



Is it permissible in Islam to punish theft with imprisonment ?

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Are modern lawmakers in moderate Muslim countries like Indonesia and Malaysia, who replace the corporal punishment for theft [hand amputation] with prison sentences contravening the Qur'an ? Many strict conservative Muslims answer this question with a "yes". Some extremists even argue that Muslims should overthrow these governments by violence, cause they hold the belief that obedience to these [in their eyes] "man-made laws" is equal to *shirk* or *polytheism*. In addition many of them argue that prison sentences are un-islamic. In this paperwork we shall offer a response to these claims, and demonstrate that modern lawmakers in moderate Muslim countries like Indonesia are not contravening the Qur'an. The verse that discusses the penalty for theft reads:

As to the thief, Male or female, cut off his or her hands: a punishment by way of example, from God for their crime: and God is Exalted in power. But if the thief repents after his crime, and amends his conduct, God turneth to him in forgiveness; for God is Oft-Forgiving , Most Merciful [Qur'an 5:38-39]

The first impression one gets by reading this quranic verses is that there is no room or option for an alternative punishment for the crime committed, since the text does not mention any alternative. In another quranic verse however this conclusion can be questioned. In Surah al-Ma'idah God states:

The punishment of those who wage war (*yuharibun*) against God and His Messenger, and strive with might and main for mischief through the land is: execution , or crucifixion , or the cutting off of hands and feet from opposite sides , or banishment from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter ; Except for those who repent before they fall into your power: in that case , know that God is Oft-forgiving , Most Merciful ¹ [Quran, Surah al-Ma'idah 5:33-34]

The above verse is referred to as *ayat al-hiraba* or the *hiraba* verse. *Hiraba*, or waging war against God and His Messenger and making or spreading corruption on earth, is a *hudud* crime. ² The

- 1: Ibn Rushd comments on this verse: "...the majority [of jurists] maintain that this verse was revealed in the case of brigands. Some said that it was revealed in the case of persons who became apostates in the period of the Prophet [saaw] and drove the camels away...The correct view is that it relates to the *muharibun* [brigands] , due to the words of the Exalted , '..Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful..' , as the inability to overpower is not stipulated for the repentance of the non-believers, which confirms that it pertains to the brigands.." [Ibn Rushd, "The Distinguished Jurist's Primer: Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid", Vol. 2 trans. by Professor Imran Ahsan Khan Nyazee (Garnet Publishing ltd ; New Edition , 2000) p. 547]
- 2: The *hudud* crimes are those offenses for which particular types of punishments are given in the Qur'an.

jurist, al-Kasani [d. 587 / 1191] defines hirabah as: "...attacks upon pedestrians for the purpose of taking money by force and in such a way that people are rendered unable to pass freely through the streets ..." ³ The Maliki jurist Ibn Àbd al-Barr [d. 463 / 1070] defines the agent of hirabah as: "...Anyone who disturbs free passage in the streets and renders them unsafe to travel, striving to spread corruption in the land by taking money, killing people or violating what God has made it unlawful to violate is guilty of hirabah ... be he a Muslim or a non-Muslim, free or slave, and whether he actually realizes his goal of taking money or killing or not.." ⁴ In Fiqh-us-Sunnah, a modern summary of the primary traditional schools of thought on Islamic law, *hiraba* is described broadly as: "...a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women, killing cattle, or disrupting agriculture .." ⁵ It is important to note that theft of money or property by force or violence are included in the definition of *hiraba* [*hiraba* is regarded as the *great theft* , since theft is done by *armed force* here , not by *stealth*]

In regards to the four punishments mentioned for *hiraba*, scholars disagreed whether there is a choice between them or they are to be applied through a gradation corresponding to the gravity of the offense by the criminal. The next two sources discuss the different interpretations of the verse, see:

Ibn Rushd states: "...Abu Hanifa and a group of jurists maintained that these *penalties* are dependent upon the offences, which lead to the punishment as determined by the *shar'* , thus, none of the brigands is to be executed unless he has slain someone, none is subjected to amputation unless he has misappropriated property and only those are to be exiled who have neither killed nor misappropriated property. A group of jurists said that, on the other hand, the imam has absolute discretion in their affair, irrespective of their having killed or misappropriated property. The reason for disagreement is whether the word "or" [*aw*] indicates discretion or the details of gradation in proportion to the gravity of the offence..." ⁶

Al-Mawardi states: "...when a band of evil-doers engage in *armed* highway robbery, plunder, murder, and attacks on wayfarers, they become included in the outlaws mentioned by God's words, let His name be exalted, '...The only punishment possible for those who fight against God and His Messenger, seeking to spread corruption throughout the world, is to have them killed or crucified or their alternate hands and feet cut off, or to banish them altogether from the land..' [Qur'an 5:33]. Scholars have approached this verse in three ways. The first is that the sovereign or the officials appointed by him to fight them have the choice to kill but not crucify, kill and crucify, cut off the hands and feet on alternate sides, or banish them from the land. The second holds that those who are masterminds among them should be killed and never pardoned, while the daredevils should have their hands and feet cut off on alternate sides, and the bandits possessed neither of mind nor of strength should only receive correctional punishment and prison terms. The third school orders sentences according to the acts committed..." ⁷

The two previous quotes demonstrate that the view that the ruler is given a choice between any of the four punishments [mentioned in the Qur'an] for those who committed the crime of *hiraba* [irrespective of their having killed or misappropriated property] , is a valid interpretation of the verse, that was preferred by one group of classical jurists. Those who disagreed with this view, and maintained that these penalties are dependant upon the offences, found support for their view in a narration, in which we read that the Prophet asked Jibril about the punishment of those who

³: See: Ala' al-Din Abu Bakr b. Masud al-Kasani, Bada'i, 9:360.

⁴: See: Al-Kafi fi fiqh ahl al-medinah al-maliki [Beirut: Dar al-Kutub al-Ilmiyah, 1418 / 1997] , pp. 582-83

⁵: See: Sabiq, Sayed. 1993. Fiqh-us-Sunnah. [10th edition]. Mecca: Bab al-Loq. 2:450

⁶: Ibn Rushd, "The Distinguished Jurist's Primer: Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid", Vol. 2 trans. by Professor Imran Ahsan Khan Nyazee (Garnet Publishing Ltd ; New Edition , 2000) , p. 548

⁷: Al-Mawardi, "The ordinances of government: a translation of Al-Akham al-Sultaniyya w'al-Wilayat al-Diniyya", trans. by Wafaa Hasan Wahba (Center for Muslim Contribution to Civilization 1996) , p. 68

committed the crime of *hiraba*, and Jibril informed the Prophet that whoever terrorized people and usurped property should have his hand and foot amputated from opposite ends ; whoever terrorized people and committed murder should be killed ; and whoever terrorized people and committed rape should be crucified. ⁸ Professor Khaled Abou El Fald however points out that:

This report was not accepted by everyone. For example, the jurist Malik b. Anas [d. 179 / 795] is reported to have adopted either an unlimited *takhyir* ¹ position [see Ibn hajar al-'Asqalani, *Fath*, XIV: 67] or a somewhat limited *takhyir* position [see Sahnun ibn Sa'id ibn Habib at-Tanukhi, *Al-Mudawwana* IV: 428] ⁹

1: Note: the *takhyir* position refers to the view that discretion is given to the ruler to apply whichever punishment the ruler sees fit. No proportionality between the offense and punishment needs to exist.

In some *tafsir* moreover we read that the Sahaba differed among themselves over the meaning of the verse. Had the hadith about Jibril explaining to the Prophet the *hiraba* verse been authentic, the Sahaba would not have disagreed over its interpretation. Khaled Abou El Fadl also points out that:

The cited occasions for the revelation of this verse are as contradictory and ambiguous as the verse on *baghy* [49:9-10] ... The first set of reports are very general. In these reports, a group of scripturaries purportedly had an unspecified covenant with the Prophet, but they broke the covenant and caused corruption on the earth, so the verse was revealed. The second set of reports provide that the tribe of Hilal b. Uwaymir [Abu Burda] entered into a reciprocal treaty with the Prophet not to attack any group that passed by Hilal heading towards the Prophet. However, when a group from Banu Kinana passed by seeking to join the Prophet, Hilal's tribe attacked, killing the men and stealing their property. This verse was then revealed. Importantly, some reports add that the Prophet was given a *choice* in dealing with them: he could select *any of the penalties spelled out in the verse*, including banishing them. ¹ In a third set of reports, it is argued that the verse was revealed to address a group of polytheists who attacked Muslims, caused corruption on the earth, and then fled to non-Muslim territory before they could be captured. ² A fourth set of reports assert, without further elaboration, that the verse was revealed to address the Israelites [Banu Isra'il] . ³ A fifth report asserts that the verse was revealed to address the Haruriyya [the early Khawarij] . ⁴ The final report, and the one that espoused the most controversy, asserts that a group of men from the tribe of 'Urayna adopted Islam and came to Medina in poor health. They complained to the Prophet that they were a people of the desert and, therefore, were unable to live in Medina. The Prophet sent with them camels so that they could, pursuant to their Bedouin practice, drink the camels' milk and urine and regain their health. The Prophet also sent with them a Nubian shepherd boy known as Yasar.. The men then apostatized and tortured the shepherd boy by severing his limbs, inserting thorns in his eyes, and then crucified him. They stole the camels and fled. After seizing them, the Prophet severed their hands and feet from opposite ends, blinded and crucified them, and then left them to die in the desert ⁵ .. The debates around this particular report focused on whether the revelation of the verse meant to abrogate or reprimand the Prophet for what he did to the men from Urayna. ¹⁰

- 1: Al-Suyuti, *al-Durr*, II:307 ; al-Jassas, *Akham*, II:407 , Ibn al-Jawzi, *Zad*, II:343 ; al-Tabari, *Jami* , V:132
2: Al-Suyuti, *al-Durr*, II:307, Ibn Kathir, *Tafsir*, 11:55, 59 ; Ibn al-Jawzi, *Zad*, II:344 ; al-Tabari, *Jami* V:133
3: Al-Razi, *al-Tafsir*, XI:169 ; al-Tabari, *Jami* , V:134-5
4: Al-Suyuti, *al-Durr*, II:305 ; Ibn Kathir, *Tafsir*, II:55
5: Al-Razi, *al-Tafsir*, XI:169 ; Ibn Kathir, *Tafsir*, II:55-7 ; Ibn al-Jawzi, *Zad*, II:343 , al-Tabrisi, *Majma*, II:82-4

⁸: See: Al-Suyuti, *al-Durr*, II: 305 ; Ibn Kathir, *Tafsir*, II: 56, 58 ; al-Mawardi, *al-Nukat*, II:33 ; Tabari, *Jami* V:134

⁹: See: Abou El Fadl , "Rebellion and Violence in Islamic Law" , (Cambridge University Press 2001) , p. 58

¹⁰: See: El Fadl , "Rebellion and Violence in Islamic Law" , (Cambridge University Press , 2001) , pp. 49-50

It is interesting to note that some narrations support the view that the authorities are given a choice between any of the four punishments [mentioned in the verse] for those who committed the crime of *hiraba* [irrespective of their having killed or misappropriated property] , i.e. the *takhyir* [choice] position. However we cannot draw any conclusion from these narrations, since the cited occasions for the revelation of this verse are contradictory, and because we read in some *tafsir* that the Sahaba differed among themselves over the interpretation of the *hiraba* verse [5:33]. Therefore the choice of interpretation is left open. In our view the *takhyir* position is the strongest one. Imam Ibn Kathir in his *tafsir* also demonstrates that the word “*aw*” [or] in this verse indicates a choice. He writes:

the word “*Aw*” [or] , indicates a choice. As Allah said, “...The penalty is an offering, brought to the Ka’bah, of an eatable animal equivalent to the one he killed, as adjudged by two just men among you; “*or*” , for expiation he should feed the poor “*or*” its equivalent in fasting.” [5:95] Allah said, “..And whosoever of you is ill or has an ailment in his scalp [necessitating shaving] , he must pay ransom of either fasting, “*or*” giving charity “*or*” offering a sacrifice...” [2:196] and, “...for its expiation feed ten of the poor, on a scale of the average of that with which you feed your own families, “*or*” clothe them, “*or*” free a slave...” [5:89]. All of these ayat offer a *choice* , just as the Ayah above [5:33]. **11**

Some scholars who disagreed with the *takhyir* position, argued that it would be unjust if the state authorities were given the option to execute bandits who did *not* kill anyone. Those who favoured the *takhyir* position however offered a response to this view. In the Maliki mahdab for example, one guilty of *hirabah* could be executed or crucified **12** even if they neither killed nor took money. Their reasoning was that the spreading of fear, helplessness and a host of other evils could result from an act of *hirabah* that involved *no* killing or robbery. Indeed, Imam Malik himself is on record as having once remarked that “..Many a one is there who commits *hirabah* who does not kill but who spreads more fear and is *more detrimental to society* in the fear that he spreads than one who actually kills people...” **13** Therefore it is incorrect to claim that the *takhyir* position causes injustice to occur.

In regards to the four punishments that are mentioned in the *hiraba* verse [5:33] , we shall discuss the one which states that the criminals are to be banished from the land. The quranic text “...banish them altogether from the land...” has received several different interpretations. Ibn Rushd writes:

Some said that exile here means imprisonment, while it is said that exile means that he be expelled from one area to another and imprisoned there till such time that his repentance is manifest. This is the opinion of Ibn al-Qasim related from Malik. The distance between the two areas, at a minimum, should be one in which prayers are to be shortened while traveling. Both views are related from Malik, with Abu Hanifa adopting the first one. Ibn al-Majishun said that exile is their fleeing from the land of the imam before the application of hadd to them. Exile after capture, however, is not allowed. ... **14**

It is important to note that scholars like Imam Malik and Abu Hanifa said that the phrase “banish them altogether from the land” means imprisonment. The scholars who favoured this view argued that if the offender is to be banished from one place to another place, the harm is not likely to

11: See: Tafsir Ibn Kathir [Abridged] , Vol. 3 [Darussalam, 2003] , p. 163

12: Prof. Khaled Abou El Fadl Notes: “... In Arabic, crucifixion (*salb*) does not mean placing on a cross or the driving of nails through the hands or feet. As the term is used in the Qur’an and in Islamic law, it simply means tying and hanging someone on the bark of a tree (*yurbaṭ fi jiz’I al-nakhla*). Nailing someone to a cross would be considered heretical in Islamic theology. See al-Qannut, al-Rawda, II: 415 , 417 ..” [Khaled Abou El Fadl , “Rebellion and Violence in Islamic Law” , (Cambridge University Press , 2001) , p. 47]

13: See: Al-Mudawwanah 4:428

14: Ibn Rushd: “The Distinguished Jurist’s Primer: *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid*” vol. 2 trans. by Professor Imran Ahsan Khan Nyazee (Garnet Publishing ltd ; New Edition , 2000) p. 549

be prevented as he may commit further offences there. The only proper meaning of the phrase which would achieve the Shari'ah purpose behind the penalty, is, therefore, imprisonment. In imprisonment, too, a man is banished from his usual place of habitation. Therefore we conclude, that according to one valid interpretation of the *hiraba* verse, imprisonment is a punishment stipulated by God in the Qur'an ! [15](#) It is therefore incorrect to claim that prison sentences are un-Islamic. [16](#)

In conclusion, we are of the opinion that the *hiraba* verse offers state authorities the *choice* to punish brigands by either: execution ; crucifixion ; cross amputation of the right hand and left foot [17](#) or imprisonment. In other words the judge has absolute discretion in their affair, irrespective of their having killed or misappropriated property. By giving state authorities in this verse a choice between various punishments, God made it possible for a judge to apply a penalty in accordance with what is deemed suitable for the region's culture and norms, and the conditions and needs of the time ! In selecting a particular form of punishment the habits and usages of the people should be taken into consideration by the government. A wise administrator or legislator would not like to do anything which might shockingly hurt the feelings of the populace or act in a manner which might appear as atrocious or needlessly cruel. Therefore God gave state authorities in the Qur'an the *option* to punish brigandage with imprisonment, instead of amputation of limbs. In modern society, most people are of the opinion that prison sentences are more humane and educative and therefore an appropriate substitute for amputation of limbs. Therefore it would not be un-islamic for a government to decide that those who commit *brigandage* [without murder] are to be punished with imprisonment, and not amputation of limbs. The Qur'an does permit them such decision !

Theft is discussed in the Qurán in two passages [5:33-34 ; 5:38-39]. One passage [the *hiraba* verse] discusses theft by violence or intimidation [brigandage]. The other one [5:38-39] discusses theft by non-violence, i.e. stealth. Earlier in this paperwork we demonstrated that according to one valid interpretation of the *hiraba* verse [5:33] , brigandage can be punished with imprisonment. If those who seize the property of another through violence or intimidation, are allowed to be punished with imprisonment, then why would it not be permissible to imprison those who commit theft by non-violence, i.e. stealth ? Theft done by violence [brigandage] is seen by God as a greater evil than theft done by stealth. The evidence for this is the fact that God besides imprisonment, also permits a judge to punish brigandage with execution, crucifixion or cross amputation of the right hand and left foot ! If imprisonment can be an alternative punishment for those who commit theft by violence or intimidation [i.e. the great theft] , then clearly it can also be an alternative punishment for those who commit theft in a non-violence way, i.e. theft by stealth [a crime that is seen by God as a *lesser evil*] ! Sir Sayyid Ahmad Khan agreed with this view. In one source we read:

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- 15:** M.H. Shakir translated the verse as follows: "...The punishment of those who wage war against Allah and His apostle and strive to make mischief in the land is only this, that they should be murdered or crucified or their hands and their feet should be cut off on opposite sides or they should be imprisoned .." [The Qur'an, trans. by M.H. Shakir (Tahrike Tarsile Qur'an Inc. 1985) , Surah al-Maidah , verse 33 , p. 100]
- 16:** Umar b. al-Khattab reportedly bought a house in Mecca and turned it into a prison. The same is said of 'Ali in Basra . [Al-Simnani, "Rawdat al-qudah wa-tariq al-najah", ed. al-Nahi (1970-74) , Vol. 1 , 361]
- 17:** The hadith which reads "...there is no cutting [of hand] for a confiscator or usurper or embezzler.." [Ibn Majah, Vol. II , 2591, 2592] seems to suggest that amputation of limbs could not be a possible punishment for highway-robbery. However in the *hiraba* verse we clearly read that God gives the ruler the choice to punish the brigand with cross amputation of the right hand and left foot. This seemingly contradiction was resolved by the jurists. Ibn Rushd writes: "...They (the jurists) also agreed that there is no amputation for the usurper or the quarrelsome dominating person, unless he is a highway-robber *bearing arms* against the Muslims and threatening the highways, for his *hukm* (judgment) is then the same as that of the brigand (*muharib*) , as will be coming up in the discussion of the *hadd* of the *muharib*.." [Ibn Rushd, "The Distinguished Jurist's Primer: Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid", Vol. 2 , translation by Imran Ahsan Khan Nyazee , (Garnet Publishing Ltd ; 2000) , p. 537]. Ibn Rushd in the discussion of the *hadd* of the *muharib* , sums up the different interpretations of the *hiraba* verse [5:33]. Here he (Ibn Rushd) mentions that according to one interpretation of the text, the ruler or judge is given a choice between any of the four punishments (mentioned in the verse) for those who committed the crime of *hiraba* (irrespective of their having killed or misappropriated property) [Ibn Rushd, *Ibid.* , p. 548]

On the issue of the cutting off of the hands of the thief, he [Sayyid Ahmad Khan] discusses the following Qur'anic verses: "...And as for the thief, whether man or woman, cut off their hands in recompense for their deeds.." [Qur'an 5:38] "...Only, the punishment of those who wage war against God and His prophet and who strive to make mischief in the land ...is alternate hands and feet should be cut off or they should be banished from the land.." [Qur'an 5:33] . In interpreting these verses, Sayyid Ahmad Khan followed the reasoning attributed to Abu Hanifa, the founders of the school of law followed by most Muslims in the subcontinent. The argument runs as follows: 1. In the second verse, there is a choice between two types of punishment, hand cutting or imprisonment. 2. In all the schools of law, there is stipulation as to which goods would require the hand cutting if they were stolen. This means that the jurists did not consider the simple stealing of anything to deserve this punishment. 3. There is good evidence that even at the time of the Companions of the Prophet hands were not cut off and only imprisonment was used [Dar, "Religious Thought of Sayyid Ahmad Khan" (Institute of Islamic Culture 1957) pp. 262-263]. In sum, then, hand cutting is a possible form of punishment, but not the only one. **18**

Various narrations however seem to suggest that cutting of the hands was the only permissible punishment for theft. In one narration for example we read that a noble woman stole at the time of the Prophet, and Usaamah ibn Zayd wanted to intercede for her. The Prophet became angry and said, "Do you intercede concerning one of the hadd punishments set by God ? Those who came before you were destroyed because if a rich man among them stole, they would let him off, but if a lowly person stole, they would carry out the punishment on him. By God, if Fatimah bint Muhammad were to steal, I would cut off her hand." [Bukhaari 3216]. It is further reported that the Prophet said: "...May God curse the thief who steals an egg and has his hand cut off, or steals a rope and has his hand cut off..." [Bukhaari 6285] and ; "...The hand is amputated for a quarter of a *dinar* or more.." [Bukhaari 6291]. In Sahih Bukhaari we also read that the Prophet cut off the hand of a thief for stealing a shield that was worth three Dirhams. These narrations however do not disprove our view that imprisonment can be an alternative punishment for theft. First it can be argued that the verse about cutting off the hands [5:38] was revealed prior to the *hiraba* verse [in which imprisonment is mentioned as an alternative punishment for amputation of limbs]. Prior to the revelation of the *hiraba* verse, amputation of limbs was the only possible punishment for theft in Islam. In this respect, it can be argued that statements like: "... if Fatimah bint Muhammad were to steal, I would cut off her hand" or ; "...may God curse the the thief who steals an egg and has his hand cut off.." or ; "...The hand is amputated for a quarter of a *dinar* or more..." ; were made prior to the revelation of the *hiraba* verse [5:33]. Secondly it can be argued that statements like "...the hand is amputated for a quarter of a *dinar* or more..." , only demonstrate under which conditions amputation of limbs would be permissible, in case the government would prefer this punishment over imprisonment. Thirdly it is important to note that the punishment of mutilation for theft was practiced by the Arabs before the advent of Islam. Also, in a Bedouin society, where the people move about with their tents and camels in search of pasture, it was not possible to penalize the thief by imprisonment. Imprisonment necessitates durable structures and guards, feeding and care of inmates. The society in which the Prophet lived could not afford these things. Hence the only reasonable option back then was corporal punishment. In this historical context was the next verse revealed: "...As to the thief, Male or female, cut off his or her hands.." [5:38]. Later on God revealed the *hiraba* verse [5:33]. In this verse God ruled that theft by violence could be punished by either amputation of limbs *or* imprisonment. **19** If imprisonment can be an alternative punishment for those who commit theft by violence or intimidation [i.e. the "great theft"], then clearly it can also be an alternative punishment for those who commit theft in a non-violence way, i.e. theft by

18: See: Sheila McDonough , "Muslim ethics and modernity: a comparative study of the ethical thought of Sayyid Ahmad Khan and Mawlana Mawdudi" [Wilfrid Laurier University Press, June 1984] , p. 48

19: In regards to the *hiraba* verse [5:33] Al-Qadi As-Safadi [d. 784 / 1378] states: "...Malik says that no particular order need to be followed. The ruler can choose between killing, crucifixion, amputation of alternate hand and foot, exile or imprisonment..." [As-Safadi, "The Mercy: In the Difference of the Four Sunni Schools of Islamic Law" , trans. by Aisha Bewley (Dar Al Taqwa Limited 2004) p. 194]. Ibn Abi Zayd, states that if a bandit kills, he must be killed. Otherwise, *the ruler has discretion* on the fate of a bandit according to his history of criminality and the degree of danger he poses to society [al-Risala pp. 330-1]

stealth [a crime that is seen by God as a lesser evil]. By giving state authorities in the *hiraba* verse a choice between punishments like “amputation of limbs” or “imprisonment”, God made it possible for a government to apply a penalty in accordance with what is deemed suitable for the region’s culture and norms, or the conditions and needs of the time ! God did not forget the future world in this quranic verse. However in the society in which the Prophet lived, it was not reasonable to punish a thief by imprisonment. Hence the Prophet inflicted amputation of limbs as a punishment for theft, and not imprisonment. So even if we for the sake of argument would say that statements like: “..The hand is amputated for a quarter of a *dinar* or more..” or ; “.. if Fatimah were to steal, I would cut off her hand...” ; were said after the revelation of the *hiraba* verse , in no way do they disprove our view, since the historical context made it very logical for the Prophet to say such things even after the revelation of the *hiraba* verse. In addition it can be argued that most people in the early Muslim societies were not interested in replacing the corporal punishment for theft with imprisonment. A good reason for this could be the fact that the punishment of mutilation for theft was practiced by the Arabs before the advent of Islam. Why would they want to change a custom that was already widely accepted by the society ? Therefore many of the early Muslims did not search for any quranic verse or interpretation of the text that would demonstrate the permission to replace the corporal punishment for theft with imprisonment. There was simply no need or interest for this in the very early Muslim societies. But again, this does not in any way disprove our view that there is a quranic verse and interpretation of the text, which demonstrates that the corporal punishment for theft “can” be replaced by imprisonment. Therefore we conclude that modern lawmakers in moderate Muslim countries like Indonesia and Malaysia are not contravening the Qur’an, when they replace the corporal punishment for theft or brigandage with imprisonment. [20](#)

Conclusion:

Mufi M. Mukarram Ahmed, a strict traditional scholar, states in the “Encyclopaedia of Islam” that Islam permits punishments by way of imprisonment [in certain instances] , but does not favour them. Although we do not agree with the view that Islam does not favour punishments by way of imprisonment [21](#) , we praise the Mufti for pointing out that punishments by way of imprisonment are not forbidden [haram] or un-Islamic. In addition we would like to quote some of his comments on the *hiraba* verse [5:33] that are very interesting. In regards to this verse, the Mufti comments:

All conceivable offences against the State, such as treason or public disorder, or willful defiance of the laws of God and of constituted authority, are made punishable with anyone of the four punishments enumerated above, that is 1 killing ; 2 crucifixion , 3 cutting hands and feet, and 4 exile from land. The expression which literally means “*elimination from land*” may mean banishment or imprisonment in a jail to prevent the commission or repetition of an offence. It should be distinctly noted that the punishments are in the alternative, that is, for one, the other may be substituted in view of the exigencies of the case. It shall, therefore, follow that where the killing or cutting of hands is prescribed, it shall *not* be un-islamic to commute it to some other form of punishment. In selecting a particular form of punishment the habits and usages of the people, the facts and circumstances of each case including the status of the offender may be taken into consideration... A wise administrator or legislator would not like to do anything which might shockingly hurt the feelings of the populace or act in a manner which might appear as atrocious or needlessly cruel. ... the words “waging war against Allah and His Apostle” does not mean actual taking up of arms against Allah for that would be meaningless; it means *disobedience* to His commands. [22](#)

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- [20](#): Imprisonment for such term as in the opinion of the court, may likely to lead him to repentance.
 - [21](#): If punishments by way of imprisonment were not favoured in Islam, the Holy Qur’an would not have mentioned banishment [i.e. imprisonment] as an alternative option for crucifixion, execution or amputation of hands or feet in the ayat al-hiraba. [See: Holy Qur’an , Surah al-Ma’idah , 5:33-34]
 - [22](#): Mufti M. Mukarram Ahmed, “Encyclopaedia of Islam” Vol. 10 [Anmol Publications , 2005] , p. 301

As we noted earlier, in the time of Prophet Muhammad, it was not possible to penalize the thief by imprisonment. ²³ Hence the Prophet inflicted *amputation of limbs* as a punishment for theft, and not imprisonment. In this respect it is important to mention that according to one tradition of Ibn Abbas, “the Prophet ordered amputation of the foot after the hand” ²⁴. This text demonstrates that the Prophet was of the opinion that a thief who steals a second time, should [in case amputation is chosen as a penalty] not have his second [left] hand amputated, but one of his feet [i.e. his left foot]. If we keep this mind, and take a look again the *hiraba* verse [5:33], it becomes clear that the *option* of cross amputation of the right hand and left foot, is equal to the punishment for a thief who commits theft a second time. The robber however *could* lose his right hand and left foot immediately after his first armed robbery, whereas the thief could only lose his left foot after his second theft. This again demonstrates that God viewed robbery or brigandage as a greater evil than theft. In this respect it is important to mention that God offered state authorities or rulers in the *hiraba* verse the *choice* to punish brigands by either execution, crucifixion, amputation of limbs or imprisonment. If imprisonment can be an alternative punishment for those who commit theft by violence or intimidation, then clearly it can also be an alternative punishment for those who commit theft in a *non-violence* way, i.e. theft by stealth [a crime that is seen by God as a *lesser evil*] !

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- 23: Dr. Mohammad Hashim Kamali states: “.....To formulate a rational response that could explain the punishment of mutilation for theft, the jurist would reflect on the time, place and circumstances in which the law in question originated. The following factors would need to be brought into the picture: firstly, the punishment of mutilation for theft was practiced by the Arabs before the advent of Islam. Second, Bedouin Arab society consisted largely of nomads who travelled with their camels and tents in search of pastures, and it was not feasible under the circumstances to penalize the thief with imprisonment. Imprisonment necessitates durable structures and guards, feeding and care of inmates and so forth, hence the physical punishment was the only reasonable option. Since there were no protective barriers to safeguard the property of people, society could not afford to tolerate proliferation of theft. Mutilation of the hand of the thief also provided the kind of punishment that disabled the thief from persisting in his wrongdoing, just as it also left a visible mark on the offender to warn people against this *menace*. Mutilation was thus an eminently rational punishment for theft. Even after the advent of Islam, the same punishment was retained, as there was *no drastic change* in the customs and lifestyles of the Arab society...” [M. Hashim Kamali, “Shari’ah Law: An Introduction” (Oneworld Publications , 2008) pp. 130-131]. In addition it is important to point out that in the time of Prophet Muhammad, prisoners of war, not being criminals, used to be made over by the Prophet to some citizens of Medina, as in the case of the prisoners of Badr, to keep them in their houses as guests, on account of the want of prisons ; but criminals like brigands and thieves, could not be treated and entertained so hospitably. Thus the only option left for Prophet Muhammad was to punish these criminals by corporal punishment. This point is also confirmed by another historical fact. In the desert region in which Prophet Muhammad lived, there was neither a river nor adequate rainfall to support agriculture worthy of the name, and the main sources of livelihood were the caravan trade and a little livestock breeding. As most of the people were not tied to the land, they lacked the urban structures necessary for the birth of a state. There was no administrative organization in any meaningful sense of the term, and still less any statelike structures. Each tribe had its chieftain who decided on the movements of the tribe, arbitrated internal disputes and sealed alliances with other desert tribes. Assaults by members of one tribe against members of another tribe were the source of constant and often bloody conflict. If the chieftains in question were able to reach a quick agreement about compensation, peace could be preserved and the two tribes could continue to coexist smoothly. If such an agreement proved impossible, however, the resulting conflict could last a long time and bring a vicious cycle of raids and revenge raids. Historians tell of the twists and turns of the Bassu war, which originated in the theft of a camel and pitted various tribes against one another for 40 years. The story in question shows us that the Arabs in the time of the Holy Prophet desired a severe punishment for theft. Crimes like theft called for vengeance – that is, the death of the perpetrator. In the case of intertribal offences, where strong ties of solidarity operated within each tribe, execution of the criminal by close relatives of the victim called down in turn further acts of vengeance. And so the cycle of wars was unleashed. As a result the Qur’an stipulated in one verse [5:38] that the hand of a thief should be cut off. This punishment is of course very harsh, but in the Arabia of the time of the Prophet, where there was no state and there were no prisons, this form of justice made it possible to *avoid killing the thief* and unleashing a tribal war that might cost many lives. But God did not forget the future world. Hence He demonstrated in another Quranic verse [5:33], that amputation of limbs as a form of punishment for theft or robbery *can* be replaced by imprisonment !
- 24: Ibn Rushd: “The Distinguished Jurist’s Primer: Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid” vol. 2 trans. by Professor Imran Ahsan Khan Nyazee (Garnet Publishing Ltd ; New Edition , 2000) p. 545

Appendix I: Repentance waives punishment

When the Holy Qur'an prescribes a penal sanction, it adds that the offence may be forgiven or that repentance should be taken into account. In the hiraba verse [ayat al-hiraba] for example we read:

The punishment of those who wage war (*yuharibun*) against God and His Messenger, and strive with might and main for mischief through the land is: execution , or crucifixion , or the cutting off of hands and feet from opposite sides , or banishment from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter ; Except for those who repent before they fall into your power: in that case , know that God is Oft-forgiving , Most Merciful [Quran, Surah al-Ma'idah 5:33-34]

The Maliki jurist Ibn al-Jallab [d. 378 / 988] , adopted the *takhyir* position. He states that if a group of people commit banditry, the ruler has the *option* of either killing, crucifying, severing a hand and foot from opposite ends, or beating, banishing, and imprisoning them. He also adds that a bandit may be executed even if he does not commit murder. Further he confirms that the ruler may also choose to banish him to a town in which he is imprisoned until he repents. In addition he states that if a bandit repents and surrenders *before* being captured, that the specified punishments for the crime of banditry should not be applied. Nonetheless, he will still be liable for life or property destroyed. This means that the victims of his crimes have the option of demanding retribution or compensation, or they may forgive him. [25](#) It is important to note that repentance [*tawbah*] can only waive punishment, in case the offender presents himself before the ruler *prior* to his arrest. [26](#)

Despite the heinousness of brigandage, repentance can waive punishment, as is clearly stated in Qur'an. By analogy, punishment for other acts can also be remitted provided there is repentance. [27](#)

Appendix II: Another alternative punishment

Earlier in this work we argued that imprisonment can be an alternative punishment for theft. Some traditional Muslims might reject or not accept our view, on the ground that we could not cite any of the four great Imams in support for our view. In this respect we would like to point out, that even if we for the sake of argument would accept that imprisonment cannot be an alternative punishment for theft [but only for high-way robbery or brigandage] , then we can still find another alternative punishment for theft in classical Islamic jurisprudence. Al-Qadi As-Safadi [d. 784 / 1378] states:

They [the Muslim jurists] agree that if a stolen item remains, it must be returned. Does a thief incur the hadd if he returns the stolen item ? Abu Hanifa says that if the person stolen from *prefers* to be reimbursed, then the thief's hand is not amputated. If he *chooses* amputation and it is done then the thief is *not* liable for what was stolen. Malik says that if the thief is wealthy, his hand is amputated and he is liable for what he stole. If he is poor, he is not pursued for its price, but his hand is cut off. [28](#)

[25](#): See: Ibn al-Jallab , *al-Tafri* , II:233

[26](#): The obvious reason behind this ruling is the fact that it is not too difficult for a person who wants to escape punishment to *feign* repentance once he is arrested. Therefore repentance must occur *prior* to arrest.

[27](#): This seems to be also the view of al-Shafi'i [B. Dodge, "Muslim Education in Medieval Times" , p. 70]

[28](#): Al-Qadi Muhammad ibn Abd Ar-Rahman As-Safadi, "The Mercy: In the Difference of the Four Sunni Schools of Islamic Law" , translated by Dr. Aisha Bewley , [Dar Al Taqwa Limited , 2004] , p. 194

According to Abu Hanifa, if the victim of theft would prefer to be reimbursed [instead of receiving the stolen goods back [29](#)] , then the thief's hand is not amputated. Support for this view can be found in a narration, in which the Prophet reported to have said: “..An owner of stolen property is not compensated if the hadd is applied to the thief...” [30](#) In another version the text reads: “..If the thief is amputated, there is no liability for compensation...” [31](#) The Hanafis argued that this tradition demonstrates that a thief cannot be subject to both amputation and compensation. The text indicates that there was room for a choice between compensation or application of the penalty of amputation. In addition it can be said that if amputation cancels out compensation, then so does compensation also cancel out amputation ! According to the Hanafis a victim can only demand compensation or application of the penalty of amputation but not both ! [32](#) Others who disagreed with this view argued that the victim of theft could not demand compensation, but was forced to be satisfied only with the application of the penalty of amputation [in case the stolen property reached the *nisab* [33](#)]. If we adopt this view, then victims are forced to buy again [from their own pockets] the goods they lost. Imagine the effect this law would have on poor people ! Therefore we believe that the opinion of Imam Abu Hanifa is more correct. Moreover it can be said that the view of the Hanafis is supported by the prophetic tradition: “If the thief is amputated, there is no liability for compensation”. In regards to the authenticity of this report, Ibn Rushd comments:

this tradition is weak according to the traditionists; Abu Umar said that it is *maqtu'* [report with a cut-up chain] , according to them, but some narrated it with a complete chain and it is recorded by al-Nasa'i. [34](#)

Ibn Rushd points out that the authenticity of this tradition can be debated. However what is more important to note is that the Hanafi jurists deemed this tradition strong enough to rely upon ! As a result Imam Abu Hanifa ruled that if the victim of theft would prefer to be reimbursed, then the thief's hand is not amputated. It is interesting to note that the English orientalist Robert Charles Zaehner refers to this Hanafi ruling in his work “The concise encyclopedia of living faiths” , see:

For crimes against property, the Koran prescribes amputation of the hand of the thief the Hanafi school [madhab] , at least, in later times permitted the substitution of *monetary penalties* for theft also. [35](#)

29: In case the stolen goods are still in the possession of the thief. If not, the victim of course can still demand compensation [in case the person would not prefer to demand application of the penalty of amputation].

30: See: Suyuti, Sharh Sunan al-Nasa'i , 8:93

31: See: Kasani, Bada'i , 9:341 ; for other versions see: Daraqutni, Sunan al-Daraqutni , 3:129-30

32: See: Rudolph Peters: “Crime and Punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century” (Themes in Islamic Law) , [Cambridge University Press, 13 Feb 2006] , p. 57

33: Nisab: the minimum scale fixed for a number of things. For *sariqa* [theft] it is a minimum amount of wealth. It is reported that the Prophet said “...The hand is amputated for a quarter of a *dinar* or more...” [Bukhaari 6291]. In this tradition the Prophet clarifies that the penalty of amputation becomes only a possible form of punishment, in case the stolen property is worth a quarter of a *dinar* or more. But as we mentioned earlier, Abu Hanifa said that if the person stolen from prefers to be reimbursed, then the thief's hand is not amputated [See: As-Safadi, “The Mercy: In the Difference of the Four Sunni Schools of Islamic Law” , translated by Dr. Aisha Bewley , (Dar Al Taqwa Limited , 2004) , p. 194]

34: Ibn Rushd: “The Distinguished Jurist's Primer: Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid” vol. 2 trans. by Professor Imran Ahsan Khan Nyazee (Garnet Publishing Ltd ; New Edition , 2000) p. 544

35: Robert Charles Zaehner, “The concise encyclopedia of living faiths” (Hawthorn Books, 1959) , p. 189

Appendix III: Amputation in other Religions

Previously we demonstrated that it is not un-islamic to replace the corporal punishment for theft with prison sentences. In addition we pointed out that Imam Abu Hanifa stated that if the person stolen from prefers to be reimbursed, then the thief's hand is not amputated. In other words hand cutting is a possible form of punishment for theft, but not the only one. Those who criticize Islam simply for the fact that the penalty of amputation can be found in the Qur'an, should realize that this type of punishment does also exist in other religions. In Hindu law books for example we read:

With whatever limb a man of low caste does an injury to a superior, even that limb shall be cut off [36](#)

for stealing cattle he [the thief] should be made half-footed [37](#)

One who steals gold, silver, or clothing beyond the value of 50 must be deprived of a hand [38](#)

The Bible also approves of hand cutting, see:

If two men are fighting and the wife of one of them comes to rescue her husband from his assailant, and she reaches out and seizes him by his private parts, you shall cut off her hand. Show her no pity. [39](#)

Prof. Carolyn Pressler comments on this law:

The following law, Deut 25:11-12 , treats a case where a married woman intervenes in a fight between her husband and another man by seizing the genitals of her husband's opponent. The penalty laid down for the woman is that her hand is to be amputated ... That the woman is punished for for seizing a man's genitals even if she has acted in order to rescue her husband shows that for a married woman to have sexual contact with a man other than her husband is abhorrent, even under extenuating circumstances [40](#)

[36:](#) Manu 8.279

[37:](#) Manu 8.325

[38:](#) Vishnu 5.81

[39:](#) Deuteronomy 25:11-12

[40:](#) Pressler, 'The View of Women Found in the Deuteronomic Family Laws' [Walter de Gruyter 1993] 74-75