

## ***Islam's Normative Discourse on Crime and Punishment***

***Dr.GhulamShabbir***

Assistnat Professor, Departement of Humanities  
Comsats University, Park Road, Islamabad

***Dr.Naima Saeed***

Assistnat Professor, Departement of Sociology,  
University of Karachi, Karchi.

### **Abstract**

Islam entertains a balanced approach to address crime on moral and legal planes as per requirement of time, space and causality. On legal plane it legislates in light of exigencies of time; on moral plane it sets forth eternal or universal values the society is destined to. So, in fact Islam develops a moral sense in an individual and society against crime not through interdiction and sanction but gradually, gently, exactly, understandingly, and at deep level. But in an ultimate sense Islam is not oblivious of the forces and dictates of history; it forestalls crime with the force of law. However, the ignored fact is that punishments in Islam are means to an end not end itself.

This paper intends to bring forward that what went wrong with original intent and purposes behind punishments and their implementation that to some modern minds these instead of abolishing or decelerating crimes have become accelerator of the same. This would be based on qualitative research. It would be a survey of historical formulations of the thinkers of Islamic jurisprudence. In this paper philosophy of code Romane, English jurisprudence and other known legal traditions regarding crime and punishment would also be brought forth so that it could be easier to grasp the stand of Islam in this crucial social parlance.

***Key Words:*** *Islam, Cirme, Punishments, Lego-Moral Planes.*

Whether it be the case of Holy Scriptures or holy messengers morality rather than law has been linchpin of their programs since Adam to Muhammad; a few prophets and revealed books carry legal content but amount is so small that neither prophet might be called only law-giver nor the book might be termed as law book. This is because Prophet (PBUH) said: "I have been sent to set the morality aright". Raising the foundations of the House (Kaaba) Abraham and Ismail had prayed "Our Lord! Send amongst them an Apostle of their own, who shall rehearse thy signs to them and instruct them in Scripture and Wisdom, and sanctify them: for you are the Exalted in Might, The Wise (2:129)". God responded their prayer, Quran says: It is He Who has sent amongst the unlettered an Apostle from Among themselves, to rehearse to them his signs, to sanctify them, and to instruct them in Scripture and Wisdom, although they had been, before, in manifest error (62:2). So, the *raison d'être* of sending Apostle and revealing the Scripture is to address the hearts of mankind the *locus* of thought and action. Religious and pure intellects are poles apart. It is the former which has potential to transform the personality. Therefore we are apt to say that religion as against secular law handles crime on moral plane by sanctifying heart and mind of the criminal, then as a last resort bring forth set of punishments to curb the crime. But implementation of those punishments necessarily entails the institution of state. Machiavelli puts it that "only armed prophets succeeded and all unarmed prophets come to grief<sup>1</sup>". So only those prophets implemented punishments who established themselves as *de facto* and *de jure* political authority.

However, here we are only concerned with Islam's normative discourse on crime and punishment. Our focus would be how do the Quran's discourse and prophet's conduct unfolds in history in relation to crime and punishment. Let see what *modus operandi* Muhammad's educator (al-Rabb) harnessed to develop in him a moral *élan* and how Prophet (PBUH) trained his followers on moral plane?

Throughout his life Muhammad of course remained under the protection of the One, his Rabb, and his Educator. In Meccan milieu God persistently protected him from idol worship, festivals, feasts etc. where drunkenness and lack of restraint prevailed. One evening Muhammad heard that there was a wedding ceremony in Mecca to be celebrated and he wanted to attend. The ceremony includes intoxicants. On the way there, he reported, he felt tired; he lay down to rest and fell asleep. The next morning, the heat of the sun woke him from the deep

slumber. The story reveals that His educator always on his side put him to sleep, thus protecting him from his own instincts. Gentleness and diversion were fine tactics of the Lord to protect him and the same gradually developed a moral sense in Muhammad (PBUH) which he was to impart to his companions. With a teaching method relying on gentleness, on the common sense of individuals and their understandings of the commands, the Prophet also strove to teach them how to put their instincts to sleep, so to speak, and how to resort to diversion to escape evil temptations. The behavior and conduct of the Prophet in sum total reveals not only to his companions but generations to come that moral sense should be developed not through interdiction and sanction but gradually, gently, exactingly, understandingly, and at a deep level<sup>2</sup>.

Now, we come to the issue what is the philosophy of crime and punishment in Islam? But first we have to analyze what the chemistry of crime itself is in modern social parlance? To Western criminologists "crime is a wrongful act of such a kind that the state deems necessary, in the interests of the public to repress it; for its repetition would be harmful to the community as a whole"<sup>3</sup>. William black stone states that crime is an act committed or omitted in violation of a public law forbidding or commanding it. Grygier states that crime is an act for which criminal legislation prescribes sanctions aimed at the protection of community which includes the offender. The English Jurist Friedman puts that "law is not generally concerned with the highest standards of morality but with the minimum standard that can be made the norm of general conduct"<sup>4</sup>. Therefore, we are apt to say that a society as a whole attains values and preservation of those values requires law in context of time and space, moreover it is an evolutionary process. Neither crime nor law is a static phenomenon. At times, in Britain the law would execute a person who had stolen sheep, now in developed world capital punishment is considered barbaric and even against the fundamental rights, therefore cancelled. Now, in modern developed societies execution is being considered as an act of vengeance not justice, even though how much greater the crime might be. Human conscience has traversed a journey of millennia from stone era to an industrial and corporate era. What was an act of civility in Agrarian age might be an egregious act in our today world.

Islam, however, entertains a dynamic balanced approach to address crime on moral and legal planes as per requirement of time, space and causality. On legal plane it legislates in light of exigencies of

time; on moral plane it sets forth eternal or universal values the society is destined to. For example consider the Quran's treatment of the crime of murder. In seventh century Arabia, Quran was not oblivious of the customs and habits of a crude tribal society, therefore the traditions which were not repugnant to the fundamental tenets of Islam, Quran did not bother to retain them as it were or with reasonable amendments, however, was not future blind to not set the eternal moral principles the society was destined to approach in its evolution. On legal plane Quran retains the custom of Arabia that if someone kills a person in vengeance he has to be killed or pay the blood money, but adds an excellent moral clause that if the heir of the killed in his discretion forgives the killer would find great reward from his Lord. Here as per the requirements of unstructured unsophisticated tribal seventh century Arabian society an issue of murder is deemed as a private crime: an issue between the offender and the plaintiff. However, on moral plane Quran exhorts that who kills a person is as if he kills the whole mankind; saving one man's life is as if to save the whole humanity. Hence here on moral realm an issue of murder is taken as a social rather than private crime. It suggests that an issue of crime or any legal import is to be dealt with according to the dictates of history. It is in this context, says Shah Wali Allah the last theologian of Islam.

“The law revealed by a prophet takes especial notice of the habits, ways and peculiarities of the people to whom he is specifically sent. The Prophet who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leaves them to work out their own rules of conduct; his method is to train one particular people, and to use them as a nucleus for the building up of a universal Shariat. In doing so he accentuates the principles underlying the social life of all mankind, and applies them to concrete cases in the light of the specific habit of the people immediately before him. The Shariat values (Ahkam) resulting from this application (e.g., rules relating to penalties for crime) are in a sense specific to that people; and, since their observance is not an end in itself, they cannot be strictly enforced in the case of future generations<sup>5</sup>”.

The doctors of Islamic law in heydays of Islam with creative ingenuity responded the challenges when great communities of Byzantine and Persian empires were being assimilated in the polity of Islam. That is why when Abbasids emerged on the helm of affairs (750 A.D or 133 A.H) the Quran's penalties of theft and adulteration etc.

cease to be implemented. A Great Iraqi scholar Dr. Jawwad Ali comments on this Issue.

“In Arabs, these penalties were continued from the age of Jahilliyya, they were accustomed to them, so Quran kept them intact. But when non-Arab communities entered in Islam and outnumbered the Arabs and their social and cultural impact increased. The implementations of penalties peculiar to Arab temperament were not strictly enforced. In lieu of them other penalties, the non-Arab communities were accustomed to, were implemented. There was no hue and cry against the revocation of those penalties. Same is the order of the day in present Muslim world with an exception of Saudi Arabia<sup>6</sup>”.

No cut and dried laws of penalties can be useful for ever. Therefore, Islam harnesses a dynamic balanced view of legislation in a particular context of time, space and causality. Laws are to be changed, amended or harmonized to changing scenarios assimilating the ground realities. Spanish Jurist al-Shatbi points out that “although an action may be deemed permissible, recommended, lawful, objectionable or unlawful in itself, its status can change according to the context in which it is considered and judged<sup>7</sup>”. This is because Shatbi Sees Meccan and Medenan phases of Prophet's life in two discrete but organically linked scenarios. To him “Meccan revelation period is crucial because the verses revealed during this initial temporal sequence established the higher, universal objectives of Islamic law and jurisprudence. Thus such principles as protecting religion and human life, as well as the elements of the two categories of complementary needs and embellishment, had already been stated during the first years of prophetic mission and all the latter verses revealed in Medina bringing greater detail and more concrete implementation are only rendering and illustration of the meaning of those objectives and principles in the Medina context<sup>8</sup>”. To some extent the same stance was taken by Mahmoud Muhammad Taha (1909-1985) of Sudan . He said that the Quran revealed in Madni Phase of Prophet's life was in that particular historical context, specific to that backward society of seventh century Arabia. He believed that the part of Quran revealed in Meccan phase of Muhammad's life is of universal import and modern state can be run in view of contours of religious freedom and equality laid down in Quran when prophet was at Mecca<sup>9</sup>.

Take for example, the wisdom and dynamism in Islamic law of retribution. The law proclaims an eye for eye, nose for nose, ear for an ear and life for life. It sounds suitably barbaric and not just to modern ears. But the law did not emanate from the sources of Islamic jurisprudence. It had been the basis of law throughout the ancient world, was part of Hebrew bible; and had been encoded under the Latin name of *Lextalionis*— a phrase that means “law of retaliation; its clues can also be traced in English jurisprudence. But in an ancient world or seventh century Arabia we find no signs of sophisticated model of modern state. Therefore Hazleton justifiably says “if anything, the principle of blood vengeance worked to keep the peace more than to break it; in the absence of a central authority, it was a rough-and-ready but effective way of ensuring security. Rather than perpetuating violence, it served to deter it<sup>10</sup>. She states that Islamic jurists of Damascus and Baghdad in 8<sup>th</sup> and 9<sup>th</sup> century had termed it practices of jahiliyyah and was rescinded.

As earlier mentioned, penalties in Islam are means to an end not end itself, but Islamic literalists attached supreme importance to penalties rather than to the abolition of crime. Orthodoxy's decontextualized approach to penalties instead of decelerating accelerates and multiplies the crimes as secularists claim. No doubt, Islam at legal plane keeping in view the conditions of seventh century Arabia validated the custom of blood vengeance giving murder a status of private crime; but on moral plane by calling the murder of one man the murder of whole mankind on very sound footing declared murder a social crime. It is the dual character of Pakistan penal law that at initial level when *FIR* is lodged, murder is considered as a *social crime*, when proceedings come to conclusion by throwing the ball in courts of plaintiff and defendant it is established as a private crime, state stays as a neutral. That is because the feudal and the wealthy assert influence on the victims forcing them to withdraw from the case or blood money's magic works miracle. Observe Raymond David case or Shahzeb's murder by Shah Rukh Jatoi. Former a US spy killed two Pakistanis and got scot free after paying blood money, latter a son of feudal cum business tycoon poked sign of victory in conscience of masses, coming out of trial court. It was an event that sparked anger in sitting chief justice of Pakistan saying that law of Dayat (blood money) needs to be amended that went unheeded to the upper echelons of legislative. In Baluchistan mother and daughters were dogged to death on expressing opinion regarding marriage and native lawmaker called

it tradition of Baluchistan. It is a nexus of feudal, political leadership, mercantilist elite and orthodoxy maligning the laws of Islam for their vested interests.

Similarly, Islam condemns adultery in the harshest terms to keep the society in order and pure. But is there any sharp distinction between adultery and rape in Pakistan Penal Law. First, see what is the background of law against adultery in Islam? On return from a campaign against BanuMustaliq during a layover Ayesha lost her necklace during a relieving, caravan left for Madina missing her on the spot and reached the city. A young companion of the prophet Rizwan saw Ayesha alone and managed to get her to the city. Prophet did not doubt her innocence and integrity, but being the leader of community his life undoubtedly was subjected to public critique, same happened and Ayesha was snared in scandal. In short her honor was divinely vindicated, and those who had spread the rumors about her were flogged. Lesley Hazelton writes “ if it had all turned out well for her, it would not turn well for the other women. In the long term, the verses exonerating Aisha would be interpreted in a very different way by conservative Islamic clerics, and used to do the opposite of what had originally been intended: not to vindicate a woman but to blame her. Conflating adultery with rape, they would argue that any such charge could be valid only if the woman could do virtually impossible and produce four witnesses. Unless she could do so, a ghastly catch-22 came into effect: the accused rapist was to be declared blameless and the accuser punished not only for slander but for adultery, since by charging rape she had herself testified to illicit sexual relations. Aisha's exoneration was thus destined to become the basis for the humiliation, silencing and killing of countless women after her.<sup>11</sup>” In our recent history Mukhtaran Mai case is case in point that points to the victory of law over justice. Is Islam inimical to any scientific or technological advancement? Can DNA test be of any help to testify the rapist? In developed countries like USA, genome banks are operational to preserve the semen. After two decades of the husband's death is it lawful for the wife to retrieve semen for getting pregnant.

Islam's treatment of crime is not to attack the criminal per se; it removes the conditions conduit of crime; then gradually rehabilitates criminals from the mess. Islam declared usury a war against God and his Apostle in 9<sup>th</sup> Hijra, a year before Prophet's death in final phase when treasury of Islam was suffice enough to lend the needy; it took twenty two years to make necessary arrangements to reach this logical

end. Islam offered grand rewards for freeing slaves; but slave free society remained and is an élan of Quran. Take the matter of alcohol, primarily it was unreservedly permitted in the early years; then offering prayer under influence of alcohol was prohibited. Later it is said, "They ask you about the alcohol and gambling. Say: in these there is great harm and also profits for the people but harm far outweighs their prophet (2:219). Finally it was banned (5:90-91) on the ground that these are the works of the devil... The devil wants to sow enmity and rancor among you. This is the *modus operandi* of Quran that shows the slow, experimental legal tackling of problems *as they arise*. In fact except worship related rules literal implementation of Quran's laws is impossible. It is the higher objectives of Sharia that determine the modalities of their possible implementation. This is how one should understand the Caliph Umar's decision to suspend the implementation of punishments for poor thieves in times of famine: literal implementation of the punishment would have run against the higher objective of justice since poor thieves would have been twice victimized.

So, we can easily infer from the foregoing discourse that text operates in context. Here text denotes scripture while context represents universe. To venture out the prevailing crisis of crimes or any sort only joint and allied expertise of the scholars of text and context can be helpful. Decontextualized implementation of the text leads to confusion and crisis. Take for instance, Quran had forbidden the cutting of tree and destroying crops during war, but when Muslims were embattled with BanuNadhir a Jew tribe of Medina, Muslims cut trees to effect siege of the tribe. Jews leveled allegation that Muslim violated rules of their scripture while cutting tree. Quran validated the act in that particular context. Umar the second caliph suspended Quran's punishment of cutting the hands of thief during the days of famine because context suggested this way. The slaves of a man stole camel of any body and dined it. On inquiry Umar forced the master of slaves to pay the ransom, for the master by keeping them in hunger forced them on theft. In prophet's life blood money was due on killer's tribe; Umar eliminated it from the tribe and shifted to the military. In Prophet's life the conquered lands in short tracts were divided among the warriors, same endorses Quran, when Iraq and Syria came under the pale of Islam, companions demanded same solution but Umar refused on the plea that by doing this income of the rich fertile lands will be limited to a limited elite while in it there is part of the



emigrants and the generation to come. Remember now Islam is out of Arabian Peninsula where limited booty would come in our hands, now countries of vast lands are coming under the suzerainty of Islam. From the vast source of the Umar's decision we can safely conclude that:

1. A Mujtahid can change his one judgment by the other.
2. A Mujtahid ruler is not bound to follow the judgments of his predecessor.
3. Every generation has right to resolve her issues in light of her own situation. It is not bound to follow the earlier one.

To grasp the substance, form and spirit of Islam's normative discourse on crime and punishment we would like to cite some crucial judgments made by Umar the second caliph.

Once from Kufa a messenger of Abu Musa Ashari reached Medina, on queries he said a man turned apostate in our region. Then how did you handle the issue surprisingly asked Umar. The messenger replied we killed him. Umar said you must have kept him in harassment, had served him meal, and had convinced him to repent. Any way, he said O God be witness! Neither I order his murder, nor effected the case and nor am happy with this news<sup>12</sup>. Similarly, in Sana five or six men together killed a man in non-alert situation. Umar ordered the killing of all the murderers saying if all the population of Sana would have been accomplice in this murder Umar would have ordered to kill all of them<sup>13</sup>. Islamic law as against secular law does not address crimes at face value, but zeroes in on the very intent and purpose of crime which originates from the very conscience of the doer. For example, Malik bin Anas reports that two men on an issue began to abuse each other. One of them said to other my parents are free from the crime of adultery. The case was presented to Umar. He took advice of two persons of opinion on the matter. One said, he only has praised his parents; there is no offence in it. The other said, the context shows he has alleged other man's parents. Umar convinced and effected 80 lashes on the offender<sup>14</sup>. Such cultured and civilized was the people of Islam.

Now, we see the origin and development of Islamic law in historical background in brief survey. In prophet's time revealed text both provided direct answers to the events and at the same time established an orientation, a way to follow through history, beyond the singular history that gave it birth and meaning. For in Quran's relation to Prophetic tradition the revealed text comes first; it determines major

principles and sometimes details while the Sunnah's function is to detail, clarify and illustrate. This view in effect liberates Quran from the specific contextual interpretation offered by the Medina period alone. After Prophet the companions who lived closed to the revelation and in immediate contact with Prophet relied on the examples of him and interpreted the revelation in light of their circumstances wherever it was necessary. When Islam ventured out of Arabian Peninsula the doctors of Islamic law devised legal principles resonant with Quran, Sunnah and native customs. We see in their own contexts there developed Sunnah of Hijjaz, Iraq and Baghdad. It was a natural growth and organic link between Sunnah, Ijma and Ijtehad. A new law or custom developed, there emerged consensus of community over it when it entered in blind alley, a new sunnah or law was devised in light of Ijtehad; so far as there remained consensus it remained valid; otherwise new Sunnah would take its place. It was in interest of Islamic state that Shafi reversed the trend by Sunnah, Ijtehad and Ijma to strike uniform legal structure in Islamic empire. It was in this context, says Von Kremer, "nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors, next to the Romans, there is no other nation besides the Arabs which can call its own a system of law so carefully worked out"<sup>15</sup>.

Of course our early doctors of law evolved a number of legal systems. Preference is the source law in Fiqh Hanafi; Public good was utilized in fiqh Malki; reason or logic was major component of Shafi and equity has been major principle of all fiqhs of law. Ancient customs and laws which Quran and Sunnah did not reject or forbade remain part of sources of Islamic. However, in evolution of Islamic law came a time when there emerged school of Higher objectives of Sharia which synthesized all the previous wealth of law schools into Maqasid al-sharia which stated:

"The very objective of the Sharia is to promote the welfare of the people, which lies in safeguarding their faith, their life, their intellect, their posterity and their wealth. Whatever ensures the safeguarding of these five serves public interest and is desirable"<sup>16</sup>.

Imam Ibn al-Qayyim says: "the basis of the Sharia is wisdom and welfare of the people in this world as well as the Hereafter. This welfare lies in complete justice, mercy, wellbeing and wisdom. Anything that departs from justice to oppression, from mercy to harshness, from welfare to misery and from wisdom to folly, has

nothing to do with Sharia<sup>17</sup>”. However, to great jurist of Spain Imam Shatbi (d:1388) protecting religion, life, family relations, property, and intellect al-irda honor as sixth category constitutes a set of objectives common to all religions and therefore transcending them make the framework through which all revealed texts- and especially the Quran of course- must be grasped.

In last, we would like to quote view point of Justice Cornelius (a grand principled Christian judge in history of Pakistan) about potentials of Islamic law in curbing crimes and regulating affairs of modern Islamic state. On question how to establish rule of law in Pakistan, he replied in any society only those laws work which resonate with public feelings. In Pakistan, majority belongs to Islam, if we need rule of law in Pakistan then Islamic law needs to be implemented here. Pakistanis feel grand love and thirst for Islamic law, and this thirst increments with every passing moment, it is my firm belief that implementation of Islamic law in Pakistan would lead to a pleasant revolution. When he was asked whether Islamic law is workable in these modern times, the disarming reply was, if there be libraries of English common law, is research on Islamic law impossible? If judges and lawyers would study Islamic law it would develop into highly workable phenomenon. Till very near past through this law grand empires had been run<sup>18</sup>.

In nutshell, Islam tackles crime on legal and moral planes. In Islam's legal discourse punishments are means to an end not end itself. Islamic legal structure accommodates change. As against Secular law, morality is the bedrock of Islamic legal system. If Islam is given a chance, powerful, peaceful and prosperous society would be the necessary outcome.

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