The Aims of Punishment in Moslem Law

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Abstract: Issues of punishment based on current classic Moslem criminal law are of interest for scientific investigation. Punishment is one of the central institutes of criminal law, while issues of the aims of punishment are among the most complex in criminal legal science. The significance of these issues is defined by that criminal law is brought into action, above all, through the threat and administration of punishment, the attainment of the aims of its administration. This article, based on the analysis and summation of sources and literature, investigates issues of the aims of punishment and reveals trends in defining the aims of punishment characteristic of traditional Moslem law. Our study has shown that the primary aim of punishment, according to Moslem criminal legal doctrine, lies in reforming the offender. Moslem law traditionally draws a divide between general and particular prevention, which is also viewed as the aims of punishment. Punishment both in its essence and its aim is associated with retribution, which acts as the intermediary aim en route to attaining other aims of punishment envisaged.

Key words: Moslem criminal legal doctrine • Crime • Punishment • Aims of punishment • Retribution • General warning • Particular warning • Reformation

INTRODUCTION

Islam is rightfully considered one of the world religions and law holds a special place in Islam. Islam is a religion of law as a body of mandatory rules of behavior, a religion with strictly defined commandments, norms of behavior and worldview, which are obligatory for all. These rules of behavior permeate the entire life of a Moslem and legal norms proper hold a special place among them. Moslems themselves call Islam “din”, which is roughly translated as “law”, some kind of a social-political reality that comes from God. It is this “law” that underlies Sharia. In this regard, to its followers Islam is not just a religion but a universal regulatory system that encompasses all social norms, including law.

Moslem criminal law is a special phenomenon whose historical development reveals one of its major characteristics: all the major issues of criminal law deal not with the institute of crime but that of punishment [1-6]. The classic Moslem concept of punishment, which originated in the Arab caliphate, lies in that the offender is stripped of the physical ability to commit crimes in the future through either being physically terminated, or executed, or via incurring the penalty of mutilation as a result of which the person stays alive and free but as a criminal is no longer dangerous. Thus, punishment is one of the ways to combat crime as a social phenomenon.

It is issues of punishment, the system and types of punishment that the modern legislator in the Moslem world builds on when one sets to reforming and codifying criminal law. Punishment in Moslem criminal law is the basis for constructing a special classification for crimes and, as they follow this system of constructing punishments, Islamic men of law lay out the major issues of criminal law. The institute of punishment helps bring to light the social-legal essence of Moslem criminal law, its real action and the link between criminal law and other components of statutory regulation.

Consequently, the significance of punishment problematics in Moslem criminal law and understanding its aims for the theory of comparative jurisprudence in the area of criminal law and for the study of foreign criminal law define the topicality of this investigation.

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MATERIALS AND METHODS

The methodological basis of this study is the dialectical method of knowledge discovery, the juridical comparativistics and analysis method and the systemic and historical approaches.

Main Part: Criminal legislation in Moslem countries does not contain the notion of punishment and does not stipulate its aims, which leads to ambiguity in resolving the issue of the aims of punishment in criminal legal doctrine. If viewed from the standpoint of the Quran paradigm, punishment is the most extreme earthly measure administered to the sinner. Sharia declares as sinners those who do not conform to Moslem law and subjects them to punishment on Earth and in the other world as well, warning one that for certain deeds and crimes one can be punished in the future life, while for others-in this life as well [7, 48]. Punishments prescribed in the Quran are aimed at reforming through intimidation. Capital punishment, mutilation, flogging-all this should make the sinner repent and thereby avoid retribution in the hereafter. Quran punishments also carry the idea of retribution, retaliation for the offender. Quran punishments are administered exemplarily, which is achieved through staging most public punishments. Punishing the offender is not just the right of the state- it is its obligation which follows directly from religious dogmas. This especially holds for “hudud” crimes: the Quran prohibits pardoning the offender, placing on the judge the obligation to administer punishment [8, 322-323].

Based on the Quran paradigm, Moslem criminal legal doctrine brings to light the aims of punishment. Thus, for instance, Ibrahim Kilani writes: “Punishment is retaliation or retribution administered by the government authorities for breaching the norms of Sharia and crime is all wrongdoings prohibited by Allah” [9, 77].

Punishment both in its essence and its aim is associated with retribution. The essence and content of punishment in Moslem law is retribution, earthly retaliation, or requital for a wrongdoing: the victim and society must be avenged for justice to be restored. Retribution, retaliation, or requital as the intermediary aim of punishment has been dwelt upon by many Moslem authors [10, 175; 11, 309-310; 12, 67; 13, 129-130].

According to certain authors, retribution creates the necessary conditions for attaining other aims-above all, the aim of preventing crimes. Jundi Abdel-Malek believes that “punishment is indissolubly associated with the idea of inflicting pain upon the offender, although it (pain) is not the aim of punishment. Pain is inflicted upon the offender only for the sake of attaining the ultimate purpose of punishment — protecting society and ensuring the maintenance of public order. The ultimate purpose of punishment differs from the actual aims: preventing repetition of crime (particular prevention) and deterring others from committing crime (general prevention). Punishment should balance out the attainment of both of these aims to make sure one of them is not sacrificed for the sake of attaining the other. In this sense, particular prevention is attained through intimidating the offender, reforming one, or even expelling one from society if one is incorrigible (here we mean sentencing one to capital punishment or life in prison), while preventing-through intimidating” [14, 123-124]. We believe that by “pain” the author implies retribution and considers it as a means of attaining other aims of punishment.

Ali Abdel-Kader El-Kahwaji defines punishment as requital determined by the law and prescribed by the court, which lies in deliberately inflicting pain upon a person who is guilty of a crime. Pain (retribution) is not an aim per se but acts as a means (the intermediary aim) of attaining other aims of punishment. The primary purpose of punishment is combating crime. It is attained through more specific aims, such as administering justice, general and special prevention and reforming the offender. Among all possible aims of punishment he sees the aim of punishment only in reforming the offender, while the rest are secondary in relation to this ultimate purpose [11, 309-310].

According to Mahmoud Najib Hosni, a crime is an encroachment upon justice as a universally accepted social value, on one hand and an infringement upon the sense of justice with individuals, on the other. Both aspects of injustice caused by criminal infringement should be done away with through punishment. Punishment should restore justice as a social value and satisfy public sentiments which demand it be administered [15, 197]. The author differentiates between the ultimate and actual aims of punishment. He construes the ultimate aim as the protection of rights and interests protected by criminal legislation, while the actual aims of punishment, in his view, are about restoring justice (the moral aim of punishment) and preventing committing new crimes, both on the part of the criminal and other persons (the utilitarian aim).

Muhammad al-Fadel singles out such aims of punishment as the protection of society’s interests, which is aimed at preventing the committing of crime by a person who has committed crime already before.
Through requital, administering punishment to a person who has committed a crime, an educative effect on the offender oneself and other members of society is provided. The other aim pinpointed by the author is the so-called moral aim, which is about restoring social justice [12, 70].

The purpose of general prevention is preventing the committing of crimes by other individuals who could commit them. It is assumed that the fact of administering punishment to a specific person who has committed a crime should also have a preventive action on other citizens. In the theory of criminal law, there is no universally accepted belief on which punishment in the general prevention sense has an action on. According to the majority, the general preventive action of punishment is addressed towards only those who are inclined to committing crime. Law-abiding citizens are impacted by the administration of punishment to the offender mainly in terms of the educative aspect, as it convinces them that such deeds are criminal and foster in them an intransigent, negative attitude towards such deeds.

Moslem lawyers single out two primary aims of punishment: general prevention and particular prevention, which certain authors’ contrapose to each other. For instance, according to Abdel-Kader Auda, “punishment in Sharia pursues two opposite aims. One is general prevention: focus, above all, is on combating crime, while the offender’s personality is not given much attention. The other aim is particular prevention, wherein emphasis is not on crimes and combating crime but the offender’s personality. Moslem law has incorporated two opposite aims and attempted to remove these contradictions in the following way: in prescribing any punishment, the protection of society’s interests must be ensured. Therefore, in committing crimes dealing with the interests of society the offender’s personality is ignored, while in committing other crimes the offender’s personality is taken into account by the court in prescribing punishment. In the last case, the aim of punishment is a particular prevention”[16, 274-275].

The author’s position on the preventive meaning of punishment is not incontestable, for society is protected in case of both general and particular prevention.

Note that in the Moslem criminal legal theory, there is an approach to defining the aim of punishment depending on the type of punishment. The majority of Moslem men of law single out three types of punishment: 1) “hadd” (“hudud”), punishment (punishments) prescribed for committing crimes against Allah; 2) “qisas”, retaliation based on the principle of an eye for an eye; 3) “tazir”, punishment that can be administered at the discretion of the judge [7, 48].

Punishments for committing “hudud” and “qisas” crimes pursue the aim of general prevention. The other group of punishments, which are prescribed for “tazir” crimes, pursues the aim of particular punishment. In prescribing punishment for committing a “tazir” crime, the judge is guided by the following considerations:

- If the circumstances of committing the crime aggravate one’s guilt and the offender does not deserve indulgence, one is sentenced to the supreme measure of punishment;
- If the circumstances of committing the crime extenuate one’s guilt, but the offender does not deserve indulgence, one is sentenced to the medium measure of punishment;
- If there are circumstances extenuating one’s guilt and the offender deserves indulgence, one is sentenced to the minimum punishment.

In Moslem criminal legal literature, there is also an interest towards the ways of defining the aims of punishment based on values protected by administering punishment. In accordance with the norms of Moslem law, punishment is aimed at protecting the five primary values of Islam-religion, life, intellect (reason), family life (kin continuation) and wealth (property).

Religion in Islam is one of the forms of public consciousness, an aggregate of spiritual notions predicated upon belief (iman) in supernatural forces and a deity (Allah). Religion is a force that unites society. Observing and carrying out religious obligations set out in Quran is crucial to educating a person-it keeps one away from violating the law. If a person observes the Divine laws, one does not come into conflict with the laws of society, does not commit crime. Otherwise, the aims of punishment are reforming one, which is construed as perfecting one morally and religiously and retribution for the crime committed, which is associated with the significance of protecting religion as one of the most important values of society.

The life of man is the primary value of society and, therefore, there are severe punishments envisaged for crimes against someone’s life. The aim of punishment against a person is retribution for committing and prevention of criminal deeds.
One’s intellect enables one to observe laws. If a person’s ability to think rationally is somehow impaired (e.g., through drugs or alcohol), one becomes a potential offender, since one cannot assess things adequately and, as a result, can commit a crime. The aim of punishments for crimes against the intellect, as is pointed out in Moslem legal literature, is preventing crimes and educating (reforming) one.

The rigidity of punishments for crimes against family and kin continuation is associated with that such crimes pose a serious threat to the health of society, family life and relations between people. The aim of punishment in this case is preventing such crimes and retribution.

Sharia protects wealth (property) as a value that is considered sacred and untouchable. Encroachments on property in the form of theft (“sarika”) or robbery (“haraba”) are punished quite severely (by amputation of body parts). It is clearly set out in the Quran: “As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime…” Other encroachments on property are punished through “tazir” (reformative punishments) at the discretion of the judge. Consequently, the aims of punishment for crimes against property are retribution, intimidation, particular prevention and general prevention.

According to Moslem law researcher L.V.S. Van den Berg, “certain punishments can suggest the idea that the Prophet considered as the grounds for and aim of punishments retribution against the offender for committing an evil act and, thus, restoring balance in the moral world; while others can be explained by that they must intimidate the offender with their harshness, deterring one from committing a crime; finally, thirdly, there sort of shows through the idea of redressing the damage incurred by the aggrieved party” [17, 165].

Inferences: The analysis of sources of the Moslem criminal legal thought leads us to infer that the main aim of punishment, which is associated with the nature of criminal infringement upon laws, both worldly and, concurrently, divine, lies in reforming the offender, which is construed as one’s repentance of one’s sins before Allah. The religious tincture of reformation, in turn, is associated with that reformation is possible in administering any kind of punishment, up to capital punishment: an offender dying as a result of the decision made by the court is considered reformed if one has repented of one’s deed before death.

The other aim of punishment lies in prevention, both general and particular. It is attained through the harshness of punishments prescribed by Moslem law, publicness of their administration and their unavoidableness. The general preventive action of punishment is addressed both towards law-abiding citizens, acting on them educatively and fostering a negative attitude towards crime and those inclined to violate the law. The primary general preventive potential of punishments is addressed towards morally unbalanced individuals who are ready to commit a crime, but fear of punishment deters them from it.

General prevention is closely associated with particular prevention, which implies prevention of the committing of new crimes by individuals who has been convicted before. Its essence lies in the intimidating and at the same time educative action that punishment is intended to have.

Moslem criminal law has retained the significance of the historically formed system of punishment, which reflects the perils of crime from the standpoint of religious canons, the procedure for prescribing punishment and its aims.

Moslem law traditionally draws a divide between general and particular prevention. It is believed that punishments for “hudud” and “qisas” crimes, being rigid and unambiguous, pursue the aims of general prevention, whereas punishments for “tazir” crimes, which are handled at the discretion of the judge in application to a given individual, mainly pursue the aims of particular prevention.

Retribution, retaliation, or requital as concurrently the essence and aim of punishment creates the necessary conditions for attaining other aims-above all, the aim of prevention. One may find that the idea of pain (retribution) and punishment are inseparable and punishment, in both its essence and its aim, is associated with retribution.

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