

THE LAW OF DEFAMATION UNDER THE CIVIL,
CRIMINAL LAW OF MALAYSIA AND ISLAMIC
LAW: A COMPARATIVE STUDY

BY

RAFEAH SAIDON

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UNIVERSITY

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ABSTRACT OF THE THESIS

The law of defamation seeks to protect people's reputations. Reputation is a crucial asset in social and economic life. People with reputations for disloyalty for example, disqualify themselves from most high-ranking jobs. Indeed, reputations may be a more important method by which people control one another than the law itself.

The law of defamation is not new to the world, nor it is limited to certain nations or legal systems. In Malaysia, the law of defamation is governed under the law of torts and the criminal law, i.e under the Defamation Act 1958 and the Penal Code. The legal protection against defamation is also available under the Islamic Law. In Islam, the freedom of speech and expression must not be used to hurt others nor to encroach on people's right or their dignity.

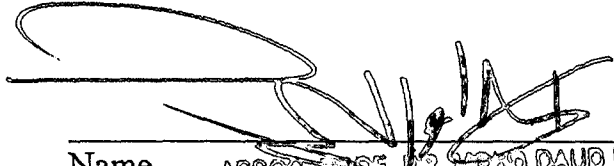
The purpose of this research is to compare and contrast the law of defamation which is available under the two different laws, Malaysian laws and Islamic laws. The research is also to find out the weaknesses and the loopholes of the available laws and try to suggest the Islamic law as the alternative.

There are a lot of reading materials used in conducting this research. The main references are the provisions of the Quran and Sunnah, Acts, books and articles. This research is also based on both Malaysian and English cases decided by the court. Various opinions of the judges and views of ulama' are also being referred. The writer is largely dependent on the materials available in libraries i.e International Islamic University (IIU), University of Malaya (UM), or Mara Institute of Technology (MIT), Centre of Preparatory Program (PPP/ITM), Islamic Centre (Pusat Islam) and state libraries.


The findings of the study shows that there are a lot of differences between Malaysian laws and Islamic laws, among other things, with regard to the sources, ingredients of liability, defences, proof of damages, remedies etc. This research attempts to point out that Islamic law is the best, the most perfect and comprehensive law because it is a divine law and it reflects the perfectness of Allah. The research is concluded with a suggestion that the law of defamation under Islamic law should be imposed and the law under civil and criminal law of Malaysia should be maintained as long as it does not contradict to the principle of Shariah.

APPROVAL PAGE

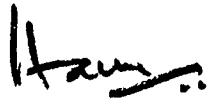
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for Name **ASSOC. PROF. DR. LENDO DAUD BAKAR**
Supervisor **DEPUTY DEAN (ACADEMIC AFFAIRS)**
KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.


Name
Examiner **Tan Sri Wan Hamzah**

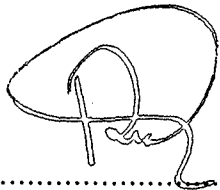
This thesis was submitted to the Kulliyah of Laws and is accepted as partial fulfilment of the requirements for the degree of Master of Comparative Laws.


Name
Dean, Kulliyah Of Laws
Tan Sri Prof. Dato' Harun Mahmud Hashim
Acting Dean
Kulliyah Of Laws
International Islamic University Malaysia

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Rafeah Saidon



Signature.....

Date 20 October 1997

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Malaysia. 1993. *Defamation Act, 1957 (Act 286)*

ii. **State Legislative Assembly Enactment**

State Legislative Assembly Kelantan. 1993. *Shariah Criminal Code II*

B. Publication by Federal/ State Government

I. **Federal Government Publication**

Pakistan. 1979. *The Offence Of Qazf (Enforcement Of Hadd)*

Ordinance

LIST OF ABBREVIATIONS

- | | |
|-----------|------------------------|
| 1. All ER | All England Report |
| 2. KB | King's Bench |
| 3. WLR | Weekly Law Report |
| 4. AC | Appeal Case |
| 5. MLJ | Malayan Law Journal |
| 6. QBD | Queen's Bench Division |
| 7. CLJ | Criminal Law Journal |

TRANSLITERATION

ا	a	ز	z	ق	q
ب	b	س	s	ك	k
ت	t	ش	sh	ل	l
ث	th	ص	ṣ	م	m
ج	j	ض	ḍ	ن	n
ح	h	ط	ṭ	ه	h
خ	kh	ظ	ẓ	و	w
د	d	ع	‘	ي	y
ذ	dh	غ	gh		
ر	r	ف	f		

short vowel

ـِ	a
ـِ	i
ـِ	u

long vowel

ـَ	ā
ـِ	ī
ـِ	ū

INTRODUCTION

The Law of Defamation provides legal protection for an intangible asset that is one's reputation. Reputation is defined in the Oxford English Dictionary as "the common or several estimate of a person with respect to character or other qualities, the relative estimation or esteem in which a person is held....." As it may take years of effort for someone to develop, build and acquire reputation, it can be a priceless asset worthy of protection.

The legal protection against defamation is available under both the Malaysian and Islamic Law, but there are differences with regard to the definition, cause of action, classification, mode of proving, defences, punishment and remedy.

Under the Malaysian Law which based on English Common Law liability for defamation is divided into the two categories of libel and slander and the law of defamation is governed under the law of torts and the criminal law i.e. in the Malaysian Defamation Act 1957 and the Penal Code of Malaysia Section 499 - Section 503. The law of defamation is not being explained in detail under the Islamic Law. Basically it is quite related to the freedom of expression. Islam gives the right of freedom of thought and expression to all human beings provided that there is no violation of such right. There are a number of provisions from the Quran and Sunnah regarding those matters. Thus guidelines have been given by Islam to show that Islam has strongly disagreed

with those activities which can violate the dignity of others. The most important division of defamation under Islamic Law is:

a) Defamation which will be punished by *Hudūd* punishment

i.e. *Qadhf* (قذف).

b) Defamation which will be punished by *Ta'zīr*.

If the husband puts forward slanderous accusations against his wife without producing four witnesses both of them will be entitled to do *Li'ān* (an oath of accusation made by the husband and the oath by the wife to reject the accusation).

The purpose of this research is to compare and contrast the law of defamation under the civil and criminal law of Malaysia and Islamic Law.

CHAPTER ONE

DEFINITION AND SCOPE

a) Definition and scope of Defamation under the Islamic Law.

One of the most important rights which Islam gives to a man is that of protection of honour. People have been forbidden to attack each other's honour in any way. Muslims are bound to protect the honour of other human beings. A person who attacks the honour of others can be punished by the court as soon as the guilt against him is proved. The Islamic state is also bound to protect the honour of its citizens without any discrimination. Islam not only makes it obligatory for the state to protect the honour of the citizens but also gives them the right of private defence to protect their honour.¹

As Allah said in the Quran,

يَأْتِيهَا الَّذِينَ ءَامَنُوا لَا يَسْخَرُونَ مِنْ قَوْمٍ عَسَىٰ أَنْ يَكُونُوا خَيْرًا مِنْهُمْ
وَلَا يُنِسَاءُ مِنْ نِسَاءٍ عَسَىٰ أَنْ يَكُنَّ خَيْرًا مِنْهُنَّ وَلَا تَلْمِزُوا أَنْفُسَكُمْ وَلَا تَنَابَزُوا
بِالْأَلْقَابِ بِئْسَ الْأَسْمُ الْفُسُوقُ بَعْدَ الْإِيمَانِ وَمَنْ لَمْ يَتُبْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

¹ Shibli Nomani, *Al-Farooque* (English translation) by Abu Zafar Zain as quoted by Sheikh Showkat Hussain, *Islam And Human Rights*, (1991) pp. 16-17

*“O you who believe! Let not some men among you laugh at others. It may be that the (latter) are better than the (former). Nor let some women laugh at others. It may be that the (latter) are better than the (former). Nor defame, nor be sarcastic to each other. Nor call each other by (offensive) nicknames. Ill-seeming is a name connoting wickedness, (to be used of one) after he has believed, and those who do not desist are (indeed) doing wrong”.*²

The law of defamation in Islamic Law is related to the freedom of speech and expression. Islam gives the right of freedom of thought and expression to all human beings provided that there is no violation of such rights.³ Some of the violations of freedom of speech that the Shariah has specified are expounded in positive legal terms which require enforcement by government authorities. Slanderous accusation (*Qadhf*) for example, is a prescribed (*Hadd*) offence for which the Quran specifies a particular punishment. Similarly, blasphemy, sedition and insult are punishable offences under the law.⁴

A person may express an opinion, arbitrary or otherwise and so long as he does not violate the law concerning blasphemy or sedition he is free to advance his opinion.⁵ This freedom of opinion must however be used for propagation of virtue and truth and not for spreading evil or wickedness. The Prophet during his life time gave the people full freedom of expression. He trained his companions in such a way that they expressed their dissent without any hesitation. During the Battle of Uhud, when the

² The Holy Quran, Surah Al-Hujurat, 49:11

³ *Supra* n. 1

⁴ Mohammad Hashim Kamali, *Freedom Of Expression In Islam*, (1994) p. 113

⁵ *Id.*, at p. 62

Prophet asked his companions to resist the enemies inside the town of Madina, the companions asked him in what capacity he was suggesting to them that strategy. When the Prophet said that it was his own opinion not based on Divine Guidance, the companions insisted upon their own views and the Prophet agreed to fight the battle on the grounds of Uhud as wanted by them. The question by the companions regarding the capacity in which the Prophet was suggesting a particular course and their insistence on their own opinion afterwards clearly signifies the freedom which the Prophet had granted them. There are several other instances which signify the freedom of thought and expression that prevailed in the ideal Islamic society under the leadership of the Prophet.⁶

Islam grants, and at times encourages, freedom of expression subject to the condition that it does not hurt the susceptibilities of other people and does not involve the country into trouble. The Prophet generally consulted his companions whenever important issues arose regarding the social, economic or political affairs of the country and he often accepted their suggestions.⁷ Allah has commanded the Prophet to consult his companions as he says:

فَاعْفُ عَنْهُمْ وَاسْتَغْفِرْ لَهُمْ
وَسَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ
عَلَى اللَّهِ إِنَّ اللَّهَ يُحِبُّ الْمُتَوَكِّلِينَ

⁶ *Supra* n. 1 at 24

⁷ Syed Muzaffar Uddin Nadui, *Human Rights And Obligations in the light of the Quran And Hadith*, (1974) p. 63---

“ So pass over (their faults) and ask for Allah’s forgiveness for them and consult them in affairs (of moment) then, when you have taken a decision, put your trust in Allah. For Allah loves those who put their trust (in Him).”⁸

Hadrat Abu Bakr, first caliph of Islam, allowed freedom of expression and liberty of action to the people, as he addressed them saying:

“Follow me as long as I follow the commandments of Allah and His Prophet. If I happen to go astray, you must put me to the right path.”⁹

(There are some varieties of abusive speech which receive much attention in the Quran and Sunnah. The Quran is specific in a number of passages on the varieties of evil speech which violate the dignity of others and which seek to expose their weaknesses.¹⁰

As stated in the Quran

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرُ قَوْمٌ مِنْ قَوْمٍ عَسَىٰ
أَنْ يَكُونُوا خَيْرًا مِنْهُمْ وَلَا نِسَاءٌ مِنْ نِسَاءٍ عَسَىٰ
أَنْ يَكُنَّ خَيْرًا مِنْهُنَّ وَلَا تَلْمِزُوا أَنْفُسَكُمْ وَلَا تَنَابَزُوا
بِالْأَلْسِنِ بِنِسِ الْأَسْمَاءِ الْفُسْطُوقِ بَعْدَ الْإِيمَانِ
وَمَنْ لَمْ يَتُبْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ ﴿١١﴾

⁸ The Holy Quran, Surah Al-Imran, 3:159

⁹ *Supra* n. 7

¹⁰ *Supra* n. 4

“ O you who believe! Let not some men among you laugh at others, It may be that the (latter) are better than the (former) Nor let some women laugh at others, It may be that the (latter) are better than the (former). Nor defame nor be sarcastic to each other, Nor call each other by (offensive) nicknames. Ill-seeming is a name connoting wickedness (to be used of one) after he has believed and those who do not desist are (indeed) doing wrong.”¹¹

The word defamation as stated in the above ayat (لَمَزَ) may consist in speaking ill of others by the spoken or written word, or in acting in such a way as to suggest a charge against some person whom we are not in a position to judge. A cutting, biting remark or taunt or sarcasm is included in the word (لَمَزَ). An offensive nickname may amount to defamation, but in any case there is no point in using offensive nicknames, or names that suggest some real or fancied defect. They ill accord with the serious purpose which Muslims should have in life. For example, even if a man is lame, it is wrong to address him as “O lame one!” It causes him pain, and it is bad manners. So in the case of the rude remark, “the black man”.)

The above *āyah* is immediately followed by another passage, as Allah said

¹¹ The Holy Quran, Surah Al Hujurat, 49: 11

يَا أَيُّهَا الَّذِينَ ءَامَنُوا اجْتَنِبُوا كَثِيرًا مِّنَ الظَّنِّ إِنَّ بَعْضَ
 الظَّنِّ إِثْمٌ وَلَا تَجَسَّسُوا وَلَا يَغْتَب بَّعْضُكُم بَعْضًا
 أَيُحِبُّ أَحَدُكُمْ أَن يَأْكُلَ لَحْمَ أَخِيهِ مَيْتًا
 فَكَرِهْتُمُوهُ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ تَوَّابٌ رَّحِيمٌ ﴿١٢﴾

“ O you who believe ! Avoid suspicion as much (as possible): for suspicion in some cases is a sin; and spy not on each other, Nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, you would abhor it...But fear Allah ; For Allah is Oft-Returning, Most Merciful. ”¹²

Most kinds of suspicions are baseless and to be avoided, and some are crimes in themselves for they do cruel injustice to innocent men and women. Backbiting also should be avoided. The one who commits back-biting is like the one who eats the flesh of his dead brother. No one would like even to think of such an abomination as eating the flesh of his brother. Then understand that back-biting is more heinous than that. In short as a Muslim we are asked to refrain from hurting people’s feelings whether they are present or absent.

(In the Shariah defamation for which the punishment has been prescribed by Allah is *Qadhf* (Slanderous Accusation). What is meant by *Qadhf*? *Qadhf* in its primitive

¹² The Holy Quran, Surah Al-Hujurat, 49:12

sense, simply means accusation. By *Qadhf*, in the language of the law, is understood to levy a charge of adultery against a married man or woman. The person so acting is termed the *Qadhif*, or slanderer and the man or woman so scandalized the *Maqdhūf* or slandered.¹³ In other words *Qadhf* is an offence which comes into existence when a person falsely accuses a Muslim of fornication or doubts his paternity.¹⁴

The other term used to describe the offence of defamation in Syariah is *iftirā'* (libel). *Iftirā'* means attribution of lies to another person, maliciously accusing another person of criminality, or inventing something about an individual which he or she has not done. All other varieties of false accusation, whether of adultery or other offences, which do not amount to *Qadhf* may amount to criminal libel and invoke a deterrent punishment of *Ta'zir*.¹⁵ Furthermore if the accused person chooses to forgive the accuser, no punishment will be imposed.¹⁶ *Iftirā'* differs from a simple lie (*kidhb*) in that the former is normally coupled with malice, that is the intention to defame another person, whereas this may not always be the case with regard to lying.¹⁷ The test of *iftirā'* is not whether the charge it contains amounts to criminality, but whether it qualifies under the Quranic criterion of "evil speech". This may be in any form including written words, signs, and pictures.¹⁸ Speech which does not fulfil this test would therefore, not

¹³ Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, (1978) p. 87

¹⁴ Abdul Rahman I. Doi, *Shariah The Islamic Law*, (1984) p. 246

¹⁵ *Ta'zir* is used for punishment other than *Hadd*, *Qisas* and *Kaffarah*. i.e it is up to the ruler to decide on what type of punishment should be imposed.

¹⁶ Mohammad Hashim Kamali, *Freedom Of Expression*, *op cit* at p. 169

¹⁷ *Al-Mawsū'ah al-Fiqhiyyah*, 276 (1984) as quoted by Mohammad Hashim Kamali, *Freedom Of Expression*, *op cit* at p. 169

¹⁸ Abd. Al-Hakim Hassan Al- Ili, *Al-Hurriyyat al-'Āmmah*, as quoted by Mohammad Hashim Kamali, *Freedom Of Expression*, *op cit* at p. 170.

amount to libel and must be tolerated. If a speech is deemed to be evil and hurtful, then it must violate the personal honour and dignity of the individual.¹⁹

The other word used by Shariah regarding defamation is *Sabb* (سب) or *Shatm*

(شتم) i.e. *insult*. An insult can refer to any word, expression, or gesture which attacks the dignity of the person to whom it is addressed, and which humiliates the latter in the eyes of his or her compatriots. Insulting words must be hurtful, but they need not be uttered in public in order to qualify as *Sabb*. This type of offence does not carry a fixed penalty but may be given deterrent punishment under *Ta'zir*. Then it is up to the court to determine the type and quantum of the punishment, bearing in mind the nature of the offence and the circumstances in which it was committed. At this juncture, it is interesting to note that the only Quranic ayat which is specific on the prohibition of *Sabb* is concerned with insult to Non-Muslims although this does not mean that insulting a Muslim is not an offence.²⁰ As Allah said :

وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ
فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ

“Revile not those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance.”²¹

¹⁹ *Supra* n. 4 at p. 170

²⁰ *Ibid*

²¹ The Holy Quran,– Surah Al An'am, 6:108

The Quranic commentators have concluded that this *āyah* forbids insult, which is likely to invoke hostility and abuse, to everyone, Muslim and non Muslim alike, which shows that the religious following of the person to whom the insult is addressed is immaterial.²²

Al Quran also use the word *al jahr- bil-sū' min al- qawl*. The passage where this phrase occurs is as follows:

لَا يُحِبُّ اللَّهُ الْجَهْرَ بِالسُّوءِ مِنَ الْقَوْلِ إِلَّا
 مَنْ ظَلَمَ وَكَانَ اللَّهُ سَمِيعًا عَلِيمًا ﴿١٤٨﴾
 إِنْ تُبْدُوا خَيْرًا أَوْ تُخْفُوهُ أَوْ تَعْفُوا عَنْ سُوءٍ
 فَإِنَّ اللَّهَ كَانَ عَفُوًّا قَدِيرًا ﴿١٤٩﴾

“ Allah loves not that evil should be noised abroad in public speech, except where injustice has been done; For Allah is He who hears and knows all things.”
Whether you publish a good deed or conceal it or cover evil with pardon, verily Allah blots out (sins) and has power (in the judgment of values).²³

²² Mohammad Hashim Kamali, *Freedom Of Expression In Islam*, op cit at p. 172

²³ The Holy-Quran, Surah An Nisa', 4:148-149

Al-Jahr literally means broadcasting or publicizing, whereas *sū'* denotes something evil, or hurtful. Words uttered in public which hurt another person by violating his honour or causing him physical harm and loss of property, whether directly or indirectly (such as by abusing his close relatives and homeland) are all included in this *āyah*. Hurtful speech, in this text, also comprises that which is addressed to an individual, to the multitude or to the community at large. Furthermore, the text is broad enough to comprehend all modern methods and facilities which are used for the purposes of publicity and broadcasting.

In their commentaries on this *āyah* the *Mufasssirūn* indicate that the text here denounces utterance of offensive speech absolutely, that is regardless of the end it may serve, or the context in which it may occur. Public utterance of evil speech, may consist of speaking ill of others and finding faults in their characters, or of attributing misdeeds to individuals and their families. It may also consist of self-gratification and indulgent speech concerning evil deeds committed by oneself, such as adultery, wine drinking, gambling, or tricks and designs which lead to these.²⁴

The Shariah Law has a different rule if the defamation or accusation occurs between husband and wife. If a husband puts forward slanderous accusations of adultery against his wife without producing four witnesses both of them will be entitled to undergo the process of *Li'ān*. It is because under the Shariah Law, a charge of adultery preferred by a person against another can only be established by the direct

²⁴ Mahmud Shaltut, *Min Tawjihāt Al-Qur'ān Al-Karīm*, 330 as quoted by Muhammad Hashim Kamali, *Freedom Of Expression*, op cit at p. 162