Hudud in Malaysia:
The Issues at Stake

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"The crucial question, to my mind, is not whether a Muslim is committed to the fundamentals of Islam because this is a sentiment shared by the vast majority of Muslims but rather how to implement that commitment in concrete policy and legal terms today."

- Abdullahi Ahmed An-Na'im

ACKNOWLEDGMENTS

This book would not have been possible without the help and support of several individuals. Many thanks are due and I now gratefully offer them: to Askiah Adam, Dr Amina Wadud, Salbiah Ahmad, Zainah Anwar, Sharifah Zuriah Aljeffri, Rashidah Abdullah and Norani Othman for their advice and editorial contributions; to Ruhanas Harun and Jamilah Samian for translating the two speeches published in this book; to Professor Tan Sri Ahmad Ibrahim for allowing us to reproduce his paper on *Hudud* Law; to Suryani Alias for running errands when we embarked on a comparative study of several state Islamic laws; to Seng Guan for putting up with endless changes to the copy; to the New Straits Times, Berita Harian and The Star for allowing us to reprint relevant articles from the respective newspapers, and, to the Government of Canada for sponsoring this book project.

Finding a consistent and comprehensive system of transliterating Arabic words was a problem. We had to consider both the Arabic as well as the Bahasa Malaysia spelling of some words. However, to minimise confusion, we have standardised the spellings except for those which appear in the Kelantan Syariah Criminal Code (II) Bill 1993.

Rose Ismail
for *Sisters in Islam*

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INTRODUCTION

Although the Kelantan Syariah Criminal Bill (II) is now an Enactment, its enforcement remains only a possibility for as long as its implementation continues to be a bone of contention between the State and the Federal Government, thus offering some space for further debate on the viability of enacting the *hudud*. This book, therefore, remains current as the voice of an alternative opinion. However, its currency does not deny it the possibility of being relevant whatever the eventual turn of events maybe.

We, *Sisters in Islam*, the author, editor and compiler of this book, have felt the necessity to put forward an alternative standpoint regarding the above mentioned Enactment passed by the Kelantan State Government on November 25, 1993.

That urgency, shared equally strongly by all eight of us, was born of the understanding that should all the possibilities and the consequences not be weighed carefully, the implementation of *hudud* holds within it the potential for enormous injustices. Fear of this eventuality forced us to make plain, for public examination, our anxiety.

But the strength of our beliefs must lie within the many arguments - the pros and cons - informing the whole debate. The book sets out to demonstrate this by including the various positions, each held separately and independently. These are the positions held by our group (Part One), Parti Islam Se Malaysia (PAS), the originators of the Enactment (Part Two); the Prime Minister, which must reflect the position of the Federal Government as headed by him (Part Three); and, not least, Professor Ahmad Ibrahim, a respected and distinguished Islamic scholar now with the International Islamic University (Part Four). We have also included in the appendices the Kelantan Syariah Criminal Code (II) Bill 1993; the paper on *hudud* law delivered by Professor Ahmad Ibrahim at a Pusat Islam workshop in January, last year; and a selection of newspaper articles to reflect the range of views held by Malaysians. These are views already made public through the

media which we believe require a systematic compilation enabling easy access to all those who feel the need to be informed. That it would excite the interest of all Malaysians is our deepest hope.

In our Memorandum to the Prime Minister we have enumerated our position from the legal perspective, the historico-sociological view point and a compilation of the empirical evidence of injustices as found in other Muslim countries - forerunners in the implementation of the *hudud*. These views were aired at a Forum on Women and the Syariah Criminal Bill (II) 1993 at the Institute of Strategic and International Studies on November 10, 1993. We also organised a workshop to discuss aspects of the Bill which we found prejudicial towards women. This was held in Universiti Malaya on January 4, 1994.

Above all, we are indebted to the overarching canopy of Divine justice that emanates from the *Qur'an*. Allah's Divine Justice is always tempered with mercy and compassion. Indeed, every *surah* of the Holy Book (save one) is opened "In the name of Allah: the merciful, the compassionate."

While we do not dispute PAS' arguments regarding the Qur'anic origin of the *hudud*, we sincerely believe that such severe punishments which are undoubtedly meant to deter, are but aspects of commandments intended to be internalised by each and every Muslim. Indeed, can we not consider the cutting off of hands of thieves as metaphors of Divine Abhorrence for the heinous act of theft?

Unlike the summary justice of the Judaic tradition, the *Qur'an* does not speak exclusively of "a life for a life" in the event of murder. Neither does it observe only the "turning of the other cheek" from the Christian tradition. Rather the *Qur'an* tempers them both with an absolute emphasis on justice. Such justice cannot be achieved unless we carefully consider the underlying rationale relevant to every circumstance and temper this with compassion.

The universality of the *Qur'an* overrides its own specific historical context. It is our belief that humanity's inability to transcend history, a necessary consequence of having being created, demanded some guidance specific to the context of the revelation. In the light of the clarity of this literal utterances, it is no wonder that the more subtle, yet more important universal virtues have been ignored. The result is that Islam has been viewed - by Muslims and others - as a severe and punitive religion with a vengeful Lord and Creator.

Quite apart from the techno-legal difficulties we seek to high-

light the repetition in the *Qur'an* that "Allah does not oppress" makes it impossible to support any violation of human dignity - even towards a trangressor.

It is against this backdrop that we have focussed our hopes for the operationalising and contextualising of the Divine Message. Indeed, in our effort to do just this, we have found aspects of the Kelantan Syariah Enactment to run counter to the spirit and intent of the *Qur'an*. Take rape, for instance. In trying to establish this, a woman must produce four male Muslim eyewitnesses to the act without which she can be accused of adultery or fornication. Given that this is the absolute precondition for any woman to seek redress for such a heinous crime, it would seem that the laws cannot protect women because rape, as we know, is never committed in the open (Parts One and Four explore this in greater detail). For this reason, we are adamant that no matter how well-intentioned the Enactment appears to be, it can have adverse if not unforseen and unintended effects for Muslim women, specifically, and for society as a whole.

Consequently, while the immediate concern of this book is the Kelantan Syariah Criminal Enactment (II), we deem it appropriate, too, as we focus on this to urge Muslims to look more towards Qur'anic universals in order to comprehend fully the intention behind the specifics. *In sha'Allah*, we hope such an endeavour would more clearly highlight the social, economic, political and spiritual rights and responsibilites, not only of Muslims, but of all humankind.

Sisters in Islam
Kuala Lumpur
April 1995

Part 1

MEMORANDUM TO THE PRIME MINISTER ON THE SYARIAH CRIMINAL CODE (II) 1993 STATE OF KELANTAN FROM SISTERS IN ISLAM

1

LETTER TO THE PRIME MINISTER

25.12.93

The Honourable Prime Minister
Datuk Seri Dr. Mahathir Mohamad

Assalamualaikum wr. wb.

Dear Sir,

We, *Sisters in Islam*, write to you to express our deep concern at the passing on 25 November 1993 of the Kelantan Syariah Criminal Bill (II) 1993. This Bill was passed unanimously by all 36 State Assemblymen, including two from the Barisan Nasional.

1. The Kelantan Code

This Code discriminates against Malaysian women in several of its parts, including:

- the grounds for presumption of *zina* in clause 46(2);
- the disqualification of women as eye-witnesses in clause 41(1);
- the termination of a marriage by a husband's accusation of *zina* (*al-li'an*), whether proved or not, against his wife in clauses 14 and 15; and
- the implied endorsement in clauses 2(i) and 62 of the view that *diyat* or compensation for death or injury to a woman should be half that for a man.

The Code also has other troubling features, including:

- the imposition of the death penalty for apostasy;
- the uncertainty of cases where
  - the victim is of a faith different from the perpetrator of the crime; and/or
  - the witnesses to the crime are not Muslims; and/or
  - the co-perpetrators are of different faiths;
- the Code's relation to the provisions of the Penal Code. Some offences under the Code are also federal law offences, giving rise to issues of double-jeopardy where both laws are enforceable.

The drafters of the Kelantan Code have declared that a person convicted under it would not be tried again for the same offence under the Penal Code; but they have explicitly confirmed that further action might still be taken under the Penal Code following an unsuccessful prosecution for the same offence under the Kelantan Code.

That is, advocates of the Kelantan Code assert that an offender might not be punished twice, but only tried twice (following a first and unsuccessful *Shari'a* prosecution) for the same offence. Even so, this remains double-jeopardy. Whether the advocates of the Kelantan Code can speak for those implementing the Penal Code—and whether the latter are in any way constrained by the explanations of the former from bringing a second prosecution following a prior *Shari'a* prosecution, successful or unsuccessful—remains unclear, further compounding the problems of double-jeopardy posed by the Kelantan Code.

The *hudud* provisions emerged as opinions of lawyers (*fuqaha* or jurists in Muslim jurisprudence). Formed through a methodology of interpretation (*ijtihad*, *qiyas*), their views were given subsequent sanction through the political-legal process through *ijma'*, or the consensus of the jurists of a particular time and place (but consensus is not unanimity), or through a majority opinion (*jumhur*). These processes are human efforts, not divine injunctions.

Even before its enactment by the State Legislative Assembly, those promoting the Code took upon themselves to pass judgements of apostasy on those who oppose it (as reported in *New Straits Times* 19 October 1993: enclosed). The fact that these invidious pronouncements were made outside a court of law only increases legitimate doubt concerning the manner in which these laws are likely to be implemented.

2. Traditional *Shari'a* and Contemporary Malaysian Society

We live in a plural society. Malaysia has made its mark in today's world through the wise guidance of its leaders since 1957. We have built in our society a culture of tolerance, respect for others and, no less notably, the emancipation of Muslim women consistent with an enlightened understanding of Islam. In no other country which calls itself Muslim do women enjoy the same freedom of movement, association and education as in Malaysia.

The questionable impact of implementing Muslim criminal law, upon women and upon society generally, has been documented in a number of Muslim countries. However well-intentioned, its implementation has in practice proved problematic.

Malaysia neither needs nor deserves the widespread criticism that some other countries have received from modern Muslims and Islamic human rights lawyers worldwide. The enforcement of such laws leaves rape victims who are unable to provide four male witnesses liable to prosecution. Women in custody are also often exposed to systematic abuse while in detention or awaiting trial. Disquietingly, the Code in its formal aspects, closely resembles those laws under which abuses of this kind have occurred elsewhere.

The question is: should we as mere humans, insist upon the imposition of *hadd* laws when they should remain as *Haqq Allah*, a matter solely between the believer and the Almighty.

The Penal Code provisions (which can be classified as *ta'azir* laws) that are presently enforced have served Malaysia well, and there is nothing in the Penal Code which is in principle contrary to the Muslim faith.

3. Vision 2020, Islamic Modernity and Re-thinking of the *Shari'a*

Our push, as a country and nation, towards industrialisation envisages the creation of a fully modern society based upon a Malaysian culture of modernity. This is clearly outlined in our own *Wawasan 2020*. Central to an authentically Malaysian modernity must be an Islamic culture of modernity.

The anachronistic enforcement of premodern understandings of Islamic law, as in the Kelantan Code, seems hardly congruent with

any principled project for the modern sociolegal realisation of enduring Qur'anic imperatives. Those who codified Islamic law in its premodern forms were simply human beings who sought to offer the best understanding of the Qur'anic ethic that was possible for them in their time.

We, in our time, are required and entitled to do no less. In fact this is our *dakwa*, and we are compelled to make better efforts than our forebears.

All the great changes that have led to the emergence of the modern world provide this generation with opportunities to understand and actualise Islam in ways that were not available to our predecessors. They provide enlightened Muslims of this era with unprecedented opportunities to seek the realisation of the essential and universal message of Islam. In particular, as we progress, we must endeavour (*jahd*) to give expression to Islam's sociolegal aspirations in a far more profound and just form than was ever possible under the constraints and circumstances that limited even the best and most noble thinkers of earlier Islamic civilisation.

4. Recommendation

Accordingly, as Muslim women, *Sisters in Islam* request that any action by the Federal government enabling implementation of the recent Kelantan Code should be postponed until the issues raised here are adequately addressed. We urge that

1. The legitimacy and acceptability of the juristic opinions upon which the Code is based be reviewed;

2. The question whether the views upon which the Code is based are prejudicial to women, and whether they accord with current enlightened and progressive Islamic sociolegal thinking, be closely examined; and

3. The feasibility, advisability and likely impact of the Code within our plural society be considered in detail before any action is taken permitting its implementation.

We enclose for your perusal,

1. Our papers on the Bill (as it then was) that were presented for discussion on 10 November 1993 at an ISIS Forum entitled "Women and the Syariah Criminal Bill (II) 1993 [Kelantan]";

2. Additional material on evidence of women, *diyat* and apostasy;

3. Selected newspaper clippings on the issue; and

4. Our *Sisters in Islam* brochure.

We respectfully urge your careful consideration of the matter, and thank you for your attention.

Wassalam
Sisters in Islam

Amina Wadud

Askiah Adam

Norani Othman

Rashidah Abdullah

Rose Ismail

Salbiah Ahmad

Sharifah Zuriah AlJeffri

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2

ZINA AND RAPE UNDER THE SYARIAH CRIMINAL CODE (II) BILL 1993 (KELANTAN)

Salbiah Ahmad

The Syariah Criminal Code (II) of the State of Kelantan (to be tabled during the November 20-25 1993 sitting of the State Legislative Assembly) is the first piece of legislation which attempts to lay down the *hudud* [1] and *qisas* [2] laws of Muslim law in this country.[3]

Kelantan as well as other states have long standing laws on *zina* "which is not liable to the punishment of *hadd*" (singular for *hudud*).[4]

Zina under the Bill

Zina is classified under *Hudud* Offences in Clause 4 (c). Clause 10 describes *zina* as an offence "which consists of sexual intercourse between a man and a woman who are not married to each other". *Zina* applies both to adultery (legally defined in most penal systems as illicit intercourse between two married individuals) and fornication, i.e. sexual intercourse between an unmarried man and an unmarried woman.

Any sexual relationship between a man and a woman which does not involve intercourse is not punishable by the *hadd* punishment. These relations are nevertheless prohibited and the state may create offences to cover these situations, but their punishment lies in the category of *ta'azir*.[5]

Punishment of *zina* under the Bill

Clause 11 of the Bill punishes *zina* with stoning until death if

the offender is married and with 100 lashes if the offender is not married.

Proof of *zina*

Zina is proved by eyewitness evidence (oral testimony of witnesses or *shahadah*) and by confession or *iqrar* of the offender only (clause 39(2)). As a general rule, circumstantial evidence *(qarinah)* is not a "valid method of proving a *hudud* offence" (clause 46(1)). The Bill insists that four male eyewitnesses who are just, are required for *zina* (clauses 40, 41).

Each eyewitness to *zina* "shall state clearly that he has actually seen ... the act of penetration of the sex organ of the male partner into that of the female partner" (clause 42(2)). The standard of proof "shall be one of certainty and free of any ambiguity or doubt" (clause 42 (1)).

A confession of *zina* must be "voluntary and without force" (clause 44(2)). A confession binds only the confessor and not any other party charged with the same offence (clause 44(3)).

Retraction of eyewitness testimony or confession

In the event of a retraction, the punishment will cease. The eyewitnesses upon a retraction of any one testimony, are all nevertheless guilty of the *hudud* offence of false accusation of *zina* or *qazaf* (clauses 43(2)), and punishable with 80 lashes and disqualified as witnesses in any other case until they repent (clause 13).

The offender who is set free from the *hadd* punishment as a result of the above retraction, is nevertheless liable to a punishment of *ta'azir* (clause 47) if there is sufficient evidence (including circumstantial evidence). The 'lesser offence' and its punishment is left to the discretion of the court (from a reading of clause 3(c)). The Bill itself has no actual provision prescribing the lesser punishment.[6]

Gender Bias - the presumption of *zina* in case of a woman and the impropriety of categorising rape as *zina*

Clause 46(2) states: In the case of *zina*, pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of *zina* and therefore the *hudud* punishment

shall be passed on her unless she can prove to the contrary.

Zina is consensual sexual intercourse. Rape entails the use of force and the absence of free-will on the victim's part.

The Bill discriminates women, both in *zina* and rape

The Bill discriminates against women as follows:-

• *Zina* of a man which is punishable by *hadd*, is proved by four male eyewitnesses or his own confession, otherwise he is liable to *ta'azir* punishment

• *Zina* of a woman which is punishable by *hadd*, is proved by four male eyewitnesses or her own confession **or being unmarried, she becomes pregnant or has delivered a child**

• the burden of proof shifts from the prosecutor to the woman in a case of pregnancy or delivery of child—she is the one to bring evidence that she has not committed *zina*.

• the burden of proof never shifts in the case of a man—the prosecutor is the one to bring evidence to convict.

• In the case of a married woman, the Bill allows her husband to denounce the child as his by a process of *al-li'an* (accusing one's wife of *zina*) in clause 14. While this denunciation does not attract the *hadd* punishment for *zina*, the marriage will be dissolved even if the accused wife exercises a counter-oath to deny the accusation of *zina* (clause 15).

The presumption of *zina* constitutes a departure from the general rule :-

• that all *hudud* offences punishable by *hadd* are proven by oral testimonies of witnesses or by confession of the offender (clause 39(2))

• that circumstantial evidence *(qarinah)* is not a "valid method of proving a *hudud* offence" (clause 46(1)). Circumstantial evidence includes all else other than eyewitness evidence or confession. Pregnancy is circumstantial evidence.

• that *hudud* offences that cannot be proven by oral testimonies of witnesses or by confession should not be subject to *hadd*, but will fall under the category of *ta'azir* punishment (clause 47). [7]

• that one is presumed innocent until proven guilty; in which

case the prosecution has to prove the case on a standard of absolute certainty and free from ambiguity or doubt (clause 42(1)). This is more strict than the civil law standard of beyond a reasonable doubt. The presumption of *zina* removes the burden of proof from the prosecutor to prove the guilt of the accused. The accused is now saddled with the burden of bringing evidence to the contrary; to rebut the pesumption of *zina* and prove her innocence.

In *al-li'an* and the presumption of *zina*, a woman's fate is determined by her biological make-up. This biological factor has prejudiced her case either as an accused (of *zina*) or as a complainant of rape as the illustration below will show.

Illustration of the legal process by way of a case in point

Case X unmarried female is pregnant. X had been raped by Y. The state presumes *zina* on her part on account of her pregnancy.

To prove rape, X female has to

(i) show *zina* of Y male (i.e. sexual intercourse on his own free will); and
(ii) provide evidence "to the contrary" on X female's part. This means that X female has to show lack of free will on her part; a struggle, bruises etc. It is not uncommon among rape survivors that they do not seek medical aid immediately out of fear and shame. It is not uncommon that rape survivors do not struggle for fear of her safety or the safety of others who are threatened with her.

Failure to prove (i) and (ii) means -

(a) Y male is free of the *hudud* punishment (lashes or stoning), but may be subject to a lesser punishment of *ta'azir*, but
(b) X female is still subject to the *hudud* of lashes as she had failed to discharge her burden — 4e(2) states. In the case of *zina*, pregnancy or delivery of a baby by an unmarried women shall constitute evidence on which to find her guilty of *zina* and therefore the *hudud* punishment shall be passed on her unless she can prove to the contrary.

The impossibility of proving *zina*

Other than confession, only eyewitnesses' account of the sexual act will be conclusive proof of the crime and thereby attracts the *hadd* penalty of lashes or stoning. In a case of confession, this can be retracted at any time. There are very stringent requirements for eyewitness evidence:-

(i) four eyewitnesses who saw the actual act of penetration
(ii) all four accounts must not differ, or else all four witnesses can be charged and punished with the offence of *qazaf* of 80 lashes.
(iii) all eyewitnesses must be just. To ensure that they qualify to testify they are vetted prior to their testimony through a process called *tazkiah syuhud*. The Bill reiterates this in clause 41(2): a person shall be considered just if he does what is required of him by Islam and avoids committing great sins and does not continuously commit lesser sins and further has *isti'mal al-muruah* (a sense of honour).

[It might be noted that the drafters of the Bill have avoided the juristic requirement of *tazkiah syuhud* by choosing to enact instead, clause 41(3): a person shall be deemed to be just, until the contrary is proved.]

These processes clearly suggest that until and unless the act is done in public such that four people can actually see the intercourse taking place, the crime cannot be proved in reality.

However this also means that by equating rape with *zina*, the rape victim-survivor cannot prove rape - *zina* on the part of her attacker.

It is highly unlikely that rape is committed in the open, such that four male eyewitnesses can observe " the act of penetration of the sex organ of the male partner into that of the female (victim)" (clause 42(2)). This will mean that she can never prove rape at all unless the attacker confesses to the crime.

At this point it might be emphasised that anyone who had witnessed the act of *zina* or rape and has not sought to prevent it, is technically an abettor to the crime.

Clause 57 states: Where every offence is committed as a result of, or in furtherance of an abetment, assistance...every person who abets or assists 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'azir* punishment for a term not exceeding 10 years.

This implies that every potential witness to *zina* or rape is an abettor first and would not qualify as a person of honour (clause 41(2)) and is disqualified from giving testimony in *zina* or rape.

In addition the rape complainant may herself be liable to *qazaf* if she is unable to bring eyewitness evidence (or they failed their *tazkiah syuhud*) or their evidence were inconsistent.

Whether the woman accused of *zina* on account of her pregnancy can take an oath to deny *zina*, to discharge the burden of proof

In the administration of criminal justice in Muslim law, the oath or *al- yamin* as a general rule, is given to the accused to deny the case against him/her. The oath is not an independent form of evidence and is used for purposes of strengthening whatever primary evidence required to discharge the burden of proof. In addition the administration of the oath in the case of the accused is not automatic—it lies in the discretion of the judge in a given case. The judge allows an oath in a case where the prosecution case is weak—such as lack of sufficient evidence to convict. In the case in point, the pregnancy and the presumption of *zina* thereof pre-empts the obligation of the prosecution to bring any other evidence.

It is submitted that the *al-yamin* procedure does not assist the accused in question. While there are ample opinions to state that the oath cannot be used by the prosecution in a *hudud* case against the accused, it is unclear as to whether the oath can be administered to the accused in his/her defence in a *hudud* offence.

The Bill as a choice of differing juristic opinions

It is necessary to point out that codification efforts in Muslim law involves a process of choosing opinions of Muslim jurists. Juristic opinions by and large constitute opinions of the four great *imams* or founding jurists (Abu Hanifa, Malik ibn Anas, Shafi'i and Hanbal) and

their students. Legal injunctions are derived through the processes of interpretation (*ijtihad, qiyas*) of the *Qur'an* and *Sunnah* of the Prophet Muhammad.

Prior to codification efforts, the choice of opinions were followed according to a hierarchy of popularity of the opinions (and their reasoning processes) through *ijma'* (consensus), or *jumhur* (majority) opinions. This is also a political-legal process.

In modern nation states , a doctrine called *siyasah shari'ah* (government in accordance with the *Shari'a*) is used to give governments the legitimacy of deciding which juristic opinion is to prevail as the law of the land. The processes include:-

- the choice between two juristic opinions within one school of thought
- a preference for one school of thought over the other
- the upholding of a variant or isolated opinion of individual jurists
- the patching up of legal rules from a combination of views from the differing views of different jurists and schools.

In pursuing these options, states have veered away from the traditional jurisprudence and have also utilised views of jurists not included in *ijma'* or *jumhur* opinions. Whatever the choice, states must be guided by the principle of public interest or *maslaha* of the community.

It might be noted that the presumption of *zina* by pregnancy of the women or the birth of a child is a variant opinion in the Maliki tradition. Traditionally this opinion lacks authenticity as it is not the view arrived at by consensus (*ijma'*) nor held by the majority (*jumhur*) of jurists. The drafters have nevertheless chosen it to be the law of the land (in Kelantan).

The charge of apostasy

It is disconcerting that Haji Abdul Hadi Awang, the chairperson of the drafting committee of the Bill, opined that Muslims who reject the Bill are apostates and apostasy is punished by death. This claim is both irresponsible and manipulative.

Irresponsible, since it was made carelessly. In a modern nation

state scenario, only a court can find one to be an apostate, or unless the person so confesses (which can be retracted at any time). Manipulative, since the learned *ustadz* (teacher) seems to equate the varied juristic opinions contained in the Bill as one and the same with the revealed texts of the *Qur'an*. Irresponsible and manipulative, since as all students of Muslim jurisprudence know, that the *fuqaha* (jurists) including the *mujtahid mutlaq* (founding jurists), have always exercised healthy debates and have held differing opinions without each accusing the other an apostate. This liberal tradition of dissent does not seem to be supported by Muslims in more recent times.

The careless announcement of apostasy shrinks the democratic space for Muslims to debate the validity of the exercise of the choice of differing opinions selected by the state in formulating the Bill.

Endnotes

** Revised since delivery. Note that the Kelantan Bill has made no provision for rape. However on 17th October 1993, Tun Salleh Abas (resource person) and Haji Abdul Hadi Awang (chairperson of the drafting committee of the Kelantan Bill), confirmed that rape would fall under zina under the said Bill.*

1. *Hudud* in its legal sense, means a punishment which has been prescribed by God in the revealed text of the *Qur'an* or the *Sunnah* (of the Prophet), the application of which is the right of God (*haqq* Allah). See El-Awa (1982:1).
2. *Qisas* (retaliation) is the punishment prescribed in Islamic law for murder and the infliction of injury. El-Awa, ibid. at p. 69.
3. There are important constitutional constraints before the Kelantan Bill can become law, even if it survives its passage through the state legislative assembly. Part VI of the Federal Constitution (Relations between the Federation and the States) limits the right of states to legislate matters contained in the state list and the concurrent list set out in the ninth schedule. (Articles 73, 74, 75, 76A, 77) This does not include criminal law except if it falls within the "creation of offences by persons professing the religion of Islam against precepts of that

religion, except in regard to matters in the Federal List ... have jurisdiction in respect of offences ... in so far conferred by federal law...' (List II— State List, clause 1).

4. See the Shar'iyah Courts and Muslim Matrimonial Causes Enactment (Kelantan No. 1 of 1966) and the Syariah Criminal Code (Kelantan No. 2 of 1985). These laws provide for *zina*, attempt to commit *zina*, abetment of *zina*. The 1985 law punishes *zina* "which is not liable to the punishment of *hadd*" to imprisonment for a term not exceeding three years or to a fine not exceeding RM 5,000 and to six lashes. (s.11)

5. Offences not included in *hudud* or *qisas*. In the event of a retraction of a confession, the punishment shall cease (clauses 45(1)(2)).

6. A query arises whether this falls under "*zina* which is not liable to the punishment of *hadd*". See footnote 4. Arguably the offender could be charged under the Penal Code-this depends upon how clause 61 (double jeopardy) will be interpreted in the court.

7. Note that the provision for presumption of drinking intoxicating drinks in clause 46(3), does not have the equivalent phrase that "*hudud* punishment shall be passed' as in clause 46(2). In fact a reading of clauses 22, 46 and 47 suggests that the offence described in clause 46(3) is punishable by *ta'azir* (not *hadd* in 22(1)).

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3

THE PRACTICE OF *HUDUD* IN OTHER COUNTRIES

Rose Ismail

Hudud laws are God's laws - this is what the proponents say. It should, therefore, be just laws. Yet, comparative research on *hudud* ordinances in several Muslim countries reveals widespread injustices, especially towards women. Take Pakistan. *Hudud* laws were introduced by General Zia ul-Haq as part of his Islamisation campaign in 1979. Statistics compiled by women lawyers and human rights groups since then indicate that more women compared to men have been kept in jail for long periods of time pending trial under such laws.

In 1991 alone, a Karachi-based committee for the repeal of *Hudud* Ordinances found more than 2,000 women - all involved in *hudud*-related cases - languishing in jail. Although many of these convictions were reversed on appeal, women and men alike suffered lengthy periods of imprisonment before they were released.

For women who lack the financial resources to obtain adequate counsel or to post bail, the suffering is often longer. Upon release, they tend to be ostracised by friends and family. When representatives from women's or human rights groups visit women convicted and jailed for *hudud*-related crimes, they hear tales of misery and fear. In most of these cases, researchers discover that the very laws that are meant to protect people, especially women, end up doing the exact opposite.

For instance, in 1981, Jehan Mina, a 13-year-old orphan was sent by her grandmother to live with an aunt in remote northern Pakistan. Two years later, Jehan got pregnant. According to her testimony, she was raped by her uncle and his son but her family refused to believe her and threatened to kill her. Fortunately for Jehan, an uncle took pity and registered a rape accusation on her behalf. But Jehan's testimony was considered useless. Under Pakistan's *hudud* laws, four devout adult males would have to witness the act to prove her innocent

and because she was unable to do this, she was found guilty of *zina* or illegal sexual intercourse. The court sentenced her to 10 years imprisonment and 100 lashes but this was later reduced to a 5-year term with 30 lashes by a higher court.

In that same year, Safia Bibi, an 18-year-old girl who was virtually blind was employed as a maid in a local landlord's house. According to her statement made to the police, she was raped first by the landlord's son and subsequently by the landlord himself. As a result, she became pregnant and gave birth to a child who later died. Her father registered a case of rape after the death of the child but the court acquitted both the landlord and his son of the crime, as there was insufficient evidence to prove under *hudud* law

Safia's self-confessed pregnancy was later used as evidence of *zina* by the judge who claimed he gave Safia a light sentence because of her young age and near blindness. Safia was imprisoned for three years, lashed 15 times and fined 1,000 rupees for *zina*.

Under Pakistan's *hudud* laws - which applies to both Muslims and non-Muslims - a person convicted of adultery, fornication or rape can be sentenced in one or two ways, depending on the religion and marital status of the accused, the witnesses and the evidence on which the conviction rests.

The maximum sentence is known as *hadd*, the singular of *hudud*. In the case of fornication and adultery if the accused is a Muslim and confesses or there are four pious, adult male Muslim witnesses to the act of penetration, then the accused must be sentenced to death by stoning.

If the person is a non-Muslim and confesses, or the crime is witnessed by four, pious male Muslim adults, the accused must be sentenced to 100 lashes. The testimony of four female Muslim witnesses, however is not adequate for the maximum punishment.

If the evidence falls short of what is required for maximum punishment but the case is still proven, then the accused is sentenced to a lesser class of punishment known as *ta'azir*.

Evidence for *ta'azir* is governed by the standard evidence code which was introduced by General Zia in 1984. It states that "unless otherwise provided in any law relating to the enforcement of .in matters pertaining to financial or future obligations...the instrument shall be attested to by two men or by one man and two women...in all other matters, the court MAY (emphasis here is mine) accept, or act on,

testimony of one man or one woman". The use of the word *may* in the second part of the section provides for the admissibility of the testimony of women but does not guarantee that such a testimony will be admitted or given equal weight with that of a man.

At both the *hadd* and *ta'azir* levels of punishment, the burden of proof is on the prosecution to prove rape or adultery or fornication charges beyond doubt.

There is a general rule that if there are two versions of an incident, the one favouring the accused should be accepted by the court. In one 1988 *zina* case, the benefit of the doubt was given to the accused and he was acquitted when penetration was not positively proved.

Other cases have also maintained that semen stains or vaginal swabs do not necessarily mean that sexual intercourse had taken place. Rather, there must be positive proof of penetration or other corroborative evidence.

In practice, research shows that courts in Pakistan exhibit a bias against female testimony. There is a general tendency to see women as complicit in sex crimes, even if there is no evidence or evidence is available to the contrary.

Studies have shown that while the courts extend the benefit of doubt to men accused of rape, female rape victims require conclusive proof that the intercourse was done with force.

And, if there is no evidence of force - and this is quite possible when a man holds a knife at the woman's throat, preventing her from retaliating in any way - the charge is also dismissed.

What is even more dangerous and frightening and has enormous bearing on the Kelantan *Hudud* Enactment, is that when women cannot prove rape, they are themselves charged with illicit sex.

There is also evidence to show that the Pakistani police have sometimes been overzealous in the implementation of the law.

In November 1991, 10-year-old Majeeda Mujid was abducted by a landowner and several other men for over two months and raped repeatedly during the period. Ten days after her abduction, Majeeda's family filed a First Information Report (FIR) with the local police. Eventually the landowner brought Majeeda to the police station and forced her to tell them that she was staying with them on her own will. She refused to do so and instead told the police that the landowner raped her. She was kept in the police station for six days without seeing a female police officer. On the sixth day, she was taken to prison and

charged for fornication. She spent two months in prison before being released pending trial.

The outcome of these cases clearly shows that if a woman lives in a community where women are perceived as unequal to men both socially and economically, she would have to be brave indeed to claim that she had been raped.

Malicious prosecution, police harassment and abuse of power have protected rapists and victimised victims of *hudud* crimes.

Hudud has also affected Pakistani women in other ways. Disgruntled husbands and fathers, for example, can bring ill-founded adultery or fornication charges against their wives and daughters, who upon the basis of such accusations, often unsupported by evidence, are arrested and imprisoned pending trial.

Studies have shown some husbands filing *zina* cases against their wives or former wives, either to keep them in forced marriages or simply to humiliate them.

What is alarming is that mere suspicion of adultery by the wife is often reported as *zina*. Of the 90 women prisoners accused of *zina* surveyed in 1988, more than half had been accused by their husbands or fathers.

Women who divorce and re-marry are also at risk of malicious denunciation under *hudud* law. According to the Muslim Family Laws Ordinance, passed in 1961, a man seeking to divorce his wife after pronouncing the divorce to her orally must send a written notice of the divorce to a local council and provide a copy to his wife.

After this official registration, 90 days must pass before the divorce becomes legally binding. During this three-month period, an arbitration council is established to try and reconcile the couple. If it succeeds, the divorce is revoked.

However, after the implementation of *hudud*, a husband's failure to register a divorce has often resulted in criminal penalties against the wife. Women who have remarried mistakenly believing that their first husband had properly registered the divorce have been charged by that husband with adultery.

Take the case of Shahda Parveen and Mohammed Sarwar, who in November 1987 was sentence to death by stoning for adultery and rape. Shahda had been divorced by her first husband and married Mohammed after the 90-day period. Shahda even had an affidavit attesting to her single status.

However, Shahda didn't know that her first husband did not register their divorce as required under the Muslim Family Law Ordinance and had decided that he wanted her back.

Because Shahda's first divorce was not recognised by the court, she and her new husband were charged for adultery and rape and sentenced to death. The sentenced was later overturned by the Supreme Court on the grounds that it had no basis in law or fact but by then Shahda had spent over nine months in prison.

Mohammed, the co-defendant, was also previously married and had not divorced his wife. But because polygamy is legal in Pakistan, he was released immediately on bail.

Women who decide to marry against the wishes of their relatives can also be denounced under *hudud* laws. Out of the 44 women in Karachi Central jail in 1987 who were charged with *hudud* offences, over half were accused of having committed *zina* due to leaving their homes with a man of their choice.

Pakistani courts usually interpret this as abduction. Because a woman is not a free agent and therefore has no right to leave home without the family's permission, she is seen to have abducted herself if she does so.

It is reported that the police have also abused *hudud* for the purposes of extorting money or exercising social control over women and through them, the broader population.

In one case in 1990, four women were taken from the house of a Mrs. Halim by police who were searching for their male relatives. The four women were brought to the police station, reportedly after being molested by several policemen en route, and illegally detained for nine hours until the accused male relatives surrendered.

Men can also be victims of false adultery and fornication charges. They are often arrested as co-defendants in such cases and imprisoned pending trial but many who are convicted on rape get these charges converted into the lesser charges of adultery and fornication as a preclude to conviction.

Research further shows that men are arrested less frequently than women on adultery and fornication crimes. Interviews with women prisoners charged with *hudud* offences in 1988 found that in 29 per cent of the cases, no male accused was mentioned in the original report. Among those in which a male was accused, he was not arrested in 40 per cent of the cases.

To sum it up - *hudud* laws affect all Pakistanis but are applied to women with a more disastrous effect.

In the Sudan, President Numeiri announced plans for the Islamisation of the Sudanese legal system in 1983. Following this, major changes were made by the repeal of several laws including the Civil Procedure Act 1974, the Criminal Procedure Act 1974, the Penal Code 1974, the Contract Act 1974 and so on. New laws were also introduced to reflect Islamic features. These included the Penal Code 1983, the Criminal Procedure Act 1983, the Sources of Judicial Decisions Act 1983, the Evidence Act 1980, the Advocates Act 1983 and the Civil Transaction Act 1984.

It is said that Numeiri introduced *Shari'a* because he wanted to appease the Muslim Brotherhood and to gratify the oil-rich countries from which he desperately needed financial aid and free oil. Unfortunately for Numeiri, the Islamisation of law in general and the application of the Islamic penal code in particular, aroused widespread criticism.

Researchers say the main criticism against these laws was that they were introduced out of political opportunism rather than religious conviction, for they were mainly designed to suppress opposition against the government of Numeiri.

Take the Penal Code of 1983. By making it Islamic, *hudud* punishments were included in the definition and list of existing and new crimes. The offence for adultery, for instance, was redefined to mean any act of unlawful sexual intercourse, including rape and sodomy. And, the punishment for the offence will, according to Section 318 of the Code, depend on whether the offender was married or unmarried, Muslim or non-Muslim.

The application of provisions regarding punishment for adultery was said to have shocked a large segment of Sudanese society. What was particularly worrying was the term "attempted adultery", which is foreign to Islamic law.

With such a term included in the law, the police can stop men and women who walk in the streets or travel together in cars and require them to submit their marriage certificates. If they failed to do so, they could be charged under the offence of alleged adultery.

Hudud is not practised in Morocco even though family law is based on Islamic legal principles.

Iraq also does not have *hudud* laws and although there have

been "crimes of honour" reported from the rural areas in some of these countries - crimes in which a woman is killed for dishonouring the family - the family and not the court metes out the punishment. This goes against the grain of *hudud* laws.

In Iran, it was reported last year that the government may stop the amputation of hands and legs for *hudud* crimes because this was no longer considered a shame as many Iranians had lost their hands and limbs in the Iran-Iraq and Gulf Wars.

However, there appears to be active discussion of the subject among women and human rights groups about Iranian *hudud* law, including the sizes of stones to be used for *hudud* crimes.

In Bangladesh early last year, a 22-year-old woman and her husband were accused of adultery by the village *imam* and stoned a 100 times while her elderly parents were subjected to 100 lashes. This runs contrary to the conventional application of *hudud* laws.

It has been argued that Muslims in Malaysia should not bother about the implementation of *hudud* laws in other countries. One senior lecturer here, an individual often consulted by *Pusat Islam* for his learned opinions on the religion, said: "Kita tidak patut menjaga tepi kain orang".

We can accept this advice and bury our heads in the sand but the world is a small place and human beings are so alike even though we live in different communities. If abuses occur in one country, we are obliged to take heed. God willing, this may prevent us from repeating the errors in our land.

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4

SHARI'A CRIMINAL LAW IN MODERN SOCIETY: SOME SOCIOLOGICAL QUESTIONS

Norani Othman

Shari'a Criminal Law includes *Hudud*, *Qisas* and *Ta'azir* offences and their punishments. The most contentious of these are *hudud* punishments for they require public punishments of convicted offenders which include mutilation of limbs, *rejam* or stoning to death, crucifixion, and lashing.

Islamicists all over the world especially the militant activists have always tried to capture power on the slogan of Islamising the state and its laws. These "*shari'a*-minded" activists have always invoked the divine sanction of *shari'a* which requires its mandatory implementation in a country that had declared itself to be a Muslim one.

Yet the administration of *Shari'a* criminal justice presents us in modern times with the most visible and controversial issues of the current debate over the application of *shari'a*. Numerous problems of substantive law, evidence, and procedure are raised by the prospects of implementing this branch of *shari'a*. These problems must be resolved at both the theoretical (or theological) and practical (or social which includes administrative and formal legal) levels **before** Islamic criminal law is implemented. A premature, hasty and arbitrary application of the penal law of *shari'a* can only lead to extreme hardship, a miscarriage of justice and drastic political repercussions.

Ultimately we must remind ourselves that the purpose of all laws, God's law as well as human-made law, is to dispense justice, at the same time maintain order and preserve security through the power to impose criminal punishments affecting the life, liberty and property of the individual. The imposition of any criminal punishment involves not only the possible loss of limbs, life, liberty, and property for the

individual but also inflicts severe social stigma and psychological pain and suffering. That such drastic consequences can be justified as necessary for discharging the vital function of protecting public and private security and morality should not obscure the very serious risks of abuse and manipulation of this power.

Basic standards of all criminal justice systems

Most of the modern international and constitutional standards of criminal justice pertain to the procedural aspects of the process in that they require: (a) minimum safeguards for a fair and valid determination of guilt or innocence. These safeguards are predicated on the fundamental assumption of innocence and a requirement of proof of guilt by the accuser. (In this case, most of *hudud* offences are no different in their requirement for proof e.g. for *zina* there must be four reliable witnesses who are able and willing to testify that they saw the actual sexual intercourse when it took place).

Furthermore, (b) to minimise hardship and avoid the dangers of the abuse of the criminal justice process in relation to the accused person, who is presumed to be innocent until proven guilty, procedural safeguards are generally required before the trial stage.

In other words the implementation of criminal law must also ensure legal justice - both in its substantive and procedural forms - is not compromised. The principles of legality implicated here are:-

- that the offence is defined in the clearest and most precise terms;
- that the court has to give the strictest or narrowest possible interpretation of penal legislation before it can impose punishment in accordance with its terms;
- that the implementation of the law conform to the widest possible consensus of the society as a whole;
- that due regard must be given to the legitimate expectation and concerns of ethnic, religious and political minorities; and
- that a moral value judgement applies whereby one is morally bound to concede the same minimum standard to others which is demanded for oneself.

These are also crucial questions for all of us in Malaysia. The

Kelantan state government will be tabling its Syariah Criminal Bill (II) 1993 in the Kelantan State Assembly on 20 November, 1993*. Other countries such as Iran, the Sudan and Pakistan have demonstrated to us how problematic and even cruel the effects can be when this kind of law is implemented in society without prior attention given to a review of some of its bases of interpretation, the manner and the different cultural context of its actualisation today.

The contingent historicity of *shari'a* which was the product of historical and human interpretation of the text

Religious principles are perpetually conditioned by the socio-cultural reality within which they are actualised or realised. Herein lies the contradictory relationship between religion as text and religion as practice.

The contradiction looms large and remains ignored by religious authorities in most of the faiths that have attained world-wide or civilisational status such as Judaism, Christianity, and Hinduism. But it is perhaps seen most clearly in those religions that make universal and timeless claims yet whose established authorities selectively allow only biased, rigid and anachronistic or historically-fossilised interpretations to dominate, excluding all others.

This inherent contradiction between doctrinal claims of a religion and its actualisation in society and history can also be seen in the case of Islam.

• The formation of Islamic law took place over several centuries and by a variety of processes. During the Prophet's lifetime he was the judge of the community and the interpreter of the general provisions of the divine revelation. On his death (632 C.E.) the responsibility for interpreting Qur'anic precepts, and translating that interpretation into practical decisions, devolved on the four caliphs who immediately succeeded him (632-661 C.E.; i.e. Abu Bakr 632-634; Umar 634-644; Uthman 644-656; and Ali 656-661).

• The difficulties of interpreting religious texts to yield a body

* The Bill has since been tabled. See page 189 of Appendix 3

of religious law were compounded by the Arab's rapid acquisition of vast foreign territories. With the establishment of the capital of the empire of the Umayyads (661-750 C.E.) in Damascus the Arab rulers adopted the administrative machinery of the Byzantine rulers they had succeeded, which facilitated the assimilation of foreign concepts into the still developing and essentially rudimentary apparatus of Islamic law. Government-appointed judges, who initially combined the role of judge with that of administrator, tended to apply local laws (which varied throughout the territories) informed by their own understandings of Qur'anic precepts [Leila Ahmed, 1992b].

• Over the course of the Umayyad period local laws were modified and elaborated by Qur'anic rules and "overlaid by a corpus of administrative regulations and infiltrated by elements of foreign systems". The growth and development of these laws were haphazard and brought together heterogeneous materials, and the Qur'anic elements were largely submerged [Leila Ahmed, 1992a].

• Almost a century later. The founding of the four schools of jurisprudence by the four great imams were all in the Abbassid period (750-1250 C.E.) beginning at least 100 years after the Prophet's death: Abu Hanifa (699-767 C.E.), Malik ibn Anas (715- 795), Shafi'i (767-820) and Hanbal (780-855).

• The systematic compilation of the *hadith* by the six scholar-jurists took place even much later about the middle of the 9th century: Bukhari (d. 870 C.E.), Muslim (d. 875), Dawud (d. 888), Tirmidhi (d. 892), Ibn Majah (d. 886), and Al-Nasai (d. 915).

• Therefore it is safe to say that no one can claim either exclusive right or hegemony over the interpretive endeavour.

Shar'ia as a Qur'anically-based law is derived from divine revelation. Yet this Divine revelation had to be injected into human history, among people (the Quraysh and Bedouin Arabs) such as they were at the time. Once the divine manifested itself - in the form of the Qur'anic word - among humans and was launched by the Prophet, as the bearer and messenger of that word, into human history, everything in Islam is undeniably historical.

The Need for Reformation & Renewal: Towards A Humane and Practical Islamic System of Criminal Justice

The socio-cultural milieu of early Islam

The question whether the Kelantan Syariah Criminal Bill (II) 1993 (the Bill) fulfills its claim of divine sanction is at best a non-question for no human interpretation of divine revelation can claim for itself the same status as the revelation itself.

However, the Bill does require our careful scrutiny and close examination for it is the duty of the Muslim *ummah* to ensure that the letter and spirit of the law as contained within this Bill do not contravene the ethical principles of justice and equality of the law as required by the *Qur'an*.

There is no doubt that *shari'a* principles which are explicitly contained in the *Qur'an* are divinely-sanctioned but it is another thing to claim that the interpretation of those *shar'ia* principles by the Committee which was appointed by the state government of Kelantan into an instrument of law for legislation (i.e. as contained within the Bill) is divine.

Before any scrutiny of the Bill can be made, one point must be made clear. Islam asserts a universal claim and is not confined to any particular ethnic or national group. But Islam spread to the far parts of the earth after the establishment of a *Pax Islamica* in the Hejaz or Arabian peninsula.

Nevertheless, it cannot be disputed that Islam was originally an "Arab religion for Arabs" [among others see, Maxime Rodinson, W.M. Watt, M. Hodgson], a characterisation still generally accepted today. For example, Bassam Tibi (1988) reported that at a conference in Cairo in 1979 he followed an interesting debate between Mukti Ali, an Indonesian scholar of religion who presented a paper entitled "Islam and Indonesian culture", and Arab scholars from Al-Azhar University. For Mukti Ali there was no inherent contradiction involved in holding fast to Islam as a religion and to Indonesian culture as his national and cultural frame of reference, whereas the Arab Muslims uncompromisingly insisted on the essentially Arab character of Islam.

The Pakistani Islamic scholar Fazlur Rahman too in his writings maintains that the thesis that Islam is a national religion of the Arabs is totally unacceptable since Islam, in his opinion, has a univer-

sal claim. This is correct but it must not detract us from acknowledging the contingent historical and socio-cultural context of early formative Islam. Before anything else, we need first to deal with the historical framework and socio-cultural milieu from which Islam originated, in which it was launched.

[The following is a summary of the chapter by Irfan Shahid, "Pre-Islamic Arabia" in Holt, Lambton & Lewis eds. 1970 *The Cambridge History of Islam* Vol. 1, 3-29].

The pre-Islamic Arabs were polytheists, lived in segmented tribal units, and possessed no institutionalised centre. Two forms of social structure existed side by side. In Mecca a mercantile centre developed within which the ethnic group of the Quraysh formed a stratum of wealthy merchants. By contrast the primitive bedouins living in the desert maintained themselves materially by robbing trading caravans. The Quraysh of Mecca worshipped three main female goddesses, Allat, al-Uzza and Manat.

In the sixth century (C.E.) the civilised world was dominated by two world empires, the Roman Byzantine and the Persian Sassanid. The Arab of this period were called Saracens because they lived in tents (Greek: *skene*). They lived primarily from the spoils taken in the plundering of merchant caravans, which was a form of acquisition and conquest called *ghazu* but which, however, prohibited the killing of human beings.

The bedouins possessed neither legal norms nor a central state power. Human lives were protected, as it were, through the institution of the vendetta. A bedouin avoided killing in order to avoid jeopardising his and his family's lives by acts of blood vengeance. The harsh life of this people precluded the rise of indigenous art. Poetry, for example, was considered propaganda. The poet acted as the bard of his ethnic group and not as an independent artist. Thus the bedouin had a low level of aesthetic development. Perhaps the institution of the vendetta best explains the morality of the bedouins, which Rodinson calls "tribal humanism". The bedouin was unfamiliar with abstract thinking. "He is a realist and the hard life of the desert has given him little preparation for reflection on the infinite". In order to avoid becoming the victim of *ghazu*, merchant caravans paid off the bedouins, and only a strong state could neutralise the danger from *ghazu*. According to

Bassam Tibi, the revelations the Prophet (Muhammad s.a.w.) brought became a new ideology which was able to function as a "mobilising" force because it corresponded to the demands of the period for a uniquely Arab, monotheistic ideology.

N.B.: The history of the founding of the Islamic religion is not simply a religious history but is also synonymous with the establishment of a *Pax Islamica* and thus with the birth of a new legal tradition, as is documented by historical *shar'ia*.

The Reform of Islamic Law and the Potential for Flexibility in the Islamic Notion of Law

The history of Islamic law so far may be divided according to Coulson's [N.J. Coulson, 1978] research into three phases:

The first phase, comprising the course taken by the founding of the Islamic religion from the 7th to 9th centuries, may be described as the formative phase, during which a coherent Islamic legal system was developed.

The second phase, from the 10th to the 20th centuries, documents the rigidity of this law, inasmuch as reality was seen as being determined by law, which claimed to be valid as divine truth for all times and was in no respect to be modified by history.

Only in the twentieth century, after the formation of national states in what is now an international society, has a third phase been entered in the historical development of Islamic law. This phase has come about because modern nation states have been unable to cope with their system and its environment with the aid of classical Islamic law.

However, this problem did not arise for the first time in the 20th century. Even during the golden age of Arab-Islamic civilisation particularly in the period between the 9th and 11th centuries, before the collapse of the Arab Islamic empire in 1258, new and complex social and economic structures that could not be regulated by means of the then existing *shar'ia* evolved.

This difficulty was resolved often by using a method characteristic for Arab Islamic history: through the legal circumvention of a legal dogma that was unlimited in its validity, namely by means of a new type of law known as the *hiyal* literature. *Hila* (plural *hiyal*) means legal dodge in Arabic, in other words, a way of circumventing

a legal norm by legal means (or better known as legal fiction).

Clearly, the behaviour of people who believe in an immutable dogma must in the course of the centuries deviate from dogma, if that dogma is not newly formulated and adapted to suit new conditions. But because that dogma claims not to be historically conditioned, and because it conceives of itself as eternally valid, a new restructuring would contradict the essence of that dogma.

But circumstances have changed, history and humanity have not stood still. Therefore these questions need to be raised:-

Must we still be bound by the constraints that limited the efforts to actualise the message of Islam within the earlier historical *ummah*? Surely all the changes that have led to the emergence of the modern world now shall enable us to do better than that, to strive for the realisation of the essential meaning of Islam as originally revealed in the Meccan verses? Should we not endeavour so that the essential message of Islam (for justice and equality) can now be given a far more general, profound, and truly universal expression in a form that was not possible under the constraints and circumstances affecting the formation of the first *ummah* in Medina?

Islamic Universalisation: Beyond Conventional Ijtihad

If we recognise and accept the argument that the paradigm in which historical *shari'a* was fashioned was rather limited, narrow and even selective, governed by the socio-political constraints of the time *(hukm al-waqt)* then it would not be so difficult to consider a paradigm shift or at the very least an enlargement of the political space for the endeavour of ijtihadic reasoning: dare we say an *ummahi ijtihad*? That enlarged space merely means a greater participation of the Muslim citizens in the discourse or debates about Islamisation, not restricted to selected religious scholars or ulama. [To be sure, dogmatic Islam admits of no clergy. Nevertheless a clergy has developed, complete with appropriate religious institutions. However, the Islamic clergy never possessed a separate "church" and never established an autonomous political power over the secular rulers even in the period from the Ummayad era to the Ottoman].

There are two important facts that need to be clarified when discussing the implementation of *shari'a* under this new or enlarged paradigm. First, every member of the *ummah* or Muslim community

needs to be educated on the question of legislation and institutionalisation of rules or regulations deemed to be Islamic by the state or government. All sections of the *ummah*, male and female, must be able to decide and examine the interpretation of the religious principles which form the basis of such laws.

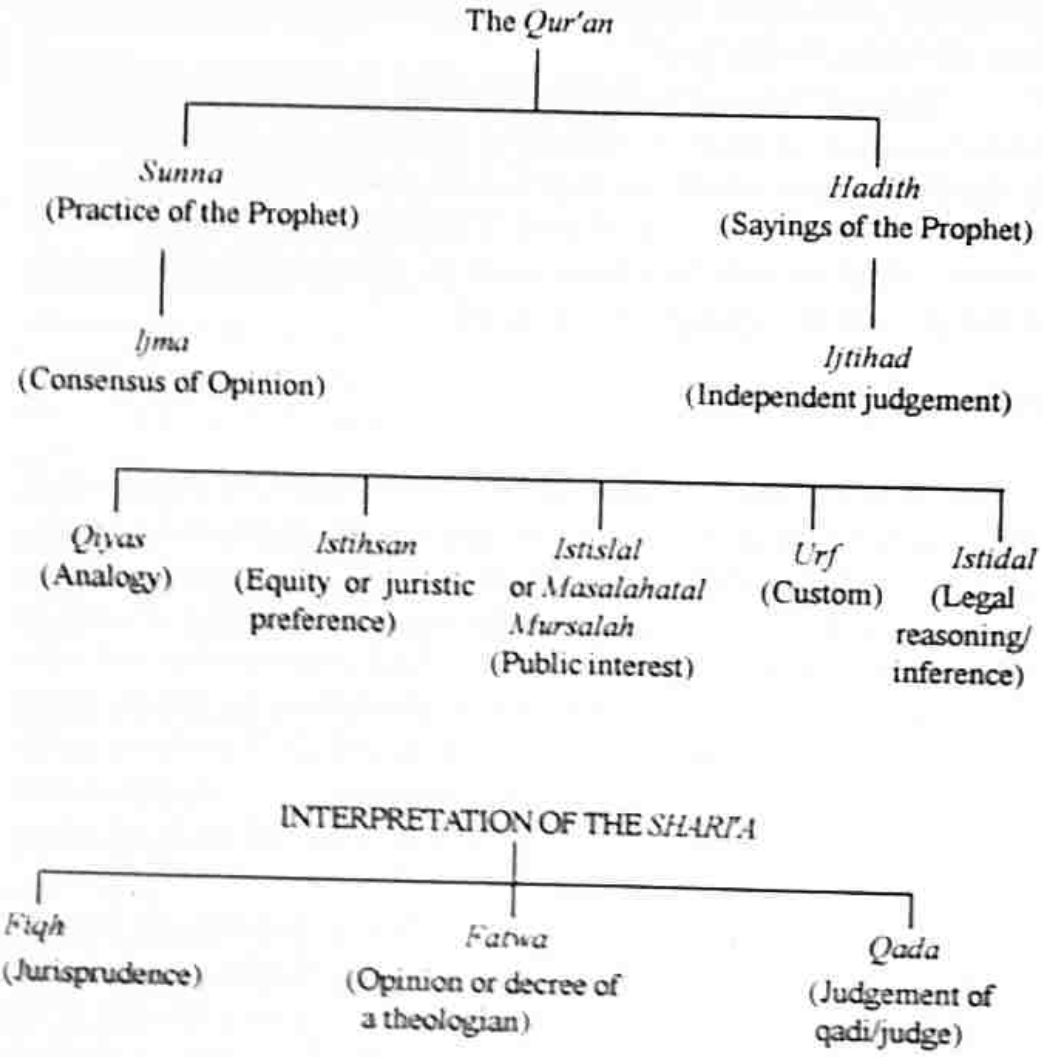
Second, we must recognise that with universal education and democratisation of access to education there must be an enlargement of the ground upon which, in modern times and for modern people, the paradigm must now be refashioned. That paradigm shall include all sections of the *ummah*. Muslim women are indispensable participants in that process of paradigm enlargement.

Concluding Remarks

A social transformation of the Islamic part of the world would today call for a modern notion of law, appropriate to social conditions, since any modernisation of the social structures of the present Islamic countries is bound to fail unless it also aims for a parallel attempt to regalvanize Islamic culture thus enabling the creation of an authentically Muslim culture of modernity. Only reform from the **inside**, therefore, can bring any promise of success. It would also have to be incorporated into similarly structured Islamic institutions. The modernisation of Islam must take place from the inside and be carried out by Muslims themselves.

It is a big task that we Muslims face in initiating an Islamic project of law reform capable of credibly reconciling the various legitimate demands and expectations of the citizenry, of all segments of the population, of the contemporary nation-state. A big task indeed but perhaps not an impossible one. The challenge remains whether Muslims want to recognise that in order to overcome the tension between religion and state, we must devise a rational constitutional and legal system. Such a system can only be derived from the universal and fundamental principles of Islam.

Only on the basis of those enduringly Islamic yet also contemporary and universal principles can a modern Islamic legal and political order be established that will not violate the constitutional and human rights of Muslims and others.



The *shari'a* historian Schact states that it is impossible to understand Islam without understanding Islamic law. He also points out that *kalam* (Islamic theology) scholars have never been able to achieve the same status as *fiqh* scholars in Islamic history. Semantically *fiqh* means science, but juristic science is science par excellence. The term *'alim* (pl. *ulama*) means scholar in Arabic. In Islamic history, the *ulama* have always been the guardians of legal Islam, which has been in a state of permanent antagonism with the very spiritually oriented Sufi *tariqa* (Islamic mysticism) Islam but has nevertheless always managed to keep the spiritually upper hand.

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5

EVIDENCE OF WOMEN (AS WITNESSES), *DIYAT* AND APOSTASY

Salbiah Ahmad

Sura al Baqarah 2:282 states: -

> Whenever you take credit for a stated term, set it down in writing. And call upon two men of your men to act as witnesses; and if two men are not available to you as witnesses, then a man and two women from among you, so that if one of them should make a mistake, the other would remind her.[1]

I have taken the liberty to quote the full text of 2:282 for the simple reason that the first and the last lines are usually cut off in any discussion on women as witnesses. These lines are important in that they contextualise the operation of the words in between those lines.

In Muslim jurisprudence, both women and men are capable of giving evidence. **Jurists have however not allowed women to give eyewitness evidence (*shahadah*) in *hudud* and *qisas* and have insisted that the eyewitness evidence of two women are equal to that of one man** (in all other cases). In *zina*, four adult male eyewitnesses are required to establish the offence which attracts *hadd*. This is echoed in clauses 40, 41 of the Syariah Criminal Code (II) 1993 of Kelantan.

Two women-one man rule

2:282 does not equate the evidence of two women equal to that of one man. The context of this verse relates to a written loan agreement. At the time of its revelation, the women were not expected to deal in business and financial transactions. This can be seen in the example of Khadijah (r.a) the wife of the Prophet Muhammad (s.a.w). She left the charge of her business affairs to him.

2:282 states that it is important to have a loan agreement in writing. The written loan agreement can be witnessed by a man or by two woman not because two women are equal to one man, but because if the woman witness errs or forgets, the other was needed, not to give evidence, but to remind her. The universal principle behind this verse is to ensure that justice is done, not that the evidence of two women is equal to that of one man.

Despite the social constraint the Arab women faced at that time in financial transactions, the *Qur'an* recognised the potential of women as witnesses.

No women as eyewitness rule

Other than 2:282, no other verse in the *Qur'an* makes a distinction between men and women in witnessing nor a distinction between men and women in *hudud* and *qisas* (4:6, 4:15, 5:106, 24:4, 65:2).[2]

It is a historical fact that the eyewitness account of Naila, wife of the caliph Umar (r.a) was accepted in the murder of the caliph Umar (r.a) and Ali (r.a) enforced the *hadd* punishment on the murderers.

We are often advised that women are disqualified from becoming witnesses especially in *zina* to 'protect' them from shame and discomfort in having to testify in court.[3] As this has little support from the textual sources, it would be dangerous to assume this as overriding the original intent of the *Qur'an*: anyone who is capable of witnessing has the right to be a witness.

Witness evidence in rape cases

Our life experience which is the observable reality, tells us that women are not usually raped in public. There is thus little hope that the rape survivor can prove rape through eyewitness evidence. The bur-

den is further compounded if the rape survivor is presumed to have committed the *hadd* of *zina* if she is found to be pregnant or have delivered a child when she is unmarried under clause 46(2) of the Syariah Criminal Code (II) 1993 of Kelantan.

The intent and spirit of the *Qur'an* in insisting on four eyewitnesses is in relation to slandering a woman or falsely accusing her of *zina* (that a woman had unlawful sexual intercourse on her own free will).

Sura An Nur 24:4 states: " And those who launch a charge against chaste women, and produce not four eyewitnesses (to support their allegations) flog them with eighty stripes and reject their evidence.."[4] This verse was revealed at a time when Aishah (r.a) was led home (on a camel) by a Companion of the Prophet Muhammad when she was left behind on an expedition. This incident became the source of a false and malicious rumour.

The presumption of *zina* is a direct perversion of the original intent of the *Qur'an* in 24:4

It is submitted that the presumption of *zina* in clause 46(2) is itself a subversion of the intent and purpose of the *Qur'an* in 24:4. It equates rape with *zina* and it circumvents the production of four eyewitnesses to prove *zina* (consensual intercourse on the part of the rape survivor). Unless the rape survivor confesses to *zina*, the case cannot be made out against her by pregnancy alone.

Rape has to be proved differently and it is submitted that the rape survivor's testimony should itself be allowed. She is her own witness to the sexual violence.

***Diyat* for women**

Diyat is compensation in cases of death or injuries. Compensation for death/injuries can be claimed by the victim or the victim's family in substitution for *qisas* (retaliation/retribution).

The amount varies depending on the severity of the crime (death or nature of the injury). This is developed by juristic opinion.

As regards *diyat* of women there is *ijma'* (consensus) opinion that it is half that of a man. There is nothing in the *Qur'an* or *Sunnah* to support this view. At best, the view stems from the idea that the

male is the provider of the family.[5] This idea is certainly subject to debate in the Malaysian context where women and men are (increasingly) providers on a partnership basis whether in the traditional agrarian society, where both work in the fields or in the urban setting. Our concept of *harta sepencarian* is reflective of that partnership.

While the Syariah Criminal Code (II) 1993 of Kelantan does not expressly state that the *diyat* of women is half to that of men, it arises by implication in clause 2(i) read with clause 62.

Apostasy and death

The *Qur'an* deals with apostasy in several verses: e.g 4:90, 5:59 and 16:108. The verses do not prescribe the punishment for apostasy.

Hadith literature is often cited as supporting the punishment of death. The most celebrated of these relates to the case of the 'Ukl tribe. A band of them came to the Prophet in Medina and announced that they had accepted Islam as their faith. When they were taken ill, the Prophet advised them to live with the Muslim herdsmen. When they recovered from their illness, they disclaimed Islam and killed the herdsmen and stole their camels. They were captured and executed.

The extremely harsh punishment was not just for disclaiming Islam as their faith, but also for robbery and murder. There was also the question of security of the state (Medina). The case of the 'Ukl tribe is often cited for *fasad fi al-ard* (revolution on earth) which is more than just a disclaimer of belief.

Today the charge of apostasy seems to be extended to even questioning the choice of juristic opinion upon which the Syariah Criminal Code (II) of Kelantan is based. This is not a case of belief or disbelief in Islam as a faith — it is a serious political issue.

Endnotes

1. Taken from Muhammad Asad (1990), *The Message of the Qur'an*
2. Other than 5:106 (property) and 65:2 (divorce), other verses mention *huma* which grammatically includes both genders. See Aftab Hussain (1991) pp 242-289 for clarification to 5:106 and 65:2.

3. Tun Salleh Abas and Haji Abdul Hadi Awang on 17 October 1993 in the workshop on the Kelantan Bill in Concorde Hotel.
4. A Yusuf Ali (1983), *The Holy Qur'an*. Translation and Commentary
5. Bassouni (1982), p 207

Part 2

VIEWS ON *HUDUD* LAWS

6

THE PAS VIEW

Proponents of the Kelantan Syariah Criminal Enactment have organised public forums and published several books to explain why Muslims must accept *hudud* laws. They have also reached out to Malaysians of other faiths to quell expected fears. The argument for non-Muslims is based on the simple rationale that Malaysians are by and large law-abiding, family-loving and religious. Because of this, all Malaysians will eventually accept *hudud* because its laws protects people and their property and this can only enhance their peace of mind.

We list here the main reasons offered by PAS to persuade Malaysians to accept *hudud*:-

1. *Hudud* laws are God's laws and this is stated in the *Qur'an*. Muslims must therefore implement and abide by such laws for the betterment of humankind.

> "Hence, judge between the followers of earlier revelations in accordance with what God has bestowed from on high. And do not follow their errant views; and beware of them, lest they tempt thee away from aught that God has bestowed from on high upon thee. And if they turn away (from his commandments), they know that it is but God's will (thus) to afflict them for some of their sins: for, be hold,a great many people are iniquitous indeed. Do they, perchance, desire (to be ruled by) the law of pagan ignorance? But for people who have inner certainty, who could be a better law-giver than God?'
>
> *Sura al-Maidah* (5:49-50)

2. Muslims have no choice but to accept *hudud*. They cannot pick and choose what they consider reasonable or sensible in Islam

and leave out the rest.

> "Now whenever God and His Apostle have decided a matter, it is not for a believing man or believing woman to claim freedom of choice insofar as they themselves are concerned: for he who (thus) rebels against God and His Apostle has already, most obviously, gone astray."
>
> *Sura al-Ahzab* (33:36)

3. Man-made laws have loopholes. Why rely on such laws which are imperfect when God provides us with His laws?

4. Crimes in all forms are becoming more serious. The prisons are overcrowded and a heavy financial burden on the State. Under *hudud*, these problems will be reduced considerably because once an individual is tried, convicted and punished, he or she is released.

Hudud laws are problematic in some countries because individuals abuse the laws.

5. Those who question the laws are not necessarily bad Muslims; they are merely ill-informed. They are influenced by the liberal and immoral West. They are swayed by the belief that everything must be logical. For such people, *hudud* laws should be rejected because the West regards punishments for such laws to be barbaric.

6. Those who reject the laws are apostates.

7. *Hudud* laws are only meant for Muslims.

8. The laws will make everyone safe. In Saudi Arabia,, for instance, investors are not fearful of *hudud* laws. Instead they feel safe doing business in that country knowing that criminals will be dealt with severely.

The reason why investors are not coming to Kelantan has nothing to do with *hudud* laws, they are actually prevented from investing in the State by the Federal Government.

9. In time, non-Muslims will see the value of implementing

hudud laws because they protect the public, prevent crimes and provide just punishments for convicted persons. Under the administration of *hudud*, reform programmes will be made available for offenders.

10. *Hudud* laws should be implemented even though the majority of people do not understand the laws. Take income-tax laws: do most people understand them? If they cannot comprehend the intricacies of income tax laws and yet abide by them, they should be able to do the same for *hudud*.

7

THE SEMANGAT 46 VIEW

Tengku Razaleigh Hamzah

Thank you and welcome to our seminar. The aim of this seminar is to open discussion on the proposal by the government of Kelantan to implement the Islamic criminal law in the state.

The proposal generated a lot of controversy because it worried certain groups of people who questioned the consequences of the implementation of such law. At the same time there are groups who want the law to be implemented without delay. Also there have been criticisms about the proposal that have irritated certain quarters.

As a Malay-Muslim based political party, Semangat 46 sees the proposal to implement such a law as a very important development in the history of our government and politics. It has a tremendous implication and its implementation can change the type of government and culture of our society. We are of the opinion that, although God's law is final and should not be questioned, the general public must be given the opportunity to inform themselves about the proposed law. It is for this reason we believe that before such law can be implemented, the public has the right to voice their opinion and criticism.

Since independence, Malaysia has practised the legal system based on the present constitution. We should not simplify matters by saying that our constitution is only a manual of statecraft left by the colonialists that has nothing to do with Islam and thus should be ignored. On the contrary, the promulgation of our constitution has its

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This speech was delivered in Bahasa Malaysia on October 17, 1993 at the first public forum organised by Semangat 46 on *hudud* laws in Malaysia. Tengku Razaleigh is the president of Semangat 46.

history. This includes the history of the struggle of the Muslim-Malays who rejected the Malayan Union and accepted the tradition of consultation and compromise among the various groups that existed at that time.

We cannot say that our constitution is completely a secular one. This is because in a totally secular system, there is a complete separation of religion and politics. (In our case) this complete separation does not exist. Although Islam is not the main source of all our laws, our constitution does not completely ignore Islam. Islam as the religion of the indigenous people of this country has been given a special status. Since Islam is recognised by the constitution as the religion of the Federation, there is a wider scope for its expansion. This shows that our constitution is accommodating, being a social contract between the various groups, various entities, races and beliefs of the people of this country.

However, it must be admitted that the basis of our legislation is very much influenced by Western legal thought whose roots are not to be found in any of the ethnic or religious groups of this country. Our legal system does not have its origins in the Islamic legal system although Islam is the religion of the indigenous people of this country, nor does it originate from China or India, the countries of origin of the other groups of people of this country. This is to say if there are those who argue that Islamic law is alien to them, then they must also accept the fact the Western law is as alien.

For the Malays, the implementation of Islamic law is nothing new. It has been there for a long time. This is due to the legalistic nature of the Islamic religion which, like other religions of the Book, has its own regulations. These rules are known as the *Shari'a*. The *Shari'a* is not only a set of what is known as Islamic law, but covers a wider system of values and ethics. *Shari'a* is the guiding factor in the development of Islamic civilisation. In theory, the *Shari'a* includes all aspects of life, including the personal, family, social and political. In a society where Islamic teachings are practised, it can be seen how the *Shari'a* determines the worldview, social interactions and the behaviour of its members. That is why during the time when Islam exercised great influence on Malay society, many Malay states implemented Islamic law which was a part of the *Shari'a*. This included laws as prescribed in Islam regarding criminal offence such as theft, killing, intoxication and adultery.

With the coming of colonialism, most of the practices disappeared. Western liberal thinking which regards religion as an individual matter and has nothing to do with state influenced our legal system. This process continued even after independence. The implementation of Islamic law is restricted to family administration and certain criminal offences. These laws are administered by a special court known as the *Shari'a* court which has limited authority.

Although the existing legal system of this country originated mainly from the West, it has become a part of the life of the people of this country. It acquired legitimacy through overall public acceptance of its regulations. If we observe closely, we will find that our daily life, from dawn to dusk, is very much regulated by the existing laws. As a matter of fact today's seminar has to go through the same legal process based on the Western system. That is why many are of the opinion that any radical effort towards changing the present legal system will face an uphill battle because it has become a part of our multi-racial and multi-religious society.

The difficulty in changing the present system to another is due not only to society's reluctance to accept change, but also due to the absence of a dominant ethnic or religious group in the law-making body which is the Parliament. We must accept the fact that our society is a multi-racial one. Other ethnic groups who do not share our faith will definitely feel concerned about the possibility of implementing Islamic law and will view it as a way of forcing them to accept the religion. Moreover, those who are hostile towards Islam will always oppose anything which bears the name of Islam. That is why we must at the same time try to convince non-Muslims that Islam, in accordance with the *Qur'an*, does not advocate the use of force and that we uphold this principle.

However, political development in Malaysia reveals increasing interest among the Malays who make up the dominant group in the government of this country and who want to see the teachings of Islam practised fully. Although this interest existed for a long time, it became more apparent only in the mid-seventies. The rise of the world Islamic renaissance and the many writings about Islam which gave a new lease of life to the teachings of Islam greatly changed the thinking of Malay-Muslims in this country. Demand for the total implementation of Islam in the social and political life is such that it must be given due attention.

This demand is difficult to refuse because it involves basic faith and has an emotional appeal which can grow out of hand. In many Muslim countries , rejection of this demand resulted in prolonged conflicts which resulted in the loss of human lives and property . Fortunately we do not have to endure such experience . The ability of our people to solve conflicts amicably reflects our maturity and awareness of the importance of peace

In our country, there are many obstacles in complying with this demand, but the majority of our political actors still believe in democratic means and let the people decide through the elections. This is the privilege enjoyed by supporters of Islam in Malaysia. The majority of them still have faith in democracy and will let the people decide as to who should have the mandate to implement the teachings of Islam as required.

In relation to this, as President of Semangat 46, I would like to affirm our commitment to see that Islam is practised in this country. As a political party which represents the Malay-Muslim group, we will continue our effort to ensure that Islam is elevated to the highest position. We are convinced that Islam is the religion for all ages and that its teachings must be followed.

However, in trying to uphold the sacred religion of Islam, we are also careful not to accept anything and everything that labels itself Islamic. We do not want Islam to be manipulated for the interest of an individual or a group to acquire power. Throughout the history of Islam, never had the *Shari'a* been so much abused, misunderstood and wrongly implemented as it is today. It is used to justify oppression, defend dictatorship and feudalism. In fact there are cases where Islam is used to defend inequality, abuse of power, oppression of women and corruption on the part of the leaders. These are lessons to be learned so that what happened in other countries will not be repeated in this country. In our opinion, the purity of Islam lies in justice, freedom and the love of mankind which is a part of its teachings. We do not want the image of Islam as a religion that emphasises moderation, love and harmony in society tarnished as a result of harsh punishment imposed without taking into consideration the political and social environment of the society. We are of the opinion that apart from punishment and laws, other aspects of Islam such as tolerance, respect for human rights, social justice, abolition of corruption, responsible government, eradication of poverty and the fight against misuse of power must also be given equal

emphasis. That is why in Kelantan, we would like to see the establishment of a mechanism such as ombudsmen to act against corruption. We want Kelantan to be the model of a state government where its leaders are not afraid to be investigated in case of abuse of power. In our opinion, these and any other effort to islamise other branches of administration must done simultaneously.

The implementation of Islamic law must not be considered solely from its implementation aspect, but how the law can solve the problems of today's society. If we can prove that Islamic law is able to solve the problems of our society, then we are able to project the truth about Islam as the religion relevant to all times. On the other hand, if the implementation of the Islamic law results in more problems in our society because those who execute the law are weak and unjust, and its people ignorant, then Islam will be despised, and they will be held responsible for bringing disgrace to Islam.

Besides, we are also faced with the dilemma as to what must be given priority in Islam. Is it the criminal law or the constitution as a whole? Can Islamic law function effectively in a country in which the system of government is not based on the philosophy and the teachings of Islam? Can Islamic law achieve its objective of bringing goodness to its followers if our education system, our mass media, our economic distribution and social life do not conform to Islam? This is why many have posed the question as to how Islamic law can bring justice if it is implemented in society where its social structure, its legal and political system is not based on Islamic teachings. This is the dilemma that we have to face and overcome. These are the issues that we must consider and discuss thoroughly today.

The strategy of implementing the law itself depends very much on the interest shown by the federal government with regard to its implementation. Without their accord and the support of members of Parliament, the process of implementation will be difficult. This is due to the provision of the law which does not allow a state government to implement laws not in accordance with the Federal Constitution. Since the federal leaders have expressed support for the proposed *shari'a* criminal law, it is hoped that they take the initiative to forward the matter to a higher level.

These are the issues that we must discuss today. We have here with us leaders of PAS who are the promoters of Islamic law in Kelantan. Also present are legal expert consultants, including those in

Islamic law .

As the organising party for this seminar, I thank each and everyone involved in the seminar. May God bless our effort and I pray that this seminar will bring benefit to all present and to all the people of this country.

Wabillahi taufik walhidayah, wassalamu'alaikum warahmatullahi wabarakatuh.

Part 3

THE GOVERNMENT'S POSITION

8

ISLAM GUARANTEES JUSTICE FOR ALL CITIZENS*

Datuk Seri Dr Mahathir Mohamad

Every time we speak or do something, we will begin with the name of *Allah*, Most Gracious and Most Merciful.

While we mention attributes of *Allah S.W.T.*, we find there are people who do not take into account whether such qualities should be practised and displayed. On the contrary, when they come across interpretations of the *Qur'an* and *Sunnah* that are not in line with attributes of *Allah S.W.T.*, they do not question whether these are indeed teachings, or misinterpretations of the *Qur'an* and *Sunnah*.

Some of us do not endeavour to abide by or comprehend fully the attributes of *Allah S.W.T.* Some of us are neither merciful nor compassionate. At the same time, some of us act unjustly towards other Muslims and the rest of the human race. These people do not regard harshness and injustice as against the teachings of Islam. Because of this, Islam is defiled and its followers are not respected.

Islam was revealed to mankind through the native Arab language. However, it is not possible for every Arab to understand the teachings of Islam just because he/she understands and speaks Arabic daily.

To understand the teachings of the *Qur'an* and the Prophet's *Sunnah*, all Arabs need to refer to interpretations and clarifications by those who have studied the religion, read and interpreted the *Qur'an* and *Sunnah*. However, the interpretations and clarifications of these experts depend on their very own understanding and comprehension, or *fiqh*, of what they have read in the *Qur'an* and *Sunnah*. What is

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* Datuk Seri Mahathir Mohamad is the Prime Minsiter of Malaysia and President of UMNO. This speech was delivered in Bahasa Malaysia at the Arab Language Centre in Nilam Puri, Kelantan on March 3, 1994.

then passed on to other Arabs would depend on their (the Arabs') own translation of these interpretations into everyday Arabic.

This exposes them to two possibilities. If the understanding of the person who conveys the teachings of the *Qur'an* and *Sunnah* is wrong, then their teachings are wrong. Secondly, if the translation into everyday Arabic is wrong, then the teachings are wrong. The possibility of errors occurring increases when non-Arabs who understand Arabic try to convey teachings of the *Qur'an* and *Sunnah* in a language other than Arabic. In this case, the understanding and interpretations, besides the translation, may be wrong.

The possibility of errors occurring when a non-Arab conveys Islamic teachings in a language other than Arabic is the same as when an Arab who is fluent in a language other than Arabic tries to convey Islamic teachings through lectures or books in that language. Therefore, nobody can claim that his teachings are more accurate just because he understands Arabic. What he is teaching may be just as erroneous as the material that is written by an Arab, in another language. A person who studied Islam but does not understand Arabic is not always wrong compared to another who understands Arabic. Everyone is susceptible to errors in understanding or interpretations or translations, either due to himself or *ulama*.

It is extremely arrogant for Malays who understand modern Arabic to claim that only *their* understanding and interpretations are accurate; that whoever studied the religion through the interpretations and translations of other *ulama* in another language is inaccurate and unacceptable. Every time they explain their interpretations in a non-Arabic language, they can also make mistakes just as a person who writes religious books in a language other than Arabic might.

The differing interpretations on the teachings of Islam have been going on for a long time, even among those who speak Arabic. This is due to the general guidelines found in the *Qur'an*, meant for differing situations. Therefore, the interpretations of these verses through the process of *ijtihad* can differ according to the *fiqh*'s understanding or interpretation and depending on the situation or era.

Differing interpretations do not mean that one is correct while the rest are all wrong. All of the interpretations may be correct, or all of them may be wrong. And among these interpretations, there may be some that are correct while the rest are wrong. It is possible that an earlier *ijtihad* is nullified or modified by a later *ijtihad*. Only the *Qur'an*

and *hadith* that is *sahih* (valid) cannot be altered. *Fiqh* scholars can have different understandings on the same Qur'anic verses or *hadith*.

Differing interpretations of the *Qur'an* and *hadith* resulted in the formation of many *mazhabs*. No particular *mazhab* can claim that only its teachings are in line with Islam while the rest are not.

Although there are teachings that are outrightly deviationist in nature and unIslamic, *mazhabs* that are different but recognized cannot simply be proclaimed as unIslamic.

What is prohibited in Islam is divisions among its adherents. In *Sura Al-Anaam*, Verse 159, *Allah S.W.T.* decreed:

> "Lo! As for those who sunder their religion and become schismatics, no concern at all hast thou with them. Their case will go to *Allah*, who then will tell them what they used to do."

Claims by PAS that whoever denounces their *hudud* law is an apostate are totally against the teachings of Islam which gives leeway to differing interpretations, since we are allowed to reject or accept any of these interpretations.

PAS *hudud* law is the result of the understanding, or *fiqh*, and interpretations of the *Qur'an* and *Shari'a* by PAS people, besides being in the interest of a political party. It does not become part of the teachings of Islam that must be accepted by all Muslims. Neither does it come under the teachings of Islam that resulted from the understanding and interpretations of *imams* who are recognized by either the Sunni or Syiah Muslims.

We do not deny the fact that there are people who can become apostates. There are certain conditions and actions that — if done by a person — will allow us to proclaim him/her as an apostate. Rejection of PAS law is not included in this condition. In fact, PAS law does not include the offence of rejecting this law as part of committing *irtidad* or *riddah*. This is evident in Section 23 of PAS law.

Hence, PAS cannot claim that its law is accurate and part of Islamic teachings. Even the validity of PAS law cannot yet be ascertained. They may be judged against the teachings of Islam.

There is no better way to determine whether PAS *hudud* law in Kelantan comply with Islamic *hudud* law, than to make an evaluation of the fairness of the verdict meted out by this law.

If the verdict is fair, then it is likely to have been based on

Islamic law. If the verdict reached is based on PAS law, then it is clearly unfair and not possible to have been derived fully from Islamic law, which takes into consideration the benefit of the *Shari'a* to the public. The question of whether the sentence imposed according to Islamic law is more severe than that of current law does not arise here.

For example, let us consider a rape case in which an unwed woman was raped. She makes a report against the person(s) who has/have raped her, whom she knows. According to PAS law, i.e. Section 10, what will be the outcome of such a case?

To verify that she was indeed raped and did not willingly commit adultery, four witnesses are required, who should not have committed major sins and do not habitually perpetrate minor sins.

Such witnesses are certainly difficult to find. A rapist will not rape his victim in front of a witness. He surely does not wish to expose himself to the heavy sentencing that will be imposed on him and will not do so, even if the sentence is light.

Witnesses of noble character will simply not allow such an act to happen before their very eyes. It would be irresponsible of them should they let such a heinous crime take place without them so much as lifting a finger. If they do not try to help the victim, they are guilty of collaborating with the rapist. This means they too are guilty and do not qualify to become witnesses.

Only if they are forced to witness and are threatened by the rapist or his accomplice(s) can they witness the crime without doing anything. It is not possible for such a situation to occur except during a war, when rapes take place openly, e.g. in Bosnia. In this case, the Serbs are the rapists but even then, they cannot be punished according to PAS *hudud* law since they are non-Muslims.

Clearly, the rape victim who lodged a report will never be able to get any witnesses who is acceptable under PAS law. Therefore, rapists cannot be prosecuted under PAS law.

PAS law also does not accept circumstantial evidence, i.e. indications on the victim that prove she has been raped. PAS law does not accept marks or injuries at the affected areas or indications on the rapist to show that his victim resisted him to protect her chastity.

Due to the absence of four witnesses who are acceptable by PAS law and the rejection of circumstantial evidence, the rape victim's report and allegation will be rejected while the rapist escapes prosecution.

Meanwhile, an unmarried woman who gives birth to a child will be considered as having committed adultery. Since she is not able to prove that she had been raped, she also will not be able to defend herself from being accused of committing adultery when she becomes pregnant and delivers her baby. According to PAS law, an unmarried woman who gives birth to a baby is guilty of adultery and will be punished for this crime. (Please refer to Subsection 2, Section 46 of PAS law.)

The sentence in this case is severe. If the person who committed adultery is married, he/she can be stoned to death. Otherwise, he/she can be whipped 100 times. There is a new view on stoning a married person to death, but this is not considered.

Can Muslims accept punishment for the rape victim while the rapist goes scot-free as fair? We can say that women should take care of themselves and not go anywhere without being accompanied by their *muhrim* (close relatives prohibited from marrying them) to avoid being raped. But we know that however careful they are, there are women who will be raped. They can be abducted while in the company of their *muhrim* — and then raped.

Is it fair to punish the victim of a crime while the criminal escapes prosecution? Anybody in his right mind can see how unjust and cruel this is. Will women feel safe living in a society that punishes them if they are raped? Can such a society be peaceful? Will there be any justice in such a society?

Islam is a religion that brought justice to the Arabs during their time of ignorance and to the rest of the Muslims in the world. Islam guarantees justice in a Muslim society and for all who come under the jurisdiction of a Muslim country. Injustice has never been and will never be a part of Islam. Islam upholds and maintains justice. Cruelty is not a part of Islam.

Allah S.W.T. says in *Sura Saad* verse 27:

"And We created not the heaven and the earth and all that is between them in vain. That is the opinion of those who disbelieve. And woe unto those who disbelieve from the Fire!"

And in *Sura Asy-Syura* verse 17, *Allah S.W.T.* proclaims:

"Allah it is Who hath revealed the scripture with Truth, and the Balance. How canst thou know? It may be that the Hour is nigh."

In *Sura Ar-Rahman*, verse 7:

"And the sky He hath uplifted; and He hath set the measure,"

And verse 8:

"That ye exceed not the measure."

Thus, any cruelty that takes place in a Muslim society or nation is not due to Islamic teachings, but because the Muslims or Muslim leaders do not abide by the teachings of Islam or they misinterpret the true teachings of Islam. This often happens, and as a result, Muslims and Muslim countries are backward, disorderly, disorganized and weak.

PAS law is a result of PAS' interpretations of the teachings of Islam. It is not the authentic law of Islam. Neither is it according to the accurate interpretations of Islam. It was studied and then made by people whose understanding of Islam is superficial. Worse still, it was drafted by certain quarters with vested interests that have nothing to do with Islam.

Islam takes into account the *maqasid am Shari'a* ('underlying purpose of the *Shar'ia*') of a country and this was ignored. PAS law is influenced by the political interests of a political party that was established by Muslims who are of equal standing with other Muslims in this country. Time and again, we have witnessed Muslims or Muslim nations deliberately misinterpreting teachings of Islam to serve their own interests. Certainly PAS law which is a product of PAS' interpretations comes under this category.

This is not the first time Muslims have tried to do something unIslamic while pretending to uphold the banner of Islam. It has happened throughout the history of Islam. Otherwise, why do Muslims - who are considered brothers - fight one another? Is war among Muslims not against the teachings of Islam? Yet, everyone claims he is fighting for the sake of Islam and uses the name of *Allah S.W.T.*.

There is nothing wrong with Islamic teachings. Islam has nothing to do with laws that are so obviously unjust as mentioned in the rape case earlier. Injustice cannot take place if teachings of Islam are implemented; if it does happen, it is not based on Islam. It is a lie for anybody to say that injustice is Islam and justice is not Islam.

To make it worse, not only is PAS law unjust; it also causes Islam to be ridiculed by others, tarnishing the image of Islam. Should the PAS law be implemented, the number of Muslims will not increase, but dwindle. In fact, we know that Islam flourished before PAS and its law existed.

The injustice alone is strong enough a reason for us to reject

PAS law as the authentic law of Islam. Besides, PAS law contains other adverse elements and effects that are also unIslamic. For example, in a multiracial country such as Malaysia, the PAS government only imposes the law on Muslims alone.

It is true that, when the Prophet ruled Medina, the Jews were punished according to their own law. But punishment ordained by the Torah is as severe as that by Islam.

When Muslims rule countries that have non-Muslim citizens, e.g. Coptic Christians in Egypt, the law imposed on the Coptics were formulated by the Muslim government based on the latter's studies and interpretations of the teachings of Islam. Therefore, the Coptics were not required to pay *zakat* and *fitrah* (tithe). Instead, they had to pay individual tax or *jizyah*, whereby every Coptic was imposed a certain amount of tax on an annual basis. This was also practised by several Islamic governments earlier. Upon payment of *jizyah*, they are entitled to protection. They can be exempted from military service. By imposing *jizyah*, the tax on non-Muslims is the same as on Muslims. Nobody can complain either *jizyah* or *zakat* as unfair.

This is the law of an Islamic government. However, the implementation varies according to the conditions that prevailed in the country in question. In other words, flexibility is exercised. If other Muslims or Muslim countries neither accept nor implement the *jizyah* system on non-Muslims, this does not mean they cease to be Muslims. They are still Muslims. Only the prevailing conditions of that country can determine whether *jizyah* should be implemented. In this instance, there is a *fiqh* view that says: "Laws may vary due to changes with regard to time, place and situation," while yet another states: "The actions of an *imam* or head of state on the populace depend on *maslahah*." Both of these methods are contained in major principles known as *siyasah shari'ah*.

PAS law will not be applied to non-Muslims in Kelantan, who do not come under the jurisdiction of any holy books. Therefore, man-made laws will be applied to them.

Furthermore, the sentences that will be meted out to Muslims will be far different from that of non-Muslims, under PAS law. Whereas Muslims found guilty of adultery will be stoned to death, non-Muslims who committed the same crime will only be fined or imprisoned for a few years or months. Can we regard death and imprisonment the same as punishment?

According to the Jews' Torah, adulterers will be stoned to death, which is the same as in Islam. This was the sentence imposed by the Prophet on a Jewish couple brought to him on adultery charges. Nobody can claim that punishment on non-Muslims is lighter compared to that of Muslims. In other words, injustice did not occur during the Prophet's reign in Medina.

Once again, it is proven that PAS law is not based on *maqasid Shari'a* at all. In fact, it will only cause discernible injustice, and injustice cannot be regarded as Islam. The different punishment imposed on Muslims and non-Muslims is not Islamic.

PAS law is the result of interpretations of Islamic teachings by PAS people. Nobody has the right to make his interpretations part of the absolute law of Islam. Only the *Qur'an* and the Prophet's *Sunnah* form the basis and source of Islam.

Interpretations done by any other man, even through the process of *ijtihad*, does not become an absolute part of Islamic law and its rejection is not tantamount to apostasy.

We know that sentencing, interpretations or the Islamic point of view with regard to a given matter varies from one school of thought to another and from time to time, even through the process of *ijtihad*. This is even more so in cases where the sentencing, interpretations and views made did not conform to the valid *ijtihad* process.

PAS law is not the result of a valid *ijtihad* process. It was produced to serve interests other than Islam and spurred especially by PAS' political motives. PAS itself admitted that this law was made due to political pressure from UMNO. It was not motivated by Islamic politics, which is different. Hence, PAS law cannot be endorsed as valid from the Islamic point of view.

Unequal sentencing — sentencing that treats perpetrators of the same crime differently, whereby one criminal is penalised severely while the other is lightly punished — is not fair, whether from the Islamic point of view or otherwise. Unjust sentencing cannot be claimed as based on Islam. Injustice cannot occur in Islam. If it does, it certainly does not belong to Islam. PAS' claims that the law they have created will be imposed only on Muslims alone is unfair and therefore, unIslamic.

The Prophet states in a *hadith*: "Verily, the destruction of people of the past was brought about by their deeds of letting go the well-heeled among them who stole, and amputating the hands of the weak

who stole."

Islam is not a religion that simply ignores prevailing conditions or problems faced by its adherents wherever they reside. Neither does it burden Muslims as an individual or as a nation. On the contrary, Islam is a religion revealed by Allah, Most Merciful and Most Compassionate, Who gives consideration to all the problems faced by its believers. Islam neither oppresses nor troubles them. If there are concessions pertaining to acts of devotion, shouldn't the same apply to legal matters?

Allah S.W.T. says in *Sura Al-Hajj*, verse 78:

". . . and hath not laid upon you in religion any hardship . . ."

Hence, a lot of concessions are given in carrying out the teachings of Islam, i.e. in performing acts of devotion and no less in implementing its legal system. For instance, concessions can be found even in practising the five pillars of Islam. A child who has yet to talk and understand is exempted; while a dumb or mentally disabled person need not need recite the *kalimah syahadah* (oath of faith) as long as his/her heart professes it.

In terms of prayers, the situation is taken into account. Laxity is given with regard to time; in fact, prayers can be carried out sooner or later within the specified time, shortened or combined in certain conditions. For the sick who cannot move freely, complete bodily movements are not compulsory when performing prayers. In addition, Muslims can pray lying down, sitting or in a moving vehicle. The same laxity applies to performing ablution. Islam allows "*rukhsah*" to its believers.

The same goes for fasting, payment of *zakat* and *hajj*. Each one of them depends on certain capabilities. It is not wrong or sinful if one does not do it due to unpermitting circumstances, sickness, poverty or any other reason that will create problems or burden oneself should the deed be done. Clearly, these are all in line with the principles of Islam.

Prohibitions on Muslims also take into account the situation and problems faced. Pork is disallowed for consumption. However, since Islam values human life, especially that of Muslims, even pork is considered lawful in the absence of other foods to save one's life. When an emergency exists, normal rulings may be overruled.

Certainly in implementing *hudud* law, we cannot go so far as to endanger Muslims. *Hudud* law aims to establish justice among Mus-

lims for their very own benefit; if this cannot be achieved due to certain circumstances, the implementation may be deferred. For example, during the reign of *Khalifah* Hisyam bin Abdul Malik, the implementation of *hudud* law was delayed for a year. There must be some justification for this postponement. Enforcing *hudud* law to the extent of weakening the Muslims, making them disorganized and oppressed by others is far from being an act of devotion and unlike any other teachings of Islam that clearly allow concessions so as not to burden Muslims. *Allah S.W.T.*, Whose name we invoke time and again as The One Most Merciful and Most Compassionate did not reveal Islam as a religion of cruelty, devoid of compassion.

What makes Islam a burden, cruel and a stumbling block to the well-being of Muslims is the actions of certain quarters who are fanatics, who wish to practise it in a unreasonable manner.

This may be true for other religions that regard acts of devotion which expose its followers to pain and suffering as a test of faith towards that religion. Hence, a lot of events that involve self-inflicted pain are practised. Sometimes, even suicide is considered necessary and meritorious among the fervent believers.

Islam does not include self-imposed suffering as an effort that will bring merit. A lot of concessions are given to the extent that an oppressed Muslim can verbally express acceptance of another religion but still practise the religion secretly. This is the reason why, when the Communists ruled several Muslim countries in East Europe and Central Asia, Islam appeared to have been eliminated. However, once the Communists were defeated, Islam reigned supreme, although decades had passed since its practice was forbidden.

If concessions are given to this extent, does the same principle not apply to the implementation of *hudud* law? Are there not any factors or circumstances that have to be examined? Must *hudud* law still be implemented regardless of the scenario, bringing misery to the Muslims and Islam? Should a law that may further weaken Muslims who are already weak be enforced? Should Muslims who live in countries whose population consists mainly of non-Muslims implement *hudud* law, subjecting themselves for prosecution by the law in these countries? Is Islam not flexible, able to respond to changes that happen to humankind over time and in different places? This is the very characteristic of Islam that makes it ideal for all times and conditions. Prevailing situations are taken into consideration, especially if the Muslims are

weak and deficient. Such a state of affairs may be looked upon as an emergency.

Islam is not an irrational religion which simply dismisses circumstances and how these affects the teachings of the religion. *Allah*, The Most Compassionate and Most Merciful will not torture His servants. It is some *fiqh* scholars and fanatic interpreters in Islam who are irrational. They are responsible for causing Islam to be a heavy burden on Muslims, weakening the latter to the point of failing to achieve success, even for the Hereafter. They nurture other vested interests, for instance, individual politics.

PAS law has to be examined before it can be accepted or rejected by a government that aspires to apply Islamic values, like Barisan Nasional. Certainly, the government cannot simply turn its back on a law that is contended to have been sourced from Islam.

The Barisan Nasional government at the Federal level has taken a long time scrutinizing the law that was passed so easily by the PAS government in Kelantan. This scrutiny has not ended. However, for the sake of providing guidance to the public, its latest results have to be disseminated, to protect the interests of Muslims in Malaysia regardless of party or group. Although Malaysian Muslims are spared from facing external challenges, they are still weak and not able to safeguard their own safety. Undoubtedly, they are still not capable of rendering assistance to oppressed Muslims in other countries. Thus, a government that is responsible towards Muslims and Islam cannot allow any quarters to enforce anything that is related to Islam without first examining the positive and negative consequences on Muslims and Islam. The Federal government shoulders this responsibility and will not neglect it. The government of Kelantan cannot be allowed to proceed with anything that may be in contrast to Islam.

The first question that has to be answered is whether this law was indeed created in accordance with Islamic jurisprudence, i.e. based on *fiqh* methods that are all-encompassing. The brief but accurate answer is, no. All the *ulama* in this country, even in Kelantan, did not participate in studies that gave birth to PAS *hudud* law. What was done was a limited study that cannot be interpreted as appropriate with *fiqh* methods beneficial to the Muslims.

Only *ulamas* from a certain political party, who sympathised with the party, were granted the opportunity to participate. Their standpoint is already known. They are not free to alienate themselves from

their political standing. As such, the teachings of Islam, its interests as well as that of Muslims, no longer take precedence. The interests of the political party exert influence on the thinking and study process. Politics in Islam is mixed up with party politics and hence is not given superior attention.

Hudud law concerns crimes. The *ulama* who are knowledgeable in the teachings and rulings of Islam are not necessarily well-versed in criminology. The crimes perpetrated during the Prophet's era and the circumstances in which they were committed were different from that of today. So was the society in Medina and other Muslim countries where *hudud* law was fully implemented — each one of them was very different from the present Malaysian community. The problems that arise due to the multi-racial nature of the society in this country needs serious and special consideration. The types of crimes committed, besides sentencing under common law, also have to be reckoned with.

To satisfy all these parameters, views and contentions from experts in criminology — not only in Kelantan but nationwide — have to be sought in the process of *ijtihad*. Such a move is imperative since the law to be legislated will involve the whole nation, directly or otherwise. There is no proof that these experts have taken an active part in creating PAS law; in other words, this aspect of the *ijtihad* process was ignored too. The whole consultation process was superficial and did not comply with the proper spirit of *ijtihad*.

Even for this reason alone, PAS law cannot be accepted as compatible with Islam. Its rejection will not make one an apostate — rather, new Muslim converts possibly will revert to their previous faith should the law be enforced.

Studies that will be carried out by the Federal Government on PAS law will focus on all important aspects of Islam. The question of whether PAS law concerning Islamic *hudud* law does comply with, and possibly achieve the aspirations and objectives of the authentic Islamic *hudud* law, will be dealt with.

Secondly, can PAS law guarantee justice for all who are indicted under it? *Hudud* law does not stress on the severity of sentencing in Islam, but rather, to ensure that justice is done. To assume that justice is of no importance in Islam is wrong. The advent of Islam brought justice to the ignorant Arabs and to all Muslims.

PAS leaders, in a simplistic manner, claim their law will not be

forced on non-Muslims. This claim is motivated by political interest. Although the Prophet S.A.W. never imposed Islamic law when trying cases involving non-Muslims, justice is still rendered to all parties concerned, be they Muslims or not. However, if PAS law is imposed on Muslims while normal criminal law is applied to non-Muslims, there will be discernible differences between sentences meted out to Muslim and non-Muslim criminals, who committed the same offence. This is clearly unjust, regardless of the value system or religion.

Based on the studies carried out, it is extremely palpable that PAS law in Kelantan does not comply fully with the law, spirit and attributes ingrained in Islam. It was not based completely on *maqasid Shari'a*. PAS law should therefore be accepted; it should be rejected at this point.

This does not mean that we reject *hudud* law. We are only rejecting PAS law in Kelantan because its interpretations are not harmonious with *maqasid Shari'ah*. It is compulsory upon us to reject anything that is erroneous if we wish to uphold the principles of Islam.

UMNO does not look upon this law as linked to any political party. UMNO only studied the matter from the religious point of view and has not associated it with politics. In reality, everyone should examine and then accept or reject PAS law from the religious perspective. It is a mistake to view Islamic law from the perspective of a political party or to serve the latter's interests. UMNO does not do that.

It is the Muslims in UMNO who reject and should reject PAS law. The Muslims in UMNO have yet to be shown proof that accurate studies were done based on proper *fiqh* and *maqasid Shari'ah*, in creating the law in question.

I speak today as a Muslim who is entrusted with the responsibility of being the President of UMNO. I am also shouldering the position of Prime Minister of Malaysia. PAS law does not merely concern the Dewan Rakyat, although the latter has its functions as stipulated in the Constitution of Malaysia.

The government has to examine PAS law in Kelantan in great detail. A body consisting of Muslims who are scholastic in religion, its rulings and criminology has to be established. They have to be people who have no vested interests other than upholding the principles of Islam. Yet, they must be experts not only in Islam, but other faiths too, besides being well-versed in criminology , and civil and criminal law.

They must take into account prevailing conditions that influence the practice, implementation, acts of devotion and rulings in Islam.

As a government that is fully responsible towards Islam and the Muslims in Malaysia, the Malaysian government will take action to establish the above mentioned body. Meanwhile, PAS law cannot be accepted or implemented by anyone because it still does not conform to Islamic law and it is not the law of the country.

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Part 4

A VIEW FROM THE ACADEMIA

9

SHARI'A EXPERT DISPUTES *HUDUD*

Izman Ismail*

KUALA LUMPUR, Tuesday - The Dean of the Law Faculty, International Islamic University (UIA), Prof. Tan Sri Ahmad Ibrahim, said that a few sections of the Syariah Criminal Enactment (II) Kelantan, must be removed because it is diametrically opposed to the opinion of the vast number of *ulamas*.

According to him, Section 46 (2) of the Enactment is at odds with the *Shafie* and *Hanafi* schools of law and is accepted only by the *Maliki* school together with some *ulamas* of the *Hanbali* school.

"This Section deals with *zina*. Pregnancy and the birth of a child by an unmarried woman is adequate prove for *zina* and the *hudud* punishment can than be passed.

"From the point of view of *ammah*, such a provision without a doubt is an injustice towards women.

"For instance, a rape victim who fails to prove rape because there are not the necessary four eye witnesses," he said when presenting his paper 'The Implementation of *Hudud*' in Malaysia during the Exclusive Workshop for the Clarification of the Syariah Criminal Enactment, here today.

He said that Section 23 of the Syariah Criminal Enactment (II) Kelantan too should be done away with because it is at odds with the provisions to freedom of religion as accorded by Section 11 of the Federal Constitution.

This same Section is also at odds with the right to property as provided for by Section 13 of the Federal Constitution.

Professor Ahmad said, Parliament cannot implement the laws of the Kelantan's Syariah Criminal Enactment because it is under the pur-

view of the state powers with the exception of the Federal Territories of Kuala Lumpur and Labuan. Laws regarding Islam and the Islamic laws can only be promulagated by the states concerned.

"As an example, in the case of Mamat bin Daud vs. the Government of Malaysia, the pettitioner is accused of disturbing the peace of the followers of Islam under Section 298A of the Penal Code.

"But, the accused was freed by the Supreme Court because Section 298A deals with the religion of Islam and as such only the states have the right to promulgate laws of Sections 74 and 77 of the Federal Constitution," he said.

According to him, the State of Kelantan should make every effort to clarify the provisions of the criminal laws of Islam before it is implemented.

The State of Kelantan, too, must make it clear that Islamic laws are to act as a deterrent and not purely as punishment.

"Other than that, provisions such as guardianship as enabling forgiveness for the crime of murder and the burden of proof that is required under the *hudud*, too, must be made clear.

"The provisions for blood money (*diyat*) must be explained as widely as possible because the victims are not differentiated between rich or poor, professional, of a high ranking official or an ordinary worker," he said.

Another scholar of Islamic jurisprudence, Prof. Datuk Dr. Mahmud Saedon Awang Othman, at the sanme workshop, asked that the Syariah Criminal Enactment (II) Kelantan be reviewed so that it is more appropriate to the society, time and place.

According to him, although the code is based on the syariah, it should be reviewed because a number of its provisions are not complete, narrow and give rise to problems.

"As an example, the law of evidence enabling the *hudud*, *qisas* and *ta'zir* under this enactment is too narrow relying only on oral evidence or an oath taken by the accused.

"This means that bayyinah which includes *qarinah* cannot be used. "Kitabah or document too cannot be used and syawahid hal too cannot be used.

"I believe that the narrowing of the law of evidence as used under this enactment is unable to pursue the justice which is required by Islam,"

he said in his working paper entitled The Syariah Criminal Enactment (II): An Analysis.

Prof Mahmud said the provisions of the law of evidence here proves that the Enactment is against Islamic justice and is also regressive.

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*Translated from a Berita Harian article dated January 26, 1994. Professor Ahmad Ibrahim was one of several speakers at a closed-door meeting on *Hudud* Law in Pusat Islam on January 25, 1994. His paper is reproduced in Appendix 2.

Part 5

CONCLUSION

10

BEYOND THE LITERAL

While the Kelantan Enactment has been referred to as PAS *Hudud*, it is in fact the classical law as understood and "enacted" by Muslim jurists over the years, acquired through the methodology used in Islamic jurisprudence. This methodology has been accepted through a political process of consensus (*ijma'*) and *jumhur* (majority opinions). Indeed, in any state today, these juristic opinions form the body of laws after going through the modern legislative processes.

Most states implementing Islamic criminal law by *hudud* would refer to these classical opinions as reference. Thus, we consider it futile to make distinctions between so-called PAS *hudud* and Islamic *hudud*.

Instead, we should look at the legal hypotheses of jurists or scholars which are voluminous and intended by the authors to cover every imaginable (and sometimes unimaginable) event. The most empowering aspect of these works - an aspect not always encouraged and often hidden from public knowledge by the traditional *ulama* - is that they provide spaces for alternative viewpoints to emerge (*ikhtilaf* or differences of opinion). And, by this process alone, the so-called consensus opinions can be critiqued (this is discussed in Part One).

It is this knowledge of the democratic space within Islamic jurisprudence which is vital to building a confident Islamic identity for the majority of Muslims who feel that only the *ulama* can explain the full meaning intended by Allah. While we recognise the expertise of the *ulama* in the various *ulum*, we cannot believe that any human being, no matter how well-informed, can understand, let alone, explain God's message in its entirety to humankind. The reason for this is compellingly clear: human beings are not only limited in their context but also limited against an infinite message.

Allah has promised us Divine Guidance (7:29-30). Therefore,

as His trustees or vicegerents in creation, we must make every effort to comprehend and embody the universal virtues of the Text. And, even if our efforts are modest and our understanding limited, it is still a worthy and noble endeavour. Not least because this is all that we can manage given the vastness of a Divine Message that is constant, immutable, perfect and infinite.

As Fazlur Rahman has written: "To insist on literal implementation of the rules of the *Qur'an*, shutting one's eyes to the social change that has occured and that is so palpably occurring before our eyes, is tantamount to deliberately defeating its moral-social purposes and objectives. It is just as though, in view of the Qur'anic emphasis on freeing slaves, one can earn merit in the sight of God by freeing slaves. Surely the whole tenor of the teaching of the *Qur'an* is that there should be no slavery at all."

The same surely must be true for the *hudud* (the limits as set by God). While punishments for certain crimes may have been clearly stipulated in the *Qur'an*, their literal implementation is not obligatory under objective conditions of continual change. This has been clearly understood by the fathers of Islamic jurisprudence for, any study of their works will demonstrate, beyond any doubt, the numerous caveats attached before the actual sentence can be inflicted on a defendent. Mercy and compassion requires that condemnation is indeed the only avenue possible after every possible means to redeem the accused has been exhausted.

Furthermore, the *hudud* as a system of justice has been burdened with excessive caution which is absolutely necessary to ensure that no injustice is committed in implementing such laws. Take for instance the crime for *zina* which requires four Muslim male eye witnesses of religiously impeccable standing before the *hudud* punishment is operable. Is it ever probable — with the obvious exception of conditions of decadence and debauchery — that four righteous male Muslims would happen upon such an intimate scene?

We also believe that in any attempt to dispense legal justice, the state as the people's representatives should constantly endeavour to commit themselves to a process of consultation with the governed. This is especially important in a multi-racial, multi-religious community like ours.

The great challenge before us is to develop laws culled from our religious and spiritual philosophies into a comprehensive charter of

values and principles, responsibilities and rights, roles and relationships acceptable to human beings everywhere.

To do this we should first distinguish what is universal and eternal within our respective traditions from what is particularistic and contextual. On that basis we should dialogue with people of all religions on the question of human dignity. Even those of secular persuasion should be invited to dialogue with people of faith.

For in the final analysis, whilst it is good to have an end to journey towards, it is also the journey that matters in the end.

Part 6

EPILOGUE

11

HUDUD AND STATE ISLAMIC CRIMINAL LAWS

Salbiah Ahmad

The Islamisation agenda and *hudud*

The passage of the Kelantan Syariah Criminal Bill in the state of Kelantan in Malaysia is a landmark in the attempt towards Islamisation of laws in this country. The debate has reverberations on two sides of the coin. On one side, the controversy it generated has unfortunately overshadowed the on-going work on 'revising' of the common law (i e. basis of positive laws) which proposes a consideration of Islamic principles to our own body of Malaysian law.[1] On the other, the debate has to some extent held back the reigns of blind enthusiasm (i e through *taqlid*) among proponents of the Islamisation of laws agenda in Malaysia. The debate adds caution and sensitivity to the said agenda. It has opened democratic spaces for healthy intervention, critique and dialogue among Malaysians and among Muslims.

Faith will always be an issue fraught with emotion and that in itself makes discussion on the *hudud* law more sensitive. One of the most difficult points of contention on both sides of the debate has been the tension between faith and legalism; between Islam as a faith, the *Shari'a* (here meaning 'faith') as Divine and the Kelantan criminal legislation as an example of positive law, (also termed *Shari'a* but here referring to legislation) the product of juristic opinion and human intellect.

The tension is not new in its conceptual framework, but as can be apparent from the debate, is new to the general public, as Malaysians and as Muslims in Malaysia. To operationalise the message of Islam as contained in the *Qur'an* and *Sunnah* requires Muslims to move beyond the rhetoric of Islam. This is exactly the point of the debate. This debate as an on-going process of *jahd* (movement) is not closed for as long as Muslims choose to believe and to respond to the message of the *Qur'an*.

It would be useful for those who want involvement in the de-

bate to have a working knowledge of the methodological framework of Muslim jurisprudence. Once the frame of reference is understood, the debate should not be conceived as a test of faith. We are all believers and committed to the fundamentals of the faith. The issue at hand is how that commitment is to be implemented in concrete policy and legal terms today; a reassessment of the strengths and weaknesses of various legal constructs and interpretations. We live in a country whose diversity allows the existence of multiple opportunities to reorganise life structures in the course of new developments. We need to reorganise our religious structures as well, in such a way that the course of religious development in the future is as self-empowering and as fully participatory as we believe it can be.

An understanding of the premises of the debate is thus crucial to prevent speaking at cross-purposes especially among lawyers, who are presumed to have a more responsible role to play in the whole agenda of Islamisation of laws. To confine the debate solely to traditionally-schooled Muslim scholars will force the debate to one of belief or unbelief, belief or apostasy—an adherence in most cases to dogma and doctrine.[2]

Existing state criminal laws

The debate on the Kelantan criminal legislation had not considered the myriad state Islamic criminal laws, quietly passed at state level over several years. These are not *hudud* laws, but nevertheless claiming rationale from the same original sources in the *Qur'an* and *Sunnah*. Perhaps it was by the grace of *Allah* that the controversy of the Islamisation of criminal laws was to continue with the case of the alleged statutory rape of a 15-year-old Muslim schoolgirl by the former Malacca Chief Minister, Tan Sri Rahim Thamby Chik.

Background to case

The incident involving the 15-year-old Muslim schoolgirl came to public attention in August 1994. A local Bahasa Malaysia daily broke the news that Tan Sri Rahim Thamby Chik may step down as UMNO youth leader due to personal problems (August 24). The next day the Prime Minister, Datuk Seri Dr Mahathir Mohamad was reported to have ordered an investigation into the allegations that Rahim was hav-

ing an affair with a 15-year-old student. On September 9, the 15-year-old was already at Bukit Aman under police custody. On October 12, the UMNO Supreme Council accepted Rahim's resignation as Chief Minister. On October 21 the Attorney General, Datuk Mokhtar Hashim, in a press conference announced that there was insufficient evidence to prosecute Rahim for statutory rape.

On October 24, the Deputy Minister in the Prime Minister's Department, Datuk Dr Abdul Hamid Othman, advocates prosecuting the 15-year-old Muslim schoolgirl under Islamic laws of having illicit sex and being pregnant out of wedlock. Dr Hamid heads the Islamic Affairs division in the Prime Minister's Department. "The question of not prosecuting her does not arise. She is eight weeks pregnant. This gives the department ample grounds to start legal proceedings against her....The contention of illicit sex is deduced from the fact that she is pregnant out of wedlock....The important thing is that the sanctity of the *syariah* must be upheld. She has committed a wrong under the law and must be charged," he said.[3]

The case has brought to focus various issues, a critical one being competing federal and state jurisdiction. Two problems arise:

1) The competing federal and state jurisdiction over Muslims;
2) In a conflict of law situation, should a civil or Muslim law standard apply?

The competing federal and state jurisdiction over Muslims: The Penal Code and state Islamic criminal laws.

(1) Federal and State jurisdiction over Muslims

The persecution and proposed prosecution of the minor under state criminal laws clearly demand an informed policy of the administration of justice in the country. Up to this date, Malaysians have only had the word of the Law Minister Datuk Syed Hamid Albar that (as reported) "if an offence was punishable under common law, it had to be governed by such laws as the extent of jurisdiction under the Syariah Law in every state has been determined by the Constitution."[4]

This general statement does not appear to have taken into consideration that Muslims are bound both by the federal "common law"

of the Penal Code and bound by the state criminal law as "has been determined by the Constitution". All Malaysians (including Muslims) are bound by federal laws. State laws primarily relate to Muslim family law matters and "offences by persons professing the religion of Islam against the precepts of the religion" (paragraph 1 of the State List (II) under the Federal Constitution). Thus all Muslims are bound by state laws as well.

(2) Conflict of law situation: a civil or Muslim law standard?

The Penal Code

Under the Penal Code, the 15-year-old Muslim schoolgirl in the case is protected. Section 375 of the Penal Code (as amended in 1989) states:

s. 375 A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

Firstly—Against her will.

Secondly—Without her consent.

Thirdly—With her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception.

Fourthly—With her consent, when the man knows that he is not her husband, and her consent is given, because she believes that he is another man to whom she is or believes to be lawfully married or to whom she would consent.

Fifthly—With her consent, when, at the time of giving such consent she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly—With or without her consent, when she is under sixteen years of age.

The Muslim schoolgirl is a minor under the common law-civil standard of the Penal Code and does not have the capacity to consent

to the sexual intercourse under the sixth exception to section 375. The suggestion by Dr. Hamid that the schoolgirl be prosecuted under state Islamic criminal laws for illicit sexual intercourse raises a curious situation. a minor protected under the federal civil law standard as the victim-complainant of an alleged rape, may now stand accused under the state Muslim law standard for illicit sexual intercourse.

Malacca state Islamic criminal laws

These laws are primarily contained in two basic state laws: the Islamic Family Law Enactment 1983 (No. 8 of 1983) and the *Enakmen Kesalahan Syariah* (No.6 of 1991).

The Islamic Family Law Enactment 1983 in section 134 repealed and substituted many of criminal provisions of an older law, the 1959 Administration of Muslim Law Enactment. The 1959 law made provision for offences of illicit sexual intercourse and illegal cohabitation.[5] The Islamic Family Law Enactment 1983 has not however re-enacted the 1959 provision on illicit sexual intercourse between parties not married to each other. The 1983 law retained and expanded the 1959 provision for illicit intercourse (during *iddah*) between divorced persons, formerly married to each other in sections 112 and 113.

The *Enakmen Kesalahan Syariah 1991* came into force on January 1, 1992. Sexual crimes include:

s. 52: attempt to commit illicit sexual intercourse ("*percubaan persetubuhan haram*")
s. 53 (1)-(4): Cohabitation, in retirement or in close proximity ("*bersediaman*")
s. 55: Abetment/Conspiracy to illicit sexual intercourse ("*bersubahat melakukan kesalahan persetubuhan haram*")

Sections 52, 53 and 55 do not make a distinction as to status (state of being married or single) of the parties, unlike sections 112 and 113. This means that while the law makes illicit sexual intercourse a crime between parties once married to each other (s. 112 ad 113), it remains silent if the parties are single or unmarried to each other. It however avers to illicit sexual intercourse in 52, 53 and 55.

Section 54 raises interesting questions.

s.54: Any woman who is found pregnant or who gives birth to a child outside wedlock shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding twenty-four months or to both. (translated from the original in Bahasa. There is no official English version of this law).

The question arises: would a woman found pregnant, or who has given birth to a child outside of wedlock as a result of rape or incest, be liable to prosecution? The 1991 is silent on this, there are no exceptions stated, nor defences provided. The fact of pregnancy or birth creates the offence *per se*. It practically amounts to an offence of strict liability (i.e. where defences or mitigation are not available to the accused).

A situation may arise where a woman has been raped under the Penal Code—a victim under the federal civil law standard, and yet stand accused (if she is pregnant) under the state Muslim law standard.

Jurisdiction of legislative bodies under the Federal Constitution: federal law-making power on crimes and state law-making power on crimes

All crimes under the Islamic criminal justice system comes under three categories: *hudud*, *qisas* and *ta'azir*. *Ta'azir* laws encompass:

— all other offences not included in *hudud* - *sariqah* [theft], *hirabah* [robbery], *zina*, *qazf* [accusation of zina which cannot be proved by four witnesses], *syurb* [drinking intoxicating drink], *irtidad/riddah* [apostasy] or *qisas* [homicide and injury to persons] categories. *Ta'azir* here could include traffic offences, pornography etc.
— all cases in *hudud* or *qisas* where the evidence presented is insufficient to prove the *hudud* or *qisas* offence (to merit a *hudud* or *qisas* penalty). *Ta'azir* here allows lesser penalties to *hudud* and *qisas*.

The Penal Code (a federal law) is an example of *ta'azir* laws. So are existing state Islamic enactments on criminal law.

The rights of states to make law are prescribed in the State List and in the Concurrent List set out in the Ninth Schedule. (see

articles 73, 74, 75, 76A, 77). Clause 1 of List II which sets out the State List reiterates the general principle that states have no right to make criminal laws: "(states) shall not have jurisdiction in respect of offences except as conferred by federal law". This assumes that the federal Parliament has primary control of all criminal laws in the country and has control in determining the kind of criminal laws the state can make. In other words, the power of states to make criminal laws (other than offences related to Muslim family law), will depend upon Parliament making a federal law to so allow it. The State List allows states the "creation of offences by persons professing the religion of Islam against the precepts of that religion". This clause, coming after a list enumerating Muslim family law concerns, technically suggests that the offences are related to matters of Muslim family law.[6] The making of criminal laws by the state, other than laws related to Muslim family law depends "in so far as conferred by federal law" (paragraph 1, State List (II)).

State Islamic criminal laws outside the ambit of the Islamic Family Law Enactments are laws passed "as conferred by federal law". Thus the contentious Kelantan Criminal Bill, although passed at the State Legislative Assembly in Kelantan is arguably, a law which the state of Kelantan may not have the competence to make in the first place. It would be a critical constitutional test case nevertheless as some members of the Malaysian Bar are of the view that the Supreme court decision of *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 raises state competency to legislate on any criminal law matter that pertains to the religion of Islam.[7]

Basis of state *ta'azir* Islamic criminal laws of illicit sexual intercourse and pregnancy/delivery of child outside marriage

Islamic laws, whether civil or criminal, will have its source from the *Qur'an* and *Sunnah*. The principles espoused in these references have been expanded for implementation purposes by Muslim jurists.

Islam as a matter of principle does not allow sexual relations outside marriage. The Qur'anic verses attest to this in *Sura An Nur* 24:2 as follows:

> The women and men guilty of zina flog them each with a hundred stripes. Let not compassion move you in their case,

> in a matter prescribed by *Allah* and the Last Day. And let a party of believers witness their punishment. [8]

Jurists have developed extensive rules on what amounts to *zina*, proof of *zina* and penalties in their effort to operationalise the principle in the textual sources. The *Qur'an* and *Sunnah* provide the maximum penalty or *hadd*, thus the "hudud laws"

If *zina* as *hudud* cannot be proven beyond doubt, (and this can only be proved in two ways—by confession of the accused or by uncontroverted eyewitness testimony of four, just, adult males) *zina* may nevertheless be punishable under *ta'azir*, i.e. of a lesser offence. *Zina* as *ta'azir* laws enacted as "illicit sexual intercourse" have been part of state Islamic criminal laws for sometime under the Administration of Muslim Law Enactments. The state metes out a punishment of jail or fines or both in such cases. The accused merely enters a plea of guilty by confession.

Sisters in Islam have made its submission in the memorandum to the Prime Minister in Part 1 that *zina* as *hudud* is almost impossible to prove by eyewitness testimony. Confessions to *zina* as *hudud* can be retracted at any time (although arguably exposing the retractor to a penalty of *ta'azir*). *Ta'azir* penalties operate when strict proof for *hudud* fails. In a prosecution under state *ta'azir* criminal laws (independent of *hudud* laws), the state merely need to raise a *prima facie* case to mount a charge. As it is, the practice of pleading guilty has made the prosecution case much easier. Otherwise the prosecution will have to prove the crime beyond doubt, the standard of proof required under the administration of criminal justice in Islam.

A most pertinent question arises here: would a confession to *zina* as *ta'azir* open the accused to a prosecution under *hudud* if *hudud* becomes law of the land? On a matter of principle this should not happen, as *ta'azir* (here meaning only those offences tied to original hudud offences. *sariqah, hirabah, zina, qazf, syurb, irtidad/riddah*) becomes operative only when the *hudud* criteria has not been met i.e. the initial prosecution is under *hudud*. This fact in turn raises questions on the propriety of state Islamic *ta'azir* criminal laws (legislated independent of *hudud*) in the first place.

Whether the 15-year old schoolgirl can be prosecuted for illicit sexual intercourse under the Malacca state criminal laws is now academic as the *Enakmen Kesalahan Syariah 1991* does not provide for

it. The same may not be true in the other states which may still have illicit intercourse provisions. A closer scrutiny of all state Islamic criminal laws is not within the purview of this comment.

The position of the 15-year old schoolgirl in relation to s.54 of the *Enakmen Kesalahan Syariah 1991* remains controversial. The biological fact that only women can be pregnant, has left the victim literally, 'holding the baby'.[9]

Conclusion

It is most unfortunate that the passing of state criminal laws has escaped studied scrutiny of policy makers and the public. In the present situation, the scandal of the alleged rape by a former Chief Minister has been an eye-opener in many ways, not the least the problems of contextualising Islamic injunctions as law in the country and the discrimination in the operation of the law between females and males.

The proposal by the Ministry of Law to set up a law reform committee to study the present legal system and recommend reforms is laudable.[10] It is hoped that this law reform committee will have the mandate to study the problems in recent years of the conflict of laws arising between the two parallel systems of law in its civil and criminal aspects.[11] The *hudud* debate and the implementation of existing state Islamic criminal laws have raised new questions to the legal system - whether in the interfacing of the Syariah and Common Law or in the Islamisation of laws, the State is duty-bound to enforce the notion of the rule of law. The traditional manner of delegating different institutions at the federal and state levels in developing the two parallel systems of law must be arrested and current policies on administration of law in the country reviewed.

Endnotes

1. See also Salbiah Ahmad, *Islamic Law in Malaysia: Its Impact on Civil Law*, *INSAF* (Journal of the Malaysian Bar Council) Special Edition. p.100-107. 1991

2. See also, Norani Othman (ed), *Shari'a Law and the Modern Na-*

tion State: A Malaysian Symposium. Sisters in Islam, 1994

3. *The Star*, October 24, 1994.

4. *The Star*, December 6, 1994.

5. s. 149 (3) Save in the cases referred to in sub-sections (1) and (2) of this section, whoever shall be guilty of illicit intercourse, whether or not the other party to such illicit intercourse professes the Muslim religion, shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding six months and shall also be liable to a fine not exceeding one thousand ringgit.

s. 149C. Any person who cohabits as husband and wife with any Muslim or non-Muslim without any valid solemnisation of marriage in accordance with Muslim Law and not prohibited to marry by reason of consanguinity, affinity and fosterage shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding one thousand ringgit.

The 1959 law also defines "illicit intercourse" as " sexual intercourse *not amounting to rape* (emphasis mine) between any male and any female who is not his wife or with whom he is forbidden by the law of the religion of Islam to marry" Section 149C presupposes a continuous living-in arrangement between the parties.

"Rape" is not defined under the 1959 law, presumably rape is treated as falling under s.375 of the federal Penal Code.

6. Paragraph 1 of the State List enumerates Islamic law and family law of Muslims, including " succession, testate and intestate, betrothal, marriage,divorce,dower,maintenance,adoption,legitimacy, guardianship, (w)akafs. creation and punishment of offences by persons professing the religion of Islam against the precepts of the religion, except with regard to matters in the Federal List...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... "

7. The petitioners in this appeal were charged under s.298A of the Penal Code for doing an act likely to prejudice unity among persons professing the Islamic religion. They were alleged to have acted as an unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without being so appointed under the Terengganu Administration of Islamic Law Enactment 1955. The issue before the Supreme court was whether s. 298A, an amendment to the Penal Code,

introduced by Parliament in 1983, was *ultra vires* federal powers in the Constitution, article 74. In a 3:2 judgement the court found for the petitioners. Salleh Abas L.P. (as he then was) found the impugned section a "colourable legislation...the power to legislate (for such a situation)..is given to states.." (at p.121).

8. Majority (*jumhur*) of the jurists opined that 24:2 has abrogated 4:15,16 in terms of the sanction for *zina*.

9. see chapter 1 where similar arguments have been raised under the Kelantan hudud.

10. *NST*, December 6, 1994.

11. See for example, Rose Ismail, *Embracing Islam raises questions over motives* in Islam, Gender And Human Rights : An Alternative View, Sisters in Islam, 1993.

Appendices

APPENDIX 1

KELANTAN

SYARIAH CRIMINAL CODE (II) BILL 1993

ARRANGEMENT OF CLAUSES

PRELIMINARY

PART II

Qisos

PART III

Evidence

PART IV

How Punishment Is Carried Out

PART V

General Provisions

PART VI

Court

A BILL

Intituled

An Enactment to enforce the Syariah Criminal Law.

IT IS HEREBY ENACTED by the Legislature of the State of Kelantan as follows:

PRELIMINARY

Short title and commencement

1. This enactment may be cited as the Syariah Criminal Code (11) Enactment 1993 and shall come into force on such date as His Royal Highness the Sultan may by notification in the Gazette, appoint.

Interpretation

2. (1) In this Enactment unless the context otherwise requires-

"Court" means that Special Syariah Trial Court and the Special Syariah Court of Appeal established under Part VI of this Enactment;
"diyat" means a sum of money or property payable as a compensation for death or loss of intelligence or injury to any organ which is complete or injury to any organ which is in pairs or the loss of function of any such organ caused to the victim of an offence. A diyat is equivalent to the prevailing price of 4,450 grams of gold or such sum as may be fixed by His Royal Highness the Sultan from time to time in accordance with Syariah law;
"imprisonment" includes an order restricting an offender to reside within a particular area or district in the State;
"irsy" means a sum of money or property or a part of a diyat payable as compensation for injury (jurh) caused to the victim of an offence as specified in Schedule II, III and IV of this Enactment;
"judge" means a judge appointed under Part VI of this Enactment;
"Jumaah Ulama" means the Jumaah Ulama established under section 12 of the Kelantan Council of Islamic Religion and Malay Custom En-

actment 1966;
"mohsan" and "ghairu mohsan" have the same meaning as defined in section 10 (2);
"mukallaf" means a person who has attained the age of eighteen years and of sound mind;
"nisab" means a sum of money equivalent to the prevailing price of 4.45 grams of gold; or such sum as may from time to time be fixed by His Royal Highness the Sultan according to Syariah law;
"qisos" means the law of retaliation and equality governing offences of causing death of, and causing bodily injuries to person;
"son" includes a grandchild and any person in descending order;
"State Service Commission" means the State Service Commission established under Article LXI of the Laws of the Constitution of Kelantan (First Part);
"wali" means a relative of the victim of crime who is entitled to remit the offence committed by an offender on the victim of the offence;

(2) To avoid doubts with regard to identity of the words or expression used in this Enactment which are listed in Schedule 1, reference may be made to the Arabic Script of the said words and expressions shown against them in the said Schedule.

(3) All words, expressions, definitions and terms used in this Enactment which are not expressly defined in this Enactment shall be deemed to have the meaning given to them in the Interpretation Act 1948 and 1967, if not contrary to Syariah law.

(4) Save where the context otherwise requires, any reference in this Enactment to a specific Part or section or subsection or Schedule shall be construed as a reference to the specific Part or section or subsection or Schedule in this Enactment.

Types of offences

3. All offences under this Enactment shall be divided into three categories, namely -

(a) offences the punishments of which are ordained by the Holy Quran and Sunnah. Such offences are referred to as hudud offences and their punishments as hudud punishments;

(b) offences to which qisos applies and such offences also are ordained by the Holy Quran and the Sunnah and are referred to as qisos offences, and their punishments as qisos punishments; and

(c) offences which are neither hudud nor qisos but left to the discretion of the legislature or, according to this Enactment left to the discretion of the Court. Such offences are referred to as ta'zir offences and their punishment as ta'zir punishments:

Provided that where a hudud or a qisos offence cannot be punished with the hudud or qisos punishment respectively because it cannot fulfill the conditions required to attract such punishment, the offence shall become a ta'zir offence and be punished accordingly.

PART I

Hudud Offences

Types of hudud offences

4. Hudud offences are as follows:

(a) sariqah (theft);
(b) hirabah (robbery);
(c) zina (unlawful carnal intercourse);
(d) qazaf (accusation of zina which cannot be proved by four witnesses);
(e) syurb (drinking liquor or intoxicating drink); and
(f) irtidad or riddah (apostasy).

Sariqah

5. Sariqah consists of an act of removing by stealth a movable property from the custody or possession of its owner without his consent and with the intention to deprive him thereof.

Punishment for sariqah

6. Whoever commits sariqah except in the circumstances enumerated in section 7, shall be punished with hudud punishment as follows:

(a) for the first offence with amputation of his right hand;

(b) for the second offence with amputation of part of his left foot; and

(c) for the third and subsequent offences with imprisonment for such term as in the opinion of the Court, may likely to lead him to repentance.

Where hudud punishment does not apply

7. The hudud punishment for sariqah shall not apply in any of the following circumstances:

(a) where the value of the stolen property is less than the nisab;

(b) where the offence is not proved by evidence required under the provisions of Part III;

(c) where the offender is not a mukallaf,

(d) where the owner of the stolen property has not taken sufficient precaution to guard it against theft, having regards to the nature of the property and place where the property is kept or left;

(e) where the offender has not obtained full possession of the stolen property, although its owner have already been deprived of its custody and possession;

(f) where the stolen property is of trifling nature and can be found in abundance in the land or is of perishable nature;

(g) where the property is of no value according to Syariah law, such as intoxicating drink or instruments used for amusement;

(h) where the offence is committed by a creditor in respect of the property of his debtor, who refused to pay the debt:
provided that the value of the stolen property shall not exceed the amount of the debt or the value of the stolen property exceeds the amount of the debt but does not exceed the nisab;

(i) where the offence is committed in circumstances of extreme difficulties, such as war, famine, pestilence and nature disaster;

(j) where the offence is committed within the family, such as a

wife stealing from her husband and vice versa or son from his father and vice versa;

(k) where in the case of an offence being committed by a group of persons, the share of each offender after dividing the stolen property or the proceeds thereof is less than the nisab;

(l) where the offender returns the stolen property before the execution of the hudud punishment;

(m) where the owner of the stolen property denies the theft notwithstanding the confession by the offender;

(n) where the offender makes objection accepted by Syariah law against the witnesses; and

(o) where the stolen property is or the circumstances in which the offence is committed are such that according to Syariah law there is no hudud punishment.

Hirabah

8. Hirabah is an act of taking another person's property by force or threat of the use of force done by a person or a group of persons armed with weapon or any instrument capable of being used as weapon.

Punishment for hirabah

9. Whoever commits hirabah shall be punished with the hudud punishments as follows:

(a) death and thereafter crucified, if the victim is killed and his or other person's property is taken away;

(b) death only, if the victim is killed without any property being taken away;

(c) amputation of right hand and left foot, if only the property is taken away without killing the victim or injuring him but where the property is taken away and bodily injury is caused, diyat or irsy punishment shall be payable in addition to the punishment of amputation of hand the foot; such diyat or irsy being an appropriate amount consistent with the type and nature of injuries caused as specified in Schedules II, III and IV; and

(d) imprisonment for such term as in the opinion of the Court

would lead the offender to repentance, if only threats are uttered without any property being taken away or bodily injury caused.

Zina

10. (1) Zina is an offence which consists of sexual intercourse between a man and a woman who are not married to each other and such intercourse does not come within the meaning of "wati syubhah" as defined in subsection (3).

(2) where an offender is validly married and has experienced sexual intercourse in such marriage, such offender is called "mohsan", but where an offender is not married, or is already married but has not experienced sexual intercourse in such marriage, such offender is called "ghairu mohsan".

(3) Wati syubhah is a sexual intercourse performed by a man with a woman who is not his wife and such intercourse took place -

(a) in doubtful circumstances in which he thought that with the woman whom he had sexual intercourse was his wife, when in fact she was not; or

(b) in doubtful circumstances in which he believed that his marriage to the woman with whom he had sexual intercourse was valid according to Syariah law, when in fact his marriage to her was invalid.

Punishment for zina

11. (1) Where the offender who commits the offence of zina is a mohsan, such offender shall be punished with the punishment of rejam, being the punishment of stoning the offender with stones of medium size to death.

(2) Where the offender who commits the offence of zina is a ghairu mohsan such offender shall be punished with the punishment of whipping of one hundred lashes and in addition thereto to one year imprisonment.

Qazaf

12. (1) Qazaf is an offence of making an accusation of zina, being an accusation incapable of being proved by four witnesses, against a Muslim who is akil baligh and known to be chaste.

(2) It is also an offence of qazaf for any person to make a statement by expressly saying that a particular individual has committed zina or by impliedly saying that a particular individual is not the parent or not the offspring of another particular individual.

(3) The statement under subsection (2) shall be deemed to be qazaf unless proved by four male witnesses; and if unproved the person who makes the statement shall be guilty of an offence of qazaf; but where such statement is proved, the person against whom the statement is made shall be guilty of an offence of zina.

(4) The statement under subsection (2) shall be deemed to be unproved, if one or more of the four witnesses called to give evidence to support the statement decline to testify or do testify but their testimonies are against such statement; and in that event each of the witnesses who give evidence in support of the statement shall be deemed to have committed an offence of qazaf.

Punishment for qazaf

13. Whoever commits qazaf shall be punished with eighty lashes of whipping and his testimony shall no longer be accepted until he repents.

Al- li'an

14. (1) Al-li'an is an accusation of zina on oath made by a husband against his wife, whilst the wife on oath rejects such accusation; and both the accusation and rejection are made before a judge by uttering words which according to Syariah law are sufficient to prove al-li'an; and such words shall be as contained in subsection (2).

(2) The husband who makes the accusation shall repeat four times consecutively the following utterance: "Allah is my witness that I speak the truth that my wife ... has committed zina."

(3) When he has completed repeating those words as contained in subsection (2) four times, 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, the wife shall also repeat four times consecutively the following utterance: "Allah is my witness that my husband ..... had lied in making this accusation against me."

(5) When she has completed repeating those words as con-

tained in subsecution (4) four times, she shall make the fifth utterance by saying:
"Allah's anger shall fall on me if my husband has spoken the truth."

(6) If the wife has given birth to a child or if she is pregnant, both the birth and the pregnancy being considered as the consequence of the zina alleged by the husband, he shall deny fathering the child by adding to the words in subsection (2) which shall be repeated four times, the following utterance: "The child/what is being carried by my wife is not from me."

Consequences of al-li'an

15. Where a married couple resorts to al-li'an to settle an accusation of zina between them neither the husband shall be guilty of qazaf, nor the wife of zina, and both shall be free from punishment for such offence; but the marriage shall automatically 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, have sexual intercourse between them such act is zina.

Liwat

16. Liwat is an offence consisting of carnal intercourse between a male and another male or between a male and a female other than his wife, performed against the order of nature, that is through the anus.

Punishment for liwat

17. Whoever commits liwat shall be punished with the same punishment prescribed for zina.

Proof of liwat

18. The offence of liwat shall be proved by the same mode as that required to prove zina.

Musahaqah

19. (1) Musahaqah is a ta'zir offence consisting of an act of sexual

gratification between females by rubbing the vagina of one against that of the other and the punishment thereof shall be at the discretion of the Court.

(2) The offence shall be proved by the same mode as the required to prove a ta'zir offence.

Ittiyan almaitah

20. Ittiyan almaitah is an offence of performing carnal intercourse on a dead body, irrespective of whether such dead body is male or female, and if it is a female dead body whether it is that of the wife of the offender or that of any other person; and whoever commits this offence shall be punished with ta'zir punishment of imprisonment not exceeding five years.

Ittiyan albahimah

21. Ittiyan albahimah is an offence of performing carnal intercourse with an animal; and whoever commits this offence shall be punished with ta'zir punishment of imprisonment not exceeding five years.

Syurb

22. (1) Syurb is an offence of drinking liquor or any other intoxicating drinks and any person who commits this offence, whether intoxicating or not, and irrespective of the quantity consumed, shall be punished with whipping of not more than eighty lashes but not less than forty lashes.

(2) The offence may be proved by oral testimonies of two witnesses or the accused's own confession as provided for in Part III.

Irtidad or riddah

23. (1) Irtidad is any act done or any word uttered by a Muslim who is mukallaf, being act or word which according to Syariah law, affects or which is against the 'aqidah (belief) in Islamic religion:

Provided that such act is done or such word is uttered intentionally, voluntarily and knowingly without any compulsion by anyone or by circumstances.

(2) 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 matters 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 repent within a period of not less than three days after he has been so found.

(4) Where he is reluctant to repent and still continues with his attitude as regards the act he has done or the word he has uttered, the Court shall pronounce the death 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 Baitul-Mal.

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 death sentence and his property ordered to be forfeited shall be returned to him. Provided further that he shall be imprisoned for a term not exceeding five years.

PART II

Qisos

Qisos and diyat

24. Both qisos and diyat shall apply to offences of homicide and causing bodily injuries.

Types of homicide

25. Homicide shall be divided into three categories-

(a) qat-al-'amd (wilful killing);

(b) qati-syibhi-al-'amd (quasi-wilful killing); and
(c) qatl-al-khata' (killing without intention).

Qatl-al-'amd

26. (1) Whoever causes the death of a person by doing an act with the intention of causing death or bodily injury which in the ordinary course of nature is likely or sufficient to cause death; or by doing an act with the knowledge that his act is so imminently dangerous that it must in all probability cause death, is said to commit qatl-al-'amd.

(2) Whoever by doing an act with the intention or knowledge that the aforesaid act is likely to cause death, causes the death of any person whose death he neither intends nor knows himself to be likely to cause, is also said to commit qatl-al-'amd.

Punishment for qatl-al-'amd

27. (1) Except as provided in subsection (2), whoever commits qatl-al-'amd shall be punished with death as qisos punishment.

(2) the punishment of death in subsection (1) shall not be imposed where

(a) the offence is not proved by the evidence required under Part III; or

(b) notwithstanding such proof, the wali remits the qisos.

Pardon

28. The wali may at any time before the punishment of death as the qisos punishment is executed, 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 instalments 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.

Alternative punishment to qisos

29. Where the punishment of death as qisos 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.

Qatl-syibhi-al-'amd defined

30. Whoever 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 a weapon which in the ordinary course of nature is not likely to cause death is said to commit qatl-al-syibhi-al-'amd.

Punishment for qatl-syibhi-'al-'amd

31. Whoever commits qatl-syibhi-al-'amd shall pay diyat to the victim's wali and in addition thereto shall be punished with the ta'zir punishment of imprisonment for a term not exceeding fourteen years.

Qatl-al-khata'

32. Whoever 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. Whoever commits qatl-al-khata' shall pay diyat to the victim's wali and addition thereto may be liable to the ta'zir punishment of imprisonment for a term not exceeding ten years.

Causing bodily injury

34. Whoever causes pain, harm, disease, infirmity or injury to any person, or impairs or destroys or causes the loss of function of any organ of the body of any person or part thereof without causing his death is said to cause bodily injury.

Punishment for causing bodily injuries

35. (1) Whoever causes bodily injury to a person shall be punished with the qisos punishment, that is with similar bodily injury as that which he has inflicted upon his victim and where qisos punishment cannot be imposed or executed because the conditions required by the Syariah law are not fulfilled, the offender shall pay irsy to his victim and may be liable to ta'zir punishment of imprisonment.

(2) The amount of irsy payable and the term of imprisonment to be imposed shall be fixed by the Syariah law 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 purposes of awarding punishments, bodily injuries shall be classified as follows:

(a) itlaf-al-udhw (causing dismembering of any organ of the body of injury to a part of or organ of the body);

(b) itlaf-solahiyyatu-al-udhw(causing destruction or permanent impairment of the function, or use of an organ of the body, or permanently disfiguring such organ;

(c) syajjah (causing injury on the head of 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 mark or wound whether temporary or permanent); and

(e) all other bodily injuries.

When qisos punishment shall not be imposed

37. Qisos punishment shall not be imposed in the following cases:

(a) where the offender who has committed the qisos offence is dead;

(b) where the limb or the organ for which qisos punishment is to be applied is already non-functional or otherwise incapacitated;

(c) where pardon is given by the victim or his wali; or

(d) where a settlement (solh) and agreement between the victim and the offender has been made.

Consequences where qisos punishment is not imposed

38. Where qisos punishment is not imposed-

(a) the term of imprisonment as ta'zir punishment for causing itlaf-al-udhw and itlaf - solahiyyatu-al-udhw is ten years; and the irsy payable for causing the injury shall be as specified in Schedule II;

(b) the term of imprisonment as ta'zir punishment and the irsy payable for causing syajjah shall be as specified in Scheduled III; and

(c) the term of imprisonment as ta'zir punishment and the irsy payable for causing jurh shall be as specified in Schedule IV.

PART III

Evidence

How to prove an offence En. 2/91

39. (1) Save where it is in conflict with the provisions of this Enactment, the Evidence Enactment of the Syariah Court 1991 shall apply for the purpose of proving offences under this Enactment.

(2) All offences under this Enactment, whether hudud offences or qisos offences or ta'zir offences shall be proved by oral testimonies or by confession made by the accused.

Number of witnesses

40. (1) The number of witnesses required to prove all offences under this Enactment except zina shall be at least two.

(2) The number of witnesses required to prove zina shall not be less than four.

Qualification to be a witness

41. (1) Each witness shall be an adult male Muslim who is akil baligh, and shall be a person who is just.

(2) A person shall be considered just if he does what is re-

quired of him by Islam and avoids committing great sins and does not continously commit lesser sins and further has isti'mal al-muru ah, (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 qisos 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 zina the four witnesses shall state that they have actually seen the act of penetration of the sex organ of the male partner into that of the female partner of the copulating pair and further there shall neither be contradiction nor inconsistency among the witnesses in such testimony.

Withdrawal of testimony

43. (1) To make the accused liable to a 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 to the hudud punishment, and if it is withdrawn at the time when the accused is undergoing the punishment, the punishment shall forthwith cease.

(2) In the case of zina, where one witness declines to give evidence, or gives evidence contrary to the charge, or gives evidence in support of the charge but later withdraws such evidence so that the number of witness in support of the charge becomes less than four, the charge of zina against the accused shall remain unproved and he shall cease to be liable to the hudud punishment; but the remaining witnesses who have testified in support of the charge shall be guilty of an offence of qazaf.

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 judicial officer and shall afterwards be repeated before the trial judge during the course of the trial, and if the trial is one of zina 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 be admissible only against the accused who makes it, and cannot be used against any other person; and to be valid the confession must not be a retracted confession.

Retraction of confession

45. (1) A confession may be retracted by the accused who makes it at anytime 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) Save as provided in subsection (2) and (3) circumstantial evidence, though relevant, shall not be a valid method of proving a hudud offence.

(2) In the case of zina, pregnancy or delivery of a baby by an

umarried woman shall constitute evidence on which to find her guilty of zina and therefore the hudud punishment shall be passed on her unless she can prove to the contrary.

(3) 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 vomitting 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 an alternative punishment to hudud where the evidence does not fulfill the conditions required to prove a hudud offence

47. Where the accused cannot be made liable to a hudud punishment because the witnesses have withdrawn 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 a hudud offence, the accused may be liable to a ta'zir punishment; and the Court shall proceed to pass such punishment if there is sufficient evidence for that purposes.

PART IV

How Punishment Is Carried Out

Hudud punishment not to be varied

48. The hudud punishment imposed under this Enactment shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered.

Confirmation of sentences before execution

49. Every sentence imposing a hudud punishment and every death sentence imposed as qisos or ta'zir punishment under this Enactment 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 rejam shall not be executed unless the offender is medically examined by a Muslim medical officer and certified to be fit by that officer.

How to carry out several punishments

51. If an offender is guilty of several offences, the punishment which shall be carried out on him shall be as follows :

(a) if the punishments are of the same kind and graveness, only one punishment shall be carried out;

(b) if the punishments are of the same kind, but of different graveness, only the severest punishment shall be carried out;

(c) if the punishments are of different kinds, all shall be carried out; and

(d) if one of the punishments is death all other punishments shall be set aside.

Manner of amputation of hand and foot

52. (1) 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.

(2) 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 still be usable for walking and standing.

Manner in which the punishment of whipping is carried out

53. The punishment of whipping shall be carried out in accordance with the Rules specified in Schedule V.

Postponement of rejam on a pregnant women and on a mother suckling her child.

54. The punishment of rejam shall not be carried out on a pregnant female offender until after 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 suckled by her, the rejam shall not be executed until after the completion of full two years of suckling unless there is a wet nurse who is willing to undertake to suckle 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 after she has delivered her child, and thereafter becomes clean of blood and is fit again to undergo the punishment without hazard.

PART V

General Provisions

Applicablity of the Enactment

56. (1) Subject to subsection (2), this Enactment shall apply to every Muslim who is a mukallaf in respect of any offence committed by him in the State of Kelantan.

(2) Nothing in this Enactment shall preclude a non-Muslim from electing that this Enactment apply to him in respect of any offences committed by him within the State of Kelantan, and in the event of such non-Muslim electing as aforesaid, the provisions of this Enactment shall, mutatis mutandis, apply to him as they apply to a Muslim.

Abetment and conspiracy

57. Where an offence is committed as a result of, or in furtherance of an abetment, assistance, conspiracy or plot, every person who abets or assists or conspires or plots 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

58. When an offence is committed by several persons in furtherance of common intention of all, each of such persons is liable for that offence in the same manner as if the offence were 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

59. 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

60. Whoever attempts to commit an offence under this Enactment 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

61. Where a person has been tried or faced any proceeding for an offence under this Enactment, he shall not be tried and no proceeding shall be taken against him under the Penal Code in respect of the same or similar offence provided in the Code.

Syariah law to govern interpretation

62. (1) All offences under this Enactment and the provisions relating thereto shall be interpreted according to the Syariah law and the precedents found therein; and reference to such law shall be made in respect of any matter not provided for in this Enactment.

(2) If any doubt of difficulty arises in the interpretation of any word, expression or term relating to Syariah law, the Court trying the case shall have jurisdiction to give meaning to such word, expression or term.

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 offences under this Enactment.

(3) The Special Syariah Court of Appeal shall have jurisdiction to hear appeals from the decisions of the Special Trial Court.

Special Syariah Trial Court and Special Syariah Court of Appeal are additional to Syariah Courts En.3/82

64. The Courts established under section 63 shall be an 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 provisions of this Enactment or are not intended by the provisions of this Enactment.

Application of Syariah Criminal Procedure Enactment 1983 En.9/83

65. The Syariah Criminal Procedure Enactment 1983 shall apply to all

proceedings of the Courts with or without such modifications as the Courts think fit in the interest of justice.

The Special Syariah Trial Court

66. When it is sitting to try an offence under this Enactment the Special Syariah Trial Court shall consist of three judges, two whom shall be ulamak; and the session shall be presided over by one of the said judges.

The Special Syariah Court of Appeal

67. When it 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 ulamak and the session shall be presided over by any one of the said judges.

Qualification to be a judge

68. A person who holds or has held office as a judge of the High court of Malaya or Borneo or the Supreme Court of Malaya or any person who has the qualification to be appointed as a judge of any of those Courts may be appointed to be a judge; whilst an ulamak who may be appointed a judge shall be a person who holds or has held office as a Qadhi Besar or Mufti Kerajaan or any one who has the qualification to hold any of those offices and is known to have a deep knowledge of Syariah law.

Appointment

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 Jumaah Ulama and in addition His Highness may also consult any other authority or body or individual who in His Highness's 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 Syariah Court of Appeal or the Chief judge of the

Special Syariah Court of Appeal or a judge of the Special Syariah Trial Court.

Independence of the judiciary

70. The principle of independence of the judiciary shall apply to the Courts and every judge appointed under this Enactment shall be free from interference from any authority or individual.

71. (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 Judicial Commission to have committed an offence which renders him unfit to be a judge.

(2) Both the medical experts and the independent Judicial Commission shall be appointed by His Royal Highness the Sultan after consulting such authority, body or individual whom His Highness thinks fit and proper.

(3) The offence referred to in subsection (1) shall be an offence known to the secular law or the Syariah law and the evidence in support thereof must be clear.

Salaries, allowances and other privileges of judges

72. (1) The salaries, allowances 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 Borneo or of the Supreme Court of Malaysia.

(2) The Legislative Assembly of the State may make law to fix the salaries, allowances and other privileges of the judges of the Courts established by this Enactment.

SCHEDULE 1
(SECTION 2)

GLOSSARY OF ARABIC WORDS

Al-li'an	اللعان
Badhi'ah	باضعه
Baitulmal	بيت المال
Damiyah	داميه
Diyat	دية
Dubur	دبر
Faraj	فرج
Ghairu Jaifah	غير جائفة
Ghairu Mohsan	غير محصن
Halal	حلال
Haram	حرام
Hashimah	هاشمة
Hirabah	حرابة
Hudud	حدود
Iqrar	اقرار
Iman	ايمان
Irsy	ارش
Irtidad	ارتداد
Isti'mal Al Muruah	استعمال المروءة
Itlaf Solihayat-al-udhw	اتلاف صلاحية العضو
Itlaf-al-udhw	اتلاف العضو
Ittiyan al bahimah	اتيان البهيمة
Ittiyan al maitah	اتيان الميتة
Jaifah	جائفة
Jenayah	جناية
Jurh	جرح
Lafaz	لفظ
Laknat	لعنة
Liwat	لواط
Mohsan	محصن
Mudhihah	موضحة
Mukallaf	مكلف
Munaqqilah	منقلة

Munaqqilah	منقلة
Musahaqah	مساحقة
Mutalahimah	متلاحمة
Nisab	نصاب
Qadhi	قاضى
Qarinah	قرينة
Qatl-al-'amd	قتل العمد
Oatl-syibhi-al-'amd	قتل شبه العمد
Qazaf	قذف
Qisos	قصاص
Rejam	رجم
Sariqah	سرقة
Solh	صلح
Sunnah	شنة
Syajjah Damighah	شجة دامغة
Syajjah Hashimah	شجة هاشمة
Syajjah Ma'mumah	شجة مامومة
Syajjah Mudhihah	شجة موضحة
Syajjah Munaqqilah	شجة منقلة
Syarak	شرع
Syariah	شريعة
Syurb	شرب
Ta'zir	تعزير
Wali	ولى
Wati Shubhah	وطى شبهة
Zina	زنا
'Adala	عدل
'Aqidah	عقيدة
'Aqil Baligh	عاقل بالغ
'Aurat	عورة

SCHEDULE II

(Section 38 (a))

The amount of irsy payable for causing itlaf-al-udhw and itlaf-solahiyyatu-al-udhw shall be as follows :-

Types of Injuries	Amount of Irsy
1. loss of a single organ, such as nose or tongue	a diyat
2. loss of an organ which is in pairs such as hands, feet, eyes, lips, breast and ears	a diyat if a pair is injured, but 1/2 of a diyat if only one is injured.
3. loss of an organ which is in fours such as eyelashes or eyelids	1/4 of a diyat if only one organ is injured. 1/2 of a diyat if two are injured, 3/4 of a diyat if three are injured, and a diyat if all four are injured.
4. a finger of a hand or a foot	1/10 of a diyat
5. a joint of a finger	1/30 of a diyat
6. a joint of a thumb	1/20 of a diyat
7. a tooth other than milk tooth	1/20 of a diyat
8. twenty teeth	a diyat
9. a milk tooth	as determined by the Court
10. uprooting all the hairs of the head, beard, moustaches, eyebrows, eyelashes or any other part of the body	a diyat

SCHEDULE III
(Section 38 (b))

The amount of irsy and the term of imprisonment for causing syajjah (injuries to the head or face).

Types of Injuries	Amount of Irsy	Term of Imprisonment
1. Syajjah khalifah (injury which exposes no bone)	as determined by the Court	not exceeding two years
2. Syajjah mudhihah (injury which involves a bone without causing fracture)	1/20 of a diyat	not exceeding five years
3. Syajjah hashimah (injury which involves a fracture of a bone without dislocation)	1/10 of a diyat	not exceeding five years
4. Syajjah munaqqilah (injury which involves a fracture and a dislocation of bone	3/20 of a diyat	not exceeding ten years
5. Syajjah ma'munah (injury which involves fracture of the skull but the wound just touches the brain's membranes without tearing it)	3/10 of a diyat	not exceeding ten years

6. Syajjah damighah (injury which involves a fracture of the skull, and the wound tears the brains membrance)	1/2 of a diyat	not exceeding fourteen years

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SCHEDULE IV
(Section 38 (c))

The amount of irsy 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)

Types of Injuries	Amount of Irsy	Term of Imprisonment
1. Jaifah (wound extending to body cavity of the trunk)	1/3 of full diyat	not exceeding ten years
2. Ghairu jaifah (wound other than jaifah) these are:-		
a) damiyah (tear of the skin and bleeding)	as determined by the Court	not exceeding three years
b) badhi'ah (wound which exposes no bone)	as determined by the Court	not exceeding three years
c) mutalahimah (laceration of the flesh)	as determined by Court	not exceeding three years
d) mudhihah (wound exposing bone)	as determined by the Court	not exceeding five years

e) hashimah (fracture without dislocation)	as determined by the Court	not exceeding five years
f) munaqqilah (fracture and dislocation)	as determined by the Court	not exceeding seven years

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SCHEDULE V
(Section 53)

The Whipping Rules

1. The Rules in this Schedule shall apply to the execution of whipping punishment under section 53 of this Enactment.

2. Whipping punishment to be executed on an offender shall be carried out by an officer specifically authorized by the prison authority at a place and time directed by the Court and shall be in the presence of and witnessed by a Muslim medical officer and at least four adult male Muslims as witnesses; provided that before the punishment is carried out the offender shall first be examined by the medical officer and certified by him to be fit to receive such punishment.

3. No whipping punishment shall be carried out on an offender unless a period of fourteen days have lapsed after the date of the judgement; provided that in the event of an appeal, the punishment shall be carried out as soon as possible after the punishment is confirmed by the Special Syariah Court of Appeal.

4. The whipping punishment shall be carried out by the aforesaid officer hitting the offender with a rattan, the size of which (save in the case mentioned in Rule 8 (2) (ii) shall be one meter long and once centimeter in diameter.

5. The whipping shall be administered in such a way that the strokes shall be well distributed on all parts of the body except the face, head, chest and private parts.

6. The whipping shall be carried out with a moderate force in that the officer administering the punishment shall not raise the rattan whip high up to the level of his head; and such whipping shall be given consecutively and shall not exceed the number of strokes ordered by the Court.

7. When receiving the whipping, the offender shall be in standing position and clothed in thin clothing which covers the 'aurat according to Syariah law.

8 (1) If during the course of the whipping being administered to him the offender is found to be incapable of receiving further whipping, on the certification by the medical officer, the whipping shall forthwith stop and postponed until the Court shall give a new direction as to the resumption of the punishment; and in the meantime the offender shall be detained in prison or set free on bail.

(2) Such direction shall be made on the basis of a report made by the aforesaid medical officer and shall be as follows :

(i) if according to the report the offender is likely to recover from his present incapacity, the punishment shall be resumed as soon as he recovers from his ailments; and

(ii) if according to the report the offender is not likely to recover from his present notwithstanding the ailments, the punishment shall also be resumed at a suitable time but the rattan to be used to continue the whipping shall be lighter and of smaller size than that specified in Rule 4 of these Rules.

EXPLANATORY STATEMENT

This Bill seeks to enforce the Syariah Criminal Law.

PRELIMINARY

2. Clause 1 deals with short title and commencement
3. Clause 2 deals with interpretation.
4. Clause 3 deals with the division of offences under the Enactment into the hudud, qisos and ta'zir offences.

PART 1

Hudud Offences

5. Clause 4 deals with types of hudud offences.
6. Clauses 5,6 and 7 deal with the offences of sariqah and the punishment therefor.
7. Clauses 8 and 9 deal with the offence of hirabah and the punishment therefor.
8. Clauses 10 and 11 deal with the offence of zina and the punishment therefor.
9. Clauses 12 and 13 deal with the offence of qazaf and the punishment therefor.
10. Clauses 14 and 15 deal with al-li'an and the consequences therefor.
11. Clauses 16, 17 and 18 deal with the offence of liwat and the punishment therefor.
12. Clauses 19 deals with the offence of musahaqah and the punishment therefor.
13. Clauses 20 deals the offence of ittiyan almaitah and the punishment therefor.
14. Clause 21 deals the offence if ittiyan albahimah and the punishment therefor.
15. Clause 22 deals with the offence of syurb and the punishment therefor.
16. Clause 23 deals with the offence of irtidad or riddah and the punishment therefor.

PART II

Qisos

17. Clause 24 seeks to provide for the application of qisos and diyat in cases of homicide and bodily injuries.
18. Clause 25 deals with the types of homicide.
19. Clauses 26 and 27 deal with the offence of qatl-al-'amd and the punishment therefor.
20. Clause 28 seeks to make provision for pardon for the punishment of qisos.
21. Clause 29 seeks to provide for the punishment of ta'zir as an alter-

native to the punishment of qisos.
22. Clauses 30 and 31 deal with the offence of qatl-syibhi-al-'amd and the punishment therefor.
23. Clauses 32 and 33 deal with qatl-al-khata' and the punishment therefor.
24. Clause 34 and 35 deal with the offence of causing bodily injury and the punishment therefor.
25. Clause 36 seeks to classify the types of injuries for the purposes of awarding punishment.
26. Clause 37 seeks to provide for cases when qisos punishment shall not be imposed.
27. Clause 38 deals with consequences where qisos punishments are not imposed.

PART III

Evidence

28. Clause 39 seeks to make provision on how to prove an offence under this Enactment.
29 Clause 40 deals with the number of witnesses required to prove offences under this Enactment.
30. Clause 41 deals with qualification to be a witness.
31. Clauses 42 and 43 deal with testimony.
32. Clauses 44 and 45 deal with confession.
33. Clause 46 deals with circumstantial evidence.
34. 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.

PART IV

How Punishment Is Carried Out

35. Clause 48 seeks to provide that hudud punishment shall not be varied.
36. Clause 49 deals with confirmation of Hudud punishment and death sentences by the Special Syariah Court of Appeal before execution.

37. Clause 50 deals medical examination before execution of punishment.
38. Clause 51 seeks to make provision on how to carry out several punishments.
39. Clause 52 deals with the punishment of amputation of hand and foot.
40. Clause 53 deals with how the punishment of whipping is to be carried out.
41. Clause 54 seeks to provide for postponement of rejam on a pregnant woman and on a mother suckling her child.
42 Clause 55 deals with the punishment of whipping on a pregnant woman.

PART V

General Provisions

43. Clause 56 deals with the applicability of the Enactment on every Muslim who is a Mukallaf.
44. Clauses 57 and 58 deal with abetment and conspiracy as well as common intention.
45. Clause 60 deals the commission of sariqah by several offenders.
46. Clause 60 deals with attempt to commit on offence.
47. Clause 61 deals with the circumstances in which proceeding under the Penal Code shall not be taken.
48. Clause 62 seeks to provide that offences under this Enactment shall be interpreted according to Syariah law.

PART VI

Court

49. The Clauses under this Part deal with the Special Syariah Trial Court, Special Syariah Court of Appeal, appointment of judges and other matters relating thereto.

FINANCIAL IMPLICATION

This Bill will involve the Government in additional financial expenditure the amount of which cannot at present be ascertained.

Appendix 2

Perlaksanaan Undang-undang Hudud di Malaysia

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Perlaksanaan hukum jenayah Islam bukanlah satu perkara yang baru di Malaysia. Di sebuah batu surat bertulis dengan tulisan Jawi yang telah dijumpai di suatu tempat berhampiran Kampung Buluh di Sungai Tersat, Kuala Berang di Hulu Terengganu yang mana tarikhnya ialah 22 Februari 1303 bersamaan dengan 4 Rejab 702 A.H. disebut -

"Orang berbuat bala cara laki-laki perempuan stitah Dewata Maha Raya jika merdehika bujang palu seratus rotan. Jika merdehika beristeri atau perempuan bersuami ditanam hinggakan pinggang dihambalang dengan batu matikan".

Di undang-undang Melaka terdapat beberapa peruntukan mengenai hukuman hudud, antaranya -

(a) 5.1 Fasal yang kelima pada menyatakan orang membunuh dengan tiada setahu raja atau orang besar-besar. Jikalau dibunuhnya dengan tiada dosanya sekalipun dibunuh pula ia pada hukum Allah, maka adil namanya.

(b) 5.3 Adapun jikalau membunuh madunya maka ia lari ke dalam kampung orang, maka diikutnya oleh empunya madu itu, maka berkelahi ia dengan yang empunya kampung itu, maka jikalau ia melawan, maka terbunuh yang mengikut itu, mati sahaja tiada dengan hukum lagi. Itulah 'adatnya negeri, tetapi pada hukum Allah yang membunuh itu dibunuh juga hukumnya, kerana mengikut dalil Quran dan menurut *amr bi'l maruf wa nahy ani'l munkar.*

(c) 7.2 Adapun pada hukum Allah orang yang mencuri itu tiada harus dibunuh melainkan dipotong tangan.

(d) 11.1 Fasal yang kesebelas pada menyatakan hukum orang

yang mencuri lagi dicemari kampung orang itu, maka tahu yang empunya kampung itu, maka dibunuhnya atau diturutinya antara dua kampung, maka dibunuhnya, tiada salahnya yang membunuh itu. Adapun jikalau kemudian daripada hari itu, maka bertemu dengan orang yang mencuri itu, maka baru dibunuhnya tiadalah sah bunuh itu, melainkan hukum juga di atasnya. Dan jikalau ia mencuri di dalam rumah, dipotong tangannya hukumnya. Adapun jikalau yang mencuri itu banyak maka seorang sahaja yang naik rumah itu maka seorang itu juga dipotong tangannya dan yang banyak kena *ta'azir*. Ertinya dinaikkan di atas kerbau balar dibunuh bunga raya dan berpayung tudung saji, dicoreng mukanya dengan kapur dan arang dan kunyit maka dicanangkan berkeliling negeri. Jikalau dapat hak orang itu, maka digantungkan pada lehernya. Jikalau habis dimakannya, tuannya memberi ganti. Adapun jikalau ia merdehika masuk lulur kepada orang yang empunya harta itu.

(e) 12.2 Demikian lagi menangkap orang maka lalu diwati'nya perempuan itu, pun sepuluh emas dendanya kerana menggagahi orang. Demikain hukumnya atas pihak kanun hukumnya. Adapun tiada dapat ia menangkap dan menggagahi orang. Jikalau ada orang merdehika yang ditangkapnya itu, maka lalu diwati'nya perempuan itu maka diberinya tahu kepada hakim, maka dipanggil oleh hakim, disuruh kahwinkan. Jikalau ia tiada mahu kahwin didenda tiada tahil sepaha dengan isi kahwinnya adab hamba raja. Adapun pada hukum Allah, jikalau dia muhsan direjam. Adapun erti muhsan itu perempuan yang berlaki; jikalau laki-laki yang ada beristeri, itulah erti muhsan. Jikalau ghair muhsan dipalu delapan puluh dengan hukum dera. Itulah hukumnya dengan tiada bersalahan lagi.

(f) 12.3 Adapun akan hukum orang menuduh orang zinah itu pada hukum Allah didera delapan puluh kali deranya. Jikalau pada hukum kanun didenda sepuluh tahil.

(g) 36 Fasal yang ketiga puluh enam pada menyatakan peri hukum orang yang murtad. Apabila seorang Islam itu murtad, disuruh ia taubat tiga kali. Jika tiada ia mahu taubat dibunuh pada hukum Allah harusnya dan jangan dimandikan dan jangan disembahyangkan dan jangan ditanam pada kubur Islam.

(h) 37.1 Fasal yang ketiga puluh tujuh pada menyatakan hukum saksi yang harusnya di atas empat martabat. Pertama tahu ia akan halal dan haram, kedua tahu ia akan sunah dan fardu, ketiga tahu ia akan salah dan benar, keempat tahu ia akan baik dan jahat. Itulah harus diperbuat saksi.

Saksi tiada dikabulkan melainkan berhimpun pada saksi itu lima perkara. Pertama Islam, kedua baligh, ketiga akil, keempat adil, kelima hendaklah menjauhi daripada dosa yang besar dan dosa yang kecil dan baik kelakuannya dan jangan ia penggusar dan memeliharakan lakunya dan namanya.

(i) 37.2 Bermula tiada pada zinah itu thabit melainkan empat orang laki-laki dan jikalau tiada empat melainkan dua orang laki-laki pada segala had seperti minum arak dan tuak dan mencuri dan menyamun dan membunuh orang dan murtad dan qisas pada nyawa dan pada anggota dan orang bermuka-muka dan ikrar pada segala perkara ini dan nikah dan talak dan merdeka dan Islam dan pada wakil dan pada wasiat dan ikrar pada segala perkara ini dan melihat bulan Ramadan dengan orang pun padalah.

(j) 39 Apabila seorang akil baligh membunuh Islam dengan disahajanya, dibunuhnya itu laki-laki atau perempuan atau kecil atau besar, maka yang membunuh itu dibunuh. Bermula tidak harus Islam dibunuh sebab membunuh kafir dan tiada harus merdehika dibunuh sebab membunuah abdi dan tiada harus bapa dibunuh sebab membunuh anaknya.

(k) 40 Fasal yang keempat puluh pada menyatakan hukum zina itu atas dua perkara: suatu muhsan namanya laki-laki atau perempuan yang sudah bersuami dengan nikah yang sah. Dan tiada muhsan laki-laki yang tiada beristeri dan perempuan yang belum bersuami. Bermula maka yang muhsan itu dihukum direjam dan dilontar dengan batu hingga mati. Maka ghair muhsan hadnya didera seratus kali palu, dibuang keluar negeri itu setahun lamanya. Bermula yang muhsan itu empat perkara: pertama Islam, kedua baligh, ketiga bera'akal dan keempat tiada ia gila. Bermula hamba laki-laki dan hamba perempuan hadnya setengah daripada merdehika, lima puluh kali palu.

(l) 40.2 Bermula hukum liwat dan menyertai binatang seperti hukum zinah juga. Jikalau tiada setubuh sehingga peluk cium sahaja dita'zirkan oleh hakim. Jikalau dihadkan dua puluh juga palunya. Bermula dihukum hakim zinah dengan ikrar atau dengan empat orang saksi laki-laki yang merdehika melihat orang zinah itu seperti culk masuk ke perculkan. Bermula jika dua orang saksi berkata "Kami melihat ia zinah pada suatu penjuru", dua orang berkata-kata "Kami melihat ia zinah pada suatu penjuru lain" maka tiada thabit. Pada hukum zinah itu hendak sekata keempat saksi itu maka thabit pada hukum zinah, maka dihukumkan seperti adat yang tersebut dahulu adanya.

(m) 41 Fasal yang keempat puluh esa pada menyatakan peri hukum memaki orang haram zadah. Seorang memaki seseorang maka mungkir yang memaki itu daripada tiada ada saksinya, maka didera delapan puluh kali orang yang memaki itu.

(n) 42 Fasal yang keempat puluh dua pada menyatakan orang minum arak dan tuak. Barang siapa minum arak dan tuak atau minum barang yang memabukkan jikalau merdehika empat puluh kali palu didera akan dia; jikalau merdehika empat puluh kali deranya. Bermula dihadkan dua perkara, suatu dengan ikrar, suatu dengan dua orang saksi laki-laki. Tiada dihadkan dengan dicium bau tuak, ya'ani tiada dihukum padanya.

Di Pahang undang-undang Melaka telah menjadi asas Undang-Undang Negeri Pahang yang diperbuat dalam masa pemerintahan Sultan Abd al Ghafar Muhaiyuddin Shah (1592-1614). Undang-Undang itu menyebut antara lain -

(46) Bab peri hukum apabila seorang 'akil baligh membunuh seorang orang Islam, disahajanya dibunuhnya itu, laki-laki atau perempuan, kecil atau besar, maka yang membunuh itu dibunuh. Bermula tiada harus Islam dibunuh oleh (membunuh) kafir. Bermula tiada harus merdehika dibunuh oleh membunuh hamba orang.

Bermula tiada harus bapa dibunuh oleh membunuh anaknya. Bermula (tiada) dikisaskan antara hamba Islam dan merdehika kafir. Demi bermula, jika Yahudi membunuh Nasrani atau kafir Majusi, maka atas dibunuh tiada ditahani bunuhnya, jika ia masuk Islam pun.

Bermula apabila seorang membunuh jama'at, dibunuh yang dahulu dibunuhnya; jika segala yang kemudian dibunuhnya itu, denda kepada dia.

Bermula jika yang membunuh tiada ketahuan pertama yang dibunuhnya.

Bermula pada tempat dikisaskan pada segala anggota; apabila tiada dikisaskan pada nyawa, tiada dikisaskan pada anggotanya.

Bermula membunuh dan menentukan dan mengharamkan dibunuh seperti itu, jika mati dengan itu, jika tiada mati dengan itu, dibunuhnya dengan senjata.

Bermula jika seorang memenggal kedua tangan seorang orang, maka mati ia dengan penggal itu, maka keluarga yang terbunuh itu, jika hendak dia, dibunuhnya; jika tiada, dipenggalnya tangannya kedua; jika hendak ia ampunya dengan denda atau diampuninya tiada dengan denda,

dapat, hukumnya.

(47) Peri pada menyatakan hukum kisas pada segala anggota, tetapi tiada harus dipotong kanan dengan kiri, yang benar dengan chenangga, tiada kelingking dengan jari manis, tiada gigi kecil dengan gigi besar; jika rela keduanya sekali pun, (tiada) dipenggal tangannya chenangga dengan yang benar; jika berkenan yang dilukai, jika dipuntong oleh tangan yang berjari, tiada dipuntong; jika tangan yang tiada berjari memuntong tangan yang berjari dipuntong, diambil dengan jari pula. Bermula tiada dikisas tatkala luka tubuh melainkan luka yang datang pada tulang itu.

(48) Peri pada menyatakan hukum denda.

Bermula denda itu dua bagai. Pertama denda itu dibesarkan, kedua denda dikecilkan.

Maka denda yang diperbesar itu seratus daripada unta: tiga puluh unta betina tiga tahun usianya; tiga puluh unta empat tahun usianya; empat puluh unta bunting.

Bermula denda yang diperkecilkan itu seratus daripada unta: dua puluh unta, empat tahun usianya; dua puluh unta betina, tiga tahun usianya: dua puluh unta, setahun usianya; (.....unta) jantan dua tahun usianya. Jika tiada unta, harganya unta, kata setengan kaul seribu dinar emas akan gantinya unta.

Bermula denda perempuan setengah daripada denda laki-laki. Bermula denda Nasrani dan Yahudi tiga bahagi, sebahagi daripada denda Islam.

Bermula denda kafir yang lain sepuluh emas daripada denda Islam.

Akan dua tangan, sempurna denda seratus unta; akan dua kaki sempurna denda, akan hidung sempurna denda, akan dua telinga sempurna denda, akan dua mata sempurna denda, akan empat kelopak mata sempurna denda, akan dua bibir sempurna denda. Bermula akan hilang penglihat matanya atau hilang katanya menjadi bisu atau hilang pendengarnya atau hilang budinya atau hilang penciumnya sekalian, sempurna denda seratus unta: akan puntong firusnya (farajnya) atau buahnya itu pun sempurna denda.

Bermula akan suku gigi, lima ekor unta.

Bermula segala anggota yang tiada berguna, dengan kira-kira hakim.

Bermula denda anak dalam perut ibunya itu sepuluh emas daripada denda ibunya.

Bermula kafarat membunuh orang merdehikakan seorang sahaya yang tiada berjalla Islam.

(49) Peri pada menyatakan hukum zinah iaitu dua perkara. Pertama zinah muhsin namanya, laki-laki atau perempuan yang sudah bersuami dengan nikah yang sah. Dan tiada muhsin, laki-laki belum beristeri perempuan belum bersuami iaitu laki-laki atau perempuan yang belum merasai nikah. Bermula yang muhsin itu hukumnya direjam dilontar dengan batu dan ditanamkan hingga pinggang dan pada suatu riwayat hingga leher. Sabda Nabi (s.a.w.): *La yadkhulu 'l-jannata walaudu 'z-zina*, ertinya tiada masuk syurga anak zina.

Bermula yang tiada muhsin itu, hukumnya dipalu seratus, maka dibuangkan daripada negeri itu setahun lamanya.

Bermula yang muhsin itu empat perkara: pertama Islam dan berbudi tiada gila.

Bermula hamba laki-laki dan hamba perempuan itu hadnya setengah daripada merdehika, lima puluh palunya.

(50) Bermula hukum liwat dan menyertai binatang seperti hukum zinah jua.

Bermula jika tiada bersetubuh dengan dia sehingga peluk cium sahaja, dita'azirkan oleh hakim, jangan sampai sepada sekurang-kurang had iaitu dua puluh.

Bermula dihukumkan hakim zinah dengan ikral atau dengan empat orang saksi laki-laki melihat orang itu zinah seperti colak-celak masuk diperhadkan.

Bermula jika dua orang saksi berkata, "Kami melihat dia zinah pada suatu penjuru", tiada thabit, hukum zinah hendak sekata empat orng saksi itu, maka thabitlah atasnya hukum zinah.

(51) Peri pada menyatakan hukum memaki orang haram zadah.

Bermula seorang orang memaki seorang dengan zinah, maka munkir yang bermaki itu, tiada ada saksi, maka dipalu delapan puluh palu orang yang memaki itu.

Bermula jika ia bermaki itu 'abdi orang, dipalu empat puluh palu.

Bermula apabila memaki hamba orang atau kafir, had akan orang yang memaki itu, hendaklah dita'azirkan.

Bermula tiada ada hadkan jika bapa memaki anaknya.

Bermula akan orang yang memaki, hendak tiga janji: suatu baligh dan berbudi, tiada gila dan jangan ada bapa yang bermaki.

Bermula yang dipermaki itu hendaklah ada lima janji: pertama ada Islam, kedua baligh, ketiga berbudi, keempat muhsin, kelima tiada pernah dikata orang zinah padanya.

(52) Peri pada menyatakan hukum orang yang minum arak atau tuak atau segala yang memabukkan.

Hukumnya empat puluh dipalu, jika merdehika; dua puluh jika hamba orang. Bermula dihadkan dengan dua perkara, suatu dengan ikral, suatu dengan dua orang saksi laki-laki; tiada dengan dihadkan dengan dicium bau arak atau tuak mulutnya.

(53) Peri menyatakan hukum orang mencuri harta orang. Maka hukumnya dipotong tangan orang yang mencuri itu dengan beberapa janji: pertama bahawa ada baligh, tiada dipotong kanak-kanak; kedua, hendaklah ada berbudi, tiada dipotong orang gila; ketiga, hendaklah ada benda yang dicurinya itu seemas tiga kupang harganya; keempat, hendaklah ada dicurinya itu daripada tempat benda yang di dalam peliharanya; tiada dipotong, jika mencuri benda yang bukan tempatnya ditaruhnya; kelima, jangan benda itu serupa dengan bendanya.

Bermula dipotong tangannya kanan daripada pergelangan tangannya; jika lagi mencuri, dipangkal kakinya kiri; dan jika lagi ia mencuri, dipotong tannganya kiri; jika lagi ia mencuri, dita'azirkan ia, hukumnya.

(54) Peri menyatakan hukum orang menyamun orang. Bermula orang menyamun itu atas empat bahagi.

Jika membunuh tiada mengambil harta, dibunuh jua hukumnya. Bermula jika membunuh dan mengambil hartanya, dibunuh had dan disulakan tiga hari.

Bermula mengambil harta tiada membunuh, dipotong tangannya (dan kakinya); jika bertakut juga, ianya tiada membunuh, sehingga dita'azirkan juga; jika terbunuh ia dahulu daripada ditangkap, lepas daripadanya, maka diambil hak orang daripadanya.

(59) Peri hukum segala orang yang murtad.

Apabila seorang Islam murtad, disuruh taubat tiga kali; jika tiada ia mahu taubat, dibunuhnya, hukumnya, jangan dimandikan dan jangan

disembahyangkan dan jangan ditanamkan pada kubur Islam.

(62) Peri pada menyatakan hukum orang menuntuti seorang orang. Jika ada saksinya, didengar hakim; jika tiada saksinya daripada yang menuntut itu dan jika munkir yang dituntut jika ia mahu bersumpah, sumpah ia daripada tuntut itu; dan jika tiada ia mahu bersumpah, diberi nyatakan ya'ani kembali sumpah itu kepada yang minta bersumpah. Bermula menuntutilah suatu benda. Jika yang diberinya tuntutan pada tangan seorang orang, maka sahut yang dituntuti itu, "Benda itu benda aku," keduanya menuntut benda itu, yang pada tangannya benda itu ia bersumpah; dan jika ada benda itu pada tangan dua orang, keduanya menyatakan bendanya, keduanya bersumpah, dibahagi benda itu akan kedua orang itu. Bermula barang siapa bersumpah akan perbuatan dirinya, "Bahawa benda itu thabit benda aku", barang siapa bersumpah perbuatan lain, jika ada ia akan mengadakan, "Memangnya bahawa ku tahu akan dia empunya akan perbuatan sianu", jika bersumpah akan menidakkan, "Bahawa memangnnya aku tiada tahu akan pekerjaan itu".

(63) Peri pada menyatakan hukum segala saksi lima perkara:- Pertama Islam dan baligh dan berbudi dan merdehika dan 'adil. Dan lima perkara itu: bahawa hendak menjauhi dosa yang besar, dan jangan berbuat dosa kecil, dan baik kelakuannya dan jangan mereka gusar dan memeliharakan lakunya serta namanya.

Bermula tiada zinah thabit tetap melainkan empat laki-laki. Dan tiada thabit melainkan dua laki-laki pada segala had seperti had minum dan mencuri dan menyabung dan membunuh orang dan murtad, dan kisas pada nyawa dan pada anggota, dan had bermaki dan ikral pada segala perkara ini: nikah dan talak dan merdehika dan Islam dan pada amanat dan pada wakil dan wasiat dan melihat bulan, melainkan bulan Ramadhan pada dengan seorang orang.

Bermula tiada thabit melainkan dua laki-laki atau dengan orang perempuan tiada thabit dengan perempuan sebanyak pada berniaga berpulangan dan mengembalikan benda yang dibelinya, jika berjual dan bersandar, dan pada jual dan pada mengaku dan pada sulh dan pada melepaskan dan pada utang dan pada meminjam dan pada upahan dan pada sekutu dan pada memberi dan pada merampas dan pada membinasakan.

Bermula tiada thabit melainkan laki-laku dua orang atau seorang

laki-laki dengan dua orang perempuan atau empat orang perempuan pada beranak dan bikr dan munib ya'ani janda dan segala 'aib perempuan dan segala yang terbanyak pekerjaannya segala perempuan dia.

Bermula peri hukum menuntut dan yang dituntutnya daripada sabda Nabi (s.a.w.): *al-bayyinat 'ala 'l-mudda'i wa'l-yamin 'ala man ankara*, ya'ani saksi pada orang yang menuntut bersumpah atas yang munkir, tiada dapat tiada dibicarakan kepada kathi.

Di Terengganu undang-undang jenaya Islam telah dilaksanakan khususnya semasa Sultan Zainal Abidin III (1881-1918). Pada masa itu terdapat beberapa Mahkamah yang boleh menjatuhkan hukuman mengikut undang-undang Islam. Ini termasuk Mahkamah Rayuan, Mahkamah Agung, Mahkamah Magistret, Mahkamah Kadhi dan Mahkamah Penghulu. Mahkamah Rayuan mendengar rayuan dari Mahkamah Agung. Ia dianggotai oleh Penasihat British dan dua orang yang berpangkat menteri atau pegawai negeri yang berpangkat tinggi yang dilantik oleh Sultan. Mahkamah Agung dianggotai oleh Hakim Melayu yang dikenali sebagai Ketua Hakim dan seorang bangsa Eropah yang dikenali sebagai ahli Mahkamah Agung. Ketua Hakim boleh dengan kuasa yang ada padanya memutuskan sesuatu perkara berpandukan undang-undang Islam. Mahkamah Agung mempunyai kuasa untuk mendengar dan memutuskan mana-mana bidang sama ada dalam bidang sivil ataupun jenayah dan boleh menjatuhkan apa-apa hukuman yang berpandukan undang-undang adat. Undang-undat adat memperuntukkan tidak boleh dikenakan hukuman mati atau penjara melebihi 15 tahun kecuali mendapat pengesahan Sultan dalam Majlis. Hukuman mati mestilah ditandatangi dan disahkan oleh Sultan.

Terdapat juga satu lagi Mahkamah iaitu Mahkamah Yang Maha Tinggi, dimana Sultan sendiri mendengar dan memutuskan kes-kes.

Perlaksanaan undang-undang yang berlandaskan Hukum Syarak di zaman Sultan Zainal Abidin III jelas terbukti dengan wujudnya hukuman-hukuman yang pernah dijatuhkan dan dijalankan seperti berikut:-

"Dalam kes-kes jenaya, keterangan dari dua pihak didengar oleh Baginda tetapi akhirnya dirujuk kepada Al-Quran untuk mendapat satu keputusan dalam menjalankan hukuman itu. Jenis-jenis hukuman yang mungkin dikenakan ialah hukuman mati, penjara, denda, dera dan kalau kesalahan zina, perempuan yang bersalah itu ditanam setakat pinggang di halam pasar untuk satu hari; orang ramai diizinkan merejam pesalah itu dengan batu. Sekiranya ia

masih hidup ia akan dibebaskan. Hukuman dera dikhaskan untuk pesalah-pesalah muda. Deraan dikenakan di bahagian punggung, tanpa membuang pakaian. Jumlah yang mati dihukum dalam masa 27 tahun pemerintahan baginda ialah hanya lima orang iaitu tiga orang Cina dan dua orang Melayu."

Dari keterangan di atas jelaslah kepada kita bahawa perlaksanaan hukuman-hukaman itu berdasarkan Hukum Syarak (Undang-Undang Islam). Hukuman-hukuman yang dilaksanakan pada masa itu seperti bunuh balas, potong tangan, penjara dan denda. Dalam menjatuhkan hukuman terhadap kes-kes pembunuhan, kadangkala kes-kes tersebut tidak dijatuhkan hukuman bunuh sebaliknya sipembunuh akan dipenjarakan atau dibebaskan apabila saudara-saudaranya membayar wang darah (blood money) ataupun "diat". Pembayaran diat itu telah ditetapkan sebanyak $1,200.00 tetapi kadangakalanya dikenakan lebih. Hukuman bunuh adakalanya terpaksa dilakukan atau dilaksanakan apabila waris simati mendesak supaya hutang nyawa dibayar dengan nyawa.

Manakala kes-kes kecurian tanpa sebab-sebab yang tertentu akan dihukum mengikut Hukum Syarak dengan memotong tangan pencuri. Ianya selaras dengan hukuman yang dinyatakan dalam Al-Quran.

Mengenai kes-kes kecederaan atau cedera teruk (parah) pula akan dihukum dengan dikenakan bayaran pampasan. Kalau sekiranya denda itu tidak dapat dibayar oleh yang bersalah, maka ianya akan dipenjarakan sehingga datang saudara-maranya membayar dengan tersebut.

Di samping hukuman-hukuman yang dibincangkan di atas, masih terdapat hukuman-hukuman lain yang dilaksanakan di Negeri Terengganu. Contohnya hukuman rotan yang kebiasaannya dikenakan dan dikhaskan untuk kanak-kanak saja dan jarang sekali dikenakan kepada pesalah-pesalah wanita.

Selain daripada itu, hukuman terhadap kesalahan berzina sama seperti yang diperuntukkan oleh Al-Quran dan Al-Hadith. Jika kesalahan itu dilakukan oleh perempuan yang masih dara atau lelaki yang masih teruna akan didera empat puluh rotan dan dijalankan di hadapan umum. Manakala kesalahan itu dilakukan oleh seorang perempuan yang telah berkahwin (bersuami) akan dikenakan tanam hingga ke paras pinggang di tengah-tengah kawasan pasar selama satu hari dan setiap orang yang melalui kawasan itu dimestikan membaling batu ke arahnya. Sekiranya

ia masih hidup, ia akan dibebaskan.

Perlaksanaan Hukum Syarak tidak sahaja dikenakan kepada orang-orang Islam sahaja seperti sekarang ini, tetapi juga dikenakan kepada orang-orang yang bukan Islam. Hal ini dapat dilihat apabila seorang Cina bermukah dengan perempuan Melayu, ianya akan diberi dua pilihan, sama ada memeluk Islam dan berkahwin dengan perempuan itu atau dihukum penjara.

Keadaan bertukar selepas kedatangannya British ke Tanah Melayu. Melalui treati yang dibuat oleh British dengan Raja-Raja Melayu, Raja-Raja Melayu telah bersetuju di tiap-tiap negeri menerima nasihat British dalam semua perkara pentadbiran kecuali mengenai ugama Islam dan adat Melayu. Treati-treati itu telah ditafsirkan seluas-luasnya oleh British supaya membolehkan mereka mengembangkan pengaruh mereka di dalam semua perkara termasuk pentadbiran undang-undang Islam. Dengan demikian atas nasihat British Raja-Raja Melayu telah bersetuju mengadakan perundangan berdasarkan undang-undang Inggeris dan undang-undang Inggeris-India. Dengan cara ini Kanun Keseksaan Negeri-negeri Selat (yang mengikut Kanun Keseksaan India) telah diterima pakai di Perak dengan Perintah dalam Majlis 28 Jun 1884 dan kemudiannya di negeri-negeri lain yang bergabung dalam Negeri-Negeri Melayu Bersekutu, diperbuatkan undang-undang pada tahun 1906 di Selangor dan Negeri Sembilan dan pada tahun 1909 di Pahang dan Perak, dan akhirnya dimasukkan dalam Edisi Di-Semak Undang-undang Negeri-negeri Melayu Bersekutu, 1936 sebagai Bab 45. Ia telah diperluaskan dan berkuatkuasa keseluruhan Persekutuan Tanah Melayu pada 18.12.1948 (Ordinan 32/48) dan keseluruhan Malaysia pada 31.3.76 (Akta A 327). Begitu juga Akta Keterangan Negeri-negeri Selat (yang mengikut Akta Keterangan India) telah diterima pakai di Selangor melalui Peraturan Mahkamah 1893 dan di Perak oleh Perintah dalam Majlis No. 9 Tahun 1894 dan kemudian di negeri-negeri lain yang bergabung dalam Negeri-negeri Melayu Bersekutu, dan akhirnya dimasukkan dalam Edisi Di-Semak Undang-undang Negeri-negeri Melayu Bersekutu 1956 sebagai Bab 10. Enakmen yang sama juga telah diadakan di Negeri-negeri Melayu Tak Bersekutu dan pada tahun 1950 semua Ordinan dan Enakmen itu telah digantikan dengan Ordinan Keterangan, 1950, yang mana telah kemudiannya disemak dan diperluaskan ke Sabah dan Sarawak pada tahun 1971 dan dicetak semula sebagai Akta 56. Kanun Acara Jenayah, India, telah diterima pakai di Negeri-negeri Melayu Bersekutu dan akhirnya dimasukkan dalam Edisi

Di-semak Undang-undang Negeri-negeri Melayu Bersekutu, 1936, sebagai Bab 6. Ia telah diperluaskan kepada negeri-negeri Melayu Tak Bersekutu pada tahun 1947 dan ke Melaka, Pulau Pinang, Sabah dan Sarawak pada tahun 1976. Oleh kerana itu undang-undang am di Malaysia mengenai jenayah, tatacara jenayah dan keterangan adalah didapati dalam undang-undang yang berdasarkan undang-undang Inggeris-India. Demikianlah kita ada kesalahan-kesalahan berikut disebut dalam dan dihukum di bawah Kanun Keseksaan:-

Bab VI	Kesalahan terhadap negara	Hirabah
S. 302-304A	Kesalahan mematikan orang dan menyebabkan kematian	Qatl
S.323-338	Kecederaan	Kecederaan
S.376	Rogol	Zina
S.377	Kesalahan dengan binatang	Ittiyah al bahimah
S.377A	Persetubuhan luar tabii	Liwat-Mushaqah
S.379-282	Curi	Curi
S.392-402	Rompak	Hirabah

Terdapat juga Akta Dadah Berbahaya yang menghukum kesalahan syurb mengenai dadah berbahaya.

Pihak British juga telah menasihatkan Raja-Raja Melayu menubuhkan mahkamah dan akhirnya mahkamah itu telah mengambil alih bidangkuasa dan tempat mahkamah Syariah. Mahkamah Syariah telah diletakkan di tempat yang bawah dalam susunan mahkamah dan telah diberi bidangkuasa jenayah yang sempit. Sebagai contoh di bawah Enakmen Mahkamah, 1905, Negeri Sembilan Mahkamah Kathi atau Naib Kathi hanya diberi kuasa mengenakan denda tidak lebih $10/. Di bawah Enakmen Pentadbiran Undang-Undang Islam, 1952 Selangor, hukuman maksima yang boleh dikenakan ialah penjara tidak melebihi enam bulan atau denda tidak melebihi lima ratus ringgit. Selepas diadakan Ordinan Mahkamah, 1948, Mahkamah Syariah telah tidak lagi disebut dalam sistem mahkamah Persekutuan. Di dalam Perlembagaan Persekutuan telah diperuntukkan dengan Perkara 121 bahawa kuasa kehakiman Persekutuan terletak kepada Mahkmah Persekutuan (kemudiannya Mahkamah Agung), Mahkamah-Mahkamah Tinggi Ma-

laya dan Borneo dan Mahkamah Rendah yang diperuntukkan di bawah undang-undang Persekutuan. Oleh kerana itu Mahkamah Syariah menjadi hanya mahkamah negeri. Akta Mahkamah Syariah (Bidangkuasa Jenayah), 1965, memperuntukkan bahawa kesalahan-kesalahan terhadap ajaran-ajaran Islam yang boleh dihukum dengan penjara tidak melebihi enam bulan atau denda tidak melebihi $1000/- atau kedua-duanya. Pada tahun 1984 Akta itu telah dipinda dan bidangkuasa jenayah Mahkamah Syariah diluaskan dengan membenarkan mahkamah tersebut menjatuhkan hukuman penjara sehingga tiga tahun atau apa-apa denda sehingga tiga tahun melebihi enam pukulan atau gabungan semua hukuman itu. Bidangkuasa ini adalah lebih rendah dari bidangkuasa Magistret Klas Pertama.

Pada tahun 1988 Perkara 121 Perlembagaan Persekutuan telah dipinda supaya memansuhkan peruntukkan yang mengatakan kuasa kehakiman Persekutuan diletakkan di Mahkamah Sivil sahaja dan juga diperuntukkan bahawa Mahkamah-mahkamah Tinggi dan mahkamah-mahkamah di bawahnya tidaklah boleh mempunyai bidangkuasa berkenaan dengan apa-apa perkara dalam bidangkuasa Mahkamah Syariah. Mahkamah-mahkamah Syariah telah disusun lebih baik di dalam tiga peringkat iaitu Mahkamah Rendah Syariah, Mahkamah Tinggi Syariah dan Mahkamah Rayuan Syariah. Hakim-hakim Mahkamah Syariah dan pegawai undang-undang telah lebih terlatih dan mereka telah diberi beberapa kemudahan fisikal yang lebih baik dari dahulu dan juga undang-undang lengkap mengenai keterangan, aturcara sivil and jenayah, berasaskan kepada undang-undang Islam.

Pada masa penjajahan dahulu kita dihalang dari meneruskan pelaksanaan undang-undang jenayah Islam. Kini kita telah mencapai kemerdekaan and sebanyak-sedikit kematangan dalam politik, kehakiman and ekonomi and masanya telah tiba kita menimbangkan dengan serius mengadakan semula undang-undang jenayah Islam di Malaysia.

Perlaksanaan Undang-Undang Hudud di negeri-negeri

Kuasa negeri-negeri di Malaysia mengadakan perundangan mengenai undang-undang jenayah Islam dihadkan oleh Perlembagaan Persekutuan. Senarai II (Senarai Negeri) Jadual Kesembilan memberi kuasa kepada negeri membuat undang-undang antara lain mengenai -

1. Kecuali mengenai Wilayah-Wilayah Persekutuan Kuala Lumpur dan Labuan, Hukum Syarak dan undang-undang diri dan

keluarga bagi orang yang menganut ugama Islam, termasuk Hukum Syarak berhubung dengan mewarisi harta berwasiat and tak berwasiat, pertunangan, perkahwinan, perceraian, maskahwin, nafkah, pengambilan anak angkat, taraf anak, penjagaan anak, pemberian, pembahagian harta dan amanah bukan khairat; Wakaf Islam dan ta'arif serta peraturan mengenai amanah khairat dan khairat ugama, perlantikan pemegang-pemegang amanah dan perbadanan bagi orang-orang mengenai pemberian ugama Islam dan khairat, yayasan, amanah khairat dan yayasan khairat yand dijalankan, kesemuanya sekali dalam Negeri; adat istiadat Melayu. Zakat Fitrah dan Bait-ul-mal atau hasil ugama Islam yang seumpamanya; masjid atau mana-mana tempat sembahyang awam untuk orang Islam; mengadakan dan menghukum kesalahan-kesalahan yang dilakukan oleh orang-orang yang menganut ugama Islam terhadap ajaran-ajaran Islam, kecuali mengenai perkara-perkara yang termasuk dalam Senarai Persekutuan, keanggotaan, penyusunan dan acara bagi Mahkamah-mahkamah Syariah, yang akan mempunyai bidangkuasa hanya ke atas orang-orang yang menganut ugama Islam dan hanya mengenai mana-mana perkara yang termasuk dalam perenggan ini, tetapi tidak mempunyai bidangkuasa mengenai kesalahan-kesalahan kecuali setakat yang diberi oleh undang-undang Persekutuan; mengawal pengembangan iktikad dan kepercayaan antara orang-orang yang menganut ugama Islam; menentukan perkara-perkara Hukum Syarak dan iktikad dan adat istiadat Melayu.

Sungguhpun peruntukan itu nampaknya secara am dan bermula dengan merujuk kepada "Hukum Syarak dan undang-undang diri dan keluarga bagi orang yang menganut ugama Islam" ia telah biasanya ditafsirkan hingga sekarang dengan mengikut sekatan butir-butir perkara yang disebutkan dalam perenggan itu. Perkataan "termasuk" adalah ungkapan meluaskan dan bukan tafsiran yang bersifat membatasi; ia tidak sama dengan "hendaklah ertinya". (Lihat Stroud's Judicial Dictionary p. 1263 mengenai "includes")

Bertambah pula Perkara 74(4) Perlembagaan Persekutuan memperuntukkan "Jika perbahasaan serta perbahasaan tertentu digunakan pada memperihalkan mana-mana jua perkara yang disebutkan dalam senarai-senarai yang dinyatakan dalam Jadual Kesembilan maka keluasan makna perbahasaan am tidak boleh ditafsirkan sebagai terhad oleh perbahasaan tertentu itu"

Mengenai undang-undang jenayah, Senarai II itu menyebut "mengadakan dan menghukum kesalahan-kesalahan yang dilakukan oleh

orang-orang yang menganut ugama Islam terhadap ajaran-ajaran Islam, kecuali mengenai perkara-perkara yang termasuk dalam senarai Persekutuan; keanggotaan, penyusunan dan acara bagi Mahkamah-mahkamah Syariah, yang akan mempunyai bidangkuasa hanya ke atas orang-orang yang menganut ugama Islam dan hanya mengenai mana-mana perkara yang termasuk dalam perenggan ini, tetapi tidak mempunyai bidangkuasa mengenai kesalahan-kesalahan kecuali setakat yang diberi oleh undang-undang Persekutuan".

Perkataan "precept" yang digunakan dalam Perlembagan telah salah diterjemahkan sebagai "rukun-rukun". Ia telah diberi makna dalam Oxford Advanced Learner's Dictionary of Current English sebagai maksudnya "Kaedah atau panduan khususkan bagi tingkahlaku seperti mengikut "precepts" ugama seseorang; pengajaran akhlak". Dalam Webster's Encylopaedia Unabridged Dictionary ia diberi makna maksudnya "Perintah atau panduan diberi sebagai peraturan tindakan atau kelakuan; perintah ugama mengenai kelakuan akhlak. Concise Oxford Dictionary memberi makna "precept" maksudnya "perintah; perintah Tuhan". Kamus Dwibahasa Dewan memberi makna "precept" sebagai "petua; nasihat; ajaran; petunjuk

Perkataan "jurisdiction" diberi makna dalam Jowitt's Dictionary of English Law sebagai maksudnya "Kuasa perundangan; takat kuasa; ia boleh dihadkan mengikut tempat, orang atau jumlah atau jenis soalan yang perlu diputuskan". Akta Mahkamah Syariah (Bidangkuasa Jenayah), 1965 (Disemak 1988) memberi bidangkuasa kepada mahkamah yang ditubuh di bawah undang-undang negeri untuk membicarakan kesalahan-kesalahan di bawah undang-undang Islam. Seksyen 2 memperuntukkan - "Mahkamah-Mahkamah Syariah yang ditubuh di bawah mana-mana undang-undang dalam sebuah Negeri dan diberi bidangkuasa ke atas orang-orang menganut ugama Islam mengenai mana-mana perkara yang disenaraikan di Senarai II Senarai Negeri Jadual Kesembilan Perlembagaan Persekutuan adalah dengan ini diberi bidangkuasa mengenai kesalahan-kesalahan terhadap ajaran-ajaran Islam oleh orang-orang yang menganut ugama itu seperti yang diperuntukkan oleh mana-mana undang-undang negeri. Dengan syarat bidangkuasa itu tidak boleh dijalankan mengenai mana-mana kesalahan yang boleh dihukum dengan penjara untuk masa lebih tiga tahun atau dengan denda melebihi lima ribu ringgit atau sebat lebih dari enam pukulan atau dengan gabungan hukuman-hukuman itu". Kuasa Persekutuan mengenai undang-undang jenayah disebut di Senarai I

Jadual Kesembilan itu seperti berikut "Mengadakan kesalahan-kesalahan mengenai apa-apa perkara yang termasuk dalam Senarai Persekutan atau yang diselenggarakan di bawah undang-undang Persekutuan". Perkataan "atau yang diselenggarakan di bawah undang-undang Persekutuan" telah ditambah dan berkuatkuasa dari 29 Ogos 1963 oleh Akta Perlembagaan (Pindaan), 1963 (No. A25) akan tetapi pindaan yang sama tidak dibuat ke Senarai II, perenggan 1 (Senarai Negeri).

Oleh kerana itu negeri-negeri mempunyai kuasa mengadakan dan menghukum kesalahan-kesalahan oleh orang-orang yang menganut ugama Islam terhadap ajaran-ajaran ugama itu akan tetapi (a) ia tidak mempunyai kuasa mengadakan dan menghukum kesalahan-kesalahan mengenai perkara yang disebut dalam senarai Persekutuan; (b) Mahkamah Syariah hanya mempunyai bidangkuasa ke atas orang-orang yang menganut ugama Islam dan mengenai perkara-perkara yang disebut dalam perenggan satu itu dan (c) Mahkamah Syariah tidak boleh mempunyai bidangkuasa mengenai kesalahan kecuali setakat yang diberi oleh undang-undang Persekutuan.

Kerajaan Kelantan telah mengemukakan Kanun Jenayah Syariah II, 1993. Undang-undang yang dicadangkan itu nampaknya tidak sah atas alasan ia telah membuat peruntukan mengenai perkara yang Bidang Undangan Negeri tidak mempunyai apa-apa kuasa untuk membuat undang-undang, iaitu :-

(a) ia cuba mengenakan undang-undang itu kepada orang-orang yang tidak menganut ugama Islam seperti dalam Fasal 56(2) yang memperuntukkan - "Tidak ada apa-apa dalam Enakmen ini yang menghalang seseorang yang bukan Islam daripada membuat pilihan supaya Enakmen ini terpakai ke atasnya mengenai apa-apa kesalahan yang dilakukan olehnya dalam Negeri Kelantan dan sekiranya seseorang bukan Islam itu membuat pilihan sedemikian, maka peruntukan Enakmen ini, hendaklah *mutatis mutandis*, terpakai ke atasnya seperti juga peruntukan-peruntukan tersebut terpakai ke atas seorang Islam".

(b) ia mencadang mengadakan Mahkamah Bicara Syariah Khas dan Mahkamah Rayuan Syariah Khas dengan bidangkuasa ke atas orang-orang yang tidak menganut ugama Islam (lihat Bahagian VI Rang Undang-undang itu).

(c) ia mencadang memberi mahkamah-mahkamah itu bidangkuasa yang tidak diberi oleh undang-undang Persekutuan. (Lihat Fasal 64 Rang Undang-undang itu).

Hukuman-hukuman yang boleh dikenakan oleh mahkamah-mahkamah itu, termasuk hukuman rejam, mati, penjara dan sebat, jauh lebih dari apa yang diberi oleh Akta Mahkamah Syariah (Bidangkuasa Jenayah), 1965.

Satu cara yang mungkin boleh diambil untuk membolehkan Badan Perundangan Negeri membuat undang-undang itu ialah dengan Parlimen memperluaskan kuasa Badan Perundangan Negeri di bawah Perkara 76A Perlembagaan Persekutuan yang memperuntukkan -

76A (1) Adalah dengan ini ditetapkan bahawa kuasa Parlimen bagi membuat undang-undang mengenai sesuatu perkara yang disebutkan dalam senarai Persekutuan adalah termasuk kuasa membenarkan Badan-badan Perundangan Negeri atau mana-mana daripadanya membuat undang-undang mengenai kesemua atau sebahagian perkara itu tertakluk kepada apa-apa syarat atau sekatan (jika ada) yang dikenakan oleh Parlimen.

(2) Walau apapun peruntukan Perkara 75, sesuatu undang-undang Negeri yang dibuat menurut kuasa yang diberi oleh Akta Parlimen seperti tersebut dalam Fasal (1) boleh, jika dan setakat mana yang diperuntukkan oleh Akta itu, meminda atau memansuhkan (mengenai negeri yang berkenaan itu) mana-mana undang-undang Persekutuan yang telah diluluskan sebelum Akta itu."

Kuasa jelaslah diberi di bawah Perkara 76A untuk Badan Undangan Negeri meminda atau memansuhkan undang-undang Persekutuan dan oleh kerana itu Akta Mahkamah Syariah (Bidangkuasa Jenayah), 1965, boleh dipinda atau dimansuhkan.

Satu cara yang lebih berat dan menyeluruh ialah dengan meminda Perlembagaan Persekutuan dan khususnya meminda Senarai II (Senarai Negeri) supaya tidak ada sekatan atas Badan Perundangan Negeri membuat undang-undang jenayah Islam dan tidak diadakan lagi undang-undang Persekutuan menyekat bidangkuasa Mahkamah Syariah dalam perkara itu. Dengan pindaan itu Badan Perundangan Negeri mempunyai kuasa penuh membuat undang-undang jenayah Islam.

Jika Kerajaan Persekutuan tidak ingin meluaskan kuasa Badan Perundangan Negeri atau meminda Perlembagaan Persekutuan, seperti yang disebut di atas, nyatalah undang-undang yang dicadangkan oleh Kerajaan Kelantan itu adalah tak sah setakat mana ia membuat

peruntukan bagi perkara-perkara yang mana Badan Perundangan Negeri tidak mempunyai kuasa untuk membuat undang-undang. Akan tetapi di bawah Perkara 4(3) sahnya sesuatu undang-undang itu tidak boleh dipersoalkan kecuali dalam pembicaraan untuk mendapatkan suatu penetapan yang undang-undang itu tidak sah atas alasan itu atau jika undang-undang itu telah dibuat oleh Badan Perundang Negeri, dalam pembicaraan antara Persekutuan dan Negeri itu. Pembicaraan untuk mendapatkan suatu penepatan itu yang sesuatu undang-undang adalah tidak sah atas alasan tersebut (kecuali dalam pembicaraan antara Persekutuan dan Negeri itu) tidak boleh dimulakan dengan tiada kebenaran seorang hakim Mahkamah Agung dan Persekutuan adalah berhak menjadi suatu pihak dalam mana-mana pembicaraan itu dan begitu juga mana-mana negeri yang akan atau harus menjadi suatu pihak dalam pembicaraan yang dibawa bagi maksud itu.

Dalam kes Nordin bin Salleh lwn. Kerajaan Negeri Kelantan dan Majlis Ugama Islam, Kelantan, pemohon telah memohon penetapan antara lain bahawa seksyen 73 Enakmen Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan, 1956, adalah tak sah atas alasan ia telah membuat peruntukan mengenai perkara yang Badan Perundangan Negeri Kelantan tidak mempunyai kuasa membuat undang-undang. Hakim Besar Malaya telah memberi kebenaran memfailkan prosiding bagi permohonan itu. Soal *locus standi* (hak menuntut) tidak ditimbulkan dalam kes itu kerana jelas pemohon mempunyai *locus standi* kerana dia telah dituduh melakukan kesalahan di bawah seksyen itu. Begitu juga dalam kes Mamat bin Daud dan lain-lain lwn. Kerajaan Malaysia [1988] 1 MLJ 119 di mana kesahan undang-undang Persekutuan telah dipertikaikan atas alasan ia membuat peruntukan mengenai perkara yang Parlimen tidak mempunyai kuasa membuat undang-undang, soal *locus standi* tidak ditimbulkan, oleh kerana perayu-perayu itu telah dituduh melakukan kesalahan di bawah undang-undang yang dipertikaikan itu. Walau bagaimanapun soal *locus standi* tidak timbul jika permohonan dibuat oleh Kerajaan Persekutuan atau Negeri atau oleh Peguam Negara.

Dalam kes Kerajaan Malaysia lwn. Lim Kit Siang [1989] 1 MLJ 50 Salleh Abas KHN pada masa itu telah berkata -

"Semua sistem undang-undang mempunyai cara sedia ada untuk melindung proses kehakimannya dari disalahgunakan oleh pak sibuk, orang yang berperangai pelik dan lain-lain dan orang yang hanya mengacau dengan

menegaskan bahawa seorang plaintif hendaklah mempunyai kepentingan khas dalam prosiding yang ia memulakan. Kepentingan khas ialah pertalian antaranya dan pihak terhadap siapa dia membuat aduan kepada Mahkamah dan ia dikenali sebagai locus standi. Dalam dakwaan awam, kaedahnya ialah Peguam Negara menjadi penjaga kepentingan awam. Dialah yang akan menguatkuasakan kewajipan awam dan kepatuhan kepada undang-undang awam. Oleh kerana itu apabila dia membawa tindakan, dia tidak perlu menunjukkan locus standi. Akan tetapi, mana-mana orang lain, walau apapun semangat kemasyarakatannya, tidak boleh membawa tindakan itu kecuali ia ada locus standi atau ia mendapat pertolongan atau persetujuan Peguam Negara. Jika persetujuan itu diperolehi, tindakan itu dinamakan tindakan relator dan Peguam Negara menjadi plaintif dan orang itu menjadi relatornya."

Satu lagi perkara yang boleh dibawa terhadap undang-undang yang dicadangkan di Kelantan itu ialah ada peruntukannya yang mengenakan sekatan-sekatan ke atas kebebasan asasi yang disebut di Bahagian II Perlembagaan Malaysia dan oleh kerana itu ia berlawanan dengan Perlembagaan. Umpamanya boieh dihujahkan bahawa Fasal 23 Enakmen Kanun Jenayah Syariah II itu mengenai irtidad atau riddah adalah berlawanan dengan kebebasan ugama yang disebut dalam Perkara II Perlembagaan. Fasal 23 itu sebetulnya tidak menyebut dengan jelas mengenai murtad sebagai kesalahan. "Irtidad" ditafsirkan sebagai apa-apa perbuatan yang dilakukan atau perkataan yang disalurkan oleh seorang Islam yang mukallaf yang mana perbuatan atau perkataan itu mengikut Hukum Syarak adalah menjejaskan atau berlawanan dengan 'aqidah ugama Islam: dengan syarat bahawa perbuatan itu dilakukan atau perkataan itu disebutkan dengan niat, dengan sukarela dan dengan pengetahuan dan tanpa apa-apa paksaan oleh sesiapa atau oleh keadaan. Kemudian disebutkan perbuatan-perbuatan atau perkataan-perkataan yang menjejaskan 'aqidah itu ialah perbuatan-perbuatan atau perkataan-perkataan mengenai atau bersabit dengan perkara-perkara asas yang dianggapkan mesti diketahui dan dipercayai oleh tiap-tiap orang Islam sebagai pengetahuan umumnya kerana dia orang Islam seperti perkara-perkara mengenai Rukun Islam, Rukun Iman dan perkara-perkara halal dan haram". Oleh kerana itu murtad iaitu penukaran ugama dari Islam ke ugama lain tidak disebut dengan jelas akan tetapi hukuman yang diperuntukkan ialah hukuman untuk jenayah murtad di bawah undang-undang Islam, iaitu jika orang itu tidak bertaubat ia akan dibunuh.

Hukuman itu termasuk juga "memerintahkan supaya hartanya sama ada diperolehi sebelum atau selepas dia melakukan kesalahan itu dirampas untuk dipegang bagi keperluan Baitulmal". Ini boleh dihujjahkan

telah melebihi kuasa merampas harta yang terlibat dalam satu jenayah, seperti yang disebut dalam seksyen 435 Kanun Acara Jenayah dan boleh dipertikaikan kerana berlawanan dengan Perkara 13 Perlembagaan Persekutuan mengenai hak terhadap harta.

Perlaksanaan Undang-Undang Hudud oleh Persekutuan

Bolehkan Parlimen membuat undang-undang seperti Enakmen Kanun Jenayah Syariah Kelantan itu? Jawab nampaknya tidak boleh kecuali untuk Wilayah-Wilayah Persekutuan Kuala Lumpur dan Labuan. Ini kerana ia adalah undang-undang mengenai ugama Islam dan undang-undang Islam dan oleh kerana itu hanya negeri-negeri boleh membuat undang-undang itu (kecuali bagi Wilayah-Wilayah Persekutuan). Dalam kes Mamat bin Daud dan lain lwn. Kerajaan Malaysia [1988] 1 MJL 119 tiap-tiap si petisyen itu telah dituduh melakukan kesalahan di bawah Seksyen 298A Kanun Keseksaan kerana melakukan perbuatan yang boleh memudharatkan perpaduan antara orang-orang yang menganut ugama Islam. Mereka dikatakan telah bertindak tanpa kebenaran sebagai Bilal, Khatib sungguhpun Imam di sembahyang jumaat di Kuala Terengganu dan tidak dilantik di bawah Enakmen Pentadbiran Undang-Undang Islam, Terengganu 1955. Kebenaran telah diperolehi untuk memfail tindakan mendapat deklarasi bahawa Seksyen 298A Kanun Keseksaan itu tidak sah kerana ia membuat peruntukan mengenai perkara yang Parlimen tidak mempunyai kuasa membuat undang-undang. Telah diputuskan oleh majoriti Mahkamah Agung bahawa Seksyen 298A itu adalah undang-undang atas perkara ugama Islam dan mengenai perkara itu hanya negeri-negeri mempunyai kuasa membuat undang-undang di bawah Perkara 74 dan 77 Perlembagaan Persekutuan. Undang-Undang itu oleh kerana itu diputuskan tidak sah, kecuali bagi Wilayah-Wilayah Persekutuan Kuala Lumpur dan Labuan.

Akan tetapi undang-undang seperti di Kelantan itu boleh dibuat oleh Parlimen di bawah Perkara 76 Perlembagaan Persekutuan, yang memberi kuasa kepada Parlimen membuat undang-undang untuk negeri-negeri dalam hal-hal tertentu. Perkara 76(1) memperuntukkan bahawa Parlimen boleh membuat undang-undang mengenai apa-apa perkara yang disebut dalam Senarai Negeri tetapi hanya seperti berikut sahaja
[(a) Tidak berkenaan]
(b) bagi maksud mengadakan persamaan undang-undang di antara dua buah negeri atau lebih; atau

(c) jika diminta sedemikian oleh mana-mana Dewan Negeri.

Sesuatu undang-undang yang dibuat mengikut perenggan (b) atau (c) Fasal (1) (kecuali undang-undang mengenai tanah dan kerajaan temaptan) tidak boleh berkuatkuasa di mana-mana Negeri sehingga undang-undang itu telah diterima dengan suatu undang-undang yang dibuat oleh Badan Perundangan Negeri itu dan selepas itu undang-undang itu hendaklah disifatkan sebagai suatu undang-undang Negeri dan bukan suatu undang-undang Persekutuan, dan oleh yang demikian undang-undang itu boleh dipinda atau dimansuhkan oleh suatu undang-undang yang dibuat oleh Badan Perundangan Negeri. Masalah yang masih timbul ialah Mahkamah mana yang akan menjalankan bidangkuasa di bawah undang-undang yang dicadang itu. Jika mahkamah itu Mahkamah Syariah yang ditubuh di bawah Kerajaan Negeri mahkamah itu masih tertakluk kepada Akta Mahkamah Syariah (Bidangkuasa Jenayah) 1965. Oleh kerana itu bidangkuasa hendaklah diberi kepada mahkamah yang ditubuh di bawah undang-undang Persekutuan sama ada mahkamah sivil yang ada atau Mahkamah Syariah baru. Mahkamah Syariah yang ditubuh di bawah undang-undang Persekutuan di Wilayah-Wilayah Persekutuan Kuala Lumpur dan Labuan nampaknya tidak tertakluk kepada Akta Mahkamah Syariah (Bidangkuasa Jenayah) 1965 itu.

Jika Kanun Jenayah Shariah II Kelantan itu dijadikan undang-undang Persekutuan ada beberapa pindaan dan ubahsuaian yang perlu dibuat:-

(a) Seksyen 23 Kanun itu hendaklah tidak diadakan oleh kerana ia mungkin bercanggah dengan hak kebebasan ugama yang diberi di bawah Perkara 11 Perlembagaan Persekutuan dan hak terhadap harta di bawah Perkara 13 Perlembagaan itu.

(b) Seksyen 46(2) memperuntukkan dalam perkara zina, kehamilan atau kelahiran anak oleh seorang perempuan yang tidak mempunyai suami hendaklah menjadi keterangan yang boleh mendapatinya bersalah melakukan zina dan yang demikian hukuman hudud ke atasnya hendaklah dikenakan melainkan jika dia dapat membuktikan sebaliknya. Peruntukan ini hendaklah dihapuskan, oleh kerana jelas ia berlawanan dengan pendapat mazhab Shafii dan Hanafi. Ia hanya diterima oleh mazhab Maliki dan sebahagian ulama mazhab Hambali (tidak oleh Imam Ahmad). Daripada segi maslahah ammah,

peruntukan seperti ini telah dibuktikan di Pakistan menjadi keaniayaan kepada kaum wanita. Mithalnya, jika seorang perempuan telah dirogol oleh seorang lelaki, dia susah hendak membuktikan tuduhan rogol itu kerana tidak dapat membawa empat orang saksi lelaki yang adil, akan tetapi jika dia hamil dari rogol itu atau melahirkan anak, dia boleh dituduh dengan zina.

Seksyen 46(2) itu nampaknya berlawanan dengan seksyen 39(2) Enakmen itu yang memperuntukkan "Semua kesalahan di bawah Enakmen ini sama ada kesalahan hudud atau kesalahan qisas atau kesalahan ta'zir hendaklah dibuktikan dengan keterangan lisan atau iqrar yang dibuat oleh tertuduh". Ia juga berlawanan dengan seksyen 12 Kanun Jenayah Syariah 1985 mengenai kehamilan di luar nikah, dimana hukum ta'zir diperuntukkan.

(c) Perhubungan antara Kanun Jenayah Syariah 1985 dan Enakmen Kanun Syariah II, 1993 tidak dijelaskan. Kanun Jenayah Syariah 1985 telah menyebutkan hukuman ta'zir bagi khalwat (seksyen 9), sumbang (seksyen 10), zina (seksyen 11), liwat (seksyen 14), mushahakan (seksyen 16), kehamilan di luar nikah (seksyen 16) dan minuman yang memabukkan (seksyen 25). Bolehkah seseorang dituduh dengan kesalahan di bawah Enakmen Kanun Jenayah Syariah II 1993 dan kemudiannya di bawah Kanun Jenayah Syariah, 1985 atau sebaliknya?

Seksyen 47 Enakmen Kanun Jenayah Syariah, 1993 memperuntukkan - "Apabila seseorang tertuduh itu tidak boleh dihukum dengan hukuman hudud kerana saksi-saksi telah menarik balik keterangan mereka sebagaimana yang diperuntukkan di bawah seksyen 43 atau kerana tertuduh itu telah menarik balik iqramya sebagaimana yang diperuntukkan di bawah seksyen 45 atau kerana keterangan yang ada tidak memenuhi syarat-syarat yang dikehendaki untuk membuktikan kesalahan hudud, maka tertuduh bolehlah dihukum dengan hukuman ta'zir dan Mahkamah hendaklah mengambil tindakan untuk menjatuhkan hukuman itu sekiranya ada keterangan yang cukup bagi maksud itu".

Di manakah hukuman ta'zir itu diperuntukkan? Bolehkah seorang yang dituduh umpamanya dengan kesalahan zina di bawah seksyen 10 Enakmen Kanun Jenayah Syariah, 1985? Perlu diadakan undang-undang untuk hukuman ta'zir bagi Persekutuan dan perlu ada peruntukan yang membolehkan seorang yang dituduh melakukan kesalahan hudud disabitkan dan dihukum untuk kesalahan ta'zir.

(d) Seksyen 61 Enakmen Kanun Jenayah Syariah II, 1993,

memperuntukkan "Apabila seseorang itu telah dibicarakan atau menghadapi apa-apa prosiding kerana melakukan kesalahan di bawah Enakmen ini, maka dia tidaklah boleh dibicarakan dan tiada apa-apa prosiding boleh diambil terhadapnya di bawah Kanun Keseksaan mengenai kesalahan yang sama atau serupa yang diperuntukkan di bawah Kanun itu".

Mengenai kesalahan yang menyebabkan kematian manusia dan yang menyebabkan kecederaan badan memang terdapat peruntukan bagi qisas dan diyat dan juga untuk ta'zir (lihat seksyen-seksyen 24, 29 dan 38). Akan tetapi Kanun Keseksaan ada peruntukan untuk curi dan beberapa jenis kesalahan seks, seperti rogol. Jika tindakan tidak boleh diambil di bawah Kanuan Keseksaan, seperti yang disebut dalam seksyen 61, bagaimanakah boleh hukuman ta'zir dikenakan di bawah seksyen 47? Jika seorang dituduh melakukan sariqah atau pencurian di bawah seksyen 5 Enakmen itu yang boleh dihukum di bawah seksyen 6 Enakmen Kanun Jenayah Syariah II, 1993 tidakkah dia boleh disabitkan dan dihukum di bawah Kanun Keseksaan sebagai ta'zir untuk kesalahan mencuri itu?

(e) Kesalahan menyetubuhi binatang (buggery) boleh dihukum di bawah seksyen 377 Kanun Keseksaan dengan penjara hingga dua puluh tahun dan boleh dikenakan sebat. Ini adalah lebih berat dari hukuman yang diberi di bawah seksyen 21 Enakmen Kanun Jenayah Syariah, di mana hukumannya tidak melebihi lima tahun. Tidakkah boleh peruntukan di Kanun Keseksaan itu dipakai? Begitu juga mengenai seksyen 377 Kanun keseksaan mengenai persetubuhan luar tabii.

(f) Seksyen 375 dan 376 Kanun Keseksaan adalah mengenai rogol. Tidakkah baiknya peruntukan ini dikekal untuk melindung wanita dan anak perempuan.

(g) Enakmen Kanun Jenayah Syariah II 1993 hanya menghukumkan meminum arak atau sebarang minuman yang memabukkan. Akta Dadah Berbahaya, 1952 dan hukuman-hukumannya bolehlah dikekalkan.

(h) Mengenai keterangan, perlu diadakan bagi Persekutuan Akta Keterangan Syariah, yang menerangkan jenis-jenis dan cara-cara keterangan untuk kesalahan di bawah Kanun Jenayah Syariah. Seksyen 39 Enakmen Kanun Jenayah Syariah II 1993 memperuntukkan :-

(1) Kecuali jika ada percanggahan dengan peruntukan yang ada dalam Enakmen ini, maka Enakmen Keterangan Mahkamah Syariah 1991 hendaklah dipakai untuk membuktikan kesalahan-kesalahan di

bawah Enakmen ini.

(2) Semua kesalahan di bawah Enakmen ini sama ada kesalahan hudud atau qisas atau kesalahan ta'azir hendaklah dibuktikan dengan keterangan lisan atau ikrar yang dibuat oleh tertuduh".

Perlu dijelaskan perbezaan antara syahadah dan bayyinah dan kegunaan bayyinah dan qarinah untuk kesalahan ta'zir. Seksyen 46 Enakmen Kanun Jenayah Syariah II 1993 hanya sebut kegunaan keterangan qarinah mengenai kesalahan hudud dan tidak menyebut apa-apa mengenai kegunaan qarinah bagi kesalahan qisas dan ta'azir.

(i) Kesan dan perhubungannya antara peruntukan diyat dan undang-undang tort yang ada di bawah undang-undang sivil perlu dikaji dengan mendalam dan usaha dibuat untuk menerangkan kebaikan dan manfaat undang-undang Islam mengenai diyat, yang boleh mengambil tempat undang-undang tort mengenai kecederaan kepada badan.

(j) Bahagian VI Enakmen Kanun Jenayah Syariah II 1993 perlu dikaji dengan teliti. Perlukah diadakan Mahkamah Bicara Khas dan Mahkamah Rayuan Syariah Khas? Bolehkah kes-kes itu dibicara dan diputuskan oleh Mahkamah Sivil yang ada dengan menambahkan beberapa Ulamak sebagai Hakim Mahkamah Tinggi?

(k) Oleh kerana Kanun Jenayah Syariah memperuntukkan hukuman untuk kesalahan-kesalahan yang berat dan serius perlu diadakan peruntukan untuk mengawal pendakwaannya. Satu cadangan ialah kuasa Peguam Negara di bawah Perkara 145 Perlembagaan Persekutuan diperluaskan supaya termasuk kuasa membawa, menjalankan dan memberhentikan apa-apa prosiding di hadapan Mahkamah Syariah. Adalah penting umpamanya dalam kes zina, menentukan, sama ada seorang itu hendak dituduh untuk kesalahan zina hudud atau kesalahan zina ta'azir.

Perlaksanaan

(a) Undang-Undang Islam membezakan antara kesalahan-kesalahan hudud dan kesalahan-kesalahan ta'zir dan antara qisas dan ta'zir. Kesalahan-salahan ta'zir dan hukumannya terpulang kepada pemerintah dan hakim untuk menentukannya. Di Malaysia kesalahan-kesalahan ta'zir telah diperuntukkan di undang-undang sivil yang dikenakan kepada semua orang, orang Islam dan orang bukan Islam. Antara undang-undang itu ialah Kanun Keseksaan dan Akta Dadah Berbahaya, 1952.

Langkah yang pertama ialah meneliti undang-undang itu dan melihat samada perlu meminda undang-undang itu supaya menyeleraskannya dengan undang-undang Islam.

(b) Mengenai kesalahan mematikan manusia Kanun Kesiksaan ada peruntukan bagi (a) membunuh orang (*Murder*) (b) mematikan orang dengan salah (*culpable homocide*) dan (c) menyebabkan kematian dengan cuai (*causing death by a rash or negligent act*). Boleh dikatakan ini berasal dari undang-undang Islam yang diikuti di India dan sama dengan (a) *qatl al' amd* (b) *qatl syibhi al' amd* dan (c) *qatl al khata'*. Adalah dicadangkan peruntukan yang ada di Kanun Kesiksaan itu dipakai dengan apa-apa pindaan yang perlu. Satu pindaan yang perlu ialah mengenai hukuman mandatory bagi membunuh orang. Ini perlu dipinda supaya hukuman mati tidak dikenakan apabila (i) kesalahan itu tidak dibukti dengan dua saksi yang boleh dipercayai dan (ii) jika waris mengampunkan pesalah itu samada dengan membayar diyat atau tidak.

Apabila hukuman mati sebagai hukuman qisas tidak boleh dikenakan, pesalah itu hendaklah dikenakan hukuman ta'zir dengan penjara seumur hidup.

(c) Mengenai kecederaan badan, kesalahan-kesalahan ta'zir dan hukumannya di bawah Kanun Kesiksaan boleh dipakai. Peruntukan hendaklah dibuat untuk pembayaran diyat samada di Kanun Acara Jenayah atau dengan pindaan kepada Akta Undang-Undang Sivil 1956 mengenai tort.

(d) Mungkin perlu diadakan seksyen di Kanun Kesiksaan supaya mengadakan hukuman ta'zir bagi zina. Jika ini tidak dapat diterima hukuman ta'zir bagi zina hendaklah diadakan di undang-undang mengenai Jenayah Syariah. Begitu juga hukuman ta'zir bagi kesalahan meminum arak hendaklah diadakan di undang-undang mengenai jenayah syariah.

(e) Peruntukan mengenai hudud dan qisas di Enakmen Kanun Syariah boleh diterima dengan beberapa pindaan yang perlu.

(f) Perlu diadakan usaha untuk menerangkan dan menjelaskan peruntukan-peruntukan dalam undang-undang Jenayah Islam sebelum undang-undang itu dilaksanakan. Khususnya perkara-perkara berikut perlu dijelaskan :-

(i) Peruntukan mengenai keampunan oleh wali mengenai kesalahan membunuh orang.

(ii) Tujuan undang-undang Islam ialah untuk menegah jenayah bukan untuk menghukumnya. Insya Allah dengan pertolongan Allah

tidak ada orang yang perlu dihukumkan dengan hukuman hudud.

(iii) Beban bukti yang diperlu untuk kesalahan hudud ialah sangat berat - iaitu hingga tidak ada apa-apa keraguan.

(iv) Peruntukan untuk diyat adalah jelas dan detail dan oleh kerana itu tidak memerlukan taksiran oleh mahkamah. Tidak dibezakan, samada orang yang dicedera itu kaya atau miskin, atau seorang profesynal dan pangkat tinggi dan seorang pekerja biasa, kerana nilai yang sama digunakan.

g) Dari Abu Hurairah, ia berkata Rasulullah s.a.w bersabda maksudnya "Hindarilah hukuman selama kamu masih menemui alasan untuk menghindarinya."

(Ibn Majah)

Dari Aisyah r.a. ia berkata Rasulullah s.a.w bersabda maksudnya "Tolaklah hukuman terhadap kaum Muslimin selama kamu boleh. Maka jika ada jalan keluar lepaskanlah dia, sebagai seorang imam atau hakim itu jika keliru dalam memberikan ampunan, adalah lebih baik daripada keliru menjatuhkan hukum."

(Tirmidzi)

(Nailul - Authar Kitabul Hudud)

Sampling of Newspaper Articles on the *Hudud* Debate

(arranged in chronological order)

Niz Aziz: We are not the deviants. By Manisah Ismail (NST 21/11/94)

KOTA BARU, Sun. - Menteri Besar Nik Abdul Aziz Nik Mat told the Kelantan State Assembly today that Muslims who opposed the *hudud* law can be regarded as having deviated from the true teachings of Islam.

He said the reason being that they refused to accept the teachings of Islam as stated in the *Qur'an*.

"Personally, I regard those who opposed *hudud* law as deviants although it is the State Religious Council which determines questions pertaining to deviation."

He said this when replying to an original question from Othman Wahab (Pas-Cherang Ruku) who wanted to know the State Government's view on the rejection of the *hudud* law by the Federal Government and whether it (the rejection) could be categorised as deviationist teaching.

Nik Aziz said the State Government was informed of the Federal Government's rejection of the *hudud* law through a letter on June 8.

He added that the Federal Government did not give any reason for its rejection.

"It was a decision purposely made to prevent God's law from being implemented."

Nik Aziz also said the State Government had formed a special committee, comprising the State Chief Kadi, deputy mufti, a former mufti and a lawyer, to rebut the Federal Government's rejection based on the *Qur'an* and *hadith*.

"We will send a written reply to the Federal Government and hope it will clear all confusion pertaining to *hudud* law."

There was a stir in the house when Speaker Omar Muhammad

(Pas-Perupok) objected to a question from Wan Mohd Najib Wan Mohamed (BN-Limbongan) who wanted to know whether the *hudud* law which the State Assembly had passed, was based on the *Qur'an* and *hadith* and if so, whether it complied with the Qur'anic verses found in *Surah An-Nisa* (one of the chapters of the *Qur'an*).

According to Wan Mohd Najib, under verse eight of the *Surah An-Nisa*, all those who committed an offence should be punished.

"But under the State Government's *hudud* law, why are non-Muslims exempted?" he said.

In reminding Wan Mohd Najib of the Assembly meeting during which the House passed the *hudud* law, Omar said all members of the House participated in voting for the law.

"The House unanimously voted for the law," he added.

Earlier, Wan Mohd Najib also challenged the State Government to proceed with its intention to implement the Syariah Criminal Code II containing the *hudud* law.

He said the State Government should implement the law if it was sincere in upholding God's law.

"If the State leaders are confident that the *hudud* law which they had passed is truly God's law, then they should not be afraid to enforce it," he said.

"The State Assembly has passed the law and the Kelantan Sultan has also consented to it, so why be afraid to enforce it?"

Wan Mohd Najib said he was challenging the State Government to enforce the law because "Pas leaders are politicising the issue regarding the *hudud* law for the party's interests".

He added that the Pas leaders were also blaming Umno leaders, including Prime Minister Datuk Seri Dr Mahathir Mohamad, for not allowing the *hudud* law to be enforced in the State.

"Pas still doesn't understand that the Prime Minister is not against *hudud*, but what he opposed is the *hudud* produced by Pas.

Wan Mohd Najib also said that Pas was in a hurry to get the *hudud* law passed resulting in many mistakes and weaknesses in the drafting of the law.

He added that Pas had also exempted the non-Muslims under *hudud* because the party wanted to win over the non-Muslims voters.

Earlier, Mohamed Daud (Pas-Lundang) said the move to exempt the non-Muslims from the *hudud* law was in accordance with the *Qur'an* and *hadith*.

He added that a thorough study had been carried out on the matter.

Hudud laws: What worries non-Muslims (NSUNT 9/10/94)

Should non-Muslims be allowed to debate the pros and cons of hudud laws? Rose Ismail reports on a recent colloquium which discussed this issue.

GIVEN Pas' efforts in recent months to explain *hudud* laws to Malaysians, there appears to be a growing sense of disenfranchisement, exclusion and fear among non-Muslims. What do non-Muslims have to say about *hudud* laws? The comments revealed thus far show appalling disinterest in the subject. Yet, in private conversations, there are deep and serious misgivings about the laws.

Some Malaysians argue that non-Muslims should not worry because *hudud* laws only form a small portion of Islamic laws and that they are comparable to existing criminal laws under the Penal Code.

Others claim that non-Muslims should not jump into the fray because they will not be affected by *hudud* laws. But would this be a responsible view to adopt when there are problems affecting both Muslims and non-Muslims even under existing Islamic laws?

Lawyer Sivarasa Rasiah says many non-Muslims are confused about the laws. This confusion has led to fear which, in turn, has produced a sense of alienation.

There may be a real reason for this. Pas today says non-Muslims have a choice to accept the administration of *hudud* laws or live under a parallel legal system. But this wasn't always the case.

In early 1992 leading up to late 1993, Kelantan Menteri Besar Nik Abdul Aziz Nik Mat emphatically declared that *hudud* laws would apply to both Muslims and non-Muslims.

However, by late November 1993, he changed his mind. Just before the draft enactment was released, non-Muslims were suddenly given a choice with the additional reminder that if they do choose to come under *hudud* laws, the benefits would be greater.

Pas' vacillation on the key issue of choice raises several questions: first, will the Menteri Besar change his mind again? If he does, then choice is no longer the operative word and non-Muslims will be

forced to take full cognizance of the law.

Second, if Saudi Arabia has implemented *hudud* laws to cover both Muslims and non-Muslims, who is Nik Aziz to say that Malaysian non-Muslims can be exempted? Perhaps, then, he should explain his interpretation of God's laws.

Third, if there is choice, shouldn't non-Muslims be allowed to debate the pros and cons of such laws? On this third point, a recent colloquium on *hudud* laws held in Universiti Malaya included the views of two non-Muslim lawyers - Philip Koh and Sivarasa Rasiah.

Not surprisingly, the discussion was dominated by Muslims who claim expertise on the subject: Professor Muhammad Ata Al-Sid, a Sudanese teaching at the International Islamic University, and lawyer Sulaiman Abdullah.

In sum, Sulaiman's argument took this line of thought: all Malaysians are religious, law-abiding and family-loving. Therefore, *hudud* laws can only enhance rather than threaten their peace of mind.

Under current laws, he said, crimes continued unabated, prisons were overcrowded, prisoners were not rehabilitated and people were generally worried about their lives and the security of their properties.

Under *hudud* laws, once the thief's hand is cut off, or if he is a habitual offender his foot as well, the person is forcibly rehabilitated as he becomes increasingly incapacitated. Sulaiman said Muslims should not worry because *hudud* laws were "God's laws and God's laws are fair and just".

But difficult is the task of persuading non-Muslims to tie their camels and trust in God (this saying of the Prophet implies that even as human beings place all trust in God, they should nevertheless take all precautions to protect their lives and property).

Koh, who marshalled well the little time given to him, presented a cogent case for Malaysians to think and ponder carefully before searching or seeking out a religious basis for legislation.

In North America, he said, a movement grew to engender God's laws into human society. The Christian Reconstructionist or theonomy movement was making an attempt to reintroduce biblical laws to American society. To the movement, he said, this move was the panacea to the North American social ills of high crime rates, failure of families and sexual misconduct.

Koh said the movement's quick fix solution to such troubles

was a call to return to the words of Moses as a blueprint for society with special emphasis on the law of an eye for an eye and a tooth for a tooth.

One characteristic of this movement, he said, was the desire to return to a real or imagined glorious past. "There is a myth of the working of laws. Many have the naive belief that a legislative regime would provide the complete answer to problems which so far have eluded solutions," he said.

The movement's persistent assumption was that by institutionalising norms, backed by political will, society would be able to resolve many of its deep and tragic problems. But, Koh said, the (problem was that institutionalising and the involvement of the state would) give rise to other equally troubling issues. For one, "vesting the Government with the role of a moral police will lay the framework for social utopia", said Koh.

He said members of such a movement did not realise that this could give rise to a massive build-up of state apparatus. The obvious consequence was totalitarianism, he added.

Koh also raised the issue of legitimacy in law. "If a dominant group seeks to establish a specific norm onto the rest without it being consensually accepted, this may lead to a crisis of legitimacy in the particular law."

Sivarasa, who had even less time to speak his mind, explained why non-Muslims were nervous about *hudud* laws. They have the view that if such laws are implemented, they fear for the future. "What other laws will non-Muslims be subjected to?" he asked.

As it was, he said, certain events were already causing concern among non-Muslims. The alleged discrimination against other religions included the curbs placed on temple and church sites, and limiting burial grounds. The refusal to allow the translation of the Bible into Bahasa Malaysia has led non-Muslims to wonder what more to expect in a *Shari'a* system.

Sivarasa also said that under Section 56 of the Syariah Criminal Code II, it was stated that laws would apply to all Muslims but it allowed non-Muslims the option of being tried under *hudud* law. What was worrying, he said, was that the code did not expressly provide that it was not applicable to non-Muslims.

If it did apply to non-Muslims, he warned of a possible clash of values. He cited adultery where witnesses called to testify must be

male and, above all, Muslim. It implied a non-Muslim was not qualified to be a witness, he said.

It is not known how the audience comprising lawyers and university staff responded to the views of Koh and Sivarasa. Few spoke. Those who did asked sharp questions. For one, what is the duty of a Muslim citizen if the state does not implement *hudud* laws? For another, how prepared were enforcement officers to handle *hudud* cases? And, then, the question whether women would be oppressed in a mismanagement of such laws.

None asked whether Muslims who support *hudud* laws would unwittingly encourage fissures that would rend society.

Neither did any raise the question of perceptions: how Muslims and non-Muslims perceive each other and how, over the years, they have learnt to accommodate each other?

In any discussion of law, these issues are critical because Muslim Malaysians and non-Muslims are almost equal in number. If we overlook political dominance we are obliged to realise that we are all humans first before we are categorised and stamped as Malay, Chinese, Indian, Muslim or non-Muslim.

This recognition is central to the creation of a coherent Malaysian identity. An identity which will persuade Muslims to recognise that they possess options denied to those in more traditional communities.

As several Muslim scholars from abroad have proposed, Muslim Malaysians should use their unique position in Islamic history to consider different ways of living with "the other".

No other Muslim nation has this privilege. If Malaysia fails, the future of the Muslim civilisation will also be affected.

What is at stake here is the concept of equality. A concept enshrined in the *Qur'an*: "O Mankind. We created you from a single (pair) of a male and a female, and made you into nations and tribes that ye may know each other (not that ye may despise each other). Verily the most honoured among you in the sight of God is (he who is) the most taqwa (God-conscious) of you." (49:13)

If Muslims cannot recognise "the others" as equal to them, there is no hope of ever breaking down the many compartments built in this society.

True, it can be argued that minorities need not be treated as equals; that they should merely be tolerated but this is a weak form of respect which can fail or fall apart.

For a society to rise above these schisms, minorities should not be regarded as imperfections in the polity. The manner in which they, the minorities, are regarded and accepted will test the nation's moral validity.

In essence, this is what *hudud* laws are about. It tells us what we think of ourselves and each other. It reveals our instincts about "the other" and this, hopefully, will persuade us to wonder why laws are being implemented that will further compartmentalise the population.

As Dr Chandra Muzaffar succinctly phrased it once in these columns: "It was Islam's passion for justice and fairness manifested and in the total repudiation of any form of racial, ethnic or racial discrimination which attracted millions of non-Muslims to the faith in the first few centuries of its history."

He said the Muslim-Malay leadership had "one of the rare opportunities in history to establish a society which embodies the spirit of universalism contained in the *Qur'an* in all its manifestations".

All this, of course, is very hard. But not impractical. Let us hope that Muslims will not give up the way to live with "the other". Let us hope that they won't choose the easier path, one that includes *hudud* laws.

Reason for rejection of Pas' *hudud* laws (NST 20/07/94)

THE Government rejected *hudud* laws drafted by Pas because several sections contradicted Islam, Parliamentary Secretary in the Prime Minister's Department Othman Abdul said yesterday.

Among others, he said Pas listed only six *hudud* offences while the religion says there were seven.

"Pas *hudud* laws did not provide disloyalty to the Government as an offence and that non-Muslims who commit offences under the *hudud* laws can opt for judgment under existing laws.

"This is contrary to Islam as non-Muslims are subject to the same treatment under *hudud* laws.

"*Hudud* laws are applicable to all Malaysians but Pas says non-Muslims can choose to opt out," he said in reply to supplementary questions by Abdul Hadi Awang (Pas-Marang) and Ibrahim Ali (BN-Pasir Mas).

Hadi said the Government was afraid to accept Pas's proposal to hold a "*mubahalah*" (a sworn debate) on the *hudud* laws.

Othman said the Government accepted *hudud* laws but believed it should be implemented gradually and after careful planning to ensure it fullfils the demand and aspirations of Islam.

***Hudud* laws are difficult to enforce, says Muslim scholar** (NST 12/07/94)

KUALA LUMPUR, Mon. - *Hudud* laws are difficult to implement as there are many variations to their application, a well-known Islamic scholar and researcher said today.

Professor Dr Khalid Abdulhadi Yahya Blankinship of the United States' Temple University said it would also be difficult to find people competent enough to enforce the laws, which are based on the *Qur'an* and *hadith* (sayings of Prophet Muhammad).

"Islamic laws are not codified. There are variations as to its interpretation and implementation as observed by the various *madhab* (sects).

"If you pick just one variation and implement it as the law of the state, you are narrowing it down," he said in an interview.

Raising the question about the competency of authorities enforcing the law, he said, it was difficult to determine the qualifications needed for such offices.

"What exact qualifications are we to impose on, say, the kadi before he can be deemed competent to apply the *hudud* laws?" he asked.

Blankinship, who has written several books and research articles on Islamic history, is on a 12-day visit here under the auspices of *Angkatan Belia Islam Malaysia*.

Hudud* laws: Real answers are in *Qur'an. By Syed Akbar Ali (NST 03/02/94)

In a recent workshop discussion on Pas' *hudud* laws, Prof Tan Sri Ahmad Ibrahim, the Dean of the Faculty of Laws of the International Islamic University, and others said that some sections of Pas' *hudud* laws contradict the majority opinions of the *madhab* of Shafie

and Hanafi.

The Professor referred to section 46(2) of Pas' *hudud* laws, which are only accepted by the *madhab* of Maliki and certain sections in the *madhab* of Hambali. (Section 46(2) deals with types of evidence required to prove adultery against women).

Despite Prof Ahmad's finding, we cannot expect the Pas *ulama* to accept this argument lying down. They will also have their doctors of jurisprudence who will advise them which *madhab* or whose opinion is the best. Pas has already stated that whoever opposes its version of *hudud* laws is an apostate.

But to pursue Prof Ahmad's comments (and maybe Pas' expected retort) just a little further, we could then logically ask whether both Pas and the Islamic University have considered the views of other schools like the Ismailis and the Shiites - for they too are Muslims and will have their opinions on the matter.

And assuming that we consider their opinions and then take the majority view, does this not mean that *hudud* laws are dependent on the majority?

Contrary to such a viewpoint, the *Qur'an* preaches universal concepts of justice which are above majority or minority opinions, scholars, etc.

The Prophet revealed the following verse from God Almighty about the majority opinion:

"If you follow the majority of the people on the earth, they will surely lead you astray. They only follow conjecture and they only guess" (*Surah* 6:116)

Quite interestingly, the context of this warning is set in the preceding verses (114 and 115) which ask if we should seek other than God as a source of law when God has revealed the *Qur'an* which is fully detailed, complete, in truth and in justice?

Pas' version of *hudud* laws and now the rebuttal by other scholars (all using different opinions to support their stance) is ample proof that "one scholar's conviction is another scholar's conjecture".

If we look at the example of the Prophet, he was definitely an excellent legislator and judge.

And the method he used to judge among the people is preserved for our use in the following verse:

"We have revealed to you this scripture (*Qur'an*) truthfully in order that you judge between the people in accordance with God's

teachings to you. Do not defend the betrayers." (*Surah* 4:105)

Another guiding light for the Prophet and for us is the following.

"You shall judge among them according to God's scripture, and do not follow their ideas, and beware lest they divert you from some of God's revelations to you ... " (*Surah* 5:49)

The message is clear. We have to judge according to the revealed scripture. And what if there were differences of opinion or disputes which were not specifically addressed in the *Qur'an*?

The answer is again in the *Qur'an* in many verses like the following: "We did not send this scripture down to you, except that you may explain to them that which they dispute, and to provide guidance and mercy for those who believe." (*Surah* 16:64)

So, being the bearer of the Qur'anic message, the Prophet would definitely remain within the *Qur'an* to solve issues.

This is the *uswah al hasanah* (good example) of the Prophet.

In fact, to those who insist on making laws from sources other than the *Qur'an*, the Prophet was commanded to ask:

"What is wrong with you? How do you judge? Do you have another book (other than *Qur'an*) that you apply? One that gives you anything you want?" (*Surah* 68:36-38)

In present-day Islam, the answer to this question is a resounding "yes" because the Islam of today is divided into so many sects and schools of thought, which are all at loggerheads with each other (seen quite clearly now by some scholars questioning Pas' version of *hudud* laws and Pas, in turn, labelling them apostates).

All these sects have different sources of reference, usually books and traditions written down by their respective scholars which they are then obliged to defend and uphold.

As it is now, the *Shari'a* Law in Iran may not tally with that in Kelantan, the Islamic constitutions in Pakistan may not tally with that in the Sudan and Islamic banking in Saudi Arabia may not tally fully with that in Malaysia.

These differences of opinion have been the hallmark of Islamic history for a thousand years now.

We are now trying to establish trade, banking, etc, all according to the Islamic model.

Taken together with the fact that we are now living in a world with instant communication, Muslims everywhere must realise that they

are all going to be talking to each other on a much larger scale than ever before.

It is in this light that the Islamic scholars need to initiate a framework for Muslims to resolve their issues.

And the common yardstick among all Muslims all over the world is the *Qur'an* - hence, it must be the condition that only the *Qur'an* can be used to solve these problems.

Is this a too far-fetched suggestion?

But when we say this, the immediate retort from the scholars will be "apostates", "deviants", and so on.

As time passes, more are going to question our scholars how all the confusion and differences of opinion can be passed off as Islamic salvation?

And as more time passes, the scholars will realise that they cannot make the questions go away simply by shouting "apostates", (or by labelling each other "apostate", as is happening now).

The responsibility for our *ummah* is collective. So, all who care about Islam should make an effort to meet this challenge. Allah said that He has revealed the *Qur'an* "to take you out of the darkness into the light". There are real answers to all these issues.

It is time for the confusion to disappear.

Resolving the *hudud* law dilemma. By Kassim Ahmad (NST 04/12/93)

Now that the Pas-controlled Kelantan State Assembly has passed the so-called fixed laws (*hudud*) of the *Shari'a*, the Federal Government has to state whether that law is legal or not in the light of the Federal Constitution.

If it says "no", then Pas can fault the Federal Government with hindering it to carry out Islamic law. On the other hand, if the Federal Government says "yes" then the Federal Government stands accused of not carrying out Islamic law in States under its control. Thus, it seems, Pas is going to have it both ways.

The Federal Government is indeed in a dilemma. To resolve it in a principled way, it has to state clearly whether Malaysia is a secular or an "Islamic" State. We have put the word "Islamic" in inverted commas because there is no agreement on the concept of the Islamic State among Muslims.

The Umno-led Federal Government cannot oppose Islamic laws for obvious reasons, but the Umno leaders, being religiously more enlightened people, are not happy with rigid and sometimes archaic laws promulgated by Muslim medieval jurists 1,000 years ago. However, they cannot say this out aloud. Hence, their dilemma.

While we sympathise with them, we are unable to help them, unless they are prepared to help themselves. The way out of this embarrassment is quite simple. It is to go back to the *Qur'an*, which is the only indisputable book of guidance for the Muslims. For punishments of all crimes, the *Qur'an* gives two golden rules. Firstly, punish according to the severity of the crime, that is, the biblical principle of an eye for an eye, a tooth for a tooth. This is stated in many verses; one of them goes like this:

"They (the believers) encounter aggression with an equivalent response. However, those who pardon and conciliate receive a better reward from God; God is never unjust" (42:40). this is a just principle and may also be called the principle of equivalence.

The second principle given by the *Qur'an* is higher than the principle of justice. It is higher than justice in the sense that justice requires retaliation, which is painful. The principle that forgoes punishment is none other than the principle of mercy. Now, mercy is a major attribute of God. About His mercy, God says in the *Qur'an*: "He has ordained mercy on Himself" (6:12). So the second rule of punishment is punishment in accordance with mercy.

Again, typical of the *Qur'an*, its grand teachings are almost always repeated several times. As the reader can see, the verse cited above containing the first principle also gives the second principle.

That being so, that Islam gives two universal principles of punishment for all crimes, how is that we have this so-called fixed punishments for certain crimes?

The answer is simple. History has handed them down to us. Are we to question history? Who knows in these times of great uncertainty? But we should keep in mind the saying that history is often written by victors.

However, we can examine the *Qur'an* for the use of this word *hudud*, which is the plural form of the word *hadd* meaning "boundary" or "limit". This word is used 14 times in the *Qur'an*, and, strange to say, none of them refers to punishments, fixed or otherwise. The word refers to the general concept of limits as in the sentence, "Do not

go beyond limits". The word "limits" here refers to metaphorical rather than physical boundaries.

Let us quote the *Qur'an* for the use of this word:

"Divorce may be retracted twice. The divorced woman shall be allowed to live in the same home amicably, or leave it amicably. It is not lawful to take back anything you have given her, unless the couple fears that they may trangresses *God's laws*. If there is fear that they may transgress *God's laws*, they commit no sin if the wife willingly gives anything back. These are *God's laws*; do not transgress them. Those who transgress *God's laws* are unjust (2:229) (Italicised words are translations of *hudud 'Illah*)

We should note carefully that the passage refers to laws of divorce. It does not refer to any crime. One can wonder without end how those brilliant jurists of old tell us that it refers to crimes.

Let us have a look at the famous passage of hand-cutting:

"The thief, male or female, you shall cut their hands as a punishment of their crimes, and to serve as a deterrent from God. God is Almighty, Most Wise. If one repents after committing this crime, and reforms, God redeems him. God is Forgiving, Most Merciful (5:38-39).

One should note well the second part of the passage where it commands lightening the punishment up to pardon. The jurists, amazingly, seemed to have forgotten this part altogether. It should also be noted that the punishment is not carried out automatically or immediately. The mention of the offender repenting and reforming shows that a period of time elapses between his apprehension or trial and the passing or carrying out of the punishment.

Let us look at another passage, the punishment for adultery:

"The adulteress and the adulterer you shall whip each of them a hundred lashes. Do not be swayed by kindness from carrying out God's law, if you truly believe in God and the Last Day... However, if they repent afterwards, and reform, then God is Forgiving, Most Merciful (24:2-6).

We should note three things in this passage. First, the punishment applies equally to both married and unmarried offenders, while the *hudud* laws promulgated by the jurists make a distinction between married and unmarried offenders: death by stoning for the married, and a hundred lashes for the unmarried. Second, the difference between the *hudud* punishment and the Qur'anic punishment. Third, again, consistently, the Qur'anic law provides a merciful way out for repenters

and reformers.

To climax the discussion, let us look at the famous law for apostasy. The *hudud* law stipulates death, whereas the *Qur'an* unambiguously proclaims and establishes absolute freedom of belief. Let us quote the *Qur'an*:

"There is no compulsion in religion; the right way is indeed clearly distinct from error (2:256)."

"If your Lord had pleased all those on earth would have believe, all of them. Will you then force men till they are believers? (10:99)."

The many Qur'anic pronouncements on this momentous matter are so clear that they do not need any elaboration. However, the upholders of the death punishment for apostasy argue that the above verses command believers to fight and kill the disbelievers.

However, this argument is self-negating, because it is preposterous to suggest that God changed His mind half-way through the *Qur'an*! The verses they refer to are those that came down in times when the Muslims were at war with the disbelievers: naturally the enemy was to be killed for being the enemy, and not for their disbelief.

Disbelief, whether occuring from the beginning or later, will only be punished by God after the Day of Judgement. This is because no man can sit in judgement of another's belief.

With these three examples, the reader should be able to see for himself the vast differences between the punishments mentioned in the *Qur'an* and the *hudud* punishments. How do we account for the differences? We leave it to our religious scholars to explain to us.

Lastly, we should ask why the *Qur'an* fails to mention certain crimes. It does not mention rape. It does not mention lesbianism. Although it mentions fraud and corruption, it does not stipulate punishments for them. If we are short-sighted, we shall charge the *Qur'an* for being incomplete as to leave out these important things. But, as I have pointed out, the *Qur'an* gives two beautiful universal principles of punishments to cover all crimes.

The most probable reason why certain crimes and their punishments are mentioned in the *Qur'an* is that those crimes were actually committed in Arabian society then, and the punishments were the forms of punishments current at that time.

These forms, like cutting the hand for theft and a hundred lashes for adultery, were taken over by the *Qur'an* from current practices, with the important proviso for lightening the punishments in cases of

repentance and reforms by the offenders.

No doubt, our modern sense of justice would make us recoil at the thought of hand-chopping, but we must not forget that in all cultures in pre-modern times, punishments were very severe. In England in the 18th century, it was reported that one punishment for theft was not chopping off the hand, but chopping off the head!

So the predicament faced by the Federal Government over this *hudud* law, (which incidentally is not Pas' law, but that of our ancient jurists) is resolved by simply applying the two golden rules of punishments given in the *Qur'an*.

We can be absolutely sure that our noble Prophet Muhammad applied the laws of the *Qur'an* closely during his time. As to the large discrepancies found between the *Qur'an* and the accounts of what he was supposed to have done in terms of punishments, I am content to leave it to the scholars to answer. As they say, history is often written by the victors. Maybe it is, in this case!

As to the question whether solving the *hudud* dilemma by recourse to the *Qur'an*, and therefore, defeating Pas in its own game, so to speak, makes Malaysia an "Islamic" country, the answer is: does it matter? Islam as a universal system giving justice to all our citizens is surely welcome. But this Islam must be freed from its theocratic shackles. Our religiously-enlightened Prime Minister, among all our leaders, is best placed to achieve this. We hope he will do it.

Straitjacket stranglehold on Muslims. By Mohd Yusoff (NST 16/12/93)

I refer to Kassim Ahmad's "Resolving the *hudud* law dilemma" (NST Dec 4) and I would like to comment on the "dilemma".

It appears that Muslims everywhere are always in a state of dilemma, confusion and chaos.

One would have liked to think that anything good introduced for the betterment of Muslims would be enthusiastically welcomed.

But apparently this is not so. Whenever the word "Islamic" is introduced, in whatever sphere, one is invariably confronted with hostile reactions, dismay, resentment, animosity and sometimes violent protests, even from Muslims and non-Muslims alike.

As a Muslim, I am not surprised at this paradox. The usual scenario is that the moment Islamic rules are introduced, all Muslim

women must have their heads covered, on pain of being penalised for non-compliance.

And visions of the cutting off of hands, stoning to death, and public whipping begin to send chills of fear down my (and others?) spine. Repressions, punishments, and prohibitions galore!

You disagree, and you are likely to be branded an unbeliever, an apostate and that means death!

The death sentence on Salman Rushdie sent shock waves throughout the literary world. These are still reverberating.

Millions of Muslims the world over are suffering as a result of Khomenini's *fatwa* - they are bloodied in Bosnia, Somalia, Iraq, Libya, Palestine and everywhere.

The West's reluctance to help the Muslims in Bosnia can partly be attributed ot their repugnance at Islam's (Iran) righteous stance and intolerance to literary license.

Iran has put all writers to ransom with the imposition of a death sentence on a writer for alleged "insult" to Islam, hence alienating Islam vis-a-vis the world.

There is a feeling of revulsion - and what a heavy price to pay "so that the religion of Islam is not insulted". Sic!

From early childhood, we have been inculcated with a kind of straightjacket mentality.

One remembers a typical scenario, when a six-year-old would invariably point an accusing finger at an adult, if he failed to hear the words *Bismillah* (In the name of Allah) audibly mentioned just prior to mouthing his food.

This same game is now being played by Pas vis-a-vis Umno. Any act of omission and lo! the accusing finger is pointed.

Hence Kassim's contention that now Umno is "caught" by default and in a state of dilemma - the moment Pas implemented *hudud* law in Kelantan. And the meek "aye" by the two Umno Assemblymen there.

Enlightened but meek Muslims can easily be held to ransom.

Yes, we have not grown up - far from it! Nobody here dares to publicly express the fact that archaic laws should remain where they belong - in the archives.

A foreigner, Prof Dr Roger Garaudy, did so recently. The straitjacket has a stranglehold on us Muslim and maybe by the year 2020, our Prime Minister (or his deputy) might be able to break the

Gordian knot! *Insha Allah*!

Syariah Criminal Code not without loopholes. By Syed Akbar Ali (NST 29/11/93)

The Kelantan State Government seeks to implement the Syariah Criminal Code 1993 - otherwise known as the *hudud* laws. This will be the first time a State Government tries to implement the *hudud* laws in full within its boundaries.

The *hudud* laws are cause for much concern both among Muslims as well as non-Muslims. The Institute of Strategic and International Studies (ISIS) held a forum on Nov 10 to discuss the issue. The forum was well attended by people of many religions, races, political parties, academics and scholars.

Hudud laws will cover theft, robbery, adultery, homosexuality, bestiality, murder and apostasy - among other things. However, the forum at ISIS focused on the status of women in relation to the offences and punishment for adultery. The "Sisters in Islam" - group of women activists - led the forum by presenting papers on the subject of adultery and rape.

The Kelantan Syariah Bill has comprehensively detailed offences and punishment relating to adultery, homosexuality, lesbianism, bestiality, sodomy and even sex with dead bodies. However, there is no specific mention anywhere at all in the Bill about rape. The offense of rape is not defined and neither is the punishment for rape set out clearly.

In practice, however, the *hudud* laws appear to draw upon the injunctions on adultery to make up for the legal vacuum on rape. To prove adultery, the Syariah Bill states that four male witnesses who have actually witnessed the full act are required. Women cannot be accepted as witnesses.

Similarly, to prove a charge against a rapist, the rape victim must also bring forward four male witnesses "of good character and integrity" who have actually witnessed the rape. Here we have to note that such stoic witnesses can, however, be discredited on the excuse that they did not do anything to prevent the rape.

In the ensuing discussion, a question was asked (relating to gang rape which has happened in this country and also in Bosnia-Herzegovina) where one man or a gang of men raped just one or two

women out of a group of, say, five or six women. Since the men were the perpetrators and the women were either victims or witnesses, could there be a case against the rapists?

The scholars could not provide an answer and chose instead to dismiss the question with a smile.

But what is even more significant is the fact that if a woman is not able to conclusively prove a charge of rape, she herself may instead be accused of commiting adultery or fornication - especially if she becomes pregnant and has no husband or rapist to vouch for her pregnancy.

According to one of the speakers, this is exactly what has happened in some of the countries where *hudud* laws are in force. Rich landlords have abused peasant women and servants who are then punished under the *hudud* laws because they cannot find four male witnesses of good character to testify to their rape.

It is also a requirement of the *hudud* that only oral testimony and confessions are admissible as evidence. Material or scientific evidence like semen stains, vaginal swabs, blood samples, scratch marks, "genetic" fingerprinting, etc. are not permissible as evidence.

In both, the matter of accepting neither female witnesses nor material evidence, not only does the Kelantan Syariah Bill go against reason and scientific knowledge but it also goes against the *Qur'an*, which clearly records the presence of a single female witness only plus the use of material evidence to solve an accusation of rape.

The incident is recorded in *Surah* Yusuf, (verses 23 to 29) which relates the story of Prophet Yusuf, who was falsely accused by a woman of wanting to seduce her after she herself had failed to seduce him.

In the *Qur'an*, this issue was solved by just one female witness who pointed out that since Prophet Yusuf's shirt was torn from behind, it must have been the woman who had tried to lay her hands on him. The *Qur'an* records this testimony by a single female witness offering material evidence as conclusively acquitting Prophet Yusuf.

Similarly there is no punishment by stoning to death in the *Qur'an* whereas the Kelantan Syariah Bill prescribes it and even defines the size of stones to be used (medium size). On the contrary, in the five verses where it is mentioned, the *Qur'an* records stoning as an act of the disbelievers (*Surah* 18:20, 19:46, 26:116, 36:18 and 44:20).

The forum ended without any conclusions or resolutions. What

became obvious was that more questions than answers were generated. And most of the questions were not of the type that could be dismissed with a smile.

Also towards the end of the forum there was a general consensus (almost accompanied by a sigh of relief) among all who were present that more time and more discussion was definitely needed before the implementation of any *hudud* laws.

It was very telling indeed that so diverse is the feeling about *hudud* laws even after 1400 years of Islamic civilisation. It merely lends support to the belief held by many scholars that not all of the *Shari'a* is divine. Unlike the *Qur'an*, much of the *Shari'a* is man-made.

The burden of proof in *hudud*. By Linna Yong (STAR 27/11/93)

Provisions relating to the *hudud* offence of *zina* which incorporates fornicaton, adultery and rape have made it almost impossible for a rape victim to prove rape, according to most of the participants of a forum organised by ISIS recently.

The forum on Women and the Syariah Criminal Bill (2) 1993 resulted in more questions than answers being brought up. The Bill was passed by the Kelantan State Assembly on Thursday.

Almost all agreed that the Bill requires more discussion as there are still a lot of "nitty gritty details" that need to be worked out.

Married people convicted of *zina* face the maximum death penalty by stoning while unmarried people face 100 lashes.

To attract this punishment, an offender will have to confess or four righteous or just men must testify that they have clearly seen the act of penetration.

Failing the required number of eyewitnesses or a confession, the offender if there are other incriminating evidence will face a lesser offence attracting ta'azir or discretionary punishment.

According to lawyer Salbiah Ahmad, who is attached to the Asia Pacific Forum on Women, Law and Development, the presumption that an unmarried pregnant woman or one who has given birth has committed *zina* is unfair to the woman because the burden is on her to prove *zina* on the part of the man.

To prove rape, she has to produce four righteous men who can testify that they have actually seen "the act of penetration of the sex

organ of the male partner into that of the female partner."

If she fails, and it is very likely she will, given that four men will hardly ever stumble upon her being raped, the prosecutor can prosecute her for fornication.

She can also be found guilty of *qazaf* or making an accusation of rape without producing four male eyewitnesses. This offence attracts 80 lashes.

Unless the man confesses to the rape, which he can withdraw later, the woman is doomed to be whipped.

To make matters worse, the woman and her four witnesses are also liable for *qazaf* if the testimony of one of them is inconsistent with the rest.

It has to be noted that one cannot call four men righteous or just if they watch a woman being raped without lifting a finger.

An unlikely but possible instance of that happening is when the four men are imprisoned and therefore cannot help the woman who is being raped in their full view.

In theory, these eyewitnesses are liable for the offence of abetment or assisting in the offence of *zina*.

Thus, according to Salbiah, every witness is automatically an abettor and thus disqualified from giving evidence.

She added that only a small minority of Muslim jurists hold onto the presumption that an umarried pregnant woman is presumed to have committed *zina*.

On the other hand, former law lecturer, Haji Sulaiman bin Abdullah is of the opinion that *hudud* is biased against men as a man cannot plead the woman's consent when he is accused of rape.

"So long as his 'instrument' is in, he goes (is convicted), as long as there are four just witnesses," he said.

Another provision in the Bill states that if a Muslim renounces his faith in the fundamental tenets of Islam, he can face the death penalty and his property confiscated if he does not repent within three days.

Haji Sulaiman defends this by saying that when a Muslim leaves the faith, he effectively wages war against Islam.

The Pakistani experience has shown that wide-spread abuse of *hudud* can occur resulting in prisons swelling with large number of women prisoners.

Half of them are accused of *zina* by malicious husbands or

fathers intent on keeping them in forced marriages or simply to humiliate them.

Journalist Rose Ismail said that out of the 44 women in the Karachi Central jail in 1987 charged with *hudud* offences, more than half accused of committing *zina* were due to leave their homes with the men of their choice.

"According to 1991 figures compiled by a Karachi-based committee seeking the repeal of the Hudud Ordinances, more than 2,000 women were at the time in jail waiting trial under this law.

"Although many convictions are reversed on appeal - approximately 33 percent of rape and adultery charges are overturned - women and men alike would have suffered lenghty periods of imprisonment before they are released."

Haji Sulaiman is of the opinion that the problem does not lie with the *hudud* law but with the oppressive system.

"*Hudud* law is the ultimate sanction. It will be rare indeed for *hudud* punishment to be imposed because it is not everyday that four male wintesses stumble upon a public display of sexual intercourse," he said.

Kelantan passes Bill on *hudud* laws. By Hisham Mahzan; Shamsul Akmar (NST 26/11/93)

KOTA BARU, Thurs. - The State Legislative Assembly today passed the Syariah Criminal Code (II) Bill 1993 which included the *hudud* laws. All the 36 Assemblymen including two from the Barisan Nasional voted in support of the Bill.

Speaker Omar Mohamad invoked section 117 of the State Assembly Standing Order requiring members to stand up and announce their stand.

Six Assemblymen took part in the debate on the Bill - three yesterday and another three today.

Menteri Besar Nik Abdul Aziz Nik Mat did not vote as he is in hospital while Meranti Assemblyman Zakaria Ismail is on leave.

Deputy Menteri Besar Abdul Halim Abdul Rahman, in his winding-up speech, said the passing of the Bill was significant because it saw unity among all Assemblymen regardless of their party affiliation.

Abdul Halim said the Bill which allows non-Muslims to choose

to be tried under Islamic laws or the common law was consistent with the spirit of *Shari'a* when it was implemented during the period of Prophet Muhammad.

He said the Prophet allowed non-Muslims to choose between Islamic laws and those of their own religion.

Wan Mohd Najib Wan Mohamad (BN-Limbongan), who spoke during the debate earlier, said he supported the Bill because he was a Muslim. The other Barisan Assemblyman is Nordin Salleh of Sungai Pinang.

Wan Najib said: "The laws are God's laws and no political party, including Pas, can claim that they (the laws) are theirs."

He said thorough preparation was vital before the State Government implemented the laws.

"The whole purpose of having the laws will backfire if adequate measures are not taken by the State Government to ensure their smooth implementation," he said, adding that the laws should not be used as a political tool.

On calls by Assemblymen that the Federal Government should support the Bill, Wan Najib said Pas should make sure that Semangat 46, Pas' ally in the State Government, get the DAP and PBS to do likewise.

Wan Najib also questioned Pas' motive of allowing non-Muslims to opt for the common law courts if they did not want be tried under the *Shari'a*.

"Prophet Muhammad had allowed non-Muslims to be tried under their own religion because the punishment for offences were equally harsh as those under the *hudud* laws.

"But the punishment meted out by an ordinary court for the same offences is more lenient," he said.

Nik Aziz tables Bill on *hudud* laws. By Hisham Mahzan; Shamsul Akmar (NST 25/11/93)

KOTA BARU, Wed. - The Pas-led Kelantan Government tabled the Syariah Criminal Code (II) Bill 1993 which included the *hudud* laws at the State Legislative Assembly today.

Menteri Besar Nik Abdul Aziz Nik Mat, when tabling the Bill, said the State Government was performing a duty required by Islam

and failure to do it would be a great sin.

The motion was seconded by his deputy Abdul Halim Abdul Rahman.

Later, when asked by reporters outside the House, he said the Bill, which is expected to be passed tomorrow would, however, not be implemented until the Federal Government made changes to the Federal Constitution.

Asked how soon the State Government would be able to implement the laws if the Federal Government, through Parliament, allowed it, Nik Aziz admitted that it would not be able to implement them immediately.

"Seminars will have to be conducted especially among Federal officers on the mechanisms for their implementation. If the Federal Government will allow us to use the National Institute of Public Administration, we believe the process will be expedited," he said.

When tabling the Bill, Nik Aziz said it was prepared by a committee headed by Abdul Halim and reviewed and later passed by the *Jemaah Ulama* of the State Islamic Religion and Malay Customs Councils (Maik) and the State Mufti after considering it from all angles of the Islamic *Shari'a*.

He quoted numerous verses from the *Qur'an* and the *hadith* (prophetic tradition) when tabling the Bill.

He said certain quarters had expressed scepticism over the implementation of Islamic laws, claiming that it would cause fear among investors which would later obstruct economic growth.

He said this reflected "orientalist thinking", an attitude bogged by materialism which places the worldly needs as the thrust of Islam.

"I do not see any reason why investors should fear the laws as they are not felons. If the investors are not Muslims, they have nothing to fear as the laws are not applicable to them.

Nik Aziz said judges could be appointed by the State Services Commission with the Maik's *Jemaah Ulama* as the co-ordinating body.

He said the State Government would not have tabled the laws if it was not confident in its ability to implement them.

The Bill divided into six parts would, once approved, be applicable to all Muslims in Kelantan aged 18 and above while non-Muslims would be allowed to choose to have their cases heard under Islamic laws or existing common laws.

The six parts are *hudud* offences, *qisas* (law of retaliation),

evidence, how punishment is carried out, general provisions and the court. It also incorporates the laws of *ta'azir* (discretion of judges in meting out punishment).

Under the offences part, the Bill stipulates that the offences punishable under *hudud* are theft, robbery, *zina* (unlawful carnal intercourse), accusation of *zina* which cannot be proven by witnesses, drinking of liquor and intoxicating drinks and apostasy.

For theft, the punishment is amputation of the right hand for the first time offender and amputation of the left foot for a second time offender and for subsequent offences, the culprits would be subjected to imprisonment.

For robbery, it includes death, crucification and amputation of the limbs depending on the severity of the act against the victim.

On *zina*, the punishment is 100 lashes of the whip for those who are unmarried and stoning to death for the married ones.

For false accusation of *zina*, the offender would be punished with 80 lashes of the whip.

For drinking liquor and other intoxicating drinks, the offender could be punished with not more than 80 lashes of the whip and not less than 40.

The Bill provides that those guilty of apostasy would be required to repent within three days and if the offender refuses to do so, he would face the death sentence.

Many questions on *hudud* laws still unanswered. By Mazlan Nordin (NST 19/11/93)

More questions are often raised than answers received in a public forum, and this was again proved in one recently organised by the Institute of Strategic and International Studies (ISIS) and Sisters in Islam. The topic was *hudud* laws and its impact on women, and most of the questions came from women.

Officially titled the "Syariah Criminal Bill", it will be tabled in the Kelantan Legislative Assembly session which begins tomorrow. Whether thereafter the *hudud* ordinance can be implemented would depend on concurrence at the federal level and amendments to the country's Constitution.

Does the Bill enjoy national consensus? How would the laws be applied in a multi-racial and multi-religious society as in Malaysia?

Should a nation be governed by two sets of laws - one for Muslims and another for non- Muslims? These were among issues raised at the seminar.

Islamic countries known to have such a legislation are Saudi Arabia, Iran, Sudan and Libya. There is not enough data about their implementation but more is known about events leading to eventual passage of a similar ordinance in Pakistan for its 100 million people.

Acrimonious debates ensued when the Syariah Bill was tabled in Pakistan's National Assembly in May 1991 by Prime Minister Nawaz Sharif and his Islamic Democratic Alliance Government. It was opposed by the People's Democratic Alliance led by Benazir Bhutto. From her came the reminder: "Under any legal code, Islamic, Roman, Anglo-Saxon or whatever, no agreement is valid if it has the taint of coercion."

The National Assembly later ignored opposition protests and the Bill was passed by voice vote. Bhutto is now again Prime Minister but is not likely to rescind the ordinance in view of her slim majority in the Assembly following recent elections.

Still unreconciled to the code are Pakistani women activists such as Dr Shirin Mazari from the Quaid-i-Azam University who declared that in Pakistan, women were already treated as second grade citizens. She termed the code as giving legal protection to the exploitation of women.

The Bill to be tabled in the Kelantan Legislative Assembly is divided into six parts, and classified as *hudud* offences are theft, robbery, *zina* (adultery) or unlawful carnal intercourse, accusation of *zina* which cannot be proved by four reliable witnesses, consuming liquor and apostasy.

Punishment for the first offence of theft is amputation of the right hand, and for the second, amputation of the left foot (in the middle in such a way that the heel may still be usable for walking and standing). For the third and subsequent offence, the punishment is imprisonment for a term at the court's discretion.

The punishment will not be carried out under certain conditions, for example, when the offence is committed in circumstances of war, famine, pestilence and natural disaster.

Punishment for robbery is death, and crucifixion if the victim is killed. If there is no death or injury, the punishment is amputation of the right hand and left foot.

For a person convicted of *zina*, the punishment is stoning to death for a married person and whipping of 100 lashes plus one-year imprisonment for the unmarried. Four witnesses will be required to prove the act of *zina*. Each shall be an adult male Muslim, devout and just.

The Bill states that pregnancy of an unmarried woman or delivery of a child of an unmarried woman is evidence of *zina* punishable by whipping of 100 lashes.

Punishment for drinking liquor based on oral testimonies of two persons is whipping of not more than 80 lashes but not less than 40.

A person accused of apostasy is required to repent within three days and failure to do so will result in a death sentence and all his property forfeited. The offender will be free of the death sentence, even if it has been passed, if he or she repents. He then faces a five year imprisonment.

All sentences can be appealed against and sentence will be carried out if confirmed by the Appeal Court. The Bill provides for the establishment of a *Shari'a* Court consisting of three judges, two of whom shall be *ulama*, and a *Shari'a* Appeal Court consisting of five judges, three *ulama*.

Any person who holds or has held the office of judge at the High Court, Supreme Court may be appointed to be a judge. An *ulama* qualified to judge is one who holds or has held the office of *kadi besar* or *mufti*.

Of great importance is application of *hudud* laws to non-Muslims based on the person's own election or choice.

Much of the details of the *hudud* Bill are not known to the public. Little is known also about the implementation of sentences in Islamic countries having such laws, and indeed whether they have ever been implemented at all.

Discussions which ensued in the ISIS forum touched on the implementation of *hudud* laws in Pakistan. Cited as examples of gender bias were cases of several Pakistani women who had been raped but were unable to provide witnesses as required under the ordinance. They were then accused of committing *zina* and sentenced.

A paper by Salbiah Ahmad, a lawyer and programme associate of the Asia Pacific Forum on Women, Law and Development, rejected the equation of rape with *zina*. The woman victim would then have to prove rape on the part of her attacker by bringing four male witnesses. She said: "It is highly unlikely that rape is committed in the

open such as four male witnesses can observe."

From Norani Othman, lecturer in Sociology and Anthropology in Universiti Kebangsaan Malaysia, was the reminder on the "purpose of all laws, God's laws as well as man-made laws, which is to dispense justice".

Calling for careful scrutiny and closer examination of the *hudud* Bill, she suggested greater participation of the *ummah* in discourses about Islamisation and that they be not restricted to "selected" religious scholars or *ulama*. In such a situation all sections of the community, male and female, should be well-informed and educated.

From Ustaz Nakhaie Ahmad of *Yayasan Dakwah Pusat Islam* came a quotation from the *Qur'an* on dispensation of justice even unto the enemy. "If a Muslim is exhorted to be just towards an enemy, he should surely be just also to women and others."

Often quoted these days is Imam Khomeini. Perhaps his advice to a group of women in Qom has relevance too when he said: "Like the Noble *Qur'an* itself, women have the function of serving and training true men. If nations were deprived of courageous women to rear true men, they would decline and collapse. The laws of Islam are for the benefit of both men and women, and women must have a say in the fundamental destiny of the country."

***Hudud* laws may not be enforced** (NST 22/10/93)

KOTA BARU, Thurs. - The Pas-led Kelantan Government said today that the people should not be surprised if the *hudud* laws, to be tabled next month in the State Legislative Assembly, are not gazetted or enforced after they have been passed.

Deputy Menteri Besar Abdul Halim Abdul Rahman said during the Nov 20 to 25 sitting, the State Government would also table a Bill specifically requesting the Federal Parliament to allow the State Government to enforce the *hudud* laws.

He said the Kelantan Government would have fulfilled its responsibilities in tabling and getting the State Legislative Assembly to pass the *hudud* laws.

It will then be up to the Federal Muslim leaders to prove their stand on the Islamic *Shari'a*.

"The *rakyat* of Kelantan should not be surprised if the laws, after being passed at the Legislative Assembly, are not enforced im-

mediately.

"Bear with us and understand the constraints and obstacles we face in wanting to enforce them as the power to allow us to do so is in the hands of the Federal Government and the Parliament," he said in his speech at the celebration to mark the *Angkatan Perpaduan Ummah*'s third year of rule in Kelantan, at the Menteri Besar's residence here.

The APU comprises Pas, Semangat 46, Berjasa and Hamim.

Abdul Halim said the *rakyat* should understand that the State Government would not be able to enforce the laws unless certain provisions in the Federal Constitution were amended.

He said in the Bill specifically to request assistance from the Parliament, the Kelantan Government would propose that it amend Article 3 of the Federal Constitution.

"This article requires a two-thirds majority for it to be amended. Since the Muslim parliamentarians do not make up two-thirds of the members, then we propose that the Parliament set up an Act using Article 76A, to specifically allow the Kelantan Government to enforce the laws, if the request is rejected.

"Making amendments using Article 76A only requires a simple majority and we have enough Muslim MPs to do this.

"Another suggestion is for the Parliament to expand the fourth list under the Ninth Schedule of the Federal Constitution to include under it the laws of *hudud*, *qisas* and *ta'azir*."

Umno Youth: Pas making a mockery of *hudud* laws. By Shamsul Akmar (NST 20/10/93)

KOTA BARU, Tues. - The Pas-led Kelantan Government's decision not to impose the *hudud* laws on non-Muslims is proof that Pas is prepared to make a mockery of the laws as long as it suits its political needs.

State Umno Youth chief Kamaruddin Jaafar said the inconsistent stand of the Kelantan Government was detrimental to the image of Islam. Kamaruddin said: "The non-Muslims will hold the view that Islamic laws are inconsistent, when in reality it is the Pas-led State Government which is unsure of how the laws should be implemented.

"I believe the Pas leaders' views on the *hudud* laws are

clouded by their political objectives."

He was commenting on newspaper reports today quoting Deputy Menteri Besar Abdul Halim Abdul Rahman as saying that the Bill on the *hudud* laws to be tabled during the State Legislative Assembly meeting next month would not apply to non-Muslims.

Abdul Halim did not elaborate but it appeared to be a total change of heart on the part of the State Government which previously had remained adamant that the laws would be applied on non-Muslims as well despite strong protests from non-Muslim political organisations and religious councils.

Abdul Halim said the Syariah Criminal Law (2) Bill 1993 would be tabled during the six-day State Budget meeting from Nov 20.

"Prior to this the Menteri Besar (Nik Abdul Aziz Nik Mat) had gone around saying that the Islamic *Shari'a*, which encompasses the *hudud* laws, is good for the whole society.

Therefore, he said, the laws should be enforced on all the people of Kelantan, irrespective of their race or religion.

"By changing its tune, I would like to ask if the State Government is now saying that Islamic laws are not good enough to be enforced on people from all races?" he asked.

Kamaruddin said the State Government should also explain to the people in Kelantan, especially the Muslims, the justification for excluding non-Muslims from the laws.

"Does this mean that if a couple, one a Muslim and the other a non-Muslim, is caught for *zina* (adultery), only the Muslim will be punished while the partner is let off?

"Even on humanitarian grounds, this will be viewed as an injustice. Is the State Government going to allow Islamic laws to be seen as an unjust set of laws?" he asked.

Kamaruddin said the State Government should have given answers to these questions when it began talking about the implementation of the *hudud* laws.

"By just using the laws as points during their political ceramah to impress the *rakyat* that Pas is an Islamic party, it will only shatter the trust of the *rakyat* in the sanctity of the laws," he said.

***Hudud* laws for Muslims only.** By Shamsul Akmar (NST 19/10/93)

PASIR MAS, Mon. - The Pas-led Kelantan Government today said the Bill to provide for the implementation of *hudud* laws in the State, which will be tabled in the State Assembly next month, will not apply to non-Muslims.

When asked why the State Government had changed its mind on the issue, Deputy Menteri Besar Abdul Halim Abdul Rahman said: "That is the way it should be" and refused to elaborate.

Prior to this, despite strong protests from non-Muslim political organisations and religious councils, the State Government had remained adamant on wanting to enforce the laws on non-Muslims as well.

Menteri Besar Nik Abdul Aziz Nik Mat had on April 12 last year said the Kelantan Government would proceed with its plans to implement the *hudud* laws and once in force, would apply to all races.

He said the State Government would not bow to any pressure from anyone against the implementation of the hudud laws and that the laws were for the good of the whole society and as such should apply to all those living in Kelantan, irrespective of their race or religious belief.

On May 4 last year, representatives of the Malaysian inter-Religious Consultative Council (MRCC) led by president A. Vaithilingam, who met Nik Abdul Aziz, failed to convince the Menteri Besar that the *hudud* laws should only be applicable to Muslims in Kelantan.

Abdul Halim, who is chairman of the laws' drafting committee, said the Bill would be tabled in next month's assembly meeting from Nov 20 to 25.

He said the Syariah Criminal Law (2) Bill 1993 would be tabled during the six-day State Budget meeting.

On the possibility of the laws being nullified if they were found to be inconsistent with the Federal Constitution, Abdul Halim said the matter was up to the Federal Government.

"As we have promised before, we will proceed with our plans to table the laws and will do so in the coming assembly meeting," he added.

This would be the fifth attempt by the Kelantan Government to table the Bill after postponing it in previous sittings since 1991.

On whether the *rakyat* have accepted the State Government's

plans to implement the laws, Abdul Halim said the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate).

"We will continue with our explanation process but will not hold a referendum to gauge whether the *rakyat* support it."

Pas: *Hudud* laws based on *hadith* (NST 17/08/92)

KOTA BARU, Sun. - Pas president Fadzil Noor said the *hudud* laws to be introduced in Kelantan will be based on the *Qur'an* and *hadith* (traditions of the Prophet) as required by Islam.

He said there was no dual interpretations of the *hudud* laws and as far as Pas was concerned, the laws were purely Islamic.

He was responding to Prime Minister Datuk Seri Dr Mahathir Mohamad's statement in Kuala Lumpur during the MCA annual general meeting that Pas' proposed *hudud* laws were different from the teachings of Islam.

Dr Mahathir also said that Umno would not support the implementation of *hudud* laws which was not the Islamic *hudud* laws but in reality, Pas' laws.

Fadzil challenged Dr Mahathir to prove the *hudud* laws propogated by Pas were not based on the Islamic teachings or that stated in the *Qur'an*, *hadith* or other Islamic sources of jurisprudence.

"I think what Dr Mahathir is trying to do is to retract from his commitment that the Barisan Nasional will allow the implementation of the *hudud* laws in Kelantan.

"I hope he will still keep his promise and allow us to proceed with tabling the motion to amend the Federal constitution to allow the *hudud* laws to be implemented in Kelantan," Fadzil said.

Pas: Sultan too bound by *hudud* laws. By Shamsul Akmar (NST 10/08/92)

KOTA BARU, Sun. - *Hudud* laws will apply to everyone in Kelantan, including the Sultan, when they are implemented by the Pas-led State Government.

This was stated by Pas deputy president Hadi Awang yesterday.

He said he did not see any reason why the Malay Rulers would reject laws when they had allowed themselves to be bound by English laws for a long time.

He said *hudud* and other Islamic laws derived from the *Qur'an* originated from God and there was no reason, therefore, for the Malay Rulers to refuse to be bound by them.

"As far as the Kelantan Government is concerned, the Sultan had expressed his readiness to be bound by the code of ethics as stated in the *Qur'an* and *Sunnah* (the traditions of the Prophet).

"The Sultan made this stand public in his speech a few months back and this shows that he is ready to be subjected to the Islamic and *hudud* laws which the Kelantan Government proposes to implement," Hadi said in response to a question from the audience at a forum on *hudud* laws organised by the State Information Secretariat.

The forum held at Balai Islam here last night was supposed to have had four panel members, including Hadi. However, the other three, Prof Khoo Kay Kim (representing Christians), Reverend Sik Kim Ming (Buddhist) and Prof Razali Nawawi (Umno) did not turn up for the function.

The question from the audience was whether the Malay Rulers would be subjected to Islamic laws when implemented in Kelantan as they were "above the law" under Article 32 of the constitution.

Hadi said judicial precedents from the Islamic era showed that nobody was above the law.

Earlier, Hadi said the draft on the amendment to the State (constitution to provide for the implementation of *hudud* laws had been completed.

"We are waiting for the approval from the Federal Government and the amendments to the Federal constitution to be made.

"We will continue to struggle to get the laws implemented," he added.

Explain *hudud* laws, says lawyer. (NSUNT 28/06/92)

KUALA LUMPUR, Sat. - Muslims should not feel that non-Muslims are being offensive when the latter speak against the implementation of *hudud* laws.

They should instead make it their duty to understand and ex-

plain the Islamic criminal law to their non-Muslim friends.

Lawyer Sulaiman Abdullah, who spoke at a forum on legal and medical aspects of *hudud* laws yesterday, said non-Muslims viewed *hudud* laws suspiciously because they lacked understanding on the matter and feared an "alien" judicial system.

He said one reason for the lack of rational discussion on *hudud* laws was the belief by some that it was an effort by the Malays to assert their superiority over non-Malays.

Sulaiman also described as "simplistic" arguments by certain quarters who implicitly suggested that *hudud* laws were not important on the ground that they represented "only 0.1 per cent" of Islamic jurisprudence.

"The important thing to bear in mind is that from the Muslim perspective, *hudud* law is not a question of choice."

Sulaiman, who is a senior member of the Bar, was a former lecturer in Universiti Malaya's Faculty of Law. He is now a lawyer with a private firm.

The forum was organised by the Medico Legal Society of Malaysia to provide opportunities for members of the medical and legal professions to freely discuss the implications of *hudud* laws in the medical and legal fields.

The topic was chosen in view of plans by the Pas-led Kelantan Government to introduce *hudud* laws.

Cardiac surgeon Datuk Dr Joseph Iravelly brought up the subject of advances in medicine which had enabled doctors to re-attach severed limbs.

He wondered whether it would be allowable to reattach the limb of a person severed under *hudud* laws, in another State which did not observe such laws.

***Hudud* laws can't stand on their own, says IIU don.** (NST 26/06/92)

KUALA TERENGGANU, Thurs. - The implementation of the *hudud* laws should include other related Islamic criminal offences under the *qisas* and *diat* to ensure fair justice to the public.

International Islamic University deputy dean in the Islamic law faculty Prof Dr Mahmud Saedon Awang Othman said today that the inclusion of offences under the *qisas* and *diyat* together with *hudud*

would make the Islamic criminal laws more comprehensive.

"We are aware that the *hudud* laws are rather strict where an accused person often escapes severe punishment because of insufficient evidence," he said in a talk on "*Hudud* Laws - Its Philosophies and Implementation" here.

He said the mere concentration on the implementation of *hudud* laws alone would confine the criminal offences to only six namely theft, highway robbery, fornication, intoxication, false allegation and apostasy.

"Offences that can be tried under *hudud* laws are limited. Thus, the inclusion of other Islamic criminal offences would make it more comprehensive and effective," he said.

Among the offences under the *qisas* is premeditated murder. A person could be charged under the *diyat* if he is accused of culpable homicide not amounting to murder where compensation can be offered to the victim's family.

Mahmud added since the *hudud* laws required clear evidence to the point of being confident that an offence had actually taken place, an amended charge for the same offence under the *ta'azir* laws should be introduced.

He said the *ta'azir* laws would serve as an alternative to the *hudud* laws to ensure that an accused person would not escape punishment due to lack of evidence when tried under *hudud* laws.

"We want to discourage criminal acts among the Muslims and if those charged under the hudud laws are freed then the Islamic laws will not serve its purpose," he said.

He stressed that the *ta'azir* laws which did not require a higher degree of evidence unlike the *hudud*, would ensure that an accused person underwent a less severe punishment upon conviction.

However, he added that the implemention of the *hudud* laws, in particular, could not be carried out unless amendments were made to the Federal Constitution.

Abandon *hudud* laws proposal, says MHYC . (NST 21/05/92)

PENANG, Wed. - The Malaysian Hindu Youth Council has called on the Kelantan Government to abandon its plan to impose *hudud* laws on non-Muslims as this is contrary to the Constitution.

Its president, Mr V. Sithambaram, said today that this was one

of the two resolutions adopted at the MHYC's annual delegates conference here on Sunday.

The council said that imposing one's own religious laws on a person of a different faith would only result in greater racial and religious polarisation in this multi-racial, multi-religious and multi-cultural nation.

Organise a public forum on *hudud* laws.By Sisters in Islam (NST 16/05/92)

NEWS reports on *hudud* laws over the last few weeks have failed to shed sufficient light on this complicated subject.

More and more Malaysians are confused and bewildered by claims made by different individuals on why the laws should or should not be implemented.

We are most concerned about this and we propose that a public forum be organised on *hudud* laws. Such a forum, we feel, should be attended by local and foreign Muslim thinkers so that Malaysians can hear the various views on the subject in the context of a multi-racial society.

The presence of foreign scholars at the forum will also enlighten us on the problems of its implementation, for example in countries like Saudi Arabia, Pakistan and the Sudan.

While such a forum may not settle the matter once and for all, it will dispel erroneous speculation and interpretation of what *hudud* laws entail and go some way in explaining how they will affect the fabric of Malaysian life and the rights of non-Muslims.

As it is, the people are alarmed and divided on *hudud* laws because they are not thoroughly informed.

Indeed, to leave such a complicated issue dangling for so long can only be detrimental to Islam and the *ummah*.

For centuries, Muslims have maintained a healthy dialogue and discourse over the best way to live their lives as Muslims and for understanding Islam.

The fact that in Sunni Islam there are four *madhabs* (schools of legal thought) is an indication that healthy differences exist across the globe for what is understood as "Islamic".

These four schools were not founded by the scholars for whom

they are named: Shafi'i, Malik, Hanbal and Hanafi, but by their students and descendants. These great thinkers had no intention of creating "new schools of thought": their reasonings and discussions were attempts to better understand and follow the *Qur'an* and *Sunnah*.

The relationship between these scholars was healthy and strong. They were intellectually and spiritually dedicated and mutually responsive. Shafi'i was a student of Malik's; but when Malik came to Egypt, he prayed in the same way as Shafi'i.

Today, this sense of fraternity is, for the most part, absent among Muslims. As we try to establish what is Islamic, we point accusing fingers at one another to prove how much more worthy we are, compared to the other, in the eyes of God.

This 15th century of Islam has been particularly marred by bitter conflicts over what is Islam. The acrimony has been noticed worldwide, giving the impression that Islam is, if nothing else, a source of continued bitterness.

That we may feel the institution of a few punitive measures like the *hudud* laws will make a proud statement globally of the value and virtue of a glorious Islam is regrettable.

Islam is much more than cutting off the hand of a thief. Yet, it is that same "much more" which seems to elude us.

Perhaps the distinctive nature of the *hudud* in existing laws and legal systems might give us the short-lived satisfaction that we are unique, special.

But the institution of *hudud* laws is a negative dakwah policy. No one ever says or will say: "I want to join that religion which whips men and women, stones them and cuts off their limbs for a variety of crimes."

Furthermore, we must ask ourselves whether the implementation of another form of legal retribution can elevate the status of Muslims spiritually and improve the overall quality of our devotion to Allah?

Not only does the spirit of Islam suffer, by diminishing it to the level of a few penal measures, but the mechanisms for implementation could pose a real threat to the just and correct application of *hudud* laws.

We would also like to know who, in the last few decades, has been trained properly and thoroughly in all aspects of *hudud* implementation in modern Muslim states to ensure that the basic rights of each Muslim brought before the courts will not be violated through

misconduct, misunderstanding or poor judgment on the part of the authorities?

The entire affair is becoming quite tragi-comic. To avoid mistakes, we must now ask ourselves whether we are fully prepared for the consequences or are we merely fooling ourselves for the sake of appearing more Islamic than others?

In trying to answer this, too, we must be courageous enough to take this matter to the people for everyone in this country has a fundamental right to be informed and involved in a matter which will undoubtedly affect their lives.

Party unprepared for *hudud* laws (NST 16/05/92)

KOTA BARU, Fri. - Deputy Umno Information chief Nakhaie Ahmad said Pas has not made any preparations on various aspects of *hudud* laws which it plans to implement.

He said that one of these was the need to reform the *Shari'a* courts. "Apart from that, Pas has yet to prepare the Islamic Evidence Act and there are no judges qualified to sit for cases concerning *hudud* laws."

Nakhaie said at a forum on *Islamkah Kerajaan Kelantan Hari Ini?* (Is the Kelantan Government of today Islamic?).

The forum was opened by the Deputy Minister in the Prime Minister's department Datuk Dr Abdul Hamid Othman. It was held at the State Umno building.

Nakhaie said if the *hudud* laws were to be implemented in Kelantan, their cases could not be referred to the present *Shari'a* courts as Pas leaders had labelled them as not being efficient.

"Therefore, the *Shari'a* court system must be revamped and it is a task which Pas has yet to carry out.

"The Evidence Act in *hudud* cases needs to be prepared. Judges to sit on these cases are also not available today and Pas has not made any preparations to fill the gap," he said.

Abim cautions Kelantan on *hudud* laws. By Sharifah Fatimah (NST 06/05/92)

PETALING JAYA, Tues. - The Muslim Youth Movement of Malaysia (Abim) today expressed support for Kelantan's plan to implement

hudud laws but cautioned against a hasty implementation in view of the nation's multi-religious society.

Abim president Dr Muhammad Nur Manuty said the Pas-led State Government should ensure that they had adequate legal personnel to implement *hudud* laws (Islamic penal laws) according to Islamic jurisprudence so that it would not backfire.

He also said that to ensure the smooth implementation of *hudud* laws, preparation was particularly needed in the form of education as both Muslim and non-Muslim Malaysians now had little or no knowledge at all about *hudud* laws.

Apart from ensuring that there was no misunderstanding about *hudud* laws among members of the public, efforts should also be taken to ensure that there were capable legal personnel to implement the law efficiently.

"Any move to implement *hudud* laws without capable implementors would only mar the image of Islam," he said at a Press conference at the Abim secretariat here.

Asked whether *hudud* laws applied to non-Muslims, Muhammad Nur said *ulama* had differing opinions on the matter.

"I believe that in the case of Malaysia it would be appropiate for non-Muslims to be exempted from the law."

Muhammad Nur also proposed that the recently set up Institute of Islamic Understanding be given the leading role in educating both Muslims and non-Muslims on *hudud* laws.

Meanwhile, DAP deputy chairman Karpal Singh called on the Yang di-PertuanAgong Sultan Azlan Shah to invoke his power under Article 130 of the Federal Constitution to seek the opinion of the Supreme Court whether the Federal Constitution could be amended to provide for the implementation of *hudud* laws on non-Muslims in the country.

"Any amendment to the Federal Constitution to implement *hudud* laws on non-Muslims will be unconstitutional as no alteration can be made to the basic structure of the Constitution. And the freedom of religion forms a fundamental and basic structure of the Constitution," Karpal said in a statement.

DAP secretary-general Lim Kit Siang said in a separate statement that Kelantan Menteri Besar Nik Abdul Aziz Nik Mat's refusal to give an assurance to the Malaysian Inter-Religious Consultative Council (MRCC) that *hudud* laws would not be imposed on non-Mus-

lim Malaysians showed that Pas did not respect the constitutional rights and religious sensitivities of non-Muslim Malaysians.

Lim said Pas leaders should understand that the issue, as far as non-Muslim Malaysians were concerned, was not whether *hudud* laws were fair.

Instead, he said, the fundamental question was the constitutional right and guarantee for non-Muslim Malaysians not to have *hudud* laws imposed on them.

Semangat backs Pas plan to implement *hudud* laws. (NST 20/04/92)

KUALA TERENGGANU, Sun. - Semangat 46 president Tengku Razaleigh Hamzah said his party agrees with Pas' intention to implement the *hudud* laws, not only in Kelantan but in other States as well.

However, he said, the implementation of the *hudud* laws must not violate the religious rights of non-Muslims as agreed between Semangat 46 and Pas during the run-up to the 1990 general election.

"When Semangat 46, Pas, Hamim and Berjasa formed the *Angkatan Perpaduan Ummah* (APU), all of us agreed to accept Islam as an addeen (way of life)," he said when met at the Primula Beach Resort here today.

"That means that Semangat 46 will support Pas in the implementation of not only *hudud* laws but also the full Islamic *Shari'a*."

He added that during the formation of APU, Pas and its allies agreed that in implementing *hudud* laws, the non-Muslims' rights to their religion were guaranteed.

Razaleigh said the Kelantan Government, apart from being responsible in implementing the *hudud* laws, would also be responsible in ensuring that it was applied justly.

He admitted that Semangat 46 had not been invited to discuss the draft on the *hudud* laws.

He said: "We have yet to be briefed or invited to participate in the discussion. But I believe that we will be invited when Pas is ready.

"From what I have gathered, the draft being prepared by the Pas committee is in its preliminary stage, and that is probably why we are yet to be invited."

Asked whether Pas discussed the matter with Semangat 46 and the other APU allies when the Kelantan Government was formed,

Razaleigh said: "Pas had informed us that they intended to implement the *hudud* laws but we did not go into details then."

On DAP's plan to take the Pas-led Kelantan Government to court if the latter proceeded with its plans to implement the laws, Razaleigh said he believed the DAP was not well informed on the matter.

Dr Mahathir to Aziz: Try *hudud* laws now. By Farush Khan and Zulkifli Othman (NST 17/04/92)

JOHOR BARU, Thurs. - The Pas-led Kelantan Government should implement *hudud* laws immediately in the State if it is serious about the matter, Datuk Seri Dr Mahathir Mohamad said today.

The Prime Minister said the Federal Government would not obstruct or prevent the State Government from proceeding with its plans. However, it doubted Menteri Besar Nik Aziz Nik Mat's sincerity.

"If Nik Aziz feels that cutting off people's hands would make him a more complete Muslim, the Federal Government will not stop him from implementing the *hudud* laws. However, we do feel that it is not appropriate in this day and age because of the unique situation in our country and the many other Islamic alternatives to the *hudud* laws," he told a meeting of Johor Umno leaders here.

"I want to know which Pas members are willing to cut off another person's hand for stealing. Maybe Nik Aziz wants to do it but I know it is not easy to do so."

Later, speaking to reporters after opening the polypropylene plant of the Titan Himont Polymers in Pasir Gudang, about 40km from here, Dr Mahathir said the Federal Government was prepared to amend the Constitution to allow the Kelantan Government to implement the *hudud* laws.

He said the Federal Government would do this if necessary to show that it was not trying to stop Kelantan from implementing the laws.

"All this while, they have been saying with sarcasm that the Federal Government is an obstacle for them to implement the laws and that we are not so Islamic.

"Now we are not going to stop them. If they wish, they can implement such laws in Kelantan."

Asked whether the proposed amendment would allow the

Kelantan Government to impose *hudud* laws on non-Muslims too, Dr Mahathir said that it would be up to the Kelantan Government to decide.

He said it was the people of Kelantan who had voted Pas to power in the State. Therefore, as a democratic country, the Federal Government would allow it to implement *hudud* laws.

Earlier, he said he doubted Pas would ever implement *hudud* laws in Kelantan. The party was merely using the publicity to make it seem more Islamic than everyone else.

"What Nik Aziz is really trying to do is announce that he wants to implement such laws, and then turn around and say that he is unable to do so because the Federal Government would not let him," Dr Mahathir said.

Dr Mahathir said even countries with more Muslims than Malaysia had not introduced the *hudud* laws.

Nik Aziz said last week in Kelantan that his State Government was serious about implementing the laws and had set up a special committee to draft the *hudud* laws as well as other *Shari'a* laws.

He had said that Kelantan was ready to discuss the implementation of the *hudud* laws with the Federal Government.

MB: We will proceed with *hudud* laws. By Shamsul Akmar (NST 13/04/92)

KOTA BARU, Sun. - The Kelantan Government will proceed with its plans to implement the *hudud* laws and once in force, they would apply to all races.

Menteri Besar Nik Abdul Aziz Nik Mat said the State would not bow to pressure from anyone against the implementation of *hudud* laws.

"The *hudud* laws are for the good of the whole of society and will apply to all Kelantanese, irrespective of their race or religious beliefs," Nik Aziz said when met at the Sultan Ismail Petra Airport in Pengkalan Chepa near here today.

He was with other State leaders and dignitaries to welcome home the Tengku Mahkota who was returning from abroad.

The Menteri Besar said the State Government was serious about implementing the laws and had set up a special committee which

was now drafting the *hudud* laws as well as other aspects of the Islamic *shar'ia*.

The *hudud* laws, among other things, provide for stoning, whipping and amputation of hands and legs for offences such as adultery, theft, renunciation of Islam and consumption of alcohol.

Asked about the delay in the implementation of the *hudud* laws, Nik Aziz said the Kelantan Government lacked experts on the subject and it had to invite those from outside Kelantan as well as from abroad.

"We have been very careful in drafting the laws and we managed to obtain the services of the experts. We are now in the final stages of completing the draft."

"Furthermore, the Kelantan Government is trying to become a pioneer in getting the laws implemented and we have to ensure that all requirements of Islam pertaining to the laws are covered," he added.

Asked if the Kelantan Government had ample officers to implement the laws, Nik Aziz said once the *hudud* laws are in writing, the implementation would not require as many experts as State officers had the guidelines to observe.

He said before the laws are incorporated into the State Constitution, the Kelantan Government would forward the draft to the Federal Government.

Nik Aziz said the Kelantan Government was ready to discuss the implementation of the *hudud* laws with the Federal Government. On the strong protest by MCA and Gerakan on the proposed implementation of the *hudud* laws, Nik Aziz said he was surprised by the strong opposition.

DAP opposes *hudud* laws. (NST 10/04/92)

KUALA LUMPUR, Thurs - The DAP opposes the imposition of Muslim laws against non-Muslims in any state including the *hudud* laws which carries penalties of limb-chopping, whipping and stoning, its secretary-general, Mr Lim Kit Siang, said today. He said the imposition of such laws by the State or Federal government was against the constitution of the country and this applies to the Pas-led Kelantan State Government.

Note: These articles have been suitably shortened. Original versions can be obtained at the New Straits Times and The Star.