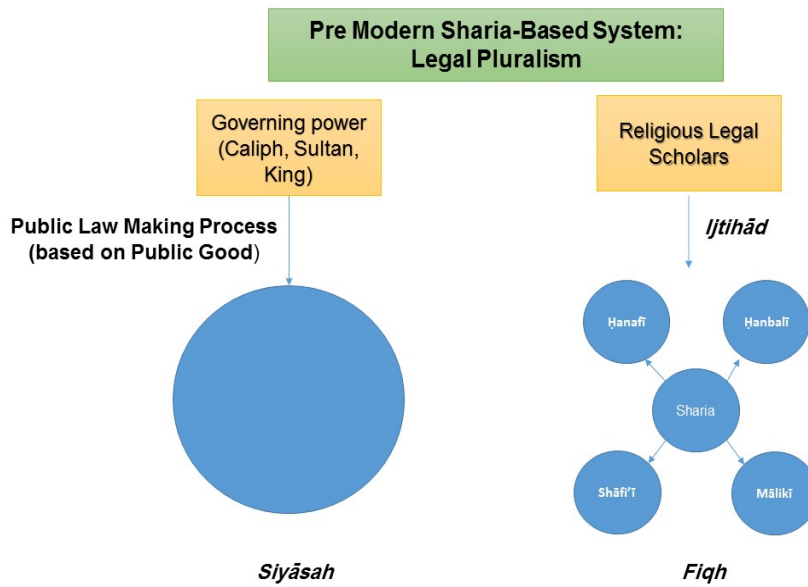
During the prophetic era, the Prophet (pbuh) acts both as a political and religious leader to the Muslim community. After his death, this interlinked role was passed to the four successors of the Prophet (pbuh); Abū Bakar, 'Umar, 'Uthmān and 'Alī, collectively known as the rightly-guided caliphs. In the next period, during the

Umayyad Dynasty, the selection of the caliph was shifted from merit to hereditary succession (Philips, 2003). Gradually, a structural change began to emerge when the Islamic legal system began to develop independently by a group of scholars, often in opposition to the power of the state (S. Vikor, 2000).

Around the early parts of 7<sup>th</sup> century, a class of private legal specialists began to emerge. Initially, the group of scholars created their own circle of learning to discuss and debate religious issues, and at the same time teaching students who were interested. Gradually, they gained respect and influence from the locals, later becoming social leaders. Feeling the pressure to have a local connection with the masses in order to gain some legitimacy, the Umayyad rulers began to support Islamic scholarship. By the eighth century, this class of private legal specialists, while maintaining their juristic and judicial independence, began to administer in the name of the ruling dynasty (Hallaq, 2005, 2009).

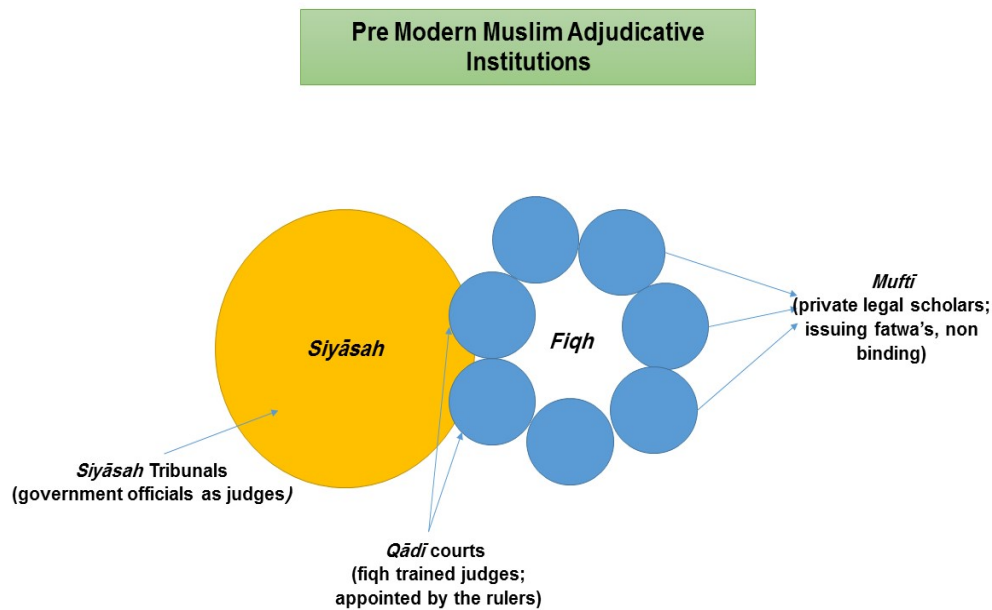
The 9<sup>th</sup> century witnessed a series of attempts by the Abbasid rulers to impose a particular theological belief: the doctrine of the created-ness of the Qur'an through the event of inquisition (*miḥna*). Inquisition (*miḥna*) was initiated by the seventh Abbasid ruler, al-Ma'mūn, only four months before his death, and later continued by his two successors al-Mu'taṣim and al-Wakīl. It lasted approximately sixteen years until the tenth Abbasid ruler, al-Mutawakkil, finally abolished it (Hinds, 2012; Nawas, 1994; Patton, 2017). Among the principal targets for the inquisition were the traditionalists (*ahl al-ḥadīth*), led by Aḥmad Ibn Ḥanbal. During al-Mu'taṣim's rule, Aḥmad Ibn Ḥanbal was interrogated and flogged for refusing to accept the Qur'an's created-ness. This was viewed by many scholars as an attempt by the Abbasid rulers to reclaim a religious authority that had belonged to earlier caliphs (Crone, 1986). However, due to the jurists' resistance, the inquisition failed, and ultimately legal jurists were able to claim exclusive authority as the sole interpreters and articulators of divine law.

In Islamic history, the event of *miḥna* officially marked the distinct division between two realms of law; the *fiqh* (the scholarly autonomy to interpret scripture) and the *siyāsah* (law making based on public interest) (Quraishi-landes, 2015). During this period, the relationship between the rulers and scholars can be illustrated as below (Quraishi-landes, 2008, p.170)



**Diagram 3.1.1: Pre-modern Sharia-based system**

The diagram above shows the division of authority between both realms, *siyāsah* and *fiqh*. Primarily, the caliph who owned the *siyāsah* authority was responsible before the people to maintain public order and justice based on public interest (*maṣlahah*). However, the *fiqh* authority is grounded in the need to interpret and apply the divine text. Both of the entities work in parallel and independently. Between the two realms of authority, there were overlapping jurisdictions and various institutions to make law enforceable, especially to resolve conflict between two parties. The following diagram illustrates this more clearly (Quraishi-landes, 2008, p.172),



**Diagram 3.1.2: Pre-modern Muslim adjudicative institutions**

The caliph has a paramount responsibility to fulfil the Qur’anic injunction, ‘command good and forbid wrong’. Thus, as mentioned earlier, he delegates this duty to the scholars by appointing them as judges. The caliph may restrict the judges by adhering to a certain school of thought. Although the judicial authority comes from the caliph, the law to be applied comes from the scholars (Fieldman 2008).

Based on the discussion above, it can be understood that the pre-modern Muslim government did not not operate on the assumption that all law emerges from the state. The state only governed certain aspects, namely *siyāṣah*, while the jurists were responsible for administering the interpretation of the Sharia. In other word, this government is based on a legal pluralism in which more than one entity exists and works together. Additionally, the ruler also rarely attempted to codify the divergent opinions of the *fiqh* school (Quraishi-landes, 2015a). In fact, the jurists themselves had opposed such an attempt. For example, Ibn al-Muqaffa’ suggested to al-Manṣūr, an Abbasid ruler to codify and enact his own code for the purpose of uniformity and proposed using *al-Muwattā’* to become the main legal reference for

the judges in the empire. During his first pilgrimage, al-Manşūr met Mālik and proposed this idea. However, Mālik refused and insisted people should not be forced to adhere to the opinion of a single jurist (Jackson, 2006; Philips, 2003; Zanki, 2014). This constitutional structure and system in pre-modern Muslim countries operated for a hundred years until the advent of the imperialism that caused its destruction (Peters, 2005). This legal and political change, due to European imperialist colonialism, will be addressed in the next section.

### **3.2 EUROPEAN IMPERIALISM AND ITS IMPACT ONTO THE MUSLIM WORLD**

The word imperialism is derived from a *latin* word, *imperium* which means supreme power, dominion, supremacy, and authority. Essentially, imperialism refers to a concept or policy of “*the extension of the dominion of one nation over others by military conquest, political or economic compulsion, or some combination of the three.*” (Hodge, 2011). Although imperialism had existed since ancient time, this term is usually referred to the period of modern European imperialism, which is the matter of concern in this study, due to its significant impact on the Muslim world<sup>22</sup>.

#### **3.2.1 EUROPEAN IMPERIALISM**

The Age of Imperialism refers to a period which witnessed the stronger nations in Europe (usually through military force and advanced technology) such as Britain, France, Italy, Holland, Russia, and Spain, engaging in the process of colonising foreign lands in order to advance their economic and political needs (Bishku, 2017). This period is divided into two phases, the Old Imperialism and the New Imperialism. The Old Imperialism refers to the period from the sixteenth to the early nineteenth century while the New Imperialism began from the late nineteenth century until 1914. Both periods shared the same concept of controlling and utilising foreign countries, however, the former was more concerned with the

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<sup>22</sup> The word Muslim world is defined as predominantly Muslim-populated territories.

systems of trade, while the latter period displayed a more aggressive expansionism policy, mainly due to economic needs created by the Industrial Revolution (Hobson, 1902).

During the old Imperialism, the European nations were mainly concerned with finding direct trading routes. This primary goal, alongside personal religious motives and imperial beliefs, which were reflected by the dictum, 'Gold, God and Glory', motivated the European Nations of Britain, France, The Netherlands, Portugal, and Spain to establish empire in the Americas, India, and East Indies. During this period, they set up trading posts and worked closely with locals to ensure protection of their economic interests. However, their influence was limited, and this changed drastically when Europe went through the Second wave of Industrial Revolution in 1870 which marked the beginning of the New Imperialism era (Buskens, 2014).

The New Imperialism era witnessed vast domination and control over Africa and Asia by European nations, United States and Japan. The end of this period witnessed an increase in the land controlled by the dominant European powers, up from 35% in 1800 to 84.4% in 1914 (Fieldhouse, 1973). This New Imperialism gained impetus for several reasons, namely: economic, political, military, religious, advances in science and technology, and sociological motives. Regarding the economic factors, the industrial revolution led to a pressing need for a wider market to sell and buy products, cheap labor, and a steady supply of raw materials (oil, rubber and steel) in order to fuel industrial production (Hobson, 1902). Additionally, a surplus of capital, alongside foreign investment policies offered greater profits, despite the high risk also contributed to the New Imperialism policy. All of these economic reasons required the European national powers to expand and gain control over unexplored area.

Also seen at this time was a fast-paced advancement in science and technology, which was fostered by the Industrial Revolution. The discovery of quinine, the use of steam vessels, the telegraph, and the advancement in weaponry, mainly fire-



machine gun contributed much to promote imperialism (Hedrick, 2010). The discovery of quinine helped Europeans to survive tropical disease, and so enabled them to venture into Africa and Asia, while the use of steam vessels and telegraph increased mobility along with more effective communications between the mother countries and the colonies. Additionally, the formal opening of Suez Canal in 1869, which shortened the sea route from Europe to South Africa and East Asia, had a significant impact in accelerating imperialism.

Imperialism was also driven by religious and humanitarian reasons. It was supported by missionaries, as they believed that European control would help the spread of the true religion, Christianity, in Asia and Africa. Moreover, Europeans believed that they had a moral obligation and responsibility 'to civilise the uncivilised'. This feeling of responsibility is believed to have been originated by a poem written by Rudyard Kipling, *The White Man's Burden: The United States and the Philippine Islands* in 1889 during the Philippine-American War. Through this poem, Kipling addresses the amount of cost that the imperialists needed to spend in order to build an empire. However, American imperialist understood that the phrase, "The White Man's burden" formed a civilisation mission and a duty to spread and impose Western civilisation to non-white peoples (Buskens, 2014).

Apart from religious and humanitarian reasons, the establishment of the Theory of Charles Darwin through his book, *On the Origin of Species* in 1869, also had an impact on imperialistic expansion. In his theory, he argued that all creatures evolved to their present state over millions of years and supported this idea with the theory of natural selection. Although Darwin himself did not establish any social ideas, his theory gradually emerged to be known as the 'survival of the fittest' and Europeans believed that the white race was the dominant race, and therefore natural to them to subjugate 'inferior' people in order to improve humankind.

As for the Muslim world, the process of domination and taking control by the European imperialist was not identical but it was thorough and effective. It began

with the conquest in Mongul, India during the eighteenth century followed by the 'scramble for Africa'<sup>23</sup> in the nineteenth century (Armstrong, 2002; Pakenham, 2009). By the twentieth century, The French ruled much of North Africa and parts of West and Central Africa. The British controlled Muslim areas of Africa (including Egypt) and of Asia (including India with its large Muslim minority) and parts of Southeast Asia. The Dutch ruled most of present-day Indonesia, while the Spanish controlled parts of North Africa and the Philippines. After the first World War, the Ottoman territories were divided between the United Kingdom and France, with assent from Russia and Italy through the agreement of Sykes-Pycot (Bishku, 2017; Hodge, 2008; S.V.R. Nasr, 1999).

### **3.2.2 THE IMPACT OF EUROPEAN IMPERIALISM IN THE MUSLIM WORLD**

By the middle of the 1970s, most of the Muslim territories gained independence from colonial power, either through negotiation or bloody war. However, imperialism has had a long-lasting impact to the social, political, legal, and educational system in the Muslim world. Today, Muslim countries are a collection of nation states, a political concept imported from the West. The concept of territorial states is a foreign concept in Muslim history. Previously, Muslims were bound politically under the caliphate and later empires and sultanates who ruled in the name of Islam (Abou El Fadl, 2007).

Regarding legal aspects, colonialism adversely affected the Muslim world by dismantling pre-existing legal systems and replaced them with European nation-state systems of government. During the pre-colonial period, most of the Muslim territories applied either Islamic law or indigenous laws that were influenced by Islamic precepts. With the advent of the colonial power, Islamic law and indigenous law were confined only to the private sphere (Tan, 2017). In some countries this

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<sup>23</sup> The scramble for Africa refers to the acquisition of African Land and and the partition of the continent by several European powers.

happened at once, usually immediately after the establishment of colonial rule. Elsewhere it was a gradual process (Peters, 2005). Unlike the existing system which is based on legal pluralism, the nation state is in contrast founded on legal centrism, the idea that everyone is governed by the same law, and that law comes from a central state (Asifa Quraishi 2015; Abou El Fadl, 2014; Maurits S. Berger 2016). It is argued that the reason behind the introduction was a pressing need for 'a system of concession and special jurisdiction that served the economic and political interest of the colonisers' as the existing system did not serve their interest very well (Abou El Fadl, 2014).

As part and parcel of the nation state system, other foreign state apparatuses, modes of administration and social institutions were introduced. The creation of mixed courts and a systematic movement toward legal codification began to take place in Muslim countries (Abou El Fadl, 2017). Essentially, the civil courts which applied to all citizens dealt with the majority of laws concerning contracts, torts, commercial cases, property and succession to property, crime and constitutional, and administrative cases. At the same time, Sharia courts dealt mainly with Islamic family law and some criminal offences relating to the practice of Islam and had jurisdiction only over Muslims. The effect of this dual system confines the application of Islamic law only to matters of personal law such as marriage, divorce, inheritance, gift (*hibah*) and to some extent *waqf* (Hallaq, 2009). On the other hand, the effect of the codification was "*the transformation from a scholarly discourse in which different and opposing opinions are juxtaposed to an authoritative, definitive statement of law, purged from all alternative views.*" (Peters, 2002).

Apart from major legal system change, colonialism also had far-reaching impact on the educational systems and institutions in the Muslim countries, where it was refashioned and adapted according to the colonial power system (Abou El Fadl, 2014; Tan, 2017). Islamic education was also marginalised and later on gradually collapsed due to the centralisation of *waqf* revenues by the state, which had hitherto been the largest funder of the madrasah. The lasting impact of this

development was the creation of a dual system of education, resulting in skilled and gifted lawyers who were not rooted in Islamic jurisprudential system, and those who qualified as *fuqaha'* in the modern age no longer receiving training that would qualify them as lawyers in any real sense (Abou El Fadl, 2014). Gradually, a new elite of Western educated professional began to emerge and replaced the religious scholars and jurists.

The introduction of the nation state into the Muslim world, which brought along other administrative apparatus, as mentioned above, is argued to have contributed to the deterioration of Islamic law. Nevertheless, as An-Naim (1990) viewed, the deterioration of Islamic law in Muslim countries was not only the result of colonialism but also a significant and growing awareness among Muslims of the inadequacy of the relevant Sharia concepts in a modern, nation state world. For instance, An-Naim (1990) contended that 'early Muslim jurists did not distinguish between the religious, ethical and legal aspects of Sharia'. All of these were written in one book. Thus, if one is about to find what is known in modern terminology as criminal law, evidence and procedure, these can be extracted only from general and extensive treatises of Islamic jurisprudence. In sum, he asserted that,

*"Western influence was the consequence rather than the cause of the diminished role of Sharia." (An-Naim 1990, p.106)*

Another scholar who challenged the widely held view that colonialism is the cause of deterioration of Islamic law is Fieldman (2008). He argues that the Islamic legal system had been gradually diminishing since the emergence of the *Tanzimat* group during the Ottoman Empire. In the late of 19<sup>th</sup> century, the Ottoman ruling elites initiated a legal reform that involved large scale acceptance of European law, in an effort to catch up with Western imperial power (Coulson, 1964). Legal reform and legislation become one of its most important instruments, which shifted the system from legal pluralism to a unified and centralised system. While many argue that this reform was a response to the West, some argue that the *Tanzimat* 'were meant to bolster the Islamic legitimacy of an Ottoman sultanate contending with domestic challenge to its authority' (Emon, 2012).

### **3.3 CONTEMPORARY DISCOURSE ON THE COMPATIBILITY OF SHARIA IN A MODERN NATION STATE FRAMEWORK**

During the 1990s, unlike Ayatollah Khomeini in Iran who chose to establish an 'Islamic state' through revolution, a number of Islamic movements began to join democratically through election as a means for reintroducing Sharia in Muslim countries. Surprisingly, some of these Sharia-oriented political parties also gained support from among the Muslim masses. However, does this support indicate a mass demand for the implementation of Sharia? According to a survey conducted by Pew Research (2013), the report did indeed indicate a huge support from the Muslim masses in favour of implementing Sharia as the official law of the land. For instance, in Southeast Asian countries, the percentage of Muslims who say they favour making Islamic law the official law in their country is 86% in Malaysia, 77% in Thailand and 72% in Indonesia. Further statistics also signify two important facts, Muslims who favour the implementation believe that it should not be applied on non-Muslims and secondly, there is a lower percentage (but still substantial) that support hand amputation for theft, stoning for adultery and the death penalty for apostasy.

Concurrently, the great demand for Sharia from the Muslim masses had sparked debate and interest among scholars, Muslim and non-Muslim alike. The discourse ranged from whether Sharia is compatible in a modern nation state, what Sharia is, which school of thought should be used and legislated, and to what extent Sharia may govern the public sphere. Essentially, for the sake of discussion, these people are divided into three different groups: the proponents, opponents and moderates.

To begin with, the proponents of the formal implementation of Sharia believe that Sharia is a way of life and a system that should govern every aspect of Muslim life. Thus, to achieve or fulfil the 'entirety' of Sharia into every aspect of Muslim life, some of them believe it is necessary to establish an Islamic state (al-Mawdūdī, 1960). By achieving this, all parts of Islamic principles and law can be moulded into

the state. This belief is supported on a basis that the Prophet Muhammad (pbuh), during his life had established an Islamic state, which was upheld by the following four caliphs. The idea of Sharia and the state was believed to originate through the writings of Al-Māwardī and Ibn Taymiyyah, who both advocated for the need to choose a ruler who can uphold the sovereignty of Allah. After the collapse of the Ottoman Empire, this idea was revisited by a group of people who were regarded as Islamist, such as al-Mawdūdī and Sayyid Quṭb.

The idea of establishing an Islamic State by the use of Sharia is clearly propagated through the writing of al-Mawdūdī (1960) in *The Islamic State and Constitution* and Sayyid Quṭb in *Ma'ālim fī al-Ṭarīq*. Al-Mawdūdī explicitly asserted that,

*“The movement for the introduction of Islamic Law and the establishment of an Islamic State is part and parcel of this overall movement for the revival and rehabilitation of Islam.”*

While Sayyid Quṭb (2006, p.46) did not specifically allude to the need to establish an Islamic state, he did hint at establishing a society based on the sovereignty of God. For instance, he said,

*“It is necessary that the believers in this faith be autonomous and have power in their own society, so that they may be able to implement this system and give currency to all its laws. Moreover, power is also needed to legislate laws according to the needs of the group as these present themselves in its day-to-day affairs.”*

In calling for an Islamic state and civilisation, both al-Mawdūdī and Sayyid Quṭb, share the same underlying reasons for this aspiration; declining values in humanity. While acknowledging the material progress and technology advances in the West, they are both deeply concerned with the evident immorality and materialism. Hence, both of them view that Islam is the only system that can bring these values back. In addressing this issue, Sayyid Quṭb (2006, p.8) shared some of his observation during his stay in America in 1948,

*“It is astonishing to realize, despite his advanced education and his perfectionism, how primitive the American really is in his views on life. His behaviour reminds us of the era of the ‘caveman’. He is primitive in the way he lusts after power,*

*ignoring ideals and manners and principles. It is difficult to differentiate between a church and any other place that is set up for entertainment, or what they call in their language, fun”.*

In thinking about putting this idea into reality, it is imperative to address the challenges. Firstly, the concept of Islamic State proposed by either Al-Mawdūdī and Quṭb, or any other Islamic movement, remains ambiguous and vague even up to the present day (Berger, 1998; Tibi, 2002). Would it mean introducing many normative exhortations and legalising every aspect of Sharia, as in the case of what happened in Muslim countries when Islamists gain power? Or does it mean *“inscribing Islam in the institutional ensemble of the organisations, practices and values of a state”* as proposed by Sayyid (2014, p.107)? This debate and discourse is still going on today. In addressing this lacuna, Tibi (1998, p.xi) who described this group as Islamic fundamentalists, asserted that,

*“The movement lacks the capabilities and resources needed for broad implementation of their concept, but their vision is not simply rhetoric, they are already able to launch considerable disorder”.*

For instance, Bassam claimed that this radical idea had contributed to the birth of jihadist militant group and movement such as ISIS under the leadership of Abū Bakar al-Baghdādī who called for *jihād* on Muslims to build an Islamic State in Iraq and Syria.

On the other hand, one of the most problematic points regarding this idea, is that the opponents of this group advocate a restoration of the ‘traditional’ Sharia as described by An-Naim (1990). For example, Sayyid Quṭb employs the same classification of the states as classical scholars do; *dār al-Islām* and *dār al- ḥarb*. In his book, *Ma’ālim fī al-Ṭarīq*, he mentioned that,

*“There is only one place on earth which can be called the home of Islam (Dar-ul-Islam), and it is that place where the Islamic state is established and the Shari’ah is the authority and Allah's limits are observed, and where all the Muslims administer the affairs of the state with mutual consultation. The rest of the world is the home of hostility (Dar-ul-Harb).”*

This is also the case with al-Mawdūdī when he classified citizens of a country according to their beliefs and disbeliefs, hence implying unequal rights between them. This view has been criticised by many contemporary scholars suggesting that this binary concept need to be revisited in the light of the modern world (al-Qaraḍāwī, 2009; al-'Awwā', 2006a; Abū Zahrah 1995).

Another issue regarding this idea is that it challenges and undermines the secular order of the body politic and aims to replace it by the divine (Tibi, 1998). One striking aspect of the call for the reintroduction of Sharia is that it be done within the framework of a non-Islamic legislative and judicial system. This is the main reason why the opponents of the idea object to the formal implementation of Sharia, arguing that the Islamic State and the modern state are fundamentally incompatible. Historically, the nation state was initially a European institute, formulated in the early of nineteenth century on which the once exclusively European system was based (Tibi 1998; Hallaq, 2013). As Hallaq (2014) contended,

*“The methodological and substantive pluralism of the Islamic legal tradition, along with its core internal logics, developed outside the context of the modern state and that these constitutive features cannot be sustained under the legal monism that is part and parcel of contemporary statecraft”.*

More importantly, An-Naim is against the idea of enacting Sharia as a public law. He argued, *“Sharia principles cannot be enacted and enforced by the state as public law and public policy solely on the ground that they are believed to be part of the Sharia”.* The reason behind this argument is quite logical: in order to *“facilitate the possibility of religious piety out of honest conviction.”* He also proposed a secular state, not a secular society. He further clarifies that a secular state means a state which is neutral with regard to religion. An-Naim’s observation that the state is made of political and not religious institutions was in line with ‘Alī ‘Abd al-Rāziq’s assertion in early 1925 in his controversial book, *al-Islām wa al-Uṣūl al-Ḥukm* (Islam and the Foundation of the Government)<sup>24</sup>. In this seminal book, he argued that the

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<sup>24</sup> Because of this book, ‘Alī ‘Abd al-Rāziq was dismissed from al-Azhar.



Prophet is only a messenger, not a ruler, he preaches Islam as a religion, not a state, and the caliphate is not made up of Islamic dogma ('Abd al-Rāziq, 2012). This assertion was supported by some of scholars such as Faraj Foda and Fawzī al-Najjār. Foda who also shares the same view as 'Abd al-Rāziq, asserted that the caliphate is a worldly and not a religious affair, a political and not a divine institution. In his book, al- Najjār he argues that,

*“We do not believe that Muhammad came to establish a kingdom or a state. He was simply a Prophet and messenger to all mankind.”*

Both of them contended that the relationship between religion and politics during the early period of Islam is a historical coincidence rather than a constitutive part of Islamic religious belief. In 1991, the same assertion emerged again. Abdel Wahab El-Affendi, a Sudanese wrote a book, “Who needs an Islamic State?” sharing the same central argument that Islam does not have a certain political system (El-Affendi, 2008).

The debate between the so-called secularist and fundamentalist camps was polarised to some extent, leading to accusations and charges against each other. While the fundamentalists labeled the secularists as *kufur*, apostates and trying to please the west, the secularist in turn accused them of being backward and conservative (Fawzī al-Najjār, 1996). For instance, al-Ghazālī, a leading theologian declared, *“as separation of religion and state, secularism is unadulterated kufr”*.<sup>25</sup> This kind of fatwa leads to a more extreme outcome, some of the the Muslim secularists were vilified, threatened, some life in exile and separated from their wives, as in the case of Nasr Hamid, and some were assassinated, such as Faraj Foda. The clash between the opponents and the proponents of Sharia became so intense that there was no room for intellectual discussion. However, with the emergence of a third group, which can be described as the moderates, there was hope for bridging the gap between both groups. Although their voices often went

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<sup>25</sup> As al-Ghazālī claimed, a secularist must be punished to death as they represented danger to the society and it was the duty of the government to put him into death.

unheard, and they were sometimes ostracised, their ideas are slowly emerging.

Among the so-called moderates are Kamali, Al-Qaraḏāwī and Abou El Fadl. Most of the moderates hold the view that Sharia should be implemented, but not as it was before, rather it should be applied in a renewed form. They also suggest different approaches and methodologies on how to make Sharia workable in a modern framework. The moderates take a centralised position by not blindly accepting the ideas of the proponents, nor hostilely rejecting those of the opponents, but they critically engage and synthesise arguments from both groups. For instance, they agree with the secularists that there are certain things that Muslims can adopt from the West (for example democracy) as long as it does not undermine the basic principles of Islam. On the other hand, they believe that Muslims do not need to adopt secularism in order to progress. They also have a moderate position in regard to the secularist. They do not regard the secularist as *kufur* but as misguided, even though they may be well intentioned<sup>26</sup>.

### **3.4 THE IMPETUS BEHIND THE APPLICATION OF ISLAMIC LAW IN MODERN NATION STATES**

One pertinent issue that needs to be explored is the impetus behind the call for a full implementation of Sharia in predominantly Muslim countries. Countless terms have been used interchangeably with the growth of Islamic consciousness among Muslims worldwide: Islamic resurgence, Islamic renewal, Islamic fundamentalism, political Islam, or Islamism. Scholars suggested that there are at least three perspectives on how to view this phenomenon.

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<sup>26</sup> As Muḥammad ‘Imārah, an eminent scholar, he classifies the secularist into two categories, the extremist; who reject religion altogether and the moderates; who believe in God but they advocate a separation of religion and state.

## I. Reassertion of the religious and culture identity of Muslims

Collectively, the majority of Muslims view that to uphold the divine law in this world is a supreme duty towards their god; to actualise his imperative in the world. Muslims claim that Islam is not merely a theological system, but a way of life that contains a number of ethical and moral standards as well as legal norms implemented in life, in society and state. H.A.R. Gibb, for instance, said: "*Islam is indeed much more than a system of theology. It is a complete civilisation,*" while Edward Mortimer says: "*Islam, we are told, is not mere religion: it is a way of life, a model of society, a culture, a civilization.*" (Masykuri Abdillah, n.d).

To understand more deeply this perspective, we can look back at the history that shaped it. During the era of the Prophet until the fall of the Ottoman Empire, Islam was a unified force in the lives of a Muslims. These Islamic doctrines were implemented in personal, social, and political lives, from the prophetic period until the coming of Western colonialism. We can verify that this is true if we delve into the jurists' books and see that there is no separation between private and public law. Also, during the pre-modern era, religion played a substantial role in defining the identity and loyalty of one person in the state. Hence, one can make sense of why the death penalty is prescribed for apostasy in Islamic law, if they understand the historical context of how religion is intertwined with identity and loyalty during that time.

Due to colonialism in Muslim countries, most Islamic law has been sidelined to have only personal status. During the twentieth century, Muslims began to assert their religious and cultural identity to re-establish Islamic Law. Scholars suggest this phenomenon can be seen as the Muslim collective's right to self determination<sup>27</sup>.

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<sup>27</sup> According to Encyclopaedia of American Policy (2002), the principle of self-determination refers to the right of a people to determine its own political destiny. At the close of the twentieth century, it could mean the right of people to choose their form of government within existing borders or by

This self determination includes why and how they are governed and their rights to determine their own proper scope on penal law. However, as An-Naim (2008) argues, Muslim peoples are entitled to exercise this right as long as they do not violate the legitimate right of self-determination of individuals and groups both within and outside the Muslim communities.

## **II. Political expression**

The second explanation that can describe this event is this call for a formal application of Sharia as a political expression, linked either to legitimise an established government or the religious opposition (Salim, 2008). As mentioned earlier, some political actors realised how powerful religion, in this case Islam, can be as a unifying and motivating force. Each of the parties compete to show how faithful they are to the religion either to stay in power. For example, in the late 1970s in Egypt, Sadat attempted to use Islam as a means of gaining much-needed political and popular support. The Sadat government began to fund the construction of new mosques, utilised Islamic rhetoric in their public statements, and promoted the formation of Islamic student organisations in schools and universities nationwide (Othman, 2006)

## **III. Islamic Resurgence**

With global Islamic resurgence since the 1970s and 1980s throughout the Muslim world, most governments in most Muslim countries – whether modern or secular-oriented – have to responded to the demands of their Muslim constituencies. (Othman, 2006). The first examples of an Islamic resurgence in the 20th century can be traced to the Society of the Islamic Brotherhood, founded in Egypt in 1928 (Black 2011, 307–308). Some years later, in 1941, al-Mawdūdī established the Jamaat al-Islami (JI) movement in what was then British India (Black 2011, 307–308). These

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achieving independence from a colonial power.

organisations differed in many respects, but they had a common concern with bringing Islam more into everyday life.

### **3.5 PROBLEMS AND CRITICISMS ON THE APPLICATION OF ISLAMIC CRIMINAL LAW IN MODERN TIME**

The reestablishment of Islamic criminal law in Muslim countries is considered the most contentious area over the application of Sharia (An-Naim, 1990). One of the central debate in regard to the application of ICL in Muslim countries is the barbarity punishments prescribed for the *ḥadd* offences. These punishments, which include hand amputation, crucifixion, and stoning to death are viewed as extremely harsh by today's universal human rights standards. Ironically, most of the Muslim majority countries that applied ICL are signatories of the International Covenant on Civil and Political Rights (ICCPR), Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention Against Torture and Other Cruel, and Inhumane and Degradation Treatment or Punishment (CAT) (Peters, 2005).

Substantively, Islamic criminal law violates the human rights standard in several areas. First, the harsh punishment prescribed by the Islamic penal code such as stoning to death, crucifixion, and amputating limbs, is contrary to Article 1 of CAT, the prohibition against cruel, inhuman and degrading treatment or punishment (al-Fitri, 2009). Additionally, most of this code also prescribes the death penalty for apostasy which is contrary to Article 7 in ICCPR, prohibition against death penalty and the basic right provided in Universal Declaration of Human Right that protect the religious liberty of every human being (Ogbu, 2005) . In regard's to CEDAW, all of these codes, contains discriminatory provisions based on gender by denying women testimony for *ḥudūd* cases and only valuing the testimony of a woman in court as equal to half that of a man, in some cases.

Violation and contradiction of human rights also can be traced in regard to its application. The application of Islamic criminal law is claimed to cause injustice to women. In order to examine to what extent this claim is true, the following part provides an illustration of the most prominent cases in regard's to women in Muslim countries:

I. Safia Bibi, Pakistan

Safia Bibi, a 21 years old girl, severely myopic, worked as a domestic worker and was raped by her landlord's son, Maqsood Ahmad in Sahiwal, 18 kilometres away from the Punjab, Capital of Lahore. Later, she became pregnant and gave birth to a child who died shortly after its birth. Her father lodged a complaint to charge her with *zinā*. The case was brought to the court against both of them - Safia for fornication and Maqsood for rape. Due to insufficient evidence to charge Maqsood with rape, he was acquitted while Safia's pregnancy was treated as evidence of fornication. She was sentenced to 3 years in prison, 15 lashes, and a fine of 1,000 rupees. Due to the international and public outrage, the case was brought to the Federal Sharia court. The Federal court ruled that the trial court judge had erred on the ground that, "If an unmarried woman delivering a child, pleaded that the birth was a result of an act of rape, she cannot be punished". In the end, the sentence was set aside by the Federal Sharia Court (Kennedy, 1991).

II. Amina Lawal, Katsina State, Northern Nigeria

In March 2002, Amina Lawal and Yahaya Mohammed were prosecuted before the lower Sharia court in Bakori, Katsina State, Northern Nigeria on a charge of adultery. While the co-accused, Yahya was set free due to the insufficient evidence to convict him of adultery, and that he swore on the Holy Qur'an, the trial court sentenced Amina to be stoned to death, based on an alleged confession and a pregnancy out of wedlock. This case drew international attention and that of the human rights organisations. A Million people signed the 'Save Amina Nawal' petition and thousands of people

wrote letters and made phone call in support for her (Harvard Law Review, 2004).

As the Sharia Penal Code Law of Katsina State permits appeal to the Upper Sharia Court, in August 2002, Amina's lawyer, Hauwa Ibrahim appealed the judgement to the Sharia higher court Funtua. However, the appeal was rejected. Subsequently, the second appeal to the *Syariah* Appeal Court was put in motion and Katsina State Sharia Court of Appeal overturned the sentence. The judges argued that the conviction violated the Islamic law on the ground that Amina did not receive proper legal defence, her confession was made under duress, hence invalid, and pregnancy alone was not sufficient to convict someone of adultery, and only one, instead of three judges was present during the trial court. Finally, the court dismissed all the charges against Amina (Hauwa, 2004).

### III. Safia Ishaq Mohammed Issa, Sudan

Safia Ishaq is a member of a youth group called Girifina (a Sudanese non-violent resistance movement) and the Youth Forum for Social Peace. In 2011, she participated in a demonstration at the University of Khartoum. Due to her participation in the demonstration and her affiliation with the aforementioned movement, she was arrested. In custody, she was gang raped, verbally abused and beaten by members of the Sudanese National Intelligence and Security Services (NISS). Safiya reported the rape at the local police station and she began to circulate her story on YouTube. Although the case was brought to the authorities, there was no proper investigation made by them (Tønnessen, 2014). Her ordeal received wide attention and support from human rights activists and journalists. However, due to the politicisation of this case, one of the journalists who published an article calling for an independent investigation for this case, was charged with the publication of false news and defamation in May 2011 (Human

Rights Watch, 2013). Due to fear, Safiyya and her family were forced to flee the country.

IV. Safiyya Husaini, Sokoto State, Northern Nigeria

Safiyya Hussaini, is a 35 years old divorcee from Tungar Tudu, a poor village 20 miles from Sokoto. In 2001, she was convicted by the Sharia court of committing adultery and was sentenced to stoning to death based on alleged confession and pregnancy out of wedlock. Initially, both of them, Safiyya and Abū Bakr confessed to having sex. However, in court, Abu Bakar retracted his confession. Therefore, Safiyya changed her statement and alleged that she was raped by Yakubu Abu Bakar. Due to insufficient evidence, Abu Bakar was acquitted while Safiyya was convicted. This judgement was widely condemned and petition to release her was launched. Safiyya and her lawyer, Hawra Ibrahim made an appeal to the judgement. Safiyya changed her statement in defence alleging that her former husband, Yusuf was the father of the child and her initial confession was made without legal representation. Finally, on March 2002, won her appeal and the case was dismissed. The Appeal Court ruled that the adultery provision cannot be used against Safiyya as the adultery had taken place before the Sharia penal code came into effect (Kalu, 2003).

V. Qatif girl, Saudi Arabia

In mid-2006, a Shia young woman from Qatif, Eastern Province of Saudi Arabia was abducted, and gang raped by seven men. The incident began when the Qatif girl met a man, to retrieve a photo of herself, whom she had a relationship previously. Fearing that the picture would be used to blackmail her, as her wedding was approaching, as part of the deal she agreed to meet the man inside a car at a nearby market. En route to her house, both of them were abducted and brought to a secluded place where she was raped repetitively by the seven men.



In seeking for justice, the Qatif girl brought the case to the court. While the seven men were given varying sentences from 80 to 1000 lashes and imprisonment up to ten years for four of them, what was most striking was the Qatif girl and the man were also sentenced 90 lashes each for being alone with a man/woman who is not a relative. Unsatisfied with the verdict, she appealed the case. Although the court increased the sentences for the perpetrators to two and nine years imprisonment each, again the appeal court issued an outrageous verdict to the victims; their sentences were also doubled to 200 lashes and six months imprisonment. This verdict provoked international outcry and finally in December 2007, King 'Abdullah intervened and issued a royal pardon to both of the victims.

The main issue behind these cases are that most Muslim countries that introduced ICL treated rape under the provision of *zinā*. In some cases, not only the victim failed to seek justice, some eventually being tried and executed under the provision of *zinā* whereas the other party; co-accused is acquitted due to insufficient evidence. In all cases, justice prevailed to the victims only after case received international intervention and pressure from the public, and human rights organisations.

A further issue regarding the application of ICL, particularly in Saudi Arabia, is that Sharia law is not codified in its statutes and codes (Eijk, 2010). In regard to criminal justice, the court relies on the judge's interpretation of the Sharia to determine which actions constitute crimes, and what the attendant punishment should be. As a result, the definitions of crimes and severity of punishment may vary much from case to case. However, the wide discretion of the judge may lead to abusive of power and inconsistencies of punishment, as illustrated in the case of Qatif girl.

It is also interesting to point out other interesting observation from these cases. As Kennedy (2013) highlighted, in some instances, these cases were exaggerated and contained falsehoods. For instance, in the case of Safia Bibi, some claimed that she

was 13 years old, some reported that she was raped repetitively by other family members of Maqsood, some claimed that she was given punishment. This example is also applicable to other cases where conflicting facts were observed throughout the reports.

Whether the claims that ICL brings injustice to women is somewhat unclear, what undoubtedly is clear is that the application of ICL discriminates against the lower socio-economic classes. For instance, in Pakistan, “those accused of *Hudūd* crimes are for the most part employed in semi-skilled, unskilled, or menial jobs. In 1979-1986, 42% of the males accused were cultivators; 17% common labourers; and most of the others were beggars, rickshaw drivers, fruit-sellers, or servants. Over 95% of the accused women were employed in the household. Of the accused, 75% dwelt in rural areas, and the overwhelming majority of the accused were illiterate. Conversely, very few middle-class individuals have been accused of *Hudūd* crimes—less than 2%.” (Kennedy, 1991).

As for due process, most of these countries failed to abide by international standards of fair trial and safeguards for defendants. Such cases were often held in secret and their proceedings were summary with no legal assistance or representation, there was no equality before the courts, lack of time and facilities for the preparation of the accused’s defence, and some were tortured for several days to make them confess and, so on (Al-Fitri 2009). In some cases, the law was reported to have been exploited and manipulated to criminalise political enemies and minority sectarian groups, such as Shia. For instance, in Saudi Arabia, there were a number of Shi’a activists accused of supporting, or taking part in demonstrations in the Eastern Province, or expressing views critical of the state, who were put on trial, and in some cases faced the death penalty following unfair trials (Amnesty International, 2018). This is due to the reluctance of the state to codify the law, allowing it to be in the hands solely of the judge, which facilitates the misuse of power over vulnerable minority groups.

Shifting back to the discussion on the perception of the barbarity of *hadd* punishments in a contemporary setting, it is interesting to bring to light the reasons behind Western revulsion of this type of punishment. One can only make sense of these 'harsh' punishments by appreciating and understanding the historical development of the criminal justice system during the pre-modern period. Historically, capital punishment and corporal punishment (inflicting some form of pain to the offender) had been used as a main means to punish wrongdoing in human society. For instance, in the Law of Rome, conviction for most offences was the death penalty. Among the forms of capital punishments used were: burning, clubbing to death, decapitation, and hanging to death (E. M. Peters, 1995). This type of punishment was also prevalent in Europe, during the seventeenth century, where different types of mutilations such as amputating hands, fingers, ears, tongues, burning with hot tongs, drawing and quartering were prevalent (Langbein, 1976). However, with the growth of humanitarian ideals during the Enlightenment, along with the Industrial Revolution had gradually led to the abandonment of corporal and capital punishment and replaced it with imprisonment. It was only by the late eighteenth and the early nineteenth century that prison came to be used as the principal means of punishment.

Another major historical change that needs to be understood is the nature of law enforcement during the pre-modern period. Prior to the nineteenth century, there were no public police forces as we know them today (Allen & Barzel, 2011). For instance, the emergence of an organised police force in Britain can be traced only as far back as the 1830s while in New York and Boston it was the 1840's. Prior to the nineteenth century, enforcement officials (with limited roles and function) were only found in capital cities. Due to the undeveloped ability to protect the order of the society at that time, severe punishment was needed as a means to deter members of society from committing crime.

Another reason that explained the Western revulsion at the application of ICL is related to the increasing social permissiveness in sexual matters. With the rise of

social movements that advocated sexual freedom during the 60's, this type of punishment, which criminalised sexuality, caused public uproar. The most cited example is the sexual revolution, which occurred in Europe and America during the 60's until 80's. This formed part of the social movements that challenged the traditional codes of behaviour relating to drugs, artistic freedom, and sexuality. As a result, premarital sex became widely accepted, contraception and pill became normalised, and nudity, pornography, homosexuality and the legalisation of abortion all followed suit.

Based from the foregoing issues and controversies illustrated above, in 2005, Tariq Ramadan, a professor of Contemporary Islamic Studies in Oxford, proposed a moratorium (Ramadan, 2005). In his statement, Ramadan said,

*"We launch today a call for an immediate international moratorium on corporal punishment, stoning and the death penalty in all Muslim majority countries."*

A notable feature from Ramadan's statement is that he did not provide any evidence or specific reference to support his claim and therefore received outraged criticism from Muslim intellectuals. Responding to Ramadan's call, Sidduqi suggest that freezing a law because of its misapplication would not solve the problem. *"Ramadan should have called for a better and more comprehensive application of the Sharia. He should have criticised more openly and clearly the misapplication of the Ḥudūd in some Muslim countries"*. In sum, most of the critics query two points. First, was it appropriate to raise the issue of Ḥudūd when it is hardly in use anywhere in Muslim countries. For instance, in Northern Nigeria, a research project led by Nigeria Research Network reported that *"serious punishments such as amputations and stoning to death were rarely being imposed-and where they were imposed, were not being executed."* Secondly, some of the critics doubt the lawfulness of Ramadan's call and accused him of trying to please the West (Abou El Fadl, 2014).

More positively, Ramadan's call for a moratorium is a wake-up call for Muslim scholars and intellectuals to reflect deeply upon several points that Ramadan

advocated in his moratorium. First it is important to realise that whereas the *Hudūd* laws are based on scriptural sources which are sacred and immutable, these laws when codified are the product of human beings, who are fallible and prone to making mistakes. Hence, change and improvements are needed, and objective criticisms are always welcome. However, the discourse on Sharia or *Hudūd*, particularly in modern times has always been polarised, politicised, and full of hostility, to the point of where rational discourse is no longer possible (Bassioni 1997, Berger, 2016). Secondly, one must acknowledge that Sharia is not solely about *Hudūd*, and this has to be taken into account. Sadly, in some countries, *Hudūd* application often dealt separately, without consideration given to the whole of Sharia (social, governmental, economical, judicial, educational, ethical, moral, spiritual) which eventually resulted in a backlash which harmed the image of Islam (Sidahmad 1995). Thirdly, it is important to admit to the fact that there are injustices in the application of *Hudūd* in certain countries towards women and the poor, either because of the system or the literal way it is carried out.

## **CONCLUSION**

In this chapter, I attempt to provide a comprehensive view of the modern scholars' discourse on the application of Sharia and Islamic criminal law within a nation state framework. In the first part of the chapter, I illustrated that the pre-modern Sharia legal system is based on legal pluralism, built up from two realms, the *fiqh* and the *siyāsah*, which both operate in parallel and sometimes interdependently with the state. The *siyāsah* authority governs public affairs based on the public interest of the people, while the *fiqh* authority is responsible for articulating the law.

Subsequently, in the next part of the chapter, I illustrated how this pre-modern Sharia based legal system was dismantled with the imposition of a nation state framework in the Muslim world, after the age of European colonialism. The introduction of a nation state framework which concentrates on centralisation of state power brought along other legal, administration and institution apparatus

such as the introduction of European legal codes and courts, mass movement toward codification, the centralisation of *waqf* revenues, and the introduction of a western educational system. All of this contributed to the deterioration of Islamic legal system and eventually led to a crisis of authority in the Muslim world.

In the next part, I presented the various views of scholars and Muslim thinkers regarding the application of Islamic law in a modern nation state framework. The proponents of the reestablishment of Islamic law are mainly represented and dominated by a broad spectrum of political and religious movements known as Islamists. Conversely, the opponents of the reestablishment of Islamic law are represented by multiple faces and factions, mainly from those who received western education and legal training, human rights activist and advocates. The strong contrasting views between both parties has led to accusations and leaves no room for intellectual discussion.

In the final part of the chapter, I provided the problems and criticisms on the application of Islamic criminal law in Muslim countries. Throughout the discussion, it is important to acknowledge that some of the problems are real and need attention, such as the injustice towards the lower classes of society, the exploitation of ICL by the political rulers, and the lack of due process throughout its application. This part also identified the reasons behind Western revulsion of the application of ICL in Muslim countries, which has infrequently been highlighted in previous studies. The major change in criminal justice from corporal and capital punishment to prison centred approach, and the rise of a permissive society, which increasingly liberalises social norms, especially with regard to sexual freedom, have contributed to the confrontation on the application of ICL in Muslim countries.

The questions emerging from the discussion in this chapter are, did European imperialism in Malaysia have the same impact as in other Muslim countries? How did European imperialism contribute to shaping the current Malaysian legal system,

and does it have an impact on the position of Islamic law? This discussion will be explored in the next chapter.

## CHAPTER 4

### THE HISTORICAL BACKGROUND OF THE MALAYSIAN LEGAL SYSTEM: THE IMPACT OF EUROPEAN IMPERIALISM ON ISLAMIC LAW

#### INTRODUCTION

In the previous chapter, I illustrate the global impact of European Imperialism on the Muslim world. In this chapter, I will attempt to illustrate the impact of European Imperialism specific to the Malaysian legal system, with particular attention given to the position of Islamic law. The purpose of this discussion is to examine the feasibility of *Hudūd* law within the Malaysian legal framework. Additionally, it helps the reader to understand the context and the motivation of the reestablishment of ICL by the Malay Muslims who constitute the largest population in Malaysia. This chapter begins by providing a detailed description on the historical background of the early legal system in Malaysia. The discussion is divided into three phases, the position of Islamic law prior the advent of any foreign power in Malaya followed by the position of Islamic law during and after the colonial era.

#### 4.1 HISTORICAL BACKGROUND OF EARLY LEGAL SYSTEMS IN MALAYSIA

*“There can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it”*

(RJ Wilkinson, 1971)

One can only imagine the constant struggle of the Malay Muslims, who constitute the largest population in Malaysia, and the reasons why they want to re-establish Islamic law by grasping at the historical antecedent of the early legal system in Malaysia (previously known as Malaya). According to historical reports, after the



arrival of Islam in Malaya, Islamic law, together with Malay customary laws were the main legal references that existed in the history of Malaya (Ahmad Ibrahim, 1970). However, due to European intrusion, particularly British, both Islamic Law and customary law were gradually reduced in importance and significance, and finally they were marginalised and used only to govern personal matters. To explain this further, this discussion in this subtopic will be divided into two periods; the position of Islamic law before colonial era and the position of Islamic Law during the colonial era in Malaya.

#### **4.1.1 POSITION OF ISLAMIC LAW PRIOR COLONIAL ERA**

According to historical reports, the Malayan Peninsular is inhabited by Malay aboriginal tribes which can be distinguished into three main groups: the Negritos, collectively known as Semang; the Sakai; and the Proto-Malays, also known as Jakun (RJ Wilkinson, 1908). In regard to the applicable laws during this period, these aboriginal tribes enforced various native customary laws (*Undang-undang adat Bumiputera*), along with Malay customary law (*Undang-undang adat Melayu*). These were rudimentary and consisted of customs and practices that came from tradition, which was eventually elevated to the status of law (Ahmad Ibrahim, n.d.). Although ample studies have been done to look at these aboriginal tribes, no special study has ever been dedicated to explore and analyse their customary law structures. However, it is believed that as other primitive societies, all laws are based on the principle of tribal interest and self-preservation (P. P. Buss-Tjen, 1958).

During the 2<sup>nd</sup> and 3<sup>rd</sup> centuries, small Malay Kingdoms began to emerge on the Malayan Peninsular. Due to the strategic geographical location, the peninsular has been part of an important maritime route for traders and priests, mainly from China and India. Apart from trade, they also brought with them their Hindu and Mahayana Buddhism religions, culture and arts. Later on, the influence of Hindu-Buddhism was later reinforced through the establishment of relationships with

other Hindu-Buddhism Empires during the 7<sup>th</sup> century. These Malay Kingdoms came under the loose control of the Malay Buddhist Empire of Srivijaya in Sumatra, and the Hindu Empire of Majapahit in Java. As a result, the Malays were largely *Hindu-ised*, and over the centuries, profound Hindu-Buddhist influence began to be adopted, with modification by the Malays. This can be seen in ruling, administrative, social, cultural as well as legal institutions (P.Daniels, 2017; Joned & Ibrahim, 2015).

At the end of 13<sup>th</sup> century (other opinions say that Islam came as early as 7<sup>th</sup> or 8<sup>th</sup> century), a new religion of Islam found its way to Malaya. The spread of Islam in Malaya was carried out largely through trading activities, intermarriages with royals and the locals, the rivalry with the Portuguese and *sufism* activities (Syed Farid, 1985). In regard to the theory of the origin of Islam, Western scholars such as Snouck Hurgronje, R.A Kern, Schrieke, GH Bosquet, R.O. Winstedt asserted that Islam arrived in and spread to Malaya from India through trading activities. This view is mainly based from the discovery of a tombstone in Pasai and Gresik which are similar to those found in Cambay, Gujerat (Drewes, 1968; Fatimi, 1963; Hamid, 1982). Conversely, scholars such as al-Attas (1969), claimed that Islam was brought by the Arabs. To support this claim, al-Attas presented ample evidences from the Malay historiography classics such as *Hikayat Raja Pasai* and *Sulalatus-Salatin* which contain the names of the rulers during that time, locations and names of individuals who were involved in preaching Islam. While the first theory is built on the basis of supposition, the second theory is based on an empirical-logical method, supported by evidences from oral and written reports made by the native of the region (Kamaruzaman, Omar, & Sidik, 2016). Thus, it is argued that the second view is considered more reliable compared to the first view; the advent of Islam in Malaya was brought through Arab traders who either came direct from Arabia or through India or China.

With respect to the *madhhab* followed by the locals, most of them belong to the *Shāfi'ī madhhab* due to the fact that large number of Arab preachers who came to

Malaya being *Shāfi'ī* adherents. This fact was highlighted in *Hikayat of Pasai* and *Hikayat Aceh* which both mention the name of Arab preachers who came to this region were the adherent of the *Shāfi'ī madhhab* (Arnold, 1913). To disseminate this in more detail, in the 13<sup>th</sup> century, a scholar from Mecca named Sheikh Ismā'īl al-Ṣiddīq went to Pasai and converted the local ruler, Merah Silu to Islam and changed his name to Sultan Malik Salih. Pasai was believed to have become the first place in the region to receive Islam followed by other areas (Abdullah, 1990; Mahmood Zuhdi, 2007). Apart from Sheikh Ismā'īl al-Ṣiddīq, there were also other *Shāfi'ī* scholars who went to Pasai. According to Ibn Batutah traveller's account, during his visit to Pasai, he met two *Shāfi'ī* scholars, Amir Ibn Sa'id al-Shirāzī and Taj al-Dīn al-Iṣfahānī, both from Persia (Ibn Batutah 2003). This is also the case in other places in Malaya where Islam was disseminated through the Arab-*Shāfi'ī* preachers such as Sayyid Abdul Aziz from Arabia in Malacca and the descendant of the Syed from Hadramaut, Yemen in Pahang.

In Pasai, after the conversion of the Sultan, it became the centre of Islamic teaching in the Malay Archipelago. Apart from preaching the oneness of God (*tawḥīd*), concept of brotherhood, equality, eliminating the caste system and the simplicity of Islam, the scholars also taught the *sultans* and the locals matters on *taṣawwuf* and *Shāfi'ī fiqh*. During that time, *Shāfi'ī* books were brought to Malaya and used as a main reference and text books. Among the *Shāfi'ī* books discovered in the Malay Archipelago during that time is *Minhāj al-Ṭālibīn*, by al-Nawawī. This book was brought to Pasai during the 13<sup>th</sup> century. Other books are *al-Muhadhab* written by al-Shirāzī which had been used and taught in Malacca, *Fath al-Wahhāb* written by Abū Zakariyā al-Anṣārī and *Fath al-Mu'īn* written by Zayn al-Dīn al-Malibari, a *Shāfi'ī* scholar from Malabar who was a pupil of Ibn Hajar al-Haytamī (Abdullah, 1990). Additionally, the scholars also travelled to neighbouring places to preach Islam. For instance, Syeikh Said Sari went to Pattani and finally converted the local ruler, Tu Nakpa to Islam and changed his name to Sultan Islam Zillu Allah Fi al-'Alam (A.Teeuw & D.K Wyatt 1970).

The position of *Shāfi'ī madhhab* later became reinforced when some of the local scholars who were legally trained by *Shāfi'ī madhhab* scholars were appointed as *kadi*, *muftī* and government advisors to the Sultan during that time. As a result, the *Shāfi'ī* teaching began to have influence on administration and judicial matters. For instance, Islamic law mainly from *Shāfi'ī madhhab* began to be enacted as written code of law. In 1444, under the reign of Sultan Muhammad Shah, two written codes; the *Hukum Kanun Melaka* and *Undang-undang Laut Melaka* were established. The compilation of the codes was finally completed during the reign of Sultan Muzaffar Shah (Ahmad Ibrahim, 1988; Fang, 1976). The *Hukum Kanun Melaka* consists of 44 chapters, touches matter upon the responsibilities of the ruler, penalties for civil and criminal crimes and family laws. Whereas, *Undang-undang Laut Melaka* consists of 22 chapters, deals specifically with maritime law and regulation, such as the role and responsibilities of the ships' crew, penalties for offences committed on board, and regulations on trade and so forth. Alongside the codification, *mahkamah balai* was established to administer justice. During this period, the Sultan himself acted as a judge with the help of the *Kadi* who was responsible for advising the Sultan in matters related to *hukum syarak*. In most occasions, the *Kadi* referred to *Shāfi'ī* books as a basis for judgement in the court (Jasni Sulong, 2008).

In regard to *Hukum Kanun Melaka*<sup>28</sup>, a substantial amount of Islamic influence can be seen in the chapter on family law, such as the rules pertaining the *walī*, hierarchy of *walī* (Chapter 25), rules pertaining marriage contract (Chapter 25.2), rules pertaining witnesses in marriage contract (Chapter 26), rules pertaining *ṭalāq* (divorce) and *'iddah* (Chapter 28). In chapter contract law, it contains rules pertaining prohibition of *ribā*, rules and regulations of contract (Chapter 30), rules pertaining debt (Chapter 32), rules pertaining company law (Chapter 33).

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<sup>28</sup> The compilation of *Hukum Kanun Melaka* was done through a period of time and has resulted in multiple versions and undergone a series of developments. This study refers to the text edited by Liaw Yock Fang.

Whereas in the chapter of criminal law, it provided provision such as the rules governing apostasy (chapter 36), Rules governing *qiṣās* (Chapter 39), Rules relating to *zinā* (Chapter 40), Rules relating to *qadhf* (Chapter 41) and Rules relating to alcoholic drinks (Chapter 42).

In 1511, when Malacca fell under the rule of the Portuguese, the Malacca Sultanate fled to Johor. However, the process of assimilation and adaptation between the Malay customary Law and Islamic Law was continued and expanded into other Malay states. *The Hukum Kanun Melaka* was responsible for the growth of other written codes in other Malay States such as *Undang-undang Johor*, *Undang-undang Kedah*, *Undang-undang Pahang*, *Undang-undang Sembilan Puluh Sembilan Perak*, and *Undang-undang Sungai Ujung*. As these sultanates emerged relatively late compared to the Malacca Sultanate, a greater amount of Islamic influence can be traced in their state laws as the process of assimilation into traditional law was substantially longer. For instance, *Undang-undang Johor* which comprises of 19 sections including criminal, civil, family, evidential and procedural laws, were largely based from *Hukum Kanun Melaka*. This is evident, as the content and the organisation were similar as compared to the *Hukum Kanun Melaka*. This feature was highlighted by Hooker (1970),

*“Its contents are much the same in the Undang-undang Kerajaan and Malacca Digest”*

In general, *Undang-undang Johor* are shorter than the *Hukum Kanun Melaka*. However, it included all the sections contained in the *Hukum Kanun Melaka*. One instance to highlight the influence of Islam in *Undang-undang Johor* can be seen in the ruling of *qiṣās*,

*“Adapun pada hukum Allah yang membunuh itu dibunuh hukumnya kerana Allahtaala hak segala manusia itu amat besar bagi negeri ini seperti firman Allah taala di dalam Al Qur’an ‘Fala Taqtulu al-Nafsa allati harrama Allah illa bil haq’ ertinya: jangan kamu membunuh segala nyawa yang diharamkan Allah melainkan dengan sebenar-benarnya juga itulah qanun namanya”*

*Translation: “According to God’s Law, anyone who kills must be put to death” as Allah says in the Quran ‘Fala Taqtulu al-Nafsa allati harrama Allah illa bil haq’*

*which means: “do not kill any life prohibited by God except for the right reasons”*

The influence of *Hukum Kanun Melaka* can also be seen in *Undang-undang Pahang*. Under the reign of Sultan Abd Ghafur, *Undang-undang Pahang* was codified, largely based on *Undang-undang Melaka*. It comprises of 45 sections including the matters of criminal, civil, family law, procedural and evidential (keterangan), and jihad. In the chapter on criminal law, it contains provisions based on Islamic law such as ruling dealing with *qīṣās* (section 46 and 47), unlawful intercourse (section 49), sodomy (section 50), theft (section 53), robbery (section 54) and apostasy (section 62). The amount of Islamic influence is greater as compared to *Hukum Kanun Melaka*. Section 49:

*“Peri pada menyatakan hukum zinā itu dua perkara. Pertama zinā muḥṣan namanya, laki-laki atau perempuan yang sudah bersuami dengan nikah yang sah. Dan tiada muḥṣan, laki-laki belum beristeri perempuan belum bersuami, iaitu laki-laki atau perempuan yang belum merasai nikah. Bermula yang muhsin itu hukumnya direjam dengan batu dan ditanamkan hingga pinggang dan pada satu riwayat sehingga ke leher. Sabda nabi s.a.w: La yadkhulu jannata waladu zinā, ertinya tidak masuk syurga ana zinā. Bermula tiada muḥṣan itu, hukumnya dipalu seratus, maka dibuangkan negeri itu setahun lamanya”*

*Translation: “Legal ruling stipulates two categories of punishments for the offence of Zina. The first, Zina muḥṣan for lawfully married men or women and the second, Ghayr muḥṣan for unmarried men or women. The punishment for the first is stoning with part of the body, up to the waist, buried under the ground (some narration state up to the neck) The punishment for the second is 100 floggings and banishment for a year.”*

Another instance can also be seen in *Undang-undang Kedah* and *Undang-undang Sembilan Puluh Sembilan Perak*. In the preamble of the text, *Undang-undang Kedah*, it proclaims that the sources of the law are based on the *Kitab Allah*, *akal* and *naqal*. This code of law has 40 sections, including matters on criminal, matrimonial, transaction, and land laws. The provisions regarding *Ḥudūd*, *qīṣās*, takzir and diyat are included in chapter 3,5,7,8, 9 and 12. The latter, *undang-undang Sembilan Puluh Sembilan Perak* also contains provisions regarding *Ḥudūd* offences such as theft, *qīṣās*, *zinā* in chapter 1, 2, 3, 4, 5, 6, 37, 50, 52, 56, 67, 68, 86 and 91.

All of the above instances indicate the significant role of Islam on the existing laws during the early periods. The process of assimilation between the Malay traditional laws with Islamic law were in place and ongoing until the beginning of European intrusions into Malaya and resulted in the interruption of the process (Ahmad Ibrahim, 1988). Undoubtedly, the remarks made by RJ Wilkinson at the beginning of this section, and acknowledgement by other early British historians such as William Roff (n.d.) and Alfred P. Rubin (1974) portrayed the significant influence of Islam over the existing law, prior to the advent of European colonial power in Malaya. However, it is also important to highlight that all of the codes were not purely Islamic law, but an amalgamation of Malay customary law and Islamic law<sup>29</sup>. One instance that shows that these laws are a combination between both is that customary law and Islamic law can be seen in some chapters of the law relating to punishment. In this chapter, it prescribes both penalties, with priority given to the traditional law, followed by various alternatives penalties according to '*hukum Allah*'. Thus, it can be understood that all these codes originated as Malay customary law, which was later infused with Islamic law, although not in its entirety (Nasohah, 2004). This fact is important as it shows the high degree of adaptability of Islamic law the local customs, which makes it easily to assimilate. What is more important is, any effort to reintroduce Islamic law must take into account this fact. Efforts on the reestablishment of Islamic law in Malaysia, which calls for a restoration based on the classical jurists' tradition denies the fact that it was never applied purely during the pre-colonial era.

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<sup>29</sup> In regards to Islamic law, it is mainly a summarised extraction from *Shafi'i* school of law (Hooker, 1984; Saedon, 1988)

#### 4.1.2 POSITION OF ISLAMIC LAW DURING THE COLONIAL ERA



**Diagram 4.1.2 European Power in Malaya**

Malaya fell under the rule of foreign powers, the Portuguese, Dutch, and the British, for about 500 years. The impact of colonialism on the existing legal system in Malaya was varied, due to the different administration colonial policies and political interests of the colonial powers (Joned & Ibrahim, 1995). The Portuguese and Dutch colonial rule made relatively no significant impact to the existing legal administration in the Malay states, as both of them were only interested in trade and not in political power (Hasan, 1996; J. N. Waler, 1808). However, this is not the case when the British started to exert their grip on Malaya. This marked the beginning of foreign intervention on the existing local laws. This event will be explained in more details in the following part.

During Portuguese colonial rule, a military and civil administration was established over the ports. Malacca was governed by a Governor, or Captain who had supreme authority over all the inhabitants; local and foreigners. The Governor was assisted by a council comprising of Ovidor (Chief Justice), Viador (Mayor), the Bishop, and a secretary to administer civil and criminal affairs. Apart from this, seven local natives from the ranks of leading citizens was appointed annually as magistrates and formed the Corpus de Cidade, a civil body which managed all affairs of the town, including civil and criminal matters over all citizens (P. P. Buss-Tjen, 1958). In general, the administration of justice to the locals was left to the community leaders while the Portuguese were subjected to Portuguese laws under the jurisdiction of Portuguese judges (Wallen, 1808).



The non-interruption of existing local laws by foreign powers remained during the Dutch colonial rule. During this time, the administration of Malacca was headed by a Governor and assisted by a council consisting of the collector, the fiscal officer, the mayor, the upper-merchant and the secretary. The Governor has the highest-ranking authority to all of the inhabitants (P. P. Buss-Tjen, 1958). In regard to the type of laws enforced in Malacca during this time, there is no clear information yet found that specifically deals with this matter. However, it was Dutch practice in their other territories, such as Java, to leave the natives to their own laws while Dutch laws based on colonial statutes were applied only to the Europeans. Interference occurred only if there was a clash between the custom and a generally accepted principle of justice (A. Ibrahim, 1992; J. N. Waler, 1808). Thus, it is safe to presume that the same policy was imposed in Malacca. While a magistrate, to administer criminal and judicial disputes among the Europeans was appointed, the locals were left to administer justice according to their own customs and laws.

During British colonial rule, intrusion of foreign laws onto the existing legal system began to occur early on. Gradually, English Law was introduced into the Malay states through several charters and civil law ordinances. At first, English Law was introduced in the Straits Settlements (Pulau Pinang, Malacca and Singapore). Afterwards, the introduction of English Law was expanded to the Federated Malay States (Pahang, Perak, Negeri Sembilan and Selangor) and finally extended to the Unfederated Malay States (Johor, Kelantan, Terengganu, Kedah and Perlis). The following section describes this event in more detail:

#### **I. Introduction of English Law to the Straits Settlements**

The Straits Settlements were the British territories in Southeast Asia, which consisted of Penang, Malacca and Singapore. The Straits Settlements were established in 1826 and put under control of the British East India Company, and later, in 1858 became part of the British East India Company's successor, the

British Raj. Finally, in 1867, the Straits Settlements came under direct British control, as a Crown Colony.

The first official territory of Malaya to fall into the hands of British is Penang, which later known as "Prince of Wales Island". In 1786AD, the British acquired Pulau Pinang from the Sultan of Kedah. The island was given to the British by the Sultan of Kedah in return for protecting Kedah from the threats of the Kingdom of Siam in the north, and the Bugis people in the south. At the beginning of the early period, the system of administration was in chaos. In an attempt to maintain some form of order, British administrators were appointed. However, local customs and laws continued to be applied by the locals. During this time, an important question arose as to whether Penang would be ceded from Sultan Kedah to the British or settled. The answer would determine the *lexi loci*, the law of Penang. If Penang were to be ceded, then the applicable law should be the existing law, i.e. Malay customary law. However, if Penang was settled, then English law would be applied. This question was due to the ambiguous circumstances at that time. Although it is clear that British ceded Penang from Sultan Kedah, some of the British officers claimed that Penang was inhabited when they first landed there.

The official incursion of the British into the Straits Settlements started with the introduction of the First Charter of Justice in 1807. The charter had a profound impact; it marked the beginning of the statutory introduction of English law in Malaya. Through this charter a court, called the 'Court of Judicature of the Prince of the Wales' was established in Pulau Pinang. This court had jurisdiction over all civil, criminal and religion matters, including those related to the religion of Islam. One instance that indicated the interference of English law into matters relating to the religion of Islam is the case of *In the Goods of 'Abdullāh*. In this case, a deceased Muslim left a will to dispose his entire property to a non-beneficiary although he had a wife. According to Islamic law, a Muslim can devise only 1/3 of his property to a non-beneficiary. When he died, a dispute between the widow

and the non-beneficiary occurred and finally the case was brought to the court. In this case, the judge, Benjamin Malkin R declared that,

*“The law of England was introduced into Penang by the 1807 Charter and consequently a Muslim could, by will, dispose of his entire property even though such a will would be contrary to Muslim law. “*

From this judgement, it can be noted that the judge overrides the ruling of inheritance in *Mohammedan Law* and imposed English Law on the judgement, although both of the parties were Muslims. Another instance can also be seen in the case of *Fāṭimah & Ors vs Logan & Ors*. In this case, a Muslim man, Mohd Nordin died in Penang, leaving behind him a will to donate a piece of land. The issue before the court was to determine the validity of the will made by the deceased. While the lawyers defended that the validity of the will should be referred to based on the respective religious customs and practice, the judge argued that the English law should be referred to. In the judgement, Hacket declared that,

*“...the law of England was introduced into this settlement (Penang) immediately on possession taken in the name of the king of England by and for the use of the late east India company; and law (if any) previously existing thereupon immediately ceased...”*

Based on the judgement, the judge proclaimed that English law should be referenced, resulting in the invalidity of the will. Both judicial decisions made by the English judges in these cases displayed the intervention of English law into matters related to religion after the introduction of the First Charter of Justice.

Afterwards, the British took control of Singapore in 1819 and Malacca from the Dutch in 1825 through the Anglo-Dutch Treaty 1824. The treaty between the United Kingdom and the Netherlands was initially aimed at resolving the disputes between both parties, arising from the execution of the Anglo-Dutch Treaty 1814. As part of the outcome, the Malay Archipelago was divided into a Dutch Zone in the south and a British Zone in the North. It also resulted in the exchange of the British Settlement of Bencoolen (Sumatra) for the Dutch colony of Malacca and

Singapore. After the British gained control over Singapore and Malacca, the Second Charter of Justice was declared which resulted in the establishment of 'The Court of Judicature of Prince of Wales Island, Singapore and Melaka". The second charter marked the official reception of English law into all the Straits Settlements (Pulau Pinang, Malacca and Singapore).

In order to strengthen the jurisdiction of English Law in the Straits Settlements, the British decreed the Third Charter of Justice in 1855AD. Through this charter, the British had a courts rearrangement in all three settlements. As a result, the Court of Judicature in the Straits States was divided into two administrative units. The first unit covered Pulau Pinang and Malacca while the second unit covered Singapore. In 1868AD, the two courts were abolished and replaced with the Supreme Court for the whole of the Straits Settlements. With the introduction of these three charters in the Straits Settlement, the Malay customary law together with Islamic law were officially sidelined and marginalised.

Apart from the three Charters of Justice, other English law was also introduced in the Straits Settlement. One example is the introduction of English Commercial Law by Section 6 of the Civil Law Ordinance 1878. According to this ordinance, any question or issue arising locally in respect to commercial law, must be administered according to the law of England.

## II. Introduction of English Law to the Federated Malay States

As mentioned earlier, the existing laws prior the advent of British were Malay customary law and Islamic law. These laws were administered by the *raja/sultan* (Malay ruler), local elites and local chief appointed by the Sultan. This was evident from the remark made by Judge Edmonds J in the case of *Shaik Abdul Latif and others v Shaik Elias Bux*. In the judgement, he mentioned,

*"Before the first treaties, the population of these States consisted almost solely of Mohammedan Malays with a large industrial and mining Chinese community in*

*their midst. The only law at that time applicable to the Malays was Mohammedan Law modified by local customs”*

British intrusion in matters related to ruling and law in the Malay States came about through the treaties made by the English Governor with the Malay rulers. The earliest treaty that marked the beginning of the British intrusion was the *Pangkor* Treaty of 1874. The treaty between Sir Andrew Clarke (Governor of Straits Settlements) and Raja Muda Abdullah, the Sultan of Perak was initially aimed at resolving local strife between the local elite and the frequent clashes between Chinese secret societies at that time (Allen, J. de V. Stockwell, 1981). British saw this as an opportunity to strengthen their monopoly on tin and expand their influence in Malay Peninsula. Eventually, on 20<sup>th</sup> January 1874, the treaty was signed on a ship, HMS Pluto near the Island of Pangkor.

According to the treaty, Raja Abdullah was acknowledged as the legitimate Sultan and in return the Sultan would receive a British Resident whose advice must be sought and adhered to except in matters related to Islam and Malay customs. Additionally, the Sultan was also responsible for paying the salary of the Resident. Initially, the Resident acted as a guardian to the British people and foreign traders, dealing with foreign issues to the Malay State, and the executioner of government policies (Nasohah 2004). Over the course of time, Resident started to exercise his influence to introduce and implement English Law such as Contracts Act 1950 (Act 136), Evidence Act 1950 (Act 56), Penal Code (Act 574), Criminal Procedure Code (Act 539) (Mohamad & Trakic, 2015).

Following this precedent, the British gradually expanded their control over into other Malay States, beginning with Selangor followed by Negeri Sembilan and Pahang. Eventually, through the treaty, the Resident System alongside a State Council headed by the Resident were established in each of the states. Consequently, this system witnessed the reduction of the Sultan's power in administration matters and he was confined to matters related to Islam. In some cases, the Resident interfered in matters related to Islam such as in selection of

the *kadi*, rules and regulation in *zakāh* collection and the administration of the mosque.

Eventually, in 1895, the administration of these states was reorganised by the British through the Treaty of Federation between the British and all the Malay rulers in the States (Pahang, Negeri Sembilan, Perak and Selangor). As a result, The Federated Malay States was established under a centralised administration of the British Resident Jeneral, Sir Frank Swettenham.

### **III. Introduction of English Law to the Unfederated Malay States**

Britain's acquisition of Kelantan, Terengganu, Kedah and Perlis officially took place on 10<sup>th</sup> March 1909, through the Anglo-Siamese Treaty of 1909, or Bangkok Treaty of 1909. Through this treaty, the Kingdom of Siam granted rights of sovereignty, protection, administration and all control over all the respective states to the British. After the treaty, Kelantan became the first state to agree to accept a British Advisor in 1910AD. Other states followed suits in the years to come – Johor (1914), Terengganu (1919), Kedah (1923) and Perlis (1930).

According to the treaty between the British and the Malay rulers, it was agreed that the British Advisor will not interfere in matters related to Islam and Malay customs. This guarantee was then doubted and questioned when *Majlis Negeri* (State Council) which initially served as an advisory body had now slowly begun to act like a state's legislative body. For example, it interfered in matters relating to Islamic marriage, which supposedly falls under the jurisdiction of the *kadi* (Islamic judge). The Advisors on the other hand justified their action by saying the interference was necessary because it could jeopardise the state's peace and harmony only if the *qādī's* were involved.

Another instance of the British intrusion is through the abolishment of the existing courts. In Terengganu, *mahkamah balai*<sup>30</sup>; a local court established during the reign of Baginda Omar was abolished and replaced by a court governed by the English judges and Muslim judges (Hasan, 1991). In Kelantan, *mahkamah adat* was also abolished, leaving *mahkamah Syariah* to govern only matters regarding personal laws and religion offences (Graham, 1904).

### **OFFICIAL RECEPTION OF ENGLISH LAW IN MALAYA**

Based on the previous discussion, it can be concluded that the introduction of English law into the existing legal system was done informally through various means. First through judicial decisions made after the establishment of the English Court, such as in the case of *Goods of Abdullah and Fāṭimah Ors vs Logan Ors* and secondly, through the introduction of English laws, such as the Civil Law Ordinance 1878 and finally through the establishment of State Councils (*Majlis Negeri*). However, official reception of English Law was done through the introduction of the Civil Law Enactment in 1937AD in the Federated Malay States and the Civil Law Ordinance (Extension) in 1951AD. In order to expand the jurisdiction over to Pulau Pinang and Malacca, both enactments were replaced with Civil Law Ordinance in 1956CE. The introduction of the Civil Ordinance brought into the importation of Common Law and Rules of Equity of England into Malaya. As a result of this enactment, it marginalised the application of Islamic law, in which everything was now referred to the law established by the British, except for matters related to personal and family law.

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<sup>30</sup> This court is governed by the sultan as the judge and *mufṭī* as his advisor, using custom and adat laws.

## **4.2 POSITION OF ISLAMIC LAW AFTER COLONIAL ERA**

### **4.2.1 REID COMMISSION AND THE INSERTION OF THE CLAUSE, “ISLAM IS THE RELIGION OF FEDERATION” IN THE FEDERAL CONSTITUTION**

On January 1956, Tunku Abdul Rahman, the leader of Alliance and UMNO headed a Merdeka Mission to London to negotiate for independence. The delegation consisted of four representatives from the Alliance Party, Dato' Abdul Razak Hussin, Dr Ismail Abdul Rahman, Colonel H.S. Lee and Mr T.H. Tan. The other four representatives were from the Malay rulers: Dato' Panglima Bukit Gantang Hj Abdul Wahab bin Toh Muda Abdul Aziz, Dato' Nik Ahmad Kamil, Encik Abdul Aziz Majid and Dato' Mohd Seth Mohd Said. On 18 January, a round table conference took place and went on for three weeks negotiating matters related to independence of Malaya (National Archive, n.d).

As part of the round table conference outcome was a selection of an independent commission to draft a constitution of Malaya. In March 1956, the Reid Commission was set up. The independent commission was responsible for drafting the constitution for the Federation of Malaya prior obtaining independence from Britain on 31 August 1957. The commission was headed by Lord William Reid (United Kingdom) and joined by Sir Ivor Jennings (United Kingdom), Sir William McKell (Australia), Hakim B. Malik (India) and Hakim Halim bin Abdul Hamid (Pakistan). The Reid Commission held 118 meetings in Malaya. It met a wide cross-section of persons and organisations and received 131 memoranda. The Alliance Party also submitted a twenty-page memorandum to the Commission. In regard to the statutes of Islam, the memorandum specified as below,

*“The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State.*

In responding to this provision, the Reid Commission stated that (In A. Aziz 2019),



*“We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims — ‘the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State’. There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us — ‘It is Their Highnesses’ considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such declaration being inserted and that is a matter of specific instruction in which I myself have played very little part.’*

However, one of the member of Reid Commission, Mr Justice Abdul Hamid viewed that this provision as suggested by the Alliance party in the memorandum should be respected, hence be inserted in the Constitution. In a side note, Abdul Hamid remarks that (In A. Aziz 2019),

*“It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Article 2 in Part I or at the beginning of Part XIII.”*

*‘Islam shall be the religion of the State of Malaya, but nothing in this Article shall prevent any citizen professing any religion other than Islam to profess, practice and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim’.*

*“A provision like one suggested above is innocuous. Not less than fifteen countries of the world have a provision of this type entrenched in their Constitutions. Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Article 6), Norway (Article 1), Denmark (Article 3), Spain (Article 6), Argentina (Article 2), Bolivia (Article 3), Panama (Article 36) and Paraguay (Article 3). Among the Muslim countries are Afghanistan (Article 1),*

*Iran (Article 1), Iraq (Article 13), Jordan (Article 2), Saudi Arabia (Article 7), and Syria (Article 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion (Constitution of Thailand, Article 7). If in these countries a religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitutions and to embed it in the Federal.”*

Eventually, the Reid Commission inserted the provision regarding the religion of Islam in the Federal Constitution. Clause 1 of Article 3 declares,

*“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”*

However, as the Reid Commission did not provide any explanation and elaboration to this provision, the meaning and its effects on the position of Islamic law has become a matter of dispute especially between the proponents and the opponents of Islamic law to the present day.

#### **4.2.2 THE MEANING OF ARTICLE 3(1) AND ITS EFFECTS ON ISLAMIC LAWS**

There are contending views in interpreting article 3(1), which declares Islam as the religion of the federation. To some scholars such as Ahmad Ibrahim and Aziz Bari, this prescription has given Islam a special position in Malaysia. Both of them suggested that this article should be read with other articles in the Federal Constitution, which contains provision related to Islam such as Article 11 and Article 12. In Article 11, it prescribes that,

*“Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.”*

(Clause 4) provided that,

*“State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”*

Based on this provision, it can be clearly seen that although the Federal Constitution protects the freedom of religion for each of the citizens, but at the same time it allocate a provision to give special jurisdiction to the state and federation to limit the activity of propagating other religions to Muslims. The special provision regarding Islam can also be seen in Article 12(2),

*“Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.”*

Based on this allocation, as the previous one, while the Federal Constitution protects the right of religion for other people, it allows the Federation to establish Islamic institutions and Islamic education for Muslims, using federal money to maintain them. This can be understood in part by understanding the historical backdrop of Malaya, which has been partly elaborated on previously.

Conversely, some scholars such as Muhamed Suffian contended that this allocation does not have any consequences on the law and argued that it was intended for purely ceremonial purposes. This is in line with the purpose of this allocation based on what was proposed by the Alliance Party – to enable Islamic prayers to be recited in formal events, as mentioned earlier. This view is also echoed by the interpretation made by Sheridan and Groves, who stated that the allocation was meant to ensure that all rituals and customs in formal ceremonies must be conducted in the way of Islam.

#### **4.2.3 THE POSITION OF ISLAMIC LAW IN THE FEDERAL CONSTITUTION**

Despite several provisions that give Islam a special position in the Federal Constitution, including the pronouncement that “Islam is the religion of the Federation”, simultaneously, the Federal Constitution also limits the application of

Islam in Malaysia, mainly by way of two limitations. First is the limited jurisdiction given to the state on matters pertaining to Islam, and secondly through the limited jurisdiction of the *Syariah* Courts by enacting *Syariah* Courts (Criminal Jurisdiction) Act 1965.

According to the Federal Constitution, matters related to Islamic law fall under state jurisdiction. This is mentioned in the Ninth Schedule, List 2 as follows,

*“Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.”*

Based on this provision, it is clear that the jurisdiction of the state in matters related to Islam is confined only to restricted matters: personal and family law; the collection of *zakat*; the administration of religious institution such as mosques; *wakaf*; *baitulmal*; and the administration of the *Syariah* courts; and creating and punishing some religion offences. This provision also stresses that the latter jurisdiction in regard to religious offences is limited only to Muslims (persons professing the religion of Islam) and must respect the matters of the Federal list.

In regard to the second limitation, *Syariah* court is also bound to the Sharia Courts (Criminal Jurisdiction) Act 1965. Initially, in 1965, the Parliament passed the Muslim

Courts (Criminal Jurisdiction) Act. The act was introduced to limit the punishment prescribed by the *Syariah* court to the maximum of six months imprisonment or one thousand (Malaysian) ringgit fines, or the combination of both. Later on in 1984, the act was amended to provide a wider jurisdiction to the *Syariah* courts and was renamed Muslim Courts (Criminal Jurisdiction) (Amendment) 1984 (Act 612). This amendment is due to the increasing number of criminal offences despite all the efforts made by the government to curb crime through education and religious talks. Hence, maximum sentences for *Syariah* criminal offences were increased to three years imprisonment or five thousand (Malaysian) ringgit, or six lashes, or any combination of those sentences.

After nearly thirty years, in 2015, there was an attempt to increase the *Syariah* court jurisdiction through a private member's bill, by MP Marang, Abdul Hadi Awang (President of PAS). However, due to the 'politicisation' of the issue, this move created a heated debate and some parties claimed that this was done to give way to the State of Kelantan to implement their *Hudūd* bill, which has been passed in the State Assembly. Although the private bill had appeared several times in Parliament order paper, this private bill was never debated in Parliament. This event will be elaborated in more detail in the following chapter.

## **CONCLUSION**

In this chapter, I attempted to illustrate the impact of European Imperialism onto the existing legal system. Primarily, before the advent of Islam, the law operating in Malay was customary law, with a significant influence of Hindu-Buddhism. With the arrival of Islam in Malaya, the influence of Islam began to take place. Profound Islamic influences in regard's to legal aspects can be traced in the local state laws, such as in *Hukum Kanun Melaka*, *Undang-undang laut Melaka*, *Undang-undang Johor*, *Undang-undang Kedah*, *Undang-undang Pahang*, *Undang-undang Sembilan Puluh Sembilan Perak*, and *Undang-undang Sungai Ujung*. The process of assimilation of Islamic law with the local custom continued until the advent of

European power. However, this process was wholly interrupted with the advent of foreign power into Malaya.

The Portuguese and Dutch rules in Malaya did not result in significant impacts, but this changed with the arrival of the British in Malaya. The reception of English law was done informally through the establishment of English courts, the appointment of English judges, the introduction of English common law and statutes and establishment of State Council in the Federated and Unfederated Malaya States. Official reception of English laws began to take place with the introduction of the Civil Law Ordinance (Extension) in 1951CE and the Civil Law Ordinance in 1956CE. The profound impact it had was to do with the confinement of Islamic law into personal status matters. Another impact was the establishment of The Federation of Malaya in 1957, which resulted all of the Malay States were unified under one federal administration and legal system. Each of the states were obliged to adhere to the Federal Constitution. Previously, the Malay states were separate entities, each of them with their own legal system.

Based on the evidence shown in this chapter, it is evident that the Islamic law or Islamic criminal law has an importance place in the early legal system in Malaya, prior the advent of any foreign power. However, one important point must be highlighted that the existing law in Malaya was never purely Islamic, but an amalgam between Islamic law and Malay customary law. Thus, any effort on the reestablishment of Islamic law during present time must acknowledge this. The process of modification and adaptation of existing law proved that Islamic law was capable of accommodating the local customs. This important fact was to deny a restoration of total application of Islamic law according to the classical jurists into the context of Malaysia.

Throughout the discussion, I also explored the feasibility of *Hudūd* law in the current legal framework. Article 3(1), in Federal Constitution declares that the religion of Islam is the religion of the federation. However, it is argued that this

provision has no significant impact in giving special position to Islamic law and is only meant for ceremonial purposes. The Federal Constitution in the Ninth Schedule, Item 4 Federal List, stipulated that the administration of criminal law is under the federal government, whereas the Item 1 State List stipulated that the state can create and punish some religious offences under what is known typically as Islamic criminal law. However, the jurisdiction given to the state in this matter is limited. First, it applies only to Muslims. Secondly, the state can only enact laws which are not under the the Federal List. Thirdly, the state must be bound with the Sharia Courts (Criminal Jurisdiction) Act 1965. This act allows the *Syariah* court to inflict punishment for only a punishment of three years imprisonment, or five thousand (Malaysian) ringgit, or six lashes, or any combination of those sentences. Based on this explanation, Islamic criminal law can be enacted in Malaysia by the state but with certain limitation. This limitation will be elaborated in more detail in the next chapter.

## CHAPTER 5

### ***HUDŪD* LAW IN MALAYSIA: AN ANALYTICAL REVIEW OF SYARIAH CRIMINAL CODE (II) (1993) AND AMENDMENT 2015, STATE OF KELANTAN**

#### **INTRODUCTION**

This chapter aims to analyse the process of the re-establishment of Islamic criminal law in Malaysia, with particular attention given to the efforts to legislate Islamic criminal law by the state of Kelantan from 1993 until 2018. We begin by exploring the main impetus behind the re-establishment of Islamic law in Malaysia and follow on with a brief introduction of the state of Kelantan. The chapter continues with the discussion of the *Hudūd* bill proposed by the state of Kelantan. To date, this State has introduced two versions, the first was tabled in 1993 and a slightly modified version was tabled in 2015. Both of the codes are still ineffective at present due to legal issues. In this section, the methodology and the legal procedure of drafting the *Hudūd* bill is discussed. Finally, in the closing section, a critical review of the *Hudūd* bill is set out.

#### **5.1 THE MAIN IMPETUS BEHIND THE REESTABLISHMENT OF ISLAMIC LAW IN MALAYSIA**

Apart from the effort to reintroduce *Hudūd* bill by the state of Kelantan in 1993, effort to reestablish Islamic law has initiated at the national level by the proponent of Islamic law. Thus, an understanding of the discourse of *Hudūd* in Malaysia is incomplete without also understanding the impetus behind the re-establishment of Islamic law in the context of Malaysia. This section is dedicated to provide the reader with a discussion on the major drives behind the re-establishment of Islamic law in Malaysia.



As many scholars and academicians asserted, the main impetus behind the struggle to re-establish Islamic law within the context of Malaysia can be understood as an assertion of cultural and religious identity of the Malay Muslims who constitutes the largest population in Malaysia (Pankaj K'Umar, 2009). This aspect had been elaborated in detail in the previous chapter, which highlights the position of Islamic law prior and post colonialism, to the present day. By presenting these historical facts on the deep roots and force of the religion of Islam within the historical context of Malaysia, from the beginning of its arrival in Tanah Melayu, the proponents of Islamic law advocate its re-establishment in Malaysia. To highlight some of these notable facts, the presence of Islam as a force can be traced from when Islam arrived in Tanah Melayu, through the Arab traders. For instance, in Malacca, these traders acted as teachers to the locals and established mosques and surau. With the conversion of the Malay rulers (*sultan*) to Islam, the local scholars, known as *ulama'* began to grow in significance. They acted as religious teachers to the King, and according to *Sejarah Melayu*, Sultan Mansur Shah studied with Maulana Abū Bakar, and Sultan Mahmud Syah studied with Kadi Yusuf (Mohamed Osman, 2007). The role of *ulama'* grew in the nineteenth century, and they played an important role in the state structures, and some were even involved in the formulation of Islamic law in the Malay states. For example, the *muftī* of Kedah, Shaikh Abd Jalil, was responsible for formulating Islamic regulations for the Sultan and his officials.

The strong force of Islam continued when the European intrusion emerged, and it was used to resist the colonial power (Mohamed Osman, 2007). Before the emergence of Malay Nationalism, which took shape in 1930, the local *ulama* and chiefs, some of whom had a very close relationship with the sultan, played a significant role in mobilising the masses against colonial rule, particularly the British (Arifin, 2014). This was influenced both by external and internal factors. Globally, the ideology of 'Pan Islam' by Sultan Abd Hamid began to emerge and arrive in Tanah Melayu. It called for a unity of all Muslims in the world to unite under the caliph, and as part an effort to spread the idea, emissaries were sent throughout

the Muslim world. At its zenith, a fatwa was issued to urge Muslims in the British Empire to rise in rebellion against their oppressors (Kayadibi, 2011). During that time, the Ottoman flag can be seen waved by the *ulamā'* and the locals. Internally, British interference in local administration, such as denying the local chiefs right to collect taxes, forcing them to pay taxes to the British Company, and reducing their power, caused an uproar, and resurrections lead by them (Al-Junied, 2019; P. Daniels, 2017).

A series of events which witnessed the mobilisation by the local *ulamā'* can be seen in several states. For instance, in 1791, Sultan Kedah, with the support of the ulama' called for a holy war against the British after losing Penang to them (Mohamed Osman, 2007). The same thing happened later in Kelantan, Tok Janggut, a learned man who studied in Mecca for several years called for a jihad to resist the British, which gained support from Muslims. British collaborators were murdered, government properties and businesses owned by foreigners were destroyed. Responding to the attack, the British utilised two infantry companies against them. Tok Janggut was killed and his body was hung in public for seven days as a deterrence to other people. This was also the case in Terengganu. Abdul Rahman, a local *alim*, led a rebellion in defence of the ruler (Mohd Nor et.al, 2011). During this event, locals were seen carrying the Ottoman red flag, the *Bendera Stambul*, as a symbol of their allegiance to Ottoman Empire (al-Junied, 2019). Although in all of these occasions, the British successfully quelled the unrest, it signified an active role of the ulama' in resisting colonial power on their land.

The strong force of Islam continue to be sustained until the years prior to independence. Young people who were significantly influenced by devout scholars from the religious schools, Maahad Ihya Al-Sharif, Gunung Semanggol, formed organisations such as MATA and *Hizbul Muslimin*. The aim of MATA and *Hizbul Muslimin* was to demand the independence of Malaya, and the establishment of an Islamic State. Realising this threat, in 1948, the British announce a declaration of emergency to hinder the rise of this group, which was believed would interfere

with the political and economic policies introduced by them. As a result, Malay's leaders from the left, and other religious groups were banned and many key leaders from this group were arrested and prosecuted (Arifin, 2014). Following the banning, some of the Hizbul Muslimin leaders established another organisation, known as Persatuan Ulama' Semalaya, which subsequently evolved to form the Party Islam Se-Malaysia (PAS); the second largest Malay Muslim party in Malaysia at this time.

Approaching the negotiations of Malaya independence, through discussions with the component members of the Alliance Party, the Malay elites from UMNO insisted on a provision regarding the position of Islam in the Federal Constitution. The Reid Constitutional Commission, a committee consisting of members from the United Kingdom, Australia, India and Pakistan, which was responsible for drafting the Federal Constitution, responded to this demand (Hassan, 2007; Harding, 2002). Article 3(1) declares that, Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation. Although from the beginning, the drafters of the Reid commission report emphasised explicitly that this article was only to be symbolic, and for ritual purposes only, and "will not in any way affect the present position of the Federation as a secular state", this article has had divergent interpretations based on an inclination either to support, or object to the establishment of Islamic Law in Malaysia (P.Daniels, 2017) .

It is also argued that the re-establishment of Islamic law in Malaysia has also been driven by external influences, mainly the Islamic resurgence which occurred in the beginning of the 1970s. This has reinforced the significant role of Islam in Malaysia. It was this time that witnessed the blossoming of various Islamic movements in Malaysia such as the Muslim Youth Movement of Malaysia (ABIM: *Angkatan Belia Islam Malaysia*), the Society for Islamic Reform (JIM: *Jamaah Islah Malaysia*), *Darul Arqam* and *Jamaat Tabligh* (Nagata, 1980; Peletz, 2002). These movements were distinctive by their use of dakwah (missionary effort) rather than overt politics as a

means of struggling for Islam. Except for the Indian-originated Jamaat Tabligh, other movements' programmes, structures and aspirations had political content and significance in their various ways and configurations (Abdul Hamid, 2008).

The New Economic policy (NEP), introduced by the government, has in some way also contributed to the Islamic resurgence amongst the youth. It was initially aimed at uplifting the economic status of the Malays and to bridge the gap with the Chinese (Peletz, 2002). It has given bright students from Malay the opportunity to pursue their studies overseas, which has in turn given them the chance to interact with Muslim activists from Islamic countries such as Egypt and Iraq, who migrated to the United States and Europe in order to escape persecution by their respective governments. This interaction gave them an opportunity to contemplate the idea of Islamic movements and, upon return, most of them became active members of ABIM, Al-Arqam and PAS (Hassan, 2007).

In 1979, the success of the Iranian Islamic revolution by Khomeini, and the call for jihad in Afghanistan further Islamised these social movements. The success of the Iranian revolution and the increasing influence of political Islam encouraged more activists to take up direct political platforms to effect changes in society. The resurgence also gave PAS new spirit after its expulsion from the Barisan Nasional (1973–1977) and its loss of Kelantan to UMNO, which it had ruled since 1959 (Hassan, 2007). The impact of the emergence of this movement is the growing of Muslim consciousness, especially among the middle-class youth. During this time, Islamic dress became visible. Women started to cover their body, wore a short veil (*hijāb*), socks and gloves, while a small minority even adopted the face veil. Pleas for sex segregation also emerged at this time.

Faced with the widespread Muslim consciousness and demands for a more Islamisation measures, the government started to respond by introducing large scale Islamisation programmes (Roff, 1998). In explaining this, a number of scholars argued that this large scale of Islamisation programmes was not solely driven by the

growing Islamic resurgence in Malaysia but was contributed to by the political rivalry between UMNO Party the incumbent government with the second largest Malay opposition party, PAS (Thirkell-White 2006, Hung, 2016; Jason P. Abbot & Sophie Gregoorious-Pippas, 2010). While the PAS Party from the beginning of its establishment made their Islamic political ideology very clear, the UMNO nationalist Party had to compete to be the greater champion of Islam in order to boost their Islamic credentials in the eyes of the Malay electorate. Given the multi-religious composition of the governing coalition, Barisan Nasional (BN), UMNO (the leading party of BN) cultivated its image as the promoter of a moderate, modernist form of Islam and contrasted itself against the purportedly backward, traditional brand of Islam as propounded by PAS. During this time, under the reign of Mahathir Mohammad, the fourth Prime Minister of Malaysia at that time, large scale Islamisation of the Malaysian bureaucracy was initiated (Afiqah, Zainal, & Jani, 2017). In 1983, the government launched the International Islamic University of Malaysia, and the Malaysian Islamic Bank. Other Islamic economic initiatives such as the Islamic Insurance Company (*Takaful*) and Haj Pilgrim Management fund (*Lembaga Urusan Tabung Haji*) followed suit. By initiating its own Islamisation programme, the Mahathir government effectively stole a march on the PAS (Noor, 2003).

## **5.2 A GLIMPSE OF THE BACKGROUND OF THE STATE OF KELANTAN**

The state of Kelantan is an agriculture state located in the northeast of the Malaysian Peninsular, bounded by Thailand at the North, Terengganu to the Southeast, Perak to west and Pahang to the South. Kelantan has an estimated 1.89 million population, with the largest ethnic group represented by the Malays (95%), followed by Chinese (3%), Indian and others (2%). In regard to religion, 96.2% of the population is Muslim, while the remainder is the follower of other religion (Department of Statistic Malaysia, 2019).

Historically, Kelantan has been known for its strong commitment to Islamic identity (Winzeler, 1975). This strong commitment has been translated into the uniqueness of the Kelantan political landscape, which is still the case today. Unlike other states which has been under the control of the Federal government coalition party, UMNO since the independence of Malaya, the state of Kelantan has been under PAS<sup>31</sup> rule for two substantial periods. The first period of PAS rule was after two years of independence in 1959, which lasted for 18 years (1959-1977). In 1977, due to internal political conflict, the Federal declared a State of Emergency in Kelantan. Subsequently, an election took place and PAS lost Kelantan to UMNO. The second period began in 1990 and continues to the present day (Salleh, 1999). In 1990, during the 8<sup>th</sup> General Election, PAS returned with an overwhelming victory through a coalition led by PAS, Angkatan Perpaduan Ummah and won all the 39 states and 13 Parliamentary seats.

Following the electoral victory in 1990, Nik Abdul Aziz Nik Mat, a local spiritual leader was appointed as the new Chief Minister of Kelantan. Deploying a slogan of 'Developing with Islam', the Chief Minister set out to transform the state into a model Islamic polity (P. Daniels, 2017). The transformation focussed on five key aspects: administration; legal reform to implement Sharia; education; economy; and socio cultural (Ghani, 2011). In terms of administration, the state government begin to relocate state funds into banks without interest free counters. This move contributed to the explosion of interest-free banking. The state government also introduced an innovative fund called '*Tabung Serambi Mekah*', which was separated into two distinctive accounts, the halal (agriculture, trade in permitted products) and non-halal (interests, gambling, alcohol). Both were used for different purposes; the halal funds were distributed to needy populations such as the poor and victims of natural disaster while the non-halal funds were used for

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<sup>31</sup> PAS is an Islamic political party established in 1951. From early on in its establishment, PAS consistently promoted an Islamic agenda. PAS leaders believe that political and governing power is an important means to implement the God's law. PAS is among the oldest and prominent opposition party in Malaysia.

infrastructural projects or building non-Muslim religious institutions (P. Daniels, 2012).

Another policy introduced under this key aspect was on women's empowerment. The state government introduced an extension of maternity leave from 42 days to 60 days and started the development and takaful programmes for single mothers and widows under the '*Armalah* Development Programme'. Additionally, women's development centres called '*Pusat Pembangunan Wanita Kelantan*' were built in every district to encourage activities among women. In order to encourage female participation in decision-making, women representatives were appointed to important posts such as the Senate, State Exco, district council members and even *penghulus* (Mohamed & Mohamed, 2016). This final key aspect in empowering women was seen as exceptional because in other Muslim countries, the Islamisation programme was reported to be degrading to women.

Apart from administration reform, the state government also initiated legal reform initiatives to restrict unlawful activities such as shutting down night clubs and gambling premises. The selling of alcohol drinks was also controlled and restricted only to non-Muslim. Under the local council, laws regarding modest dress code in public places were introduced. Regarding the economy, the state government initiated programmes offering interest-free loans to civil servants and students. Other programmes such as the '*Takaful Kifayah*' scheme was also introduced. This scheme was initiated to give financial support to the elderly population, aged 60 and above, from all ethnic and religious backgrounds. Whilst, the state government also built free homes for the poor, disabled and infirm people under the '*Rumah Dhuafat*' Programme. In respect to understanding the importance of education for the young generation, the state government also allocate substantial amounts to build religious schools, specifically '*maahad tahfiz*' schools in each district (Yusoff, 2017).

### 5.3 BACKGROUND OF THE SYARIAH CRIMINAL CODE (II) 1993

The implementation of *Hudūd* laws was part of the PAS manifesto during the general election in 1990 (Abdul Hamid, 2009). In 1991, the Chief Minister of Kelantan, Nik Abdul Aziz Nik Mat announced that the State was making initial preparations to implement *Hudūd* law. A committee consisting of legal experts and Islamic scholars was set up to draft the bill. Among the drafters were the Chief Judge of the *Syariah* court of Kelantan (Dato' Hj Daud bin Muhammad), *Syariah* court Public Prosecutor (Abu Bakar Abdullah Kutty), State *muftī* of Kelantan (Dato' Muhamad Shukri Bin Mohamad), Professor of law (Prof Dr Ahmad Bin Ibrahim), Professor of Islamic Law (Prof Dr Mahmud Saedon), and former Lord President of the Supreme Court (Tun Mohamed Salleh Abbas) (Azhar et al. 2015; Mohamed Fadzi, 2015).

Before the *Hudūd* bill was tabled in the State Assembly Meeting, the State conducted a state-wide explanatory session through road shows, talks and seminars in order to inform and educate the public on the bill (Abdul Hamid, 2009). Eventually, on 25 November 1993 the *Hudūd* bill was tabled in the State Assembly Meeting and received unanimous support by the State Legislative Members, 24 from PAS, 13 from Semangat 46, 1 from BERJASA and 1 from HAMIM (Mohamed Fadzi, 2015; Nasran et al.2015).

Essentially, the *Hudūd* bill, known as *Syariah* Criminal Code (II) 1993, covers the three main component of Islamic criminal law, namely *Hudūd*, *qisās* and *ta'zīr*. It contains 72 clauses, divided into six parts. The first part is *Hudūd* which subsumes the offence of theft (*sariqah*), robbery (*hirābah*), unlawful sex (*zinā*), false accusation of unlawful sex (*qadhf*), consuming alcohol (*shurb*) and apostasy (*riddah*). The penalties include limb amputation, flogging, stoning, imprisonment and the death penalty. Part II is *qisās* which include various form of killing and wounding. Part III stipulates evidential requirements, while Part IV outlines the procedures for whipping and amputation. Part V and VI are general provisions,



including the establishment of the Special *Syariah* Trial Court and a Special *Syariah* Appeal Court.

The implementation of *Hudūd* bill proposed by the state of Kelantan was conditional upon amendment to the Federal Constitution. Realising and predicting that this would be an issue early on, throughout the process of introduction of the *Hudūd* bill, the Chief Minister, Nik Abdul Aziz Nik Mat was engaged in correspondence with the Prime Minister, primarily to ask support and cooperation from the Federal Government. The chronological of the event is described as follows:

#### **1. 7 May 1992, letter from the Nik Aziz to Mahathir Mohammad**

The initial aim of this letter is to inform the Federal government on the State's plan to introduce a *Hudūd* bill and more importantly to ask early support and permission from the federal government. In the letter, Nik Abdul Aziz states that, *"Saya dengan segala hormatnya ingin memaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri Kelantan telah membuat keputusan menulis kepada Yang Amat Berhormat untuk mendapat persetujuan dan izin secara rasmi bagi Kerajaan Negeri Kelantan, dengan segala kemampuan yang ada, agar dapat melaksanakan sebahagian daripada syariat Islam iaitu perkara jenayah mengikut yang ditetapkan di dalam Al-Qur'an.*

*Adapun persetujuan dan izin dari Yang Amat Berhormat Perdana Menteri, selaku pengerusi Jemaah Menteri dan Ketua Kerajaan Persekutuan sesungguhnya tidak syak lagi amat penting bagi saya dan Kerajaan Negeri Kelantan melaksanakan syariat Islam ini"*

*Translation: "With all due respect, I would like to inform you that the Executive Committee of the state of Kelantan have decided that I to write to your honour in a bid to seek your official consent and blessing for the state of Kelantan, with all its available facilities, to implement certain parts of the Sharia regarding criminal matters as stipulated in the Quran."*

*"The consent and blessing of the Prime Minister as Head of the Cabinet and leader of the Federal Government is without doubt essential for the Government of the state of Kelantan to implement this part of the Sharia."*

Based on this letter, it implied deductively that the state government already predicted that the *Hudūd* bill would face legal and constitutional issues, hence the reason why the state asked permission and support from the federal government. Additionally, in the letter, the Chief Minister mentioned the reason behind the introduction of a *Hudūd* bill was part of their duty to uphold the Sharia, in regards criminal punishment sanctioned in the Qur'an.

## **2. 15 August 1992, letter from the Mahathir Mohammad to Nik Aziz**

Responding to Nik Aziz's letter, Mahathir Mohammad states that,

*"Saya sebagai seorang Muslim menerima dan menyokong semua hukum Syariat. Tetapi ini tidak bermakna saya menyokong tafsiran dan andaianya oleh parti dan Kerajaan PAS yang kerap membuat tafsiran agama yang mencampur adukkan kepentingan parti politik dengan kehendak agama Islam."*

*Translation: "As a Muslim, I fully accept and support all Sharia rulings. However, this does not mean that I support PAS's interpretation and presumptions on the religion nor of those leaders who often interpret religion to further their party interests."*

In the letter, the Prime Minister asserted that he accepts and understands the responsibility of a Muslim to uphold Sharia law. However, he rejected the interpretation of *Hudūd* made by PAS-led State government. He alleged that on many occasions, the PAS interpretation of religion was mixed with political interest. However, he did not provide any evidence to support his claim. In the letter, he also mentioned that early permission by the federal government was not needed at that moment. Only after the *Hudūd* bill was tabled, then the federal government would respond to it accordingly.

## **3. 21 March 1994, letter from the Nik Aziz to Mahathir Mohammad**

This is the first letter sent by the Chief Minister to the Prime Minister after the *Hudūd* bill was tabled and passed by the State Assembly Meeting on 25 November 1993. In the letter, Nik Abdul Aziz, stressed that the introduction of the *Hudūd* bill by the state is part of the responsibility of the state to implement the Sharia. He also asserted that the *Hudūd* bill was legislated by experts from civil and Islamic law

and had been endorsed by the state *Muftī* and religious council (*Jamaah Ulama' Majlis Agama Islam dan Adat Istiadat Melayu Kelantan*). Again, in the letter, he asked permission and support from the Federal Government to implement this *Ḥudūd* bill in Kelantan and argued that the *Ḥudūd* bill was aligned with the teaching of the Qur'an and the Sunnah. However, this letter, did not received any reply from the Prime Minister.

#### **4. 8 June 1994, letter from the Nik Aziz to Mahathir Mohammad**

As the previous letter did not receive any reply from the Prime Minister, the Chief Minister sent a second letter to the Prime Minister, asking for a response, and official stance of the Federal government on the State's plan to enforce the *Ḥudūd* bill in Kelantan.

#### **5. 15 July 1994, letter from the Mahathir Mohammad to Nik Aziz**

Finally, the Prime Minister replied to the letter and stated the official stance of the Federal Government regarding the *Ḥudūd* bill. In the letter, the Prime Minister stated that,

*“Khusus mengenai undang-undang jenayah PAS di Kelantan, kajian awal menunjukkan dengan jelas bahawa undang-undang itu yang disediakan menerusi perjuangan sebuah parti politik ternyata bukan sahaja menyebabkan ketidakadilan akan berlaku tetapi sebaliknya ia akan membawa kezaliman. “*

*Translation: “Regarding the PAS Ḥudūd bill in Kelantan, early studies indicate that the said laws which a political party struggles with, will lead to injustices and inequality.”*

Based on the extraction, the Prime Minister stressed that justice is one of the main principles observed in Islam and argued that the implementation of *Ḥudūd* bill would resulted in injustice. In supporting his claim, the Prime Minister provides two instances from the bill; the applicability of the bill to Muslims and giving choices to non-Muslims, and the issue of rape victims which could be tried under the provision of *zinā*, under a strictly evidential process. The Prime Minister also claimed that this

*Hudūd* bill proposed by the state of Kelantan was not aligned with Islamic teaching. Based on this reason, the Prime Minister stated that the federal government refused to give support, and furthermore warned that if the state of Kelantan proceed with their plan, the Federal Government would take further action on the state of Kelantan.

#### **6. 17 November 1994, letter from the Nik Aziz to Mahathir Mohammad**

Replying to the previous letter, lengthy explanations have been given to clear the misunderstanding in the previous letter. In the final part of the letter, the Chief Minister again stressed that the *Hudūd* bill is based on the evidence founded in the Qur'an and Sunnah. These laws according to him, are not open for alteration and must be applied to the letter each place and time. This was the final letter, and after that there was no further interaction between the parties.

Based on the letters above, there are several important points that we can deduce. First is to do with the main impetus behind the re-establishment. Previous studies claimed that the reintroduction was initiated by PAS to gain political mileage. For instance, Funston (2006, p.178) stated,

*“The existence of the code is important as a symbol of PAS’s commitment to implementing Islamic values through sharia law. The code allows PAS to claim it is a ‘more Islamic’ political party than its opponent.”*

However, based on the extraction on the letters, it can be concluded that the reestablishment is largely motivated by religious reasons not political motives. The Chief Minister believed that reestablishment was a duty to uphold the Qur'anic injunctions on crime and punishment. This has also been mentioned repeatedly by the Chief Minister on other occasions, such as in his speech in front of the public before the *Hudūd* bill was tabled. In the speech, he states,

*“Harapan besar rakyat Kelantan untuk melihat tegak semula hakimiyah Allah di atas muka bumi, dengan tujuan melebarkan keadilan dan menuntut keredhaan Allah kian menghampiri kenyataan” (Nik Mat, 2011c)*

*Translation: "It is the great hope of the people of Kelantan to uphold Allah's sovereignty on earth with the aim of spreading justice and gaining Allah's blessing."*

Based on this statement, the Chief Minister believes that the implementation of the *Hudūd* bill also constituted the will of the Kelantan citizens who wanted to uphold the Sharia. Apart from religious motives, there was also a historical argument that was always used to support reestablishment. In one of the Chief Minister speeches, he stated,

*"Di Kelantan sendiri, undang-undang ini telah menjadi undang-undang negeri yang berdaulat, terutama pada zaman pemerintahan Sultan Muhammad (I) dan Sultan Muhammad (III). Penjajah yang jahat itulah yang telah mengubah segalanya dan anak bangsa yang keliru itulah yang tidak tahu kedudukan yang sebenarnya" (Nik Mat, 2011c)*

*Translation: "In Kelantan, sharia law was practised by a sovereign state during the reigns of Sultan Muhammad I and Sultan Muhammad III. It was the colonialists who replaced these laws with their version thus raising confusion among those ignorant of this state of affairs"*

Based on this statement, the Chief Minister believed that the implementation of *Hudūd* bill constituted the Muslim's right to re-establish *Hudūd* law which had been abolish during colonial times. Additionally, the reestablishment of ICL was also claimed to be done on the basis of penological justification.

*"Dengan kadar jenayah yang semakin meningkat dan bentuk jenayah yang semakin ganas dan beraneka ragam, sampailah masanya Common Law atau undang-undang yang ada diletakkan di dalam kandang dan dihadapkan dengan keraguan dan pertanyaan, adakah undang-undang ini berkesan? Adakah ia mampu memainkan peranannya sebagai pelindung masyarakat?" (Nik Mat, 2011c)*

*Translation: "With increasing diverse and violent crime rates, it is high time to question the effectiveness of the Common Law to curb this worrying development. Has Common Law lost its effectiveness to be the defender of society?"*

*"Rang undang-undang ini telah memenuhi fungsinya seperti berikut; Melindungi masyarakat, mencegah perbuatan jenayah, hukuman yang setimpal, memulihkan masyarakat, mendidik masyarakat" (Nik Mat, 2011a)*

*Translation: "The bill has fulfilled its as following purposes: protect society, prevent crimes, dispense fair rulings, restore community order, educate people"*

Based on this statement, the Chief Minister argued that increasing of crime rate in the society proved that the existing law failed in curbing crime. However, it can be noted from the statement that this claim is not supported by any empirical statistics or data. More importantly, these letters also revealed the stark political divide between both parties, which left no space for intellectual discussion. When the Prime Minister made an accusation that the *Hudūd* bill was a PAS interpretation of *Hudūd*, the Chief Minister challenge the UMNO leader to come out with another *Hudūd* bill or ask for a dialogue to break the deadlock. However, the Prime Minister, Mahathir Mohammad, did not respond to this constructively, leaving the *Hudūd* bill in abeyance, as it remains to the present day.

Another important point to highlight in the letters, is that the Chief Minister repeatedly stated that the *Hudūd* bill was drafted and based on the Qur'an and Sunnah. In another statement, he also mentioned the same point.

*"Suka saya tegaskan sekali lagi bahawa hukuman-hukuman yang terkandung di dalam enakmen ini adalah berdasarkan perintah-perintah al-Qur'an dan Al-Hadis. Ia bukan rekaan mana-mana pihak seperti didakwa" (Nik Mat, 2011a)*

*Translation: "I would like to re-affirm that the penalties contained in this enactment are based on the precepts of the Quran and Al-Ḥadīth. It is not drafted by any party, as alleged."*

*"Nyatalah bahawa hukuman-hukuman ini adalah perintah-perintah wajib yang mesti dilaksanakan dan ia mempunyai kaitan yang begitu erat dengan soal keimanan" (Nik Mat, 2011a)*

*Translation: "The rulings are the commandments of Allah and as such are matters relating to faith."*

*"Semua peruntukan di dalam Kanun Jenayah Syariah II 1993 Negeri Kelantan adalah bersumberkan kepada nas-nas dari Al-Qur'an dan Al-Sunnah serta pendapat-pendapat ulama' yang muktabar." (Nik Mat, 2011b)*

*Translation: "All of the provisions in the Syariah Criminal Code II 1993 of Kelantan are derived from the verses of the Quran and the Al-Sunnah and the views of renowned scholars.*

From these three statements, made at different times by the Chief Minister, it can be noted that there is a confusion between the concept of Sharia and *fiqh*. It seems that Chief Minister, Nik Aziz Nik Mat equates the *Hudūd* bill with Sharia. By using the term Sharia in relation to the *Hudūd* bill, it connotes that questioning such legislation is tantamount to questioning the divine law. In truth, the *Hudūd* bill does not entirely represent the Sharia but also contained another fraction known as *fiqh*. Unlike the former, *fiqh* is always open for debate and discussion. Thus, any criticism towards the *Hudūd* bill should be heard and not taken as hostile and equating it with Sharia.

#### **5.4 BACKGROUND OF THE 'SYARIAH CRIMINAL CODE (II) AMENDMENT 2015'**

For 25 years, the *Syariah Criminal Code (II) 1993* remained in abeyance, but on 7<sup>th</sup> October 2011 a serious effort to reintroduce the bill was tried by the late Nik Abdul Aziz Nik Mat, the Chief Minister of Kelantan. After his death, it was taken on by his successor, the current Chief Minister of Kelantan, Dato' Ahmad Yakob. A *Hudūd* committee known as '*Jawatankuasa Teknikal Hudūd Kelantan*' was formed, which was led by the the current Deputy Chief Minister of Kelantan. Under the Dato' Mohd Amar Abdullah he was mainly responsible for improving the previous *Hudūd* bill, tabled in 1993, and finding ways to resolve the various legal issues.

Surprisingly, the effort to reintroduce this *Hudūd* bill had been well received by the Federal Government at the time. Openness shown by the Federal Government led to another milestone in the effort related to the implementation of *Hudūd* in Kelantan. Deputy Prime Minister, Mahyuddin Yasin announced the proposal to establish a national committee on *Hudūd* called '*Jawatankuasa Hudud Kebangsaan*'. In a press media statement, he said,

*“The committee will look from all angles of Ḥudūd and how it could be implemented in Malaysia, especially in Kelantan, or whether it could be implemented or otherwise.” (New Straits Time, 2014)*

The committee consisted of six representatives from the state government of Kelantan and other government agencies such as the Prison Department of Malaysia, Royal Police Malaysia, legal experts and academicians. One of the roles of the committee was to set the direction of the enactment, evaluate the separation of power between the federation and the state, identify legal limitations, and propose possible solutions for ensuring the success of the implementation of Islamic criminal law in Kelantan. The committee was also responsible for ensuring that the implementation of the *Ḥudūd* bill fulfilled the objectives of Islamic law. The forming of the committee marked a new milestone in Malaysia’s political history whereby two parties of different ideologies or principals sat together in an effort to uphold Islamic criminal law in Malaysia. However, the sudden openness shown by the UMNO government to cooperate with PAS to implement *Ḥudūd* is viewed by political analysts as having political motives (Abdul Hamid, 2015). This will be elaborated in more detail in section 5.6.

#### **5.4.1 METHODOLOGY OF DRAFTING ‘SYARIAH CRIMINAL CODE (II) AMENDMENT 2015’**

According to the drafters, the *Syariah* Criminal Code (II) 1993 mainly relied on the books of scholars from the four main schools; Ḥanafī, Mālikī, Shāfi’ī and Ḥanbalī. Nevertheless, priority was given to the school of Shāfi’ since it is the most common school practiced by the people of Kelantan and Malaysia alike (Azhar et al, 2015). The school of Shāfi’ī has been the basis for religious teaching at schools and mosques since Islam came to the Malay Archipelago. It is also in line with the state’s administrative body which decrees:

*“Council or union of scholars must, in its customs adhere to the conclusive opinions of the Shāfi’ī madhhab”*



The methodology applied for the drafting was comparative in nature which involved collecting different opinions from classical books and contemporary scholars. Every opinion was evaluated based on the strength of the evidence and the method involved. After that, the authentic and relevant opinion would be selected as guidance. Although it is said by the drafters that contemporary opinions of scholars were considered, through examination on the *Hudūd* bill, almost 90% of the bill appears to adhere to classical jurists' treatises.

#### **5.4.2 PROCEEDINGS AND ESTABLISHMENT OF SPECIAL SYARIAH TRIAL COURT AND SPECIAL SYARIAH COURT OF APPEAL**

In the early process, prior to a proceeding or prosecution, a screening process is carried out by the *Syariah* Court Public Prosecutor in determining whether a case would be heard by Special *Syariah* Trial Court or Civil Court. The screening process is vital to ensure there can be no double jeopardy imposed for the same offence, especially when it involves similar offences, such as *sariqah* and theft, *hirābah* and robbery, as per the Penal Code. It is clarified in a provision in Section 60 which says,

*“ Any individual who has been convicted or is going through a proceeding bounded to KJS 2015, must not face any prosecution under the Penal Code.”*

In order to prosecute the offenders with regard to this law, two new courts, the Special *Syariah* Trial Court and the Special *Syariah* Court of Appeal, are introduced. Each prosecution would be heard at two levels of courts:

##### **I. Special *Syariah* Trial Court**

This court consists of three judges; two of whom are scholars. Any sentence ruled by this court cannot be carried out except after being decreed by the Special Court of Appeal. Every case that has been decided upon must be brought up to the Special Court of Appeal.

## II. **Special *Syariah* Trial Court of Appeal**

This court acts as the court that will assess and determine the sentence ruled by the Special *Syariah* Trial Court. This court has the power to confirm, lower or drop the punishment sentenced by the Special Sharia Trial Court. It is consisted of five judges; three of whom are scholars.

All cases are to be heard at a centralised court, not by existing district *Syariah* courts. With regard to the appointments of judges, it will involve the existing eight judges, along with a combination of *Syariah* and civil courts judges. The qualification of a judge includes being or having been a Judge of High Court of Malaya, or Sabah Sarawak, or Court of Appeal, or Federal Court of Malaysia. Apart from that, any Islamic scholar who had previous experience of being a '*Qadi Besar*' or Government '*mufti*' or any individual has good qualifications (well trained) and knowledge in the field of Islamic rulings can also be appointed as a judge. (Azhar et al, 2015)

### **5.4.3 PROCEDURES FOR DRAFTING SYARIAH CRIMINAL CODE (II) 1993 AMENDMENT 2015**

There are four stages to go through before the *Hudūd* bill can be tabled in the State Assembly of Kelantan (Azhar et al, 2015):

#### **I. First Stage**

The Bill Amendment Committee was responsible for reviewing the *Hudūd* bill tabled in 1993. Subsequently, a draft for amendment was proposed and finally checked by the Secretariat Committee, and the Technical Committee.

#### **II. Second Stage**

The draft was presented to the State Religious Council, *Jamaah Ulama' Majlis Agama Islam dan Adat Istiadat Melayu Kelantan*, which was led by Dato' Muhammad Syukri, the *mufti* of the state of Kelantan. The draft was passed on 1

December 2014. Subsequently was approved by the members of *Majlis Agama Islam dan Adat Istiadat Melayu Kelantan* (MAIK), at meeting chaired by Tengku Muhammad Faiz Ibni Sultan Ismail Petra, Kelantan Crown Prince, on 7 December 2014.

### **III. Third Stage**

*Majlis Agama Islam dan Adat Istiadat Melayu Kelantan* (MAIK) then presented the draft amendment to the state legal adviser, Shahidani Abdul Aziz, for final inspection, and subsequently distributed to all members of the State Assembly of Kelantan as a preliminary for tabling the debate at the next state sitting.

### **IV. Fourth Stage**

On 18 March 2015, the State Assembly of Kelantan picked the bill of *Syariah Criminal Code II 1993 Amendment (2015)* as the main agenda of the sitting. The Chief Minister, Dato' Ahmad Yakob presented the bill, which was followed by a debate among the members of the state assembly. The bill passed with unanimous support from all the state legislature, which consisted of 32 and 12 members from PAS and UMNO respectively. The Chief Minister announced one million allocations in making it a reality. This included improving facilities, providing training and continuous awareness campaigns to the public, especially in Kelantan.

## **5.5 ATTEMPT TO REFORM THE SYARIAH CRIMINAL CODE (II) (1993) AMENDMENT 2015**

In the previous section, the four stages prior to the *Hudūd* bill was tabled have been illustrated. As noted earlier, the *Hudūd* bill committee was responsible for reviewing the previous *Hudūd* bill, named the *Syariah Criminal Code (II) (1993)* which was tabled in 1993. As part of the process to improve the bill, the *Hudūd* bill committee appointed 57 individuals, consisting of civil court lawyers, *Syariah* court lawyers and academicians to form a task force to review the *Hudūd* bill. After several meetings, a full report was prepared and given to the committee.

In 7<sup>th</sup> August 2014, a meeting between the *Hudūd* bill committee and representatives from the task force was held. It was led by the Chief Judge of Kelantan and attended by the state *mufti* and other *Hudūd* technical committee members. Prior the meeting, the head of the bill committee said, in his preliminary speech,

*“Mengkaji itu bagus, tetapi semua kandungan EKJS II adalah berdasarkan kepada apa yang termaktub di dalam Al-Qur'an dan hadis. Ulama-ulama juga telah sepakat berkenaan hukuman tersebut. Tiada perkara yang perlu diragui dan dikaji semula. Kemungkinan yang perlu dikaji semula adalah dari segi teknikal perundangan dan sebagainya yang kemungkinan tidak berapa jelas kepada sesetengah pihak.” (Meeting Report, 2014)*

*Translation: “To analyse is good, but all the contents of EKJS II are based on the Quran and Ḥadīth. Scholars have also concurred on the penalties of the sharia. There are no uncertainties and need for review. If there are any issues that do need reviewing, these are legal technical issues which may not be decipherable by some”*

After the speech, the representatives presented a proposal containing suggestions to improve the existing EKJS 1993. Among the major amendments proposed by the report were:

1. In the *Hudūd* Bill of Kelantan 1993, the punishment for *zinā* for the category of *muḥṣān* is stoning to death. Based on the view of Abū Zahrah, al-Suyūṭī and al-Zarqā', this report suggested that the *zinā* punishment should be confined only to 100 lashes of the whip for both categories; *muḥṣān* and *ghayr muḥṣān*.
2. In the *Hudūd* Bill of Kelantan 1993, section 7(a) defined the *niṣāb* of theft as 4.45 gram of gold. The report suggests re-evaluating the value, taking into account current social, economic and other factors. The revised value should also be converted into the current currency of Malaysia Ringgit.

3. In the *Hudūd* Bill of Kelantan 1993, the age of *mukallaf* is defined as 18 years old. The report suggested an increase to the age of *mukallaf* from 18 to 21.
4. The report also calls for a redefinition of the following offences; *zinā*, *shurb* and *riddah*.

There are also other minor changes, related to technical aspects, proposed by the report. However, all of the major amendments proposed by the report were rejected by the *Hudūd* bill committee (Meeting Report, 2014). Its failure was already predicted by Sikandar (2010). Sikandar pointed out that any reform to reconstruct the *Hudud* law in Malaysia would pose serious challenge for the hard-line conservative segment of '*ulama*'.

#### **5.6 PAS AND THE PRIVATE MEMBER BILL TO AMEND THE SYARIAH COURT ACT (CRIMINAL JURISDICTION) 1965**

Realising the legal constraints to implementation of the *Hudūd* bill in the previous attempt in 1993, this time, PAS was more prepared than before. In order to overcome one of the legal obstacles, PAS through Marang MP, Abdul Hadi Awang proposed a private member's bill to amend the *Syariah* Court Act (Criminal Jurisdiction) 1965. Initially, the private bill sought to expand the *Syariah* court jurisdiction - which limits the *Syariah* court to meting out of punishments to only a maximum of three years jail term, five thousand ringgits fine, or six strokes of the (Sharia) whip, or any of combination thereof - to be unlimited, except for the death penalty. This private member bill first appeared in the Parliament order paper on 7 April 2015 (Hansard, 2015). It caused a heated debate, as opponents describe it as a 'blank cheque' given to the *Syariah* court judges to inflict a wide range of punishments. The bill appeared again several times in the Parliament order paper, but as yet it is still not tabled.

On 24 November 2015, Hadi proposed amendment to his private member bill. Instead of proposing unlimited jurisdiction (except death penalty) to the *Syariah* court, it suggested limiting it to a jurisdiction of 30 years' jail, RM10000 fine, and 100 lashes for *Syariah* offences (Hansard, 2016). Unexpectedly, on 2<sup>nd</sup> December 2016, the Prime Minister announced that the government would take over Hadi's bill, and there followed an announcement on 17 March 2017, by the Deputy Minister, Zahid Hamidi that the bill would be tabled by the government in the year's first *Dewan Rakyat* sitting (Astro Awani, 2017). However, on 29 March 2017, the Prime Minister made another announcement saying that the government would not now take up Hadi's bill and that would remain a private member's bill, with tabling and voting subject to the speaker's ruling (Harian Metro, 2017).

Finally, on 6 April 2017, Hadi tabled the private bill for the first time. However, the Speaker deferred the debate session (Hansard, 2017). The bill appeared several times, but the debate session was deferred on each occasion. The situation remained like this until the final sitting of the Parliament, prior to the general election. In 9 May 2018 the Malaysian General Election was held, which finally witnessed the defeat of the BN government to the opposition coalition, Pakatan Harapan, for the first time in Malaysian history. After this general election, the private member bill has not re-appeared in Parliament up to the present day.

The key events and amendments of the *Syariah* Court 1965 can be summarised below:



**Diagram 5.6: Chronological events for Hadi's private bill**

Based on the chronological event above, it can be noted that the situation was quite confusing. While at the beginning, the UMNO-led Federal Government announced that the federal government would cooperate with any state that

wished to implement Islamic criminal law, but at the same time when the private bill to amend the *Syariah* Court Act 355 was planned to be tabled by the MP of Marang, it faced many obstacles from the Federal Government itself. Although it is a matter of fact that the Speaker has full autonomy in a Parliamentary Session, the UMNO Minister can make a request to expedite any private member bill proposed by the opposition. As illustrated above, the private bill was held back several times during the sitting of Parliament, although it has appeared in the Parliament paper order many times.

In explaining this, it is claimed that the UMNO government is manipulating the issue of *Hudūd* for political gain, initially to bolster their Islamic image among the Malay Muslim voters for the upcoming general election, which was due several months after the Parliamentary sitting (Abdul Hamid, 2015). Apart from that, realising that the issue of *Hudūd* has been a divisive issue among the *Pakatan Rakyat* coalition (the opposition coalition) in the last general election, it has been argued that this issue has been exploited by UMNO, the leading party of BN government coalition, to split the opposition coalition prior the coming general election. This became reality when the resistance of PAS on the issue of *Hudūd* has resulted in the split of the opposition bloc. However, this political tactical strategy has failed and finally, for the first time in Malaysian history since independence, BN coalition lost to the *Pakatan Harapan* coalition in the Malaysian General Election in May 2018.

## **5.7 ANALYTICAL REVIEW OF THE 'SYARIAH CRIMINAL CODE (II) (1993)' AND AMENDMENT 2015**

To date, the state of Kelantan has introduced two versions of the *Hudūd* bill. The first version was tabled in 1993, and the modified version was tabled in 2015. Before going into an in-depth analysis, the difference between the two codes will be highlighted. Initially, there are no major changes made from the original version. In brief, the differences between the two versions are identified as follow



	<b>Syariah Criminal Code (II) (1993)</b>	<b>Syariah Criminal Code (II) (1993) Amendment 2015</b>
<b>Position of Non-Muslim</b>	<b>Section 56(2)</b> Non-Muslims given choice to be prosecuted either under Sharia law or civil law.	<b>Section 2</b> The application of this code applied only to Muslim.
<b>Pregnancy out of wedlock as an evidence for <i>zinā</i></b>	<b>Section 46(2)</b> Pregnancy can be used as an evidence to charge unmarried women of <i>zinā</i> .	Pregnancy cannot be used as an evidence to charge unmarried women of <i>zinā</i> . The section regarding this provision was deleted.
<b><i>Liwāt</i> between husband and wife</b>	<b>Section 16</b> <i>Liwāt</i> between a husband and wife is not considered as an offence.	<b>Section 15(2)</b> <i>Liwāt</i> between a husband and wife is considered as an offence, but not under <i>Hudūd</i> , but <i>ta'zīr</i> .
<b>Punishment for Apostasy</b>	<b>Section 23(3)</b> Imprisonment for at least three days, if the offender did not repent, he must be put to death.	<b>Section 23(3)</b> The section did not provide a specific period for imprisonment.  <b>Section 23(4)</b> The section also did not specify any final punishment, thus remained ambiguous.

**Table 5.7: Comparison between Syariah Criminal Code (II) 1993 and Amendment 2015**

The following part analyses the *Hudūd* bill from different angles. Due to the insignificant amount of difference between the two, the discussion in the next section will refer to the latest version *Syariah Criminal Code (II) 1993 Amendment 2015* as a point of reference. The full version of the code is enclosed in the appendix.

### 5.7.1 LEGAL ISSUES

The most central criticism received by the *Hudūd* bill proposed by the State of Kelantan is about its violation of the Federal Constitution of Malaysia (Kamali, 1998; Mohamad, 2015b; Sarwar, Malik Imtiaz & Ananth, 2016). The violation can be seen from two aspects. Firstly, the *Hudūd* bill enacted some criminal offences such as theft, robbery, killing, and causing body injury, which were under the jurisdiction of the Federation. The Federal Constitution in the Ninth Schedule outlines the legislative power between the Federation and the State. Item 4 of the Federal List stipulated that criminal law falls under the Federal List and within the jurisdiction of civil court. Although the Federal Constitution, Item 1 of State List, stipulated that the State has power to make laws for the *“creation and punishment of offences by persons professing the religion of Islam, against precepts of that religion”*, this jurisdiction is limited. The later part of the article mentions, *“Except in regard to matters included in the Federal List”*. Hence, whenever there is a conflict between Federal and the State law, Article 75, Federal Constitution declares that,

*“If any State law is inconsistent with a Federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.”*

Secondly, the *Hudūd* bill also prescribed punishments such as limb amputation, death penalty, and 100 lashes, which exceed the jurisdiction given to the *Syariah* court. The Sharia Court Act (Criminal Jurisdiction) 1965 (Act 355), an act which limits the punishments by Sharia courts, stipulates that the *Syariah* Court can

prescribed punishment, *“to the maximum of three years of jail term, five thousand ringgit fine or six strokes of (Sharia) whipping or any of combination.”*

The move taken by the State of Kelantan to table the *Hudūd* bill, despite having these constitutional issues, has caused controversy and criticism by the media and public alike. The question is, was the State of Kelantan itself aware of this constitutional issue prior tabling the bill, given the fact that it was drafted by a committee consisting of legal experts? Referring to the corresponding letter from the Chief Minister of Kelantan to the Prime Minister, it indicated that the state of Kelantan should seek permission and support from the Prime Minister prior the *Hudūd* bill being tabled. Based on this evidence, it implied that the state of Kelantan was already aware of the legal issues prior tabling the *Hudūd* bill.

Realising this legal constraint, some legal expert such as Ahmad Ibrahim (2011) and Mohamad (2015a), suggested that the Article 76A (1) of the Federal Constitution could be used to pave the way for its implementation. This article provides that, the Parliament can give the power to the State to enact laws under the Federal through Article 76A (1). In this Article, it stipulates the Power of Parliament to extend legislative powers of States 76a,

*“It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorise the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter.”*

However, this suggestion requires a high political will and cooperation between the Federal Government and the PAS-led State Government. Considering the current political climate in Malaysia, this seems unlikely, at least for the next few years.

## 5.7.2 AMBIGUITY OF DEFINITION

The character of a legal code is that it needs to be authoritative, clear and unequivocal. However, there are several provisions in the *Hudūd* bill that are ambiguous. For instance, in Section 9(1), the definition of *ḥirābah* was stipulated as, “A person or a group of persons who confiscate the property of another with violence or wrongful restraint or making threat, is said to commit *ḥirābah*.”

Based on this, it is argued that this definition is too broad. Compared to a section in the Penal Code, Act 574, the definition of *ḥirābah* in this *Hudūd* bill comprised four offences in one section. In the Penal Code, Section 390 specified an offence for robbery, section 391 for group-robbery, section 339 for ‘wrongful restraint’<sup>32</sup> and section 383 for extortion.

Apart from that, one must note that that definition and discourse of *ḥirābah* by classical scholars are the outcome of their deduction towards the forms and nature of crimes that existed during their time (Kamali, 2017). By referring to Qur'anic verse on *ḥirābah* (verse 5:33-34), great attention to detail can be found on the punishment but only general picture of the crime is mentioned. There are two features mentioned regarding *ḥirābah*, the first one being those who commit *ḥirābah* are deemed to be declaring war toward Allah and the Prophet (pbuh). The second is those who commit this crime are said to be committing atrocities on earth. In order to obtain a clearer interpretation of this verse, several *ḥadīths* related to the *asbāb al-nuzūl* (reasons for the revelation) of this verse have been explored. Al-Ṭabarī, (2000) mentioned three opinions with regard to the *asbāb al-nuzūl* and they are:

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<sup>32</sup> In the Penal Code, section 339 defines the offence of “wrongful restraint” as “whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person”.

I. A narration of Ibn ‘Abbās and al-Ḍahāk saying that this verse was revealed toward a group of *ahl al-kitāb* who made a covenant with the Prophet (pbuh), only to violate it later and were deemed to have committed atrocities on the world.

II. Based on the narration of ‘Ikrimah and Hasan al-Baṣrī, this verse was directed toward the polytheists. In this narration, there is no specific mention of any particular event that took place.

III. Anas narrated that this verse was revealed regarding the clans of ‘Uraynah and ‘Ukayl who embraced Islam and later on apostatised whilst going against the Prophet SAW at the same time. The said *ḥadīth* is “Anas who related that a group of people from ‘Ukayl and ‘Uraynah went to see the Messenger of Allah, Allah, bless him and give him peace. They said: “O Messenger of Allah, we were never people of agriculture, and before we settled around Medina we used to be people who looked after cattle”. The Messenger of Allah ordered that they be given a flock of camels, a shepherd, and commanded them to set off with them, with a dispensation to drink their milk and urine. When they reached the region of al-Harrah, they killed the shepherd of the Messenger of Allah, and took off with the camels. The Messenger of Allah sent after them and when they were captured and brought to him, he cut off their hands and feet and gouged their eyes. They were left in this state in Medina until they died. Said Qatādah: “*It was mentioned to us that this verse was revealed about them (The only reward of those who make war upon Allah and His messenger and strive after corruption in the land...)*”. Narrated by Muslim.

By applying interpretation, medium and speculative *ijtihād*, scholars have variously interpreted definitions for the offence of *ḥirābah*. Most classical scholars classified this offence as *qat’u al-ṭarīq* or *sariqah al-kubrā*. While, al-Shawkānī (2007) is of the view that associating Allah with something else, killing, sexual harassment, seizing people’s properties, destroying buildings, polluting and damaging the ecosystem such as cutting down trees, are categorised as *ḥirābah*. According to some exegesis scholars, *ḥirābah* is referred to recidivist thieves and burglars, notorious rapists,

and homosexuals as those whose evil cannot be stopped under execution (Kamali, 2017). Apart from that, contemporary scholars such as Abou El Fadl (2006) and Kamali (2017), associated *ḥirābah* offences to terrorism.

Another example in regard to the ambiguity of definition can be seen in the definition of *riddah* in section 23(1),

*“Whoever voluntarily, deliberately and aware of making an act or uttered a word affects or against the faith in Islamic religion is coming irtidad.”*

The definition of *riddah* in this *Ḥudūd* bill is vague and too broad, which can encapsulate a wide spectrum of offences such as blasphemy, heresy, disbelief and apostasy. All of this is arguably a result of a literal approach by the drafters, who replicate the definition from the classical texts, which were not written for legal coding purposes as mentioned by Peters (2002, p.86), *“fiqh text does not resemble code laws. They contain scholarly discussion and are therefore open, discursive and contradictory”*.

### **5.7.3 ISSUE OF STONING (RAJM)**

In section 13, the *Ḥudūd* bill prescribes the punishment for adultery as follows,

*“If the offender who commits adultery is a muḥṣān, the offender shall be punished by stoning, which is stoned until death with medium size stones”*

*“If the offender who commits adultery is a ghayr muḥṣān, the offender shall be punished with whipping of one hundred lashes and in addition shall be liable to imprisonment for one year”*

While scholars unanimously agreed that the punishment for an unmarried man or woman who has committed adultery is 100 lashes of the whip based on the verse (24:2), there is a recurring discussion among the contemporary scholars on the punishment for someone married who commits adultery. Prior to addressing the contemporary discourse on this matter, the classical jurists’ views on this issue will be provided. All classical jurists, with the exception of Khawārij and a minority of

Mu'tazilah and Shī'ī scholars, are unanimously of the view that the punishment for a married man or woman who has committed adultery is stoning to death ('Awdah, 1997). Classical scholars came up with this opinion based on a few textual evidences as follows:

- I. Take from me, take from me, Allah has prescribed for them [those guilty of adultery] the way, an unmarried will be punished with hundred stripes and expulsion for one year and a married person will be punished with a hundred stripes and stoning to death.
- II. *Ḥadīth* in Bukhārī that mentioned about the abrogated verse of *rajm*. "Undoubtedly Muhammad was the true prophet of God, and revealed unto him the Holy Qur'an, and one of that which God sent down to Muhammad is the verse of stoning, and we saw it, and read it, and understood it. The prophet himself ordered persons to be stoned, and we did the same after him. I fear that after a time men would say, "we do not find stoning in the Qur'an;" then verily, they would be misled by not obeying this order, truly sent down by God; and there is no doubt that stoning is the punishment specified in the Qur'an for men and women who commit adultery, after it has been either proved by witnesses, or by female conception, or by acknowledgement of the accused party himself."
- III. *Ḥadīths* that relate the story about the Prophet (pbuh) sentencing stoning towards those who have committed *zinā* such as the *Ḥadīth* of Māi'z, al- 'Asīf, al-Ghamidiyyah and a Jewish couple.

In regard to the contemporary scholars' views on this issue, they are divided into three factions - those who conform to the view of the majority of classical scholars, those who totally reject stoning as a punishment, and finally those who take the view that stoning falls under the *ta'zīr* category. The majority of scholars fall into

the first group. The second view was proposed by Abū Zahrah on 6 May 1972, in a conference held in Dar al-Bayḍā', Morocco (Al-Qaraḍāwī, 2017)<sup>33</sup>. He opined that stoning was a punishment that was adopted from Judaism and recognised by the Prophet (pbuh). The third view is the view of Al-Qaraḍāwī (2017), al-Zarqā' (1976). They are of the view that stoning to death for adultery falls under *ta'zīr*, and not classified under *Ḥudūd*. All of the views of the contemporary scholars on this issue will be elaborated in more detail in chapter six (section 6.2.1).

#### 5.7.4 ISSUE OF APOSTASY (*RIDDAH*)

In the *Ḥudūd* bill, Section 23(3-4) stipulated that the punishment for *riddah* is as follows,

*“Whoever is found guilty of committing the offence of irtidad shall, before a sentence is passed on him, be required by the court to be imprisoned within such period deemed suitable by the Court for the purpose of repentance.*

*Where he is reluctant but there is still hope for his repentance then the Court shall consider for continuance until no hope of repentance then **the court shall pronounce the Ḥudūd sentence on him** and order the forfeiture of his property irrespective of whether such property was acquired before or after the commission of the offence to be held for the Baitulmal”*

Based on this provision, it is noticed that the section does not specify an explicit final punishment for the offence, whether it is death penalty or any other sentence. However, based on the existence of criminal procedural code, named '*Kaedah-Kaedah Hukuman Mati*', promulgated by the *Ḥudūd* Technical Committee, it is believed that the final punishment can reach the death sentence<sup>34</sup>. The imposition of the death penalty for apostasy in this *Ḥudūd* bill ignores the fact that in reality, there is no consensus between the classical jurists in regard to this issue. Although

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<sup>33</sup> A full account of Abū Zahrah's view in regard to this issue was written by al-Qaraḍāwī in his webpage (<https://www.al-qaradawi.net/node/4488>).

<sup>34</sup> This is a document obtained by the researcher during field work. This document outlines specified procedural aspects on how to inflict death penalty punishment for *riddah* offence.



the majority of the classical jurists hold the view that an apostate must be put to death after the period of *istitabah* ends, there are other jurists who hold the view that an apostate should not be put to death in any circumstances and should forever be asked to repent. This is the view of Ibrāhim al-Nakha'ī and Sufyan al-Thawrī (Ibn Taimiyyah, 1983). Moreover, the prescription of death penalty for apostasy in this *Hudūd* bill disregards the recurring discussion of contemporary scholars and Muslim thinkers such as Al-Qaraḍāwī (n.d.), Saeed (2016), al-Raysūnī (2009), al-'Alwānī (2011) and Abū Zahra's views on this issue. We will explore this in more detail in chapter six (section 6.2.1).

### 5.7.5 ISSUE OF THEFT

Concerning the offence of theft, there are two issues that need to be highlighted. First, the issue of the minimum value (*niṣāb*) of the stolen property. In the *Hudūd* bill, section 3, it specifies the amount of minimum value (*niṣāb*) of the stolen property as follows,

*“niṣāb means a sum of money equivalent to the current price of gold weighing 4.45 gram or a sum to be determined by His Royal Highness the Sultan from time to time in accordance with hokum syarak”*

It is believed that this amount converts to the classical jurists' view of the amount of *niṣāb*. Briefly, Ḥanafī scholars view that the amount of minimum value (*niṣāb*) of the stolen property which would lead to amputation of the hand is one *dinār* or ten dirhams. This was based on the following ḥadīth, “a thief's [hand] should not be cut off except for a quarter of a *dinār* or more”. Whereas, other majority scholars; Mālikī, Shāfi'ī, and Ḥanbalī scholars view that the minimum value (*niṣāb*) of the stolen property should be a quarter of *dinār* or three dirhams. The ruling has its basis in a ḥadīth by Ibn 'Umar, “[he] narrated that the Messenger of Allah (pbuh) cut off the hand of a thief for stealing a shield that was worth three dirhams”. However, contemporary scholars argue that the value of *niṣāb* must be revisited (al-'Awwā', 2006b). This will be elaborated in more detail in chapter six (section 6.2.1).

The second issue is related to the punishment for committing theft. In the *Hudūd* bill, section 7, the punishment is stipulated as follows:

- I. *For a first offence with amputation of his right hand,*
- II. *For a second offence with amputation of his left foot; and*
- III. *For third and subsequent offences, imprisonment for such term as, in the opinion of the court is deemed appropriate, of not more than fifteen years, to make the offender realise and regret.*

For punishment of theft as a second offence, and subsequent offences, scholars have different opinions. For second time offenders, the majority of scholars hold that the punishment is to cut off the left foot, as stated in the enactment. However, Aṭṭā' and Ibn 'Abbās were of the view that amputating a foot should not be the punishment, since the Qur'an only mentions about removing the hand ('Awdah, 1964). For a third offence, Ḥanafī and Ḥanbalī scholars agree with the enactment, i.e. the *ta'zīr* approach – imprisonment until repentance. There is a stricter approach to this, Mālikī and Shāfi'ī scholars view that the punishment for a third time offence is the cutting off the left hand, and for a fourth time offence, amputating the right foot ('Awdah, 1964). This brought about the question, why on some occasions are less strict opinions chosen and at other times stricter? This inconsistency, without apparent justification, is problematic.

#### **5.7.6 ISSUE OF DRINKING ALCOHOLIC DRINKS (SHURB)**

In the *Hudūd* bill, section 22 defines and punishes the offence of *shurb* as follows,

*“Whoever drinks liquor or any other intoxicating drinks whether he is intoxicated or not, irrespective of the quantity he consumed, is committing a shurb offence and upon conviction shall be punished with whipping of not more than eighty lashes and not less than forty lashes.”*

Regarding the definition of *al-khamr* in this section, there is a generalisation that a person who drinks liquor or takes anything intoxicating, whether in small or large quantities, is punished according to *Hudūd*. This generalisation portrays a dismissal of the different existing opinions among the majority of scholars within the Ḥanafī school of thought.

According to Mālikī, Shāfi'ī, and Ḥanbalī scholars (also known as the *Ḥijāzī* scholars), *al-khamr* is any drink deemed to be intoxicating, whether it is produced from brewing grapes or anything else such as dates, dried grapes, grains, barley and rice, and whether in low or high level of intoxication. While, according to Ḥanafī school, *al-khamr* is the juice from grape or date syrup that has been fermented to a point where the sugar turns to alcohol, thereby making it an alcoholic drink. Other intoxicating drinks are called as '*muskir*' or '*nabīdh*' and are not regarded as '*al-khamr*'.

The implication of this view is that, the *Ḥijāzī* scholars view that all intoxicating drinks should be classified as *al-khamr*, and it is forbidden to consume, whether in small or large quantity, and those who are caught doing so are punished according to *Ḥudūd*. On the other hand, Ḥanafī scholars view that the total prohibition is only meant towards *al-khamr* –the alcoholic drink made from brewing grapes and dates, and for other types of alcoholic drinks only liable for *Ḥudūd* if a person who drinks to the level of intoxication or gets drunk.

Another important aspect to discuss is the relevance of including this offence under the *Ḥudūd* category. There are scholars who view that the offence of drinking alcohol falls under the category of *ta'zīr* based on the absence of specific evidence from the Qur'an regarding the punishment for drinking alcohol. As far as *ḥadīths* are concerned, there is no evidence of definite sentence and number of lashes as punishment ordered by the Prophet (pbuh) to people who are drunk. Among the *ḥadīth* that reported how the Prophet treated the drunks are as follows:

- I. Narrated by Anas Ibn Mālik: The Prophet (pbuh) beat a drunk with palm-leaf stalks and shoes. And Abū Bakr gave (such a sinner) forty lashes (*Ṣaḥīḥ al-Bukhārī*).
- II. Narrated by `Uqbah bin al-Ḥarith: Al-Nu'mān or the son of Al-Nu'mān was brought to the Prophet (pbuh) in a state of intoxication. The Prophet felt it

hard (was angry) and ordered all those who were present in the house, to beat him. And they beat him, using palm-leaf stalks and shoes, and I was among those who beat him (*Ṣaḥiḥ al-Bukhārī*)

III. Narrated Abū Salamah: Abū Hurairah said, "A man who drank wine was brought to the Prophet (pbuh). The Prophet said, 'Beat him!' Abū Hurairah added, "So some of us beat him with our hands, and some with their shoes, and some with their garments (by twisting them) like a lash, and then when we finished, someone said to him, 'May Allah disgrace you!' On that the Prophet (pbuh) said, 'Do not say so, for you are helping Satan to overpower him.' (*Ṣaḥiḥ al-Bukhārī*).

IV. Narrated al-Sa'ib bin Yazīd: We used to strike the drunks with our hands, shoes, clothes (by twisting it into the shape of lashes) during the lifetime of the Prophet, Abū Bakr and the early part of `Umar's caliphate. But during the last period of `Umar's caliphate, he used to give the drunk forty lashes; and when drunks became mischievous and disobedient, he used to scourge them eighty lashes. (*Ṣaḥiḥ al-Bukhārī*)

Based on the *ḥadīth* found on this issue, it is evident that the Prophet (pbuh) ordered the drunks to be beaten or flogged, but the Prophet (pbuh) did not specify the number of strokes or lashes. Therefore, on the evidence provided, it is argued that the offence of wine drinking falls under the category of *ta'zīr*, not *Ḥudūd* offence.

## CONCLUSION

In this chapter, I have attempted to provide a comprehensive view on the effort to reintroduce *Ḥudūd* in Malaysia. In the earlier part, by presenting historical fact and evidence, it is suggested that the re-establishment of Islamic law in general, and Islamic criminal law in particular is largely motivated by an assertion of cultural and

religious identity of the Malay Muslims, however it cannot be denied that other factors, such as the Islamic resurgence, have also contributed to hasten its reestablishment.

In the next part of the chapter, the protracted process of reintroduction by the state of Kelantan, from 1993-2018 has been highlighted. Previous studies have largely utilised secondary instead of primary sources in describing this event. In this study, through meticulous study of the primary resource, I attempt to gain impartial and comprehensive view on the efforts towards reestablishment. Based on these sources, there are several points that I have discovered. Firstly, the reintroduction of Islamic criminal law in Kelantan represented only a small fraction of the Islamisation project by that State. Although the reintroduction failed, other Islamisation projects were established and are in existence up to the present day. Interestingly, unlike islamisation projects in other Muslim countries that witnessed the subjugation of women, the state of Kelantan introduces various programmes to empower women. Among the efforts were the extension of maternity leave, the introduction of Armalah Development Programme for single mothers and widows, and the formation of women's development centres, and the appointment of women representatives to important posts such as the Senate, State Exco, district council members, and even *penghulu*, to encourage female participation in decision-making. This information is rarely acknowledged or discussed in previous studies.

Another important point that needs to be highlighted in this chapter is regarding the motives of the reintroduction. Most previous studies claimed that the reintroduction of Islamic criminal law by the State of Kelantan was done for political mileage. However, it is argued in this chapter that this claim is not supported by any strong evidence. In fact, there are several instances illustrated in this chapter that showed how the MP's from PAS party went against popular political moves. Thus, this study suggests that previous studies tend to exaggerate on the political motive and subsequently failed to acknowledge other important motives such as

religious, historical and social. With respect to the religious motive, the evidence presented in the chapter shows how committed the State of Kelantan has been in reintroducing the *Hudūd* law despite knowing that the law is against the Federal Constitution.

This chapter also points out that the sharp political rivalry between PAS and UMNO has left no room for intellectual discussion. This has been described through the analysis of letters between both parties in 1993 and 1994. The situation remained until 2015 when the UMNO leaders showed openness to provide some space for negotiations between the state and the federal government to implement the *Hudūd* bill. However, from the evidences presented in 5.6, it may be suggested that this move was merely a political strategy by the UMNO during that time in an effort to split the opposition bloc, and at the same time to attract the Malay Muslim voters a few months prior to the upcoming general election.

Additionally, this chapter highlight an attempt to reform the *Hudūd* bill by a group of lawyers and academicians. In a meeting with the bill Amendment committee, headed by the Chief Judge of Kelantan, a representative of this group presented a proposal that contained suggestions to improve the existing *Hudūd* bill. Among the major improvements proposed were annulment of *rajm* for the punishment of *zinā*, an evaluation of the *niṣāb* values, increased age for *mukallaḥ*, from 18 to 21, and redefinition of *zinā*, *shurb* and *riddah*. However, this attempt failed due to the conservative understanding held by several individual of the *Hudūd* Committee, who largely insisted on holding on to the classical doctrines of *Hudūd* law.

Finally, through the critical review of the *Hudūd* bill proposed by the state of Kelantan, by illustrating a lot of issues and problem of the *Hudūd* bill, it is suggested that the model of *Hudūd* proposed by the state of Kelantan is problematic and would not be feasible to implement in the Malaysian framework. However, it is believed that all of the issues could be overcome through the engagement of *ijtihād*. This will be elaborated in detail in the next chapter.

## CHAPTER 6

### RECONSTRUCTING *ḤUDŪD* LAW WITHIN THE CONTEXT OF MALAYSIA; UTILISING *IJTIHĀD* AS A TOOL FOR REFORM

#### INTRODUCTION

This chapter is dedicated to examine the prospect of *ijtihād* in achieving legal reform, particularly in the field of *Ḥudūd* law and its application within the context of Malaysia. The chapter begins with the definition of *ijtihād*, the role and importance of *ijtihād*, the challenges encountered by the contemporary *mujtahid*, and the boundaries of *ijtihād*. Then, the discussion continues, providing reasons why utilising *ijtihād* is pertinent, prior the reestablishment of Islamic criminal law in Malaysia. Subsequently, by utilising the framework of *ijtihād*, a critical reassessment on the theory of *Ḥudūd* will be attempted. In the final part, this study attempts to suggest alternative ways of how to implement *Ḥudūd* within the context of Malaysia.

#### 6.1 *IJTIHĀD* AS PART AND PARCEL OF LEGAL REFORMS

As part and parcel of the vehicle of renewal and reform, *ijtihād* can be employed as a mechanism to facilitate human life by finding solutions to perplexing problems and critical situations. In this study, *ijtihād* is utilised in achieving legal reform, particularly in the field of Islamic criminal law in Malaysia. In this section, the definition of *ijtihād* will be explored, followed by its importance and mechanisms, and ended by the challenges and obstacles of *ijtihād* faced by contemporary jurists.

##### 6.1.1 DEFINITION OF *IJTIHĀD*

Literally, *ijtihād* is defined as self-endeavour or exertion. In a legal sense, according to Hallaq (2005, p.208), *ijtihād* means “a process of legal reasoning and

*hermeneutics through which the mujtahid derives or rationalises law on the basis of the Qur'an and the Sunna*". Similarly, Abū Zahrah (1958, p.379) and Al-Jurjani (1984, p.10), define *ijtihād* as "the exertion of the utmost effort, either in deduction of religious rulings or in their application". Unlike other scholars, Kamali (2002, p.623) offers a more comprehensive definition. Kamali defines *ijtihād* as, "a creative but disciplined and comprehensive intellectual effort to derive judicial rulings on given issues from the sources of the Sharia, in the context of the prevailing circumstances of the Muslim society". From the above definitions, despite of the different wording in defining the meaning of *ijtihād*, scholars agree on the main features of *ijtihād*; an exhaustive process of deduction to derive legal rulings from the Qur'an and the Sunnah by a *mujtahid*.

The uniqueness of Kamali's definition of *ijtihād* is, it mentions the word 'creative'. Arguably, in this contemporary era, this is a characteristic considered lacking in most of the *mujtahid* jurists. This might be the result of intellectual decline of Muslim scholarship after the sacking of Baghdad which eventually led to low self-esteem, inferiority and a stagnant decline of *ijtihād*. Secondly, is the word 'disciplined'. This word is broad enough to encapsulate all sorts of methodologies employed by contemporary scholars in exercising *ijtihād*. However, in search of a viable methodology, it needs a considerable amount of scrutinisation. Questions, such as which methodology is the best to achieve the desired outcomes, and at the same time not violate the essential message of the Sharia? Is the theory of *uṣūl al-fiqh*, developed by classical jurists, good enough to be used as a tool to answer the complex questions to do with the realities of the modern world, which must be addressed and answered by contemporary scholars before committing to *ijtihād*. Thirdly, Kamali mentions the phrase, 'comprehensive intellectual effort'. This phrase is somehow interrelated, with a suggestion propounded Siddiqi (2007). Siddiqi proposes that *ijtihād* must take account of expert views in the field in order to comprehend and get a clear picture of the facts and issues. Finally, the phrase, 'in the context of prevailing circumstances. It means that every *mujtahid* in exercising *ijtihād* needs to observe their surroundings and the reality that they live



in. This explains the divergent opinions that have arisen between the jurists, despite of the ruling arrived at by the same text. Besides, it also implies that there is an urgent need for reassessment of the rulings derived by the classical jurists, by the contemporary mujtahid because of these reasons.

### **6.1.2 THE ROLE AND IMPORTANCE OF *IJTIHĀD***

In 1898, Abduh began to advocate the need of *ijtihād* as he view this as the only way for Islam to adapt to the needs of today's society (Coulson, 1964) . Similarly, scholars such as al-'Alwānī (1993), al-Qaraḍāwī (1996), and Kamali (2003) view that *ijtihād* is not only permissible but is an obligation. The nature and features of Sharia which combines *al-thabāt* and *al-mutaghayyirāt*, *qaṭ'iyyah* and *ẓanniyāt* gives a space for a jurist to determine a ruling based on the best interest of the people within a specified context (al-Qaraḍāwī, n.d., 2002).

Throughout history, there have been many instances that showed how *ijtihād* was used to address the different needs of various societies, times and place. For example, al-Shāfi'ī, the founder of the Shāfi'ī school of thought, had a different set of rulings and positions when he was in Egypt from those during his time in Iraq. This idea is also embodied by the jurists through a famous legal maxim, '*la yunkar taghayyur al-aḥkām bi taghayyur al-zamān wa al-aḥwāl*'<sup>35</sup>. A ruling can differ from place to place, and time to time depending on several factors; social, political, economic and necessities of life (Al-Qaraḍāwī, 2007). To contextualise this more clearly, each factor will be given examples from history:

#### **I. Social change**

Historically, during the time of the prophet, the mosque (*masjid*) was a place where all were welcome, all participated and contributed despite gender, race or age. The

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<sup>35</sup> The translation of this legal maxim is "It may not be denied that laws will change with the change of circumstances".

*masjid* was not confined to ritual prayer and worship but played a bigger role as a centre of the community which included education, political discussions and social interactions. In particular, women participated equally as students, joining *halaqah* with men. Some, even after receiving their *ijazah* continue to teach both men and women (Nadwi, 2007). However, over a period of time, a marginalisation and exclusion of women from the mosques was seen. There were fatwas issued, taking away the right of women to attend mosque, some mosques no longer provide praying space for women. Ironically, when women today are allowed to go to school, university, market, the only place which is prohibited is the place of worship (al-Qardawi, 1993). As Al-Qaraḍāwī (1996) suggested, in today's world, women must be given equal space to attend and contribute to the mosque.

## II. Political change

Traditionally, the jurists classified the countries into *dār al-Islām* and *dār al-ḥarb*. Similar to this binary division of territories, supplementary definitions were also given for non-Muslims. Non-Muslims living outside of Muslim countries were known as '*ḥarbī*', those under Muslim protection in exchange for a special tax were called '*dhimmī*' while citizens of non-Muslim countries who maintained peaceful relations with the *dār al-Islām* were '*mu'āhad*', and non-Muslims who sought temporary protection in Muslim lands were '*musta'man*' (Malik, 2018). All of this classification and discussion reflected the political context surrounded by the jurists during that time (Abū Zahrah, 1995). However, after substantial revision, contemporary scholars such as Al-Qaraḍāwī (2009), and al-'Awwā' (2006a) argued that this classification is no longer suitable for modern times and there is a need to develop a new understanding of international relationship and citizenship. For instance, Al-Qaraḍāwī suggests that Muslims and non-Muslims today share equal civil and political rights except in specialised religious obligations as both share same responsibilities to the country they lived in.

### III. Necessities of life

The basic rule is that a woman must travel with their *maḥram* at every time and circumstances. This is based on a tradition which states that, “A woman must not travel unless she is accompanied by a *maḥram*, and no man is to enter into her company unless she is accompanied by a *maḥram*”. However, institution such as Dār al-Iftā’ al-Miṣriyyah, (n.d.) issued a fatwa allowing women to travel alone, based on Mālikī, and some scholars’ view, provided that the journey is safe and permission is granted by their *maḥram*, husband or guardian beforehand. They argue that prohibition in the *ḥadīth* is because of the lack of security during previous times. At the present time, various safe routes and means are available for women. Based on these reasons, if the safety of the woman is assured and permission is granted, the prohibition is lifted.

Apart from the factors mentioned above, another reason which can explain the importance of *ijtihād* is the fallibility of human reasoning. Commenting on this, Al-Qaraḍāwī, (2009, p.14) points out that, “no single *tābi’un* claimed that they are *ma’sūm*, they are *mujtahid* who put their best effort to understand the text”. In fact, the tendency to err is acknowledge explicitly by the great *imām* mazhab. For instance, Imām Mālik, in one of his book notes that, “every word of a jurist can be accepted or rejected except for the word of prophet”. In the same vein, al-Shāfi’ī said, “my opinion is right but maybe wrong, and others view is wrong but maybe right”. Similarly, Iqbal (1975) argues that no single jurist claims that their opinion is final. This can also be seen when the jurists end their writing with the phrase, ‘God knows best’(Quraishi-landes, 2015) .

With the advancement of technology and production of knowledge in today’s world, it is evident that this concept does have a point. One example is regarding the determination of minimum and maximum duration of pregnancy. The classical jurists indicated that seven years as the maximum period for pregnancy. This opinion is no longer tenable in the light of a more accurate medical research that

proves the maximum period of pregnancy is only nine months (al-Qaraḍāwī, 1996).

However, at the same time, a *mujtahid* needs to be aware that *ijtihād* must not become prey to the pressure of prevailing realities. This has been addressed by Al-Qaraḍāwī, (1996, p.180),

*“We should be cautious not to be prey to the pressure of the prevailing reality in our contemporary societies. This reality is not created by Islam through its creed, law and morals; it is brought about neither by Muslims' free will and accord, nor by their minds or hands. It was rather a reality that was imposed on them in times when they were unmindful, weak and disunited, whereas their colonisers were strong, alert and proficient. As Muslims could not at that time set themselves free, the subsequent generations inherited this reality and matters remained unchanged. Hence, the essence of ijtihād does not consist of finding justifications for this reality, making texts subservient to it and fabricating fatwas to lend legitimacy to its existence.”*

Undeniably, as an example, there are some Muslim countries that felt pressure to initiate reform to conform to international human rights organisations or western hegemony, in order to stay in power (Codd, 1999).

### **6.1.3 UTILISATION OF *IJTIHĀD* AS A TOOL FOR LEGAL REFORM**

Al-Qaraḍāwī is among the scholars who persistently believe that *ijtihād* can be exercised by modern scholars in today's world. According to Al-Qaraḍāwī (1996), there are three types of *ijtihād*: opinion (*fatwā*), institutionalized academic research (*baḥth*), as well as the statutory codification of laws at a parliamentary level (*taqnīn*). The latter type which is *taqnīn* involved a great part of legal reform in all Muslim countries in the post colonialism era. To perform *ijtihād*, Al-Qaraḍāwī (1996) proposed two approaches namely *ijtihād intiqā'ī* (selective *ijtihād*) and *Ijtiḥād insyā'ī* (innovative *ijtihād*).

The first approach, selective *ijtihād* involves the process which is known as *takhayyur* and *talfīq*. *Takhayyur* is a process of selecting one of the opinions among

the available rulings either from a single *tābi'un* or different *tābi'un*. It may also be widened further by selecting views from individual jurists outside the existing *tābi'un* if it offered the most appropriate views for the purpose of legislation and codification. This process of *takhayyur* is not merely a 'cherry picking' effort but involves a process known as *tarjīh*; a careful process of weighing the evidence used by the conflicting opinions and selecting the strongest, and at the same time appropriate, based on certain reasons and factors which will be explained later. Another approach is *talfīq*, an extension of *takhayyur* can also be utilised by the scholars. *Talfīq* which is also known as syncretism in western thought, consisting of a combination of different existing views, and patching them together in order to make them fit into a solution for a particular problem.

The second type of *ijtihād* proposed by Al-Qaraḍāwī, known as *innovative ijtihād*, involves a more challenging task which consist of deriving new rules for current issues in various fields such as, for instance, in medical issues; organ transplant, milk bank and banking. Al-Qaraḍāwī also points out the possibility for a reassessment of the ruling derived by the classical jurists, as the time space factor may affect the outcome.

#### **6.1.4 CHALLENGES OF IJTIHĀD**

In addressing the challenges of *ijtihād* in this century, there is the claim of 'closing the gates of *ijtihād*' by many modern scholars, such as Schacht (1964), Coulson (1964), Anderson (1976) along with Muslim scholars themselves. Although this claim was refuted by scholars such as Hallaq (1986), Abou El Fadl (2017) and Jackson (1996), in reality, *ijtihād* witnessed a stagnant decline, the result of multiple reasons, such as low self-esteem, lack of creativity, lack of democracy and freedom, internal conflict between *madhahib* and theology, factions and factionalism between conservatives, modernist and other camps. However, the spirit of *ijtihād* need to be revived as advocated by Kamali, (2002, p.630), "just as the early jurists made their own *ijtihād*, Muslims of the subsequent ages are also entitled to

interpret the fundamental principles of Islam in the light of their own experiences and the altered conditions of life”.

Secondly, is the inadequacy of *uṣūl al-fiqh* as a tool to help perform *ijtihād*, (Kamali, 2001; Nyazee, 2000). This is believed to be part of the result of the so-called ‘closing of the gate of *ijtihād*’. Another weakness highlighted by Kamali (2002) and Ibn ‘Ashūr (2013) was the total neglect of the general goals and purposes of the Sharia. It was only later this branch of discipline began to receive attention, and subsequently developed independently from the *uṣūl al-fiqh*. The integration between the *uṣūl al-fiqh* and *maqāṣid* approach is believed to bring more flexibility and relevance to modern realities (Kamali 2002).

Thirdly, it has been proposed that the imposition of overly stringent conditions on *mujtahids* has killed the spirit of *ijtihād* and perpetuated a tendency to imitate (Shabbar, 2018). However, as Al-Qaraḍāwī (1996) suggests, this rigorous condition is confined only for ‘*mujtahid mutlaq*’ and did not apply to ‘*al-Ijtiḥād al-juzi*’<sup>7</sup>. Alternatively, a collective endeavour of *ijtihād* can also be initiated to overcome the fear of lack of capability to exercise *ijtihād* (Kamali, 2002; Siddiqi, 2007). In reality, there are several institutions such as International Islamic Fiqh Academy, International Union for Muslim Scholars, and the European Council for Fatwa and Research are working toward this. If they can work collaboratively, involving specialist expertise from the various fields, depending on the issue, they can bring impactful change to Muslims, and the world at large.

Fourthly, *ijtihād* should be exercised by independent scholars who, free of any political affiliations or institutions. Throughout the Islamic history, Sharia has been used intentionally, or unintentionally, by rulers to gain their political ends, which has resulted in bias and prejudicial interpretations (Siddiqi, 2007).

### 6.1.5 BOUNDARIES FOR *IJTIHĀD*

Essentially, the *uṣūl al-fiqh* scholars divide the evidences of meaning into two distinctive categories, *qaṭʿiyyāt* (definitive) and *ẓanniyyāt* (speculative). The definitive text is clear and specific. It has only one meaning, binding upon everyone and not open to other interpretations (Sidahmad, 1995). An example of this text is the verse on the punishment of *zinā* (24:2). According to this, every woman and man guilty of *zinā* should be punished with 100 lashes of flogging. This verse specifies an unequivocal punishment for the crime that must be executed if all the strict regulations are to be fulfilled. Conversely, the latter type which is speculative text is open for interpretation. One of the most famous examples was on the word *qurūʾ* in verse (2:228) "And [divorced women] shall wait for three *qurūʾ*". As the word *qurūʾ* linguistically can mean, either the time of purity, and menses, the jurists have divergent opinions in determining the meaning and interpretation of this word.

Similarly, in respect of authenticity, the scholars also divided evidences into two categories. Definitive evidence is transmitted by a group of people who is undeniably telling lies whereas speculative evidence is transmitted by only a people or some people. Thus, the Qur'an and *ḥadīth mutawātir* fall under the first category, while the *ḥadīth ahad* fall under the latter. From these explanations, basically, all the evidences in the Qur'an and the Sunnah are categorised into four types as follows;

- I. Evidence from a definite source with a definite meaning;
- II. Evidence from a definite source with a speculative meaning;
- III. Evidence from a speculative source with a definite meaning;
- IV. Evidence from a speculative source with a speculative meaning

According to scholars, *ijtihād* it is not applicable for the first type and only applicable in the three remaining types. This implies that *ijtihād* is not applicable

when there is a clear evidence from the Qur'an or Sunnah (Nyazee, 2000). This restriction also was embodied in a legal maxim, '*la ijtihād ma' al-naṣ'* which means "*when there is a text, there is no room for interpretation*". However, Kamali (2002) and Abou El Fadl, (2017) call for a reconsideration of this maxim as it puts restrictions on a *mujtahid*. Kamali further claimed that there are instances that the Companions of the Prophet exercised *ijtihād* in the presence of a clear text. For example, in the case of giving zakat to the new Muslim converts. Although in the text it clearly specifies that converts are eligible to receive *zakāh*, 'Umar discontinued distributing *zakat* to them because he believed that the underlying reasons and wisdom behind the purpose of giving to them at that time had vanished. He also called for a temporary annulment of *Ḥudūd* during the time of famine. Throughout the centuries, both of these instances were recognised as legitimate decisions by scholars. Correspondingly, An-Naim (1990) also shares the same stance. He suggested that *ijtihād* can be exercised even when there is a clear and definite text available, as long as it does not contradict any essential message of Islam. Additionally, regarding this maxim, Kamali (2002, p.631) propounded another interesting point of view. He suggests that "*a text may also be clear in its wording and import but may leave a room for ijtihād in respect of new and more efficient ways of implementation.*" This suggestion, since it does not 'violate' the text, holds the potential of achieving legal reforms, and will be examined later in the following section.

## **6.2 RECONSTRUCTING THE THEORY AND APPLICATION OF ḤUDUD IN MALAYSIA**

In the late twentieth century, there had been an increasing demand from the public to make Islam more visible in Malaysia. According to a research conducted by Pew Research Center (2013), 86% of the Muslim population in Malaysia wanted the Sharia Law to be the official law of the land. Despite this high percentage, only 55% of these people believe that Islamic law should apply only to Muslims, not all citizens. In regard to Islamic Criminal Law, among those who favour the Sharia to be the official law of the land, 66% favoured corporal punishment for crimes such as



theft and robbery, 60% favoured stoning to death as punishment for adultery, and 62% support death penalty for apostates.

In the state of Kelantan in particular, the PAS party has been governing the State for 18 years in 1959-1977 and 1990-present. Despite having slow progress in terms of material development, due to financial constraints and political pressure from the Federal government, the citizens of Kelantan continue to support the PAS-led State government for almost five decades. Without denying that there are multiple explanations behind the result obtained by the Pew Research, such as what kind of education, political and social movement, that shaped this kind of understanding of Muslims in Malaysia, both sets of evidences signifies the resistance of Muslims towards the 'secularisation of law' imposed by them during the colonial period, and an accelerating consciousness among them to have their own set of laws to govern them. In other words, Muslims today, using the language of self-determination, demand a greater role for Islam in public law in the country.

Regarding the right of the self-determination, this study concurs with an-Naim (2008a, p.1) view that, *"The Muslim people of the world are entitled to exercise their legitimate collective right to self-determination in terms of an Islamic identity, including the application of Islamic law, if they wish to do so, provided the fact that they do not violate the legitimate right of individuals and groups both within and outside for Muslim communities"*. Thus, the question is, how to reconcile between the demand of the Muslim in Malaysia and the citizens of Kelantan in particular, while at the same time respecting the right of other segment of the population who also entitles equal rights as a citizen living in the country? Thus, this study believes that if the Muslim wants to implement ICL in Malaysia, the application of ICL must be reconstructed within an Islamic framework and simultaneously introduced through a democratic way, within the confine of the Federal Constitution of Malaysia.

Initially, the reconstruction of *Hudūd* prior establishment is imperative based on several reasons which are already mentioned throughout the study. To recap, in chapter two of the study, it has been illustrated that the theory of *Hudūd* itself is not fully immutable. The framework of ICL was established by the classical jurists during the 9<sup>th</sup> century. Considering the social and political change that occurred over the course of time which has been explained in length in chapter 3, the application of *Hudūd* requires critical reassessment and adaptation to reflect the need of current time. Moreover, based on the instances provided in chapter three, it has been illustrated that the literal approach and blind imitation of this framework in today's context has created a lot of issues such as the contradiction with the national and international law, caused injustice to women, exploitative and misuse of power by the political rulers to serve the political interest and so forth.

There is also an internal reason behind this attempt which relates to the historical of Islamic law in Malaysia itself and this has been elaborated previously in chapter 4. It is imperative to highlight that prior colonisation in Malaya, Islamic law as functioning normative system has never existed in isolation. As Otto (2008) points out, Islamic law has always been part of pluralistic legal systems in which it has found itself surrounded by other normative systems such as customary law. As mentioned in chapter four, the Islamic law in Malaysia (previously known as *Malaya*) prior colonisation is not purely Islamic law but an amalgam between the Malay customary law and Islamic law (Joned & Ibrahim, 2015; Nasohah, 2004). Thus, the *Hudūd* bill proposed by the state of Kelantan, which Fathi Osman (in Kamali 1995) describe it as 'an undiluted *taqlīd*' is quite contradictory with the character of the existing law prior the advent of foreign powers in Malaysia.

Another important feature which needs to be highlighted is on the structure of legal system prior colonisation. During that time, Islamic law was enforced under a separate legal entity and administration. Each of Malay states is a different entity under the rule of a *Sultan*. However, after Malaya gained independence, all of these

states were unified under the Federation of Malaysia. Although Islamic law is retained under the jurisdiction of the state, the power given is limited only to certain matters and subjected to the Federal Constitution. Based on all reasons mentioned above, it is evident that the *Ḥudūd* law must be reconstructed prior establishment in Malaysia through the engagement of *ijtihād*.

### 6.2.1 RECONSTRUCTING *ḤUDŪD* LAW; NEGOTIATING A FRESH INTERPRETATION

In the twentieth century, there were emerging voices within Islam to reform *Ḥudūd* law. However, while these scholars agreed that it should be reconstructed, they differed in their views as to what extent it could be reconstructed. The first segment held that partial reform could be made on *Ḥudūd* law, but in principal *Ḥudūd* punishments must be observed throughout place and time, when all the pre-conditions are established. *Ḥudūd* punishment is regarded as mandatory because it has been deduced, based on authentic and explicit texts that classical jurists classified as definitive (*qat'iy*) text<sup>36</sup>. This group is represented by scholars such as Al-Qaraḏāwī (1996), Sidahmad (1995) and al-'Awwā' (2006).

Conversely, the second segment, mainly represented by Abou El Fadl (2017) and An-Naim (1990) advocates that partial reform is not sufficient but *Ḥudūd* law requires thorough reconstruction and understanding. In disseminating his view, Abou El Fadl, (2017) claims that while the majority of scholars and Muslim thinkers hold the view that *Ḥudūd* law must be observed throughout place and time, at the same time, they stipulate various conditions which seem to be impossible to achieve, effectively a utopian vision. For instance, Al-Qaraḏāwī stipulated that among the pre-conditions is that every part of Islamic teaching must be applied alongside the enforcement of *Ḥudūd* (al-Qaraḏāwī, 1993). Other scholars such as al-Zarqā' (2004) and Bayyah (2018) view that the application of *Ḥudūd* is mandatory,

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<sup>36</sup> The classical jurists claimed that definitive text has only one meaning, cannot be subject of debate and denial, and binding upon everyone.

but the prevailing condition is unsuitable for its enforcement. This has also been pointed out by 'Ali Juma'ah (2011), the former Grand *Muftī* of Egypt. In one of his statements, he asserted that,

*“Hudud has not been implemented in countries such as Egypt for a very long time. The reason behind this is due to its legal conditions prior reestablishment...Most of the penal codes in Muslim countries are silent on the issue of Ḥudūd punishment. This is because our age is one of the general uncertainty and the Prophet (pbuh) mentioned that, “Avert away the Ḥudūd punishment when there is doubt”*

Thus, according to these scholars, the application of Ḥudūd in modern times must be postponed temporarily until the pre-condition is established.

Ironically, while the majority of scholars acknowledge the fact that enforcing Ḥudūd is nearly impossible, at least in the foreseeable future, due to political, legal, and social reasons, they pay-lip service to the obligation to uphold Ḥudūd law (Abou El Fadl, 2017b). This has been pointed out by Anderson (1976),

*“To a Muslim, it has always been a far more heinous sin to deny or question the divine revelation than to fail to obey it. So it seemed preferable to continue to pay-lip service to an inviolate Sharia, as the only law of fundamental authority, and to excuse departure from much of it in practice by appealing to the doctrine of necessity, rather than to make any attempt to adapt that law to the circumstances and needs of contemporary life”.*

From the foregoing discussion, the question brought by Abou El Fadl (2017b: 295) is whether Ḥudūd penalties must be defended as “an ultimate normative goal” which can only be suspended temporarily but never be discarded? Thus, according to Abou El Fadl (2017a,2017b), the belief that Ḥudūd law is an immutable and permanent part of Sharia deserves further and considerable reassessment. In putting forth his argument, Abou El Fadl largely based it on the analysis of the Qur'an.

In the Qur'an, when certain crimes with specific punishments are mentioned, it is worth considering whether the punishment is an objective itself, or a mean to achieve a moral objective. In discussing the Ḥudūd punishments, the classical jurists

tend to focus largely on the punishment and not the immoral conduct itself. This is evident through the classification of punishments, itself based on the nature of punishment, not on the act itself. Thus, Abou El Fadl argued that the severity of the *Ḥudūd* punishments in the Qur'an symbolise the immutable and eternal part of the ethical values that the Qur'an want to protect, not the punishment itself (Abou El Fadl, 2017a, 2017b). Thus, the *Ḥudūd* verses must be viewed as moral condemnation of certain acts of misconduct and these moral and ethical values must be protected every time, and throughout each society and place.

The call to view *Ḥudūd* verses to provide a framework of moral and ethical values, not as an end itself still needs careful discussion among scholars. At this point, when the issue of *Ḥudūd* is highly politicised, this proposal is most likely to be unheard and rejected without due consideration. Due to this reason, this part of study will focus only on partial reform which has been advocate by aforementioned scholars. Among the partial reform which can be considered within the context of Malaysia is illustrated as follows:

### **I. Modern *Ijtihād* on the Number of *Ḥudūd***

Through examining the evidence used by the classical jurists to deduce the *Ḥudūd* punishments, it is suggested that there are only four offences that can be classified as *Ḥudūd*, in the sense of the jurists' definition. The offences are *zinā*, *qadhf*, *sariqah*, *ḥirābah* (Al-'Awwa, 2006b). The punishment for all of these crimes are unalterable in nature because the punishment was decreed based on clear evidence (*qaṭ'iyyah al-thubūt* and *qaṭ'iyyah al-dilālah*) from the Qur'an<sup>37</sup>. For the *ḥirābah* offence, although the verse is very clear on the punishment, the details of the crime was not explicitly specified in the Qur'an. Thus, it is suggested that the crime should be determined based on the consensus of the scholars and rulers

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<sup>37</sup> There is a legal maxim says, (*lā ijtihād ma'a al-naṣ*), which means "when there is a text, there is no room for interpretation".

every time, not only bound by the crime specified by the classical jurist. For drinking offences, numerous *ḥadīth* on this offence reveal that there are no specific number of lashes, neither any specific way to deal with the drinker. One *ḥadīth* that illustrate this clearly is reported by Ali as follows:

*“Ali reported: If I impose Ḥadd on anyone, and he (in course of punishment) dies, I would not mind except in case of a drunkard. If he dies. I would pay indemnity for him because the Messenger of Allah (pbuh) has laid down no rule for it (Ṣāḥīḥ Muslim, Book of Legal punishments, Chapter Ḥadd punishment for drinking alcohol)”*

Based on this *ḥadīth*, it implies that this offence falls under the category of *ta’zīr* as suggested by several scholars such as Al-Qaraḍāwī (2002) and al-‘Awwā’ (2006b). For *rajm* and *riddah*, based on plentiful evidence, both are *ta’zīr* in nature. This will be discussed in a separate section later.

## **II. Categorisation of Crime**

The prevalent view among the majority Muslims is that Islamic criminal law is divided into three main divisions; *ḥudūd*, *ta’zīr* and *qiṣās*. This understanding was based upon the book written by the classical jurist who asserted ‘the Sharia’ classifies crime into that typology. However, by using the word Sharia, it overshadows the fact that this classification is a human deduction, thus making people believe that this categorisation is divine and immutable. Nonetheless, as suggested by Ibn Taymiyyah, the definitions and categories of crime are the product of human reason and not scripture (Brown, 2017a). By saying that, it is not to say that there are no prescriptions from the Qur’an or Sunnah for certain crimes, but to suggest that all of these divine prescriptions might be carried out without being under the banner of *ḥudūd*, *qiṣās*, and *ta’zīr*. In fact, employing this understanding gives more flexibility and makes it easier to incorporate these injunctions into the legal framework in today’s world.

### III. Modern *Ijtihād* on Stoning (*Rajm*)

It is believed that the modern discussion on stoning (*rajm*) for the offence of *zinā*, category *muḥṣān* was sparked when a prominent scholar, Abū Zahrah disseminated his differing view from the pre-modern position in a conference held in Libya in 1972 (Al-Qaraḍāwī, 2017). However, based on evidence found, some suggested that the discussion on this particular issue had been started earlier by Abd al-Wahāb Khallāf in a conference in 1954 (Talimah, n.d.). Essentially, the contemporary scholars' view on this issue can be divided into three main groups. The first group, represented by the majority of contemporary scholars, concurs with the classical jurists' position that an adulterer must be stoned to death. Taking a contrary view, the second group asserted that the punishment of stoning is considered as *ta'zīr* and *siyāsah*. This group is represented by Abd Wahhab Khallāf, Al-Qaraḍāwī and al-Zarqā'. Finally, the third group believed that stoning is a tradition brought from the Jews, adopted by the Prophet (pbuh) but later has been abrogated with the verse of (24:2). This group is represented by Abū Zahrah and al-Shanqīṭī.

The first group based their view on the evidence provided by the classical jurists'. Conversely, the second group are of the view that stoning to death for adultery falls under *ta'zīr* and not classified under *ḥudūd* mainly on the basis of ḥadīth report which mentioned the punishment of *zinā*. Khallāf viewed that the ḥadīth report such as Māi'z and Ghamidiyyah used to deduce the punishment is problematic (*muḍṭarib*), while Al-Qaraḍāwī (2017) viewed that there are indications from the ḥadīth report itself that show the punishment of stoning is considered as *ta'zīr*. The ḥadīth which Al-Qaraḍāwī refers to is reported in *Ṣaḥīḥ Muslim*,

*"Ubādah bin al-Ṣāmit (RAA) narrated that the Messenger of Allah (pbuh) said: "Receive from me (this revelation), receive from me (this revelation). Allah has ordained a way for those women (unmarried females who committed adultery). When an unmarried man, commits adultery with an unmarried woman, they should receive one hundred lashes and be exiled for a year. If they (fornicate while they) were married, they shall receive hundred lashes and be stoned to death."*

Based on this ḥadīth, according to the Ḥanafī scholars, the *ḥadd* punishment of *zinā* for the *ghayr muḥṣān* category is 100 lashes of the whip, while the subsequent punishment mentioned; banishment is considered as *ta'zīr*. Thus, according to Al-Qaraḏāwī, employing the same logic, he viewed that for the *Ḥadd* punishment for *zinā* category *muḥṣān*, the *ḥadd* punishment is 100 lashes of the whip, while the following punishment mentioned in the ḥadīth, which is stoning, must also be considered as *ta'zīr*. Additionally, al-Zarqā' (1976) bases his view on the argument that the Prophet (pbuh) set stoning to death as the punishment for a *muḥṣān* due to it being more severe than *zinā* of a *ghayr muḥṣān*. By categorising this punishment as *ta'zīr*, all of these scholars view that this punishment is upon the consideration of authority based on the evaluation of *maṣlahah*, the need of the era and the person's attributes.

The third group, mainly represented by Abū Zahrah, viewed that the punishment of stoning has been abrogated based his argument on the following reasons:

- I. In verse (4:25), it is mentioned that the punishment for *zinā* for a married slave man or woman is half of that of freeman. Hence, given its nature, it is impossible to halve the stoning punishment which shows that the punishment for married or unmarried person is 100 strokes of flogging.
- II. Based on a *ḥadīth* in Bukhārī when 'Abdullāh Ibn Awfā was asked whether the punishment of stoning was carried out before or after Sūrat al-Nūr was revealed. he replied that he did not know.
- III. The opinion that claims that the verse related to stoning is abrogated but the verdict remained using the ḥadīth of 'she-goat ate the page' is illogical and cannot be accepted.

Abū Zahrah view is supported by other contemporary scholars such as al-Shanqīṭī (2013) who hold that this view deduced this punishment based on a ḥadīth which is



'*muḍṭaribah al-mutūn*' and '*ma'l ūlah al-asānid*'. Based on the foregoing discussion illustrated above, it is suggested that the ruling on stoning requires further discussion and reassessment by scholars. In the meantime, it is therefore preferable and safe not to apply the punishment of stoning (*rajm*) until a consensus by the scholars is attained.

#### IV. Modern *Ijtihād* on the Issue of Apostasy (*Riddah*)

The ruling on apostasy (*riddah*) has become widely accepted as one of the unchangeable and agreed upon by vast majority of Muslim scholars today. Nevertheless, there are emerging voices from a significant number of scholars who began to call for revisiting the classical jurists' position on this issue (al-'Alwānī, 2011a). Essentially, in revisiting this issue, the contemporary scholars focused their discussion on the authoritativeness of the evidences used by the classical jurists in deducing this legal punishment and the political and social context during that particular time. To begin with, the classical jurists in their treatises usually began the discussion on the ruling of apostasy by quoting the verses of Qur'an which condemn the act of revoking one's faith after becoming a believer. However, as proposed by some scholars such as al-'Awwā', (2006b) and Saeed (2016), all of the aforementioned Quran verses only prescribe severe punishment in the hereafter and no single verse in the Qur'an mentions any worldly punishment on the crime of apostasy.

In addition to the Quran verses, the classical jurists mainly deduced the legal ruling on apostasy based on two *ḥadīths*. The first *ḥadīth* is, "*Whoever changes his religion, kill him*". This *ḥadīth* is categorised as a sound (*ṣaḥīḥ*) *ḥadīth* and narrated in most of *ḥadīth* books such as in *Ṣaḥīḥ al-Bukhārī* (*Ḥadīth* 57), *Jāmi' al-Tirmidhī* (*Ḥadīth* 1548), *Sunan Ibn Mājah* (*Ḥadīth* 2535) and *Sunan al-Nasāī* (*Ḥadīth* 4064). In discussing the authoritativeness of the *ḥadīth* in deriving a legal ruling, scholars such as al-Alwani (2011b) and Saeed (2016) contended that this *ḥadīth* is a solitary *ḥadīth* (*ḥadīth aḥad*) and further extended that it cannot be used as an evidence to

apply *Ḥudūd*. However, it is argued that this claim can be refuted in several ways. Prior to discussing further, it is important to bring to light the definition of solitary *ḥadīth* (*ḥadīth aḥad*). Linguistically, *aḥad* means solitary or singular. In relation to the definition of solitary *ḥadīth*, it does not mean a *ḥadīth* that is transmitted by one narrator as understood by some. According to Kamali (2004), solitary *ḥadīth* is a *ḥadīth* which is narrated by one, two or three persons at every level or the number may vary, but the numbers do not fulfill the requirement of *mutawātir*. With respect to the aforementioned *ḥadīth*, the sole transmitter of the *ḥadīth* at the level of the companion is Ibn ‘Abbās.

In refuting the claim on the legislative value of solitary *ḥadīth*, it is pertinent to observe the *uṣūl fiqh* scholars’ view on the issue. Generally, almost all schools of thoughts accept solitary *ḥadīth* as legal evidence despite having different conditions and requirements. For instance, while *Zāhirī*, *Ḥanbalī* and *Shāfi’ī* adopted a lenient approach in accepting solitary *ḥadīth* as legal evidence, *Ḥanafī* and *Mālikī* adopted a stricter approach (Abdurezak A. Hashi, 2013). For instance, according to *Ḥanafī*, a solitary *ḥadīth* must comply several conditions prior to being accepted as a legal evidence. Among the conditions are the transmitter must have not been known to act against himself, the content of solitary *ḥadīth* is not such that would necessitate the knowledge of a vast people and in the event of conflict between solitary *ḥadīth* and *qiyās*, solitary *ḥadīth* will only be accepted if the narrator is a knowledgeable person. If not, *qiyās* is preferred over solitary *ḥadīth* (Kamali, 2004). Based on this discussion, a total rejection of solitary *ḥadīth* denies the fact that this type of *ḥadīth* has been widely used by the leading scholars in deducing legal rulings.

Additionally, it is also pertinent to point out that solitary *ḥadīth* formed 95% of the whole corpus of *ḥadīth* as opposed to *ḥadīth mutawātir*. This deductively means that the rejection of solitary *ḥadīth* means rejecting the authority of Sunnah as the second source of the Sharia. Consequently, it also means that rejection of other solitary *ḥadīth* used in other important branches such as in the area of worship (*‘ibādah*) (al-Qaraḍāwī, n.d.). On the other hand, other scholars such as Kamali and

Saeed (2006) argued that this *ḥadīth* is general and open to other interpretation. Nevertheless, this *ḥadīth* is supported by other *ḥadīths* which specify its meaning and will be discussed in the following part.

The second most quoted *ḥadīth* is a report from Bukhari and Muslim,

*“The Prophet (pbuh) said: ‘The blood of a Muslim who confesses that there is no god but Allah and that I am the Messenger of Allah cannot be shed except in three cases: a life for life, a married person who commits illegal sexual intercourse, and the one who turns away from Islam and leaves the community.’”*

Based from the *ḥadīth* above, it can be noted that in regard to the crime of apostasy which deserves death penalty, it mentioned a specific characteristic which is the one who leaves the community. Regarding this *ḥadīth*, Ibn Taimiyyah, (1983) viewed that *“the one who turns away from Islam and leaves the community”* in the *ḥadīth* is concerned with the crime of highway robbery (*ḥirābah*) not apostasy (*riddah*). He supports this view on the basis of a *ḥadīth* reported from Aishah as follows:

*“Narrated Aisha, Ummul Mu'minin: The Messenger of Allah (pbuh) Said: The blood of a Muslim man who testifies that there is no god but Allah and that Muhammad is Allah's Apostle should not lawfully be shed except only for one of three reasons: a man who committed fornication after marriage, in which case he should be stoned; one who goes forth to fight with Allah and His Apostle, in which case he should be killed or crucified or exiled from the land; or one who commits murder for which he is killed”*

Apart from the critics on the evidence used by the classical jurists', contemporary scholars also point out that the ruling on apostasy must be understood within its own political and social context during that particular period. In the pre-modern state, religion plays an important role for each society and is intertwined with the state's identity. Hence, changing a religion means betraying group/tribe and this is considered as being an enemy of the state. Therefore, it explains the harsh punishment for this crime. In explaining this, al-'Alwānī said,

*“The Muslim jurist who affirmed the death penalty for apostasy generally did so based on the fact that, in the ages in which they lived, apostasy in the sense of a change in a personal beliefs was frequently the result of a comprehensive shift*

*away from allegiance to the Muslim community and the rejection of its associated system, laws and culture.”*

This is also explained by Brown, (2017b) who emphasises the importance of religion in nation building during the pre-modern age. He views that,

*“the Arabic noun ridda and the verb for engaging in it were understood not as meaning a personal choice of changing one’s religion but as the public act of political secession from the Muslim community”*

Based from the foregoing discussion, contemporary scholars such as Al-Raysūnī, (2009), al-’Awwā’, (2006a, 2006b) and Brown (2017) viewed that the punishment of death penalty for apostasy is categorised as *ta’zīr*. It can be understood that the legal ruling on apostasy is deduced on the basis of *siyāsah al-shar’iyyah* and meant to maintain order in the country, therefore, due to the crime of apostasy being followed by other crimes, this makes the criminal liable for death sentence. The view that this punishment is on the basis of *siyāsah* does have a point if one scrutinise the classical jurists’ discussion on this issue. For instance, al-Ṭaḥawī and al-Kāsānī subsumed this offence under the heading of *al-siyār*. Other scholars such as Al-Qaraḍāwī (n.d) divide the crime of apostasy into two distinctive categories: transgressive apostasy (*al-riddah al-ghalīzah*) and non-transgressive apostasy (*al-riddah al-khafīfah*). The first type is an apostate who renounce his faith publicly and calls people towards his new belief, or his apostasy is accompanied by other crimes such as *al-tajassus*. Conversely, the second type is an apostate who change his religion but at the same time does not wage war against Islam and Muslims. The former must be put into death because this act can cause disorder in a Muslim community, contrarily the second should be invited back to Islam but if he resists, no one can force him to do so. Al-Qaraḍāwī’s views that apostasy which is punishable by death if it is associated with the crime of fighting against Muslims is in line with Maḥmūd Shaltūt’s (2011) view in his book, *al-Islām, Aqīdah wa al-Sharīah*.

To sum up, the classical jurists’ ruling on apostasy can be understood as a mechanism in order to protect the communal faith and social order of a Muslim

state, not solely on the basis of a simple conversion. This can also be seen through the cases of apostasy which occurred during the lifetime of the Prophet (pbuh). There are some incidents where the prophet (pbuh) accepted the repentance of the apostates whilst in other situations he ordered their killing. This is because some individuals just committed apostasy without committing other crimes and some committed apostasy along with other crimes that jeopardised Islam and the Muslims. For example, the Prophet (pbuh) ordered the killing of Miqyās Ibn Hababah on the day of *Fath Makkah* because he was found guilty of apostasy, murdering Muslims and seizing their properties. As such with the case of the group of ‘Uraniyyūn who were ordered to be killed for committing the same crimes. In another account, the prophet (pbuh) also ordered the killing of Ibn Khatl for the crimes of apostasy, insulting and degrading the Islamic faith and murdering Muslims. Also, the Prophet (pbuh) ordered the killing Ibn Abī Sarḥ for the crimes of apostasy and betrayals. All of these cases were mentioned by Ibn Taymiyyah (1983) in his book *Ṣārim al-Maslūl*.

#### **V. Modern *Ijtihād* on The Testimony of Women**

The rejection or the unequal value of women’s testimony in Islamic law has been a heated topic of debate among feminist and human rights activists. This was reflected as a discrimination based on gender which stems from the so-called verse of debt (*ayat al-dayn*), which occurs in Qur'an (2:282) that requires two female witnesses to testify in the absence of one male witness. From this verse, most classical jurists deduced that women’s testimony is less credible compared to men’s, as the verse explicitly mentioned that women are more prone to error and require a reminder or guarantor to support their statements. Nonetheless, it is important to point out that there are another seven verses in the Qur’an on witnesses and none of them mention the requirement of two women witnesses to replace one male. These verses are al-Māidah (5:106-107) regarding witnesses in writing a will, al-Nisā’, (4:15) referring to witnesses of *zinā*, al-Nūr (24:4) on *zinā*, (24:6) on *qadhf*, (24:8) on *li’ān*, and *ṭalāq* (65:2) on divorce and remarriage.

In exploring the pre-modern exegetes' understanding of this verse (2:282), one may discover two points; how they justify this unequal value of women's testimony in regard to men without questioning, and how they extend this verse, which basically refers to financial transactions, to other legal rulings such as women's testimony in criminal cases. In expounding the rationale behind this verse, that women are more prone to error, most of them believed it's because of their nature. For instance, Ibn Kathīr (1999) points out that women have lack of reason (*bi nuqṣān aqlīnihā*). Other exegetes such as al-Bayḍāwī (n.d) share a similar view, and add further reasons that women are lacking in religion, and strength. Some exegetes such as al-Rāzī (n.d) went further by claiming the biological and psychological make up of women influence the credibility of women witnesses. He states that, "*And the meaning is that forgetfulness predominates in the physiology of women due to the abundance of moisture and coldness in their physical constitutions.*". However, this assertion was believed to be influenced by Ancient Greek Physiology and has no basis in the Qur'an or *ḥadīth*. Similarly, some jurists tend to rationalise the unequal treatment with the same argument held by the exegetes. For instance, al-Sarakhsī (1993) again mentioned women's deficiencies in reason and religion, while both Imām Aḥmad (1994) and Ibn Qudāmah (1968) claimed that the women's testimony is not probative in *ḥudūd*, *ṭalāq*, and *nikāḥ* cases from the prophet's (pbuh) time, and during the time of the two first caliphs.

However, in contrast to the exegetes, there are some jurists who endeavour to treat this issue more critically, as pointed out by Fadel (1997). Al-Qarāfī and al-Ṭarabulusī sought to preclude themselves by not justifying this unequal treatment on the basis of gender, and undertook alternative sociological explanations. Both of them explicitly agreed that primarily the reports of men and women are equally probative but because of external factors, mainly social, women's accounts become less reliable. Al-Qarāfī remarked that during that time, the courts had difficulty in imposing their verdict. The situation was worsened if the cases involved men and women testifying against each other, as women were viewed generally as inferior

to men. Subsequently, in this case, the possibility of disrespecting the court's decision was higher. Likewise, al-Ṭarabulusī elucidated that the law purposely 'discriminated' against women's testimony in order to compel women to stay at home. This was believed to be in order to minimise unnecessary mingling of opposite sexes, that could lead to social corruption and disorder (Fadel 1997).

Intriguingly, two prominent scholars from the Ḥanbalī schools, Ibn Taymiyyah, and his pupil Ibn Qayyim (1985) differed in their view, against the majority's position. They suggested that the main objective of *al-qaḍā'* is to establish justice. Thus, the judge is given full power to accept or reject any account which he deems more, or less credible, despite the gender of the person giving it. For this reason, both of them rejected the two women equal to one-man rule. Likewise, some contemporary scholars such as Rāshid Riḍā also challenge the traditional view and propose a re-examination of this verse (2:282), taking into consideration the context of the present day. Rāshid Riḍā (1947), quoting his teacher's view, Muḥammad 'Abduh in his *tafsīr, al-Manār*, argued that both women and men have the same capability to give evidence. Clearly, in this verse, it stressed the different abilities by both genders due to the specific roles played within those social circumstances, which reflected the social tradition of the time. While men were more exposed to financial and economical transactions, hence making them more reliable in this area, this is same as the case to women whose are more knowledgeable in domestic affairs compared to men. In research conducted by Elizabeth Loftus, the results demonstrate that gender has no substantial effect on one's memory, but it suggests that each gender has unique ways to retain information. In her pivotal work, she reports an interesting finding,

*"Males were more accurate and less suggestible about the male oriented items while females were more accurate and less suggestible about female oriented items. This finding provided clear support for the hypothesis that females and males tend to be more accurate on different types of items, perhaps indicating their differential interest in particular items and corresponding differential amounts of attention paid to those items."*

Given the foregoing discussion, some scholars such as Raḥmān (2012) points out the *ratio legis* behind this verse.

*“Each legal or quasi-legal pronouncement is accompanied by a ratio legis explaining why a law is being enunciated. To understand a ratio legis fully, an understanding of the socio-historical background (what the Qur’anic commentators call “occasions of revelation”) is necessary. The ratio legis is the essence of the matter, the actual legislation being its embodiment so long as it faithfully and correctly realizes the ratio; if it does not, the law has to be changed. When the situation so changes that the law fails to reflect the ratio, the law must change.”*

Highlighting the fact that women in this era were given equal opportunity in education and involved actively in various public affairs - economics, politics, and state matters - based on this understanding, it might suggest that the social development that takes place nowadays might open up a new and different perspective regarding this issue. While some may persistently advocate and suggest a fresh interpretation on this issue, the writer’s intention, at the least, is to open a door for a discussion regarding this issue. Importantly, this discussion is to untangle the myth of underlying reasons behind the previous ruling by the classical jurists which is nothing to do with women being less trustworthy and reliable than men but most probably reflects the sociocultural of the society during that time.

## **VI. Modern *Ijtihād* on the *Niṣāb* of Theft**

The classical jurists unanimously agreed that one of the conditions that must be fulfilled before the application of the *ḥadd* for theft, is the value of the stolen item must reach a certain value (*niṣāb*). However, they differ their views on the amount of *niṣāb*. The opposing views between both groups implies that the amount of *niṣāb* is a matter for the jurists to decide, which is open to interpretation. Secondly, it also implies that the different values deduced by the jurists might be a result of different economic and social circumstances surrounded by the jurist at that time.

Through examination, plenty of Muslim countries which include theft punishment in their criminal code, still use the ‘same language’ written by the jurist regarding



the issue of *niṣāb*. Most of the countries either use *dinār* or convert the value of it into the weight of gold. For instance, in Pakistan, The Offences Against Property (Enforcement of Hudood) Ordinance mentioned that, “The '*niṣāb*' for theft liable to '*ḥadd*' is four decimal four five seven (4.457) grams of gold, or other property of equivalent value, at the time of theft.” This is also the case in the *Ḥudūd* bill proposed by the state of Kelantan. In Section 3, it specifies the definition of *niṣāb* as,

*“niṣāb means a sum of money equivalent to the current price of gold weighing 4.45 gram or a sum to be determined by His Royal Highness the Sultan from time to time in accordance with hokum syarak”*

This event might be explained in two ways. Either they believe that every part of *Ḥudūd* is immutable, including the details, in this case the amount of *niṣāb*, or the literal approach that brings a blind imitation, or *taqlīd*, of the jurists' work. Therefore, it is suggested that this amount should be reviewed, taking into account the society and economics of each country. In order to determine the *niṣāb* value, Ibn Qayyim (1991) proposed that it can be set based on the “minimum value sufficient for the daily maintenance of an average man”. All in all, it goes back to the ruler and/or the legislative body of the country, or state.

## **6.2.2 RECONSTRUCTING THE APPLICATION OF *ḤUDŪD* LAW IN MALAYSIA: UTILISING THE FRAMEWORK OF HARMONISATION AS AN APPROACH**

### **6.2.2.1 THE FRAMEWORK OF HARMONISATION**

Among the earliest figure known to introduce the idea of harmonisation is the renowned Egyptian jurist, ‘Abd al-Razzāq al-Sanhūrī (Mohamad, 2009). Initially, he calls for a modernisation of Islamic law by considering the historical, social and legal experience of the respective country. In Malaysia, the idea of harmonisation was initially propounded by the Islamisation of Knowledge Committee, Ahmad Ibrahim Kuliyyah of Law, and the International Islamic University of Malaysia in 2002 (Kamali, 2003 & 2007) . Later on, this idea was reappeared and was disseminated in

more detail by Kamali. The idea of harmonisation between Sharia and civil law was mainly aimed at bringing them together, and not proposing new legislation. This methodology also employs tools which are not alien to Sharia itself such as *talfīq*, *takhayyur*, *maqāṣid al-sharī'ah* and *ijtihād*. The following points can help one to understand the framework of harmonisation in more detail (Kamali, 2007).

- I. Harmonisation presumes compatibility between two substantially different rulings of the Sharia and civil law. It cannot be entertained if both opposing positions are in total conflict, such as in the case of usury.
- II. Harmonisation involves a measure of Islamisation in the sense that what is being harmonised with the Sharia is also made being acceptable to Islam.
- III. Harmonisation is open to the mutual impact of both the Sharia and civil law on one another. Certain aspects of civil law can be made Sharia compliant through amendment, either substantive or procedural.
- IV. Areas of dogma and rituals, namely faith (*aqīdah*) and worship (*'ibādah*), are outside the scope of harmonisation.
- V. Harmonisation can be perceived either as a dogmatic and totalitarian activity or as one that allows partial steps to be taken.
- VI. Harmonisation may sometime pose a question of language and style of presentation, without involving substantive legislation of *ijtihād*. Such as converting the *fiqh* terminologies on weights and measure into modern equivalent.
- VII. Basic goal of harmonisation is to integrate discordant laws within a given legal system, and to overcome the entrenched problem of duality between Sharia and civil law

Unlike Kamali who outline this methodology as a framework, the previous Chief High Court Judge, Tun Abdul Hamid Mohamad disseminated this idea in a practical way by harmonising the Sharia and Civil Law in Malaysia. In fact, Abdul Hamid Mohamad, (2003) claimed that the process of harmonisation has been on-going for more than two decades, except that the word harmonisation is not used. For

instance, the *Syariah* Criminal Procedure and *Syariah* Evidence Act were adopted from the civil procedure and evidence code with changes either to 'islamise' them or to suit the application of *Syariah* court.

In order to harmonise between the Sharia and civil law in Malaysia, Abdul Hamid Mohamad outline the process and guidelines as follows:

- I. The process of harmonisation must work within the confine of the Federal Constitution.
- II. Harmonisation begins with the process of identifying the areas of conflict in the existing laws
- III. Prioritise and start with the less controversial

Based on the guidelines, the next section attempts to reconstruct the application of *Hudūd* in Malaysia by utilising the framework of harmonisation of sharia and civil law.

#### **6.2.2.2 THE POTENTIAL PROSPECT OF HARMONISATION OF SHARIA AND CIVIL LAW IN THE AREA OF CRIMINAL LAW**

This study envisages the potential prospect of using this framework in order to harmonise the Sharia and Civil law in the area of criminal law for several reasons. Firstly, because both systems enjoy a great amount of similarities in terms of their aims of punishment and end results, despite the differences in their sources and value judgments. In terms of objectives, both systems are aimed at deterring crimes, to retaliate and rehabilitate the offender, and most importantly to establish justice between both parties involved.

Secondly, the methodology of harmonisation focus on substance rather than form (Mohamad, 2003). In regard to criminal law, instead of proposing a new code, such

as done by the State of Kelantan, this methodology suggests the incorporation of the Sharia into existing law, either to the *Syariah* Criminal Offences under the jurisdiction of each state, or into the Penal Code 574 under the jurisdiction of the Federal government. This evolutionary approach is more appropriate considering the fact that Malaysia is a multi-racial and multi-religion country, with a mixed parallel legal system.

Thirdly, the methodology of harmonisation proposes a reform within the confine of the constitution of the country, and in this case, the Federal Constitution of Malaysia must be referred to. Initially, regarding criminal law, there are three important articles that need to be observed during initiating legal reform.

I. Ninth Schedule

This article specifies the jurisdiction between the Federal and State laws. In Table IX, List I (Federal List), it mentions that,

*“The Federation has jurisdiction to make law for internal security and civil and criminal law, and procedure and the administration of justice.”*

In Table IX, List II (States List), it mentions that,

*“States have jurisdiction to make laws for the “...creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List...”*

II. Article 75: Inconsistencies between Federal and State laws

This article proclaims that if there is any inconsistency between the federal and state law, the federal law shall prevail.

*“If any State law is inconsistent with a Federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.”*

III. The Sharia Courts (Criminal Jurisdiction) 1965 (Act 355)

This act specifies the Sharia court's jurisdiction regarding criminal matters. In section 2, it mentions that,

*“The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law: Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.”*

Finally, this methodology is chosen because it was proved to be successful in other fields in Malaysia, such as in banking. The success of this approach can be seen through the achievement and growth of the Islamic banking sector in Malaysia as well as the recognition of its products worldwide (Hasan, 2007).

### **6.2.2.3 UTILISATION OF HARMONISATION FRAMEWORK IN RECONSTRUCTING THE APPLICATION OF *ḤUDŪD* IN MALAYSIA**

To begin with, in order to harmonise between the Sharia and civil law, the areas of conflict between both laws are identified. In regard to criminal law, the existing law at the federal level is the Penal Code 574, while the criminal law in regard to religious offences at the state level is the *Syariah* Criminal Offences. As each state in Malaysia has their own *Syariah* Criminal Offences code, this study chose the *Syariah* Criminal Offences (Federal Territories) Act 1997 as a point of reference. By comparing both the codes substantively, the areas of conflict between the both codes can be summarised as below:

Offences	Jurisdiction	Provision to the Offence	Related	Specified Punishment
1. <i>Zinā</i>	State	<i>Syariah</i> Code prescribe this offence under the “Sexual Intercourse out of Wedlock”	Criminal	Fine not exceeding RM5000 or imprisonment not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.
2. <i>Qadhf</i>	State	<i>Syariah</i> Code prescribe this offence under the “ <i>Qadhf</i> ”	Criminal	Fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or to both.
3. <i>Shurb</i>	State	<i>Syariah</i> Code prescribe this offence of “intoxicating drink”	Criminal	Offender: fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both  Seller: fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or to both.

4. <i>Riddah</i>	State	<p><i>Syariah</i> Code Territories did not prescribe this offence. However, some states such as Melaka, Negeri Sembilan, Pahang prescribe this offence under the offence of “attempt of apostasy” or “Claiming to be non-Muslim”</p>	<p><i>Criminal</i> Federal Islamic Rehabilitation Centre for a period not exceeding six months</p> <p>Melaka: Retained at Islamic Rehabilitation Centre for a period not exceeding six months</p> <p>Negeri Sembilan: Fine up to RM5000 or imprisonment up to three years or to both</p> <p>Pahang: Fine up to RM5000 or imprisonment up to three years or whipping not exceeding to six strokes or combination of the above.</p>
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5. <i>Sariqah</i>	Federal	<p>The penal code specifies this offence as theft. Act 574, Penal Code, Section 378 which says, “Whoever intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft”</p>	<p>Section 379: Whoever commits theft shall be punished with imprisonment for a term which may extend to seven years or with fine or with both, and for a second or subsequent offence shall be punished with imprisonment and shall also be liable to fine or to whipping.</p>
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6. *Hirābah*

Federal

In the Penal Code, Robbery: Section the offence of 392. Whoever *hirābah* is stipulated commits robbery in four separate shall be punished sections; Section with imprisonment 390 specifies for a term which offence for robbery, may extend to section 391 for fourteen years, and group-robbery, he shall also be section 339 for liable to fine or to 'wrongful restraint' whipping. and section 383 for extortion.

Gang Robbery: Section 400. Whoever shall belong to a gang of persons associated for the purpose of habitually committing gang-robbery, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

Wrongful restraint: Section 341. Whoever wrongfully restrains any person shall be punished with imprisonment for a term which may extend to one month or with fine which may extend to one thousand ringgit or with both.

Extortion: Section 384. Whoever commits extortion shall be punished



with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

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### Table 6.2.2.3: Areas of Conflict

The main principle of the framework of harmonisation is that it must be done within the boundary of the Federal Constitution. Departing from this, in respect of the Federal Constitution, each of the offences should be maintained under the jurisdiction as stipulated by the Federal Constitution. Based on the table above, according to the Federal Constitution, it can be noted that the offence of *zinā*, *qadhf*, *shurb* and *riddah* falls under the jurisdiction of the state while the offence of *sariqah* and *hirābah* falls under the jurisdiction of the Federation.

Looking at the table above, it can also be noted that for most of the offences, the prescribed punishment does not comply with the punishment prescribed by the Sharia. The question is, how to make the punishment comply with the Sharia, if Muslims wish to do so? This study suggests that any effort, either at the state or federal level, to make the punishment comply with the Sharia must be channeled through the democratic process. Thus, for the offences under the state jurisdiction (*zinā*, *qadhf*, *shurb* and *riddah*), one feasible way to make these provisions comply with the punishment prescribed by the Sharia is to propose a bill through Parliament to expand the *Syariah* court jurisdiction by amending the *Syariah* Courts (Criminal Jurisdiction) 1965 (Act 355). For the offences under the federal jurisdiction (*sariqah* and *hirābah*), a proposal to also amend the Penal Code can be put through Parliament, with a simple majority needed to pass the law.

The following question is, how could the process be initiated? First, this study suggests that any legal reform proposed to make the existing law comply with the Sharia must be done on a basis of public interest, not for religious reasons. The reason behind this has been illustrated in chapter five. Throughout the discussion in chapter 5, we see that the polarisation between the opponents and the proponents of the idea is stark and did not allow any room for discussion between either party. The proposal to use public interest as a basis for any legal reform is imperative to provide a middle ground between both; the opponents and the proponents to discuss and debate the through the law making, or reform process. In fact, this suggestion has a rooting in Islamic history itself. In the previous discussion in chapter 3, the pre-modern Sharia-based legal system is divided between the realms of *fiqh* and *siyāsah*. If one can consider that any legal reform of criminal matters falls under the realm of *siyāsah*, one may appreciate this suggestion. Thus, any attempt to initiate legal reform must begin by convincing the opponents using a platform of public interest (An-Naim, 2008b; Quraishi-Landes, 2015). In propounding this, An-Naim (2008) stated,

*“The separation of Islam and the State does not prevent Muslims from proposing policy or legislation stemming from their religious or other beliefs. All citizens have the right to do so, provided that they should support such proposals with what I call civic reason. The word civic here refers to the need for policy and legislation to be accepted by the public at large, as well as for the process of reasoning on the matter to remain open and accessible to all citizens. By civic reason, I mean that the rationale and the purpose of the public policy or legislation must be based on the sort of reasoning that most citizens can accept or reject. Citizens must be able to make counterproposals through public debate without being open to charges about their religious piety. Civic reasons and reasoning, and not personal beliefs and motivations, are necessary whether Muslims constitute the majority or minority of the population of the state. Even if Muslims are the majority, they will not necessarily agree on what policy and legislation should follow from their Islamic beliefs”*

In disseminating this important point, Asifa provided a simple example. Asifa suggest that if any political party or individual wants to propose legislating Mālikī rules on usury, they cannot simply justify it by quoting the view of Mālikī. He must convince all parties, whether a Mālikī or non-Mālikī alike that this would be better to serve the economy and public good (Quraishi-Landes, 2015). There is also a

relevant example from Malaysian experience in regard to this matter. In Malaysia, when the Islamic bank introduced banking facilities, non-Muslims voluntarily accepted it believing that it would be more beneficial to them, for example, they did not have to pay penalty interest or compound interest (Yunus & Hanifa, 2005). Through this example, it is obvious that the non-Muslims were persuaded to join up to Islamic banking because the products are more attractive and convincing, not because of religious reasons. However, the proposal to amend the penal code will be much more challenging as the *Hudūd* punishment from the modern sensibilities is considered as 'harsh and barbaric'. But if Muslims can convince the public of its efficacy and justice based on public interest, it will not be impossible.

The understanding that a modern Islamic state can enact any law, including law inspired by *fiqh*, on the basis of public good can also help to stimulate public debate throughout the law making or reform process. This public debate is important as such law passed by the Parliament will impact both the private and public life of the citizens. Given the significant impact of the law, directly or indirectly on each of the citizen, Muslim or non-Muslim, consultation and public debate from all sections of society prior to any law-making process is pertinent. Departing from this point, the public must be given space and freedom of expression to openly debate the proposed law without being afraid of being accused of heresy. In disseminating the importance of freedom of expression throughout the process, An-Naim (1990, p.120) mentions,

*“When exercising collective discretion on which conduct to penalise and how to punish it through the criminal process, the community as a whole, both Muslims and non-Muslim alike must enjoy the freedom of expression and association and effective access to the policy formulation process. Decisions should not be made exclusively on the religious sense or rationale held by Muslims as part of their faith but also a general social utility and consensus. Unless Muslims can convince all segments of the population of the need to penalise certain conduct and of the appropriateness of the particular type of punishment to be imposed, the imposition of penal punishment would be tantamount to the perversion and manipulation of formal legislative process to legitimise Muslim domination of the other segment of the population. “*

In fact, freedom of expression can be considered as one of the main essential pillars throughout this process of law making or reform. Over the course of history, we have witnessed that this right has often been denied by political rulers in order to suppress their political enemies, or to block different points of view, such was in the case of Mahmood Taha, Faraj Foda and Nasr Hamid. As the case of Mahmood Taha, in 1985, he was charged with apostasy and executed by the regime of Jaafar Nimeri for opposing Sudan's interpretation of Islamic Law. This is also the case for Faraj Foda. In 1992, Faraj Foda, a professor, writer and activist has been accused of blasphemy by al-Azhar and was later assassinated by a member of the Islamist group, al-Jamaah al-Islamiyyah. This assassination was supported by al-Azhar scholars such as al-Ghazālī who claimed that, "*The killing of Faraj Foda was in fact the implementation of the punishment against an apostate which the imām (the Islamic leader in Egypt) had failed to implement*". Eventually, eight from thirteen of the murderers who were brought to trial were subsequently released. For the case of Nasr Hamid, he was accused of being an apostate, forcefully separated from his wife and, running from this turmoil he fled to another country.

Despite the chaos, both of them, Faraj Foda and Nasr Hamid, defended themselves as true and faithful Muslims. In El-Magd's (2000) interview with Nasr Hamid, he expressed his view,

*"I'm sure that I'm a Muslim. My worst fear is that people in Europe may consider and treat me as a critic of Islam. I'm not. I'm not a new Salman Rushdie, and don't want to be welcomed and treated as such. I'm a researcher. I'm critical of old and modern Islamic thought. I treat the Qur'an as a naṣṣ (text) given by God to the Prophet Muhammad. That text is put into a human language, which is the Arabic language. When I said so, I was accused of saying that the Prophet Muhammad wrote the Qur'an. This is not a crisis of thought, but a crisis of conscience". At the end of the interview he said, "I would like to tell the Muslim nation that I was born, raised and lived as a Muslim and, God willing, I will die as a Muslim"*

This is also the case for Faraj Foda. His eldest daughter, Samar in rebutting the claim against her father stated that (al-Sherbini, n.d.),

*"My father was an Islamic thinker in the full sense of the word and wholeheartedly defended moderate Islam. I challenge his killers if they could spot a single text in his writings against Islam."*

These instances above show the importance of freedom of expression, which must be given throughout the law-making process, in particular when in engaging in *ijtihād* by the scholars in general.

## CONCLUSION

In this chapter, I attempted to illustrate the potential of utilising *ijtihād* as a mechanism to reconstruct the theory of *Ḥudūd* and its application in Malaysia. Based on the discussion, it is evident that a number of Muslim scholars today are fully aware on the need for *ijtihād* due to the change in political, social of current exigencies. Additionally, I pointed out a few instances from the classical jurists themselves, that they did not claim infallibility throughout the process of systematising the law during that time.

The next part of the chapter, I highlighted the reasons why *ijtihād* is pertinent prior being established in Malaysia. From the Malaysia' historical background itself, the existing law prior to the advent of foreign power is an amalgam between the customary and Islamic law. This fact indicates that during that time, Islamic law did not replace the existing customary law but assimilated and adapted it gradually. Secondly, the classical framework of Islamic criminal law is not compatible with the Federal Constitution, and finally due to the social structure in Malaysia which consists of a multi cultural and religious society.

In the following part, I suggested some of partial reform of Islamic criminal law which can be reconsidered. First, after considering and examining the evidences used by the classical jurists to deduce the punishment throughout this study, it is suggested that the number of *Ḥudūd* offences must be limited only to four. The four offences are *sariqah*, *ḥirābah*, *zinā* and *qadhf*. For the other offences, *shurb* and *riddah* offences, they fall under the category of *ta'zīr*. In regard to the categorisation of crime, I concur with Ibn Taymiyyah's views, who believes that the definition and categories of crime are the product of human reason and not

scripture. For the issue of stoning and apostasy, I proposed that further discussion must be allowed between the scholar experts. Until a consensus between the scholars is attained, both of the punishments must be annulled temporarily. Additionally, I also suggest for a thorough examination of the issue of women as witnesses in *Hudūd* crimes. Through examining the evidences used by the classical jurists, I found no explicit text on this issue. In the Qur'an, none of verses mention any prohibition for a woman to become witnesses for *Hudūd* punishments. The jurists basically hold on to a tradition that says during the time of the Prophet, the testimony of a woman was not accepted. However, the tendency for some Islamic scholars to believe that women were not allowed to bear witness is rejected in the case of *Hudūd* claiming it as a consensus, without any further reassessment, is problematic. Finally, I proposed the evaluation of *niṣāb* for theft. I believe that the prophet's tradition which mentions the specific *niṣāb* for theft is not intended to become a binding precedent. Rather it was deduced based on the amount which was regarded reasonable according to the social and economic context of that period. Thus, it is suggested that the amount of *niṣāb* be must reevaluated taking into account the local social and economic context.

In the final part of the chapter, utilising the framework of harmonisation, I propose another way to introduce *Hudūd* in Malaysia. Rather than introducing a separate code such as taken by the State of Kelantan, this approach proposes to modify the existing law in order to become aligned with the Sharia. In initiating this reform, I also proposed that its legal foundations must be based on public interest, and not personal or religious reasons. By using this as a basis, all parts of the population would have an opportunity to freely debate throughout the law-making process, without having the fear of being charged with religious piety. Throughout the process, freedom of expression must be given to the public to discuss it.

## CHAPTER 7

### CONCLUSION

From the outset, this study sought to critically examine the on-going efforts to reintroduce *Hudūd* law in the State of Kelantan, Malaysia from 1993 until 2018. Although the attempt has been going on for nearly 25 years, until the present, the *Hudūd* bill, *Syariah Criminal Code (II) 1993* remained in abeyance. Hence, this study was undertaken to explore and analyse the underlying reasons behind the unsuccessful attempt. This study is divided into two parts. Part one of the study, explores the historical development of *Hudūd* law followed by an analysis of its relevancy within a modern nation state framework and Malaysian legal framework in particular. Part two of the study reviews the whole process of the reintroduction and the *Hudūd* bill proposed by the State of Kelantan. Ultimately, in the final chapter, by utilising the framework of *ijtihad* and harmonisation, this study endeavored to reconstruct the theory of *Hudūd* and its application within the Malaysian legal framework.

Chapter two of the study reviewed the historical development of *Hudūd* law and its application during the formative period of Islamic legal system. The discussion in this chapter proved that the prevalent view which believed all part of *Hudūd* law is divinely ordained and immutable is inaccurate. Based on the analysis in this chapter, it is evident that the definition and the concept of *Hudūd* in the sense of strict punishment is a human deduction, and not scripture. It is suggested that the earliest concept of *Hudūd* in the sense of this narrow definition is originally established by the *tābi' al-tābi'ūn* during the 8<sup>th</sup> century. The findings of this chapter concur with the view of Rahman (1965) and Kamali (1995) who wrote earlier on this matter. Apart from assessing the origin of the word *Hudūd* from the Quran and *Sunnah* as performed by Rahman and Kamali, this study also provided additional evidences to further support this claim. First, by illustrating the existence

of divergent opinions among the jurists in the details of *Hudūd* law and second, by highlighting some inconsistencies in establishing the theory itself by the jurists in their treatises. All of the evidences presented in this chapter pointed to the conclusion that, despite having a basis from the divine text, *Hudūd* law also contains a significant amount of human agency in establishing and systematising it.

Chapter three of the study examined the compatibility of classical Islamic criminal law within a modern nation state framework. Despite the issue having been raised and widely engaged by other Muslim and Western scholars worldwide, this issue has not been discussed diligently by the proponents of Islamic law in Malaysia. In this chapter, I demonstrated that there are significant different features between the pre-modern Sharia legal system and the modern legal system. The most prominent feature is that the pre-modern Sharia legal system is based on legal pluralism, governed by two separate domains, the *siyāsah* and the *fiqh* domain. The *qāḍī* court which is responsible in resolving conflicts between two parties or more and issuing a verdict for all cases including *Hudūd* is adjudicated by well-trained and highly reputable group of *fiqh* scholars (*ulāma'*) with minimum political intervention by the *siyāsah* rulers. However, the latter, namely the nation state is based on legal centrism, all laws including *Hudūd* law emerge from the state through the Parliament or State Assembly, which both most of the time were not constituted by members who were well trained in traditional Islamic training. This also means the state can manipulate and exploit the law for their political end. It is argued that the different features of both systems resulted in discord when the same framework used to apply Islamic criminal law was applied in modern time. The findings in this chapter illustrated that critical reassessment and necessary reform must be done prior to the reintroduction of *Hudūd* law in any Muslim country.

Chapter four of the study examined the compatibility of classical Islamic criminal law within the Malaysian legal framework. Throughout the discussion in this chapter, it is revealed that the Federal Constitution of Malaysia does not permit the



structure of Islamic criminal law developed by the classical jurists to be implemented in Malaysia. In this chapter, the historical background of Islamic law in Malaysia has been provided. This background is pertinent to give the readers an insight on the historical argument put forth by the proponents of Islamic law or *Hudūd* law in particular in Malaysia. It is argued in the chapter that the historical argument presented by the proponents of Islamic law is not entirely correct and need more deliberate consideration due to the different political system that existed prior to and after the independence of Malaysia. Prior to the independence, the Malay states were separate entities with full autonomy to implement any type of law including *Hudūd* law. However, at present, the Federation of Malaysia is a federated country, and all states are obliged to adhere to the Federal Constitution. The difference between both systems implies that any reintroduction of *Hudūd* law at present time cannot follow the same trajectory in the past. This aforementioned analysis has not been mentioned in any previous study before.

Chapter five formed the most crucial part of the study as it provided a detailed account on the on-going attempt of the reintroduction of *Hudūd* law in the state of Kelantan. In this chapter, the motives of the reintroduction were identified. It can be concluded that the reintroduction of *Hudūd* law by the State of Kelantan was driven by multiple motives; religious, historical, and social. All of these motives can be traced throughout the analysis of the meeting reports, books and speeches of the state officials obtained from the Information State Bureau of Kelantan. This finding is important as it refuted some previous studies findings which tend to exaggerate the political motives and failed to acknowledge other important motives. This has also been the case in other Muslim countries which the reintroduction has always been associated solely with political motives. This study concurs with Salim's view which he mentioned in his book (2008), *"to claim that calls for religious law result solely from political activism of religious groups is superficial, as there is a whole range of motives (religious, psychological and economic) should take into account. One must go beyond this purely political approach to examine what religious law means for the individuals involve"*. To

describe the process of the reintroduction only on one motive and sideline others means that the objectivity of the research is questionable.

The most profound finding of the chapter is it revealed the real problem behind the unsuccessful attempt to enforce *Hudūd* law by the State of Kelantan. It is argued that the main problem was due to the *Hudūd* bill itself being problematic. By illustrating that the main problem is the *Hudūd* bill itself, this finding contested the most dominant view in previous studies which pointed out the legal issue as the main problem. Following the discussion in chapter four, considering that *Hudūd* bill was a literal adoption of the classical jurist's framework of Islamic criminal law, this study proposed that the *Hudūd* bill of Kelantan is not feasible to be implemented in the Malaysian legal framework. In short, it has failed to reflect the current needs of the modern penal system and nation state framework. Based on the analysis of the process of the reintroduction, it is shown that throughout the 25 years, efforts by the proponent of the *Hudūd* law was primarily focused on making the *Hudūd* bill enforceable rather than to critically examine and improve the existing *Hudūd* bill.

Further discussion in this chapter also demonstrated the attitude of the state legislative and religious bureaucrats in dealing with criticisms and idea of reform towards the *Hudūd* bill. An interesting information that I obtained throughout conducting this study is that there was a proposal to reform the *Hudūd* bill initiated by a group of academics and civil and *Syariah* court lawyers. However, this proposal has been rejected by the *Hudūd* committee. The resistance to the idea of reform has been predicted earlier by Sikandar (2010). He pointed out that any legal reform in regard to Islamic law in Malaysia will pose a serious hurdle by the conservative group who by and large sits in the state religious institutions. In fact, the tension which occurred by the so-called traditionalists and non-traditionalists in the case of Kelantan is not an isolated case but does occur globally in other Muslim countries when any effort related with introducing any law under the name of Islam is at stake.

Chapter six reviewed the potential of *ijtihād* in initiating legal reform in the field of Islamic criminal law. This chapter illustrated that the effort to engage into *ijtihād* in the field of Islamic criminal law has already been initiated by contemporary scholars such as al-‘Awwā’, Kamali, al-Qaraḍāwī, al-‘Alwānī. The instances of *ijtihād* and idea of reform presented in this chapter can be utilised by the State Legislature of Kelantan in reviewing and improving the *Ḥudūd* bill. Another central part of the chapter is a proposal to introduce *Ḥudūd* law in Malaysia by employing the framework of harmonisation. While previous studies focused on amending the Federal Constitution to make this *Ḥudūd* bill enforceable, this chapter discussed another viable way to introduce *Ḥudūd* law without making substantial amendment to the Federal Constitution. This approach is believed to be more feasible within the Malaysian legal framework. Additionally, this chapter also provided an idea of providing a middle ground of debate between the proponents and opponents of Islamic law. It suggested that any attempt regarding legal reform must be done on the basis of public interest. This suggestion is meant to provide a conducive space for public debate, to include all segments of society. In achieving a mature public debate, freedom of expression must also be given to all people, provided that it is within the boundaries provided by the Federal Constitution.

Based on the major findings illustrated above, it is clear that what is known as *Ḥudūd* law is essentially constituted from two elements. The first element is the Sharia; the God’s eternal law which comprises main principles that is fixed in nature, unchangeable throughout time and place. The second element is *fiqh*; a vast collection of legal rulings as an outcome of human understanding of the text, constructed based on specific historical, social and political context, flexible in nature and open to *ijtihād*. Therefore, based on this understanding, with respect to Islamic criminal law, it is compulsory to be implemented according to the main principle, whereas the details are open for *ijtihād* and discussion among the scholars. Subsequently, by illustrating the difference between the present reality and the past, this study also demonstrated that the application of *Ḥudūd* in today’s context requires critical reassessment and necessary reform. Some parts are still

valid whilst some require new interpretation and adaptation to suit the need of current exigencies.

This study also reflected on the difficulty with introducing any law under the name of Islam which always tends to close doors of review and criticisms. With respect to the *Hudūd* bill proposed by the State of Kelantan, it must be understood that although the *Hudūd* law is ordained by Allah and there is no room for doubt, when these laws are codified, this code of laws represent human effort which is not infallible and prone to mistakes. This also means that there is always a possibility of flaws and weaknesses throughout the process of drafting and implementation. Thus, the process of review and improvement must be allowed provided that it does not violate the injunction of the Sharia. It is also important to ensure that the process is guided by objectivity and not hostility.

In a broader sense, this study exemplifies a much-needed and serious studies devoted to review the Islamic heritage as a whole and not limited to Islamic criminal law. As pointed out by Khaled (2014), *“One can and should have a respectful deference to tradition while at the same time critically engaging and reinventing to respond to ongoing demands and imperatives”*. In other words, this study advocates for all Muslim scholars around the world to engage in *ijtihād* not only for the new emerging issues but also to revisit the opinions of the classical jurists whenever necessary. The underlying reason behind such a call is that we must comprehend that the reality of the present is entirely different from the past in terms of social, political and legal aspects. All of these changes necessitate for a recontextualisation of the *fiqh* application and more importantly, in order to achieve the higher objective of the Sharia; the preservation of the religion, soul, mind, off-spring and wealth.

In terms of contribution of the study, the analysis undertaken in this study has further extended our understanding on the efforts to implement *Hudūd* within the context of Malaysia. This study has shifted the main focus of *Hudūd* discourse in

Malaysia from legal issues to discuss and initiate a self-critic to the *Ḥudūd* bill itself. The resistance to engage in self-critic to the *Ḥudūd* bill previously stems from the belief that the *Ḥudūd* law is largely based on definitive text and therefore is closed to *ijtihād*. Throughout the study, it is shown that such belief is inaccurate. This study demonstrated the importance of revisiting any claim which closes the door of discussion under the name of ‘scholarly consensus’ or ‘divinely ordained’ in any particular issue in the religion of Islam. It is hoped that this study will open up for more intellectual discussion and dialogue in reforming *Ḥudūd* law prior to its reintroduction in Malaysia.

Another key contribution of the study is through its proposal of introducing *Ḥudūd* law in Malaysia by utilising the framework of harmonisation. Throughout the study, the shortcomings of the existing *Ḥudūd* bill have been discussed rigorously. This study has come to the conclusion that the *Ḥudūd* bill proposed by the State of Kelantan is not feasible at least in the foreseen future. Thus, this study proposed an alternative way of introducing *Ḥudūd* law in Malaysia which is believed to be more feasible and democratic compared to the revolutionary approach taken by the State of Kelantan. This framework is chosen as it works within the confine of the Federal Constitution and was proved to be successful in other areas such as in Islamic banking in Malaysia. This approach may also be relevant to other Muslim countries especially for Southeast Asian Muslim majority countries.

This study, being of an explanatory and exploratory nature on the other hand, also opens up new possibilities for future research both in terms of theoretical development and application. While the framework of harmonisation which has been employed in this study was introduced since the early of 2000’s in Malaysia, there is still room for improvement. More research will in fact be necessary to refine and further elaborate the framework which was initially proposed by Sanhuri and Kamali. In terms of application, through replicating the same framework namely harmonisation, it is suggested that this framework can be extended into other area of Islamic criminal law such as in area of *qiṣāṣ* and *diyāt*. As proposed by

ex-chief judge in Malaysia, Tun Abdul Hamid, the current penal code in Malaysia is not entirely 'unislamic', only some parts need to be harmonised so that it will be in line with the Sharia. Similarly, the framework can also be extended into other parts of Islamic law such as in civil transactions, family law and particularly in any area that potentially causes conflict between the civil court and the *Syariah* court in Malaysia.

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## APPENDIX

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A BILL  
SYARIAH CRIMINAL CODE (II)  
(1993) 2015

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ARRANGEMENT OF CLAUSES

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PRELIMINARY

Section

1. Short title and commencement
2. Application
3. Interpretation
4. Category of offence

PART I

HUDUD OFFENCES

5. Types of *hudud* offences
6. *Sariqah*
7. Punishment for committing *sariqah*
8. A circumstances where *sariqah hudud* punishment shall not be imposed
9. *Hirabah*
10. Punishment for *hirabah*
11. A circumstances where amputating hand and foot in *hirabah* offences shall not be imposed
12. Adultery
13. Punishment for adultery
14. Sodomy
15. Punishment for sodomy
16. Proof of sodomy
17. Qazaf
18. Punishment for qazaf
19. *Al-li'an*
20. Refusal to do *li'an*

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Section

21. Consequences of *al-li'an*
22. *Syurb*
23. *Irtidad* or *riddah*

PART II

QISAS

24. *Qisas* and *diyat*
25. The types of offences causing death
26. *Qatl-al'amd*
27. Punishment for *qatl-al-'amd*
28. Pardon
29. Substitute punishment to *qisas*
30. *Qatl syibhi-al-'amd*
31. Punishment for *qatl syibhi-al-amd*
32. *Qatl-al-khata'*
33. Punishment *qatl-al-khata'*
34. Causing bodily injury
35. Punishment for causing bodily injury
36. Types of bodily injury
37. A circumstances where *qisas* punishment shall not be imposed
38. Consequence where *qisas* punishment is not imposed

PART III

EVIDENCE

39. Proving an offence
40. Number of witnesses
41. Requirements of a witness
42. Nature of testimony
43. Retraction of confession

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Section

44. *Iqrar*
45. Retraction of *iqrar*
46. Circumstantial evidence
47. Ta'zir as a substitute punishment to *hudud* where the evidence does not fulfill the condition required to prove a *hudud* offence

PART IV

IMPLEMENTATION OF PUNISHMENT

48. *Hudud* punishment not be varied
49. Confirmation of sentences before execution
50. Examination of medical officer before execution of punishment
51. Implementation of several punishment
52. Execution of amputation of hand and foot
53. Execution of whipping punishment
54. Postponement of stoning punishment for a pregnant woman and breast-feeding
55. Whipping punishment on a pregnant woman

PART V

GENERAL PROVISIONS

56. Abetment and conspiracy
57. Common intention
58. *Sariqah* by several offenders
59. Attempt to commit an offence
60. Proceeding under the Penal Code shall not be taken
61. Application of hukum syarak
62. Rules



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PART VI

COURT

Section

63. Special Syariah Trial Court and Special Syariah Court of Appeal
64. Special Syariah Trial Court and Special Syariah Court of Appeal are in addition to the Syariah Courts
65. Application of Syariah Criminal Procedure Enactment 2002
66. Special Syariah Trial Court
67. Special Syariah Court of Appeal
68. Eligibility to become Judges
69. Appointment of Judges
70. Tenure of office
71. Salaries, allowances and other privileges of Judges.

SCHEDULE I

SCHEDULE II

SCHEDULE III

SCHEDULE IV

## A BILL

*intituled*

An Enactment to make provisions for syariah *hudud* criminal offence, *qisas* and ta'zir and matters related thereto.

[ ]

ENACTED by the Legislature of the State of Kelantan as follows:

## PRELIMINARY

**Short title and commencement**

1. (1) This Enactment may be cited as the Syariah Criminal Code (II) (1993) 2015 and shall come into operation on a date to be appointed by His Royal Highness the Sultan by notification in the *Gazette*.

(2) Different dates may be appointed under subsection (1) for the commencement of the different provisions of this Code.

**Application**

2. This Code shall apply to every Muslim who is *mukalaf* for any offence under this Code committed by him in the State of Kelantan.

**Interpretation**

3. (1) In this Code, unless the context otherwise requires—

“child” includes grandchild and descendant underneath or next;

“*arsy*” means a sum of money or property or any part of a *diyat* to be paid to the victim as prescribed in Schedule II, III, and IV as compensation for the injury (*jurh*) caused to the victim;

“*Baitulmal*” means Baitulmal established under section 41 of Majlis Agama Islam and Adat Istiadat Melayu Kelantan Enactment 1994 [*En. No. 4/94*];

“Administration Enactment” means the Syariah Courts Administration Enactment 1982 [*En. No. 3/1982*];

“Judge” means a judge appointed under Part VI;

“*diyat*” means a certain amount of money or property that the amount or value equal to the current price of gold weighing 4450 grams or at the rate prescribed by His Royal Highness the Sultan from time to time;

“*hukum syarak*” means in Shafi sect or according to any one of Hanafi Maliki, or Hanbali;

“Jamaah Ulama” means Jamaah Ulama established under section 33 of the Majlis Agama Islam and Adat Istiadat Melayu Kelantan Enactment 1994;

“Court” means the Special Syariah Trial Court and Special Syariah Court of Appeal established under Part VI;

“Council” means Council of the Islam and Malay Custom, Kelantan established under subsection 5 (1) of the Council of the Islam and Malay Custom, Kelantan Enactment 1994;

“*Mohsan*” and “*ghairu mohsan*” have the same meaning as defined in section 12(2)(a) and (b);

“*mukalaf*” means a person who has attained 18 years of age and of sound mind;

“*nisab*” means a sum of money equivalent to the current price of gold weighing 4.45 gram or a sum to be determined by His Royal Highness the Sultan from time to time in accordance with *hukum syarak*;

“Imprisonment” have the same meaning as provided under section 2 of Prison Act 1995 [*Act 537*];

“*qisas*” means equal retaliation punishment or equation for the offence of causing death or bodily injury to any person;

“State Judicial Commission” means the State Judicial Commission established by the State Government;

“wali” means a relative of the victim who is entitled to remit the offence committed by the offender on the victim.

(2) To avoid doubt about the identity of words or expressions used in this Code which are listed in Schedule I, reference may be made to the Arabic script of the said words and expressions as shown against them in the said Schedule.

(3) All words, expressions, interpretations and phrases used in this Code but not defined herein, shall be deemed to have the meaning given to them in the Interpretation Acts 1948 and 1967 [Act 388] if not contrary to hukum syarak.

(4) Unless the context otherwise requires any reference in this Kanun in respect of any part or section or subsection or Schedule is a reference to a particular part or section or subsection or a specific schedule in this Kanun.

### **Category of offence**

4. (1) Offences under this Code are divided into three categories as follows:

(a) *hudud* offences, are offences specified in section 5, the punishments of which are called *hudud* punishments and ordained by al-Quran al-Karim or al-Sunnah;

(b) *qisas* offences, are offences causing death or bodily injury to a person, the punishments of which are called *qisas* punishments and ordained by al-Quran al-Karim or al-Sunnah; and

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- (c) *ta'zir* offences, are offences other than hudud or qisas offences, the punishments of which are called *ta'zir* and determined by the Legislature of the State under this Code or otherwise and imposed at the discretion of the Court.

(2) Notwithstanding subsection (1), if hudud or qisas offences cannot be punished with hudud or qisas punishments because they do not meet the conditions required for the punishments as prescribed under this Code or in accordance with hukum syarak, then the offences shall become a *ta'zir* offences and be punished accordingly.

## PART I

### HUDUD OFFENCES

#### **Types of hudud offences**

5. Hudud offences are as follows:

- (a) *sariqah*;
- (b) *hirabah*;
- (c) adultery including sodomy;
- (d) *qazaf*;
- (e) *syurb*; and
- (f) *irtidad* or *riddah*.

#### ***Sariqah***

6. Any person secretly moving a movable property out of lawful custody or possession of the owner without his consent, the act of which is committed with the intention to deprive him of the property from his custody or possession is said to commit *sariqah*.

**Punishment for committing *sariqah***

7. Any person who commits *sariqah*, except in the circumstances set out in section 8, shall be punished with the following *hudud* punishments:

- (a) for a first offence with amputation of his right hand;
- (b) for a second offence with amputation of his left foot; and
- (c) for third and subsequent offences with which imprisonment for such term as in the opinion of the Court deemed appropriate of not more than fifteen years, to make the offender realize and regret.

**A circumstances where *sariqah hudud* punishment shall not be imposed**

8. *Hudud* punishment for *sariqah* offences shall not be imposed in the following circumstances:

- (a) when the value of the stolen property is less than the *nisab*;
- (b) when the owner of the stolen property has not taken sufficient precaution to guard it from being stolen, given the condition of the property and where it is stored or abandoned;
- (c) if the offender has not yet received the full possession of stolen property, even though its owner no longer has custody or possession of the property;
- (d) if the stolen property is of the type that is not worth of value and can be found in abundance all over the place or of the type that is perishable;
- (e) when the stolen property does not have any value in accordance with *hukum syarak*;

- (f) when a theft was committed by the creditor on the property of the debtor who refused to pay the debt, provided that the value of the stolen property does not exceed the amount of the debt or the value of the stolen property exceeds the amount of debt but not exceeding the *nisab*;
- (g) when the offence is committed in extreme situations, including war, famine, disease and natural disasters and the like;
- (h) when the offence occurred within the family, such as a wife stealing from her husband and vice versa or a child stealing from his father and *vice versa*;
- (i) when the offence is committed by a group of people where the proportion of every one of them after dividing the stolen property or the proceeds thereof is less than the *nisab*;
- (j) when the offender returns the stolen property before the execution of *hudud*;
- (k) when the owner of the stolen property denies that his property had been stolen, even if the offender has made a confession to stealing it;
- (l) when the offender has made an objections against the witnesses that can be accepted by *hukum syarak*;
- (m) when the offender legally owns the stolen property after the theft and before the punishment is carried out;
- (n) when the execution of amputating hand harms or threatens the life of offender;
- (o) when the offender's left hand is not functioning, maimed or truncated;
- (p) when the offender stole a property or items belonging to the *baitulmal*; or

- (q) when the stolen property or circumstances in which the offence is committed in accordance with *hukum syarak* and there is no *hudud* punishment that can be imposed on him.

### ***Hirabah***

9. A person or a group of persons who confiscate the property of another with violence or wrongful restrain or making threat is said to commit *hirabah*.

### ***Hirabah* sentence**

10. Any person who commits *hirabah* shall be punished with following *hudud* punishments:

- (a) death and thereafter crucified, if the victim of the offence is killed and his property or the property of others under his custody is taken;
- (b) death only, if the victim of the offence is killed but no property has been taken;
- (c) amputation of right hand and left foot, if only a property is taken without causing death or injury to victim; but if the property is taken and an injury is caused to the victim, then the *diyat* or *arsy* shall be paid in addition to amputating hand and foot where the total *diyat* or *arsy* shall be subject to what is reasonable having regard to the nature and circumstances of the injuries caused as specified in Schedule II, III and IV; and
- (d) imprisonment for a period deemed appropriate by the Court, not exceeding five years to make the offender realize and regret, if only a threat is uttered to take any property or no injury caused.



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**A circumstances where amputating hand and foot in *hirabah* offences shall not be imposed**

**11.** (1) The punishment of cutting of hand and foot shall not be imposed in cases of punishments that will not be imposed for *sariqah* provided by section 8, whichever appropriate.

(2) The *hudud* punishment of *hirabah* shall not be imposed in when the offender voluntarily submit himself before the legal process is being commenced provided that the offender declares his repentance before a Judge or *syariah* and surrender the seized property to the authority or the owner from whom the property is robbed.

**Adultery**

**12.** (1) Except in the case of *wati' syubhah* as specified in subsection (3), whoever has sexual intercourse between a man or a woman whom are not her or his legally spouse is committing adultery.

(2) For the purposes of subsection (1):

- (a) where the offender is already lawfully married and have enjoyed sexual intercourse in the marriage, then the offender is named *mohsan*; and
- (b) where the offender is unmarried or married but has yet to experience a sexual intercourse in marriage then the offender is named *ghairu mohsan*.

(3) *Wati' syubhah* is a sexual intercourse which is committed by a man with a woman who is not his wife and the intercourse is done:

- (a) in dubious circumstances in which he thought that the woman with whom he had the sexual intercourse was his wife, when in fact the woman was not his wife; or

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- (b) in dubious circumstances in which he thought that his marriage to the woman with whom he had the sexual intercourse was valid according to hukum syarak, when in fact the marriage was invalid.

### **Punishment for adultery**

13. (1) If the offender who commits adultery is a *mohsan*, the offender shall be punished by stoning, which is stoned until death with a medium size stones.

(2) If the offender who commits adultery is a *ghairu mohsan*, the offender shall be punished with whipping of one hundred lashes and in addition shall be liable to imprisonment for one year.

### **Sodomy**

14. A man who having carnal intercourse with another man and another man or a man who having an intercourse with woman by anus is committing sodomy.

### **Punishment for sodomy**

15. (1) Subject to subsection (2), any person who commits the offence of sodomy shall be punished with the same punishment as prescribed for adultery.

(2) A husband who commits the offence of sodomy against his wife shall be punished with *ta'zir* punishment.

### **Proof of sodomy**

16. Sodomy offences shall be proved by the manner required to prove adultery.

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***Qazaf***

17. (1) A person is committing *qazaf* if he—
- (a) makes an accusation of adultery or sodomy, which is not substantiated by four witnesses, against an *aqil baligh* muslim and who is known as chaste of the behavior of adultery or sodomy; or
  - (b) subject to subsection (2), who expressly or impliedly makes a statement that a particular person has committed adultery or sodomy or expressly or impliedly alleged that a particular person is not a father or a child to another particular person.

(2) A statement under paragraph 1(b) is regarded as *qazaf* unless it is proven by four male witnesses, and if the statement cannot be proved then the person making the allegation shall be guilty of *qazaf* offence; but if it has been proved, then the person against whom the statement is made is guilty of adultery or sodomy.

(3) A statement under paragraph 1(b) is deemed not proven, if one or more of the four witnesses withdraw or refuse to testify or if the evidence is inconsistent with the statement; and in that case any witness who commit any of the acts mentioned above shall be deemed to have committed a *qazaf* offence and shall be punishable with *hudud* punishment.

(4) Any person who claims and witnesses who testify in good faith, either with *syahadah* or *bayyinah* before the Court, to prove the offence of adultery or sodomy but the evidence does not meet the requirements of *hukum syarak* for the accused to be imposed with *hudud* punishment, then the claimant and the witnesses shall not be guilty of *qazaf* offence.

**Punishment for *qazaf***

18. (1) Any person who commits a *qazaf* offence shall be punished with whipping of eighty lashes and his testimony shall not be accepted by the Court until he repented of his wrongdoings.

(2) *Hudud* punishment for *qazaf* shall not apply in the following circumstances:

- (a) when a person has committed *qazaf* against any of his descendants;
- (b) when the complainant withdraws the allegation of *qazaf*;
- (c) when the complainant pardons the person who commits *qazaf* before the execution.

### *Al-li'an*

19. (1) *Al-li'an* is an accusation of adultery by oath made by a husband against his wife, while his wife by an oath rejected the accusation, and both the accusation and rejection are made before a judge by uttering the words as specified in subsection (2), (3), (4), (5) and (6) as the case may be.

(2) A husband who had made the accusation should repeat four times in a row following utterance:

“**اشهد بالله** Allah is my witness that I speak the truth that I accuse my wife ..... has committed adultery”.

(3) At the end of the four times he repeats the words contained in subsection (2), he shall make the fifth utterance by saying:

“The curse of Allah shall fall on me if I have lied.”

(4) To reject the accusation, then his wife shall also repeat four times in a row following pronouncement:

“**اشهد بالله** Allah is my witness that my husband ..... had lied in making the adultery accusation against me.”

(5) At the end of the four times she repeats the words specified in subsection (4), she shall make the fifth utterance by saying:

“The wrath of Allah shall fall on me if my husband has spoken the truth.”

(6) If the wife has given birth or is pregnant, considered as the result of zina as accused by her husband, the husband shall deny being the father of the child who has been given birth or is still being conceived by adding to the pronouncement under subsection (2) that must be repeated four times a syllable, pronouncing the following:

“The child/what is being conceived by my wife is not from me.”

### **Refusal to do *li'an***

**20.** A husband who accuses his wife of adultery and he or his wife refused to resort to *li'an* after being ordered by the Court to do so, then—

- (a) he husband shall be punished with *hudud* punishment for committing *qazaf*; or
- (b) the wife shall on conviction of offence be punished with *hudud* punishment for committing the offence of adultery.

### **Consequence of *al-li'an***

**21.** Where a married couple resort to *al-li'an* to settle an accusation of adultery between them neither the husband shall be guilty of *qazaf*, nor the wife of adultery, and both of them shall be free from punishment for such offence; but the marriage shall be dissolved forthwith and the Judge shall make an order accordingly; and the couple shall forever not be capable of marrying each other again and if they thereafter having a sexual intercourse such act is prohibited and the intercourse is considered as an adultery.

***Syurb***

22. Whoever drinking liquor or any other intoxicating drinks whether he is intoxicated or not, irrespective of the quantity he consumed, is committing a *syurb* offence and upon conviction shall be punished with whipping of not more than eighty lashes and not less than forty lashes.

***Irtidad or riddah***

23. (1) Whoever voluntarily, deliberately and aware of making an act or uttered a word affects or against against the *aqidah* (belief) in Islamic religion is committing *irtidad*.

Provided that such act is done or such word is uttered intentionally, voluntarily and knowingly without any compulsion by anyone or by circumstances.

(2) For the purpose of subsection (1) the acts or the words which affect the 'aqidah (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim as part of his general knowledge for being a Muslim, such as matter pertaining to *Rukun Islam*, *Rukun Iman* and matters of *halal* (the allowable or the lawful) or *haram* (the prohibited or the unlawful).

(3) Whoever is found guilty of committing the offence of *irtidad* shall, before a sentence is passed on him, be required by the court to be imprisoned within such period deem suitable by the Court for the purpose of repentance.

(4) Where he is reluctant but there is still hope for his repentance then the Court shall consider for continuance until no hope of repentance then the court shall pronounce the hudud sentence on him and order the forfeiture of his property irrespective of whether such property was acquired before or after the commission of the offence to be held for the *Baitulmal*:

Provided that when he repents whether the repentance is done before the death sentence is pronounced or after such pronouncement but before the sentence is carried out, he shall be free from the *hudud* sentence and his property ordered to be forfeited shall be returned to him.

## PART II

### QISAS

#### *Qisas and diyat*

24. The punishment of *qisas* and *diyat* shall be imposed to offences of homicide and causing bodily injuries.

#### **Type of homicide**

25. Homicide shall be divided into three categories—

- (a) *qatl al-‘amd*;
- (b) *qatl syibhi al-‘amd*; dan
- (c) *qatl al-khata’*.

#### *Qatl al-‘amd*

26. (1) Any person who causes the death of a person by doing an act with the intentionally causing death or bodily injury which in the ordinary course of nature is likely or sufficient to cause death; or by doing an act knowingly that his act is so imminently dangerous that it strongly in probability to cause death, is committing *qatl al-‘amd*.

(2) Any person who by doing an act with the intention or knowingly that the act is likely to cause death, unintentionally causes the death of any person or have no knowledge that it can cause a death, is also committing *qatl-al-‘amd*.

**Punishment for *qatl-al-‘amd***

**27.** (1) Except as provided in subsection (2), any person who commits *qatl-al-‘amd* shall be punished with death as *qisas* punishment.

(2) The punishment of *qisas* in subsection (1) shall not be imposed:

- (a) the offence is not proved by the evidence required under Part III; or
- (b) notwithstanding such proof, the wali had pardoned

**Pardon**

**28.** A *wali* may at any time before the execution of the punishment of death as the *qisas* punishment, pardon the offender either with or without a *diyat*; and if the pardon is with a *diyat*, this shall be paid either in a lump sum or by installment within a period of three years from the date of the final judgement, and if in the meantime the offender dies, the *diyat* shall be recoverable from his estate. In case of no estate available the *diyat* is borne by Baitulmal.

**Substitute to *qisas* punishment**

**29.** When the punishment of death as *qisas* punishment is not imposed, the offender shall be liable to the *ta’zir* punishment of imprisonment for life or having regards to the circumstances of the case to such term of imprisonment as in the opinion of the Court would lead the offender to repentance or with such compensation fix by the Court.

***Qatl syibhi al-‘amd***

**30.** Any person who with the intention of causing injury to the body or mind of any person causes the death of that person or any other person by doing an act with or without an act with or without a weapon which in the ordinary cause of nature is not likely to cause death is said to commit *qatl-syibhi-al-‘amd*.



**Punishment for *qatl syibhi-al-‘amd***

31. Any person who commits *qatl syibhi-al-‘amd* shall pay *diyat* to the victim’s *wali* and in addition thereto shall be punished with the *ta’zir* of imprisonment for a term not exceeding fourteen years that would lead the offender to repentance.

***Qatl al-khata’***

32. Any person without an intention of causing death or injury causes the death of a person by doing an act which is not anticipated to cause the death of such person or any person or by doing an unlawful act which later becomes the cause for the death of such person is said to commit *qatl-al-khata’*.

**Punishment for *qatl-al-khata’***

33. Any person who commits *qatl-al-khata* shall pay *diyat* to the victim’s *wali* and in addition thereto may be liable to the *ta’zir* punishment of imprisonment for a term not exceeding ten years that would lead the offender to repentance.

**Causing bodily injury**

34. Any person who causes pain, harm, disease, infirmity or injury to a person, or impairs or causes the loss of function of any organ of the body of any person or part thereof without causing his death is committing an offence of causing bodily injury.

**Punishment for causing bodily injury**

35. (1) Any person who causes bodily injury to a person shall be punished with the *qisas* punishment, that is with similar bodily injury as that which he has inflicted upon his victim and

where *qisas* punishment cannot be imposed or executed because the conditions required by the *Syariah* law are not fulfilled, the offender shall pay *arsy* to his victim and may be liable to *ta'zir* punishment of imprisonment.

(2) The amount of *arsy* payable and the term of imprisonment to be imposed shall be as provided by Schedule II and Schedule III or *hukum syarak* and shall vary according to the nature and gravity of the injuries caused to the victim, and the circumstances in which the offence is committed.

### **Types of injuries**

**36.** For the purpose of awarding punishment, bodily injuries shall be classified as follows:

- (a) *itlaf al-udhw* (causing dismemberment of any organ of the body or injury to a part of or organ of the body);
- (b) *itlaf solahiyyatu al-udhw* (causing destruction or permanent impairment of the function, use of an organ of the body, or permanently disfiguring such organ);
- (c) *syajjah* (causing injury on the head or face which injury does not amount to *itlaf-al-udhw* or *itlaf-solahiyyatu-al-udhw*);
- (d) *jurh* (causing injury on any part of the body save the head and the face which injury leaves a marks or wound whether temporary or permanent); and
- (e) all other bodily injury.

**A circumstances where *qisas* punishment shall not be imposed**

**37.** *Qisas* punishment shall not be imposed in the following cases:

- (a) where the offender who has committed the *qisas* offence is dead;
- (b) where the limb or the organ for which *qisas* punishment is to be applied is already non-functional or incapacitated;
- (c) where pardon is given by the victim or his wali; or
- (d) where the settlement *sulh* or agreement between the victim and the offender has been made.

**Consequence when *qisas* punishment is not imposed**

**38.** When *qisas* punishment is not imposed:

- (a) the term of imprisonment as *ta'zir* punishment for causing *itlaf-al-udhw* and *itlafsolahiyyatu-al-udhw* is ten years; and the *arsy* payable for causing the injury shall be as specified in Schedule II;
- (b) the term of imprisonment as *ta'zir* punishment and the *arsy* payable for causing *syajjah* shall be as specified in Schedule III;
- (c) the term of imprisonment as *ta'zir* punishment and the *arsy* payable for causing *jurh* shall be as specified in Schedule IV.

## PART III

## EVIDENCE

**Proving an offence**

**39.** (1) This Part shall apply for offences under this Code.

(2) The provisions under the Evidence Enactment of the Syariah Court 2002 [*En. No 9/2002*] shall apply to any matter which was not specifically provided in this Part.

(3) All offence under this Code, whether *hudud* offences or *qisas* offences or *ta'zir* offences shall be proved by oral testimonies or by confession made by the accused or *syahadah* of witness.

### **Number of witnesses**

**40.** (1) The minimum number of witnesses required to prove all offence under this Code except for adultery and sodomy shall not less than two witnesses and taking into consideration the requirement of *tazkiyyah-al-shuhud*.

(2) The minimum number of witnesses required to prove an offence of adultery and sodomy shall be four with the consideration to the requirement of *tazkiyyah-al-shuhud*.

### **Qualification to be a witness**

**41.** (1) Each witness must be an adult male Muslim who is *aqil baligh* and just.

(2) A person shall be considered as just if he does what is required of him by Islam and avoids committing great sins and does not continuously commit lesser sins and protecting *al-muruah* that is a sense of honour.

(3) A person shall be deemed to be just, until the contrary is proved.

### **Nature of testimony**

**42.** (1) To prove the charge against the accused and render him liable to *hudud* or *qisas* punishment the evidence given shall be one of absolute certainty and free from any ambiguity or doubt.

(2) Each witness shall state clearly that he has actually seen the act complained of and in the case of adultery the four witnesses shall state that they have actually seen the act of penetration of the male sexual part into the female sexual part and further there shall neither be contradiction nor inconsistency among the witness in such testimony.

### **Withdrawal of testimony**

**43.** To make the accused liable to *hudud* punishment each witness shall maintain his testimony against the accused not only during the trial and thereafter but also during the execution of the punishment because if such testimony is withdrawn before the execution of the punishment the accused shall cease to be liable o the *hudud* punishment, and if it is withdraw at the time when the accused is undergoing the punishment, the punishment shall forthwith cease.

### **Confession**

**44.** (1) The best evidence to convict the accused and make him liable to *hudud* punishment is his own confession.

(2) The confession must be made voluntarily and without any force before a Judge and shall afterwards be repeated before the trial Judge during the course of the trial, and if the trial is one of adultery the confession shall be repeated four times before the Judge during the course of the trial:

Provided that both the making and the repetition of the confession must be without any threat, promise or inducement and must clearly prove in detail that the accused has actually committed the offence with which he is charged and that he understands that he will be punished for making such confession.

(3) The confession shall only be admissible against the accused that makes it, and cannot be used against any other person; and to be valid the confession must not be retracted confession.

**Retraction of confession**

**45.** (1) A confession may be retracted by the accused who makes it at any time even while he is undergoing the punishment.

(2) If the confession is retracted before the execution of the punishment on him, the accused shall no longer be liable to punishment and if he retracts the confession at the time when he is undergoing the punishment such execution shall forthwith cease.

(3) If at any time before or at the time when the punishment is being executed the accused manages to escape from the authorities, he shall be deemed to have retracted the confession and as such the provision of subsection (2) shall apply.

**Circumstantial evidence**

**46.** (1) Except prescribed in subsection(2), circumstantial evidence though relevant shall not be valid method of proving a *hudud* offence.

(2) In the case of drinking liquor or any other intoxicating drinks, the smell of liquor in the breath of the accused, or the fact of his vomiting liquor or any other intoxicating drinks or traces thereof, or the observation by the court of the accused being in a state of intoxication shall be admissible as evidence to prove that he has committed the offence of *syurb* unless he can prove to the contrary.

***Ta'zir* as a substitute punishment to *hudud* where the evidence does not fulfill the condition required to prove a *hudud* offence**

**47.** Where the accused cannot be made liable to a *hudud* punishment because the witness have withdrawal their testimonies as provided for in section 43 or because the accused has retracted his confession as provided for in section 45 or the evidence available does not fulfill the conditions required to prove *hudud* offence, the offender may be punished by the *ta'zir* punishment as the court deems fit; and the court shall proceed to pass such punishment if there is sufficient evidence for that purpose.

PART IV

IMPLEMENTATION OF THE PUNISHMENT

***Hudud* punishment not to be varied**

48. The *hudud* punishment imposed under this Code shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered.

**Confirmation of sentences before execution**

49. Every *hudud* punishment, a death sentence imposed as *qisas* or *ta'zir* punishment under this Code shall be referred by the Special Syariah Trial Court which has passed the sentence to the Special Syariah Court of Appeal for confirmation and the punishment imposed shall not be carried out before such confirmation is obtained.

**Medical examination before execution of punishment**

50. A *hudud* punishment imposed, other than the punishment of death and stoning shall not be executed unless the offender is medically examined by a Muslim medical officer and certified to be fit by that officer.

**Implementation of several punishments**

51. If an offender is guilty of several offences, the punishment that shall be carried out on him shall be as follows:

- (a) if the punishment are of the same kind and graveness, only one punishment shall be carried out;
- (b) if the punishment are of the same kind, but of different graveness, only the severest punishment shall be carried out;

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- (c) if the punishment are of different kinds, all shall be carried out; and
- (d) if one of the punishment is death all other punishment shall be set aside.

### **Implementation of amputation of hand and foot**

**52.** For the purpose of this Code—

- (a) the punishment of amputation of a hand shall mean an amputation of the hand at the wrist; that is the joint between the palm and the forearm,
- (b) the punishment of amputation of a foot shall mean an amputation of the foot in the middle of the foot in such a way that the heel may be still be usable for walking and standing.

### **Execution of whipping punishment**

**53.** The punishment of whipping shall be carried out in accordance with the provisions in sections 125 and section 126 of Syariah Criminal Procedure Enactment 2002 [*En. No. 8/2002*].

### **Postponement of stoning punishment for a pregnant woman and breast-feeding**

**54.** The punishment of stoning shall not be carried out on a pregnant female offender until she has delivered her child and thereafter become clean of blood and is fit again to undergo the punishment; and in the event of the child being breastfeed by her, the stoning shall not be executed until the completion of two year of breastfeeding unless there is a wet nurse who is willing to breastfeeding the child during the said period.



**Punishment of whipping on a pregnant woman**

**55.** The punishment of whipping shall not be executed on a pregnant female offender until she has delivered her child, and thereafter become clean of blood and is fit again to undergo the punishment without hazard.

## PART VI

## GENERAL PROVISION

**Abetment and conspiracy**

**56.** Where an offence is committed as a result of or in furtherance of an abetment, assistance, plot or conspiracy, every person who abets, assists, plots or conspires for the commission of such offence shall be guilty of that offence and shall be liable to be punished with imprisonment as *ta'zir* punishment for a term not exceeding ten years.

**Common intention**

**57.** When an offence is committed by several persons in furtherance of a common intention of all, each of such person is liable for that offence in the same manner as if the offence was done by him alone and shall be liable to be punished with the *ta'zir* punishment of imprisonment not exceeding ten years.

***Sariqah* by several offenders**

**58.** Where several offenders commit *sariqah*, each of them shall be punished with the *hudud* punishment as if each offender has committed it all alone:

Provided that the share obtained from the stolen property by each of them when divided equally amongst them, is equal to or exceeds the amount of *nisab*.

**Attempt to commit an offence**

**59.** Any person who attempts to commit an offence under this Code shall be punished with the *ta'zir* punishment of imprisonment for a term not exceeding ten years.

**Proceeding under the Penal Code not to be taken**

**60.** Where a person has been tried or faced any proceeding for an offence under this Code, he shall not be tried and no proceeding shall be taken against him under the Penal Code [*Act 574*] in respect of the same or similar offence provided in the Code.

**Application of *hukum syarak***

**61.** (1) Any provision of this Code which is inconsistent with *hukum syarak* is void to the extent of the inconsistency.

(2) If there is any lacuna or matters not expressly prescribed in this Code, the Court shall apply the *hukum syarak*.

**Ruler**

**62.** His Royal Highness the Sultan on the advice of the Council may, by the notification in the *Gazette* make rules for carrying out the provisions of this Code and the Court process as well as the appointment of officer and agent of the Court.

## PART VI

## COURT

**The Special Syariah Trial Court and The Special Syariah Court of Appeal**

**63.** (1) There shall be established the Special Syariah Trial Court and the Special Syariah Court of Appeal.

(2) The Special Syariah Trial Court shall have jurisdiction to try offence under this Code.

(3) The Special Syariah Court of Appeal shall have jurisdiction to hear appeals from the decision of the Special Syariah Trial Court.

### **Special Syariah Trial Court and Special Syariah Court of Appeal are additional to Syariah court**

**64.** The Courts established under section 63 shall be addition to the Syariah courts established under the Administration of the Syariah Court Enactment 1982, and the provisions of that Enactment shall in appropriate matters apply to the Courts, unless they are in conflict with the provision of this Code or are not intended by the provisions of this Code.

### **Application of Syariah Criminal Procedure Enactment 2002**

**65.** The Syariah Criminal Procedure Enactment 2002 [*En. No 8/2002*] shall apply to all proceedings of the Courts with or without such modifications as the Court think fit in the interest of justice.

### **The Special Syariah Trial Court**

**66.** When the court is sitting to try an offence under this Code the Special Syariah Trial Court shall consist of three Judges, two of whom shall be *ulama*; and the session shall be presided over by any of the said Judges.

### **The Special Syariah Trial Court of Appeal**

**67.** When the court is sitting to hear an appeal from the decision or order of the Special Syariah Trial Court, the Special Syariah Court of Appeal shall consist of five Judges, three of whom shall be *ulama* and the session shall be presided over by any one of the said Judges.

### **Qualification to be Judges**

**68.** A person who holds or has held office of a Judge of the High Court of Malaya or Sabah and Sarawak or the Appeal Court of Malaysia or the Federal Court of Malaysia or any person who has the qualification to be appointed as a Judge of any of these Court may be appointed be a Judges; whilst an ulama who may be appointed a Judge shall be a person who holds or has held office as a Qadhi Besar or Mufti Kerajaan or who has the qualification to hold any of those offices and is to known have a deep knowledge of *hukum syarak*.

### **Appointment of Judges**

**69.** (1) These judges shall be appointed by His Royal Highness the Sultan by an Instrument of Appointment under His Sign Manual and Seal after consulting the State Service Commission and the Jamaah Ulama and in addition His Highness may consult any other authority or body or individual who in His Highness opinion is considered fit and proper and such appointment shall be published in the *Gazette*.

(2) In making of the appointment under subsection (1) His Royal Highness the Sultan shall signify whether the appointee is the President of the Special Court of Appeal or the Chief Judge of the Special Syariah Trial Court or a Judge of the Special Court of Appeal or a Judge of the Special Syariah Trial Court.

### **Tenure of office**

**70.** (1) Every Judge is entitled to hold office until he voluntarily resigns from his office, unless in the meantime he is required to leave the service because of unsound mind or ill health which has to be certified by not less than three medical experts or because he is found by an independent Tribunal to have committed an offence which renders him unfit to be a judge.

(2) Both the medical experts and the members of the independent Tribunal which is consist of a chairperson and not less than 4 members shall be appointed by His Royal Highness the Sultan after consulting such authority, body or individual whom His Highness thinks fit and proper.

### **Salaries, allowance and other privileges of judges**

**71.** (1) The salaries, allowance and other privileges of the judges shall be a charge on the Consolidated Fund of the State and shall not be less than those enjoyed by a judge of the High Court of Malaya or Sabah and Sarawak or of the Federal Court of Malaysia.

(2) The Legislative Assembly of the State may make law to fix the salaries, allowance and other privileges of the judges of Courts established by this Code.

## SYARIAH CRIMINAL CODE ENACTMENT (II) (1993) 2014

### SCHEDULE I

### SECTION 3

#### GLOSSARY OF ARABIC WORDS

Adil	عادل
Akibat	عاقبة
Aqidah	عقيدة
Aqil Baligh	عقل بالغ
Aurat	عورة
Arsy	أرش

## SYARIAH CRIMINAL CODE II (1993)

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Al-Quran al-Karim	القرآن الكريم
Al-Li'an	اللعان
Al-Muruah	المروءة
Bayyinah	بينة
Badhia'h	باضعة
Baitulmal	بيت المال
Damiyah	دامية
Diyat	دية
Dubur	دبر
Faraj	فرج
Ghairu Jaifah	غير جانفة
Hadd	حد
Halal	حلال
Haram	حرام
Hashimah	هاشمة
Hirabah	حرابة
Hudud	حدود
Hukum syarak	حكم شرع
Iqrar	إقرار
Iman	إيمان
Irtidad	ارتداد

Itlaf-solahiyyatul-al-udhw	اتلاف صلاحية العضو
Itlaf-al-udhw	اتلاف العضو
Jaifah	جانفة
Jenayah	جناية
Jurh	جرح
Khafifah	خفيفة
Lafaz	لفظ
Laknat	لعنة
Liwat	لواط
Mohsan	محسن
Mudhihah	موضحة
Mukalaf	مكاف
Munaqqilah	منقلة
Mutalahimah	متلاحمة
Nisab	نصاب
Qadhi	قاضي
Qarinah	قرينة
Qatl-syibhi-al-amd	قتل شبه العمد
Qatl-al-khata'	قتل الخطاء
Qazaf	قذف
Qisas	قصاص

## SYARIAH CRIMINAL CODE II (1993)

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Rejam	رجم
Riddah	ردة
Sariqah	سرقة
Sulh	صلح
Sunnah	سنة
Syajjah Damighah	شجة دامغة
Syajjah Hashimah	شجة هاشمة
Syajjah Ma'mumah	شجة مأمومة
Syajjah Mudhahah	شجة موضحة
Syajjah Munaqqilah	شجة منقلة
Syarak	شرع
Syarat	شرط
Syahadah	شهادة
Syariah	شرعية
Syurb	شرب
Taubat	توبة
Ta'zir	تعزير
Tazkiyyah-al-shuhud	تزكية الشهود
Wali	ولي
Wati' Syubhah	وطيء شبهة
Zina	زنا



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KELANTAN No. OF 2015

## SCHEDULE II

( Section 38(a) )

The amount of *arsy* payable for causing *itlaf al-udhw* and *itlaf-solahiyatu-al-udhw* shall be as follows:

<u>No</u>	<u>Type of injuries</u>	<u>Amount of Diyat</u>
1.	Loss of single organ, such as nose or tongue	A <i>diyat</i>
2.	Loss of organ which is in pairs such as hands, feet, eye, lips, breast and ears	A <i>diyat</i> if a pair is injured, but $\frac{1}{2}$ of a <i>diyat</i> if only one is injured.
3.	Loss of organ which is in fours such as eyelashes or eyelids	$\frac{1}{4}$ of a <i>diyat</i> if only one is injured, $\frac{1}{2}$ of a <i>diyat</i> if two are injured, $\frac{3}{4}$ of a <i>diyat</i> if three are injured, and a <i>diyat</i> if all four are injured
4.	A finger of hand or a foot	$\frac{1}{10}$ of a <i>diyat</i>
5.	A joint of a finger	$\frac{1}{30}$ of a <i>diyat</i>
6.	A joint of a thumbs	$\frac{1}{20}$ of a <i>diyat</i>
7.	A tooth other than milk tooth	$\frac{1}{20}$ of a <i>diyat</i>
8.	Twenty teeth	A <i>diyat</i>
9.	A milk tooth	$\frac{1}{50}$ of a <i>diyat</i>
10.	Uprooting all the hairs of the head, beard, moustaches, eyebrows, eyelash or any other part of the body	A <i>diyat</i>

## SYARIAH CRIMINAL CODE II (1993)

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## SCHEDULE III

( Section 38(b) )

The amount of arsy and the term of imprisonment for causing *syajjah* (injuries to the head or face)

<b><u>No</u></b>	<b><u>Type of injuries</u></b>	<b><u>Amount of Arsy</u></b>	<b><u>Term of imprisonment</u></b>
1.	<i>Syajjah khafifah</i> (injury which exposes no bone)	1/40 of a <i>diyat</i>	not exceeding two years
2.	<i>Syajjah mudhihah</i> (injury which exposes a bone without causing fracture)	1/20 of a <i>diyat</i>	not exceeding five years
3.	<i>Syajjah hashimah</i> (injury which involves a fracture of a bone without dislocation)	1/10 of a <i>diyat</i>	not exceeding ten years
4.	<i>Syajjah munaqqilah</i> (injury which involves a fracture and a dislocation of bone)	1/4 of a <i>diyat</i>	not exceeding ten years
5.	<i>Syajjah ma'mumah</i> (injury which involves fracture of the skull but wound just touches the brain membranes without tearing it)	1/3 of a <i>diyat</i>	not exceeding ten years
6.	<i>Syajjah damighah</i> (injury which involves a fracture of the skull, and the wound tears the brain membrane)	1/2 of a <i>diyat</i>	not exceeding fourteen years

SCHEDULE IV

( Section 38(c) )

The amount of arsy and the term of imprisonment for causing jurh (injuries to parts of the body other than the head or face which leave marks of the wounds)

<u>No</u>	<u>Type of injuries</u>	<u>Amount of Arsy</u>	<u>Term of imprisonment</u>
1.	<i>Jaifah</i> (wound extending to body cavity of the trunk)	1/3 of a <i>diyat</i>	Not exceeding ten years
2.	<i>Ghairu jaifah</i> (wound other than jaifah) these are:-		
	(a) <i>damiyah</i> (tear of the skin and bleeding)	As determined by the Court	Not exceeding three years
	(b) <i>badhia'h</i> (wound which exposed no bone)	As determined by the Court	Not exceeding three years
	(c) <i>mutalahimah</i> (laceration of the flesh)	As determined by the Court	Not exceeding three years
	(d) <i>mudhihah</i> (wound exposing bone)	As determined by the Court	Not exceeding five years
	(e) <i>hashimah</i> (fracture without dislocation)	As determined by the Court	Not exceeding five years
	(f) <i>munaqqilah</i> (fracture with dislocation)	As determined by the Court	Not exceeding seven years

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SYARIAH CRIMINAL CODE II (1993)  
2015

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## EXPLANATORY STATEMENT

This Bill seeks to make provisions for syariah *hudud* criminal offence, *qisas* and *ta'zir* and matters related thereto.

## PRELIMINARY

2. Preliminary Part of this Bill contains the preliminary matters.
3. *Clause 1* contains the short title of the proposed Code and empowers the His Royal Highness the Sultan to appoint the commencement of the proposed Code.
4. *Clause 2* contains the provision relating to the application of the proposed Code.
5. *Clause 3* contains the definitions of certain words used in the proposed Code.
6. *Clause 4* deals with the division of offences under the Code into *hudud*, *qisas* and *ta'zir* offences.

## PART I

7. Part I contains the provision on *hudud* offences.
8. *Clause 5* deals with the types of *hudud* offences.
9. *Clause 6, 7* and *8* deal with the offence of *sariqah*, the punishment therefor and the exception to *sariqah hudud* punishments.
10. *Clause 9, 10* and *11* deals with the offence of *hirabah*, the punishment therefor and the exception to *hirabah hudud* punishments.
11. *Clause 12* and *13* deal with the offence of adultery and the punishment therefor.
12. *Clause 14, 15* and *16* deal with offence of sodomy and the punishment therefor.
13. *Clause 17* and *18* deal with offence of *qazaf*, the punishment therefor and the proof.
14. *Clause 19, 20* and *21* deal with *al-li'an* and the consequences therefor.
15. *Clause 22* deal with offence of *syurb* and the punishment therefor.
16. *Clause 23* deal with offence of *irtidad* or *riddah* and the punishment therefor.

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KELANTAN NO. OF 2015

## PART II

17. Part II contains the provision on *qisas*.
18. *Clause 24* seeks to provide for the application of *qisas* and *diyat* in cases of homicide and bodily injuries.
19. *Clause 25* deals with the type of homicide.
20. *Clause 26* and *27* deals with the offence of *qatl al-'amd* and the punishment therefor.
21. *Clause 28* seeks to make provision for pardon for the punishment of *qisas*.
22. *Clause 29* seeks to provide for the punishment of *ta'zir* as an alternative to the punishment of *qisas*.
23. *Clause 30* and *31* deals with the offence of *qatl syibhi al'amd* and the punishment therefor.
24. *Clause 32* and *33* deals with *qatl al-khata' and* the punishment therefor.
25. *Clause 34* and *35* deals with offence of causing injury and the punishment therefor.
26. *Clause 36* seeks to classify the types of injuries for the purpose of awarding punishment.
27. *Clause 37* seeks to provide for cases when *qisas* punishment shall not be imposed.
28. *Clause 38* deals with consequences where *qisas* punishments are not imposed.

## PART III

29. Part III contains the provision on the evidence.
30. *Clause 39* seeks to make provision on how to prove the offences under this Code.
31. *Clause 40* deals with the number of witnesses required to prove offences under this Code.
32. *Clause 41* deals with the qualification to be a witness.
33. *Clause 42* and *43* deals with the testimony.
34. *Clause 44* and *45* deals with confession.
35. *Clause 46* deals with the circumstantial evidence.
36. *Clause 47* seeks to make provision for *ta'zir* as an alternative punishment to *hudud* where the evidence does not fulfill the conditions required to prove a *hudud* offence.

## SYARIAH CRIMINAL CODE II (1993)

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## PART IV

37. Part IV contains the provision on the implementation of punishment.
38. *Clause 48* seeks to provide that *hudud* punishment shall not be varied.
39. *Clause 49* deals with confirmation of *hudud* punishment and death sentences by the Special Syariah Court of Appeal before execution.
40. *Clause 50* deals with medical examination before execution of punishment.
41. *Clause 51* seeks to make provision on the implementation of several punishments.
42. *Clause 52* deals with the punishment of amputation of hand and foot.
43. *Clause 53* deals with implementation of punishment of whipping.
44. *Clause 54* seeks to provide for postponement of stoning punishment on a pregnant woman and breast-feeding.
45. *Clause 55* deals with the punishment of whipping on a pregnant woman.

## PART V

46. Part V contains the provision on general provisions.
47. *Clause 56* and *57* deals with the abetment and conspiracy.
48. *Clause 58* deals with the commission of *sariqah* by several offenders.
49. *Clause 59* deals with attempt to commit an offence.
50. *Clause 60* deals with the circumstances in which proceeding under Penal Code shall not be taken.
51. *Clause 61* seeks to provide that offences under this Code shall be interpreted according to Syariah law.
52. *Clause 62* seeks to empower His Royal Highness the Sultan on the advice of the Council to make rules on the provision of this proposed Code, the ruling of Court and also the appointments of the officer and agent of the Court.

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PART VI

53. Part VI contains the provision relating to Court.

54. *Clause 63, 64, 65, 66, 67, 68, 69, 70 and 71* deals with the Special Syariah Trial Court, Special Syariah Court of Appeal, appointment of judges and other matters relating thereto.

*FINANCIAL IMPLICATION*

The Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

8 February 2015  
[PU.KN.1/G/40]

SHAHIDANI BIN ABD AZIZ  
*State Legal Adviser*  
*Kelantan*

Hak Cipta Pencetak (H)

PERCETAKAN NASIONAL MALAYSIA BERHAD

Semua Hak Terpelihara. Tiada mana-mana bahagian jua daripada penerbitan ini boleh diterbitkan semula atau disimpan di dalam bentuk yang boleh diperolehi semula atau disiarkan dalam sebarang bentuk dengan apa jua cara elektronik, mekanikal, fotokopi, rakaman dan/atau sebaliknya tanpa mendapat izin daripada Percetakan Nasional Malaysia Berhad (Pencetak kepada Kerajaan Malaysia yang dilantik).



DICETAK OLEH  
PERCETAKAN NASIONAL MALAYSIA BERHAD,  
CAWANGAN KUALA TERENGGANU  
BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA

## Surat Pertama

MB (KN): (S) 19/2/ (1)

7 Mei 1992

3 Zulkaedah 1412

Bismillah hirrahma nirrahim.

Segala puji-puji dan ketinggian adalah kepunyaan Allah Subha nahuwata'ala dan salam sejahtera ke atas junjungan Nabi Muhammad sallallahu alaihi wassalam.

الوال على الخير كفاعله "حديث شريف"

"اورغ يغ منونجوقكن اورغ لأين بربواة كبجيكن سروفاله دغن اياث ممبواتش  
سنديري"

Yang Amat Berhormat,  
Datuk Seri Dr. Mahathir Bin Mohamed,  
Perdana Menteri Malaysia,  
Jalan Dato, Onn,  
KUALA LUMPUR.

السلام عليكم ورحمة الله وبركته

### Ke Arah Perlaksanaan Syariat Islam Di Malaysia

Saya dengan segala hormatnya ingin memaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri Kelantan telah membuat keputusan menulis kepada YAB Perdana Menteri untuk mendapat persetujuan dan izin secara rasmi bagi Kerajaan Kelantan, dengan segala kemampuan yang ada, agar dapat melaksanakan sebahagian dari Syariat Islam iaitu perkara jenayah mengikut yang ditetapkan di dalam Al-Quran.

2. Adapun persetujuan dan izin dari YAB Perdana Menteri selaku Pengerusi Jemaah Menteri dan Ketua Kerajaan Persekutuan sesungguhnya tidak syak lagi amat penting bagi saya dan Kerajaan Negeri Kelantan melaksanakan Syariat Islam ini.



3. Segala doa restu untuk kesejahteraan dan ketinggian iman YAB Datuk Seri adalah sentiasa di hati saya.

**\*MEMBANGUN BERSAMA ISLAM\***

Yang ikhlas,

**(HAJI NIK ABDUL AZIZ BIN NIK MAT)**

Menteri Besar  
Kelantan.

s.k

Yang Berhormat,  
Speaker,  
Dewan Rakyat,  
Bangunan Parlimen,  
Kuala Lumpur.

Tarikh: 7 Mei 1992 bersamaan  
3 Zulkaedah 1412.

**Surat daripada  
Perdana Menteri Malaysia**

**Kepada  
Menteri Besar Kelantan**

## Surat Kedua

15 Ogos 1992

Yang Amat Berhormat  
Tuan Haji Nik Abdul Aziz bin Nik Mat  
Menteri Besar Kelantan  
Pejabat Menteri Besar Kelantan  
Kota Bharu  
Kelantan

Yang Amat Berhormat,

Ingin saya memaklumkan bahawa surat Yang Amat Berhormat bertarikh 7 Mei 1992 telah selamat saya terima.

Saya sebagai seorang Muslim menerima dan menyokong semua hukum-hukum syariah. Tetapi ini tidak bermakna saya menyokong tafsiran dan andaiannya oleh Parti dan Kerajaan PAS yang kerap membuat tafsiran agama yang mencampuradukkan kepentingan politik parti dengan kehendak agama Islam.

Persetujuan dan izin dari saya tidak diperlukan untuk Kerajaan Kelantan di waktu ini. Hanya jika didapati tindakan Kerajaan Kelantan tidak seperti kehendak ajaran Islam dan bertentangan dengan Perlembagaan atau undang-undang barulah Kerajaan Persekutuan akan bertindak. Disaat ini Kerajaan Persekutuan tidak dapat memastikan samada rancangan Kerajaan Kelantan benar-benar berasas kepada syariat Islam dan tidak bertentangan dengan peruntukan Perlembagaan Malaysia dan undang-undangnya. Justeru itu soal persetujuan dan izin saya sebagai Perdana Menteri belum timbul.

Saya akhiri dengan doa demi kesejahteraan dan ketinggian iman Yang Amat Berhormat.

DR MAHATHIR BIN MOHAMAD

## Surat Ketiga

MB (KN) (S) 16/6/ (25)

KOTA BHARU: 21hb Mac 1994

8 Syawal 1424

Bismillahi rRahmani rRahim

Segala puji dan ketinggian adalah kepunyaan Allah Subhanahu Wataala dan salam sejahtera ke atas junjungan Nabi Muhammad Sallallahu alaihi wassalam.

Yang Amat Berhormat,  
Datuk Seri Dr. Mahathir bin Mohamad,  
Perdana Menteri Malaysia,  
Jabatan Perdana Menteri,  
Jalan Dato' Onn,  
KUALA LUMPUR.

YAB Datuk Seri,

### **PENGUATKUASAAN KANUN JENAYAH SYARIAH (II) 1993 DI NEGERI KELANTAN.**

---

Dengan segala hormatnya saya merujuk kepada perkara yang tersebut di atas.

2. Sukacita saya memaklumkan bahawa Enakmen Kanun Jenayah Syariah (II) 1993 (selepas ini disebut sebagai "Kanun Jenayah Syariah II") telah pun diluluskan oleh Dewan Negeri Kelantan pada 25hb November 1993 dengan sebulat suara termasuk oleh dua orang Ahli Yang Berhormat daripada UMNO. Dengan keputusan itu Kerajaan Negeri Kelantan berazam hendak menguatkuasakan Kanun Jenayah Syariah II yang mengandungi hukum Hudud, Qisos dan Ta'zir.

3. Ini juga adalah sejajar dengan pegangan dan dasar Kerajaan Negeri Kelantan yang menjadikan Islam sebagai Ad-Din serta juga adalah untuk memenuhi tuntutan yang wajib ke atas pemerintah untuk melaksanakan undang-undang Islam seperti yang termaktub di dalam Al-Quran dan Al-Sunnah. Tambahan pula undang-undang Islam adalah seadil-adil hukum dan mengatasi segala undang-undang.

4. Kanun Jenayah Syariah II telah disiapkan oleh sebuah Jawatankuasa Khas Kajian Undang-Undang Syariah dan Sivil Negeri Kelantan. Ianya digubal mengikut kehendak agama Islam dan telah diperakukan oleh Sahibul Samahah Dato' Mufti Kerajaan Kelantan bahawa kandungannya bertepatan dengan kehendak Al-Quran dan Al-Sunnah. Satu salinan Rang Undang-undang ini disertakan bersama-sama ini sebagai LAMPIRAN A dan LAMPIRAN A1.

5. Kerajaan Negeri Kelantan sedar bahawa untuk membolehkan Kanun Jenayah Syariah II dikuatkuasakan, sokongan penuh dan kerjasama dari Yang Amat Berhormat adalah sangat diperlukan. Oleh itu, Kerajaan Negeri Kelantan sangat berharap Yang Amat Berhormat dapat mengambil langkah-langkah yang sewajarnya bagi membolehkan Kerajaan Negeri Kelantan menguatkuasakan Kanun Jenayah Syariah II dengan jayanya.

6. Kerajaan Negeri Kelantan yakin sokongan yang diperlukan itu dapat diberikan oleh Yang Amat Berhormat dan Parti pimpinan Yang Amat Berhormat, berdasarkan pengakuan Yang Amat Berhormat di Kota Kinabalu pada 30hb April 1992 dan di Johor Bahru pada 16hb April 1992. Saya bersyukur kepada Allah di atas pendirian yang telah Yang Amat Berhormat tunjukkan itu. Seperti yang telah dinyatakan di perenggan 4 surat ini hukum Hudud, Qisos dan Ta'zir yang hendak dilaksanakan oleh Kerajaan Negeri Kelantan adalah benar-benar mengikut kehendak agama Islam seperti yang termaktub dalam Al-Quran dan Al-Sunnah serta selaras dengan kedudukan Islam sebagai agama Persekutuan. Dengan hal yang demikian Kerajaan Negeri Kelantan sekali lagi menaruh harapan yang besar untuk mendapat persetujuan dan sokongan dari Yang Amat Berhormat dan Kerajaan Persekutuan.

7. Adalah diakui bahawa Yang Amat Berhormat telah membawa perubahan-perubahan yang besar dan penting dalam pemerintahan Yang Amat Berhormat. Saya penuh yakin bahawa kelulusan serta persetujuan Yang Amat Berhormat berikan untuk menguatkuasakan Kanun Jenayah Syariah II akan mencatatkan sejarah perundangan di Negara ini.

8. Sukacita kiranya dapat Yang Amat Berhormat memaklumkan keputusan Kerajaan Persekutuan terhadap permohonan ini.

9. Sekian, untuk pertimbangan Yang Amat Berhormat jua.

10. Segala doa restu untuk kesejahteraan dan ketinggian iman Yang Amat Berhormat Datuk Seri adalah sentiasa di hati saya.

Terima Kasih.

“MEMBANGUN BERSAMA ISLAM”

Yang ikhlas,

(HAJI NIK ABDUL AZIZ BIN NIK MAT)  
MENTERI BESAR,  
KELANTAN.

## Surat Keempat

(S) 16/6/(26)

28 Zulhijjah 1414

8 Jun 1994

Bismillahi rRahmani rRahim

Segala puji dan ketinggian adalah kepunyaan Allah Subhanahu Wataala dan salam sejahtera keatas junjungan Nabi Muhammad Sallallahu Alaihi Wasallam.

Yang Amat Berhormat,  
Datuk Seri Dr. Mahathir bin Mohamed,  
Perdana Menteri Malaysia,  
Jabatan Perdana Menteri,  
Jalan Dato' Onn,  
50502 KUALA LUMPUR.

YAB Datuk Seri,

### **PENGUATKUASAAN KANUN JENAYAH SYARIAH (II) 1993 DI NEGERI KELANTAN**

Dengan segala hormatnya saya merujuk kepada perkara yang tersebut di atas dan surat saya bertarikh 21hb. Mac, 1994, bil. (25) dalam siri yang sama.

Sukacita saya untuk mendapat maklum balas daripada pihak YAB Datuk Seri mengenai permohonan untuk mendapat kelulusan serta persetujuan Kerajaan Persekutuan bagi menguatkuasakan Kanun Jenayah Syariah (II) 1993 di Negeri Kelantan kerana sehingga kini, pendirian Kerajaan Persekutuan mengenai penguatkuasaan Kanun Jenayah ini di Negeri Kelantan hanya melalui akhbar-akhbar tempatan, yang tidak jelas kedudukan yang sebenarnya.

Oleh itu, saya tidak akan berputus asa serta sentiasa berharap semoga pihak YAB Datuk Seri dapat memberi sokongan penuh dan kerjasama bagi menguatkuasakan Kanun Jenayah Syariah (II) 1993 di Negeri Kelantan.

Sekian dan saya berharap mendapat jawapan rasmi daripada YAB Datuk Seri jua.

Terima kasih. Wassalam.

**\*\*MEMBANGUN BERSAMA ISLAM\*\***

Yang ikhlas,

(HAJI NIK ABDUL AZIZ BIN NIK MAT)  
Menteri Besar  
Kelantan.



**Surat daripada  
Perdana Menteri Malaysia**

**Kepada  
Menteri Besar Kelantan**

YAB Tuan Haji Nik Abdul Aziz bin Nik Mat  
Menteri Besar Kelantan  
KELANTAN

Y.A.B. Tuan Haji,

## **PENGUATKUASAAN KANUN JENAYAH SYARIAH II 1993 DI NEGERI KELANTAN**

Rujukan: MB (KN) (S) 16/6/(26)  
bertarikh 8 Jun 1994

Pihak Kerajaan Pusat sentiasa berpandu kepada kebijaksanaan (al-Hikmah) yang telah ditunjukkan oleh baginda Rasulullah SAW. Dan juga para sahabat baginda khususnya Al-khulafa Ar-Rasyidun dalam melaksanakan ajaran Islam lebih-lebih lagi yang berkaitan dengan hukum-hukum jenayah. Jalan yang diambil oleh pihak Kerajaan Pusat ini adalah juga pemerintahan Islam iaitu "tindakan pemerintah adalah sentiasa bergantung kepada kepentingan ramai (muslihat umum)" Penguatkuasaan kanun jenayah yang digubal oleh Kerajaan PAS di Kelantan, menurut kajian sehingga setakat ini tidak menampakkan dan tidak meyakinkan pakar-pakar perundangan Islam yang tidak mempunyai sebarang kepentingan politik bahawa ia selari dengan ajaran dan kehendak Islam sebagaimana yang telah diuruskan dengan bijaksana oleh Rasulullah SAW. dan para sahabat.

2. Sepertimana Yang Amat Berhormat sendiri sedia ketahui, KEADILAN adalah ASAS yang paling utama ditekankan oleh agama Islam apabila melaksanakan sesuatu perkara. Penekanan mengenai dengan keadilan adalah sangat terserlah dalam ajaran Islam lebih daripada penekanan yang terdapat dalam ajaran-ajaran yang lain dalam sejarah agama. Salah satu daripada penekanan yang telah dibuat oleh Baginda Rasulullah SAW. sewaktu mengembangkan agama Islam ialah usaha menghapuskan ketidakadilan yang menjadi sebahagian daripada budaya di zaman itu.

3. Tidak perlu lagi saya menyatakan di sini betapa banyaknya terdapat ayat-ayat Al-Quran yang menegaskan tentang pentingnya keadilan dan lebih banyak lagi ayat-ayat yang mencela sebarang jenis kezaliman. Di

samping itu Al-Quran juga sentiasa menggesa supaya dielak daripada terjadinya huru-hara dan Allah sendiri sangat tidak gemarkan kepada mereka yang menyebabkan huru-hara berlaku. Agama Islam tidak menyuruh orang Islam bermusuh dengan bukan Islam semata-mata kerana mereka bukan Islam. Kita hanya bertindak balas terhadap sikap permusuhan dan serangan yang dilakukan terhadap kita. Di Malaysia, orang bukan Islam bukan sahaja tidak memusuhi kita tetapi mereka memberi kerjasama bahkan membantu kita dalam urusan-urusan yang bersangkutan dengan kegiatan dan amalan ajaran Islam.

4. Khusus mengenai undang-undang jenayah PAS di Kelantan, kajian awal menunjukkan dengan jelas bahawa undang-undang itu yang disediakan menerusi perjuangan sebuah parti politik ternyata bukan sahaja menyebabkan ketidakadilan akan berlaku tetapi, sebaliknya ia akan membawa kezaliman. Kebenaran kenyataan ini adalah berdasarkan kepada keterangan berikut;

- (i) Dakwaan bahawa undang-undang ini akan dikuatkuasakan hanya di kalangan orang Islam sahaja dan tidak digunapakai untuk orang bukan Islam akan menyebabkan ketidakadilan dan kezaliman yang ketara berlaku. Memang benar di zaman Nabi Muhammad SAW, orang Yahudi biasa dihukum di bawah undang-undang yang berada di dalam kitab Taurat mereka tetapi kitab Taurat mempunyai hukuman yang tidak berbeza dengan hukuman-hukuman dalam Al-Quran. Mereka yang berzina umpamanya, akan dihukum rejam sama seperti hukuman terhadap jenayah yang sama bagi orang Islam. Justeru itu tidak ada perbezaan sama ada penjenayah dihukum di bawah undang-undang Islam atau undang-undang Yahudi di zaman Nabi Muhammad SAW. Tetapi terdapat perbezaan yang amat ketara di antara hukuman di bawah undang-undang yang ada sekarang dengan hukuman di bawah undang-undang jenayah yang dicadangkan oleh Kerajaan PAS di Kelantan. Menghukum orang Islam yang lebih berat tetapi orang bukan Islam dengan amat ringan untuk jenayah yang sama atau jenayah dilakukan bersama amatlah tidak adil dan merupakan satu kezaliman, sedangkan undang-undang PAS akan menyebabkan ketidakadilan dan kezaliman berlaku, maka undang-undang PAS tidak boleh diterima sebagai undang-undang Islam atau secucuk dengan

undang-undang Islam ataupun selaras dengan ajaran Islam. Ia sebenarnya bertentangan dengan agama Islam.

- (ii) Masalah, kesalahan merogol wanita, berdasarkan kepada undang-undang PAS, jika seseorang wanita yang belum berkahwin melahirkan anak maka ini adalah bukti ia telah berzina dan akan dihukum mengikut undang-undang PAS, sedangkan apa yang sebenarnya berlaku ialah wanita itu adalah mangsa rogol. Mengikut undang-undang PAS jika ia menuduh perogolnya, tuduhan hanya boleh diterima sah jika terdapat empat orang saksi (yang terdiri daripada orang-orang yang baik, yang tidak melakukan dosa besar) yang menyatakan bahawa telah melihat dengan terang dan jelas bahawa yang dituduh telah merogol wanita berkenaan.

Sepertimana kita tahu, melainkan dalam keadaan perang seperti di Bosnia di waktu mana orang Serb merogol beramai-ramai wanita Bosnia, tidak mungkin jenayah merogol dilakukan di hadapan saksi-saksi yang terdiri daripada orang-orang yang baik. Jika saksi ini melihat dan mereka tidak menolong wanita berkenaan, mereka boleh dianggap sebagai bersubahat sepertimana penjenayah-penjenayah Serb bersubahat dengan perogol daripada kaum mereka. Jika ada pun saksi, dan mereka tidak membuat apa-apa untuk menolong mereka tidak boleh dianggap sebagai terdiri daripada orang yang baik, tetapi di sebaliknya akan dianggap sudah bersubahat. Kenyataan mereka tidak lagi boleh diterima. Dengan itu tuduhan mangsa rogol akan ditolak dan perogol akan bebas.

Keadaan di mana mangsa rogol dihukum salah kerana melahirkan anak di luar nikah dan perogol dilepaskan sebagai tidak bersalah kerana tidak ada saksi adalah sama sekali tidak boleh diterima oleh sesiapa pun sebagai sesuatu yang adil, bahkan ia adalah satu kezaliman yang dahsyat.

5. Hukum Hudud Islam bertujuan untuk memberi keadilan kepada semua pihak. Ia bukanlah bertujuan untuk melakukan kezaliman. Undang-undang PAS jelas menunjukkan ketidakadilan dan kezaliman yang ketara akan berlaku. Justeru itu undang-undang yang disediakan oleh PAS bukanlah undang-undang yang menepati ajaran Islam. Ia hanyalah undang-undang ciptaan PAS yang bertentangan dengan penekanan oleh agama Islam yang menuntut supaya menghukum secara adil dan

menolak sebarang kezaliman. Kerajaan Pusat akan sentiasa berpandu dan menerima ajaran-ajaran dan amalan-amalan Islam dari semua aspek tanpa diheret oleh kehendak organisasi politik yang mempunyai kepentingan yang lain daripada Islam dan kepentingannya.

6. Jika undang-undang PAS yang jelas mengandungi unsur-unsur ketidakadilan dikuatkuasakan di Negara ini, dan jika ia dikatakan itulah Hukum Hudud Islam maka umat Islam dan juga anggota masyarakat bukan Islam akan hilang kepercayaan bahawa Islam membawa keadilan untuk penganutnya. Ia juga memberi gambaran yang buruk terhadap agama yang suci ini dan menjejaskan imej orang-orang Islam di kalangan penganut agama-agama yang lain. Ia tetap akan menyebabkan penganut agama lain menjauhkan diri daripada agama Islam dan menyebabkan orang yang berminat memeluk Islam menolaknya.

7. Kerajaan Pusat tidak berhajat untuk bersubahat dengan PAS bagi melaksanakan ketidakadilan semata-mata untuk kepentingan politik dan sokongan oleh orang yang telah diabui matanya. Kerajaan Malaysia yang sentiasa dan terus mempertahankan ajaran dan nilai-nilai Islam tidak dapat membenarkan Kerajaan PAS menjalankan sesuatu yang bercanggah dengan prinsip keadilan yang ditekankan oleh Islam sendiri. Jika PAS cuba juga untuk menguatkuasakan undang-undang yang diciptanya yang sudah jelas bercanggah dengan prinsip keadilan Islam, **maka Kerajaan Pusat akan mengambil tindakan** yang sewajarnya terhadap Kerajaan PAS demi menjaga maruah dan ketinggian martabat Islam dan penganut-penganutnya.

DR MAHATHIR BIN MOHAMAD

15 Julai 1994



**Surat jawapan  
Menteri Besar Kelantan**

**Kepada  
Perdana Menteri Malaysia**

Yang Amat Berhormat,  
Dato' Seri Dr Mahathir bin Mohamad,  
Perdana Menteri Malaysia,  
Jabatan Perdana Menteri,  
Jalan Dato' Onn,  
50502 KUALA LUMPUR.

Dato' Seri,

### **PENGUATKUASAAN KANUN JENAYAH SYARIAH II 1993 DI NEGERI KELANTAN DARULNAIM**

Adalah saya dengan hormatnya merujuk kepada surat Dato' Seri bertarikh 15 hb. Julai 1994, berhubung dengan perkara di atas, sukacita menjelaskan kedudukan sebenar perkara yang dibangkitkan oleh Dato' Seri.

Pihak Kerajaan Negeri memang sentiasa mengamalkan sistem Pemerintahan secara Islam mengikut prinsip Tindakan pemerintah adalah sentiasa bergantung kepada kepentingan ramai (muslihat umum) selagi ianya tidak bertentangan dengan hukum Allah yang ditetapkan di dalam Al-Quran, Al-Sunnah, Ijma' dan Qias. Saya berpendapat bahawa Hukum Hudud merupakan satu undang-undang yang boleh memberi keadilan yang hakiki. Dengan terlaksananya hukuman hudud akan terhasillah kepentingan umum kerana Islam memandang muslihat ramai itu lebih utama dari muslihat perseorangan. Dengan itu terhindarlah kerosakan dan terciptalah kemuliaan. Menjaga kemuslihatan ialah menjaga AGAMA; KETURUNAN; HARTA dan NYAWA.

Keadilan yang menjadi asas kepada Kanun Jenayah Syariah II 1993 Negeri Kelantan adalah berasaskan kepada keadilan Ilahi sebagaimana yang disebut dalam Al-Quran:

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَايَ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ  
الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ ﴿٩٠﴾

(النحل: 90)

Bermaksud: "Sesungguhnya Allah menyuruh berlaku adil dan berbuat kebaikan serta memberikan bantuan kepada kaum kerabat dan melarang daripada melakukan perbuatan-perbuatan yang keji serta kezaliman. Dia mengajar kamu dengan suruhan dan larangan itu supaya kamu mengambil peringatan mematuminya." - Al Nahl-90

وَتَمَّتْ كَلِمَتُ رَبِّكَ صِدْقًا وَعَدْلًا لَا مُبَدِّلَ لِكَلِمَاتِهِ ۗ وَهُوَ السَّمِيعُ الْعَلِيمُ ﴿١١٥﴾

(الأنعام: 115)

Maksudnya: Dan telah sempurnalah kalimah Tuhanmu iaitu Al-Quran meliputi hukum-hukum dengan benar dan adil tiada siapa yang dapat mengubah sesuatu pun dari kalimah-kalimahnya dan Dialah yang sentiasa mendengar lagi sentiasa mengetahui. - Al-An'aam: 115

Allah ini merupakan seadil-adil hukuman kerana Dialah yang mencipta manusia dan makhluk seluruhnya, maka Dialah yang lebih mengetahui di atas segala-galanya dan sebarang hukuman yang tidak mengikut Al-Quran dan Al-Sunnah adalah merupakan satu ketidakadilan. Oleh itu tiada siapapun orang Islam yang benar-benar beriman yang tidak yakin dengan ayat-ayat Al-Quran dan Al-Hadis.

2. Menyedari akan pentingnya keadilan dalam masyarakat dan Negara demi menjaga keamanan dalam Negara ini, maka diwujudkan Kanun Jenayah Syariah II 1993 Negeri Kelantan demi menjaga kesejahteraan dan kebahagiaan di dunia dan akhirat kepada semua umat manusia sama ada Islam atau yang bukan Islam.

3. Semua peruntukan di dalam Kanun Jenayah Syariah II 1993 Negeri Kelantan adalah bersumberkan kepada nas-nas dari Al-Quran dan Al-Sunnah serta pendapat ulama-ulama yang muktabar sebagaimana Lampiran "A" berkembar.

4. Berhubung dengan wanita yang hamil/melahirkan anak tanpa suami menurut pendapat mazhab Hanafi seseorang wanita yang telah nyata kehamilannya, atau telah melahirkan anak tanpa suami, hendaklah disoal siasat sebab-sebab kehamilannya atau melahirkan anaknya itu.

Apabila wanita itu menyatakan bahawa dia telah dipaksa melakukan persetubuhan, atau dia disetubuhi secara syubhat *واطىء شبهة* maka



kenyataan wanita itu boleh diterima sebagai keterangan bahawa wanita itu adalah "dirogol", dan wanita tadi tidak boleh dikenakan hukuman hudud.

Ini adalah kerana kenyataan wanita itu adalah sebagai "ikrarnya" (pengakuannya), bahawa kehamilannya atau anak yang dilahirkannya adalah hasil dari persetubuhannya secara paksa bukan dengan kemahuannya sendiri. Kemudian hakim boleh meminda kes ini dari "kes zina" kepada "kes rogol".

Ini adalah berhujah dan merujuk kepada peristiwa kepada seorang perempuan bernama 'Syarahah' bahawa Saidina Ali Karamalallahu Wajhah berkata kepadanya: 'Boleh jadi, lelaki itu memaksa engkau melakukan persetubuhan?' Syarahah menjawab: 'Tidak.' Saidina Ali berkata lagi: 'Boleh jadi lelaki itu menyetubuhi engkau ketika engkau tidur?' Syarahah menjawab: 'Begitulah halnya'

Tindakan Saidina Ali menyoal siasat wanita itu ialah kerana syarak (syariat Islam) seboleh-bolehnya adalah lebih berminat mengelakkan seseorang itu dari dikenakan hukuman hudud.

Dan diriwayatkan pula, bahawa Saidina Umar bin Al-Khattab r.a telah ditanya mengenai seorang wanita yang telah mendakwa bahawa ketika dia tidur dengan lenanya, seorang lelaki menyetubuhinya secara paksa, kemudian lelaki tadi lari menghilangkan diri dan wanita itu tidak kenal siapa lelaki yang menyetubuhinya secara paksa itu.

Maka dalam kes ini, wanita itu tidak boleh dikenakan hukuman hudud ke atasnya. Dan hendaklah diterima kegagalan wanita tadi mengenalpasti lelaki yang menyetubuhinya secara paksa (lelaki yang merogolnya). Dan kes ini adalah merupakan sebagai kes syubhat yang menimbulkan keraguan penghakiman.

Dalam kes wanita yang disetubuhi secara paksa (dirogol) tidak timbul perselisihan pendapat para ulama Islam, bahawa wanita yang dirogol itu tidak boleh dikenakan hukuman had ke atasnya.

Dalam kes rogol ini, Imam Syafei berpendapat: Wanita yang dirogol tidak wajib dikenakan hukuman had ke atasnya, sekalipun tidak ada dalam dakwaan rogol itu bukti yang menunjukkan kesahihannya, dan tidak ada dalam dakwaan keterangan bahawa wanita itu mempunyai suami.

Ini ialah kerana hukuman had itu tidak boleh disabitkan, kecuali dengan saksi, atau ikrar (pengakuan), dan kerana hukuman hudud itu

gugur (boleh diketepikan) dengan sebab berlaku syubhat (keraguan pihak Hakim). Dan dalam kes rogol ini terdapat perkara syubhat, iaitu perkara yang boleh menimbulkan keraguan penghakiman.

Oleh itu mengikut pendapat mazhab Syafei: Dalam kes zina, pihak Hakim tidak boleh mensabitkan kesalahan wanita itu berzina dan menjatuhkan hukuman had ke atasnya dengan hanya semata-mata kehamilannya sahaja, kecuali pihak Hakim menerima pengakuan atau keterangan di Majlis Qadha (majlis penghakiman), bahawa kehamilannya atau anak yang dilahirkan adalah hasil dari penzinaannya.

Dan mazhab Imam Malik berpendapat:

Jika wanita itu bermukim – bukan wanita yang baru datang dengan mengejut, wajib dijatuhkan hukuman had ke atas wanita itu, kecuali didapati tanda-tanda bahawa dia dirogol atau dengan mengemukakan bukti paksaan terhadap dirinya, atau wanita itu mengemukakan keterangan bahawa dia mempunyai suami, atau didapati sesuatu bukti yang boleh menyokong kesahihan keterangannya itu, seperti dia datang meminta pertolongan membuat report dan sebagainya atau didengar dia menjerit meminta tolong dan seumpamanya atau dianya dikenal sebagai seorang yang solehah (yang baik).

Mengenai wanita yang baru datang dengan mengejut boleh diterima perkataannya, kerana didapati syubhat (keraguan) dan kehamilan wanita itu tidak boleh dijadikan bukti untuk mensabitkan hukum hudud had ke atasnya.

Dalam Islam perempuan yang dirogol atau dipaksa atau lain-lain bentuk seumpamanya tidak boleh dikenakan hukuman hudud ke atasnya bahkan ianya tidak bersalah dilepaskan sebagaimana hadis yang diriwayatkan oleh النسائي sabda Rasulullah SAW.

عفى لأمتي عن الخطأ والنسيان وما استكرهوا عليه.

Yang bermaksud: *Dimaafkan bagi umatku kerana tersalah, terlupa dan apa yang dipaksa ke atasnya.*

Dalam kes ini pihak lelaki yang merogol hendaklah didakwa di bawah kes zina dan jika tidak sabit kesalahan zina bolehlah dijatuhkan hukuman takzir (dalam konteks sekarang hukuman 'Penal Code').

Kes ini berlaku kepada seorang perempuan yang dipaksa melakukan penzinaan (rogol). Alqamaah berkata: Rasulullah SAW bersabda kepada perempuan yang dirogol tadi:

إذ هي فقد غفر الله لك، وقال للرجل الذي وقع عليه ارجموه.

Maksudnya: 'Pergilah engkau (perempuan yang dirogol); sesungguhnya Allah telah mengampunkan dosa engkau.' Dan Rasulullah SAW bersabda pula kepada lelaki yang merogol perempuan tadi dan mengarahkan sahabatnya: 'Rejamlah lelaki itu.'

Dan para sahabat menjadikan hamil tanda berlaku penzinaan, dan Al-Malikiah berpegang dengan pendapat: Dikenakan hukuman had ke atas wanita yang hamil dengan sebab berzina, dan suami wanita itu jauh daripadanya, apabila tidak menimbulkan perkara yang syubhat, dan tidak sabit zina dengan sebab hamil wanita yang tidak mempunyai suami.

Mazhab Hanafi dan Mazhab Syafei tidak berpegang dengan pendapat yang mengatakan sabit zina itu dengan qarinah.

Qarinah yang muktabar (yang boleh diambil kira) dalam kes zina ialah nyata hamil seseorang wanita yang tidak mempunyai suami. Menurut pendapat Abu Hanifah, Syafei dan Ahmad bin Hambal: zina itu tidak boleh disabitkan dengan sebab nyata hamil seseorang wanita itu.

Mereka berhujah: Kehamilan wanita itu boleh jadi berlaku dengan sebab wati syubhat, atau kerana dirogol. Ini bermakna, kehamilan wanita itu menimbulkan keraguan. Oleh itu tidak boleh dikenakan hukuman had ke atas wanita itu, kerana hukuman had itu boleh ditolak (diketepikan) dengan sebab datang keraguan.

Dan mazhab Imam Malik berpendapat: Zina itu sabit dengan sebab nyata hamil seseorang wanita itu dengan syarat:-

1. Wanita yang telah nyata hamilnya itu tidak mempunyai suami;
2. Wanita itu berkahwin dengan suami yang tidak boleh melahirkan anak;
3. Wanita itu tidak dirogol.

Mazhab Maliki berkata: Wanita yang telah nyata hamilnya dan tidak diketahui wanita itu mempunyai suami, atau diketahui wanita itu mempunyai

suami tetapi suaminya tidak berupaya untuk menghamilkan isteri, seperti suami yang masih kecil, atau suami yang terpotong kemaluannya, atau wanita itu melahirkan anak yang sudah sempurna sifatnya, tetapi perkahwinannya dengan suaminya belum sampai enam bulan dari tarikh akad nikahnya, maka wanita itu wajib dikenakan hukuman had, kerana sabit wanita itu berzina, kecuali dia mendakwa, bahawa dia dirogol, atau wati syubhat. Jika wanita tadi mendakwa sebagaimana tersebut, dan wanita itu terkenal seorang wanita yang sentiasa menjauhkan diri dari perbuatan yang haram, dan berakhlak mulia, maka tidak boleh dikenakan hukum hadd.

Para Ahli Perundangan Islam berselisih pendapat mengenai wanita yang telah nyata hamilnya, dan wanita itu tidak mempunyai suami.

Menurut pendapat sebilangan besar Ahli Perundangan Islam:

Kehamilan seseorang wanita tanpa suami yang tidak ada bukti yang lain selain dari kehamilan wanita itu sahaja, tidak boleh dikenakan hukuman had ke atasnya.

Ini ialah kerana ada kemungkinan kehamilan tadi dengan sebab dirogol, atau disetubuhi ketika wanita itu sedang tidur sangat lena dan dia tidak berupaya mempertahankan dirinya dari diperkosa oleh lelaki yang menyetubuhinya.

Sebahagian besar Ahli Perundangan Islam termasuk mazhab Maliki berpandu kepada hadis Rasulullah SAW.

### ادرؤا الحدود بالشبهات

Maksudnya: *Elakkan hukumn hudud, jika didapati perkara yang syubhat (keraguan dalam penghakiman).*

Dengan yang demikian dalam tafsiran pelaksanaan Seksyen 46 Kanun Jenayah Syariah II 1993 Kerajaan Negeri Kelantan adalah berpandu kepada prinsip-prinsip yang dinyatakan di atas sebagaimana kehendak Seksyen 62 Kanun berkenaan.

5. Kanun Jenayah Syariah II 1993 Negeri Kelantan ini ada diberi pilihan kepada orang-orang bukan Islam sama ada untuk menerima hukuman di bawah kanun ini atau pun undang-undang sivil. Kaedah ini adalah selari dengan pendapat-pendapat ulama-ulama muktabar.

Imam Syafei berkata: Sesuatu kes atau kesalahan yang dilakukan oleh orang-orang yang bukan Islam (Ahli Al-Zimmah) di dalam Negara Islam, pihak Hakim yang menjadi wakil kerajaan boleh membuat pilihan sama ada hendak menghakimi kes ini (dibicara di Mahkamah Syariah), atau menolaknya (tidak dibicarakan di Mahkamah Syariah) – Al Umm, Juzuk 8, muka surat 368, Cetakan Darul Fikri, Beirut.

Ini adalah berhujah dan beralilkan firman Allah Taala:

فَإِنْ جَاءُوكَ فَأَحْكُم بَيْنَهُمْ أَوْ أَعْرَضْ عَنْهُمْ وَإِنْ تُعْرِضْ عَنْهُمْ فَكَنْ  
يَضُرُّوكَ شَيْئًا وَإِنْ حَكَمْتَ فَأَحْكُم بَيْنَهُمْ بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ  
الْمُقْسِطِينَ ﴿٤٢﴾ (المائدة: 42)

Maksudnya: *Maka jika mereka datang kepadamu (wahai Muhammad) maka hukumlah di antara mereka (dengan apa yang diterangkan oleh Allah), atau berpalinglah dari mereka. Dan kalau engkau berpaling dari mereka, maka mereka tidak dapat membahayakanmu sedikit pun, dan jika engkau menghukum, maka hukumlah di antara mereka dengan adil, kerana sesungguhnya Allah mengasihi orang-orang yang berlaku adil.*

Firman Allah ini adalah termasuk dalam آيات الأحكام yang berkaitan dengan penghakiman (mahkamah). Menurut Al Hassan, As Sya'bi, An Nakhaei dan Az Zuhri, sesuatu kes atau kesalahan (jarimah) yang mana hukumannya boleh dijatuhkan hukuman "hudud", apabila kes itu dibawa ke Mahkamah Syariah, pihak hakim syarie selaku wakil Sultan atau Kerajaan boleh membuat pilihan mengikut budi bicara mereka.

Jika hakim itu berkehendak untuk mengambil kes itu (membicarakannya) dalam Mahkamah Syariah, mereka boleh menghakimi kes ini. Dan jika mereka tidak berkehendak menghakiminya dalam Mahkamah Syariah, mereka boleh menolak dan mengenenepikan kes ini.

Ini tidak bermakna, orang-orang yang bukan Islam yang melakukan jenayah syariah di negeri ini bebas dari tindakan undang-undang jenayah, malah pihak hakim Syarie hendaklah mengarahkan kes ini mesti dibawa ke Mahkamah Awam atau Mahkamah Sivil dan diadili oleh hakim yang berkenaan.

Berdasarkan fakta-fakta tersebut: Sesuatu kes atau kesalahan (jarimah) yang dilakukan di negeri ini yang mana pelakunya orang-orang yang bukan Islam dan hukumannya pula boleh dijatuhkan hukuman hudud, tidak akan didakwa di Mahkamah yang ditubuhkan dalam bahagian VI di bawah Seksyen 63(1) Undang-undang Kanun Jenayah Syariah II 1993 Kerajaan Negeri Kelantan, dan tidak boleh dihakimi oleh hakim-hakim yang dilantik di bawah kuasa Undang-undang Kanun Jenayah Syariah II 1993 dalam Bahagian VI di bawah Seksyen 69 (1).

Pengecualian orang yang bukan Islam yang melakukan Jenayah Syariah di negeri ini dari didakwa di bawah Kanun Jenayah Syariah II 1993 Kerajaan Negeri Kelantan adalah berdasarkan hujah-hujah dan dalil-dalil berikut:

1. Firman Allah Taala dalam ayat *فَأَحْكُم بَيْنَهُم أَوْ أَعْرَضْ عَنْهُمْ*  
(Al-Maaidah: 42)

(Maksudnya: Maka hukumlah di antara mereka dengan apa yang telah diterangkan oleh Allah atau berpalinglah dari mereka.

Ditujukan khitabnya kepada 'Hukkam' (para hakim). Maksudnya: Kes-kes jenayah syariah yang dilakukan oleh orang-orang yang bukan Islam, pihak hakim boleh membicarakan kes itu dalam Mahkamah Syariah, atau menolaknya (mengenepikan) kes itu untuk dibicarakan dalam mahkamah awam.

2. Firman Allah Taala dalam ayat *وَأِنْ أَحْكَم بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ*  
(Al-Maaidah: 49)

Maksudnya: Hendaklah engkau menjalankan hukuman di antara mereka dengan apa yang diturunkan Allah.

Ia memberi pengertian yang jelas: Dalam penghakiman hendaklah mengikut hukum yang diturunkan Allah di dalam kitab-Nya (Al-Quran) dan dijadikan dasar dan panduan cara memutuskan sesuatu kes, sama ada kes jenayah, atau kes mal dan lain-lain kes. Dan Imam Ahmad berkata: Kedua-dua ayat tersebut tidak berlawanan dan tidak bertentangan.

3. Para ulamak tafsir berselisih pendapat mengenai hukuman hudud ke atas orang-orang yang bukan Islam. Perselisihan ini ialah kerana ulama tafsir berselisih pendapat mengenai tafsiran firman Allah Taala:

فَإِنْ جَاءُوكَ فَأَحْكُم بَيْنَهُمْ أَوْ أَعْرَضْ عَنْهُمْ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئًا وَإِنْ حَكَمْتَ فَأَحْكُم بَيْنَهُم بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ  
 الْمُقْسِطِينَ ﴿٤٢﴾ (المائدة: 42)

Maksudnya: *Sekiranya mereka datang kepada kamu, hukumkanlah antara mereka atau berpaling dari mereka; kerana jika engkau berpaling dari mereka, tidaklah mampu mereka sampaikan bahaya apapun kepadamu; dan kalau engkau menghukum, hukumlah antara mereka dengan adil. Sesungguhnya Allah cintakan orang-orang yang berlaku adil.*

Surah Al-Maidah: 42

Perselisihan ulama tafsir mengenai hukum dalam ayat tersebut terdapat dua pendapat:

#### **Pendapat Pertama:**

Hakim Syarie wajib menghukum orang-orang yang bukan Islam yang melakukan jenayah syariah dengan hukuman hudud, sebagaimana yang dikenakan kepada orang-orang Islam juga,

Ini bermakna: Orang-orang yang bukan Islam yang melakukan jenayah syariah, pihak Hakim Syarie hendaklah menghakimi kes ini (membicarakan kes tersebut) dalam Mahkamah Syariah, dan Hakim Syarie tidak boleh menolak atau mengenyepikan kes tersebut.

Ulama yang berpendapat seperti tersebut adalah berhujah dan berdalilkan sebagaimana berikut:

- a) Mereka yang berhujah dan berdalilkan firman Allah Taala

وَأَنْ أَحْكُم بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ (المائدة: 49)

Maksudnya: *Dan hendaklah engkau menjalankan hukum di antara mereka dengan apa yang diturunkan Allah.*

- b) Firman Allah Taala lagi

فَأَحْكُم بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ (المائدة: 42)

Maksudnya: "Maka hukumlah di antara mereka (dengan apa yang telah diturunkan oleh Allah), atau berpaling daripada mereka".

Telah dinasakhkan oleh firman Allah Taala dalam surah Al-Maaidah:

وَأَنِ احْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ (المائدة: 49)

Maksudnya: Dan hendaklah engkau menjalankan hukum di antara mereka dengan apa yang diturunkan Allah.

Pendapat ini ialah pendapat Mujahid dan Ikrimah.

Dan diriwayatkan daripada Ibnu Abbas, katanya: Ayat-ayat dalam surah Al-Maaidah tidak dinasakhkan kecuali dua ayat sahaja.

a) Firman Allah Taala:

لَا تُحِلُّوا شَعَائِرَ اللَّهِ (المائدة: 2)

Maksudnya: Janganlah kamu ingat halal membuat sesuka hati mengenai syi'ar-syi'ar Allah.

Ayat ini dinasakhkan oleh firman Allah Taala dalam surah At-Taubah ayat 5:

فَأَقِمْ وَجْهَكَ لِلدِّينِ حَنِيفًا ۚ فِطْرَةَ اللَّهِ الَّتِي فَطَرَ النَّاسَ لَا تَمِيلُونَ (التوبة: 5)

Maksudnya: Maka bunuhlah orang-orang musyrik itu di mana sahaja kamu menemui mereka.

b) Firman Allah Taala:

فَأَحْكُم بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ (المائدة: 42)

Ayat ini dinasakhkan oleh firman Allah Taala:

وَأَنِ احْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ (المائدة: 49)

**Pendapat kedua:**

Orang-orang bukan Islam yang melakukan jenayah, pihak hakim boleh membuat pilihan sama ada hendak membicarakan kes ini di Mahkamah Syariah atau menolaknya (tidak dibicarakan di Mahkamah Syariah).



Ulama' yang berpendapat seperti tersebut adalah berhujah dan berdalilkan sebagaimana berikut:

1. Firman Allah Taala dalam surah Al-Maaidah ayat 42:

وَأَن أَحْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ (المائدة: 49)

Adalah termasuk dalam ayat Al Ahkam yang mengandungi dua sighth amar (dua arahan) iaitu فاحكم dan أعرض

Ayat ini memberi pengertian yang jelas, bahawa dalam kes jenayah syariah yang dilakukan oleh orang-orang bukan Islam, pihak hakim boleh membuat pilihan dalam penghakiman, sama ada hendak menghukum pesalah-pesalah itu mengikut hukuman Allah (hukuman hudud), atau mengecualikan mereka dari hukuman hudud itu, kerana dalam ayat tersebut terdapat kalimah أو yang mengandungi makna 'atau'.

Maksudnya: Hakim boleh menjatuhkan hukuman hudud kepada orang-orang bukan Islam jika hakim itu mahu berbuat demikian, atau mengecualikan mereka dari hukuman hudud itu. Pendapat ini adalah pendapat yang diriwayatkan daripada Al-Hassan, As Sya'bi, An-Nakhaie dan Az-Zuhrie.

2. Firman Allah Taala :

وَأَن أَحْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ (المائدة: 49)

Tidak menasakhkan firman Allah Taala yang berikut:

فَأَحْكُم بَيْنَهُم أَوْ أَعْرِضْ عَنْهُمْ (المائدة: 42)

Ini bermakna: *Firman Allah Taala dalam surah Al Maaidah ayat 42, ini bukanlah ayat yang sudah mansukh hukumnya dan tidak boleh diistilahkan ayat itu نسخ الحكم وبقاء الرسم*

Dan kedua-dua ayat tersebut tidak 'Ta'arudh' (berlawanan) dan tidak 'Tanaqudh' (bertentangan).

3. Firman Allah Taala berikutnya:

(فاحكم بينهم أو أعرض عنهم) adalah menyuruh hakim membuat pilihan

dalam penghakiman ke atas penjenayah syariah yang bukan Islam di antara dua perkara, iaitu menghukum mereka dengan hukuman Allah (hudud), atau mengecualikan mereka dari hukuman tersebut.

4. Firman Allah Taala :

( وَأَنْ أَحْكَمَ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ ) adalah menyuruh hakim mengikut kaifiat dan peraturan yang termaktub di dalam Al-Quran dan Al-Sunnah.

5. Kebanyakan Ahli Ilmi (pakar) berpendapat: Hakim Syarie hendaklah memilih di antara dua perkara, iaitu menghukum orang-orang yang bukan Islam yang melakukan jenayah syariah, atau mengecualikan mereka adalah suatu hukum yang sabit (hukum yang tetap).

6. Abi Muhammad Al-Hussain bin Mas'oud Al-Farra' Al-Baghawie yang wafat pada tahun 516 Hijrah menyatakan dalam 'Tafsir Al-Baghawie': Tidak didapati di dalam surah Al-Maaidah satu ayat pun yang sudah mansukh hukumnya yang boleh diistilahkan نسخ الحكم وبقاء الرسم (menasakh hukum dan mengekalkan tulisan).

#### **Pendapat Ahli perundangan Islam:**

Para Ahli Perundangan Islam berselisih pendapat mengenai syarat hukuman hudud yang dijatuhkan kepada mereka yang melakukan perzinaan.

#### **Imam Hanafi dan Imam Malik berpendapat:**

Islam adalah menjadi syarat seseorang yang melakukan perzinaan boleh dijatuhkan hukum hudud. Mereka berhujah dan berdalilkan hadis Rasulullah SAW. yang diriwayatkan daripada Ibnu Umar r.a:

من أشرك بالله فليس بمحصن

(Diriwayatkan oleh Ishak bin Rahawaih).

Maksudnya: *Sesiapa yang syirik (menyekutukan) Allah, maka bukanlah orang yang muhsan (tidak boleh dijatuhkan hukuman hudud).*

Hukuman hudud adalah untuk membersihkan dosa mereka yang melakukan jenayah syariah di dunia ini, dan mereka di akhirat nanti tidak diazab lagi dengan api neraka.

Mengenai orang-orang yang syirik yang hendak melakukan jenayah syariah, mereka tidak akan bersih dosanya, sekalipun mereka dikenakan hukuman hudud di dunia ini, kecuali dibersihkan dengan bakaran api neraka di akhirat nanti.

### **Mazhab Syafei dan Mazhab Hambali berpendapat:**

Islam tidak menjadi syarat seseorang yang melakukan perzinaan untuk dijatuhkan hukuman hudud, kerana Rasulullah SAW. pada masa hayatnya telah merejam Yahudi yang telah melakukan perzinaan ketika Yahudi itu mengadakan kes ini kepada Baginda.

Orang-orang bukan Islam yang melakukan jenayah syariah di negeri ini, tidak akan didakwa di bawah peruntukan Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan berdasarkan kaedah perundangan (prinsip Fiqh Islam), iaitu المصالح المرسله (مصلحة عامة) di mana perlaksanaannya adalah tepulang kuasanya kepada Ketua Negeri yang berkenaan.

Tindakan yang dijalankan oleh Ketua Kerajaan terhadap rakyatnya adalah bergantung kepada muslihat.

Tindakan Kerajaan Negeri Kelantan sebagaimana yang disebutkan dalam perkara (3) adalah juga berdasarkan kaedah الإستحسان iaitu meyakini dan mempercayai sesuatu tindakan yang dilakukan itu adalah mengikut jalan yang baik dengan berdasarkan peraturan dan perundangan selaras dengan wahyu Ilahi. Firman Allah:

الَّذِينَ يَسْتَمِعُونَ الْقَوْلَ فَيَتَّبِعُونَ أَحْسَنَهُ أُولَئِكَ الَّذِينَ هَدَاهُمُ اللَّهُ وَأُولَئِكَ  
هُمْ أُولُوا الْأَلْبَابِ ﴿١٨﴾ (الزمر: 18)

Maksudnya: Mereka yang berusaha mendengar perkataan-perkataan yang sampai kepadanya lalu mereka memilih dan mengikut akan yang sebaik-baiknya (pada segi hukum agama), mereka itulah orang-orang yang diberi hidayat petunjuk oleh Allah dan mereka itulah orang-orang yang berakal sempurna.

Hukum hudud adalah untuk menghapuskan dosa orang-orang Islam yang melakukan jenayah syariah, dan mereka tidak diazab di akhirat kelak di atas kesalahan jenayah yang dilakukannya di dunia ini.

Ini telah dinyatakan oleh Rasulullah SAW. dalam hadis yang sahih yang diriwayatkan dari Ubadah bin Al-Samit katanya: Pada suatu ketika kami duduk bersama-sama Rasulullah SAW di dalam satu majlis, lalu baginda bersabda:

تبايعوني على ان لا تشركوا بالله شيئاً، ولا تزنوا ولا تسرقوا ولا تقتلوا النفس التي حرم الله إلا بالحق فمن وفى منكم فأجره على الله، ومن أصاب شيئاً من ذلك فعوقب به فهو كفارة له. (رواه البخارى ومسلم)

*'Hendaklah kamu berjanji dan mengaku kepada aku kamu tidak sekali-kali menyekutukan Allah (syirik) dan tidak akan melakukan perzinaan, dan tidak akan melakukan pencurian, dan juga tidak akan membunuh orang yang diharamkan Allah membunuhnya kecuali dengan jalan yang hak. Sesiapa di kalangan kamu yang menyempurnakan (melaksanakan janji itu dengan sempurnanya, maka dia akan menerima pahala dari Allah dan siapa yang melakukan sesuatu perkara dari apa yang dijanjikannya itu, lalu mereka diiqab (dijatuhkan hukuman hudud), maka hukuman yang diterimanya itu adalah menghapuskan dosa yang dilakukannya itu (mereka tidak diazab di akhirat nanti di atas kesalahan jenayah yang dilakukan di dunia ini).'*

Mengenai orang-orang bukan Islam (orang-orang yang syirik dan kufur) yang melakukan jenayah syariah, walaupun mereka itu telah dijatuhkan hukuman hudud di dunia ini, mereka tidak akan terlepas juga dari azab neraka di akhirat kelak dengan sebab kesyirikan dan kekufuran mereka.

Oleh itu, orang-orang bukan Islam yang melakukan jenayah syariah tidak akan didakwa Kanun Jenayah Syariah II 1993 Kerajaan Negeri Kelantan, kerana orang-orang bukan Islam yang melakukan jenayah syariah, itu tetap akan dihukum dan akan dimasukkan ke dalam neraka juga.

Dengan yang demikian, tindakan Kerajaan Negeri Kelantan mengecualikan orang-orang yang bukan Islam yang melakukan jenayah syariah dari didakwa di bawah Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan, tidak boleh ditafsirkan oleh suatu Kanun yang menzalimi orang-orang Islam di negeri Kelantan, kerana Kanun tersebut adalah memberi faedah dan manfaat kepada orang-orang Islam dan yang bukan Islam di negeri Kelantan dunia dan akhirat.

Orang-orang Islam yang telah dijatuhkan hukuman hudud di atas kesalahan melakukan jenayah syariah, dan hukuman hudud itu telahpun dilaksanakan ke atas mereka di negeri akhirat kelak mereka terlepas dari azab neraka.

Orang-orang yang bukan Islam yang tidak didakwa di bawah Kanun Jenayah Syariah (II) Kerajaan Negeri Kelantan di atas kesalahan melakukan jenayah syariah, mereka tidak dikenakan hukuman hudud di dunia ini, mereka akan menerima azab neraka di akhirat kelak.

Ini jelas dan nyata bahawa jika hudud tidak dilaksanakan merupakan satu kezaliman dan tidak adil kepada orang Islam kerana mereka tidak diberi peluang untuk membersihkan diri dari dosanya.

Sebenarnya Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan adalah suatu undang-undang yang adil, kerana undang-undang tersebut adalah berdasarkan undang-undang Ilahi (Al-Quran dan Al-Sunnah), tidak sebagaimana yang didakwa oleh mereka yang sengaja untuk menolak undang-undang Allah yang mentafsirkan Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan adalah undang-undang yang menzalimi orang Islam di negeri Kelantan dan bercanggah dengan ajaran Islam.

Mereka yang mendakwa Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan suatu undang-undang yang tidak adil, zalim dan bercanggah dengan ajaran Islam dengan beralasan firman Allah pada:

وَإِذَا حَكَّمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ (النساء: 58)

Maksudnya: 'Apabila kamu menjalankan hukum di antara manusia Allah menyuruh kamu menghukum dengan adil'

Jelas menunjukkan mereka tidak memahami maksud ayat tersebut, dan berpandu dengan ayat itu tidak mengikut kaedah ahli Usul, iaitu tidak memahami ayat tersebut mengikut pengucapan dan mafhumnya.

Maksud ayat 58 dalam surah An-Nisa' ini adalah ditujukan kepada 'Hukkam' (para hakim) - Maksud Firman Allah:

وَإِذَا حَكَّمْتُمْ بَيْنَ النَّاسِ adalah ditujukan kepada para hakim yang menjalankan penghakiman. Dan firman Allah:

أَنْ تَحْكُمُوا بِالْعَدْلِ perintah ini adalah ditujukan kepada 'para hakim' juga.

Maksudnya: para hakim hendaklah memutuskan sesuatu kes itu secara adil.

Menurut tafsir Al Khazin yang dimaksudkan dengan 'Bil adl' dalam ayat tersebut ialah:

### المساواة في الأشياء

iaitu menjalankan penghakiman mestilah menyamakan pada semua perkara.

Al Khazin menyebutkan juga, setiap hakim yang menjalankan penghakiman hendaklah menyamakan di antara dua orang yang berguam itu (pendakwa dan yang didakwa) dalam lima perkara:

1. Pintu masuk;
2. Tempat duduk;
3. Menghadap kepada kedua-duanya;
4. Mendengar keterangan dan hujah dari keduanya, dan
5. Menghukum dengan hukuman yang benar iaitu hukum Allah. (Mana yang lebih benar selain Hukum Allah?).

Di sinilah letaknya keadilan yang dimaksudkan dengan menjalankan penghakiman mestilah pada sama perkara.

Oleh itu dakwaan mereka yang mengatakan Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan tidak adil dan menzalimi orang-orang Islam di Kelantan dan bercanggah dengan ajaran Islam adalah suatu tafsiran yang tidak berasas dan dakwaan yang tidak mempunyai alasan yang kukuh dan mengelirukan.

Oleh yang demikian untuk memberi kefahaman kepada mereka yang mempertikaikan kesahihan Kanun dari segi hukum syarak adalah ditegaskan sebagaimana berikut:

1. Kanun Jenayah Syariah (II) 1993 Negeri Kelantan adalah berlandaskan Hukum Allah, iaitu Al-Quran dan Al-Sunnah. Oleh itu undang-undang tersebut tidak boleh ditafsirkan dan didakwa suatu undang-undang yang tidak adil dan menzalimi orang-orang Islam Kelantan dan bercanggah dengan ajaran Islam.

2. Kalaulah ada mereka yang mentafsirkan dan mendakwa bahawa Kanun Jenayah Syariah II 1993 Kerajaan Negeri Kelantan suatu undang-undang yang tidak adil, zalim dan bercanggah dengan ajaran Islam adalah bermakna Allah Taala juga tidak adil dan zalim, kerana undang-undang tersebut adalah berlandaskan Hukum Allah, iaitu Al-Quran dan Al-Sunnah yang tidak boleh dipertikaikan keadilannya.

3. Diwujudkan Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan adalah untuk melaksanakan undang-undang Allah-bukan untuk membuat undang-undang baru, kerana undang-undang Allah itu telah tersedia ada di dalam Al-Quran dan Al-Sunnah yang tidak boleh diubah suai, dan tidak boleh dipinda mengikut keadaan masa dan tempat. Dengan sebab itulah kezaliman tidak timbul dalam undang-undang Allah. Tidak seperti undang-undang yang dicipta oleh manusia yang boleh diubah dan dipinda mengikut keperluan dan kepentingan sesuatu pihak yang tertentu.

4. Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan adalah selaras dengan kehendak syarak, iaitu menjaga **agama, nyawa, akal, keturunan** dan **harta benda**. Ini telah ditegaskan oleh Imam Ghazali:

أن مقصود السرعة من الخلق خمسة: وهو أن يحفظ عليهم ونفسهم  
وعقلهم ونسلهم ومالهم.  
(منهاج الصالحين 607)

**Maksudnya:** *Sesungguhnya tujuan syarak (mensyariatkan Agama Islam) kepada umat manusia adalah mengandungi lima tujuan, iaitu menjaga ugama, nyawa, akal, keturunan dan harta benda.*

5. Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan tidak boleh ditafsirkan dan didakwa suatu undang-undang yang bercanggah dengan ajaran Islam kerana undang-undang tersebut adalah berdasarkan Al-Quran dan Al-Sunnah, di mana Al-Quran dan Al-Sunnah itu adalah juga menjadi dasar ajaran Islam.

6. Kalaulah undang-undang tersebut ditafsirkan dan didakwa oleh mereka suatu undang-undang yang bercanggah dengan ajaran Islam adalah bermakna ajaran Islam itu juga bercanggah dengan Al-Quran dan Al-Sunnah, kerana ajaran Islam itu berdasarkan Al-Quran dan Al-Sunnah juga.

7. Dengan sebab itulah tidak boleh ditafsirkan dan didakwa Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan bercanggah dengan ajaran Islam kerana undang-undang tersebut dan ajaran Agama Islam keduanya berdasarkan sumber yang sama, iaitu Al-Quran dan Al-Sunnah.

Oleh itu tidak timbul percanggahan di antara undang-undang tersebut dengan ajaran Islam.

8. Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan, mengecualikan orang-orang bukan Islam dari hukuman hudud. Dengan pengecualian ini ada orang yang mendakwa, hukuman hudud yang dikuatkuasakan dalam undang-undang tersebut yang hanya kepada orang-orang Islam sahaja bukan hukum hudud dalam Islam, malah hukum hudud PAS di Kelantan.

Dakwaan mereka itu jelas menunjukkan bahawa mereka memahami nas-nas syarak (Al-Quran dan Al-Sunnah) hanya mengikut pengucapan nas-nas itu sahaja tanpa memahami maksud nas-nas itu dan juga hanya mengikut pendapat sesuatu mazhab sahaja, tanpa merujuk pendapat mazhab-mazhab yang lain, dan tidak pula menggunakan kaedah-kaedah perundangan Islam (prinsip-prinsip Fiqh Islam).

Dengan sebab itulah mereka dengan senang sahaja membuat dakwaan dengan alasan-alasan yang tidak kukuh. Oleh itu untuk memberi kefahaman kepada mereka adalah dinyatakan sebagaimana berikut:

1. Mengecualikan hukuman hudud kepada orang-orang bukan Islam (Ahlu Zimmah) di Negara ini sebagai Negara Islam didapati nas-nas Syarak (Nusus Al Syariyyah), iaitu Hakim Syarie berhak menolak kes jenayah syariah yang dilakukan oleh Ahlu Zimmah (orang kafir zimmi) dalam Negara Islam dibicarakan dalam Mahkamah Syarak, dan Hakim Syarie adalah berhak mengarahkan kes ini dibicarakan dalam Mahkamah Sivil. Maksudnya: Orang-orang bukan Islam tidak terlepas juga dari hukuman di atas kesalahan jenayah yang dilakukan oleh mereka itu.

2. Mengecualikan hukuman hudud kepada Ahlu Zimmah dalam Negara Islam didapati nasnya di dalam Al-Quran dan dalam mazhab yang muktabar dan pendapat ulama-ulama dahulu dan kemudian.

3. Mengecualikan orang-orang bukan Islam (Ahlu Zimmah) dari hukuman hudud di negara ini adalah mengikut kaedah perundangan Islam (prinsip-prinsip Fiqh Islam) dan pendapat Imam Shafei.



4. Pengecualian orang-orang bukan Islam adalah suatu pilihan yang sesuai dengan muslihat umum dalam konteks Perlembagaan Malaysia dan Negeri Kelantan.

5. Pelaksanaan Kanun Jenayah Syariah (II) 1993 Kerajaan Negeri Kelantan mengenakan hukuman hudud kepada orang-orang Islam di Kelantan bukanlah menzalimi orang-orang Islam di Kelantan, bahkan memberi keadilan kepada mereka. Hukuman ini adalah hukuman Allah yang telah termaktub di dalam Al-Quran dan Al-Sunnah. Hukuman ini juga tidak bercanggah dengan ajaran Islam, kerana ajaran Islam itu juga berdasarkan Al-Quran dan Al-Sunnah.

6. Mengecualikan orang-orang yang bukan Islam dalam undang-undang tersebut dari hukuman hudud adalah berdasarkan kaedah perundangan Islam, iaitu المصالح المرسله atau الإستصلاح. Kaedah ini adalah untuk menjaga المصالح dan menolak مفسد "مفسد" "رعاية للمصالح ودرأ للمفسد"

Kaedah ini adalah berdasarkan kaedah perundangan Islam (prinsip Fiqhiah) - درء المفسد أولى من جلب المصالح

السيوطي: الأشباه والنظائر - menolak kerosakan / kebinasaan lebih utama dari menarik kemuslihatan.

Berdasarkan kaedah ini, suatu permasalahan yang akan menimbulkan kerosakan atau kebinasaan dalam pentadbiran atau perundangan hendaklah diutamakan menolak kerosakan secara bijaksana, kerana syariat Islam lebih memberi penekanan dalam perkara-perkara menolak kerosakan.

Oleh itu tindakan Kerajaan Negeri Kelantan dalam perundangan dan penghakiman mengecualikan orang-orang bukan Islam dari hukuman hudud adalah suatu tindakan yang wajar dan bijaksana. Di mana tindakan ini tidak terkeluar dari ajaran Islam dan tidak bercanggah dengan Al-Quran dan Al-Sunnah dan selaras dengan tujuan syarak serta tidak bercanggah dengan Perlembagaan Malaysia.

Dari tujuan inilah diwujudkan peraturan dan perundangan تشريع دان yang diistilahkan sebagai 'Kanun' atau 'Syariat' (Undang-undang تنظيم Syarak) yang tertakluk kuasanya di bawah penghakiman yang wajib

dilaksanakan oleh Kerajaan yang menerima amanah daripada Allah dan rakyat.

Sebuah negara atau negeri mestilah menghayati dan melaksanakan peraturan-peraturan dan perundangan (تنظيم دان تشريع) untuk menjaga rakyat sesebuah negara atau negeri itu agar menjadi sebuah negara atau negeri yang aman makmur dan mendapat keampunan Allah, sesuai dengan firman Allah Taala:

بَلَدَةٌ طَيِّبَةٌ وَرَبٌّ غَفُورٌ ﴿١٥﴾ (سبأ: 15)

Sebuah negara / negeri yang Toyyibah (negara yang baik) di bawah perlindungan Allah Yang Maha Pengampun.

7. Mengikut pandangan saya, pilihan yang diberi ini amat adil terhadap orang-orang Islam kerana walaupun dari segi pandangan zahir orang-orang Islam lebih berat menerima hukuman daripada orang-orang bukan Islam sebagaimana contoh perempuan Islam yang berzina seperti yang disebut dalam surat Dato' Seri di perenggan 4(i) tetapi kita hendaklah sedar bahawa matlamat hidup orang-orang Islam ini adalah untuk mendapat keredhaan dan syurga Allah di akhirat nanti. Oleh itu apabila dihukum mengikut Kanun Jenayah Syariah ini, maka kesalahan yang dilakukan itu akan mendapat keampunan Allah di akhirat nanti. Hukuman yang dikenakan itu merupakan satu hukuman yang paling adil untuk melepaskan mereka dari api neraka. Manakala bagi orang bukan Islam walaupun tidak menerima hukuman sebagaimana orang Islam, tetapi mereka tidak mendapat keampunan Allah dan kekal dalam api neraka selama-lamanya. Di atas prinsip inilah Kanun Jenayah Syariah ini memberi keadilan kepada semua masyarakat Islam dan Bukan Islam.

Sekian.

(Tuan Guru Haji Nik Abdul Aziz bin Nik Mat)  
MENTERI BESAR KELANTAN