

## Implementation of *Hudud* (or limits ordained by Allah for serious crimes) in Malaysia

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### **Introduction**

Crime and punishment in Islam is categorised into fixed and discretionary. *Hadd* (plural *hudud*) and *qisas* are crimes where the punishment is ascribed by Allah (SWT) and is thus unchangeable. *Hudud* crime consists of *zina* (unlawful intercourse), *qadhf* (false accusation of *zina*), drinking intoxicants (*shurb al-khamr*), theft (*sariqa*), robbery (*hiraba*), apostasy (*ridda*), and rebellion (*baqhy*). Punishment for the crime committed shall be imposed only when the evidence is established beyond all reasonable doubt. This is based on the *hadith* of the Prophet (SAW): ‘set aside *hudud* punishments in cases of doubt’.

*Qisas* is crime involving the taking of life or the causing of bodily harm punishable by retaliation or blood money (*diya*); the victim or his relative have the right to forgive or reduce the penalty of the accused person. Finally, *ta'zir* or discretionary punishment in Islam is broad and is left to the presiding court. *Ta'zir* literally means prohibition. In cases where no specific punishment is prescribed, the judge is authorised to inflict such punishment on the culprit as seems to be most suitable in view of the circumstances of each particular case. This form of discretionary punishment is called *ta'zir* or chastisement. It is corrective punishment lower than *hadd* and it becomes applicable in cases which do not incur *hadd*. Having said the above, this article discusses the issue on the implementation of *hudud* laws in Malaysia.

### **Islamic criminal Law in Malaysia during the colonial era**

Before the era of European colonial powers in the Malay peninsular, Islamic law was implemented gradually. The Laws of Malacca (*Hukum Kanun Melaka*) which was compiled during the reign of Muzaffar Shah (1446–1459), covers varying degrees and areas ranging from criminal offences, commercial transactions, family matters, matters of evidence and procedure and the conditions of a ruler. For example, *zina* (section 40:2), *qadhf* (section 12:3), theft (section 7:2 and 11:1), robbery (section 43), apostasy (section 36:1), drinking intoxicants (section 42), *baqhy* (section 5 and section 42). *Qisas* and *diya* is legislated in section 5:1, 3; section 8:2, 3; section 18:4 and section 39, causing injury in section 8:2 and its various types in sections 16, 17, and 21. Punishment for the abovementioned crimes conform with those of classical Islamic law. Crimes punishable with *ta'zir*, ie, when the crime lacks the conditions for *hadd* penalty (section 11:1), kissing between a man and a woman (section 43:5), gambling (section 42), giving false testimony (section 36).

The above laws were also enforced in the states of Pahang, Johor and Kedah. ‘In Terengganu there has been found a Stone of Inscription dating to the 12<sup>th</sup> century which among other things sets out the punishment for *Zina*, one hundred stripes for the unmarried and lapidation for the married offenders. During the reign of Sultan Zainal Abidin III (1881-1918), Terengganu were administering Islamic Law and the punishments of *hudud*, *qisas*, *diyat* and *ta'zir* were provided for’.<sup>1</sup>

The foreign invasion into the Malay peninsular began from Malacca. Before the arrival of foreign powers, Malacca was already an influential regional power and a thriving trade centre with a busy port city visited by numerous Asian and European traders. The people there were engaged in some form of trade and commercial activities.<sup>2</sup>

<sup>1</sup> Per Ahmad Mohamad Ibrahim in “Suitability of the Islamic Punishments in Malaysia” (1993) 3 IIUM Law Journal 1, 14.

<sup>2</sup> See Ismail Noor and Muhammad Azaham *The Malays par Excellence, warts and all: An Introduction* (Subang Jaya, Pelanduk publications, 2000, p 7.

From 1 July 1511 until 1640, Malacca came under Portuguese control—the trade in the Far East mainly dominated their invasion into Malacca. From 1641 until 1824, Malacca was occupied by the Dutch and their main reason for the capture was to ensure that their trade rivals, the Portuguese and the English, would not compete with them in Malayan waters.<sup>3</sup> During the Portuguese and Dutch administration of Malacca, Islamic law continued to be the governing law, as these foreign powers never intended to introduce their laws into Malacca. In 1795, the Dutch surrendered Malacca to the British without resistance, mainly to avoid the state from falling into the hands of France when the latter captured the Netherlands during the French Revolution. Britain handed back Malacca to the Dutch by virtue of the Treaty of Vienna in 1818. In 1824, the Dutch gave permanent occupation of Malacca to Britain in exchange for Bencoolen on the West Coast of Sumatra.

The British expanded their colonial rule into other states in the Malay peninsular. This began when Captain Francis Light on behalf of the East India Company took possession of the island of Penang in August 1786. In 1824, Singapore and Malacca had been placed under their control and grouped as the Straits Settlements. In the Straits Settlements, English law became the general law of the land by virtue of the Charters of Justice 1807, 1826 and 1855. The Charters set up a judicial system and made English law applicable to the native inhabitants and other residents in so far as their various religions and customs would permit.

Perak and Selangor came under British protection in 1874, Negeri Sembilan in 1875, and finally Pahang in 1888. In July 1895, the above states formed themselves into a federation known as Federated Malay States (FMS) with the capital in Kuala Lumpur. British Residents were appointed in the above states, who wielded considerable political and administrative power and the Sultan had to consult the Resident on all state matters, except those pertaining to Islamic administration and customs. Islamic law was isolated and eventually confined only to matrimonial law, divorce and inheritance.

Furthermore, in 1909, Siam transferred to the British all rights of suzerainty, protection, administration and control whatsoever which she possessed over Kedah, Perlis, Kelantan and Terengganu by virtue of the Anglo-Siamese Treaty 1909. Johor came under British protection in 1914. The above states were grouped together and referred to as the Unfederated Malay States (UFMS). British advisors were appointed who only served in a consultative capacity to the Malay Sultans.

English common law and the rules of equity were introduced into the Federated Malay States by virtue of the Civil Law Enactment 1937. The above Enactment was extended in its application to the Unfederated Malay States by virtue of the Civil Law (Extension) Ordinance, 1951. Civil courts were established to take over the functions of the Kathis court. In 1948, the Courts Ordinance 1948 (No 43 of 1948) established a judicial system for the Federation wherein the Kathis Court was omitted from being part of the Federal court system. The significant aspect of the Ordinance is that it made the civil court's jurisdiction general and freed it from the limitations arising from Kathis court's jurisdiction. The Ordinance continued to apply throughout the Federation until it was repealed and replaced by the Courts of Judicature Act 1964 (Act 91) and the Subordinate Courts Act 1948 (Act 55)

Ahmad Mohamad Ibrahim, in his article entitled "Suitability of the Islamic Punishments in Malaysia" stated: 'With the coming of the British and the introduction of the Penal Code based on the Indian Penal Code and the principles of English Law, the Islamic Criminal Law ceased to be applied. Many of the Muslims no longer know and appreciate the purpose and benefits of the Islamic Criminal law and it is not surprising that there is misunderstanding and prejudice against it'.<sup>4</sup>

### **Syariah Courts Criminal Jurisdiction**

In Malaysia, the Syariah Courts are designated as a specialist court where the judges of these courts are persons familiar with knowledge of Islamic principles and law. The Syariah Courts are invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in list II of the State List of the Ninth Schedule to the Federal Constitution.<sup>5</sup>

<sup>3</sup> See M.C. Sheppard, *Historic Malaya: An Outline History* (Singapore: Eastern Universities Press Ltd, 1959), 14.

<sup>4</sup> Ahmad Mohamad Ibrahim, in his article entitled "Suitability of the Islamic Punishments in Malaysia" (1993) 3 IIUM Law Journal 1, 14.

<sup>5</sup> See *Latifah bte Mat Zin v Rosmawati Sharibun & Anor* [2007] 5 MLJ 101 (FC).

In other words, the jurisdiction of the Syariah Court is restricted to Muslims and further, the court derives its jurisdiction under State law enacted pursuant to article 74(2) of the Federal Constitution following para 1, State List of the Ninth Schedule of the Federal Constitution and in the case of the Federal Territories, by virtue of item 6(e) of the Federal List. In *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor*,<sup>6</sup> Mohd Eusoff CJ stated that: '[T]oday, the Syariah courts in each State and in the Federal Territories have their own officers to investigate and prosecute cases in their own courts. Their court system is similar to and running parallel with the civil court system. It has its own Syariah subordinate court, the Syariah High Court and Syariah Appeal Court. The decisions of the Syariah subordinate court are appealable to the Syariah High Court, and the Syariah Court of Appeal hears appeals from their High Courts. The Chief Syariah Judge is the head of the Syariah courts and the Chief Syariah Prosecutor has the power to institute, conduct or discontinue any proceeding for an offence before a Syariah court'.

However, the application of syariah in Malaysia is restricted in the area of Muslim personal law and minor offences against the precepts of the religion of Islam. The Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) has restricted the criminal jurisdiction of the Syariah Courts. It provided that the jurisdiction of the Syariah Courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. It is noteworthy that the Syariah Court's criminal jurisdiction is a far cry compared to the court at the lowest tier of the civil jurisdiction i.e., the first class magistrate. A first class magistrate has jurisdiction to try all offences for which the maximum sentence does not exceed ten years imprisonment or with a fine only.<sup>7</sup>

Suffice at this juncture to compare the severity of punishment between section 377B of the Penal Code (Revised 1971) for committing carnal intercourse against order of nature and section 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 for act of sodomy. Section 25 of the Syariah Criminal Offences (Federal Territories) Act provides: 'Any male person who commits *liwat* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof'.<sup>8</sup> While section 377B of the Penal Code provides: 'Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.'

### **Hudud in Malaysia**

As noted earlier, the *hadd* offences involve the transgression of the limits set by Allah (SWT). They fall into the following categories: (i) drinking alcohol; (ii) theft; (iii) highway robbery; (iv) illegal sexual intercourse or *zina*; (v) false accusation of *zina*; (vi) rebellion against the rule; and (vii) apostasy including blasphemy. The commission of the abovementioned crimes would entail punishment such as stoning, whipping and amputation of hand and feet as is prescribed in the Quran and *hadith*. The Quran contains the words proclaimed by Allah SAW.<sup>9</sup> It is a revelation from the All-Wise and Praiseworthy.

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<sup>6</sup> [1999] 2 MLJ 241, FC.

<sup>7</sup> Subordinate Courts Act 1948 s 85. For the criminal jurisdiction and sentence competence of a first class magistrate, see the Subordinate Courts Act 1948 ss 85 and 87 respectively. For the criminal jurisdiction and sentence competence of a second class magistrate, see ss 88 and 89 of the Subordinate Courts Act 1948.

<sup>8</sup> Section 2 of the Syariah Criminal Offences (Federal Territories) Act 1997 defined '*liwat*' to mean 'sexual relations between male persons ie, anal intercourse between two males'. Homosexuality or '*liwat*', an unnatural sexual act to satisfy ones sexual passion, is considered a detestable act in Islam. Islam looks at homosexuality as something contradictory to the very nature according to which Allah (SWT) created man. It is destructive to both morality and manhood. Allah (SWT) mentioned what happened to the people of Prophet Lut in the Quran: 'We also (sent) Lut: He said to His people: Do ye commit lewdness such as no people in creation (ever) committed before you? Because you practice your (sexual) desires on men in preference to women: you are truly a people going beyond bounds': *Surah Al-Araf* (7): verses 80-81.

<sup>9</sup> See *Surah Al-Hijr* (15):9 where Allah SWT says, which can be translated to mean 'We have, without doubt sent down the Message; and We will assuredly guard it (from corruption)'.

It is also an explicit and unequivocal teaching for mankind<sup>10</sup> and therefore, binds the Muslims, its non-adherence amounts to a great sin.<sup>11</sup> It calls human beings to the life of virtue, morality, law and order. In Malaysia, the Syariah Criminal Enactment (II) 1993 of Kelantan and the Syariah Criminal Enactment 2003 of Terengganu, allow the application of *hudud* laws into the above mentioned states. Unfortunately however, the enforcement of the above two instruments have been suspended indefinitely as these laws are inconsistent with the Federal Constitution, the supreme law of the Federation. This is because the enactment of penal laws are within the jurisdiction of the federal authority and not the state.<sup>12</sup> Furthermore, the criminal jurisdiction of the Shariah Court, as noted earlier, has been restricted by the Shariah Courts (Criminal Jurisdiction) Act 1965, a federal law.

Be that as it may, the arguments in relation to the implementation of *hudud* laws in Malaysia has once again resurfaced and is heatedly argued by the proponents of this laws and those who oppose its implementation. Some have contended that the implementation of *hudud* will only boost, and not deter crimes because of the high standard of proof imposed by syariah. This contention is but a mere conjecture with no salutary evidence to substantiate.<sup>13</sup>

The criticism is primarily focused on the stringent requirements of four reputable witnesses for offences such as adultery and *qazaf* (false accusation of committing *zina*) which according to them makes conviction for the above crime almost impossible. The evidence that could support the charge of adultery are the confession of either or both the accused persons and/or eyewitness testimony made by four males, who are of justifiable and credible character.<sup>14</sup> Anything else is merely circumstantial evidence and not admissible in a *hadd* prosecution.<sup>15</sup> Any person who makes false accusation of *zina* may be sentenced to eighty lashes, as directed by the Quran, *surah Al-Nur* (24):4. It has to be understood that due to the severity of the *hadd* punishment for the above mentioned crimes, the stringent requirements to establish the crime is equally emphasised. It is among others, to safeguard those who are being falsely accused. According to Karamah “[T]he requirement of four witnesses (with all its restrictions and specifications) is a merciful measure from God in order not only to avoid incriminating innocent people, but also to preserve the privacy of Muslims, which is one of the most valued principles in Islam (the concept of *sitr*)”.<sup>16</sup>

It is noteworthy that adultery or fornication is strictly forbidden in Islam irrespective of whether the parties freely consented to the said act.<sup>17</sup>

<sup>10</sup> See *Surah Al-Isra* (17):9 where Allah SWT says, which can be translated to mean ‘Verily this Quran doth guide to that which is most right (or stable), and giveth the glad tidings to the Believers who work deeds of righteousness, that they shall have a magnificent reward.’

<sup>11</sup> To doubt *hudud* laws and to dispute on its authenticity may nullify one’s creed and may fall under the category of those mentioned in the Quran, *Surah al-Maidah* (5):44, ‘If any do fail to judge by (the light of) what God Hath revealed, they are (No better than) Unbelievers.’ See also Mohammad Shabbir, *Criminal Law and Justice in Islam*, Petaling Jaya, International law Book Services, 2002, at p 232.

<sup>12</sup> See the Federal Constitution, Ninth Schedule.

<sup>13</sup> ‘*Karpal: Crimes will rise under hudud laws*’, see <http://www.freemalaysiatoday.com/2011/10/30/karpal-crimes-will-rise-under-hudud-laws/>

<sup>14</sup> If a husband accuses his wife of *zina*, the Quran, *Surah Al-Nur* (24):6-9 provides the procedure *inter alia*, that instead of bringing four witnesses, the judge should make the person alleging to swear four times by Allah, that he is telling the truth ie, about what he is accusing her of, namely *zina*. And the fifth time he should invoke the curse of Allah upon himself if he is lying. The wife must also engage in *li’an* and swears by Allah four times that he is lying, ie, with regard to what he has accused her of; and the fifth time she should invoke the wrath of Allah upon herself if he is telling the truth.

<sup>15</sup> See Asifa Quraishi, “Islamic Legal Analysis of Zina Punishment of Bariya Ibrahim Magazu, Zamfara, Nigeria” at [http://www.mwlusa.org/topics/marriage&divorce/islamic\\_legal\\_analysis\\_of\\_zina.htm](http://www.mwlusa.org/topics/marriage&divorce/islamic_legal_analysis_of_zina.htm)

<sup>16</sup> See Karamah, *Zina, Rape, and Islamic Law: An Islamic Legal Analysis of The Rape Laws In Pakistan*, at [http://www.globalwebpost.com/farooqm/study\\_res/islam/gender/karamah\\_zina.pdf](http://www.globalwebpost.com/farooqm/study_res/islam/gender/karamah_zina.pdf)

<sup>17</sup> In Islam, where a woman alleged that she had been raped, the rapist would be punished, if the evidence points to that conclusion, and not so the woman, the victim of rape. During the time of the Prophet SAW punishment was inflicted on the rapist on the solitary evidence of the woman who was raped by him. Wa’il ibn Hujr reports of an incident when a woman was raped. Later, when some people came by, she identified and accused the man of raping her. They seized him and brought him to Allah’s messenger, who said to the woman, ‘Go away, for Allah has forgiven you,’ but of the

In *Surah Al-Isra* (17):32, Allah SWT says, which means ‘Nor come nigh to adultery (*zina*): for it is a shameful (deed) and an evil, opening the road (to other evils)’. Again, Allah SWT says in the Quran, *Surah Al-A’raf* (7) verse 33, the meaning of which is ‘Say, ‘Verily, my Lord has prohibited the shameful deeds, be it open or secret ...’. The social implications of adultery are obvious, it has given rise to teen pregnancies, broken homes, distrust, divorce and baby dumping, fast spread of AIDS and other venereal diseases, among others.<sup>18</sup> In pre-marital sex involving young teenagers for example, it may sometime end up with an unwanted pregnancy<sup>19</sup> and subsequently, the newborn baby is discarded to cover up the shame and humiliation of the girl and her family. There have been cases of girls as young as thirteen years who have dumped their newborn.<sup>20</sup> It is thus, a move back to the dark ages where man treated women as chattels only for pleasure and then discarded, babies born are killed alive and/or discarded. No doubt due to its serious social repercussion, Islam has forbidden these acts to the extent of saying that even by looking at the opposite sex with desire, the eyes commit *zina*.<sup>21</sup>

Coming back to criticism against *hudud* in Malaysia, some went to the extent of saying that the implementation of *hudud* would only bring greater human rights disaster in Malaysia as the punishment is very cruel, inhuman or degrading.<sup>22</sup> They argued that if the Malaysians are exposed to *hudud* punishment, Malaysians will gradually become inhumane.<sup>23</sup> It was further contended that the nature of *Hudud* punishment is outdated and therefore, does not fit right into our system of society today. It is submitted that the critique should not merely look at the harshness of the syariah punishment from the offender’s point of view. They should also understand the psychological and emotional suffering of the victim or the dependants of the deceased. They should put themselves in the shoes of the victim or their family members who are grieving for the loss of their loved one in a brutal crime, for example, an adolescent girl who had been brutally raped or in a robbery, where the victim was seriously wounded with a knife or stabbed to death by slashing the neck, among others.<sup>24</sup>

Take for example, the conduct of a criminal, torching a motor car and burning the victims who were inside the motor car, alive! How would a fair minded person react to such heinous crime? It is certainly an unforgiveable conduct. The act of torching the motor car and burning the victims alive occurred in the case of *Sinnathurai Subramaniam v PP*.<sup>25</sup>

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man who had raped her, he said, ‘Stone him to death.’ (Tirmidhi and Abu Dawud), Per Uzma Mazhar, ‘Rape & Incest: Islamic Perspective’ at:

[http://www.muslimaccess.com/articles/Women/rape\\_in\\_islam.asp](http://www.muslimaccess.com/articles/Women/rape_in_islam.asp)

<sup>18</sup> The Prophet SAW said ‘When promiscuous behaviour becomes rampant in a nation, Allah will send upon them such (strange) diseases that their own ancestors never heard of’.

(See [http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask\\_Scholar/FatwaE/FatwaE&cid=1119503548032#ixzz108Mdf7qb](http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503548032#ixzz108Mdf7qb))

<sup>19</sup> It must be noted that where the sexual intercourse was the result of the free consent of the parties, it does not amount to rape under s 375 of the Penal Code. However, her consent will be negated where at the material time she was under 16 years of age.

<sup>20</sup> See Ashgar Ali and Farheen Baig, ‘Prevention of Baby Dumping Phenomenon: The Islamic Perspective’ [2010] 4 Syariah Law Reports 1.

<sup>21</sup> The lustful looks at a person of the opposite sex is considered as ‘the *zina* (adultery or fornication) of the eye’. The Prophet SAW stated ‘The eyes also commit *zina*, and their *zina* is the lustful look.’ (Sahih Bukhari). In *Surah An-Nur* (24):30-31 Allah SWT says, which means ‘Tell the believing men that they should lower their gazes and guard their sexual organs; that is purer for them. Indeed, Allah is well-acquainted with what they do. And tell the believing women that they should lower their gazes and guard their sexual organs, and not display their adornment, except that which is apparent of it; and that they should draw their head-coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husbands’ fathers, or their sons or their husbands’ sons, or their brothers or their brothers’ sons or their sisters’ sons, or their women, or those whom their right hands possess, or male servants who lack sexual desire, or children who are not aware of women’s nakedness; and that they should not strike their feet in order to make known what they hide of their adornment.’

<sup>22</sup> See ‘Implementing hudud – a disaster in-waiting’ at <http://mole.my/content/implementing-hudud-disaster-waiting>.

<sup>23</sup> Many people today objects to the amputating of hands for theft on the basis of cruelty of the punishment. However, they failed to understand the definition of “theft”; the philosophical dimension to such a ruling; and the circumstances justifying the execution of such punishment, among others.

<sup>24</sup> See *Public Prosecutor v Prabu Veeramuthu & Ors* [2010] 8 CLJ 257.

<sup>25</sup> [2011] 5 CLJ 56.

The facts of the above case are as follows ‘On 2 November 2007 (the date of the offence) at about 4.30pm, Kristina telephoned Khosla informing the latter that she wanted to buy cosmetics which were being sold by the latter. Responding to the telephone call, at about 5.30pm, accompanied by her daughter (who was then about six years old), Khosla left her mother's house in the car No JHD 9225 to meet Kristina. The car belonged to Khosla. Khosla and Keerthisa arrived at Kristina's house at about 7.30pm. At that time Sinnathurai was also present in the house. About an hour later, while they were still in the house, all of a sudden, Sinnathurai pounced upon Khosla and dragged her into a room and tied her hands. Kristina tied Khosla's legs. Then, Sinnathurai dragged Khosla and dumped her in the boot of Khosla's car. Meanwhile, Keerthisa was taken into the car and made to sit with Kristina. The car was then driven to a vegetable farm at Batu 6, Jalan Mersing, Kluang (the scene). There, Sinnathurai and Kristina alighted from the car leaving Khosla locked in the boot of the car and Keerthisa locked in the car. Sinnathurai then torched the car with Khosla and Keerthisa still locked in it. At that time Khosla and Keerthisa were still alive.

Referring to the above heinous crime, Ahmad Maarop JCA observed:

Anyone reading the facts of this case would be overcome with horror, indignation and disgust. Crime of this nature will not be tolerated in this country. Stern punishment must be meted out... In my judgment, the sentence meted out is commensurate and appropriate to the gravity of the crime. And the sentence too had achieved its desired effect.

The question arises whether a mere custodial sentence meted out on the offender of a grave and heinous crime as above had achieved its desired effect namely, deterrence and prevention? Whether the custodial sentence would be able to send a message to the world at large that the offence is serious? In *Sinnathurai's* case, Ahmad Maarop JCA further stated:

But, the type of offence committed by Sinnathurai cannot attract leniency. The offence is so gross and barbaric. A severe sentence is called for. This is an apt case for crime control and public protection. Deterrence is the answer. The right message must be sent to all prospective offenders. It is just unthinkable to give a light sentence. A severe sentence is called for. No criminal is deterred by a slap on the wrist type of sentence or the wink of an eye type of sentence. The criminal will continue to commit the same crime, over and over again. Lawlessness will then prevail. It is crucial to impose deterrent sentences for serious offences in order to maintain law and order. I agree that the sentence of 24 years imprisonment is in order for this kind of offence. Under the circumstances, the sentence imposed by the learned High Court judge is not manifestly excessive. I agree that the factual matrix do not merit a discount to be given to the appellant.

It is submitted that the severity of *hudud* punishment for example, the amputation of hand and feet for offences of theft and robbery, is to serve as a prevention and deterrence from committing these crimes in the first place.<sup>26</sup> The imposition of the punishment is to bring about ultimate order of human civilisation and happiness in the society. What *hudud* brings is peace and order and disciplined behaviour as people would not dare to lift a finger to do an evil deed as they know the punishment that awaits them is severe. This is the wisdom of *hudud*.

<sup>26</sup> For example, in Surah *Al-Ma'idah* (5):38 Allah SWT proclaims ‘As to the thief, male or female, cut off his or her hands: a retribution for their deed and exemplary punishment from Allah and Allah is Exalted in Power, full of Wisdom.’

The table below further illustrates the consequences if the *hadd* punishment is imposed and when such punishment is withheld.

THE CRIME /OFFENCE	WITHOUT HUDUD	WITH HUDUD
<p><b>1. Zina (Adultery and Fornication)</b></p>	<p><b>Punishment:</b>  <b>Consensual sexual intercourse is not a crime in the Penal Code.</b></p> <p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Moral decay – free mixing between male and female over the limits</li> <li>2. Rise in divorce rate – due to infidelity – promiscuity</li> <li>3. Diseases such as HIV / AIDS due to multiple sex partners</li> <li>4. Abortions</li> <li>5. Baby dumping / murder of innocent children</li> <li>6. Rise in illegitimate children</li> <li>7. Single parent crisis</li> <li>8. Illegitimate child often neglected – become a menace to society</li> <li>9. Psychological problems on the rise due to unhappiness of the single parent – no proper family unit</li> <li>10 Suicide</li> <li>11. Psychological problems for the illegitimate child due to anger, frustration and vengence, promoting further moral decay</li> <li>12. Lineage problems often not knowing who the father is</li> <li>13. Bringing shame and disrespect to the individual and family</li> <li>13. Government troubled in finding solution for selfish acts of these individuals – taxpayers involved eg: Rumah harapan and baby banks</li> <li>14. Break in ties of relationship among families</li> <li>15. Promotes prostitution</li> </ol>	<p><b>Punishment:</b>  <b>Fornication and adultery is punishable with 100 lashes and stoning to death respectively.</b></p> <p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Promotes institution of marriage</li> <li>2. Family unit and lineage is maintained</li> <li>3. Stable children from a stable households</li> <li>4. Respectful and clean society</li> <li>5. Adherence to moral value and curbing immoral sexual activities and unwanted diseases</li> </ol>
<p><b>2. Theft/Robbery</b></p>	<p><b>Punishment:</b></p> <p><b>Theft</b> - imprisonment for a term which may extend to seven years, or with fine, or with both, and for a second or subsequent offence shall be punished with imprisonment and shall be also be liable to fine or to whipping (S 379 Penal Code)</p> <p><b>Robbery</b> - imprisonment for a term which may extend to fourteen years, and he shall also be liable to fine or whipping (S 392 Penal Code)</p> <p><b>Gang robbery</b> - imprisonment for a term which may extend to twenty years, and shall also be liable to whipping (S 395 Penal Code)</p>	<p><b>Punishment:</b></p> <p><b>Theft</b> – Amputation of the hand if the necessary conditions are met with other qualifications that are taken into consideration before the amputation</p> <p><b>Highway robbery (Hirabah)</b> - punished according to the crime committed namely, execution, or crucification, or the cutting off hands and feet from the opposite sides, or exile from the land</p>

	<p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Increase in crime</li> <li>2. Criminals becoming bolder and meaner – combining theft with rape and murder</li> <li>3. Snatch theft in broad daylight</li> <li>3. Becoming lawless society</li> <li>4. Society living in fear of criminals at large – living in caged homes and alarm systems has become the order of the day</li> <li>5. Severe penal punishment cannot deter this crime</li> <li>6. Even foreigners resorting to theft as not deterred by the Penal Code</li> <li>7. Government troubled – prison congested, taxpayers involved</li> </ol>	<p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Deterrence of theft / robbery due to severity of the punishment</li> <li>2. Would promote a peaceful neighborhood as the fear of severe penalty would deter theft especially if the Government is serious in its implementation</li> <li>3. Taxpayer money degenerated to other more beneficial causes like community libraries, better roads and housing, among others.</li> </ol>
<p><b>3. Intoxication (drinking liquor)</b></p>	<p><b>Punishment</b></p> <p><b>No prescribed punishment for intoxication in the Penal Code</b></p>	<p><b>Punishment</b></p> <p><b>Prescribed punishment between 40 to 80 lashes</b></p>
	<p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Health hazard – cancer, liver damage</li> <li>2. Broken / unhappy homes</li> <li>3. Domestic violence</li> <li>4. Rise in divorce rate</li> <li>5. Rise in road accidents</li> <li>6. Rise in crimes such as street fights, murder, causing grievous hurt</li> <li>7. Increase in date rape, unwanted pregnancy and sexually transmitted disease</li> <li>8. Chaos in poor families due to extreme poverty</li> <li>9. Suicide</li> <li>10. Psychological problems / extreme behaviour due to addiction of the bottle</li> <li>11. Psychological problems faced by children</li> <li>12. Abortions / malformed babies</li> </ol>	<p><b>Effect:</b></p> <ol style="list-style-type: none"> <li>1. Balanced and stable families</li> <li>2. Healthy lifestyle, pregnancies</li> <li>3. Responsible and accountable conduct</li> <li>4. Decrease in road accidents</li> <li>5. Decrease in crime and divorce</li> <li>6. Safe society</li> </ol>

What is apparent from the above is the effectiveness of the *hadd* punishment. There is no sense in having light punishment for an offence that brings so much harm to the society and then have extra laws to deal with those created harms that could have been prevented in the first place with proper set of laws, like *hudud*. Above are only three examples of *hudud* offences. The three punishments combined together would have a magnificent effect on curbing crime in Malaysia – decreased theft, people no longer living in fear, the return of moral values and respect of the family unit, healthy/stable homes, stable children, less psychological problems and depression and the list goes on. Only good comes from the implementation of effective punishment for such heinous crimes. This is the value of *hudud*. It prevents crime and promotes peace and order in society. *Hudud* is therefore a mercy to mankind<sup>27</sup> and not as some have claimed it to be barbarious, cruel and degrading. When it prevents crime, the society is safe and the punishment would be executed only when the necessary conditions of this crime is established beyond reasonable doubt. One execution however, is enough to bring a screeching halt to such crime or would significantly reduce the commission of the offence to a high degree.

<sup>27</sup> In Surah *al-A'raf* (7):156, Allah SWT says, which can be translated to mean 'And ordain for us that which is good, in this life and in the Hereafter: for we have turned unto Thee.' He said 'with My punishment I visit whom I will; but My mercy extendeth to all things. That (Mercy) I shall ordain for those who do right and practise regular charity and those who believe in Our signs.'

Ask the families of teetotallers, families whose daughters have been gang raped by robbers or drunkards, wives whose husbands and sons go to prostitutes, and parents whose children have brought shame to themselves and their family by their selfish acts of adultery. Siti Mariah Mahmud rightly noted:

It must be always borne in mind that the purpose of the law is to act as a serious deterrent to all 'would-be perpetrators' and in so doing, reduce crime significantly. It is not the objective to maximise the number of those punished. Theft, especially one accompanied by violence, leaves traumatised victims in its wake. Victims of snatch thieves, dragged over a few metres, suffer serious injuries. Some have died. Pregnant women have been known to suffer miscarriage and even innocent bystanders have been known to have become victims of this crime. While conviction is difficult, due to the requirements set by the *hudud*, its implementation will serve as an effective deterrent. Should, through its implementation, the occurrence of crime be significantly reduced, then we must say that it has achieved its objective. If a single hand is in the end cut off, but through it a thousand incidents are averted, and with it also a thousand traumatised victims, would one not say that the law has been a success? It has to be reiterated that in the event a case cannot be charged under *hudud*, due to it not fulfilling the explicit requirements, it can then be charged under *ta'zir*. In the case of theft, this includes situations where there were no witnesses to the crime but the stolen material was found in the possession of the accused, or there was only one witness instead of two. In such cases the accused, if found guilty, will still be punished but not under the laws of *hudud*.<sup>28</sup>

These punishments should not be rejected outright just because they are labelled under 'Islam'. It should be viewed through its logic, effectiveness and its solution to the problems that our community is facing today. People of all faiths know that drinking (intoxication) brings disasters. Adultery brings with it a storm. Theft leaves people devastated. This is the truth which no reasonable man can deny.<sup>29</sup> Man-made laws that impose 'severe punishment' for certain offences such as rape, murder, drug trafficking and armed robbery, among others, have not deterred criminals from the commission of such crimes.<sup>30</sup> This is evident from the fact that these days there have been far too many of such cases reported daily or weekly in the mass media and in many cases, the criminals, despite having served the necessary punishment, have not turned from their old ways to honest living.<sup>31</sup>

Let's face it. Man-made laws have failed miserably to curb or eliminate crime rate. Incidents like drug trafficking, murder, rape, baby dumping, purse-snatching, pick-pocketing and residential burglaries among others, are on the rise in Malaysia<sup>32</sup> and in many cases the criminals have no fear of being caught.

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<sup>28</sup> Siti Mariah Mahmud, *Hudud is a matter of choice for Muslims at* <http://thestar.com.my/news/story.asp?file=/2011/10/9/focus/9662360&sec=focus>

<sup>29</sup> See for example, *Public Prosecutor v Kamaruzaman bin Mahmud & Anor* [2007] 4 MLJ 750, where VT Singham J took judicial notice of serious crimes prevalent in this country such as robbery armed with weapon.

<sup>30</sup> In *Public Prosecutor v Muhamad Asikin Bakar* [2008] 10 CLJ 431, Zamani Rahim JC observed 'The accused three convictions for drugs from the year 1997 to 2000 speak for itself. He is a persistent and habitual offender. He is not a remorseful person, contrary to what the Magistrate found him to be. According to the Magistrate, by pleading guilty he had shown repentance. The Magistrate must be hoodwinked by the accused. The current offences were committed about one year 11 months after he was released from prison on 21 September 2005 after serving the nine year imprisonment term in respect of the fourth conviction. The lengthy custodial sentence seemed to have failed to reform and rehabilitate the accused.' Again, in *Public Prosecutor v Kuluput Sompong* [2011] 1 LNS 245, the respondent, 50 years of age at the material time was charged in the Sessions Court at Kota Kinabalu with 4 counts of rape against his 12 year old granddaughter. Abdul Rahman Sebli J noted 'The seriousness of the offence is compounded by the fact that the respondent has a record of previous conviction against the same victim in 2004 for outraging her modesty. He was sentenced to two years imprisonment for that offence. It is clear that instead of turning over a new leaf he graduated to a more heinous crime.' It is submitted that had the accused been put to death, this punishment would have created an impact on the society thus, significantly reducing such crime in the future.

<sup>31</sup> The offence of robbery and 'snatch-thieves' for example, is so rampant today. In *Mohamad Hamzah Mohamad Nazam v PP* [2009] 1 LNS 626, Vernon Ong Lam Kiat JC observed 'The scourge of 'snatch thieves' must be dealt with severely. There must be a strong message sent that the law will deal with such offenders severely.'

<sup>32</sup> See *ACP Amar Singh Sidhu*, "The Rise of Crime in Malaysia", paper presented at the Conference of the Commissioners of Police / Chief Police Officers / Commandants / Commander Brigades on 23 & 24 March 2005, at <http://mpk.rmp.gov.my/jurnal/2005/riseofcrime.pdf>. See also "Crime and Safety" at [http://cpps.org.my/resource\\_centre/Crime.pdf](http://cpps.org.my/resource_centre/Crime.pdf)

The criminals are getting more brazen and are even daring to commit daylight robbery in full view of the public at a very public place and this has often been given publicity by the mass media. It is obvious that the criminals are prepared to sacrifice a few months or years of their life in prison for a few moments of pleasure derived from their ill-gotten gains. In *Bong Hiong Fatt & Ors v Public Prosecutor*,<sup>33</sup> a case dealing with voluntarily causing grievous hurt at the terminal of the Kuching International Airport, Ian HC Chin J noted:

The present case is committed by a gang of people who could be properly called gangsters. The offence was committed in full view of the public at a very public place. That the accused have chosen that time and place demonstrated that they have scant regard for what the public think of them nor with whether they are caught or not by the law since what they did cannot but put fear in the public and cannot escape the attention of those in the airport. So brazen were they that any lesser sentence would convey the impression that the gangsters reign supreme in Sarawak and that the public had better fear them. The court must therefore not make that mistake in passing any lesser sentence.

Has the time not come to acknowledge the truth that man made laws had failed to curb crimes in Malaysia. Should we not have the feeling for the victims of heinous crime instead of thinking of our selfish desires? It is submitted that *hudud* can and will decrease these crimes. Perhaps reference should be made to Saudi Arabia where the syariah reigns supreme in the Kingdom and where the incidence of crime is considered to be relatively low.<sup>34</sup> Thus, it may be right to state that the imposition of divine punishment (*hudud*) enhances and does not diminish an individual's dignity and stature in society and before Allah (SWT). As Khurram Murad rightly stated: 'Punishments are thus designed to keep the sense of justice alive in the community by a public repudiation of the acts violating the limits set by God. They are expected to build up in the society a deep feeling of abhorrence for transgression against fellow human beings, and therefore against God - a transgression which, according to the al-Qur'an, is the root cause of all disorders and corruption in human life.'<sup>35</sup> As a final remark, it would be worthwhile reproducing the observation made by *Al-Marhum* Ahmad Mohamad Ibrahim 'With the coming of the British and the introduction of the Penal Code based on the Indian Penal Code and the principles of English law, the Islamic Criminal Law ceased to be applied. Many of the Muslims no longer know and appreciate the purpose and benefits of the Islamic Criminal Law and it is not surprising that there is misunderstanding and prejudice against it.'<sup>36</sup>

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<sup>33</sup> [2001] 5 CLJ 297.

<sup>34</sup> See for example, *Saudi Arabia: Crime and Punishment* at <http://www.country-data.com/cgi-bin/query/r-11683.html>

<sup>35</sup> Khurram Murad, 'Syariah: The Way of Justice' <http://www.sunniforum.com/forum/showthread.php?76395-SYARIAH-THE-WAY-OF-JUSTICE-By-Khurram-Murad&s=827768632a7e4101e08b55d71a44ddde&p=651079#post651079>

<sup>36</sup> Ahmad Mohamad Ibrahim, *Suitability of the Islamic Punishments in Malaysia*, (1993) 3 IIUM Law Journal 1, at p 14.