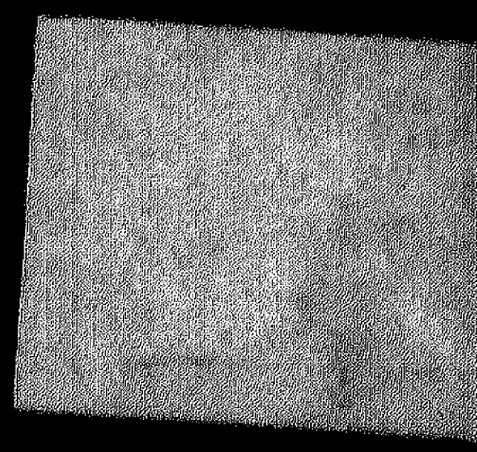

HUDUD LAWS:

DETERRENCE AND RETRIBUTIVE EFFECTS OF PUNISHMENT ANALYSED (A COMPARATIVE STUDY WITH MALAYSIAN AND ENGLISH LAW)

MD. NADZRI BIN YUSOFF
G9210883

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PREFACE

In the Name of Allah

The Compassionate, the Merciful

The opportunity to graduate from the International Islamic University and now pursuing its MCL Program is, indeed, to me, a great honour and the best gift of a lifetime. I praised Allah for His Mercy and Blessings.

The topic for this dissertation - "Hudud Laws - Deterrence and Retributive effects of Punishment Analysed (A Comparative Study of the Malaysian and English Law)" has been personally suggested by my distinguished supervision, Professor QaiSar Hayat. I am indebted to him for the encouragement and guidance extended in completing this work. He dedication and patience has been a source of admiration and inspiration to me ever since he lectured Criminal law back in the undergraduate days. My special thanks is also due to Professor Zakaria Siddiqi whose discourses on "sentencing" sparked my interest in this area of law.

I apologise for any shortcoming and imperfection and sincerely hope that this work will be useful to the readers especially in the wake of restoring the status and rightful position of the Hudud laws.

30th May 1994

MD. NADZRI BIN YUSOFF

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INTRODUCTION

The controversy surrounding the Hudud Bill of Kelantan, the challenge on the constitutionality of the death penalty in an "Islamic state" and the misconceptions of the Hudud laws fascinate and encourage me to venture into this area of research for my dissertation.

The Kelantan Syariah Criminal Code (II) Bill 1993, was tabled in the State Legislative Assembly on 24th November 1993. The Bill, divided into 6 Parts and consisting of 72 sections, incorporates provisions relating to Hudud and Qisas crime and punishments; evidence; modes of execution and others. The Bill has sparked off considerable interest and debate among the general public and there had been unjust and unwarranted comments on its proposed implementation. The Hudud laws, being of divine origin, is beyond human perception and evaluation. What makes it controversial? Besides the fact that the Bill was being sponsored by an opposition led State Government much "politicking" have come into play which can mislead the masses. A concerted effort must be taken to put the Hudud laws back on its proper perspective.

The Criminal Appeal Nos. 28 and 29 of 1986 seeks to show that a mandatory death sentence under the Fire Arms (Increased Penalties) Act is against the injunction of Islam and therefore

void. It is argued that since Islam is the religion of the Federation (Article 3(1)), and the Constitution is the supreme law of the Federation (Article 4(1)), the imposition of the death penalty on these offences, not being a "hudud" or "qisas" according to Islamic law, is contrary to Islamic injunction and is therefore unconstitutional.a

The Supreme Court decided that the term "Islam" or "Islamic religion" in Article 3 of the Federal Constitution in the contexts means only such acts as relate to rituals and ceremonies. During the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic Law was rendered isolated in narrow confinement of the law of marriage, divorce and inheritance only. It is in this sense of dichotomy that the framers of the constitution understood the meaning of the word "Islam" in the context of Article 3. It should thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking or any other offence will be void as being" unconstitutional.a Salleh Abbas LP remarked -

> ".... However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps

that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today."[4]

The Islamic Penal Law is criticized in certain quarters that its punishments are barbarous and do not take into consideration the mitigating circumstances. This part of criticism is misconceived. In matters of takzir no fixed punishment is prescribed. The nature of the punishments has been left entirely to the sole discretion of the Qadi, the trial court, who will award such ta'zir as the nature and circumstances of the offence do require. Of course, in the matters that are liable to hadd, the punishments are fixed and rigidly enforced, provided that all the ingredients of those offences are found there and are proved beyond doubt, for the Holy Prophet has said - "Do away with hadd punishments in cases of doubt." In another saying it is reported that it is better to let offenders go off unpunished than to convict one innocent person.[5]

The orientalists labelling of the Islamic criminal law as barbaric, outdated and unsuitable for modern world is clearly a reflexion of their superfluous knowledge and inaccurate study on subject. This state of affair is being further aggravated by the fact that most muslims students sought their knowledge of

Islamic law from the western universities instead of the Islamic own centres of learning. Thus, it is no surprise when an imminent muslim writer admitted that he was "taken off" with "progressive" and "modern" ideas and started to doubt the wisdom of the Hadd punishments during his student days.[6]

It must be explained in the first instance that the amputation of hand is the maximum punishment for theft. It is not to be imposed if the property involved is less than the nisab, not kept in properly protected place or the theft being committed due to starvation or hunger.[7] This punishment is redressive and will not be inflicted where there are circumstances which impel the criminal to commit the crime.[8] That the amputation of hand does in fact prove a deterrent will appear from the conditions prevailing in Saudi Arabia. Foreigners consider this a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world.[9]

With the above backdrops, I propose to discuss the "Hudud punishments with emphasis on its deterrence effect. As a muslim, I feel dutibound to participate in the quest of knowledge and promote the greatest gift of Allah to mankind - The Hudud Laws.

According to Prof. H.L.A.Hart, punishment should be defined in terms of five elements

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[10]

A.G.N. Flew defined punishment as the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command).[11]

Joel Feinberg stated that 'At its best, in civilized and democratic countries, punishment surely expresses the community's strong disapproval of what the criminal did. Indeed, it can be said that punishment expresses the judgment (as distinct from any emotion) of the community that what the criminal did was wrong.[12]

The principle of legality of crimes and punishments is reflected in the maxim "Nullum crimen nulla poena sine lege". This principle implies that no person can be accused of crime or suffer punishment except as specified by law. Thus, crimes and punishment can only be prescribed by the legislature, the law making body of the State.

The Constitution, being the supreme law of State, merely formulates the guiding principles in achieving and securing a just and fair society. Every law, then, has to be enacted or legislated in accordance with the ideas laid down in the constitution. No law can be enacted against the morality of constitution. In this respect, a law that prohibits certain conduct with a threat of punishment is the criminal law.

The Constitution normally does not give any guideline as to what conduct should be within the boundary of criminal law except the following principle :

1. Ex - post facto law cannot be enacted ie. no criminal should have retrospective effect.
2. No citizen should be subjected to the same punishment twice ie. No double jeopardy.

Any law that violates the above principle is considered unconstitutional. Thus, the legislators are free to declare any other activity as criminal acts so long as the above principle are fully observed and upheld.

The main objectives of punishment are :

1. Retribution
2. Deterrence
3. Reformation

The essence of the retributive theory is that punishment will make the offender pay back to society for damage done whereas deterrence involves the prevention of the occurence of future crimes. Reformative theory, on the other hand, is based on the promise that training in some kind of vocational / correctional training will help the person to adjust in a better way in society.

Introduction

Footnotes:

1. See Appendix A - The Draft bill.
2. Che Omar B. Che Soh v. PP and Wan Jalil B. Wan Abd Rahman v. PP (1988) 2 MLJ 55.
3. Ibid.
4. Ibid page 57.
5. Emmanual Zafar - Law & Practice of Islamic Hudood page 7.
6. Abdul Rahman I. Doi - Shariah The Islamic Law - Preface.
7. Muhammad Iqbal Siddiqi - The Penal Law of Islam page 27 - 28.
8. Ibid page 29.
9. Gordon Gaskell - Reader's Digest Feb. 1967. Ibid page 32.
10. Hyman Gross & Andrew Von Hirsh - Sentencing page 9.
11. Ibid page 23.
12. Ibid page 25.

CHAPTER 1 - PUNISHMENT - THE CONCEPT

1. The Theories of Punishment

Under the Common Law, it is assumed that the penal system aims at reducing crime by making as many people as possible want to obey the criminal law. It follows that the general practice of punishment by the State is only justified if it has two objectives, the reduction of crime and promotion of respect for criminal law.[1]

The criminal law can only work successfully if the practice of punishing for its breach as well as nature and extent of the punishment is accepted by a very substantial part of society and it is reasonable to assume that such a majority would, in general, approve of punishments which are deserved, no more, no less.[2] Punishment reduces crime either by deterring potential offenders, by deterring the individual offender or by reforming the individual offender. This is commonly associated with preventive theories - utilitarian or rehabilitative. On the other hand, punishment can also be justified by meting out to offenders of their deserts. This is associated with the retributive theories. In this case, the aim of punishment is to reduce crime by a means which commands the respect of the majority of society. But in reality, prevention and retribution are mutually dependant. If punishment is to deter it may only do so by giving offenders their deserts; but the only reason for giving offenders their deserts is that it deters.[3]

The usual way of distinguishing between retributive and utilitarian theories of punishment is to say that the former are concerned with the relation of the punishment to a past event, the crime, whereas the latter are concerned with the consequences of the punishment; but this distinction is unsound because the satisfaction of victims demand for vengeance is commonly regarded as a typical retributive justification, although it lays stress on a particular consequence of punishment. A sounder basis of distinction is that between theories which stress the accountability of the offender to his victim and others and those which stress the effect of the punishment on the offender and others.[4]

The essence of retributive theories is that punishment is justified because the offender is in some sense made to "pay" for what he has done, whereas the essence of utilitarian theories is that punishment is justified because it tends in some way to prevent the occurence of future crimes.[5]

The Retributive Theories

The bases of the retributive theories of punishment are vindication in the sense of society's claim to amends for the harm done, or for outraged feelings, fairness to the law abiding and proportionality of punishment to the seriousness of the offence.[6]

1. Vindication

Vindication, in its crudest form, justifies punishment on the ground that it tends to satisfy the victim's need for vengeance. This is reflected in the satisfaction of the victim's sense of justice or the satisfaction of the feeling of resentment of the victim, his friends and relations, or others who are aware of the crime. But this type of vindication cannot be treated as a justification of punishment on its own account. What has to be justified is the deliberate infliction of pain by the state. Bentham maintained that the satisfaction engendered by the spectacle of punishment will never equal the pain caused by that punishment.[7]

In Williams, the two accused, who had been drinking, pleaded guilty to buggery of a sheep. When sentencing them to a year's immediate imprisonment the trial judge said -

> "I fully appreciate that it is going to be a matter of comment about you for years to come and I think the kindest thing I can do is to visit upon you the outrage which I think anybody with decent feeling would feel about it so that nobody can say, in your village, that you haven't paid for it".[8]

In Llewellyn Jones, a deputy County Court Registrar was convicted of offences involving the conversion of funds under his control belonging respectively to a crippled infant and a mental patient. The trial judge sentenced him to four years imprisonment. On appeal it was argued that heavy punishment was not called for on deterrent ground, it was unlikely that the accused would ever again be in a position to commit such offences, and other deputy County Courts registrars scarsely needed a powerful warning by example in order to deter them from converting funds under their control. The Court of Appeal replied -

> "This Court is quite satisfied that this is not a deterrent sentence. It is a sentence which is fully merited, in the opinion of this Court, as punishment for very grave offences, and as expressing the revulsion of the public to the whole circumstances of the case."[9]

ii. Fairness

Punishment may be justified by the need to show the offender and the law abiding that the threats of the law will be carried out, and that those who unfairly take advantage of the self-restraint of others cannot do so with impunity. Inasmuch as punishment aims at depriving the offender of his gain, or at least counter-balancing the advantage obtained unfairly through the offence, this justification may be seen as retributive.[10]

In the case of offences against person or property, if the sole justification of punishment were the vindication of the victim's injury, punishment ought never to be inflicted where the victim forgives the offender. Generally, the Court consider the attitude of the victim irrelevant to the accused's punishment because he has to be punished for having flouted the law.

In **Hampton**, the accused, aged twenty-three, had been convicted of rape of a girl of eighteen. She had permitted familiarities on the occasion in question, but clearly did not consent to intercourse and reported the incident to the police immediately afterwards. On hearing that he was sentenced to three years imprisonment, the girl wrote to the court of Criminal Appeal saying that she was shocked by the result, that she had no idea that this would be the consequences of her action, and she had told the accused, before the incident, that she would have intercourse with him some time in the future. The sentence of three years was nonetheless upheld -

> "It might well be true that she had no idea of the serious view that the Courts take of the crime of rape on young girls. But her misgivings could not afford any justification for altering a sentence which was right in principle and in fact well deserved."[11]

iii. Proportionality

Sentencers think in terms of a complex notion which they frequently describe as "the gravity of the offence." This certainly includes wickedness and, to the extent that punishment is measured proportionately to the wickedness implicit in the definition of the offence, or indicated by the particular circumstances, the sentencer is thinking in terms of proportionality to the moral deserts of the offender. Some retributive theories measure punishment according to the amount of harm actually done, but the proper measure of moral desert is surely the amount of harm that the offender intentionally inflicted, knowingly risked or (perhaps) negligently caused.[12]

Salmon LJ in Riddle and Stevens said -

> "No doubt there are crimes against property which, in exceptional circumstances, enabled justice to be tempered by mercy and first offenders to be treated with extreme leniency. But crimes of violence are altogether different in kind. These appellants were members of a gang which in brutal and cowardly fashion, set on a man standing alone, and proceeded to kick him as he lay unconscious.... In such circumstances the appellants would, or should, have been sentenced to long terms of imprisonment.... They are all young with no previous convictions. Even so

in circumstances such as these to impose the most derisory fines £20 and £25 is a travesty of the proper administration of justice."[13]

The same Lord Justice, in Disbery said -

> "This Court does not want to minimize the seriousness of the offences of receiving excise licenses and using them fraudulently, but to send a man to prison for three years for doing that seems to this Courts to be beyond all reason."[14]

The Utilitarian Theories

The utilitarian theories of punishment works on the assumption that crime must be prevented as economically in terms of the suffering of the offender as possible. Prevention, deterrence and reform may be treated as the three bases of these theories.[15]

i. Prevention

According to the prevention theory, the object of punishment is to incapacitate the offender from committing further crimes. The protection of society from the offender's maraudings, even for a comparatively short time, is a frequent judicial justification of a sentence.[16] One of the limitation of the prevention theory is that it may be excessive. This can be

demonstrated in Clarke where the Court of Appeal substituted the 18 months imprisonment upon a mentally disturbed young recidivist for breaking a flower pot valued at £1, to a fine of £2 only claiming it to be "wholly inappropriate."[17]

ii. Deterrence

The deterrent theories of punishment discourages crimes through the experience, threat or example of punishment. It can be sub-divided into individual deterrence, general deterrence and long term deterrence.

In the case of individual deterrence, the rationale is that the offender should be given such an unpleasant time that, through fear of a repetition of the punishment, he will never repeat his conduct. The Advisory Council on the Penal System reported that it is the first prison sentence in an offender's life which is widely held, though largely on conjectural grounds, to have the most traumatic effect. The initial impact of prison life is therefore thought to be a powerful individual deterrent, and sentencers have frequently in recent years been urged to make the first prison sentence reasonably short.[18]

Lord Lane LJ in Upton remarked -

> ".... sentencing judges should appreciate that overcrowding in many of the penal establishments in this country is such that a prison sentence, however short, is a very unpleasant experience indeed."[19]

In the case of general deterrence, the aim of punishment is thought of as the discouragement of others minded to commit crime by the threat of punishment and the example of the punishment of the offender. However, the deterrent effect of either the threat or the example of punishment probably varies considerably from crime to crime.[20]

The case of Daher illustrated the example of punishment in acquisitive crime. The Court of Appeal upheld a sentence of three years imprisonment on a Lebanese student of nineteen for the illegal importation of cannabis. The accused, previously of good character, had been induced to become the "runner" of some Lebanese drug exporters by the promise of money and short holiday in England in addition to the payment ofhis air fare; his employers had also promised assistance to his impoverished family. On his arrival in England Daher was found to have £3500 worth of cannabis in his suitcase.

Salmon LJ in the Court of Appeal said -

> "If a young man such as the appellant is given a six months suspended sentence, back he goes from whence he came and the news spread like wildfire amongst all

student. 'Well, this is not a bad way of trying to get money because if it comes off you have made a nice profit and had a good holiday, and if it does not come off you will just be sent home again.' On the other hand, if it is known among potential offenders in the Lebanon and elsewhere that, if they are caught attempting to smuggle drugs into this country, they will be severely dealt with, there may be a remarkable lack of enthusiasm for enterprises of this kind and great difficulties put in the way of people who run this filthy trade."[21]

In Motley, the accused pleaded guilty to two counts of assault occasioning actual bodily harm and two counts of criminal damage, having thrown a beer can and part of brick through the windscreens of two cars whilst travelling in coach back from a football match.

Lawton LJ, in upholding a Borstal sentence, said -

"It is manifest now that kind of sentence (i.e non-custodial sentences) has not deterred the hooligans who go to football matches intent on causing disorder. Something has to be done in order to ensure as far as possible that this kind of conduct comes to an end.... We have no hesitation in saying that hooligans of the kind which the appellant has shown himself to be, who are 17 years and older, should

expect to lose their liberty if they are convicted of offences of violence which cause injury to other people or criminal damage which ordinary sensible folk can fairly and justly call vandalism. The sooner football supporters appreciate when they get into their coaches or trains to go away to football matches if they use violence to other people the probabilities are that they will not be returning to their homes for some time. We are confident that if the courts impose a policy of this kind for rest of this football season, there may be an improvement next year."[22]

Long term deterrence is justified on the ground that it helps to maintain people's standards. The fact that people are punished for crime is believed to build up an abhorrence of it over the years and thus to reduce the number of those who would even remotely contemplate it.[23]

In relation to general deterrence in both its short and long term forms, a question which may be raised is what justifies the use of the criminal as a means to the good of others, especially when that use consists of the infliction of pain? The answer is that the criminal is not being used merely as a means. He is being given his just deserts although there is no reason why he should receive them at the hands of an earthly power if crime is not reduced thereby.[24]