

The Concept and Signs of Punishment in Islamic Law

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Abstract: The foundations of Muslim doctrine of punishment are laid down in the Koran. In the Criminal Law of Muslim countries there are no generalized theoretical definition of punishment, its fixed purpose, or any specifying of its features. The concept of punishment is insufficiently developed in Islamic Law as well. This article presents the results of research of problems related to the definition of punishment according to Islamic Law. The analysis of sources suggests that in the Islamic Law the essence of punishment is just retribution (retribution, requital), applied on behalf of the state (society) to the guilty person who violated prohibitions, defined by law (all sources of Islamic Law, including the Koran, the Sunna, ijma and so on), causing suffering and pursuing the goal of prevention of new crimes.

Key words: Koran • Sunnah • Islam • Islamic Law • Islamic Criminal Law • Crime • Punishment • Law

INTRODUCTION

The urgency of the notion of punishment in the Islamic Law theory is due to the fact that punishment remains the most effective criminal means to counteract crime. In accordance with the rules of the Islamic Law punishment is intended to protect five core values of Islam - religion, life, intellect, property and posterity, which also are the main objects protected by the Islamic Law. In modern conditions, the functions of punishment are to restore social justice and disturbed public order, smooth down the harm done to a victim, meet the needs of the society, punish the culprit, eliminate the feeling of insecurity arising in citizens in connection with the commission of crime and strengthen people's faith in the ability of the state to fight crimes and reliably protect the legitimate rights and interests of individuals and the society.

The importance of the research of the notion of punishment lies also in the fact that in the traditional Muslim Criminal Law the most severe punishments "hudud", "qisas" and "diya" are directly installed in the Koran [1]. and the Sunnah. At the same time, there are some questions about the effectiveness of the sanctions fixed by the Muslim Criminal Law, threats of punishment in the prevention of crime, the impulsion to abide by the

law; the effectiveness of punishment in terms of achieving the objectives of punishment to reform the convict and prevent new crimes committed by convicts and by other citizens as well.

In its traditional form Islamic Criminal Law universally retained positions in selected areas of the Arabian Peninsula and the Persian Gulf, where Islamic Law is preserved as the lead source to resolve criminal cases, used in the form of certain doctrines of persuasion, or incorporated into national legislation.

For example, the Criminal Law of Saudi Arabia establishes liability for the use of alcohol, homosexuality, falsification of documents, organization of riots and attacking the civil servants in accordance with the provisions of the Islamic Law. Courts in Saudi Arabia resolving criminal cases, along with the application of the mentioned law, also use the provisions of the authoritative works on Hanbali persuasion of the Islamic Law, which is officially recognized as a source of law. Thus, for example, a theft that meets all the conditions provided by these classic works entails cutting off a hand.

In most Muslim countries, Islamic Criminal Law is limited to the inclusion of some of its provisions in the Criminal Law, in their number is the establishment of criminal responsibility for the manufacturing, storage, sale and consumption of alcohol, violation of the Muslim

fasting, gambling, adultery and other acts, though established penalties for these crimes, such as imprisonment or fine, do not correspond with the original Islamic Law.

MATERIALS AND METHODS

The research is based on the dialectical method of cognition, a comparative analysis of the legal rules of Islamic Sharia Criminal Law and the legal rules of the official criminal legislature about punishment of some individual Arab countries, the traditional doctrinal foundations of the Islamic Law have been reinterpreted. With the application of historical, aristotelian and other private scientific research methods an attempt has been made to discover the essence of punishment under the Muslim Law, show general and specific features.

The study of the basic concepts of punishment in the Islamic Law is based on the Koran and the Sunnah as the general framework of the studied problem, as well as criminal laws of individual Arab states.

In Islamic legal literature, there are studies that address the basic issues of the Criminal Law, as well as issues related to the definition of punishment and its features. In particular, these issues have been addressed in their researches by Al-Mawardi, Abdel-Qader Awda, Ali Abdel-Qader El Kahvadzhi, Ahmad Fathi Bahnasi, Jundi Abdel-Malek, Iskhaq Ibrahim Mansour, Mahmoud Najib Hosni, Mohammad Al-Fadel, Yusr Anwar Ali, Amal Abdel-Rahim Osman, Manna Ammar Abdul Karim, Ibrahim Kilani, Nabil Abdelrahman Al-Asumi, Ramez Ahmed Allied, Allied Ramiz Ahmed, Sarferaz Vazireal, Hishalg Abdel Majid Rahal, Rahmani M [2-18].

The study of the theory and practice of the Muslim Law and Muslim Criminal Law also engaged Western scholars: Weiss B. J. Van den berg L. B. S. Leger R. Marginani B. Peters R. Schacht J. and others [19-24]. as well as S. Boronbekov, G.A. Esakov, G. Kerimov, A.V. Serebrennikova, L.R. Syukiyaynen and others [25-27].

The problem of the notion of punishment in terms of features of the traditional Muslim Law and from the standpoint of the changes being undergone by the Muslim Criminal Law with the incorporating of its provisions into modern criminal laws of Muslim countries today, is of undoubted interest.

Main Part: The criminal legislation of the majority of the Muslim states doesn't contain the concept of punishment. The absence in the Muslim Law of the uniform

conventional definition of punishment can be explained with casuistry of norms of Sharia and the Muslim Law where a generalization of legal categories is very rare. It is very difficult for Muslim scientist-lawyers to give a general definition of punishment, it is difficult to find a general basis for the development of the general concept of punishment. The general doctrinal idea uniting all types of punishment and the rules of their infliction comes to light correlatively with three categories of crime known to the Muslim Law. In each of them the idea of punishment and the practice of its application, in fact, are individual: the same punishment can be appointed for different types of crimes and can have different nature and different sources. Thus, for example, the most prominent representative of the Muslim and legal theory of offenses Al-Mavardi (974-1058), giving definition to punishment in relation to Sharia, writes: "Huddud is the punishment established by Allah for violation of a ban; as in human nature fight, on one side, passion and the need for pleasures and, on the other side, – understanding of the tortures promised in the otherworldly life for violation of a ban, Huddud is established as the possible pain, capable to keep frivolous people from violation of a ban" [3, 13].

In spite of the fact that in this definition is only about the Hudduds – categories of the punishments appointed for commission of certain crimes, beside which there are also two more categories of punishment – Khissas and Tassir, this circumstance does not belittle al-Mavardi's attempt to define the concept of punishment. Besides, the stated definition has pronounced religious coloring. In it the prevention of a commission of a crime is explained and grounded not only by the protection of interests of the society, but also by fear of the promised torture in the otherworldly life.

Ibrahim Kilani writes: the concept of punishment is a retribution or requital which is carried out by government bodies for a violation of the norms of Sharia and crime - is all wrong actions forbidden by Allah [5, 77].

The bases of the Muslim doctrine of punishment are, undoubtedly, founded in the Koran. It is possible to allocate a number of distinctive features of punishment, deriving from Koranic establishments [26, 322-323].

First, punishment is considered as the last and extreme terrestrial means applied to a sinner. Islam precepts, in effect, close all criminal ways, directing human life exclusively on a just way. The one who breaks these precepts deserves, undoubtedly, a strict punishment as the one who not so much broke wordly laws, as divine canons.

Secondly, Koranic punishments are applied for other people's edification as many of the former are executed publicly.

Thirdly, a punishment in the Muslim Law has a strictly personal nature, as it is applied only to the person guilty in breaking a ban.

Fourthly, a punishment can be applied only after the commission of a criminal action. Punishment application in the absence of the clear instruction of the Koran and the law on a ban of these or those actions is inadmissible.

Fifthly, the punishments ordered in the Koran are aimed at the correction through intimidation. The death penalty, mutilation, lashes – all these have to force the sinner to repent and avoid thereby a penalty in an afterlife.

Sixthly, Koranic punishments bear in themselves also an idea of a requital, retribution on the criminal.

Seventhly, punishment is not the right of the state, but its duty, directly deriving from religious doctrines. In particular, it is shown in the annex to a category of crimes Huddud where the Koran forbids the forgiveness of a guilty party, imposing on the judge a duty to apply a punishment.

On the basis of these Koranic establishments the criminal and legal doctrine of the Muslim countries gives the following definitions of the concept of punishment and its indications.

For example, Ahmad Fatkhi Bakhnasi writes that punishment - is an in advance established by the law (and he understands all sources of the Muslim Law as the law, including the Koran, Sunnah, ijma, etc.) requital for a violation of a ban specified in it for the purpose of the prevention of commission of crime, both by condemned and by other persons [3, 13; 4, 175].

In this definition the following signs Are accurately traced:

- Punishment is in advance established in the law;
- Punishment is a retribution;
- It is appointed for a violation of bans provided by the law;
- Punishment pursues the aim of the prevention of commission of crimes.

Similar definition of punishment can be seen given by the majority of Arab authors. Ali Abdel-Kader El-Cahvadzhi notes that punishment is the requital determined by the law and appointed by court and consisting of deliberate infliction of pain to the person found guilty of the commission of a crime [6, 309-310].

According to this definition, such features are inherent in punishment:

- Punishment is requital;
- Punishment is defined by the law;
- Punishment is appointed by court;
- Punishment consists of deliberate infliction of suffering, pain;
- Punishment is applied to the person guilty of the commission of a crime.

According to the author, deliberate infliction of pain to the criminal is the sign distinguishing punishment from other measures of the state coercion. Thus, for example, punishment in the form of imprisonment differs from the preventive conclusion in that the suffering and pain felt by the condemned during the punishment in the form of imprisonment are deliberate, while the same sufferings and pain felt during the preventive conclusion are casual (not deliberate). However, inflicting pain and suffering to the criminal isn't an end in itself. They have to be considered as means (the intermediate purpose) for achievement of other purposes of punishment (first of all, crime preventions).

The Syrian lawyer Mohammed Al-Fadhel writes that punishment is the penalty provided by the law, applied on behalf of the state to the person whose guilt is ascertained and who deserved to be punished for the commission of a crime, provided by the law [7, 373].

The author in his definition points to the following signs of punishment:

- Punishment is a penalty, requital for deeds;
- penalty is applied on behalf of the state;
- Penalty as punishment is applied to the person guilty of a commission of a crime;
- The law defines a crime, therefore, a punishment for its commission as well.

Some researchers explore the given signs on a larger scale, though at the heart of their approach are the same general principles. For example, an Algerian author Iskhak Ibrahim Mansur, who considers punishment to be the penalty established by the law and appointed by court to the person found guilty in a commission of a crime and consisting of inflicting sufferings to this person, of restriction of his or her rights and freedoms, allocates the following signs of punishment:

- Punishment is defined only by the law;
- Punishment has a strictly personal character;
- Punishment is appointed only by court;
- Punishment has to be fair and proportional to the weight of the committed crime;
- Punishment inflicts suffering and pain, which consist of deprivation or restriction of certain rights of the condemned: life, rights for freedom, for the free movement, some property rights etc [8, 129-130].

Thus, firstly, punishment has to be subordinated to the principle of legality. Only the law defines the minimum and maximum limits of punishment. The legality of punishment is predetermined by the fact that it is provided by any of the conventional sources of the Muslim Law, i.e. The Koran, the Sunnah, it is established by unanimous opinion of Muslim scientists (ijma) or the legislation. Therefore, the judge can not apply made-up punishments. The legality of punishment also means that the judge cannot appoint punishments at discretion and is limited to only those punishments which are specified by the law, only those limits which are set by the law.

Secondly, punishment has to be personal. Personal nature of a punishment means that a punishment for a crime is borne by the criminal, instead of his relatives or other persons. This principle found reflection in the Constitutions of Egypt (Art. 66), Bahrain (the item "in" of Art. 20), Yemen (Art. 46), Algeria (Art. 45), in which it is fixed that object of punishment is the personality in a legal, social and biological sense of this word, that burdens of punishment cannot be assigned to the legal entity, collective, family, the immediate environment of the personality and they do not bear any responsibility if it isn't provided by the law. If after a pronouncement of a sentence a criminal died, none of his relatives should be punished for it. Nevertheless, this sign of punishment is not always observed in the Muslim criminal legislation, as in a number of the countries a duty to pay "repayment for blood", diya, assigned by the law both on the guilty and his family (for example, by the legislation of Sudan).

Thirdly, punishment has to be appointed only by a court sentence. The judge pronounces a sentence on behalf of the state as he acts as the representative of the law. Neither the victim, nor any other government body (except court) have the right to punish the criminal, or appoint a punishment to the guilty. This principle it is mentioned in the Constitutions of Syria (Art. 29), Kuwait (Art. 32) and some other countries.

Fourthly, punishment has to be fair and proportional. The maximum and minimum measures of the severity of a punishment have to correspond to the weight of the committed crime.

Fifthly, the content of a punishment has to include a suffering element as it deprives guilty of certain benefits, for example, freedom, an property, or even the right for life [9,305].

As a whole, all these allocated signs of punishment proceed from the general judgment that a punishment, which causes inevitably suffering to a criminal, is the penalty defined within the law and appointed by a judge.

The similar position is observed at Dzhundi Abdel-Malek who also believes that punishment is the penalty imposed on a criminal for the benefit of the society; it is the pain inflicted to a criminal for a violation of an instruction of the law [10, 24-25].

In this definition of punishment it is possible to allocate its following signs:

- Punishment is a penalty imposed on a criminal;
- Punishment is the pain caused to a criminal;
- Punishment is imposed and caused only to the criminal and for the benefit of the society;
- The basis of the application of a punishment is a violation of the instructions of the law.

Dzhundi Abdel Whitebait notes three signs inherent, in his opinion, in criminal penalty:

- First, punishment has to be lawful, as in it is defined by the law. It means that only the law defines the type, size and limits of a punishment. However, here it should be noted that judges are given an opportunity: to choose a type of punishment (when alternative sanctions for a commission of a crime are provided); to determine its size, without being beyond the law; to exempt guilty from an execution of the punishment, etc.

The bodies of the executive authority also have a number of powers that affect an execution of a punishment. For example, the right for pardon and amnesty, replacement of a punishment with a softer one, a conditional early release from a punishment, etc. Thus, all branches of authority (legislative, judicial and executive) participate from different positions in the definition and execution of a punishment;

- Secondly, punishment has to be equal for all. However, this equality - legal, instead of actual, as the pain caused by a punishment is not identical to all people undergoing it. Thus, for example, the pain caused by an imprisonment to the person who is used to living in a family, is incomparable with that which is felt by the tramp serving this sentence. Penalty as the type of a criminal penalty, not equally influences the rich and the poor. The punishment inequality, according to the author, is shown at the level of the legislation itself, when in the law a punishment is more severe concerning certain categories of people, like official bodies [10, 25-27; 11, 85-86].
- Thirdly, punishment has a strictly personal nature. It is applied only to the criminal and cannot be under any circumstances shifted to other people. Thus, for example, if the criminal died, the liability for the crime committed by him or her cannot be shifted to his successors or to other people at all. Despite this, punishment often has negative consequences for a family of the condemned or his relatives (for example, a penalty, imprisonment, etc.).

Thus, in the criminal legislation of the Muslim countries, in Muslim Criminal Law, there is no generalized theoretical concept of punishment and its signs.

CONCLUSION

Muslim traditional criminal law is a complex social phenomenon. It is in close connection with the Islam religion, but at the same time is not intertwined with it. The Muslim Criminal Law is considered to be the legal phenomenon that belongs to the legal, instead of the religious system. In this regard norms of Muslim Criminal Law differ from the religious rules of behavior by the compulsory force of the state. At the same time, the Muslim Law closely interacts with religious and moral standards, customs in the uniform system of religious and standard regulation. All of the said above allows us to come to the following conclusions:

Firstly, a punishment in Muslim Criminal Law is, first of all, a sacral phenomenon, a result of divine revelation and is granted to the people by Allah through his prophet Mohamed.

Secondly, a punishment in Muslim Criminal Law serves the purpose of restoration of the social justice, protection of moral, material and religious interests of the

society and its members and orders relationship of members of the society and, at the same time, the relation of the Muslim with Allah and the rules of the law.

Thirdly, punishments prescribed in the Koran and Sunnah, are cornerstones of the concept of a punishment and the Muslim Criminal Law. It is considered to be a positive factor, as severe punishment which the Koran and Sunnah indicates for deeds, carries out preventive functions.

Fourthly, as the main sources of the Muslim Criminal Law are the Koran and Sunnah, basic provisions of the Muslim Law are rather stable, steady and constant, unlike the modern criminal laws.

Fifthly, the Muslim criminal and legal doctrine considers that protecting the main values of the Islamic society, punishment is a terrestrial measure of the liability which is expressed in deprivation or restriction of the rights and freedoms, the prevention of new crimes and the aim the terrestrial and moral correction of a person.

Sixthly, punishment signs in Muslim Criminal Law are its religious, retaliatory and personal nature, application for others' edification and admissibility of application of a punishment only after the commission of a crime and its inevitability.

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