

**THE STUDY OF ISLAMIC CRIMINAL LAW ENACTMENT IN
SELANGOR**

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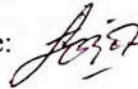
AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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

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الحمد لله والصلاة والسلام على سيدنا محمد وعلى آله وصحبه ومن دعا بدعوته إلى يوم الدين.

All praise to Allah SWT, full honorable and adoration towards our prophet Muhammad (p.b.u.h), *Ummu al-Mukminin* along with greeting to all his friends, *Tabi'in*, *Tabi' at-tabi'in* and also the Muslims Fellows who receive His guidance (*hidayah*).

Firstly, I like to dedicate my gratitude to Allah, because I finished the academic project. I' am grateful to my supervisor Pn. Syahirah Bt. Abdul Shukor for teaching and helping me in completing this thesis. I' am also wish to thank to all lecturer in Faculty of Syariah and Judiciary especially Tuan Sheikh Salem, Pn. Dina, Pn. Abidah, En. Arif Fahmi, Ust. Irwan, Ust. Yunus and Ust. Abdul Manan.

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ABSTRAK

Kajian ilmiah ini akan membincangkan mengenai enakmen jenayah Islam di Selangor. Penulis membuat kajian ini bertujuan untuk mengenalpasti enakmen atau undang-undang jenayah Islam serta peruntukan-peruntutannya yang telah dikuatkuasakan untuk umat Islam di Selangor. Sebahagian besar maklumat adalah daripada kajian lapangan yang banyak tertumpu di Mahkamah Syariah Shah Alam iaitu Mahkamah yang utama di Selangor serta ditambah dengan maklumat daripada Unit Pendakwaan Jabatan Agama Islam Selangor (JAIS). Caranya adalah dengan mengumpul data dan mengadakan temubual terhadap sebahagian daripada pegawai-pegawai di organisasi berkenaan. Maklumat juga didapati daripada kajian perpustakaan yang lebih tertumpu kepada Perpustakaan Negara dan Perpustakaan Akademi Pengajian Islam Universiti Malaya. Hasil kajian telah menunjukkan bahawa Enakmen Jenayah Syariah Selangor No. 9/1999 adalah sebagai undang-undang jenayah utama yang digunakan di Selangor. Dapatan daripada hasil kajian juga telah menunjukkan enakmen ini masih tidak dapat membendung umat Islam daripada terus melakukan jenayah Islam terutamanya jenayah khalwat, judi dan perbutan tidak sopan yang telah mencatat angka tertinggi berbanding jenayah-jenayah lain yang berlaku di Selangor.

ABSTRACT

This academic project is study about the Islamic criminal law enactment in Selangor. The study is to identify the enactment of Islamic criminal law and its provision that enforceable for Muslims in Selangor. Many of information are from fieldwork which more focusing to Syariah Court of Shah Alam and Prosecutor Unit of Islamic Religious Department of Selangor (JAIS). The methods are from collecting data and made interviews to some official in its organization. Information also gets from library research which more focusing to Academic of Islamic Studies Library in Malaya University and National Library. As a result for this research, the Syariah Criminal Law Enactment of Selangor No. 9 1995 is as the main law related to Islamic criminal that used in Selangor. And finally, the study concludes that the existing enactment still cannot deter a Muslim to make a crimes especially *khalwat*, indecent act and gambling had showed the high total compare with other crimes happened in Selangor.

ملخص البحث

هذا البحث العلمي يبحث عن القوانين الجنائية الشرعية في سلنجرور. ويهدف المؤلف من هذا البحث لمعرفة الحكم أو القانون الجنائي الإسلامي في سلنجرور. وقد أخذت معلومات هذا البحث من البحث الميداني، وخاصة في المحكمة الشرعية بشاه عالم وهي المحكمة الأولى في سلنجرور ومن إدارة الشؤون الإسلامية في سلنجرور (JAIS). وأيضاً بإجراء المقابلة الشخصية في تلك الإدارة. وأخذ المعلومات من المكتبة وخاصة المكتبة الوطنية ومكتبة الأكاديمية الإسلامية بجامعة ملايا. والنتيجة من هذا البحث هي أن "القوانين الجنائية الشرعية في سلنجرور رقم ١٩٩٥/٩" هو القانون الجنائي الأولي الذي يطبق في سلنجرور. وأيضاً، أن هذا القانون لم يمنع المسلمين من ارتكاب الجرائم مثل الخلوة بالأجنبية والميسير والإخلال بالأخلاق التي سجلت هذه الجرائم رقماً عالياً في ولاية سلنجرور بالمقارنة مع الجرائم الأخرى.

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GLOSSARY

<i>Al-Quran</i>	the Holy book revealed by Allah SWT to prophet Muhammad (p.b.u.h).
<i>As-Sunnah</i>	the tradition of Prophet Muhammad (p.b.u.h) including his deeds, saying and approval.
<i>Baitul Mal</i>	treasury
<i>baligh</i>	the age of puberty.
Caliph	the first four Islamic caliphs: <i>Abu Bakr r.a.</i> , <i>'Umar r.a.</i> , <i>'Uthman r.a.</i> and <i>'Ali r.a.</i>
<i>diyat</i>	compensation paid causing death.
<i>fatwa</i>	formal legal opinion by a Mufti.
<i>Fuqaha</i>	Islamic jurists
<i>Hadith</i>	the tradition of Prophet Muhammad (p.b.u.h).
<i>hudud</i>	offence and penalty prescribed by Allah.
<i>Hukum Syara'</i>	practical laws of Islam.
<i>Imam</i>	leader.
<i>iqrar</i>	admission.
Islam	A word meaning literally 'submission' (to the will God). Islam is the name of one of the world's great monotheistic religious.
Islamic Law	the laws of Islam as provided for, administered and applied in Malaysia.
<i>li'an</i>	imprecation.
<i>liwat</i>	sexual relation between male persons.
<i>jinayah</i>	crimes.
<i>kaffarah</i>	expiation.
<i>Majlis</i>	Islamic Religious Department of Selangor.
messenger	Arabic " <i>Al-Rasul</i> ", the prophet.

<i>Mufti</i>	jurisconsult who is authorized to issue a <i>fatwa</i> .
<i>mukallaf</i>	persons with full legal competence.
Muslim	believer of Islam.
<i>muncikari</i>	person who acts as a procurer between a female and male person for any purpose which is contrary to Islamic Law.
<i>musahaqah</i>	sexual relation between female persons.
<i>kadhi</i>	judge.
<i>qazaf</i>	making false allegation on any person.
<i>qisas</i>	law of retaliation or retribution.
<i>Ramadhan</i>	the ninth month of the Muslim lunar calendar and also the Muslim month of fasting. <i>Ramadhan</i> falls at different times every year.
rights of Allah	<i>Hudud</i> , matters of worship etc.
<i>surah</i>	chapter of the <i>Al-Quran</i> . The number preceding colon denotes the chapter number while numbers after the colon denotes the verse number.
<i>takfir</i>	regard a Muslim as a non-Muslim.
<i>tabi'in</i>	followers of the companions.
<i>ta'zir</i>	discretionary penalty determined by <i>kadhi</i> .
<i>wali</i>	legal guardian.
<i>zakat fitrah</i>	legal alms.

ABREVIATION

Bhd	Berhad
Bil.	Bilangan
Dr.	Doctor of philosophy
Hj.	Haji
Ibid	ibidem
i.e	that is
JAIS	Jabatan Agama Islam Selangor
N.a	no author
N.d	no date
N.pb	no publisher
No.	Number
p.b.u.h	Peace be upon him
r.a	<i>Radiya Allahu 'Anhu</i>
Sdn	Sendirian
SWT	<i>Subhanahu Wa Ta'ala</i>
Vs.	Verse (against)
Vol.	Volume
Y.A.A	Yang Amat Arif

CHAPTER 1

INTRODUCTION

1.1 Background Of Research

Crimes are becoming a serious of problem, which happened in every parts of Selangor especially in town areas like Klang, Shah Alam and Petaling Jaya. Islam provides a comprehensive guideline on matters pertaining to criminal laws to handle the action of Muslim.

This situation encourages the writer to do a research about this issue. The topic of this academic project is “The Study Of Islamic Criminal Law Enactment In Selangor”. Meaning the words of ‘Enactment’ is a law that enforced by the government to every person and it must be written as section or act. ‘Islamic criminal’ means an offences or crime which it is a prohibition act of *hukum syara*’ or under the Islamic law and it have the punishment to a maker or offender.

Generally, this topic will be focused and discuss about the types of Islamic criminal and its punishment based on the enactment. The reports and statistic of crimes that made by Muslim in Selangor are enclosed to my findings. In this academic project, the writer will refer to the Syariah Criminal Law Enactment (Selangor) No. 9 of 1995 as the main sources of the study.

1.2 Aim Of Research

The undertaken is to explore the provisions, which are provided by the Islamic enactment of Selangor. References to the decided cases are made in order to set a better view on its application.

1.3 Objective Of Research

The objectives of this research are as follows: -

- To identify the historical development of Islamic criminal law enactment in Selangor.
- To know the criminal law that enforced among Muslim in Selangor.
- To identify the types of Islamic criminal and its punishment based on the Islamic Criminal Law Enactment in Selangor.
- To study the effectiveness of the provision in Islamic Criminal Law Enactment in Selangor.

1.4 Research Methodology

Many methods can be employed and it depends on the research. Generally, the research methodology can be divided into two types, there are primary and secondary.

In undertaking this study, primary data was employed in collecting the facts and information from the officers who work in Syariah Court and Prosecutor Unit of Islamic Religious Department of Selangor. The writer has interviewed some officers who are knowledgeable in this legal system.

The secondary data was obtained based on the library research. There are several libraries that have been visited, for example, the National Library, Shah Alam Library and libraries of KUIM, UKM, UM and IIUM. Besides collecting data from the Internet is being employed in this academic project.

1.5 Literature Review

Dato' Haji Daud Muhammad 1999 in his paper entitled is '*Tugas Kehakiman Dalam Mahkamah: Pengalaman Dalam Mahkamah Syariah*' provides a general view about the Islamic criminal law enactments which under the jurisdiction of Syariah Court. It

is notable that the judge of Syariah Court has limited jurisdiction to hear matters pertaining to Islamic family (matrimonial) and a limited scope offences criminal. The penalty or the punishment that can be granted by Syariah Court is fine not more RM 5,000 and three years imprisonment or whipping not excessive than 6 strokes. All of these jurisdictions are under the Syariah Court Criminal Jurisdiction Enactment 1984. The criminal jurisdiction of Syariah Court was included 79 kinds of criminal offences that made by a Muslim. There are divided into 6 categories: -

1. Sex offences. Example: prostitute case, homosexual, lesbian etc.
2. Liquor offences. Example: as seller, as buyer, drunker etc.
3. Behavior offences. Example: not make the Friday's prayed, not pay tithe etc.
4. Belief aspect offences. Example: change religion, propagare belief's false etc.
5. Matrimonial offences. Example: 'nusyuz', not give the basic necessity to his wife etc.
6. And others that not included in category at above. Example: run off with a female or wife of others, contempt of official Islamic religion etc.¹

Based on these category at above, the allocation of law that used by each state in Malaysia can divided into 3 enactment, there are: -

1. Syariah Criminal Law Enactment.
2. Family Law Enactment.
3. Islamic Religious Council Enactment.

Generally this working paper had explained the jurisdiction of Syariah Court and allocation of laws in Malaysia but on my research would be discussing are related with the criminal jurisdiction of Syariah Court and would focus to *syariah* criminal enactment in Selangor only because I have taken the criminal offence as my scope of this research.

¹ Haji Daud Muhammad. (Y.A.A Dato'). 1999. *Working paper of 'Seminar Antarabangsa: Sistem Kehakiman Islam' titled 'Tugas Kehakiman Dalam Mahkamah: Pengalaman Dalam Mahkamah Syariah'*. Kuala Lumpur: Institut Kefahaman Islam Malaysia and Jabatan Kehakiman Syariah Malaysia. Page 24.

“The criminal law of Islam” is a book written by *Prof. Dr. Anwarullah* is also regarded as my main sources. Generally, this book is about the Islamic criminal law based on the *Al-Quran* And *As-sunnah* which only used in Islamic states. From the information of this book, the writer compare with the Islamic criminal law enactment in Selangor which as enactment among Muslim in Selangor. The difference such as in punishment which all of sentencing that provided by the Islamic criminal law enactment in Selangor are under the punishment for crimes liable to *ta'zir* according Islamic law of this book. The punishment for crimes liable to *ta'zir* based on this book are whipping strokes, imprisonment, banishment, fine, death punishment etc. According to Islamic criminal law enactment in Selangor, there are provides the imprisonment, fine and whipping strokes only. This statement showed that Islamic law is harder in sentencing if compare with Islamic criminal law enactment in Selangor.

As a conclusion, all the references are in deed a great help for the writer. For this academic project, the study will be looking in general the implementation of the Islamic criminal law in Selangor.

CHAPTER 2

THE BASIS OF ISLAMIC CRIMINAL LAW

2.1 The Historical Of Islamic Administration In Selangor

The criminal law in a broad sense is the body of law that defines criminal offence, regulates the apprehension, charging and trial of suspected persons and fixes punishments and modes of treatment applicable to the offenders.²

The objective of the criminal law is to control the commission of the crimes so as to protect the rights and interests of the public and insure peace in the society. A law is an obligatory rule of conduct imposed and enforced by the state. The Islamic criminal law has prescribed types of criminal offence and has provided deterrent, reformatory, retaliate and other kinds of punishments for them in order to maintain or ensure a peace in the society of each states and reform the offenders.³

When we mention, the Islamic criminal law, of course, there must be organizations are that in charge or handle especially to become the Islamic criminal law as one of rules in humans or objective of life.

In Selangor, the Islamic administrations are divided into two. The organizations are Islamic Religious Department of Selangor (JAIS) and Syariah Court.

The history of Syariah Court in Selangor can be traced as early in 17th century. In 1884, the Selangor State Council had appointed *Kadhi* and *Imam*. The appointed of a *Kadhi* was to settle problems arouse in Muslim society in Selangor. *Sultan* of Selangor as the head of religion in Selangor. The Sultan appointed a *Kadhi* and named it as *Kadhi of Selangor* with annual income RM 900. *Kadhi of Selangor* become advisor of Islamic affairs to Sultan and reference were made to him for problems arouse in the

² Anwarullah. 1997. The Criminal Law of Islam. Kuala Lumpur: A. S. Noordeen. Page vii.

³ Ibid. Page vii.

Muslim society and the duty for Islamic and Malay custom. In 1900, occupation of *kadhi* has been broaden to every districts in Selangor to handle the cases of marriage and divorce. In 1922, every region in Selangor has their own *Kadhi*. At that time, there was no specific place for the office of *Kadhi*, it was placed on their houses. This happened until 1892 and than the position of *Kadhi* was rename with a new position *Chief Kadhi* and the office was in Klang.⁴

In that time the Syariah Court was named as the Kadhi Besar Court. Nowadays, it is named the Syariah Court and the hierarchy of the Syariah Courts can be divided into three. There are Subordinate Syariah Court, Syariah High Court and the Syariah Court Appeal. Every region in Selangor now has their own Syariah Court. There are in Petaling Jaya, Shah Alam, Sabak Bernam, Kuala Selangor, Klang, Kuala Langat, Hulu Langat, Sepang, Gombak Timur, Gombak Barat and Hulu Selangor. The Syariah High Court and the Syariah Court Appeal were placed in Shah Alam.

The criminal jurisdictions of a judge in Syariah Court have written in the Enactment Syariah Criminal Procedure Code of Selangor. Under the Section 7 of part two of this enactment, a judge has their certain criminal jurisdiction. There are subject to the provision of this code, every judge shall have cognizance of and power to: -

- 1- Hear, try, determine and dispose of any prosecution for any offence committed wholly or in part within the local jurisdiction of such judge and cognizable by such judge;⁵
- 2- Inquire into complains of offence and summons and examine witnesses touching such offence and summons and apprehend and issue warrants for the apprehension of criminal and offenders and deal with them according to law;⁶
- 3- Issue warrants to search or to course to be searched places wherein any articles or things with which or in respect of which any offence has been committed are alleged to be kept or concealed, and require persons to furnish security for their good behavior according to law; and⁷

⁴ N. a. N. d. "Sejarah Pentadbiran Islam di Selangor". <http://www.mpsj.gov.my/cybermosque/organisasi.html>. Page 2.

⁵ Syariah Criminal Procedure Code (Selangor) No. 6 of 1991. Section 7 (a).

⁶ Ibid. Section 7 (b).

⁷ Ibid. Section 7 (c).

- 4- Do all other matters and things, which a judge is empowered to do by any written law.⁸

2.2 Historical Of Selangor Enactment

In earlier of 1877, the Selangor State Council had established, which it is proposed by British command. It has responsibilities to make a law or state administration law and also inclusive all matters of Islamic affairs. In 5 September 1879, the Selangor State Council had announced the D.Y.M.M Sultan is a Head of Islamic religion state. This organization had also post-haste all of *Imam* to make saving on the registration book that regular about marriage, divorce and procedure to manage dead a Muslim at their region.⁹

Prevention of Adultery Regulation 1894 was the first of criminal law enforced in Selangor. It was passed by the Selangor State Council on 26th September 1894 and applicable to Muslims only. According this regulation, a man who have sexual intercourse with a woman else that got married without marriage could be convicted with two years imprisonment for man and one year imprisonment for woman or fine to both. In this case, the officer of the Syariah Court will take base on the report made by husband of that woman or someone else who have responsibility to that woman while her husband not existing at that time.¹⁰

In 1900, The Selangor State Council has passed the Muhammadan Marriage and Divorce Registration Enactment of 1900. This law related with marriage and divorce of Muslims in Selangor. This enactment also allocated a husband or *Wali* must report for any marriage to *Kadhi* or *Deputy of Kadhi* that within seven days after the solemnization of marriage. After the registration, *Kadhi* or his deputy will produce the marriage certificate. This applies to divorce cases, the divorce must be registered to *Kadhi* for a period of seven days after pronouncement of divorce and certificate of

⁸ Ibid. Section 7 (d).

⁹ N. a. N. d. "Sejarah Pentadbiran Islam di Selangor".

<http://www.mpsj.gov.my/cybermosque/organisasi.html>. Page 2.

¹⁰ N. a. N. d. "Sejarah Mahkamah". <http://www.Selangor.gov.my/mss/sejarah.htm>. Page 2.

marriage will be adduced produce for divorce application. The penalty would be RM 25.00, if these procedures were not followed by the application.¹¹

This enactment also contains Islamic personal law such as the allocation of *Wali Hakim* which has the power to permit a woman to set if her *wali* refuses to give the permission without reasonable causes when a woman does not have any *wali*. This an allocation has used until make combine with other matter relate with Islamic administration under the Islamic Administration Enactment. This enactment was the first of its kinds in Selangor that was enforced on 5th December 1952. It was the first enactment passed which provides the administration of Islamic Law in Malaysia.¹² After having the enactment, the state government took the initiatives to introduce the court system known as the Kadhi Court. In 1922 every region of Selangor have their own *Kadhi*. There are in Klang, Kuala Lumpur, Kuala Langat, Ulu Langat, Kuala Selangor, Sabak Bernam, Kuala Kubu and Rawang.

In 1948, the Islamic Religious Department of Selangor set up by the government. So that, this department does any efforts to make a law and as a result this department has established the Islamic Religious Law Administration (Selangor) No. 3 of 1952 and it has begins enforced on 5th December 1952. After that, the law enforced before this enactment are void. Until now, this enactment has been amended for seven times i.e. 1960, 1961, 1962, 1966, 1969, 1972 and 1979. These amendments because relating to up-dated management in Islamic affair administration of Selangor. In 1984, the Islamic Family Law (Selangor) No. 4 of 1984 was passed and enforced on 23rd January 1989 in Selangor. This law has amendment the part six and seven section 155, 158, 160 and 178 paragraph (n) Islamic Religious Administration Law of Selangor No. 3 tahun 1952.¹³

In 1989, Islamic Law Enactment of Selangor No. 2 of 1989 was passed. This enactment mentioned about the function and responsibilities of the Islamic Religious Department of Selangor (JAIS) and the Syariah Court, which both have their own

¹¹ N. a. N. d. "Sejarah Mahkamah". <http://www.Selangor.gov.my/mss/sejarah.htm>. Page 2.

¹² Zainuddin and Nasir. 2000. *Journal Kisdar Edisi kedua: Pemangkin Tradisi Ilmu*. Selangor: Kisdar Sdn. Bhd. Page 48.

¹³ N. a. N. d. "Sejarah Mahkamah". <http://www.Selangor.gov.my/mss/sejarah.htm>. Page 3.

function and differ with others. In 1991, Syariah Criminal Procedure Code Enactment No. 6 of 1991 and Syariah Mal Procedure Code Enactment No. 7 1991 were passed and enforced on 1st September 1991. Starting from this date, the Syariah Court of Selangor separated from Islamic Religious Department of Selangor (JAIS).¹⁴

Than in 1995, the new enactment was passed by the Sultan of Selangor as the head of Islam in Selangor, which known as Syariah Criminal Law Enactment (Selangor) No. 9 1995. This act provides the types of *syariah* criminal that liable as offence under the Islamic law. This enactment also provides the jurisdiction of the enforcement officer of JAIS and Syariah Court to handle the criminal cases among Muslim in Selangor.

2.3 Definition Of Islamic Criminal

Islam is a religion and a way of life based on the commandments of Allah contained in the *Quran* and the *Sunnah* of the Prophet *Muhammad (p.b.u.h)*. Every Muslim is obliged under an obligation to fashion his entire life in accordance with the principles of *Quran* and *Sunnah*. Muslims must observe every step the taken whether what is right and what is wrong. This highlights, the need and importance of his acquaintance with corpus jurist of Islam. If humans have not a rule in a life, maybe much of criminal offence would be happens without any efforts to solve or to decrease this problem. What is a criminal? What are the opinions of Islamic jurists about it?

In Arabic, the word of criminal is from the word of '*Jarimah*' and the word of '*Jarimah*' is from the word of '*Jarama*', it means certain efforts to make despicable matter and known as not good behavior.¹⁵ Other means, it is a sin, a crime, a fault, offence or an act of disobedient, a transgression, whether intentional or committed through inadvertence.¹⁶

¹⁴ Ibid. Page 3.

¹⁵ Abdul Halim El-Muhammady. 1998. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Bangi: Fakulti Undang-undang Universiti Kebangsaan Malaysia. Page 1.

¹⁶ Anwarullah. The Criminal Law of Islam. Page 1.

The word of '*Jarimah*' indicates that certain behavior or offence that brought to become a sin to it maker. This word had used in *Al-Quran* with several of expression, such as '*Ajramu*', '*Yajrimannakum*' and '*Ajramna*'.¹⁷ For example, the Holy *Quran* says,

ولا يجرمنكم شنآن قوم على ألا تعدلوا.¹⁸

Means: *And let not a nation's hatred by any means occasion you, or incites you to wrong and depart from justice.*¹⁹

The word of criminal also is from the word of '*Janna*', it means to make a crime and the word of '*Jinayah*' means certain despicable matter that made.²⁰

Based on these clarifications, means the word of '*Jarimah*' or '*Jinayah*' is certain action or behavior that made as opposite of truth and justice. The definition of language form is certain bad behavior that made. Definition of term form is the matters of prohibition by Islamic law and it have certain punishment that made by Allah with '*hudud*' or '*ta'zir*' and *Al-Quran* as main source for it. These prohibitions are related to life, property, human body and equally.²¹

Some of *Fuqaha*' make definition to the word of *Jarimah* or *Jinayah* are have same meaning. The meaning is behaviors that had prohibited by Islamic law and have punishment to the maker either relate with human body, property, life and others. Other *Fuqaha*' defines to the word of *Jinayah* is only to *hudud* and *qisas* offences. Base on this opinion, *ta'zir* is not included on that term. However, it is meaning for the word of *Jarimah* which it has a concept more general and include all of offences either it are *qisas*, *diyat*, *hudud* or *ta'zir*. The majority of *Fuqaha*' used the term of *Jinayah* for certain offences, it includes the offences that relate to life and human body only, or known as *qisas* and *diyat* offences. However, the term of *Jarimah* is used for

¹⁷ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 1.

¹⁸ Al-Quran. Al-Maidah 5:8.

¹⁹ All the meanings of Quranic Verses in this book are based on Tafsir Quran Al-karim by Prof. Dr. H. Mahmud Yunus. First Edition. 1973. Singapore: Tawakal Trading.

²⁰ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 1.

²¹ Ibid. Page 1.

general definition which same with second group of *Fuqaha'*, it includes offences either related with life, human body, property and others.²²

According to Syariah Criminal Procedure Code No. 6 of 1991, the word of crime is mentioned as offence. The meaning of offence is an offence under any written law relating to Islamic religion.²³

2.4 The Classification Of Islamic Criminal

The jurists have discussed three classifications of Islamic criminal on different aspects, there are: -

- 1- Classification according to punishment.
- 2- Classification according to intention.
- 3- Classification according to violation of rights.²⁴

2.4.1 Classification According To Punishment

In Islamic Law, the Islamic criminal can be divided into three types base on the hard or less the sentencing of offences that provided in *Al-Quran* and *As-Sunnah* of Prophet Muhammad (p.b.u.h). In other word, the Islamic criminal law has been divides into three kinds on the basis of the quantum of the punishment, there are: -

- 1- *Hudud* (crimes of fixed punishments).

Hudud crimes are the crimes for which the kind and the quantum of punishment have been fixed by the *Quran* or *Sunnah* of the Prophet (p.b.u.h.) as a right of God. Meaning the term of *Hudud* that always used by *Fuqaha'* as offences and intolerable. The *hudud* criminal is certain criminal, which it intolerable punishment laid down decides by Allah with *hudud* punishment. The meaning of the *hudud* punishment is

²² Mahmood Zuhdi. 1992. Undang-undang Jenayah Islam, Konsep dan Asas Perlaksanaannya. Kuala Lumpur: Bahagian Hal Ehwal Islam Jabatan Perdana Menteri. Page 2 & 3.

²³ Syariah Criminal Procedure Code No. 6 of 1991. Section 2 (1).

²⁴ Anwarullah. The Criminal Law of Islam. Page 26.

certain punishment that must be made in the same manner as decided and not more or less from it or can neither be increased nor decreased nor altered. *Hudud* also as certainty of Allah and cannot be leave by any one either a person or certain group. This punishment is belongs to Allah and it purpose for importance of general society to avoid any bad situation and ensure benefit to them. The *hudud* criminal has seven types. There are: -

- a) Adultery.
- b) False accusation of adultery.
- c) Theft.
- d) Dacoit and robbery.
- e) Drinking liquor or wine.
- f) Apostasy.²⁵
- g) Defy to the person in command.²⁶

The Holy *Quran* says about the *hudud* in His verse,

إِنَّمَا جَزَا الَّذِينَ يُجَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعُونَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تَقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خَلْفٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ.²⁷

Means: *For those who act as if to war against Allah and His Prophet (Muhammad), and work hard with strength and taste for mischief through the land, the punishment is: execution or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land.*

2- *Qisas* and *diyat* (crimes of retaliation and blood money)

In Islamic criminal law, the punishments for some crimes have been provided by way of retaliation or blood money, which are called *qisas* and *diyat*.²⁸ It means that the both terms are related a criminal offence that provided it punishment by Allah with

²⁵ Anwarullah. The Criminal Law of Islam. Page 24.

²⁶ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 3.

²⁷ Al-Quran. Al-Maidah 5: 33.

²⁸ Anwarullah. The Criminal Law of Islam. Page 23.

qisas and *diyat*.²⁹ These punishments have been prescribed as rights of the individuals, which can be remitted or altered by the victim or his legal heirs. The *qisas* and *diyat* criminal have 6 types. There are: -

- a) Intentional murder.
- b) Quasi-intentional murder.
- c) Murder as a result of mistake.
- d) Intentional hurts³⁰.
- e) Quasi-intentional hurts.
- f) Hurts as a result of mistake³¹.

The Holy *Quran* says about the *qisas* in His verse,

وكتبنا عليهم فيها أن النفس بالنفس والعين بالعين والأنف بالأنف والأذن بالأذن والسن بالسن والجروح قصاص.³²

Means: *We ordained in there for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal"*.

The above verse is mentioned about the punishment of Intentional murder or Intentional hurts. That means, a murder when a person willfully and with the intention of causing death makes another person the direct object of his action which in general is fatal and that person dies as a result of that action. The three basic conditions for intentional murder are: -

- 1- The victim must be a living human being;
- 2- The victim must have died as a result of the action of the accused;
- 3- The offender has willfully intention of causing death of the victim.³³

The victim being a human being also must be a protected person. All Muslim, Non-Muslim who permanently reside in an Islamic state, non-Muslim who are either in a

²⁹ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 3.

³⁰ Anwarullah. The Criminal Law of Islam. Page 23.

³¹ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 3.

³² AlQuran. Al-Maidah 5:45.

³³ Anwarullah. The Criminal Law of Islam. Page 33.

treaty or not a war with the Muslims and non-Muslim who enter an Islamic state with permission all are protected persons in Islamic criminal law and their blood and property are inviolable and if anyone of them is murdered by a person, he will be liable to *qisas*.³⁴

The Holy *Quran* says about the *diyat* in His verse,

وما كان لمؤمن أن يقتل مؤمنا إلا خطأ ومن يقتل مؤمنا خطأ فتحريم رقبة مؤمنة ودية مسلمة إلى أهله إلا أن يصدقوا فإن كان من قوم عدو لكم وهو مؤمن فتحريم رقبة مؤمنة وإن كان من قوم بينكم وبينهم ميثق فدية مسلمة إلى أهله وتحرير رقبة مؤمنة.³⁵

Means: *A believer should never kill a believer; but (if it so happens) by mistake, (compensation is due): if one kills a believer (by mistake) it is necessary that he (the killer) should free a believing slave, and pay compensation to the dead person's family, unless they remit it freely. If the dead person 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 you had a treaty of mutual understanding, compensation should be paid to his family, and a believing slave be freed.*

The above verse is mentioned about the murder as a result of mistake or hurts as a result of mistake. That means, someone without intention to cause death of, or cause harm to a person, causes death of any person either by mistake of intention or by mistake of act, for instance a person suppose another person to be wild beast, kills him or someone hits another person unluckily while shooting at a target so that he dies.

Murder by mistake contains three elements, there are: -

- 1- The offender must have no intention to cause death or harm to the victim;
- 2- The offender must have committed some fatal act;
- 3- The victim must have died as a result of the act of the offender.³⁶

³⁴ Ibid. Page 34.

³⁵ Al-Quran. An-Nisa' 4:92.

³⁶ Anwarullah. The Criminal Law of Islam. Page 64.

Murder as a result of mistake can be pardoned by the heir of the victim with or without compensation. The court may, after the pardoning of the convict, award him any *ta'zir* if it deems necessary in the circumstances of the case.³⁷

3- *Ta'zir* (crimes of discretionary punishments).

Ta'zir is the verbal noun of the verb *azzara*, which means to repeal and to prevent. *Ta'zir* punishment is a punishment of admonition and recovering from bad behavior. In other meaning, Allah has not provides the punishment of this criminal offence with specifically.³⁸

Other meaning is a crimes other than those liable to *hudud*, *qisas* and *diyat* are the crimes for which punishments have not been fixed by the *Quran* and *Sunnah* of the Prophet (p.b.u.h) and their punishment have been left to the discretion of the legislator or judge to prescribe them in accordance with the circumstances. These criminals are innumerable.³⁹

The jurists agreed to impose the *ta'zir* as punishment to any immoral behavior of person which have to not been mentioned its punishment in *hudud* or *kaffarah* whether the immoral behavior are made to rights of Allah or right to individuals.

The right of Allah means a crime that is preponderantly injurious to the society at large. A right is ascribed to Allah when it is purely in the interest of the community or wherein collective interest is predominant.⁴⁰ The right of individuals means a crime that directly effect the interest of the individuals and an individual can give up his right and can remit or compound the punishment.⁴¹

³⁷ Ibid. Page 65.

³⁸ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 4.

³⁹ Anwarullah. The Criminal Law of Islam. Page 24.

⁴⁰ Ibid. Page 28.

⁴¹ Ibid. Page 29.

2.4.2 Classification According To Intention

Regarding to intention, Islamic criminal law has divided intention into two types, there are: -

- 1- Intentional crimes- these are the crimes wherein the criminal commits crime knowing that he is committing illegal act and understands the result of his act like intentional homicide, intentional hurt, etc. Any criminal who commits crime with intention and knowing that he is committing illegal act shall be liable for the full punishment prescribed for that crime. The willful commission of a crime liable to *hadd* or *qisas* has no concern with the motive of the offender. However, motive helps in determining the intention of the offender.⁴²

- 2- Unintentional crimes- in these crimes the criminal does not intend to commit a crime but the crime is committed by him by negligence or mistake, for example, the criminal drives a car and does not follow the traffic rules and all of sudden meets an accident and kills another person therein; or other example, the criminal does not even intend the act. For instance, overcoming of a heavy person who is sleeping on a weak person lying nearby and killing him.⁴³

The intentional and unintentional crimes are the two types of Islamic criminal which both of them have been given bad effects that same to all of their victims. The difference between the offenders whether they have intention or without intention when committing the crime. The punishment is different for the offender of intentional crimes as he would accepts the hard punishment compared with the offender of unintentional crimes.

2.4.3 Classification According To Violation Of Rights

The crimes on the basis of violation of rights have been divided into two kinds, there are: -

⁴² Ibid. Page 23.

⁴³ Ibid. Page 24.

- 1- Crimes against public- these are the crimes, which are preponderantly injurious to the society at large. Such crimes may be committed against individuals as well as against public. In term of jurists they are called rights of Allah. A right is ascribed to Allah when it is purely in the interest of the community or wherein collective interest is predominant. Such crimes are punished to safeguard the interest of the society. Their punishments cannot be pardoned, diminished or extinguished by anyone. These crimes are called crimes liable to *hudud* such *zina*, theft, dacoity.⁴⁴

- 2- Crimes against individuals- these crimes directly affect the individuals though they are injurious to the public as well. In terms of jurists they are called rights of individuals because they directly affect the interest of the individuals and an individual can give up his right and can remit or compound the punishment. The crimes of *qisas* (retaliation) and *diyat* (blood money) are the instances of these crimes.⁴⁵

From the above explanation, we can conclude the crimes against public are crimes to our God (Allah), so the offender must be punished to offender without pardon as punishment for these crimes are the right of Allah. However, it is different with the crimes of against individual which it is a crimes to a person, so it punishment it is the right of that person which can be remitted or altered by the victims or his legal heirs.

2.5 The Elements Of Islamic Criminal

The element of Islamic criminal is call by *syara'* as principles of crimes. This means, there is certain principle or fundamental that must exist in for certain Islamic criminal. Any behavior or action will not be liable as a crime if does not include this fundamental or principle.⁴⁶

⁴⁴ Ibid. Page 28.

⁴⁵ Ibid. Page 29.

⁴⁶ Abdul Halim El-Muhammady. Undang-Undang Jenayah Dalam Islam dan Enakmen Negeri-negeri. Page 7.

From the definition and the classification of Islamic criminal there certain requirements are: -

- 1- There have verses of *Al-Quran* or *As-sunah* of Prophet (p.b.u.h) that provides a certain behavior or action as crimes and also have provision of its punishment.
- 2- Any action that become or liable as a crimes (*actus reus*) whether with made that action or leave the action.
- 3- The offender is as a *mukallaf* person that can liable his action or behavior.⁴⁷

However, the jurists have discussed the following three fundamental elements of a crime and if any of these elements is lacking, the criminal shall not be liable to the punishment: -

- 1- Legal element which means an explicit provision for prohibiting an act constituting crime and declaring punishment thereof;
- 2- Substantial element which means doing of an act which amounts to the commission of the crime;
- 3- Cultural element that means the maturity, capability and accountability of the criminal.⁴⁸

In order to treat an act as a crime, there must be an explicit provision in *Syariah* sources declaring that act unlawful and prescribing punishment for that. Such provision must be obligatory. For example, the Holy *Quran* states,

والسارق والسارقة فاقطعوا أيديهما.⁴⁹

Means: *As for the thief, both male and female, cut off their hands.*

The Holy *Quran* says,

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة.⁵⁰

⁴⁷ Ibid. Page 7.

⁴⁸ Anwarullah. The Criminal Law of Islam. Page 3 & 4.

⁴⁹ Al-Quran. Al-Maidah 5:38.

⁵⁰ Al-Quran. An-Nur 24: 2.

Means: *The adulterer and the adulteress, scourge each one of them with hundred stripes.*

The Holy *Quran* says,

يأيتها الذين آمنوا كتب عليكم القصاص في القتلى.⁵¹

Means: *O you who believe! Retaliation is prescribed for you in cases of murder.*

Moreover it is a fundamental rule of the *Syariah* that unless relevant provision exists, a person shall not be punished for any act. The Holy *Quran* says,

وما كنا معذبين حتى نبعث رسول.⁵²

Means: *We never punish until we have sent a messenger.*

The Holy *Quran* says,

وما كان ربك مهلك القرى حتى يبعث في أمها رسولا يتلوا عليهم آياتنا.⁵³

Means: *And never did your Lord destroy the population till he had raised in their mother (town) a messenger reciting unto them our revelations.*

It is important to mention that punishment is prescribed either expressly as in cases of crimes liable to *hudud*, *qisas* and *diyat* or it is left to the discretion of a ruler or judge to prescribe it in the relevant circumstances as in cases of crimes liable to *ta'zir*. Thus the provisions regarding crimes liable to *ta'zir* must also be existed before the punishment of a criminal for any of such acts whether in form of a codified law or in form of a compiled collection like book, magazine or other publication.⁵⁴

However, the details of the punishment in any cases are not necessary to be provided but the person who commits any of such acts must know the aspect of their being punishable. It is only in case of the crimes of *hudud* and *qisas* for which punishments have been prescribed by the Holy *Quran* or the *Sunnah* of the Holy Prophet, that the

⁵¹ Al-Quran. Al-Baqarah 2:178.

⁵² Al-Quran. Al-Isra' 17:15.

⁵³ Al-Quran. Al-Qasas 28:59.

⁵⁴ Anwarullah. The Criminal Law of Islam. Page 5.

criminal must know the kind and quantum of the punishment for the relevant crime. It was under this principle that *Hazrat Umar* who compiled the criminal laws and sent their copies to various parts of the empire in the time of *Caliph Abu Bakar*.⁵⁵

The jurists have suggested that all the criminal laws of an Islamic state must be publicized throughout the states so that every one may be aware of them. It is also necessary because most of the crimes, which related to *ta'zir* punishment have not been prescribed by the Holt *Quran* and *Sunnah* of the Holy Prophet and have been left to the discretion of the rulers to prescribed them in their respective circumstances. The jurists opine that basically every act is permissible except the act, which is prohibited by a *Syariah* sources.⁵⁶

Further mere existence of a *Syariah* provision is not sufficient to incriminate a person and punish him on its violation, but it is necessary that the relevant provision must have been legislated and enforced before the commission of the crime and must be in force at the time and place of the commission of the crime. The provisions of the Islamic Criminal law do not operate with retrospective effect and punishments for crimes will be awarded on the basis of the provisions existing at the time of their commission. Moreover the criminal must have the capability of understanding the provisions relating to the crimes and he must have the capability to commit the crimes charged for. The act constituting the crime must be possible with respect to the criminal. A lunatic or a minor cannot be bound by any obligation and none of their acts can be declared as crime though it constitutes a crime. Since mandates and prohibitions are legal obligations, they are addressed to a mature and rational person with a sense of responsibility.⁵⁷

The Holy Quran says,

يأيتها الذين ءامنوا اطيعوا الله واطيعوا الرسول وأولى الأمر منكم.⁵⁸

⁵⁵ Ibid. Page 5.

⁵⁶ Ibid. Page 5.

⁵⁷ Ibid. Page 6

⁵⁸ Al-Quran. An-Nisa' 4:59.

Means: *O you who believe! Obey God and obey the prophet, and those who are in power among you.*

The above verses obliges command the Muslims to obey the laws of an Islamic state provided by the state as long as such laws are not contrary to the Holy *Quran* and the *Sunnah* of the Holy Prophet. Thus all the enacted laws of an Islamic state come under the provisions of the Islamic criminal law if they are not contrary to the injunction laid down in the Holy *Quran* and the *Sunnah* of the Holy Prophet.

CHAPTER 3

ISLAMIC CRIMINAL LAW ENACTMENT IN SELANGOR

3.1 Background Of Islamic Criminal Law Enactment In Selangor

The Islamic criminal law enactment in Selangor is a law relate and focusing to criminal action that enforced in Selangor. The name of this act is the Syariah Criminal Law Enactment (Selangor) No. 9 1995, which it is Islamic criminal law enactment that have been used in Selangor state at this time. This enactment had passed by *Yang Maha Mulia Sultan Selangor, Sultan Salahuddin Abdul Aziz Shah Al-Haj* in 10th January 1996. This enactment also actually had through some amendment to be the better enactment or to recover the enactment before.

The jurisdiction of the Syariah Court especially in *syariah* criminal cases are mentioned in the Syariah Court Criminal Jurisdiction Act 1965. This act has allocated the jurisdiction Syariah Court to impose the punishment. The punishments granted are fine not more than RM 1,000 and not more than 6 months imprisonment or both.

However, the Syariah Court Criminal Jurisdiction Act 1965 through the amendment process by the Syariah Court Criminal Jurisdiction Act (Amendment) 1984. This amendment had been given under power the Syariah Court to impose punishment for *syariah* criminal offences. The punishment that allocated in this act is fine not more than RM 5,000, not more than three years imprisonment and whipping not exceeding than 6 strokes or sentence with any combination all of these punishments.

According to the Syariah Court Criminal Jurisdiction Act (Amendment) 1984, it was added a stroke as one form of punishment there. However, this punishment just in theory because in a practical manner it is difficult to made. This situation happens because it is needs detailed examination and investigation for every criminal offence. Usually, every case that through is tried in Syariah Court will not reach to the level that need to stroke punishment.

After the amendment in 1965 and 1984 for this enactment, it had through the last amendment so it is become the Syariah Criminal Law Enactment (Selangor) No. 9 1995, which the Syariah Court still using until now in every region of Selangor.

3.2 Introduction Of The Syariah Criminal Law Enactment (Selangor) No. 9 1995

According to the Syariah Criminal Law Enactment (Selangor) No. 9 1995, it contained eight parts and includes fifty-five arrangements of sections. The parts are: -

- 1- Preliminary.
- 2- Offence relating to *Aqidah*.
- 3- Offence relating to the sanctity of the religion of Islam and its institution.
- 4- Offence relating to decency.
- 5- Miscellaneous offences.
- 6- General exceptions.
- 7- Abetment and attempt.
- 8- General matters.

In part one, it has mentioned about preliminary and there have three sections. This enactment is known as the Syariah Criminal Law Enactment (Selangor) No. 9 1995 and shall come into force in 10th January 1996 as the *Yang di-Pertuan Agong* may, by notification in the Gazette. This enactment shall apply only to the Selangor states and to persons professing the religion of Islam. In section two, it has mentioned some of words that used in this enactment, unless the context otherwise requires. There are: -

- 1- *Baligh* means having attained the age of puberty according to Islamic law.
- 2- *Fatwa* means any *fatwa* made under section three of the Administration Act.
- 3- Judge means a judge appointed under section 38 and 40 of the Administration Act.
- 4- *Hukum syara'* means Islamic law according to any recognized *mazhab*.
- 5- *Li'an* means an allegation made by a man under oath in accordance with Islamic Law that his wife has committed *zina*.
- 6- Court means any court constituted under section thirty-seven of the Administration Act.

- 7- *Majlis* means the Islamic Religious Department of Selangor established under subsection 4(1) of the Administration Act.
- 8- *Mufti* means the person appointed to be the *Mufti* under subsection 29(1) of the Administration Act, and includes the *Deputy Mufti*.
- 9- *Muncikari* means a person who acts as a procurer between a female and male person for any purpose, which is contrary to Islamic Law.
- 10- Incest means sexual intercourse between a man and a woman who are prohibited from marrying each other under Islamic Law.
- 11- *Qazaf* means making false allegation on any person.
- 12- *Takfir* means to regard a Muslim as a non-Muslim.
- 13- *Zina* means sexual intercourse between a man and a woman out of wedlock.

All word and expression used in this Act and not herein defined but defined in the Interpretation Acts 1948 and 1967 shall have the meaning thereby assigned to them respectively to the extent that such meanings do not conflict with Islamic Law.⁵⁹

In part two, three, four and five are about the types of criminal offence, which will discuss in detail in the coming of this chapter.

In part six, it has mentioned about the general exceptions and there are seven sections. Generally, this part explained about exceptions in certain matter or situation; or there as nothing is an offence. There are: -

- 1- Act of judge when acting judicially. It means nothing is an offence, which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.⁶⁰
- 2- Act done pursuant to the judgment or order of a court. It means nothing is an offence which is done in pursuance of, or which is warranted by the judgment or order of, in force, notwithstanding that the court may have no jurisdiction to pass such judgment or order, if the person doing the act in good faith believes that the court had such jurisdiction.⁶¹

⁵⁹ Syariah Criminal Law Enactment (Selangor) No. 9 of 1995 Section 2.

⁶⁰ Ibid. Section 39.

⁶¹ Ibid. Section 40.

- 3- Act done by a person justified by law. It means nothing is an offence, which is done by a person who is justified by law, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be justified by law, in doing.⁶²
- 4- Act that a person is without intention or as a result of mistake. It means nothing is an offence, which is done without intention or result of mistake, although the act or behavior is valid guilty under this enactment.⁶³
- 5- Act of child who is not *baligh*. It means nothing is an offence, which is done by a child who is not *baligh*.⁶⁴
- 6- Act of person of unsound mind. It means nothing is an offence, which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is wrong and contrary to law.⁶⁵
- 7- Act that a person is compelled to do by threats. It means nothing is an offence, which is done by a person who is compelled to do it by threats, which at the time of doing it reasonably caused the apprehension that instant death to the person will otherwise be the consequence.⁶⁶

In part seven, it has mentioned about the abetment and attempt. There have six sections. Under this enactment, the means of abetment is a person abets the doing of a thing who instigates any person to do thing; engages with one other persons or more in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing; or intentionally aids by any act or illegal omission, the doing of that thing.⁶⁷ The means of attempt is any person who attempts to commit an offence punishable under this enactment or under any other written law relating to Islamic law; or to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence.⁶⁸

⁶² Ibid. Section 41.

⁶³ Ibid. Section 42.

⁶⁴ Ibid. Section 43.

⁶⁵ Ibid. Section 44 (1).

⁶⁶ Ibid. Section 45 (1).

⁶⁷ Ibid. Section 46 (a) (b) (c).

⁶⁸ Ibid. Section 52 (1) (a) (b).