CHAPTER THIRTY-THREE

PUNISHMENTS

1. The Philosophy of Punishment

Despite the fact that the civilisation of mankind has rapidly been developing from various points of view, the philosophy of punishment under the present national and international criminal systems is still similar to its primitive period. One cannot, however, deny the fact that the science of criminology has helped criminal justice and has tried to abolish or modify the old philosophy of punishments. Nevertheless, most states of the world still use punishment for different reasons and the application of severe punishments has not yet been abolished.¹

The philosophy of punishment within Islamic international criminal law, like the system of international criminal law, has gone through many criticisms and evaluations by many writers. In particular, the severe punishments under the provisions of the former have been strongly criticised in the international arena and this has specifically been against the application of the death penalty, stoning and amputation. Regardless of the fact that the new interpretation of Islamic criminal justice under the Cairo Declaration on Human Rights in Islam prohibits all these old methods of punishment, their application is not rare. In particular, the capital punishment of hanging is common in Iran and is used as a political tool to stop radical as well as political movements.

2. Reasons for Punishments

The historical period under which Islamic law was presented was not united and required the temporary imposition of punishment. The Arab

¹ Even some Islamic states repeatedly use the capital punishment of hanging not just as a method of punishment of criminals, but also, as the most prevailing method of punishment of accused persons. This is especially notorious in the case of political prisoners, demonstrators against the government and young age juveniles under the military power of the Iranian regime.
nations of the time were very barbarous and burying their daughters alive was a part of their culture. The rules of law would not, therefore, be so severe for the population, if they had been introduced without any punishment. However, a modern evaluation of the law reveals that punishment encouraged its own gradual modifications. In general, the followings are some of the reasons underlining the philosophy of punishment within Islamic criminal justice, some of which may also be found under international criminal justice too.

2.1. Application of Human Rights

An essential basic philosophy behind the law of punishment was to encourage human rights and human values and also decrease their violations. This is based on the fact that the pure Islamic law encourages equality and non-violation and this could not be achieved at the time of the revelation of Islamic law when human rights had no social values. In this respect, Islamic criminal justice for the purpose of the implementation of its norms, resorted to the severe punishment of criminals in order to decrease various violations of its norms and increase its respect. Similar to this philosophy, the system of international criminal justice for the maintenance of human rights’ norms empowers states parties to international conventions to criminalize certain violations of human rights and apply appropriate punishments against the perpetrators of those crimes. These are such as apartheid, genocide and trafficking in person.

2.2. Deterrent Philosophy

Punishment had also a deterrent philosophy. This meant that it should avert other persons from committing criminal conducts. Therefore, the punishments were executed publicly and the idea was that the imposition of punishment could frighten others from committing the same act. The deterrent philosophy has also been entered into the structure of international criminal law. However, it is true that the deterrent policy is strongly objected to within both legal systems and the tendency of international legal community is to minimise punishments. Yet, the deterrent policy has proved to have scarcely any effect in the commission of criminal behaviours and states have consequently endeavoured to reach another strategy for the prevention of criminal behaviours. The policy of punishment applied under the ICC is certainly mixed with the deterrent philosophy; however, it is doubtful whether it will be successful in the long term.
2.3. Retributive Character

Punishment also has a retributive character. This means that it is vengeance for the wrongful behaviour which has been carried out by the condemned person. This philosophy is also entered into the legislation of international criminal law. The most usual terminologies used under this legal system are reprisal, retaliation and revenge. All these have also been used in the literature of Islamic law. Yet, the system of international criminal law has permitted retaliation and reprisal as a method of punishment. States have been permitted under customary international criminal law to resort to reprisal, not only as a punishment of the wrong-doer, but also, a legal right of the victim.

2.4. Protective Validity

Another reason has been the protective validity of punishment. This means that the philosophy behind punishment has been to protect others from unlawful or illegal acts. The philosophy of protective validity has been employed by both legal systems and has been interpreted as one of the most essential reasons for the development of penal law. The protective validity of the punishment is normally stated within the provisions of international criminal conventions and this policy can also be understood from the provisions of the ICC. The Court is sanctioned to protect the international, legal and political community with its judgments and permission to apply certain punishments. The protective validity refers also to the high validity and respect of the de lege lata principle.

2.5. Preventive Validity

The systems of international criminal law and Islamic international criminal law have, more or less, struggled to prevent certain internationally criminal wrongful conduct.

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2 Islamic law has however encouraged the principle of equality in order to minimize violations and revenge between individuals. It say that “O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grants any reasonable demand, and compensates him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.” The Qur’an 2:178. Accordingly, “for you there is security of life in the law of equality, O man of understanding, so that you may guard yourselves against evil.” The Qur’an, 2:179 Although the above provisions permit revenge, its intention is to reduce it by redressing the aggravated party the same right, but, through compensation and the understanding of the ill nature of the criminal behaviour.
The philosophy of punishment under Islamic criminal justice may, therefore, be of a preventive nature. This means that punishment is supposed to prevent the further commission of the criminal act. This is also found within international criminal justice. In fact, most international criminal conventions aim to prevent the occurrences of certain acts.

2.6. Restoration

The philosophy of punishment has also been to restore to the rightful owner the movable and immovable materials that have been stolen. This is also called restitutive character of punishment. The philosophy has also been used under the international criminal justice system. Both systems with the implementation of punishment, aim to emphasise that stolen properties do not create the rights to the goods. The idea is here to minimize violations of the rights of other persons by stealing their goods. The term “restoration” also emphasizes the re-establishment of the rights of others through payment or a certain amount of money. The theory of restoration is also exercised by the ICTY and the ICTR. The function of both international tribunals has been to restore peace for the victims in order to achieve to their inalienable rights before the jurisdiction of the tribunals.

2.7. Elimination of Evil

Punishment may also have the purpose of the elimination of the commission of certain criminal behaviour. This purpose aims to criminalise certain conducts entirely that have been legitimated in the earlier practice of nations or states, such as slavery. The philosophy of elimination has been entered into both legal systems and has succeeded in the elimination or abolition of certain acts, although the contemporary practice speaks for the contrary. For instance, the elimination of slavery has been one of the dreams of both international legal systems, but, slavery under trafficking constitutes one of the permanent international offences. Furthermore, the outbreak of many wars since the end of the Nuremberg Tribunals demonstrate that elimination as one of the purposes of punishment has not been achieved and violations of the system of international criminal justice have repeatedly been carried out by many individuals under the legal personality of states.
2.8. Rehabilitation

Punishment may have a rehabilitatory purpose. According to this purpose the punishment intends to rehabilitate the offender and bring him/her back into normal social relations. Thus, due to this view the purpose is not permanently to identify the offender as a criminal, but, to treat him/her in order to understand social or international relations between human beings. The theory of the rehabilitation of criminals within prisons has not, however, been that successful and has sometimes increased the boundaries of criminality between criminals. However, certain new methods have been worked out to decrease the borderline of criminality and increase the awareness and knowledge of the offender in combination with the human rights law. The rehabilitation method is however not that strong within some Islamic nations and has even lost its practical intentions such as in Iran, Iraq and Afghanistan.

2.9. Reformation of Norms

The reformation of norms means to put an end to a special behaviour that has been practised for different reasons, such as slavery, institutions similar to slavery and trafficking in women and children. Even though the purpose of elimination and reformation may overlap one another field, the intention of the former is to combat special action and the aim of the latter is to increase the value of elimination. In any event, reformation and elimination have, in the final stage of implementation a similar policy of modification of certain norms. The theory of reformation can be found within both legal systems. Examples are slavery, inferior treatments of women, different sexual abuse of females and the use of children in armed forces.

2.10. Redressive Purpose

Another philosophy of punishment has been redressive purpose. According to this purpose, the punishment aims to teach individuals to lay the blame on their own behaviour. The intention is to create self-control and for the individual to recognise the intention of the law. This is one of the legal philosophies of Islamic law which recognises the individual's responsibility for the understanding of the truth and a right or wrong action. It helps the process of achieving human rights respect. The redressive purpose of punishment has also been to increase the moral capacity of individuals in order to realise the consequence of criminally wrongful
behaviour. The redressive mechanism may be imposed for the purpose of understanding the criminal nature of a wrongful conduct in a social context and its effect on the victim. The Statute of the ICC, the ICTY and the ICTR do not speak about their redressive purpose but the readings of different documents as well as the judgments of the courts contain this fact.

2.11. Apology

Both systems of criminal justice also base the reason of punishment on apology. This is the admission of guilt. It means to obtain the response to a crime by way of propitiation or appease. The position paves the way for conciliation. The intention is to calm down the criminal and society for the heinous behaviour which has occurred. It is, therefore, a pacific settlement of the crime. Accordingly, the perpetrators of crimes may understand the consequences of their criminal behaviour and voluntarily change their criminal policy and intentions. Both systems of international criminal law struggle for this end.

2.12. Compensation

Punishment may also have the purpose of reparation, compensation, reimbursement, return and reward. This goal traditionally constitutes one of the chief intentions within both legal systems. Besides, the implementation of punishment is still considered one of the most significant functions of jurisdiction over criminals and the restoring the wrongful behaviour. Compensation as punishment may also have a restitutive character.

The nature of compensation may vary from case to case, but, its substance and intent is the same. The request for compensation has, not only, been claimed in proceedings of criminal justice, but, has also been asked for by one state from another where damages have been caused to nationals or the interests of the requesting state.

2.13. Amnesty

The philosophy of punishment may also be to grant amnesty. This is when criminals admit guilt and express their repentance. Both systems of criminal justice have used this alternative. In fact, under special conditions and circumstances, to give mercy is one of the chief purposes of Islamic justice for the understanding of guilt and to go forward for
positive achievements. Here, amnesty cannot be given if the victims of the crimes have not given their consent. For instance, amnesty could not be granted to the perpetrators of apartheid in South Africa without their confession of guilt and the consent of the victims. Similarly, a confession of guilt may, in certain circumstances, be a strong reason for amnesty, forgiveness or mercy.

2.14. Recreation of Civil Rights

The philosophy of punishment in Islamic criminal justice is not just to implement certain penalties on the guilty party, but is also, to recreate the civil rights of the condemned person. The idea of the recreation of civil rights is based on the fact that a criminally wrongful conduct may be a reason for the criminal to lose his/her civil rights. Consequently, a person who has been punished for his/her criminal act is free of any charge and restrictions thereafter. The system of international criminal justice has also, more or less, similar rules regarding the person who has been punished for his/her internationally criminal wrongful act. The recreation of civil rights implies also the enforcement of the principles of human rights regarding the accused and condemned person.

2.15. Methods of Punishment

Historically, there are different methods of punishments under Islamic international criminal law which are not equivalent to the new methods of contemporary punishment. These methods, because of the development of the law and its adaptation to modern philosophy of punishment, have been abolished and are not any longer valid under Islamic national and international criminal law. They face the problem of interpretation and application and create controversy in the practical aspects of the law. These punishments *inter alia* include crucifixion, amputation of parts of bodies, capital or death penalty, stoning and torture.

Punishments in Islamic criminal justice were not all together the implementation of cruel and harsh penalties, it could also include, concerning certain crimes, the search for mercy, forgiveness and pardon by the offender. This could decrease the borderline of the penalty and increase the practical recognition of the guilt. The perpetrator of the crime could, through acts of reconciliation, enhance his/her understanding of the effect of the crime on the victims. This method is still employed by many Islamic nations for the purpose of reducing the effect of criminal action and increasing sympathetic goals. Similar methods are also used
under the system of international criminal law when the border of criminality is impossible investigate. In particular, the method is employed in the case of governments’ or states’ crime according to which most legal and political authorities are involved in the commission of criminal behaviour. Clear examples are the National Commission on the Disappearances of persons, Argentina, 1983; the United Nations Truth Commission in El Salvador, 1992/3; the Historical Clarification Commission, Guatemala, 1994; the Truth and Reconciliation Commission, Chile, 1994; the Truth and Reconciliation Commission, Sierra Leone, 1999; the National Commission on Political Imprisonment and Torture, Chile, 2004/5; the Truth and Reconciliation Commission, Republic of Korea, South Korea, 2005 and the Commission for Reception, Truth and Reconciliation in East Timor, 2002. The most well-known of these types of commissions is the Truth and Reconciliation Commission concerning the apartheid system. The Commission had a politico-legal character and was a type of court assembled in South Africa. Its function was to hear the witnesses, victims and the perpetrators of apartheid. The criminals provided testimonies and requested amnesty from civil and criminal investigations.

Both legal systems have also used the method of imprisonment. This means that a condemned person may be charged with imprisonment depending on the gravity of the crime. The terms of imprisonment may also depend on the financial ability of the condemned person to recover damages. In some cases, the exile of criminals could be decided in Islamic criminal justice. But this concept has been completely abolished in practice and by the Arab Charter on Human Rights. Individuals have the right to their homelands. In the case of international criminal law, criminals have been exiled or banished for the reason of the gravity of their crimes without necessarily being trialled in a criminal court. For instance, Napoleon Bonaparte who was the Emperor and the military leader of France, was banished by Six Coalition to the island of Elba. After his escape from Elba and the Battle of Waterloo, he was exiled by the United Kingdom of Britain in Saint Helena. Nonetheless, the principles of human rights do not any longer permit a criminal justice system to expel a criminal from his/her homeland.

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3 These were occurred between 1813 and 1915.
Due to the growing development of international criminal law, there is a strong tendency in Islamic justice and international criminal justice to abolish severe penalties. While the process of abolition has been very slow and controversial, many nations of the world have succeeded in abolishing certain punishments such as torture and capital punishment. However, one cannot deny that both punishments are still applied by many Islamic nations/states. Even, the Arab Charter on Human Rights permits its implementation. According to it “sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.”

The application of death penalty may even be permitted against persons who are under eighteen years old. Accordingly, “sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.” Capital punishment is also imposed on women, but, under special conditions.

Similarly, on the one hand, torture has been abolished and recognised as a violation of the principles of international human rights law, but, on the other hand, it has been inflicted by many nations including the permanent members of the United Nations such as China, Russia, the United Kingdom and the United States. In particular, the recent examples are the torture of Irish prisoners by the British, the torture of Iraqi prisoners in the Abu Ghraib prison by the United States and the complicity of British commanders and the torture of Guantanamo Bay Prisoners by the authorities of the United States. Water torture has been one of the most notorious methods of torture that has been reported in the recent years.

Regarding the amputation of parts of the body, many of the provisions of international human rights law and even the content of the Cairo Declaration on Human Rights in Islam prohibit such punishments. Furthermore, since Islamic States have ratified most international conventions concerning the human rights law and the Statue of the ICC, they are,

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4 Article 6.

5 Article 7 (1).

6 Due to Article 7 (2) “The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.”
due to the principle of *pacta sunt servanda*, bound by the provisions of the conventions. The respect of this principle constitutes one of the most significant obligations of the Islamic states and its legal merit should not be violated. Equally, Islamic nations which may prosecute their own citizens or citizens of other nations for the violations of the Statute of the ICC are under international obligations to respect international provisions and not to violate their legal framework. This means *inter alia* that

a) the application of torture is not permitted,  
b) capital punishment or the death penalty should not be allowed,  
c) the amputation of parts of the body is against the basic structure of the human legal legacy,  
d) Islamic criminal justice wherever it is necessary should adapt itself to the international rules, regulations, principles and norms including conventional and customary one. All these imply the fact that the integration of international methods of punishment should be the leading line of criminal justice wherever international criminal law is going to be applied.