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LIBERATING ISLAM: How to Reconcile Islamic Criminal Law with Human Rights
By Mark A. Gabriel, PhD

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LIBERATING ISLAM
How to Reconcile Islamic Criminal Law with Human Rights

Mark A. Gabriel, PhD
Contents

About the Author .................................................................................................................................................. ix
Foreword ............................................................................................................................................................. xi
Preface .................................................................................................................................................................. xv
Introduction ......................................................................................................................................................... 1
  Background of the research .............................................................................................................................. 1
  Description of the problem .............................................................................................................................. 6
  Main argument ................................................................................................................................................ 8
Chapter 1 - Understanding the Difference Between Shariah and Islamic Law .............................................................. 13
  1. Shariah versus Islamic law ............................................................................................................................. 15
     a) The primary sources of Shariah: The Qur'an and the correct Sunnah .................................................... 17
     b) Secondary and subsidiary sources of Shariah .......................................................................................... 21
  2. The role of Islamic jurisprudence (fiqh) ....................................................................................................... 25
     a) The historical development of Islamic jurisprudence (fiqh) ................................................................. 28
     b) The four main Sunni schools of Islamic jurisprudence .... 30
     c) The current debate over Islamic jurisprudence ...................................................................................... 33
  3. Islamic law ..................................................................................................................................................... 37
     a) Islamic criminal law ............................................................................................................................... 39
     b) Hudud ordinances ............................................................................................................................... 42
Conclusion ......................................................................................................................................................... 56
Chapter 2 - The Conflict of Islamic World with International Human Rights ........................................................................ 61
  1. Islamic reservations against international human rights laws .................................................................... 63
     a) The view of human rights as a western invention ............................................................................... 64
b) The historical development of international human rights laws .............................................................. 66

c) The Islamic world’s attitude towards international human rights laws ......................................................... 69

d) The debated universality of human rights .............................................. 73

e) The protection of religion as a limit to individuals’ human rights ................................................................. 76

2. The conflict of *hudud* ordinances with international human rights laws ................................................... 78

   a) Cruel, inhuman and degrading punishment ........................................... 78

   b) Discrimination — a violation of the principle of equality ................................................................. 79

   c) Violation of freedom of thought, conscience and religion ................................................................. 80

   d) Death penalty .............................................................................................................................. 81

   e) Procedural abuses .......................................................................................................................... 83

   f) Conflicts of the individual *hudud* crimes with international human rights laws ......................... 83

3. The influence of Islamic jurisprudence on the conflict of *hudud* ordinances with human rights .......... 85

   a) Apostasy (*al-riddah*) ...................................................................................................................... 86

   b) Adultery and fornication (*zina*) ........................................................................................................ 88

   c) Drinking (*shurb al-khamr*) ............................................................................................................ 93

   d) Theft (*sariqa*) .............................................................................................................................. 94

   e) Fighting against Allah and His Messenger (*haraba*) ................................................................. 96

4. The different Muslim positions towards *hudud* ordinances and human rights .................................... 99

   a) The orthodox Muslim view — defending *hudud* ordinances and rejecting reforms ......................... 99

   b) Secular Muslim view — calling for the separation of religion and state .................................................. 101

   c) The moderate Muslim position — striving to build bridges .............................................................. 102

Conclusion ........................................................................................................................................ 105
Chapter 3 - Hudud Ordinances according to the Four Sunni Schools of Jurisprudence

1. The practical application of hudud ordinances in the Islamic world
   a) The case of the Hanafi school in Pakistan
   b) The case of the Maliki school in Sudan
   c) The case of the Shafei school in Brunei Darussalam
   d) The case of the Hanbali school in Saudi Arabia

2. The legal prescriptions of hudud ordinances according to the four Sunni schools of jurisprudence
   a) Illicit sexual intercourse (zina)
   b) Defamation (qazf)
   c) Theft (sariqa)
   d) Drinking alcohol (shurb al-khamr)
   e) Highway robbery (qata al-tariq)
   f) Fighting against Allah and His Messenger (haraba)
   g) Rebellion (al-baghi)
   h) Apostasy (al-riddah)

Conclusion

Chapter 4 - The Islamic Concept of Reformation and Renewal

1. The concept of reformation in the Qur'an and the Sunnah
   a) Allah's promise to send reformers
   b) The Farewell Sermon of the Prophet Muhammad
   c) Reformation in the Qur'an

2. Shariah and reformation
   a) The purposes of Shariah (maqased al-Shariah)
   b) Two major obstacles for reformation

Conclusion

Chapter 5 - An Attempt to Reform Hudud Ordinances

1. Why amend hudud ordinances?
2. The legal challenge and approaches to amending hudud ordinances
   a) The challenge of the ‘definite’ texts
   b) The principles of necessity and reality (fiqh al-darurah, fiqh al-waqa)
   c) The Islamic principle of doubt (shub’ha)
   d) Examples of the amendment of definite texts
   e) Re-reading the five indispensables

3. Suggestions for amending hudud ordinances
   a) Hudud prescriptions developed by Islamic jurisprudence
   b) Hudud punishments prescribed by the Qur'an

Conclusion

Summary and Conclusion

1. Main findings of the book
   a) Questioning hudud ordinances is fully legitimate and necessary
   b) Shariah promotes human rights and reformation and aims to serve the benefit of the people
   c) Suggestions for reformation

2. Main conclusion and contribution of the book

Bibliography
About the Author

Dr. Mark A. Gabriel, a U.S. citizen born in Egypt, is an internationally renowned expert on Islam and human rights. He graduated from Al-Azhar University in Cairo, the oldest and most influential Islamic university in the world, where he worked as a lecturer of Islamic studies. He holds a Ph.D. in Islamic Law and Human Rights from the University of Cape Town (UCT), which is one of the world’s top-ranking universities.

In addition to constant research and teaching, Dr. Gabriel travels around the globe speaking at conferences and universities and advising governments and security agencies on how to counter Islamic terrorism.

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Preface

The main conflict of Islamic law with human rights is caused by the part of Islamic criminal law known as *hudud* ordinances. This is a set of crimes and punishments that assign very harsh and cruel corporal punishments, namely beheading by the sword for leaving Islam, stoning to death for adultery, public flogging for fornication and defamation, amputation of limbs for thievery, and crucifixion, beheading, amputation of limbs, or exile for the crime of *haraba* (fighting against Allah and His Messenger). International human rights laws are grossly violated by the *hudud* ordinances. Pakistan, Sudan, Brunei Darussalam and Saudi Arabia, for example, follow the doctrines of the four main Sunni schools of jurisprudence and enforce *hudud* ordinances, thereby violating some of the core international human rights law instruments to which they are State Parties.

Orthodox Muslims generally defend the *hudud* ordinances, claiming that they are divine and immutable. This book, however, refutes that claim and demonstrates that it is legitimate and possible to reform *hudud* ordinances and to reconcile them with international human rights law. This book explains why it is very important to differentiate between *Shariah* and Islamic law. *Shariah* refers to the rulings recorded in the Qur'an and correct *Sunnah* and is therefore considered divine. Islamic law, by contrast, cannot be considered fully divine, for it includes also such prescriptions that have been developed by the human effort of Islamic jurists.
This book demonstrates, further, that the concept of reformation – including restoration (islah) and renewal (tajdid) – is deeply rooted in the Qur'an and the Sunnah. It requires that Muslims read the teachings of the Qur'an and the Sunnah in the context of their own time and environment. The rulings of Islamic law, thus, need to be examined in the light of the Qur'an, the correct Sunnah and the Islamic core values promoted in them. These include several internationally protected human rights, such as the right to life, equality, and freedom of religion.

This book points out that the main purpose of Shariah is to serve the benefit of the people and to protect them from harm. To this end, Shariah has provided the Islamic principles of reality and necessity. These require that the reality of life and the needs of the people be considered at all times. If necessary for the sake of the people, these principles allow for exceptions to be made from what is generally prohibited – even from divinely assigned prescriptions. This book demonstrates how these principles can be applied to reform the hudud ordinances and to reconcile them with international human rights law.

The unique contribution of this book is that it reconciles hudud punishments with international human rights laws in a religiously and culturally sensitive manner. It offers suggestions for a reformation of hudud ordinances that are in full compliance with Shariah. The suggestions for reformation developed in this book consider the realities of life in twenty-first century Muslim society, including the internationally recognized human rights standards, and at the same time preserve the Islamic scholarly rules and standards.
The suggested reform of the *hudud* ordinances can be of assistance to the Muslim countries where they are currently applied, and also to those where they are currently not practiced, but where radical Muslims might gain more influence in the future. In contrast to the appeal to freeze or abolish *hudud* ordinances pronounced by several secular and moderate Muslim scholars, the suggestions for reformation proposed in this book provide a long-term solution for the conflict between *hudud* ordinances and international human rights laws.

Another major contribution of the book to the topic under discussion is that it clarifies the distinction between *Shariah* and Islamic law and lays out that it is mostly Islamic law, its rules and regulations — especially the *hudud* prescriptions developed by Islamic jurisprudence — that are responsible for the conflict with human rights and that result in Islam and Muslims being rejected as being a major threat to world peace, justice and security. The Qur'an and the correct *Sunnah*, conversely, actually promote values that are comparable to human rights. Consequently, it is not necessary for a good and committed Muslim to follow blindly all the antiquated and inhumane rules and prescriptions that have been developed by Islamic jurists over the centuries and that have become part of Islamic law.

The book demonstrates that *Shariah* (the Qur'an and the correct *Sunnah*) encourages Muslims of all generations to apply the Islamic teachings in a way to fit with their own time and environment. This includes that they might have to re-interpret the primary sources or to clear the Islamic law from the humanly developed rulings that no longer fit with the reality of contemporary life, or that contradict the primary sources of
Shariah, its core values or main purpose. The clarification of the difference between Shariah and Islamic law, thus, can help to restore the image and reputation of Muslims in the world and it can help and encourage contemporary Muslims to search for ways to reconcile also other areas of Islamic law with international human rights standards, while remaining faithful to Shariah.
Introduction

Background of the research

Human rights can be considered as one of the most valuable, and yet vulnerable, gifts to humankind. That human rights have been protected by international law and acknowledged by the majority of the world population as a legal basis for their domestic laws, is one of the most remarkable achievements of our time. Some of Shariah’s core values have in fact much common ground with internationally protected human rights. Unfortunately, though, Islamic criminal law, particularly the set of hudud ordinances with its extremely harsh and cruel punishments, clashes with both Shariah’s purposes (maqased al-Shariah) and with international human rights in a fundamental and severe way. The punishments foreseen by the hudud ordinances include beheading by the sword for leaving Islam, stoning to death for adultery, public flogging for fornication and defamation, amputation of limbs for thievery, and crucifixion, beheading, amputation of limbs, or exile for the crime of haraba (fighting against Allah and His Messenger). International human rights laws ban such punishments. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

i The Arabic term ‘hudud’ (sing. hadd) can be translated as boundary or limit and refers to the boundary that identifies what is prohibited and what is permissible. Hudud ordinances are known as a set of crimes that concern the right of Allah and that have specific punishments.
Punishment (CAT)\(^3\) unanimously declare that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’\(^4\). \textit{Hudud} punishments, further, violate the principle of equality, which is one of the most fundamental human rights. The UDHR stresses that ‘the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and that these rights ‘derive from the inherent dignity of the human person’.\(^5\) Further, \textit{hudud} ordinances violate the religious freedom, protected in art 18 of the UDHR.

Several publicly professed Muslim countries, including Saudi Arabia, Pakistan, Sudan and Brunei Darussalam are members of the United Nations and are among the signatories of the main international human rights treaties or conventions, yet they officially practice \textit{hudud} ordinances as part of their criminal justice system. They compromise their legal responsibility of protecting human rights within their territory by failing to bring their domestic criminal law into line with international human rights laws. Muslim countries that practice Islamic law usually defend the practice of \textit{hudud} ordinances, arguing that they are divinely assigned, and therefore perfect, infallible, mandatory and immutable.\(^6\)

Consequently, amending \textit{hudud} ordinances to ensure consistency with international conventions is not an option to them. This claim is based on a widespread failure to distinguish between \textit{Shariah} and Islamic law. Orthodox Muslims view Islamic law as a God-given system that is superior to any human-made law, including the international laws of human rights.\(^7\) Human rights organisations and activists who call upon Muslim countries to adjust their national laws and make them compatible with international human
rights laws are, therefore, usually viewed by orthodox Muslims as infidels who call on Muslims to court heresy.\(^8\)

Due to the worldwide rise of radical Islamic groups, who strive to implement Islamic law, the threat to human rights through the application of the *hudud* ordinances is steadily increasing. The so-called ‘Arab Spring’ contributed significantly to an increase in the power of radical Islamic groups, including Boko Haram in Nigeria, al-Shabaab in Somalia\(^9\) and the Islamic State in Syria and Iraq (ISIS), all of which practice *hudud* ordinances. The methods used by these radical Muslims groups are extremely inhumane and excessive.

The practice of the cruel *hudud* punishments, further, harms the reputation of Islam and Muslims worldwide and causes them to be criticized as barbaric and antiquated. This contributes to the worldwide rise of what is known as Islamophobia. This can be seen, for example, in the statement of Donald Trump, who suggested during his United States presidential election campaign that Muslims should be banned from entering the United States. Since Muslims represent over 20 per cent of the world’s population, this is an issue of great importance and worldwide relevance.\(^10\) This shows how urgent it is to reform the *hudud* punishments to counter the damage done to the reputation of Muslims and to respond to the practice of *hudud* punishments by radical Islamic groups and by several Muslim countries.

Since the terror attacks of September 11, 2001, the public debates as to whether or not violence is justified by Islam have never ceased or been responded to effectively. Some view Islam as a peaceful religion and claim that ‘Islam’ means ‘peace’, yet others see radical Islamic groups such as ISIS as representatives of the
true Islam. Whilst the non-Muslim world strives to understand which of the two opposing views is the correct one, even within the Muslim world similar debates take place. The set of *hudud* ordinances, with its harsh and cruel punishments, is often at the heart of such discussions.\(^\text{11}\)

In contrast to orthodox Muslims, who defend *hudud* ordinances as being *divine* and immutable, secular Muslims promote the separation of religion and state and call for Islamic law to be disregarded and for *hudud* ordinances to be abolished.\(^\text{12}\) The view of many moderate Muslims who recognises *Shariah* as divine, but strive for more freedom, is becoming more prevalent in the Muslim world. Many of these moderate Muslims are fully loyal to *Shariah*, but at the same time admit that the *hudud* ordinances are in conflict with human rights and that this conflict needs to be dealt with. Among the moderate voices are those of Majid al-Gharbawi,\(^\text{13}\) Nasr Hamid Abu Zayd,\(^\text{14}\) Gamal al-Banna,\(^\text{15}\) Taha Jabir al-Alwani,\(^\text{16}\) Abdullahi An-Na’Im and Tariq Ramadan.\(^\text{17}\) They suggest that the way to solve the conflict between *hudud* ordinances and human rights is that the *hudud* ordinances should be reformed or not be practiced at all.\(^\text{18}\)

In the eyes of orthodox Muslims, however, a call to ignore *hudud* ordinances is unacceptable. Moderate and secular Muslims, who promote the protection of human rights, are often accused by orthodox Muslims of taking part in a large-scale western conspiracy against Muslims and Islam.\(^\text{19}\) This is because the western world continues to be perceived by many orthodox Muslims as an adversary and a colonial power. It is partly for this reason that many orthodox Muslims do not acknowledge the universality of human rights, for they consider them to be an
invention of the colonial powers and a weapon in their hands that is used in the struggle against Islam and Muslims. Human rights activists are often perceived in Muslim countries as opponents of the ruling system. Since human rights activists defend the rights of all people — regardless of their religion or political opinion — they are often believed to seek to change the system and faith.

Orthodox Muslims often defend their position, claiming that Islam has been protecting human rights long before the establishment of the international human rights bodies.

Any approach to ignore or freeze *hudud* ordinances is thus not very promising, for in those countries where they are practiced currently, it is very unlikely that such an appeal would ever be considered. Further, it is important to note that, if *hudud* ordinances were simply set aside, committed or radical Muslims can have them re-enforced at any time, as happened, for example, in Egypt. When the Egyptian regime under Jamal Abdul Nasser put an end to the efforts of the Muslim Brotherhood that had been fighting for the implementation of Islamic law during the late 1950s and early 1960s, the matter seemed to have been settled, and the enforcement of Islamic law was no longer an issue – at least for a long time. About half a century later, however, after the Arab Spring, when the Muslim Brotherhood came to power with Muhammed Mursi as the new Egyptian president, Islamic law was about to be re-implemented. Even though the new government under Mursi did not last for long, since it was overthrown in a military coup, the rise of committed and radical Muslims in Egypt and the neighbouring countries continued. It was only shortly after the defeat of conservative Muslims in Egypt that the world witnessed the rise of the radical Sunni group known as ‘Daaesh’ or the ‘Islamic State of
Iraq and Syria’ (ISIS). ISIS declared the re-establishment of the Islamic caliphate and immediately started applying Islamic criminal law and *hudud* ordinances. Within the first 24 hours after the declaration of its establishment, the world news announced that two women had been sentenced to the death penalty by stoning.\(^{22}\) After having occupied Mosul, Iraq’s second largest city, ISIS called upon the Iraqi Christian community in that city to convert to Islam, pay *jizya* or face ‘death by the sword’.\(^{23}\) Remarkably, ISIS, which claims to practise Islam at its best, caused *hudud* ordinances to appear as the centrepiece of Islamic law. This can explain why many moderate and secular Muslims hesitate to apply Islamic criminal law.

The situation in the Middle East as described shows that the approach of putting *hudud* punishments under a moratorium does not necessarily solve the problem in the long term. In this book it is argued, therefore, that in order to end the violation of human rights by *hudud* ordinances, it is necessary to bring a real reconciliation of Islamic criminal law with international human rights standards through a reformation of the *hudud* punishments. Since *Shariah* itself can be seen as promoting human rights, a focus on Islamic core values can help to reconcile the conflict of *hudud* ordinances with international human rights law.

**Description of the problem**

The crucial question of this book is whether it is possible and legitimate to reform *hudud* punishments so that Islamic criminal law can be reconciled with internationally recognized human rights, and if so, how this can be achieved.
Hudud ordinances violate the internationally protected human rights in several ways and their enforcement harms the image and reputation of Islam and Muslims in the eyes of the world. Orthodox Muslims, however, firmly reject any attempt to reform them, since they believe that hudud ordinances are divinely assigned and thus divine, infallible, mandatory and immutable and that they concern the right of Allah. Consequently it is believed that they cannot be questioned, amended, or forgiven. Efforts to reform them are, therefore viewed as an act of heresy and an assault on Allah’s rights and Islamic identity. Further, orthodox Muslims defend the harsh hudud punishments by declaring that their main purpose is deterrence.

The main challenge to a possible reformation of hudud punishments is constituted by those punishments that have indeed been assigned in the Qur'an. These include the punishment for theft (to ‘cut the hand’), and the punishment for the crime of haraba that is ‘execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land’. Since these punishments are mentioned explicitly in the Qur'an, they form part of what is known as definite provisions. They are, consequently, considered to be immutable.

The other hudud prescriptions that have no legal basis in the Qur'an or correct Sunnah, but have been developed by Islamic jurists, such as the stoning for adultery, or execution for apostasy, are, nevertheless, considered to be part of the set of hudud

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1 ‘Correct’ Sunnah refers to the Arabic term sahih. Correct Sunnah or correct hadith refers to the collection of hadith that have been widely accepted to be ‘correct’ in contrast to those that are considered to be weak or false. Such acceptance depends mainly on the reliability of narrators, respectively the chain of (oral) transmission (isnad) from its source until it was written down, and whether or not the text (matn) is compatible with the teaching of the Qur'an.
ordinances, and are consequently claimed to be divine and immutable, even though they are based mainly on weak *ahadith*¹ and on the jurists’ human interpretations and opinions.

It is shown in this book that one of the reasons behind several of the *hudud* prescriptions that conflict with human rights and with the core values of *Shariah* is a reading of the famous concept of the five indispensables (religion, life, intellect, offspring and property) that wrongly elevates the protection of religion above the protection of individuals’ rights.

**Main argument**

It is argued in this book that it is legitimate, necessary and possible to reform *hudud* punishments and to bring them in line with international human rights laws.

The claim that *hudud* punishments cannot be negotiated since they are divinely assigned and thus perfect and infallible can be refuted on several grounds. One of them is that several of the *hudud* prescriptions have no legal basis in the Qur'an. They have been developed by Islamic jurists — either without a legal basis in the *Sunnah* or with a weak one. Some of them even contradict the Qur'an.

It is argued that it is the failure to distinguish between *Shariah* and Islamic law that is mainly responsible for the claim that the *hudud* punishments are immutable. The book clarifies the difference between *Shariah* as referring to the divinely assigned

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¹ Hadith (plur. *ahadith*) means ‘report’ and refers to the reports about the Prophet Muhammad’s life and deeds recorded in the collection of *ahadith* known as ‘*Sunnah*’. The categories of *ahadith*, including ‘strong’ and ‘weak’ *ahadith*, will be discussed in Chapter 1.
rules and prescriptions recorded in the Qur'an and the correct Sunnah and Islamic law as including additionally the rulings developed by the Islamic jurists. Since these are based on human interpretations and opinions, they are not divine or infallible. It is argued that they can therefore be questioned and can require re-interpretation.

The notion that hudud ordinances refer to a fixed set of a specific number of crimes and their punishments is refuted on several grounds. Firstly, the notion of this set cannot be found in the Qur'an or the correct Sunnah. Besides, it does not match the list of crimes mentioned in the Sunnah as ‘the seven most destructive sins’. Further, there is not even full agreement among the different schools of jurisprudence as to the exact number of crimes to be listed as hudud crimes.

Another key argument refuted in this book, is the claim that hudud punishments concern the right of Allah and therefore cannot be questioned, amended or forgiven by anyone other than Allah himself. As will be demonstrated in this book, this is not a valid argument, since it is based on a false presumption, namely the presumption that the term hudud refers to ‘punishment’. This is not correct, because the term hudud does not refer to ‘punishment’ but to the crime, or the boundary identifying what is prohibited and what is permissible. The notion of the right of Allah does, therefore, not hinder the amendment of hudud punishments.

The book, further, demonstrates that reformation is not an assault on Allah or Islamic identity, for it is, in fact, an Islamic

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1 The seven ‘worst sins’ listed in the hadith are: ‘Associating others with Allah (Shirk); witchcraft; killing a soul whom Allah has forbidden us to kill, except for a right that is due; consuming orphans’ wealth; consuming Ribâ; fleeing from the battlefield; and slandering chaste, innocent women.’ Sahih Muslim (2007) vol 1 at 177 hadith 262.
concept deeply rooted in the Qur'an and the correct Sunnah. One of the key texts concerning reformation is the famous Farewell Sermon of the Prophet Muhammad. In it the Prophet urges Muslims to abide by the teachings of the Qur'an and the Sunnah, and by the core values promoted in them. It is argued that the Sermon can be understood as a call on Muslims of all generations to apply and adjust the teachings of the Qur'an and the Sunnah in a way to fit with their own time and environment, thus to do ijtihad.

The book points out that the Islamic core values that are stressed in the Farewell Sermon and protected in the Qur'an and the Sunnah have much in common with internationally protected human rights. They include the protection of life and property, justice, equality, and freedom of religion. The book, therefore, advocates a re-reading of the concept of the five indispensables in a way that reflects the Qur'anic promotion of freedom of religion and Shariah's purpose to serve the benefit of the people.

The book, further, demonstrates that Shariah — known to be flexible enough to suit all times and environments — is indeed flexible enough to reform hudud punishments. This is thanks to the Islamic principles of reality and necessity (fiqh al-waqa and fiqh al-darurah), the principle of doubt and the method of ijtihad. It is argued that those prescriptions that have been assigned explicitly in the Qur'an, such as the public flogging for adultery or ‘cutting the hand(s)’ for theft, can be reformed by applying the Islamic principles of reality and necessity. These principles make it possible to consider the realities of life and the needs of the people. They allow for exceptions to be made, even in respect of definite provisions, if these are necessary to secure the benefit of the people or to protect them from harm.
Those prescriptions that have been developed by Islamic jurists in the application of the method of *ijtihad* can be reformed by re-interpreting the primary sources of Islam by applying the same method, ie *ijtihad*. It is argued, further, that those prescriptions that have no legal basis in the Qur'an or correct *Sunnah* and that contradict *Shariah*, such as the punishment of execution for apostasy and the stoning for adultery, should be eliminated completely, for the Islamic principle of doubt calls for the suspension of *hadd* punishments if there is any doubt that justifies its suspension.

It is demonstrated, thus, that it is possible to develop — in a religiously and culturally sensitive manner — suggestions for a reform of *hudud* punishments that are compatible with international human rights laws and that are in full compliance with *Shariah* and serve the fulfilment of its purpose by securing the benefit of the Muslim community. It is argued that a reformation according to the suggestions proposed in this book can do much to protect the human rights of the people in those Muslim countries, where *hudud* ordinances are currently practiced and it can help repair the damage done to the reputation of Muslims worldwide.
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