

CRIMINAL PUNISHMENT AND PURSUIT JUSTICE IN ISLAMIC LAW

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I. INTRODUCTION

Bacon has been quoted to have said: “*Religio praecipuum humanae societatis vinculum*” (Religion is the most substantial bond of humanity)¹.

Islam as monotheistic religion “remains exogenous as the primal ontology. We consider this primal ontology as the super-cardinal topology. Super-cardinal topology denotes the unbounded and open domain of the origin of knowledge under the principle of the monotheistic law characterizing organic inter-causal unity of knowledge and its induction of and by the generality and particulars of studies. From this primal origin emanate worldly knowledge-flows of the nature of organic unity of being and becoming. In every round of the evolutionary learning in unity of knowledge, the same primal ontology of monotheistic law is recalled and activated in the self-same discursive manner as of *ijtihad* and *shura* processes. By virtue of its completeness in the state of the unbounded and open nature of the super-cardinal domain, we also refer to the primal ontology as Stock of Knowledge because of its completeness.”²

Islam favors humanities on two bases, firstly, because it appeals to human reason. The Quran attaches pivotal significance to individual rational choice and responsibility. “*There is no coercion in religion. The truth stands out clear from Error*”.³ “By the soul, and the order given it, He has inspired it to its wrong and to its good”⁴. “*To each is a goal to which he turns it. Then strive for what is good...*”⁵ “*Say, ‘The Truth is from your Lord’, then believe who wills and deny who wills*”.⁶ The emphasis here is not so much that ethical values are rational and scientific but that they are reasonable to be understood as such by humans. Since the level of understanding may differ from person to person and from community to community multiplicity of views is inevitable.

The second basis of pluralism is social acceptance of these values. This basis also regulates the dissent. The Qur’an calls good *Ma’ruf* (well known) and evil *Munkar* (rejected), which points to the fact that normativity is based on social acceptance or rejection. The social dialectics develop the acceptable definition of ethical values.⁷

Fiqh (Islamic jurisprudence) developed initially as multiple local customary legal traditions. The plurality of views in the *Fiqh* traditions is proverbial. The Hadith tradition questioned the authenticity of *Fiqh* traditions and described it as mere opinions (*ra’y*) as opposed to the Hadith which was based on scientific knowledge (*‘ilm*). The *Fiqh* traditions produced more than nineteen schools, all of them recognizing each other’s legal validity. The multiplicity of views continues within the schools and is regarded as a blessing. The principle of legal reasoning (*ijtihad*) encourages difference of opinion considered religiously rewardable even in case of error. Adherence to these different schools of law is reflected in the diverse personal laws in Muslim societies.⁸

A deliberately discussion on the Islamic criminal justice system is important for many reasons. First, like in the conventional system, crime is a public wrong thereby bringing laws relating thereto to the realm of the public. Islamic criminal law is therefore central to the entire Islamic legal system. Second, religio-political parties in a number of Muslim countries have increasingly been clamouring for the application of the Islamic criminal justice within their respective jurisdictions. Countries such as Saudi Arabia, Iran, Sudan, Pakistan, Nigeria and Brunei Darussalam apply the law in varying degrees. Third, the application of the law has wider implications. For instance, in an increasingly globalising world, it is worth asking how compatible the law is with international human rights treaties to which the Muslim countries are party. It is for these and other reasons that the Islamic criminal justice system became an important, and perhaps, the most ‘popular’ field of Islamic law nowadays.⁹

This paper is an attempt at introducing an issue in Islamic criminal law relating to the theory of punishment and pursuit justice. Thus, it’ll be divided into following points of discussion.

II. CRIMINAL PUNISHMENT IN ISLAM

The body of law dealing with wrongs that are punishable by the state with the object of deterrence is known as criminal law. In the context of modern world today, “the practice of Islamic criminal law has often attracted fierce criticism and debate from across the globe. There appears to be an assumption, albeit arguably misguided, that punishments such as flogging and stoning to death are practices which Islam is ready to implement. It would be worth asking at the outset

¹ Joachim Wach. (1944). *Sociology of Religion*. Chicago: The University Press, p. 6.

² Choudhury, Masudul Alam. “Islamic Political Economy: An Epistemological Approach.” *Social Epistemology Review and Reply Collective* 3, no. 11 (2014): 53-103.

³ Quran, Surah al-Baqarah: 256.

⁴ Quran, Surah al-Shams : 7-8.

⁵ Quran, al-Baqarah 2: 178.

⁶ Quran, Surah al-Kahf, 18: 29.

⁷ Cf. Muhammad Khalid Mas’ud. “Islam, Modernity and Society”.

⁸ Ibid.

⁹ See: Lawan, Mamman. et. al. (2011), *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual*. UK: UK Centre for Legal Educators, p. 3-4.

what the general consensus of the class is in this regard. Have their answer been influenced by the media? Has the interpretation of Islamic Law been distorted by leaders so as enable them political gain? Have the countries that have employed Islamic criminal law succeeded in terms of a reduced rate of crime? In order to address whether the critics of Islamic criminal law are justified in their claims or whether their arguments are flawed as a result of misconception, close examination of the law is required.”¹⁰

A. *The Meaning of Punishment: Global View*¹¹

According to Garland punishment is “the legal process whereby violators of criminal law are condemned and sanctioned in accordance with specified legal categories and procedures”.¹²

Flew argues that punishment, in the sense of a sanction imposed for a criminal offense, consists of five elements:¹³

- 1) It must involve an unpleasantness to the victim.
- 2) It must be for an offense, actual or supposed.
- 3) It must be of an offender, actual or supposed.
- 4) It must be the work of personal agencies; in other words, it must not be the natural consequence of an action.
- 5) It must be imposed by an authority or an institution against whose rules the offense has been committed. If this is not the case, then the act is not one of punishment but is simply a hostile act. Similarly, direct action by a person who has no special authority is not properly called punishment, and is more likely to be revenge or an act of hostility.

In addition to these five elements, Benn and Peters add that the unpleasantness should be an essential part of what is intended. The value of this definition of punishment resides in its presentation of punishment in terms of a system of rules, and that it distinguishes punishment from other kinds of unpleasantness.

Why should offenders be punished? This question might produce the following responses:

- They deserve to be punished.
- Punishment will stop them from committing further crimes.
- Punishment tells the victim that society disapproves of the harm that he or she has suffered.
- Punishment discourages others from doing the same thing.
- Punishment protects society from dangerous or dishonest people.
- Punishment allows an offender to make amends for the harm he or she has caused.

¹⁰ Madkour, Mohammed Salam, “Human Rights from an Islamic Worldview: An Outline on Hudud, Ta’zir and Qisas”, p. 18.

¹¹ This sub topic of article is based on “The Purpose of Criminal Punishment” in *Ethic and Criminal Justice System*, p. 103-25.

¹² Garland, D. 1990. *Punishment and Modern Society*. Oxford, England: Oxford University Press. p. 17.

¹³ “The Purpose of Criminal Punishment” in *Ethic and Criminal Justice System*, p. 103-04.

- Punishment ensures that people understand that laws are there to be obeyed.

Some of the possible answers to the question of why offenders should be punished may conflict with each other. This is because some answers are based on reasons having to do with preventing crime whereas others are concerned with punishment being deserved by an offender. When a court imposes a punishment on an offender, it often tries to balance the sorts of reasons for punishment noted earlier, but sometimes certain purposes of punishment dominate other purposes. Over time there have been shifts in penal theory, and therefore in the purpose of punishment due to a complex set of reasons including politics, public policy, and social movements. Consequently, in a cyclical process, an early focus on deterrence as the rationale for punishment gave way to a focus on reform and rehabilitation. This, in turn, has led to a return to punishment based on the notion of retribution and just deserts.

The concept of punishment has been theorized by moral philosophers, social theorists, and criminologists.

In the view of some scholars punishment is a complex concept, and an approach to punishment that is limited to a reading of moral philosophy fails to represent the full dimension and complexity of the subject. For moral philosophers, the “ought” of punishment is of great importance and leads to a set of questions including

- what should be the goals of punishment;
- what should be the values contained in and promoted by the criminal law;
- what is the purpose of punishment?

In contrast to the philosophical view of punishment, the sociological perspective is concerned with the “is” of punishment; that is, what punishment is actually intended for, and the nature of penal systems. The third perspective on punishment is offered by criminologists and policy makers, who focus on penalties for offenses and policy concerns relevant to the punishment of offenders.

Some critics argue that criminology has tended to ignore the moral and sociological implications of punishment in favor of the social and personal characteristics of offenders, as well as the nature of penal institutions and methods of social control. They also point out that the practical ends of penal action, particularly with the aims of sentencing and the administration of prisons and probation, are concerns that pay little attention to the philosophy or sociology of punishment.

These philosophical theories have in turn generated further theoretical discussions about punishment concerned with deterrence, retribution, incapacitation, rehabilitation, and more recently, restorative justice.

1 *Deterrence*

People are deterred from actions when they refrain from carrying them out because they have an aversion to the possible consequences of those actions. It is suggested that although penologists believe that penalties do, in fact, deter, it is hard to determine whether the kind of penalty or its severity has any effect on whether a particular penalty is successful. Some question whether deterrence is morally acceptable. They argue that it is unacceptable because it is impossible to

achieve, and if deterrent sentences are not successful, inflicting suffering in the name of deterrence is morally wrong.

2 Retribution

Retribution is the theory that punishment is justified because it is deserved. Systems of retribution for crime have long existed, with the best known being the *lex talionis* of Biblical times, calling for “an eye for an eye, a tooth for a tooth, and a life for a life”.

Retributionists claim a moral link between punishment and guilt, and see punishment as a question of responsibility or accountability. Once society has decided upon a set of legal rules, the retributivist sees those rules as representing and reflecting the moral order. Society’s acceptance of legal rules means that the retributivist accepts the rules, whatever they may be; accepts that the rule makers are justified in their rule making; and claims that those who make the rules provide the moral climate under which others must live. Accordingly, retributivists cannot question the legitimacy of rules. They argue that retribution operates on a consensus model of society where the community, acting through a legal system of rules, acts “rightly,” and the criminal acts “wrongly”. It follows that the retributivist position makes no allowance for social change or social conditions, looking instead only to crime. Raising the issue of the social causes of crime or questioning the effectiveness of punishment are irrelevant considerations to a retributivist.

It has been suggested that in historical terms, the *lex talionis* did not operate as a demand for retribution. Instead, it set a limit on the nature of that retribution, and therefore prevented the imposition of excessive penalties in the course of acts of vengeance.

Retributivists believe that wrongdoers deserve to be punished and that the punishment imposed should be in proportion to the wrongdoing the offender committed. In contrast to utilitarians, retributivists focus their line of reasoning on the offender’s just desert (a proportionate punishment) and not on the beneficial consequences of punishment.

Retributivists ask questions such as “Why do offenders deserve to be punished?” and “How are their just deserts to be calculated and translated into actual sentences?”

Retributive theories of punishment argue that punishment should be imposed for past crimes and that it should be appropriate to the nature of the crime committed; that is, the severity of the punishment should be commensurate with the seriousness of the crime.

Sometimes, retributive punishment is confused with notions of revenge. Critics of retributionist theories of punishment argue that retribution is basically nothing more than vengeance.

3 Just Deserts

Up until about 1970, criminologists generally thought of retribution as vengeance. During the 1970s, criminologists reconsidered the idea of retribution and advanced new formulations. By the 1980s, the new retributionist theory of just deserts had become influential. Importantly, the new thinking indicated that although there should continue to be

treatment programs, a defendant would not ordinarily be incarcerated in order to receive treatment. Influential writings such as *Struggle for Justice* (American Friends Service Committee 1971) and *Doing Justice* (von Hirsch 1976), which were written in the aftermath of the riot at Attica Prison in 1971, elaborated on the new retributivism in philosophical and civil libertarian terms. This theory gained support as a reaction against the perceived unfairness of systems that favored treatment that had developed over the first half of the 20th century, especially the use of the indeterminate sentence. This form of sentence vested the power of determining the date of release to a parole board, and signifies the practice of individualized sentencing. The latter attempted to sentence according to the treatment needs of the offender, rather than the seriousness of the offense. One of the criticisms of indeterminate sentencing was the fact that the sentencing courts had a wide discretion in choosing a sentence, and although they tended to adopt tariffs for classes of crime, individual judges could depart from them without providing reasons.

Along with the just deserts movement, many states and federal sentencing authorities repealed indeterminate sentencing laws with the aim of reducing judicial discretion in sentencing and promoting consistency and certainty, as well as a set of standards that would help in the process of deciding the sentence.

The fundamental difficulty with deserts theory is that it lacks any principle that determines a properly commensurate sentence. Deserts are determined by a scale of punishment that fixes the most severe penalty. This might be imprisonment or death. It then determines ordinarily proportionate penalties for lesser offenses. It follows that if imprisonment is the most severe penalty, then proportionality will provide shorter terms of imprisonment and noncustodial penalties for lesser offenses. If the term of imprisonment for severe offenses is moderate, then short sentences and penalties such as probation will soon be reached on the scale of seriousness. If the penalty for the most serious offenses is death, it follows that long terms of imprisonment will be proportionate penalties for less serious offenses.

4 Rehabilitation

Retribution and deterrence involve a process of thinking that proceeds from the crime to the punishment. However, rehabilitation is a more complex notion involving an examination of the offense and the criminal, and a concern for the criminal’s social background and punishment. Further, those in favor of rehabilitation theories acknowledge the possibility of additional problems developing during the offender’s sentence or treatment that may be unconnected with the offense and which may require an offender to spend additional periods in treatment or confinement.

Utilitarian theory argues that punishment should have reformatory or rehabilitative effects on the offender. The offender is considered reformed because the result of punishment is a change in the offender’s values so that he or she will refrain from committing further offenses, now believing such conduct to be wrong. This change can be distinguished from simply abstaining from criminal acts due to the fear of being caught and punished again; this amounts to

deterrence, not reformation or rehabilitation by punishment. Proponents of rehabilitation in punishment argue that punishment should be tailored to fit the offender and his or her needs, rather than fitting the offense.

Underpinning this notion is the view that offenders ought to be rehabilitated or reformed so they will not reoffend, and that society ought to provide treatment to an offender. Rehabilitationist theory regards crime as the symptom of a social disease and sees the aim of rehabilitation as curing that disease through treatment.

In essence, the rehabilitative philosophy denies any connection between guilt and punishment. Some scholars outline the strengths of the rehabilitation position as being its emphasis on the personal lives of offenders, its treatment of people as individuals, and its capacity to produce new thinking in an otherwise rigid penal system. They suggest its weaknesses include an unwarranted assumption that crime is related to disease and that social experts can diagnose that condition; treatment programs are open-ended and do not relate to the offense or to other defined criteria; and the fact that the offender, not being seen as fully responsible for his or her actions, is capable of manipulating the treatment to serve his or her own interests. In addition, rehabilitation theory tends to see crime as predetermined by social circumstances rather than as a matter of choice by the offender. This, it is said, denies the agency of the offender and arguably treats an offender in a patronizing, infantilizing way.

The demise of rehabilitation as a theory of punishment began in the 1970s and was the result of a complex set of factors, one of which was no treatment program works very successfully in preventing reoffending, and that no program works better than any other.

5 Incapacitation

Penal practice has always tried to estimate the risk that individual offenders might commit crimes in the future and has tried to shape penal controls to prevent such crimes from happening.

Through the incapacitative approach, offenders are placed in custody, usually for long periods of time, to protect the public from the chance of future offending. In utilitarian theory, incapacitation is seen as a good consequence of punishment because, when serving his or her sentence, the offender is removed from society and is therefore unable to commit further offenses. This applies regardless of whether the offender is deterred, reformed, or rehabilitated through the punishment he or she is given. Incapacity may also be present in other forms of punishment such as parole, in the sense that although the offender is free from incarceration, he or she is placed under supervision, which may restrict his or her opportunity to commit crime.

Some criminologists claim that certain offenders commit crimes at very high rates, and that applying a policy of selective incapacitation aimed at these "career criminals" will assist with the aims of crime prevention.

There are two basic objections to following a policy of incapacitation based on selecting offenders for this kind of punishment. The first is that predicting criminal dangerousness is problematic and will inevitably mean that a

number of persons will suffer incapacitation who would not have committed further crimes if left free, because, given the inaccuracies of prediction, it is necessary to lock up or incapacitate large numbers of non-dangerous offenders so we can ensure we incapacitate dangerous offenders. Second, there is the moral objection that it is wrong in principle to punish offenders based on a prediction of their future conduct; that is, they ought to be punished for what they have done and not for what they *might* do in the future.

Some of the problems inherent in incapacitative sentencing include the following:

- it works only if we lock up those who would have committed further offenses if they had been left free;
- if those we lock up are not immediately replaced by new recruits; or
- if the crimes committed after release are not so frequent or serious so as to negate the effects of the crimes prevented through incapacitative sentencing.

Ethical questions that arise from the sentencing rationale of incapacitation include:

- Is it ethical to punish persons for crimes not yet committed?
- Is it ethical to base punishment on inaccurate predictions?
- Is it ethical to punish a repeat offender for a past crime he or she committed and has already been punished for?

The notion of incapacitation is reflected in such punishment policies as three-strikes legislation, mandatory minimum sentences, and truth in sentencing.

6 Restorative Justice

Braithwaite argues that restorative justice has been "the dominant model of criminal justice throughout most of human history for all the world's peoples," and that it is grounded in traditions from ancient Greek, Arab, and Roman civilizations and in Hindu, Buddhist, and Confucian traditions.

Braithwaite emphasizes that restorative justice means restoring victims as well as offenders and the community. In addition to restoring lost property or personal injury, restoration means bringing back a sense of security. He points to the shame and disempowerment suffered by victims of crime. He observes that Western legal systems generally fail to incorporate victims' voices because the justice system often excludes their participation. Restoring harmony based on an acceptance that justice has been done is, in his view, inadequate.

Essentially, restorative justice proponents emphasize the need to support both victims and offenders, and see social relationships as a rehabilitative vehicle aimed at providing formal and informal social support and control for offenders. Rather than separating out the offender as a subject for rehabilitation, restorative justice sees social support and social control of offenders as the means to rehabilitation.

In considering the nature of a restorative justice approach to offenders, it is useful to note the three core principles suggested by some scholars.

- a. Justice requires the healing of victims, offenders, and communities injured by crime.
- b. Victims, offenders, and communities should be permitted to actively involve themselves in the justice process in a timely and substantial manner.
- c. Roles and responsibilities of the government should be rethought and in its promotion of justice, government should be responsible for preserving a just order and the community should be responsible for establishing peace.

Restorative justice may be considered unique in its emphasis on not just one component of the criminal justice system such as punishment, but as incorporating victims, offenders, and the community in its strategies and designs.

However, there is an absence of theory to explain how the operation of restorative justice is supposed to bring about a change in the offender. Some restorative justice proponents argue that repair in relation to offenders involves a focus on *restoring, strengthening, and building relationships between offenders, victims, and communities*, and therefore intervention intended to prevent future crime must focus not only on the offender's obligation to repair harm done to victims and the community, but also on the need to repair broken relationships between the offender and the community, the victim and the community, and the victim and the offender.

Critics of restorative justice point to its too ready assumption that it will be possible to secure agreement between offenders, victims, and communities. They note that one of the functions of punishment is to relieve the feelings of victims and communities where crimes are committed, and that restorative justice avoids the ceremonies and rituals of criminal law that recognize these emotions. In addition, it can be argued that a greater reliance on restorative justice and a consequent restriction on the operation and expression of criminal law might lead to a situation in which those victims processed through restorative justice might come to believe or feel that the harm they have suffered is of less importance than "real crime." Feminists, who have argued for severe sentencing for domestic violence, have adopted this argument. Criminalization and punishment show the limits of tolerance, and depenalizing through restorative justice processes tends to suggest that society has a different attitude towards certain kinds of behavior.

B. Sociological Approach

On the other side, in sociological terms, punishment raises questions such as why particular punishments were used and why they are no longer used; why a punishment like capital punishment has been abandoned to a great extent in the West; and why imprisonment has become the major form of punishment for criminal activity.

In social terms, research has concluded that punishments depend less on philosophical arguments and more on the currents and movements in social thinking and in climates of tolerance and intolerance. A focus on history and changes in social conditions has illuminated the relationship between punishment and society, which in turn has broadened the

investigation of the notion of punishment into questions concerned with how order and authority are maintained in society. To summarize social theory about punishment it is to be said as: "that body of thought which explores the relations between punishment and society, its purpose being to understand punishment as a social phenomenon and thus trace its role in social life."

According to Garland, punishment is the product of social structure and cultural values. Thus, whom we choose to punish, how we punish, and when we punish are determined by the role we give to punishment in society. If we construe criminal punishment as a wrong for a wrong, then we must conclude that society is, in a sense, wronging the offender. We must therefore ask, "can the infliction of pain or a wrong upon an offender be justified ethically?" To answer this question, one must first look at the purpose of criminal punishment and question the various rationales put forward for punishment, such as deterrence, incapacitation, rehabilitation, just deserts, retribution, and restorative justice.

To conclude this sub topic we could say that the morality of punishment rests upon theories of deterrence, retribution, just deserts, rehabilitation, incapacitation, and most recently, restorative justice. These theories attempt to justify society's imposition of punishment on offenders and try to provide an adequate ethical rationale for inflicting harm.

Deterrence maintains that people are deterred from crime because they are concerned about the possible consequences of their actions. Utilitarian philosophers first put forward this justification for punishment. A number of studies have considered the effectiveness of deterrence as a theory, but there is no clear conclusion about whether deterrence works. Retribution theorists argue that punishment is justified because it is deserved, and punishment therefore becomes a question of responsibility and accountability for acts that harm society. In retribution theory, the punishment imposed should be proportionate to the wrongdoing. Retribution is justified in a number of ways, including the notion that offenders are paying their debt to society, that they are being censured by society, and that punishment has an expressive character that ought to be communicated to an offender.

The emergence of just deserts theory in the 1980s put an end to indeterminate sentencing and introduced sentencing guidelines and sentencing commissions as attempts were made to fix proportionate sentences. Just deserts theory lacks any principle that determines what amounts to a properly commensurate sentence, and it ignores social factors as well as the multiple decisions and discretions that go into the sentencing decision.

Rehabilitation shows a concern for an offender's social background and regards crime as the outcome of a social disease that should be cured through treatment. In the past, indeterminate sentences supported rehabilitation programs because the release decision was given over to boards and not determined by the court. The idea that "nothing works" brought about the demise of rehabilitation, which had been the dominant rationale for punishment until the 1970s. It has now been displaced by just deserts and incapacitation.

According to incapacitation theorists, placing offenders in custody for lengthy periods of time protects the public from the chance of future offending, but this means that offenders

are being punished based on a prediction of what they might do in the future. It raises the question of whether it is ethical to punish persons for crimes they have yet to commit.

Restorative justice is a newcomer to the field of penal theory, and some suggest that it lacks theoretical support. However, its emphasis on community involvement in solutions to crime and emphasis on the victim have attracted a body of support, at least at the local level, where it has been employed to deal with delinquency and relatively minor offenses.

The philosophical approach to punishment is concerned with the "ought" of punishment, whereas the sociological approach raises questions about the use and severity of particular punishments and the relationship among punishment, society, and social change. The criminological approach focuses on the fact of imprisonment and on penal policy making and crime control. Some suggest that no single approach adequately provides justification and rationale for punishment, and that a full explanation can be gained only by combining these various perspectives.

C. Religiosity of Punishment in Islam

Islamic approach to punishment differs from its counterparts in other thoughts as mentioned above. Even though, the similarities and the dissimilarities might be found among such thoughts. The obvious dissimilarity is that source of punishment in Islam is divinely texts and in contrast the sources of counterparts thought are rational and society's agreement.

As Muslims, they are bound by clear injunction of the Holy Quran and the Prophetic Hadith in every matter of their life individually and collectively even their relationship with other creatures of God. Allah Almighty said to the effect: *"It is not for believer, man and woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, he has indeed strayed into a plain error."*¹⁴

Punishment in Islam is an obligatory deed when it is about the determined offenses. Allah said to the effect: *"The thieves, male and female, cut off their hands as a recompense for what they have earned, a punishment by way of example from Allah. And Allah is All-Powerful, All-Wise."*¹⁵ This *ayah* (verse) clearly stated that a punishment is recompense and it has an example for the other.

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 fulfill 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. Allah says to the effect: *"We have sent our Messengers with clear signs and have sent down with them the book and the criterion so that man can establish*

And He says to the effect: *"Allah wants to make things clear for you and to guide you to the ways of those before you and to forgive you. Allah is the All knowing, the Wise. Allah wants to forgive you and wants those who follow their desires to turn wholeheartedly towards (what is right). Allah wants to lighten your burdens, and He has created man weak."*¹⁷

And He says: *"Allah commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice..."*¹⁸

Islamic punishment is divided into three levels: fixed punishment, retribution, and discretionary punishment. Felonies and a few other crimes receive fixed punishment as defined by the Quran, while minor crimes receive either retribution or a discretionary punishment as judged by the state.

The Islamic system applies the philosophy that prevention is better than cure. Having a strict and effective penal system is only part of achieving peace and stability. The other half, Muslims trust, is in the lessons of the Quran, which arm the believer with a conviction against immorality. Allah makes it very clear in the Quran that He knows all and nothing escapes Him, and that punishment for the wrongdoers will be severe. Simultaneously, He describes the abundant rewards awaiting the righteous, filling believers with a desire to follow the straight path to Heaven. Ideally, people will be motivated by the desire to please Allah rather than the fear of punishment, but for those who are not, the punishment is harsh enough to make them think twice before committing a crime.

The other strategy of crime prevention taught by the Quran is the application of a healthy and balanced economic and social system that reduces the cause for crime in the first place. Islamic punishment is severe, but enforcement would rarely be necessary in a place where the governing body provides at least the minimum requirements of food, clothing, and shelter for every individual. Islam makes it the duty of the government to eliminate poverty and create an economic system in which everyone gets a chance to grow. Scholars say that the crime rate would drop significantly on its own in a society where these ideal conditions exist, along with a high sense of morality within the people.

D. The Objectives of Islamic Penal System

If we refer to the Holy Quran as the primary source of Islamic penal system, we may understand that among its objectives are as follows:

First: Islam seeks to protect society from the dangers of crime. It is common knowledge that if crimes are not countered with serious punishments, then society will be in grave danger. Islam seeks to make social stability and security widespread, making life in society secure and peaceful. This objective could be understood from the *ayah* which says to the effect: *"There is (preservation of) life for you in retaliation, O people of understanding, that you may become pious."*¹⁹

¹⁶ Quran Surah al-Hadid: 25.

¹⁷ Quran Surah al-Nisa: 26-28.

¹⁸ Quran Surah al-Nahl: 90.

¹⁹ Quran Surah al-Baqarah: 179.

¹⁴ Quran Surah al-Ahzab: 36.

¹⁵ Quran Surah al-Maidah: 38.

If the murderer, or any other criminal for that matter, knows the extent of the negative consequences for himself that his crime will cause, he will think a thousand times before committing it. Awareness of the punishment will cause the criminal to abstain from committing the crime in two ways. The criminal who has already been subject to the punishment will most likely not return to the crime again. As for the rest of society, their awareness of the effects of this punishment will keep them from falling into the crime. To realize a general effect from the punishment, Islam has established the principle of publicly announcing when it will be carried out. Allah says to the effect: "...A group of the believers should witness the punishment."²⁰

Second: Islam seeks to reform the criminal. The Quran often makes mention of repentance in association with the crimes that it deals with, making it clear that the door to repentance is open whenever the criminal abandons his crime and behaves properly. It has made repentance a means of waiving a fixed punishment in some instances, like the punishment for highway robbery. Allah says to the effect: "...except for those who repent before you take hold of them. Then know that God is the Forgiving, the Merciful."²¹

He also says regarding the punishment for fornication to the effect: "It they both repent and mend their ways, then leave them alone. Verily, God is the Acceptor of repentance, the Merciful."²²

Allah says after mentioning the punishment for false accusation to the effect: "... except for those who repent afterwards and makes amends, then verily God is the Forgiving, the Merciful."²³

He says after mentioning the prescribed punishment for theft to the effect: "Whoever repents after his wrongdoing and makes amends, then verily God will accept his repentance and verily God is the Forgiving, the Merciful."²⁴

This objective is seen more frequently with regard to discretionary punishments, whereby it is incumbent upon the judge to take into consideration the circumstances of the criminal and what will insure his betterment.

Third: The punishment is a recompense for the crime. It is undesirable to treat a criminal lightly who threatens the security of society with danger. The criminal should receive his just recompense as long as he is pleased with taking the path of evil instead of the path of righteousness. It is the right of society to be secure in its safety and the safety of its individual members. The Quran has asserted this objective when mentioning a number of punishments. Allah says to the effect: "The thieves, male and female, cut off their hands as a recompense for what they have earned, a punishment by way of example from Allah. And Allah is All-Powerful, All-Wise."²⁵ and in another ayah says to the effect: "The recompense for those who wage violent transgression against God and His Messenger and who go forth spreading corruption in the Earth is that they should be killed or crucified or that their

²⁰ Quran Surah al-Nur: 2.

²¹ Quran Surah al-Maidah: 34.

²² Quran Surah al-Nisa: 16.

²³ Quran Surah al-Nur: 5.

²⁴ Quran Surah al-Maidah: 39.

²⁵ Quran Surah al-Maidah: 38.

E. Punishments: Islam versus Western Philosophy²⁷

According to Dr. Muhammad Tahir-ul-Qadri in his Islamic Library website²⁸ "Western philosophy of punishments gives us two viewpoints regarding the punishments:

1. Punishment as a method of protecting the society by reducing the occurrence of crimes
2. Punishment as an end in itself.

The punishments in Islamic penal system are not prescribed as ends in themselves, as propagated by the 'Western individualistic philosophy' advanced by Kant and Hegel. The punishments are, in fact, a means of promoting moral values and general welfare of human society. The philosophy of Islamic punishments is remarkably different from and highly superior to the penal philosophy advanced by Western criminologists.

There is no doubt that Islamic punishments are the most consequential as compared to any system of punishments ever enforced in human society. If a punishment is definite in preventing the rate and frequency of crime, then, even according to Salmond, a Western authority on jurisprudence, the punishment of burning alive can be awarded to all the offenders. According to Cordon Gaskell (*Reader's Digest*, February, 1967) "Foreigners consider this amputation for theft a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world."

The allegation of severity and cruelty against Islamic punishments is, therefore, absolutely baseless, false and biased: it is rooted either in sheer ignorance or scholastic dishonesty.

The most serious allegation hurled against Islamic punishments by Western critics and other adversaries of Islam is that they are uncivilized, that they are designed not for ordinary creatures of flesh and blood but for extraordinary monsters, that instead of serving the interests of humanity, they promote the causes of barbarity, and to implement these punishments as effective measures to check crime is in fact to strike at the vitals of human civilization.

In present day America, the statistics relating to wife battering and husband battering are simply staggering. According to September 5, 1983 issue of 'Time Magazine' the figures are as follows:

"Nearly 6 million wives are abused (beaten and battered) by their husbands in any one year. Some 2000 to 4000 women are

²⁶ Quran Surah al-Maidah: 33.

²⁷ See Haqqi, Abdurrahman Raden Aji Haqqi. (2014). "The Development of Islamic Criminal Law in Brunei Darussalam: The Way Forward with the Implementation of Shariah Penal Code Order 2013", paper presented at "International Seminar on the Transformation of Sharia and Law in Responding Global Issues", organized by Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University, Jakarta, 11-12 November 2014, UIN Jakarta, Indonesia.

²⁸ <http://www.minhajbooks.com/english/bookid/251/Islamic-Penal-System-and-its-Philosophy-by-Shaykh-ul-Islam-Dr-Muhammad-Tahir-ul-Qadri.html>

beaten to death annually. The nation's police spend one-third of their time responding to domestic violence calls."

'Time' further states:

"A 1979 FBI report stated that 40% of women killed were murdered by their partner and 10% of men by theirs (many of the women acted in self-defense)."

F. Punishment System of Islam²⁹

The Punishment system (*Nizam al-'Uqubat*) in Islam supplements the judiciary, and provides a means of giving tangible substance to the verdicts. We will outline here in brief some of the main points of the punishment system.

The objectives of the punishment system are three fold:

1. To punish those guilty of crime, thereby acting as a *Kaffara* (purification) and reforming them.
2. To act as a deterrent for society from committing crime.
3. To be a means of retribution for those who are victims of crime.

There are various degrees of punishment that accord with the severity of the crime, the nature of the crime, and other factors which surround it. These all have the effect of achieving the objectives detailed above.

1. Principles of the Punishment System

The following are the principles of the punishment system:

First: The Muslim is accountable for every action that he/she has performed and for every crime there exists a punishment that is enforced by the state.

Such a principle is important because it not only protects the society, but taking the punishment for such crimes through a court of Shari'ah removes its punishment in the afterlife. It acts as a *Kaffara* and is a means to repent and seek forgiveness. Muslims need to remember that Allah knows and will account all the actions. Therefore, it is better to get the punishment in this life and sincerely repent than to face the punishment in the afterlife.

Many of the Muslims during the time of Muhammad (PBUH) confessed to their crimes that were severely punishable in order that they may avoid the retribution for their actions on the Day of Judgment. It is narrated by Abu Daud when referring to a man who confessed to an illegal sexual act, and was ordered to be stoned to death, Muhammad (PBUH) said, "He is more agreeable than the fragrance of musk in the eyes of Allah."

Second: The punishment should be prevented as much as possible.

This applies because the severity of the punishment serves the primary role of a deterrent. Any shred of evidence that is doubtful or circumstantial will prevent the punishment. Indeed it is narrated in the *Sirah* (life) of Muhammad (PBUH) how he would exert himself to avert the punishment when individuals asked for the punishment to be implemented upon them. It is narrated that Muhammad (PBUH) said, "To free someone criminal mistakenly is better than to punish someone innocent mistakenly." 'A'ishah narrated, "Ward off punishments as much as you can. If you find any way out for a Muslim then set him free. If the Imam makes a mistake in granting

forgiveness it is better for him than that he should commit a mistake in imposing punishment."

In this way, bearing in mind the heavy burden of proof, false conviction or unjustified punishment will be absent in the Islamic judiciary.

Third: Islam sets down punishments to protect and secure six issues for all citizens of the state, whether Muslim or non-Muslim: Belief, Honor, Mind, Property, Life and Offspring.

1. **Belief:** The Islamic belief is the pillar of the *Din* (Religion) and like any precious jewel, it is protected. Therefore, anyone who wants to leave Islam after accepting it and being advised, is subject to the penalty of death. The same punishment is applicable to anyone that slanders the belief of Islam.

Concerning the non-Muslims, the meaning of the Qur'anic verse, "*There is no compulsion in religion*"³⁰, ensures that non-Muslims cannot be forced to become Muslims, and their right to practice their religion is protected.

2. **Honor:** In Islam, women are an Honor (*'Ird*) and must be protected from all harm, slander and degrading actions. Therefore, Islam protects the dignity of women by punishing those who even backbite against her. Moreover, Islam protects the Honor of people by punishing those who spread slanders against them. Anyone who is properly convicted of doing so is punished by eighty lashes.

3. **Mind:** The use of alcoholic drinks and any other substances that befog the mind are forbidden in Islam. Accordingly, all the social problems which are inevitable consequences of such substances on the society are removed. The punishment for use of such substances is eighty lashes.

4. **Property:** Islam protects the wealth of all its citizens by securing a harsh punishment, e.g. cutting the hand of the thief, subject to all the conditions which apply here (like the value of the goods, the place of storage of the goods etc.)

5. **Life:** Muhammad (PBUH) said that, "The blood of a Muslim is worth more than the Ka'aba and all its surroundings." The punishment for murder is death, with the right of the family of the deceased to forgive and receive blood money.

6. **Offspring:** Islam guarantees recognition of the correct lineage of people and their children, and ensures that no child is wrongfully attributed to anyone other than their own parentage. This is primarily achieved by forbidding and punishing illicit sexual relations.

With all these securities, Islam protects the things which human beings hold as most valuable. Those who are guilty of abusing any of these securities are subject to punishment.

2. Who is subject to Punishment?

Both Muslims and non-Muslims who are under the authority of the Islamic State are subject to the punishment of the judiciary if they are proven to have committed the crimes. This is because the orders of punishment that appear in the Qur'an or hadith are general and do not specify that the punishments are restricted to Muslims or non-Muslims, e.g. Allah Almighty says to the effect: "*The thieves, male and female, cut off their hands as a recompense for what they have*

²⁹ Website article: See Muhammad Abu Zahra. *Al-'Uqubat fi al-Islam*

³⁰ Quran Surah al-Baqarah: 256.

said: "By Allah, if Fatimah the daughter of Muhammad stole, I would cut her hand."

2. *Qisas* (Retaliation): This concerns crimes against the rights of an individual where the victim has the option to demand punishment or forgive the criminal and demand blood money (*diyya*). It concerns mainly the issues of killing and bodily harm, whether unlawful or accidental. For example, if someone committed murder, the family of the victim could demand that the perpetrator be killed, or they could forgive them and demand blood money. The value of blood money varies depending on the nature of the crime:

a) Blood money from the one who kills with intention is 100 camels, 40 of which must be pregnant, or the equivalent monetary value.

b) Blood money from the one who kills unintentionally i.e. manslaughter, is the equivalent of 100 camels.

It is narrated by Al-Nissai and Darimi that Abu Bakr reported that the Messenger of Allah (saw) wrote to the inhabitants of Yemen and there was in his letter: "Whosoever kills a believer unjustly will suffer retaliation for what his hand has done unless the relatives of the murdered man consent otherwise. And therein it was : A man shall be killed for the murder of a woman. And therein it was: For the murder of a life, there is bloodwit of 100 camels..."

Another hadith narrated by Imam Nissai mentions that every part of the body has blood money, for example, the blood money for the eyes is equivalent of 50 camels.

3. *Al-Ta'zir* (discretionary punishment): This is considered the right of the community. It covers those issues which are not part of the *qisas* or *hudud*, but which affect the right of the community such as shouting in the streets, cheating in the market place etc. The judge presiding over the case will study the severity and nature of the crime and prescribe a punishment to match it from his own *ijtihad* (Personal Reasoning). The punishments may range from anywhere between a warning to death. One famous example happened in the time of 'Umar ibn al-Khattab, where he punished a scholar who gave false testimony. He ordered that the scholar should have his head shaved, his face painted black, and be paraded semi-clothed in front of the people while sitting backwards on a donkey.

4. *Al-Mukhalafat* (compounds): This covers the areas of the rights of the state. Here the crime is committed when a person or group contravenes a law which the state has enacted, such as breaking the speed limit or parking in no-parking areas. The punishment is at the discretion of the judge.

4. Punishment as the Last Resort

It must be noted that the punishments administered by the Islamic State are the last resort in the process of curbing and preventing crime. Islam comes as a *al-Din* (way of life) where all the systems work in harmony, making an integrated and perfectly complementary whole.

Thus, the Economic System will ensure that all the citizens of the state will have their needs adequately fulfilled such that no-one need resort to crime to sustain themselves. As well, the Education System will teach the people the mentality of rejecting any kind of crime, all of which are forbidden in Islam, in favor of obedience to Allah. And the Social System will inculcate within the people the mentality of respect and

earned, a punishment by way of example from Allah. And Allah is All-Powerful, All-Wise."³¹

It is forbidden to discriminate against any non-Muslim if he commits a crime. This is because all citizens of the Islamic State are equal in status, and have the same rights guaranteed. Muhammad (PBUH) said, "Whoever harms a dhimmi (non-Muslim citizen in Islamic state), it is as if he harms me."

Only those who are responsible for their actions are subject to punishment. Muhammad (PBUH) said, "The pen is lifted (from recording the deeds of) three : The majnun (madman) until he becomes sane, the child until he becomes mature and the sleeping person till he awakes."

In all of the situations mentioned in the hadith, the person is not responsible for his actions, as he is unable to discern the correctness or incorrectness in his actions. Thus, he is not subject to the punishments that the court would normally administer to someone who had committed the same crimes.

If any crime is committed under force of duress, there will be no legal liability if it is proved that this was the case. Muhammad (PBUH) said, "My Ummah will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness." Again here, no punishment will be given for crimes committed under such a state of mind as negating responsibility for a criminal act.

3. The Types of Punishment

There are four categories of punishment that criminals may be subject to. These are:

1. *Hudud* (Determined Crimes): This punishment is the right of Allah Almighty, and it is a retribution for seven different crimes, which no-one can forgive. These are:

a) *Zina* (fornication or adultery): The punishment is 100 lashes for fornication (i.e. pre-marital sex) or stoning to death for adultery (where the fornicator/s is/are married).

b) *Qadhf* (False Accusation): Where a false charge of adultery is insinuated against a man or woman. The punishment is 80 lashes.

c) *Sariqah* (theft): Where theft is the crime. The punishment is cutting off of the hand, provided seven conditions are fulfilled concerning the circumstances of the crime.

d) *Shurb al-khamar* (Consumption of Intoxicants): Where the crime is for example drinking wine. The punishment is 80 lashes.

e) *Al-Baghiy* (Rebellion against the state): Where individuals or groups revolt against the authority of the state, e.g. motivation of division of the Ummah. The punishment is death.

f) *al-Irtidat* (Apostasy): Where a Muslim changes his or her belief, and refuses to return after advice is given. The punishment is death.

g) *al-Hirabah* (Highway Robbery): Where robbers attack passers by on the open highways. The punishment is cutting off the hand and foot on opposite sides, or death if the crime led to the death of the victim.

In these issues, if someone is proven to be guilty of the crime and all the conditions for the punishment are fulfilled, there is no leniency or pardon for the perpetrator. Muhammad (PBUH)

³¹ Quran Surah al-Maidah: 38.

dignity towards the opposite sex, and the segregation between men and women in their daily life will minimize the possibility of crimes in this area.

So in the Islamic State the prevention of crime works on three levels:

1) The pious of the believer: The Muslim has conviction in the rational creed of Islam, which is built upon the study of reality and use of the mind. This gives them the definite foundation for their belief in Islam and motivates them to be subservient to the One and Only True God, Allah.

Crime is a disobedience to Allah. The Muslims longing for the Paradise and their fear of the punishment of Hellfire will prevent them from committing crime.

2) Public Opinion: It is one of the mutual rights and duties of the Muslims that they always look out for and take care the affairs of each other. Thus there will be a constant motivation and encouragement from all sides for people to observe the Islamic conduct.

Crime will be shunned and rejected by the society at large. Criminals and cheats will not be accepted, nor will wealth or any perceived benefits gained illicitly be respected. This pressure from the dominant values in the society will prevent those who are tempted to commit crime from doing so.

3) The Punishments: The last resort is the fear of the consequences of the criminal actions in terms of the punishment.

It is for these reasons that so few incidences of implementation of *hudud* and other retributions by the judiciary were necessary in the history of the Khilafah.

III. CONCLUSION

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. The Islamic state successfully did this for over 1300 years, only rarely having to resort to punishing anyone.

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