

CODE OF PENAL PUNISHMENT: A STUDY OF ISLAMIC CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

The Islamic law is also known as the Shariah Law. The Shariah Law rules and regulates all aspects of public and private behaviour. It prescribes specific rules for prayers, fasting, giving to the poor, and many other religious matters. It also has regulations for personal matters including sexual conduct, and elements of child rearing; as well regulation in transactions and criminal matters. As deducted from the Arabic meaning of Sharia, **it is essentially the 'way'**. The Islamic law does not conform to the notion of law as found, for example, in the common law. Rather than a uniform and unequivocal formulation of the law, it is a scholarly discourse consisting of the opinions of religious scholars, who argue based on the text of the Holy Quran, the sacred hadith and the consensus of Muslim scholars. Islam has, in fact, adopted two courses for the preservation of the five indispensables in human life: religion (Islam), life, intellect, offspring and property. The first is through cultivating religious consciousness (**al wazi' al dint**) in the human soul and the awakening of human awareness through moral education. The second is shown by deterrent punishment (**al qanun**), which is the basis of the Islamic criminal system. The Islamic Criminal Law, which is part of the Shariah Law, provides a worldly punishment in addition to that in the hereafter. In the classical textbooks **offiqh**, criminal law is not regarded as a single, unified branch of the law. The regulations regarding offences mentioned in the Quran and Hadith constitute violations of the claims of God (**the right of Allah**), with mandatory fixed punishments; these offences are: apostasy (**riddah**), highway robbery (**hirabah**), unlawful sexual intercourse (**zina**), theft (**sariqah**), the unfounded accusation of unlawful sexual intercourse (**qazaj**) and drinking alcohol (syurb khamr). Provisions for offences against another person, i.e. homicide and wounding, are subdivided into, (i) those regarding retaliation (**qisas**) and, (ii) those regarding financial compensation (**diyat**). And they are provisions concerning discretionary punishment of sinful

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or forbidden behaviour or of acts endangering public order or state security (**ta'zir**)¹.

The Islamic conception of justice is based on fair dealing and equity. Allah commands men to judge people with justice. To achieve justice in the field of criminal law, Islam has provided various punishments. Punishments as envisaged by Islamic Criminal law fall into three groups, (i) *Hudud*; (ii) *Qisas and Diyat (Retaliation and Blood money)* (iii) *Ta 'zir (Discretionary punishment)*

However, when viewed from a comprehensive perspective by any fair person, Islam will be found sensible in all its aspects and practices. Could it be otherwise for a faith that powers one of the greatest living civilizations – one whose dynamism and creativity supplied a foundation for countless aspects of modern society?

Shariah is the Islamic Law in which the disciplines and principles that govern the behaviour of a Muslim individual towards his or herself, family, neighbours, community, city, nation and the Muslim polity as a whole, the Ummah. Similarly Shariah governs the interactions between communities, groups and social and economic organizations². Shariah establishes the criteria by which all social actions are classified, categorized and administered within the overall governance of the state. Shariah first establishes the patterns believers should follow in worshipping Allah: prayers, charity, fasting and pilgrimage. Islam's law comprises a comprehensive outlook on life. As one looks from a satellite at this planet, the Shariah conceives of the earth as a single 'city' with diverse inhabitants—in modern parlance, a 'global village.' Islam looks to the benefit of the society as a whole from a general perspective and presents a theoretical model that if followed provides safety and protection for society. Shariah literally means 'a well-trodden path to water,' the source of all life, representing the Path to Allah, as given by Allah, the Originator of all life.

GENERAL NATURE AND PRINCIPLES OF PUNISHMENT

By contrast, the Law of Islam was sent down to Muhammad, may the mercy and blessings of God be upon him, in its complete form as part of His final message to humanity. Islamic Law pays the most careful attention to this matter and provides a complete legal system. It

¹ Rudolph Peter. (2005). *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. UK: Cambridge University Press.

² The Purpose of Criminal Punishment” in *Ethic and Criminal Justice System*, p. 103-25.

takes into consideration the changing circumstances of society as well as the constancy and permanence of human nature. Consequently, it contains comprehensive principles and general rules suitable for dealing with all the problems and circumstances that life may bring in any time or place. Likewise, it has set down immutable punishments for certain crimes that are not affected by changing conditions and circumstances. In this way, Islamic Law combines between stability, flexibility, and firmness.

The ultimate objective of every Islamic legal injunction is to secure the welfare of humanity in this world and the next by establishing a righteous society. This is a society that worships God and flourishes on the Earth, one that wields the forces of nature to build a civilization wherein every human being can live in a climate of peace, justice and security. This is a civilization that allows a person to fulfil his every spiritual, intellectual, and material need and cultivate every aspect of his being. This supreme objective is articulated by the Quran in many places. God says: ***“We have sent our Messengers with clear signs and have sent down with them the book and the criterion so that man can establish justice. And we sent down iron of great strength and many benefits for man...”***³ ***And He says:“...God wants ease for you, not hardship...” (Quran 2:185)***

And He says:

“God wants to make things clear for you and to guide you to the ways of those before you and to forgive you. God is the All-knowing, the Wise. God wants to forgive you and wants those who follow their desires to turn wholeheartedly towards (what is right). God wants to lighten your burdens, and He has created man weak.”⁴

And He says:

“God commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice...” (Quran 16:90)

The Islamic penal system is aimed at preserving these five universal necessities:

1. *To preserve life, it prescribes the law of retribution;*

³(Quran 57:25)

⁴(Quran 4:26-28)

2. *To preserve religion, it prescribes the punishment for apostasy;*
3. *To preserve reason, it prescribes the punishment for drinking;*
4. *To preserve lineage, it prescribes the punishment for fornication;*
5. *To preserve wealth, it prescribes the punishment for theft and*
6. *To protect all of them, it prescribes the punishment for highway robbery.*

It should therefore become clear to us why the crimes for which Islam for which the Law has prescribed fixed punishments are as follows:

1. *Transgression against life (murder or assault);*
2. *Transgression against property (theft);*
3. *Transgression against lineage (fornication and false accusations of adultery);*
4. *Transgression against reason (using intoxicants);*
5. *Transgression against religion (apostasy) and*
6. *Transgression against all of these universal needs (highway robbery).*

Criminal Responsibility

Islamic criminal law is based on the principle of individual responsibility. Persons are punished for their own acts. Collective punishment is not allowed, although there are exceptional cases of collective liability, such as in the Hanafite *qasama* doctrine, where the inhabitants of a house or village can be held liable for the financial consequences of a homicide with an⁵ unknown perpetrator, committed in the house or village. Under certain circumstances a person who has committed an offence is not responsible for the consequences. Some of these circumstances are connected with the absence of ***mensrea***, the 'guilty mind' or the blameworthiness of the defendant, for instance because the offence was committed by a minor or an insane person. In such cases the offence cannot be imputed to the offender. Other circumstances cause the offence to lose its unlawful character (*actus reus*): an act which contains all the elements of a crime and can be imputed to the person who has committed it must sometimes be regarded as lawful because of a justifying circumstance,

⁵ Abdul Qadir Oudah, *Criminal law of Islam*, Karachi, International Islamic Publications Vol. 3 (1987) p. 101.

such as for instance self-defence.

Duress (ikrah)

Duress can be a defence with regard to had crimes. A person will not be punished if someone forces him to commit a crime by threatening to kill him or to inflict severe injuries, resulting in the loss of bodily organs, if he refuses. Similar threats against one's child and, according to some schools, against one's parents are also regarded as duress. It is not sufficient that such a threat was uttered; the person who acted under duress must have actually believed that the person uttering the threats was ready to carry them out and was capable of doing so. The person who acted under duress is regarded as a mere instrument in the hands of the one who coerced him and the chain of causality (**hukm al-sabab**)⁶ between the latter and the offence remains intact. Unlawful orders by the head of state or state officials are also regarded as duress, even if no specific threats were uttered. There is some controversy about when precisely a power relationship is assumed to imply coercion and when not. Opinions differ on the question of whether duress is also a defence in homicide cases. The problematic aspect here is that, objectively, the evils between which one must choose are equal. The discussion of this problem hinges on whether the person who acted under duress can be regarded as having acted out of his own free will, or must be seen as an instrument in the hands of the person who uttered the threats. If he can be assumed to have exercised a choice in killing the victim, even if he did not want to do so, he must be held responsible. The jurists differ on whether the person who uttered the threats may also be sentenced to retaliation. The Malikites, Hanbalites and some Shafiites hold that this is the case, arguing that he has used a method that is usually effective. Otherwise, he is liable to discretionary punishment. The Hanafites, however (with the exception of Abdul Yusuf, d. 798 CE)⁷ differ from the other schools and permit duress as a defence in homicide cases. They hold that the person who was forced to kill did not want the victim's death and was no more than an instrument in the hands of the one who forced him to act. They compare him with a man who is thrown from the roof of a house and lands on a passer-by, as a result of which the latter dies.

Actus reus

⁶ Ibn Tamiyyah, *al-Siyasa al-Shamiah*, Cairo (1951) pp. 120-121.

⁷ Oudah Vol. 3 p. 109.

For behaviour to constitute a punishable offence (*actus reus*), it must be unlawful, i.e. it must infringe upon the claims of men or of God. For some offences the unlawfulness of the act is connected with a person's religion: drinking alcoholic beverages or changing one's religion is only unlawful for Muslims. For others, such as homicide and bodily harm, it is connected by **Mahd-i, Fataw**⁸. **The classical doctrine** with the question of whether the victim's life and body were legally protected (**isma**). Self-defence or halting a crime in progress may also make lawful an act that would normally be a crime. Thus killing or wounding an attacker in defence of life, honour or property of oneself or of one's relatives is lawful if the act of self-defence is proportional to the acts of the attacker, i.e. if such an act does not exceed the level of violence necessary to ward off the aggressor. Self-defence is closely related to, and partly overlaps with, the plea of halting a crime in progress. This plea can be made by a person who used proportional violence against another person to prevent him from continuing with a crime he was in the process of committing.

Aims of punishment and rules of execution

As in most Western penal systems, punishment is justified in Islamic law by deterrence, retribution, rehabilitation and, finally, the idea of protecting society by incapacitating the offender. In addition, the rules regarding punishment are, as we shall see, closely intertwined with those of redress by means of damages, not only in the law of homicide, but also with regard to theft and unlawful sexual intercourse. Since the Sharia is religious law, some of the laws of punishment also have a 'vertical' dimension, in that they relate to reward and punishment in the hereafter. This is the case with the law of *hadd*⁹ and the institution of *kaffara*. Deterrence (*zajr*) is the underlying principle of all fields of Islamic criminal law. Since, according to the jurists, the threat of punishment in the Hereafter does not sufficiently deter people from committing forbidden acts, punishment in this world is a necessity. For the fixed punishments, deterrence is referred to by the words 'an exemplary punishment' in and its importance is clear from the rule that *hadd* penalties must be carried out in public. Although the law of homicide is based on retribution, the notion of deterrence also plays a role: proclaims: '***And there is life for you in retaliation, O men of understanding, that ye may ward off [evil].***' This is usually understood as meaning that retaliation will deter people

⁸ Sarakshi, Mabsut Vol. 16 p. 145

⁹ Matthew Lipman. (1989). "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law" in Boston College of International and Comparative Law Review. Volume 12, Issue 1, 12-1-1989

from killing. The importance of retribution is most evident in the punishment of retaliation for homicide and bodily harm (**qis.as or qawad**), which is based on the idea of ‘a life for a life, an eye for an eye and a tooth for a tooth’. The retributive character is emphasised by the majority view that the way of executing the death penalty for homicide must be similar to the way the victim was killed, and that, under supervision of the authorities, the heirs may carry out the death penalty themselves. Retribution also plays a role in the **hadd penalties**. The classical doctrine characterise the punishments for theft and banditry as the recompense of those who have committed these crimes. Rehabilitation of the offender, i.e. trying to deter a culprit from repeating his crimes and bringing him back to the straight path, is the main justification of discretionary punishment, which, as we shall see, must be meted out in accordance with the special circumstances of the accused in order to achieve an optimal effect. Finally, punishment can be a means of protecting society by incapacitating the offender, by execution, banishment or lifelong imprisonment. It is the main rationale of **siyasa punishment**, i.e. punitive measures imposed by the executive authorities for political expediency or the maintenance of public security. Not all forms of capital punishment serve this objective. The execution of a murderer on the strength of retaliation serves retribution, rather than the protection of society, witness the fact that the imposition of the death penalty depends on the will of private individuals, i.e. the victim’s heirs. Protection of society is also the principal aim in taking action against recidivists: ‘With regard to repeated offenders who are not deterred by the prescribed punishments, the executive officials are allowed, if the people suffer harm from their crimes, to keep them permanently imprisoned until they die, so as to protect the people from their harm¹⁰. Their food and clothing must be provided from the treasury (**bayt-al-mal**).’ According to all schools except the Hanafites, fixed punishments have a special religious rationale: the notion that by being subjected to the fixed punishment, the culprit atones for his sins and will not be punished for it in the Hereafter. As the Prophet has allegedly said, ‘The hand of the repentant thief precedes him to heaven¹¹.’ The Hanafites argue, however, that this atonement is brought about by sincere repentance (**tawba**) and not by the application of the fixed penalty.

Public exposure to scorn (**tashhīr**)¹². A common form of discretionary punishment was the exposure of the offender to public scorn, which was often imposed in combination with other

¹⁰ Al-Mawardi, *Al-ahkam al-Sultaniyyah* pp. 236-237.

¹¹ Ibn al-Qayyim, *al-Turuq al-Hukumiyyah* pp. 101-102

¹² Hakim, *Al-Mustadrak*, Vol. IV p. 104.

penalties. Examples are the shaving of a culprit's head, the blackening of his face with soot a punishment especially reserved for false witnesses and parading him through the streets, on foot or seated back-to-front on a donkey accompanied by a town-crier announcing the culprit's offences.

Banishment (nafy, taghrīb)

Banishment is mentioned as a penalty in connection with two hadd offences. However, banishment as a punishment for banditry is interpreted by most schools as imprisonment until the culprits show repentance. Only the Malikites regard it as real deportation, but apply it only to male bandits¹³. The Malikites and Shiites apply it, however, only to men, since the banishment of women means that they are forced to live far from their male relatives and may, therefore, lead to debauchery. The other schools, for the same reason, require that a woman who is sentenced to banishment must be accompanied, at her own expense, by a close male relative to stay with her and watch over her. In Shiite law, banishment is also an additional penalty for pimping (qiyada). The most common function of imprisonment lies outside the domain of penal law¹⁴. It is the ultimate means of coercion in private law to force debtors to fulfil their obligations. They can be imprisoned by the qadī until they pay their debts or carry out their obligations or prove that they are indigent or incapable of fulfilling their obligations. The law also allows imprisonment as a form of pre-trial custody, pending the investigation of the crime. As a punitive measure it occurs under two headings. As we have seen in the preceding paragraph, the common interpretation of banishment as a fixed punishment for bandits is imprisonment. The classical doctrine imposed as **tazir** punishment. The length of imprisonment is left to the discretion of the authority imposing it. It can be a matter of some days or months, or until the culprit repents, or even until his death. The Hanafite school adds a third instance of imprisonment, namely as a punishment for theft after two previous sentences of amputation. In principle prisoners must support themselves. However, if they do not have sufficient means, the state must feed and clothe them.

Flogging (jald)

Flogging, to be administered by a leather whip, is a very common penalty. A generally

¹³ Al-Baihaqi, Al-Sunan Al-Kubra, Vol. VI p.53.

¹⁴ al-Kattami abd. Al hay, Nizam al Hukumah al-Nawabwiyyah p. 288.

accepted rule is that the executioner, in administering the lashes, may not raise his hand above his head to the extent that the armpit is visible. The force with which the lashes are administered varies with the crime: flogging for unlawful intercourse must be more painful than flogging for calumny, and the latter more painful than flogging for drinking alcohol. Flogging for drinking alcohol may, therefore, also be inflicted by palm leaves, twined cloth or shoes. The Shafites and Hanbalites in fact regard this way of inflicting the penalty as compulsory. There is a difference of opinion regarding flogging as tazir punishment. According to some, it must be more severe than whipping for unlawful sex, whereas others hold that it must be milder than flogging for drinking alcohol. Men are as a rule flogged while standing, whereas women are whipped while seated. Men are stripped to the waist (except while being flogged for calumny), unlike women, who may leave their clothes on. However, furs and leather clothing are to be removed as they would protect the offender against the pain.

HUMANISM IN ISLAMIC PENAL SYSTEM

In Islam it is believed that there is no criminal who cannot be cured. Even the worst criminal can be reclaimed. He can repent and can be forgiven. Islamic law not only leaves the door open for repentance but it also strives to cure the criminal's moral life. Social defence in the sense of rehabilitation and treatment of the offender by eradicating of crime has its origin in Islamic Penal system. Islamic Penal law urged on Tamiyyah, al-Siyasa al-Shamiah, Cairo prevention of crime before its commission and this can be achieved by adopting the following measures (i) People should be guided to have faith in religion and protect themselves from going astray, (ii) Generate love of doing good to the people, (iii) Doing good to the people in the society and avoiding evil. Islamic law also prohibits the disclosure of crime so that moral scandals may not widely spread and the offender does not continue with his crimes. People are also encouraged to pardon offenders. Due consideration is given to promote mutual aid and co-operation in financial and moral affairs with a view to provide a prosperous life to everyone. Islamic penal law does recognise what is known in contemporary criminological terminology as 'individualisation of punishment'¹⁵. It calls upon the judge to consider the circumstances of the criminal that were instrumental in the commission of the crime. Thereafter the steps are taken by the judge to rehabilitate or reform the offender. Punishment

¹⁵ Hassan EL Sa'aty, "*Islamic Criminal Justice System in Legislation and Application*", Resource Material UNAFEI (1989) p. 230, Fuchu, Tokyo, Japan.

is awarded in proportion to the harm done and in relation to the criminal's circumstances. The harsh punishment is substituted with lighter one. He may receive medical or psychiatric treatment or moral edification. Islamic law does not prohibit any procedure leading to the disclosure of the criminal's circumstances either through medical investigation or social enquiry.

CONCLUSION

The object of punishment under Islamic Penal system is to eradicate crime from the society. To attain this object various punishments have been provided. These punishments are imposed in accordance with the nature of injury suffered by the society in order to protect humanity from evil and attain peace and security for them. The punishments in Islamic penal system are clearly and strictly prescribed and no room for discrimination and arbitrariness is left to the Courts. The punishments in Islamic criminal law are fixed for limited number of offences which fall in the category of **Hadd and Qisas**, while punishments for a large number of offences fall under ta 'zir or Penal punishments which give full discretion regarding the measure and form of punishment. Ta 'zir punishments are many and vary between lighter to more severe punishments. It may range from capital punishment to caning, imprisonment to warning, exile to public disclosure and boycott. The Holy Quran and practices of the Prophet (S.A.W.) support these punishments. The Holy Quran says: "**Nor do evil in the land, working mischief**"¹⁶. The Ruler of the country has absolute discretion to impose these punishments and make rules for the enforcement of these punishments.

In the above view, we have observed that of all the forms of punishment, imprisonment is one of the most widely used form of punishment. The Islamic penal system, although it recognises the role of imprisonment in crime prevention, however discourages its use due to the evils inherent in imprisonment. The imprisonment is to be imposed only in the circumstances when it is not possible to deal with the offender by any other form of ta 'zir punishment. Islamic penal law provides a wide range of punishment in the category of **ta 'zir**. These punishments are both deterrent and reformatory in nature and are also easier to administer. It is submitted that due to the inherent evils involved in imprisonment and particularly in short term imprisonment, some of the **ta 'zir** or penal punishment can be helpful in dealing with the problem of petty offenders.

¹⁶ (Surah ash-Shu'raa (26) :183)

In conclusion, these were the head notes of a very important topic whose cognitive structure is related to a number of intermediate sciences that are purely Islamic and generally humanistic. Moreover, the study of this issue cannot be profoundly fulfilled away from a broad vision that encompasses the sources of Shari'ah, the sciences of fiqh, the achievements of the age, and the reality of Muslims. The Judicial System and Punishments of the Islamic State were implemented throughout every period from the time of the Prophet (PBUH) in Madinah, when he established the first Islamic state. It settled the disputes between the people, protected the legitimate rights of the community, and ensured that those in authority gave the citizens of the state their dues in accordance with the Shari'ah of Islam. All this it did in a superior manner, such that it was acknowledged by all the justice and propriety which it conferred upon those who were protected by it. However, the strength and authority that the judiciary in Islam proffers is not built upon harsh punishments or oppression of the people. Rather, its power lies in the fact that it originates from the Islamic creed (**'aqidah**) which is able to answer all the problems that may arise in life, and that its implementation and the obedience to it are considered as **ibadat** (worship). In this way, the history has shown that in only a relatively small number of cases did the judiciary have to resort to punishment of the people. The mentality of obedience to Allah and disapproval of crime that the systems of the Islamic State which are an integrated whole and of which the judicial system is one part inculcates into the people is enough to ensure that justice and harmony in society prevail, and that crime is a fringe activity. And the aim of Justice in Islam is not to punish the people as much as possible, rather it is to guarantee the rights and the security of the people.