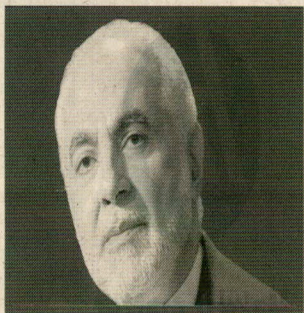


Newspaper	The Star
Date	21/7/2014



Peace be upon us by IMAM FEISAL ABDUL RAUF

▶ Getting consensus on hudud

Our task is to craft an understanding of hudud that generates the greatest possible consensus among Malaysian scholars, jurists, legislature and communities. (The Star - 21/7/2014)

LAST week the Merdeka Centre for Opinion Research reported that 53% of Malaysians surveyed support hudud, but 59% of respondents think the country is not ready to implement it. The survey also found that while a majority of Muslims support hudud, the majority of non-Muslims do not.

The Prophet told us that consensus should guide us. He said, "My community will never agree upon an error."

The lesson of the hadith is this: Consensus is the measure of our accuracy.

This hadith is the reason that consensus, *ijma'*, became the primary source of Islamic law after the Quran and the Sunnah; and why the *ijma'* of jurists, scholars and legislature in matters of law became universally accepted determinants of how Islamic laws should be understood and implemented.

Our task then is to craft an understanding of hudud that generates the greatest possible consensus among scholars, jurists, legislatures, and communities, for then we will have generated an understanding that more completely embraces the truth. We can accomplish this by incorporating the following principles into our understanding of hudud, each of which has been persuasively argued by influential Muslim jurists:

> The hudud should be recognised as maximum, not mandatory, punishments, and implemented as such.

> The reasons for the crime and

the level of atrocity must be taken into account.

> Sins only against God are left to God's jurisdiction on Judgment Day.

> Apostasy is not deemed a hadd crime.

> Consuming alcohol is not deemed a hadd crime.

> Repentance, mercy, and reformation are imperative.

We learned that the hudud helped jurists define the objectives of God's law (*Maqasid al-Shari'a*). We are obligated to prohibit the hudud sins as the common wrong (*al-munkar*), and to protect and promote their corollary values, i.e., the *maqasid*, as the common good (*al-ma'ruf*).

But because the Prophet said, "Avoid condemning the Muslims to hudud whenever you can, and when you can find a way out (of hudud) for a Muslim, then do so," and because he did this when he could, the punishments themselves were not meant as fixed, mandatory punishments.

In Afghanistan a few years ago, a young couple fell in love and - because they were forcibly engaged to other people by their parents - eloped. For this they were stoned to death.

Would there be broad support for this punishment? Or would greater consensus prevail for imposing this maximum punishment for the crime that occurred in India this past year, where three men gang-raped two girls, aged 14 and 16, and hung them from a mango tree?

Clearly, the same punishment does not fit every crime, and imple-

menting the penal code should permit sensible discretion - just like that used by Caliph Umar.

When a man stole from his uncle during a famine, Caliph Umar suspended the hadd punishment for theft, and instead punished the man's uncle for not seeing to his nephew's needs.

His ruling suggests that in the case of the Afghan couple, Caliph Umar would probably have made the couple marry, and admonished their parents for impeding their right to emotional and physical love, which, as we previously discussed, is a right protected by God's law.

Umar's precedents establish that if the reasons for the crime stem from the failure of the community to meet people's highest levels of need within each objective of God's law (*daruriyyat* and *hajiyyat*), then the community cannot impose punishment.

There is no hadd punishment for a simple change of faith. Every case where the Prophet punished apostasy occurred during war, when apostasy meant committing treason or fighting against Medina (*hirabah*), thereby threatening national security.

At the Treaty of Hudaibiya, which negotiated an end to the state of war between Mecca and Medina, the Prophet contractually agreed to let apostates freely return, proving that he never compelled anyone to embrace Islam.

Furthermore, only sins against other people are punishable by

worldly courts as crimes. Sins only against God, such as apostasy, not praying, or eating pork, are punishable only by God. Unless one claims that committing these actions is not sinful, there are no provisions in God's law for us to punish these sins.

There is no hadd penalty for alcohol consumption in the Quran or the Hadith. Caliph Umar first prescribed 80 lashes, the hadd penalty for slander, in a case where a man got drunk and shouted slanderous statements.

Umar later imposed the same penalty as a pre-emptive punishment (*ta'zir*) when people engaged in reckless behaviour while drunk, the same way people today are penalised for driving while intoxicated.

Later jurists incorrectly inferred that 80 lashes is the mandatory punishment for alcohol consumption, regardless of whether the person posed a risk at the time. However, proper application of the law separates the act of drinking from the crimes committed under its influence. If a drunk driver had hit and killed someone, would we then apply the punishment for manslaughter in every instance of alcohol consumption?

The modern common law system of punishment in many nations, unlike what existed in Medina during the Prophet's time, relies upon prisons and correctional facilities. Further deploying these institutions to provide opportunities for repentance, mercy, and reformation, which are explicitly urged in the Quran,

would generate more support for hudud.

If the hudud penalties are reserved as maximum punishment for heinous crimes or the worst offenders, courts would have the discretionary leeway to impose prison sentences or rehabilitation for ordinary criminals.

These alternatives would enforce punishment while providing the opportunity for criminals to reform.

These punishments would reflect the severity of the crime and the criminal history of the offender, giving courts the capacity to show mercy.

The Islamic penal code in conjunction with the common law penal code could holistically encompass the approach to justice prescribed in the Quran and the Prophet's teachings better than implementing the hudud punishments on their own.

Wouldn't such an understanding of hudud win broader consensus among the Malaysian public?

According to the Prophet's hadith, wouldn't that make Malaysia more correct and its society more Islamic?

> Editor's note: This article is the fourth in a special series for Ramadan, a month when Muslims are urged to deepen their understanding of their faith by reading and studying the Quran. In this spirit, this series is intended to help the reader fathom what hudud is and help reduce division between faith communities on this issue. Imam Feisal would welcome any questions readers may have. Please write to imamfeisal@thestar.com.my.