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### **Kartika drags syariah, justice into spotlight**

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Kartika Sari Dewi Shukarno's show of remorse has the public calling for the suspension of the caning sentence. MOHAMMAD HASHIM KAMALI examines the reasoning, or the lack thereof, behind the Kuantan syariah court judgment

HOW does the Kartika Sari Dewi Shukarno case fare from our reading of the sources of Islam? Some aspects of the case that call for reflection are:

- Kartika has been singled out as an odd case of prosecution and punishment for drinking beer.
- That Kartika did not appeal against the sentence of a RM5,000 fine and six strokes of the rotan indicates repentance and remorse.
- The case has received extensive media exposure showing Islam and syariah in a bad light.
- Within Malaysia, the case has aroused controversy not only among the public but also among syariah judges themselves.
- Prime Minister Datuk Seri Najib Razak has publicly urged Kartika to appeal against her sentence.

The main question that occupies us here is whether it is accurate to think that punishing Kartika in this way is a requirement of syariah.

Beer drinking is a violation of syariah but is not rare by any means in our society. To single out one case, a woman for that matter, and take an assertive position on deterrence is less than convincing, especially if it neglects the more fundamental concerns of accuracy and justice.

Why do the syariah judges see it as their duty to punish Kartika? Presumably because they see enforcement of the hudud (plural of hadd: prescribed penalty or offence) as their duty under syariah. This raises the question of whether drinking (shurb) is a hadd offence in the first place.

The answer is most likely in the negative. For hadd by definition is an offence for which the Quran (or Hadith) specifies a punishment. Shurb fails to meet this requirement. The Quran (5:90) declares wine-drinking and gambling as the "dirty works of Satan" but stops short of specifying a punishment for them -- hence, the conclusion of numerous Muslim jurists that drinking is not a hadd but a discretionary (taazir) offence, for which the judge determines an appropriate punishment, be it a verbal rebuke, lashes of the whip, imprisonment or fine.

Why is shurb considered a hadd offence? The answer comes from the ruling of an analogy (qiyas), which extended the 80 lashes of the whip that the Quran (24:4) enacted for slanderous accusation (qazaf) to shurb.

In a discussion that arose between the leading Companions, Ali ibn Abu Talib and Umar ibn al-Khattab, it was reported that the former drew an analogy between qazaf and shurb: one who drinks, raves, and one who raves is also prone to reviling and slander -- hence, the 80 lashes of qazaf were analogically extended to shurb.

This is not only a weak analogy but also contrary to a basic principle of syariah that a hadd punishment can only be determined by the text itself, not by analogy to the text.

Hence, the argument that it is the duty of a syariah judge to enforce the hadd penalty in Kartika's case collapses.

That argument also collapses on another ground: assuming that drinking is a hadd offence, it should carry precisely 80 lashes of the whip and nothing else. The syariah is completely silent on the application of fines and rotan for any of the hudud offences.

There is also the divergent position in scholastic jurisprudence, which departs from 80 in favour of 40 lashes for drinking, as under the Syafi'i school of law that prevails in Malaysia.

All this raises serious doubts over shurb as a hadd offence, and the manner it is to be dealt with in Kartika's case.

The whip with which a hadd punishment is administered in many Muslim countries consists of a strap of thick leather attached to a wooden handle, with a total length of about a metre. It is applied such that the hand is not lifted above the elbow. The fines and rotan that are imposed on Kartika for drinking beer treats the case not as a hadd but a taazir offence, and a matter therefore of discretionary sentencing.

Syariah advises accuracy in the application of punishments. In an authoritative Hadith, judges and rulers are advised to be careful in the application of punishments. If they err, it is better they err on the side of leniency. If the judge can find a way out of a harsher to a lighter punishment, he is advised to do so. Another Hadith enjoins: "Suspend the hudud in all cases of doubt (idra'u al-hududa bi'l-shubhat)."

Scholastic jurisprudence has followed the advice of this Hadith in cautioning against the use of qiyas in the determination of hudud. The general advice here is to move away from all doubtful applications of penalties. To apply a combination of rotan and fines to hudud is a total misfit from the viewpoint of Islamic jurisprudence. That the case has given rise to differences of opinion also points to the existence of doubt that calls for suspension of the punishment in question.

Public opinion in Malaysia seems to be moving in the direction of advising compassion. That Kartika's waiver to appeal against the sentence is viewed as a sign of her remorse and repentance (tawbah) will strengthen the call for compassion from the viewpoint of syariah. Kartika's statement that "my family and I will use this

fasting month to bring ourselves closer to God" (NST, Aug 26) confirms such a state of mind.

Still, it is advisable that she appeal as a matter of civic responsibility, for she would otherwise be denying the justice system an opportunity to verify whether or not the written grounds of judgment can justify the punishment.

The prime minister's appeal to Kartika that "she should not be too quick and willing to accept the punishment" is to be welcomed, as we have here a case for equity and conscience, which should not be left entirely to procedural formalities and personal decisions of the defendant. For the other party is the government of Malaysia. The issue is not treated as a civil claim to begin with and it has indeed gained such public interest as to be of concern to the government.

The prime minister's stance in favour of a formal appeal should be sufficient to authorise the Syariah Appeal Court to take up the case for review. If we say that Islam is a religion of compassion, we should act on it and take, perhaps, an exemplary stance against severity. This would hopefully also help stop the inimical media coverage of Islam.

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