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يُؤْتِيهِمُ اللَّهُ مِنْ فَضْلِهِ يُشْرِكُونَ

IMPRISONMENT PUNISHMENT:  
POSITION IN ISLAM AND PRACTICE IN MALAYSIA

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## PREFACE

Imprisonment is known as one type of punishment which is practised by most of the countries in the world. Effectiveness, over crowded of the prison and the rehabilitation approaches are the problems faced by the prison departments. Thus, the main objective of this study is to make a general comparison regarding imprisonment as punishment according to Islam and today's practiced.

This writing is divided into four chapters. In the first chapter, writer will discuss the concept of punishment in Islam. It includes sources, aims and characteristics of punishment. The discussion then followed with the Islamic perspective and approach regarding imprisonment in second chapter. In this chapter the focus will be given to the definition and legality of imprisonment, position of imprisonment under Islamic criminal law, history and the development of prisons, aims, types and duration of imprisonment and regarding expenses of prisoners.

In the third chapter, this study will discuss regarding prison and imprisonment in Malaysia. The discussion includes Malaysian legal history, history of prison department, administration of prison department, laws of imprisonment, the quantitative development of prisons and prisoners and rehabilitation approaches. In the fourth chapter, the writer will make a general comparison especially with the position of the imprisonment between Islam and today's system also commentaries on the rehabilitation approaches used in prisons especially in Malaysia and propose some suggestions to avoid the problem of rehabilitation and over crowded.

Most of the sources used in this study are library research. Beside Arabic, English and Malay books, the informations also taken from annual reports of Prison Department especially the prison and prisoner data. I hope this study will will contribute something for the future design to handle the problems of crime especially regarding imprisonment punishment.

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## CHAPTER I THE CONCEPT OF PUNISHMENT

### 1.1 INTRODUCTION

The Islamic criminal law is superior to other laws by virtue of its perfection. It contains all the rules, principles and doctrines required by a law to be complete and comprehensive. It is rich with all such rules and principles that may be of use to the fulfillment of human needs both in the near and remote future. The principles of Islamic criminal law always remain at a higher level than social standards. Whatever the degree to which the standards of human life may rise, the *Shari'ah* contains such principles and doctrines that will maintain its superiority over them and its standard will always be loftier than human standard.

The punishment in Islamic criminal law is part of Islamic Law itself. Islam looks very seriously to the five fundamental elements in human life, these are life, religion, affinity, mental and property that must be protected. The peace and safety society or community only could be achieved when the people respect the rights of others. If not the punishment is to be inflicted and the law should operate.

A criminal act is defined as one that infringes public right. From the Islam point of view when certain primary public rights are violated the wrong is called crime or offence; and it gives rise to certain substitutory public rights in the form of *Uqubah* or punishments. *Uqubah* denotes the punishments instituted in the Holy *Qur'an* and Tradition of the Holy Prophet (ﷺ).



The punishment in Islamic criminal law is divided into three classes. *Hadd*, *qisas* and *ta'zir*. The *hadd* is a punishment the limits of which have been defined by the Holy *Qur'an* and the *Sunnah*. *Qisas* stands for the return of life for life in case of murder. The punishment of *qisas* although fixed by law, can be remitted by the person offended against, or in the case of murdered person, by his heirs. It is applicable to cases of murder and wounding. While *ta'zir* is the punishment which is left to the discretion of the court in regard to the form and measure in which such punishment is to be inflicted. It is applicable to those crimes for which *hadd* and *kaffara* have not been prescribed.<sup>1</sup> Punishment for crimes can be divided into four broad categories:

- 1- Physical punishment which includes death sentence, amputation of hand, flogging and stoning to death.
- 2- Restrictions of freedom which include imprisonment or sending one on an exile.
- 3- Imposition of fines.
- 4- Warning given by the *Qadi*.

The punishment prescribed by the law cannot be reduced or increased even under sentiments of mercy. The Holy *Qur'an* says:

وَلَا تَلْزَمُوا بِهِمَ رَأْفَةَ فِي دِينِ اللَّهِ إِنَّ  
 كُنْتُمْ تَؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۚ

<sup>1</sup>Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, p. 8, (1979).

<sup>2</sup>*Al-Qur'an*, al-Nuur, 24: 2.

" And let no pity for the twin withhold you from obedience to Allah, if you believe in Allah and the Last Day. "

## 1.2 SOURCES OF PUNISHMENT

The Islamic law by which crimes and punishment are established owes itself to four sources. The jurists are unanimous on three of these sources viz; the Holy *Qur'an*, *Sunnah* and the consensus, while they differ on the fourth namely, analogy. Some of them accepted as a source of *Shari'ah* but others do not recognise it as a source of establishing crimes and punishment.

The vital difference between the *Qur'an* and the *Sunnah* on the one hand and the remaining two sources on the other has to be taken into consideration, for the *Qur'an* and *Sunnah* constitute the basis of Islamic *Shari'ah*.<sup>3</sup> Muslim scholars arrange the sources of Islamic law according to the superiority, as follows:<sup>4</sup>

### 1.2.1 Holy *Qur'an*

The *Qur'an* is the Holy Book for Muslim. It is the totality of rules which God has laid down and revealed to the Prophet Muhammad (ﷺ) for governing man's behavior.<sup>5</sup> In others words, the *Qur'an* is a code which governs the religious and social life of mankind.

<sup>3</sup> Abdul Qader Auda, *Criminal Law of Islam*, vol.1, p. 193, (1987).

<sup>4</sup> Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law*, p. 38, (1991)

<sup>5</sup> The *Qur'an* contains 114 surates (chapters) including 6,342 verses (passages), of which 500 deal with legal matters.

As an aggregate of divinely ordained rules known as *ahkam al-shari'ah*, the *Qur'an* is the first among Islamic legal sources. The rules deriving from it are therefore regarded as the highest rules, and all rules derived from other sources should be in full accord with the Qur'anic ones. Extracting practical, religious, or judicial rules out of the Qur'anic verses is a task left to Muslim scholars, who are solely competent to carry on such a serious responsibility.<sup>6</sup> The Qur'anic prescriptions are formulated in an open manner in order to allow each new case to be integrated into Islamic law.

The Holy *Qur'an* has come to us through manuscripts and recitations from generation to generation. Owing to this continuity, it is quite intelligible that the Book is unquestionably authentic and comprises a verbatim copy of the word of God.<sup>7</sup> There are two opinions among the Muslims about the fact that, on every Muslim the Holy *Qur'an* constitutes divine revelations and enjoins obedience to Allah. Thus the *Qur'an* is the final word of God, for every Muslim man and woman its injunctions are binding upon them all.<sup>8</sup>

### 1.2.2 Al-Sunnah

Any saying or action of the Holy Prophet (ﷺ) or anything approved by him as related in traditions imputed to him constitutes *Sunnah*.<sup>9</sup> The *Sunnah*, the second highest source of Islamic law, is the authentic tradition of the Prophet Muhammad. There are four legal aspects of the *Sunnah*:<sup>10</sup>

<sup>6</sup>Nagaty Sanad, p. 38.

<sup>7</sup>Ahmad Mahyudin al-Ajuz, *Manahij al-Shari'ah al-Islamiyyah*, vol. II, p. 51. (1983).

<sup>8</sup>Audah, p. 192-193.

<sup>9</sup>Audah, p. 204.

<sup>10</sup>*Ibid*, p. 206-207.

- (1) It supports or stresses a Qur'anic injunction. In this case the injunction concerned refers both to the *Qur'an* and the *Sunnah*; for instance, prohibition of killing without justification, giving false evidence and stealing. All the assertive and prohibitive injunctions found in the *Qur'an* as well as the *Sunnah* fall under this head.
- (2) It consists of elucidation and interpretation of broad Qur'anic injunction of qualifies absolute Qur'anic injunctions.
- (3) The *Sunnah* specifies Qur'anic injunctions. Its interpretation, qualification and specification are designed to elucidate and explain such injunctions as Allah has bestowed upon the Holy Prophet (ﷺ) the right to elucidate the verses and injunctions of the *Qur'an*.
- (4) The *Sunnah* provides for an injunction not to be found in the Holy *Qur'an*. Hence any condition of the *Shari'ah* that has not derived from the *Qur'an* must be taken to have originated in the *Sunnah*.

### 1.2.3 Consensus

Consensus means agreement of all the jurists of Islam on any provision of the *Shari'ah* at any time after the demise of the prophet (ﷺ). If all the jurist of Islam agree on a provision relating to a particular matter at one and the same or at different times, the consensus arrived at would be binding on all the believers and would be treated as the final and positive proof of the provision. But if a majority of the jurists and not all of them agreed, then such a consensus would be binding on the general run of the people, while the scholars may hold different views till such

time that it is declared by the head of the state or the man in authority as binding on all. In this case it would be incumbent upon every one to abide thereby.

The springs of consensus lie in the *Qur'an* and the *Sunnah*. Next to these comes *ijtihād*. But *ijtihād* is not based on abstract authority. It springs, in the absence of an explicit provision of the *Qur'an* or *Sunnah*, from the spirit and the fundamental principle of the *Shari'ah*. The consensus of jurists on a particular provision is an unquestionable proof of its being in harmony with the basic elements and the spirit of *Shari'ah*. The very fact that jurists belonging to the different regions, environments and schools bears it out that what they are agreed on is truth.<sup>11</sup>

The *Qur'an* and the *Sunnah* have given to consensus the status of binding and obligatory law and as such it owes its origin to the *Qur'an* and *Sunnah*, says Allah:

هٰذَا يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا اَطِيعُوْا اللّٰهَ وَاَطِيعُوْا  
الرّٰسُوْلَ وَاُولٰٓئِى الْاَمْرِ مِنْكُمْ ۗ

" O ! Ye who believe ! Obey Allah and obey the Messenger and those of you who are in authority"

In this verse the phrase, "those in authority" is unanimously taken to mean officers and scholars. Everyone of them is the authority in his own sphere. If the scholars are agreed on a provision, the *Qur'an* enjoins that they ought to be obeyed.

Allah says:

<sup>11</sup>C. Audah, p. 214 - 215.

<sup>12</sup>*Al-Qur'an*, al-Nisa', 4: 59

وَلَوْ رَدُّوهُ إِلَى الرَّسُولِ وَإِلَى أُولَى الْأَمْرِ  
مِنْهُمْ لَعَلِمَ الَّذِينَ يَسْتَنْبِطُونَهُ مِنْهُمْ<sup>13</sup>

" If they had referred it to the Messenger and such of them as are in authority, those among them who are able to think out the matter, would have known it."

#### 1.2.4 Analogy

Analogy means linking a problem not provided for in the *Shari'ah* with one for which a provision exists on the basis of the cause shared in common by the two problems. There has been great difference of opinion among jurists belonging to the different schools of law, on the authority attached to *Qiyas* as a source of law. Independent thinkers like Abu Hanifah and his disciples use *Qiyas* very freely, some use it sparingly and others would not at all recognise it as a source of law. As a matter of fact, *Qiyas* forms the principle point of difference among the four subdivisions of the *Sunni* school of jurisprudence. The jurists who are in favour of *Qiyas* have cited several instances in which the prophet himself used *Qiyas* in deciding cases that came before him. Instances of the use of *Qiyas* have been cited even from the *Qur'an* itself.<sup>14</sup>

<sup>13</sup> *Al-Qur'an*, al-Nisa', 4:83.

<sup>14</sup> Mir Wali Ullah, *Muslim Jurisprudence and the Qur'anic Law of Crimes*, p. 33, (1986).

### 1.3 THE OBJECTIVES OF PUNISHMENT

The objectives of punishment in Islamic Criminal Law are very clear; that is the protection of public interest and individuals by preventing the people from taking the rights of others through the wrong ways. In addition the objectives of punishment function as reminders to all people at large.

#### 1.3.1 Protection of Public Interest

The most fundamental aim in imposing punishment in Islamic Criminal Law is protection of the public interest or as described by al-Ghazali as *himayah al-Maslahah al-‘Ammah* (حمايه المصلحة العامة) . It is to safeguard and protect the five very fundamental elements for human life and its existence, they are life, religion, affinity, mental and property.<sup>15</sup>

In the modern system very little value is attached to the honour of man and chastity of woman. We find that fornication is no crime under the modern systems. Adultery is a crime to the extent that the adulterer has infringed the right of the husband. Islam assigns priority to the value attached to the chastity of women and to the respect and honour of men. Therefore, it takes strong measures to preserve this value. Thus we see that the severest punishment is prescribed for persons who molest a women, or dishonour a man.<sup>16</sup>

<sup>15</sup>Muhammad Abu Zahrah, *al-Jarimah fi al-Fiqh al-Islami*, vol.1, p.20, (n.d).

<sup>16</sup>Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, p. 10.

### 1.3.2 Deterrent

Deterrence as important aim of punishment in Islamic criminal could be divided into two. General deterrence (الردع العام) and specific deterrence (الردع الخاص). General deterrence according to Islam means the eradication or elimination of all factors leading to commission of crimes, either internally or externally. Internal factors concern those of human behaviour and instinct which always leaning towards fulfilling personal desires and motivations beyond the limits permitted to the individual.

The idea of general deterrence of this kind is not intended or provided for certain person or people, but it is aimed for every person as well as for public at large. Therefore it is hoped that the threat of punishment can be regarded as an external factor to deter people from commission of crimes. General deterrence in this concept can be found in all Islamic punishments either in *hudud*, *qisas*, *ta'zir* or *diyat*. The suffering element in those punishments makes the people afraid to attempt or commit a crime.<sup>17</sup>

Specific deterrence means that the punishment can prevent the punished offender from repeating an offence. That is why the punishment is administered so that it serves as a lesson for others so that inclinations of crime be removed through this operation and none may dare commit crime.

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<sup>17</sup>Hashem Mehat, *Islamic Criminal Law and Criminal Behaviour*, p.71-72, (1993).



### 1.3.3 Punitive

The punishment of offenders and law violators is not complete, unless unless they are punished for what they have done. Therefore the punishment to the culprit equals to the magnitude of his guilt. Punishment of qisas is an example of punitive

### 1.3.4 Preservation of Life

Under non-Islamic system right now apparently importance is attached to the life of a man but the State has become a party in all such cases instead of satisfying the aggrieved. Therefore, the state punishes a criminal unmindful of the fact that the revenge exists or is washed out of the mind of the aggrieved. Under this legal system neither revenge is removed nor the recurrence of crime is checked. As a result, a long chain of murders and crimes continues between the parties.

Under the Islamic Legal System, an equal right or justice is permitted. An eye for an eye, an ear for an ear, a limb for a limb and a life for a life is the law. The right of a person who receives the injury or of his heirs and not the State as judged. Therefore, the aggrieved can forgive the accused or demand compensation instead of revenge. Islamic Law is clear and natural that if this law is enforced the chain of crime which continues between the parties involved from generation to generation will cease. So the basic object of Penal Law of Islam is eradication of grievance from the heart and mind of the aggrieved parties.

## 1.4. CHARACTERISTICS OF PUNISHMENT IN ISLAM

Punishments prescribed by Islam have been severely objected to by opponents of Islam. Punishments in Islam include amputation of hand, flogging and stoning to death and are thus considered very severe. But apart from being severe these punishments have some prominent characteristics which are not usually taken into account while making this objection.

### 1.4.1 Punishment As a Last Resort

Islam does not remain in search of any victim committing offence and as soon as it comes across one it inflicts the punishments immediately. Actually Islam leaves no stone unturned to block all the channels leading to a sin and it is in very rare cases that one commits sin and is thus exposed to punishment.

Adultery or fornication for example, where Islam imposes checks to wipe out their possibility through internal and external checks. Belief in the Hereafter is the backbone of internal checks. Islam explains that every action major or minor of every human being is recorded very accurately and this record will be placed before each and every individual on the Day of Resurrection, thus rewarding or disrewarding him depends upon the nature of actions.

Islam then imposes external checks, which are again of two types. Firstly it induces the individual to marry and makes the institution of marriage as easy as possible. Secondly, Islam puts restrictions on the general mixing of men and women.

### 1.4.2 Punishments are Exemplary

In spite of all these internal and external checks if one still commits a crime, severe punishment should be inflicted on the convict because he has no excuse or justification. Even while inflicting punishment, Islam still plans to make use of it one way or the other. By inflicting exemplary punishment to a stubborn wrong-doer, Islam carries out psychological operation of all those in the society having criminal intentions and trends. For instance, gathering the masses on the occasion of punishing the adulterers, Hands or feet amputating of wrong doer, and stoning to death are carried out publically. Hanging somebody in the late hours of night as is prevalent in many present days' so-called civilized countries is not allowed by Islam, because it does not serve as an example to others.

### 1.4.3 Punishment are Reformative

It may be noted that whenever in the Holy *Qur'an* the punishment has been prescribed for as an offence, it has been concluded either by advice or by a threat of punishment in the life Hereafter mentioning Great Attributes of Allah Almighty. For example, in cases of murder, the Holy *Qur'an* says:

﴿وَمَنْ يَفْعَلْ ذَلِكَ يَلْقَ أَثَامًا يُضْعَفُ لَهُ  
الْعَذَابُ يَوْمَ الْقِيَامَةِ وَيُخْلَدُ فِيهِ مَهْلًا ۝۱۸﴾

<sup>18</sup>.Al-*Qur'an*, al-Furqan, 25: 68,69.

" And he who does this shall (not only) receive the punishment (but) the chastisement shall be doubled to him on the Day of Resurrection, and he shall abide therein in abasement."

In case of theft, the Holy *Qur'an* says:

هُفمن تاب من بعد ظلمه وأصلح فإن الله  
يتوب عليه إن الله غفور الرحيم<sup>19</sup>

" But whoever repents after his iniquity and reform himself, Allah will turn to him mercifully, for Allah is forgiving, Merciful."

Actually an individual who commits a crime never gets rid of his bad habits even after he receives punishments in this world until and unless he or she also repents and acts a right.

#### 1.4.4 Punishment are Retributive

Islamic punishments, are retributive as laid down in the Holy *Qur'an*:

<sup>19</sup>Al-Qur'an, al-Ma'idah, 5: 39.

﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ  
الْحُرِّ بِالْحُرِّ وَالْعَبْدَ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ فَمَنْ عَفَىٰ  
لَهُ مِنْ أَخِيهِ شَيْءٌ فَتَبَاعًا بِالْمَعْرُوفِ وَأَدَاءً إِلَيْهِ بِإِحْسَانٍ ۗ ﴾<sup>20</sup>

" O you who believe! prescribed for you of retribution in case of slain: the free for the free; and slave for the slave; and the woman for the woman. And if something is remitted for him (the offender) by his brother (who has suffered the loss of his near one) then let this remission be adhered to with fairness, and let its payment (be made) in a goodly manner."

Its objecting is , therefore, to satisfy the emotion of retributive indignation which in all healthy communities is stirred up by injustice.

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<sup>20</sup> *Al-Qur'an*, al-Baqarah, 2: 178.

## CHAPTER II IMPRISONMENT UNDER ISLAMIC PERSPECTIVE

### 2.1 INTRODUCTION

The increasing of crimes today becomes a major problem to all countries in the world. Differences of approach have been made to overcome this situation but little is success. Other than education as a tool of deterrence the very popular approach to overcome this problem is through punishment. Imprisonment has become very important punishment or correction but the problem is still there. In this situation, does Islam permit imprisonment as punishment, how does Islam really handle this problem?. If it is permissible, is the approach different from the are practiced by today's, legal system?

Islamic law is divine in its origin and, therefore, perfect and for all time. It controls the society not vice versa. Imprisonment is one type of punishments under Islamic criminal law, but it is not a principle punishment as compared to *hudud* or *qisas*. That is why this kind of punishment is not discussed widely by the Islamic jurists. Several important aspects of imprisonment were touched in the various books of *fiqh*, *hadith* and *tafsir* to show that Islam is a complete system of justice.

The approach, aims and emphasis of Islam are clearly different if we compare to the modern imprisonment system. Under Islamic perspective the aim of punishment is not to merely to restrict the movement but to emphasis on educating the criminals. The spiritual education is more important than physical education. In some cases, when criminals sincerely repent, Islam allows them to be pardoned.

## 2.2 DEFINITION OF IMPRISONMENT

Imprisonment literally means act of putting or state or being put in prison.<sup>1</sup> In Arabic, the words *al-sajin* (السَّجْن) or *al-habs* (الحبس) are used refer to imprisonment. It means to prevent or to hold . Other than that, there are other words that have close meaning with *al-sajin* (السَّجْن), such as *al-hajr* (الحجر), *al-hasr* (الحصر), *al-waqf* (الوقف), *al-i'tiqal* (الإعتقال), *al-imsak* (الإمساك), *al-isbat* (الإثبات), *al-nafy* (النفى) and *al-asr* (الأسر). Allah says in the *Qur'an*:

﴿قَالَتْ مَا جَزَاءُ مَنْ أَرَادَ بِأَهْلِكَ سُوءًا  
إِلَّا أَنْ يَسْجَنَ أَوْ عَذَابٌ أَلِيمٌ﴾<sup>2</sup>

" She said: ' What is the (fitting) punishment for one who formed an evil design against the wife, but prison or grievous chastisement? "

﴿يُحْبِسُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ بِاللَّهِ﴾<sup>3</sup>

" Detain them both after prayer, and let them both swear by God"

<sup>1</sup>The Award Compact Dictionary, Award Publication Limited, 1985.

<sup>2</sup>Al-Qur'an, Yusuf, 12: 25.

<sup>3</sup>Al-Qur'an, al-Ma'idah, 5:106.

هَوَجَعْنَا جَهَنَّمَ لِلْكَافِرِينَ حَصِيرًا<sup>4</sup>

" And we had hell a prison for those who reject ( all faith) "

وَإِذَا يَتْلَىٰ آيَاتُنَا فَأَنصِتُوا لِلْحَدِيثِ  
فَلَمَّا شَهِدُوا عَلَيْنَا مِنْكُمْ فَبِئْسَ مَا كَانُوا  
فَاعْمَدُوا فِي الْبُيُوتِ حَتَّىٰ يَخْرُجُوا<sup>5</sup>

" If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you."

هُوَ الَّذِي يَمْكُرُ بِكَ الَّذِينَ كَفَرُوا  
لِيَكْتُمُوا أَوْ يَقْتُلُوكَ أَوْ يُخْرِجُوكَ<sup>6</sup>

" Remember how the unbelievers plotted against them, to keep them in bonds, or slay them, or get them out ( of the home ). They plot and plan, and God too plan, but the best planner is God. "

<sup>4</sup>Al-Qur'an, al-Isra',17: 8.

<sup>5</sup>Al-Qur'an, al-Nisa', 4: 15.

<sup>6</sup>Al-Qur'an, al-Anfal, 8:30.