Man-Made Codifications of *Ḥudūd* Laws

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Nearly twenty years ago, the government of the Malaysian state of Kelantan passed the *Syariah¹ Criminal Code (II) Enactment 1993* which sought to introduce *ḥudūd* (lit. ‘limits’) – ‘punishments for serious crimes’ – and in 2002, the state of Terengganu passed a similar enactment. Although not implemented because of jurisdictional conflicts with federal legislations, these issues have not been properly resolved.

The Qur’ān prescribed punishments for theft (*sariqah*), ‘piracy’ or ‘unlawful warfare’ (*ḥirābah*), adultery (*zinā*) and slanderous accusation of *zinā*’ (*qadhāf*). However, the ‘limits and punishments set by Allah’ (*ḥudūd Allāh*) is a much broader concept which is not confined to punishments or any legal framework, but comprises a rather comprehensive set of guidelines on moral, legal, and religious themes that are found in the Qur’ān (2:229). While it cannot abolish offences stated in the Qur’ān, human judgement can decide whether conditions for penalties have been satisfied. Moreover, currently there is a lack of understanding of the *qur’ānic concept of repentance and reform* as juristic doctrine reduced it to a mechanical formality.

A well-known *ḥadīth* says: “Avert *ḥudūd* from being inflicted as much as you can, and whenever you find a way for a release go through it, since it is better for one who rules to make a mistake in acquitting, than to make it in punishment.” Professor Mohammad Hashim Kamali – a world-renowned expert on Islamic law – points out that general language of the *ḥadīth* is not confined to the evidential process. It could mean doubt of any kind within its purpose and cautionary advice. Circumstances and confusion in modern society present a doubtful situation within its broad meaning. In doubtful situations, a *ḥadd* could be reduced to *ta’zīr* (discretionary) punishment that the legislature and court consider suitable for deterrence and reform.

The goal of Islamic authorities is to *prevent* crime, not inflict punishments. Promoting human rights of the Muslim community (*ummah*), ensuring socio-economic justice, and education are prerequisites to ensure that society is free from want and temptation. A lack of understanding on *ḥudūd* interpretations could thus – and all too often does – lead to violation, oppression, and injustice.

Women

Article 8(2) of Malaysia’s Federal Constitution – the *supreme* law of the land – clearly provides against gender discrimination: “Except as expressly authorised by

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this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or *gender* [...]” (emphasis added). This amendment was a major step forward in upholding gender equality. The enactments constituted a gross violation of principles of justice and equality in Islam as well as constitutional protection.

Strangely, the Kelantan Enactment (section 46(2)) provides that an unmarried pregnant woman is assumed to have committed *zinā*, unless she can prove the contrary. A woman who reports rape without proof could be charged for *qadhāf*. The Terengganu enactment modified it by providing that she may bring *qarīnah* (circumstantial evidence) (section 9). However, there is still confusion surrounding this issue. Is the purpose of investigation to gather evidence against an alleged rapist or to investigate the woman? Is the burden of proof on the woman rather than on the authorities? Is the woman liable for *qadhāf* and/or *zinā* if there is lack of evidence?

These irrational provisions victimising women are man-made innovations not in the Qur’ān or authentic *ḥadīth*. On the contrary, qur’ānic provisions are very protective of women; the requirement of four *reliable* witnesses in the literal meaning of 24:4 was specially revealed in order to protect *women* – not to protect male rapists:

Those [general/masc. plur.] who launch a charge against chaste women [*muḥsanāt*-fem. plural], and produce not four witnesses – flog them with eighty stripes and reject their evidence ever after.

Its letter, spirit, and purposes (*maqāṣid*) are to protect women from victimisation. The occasion for its revelation (*asbāb al-nuzūl*) is the historical incident when the Prophet’s wife, ‘Ā’ishah, was inadvertently left behind on an expedition and was later found by a Companion. This incident gave occasion to a false and malicious rumour. The four-witnesses rule was then revealed to require the *strongest possible* evidence before allegations might be made against a woman’s chastity.

The Kelantan enactments’ disqualification of women as witnesses in *ḥudūd* and *qīṣāṣ* (retaliation) also has no precedent in Islamic law as the Prophet himself accepted evidence of women, e.g. in the case of a girl who was robbed (reported in Muslim, *aḥādīth* no. 5,231, 5,233, and 5,234) and a woman who was raped by an unknown man (reported in Abū Dawūd and al-Tirmidhī). There is also the account of caliph ‘Uthmān b. ‘Affān’s wife – the only witness to his assassination. It was solely on *her* evidence that there was demand for *qīṣāṣ* by some Companions – none raised any objection that in the absence of any male witness, *qīṣāṣ* was not tenable.

The Islamic doctrine that it is better for many guilty persons to go free from earthly punishment than for one innocent person to be wrongly convicted has thus been perverted. The Kelantan approach seems to be that it is better for practically *all* guilty men to go free (although some have sinned not ‘only’ against God, but also

committed a violent crime against fellow Muslims) than for one innocent man to be wrongly convicted, and that it is better for many innocent women to be further victimised than for one guilty woman to go free (although she has ‘only’ sinned against God). Any presumption of *zinā*’ on grounds of pregnancy is totally against the letter and spirit of the Qur’ān, which recognises the special vulnerability of women. Qur’ānic revelations meant to protect women should thus not be distorted into legal provisions that punish innocent women while guilty men go free.

There is also gross confusion between rape and *zinā*’, when rape is regarded as ‘*zinā*’ by force’. *Zinā*’ is a sin involving the ‘rights of God’ (*huqūq Allāh*) and rape cannot be equated with *zinā*’. Rape is a violent crime against the ‘rights of the human being’ (*huqūq al-insān*). The violation of the ‘rights of God’ requires very stringent proof as God in His mercy may forgive the sinner, whereas the violation of the ‘rights of the human being’ admits circumstantial evidence. It is acknowledged by lawyers, doctors, and counsellors that even circumstantial evidence is often difficult in rape cases. Malaysia’s Penal Code and Criminal Procedure Code, which is in conformity with *ta’zīr*, provides for circumstantial evidence. It is inevitable, however, that sometimes the prosecution would fail. The accused is acquitted not because of his innocence, but because of benefit of the doubt. His acquittal does not mean that the victim lied; it rather means that the prosecutors failed to produce proof beyond reasonable doubt. There was a better understanding in certain periods of classical Islamic jurisprudence regarding this situation,³ when rape was not classified under *zinā*’, but under violent crimes – *ḥirābah* or *ighṭisāb* (violent trespass, usurpation) – and was regarded by the Muslim scholar Ibn al-‘Arabī (d. 1240) as the *worst* form of *ḥirābah*. Classical jurisprudence even created an avenue for rape victims to claim financial compensation under *jirāh* (wounds).⁴

Unfortunately, instead of providing compensation, these modern provisions place the burden of proof on the victims. Whenever there is diversity of opinions, the tendency is to codify the most misogynistic opinion. The presumption that an unmarried pregnant woman is guilty of *zinā*’ was a minority opinion, but it is this opinion that is codified.

Apostasy

Traditionally there are different opinions on this issue, e.g. the severe view that death is prescribed for all apostates, the view that it is a *ta’zīr* offence, simply because the Qur’ān refers to apostasy on numerous occasions, but stops short of prescribing a punishment for it. According to yet another view, death penalty is only for apostasy accompanied by rebellion against the community and legitimate leadership – punishment is not for apostasy from personal belief, but for violent rebellion and treason. This is related to the view that apostasy is a great sin, but personal change

of faith merits no earthly punishment. The late rector of Cairo's Al Azhar University, Shaykh Maḥmūd Shaltūt (d. 1963), analysed the relevant evidence in the sources and concluded that apostasy carries *no* temporal punishment because the Qur'ān 'only' speaks of punishment in the Hereafter.⁵

Again, the Kelantan enactments have chosen the most severe opinion. In other Malaysian states, the approach is a compromise involving detention and rehabilitation – instead of death which is a one-way road.⁶ However, the detention periods may be no consolation to a person who feels his fundamental liberties are violated. Yet again the Qur'ān itself clearly recognises freedom of religion, and there exists even within the Islamic juristic heritage a position that supports this freedom.

Punishments

Certain punishments such as amputation appear to be very harsh, and the relevant codifications often opt for the most severe, e.g. cutting the left foot for a second offence is a minority opinion, as there is also the opinion that there is no second amputation.⁷ There is another opinion that amputation is not for first-time offenders. In other civilisations, severe punishments were common – theft, for instance, was an offence punishable by death in England until the nineteenth century. Amputation was a common punishment in medieval Europe and often imposed upon the poor and weak, e.g. for hunting or poaching on their lords' lands.

Islamic law, in turn, actually imposes strict limits on punishments, e.g. the *ḥadd* (sing. of *ḥudūd*) for theft cannot be enforced if the offender was in need, if stolen articles were below a minimum value or if owner was negligent. The second caliph 'Umar b. al-Khaṭṭāb even suspended *ḥadd* during any period of scarcity of food (possibly translated as 'economic recession' in modern times). The *ḥadd* for theft is imposed only in a society where *everybody's* needs are taken care of (possibly translated as a 'welfare state'). There is also a minority opinion that *ḥudūd* are meant as *maximum* limits on punishment.

Regarding *zinā'*, the punishment of stoning to death is to be found nowhere in the Qur'ān. The only punishment mentioned in the Qur'ān is whipping. It has been argued that when stoning was carried out during the Prophet's time, it was based on the Torah, before the Qur'ān had replaced it with whipping. This argument was initially accepted by the Pakistan Federal Shariat Court in *Hazoor Bakhsh v. Federation of Pakistan*.⁸ However, the Shariat Review Petition⁹ upheld the contrary opinion that stoning was an Islamic punishment. There is also a minority opinion that the *ḥadd* for illicit sex is only applicable to married offenders and not to unmarried persons

Non-Muslims

The Kelantan enactments also disqualify non-Muslims from being witnesses, whereas in other respects discriminating in favour of non-Muslims. A Muslim thief would have his hand amputated while a non-Muslim would be imprisoned instead. A non-Muslim is given the choice to submit to either law – if he feels he would be acquitted under *hudūd*, he could choose to be tried under *hudūd*, and if he feels he would be convicted, he would choose the Penal Code. Such a dichotomous system of laws regardless of who is being discriminated against, however, violates constitutional guarantees on equality as well as universal principles of justice. The existence of inequality and injustice based on religion is bound to raise conflicts.

Human Rights

There is a vast difference between divine revelation – the Qur’ān – and non-divine sources which are the result of mere human juristic interpretations. In fact, a large part of historical *sharī‘ah* law is man-made, not divine. The formation and development of Islamic law went through several centuries and a variety of processes. Traditionally, religions such as Christianity and Islam each claim the exclusive access to truth aside from moral superiority over ‘the other’.

The rise of the human rights movement, however, has tumbled the foundations of segregation and discrimination. This poses a serious challenge to traditional conceptions of Islamic jurisprudence (*fiqh*). The universality of human rights is supposed to be available to all humans, representing a convergence and inclusive morality of different cultural traditions. The challenge to Muslim societies today is the need to examine the relationship between our understandings and practice of Islam and human rights. The human agency is integral to the interpretations and practice of the Qur’ān and *Sunnah* from the very beginning.

Conclusions and Recommendations

There is an urgent need to develop a discourse whereby Muslims can be persuaded to understand thoroughly the concepts of equality for women and people of other faiths, freedom of religion, and human rights as actually consistent with their *own* religious teachings. Comprehensive moral education and spiritual awareness are the best weapons in tackling various ills in society, rather than the imposition of severe and legally unjustified and baseless punishments. Islam teaches the spirit of universal love, and emphasises repentance and the rehabilitation of sinners:

- God’s forgiveness and mercy is a constant recurring theme in the Qur’ān.

For instance, after mentioning the punishments for *sariqah*, *zinā'*, and *qadhāf*, 5:39 and 24:5 state that “those who afterward repent and amend their conduct, God is Oft-Forgiving, Most Merciful.”

- Therefore, should humans and human-made institutions hasten to punish what God, in plentiful mercy, may ultimately pardon?
- On what grounds may humans presume impetuously to do so, pre-empting divine mercy?
- Even those with the most sincere motivation and integrity should be wary of joining in any overzealous rush to judgment.

Notes

1. Syariah is the Romanised Malaysian spelling for *sharī'ah*.
2. Mohammad Hashim Kamali, *Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan* (Kuala Lumpur: Institut Kajian Dasar, 1995), 71-72.
3. Asifa Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective,” *Michigan Journal of International Law* 18 (Winter 1997), 313-17.
4. Ibid. 317.
5. Kamali, *Punishment*, 36.
6. Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments* (Kuala Lumpur: Ilmiah Publishers, 2000), 203-14.
7. Kamali, *Punishment*, 39-40.
8. Pakistan Legal Decisions (PLD) (1981) Federal Shariat Court (FSC) 145.
9. PLD (1983) FSC 325.