

Punishment from Islamic Perspectives

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All societies have identified certain actions that are regarded as disapproved and are reprimanded under the penal system. There are various theories of punishments, while the Islamic punishments are criticized widely by the western world as being harsh. This paper reviews Islamic perspectives on punishment and sentencing. By drawing the parallels between both the Islamic and western concepts of punishments, this research attempts to dispel the western critique against the Islamic punishments.

Key words: Punishment, sentencing, prison, alternatives to custody, mandatory minimum sentences, guidelines sentencing.

There has always been great debate on the rationales for sentencing. To some do-gooders, the increased prison population is a cause of concern as it incapacitates an individual and cuts him off from the society. The public, who are the victims of crime, think that every criminal behind the bars is one less prowling the streets, burgling, robbing, raping or murdering. The very punitive and tough penal environment across the globe during the last decades has resulted in overcrowded prisons. There are compelling arguments, both in the favour and against.¹

Those arguing for a *rational choice theory* of punishment contend that prison can reduce crime through incapacitation and deterrence. The proponents of *deserts theory* argue that people are responsible for their acts (misacts, indeed) and there must be a system of rewards and punishments. Counter arguments to the system of punishments are: the effectiveness of prisons in controlling crime is over exaggerated; damaging effects of prison on the lives of individuals and their families are often underrated and prisons have a very little or no role in the reformation or rehabilitation of offenders (RCP, 2004).

This research paper examines the rationale of punishing offenders, from the modern and Islamic perspectives and by comparing both the Islamic and western concepts of punishments, this research attempts to dispel the western critique against the Islamic punishments.

Method

This was a qualitative research study, based on library reviews. Descriptive and analytical methods of research are

used in this study. The purpose of the literature review was to build an argument that Islamic Penology is not some thing that delineates from the fundamental human rights; rather all the world systems have devised their penal systems that correspond to their societal needs.

Rationale for Sentencing—Modern Approach:

All human societies have defined certain parameters and boundaries, within which all men have complete independence of action. Those crossing these defined limits are given punishments. All societies have developed full-fledged penal systems to punish these human transgressors. The utilitarian conception of punishment (*Deterrence*) relies on negative general prevention that is general deterrence as a basis for punishment. The theme is that punishment suffered by an offender presents to every one (potential offender) an example. Bentham, the chief proponent of the theory, argued that sentences should be calculated to be sufficient to deter others from committing the offence (Bentham, 1998).

The model has been criticized on theoretical grounds by von Hirsch and Ashworth (2005). In a study at the Cambridge University, von Hirsch (1999) found statistically significant negative correlations between the likelihood of conviction (certainty) and crime rate, whereas the correlation between the sentence severity and the crime rates was statistically non-significant. Burnett and Maruna (2004) evaluated the effectiveness of the doctrine of 'Prison Works'. While studying the criminal careers of 130 men released from prison, they observed that the subsequent criminal careers of the majority of the sample contradicted the assumption that imprisonment had a deterrent impact and there were limitations of rational choice theory as a basis for understanding recidivism and desistance from crime.

Crime prevention through incarceration, that is, *incapacitation* renders the convicted offender incapable for a

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period of time, of offending again. Incapacitation is usually sought through predicting the offenders' likelihood of reoffending (predictive restraint, as von Hirsch 1998 describes). Bottoms (2004) reviewed the research studies on incapacitation carried out in the US and found a positive incapacitation effect of the increasing number of people in prison, though the Law of Diminishing Returns became operative after a specific time. Hirsch (1998), Hirsch and Ashworth (2005) and Walker (1998) have also objected to this theory on empirical grounds.

Conversely, *Rehabilitation* focuses on the offender reform and eventually at the prevention of crime. Rehabilitation work is incorporated simultaneously in both the prison and in the community. However, it is counter argued that such programmes are effective only if the offenders were serving long sentences. The Report of an Independent Inquiry into Alternatives to Prison (RCP 2004) quotes the observations of the Probation's Managers' Association and Thames Valley Partnership that it was virtually impossible for effective programmes to be delivered in prison, unless offenders were undergoing long-term imprisonment.

Andrew Von Hirsch is the proponent of retribution, *just deserts*, that is based on the theme that the wrong doer should be punished for his wrong doing. Proportionality is the key element, that is, sentences to commensurate with the seriousness of the offence (von Hirsch 1998 and von Hirsch and Ashworth 2005). However, the injustices of just deserts have been discussed at length by Tonry (1996). The Report of an Independent Inquiry into the Alternative to Prison (RCP, 2004) argues that imprisonment deprives a person of liberty and the stigma associated with the imprisonment sends out a message of society's disapproval of criminal acts. Likewise, other sentences also contain punitive messages in different degrees. Rex (2004) states that the findings of the survey she conducted of the views of the stakeholders on the purposes of punishment show that there was little support for pure retribution as a purpose of sentencing; while the community penalties had a wide spread support as opposed to custody as a mean of punishment.

Denunciation is another rationale for punishment. Denunciation expresses the societal condemnation of crime. The approach combines the features of both utilitarianism and retribution. Because of being publicly denounced, it serves as a deterrent and has a utilitarian approach; and as it promotes the idea those offenders deserve to be punished, so is retributive.

The Islamic Approach

The Islamic theory of punishment derives from the Holy Quran and the Hadith. On the whole, the Holy Quran has about 200 verses dealing with the legal issues). The main goal of Islamic Penology is to secure human welfare, maintain peace and to establish a righteous society. It is very

clearly enunciated in the Holy Quran that Allah has sent His messengers and the Holy Quran, so that men can establish justice. It is categorically expressed as: *"God commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice..."* (Quran 57:25; 16:90).

Though Islamic law is based on divine sources, it is a living body of law that addresses the needs of Islamic society. In the light of the parameters laid down in the Quran, the science of *Fiqh* has developed a detailed legal system whereby complex issues can be examined. The Islamic Penal system describes three types of punishments: prescribed punishments, retribution and discretionary punishments.

Prescribed punishments are fixed punishments and neither can be increased, nor decreased. Judges, any political authority or the family of victim cannot waive these punishments. God says: *"O you who believe! Verily wine, gambling, idols, and divination are but the abominations of Satan's handiwork, so abandon these things that perchance you will be successful. Satan only wishes to cause enmity and hatred between you through wine and gambling and to prevent you from the remembrance of God and prayer. Will you not then desist?"*(Quran 5:90-91).

In *retribution*, same injury is caused to the offender of the crime as punishment that he inflicted upon the victim. Intentional murder by a person requires the killing of the offender and if he severed the limb of the victim, or caused him hurt, then his own limb is to be cut off or injured. Allah says in the Holy Quran: *"O! You who believe, retribution is prescribed for you in the case of murder; the free for the free, the slave for the slave, the woman for the woman."* (Quran 2:178). At another place, retribution has been explained as: *"Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal"* (Quran 5:45).

Islam, actually, discourages bloodshed in any form. As soon as blood flows, Islam punishes such crime in a different way. Retribution provides one of the most important elements of peace, protection and security in the society. *"Retribution is life for you"* (Quran 2:179). However, the underlying principal is equal and exact. *"The punishment for an injury is an injury equal to it"* (Quran 42, 40). It is not intended to rehabilitate the criminal but to exact retribution and revenge as commanded by Allah.

However, the punishment is inflicted by the state and not by the victim or his family. If punishment is inflicted by the victim himself or his family, this is called revenge and "revenge of bloodshed" is forbidden in Islam. Criminal intent is an important parameter and there is no retribution for any act or omission done accidentally or by mistake. The victim or his family can pardon the perpetrator as well. God says: *"If anyone waives the right to retaliation out of charity, it shall be expiation for him"* (Quran 5:45).

The *discretionary punishments* are flexible enough to take into account the needs of individual and society and also to realize the maximum general benefit to society and the reformation possibilities of the criminal. Starting from exhortations and reprimands to flogging, to fines, and to imprisonment, Islamic Law has defined different types of discretionary punishments. Legal authorities enjoy discretionary powers, within the general framework of Islamic Law.

Punishments in Islam can also be classified in another way as well. They can be classified under three main categories: *Al-Hudud* (fixed punishments), *Al-Qisas* (restitutory), and *Al-Taazir* (discretionary). The goals of sharia in each kind of the punishment are summarized as under:

Form of Punishment	Nature of Crime where prescribed	Nature of Discretion with the Judge	Objective
Hadd	a) <i>Sarqa</i> (theft) b) <i>Hiraba</i> c) <i>Al-Zina</i> d) <i>Al-Qadhif</i> e) <i>Shurb al-Khamr</i> f) <i>Al-Ridda</i>	None/Mandatory	Deterrence, Retribution, Expiation
Qisas	Qatl e Amad Hurt	Some Discretion	Restitution
Tazir	a) Admonition (<i>Al Waz</i>) b) Reprimand (<i>Al-Tawbikh</i>) c) Threat (<i>Al-Tahdid</i>) d) Boycott (<i>Al-Hajr</i>) e) Public Disclosure (<i>Al-Tashhir</i>) f) Fines and seizure (<i>Al-Gharamah wal-Musadarah</i>) g) Imprisonment (<i>Al-Habs</i>) h) Banishment (<i>Al-Nafy</i>) i) Flogging (<i>Al-Jald</i>) j) Death Penalty (<i>Al-Tazir bil Qatl</i>)	Full Discretion	Reform, Deterrence

Two important complementary characteristics of Islamic punishments are: (a) the severity of the punishment, to discourage the crime and limit its occurrence; (b) the difficulty in establishing the guilt that reduces the opportunities for carrying out the punishment and accords protection to the accused. If there is an iota of doubt, punishment is waived. These components complement each other so that the crime is effectively discouraged. The fact that the punishment is severe makes people abstain from committing crime². They also provide a safeguard to the rights of the accused and mere false accusations cannot become a ground for punishment. Islam recognizes equally the society's general security and the individual offender's rights.

² The wisdom in the severity of penalty is saving lives. Quran states: "And there is (a saving of) life for you in retribution, the law of equal penalty (killer to be equally killed); O you men of understanding, that you may restrain yourselves" (Quran, 2:180). Moreover, the Islamic society is based on *taqwa*, that is, the fear of God. Evidence in Islam is obligatory. Fear of God prohibits a man, from giving false evidence. Allah says, "O you who believe! Stand firmly for justice, as witnesses to Allah, even though it be against yourselves or your parents, or your kin" (Quran 4: 135).

Critical Appraisal

Islamic punishments are generally criticized as being harsh. This criticism is, however, based on deceptive notions. Before making any judgment whether a criminal should be punished or not, the extent of his responsibility for the offence committed is first determined. Punishments are neither prescribed, nor executed in a haphazard manner. A balance of justice is maintained in a right manner and Islam insists on the examination of accentuating conditions associated with the crime and these serve as mitigating factors while a judge makes any decision. Islam takes into account the viewpoint of the criminal and that of the community against which aggression took place and a balance is maintained between the two. Keeping in view these considerations, fair punishment that is in accordance with the dictates of sound logic and wise reasoning is prescribed. The Islamic punishments need to be looked at from this conceptual framework and perhaps this is the reason that the United States Supreme Court, in 1935, honored Prophet Muhammad, (peace be upon him) as one of the 18 greatest lawgivers in human history³.

If viewed superficially, Islamic punishments appear to be cruel. However, the factual position is that Islamic punishments have a preventive orientation, as discussed above. Besides, such punishments are not executed unless it is ascertained that the crime was not justifiable and the criminal was not acting under any obligation; rather the crime was committed intentionally. The Caliph of Islam Omar bin Khattab did not carry out the punishment prescribed for theft, that is, the cutting the hands, during the year of famine as it was conceived that hunger had compelled offenders to commit the theft. Moreover, the Islamic rationale in prescribing the punishment is that Islam tries in the first place to purify society from circumstances that may lead to crime. Islam thus prescribes punishments that have a preventive impact and are just. They are inflicted on offenders who have no reasonable justification for their crimes.

In general, the interpretation and practice of Islam in Southeast Asia is more liberal than in parts of the Middle East and South Asia. Marred catastrophically by high in surge of crime rates, Brunei adopted the Sharia criminal law nationwide, to take effect from May 01, 2014. The Sultan of Brunei explained that "theory states that God's law is harsh and unfair, but God himself has said that his law is indeed fair"⁴. However, the western media and the UN dubbed this promulgation as falling down of a hammer on the residents of Brunei⁵. It is worth mentioning here that harsh punishments are also available in penal systems of many countries. Capital punishment in the United States is a

³ See the web link:

<http://www.supremecourt.gov/about/north&southwalls.pdf>

⁴ Vice News, April 30, 2014.

⁵ The Guardian, April 30, 2014 and the Los Angeles Times, May 01, 2014.

legal sentence in 37 states⁶. The incidences of harsh justice in the United States have been debated in length by Whitman (2003) and Tella and Dubra (2011). In the penal system of Singapore, many activities which are considered as fairly harmless in other countries, such as failing to flush toilets after use, littering, the sale of chewing gum, etc are considered to be the criminal acts. Singapore retains both corporal punishment (in the form of caning) and capital punishment (by hanging) as punishments for serious offences⁷. Criminologist Graeme Newman (1995) argued that corporal punishment should be introduced to fill the gap between the severe punishment of prison and the non-punishment of probation.

Islamic law has many similar defenses to crime as in the common law nations. The Islamic concept of *Qisas* can be compared with the western concept of **mandatory sentences**. The western penal systems have imposed mandatory sentences in many cases. In the United States, mandatory sentencing and increased punishment were enacted when under the Boggs Act of 1952. Subsequently, the U.S. Congress and many state legislatures, in the 1970s and 1980s, passed laws forcing the judges to give fixed prison terms to those convicted of specific crimes; especially drug offences. Mandatory sentencing laws were enacted in Australia in 1996 and 1997, through amendments to the Criminal Code. Minimum mandatory sentences also exist in the British Penal system under the provisions of Criminal Justice Act 2003. More importantly, the sharia judges enjoy much more freedom in sentencing options than the western judges as under the sharia system, mandatory sentences are applicable in *hadd* cases only. Even sharia laws make a clear cut distinction in punishments of *Qalt e Amad* and *Qatal e Khata*. Thus, the critics' view of Islamic punishments in not based on accuracy.

Criticisms exist against the western penal system, too. Fines are perhaps apart from custody, the most obviously punitive sentence. Home detention curfews enforced by electronic monitoring deprive offenders liberty, although clearly less so than prison. Probation orders are less obviously retributive but when combined with other requirements such as attendance at offending behaviour programmes and electronic tagging have a punitive message marking what the offender has done as wrong. Finally, community service/punishment, attendance centres orders, Drug Treatment and Testing Orders (DTTOs) and so on are so punitive insofar as they remove offenders' freedom of choice about how they use their time.

An examination of the Islamic penal system reveals that it has many highly interconnected institutions. Apart from relying on the legislative enactments and other deterrents, Islam focuses more on the man's internal deterrent that is the moral conscience. Being a complete system for

regulating all aspects of human life, Islam sets forth the obligations, injunctions, and prohibitions. The relationship between the individual and society is looked at with balance and an individual is not marginalized for the sake of society. Every safeguard is provided within the social and legal framework of Islam so that no excuse for a person is left to commit a crime. This conceptualization of punishment is somewhat similar to the collective conscience mentioned by Durkheim. The sociological approaches to crime are similar to the sociological orientations of crime explained by Young (2002), Cohen (1971, 1979, 1985) and Hirst and Woolley (1982).

Differences also exist even among the modern world societies on the degree of severity of punishments. Some societies are more punitive than others. Based on historical analysis and fieldwork in the penal systems of three Anglophone countries (England, Australia and New Zealand) and three Nordic countries (Finland, Norway and Sweden), Pratt and Eriksson (2013) argue that the penal differences that currently exist between these two clusters of societies originate basically from their early nineteenth-century social arrangements. The Anglophone societies were dominated by exclusionary value systems and individualism, personal advancement, and division were understood as desirable maxims. These values were in sharp contrast to the more inclusionary values of the Nordic countries, where priority was given to egalitarianism and moderation. The development of their penal programmes over this two hundred year period, including the much earlier demise of the death penalty in the Nordic countries and significant differences between the respective prison rates and prison conditions of the two clusters, reflects the continuing influence of these values.

The approach of sharia has also many parallels with the Offender Management practice present in western penal system. In 2003, the Carter Report, *Managing Offenders, Reducing Crime* proposed a new approach for managing offenders in the United Kingdom and recommended that a National Offender Management Service should be established with an objective of punishing offenders and helping to reduce re-offending (Carter 2003). In response, the government published the document, *Reducing Crime, Changing Lives* and the decision to create NOMS was the outcome of the Carter Report (Home Office, 2004). The stated aims are to enable resources to be used more effectively and to reduce rates of re-offending, and at the same time to increase public confidence in the penal system and the criminal justice system as a whole. NOMS is believed to be a driver in delivering a number of changes, as shown in the following figure. The vision of NOMS is that it will ensure the implementation of the court orders and extend supervision to the offenders and those who are held in custody in such a way that the public is protected and will effectively initiate interventions and other services, aiming at reducing the re-offending and giving an offender the

⁶ Website of the Death Penalty Information Center: <http://www.deathpenaltyinfo.org/>

⁷ The Penal Code of Singapore, 1871.

opportunity to lead a law abiding and productive life (Home Office, 2005a).



(Source: Home Office 2005b)

Conclusions

Like all the other penal systems of the world, the Islamic penal system aims to establish a just society. In many aspects, the Islamic Law and modern law coincide. However, the Islamic penal system is unique in the sense that the inner deterrent of man, that is, his moral conscience is woven fully into the fabric of external supervision. Islam wants to protect the society from the dangerous impacts of crime; seeks to reform the criminal and also recompenses the victim. The individual is not marginalized for the sake of society and its priority is the protection of the rights of an individual. This draws a parallel between the Islamic approach and the rehabilitative approach to the crime, starting in the criminological studies in the 21st Century. The safeguards provided in the Islamic Penal system compare favorably with the western approach of the Sentencing Advisory Guidelines, being exercised in many administrations. The evolution of Sentencing Guidelines in UK has been adequately reviewed by Ashworth (2005) and Ashworth and Player (2005).

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