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**A CRITICAL STUDY ON THE ROLE OF ISLAMIC CRIMINAL LAW
AND DETERRENCE OF CRIMES
IN MALAYSIA**

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**AN ACADEMIC PROJECT SUBMITTED IN PARTIAL FULFILLMENT FOR
THE
DEGREE OF MASTER OF CRIMINAL JUSTICE**

Perpustakaan Universiti Malaya



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**FACULTY OF LAW
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2008/2009

ACKNOWLEDGEMENT

I am ecstatic for the opportunity granted for joining the Master in Criminal Justice programme. It had truly been an exhilarating journey. I extend my sincere gratitude to lecturers and those involved who made the programme challenging and stimulating.

My greatest appreciation to Associate Professor Dr. Md. Khalil Bin Ruslan for his patience, guidance and wisdom throughout the whole evolution and development of my thesis. His knowledge and sound advice has been invaluable to me personally and professionally.

I would also like to express my recognition and gratitude to the Royal Malaysian Police and the Prison Department of Malaysia for facilitating my studies and to enable collection of necessary research work and the usage of data.

My humble thank you is extended to the participants of this study for their cooperation.

My family have been a long lasting source of energy during this exhaustive research. Their unflinching courage and conviction will always inspire me. It is to them that I dedicate this work. To my son, Avaneesh, whose birth I welcomed just as I was about to embark on this programme, you are my inspiration and motivation in my life. To my wife, you are the pillar of my strength.

I cannot end without praising God for his continuous abundant divine blessings that flows on to me bountifully and for never failing me in my time of need.

ABSTRACT

This study combines an evaluation of both criminological explanation of crimes in Malaysia and the extent in which regular and Islamic penal laws are effective in reducing spiralling crime rates in this country. The scope of research encompasses a study on three segments of criminal offences including property (robbery), murder and rape (sexual) offences. Largely based on Shaw and Mc Kay's work, this study examines the extent in which crimes are caused by extensive social disorganisations. The findings of the study critically postulated that property offences are largely influenced by poverty and unemployment and it appears that tougher sentencing such as the implication of Islamic penal codes are effective deterrent to this crime. However, there is less evidence showing the same to rape and murder offences where unlike property crimes that are considered 'calculated crimes' these crimes are mostly caused by emotional and psychological impairments. The study showed heavier punitive measures was not effective towards these types of crimes as they are considered as crimes of passion where offenders committed the offences in a state of mind that is emotionally or psychologically foiled.

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CHAPTER 1

INTRODUCTION TO RESEARCH TOPIC

1.1 Introduction

Crime rates and the publics' fear and sense of insecurity are increasing in Malaysia. Moreover, there is allegation¹ that global uncertainty and higher inflations of food, fuel and now even shelters (houses) are causing misery amongst society and has indicated that rise in petrol price recently have pressured society to commit crimes especially thefts and robbery at alarming rates. There is perhaps a strong connection between escalating crime rates and socio-economic changes in a country. This study is conducted to examine the extent of influence and correlation between socio-economic impacts on rising crimes and to examine the level of deterrence to crime under regular penal laws. The study also examines a comparative level of deterrence if the more stringent and punitive Islamic penal laws were applied in Malaysia.

1.2 Background to research topic

The alarming increase in crime rates and the severity of crimes have instigated very intensive calls to include Islamic penal laws into modern criminal justice system. For example, former *Prime Minister Margaret Thatcher* attempted re-introduce death penalty especially post the bomb attack at conference

¹ The Star News 25th June 2008

Conservative party in 1984. She also voted for re-introducing death penalty in House of Commons.² In Malaysia, *Dr. Mahathir* argued for tougher laws to deal with rising crimes.³ *Datuk Seri Abdul Hadi Awang* also attempted introducing the *Terengganu Syariah Criminal Offence (Hudud and Qisas) Bill* in Terengganu State Assembly on 7th July 2002. The calls for introducing capital sentence and Islamic penal law is partially due to the incapacity of modern penal laws in controlling the rampancy of crimes in modern society.

These calls to apply Islamic penal laws rest on the assumption that tougher and the more punitive nature of Islamic penal law is able to effectively deter crime. There has been no conclusive study yet conducted to examine the level of deterrence that Islamic penal law might have on deterring crimes and this study is aimed to supply some understanding on the deterrence of Islamic penal laws on three types of offences that are property (robbery), bodily (homicide) and sexual offences (rape).

1.3 Scope of the problem

Crimes are increasing at alarming rates and crimes do have realistic but negative impact on daily lives. For example, news programmes in Malaysia constantly broadcasted news of crimes and newspapers have high selling rates in reporting cruelty of crimes in the country.⁴ The *Malaysian Quality of Life (MQLI)* issued by *Economic Planning Unit* recorded a significant drop in public

² News Straits Times Oct. 17 1984

³ Reuter New Straits Times, Nov. 21 1984

⁴ Malaysia Media Monitors' Diary (Diari Pemantau Media Malaysia) 12/01/05

safety and environment by 9.8 points from 1996 – 2002. Public safety was recorded the lowest amongst the eleven indicators in the MQLI.

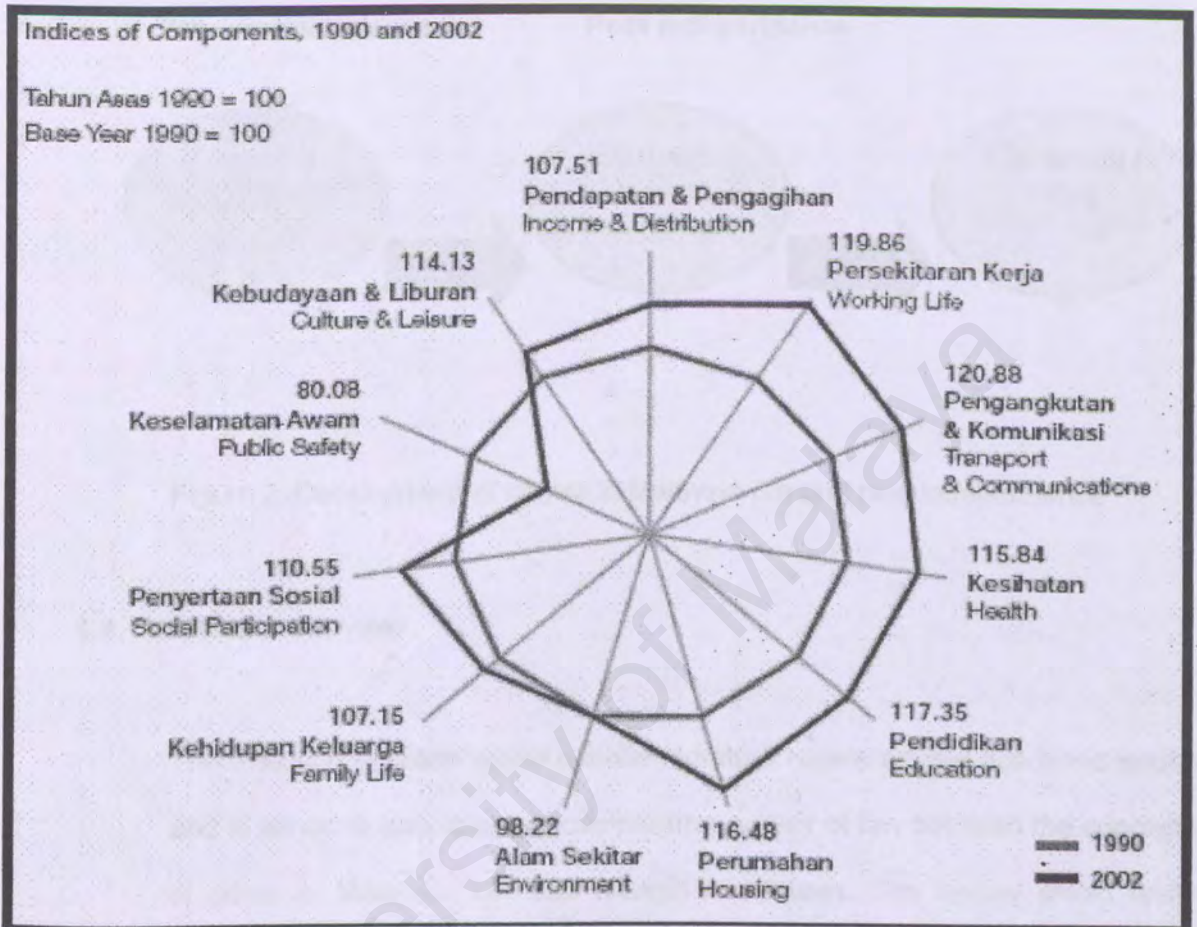


Figure 1: A comparison of indices, which are components of the MQLI

Source: The Malaysian Quality of Life Report 2004, Economic Planning Unit, Prime Minister's Department, Malaysia

Crime trends in Malaysia have significantly changed since independence in 1957. It started from basic trends of crime such as theft, physical injuries, and simple snatch theft to sophisticated organised crimes and syndicate crimes. Therefore, recent trends of crimes have pushed the capability of Royal

Malaysian Police (RMP) to limit and have seen greater engagement of forensic sciences to solve mysteries of crimes.

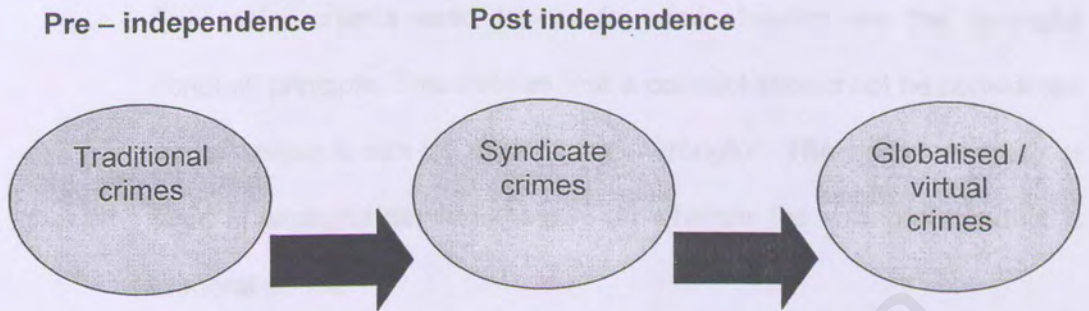


Figure 2: Development of crimes in Malaysia pre and post independence

1.4 Literature review

The following sections would provide literature review on few academic issues and is aimed to also supply a comparative survey of law between the concepts of crime in Malaysia, UK and Islamic penal laws. The review would firstly examine the comparative concepts of crime and objectives of criminal law under Malaysia, UK and Islamic penal codes. Then the review shall consider the aspect of criminology and emphasis would be rendered to examine the effect of social disorganisation and crimes. The review would be discussed as follows:

1.4.1 An introduction to the concept of crime in modern and Islamic criminal law

The major criteria used to decide criminalisation are the 'wrongful conduct' principle. This dictates that a conduct should not be considered illegal unless it can be regarded as 'wrongful'. The prime meaning of what is wrongful depends largely on whether the wrongful conduct is immoral or not.

A basic explanation of morality is "how to co-exist and to co-operate with others."⁵ The connectivity between immorality and criminal sanctions is clearly expounded by *Herbert Packer*⁶ where he stated as follows:

"The criminal sanction should ordinarily be limited to conduct that is viewed without significant social dissent as being immoral".

The next section shall basically evaluate the distinct conceptions of crime from the model of modern and Islamic penal laws.

1.4.2 Concept of crime in modern criminal law

The concept of crime in modern criminal law is not restricted to individualistic encounters but more focused on collective interests of the society. Modern criminal law is based upon the notion and idea of legal

⁵ Tony Hoore, "The Dependence of Morality on Law"(1993) 13 O.J.L.S. 1 at 2

⁶ *The Limits of Criminal Sanction* (1969), pp. 262 – 264

moralism where it has been submitted⁷ where crimes are concerned with conducts that significantly impact other people as well as animals individually or collectively. The central core of criminal conduct is therefore based upon the consensus of the communities in preserving the peace, welfare, coexistence and cooperation with others. So a conduct is considered a crime if one performs an act that is prohibited or make life hazardous or unpleasant to the society.

Thus modern criminal law is not only a prohibition of legal wrongs but also acts that are considered immoral. The idea of morality is central to modern criminal law and there are multiple examples in UK precedents. One good example is the famous UK decision of *R v Brown*⁸ where the case concerns the operation of consent in sadomasochistic behaviours. Here six middle-aged men were prosecuted their sado-masochistic practices.

The adults fully and freely consented to the acts done to them, and none sustained injuries sufficiently serious to need medical treatment. The acts were carried out entirely in private, and none of the "victims" had made any complaint, the activities having come to the attention of the police by accident during another investigation. The House of Lords, decided that the men's conduct was criminal.

⁷ Supra 5

⁸ [1994] 1 A.C. 212 (House of Lords)

Lord Templeman specifically stated that some form of assaults not occasioning actual bodily injury is not punishable at criminal law but the courts were willing to extend this criminal liability to punish harms that were caused or inflicted with the indulgence of cruelty and degradation of the victims and to invent a defense for assault in sado-masochistic behaviours would run contrary to public interest and glorifies cruelty. His Lordship stated the following:

“Sado-Masochistic homosexual activity cannot be regarded as conducive to the enhancement and enjoyment of family life or conducive to the welfare of the society”.

Another example is the decision of *Shaw v DPP*⁹ where the defendant published a book with names and addresses of prostitutes and sex workers, with their name, addresses and the types of services that they provided. There was no charge as there were no criminal offences that the defendant committed. However, Lord Simonds said that in criminal law the courts have residual power to preserve not only law and order but to preserve public morality. Therefore, for the first time, the courts held that the publications of such materials were caught under the offence of corrupting public morality.

Therefore it is clear that the courts are to some extent inventing new crimes and illustrated that the very source of quantifying a criminal act

⁹ [1961] 2 W.L.R. 897

lies largely on the issue of morality. The influence of morality is also keenly applied in Malaysian Penal Code that prohibits commission of unnatural offences for example *section 377* prohibits buggery with an animal and *section 377A* namely for sodomy and oral sex. *Section 377D* also prohibits any acts of gross indecency with another persons.

In the case of *Ng Huat v Public Prosecutor*¹⁰ where a radiographer was found guilty under the section for committing indecent acts for touching the penis, nipples and complainant's chest although the complainant was only admitted to x-ray an injured wrist.

1.4.3 Concept of crime in Islamic penal laws

Whilst modern criminal law emphasises the criterion of criminalisation upon public perceptions of moral wrongs, Islamic penal laws are strictly based on religious principles written in Qu'ran and the godly laws. The main reason for the distinction in the concept of crime in modern and Islamic penal law is probably because both laws are derived from different sources. Modern criminal laws are derived from usual instruments such as the constitutions, statutes, judicial precedents and customary laws. Islamic penal laws are from starkly different origins that are the Holy Qu'ran, traditions of the Apostle (Sunnah), the unanimous decision or consensus of Ulama' (ijma) and Qiyas (analogy).

¹⁰ [1995] 2 SLR 738

What is not forbidden in modern criminal law may not necessarily be permissible in Islamic penal laws. For example, voluntary sexual intercourse between a not married man and women is not a crime in modern law but is considered zina in Islamic hudud principles. The main rationale of the stricter and wider version of law is perhaps not only to uphold morality but also to maintain and preserve the nature of human race itself where it has been stated:¹¹

"The evil of zina is so great that it will destroy the whole human race, and the whole nation: and affection for children. From the medical point of view, zina will destroy human race physically. Sexually transmitted diseases (STD) is so rampant, especially in developed countries, that it threatens the whole society. Zina can only be stopped through strict adherence to Muslim law and today's AIDS is a human disaster created by sexual freedom culture".

The simplicity of the law has now been extended to regulate even on how a women should dress to avoid possibility of zina. Thus Islamic penal law criminalises acts that are generally not regarded as a crime in other forms of penal codes. For example, *section 31 of the Enakmen Jenayah Syariah Selangor 1995*, which lays down that:

"Mana-mana orang yang dengan sengaja bertindak atau berkelakuan tidak sopan bertentangan dengan Hukum Syara' di mana-mana tempat

¹¹ Nik Abdul Rashid, Former Director, Institute Technology MARA, "The Position of Islamic Law in Modern States" a paper presented at the Islamic Law Seminar, organised by the Bar Council of Malaysia, Kuala Lumpur, 1985

awam adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi satu ribu ringgit atau dipenjarakan selama tempoh tidak melebihi enam bulan atau kedua-duanya".

In Malaysia three Muslim girls were prosecuted in Selangor Syariah Court for having dressed indecently during a beauty pageant contest. The Holy Qur'an¹² required "believing women" to "guard their modesty"; and not to (1) "displaying their beauty and ornaments except what must ordinarily appear thereof"; (2) "draw their veils over their bosoms and not display their beauty except to their husbands" (and other named persons); and not to (3) "draw attention to their hidden ornaments". Beauty contests were in the exact contrary where women show their figures and sell their flesh for publicity and financial gains. Even though this is entirely permissible in modern penal laws but is exactly what has been prohibited in Islamic codes.

Other examples of the extra legal natures of Islamic penal law are where believers must obey the commands of Allah and His Apostle and would be liable as apostate (punishable by death) if he disobeyed Allah and His Apostles. Once an individual have accepted Islam he is permanently prohibited from embracing other religions. Furthermore, a believer would be liable for *bughat* (rebels) if he refuses to obey the Imam¹³ and must not commit treachery against the leadership of Islamic state where it has been stated:

¹² Surah Al-Nur (24:31)

¹³ Schacht, Joseph, "An Introduction to Islamic Law", Oxford at Clarendon Press, 1964

"O ye, who believe! Obey Allah, and obey the Apostle, And those charged, with authority among you"¹⁴

Therefore Islamic penal law zealously guards the dignity of religion. However, modern penal laws lack such religious decorum and although Chapter XV of the Malaysian Penal Code provides for some sort of protection but it only includes prohibition in defiling and injuring a place of worship, disturbing religion assembly, uttering words with intent to injure religious feeling and cause disunity in religions.

1.4.4 Objectives of punishments and sanctions in modern and Islamic criminal law

There are two basic objectives of punishments in modern criminal law. Firstly, the *retribution* theory that is a most common interpretation of the functions of criminal law depicts that the guilty person should be made to repay his or her debts to the society. Therefore, criminal law proceeds with expression of solemn gratification and a right to hate criminals. This view always regarded that the close alliance between criminal law and moral sentiments is always healthy and advantageous to the community at large.¹⁵ This view has been fervently supported since criminals were supposed to have asserted a superiority of influence upon an individual

¹⁴ Al Quran, al Nisa' 4:59

¹⁵ James Fitzjames Stephen, A History of the Criminal Law of England Volume ii (1883) pp 81-82 as cited in Clarkson and Keating (2004) Criminal Law Cases and Materials, Sweet and Maxwell, London.

who as a result have diminished in value rendering the criminal gaining an unfair advantage over the victim per se.¹⁶ Thus it was thought that the retribution theory explains that the punishment would have rejuvenated the rights of the victims and restores the equilibrium of benefits and burdens. Therefore, retribution theory centres on finding the social balance and equilibrium is aimed to revenge for the criminal and immoral deeds of the defendant.

Secondly, the concept of *consequentialist* theory in contrast with the retributive theory prescribe emphasis on the futuristic criminal acts and focuses on reducing the volume of crime prospectively as opposed to a retrospective emphasis of punishing the defendants for their criminal acts. The main nature of deterrence emphasizes on the probability of reducing the committing of criminal acts in future with punishment. Therefore, the severity of the punishment is based upon the merit of the severity of the crime and the volume in which it is committed and is not based on retribution against the offenders. The punishment meted out were exemplary punishments to deter the public from further committing the crime. Thus, England had reputation for football hooliganism that led to severe injuries or even death of innocent spectators. Therefore, to deter such crimes the court sentenced the defendant to life imprisonment for riotous assemblies outside a football ground or

¹⁶ Andrew Von Hirsch, *Doing Justice – The Choice of Punishment* (Report of the Committee for the Study of Incarceration) (1976) pp. 45 – 49 as cited in Clarkson and Keating (2004) *Criminal Law Cases and Materials*, Sweet and Maxwell, London

causing unrest amongst fans during games¹⁷ (the original length of sentence is 3 years).

The principal conception in the deterrence theory is focused on the ability of potential offenders to calculate the increased risks of committing crimes if punishments were duly increased. It has been shown that the potential crimes would be reduced if the potential criminal could have calculated the level of risks involved in committing the crime.¹⁸ Therefore, the degree and volume of criminal acts would subside following a greater and stricter legal enforcement. For example, there were reports on the reduction of bank robberies and kidnappings in the United States when the enactment of the federal legislation that increased the likelihood of punishment.¹⁹

Islamic penal laws are focused on *individual* and *general deterrence* (al zajr) and are aimed to remind not only the defendant but also the society at large about the hefty price they have to pay when a crime is committed. *Individual deterrence* comes into play when an offender suffers the strict penalties. *General deterrence* bears a utilitarian objective to deter any possible offenders in future from committing similar offences. Thus punishment is viewed to be exemplary whereby it serves as a vivid reminder to the public of the consequences of

¹⁷ Whiton, The Time, November 9, 1985.

¹⁸ J. Andenaes, The General Preventive Effects of Punishment (1966) 114 U.Pa.L.Rev. 960 – 970

¹⁹ Ibid

committing criminal offences. The deterrent objective of Islamic penal law is clearly seen as follow:

“Punishments of hudud are preventive before the commission of a crime and deterrent after its commission of a crime and deterrent after its commission; that is the knowledge of their (hudud) legislation can prevent any intention or attempt to commit it.”²⁰

The main objective of Islamic penal law is not to punish or retributive against the defendant because it has been registered that:

“What can Allah gain by your punishment?” “We showed them sign after sign each greater than its fellow and we seized them with punishment, in order that they might turn (to us).”²¹

Therefore, it is quite lucid that the aim of Islamic penal law is not to punish existing offenders but to deter future committing of crimes. Punishments given are almost exemplary and thereby inflicted in heavier proportion to crimes committed in order and served as a reminder to the rest of society not to commit crimes. Deterrence effect is achieved through heavier punishment and the widest possible publicity.²² This is well explained elsewhere:

²⁰ Hashiyah al Sheikh Shahabuddin Ahmad al Shalabi ala Sharh Kanz al Daqa'tq li al Zayla't, Vol. III, first publication: 1313H. P. 163

²¹ Al Quran, al Zukhruf 43: 48, see also al Quran, al Nisa 4: 147

²² Rolph, C.H., Common Sense About Crime and Punishment, London 1961, pp. 15 ff

"Hudud are those restraints provided by Allah as deterrents for commission of what is prohibited and for omission of what is commanded. Naturally human ignores the Next World threats while grabbing the world pleasure. Therefore the enforcement of hudud deters the ignorant persons from committing the crime so the prohibited is avoided and the commanded is complied: and the public interest prevails ..."²³

1.4.5 Criminological explanation of crime (sociological approach)

The sociological study of crime provides an ecological study of people and institutions in relation to influences of external environments. This study saw crimes as being proximately caused by environmental changes. Propounded by *Shaw and Mc Kay*²⁴ that studied pattern of crime rates in Chicago, the researchers divided Chicago into 140 different square miles and found that each of the segregated areas had differing rates of crimes and they found that most of the higher crime rates occurred in commerce and industrial zones where competition for living is at the peak. In these areas, living expenses were high and many of uncompetitive or unemployed people within these zones had to resort to committing crimes for survival.

²³ Al Mawardi p, al-Ahkam al-Sultaniyah 213

²⁴ Shaw, Clifford R. and Mc Kay, H.D. (1969), *Juvenile Delinquency and Urban Areas*, revised edn. Chicago: Chicago University Press

According to another research²⁵ changes in characteristics of neighbourhood has direct link with rates of crime and victimisation. Again there is support in that research that structural changes in society has direct linkage with the rate of juvenile delinquencies. Social disorganisations due to economic and societal changes bring about social disorganisations causing disruption of families and traditional parental roles. The research supported *Shaw and Mc Kay's* work whereby industrial and commercial experience core disorganisations and highest rates of crime whereas residential and more rural areas are less exposed to similar risks.

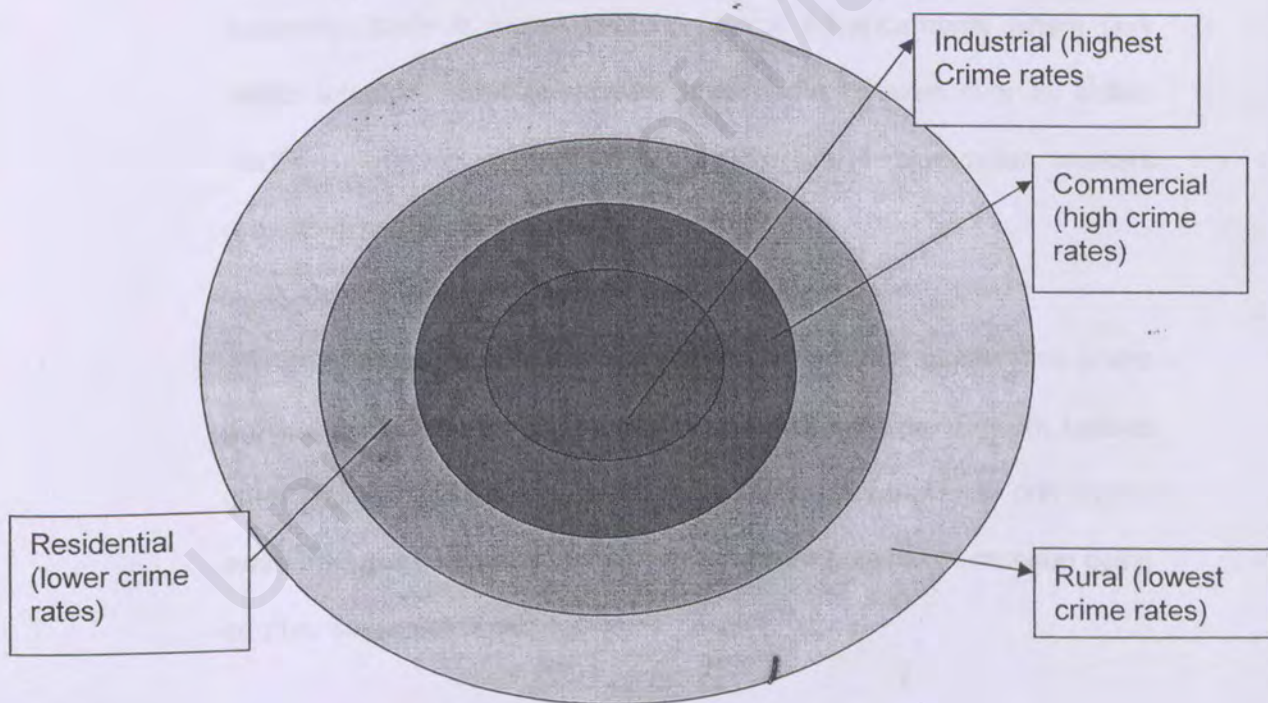


Figure 3: Distribution of crimes in society (Shaw & Mc Kay, 1969)

²⁵ Osgood D and Chambers J (2000) 'Social disorganisation outside Metropolis: An analysis of rural youth violence'. *Criminology*, 38:1: 106 – 107

This research finding was elaborated elsewhere²⁶ that economically more advanced districts, states and countries are currently undergoing fundamental economic transitions and social changes that directly affect the patterning of crimes. Social disorganisations bear the following hallmarks.

Firstly, the economic booms caused social disorganisations and the inability of nations' states to control or monitor these transnational capitals and therefore caused uneven and unequal income distributions.

Secondly, there is increase technological advancements where less labour intensive industry survived and gradually taken over by skilled workers and labourers making unskilled and blue-collar workers redundant and unemployed.

Thirdly, globalised economies caused radical change in lifestyles where it disrupts routine lifestyles. Long hours and overtime at work causes parents to spend less time with children and hence people drift further away from positive cultures such as socialising, church or mosque going or other social activities.

Fourthly, there is increase polarisation of gender roles and ethical social distinctions. This has significant impact, as more working females would

²⁶ Bottoms A. E. and Wiles P., (2002) Environmental Criminology, in Maguire M et. al (eds), The Oxford Handbook of Criminology, 3rd ed, pp. 648 – 649

mean that there is less guarded and occupied homes during the days allowing suitable target and attraction for motivated offender. This phenomenon is clearly seen in Malaysia where major cities such as Selangor and Kuala Lumpur has highest index of crimes in contrast with some more rural states such as Kelantan.

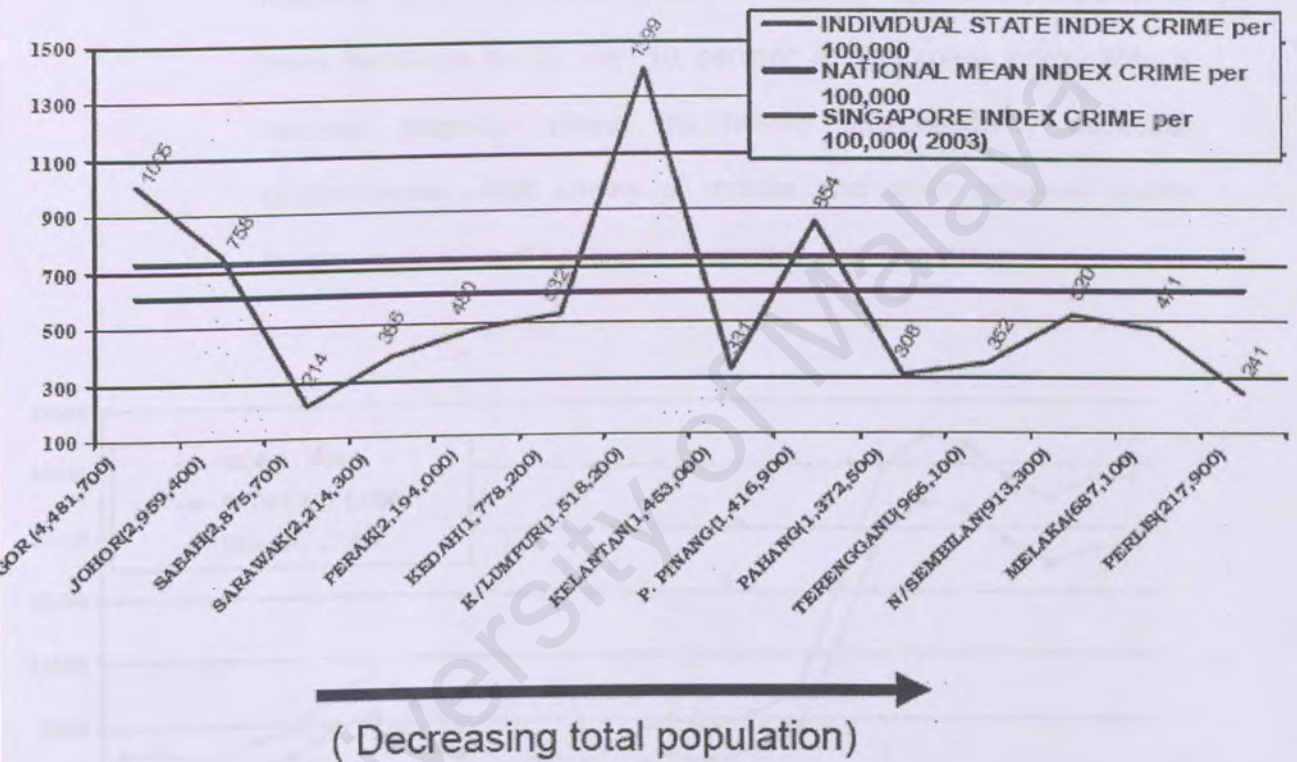


Figure 4: Crime index according to States

Source: Royal Malaysian Police (Bukit Aman)

It is clear that Selangor has 100% more crime rates compared to the National Mean Index of 600 whereas Kuala Lumpur hits a high of nearly 1,300 indexes, which is approximately 150%, compared to the National

index. It is also clearly shown that the state of Kelantan has merely 331 indexes in crime, which is approximately 300 points lower than national mean index.

Furthermore, pattern of crimes are clearly linked to economic conditions of a country. For example crimes related to property stand the highest rate from 1996 – 2004 and violent crimes although heavily reported in news headlines make only 10 percent of the crime index. This is because property crimes are heavily influenced by economic circumstances whilst crimes of murder and other personal injuries happen regardless of economic downturns and recessions.

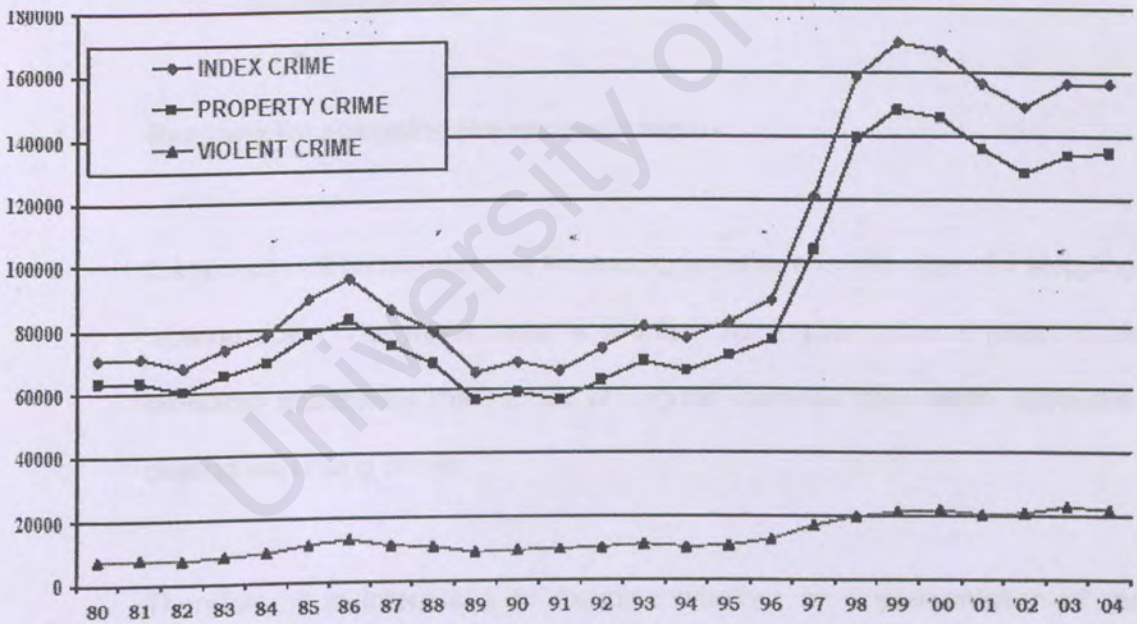


Figure 5: Crime rates in Malaysia from 1980 – 2004

Source Royal Malaysian Police (Bukit Aman)

Further examination of the chart sees that there is steady increase of crime rates in Malaysia from the past 20 years and the trend and fashion of crime is linked to economic conditions. The chart shows two peaks in crime periods that are in 1986 and 1997 – 1999 where there are economic recessions and downturns. During these periods inflation and unemployment rates were high and therefore most criminals were forced to resort to committing crimes for survival.

However, there are other studies²⁷ showed that crimes particularly aggravated assaults, burglary and robbery are not related to unemployment or social disorganisations. Therefore this study is to assess the extent in which crime is resulted from such social disorganisations.

1.5 Reasons for choosing the research topic

It appears that crime rates are increasing and there is little sign of it stopping or slowing down. The major issue is whether the regular criminal justice system including exclusively the nature of regular criminal laws were adequate in dealing with rising crimes.

Therefore, it is interesting to examine whether an implementation of more severe and rigorous mode of punishments and sanctions in Islamic penal laws would be an antidote to the worsening situation in Malaysia that is likely linked

²⁷ Danziger, S. and Wheeler, D. (1975), 'The economic of crime: punishment or income redistribution?' *Review of Social Economy*, Vol 33. p. 113

to social disorganisation. This study is then aimed to examine the level of specific and general deterrence on crimes if Islamic penal laws are implemented.

1.6 Purpose of research

There are three fundamental purposes in this research. They are explained in turn below.

a. Examine the criminological explanation of crimes

The first part of this thesis examines the underlying criminological explanation of crimes in Malaysia. Aspects and theories of criminology would be critically reviewed. The author then uses primary quantitative research to determine whether crimes in Malaysia are caused by social disorganisations. The research is conducted to study the effects of economic disorganisations and impact on crimes. There is consistent research in Malaysia²⁸ where there is significant correlation between unemployment, economic recession, inflations and crime rates. This is confirmed in another more recent research²⁹ that there is rise in crime index during the 1997 economic recession in Malaysia. The research findings showed that 75% of those convicted of crime committed crimes due to low pays, unemployment for long periods of time and difficulty in

²⁸ Hj. Ahmad Ragib b. Hj Mohd Salleh,(1987), "*Pengangguran merupakan faktor utama menyebabkan peningkatan jenayah harta benda di negeri Pahang*," Diploma Sains Kepolisian Project Paper, University Kebangsaan Malaysia / RMP.

²⁹ Mohd Sabri b. Muhamad (2002) , *Pengangguran dan Jenayah : Satu Kajian ke atas banduan di penjara Sg. Buluh.*, Diploma Sains Siasatan Project Paper, UM / RMP.

finding even part time jobs. Respondents in the findings indicated that economic factors and inability to compete is the main impetus for committing crimes. Another large category of respondents stated that they had to commit crimes to fund their drug related habits. These findings correlate to the statistics given by prison department where approximately 95% of the inmates have gross income per capita of approximately RM13, 000 making less than RM1, 200 per month.³⁰

<i>Monthly Income(RM)</i>	<i>Total Prisoners</i>	<i>Percentage</i>
Unemployed	8,543	17.3 %
Below 250	4,027	8.2 %
250 – 500	11,880	24.1 %
500-750	14,778	30 %
750 – 1000	7,573	15.5 %
1000 – 1500	1,696	3.4 %
1500 – 3000	746	1.5 %
Total	49, 243	100 %

95 % are earning below Malaysian per capita income.

Table 1: Convicted prisoners by monthly income

Source: Statistics from Prisons Department, Malaysia 2001

³⁰ Prisons Department, Malaysia 2001

- b. Critically study the adequacy of regular penal law in deterring crimes

This second part of the thesis explores the weaknesses of the penal law in deterrence of crimes. This part of the study examines whether criminals were wary and fear of regular criminal laws in Malaysia and to measure its effectiveness in specific and general deterrence of crimes.

- c. Critically study the deterrence level in Islamic criminal law

The last section of this thesis shall critically evaluate the extent Islamic criminal law could be a more suitable alternative in curbing crimes compared to regular criminal laws. The study reveals literatures stating that heavier penalties (such as death penalties) and sentencing would deter crimes. Therefore, in assessing the accuracies of these literatures, the researcher would survey amongst similar group of respondents (as above) to examine whether they would commit similar crimes if the laws were altered.

1.7 Contributions of research

The results and findings of this project shall contribute to:

- Study the underlying criminological reasons for the increase of crime rates in Malaysia

- Study the possible deterrent effects of applying Islamic penal laws and its possible effects on lowering crime rates.

1.8 Hypothesis

This study is aimed to test two different but related hypotheses:

H1: Criminals commit crimes because of economic, social disorganisations

H2: Tougher structure of penal laws with exemplary and publicised punishment would provide specific and general deterrence to committing crimes

1.9 Research methods

The modus operandi of the research would be based on the following:

a. Library research and secondary sources

The study relies fundamentally on library research on articles, journals and extensive reviews of decided cases in Malaysia, UK, USA and Pakistan (precedents) to build the foundation for testing of hypothesis. Articles and journals include a wide range of specialisations such as criminal law, criminology and psychology. These articles are acquired through premier online search such as Westlaw, Lexis Nexis, JSTOR and Ebsco Host.

The advantage of library research is that it provides readily prepared and tested information that is both reliable and accurate (as these are refereed journals). It saves time and helps to supply the researcher the fundamental concept and to steer the direction of the research. However, there are weaknesses of secondary resources. First, the articles may be outdated. Secondly, most of the journals including premier articles such as Oxford Journal of Legal Studies do not discuss the laws and impacts from Malaysian but foreign perspectives. Thirdly, most of the journals do not discuss directly on the point of deterrence of Islamic penal laws on the three scopes of crimes including property, bodily injuries and sexual offences. Selective reading is tremendously required. Other than this the researcher also relies on updates from newspapers and other published magazines. This includes reference to The Star Online, Reuters and statistics from the Royal Malaysian Police (RMP) and prisons department. Although these references are less academic but it provides the author an undated view in Malaysia.

Some of the journals referred (not exhaustive) to are:

1. Oxford Journals of Legal Studies
2. Criminal Law Review
3. British Journal of Criminology
4. Law paper by Malaysian Bar Council
5. Malayan Law Journal articles
6. Ohio Law Review

7. Journal of Sexual Aggression
8. Review of General Psychology

b. Primary resources

Due to the weaknesses of primary resources, the researcher has to supplement the information obtained from primary quantitative research. The research utilises mainly quantitative research involving the collection of information from a sample of individuals through their responses to their questions. This is a systematic collection and gathering of data. The advantages of such research method are that it is versatile and efficient where many variables could be measured at the same time.

Questionnaire development and design is a central importance in survey research that contained the questions for a self-administered survey. The questionnaires would be anchored on the *Likert scale*, response categories of (1) for agree strongly [AS], (2) for agree [A], (3) for disagree [D] and lastly (4) for disagree strongly [DS]. Questions were designed to be brief and easy to comprehend, as most of prisoners are not highly educated. Also, it would avoid difficult comprehension to the general public as well. The benefit of using *Likert scale* is to avoid having fence sitters and neutral opinions on the subject tested. Questionnaire shall be designed to test the following scope of interests in testing issues pertaining the criminological explanation of crimes and the deterrent effects of exemplary punishment under Islamic penal laws.

The results of the data would be tabulated and examined using a two-tier process of data analysis.³¹ Information would be coded and displayed through charts, graphs and taxonomies allowing researchers to detect recurring patterns for cross sectional analysis. This in turn allows researchers to develop a multi faceted comparison with other trends of information whilst maintaining their objectivity when comparing results.

1.10 Scope of research

The primary scope of study is to examine the level of deterrence of Islamic penal law in three types of offences that are:

- a. Robbery (property offences)
- b. Murder (grievous bodily harm and bodily offences)
- c. Rape (sexual offences)

This allows a balanced approach to study the deterrence impact of Islamic penal laws in relation to a cross sectional variety of offences. The research shall include two primary groups of respondents. Firstly, for testing H1, questionnaire would be distributed amongst criminals and inmates in Kajang Prison to obtain their views and study their criminology of committing crimes. For testing H2, questionnaire would be distributed to the sample respondents of criminals in Kajang Prison to ascertain whether they would not have committed

³¹ Eisenhardt, K.M., (1989), "Building theory from case study research", *Academy of Management Review*, Vol. 14 No. 4, pp. 532 – 550

the crimes if exemplary punishments under Islamic penal law were enforced. This is useful to ascertain the level of individual and specific deterrence from committing crimes. Secondly questionnaires would be distributed to the public to ascertain data for general deterrence and whether any person would commit crimes if exemplary Islamic penal laws. Figure 7 basically lays out the research scope of this study:

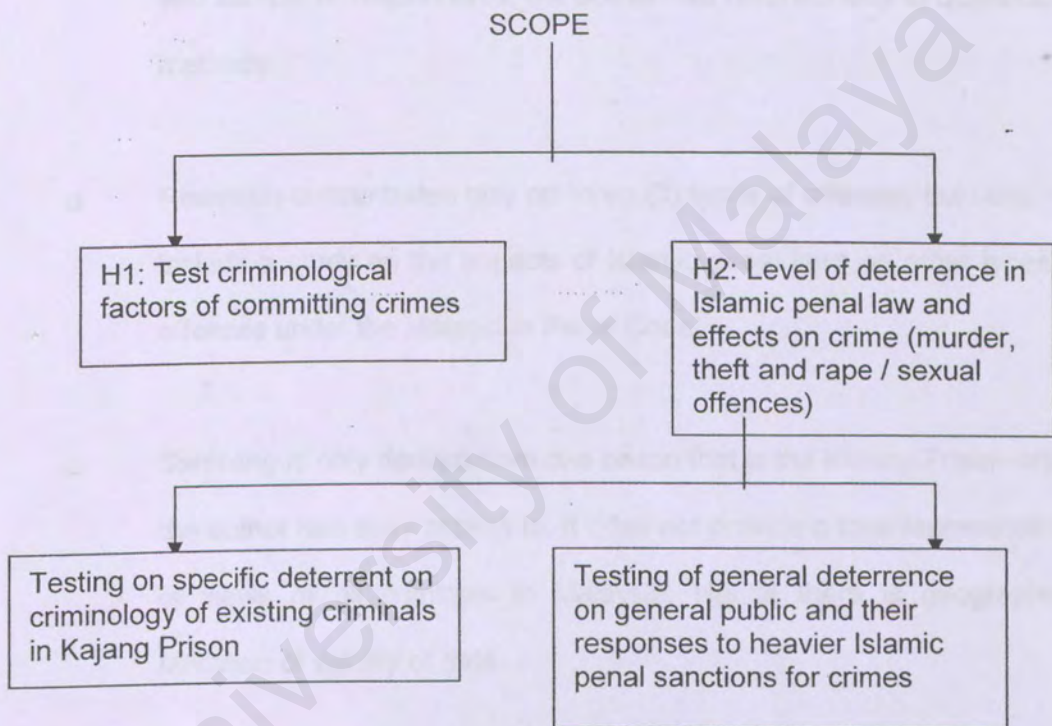


Figure 6: Scope of research

1.11 Limitations of study

The project inherits the following limitations:

- Research is conducted entirely through quantitative approach. The study would be much improved if there were qualitative interviews that would provide richer data of story telling. However, due to lack of time and sample of respondents, the author had resorted only to quantitative methods.
- Research concentrates only on three (3) types of offences but does not include a study on the impacts of Islamic penal laws on other types of offences under the Malaysian Penal Code.
- Sampling is only derived from one prison that is the Kajang Prison which the author has easy access to. It does not provide a total representation of views of all criminals in Malaysia. Hence there is geographical limitation of validity of data.
- The research tests only on Mc Kay's theory of social disorganisation and crime but does not tests on other theories such as the Routine Activity Theory (RAT) and the occurrence of crimes, physical traits and criminology and psychological explanation of crimes.

- The research does not discuss the implications and violations of human rights in the event Islamic penal law is applied in Malaysia.

1.12 Overcoming the limitations

The researcher has taken tentative steps to remedy some of the weaknesses in this study:

- The researcher engaged a prison warden as research assistant where specific instructions to distribute and explain the questionnaires to respondents and obtain unbiased sampling of respondents regardless of age, race, ethnicity and religion.
- The researcher also distributes questionnaires to general public to ascertain a more generalised opinion on deterrence factor of Islamic penal law. This gives the research a more balanced approach rather than just basing quantitative data derived from a fixed sampling of convicts and prisoners at Kajang Prison.

CHAPTER 2

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW ON ROBBERY

2.1 Introduction

This chapter is aimed to critically evaluate the Malaysian and UK criminal laws on robbery and armed robbery. The chapter then proceeds to provide case reviews showing the deterrent objectives of Malaysian penal code against robbery. It then evaluates some of the reasons why both Malaysian and UK criminal laws has been ineffective in deterring robberies in both countries. Specifically the chapter shall draw on some of the wide array of considerations for sentence reduction that may ultimately distort any forms of deterrence of crimes. Next, the chapter then reveals the aims and types of punishment accorded under the Islamic penal laws on robbery. This chapter includes quantitative study on prisoners (Kajang Prison) and public at large to assess the level of deterrence of robberies if Islamic penal laws are implemented. The issues would be dealt in chronology below.

2.2 Robbery and armed robbery in English and Malaysian penal laws (An introduction)

This section is firstly aimed to provide a general overview of the statutory provisions governing robbery offences both in Malaysia particularly *section 390, 392 and 397* of the Penal Code and *section 8(1)* of the Theft Act 1968 in the UK. Secondly, the chapter shall explain the deterrence objectives and aims of both Malaysian and UK penal codes on robbery. Thirdly, the chapter shall consider the complexities and obstacles in Malaysian and UK penal codes in laying effective deterrent factors to robberies. Fourthly, the chapter then proceeds to explain the relevance of sanctions on robberies provided under Islamic penal laws and to identify the level of deterrence compared to the Malaysian and UK penal codes on the offence. Each of the issues would be dealt in turn below.

2.2.1 Robbery under the Malaysian and UK penal laws

Robbery is an offence under *section 8* of the Theft Act 1968 (UK) that provides the following:

- (1) *A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.*

- (2) *A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.*

In Malaysia robbery is an offence under section 390 that provides the following:

- (1) *In all robbery there is either theft or extortion*
- (2) *Theft is "robbery", if, in order to commit theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or of instant wrongful restraint.*
- (3) *Extortion is "robbery", if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.*

Section 392 defined the punishment for robbery and states:

Whoever commits robbery shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine, and if the robbery be committed between sunset and sunrise the imprisonment may be extended to fourteen years, and he shall also be liable to fine or to whipping.

Whereas armed robbery is properly provided in section 397 where:

If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code.

2.3 Punishment and deterrence in Malaysian and UK penal laws on robbery

The main objective of sanctions provided under the UK and Malaysian penal law is not simply to punish the offender but to deter further commission of similar offences by the public at large. The aims of sanctions are partly to incapacitate the offender from re-offending. The following segment shall provide case reviews of authorities and decisions of Malaysian and UK courts and to explore the aim of deterrence in robbery and armed robbery.

2.3.1 Deterrent objective in sanctions and sentencing (case reviews)

The greatest rationale for courts imposing a deterrent attitude towards robbery and armed robbery is because these offences are *calculated and pre-planned* crimes. In *Choh Wai Sung v Public Prosecutor*³² robbery is described as:

"[Calculated to inspire great alarm]", as manifesting a very mischievous disposition, or especially rife in a particular district or throughout the country, it may be necessary to award a very severe punishment and to take away from the offender the power of committing such a crime or any crime for a long period" [Emphasis added]

There is increasing need to preserve public safety and prevent the commission of such serious offences. This is because robbery and armed robbery is potentially a life-threatening endeavour and most victims suffer some sort of psychological injuries and side effects. Furthermore, robbery is more than just merely property offences but also a crime against persons.³³

Therefore, the main objective of punishment meted out in *section 392* and *397* is aimed to provide sufficient deterrence to the public as an

³² [1946] 12 MLJ 119 at p 123

³³ *R v Henry* [1999] 46 NSWLR 346

exemplary punishment to deter the crime. In *Ong Lai Kim v Public Prosecutor and other appeals*³⁴ Zakaria Yatim J stated that:

"The punishment must not only deter the appellants from committing a similar offence in the future [but it must also deter others from committing such an offence]. In this case therefore the [punishment has to be sufficiently harsh] ... for the robbery offence must also be deterrent in nature". [Emphasis added]

This is confirmed elsewhere³⁵ where his Lordship Hashim Yeop A Sani J (as he then was) stated:

"In my view the courts will not be performing their functions honestly if the [seriousness of the situation is not reflected in the sentence imposed]..." [Emphasis added]

In the case of *Public Prosecutor v Vun Tain Yin & Anor*³⁶ his Lordship Abu Mansor Ali J (as he then was) said:

"It has also been many times said in sentencing the interest of the prisoner is not the only consideration...it is felt that it is the duty of this court to remind the public, so that it may act an [effective deterrent] and also speak of the clear stand of the court when an offence of this nature

³⁴ [1991] 3 MLJ 111 at p 115

³⁵ *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257

³⁶ [1986] CLJ (Rep) 633 at p 634

is committed that the punishment can only be imprisonment [Emphasis added].

In *Public Prosecutor v Lee Tak Keong*³⁷ his Lordship Zakaria Yatim J (as he then was) similarly stated that:

"The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries (see Goh Chong Wee v PP and PP v Mustanina bin Daing Sinring & Anor). In cases of robbery the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime".

Similar deterrence attitude is also keenly witnessed in UK cases and decisions. In the case of *Reg v Davies*³⁸ Lawton LJ stated:

"What then is the right sentencing policy in this class of case?...There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion, I think, is not held as strongly now as it was a few years ago. The reason is manifest; the courts have to make it

³⁷ [1989] 1 MLJ 307

³⁸ [1978] 67 Cr App R 207

clear that crime does not pay and the only way they can do is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct"

A similar dicta was reiterated in the recent UK case of *Kefford*³⁹ Lord Woolf LCJ stated that:

"Faced with that background the courts have no alternative but to adopt a robust sentencing policy towards those who commit these offences. Those who do so must understand that they will be punished severely. Custodial sentences will be the only option available to the courts when these offences are committed, unless there are exceptional circumstances. That will apply irrespective of the age of the offender and irrespective of whether the offender has previous convictions".

2.3.2 Adequacy or failure of deterrence of robberies under regular penal laws

It has been explored from the brief case reviews above that both Malaysian and UK penal laws are designed to deter further commission of robberies in both countries. However, both laws failed to execute proper deterrence to crimes of robberies because there is still escalating rates on robberies. The following segments would explore some of the growing statistics of robberies and crime rates in Malaysian and UK.

³⁹ [2002] 2 Cr.App.R. (S) 77 at 348

2.3.3 Spiralling robberies in Malaysia and UK

Even if the laws are aimed at deterring robberies however, statistics show that these crimes are not effectively contained. The *Jenayah Index 2005 – 2007* (Table 2) below showed that all four forms of robberies that are (1) armed gang robbery, (2) unarmed gang robbery, (3) robbery and (4) armed robbery have escalated from between 2005 – 2007. Robbery is the most common property offences amongst the four and in 2005 there is 13, 210 cases whereas in 2007 the figure is at a stunning 17, 241 cases in all which is a 24% increase. Gang robbery records another stunning increase where in 2005 there are only 1,842 cases whereas in 2007 there are 7,067 cases in all. Whereas the number of cases solved by the Royal Malaysian Police (RMP) for gang robbery in 2007 is only 2,524.

	2005	2006	2007	2008	2009	2010
Armed Gang Robbery	1,842	3,209	3,128	4,128	5,495	6,495
Unarmed Gang Robbery	3,210	3,210	4,507	6,107	6,495	6,495
Robbery	13,210	15,972	17,241	25,743	25,195	19,987
Armed Robbery	1,842	3,209	3,128	4,128	5,495	6,495

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JENAYAH KEKERASAN	2005		2006		2007	
	Jumlah Kes	Kes Selesai	Jumlah Kes	Kes Selesai	Jumlah Kes	Kes Selesai
BUNUH	497	328	604	385	588	404
CUBA BUNUH	94	75	*	*	*	*
ROGOL	1,887	1,769	2,435	2,238	3,177	2,938
CABUL KEHORMATAN	*	*	2,023	1,646	*	*
SAMUN BERKAWAN BERSENJATA API	40	7	68	18	77	13
SAMUN BERKAWAN TANPA SENJATA API	1842	774	2,658	1,043	7,067	2,524
SAMUN BERSENJATA API	317	59	247	44	202	27
SAMUN TANPA SENJATA API	13,210	6,474	18,446	7,878	17,241	8,221
PEMERASAN	*	*	1,549	1,020	*	*
UGUTAN JENAYAH	*	*	6,336	4,972	*	*
MERUSUH	*	*	2,261	1,627	*	*
MENCEDERAKAN	4,246	3,546	5,716	4,582	6,806	5,465
JUMLAH	22,133	13,032	42,343	25,453	35,158	19,592

Table 2: Jenayah Indeks 2005 – 2007

Source: Royal Malaysian Police (RMP)

Table 2 below shows the disposition of Malaysia in terms of total cases of reported robbery in Organisation for Economic Co-operation and Development (OECD) countries (including mugging and bag snatching). The highest incident of robbery is in United States with total reported

cases of 414, 235 in the year 2003. Malaysia records 16, 309 in 2003 compared to 14, 696 in 2000.

Total Robbery	2000	2001	2002	2003
Australia	23336	26591	20989	19719
Austria	3034	2824	3638	4434
Belgium	25945	26576	27455	25604
Canada	27037	27284	26662	28332
Denmark	3152	3192	3238	3181
Finland	2600	2157	2120	2045
France	109836	134281	133137	125286
Germany	59414	57108	58867	59782
Greece	1707	1939	2131	2320
Iceland	34	39	32	39
Ireland	2622	2880	2939	2794
Italy	67424	66671	68248	70625
Japan	5173	6393	6984	7664
Luxembourg	359	307	429	432
Malaysia	14696	13661	14405	16309
Netherlands	18630	21064	21389	20667
New Zealand	1779	1658	1836	1874
Norway	1730	1477	1648	1504
Portugal	17156	18585	19764	19767
Spain	93504	104735	102325	89440
Sweden	8999	8538	8974	8575
Switzerland	2178	2256	2445	
UK: England & Wales	95154	121359	108032	101195
US	408016	423557	420806	414235

Table 3: Comparison of robbery amongst OECD countries

Source: <http://micpohling.wordpress.com/2007/09/08/oecd-and-malaysia-robbery-statistic/>

In UK, robberies account for approximately twenty percent of crimes⁴⁰ that include professional armed robberies to simple robberies such as 'street muggings'. UK is continuously plagued by robberies although overall crime rates have declined and women especially fall victim to the crime that occasionally includes physically intrusive acts such as body

⁴⁰ Home Office Statistical Bulletin, *Crime in England and Wales 2001/02* (2002)

searching and sexual molests.⁴¹ Approximately 33% of the incidents include use of weapons whilst approximately 40% of persons robbed sustained some forms of personal injuries.

Approximately 15% of citizens in UK exhibited high level of worry and stress of being robbed⁴² and many has altered their lifestyles such as refraining to go out alone at night, increased spending on security measures such as alarms and personal security gadgets. Most victims and targets of robbery victims are those at socio-economically disorganised community where there is high level of disproportionate income and large gap between the rich and the poorer community.⁴³

2.4 Inadequacies of regular criminal laws in deterring robberies

It is quite clear the regular criminal laws in Malaysia and UK are unable to contain the growing rates of robberies in the countries. This section aims to identify the main reason for the failure of both laws in deterring robberies in modern society and to compare whether similar problems do exist in Islamic penal laws.

One major problem is that the sentencing of criminals is almost inconsistent and irregular dependent upon certain considerations that might mitigate or exacerbate sentencing. For example, in Malaysia the longest sentencing for

⁴¹ Ibid

⁴² Supra note 40

⁴³ Supra note 40

robbery is ten years and if the robbery was done with dangerous weapons, then it shall be accompanied with whipping of the convict. In UK, it appeared that the length of sentencing is longer and if convicted shall be sentenced right up to life imprisonment. However, this means that the court has huge discretion to determine the length of sentencing using wide discretions. There is a serious lack of uniformity of sentencing and generally it depends on a variety of situational factors.

There are resentments that the punishment accorded under regular penal laws is grossly inadequate and too lenient. For example the results from the *British Crime Survey*⁴⁴ that approximately 51% of respondents felt that sentencing were either overtly lenient or it does not match the pain and sufferings of the victims in the crime. Similar results were acquired in another study⁴⁵ in Western Australia where approximately 80% of respondents felt that sentencing meted out by courts were too soft and merciful towards the offenders. More often, the courts would not be meting maximum sentencing and punishment but are more likely to be influenced by external variables that might mitigate the severity of sentencing.

⁴⁴ M. Hough and J. Roberts, *Attitudes to Punishment: Findings from the British Crime Survey* (1998) HORS 179 as cited in Austin Lovegrove (2007), Public opinion, sentencing and lenience: an empirical study involving judges consulting the community, *Crim. L.R.* 769

⁴⁵ *Courts Consulting the Community* (2006), Square Holes, Adelaide, South Australia as cited in Austin Lovegrove (2007), Public opinion, sentencing and lenience: an empirical study involving judges consulting the community, *Crim. L.R.* 769

The influence of mitigation is also clearly seen in Malaysian cases. For example in *PP v Leonard Glenn Francis*⁴⁶ where his Lordship Edgar Joseph Jr. J (as the then was) stated:

"In all the circumstances, after having given anxious consideration to the age, character, antecedents and family background of the respondent and the circumstances of the whole case as a whole..."

A similar note has been made in the case of *Joginder Singh v Public Prosecutor*⁴⁷ where Ajaib Singh J (as he then was) stated that:

"...The courts invariably take certain factors into consideration...the age of the offender, his health, his character and background, the nature of the offence and the circumstances that it was committed. The courts are duty bound to consider all these matters before deciding upon a suitable sentence..."

In *PP v Loo Choon Fat*⁴⁸ Yeop Sani J (as he then was) stated:

"A convicted person will also normally bring up problems of family hardship and other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship"

⁴⁶ [1989] 2 MLJ 158 at p 160

⁴⁷ [1984] 2 MLJ 133 at p 140

⁴⁸ Supra 35

Therefore, it seems that the court will not impose maximum penalty and sentencing for offenders but are obliged to balance it with mitigation factors such as age, seriousness of offence, weapons used etc.

A similar trend is seen in UK. Whereas the offence carries life imprisonment, it is very rarely that a court would impose compulsory sentencing. Table 4 below clearly shows the low number of robbers sentenced by courts yearly.

Nearly most of older robbers (aged 21 above) were imprisoned whilst younger offenders between the age of 18 –20 and the bracket of 10 – 17 receive lighter punishment including short-term detention and community sentences or supervision orders.⁴⁹

	Total sentenced	Percent	Community sentences	Percent	Sentences detention	Percent	Prison	Percent	Other percent
1990	4,800	100	1,100	23	1,400	29	1,800	38	10
1995	5,200	100	1,400	27	1,400	27	1,900	37	9
2000	5,900	100	1,400	24	1,900	32	2,200	37	7

Table 4: Sentences for Robbery (UK)

Source: *Criminal Statistics 2000*, Table 5.9

⁴⁹ *Supplementary Criminal Statistics 2000*, vols. 1 and 2 UK

In fact in UK life imprisonment is rarely meted and a study showed that courts are only meting an average of 18 – 20 years for professional armed robberies that include kidnapping, false imprisonment or serious injuries. This is the top category and classified as the most serious. A number of cases showed court's willingness to render and mete long-term sentencing. For example in the *Great Train Robbery* in the case of *Wilson*⁵⁰ involving some \$2.5 million losses where the bandits were sentenced to 22 – 25 years of imprisonment and might which had been discounted from the original 30 years imprisonment because the defendants pleaded guilty.

Starkly different however, robbers convicted for using some force in common theft of small properties is only liable to an average of 3 – 5 years imprisonment. Most robberies consist of using some force on the victim and theft of properties such as mugging of taxi drivers. In these cases, courts were more on a lenient mode and sentenced less than 5 years imprisonment to defendants. For example in the case of *Ravenscroft*⁵¹ where the offender injured the taxi – driver on the head and stole \$20, the courts sentenced four and a half years and also in the case of *Howe and Graham*⁵² where the defendant snatched bags from elderly victims but where little force was used, the courts sentenced the robbers to only four years imprisonment. Again, in the

⁵⁰ (1964) 48 Cr.App.R. 329.

⁵¹ [1996] 1 Cr.App.R. (S) 71

⁵² [2001] 2 Cr.App.R. (S) 479

case of Q⁵³ the defendant used a hammer to threaten the victim to hand over the hand phone. The court's original sentencing was initially for four years but then reduced to three because the defendant is aged only 17 years old.

The leniency of the UK disposition can be seen from a dictum⁵⁴ below:

"First of all it was to some extent unsophisticated, the absence of the mask, the fact that he was acting on his own...the fact that the gun although apparently usable was not lethal, the fact that no one was actually hurt, the whole circumstances of the various offences lead us to think that this was no the sort of case which requires a 15 year category [imprisonment]".

2.5 Islamic penal laws on robbery

Robbery and armed robbery (al Hirabah) is a serious offence in Islam and the seriousness is reflected in a verse from al-Quran⁵⁵ that stated:

"The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter. Except for those who repent before they fall into your power: In that case, know that Allah is Oft-forgiving, Most Merciful"

⁵³ [2002] 2 Cr.App.R. (S) 77

⁵⁴ As per Lord Lane CJ in Daly (1981) 3 Cr.App.R. (S) 340

⁵⁵ al Quran, al Maaidah 5.33, 34

Crimes of robbery is one of the most serious and hated crime in Islam because of its evil purpose and the adverse consequence of committing the crime where there is likelihood of hurting or even killing victims during the commission of the offence.⁵⁶

Hirabah is generally different from theft where in that offence, the offender takes away the property belonging to another not using force or in stealth where hirabah means to quarrel, to fight and take away property of others using force or violence. According to some jurisdictions⁵⁷ hirabah is explained as:

"When anyone or more persons, whether equipped with arms or not, make a show of force for the purpose of taking away property of another and attack him or cause wrongful constrains or put him in fear of death or hurt such person or persons are said to commit hirabah"

There are generally four ways in which hirabah may be committed:

First, the offender had intention to take away property by using force or threatening the victim but did not take away property or hurt or killed anyone in the process.

⁵⁶ M.S. Bassiouni, *The Islamic Criminal Justice System*, Oceana Publications, Inc, New York, 1982, pg. 195

⁵⁷ Section 15 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, Islamic Republic of Pakistan

Secondly, offender strikes and takes away property by force but did not kill or injured anybody.

Thirdly, offender threatened to use force to take property killed someone in the process but did not take away property.

Fourthly, offender takes away property by force and killed someone in the process.

The sentence and punishment given to robbery and armed robbery in Islam is divided into four groups:

a. Execution or beheading

Most jurists agree that execution should be meted for third and fourth category of robbery described above. For example *Al – Nawawi*⁵⁸ stated that robbery coupled with homicide must be punished by death and the corpse is to be exposed to the public for three days on a cross.

b. Crucifixion

Crucifixion is another punishment prescribed for hirabah and can be executed again if the offender commits homicide during the robbery. There are two views on crucifixion where the offender is placed on a cross and then thrust by a

⁵⁸ Bidaya al-Mujtahid vol.2, pg 380 381

javelin and the other opinion provides that the offender be executed first and then placed on the cross for public to view.

c. Amputation

Amputation is to be inflicted on those who rob but does not kill. According to *Imam Malik*⁵⁹ the qadi can order the cutting of hands on the muharib that commits robbery but not involving homicide. The amputation is made in public as deterrence to future crimes. There are some remaining controversies regarding amputation. *Ibn Qudama*⁶⁰ asserted that if the offence is committed for the first time then the right hand and left foot be amputated and if the offender commits another robbery then there should be no more amputations. However, more stringent jurists⁶¹ the left hand and the right foot should be cut off too.

d. Al Nafi (banishment)

Banishment or exile is prescribed for offenders that attempted to rob but did not take property nor killed the victims. However, banishment is not a literal act to exile the offender to another state or country but according to *Hanafis* and *Shafii's*, exile should be in the form of imprisonment for as long as until the

⁵⁹ Badai Al-Sanai, vol.7, pg 93

⁶⁰ Al-Mughni, vol. A, pg 311

⁶¹ Ibid

offender repents.⁶² According to the two schools, imprisonment is vital since it could deter future crimes and protect innocent people from the offender.

2.6 Result of application of Islamic penal laws on robbery

The result of application of Islamic penal laws on robbery is significant. Islamic countries such as Saudi Arabia and Yemen records significantly lower robbery rates compared to other countries. This is well explained in Table 5 below. Spain tops the table with 497, 262 compared to Saudi Arabia at rank 54 at only 598 reported robberies. Qatar reported only 4 robberies during the same period.

Rank	Countries	(Top to bottom)
#1	<u>Spain:</u>	497,262
#2	<u>United States:</u>	409,670
#3	<u>Mexico:</u>	215,120
#4	<u>South Africa:</u>	197,038
#5	<u>Russia:</u>	132,393
#6	<u>Chile:</u>	110,672
#7	<u>United Kingdom:</u>	95,154
#8	<u>Indonesia:</u>	61,260
#9	<u>Germany:</u>	59,414
#10	<u>Poland:</u>	53,533
#11	<u>Italy:</u>	37,726
#12	<u>Venezuela:</u>	34,975
#13	<u>India:</u>	28,411

⁶² Badai' al-Sanai', vol.7, pg 95

#14	<u>Canada:</u>	27,012
#15	<u>Colombia:</u>	24,537
#16	<u>France:</u>	24,304
#17	<u>Australia:</u>	23,314
#18	<u>Ukraine:</u>	21,429
#19	<u>Costa Rica:</u>	19,241
#20	<u>Netherlands:</u>	18,630
#21	<u>Portugal:</u>	17,156
#22	<u>Malaysia:</u>	14,696
#23	<u>Zimbabwe:</u>	11,855
#24	<u>Belarus:</u>	5,668
#25	<u>Uruguay:</u>	5,367
#26	<u>Japan:</u>	5,173
#27	<u>Estonia:</u>	4,754
#28	<u>Sri Lanka:</u>	4,647
#29	<u>Korea, South:</u>	4,524
#30	<u>Lithuania:</u>	4,374
#31	<u>Bulgaria:</u>	4,266
#32	<u>Romania:</u>	4,143
#33	<u>Czech Republic:</u>	4,099
#34	<u>Hungary:</u>	3,494
#35	<u>Hong Kong:</u>	3,433
#36	<u>Papua New Guinea:</u>	3,394
#37	<u>Latvia:</u>	3,160
#38	<u>Denmark:</u>	3,152
#39	<u>Zambia:</u>	2,699
#40	<u>Finland:</u>	2,600
#41	<u>Moldova:</u>	2,539
#42	<u>Ireland:</u>	2,414
#43	<u>Jamaica:</u>	2,331
#44	<u>Switzerland:</u>	2,178
#45	<u>Norway:</u>	1,781
#46	<u>New Zealand:</u>	1,775

#47	<u>Turkey:</u>	1,633
#48	<u>Kyrgyzstan:</u>	1,497
#49	<u>Slovakia:</u>	1,264
#50	<u>Mauritius:</u>	1,166
#51	<u>Tunisia:</u>	958
#52	<u>Greece:</u>	833
#53	<u>Thailand:</u>	780
#54	<u>Saudi Arabia:</u>	598
#55	<u>Slovenia:</u>	474
#56	<u>Georgia:</u>	336
#57	<u>Macedonia, The Former Yugoslav Republic of:</u>	296
#58	<u>Yemen:</u>	175
#59	<u>Armenia:</u>	162
#60	<u>Azerbaijan:</u>	145
#61	<u>Dominica:</u>	57
#62	<u>Seychelles:</u>	53
#63	<u>Iceland:</u>	34
#64	<u>Qatar:</u>	4

Table 5: Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, from 1998 – 2000

Source: United Nations Office on Drugs and Crime, Centre for International Crime Prevention

2.7 Research objectives

Chapter two seeks to examine and fulfil three research objectives. Firstly, to examine the criminology of robbery in Malaysia and to ascertain whether increase in robbery could be due to sociological disorganisation as described by Shaw and Mac Kay.

Secondly, to ascertain the level of deterrence of Malaysian penal laws on robbery and whether the sentencing or punishment is sufficient to deter crimes or it is as alleged to be overly lenient.

Thirdly, to ascertain the level of specific and general deterrence of Islamic penal law on the hypothetical assumption that the capital punishment and amputation is to be inflicted on likely offenders and to compare the level of deterrence in Islamic penal law against Malaysian penal law.

2.8 Research methods

Two sets of questionnaires were distributed for the purpose of ascertaining specific and general deterrence of Islamic penal law on crimes.

Specific deterrence

The sampling here includes twenty respondents with twelve convicted under *section 392* and eight under *section 397* for armed robbery. The samples were

selected purposively since the offences are specific and the researcher is examining deterrence level of Malaysia and Islamic penal codes on specified rather than generalised crimes. Another reason for using a purposive sampling method is that there is limited availability of resources. The sampling is derived from Kajang Prison and the researchers were only allowed to distribute maximum of twenty questionnaires to respondents. The method of data collection is self-administered questionnaire where the forms were hand delivered and re-collected after 7 days interval. Respondents are required to fill up the questionnaires after completely filling the survey forms. There is no interviewing or any personal contact with respondents since the researcher has been strictly limited the amount of contact with respondents at Kajang Prison for security reasons. The researcher engaged an assistant prison warden to explain as well as administer and distribute the questionnaire to the twenty respondents.

The questionnaires for robbery (Appendix A1) were designed to test two variables in robbery offence. Firstly, robbery is more likely committed in respond to radical social and economic disorganisation. This variable includes testing on particularly the effect of economic changes and increased challenges of life and the necessity to survive through robbery and committing property offences.

Secondly, more severe punishment for example amputation of body parts is likely to deter commission of crime. This includes a direct comparison of fear factor of respondents towards imprisonment and amputation of body parts.

General deterrence

The idea of general deterrence is to ascertain whether punishments under Islamic penal laws were exemplary enough to deter crime from a general perception. Thirty questionnaires were distributed amongst the public (random selection) to obtain public responds towards the appropriateness of imposing a more severe penalty to robbery offences and to evaluate the strength of Islamic penal law as a tool of general deterrence (Appendix A2).

2.9 Results and findings

There are two sets of results and findings on determining the level of deterrence of Islamic penal law on robbery. They are separated as the specific and general deterrence. The results and findings are discussed in separate headings.

2.9.1 Findings on specific deterrence

Questionnaires were distributed to twenty-five respondents (convicts of robbery and armed robbery in Malaysia). All twenty-five respondents are male with the average age of 30 – 39. Only five respondents were charged for armed robbery under *section 397* of the Penal Code. All twenty respondents for conviction for robbery were sentenced between 1 – 5 years imprisonment whereas all four respondents for armed

robbery were sentenced to 6 – 10 years imprisonment plus whipping whereas one respondent for armed robbery was given maximum of 11 – 14 years plus whipping. The following sections would explain the results of the findings in chronological discussions.

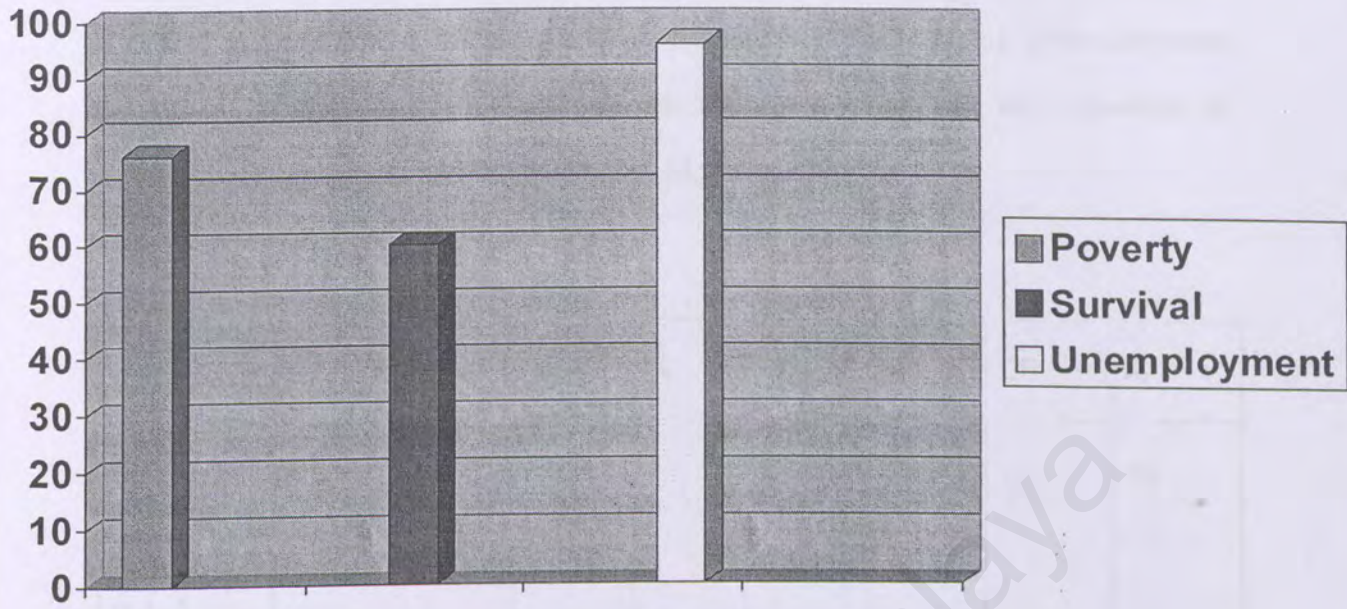
Reasons for committing robbery

Results predominantly strongly agreed that poverty, survival and unemployment. 96% of respondents agreed strongly that unemployment as the main cause of robbery whilst 76% agreeing strongly that poverty as other reasons of committing crimes. Whilst 60% of the respondents agreed strongly that survival is another culpable reason for committing robbery. The results are tabulated in Table 6 below.

	AS	%	A	%	D	%	DS	%
Poverty	19	76	6	24	Nil		Nil	
Survival	15	60	10	40	Nil		Nil	
Unemployment	24	6	1	4	Nil		Nil	

Table 6: Tabulation of findings on reasons of committing robbery

(Out of twenty-five respondents)



Percentage of respondents based on agree strongly (AS) only

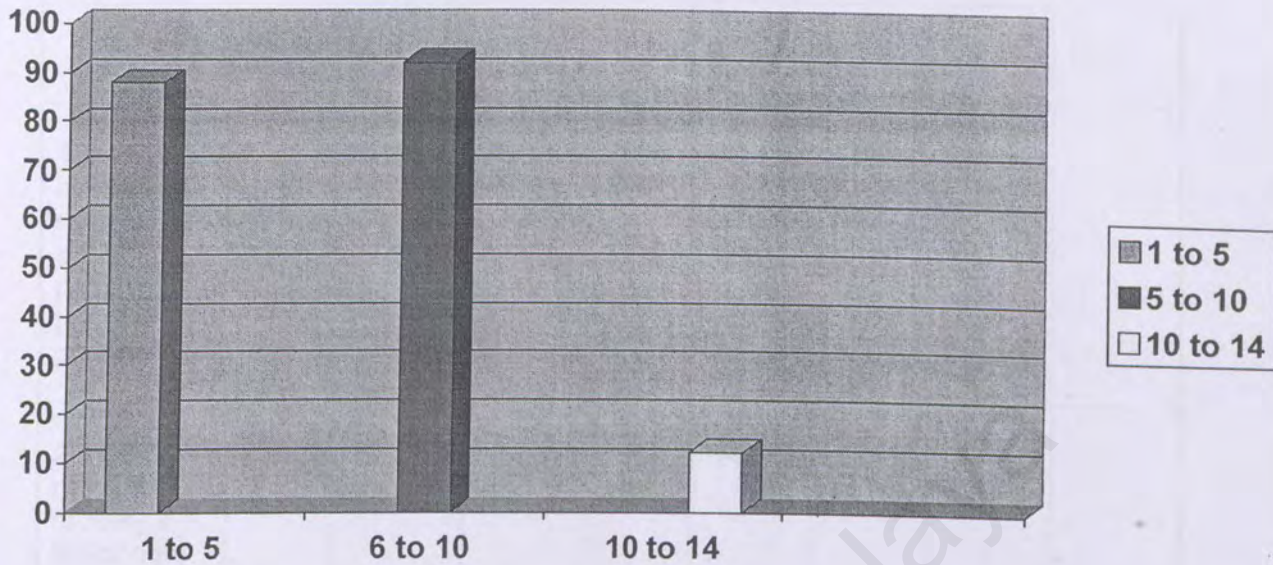
Deterrence level of Malaysian penal code on robbery

The results from quantitative study of twenty-five respondents showed that there is very little deterrent effect of imprisonment on robbery especially armed robbery. Approximately 88% respondents indicated that they would still commit robbery if the sentencing imposed were between 1 – 5 years whilst 12% disagreed strongly that they would not commit robbery with imposition of sentencing for that duration. Similar results were achieved even when sentencing imposed were between 6 – 10 years. 92% disagreed that they would not commit the crime if the sentencing imposed were between a 6 – 10 years period. However, most respondents (88%) indicated that they would not commit robbery if

sentencing imposed were between 10 – 14 years except 12% consisting of armed robbers (hardcore and professional robbers), which indicated that they would still commit the crime even with the imposition of imprisonment between 10 – 14 years.

	AS	%	A	%	D	%	DS	%
1. I would not commit robbery if sentencing is 1- 5 years	NIL		NIL		22	88	3	12
2. I would not commit robbery if sentencing is 6 – 10 years	NIL		NIL		23	92	2	8
3. I would not commit robbery if sentencing is 10 – 14 years	NIL		22	88	3	12	NIL	NIL

Table 7: Tabulation of findings on specific deterrence level of Malaysian penal code on robbery
(Out of twenty-five respondents)



Percentage of convicts that would still commit crimes at differing levels of sentencing

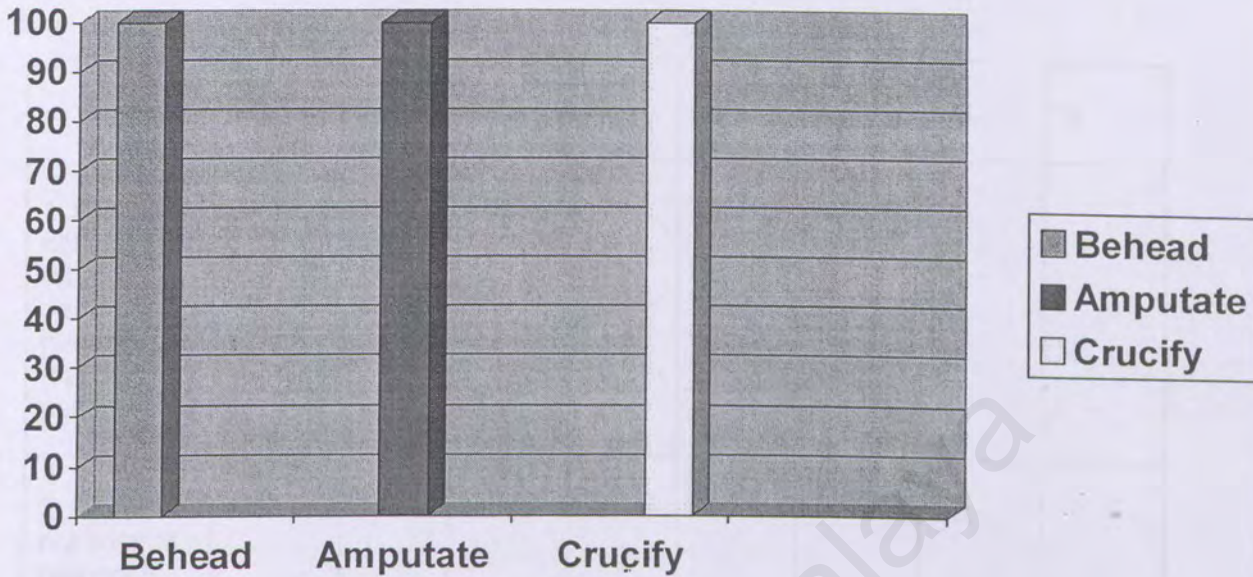
Deterrence level of Islamic penal code on robbery

It appears from the findings that the extent of deterrence of Islamic penal law on robbery is very positive. Given the heavier punishment accorded to robbery and armed robbery such as amputation of arm and legs, beheading and crucifixion all 100% of respondents indicated that they would not commit the robbery if these punishments stated above were applied. On the contrary, the punishment of exultation has little deterrent effect on robbery where an overwhelming 72% indicated that they disagreed that they would not commit the crime if the punishment of exultation.

	AS	%	A	%	D	%	DS	%
1. I would not commit robbery if death penalty (capital punishment)	25	100	NIL		NIL		NIL	
2. I would not commit robbery if left or right arm or leg amputated	25	100	NIL		NIL		NIL	
3. I would not commit robbery if I am crucified	25	100	NIL		NIL		NIL	
4. I would not commit robbery if exiled	NIL	NIL	NIL		18	72	7	28

Table 8: Tabulation of findings on specific deterrence level of Islamic penal laws on robbery

(Out of twenty-five respondents)



Percentage of convicts that would not commit crimes if Islamic penal laws were applied
(Based on response on agreeing strongly only)

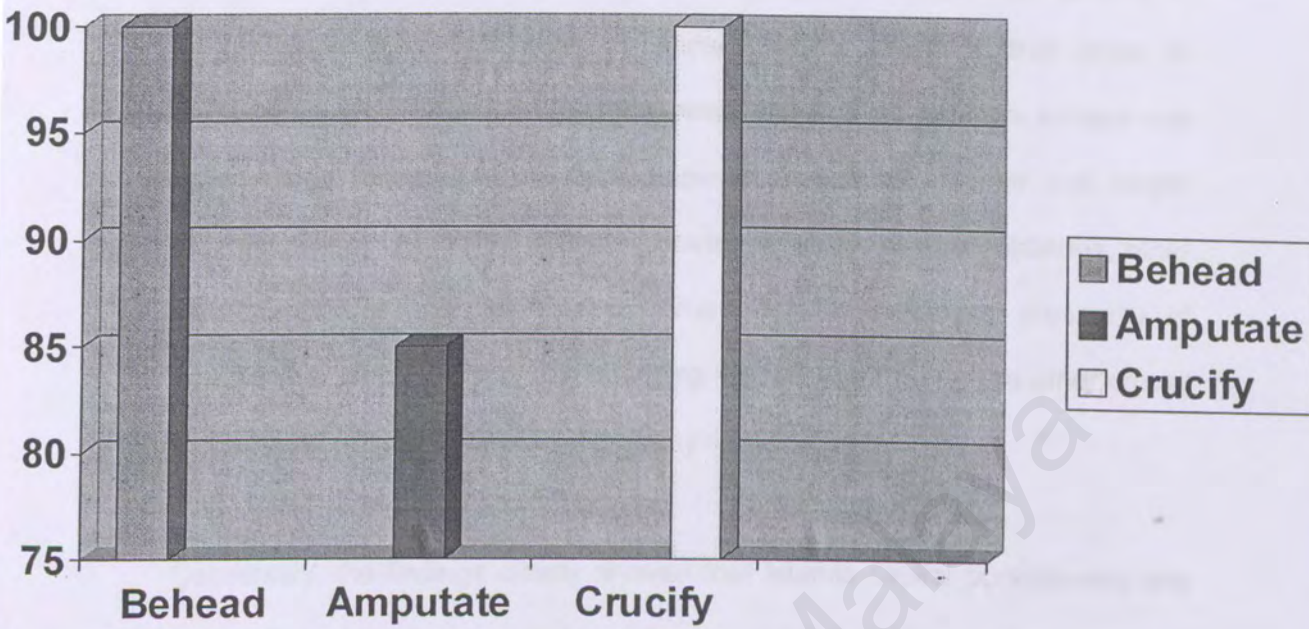
General deterrence

Questionnaires were also distributed to 34 respondents derived from the general public to ascertain the level of general deterrence of Islamic penal laws on robbery. The respondents consisted of 16 males and 18 females with age ranging from 21 – 59 years old. The results were also consistent with the findings on specific deterrence in that 100% of respondents indicated that they would not commit robbery if the punishment were death penalty or crucifixion. Precisely 85% indicated that they would not commit robbery if the punishment were amputation of bodily limbs.

	AS	%	A	%	D	%	DS	%
1. I would not commit robbery if death penalty (capital punishment)	34	100	NIL		NIL		NIL	
2. I would not commit robbery if left or right arm or leg amputated	31	85%	5		NIL		NIL	
3. I would not commit robbery if I am crucified	34	100	NIL		NIL		NIL	

Table 9: Tabulation of findings on general deterrence level of Islamic penal laws on robbery

(Out of thirty-four respondents)



Percentage of public response to Islamic penal laws
 (Based on response of agreeing strongly only)

2.10 Discussion

The results and findings clearly support *Shaw and Mc Kay's* theory of social disorganisation and increase in crimes. It appears quite vividly that unemployment, poverty and the need of survival are the prime reasons for robbery. Unemployment, poverty and difficulty of survival are a phenomenon of social disorganisation due to perhaps economic crisis, redundancy of unskilled workers and inflation.

It seems clear that sentencing has little or no effect on robbery. Most convicts indicated that sentencing between 1 – 10 years were insufficient to deter them from committing robbery. This finding is consistent with the study by *David Lee*

and *Justin McCrary*⁶³ which reported that crime rates were slow to drop in Florida despite steady increase in sentencing for crimes in that State. In another research⁶⁴ results yielded that incarceration does not have a major role on reducing robberies. The study depicted that whilst heavier and longer incarceration only resulted in one – quarter reduction of total robberies, other factors such as changes in local drug markets, increasing prosperity of economy, strategic policing and changing responses of public are other crucial matters that affect robberies and property related crimes.

Conversely, the findings clearly showed that Islamic capital punishments and amputation of bodily arms and legs have great deterrent impacts on robbery. These findings are consistent with another study⁶⁵ on the effect of capital punishment in China that was accorded to serious cases of robbery. China applies the practice of meting out justice 'severely and swiftly' that was cultivated under the *Yanda* 'Strike Hard' anticrime campaigns in 2000 – 2003. The *Yanda* strike campaign targeted mainly on serious crimes including serious robbery cases where death penalty would be imposed. *Yanda* proved to be an extreme but successful application of severe punishments that were very necessary during chaotic times. It was estimated in the study that approximately 30,000 people were executed since 1980 for serious criminal offences especially robbery. The campaign was a success and proved a major

⁶³ Lee, David S. and Justin McCrary. "Crime, Punishment, and Myopia." *NBER Working Paper* No. 11491, June 2005 as cited in David S. Abrams (2007) *More Time, Less Crime? Estimating the deterrent effect of incarceration using sentencing enhancements at University of Chicago*

⁶⁴ The Sentencing Project (2005) Ryan S. King, Marc Mauer and Malcolm C. Young, JEHT Foundation, Washington

⁶⁵ Susan Trevaskes (2007), *Severe and swift justice in China*, *British Journal of Criminology*

deterrence factor for robbery during a time in the 1980's where the country was verging towards open economy.

One explanation for the high level of deterrence of capital punishments and Islamic penal codes on robbery is that these offences are *rational crimes* where the commission is *pre-planned* rather than being emotional crimes. This has been referred to as '*calculated crime*' as in the case of *Choh Wai Sung v Public Prosecutor*.⁶⁶ This assertion is consistent with results from empirical research⁶⁷ postulating that most bank robberies were not chosen at random but on the contrary a well-planned deliberated action.

In that study, interviews with police and eyewitnesses confirmed that the bandits used walkie-talkies and fancy masks and spray paints to incapacitate close circuit television. All such modus operandi shows that these groups of offenders were sufficiently motivated to commit burglaries.

Similarly, the research also showed that the banks were not randomly chosen but were chosen because they were suitable targets. All the banks have numerous clients, large cash deposits and were situated near highway. All these factors facilitate easier escape and fleeing from crime scene. Furthermore, the research showed that the robberies occurred on Mondays and Fridays when trading and banking transactions are at peak and with largest

⁶⁶ Supra 31

⁶⁷ John, Z. Wang, (2002), "Bank Robberies by an Asian Gang: An Assessment of the Routine Activities Theory", *Journal of Offender and Comparative Criminology*, Vol. 46, No.5, pp. 555 – 568

amount to cash deposits. This result is similar to previous study⁶⁸ which, showed that the frequency of robberies on Mondays and Fridays were astoundingly at a frequency of fifty six percent.

Research also indicated that the banks lack capable guardians. Robberies most often occurred at lunch hour between twelve and one o' clock in the afternoon where there is a shift of security guards after debriefing. There is no guard during that window of fifteen minutes. Furthermore, data showed that the six banks had cameras installed but studies showed that all the cameras were wrongly fixed at unstrategic angles unable to capture overall view of building.

Furthermore, none of the six banks had bulletproof glass and the guards were armed only with a six chamber 0.38 Smith and Wesson revolvers. Whilst a revolver requires precise aiming, shotguns are able to fire multiple projectiles at differing angles causing moderate to severe injuries with least aiming efforts required. All six banks also had emergency alarm devices but they were situated out of reach of most employees except for some key bank officers. All these factors combined showed that the robbers had a very detailed and pre-planned approach to victims. These studies show that robberies are a calculated crime where potential offenders would have significantly weighed and calculated the risks of committing the crime against the severity of consequences.

⁶⁸ Vardalis, J., & Cox, T. (1998), "A descriptive analysis of bank robberies in Dade County, Florida during 1994", *Journal of Security Administration*, Vol. 21, No. 2, pp 1-18

It appears therefore, robberies are preponderantly motivated by financial gains and it also appears that sentencing between 1- 9 years have little impact on perceptions of risks with the exception of maximum 10 – 14 years imprisonment. However, it also appears clearly that the severity of punishments in Islamic penal laws is a good deterrence to robbery as it significantly increases the perception of risks in commission of the crime.

This chapter is aimed to specially evaluate the Malays as an ethnic crime of law on murder and homicide offences. This chapter first discusses the relevant capital offences for homicide under the Malaysian Penal Code. This chapter then discusses and reviews empirical studies on the rationale of death penalties and the works of Isaac Ehrlich which is specifically referred to in the chapter that explain the possible criminological attribution of homicides. The main focus of the chapter is based on the question: Is capital punishment an effective deterrent to homicide? It also discusses a large part of murders were committed with premeditation, having thought or rationalised the severity of punishment of the crime of the crimes. For example some homicides were committed with premeditation or where a person has abnormality of mind which is not held responsible.

Chapter three is aimed to achieve the following objectives. Firstly, to study the criminological background of homicide crimes in Malaysia. Secondly to assess the effectiveness of capital punishment (death penalty) as deterrence for the crime.

CHAPTER 3

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW ON MURDER

3.1 Introduction

This chapter is aimed to critically evaluate the Malaysian and Islamic criminal laws on murder and homicide offences. This chapter firstly explains the relevant capital offences for homicide under the Malaysian and Islamic penal codes. The chapter then discusses and reviews some literatures on the rationale of death penalties and the works of *Isaac Ehrlich* would be specifically referred to. The chapter then explains the possible criminological explanation of homicides. The main focus of the chapter is focused on the possible failure of capital punishment in deterrence of homicides as a large part of murders were committed without the killers having thought or rationalise the severity of punishment after commission of the crimes. For example some homicides were committed during provocation or where a person has abnormality of minds (defence of diminished responsibility UK).

Chapter three is aimed to achieve the following objectives. Firstly, to study the criminological explanation of homicide crimes in Malaysia. Secondly to assess the effectiveness of capital punishment (death penalty) as deterrence for the crime.

3.2 Murder and homicide in Malaysia and Islamic penal laws

Section 300 of the Penal Code provides that culpable homicide is murder:

- (a) *If the act by which the death is caused is done with the intention of causing death;*
- (b) *If it done with the intention to cause such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;*
- (c) *If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or;*
- (d) *If the person committing the acts knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.*

The punishment for murder in Malaysia is dictated under section 302 that reads:

"Whoever commits murder shall be punished with death"

In Malaysia murder attracts the death penalty.⁶⁹ Islamic Penal laws also clearly practices capital punishment of execution or beheading or crucifixion. The punishment for murder in Islam is dictated under Qisas based upon the concept of retaliation and proportionality of punishment against the offender. It has been clearly stated that:

*"We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal. But if anyone remits the retaliation by way of charity it is an act of atonement for himself. And if any fail to judge by (the light of) what God hath revealed, they are (no better than) wrong doers."*⁷⁰

Similar conception is found in other verse, which stated the following:

"For you, the sentence of retaliation on behalf of the murder victim has been specified so that it consists of a free man for a free man, a slave for a slave and a woman for a woman, and if the avenger of blood forgives the murderer who is

⁶⁹ Criminal Procedure Code, s 277

⁷⁰ al Quran, al Maaidah 5: 48

his religious brother with or without getting compensation, this is considered a fair deed."⁷¹

A similar philosophy of punishment is recorded in *Article 14* of the 1991 *Iranian Penal Code* prescribing that retaliation is a penalty, which the murderer is sentenced to and is equal to the severity of crime committed. The characters of retaliation according to the Iranian Penal Laws are two folds. Firstly, that the punishment for criminal offence is inflicted on the guilty person only in cases of murder and not to be borne by offenders' parents or relatives. It has been stated that:

*"Nobody is responsible for another's offence and there is nothing for human beings other than what they have done whether good or bad . . ."*⁷²

A similar stance is followed in Iranian Penal code⁷³ where:

"A person who is punished by retaliation should be killed with the avenger of blood's permission and if he is killed without their permission, the killer should be punished because of his murder. In this instance, if the murderer dies himself, there will be no retaliation and the relatives are no more responsible for compensation"

⁷¹ Quran, verse 178 of al-Baqarah

⁷² al-Quran, al-An'nam:114

⁷³ Article 259

Secondly, the retaliation must be proportionate to the crime committed and under *Article 14 of the Iranian penal code* it has been stated:

"Retaliation is a punishment on conviction and should be equal with the crime".

There are three possible justifications for imposing a retaliating sentencing:⁷⁴

First, an order of retaliation may soothe the feelings of vengeance and make murderer pay back the unfair advantages obtained from the victim.

Second, retaliation against murder may prohibit growing revengeful thoughts to kill the murderer to avenge his death and prevent a cycle of killings.

Thirdly retaliation has a deterrent effect and reduces future crimes.

3.3 Literature review on capital punishment

It is clear that both the Malaysian and Islamic penal laws advocate capital punishment (death sentence) upon wilful and intentional murders. Of course, Islamic penal laws include diyat or blood money but that is not the scope of this study. The main idea postulated by these two models of penal codes is that capital punishment is used to retaliate and provide total incapacitation of the offender and sense of complete revenge for the victims.

⁷⁴ I. Goldozian, *Special Criminal Law* (Moassese Entesharat Tehran University: Tehran, 2001) 70.

In summary, capital punishment is aimed to deter the commission of future murder cases in society. The trend of capital punishment is clearly seen in US as shown in Figure 8 below. Figure 8 shows that the number of annual executions gradually increased since 1977 peaked in 1998 with ninety-eight executions. In 1998, the number of homicides declined drastically in the US. Currently, most jurisdictions in the South favours execution and has a high eighty percent approval for execution since 1994.⁷⁵

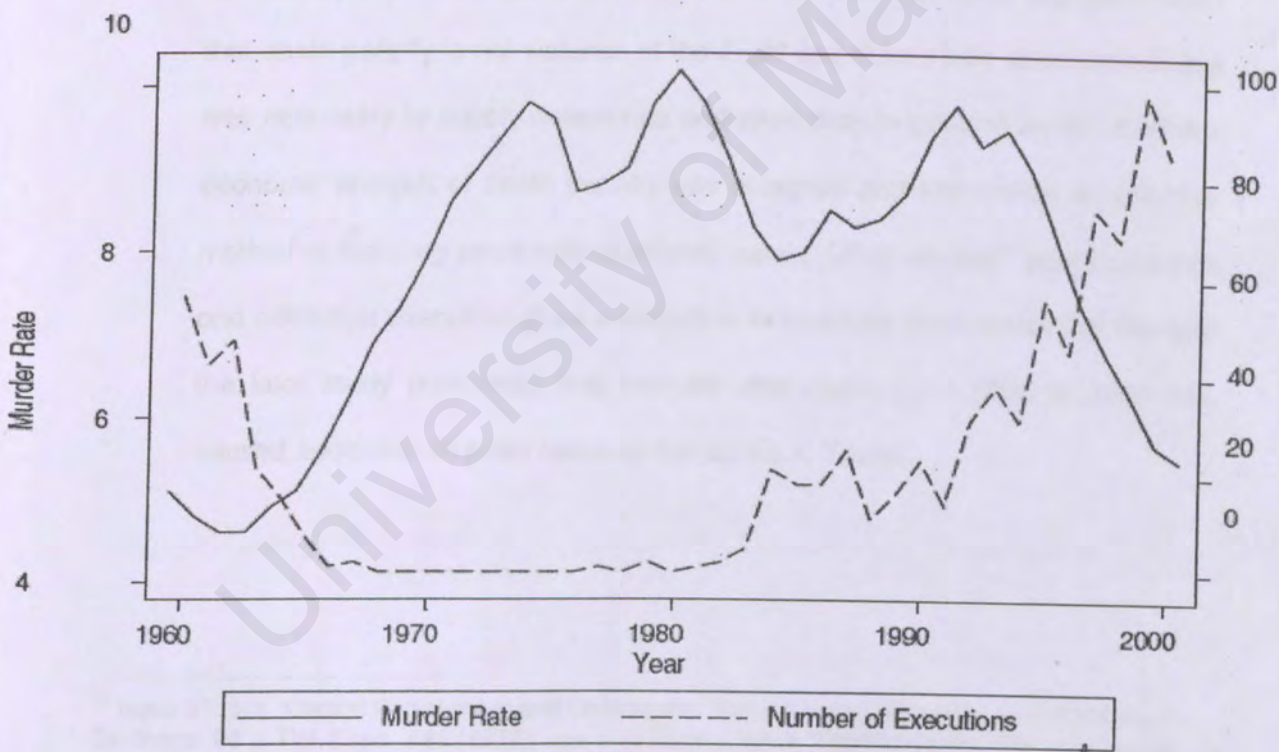


Figure 7: Murder and execution rates in US

Source: Joanna M. Shepherd (2002), Deterrence versus brutalization: capital punishment's differing impacts among states, *Michigan Law Review*, Vol. 104, No. 203

⁷⁵ Joanna M. Shepherd (2002), Deterrence versus brutalization: capital punishment's differing impacts among states, *Michigan Law Review*, Vol. 104, No. 203

Most literatures have considered the correlation between capital punishment and its string deterrent effects on murder. *Isaac Ehrlich*⁷⁶ study found negative relationship between rates of homicides and execution of capital punishment. *Ehrlich's* study (based upon U.S. time series data between 1933 – 1969) insisted that there is a positive deterrent effect of capital sentencing and murder where each execution resulted in about seven or eight fewer murder cases. *Ehrlich's* famous phrase "One execution saves eight innocent lives" were cited in the case of *Gregg v Georgia*⁷⁷ where in that case the petitioner was charged for robbery and causing the death of two men. The Georgian Supreme Court that death penalty is not violation of the *Eight and Fourteenth Amendments* but was necessary to supply deterrence and protection to general public. *Ehrlich's* economic analysis of death penalty was accepted and seen to be an effective method of reducing propensity of murder cases. Other studies⁷⁸ postulated that one additional execution gives a reduction in homicide by a number of five and the later study postulated that irregular executions from 1996 to 1997 has caused additional 90 more cases of homicides in Texas.

⁷⁶ Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 J. Pol. Econ. 741 (1977); see also Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975) as cited in Joanna M. Shepherd (2002), Deterrence versus brutalization: capital punishment's differing impacts among states, Michigan Law Review, Vol. 104, No. 203

⁷⁷ Supreme Court 428 U.S. 153

⁷⁸ H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453 (2003), Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 568, 575 (2001) as cited in Jeffrey Fagan (2006) Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment *Ohio State Journal of Criminal Law* Vol 4:255

However, later studies by Lisa Stolzenberg⁷⁹ and Craig J. Albert⁸⁰ found little or no correlation between capital punishment and deterrence to murder. It has been argued⁸¹ that some attempt to commit suicide by homicide. In these cases, a person kills another just to be executed by the courts. For example, Clinton Duffy⁸² stated that death penalty is the cause of murder rather than deterring it. It asserted that the "brutalization hypothesis," suggests that capital punishment can encourage homicide by seeming to legitimize killing of enemies. In another study⁸³ findings show that there has been increase in homicides even after highly publicized executions, rather than decrease.

Similarly, rates of murder and homicides in Malaysia remained moderately high amidst imposition of capital punishment for the offence. This can be seen in Table 10 below:

⁷⁹ Lisa Stolzenberg & Stewart J. D'Alessio, *Capital Punishment, Execution Publicity and Murder in Houston, Texas*, 94 J. Crim. L. & Criminology 351, 352 (2004), as cited in Joanna M. Shepherd (2002), Deterrence versus brutalization: capital punishment's differing impacts among states, Michigan Law Review, Vol. 104, No. 203

⁸⁰ Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. Pitt. L. Rev. 321 (1999). as cited in Joanna M. Shepherd (2002), Deterrence versus brutalization: capital punishment's differing impacts among states, Michigan Law Review, Vol. 104, No. 203

⁸¹ "Medicine and Capital Punishment," in *To Abolish the Death Penalty*, Hearings before the U.S. House Judiciary Committee, March and July, 1968, p. 124 as cited in John Lamperti Does Capital Punishment Deter Murder? A brief look at the evidence Professor of Mathematics, (Dartmouth College)

⁸² M. W. Espy Jr. in "Capital punishment and deterrence: what the statistics cannot show," *Crime & Delinquency*, Oct. 1980, pp. 537-544.

⁸³ M. W. Espy Jr. in "Capital punishment and deterrence: what the statistics cannot show," *Crime & Delinquency*, Oct. 1980, pp. 537-544 as cited in John Lamperti Does Capital Punishment Deter Murder? A brief look at the evidence Professor of Mathematics, (Dartmouth College)

JENAYAH INDEKS 2000 – 2004

TAHUN	2000	2001	2002	2003	2004
JENAYAH KEKERASAN					
Bunuh	551	608	516	565	565
Cuba Bunuh	43	68	64	77	92
Samun Berkawan Bersenjatapi	89	65	73	45	44
Samun Berkawan Tanpa Senjatapi	1,681	1,697	1,704	1,920	1,689
Samun Bersenjatapi	722	566	425	381	334
Samun Tanpa Senjatapi	12,204	11,333	12,203	13,963	13,221
Rogol	1,210	1,354	1,418	1,471	1,718
Mencederakan Manusia	5,104	4,699	4,440	4,368	4,196
JUMLAH	21,604	20,390	20,843	22,790	21,859

JENAYAH INDEKS 2005-2007

JENAYAH KEKERASAN	2005		2006		2007	
	Jumlah Kes	Kes Selesai	Jumlah Kes	Kes Selesai	Jumlah Kes	Kes Selesai
BUNUH	497	328	604	385	588	404
CUBA BUNUH	94	75	*	*	*	*
ROGOL	1,887	1,769	2,435	2,238	3,177	2,938
CABUL KEHORMATAN	*	*	2,023	1,646	*	*
SAMUN BERKAWAN BERSENJATA API	40	7	68	18	77	13
SAMUN BERKAWAN TANPA SENJATA API	1842	774	2,658	1,043	7,067	2,524
SAMUN BERSENJATA API	317	59	247	44	202	27
SAMUN TANPA SENJATA API	13,210	6,474	18,446	7,878	17,241	8,221
PEMERASAN	*	*	1,549	1,020	*	*
UGUTAN JENAYAH	*	*	6,336	4,972	*	*
MERUSUH	*	*	2,261	1,627	*	*
MENCEDERAKAN	4,246	3,546	5,716	4,582	6,806	5,465
JUMLAH	22,133	13,032	42,343	25,453	35,158	19,592

Table 10: Jenayah Indeks 2000 – 2004, 2005 – 2007

Source: Royal Malaysian Police (RMP)

3.4 Criminological explanation for murder

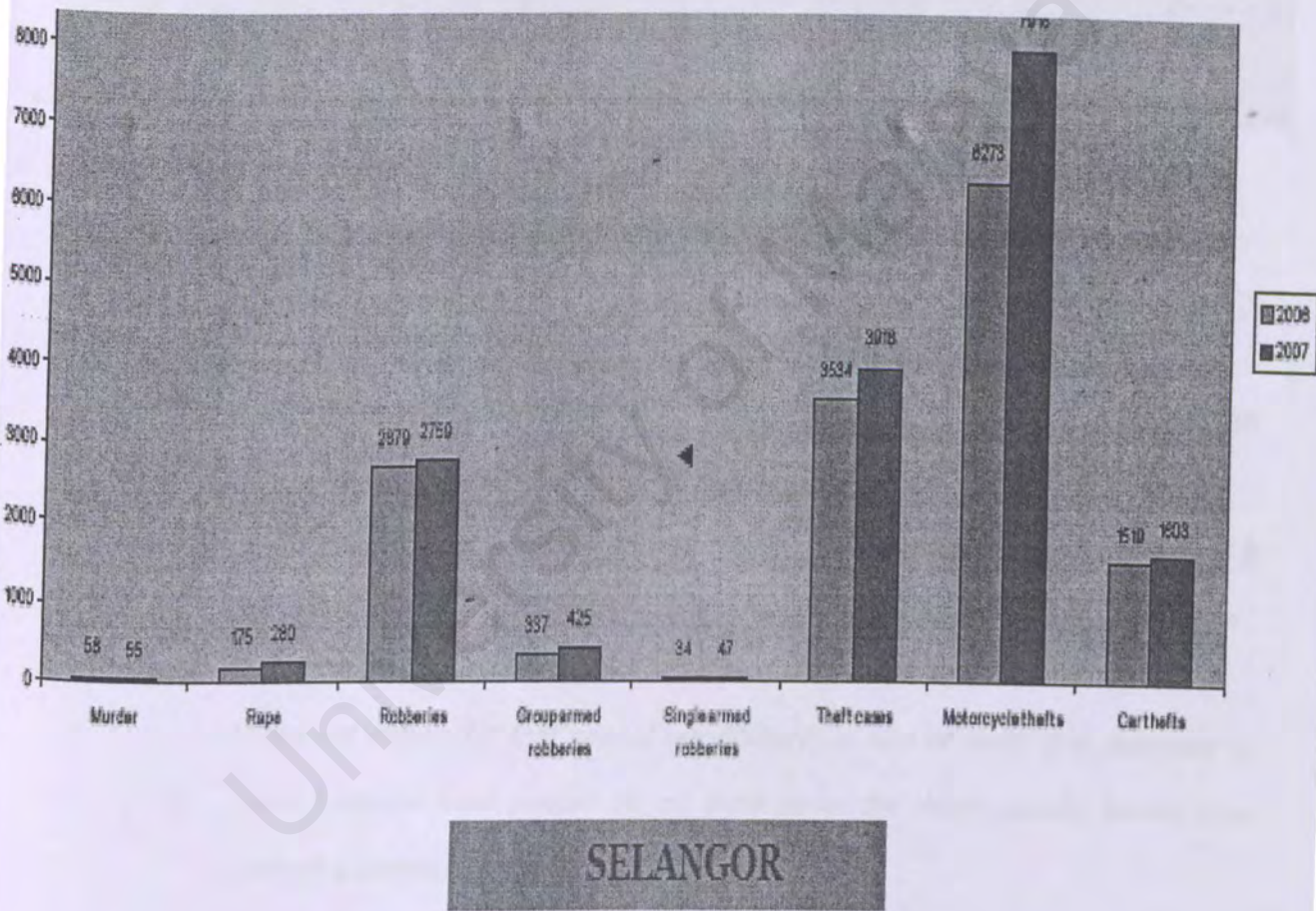
According to a study,⁸⁴ there is nexus and relations between social stress factors and changing characteristics of murderers. The study is a qualitative research focusing on the changing characteristics of murderers and offenders in Russia specifically *Udmurt Republic* that is an industrial region. The research portrait the difference in characteristics of offenders during the transition period in Russia in the 90's that has suffered and experienced significant social, economic and political changes. The results showed that offender and victim relationship is now less obvious and there is 36.8% increase in homicide of strangers. Secondly, there were increases of use of dangerous weapons in homicide including a significant increase in use of firearms. Thirdly, the research showed that most of the offenders were sober and not intoxicated at the time of committing the offence showing that the offenders had clear intentions of committing the murder. This study seems to suggest that social, political and economic stress do change characteristics of offenders.⁸⁵ There was growing individualism and competition amongst fellow Russians forcing them to out strong the others to survive. This seems to affirm the theory by *Shaw and Mac Kay* that social disorganizations do affect increase propensity of crime rates with increased competition and stresses of living.⁸⁶

⁸⁴ William Alex Pridemore (2007), Change and stability in the characteristics of homicide victims, offenders and incidents during rapid social change *Brit. J. Criminol.* 331

⁸⁵ Chervyakov, v.v ., Shkolnikov, V. M, Pridemore, W.A. and Mckee, M. (2002), 'The Changing Nature of Murder in Russia', *Social Science and Medicine*, 55: 1713-24 as cited in William Alex Pridemore (2007), Change and stability in the characteristics of homicide victims, offenders and incidents during rapid social change *Brit. J. Criminol.* 331

⁸⁶ Supra note 22.

A similar trend perhaps could be seen in Malaysia where murder rates were again significantly higher in larger states compared to less developed states. For example Figure 8 below showed that Selangor has higher rates of murder compared to Johor. This perhaps is because there is more competition and greater harshness of living conditions in Selangor that is largely an industrial state.



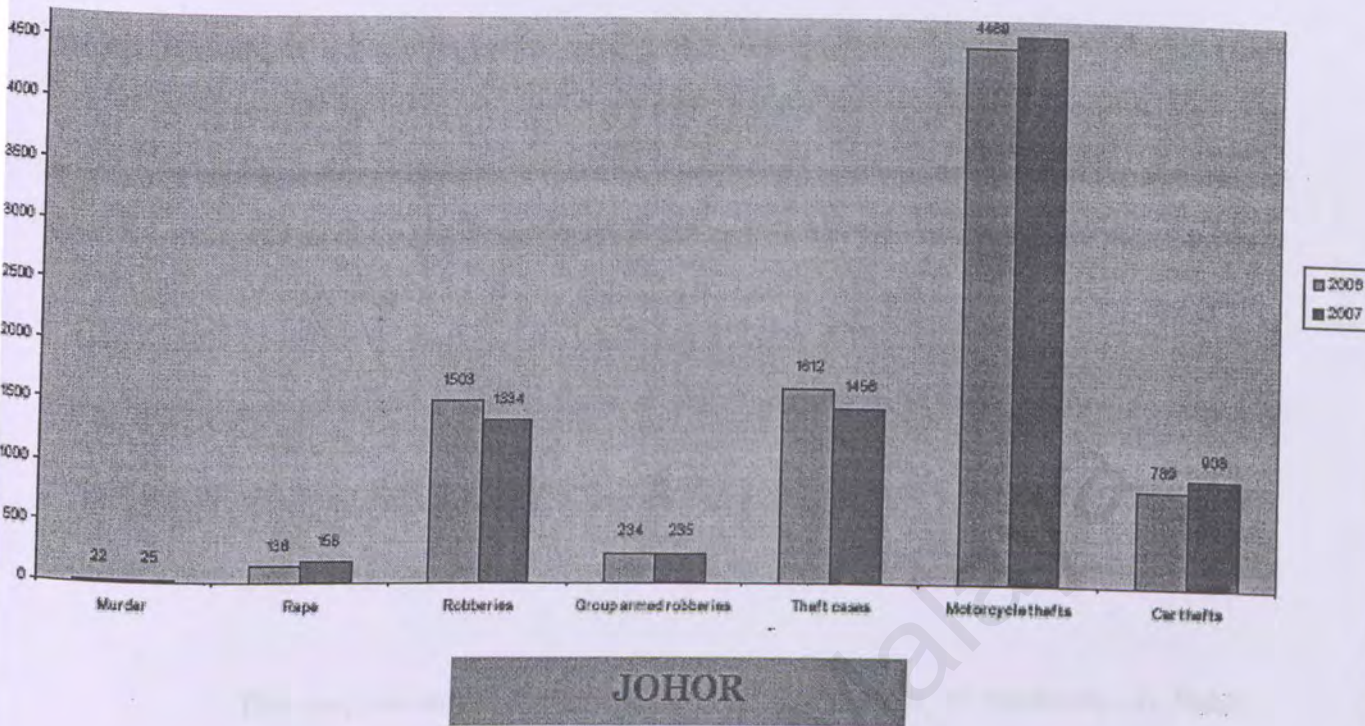


Figure 8: Comparison of murder rates Selangor & Johor

Source: Journal of the Kuala Lumpur Royal Malaysia Police College, No. 4, 2005 (p. 9)

However, there are allegations that capital punishment is not a deterrent as it has been stated that:

*"I am not convinced that capital punishment, in and of itself, is a deterrent to crime because most people do not think about the death penalty before they commit a violent or capital crime."*⁸⁷

This is affirmed where there are cogent examples where murders were committed when a person is provoked or lost sudden and temporary loss of

⁸⁷ Willie L. Williams, Police Chief, Los Angeles, CA, (2007)

self-control. For example some may have committed murder when they were provoked or lost sudden and temporary loss of self-control. One example of murder by sudden provocation is explained in the case of *Lorensus Tukan v. Public Prosecutor*⁸⁸ where *Seah SCJ* stated the following:

"The test of ['grave and sudden'] provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control"
[Emphasis added]

This requirement is further illustrated in a number of decisions. In *Public Prosecutor v Lim Eng Kiat*⁸⁹ where in that case, the accused was charged for murder of his wife (*Liaw*) and successfully raised the defence of provocation under section 304 of the Code where he suffered grave and sudden provocation upon *Liaw's* confession of adultery and made adverse comments concerning the size of defendant's penis. These words were serious enough to have caused a reasonable person of the defendant's race, class and background to be provoked in similar circumstances.

The court gave the following rationale for their decision.

"The fatal act should be clearly linked to the [passion] which arises from the provocation. If the act was done after the passion has had time to cool, it is murder, even if the act were linked to the earlier provocation ... This means that

⁸⁸ [1988] 1 CLJ 143

⁸⁹ [1995] 1 MLJ 625

if the attack was planned in advance, provocation would not serve as a defence, however grave the original provocation. Circumstances which induce a desire for revenge are not consistent with provocation, if the conscious formulation of a desire for revenge means that the defendant has had time to reflect." [Emphasis added]

In UK Diminished Responsibility⁹⁰ provides specific defence for murder and section 2 of the Homicide Act 1957 provides:

(1) *Where a person kills or is a party to the killing of another; he shall not be convicted of murder if he was suffering from such abnormality of the mind of arrested or retarded development of mind as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.*

(3) *... shall be liable instead to be convicted of manslaughter.*

In such situation, the offender committed crime at a time when he or she suffered abnormality of the mind and therefore incapable of weighing the propensity of punishment. This is well explained in *R v Sears*; where Lord Parker CJ⁹¹ stated this:

"A state of mind that is so [different from that of ordinary human beings] that the reasonable man ... would term it abnormal... wide enough to cover the mind's activities in all aspects not only physical assertions, and also the ability to form

⁹⁰ Section 2 of Homicide Act 1957

⁹¹ *Sears* (1994) 79 Cr. App. R. 261

3.6 Research methods

The sampling here includes eight respondents convicted of *section 300* of the Penal code and awaiting the execution of hanging to death penalty. The samples were selected purposively since there is severe limitation on availability of resources. The method of data collection is self-administered questionnaire where the forms were hand delivered and re-collected after 7 days interval. Respondents are required to fill up the questionnaires after completely filling the survey forms. There is no interviewing or any personal contact with respondents since the researcher has been strictly limited the amount of contact with respondents at Kajang Prison for security reasons. The researcher engaged an assistant prison warden to explain as well as administer and distribute the questionnaire to the twenty respondents.

The questionnaires for homicides were designed to test three variables in murder offence. Firstly, whether murder and homicides were committed because of social disorganisations in the country. Secondly, to ascertain the circumstances of which the homicides were committed that is whether the homicides were committed though careful planning or was it done in the heat of moment. Thirdly whether the offenders had thought of the consequences of capital punishment at the time when the murder was committed.

Two sets of questionnaires were distributed. Specific deterrence questionnaires (Appendix B1) were distributed to eight respondents consisting of convicts of

robbery. Another thirty questionnaires (Appendix B2) were distributed amongst public (random selection) to obtain public responds towards the effectiveness of capital punishment on homicides.

3.7 Results and findings

There are two sets of results and findings on determining the level of deterrence of Islamic penal law on homicides. They are separated as the specific and general deterrence. The results and findings are discussed in separate headings.

3.7.1 Findings on specific deterrence

Questionnaires were distributed to eight respondents in Kajang Prison that were convicted of murder. All respondents are male aged between 21 – 49. Seven out of the eight respondents indicated that they were emotionally turbulent at the time when they committed murder.

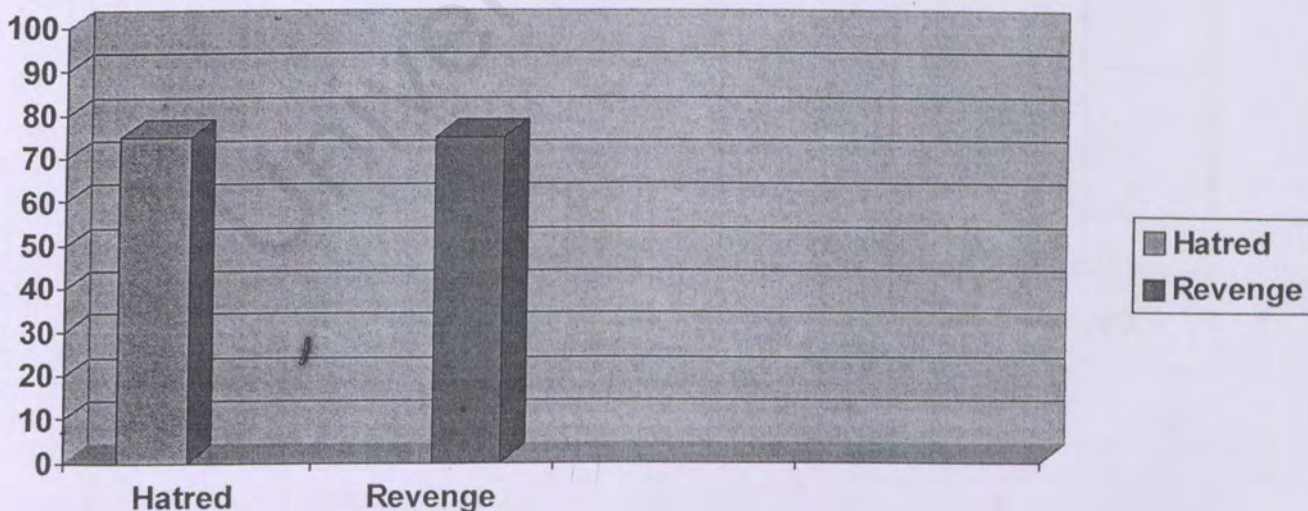
Reasons on committing homicides

It appears that most murders were not committed to rob victims of property. Only two respondents responded and both indicated disagree (D) and disagree strongly (DS) for associating murder with robbery. However, 75% of respondents indicated that hatred of victim and

revenge are the main reasons for murder. A summary of results are indicated in Table 11 below:

	AS	%	A	%	D	%	DS	%
1. To rob victim of valuable property	NIL		NIL		1	12.5	1	12.5
2. Hatred of victim	6	75	2	25	NIL		NIL	
3. Revenge	6	75	1	12.5	1	12.5	NIL	
4. Jealousy	NIL		2	25	4	50	2	25

Table 11: Tabulation of findings on reasons for committing homicide
(Out of eight respondents)



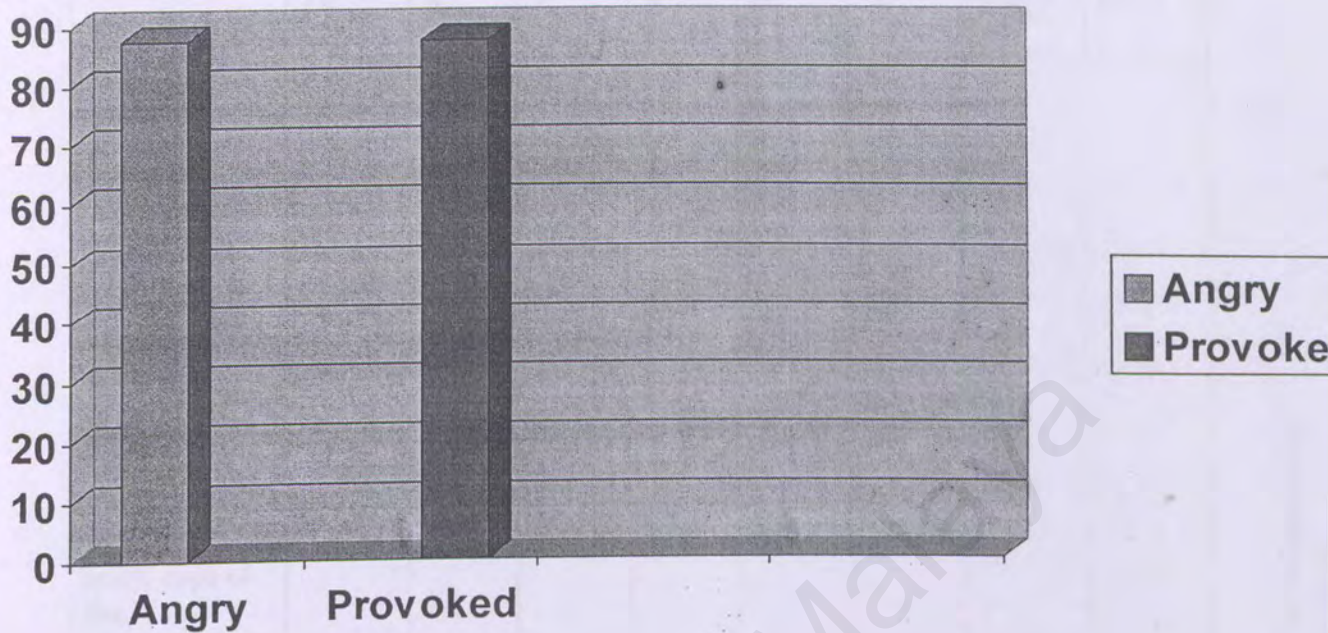
Results based on respondents indicating to agreeing strongly in questionnaire

Emotional responses during murder

Results clearly indicated that none of respondents were neither clear minded nor calm during murder. Furthermore, most respondents vindicated that they either extremely angry or provoked during the murder. This may signify that the respondents do not have a clear and pre planned modus operandi but as this study shows, murder is mostly committed ad hoc. A summary of the findings are shown below:

	AS	%	A	%	D	%	DS	%
1. Calm and clear minded	NIL		NIL		5	52.5	3	37.5
2. Extremely angry	7	87.5	1	12.5	NIL		NIL	
3. Provoked / loss self control	7	87.5	1	12.5	NIL		NIL	

Table 12: Tabulation of findings on circumstances in which murder was committed
(Out of eight respondents)



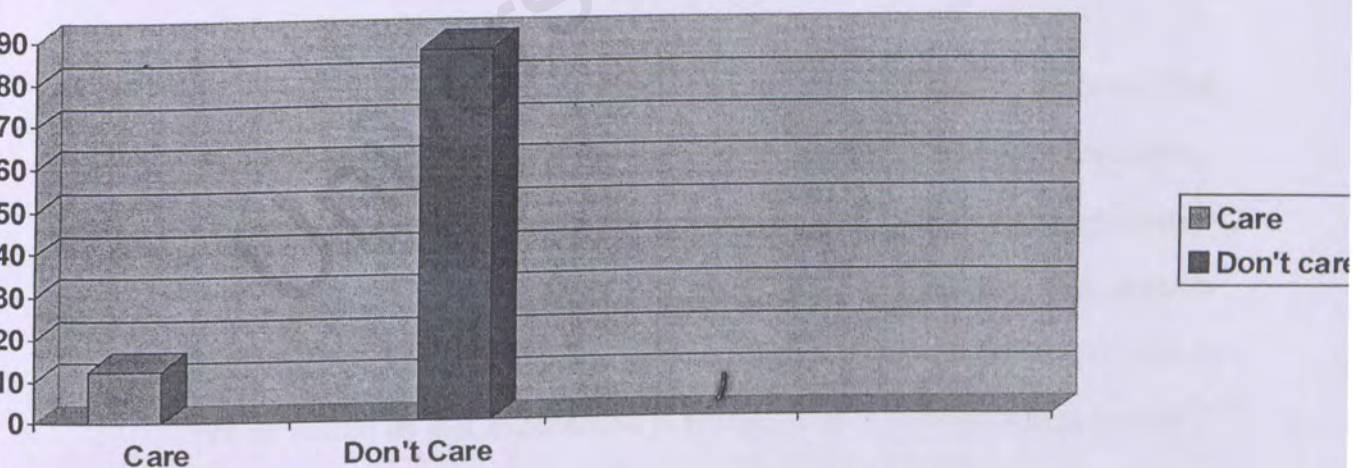
Results based on respondents indicating to agreeing strongly in questionnaire

Deterrence level of capital punishments on homicides

62.5% of the respondents knew that murder is punishable by death penalty i.e. capital sentencing. Only 37.5 stated that they had little idea that murder is punishable by death. However, 87.5% of the respondents indicated that they did not care nor considered the legal consequences of committing murder. The results and findings are shown in Table 13 below:

	AS	%	A	%	D	%	DS	%
1. I know murder is punishable by death penalty	2	25	4	50	2	25		
2. I do not know that murder is punishable by death penalty			3	37.5	5	62.5	1	12.5
3. I don't really care of the consequences at all	7	87.5	1	12.5				

Table 13: Tabulation of findings on states of mind of criminals when murder was committed
(Out of eight respondents)



Results based on respondents indicating either they care or otherwise on consequences of murder

(Percentage based on respondents agreeing strongly only)

3.7.2 Findings on general deterrence

Twenty-four questionnaires were distributed to the general public for ascertaining a generalise opinion. Half of the respondents were females. The findings showed consistency of results with results in specific deterrence. Most of the respondents vindicated that hatred and revenge were important factors of murder whilst many female respondents indicated that jealousy could be an equally influence. Similarly, most respondents vindicated that murder is most likely caused by anger and provocation. The results also showed that most respondents given the turbulent emotional circumstance at the point of murder would not have considered the consequences of committing homicide at all.

3.8 Discussion

The findings above portrayed two interesting trends. Firstly, there is no clear evidence that the increase in murder rates is caused by social disorganisations. Results indicated that most murders are committed due to hatred and revenge where respondents were either extremely angry or provoked. One possible explanation is perhaps that the level of socio-political changes in Malaysia is not as vibrant as that experienced in Russia. This is consistent with a study,⁹³ which asserted that whilst social disorganisation is good explanation for the growth of property offences but they are not always sufficient to explain the

⁹³ Louise Shelley (1983), *Crime and Modernization* 81 Mich. L. Rev. 1016

increase of homicides and violent crimes. The study postulated that social disorganisation must be a peak level before it may cause a surge in homicide rates.

Furthermore, this is also dependent on other variables such as national culture and the peoples' perception towards violence. In addition, homicide rates would decline after industrialization reached maturity where social disorganisation has drastically decreased.

Secondly, it appears that the economics and rationality of sanctions in criminal law has little deterrence to passion crimes such as murder. One reason is mainly that many commits murder with flaring emotional turbulence and give little thoughts on the legal consequences of murder. Therefore, such crimes are motivated by interdependent negative emotional utilities such as hatred and anger.⁹⁴ Therefore, the commission of murder cannot be based on deterrence of raising the 'transaction costs' and risks associated with commission of crimes because in cases of homicide, most offenders gain little by murdering the victim and therefore logically such transaction costs do not exist.

⁹⁴ Richard A. Posner (1985) An Economic theory of the criminal law 85 Colum. L. Rev. 1193

**A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW
ON RAPE AND SEXUAL OFFENCES**

4.1 Introduction

This chapter is aimed to critically evaluate the deterrence of Islamic criminal laws on rape. This chapter firstly explains rape under the Malaysian and Islamic penal laws. This chapter then proceeds to discuss especially the danger of close proximity between rape and zina offences in Islam and its negative impacts on rape victims. Cases in Pakistan and Iran would be reviewed to examine the possibility of women charged for zina if the offence of rape could not be established. This chapter then examines the criminological explanation of crime especially through the theory of social disorganisation and embedded physical and psychological traits of rapists. Then the chapter continues to evaluate whether the harsher 100 slashes on zina would be sufficient to deter rape. This chapter aims to achieve two main research objectives. Firstly whether victims of rape would likely to prosecute if Islamic laws were applied. Secondly, whether people would not continue to rape if Islamic punitive measures are adopted. If either of these factors is negative then the deterrence of Islamic penal law on rape is low.

4.2 Rape under Malaysian Penal code

Rape is defined under *section 375* of the Penal code where a man has sexual intercourse with a woman in circumstances where it was against her will (a), without her consent (b), with her consent that was obtained by putting fear or death or hurt to herself or any other person or misconception of fact (c), consent given because woman believes that he is the husband (d), women giving consent unable to comprehend nature and consequences of the consent (e) or where woman is under age of sixteen (f). The sentence for rape is explained in *section 376* where whoever commits rape shall be punished with imprisonment for not less than five years and not more than twenty years and liable to whipping.

Courts have always taken a serious stand against rape crimes. For example in the case of *R v Roberts*⁹⁵ the UK Court of Appeal stated:

"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence ... first of all to mark the gravity of the offence. Second to emphasis public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but no means least, to protect women"

A similar notion on sentencing to rape offences is seen in the case of *Sidek bin Ludan v PP*⁹⁶ where *Abdul Malik Ishak J* stated that although there is no

⁹⁵ [1982] 1 All ER 60

standard guidance as to sentencing for rape however, the court in imposing sentencing must take into consideration public interest which demand that a deterrent sentence to be give. Therefore heavier sentencing should be given to offenders if the victim suffered severe physical and mental suffering. This is because rape shackles the fundamentals of life and is considered the gravest crime against human dignity.⁹⁷

4.3 Rape under Islamic penal laws

There are no direct laws and description of rape in Islamic penal laws but the offence is indirectly covered under zina (adultery and fornication). In Islam fornication is a serious offence as it leads to moral corrosion, destruction of family unity and burdens welfare of government in order to provide for these unwanted and neglected children. There are two separate hadd punishments for zina. Firstly, one hundred lashes for unmarried people that commit adultery. Thus it has been stated:

*"The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let no pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment."*⁹⁸

Secondly, for married persons that commit zina, the punishment is stoning to death:

⁹⁶ [1995] 3 MLJ 178, 188

⁹⁷ *Manuava Venkareswarlu v State* [1995] 2 Crimes (AP) 854 of the Andhra Pradesh High Court of India

⁹⁸ An-Nur:2

"Ambil dariku, ambil dariku. Terima dan dara sebat 100 kali rotan dan buang negeri. Lelaki dan wanita yang telah berkahwin rejam dengan batu....."⁹⁹

A similar code of Islamic punishment for rape is seen under the Pakistani criminal codes. Sexual violations offences are governed under the *Haddud Ordinance 1979* where the original capital punishment was stoning to death, which is now, substituted with twenty – five years imprisonment plus 100 stripes.

4.3:1 Difficulties and complexities in Islamic rape and zina offences

However, there are significant complexities of prosecuting rape offences in Islamic penal law that is very closely connected to zina offences that include rape, adultery, fornication and prostitution. The Ordinance also includes the category of *zina-bil-jahr* (zina by force) that is almost similar to the UK law on rape.

In order to prove rape, the victim would have to adduce four adult male witnesses who have seen with their own eyes the penetration or where the accused confessed of the crime during the trial. This is provided in section 6 of the 1979 *Hudud Ordinance* where:

- (a) *The accused makes before a Court of competent jurisdiction a confession of commission of the offence; or*

⁹⁹ Quran Atadith

- (b) *At least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of "takziah al-shudood" that they are truthful persons and abstain from major sins (Khaba'ir) give evidence as eyewitnesses of the act of penetration necessary to commit the offence...*

A woman who alleges rape must receive medical examination and must also prove that she was not consenting to the rape. If she fails, the medical examination would serve as evidence against her where she and the accused would then be converted to a charge of zina offences.

There are many examples where originally alleged rape cases because of insufficiency of evidence; both parties were subjected to zina. In a reported case in Pakistan,¹⁰⁰ *Mst. Taslim Bibi* gave birth to a child and alleged a case of rape. There were insufficiencies of evidence (lack of eyewitnesses) where both the complainant and the defendant were both charged for zina and served 5 years imprisonment. In another case¹⁰¹ two fifteen-year-old girls complaint against the accused for rape. However the Shariat Court held that the sexual intercourse was consented both the victim and the alleged defendant were found guilty of zina.

The Pakistani Zina Ordinance undermines women and rape victims and allows confusion and unnatural fusion between rape and fornication.

¹⁰⁰ Pakistan Law Journal 1982 FSC 174. *Shabbir Ahmed versus The State*

¹⁰¹ 1983 Supreme Court Monthly Review 866 *Muhammad Aslam versus The State*

This altogether reduced the emphasis and designation of rape as a violent crime separate from zina offences. It has already been stated that¹⁰² rape is strictly speaking not a subset of the crime zina and by classifying rape as zina, it reduces the severity and heinous nature of rape offences.

By drawing both zina and rape offences dangerously close, there is real danger that a women originally alleging rape in court to end under the conviction of zina due to lack to evidential credibility to charge the accused.¹⁰³ There are serious allegations¹⁰⁴ in Malaysia that these laws breach the Federal Constitution where the amended *Article 8(2)* provides:

"Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

¹⁰² Quraishi, Asifa. "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman Sensitive Perspective." *Michigan Journal of Law* 18 (1997): 287-315.

¹⁰³ Mehdi, Rubya. "The Offence of Rape in the Islamic Law of Pakistan." *Women Living Under Muslim Laws Dossier* 18 (October 1997): 1-10 as cited in Julie Norman (2005) Rape law in Islamic societies, theory, application and potential for reforms, Democracy and development, challenges for the Islamic world, CSID Sixth Annual Conference, Washington DC

¹⁰⁴ Nik Noraini Nik Badli (2002), "Man made codifications of Hudud law" paper presented at Seminar on Hudud law, Sisters in Islam

Laws on zina discriminates women where an unmarried women who is pregnant is assumed to have committed zina unless she can prove that she had been raped. This is unfair to natural justice and fair trial¹⁰⁵ since the woman and not the prosecutors to prove that she had been raped.

4.4 Spiralling rape cases in Malaysia

Given the focus of deterrence of rape in Malaysian penal laws, it is still persistently seen that rape crimes are still increasing steadily. For example in the year 2000, Selangor registered 216 cases of rape whereas the number increased to 421 in the year 2006. Johor has a total of merely 194 cases in the year 2000 whereas in 2008 the figure increases to 343 in 2006. The figures of rape statistics in Malaysia are clearly postulated in Table 14 below.

¹⁰⁵ Article 6 of the European Convention of Human Rights (ECHR)

STATISTICS OF RAPE CASES IN MALAYSIA

YEAR 2000-2006 (By States)

STATES	2000	2001	2002	2003	2004	2005	2006
PERLIS	12	10	13	11	21	26	28
KEDAH	110	123	132	119	127	163	221
P/PINANG	61	75	73	70	89	71	115
PERAK	91	79	100	118	121	148	183
SELANGOR	216	269	253	280	289	368	421
K/LUMPUR	67	97	120	77	116	111	142
N/SEMBILAN	59	82	62	69	89	97	103
MELAKA	43	43	57	67	100	77	125
JOHOR	194	234	235	312	323	324	343
PAHANG	74	79	79	70	102	84	143
TERENGGANU	48	48	45	38	58	99	127
KELANTAN	52	74	70	66	82	90	152
SABAH	109	94	115	111	149	156	199
SARAWAK	81	79	77	71	94	117	129
TOTAL	1,217	1,386	1,431	1,479	1,760	1,931	2,431

Source: Polis Di Raja Malaysia, 2007

However it is asserted¹⁰⁶ that rape is one of the most unreported crimes in the world. The organisation argued that almost 9 out of 10 cases in Malaysia were unreported. There are reasonable explanations for this phenomenon. One explanation is that most rape victims suffer rape trauma syndrome where according *Burgess and Holmstrom*¹⁰⁷ that affect their immediate lifestyle and long term psychological balance. Most victims being under torment of psychological disorders were often unable to garner sufficient courage to report to authorities concerning the crime. However, this study is not intended to examine the effect of traumatic disorders and the inhibition of crime reporting.

The study emphasises on the more acute issue of procedural bias against rape victims in court. The nature of adversarial system allows lawyers to vigorously cross-examine witnesses and the victim herself. This invariably involves requesting victims to explain the details of the alleged rape repeatedly. In addition, most defence counsels would use the tactic of inquiring victims' sexual background in determining her chastity and the weight of her accusations.

If this assertion is correct, then it is predicted that the risks of alleging rape in Islamic penal law is even greater. The accuser's failure to prove beyond reasonable doubt of rape would allow the prosecution to automatically charge the victims for zina. This may be one prime possibility of low deterrence factor of regular and even Islamic penal laws on rape.

¹⁰⁶ Women Aids Organisation (WAO) (2003)

¹⁰⁷ A.W. Burgess and L.L. Holmstrom, *Rape, Crisis and Recovery* (Bowie, MD, Prentice Hall, Brady and London, 1979) 35

Therefore, in summary the effectiveness of Islamic penal laws on rape is based on two inter-related factors. Firstly, whether the penal laws would facilitate rather than inhibit victims from reporting and subsequently charging the defendant for rape. Secondly, whether the 100 lashes (whipping) on the defendant is an effective deterrence for rape offences.

4.5 Criminological exploration of rape offences

There are no specific theories explaining rape offences. A partial explanation is that sexual violence including rape is proximately caused social disorganisation where there is over emphasis on individual liberty and this liberalisation and globalisation era allowed free and uncontrolled access to pornography and sexually explicit materials. Technological advancement allowed freer access and free supply of pornographic materials (including child pornography) in internet and other multimedia. It has been stated in a case that:

*"In the course of our judicial experience we have dealt with cases of sexual offenders who have undoubtedly been incited to engage in criminal conduct by pornographic material. This is not an uncommon experience for judges dealing with sexual offenders. Pornography, and particularly the type known as 'hard porn,' in our experience have a corrupting influence. Those of us who have had to deal with matrimonial cases ... know that sometimes matrimonial troubles are started by husbands who have been reading or seeing this type of material and try to introduce in the matrimonial bed what they have read or seen"*¹⁰⁸

¹⁰⁸ Lawton, LJ in *R. v. Holloway* (1982) 4 Cr. App. R. (S.) 128

A more direct explanation is that social disorganisation and globalisation of free supply of sexual materials caused great psychological impact on society. Pornography creates unfettered and uncontrollable fantasies amongst rapists and the irresistible urge to cause sexual harm on women.¹⁰⁹ This is consistent with a study,¹¹⁰ which identified irresistible emotions as being the major impetus for rape. Other research¹¹¹ depicted that emotional anger and the irresistible need to humiliate and over power women is also a cogent explanation for rape.

Therefore, it appears that rapists suffer defects in behavioural characteristics and there are indications that rapists especially serial offenders are often caused by genetic imbalances and psychological disturbances.¹¹² It has been asserted¹¹³ that studies conducted in Malaysia showed that hormonal imbalance is one main reason for commission of the offence and most offenders described the endeavour as being 'uncontrollable' and knew that what they did were legally and morally wrong.

¹⁰⁹ Anthony Hofler (2006) Are the victims of lust expendable? Criminal Lawyer

¹¹⁰ McKay, M. M., Chapman, J. W. & Long, N. R. (1996). Causal attributions for criminal offending and sexual arousal: Comparison of child sex offenders with other offenders. *British Journal of Clinical Psychology*, 35, 63-75. as cited in Ruth E. Mann and C.R. Hollin (2002), Sexual offenders' explanation for their offending, *Journal of Sexual Aggression*, Vol. 13. No. 1, pp. 3 – 9

¹¹¹ Marita P. McCabe & Michelle Wauchope (2005) Behavioural characteristics of rapists Vol. 11, No. 3, pp. 235- 247

¹¹² Ibid

¹¹³ Datuk Dr. Ng Yen Yen as reported in The Star 8th July 2008

4.5 Research objectives

The research objective here is to measure the extent in which Islamic penal laws would deter rape. The level of deterrence is dependant upon two factors. Firstly whether victims of rape would likely to prosecute if Islamic laws were applied. Secondly, whether people would not continue to rape if Islamic punitive measures are adopted. If either of these factors is negative then the deterrence of Islamic penal law on rape is low.

4.6 Research methodology

To achieve the research objectives, questionnaires were distributed to convicted rapists (imprisoned in Kajang) and to specifically selected Muslim female respondents to attain their views on the effect of Islamic penal laws on rape. Here six respondents of convicted rapists were requested to fill in the questionnaire (Appendix C1). The questionnaire is designed to test firstly the criminological explanation for rape. Secondly to ascertain whether the imposition of 100 lashes under the offence of zina would have any effect on declining the urge of committing rape.

Other than rape convicts, thirteen devoted Muslim women were asked of their responses (Appendix C2). These women were selected based upon their devotion to Islam and the high level knowledge on laws pertaining to zina. The questionnaires were designed to solicit whether these women would proceed to

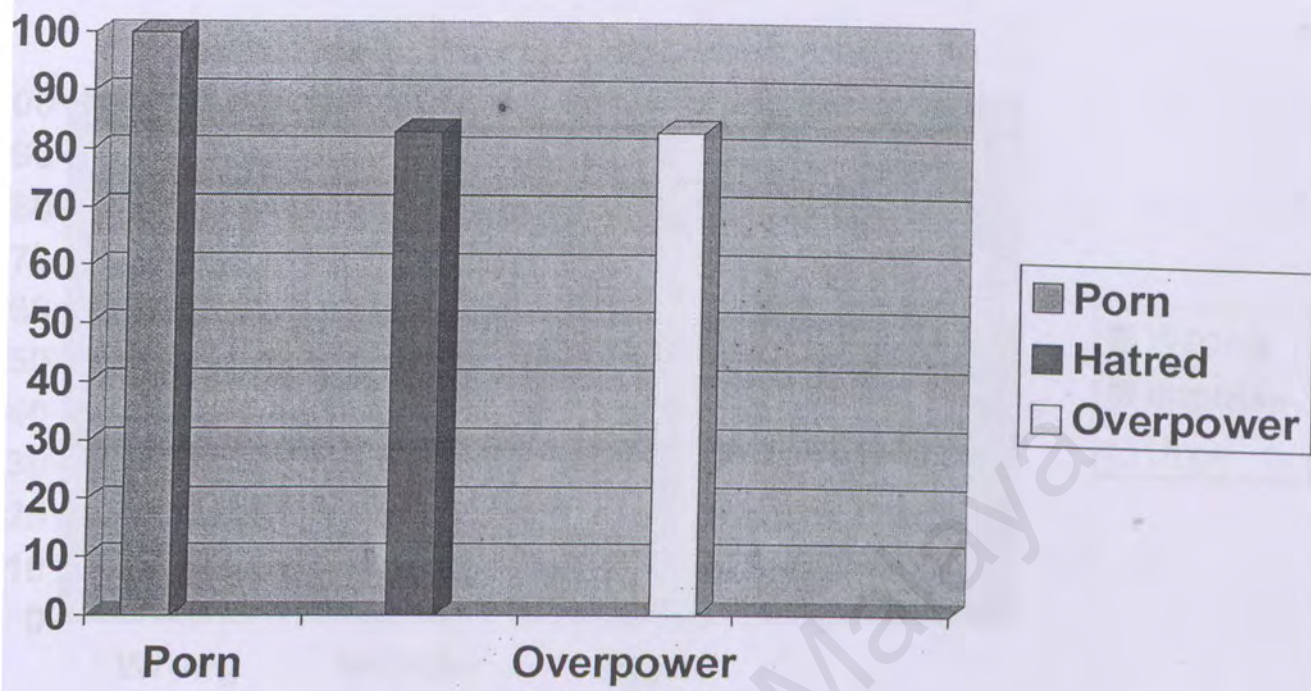
prosecute rape if given the probability that they would be charged for zina if they failed to prove rape.

4.7 Results and findings

As for specific deterrence, the results showed that rape is an emotional and lustful crime. Table 15 below clearly showed that 100% of respondents blamed pornography and lusts as main impetus to rape.

	AS	%	A	%	D	%	DS	%
1. Pornography & sexual lust	6	100	NIL		NIL		NIL	
2. Hatred of women	5	83	1	17	NIL		NIL	
3. Need to over power women	5	83	1	17	NIL		NIL	

Table 15: Reasons for committing rape



Results based on respondents on agreeing strongly only

Table 16 below showed that all respondents indicated that they knew that rape is wrong but still committed it because there is extreme uncontrollable lusts and irresistible impulse to rape.

	AS	%	A	%	D	%	DS	%
1. Knowing that rape is wrong	6	100	NIL		NIL		NIL	
2. Irresistible impulse	6	100	NIL		NIL		NIL	
3. Uncontrollable urge	6	100	NIL		NIL		NIL	

Table 16: Emotional feelings when committing rape

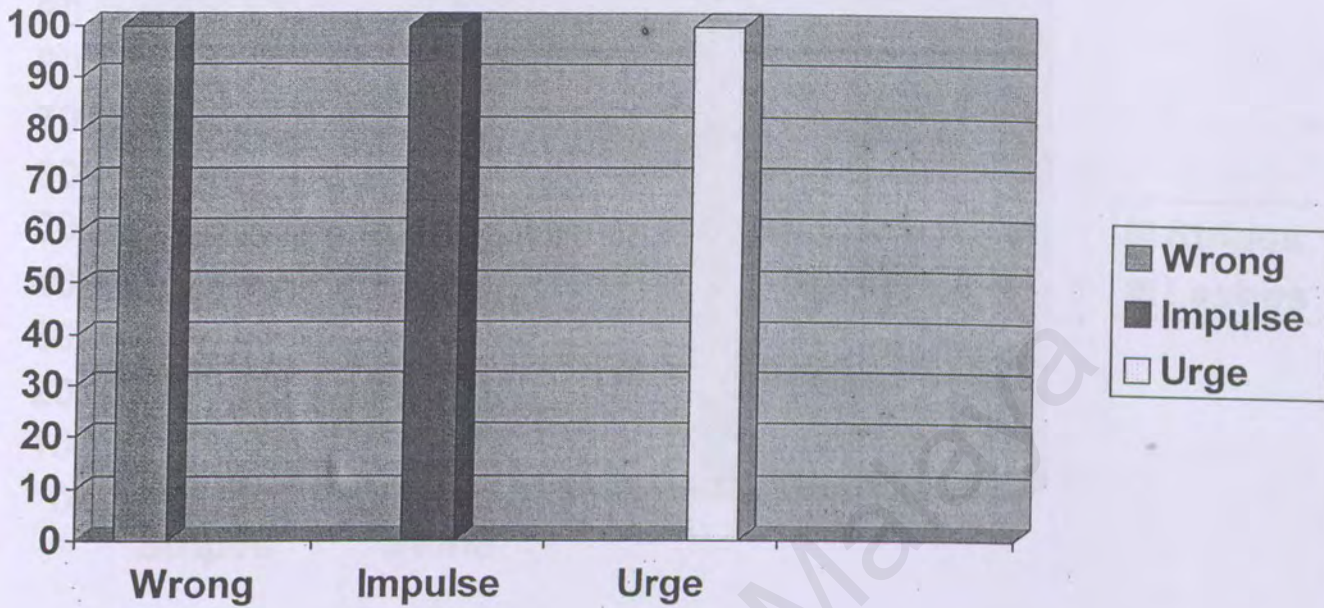
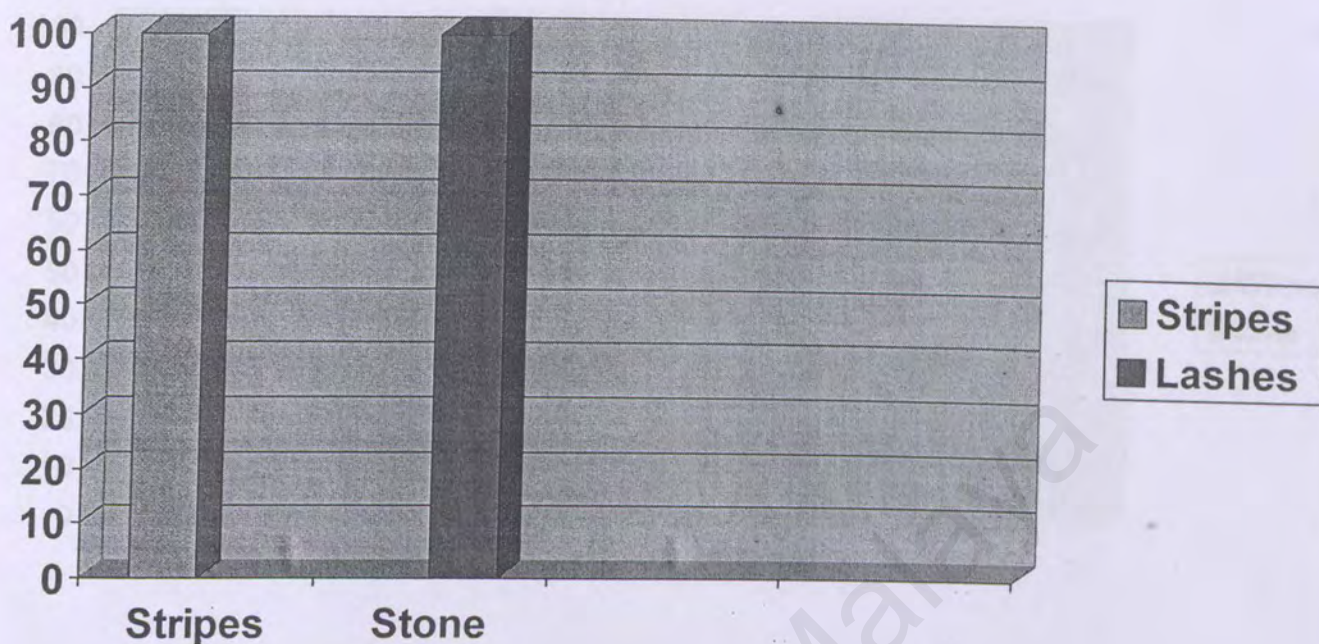


Table 17 below showed that all respondents would not commit rape if Islamic penal laws of 100 lashes and stoning to death were implied.

	AS	%	A	%	D	%	DS
1. I would not commit rape if 100 lashes	6	100	NIL		NIL		NIL
3. I won't commit rape if stoned to death	6	100	NIL		NIL		NIL

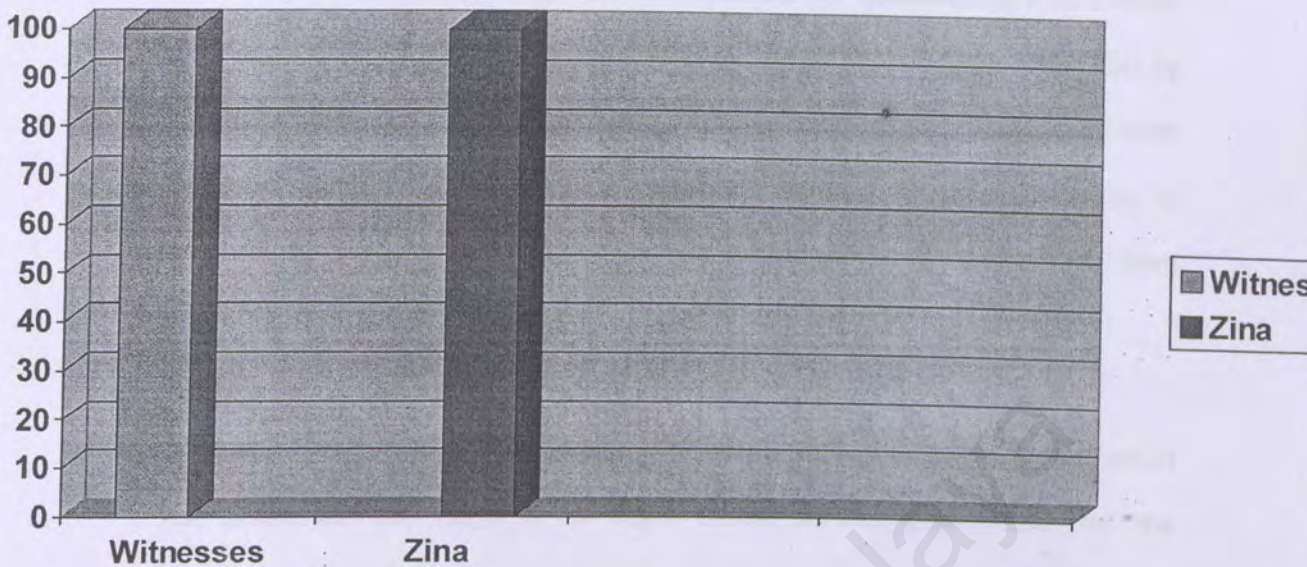
Table 17: Level of deterrence of Islamic penal laws on rape



However, the results were less convincing for general deterrence. Table 18 below showed that all thirteen respondents indicated that they would not prosecute if Islamic penal laws were applied.

	AS	%	A	%	D	%	DS	%
1. Requiring four male witnesses	NIL		NIL		NIL		13	100
2. Possibility of being charged for zina if failed to prosecute	NIL		NIL		NIL		13	100

Table 18: Likelihood to prosecute if Islamic penal laws applied to rape



Women not prosecuting rape if Islamic penal laws applied

4.8 Discussions

It appears that Islamic penal laws on rape may not have adequate deterrent on rape crimes. There are two reasons for this. Firstly, most respondents indicated that rape is not a rationale or thought offence but an uncontrollable phenomenon. Results also vindicated that most respondents were aware that the act is wrong but also indicated that rape is irresistible urge. The results also indicated that easy access to pornography enlarges their appetite and urge to rape. This affirms the dicta and assertions of *Lawton LJ in R v Hallway*.¹¹⁴

Results showed that most convicts would not have committed rape if Islamic penalties were applied. However it is submitted that these results are arguably

¹¹⁴ Supra 109

inconclusive because the respondents answered the questions at a time when they were calm and clear minded. Perhaps they had not been instigated by irresistible lusts at the time this study was conducted since also they were locked in prison. Therefore, the research method is possible weak in determining the actual condition of the convict at a time upon when the drive and urge to rape is irresistible.

Secondly, the results overwhelmingly indicated that most Muslim women would not prosecute the suspect for rape under Islamic penal laws for the burdensome evidential requirement and the possibility of zina. Therefore, if Islamic penal laws are applied, there may be increase in unreported cases against rape.

CHAPTER 5

CONCLUSION

5.1 Summary of study

Malaysia has experienced increasing crime rates in all sectors of criminal offences including robbery, rape and murder. It seriously jeopardised the tranquillity and serenity lifestyles that Malaysians have previously enjoyed. However there have yet any conclusive studies on the criminological explanations of the increase of such crimes. This study is aimed to investigate the criminological reasons for commission of these criminal offences especially to evaluate whether *Shaw and Mackay's* sociological explanation of social disorganisation could have provided sustained reasoning for the rise of crimes in Malaysia.

This study is conducted to examine three areas of crimes namely property, homicide and sexual offences. The study showed that not all crimes are caused by social disorganisations. Results from chapter two showed that robbery and property offences are proximately caused by the need to survive and unemployment. Therefore, given the state of declining economic condition in Malaysia, property crimes rose is desperate need for survival in an ever-increasing challenging atmosphere. Chapter two also postulated that regular penal laws of imprisonment are often seen as too lenient and unable to deter crime. Imprisonment between 1 – 9 years were not effective deterrent given that offenders perceived that potential gains from committing robbery are still

greater than the potentiality of legal consequences. On the contrary Islamic punitive measures of amputation of bodily limbs and beheading serves very good deterrence for property offences being that the risks of committing the crime far outweigh the potential gains of it. On this extent, it may be correct to assert that Islamic penal laws may be a suitable deterrence for crimes exclusively caused by social disorganisations and other externalities of the environment.

Chapter three basically postulated that homicide and murder are crimes of passion and not rationale crimes. It basically means that offenders committing these crimes are often emotionally turbulent and has less clear thoughts on the legal consequences of committing the offences. Perhaps of these issues, death penalty meted by both regular and Islamic criminal laws were less effective in condoning the offences as results clearly showed that most respondents commit the crimes when being provoked or where they were extremely angry. Therefore, both capital punishments meted out by regular and Islamic penal laws showed insignificant results in deterrence. Therefore, it may be concluded that capital punishments are incapable of deterring crimes caused by passions and emotions that are not properly rationalised by thoughts.

Chapter four fundamentally showed that rape offenders are mostly caused by irresistible impulse of committing sexual offences and therefore these offenders were less likely to abide by law no matter what punishments are meted. Again, rape and sexual offences are not rational crimes and therefore the results of Islamic laws and its deterrence on such offences are not surprisingly low.

In addition, Islamic penal laws on rape and zina work negatively to inhibit rightful victims from prosecuting since a failure to prove beyond reasonable doubt would cause victims to be charged in return for zina or adultery.

5.2 Implications of the results and findings

Deterrence theory assumes that most criminals have adequate foresight and good calculation of risks involved in the criminal acts. However, such assumption is quite fictitious since some categories of criminals were unable to foresee such calculated risks such as 'psychopaths' or rapists that were driven by sheer lust and insanity of thoughts or even hallucinations.¹¹⁵ Also there are certain categories of people who were fanatics or those impregnated with indispensable political propagandas would have purposively violated the law to amplify their hidden intentions.¹¹⁶

5.2.1 Rehabilitation a possible alternative

Therefore given the probable failure of punitive nature of crime, rehabilitation could be a viable alternative especially for crimes of passion and due to psychiatric disorders. Rehabilitation unlike punitive and deterrent criminal law on the extreme contrary insists that conformity of legal rules is secured not through the fear of the law, but through some inner positive motivation on the part of the individual. This theory is truly therapeutic and the main objective is making the offender into a "better person".

¹¹⁵ Gerald Gardiner, *The Purposes of Criminal Punishment* (1958) 21 M.L.R. 117

¹¹⁶ *Ibid*

However, rehabilitation may be problematic. First, rehabilitation may be workable on psychologically problematic offenders but this notion thought ineffective for crimes decisively influenced by the society as a whole including economic and political movements.¹¹⁷

Second, the model discriminates between the poor and the upper middle class society thus capable of creating unintended social stigma against the lower ranks of the society. Also, the system places unbearable burden on the state to investigate and probe into an individual at distinct length. Subsequently, the cost of such rehabilitation would increase and there would be tremendous expenses incurred in maintaining such a system.¹¹⁸

Third, the criminals would be sentenced to rehabilitation programmes or even psychiatric treatments under the supervision of medical doctors and rehabilitation officers. Such measures distorts the notion of certainty of punishment since every person shares differing pace of recovery and allowing the medical officers to have such prerogative of decision would mean that the criminals would not be able to predict the length of punishment that entirely depends on the speed of his or her recoveries. Moreover, not all rehabilitation programmes are effective and there is no golden standard of treatment and therefore a related criticism pertains to the uncertain success of treatments:

¹¹⁷ A.E. Bottoms, *An Introduction to the Coming Crisis, The Coming Penal Crisis* (1980) pp. 1-3

¹¹⁸ M. Cohen, *Moral Aspects of the Criminal Law* (1940) Yale L.J. 987 at 1012 – 1014

given. The model cannot be workable unless a reasonable expectation that the treatment works is attained.¹¹⁹

5.3 Future research directions

The above paragraphs show that there is no simple solution to fulfilling a best approach to crimes. Whilst the retributive and deterrence objectives of criminal laws may not be wholly applicable for all crimes, rehabilitation is also flawed with some practical difficulties. The author agrees that this research is preliminary and may instigate more profound future research especially involving a detailed qualitative study of respondents involved in study. More qualitative research is required to obtain a rich and narrative details especially rape convicts profiling a detail account of their emotional sentiments at the time when committing the crimes. Another important indication is perhaps to conduct more relevant studies on the possibilities of rehabilitation that could be a good alternative to the traditionally punitive and deterrent nature of criminal law.

¹¹⁹ Andrew Von Hirsch, *Doing Justice – The Choice of Punishments* (Report of the Committee for the Study of Incarceration) (1976) pp. 16 –18

APPENDIX A1

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW
ON ROBBERY (Specific deterrence*)

Instruction:

Please tick (✓) the correct answer

PART ONE

a. Personal information

1. Gender: Male
 Female
2. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

3. Offence convicted for:

- Section 390 (robbery)
 Section 397 (armed robbery)

4. Sentencing and punishment

- 1 – 5 (years)
 6- 10 (years)
 11- 14 (years)

Whipping:

- Yes No

PART TWO

Please tick (✓) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Reasons for committing robbery

	AS	A	D	DS
1. Poverty				
2. Survival				
3. Unemployment				

b. Deterrence Malaysia penal code on robbery

	AS	A	D	DS
1. I would not commit robbery if sentencing is 1- 5 years				
2. I would not commit robbery if sentencing is 6 – 10 years				
3. I would not commit robbery if sentencing is 10 – 14 years				
4. I would not commit burglary if sentenced to whipping				

c. Deterrence Islamic penal code on robbery

	AS	A	D	DS
1. I would not commit robbery if death penalty (capital punishment)				
2. I would not commit robbery if left or right arm or leg amputated				
3. I would not commit robbery if I am crucified				
4. I would not commit robbery if exiled				

* Specific deterrence – questionnaire distributed to prisoners / convicts of crimes

	AS	A	D	DS
1. Poverty				
2. Disease				
3. Unemployment				

APPENDIX A2

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW ON ROBBERY (General deterrence*)

Instruction:

Please tick (√) the correct answer

PART ONE

a. Personal information

1. Gender: Male
 Female
2. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

PART TWO

Please tick (√) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Reasons for committing robbery

	AS	A	D	DS
1. Poverty				
2. Survival				
3. Unemployment				

b. Deterrence Malaysia penal code on robbery

	AS	A	D	DS
1. I would not commit robbery if sentencing is 1- 5 years				
2. I would not commit robbery if sentencing is 6 – 10 years				
3. I would not commit robbery if sentencing is 10 – 14 years				
4. I would not commit burglary if sentenced to whipping				

c. Deterrence Islamic penal code on robbery

	AS	A	D	DS
1. I would not commit robbery if death penalty (capital punishment)				
2. I would not commit robbery if left or right arm or leg amputated				
3. I would not commit robbery if I am crucified				
4. I would not commit robbery if exiled				

* General deterrence – questionnaire distributed to general public

APPENDIX B1

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW
ON HOMICIDE (Specific deterrence*)

Instruction:

Please tick (✓) the correct answer

PART ONE

a. Personal information

1. Gender: Male
 Female
2. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

PART TWO

Please tick (✓) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Reasons for committing murder

	AS	A	D	DS
1. To rob victim of valuable property				
2. Hatred of victim				
3. Revenge				
4. Jealousy				

b. Circumstances in which crime was committed

Please indicate your emotional feelings during which murder was committed

	AS	A	D	DS
1. Calm and clear minded				
2. Extremely angry				
3. Provoked / loss self control				
4. Extremely angry				

c. Deterrence of capital punishments (Malaysian penal code and Islamic penal laws) on murder and homicides

Indicate whether you thought of the consequences of punishment at the time you committed the homicide

	AS	A	D	DS
1. I know murder is punishable by death penalty				
2. I do not know that murder is punishable by death penalty				
3. I don't really care of the consequences at all				

* Specific deterrence – questionnaire distributed to prisoners / convicts of crimes

APPENDIX B2

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW ON HOMICIDE (General deterrence*)

Instruction:

Please tick (✓) the correct answer

PART ONE

a. Personal information

1. Gender: Male Female
2. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

PART TWO

Please tick (✓) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Reasons for committing murder

	AS	A	D	DS
1. To rob victim of valuable property				
2. Hatred of victim				
3. Revenge				
4. Jealousy				

b. Circumstances in which crime was committed

Please indicate your most likely feelings if you do commit murder

	AS	A	D	DS
1. Calm and clear minded				
2. Extremely angry				
3. Provoked / loss self control				
4. Extremely angry				

c. Deterrence of capital punishments (Malaysian penal code and Islamic penal laws) on murder and homicides

Indicate whether you will think of the consequences of punishment if you commit murder

	AS	A	D	DS
1. I will weigh the consequences clearly				
2. I do not care about the consequences at all				

* General deterrence – questionnaire distributed to the public

APPENDIX C1

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW
ON RAPE (Specific deterrence*)

Instruction:

Please tick (✓) the correct answer

PART ONE

a. Personal information

1. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

PART TWO

Please tick (✓) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Reasons for committing rape

	AS	A	D	DS
1. Pornography & sexual lust				
2. Hatred of women	J			
3. Need to over power women				

b. Circumstances in which crime was committed

Please indicate your emotional feelings during which rape was committed

	AS	A	D	DS
1. Knowing that rape is wrong				
2. Irresistible impulse				
3. Uncontrollable urge				

c. Deterrence of capital punishments (Malaysian penal code and Islamic penal laws) on murder and homicides

Indicate whether you thought of the consequences of punishment at the time you committed the rape

	AS	A	D	DS
1. I know rape is punishable by imprisonment and whipping				
3. I don't really care of the consequences at all				

d. Application of Islamic 100 lashes on rape or stoning to death

Indicate whether you would still commit rape if given 100 lashes

	AS	A	D	DS
1. I would not commit rape if 100 lashes				
3. I won't commit rape if stoned to death				

* Specific deterrence – questionnaire distributed to prisoners / convicts of crimes

APPENDIX C2

A CRITICAL EVALUATION ON DETTERENCE EFFECTS OF ISLAMIC PENAL LAW
ON RAPE (General response*)

Instruction:

Please tick (✓) the correct answer

PART ONE

a. Personal information

1. Age: 21 – 29 40 – 49 60 – 69
 30 – 39 50 – 59

PART TWO

Please tick (✓) at each question and to indicate whether you agree strongly (AS), agree (A), disagree (D) or disagree strongly (DS) with it.

a. Islamic penal laws on rape and zina

Please indicate whether you would prosecute a rapist under Islamic penal laws if:

	AS	A	D	DS
1. Requiring four male witnesses				
2. Possibility of being charged for zina if failed to prosecute				

* General response – questionnaire distributed to selected Muslim women