

Yaqeen Institute for Islamic Research

# Stoning and Hand Cutting: Understanding the *Hudud* and *Shariah* in Islam

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Often the only things people in the West associate with Islam are stoning and hand chopping. These images permeate our culture, from the trailer of hits like *Robin Hood: Prince of Thieves* (1991) to straight-to-cable pablum like *Escape: Human Cargo* (1998) (again, in the trailer... ‘If you can’t live by their rules, you might die by them’). There is no better example of how our society has consistently and profoundly misunderstood Islam and its tradition of law, known as the *Shariah*. Stoning and hand chopping do feature in the *Shariah*, but their actual function can only be understood by stepping back and examining how the *Shariah* conceives of law overall. Only then can we make sense of its severest corporal and capital punishments, known as the *Hudud* (pronounced Hudood).

## The Idea of God’s Law

The *Shariah* is not a law code, printed and bound in volumes. It’s the idea of God’s law. Like other broad legal concepts like ‘American law’ or ‘international law,’ the *Shariah* is a unified whole that contains within it tremendous diversity. Just as American law manifests itself as drastically different traffic laws or zoning codes in different states or locales, so too has the *Shariah*’s application varied greatly across the centuries while still remaining a coherent legal tradition.

The *Shariah* is drawn from four sources. The first two are believed by Muslims to be revealed by God either directly or indirectly: 1) the revelation of the Quran (which itself, contrary to the [claim of a prominent Trump supporter](#), contains relatively little legal material), and 2) the authoritative precedent of the Prophet Muhammad ﷺ, known as his *Sunna* (often communicated in reports about the Prophet’s ﷺ words and deeds, called *Hadith*). These two sources work in tandem. The *Sunna* is the lens through which the Quran is read, explaining and adding to it.

The second two sources are the products of human effort to understand and channel the revelation of God through the Prophet (peace be on him): 3) the ways that the early Muslim community applied the Quran and the *Sunna*, and 4) the further extension of this tradition of legal reasoning by Muslim scholars in the

centuries since. The human effort to mine these sources and construct concrete, applicable rules from the abstraction of the *Shariah* is known as *fiqh*. If *Shariah* is the idea and ideal of God's law, then *fiqh* is its earthly—and thus its inevitably fallible and diverse—manifestation.

## There's More to Law than Law and Order

A great irony in the ubiquity of stoning and hand cutting in the popular imagination is that these punishments constitute a minuscule portion of the *Shariah*. The tradition of law in Islam is the Muslim effort to answer the question 'What pleases God?' in any particular situation. As such, unlike what we think of as law in modern states, the *Shariah* encompasses every sphere of human activity. Most of these areas would never see the inside of a courtroom in a Muslim state let alone in the West (though, oddly, obscure points in Islamic law do [sometimes](#) come up in cases on freedom of religion). If we were to look at a typical, comprehensive book of *fiqh* (well over a dozen volumes, usually), we'd find that the core subjects of the *Shariah* are the forms of worship in Islam, including prayer (and the rules of ritual purity needed to perform it), fasting, charity tithes, the pilgrimage to Mecca and hunting and slaughter of animals (about 4 volumes out of 12). Only then would we find recognizable areas of the law such as marriage, divorce, inheritance, contracts, property, liability, injuries, etc. Although they are seemingly the only thing most people know about the *Shariah*, in a typical book of *fiqh* less than 2% of the book is devoted to the *hudud* crimes and their punishments.

## Criminal Law in Islam and The West

In order to understand Islamic criminal law, we have to make sure we understand what we mean by criminal law in the first place. Most areas of law in the US, Europe and elsewhere are civil law, meaning they deal with people's rights over and obligations to each other. These include contracts, marriage, property, etc. The government might play a role in adjudicating disputes in these areas through the infrastructure of courts, but these are disputes between private parties over wrongs they do each other.



Crimes are about wrongs done to the public, society or state as a whole, and in most modern states it is the government that acts to bring people who've committed them to justice. Of course, wrongs to individuals and wrongs to society can coincide. In old (like, very old) English law, if a man murdered another man in the street, then two wrongs had been done. The murderer had wronged the victim's family by killing him, and he had also wronged the king by violating his 'peace,' or the overall order of his realm (hence our term 'disturbing the peace'). The murderer was answerable to both aggrieved parties.<sup>1</sup> Centuries (and many, many legal turns) later, we find OJ Simpson on trial for two wrongs: one civil (for wrongful death and the damages this caused the victim's family), and one criminal (murder) for which he was prosecuted by the state.

As we all recall, OJ was found innocent in his criminal trial but liable (i.e., guilty) in his civil trial. How could this be if the two trials were, in effect, for the same act? Did he commit murder or not? The two trials produced two different results because of different standards for meeting the burden of proof. In civil cases in the US, the jury only has to conclude that the preponderance of evidence indicates that the person is guilty (i.e., over 50% likelihood), while in a criminal trial the jury must be convinced 'beyond a reasonable doubt.'<sup>2</sup> There are different burdens of proof because of the differences in punishments for civil and criminal wrongs. Civil wrongs are punished by compensation. Criminal wrongs are punishable by incarceration or corporal or even capital punishment. In the West, the notion that judges or juries should exercise extra caution in finding someone guilty of a crime comes from canon law (the law of the Catholic Church) in the twelfth and thirteenth centuries, as does the notion of innocent until proven guilty.<sup>3</sup>

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<sup>1</sup> The compensation paid to the victim or the family was the *wergild* (lit. man price) or *bot*, while the *wite* was paid to the king or lord for breaking the *mund* (peace); Bruce O'Brian, "Anglo-Saxon Law," in *Oxford International Encyclopedia of Legal History*, ed. Stanley Katz (London: Oxford University Press, 2009), 1:82; F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), 107-9.

<sup>2</sup> This well-known phrase does not appear in the US Constitution, but was adopted into American law around 1800 from English law. It was first formally articulated in England in the 1780s, though it was actually used in 1770 in Boston by the future President John Adams and Robert Paine in their defense of the British soldiers involved in the Boston massacre; see James Q. Witman, *The Origins of Reasonable Doubt* (New Haven: Yale University Press, 2008), 187, 193-94; and [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=fss_papers).

<sup>3</sup> Heikki Pihlajamäki and Mia Korpiola, "Medieval Canon Law: The Origins of Modern Criminal Law," in *The Oxford Handbook of Criminal Law*, ed. Markus Dubber and Tatjana Hörnle (Oxford: Oxford University Press,

The *Shariah* has remarkably similar features (actually, I think that Western canon law was influenced a great deal by Islamic law, just as Western philosophy and science were profoundly shaped by Muslim scholars in those fields from the tenth to the thirteenth centuries... but that's another issue). Muslim jurists didn't categorize law into civil and criminal law, but these labels are nonetheless useful in trying to understand the *hudud*. The categories that Muslim jurists used were those of violations of the 'rights of God' (*ḥuqūq Allāh*) as opposed to violations of the 'rights of God's servants,' i.e., human beings (*ḥuqūq al-ʿibād*). The rights of human beings include the right to physical inviolability (in other words, one can't be killed or harmed without just cause), the right to dignity, the right to property, the right to family, and the right to religion.

Just as in modern human rights, these rights are not absolute. They can be infringed upon with just cause. But they belong to all human beings regardless of whether they are Muslims or not. If someone breaks your toe, smashes into your car or reneges on a contract they made with you, they owe you compensation because they have violated your rights. They owe this even if they didn't intend any of these actions since the damage was done and they were the cause. The same applies in American civil law (in both Islamic and American law, an exception would be if you smashed someone's car because someone else threw you onto it, which was out of your control). Along the same lines, according to the rights of human beings in the *Shariah*, if someone steals your phone from you, they owe you either the return of your phone or its replacement value. If someone kills your family member accidentally, then your family is owed the compensation value as specified in the Quran and the *Sunna*. In such cases, as taught by the Prophet ﷺ, the job of the judge is to "ensure that all those with rights receive them."<sup>4</sup>

Violations of the 'rights of God' in the *Shariah* are an important counterpart to crimes in the Western legal tradition. Of course, the ultimate 'right of God' upon mankind, as explained by the Prophet ﷺ, is for God to be worshipped without partner, and this right extends to other acts of worship as well, like giving the *zakat*

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2014), 214-215; Kenneth Pennington, "Innocent until Proven Guilty: The Origins of a Legal Maxim," *The Jurist* 63 (2003): 106-24.

<sup>4</sup> Abū Bakr al-Khaṣṣāf, *Adab al-Qāḍī*, ed. Farhat Ziadeh (Cairo: Maṭbaʿat al-Jablāwī, 1979), 254.

charity.<sup>5</sup> But, unlike human beings, God is eminently beyond the capacity of any creature to harm. Also unlike human beings, God has “ordained upon Himself mercy” (Quran 6:54), and promised that His “mercy encompasses all things” (Quran 7:156). This element of God’s vast mercy plays a crucial role in the other rights of God that Muslim jurists have identified, namely the crimes known as the *hudud*.

## What are the *Hudud*?

The concept of *hudud* in Islamic criminal law is not found in the Quran, though it is referred to in *hadiths* considered authentic by Muslims.<sup>6</sup> *Hudūd* in Arabic is the plural of *ḥadd*, meaning limit or boundary. The Quran mentions the “limits of God” several times, warning Muslims of the sin of transgressing them and that they should not even approach them (Quran 2:187). But nowhere does the phrase appear in the clear context of labeling certain crimes (see Quran, 2:229, 4:14, 58:4, 65:1, though 4:14 is followed by a discussion of sexual impropriety).

As the famous scholar Ibn Taymiyya (d. 1328) noted, definitions for the categories of crimes (and their corresponding punishments) in Islamic law were the products of human reason and not scripture.<sup>7</sup> Early Muslim jurists probably inherited the concept of a category of crimes called *hudud* from references to it made by the Prophet ﷺ and the early generations of Muslims. Muslim scholars have agreed that the *hudud* include: adultery/fornication (*zinā*), consuming intoxicants (*shurb al-khamr*), accusing someone of fornication (*qadhf*), some types of theft (*sariqa*), and armed robbery or banditry (*ḥirāba*). Muslim schools of law have disagreed on whether three other crimes should be included as well: public apostasy (*ridda*), sodomy (*liwāṭ*) and assassination/premeditated murder for purposes of robbery (*ghīla*).<sup>8</sup>

<sup>5</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-jihād wa'l-siyar, bāb ism al-fars wa'l-ḥimār; Ṣaḥīḥ Muslim: kitāb al-īmān, bāb man laqiya Allāh bi'l-īmān...*; *kitāb al-zakāt, bāb ithm māni' al-zakāt*.

<sup>6</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn min ahl al-kufr wa'l-ridda, bāb kam al-ta'zīr wa'l-adab*.

<sup>7</sup> Jonathan Brown, “*Ta'zīr*,” *Oxford Encyclopedia of Islam and Law* (Oxford: Oxford University Press, forthcoming).

<sup>8</sup> This minimal list is held by the Hanafī school (NB: for Hanafīs, *ḥirāba* was included under the heading of *sariqa*). All other schools consider public apostasy (*ridda*) and sodomy to be among the *hudud* crimes as well. In the Maliki

What is in common among the *hudud* crimes is that their punishments are specified in the Quran or *Sunna* and that they are considered to be violations of the rights of God.<sup>9</sup> Of course, some of the *hudud* are also violations of the rights of humans as well. *Sariqa* (the *hudud*-level of theft, see below), *qadhaf* (sexual slander) and *ḥirāba* (armed robbery, banditry) are obviously violations of people's rights to life, property and/or dignity.

The scriptural commands that specify these *hudud* punishments are, in summary:

- *Zinā*: The Quran commands that men and women who engage in fornication be lashed 100 times (Quran 24:2), and *hadiths* add that if the person is single and has never been married then they should also be exiled for a year.<sup>10</sup> The Hanafī school of law does not accept the additional punishment of exile because it does not deem the *hadiths* in question strong enough evidence to alter the Quranic ruling. It was agreed upon by all the Muslim schools of law that the Quranic punishment referred to here was for unmarried people. Married men and women guilty of adultery are punished by stoning, as demonstrated in the *Sunna* of the Prophet ﷺ.<sup>11</sup>

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school, *ghīla* (assassination or murder to steal someone's money) is considered a *hudud* crime punished by death. See Wahba al-Zuhaylī, *Mawsū'at al-fiqh al-islāmī*, 14 vols. (Damascus: Dār al-Fikr, 2010), 5:714-15; Šāliḥ 'Abd al-Salām Al-Ābī, *al-Thamar al-dānī fī taqrīb al-ma'ānī Ḥāshiyat Risālat Ibn Abī Zayd al-Qayrawānī*. 2nd ed. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1944), 423, 432, 435.

<sup>9</sup> There is some disagreement over *qadhaf*, which some scholars consider to be a violation of the rights of human beings only; Maṣṣūr b. Yūnus al-Buhūtī, *al-Rawḍ al-murbi'*, ed. Bashīr Muḥammad 'Uyūn (Damascus: Maktabat Dār al-Bayān, 1999), 466; al-Khaṣṣāf, *Adab al-Qāḍī*, 217, 333; Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmi' li-aḥkām al-Qur'ān*, ed. Muḥammad Ibrāhīm al-Ḥifnāwī and Maḥmūd Ḥāmid 'Uthmān, 20 vols. in 10 (Cairo: Dār al-Ḥadīth, 1994), 6:476 (on verse 24:4).

<sup>10</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn min ahl al-kufr wa'l-ridda, bāb al-i'tirāf bi'l-zinā; Ṣaḥīḥ Muslim: kitāb al-ḥudūd, bāb ḥadd al-zinā, bāb man i'taraḥa 'alā nafsihi bi'l-zinā.*

<sup>11</sup> There has long been effective consensus on the punishment of stoning for adultery, which was even accepted by the Mu'tazila school of thought (though not by the Kharijīs). In 1973, the famous Egyptian 'ālim and scholar of law Muḥammad Abū Zahra (d. 1974) stated at a conference in Libya that he seriously doubted the reliability of the reports that the Prophet ﷺ had engaged in stoning, considering it too cruel a punishment (this was reported by two scholars in attendance, Muṣṭafā Zarqā' and Yūsuf al-Qaraḍāwī, see Muḥammad Abū Zahra, *Fatāwā*, ed. Muḥammad 'Uthmān Bashīr (Damascus: Dār al-Qalam, 2006), 673. There is a modern theory that stoning is *ta'zīr*, and thus discretionary, since the Prophet ﷺ said that God gave "a path out" (Quran 4:15) for a non-married virgin who had fornicated with the 100 lashes mentioned in the Quran and then an additional year of exile added by the Prophet ﷺ as *ta'zīr*; the punishment for the married adulterer would mirror this, with 100 lashes from the Quran and then stoning as the Prophet ﷺ added, discretionary *ta'zīr*. Dr. Jasser Auda argues in his book *Naqd nazariyyat al-naskh* that stoning was Jewish law practiced in the beginning of Islam and then abrogated by Surat al-Nūr. See Jasser Auda, *Naqd nazariyyat al-naskh* (al-Shabaka al-'Arabiyya li'l-Abḥāth, 2013). What has emerged as very controversial in the modern period is the notion that there could be a verse of the Quran concerning stoning



- *Sariqa*: the Quran specifies that the thief, male or female, should have their hand cut off “as a requital for what they have done and as a deterrent ordained by God” (Quran 5:38).
- *Qadhf*: The Quran commands that anyone who accuses someone of adultery and does not provide four witnesses to the alleged act should be lashed 80 times and should never again have their testimony accepted (Quran 24:4).
- *Shurb al-Khamr*: Though the Quran prohibits drinking wine (*khamr*) and intoxication, the punishment for drinking comes from the *Sunna*. The most reliable *hadiths* state that the Prophet ﷺ would have a person lashed 40 times for intoxication, but the caliphs Umar and Ali subsequently increased this to 80 after consultation with other Companions.<sup>12</sup>
- *Hirāba*: This crime is understood to be set out in the Quran’s condemnation of “those who make war on God and His Messenger and seek to spread harm and corruption in the land.” The Quran gives it the harshest punishment in Islam: crucifixion and/or amputating hands and feet (Quran 5:33). The vast majority of Muslim scholars have held that this verse was revealed after a group of men brutally blinded, maimed and murdered a shepherd and then

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that was removed (*naskh*) by God. Most pre-modern Muslim scholars had no problem with the notion that the Quran originally included a verse stating ‘The noble man and woman, if they commit *zinā*, surely stone them both,’ but that God ordered the verse removed while maintaining the ruling intact. The famous Shāfi‘ī/Ash‘arī Hadith scholar Abū Bakr al-Bayhaqī (d. 458/1066) stated that he knew of no disagreement on the possibility of a verse of the Quran being removed in its entirety (*naskh al-tilāwa*) while its ruling remained; Abū Bakr al-Bayhaqī, *al-Sunan al-kubrā*, ed. Muḥammad ‘Abd al-Qādir ‘Aṭā, 11 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1999), 8:367. A leading traditionalist scholar of the twentieth century, ‘Abdallāh al-Ghumārī (d. 1993), however, denied the possibility of *naskh al-tilāwa*. He deemed it rationally impossible and added that all reports describing it as having occurred are narrated by too few transmissions (*āḥād*) to match the certainty of Quranic verses. He notes that the most reliable piece of evidence, namely the reports of the caliph ‘Umar in *Ṣaḥīḥ al-Bukhārī* that he worried that people would abandon stoning because it was not found in the book of God, do not actually include the wording of the supposed verse with that ruling, as pointed out by Ibn Ḥajar (though Ibn Ḥajar does not doubt that there was such a verse); ‘Abdallāh b. al-Ṣiddiq al-Ghumārī, *Dhawq al-ḥalāwa bi-bayān imtinā ‘naskh al-tilāwa*, 2nd ed. (Cairo: Maktabat al-Qāhira, 2006), 12, 14; *Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn min ahl al-kufr wa’l-ridda, bāb al-i’tirāf bi’l-zinā*. Most ulama do not accept al-Ghumārī’s argument. For one thing, another sound narration of the *hadith* from ‘Umar includes his saying, regarding a Quranic verse on stoning, that “We recited it, understood it and heeded it” (*Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn..., bāb rajm al-ḥublā min al-zinā idhā aḥṣanat*). Although al-Ghumārī does not discuss this narration, he rejects as insufficient proof all the *hadiths* mentioning verses of the Quran being removed. See Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, ed. ‘Abd al-‘Azīz Bin Bāz and Muḥammad Fu’ād ‘Abd al-Bāqī (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), 12:168, 173-74. See also al-Albānī, *Silsilat al-aḥādīth al-ṣaḥīḥa*, #2913.

<sup>12</sup> *Ṣaḥīḥ Muslim: kitāb al-ḥudūd, bāb ḥadd al-khamr*.

stole his camels. The Prophet ﷺ ordered the killers punished in exactly the same way.<sup>13</sup> Yet prominent scholars were skeptical of reports that he had actually ordered the murderers' hands or feet cut off.<sup>14</sup> This disagreement between the punishments ordered by the Quran and by the Prophet ﷺ may have been because the Prophet ﷺ's order came before the verse was revealed,<sup>15</sup> but the ambiguity is generally understood as illustrating that the ruler/state has discretion in deciding the proper punishment for *hirāba*.<sup>16</sup>

The *hudud* do not cover what most legal systems would consider the most serious part of criminal law: murder. But this does fall within what we can term Islamic criminal law. Although the Quran and *Sunna* conceptualize murder, accidental killing, as well as physical injuries done to others, as private wrongs against individuals and their families, from the time of the Prophet ﷺ it was the state that oversaw these disputes and carried out punishments. These were violations of the rights of people, but they also touched on the realm of public order and violence, which was the territory of the ruler.<sup>17</sup> Since cases of homicide were brought by the victim's kin (much like in the West until the nineteenth century), the state (in the person of the judge or governor) would be responsible for bringing cases for victims with no kin, on the basis of the Prophet's ﷺ saying that "The authority (*sulṭān*) is the guardian of those who have no guardian."<sup>18</sup> The state also often took responsibility for compensating victims and their families when the guilty party could not be identified.<sup>19</sup>

<sup>13</sup> *Ṣaḥīḥ Muslim: kitāb al-qasāma wa'l-muḥāribīn...*, *bāb ḥukm al-murtaddīn wa'l-muḥāribīn*.

<sup>14</sup> *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb mā jā'a fī al-muḥāriba*.

<sup>15</sup> *Jāmi' al-Tirmidhī: kitāb al-ṭahāra, bāb mā jā'a fī bawl mā yu'kalu laḥmuhu*.

<sup>16</sup> Al-Qurṭubī, *Jāmi' li-aḥkām al-Qur'ān*, 3:509-11.

<sup>17</sup> Mālik, *al-Muwaṭṭa': kitāb al-ḥudūd, bāb mā jā'a fī al-rajm; bāb tark al-shafā'a li'l-sāriq idhā balagha al-sulṭān*.

<sup>18</sup> *Musnad of Ibn Ḥanbal* (Maymaniyya print), 4:133 (The *ḥadīth* reads 'man taraka mālan fa-li-warathatihi wa man taraka daynan aw ḥay'atan fa-ilayya wa anā walī man lā walī lahu afukku 'anhu wa arithuhu mālahu wa'l-khāl wārith man lā wārith lahu yafukku 'anhu wa yarithu mālahu); 4:131 (This narration adds a 'qilu 'anhu); 6:47.

<sup>19</sup> Al-Shāfi'ī, *Kitāb al-Umm* (Beirut: Dār al-Ma'rifa, 1393/1973), 6:21; See also *Muwaṭṭa' al-Dīn Ibn Qudāma*, al-Mughnī, ed. 'Abdallāh al-Turkī and 'Abd al-Fattāḥ al-Ḥulw, 12 vols. (Cairo: Hujr, 1986), 9:476, 10:9, 22; Muḥammad al-Sarakhsī, *al-Mabsūṭ*, 30 vols. in 15. (Beirut: Dār al-Ma'rifa, [1978]), 10:219; al-Buhūtī, *al-Rawḍ al-murbi'*, 461; Aḥmad al-Qudūrī, *The Mukhtaṣar*, trans. Ṭāhir Maḥmūd Kiānī (London: Ta-Ha Publishers, 2010), 530-31.

## God's Mercy and Applying the *Hudud* Punishments

Violations of people's rights have to be restituted because those people have suffered actual damage or loss. God, on the other hand, is not actually harmed by violations of His rights. In the case of the rights of God, it is God's mercy that defines Islamic legal procedure. Only an adult Muslim of sound mind and who is aware that one of the *hudud* acts has been prohibited by God and still intentionally engages in it is even theoretically liable for the punishment.<sup>20</sup> In this regard, the *hudud* crimes differ from violations of the rights of people, such as accidental manslaughter or accidentally damaging someone's property, where intention is not required and children's families are liable for the damage they cause.

The central principle in the application of the *hudud* punishments is maximizing mercy. This was formulated clearly in a *hadith* attributed to the Prophet ﷺ that was also echoed by prominent Companions, among them his wife Aisha and the Caliphs Umar and Ali. The best attested version states, "Ward off the *hudud* from the Muslims as much as you all can, and if you find a way out for the person, then let them go. For it is better for the authority to err in mercy than to err in punishment."<sup>21</sup> Within a century of the Prophet ﷺ's death Muslim scholars had digested this *hadith* into the crucial legal principle of 'Ward off the *hudud* by ambiguities (*shubuhāt*).'<sup>22</sup>

<sup>20</sup> This is based on a *hadith* in which the Prophet ﷺ says that, "The pen has been lifted [from writing a person's deeds] for three people: the person sleeping until they wake up, the person afflicted [with some madness] until they recover, and the youth until they grow up," on the Prophet ﷺ's question to a man confessing to *zinā*, "Do you know what *zinā* is?" and on the practice of the caliph 'Umar, who ruled that, "There is no *hadd* except on the one who knew it (*lā ḥadd illā 'alā man 'alimahu*"); *Sunan* of Abū Dāwūd: *kitāb al-ḥudūd, bāb fī al-majnūn yasriqu aw yuṣību ḥaddan*; *Sunan* of Abū Dāwūd: *kitāb al-ḥudūd, bāb rajm Mā 'iz bin Mālik*; al-Bayhaqī, *Sunan al-kubrā*, 8:415. See also al-Qudūrī, *Mukhtaṣar*, 544.

<sup>21</sup> This *hadith* can be found in *Jāmi' al-Tirmidhī (kitāb al-diyāt, bāb mā jā'a fī al-qīṣāṣ)*, with a similar version narrated by Abū Hurayra (*Sunan Ibn Mājah: kitāb al-ḥudūd, bāb mā jā'a fī al-satr 'alā al-mu'min wa daf' al-ḥudūd bi'l-shubuhāt*) (weak according to all). Scholars like Tirmidhī and Bayhaqī consider the narrations attributing this to Aisha rather than the Prophet ﷺ to be more reliable; al-Bayhaqī, *Sunan al-kubrā*, 8:413. For other Companions making similar statements, see al-Bayhaqī, *Sunan al-kubrā*, 8:413-15. According to Ibn Ḥajar, the most reliable version is Umar's saying, "For me to err in the *hudud* because of ambiguities is more preferable for me than to carry them out because of ambiguities." See Shams al-Dīn al-Sakhāwī, *al-Maqāṣid al-ḥasana*, ed. Muḥammad 'Uthmān al-Khisht (Beirut: Dār al-Kitāb al-'Arabī, 2004), 42.

<sup>22</sup> See Intisar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt," *Islamic Law and Society* 17 (2010): 63-125.

Some might argue that this doctrine was developed by Muslim jurists in the generation after the life of the Prophet ﷺ to remedy the Quran's harsh punishments. In other words, they inherited a regime of severe punishments and maybe they thought they needed to find some way out of applying them. Or one might argue that the Prophet himself ﷺ preached warding off the *hudud* if at all possible because he was uncomfortable with the punishments revealed in the Quran.

But neither of these theories could be correct. The establishment of a harsh regime of punishments alongside a nearly unreachable standard of proof occurs together within the Quran itself. The Quran ordains that those who commit adultery should be lashed 100 times, but just one verse later it states that anyone who accuses someone of adultery without four witnesses to the act is punished with 80 lashes for slander.<sup>23</sup> Why would a message seeking to establish an order of law set up harsh punishments but then make them almost impossible to apply? We will discuss this later, but now let's turn to the ambiguities (*shubuhāt*) that Muslim jurists elaborated to avoid applying the *hudud*.

The Muslim jurists who developed the massive and diverse body of *fiqh* took the Prophet's command to ward off the *hudud* very seriously. Some of the procedural safeguards were found in the Quran itself, such as the requirement for four witnesses to *zinā*. A significant number were added in the *hadiths*. In the most famous case (there are six known instances) of the Prophet ﷺ ordering a man stoned for adultery, the man comes to the Prophet ﷺ and confesses his sin. The Prophet asks him if he is crazy, and when he continues to insist the Prophet ﷺ suggests that perhaps he only kissed the woman.<sup>24</sup> In order to prevent witnesses from assuming sex was occurring when perhaps the couple was just embracing or lying on top of one another, the Prophet ﷺ required the witnesses to testify that they'd seen "his penis enter into her vagina like an eyeliner applicator entering into its container."<sup>25</sup> Because the man who confessed, Mā'iz, insisted on confessing four

<sup>23</sup> Quran 24:2, 4, and the Quran reiterates the need for four witnesses again in verse 2:15.

<sup>24</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn min ahl al-kufr wa'l-ridda, bāb lā yurjamu al-majnūn wa'l-majnūna, bāb hal yaqūlu al-imām li'l-muqirr la'allaka lamasta aw ghamazta; Ṣaḥīḥ Muslim: kitāb al-ḥudūd, bāb ḥadd al-zinā, bāb man i'tarafa 'alā nafsīhi bi'l-zinā.*

<sup>25</sup> *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb rajm Mā'iz b. Mālik, bāb fī rajm al-yahūdiyayn.*

times to the Prophet ﷺ, the majority of Muslim scholars require all confessions of *zinā* to be done four times. Anything less cannot be punished by the *hudud*.<sup>26</sup>

Based on the same case of Mā'iz, jurists agreed that even someone who had confessed to *zinā* could retract that confession at any point and no longer face the *hudud* punishment. Finally, even external signs such as pregnancy were not considered proof that *zinā* had occurred in the opinion of the majority of Muslim scholars. For example, if a woman's husband had been away for years, he could have been miraculously transported to be with her.<sup>27</sup> Or she could have been raped. The one school that did consider pregnancy determinative proof of *zinā* (assuming the woman didn't claim she had been raped) allowed the possibility that a woman could be pregnant for up to five years. Normally in the *Shariah* such miraculous or fantastic claims would carry no weight in legal matters. But as possible ambiguities to prevent application of the *hudud*, they were accepted.<sup>28</sup>

This immense allowance for ambiguities in ruling on sexual offenses can be seen most clearly in the Hanafī school of law, which was the official school of the Ottoman Empire. When prostitutes and their clients were caught, they were not tried for *zinā* due to the (admittedly outlandish) ambiguity that prostitution was structurally similar to marriage; both were exchanges of sexual access for money (in the case of marriage, the groom's dowry payment).<sup>29</sup> This is not because Muslim scholars had any sympathy for prostitution or a low regard for marriage, but rather because they hunted for any possible ambiguity to avoid implementing the *hudud*.

In the case of *sariqa*, the strict definition of the crime laid out by the *Sunna* explains why I've been so reluctant to translate it as theft. *Sariqa* is only a very

<sup>26</sup> Ibn al-Amīr al-Ṣan'ānī, *Subul al-salām*, ed. Muḥammad 'Abd al-Raḥmān al-Mar'ashlī. 3rd ed, 4 vols. (Beirut: Dār Iḥyā' a-Turāth al-'Arabī, 2005), 4:9.

<sup>27</sup> 'Abd al-Waḥḥāb al-Sha'rānī, *al-Mīzān al-kubrā*, 2 vols. in 1 (Cairo: Maktabat Zahrān [no date]. Reprint of 1862 Cairo ed. from Maktabat al-Kastiliyya), 2:145.

<sup>28</sup> Sulaymān al-Bujayramī, *Ḥāshiyat al-Bujayrimī 'alā al-Minhāj* (Cairo: Maṭba'at Muḥammad Shāhīn, 1380/1960), 345; Mullā 'Alī al-Qārī, *Sharḥ Musnad Abī Ḥanīfa*, ed. Khalīl Muḥyī al-Dīn al-Mīs (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 487; Muḥyī al-Dīn al-Nawawī, *al-Majmū'*, ed. Muḥammad Najīb al-Muṭī'ī (Jedda: Maktabat al-Irshād, n.d.), 5:211.

<sup>29</sup> James Baldwin, "Prostitution, Islamic Law and Ottoman Societies," *Journal of the Economic and Social History of the Orient* 55 (2012): 125.

specific kind of theft. First, *hadiths* specify that a thief would only have their hand cut off stealing something over a certain value.<sup>30</sup> In another *hadith*, as well as in the practice of the Companions, we are told that an accused thief should be prompted two or three times to deny that he stole.<sup>31</sup> In court procedure, what this means is that, even if the thief is caught red-handed, with the usual number of witnesses (two) testifying that they saw him steal, all the thief has to do is claim that the item was his, and enough ambiguity would be established to make hand cutting out of the question.<sup>32</sup> On the basis of an instance in which a man stole a cloak from under a sleeping man's head, jurists concluded that only something stolen from a secure location (*ḥirz*), a concept determined by local custom and conditions, merited the *hudud* punishment.<sup>33</sup> The Prophet ﷺ also exempted acts of misappropriation done blatantly in the open.<sup>34</sup> In the end, the list of requirements that Muslim scholars agreed on to eliminate all ambiguities reaches (see Appendix *Requirements for Amputation for Theft* from al-Subki). As a result, as described by scholar Rudolph Peters, it is “nearly impossible for a thief or fornicator to be sentenced, unless he wishes to do so and confesses.”<sup>35</sup>

This system of making it virtually impossible to implement the *hudud* punishments through ambiguities characterized the *hudud* crimes of intoxication and, to a lesser extent, sexual slander as well. Someone who smells of alcohol would not be liable for the *hudud* punishment. Even someone who was seen drunk and vomiting up wine was not subject to the *hudud* punishment according to most Muslim jurists because he could have drunk the wine accidentally.<sup>36</sup> Since Muslim scholars have disagreed a great deal about what constitutes an intoxicant, the approach to

<sup>30</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-ḥudūd, bāb qawl Allāh ta'ālā wa'l-sāriqu wa'l-sāriqatu....*

<sup>31</sup> *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb fī al-talqīn fī al-ḥudūd; Sunan al-Nasā'ī: kitāb qaṭ' al-sāriq, bāb talqīn al-sāriq.*

<sup>32</sup> Mullā Hüzrev, *Durar al-ḥukkām sharḥ ghurar al-aḥkām*, 2 vols. (Istanbul: Fazilat, n.d. Reprint of Amīriyya print, n.d.), 2:82.

<sup>33</sup> Al-Buhūtī, *Rawḍ*, 469; *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb man saraq min ḥirz.*

<sup>34</sup> *Jāmi' al-Tirmidhī: kitāb al-ḥudūd, bāb mā jā'a fī al-khā'in wa'l-mukhtalis wa'l-muntahib.*

<sup>35</sup> Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press, 2005), 54. The same was observed by the British in the application of the punishment for theft in India in the late 1700's. See Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817* (Wiesbaden: Franz Steiner, 1983), 76.

<sup>36</sup> Al-Ṣan'ānī, *Subul al-salām*, 4:41; al-Buhūtī, *Rawḍ*, 467.



applying the *hudud* punishment has been to follow Imam Shafi's position that "people are only punished based on certainty."<sup>37</sup>

## Off the Hook? How Non-Hudud Crimes were Punished

Of course, just because an ambiguity was found to avoid the *hudud* punishment, this did not mean that the alleged wrongdoer was off the hook. Rather, their offense simply dropped from the upper echelon of violations of the rights of God to the violations of the rights of human beings (see *Shariah* chart below). Such offenses were punished according to *ta'zīr*, or discretionary punishment set by the judge. So a thief who had been caught red-handed by two, upstanding witnesses (the standard evidentiary bar for crimes) stealing a bar of gold from a safe deposit box could avoid the *hudud* punishment by simply denying he had done it. He would not have his hand cut off. But there was still sufficient evidence to convict him of theft at the level of *ghaṣb*, or usurpation (similar to petty larceny or the civil wrong of conversion in common law). An unmarried couple found naked in bed could not be punished for *zinā*, but they could still be severely disciplined.

A judge or governor could also draw on his authority to maintain public order to punish offenses that fell below the threshold of *hudud*. For example, someone who stank of wine and was obviously drunk might not be punished at the level of *hudud*, but he could still be punished below that level.<sup>38</sup> In the case of armed robbery/banditry, if the perpetrators repented and surrendered, then these ambiguities would drop the offense from the *hudud* range. But they were still liable for the punishments for homicide and non-*hudud* theft.<sup>39</sup>

Unlike American laws' different burdens of proof in civil versus criminal cases, the main protection against conviction for a *hudud* crime was not the burden of proof (though this was almost unachievable in the case of *zinā*). The escape hatch

<sup>37</sup> Al-Bayhaqī, *Sunan al-kubrā*, 8:549

<sup>38</sup> Al-Buhūtī, *Rawḍ*, 467.

<sup>39</sup> Al-Qurṭubī, *Jāmi' li-aḥkām al-Qur'ān*, 3:515.

was more often provided by the nearly endless list of ambiguities that the judge saw as his duty to explore.

The analogy of American criminal versus civil law is still useful since it helps us understand how the accused could be found innocent of an act in one category of law by its standard of evidence and simultaneously found guilty of the same act in another category of law. It was much easier to produce the evidence needed to convince a judge that a perpetrator was guilty of a *ta'zīr* offense than a *hudud* one. In the Shafi school of law, for example, someone could be convicted of non-*hudud* theft based on the testimony of one man and two women. And in the Hanbali school slaves could testify in non-*hudud* cases.<sup>40</sup> But no major Muslim school of law allowed women or slaves to testify in *hudud* cases since the more restrictions on who could bear witness the more difficult it was to convict the accused.<sup>41</sup> Since *ta'zīr* is, at its core, determined at the discretion of the judge, some punishment could be assigned without reference to any fixed standard of proof at all.

Discretionary punishment was historically the primary category of punishment in the *Shariah*. In some schools of law, jurists developed detailed tables of punishments within their schools of law for what *ta'zīr* punishments applied to what sorts of offenses. Lashing, the [bastinado](#) (smacking the soles of the feet with a cane) and, to a lesser extent, incarceration, have been the main methods of punishment. Although there has been disagreement on the details, the most common position among Muslim jurists is that the upper limit of *ta'zīr* punishments is that they cannot reach the punishment for the equivalent *hudud* crime. This was simple in the case of sexual indiscretion or intoxication, for which the *hudud* crime had a fixed number of lashes. The most that a *ta'zīr* punishment could be was 99 lashes for sexual crimes or one day less than one year of exile. Theft was a different matter. Petty theft was generally handled by lashing or short jail time, while repeat offenders could be sent to prisons for thieves (see for more

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<sup>40</sup> Al-Khaṭīb al-Shirbīnī, *Mughnī al-muḥtāj*, 4:176; al-Sha'rānī, *Mīzān al-kubrā*, 2:225.

<sup>41</sup> Al-Sha'rānī, *Mīzān al-kubrā*, 2:227.

on the types of punishments used in Islamic civilization (see Appendix *Types of Ta'zīr Punishment*).

One of the most important features of how the *hudud* crimes were conceptualized in the *Sunna* and by later jurists was the central role of avoiding *tajassus* (seeking out offenses done in private) and providing *satr* (finding excuses for, or turning a blind eye to, private misconduct). These concepts were rooted in the Quran, which forbids *tajassus* (Quran 49:12), and the *Sunna*, where the Prophet ﷺ repeatedly ignores a man trying to confess to having “violated one of the *hudud*.”<sup>42</sup> “If you seek out a people’s secret or shameful areas,” the Prophet ﷺ warns, “You’ll ruin them.”<sup>43</sup>

The Companions understood this as key to legal procedure. The prominent Companion and governor of Kufa, Ibn Mas‘ūd, was brought a man “whose beard was dripping with wine,” but Ibn Mas‘ūd’s only response was, “We have been forbidden to seek out faults. But if he does something openly before us, we would hold him responsible for that.”<sup>44</sup> [One reliable](#) report tells that the caliph Umar heard rowdy voices from inside a house in Medina, so he climbed over the wall and found a man with a woman and wine. When he confronted the man, he replied that, while he was indeed committing a sin, Umar had committed three: he had violated the Quranic commands against seeking out faults in others (49:12), climbing over the walls of houses (2:189) and entering homes without permission (24:27). Umar admitted his fault and left.

As with other areas of Islamic criminal law, the application of the *hudud* ultimately fell under the authority of the ruler or state. Although the Prophet ﷺ warned that, once a *hudud* crime had reached the authority, the trial had to be held, this was meant to emphasize that no one could expect favoritism.<sup>45</sup> The Prophet ﷺ and the early caliphs made it clear that the ruling authority could suspend the *hudud* punishments entirely if this was necessary, as the Prophet ﷺ ordered for

<sup>42</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-muḥāribīn min ahl al-kufr wa’l-ridda, bāb idhā aqarra bi’l-ḥadd...*; *Ṣaḥīḥ Muslim: kitāb al-tawba, bāb fī qawlihi ta’ālā inna al-ḥasanāt tudhhibna al-sayyi’āt*.

<sup>43</sup> *Sunan of Abū Dāwūd: kitāb al-adab, bāb fī al-nahy ‘an al-tajassus*.

<sup>44</sup> *Sunan of Abū Dāwūd: kitāb al-adab, bāb fī al-nahy ‘an al-tajassus*.

<sup>45</sup> *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb al-‘afw fī al-ḥudūd mā lam tabluḡ al-sulṭan*.

soldiers who stole while out on campaign and as Umar [famously ordered](#) for theft in times of famine.<sup>46</sup> As the famous Hanafī jurist al-Kāsānī (d. 1191) wrote, “It is not permissible to carry out the *hudud* without the probability of some benefit.”<sup>47</sup>

## Historical Application of *Hudud* in Islamic Civilization

The Muslim judges who applied the rules of *fiqh* also took the command of the Prophet ﷺ to ward off the *hudud* by ambiguities as a divine command. All indications are that the *hudud* punishments were very rarely carried out historically. A Scottish doctor working in Aleppo in the mid 1700’s observed that there were only six public executions in twenty years. Theft was rare, he observed, and when it occurred it was punished by *bastinado*.<sup>48</sup> A famous British scholar of Arabic in Egypt in the mid 1800’s reported that the *hudud* punishment for theft had not been inflicted in recent memory.<sup>49</sup> In the roughly five hundred years that the Ottoman Empire ruled Constantinople, records show that only one instance of stoning for adultery took place (contrast this with colonial America/USA, where over fifty people were executed for various sexual crimes between 1608 and 1785).

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Jurists’ theories of far-fetched ambiguities found real life application. A Muslim woman in India in the late 1500s whose husband had died in battle was suddenly found to be pregnant and was accused of fornication. She claimed that her husband had been miraculously brought back to life every Friday night, when he would visit her. Jurists of India’s predominant Hanafī school of law were consulted on the case and replied that it was indeed technically possible for such a miracle to have occurred.<sup>51</sup>

<sup>46</sup> Sunan of Abū Dāwūd: *kitāb al-ḥudūd*, *bāb al-sāriq idhā yasriqu fī al-ghazw a-yuqṭa ‘u*.

<sup>47</sup> *Lā yajūzu iqāmat al-ḥudūd ma ‘a iḥtimāl ‘adam al-fā’ida*; Abū Bakr al-Kāsānī, *Badā’i ‘al-ṣanā’i* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2003), 9:248.

<sup>48</sup> Alexander Russell, *A Natural History of Aleppo*, 2 vols. (London: no publisher, 1794), 1:331.

<sup>49</sup> Edward Lane, *Manners and Customs of the Modern Egyptians* (New York: Cosimo, 2005), 112.

<sup>50</sup> Fariba Zarinebaf-Shahr, ‘Women in the Public Eye in Eighteenth-Century Istanbul,’ 302–304; Anne-Marie Cusac, *Cruel and Unusual: The Culture of Punishment in America* (New Haven: Yale University Press, 2009), 22.

<sup>51</sup> ‘Abd al-Qādir al-Badā’ūnī, *Muntakhabu-t-Tawārīkh*, trans. W.H. Lowe (Delhi: Renaissance Publishing, 1986), 3:146.

The concept of non-invasiveness (i.e., avoiding *tajassus*) and covering up faults (*satr*) also became real practices. Wine drinking, fornication, prostitution and homosexuality became widespread in medieval Islamic civilization. Yet Muslim scholars could do little more than complain about this.<sup>52</sup> One scholar in Mughal India himself strayed into wanton ways, taking up womanizing and throwing drinking parties. When the market police climbed over the wall of his house to break up one such party he reprimanded them by reminding them of the caliph Umar's lapse. The police left the scholar's house in shame (the scholar later reformed himself, reports his biographer).<sup>53</sup>

Instances in which thieves did have their hands cut off were shocking to local populations. The famous Moroccan scholar and traveler Ibn Battuta (d. circa 1366) recounts how, in Mecca, when a judicial official had ordered a young man's hand cut off for stealing, the youth later murdered that judge.<sup>54</sup> The Mughal emperor Akbar the Great (d. 1605) was furious when he found that his chief judge had carried out the execution of a man convicted of a *hudud* offense, citing the principle of avoiding this through ambiguities. The judge fell from imperial favor and eventually died in exile.<sup>55</sup>

The best illustration of how seriously judges took the command to ward off the *hudud* as a religious duty is a near soap-opera level scandal from Mamluk Cairo in the year 1513. A magistrate from the Hanafi school of law had a gorgeous wife, who was lusted over by a Shafi magistrate. This Shafi judge took advantage of his colleague's absence to enter the couple's house and consummate the affair. But a jealous neighbor who also was in love with the wife informed the husband, who immediately returned home, busted into his room and found the couple in his bed. The Shafi magistrate pleaded with the fuming husband, offering him money not to disgrace him publically. The man's wife pleaded along *Shariah* lines, saying, "*Satr* is called for." But the husband refused and locked them in the bedroom until the

<sup>52</sup> See, for example, al-Suyūṭī complaining about a brothel that continued operating in Cairo; Al-Suyūṭī, *al-Taḥadduth bi-ni'mat Allāh*, ed. Elizabeth Sartain (Cairo: al-Maṭba'at al-'Arabiyya al-Ḥadītha, 1972), 175.

<sup>53</sup> This scholar's name was Sa'd Allāh Banī Isrā'īl; Badā'ūnī, *Muntakhab*, 3:88. For this point of prohibiting *tajassus*, see *Sunan* of Abū Dāwūd: *kitāb al-adab, bāb fī al-nahy 'an al-tajassus*.

<sup>54</sup> Ibn Battūṭa, *The Travels of Ibn Battuta*, ed. H.A.R. Gibb, 3 vols. (New Delhi: Munshiram Manoharlal, 2004), 2:219.

<sup>55</sup> Al-Badā'ūnī, *Muntakhabu-t-Tawārīkh*, 3:129-130.

authorities arrived. When confronted, the Shafi magistrate confessed to *zinā* and even wrote out his confession before another magistrate.

Hearing of this scandal, the Mamluk Sultan, al-Ghūrī, was livid at the corruption uncovered amongst his magistrates. So he asked for a ruling by a Shafi judge, who declared (correctly) that the couple should be stoned. The chief judge affirmed, and the Sultan, who had been acknowledged as overly zealous in punishment, was elated. He'd be commemorated for his justice, he exclaimed, since "history would record that someone was stoned for *zinā* in his time."

But in the meantime, the couple retracted their confession. Leading scholars wrote that the *hudud* punishment would have to be dropped. The Sultan responded in outrage, "O Muslims! A man goes into the house of another man, commits iniquity with his wife, they are caught together under the covers, the man confesses to what he'd done and writes a confession with his own hand, and they say after all this that he can retract it?!" The Sultan convened all the senior judges and jurists at his court, including the then nonagenarian pillar of the Shafi school, Shaykh al-Islam Zakariyyā al-Anṣārī (d. 1520). One leading Shafi scholar, Burhān al-Dīn Ibn Abī Sharīf (d. 1517), replied to the Sultan, "That is God's law," warning that whoever executed the couple would be liable for their murder. Zakariyyā al-Anṣārī agreed. Enraged, the Sultan executed the couple anyway, fired all the chief judges and scholars from their judgeships and teaching positions and sent Ibn Abī Sharīf into exile.<sup>56</sup>

We must appreciate what took place in this episode: several leading scholars and judges of Mamluk Cairo accepted dismissal from their posts and exile rather than affirming the application of a *hudud* punishment. Writing a century later, the historian Najm al-Dīn al-Ghazzī (d. 1650) remarked that the Sultan's crime of executing two people without legal right and ignoring the protocols of the *Shariah*

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<sup>56</sup> Muḥammad b. Aḥmad Ibn Iyās, *Badā'i' al-zuhūr fī waqā'i' al-duhūr*, ed. Muḥammad Muṣṭafā (Cairo: al-Hay'a al-Miṣriyya al-Āmma li'l-Kutub, 1984), 4:340-45; Najm al-Dīn al-Ghazzī, *al-Kawākib al-sā'ira bi-a'yān al-mi'a al-āshira*, ed. Jibrā'il Jabbūr, 3 vols. (Beirut: Dār al-Āfāq al-Jadīda, 1979), 1:102-5, 295.



was a cause of the fall of the Mamluk state, which the Ottomans conquered only three years after this scandal.<sup>57</sup>

Aside from the *hudud*, Muslim judges have historically generally been conservative about carrying out capital or severe corporal punishment. For example, one of the few instances in which a judge can refuse to enforce the ruling of another court applying another school of law is if that other school has more severe rules on issues like requiring execution for murder.<sup>58</sup> When one of the Ottoman sultans ordered a group of merchants to be executed for disobeying his ruling on fixing prices, a Muslim jurist intervened, objecting that, “It is not permitted to kill these people in the *Shariah*.” The sultan replied that the merchants had disobeyed an order he had issued, and the scholar replied, “What if your command did not reach them?”<sup>59</sup>

## Why Have Rules if You Don’t Follow Them? Law in Pre-modern versus Modern Societies

When my students read about *Shariah* law, their first reaction after learning about the *hudud* is, ‘Why have punishments you’re not going to apply?’ This question strikes at the root of the incongruity between modern law and how many view the *Shariah*. Although it seems obvious and, indeed, essential to many today, the notion that a legal system should function as a routinized and efficiently ordered machine stripped of cultural fictions and traditions is fairly new. It is a product of legal reforms envisioned by modernists like the English philosopher and jurist Jeremy Bentham (d. 1832).

Prior to the comprehensive legal reforms in American and British law from the mid nineteenth century to the mid twentieth, having laws on the books that were not intended to be applied was normal. In fact, it’s still a feature of law today in the US. How many times do we see signs warning us that littering will be punished by

<sup>57</sup> Al-Ghazzi, *al-Kawātib al-sā’ira*, 1:103.

<sup>58</sup> Al-Khaṣṣāf, *Adab al-qāḍī*, 349.

<sup>59</sup> Muḥammad b. ‘Alī al-Shawkānī, “*Raf‘ al-asāfīn fī ḥukm al-ittiṣāl bi’l-salāfīn*,” in *Majmū‘ fīhi saba‘ rasā’il li’l-imām al-muḥaqqiq Muḥammad b. Ismā‘īl al-Amīr al-Ṣan‘ānī*, ed. Muḥammad al-Ṣaghīr Muqāṭṭirī (Beirut: Dār Ibn Ḥazm, 2004), 452-3.

a maximum fine of \$1000? How many of us know anyone who has been fined \$1000 for littering? How many college students are allowed to drink under the age of 21? To quote the conservative legal scholar Robert George (and also Paul of Tarsus), [law is our teacher](#). It is not just a means of resolving disputes or maintaining order. It is a statement by authoritative voices within a society of how that society should be.

Another major historical change was in law enforcement. Modern law enforcement as we know it emerged in Great Britain in the early 19th century. It is no coincidence that Britain was also the first state to transition into a new stage of human history, comparable in its dramatic changes to humans settling down in agricultural communities five millennia prior: that of a modern, industrialized society. This involved changes in every area of human life, from culture and religion to political representation and economic power.

Pre-modern states like France or Britain, not to mention massive multinational empires, were highly decentralized. Often, the ruler had little direct control outside major urban areas and sometimes only around the capital. What technologies like the railway (Britain was joined by railways in 1851, followed by the US) and the telegraph (in regular use by the 1850s) enabled states to do was actually project their authority among their populations on a scale never possible before. At the same time, improvements in health care and sanitation meant that, for the first time, the population of a city like London actually grew on its own without depending on immigrants (previously, morbidity in European cities was so high that they were death traps, with higher death than birth rates).<sup>60</sup> By 1850 more than half the population of Britain lived in cities, a milestone reached globally around the year 2000. That meant that problems of crime in cities also saw manifold increases.

So as far as law is concerned, what the modern industrialized, urbanized state and society meant was 1) unprecedented challenges of law and order, 2) a new vision for an ordered, rational, technicalized and bureaucratized world, and 3) the

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<sup>60</sup> Andrew Lees, *The City: A World History* (London: Oxford University Press, 2015), 49.

technological, administrative and financial resources to pursue this vision and tackle new challenges.

It is difficult for us to imagine how law and order functioned prior to these mid-nineteenth-century developments. Prior to 1830, Britain had no organized police force. Though major cities like New York and Boston developed police forces by the 1840's, only after the Civil War did official police forces become a normal feature of urban life in America. Ironically, formal police forces in the US South developed out of the Slave Patrols that had formed decades earlier to track the movement of slaves and free blacks out of fear of rebellion.<sup>61</sup>

Of course, cities had not been lawless up to this point. As early as 1285 the British monarchs had instituted decrees to safeguard law and order in London, just as Louis XIV (d. 1715) did in Paris. But these *ad hoc*, often unprofessional, watchmen were only found in the capital cities. More importantly, they did not engage in preventative policing (walking the beat) nor investigation of the wide range of crimes reported. The same applied to the institution of the *shurṭa*, *shiḥna*, or *fawjdār* (all meaning, roughly, police) in Islamic civilization, which can first be found under the early caliphs.<sup>62</sup>[\[62\]](#)

Prior to the nineteenth century, the only law enforcement officials in cities and towns around the world were the equivalents of local marshals or sheriffs, whose main job was to handle prisoners and provide security in the court. In Britain, if someone committed a serious crime, the assumption was that “a great hue and cry” would be emitted and that a crowd would bring the perpetrator to the courthouse to stand trial.<sup>63</sup> Outside of Islamic metropolises like Cairo or Istanbul, where *Shariah* courts were readily available to litigate people's disputes, people in rural areas probably settled most disputes informally within village or family networks.<sup>64</sup>

Marshals and sheriffs conjure up images of the Wild West, and this is actually helpful. As in films like *High Noon* (1952) or *Tombstone* (1993), marshals in

<sup>61</sup> G. Edward White, *American Legal History: A Very Short Introduction* (Oxford: Oxford University Press, 2014), 74.

<sup>62</sup> *Ṣaḥīḥ al-Bukhārī: kitāb al-aḥkām, bāb al-ḥākim yaḥkumu bi'l-qatl 'alā man wajaba 'alayhi....*

<sup>63</sup> Lawrence M. Friedman, *A History of American Law*, 2nd ed. (New York: Simon & Schuster, 1985), 577.

<sup>64</sup> Wael Hallaq, *Sharī'a* (Cambridge: Cambridge University Press, 2009), 163.

pre-modern towns were on their own. Only in exceptional situations could they call on and deputize private citizens for a posse (short for *posse comitatus*). Films like *The Wild Bunch* (1969) and *Butch Cassidy and the Sundance Kid* (also 1969), in which tough and endearing groups of outlaws are eventually mowed down mercilessly by the sheer ordered force of the modern state, commemorate the losses and gains felt at moving from the self-help and community of the pre-modern to the regimented and impersonal world of the modern.

Simply put, pre-modern states did not have the means to engage in the type of law enforcement that we consider normal today, particularly preventative policing and the investigation of mundane crimes. This important fact lies behind the severity of punishments found in Islamic law and in many pre-modern legal systems for that matter. Though scholars of criminal law continue to disagree on the best means of deterring crime, a common approach has been the utilitarian one formalized by Bentham. Its basic premise is the following equation:

(E)xpected Punishment/Deterrent power = (S)everity of Punishment x (P)robability of getting caught....  $E = S \times P$ .<sup>65</sup>

In a system where there are few or no police or where the police do not busy themselves investigating crimes, moderately intelligent criminals faced little chance of being caught. According to the  $E = S \times P$  equation, if the probability (P) of being caught is minuscule, then in order for any meaningful deterrent effect to be created the severity of punishment (S) must be mammoth. Frightening punishments were seen as the only way to deter potential criminals whom police (what few there were) would never be able to reach. We can see this clearly in Britain in the 1700s and early 1800s. In 1820 there were over two hundred crimes punishable by death in Britain, including stealing firewood and poaching fish from another's fishpond.<sup>66</sup> The colony of Virginia had the death penalty for taking vegetables or fruits from a garden.<sup>67</sup>

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<sup>65</sup> I draw this equation from lecture notes from Professor Neal Katyal's course on Criminal Law at Georgetown Law School, 9/11/15.

<sup>66</sup> E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 270–77.

<sup>67</sup> Cusac, *Cruel and Unusual*, 28-29.

But, similar to the *hudud*, few people convicted of these offenses were actually executed. Putting thousands of petty offenders to death was not the intention of the law in Britain or its colonies. Scaring people into not breaking the law was. Inevitably, judges and juries would find procedural loopholes to reduce the punishment, such as purposely undervaluing stolen goods to drop the crime from grand larceny (punishable by death) to petty larceny (punishable by flogging).<sup>68</sup>

And we can see how the mind boggling advances in technology and administrative capacity in the mid-1800s changed Britain's legal landscape. More effective policing, better prisons and, more importantly, better municipal services and a much-advanced economy meant that more offenders were caught and convicted.<sup>69</sup> (P) went up dramatically, so (S) dropped accordingly. By 1900 Britain had only four death-penalty offenses.

## Cruel and Unusual Punishment

No discussion of criminal law in the *Shariah* can pass without addressing the issue of Western revulsion at flogging, the most prominent form of punishment historically employed by Muslim courts, and at the dramatic *hudud* punishments of amputation and stoning.

Today we think of incarceration as the normal way of punishing crime, so much so “that it becomes difficult to conceive of a moment when prisons were not at the core of criminal justice,” to quote one noted scholar.<sup>70</sup> But prisons have been the exception, not the rule, for punishment in human history. They are immensely costly, especially for the perennially cash-strapped pre-modern state, and carry with them constant worries over security. Prior to the seventeenth century, when the situation in Europe changed, the main use of prisons globally had been for detaining suspects pending and during trial, not for punishment.

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<sup>68</sup> J.S. Cockburn, *A History of the English Assizes 1558-1714* (Cambridge: Cambridge University Press, 1972), 128-133.

<sup>69</sup> J.J. Tobias, *Crime and Industrial Society in the Nineteenth Century* (New York: Schocken, 1967), 249-50.

<sup>70</sup> Norval Morris and David J. Rothman, eds., *The Oxford History of the Prison* (New York: Oxford University Press, 1998), vii.

Corporal punishment, on the other hand, is quick and cheap. Although many condemn it as barbaric today, inflicting some form of pain on the body of the perpetrator has been the main means of punishing serious wrongdoing in human society. In Europe from the Middle Ages through the 1700s, horrendous types of mutilation were standard punishment: amputating hands, fingers, ears, tongues, burning with hot tongs, drawing and quartering, etc.<sup>71</sup> Thomas Jefferson recommended cutting a half-inch hole in the nose of women who engaged in sodomy.<sup>72</sup> To understand how this situation changed, one must appreciate important trends in criminal punishment that accompanied industrialization in the early-modern and modern West.

In the eighteenth century, in Western Europe and later Britain, the dominance of execution and severe corporal punishments made way for various forms of forced labor, imprisonment, and deportation to the colonies. Although the first modern prison opened near Philadelphia in 1790, the philosophy behind it had been maturing for decades. Growing out of institutions for forced labor in the seventeenth century, particularly in continental Europe, prisons emerged as institutions that combined incarceration and forced labor by those who had committed crimes that would otherwise have been punished by death.<sup>73</sup> In the Quaker colony of Pennsylvania, thinkers like the founding father Benjamin Rush (d. 1813) began articulating a theory of reformatory justice in which harsh corporal or capital punishments would be set aside in favor of purifying the convict's soul in hopes of eventual redemption.<sup>74</sup> Hence the origin of the American penitentiary, where prisoners are divided into their own small cells and given meager rations for the purposes of focusing them on reflection and consulting the Bible. This model, even after its secularization and allowance for more socialization, has since been exported widely.

This historical arc seems comprehensible enough—corporal punishment to prisons; brutal medieval mutilation makes way for more sanitary executions, makes way for

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<sup>71</sup> John Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crimes," *Journal of Legal Studies* 5, no. 1 (1976): 36.

<sup>72</sup> Cusac, *Cruel and Unusual*, 21.

<sup>73</sup> John Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crimes," 51.

<sup>74</sup> Cusac, *Cruel and Unusual*, 36, 41-44.



forced labor in prisons, which in turn makes way for the modern penitentiary, where criminals are ‘reformed.’ But the reality is hardly so simple. Rather than a progress from brutality to enlightenment, Western criminal sanctions have simply expressed new and highly idiosyncratic cultural understandings of what is and what isn’t ‘cruel and unusual punishment.’

America abandoned public corporal punishment for the penitentiary and reforming the convict by properly directing his soul. But that guiding was done by stunningly brutal means more reminiscent of Abu Ghraib than a place of worship. Through the mid nineteenth century, prisoners were flogged relentlessly, gagged and stuffed into small lockers where they couldn’t kneel or lie down, and had their faces flooded with freezing water. What seems to have been the most deadly of all treatments was forcing prisoners into extended periods of total isolation with enforced silence.<sup>75</sup> All of this was somehow seen as more humane than previous, unenlightened methods of punishment such as placing people in stocks to be pelted by fruit.

The same erroneous conflation of cultural convention with enlightened progress can be seen in British colonial rule in India. When the British East India Company took over the responsibility for administering *Shariah* law in the areas of India it controlled in the late 1700’s, British officials were exasperated and shocked. They were primarily frustrated at how hard it was to execute criminals under the *Shariah*. They considered it a “barbarous construction” that the family of someone who had been murdered could accept compensation money from the murderer instead of insisting on his execution. British officials couldn’t help seeing this as some sort of pay off.

But what truly morally shocked British officials was the use of amputation as a punishment, and they eventually outlawed it in 1834. Hence we find the bizarre confusion expressed by one British woman over how a local Sikh ruler who rarely had criminals executed but instead punished them with amputation was somehow not considered cruel by his subjects (the amputation the British were referring to was mainly not hand cutting but rather an Indian punishment of cutting off the nose

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<sup>75</sup> Cusac, *Cruel and Unusual*, 53-56.

as the most severe *ta'zīr* punishment; ironically the Mughal Emperor Aurangzeb [d. 1707] had banned this as alien to the *Shariah*).<sup>76</sup> British fetishization of corporal punishment alongside a cavalier attitude towards its capital elder sibling is beautifully captured in the ironic title of J. Fisch's book on colonial law in India, *Cheap Lives and Dear Limbs*.

As US law professor Peter Moskos recently pointed out in his book *In Defense of Flogging*, the notion that imprisoning someone in a cell is somehow more humane than subjecting them to brief but intense bodily pain is a collective cultural fiction. And it is totally belied by the reality of prison-life in America. Even societies in which vicious corporal punishment was common, notes Moskos, “rarely if ever placed a human being in a cell for punishment.” “Consequently,” he concludes, “that we accept prisons as normal is a historical oddity.”<sup>77</sup> And incarceration in the general population of a US prison is mild treatment compared to placement in solitary confinement, a common practice in US prisons. As nineteenth-century American penitentiaries discovered, solitary confinement causes dramatic and often irreparable psychological damage. In 2011, the United Nations Special Rapporteur on torture [concluded](#) that just fifteen days in solitary confinement “constitutes torture or cruel, inhuman or degrading treatment or punishment,” and after that period irreversible psychological damage can occur.

The profound failings of the US prison system further indict it as a cruel and unusual form of punishment. First, prisons in the US have totally failed to reform those sent there, which is not surprising considering convicts are placed not around positive role models but around other criminals in an environment where 5% of prisoners say they had been sexually assaulted just within the previous year and in which drug use is rampant.<sup>78</sup> The result is that the US has [by far](#) the highest population of prisoners in the world and the [second highest](#) per capita.

Second, US prisons are cruel and unusual in that they destroy and atomize communities. As Anne-Marie Cusac points out, prior to the penitentiary

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<sup>76</sup> Radhika Singha, *A Despotism of Law: Crime & Justice in Early Colonial India* (Delhi: Oxford University Press, 1998), 3, 9, 24, 52, 54-55.

<sup>77</sup> Peter Moskos, *In Defense of Flogging* (New York: Basic, 2011), 50.

<sup>78</sup> Moskos, *In Defense of Flogging*, 52, 56.

movement, corporal punishment or humiliation was carried out in public, often in the town square. Criminals might be publically humiliated, but such public pain “understands criminals as existing within that community.”<sup>79</sup> Prior to the mid twentieth century, many prisons were in the center of towns, with prisoners still nearby their families. Now most prisons are in rural areas incredibly distant from the urban neighborhoods most disproportionately affected by incarceration. In America, even after release from prison, felons are denied the right to vote and are nearly unemployable. Around 5.3 million Americans who would otherwise have a voice in their communities and country’s political process are denied the vote due to a past felony.<sup>80</sup>

The American neurosis over criminal justice is even more evident in the application of the death penalty. Developed as supposedly more humane alternatives to hanging, the electric chair, and lethal injection only euphemize the violence being done in the act of execution. As a US federal judge [observed](#) in his decision regarding an execution in 2014, a society that carries out executions must acknowledge the brutality of the act and not try to disguise it by supposedly less violent means (which often fail to work as quickly and painlessly as they are supposed to).

## How Should Muslims Understand the *Hudud* Today?

Today the *hudud* are relevant mostly in their absence from the legal stage. When they do appear it is with great controversy. With the exception of a few states like Nigeria,<sup>81</sup> Sudan,<sup>82</sup> Iran,<sup>83</sup> and Saudi Arabia, the criminal laws of majority Muslim countries have been replaced by modified British or European imports.

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<sup>79</sup> Cusac, *Cruel and Unusual*, 13.

<sup>80</sup> Moskos, *In Defense of Flogging*, 74.

<sup>81</sup> Gunnar J. Weimann, “Nigeria,” in *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online. 05-Dec-2016. <<http://www.oxfordislamicstudies.com/article/opr/t349/e0071>>.

<sup>82</sup> *Hudud* have been in place in Sudan since 1991. The main manifestations have been flogging for intoxication; Olaf A. Köndgen, “Sudan,” in *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online. 05-Dec-2016. <<http://www.oxfordislamicstudies.com/article/opr/t349/e0079>>.

<sup>83</sup> In Iran, the amputation for theft is very rarely carried out, though in Imami Shiism it is only the fingertips that are cut off, not the hand. Stoning is not carried out; Hassan Rezaei, “Iran,” in *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online. 05-Dec-2016. <<http://www.oxfordislamicstudies.com/article/opr/t349/e0056>>.

How do Muslims make sense of the *hudud*'s absence? Can we justify it or, taking things one step further, can we justify not calling for their return? Muslim scholars have followed several tacks in negotiating these profound questions. In the mid twentieth century some argued that the *hudud* were abandoned because of Western pressures during the colonial period and that, if restored, the *hudud* would help mold more law-abiding and harmonious societies. Once reaffirmed, these scholars argued, the punishments themselves would rarely ever be carried out.<sup>84</sup> Others have more recently argued that a revival of the *hudud* would be inappropriate for the foreseeable future because our political and social environments make removing all ambiguities (*shubuhāt*) systematically impossible.<sup>85</sup> It's assumed that this situation is a result of colonialism and the globalization of Western values. But some scholars have argued that this had been the case for almost a millennium. Hence the extraordinary rarity of the *hudud* being carried out.

Taken to a higher level of detail, one *Shariah* argument for the *hudud* not being obligatory at present is that, like a person trying to perform ablutions on a missing limb, the 'locus of the ruling' has vanished. According to this argument, whatever the motivation for Muslim states abandoning the *hudud*, their absence makes them irrelevant until someone decides to revive them. Another argument is that our current era is an "age of crisis and necessity" (*darūra*). Since in Islamic law 'necessity makes the prohibited permissible,' Muslim states under foreign domination or other constraints are allowed to lapse in ways that would otherwise not be allowed.

The Mauritanian scholar Abdallah Bin Bayyah has made the interesting argument that he based on the Prophet ﷺ prohibiting cutting off the hand of Muslim soldiers who stole while on campaign. Instead, the Prophet ﷺ punished them with lashes or delayed the punishment until the need for a full fighting force had passed.<sup>86</sup> Though Muslims are not literally in the land of the enemy, Bin Bayyah writes, they are in "a land of anxiety" where many Muslims feel uncomfortable

<sup>84</sup> 'Abd al-Ḥalīm Maḥmūd, *Fatāwā*, 2 vols. (Cairo: Dār al-Shurūq, 2002), 2:434; Maḥmūd Shaltūt, *al-Islām 'aqīda wa sharī'a*, 14th ed. (Cairo: Dār al-Shurūq, 1987), 302-4.

<sup>85</sup> 'Alī Jum'a, *al-Bayān li-mā yashghalu al-adhhān* (Cairo: al-Muqaṭṭam, 2005), 71-2; see a 2013 [interview](#) with Yūsuf al-Qaraḍāwī and its transcript.

<sup>86</sup> *Sunan* of Abū Dāwūd: *kitāb al-ḥudūd, bāb al-sāriq yasriqu fī al-ghazw a-yuqṭa'u*.

with the *hudud*'s harsh physical punishments.<sup>87</sup> It's as if the Abode of Islam has been culturally conquered, with Muslims becoming allergic to their own revealed tradition.

The most important point to note is that Muslim scholars have affirmed that what is essential for Muslims is to believe that the *Shariah* is ideal law and that the *hudud* are valid in theory. The actual implementation of the *hudud* comes at the discretion of the ruler/state and is not necessary for people to be Muslim.<sup>88</sup>

## Can We Escape the Controversy?

Today few issues are brought up more in the media to question the civility of Islam than the *hudud*. Few issues are more often invoked to allude consciously or unconsciously to a clash of civilizations between the benighted past of Islam and the enlightened present of the West. When the Sultan of Brunei announced in 2014 that his country would phase in *Shariah* criminal law, *hudud* included, there was an international outcry at this return "[to the dark ages](#)." Few issues are as political as the *hudud*.

The *hudud* are, in fact, the perfect storm of controversy and grievance. To the twentieth-century West, with its phobia of physical punishment, prison-centered approach to criminal justice and increased social permissiveness in matters sexual, the *hudud* are barbarity embodied. In the Muslim world, reeling from colonialism and the globalization of Western norms, the *hudud* have re-emerged for many as icons of a commitment to Islamic authenticity. To many Islamist movements around the world, the notion of re-establishing the *hudud* became both the symbol and substance of a longed-for restoration of an authentic past and an independent future.

To be fair, holding the *hudud* up as the symbol of a true, godly order is not some modern fabrication. The Mamluk Sultan al-Ghūrī was not unusual in hoping to be associated with stoning an adulterer. A quick glance through any chronicle of

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<sup>87</sup> ‘Abdallāh Bin Bayyah, *Tanbīh al-marāji‘ ‘alā ta’šīl fiqh al-wāqi‘* (UAE: Muntadā Ta‘zīz al-Silm fī al-mujtama‘ āt al-Muslima, 2014), 83-5.

<sup>88</sup> Shaltūt, *Fatāwā*, 45; Jum‘a, *al-Bayān*, 71; Bin Bayyah, *Tanbīh*, 83-4.

medieval Islamic civilization will yield mention of rulers or dynasties praised for ‘upholding the Limits of God.’ But, as we have seen, the *hudud* were really not much more than symbols of submission to the idea of God’s law.

It’s hard to know if those countries that do enforce *hudud* punishments today represent a continuation of pre-modern Islamic legal practice or not. The *hudud* are probably carried out in Saudi Arabia at a higher rate than they were historically in Muslim societies.<sup>89</sup> But they are still very rare. Between 1981 and 1992, there were four executions by stoning in Saudi Arabia and forty-five amputations for theft. In a one-year sample (1982-83), out of 4,925 convictions for theft, only two hands were cut off. The rest of the guilty were punished by *ta‘zīr*. In the same time period, out of 659 convictions for *hudud*-level sexual crimes, no one was stoned. Many death sentences are the result of political punishments, not the *hudud*.<sup>90</sup> [90] In [Nigeria’s](#) northern states, all of which have adopted *Shariah*-based legal codes, a few amputations for theft have taken place. There have been at least two sentences to death for adultery, but in all cases so far ambiguities were found to release the guilty party.

Like American conservatives calling for a return to some imagined utopia of the 1950s, the authentic past that modern Muslim states claim to revive with the *hudud* is mostly an imagined one. It is envisioned to fend off the loss of identity and autonomy that so many have felt in the modern age. So it is no surprise that countries today where the *hudud* are actively enforced either define themselves by their resistance to the Western imperial order (Iran), by claims to embody Islamic authenticity (Saudi Arabia), or lie on sharp cultural, religious and political fault lines between Western cultural and military imposition on the one hand and strong traditions of indigenous identity on the other (Nigeria, Pakistan, Afghanistan).

So today it is almost impossible to discuss the *hudud* apart from consuming political tensions and conflicts over identity and autonomy. In 2005 the Swiss Muslim scholar and intellectual Tariq Ramadan called for a [moratorium](#) on

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<sup>89</sup> Knut Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005), 266.

<sup>90</sup> Frank Vogel, *Islamic Law and Legal System* (Leiden: Brill, 2000), 246-47; Vikør, 266.



corporal punishment, stoning, and the death penalty in the Muslim world. He was subsequently savaged by both Western critics of Islam who saw his call as too little and by some more conservative Muslim *ulama* who saw it as transgressing the commands of God.

Could we imagine some alternate reality in which a complex, cosmopolitan Muslim state passed through the wrenching processes of industrialization, centralization, and urbanization while preserving a *Shariah* legal regime intact? The Ottoman Empire actually offers something fairly close to that. It passed through significant industrialization and urbanization. Though by the mid-1800s the Ottomans were certainly feeling the political and cultural pressures of European power, they escaped the worst of Western colonialism until World War I.

The [Ottoman Penal Code of 1858](#) is a fascinating artifact of a modernizing, unquestionably *Shariah*-legitimate criminal law. The Code was produced as part of the Ottoman state's reform of its entire administration in light of new technologies and new challenges. The 1858 Code reformed the penal system by replacing existing punishment such as the *bastinado* with forced labor (*kürek*), prison, fines and exile (it also retained the death penalty for some crimes). The Code drew almost all of this content nearly verbatim from the French Penal Code of 1832.

And yet the Code's Islamic legitimacy was not in question. It begins 'In the name of God, the most Gracious, the most Merciful' and was approved by the Ottoman religious establishment, which remained deeply conservative until the end of the empire. The 1858 Code never mentions *hudud*, but this was not because it eliminated them. Rather, this was because the whole Code explicitly limited itself to reforming the *ta'zīr* level of punishments. Since the *hudud* had not been an effective presence in legal application, replacing the *ta'zīr* area was tantamount to overhauling the entirety of Ottoman criminal law. By not removing the *hudud* and instead leaving them in effective abeyance, the 1858 Code avoided assaulting a major symbol of Islamic legitimacy. The punishments it introduced were set by the French, but they were just as 'Islamic' as the ones previously used by Ottoman judges, since *ta'zīr* was a matter of discretion not specified in the Quran and Sunna. Moreover, the first [paragraph](#) of the 1858 Code commits to not violating

any rights of individuals under the *Shariah*, and it even [retained](#) people's rights to the *Qiṣāṣ* process in the case of homicide should they choose it.

Let's imagine that the Ottoman Empire had not been on the losing side in World War I and that it had continued on to the present day, maintaining its 1858 Penal Code (which survived until 1923 anyway) with slight modifications. Would we hear the same controversies we do over executions in Saudi Arabia or reviving the *hudud* in Brunei? Probably not as much, because the *hudud* would have continued as a symbol with no noticeable role in the law.

Yet there would, no doubt, still be some protests. As Amnesty International [objected](#) over Brunei's announcement, the *Shariah* is problematic because it assigns harsh punishments "for acts that should not even be considered crimes." The bottom line is that many modern objections to the *Shariah* in general and to the *hudud* in particular are not about specific punishments. They are about many Muslims' insistence that acts like fornication should be condemned as criminal in the first place. Perhaps they are even about the insistence that such acts should be deemed morally reprehensible at all.

It's worth considering that the crimes human societies have judged the most acutely harmful—murder and rape—are not included among the agreed upon *hudud* crimes. Perhaps the *hudud* are not necessarily the most grievous crimes in terms of the toll they take on their victims or society. Fornication and *hudud*-level theft are offenses almost by definition done in private, as intoxication could be as well. They are done out of the sight of all but God. Perhaps these stringent laws, which God's mercy has made almost impossible to apply, exist primarily to remind people of the enormity of the sins that they usually get away with.

### **Appendix: Requirements for Amputation for Theft from al-Subki**

This is a *fatwa* given by Taqī al-Dīn 'Alī b. 'Abd al-Kāfī al-Subkī (d. 756/1356), a senior Shafi scholar and judge from one of the leading scholarly families of Damascus:

The Imam and Shaykh, may God have mercy on him, said: It has been agreed upon that the *Hadd* [punishment] is obligatory for one who has committed theft and [for whom the following conditions apply]:

- [the item] was taken from a place generally considered secure (*ḥirz*)
- it had not been procured as spoils of war (*mughannam*)
- nor from the public treasury
- and it was taken by his own hand
- not by some tool or mechanism (*āla*)
- on his own
- solely
- while he was of sound mind
- and of age
- and a Muslim
- and free
- not in the *Haram*
- in Mecca
- and not in the Abode of War
- and he is not one who is granted access to it from time to time
- and he stole from someone other than his wife
- and not from a uterine relative
- and not from her husband if it is a woman

- when he was not drunk
- and not compelled by hunger
- or under duress
- and he stole some property that was owned
- and would be permissible to sell to Muslims
- and he stole it from someone who had not wrongfully appropriated it
- and the value of what he stole reached ten dirhams
- of pure silver
- by the Meccan weight
- and it was not meat
- or any slaughtered animal
- nor anything edible
- or potable
- or some fowl
- or game
- or a dog
- or a cat
- or animal dung
- or feces ( *'adhira* )
- or dirt

- or red ochre (*maghara*)
- or arsenic (*zirnīkh*)
- or pebbles
- or stones
- or glass
- or coals
- or firewood
- or reeds (*qaṣab*)
- or wood
- or fruit
- or a donkey
- or a grazing animal
- or a copy of the Quran
- or a plant pulled up from its roots (*min badā'ihī*)
- or produce from a walled garden
- or a tree
- or a free person
- or a slave
- if they are able to speak and are of sound mind
- and he had committed no offense against him

- before he removed him from a place where he had not been permitted to enter
- from his secure location
- by his own hand
- and witness is born
- to all of the above
- by two witnesses
- who are men
- according to [the requirements and procedure] that we already presented in the chapter on testimony
- and they did not disagree
- or retract their testimony
- and the thief did not claim that he was the rightful owner of what he stole
- and his left hand is healthy
- and his foot is healthy
- and neither body part is missing anything
- and the person he stole from does not give him what he had stolen as a gift
- and he did not become the owner of what he stole after he stole it
- and the thief did not return the stolen item to the person he stole it from
- and the thief did not claim it

- and the thief was not owed a debt by the person he stole from equal to the value of what he stole
- and the person stolen from is present [in court]
- and he made a claim for the stolen property
- and requested that amputation occur
- before the thief could repent
- and the witnesses to the theft are present
- and a month had not passed since the theft occurred