

Crime and Punishment under Islamic Jurisprudence: An Introspection

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Abstract:

This paper includes the sayings of Islam regarding crime and punishment as its subject matter. It analyzes and discusses different crimes and their punishments under Islamic jurisprudence. Preference is given in finding the philosophical and logical usage behind the crimes and punishments in Islamic penology. One of its objects is to discover the real theme of Islamic Jurisprudence.

Introduction:

The olden times of human evolution say that different religions were evolved in many places and among different communities for securing the humanity. 'Crime' is one of the imperative reasons for which humanity got endangered. Most of the religions tried to eradicate crime by purifying human habit and mentality from the society. Islam is the last one of all the evolved religions and perhaps the most modern one. It posses a logical and structured judicial system which bears a concrete concept about crimes as well as their punishments of which some are unchangeable, some are discretionary and some depends on the spirit of the victim.

Primarily crime was regarded as an individual aggression against the community.¹ But this concept is changed and spreaded to an extent where the 'individual aggression' turned into 'organized aggression' and 'against community' includes 'against private person'. So now crime is thought-out as an individual or organized aggression against a private individual or the community through out the world. The grand superstructure of Islamic Jurisprudence is founded on the Koranic Laws and the traditional saying of the Prophet (saw).²

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¹ Islam and The Concept of Punishment, at <http://islam4all.com/newpage18.htm> last visited 25 February, 2010.

² Syed Ameer Ali, Mahommedan Law, (P. L. D. Publisher, Lahore: 1999) p 5.

The Islamic Penal system accords as the ultimate authority and source in Almighty Allah Ta-ala. As the verse says "**He is the supreme instructor, Justice**".³ The Holy Qur'an, as the Almighty's revealed book, paves the way of understanding the sense of numerous crimes and tips their punishments. Other vital sources of Islamic laws are The Sunnah, Consensus of the Companion of the Prophet (saw) (The Ijma) and Divine Analogy (Qiyas). These sources are raised and used for providing the rules to meet the demand of the situation arisen which are not covered by the Holy Qur'an.

Underlying Philosophy:

In common law 'facts and circumstances' are the highest scales that affix the merit of a crime as well as its punishment. Some people often say that the Islamic laws are very much fixed and rigid; sometimes it opens no door for equity and discretion. As a result humanity ruins. They are right as regards **HADD** (The fixed punishment for fixed crimes), but quite wrong, perhaps misguided about other types of crimes and their punishments. The Islamic Legal System is more preventive than retributive.⁴ Merciful Almighty says "**We have already sent our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice**".⁵ Again he says "**O believers, be you securers of justice, witness for God. Let not detestation for a people move you not to be equitable; be equitable- that is nearer to God-fearing**".⁶ These two verses determine the equitable visions and missions of Islamic Penology. The whole Islamic legal system intended for ensuring a logical, equitable and circumstantial justice. The fact might be clearer by discussing the following Hadith:

"A woman Ghamid came to the prophet (saw) and said: 'I have committed a punishable sexual act'. He (saw) replied, 'Go back'. She then returned, and on the next day came to him (saw) again and said, 'Perhaps you want to send me back as you did to Ma'iz Bin Malik'. I swear by Allah I am pregnant'. He said to her, 'Go back until you give birth to the child'. She left. When she gave

³ Qur'an, 7:87.

⁴ Dr.S.A.Q. Husaini, The Constitution of the Arab Empire, (SH. Muhammad Ashraf, Kashmiri Bazar, Lahore: 1968), p 122.

⁵ Qur'an, 57:25.

⁶ Qur'an, 5:8.

birth to the child she brought the child to him (saw), and said 'Here he is! I have given birth to it'. He (saw) said, 'Go back and suckle him until you wean him'. When she had weaned him, she brought the boy to him (saw) with something in his hand which he was eating. The boy was then given to a certain man of the Muslims and He (saw) commanded regarding her. So a pit was dug for her, He (saw) gave orders about her and she was stoned to death. Khalid was one of those who were throwing stones at her. He threw a stone at her. When a drop of her blood fell on his cheek, he abused her. Muhammad (saw) said to him, 'Gently Khalid. By him in whose hand my soul is she has repented to such an extent, that if one who wrongfully takes an extra were to repent to a like extent, he would be forgiven'. Then giving command regarding her, He (saw) prayed over her and she was buried".⁷ This Hadith instructs two things. Firstly, except the real offender no one will be punished. Here the mother was the offender, not the child in her womb. If the mother was stoned before giving birth, the child would also die. It faced the death before its birth due to its mother's indulgence. But Islam didn't permit it. Secondly, that the ultimate object of executing punishment is to discourage and diminish crimes from the community, not to hurt, dishonor or take revenge personally against anyone as Prophet (saw) stopped Khalid from abusing and declared that the woman was near to innocent as she repented and no doubt these are the highest sign of justice and equity.

The inner hindrance of man's ethical conscience is greatly incorporated with exterior environment. So when dealing with community problems like crime, Islamic law does not rely simply on legislation and external curb. Through greatest emphasis on man's moral conscience it focuses more on the internal deterrent. It events to develop this scruple within a person from childhood so that he can grow up with the noblest moral character. It promises success and salvation for those who work righteousness and warns wrongdoers of an evil fate. Moreover it stirs up emotions, making a criminal renounce his ways by inspiring him with faith in God, hope for divine mercy, fear of divine punishment, adherence to moral virtues, love for others, and a desire to do good to others and refrain from causing injury and harm⁸.

⁷Abu Daud Sharif, Chapter: Rules of Punishment, Hadith no: 4387, (Islamic Foundation Bangladesh, 1999) Vol-v, p 296.

⁸Crime and punishment in Islam, edited by Dr. Abdurrahman al-Muala, at <http://www.islamreligion.com/articles/253/viewall/>, last visited 23rd February, 2010

According to the predominant view in Islam, fiqh or 'Jurisprudence' is defined as "Knowledge of the rules of God which concern the actions of persons who own themselves bound to obey the law".⁹ The Islamic legal system is significantly able to poise with respect to the relation between a private person and the community. It provides evidence that the Celestial laws do not marginalize the individual for the sake of the community while enacting penalty and precautionary events against felonious activities. In the opposite way, it takes the help of equity and ensures the protection of the individual, his freedom and his rights with precedence. It tries to fabricate such a secured society which provides no pretext for a person to initiate crime. It does not set out to punish without first preparing for the individual a situation conducive to a virtuous and happy life.

Numerous Crimes:

Under Islam When certain primary rights are violated the wrong is called Maasiat, that is, crime or offence; and gives rise to certain substitutory public rights in the form of uqbat or punishments.¹⁰ The Islamic Penology uses basically two principles for defending the community problems and for the demarcation of their solutions. Among them the primary one is "The stability and permanence of its basic tenets" and the second one is "The dynamism of its subsidiary injunctions". There are some aspects and crimes which are most common to all kinds of communities. Islamic law brings fixed statutes and punishments for them. For other vibrant situations of life derived from social development, broadening horizons, and advancing in knowledge, Islam wishes to settle them by such principles which are universally general in nature and can be applied in different ways and able to meet the variety of circumstances. All other types of crime except the above two categories, confronted by some general Islamic principles signifying the embargo of those said felonies and leaving their penalty on the proper political authority of the state. That political authority will then judge the state of affairs and take the most effective way to shield the society from impairment. So, as the principles lies above, basically crimes and punishments are of three types in Islamic jurisprudence. Such as:

- a) Prescribed Punishments.
- b) Retributory Punishments.
- c) Discretionary Punishments.

⁹Reuben Levy, *The Social Structure of Islam*, (Cambridge University Press: 1969), 1st Edition, p150.

¹⁰Abdul Rahim, *The Principles of Muhammadan Jurisprudence*, (Luzac and Co: London, S.P.C.K. Depository: Madras:1911), p361.

a) Prescribed Punishments:

Its Arabic name is '**Hadd**' or '**Hudood**'. **Hadd** used to be prevalent in Arabia at the time of the promulgation of Islam.¹¹ There are some crimes specifically described in the Qur'an for which punishments are also specified. These crimes are treated as the crimes directly against God and the execution of the predetermined punishments for these crimes are the right of God.¹² These crimes bear some inherent natures. As these are the 'Right of God' meanings that it holds a legal right of general nature and definitely concern the great welfare of the community. No one can enlarge or shrink such punishments. No judge or Political authority can change or waive these crimes and punishments. But the victim can pardon the offender and the offender can get rid of the offence when the damage is only personal. Again if a non-muslim, after being convicted under Hadd becomes a Muslim may be acquitted from the crimes against the God and these are the exceptions in this regard. Following offences are treated as 'Had': Theft, Highway Robbery, Fornication and Adultery, False Accusation, Drinking, Apostasy.

b) Retributory Punishments:

These are named as 'Tazir' in Arabic which meant prohibition,¹³ For its execution it follows two complementary characteristics. First one is 'Severity of Punishment' and the second one is 'Difficulty of establishing guilt, reducing the opportunities for carrying out the punishment protecting the accused'. In these case punishments are waved when the offence is not quite proved and doubt survives. The benefit of doubt in these cases always goes to the accused. Retribution is only possible when the killing or injury is done willingly. As per the Holly Qur'an, "*O you who believe, retribution is prescribed for you in the case of murder...*"¹⁴ Again "*There is retribution in wounds...*"¹⁵ But it is not possible when the killing or injury is done accidentally. Under retribution the offender is punished with the same injury that he caused to the victim. The perpetrator will be killed if he killed the victim. On the other hand, , if it is

¹¹ Al-Hedaya, Chapter-Evidence, (Islamic Foundation Bangladesh, 2007) Vol. IV, p.237

¹² Dr. Md. Ali Asgar Khan, Mokhlesur Rahman, Dr. Sheikh Md. Lutfor Rahman, Muslim Proshashon Babosthar Chromobikash,, (Books Pavilion, Rajshahi: 1989). p 313.

¹³ Md. Abdul Halim, The Legal System of Bangladesh, (Md. Yousuf Ali Khan, Dhaka, 2004), 1st Edition, p 49.

¹⁴ Qur'an, 2:178.

¹⁵ Qur'an, 5:45.

possible, his limb will be cut off without killing him when he cut of victim's limb. Specialists are used for making such determinations. In case of transgression Islam authorize discretion to the victim to pardon the offender because here the punishments are treated as the right of the victim. The fact is that Islam always prefers pardon than causing punishment swearing a better return in the hereafter life. As almighty says, "*If anyone waives the right to retaliation out of charity, it shall be an expiation for him.*".¹⁶ The pardon can also be by blood money. It's like that, 'A demanded and fixed amount of money by the victim'. In this case courts were free to invent new methods of punishing the criminals e.g. cutting of tongue, impalement, etc.¹⁷ Lastly, one thing must be remembered that except the state or the political authority no one is authorized to execute retribution.

c) Discretionary Punishments:

These are described as 'Qisas' or 'blood-fine'.¹⁸ These are such types of crimes and punishments which either contravenes the rights of God or of an individual, but these are not predetermined by Islamic Penology. The situation is that the numbers of crimes which have fixed punishments are very few in number. As a result, except those short listed crimes all other crimes are included under this discretionary category. Basically these types of punishments are the consequence of the social demand and it closely relates with the social change. These are flexible enough for realizing the highest benefit of the community. It tries to reform the criminal and shrink the damage that he occurred. Islam has contributed different discretionary punishments. Such as Exhortations, Reprimands, Flogging, Fines and Imprisonments. Only an empowered authority under Islamic legal frame work can impose discretionary punishments. Under Qisas the state was authorised to punish the criminals for grave offences although the injured party might, "waive his private claim to compensation or redress".¹⁹

Goals of the Punishments:

It is one of the vital legal issues in modern jurisprudence that how the punishments will be executed? Whether by retribution or by reformation or by some other procedures? Reformation always has priority votes than other

¹⁶ Qur'an, 5:45.

¹⁷ M.B. Ahmad, *The Administration of Justice in Mediaeval India*, (Lahore, 1941), p 225.

¹⁸ V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, (Eastern Book Company, Law Times Press, Lucknow: 2005), 7th edition, p 27.

¹⁹ *ibid*

But it is also proved that the reformation procedure seeks some retribution for its success. Islam also realizes this and like the other legal systems Islam aims to keep the social order stable and widespread and save the community from the jeopardy of various felonies. So, from its early inauguration, Islam has made a platform of action by enacting numerous sentences which will dispirit 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.²⁰ As it is uttered in the Qur'an, **"There is (Preservation of) life for you in retribution, O people of understanding, that you may become pious".**²¹ For a righteous and peaceful society and to apprehend the general effect of punishment, Qur'an established the principle for publicly announcement about the execution. In this regard Al-Mighty say's, **"A group of the believers should witness the punishments...."**²² The result is, if the punishments of several felonies are well known to a offender, he will think thousand times about their negative effect for himself. This punishmental dias has opened two ways. In one side, the criminal who has been convicted and faced punishment he will most likely not commit crime again in future, and on the other side, who watched the execution of punishment or heard about it, he will keep himself safe from crime.

The Islamic Penology is based on humanitarian aspect and they believe in reforming the criminals. In different verses God Al-Mighty declared and ordered the believers to show mercy to the perpetrators by means of repentance. Allah says, **".....except for those who return (repenting) before you overcome them. And know that Allah is Forgiving and Merciful".**²³ Forgiving the punishment of fornication Allah says, **"If they repent and correct themselves, leave them alone. Indeed Allah is ever accepting of repentance and Merciful."**²⁴ Again declaring the pardon of theft, God says, **"But whoever repents after his wrongdoing and reforms, indeed, Allah will turn to him in forgiveness. Indeed, Allah is Forgiving and Merciful."**²⁵ Under the Islamic Jurisprudence, judges use this objective mostly in case of discretionary punishments considering the circumstances of the said crime and the betterment of the criminal.

²⁰ The Judicial Punishment System in Islam, at <http://islamicrationalism.com/-2008/12/23/the-judicial-punishment-system-in-islam/>, last visited 27th February, 2010

²¹ Qur'an, 2:179.

²² Qur'an, 24:2.

²³ Qur'an, 5:34.

²⁴ Qur'an, 4:16.

²⁵ Qur'an, 5:39.

Punishment is nothing but a recompense of crime. Islamic Penology always admits the right of the accused and ensures that he is perfectly heard. In this regard Rasulullah (saw) said, "**Respective parties to the case must be present before the judge during the trial.**"²⁶ It indicates that accused is also given the highest opportunity for defending himself which lastly results in awarding him a perfect, just and actual sentence.

Conclusion:

Islamic penology wields the forces of nature for ensuring justice. It possesses such judicial procedures which are mostly circumstantial and equitable in nature. The reason behind this is that the predetermined crimes and punishments are very few in number. So mostly the judges or the Islamic scholars have to follow the discretionary procedure for the end of justice and here lies the splendor as well as the threat. Because the excellence of the judgments relies on the wisdom, learning, skill and the nature of the judge. If he is a man of superior nature and apt wisdom then he can set such examples of justice of which no alternative subsists. On the contrary, just the opposite will happen if he is a wicked and ignorant person.

²⁶ Abu Daud Sharif, Chapter- Trial, Hadith no: 3549. (Islamic Foundation Bangladesh, 2006)
Vol: IV, p: 447.