Islamic Restorative Traditions and Their Reflections in the Post Revolutionary Criminal Justice System of Iran

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1. Introduction

‘Why to punish?’ has been a question put to scholars and philosophers for centuries, and for which the answer would have very significant implications in terms of ‘how to punish’. By the question ‘why to punish’, we are not asking about the legal and legitimate bases of punishment, but we are actually trying to find out the ‘main objective (s)’ achieved by punishment.

Since our social life began to develop, punishment as an important concern has coexisted with human society. There seems to have been a consensus among human beings as to the necessity of punishment in case the social norms are violated. However, there have been disputes as to ways how to punish which itself has its roots in the more profound question ‘why punish?’. Other questions like ‘who should be punished’ seems to be peripheral and of less importance.

In classical approaches, mostly based on punishment per se, punishment as the ‘repayment of debt’ has had a pivotal position in answering ‘why to punish’; that is to say, when committing a criminal act, the offender is seen as a person who has been burdened with a debt to society, which he has to clear. Therefore, punishment is in fact a ‘repayment of a debt’: a debt which the offender owes to the society. However; in such a ‘clearance’, the victim on the other hand may be

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considered. It goes without saying that the latter is possible only in cases where there is a ‘direct victim’ of crime and not applicable where the crime is of the type called ‘victimless crimes’, unless in such crimes the society as an entity considers itself a victim and wishes the offender to be punished so that he/she clears the debt owed to society.

Among the other objectives of punishment, in classical approaches comes the ‘moral duty’. From this point of view, the commitment of a crime is taken as a ‘violation of moral principles’ against which the society has the ‘moral duty’ to act. Otherwise, moral principles would gradually degrade and citizens would not be able to live a morally prosperous life. In such an approach, the punishment ought to be ‘equal’ or ‘proportionate’ to the crime.\(^3\)

It is to be noted that the justification for the issue of *qisas* (retaliation for homicide or wounding synonymous with *qawad*) which is ratified by Islam and Judaism, basically takes such an approach towards criminal acts.

Other objectives, such as rehabilitation of the offenders or sending a ‘message’ to society, have also been introduced. In such views, the punishment is thought to help the offender find a reasonable opportunity for ‘moral edification’ and ‘soul purification’ (of sin(s)),\(^4\) and also puts across to society the message that committing a crime would have adverse consequences, such as pain and stigma, suffered by the punished offenders.\(^5\)

The so-called ‘correction-cum-message’ approach, is strongly linked to metaphysical origins\(^6\) and this is apparent in application of terms such as ‘impurity by sin’ and soul purification of sin(s), which are abundant in the Old and New Testament and the Quran, as well as in traditions by the Prophet Mohammad and his Household.\(^7\)

In more recent approaches, the utilitarian approach has been introduced. This approach theoretically owes Jeremy Bentham’s utilitarianism a great deal, and is based on the notion that punishment should be useful or benefit a large number of people in society.\(^8\) It is believed that punishments should be founded on a utili-