

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

(Series of Questions Addressed to Scholar Sheikh Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his "Fiqhi" Facebook Page)

Answer to Question:

There is no Cutting in the Compelling Famine

To: Umm Ibrahim

(Translated)

Question:

Assalaamu Alaikum Wa Rahmatullah Wa Barakaatuhu our respected Sheikh, may Allah increase your knowledge and virtue,

I would like to ask and am confident in your virtue to be able to respond,

We have learnt that 'Umar Ibn Al-Khattaab (ra) did not cut the hand of the thief in the year of the famine. So was the suspension of this Hukm in this circumstance only due to an 'Illah (Sharee'ah reasoning) that had ceased to be and the Hukm of cutting ceased to exist along with it?? And if that is the case then what is the 'Illah for the Hukm of cutting? And do the 'Uqubaat (punishments) have 'Ilal (legal reasonings), in origin, which they revolve around?

Barakallahu Feek

Answer:

Wa Alaikum Assalam wa Rahmatullah wa Barakataahu,

1. In regards to what 'Umar (ra) did, he applied the Hukm Ash-Shar'i as it has been found in Islam. This means that the application of the Hukm was not suspended. Rather he applied it as it must be done. That is because there are circumstances in which it is not permitted to cut the hand which include the circumstance of the famine, and so it is not permissible to cut the hand in it. I will now mention some of the evidences guiding to the impermissibility of cutting the hand in the year of the famine:

- As-Sarkhasi mentioned in 'Al-Mabsoot': He said that it was related from Mak'hool (ra) that the Prophet (saw) said: « قَالَ لَا قَطْعَ فِي مَجَاعَةٍ مُضْطَرَّةٍ » **"There is no cutting in the compelling famine"**.

- And it was also mentioned in As-Sarkhasi's 'Al-Mabsoot' from Al-Hasan from a man who said: رَأَيْتُ رَجُلَيْنِ مَكْتُوفَيْنِ وَأَحْمًا فَذَهَبْتُ مَعَهُمْ إِلَى عُمَرَ رَضِيَ اللَّهُ عَنْهُ فَقَالَ صَاحِبُ اللَّحْمِ كَأَنْتَ لَنَا نَاقَةٌ عُسْرَاءٌ نَنْتَظِرُهَا، كَمَا يَنْتَظِرُ الرَّبِيعُ فَوَجَدْتُ هَذَيْنِ فَمَا أَجْتَرَّ رَأَاهَا فَقَالَ عُمَرُ رَضِيَ اللَّهُ عَنْهُ: "هَلْ يُرْضِيكَ مِنْ نَاقَتِكَ نَاقَتَانِ عُسْرَاوَانِ مُرْبِعَتَانِ؟ فَإِنَّا لَا نَقْطَعُ فِي الْعِدْقِ، وَلَا فِي عَامِ السَّنَةِ". I saw two men who were tied up and meat. So I went with them to 'Umar (ra). Then the one possessing the meat said: "We had an 'Usharaa' (pregnant she-camel) that we were waiting for (its delivery) just as the fertile spring is waited for. But then I found that these two men had slaughtered it". So 'Umar said: **"Would you be content to accept two similar 'Usharaa' (pregnant) camels in place of it? That is because we do not cut the hands at the time of Al-lthq and not in the year of the famine"**.

The 'Usharaa' is the pregnant she-camel that has reached ten months of its pregnancy and is approaching her birth and as such it is the dearest thing to its people whilst they await its fertility and abundance in respect to its milk just like they await the coming of spring. And in respect to his statement: 'For verily we do not cut in the 'Al-ldhq'...', which some have related it as 'Al-lrq' although 'Al-ldhq' is the most common, refers to meat. Its meaning is therefore that there is no cutting (amputation of the hand) in the year of the famine due to the *Daroorah* (necessity) and dire need i.e. the hunger and the famine (drought).

- Ibn Shaibah extracted in his Musannaf from Ma'mar who said: Yahya Bin Abi Katheer said: 'Umar said: "The (hand) is not cut in regards to the 'ldhq (meat) and not in the year of the famine".

2. Consequently, the non-implementation of the Hudood in the year of the drought (i.e. year of the famine) reverts to the Hukm Ash-Shar'i related to the non-application of the Hadd (prescribed punishment) for theft in the year of the famine... That is because that represents the Hukm Ash-Shar'i in this situation or circumstance.

3. As for your question about the 'Illal (legal reasoning) in relation to the 'Uqubaat (punishments), then yes, it is possible for them to include 'Illal and for Qiyaas to occur in respect to them... However, the 'Uqubaat include within them the meaning of the 'Uqubah (punishment) and the meaning of the Haddiyah. As for the meaning of the Haddiyah which refers to the quantifying of the Hadd (set prescribed punishment) and its kind, then this is not reasoned (i.e. it does not have an 'Illah). Consequently, the Hadd is not increased upon or decreased whether this was in respect to the quantifying of the Hadd (Miqdaar) or in the number ('Adad) of the Hudood, as these are restricted within the Shar'iyah evidences. As for the meaning of the 'Uqubah (punishment) in respect to the Hadd, then what applies upon the 'Uqubaat (punishments) applies to it in terms of the 'Illah and Qiyaas (analogy)...

We will now present some examples to make this clear:

- Example: It was narrated that 'Umar (ra) was uncertain in respect to the retaliation for the murderer (i.e. the killing of the killer) in the case where seven people participated in the killing. So 'Ali (ra) said to him: "O Amir of the believers, do you see that if a group participated together in theft that you would cut off their hands?" He replied: "Yes". So he ('Ali) said, "And so it is just like that".

In this example, analogy was made between the killing of seven who had participated in the killing of someone and the cutting of the hands of thieves if they had all participated in the theft. The 'Illah here was: 'The joint participation in an act that obliges the punishment'. This then relates to the 'Uqubaat (punishments) and Qiyaas (analogy) was used in respect to killing those who share together in the punishment of death based upon cutting the hands of those who jointly share in the Hadd (fixed prescribed punishment) of theft.

- And the example of the Messenger (saw) who said:

«ألا إن قتل الخطأ شبه العمد قتيل السوط والعصا فيه مئة من الإبل أربعون في بطونها أولادها»

"Indeed, the semi-intentional killing by mistake, the killing by a whip and stick, has (in blood money) one hundred camels, forty of which are pregnant"

From this the 'Illah (Shar'i reason) was deduced in respect to the killing by the whip and the stick intentionally, and it (the 'Illah) is 'the intentional killing by that which does not kill in most cases', which is known as Shibh ul-'Amd (semi-intentional killing). And this was used in the making of analogy (Qiyaas) of the intentional killing by small rocks or repeating striking i.e. all that which does not kill in most cases. This killing then does not have retaliation attached to it but rather a heavy blood money. And the Hukm is not restricted to the whip or the stick but rather to everything that does not kill in most cases. However, if he was killed by that which kills in most cases like a knife or gun then this would be intentional and the killing of the killer would apply.

Here, Al-Qiyaas (analogy) was used and in the first example we made analogy between killing those who took part jointly in the intentional killing and cutting the hand of those who jointly participated in the theft due to the 'Illah 'The joint participation in an act that obliges the punishment'. In the second example we made analogy upon considering the killing by small stones as being semi-intentional, upon the killing by a stick being semi-intentional (Shibh ul-'Amd) as was mentioned in the Hadeeth due to the 'Illah 'The killing with the tool that does not kill in most cases'.

I hope that the answer has been clarified.

Your brother,

Ata Bin Khalil Abu Al-Rashtah

10th Jumada Ath-Thani 1437 AH

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The link to the answer from the Ameer's Facebook page:

<https://www.facebook.com/AmeerhtAtabinKhalil/photos/a.122855544578192.1073741828.122848424578904/455767874620289/?type=3&theater>

The link to the answer from the Ameer's Google Plus page:

<https://plus.google.com/100431756357007517653/posts/KzvXMBTa7WS>

The link to the answer from the Ameer's Twitter page:

<https://twitter.com/ataabualrashtah/status/711959528745652224>