THE ROLE OF PUNISHMENT UNDER ISLAMIC JURISPRUDENCE

by

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INTRODUCTION

Punishment as the word connotes can be defined to mean sufferness for an offence committed. The Oxford Learner's Dictionary[1] defines punishment to mean "an act or a way of punishing somebody".

Punishment under the Islamic jurisprudence cannot be compared with what obtains under the English Common Law. The Islamic Law understanding of punishment is for the reformation of the society, the upliftment of the individual from darkness to the way of Allah. Punishment as the word implies, does not under Islam mean "to mete out" but to bring the culprit to understand the doing of good and to do away with evil deeds or behavior.

WHAT IS PUNISHMENT?

Punishment is the sufferness meted out to an offender or disobedient people against disobeying the law giver (Allah and His prophet (SAW)) as laid down in the Holy Quran and Sunnah of the Holy prophet Muhammed (SAW) in the collective interest of the society. The major aim of prescription and administration of punishment for the violators of the law giver's edict is to reform the society, deliver the

individuals from evil, save them from ignorance, lead them out of a life of aberration and prevent them from committing sins, and induce them to obey Allah and His Messenger.[2]

Allah did not send His messenger to establish their superiority over the people and start to rule them but rather, they were entrusted with the duty of conveying and disseminating the divine message of Allah to mankind and serve as the presence of the mercy of Allah within mankind. This is thus evident in the Holy Quran when Allah says:

"We sent thee out save as mercy for the people"[3]

"Thou are not at all a warder over them"[4]

"Thou (oh Muhammed) has not been sent as a compeller over them"[5]

Moreover Allah ordained the divine law and sent down His messenger (SAW) for the purpose of guiding mankind and preach to them the revealed truth and mission. Allah, besides all the above has prescribed punishment for the purpose of curbing the violation of His command and that of His messenger, so that people may do things benefiting them and shun those harmful to them both here and the hereafter. Hence, the purpose of punishment is to protect the individuals, the community and the social system as a whole. He has only given us the directive to obey His commands for our welfare because he has neither anything to gain nor anything to lose if we obey or disobey Him.

Allah said:

"And let not pity for the twain withhold you from obedience to Allah if you believe in Allah and the last day"[6]

It is thus clear from the above verse that if guilt is proved, the offender/culprit must be brought to book and punished at all costs and that there should be no mercy in inflicting the punishment. Furthermore, the prescribed punishment cannot be replaced:

(a) If the change is due to the sense of mercy, it is disobedience,

(b) If it is due to the sense of cruelty, it is denial and defiance and only a hypocrite can imagine or say no.[7]

TYPES OF PUNISHMENTS

Punishment is of various kinds depending on the circumstances of each case. Punishment may either be divine immutable punishment (hadd), discretionary (Ta'zir) or Qisas etc.

(1) ***Primary punishment:*** These are punishment or penalties that are divine in nature as they are specifically prescribed by the Almighty Allah and are contained in the Holy Quran e.g., of these are homicide cases, fornication and theft of which punishment is prescribed as follows respectively: retaliation, stoning to death and amputation of arm.

(2) ***Substitutionary punishment:*** if there is something that bars the application of the primary punishment then substitutionary punishment is resorted to. For instance, in case of invalidation of qisas, hadd would be substituted. If hadd and qisas become null and

void, tazir would take their place. These alternative punishment are themselves primary punishment, before they are awarded substitutes. They are awarded as a kind of alternative to harsher punishment when the latter cannot be applied. For instance, in the case of quasi-homicide, diyat is the prescribed original punishment, and in case of tazir offences, tazir is the original or primary penalty. But if on grounds of shariah injunction a hadd or qisas punishment cannot be awarded and instead of it diyat and tazir are awarded, then these punishments would be substitutionary.

(3) *Complimentary* punishment: complimentary punishment are those kind of penalties awarded on the basis of the order pertaining to primary punishment and for which a separate sentence is also passed. This kind of punishment is akin to another form of punishment known as the subsidiary punishment, because both of them owe their origin to the sentence of the primary punishment. The difference is, however, still there and it occurs in that no separate sentence is needed for the subsidiary punishment, while a separate sentence is required for complimentary punishment. An example of complimentary punishment can be seen in the case of an amputated hand of a thief, which is to be hung on his neck till he is set free. This is, however, operative except when pronounced.

(4) Subsidiary punishment: This kind of punishment is like punishment which the offender will have to pass through, though not independently but as a result of the effect of the primary punishment of which no separate order is pronounced on that. For

(vi) Early marriage has been encouraged. Reward in the hereafter has been announced for those who marry their daughters as soon as signs of puberty appear.

(vii) Illegal sexual acts between man and woman is said to be severely punishable, the legal sexual act through marriage is reported to be part of devotion.[32]

(2) Restriction on free-mixing of men and women: Islam puts a restriction on mixing of men and women. The Holy Quran says: "And stay in your houses and display not your finery like that of the times of ignorance."[33] The institution of the veil is used to guard the chastity of women. Even when passing by, men and women are not allowed to gaze at each other.[34]

(D) **Punishments As Example to others:** Considering all these checks both internal and external and even the social set up in the society, some people still commit crime, thus invoking the power of punishment to decisively deal with them to serve as an example to others, so that they will not have the urge in any form to commit a similar offence. Thus, the psychological operation being carried out on all those having bad intentions is to deter them from doing the same, thereby cleansing the society of its bad eggs. This is why hands or feet are amputated and even adulterers being stoned to death on orders to prevent society being contaminated. Islam uses punishment as an example, that is why punishment is carried out in daylight in the presence of people to serve as an example to them