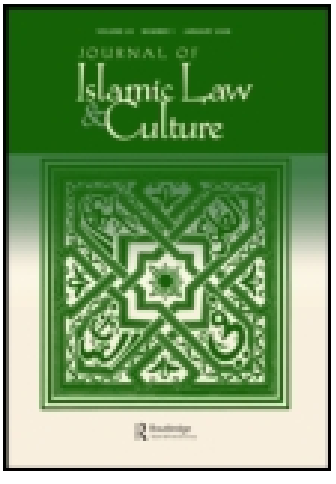

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Discourse on Hudud in Malaysia: addressing the missing dimension

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Discourse on *Hudud* in Malaysia: addressing the missing dimension

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Much has been written on the issue of applicability of *hudud* law in Malaysia. But, by and large, the discourse revolves around its feasibility or otherwise in the context of the existing legal framework at the behest of local academia as well as politician. Little attention has been paid to the question of the type and model of *hudud* that is going to be codified. This study argues that the discourse on *hudud* would not be complete unless hard questions surrounding its substance and practical procedures are judiciously disposed.

Keywords: hudud; rethinking; missing; dimension; Malaysia

Introduction

Implementation of Islamic criminal law[1] particularly of the *hudud* at present time, beyond its politics,[2] raises numerous juridical problems of substantive law, procedure and evidence. Its recent practice by some countries has been viewed as premature and arbitrary[3] on these accounts. When debating such possibilities in Malaysia[4], the

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[1]Islamic criminal law refers to Islamic penal system which subsumes three broad categories of crime, namely *hudud* (crime punishable with fixed penalties), *qisas* and *diyah* for homicide and injuries and *ta'zir* (discretionary punishments determinable by the state legislation for other offences). In this paper we only address contemporary missing dimension in the discourse on *hudud*- which by and large is regarded as a faint voice in the on-going debate on the implementation of *hudud* in Malaysia.

[2]The attempts at implementation of Islamic criminal law in countries which have followed the path of Islamization in the recent past has been greatly viewed as political rather than a sincere endavour at casting aside the colonial based law in countries like Pakistan and Sudan. In the local scene, namely Malaysia literature abound in dubbing PAS's failed attempt to introduce the so called *hudud* law at 1993 as a political ploy to fish for Malay electorates' votes. Nevertheless for the purpose of this study we do not intend to dwell into such political point. For details see, J Chinyong Liew, 'Political Islam in Malaysia', in *Islamic Legitimacy in a Plural Asia*, A Reid and M Gilsenan (eds) (London and New York, Routledge 2007) 167–185; G Fealy, 'Islamization and Politics in Southeast Asia', in *Islam in World Politics*, N Lahoud and A H. Johns (eds) (London and New York, Routledge 2005) 156–161; A Azra, 'Pluralism, Co-existence and Religious Harmony in South East Asia', in *Contemporary Islam*, Abdul Aziz Said *et al* (eds) (London and New York, Routledge 2006) 227–241.

[3]A Ahmed an-Na'im, *Toward an Islamic Reformation* (New York, Syracuse University Press 1990) 101.

[4]It is to be noted that reform discussion outside Malaysia also does not follow somewhat an informed approach as the initiators try to make an issue out of some already settled issues in Islamic jurisprudence. For instance, Na'im as one the chief proponents of reform in Islamic

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approaches seem to have been more legalistic than jurisprudential. To me this is a dimension which needs to be thrashed out if we are desirous of sensible application of such laws in Malaysia. To this end, this paper after offering an over view of the legal discourse on the issues, attempts to point to some serious juridical questions under the subheading of rethinking *hudud* issues with the purpose of stimulating enlightened discussion of *hudud* in the country.

Hudud discourse in retrospect

Implementation of *hudud* as part of Islamic criminal law, besides being a part of the agenda of Muslim revivalist movements world over, is considered as an expression of reassertion of Muslims towards reinstatement of a law which they believe to have been their governing law in Malaysia- before its replacement with Western laws.[5]

Historically the legal systems prevalent at different phases of the Malaysian history before the coming of the European powers were the aboriginal laws, ancient customary laws and the Islamic law.[6] Before the coming of Islam, the primitive tribes of Negritoes, Senis and Proto-Malays, who lived in the interior and coastal jungle of Peninsular Malaysia had their own sets of rules in dealing with the crime of killing.[7] For instance, Negretoes punished the murderer with fine, Senoi imposed death penalty on the murderer, the execution of which was carried out by the victim's relative, if possible with the very weapon which was used in the crime, proto-Malays' laws varied on this aspect which included capital punishment for murderer or fine of 60 Saucers which no one was likely to possess at that time.[8]

At later stages, in West Malaysia, there were two sets of customary laws, namely, *adat Perpateh*[9] and *adat Temanggong*,[10] each having their own distinct criminal systems. According to the former customary law the murderer was required to substitute one of his members for the victim or to pay the blood money, while retaliation was the characteristic feature of criminal policy in *adat Temanggong.*[11]

penal unnecessarily debate the issue of equality of *diyah* for women and non-Muslims. These issues were long before debated and settled by Hanafi's egalitarian interpretation. See Ibid 116. Alternative interpretation in the classical fiqh contains to numerous issues we raise today. But it is the bigoted adherence to a particular school which has put Islamic law in bad light. This point was well-appreciated by Prof. Shad who, among others, said: "Issues of apostasy and imposition of penalties like cutting of hands and stoning of death for *hudud* offences poses severe problems for a modern and just theory of Islamic criminal law. It is submitted that in this area juristic opinions and interpretations are available to reconcile the sacred injunctions with secular understanding of justice and proportionality." See S Saleem Faruqi, *Islam, International Law and the War Against Terrorism* (Shah Alam: University Pulication Centre 2006) 26.

[5]S Hamid Albar, *The Syariah and the Syariah Courts in Malaysia* 18. See also, W Arfah Hamzah and R Bulan*, An Introduction to the Malaysian Legal System* (Selangor: Penerbit Fajar Bakti Sdn Bhd, 2006) 134.

[6]A Ibrahim and A Jonad, *The Malaysian legal system*, (Malaysia: Dewan Bahasa dan Pustaka Kementerian Pendidkar 1995) 30–31.

[7]Ibid. 10.

[8]Ibid. 11–12.

[9]*Adat Perpateh* refers to those democratic matriarchal *adat* laws which were brought to Negri Sembilan from Minangkabau by Minang-Kabau settlers. See Ibid. 30.

[10]*Adat Temanggong* refers to the autocratic patriarchal *adat* law which prevailed in other parts of the Peninsula. It is believed to have its origin in matriarchal Minangkabau but was so altered under Hindu influence as to lose a great deal of its matriarchal elements. See Ibid. 30–31.

[11]Ibid. 33.

In the early fifteen century,[12] Islam began to spread and permeated into the Malay communities and transformed them – societies divided along the loyalties to the chief of the tribes, to one of the Malay *ummah*. It affected revolutionary changes in all aspects of the Malay life and marked, "the inauguration of a new period in Malay history."[13] Thus, legal sphere was an important aspect which was set to be shaped and patterned after the immutable principles of the Shariah.

Various Legal Digests are among the cogent evidences which establish the fact that every attempt was made to adopt the Islamic principles and modify the customary laws to make them conform to Islamic law. Particularly, the *undang undang* Melaka[14] (Malacca Law) is a legal document which has triggered the process of Islamisation of laws. It, among other things, contains provisions which set out the punishment for homicide as provided for by both Islamic law and the Malay Customary Law.[15] For instance, its Section 39 details the rules governing *qisas.*[16] This model was followed by other states like Pahang (S. 46–47 dealing with *qisas)*, Terengganu and Johor.[17]

Accordingly, there is ample historical evidence to assume that the Islamic law was the applicable law in Malaya before the coming of the colonialists. This fact was judicially acknowledged by the British Judges presiding the courts in Malaya. For instance, the Court of Appeal of the Federated Malay States in Ramah .v. Laton,[18] held:

> Muslim Law is not foreign law but local law and the law of the land. The court must take judicial notice of it and must propound the law.

It emerges, therefore, that the applicable law in Malaysia prior to the introduction of the English Legal system was an amalgam of Islamic and customary law.

However, with the arrival of British, the applicable Islamic penal law was replaced with the Penal Code 1976 (Revised – 1977) Act 574. The Penal Code retrospectively was formally received in Penang and Malacca,[19] by virtue of Charter of Justices entered into between the Malay rulers and the East Indian Company on behalf of the Crown in 1807 and 1824 respectively.[20] Then it was introduced in Perak by Order in Council of

[12]Ibid. 34. See also H Jusoh, *The Position of Islamic Law in the Malaysian Constitution with Special Reference to the Conversion Cases in Family Law*, (Kuala Lumpur: Dewan Bahasa dan Pustaka Kementerian Pendidikar Malaysia 1991) 1; W Min Aun, *An introduction to the Malaysian Legal Systems*, Revised 3rd ed. (Kuala Lumpur: Heinemann Malaysia 1986) 1.

[13]S Muhammad al-Naquib al-Attas, *Islam and Secularism* (Kuala Lumpur, Muslim Youth Movement of Malaysia 1978) 171.

[14]Ibrahim, *The Malaysian legal system*, 43.

[15]Jusoh, 'The Position of Islamic Law', 2–3.

[16]Ibrahim, *The Malaysian legal system*, 44.

[17]Jusoh, 'The Position of Islamic Law', 6–11.

[18](1927) 6 FMSLR 128 at p. 129. Identical opinion was expressed by Edmond, JC in the leading case of *Shaikh Abdul Latif and others .v. Shaikh Elias Bux* (1915) 1 FMSLR 204 at p. 214.

[19]The English Law was introduced in Malaysia mainly in two ways: (I) judicial decision as the courts were manned by judges trained in England; (II) statutory reception. See Ahmad Ibrahim, *The Malaysian Legal System*, 59–70.

[20]The States of Penang and Malacca together with Singapore were British colonies under an arrangement called the strait settlements. See A Ibrahim, *The Malaysian Legal System*, 63; W Min Aun, *An introduction to the Malaysian Legal Systems*, 9–10.

28 June, 1884, then to the Federated Malay States[21] in 1936[22], to Sarawak in 1949[23] and finally to the Unfederated Malay States[24] and Sabah in 1951.

Per Tun Salleh Abbas, LP in the course of historical exegesis of the declining fortune of Islam and Islamic state also in the leading case of *Che Omar bin Che Soh .V. Public Prosecutor*,[25] lamented by saying that it was under the so-called British advice and legislation whereby the religion of Islam suffered the most, particularly its public law was made mere an appendix to the rulers' sovereignty.

Time – variation in the introduction of the British legal system generally and its Penal system in particular indicates the gradual penetration, entrenchment and consolidation of the English values and principles in the various states of the contemporary Malaysia. At any rate, the Penal Code as it stands today was given the executive force by virtue of the Civil Law Act, 1956, (Revised – 1972) which had the effect of repealing all the penal codes in operation in various states.[26]

The Civil Law Act is a landmark legal document which, among other things, gives the authority for perpetual application of the English based legal principles as incorporated and embodied in Statues like, the Penal Code, Criminal Procedure Code[27] (Amendment and Extension) Act, 1976 and Evidence Act,[28] 1950 (Act 56).

Re-applicability of *hudud* : prospects and options

Legal academia are divided on the feasibility of applying *hudud* in the present legal scenario.

The vast majority[29] believe that it is possible to apply *hudud* within the existing national legal framework provided certain laws especially of the Federal constitution is amended. The reason is that although the Malaysian Constitution declares Islam as the "religion of federation",[30] its executive force is still weak. Mainly because the administration of its precepts are made the "State Matter"[31] and its laws are not included in the definition of "law" under Article 160 of the Constitution.

The further complication is that the Constitution as the supreme law of the country stipulates that any law passed after the Merdeka (Independence) day which is inconsistent with the Constitution to be invalid.

[21]The Federated Malay States as constituted were Perak, Selangor, Pahang and Negeri Sembilan at that time. See A Ibrahim, *The Malaysian legal system*, 60.
[22]Ibid. 22–23.
[23]Ibid. 25.
[24]Unfederated Malay States were Johor, Terengganu, Kelantan, Kedah and Perlis. See W Min Aun, 'An introduction to the Malaysian legal systems', l2.
[25](1988) 2 MLJ 55 at 58.
[26]According to S. 3(1) (b) and (c) of the Civil Law Act, 1956, the principles of English Law was made applicable in West Malaysia as administered in England on the 7th day of April, 1956; in the case of Sabah as in force in England on the 1st day of December, 1951 and in Sarawak as applied in England on the 12th day of December, 1949. See Civil Law Act, 1956.
[27]Criminal Procedure Code as it stands today was first received and adopted by Federated Malay States in 1900. See A Ibrahim, *The Malaysian legal system*, 22.
[28]Evidence Act as it is today was first introduced in Selangor in 1893. See Ibid. 23.
[29]Here we are not concerned with the divisive issue of establishing Islamic state as a pre-requisite for such an agenda which was debated in Malaysia before 29 September 2001 when Tun Dr. Mahathir declared that Malaysia "was already an Islamic State" to pre-empt a key political objective of PAS. Pass also seem to have abandoned that idea as a pre-condition since 1993 when it enacted Syariah Criminal Code Bill which failed to become a law. See Liew, 'Political Islam in Malaysia', 172–173.
[30]Federal Constitution 1997, Article 3 (1) as incorporated all amendments up to 1 March 1997.
[31]Ibid., Ninth Schedule, List II.

Nevertheless, Prof. Ahmad Ibrahim proposes that these provisions, if positively viewed do not create any obstacles on the way of application of Islamic Law. As to the position of Islam in Article 3, he argues:

> This article surely gives a special position to Islam. It is up to us to see that it is given a proper meaning to enable the Muslims in Malaysia to lead their lives in accordance with the teachings of Islam just as other religious communities have shown that they are allowed to follow the practices and ceremonies of their particular religion. In fact, they do not wish their way of life to be affected and would not agree that Islamic Law be applied to them. Similarly, Muslims should argue that they are entitled under Article 3 (1) to lead their way of life according to the teachings of Islam. If they wish to follow the Islamic Law and not the English Common Law, they should be allowed to do so.[32]

Justice Minister, Syed Hamid Albar expresses similar opinion in maintaining that we should give meaning to the phrase "religion of federation," in the same way we give meaning to "Malay as the national language." To him the drafters of the Constitution by inserting this provision never intended it to be for cosmetic purposes but its Laws (Shariah) ought not to be treated as a State Matter.[33]

Prof. Ahmad Ibrahim further argues that Islamic Law is already recognized as law in the Constitution in the Ninth Schedule, List II of the Constitution. He also points out that the position of Constitution as the supreme law of the country does not affect the position of Islamic Law since it is neither a written law nor passed after Merdeka though it may affect the legislation relating to its administration.[34]

Prof. Muhammmad Imam in his constitutional construction of the Islamic provisions of the Malaysian Constitution has adopted a new perspective about the position of Islam therein. He, among other things, argues that Article 3 read together with Article 11 of the Constitution affirms the rights of Muslim to expect the structuring of their life in all aspects based on the injunctions of the Qur'an and Sunnah. And Article 3 imposes a positive obligation on the Federation to enable Muslims to follow their religion as a way of life.[35]

Therefore, by adopting a positive approach to the problematic provisions in the Constitution and giving meaning to the special position of religion in the Constitution, the Muslims in Malaysia can safely argue for enactment of any laws to enable them to order their lives according to the percepts of their faith.

The advocates of *hudud* however, propose two approaches in pursuing this agenda: 1) full-scale adoption of Islamic Law by re-enacting an Islamic based penal code as was the case with Hudud law of Pakistan and Iran; 2) Islamization of the existing penal code by removing its repugnancies with the Shari'ah.

The procedure according to the first group is that considering the dual systems of justice in operation in the country, the practical way is to amend the State List in the Constitution with the view of increasing the State jurisdiction to legislate laws

[32]A Ibrahim, 'The Principles of an Islamic Constitution and the Constitution of Malaysia', (1989) 1 *IIUM Law Journal*, 2, 7.
[33]D Syed Hamid Albar, *The Syariah and Syariah Courts in Malaysia*, 32.
[34]Ahmad Ibrahim, *The principles of an Islamic constitution and the constitution of Malaysia*, 8.
[35]Mohammad Imam, *Freedom of religion and making laws Islamic in Malaysia*, A paper read in the Public Lecture Series of the Kulliyyah of Laws, IIUM, 19 October 1993, 48–49.

providing for *hudud*[36] and to repeal section 2 of the Muslim Courts (Criminal Jurisdiction) Act, 1965 as amended in 1984 to remove the jurisdictional limits of the Shariah Courts.[37] Thus enabling the Shariah Courts to apply *qisas* and *diyat* along with other Shariah laws in each state as a matter of State jurisdiction except in the case of Labuan and the Federal Territory where the same could be applied federally.

Alternatively, it is also argued that for the uniform and coherent application of the Islamic Law in various States, the parliament under Article 76 (1) (b) of the Constitution has all the necessary power to make laws[38] and then to be adopted by legislature of each states.

Prominent legal academia, on the other hand, advocate a more enlightened method by amending and repealing the existing laws in order to remove their repugnancy with the Islamic Law with the ultimate aim of creating the Malaysian Common Law – through a planned, systematic and gradual process. This idea was propounded by Justice Minister Sayed Hamid Albar and termed as "infusing Islamic principles and tenets into the main stream law."[39]

Some constitutional lawyers, however do not see this to be possible. For instance, Prof. Shad maintains that constitutionally neither the establishment of a full-fledged Islamic State nor application of *hudud* laws is possible in contemporary Malaysian context. The reason for this is twofold.

Firstly, by constitutional definition Malaysia is not a purely Islamic state. In spite of have both features of a theocratic state and a purely secular state, it is neither of them – contrary to what is popularly believed. It instead is a hybrid system between the two. It is secular in the sense that: first, it has a supreme constitution (article 4); second, any law pre- or post Merdaka violating it would be null and void-article.162(6)(7). It is also Islamic in the sense that it embodies many enabling Islamic features, such as Islam is the official religion of the federation (article 3); it allows pluralism by virtue of the same provision; Rukun Nagara declares faith as the cardinal principles of state-policy; state has jurisdiction to establish Islamic courts [article 121(1)A)]; the rulers must be Muslims and lastly, states enforce Islamic morality.[40]

Second, the current structure of the law makes it impossible to apply *hudud* law because of lack of consensus among the members of parliament on the issue to effect the large scale constitutional amendments needed to the effect: first, no constitutional amendment is possible on state list unless agreed by 2/3 majority and consented by the rulers and governors of Sabah and Sarawak; second, serious crimes are within the Federal list and governed by Malaysian Penal code so you need parliament decision and 2/3 majority to alter the status quo and finally, the power to enforce such laws also vests with the parliament since the police is a federal force and not subject to state –executive.[41]

[36]A Ibrahim, 'Recent developments in the Shariah law in Malaysia', in A Monir Yaaqob (ed) Undang-undang keterangan dan prosedur di mahkamah, (Kulal Lumpur, Institut Kefahaman Islam Malaysia 1995) 36.
[37]Federal Constitution, Article 76 (1). See also A Ibrahim, *Suitability of the Islamic Punishment in Malaysia*, 14–15; Dato' Syed Hamid Albar, *The Syariah and the Syariah Courts in Malaysia*, 32.
[38]D' Syed Hamid Albar, *The Syariah and the Syariah Courts in Malaysia*, 33.
[39]Ibid.
[40]S Saleem Faruqi, 'The Malaysian Constitution, the Islamic State and Hudud Laws', in *Islamic in Southeast Asia*, K.S. Nathan and M Hashim Kamali (eds), (Singapore, Institute of Southeast Asian Studies 2005) 266–274.
[41]Ibid. 265.

In a nutshell, the thorny issue of feasibility or otherwise of *hudud* spurs serious constitutional debate which would only be laid to rest once two third majority of the members of the parliament in session agree on constitutional amendments as proposed by Shad. Assuming that once this is forthcoming, the most serious question is: what standard of *hudud* would Malaysia apply? To us this is a missing dimension which though has been raised by marginal voices still needs serious deliberation.

Rethinking of issues at stake

As we noted that the chief preoccupation of discussant on *hudud* has been the legal feasibility of its application in pluralistic Malaysia. By default one would assume that they may be favoring the model of Pakistan, Iran and Sudan either by having a full-fledged *hudud* statute derived from classical *fiqh* or a symbiosis of Islamic law and Penal code where the provision of classical *fiqh* representing the former will be inserted into the existing penal code side by side with the provisions of the latter in the event of the repugnancy of the latter with the former. Attempts and proposal made locally enhance this impression. For instance, Syariah Criminal Code(II) Bill 1993 of the State of Kelantan[42] is an example of the first model and some theses written in the local university propose the second[43]. Both the models codify the classical *fiqh* especially of the Shafii version without addressing fundamental issues which we highlight below.

Why rethinking?

As to why modern debate over application of *hudud* should concern itself with the question of amenability of *hudud* to rethinking, the reason is twofold: peculiar penological justification of *hudud* and the rudimentary but complex nature of their practical application requirements.

An the penological level, once an offence is classified as *hadd*[44], to Muslims they become part of religious imperatives which has to be believed and held as good enough to serve the penal philosophy of retribution, deterrence and reformation. This though sounds literalists but *hudud ipso facto* are mandatory laws. Hence, from the religious point of view, their legitimacy of application does not depend on their efficacy in eradication of such serious crimes. They derive their writ from the fact that they are divine ordinances.[45]

On the application side, the juristic approaches on their *modus operandi*, by and large, have been segmental. The reason is that classical *fiqh*, plus their wholesale reproduction in the form of modern Islamic legal texts, deal with Islamic criminal law based

[42]This draft which never became law, on constitutional grounds, has been criticized by Shah as representing the arch-conservative interpretation of Islamic law, obviously because it is remodeled after Hudud and Qisas law of Pakistan and Iran. See Faruqi, ibid. 266. See also 'Syariah Criminal Code (II) Bill 1993 of the State of Kelantan' in *The Islamic Criminal Laws* (Kuala Lumpur, IIUM 2004) 150–174.

[43]See S Ahmad S A Alsaguff, *al-Diyyah as Compensation for Homicide-Wounding in Malaysia* (Kuala Lumpur, Research Centre IIUM 2006) 367–405.

[44]*Hadd* (pl.*hudud*), literally means prevention. Juridically, it refers to an offence for which a fixed punishment has been prescribed in the Qur'an or the Sunnah. See M S El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis, American Trust publications 1982) 48.

[45]Al-Na'im, Ibid.112–114. see also G Fenly and V Hooker (eds), *Voices of Islam in Southeast Asia* (Singapore, Institute of South East Asian Studies 2006) 164–165.

on separate category approach, i.e., delineate general and specific requirement of *hudud*, *qisas* and *ta'zir* disjointedly. These haphazard doctrines and views if not modernized, updated and synthesized, would hardly serve the cause of criminal justice in the contemporary setting.

Hence, any implementation of Islamic *hudud* laws in modern time without undertaking some substantial revision of their popular *fiqh*[46] would be simplistic and short of addressing the problem of crime and criminality.[47] Sensing this, al-Qaradawi said: "Shari'ah has to be re-invigorated in order to be applied in contemporary societies. The reformation has to be conducted in line with the reality *fiqh* and priority *fiqh*."[48] In the pages that follow, we address some most pertinent aspects of *hudud* which according to our believe are somehow downplayed and taken for granted in the discourse on *hudud* in Malaysia.

1. Number of Invariable *hudud*

According to the prevailing view among the jurists, *hudud* consist of seven and are eternally fixed and unchangeable. This view not only ignores the divergent marginal yet authentic voices among the jurists outside the four *sunni* schools but it also turns a blind eye in the existence of such divergence among these four schools themselves. For instance, *hudud* consists of six crimes according to Hanafiyyah, eight as maintained by Shafiiyyah and Hanabilah and 13 as maintained by Malikiyyah but seven as viewed by some contemporaries like "Awdah"[49] which is followed by countries like Pakistan and remodeled by proponents of *hudud* in other countries like Malaysia.

Reform minded scholars,[50] on the other hand, disagreed by maintaining that *hudud* offences are of two categories: disputed and undisputed. The undisputed cases of *hudud*

[46]For instance, Dr. Khoo Boo Teong said: "Unless the orthodox shari'ah reformed, the treatment of non-Muslims always be a major stumbling block in enabling Shari'ah to be consonant with the definition of the rule of law in the 21st century." See ibid. 67.

[47]For instance, Numayray's application of Penal Code 1983, was regarded as a failure on many grounds including: first, it did not curb the theft and robbery as it was applied in time of severe economic difficulty; second, wine drinkers who mostly were nominal Muslims were not educated first before enforcing the law against them, and lastly Non-Muslims who did not subscribe to the religious rationale of Islamic punishment were made subject to it. See ibid. 131–133. This was said to be discriminatory against women as well. An example to illustrate this was the case of Sudan Goveenment v. Ahmed Abu San Hamid where the testimony by a single female witness in a case of murder was declared worthless. See SLJ (1988) SC. 150. For more details see, M Khair Hassan El- Rasoul Ahmed, 'Current Development of Sharìah Law in Sudan', in *Islamic Law in the Contemporary World*, (ed) Zainal Azam Abd. Rahman (Kuala Lumpur, IKIM 2003) 43–54.

[48]Quoted in Fenly, *Voices of Islam in Southeast Asia*, 161.

[49]To Hanafiyyah they include: illicit sexual intercourse, false accusation of illicit sex, wine drinking, intoxication, theft including armed robbery and rebellion including apostasy. To Shafiih aside from these, murder is another *hadd* crime. To Malikiyyah aside from these, homicide and wounds, vocal apostasy, blasphemy of God, the prophets and angels, sorcery, intentional omission of prayer and fasting. See Abd al-Jawwad Khalaf, *al-Hudud wa al-Qisas fi al- Fiqh al-Islami* (Cairo, al-Dar al-Dawliyyah li al-Istithmarat al-Thaqafiyyah 2008) 9; Abd al-Qadir' Awdah, *al-Tashri' al-Jina'i al-Islami* (Beirut, Dar al-Fikr al-Arabi, n.d) vol.1 .7.

[50]By reform minded scholars I mean those contemporary jurists who embark on serious rethinking of Islamic religious tenets (*tajdid*) particularly of the Islamic law for the purpose of their thoughtful and enlightened application in the modern time. But this is an agenda which is adamantly opposed by traditionalists, neo-revivalists and conservative trends whose locus lies on universalizing the particulars and eternalizing the historical practices without any due regard

are four in number: theft (*sariqah*), armed robbery (*hirabah*), fornication (*zina* by unmarried man or woman*)*, and unproven accusation of sexual misconduct (*qadhf*). Because they are the only specific crimes (*hudud*) which are fixed by clear and definitive textual proofs of the Qur'an.[51]

Armed rebellion (*baghi*), wine drinking (*shurb al-khamr*), apostasy (*riddah*), and *zina* by unmarried man or woman, are disputed as *hudud.* They, among others, held that armed rebellion resorted by political opponents cannot be regarded as individual private wrong as its primary goal, in the early days, was forceful expression of political dissent against political authority. The Qur'an authorized the political authorities to subdue it if it cannot be peacefully disbanded. Accordingly, since such crimes could not be prosecuted once the rebels stop rebellion, it cannot be regarded as a *hadd* proper as maintained by al-'Awwa[52] and foresaw by Imam Malik when he said:

> If the ruler was a person of credential like 'Umar ibn 'Abd al-'Aziz- iconic for just administration, it would be legitimate to side him when there is rebellion against him. Otherwise it is not. Let the oppressive ruler be deposed by another oppressor and ultimately God would avenge from both.[53]

Thus *baghi* unlike popular belief falls within *ta'zir* (discretionary punishments) category and not an invariable offense.

I believe another dimension to this creative reconstruction of *baghi* is the change of circumstances. The law was valid in the context of the caliphate system which needs its primacy to be jealously guarded against socially destabilizing elements that resorted to such strategy at that time. In the context of democratic nation- states in our time, armed opposition is no more a fashion. Hence, the state has to devise other peaceful means of dealing with political unrest. It is essential to draw between changeable and permanent parts of the law. The classical jurists intelligently took stock of the changes in their time and responded accordingly. Malikiyyah developed rich literature on *nawazil* (emerging problems). Hanafiyyah dealt with dominant and unavoidable issues in pubic practices which were not recommended in Islam (*'umum al-balwa*)[54], to cite a few instances.

Similarly neither the Qur'an nor the Sunnah prescribe any specific punishment for consuming intoxicating drinks. The practice of the Prophet varied from non-punishment to beating the drunk with hands, shoes, clothes and reprimanding. Abu Bakr fixed it at forty lashes and 'Umar re-fixed its amount at 80 lashes. Classical jurists like al-Shawkani regard it as variable crime (punishable by *ta'zir*)[55]- to which

to change in space-time demand of Muslim society and its circumstances. For details see M Sharifi Funk, 'From Dichotomies to Dialogues', in *Contemporary Islam*, Abdul Aziz Said, Mohammed Abu-Nimer and Meena Sharify-Funk (eds) (London and New York, Routledge 2006) 66–67.

[51]See al-Ma'idah: 38; al-Ma'idah: 33–34; al-Nur: 2 and al-Nur: 4–5.

[52]Muhammad Salim al-'Awwa, *al-Fiqh al-Islami fi Tariq al-Tajdid* (Qatar, Jam'iyyat Qatar 1998) 99–100. see also an-Na'im, *Toward an Islamic Reformation.108*. The same author in his another book totally exclude this from the category of hudud. See El-Awa, *Punishment in Islamic Law: A Comparative Study*.1–2.

[53]Muhammad Ibn 'Abd Allah al-Khurashi, *al-Khurashi 'ala Mukhtasar Khalil* (Beirut: Dar al-Fikr, n.d), vol.5.302.

[54]F Osman, *Sharia in Contemporary Society* (Los Angeles, Multimedia Vera International 1994) 71.

[55]M Ibn 'Ali al-Shawkani, *Nayl al-Awtar* (Beirut, Dar al-Jalil 1973), vol.7.156.

modern thinkers like al-'Awwah and Na'im concur.[56] Accordingly, *shrub al-khmar*, in my opinion, as an indictable crime in contemporary time can be given a certain type of fitting punishment which penologically can curb its addiction among Muslims.

On the same token, unlike majority of the jurists who base their view on Sunnah[57] and assertion of *ijma'*[58], some classical Sunni jurists like al-Baji[59], al-Thawri,Ibn Taymiyyah, Khawarij and Mu'tazilah[60] do not regard apostasy among the *hadd* crimes. They, among others, reasoned that: first, although the Qur'an condemns apostasy in the strongest term[61], it does not lay down any specific worldly punishment for it; second, the *ahadith* specifying its punishment are solitary reports which methodologically cannot particularize the definitive Qur'anic injunction on "non-compulsion in matter of faith"; third, the *ahadith* about the Prophet's implementations are contradictory[62]; and finally the assertion of *ijma'* on this is not true as even "Umar when asked as to what he would do with six apostates from the tribe of Bani Bakr, had he apprehended them: He retorted: 'I would persuade them to revert back to Islam if they fail to do so I would imprison them.'"[63]

Recently, the jurists affiliated with International Fiqh Academy seem to have concurred that since the claim of *ijma'* cannot be sustained in support of apostasy as a *hadd*, hence this is an area which modern jurists can revisit.[64] For instance, Zaqzuq[65] held that the issue of apostasy is not among the permanently fixed aspect of the law so that it cannot be reopened and reviewed. Al-Najjar[66] concurred with him in holding that this issue by nature is one of the contested issues in Islamic jurisprudence and as such amenable to juristic review and legislative reconstruction in tandem with socio-political requirements of Muslim society.[67] Al-Khashan tended to be more methodological when he proposed that the most explicit *hadith* cited in favor of *hadd* for apostasy, "any one who changes his religion should be killed", does not contain specified mandatory command but elective one as the political leaders may

[56]Al-'Awwa, *al-Fiqh al-Islami fi Tariq al-Tajdid*, 102. See also an-Na'im, *Toward an Islamic Reformation*, 108–109.

[57]The Sunnah evidences are: 1) any one who changes his religion must be killed (you must kill him); 2) it is not lawful to kill a Muslim except if . . . He deserts his religion and secedes from the community; 3) Umm Ruman after refusing to comeback to Islam was punished with death penalty; 4) a man was also given capital sentence on the same ground. See al-Shawkani, *Nayl al-Awtar*, vol.7, 103.

[58]Majority held it as a *hadd* crime liable to capital punishment based on the above evidences from Sunnah and the alleged consensus among the jurists (*ijma').* See al-Shawkani, *Nayl al-Awtar*, vol.7, 216.

[59]Muhammad ibn Muhammad al-Hattab, *Mawahib al-Jalil* (Beirut, Dar al-Fikr, 1978) vol.5. 35.

[60]El-Awa, *Punishment in Islamic Law: A Comparative Study*. 52–54.

[61]Al-Baqarah. 217.

[62]In two cases it is reported that the Prophet punished the apostates but a Beduin who after taking the oath of allegiance renounced Islam, he did not prosecute him. Moreover, the Jews used to tactically embrace Islam and renounce it but the Prophet never penalized them. see Shaikh Husyan al-Khashan, "Uqubat al-Murtad Bayn al-Hadd wa al-Ta'zir", http://www.b-iraq.com/descriptionfrombyynat.php? 4 June 2009, accessed 30 June 2009. See also http://egyig.com/muntada/archive/index.php?t-720.html, accessed 30 June 2009.

[63]Ibid.

[64]The issues was debated during an International conference held in University of al-Shariqah between 26–30 April 2009. see Islam 'Abd al-'Aziz, '*Hadd al-Riddah*', http://mdarik.islamonline.net/servlet/Satellite?c=ArticleA_",27,04,2009, accessed 30 June 2009.

[65]Minister of Awqaf in Egypt, Ibid.

[66]A professor in al-Azhar University. Ibid.

[67]Ibid.

choose to do so as the Prophet did so in two instances and left the apostates alone in so many other instances.

While referring to this rationale, al-Nujaymi, maintained: "Had Prophet's contradictory judgments proven, the apostasy would neither be a *hadd* crime nor *a ta'zir*."[68] This would support Na'im *dicta* who called for decriminalization of apostasy on account of human rights and constitutional objections almost two decades ago.[69]

I believe, decriminalizing apostasy altogether would not only be *ultra virus* of the Sunnah but also tantamounts to condoning treason which is a universally agreed crime against the modern states- irrespective of their ideological specifics. In the Malaysian context, it would confuse the identity of Malays who are constitutionally defined as Muslims. Accordingly, although in view of non-existence of unimpeachable textual proof of highest quality (explicit text of the Qur'an or well-reported Sunnah) apostasy would not be classified as a *hadd* crime, it does not mean it is not indictable. But even by *ta'zir*, it would not be subject to capital punishment unless such apostates wage war against Muslim community as maintained by al-Tantawi.[70] In Malaysia the *ta'zir* punishment for apostasy is one year compulsory rehabilitation.[71]

Lastly, another disputed *hadd* punishment is the penalty of stoning to death (*rajm*) for the offender of adultery who are married (or previously married). Majority held it to be *hadd* (invariable) but Kahwarij and some Mu'tazilah and some contemporary jurists like al-'Awwa, Abu Zahrah, to name a few, regard it as *ta'zir* and thus variable. While majority depended on verbal reports and applied cases from the Sunnah and alleged jurists' consensus on the issue held it to be fixed. But the dissenting view refuted the claim that any *ijma'* has ever occurred. They also regard the *ahadith* on stoning as solitary and thus *zanni* and methodologically not strong enough to particularize the categorical Qur'anic provision which generally declares illicit sex subject to corporal punishment of flogging- without regard to marital status of the offender. This to them is the only principle of jurisprudence which helps to resolve the conflict between the Qur'anic injunction and reports from the Sunnah as the principle of *naskh* (abrogation) cannot be upheld since the companions' reports on the time of their legislation are conflicting.[72]

2. Rethinking of the undisputed *hudud*

The invariable *hudud* also if viewed methodologically, not emotively, in their details are juristic construct, namely the Qur'an penalizes them but the jurist using the Sunnah and *ijtihad* determine and elaborate them. In this process, they have been construed by some restrictively and by others broadly. To Nàim "sound modern policy" favors restrictive view which has the advantage of thwarting their potential abuse by the power would be. For instance, the grammatical construction of the Qur'anic definition of *hirabah*

[68]Al-Khashan, ''Uqubat al-Murtad Bayn al-Hadd wa al-Ta'zir',http://www.b-iraq.com/descriptionfrombyynat.php? 04 June 2009, accessed 30 June 2009.

[69]Al-'Awa after marshalling all the evidences arrived at the same conclusion, see El-Awa, *Punishment in Islamic Law: A Comparative Study*, 50–56. see also An-Na'im, *Toward an Islamic Reformation.*109.

[70]Quoted in Faruqi, 'The Malaysian Constitution, the Islamic State and Hudud Laws'. 262.

[71]See Zainah Anwar, 'Law-making in the Name of Islam: Implication for Democratic Governance', in *Islamic in Southeast Asia*, K.S. Nathan and M Hashim Kamali (eds) (Singapore, Institute of Southeast Asian Studies 2005).131.

[72]See http://egyig.com/muntada/archive/index.php?t-720.html, accessed 30 June 2009. This is regarded as the preferred view by the scholars in Morocco.

restrictively covers cases of violent and forceful taking of defenseless victim's property. This was the Hanafiyyah's position. Broadly however, it covers not only ordinary crime of armed robbery but also a wide range of political crimes, such as armed dissent, infighting between rival factions including non-violent mischief or corruption.[73] Thus by taking a holistic view to juristic legacy the first view resolves such an abuse.

Likewise, I believe that there are competing interpretations on determination of *zina*, qualification of *hirz* in theft and specific terms of *qadhf* which need judicious restrictive choice by modern legislatures when codifying the law of Islamic punishment for today's application.

The choice of sensible position from among the competing interpretations is legitimate as al-Qaradawi proposes: "Today *ijtihad* can be of three types first, selective *ijtihad* involving making methodologically sound selection of one of the opinions in our large jurisprudential legacy of *fatwas* and legal judgments on the basis of their conclusiveness in terms of legal value and evidence consistent with the methodology of juridical prioritization. But with the proviso that such a choice should suit the current requirements and needs of the people in conformity with the objectives of the Sharìah. Second, creative *ijtihad which* involve formulating opinions either on an old or new question. For instance, a host of medical, scientific and financial issues that has no precedents in the past require creative legal deduction from jurists of our time. Lastly, a combination of both creative and selective issues where an old settled point of the law has acquired a new dimension. However, creative *ijtihad* is applied in most cases on new matters."[74]

3. *ta'zir* power of the executive and judicial authorities

The classical *fiqh* stipulates that once evidentiary requirement of *hudud* is not satisfied, they would be commuted to *ta'zir* at the full discretion of the head of state or *qadi* who is his representative. But today if such wide residual power of discretionary *ta'zir* is granted to Muslim rulers and *qadi* and left unregulated may give rise to serious abuses of the law.[75] Reposing such confidence in the Caliph and *qadi* of pre-modern Islam, I believe, cannot hold true in the case of modern day head of states or judges. Classical jurists like Abu Yusuf and al-Shaybani, were aware of such changes in moral fiber of people when they differed with their teacher, Abu Hanifah, in requiring the purgation of witnesses by maintaining that due to changing situations we no longer take it for granted that, "every Muslim is a credible witness before the Islamic court."

Accordingly, with the disappearance of the caliphate system and the emergence of constitutional governments, the head of state and judiciary need to rule in accordance with the rule of law. Thus once the *hudud* and *qisas* offences are dropped and *ta'zir is* warranted, justice demands that its details have to be specifically set out by legislature and not left to the arbitrary decisions by judges or the executive for that matter.

[73]Al-Ma'idah: 33 uses the word wages war and spread corruption on earth, if construed metaphorically covers many crimes of political and economic in nature and if abused would prove oppressive. See ibid.110–111.
[74]Yusuf al-Qaradawi, *al-Ijtihad al- Mu'asir bayn al-Indibat wa al-Infirat* (Cairo, Dar al-Qalam 1994) 24, 37.
[75]Na'im, *Toward an Islamic Reformation*.122.

4. Inadequacy of the law of evidence and procedure

The procedure of investigation, trial and execution of the punishment as delineated by classical jurists have been viewed as "extremely rudimentary and informal."[76] To resolve this, to Na'im, the proponents of total and immediate application of Islamic criminal law have resorted to "anachronic projections of modern principles of criminal justice back into a legal order in which they were completely unknown."[77]

What is needed therefore, we believe, is developing a viable Islamic code of procedure in the light of general principles of the Shari'ah. This, among others, requires: first, methodological revision of traditional *fiqh* so that it can be used as the standard. Second, admissibility of modern scientific means of proof, recognition of psychiatrists finding about the mental state of the accused and a host of other hi-tech means of modern day prosecution techniques of crimes, their discovery and disposal.[78] But to do this again we need to rethink of the issue beyond the parameter of the predominant position in the classical *fiqh* which allows the admissibility of scientific proofs only in property claims, determination of paternity and imposition of *ta'zir*. By and large, it discounts its use in serious crimes of *hudud* and *qisas.* Nevertheless, in another study I have argued for its regulated use in conjunction with other corroborative evidences in all cases based one the broad definition of *bayyinah* as was articulated by some great legal thinkers, like Ibn Qayyim.[79] By doing so we could be contributing to the modernization of procedures in administering justice in the Shari'ah courts.

5. Human rights concerns

Human rights are not merely issues which concern non-Muslim nations. Muslim nation states by virtue of their membership to the United Nation and adoption of two international instruments, namely Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights, are bound to observe them in their domestic law making.[80] This international obligation has been further entrenched with the insertion of a chapter on fundamental liberties in the constitution of most member states which the traditional understanding of *hudud* out rightly contradicts. For instance, the issues like testimony of women and non-Muslims in *hudud*, etc cannot be resolved with reference to the prevailing view among the classical jurists without revision.

Conclusion

The main trend of thought emerging from the above analysis is that discussing the implementation of *hudud* without attempting its renovation raises numerous fundamental constitutional questions than anticipated by lawyers in this country. This in turn requires a large scale constitutional amendments which would not be forthcoming in the present socio-political context of Malaysian society. To top it all, undertaking the necessary renovation of the *hudud* law would also pose more serious hurdles as it

[76]Ibid.105.
[77]Ibid., 106.
[78]Ibid.
[79]See Sayed Sikandar Shah Haneef, 'Modern Means of Proof: Legal Basis for their Accommodation in Islamic Law' (2006) 20 *Arab Law Quarterly* 4 235.
[80]Ibid., p.102.

requires a major paradigmatic shift on the part of its proponents, who by and large consist of hard line conservative segment of the *'Ulama*. Moreover, haphazard harmonization between unrevised *hudud* and the Penal Code as propounded by legal academia would likewise practically lead to the application of Penal Code at the end. This is due to the strict classical evidential requirements of *hudud* which in most cases may not be fulfilled in the context of Malaysian society. All the above coupled with the present unsuitable social conditions[81] for effective application of *hudud* favors the enactment of an Islamic code of punishment based on *ta'zir.* This would fulfill Muslims' desire to be governed by the dictates of their own religious precepts rather than Penal Code. This option is already in operation by virtue of the existing various state Islamic criminal enactments in the country. What is needed, I suppose is bringing all these laws in line with the principle of *tàzir* even for serious offences like *hudud.*

[81]This point has been variously termed by Muslim jurists, such as actualization/creation of conducive social environment (*tahqiq al-manat*) which, among others, require the Islamization of the entire social fabric, its systems and subsystems. 'Umar, the second Caliph, suspended the punishment of theft when people were facing widespread poverty on account of famine.