**The Ethics of Penal Amputation**

**Introduction**

Malaysia is a South East Asian country that has, for historical reasons that we need not go into, a mixed population and rich racial diversity. About 60% of the population is Muslim and Islam is the state religion, though the rights of other religious and ethnic groups are protected by law. It is sometimes held up as a poster boy of a moderate Muslim country and deserves this reputation as it has, in the main, protected its minorities. While the majority of the population are Malays (who are Muslims), 40 % of the population belongs to the Chinese and Indian communities. The Chinese community is economically dominant while the Indian community is comparatively much poorer. They are mostly Buddhists, Hindus or followers of Confucius. Malaysia is proud of its tradition as a modern Muslim country, where, while the predominance of Islam is non-negotiable, the country has made great strides as a united rainbow country which is knocking at the door of developed status.

The Malaysian state of Kelantan has been ruled by an Islamic Party, the Parti Islam se Malaysia (PAS) since 1999. This party, which believes that Malaysia should be ruled by Sharia laws, recently proposed the implementation of Hudud laws in that state. It is unlikely that the present constitutional arrangements would allow such implementation in a single state and the federal government has ruled out its implementation. However the suggestion unleashed a controversy among the physician community in Malaysia. The Malaysian Medical Association rejected a proposal made by the Deputy Chief Minister of the state to utilize the services of qualified surgeons to carry our punitive limb amputations. On the other hand the a Muslim Medical group, the I-Medik took issue with the Malaysian Medical Association blaming it for being hasty in its reaction and not understanding the Islamic Penal code. (1)

The 14th General Elections in Malaysia in 2018 saw the PAS making a strong performance and they have retained power in the state of Kelantan while also capturing power in Terengganu, another state where they have been in and out of power in the past two decades. This has led to speculation that there will be fresh impetus to attempts to implement hudud laws in states ruled by the party. And in fact, the Deputy Chief Minister of Kelantan has stated that RM 1 million ( about USD 330,552) will be allocated to research on how the policy may be implemented.(2)

Several Muslim States such as Sudan, Saudi Arabia and Iran among others already practice Islamic penal justice, including amputations. However this study will mainly focus on Malaysia though it will draw upon practices in other Islamic countries as well.

The question therefore arises, how should a modern medical practitioner approach this ethical question? A hypothetical situation may be as follows:

*Dr A, a specialist surgeon is assigned by the head of the Department of Surgery to perform amputation of the right hand at the wrist for a prisoner who has been convicted for theft and been sentenced to amputation by Islamic law. Should he comply with the request? What are the ethical aspects that would govern this assignment?*

**Analogous Situations**

It is entirely possible that for a Western audience brought up in the modern Western and more specifically Christian tradition this may be considered remote from their interests or needs. One can be fairly sure that the above dilemma is unlikely to be faced by any Western or Indian surgeon in the foreseeable future. However there are circumstances that a similar type of dilemma may be faced even in Western style democracies. In the fairly recent past, a Scottish surgeon, Robert Smith was approached by a patient with a request to amputate his healthy leg. This is a known psychiatric condition, described in 1977 which involves two related but distinct conditions; acrotomophilia, an attraction towards amputees and apotemophilia, a sexual attraction to becoming an amputee. Apparently people with this condition are not rare, Johnston and Elliot, reporting in 2002, recorded a Yahoo chat group for people who wanted amputation which had 2100 members. (3)

After consulting with psychiatrists Smith decided to do the surgery which he completed to the full satisfaction of the patient. He then repeated the surgery in another similar patient. However while planning a third operation; he was prevented from operating by the Trust that ran his hospital. Incidentally, a recent novel by J K Rowling, of Harry Potter fame, has spoken of such patients (4).

Another issue that has similar ramifications is the practice of execution by lethal injection. In the United States 30 states still have the death penalty in their statutes and all of them utilize lethal injection as the method of execution. Now, while other commonly used methods of execution do not require the active participation of the physician (they are only required to certify death); in the case of lethal injection, sometimes the participation of a physician is essential. In fact in 27 US states, doctors must be compulsorily present at the execution. In a landmark case in California in 2006 , the so called Morales case, a federal district judge ruled ( 5) that in order to conduct lethal injection execution, the state must have a qualified medical person to certify that the individual was unconscious before the administration of potassium chloride used to stop the heart. This meant that physicians needed to participate in the actual execution and this threw up a host of ethical issues akin to those in penal execution. An examination of the ethics of penal execution can inform about the dilemmas faced in penal amputation as well.

**Hudud laws and their implementation**

It may be useful at this juncture to examine the exact provisions of the Hudud laws. Surprisingly most proponent s as well as opponents of the law appear to be unclear about what Hudud is all about and what the provisions of the implementation of the law are. *(The following section is indebted to Souryal and Potts ( 6) and Khaled Abou El Fadil ( 7) )* It is necessary to point out here that the laws as described in the following are based on the majority Sunni view. I have not discussed other interpretations as Malaysia has been declared an Islamic country and the Sunni school of Islam is the official religion. (8).

“ Islamic law has two primary sources; the Shariah which is a theocratic legal system based on a divine code revealed to the Prophet Mohammad ( PBUH), and the Sunnah or the acts of the prophet”.( 6) The concept of hudud however is not found in the Quran, though it has found mention in the hadiths which are considered authentic by Muslims. The word Hudud is plural for the Arabic word Hadd, meaning the final limit. The Quran has several passages which mention the” limits of God” beyond which Muslims are warned never to transgress. The specific Hudud crimes were compiled by early Muslim lawmakers from references made by the Prophet (PBUH) and the early Muslims. It is accepted that Hudud crimes are violations of the rights of God and the punishments are laid down in the Quran or the Sunnah. The crimes that fall under this category are Zina( fornication), Sariqa ( some types of theft). Qadif (false accusation of fornication), Shurb –al Khamur (drinking alcohol), and Hiraba (armed robbery). There are other crimes that are considered by some schools of law, but not all, to be Hudud crimes as well. These include sodomy, apostasy and assassination for the purpose of robbery. The important point to note here is that crimes in the Hudud category are crimes against God Himself and their penalties are also decreed by the Supreme Being and they are absolute, nonnegotiable and cannot be pardoned. As such a proven Hudud offense carries, as it were, a mandatory sentence laid down by the Quran, one which cannot be mitigated by earthy judges. These include hand amputation for theft, 100 lashes for fornication, and 40 lashes for alcohol consumption and so on.

One important issue which is often overlooked when considering Hudud crimes and their punishment is that the burden of proof is set at extremely high levels. For such crimes there are only two types of evidence that can be accepted. The first is Iqrar (confession). The confession however can be retracted at any time, even up to the moment of the execution of the punishment. The second type of proof is eyewitness testimony. The number of eyewitnesses required varies depending upon the crime. Four male eyewitnesses are required to prove guilt in cases of adultery and two in case of theft. The testimony of two female witnesses equal that of a man and female witnesses are permitted only if there is also a male witness. Not only this, the witness must have some other qualifications as well. They must be 1) Persons of moral integrity, 2) Mature, that is, above the age of puberty, 3) Sane at the time of observing the offence and when giving testimony 4) Have never been convicted of any crime or have nagged in deviant behavior. ( 6 ) .

The basic purpose of setting such high standards of evidence was obviously to prevent them from being applied in practice routinely. And this was acknowledged by the Prophet (PBUH) himself, who it has been reported, tried to prevent an accused of adultery from confessing. And, in fact, throughout the history of Islamic societies, a Hudud punishment was a rare event. “Muslim jurists made the evidentiary requirements and the technical pre-conditions for the enforcement of the Hudūd practically impossible to fulfill or because they admitted so many mitigating factors to the point that only a criminal who was most determined to be punished could be made to suffer the Hudūd penalties”. (7) The criminals could, however, be punished by Tazir, or discretionary punishments. This is analogous to American civil law in which the burden of proof is less than in criminal law and the punishment is different as well. (8) Scholars have suggested(9) that the presence of such laws have led to low levels of crime in Islamic societies and have also suggested that after a Hudud punishment the criminal could be rehabilitated in society instead of being sent to prisons which are notorious for reinforcing criminal proclivities rather than acting as institutes of correction.

One question that arises here is the possibility of coercion in obtaining the confessions. In Islamic law this is not permissible. Having said that it is well known that several Islamic regimes do not follow such niceties and confessions are forced from prisoners by torture. This study does not address this as it is impossible to formulate any ethical guidelines for such societies and this paper does not even intend to try. Our discussion will be confined to societies where the rule of law prevails even if this may not be a liberal society in the dictionary meaning of the term. The argument has been further clarified in the next section,

The method of amputation was also fairly standardized in medieval times. It was usually carried out in the central square of town on Fridays after the noon prayer. The condemned person was produced, the verdict read put loudly and the arm stretched out over a flat surface. In a quick move, the professional executioner exerted strong pressure, pulling the hand away from the wrist and severing the limb at the wrist. A male doctor and nurse were required to be present and they now took over, to stop bleeding and to bandage the wrist. (6)

If the role of the physician was limited to administering the criminal after the punishment had been carried out, there would not be much controversy, but in many countries where Hudud laws have been implemented or are being implemented, physicians are expected to do the amputation. This is true of Saudi Arabia, Iran and Pakistan and in the proposed Hudud laws of Kelnatan, Malaysia. In Libya it has been specified that the amputation may be performed in a hospital with recourse to anesthesia. In Iran, a special device was developed by the faculties of medicine of two major universities to facilitate amputation of fingers. (10) Sudanese law also specifies that the punishment must be carried out by a medical practitioner.

**Ethical Arguments**

We will now proceed to summarize the arguments for and against the procedure.

John Rawls, the well-known American philosopher, has described what he calls a “decent” society. (10) This “decent” society is not a modern liberal society which places individual rights at the highest pedestal. Such a non-liberal nation however may still be peace-loving, non-belligerent and have an institutional framework that allows representation, (though it may not be a full democracy) and in addition tolerates minorities and human rights. However in such a society, it is possible that the physician may need to participate in corporal punishment or even torture if it is considered to be in the “national interest”.

Rawls’ “decent “society must mainly confirm to four main conditions which include respect for other societies, adherence to basic human rights; principal among which are the right to life, right to liberty, right to personal property and the right to formal equality . In addition there must be a legal system which incorporates the idea of the common good, and finally there must be a reasonable consultation hierarchy, which may or may not incorporate free and fair elections, but attempts to reflect the interests of all groups

Malaysia may be described as a “decent” society as thus described. Malaysia has a written constitution, law courts including a well-defined route of appeal, and by all accounts the courts have been liberal in their interpretation of laws particularly when they encroach on the rights of minorities. The people are represented in the government and elections are regularly held. While it has been argued that press freedom is compromised and that the election mechanism is heavily loaded in favour of the incumbent government, the last election held in 2018 saw the fall of the party that had ruled uninterruptedly since independence.

It must be pointed out here that Rawls also defined outlaw states, as well as other societies which are not either “liberal” or “decent”. It is not necessary to go into the details of these “states” as I argue that Malaysia is a “decent” state as defined by Rawls; by some criteria it is indeed a “liberal” state. . However the Kelantanese proposal threatens to add regressive elements to the state and thus relegates Malaysia to the rank of “decent” states.

In such a “decent” society so defined, Islamic laws may be enforced including amputation. While liberal societies would consider this to be abhorrent, in a “decent” society, it may be argued that such punishments preserve society and thereby attain a higher goal. These may usually be defended by the following arguments. First as an act of penance that quickly rehabilitates the criminal, second, as an opportunity for the society to demonstrate its benevolence by this rehabilitation and finally it acts as a deterrent to crime in such societies. It has been argued that this is an example of a link between the law and the community and has the salutary effect of swift punishment, rehabilitation and crime prevention. (9)

The argument, of course smacks of paternalism. The society decides, on the basis of religious teachings what the fitting punishment is and its implementation with no regard to individual rights. And in so doing, the doctor is duty bound to abandon his “do no harm “principle.

It would be useful if we could clarify our ideas about the ethics of the punishment itself. If the punishment is unethical then the whole argument is fructuous. If the society agrees that penal amputation offends the ethical framework of the society, then leave alone physicians, no one should be participating in the process of trial and sentencing. This debate cannot take place in the so called “decent” society as the punishment is considered ordained by the Almighty and thus it is not within the purview of mere mortals to modify it. In most Islamic societies, this debate is hushed up and by tacit consensus, hudud punishments are not implemented. However in some societies it is and it is here that the dilemma is intensified. In these societies it would be suicidal to embark on an argument about the ethics of hudud. These laws are considered to be divinely inspired and the debate stops there. There is no place for modern ethical arguments. But what about those of us looking in form the outside? What are the ethics of this punishment? Here the ethics of capital punishment may offer guidance of a sort. State sponsored capital punishment has been defended and condemned by “reasonable people in good faith. “(13) Thus there appears to be no reason why reasonable people should not be able to live with the concept of hudud punishments.

Now the question therefore remains, are doctors justified in participating? What are the arguments for and against participating in penal amputation? The first argument which is the mainstay of the opinion against participation is the Hippocratic injunction to first do no harm. It is argued that amputating a healthy limb goes against the basic tenets of medical practice. Against this, however is the argument that in certain circumstances it is considered ethical in some societies to even euthanatize a patient. While there are many checks and balances to the process, it cannot be denied that in the final instance the patient does undergo harm at the hands of the physician (14) Why then should amputation be considered unethical when it is a judicial requirement? Here of course the usual riposte is that euthanasia is only considered if and when there is a clear consent from a competent patient. However it can be argued that the prisoner who is to undergo amputation has also consented to his amputation if he has confessed to a hudud crime. Even if he has not, it is difficult to argue that a just punishment morally requires the prisoners consent for the sentence to be carried out. In any case there are at least three examples of healthy organ removal which do not incur moral or ethical objections. These include live organ donations, cosmetic surgery when, say, a healthy nose is operated on, or in sex reassignment operations when genitalia may be excised. (15) Organ donation, in particular, is important in this context. Organ donations subject the donor to a major surgical procedure which can be complicated and even life threatening. The procedure is often not entirely voluntary, as familial pressures and financial need may play a role. But surgeons do perform such procedures and ethical arguments have been developed in favour of this procedure. It is also true that if there is a constitutional provision for hudud punishment, there has to be a method of carrying it out and surgical amputation is perhaps the best method of doing so.

*One hypothetical question may be raised. What if the prisoner consents for limb amputation? Would that remove any ethical objections?*

Another, perhaps more relevant argument suggests that carrying out such punishments would make it easier for the concerned surgeon to step on a slippery slope that could lead to other kinds of activities like participation in torture or other non-ethical activities. This argument has been vehemently objected to as it is considered that patient participation in state executions has not led to any such incidents, nor have the public lost faith in doctors as was feared by some other observers. This can be countered by the definite loss of esteem that physicians faced after the Tuskegee incident in the USA. This notorious study led to a long standing distrust of physicians at least among the minority communities long after the incident was exposed and action taken. (16).

Opposed to this is the argument that Baum had first proposed in relation to physician participation in executions. He suggests that patients facing execution are akin to terminally ill patients. (17) Doctors have the ethical obligation to reduce the suffering of, say, a dying cancer patient. A corollary therefore is that the dying condemned prisoner also deserves the best “treatment” that the doctor can give. In the case of penal amputation, this argument would imply that the prisoner deserves a surgeon’s specialized services rather than leaving him to the mercy of untrained mercenaries who may otherwise carry out the sentence. Black and Levine (18) however suggest that this argument does not hold good. It may be that surgeons would ensure a pain free and proper amputation, but that is not the purpose of their training. Just because physicians have the skill to do so, it is not ethical to use them for any purpose whatsoever.

An ingenious argument (13), which was again originally developed in relation to executions, suggests that as amputation of a normal organ does not count as a medical procedure, the laws of medical ethics do not apply in these patients. Thus the surgeon who does this procedure is not bound by relevant ethical norms. This argument is difficult to justify as the procedure will use a well-defined medical protocol and medical equipment and it is surely farfetched to claim that this is not a medical procedure.

Here it may be useful to bring in another dimension of the doctors’ activities, that is, his or her duties to society. Physicians routinely carry out activities that have nothing to do with the individual patients’ welfare, but serve the purposes of the society in which they live. For instance, the reporting of infectious disease which may, in fact harm the patient’s interests in the sense that they may be quarantined or forced to be admitted to a particular specialized facility. However this does not raise any ethical objections, nor does the physician wrestle with his conscience before making the report. Why then should he not consider the performance of penal amputation as a societal contribution? It may be considered analogous to the non-use of expensive medication for a patient who cannot afford it (though he may benefit from the prescription of more expensive drugs or treatments). A similar act is the use of placebo controls when conducting a medical trial. The patient undergoes medical procedures (blood tests, examinations, imaging) but with no benefit to himself and the prospect of harm (adverse events) in order to further medial research, that is other words to further societal aim. While participating in the placebo arm of a study, especially in a randomized controlled surgery study which may involve sham operations, the significant possibility of harm is always present.(19) This however does not attract any ethical objections.

A final argument that has been proposed is that not participating in penal amputation procedures harms the interests of the victims of the crimes. They may suffer from medical illness including psychiatric problems because of the crime itself and its consequences (20) . One example could be a theft of money which prevents the victim from availing medical treatment. Here it can be argued that not doing the penal amputation harms the interests of the victim. This is an extension of the society benefit argument but is does have a moral force. However this argument depends on the idea that such punishments have a deterrent effect which may not really be the case.

**What conclusion can be drawn from the above arguments?**

It appears that it is incorrect to condemn all practitioners who participate in penal amputations out of hand. There are cogent arguments that may persuade a surgeon who lives in a society which permits such punishments to participate. These cannot be discounted. If liberal societies can live with the participation of physicians in executions, then it is not quite clear why penal amputations should be so totally ethically unacceptable. While most professional bodies in the United States consider participation in penal amputation unacceptable, no regulatory body has ever proceeded against any physician participating in executions. While the UN Principles of Medical Ethics are clear that a physician cannot participate in any cruel, inhuman and degrading punishment, the arguments for not considering specific hudud punishments cruel or inhuman exist and thus may protect a physician from ethical sanctions. However it is incumbent on the so called “decent” society which enforces such punishment not to force a physician who has moral objections from carrying out this operation. If the physician is forced to do so under the threat of punitive measures it is a difficult situation for which it is impossible to develop ethical norms.

This has particular relevance to Malaysia where while the bulk of the population is Muslim, and may, in principle, accept hudud punishments in the future (though there is no consensus for their implementation at present) there is a significant minority of physicians, specifically surgeons, who may be impacted by the requirement to carry out penal amputations. Malaysia is a “decent” society and will no doubt continue to be so in the foreseeable future; thus the ethical arguments developed above will possibly be of value in deciding the course of action in case the hudud laws are implemented.

However it is also clear that a liberal society may balk at the argument used to justify penal amputations. This is also an acceptable point of view and cannot be discounted as finally, the entire issue hinges on whether the punishment is acceptable to liberal society. A society that does not accept judicial executions may decide that doing penal amputation is unethical and decide to proscribe any physician who has participated in such punishments. They would certainly be well within their rights to do so.

Thus while it may be ethically permissible to carry out these surgical procedures in a “decent” society, the surgeon must not be under any obligation to do so; however in fully liberal societies it may be considered abhorrent and the physician who agrees to carry out such an operation would ethically be left outside the pale of out of order and may expect peer group and judicial sanctions.

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