

VIEWPOINTS

Are the *Hudūd* Open to Fresh Interpretation?

*Mohammad Hashim Kamali**

The issue I raise below is over the scriptural, as opposed to the juristic, understanding of the *hudūd*, and what I am proposing is a revision of the whole concept from a qur'ānic perspective that reflects on the following four points.

Terminology

Let me say first that *hudūd* ('limits', pl. of *ḥadd*) in the sense strictly of penal sanctions do not occur in the Qur'ān. '*Hudūd*' are mentioned 14 times in the Holy Book, all in the sense, however, of limits of proper behaviour that must be observed in a variety of contexts. Six of the 14 instances of *hudūd* in the Qur'ān occur in just one passage (2:229–30) in the context of marital relations and limits that the spouses must observe in the events of estrangement, separation and divorce. The punitive connotation of *hudūd* can admittedly be subsumed under the concept of limits, as penalties are also markers and limits that separate acceptable behaviour from crime. But to reserve the *hudūd* entirely for certain types of punishments is a juristic convention that does not originate in the Qur'ān.

Number of *Hudūd* Offences

Ḥadd is defined as an offence for which a specified punishment is stipulated in the Qur'ān or authentic *ḥadīth*. The Qur'ān stipulates such punishments for four offences, namely adultery, theft, slanderous accusation and highway robbery. Yet the blueprint of *fiqh* or Islamic law raises this number to six, thus adding wine drinking and apostasy (and according to some seven, thus adding mutiny). The text condemns these as heinous behaviour which must be avoided but provides no penalty for them. This is yet another point of divergence between the *fiqh* tradition

* Prof. Dr Mohammad Hashim Kamali is the Chairman and CEO of IAIS Malaysia. An earlier version of this viewpoint appeared under the title "Strictly from the Qur'ānic Perspective" in Kuala Lumpur's English-language daily *The New Straits Times* on 25 April 2009.

and the more restrictive approach the Qur'ān takes to punishments. Modern criminal law and jurisprudence also advise a restrictive approach to punishments.

Reformation and Repentance

The prevailing *fiqh* treats the *ḥudūd* as fixed and mandatory penalties, which leave little room for rehabilitation and repentance, despite the fact that these are stipulated in the Qur'ān. All that is needed is a proof of the offence which must then be followed by enforcement, thereby leaving no room for flexibility and discretion. Each of the four qur'ānic verses on *ḥudūd* specifies a punishment, which is then followed, in every case, by a reference to repentance and reform: if the offender repents and reforms himself then God is truly forgiving and merciful. The clear text thus leaves the door open to leniency for those who have fallen into error and become regretful, first time offenders, and those who show promise of correcting themselves. The rather harsh approach to punishment taken by the *fiqh* tradition also stands in a state of tension with the totality of Islam as a religion of compassion.

The four qur'ānic verses on *ḥudūd* consist basically of two provisions each, one specifying the offence and its punishment, and the other that provides for reformation and repentance. There is no expiation beyond these terms. The question that arises is that the *fiqh* blueprint on *ḥudūd* has essentially ignored the latter portion of the text. Only the penalties were adopted but no provision was made to implement or contextualise the repentance (*tawbah*) and reformation (*islāh*) aspects of the *ḥudūd*. A structure of penalties, indeed a penal system, was thus envisaged that provides virtually no space for an educational and reformatory exercise – presumably because of the shortcomings of the pre-modern system of criminal justice: to apply quantified punishments is a relatively facile task for courts and enforcement agencies than devising carefully nuanced procedures and approaches of the kind as are now known of probation orders, remand centres, community service, open prison, police attendance, suspended sentence and the like that are absent, even to this day, in most of the less affluent countries of the Muslim world. Only in the case of apostasy it is reported that the second caliph, 'Umar b. al-Khaṭṭāb, ordered the apostate to be given three days in which to repent, failing which the *ḥadd* is to be implemented. This obviously takes rather a mechanical view of repentance, which may well require an educational approach within a more flexible time frame.

Now, if one were to review the whole theory of *ḥudūd* from a strictly qur'ānic perspective, the *ḥudūd* can no longer be seen as mandatory and fixed penalties. The qur'ānic penalties under review are admittedly quantified, which we can retain as such, but only in the sense of uppermost limits, the absolute maxima that can be reserved for the most heinous offences in the range. All other instances of *ḥudūd* as quantified penalties will accordingly have to integrate the flexibility that is embedded

in the qur'ānic text. This will effectively relegate all these instances of *ḥudūd* to the level of what is known as *ta'zīr* in the sense of unquantified deterrent punishments. The judge would thus be authorised to order a suitable punishment while taking into consideration the attendant circumstances of each case. This is proposed to apply not only to cases where some level of doubt in the proof of *ḥudūd* may arise and consequently relegate them to *ta'zīr*, as is the position now, but even to cases of *ḥudūd* that are free of such instances of doubt.

Exaggerated Beyond Merit

A substantive revision of the *ḥudūd* is important, indeed necessary, not only for Malaysia but for the Muslim world generally – simply because of the difficulties encountered in their implementation. Muslim countries have generally shied away from the enforcement of *ḥudūd* due to the severity of these penalties, yet because of public sensitivities they have not ventured to undertake a fresh interpretation of *ḥudūd*. The problematics of *ḥudūd* thus persist and are made worse by Western media and human rights activists that have taken the *ḥudūd* as a centre-piece of their anti-Islam propaganda. We know that Islam stands on its five pillars, and *ḥudūd* is not one of them. Punishment of any kind is rather remote from the spiritual core of Islam, yet the general public has maintained a highly exaggerated perception of *ḥudūd* as a litmus test and criterion of the 'Islamicity' of their governments. The whole issue has been riddled with misunderstanding, exaggeration, and disillusionment. We need to take stock of the issues and also the needed initiative to actualise an integrated reading of the Qur'ān on *ḥudūd* and the Islamic penal system as a whole.