



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

**LAW OF CHEATING: A COMPARATIVE CRITICAL  
ASSESSMENT OF ISLAMIC MALAYSIAN AND ENGLISH  
CRIMINAL LAWS**

**BY:  
SALMIN IDRUS OMAR**

**WRITTEN AS A PARTIAL FULFILMENT FOR ACQUIRING  
MASTER OF COMPERATIVE LAWS**

**1994**

## DECLARATION

I sincerely declare that this dissertation is original except those

- (a) fortified by inverted commas:
- (b) mentioned under the acknowledgements.

31-5-94

DATE

SIGNATURE



## **DEDICATION**

I sincerely dedicate this work to my daddy, mummy, son and the fountain of joy and happiness - my wife.

May Allah bless them all.

(iii)

### *PREFACE*

Nothing, however best, can be beneficial in articulation devoid of material defensive grounds. One element can import various attitudes in different kinds of the People. Likewise, a mathematical solution can be met through many acceptable and reasonable ways.

Due to civilisation trends ever experienced in this era, there is an adopted objective concept which is so inextricable that a human being has wholeheartedly accepted it as the only best means of living. It can not be easily deserted for whoever enjoys a Lion's share of it, automatically becomes addicted to its course. Cheating is all what I mean.

When I felt the danger the modernisation has produced, I got alarmed and my mind urged forth to disclose the intrinsic scope of this offence. Never was one of my incentives to go for the search merely for the sake of the Thesis. But finding out the truth was. Hence, it is irrefutable to hold the fact that the mode of bureaucracy, agencies, corporations, organisations and the like, has impliedly converted the illegality of cheating into the opposite. It is committed regardless of penal consequences due to ineffectiveness of the laws. Before going very far, it should be noted that my work is not at all legally conclusive. Its universality is confined to the Islamic, Malaysian and English Laws.

Through them, it is realised that "a human being was created very impatient; fretful when evil touches him; and niggardly when good reaches him. Not so those devoted to prayer"<sup>1</sup> It is weaknesses of the mind which is the main causing factor. It adds to today's world dominating elements of swindling, rusing, defrauding and the like. Life is now built up by them.

So by going through these laws a comparison is made, and a solution provided as to the way of handling the offenders and deterring them from repeating the same. If only inflicting punishments on them is sufficing, but the deceived should not be neglected and permanently deprived of his or her property.

There are many fields compared in this study. Some of them are similar whereas the others dissimilar. To discuss all of them, four chapters are provided. Notes have been situated at the end of each and every chapter. The first chapter is for sources and definitions of cheating. Types and punishments of cheating are discussed in the second and third chapters respectively. The fourth and last chapter is for a comparative approach of the whole work. Then in the end I have concluded my work with a suggestion that, I believe, can be helpful in legal proceedings and solving out this problem.

May Allah grant blessings over my work and keep it of great significance to all. Ameen.

---

<sup>1</sup>The Holy Quran 70:19.

*ACKNOWLEDGEMENTS*

The Law relating to cheating, the subject of my Thesis, is now set ready for reading to anyone. I have written it but I do not consider it perfect. There might be many mistakes that I have, without mensrea, overlooked because I am not infallible. I am as subject to mistakes as any other human being apart from Prophets who were guided by revelations. By this I do not mean to concede presence of mistakes, for it would be superfluous and meaningless to demonstrate them and then deliberately neglect their corrections.

Nevertheless, I am indebted to pay much tribute and all respect to the Almighty Allah who has enabled me to carry out this work. He alone can add more blessings on my work if remembered with due thanks. He says:

"And remember! your Lord caused to be declared (publicly): 'if ye are grateful, I will add more (favours) unto you; but if ye show ingratitude, truly my punishment is terrible indeed.'"<sup>1</sup>

---

<sup>1</sup>The Holy Quran 14:7.

(vi)

Then special offer of homage should be rendered to my supervisor Prof. Dr. Muhammad Ata al-`Asid. He directed me the way to reach the goal. I had no proper knowledge on relevant materials for my work if it was not for him. The Islamic mode adopted herein was suggested by him. Indeed he deserves honour.

To Sheikh Saad Salem al-Talib I owe a debt of gratitude. He was indefatigable in encouraging me spiritually and materially. In line with him is sheikh M.M. Nadwi. A man who is indifferent in enhancing education in Malawi.

To my parents, daddy and mummy warm salams. I do not forget them. They never mind living without me for the sake of education. Among them is my wife who could sacrifice her marriage privilege for better future life.

Lastly my indispensable thanks go to the International Islamic University (IIU). It has done a lot to elevate my standard in particular and promotes education worldwide in common.

**TABLE OF STATUTES**PAGES

## ISLAMIC LAW

## Divine Sources

The Holy Quran.....	11,12,17,18,26.
Hadith (Traditions) .....	2,3,8,14,24,125.

## MALAYSIAN LAW

The Penal Codes of Singapore and Malaysia  
(Cap.21,1976)

S.23.....	35,36.
S.24.....	33,35.
S.25.....	32.
S.30.....	138.
S.378 .....	78.
S.415 .....	31,47,77,79,85,86.
S.416 .....	134.
S.417 .....	41,133.
S.418 .....	141.
S.419 .....	135.
S.420 .....	41,133.

## ENGLISH LAW

Debtors Act 1869 .....	53,99.
Theft Act 1968	

S.1 .....	106.
S.2(1)(a) .....	68,69.
S.3(1) .....	95.
S.5(1) .....	88,90.
S.6 .....	94.
S.15 .....	54,68,87.
S.15(1) .....	54,63,68,143.
S.15(2) .....	65,88,92.
S.15(3) .....	94.
S.15(4) .....	55,63,64.
S.16(1) .....	143.
S.16(2)(a) .....	53,100,101.
S.16(2)(b) and (c) .....	54,87,101.
S.32(1) .....	50.

## Theft Act 1978

S.2 .....	111.
S.2(1) .....	119.
S.2(1)(b) .....	115.
S.2(2) .....	112.
SS. 1 and 2 .....	53,54,87.
S.2(3) .....	118.
S.4 .....	144.



**TABLE OF CASES**

	<u>PAGES</u>
Anderton V. Burnside [1984] AC 320	97
Andrews V. Hedges [1981] Crim LR 106 Crown Ct.	118
Baboo Khan V. State of Allahabad AIR (1961) ALL 639	83,137
Bryan [1857] Dears & B 265	58
Caldwell [1982] AC 341	65
Clucas [1949]2 K.B 226	104
D.P.P. V. Ray [1974] AC 370	60,62
D.P.P. V. Turner [1974]AC 357 at pp.365-6	110,116
Edgington V. Fitzmaurice (1885)29 Ch.D at 483	60,61
Feely [1973] QB 530, [1973]1 ALL ER 341, CA	93
Gan Leong Gee V. PP [1969]2 MLJ 76	139
Ghosh [1982]2 ALL ER 689, CA	94
Halai [1983] Crim LR 624, CA	109
Halstead V. Patel [1972]1 W.L.R.661	68
Jackson [1983] Crim LR.617, CA.	113
Johnson V. McLarty and Ors (1888)4 Kyshe 430	84
Jones (1704)2 Ld Raym 1013	87
Kanumukkala Krishnamurthy V. State of Andra Pradesh AIR 1965 S.C. 333 (S.C.-India)	135
Kanwar Sain V. The Crown (1938) I.L.R.19 (Lohore)662	45
Khoo Kay Jin V.PP (1964)30 MLJ 22	80
King Emperor v. Tha By Aw (1907)4 BLR 315 (Chief Court, Lower Burma)	36
Kumuran V. Sate of Kerala (1961)2 Cr. L.J. 98	140

Lawrence V. Metropolitan Police Commissioner [1972]AC 626	96
Lewise (1922) unreported	104
Lim Chin Huat V. Regina [1963] MLJ 314	82
Low Cheng Swee V. Rex (1941)10 MLJ 98	46
Mavji [1987]2 ALL ER 758	52
Mc Kiernan [1948]2 K.B. 142	90
Metropolitan Police Commissioer v. Charles [1977] AC 177.	58,103
Moynes V. cooper [1956]1 QB 439	98
Mulligan [1990] Crim LR 427,CA	52
PP.V. Chen Kee Nan [1969)2 MLJ 239	81
Queen Empress V. Abbas Ali I.L.R 25 Cal.512	34
R. V. Barnard (1837)7 C & P 784	56
R. V. Gilmartin [1983]1 ALL ER 829	57
R. V. Hudson [1956]2, QB 252	52
R. V. Lim Cheng Soo [1946] MLJ 51	141
R. V. Limbie [1982] AC 449	57
R. V. Meech [1974] QB 549	97
R. V. Robinson [1915]2 K.B. 347	66
R. V. Skipp [1975] Crim LR 114.	97
R. V. Tan Ah Seng [1935]4 MLJ 314	142
R. V. Turner (No.2) [1971]2 ALL ER 441	89
R. V. Wright [1960] Crim LR. 366	67
Re Dc Henry (1958) 24 MLJ 224	79

(x)

Seet Soon Guan V.PP. (1955)21 MLJ 223	32
Stainesi (1974) 60 Cr. App.R.160	67
Tan Peng Ann V. PP [1949] MLJ Supp 10	44,81
Tan Wee Meng V. Regina [1955] MLJ 239	138
Watkins [1976]1 ALL ER.578 at 579 CA.	102
White V. Elmdene Estates Ltd [1959]2 ALL ER 605 at 610	109
Yong Yong Peng V. R (1947)13 MLJ 40	47

## TABLE OF CONTENTS

	<u>PAGES</u>
Declaration	i
Dedication	ii
Preface	iii
Acknowledgements	v
Table of Statutes	vii
Table of Cases	viii
<u>CHAPTER ONE</u>	1
<u>DEFINITION OF CHEATING</u>	1
Islamic Law	1
Sources of Cheating	1
<u>ONE</u> : Traditions Relating to Ghisshu	2
Tradition Assessment	4
Comment	8
Instructions from the Traditions	12
<u>TWO</u> : Tradition Relating to the Word al-Khilabah	14
Tradition Assessment	14
Comment	14
Nature of the Permission	16
Instructions from the Hadith	23
<u>THREE</u> : Tradition Relating to unmilked animals	24
Comment	25
General Implication of all the Traditions	26
Definition	27
Ghisshu	28
al-Tadlisu	28
al-Khilabah	29
al-Makru	29
al-Ghururu	29
Summary of the definitions	30
<u>MALAYSIA LAW</u>	31
Sources and Definition of Cheating	31
i. Fraud	32
Relationship between Fraud and dishonesty	33
ii. Dishonesty	35
The Conclusion of These Two Elements	36
iii. Intention	41
Deception	42

ENGLISH LAW	50
Sources and Definition of Cheating	50
Deception	53
Sources and Definition	53
1. The Deception	54
2. The Obtaining	65
3. Dishonesty	67
<u>CHAPTER TWO</u>	75
TYPE OF CHEATING	75
Islamic Law	75
1. Artificial Type of Cheating	75
2. Verbal Type of Cheating	76
3. Concealment of fact Type of Cheating	76
MALAYSIAN LAW	77
1. Deceiving and inducing fraudulently or dishonestly	77
2. Deceiving and inducing Intentionally to do or omit to do damage or harm caused by act or omission	83
ENGLISH LAW	87
1. Obtaining Property by Deception	87
A. belong to another	88
B. Ownership, Possession or Control	92
C. Mens rea	92
An overlap of Obtaining Property by deception and Theft.	95
2. Obtaining a Pecuniary Advantage by Deception.	99
A. Overdrafts, Insurance Policies and Annuity Contracts	102
B. Opportunity to earn Remuneration or to win Money by Betting	104
C. Mens rea	106
3. Obtaining Services by Deception	106
4. Evasion of Liability by Deception	110
A. Securing Remission of a liability	111
B. Inducing Creditor to Wait for or Forgo Payment	115
Wait for	116
Forgo	117
C. Obtaining an Exemption from or an Abatement of Liability	119

<u>CHAPTER THREE</u>	124
PUNISHMENTS	124
Islamic Law	124
1. The Accused	125
(a) The Beginning of a three-day duration	126
(b) Establishment of Option	126
(c) Awareness after Ignorance	128
2. The Deceived	129
Type of Compensation	130
(a) man made defects	130
(b) Inherent defects	132
MALAYSIAN LAW	133
A. Simple Cheating	133
B. Aggravated Cheating	133
C. Cheating by Personation	134
D. Section 418	141
ENGLISH LAW	143
1. The first type of deception	143
2. The Second type of deception	143
3. The third type of deception	144
4. The last type of deception	144
<u>CHAPTER FOUR</u>	147
COMPARATIVE APPROACH	147
The first Chapter	148
1. Wording	148
2. Prohibition	149
3. Explanation	149
4. Definition	150
5. Elements	152
The Second Chapter	152
The Third Chapter	153
CONCLUSION	155
BIBLIOGRAPHY	158

## **CHAPTER ONE**

### **DEFINITION OF CHEATING SOURCE OF CHEATING**

#### **ISLAMIC LAW**

The definition of cheating in Islamic law is the consequence of the source of cheating. With this regard it is worth discussing about the origin of this offence in this law.

The fact that Islamic Law is a divinely ordained system and the command of Allah revealed to the Prophet Muhammad (peace be upon him), directs us to seek the source of this offence in the ideal Islamic materials. In that it can not be other than in accordance with the will of Allah as revealed to the Prophet Muhammad (peace be upon him).

There are several ahadith (traditions) reported from the Prophet Muhammad himself as the source of this offence. They are situated in three main categories as the following:

1. Traditions relating to Ghisshu (cheating).
2. Traditions relating to the word "al-Khilabah".
3. Traditions relating to unmilked animals.

ONE1. *TRADITIONS RELATING TO GHISSHU*

1. It was narrated by Abu Hurairah that the Prophet of Allah (peace be upon him) said: whoever holds a weapon against us, is not with us and whoever cheats us, is not with us.
  
2. It was narrated by Abu Hurairah that the Prophet (peace be upon him) came upon a heap of food and he penetrated his hand in it after which his fingers felt some wet then he said to the owner of the food: What is this? he said: It has been affected by [rain] a cloud O! you the Prophet of Allah. [The Prophet] said, should you not put it on top of the food for people to see, whoever cheats us not with me.

Both of these traditions were reported by Muslim.

3. It was narrated by Ibn Umar [the son of Umar]; that the prophet of Allah (peace be upon him) came upon food at the market of Madinah and he was attracted by its good quality, and the Prophet of Allah penetrated his hand deep inside it and he brought out what was not in appearance. Then he became angry with the owner of the food and said: "no cheating among Muslims, whoever cheats us is not with us".

Reported by Al-Daramiy



4. It was narrated by Abu Hurairah that the Prophet (peace be upon him) came upon a man who was selling food. Then he penetrated his hand in it to find that it was cheated upon. Thereafter the Prophet of Allah (peace be upon him) said: "is not with us he who cheats".

Reported by Ibn Majah

5. It was narrated by Abu Hurairah that the messenger of Allah (peace be upon him) came upon a man who was selling food and asked him the way he sold and was told. Then it was revealed to him commanding him to penetrate his hand in it. When he did so he discovered that it was wet. Then the messenger of Allah (peace be upon him) said: "is not with us he who cheats".

Reported by Abu Dauda.

6. It was narrated by Abu Al-Hamra'a, he said: I saw the messenger of Allah (peace be upon him) on the surroundings of a man with food in a container. Then he penetrated his hand in it and said: "You may have cheated, he who cheats us is not with us."

Reported by Ibn Majah.

### *TRADITION ASSESSMENT*

All the above-mentioned traditions of the Prophet (peace be upon him) which were reported by the Companion of the Prophet Abu Hurairah, are good and authentic. It is these traditions upon which the Muslim scholars work.<sup>1</sup> Eventhough there is no mathematical nicety in similarity of the wordings of these traditions, their meaning is as one and same in strength as their, reporters. Hence, it does not follow that all the cited traditions were narrated by Abu Hurairah. Tradition no. 3 above was narrated by Ibn Umar the son of Khalifah Umar. And tradition no.6 was narrated by Al-Hamraa.

Except tradition no.6, all these traditions received a unanimous approval of their authenticity by the Muslim reporters of the traditions. Each scholar reported them with a particular narrator, but relating to the same offence of cheating in the same meaning.

This diversity of narrators with various wordings of traditions, should not fix a doubt in a mind of anyone. This shows that the Prophet peace be upon him had many companions whom he used to accompany with during the fulfilment of his mission. It is not anything of logic to maintain that the Prophet used to be with all

the companions at all times. Different chances of accompanying the Prophet at different times means different narrations. This course was followed by the reporters of the tradition.

With regard to the present traditions, muslim scholars reported them in the following way:

1. IMAM MUSLIM:

reported the first and second tradition in the book of Iman (belief) under the Chapter: The word of the Prophet peace be upon him; "he who cheats us is not with us."<sup>2</sup>

2. IMAM AL-DARAMIY:

reported the third tradition in the book of trade under the chapter of prohibition of cheating.<sup>3</sup>

3. IMAM IBN MAJAH:

reported the fourth hadith (tradition) in the book of commerce under the chapter of prohibition of cheating.<sup>4</sup>

4. IMAM ABU DAUDA:

reported the fifth hadith in the book of trade under the chapter of prohibition of cheating.<sup>5</sup>

5. IMAM AL-TIRMIDHIY:

reported the same fifth hadith under the chapter of trade.<sup>6</sup>

6. IMAM AHMAD

reported hadith on cheating in his book.<sup>7</sup>

In brief, it is relevant to say that traditions relating to cheating were reported by all the well known Muslim reporters of traditions except Imam Al-Bukharaiy and Al-Nisaiy.<sup>8</sup> Thus all these traditions, except the sixty one, are authentic.

### THE SIXTH TRADITION

The authenticity, or its opposite of the traditions is born by the status of the narrators. If the narrator is not reliable as to the extent that he is sometimes not truthful, what he can narrate. can not be reliable. With this light, there are in the sixth hadith two narrators who were held to be deficient. For that reason the hadith is not reliable. Those two narrators within the version were: Abu Dauda and Abu Hamraa. The version with all the narrators was as follows:

"narrated Abu Bakri son of Abi Shaibah, Abu Nu'aim, and Yunusu son of Abu Ishaq from Abu Ishaq, Abu Dauda and Abu Al-Hamraa.

1. Abu Dauda

This narrator according to one scholar, al-Miziy, is alias NUFAI`u BIN AL-HARITH al-A`ama, one of the left-out weak narrators. And another scholar IBN ABDU al-BARRIY said that people unanimously agreed that he is not reliable and that his version should not be reported. Furthermore, IBN MA`IN, another scholar described him as an inventor of traditions. Nevertheless, Its text is authentic as it matches the above cited texts of Ibn Umar and Abu Hurairah.<sup>9</sup>

2. Abu Al-Hamraa

In respect of this narrator, IBN UMAR said that people also agreed that he is weak, and some of them even denied him and so by consensus, a version narrated by him should be left out. Once again IBN MA`IN described this one as an inventor of Traditions.<sup>10</sup>

The consideration of the status of narrators could affect the third hadith. The hadith has various narrations amongst which one of the narrators is ABOO MA`ASHAR who is truthful. But on the other hand he was weakened by some. Be what may,

the present hadith is short of this narrator. The complete narration of the hadith is:

"narrated Muhammad son of al-Swalt and Abu 'Uqail Yahya son of Al-Mutawakkal who said: Al-Qasim son of Abdullah who narrated from Salim and then from Ibn Umar, son of Umar, told me.....<sup>11</sup>

By this narrations, the hadith is authentic.

#### COMMENT

By contemplating all the abovementioned traditions of the Prophet peace be upon him, it is apparent that, even though they are of different versions, their meaning and implication is one. Since it has been proved that, all of them serve one, are correct, they can not differ in meaning. Moreover, their source, the Prophet, is one.

On one occasion, the Prophet peace be upon him, visited the market of the Holy city of Madinah. Upon that he came across a businessman and chanced upon his heaped food ready for sale. The prophet was so attracted by the good condition of the food that he inquired the man about the way he carried out his business and was told. Subsequently, a command was revealed to him to penetrate his holy hand into the heap of the food. Thereafter, he discovered

that the inner contents were wet different from the outer part which was dry. The man was a content to display the better dry part without disclosing the inner wet part. The man cheated. Thus the prophet peace be upon him said: " he who cheats us is not with us".

Cheating as embodied in those traditions can not be barred by a mere excuse. There must be some fetters recognised by the law. For instance, the Islamic Law exempts such matters belonging to capacity as minority, insanity, sleeping and mistake. If such matters or the like are available, the excuse is considerable and remission can be effected. Not all the factors need be available, one or any of them is enough.

That businessman presented an excuse when he said that the food was so wet by a cloud, meaning by that, rain. But the prophet inspite of that, blamed him for covering the real quality of the food from the sight of the people. There was no evidence that the man did that unintentionally and so liable to a blame. That blame implied that lack of disclosing defected part of a commodity, means compelling people to buy what is against their will. Anything relating to a sale contract should be set within the observation of the customers. In that way, they could buy optionally regardless of quality. So had the man disclosed the contents of all his food to the customers, no cheating would have been constituted.

The remark of the Prophet peace be upon him on that occasion, resulted in reports by his companions in three different wordings:

1. he who cheats us is not with us;
2. he who cheats us is not with me; and,
3. no cheating among Muslims, he who cheats us is not with us.

Explaining the Imam Muslim reported version, Imam al-Nawawiy preponderated it and held that the first personal pronoun (in the second wording above) "with me" is the correct wording found in the original texts. By that, the wording means: whoever does not follow my straight path knowledge, duty and the goodness of my way, is not among those who have been led in the right path.

On the other hand, Sufian bin Uyainah disliked such matters as explaining those traditions, and said that the traditions of cheating should not be explained so that they should inspire and resent in the minds of people.

The Phrase "is not with us" in the first and third wordings above, was explained by Al-Khattab. He said that "it means that he is not in our way and path. He who cheats his brother and is not sincere to him, has ceased to follow me [the Prophet] and stick to my way.