

# HUDUD PUNISHMENTS IN ISLAMIC CRIMINAL LAW

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## Abstract

Islam is more than a religion, it encompasses faith, culture, law and the social order. Islam proposes a society of righteousness and justice. Criminal behaviour is not tolerated in the Islamic order of society. Criminal behaviour is breach of God's sovereignty, hence stiffer penalties are prescribed. This paper examines hudud punishments in Islamic penal system, and agitates for the reformation of Islamic criminal jurisprudence.

While it is reasonable to punish offenders, and violators of normative principles, it is the opinion of this paper that punishments that are prescribed in municipal penal code should at least conform to international criminal jurisprudence.

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**Keywords:** Hudud, Islam, Criminal Law, Punishment, International Criminal Law

## Introduction

The primary objective of Islamic penal system is to protect society from the dangers of crime. Society must be protected from the activities of criminals and hoodlums. Social life must be peaceful and devoid of insecurity. The severity of Islamic penal system is aimed at discouraging criminal behavior. If the criminal knows the anguish and pains he will bring to himself, he/she may abstain from committing the crime. The convicted criminal who has passed through the judicial process once may not willingly dabble into any criminality after the painful experience. Herein lies the philosophy of deterrence in Islamic penal system.

While it is not reasonable to pity criminals in the hands of the law, there is a powerful and logical argument that Islamic criminal system is due for reforms to fit into the thinking of the 21<sup>st</sup> century. While fundamentalists are collectively opposed to any reforms, the progressives are pushing their case across the world. Islam cannot operate with a medieval penal system.

A great religion like Islam cannot live in the past. Islam cannot ignore all the progress that humanity has made in the past hundred years. The outcome of the agitation for reforms should not be seen as victory for the progressives. What is needed for the resolution of the impasse is a broad consensus which is the outcome of dialogue. Dialogue between all the contending forces is the only solution to end the isolation of Islam in international community.

Criminal behaviour and actions are broadly divided into three categories in Islamic criminal jurisprudence. *Hudud* offenses are crimes against God whose punishment is clearly stipulated in the *Quran* and the *Sunna*. *Qesas* are physical assault and murder that are punishable through retaliation. The victim or the surviving heirs may decide to waive the punishment, and demand compensation (blood money or *diyya*). The victim may also decide to pardon the offender. *Ta'zir* punishments are not prescribed in the *Quran* or *Sunna*, and are executed under the discretionary powers of the judge.

Capital offences in Islamic criminal justice system are called *hudud* (the plural for *hadd*), meaning “restraint” or prohibition. These are offences that are specified in the *Quran* and *Sunna*. *Hudud* crimes are often seen as criminal behavior against *Allah*, or public justice. Islamic courts do not have any discretionary power in the execution of *hudud* penalties. Once a *prima facie* case is established with evidences, and the conditions for applying the punishments are fulfilled, the Islamic court is divested of discretionary powers.

There are exceptions to this rule. The *Quran* and the *Hadith* did not stipulate punishment for all offences. Islamic jurisprudence has therefore established discretionary punishments (*ta'zir*) to accommodate minor offences. *Ta'zir* is applied to either *qisas*, or *hudud* for example theft of an item, which the value is below *nisab* and sexual offences that cannot be interpreted as intercourse. *Ta'zir* may be applied to doubtful and probable circumstances, or want of credible evidence or certainty.

*Ta'zir* covers acts that are prohibited in the *Quran* or *Hadith*, or acts that constitute violation of public morality and welfare that are not classified under *qisas* or *hudud*, like usury, embezzlement, bribery, false testimony, consumption of pork, breach of trust by a public officer et cetera. Any action that deliberately violates Islamic norms such as nudity, seductive dressing or wife's disobedience to the husband is adjudicated under *ta'zir* at the discretion of the judge. The types and categories of punishments under *ta'zir* include flogging, banishment, public condemnation and reproach, (*tashir*), while in some cases *ta'zir* sentencing may be just a warning, others may be death sentence. If the accused is convicted of spying for the enemy, homosexuality, heresies or divination, the punishment shall be a death

sentence. In the Maliki School of Islamic jurisprudence, amputation of the right hand is the punishment for forgery of documents.

### **Hudud crimes**

Crimes against God in Islamic penal system are called *hudud*. *Hudud* crimes are violations of “natural law” as interpreted within the specific cultures of the Islamic State. *Hudud* crimes as violations of God’s rights must merit divine displeasure. Declaration of war against an Islamic state is interpreted as making war against *Allah* and his messenger. This is clearly stated in the Holy *Quran* “The only reward of those who make war upon *Allah* and his messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land” (surah 5:33).

Rebellion against constituted authority either a political leader or economic order is categorized under “corruption on earth”, and is punishable by death. The convicted person may be killed through a police, or military action, or through the sentence of a court of competent jurisdiction. Rejection of Islam is a criminal offence in Islamic penal system, and the punishment is a death penalty. It can be imposed against a Muslim who denies the existence of God or angels, or any of the prophets of Islam, or rejecting any section of the *Quran*. Rejection of Islam is called apostasy. Prophet Muhammad is quoted in one of the *Hadith* as saying: “The blood of a Muslim may not be legally spilt other than in one of three (instances): the married person who commits adultery; a life for a life; and one who forsakes his religion (of Islam) and abandons the community” (Reported by Bukari no 6935).

Prophet Muhammad also said: “who ever changes his religion (of Islam) kill him” (Reported by Bukhari no 2854). The rejection of Islam tends to discourage other people from converting into Islam and that rejection encourages massive criminality and blasphemy with impunity. Islamic *Shariah* condemns general disbelief and rebellion against God and the *Ummah*. The prevailing interpretation of the rejection of Islam also called “High Treason” in Islamic criminal jurisprudence means that the apostate was only testing Islam without any commitment to it. To that extent, rejection is a deliberate attack and internal rebellion. The apostate is more dangerous than the infidel. Apostasy also means attacking Islam openly and publicly with treachery and blasphemy, which threatens the social and moral fabric of society, and capable of instigating internal revolution that may topple the Islamic State (al-Sheha, 1988: 130-135).

The convicted apostate is given three days of grace to return to Islam. Competent Islamic scholars will educate him on the enormity of the crime he has committed against his own soul, his family and community. If the

convicted person decides to return to the Islamic community, he will be set free. Execution of the apostate is a big relief for the larger society who are collectively protected from the maliciousness and violence which disbelief and blasphemy can bring to society. In punishing the offender, Islam does not extend the punishment to relatives of the person. In view of the severity of the punishment for apostasy, Abdul-Rahman al-Sheha has cautioned people not to play any trickery, or mischief in converting to Islam: “Any potential convert must take time to study, research, evaluate and examine all the aspects of Islam as a way of life prior to joining it and committing its rules and regulations. Such a severe punishment will not give any slim chance to those who would like Islam to play around, experiment with Islam, and act treacherously in the ultimate treason” (al-Sheha, 1988: 131). We shall now explain the punishment for *hudud* crimes:

### **1. Fornication**

Fornication means sexual intercourse outside marriage, and the punishment in the *Quran* is 100 lashes. “Men are strip to the waist, women have their clothes bound tightly, and flogging is carried out with a leather whip” (Schmallegger 2001: 632). The punishment of flogging is ordered in the *Quran*: Surah 24:2: “The woman and the man guilty for fornication flog each of them with a hundred lashes: let not compassion move you in their case in a matter prescribed by Allah”.

### **2. Adultery**

Adultery means extra-marital sex. Prophet Muhammad prescribed stoning to death for people convicted of adultery. Islamic criminal jurisprudence stipulates two conditions that must be met before the judgment is executed. The first is that there must be confession by four eye witnesses; it must be a voluntary confession without any element of duress. The sentence can only be executed if it has been repeated four times, at different court sessions. Secondly, it is the duty of the court to establish the fact through examination of all confessions that there was actual penetration of the male’s penis into the female’s vagina. Islamic law insists that the four eye witnesses must confirm physical observation of the actual intercourse directly.

Adultery and fornication from the Islamic perspective are not personal and private prerogative; it is a serious violation of the normative principles of society. It is a dishonor and violent aggression against the family of the woman. Adultery demoralizes the social order and may lead to pregnancy, abortion and the spread of venereal diseases. Adultery is the source of illegitimate children and mixing of the lineage when paternity is attributed, or claimed by a person who is not the real father. Adultery can

cause a child to be deprived the honor of claiming genuine paternity, which can lead to injustice in inheritance, such that the wrong person can become the heir while the real children may get nothing.

Adultery and fornication are called *zina*. False accusation of charges of *zina* is punishable for the offense of defamation (*qazaf*). Defamation threatens the legitimacy of a woman's child, the *Quran* prescribes eighty lashes for a free citizen and forty lashes for a slave: "And those who cast it up on women in wedlock, and bring not four witnesses scourge them with eighty stripes" (surah 24:4). Public flogging is meant to protect the honor, dignity and credibility of the innocent. The reasoning in Islamic criminal system is that there is a room for retaliation if the accused is not punished. From that time, the confession of that person will not be accepted because the court has taken judicial notice of that person as a confirmed liar.

### 3. Theft (*saraqq*)

The crime of theft is explicitly condemned in Islamic penal system. Theft is defined in chapter 8 (197) of Islamic code of Iran as "stealing someone else's property". Article 198 of the same chapter gives conditions to establish the crime of theft. The thief must be a matured person. The act of stealing must be intensive and deliberate. The thief must be aware that the property belongs to someone else. The property must have been kept in a secured place which the thief has forcefully broken. Islamic jurists viewed the crime of theft in line with the modern principle of manifest criminality which in the words of George Fletcher "the commission of the crime be objectively discernible at the time that it occurred" (qtd. in Forte, 1985:49).

David Forte avers that the concept of manifest criminality means that "crime is something that everyone knows when he sees it" (Forte, 1985:49). Manifest criminality also means that public knowledge of the crime is derived from the collective shared experience of society, and that the community is not defined, or established by a criminal mentality, "manifest criminality is based on the idea that the objectionable act is punishable" (Forte 1985: 49). The crime of theft is viewed as a shocking experience, for someone to violate the sanctity of another person's abode either at night through forcible entry, and then stealthily abscond with his property.

The punishment for theft is stated in the *Quran* as follows: "As to the thief, male or female, cut off his or her hands" (surah 5:38). Amputation of the hand is based on strict conditions. The value of the stolen item must be considered, to determine whether it is in the public interest to prosecute the case. The minimum value (*nisab*) for the stolen good in Islamic criminal law must be at least a quarter of a dinar, or the equivalent. In the *Hadith*, Aisha has quoted the prophet when he said "A thief's hand should not be cut off except for a quarter of dinar and upwards" (Bukhari & Muslims). The Maliki

School fixed the *nisab* at a quarter of *dinar*, while the Hanafi School relies on the *Hadith* reported by Ibn Abbas and fixed the *nisab* at 10 dirhams (Lawan, Sada and Ali, 2011:29).

The stolen property must not be *bona vacantia*, that is ownerless, or unclaimed property. The property must have been kept in a secured safekeeping (*hirz*). For the Sunis, the idea of *hirz* implies safekeeping in a place like a residential apartment, and safekeeping by way of physical security over the item. The stealing of government property is not punishable by amputation, since the Islamic state has the duty to provide for the citizens, amputation cannot be carried out in a time of famine and starvation. It is reported that the second caliph, Umar bin A-Khahab suspended punishment (amputation) during the time of starvation. On the procedure and sequence of punishment for the offense, the thief's right hand is cut off at the wrist, and the wound cauterized with boiling oil. The Hanbali School insists that the hand can be tied around the criminal's neck for three days (Shaykh Ibrahim Duyan 1962:101-102, cited in Forte 1985: 50). The Maliki and Shafii schools prescribe the cutting off of the left foot for a second offender.

#### 4. Drinking of Alcohol (*Shurb al-Khamr*)

Prophet Muhammad once described the offense of drinking alcohol as “the mother of all vices” (*umm al-Khaba'ith*), because alcoholic intoxication can lead to the commission of other offenses. In the *Hadith*, Ibn Umar quoted the Prophet when he said: “Every intoxicant is *khamr* (wine) and every intoxicant is forbidden’ (*Mushin*). Jabir also reported that Prophet Muhammad said: “If a large amount of anything causes intoxication, a small amount of it is prohibited” (Ahmad and Al-Arba'a). The punishment for alcoholism and public intoxication from the *Hadith* is 80 lashes. This punishment was not provided for in the *Quran*. Aras bin Malik reported that when a drunkard was brought before Prophet Muhammad, he directed that the man be punished with 40 stripes with two palm branches (Lawan, Sada and Alli, 2011:31). Anas Abubakar reported that Caliph Umar, consulted for a consensus on the punishment for drinking alcohol and Abour-Rahman bin Auf said “The mildest punishment for drinking wine is 80 (stripes)”.

#### 5. Qesas Offenses

*Qesas* means “equality”. *Qesas* crimes include murder, voluntary and involuntary killings, intentional and unintentional physical injuries. Murder is considered the most grievous offense in Islamic criminal law. The *Quran* in surah 17:33-35, forbids murder “Do not kill the person God has forbidden, (to kill), except with justification. In surah 6:151, it is stated: “take not life which *Allah* hath made sacred, except by way of justice and law”. Homicide, that is intentional killing (*Qate al-'amd*) is prohibited

because life is sacred and cannot be taken except through a death sentence handed down by a *shariah* court of competent jurisdiction, in an Islamic State. Ibn Mas'ud reported that Prophet Muhammad once said:

The blood of a Muslim who testifies that there is no god but Allah and that I am Allah's messenger may not be lawfully shed but for one of the three reasons: a married man who commits fornication; a life for a life; and one who turns away from his religion, and abandons the community (Bukhari and Mushin).

Manslaughter or killing by mistake (*Qate al-khat'a*), does not form part of *qisas* and is not punished by a death penalty. The *Quran* forbids Muslims from killing another Muslim, except mistakenly. *Surah* 4:92 states the Islamic viewpoint:

Never should a believer kill a believer, except by mistake. It is ordained that he should free a believing slave, and pay compensation to the deceased family, unless they remit freely. If the deceased belonged to people at war with you, and he was a believer, the freeing of a believing slave is enough. If he belonged to people with whom you have a treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, a fast for two consecutive months is prescribed...

We shall now look at the position of Islamic criminal law in a situation where a non-Muslim is killed by a Muslim. The actual Arabic word for non-Muslim is *kafir*. *Kafir* also means "concealer", that is one who conceals the truth of Islam. A Muslim cannot be killed for the murder of a *kafir* who belonged to a state at war with the Islamic state "when you encounter the *kafirs* on the battlefield, cut off their heads until you have thoroughly defeated them and then take the prisoners and tie them up firmly" (*surah* 47:4). In *surah* 8:12 it is written: "Give strength to the believers. I will send terror into the *kafirs*' hearts, cut off their heads and even the tips of their fingers". In *surah* 33:60, the *kafirs* are cursed and wherever they are found they will be seized and murdered.

It is a criminal offense for a Muslim to kill a non-Muslim who belonged to a state which has a pact with the Islamic state (known as *Mu'ahid*). The punishment in this case is death penalty. If the deceased non-Muslim is a *dhimi* (a tax-paying non-Muslim who resides in an Islamic state), the *shariah* court shall review the views of Muslim scholars in deciding the case. The Shafii, Maliki and Hanbali schools are of the view that the Muslim killer shall not be killed. The Hanafi School endorses a death penalty for a Muslim who kills a *dhimi*. Ahmad, Abu Da'ud and An-Nasa; have reported a *Hadith* from Caliph Ali who said: "A Muslim should not be killed for a *kafir* (non-believer), nor should one who has been given a covenant be killed while his covenant holds", but Abdur-Rahman bin Al-

Bailamani has narrated how the Prophet Muhammad killed a Muslim for killing a man who had a covenant of protection and said “I am the most worthy of those who guarantee their protection”.

There are various types of homicides in Islam. Willful killing with deliberate intent, known as (*Qatl al'Amd*) is murder committed through the use of a lethal weapon such as a sharp and piercing tool, stone, club, or fire. Voluntary manslaughter (*Qat'a shibu'l - Amd*), is murder through the use of weapons that are not lethal. The punishment ranges from religious expiation, such as fasting, alms-giving, freeing of slaves and blood money. The killer is prohibited from inheriting the victims' property. Homicide by mistake (*Qatt al-khata*) is a lethal act which mistakenly causes death. “Error in act occurs...when an individual shoots at a target and inadvertently kills a bystander. Error in intention occurs when an individual shoots at what he, or she believes to be an animal, but which turns out to be an individual” (Lippman, 1989:43). The punishment involves fasting for two months, freedom for a Muslim slave, and payment of compensation.

Homicide by independent cause which may include situations like a collapsed wall, or someone falls into a pit. In both cases the owner is strictly liable, and must be made to pay a fine. The infliction of body harm, or battery viewed as intentional killing is subject to retaliation, if it causes permanent physical injury. “And therein we prescribed for them: a life for a life, an eye for eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds retaliation” (*surah 5:45*).

## **6. Highway robbery (hirabah)**

The crime of *hirabah* includes armed robbery, forcible entry into houses, or business premises with weapons and harassing innocent people with weapons. In Islamic criminal law, armed robbery is synonymous with waging war against the society. The punishment ranges from amputation to execution, depending on the charges and evidence before the court. The *Quran* in *surah 5:33-34* states as follows:

The punishment of those who wage war against Allah and His Messenger, and strive with might for mischief through the land is execution or crucifixion, or cutting of hands and feet from opposite sides, or exile from the land...

The *shariah* court is at liberty to determine the *ratio decidendi* to suit the crime. If the robber seizes money and kill his victim, the sentence may be killing and crucifixion. If the robber threatens and takes money without killing and assault, the punishment is amputation of his hand and leg. If he kills his victim without taking money, he will be executed. If he threatens innocent people without murder, the sentence may be exile.



## Concluding remarks

The 1946 judgment of the Nuremberg Tribunal endorsed the notion of human rights as the foundation, and legitimacy of international criminal procedure. There is a consensus that there is natural connection between human rights and international criminal law. Some Muslim countries are signatories to various treaties that outlaw international crimes and human rights violations. The content of *shariah* law is very different from what is acceptable to the international community. If we consider the vital issue of universality of human rights and criminal law, then it is only wise for Islamic criminal law to conform to fundamental principles of international criminal law, perhaps it is time to take the advice of Abdullah An-Naim serious when he said “The choice facing the modern Muslim, therefore, is either to insist on enforcing the totality of *shariah* regardless of standards of human rights, or to seek a radical reform within Islam that will reconcile the *shariah* with present-day human rights requirements and expectations” (qtd. in Lippman, 1989:55-56). Naim advocated for a radical restructuring of traditional *shariah* law because it represented the needs and expectations of previous generations. He was optimistic that a new principle of *shariah* can be evolved in line with contemporary realities.

Lippman’s argument is that from the Islamic perspective, new reasoning (neo-itjihad) that calls for the restructuring of Islamic criminal law is contrary to the essence of Islam that bestows a duty on individuals to seek salvation through submission to *Allah*. The *shariah* as path to salvation is sacrosanct. God has the right to demand obedience from his creatures. Islamic jurisprudence generally does not consider individual rights. What is paramount is God’s right which is protected by the state (Lippman, 1989:55-56).

The punishments inflicted for *hudud* crimes – flogging, stoning, and amputation are retrogressive not only for Islam, but the entire humanity (Ogbu, 2005:170-182). The punishment of stoning to death for adultery is not provided for in the *Quran*, and it is a gross violation of fundamental human rights of people. Various human rights instruments prohibit torture and other forms of cruel, barbaric and degrading punishment. *Hudud* punishments should not be prescribed for offenses such as fornication, drinking of alcohol and apostasy.

It is completely unacceptable for Islamic criminal law to criminalize offenses that are civil violations in international law. Civil liberties like freedom of thought, conscience and religion, and religious liberties are criminal offenses punishable under *Hudud* crimes in Islam. Criminal procedure under *shariah* does not allow cross-examination of witness, or rebuttal testimony by the accused. The rules of evidence in Islamic criminal law exclude all men who lack credibility, and integrity in society (*non-adl*).

Women and non-Muslims are not allowed to testify. There is no provision for jury trial, or appeals.

Historically, we are aware of many committed Muslim scholars who advocated for the reform of Islam. There is a consensus among a reasonable number of scholars that Islam should be divested of traditionalistic, legalistic and conservative interpretation. The advocates of change have opted for a new versions of Islam – ‘cultural Islam’, ‘enlighten Islam’, and ‘individualistic faith’. Perhaps, the most negative consequences of dogmatic Islam is the manipulation of Islam for political purposes by totalitarian regimes which has culminated into socio-political instability and anarchy.

Rethinking the *sharia* does not only mean the transposition of all the sources of Islamic jurisprudence from exegesis to hermeneutics, it also involves the deconstruction of classical Islamic thought. The Algerian born Muhammad Arkoun has given a scholarly leadership in the project of rethinking Islam. Arkoun who is a strong critique of classical Islamic traditionalism has advocated for the repudiation of the epistemological framework established by jurists in the 8<sup>th</sup> and 9<sup>th</sup> centuries (Zayd 2006:84). Arkoun avers that for Islam to move towards a modern critical analysis there must be the courage to bypass both the methodology of traditional Islam, and the orientalist historical- philological analysis.

Arkoun describes traditional Islam as classical Islamology that should be discarded in preference for an “applied Islamology” that is capable of constructive engagement with modern hindsight. Islamology according to Arkoun is progressive-regressive, which is a combination of long-term historical perspective with short-term perspective. Progressive – regressive methodology entails an interdisciplinary analysis and convergence of disciplines like socio-historical psychology, cultural anthropology, semiotics, semantics and hermeneutics (Arkoun, 2002: 8-12).

The fundamental and vital dimension of rethinking Islam is the redefinition of the *Quran*, *hadith* and all other sources of Islamic jurisprudence. There is need to recover what Arkoun calls the *Quranic* facts which is the original prophetic speech that formed the basis of divine revelation which Prophet Muhammad received from God. The *Quranic* fact must be distinguished from extrapolation which Arkoun calls- “the closed official corpus”. Here, the goal is to ensure that *Quran* exists with a dialectical revelation between the revealed text and historical exigency (Zayd 2006:85-86; Arkoun 1994: 31-36). Arkoun described as an unfortunate, and retrogressive for erudite Islamic scholars to ignore the philosophical critique of sacred text when such an approach could have strengthen the scientific foundation of history of the *mushaf* and of the theology of revelation (Arkoun, 1994:35).

Another unwavering protagonist of rethinking Islam is the Sudan-born human rights activist and professor of Law at Emory University, Abdullah An-Naim. The focus of An-Naim's work is the reconstruction of *sharia* to comply with international law and human rights. An-Naim is a pupil of Mahmud Muhammad Taha who was executed in 1984 as an apostate and heretic by the Numari regime. An-Naim who went into exile continued to develop and propagate Taha's doctrine on the "Second Message of Islam". In the "Second Message of Islam", Taha upholds the distinction between Meccan and Medinan version of the *Quran* and applied the concept of abrogation, where in event of conflict of law, the Meccan *Quran* could abrogate the Medinan corpus. Taha was convinced that the Meccan message that was "spiritualistic, accommodating justice, freedom and equality, was replaced by the Medina message emphasizing law, order and obedience.

This was done because the Arabs were unable to appreciate the Mecca message in the context of 7<sup>th</sup> century Arabia" (Zayd 2006:87). Taha argued further that there is a possibility to abrogate the Medina *Quran* and restore the Meccan version, because the 7<sup>th</sup> century *sharia* is antithetical to the conscience of the 21<sup>st</sup> century. In developing the thoughts of his teacher and mentor An-Naim amplified the concept of the Meccan *Quran*. The overriding motive of An-Naim is to reconstruct *sharia* to comply with civil liberties, human rights and international law. An-Naim posits that the *sharia* of the Islamists is not only problematic, but can also be manipulated by the ruling elites to oppress the religious minorities and women. The *sharia* of the Islamists is a juridical blockade against religious freedom, freedom of speech and all civil liberties with an Islamic cloak. "The only way to reconcile these competing imperatives for change in the public law of Muslim countries is to develop a version of Islamic public law which is compatible with modern standards of constitutionalism, criminal justice, international law and human rights" (An-Naim 1990:9).

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