

THE LEGALITY OF IMPLEMENTING ALTERNATIVE PUNISHMENTS

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ABSTRACT

In these days and with the increase in population, crimes increase day after day as a result of technological development. One may commit a crime as a result of ignorance and without intention. This may happen from people who know no crime and is not their job, but they may have been victims of bad companions, and they may find themselves thrown into prison between criminals from murderers and drug addicts, and this may produce negative effect and they may end up learning crime because of staying between criminals. These kinds of people must be given an opportunity to correct their behaviors in order not to become criminals. Here the problem of the study lies as after coming out from the prison we find that the person has become a professional in crime and bad habit and become deviated after being a good person benefitting the society with his mind and his effort, and with that he becomes a shame on his family and his relatives. Here the study proposes resorting to alternative punishments in courts by providing counselors from scholars and clerics to advise those who commit minor crimes. This can be done by counseling and preparing the criminals of minor crimes by educating them if they are not educated, or teaching them a particular profession, and by this they can become beneficial to the society. The study found that preparing an alternative punishment is a successful system and will help the person who commits crime unintentionally in himself and his family. And with this the alternative punishment will rehabilitate the person who has no intention to commit crime, and thus, the alternative punishment will become a reform and refinement instead of prison and torture. And it is left to the judge to determine the alternative punishment based on the type of crime, place of its commission, method of its commission, age of the criminal and the motive for its commission.

Keyword: Punishments, alternative punishment, imprisonment, takzir

INTRODUCTION

Alternative punishments are complete alternatives to punishments that deprive freedom, where the perpetrator of the crime would be subject to a range of positive and negative obligations, and which do not aim to create pain to the convict, but it is refinement and treatment that lead to rehabilitation and thus achieve the objectives required for the interest of the community. Hence, we find that the alternative punishment is the first stage of trying to reform and discipline a criminal. If the convict becomes committed to the alternative punishment and does not commit the crime again, here the aim of the alternative punishment would have been achieved.

OVERVIEW ON ALTERNATIVE PUNISHMENT

Definition of alternative punishment: it is a set of sanctions which replace the traditional sanctions, which starts from murder and ends with monetary fines. The modern sanctions that are meant to replace the traditional sanctions lies in the replacement of punishments that cost society huge amounts of money and the service of the convict inside the prison and to make the convict to serve the community affected by his action by providing social services or fines for the benefit of the public treasury of the state or other beneficial punishments (Hassan: 1988).

Alternative punishments are part of takzir which according to the Shariah goes with interest of the community, and each community at all times may implement appropriate takzir that ensures the benefit of the community and the nation. That is why some researchers regard it as jurisprudence that keeps developing. Alternative punishments, if derived from correct analogy which does not clash with a known principle of Shariah, or a text from the Qur'an and Sunnah they are accepted (Dhab'aan: 1422). Alternative punishments are classified into two: First: if they are derived from established Shariah provisions, this is void. Second: If they are based on ijihad in accordance with takzir which the judge makes, there is nothing wrong with this, by considering the psychology and mindset of the person to be punished (Al-Otaibi: 1990).

The root of concept of alternative punishments could be found in the history. We give an example of what used to be applied in the period of the Messenger of Allah (peace and blessings of Allah upon Him) during wars and Islamic conquests, (Ibn Qayyim: 1989) where every prisoner would be asked to perform other things, such as teaching ten of Muslim children reading and writing instead of punishment of robbery and mischief on earth which the Holy Qur'an mentions as amputation of hands and legs; this is actually alternative punishment, its concept and philosophy.

There are a lot of talks recently on “alternative punishment” especially after attention has turned to many judges and courts that issue “alternative punishments” from time to time. The alternative punishments are considered socially oriented and alternative to imprisonment, but the application of alternative punishment in the takzir rulings ensures the interest of the citizen and the community together, and it is more successful in reducing prison overcrowding (Rufa’i: 1993).

The judge may apply alternative punishments whenever it is for the best interest of the case. There is interest of the country and citizen in the application of alternative punishments especially they do not have clear text, but depends on the ijthad of the judge, the personality of the convict and what suits him, provided that the alternative punishment will not miss the meaning of restrain and deterrence.

Usually, the youth are the beneficiaries of this kind of judicial decisions. And also its scope covers crimes and offense with limited severity, and that which depends on the ijthad of the judge based on situations and Shariah and legal considerations, and this alternative aims at getting a suitable working environment which helps the event or the young man who stumbled and plagues the right path to rehabilitate him and integrate him into the society, and to rebuild his character and behavior and to protect him from falling into crimes and offenses (Rufai: 1993).

The term “provisions-punishments-alternative” is a purely legal name, and the Shariah does not limit takzir to something in particular, but it includes murder and even reprimand and censure, and that is why it is possible to resort to many things to punish the offender; and takzir may be by money or defamation or flogging and imprisonment, and all these exist in the Shariah, and the Shariah is valid for every time and place, and thus Muslim communities can devise punishments that suit its community in Shariah ruling (Kamil: 2000).

Alternative punishments for takzir provisions come under what is known as public interest which the Shariah came to support in what does not violate specific Shariah provisions. Thus, there is nothing in the Shariah that prevents the application of alternative punishments (Sinan: 1982). Codification of takzir punishments is demanded in the modern era in the light of the emergence of many new economic, social and technical developments, and in order not to get great disparity between the judges in these developments, and not codifying them may lead to obstacle for alternative punishments. Estimating takzir punishments in the Shariah is left to the discretion of the judge, and in the Shariah, there is no restriction to specific punishments except that there are legal punishments stipulated in some systems, such as anti-bribery. Forgery, counterfeiting and cheque offenses and other systems, which stipulates a system on the amount of punishment and its kind which is codified; and we find the Shariah judges striving to apply takzir punishment which ensures the protection of the society by bringing the interest and warding off evils; especially if we wanted to protect juveniles from gaining abnormal experiences; and the alternative punishments are considered as new judicial provisions among some judges that must be activated and introduced because of the urgent need to take advantage of the energies of the young people in community service, rather than to disable them and throw them in prison, and to protect juveniles and young people from mixing with criminals, there are no obstacles in codifying the takzir provisions.

Punishment in Shariah is to protect the nation and to stop vice by cleansing the society; it is also a reason to achieve justice and equality. Punishments are of two types: First: Hudud that are legislated and prescribed by Allah. Second: Takzir punishments; this is the type that the Shariah left it to the judge, and its criterion is based on the opinion of the judge and his ijthad (Mawardi: 1983). But there might be other general criterion for the codification of these punishments which the judges work on, in order not to get a large variation between them, especially in light of developments that occur on the scene, whether economic, social etc. It is well-known under the Shariah that takzir punishments have no one to specify them unlike hudud issues. This opens the door to what is called today alternative punishments and those criterions (Hadisi: 1408) are:

First: the punishment should prevent the crime from occurring; if the crime occurs, the punishment should be to discipline the offender and warn others from following the same way and behavior.

Second: The amount of the punishment should be based on the need and interest of the people, and to rebuke the offender; thus, if the interest of the people requires severity in the punishment, then it should be severed, and if the interest of the people requires mitigation, then it should be mitigated; it is not acceptable for the punishment to be more or less than the need of the people. Thus, the judge must look into two things; one: the gravity of the crime, and second: the seriousness of the offender.

Third: If the interest of the people requires eradicating the offender from the society, for example by killing or imprisoning him, then that must be done, as long as his behavior has not changed.

Fourth: Every punishment that led to the rehabilitation of the individual and protection of the people is a punishment accepted by the Shariah, it should not be limited to punishments with the exception of others; punishments move with the emergence of new crimes, and this characteristic in takzir punishment goes back to its diversity and difference depending on the time and place, and difference in the act and the actor.

Fifth: Disciplining the offender, the aim is to rehabilitate him, and not revenge, and in this sense Mawardi says: (It is a discipline to rehabilitate and reprimand and it differs depending on the type of offense) (Mawardi: 1983).

Shaykh al-Islam Ibn Taymiyyah – may Allah have mercy on him- said: (the Shariah punishments are legislated as mercy from Allah towards His servants, they are issued by the mercy of Allah and the aim is to be kind to the servants, and thus, punishment should be done with the intention of being kind and mercy to servants, just like a father disciplining his son, or a doctor treating a patient (Ibn Taymiyyah: 1989).

These principles we have mentioned, we observe that they are considered in Islamic jurisprudence because of achievement of interests and warding off evils under them, and understanding these principles very well helps the judges to the right decision, and also understanding these principles helps legislators in making laws to achieve the aim of the punishment.

The main aim of punishment is discipline (Yousuf: 2003) and it is in such a way that it will deter the offender; if the punishment is done even by way of serving the community and there is interest and deterrence, that is what is required. We also have to differentiate the situation of the offender, if the offense is big and serious, or it has been done repeatedly, there must be a deterrent punishment that will stop him from committing the crime in the future. The past jurists have talked about alternatives to prison, and among that according to Hanafis, a person should accompany his debtor and lives next to his house, where he can see him during prayers and will know his travel, until he pays him back his loan, without any punishment of prison, and I think that the alternative provisions applied by some judges have origin in our Islamic jurisprudence (Abu Ghuddah: 1407), there is no clash with the Shariah provisions, and based on our reading we did not find anyone from the jurists made the punishment of imprisonment more than one year, and this shows the emphasis given by the past jurists on flogging and fines, because imprisonment has family problems as the breadwinner is distanced from the family, and what was performed by judge Mu'aih and others is a good work and should be encouraged.

But, there are many scholars (Mahdi: 2001) who believe that the institution of prison was unable to carry out its core duty which is the social integration of individuals deviants in the society; it has been proven that prison is one of the driving factors of committing crime because it mainly spoils beginners of crime instead of rehabilitating them, and mostly it does not remove criminal tendencies inherent in the usual criminals, and may be this is what makes majority of the scholars to question the value of prison as punishment and to be replaced by other alternatives and to distance the convict from living in the prison, and to be rehabilitated and not to return to crime.

THE CATEGORIES SUBJECT TO ALTERNATIVE PUNISHMENTS

If it is important to initially determine the categories who are subject to alternative punishments, we discuss in this paper various views that determine the types of crimes and classifications and concluded from them the most important categories who are subject to alternative punishments (Auji: 1993), and generally we can classify offenders who are subject to alternative punishments as follows:

- 1) Defendants who have not committed major crimes; the crimes insisted on or what is known in law as premeditated.
- 2) Defendants who have not committed serious crimes, whether with or without weapon.
- 3) Defendants who do not pose significant risks to themselves and society.
- 4) Children and adolescents who have committed crimes while they were incompetent in the process of socialization.
- 5) Persons addicted to drugs or alcohol and others who need treatment.

IMPORTANCE OF THE APPLICATION AND BENEFITS OF ALTERNATIVE PUNISHMENTS

Often traditional punishments based on deprivation of liberty are unable to achieve this goal (Auji: 1993). Traditional punishments simply mean imprisonment or detention or releasing the offenders. These traditional punishments may lead to achieving justice, but the alternative punishments ensure a lot of benefits to the offender and society, where it provides them employment skills and treatment from addiction and all forms of intervention and different kinds of treatment. In general, alternative punishments may bring some benefits, most of important of which are:

- 1) Reduction of exorbitant expenses for punishments of detention and imprisonment.
- 2) It facilitates the activation of justice by providing a wide range before the courts to choose the appropriate punishment for each offense.
- 3) Ensuring and emphasizing on public security through provision of accounting and control procedures.
- 4) Changing the offenders or accused criminals into productive citizens, and more specifically the involvement of criminals in the process that allows them to change themselves to good productive citizens.

Services offered through alternative punishments:

There are various services provided to groups that fall within the scope of alternative punishments, we mention some (Hadisi: 1408):

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| 1- Education and health services | 2- Services related to recruitment process |
| 3- Learning diverse life skills | 4- Counseling and strengthening family |
| 5- Changing bad financial situations | 6- Services related to the treatment of addiction and others |
| 7- Women's Correctional groups | 8- Programs on adjustment of behaviors |

CONCLUSION

We benefit from the foregoing that alternative punishments have become a civilized disciplinary means and an alternative to prison on takzir punishments in which the judge has the right to do ijthad in them depending on the changing of the crime and the environment in which it occurred, contrary to hudud offenses which the judge has no right for ijthad in them because they are estimated by the Shariah; and alternative punishment has positive reflection on the offender's behavior and encourages voluntary and charitable work on public benefit and qualifies the young ones and the delinquent and reckless within the

specialized programs in contributing and raising the level of natural and cultural awareness and prevents mixing of young offenders with groups of criminals.

We conclude that the application of alternative punishments in takzir crimes will lead to highlighting the advantages of Shariah and ensuring its purposes, and preserves the prestige of law and human rights and dignity, and ensuring justice in the society in political terms, and to refine and reform the offender, and to protect his family from the negative effects of traditional punishment in the society, and also rehabilitation of the offender and increase in national gross and ease burden on the State with regard to prisons, and achieving public benefit in economic terms; to sum up, we believe that the application of alternative punishments requires the judge to be qualified for *ijtihad* in determining the right and appropriate punishment to achieve the discipline, reform and rehabilitation for the offender and ensure at the same time provision of deterrence and public benefit.

Our findings:

- 1- Addressing overcrowding in prisons, which causes worse health, psychological and social conditions.
- 2- Ensuring that petty crime offenders do not mix with accustomed criminals, so that prisons would not be schools for teaching crimes and configuring criminal gangs.
- 3- Protection of the person and his integrity physically, psychologically and socially.
- 4- Reducing the burden of government expenditure.
- 5- Increasing the opportunity of applying reform programs in prisons on dangerous criminals.
- 6- Bringing interest to the community through social services offered by persons who are subject to the alternative punishments.
- 7- Maintaining social and family ties and ensuring the provision of maintenance of the family.

Suggestions regarding the implementation of alternative punishments

- The government should provide training and handwork and craft centers for the subject of alternative punishments to work in them for a period equal to the period of imprisonment to be implemented in a place other than the place of residence and determine their stay throughout the period within these educational establishments, each according to his desire and inclinations.
- Provision of lectures within the training centers by religious scholars to urge them to uphold Islamic principles and avoid going against the provisions of the Shariah.
- The centers should help them in memorizing the Book of Allah by specialists and under the supervision of the center and within it.
- The center should provide psychiatric doctors to discuss their mental condition and to treat them and to give them proper guidance to modify their behavior. By doing so, alternative punishments become reform and refinement.

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