

**WHIPPING: A COMPARATIVE STUDY BETWEEN ISLAMIC
LAW AND SYARIAH COURTS IN KELANTAN**

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LAW AND SYARIAH COURTS IN KELANTAN**

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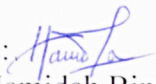
February 2004

AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ABSTRAK

Kajian ini merupakan satu bentuk kajian perbandingan diantara undang- undang Islam dan Mahkamah Syariah di Kelantan mengenai hukuman sebat dan perlaksanaanya. Kajian ini bertujuan untuk menganalisis cara pelaksanaan hukuman sebat berdasarkan *Al-Quran* dan *Hadis*. Didalam undang-undang Islam, hukuman sebat merupakan satu bentuk hukuman atau balasan keatas mereka yang melakukan jenayah tanpa mengira keturunan dan pangkat. Manakala kajian seterusnya adalah, bertujuan untuk mengetahui perjalanan hukuman sebat sepertimana yang telah dilaksanakan di Mahkamah Syariah di Kelantan, keatas pesalah menurut Enakmen Kanun Jenayah Syariah, bilangan 2, 1985 serta bidangkuasa Mahkamah Syariah didalam melaksanakan hukuman tersebut. Bagi mencapai tujuan ini, penulis telah membuat kajian keatas Enakmen Kanun Jenayah Syariah bilangan 2, 1985, serta keadaan atau cara pelaksanaan hukuman sebat sepertimana yang telah diperuntukkan oleh Kerajaan Negeri Kelantan kepada Mahkamah Syariah untuk melaksanakan hukuman tersebut. Hasil kajian ini boleh dibuat kesimpulan bahawa konsep serta matlamat kedua- dua hukuman ini adalah untuk menegakkan keadilan. Tetapi cara dan bentuk perlaksanaanya sahaja yang berbeza.

ABSTRACT

This research is a comparative study between Islamic law and Syariah Courts in Kelantan about the punishment of whipping and its implementation. The purpose of this research is to analyze the method of whipping punishment according to *al-Qur'an* and *Hadith*. In Islamic law, punishment of whipping is the punishment or reciprocation for those who commit a crime without consider their descent or statues. Next, another purpose of this research is to know the implementation of punishment of whipping which implemented in Syariah Courts, Kelantan, for offenders according to the Syariah Criminal Code Enactment, No 2, 1985 and also the jurisdiction of Syariah Courts to implement it. In order to achieve this purpose, the writer make a research to the Syariah Criminal Code Enactment No 2, 1985 beside the condition and the method of implementation of whipping punishment as allotment by Government of Kelantan to Syariah to implement it. As a conclusion, the result from this research is to insure justice in judicial system. But there are different in the method and forms of its implementation.

ملخص البحث

هذا البحث هو البحث المقارن بين الأحكام الإسلامية والمحكمة الشرعية ولاية كلنتان وخاصة في حكم التجليد وتنفيذه. ويهدف هذا البحث إلى معرفة كيفية تنفيذ هذا الحكم في القرآن والسنة. وفي الإسلام حكم التجليد هو جزاء على المخالفين للقوانين الخاصة بغض النظر عن نسب ومترلة عند المجتمع. وفي الطرق الثاني تدرس الباحثة كيفية تنفيذ هذا الحكم في المحكمة الشرعية بولاية كلنتان حسب قانون الجنايات الشرعية رقم ٢، ١٩٨٥م وسلطة المحكمة الشرعية لتنفيذ هذا الحكم. ولتحقيق أهداف البحث قامت الباحثة بدراسة قانون الجنايات الشرعية رقم ٢، ١٩٨٥م وكيفية تنفيذ حكم التجليد فيه كما منحت حكومة ولاية كلنتان سلطتها إلى المحكمة الشرعية لتنفيذه. والنتيجة من هذا البحث تبني بأن المبدأ والغاية عن حكم التجليد هما لإقامة الحق والعدالة بين الناس إلا أن كيفية تنفيذه قد تكون مختلفة بين المحكمات الشرللقوانين العاملة في عية.

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GLOSSARY

<i>Diyyat</i>	Compensation paid causing death.
<i>Fasiq</i>	A person who habitually breaks religious prohibitions.
<i>Fuqaha</i>	Islamic jurists.
<i>Ghayr muhsan</i>	An unmarried <i>Muslim</i> .
<i>Had</i>	A specific form of punishment laid down in the Qur'an.
<i>Halal</i>	Lawful, permissible.
<i>Haram</i>	Prohibited
<i>Hadīth</i>	Saying of the Prophet Muhammad s.a.w
<i>Hirabah</i>	Highway robbery.
<i>Hudūd</i>	Several specific crimes and punishment laid down in the Qur'an
<i>Hukm</i>	Legal rule.
<i>Kafarrah</i>	Lit, expiation, self-imposed punishment.
<i>Muhsan</i>	A married person.
<i>Qadi</i>	Judge.
<i>Qisas</i>	Law of retaliation
<i>Right of Allah</i>	<i>Hudud</i> , matters of worship.
<i>S.a. w</i>	Abbreviation of “ <i>Sallallahu ‘Alaihi wa Sallam</i> ” meaning “Peace be upon Him”. It is compulsory for a Muslim to utter this blessing whenever he hears the prophet Muhammad’s name being mentioned.
<i>Sunnah</i>	Saying, deeds and approvals of the Prophet s.a.w.
<i>Ta`zir</i>	Discretionary punishment for offences not amounting to <i>hudud</i> .
<i>Ulama`</i>	Plural of <i>‘alim</i> , Islamic jurist.
<i>Zina</i>	Adultery or fornication.

TRANSLITERATION

ARABIC WORDS TRANSLITERATION SYSTEM

TRASLITERATION TABLE

1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ت	t	تعزير	Ta'zīr
ج	j	جلد	Jalada
ح	h	حرام	Harām
خ	kh	خمر	Khamr
د	d	دية	Diy'ah
ر	r	رجم	Rajm
ز	z	زنا	Zinā
س	s	سارقة	Sariqah
ش	sh	شرع	Syara'
ف	f	فقهاء	Fuqaha'
ق	q	قذف	Qazf
ك	k	كفارة	Kafārrah
م	m	محسن	Muhsan
ن	n	نشوز	Nusyuz

2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
َ	a	رجم	rajima

_____	i	زنا	zinā
_____	u	فقهاء	Fuqaha

3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ا	ā	سارقة	sāriqah
ي	ī	شرعي	Syarīe'
و	ū	نشوز	nusyūz

4. Diphotong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ى	iy	شافعي	shafīyy (ending)

5. Exemptions

5.1 Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” and not to ‘.

Example: أكبر transliterated to: akbar (not ‘ akbar)

5.2 Arabic letter ة (ta’ marbutah) found in a word without ال (al) which is coupled with another word that contains ال at the beginning of it is transliterated to the letter “t”.

Example: سارقة transliterated to: sariqah

However if the Arabic letter ة (ta’ marbutah) found in a word with ال (al), in a single word or in the last word in a sentences, it is

transliterated to the letter “h”.

Example: سارقة transliterated to: sariqah

كفارة kafarrah

ABBREVIATIONS

N.d	No date/no year
N.p	No publisher
P.	Page
SAW	Salla Allāh anhu/ anha/ anhum
SWT	Subhānahu wa taālā
Vol.	Volume

LIST OF SYMBOL

#	Hadith Number
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INTRODUCTION

BACKGROUND OF RESEARCH.

Before the Islamic came and brought by the Prophet Nabi Muhammad s.a.w, the *jahiliyah* society was life in darkness. They also cruel and have not humane to those who weak in that society. For those who have a power they will hijack the others property, personal possession and others. This situation happens because there is no justice implemented to punish those who make criminal cases.

Islam is the best among the best approach and unique in all of matters that needed in our life such as politic, economic, education, and the most important in the judicial systems. The nature of concept in Islam has created to give justice for all of persons that maltreat and impose a punishment for those who make a crime. This concept was fair designed for the purpose to make sure all of society lives in peace and harmony. For that reason, the punishment of whipping is one of punishments in Islam.

This research is a comparative study about the punishment of whipping and it implementation in two perspective namely in Islamic law and in Syariah Court in Kelantan. The research also about the implementation punishment of whipping is followed in Islamic rules namely, based on *qur'an* and *hadith*.

Beside that, the writer also makes a research about the method of implementation of punishment of whipping in Syariah Courts in Kelantan especially in Syariah Court in Kota Bharu, Kelantan.

In this research the writers also will explain in detail about the concept of punishment of whipping in Islamic law. After that, the writer will elaborate about the punishment of whipping based on *qur'an* and *hadith*. Besides that, the writer will discuss about the

hikmat of implementation of punishment of whipping such as retribution, preventive, reformative and public interest.

Next, the writer also will discuss about the type of offences under the punishment of whipping for example in criminal adultery, false accusation of adultery and drinking wine. At the same time, the writer will discuss about the punishment of whipping in offences of *qisas* and *ta'zir*.

Thus, the writer will discuss about the method of implementation of punishment of whipping in Islam such as the position and situation of the offender during punishment of whipping, the appliance of whipping, method punishment of whipping, the part of body to be whipped and the last one about the time and place of punishment of whipping.

In the next chapter the writer will discuss about the implementation of punishment of whipping in Syariah Court. Under this topic the writer will discuss about the Jurisdiction of Syariah Court in implementing of punishment of whipping. Next, the crimes, which are imposed by punishment of whipping. Then, the method of implementation the punishment of whipping such as the position of offender within the punishment of whipping, the appliance of whipping, the method of whipping, the part of body to be whipped and about the time and place of it's implementation and so on.

Lastly, as a conclusion for the reason that the punishment of whipping is provided in Islamic religion, it's important to discuss it, to ensure the society would understand and get explanation about this punishment. It's important to the society to change their perception about it. Accordingly, any problem that existed should be settled based on Islamic rules.

SIGNIFICANCE OF RESEARCH.

The important of this research is that the writer can know how the implementation of punishment based on Islamic rules especially for those who commit a crime. Before this, the writer knows about the punishment of whipping only from the book, newspaper and some article. But, while making this research, the writer can understand clearly about the punishment of whipping.

Second, the writer also wants to expose to society about the punishment of whipping based on *qura'n* and *hadith*. So, the society will understand and get well explanation about this punishment. It's also important because the punishment in Islam was created to give justice for all of persons that maltreat and impose a punishment for parties who's involved in crime such as adultery, accusation of *zina*, drinking wine and other.

Lastly, this research also have contribution to knowledge especially for the writer because on this research the writer has discussed clearly about the punishment of whipping comparatively between Islamic law and the punishment of whipping in Syariah Court in Kelantan nowadays.

AIM OF RESEARCH.

The aim of research is to look how far the effectiveness of whipping punishment was implemented in Syariah Court and how far the effectiveness of it for the Islamic society nowadays especially for parties involved in the criminal such as adultery, false accusation of adultery, drink wine and other.

OBJECTIVE OF RESEARCH

The objectives of the research are: -

- 1) To fulfill all the condition to get the degree from this university.
- 2) To compare punishment of whipping between Islamic law and the Syariah Courts in Kelantan.
- 3) To compare punishment of whipping between Islamic law and the Syariah Courts in Kelantan.
- 4) To clarify the implementation punishment of whipping according to the Islamic law and the Syariah Courts in Kelantan.
- 5) To expose to the society, that whipping punishment which imposed to the offences was based on the Islamic rules.
- 6) To give explanation to the society that whipping punishment is not to chastise and inhuman but, to curb and give awareness to the society and offender itself.

PROBLEM STATEMENT.

In order to make this research the writer faced many problem such as to collect the information related to the topic the writer must go to other university library such as UM, UKM and others. It is because, in KUIM's library have no much book related to author topic. Beside that, to go from one place to other place the writer should be spend a lot of money such as for transport, photocopy and so on.

SCOPE OF RESEARCH

In this research the writer will discuss about the punishment of whipping in two perspectives namely, in Islamic law and Syariah Courts in Kelantan. Next, The writer

will elaborate about the methods of implementation of the whipping punishment based on Islamic rules.

Besides that, the writer also makes a research about the implementation of punishment of whipping in Syariah Courts in Kelantan in nowadays. The Syariah Courts in Kelantan implement the whipping punishment based on the Whipping Rules 1987 and shall be deemed to have come into force on the 1st day of May 1987.

RESEARCH METHODOLOGY.

In complete this research, two methods are being used namely: -

- a) Data collection plan.
- b) Research design.

a) Data collection.

To complete this research, the writer make a research at library such as Islamic University College of Malaysia, University of Malaya, National University of Malaysia, International Islamic University Malaysia and National library. From this method, the writer can find a data collection or information on the topic of research.

b) Research design.

Next, for gathering the information, the writer also makes a research in Syariah Court in Kelantan to how the punishment of whipping that implemented in Syariah Court. So, by this way, the writer can get the information related on the topic of research.

LITERATURE REVIEW.

Prof Dr.Anwarullah (1997): The writer was discussed about the punishment in Islamic Law it means the *hudud*, it present us with a potential conflict between the specific rules and the overriding objectives of Shariah unless it also discussed specific issues and made suggestion as to the ways how this bill can be developed and improved. Besides that, on this research the writer also discussed about the Punishment but the writer focus in topic of punishment of whipping: comparative between Islamic law and Shariah Courts in Kelantan.

Mohamad Hashim Kamali (1995): The writer about the represents a valuable step forward. He has focused on the *hudud* bill of Kelantan but he has in the meantime seized the chance to enquire into the whole issues the implementation of Islamic criminal law in Malaysia. He has preached an important conclusion after although discussion “the bill of is a product undiluted limitation (*ta’lid*) failing to knowledge the contemporary realities of society and make necessary adjustment to some the *fiqhi* formulation of pre-modern times. I have specified where and how an *ijtihad* approach could beneficially be taken.

Ahmad Ibrahim (1992): the writer discussed about the punishment in Malaysia such a punishment of whipping, *qisas* and *ta’zir* and then what the *hikmat* of punishment of whipping. But on this research the writer discussed about the punishment of whipping: comparative between Islamic Law and in Syariah Courts in Kelantan.

Dr. Mahfoz Mohamad (1985): the writer only discussed about the punishment to the criminal in Islam. Next, the writer was elaborated how to implementation of punishment under the Islamic law it means based on the *qur’an* and *hadith*. As we know the punishment in Islam was created to give justice for all people. But on this research the writer discuss about the punishment of whipping: comparative between Islamic law and Syariah Courts in Kelantan.

CHAPTER I

THE CONCEPT OF WHIPPING PUNISHMENT

1.0 INTRODUCTION

Punishment usually defined as the infliction of some pain, suffering, loss or social disability as a direct consequence of an action or omission by the punished. The primary object of punishment in Islam is reformation of the culprit for the protection, peace in society and at the same time the concept punishment of whipping one of the punishment in Islamic. Its kind and quantum vary according to various circumstances with the respect to the culprit, society and state.

Generally the punishment was divided into some categories such as imprisonment, *whipping stripes*, fine compensation, banishment and confiscation. However the ruler or a judge is fully authorized to prescribed any suitable punishment in whatever forms it maybe to serve the purpose. Beside that, a legislator or a judge is authorized to give more than one different punishment to a culprit in the same offences if he deems fit in public interest.

Next, the punishment of *whipping* has been recognized in Islamic Law. It has been prescribed as a *hadd* punishment for adultery, false accusation of adultery and drinking wine. "*Hadd*" literally means boundary, limit, barrier, and obstacle. In terms of Islamic Criminal Law *hadd* means an unalterable punishment fixed by the *qur'an* or the *Sunnah* of the Prophet (s.a.w) as a right of Allah for a crime.¹

Hadd cannot be increased, decreased, altered or remitted by anyone even the head of an Islamic State. Thus the punishment of *qisas* or *diyat* is not *hadd* because the Holy *qur'an* has fixed it as right of individuals and it is for this reason that it can be

¹ Anwarullah. 1997. *The Criminal law of Islam*. Kuala Lumpur:A.S.Noordeen. p.145.

remitted by the victim or his heirs. As a right of Allah means that it is meant for the betterment of society.

Hadd in terms also means the crime for which unalterable punishment has been fixed by the *Quran* or the *Sunnah* of the Prophet s.a.w as a right of Allah.

1.1 THE DEFINITION OF WHIPPING

In *Arabic Language* “ it means to fitting or abuse.”²

In *Technical Sense*, there is no particular meaning that mention by many groups. However there are a few of opinion, which showed that the implementation and the method of punishment were done.

According to *Ibn Taimiyyah* mentioned that *whipping* was obligated by *Syara'* is a moderate of *whipping* not really lack of burden and so burden for the criminal.³

1.2 PUNISHMENT OF WHIPPING IN THE LIGHT OF AL-QUR'AN AND AL-SUNNAH

1.2.1 WHIPPING IN THE AL-QUR'AN

Actually there are so many proofs in the *al-Qur'an* that touch about the punishment of whipping. Some of the particular proofs as mentioned by Allah S.W.T in the *qur'an* are as follows.

² Muhamad Ganu. 1973. *Kamus Arab Indonesia Jakarta*. N. p. Penerbitan Yayasan penyelenggaraan penterjemahan / pentafsiran Al-quran. P. 83.

³ Ahmad Ibrahim. 1982. *Hukum Sebat dalam undang-undang Islam dan undang- undang Awan diMalaysia*. Kuala Lumpur: terbitan institusi Dakwah dan undang Islam Jabatan Perdana Menteri.P 13.

i. Allah says.

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة ولا تأخذكم بهما رافة في دين الله إن كنتم تؤمنون بالله واليوم الآخر وليشهد عذابهما طائفة من المؤمنين

Translation: *The women and the man guilty of adultery or unlawful sexual relations severely whip, each of them with a hundred strips, do not let kid ness more in their cases in a matter that is already decided by Allah if you (truly) believe in Allah and the let day and let a party of the believers witness the punishment.*⁴

ii. Allah says

والذين يرمون المحصنت ثم لم يتوبوا بأربعة شهداء فاجلدوا ثمانين جلدة ولا تقبلوا لهم شهادة أبدا وأولئك هم الفسقون

Translation: *And those whose launch a charge against pure woman, and not have four witness (in support of what the say): - severely whip them eighty stripes and not ever accept their evidence after words because such men are wicked transgressors.*⁵

iii. Allah says

والسارق والسارقة فاقطعوا ايديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم

Translation: *As to the thief, male and female cut off his or her hands a: punishment by way of example, from God, for their crime: and God is exalted in power.*⁶

⁴ Al-Qura'n. Al-Nur 24:2.(All Quranic translations in this writing are based on Abdullah Yusuf Ali. 1994. *The Holy Qur'an Text, Translation and Commentary*. Kuala Lumpur: Islamic Book Trust. Translations from other sources will be cited accordingly).

⁵ Al-Qur'an. An-Nur 24:4.

⁶ Al-Qur'an. An-Maidah 5:38.

iv. Allah says

وما كان لمؤمن أن يقتل مؤمنا إلا خطأ ومن قتل مؤمنا خطأ فتحرير رقبة مؤمنة ودية مسلمة إلى أهله إلا أن يصدقوا فإن كان من قوم عدو لكم وهو مؤمن فتحرير وإن كان من قوم بينكم وبينهم ميثاق فدية مسلمة إلى أهله وتحرير رقبة مؤمنة فمن لم يجد فصيام شهرين متتابعين توبة من الله وكان الله عليما حكيما

Translation: *Never should a believer kill believer; but (if it so happens) by mistake (compensation is due: if one (so) kills a believer. It is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of mutual alliance, compensation should be paid to his family, and a believing slave be free. For those who find this beyond their means, (is prescribed) a fast for two month running: by way of repentance to God: for God knowledge and all wisdom.*⁷

v. Allah says

يأبها الذين امنوا كتب عليكم القصاص في القتلى الحر بالحر والعبد بالعبد والأنثى بالأنثى فمن عفى له من أخيه شيء فإتباع بالمعروف وإداء اليه بإحسان ذاك تخفيف من ربكم ورحمة فمن اعتدى بعد ذلك فله عذاب اليم

Translation: *O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome, gratitude this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.*²

⁷ Al-Qur'an. An-Nisa 4:92.

² Al-Qur'an. Al-Baqarah 2:178.

vii. Allah says

ولكم في القصاص حياة يأولى الالباب لعلكم تتقون

Translation: *In the law of Equality there is (saving of) life to you, O ye men of understanding that ye may restrain yourselves.*

1.2.2 WHIPPING IN THE AL-SUNNAH

There are several evidences or *dalil* from Al-sunnah, which related to the punishment of whipping.

i. The prophet (s.a.w) said.

حدثنا مكى بن ابراهيم عن الجعيد، عن يزيد بن خصيعة عن السائب بن يزيد قال: - كنا نؤتى بالشارب على عهد رسول الله صلى الله عليه وسلم وإمره أبي بكر وصدرنا من خلافة عمر فتقوم إليه بأيدينا ونعالنا وأرد يتنا حتى كان آخر إمرة وعمر فجلد أربعين حتى إذا عتوا أو فسقوا جلد ثمانين

Translation: *Narrated: - As Said bin Yazid we used to strike the drunks with our hands, shoes clothes (by trysting in into the shape of lashes during the lifetime of the Prophet (S.A.W). Abu Bakar and the early part of 'Umars' caliphate. But during the last period of 'Umars' caliphate, he used to give drunken fourthly lashes and when drunks became mischerious and disobedient, he used to scourge them eighty lashes.¹⁰*

⁹ Al-Qur'an. Al-Baqarah 2:176

¹⁰ Al-Bukhariyy. 1998. *Sahih al-Bukhariyy*. Dr Muhamad Muhsin Kali Khan. Pakistan: kazi Lahore publication. Bab al-Hudud. Vol iii: p.507. #770.

ii. The prophet (s.a.w) said.

حدثنا مالك بن اسماعيل :- حدثنا عبد العزيز:- أخبرنا ابن شهاب عن عبيد الله بن عتبة عن زيد بن خالد الجهني قال:- سمعت النبي صلى الله عليه وسلم يأمر فيمن زنى ولم محصن: جلد مائة وتقريب عام قال ابن شهاب وأخبرني عروة بن الزبير: أن عمر ابن الخطاب عرب ثم لم تزل تلك السنة.

Translation: Narrated Zaid bin Khalid Al-Juhairi:- I heard the prophet (S.AW) or during that an unmarried person guilty of illegal sexual intercourse be flogged hundred stripes and be exiled for one year/ Umar bin Al-Khattab also exiled such as a person, and this tradition is still valid.¹¹

iii. The prophet (s.a.w) said.

عن أبي هريرة رضي الله عنه قال قال أبي النبي (ص) برجل قد شرب قال (أضربوه) ، قال أبو هريرة :فمنا الضارب بيده، ومنا الضارب بنعله، ونا الضارب بثوبه فلما أنصرف، قال بعض القوم: أخزأك الله قال: (لا تقولوا هكذا لا تعينوا عليه الشيطان)

Translation: Narrated: - (Abu Salama:) Abu Hurairah r.a said: - "A man who drink wine was brought to the Prophet s.a.w the Prophet s.a.w said "beat him" Abu Hurairah added some of us beat him with their hands, and some with their shoes and some their garment (by twisting it) like a lash, and then when we finished, someone said to him 'may Allah upon discharge you! On that the Prophet s.a.w said 'do not say to for u are helping satan to overpower him.¹²

¹¹ Al-Bukhariyy. 1998. *Sahih al-Bukhariyy*. Dr Muhamad Muhsin kali Khan. Pakistan: Kazi publication Lahore. Bab al-Hudud. Vol iii: p.544. #818.

¹² Al-Bukhariyy. 1998. *Sumarized Sahih al-Bukhariyy*. Dr Muhamad Muhsin Kali Khan. Saudi Arabia: Islamic dar-us salam Ridayu. Bab prescribed punishment for (drinking wine) vol iii: p.955. # 2159.

iv. The prophet (s.a.w) said.

وحدثنا يحيى بن التميمي أجزنا مشيم عن منصور عن الحسن، عن حطان بن عبد الله الرقاشي خذوا عن عبادة من الصامات قال: قال رسول الله صلى الله عليه وسلم عنى خذوا عن قد جعل الله لمن سبيلا: - البكر بالبكر جلد مائة ونفى سنة، والثيب بالثيب جلد مائة والرجم بالحجارة

Translation: *Ubada b. As-Samit reported: Allah's messenger (SAW) saying: receive (teaching) from me; receive (teaching) from me. Allah has ordained a way for those (women). When an unmarried male commits adultery with an unmarried female (the should receive) one hundred lashes and banishment for one year. And is case of married male committing adultery with a married female, they should receive one hundred lashes and be stoned to death¹³.*

1.3 HIKMAT IMPLEMENTATION OF PUNISHMENT OF WHIPPING.

- I. Retributive.
- II. Preventive
- III. Reformative
- IV. Public interest.

I.Retributive.

The factor of retributive is explained clearly in Islamic Criminal law and as Allah said,

السارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم

Translation: *As to the thief, male and female cut off his or her hands: a punishment by way of example, from God, for, their crime: and God is exalted in power.¹⁴*

¹³ Al-Muslim. 1999. *Sahih Muslim*. Abdul Muhamad Sidiqqi. India: Adam publisher and distributor. Bab prescribed punishment for adulterer and adulteress. Vol iii:p.131. #1690.

¹⁴ Al-Qur'an. Al-Maidah 5:38.

Allah considers the punishment of cutting off a hand for the thief as a *jaza* (retribution) for their offences and also for other punishments. Beside that, in implementation that punishment such as punishment of *whipping* for both of adulterer (that still occur) let not compassion move you in their case and will prevent us to impose this punishment as Allah said,

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة ولا تأخذكم بمما رافة في دين الله إن كنتم تؤمن بالله واليوم الآخر ولشيهد عذابكما طائفة من المؤمنين

Translation: *The woman and the man guilty of adultery or fornication, - flog each of them with a hundred stripes: let not compassion move you in their case, in matter prescribed by God, if ye believe in God and the last Day: and let a party of the believer witness their punishment.*¹⁵

Beside that, Allah mentioned the word “*jaza*” (retribution) in *hirabah* criminal (highway robbery) *hadd* criminal and also in another criminals.¹⁶ And Allah said,

إنما جزؤا الذين يحربون الله ورسوله ويسعون في الأرض فسادا أن يقتلوا أو يصلبوا أو تقطع أيديهم وأرجلهم من خلاف أو ينفوا من الارض ذلك لهم خزي في الدنيا ولهم في الآخرة عذاب عليم

Translation: *The punishment of those who wage war against God and his apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world and a heavy punishment is theirs I the hereafter.*¹⁷

¹⁵ Al-Qur'an. An-Nur 24:2.

¹⁶ Ahmad Ibrahim. 1992. *Hukum diMalaysia*. Kuala Lumpur. Bahagian hal ehwal Agama Islam. Jabatan Perdana Menteri.p.24.

¹⁷ Al-Qur'an. Al-Maidah 5:33.

Whenever the punishment was confirmed, as a part of the retributive should be imposed as fit that criminal (mukafaah) with the crime that doing by such person. It is clearly found in *qisas* criminal and punishment of *qisas* in Islamic Criminal Law, namely punishment for those who make an offences by intend such as killing, bodily harm or manslaughter and others. As Allah said,

ياايها الذين آمنوا كتب عليكم القصاص في القتلى الحر بالحر والعبد بالعبد والانثى بالانثى
فمن عفى له من أخيه شيء فاتباع بالمعروف واداء اليه باحسان ذلك تخفيف من ربكم
ورحمة فمن اعتدى بعد ذلك فله عذاب اليم

Translation: *O ye who believe! The law of equality is prescribed to you in cases or murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by brother of the slain, then grant any reasonable demand and compensate him with handsome, gratitude this in a concession and a mercy from your lord. After this whoever exceeds the limits shall be in grave penalty.*¹⁸

And also for the criminal of body as Allah said,

وكتبنا عليهم فيها ان النفس بالنفس والعين بالعين والانف بالانف والاذن بالاذن والسن
بالسن والجروح قصاص فمن تصدق به فهو كفارة له ومن لم يحكم بما انزل الله فاولئك
هم الظالمون

Translation: *We ordained therein for them: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal, but if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what God hath revealed, they are (no better) wrongdoers.*¹⁹

¹⁸ Al-Qur'an. Al-Baqarah 2:178.

¹⁹ Al-Qur'an. Al-Maidah 5:45.

II. Preventive.

The preventive in Islamic Criminal Law is more complete, clear and really accurate as a deal punishment. The universal (*kafa'ah*) preventative can prevent (*jaz'u*) crime before it's occurred because the punishment can be as to prevention (*ta'dib*) for others from doing it. According to the Ibn Human, he mentioned that," the illness of punishment can be preventative (*mana'i*) before it's occur and be as abuse (*zawarji*) and after being such person, from do it again and again.²⁰

Next, the preventative element (*zajru* and *mana'i*) clearly explained in punishment of thief as Allah said.

السارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم

Translation: *As to thief, male and female cut off his or her hands: a punishment by way of example, from god, for their crime: and God is Exalted in power.*²¹

The punishment of amputation of a hand for thief is a *jaza'* (retributive) for their offences, and is a *nakalan*. *Nakalan* according to Asfahani translation is to emasculate offender and prevent others from doing a guilty as done by the offender. Beside that, the purpose of preventive is clear in all punishment of *hudud*.²²

Allah said.

فهزموهم بإذن الله وقتل داود جالوت واته الله الملك والحكمة وعلمه مما يشاء لولا دفع الله

الناس بعضهم ببعض لفسدت الأرض ولكن الله ذو فضل على العالمين

Translation: *By God's will they routed them: and David slew Goliath: and God gave him power and wisdom and taught him whatever (else) He willed. And did not God*

²⁰ Ahmad Ibrahim. 1992. *Hukum di Malaysia*. Kuala Lumpur: Bahagian hal ehwal Agama Islam.p 25.

²¹ Al-Qur'an. Al-Maidah 5:38.

²² Ahmad Ibrahim. 1992. *Hukum di Malaysia*. Kuala Lumpur: Bahagian hal ehwal Agama Islam.p 25.

*check one set of people by means of another, the earth would indeed be full of mischief: but God is full of boundary to all the worlds.*²³

The punishments of *hudud* for anybody who commit adultery is *muhsan* is *rajam* one hundred lashes for adulteress which still virgin (*bikr*). Hence, punishment for false accusation of adultery without four witnesses (*qazf*) is eighty lashes and witness for those person make that crime will be rejected forever. According to two *riwayah*, the punishment for drinking wine should be hit (*whipping*) with eighty or forty lashes. However the punishment of *hirabah* (robbery and ferocity) should be killing or cutting off hand and leg from opposite or an exile or banishment, while the punishment for apostasy is killing if he not repents and all of his wealth will be confiscated.²⁴

Thus, the punishment of *qisas* for offences of soul and body and also manslaughter should be killing and people who cause bodily harm should be punished like what he had done. So that, the punishment which is very severe in Criminal Law of *hudud* and *qisas* can be as learning and prevent other persons from doing the offences. Hence, the punishment of *whipping* for adulterer who are virgin (*bikr*) one of the way to encourage group of Muslim to observe it's implementation²⁵ as Allah said,

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة ولا تأخذكم بما رافة في دين الله إن

كنتم تؤمنون بالله واليوم الآخر وليشهد عذابهما طائفة من المؤمنين

Translation: *The women and the man guilty of adultery or unlawful sexual relations severely whip, each of them with a hundred strips, do not let kid ness more in their cases in a matter that is already decided by Allah if you (truly) believe in Allah and the let day and let a party of the believers witness the punishment.*²⁶

²³ Al-Qura'n. Al-Baqarah 2:251.

²⁴ Ahmab Ibrahim. 1992. *Hukum di Malaysia*. Kuala Lumpur: bahagian Hal Ehwal Agama Islam. P.26.

²⁵ Ahmad Ibrahim. 1992. *Hukum di Malaysia*. P.27.

²⁶ Al-Qura'n. An-Nur 24:2.

III Reformative.

The reformative is one of the *hikmat* of implementation of punishments of *Whipping*, it is because the main objective of punishment in Islamic Criminal Law is to teach or educate (*ta'dib*) or learn also to improve or reform (*Istislah*) such mentioned by Mawardi about the purpose of *hudud* criminal and *ta'zir* by saying:

“For educate (*ta'dib*) reformative (*istislah*) and abuse also to prevent (*zajr*) which different one offence with another offences”.²⁷

(*Al-Ahkam Al-Sultaniyyah*)

In others opinion such said by Abu Abdullah Az-Zubairi from Mazhab Shafi'i about *ta'zir* that offender can be imprisoned until one month for investigation (*istibra*) or to ensure the truth (*kasyf*) and also can be imprisoned until six month for educating or improving (*ta'dib* or *taqwin*).²⁸

VI.Public interest.

The basic punishment (*uqubah*) in Islamic Criminal Law is to protect the rights of people by implementing a basic method. The first is by keeping fundamental liberties of a person to protect the society peacefully. Secondly, to give benefit or keep the rights generally. So that, the Islamic Criminal Law especially for *hudud* and *qisas* is to protect five of basics of living such as religion, animate (concluding body), thinking (*al-'aql*), descent and wealth.²⁹

Thus, Syariah also was obligated to implement the punishment for those who involved with crime or offences for example adultery, we should punished them with whipping, it is because by implementing it, we can protect our descent and at the same time can solve the social problem faced by Muslim.

²⁷ Ahmad Ibrahim. 1992. *Hukum di Malaysia*. Kuala Lumpur: bahagian Hal Ehwal Agama Islam. P. 28.

²⁸ Ahmad Ibrahim. 1992. *Hukum di Malaysia*. P. 28.

²⁹ A.I. 1992. p.29.

As a conclusion, the punishment in Islamic Criminal Law should be implemented especially in Islamic State, because it is fair and justice to the parties involved especially for the offender itself, members of family and others. And at the same time, this punishment was fair designed for the purpose of making the society lives in peace and harmony.

CHAPTER II

THE OFFENCES WHICH ARE IMPOSED BY PUNISHMENT OF WHIPPING

2.0 INTRODUCTION

In Islamic Law the punishment of whipping can be viewed in all types of offences of crime such as in *hudud*, *qisas* and *ta'zir*.

2.1 THE PUNISHMENT OF WHIPPING IN HUDUD OFFENCES

The word of *hudud* is the plural of an arabic word *hadd*, which it means prevention, restrain or prohibition, and for this reason it is a restrictive and preventive ordinance or statute of Allah concerning things lawful (*halal*) and things unlawful (*haram*). In Islamic jurisprudence the word of *hudud* is limited to punishments for crimes mentioned by *qura'n* or the *sunmah* of Prophet, while other punishments are left to the discretion of the *qadi* or the rule, which are called *ta'zir* (disgracing the criminal).³⁰

The general word of punishment is *uqubah* derived from *aqb*, which means one thing coming after another because punishment followed transgression of the limits set by Devine law. Next, the punishments of whipping in crimes of *hudud* are awarded in the following three cases: -

- 1) Adultery
- 2) False accusation of adultery

³⁰ Abdul Rahman I.DoI. 1998. *Shari'ah the Islamic Law*. Kuala Lumpur: A.S. Noordeen. p. 221.

3) Drinking wine

2.1.1 ADULTERY OR FORNICATION

In Islam the punishment is clear about the sexual intercourse between man and women especially in adultery namely unlawful sexual intercourse between man and women and Allah obligated the punishment of *hudud* to be imposed for every person who commit illegal sexual intercourse.

i. Allah says.

الزانية والزاني فاجلدوا كل واحد منها مائة جلدة ولا تأخذكم بمما رافة في دين الله إن كنتم تؤمنون بالله واليوم الآخر

Translation: *The women and man guilty of adultery or unlawful sexual intercourse severely whip, each of them with a hundred strips, let not compassion more you in their case, in matter prescribed by God if ye believe in God and the last day: and let a party of the believer witness their punishment.*³¹

“Zina” means willful sexual intercourse between man and women not married to other parties. It is immaterial whether one or both parties have their own spouses living or are unmarried. It is also immaterial whether it is with the consent of the parties. The word of *zina* applied to both adultery (where one or both parties are married to a person or persons other than the persons involved in the sexual intercourse) and fornication where both parties are married and unmarried.³²

Islam considers adultery is not only as a great sin but it also an act which opens the gate for many other shameful acts, which destroys the very basis of the family, which

³¹ Al-Qur'an, An-Nur 24:2.

³² Abdul Rahman I.DoI. 1998. *Shari'ah the Islamic Law*. Kuala Lumpur: As.Noordeen. p. 236.

leads to quarrels and murder, which ruins reputation and property and which spreads numerous diseases both of physical and spiritual. Therefore, the holy *qur'an* enjoins upon people.

ii. Allah says.

ولا تقربوا الزنى إنه كان فاحشة وساء سبيلا

Translation: *And come not near to adultery: for it is a shameful (dead) and an evil opening the road (to others evils).*³³

The above verse mentioned the Muslim should be run away from adultery because adultery is not only shameful in itself and inconsistent with any self-respect or respect for others Muslim but it also open the road to many evils. The *qur'an*, while describing the qualities of the believers.

iii. Allah says.

والذين لا يدعون مع الله إلهاً آخر ولا يقتلون النفس التي حرم الله إلا بالحق ولا يزنون
ومن يفعل ذلك يلق أثاماً

Translation: *Those who invoke not with God any other God, nor slay such life as God made sacred, expert for just cause, nor commit fornication, and any that those meets punishment.*³⁴

Thus, Islam is very strict in prohibiting adultery because it leads to confusion of lineage, child abuse, the breaking-up of families, and bitterness in relationship, the spread of venereal diseases and a general laxity in moral.

³³ Al-Quran. Al-Isra 17:32

³⁴ Al-Quran. Al-Furqan 25:68

2.1.1.1 THE PUNISHMENT OF ADULTERY

The punishment in Islam is fair. It is not only to abuse a person but that punishment is to protect the right of individual and society. Besides that, the punishments in Islam also to give reciprocation for offenders especially for the adultery's offender. Therefore, the punishments of *hadd* for adultery have three types which it different in their statuses. Namely:

- 1) Muhsan.(married person)
- 2) Ghayr muhsan (unmarried person)
- 3) Slave

i. THE PUNISHMENT OF MUHSAN (محصن)

In adultery, *muhsan* means a person who is validly married has experienced sexual intercourse in such marriage. However the punishment of adultery in case of *muhsan* can be implemented by *rajm* and *whipping*. First, by *rajm*. It can be accepted, as a punishment for adultery is *muhsan*. The view of jurist mentioned the punishment for offender's adultery is *muhsan* can be punished by *rajm* namely, stoning to death as he or she has the legal means for sexual satisfaction.³⁵

The prophet s.a.w also was imposed this punishment for al-Amidiyah and two of Yahudi is adultery. And Allah said the punishment for offender's adultery whether is *muhsan* or *ghayr muhsan* can be imposed one hundred lashes.

³⁵ Paizah Hj Ismail.1996.*Undang-undang Jenayah Islam*. Petaling Jaya, Selangor: Dewan Pustaka Islam.p.185.

i.Allah says.

الزانية والزاني فاجلدوا كل واحد منها مائة جلدة ولا تأخذكم بمرأفة في دين الله إن كنتم تؤمنون بالله واليوم الآخر

Translation: *The women and man guilty of adultery or unlawful sexual intercourse severely whip, each of them with a hundred strips, let not compassion more you in their case, in matter prescribed by God if ye believe in God and the last day: and let a party of the believer witness their punishment.*³⁶

There is *hadith*, which place punishments for married of adulterer.

i. The Prophet (s.aw) said

وحدثنا أبو الطاهر وحرملة بن يحيى . قال : حدثنا ابن وهب. أخبرني يونس عن ابن شهاب . قال : أخبرني عبيد الله بن عبد الله بن عتبة ; أنه سمع عبد الله بن عباس يقول: عمر بن الخطاب ، وهو جالس على منبر رسول الله صلى الله عليه وسلم: إن الله قد بعث محمد صلى الله عليه وسلم بالحق. وأنزأ عليه الكتاب . فكان مما أنزل عليه آية الرجم. قرأناها ووعيناها وعقلناها. فرجم بعده فأحشى إن طال الناس زمان، أن يقول قائل: ما نجد الرجم في كتاب الله. فيضلوا بترك أنزلها الله. وإن الرجم في كتاب الله حق على من زنى إذا أحسن، من الرجال والنساء، إذا قامت البينة، ، أو كان الحبل أو الاعتراف

Translation: *Abdullah b. Abbas reported that Umar b. Khattab sat on the pulpit of Allah's messenger (SAW). He said: verily punishment with truth and he sent down the*

³⁶ Al-Qur'an. An-Nur 24:2.

book upon him, and the verse of stoning was included in what was sent down the book upon him, and the verse of included in what was sent down to him. We recited it, retained it in our memory and understood it. Allah's messenger (SAW) awarded the punishment of stoning to death (to the married adulterer and adulteress) and, after him; afraid that with the lapse of time, the people (may forget it) and any says: we do not find the punishment of stoning in the book of Allah. Stoning is a duty laid down in Allah's book for married men and women who commit adultery when proof is established, or it there is pregnancy or a confession.³⁷

ii. The Prophet (s.a.w) said.

حدثنا آدم حدثنا سلمة بن كهيل قال: سمعت الشعبي يحدث عن علي رضي الله عنه حين رجم المرأة يوم الجمعة

Translation: Narrated Ash-Sha'bi from Ali when the letter stoned a lady to death on friday, Ali said " I have stoned her according to the tradition of Allah's apostle s.a.w."³⁸

The second type of Punishment is for *muhsan*, the married person, which is whipping or cane, as he or she has the legal means for sexual satisfaction. It also involves the terrible of infidelity in the case of married persons. The prophet said,

وحدثنا يحيى بن يحيى التميمي. أجبرنا هشيم عن منصور ، عن الحسن ، عن حطان بن عبد الله الرقاشي، عن عبادة بن الصامات. قال: قال رسول الله صلى الله عليه وسلم "خذوا عني خذوا عني فقد جعل الله لمن سيلا: البكر بالبكر جلدة مائة ونفي سنة والثيب جلدده مائة ورجم بالحجارة

Translation: Ubada b. As-Samit reported: Allah's messenger (SAW) saying: receive (teaching) from me; receive (teaching) from me. Allah has ordained a way for those

³⁷ Al-Muslim. 1999. *Sahih Muslim*. Abdul Hamid Siddiqi. India: Adam publisher and distributors. Bab stoned to a married adultery. Vol iii: p.132. #1670.

³⁸ Al-Bukhariyy. M.I. 1983. Dr Muhamad Muhusn Khan. *The translation of the meaning of Sahih al-Bukhari*. Pakistan: Kazi publication.vol.viii:p.502. # 803.