

HUDUD: A LAW CODE FOR CARAVAN MERCHANTS?

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The voluminous literature devoted to the formation of Islamic law has little to say about who or how the list of crimes and punishments known as *hudud*, or “limits,” came into being. Yet different authors discuss at length the evidence required for charging someone with one of the crimes, the degrees of punishment appropriate to different categories of offenders, and, above all, the need for judges to exercise caution and not be too hasty or severe in applying the prescribed punishments.

A frequently cited saying (*hadith*) attributed to the Prophet and reiterated by some of his closest associates declares: “Ward off the *hudud* from the Muslims as much as you 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.” According to Intisar A. Rabb’s book, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*,¹ this caution was well known by the end of the first century and frequently referred to thereafter as jurists worked to formalize the *shari’a*, the Islamic law code.

The eighth century legal thinkers who shaped the several schools of Islamic legal thought all recognized the *hudud* as a pre-existing list of crimes and punishments, and understood them to be those offenses that are specified in the text of the Qur’an. However, they attribute the list neither to Muhammad, nor to any other individual, and the offenses never find collective mention in any sequence of Qur’anic verses. The word *hudud* does appear in the Qur’an, but not with reference to any of the *hudud* crimes. It occurs most often in the phrase, “those are the limits set by God,” and pertains, when used in specific contexts, to details of divorce and fasting. More generally, observance of “the limits set by God” qualify a believer for entry into paradise.

The number of *hudud* varies from four to eight in different lists. The core offenses consist of highway banditry (literally, “cutting the road”), fornication, false accusation of fornication, and thievery. Most lists also include drinking wine, an offense to be punished by either 40 or 80 lashes of public flogging, a much less severe punishment than the execution prescribed in some cases of highway banditry and adultery, or the amputation of the hand and/or foot of some thieves. Apostasy, the most common sixth offense, can also lead to execution.

“Cutting the road” (*qati’ al-tariq*) affords a clue to the list of *hudud* not being what it is alleged to be, namely, a simple and definitive compendium of crimes and punishments stipulated explicitly in the Qur’an. The phrase does not, in fact, appear in the Qur’an. Yet what crime could be more threatening to a caravan merchant and his goods? Is it not plausible that some group of Muslim caravan traders, probably in the first decades after Muhammad’s death, cherry-picked Qur’anic revelation, along with personal memories of the Prophet’s dealings with malefactors, to turn their concerns as merchant travelers a long way from home into fixed laws

¹ [Intisar A. Rabb](#), *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge: Cambridge University Press, 2014.

grounded, however tenuously, in divine writ? This may not make the *hudud* list of crimes and punishments the first Islamic law code, but it would certainly offer insight into the merchants' perception of their new religion as a mainstay of their commerce.

Imagine you are living in Arabia in the seventh century, and you spend several months of every year (or even longer) walking or riding with a camel caravan transporting your goods, or the goods of your principal, to and from a distant marketplace. According to the standard biography of the Prophet, this was precisely the way Muhammad lived for a period of years before receiving his first revelation. What are your greatest worries?

What is my wife getting up to back home?
Is someone pilfering my goods?
Are other merchants making lots more profit than I am?
Will bandits hijack the caravan?
Are the men I do business with trustworthy?

Without prejudice to any other speculations on how the list of *hudud* offenses came into being, here is my interpretation:

Adultery— The *hudud* stipulation of four legal eye-witnesses to the offense of fornication only makes sense when a husband is returning from far away. A husband living at home and becoming aware of his wife's possible misbehavior would surely be loath to summon four adult male neighbors to witness the act. To do so would add public disgrace to the shame and anger he is already feeling. The evidentiary stipulation only makes sense for men who have been away for substantial periods of time and are told, upon their return home, that their wife has been untrue, perhaps because she is pregnant or has recently given birth. In the early seventh century, the only Meccan men who traveled away from their families for such long periods were caravan merchants. Using Qur'anic strictures that originally arose because of a potentially scandalous incident in the life of one of Muhammad's wives to threaten would-be adulterers with capital punishment might well have made sense as a deterrent. The more obvious alternatives, divorce or beating, would have been much weaker deterrents.

Once Islamic law (*shari'a*) became fully elaborated in later centuries, ways of circumventing the *hudud* law's harsh punishment included unscientific extensions of the human gestation period. "The maximum length was subject to strong disagreement given the lack of any relevant instruction in the Qur'an and the Prophetic tradition. The dominant positions were not ruled by medical or pseudo-medical criteria but rather by the practical consideration to guarantee the stability of the Islamic social order and its fundamental pillar, the family. Thus the fixed maximum lengths far exceeded the average nine months, spanning from two to seven or even ten years."²

² Delfina Serrano-Ruano, "The Duration of Pregnancy in Contemporary Islamic Jurisprudence (fiqh) and Legislation: Tradition, Adaptation to Modern Medicine and (In)consequences," *Muslim World*, v. 112/3 (summer 2022), p.367. [<https://doi.org/10.1111/muwo.12442>].

False Accusation of Adultery— Obviously, a malicious and untrue accusation leading to the severe punishment of death by stoning would be a travesty of justice. Nevertheless, any number of reasons might inspire one man to tarnish another's reputation in this way: envy, business rivalry, unresolved grievance, personal animus, and the like. After all, rumors and suspicions that a man's wife has betrayed him are a staple of world literature. Think of Othello and Desdemona, or Rama and Sita. So, it makes sense that imposition of the *hudud* penalty must rest upon absolutely irrefutable evidence.

As a practical matter, the requirement of four adult males witnessing the illicit sexual act might seem absurd; but in an age when knowledge of the maximum length of gestation was known mainly to midwives, and scientific means of determining paternity did not yet exist, it might have seemed like the best available option. Even so, however, the threat represented by just the possibility that a returning merchant might call down capital punishment upon an unfaithful wife and her alleged lover could have worked as a deterrent, despite the substantial balancing penalty for a false accusation. An Iranian *ayatollah* of my acquaintance informed me that in order to confirm that fornication is taking place, the four male witnesses must try to pass a string between the bodies of the couple and have its passage impeded by genital intromission. For practical purposes, this would make it virtually impossible to prove the offense, thus opening up the accuser to the charge of false accusation and making the likelihood of the *hudud* penalty ever being enforced almost nil.

Theft— As later elaborated in Islamic law, the penalty of cutting the hand is reserved for significant appropriations of other people's goods. The stolen goods must be of substantial value and taken by stealth, and the offence must be substantiated by two qualified witnesses, or by the thief's confession, twice iterated. Further qualifications reflect a judicial concern for fairness that is not evident in the stark terms of the *hudud*. The imbalance between the drastic *hudud* penalty and the many later qualifications resonates with the situation of a caravan merchant.

Out on the trail, there is no jail, no police jurisdiction, no court, and no easy way of preventing a thief from absconding and then coming back to steal again. Cutting the hand, a truly horrific punishment inasmuch as it makes most legitimate employment forever impossible, would have served as a deterrent if the thief were aware of it; but in early Islamic times such awareness could not be assumed. Most people, including most thieves, were not yet Muslims. Amputation, regardless of the offender's religious identity, would have served more commonly as a visible stigma warning everyone on the road of a thief's proclivities. If you were journeying along desolate routes, and your primary responsibility was the safe conveyance of your goods, you may have felt more secure to be in the company of other merchants who shared your fears enough to agree to an act of summary justice they considered to be religiously sanctified.

Notably, similar crimes targeting a person's physical goods or premises, such as breaking-and-entry, burglary, home invasion, and arson, relate to urban, or at least settled, environments quite different from caravan life. In town, legal authorities are at hand. A home might be a man's castle, but its security was not a concern of *hudud* law.

Cutting the Road— Bandits and marauders posed a major threat to caravan travel, as indicated by the clichéd description throughout Islamic history of good rulers as those who make the roads safe for travel. The legal status of bandits or ruffians who preyed on cities, such as the *'ayyarun*, figured as a problem for local government rather than a major crime requiring a *hudud* penalty. Specifying “the road” as the place of peril also draws attention to the lack of a parallel *hudud* penalty for piracy, which was the perennial scourge of maritime traders from Rome to China.

The absence of a Qur’anic text using the specific words cited in sources on *hudud* law, a code that supposedly brings together those crimes and punishments specified in the Qur’an, raises the question of how the inclusion of highway banditry came to be justified. According to Joseph Schacht, the eminent European historian of Islamic law of the last generation, the authority for this penalty came from Sura 5:33-34 of the Qur’an: “The punishment of those who fight against Allah and His prophet and create ruin upon the earth is that they shall be slain or crucified or their hands and feet cut off on the opposite sides or be banished from the country. This is their humiliation in this world and in the next world they shall be severely punished — unless they repent before ye have them in your power . . .”.³

Since the historic context associated with these verses relates to the early Muslim community’s warfare against unbelieving Meccans rather than highway banditry, their connection with “cutting the road” betrays the particular concerns of caravan merchants, for who else on the road would have been worth robbing?

Wine-drinking— Is it not peculiar that flogging a person for drinking wine falls into the same legal category as stoning adulterers, executing highwaymen, and cutting off a thief’s hand? To be sure, the Qur’an deplores performing one’s prayers while intoxicated, but wine-drinking seems to have been a constant feature of life in the Islamic world, just as in the world beyond Islam. Wine poems feature strongly in the history of Islamic literature, and many Muslim rulers were notorious toppers.

More to the point of this discussion, maritime commerce in the era of Late Antiquity involved immense quantities of wine. Indeed, wine was probably its most important item, in both quantity and value. Imported wine cannot easily be distinguished from local vintages, but wine was consumed everywhere, including in Mecca during Muhammad’s lifetime, and despite the ban pronounced by the Qur’an. References to wine (*khamr*) in sacred verse provide no clear-cut explanation of its prohibition, and religious scholars have debated the matter vigorously for the last fourteen centuries without reaching a consensus.⁴ Sura 2:219 says: “They ask thee concerning wine and gambling. Say: ‘In them is great sin, and some profit, for men; but the sin is greater than the profit.’” Yet rivers of non-intoxicating wine appear as one of the promised delights of Paradise. Sura 5:90 further links wine with gambling and divination as Satanic abominations. Yet gambling and divining, which did not involve transport economics, escaped the canon of behaviors requiring a *hudud* punishment.

³ Q.v. *katl* in *Encyclopedia of Islam*, 2nd ed.

⁴ For a good introduction to the debate see Ralph S. Hattox, *Coffee and Coffeehouses: The Origins of a Social Beverage in the Medieval Near East*, Seattle: University of Washington Press, 1985, ch. 4.

I think it highly probable that the Muslim conversion of a frowned upon peccadillo into an iron-clad prohibition, enforced by public flogging, owes its origin to caravan traders seeking to undermine the prosperity of rival merchants trading by sea and river. Camel caravans provided excellent conveyance for dry goods — textiles, paper, dried foods, spices, etc. — better than boats and ships where cargos were likely to get drenched. But camels were poorly suited to transporting liquids over long distances. Unlike a ship into which one could pack hundreds of wine-filled amphorae that would lie sealed and undisturbed throughout a voyage, camels engaged in caravan work had their loads taken off and put on again at least once every day, providing ample opportunity for goatskins to spring leaks or amphorae to bump together and crack. Overland transport of olive oil, another highly valued liquid in Late Antiquity, seems to have involved shorter distances, and donkeys more often than camels. Donkeys also carried water.

Representations of camels laden with amphorae in Roman North Africa and mention of camels bringing goatskins filled with olive oil to pre-Islamic Palmyra notwithstanding, camels laden with amphorae and bulging animal skins, much less barrels, make few appearances in Islamic contexts, as do references to camel caravans carrying wholesale quantities of any liquids over long distances. In addition, by the time of the rise of Islam, wooden barrels, which the Romans first encountered when conquering Gaul, had almost entirely replaced clay amphorae as shipping containers for wine. The absence of words for “barrel” and “cooper” in premodern Arabic, Turkish, and Persian indicates a failure to adopt this key new technology for transporting liquids.

Apostasy— This offense does not always appear in lists of *hudud* offenses, but it fits with them analytically. The history of declared Muslims renouncing their faith begins with the *Ridda*, the wars of apostasy that arose after the death of the Prophet Muhammad and briefly threatened the newly formed caliphate. Steadfastness in faith played a different role in the world of commerce, however. Prior to the vast expansion of European seaborne adventurism that accelerated in the sixteenth century, long-distance trading often hinged on religious and linguistic identity. Jews trusted other Jews and used their own writing system to convey business secrets and record financial transactions. In the same way, Armenians trusted Armenians, Greeks trusted Greeks, Sogdians trusted Sogdians, and different Italians trusted compatriots from Genoa, Pisa, Venice, or Florence.

But whom did Muslim traders trust during the first century of Islam? Not Arabs, certainly. Not only were a majority of them still Christian, but different Christian sects had different networks and wrote in languages like Syriac and Greek that the Muslims eschewed. What about other Muslims? Yes, they could be trusted if one could be certain who was a real Muslim, and not just someone who dressed like a Muslim or posed as one to obtain one’s business secrets. So long as the Muslim community remained small, a merchant could probably count on personal or tribal connections to verify membership; but by the end of the first century, non-Arabs, with or without links to Arab tribes, were surely becoming a presence in the caravan world. In this context, the threat of dire punishment for claiming to be a Muslim in one context and denying it in another may have served a useful purpose.

Just as they do today, all Muslims in the first century seem to have known about the *hudud* offenses, and to have recognized some uncertainty as to how offenders should be punished. Those Muslims who acquired judicial office in subsequent centuries also knew that that they should exercise caution in ordering strict application of *hudud* punishments. But while specific *hadith* supported the admonition to exercise caution, the *hudud* themselves had no author(s). Nor did many Muslims in the first century know the Qur'an well enough to disentangle a putatively definitive list of crimes and punishments from widely dispersed verses embedded in radically different narrative contexts.

The suitability of the list to the circumstances of Muslim caravan traders does not prove that they compiled or disseminated it. But absent any tradition ascribing the *hudud* to other authors, the fit between the list's uncompromising rigor and the practical realities of merchants on the road, far from any legal jurisdiction, makes a strong case for authorship.