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THE TRIAL OF ADULTERY CASES IN MALAYSIA

Ahilemah Joned*

INTRODUCTION

In Malaysia, adultery is an offence for Muslims. Although countless Malaysian women have been punished for adultery, most men usually escape conviction for the offence. Adultery trials occur daily in the Malaysian Islamic court calendar, yet many people do not know how the trials are conducted. This is so because the judgments of Islamic courts are not reported. In addition, to date, no scholar has ever attempted to analyze the legality of the law, rules of procedure, and rules of evidence that an Islamic court applies when trying adultery cases.

Part I of this article briefly discusses the Islamic criminal law, the Islamic rules of evidence, and criminal procedure. It also explains the reasons why those Islamic law and rules are not applied strictly in Malaysia.

Part II provides a complete and detailed account of three trials that the author and her colleague observed and recorded verbatim. These trials were held in an Islamic court on November 25, 1982.¹

Part III examines the proceedings of the trials of the cases in Part II. Part III compares and contrasts the law on adultery, the criminal processes, the rules of evidence and the sentencing policies with regard to adultery as an offence under the Islamic law and under the provisions of the "Malaysian Islamic law." The discussion in Part III concludes that

* LL.B., University of Malaya; LL.M., University of London; LL.M. Yale University; Lecturer in Law, University of Malaya.

¹ The informal and ungrammatical English sometimes used in the translation of the proceedings is deliberate. This is so because the author attempts to reflect the informal structureless nature of the original language.

These trials are also exemplary of a trial in other Islamic courts. In this paper the terms "Islamic courts" mean religious courts established by the various legislation of states in Malaysia. The terms "civil courts" mean secular courts established by the Subordinate Courts Act, 1948 and the Courts of Judicature Act, 1964. The terms "Islamic law" mean the pure Islamic law as revealed by the Koran and Sunna. The term "Syaria" means Islamic law.
the Islamic court that tried the three cases did not observe Islamic law and the rules for the trial of adultery cases. In addition, Part III also argues that the procedures followed by the Islamic court in the trials in the cases under study were not in compliance with procedures provided for in criminal trials under Malaysian law. This article concludes that there is a need to improve the quality of the administration of justice in Malaysian Islamic courts when cases concerning adultery are being adjudicated.

PART I: BACKGROUND

A: ADMINISTRATION OF ISLAMIC LAW IN MALAYSIA

Malaysia is a federation comprising thirteen states. The Malaysian Federal Constitution distributes the legislative and executive powers between the Federal authority and the States. Islam is one of the matters in which the States have power to legislate and administer.

Regarding the States' legislative and executive powers to deal with Islamic matters, section 1 of the State List of the Federal Constitution sets out the powers of the States as follows:

Except with respect to the Federal Territory, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianships, gift, partitions and non-charitable trusts, wakafs, Malay custom, zakat, fitrah, bautil-mal, and similar Islamic religious revenues, mosques or any Islamic public place of worship, creation and punishment of offenses by persons professing the religion of Islam against precepts of that religion, except in regard to matters included

2. These are Johore, Kelantin, Malacca, Negri Sembilan, Pahang, Perlis, Perak, Penang, Kedah, Trengganu, Sabah, Sarawak and Selangor.
3. See MALAYSIA FEDERAL CONST. Art. 1 (2) & Art. 74.
4. Although Art. 3 of the Malaysian Federal Constitution provides that Islam is the religion of the Federation, the article also provides that other religions may be practiced in peace and harmony.

Islamic law has limited application in Malaysia. This is so because (i) it is only applicable to Muslims and (ii) it is only applicable in matters of family, inheritance, and certain Islamic offenses. In contrast, matters such as criminal and commercial laws are governed by legislation which adopted or was based on the principles of English law. English law is applicable to such a great extent because of the English colonial legacy and the effect of sections 3 and 5 of the Civil Law Act 1956 (Revised 1972). These sections provide for the importation of English law whenever there is a lacunae in the law.
in the Federal List: the constitution, organization and procedure of Islamic courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offenses except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

With the power so vested, the States have promulgated enactments to regulate the administration of Islamic law. However, the States' enactments on the administration of Islamic law do vary and this prevents uniformity of the law throughout the country. This is so notwithstanding the fact that these enactments are similar in form and substance. Each state's enactment is divided into ten parts and are designated as follows:

(a) Part I - Preliminary
(b) Part II - Constitution of Islamic Council
(c) Part III - Religious Courts-Constution and Jurisdiction
(d) Part IV - Finance
(e) Part V - Mosques
(f) Part VI - Marriage and Divorce
(g) Part VII - Maintenance and Dependents
(h) Part VIII - Converts
(#) Part IX - Offenses
(j) Part X - General

From the titles of the divisions stated above, it can be seen that the States try to include all rules of Islamic matters enumerated in section 1
of the State List. As the result of such ambitious efforts, matters dealt with are not given equitable attention. Most legal rules are touched on but only in general terms. For example, the rules of procedure and evidence are not stated clearly. The unsatisfactory general position of the administration of law in the Islamic courts brought about the establishment of a committee to consider the position, powers and status of the Islamic courts.  

**B: APPLICATION OF ISLAMIC CRIMINAL LAW IN MALAYSIA**

1. Islamic Criminal Law

There are two categories of crime and punishment in Islam: determined crimes and discretionary crimes.

*Determined crimes and penalties* - Determined crimes and their punishments are provided for in the Koran. Under this category, the crimes are further divided into two: crimes of *hudud* and crimes of *quesas*.

The function of *hudud* crimes and punishment is to protect public interests in Muslim society. These crimes are termed *hudud* because their punishments have been irrevocably and permanently specified by God. There are seven *hudud* crimes: (1) theft; (2) banditry; (3) adultery or *zina*; (4) false accusation of adultery; (5) apostasy; (6) wine drinking; (7) rebellion against the legitimate authority.

*Quesas* are crimes of retribution and compensation. Such crimes involve homicide, bodily injury or other forms of harm committed against

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7. Although there are subsidiary rules promulgated under the Enactments, these rules are merely administrative rules concerned mainly with the day-to-day administration of Islam as a religion in the States.  


An attempt was also made to bring the existing Islamic family law into accord with the teachings of Islam. Another committee was set up to draft a model bill for the States to adopt as the administration of the Islamic family law enactment. Some States have adopted the bill, but although the original intention was to have uniformity of the law in this regard, this has not, unfortunately been possible. Some States refused to base their enactments on the model bill and have their own variation.  

9. The words adultery, *zina*, unlawful intercourse and illicit intercourse mean the same thing, namely illegal sexual intercourse between a man and a woman. Islam only permits sexual intercourse between a man and a woman who are legally married to each other; outside this relationship the sexual intercourse is illegal. The author is not able to select only one term to use for the purpose of this paper because of the different terms used by the laws and commentators cited.
the physical security of the person. They are called crimes of retribution or compensation because the punishment imposed is either retributive penalty equivalent to the injury inflicted on the victim, or it takes the form of pecuniary compensation for the victim’s injuries and is imposed only if retribution is not executable or the victim waives his right to demand it. Similar to hudud, provisions for quesas offenses and penalties are found in the Koran and the Sunna.\textsuperscript{10}

**Discretionary crimes and penalties or taazir offenses.**

This category of crimes encompasses all offenses which the Koran or the Sunna do not prescribe. The creation of the offenses and the punishments for them proceed, instead from the discretionary authority of the sovereign as delegated to the judge.\textsuperscript{11} The purpose of the infliction of taazir penalties is to correct, rehabilitate, or chastise the convicted person.\textsuperscript{12}

2. Application of Islamic Criminal Law in Malaysia

The above described Islamic crimes have limited application in Malaysia. The legislative power of the State to create Islamic offenses is limited by the Federal Constitution to those which have not been included in the Federal List.\textsuperscript{13} Most quesas crimes such as murder, theft and other offenses related to bodily harm are not provided for in the States’ Enactments since they are already provided for in the federal Penal Code.\textsuperscript{14} Therefore, since the States’ powers are limited, the State authorities have created six categories of Islamic offenses. The offenses are:

(a) matrimonial offenses such as cruelty to wives and disobedience to husbands;
(b) offenses relating to sex such as adultery, close proximity or khalwat, and prostitution;
(c) offenses relating to consumption of intoxicating liquor such as its...

\textsuperscript{10} Islamic law is regarded as a divine law with the Koran as a primary source and the Sunna (the sayings and the acts of Muhammad) as the secondary source. The Sunna are used to interpret and to fill up the lacuna of the Koran. The ijma (consensus of the community) and gisas (individual reasoning) are considered to be the third and the fourth, respectively, sources of Islamic law. Islamic law has been accepted to be immutable. See e.g. Muhammad Salim al Awwa, *The Basis of Islamic Penal Legislation*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 127-28 (Bassiouni ed. 1982) [hereinafter cited as “Awwa”].

\textsuperscript{11} Ghaouti Benmelha, *Taazir Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 212 (Bassiouni ed. 1982) [hereinafter cited as Benmelha].

\textsuperscript{12} Id.

\textsuperscript{13} MALAYSIA FEDERAL CONST. State List, Ninth Schedule, at 1.

\textsuperscript{14} FMS. Chapter 45. Penal Code is a federal statute and it applies to all: non-Muslims and Muslims.
sale and purchase;
(d) offenses relating to conversion of religion such as failure to report and register conversion; and
(e) miscellaneous offenses not provided under any of the above categories.

Adultery and wine drinking are the two *hudud* crimes which have been included in the States' Enactments.\(^5\) Other offenses belong to the category of *taazir* offenses. Although the Islamic courts can try the two *hudud* crimes, these courts are not empowered to impose the *hudud* penalties prescribed by the Koran and the *Sunna*. This is so because, under the Federal Constitution, the jurisdiction of the Islamic courts to impose sentences for the offenses triable by them is only that which is conferred by the federal law.\(^6\) A federal statute, the Muslim Courts (Criminal Jurisdiction) Act 1965, only authorizes the Islamic courts to impose these maximum punishments:

- (a) imprisonment up to 3 years;
- (b) fine up to $5,000; and
- (c) whipping up to six strokes.\(^7\)

**C: APPLICATION OF ISLAMIC RULES OF EVIDENCE**

1. Islamic Rules of Evidence

The fundamental principle in the Islamic law of evidence is that the accused is to be presumed innocent. Thus, the prosecution and the accuser have the burden of proof to show guilt.\(^8\) These rules are revealed in the following verse of the Koran:

> And those who produce not your witnesses to support their allegation flog them with eighty stripes.\(^9\)

Two *Sunna* further clarify this verse:

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15. Some States have apostasy as one of the offenses in their Enactments. However, similar to *zina*, the punishment for apostasy is only *taazir*. *See, for example*, the Administration of Muslim Law of the State of Perak, 153.
17. Prior to the amendment of this Act in 1984, the maximum punishments that the Islamic courts could impose were six months' imprisonment or a fine of $1,000.00. *See Act 612/84*.
(a) If men were to be granted what they claim, some will claim wealth and lives of others. The burden of proof is on the proponent; and oath is incumbent on him who denies. 
(b) Your evidence or his oath.20

Based on the above authorities, Islamic criminal evidence must essentially consist of testimony of witnesses and confession. In addition, according to some schools, evidence may also consist of presumption.21

Testimony

Testimony of witnesses is sufficient to prove a fact if the conditions prescribed by Islamic law regarding the number, status and quality of witnesses are observed. Briefly, the requirements are as follows:

(a) Number of witnesses- The number of witnesses required under Islamic law depends on the case. Generally the testimony of a single person is not enough to prove a fact, except the appearance of the new moon in the month of Ramadhan. Adultery, however, has to be proven by four male witnesses and, in other cases, proof is required from two male witnesses or one male and two female witnesses.
(b) Status of witnesses - Witnesses must be free from bias and prejudice. The adverse deposition of any enemy is not admissible, but the favorable deposition of such an enemy is admissible.
(c) Quality of witnesses - A witness is required to be free from slavery, an adult, sane, a Muslim, of irreproachable and serious character and not liable to suspicion22

Confession

A confession is admissible if the confessor is adult, sane, mature and capable of self-expression. By maturity, the law has been interpreted to mean that the accused must be able to understand what is being admitted and the legal consequences of such admission. The confessor must also:

(a) confess with a free and conscious will; and
(b) confess to the crime in unequivocal, clear and explicit words.

With regard to the forum, generally the law requires that the confession be heard in and during a legal hearing. However, the major Islamic

20. As quoted by Salama, supra note 18, at 110.
21. See infra, note 23 and the accompanying text.
22. Ahmad Ibrahim, Islamic Law In Malaya 367-73 (1965); See also, Salama, supra, note 18, at 116.
schools of law, *Maliki*, *Shafii* and *Hanbali*, all accept confession made outside court if the confession is witnessed by two persons.\(^2\)

**Presumption**

The admissibility of a presumption in evidence is controversial. The *Shafii* and *Hanbali* schools reject the use of presumption in *hudud* cases.\(^3\)

2. Application of Islamic Rules of Evidence In Malaysia

The Islamic courts in Malaysia are required to apply the Islamic rules of evidence. This is so because States' Enactments have a provision as follows:

The Court shall observe all provisions of Muslim law relating to the number, status or quality of witnesses or evidence required to prove any fact. Save as aforesaid, the Court shall have regard to the law of evidence for the time being in force in the State, and shall be guided by the principles thereof, but shall not be obliged to apply the same strictly.\(^2\)

**D: APPLICATION OF ISLAMIC RULES OF CRIMINAL PROCEDURE**

1. Islamic Rules of Criminal Procedure

Although the Koran and *Sunna* define most crimes and provide for the corresponding punishments, and, to a certain extent rules of evidence,

\(^2\) The Muslims are broadly divided into two main groups: the Shia and the Sunni. The Sunni is further divided in four major schools of law:

*Hanafi*: The founder of the school was Abu Hanifa, who undertook to create precedents by analogy with decisions of the first four caliph. Its followers are mainly found in Central Asia, northern India, Turkey, as well as Pakistan and China.

*Shafii*: The founder was al Shafii. Its followers are centered in southern Egypt, Indonesia, and Malaysia.

*Maliki*: The founder was Malik Ibn Anas. Its teachings are confined to the Sunna. The school's main followers can be found in North Africa and Northern Egypt.

*Hanbali*: The founder was Abu Hanbal. This school is characterized by a strong puritanical tendency.

\(^3\) See, e.g., Selangor Administration of Muslim Law Enactment, 1952, § 53; Kelantan Council of Religion and Malay Custom Enactment, § 57; Trengganu Administration of Muslim Law Enactment, 1955, § 33; Pahang Administration of Muslim Law Enactment 1956, § 46.
these authorities fail to provide a detailed system of criminal procedure. Thus, one commentator has stated:

Historically, aside from defining substantive crimes and their punishments, the Syaria did not set forth a detailed system of criminal procedure since such a system falls within the province of delegated interest, i.e. those which the Ruler has the authority to organize according to his personal reasoning consistent with particular circumstances of time and place, and inspired by its general principles.26

The general principles which are supposed to guide the sovereign or the State in designing the procedures of criminal trials are Siyasa al Sharia or the philosophy and policy of Islam.

The philosophy and policy of Islamic criminal justice seek to achieve many goals, the most important of which is the pursuit of justice. Justice is attained when only criminals are punished. The only way to achieve this is to uncover the truth, and truth can only be uncovered if all parties concerned in a trial, i.e., the judge, the prosecution and the defence counsel, work together. Meanwhile, the accused person should be guaranteed certain basic rights throughout the trial so that he would not be wrongly convicted at the end of it. Although the accused is guaranteed basic rights, the prosecution, who represents the State, has no less of a right. Hence, a commentator states:27

The accused has the right not to be judged guilty when innocent; society has no less a right, because legal justice and social interest require that only criminals be punished. Otherwise, society suffers a twofold injury; the innocent receives undeserved punishment, while the criminal eludes his.28

2. Rules of Criminal Procedure Applicable in Malaysia

The Islamic rules of criminal procedures are not applicable in Malaysia.29 The various States’ Enactments provide the rules of criminal procedure that are to be followed by Islamic courts.

Under States’ Enactments, the procedures for criminal trials are in fact based on the rules of criminal procedure in the Criminal Procedure

27. Id. at 91-107.
28. Id. at 95.
29. Ahmad Ibrahim, supra note 22, at 100.
Very often the Islamic courts are required to make references to the Criminal Procedure Code for guidance. This practice does not lend itself to the clear definition of rules of procedure in Islamic courts. Although States' Enactments do name and describe the elements of offenses, provisions relating to rules of procedure and evidence that are to be observed by the Islamic courts when trying such offenses remain vague and unclear.

Steps have also been taken to enact law relating to the civil and criminal procedure and evidence along the line of Islamic principles. So far only two States have enacted separate legislation on Muslim criminal and civil procedure.

PART II. THE CASES

A. CASE I

Public Prosecutor v. Siti Zan binti Kamarudin
File No: 38/82
The accused, Siti Zan Kamarudin, was not represented by counsel. The male co-accused was not present. The accused was produced before the Judge.
The Court Clerk read the charge:

That you Siti Zan binti Kamarudin, a Muslim woman, in November 1978, in a house, had unlawful sexual intercourse not amounting to the offence of rape and as a result of it you were pregnant. You, committed the act with a man who was not your muhrim. If you are convicted, you shall be liable under section 155.
The Prosecutor: Do you understand the charge?
The Accused: Yes.
The Prosecutor: (Giving the background of the case)

On 16th May 1979, an Inspector of Religious Affairs carried an investigation on Siti Zan binti Kamarudin after receiving information from

30. AFMS Chapter 6. Criminal Procedure Code is a federal legislation. It provides for procedures for criminal trials in civil courts.
31. See e.g. infra "Pretrial Process".
32. For example, in the Administration of Muslim Law Enactment of the State of Perak, there are 40 sections that deal with offenses. However, there is only one section that deals with evidence and 15 sections that deal with criminal procedure.
33. See e.g. the legislation of State of Kelantan, (i) Syariah Criminal Procedure Enactment 1985; and (ii) Syariah Civil Procedure Enactment 1984. See also legislation of the State of Kedah, (i) Islamic Criminal Procedure Enactment 1985; and (ii) Islamic Civil Procedure Enactment 1978.
members of the public. The accused admitted that she had unlawful intercourse with a man in her house sometime in November 1978. As a result of the act she was carrying a child of seven months. It was reported that she had given birth to a baby girl aged three years old now; she has therefore committed the offence of zina.

The Judge: Was it true what the Prosecutor has just said?
The Accused: Yes.
The Judge: Before the Court passes the sentence, the accused is now given an opportunity to say anything she likes.
The Accused: I can afford to pay money. Nothing else.
The Judge: How old is your baby?
The Accused: Three years - I have given her away.
The Judge: Are you taking care of any child?
The Accused: No.
The Judge: What's your occupation?
The Accused: I just stay at home.
The Judge: Do you have a husband?
The Accused: No. I’m not married yet.
The Judge: What's your age?
The Accused: Twenty-seven.
The Judge: Your father and your mother - are they still alive?
The Accused: Yes.
The Judge: What's your father's occupation?
The Accused: Watchman.
The Judge: And your mother?
The Accused: She doesn't work.
The Judge: Has any man asked for your hand?
The Accused: Yes - but I was still in school then.
The Judge: After that, have other men asked for your hand?
The Accused: No.
The Judge: You didn't know this man?
The Prosecutor: This is a very serious case- frequently happening in our society. If it is possible, the penalty under Muslim law, which is flogging with 100 strokes should be imposed -that is if it is possible for this Court to enforce the penalty. According to the jurisdiction given by section 155(3) the penalty is very light; six months imprisonment or fine of $500 - or both. We cannot lessen it further; this is to be an example to the accused and the society so that such thing will not be repeated. The accused, according to her record, had committed the offence for the first time.
The Judge: Before the Court passes the sentence, the Court would like to address itself to those present in this Court. Sexual need is a very natural thing. Allah regulates the relationship between man and women. There are many ways which have been proposed to us. It is not wrong for women to subtly invite proposals from men. There was a hadith. A woman came to see the Prophet of God and said: “I want to get married.” One of the companions of the Prophet of God
was willing to marry the woman. If no man has asked for your hand you can be honest about it. It is the responsibility of parents to do that - it is an obligation - up to the parents to project the daughter to a man who should marry her. If you don't do that, she will always be waiting - her sexual desire becomes strong. Islam opens the door of marriage. Fine as a penalty is very light; apart from fine what is the penalty under Islam? It is 100 strokes. Does she have any dependents? Although you choose to pay the fine, use that money for charity purposes. The Court sentences the accused to 6 months' imprisonment.

B. CASE II

Public Prosecutor v. Sakinah binti Husain

File No: 37/82

The Accused, Sakinah binti Husain, was not represented by counsel and the male co-accused was not present.

The Court Clerk read the charge:

That you a Muslim woman is hereby charged between 7th. January 1977 to February 1980 of having sexual intercourse not amounting to rape in a house with a non-Muslim man. The man was not your husband and not you muhrim. If you are convicted, you shall be liable under section 155(3).

The Prosecutor: Do you understand the charge?
The Accused: Yes.
The Prosecutor: Do you plead guilty?
Do you know the consequence?
The Accused: Yes.
The Prosecutor: On 3rd. April 1980, an Inspector of Religious Affairs made inquiries on the accused who was at the time twenty-one years old. this was after receiving information from members of the public. The accused admitted that she had given birth to a baby boy at the Telok Anson Hospital as a result of her sexual intercourse with a non-Muslim man from January 1977 to February 1980. They cohabited as husband and wife at No. 111, Jalan Syed Abu Bakar, Telok Anson. They, therefore had committed the act of zina as charged.

The Judge: Is the baby still alive?
The Accused: Yes.
The Judge: Was it true what has been said by the Prosecutor?
The Accused: Yes.
The Judge: The Court accepts the plea of guilt. Do you want to say anything? To plea?
(The Accused shook her head)
The Judge: No plea? Who is looking after the baby?
The Accused: I am.
The Judge: How old is the baby?
The Accused: Two and one-half years.
The Judge: Is he being breast fed by you?
The Accused: Yes. He is.
The Judge: Are you married?
The Accused: No.
The Judge: When you did it, were you a virgin?
The Accused: Yes.
The Judge: Even after it had happened, you are still not married?
The Accused: He's not here.
The Judge: If you have committed zina - it is difficult.
What does the Prosecutor have to say?
The Prosecutor: I urge the Court to pass a heavy sentence on the Accused because she was willing to cohabit with a non-Muslim man for a long time. This should not have happened to Muslim girls. Penalty, if it is possible - if the Court has the power, should be the penalty under Muslim law which is 100 strokes. That way it will serve as a lesson to the Accused herself as well as the others. This penalty is not harsh but it is a lesson to the Accused. This is her first offence, even though she had committed the sexual intercourse several times.
The Judge: Sentence imposed is six months' imprisonment.

C. CASE III

_Public Prosecutor v. Haji Mustakim bin Muslan (Accused I) and Muslimah binti Haji Ali (Accused II)

File No: 35/82
Neither accused was legally represented.
The Court Clerk read the charge:
That both of you, Haji Mustakim in Muslan and Muslimah binti Haji Ali are hereby jointly charged with committing unlawful intercourse in a house not amounting to rape. As you are prohibited from marrying by reason of consanguinity, you have therefore committed a criminal offence of incest; as for the Accused I, he will be guilty under section 156(2); and as for Accused II, she will be guilty under section 156(3).

The Prosecutor: Do you understand the charge?
(To Accused I) What is your plea?
Accused I: I plead guilty.
The Prosecutor: Do you understand the charge?
(To Accused II)
Accused II: Yes.
The Prosecutor: What's your plea?
Accused II: Not guilty.
The Judge: Do you understand your plea of guilty? (To Accused I)
After receiving information from the public, investigation was carried out on Accused II on 5th January 1982. During the investigation Accused II admitted that she had intercourse with Accused I in the month of April 1981. According to her because of the intercourse she had given birth to a baby girl on 6th December 1981. Then on 12th January 1982, I carried out an investigation on Accused I. In his statement Accused I admitted that he had intercourse with Accused II in the month of April. This resulted in Accused II giving birth to a baby on 6th December 1981.

Accused I and accused II are prohibited from marrying because they are *muhrim* according to Muslim law by reason of consanguinity. Accused I is the uncle of Accused II. Accused I is the brother of the mother of Accused II.

Therefore - both have committed the offence of incest.

The Judge: Is the statement of the Prosecutor correct?
(To Accused I)
Accused I: Correct.

The Judge: Plea of guilty of Accused I is accepted.
Has Accused I anything to say?
Accused I: No.
The Judge: No plea?
Accused II: No.

The Prosecutor: I urge the Court that since accused I has outraged the modesty of his niece, this case becomes very serious - a heavy penalty is therefore necessary. This penalty will make accused I remorseful as well as be educational to him. According to Muslim law, he could be stoned to death as he is a married man and already has children of his own. But this is his first offence. According to section 156(2) Accused II can be sentenced to the maximum of a year's jail. This sentence is very light. I request penalty under Muslim law be imposed instead.

The Judge: How old are you?
Accused I: Sixty-four.

The Judge: Have you ever been married?
Accused I: Yes.

The Judge: Have you have any children?
Accused I: Yes, I have.

The Judge: Is your wife still with you?
Accused I: Yes, she is.

The Judge: How many are your children?
Accused I: Six.

The Judge: Before I pass the sentence, I like to remind you that a man and woman cannot stay together. I am no exception too even
though I am old. A woman is like a baby goat and a man like a tiger. What happens if the two are close together? This is a sad thing. According to Muslim law Accused I should be stoned to death, but it is different according to the “worldly” penalty. You may be punished according to the “worldly” penalty, but you will not escape on judgment day. The Court hereby sentences you but it will not save you from the penalty of the after life. Penalty imposed here is the lightest - six months’ imprisonment. The case of Accused II is postponed to some other time.

PART III: COMMENTARY

A: THE LAW RELATING TO ZINA

Those individuals accused in the above transcripted cases were charged with the offence of zina. Under the Administration of Muslim Law Enactment, 1965, of the State of Perak, the State in which the offenses were committed and tried, the offence of zina is divided into four categories. They are:

(a) intercourse between two persons who are not legally married provided for by section 155. The offence under this section is called adultery;
(b) intercourse between two persons who have been lawfully divorced from each other provided for by section 157;
(c) incest, intercourse between two persons who are prohibited to marry each other provided for by section 156; and (d) prostitution, a woman who engages in unlawful intercourse for monetary gain provided for by section 179.

In Cases I and II, the accused were charged with “adultery” and in the third case, the accused were charged with “incest.”

Section 155 of Perak Enactment provides for the offence of adultery and its penalty. The section provides:

(1) Any person who has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man and such intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be liable to imprisonment of a term not exceeding one year and to a fine not exceeding one thousand dollars.
(2) Any person who has sexual intercourse with a person who is not

34. The Administration of Muslim Law of the State of Perak hereinafter cited as “Perak Enactment”.
the wife of another man, such intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be liable on conviction before a competent court to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars or both such imprisonment and fine.

(3) Any female person who abets an offence under subsection (1) and (2) of this section shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars.

The penalty for zina under Islamic law will depend on the marital status of the guilty party. If committed by a married person, the penalty is death by stoning. An unmarried person, however, receives one hundred lashes. In addition, the unmarried person may also be banished for a year. This is provided in the Koran, the relevant part of which is as follows:

And come not near to adultery . . . as for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) confine them to the house until death take them or until Allah appoint for them a way (through new legislation).

A Sunna amplifies on the above verse by stating:

As to the virgin, one hundred lashes and banishment for one year; the married woman, one hundred lashes and the penalty of stoning to death.

In practice, additional penalties of banishment for the single person, and flogging for the adulterer will not be applied. Thus, the basic penalties for zina are: flogging for fornication and stoning for adultery.

In Malaysia, although the law lists zina as one of the offenses with which the Muslims can be charged, the penalty differs from that provided under the traditional Islamic law. This is clear from the provision of Section 155 of the Perak Enactment which, according to the section prescribing the penalty for adultery, is:

(a) fine and imprisonment;
(b) fine only; or
(c) imprisonment only.

36. 3 Sahih Muslim, Kitab Al-Hudud, Verse 4206, p. 911.
37. Ali Ibn Khalil Tarabulsi, Mu'jinn Al-Hukkam (On Flagellation and Lapidation) at 182, as cited by Taymour Kamel, The Principles of Legality and Its Application in Islamic Criminal Justice, in The Islamic Criminal Justice System 164 (Bassiouni, ed. 1982) [hereinafter cited as Kamel]
38. Here "adultery" means zina committed by parties who are married or one of them is married.
Under the Perak Enactment, the sentence for the male guilty person will depend on whether the female counterpart is a married woman or an unmarried one. If the female party is "a wife of another" the penalty is an imprisonment for a term not exceeding one year and a fine not exceeding one thousand dollars. However, if the female counterpart "is not a wife" the penalty for the male partner is lighter; namely, an imprisonment for a term not exceeding one year or a fine not exceeding one thousand dollars, or both imprisonment and fine.

Under the traditional Islamic law, however, the penalty for a man found guilty of committing zina with an unmarried or a married woman is the same. If the adulterer is a married man, then he will be stoned to death; if he is not, he will be flogged with hundred strokes. These rules apply whether or not the female co-accused is a married woman.

Zina, under the traditional Islamic law is one of the seven hudud crimes. As noted earlier, hudud crimes, under the traditional Islamic law, are punishable with prescribed penalties.

The Perak Enactment, however, confers on the Islamic courts only jurisdiction and powers to impose taazir punishment in the form of a fine, imprisonment, or both even though some of the offenses are hudud crimes. The two hudud crimes included in the Perak Enactment are zina, and apostasy. The Perak Enactment does not confer jurisdiction on the Islamic courts to impose hudud punishment. And as explained earlier, this is so because the jurisdiction of Islamic courts in Malaysia is limited by federal law. Accordingly, under the then existing provisions of Muslim Courts (Criminal Jurisdiction) Act 1965, the Islamic courts could only impose the maximum jail sentence of six months and a fine of one thousand dollars.

A taazir punishment or a discretionary punishment under the traditional Islamic law can be imposed for an offence which is defined by or included in one of the following categories:

(a) Certain hudud offenses where the violations are not so severe as to require the infliction of the mandatory punishment. Examples are:

39. There are four types of unlawful intercourse under the Enactment. There are (i) Adultery; (ii) Incest; (iii) Illicit intercourse between parties who have divorced from each other; and (iv) Prostitution. See, supra note 35 and the accompanying text.

40. Apostasy as an offence under the Enactment can only be committed by a Muslim woman who dislikes her husband and by deception makes herself an apostate in order to annul her marriage. See Sec. 153 of the Enactment.

41. These were the maximum penalties for zina prior to the amendment of the Muslim Courts (Criminal Jurisdiction) Act 1965 in 1984.

42. Benmelha, supra note 11, at 213-14.
simple robbery, theft in the absence of aggravating circumstances, petty theft, attempted robbery, and attempted adultery.\textsuperscript{43}

(b) \textit{Hudud} crimes where, by reason of doubt, or because of the situation of the accused, proof is likely to be difficult. For example, stealing from a relative.

(c) All acts which fall under the prohibition of the law and for which punishments are not specified. Examples are: consumption of pork, breach of trust by public authority, slander, and corruption.

It is submitted that the inclusion of the crime of \textit{zina} as one of the Islamic offenses in the Perak Enactment and the imposition of non-\textit{hudud} penalty (imprisonment and fine) as a punishment were made because the lawmakers had anticipated the difficulties of proof in \textit{zina} cases.\textsuperscript{44} Of the three, the offence of \textit{zina} in Malaysia possibly falls under category (b) above. This is based on a doctrine which states that “doubt nullifies \textit{hudud}.”\textsuperscript{45}

One commentator has noted:

The practice of nullifying \textit{hudud} crimes in case of doubt is based on a doctrinal rule which prevents a judge from imposing a fixed penalty should doubt or uncertainty exist in his mind as to whether the accused has committed a crime to which a \textit{hudud} punishment applies. In certain situations, it is possible for the judge to impose a \textit{taazir} punishment instead. Although doubt might lead to the acquittal of the accused or the dismissal of the charges, it might also lead to reformulating the indictment so as to convict the accused of a crime other than the one for which he was brought to trial.\textsuperscript{46}

However, there is not a single writer of Islamic criminal procedure who has suggested that the case of doubtful \textit{zina} is to be included in category (b) above. Islam regards \textit{zina} as a very serious crime. Once the crime is proven, the punishment specified must be imposed because the Koran provides that:

The woman and the man guilty of \textit{zina} flog each of them with one hundred stripes. Let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day.\textsuperscript{47}

Based on the above verse, some commentators argue that under no circumstances can the penalty for \textit{zina} be reduced from those which have

\textsuperscript{43} See \textit{e.g.} Javed \textit{v.} Iqbal, PLD 1985 F.S.C. 141; Pak Muhammad and Others \textit{v.} The State, PLD 1983 F.S.C. 165; Shaukat \textit{v.} The State, PLD 1982 F.S.C. 179.

\textsuperscript{44} See infra, note 54 and the accompanying text.

\textsuperscript{45} \textit{Awwa}, supra, note 10 at 128.

\textsuperscript{46} Id. at 143.

\textsuperscript{47} Chap. IV: verse 14.
prescribed by the Koran. The mandatory penalties may not be mitigated, aggravated or suspended.48 Some Islamic scholars in Malaysia hold a strong view that the inclusion of zina offenses in the various states enactments is not legal under Islamic law because the offenders cannot be punished as prescribed by the Koran.49 Since it is assumed that the penalty for zina can be legally substituted with a taazir penalty without violating the Koran as current practice indicates, then a question arises regarding the disparate treatment of the male who commits the offence with a married woman and the male who commits the offence with an unmarried woman.

As noted earlier, a man is subject to a heavier penalty where his partner is a married woman. Initially, the author thought the only possible rationale for the different punishments might stem from the traditional ideas regarding the position of married women. To commit zina with a married woman is like committing an offence against the property of another man. This is a possible rationale which could easily be supported by a provision in the Perak Enactment and two provisions in the Code of the indigenous customary law: the Ninety-Nine Laws of Perak.

Under section 184 of the Perak Enactment, it is an offence for anyone to entice a married woman to abscond or to leave her house,50 whilst under the Ninety-Nine Laws of Perak the law differs with regard to its treatment of a man who commits zina with a woman who is a "wife of another" and with a woman who is not. Clause 67 of the Ninety-Nine Laws of Perak provides that the husband of the married woman involved may kill the couple without having to fear being prosecuted.51 However,

48. Awwa, supra note 10, at 128.
49. There is no offence of zina in the Administration of Muslim Law Enactment of the State of Trengganu. A number of States including Kelantan and Kedah are in the process of enacting new laws to substitute the present punishment of zina to be the Islamic hudud punishment. For example the Syariah Criminal Code 1985 of the State of Kelantan provides as follows:

Any person who commits the offense of zina shall be punished according to Islamic law. Where a person commits illegal intercourse which cannot be punished with hudud punishment for zina or evidence that is required cannot be obtained, he shall be liable to the taazir punishment of a fine not exceeding $5,000.00 or imprisonment not exceeding three years, or to whipping not exceeding six strokes or combination of such punishments.

50. The maximum punishment provided is one year imprisonment or a fine of one thousand dollars.
51. The Clause provides:

Said Nurshirwan the Just, "What is the law where a man seduces the wife of another?"
The Minister Bardza Amir Hakim replied, "Your Majesty, if the husband comes upon the guilty pair within the four posts of the house, he may stab them without fear of
according to Clause 50, where a man commits *zina* with an unmarried woman, the judge may simply order them to be married.\(^{32}\)

However, this finding appears most puzzling when other sections in the Perak Enactment which make provisions for offenses are examined. Although the maximum jail sentences provided for by some sections are the same, the maximum fine imposable for the offenses varies. The following table is illustrative:

<table>
<thead>
<tr>
<th>Secs.</th>
<th>Offenses</th>
<th>Max. Jail</th>
<th>Max. Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>155(2)</td>
<td>Adultery by woman</td>
<td>1 year</td>
<td>$1000/-</td>
</tr>
<tr>
<td>184(1)</td>
<td>Enticing married woman</td>
<td>1 year</td>
<td>$1000/-</td>
</tr>
<tr>
<td>170</td>
<td>Propagation of other beliefs</td>
<td>1 year</td>
<td>$2000/-</td>
</tr>
<tr>
<td>154</td>
<td>Close Proximity</td>
<td>3 months</td>
<td>$300/-</td>
</tr>
<tr>
<td>158</td>
<td>Unlawful solemnization of marriage</td>
<td>3 months</td>
<td>$300/-</td>
</tr>
<tr>
<td>171</td>
<td>Deriding religion of Islam</td>
<td>3 months</td>
<td>$300/-</td>
</tr>
<tr>
<td>163</td>
<td>Unlawful collection of money</td>
<td>3 months</td>
<td>$500/-</td>
</tr>
<tr>
<td>172</td>
<td>Contempt of religious authority</td>
<td>3 months</td>
<td>$500/-</td>
</tr>
</tbody>
</table>

prosecution, and the woman's head shall be shaved. If the case should come before the raja or chief of the district, the adulterer shall not be put to death. The law is that the woman shall leave her husband's house stripped of everything, and for her debts her seducer shall be liable. Her dowry shall be returned to her husband, and for the wrong she has done, her seducer must pay a *tahil* and a *paha* of gold; to the village also he must pay a fine of a *tahil* or a *paha* of gold; if these fines can be paid, the parties are free and can marry, but if they fail to pay the customary fines the marriage shall not take place and the parties expelled from the village and fined a *tahil* and a *paha*, and if this is not paid, any articles on their persons may be taken and they will be treated as feasts [beasts? ed.].

52. The Clause provides:

What is the law applicable in the case of illicit intercourse, where the parties are brought before the *penghulu* of a *mukim*? The Minister made answer, "If both admit their guilt, let them pay a fine of one *paha*. If there is no *penghulu*, and their guilt is clear, the parties may settle things themselves."
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165 Breach of secrecy 3 months $250/-
169 Teaching false doctrine 3 months $250/-

In light of the above, the author is no longer certain that the lawmakers were influenced by the traditional attitude towards married women when fixing a higher maximum penalty for a man who commits zina with a "wife of another." The author now believes that the lawmakers had fixed the penalties without any guiding principles.\(^5\)

Another question also arises when subsections (1) and (2) and subsection (3) of section 155 are examined: why are there different penalties for men and women? A woman who is the party to the crime is stated as an abettor throughout the Perak Enactment. As an abettor, the punishment can be either different or the same as that for the male party. Again, in this respect there is no clear policy or principle which the legislature had used when deciding when women, as abettors, should get the same or dissimilar punishment as the male offenders. Under section 155(3) the maximum punishment that may be imposed on a female is half of that provided for the male counterpart. Comparing this section with section 154, which provides for the offence of close proximity, a female is not quite as fortunate.\(^4\) This is so because the maximum sentence for close proximity for the female is the same as that for the male party.

The Islamic law does not provide for punishments that differ by sex. Men and women are subject to the same punishment and what matters is their marital status.\(^5\) By providing a lesser punishment for women and a heavier one for men, the lawmakers may have believed that to have men convicted was more difficult, if not impossible, while to convict a woman was easier. This is so because once a woman without a lawful husband becomes pregnant, it is seemingly easy to prove that she has committed

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\(^5\) The legislative history of Perak Enactment is not available at the time of writing this article. Perhaps, like most states' legislation, there are no records of legislative proceedings.

\(^4\) Close proximity is an act of being in retirement with and in suspicious "circumstances" with a member of opposite sex.

\(^5\) Awwa, *supra* note 10, at 140.
unlawful intercourse.\textsuperscript{56} And perhaps, as the Islamic law has been generous to men by allowing them to marry four wives, they should be made subject to heavier punishments if they do commit \textit{zina}. As one commentator has stated, "God has explicitly forbidden adultery and has established severe punishment but only after allowing the Muslim men to marry two, three or four wives."\textsuperscript{57}

The third case in this commentary deals with \textit{zina} committed by parties who are forbidden by Islamic law to marry by reason of consanguinity, fosterage or affinity. This offence is provided for in section 156 of the Perak Enactment:

(1) Any person who has sexual intercourse with a person who he is, and whom he knows or has reason to believe that he is, forbidden by the Muslim law to marry by reason of consanguinity or of fosterage or of affinity is guilty of the offence of incest.
(2) Any person who commits the act which is incest by reason of consanguinity or of fosterage shall on conviction be liable to imprisonment of either description for a term not exceeding one year.
(3) Any female person who abets an offence under subsection (2) shall on conviction be liable to imprisonment not exceeding one year.
(4) Any male person who commits the act which is incest by reason of affinity shall on conviction be liable to imprisonment for a term not exceeding one year.
(5) Any female person who abets an offence under subsection (3) shall on conviction be liable to imprisonment not exceeding one year.

As noted earlier, incest is also \textit{zina} under Islamic law and, as such, it carries with it the mandatory punishment.

The Perak Enactment prescribes the maximum penalty for incest to be one year's imprisonment and provides for no alternative fine. Accord-

\textsuperscript{56} In two interviews, the Public Prosecutor admitted that it was difficult to prove the offence of \textit{zina} had been committed. Reliance, according to him, was greatly placed on "witnesses" and the "confession" of the accused themselves. Kamilia Ibrahim, Administration of Muslim Law in Perak 106 (1975) (unpublished project paper); Noor Hani Hamarudin, Penghukuman Dalam Islam (Penghajian di Perak) 19 (1984) (unpublished project paper) [hereinafter cited as "Kamarudin"].

By "witnesses", the Public Prosecutor in these interviews meant "complainants" who reported the incident of the unmarried women who became pregnant or had given birth to illegitimate babies. By "confession" he meant either "admissions" made by these women to the Inspector of Religious Affairs during the so called investigation of the case or the "plea of guilty" by women during the court trial.

\textsuperscript{57} Aly Mansour, \textit{Hudud Crimes}, in \textsc{The Islamic Criminal Justice System} 196 (Bassiouni, ed. 1982).
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ingly the punishment for incest is more severe than that for other types of zina.58

B. THE PRE-TRIAL PROCESS

The Perak Enactment provides that proceedings in the criminal process do not begin until the prosecuting officer is satisfied that a case can be established from the information that he has received. Section 61 states that the institution of criminal proceedings shall first be made in writing or given orally to the presiding officer of the Court. If made orally, the information shall require the informant to swear or affirm to the truth of such information. The Court may refuse to take any action on such information if it is not satisfied that there is reason to believe that an offence has been committed. If the Court believes that there is sufficient evidence to establish a case then the prosecution would carry out an investigation on behalf of the Court.

The Perak Enactment, however, does not have any provision regarding the investigation stages. It does not deal with the duties of the Court, or investigating officer and rights of the suspect. According to section 75 of the enactment, the Court is required to refer to the practice and procedure in the subordinate civil courts. Section 75 provides as follows:

In matter of practice and procedure not expressly provided for in the Enactment or any rule made thereunder, the Court shall have regard to the avoidance of injustice and convenient dispatch of business and may have regard to the practice and procedure obtaining in the subordinate civil courts in criminal proceeding.

It is not clear, then, whether the Islamic court is required to observed the pretrial process as provided for by the Criminal Procedure Code - the code which regulates criminal procedure in the civil courts. Chapter XIII of the Criminal Procedure Code is devoted to the presentation of information to the police and their powers to investigate. Since the Perak Enactment only empowers the prosecuting officer of the Islamic court and not the police to receive information and to carry on investigations subsequent to that, Chapter XIII does not seem to be appropriate law to use to fill the lacunae in the Perak Enactment.

58. This section of Perak Enactment is also peculiar in that the maximum punishment for a man and woman involved are the same. There is no explanation for the provision of one type of punishment (one year imprisonment), except the absence of any principle to guide the law makers in fixing penalties when enacting the Enactment.
For example, what is the effect of statements made during the investigation stage? According to section 113 of the Criminal Procedure Code, one of the important requirements to be fulfilled before the statement (whether it amounts to confession or not) can be admitted in evidence at a trial is that the statement must be made to a police officer of or above the rank of Inspector. Since the statement must be given to such an officer - a police officer of or above the rank of Inspector - it is submitted that none of the statements given by the four accused in the three cases studied to the Inspector of Religious Affairs when he carried out an investigation should have been admitted evidence.\(^{59}\)

Section 113 further provides that no such statement shall be admissible or used as evidence against the accused if (i) the making of the statement has been caused by any inducement, threat or promise that the accused would gain any advantage or avoid any evil of temporal nature or (ii) in the case of a statement made by the person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

In each of these cases, the Public Prosecutor while giving the background of the cases said that the information with a view to prosecution was received from the general public. In all cases, the public lodged complaints that these women either were found pregnant or had given birth. In the first two cases, the accused admitted commission of the offence to the Inspector of Religious Affairs when he carried out an investigation pursuant to the complaint received. However, the Public Prosecutor in his statement at both trials (when he addressed the Court before the sentences were passed) did not state whether or not the suspect-accused were cautioned as provided for by section 113 of the Criminal Procedure Code. Thus, had the two accused claimed trial, the public Prosecutor would not properly be able to use the statement given at this investigation stage as evidence.

\(^{59}\) One is in fact in the dark with regard to the status and rank of the Inspector of Religious Affairs. There is no way to ascertain that the rank is equivalent to the Police Officer or higher. Perak Enactment fails to throw light on this matter. However, since section 75 of the enactment requires the Court to have regard to the practice and procedure at that time being observed in civil subordinate courts in order to despatch business conveniently (as well as to avoid injustice) perhaps we likewise (for the sake of convenience) should treat the Inspector of Religious Affairs equal in rank with Police Inspector.
Under Islamic law, although the law prescribes penalties for criminal acts, it does not specify the means by which the accused could be apprehended and brought to justice. Such matters are left to the political authorities to establish in accordance with the best interests of the society. Thus, procedures for investigation (and prosecution) are considered to be within the political realm. According to Islamic law, in order to commence an investigation on the accused, there must have been a quantum of evidence, as prescribed by law, against the accused. With this amount of evidence, a *prima facie* case against the accused is thus established; proceedings to charge the accused formally in court will follow. Based on what was said in the trials it can be concluded that the two following facts had helped establish a *prima facie* case against all of the female accused: (a) the accused were found pregnant and later gave birth; and (b) the accused's own statements admitted that they did have sexual intercourse during the time specified.

Assuming that the initial requirement to bring the accused to Court to be charged had been complied with, then a further question arises: Had the accused been rightly convicted under Islamic law?

Under Islamic law, in order to secure conviction for offenses such as *zina* there must be (i) testimony of four men; or (ii) confession of the accused; or (iii) presumption. Regarding the use of presumptions for crimes of *hudud*, Muslim jurists have expressed three views:

(a) The *Shafii*, *Hanafi* and *Hanbali* reject the use of presumption in *hudud* cases. These jurists therefore only allow the use of testimony of witnesses and confession as evidence;
(b) The *Maliki* school allows the use of pregnancy as an evidentiary presumption in the trial of *zina* cases, provided that the woman has no husband and has not claimed rape.
(c) The *Ibn al-Qayyim* and *Ibn al-Ghar* view that evidence by presumption is valid in all *hudud* cases.

Muslims in Malaysia are followers of the *Shafii* school.

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60. Awad, *supra* note 26, at 93.
61. The procedure is similar to the procedure provided for in Perak Enactment. The discussion here is to analyze the legality of the pretrial stage of these cases under Islamic criminal procedure.
63. Under the Evidence Act (the rules of evidence applicable to civil courts), if a presumption of a certain fact arises no evidence need to be led to prove that fact. Whether evidence may be received to counter the effect of that presumption depends on the classification of the presumption as rebuttable or irrebuttable. *See* Sec. 4.
64. Salama, *supra* note 18, at 121.
65. *See, supra* note 23 and the accompanying text.
Accordingly, the pregnancy of these women would not amount to legal presumption which if not rebutted would be sufficient to secure conviction. There are therefore, only two ways in which the women could be rightly convicted according to Islamic law. As the Perak Enactment provides that the Court shall observe "all provisions of Islamic law relating to the number, status, or quality of witnesses or evidence required to prove any fact," those two are also the only ways in which the accused could be convicted under the Enactment. The two methods are by testimony of witnesses or confession.

**Testimony of witnesses**

The general principles regarding testimony of witnesses have been discussed earlier. In *zina* cases, since the penalties for these offenses are severe, the law requires further proof before conviction. For example, the number of witnesses required to testify is four and they have to be Muslim, male, and of good behavior. Each witness must describe explicitly the criminal act so as to substantiate each testimony of adultery. If the crime is not proven under Islamic law, the witnesses become guilty of defamation.

**Confession**

As noted earlier, several conditions must be fulfilled before a confession can be admitted in evidence. Since confession establishes guilt and incurs penalties, the judge has to be personally convinced that the confession is given voluntarily and without duress. Therefore, the accused must repeat the confession the same number of times as that of the required number of witnesses. Thus, in the case of adultery, four separate confessions are necessary. In addition, under no circumstances, may a

66. See, *supra* note 22 and the accompanying text.
67. Salama, *supra*, note 18 at 120. Also see *supra*, note 23 and the accompanying text.
68. This law is based on the following *Hadith*:

Abdullah b. Buraida reported on the authority of his father that Ma'iz b. Malik al Aslami came to Message of Allah and said, "Allah's Messenger, I have wronged myself; I have committed adultery and earnestly desire that you should purify me. The Prophet turned him away. On the following day Ma'iz came to him and said, "Allah's Messenger, I have committed adultery." Allah's Messenger turned him away for the second time and sent him to his people saying, "Do you hear if there is anything wrong with his mind?" They denied, "We do not know him but as far a wise good man amongst us, so far as we can judge". Ma'iz came for the third time and the Holy Prophet sent him away as he had done before. He asked about him and they informed him there was nothing wrong with him or his mind. When it was the fourth time, a ditch was dug for him and the Holy Prophet pronounced the judgment on him and he was stoned. *Sahih Muslim*, *Kitab-Al Hudud*, Verse 4206, p. 916.
retracted confession be relied upon. Finally, before the judge can admit a confession he must also find other facts to corroborate it.

In the three cases under study, there were no witnesses who testified. Therefore, the only way the accused could have been convicted was by confession. Assuming the conditions under which confession may be admitted had been fulfilled, the statements made to the Inspector of Religious Affairs during his investigation could amount to confession although made outside the court proceeding. This is so because the Shafii school recognizes a confession made outside a legal proceeding. However, an extra-judicial confession will only be admitted if it is witnessed by two people. In these cases, there was not a single witness to the statements made by Siti Zan and Sakinah.

If the Court had, as required by the Perak Enactment, observed all rules regarding Islamic evidence, the two accused in the first two cases should have never been convicted for the offence of zina. This is so because the confessions, which constituted the only possible ground for conviction in those cases, were not valid confessions because they were made in the absence of two witnesses.

C. THE TRIAL

The Perak Enactment prescribes that criminal proceedings do not begin until the prosecuting officer is satisfied that a case can be made out from the information that he has received. According to these three cases, the information received from the general public, and confirmed by interviews by the Inspector of Religious Affairs, was apparently sufficient to the subjective consideration of the Public Prosecutor. This was a discretionary power that belongs to the Public Prosecutor and which could only be challenged if the accused had claimed trial. The decision of the Public Prosecutor to press charges against Muslimah, the female accused in the third case, shows how the Public Prosecutor could at times exercise his discretion arbitrarily. In her statement to the Inspector of

69. Salama, supra, note 18 at 120.
70. Id.
71. Id.
72. Since there were no witnesses, there is no necessity to further discuss the conditions for the admissibility of a confession. Arguments against treating the plea of guilty at the hearing as a confession will be put forward under the discussion "The Trial".
73. The Public Prosecutor and the Inspector of Religious Affairs are not the same person. The Public Prosecutor prosecutes while the Inspector of Religious Affairs investigates a case.
Religious Affairs, Muslimah stated that she was ‘‘disetubohi’’ by the male accused. In Malay, the phrase simply means that the male accused had sexual intercourse with her. By making such a statement the female accused may not necessarily have intended to admit that she had consented to the act. Thus, there was no indication that she did not resist the act. The fact that she later pleaded not guilty would substantiate the argument that she was not making a statement admitting to the offence. The question is, was the Public Prosecutor right in his decision to charge her with the offence of incest?

With regard to the charge, section 67 of the Perak Enactment provides as follows:

The charge shall be framed by the Prosecutor or by the Court and shall contain sufficient particulars of the offence alleged as are reasonably sufficient to give the accused notice of the matter with which he is charged.

The Perak Enactment has no provision requiring that the charge should be read to the accused. The Enactment contains only one section which deals with the matter. This is Section 68 (2) of the Enactment which reads as follows: ‘‘The accused shall be charged. If he pleads guilty he may be sentenced on such plea.’’ Perhaps the words ‘‘shall be charged’’ in subsection (2) of Section 68 above is intended to mean that the charge shall be read and explained to the accused.

What happens if the accused person refuses to plead guilty or claims trial? Subsection (3) of Section 68 provides the following:

‘‘If the accused claims trial or refuses to plead, the Prosecutor shall outline the facts to be proved and the relevant law and shall then call his witnesses.’’

Comparing the above provisions with the corresponding provision in the Criminal Procedure Code, one would note that the provisions in the Criminal Procedure Code are clearer. Section 173 of the Criminal Procedure Code provides the following:

When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence or claims to be tried.

The Perak Enactment does not require that the charge be explained to the accused. In addition, the Enactment does not have a provision which further directs the Court what to do if the accused pleads guilty. By comparison, paragraph (b) of Section 173 of the Criminal Procedure Code has the following provision:
If the accused pleads guilty to a charge whether as originally framed or as amended, the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualifications the offence alleged against him.

In the cases under study the charges were read to the accused and all, except for the female accused in the third case, pleaded guilty. In the first two cases, it was the Public Prosecutor and not the Court who further asked the two accused if they understood the charge, and in their pleas they both answered that they did. It is to be noted that in the third case it was the Court who asked the male accused if he understood his plea.\textsuperscript{74}

The fact that the accused were asked if they understood the charge shows that there was an attempt to follow the procedure observed in civil courts and an attempt to grant the accused some kind of protection provided for in the proviso to paragraph (b) of Section 173. By virtue of Section 75 of the Perak Enactment, this procedure was not a favor which the Court or Public Prosecutor granted to the accused in these trials. This is so because Section 75 has required the Court and Public Prosecutor to follow the practice and procedure observed by civil courts to supplement the deficiencies of the Perak Enactment - all presumably in the interests of justice.

It is doubtful that any of the accused was aware of the penalty provided for the offense of \textit{zina} under the enactment. The penalty was not explained to the accused. In the author's opinion when the Public Prosecutor asked the accused if they understood their pleas, he was merely acting on a procedural formality.

In addition, and according to paragraph (b) Section 173 of the Criminal Procedure Code, the Court is required to ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. Regarding this matter, the practice of civil courts has been as follows: first, the court asks the Public Prosecutor to state the brief facts of the case. Then the court asks the accused if he or she approves and admits the facts as

\textsuperscript{74} As who had asked might not make any difference to the accused. However, since a judge is more authoritative than a prosecuting officer, the fact that the male accused in this case was asked by the former instead of the latter shows that a male accused receives more respect than a female accused. Furthermore, the rule provides that the court, not the prosecuting officer, is to ask for the plea.
stated by the Public Prosecutor. If the accused person does not admit or
denies the facts, the court is required to reject the plea of guilty and set
the case down for trial. In contrast, this practice was not followed in
the three cases under study.

Under Islamic law in order to charge or indict a suspect in the court,
suspicion alone is not sufficient. One commentator has stated:

At that stage (indictment stage), the suspect is the person presumed
in fact to have committed a crime based on a quantum of evidence
as prescribed by law.

Suspicion alone is inconsequential, unless it leads to indictment, which is
a procedural function carried out by a specific agency.

It is submitted that in the cases of Siti Zan (Case I) and Sakinah
(Case II) the fact that they were pregnant and later delivered babies
without lawful husbands raised a mere suspicion of their guilt. However,
assuming that these facts amounted to more than mere suspicion, there
are several rights guaranteed to an accused which were denied in these
cases.

According to Islamic law, once indicted an accused enjoys a number
of primary and secondary rights. His and her primary right is the right
of lawful defence, which attaches independently by virtue of the mere
fact that he or she is the accused. Secondary rights are related to the
powers which are granted to the examination or investigative authority
and represent the restrictions placed upon those powers. From the per-
spective of the accused, these restrictions represent guarantees which might
be broadly called rights.

Under Islamic law the right to defence is a principal right which
attaches at the accusation stage. The right enables the accused to deny
the accusation either by showing the insufficiencies or invalidity of the
evidence on which the accusation is based or by submitting other evidence,
such as an alibi, to prove innocence. By its very nature, accusation
requires defence; for accusation not countered by defence becomes a
verdict.

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75. As discussed earlier, by virtue of Section 75 of Perak Enactment, the Court was obliged
to observe the procedure and practice of civil courts. See supra "Pre Trial Process". Also see, Singah
Ky. 78.

76. Awad, supra note 26, at 94.

77. Id.

78. Id. at 95.
In the cases under discussion, after the charges were read, the accused were asked if they would like to plead guilty. They pleaded guilty to the charges and were accordingly convicted. In sum, the finding of guilty in these cases was based solely on the plea of the accused.

Had the accused been given the right to defend themselves as is granted under Islamic law? If they had, were they in fact capable of defending themselves? This is an important aspect of the right to defence. According to Islamic law, an inability to defend oneself is effectively identical to the State preventing one from doing so. According to Islamic law, if the accused is incapable of adequately defending himself, he must seek the aid of a counsel to present his case. He is thus permitted to seek the help of those who are more knowledgeable and experienced.

It is submitted that in the cases under study, the fact that the accused were not represented by counsel due to either their ignorance of the fact that they had such a right or their inability to pay for legal counsel amounted to the denial of their rights to defence. In this respect it has been said:

Most criminal matters focus on transgressions against divine right, with the remainder equally divided between transgressions against man's divinely received rights and other private rights. This requires facilitating and even liberalizing the accused's right of defence, since the reason for practicing law - to achieve equality between litigants - unquestionably is otherwise negated. In effect, the accused faces the public prosecutor as his adversary, especially in contemporary procedural systems which do not contradict the Syaria. Thus, it is because the prosecutor is more capable of obtaining evidence by virtue of the public authority he possesses than the accused, that the right to counsel must be closely guarded and rigorously enforced in criminal prosecutions.

Alternatively, if it is assumed that the accused were in fact given the right to defence but chose not to exercise the right given, then was it justifiable for the Court to convict each of them on their own plea of guilty? As noted earlier, in these cases, the facts were that charges were read and the accused were asked for their plea and they pleaded guilty.

79. Id. at 97-98
80. Section 51 of Perak Enactment permits a counsel to appear for an accused person in a trial. The Section does not guarantee the right for legal counsel to an accused person.
81. Awad, supra note 26, at 99.
Accordingly, it is questionable that the accused’s pleas of guilty amount to confession.\textsuperscript{82}

As noted earlier, in order for the plea to be admissible as a confession under Islamic law certain conditions must be fulfilled. The conditions are: (i) the confessor must be of full age, mature and sane, capable of self-expression, and (ii) the confessor must be acting on his own free will.\textsuperscript{83}

By “maturity” the law means capacity to understand what is being admitted to and its legal consequences. Did the accused in the first two cases understand what was being admitted and the legal consequences of the confession? Did they know that the maximum period of imprisonment for the offence was six months? Did Siti Zan, who claimed not to know the man with whom she had intercourse, know that the judge would probably not accept her money to pay for her fine, as what eventually happened? Did Sakinah realize that she probably could not breast-feed her baby for six months if she was sentenced to maximum period of imprisonment, as in fact did happen? If the pleas of guilty could not be considered as confession on what basis did the judge convict these accused?

On the basis of the foregoing argument, it is submitted that although the accused might have been convicted rightly according to the procedure provided by the Perak Enactment when read together with the Criminal Procedure Code, the accused were not tried according to the Islamic procedure.

**D. THE SENTENCING PROCESS**

What are the procedures that the Court has to follow before sentencing the accused?

Section 68(2) of the Perak Enactment merely provides that the Court can pass sentence on the plea of guilty and the Criminal Procedure Code in section 173(m) (2) provides:

> “If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law.”

The question then becomes whether the accused had been correctly sentenced.\textsuperscript{84}

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82. See Supra. In the earlier discussion under the heading “THE PRE TRIAL PROCESS”, the author has ruled out the possibility of the statements to the Inspector of Religious Affairs being confessions.

83. Id.

84. The discussion herein proceeds on the assumption that the accused had been rightly tried and convicted under Perak Enactment read together with the Criminal Procedure Code.
Under Islamic law there are several types of *taazir* penalties: corporal punishment, flagellation, imprisonment and fine or even reproach. However, under the Perak Enactment, the only penalties provided are imprisonment, or fine, or both.

Under Islamic law, the penalty of imprisonment is usually reserved for incorrigible criminals and those who are deemed to be dangerous recidivists. This form of penal sanction is associated with security measures and is recognized by contemporary law as means of repressing crime.\(^5\) Therefore, the imposition of jail sentences on Siti Zan and Sakinah violates this principle of Islamic law because the judge had the alternative of penalizing them with a fine up to the extent of $500 or merely binding them over.\(^6\) In addition, the judge had asked several questions; the answers to those questions were relevant for the purpose of the mitigation of punishment. In the case of Sakinah, for example, a fine may have been more appropriate in view of the fact that she was breast-feeding her baby. Imprisonment was a severe punishment for her and also was, unintentionally, a punishment levied on the baby.

Similarly, in the case of Siti Zan, the judge did not deem it necessary to question her further even though she admitted that she did not know the man with whom she had committed the act. Was it possible for her not to know, or was it because she was protecting someone (possibly a male member of the family)? Could she have consented to the crime when she did not know the partner? Was there not a possibility that she could have been raped? Indeed, it was most disheartening to watch the Judge conducting the case with little or no interest or feeling for the female accused.

The Judge in his one paragraph judgment made three points before sentencing Siti Zan to six months' imprisonment. These points were:

(a) Sexual needs of men and women are a natural thing;
(b) Marriage should be sought for by women in order to satisfy their sexual desire;
and (c) Responsibility lies with parents to have their daughters married off.

In light of the above, and assuming that Siti Zan committed the act on her own free will, why was she so severely penalized when her parents,

\(^6\) The power of the Court to bind over a person is provided for by Section 71 of Perak Enactment.
arguably, were the ones who did not discharge their duties under the judge’s finding? 87

In the case of Sakinah, the judgment is even shorter; it comprised one short sentence. However, by examining the events at the trial, perhaps the maximum jail sentence was imposed because the partner to the crime was a non-Muslim man. 88 In her case the Public Prosecutor had urged the Court to pass a heavy sentence “on the accused because she was willing to cohabit with a non-Muslim man for a long time.” This fact might have been considered by the judge as an aggravating factor. In addition, Sakinah did not behave as a repentant sinner throughout the trial to warrant sympathy from the Court. 89

As far as the judge is concerned, Siti Zan and Sakinah do not differ from each other. In his view they both deserve the maximum penalty under the Perak Enactment. Indeed, these cases are exceptional ones. The sentence was manifestly excessive, especially so when we compare the sentences passed by Islamic Courts in the State of Perak for the offence of zina prior to the cases under study. In the past, normally the fine imposed was between $200 to $300 and it was also common for the Court to give the accused the alternative jail sentence, which had ranged between two to three months. 90 Applying the civil courts’ principles of sentencing, to pass an excessive sentence is to commit a wrong in law. Not only was the sentence excessive under the Perak Enactment, it was also excessive under Islamic law where the judge is required to appraise the degree of punishment for taazir criminals. When imposing punishment on a criminal through taazir, a judge should take into account the nature and gravity

87. The indigenous Malay Customary Law as codified in the Ninety-Nine Laws of Perak has a rule about the obligation of parents who have a young unmarried daughter. Thus Clause 67 provides:

What are the rules applying to the case of parents who have a young unmarried daughter? The Minister made answer, “Your Majesty, having a virgin daughter is like having gold, there are its uses and its drawbacks; its like having fire in the kampong, when she comes of age, at 17, her parents must seek a husband for her. If an inferior person wishes to wed her, she must be informed, and similarly if her proposed husband is a superior position. If they are both in the same station of life, after a short interval the marriage can take place.

88. Under Islamic law, a Muslim man may marry a Kitabiyya, that is a woman belonging to revealed religion with holy scripture such as Christianity and Judaism. A Muslim woman, however, is prohibited from marrying anyone but a Muslim.

89. She appeared in Court in a pair of jeans and a T shirt. The other two female accused wore a traditional dress and were veiled. She also looked defiant.

90. See, Kamarudin, supra note 56, at 64, 69, & 71.
of the offence and the personality of the offender. The choice of punishment is thus the result of the judge’s assessment of the facts. In addition, the judge is also expected to investigate thoroughly into the grounds for mitigation.91

Did Siti Zan and Sakinah have mitigating factors? The author believes they did; their mitigating factors are found in their answers to the questions put to them. However, as they had not been advised to seize such opportunity to ask for lesser sentence, they did not say much to help their cases. Notwithstanding that, the mitigating factors were available for the judge to consider. As the judge passed the sentence without reserving some time for deliberation, one could easily come to a conclusion that the factors were not considered at all.

Mitigation is important in both civil and criminal cases. Although legal aid is not available to defend the accused, legal aid is available to help the accused to seek mitigation of sentence;92 but, of course, no one had drawn the attention of these accused to the availability of such help.

With regard to the punishment of the male accused in the third case, the punishment was equivalent to that imposed on Siti Zan and Sakinah. This is most unfair to the two female accused. There were several aggravating factors against the male accused. Following the judge’s logic, the accused, as a married man, had an outlet to “satisfy his sexual need;” he was forty-six years older than his female co-accused; and, more importantly, when the female accused did not plead guilty (and if the charge against her was not proven) he could be guilty of rape. Probably because of lack of jurisdiction, a heavier sentence could not be imposed. Although this could have been the reason, the judge should have explained the restrictions imposed by law on him when sentencing Haji Mustakin. His failure to do so made him subject to criticisms by those present in the court.

91. Benmelha, supra note 10, at 220.
92. Section 10 of the Legal Aid Act, 1971 provides that legal aid may be given to criminal proceedings which are specified in the Second Schedule of the Act. The description of the criminal proceeding are as follows:

(1) All criminal proceedings in which the accused not being represented by counsel pleads guilty to the charge or charges and wishes to make a plea in mitigation in respect thereof.
(2) Criminal proceedings under the Children and Young Persons Act, 1947.
(3) Criminal proceedings under the Minor Offenses Ordinances, 1955.

The Legal Aid Centre of Selangor and Federal Territory was established in 1985 to render free legal service to the poor; and criminal defence is one of the matters in which legal aid can be given. However, this is only available to the poor in Kuala Lumpur and in some towns in Selangor.
The trial of the female accused in the third case was postponed. What happened subsequently is unknown; but if at the trial it was clear that there was doubt that she did commit the offence with her own free will, her case should be dropped. This is so because there is a provision in the Perak Enactment which provides that at any stage of the hearing before the verdict the Public Prosecutor may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge.\textsuperscript{93}

**CONCLUSION**

No doubt the punishment for \textit{zina} is severe, but the Islamic rules of evidence will ensure that only the guilty ones get punished. It is clear that the strict requirements for proving crimes is a confirmation of the individual's right to the presumption of innocence and to his or her dignity as a human being. Islam imposes the duty on the State to establish procedures for the investigation and prosecution of offenses. When prescribing the rules of criminal procedure, the State must ensure that the suspect will not be unfairly dragged to court and that the accused will be given a fair trial. Until proven otherwise the accused is to be presumed innocent.

Compared to the \textit{hudud} punishment prescribed for \textit{zina}, the punishment for \textit{zina} under States' Enactments is relatively light; and as States' Enactments further stipulate that the Islamic courts are to observe Islamic rules of evidence, a person accused of the offence would come to court confident of being acquitted at the end of the trial. However, his confidence will soon shatter once he pleads guilty. This is so because once he makes the wrong move to plead guilty, according to the procedure prescribed in States' Enactments, he will be sentenced, the Islamic courts not having to concern themselves with rules of evidence - Islamic or otherwise. The Islamic court judges feel themselves bound by the rules of

\textsuperscript{93} Section 68(13) of Perak Enactment provides:

\begin{quote}
At any stage of the hearing before verdict, the prosecutor may if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon, all proceedings on such charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same. Such discharge shall amount to an acquittal unless the Court so directs.
\end{quote}

This section is similar to section 259 of the Criminal Procedure Code.

Making Muslimah wait for the new trial would certainly cause her anxiety and trauma. She had not confessed to the offence. Was it likely that the Public Prosecutor would have four witnesses testifying to the actual act?
trial of adultery cases in Malaysia

criminal procedure laid down in States' Enactments although some of them are contrary to the Islamic principles. It is clear that there was an attempt to incorporate rules from the Criminal Procedure Code into States' Enactments. However, the performance of the task was deficient in that not only have important rules been left out, but also basic rules are provided for in a confusing and ambiguous way. The Islamic courts' judges, who are not familiar with the rules in the Criminal Procedure Code, administer justice according to what they understand to be the procedure laid down in States' Enactments. The trials discussed above are examples of the result of this judicial chaos.

It is also clearly desirable that judges be carefully trained in all matters relating to procedure, evidence and punishment before they are given authority over accused persons. Accused persons are all too often overborne by authority, confused and ashamed by the publicity attendant to their appearance in court. When they are not represented by any legal adviser skilled in Islamic law their plight becomes worse. The need for such training is imperative if the principles of Islam are to be upheld by those who are anxious to maintain them.

94. As an effort to train these judges in Islamic procedure and evidence, the Kulliyah of Law of the International Islamic University started to run a course for them in March 1985. This two-semester course leads to the conferment of the Diploma of Law and Administration of Islamic Judiciary.