

**THE APPLICATION OF THE RULE OF “AVOIDING *HUDUD*
DUE TO *SHUBHAH*” AS A MECHANISM FOR ENSURING
JUSTICE IN THE DETERMINATION OF PUNISHMENTS IN
ISLAMIC CRIMINAL LAW**

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The Application of The Rule of “Avoiding *Hudud* due to *Shubhah*” as a Mechanism for Ensuring Justice in the Determination of Punishments in Islamic Criminal Law

There are strict evidentiary requirements that need to be fulfilled before a person can be found guilty in a court of law. The avoidance of infliction of punishment of *hudud* where there exists a situation called *shubhah* (doubt) is based on the Hadith of Prophet s.a.w. which says, "Set aside the execution of *hudud* punishments in cases of doubt (*shubhah*)." The rule of avoiding *hudud* due to *shubhah* not only applies to *hudud* cases, but it can also be applied in *qisas* and *ta'zir* crimes. This is because the main aim of the principle is to maintain justice and to guarantee that the rights of the accused are protected. This paper looks at the meaning of *shubhah*, its types and discusses how this concept has been used to ensure that the application of punishment is done in a practical manner. This paper also examines the practice of *Shari'ah* Courts in Malaysia when considering *shubhah* in the determination of punishment. It is submitted that the existence of *shubhah* can be used as a mechanism to ensure that the application of punishments are not issued at the whims and fancies of the judges. This clearly shows that the operation of the Islamic criminal justice system operates in moderation and looks into the welfare of not only the victim but also balances it with the rights of the accused persons.

Keywords: *Hudud*, *Shubhah*, Punishment, Criminal Justice, Islamic Law

Introduction

The Islamic Criminal law does not aim to punish a suspect immediately. There are strict evidentiary requirements that need to be fulfilled before a person can be found guilty in a court of law. If there is doubt or "*shubhah*" even in the slightest form when establishing an offence, the prescribed punishment may not be imposed.¹ This is based on the *Hadith* of Holy Prophet s.a.w which says,

¹In Islam, crime and punishment may be classified into three types, i.e. *hadd*, *qisas* and *ta'zir*. *Hadd* (plural: *hudud*), is a crime punishable with a fixed punishment imposed as the right of public, or known as the right of Allah. *Hudud* crimes and their punishments are mentioned clearly in the text of the Qur'an and the Sunnah. The crimes of *hudud* in Islamic criminal law are *zina* (adultery or fornication), *qazf* (false accusation of *zina*), theft, robbery, drinking intoxicants, apostasy and rebellion. When a crime of *hadd* is established, the prescribed punishment must be imposed. It cannot be reduced nor pardoned. *Qisas & Diyat* is a crime punishable with a fixed punishment imposed as the right of individual. *Qisas & Diyat* crimes and their punishments are mentioned clearly in the text of the Qur'an and the *Sunnah*. The crimes include homicide and causing bodily harm to others. Since these crimes involve the right of an individual, the victim has the right to choose, whether to demand the infliction of punishment on the offender or to pardon him. *Ta'zir* is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. It consists of all kinds of transgression where no specific and fixed punishment is prescribed. (see: Awdah n.d.)

"Set aside the execution of *hudud* punishments in cases of doubt (*shubhah*)." (Al-Shawkani 1973)

This is clearly reflected in the strict nature of proof required to establish *hudud* offences, for instance high demands are made of the witnesses as regards to the numbers, qualifications and the contents of their statements.

Shubhah can be translated as doubt, in the Islamic penal context, it means something which is ambiguous or something that is very close to certainty but is not certain. (Ibn al-Humam 1995) For example, *shubhah* relating to the possession of the property in the case of stealing shared property. Anyone who steals something which he shares with another person will not be liable to the *hadd* punishment as the definition of theft, that is punishable by the *hadd* punishment, is taking someone else's property by stealth. A *shubhah* exists in this case since he does not really take the property of others because he has a share in it. Another example of *shubhah* is one relating to the uncertainty of the evidence. For instance, one who confesses that he has committed a *hadd* crime in the absence of evidence to establish his crime other than his confession. In this case, the *hadd* punishment should be inflicted on him based on his confession. However, if he withdraws his confession, the punishment should be remitted. This is because the withdrawal of a confession leads to *shubhah*, that the confession might not be true. The same rule applies if the witnesses withdraw their testimony in a case which depends solely on the testimony of witnesses. (Ibn Rushd 1983)

Though the Muslim jurists are in consensus regarding the remittance of *hudud* punishments due to *shubhah*, they are not in agreement concerning all *shubhah* matters. Some jurists consider that the existence of a particular *shubhah* remits the infliction of a *hadd* punishment, while others do not think so. These opinions are discussed in the following paragraphs.

According to Malik, al-Shafi'i and Ahmad ibn Hanbal, one who has had sexual intercourse with a woman who sleeps in his bed, believing that she is his wife, is excused from being punished by the *hadd* punishment since they hold that a woman found sleeping in his bed constitutes a *shubhah*, which supports his claim that he believes that she is his wife. (Awdah n.d.) Abu

Hanifah, on the other hand, does not consider the existence of a woman in the man's bed to be *shubhah*. (Ibn al-Humam 1995)

Abu Hanifah is of the view that one who marries his *mahram* (a woman within the forbidden degrees of marriage) is excused from the *hadd* of *zina* due to the *shubhah* relating to the *'aqd* (marriage contract). The same rule applies to any marriage which is unanimously agreed to be null and void, such as marriage to a fifth wife, or a married woman, or a woman who is still in her *'idda* (waiting period following divorce or death of the husband) or a divorcee after the third time (*ba'in*). (Ibn al-Humam 1995) Abu Yusuf and al-Shaybani, on the other hand, hold the same view as Malik, al-Shafi'i and Ahmad ibn Hanbal, who hold that the *hadd* of *zina* must still be imposed in these cases because the *shubhah* relating to the *'aqd* is null and void, as long as the offender knows of the prohibition of such marriages. (Ibn Rushd 1983)

In the case of stealing something originally permissible, for instance, stealing water that is being stored, or an animal carcass after it has been hunted, Abu Hanifah states that the *hadd* punishment for theft cannot be imposed because it is originally public property which is shared by all people. The public sharing of such things originally results in a *shubhah* because the need to share also exists after the thing has been possessed. (Ibn al-Humam 1995) Malik, al-Shafi'i and Ahmad ibn Hanbal, however, do not remit the *hadd* punishment in this case since they do not think that there is a *shubhah* regarding property which is originally permissible. (Ibn Rushd 1983)

Abu Hanifah also considers the state of something being of insignificant value (*tafiḥ*) as a *shubhah* which can remit the infliction of the *hadd* punishment on those who steal things such as sand, mud, gypsum, wood, grass and so on. According to him, these things are of insignificant value because people are not normally interested in them. Thus Abu Hanifah refers to custom and common practice in society to identify which things are of insignificant value. However, if such things are modified and become valuable, for example, wood which has been modified and become furniture, then in this case amputation of the hand should be imposed on the one who steals them. Abu Yusuf, however, disagrees with Abu Hanifah on this matter. He holds that the *hadd* punishment for theft can be remitted only in the case of stealing sand and manure. In other

cases, the *hadd* punishment must be imposed as long as the thing is valuable, i.e. can be bought or sold. (Ibn al-Humam 1995)

In contrast to the Hanafi School, Malik, al-Shafi'i and Ahmad ibn Hanbal do not think that there is any *shubhah* with regard to things of insignificant value as long as their value reaches the prescribed amount above which the *hadd* punishment for theft applies (*nisab*). (Ibn Rushd 1983)

Abu Hanifah also holds that the *hadd* punishment for theft is excused in the case of stealing something which rots quickly, for instance, vegetables, meat and bread. (Ibn al-Humam 1995)

Abu Yusuf, however, disagrees with Abu Hanifah and holds the same view as Malik, al-Shafi'i and Ahmad ibn Hanbal who do not think that something which rots quickly is a cause for any *shubhah*. (Ibn Rushd 1983)

Similarly, Abu Hanifah exempts the *hadd* punishment for theft in the case of stealing the mosque door due to the *shubhah* relating to the custody of the property. (Ibn al-Humam 1995) On the other hand, Malik, al-Shafi'i and Ahmad hold that the mosque door is kept in a proper place and thus there is no *shubhah* to exempt anyone who steals it from being punished with the *hadd* punishment. (Awdah n.d.)

Types of *Shubhah*

The Shafi'is and the Hanafis are concerned about classifying the different types of *shubhah* in detail whilst the Malikis and the Hanbalis are content with mentioning the cases which are considered as *shubhah* in general. According to the Shafi'i and Hanafi jurists, *shubhah* can be classified into three types. Both agree that the first type is, *shubhah* concerning '*al-mahall*' or the existence of a special situation. (Ibn al-Humam 1995, al-Ramli 1984) This can be seen in the case where a father steals the property of his son. Although the general position of theft is that if all the elements are fulfilled, it would result in the punishment of the amputation of the right hand, in this case, the *shubhah* that arises is the relationship between the offender and the victim. This situation becomes special due to the existence of a *hadith* of the Holy Prophet which says, "You and your property belong to your father." (Abu Dawud, Hadith no.3530)

In relation to the second type of *shubhah* the Shafi'i jurists are of the opinion that *shubhah* can exist concerning “*al-jihah*” or the legal value (*hukm*) relating to an act. The basis of this *shubhah* is the difference of opinion among the jurists on the legality of certain acts. Therefore, if someone commits a certain act when legality is disputable, the *hadd* punishment is remitted. For instance, a dispute between schools arises because Abu Hanifah accepts that a marriage without a guardian as legal, Malik accepts that a marriage without any witnesses as legal, Ibn ‘Abbas accepts that temporary marriage (*mut‘ah*) as legal. Thus, having sexual intercourse in these disputable marriages is not considered as *zina*, since there is a *shubhah* which can remit the infliction of the *hadd* punishment, even though the doer himself believes that it is illegal. (al-Ramli 1984)

Meanwhile, the Hanafi jurists hold that the second type of *shubhah* is that concerning the act (*fi'il*). This *shubhah* exists when a person is confused as to whether certain acts are lawful or prohibited. An example can be seen in the case of a man who had sexual intercourse with a wife who he has divorced for the third time during her *'iddah*, or having that with a wife's slave. In this situation, the man and woman cannot be made liable for the *hadd* of *zina* because there exists doubt or *shubhah* in relation to the legality of the act. Therefore, in this situation, the *hadd* punishment can be replaced with a *ta'zir* punishment. It is stipulated that *shubhah* concerning the act can be an excuse if there is no original provision (*dalil*) which prohibits certain acts and the criminal believes that it is lawful; otherwise this *shubhah* cannot be an excuse to avoid the *hadd* punishment. (Ibn al-Humam 1995)

The other three jurists, however, disagree with Abu Hanifah regarding this matter and do not recognise the legality of *shubhah* concerning the act in the case of *zina*. (Awdah n.d.)

In relation to the third type of *shubhah*, the Shafi'i jurists state that *shubhah* can exist in relation to the doer (*fa'il*). (Al-Shirazi n.d.) An example can be seen when a man has sexual intercourse with a woman that he mistakenly believes to be his wife when in fact she is not. Here, he cannot be given the *hadd* punishment because of the doer's belief that he is exercising his right.

The Hanafi jurists on the other hand maintain that the third type of *shubhah* comes into being when there exists a contract or *'aqd*. (Ibn al-Humam 1995) For example, a man contracts into a

marriage with his sister and has sexual intercourse with her. They cannot be made liable for *hadd* because of the existence of the contract of marriage or '*aqd al-nikah*. This is the *shubhah* that operates here. They can however be liable for *ta'zir* punishment. His disciples and the other jurists disagree with him regarding this matter and hold that the contract is not considered as causing a *shubhah* unless the criminal believes that it is legal. (Ibn Rushd 1983)

The Consequences of the Rule "Avoid *Hudud* Punishments in Cases of *Shubhah*"

The existence of *shubhah* in a particular crime could lead to two possible consequences i.e. either the accused is totally acquitted from the charge or the *hadd* punishment is remitted and replaced with a *ta'zir* punishment. (Awdah n.d.) Total acquittal can happen in three circumstances. First, if the *shubhah* exist in the elements of the crime. For example, the man who had sexual intercourse with a woman believing that she is his wife. Here, the mental element is absent hence no punishment may be awarded at all.

Second, if the *shubhah* exist in the application of the prohibitive text of the Qur'an or the *Hadith* of Prophet. An example of this is in the case of a marriage without the presence of a guardian or a witness. Some of the jurists accept it as legal whilst some others do not consider it as valid. Hence, there can neither be *hadd* nor *ta'zir* punishment.

Third, if there is *shubhah* in establishing the crime. For example, in the crime of *zina* where the testimony of the witnesses do not reach the required number of four, male, Muslim '*adil* witnesses. In such a circumstance, no punishment can be issued. (Awdah n.d.)

Apart from the above consequence, the rule of avoiding *hudud* in cases of *shubhah* will also result in remittance of *hadd* punishment and reduction to *ta'zir* punishment. The example of this is the situation where the father stealing from his son. Although the father will not be awarded the *hadd* punishment due to the existence of *shubhah*, he will be punished with *ta'zir* punishment instead. (Awdah n.d.)

The principle of avoidance of *hudud* in cases of *shubhah* not only applies to *hudud* cases only, but it can also be used both in *qisas* and *ta'zir* crimes. This is because the main aim of the principle is to maintain justice and to guarantee that the rights of the accused are also protected. This clearly shows that the operation of the Islamic criminal justice system operates in

moderation and looks into the welfare of not only the victim but also balances it with the rights of the accused persons.

The Application of the Rule as Practised in the Syariah Courts of Malaysia

In Malaysian legal system there exist two separate systems of courts, i.e. the Syariah courts and the civil courts. The Syariah courts are distinct from the civil courts as to their function and jurisdiction. The Federal Constitution of Malaysia provides that, other than in the Federal Territories, the constitution, organisation and procedure of the Syariah courts are state matters over which the state has the exclusive legislative and executive authority. The Syariah courts were established under the state laws (that is the state enactments). The state enactments also provide for both the civil and criminal jurisdiction of the Syariah courts. A number of criminal offences which may be tried in the Syariah courts are listed in the state enactments. Generally, the offences can be divided into six categories, namely, matrimonial offences, offences relating to decency, offences relating to the consumption of intoxicants, offences concerning the spiritual aspect of Muslim communal life, offences relating to the sanctity of religion, and miscellaneous offences (of a religious nature) apart from those categories mentioned. (Ahmad Ibrahim 1986)

In criminal matters, the jurisdiction of Syariah courts is limited to that conferred by the Federal Constitution. (Schedule 9, List II, item 1) Parliament also enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 (amendment) 1984,² limiting the jurisdiction of the Syariah courts to offences punishable with imprisonment for a term not exceeding three years, or with a fine not exceeding five thousand Malaysian Ringgit, or with whipping not exceeding six strokes, or any combination thereof. It should be noted that the jurisdiction of Syariah courts is limited only to persons professing the Religion of Islam.

From the above explanation, the extent to which Islamic criminal law is applied in the Syariah courts of Malaysia and its position can be clearly seen. Only a small part of Islamic crimes and punishments are included under the jurisdiction of the Syariah courts. Though *hudud* offences such as *zina*, *qazaf* and drinking intoxicants are included under the jurisdiction of the Syari'ah

²Act No.23 of 1965. Before its amendment in 1984, the Syariah Courts have jurisdiction over offences punishable with imprisonment for no more than six months, or with a fine not exceeding one thousand ringgit, or any combination thereof.

Courts, the *hadd* punishments which should be imposed for these crimes are made impossible due to the limitations resulting from the Syariah Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984.

Despite the above, in practice, the rule of “avoiding *hudud* due to *shubhah*” is always applied by the Syariah court before deciding a case. In some cases, the court would dismiss the case and acquit the accused if there exist *shubhah* in establishing the offence while in some other cases the Syariah Appeal court would revise the decision of the trial court due to the presence of *shubhah* which may be overlooked by the previous court.

In *Syarie Prosecutor of Federal Territories v Jaiman bin Masta @ Mastah and Jamidah binte Abdul Majid* [2005]20 JH 154, both were charged for committing close proximity (*khalwat*). However, the accused were acquitted from the charge as *shubhah* exist in the elements of the crime of *khalwat* i.e. a man and a woman who are neither married to one another nor *mahram* to one another, being found together in any secluded place or in a house or room in circumstances which may arouse suspicion that they would commit *maksiat* (sexual intimacy). In this case, the element of *khalwat* cannot be proven. Besides, the testimony tendered by the witnesses was also inconsistent with each other.

Similarly, in *Syarie Prosecutor of Kelantan v Mohamed bin Sabu anor* [1997] 11(1) JH 61, the court decided to dismiss the case. This was due to the fact that *shubhah* arose when the elements of the crime of *khalwat* cannot be established and the number of reliable witnesses was insufficient. Thus there was no prima facie case.³

In *Daud bin Mohamed anor v Syarie Prosecutor of Terengganu* [1997]11(2) JH 173, the appellants were charged for not performing Friday prayer. However, there were *shubhah* to proceed with the trial because the prosecutor who prosecuted the case was the potential witness for the respondent. The prosecutor who was also the investigating officer should not handle the case since it would create conflict of interest. The judge presiding the case decided that the case be handled by another prosecutor. If the case continued to be handled by the former prosecutor, this would lead to dismissal of the case.

³ See also *Syarie Prosecutor of Pahang v Mahadi and Noriah* [1998] 12(1) JH 55.

In *Syarie Prosecutor of Sabah v Hj Adib Datuk Said* [1989] 6(2) JH 306, the accused was charged for committing illicit sexual intercourse with a girl that caused her to become pregnant. In the beginning the accused confessed in front of the investigating officer. However, when the case was brought before the court, he retracted his confession. The judge presiding the case concluded that there was *shubhah* in establishing the offence when the accused retracted his confession and thus he was acquitted.

In *Faridah v Syarie Prosecutor of Kelantan* [1980-1981] 1&2 JH 89, the appellant was convicted of attempting to commit illicit sexual intercourse based on her confession. However, the appellant later on retracted her confession claiming that she was actually coerced by the father (i.e. the other accused) to commit the offence. The Appeal Committee decided to grant her appeal on the ground that her retraction of confession creates *shubhah* and thus the punishment should be set aside.

Meanwhile, in *Che Lah v Syarie Prosecutor of Kelantan* [1980-1981] 1&2 JH 86, the appellant together with two others (a man and a woman) were convicted of the offence of illicit sexual intercourse. In the beginning the appellant confessed but he later on retracted his confession claiming that he was not involved in committing the material part of the crime. The Appeal Committee found that retraction of confession would amount to *shubhah* and thus granted his appeal. However, he was still convicted of the offence of *khalwat* since there was no *shubhah* in the fact that the appellant was found together with the other two accused during the commission of the offence.

Conclusion

From the above discussion, it can be submitted that the existence of *shubhah* can be used as a mechanism to ensure that the application of *hudud* punishments are not issued at the whims and fancies of the judges. In the Malaysian context, the fact that the Syariah Courts are given limited jurisdictional power could be considered as a *shubhah*. Hence, in Malaysia the *hudud* punishment cannot be exercised due to this very real restriction. However, as mentioned in the beginning of the paper, the Syariah Courts in Malaysia have gone on to apply this rule of avoiding *hudud* when there is uncertainty in many of its judgments. This shows that judges are

not keen to find a person guilty even when there is the slightest of a doubt. However, the judges try their best in balancing the rights of the accused with the rights of the victims. This can be seen in cases illustrated above where the judge would convict with a lesser punishment even when there is a doubt if the evidence could support a lesser punishment. Nevertheless, if the evidence cannot support a lesser crime, then the existence of a doubt would directly lead to an acquittal. This shows how Muslim judges should always be weary when administering the law and especially when executing the punishments. It should be remembered that justice must not only be done but seen to be done. *Wallahu a'lam*

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