

HUDUD: THE RIGHT OF ALLAH SWT IN PERSPECTIVE OF PUNISHMENT FOR ADULTERY

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Abstract

Allah swt is the Creator and all creations (as servants) in this world are subjected to His commands and directions. Since He created humans and all creations in this world, then only Allah swt knows what is the best for His creations. This concept paper is to highlight about *Hudud* as one of punishment under Islamic criminal law which is also known as right of Allah swt. The general evidence of *Hudud* being proved by Quranic Verses in Surah Al- Baqarah which remind people not to transgress or challenge the limits of Allah swt (2:229). *Qisas* and *Takzir* also the types of punishment for Islamic criminal law. Hence, the author selects *Hudud*, and specifically chooses punishment of adultery to be emphasized in this paper to give clear picture to mass about this kind of punishments and the wisdom behind the implementation of the punishments. Muslim worldwide also are not confident about the survival of Islam without the sword and the harsh punishment of Islamic law. Islam is a religion of wisdom. The wisdom came with comprehensive way of life. In educating people to abide with all rules and regulations in their daily life, we need to have some guidance and reference. Islam already remind people to always stick with Al- Quran and As Sunnah, so that the people always having guidance to survive in this challenging world and prepared for Hereafter. It is hoped that this paper may provide better picture of *Hudud* by using punishment for adultery as matter of thinking, or to the best, change the mentality of some who label Islamic law is harsh and strict.

Keywords --- *Hudud*; Right of Allah; Adultery; Fornication

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INTRODUCTION

Hudud is technically defined as fixed punishments ordained by Allah swt and specified for certain varieties of conduct[1]. The terms *hadd* means boundary, penalty, limitation and prevention[2]. *Hudud* is a fixed punishment set by Allah swt and was not forgiven by the human even the heirs or victims.

There are dissensus among scholars related to the number of *Hudud* offences or crimes. Some scholars said that there are eight types of offenses imposed in *hudud* namely adultery, accusation of adultery, stealing, drinking intoxicants, *hirabah*, apostasy, *bughah* (an act of rebellion against a just authority) and including not performing the prayers [3]. The authors will show opinion of other scholars later.

They thought and said that they cannot be forgiven by anyone other than Allah and only Allah swt is The Most Merciful[4]. Adultery or fornication is one of the crime categories in *Hudud*.

Oxford Advanced Learner's Dictionary latest edition defines adultery as having sex between a married person and someone who is not their husband or wife. All sexual intercourses must be within the marriage that fulfill all the marriage requirements under Shari'ah law[5]. Otherwise it will be considered as illegal sexual intercourses and strictly forbidden under Islamic law and subject to punishments as it is considered as crime.

RESEARCH OBJECTIVES

The research is aimed to:

- i. Correct the misunderstanding towards *Hudud* by giving punishment for adultery as example.
- ii. Give clear picture towards the relevancy and wisdom behind *Hudud* implementation.

SIGNIFICANCE OF THE STUDY

Many people make presumption that *Hudud* is specially revealed only for Muslims and not comprehensive in terms of implementation. This concept paper is important to correct the misunderstanding towards *Hudud* by showing punishment for adultery as example. Other important reasons are that the paper would provide useful knowledge to mass so that:

- i. People would be able to understand the meaning of *hudud*.
- ii. They would know the wisdom or *hikmah* of implementing *Hudud*.

ADULTERY AND THE PUNISHMENTS

Zina is regarded as a crime and anybody who has sex outside the legal marriage, although the status of perpetrators are single, or married, then it is considered adultery [6]. Islam did not consider adultery as personal and private prerogative. It is a severe damage and harm to the society because it will embarrass the family of the woman involved. Adultery will increase the social problems among society because it may lead to illegal pregnancy, illegitimate child, illegal abortion and the spread of many diseases like AIDS and sexually transmitted diseases. It is clearly against the *Maqasid Shari'ah* that is protection of lineage.

Adultery is the cause and factor leading to illegitimate children and this will cause a mixing of the lineage of family hereditary. Adultery also affect the child to be excluded for the genuine paternity. Hence, this can lead to underprivileged the right of claiming genuine paternity, which can lead to injustice inheritance even the sin originated from the mother and illegitimate father. Adultery and fornication are called zina [7]. Zina is a severe crime and also one of the violations and

infringement of lineage which against the *Maqasid Shari'ah* that is to protect the dignity and lineage and it deserves a fixed punishment (*hudud*) [8].

Zina punishments has been mentioned under Surah *An-Nisa'* in verse 2 whereby the unmarried couple convicted for zina should be punished each of them with hundred lashes. Since its punishments came from Allah swt and considered as fix and mandatory, any attempt to change or reform any element of this punishments of *hudud* ordinances is regarded as an assault upon Allahswt[9].

Generally Muslim jurists have unanimously agreed on six types of *Hudud* crimes. One of them namely zina (adultery/ fornication or illicit sexual relations), stoning to death (*rajm*) for a married person and flogging (*jald*) 100 lashes for an unmarried person [10]. For zina committed by an unmarried person, the punishment is 100 lashes. According to the majority of scholars, the punishment is stoning (*rajm*) to death for a married person. Stoning the married offender is obviously supported by all four major schools of Islam [11]. With the *hudud* crimes and punishment, the public interest of Muslim society is being protected. In addition, these crimes are known as *hudud* because their severe punishments have been conclusively and permanently specified by Allah swt [12].

This can be showed in one hadith narrated by Abu Daud no. 4438, which reads, "From Jabir (bin 'Abdullah), that there is an adulterous man with a woman, then by the Prophet saw commanded to the man to be devastated as a punishment. But then he was told that the man was *muhsan* (already married), then ordered to be stoned, then he was stoned [13].

However, the punishment under Malaysian statutory rape law in Penal Code regarding consensual sexual intercourse is being unfair to male offender and reformation is necessary. Female offender should be imposed with similar punishment. In fact, the offender should be accused under zina under Shari'ah criminal law in Shari'ah Court, rather than convicted under Penal Code in Civil Court [14].

THE IMPLEMENTATION OF ADULTERY PUNISHMENTS

The strictness of the sentence for adultery not merely proof by simple evidences but by the high evidentiary standards[15]. The western scholars blame this system and they claimed that it is obsolete, unjust and merciless by looking at the physical appearance of the punishments itself. It is almost certainly that Islam has imposed severe punishments to avoid the widespread of the crimes and to guarantee peace and create harmony in the society or for the *maslahah 'ammah* (collective interest). In fact, the rules in implementing these penalties are also very fixed and cautious. In order to establish the penalties, a number of attestations is required. Some of the rules on implementation of these punishments considered the following which are the locality of crime, type of crime, witness, competency of witness, state of eyewitness and also situation of the offender during the criminal is done such as financial, social and political circumstances[16].

The penalties under *hudud* and rules for crime's proofs are in line i.e. very strict. For example, the punishment for adultery is very stern and severe showed the consistency with its requirements which are also very strict as compared to other *takzir* and *qisas*. Two witnesses are considered adequate for the evidence of other crime sun like for adultery in giving the evidence, it is obliged to come with four men eyewitness. In fact, merely hearsay or hearing evidence cannot be recognized.

These are the requirements for adultery to be proven:

1. Four men witnesses are required.

2. All eyewitnesses must be male because the female eyewitness is not tolerable in any situation. This state is the consensus of all jurists [17].

3. All witnesses must be independent.

4. Truthful witnesses[18].

5. All witnesses of adultery must be Muslims [19].

6. Witness must describe the scene of adultery vibrantly that he has seen the penis of man entering into the vagina of woman same like needle entering into collyrium [20].

7. All witnesses of adultery must give their evidence in single trial simultaneously [21].

Some scholars claim that according to Islamic history, nobody has been penalized under the crime of adultery due to the testimony of four men witnesses and special punishments occurred by confession of the offenders [22]. Basically, the rule obliges the confession to be heard during a legal session. Nevertheless, Maliki, Shafii and Hanbali, the major Islamic schools of law admit confession made out of court if the confession is witnessed by two persons [23]. In fact, unlawful sexual intercourse was never been punished in Islamic history at *hudud* level due to the impossibly high evidentiary standards, but was punished under other crime which was *ta'azir* by fines and few lashings [24].

In addition, *hudud* punishments are eliminated after the creation of a little doubt or uncertainty. The Prophet Muhammad stated the concept of *shubhat* (doubt) towards the ingredients of the crime, occurrence of the offence and definition of offenders that forced the stay of punishments. Truly, the implementation of *Hudud* punishments in Islamic history suggests a strong tendency to avoid *hudud* punishment in presence of *shubhat* [25]. Punishments such as stoning to death, *qisas* (retaliation) in cases of murder, *qisas* of limbs, whipping, imprisonment and exile have been exercised by the government within prescribed ethical standards in Islam [26].

Among the ethics in implementing penalties against offenders is to defer the punishments of whipping if the offender is either ill or sick or is not in a good state of health. However, for penalties that will affect the loss of life, the Islamic criminal law will not allow for such suspension. This is due to the fact that its original objective is death. Therefore, the health condition of the offender will not be taken into consideration if the offender is sentenced to death such as punishment of *qisas* for deliberate manslaughter or stoning for adultery [27].

Some requirements must be considered in implementing the whipping punishment (*jald*) which are: 1. Hit with a rod which has neither a knot nor fruit. 2. Beat with moderate hit (not so hard which can produce chance of death or so light that did not give any effect [28]). 3. Remove offender's clothes. He can only keep his trousers and lash him in vertical position.

However, for female offender, she will be in sitting position without get rid of her clothes. 4. Whip should not be on the similar part of the body but it might be on all parts of the body. 5. Prohibit to whip on head, face and secret parts of body [29]. By observing and knowing these kind of implementation of the punishments will make practical person realize and will not blame and accuse this system unjust. The Islamic law is complete and claims from western scholars on this system are baseless, based on partial approaches and demonstration of prejudiced behavior.

Even the Malay Muslims in Malaysia also did not ready on the implementation of *Hudud*. The figures below showed the result of survey by Merdeka Centre in 2014 relating to readiness for the implementation of *Hudud* among Malaysian comprising three major races that are Malay, Chinese and Indian. Merdeka Centre said that the survey found great support for *hudud* among Malay

respondents but at the same time low level of readiness to see it implemented [30].

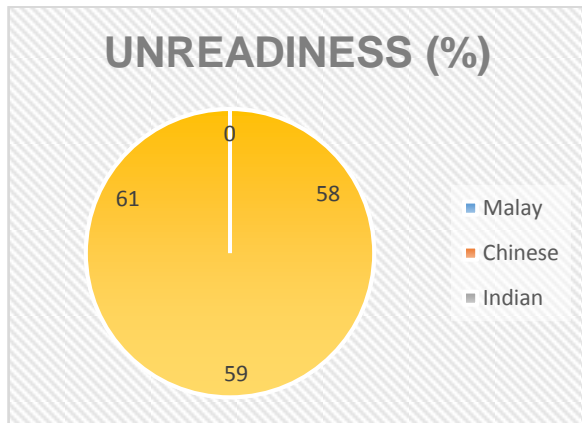


Figure 1. Respondents involved in the survey (Source: Merdeka Centre: Vitoria Brown; The Star Online: 16 July 2014)

LIMITATION OF THE PUNISHMENTS

Islamic criminal jurisprudence demands two compulsory conditions before the punishments is implemented. The first condition is there must be confession by four men eye witnesses. The confession must be a voluntary confession without any element of duress or fraud. This element of duress will eliminate the confession.

Secondly, it is the burden of the court to establish the fact through investigation of all confessions that there was actual penetration of the penis into the vagina. Islamic law maintains that the four eye witnesses must confirm bodily observation of the actual intercourse directly [31]. It is supported by Quranic verse under Surah An-Nisa', verse 4 "And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient".

The number of witnesses required by Islamic law is determined case by case. Generally, the testimony of a sole person is not sufficient to prove a fact, except for the appearance of the new moon in the month of Ramadhan. Adultery, however, has to be proven by four men witnesses and, unlike other cases, proof is required from two men witnesses or one man and two women witnesses. Witnesses are free from bias and prejudice [32].

Punishments also depend on the circumstances of the offender. The Prophet Muhammad saw said that three types of persons whereby his/her action did not take into consideration are the sleeping person until he/she awake, a boy until he reached puberty and an insane till he/her sane [33]. The child who has not reach the puberty, he remains a child and his/her actions are not accountable including criminal liability, according to above said Hadith. It means that once the Muslim attained puberty, his/her actions are fully liable (*mukallaf*), including criminal liability [34].

State power governs almost all offences regarding Islamic criminal law, even though the States' powers are also limited regarding the *Hudud* offences. Hence, the State authorities have formed six divisions of Islamic offences. One of them is offense interconnected to sex such as adultery, close proximity or *khalwat*, and prostitution. Adultery and wine drinking are the two *hudud* crimes which have been comprised in the States' Enactments. Some States includes apostasy as one of the offenses in their Enactments. However, similar to apostasy, the punishment for zina is only *takzir*, and not hudud punishments. The Muslim Courts (Criminal Jurisdiction) Act 1965, only

empowers the Islamic courts to impose maximum punishments which are imprisonment up to 3 years; fine up to RM5000; and whipping up to six lashes. This power is equivalent to the power of magistrates in civil courts [35].

The Syariah Criminal Code 1985 of the State of Kelantan mentioned that anybody who commits the offense of zina shall be punished according to Islamic law. If the person commits illegal intercourse, but punishment of *hudud* for zina cannot be executed or evidence was not able to be obtained, he shall be liable to the *takzir* punishment that are fine not exceeding RM5000 or imprisonment not exceeding three years, or whipping not exceeding six lashes or combination of such punishments.

Even if the adultery or zina could be convicted and proved, the lack of power of State to implement *Hudud* punishment leads to failure of attainment the main objective of *Hudud* itself. Moreover, if the allegation of adultery is lack of evidence, the case could be charged under close proximity or *khalwat*. When a man and a woman who are not *mahram* (those who can marry one another) are together in any private and suspicious place under circumstances that may give rise to suspicion that they might engage in dishonest activity, then it can be constituted as *khalwat*.

This has led to the accusation that the law pertaining to *khalwat* is an attempt to invade privacy and personal freedom. Then, it is also referring to a specific action involving two or more *ajnanis* (people without a blood relationship) being together in a private and suspicious place with intention to commit a sexual offence [36]. The Muslim jurists later made it an offence which could be punished under *takzir* when two *ajnanis* were together in a close and secluded environment in a suspicious manner [37].

For the purpose of *khalwat* discussion, the provision in Selangor will be used. The section explained the situation where *khalwat* can happen which is any man who is found together with one or more women, who are not his wife or *mahram*, or woman who is found together with one or more man, who are not her husband or *mahram*, in any secluded and private place which may give rise to suspicion that they were engaged in dishonest acts shall be guilty of an offence of *khalwat* and shall be liable to a fine not exceeding three thousand ringgit or to imprisonment not exceeding two years or combination of both. The punishments seem as lessen than adultery under State's power [38].

CONCLUSION

The main objective of Islamic criminal law is to protect society from the criminals and give lesson to others not to repeat the crimes, not to merely punish or revenge the offender. Society must be protected from the activities of criminals and delinquents. Life of society must be peaceful and empty from insecurity. The severe punishments of Islamic penal system is aimed at discouraging criminal behavior and protect the objectives of Shari'ah. [39]

Obviously, Islamic criminal law only punishes the offender when there is no chance of giving lessening from any angle. If any aspect of offender's life or circumstances like state of crime, financial situation of offender, his mental and physical condition, cultural background, social and economic conditions demands lessening then it is the specialty of Islamic law to eliminate or lessen the punishment while keeping offender's conditions into considerations.

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