



**A STUDY ON THE POSSIBILITY OF THE IMPLEMENTATION  
OF HUDUD LAWS IN MALAYSIA**

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## 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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This study is simply a survey which aims at the removal of the doubts and prevailing fancies which take hold due to ignorance of Islam and of application of its tenets. Each system will be reviewed separately concluding with a criticism of the misconceptions of each system and a listing of its pres and cons on the basis of practical operation.

In doing so, I beseech help and guidance from Allah SWT. May Allah SWT accept this work as humble contribution of one His servants the greatest of all topics and may He guide the reader to His truth.

Wassalam

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## ABSTRAK

Menurut kajian yang menggunakan pendekatan etnografik, pelaksanaan hukum hudud di Malaysia sukar dilaksanakan. Ini kerana disebabkan banyak halangan untuk melaksanakannya di Malaysia sebagaimana yang telah diuraikan oleh penulis dalam kajian ini. Persoalan yang akan dibicarakan oleh penulis merupakan satu persoalan penting yang perlu diketengahkan bagi memecahkan persoalan dan permasalahan masyarakat ketika ini. Perkembangan muktahir menunjukkan isu pelaksanaan hukum hudud mendapat perhatian oleh semua pihak tidak kira bangsa dan agama. Lantaran itu, penulis cenderung untuk mengkaji tentang pelaksanaan hukum hudud di Malaysia, agar dapat mencari satu jawapan kepada isu yang hangat diperkatakan sekarang ini agar ianya dapat diterima oleh semua pihak. Untuk mendapatkan data penulis telah menggunakan beberapa kaedah bagi mendapatkan maklumat yang tepat iaitu melalui kaedah soal selidik daripada masyarakat daerah Temerloh sama ada orang Islam dan bukan Islam.

## ABSTRACT

Ethnography has, as its central principle, belief that the implementation of hudud in Malaysia is difficult. This that may be many factors which became the barrier for the implementation of hudud law in Malaysia. The writer will talk about most important issue which has to be carried forward to solve the dispute and problem of society today. The latest development shows that the enforcement issue of hudud law attract the attention of many parties regardless of their races and religions. Therefore, the writer is more incline to study about the enforcement of hudud law Malaysia as to find the answer to the most hattest issue in order to satisfy and accept by all parties. For getting the data, a few tactic to use that collecting the data and informal interview with society.

## ملخص البحث

وصل البحث إلى أن حكم الحدود في ماليزيا سيواجه صعوبة في تنفيذه ذلك من طريق جمع البيانات السبب الرئيسي كثرة المعرضون لها من جوانب مختلفة. هذا البحث تناقش عن أهم المسائل المتعلقة بإمكانية تنفيذ الحدود في ماليزيا مع تقديم حلول لمشاكل متعلقة. ظهر حديثا اهتمام المجتمع المختلفة الشعوب والأديان بمسألة تنفيذ الحدود في ماليزيا. لذلك رغب الباحث في دراسة هذه مسألة الهدف الأساسي هو استنتاج لأجوبة والحلول المتناسبة للقضية ولحصول على معلومات الصحيحة جمع الباحثة البيانات من المجتمع الإسلامي في دائرة تمرلوه وكذلك من غير المجتمع الإسلامي فيها.

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**TRANSLITERATION SYSTEM FOR THE ARABIC WORDS  
TRANSLITERATION SCHEDULE**

**1. Alphabet**

<u>Arabic Letter</u>	<u>Latin Letter</u>	<u>Transliteration</u>
ا	‘	fa’r
ب	B	burd
ت	T	tall
ث	Th	thawb
ج	J	jidār
ح	H	halīb
خ	Kh	khādim
د	D	dīk
ذ	Dh	dhahab
ر	R	raffq
ز	Z	zamīl
س	S	salām
ش	Sh	sha <sup>‘</sup> b
ص	S	sakhr
ض	D	dayq
ط	T	ṭāzij
ظ	Z	zalīm
ع	‘	‘aql
غ	Gh	ghulām
ف	F	fīl
ق	Q	qalb
ك	K	kalām
ل	L	lubb

<u>Arabic Letter</u>	<u>Latin Letter</u>	<u>Transliteration</u>
م	M	māl
ن	N	najm
هـ	H	hawl
و	W	waraq
ي	Y	yamm

## 2. Short Vocal

<u>Arabic Letter</u>	<u>Latin Letter</u>	<u>Transliteration</u>
_____	a	kataba
_____	i	°alima
_____	u	ghuliba

## 3. Long Vocal

<u>Arabic Letter</u>	<u>Latin Letter</u>	<u>Transliteration</u>
ي, ا	ā	°ālim, fatā
ي	ī	°alīm, dā°ī
و	u	°ulum, ad°u

## 4. Diphthong

<u>Arabic Letter</u>	<u>Latin Letter</u>	<u>Transliteration</u>
و	aw	nawm
ي	ay	layl
ي	iy	Shafi°iy (at the end)

و

uww

°uluww (at the end)

## 5. Exception

5.1 The Arabic letter ء (*hamzah*) at the first words were transliterate into ‘**a**’ not ‘**ʿ**’.

Example: أكبر

Transliteration: akbar (not ‘akbar)

5.2 The Arabic letter ة (*ta’ marbutah*) at the words without ال (*al*) that was continued to another words that was begin with ال (*al*) at the early, were transliterate into ‘**t**’.

Example: مكتبة الإمام

Transliteration: maktabat al-imām

However, if there are words that have ال (*al*) or at the root word or to the last words, this *ta’ marbutah* were transliterate into ‘**h**’.

Example: المكتبة الأهلية

Transliteration: al-maktabah al-ahliyyah

قلعة

qal‘ah

دار وهبة

dār wahbah

*CHAPTER*

*ONE*

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of research

This research is done to study the *hudud's* issues whether it should or shouldn't be implemented. Various opinions and views came from community, political figures, *ulama'*, the academicians and legal practitioner. These opinion display two opposite attitudes agreement and disagreement or pro and contra.

This study is also done after considering various social problems that is getting increasingly such as close-proximity, adultery, murder, abandoned child, stealing and etc must be solved or cope with the right way.

As we all know, there are seven types of criminals in hudud which based on *Quran*, *Sunnah* and majority of *ulama'* do think that seven hudud's crime types offences are zina, qazaf, theft, robbery, drinking of intoxicants, rebel and apostasy.

The main point that the writer wants to study is to know how far the effectiveness of this *hudud* law on the society. Here, we don't see only the aspect of punishment but also on the implementation itself. And we don't want to discuss the wrong or punishment either it is existed or not because it had been existed in the *Quran*. And the primary focus on this study is how to implement the hudud's law to overcome the social problem.

#### 1.2 Aim of research

The aim of this research is to observe about implementation of the hudud's law for the societies in Malaysia. And how far the implementation will reduces, the criminal cases.

This study is also to observe from the two aspects which the first aspect is from the religion aspect. Because this is *syarak's* obligation that must be obeyed and believed in order to *maqasid al-Shariah*.

Secondly, from the public aspect, because the *hudud* law obliged by Allah is to protect the right life of the society and avoid them from doing the offences that is broke beyond to the Islamic rules.

### 1.3 Objective of research

The enforcement of hudud issue has been extremely talked and discussed after the Kelantan state government under YB Tuan Guru Nik Aziz leadership and the Terengganu state government lead by Tuan Haji Abdul Hadi Awang had stated to implement hudud law in both states.

This exposure has attract the interest and attention of other parties to discuss the pro and contra of this issue. The most popular excuse to avoid hudud implementation is because in Malaysia consists of multi races and religions followers. It is considered that, the current law is sufficient enough and acceptable by all races in Malaysia.

Therefore, the writer try to come forward to see and observe the society perception towards hudud implementation in Malaysia.

### 1.4 Scope of research

This study involves cases of crimes that related to *hudud* law and the social problem that occurs now and without control.

This study is referred based to the increasing the crimes cases and the crimes that threatened the society.

Information research that doing in Malaysia especially Temerloh area and is assumed cruel for person is non-Muslim towards hudud law.

### 1.5 Research Methodology

In this research the researcher used several of methods to get information. The methods or the way to get data are through data collection and data analysis.

In primary data the writer use the method of questionnaire and interview to the respondent. In questionnaires the writer will be choose the public as the respondent. The questionnaire are in close-ended question. The writer will give the questions for respondent in contingency questions and matrix question and the respondent will be answer that questions.

In secondary data, the writer used method library research. Library research is the main place for writer to get information about *hudud*. The writer also refers to the books, project paper, magazines, articles in newspaper and other references that related to the research which that will be taken from KUIM Library, University Malaya Library, Tun Sri Lanang's Library and also from Internet Website. The aim of library research are to in-depth the knowledge about research problem, to strengthen and simplify detail in the research.

The other methods that use in this research also method analysis data. The writer chose 150 respondents for questionnaires the selection of respondents based to Muslim and non-Muslim respondent. This technique is chose because it save cost, energy and time research and also to get the different answer because the level knowledge of each respondent are different.

## 1.6 Literature Review

There were several studies, which made from *The Study on the Possibility of the Implementation of Hudud Laws in Malaysia*. Based on the thesis did on the title “Pelaksanaan Hudud Pada Zaman Khulafa’ AL-Rasyidin” (1994/1995). This research is to discuss about *hudud* cases did do on zaman khulafa’ al-rasyidin. It involves cases that occurred during the era before them that is during Rasulullah Zaman. Otherwise, an era after them are not discussed in this thesis.

Method “Ditolak Hukuman Hudud Kerana Wujudnya Kesamaran” made by Nurhidayah Hasyim in Jurnal Shariah. The writer aims to see allocation in law of Islam and law of Malaysia about *syubhah* or dimness factors in hudud cases. The writer also studies about dimness between both and how it used in cases of *ta'zir* crime. (1990)

# CHAPTER

# TWO

## CHAPTER 2

### THE DEFINITION OF *HUDUD*

#### 2.1.1 Literal Meaning

Literally, *hudud* is derived from an Arabic word *hadd* (plural *hudud*) which means a punishment which has been prescribed by God in the revealed text of the *Quran* or the *Sunnah*. It is also refers to prevention ( المنع ) or barrier between the two words ( Drs. Abdul Ghani Azmi b. Idris, 2000:27). Therefore, *hudud* is usually refer to the first mentioned term because of its ability to overcome sin which can cause the implementation of punishment.

Technically, *hudud* means anything which is prohibited by God. Therefore, man is strongly forbidden from doing it and man cannot go beyond or infringe this punishment. Allah has cited in Qur'an:

تلك حدود الله فلا تقربوها

(al-Qur'an, al-Baqarah: 187)

*These are the limits set by Allah: do not ever violate them.*

#### 2.1.2 *Fiqh* Interminology

The definitions are varies among the Islamic scholars. However, there are two definitions of *hudud* generally accepted by them.

According to Hanafi school, *hudud* is referred to the punishment which its conditions has been prescribed by *syara'*. In order to serve the right of Allah or *haqq* Allah. This punishment is known as *hudud* because again it becomes the barrier of any fault which falls under it.

Therefore, *ta'zir* is excluded from this category but the same thing apply to *Qisas* although its conditions has been prescribed since the early stage of mankind history and throughout the ages up to the present. The rile of *Qisas* is mainly to maintain the right and the importance of individuals in this world. In other words, *qisas* means to inflict the culprit an injury exactly equal to the injury inflicted on his victim.

The other scholars referred *hudud* as a leisure by *syara'*, whether to serve the right of Allah or the right of individuals. These two definitions take into account *hadd* its meaning which is generally covered *Qisas* and *Hudud*.

In conclusion, the overall definition for *hudud* is punishment, subject to its conditions and *syariat* to maintain the important of *syara'* which related to religious, soul, property and honour. This definition will be used in this study because it is more general and covered wider scope.

Due to the various meaning of *hudud* itself, *fuqaha'* have different views in setting up the sort of crime (*jinayat*) as a *hudud*. For the time being there are several criminal considered as *hudud* such as *zina*, *qazaf*, accusations of unchastely, the drinking of alcohol beverage, theft and armed robbery. However, dispute still a raised between the *fuqaha'* in considering other criminal as *hudud* or not.

## 2.2 *Zina* and Its Punishment

*Zina* is one of the greatest sin after apostasy and murder. The most comprehensive definition of *zina* is sexual intercourse between a man and a women without legal right or semblance of legal right. In Arabic, the same term *zina* applies to adultery (illicit sexual relations between two married individual) and fornication (sexual relation between unmarried individual) (Abdul Rahman Zainal Abidin, 1997: 154)

In term of etymology, *zina* is described as:

وطء الرجل المرأة في القبل في غير مالك وشبهة

*Sexual intercourse between a man to a female sex organ without legal right and there is no syubhah element in that relation. (Ibnu Abidin: 154)*

Literally, there are differences in defining *zina* terminology given by the fiqh jurist.

**Maliki** school of thought:

“ Sexual intercourse done by *mukallaf* man to female sex organ (*al-qabul*) intentionally”. (Syams al-Din Muhammad ibn Ahmad ibn Arafah al-Dasuqi al-Maliki:3)

**Shafi’e** school of thought:

“ Penetration of male sex organ into forbidden female sex organ (*syara* ’) with procession or wants without *syubhah* element. (Abu Ishaq Ibrahim ibn Ali Ibn Yusuf al-Fairuzabadi al-Syirazi: 283)

**Hanafi** school of thought:

“ *Ulama*’ of the Hanafi provides more comprehensive meaning of *zina* which is:

الوطء الحرام في قبل المرأة الحية المشتهاة في حالة الإختيار في دار العدل ممن التزم أحكام

الإسلامي. الخالي عن حقيقة الملك وحقيقة النكاح وعن شبهة الملك وعن شبهة النكاح

الإشتباه وموضع الإشتباه في الملك والنكاح جميعا.

*Prohibited sexual intercourse done to female sex organ which is alive and aroused the desire in conscious condition in Islamic state (Dar al-Islam) which implementation Islamic Law, that relation ( sexual intercourse) is averted from the truth of ownership, the truth of ijab and qabul or syubhah in code of conduct and place occurred whether related to ijab and qabul generally (Mohd Said Ishak, 2000: 6).*

The differences of meaning about the truth of *zina* by the fiqh jurist above are based on their point of views and rationality.

*Ulama'* of Malikiyyah, Syafi'yyah and Hanafīyyah stated that the sexual intercourse particularly done at female sex organ at her anus. Meaning that, if male sex organ penetrated into prohibited female sex organ for him, this action does not involved sexual intercourse is not punishable by *hadd* punishment.

However, *Hanabilah ulama'* considered sexual intercourse with prohibited female anus as a *zina* crime.

According to the fiqh jurist, sexual intercourse is punishable by *hadd* punishment justify by penetration of male sex organ into female sex organ. There is no question whether there is emission of sperm or not. (Mohd. Said Ishak, 2000: 7)

Sexual intercourse using a condom or any other tools to obstruct male and female sex organ still considered as *zina* crimes eventhough the tool is thin because its can provides satisfaction and pleasure to both parties.

Any type of sexual intercourse which do not involved the penetration of male sex organ into female sex organ is not considered as *zina* and is not punishable by *hadd* punishment. However, *ta'zir* can be imposed because this action is considered as *muqaddimah of zina* which mean the step that can move to *zina's* action such as kissing, hugging or sleeping together in one bed..

### 2.2.1 The Punishment of *Zina*

When the *zina* crime are witnesses by four male or confession of the culprit or any other modes which still disputable among the *ulama'*, Therefore, the punishment is *wajib* to be inflicted by the Ruler (*amir*) towards the culprits.(Ibn Juza, al-Qawanin al-Fiqhiyyah:342)

Three types of punishment (*uqubah*) are:

1. Whipping (*al-jald*)
2. Stoning to death (*al-Rajm*)
3. Exile from country

Whipping

The punishment for *zina* is whipping (*al-jald*) meaning that the culprit would be whipped 100 times for the unmarried individual. Allah has cited in Qur'an (Ibn Juz'a, al-Qawanin al-Fiqhiyyah: 189)

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

(al-Qura'an, al-Nur 24:2)

*The committers of zina, male and female, whip each of them with hundred stripes*

Exile for a year from his or her country is applied to unmarried individual of *zina* crime based on one *hadith* of the Prophet:

عن عبادة بن الصامت رضى الله عنه قال: قال رسول الله صلى الله عليه وسلم خذوا عن عني قد جعل الله لهن سبيلا البكر بالبكر جلد مائة ونفى سنة والثيب بالثيب جلد مائة والرجم.

*From Ubadah Ibn al-samit said, the Prophet Muhammad SAW said, the Prophet Muhammad SAW: Take it from me, take it from me verily Allah had made an exit for them (Unmarried Zina committers male and female) flog them with hundred lashes and exile them from the country for a year. The man and women (widow) who are married, if they committed fornication, then lash 100 times and stone them.*

Reported by *Hadith* Muslim

As for the implementation of exile from country for a year as mentioned in the *hadith* above, beside flogging hundreds times, there are several argument between the *fiqh Ulama'*. Majority of the *ulama'* stated that beside 100 time lashes, the unmarried zina committers should be exile for a year from his country according to *ubadah hadith*.

However, Imam Malik stated that, exile for a 5 year from his country is applied to male committer only because for the female, it is feared the slander (*fitnah*) will raise in that country. (Al-Sayyid Sabiq, 1983: 378-379)

### 2.3 *Qazaf* and Its Punishment

Beside *zina* which clearly abrade the respect and *nasab* (descendant), *qazaf* is an action which bring shame to the individual in the society at large. Literally it refers to accusation and technically it refers to accusation of a person to another with conditions.

In term of etymology, *qazaf* refers to the action of stoning, torture, hurting other person directly by speech, or accused another committing *zina*. (Muhammad bin Abu Bakar al-Razi: 526). On the other hand, in terminology it refers to accusation towards honorable women committing *zina* or denying the *nasab* ones child. (Al-Sayyid Sabiq, 1983: 455)

In reality, there are numerous definitions given by the *ulama'*, however the most interesting definition is written by Ibn Juza ai-Maliki in his book "al-Qawanin al-Fiqhiyyah" which is: "It is an action of prohibited sexual intercourse accusation to vagina or anus , or denying the *nasab* from his father or to tease with it." (Ibn Juza: 342)

Denying the *nasab* of ones child also refers to accusing the mother to commit *zina* with other man. Therefore this accusation is include of *qazaf*. There are several criteria has to be considered for *qazaf* before inflict it. The criteria are as follows:

1. The accusation is only for committing *zina* or denying the *nasab* of a person.

2. The accusation is an honorable women and the accusation is done consciously and on purpose.

### 2.3.1 The Punishment of *Qazaf*

Due to the wrong accusation which can destroy the pride and respect of the victim and his or her family, therefore once the crime is proved either by testimony or by confession, the guilty person should be punished as prescribed in the Holy *Quran*.

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم ثمانين جلدة ولا تقبلوا لهم شهادة أبدا وأولئك هم الفاسقون.

(al-Qur'an, An-Nur 24:4)

*Those who accuse a chaste woman of fornication and do not produce four witnesses to support their allegation, shall be whipped with eighty lashes and their testimony shall not be accepted ever after, for they are the ones who are wicked transgressors.*

The verse above clearly shows that there are two types of punishment prescribed by Allah, one is whipping and another is never to take their testimony.

There is no difference between the man or woman accuser in term of punishment which is whipping with eighty lashes. There is also no increasing or decreasing the number of stripes and the authority party has no right to give forgiveness to the accuser.

Besides the whipping, the accuser will loose the qualification to be a witness. The prohibition to be a witness will continue until and unless she or he is repentant ( Mohd Said Ishak, 2000: 35).

## 2.4 The Drinking of Alcoholic Beverage and its Punishment

Regarding to *fuqaha*, the drinking of alcoholic beverage is known as *Jarimah Shurb al-Khamr*.

In etymology term, it refers to close, obstruction or hidden ( Muhammad bin Abu Bakar al-Razi: 526). However, there are differences in defining *al-Khamr* among the *fiqh ulama'* in term of its terminology. Most of the *fiqh jurist* stated that alcohol refer to any drink made of grape or from any other means ( Mohd Said Ishak, 2000: 10).

According to Abu Hanifah, the punishment of *hudud* will be inflicted only if the alcohol is made from grape juice whether the drinking is in minimum or maximum amount. *al-Khamr* from their point of view is a liquid made of:

1. Fermented grape juice till it has foam and makes a person drunk.
2. The grape juice which is cook till boiling and two quarter of its pure nutrient is gone, and became intoxicant.
3. *Tamar* juice or dried grape fermented till it has foam and become intoxicant nutrient.

All the three types of liquid stated above are referred as *al-khamr* by Hanafiyah when the crime is committed the hadd punishment will be punishable (Mohd Said Ishak, 2000: 10).

From the two definitions mentioned before, the definition of *al-khamr* derived by most of the *ulama'* is more accurate to the modern world. This is because, the alcohol at this present age is not made of grape or *tamar*, but also it is made of any other kind of fruits and plants. Therefore the most accurate in defining *al-khamr*, is any liquid which consist of intoxicant nutrient. This is in line with the *hadith* of the Prophet S.A.W:

From Jabir r.a stated that the Prophet said: Anything (the drinking) in large amount (when it is drink) intoxicant, thus a little amount (*hukum*) is prohibited.

#### 2.4.1 The Punishment of The Drinking of Alcoholic Beverage

In cases of liquor drinking, after the *ulama'* are in agreement that the punishment type is imposed to liquor drinking is flagellate. They are vast different about flagellate total to impose toward offences (Muhammad ibn Ali ibn Muhammad al-Syaukani: 144)

According to the majority of the *ulama'* the liquor drinking are imposed 80 times flagellate punishment.

However the majority of the *fiqh* jurists are in agreement the punishment to the liquor drinking that similarly with the punishment person who accuses a person do zina (Mohd Said Ishak, 2000: 40). And according Syafiyah that punishment for person who drinks the liquor drinking whether liquor or the other drinks are 40 times the stroke of the cane because Rasulallah doesn't determine the exact number personally in cane the liquor drinking on the era.

Nevertheless Umar added to the punishment from punishment who did implemented by Rasulallah to cane the liquor drinking that 40 times with two his shoes. This is meaningful two punishment in meaning two with 40 times the stroke of the cane that become 80 times. When Umar give signals to implement the punishment obviously there is the friend not refuses ( Ibn al-Hamam al-Hanafi, 1970: 310).

#### 2.5 Theft and its punishment

Theft in term of etymology is define as taking someone else's property by stealth

أخذ ما للغير حفية ( Muhammad bin Abu Bakar: 296). The *fiqh* jurist provides more comprehensive definition for the theft include in *jarimah hudud* is taking someone else's

property by stealth by *mukallaf* man from its respective without any doubt. (Muhammad bin Muhammad bin Abu Syubhah: 215)

According to the definition mentioned above, taking and (one else's property by knowledge of others (not by stealth) is not considered as theft except far pick pocket, the *hadith* of the prophet Muhammad SAW said:

عن المغيرة بن مسلم عن ابي الزبير عن جابر قال: قال رسول الله صلى الله عليه وسلم ليس على الخائن والمختلس قطع.

( رواه الترمذى والنسائى وأبو داود )

*From al-Mughirah bin Muslim reported from Abi Az-aur reported from Jabir r.a: Rasulullah said: Toward betrayal and pick pocket, there is no cut off hand punishment.*

By the definition, the *hadd* punishment will be inflicted if the can condition is fulfill by the culprit. The conditions are as follows:

1. Taking other's property by stealth
2. The property taken is valuable
3. The property belong to other
4. The criminal done in conscious and with intention

Majority of the *fiqh* jurist agreed that there is no cut off hand punishment for pick pocked. This is because pick pocket set the criminal without stealth, but the thief stole properties due to the carelessness of the owner. The cut off hand prescribed by Allah is only for thief. (Muhammad bin Ali ibn Muhammad al-Syaukani: 137)

Therefore, if taking someone else's property without stealth and the theft is done in unconscious, for example in drunk condition or forced others or the property taken

contains doubt al-Milk and it is so, all the examples stated before is not categorize as *hudud* criminal and cut off the hand is not inflicted.

### 2.5.1 The Punishment of thief

As far thieves male and female, the punishment is cut off their hands the punishment for theft is prescribed in Quranic. Allah says:

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

(al-Qur'an, al-Maidah-5:38)

*Male or female, whoever is guilty of theft, cut off the hand (that was used in theft) of either of them as a punishment for their crime.*

The important question discussed by the *fiqh* jurist is the obligation to return the stolen property when it is with the thief or it has been consumed by him. The *fiqh* jurist agreed that when the punishment of hand cut is confirmed and inflicted, then the stolen property is still in good condition with the thief, therefore it is should be returned to the owner. On the other hand, there is differences of *fiqh* jurist views if the property has been sold.

Hanafis opinion, if the stolen property has been, so the thief hand will be cut off and he cannot demand to compensate it. However, if the thief is willing to compensate the respective property then the cut off hand will be not inflicted. (Muhammad Ibn Ismail al-Kahlani al-Sanani: 34) This is according to the prophet tradition:

“If the cut off hand for the thief is confirmed, then no need for compensation.”

According to the Syafīyyah and the Hanabilah, the punishment of cut off the hand is inflicted as well as the obligation to substitute or replace the stolen property by the thief. There is no differences in fulfilling the obligation to replace the stolen property for those who are affordable or unaffordable. The combination the return or to replace the stolen property is mainly to serve the right of individual in this world. (Ibn Qudamah: 280)

The Malikis makes a difference between affordable and unaffordable thief. If he or she is not afford able to return the property, then only his or her hand will be cut off. (Ibn Rusyd: 442)

## 2.6 Armed Robbery and Its Punishment ( *Al-hirabah* )

In term the etymology, *al-Hiraba* derives from a word *haraba* which means anger, to take by force and word (Muhammad bin Abu Bakar al-Razi: 128). The fiqh jurist named *al-Hirabah* as *al-Sariqah al-Kubra* (great stealing) or *qarh'u al-tharif* (road divider).

The *fiqh* jurist define *al-Hirabah* as an action taken by someone or by a group of people to take the property of others by stealth and by force in the a way of hardness and occurred murder or scaring the owner and occurred in a place where the victim cannot ask far help from other people. (Zakaria al-Ansari: 154-155)

The Hanafis put a condition which is the action (*al-Hirabah*) is happened in an Islamic state and outside the residents area.

However the Malikis stated that the crime, *al-Hirabah* should not only occurred outside the resident area, but also happened inside the village.

For the time being, according to the definition aforementioned, the definition by majority of the *ulama'* are more suitable. This is because many *al-Hirabah* occurred in the cities.

Therefore, the most important element in differentiating *al-hirabah* and *al-Sariqah* is by the way or action taken during taking others' property. In other words, *al-Hirabah* crime is taking others' property by stealth and by force. (Mohd Said Ishak, 2000: 46)

### 2.6.1 Punishment for Hirabah

The punishment for *al-Hirabah* has been prescribed by God in the Holy *Quran*. Allah says:

إنما جزاؤا الذين يحاربون الله ورسوله ويسعون في الأرض فسادا أن يقتلوا أو  
يصلبوا أو تقطع أيديهم من خلاف أو ينفوا من الأرض ذلك لهم خزي في الدنيا ولهم  
في الآخرة عذاب عظيم

(al-Quran, al-Maidah: 5-34)

*The punishment for those who wage war against Allah and his prophet and strive to create mischief in the land, is death or crucifixion or the cutting off their hands and feet from opposite sides or exile from the land based on the gravity of their offense. This will be their humiliation in this world and in the Hereafter they will have grievous punishment.*

The verse above clearly stated the various requital allocated for the robbers. However in term of its enforcement, the *ulama'* have different view in deciding the punishment toward the particular requital:

1. Killing and taking by force the property

2. Killing but did not take the property
3. Taking by force the property but not killing
4. Scare the road users without murder and taking by force the property.

## 2.7 Rebellion (*Al-Baghyu*)

In an Arabic term, this crime is called "السبغى" to claim something (Muhammad bin Abu Bakar al-Razi:59).

Beside that, *al-baghyu* term according to *urf* is to act something which is not permissible or to infringe the right. This is accurate with Allah's commandment in Surah al-A'raf:

اتبعوا ما انزل إليكم من ربكم ولا تتبعوا من دونه أولياء قليلا تذكرون

(al-Qur'an, al-A'raf 7:3)

*Say: "O people, follow what has been brought down to you from your Rabb and do not follow other patrons besides Him" Yet, little do they take admonition.*

In term of literal meaning (terminology) its defined as to claim something which is not proper by the way of cruelty (Mohd Said Ishak, 2000: 60). However, there is differences of opinion bet. The *fiqh* jurist in defining "*al-baghyu*" crime.

*Malikiyyah ulama'* defined it as "an action of a group of people who refused to obey to their rulers or leaders in a country to something which is not related to a sin by the way of demonstration or with their own reasons"( Muhammad al-Zarqani: 207).

On the other hand, *Syafiyyah ulama'* refers it as "*Muslim* people who are not subservient and to bow (submit) to their highest country ruler and start to lead a power movement with their own excuses". (Syihab ad-Din al-Ramli: 382)

Meanwhile, *Hanabalah ulama'* refer it as “a statement of not subservient to the country’s although he is injustice by using the power with their reason.” (Ibnu Qudamah: 114)

Rebellion crime is punishable by *hadd* punishment when its fulfill the elements stated below:

1. To show the attitude of not obeying the highest country leader.
2. It is show through a demonstration through general movement medium.
3. It is done consciously and intentionally.

If all or one of the abovementioned elements do not exist, then this act is not considered as “*al-baghyu*”.

#### 2.7.1 Punishment of Rebellion

There are several Qur’anic verses and *hadith* for rebellion crime. As His saying in *Surah al-Hujurat*:

وإن طائفتان من المؤمنين اقتتلوا فأصلحوا بينهما فإن بغت إحداهما على الأخرى فقاتلوا  
التي تبغى حتى تنفء إلى أم الله.

(al-Qur’an, al-Hujurat 49:9)

*If two parties among the believers fall into a fight, make peace between them. Then if one of them transgressed until he returns to the commands of Allah.*

One of the *hadith* reported by Imam Muslim:

عن عرفجة ابن شريح قال: سمعت رسول الله صلى الله عليه وسلم يقول: من أتاكم وامركم جميع على رجل واحد يريد أن يشق عصاكم أو يفرق جماعتكم فاقتلوه.

Based on the verse and *hadith* above, it is clear that rebellion punishment is carried out by looking at its conditions and the power they own before the punishment is imposed.

## 2.8 Apostasy and Its Punishment

In term of etymology, apostasy derived from a word “*radd-riddah*” meaning that as a returned person (Muhammad bin Abu Bakar al-Razi:239). Allah in His saying in surah al-Maidah 5:21

يقوم ادخلوا الأرض المقدسة التي كتب الله لكم ولا ترتدوا على أدباركم فتنقلبوا خسرين

(Al-Qur’an, al-Maidah 5:21)

*O my people! Enter the Holy land which Allah has assigned for you. Do not turn back, because if you do, you will become losers.*

In term of terminology, is a statement out from *Islam* religion by a *Muslim* (*Al-Kasani:134*). The *fiqh* jurist include the apostasy religion meaning that do not believe in Islam anymore which happened in three situation:

1. An action
2. Word
3. *Iktikad* (Intention)

### Apostasy by Action (Act and abandonment)

Apostasy by action can be divided into two classifications: apostasy by an act and apostasy with an abandonment. Apostasy by act can be equalized by committing forbidden actions by Islam through refusing the forbidden intentionally or with the purpose to humiliate or to tease the Islam. For an example to warship an idol or to throw the Holly *Qu'ran* to the dirty place or to humiliate its content. To permit something which is forbid by *Islam* also include in this category such as a *zina* by refusing its unlawfulness.

On the other hand, apostasy with abandonment is to abandon the obligations in Islam such as prayer, fasting, *zakat* and pilgrimage (*al-hajj*) by refusing its obligation or to permit its abandonment.

### Apostasy by Word

Apostasy by word refer to say something which will lead to the *kufur* such as to deny the power of Allah by saying there is other gods beside Allah, to admit the Prophet or to declare oneself out from Islam.

### *Murtad* by *Iktikad* (intention)

*Murtad* by *iktikad* happened when an individual has an opposing faith with Islamic teaching such as believe there is no creator for this universe or the Prophet is a liar or any other *iktikad* which is not inline with *al-Qu'ran* and *Sunnah*(Paizah Hj Ismail, 2002:244).

### 2.8.1 Punishment of Apostasy

As stated by the fiqh jurist, the apostasy (admitting oneself expelled from Islam) is categorized in *hudud* crime. The *fiqh* jurist has concluded that the punishment of “*jarimah murtad*” is murder.

According to majority of *ulama*’, there is no differences between man and female for murder punishment because of the Prophet’s *hadith* says:

Ulama’ Hanafī stated that murder punishment is not punishable specifically on women but she is forced to convert back to the Islamic faith. The force is carried out by the way of imprisonment until that person convert back to Islam. This is based on the Prophet Muhammad SAW *hadith* (Reported by Abu Daud) that forbid the murder punishment on women, and the murder punishment is imposed for those who create chaotic. (al- Sarakhsi:98)

Hanafī and majority of *ulama*’ agreed that, the punishment for *murtad* man is murder. (Mohd Said Ishak, 2000:53)

*CHAPTER*

*THREE*

## CHAPTER 3

### BARRIERS FOR HUDUD IMPLEMENTATION AND ENFORCEMENT IN MALAYSIA

Instead of 45 years of independence the legislation system in this country is still based on the law inherited from the imperial, this is the main problem which become an obstacle towards the implementation of *hudud* in Malaysia.

In this chapter, the writer will try to reason out factors which hinder the implementation of *hudud* in Malaysia.

#### **Reason as a barriers toward *hudud* implementation in Malaysia**

##### **3.1 Rulers Attitude**

Rulers have an authority in deciding administration and legislation system for the government. The history has proved that the success of Malacca as a center to spread Islam in Malaya Island (territory) was due to strict attitude of the Sultan (king) of Malacca at that time by declaring Islam as a state religion and implemented as a way of life.

In Malaysia, the difficulties toward hudud implementation can be considered as due to lake of serious effort and derive from the to implement it rulers

At the time of Dato' Hussein Onn, ex-Prime Minister of Malaysia, he had made a stand that, he had no intention to implement Islamic law in comprehensive way and do not ready to develop it under his leadership.

Although under Prime Minister leadership Dato' Sri Dr Mahathir Mohamad has stated that the controlling government do not go against the Pas intention idea to enforce

*hudud* law in Kelantan and Terengganu, but in reality he is still uncertain to implement the punishment in Malaysia.

The Rulers attitude who consider it is not an appropriate time to enforce *hudud* law in Malaysia, because of their non-confident toward the acception of society especially for non-Muslim and also no knowledge (*jahil*) about the *hudud* itself. The truth that cannot be denied is, this situation by the problems of party politic.

In other words negative attitude is a major problem and barrier towards the enforcement of *hudud* laws in Malaysia.

### 3.2 Ulama' Attitude

*Ulama'* as an idol whom is respected and looked up by others in a society because of his knowledge, should play an active role in giving out explanation and understanding about Islam and God's law.

However, majority of *ulama'* have no courage to directly talk about the important of implementation of God's law. Some of them give *fatwa* supporting the government foundation.

Here, we can divide the *ulama'* into two categories:

- i) *ulama' Akhirat*- those who submit or devote himself to Allah. This is where the *ulama'* have the courage to tell the truth in sincerity and cautiousness.
- ii) *Ulama' diniawi*- refers to those who carry out his duty for the importance and convenience of a life in this world. This *ulama'* is very careful in giving out their opinion because he worried about his future.

On the other hands, they try to find a way and give a *fatwa* in line with the rulers' desire although the *fatwa* is against Islam. They don't make the rulers (to

give adduce) to follow the Islamic law instead they make Islam to follow the rulers wants.

The second group of *ulama'* attitude is the barrier towards *hudud* law enforcement in Malaysia. In addition, the attitude of Islamic law expert who consider Islamic law as not suitable to be implemented have no and no confidence about *hudud* law itself.

### 3.3 Islam as a Federal Religion

Provision article 3 (1), Federal Constitution provides “ Islam is the religion of the federation, but other religions may be practiced in peace harmony in any part of the federation” (Federal Constitution, 1999:20)

This provision has by implication toward Islam position and the enforcement of *hudud* law in Malaysia because the meanings of religion given by law experts are based on “religion” provides by western scholars who divide religion and politic. The result is Islam is only for the formal functions and the enforcement of Islamic law cannot be done in Malaysia as long as the religion interpretation remain unchanged.

### 3.4 Federal Constitution is the Supreme Law (Article 4(1) and article 75)

The supreme law in Malaysia is the Federal Constitution and any other law which go against it is void. *Al-Quran* and *sunnah* as the supreme law, however it also become a barrier in order to enforce *hudud* law in Malaysia. The provision of 4 (1) provides:

*This Constitution is the supreme law of the Federation and law passed after Merdeka Day which is inconsistent in this constitution shall, to the extent of the inconsistency* (Federal Constitution, 1999: 21)