REVISITING ISLAMIC PUNISHMENT AND ITS IMPLEMENTATION IN THE CONTEMPORARY WORLD

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Abstract: The demand for infusing Islamic law, particularly Islamic criminal law, into the administration of justice and the judicial system in Muslim countries has become an important issue today. Numerous conferences and seminars on Islamic criminal law have been held on ways of introducing this law. Our neighbour, Brunei as well as Aceh declared its decision to enforce an Islamic penal system in the respective states. For many Muslims they believe that implementation of hudud are the essential requirement for consideration to be a Muslim state. In reality, the infliction of hudud punishments is almost impossible due to the very strict requirements regarding the procedure of establishing the crimes. On contrary, it is obvious that the scope of discretionary punishment or ta’zir is very wide as compared to the limited nature of hudud and qisas. Besides, ta’zir crimes and punishments are left unspecified in the Shariah texts so as to make them appropriate to the changing requirements of a society as it develops. This paper seeks to highlight this issue so as to indicate the flexibility of Islamic criminal law which can be adapted according to different times and places and remains compatible with the demands of the modern world.

Keywords:

Introduction

The most fundamental purpose of the Shariah is the protection of the five basic necessities of the human being i.e. religion, life, lineage, mind and property. These are known as masalih (interests) which means human or public good, interest, welfare and utility. The protection of these interests is recognised by all jurists who also maintain that any transgression against these interests is considered unlawful and may be a punishable offence. Concerning this matter, al-Ghazzali is reported to have said that anything which protects these five basic necessities is maslahah while anything which denies their protection is mafsadah whose prevention is also maslahah [1]. The prevention of mafsadah may take various forms, one of which is the infliction of a punishment. Thus, the basis of Islamic criminal law, i.e. the prevention of mafsadah, is in fact the same as the general purpose of the Shariah, i.e. the protection of people’s interests (masalih). In Islam, crimes and punishments are divided into three categories as follow:

1. **Hadd**

   Hadd (plural: hudud), is a crime punishable with a fixed punishment imposed as a right of the public, or known as the right of God. Hudud crimes and their punishments are mentioned clearly in the text of the Quran and the Sunnah. The crimes of hudud in Islamic criminal law are zina (adultery or fornication), qazf (false accusation of zina), theft, robbery, drinking intoxicants, apostasy and rebellion. When a crime of hadd is established, the prescribed punishment must be imposed. It cannot be reduced nor pardoned, in other words, hadd punishment is mandatory. [2]

   The hudud are the maximum punishments. In many cases hudud punishments cannot be imposed due to the very strict requirements regarding the procedure of establishing hudud crimes, based on the hadith of the Prophet (SAW): ‘Set aside hudud punishments in cases of doubt’. [3].
Thus the *hadd* punishment may be set aside due to the existence of even the slightest doubt and may instead be reduced to one of *ta’zir*.

2. *Qisas* and *diyāh*

*Qisas* [4] and *diyāh* [5] is a crime affecting life i.e. homicide and causing bodily harm to others. It is a crime punishable with a fixed punishment imposed as a right of the individual. *Qisas* and *diyāh* crimes and their punishments are mentioned clearly in the text of the Quran and hadith of the Prophet (SAW). The punishment of *qisas* and *diyāh* is fixed and thus the judge has no right to remove or mitigate the punishment based on his own discretion. However, since this type of offence involves the right of the individual, the infliction of punishment depends on the demand of the victim or his relatives. The victim or his relatives may want to demand the infliction of *qisas* or choose to reduce it to *diyāh* or to pardon the offender. It also depends on them whether or not to consider any negotiation in determining their rights. [6]

Hadith of the Prophet (SAW): ‘If a relative of anyone is killed, or if he suffers a wound, he may choose one of three things, he may retaliate i.e. *qisas* or pardon or receive *diyāh*...’ See Abu Dawud, Sulayman ibn al-Ash’ath, *Sunan Abi Dawud*.

3. *Ta’zir*

*Ta’zir* (plural: *ta’azir* or *ta’zirat*) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. The crimes of *ta’zir* are unlimited. It consists of transgressions where no specific and fixed punishment is prescribed, i.e. apart from *hudud* and *qisas* and *diyāh* [7]. The Shari’ah gives the ruler or the court considerable discretion in the infliction of *ta’zir* punishments, which range in gravity from a warning to death taking into account the seriousness of the offence, the circumstances of the criminal, his record, and other mitigating or aggravating factors. However, the authority of the judge is limited by his obligation not to order a punishment which is not allowed by Islamic law. [8]

As for *ta’zir* there is no specific punishment to be inflicted on an offender. Any punishment which can serve the purpose of punishment may be used. *Ta’zir* punishment can be inflicted upon the offender's soul, body, property, and dignity. These penalties are graduated according to the school of law, morality and local custom. Types of *ta’zir* punishment can be of these following categories:

1. Corporal punishments (*al-‘uqubah al-badaniyyah*). These include capital punishment, i.e. the death penalty and flogging.
2. The withdrawal of one's freedom (*al-‘uqubah al-muqayyadah li al-hurriyyah*). This includes banishment, boycotting and imprisonment.
3. Financial punishments (*al-‘uqubah al-maliyyah*). These include fines, seizure of property, and the modification or demolition of property.
4. Verbal punishments (*al-‘uqubah al-nafsiyyah*). These include admonition, reprimand, and threat.
5. Other punishments. These include any punishment which can serve the purpose of *ta’zir* such as dismissal from office, and public disclosure.

From the above, it can be seen that there are various types of punishments which can be imposed as *ta’zir* punishments in Islamic criminal law as discussed by the jurists. It is agreed that the jurists do dispute on the legality of some of these punishments, particularly financial punishment and imprisonment. However, as they are all *ta’zir* punishments, they are left to the discretion of the ruler or the authority concerned to legislate *ta’zir* laws depending upon the suitability of their application according to place and time. Any punishment can be considered a legal punishment to be imposed on an offender if the public interest necessitates it provided that it could serve its objectives and conforms to the principles as laid down by Shari’ah.
Punishment in Islamic law is imposed as a last resort

Islam tries to wipe out all channels leading to the commission of a crime by imposing two kinds of controls, the internal and external.

Internal Controls

All Muslims accept the existence of God and the life hereafter. They are reminded that Allah is witnessing them permanently and every one of their actions is being recorded. This record will be placed before each and every individual on the Day of Judgement. Whether one is rewarded or punished will depend upon the nature of one’s actions. Muslims accept that an act done in the thick layers of darkness may remain a secret in this world but cannot go unresponded in the Hereafter. Even the feelings and passions that occur in the innermost recesses of the heart are known to Allah and cannot go unnoticed. Hence, when a Muslim has such a strong belief, he surely would obey God's commands and abstain from His prohibitions. The Quran says: Or do they think that We cannot hear their secrets and their private counsels? Indeed (We do), and our Messengers are by them, to record.

The observation of ‘ibadah plays an important role to restrict ways leading to the commission of crime. Daily prayers, for example, if performed with khushu’ (humility) can restrain Muslims from doing shameful deeds (Abu Zahrah 1998:24), as stated in the following Quranic verse: And establish regular prayer: for prayer restrains from shameful and unjust deeds. (al-Ankabut: 45)

Similarly, fasting can be a shield (or protection) from the commission of crime, as mentioned in the following hadith: Mu’adh ibn Jabal reported that the Prophet said, "Fasting is a shield", in other words, a shield against wrong action. [9]

Paying zakat (obligatory alms) may promote Muslims to help their less fortunate brothers. Zakat is the allocation of wealth which is taken compulsorily from the rich and distributed amongst the poor. This obligation will help to close the gap between them. Thus the bad consequences which result from poverty could be avoided. [10]

Furthermore, Muslims are required to carry out the duty to enjoin the right and forbid the wrong (al-amr bi al-ma’ruf wa al-nahy ‘an al-munkar), as mentioned in the following Quranic verse: Let there arise out of you a bond of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity. (Ali Imran: 104)

Muslims should encourage one another to acts of piety and the restraint of evil. This would lead a Muslim community to live in unity and harmony. These internal controls help closing all the channels which lead to the commission of crime.

External Controls

Attempts have been taken in Islam to eradicate all the causes which lead to the commission of crimes. First of all, the government of a Muslim state is responsible for the support of every citizen, regardless of his caste, race, language, colour or social status. It should try as far as possible to ensure that the citizens get their basic needs (al-daru’riyyat) such as food, clothing, shelter, medical treatment and education. The government should also make an attempt to provide sufficient jobs for all citizens. Where a job is not available or if an individual is incapable of working, aid should be given to him from the bayt al-mal (public treasury) [11]. This would block the way to the commission of theft and robbery. Regarding this matter, Muhammad Asad, as quoted by M.Siddiqi, explains: “In a community or state which neglects or is unable to provide complete social security for all its members, the temptation to enrich oneself by illegal means often becomes irresistible ... If the society is unable to fulfil its duties with regard to every one of its members, it has no right to invoke the full sanction of Criminal Law (hadd) against the individual transgressor, but must confine itself to milder forms of administrative punishment...”. Islam recognises the sexual need of an individual and thus gives him a permissible way to satisfy it through marriage. The institution of marriage in Islam has been made as easy as possible and a great stress has been laid upon living in a married state, as confirmed by the hadith of the Prophet which says: When a servant of Allah marries, he perfects half of his religion. [12]
If anyone wishes to get married yet cannot afford to do so, aid should be provided from the bayt al-mal. Furthermore, several measures are taken to purify a Muslim community from evil temptations which excite the passions that may lead to the commission of sexual offences, for example, prohibiting celibacy; allowing a man to marry four wives, if not satisfied with one, two or three; allowing widows to remarry; forbidding women from displaying their beauty and ornaments, and so on. [13]

There are several other measures taken in Islam to block the channels which lead to the commission of further crimes, for example, prohibiting dealing with intoxicants either drinking or selling, prohibiting backbiting, insulting, entering private homes without permission, spying on others, gambling, and so on.

In view of this comprehensive system of internal and external controls, one can easily visualize the general environment in which committing an offence itself becomes almost impossible. The last measure taken in this system, however, is a warning of the infliction of punishments. If one still turns to crime despite the above mentioned safeguards, then he deserves to be punished, either by a hadd punishment or qisas or ta’zir, depending upon the crime that he has committed. It should be remembered that before the infliction of any punishment, certain conditions and procedures should be followed by the court.

The Objectives of Punishment

In Islamic law, punishments have the objective of preventing the commission of further offences, both by the offender and by other members of society. Punishments are also intended to rectify the offender and to reform him [14]. In the following paragraph, a further discussion on the objective of Islamic punishments will be explained.

1. Preventive and Deterrent (al-Zajr)

Al-Zayla’i, in his discussion on Matn al-Kanz states that the objective of punishments is to serve as a deterrent (zajr). [15] What is meant by the term zajr is to prevent the offender from the recommission of further offences and to deter other members of society from initiating the offences, realizing that the punishment which has been inflicted on the offender is not only confined to him alone but may also be imposed on any other potential offender whenever he commits the crime. In this regard Ibn al-Humam states in his discussion on Fath al-Qadir as follows:

“Punishment can serve as a preventive measure (mawani') before the occurrence of a crime, and serve as a deterrent (zawajir) after the occurrence of a crime. It means that the knowledge of the enforcement of the punishment could prevent any other potential criminal from carrying out his intention, or whenever a criminal is punished, it deters him from the recommission of further offence”. [16]

Since religious disobediences (ma'asi) which are punishable can be either the commission of the prohibited acts or the omission of the obligatory acts, the meaning of zajr is, in the former, to prevent a person from committing such prohibited acts and, in the latter, to prevent him from omitting such obligatory acts. The offender will be punished until he obeys the religious duty. It is interesting to note that the punishment in the latter case should be stricter and stronger in degree since the objective of punishment in such cases is to compel the offender to observe the obligatory acts. Thus, the punishment can be repeated so long as he omits the obligatory acts. [17]

The recognition of the deterrent aspect in the Islamic Penal system is, in fact, deeper and stronger than in other systems of law. Here, deterrence is recognised as the predominant justification for the punishments. The jurists maintain that deterrent punishments promote the safety of society and the honour and interests of all. Deterrence is not pursued merely by proclaiming the crime and its punishments, but rather is based on the speed with which the accused is tried and punished, and on the public manner of the infliction of the punishment. [84]

2. Reformative (al-Islahwa al-Tahdhib)

Another objective of punishment is to reform and to rehabilitate the offender from committing the crime or sin. It means that disciplinary and reformative punishment can lead the
offender to stop from the commission of a crime, motivated by his religious awareness and self-consciousness, which results from his abhorrence of the crime and not from the fear of the punishment, to seek God's pleasure since the crime is considered a ma'asiyah. This religious awareness is, indeed, the best way to confront the crime at its root when a person believes that every one of his actions is recorded by God and cannot go unresponded in the Hereafter. [19]

The concept of reformation of the offender is obtained from the principle of repentance or tawbah which is recognised by the Qur’an. The most noticeable example of this objective can be traced from the punishment of imprisonment for an indefinite term where there is no limitation on the period of this punishment. It will last, either until the criminal's repentance, or until his death in the case of a dangerous criminal. Recourse has been had to imprisonment from a very early date. It is said that during the caliphate of ‘Umar ibn al-Khattab a house was purchased in Medina to house prisoners. This practice was later followed by governors. [20] Imprisonment came to be used mainly for discipline and correction, both of which objectives, it was thought, would be achieved by self-reflection.

3. Retributive (al-Jaza’)

Since crime is a detested and undesired act that harms the sense of justice, and rouses the wrath of society against the offender, and sympathy with the victims, punishment is the reaction of society against the act of the offender. Therefore, punishment is the general retaliation of society to maintain peace and social order. In the case of an offence which infringes the right of individuals, the punishment provides satisfaction for the aggrieved parties by eliminating the ill feelings which they may bear against the offenders. Punishment prevents offenders from experiencing the consequences of the wrath that crime creates in society against them, and thus rehabilitation may be achieved. [21]

4. Expiation (al-Kaffarah)

The objectives of punishment in Islamic law do not only cover the benefits gained in this world as those mentioned above but they also encompass the permanent objectives of the next world [22]. This objective of punishment is a unique feature of Islamic criminal law that cannot be found in any other criminal law. The punishment that is inflicted on an offender in this world is to clear his account with Allah. This is based on a hadith of the Prophet which says: Whoever commits a crime deserving of hadd and receives its punishment, this will be its expiation (of sin). [23]

From the hadith, it can be understood that an offender who has been punished in this world will not be punished again for the same offence in the hereafter. However, it must be borne in mind that the right to pardon sins of a man belongs solely to Allah. Allah knows the truth.

Conditions of Punishment in Islam

In order for a punishment to be valid in Islamic criminal law, it must fulfil the following conditions:

1. It should be legal in the sense that it should be based on one of the sources of Islamic law, i.e. Quran, Sunnah or a legislation issued by a competent body in conformity with the laws of Islam.
2. It should be strictly individualised, i.e. inflicted on the offender, and should in no way affect others, as confirmed in the following Quranic verse: Nor can the bearer of a burden bear another's burden. Based on the above text, a punishment on a pregnant woman must be deferred since the foetus which is still in its mother's womb should be protected from any possible harm caused by the infliction of a punishment on its mother. [24]
3. It should be common in the sense that it should be awarded to any offender irrespective of sex, status or position. The ruler and the ruled, the rich and the poor - all should be equal before justice without any discrimination between them. Absolute equality is required in the case of a hadd or qisas. As for ta'zir, equality is not required in the magnitude, quality or type of punishment. Equality is required in the effect of the punishment on the offender, the desired effect being prevention, reformation and deterrence. Some persons are deterred by reprimand, whereas others can be deterred only by imprisonment or bodily pain, each according to his or her nature, age,
circumstances, status, or any other mitigating and aggravating factors. It is a discretionary matter which is left entirely to the judge. [25]

**Restorative Justice**

Restorative justice concerns on the victim and the implication of the crime rather than to punish the offender based on the retributive justice. Under the restorative justice, the victim, the offender and the community are the participants in the process may discuss and decide how to solve the crime. Restorative justice focuses on the injury to the victim and the community and the goal is for reparation i.e. to do something to the victim (such as to pay compensation) or to serve the community (such as to do community service) for the harm caused by the crime. [26] Restorative justice concerns on the nature of the harm resulting from the crime, how to repair the harm and who is responsible for repairs [27].

Restorative justice concerns the implication of crime and focus on the involvement of the offender, the victim and the community by emphasizing the responsibility of the offender with the needs of the victim and the community. [28] Facing the victims to apologize and repair the harm will help the offender to reestablish relations with the community. At the same time, it might encourage the offender not to re-offend, to remorse and to repair the harm caused by his act. It also will be beneficial to the community in which repeated crime could be reduced. [29]

Restorative justice is opposed to the traditional justice system, where an offence is associated against the state. The prosecution acting on behalf of the state prosecutes the offender. [30] The traditional justice system is based on retributive justice, which is to punish the offender proportionate to the harm caused. [31] The punishment inflicted focuses on the responsibility of the offender by imposing pain, discomfort, harm and social stigma. [32] It ignores the effect of punishment and moral quality behind the rejection of the act since the goal of the criminal law is to punish the offender for what they did in the past. [33]

**Definition of Restorative Justice**

Restorative justice is a process where all victims and the offender in a particular offence get together to negotiate the offence and its implications in the future. Article 2 of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters defines restorative process as any process where both the victim and the offender with community members affected by a crime, participate in resolving the criminal case with the help of a facilitator.

The principles of restorative justice are as follows;
1) The offence is primarily against the victim and secondarily against the state.
2) The relationship between victim and offender can be restored through restitution.
3) Restitution may be achieved through reparation whether in the form of compensation or community service.
4) Communication between victim and offender is important to reach an agreement.
5) Offenders need to take responsibility for the crime and should be given opportunity to make amends. [34]

**Restorative Justice under the Qur’an and Hadith of the Prophet**

Restorative justice consists of forgiveness, conciliation and compensation or reparation. The reflection of restorative justice can be seen in Islamic criminal law, where certain offences which directly affected individuals may be compromised and forgiven by the victim which is also known as sulh.

**Compromise (sulh)**

*Al-sulh* means to compromise dispute, to end dispute among persons, [35] “to reconcile or to make peace with the opponent”. [36] The Shafi’is define *sulh* as an agreement to end the dispute. According to the Hanbalis and the Malikis, *sulh* is an agreement between two disputants to reach a settlement or an agreement to compromise between two disputing parties. The Hanafis define *sulh* as an agreement arises by the quarrelling and conflict between opponents. [37]
According to the Hanafis, the element of ṣulḥ is offer and acceptance. Imam Ash-Shafi’i, Imam Ahmad and Imam Malik agree that the elements of ṣulḥ are; there must be two disputing parties, offer and acceptance, matters being disputed, reparation or compensation. [38]

The legal basis of ṣulḥ in criminal matters can be found in Qur’an, hadith of the Prophet (s.’a.w.), and tradition of the Companions. Islam promotes people to make peace and reconcile when there is a quarrel as governed in the Qur’an (Al-Hujurat:9) which stated that, “Truly the believers are brothers. Make peace among your brothers (who are fighting); and remain conscious of Allah, so that you may be shown mercy”. In Qur’an (Ash-Shura: 40) there is another verse which stated that, and (if you wish to requite, then) let evil be rewarded with evil equal thereto; but he who forgives (an evil deed) and seeks reconciliation (with him), his reward rests with Allah (Who will grant him an excellent reward). For Allah does not love the wrong-doers.

In this verse, Islam allows victims of injury to seek retaliation from the offender. However, if the victim forgives and reconciles with the offender, the victim will be rewarded by Allah. In the TafsirIbnKathir, justice in the context of punishment is to punish the offender in the form of equality or qisas(retaliation). But, the best way which is recommended by Allah is to forgive and make reconciliation. [39]

Forgiveness

Islam encourages forgiveness for the wrong deeds done by all human beings. Nevertheless, it does not deny the right of the victim against the offender such as compensation. If the victim has forgiven the offender, the criminal report against the accused may be withdrawn. For instance, in certain ḥudud cases which particularly involve the right of individuals can be withdrawn with forgiveness provided that the matter has not been brought to the authority. Imam Abu Hanifa opines that ḥudud cannot be forgiven by the accused or pardon by the Ruler if the matter has been brought to the authority. Ash-Shafi’i’s agrees that ḥudud can be waived after repentance or pardon in false accusation and robbery if the matters have not been brought before the authority, and the accused has been forgiven by the victim.

In case of false accusation, Imam Abu Hanifah, Imam Shafie, Imam Malik and Imam Hanbali agree that if the victim does not wish to lodge a complaint against the accused and has forgiven the criminal act of the accused, the ḥadd punishment will not be imposed to the accused. As in case of theft and robbery, there is a hadith reported by Abdullah ibn Mas’ud, where there was a man committed theft and was ordered to cut off his hand. The Prophet (s.’a.w.) said nothing could prevent him from executing the punishment if the case has been brought to the ruler. The Prophet (s.’a.w.) further said that Allah loves forgiveness (Musnad Ahmad, no 4157). This hadith indicates that if the victim has forgiven and compromised with the offender before the matter is brought to the ruler, ḥudud will be withdrawn. As in the case of robbery, if the victim has forgiven the accused before the case is brought to the court, had punishment may be withdrawn against the accused. But, the accused may be liable to the victim or the victim’s heirs if the act he had committed has caused death, or injury to the victim. As such, the accused has to face with qisas punishment or diyat unless has been forgiven by the victim to remit those rights.

Forgiveness from the victim is highly recommended in qisas cases. It can be seen in the hadith reported by Anasibn Malik that he noticed that the Prophet (s.’a.w.), whenever a dispute that involved qisas was brought before him, he would exhort the aggrieved party to pardon the offender (Sunan Abu Dawud, No 4495). In another hadith Aishah reported that the Prophet said, “The disputants should refrain from taking retaliation. The one who is nearer should forgive first and then the one who is next to him, even if the one who is forgives is a woman” (Sunan Abi Dawud, No 4523).
For instance, in case of wilful murder, the punishment is *qiṣas* or retaliation but, the victim and the heirs may forgive the offender and claim compensation as mentioned in the Qur’ān (Al-Baqarah: 178), “O believers! Retaliation (Qisas) is decreed for you in case of killing: the free man for the free man, the slave for the slave, and the female for the female. But if the aggrieved brother (of the victim) pardoned him (the accused), he shall (pardon him) in good manner (in claiming the compensation), and (the killer) shall pay a liberal fine (as compensation). This is alleviation and a mercy from your Lord. And he who transgresses (takes revenge) thereafter, will have a painful punishment”.

Imam Malik agrees that though the heirs of the victim have forgiven the offender, whether with *diyat* or without *diyat*, the offender is subjected to penal punishment. Penal punishment is punishment determined by the ruler ranging from the lightest to the most severe. Imam Malik, Imam Abu Hanifa and Imam Ash-Shafi’i differ with Imam Ahmad and opine that since the heirs of the victim have forgiven the offender, penal punishment is not necessary. The Shafi’is holds that liability to pay *diyat* for wilful murder is on the offender by using the offender’s property himself.

References

[4] *Qiṣas* means to inflict a similar punishment on the offender as he has caused to the victim. In the case of homicide, *qiṣas* means death sentence whilst in the case of causing injury with intention, it means causing similar injury (if possible) to the offender as he has caused to the victim, with certain conditions.
[5] *Diyah* or blood money is a prescribed amount of property payable to the aggrieved party in the case of homicide or bodily injury.


[38] Wahbah al-Zuhaili, translated from Arabic by Ahmad Shahbari Salamon et al., *Fiqh & Perundangan Islam*, vol. v, h. 268.