

A Comparative Study of How to Apply the Hadd with Customary Laws and Jurisprudential Rules in Iran

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ABSTRACT

Hudud is a special and important punishment in the Islamic penal system which, unlike *Ta'zir*, can not be modified; its fixity is not compatible with the rules and regulations of punishments. This importance and features demanded that the implementation of the Hadd is performed by the Prophet and Caliphs, and others do not have that right, but after the death of the Prophet the dispute arose as to whether his public representatives can carry out Hadd in occultation? In this paper, explaining *Hudud* and focusing on issues that are relevant, and stating the most important ways of its implementation, we investigate executing the Hadd during the occultation with customary norms and juristic rules. This paper is an analytical study, and data collection tools were library resources.

KEYWORDS: Hadd, Hudud, occultation, punishments, customary norms, juristic rules

1. INTRODUCTION

There are some disagreement between *Fuqaha* (the plural of Jurist in Islamic jurisprudence) about the authorities of *Vilayat-e Faqih* (Guardianship of the Jurist) during the occultation, but those who consider *Faqih* (jurist in Islamic jurisprudence) as an innocent representative, believe that it has three authorities: first those that are exclusive to the *Faqih*, and others have no right to them, these are related to religious affairs. Second authority is judgment and settlement of disputes among the people. The majority believe that this is an exclusive authority of the *Faqih*; that is why, for many years, the rulers did not interfere in judicial affairs. Third authority is the ruling society, and some say the *Faqih* do not perform this as a *Faqih*, but as a ruler; so if there is a just ruler, *Faqih* has no need to intervene, and it is enough to supervise the ruler's behaviour. Now, for investigating the possibility or impossibility of executing hadd and punishment during the occultation as well as how to implement it which is our scope, we should see carrying out the punishment is related to which aforementioned authorities?

Hudud (the plural of Hadd) as a legal punishment which has been predicted in Article 14 of the Islamic Penal Code (IPC) of 2013 of Iran as one of the four main punishments, in legal terms, has some rules on how to implement it which has created the suspicion of conflict with customary laws and human rights. One of conflict between a group of *Fuqaha* and lawyers is the need to carry out it in public or non-public. In the Qur'an (e.g. An-Nur, Verse 2), hadith, and among *Fuqaha* there are cases that have been referred to the implementation of public punishment, but in customary norms of Iran and in any of the criminal laws and regulations, bylaws and approval letters, the implementation of punishment in public has not been predicted.

How to implement the Hadd in the occultation is another controversy and dispute among lawyers and *Fuqaha*. Some of *Fuqaha* (Khansari, 1985) believe that its implementation, in terms of the complexity and sensitivity has a direct connection with the dignity of people, and on the other hand, it is in the interests of the Muslim world; Therefore, it is devoted the innocent Imams, and others can not do this. Another group of *Fuqaha* like Saheb Javaher says that Hadd is to prevent corruption and is for the public interest, and in terms of religious duty it must be carried out at any time; hence, study of the reasons for these disagreements and presenting a comprehensive study and a plan of action is necessary at this point in time. It may be said that, since the changing of circumstances and elements of time and space are the main factors determining the rules or secondary titles, and therefore, fort the Hadd punishment, due to advertisement of enemies of religion and international organizations, the face of religion in the world is shown unpopular by the media, changing some of *hudud*, or at least, the method is legitimate and necessary, but it is very difficult to accept this view because, according to the consensus of *Fuqaha*, the provisions of the rules are final and can not be modified. There is another problem that the fixed penalties are not compatible with the legal principles because punishment should be proportionate to the situation and circumstances of the community at any time and place so we can not carry out a punishment at the present time which has been set for a thousand years ago.

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Comparing *Fuqaha*'s different reasons and points of view on the implementation of the Hadd with customary norms makes Iran closer to international obligations in the field of non-applying and enforcing penalties against human dignity, because the hadd punishments like stoning, or being thrown off a high point are not known in customary law. By investigating customary rules, we can offer new solutions to replace old practices with new punishment practices in order to achieve reform goals.

2. The Hadd

The hadd (literal meaning "limit", or "restriction"; pl. *Hudud*), is a punishment fixed in the Quran and hadith for crimes considered to be against the rights of God. Hadd is more physical punishment whose number and amount has been predetermined, and the Judge has no authority to change, decrease, increase, or dismantle it. Punishments for the hadd crimes are execution, stoning, lashing, amputation, life imprisonment, exile, hanging, head shaving, and blinding (Haji Dehabadi, 2010; Volaei, 2012). The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death). (The Oxford Dictionary of Islam).

Some *Fuqaha* argue with the number of crimes. Some of them like Mohaghegh Helli stated 8 Hadd crimes: *Zina* (Adultery), *Livat* (sodomy), *Musaheqeh* (lesbianism), pimps, *qazf* (extrusion), binge, theft, and *Moharebeh* (waging war against God). Ayatollah Khoei (2001) believe in 16 hadd crimes which are: *Zina*, *Livat*, *Musaheqeh*, *Qavadi* (Procuring), *Qazf*, drinking alcohol, theft, *Tafkhiz* (non-penetrative 'foreplay' between men), marrying with an infidel woman without permission of Muslim woman, Kissing a boy from the desire by a *Mahram* (unmarriageable kin), insulting the Prophet Mohammad, prophetic claims, Selling a free man, *Moharebeh*, *Ertedad* (Heresy), and sorcery (Mosavi Khoei, 2001).

In the IPC of 2013 of Iran, hadd crimes have 12 cases: *Zina* (Article 221), *Livat* (Article 235), *Musaheqeh* (Article 238), *Qavadi* (Article 242), insulting the Prophet Mohammad (Article 262), drinking intoxicants (Article 264), theft (Article 267), *Moharebeh* (Article 279), *Mofsed-e-filarz* (Corruption on earth) (Article 286), and *Baghi* (transgression) (Article 287).

3. Hadd punishments: in public or nonpublic?

At various times, on whether the hadd penalty should be carried out publicly or behind closed doors, there has been much debate. Some, for reasons including lesson to others, intimidation and deterrence, have allowed its public punishment, and some *Fuqaha* and lawyers, for some reason such as dignity of persons, the principle of personal penalties, preventing the insult to Islam and ineffectiveness of deterrence, and reform of the offender has not allowed it to be carry out publicly. To better understand the issue and find a solution desired by the holy legislator and that whether public hadd punishment in any circumstances is permissible or not, we should refer to religious rules such as Quranic verses and hadith and reliable sources of jurisprudence and after that, it followed the customary rules of Iran.

In the Quran, hadith, and among *Fuqaha* some cases have been referred to the implementation of public punishment. Allah says in Surah An-Noor, verse 2:

“You shall lash the adulterer and the adulteress each with a hundred lashes. In the religion of Allah, let no tenderness for them seize you if you believe in Allah and the last day; and let their punishment be witnessed by a party of believers.”

Prestigious hadithes about publicly implementation of the Hadd crimes is mostly related to *Zina*.

About publicly implementation of punishments, Iran's Criminal law is silent, and in none of the Criminal Codes, bylaws, and decree, the implementation of punishments (except one: execution) in public has been expected. Only in Article 101 of IPC of 1991, the hadd punishment in the presence of a group of believers was mentioned. Supporters of publicly carrying out punishments usually justify their theory based on this Article, and argue that the purpose of writing this article by the legislature is hadd punishment in public, while this Article only implies that the implementation of hadd should be in the presence of a group of believers.

If, in Iran, the court decides to order the implementation of punishment in public, according to Article 166 of constitution which says: “The verdicts of courts must be well reasoned out and documented with reference to the articles and principles of the law in accordance with which they are delivered”, and Article 214 of Criminal Procedure Code: “the court must be reasonable and justified and documented with the laws and principles on which it was issued”, In its ruling, the court can not provide evidence and document for the implementation of public punishment.

Article 10 of the regulations of the executions, stoning, crucifixion, amputation or mutilation in Iran, authorized the implementation of the execution in prison or another specific location with the presence of prosecutor, the warden, the chief of police or his agent, the clerk of the court and others who have the right. Only in Article 9 of Iranian Anti-Narcotics Law “The death penalty if convicted of interest, will be conducted in the area and in public.” Iran is a signatory to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which banned the torture and also "degrading and inhuman treatment

and punishment." The openness of punishment means the rejection of its secrecy and the number of persons, including judges, executives, officers, medical examiners, prosecutors and others is essential in proportion to the crime.

Iranian National Security and Foreign Policy Commission issued a report on September 5, 2001 which partly stopped the publicly punishment in Iran. In 29.01.2008, on the stay of execution in public, then head of the judiciary delivered memo announcing that executions was possible publicly only with the consent of the head of the judiciary and according to social needs. According to this directive, the publication of photographs and images of execution in the media was also prohibited, and Public and Revolutionary Prosecutors of any jurisdiction, were supervising the implementation of this directive.

4. The effects of publicly implementation of hadd punishments

Implementation of hadd punishments in public has various results and effects and in addition to advantages, has some disadvantages, so in one division it can be divided into positive and negative effects.

4.1. Positive effects

Teaching offenders a lesson: The crime has affected society, and therefore the offenders should not be immune to humiliation and blame of society. This humiliating punishment is for disregarding the rules that society respects them and reserves their privacy. Implementation of the hadd in public isolates offenders from society, and with a wall between him and other people, they are warned.

Reform and individual deterrence: Some criminologists believe that the implementation of public punishment leads to purification and reform of the offender. Because he after suffering punishment as an atonement for sin, and being informed by people he often tries to reform himself, and take the right way, and probably will not again commit a crime.

Social inhibition: with the implementation of punishment in public, potential offenders view degrading punishment implementation; this cause he does not give in to the temptations, and not commit a crime

Avoiding rumours in the execution of punishment: The public implementation of hadd punishments closes the door of abuse and discrimination in law and penalty to people with power and wealth, and make judicial system, particularly judges and enforcement officers innocent of the charges of taking bribes, nepotism and other illegal abuse, because if the punishment be carried out in closed rooms, it creates the suspicion that in carrying out the punishment of certain people, justice is not respected as it should.

Public order and peace: French neo-classical school founders believe that punishment should lead to calm and soothe public opinion, and warn the offender during punishment to understand the results of their evil deeds. Execution of punishment, especially in the crime scene itself would ensure public safety, and return the order disrupted by the crime to the arms of society.

4.2. Negative effects

Eliminating reform and rehabilitation of offenders: The main purpose of social defence is re-socialization and rehabilitation of the offender. One of the reasons that opponents of publicly carrying out punishments present is that public execution punishments cause the loss of personality, and the dignity of the offender, and this humiliation makes him assertive, and he will not be afraid of execution of punishment in public.

Creating a sense of revenge and hatred for offenders: By implementing the hadd punishments in public, we actually sow the seeds of hatred and revenge on the offenders, causing them to deviate towards more abnormal behaviours.

Proliferation of crime in the community: Watching the horrible executions and the lashes of offenders causes the loss of people's feelings, and thus inciting people to commit crimes. It also causes them to commit a terrible crime in cold blood without any sense of remorse, regret and conscience.

Insulting Islam and inciting hatred on the commandments of Allah: publicly implementation of hadd punishments like stoning, or being thrown off a high point, While has no effect on reforming the offender, and would insult Islam and the commandments of God at the international level, and is ridiculed by the enemies of Islam, and show a form of violence and human rights violations in respect of Islam, portrayed some of the inefficiencies of Islam in guiding the individual and the community, which is not in accordance with reason and the ultimate goal of Islam from the philosophy of punishment.

5. Implementation of the hadd in the occultation

Implementation of hadd punishments is one of divine laws and regulations at the time of the Prophet and the infallible Imams (as) they were responsible for them, so the issue is not disputed and controversial, because they were the executors of hadd, but during the occultation, this has become a controversial and dramatic subject in *Imamieh* jurisprudence which has continued till the present, and this difference of opinion is so intense that not only can not be solved, but also it has led scholars of the *Ummah* (Islamic nation) to confront against each other, and offering completely different ideas about each other. Allameh Majlesi presented four views about how to implement the hadd punishments during the occultation: Many scholars believe that the *mujtahid* (an individual who is qualified to exercise decision-making process in Islamic law) can implement all hadd punishments during the occultation; some says that he can only execute the hadd punishments those do not lead

to killing the offender; other scholars claim that he can also execute the punishment that lead to injury; Finally there are some scholars who says that implementing hadd is devoted to the Imam, and *mujtahid* can not execute any hadd punishment (Majlesi, 1999).

Fuqaha those agreed with the implementation of the hadd during the occultation are: Sheikh Mofid and Ibn Saeid Hazli (both cited in Haji Dehabadi, 2010); Deylami (1984); Shahid Sani (cited in Horr Amoli, 1995); Saheb Javaher (cited in Najafi, 1972); Ayatollah Khoei (Mosavi Khoei, 1975); and Imam Khomeini (Mosavi Khomeini, 1961). Among these Fuqaha, Saheb Javaher is at the top. Also Fuqaha who disagreed with the implementation of the hadd during the occultation are: Khansari (1985); Helli (1991); Fazel Hindi; Sheikh Bahaei; Sheikh Tousi; Mohaghegh Helli; Ayatollah Mar'ashi; Ayatollah Sanei; and Ayatollah Mohaghegh Damad.

by reviewing theories and reasons of both groups of Fuqaha; it should be acknowledged that opponents have the right because this theory, in addition to having a strong reasons and documentations including renowned scholars consensus, and invalidity of proponents' cited hadithes, and according to jurisprudential and intellectual rules like the principle of expediency, is more consistent with the objectives of Holy legislator. So verdict of the implementation of *Hudud* by most judges of our time are facing a serious problem.

6. Conclusion

In this study, after reviewing the concept of the hadd, and its implementation in public, and discussing their effects and repercussions on the domestic and international arenas, and finally evaluated the implementation of Hadd punishment during the occultation from the perspective of different Shiite jurists, juristic rules, customary laws, and human rights, and given the sensitivities of the Muslim world, we concluded that:

- Stopping execution of hadd punishments in the occultation, and the need to change it to *Ta'zir* in the IPC of Iran is not for the interests, but is the need for fundamental change in the country's penal code which gives true meaning to the jurisprudence. This, while have no opposition and conflict with jurisprudential views and rules, human rights, and customary rules, is more consistent with the aim of legislator of Islam which is human excellence, dignity and honor of their people, protecting the public interests of the Islamic Ummah, the principle of personal penalties, education and reforming offenders, misdemeanor ignore, avoid spreading corruption, preventing insult to Islam, the prevention of religion aversion, and protecting the principle of Islam.
- Enforcement of *hudud* in the criminal laws of the Islamic Republic of Iran, which has continued since 1982, clearly not only failed to fulfil the main objective of the Islam in implementation of *hudud*, and be a model for the Islamic and non-Islamic communities, but also faced with a serious reaction from the community, lawyers and some Fuqaha in the domestic arena, causing insult and ridicule at the international level, and declaration and resolutions of human rights violations against Iran.
- Jurisprudential views on the implementation of hadd in the occultation, and many Fuqaha do not allow its execution during the occultation. So the idea of stopping the implementation of hadd in the occultation, and implementing *Ta'zir* as an alternative has been proposed by the Shiite jurists.
- By continuation of the implementation of hadd in the occultation, the sacred system of the Islamic Republic will face serious challenges both in domestic and in the international arena. Is not it reasonable and worthy that, before facing domestic and international pressure and being forced to change some of the laws about the hadd, in a reasonable and realistic atmosphere away from the religious fervors to act the theories of other famous Shiite jurists which have social support and are based on customary norms?
- The goal of implementing hadd is not revenge, not destruction of the individual and his family, and not the sense of Islamic authoritarianism. The sole purpose of the prophets and imams in executing hadd punishments was that offenders stay in the arms of Islam in every way possible, and reach consummation.
- Opposition to the implementation of hadd in the occultation is not to deny or disagree with *Vilayat-e Faqih*. People may not respect to the theory of *velayat-e Faqih*, but believe that it can carry out the hadd in the occultation, like Ayatollah Khoei; or vice versa, like Mohaghegh Karaki. Also some Fuqaha may believe in none of them, like Ayatollah Khansari, or some may believe in both like Imam Khomeini.
- Some hadd punishments in the occultation are associated with permanent contempt for offender, and for his/her relatives and families which do not comply with Sharia principles and customary norms. This is in contradiction with human dignity. Offenders should be humiliated to the extent that they have committed.
- The impact of time and space on different aspects of human life is known to everybody; for this reason, penal policy has been developed strongly in the international arena. Regretfully, the penal provisions of Islam in history, except at time of the Prophet and for a short period after it, at no time has not been properly implemented, so not only failed to show their privileged position in the world and influence, but also has been charged as a violent and anti-human rights laws, most of which will be summarized in the implementation of the hadd.
- In the context of the commandments of Allah, blessed and noble objectives are hidden one of which are reforming and consummation. The implementation process of hadd should be such that it does not cause

concern to the society and public opinion, and be thought that its implementation will undermine human dignity, and led to their isolation from society.

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