

**Punishment in
ISLAMIC LAW**

**An Enquiry into
the Hudud Bill
of Kelantan**

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**MOHAMMAD HASHIM
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Foreword

PUNISHMENT IN ISLAMIC LAW

AN ENQUIRY INTO THE HUDUD BILL OF KELANTAN

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Preface

“These are the bounds set by God; do not, then, transgress them: for they who transgress the bounds set by God — it is they, they who are evildoers.”

The Qurʾān 2.:229

“The bounds set by God” which should not be transgressed, embody all what God orders or forbids, and are not limited to certain punishments as it is meant by the term in the Islamic penal law.

The Qurʾānic warning against transgression of the bounds set by God, *ḥudūd Allah*, encompasses both reluctance to enforce the bounds, and hastiness and excess in carrying out the bounds. The Almighty God is All-just as He is the Most Merciful and Gracious, and in all His teachings and laws His justice and Grace are combined together and are never split. The Prophet — peace be upon him — teaches: “Avert the *ḥudūd* (punishments fixed by law) from being inflicted, as much as you can, and whenever you find a way for a release [of a defendant] go through it, since *it is better for one who rules to make a mistake in acquittal, than to make it in punishment*” [a tradition reported by Ibn Abī Shaybah, al-Tirmidhī, al-Ḥakīm, and al-Bayhaqī on the authority of ʿĀishah; other versions were reported by Ibn Mājah, Ibn ʿAddiyy, al-Dāraqutnī and others].

The “bounds set by God” are comprehensive, and the term refers in the Qurʾān to various laws, not only to the penal law. The Qurʾān uses *ḥudūd* in relation to fasting, family laws, and inheritance [2:187, 229-30, 4:113, 58:4, 65:1], in addition to using the word in its general and wider meaning which embodies all God’s teachings and laws [9:97, 112]. It is unfair for Shariʿah to be repre-

sented in some minds only by the punishments. Although the penal law has been considered in the classical clarification as a branch of the public law — which has to deal with the interests of the society or the state as a whole — it comes next to the laws which organize the relations between the government and the people. Human rights and socio-economic justice now seem to top the list of legal priorities. A punishment for theft has to be preceded by socio-economic measures to secure the development of material and human resources, and provide work with fair conditions for those who are able to work, and provide social security for those who are not able temporarily or permanently to work. Accordingly, Caliph ‘Umar considered both cases of individual necessity and famine as excuses that prevent the punishment of theft, as it was reported in *al-Muwatta’a* and other sources.

Besides, it is required that people have to be educated about God’s teachings and laws in order that they become responsible for abiding by them. The Qur’an requires that “guidance should become clear” to a person for bearing responsibility about carrying it out, and that the public as a whole has to always know what is right and wrong and behave accordingly to develop a social tradition of good-doing: “And as for one who, after guidance has become clear to him/[her], cuts himself/[herself] off the Conveyor of [God’s] message and follows a path other than that of the believers — we shall let him/[her] bear [the consequences of] what he/[she] himself/[herself] has chosen to put himself/[herself] through ...” [4:115]. Such a moral and legal education of the masses is required by many jurists for all children and adults, males and females, and even free persons and slaves — when there were slaves. It is the responsibility of the individuals, the families, and the whole society and the state to make such education available, in order to develop public observance of moral and legal rules which is based on con-

viction: "There is no coercion in matters of faith; distinction has been made between the right way and the way of error" [2:256].

The goal of the Islamic authorities is to prevent crime in the first place, and not to inflict punishments. Caring about human rights, socio-economic justice and education deals with the roots of crime, and this is more effective than looking only at the penal law as a deterrence. The Qur'ān opens the way for the individual moral development to the last moment, indicating that it does not aim to merely inflict punishments, and thus those offenders whose genuine repentance can be proved before being arrested should be exempted from any punishment: "... save for such [of these offenders] as repent before you have power over them, you must know that God is much-forgiving and mercy-giving" [5:34]. The distinguished jurist Ibn Qayyim considers this a general principle of Islamic justice, which applies to all offences and offenders [*I'tām al-Muwaqī'in*, II: pp.48-49, Cairo, n.d.].

The Prophet's traditions guide us to reduce the cases of punishment as much as possible. The Prophet never urged a defendant to confess, but rather opened the doors for denial. His guidance is clear that repentance is preferred to punishment [ibid, II: pp.48-49, IV: pp.306-307]. The Prophet states that punishments should be averted whenever any doubt about the case may exist [as reported by Ibn Mājah, Ibn 'Addiyy and others]. The doubt is not restricted to an individual case, but can be general circumstances of the whole society, such as socio-economic or educational considerations. Such doubts may not be left always to the judge to be decided in particular cases, but can be decided by the government in reference to general circumstances, as Caliph 'Umar acted in suspending the punishment of theft in the time of the famine.

Looking at the juristic definition of the crimes of theft, fornication and adultery which are punished by penalties fixed by the

Qur'an and Sunnah (*ḥudūd*) and not left to the changeable legal discretion (*ta'zir*), it can be seen that Muslim jurists have made the indictment in such crimes very difficult, and in case of fornication and adultery it is almost impossible except through a confession. For example, it is required for inflicting the fixed punishment (*ḥadd*) of theft, that the stolen object should be kept and protected in an inaccessible way, which is why felonies such as defalcation, fraud, breach of trust, malversation of public money and pickpocketing are not included in the category of fixed punishments (*ḥudūd*). Sheikh Abū Zahrah, an Egyptian contemporary jurist and former Professor of Shari'ah at the Faculty of Law in Cairo University, stated that one cannot be described as a thief unless he/she repeatedly steals, because the Qur'an refers to the punishment of "the thief" not of "the theft" [5:38]. Besides, "making war on God and the Conveyor of His message and spreading criminality on earth" [5:33], which implies organized crime and continuous use of force, represent a definitely more serious and dangerous crime than mere theft, yet the committers of such crimes may be punished optionally by moving them to another area or being imprisoned all their life as Hanafi jurists interpret the verse [5:33]. How, then, can such an option not be considered in a less serious and dangerous crime as in the case of theft? And if one who is proved to be guilty of theft loses his hand as a punishment after a surgery with all medical requirements at the state's expense, applies to the state for a free artificial limb as a disabled person, should the state accept or reject? And on what grounds may the state reject such a humane request?

As for fornication and adultery, confession is almost the only evidence, and yet confession is discouraged, and the defendant has to be urged preferably to repent. The traditions of the Prophet (Sunnah) indicate a punishment for adultery, which is different

from the punishment that the Qur'ān has specified [24:2], and the latter may be seen to be a unified and comprehensive punishment for both fornication and adultery. Could the Prophet's infliction of the Torah's punishment of adultery be merely a case of following "the law of the believers before us", which has to be reconsidered in the light of the later Qur'ānic law as soon as it is revealed? Could such a ruling be categorized as discretionary punishment *ta'zīr* as some contemporary jurists suggest? Can we assume, then, in the light of all such considerations, that *ḥudūd* are meant mainly to be deterring, underlining the seriousness and harmfulness of the crime, rather than inflicting a certain punishment for a certain crime?

Another essential and legitimate question should be raised about the implementation of *ḥudūd* in a contemporary state: "What is the situation of a non-Muslim defendant?" In modern secular law, the penal law is part of the public law which is reflective of the interests of the state and society as a whole, and thus it has to be enforced on all residents, whatever their differences may be. However, the Hanafi juristic school did not see the punishment of adultery (when the defendant is married) applicable to non-Muslims.

It is the responsibility of contemporary scholars of Islamic jurisprudence, especially Muslims, to discuss in depth the whole issue of *ḥudud* in the light of contemporary circumstances in Muslim countries, and in the world in which the Muslims are a partner and represent a component of its pluralism. They have to trace the experiences of different countries and the effect of national and universal plurality, as well as the findings of modern relevant disciplines such as criminology and criminal psychology and sociology. In this way they can reach convincing results which have for decades been awaited by Muslim and non-Muslim scholars, law-

yers, intellectuals and others. They have to prove to the contemporary mind through serious research, what the previous jurists emphasized about “the goals of Shari‘ah which have to fulfil the human essentials *darūrāt*, needs *ḥājāt* and refinements *taḥsiniyyāt*. In all these levels, Shari‘ah secures and develops the human life, the family and children, the minds, the freedom of faith and the rights related to property. As the prominent jurist Ibn Qayyim in his valuable work that has been mentioned above pointed out: Shari‘ah is based and constructed on what is reasonable and what secures the interests of the people. It is all justice, mercy, benefit and wisdom. Anything that turns justice to injustice, mercy to its opposite, benefit to harm and wisdom to meaninglessness, cannot be genuinely related to Shari‘ah”. The distinguished jurist stated in the same work that “the main goal of God’s messages and books has always been to establish justice”; thus whatever leads to this goal can be considered as an integral part of God’s law and order.

The present enquiry by my friend and colleague Professor Dr. Mohammad Hashim Kamali about *ḥudūd* represents a valuable step forward. He has focused on “The Hudud Bill of Kelantan” but has in the meantime seized the chance to enquire into the whole issue of “the implementation of Islamic criminal law” in Malaysia. He has reached an important conclusion after a thorough discussion: “The Bill is a product of undiluted imitation (*taqlid*), failing to acknowledge the contemporary realities of society and make necessary adjustments to some the *fiqhi* formulations of pre-modern times. I have specified where and how an *ijtihādi* approach could beneficially be taken”.

The author deals in depth with the concept of *ḥudūd* in general, and its different manifestations in particular areas. He points out wisely the importance of repentance *tawbah* in the structure of the Islamic penal law: “*Tawbah* is a state of mind that is not expected

to come about through insistence on retribution and deterrence alone, and would necessitate a certain shift of attitude toward reformation and rehabilitation to be combined with such corrective and educational efforts as may seem appropriate". Our juristic heritage about the discretionary punishment *ta'zīr*, provides a genuine and significant contribution in this field.

Professor Kamali has condensed the outcome and the message of his valuable research in this deep and wide vision: "*We either choose to retain the eternal message of Islam, uphold its civilizational ideals, and invest our energy in the task of reconstructing a society in that image or lower our sights only to see the concrete rules and specific details. This latter alternative is not only unwise, but also methodologically unsound, as it attaches higher priority to details and make them the focus of attention at the expense of the broader and more important objectives of Islam. Islam's commitment to moral virtue, to justice, to equality and freedom, to the realization of benefit and to the promotion of humanitarian and compassionate values are of universal and perpetual significance. Failing to understand these will inevitably lead to the misapprehension and misinterpretation of Islam and its criminal justice*".

Thanks to the dear friend and colleague, for his sharp words and genuine enlightenment, something which the contemporary Muslim mind and the world of scholarship and intellectuals have been looking for. I hope that his serious research and clear vision would reach the widest range and the deepest effect in Malaysia among all Muslims and in the whole world.

Fathi Osman

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