



# A Comparative Analysis of Punishments Awarded in Islamic Legal System and Western Legal System

Muhammad Waqas<sup>1</sup> and Humdia Qaiser<sup>2</sup>

<sup>1</sup>Department of Law Abdul Wali Khan University Mardan, PAKISTAN

<sup>2</sup>Department of Shariah and Law, International Islamic University Islamabad, PAKISTAN

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## Abstract

*When the authority imposes something disobliging upon a person due to his unacceptable behaviour to that authority is known as punishment. Different theories of criminal behaviour or criminality have suggested justifications for imposition of punishment. The justifications for punishment are deterrence, incapacitation, retribution, or rehabilitation. The object of punishment in all legal systems is the prevention of crime in order to provide a cleaner society. However, there is remarkable difference between Islamic legal system and western legal system in imposition of punishments. The encounter between the two legal systems shows that Islamic law have certain unique features that have increased its effectiveness in achieving its goals as compare to its western counterpart.*

**Keywords:** Punishment, theories of punishment, object of punishment, Islamic legal system, western legal system.

## Introduction

The unwanted and unpleasant imposition of something upon a person or group of persons by a competent authority because of their unacceptable behaviour to the authority is known as punishment<sup>1</sup>. There must be an authority behind the imposition of punishment. Inflicting something upon a person without competent authority is not punishment. It may be either revenge or something else.

All the schools of thought provide justifications for punishment. The basic concepts for the justification of punishment are retribution, which is the equal requital for the harm caused, the deterrence to prevent others to commit the same harmful acts, the rehabilitation and the incapacitation of the wrongdoer from committing the same crime again. These justifications are provided by different law schools with a different approach for achieving the same desired objectives. For example the incapacitation, in western law includes the imprisonment or isolation of the victim while in the Islamic law the removal of hand in cases of theft, have the objective to make the wrongdoer incapable of committing the crime again<sup>2</sup>.

However the Islamic law and the western law schools are not always at the same page regarding the object of punishment. They may vary and thus produces contrasting effects on the society.

Punishments are justified by four main objects namely: i. Retribution, which is the equal requital for the injured party, ii. Deterrence for other ill-minded people from committing crimes, iii. Rehabilitation and iv. Incapacitation, which is to make the victim of punishment incapable of committing the same crime

again like removal of hand in cases of theft or isolation of criminal<sup>3</sup>.

**Theories of Punishment:** The theories of punishment which are actually the justification for the imposition of punishments are classified into four main headings. These include;

**Retributive theory of punishment:** According to this theory the offender should be suffered in proportion to the harm caused to aggrieved party by him. Usually in criminal activities the wrongdoer gets some benefit from incurring loss to the victim. Therefore, the retributive theory aims to rebalance the benefit gained by the offender by ensuring that the offender should also be suffered.

**Deterrent theory of punishment:** The object of this theory is to prevent the commission of crime by imposing severe kind of punishment. The aim of the punishment should be to deter, the ex-convict from re offending and also, those people who are evil-minded. This theory supports the imposition of exemplary punishment on the offender to make the commission of crime a bad bargain for the offenders.

**Reformative theory of punishment:** This theory of punishment states that the object of punishment should be the moral reform of the criminal and not to wreak vengeance. According to this theory crime is a disease, it should be diagnosed properly like all other diseases and the offender should be given proper treatment to cure the disease.

**Preventive theory of punishment:** This theory aims to prevent the repetition of the crime by the offender. According to this theory punishment should be of such a nature to make the

criminal incapable of committing the same crime again. Penalties like imprisonment, death, exile or imputation of hand are awarded to incapacitate the offender.

### Object of Punishment in Islam

The main object of punishment in Islam is to prevent the commission of crime. For this purpose Islam provides a system of imposing harsh punishment on the criminals. However, the procedure to be followed for the conviction is much more difficult. The reason is that the Prophet (S.A.W) has given preference to the non-conviction of an innocent man over convicting criminals. The punishment may or may not be proportional to the crime committed, as proportional punishment will require the evaluation of certain complex factors, like motive behind the commission or the circumstances in which the crime has been committed, which a judge of ordinary human prudent is incapable of evaluating efficiently. Moreover, penalties awarded in Islam are not punishments. These penalties are known as Hadoods which means boundaries. It signifies that the punishment in Islam is regulative in nature. Every person has certain rights and obligations which must be respected by others. For this purpose Islam has advised to observe certain boundaries and limitations in order to maintain peace in the society. Liabilities are incurred upon the person who crosses these boundaries.

Similarly Islamic law educate the people about the outcome of the punishment and thus prevent and deter them from committing the crimes. The Quran describe the Hadoods as exemplary punishments from God (al-Ma'ida 5:38). It means that these penalties imposed upon the person are exemplary in nature. They become examples for those who have criminal mentality. The like-minded criminals become aware of the fact that committing crime is not worthy business.

In Islamic law criminals are punished for committing crimes. However, the provision for the rehabilitation also exists. According to Islamic law the reformation is either before commission of crime so that the criminal may not commit the crime or it should be after punishing the criminal. Once the criminal is punished for his crime he should be treated like innocent people. The double standard for the ex-convict is forbidden in Islam. Society is the best place for the reformation of the criminals after being punished. Keeping the criminals in prisons, which is the absolute community of criminals, will enhance the criminal mentality rather than the reformation. That's the reason why Islamic law do not prefer imprisonment of criminals.

Another object of punishment in Islamic law is Qisas (retribution). When a person causes injury to another person, the other has a right of equal requital. This right solely belongs to the party being injured. There are two conditions for retribution under Islamic law. One condition is that the victim seeks punishment for the wrongdoer. The other is that the victim

demand compensation for the loss or he may even forgive the offender, however, if he seeks compensation it must not be more than the loss incurred. It means that the object of Qisas is not vengeance but reconciliation and thus punishment can be avoided under Qisas.

### Encounter between Islamic legal system and Western legal system

The Islamic legal system as compare to the western legal system provides a peaceful and cleaner society. Western laws where the ethical norms of the society are always violated for example in Norway and Sweden homosexuality and lesbianism is not a crime<sup>4</sup>.

Similarly Spain has passed a bill for legalising adultery. Adultery will not be considered as crime. In contrast to the immoral and un-ethical laws of west, Islam provides a system based on natural and divine law where the norms and ethical values are highly respected. The deterrent punishment of Islamic law ensures greater peace in society. This is because of the Shariah laws applied in Saudi Arabia that the crime rate is negligible i.e. one murder in one year<sup>5</sup>.

One can find unique characteristic of Islamic law that shows a remarkable difference from the western law. These unique salient features of Shariah law shows the significance of Islamic law over the western legal system.

One of the unique features of Shariah law is that there is no rule for imprisoning the offender. The imprisonment is a disapproved kind punishment in Islamic legal system. There are several reasons for avoiding imprisonment of the offender. The main objective for awarding imprisonment is the reformation of the offender but the results produced by imprisoning the wrongdoer is contrary to what the law seeks to achieve through imprisonment<sup>6</sup>. The reason is that society is the best place for reformation of criminals as compare to the prisons which is a community of criminals. The criminals in prison do not feel shame on their crimes instead they feel proud to boost their stories of crimes in front of other offenders. Moreover, offenders become more skilful in committing crime after release<sup>7</sup>.

Another contradiction between Islamic legal system and western legal system is treatment with the ex-convict. The treatment with the ex-convict plays a vital role in the reformation of the offender. However, the West's contemptuous treatment with the ex-convict prohibits him from rehabilitation. In most of the western legal systems an ex-convict is deprived of contesting elections<sup>8</sup>. Moreover, even the ex-convicts are deprived of casting votes<sup>9</sup>. Contrary to this, Islamic legal system highly disapproves such kind of treatment with the ex-convict. The conviction of the offender should not become a permanent stigma on his character. Once the offender is punished for his crime he becomes innocent. He must be treated like he never committed that crime. The conviction should not become an

obstacle in his social and economic progress. This kind of treatment with ex-convict plays a greater in the reformation of the offender. The Prophet (PBUH) has forbidden his companions from calling bad names to two Sahabis, who have confessed the sin of adultery and were stoned to death.

Similarly Islam provides a system of equality. Discrimination between rich and poor in awarding punishment is prohibited. In order to avoid the discrimination Islam provide a legal system which is lacking of imposing any monetary fine or penalty<sup>10</sup>. Such equality before law has the same deterrent effect on both the rich and the poor. On contrary to the western legal system where the offenders are usually fined, wealth has become the license for the rich people to commit crimes. The pecuniary punishments have promoted the criminal mentality of the rich class of the society. Islamic legal system has the provision of monetary fine only in case of Diyyat, however, the amount of diyyat is fixed and it can only be imposed if the aggrieved party wishes to do so. The law, otherwise, cannot convert the punishment of Qisas into Diyyat.

Another significant feature of Islamic legal system is the reporting of crime. No one can be punished mere on the suspicion that he has committed the crime until it is proved by the prescribed number of reliable witnesses. The strict procedure to be observed for the reporting of crime preserves the integrity of mankind. Strict punishments should be awarded to those who bring allegation against someone and then fails to prove those allegations. The western legal system, on contrary, does not have such provisions. In western legal system any person can report a crime against a noble and innocent man without having any proof. The person after a long process of humiliation may be proved innocent. Islam prohibits such kind of system where every member of the society lives like suspects. He can be charged any time for a crime mere on suspicion.

## Conclusion

Different philosophers and criminologist studied the criminal behaviour of the criminals. They summed up their work and produced different theories about the causes and prevention of crime. The first theory, in this respect, known as classical theory of criminality was developed by an Italian and Englishman named Cesare Beccaria and Jeremy Bentham respectively in late eighteen century. The underlying principle of their theory is that man is having free will. Human beings are hedonistic and they try to maximise their pleasure and minimize their pain. According to this theory the behaviour of human can only be controlled by fear of pain and thus deterrence is the only effective measure for the prevention of crime.

Similarly positivistic school of criminologist argues that human beings do not have their free will. Their behaviour is affected by various biological, sociological and psychological factors. Humans are not responsible for their actions. According to this school of criminology the instrument for the prevention of crime

should be the rehabilitation efforts for the reformation of offenders.

All the legal systems in the world support any one of the above theories for justification of awarding punishment. The Western legal system follows the positivistic school of criminology. However, the rehabilitation efforts (like imprisonment) is highly criticised due to their contrasting outcomes. The Islamic legal system on the other hand has lessons for criminologist of both classical and positivistic schools of criminology. Both deterrent and reformatory punishments are awarded by the Islamic law. Moreover, many Islamic punishments have dual effects of rehabilitation and deterrence at the same time. For example, imputation of hand in cases of theft has the deterrent effect on all those who are like minded to the criminal, and it also helps in the rehabilitation of convict as Islam allows such convicts to live his life in the society with all the privileges like others and forbids any discriminatory treatment to him because of his ex-convictions.

Islamic law is the perfect law for the prevention of crime. Shariah laws are divine laws. The principles of Shariah laws are established by God the Almighty Who is fully aware of the human nature, their psychologies etc. Thus Islamic laws act as guidelines for the criminologists to study and develop their knowledge of the subject.

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