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THE RATIONALE BEHIND THE APPLICATION OF PUNISHMENT IN ISLAMIC LAW

1.0 INTRODUCTION

The first consideration any penal system is concerned with, is the punishment of the offender. Therefore, the rationale behind the punishment is an essential step in understanding such penal system.

Also the application of any given penal system cannot be justified unless it has become clear that the rationale of punishment can successfully achieve the required ends and objectives.

Thus, punishment in Islamic law is not only functional, but can successfully achieve the required ends and objectives. The reason being that it has with it, social, economic, political and above all divine contents. While punishment in western penal system, is based on, and justified by, considerations of social utility.[1]

Therefore, punishment is essential so that sanity will prevail in the society, because without its existence, the society would be thrown into complete anarchy. For example, if a person who commits murder is left free, he would inevitably proceed to kill more innocent lives. Punishment, is then, the source of protection that will ensure public order and security in the society. This shows that the collective interest of the society is given the uppermost priority. It will lead to the establishment of a just society and no injustice is as grave as neglecting to punish offenders.

Definition.

Uqubat is the arabic word for punishment connoting the infliction of penalty or harm for wrong doing. It is defined as the penalty, being inflicted upon whoever violates a divine directive with a view to promoting the interest of the society at large[2].
From the above definition, the following observations can be deduced thus:-

(a) Punishment originates from a divine source. Therefore it is to serve for all times and situations.

(b) It is believed that criminal acts and behaviours attract punishment both in this world and the hereafter, restrain people from committing crime not only out of fear of punishment by the state, but also to avoid divine punishment after death. This makes Islamic law more effective in reducing incidences of crimes in the society to the barest minimum.

(c) Islamic law provides a variety of punishments to cover all types of unlawful acts, however, small it may be. For example, it provides for Kaffara (expiation) concerning certain small sinful acts.

1.2 Classification of Punishments.

Generally, punishments in Islamic law are variously classified by putting into consideration a lot of factors such as nature, effect, person etc.

(a) Punishment based on the nature of penalty.

Punishment here are divided into four[3] namely:-

(i) Uqubat Asliyyah - Original punishments.

These are punishments fixed by the Holy Qur'an and Sunnah. Hudud and Qisas punishments are included here.

(ii) Uqubat al-Badaliyya - Alternative punishments.

These are punishments in which the courts of law may prescribe as an alternative for the offence.

(iii) Uqubat Tabiyyah -Incidental punishments.

These are punishments which may affect the accused as part of the effect of Hudud or Qisas offences for which he is convicted. A good example here is a situation where a son kills his parent, he will not be eligible to inherit such parent.

(iv) Uqubat Takmiliyyah - Additional punishments.

These are punishments prescribed by the courts in certain dangerous criminal cases.

(b). **Punishments depending on the nature of the legal rule applying to the offence.**

Punishments in this category are divided into two[4] namely:-

(i) Uqubat Muqadara - Fixed punishments.

These are punishments in which courts have no jurisdiction to add, reduce or modify. A good example is a Hadd punishment.

(ii) Uqubat ghair Muqadara -Non fixed punishments.

These are punishments in which the penalty is not strictly provided for in the Holy Qur'an and Sunnah. The courts have discretion to determine or vary the punishment with due consideration to the nature of crime involved and the spirit of the sharia.

Punishments with reference to persons on whom the penalties are to be administered.

The punishment here are into two[5] namely:-

(i). Uqubat Badaniyyah - corporal punishments.

These are cases in which the punishments are inflicted upon the body of the offender.

(ii). Uqubat Nafsiyyah - Psychological punishments.

These are punishments which take the form of rebuking the accused in public, reprimand etc.

(iii). Uqubat Maliyyah - Monetary punishments.
These are punishments which take the form of fines.

(d) **Punishments based on practical purposes.**
These are punishments which take the form of Hudud, Qisas and Ta'azir.[6] Hudud is the plural form of Hadd meaning prevention, restraint, obstruction, hindrance or prohibition.[7] Hudud are punishments that are textually designated and apply to crimes whose penalties are mandatory defined in the Holy Qur'an or prophetic tradition.[8] In short, Hudud are crimes with fixed punishments in the Holy Qur'an and Sunnah. Hudud apply to only seven crimes[9] namely:-

(i) Zina - Fornication or adultery
Zina is defined as sexual intercourse between a man and a woman who are not lawfully married to each other.[10]

The punishment varies depending on whether the act of Zina is fornication or adultery. It is fornication where the offender is not married at the time of committing the act of Zina. Whereas, it is adultery where the offender is married at the time of committing the act of Zina. If it is fornication, the punishment is 100 lashes as stated in the Qur'an plus one year in exile which is added by the Holy prophet Muhammad (S.A.W) (now substituted with one year imprisonment).

> "The woman and the man guilty of adultery or fornication, log each of them with hundred stripes."[11]

The jurists say that this verse is the punishment for fornicators who have never been married. If it is adultery, the punishment is stoning to death ie. Rajm for married adulterer.

> Receive (teaching) from me, receive (teaching) from me. Allah Has ordained a way for those (women), when an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes, and be stoned to death.[12]

There are juristic arguments whether it is essential to combine lashing with stoning as recorded in the above Hadith for married persons.[13]

(ii) Qadhf - slander or false accusation.

Qadhf is defined as an unproven allegation that an individual has committed Zina.[14]

In other words, the crime of Qadhf is committed when one falsely accuses another of Zina or unchastity to a man or woman, or who injuriously contests the status or the paternity of a Muslim.[15] The punishment for Qadhf has 3 limbs:-

(a) The infliction of 80 lashes.

"And those who launch a charge against chaste women and produce not four witnesses to support their allegations, flog them with 80 stripes."[16]

(b) The rejection of the evidence or testimony of the offender.

"... and rejected their evidence even after...."[17]

The offender is treated as 'fasiqoon' i.e transgressor.

"....for such men are wicked transgressors."[18]

As a transgressor, the offender ought to be cast out by the community unless and until he repents and mends his conduct and thereafter may be re-admitted to the community.[19]

(iii) **Al-sariqa** -Theft.

Theft is an act of taking away other people's property without any lawful claim to it. In other words, it is the taking away of property recognised in law as belonging to another from where it is kept and carried it away with the intention of appropriating it without justifying one's action committed the crime of theft, if the value of such stolen property can be legally appreciated.[20]

The punishment for theft is prescribed in the Holy Qur'an thus-

> "As to the thief male or female' cut off his or her hands a punishment by way of example from Allah for their crime. And Allah is exalted in power."[21]

(iv) Shurb al-khamr- wine drinking.

Khamr is defined as any drink which makes a person drunk or intoxicated.[22] This prompted the Holy Prophet Muhammad (S.A.W) to say thus:-

> " Every intoxicant is Khamr (wine) and every (type of) khamr is prohibited."[23]

The punishment for wine drinking is 80 lashes.

> "..... flog him for it with 80 lashes. Because when he drinks, he becomes intoxicated, and when he becomes intoxicated, he talks confusedly, and when he talks confusedly, he lies."[24]

(v) **Hiraba** - Robbery or Brigandage.

Hiraba is defined as a situation where a person or people from the Muslims who pull out weapons in the face of the people and cut off their path by robbling those who pass, killing them and taking their possessions with their force and strength.[25]

In Hiraba, unlike in other hudud offences, there are several alternative punishments i.e execution, crucifixion, amputation of a hand and a foot, and exile (now imprisonment).

> The punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is execution, crucifixion, or the cutting off of hands and feet from the opposite sides or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.[26]

Therefore, it is open to the judge to pass any one of these sentences which he thinks fit under the circumstances of each case.[27] The jurists of the four sunni schools have suggested the following punishments under the following circumstances:[28]

Where murder is committed and property robbed, the punishment is crucifixion.

Where murder is committed, but no property is robbed, the punishment is death sentence.

Where there is no murder committed, but property is robbed the punishment is cutting of hand and a foot (from the opposite direction).

Where no murder is committed and no property is robbed, but the road is made unsafe, the punishment is exile or imprisonment.

(vi) **Riddah** - Apostasy.

Riddah is the renunciation or abandonment of the Islamic faith by one who professes it, to any other religion. The person who forsakes Islam for unbelief or for another religions called a Murtad.[29] The punishment of Apostasy is death sentence.[30]

(a) "Whosoever changes his religion, kill him"[31].

(b) "Not permissible to kill a Muslim except for 3 causes, of which apostasy is one of the three"[32].

Other punishments other than killing are as follows:

As soon as one apostates, his/her marriage is annulled forthwith. They can only re-unite when he/she recants back to Islam, with a new marriage contract, Wali, Sadaq, witnesses etc.[33]

The Murtad can no longer be a marriage guardian for his daughter(s) unless he comes back to Islam.

As to inheritance, the general position is that it is a double-edged sword. The Murtad will not inherit from any of his relatives and they will not inherit him also.[35]

(vii) Baghye - Rebellion or Treason.

Al-Baghye is basically an act of rebellion against the state by a collective action of a group of Muslims[36].The punishment for al-Baghye is death sentence.[37] The death sentence can only be inflicted where the leader or the Head of state is a just leader.[38]

(e) **Qisas**

Qisas is the punishment prescribed for murder and the infliction of injury, that is inflicting on an offender an injury exactly equal to the injury he inflicted on his victim[39] In other words, Qisas punishment applies to instances namely, homicide or murder and injuries or wounds. In these two cases, where retaliation has not been effected, Diyyah (blood money) is payable.[40]

(f) **Ta'azir**

Ta'azir is discretionary punishment to be delivered for transgression against Allah, or against an individual for which there is neither fixed punishment nor penance (Kaffara).[41] This definition excludes all crimes for which Hadd or Qisas are applied; and Ta'azir can be a possible alternative and/or additional punishment in some cases, but not as the sole punishment.[42] There are variety of punishments from which the judge can choose the one suitable for the particular crime, according to the criminal's circumstance, his record and psychological condition etc. The punishments range from al-wa'az (admonition), al-Tawbikh (reprimand), al-Tahdid (threat), al-Hajr (boycott),al-Tashhir (Public disclosure), al-Gharramah wal-Musadarah(fines and seizure of property), al-Habs (imprisonment), al-Jald (flogging) to al-Ta'azir bil Qatl (death sentence) etc.[43]

2.0 Rationale Behind Punishment.

Generally speaking the rationale behind punishment in Islamic law is to suppress crimes and injustices and to protect the public interests of the Ummah (community).In fact, the underlying objective of punishment is the protection of the public interests. There are five(5) basic interests which should be protected. These interests are the protection of religion, life, intellect, progeny and property[44] This has been succinctly observed several centuries ago by Imam al-Ghazzali thus

> The interest of the community lies in deriving benefit and avoiding harm. Thus, the community will be pleased when these essential interests are protected. The legitimate interests of the public include five essential objectives of the Sharia. These are protection of religion, life, intellect, progeny and property. Whatever is necessary to ensure the protection of these objectives of Sharia is part of the Daruriyyat (basic necessities) of the Sharia.[45]

2.1 Protection of Rleigion

Religion is a special responsibility which Almighty Allah Has assigned to human beings. Without religion, human society has no linking bond with the creator. That is why Sharia attaches great importance to the protection of religion.

2.2 Protection of Life

Likewise, Islamic law aims at protecting the lives of the people. This implies, among other things, ensuring the safety of both physical and psychological conditions of people. The latter requires, among others, the protection of human dignity from degradation.

2.3 Protection of intellect

The human intellect is protected under Islamic law by prohibiting wine drinking as it is regarded as the mother of all evils. The Holy Prophet Muhammad (S.A.W) says so in the following words:-

> "An intoxicant is a mother of all vices, whosoever drinks it, his prayer (salat) will not be accepted (by Allah) for 40 days. If he died and there is wine in his stomach he has died, the death of the Jahiliyyah (Ignorance)."[46] In another vein, the Holy Prophet Muhammad (S.A.W) said: "Stay away from Khamr (wine) as it is the mother of (all) evils."[47]

2.4 Protection of Progeny

It is equally necessary to preserve the progeny. When there is the unfettered unlawful sexual activities, it becomes difficult to protect progeny and ensure the preservation of the human society. This requires that children should have legitimate parents for the purpose of proper training and upbringing. Hence, the reason why Sharia provides for rules to regulate marriage and protect the family life.

2.5 Protection of Property

Also, one of the things which Allah Has declared inviolable and sacred is property and its protection is guaranteed against any violation by imposing the penalty of amputation of the hand in case of theft. .

3.0 Conclusion

Generally, punishment in Islamic law is primarily based on the concept of prevention, deterrence and retribution within the scope of Hudud and Qisas. The Holy Qur'an alludes to this aspect when it described it as an exemplary punishment from Allah.

> "... a punishment by way of example from Allah for their crime: and Allah is Exalted in power."[48]

Therefore, one can see that punishment is designed to keep the sense of justice alive in the community by a public repudiation of the acts violating the limits set by Allah. It is expected to build up in the society a deep feeling of abhorrence for transgression against Allah and fellow human beings, which is the root cause of all disorders and corruption in human life.

The unique features of punishment in Islamic law, makes it possible to achieve the required ends and objectives. This shows that the Islamic penal.

System has proved successful in the past and present (and will in the future) in the preventing crime, or at least in minimizing the crime rate in Islamic society.

By way of conclusion, it is observed that there are those who have studied the reality of the Islamic concept of crime and punishment that they consider the punishments prescribed by Islam to be too severe, cruel, inhuman, barbarous and degrading in human dignity. It is wrongly imagined that punishments of flogging, hand cutting, stoning etc will be inflicted on daily basis. But the fact is that such deterrent punishments have been executed very rarely.

Also, before prescribing any punishment, Islam tries, in the first place to wipe out all circumstances and motives that may lead to crime. Even after a crime is committed, Islam tries to waive the execution of punishment if there is any doubt about it. Some of the basic philosophies underlying any punishment must be that it should be just and commensurate with the crime committed, uphold law and order, inculcate respect for law in the society and above all, deter potential delinquents from undertaking criminal activity.[49]

This shows that the punishments laid down by Islam can be justified and no known system can match the justice of Islam in this regard.[50]

In short, Islam neither prescribes punishments haphazardly nor execute them without due considerations. It holds the balance of justice in the right manner and insists on examining all conditions and circumstances connected with the offence. In studying a crime, Islam takes into account two considerations, at the same time; the view point of the criminal and that of the society or community against which aggression took place In the light of such considerations, Islam prescribes a fair punishment which is in accordance with the dictates of sound logic and wise reasoning.[51]

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