Filling the Gap in Favour of the Accused: The Approach of Islamic Criminal Law in Light of the Rule No Punishment in Case of Doubt

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I. INTRODUCTION

To start with, one must say that although the issue of gap-filling in criminal law is not as significant as it is in private law, one cannot say emphatically that the issue of gap-filling never arises in criminal law. One example is human trafficking and the fact that in countries without a local law on human trafficking, legislation on slavery and similar matters might be applied to human trafficking. Other examples can also be given in this respect. Terrorism may not have been expressly criminalized in certain countries, including some Muslim countries like Iran, but other criminal behaviour like murder, criminal damage, or even the crime of *muharaba* or *hiraba* under traditional Islamic law, which means resorting to arms in order to frighten people, may be taken to cover terrorism. Similarly, the crime of rape under traditional Islamic law refers to cases where force (in Arabic: *'unf*) is used against the victim. However, later developments, as reflected in the new Islamic penal code of Iran, 2013,

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have interpreted the texts in a way that extends it to cases where the victim, although not being forced, is in a state of unconsciousness, or is a minor or is deceived by the offender about the offender's identity and his relationship with the victim.

Also, if one possible way for gap-filling in private law matters is to refer to the prevailing custom, such a process is not totally unknown in criminal law. If, for example, while defining homicide, a statute, e.g., the former Iranian penal code in Article 206, refers to an "act" committed by someone causing the death of another person, one might well say that although the apparent and narrow meaning of the phrase "committing an act" signifies the commission of a positive act, in practice people do not differentiate between one who causes the death of another by committing an act and one who causes it by failing to perform a required act, as is the case of a mother who refrains from feeding her newly born child, and thus causes the child's death.[1]

Having said that, there is no doubt that in this process the most mitigating interpretation among the possible interpretations, i.e., that which benefits the accused most, should be adopted. This may be based on the legal logic (purposive interpretation) of the criminal norm. So, silence *per se* and without other indicators, cannot be regarded as a legal gap to be filled by the courts to the detriment of the accused. In other words, a distinction should be made between cases where there is no rule, and those in which there is a rule that lacks details, although both of these can be regarded as legal gaps.

As far as Islamic criminal law is concerned, this is the result of a golden rule inferred from a Prophetic tradition to the effect that no punishment is to be enforced in any case where doubt exists as to the presence of the necessary conditions prescribed by the law or as to the responsibility of the offender.

The most fundamental and important result of the application of this golden rule is the interpretation of any *lacuna juris* as a negative opinion of the law, i.e., when the law is silent it is assumed it was asked for its opinion on a legal issue and rejected criminalization. So, the judge in criminal law, unlike most other spheres of the law, cannot as readily and as frequently resort to complementary legal sources in order to fill the *lacuna*. Whenever the law has not determined explicitly or by necessary implication that a conduct is criminal, or whenever a required element of a specific crime or a pre-condition of criminal responsibility does not exist, or when the *actus reus* or *mens rea* of any particular crime

1. This has now been expressly mentioned in Article 295 of the new Penal Code, 2013.

has not materialized, or when a particular offender has not reached the age of criminal responsibility, then criminal liability cannot be imposed.

The interpretation of *lacuna juris* as a negative legal opinion is also closely related to a secondary principle of Islamic law, called the principle of lawfulness or non-criminality, by virtue of which it is criminality which requires expression. Silence *per se* signifies legality.

Apart from this most fundamental effect, the golden rule, hereinafter referred to as the rule of doubt, has also other consequences. As far as these other consequences are concerned, however, the rule applies differently to various punishments.

In case of *hadd* punishments, i.e., punishments expressly prescribed in *sharia* for the most fundamental and serious crimes, this Rule is applied extensively. The number of these punishments ranges from four to seven, according to different Jurists,[2] due to their severity and the Law-Maker's desire not to enforce them except against those who really deserve punishment.[3] In other words, the slightest doubt as to the presence of any prescribed condition shall make these punishments unenforceable. In fact, it was in respect of these particular punishments that the Rule was originally adopted and expressly mentioned in the saying of the prophet. The extension of its application to other types of punishments was due to juristic interpretation.

In the sphere of discretionary punishments (*t'azirat*), however, a flexible approach has been adopted in interpreting this Rule. These are punishments which are not specifically prescribed in the Quran or the *sunna* (precedent) of the prophet, but are determined by the judge or ruling authority for non-specified crimes.

Retaliation (*qisas*) which is the punishment prescribed for murder and intentional bodily harms, stands midway between the two. Although, on the one hand, it is a severe punishment like *hudud*, on the other hand, unlike them, its application is regarded as the right of an individual and not the so-called right of God. Therefore, full application of the Rule, as is the case in *hudud*, could be to the detriment of the victim of the crime.

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2. There is no consensus among jurists about crimes punishable by *hadd*. All jurists agree that adultery, theft, resorting to arms in order to frighten people and false accusation of unchastity are punishable by *hadd*. The reason for such a consensus is that these crimes and their respective punishments have been prescribed in the Quran. Most jurists regard apostasy, armed rebellion and wine-drinking also as crimes punishable by *hadd*. They base their view on the *sunna* (precedent) of the prophet.

3. The following statement by the prophet reflects such an intention of the Law-Maker: "Avoid carrying out *hudud* on people, whenever you find a way out for them release them from it." BAIHAQI (ALI BAKR AHMAD IBN AL-HUSSAIN), AL-SUNAN AL-KOBRA vol. III, at 238 (Heidarabad: Matbaa Dairat al-Maarif, A.H. 1354).

In the following Parts of this Article, certain other results of this golden Rule of Islamic criminal law (apart from the most fundamental one already mentioned) will be discussed, and it will be shown how it applies differently to the three main types of Islamic criminal punishments. The fields which will be covered in the following sections are: the rules of proof; withdrawal of confession or evidence; proof by circumstantial evidence; punishment for committing more than one crime; the absence of a prescribed condition of a crime; judgment by default and hearsay evidence.

II. THE RULES OF PROOF

As a result of the application of the Rule of Doubt to different punishments, the rules of proof are more strict in prescribed punishments than in the case of discretionary punishments. An offence punishable by *hadd* or *qisas* can be proved exclusively by either two confessions or the evidence of two just witnesses (or four in case of adultery). As far as retaliation is concerned, since this punishment is the right of private individuals (and in order to protect their rights) a provision has been made to make possible the proof of an offence punishable by retaliation in an exceptional way, i.e., by *Qasama* (oaths). Accordingly, if strong evidence exists which indicates, but does not prove beyond reasonable doubt, someone's guilt (for example, his being present near the body of a murdered person, with a knife stained with blood in his hand), he can be convicted of murder if the blood relatives of the victim swear fifty oaths to the effect that although not having seen the commission of the crime with their own eyes, they are certain, beyond reasonable doubt, that the crime was committed by the accused.[4] As mentioned above, this is an exceptional mode of proof, prescribed only for murder and bodily harm, and its purpose, as expressly mentioned by Iman Jafar al-Sadigh, the sixth Shi'i Imam, is to protect the victim's right.[5]

Unlike prescribed punishments and retaliation, the judge administering discretionary punishments is not restricted in any way, and is entitled to use any valuable evidence which he regards to be of such a weight and credibility to help him reach his decision. This makes the proof of offences punishable by *tazir* easier, as compared to those punishable by *hadd* or *qisas*, in which the method of proof has been determined exclusively.

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4. Under *shi'i* law, unlike *sunni* law, *Qasama* can also be used in bodily harm, but in such a case the number of oaths is less than fifty. Moreover, bodily harms proved by *qasama* may only lead to *diya* (blood money) and not *qisas* (retaliation).

5. *See* KULAINI, FURU MIN AL-KAFI vol. II, at 342.

The important point to bear in mind is that, as far as the position of proof in *shi'i* law is concerned, the majority of *shi'i* jurists believe that even crimes punishable by *hadd* or retaliation can also be proved by other means. They believe that any offence, whether committed against a public or a private right, can be proved in one of three ways: confession, evidence of witnesses, and personal knowledge of the judge (*'ilm al-qadi*). The personal knowledge of the judge, which has priority over confession and evidence of witnesses, may be obtained by various means, for example, by his presence at the scene of the crime, or by his use of modern methods of discovering crimes. This view is to be preferred, because the important point in proof is to reach at the truth, and not merely to apply certain formal rules. Therefore, if a better way of achieving this purpose can be found, there is no reason to reject it, merely because people may accuse the judge of acting arbitrarily.[6] This is strengthened by the fact mentioned by shahid al-Thani (zain al-din Ali), the famous *Shi'i* jurist, in his book *Masalik al-Afham*,[7] that even those who do not accept the judge's personal knowledge as one type of proof allow for certain exceptions. They say, for example, that if the judge knows that a witness is lying, he must act according to his personal knowledge and reject the evidence of the witness. So even they, without realizing it perhaps, admit that the judge's personal knowledge must take precedence over the evidence of witnesses, because while the former discloses the truth for the judge and is, in other words, *kashif al-haqq*, the latter is only used as a criterion accepted by *sharia* to help the judge make a decision.

By accepting this view, the distinction between different punishments in this respect becomes less evident.

III. WITHDRAWAL OF CONFESSION OR EVIDENCE

A. Withdrawal of Confession

In case of prescribed punishments, if the offender withdraws his confession, punishment will not be enforced according to *Sunni* law. This is because withdrawal of confession raises doubt as to the person's

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6. This is one of the reasons given by those who deny the possibility of proof by a judge's personal knowledge. Some others, however, deny this, not because people may accuse the judge, but because the judge may in fact act arbitrarily. Shafii, for example, is believed to have said: "If it were not because of bad judges, I would have said that a judge can act according to his personal knowledge". A. RAKBAN, AL-NAZARIYAT AL-AMMA LI ITHBATI MUJIBAT AL-HUDUD vol. II, at 196 (Beirut: Muassisat al-Risala, A.D. 1981). Neither of these views, however, seems acceptable, as such problems may exist in other forms of proof too.

7. KITAB AL-QADA vol. II.

guilt, and prescribed punishments cannot be carried out while the slightest degree of doubt exists. In case of retaliation, on the other hand, the accused's later denial has no legal effect. In this case, the legal maxim, "the wisemen are bound by their confessions" (*iqrar al—'Uqala ala anfosihim jaiz*) applies, since the reason for departing from this maxim in case of prescribed punishments (i.e., the Law-Maker's desire to save people from these punishments) does not exist here. Giving any value to the accused's later denial in retaliation would, instead, be to the detriment of the victim of the crime, which is not justified. Similarly, in discretionary punishments, the accused's later denial has no automatic effect on enforcement of punishment, and the judge may still convict and punish him.

As far as *shi'i* law is concerned, the denial after confession has no effect on enforcement of any of the different categories of punishments because, according to the jurists, to give any effect to such a denial would cause the unjustifiable escape from punishment. One exception to this is the punishment prescribed for adultery by a married person, which is not carried out if the confession is withdrawn.[8] This exception is based on various statements of the *Shi'i* Imams, and the reason for it may be the great severity of this punishment, and the fact that it is primarily meant to act merely as a deterrent, showing the seriousness of this crime in the eyes of *sharia*.

Again, by accepting this latter view, the distinction between different punishments in this respect becomes less important.

B. Withdrawal of Evidence

None of the punishments of *hadd*, *qisas* or *tazir will be* carried out if the person providing the evidence by which the accused is convicted withdraws his evidence. This is because in such a case, doubt (*shubha*) arises as to the culpability of the accused and such doubt is so strong as to bar the enforcement of all punishments, including the discretionary punishments.

IV. PROOF BY CIRCUMSTANTIAL EVIDENCE (*QARA'IN*)

In prescribed punishments and retaliation, where the modes of proof must be conclusive, circumstantial evidence, however convincing it may

8. HILLI, SHARAI AL-ISLAM vol. IV, at 152.

look, is not in itself sufficient to convict the accused.[9] Consequently, pregnancy of an unmarried woman, having the smell of drink on one's breath, or intoxication are not sufficient to punish the person for adultery or wine-drinking, respectively, because, in such cases there still exists doubt as to the person's responsibility.[10] For example, the crime might have been committed under duress or through ignorance.

In discretionary punishments, on the other hand, the judge may use circumstantial evidence for proving the offence if he can be satisfied about the accused's guilt. It is thus easier to convict someone for a crime punishable by *tazir*, as opposed to crimes punishable by *hadd* or *qisas*, due to the more flexible application of the Rule of Doubt in the former case.

V. PUNISHMENT FOR COMMITTING MORE THAN ONE CRIME (*TA'ADDUD AL-JARA'IM*)

All jurists agree that if an offender commits an offence punishable by *hadd* several times before he stands trial, the punishments imposed for such offences are carried out concurrently as one penalty. The reason for this is that the Law-Maker's purpose in making the act punishable can be achieved by enforcing only one punishment. Doubt arises as to whether it is essential to carry out other punishment, and no *hadd* can be enforced in case of doubt. If, however, the crimes committed are different in nature (for example, adultery, wine-drinking and theft) the principle of concurrence may not be applied and all punishments should be carried out, as the Law-Maker has a different purpose in enforcing each punishment. In punishing adultery, His purpose is to preserve family life and parentage, in punishing wine-drinking, it is to preserve mental health, and in punishing theft it is to protect property rights. Where different punishments are to be enforced, the judge must start by enforcing the most lenient punishment first, and carrying on to reach the death penalty (if there is one).

An important difference which exists in this respect between *sunni* law and *shi'i* law is that in *sunni* law, the principle of concurrence will be applied even in cases where, although the crimes are not identical, the penalties are designed to protect the same interest (for example,

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9. Even in the special case of *Qasama*, the accused is not convicted solely on the basis of the circumstantial evidence, but because the victim's or his family's oaths are also added to the existing evidence.

10. According to Malik, however, all these signs are sufficient to prove the crime. *See* IBN RUSHD (MUHAMMADIBN AHMAD), BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID vol. II, at 436.

committing theft and highway robbery or married and unmarried adultery). In *shi'i* law, on the other hand, the crimes must be strictly identical, before this principle can be applied. For instance, if adultery is committed with more than one person, or if, in *qadhf* (false accusation of unchastity), a group of people are slandered by different words, several punishments will be enforced.[11]

As far as discretionary punishments are concerned, since the "Rule of Doubt" does not apply to them strictly, the principle of concurrence is in turn not necessarily applicable to them, and thus the law may require the enforcement of all punishments on the offender.

As far as retaliation is concerned, where murder is not among the crimes committed, for example when the offender commits various non-fatal offences against the same person such as cutting his leg and hand, then the principle of concurrence will not be applied, but for a different reason. It is to protect the victim's right. The fact, however, that an offender who commits murder and non-fatal offences against the same victim must only be subjected to retaliation for murder, has sometimes been justified on the basis of the Rule of Doubt: When we are in doubt as to whether we can enforce all punishments in such a case, then we should refrain from doing so.

VI. THE ABSENCE OF A PRESCRIBED CONDITION OF A CRIME

Different conditions have been prescribed by the law for crimes punishable by *hadd* or retaliation. Any doubt about the existence of any of these prescribed conditions will relieve the offender of these punishments.

In such cases, the offender may only be punished by a *tazir* or discretionary punishment. In fact, *hadd* or retaliation has been prescribed in *sharia* for the most serious type of a crime, and all other types are punishable by *tazir*. Among many different kinds of theft, for example, only a special kind which has all the necessary conditions prescribed by the law (for example, the conditions of safe custody, or *hirz*, minimum value or *nisab*, and lack of partnership)[12] is punishable by *hadd*.

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11. KULAINI, FURU MIN AL-KAFI vol. II, at 292. Some Jurists believe that if all victims of *qadhf* bring their actions together, there will follow one punishment, but if they bring them separately, the offender will be punished several times. *See* TUSI, AL-ISTIBSAR vol. II, at 310.

12. Lack of partnership is, according to some jurists, one of the conditions required for punishing a thief by *hadd*, in the sense that such a punishment cannot be applied if the thief owned a certain portion of the stolen goods, as he might have been under the presumption that he was taking his own share and, therefore, doubt will arise about his liability. However, the position of the Iranian legislator on this issue has changed in article 277 of the New Penal Code, 2013).

VII. JUDGEMENT BY DEFAULT (*QADA ALAL-GHA'IB*)

As a result of the Rule of Doubt, judgment by default cannot be given in case of *hudud* punishments, since doubt arises as to the accused's liability (as he may have a defence which he cannot raise if he is tried in absentia). In *t'azirat*, on the other hand, due to the less strict application of the Rule, the judge can try the accused in his absence if he so wishes, provided he thinks there is enough evidence proving his guilt. As far as retaliation is concerned, judgment by default is possible because, otherwise, the victim's right may be violated.[13]

VIII. HEARSAY EVIDENCE (*SHAHADA ALAL-SHAHADA*)

Hearsay evidence does not have the same weight as original evidence, and the Rule of Doubt applies in such cases preventing the acceptance of hearsay evidence in *hudud*.[14] In retaliation, it can be accepted if, for some reason, the original witness cannot attend the trial, and provided for each original witness there are two witnesses to give hearsay evidence.[15] The hearsay evidence has been permitted in *qisas* in order to protect the right of the victim. Some jurists believe that in hearsay evidence, doubt is so great that it supersedes the individual's right. They believe, therefore, that this kind of evidence is not permitted even in case of crimes punishable by retaliation.[16]

As far as discretionary punishments are concerned, the judge is given a wide discretion whether or not to accept hearsay evidence. There are some jurists, however, who believe that hearsay evidence is not permitted even in relation to these punishments. According to them, hearsay evidence is so unreliable that it may not prove any kind of punishment against the accused, as a result of the application of the Rule of Doubt.

For the same reason, stealing from the public treasury (*bayt al-mall*) is not punishable by *hadd*. Some jurists (like Tusi in ISTIBSAR vol. IV, at 241-42), believe that in the case of stealing from the public treasury, punishment should only be enforced if either the amount stolen is less than or equal to the offender's share in the public treasury, or, in case it is more, the excess is less than the prescribed minimum (*nisab*). In this respect, Islamic law is exactly opposite to English law, in which a person may be guilty of stealing his own goods. S.5(1) of the Theft Act, 1968, provides, "[P]roperty shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest." Thus in *R. V. Turner* (1971) 2 ALL ER 441, *A* took his car to be repaired by *B*. Without telling *B* and to evade payment, *A* later took it from *B*'s garage. *A*'s appeal against conviction for theft was dismissed; it was held sufficient that the property was, in fact, in the possession or control of *B* from whom *A* had taken it.

13. SHAHID AL-THANI, MASALIK AL-AFHAM vol. II (Kitab al-Qada).
14. HILLI, SHARIA AL-ISLAM vol. IV, at 138.
15. *Id.* at 341; SHIRAZI (IBRAHIM IBN ALI) vol. II, at 337.
16. IBN NAJIM, AL-BAHR AL-RA'IQ vol. VII, at 131.

IX. CONCLUSION

It can be concluded from what was said above that a fundamental Rule of Islamic criminal law, derived from a saying of the Prophet, is that no punishment should be enforced in case of doubt. This golden Rule can be employed at different stages of a criminal trial and even before that, in order to fill any gap in favour of the accused. However, setting aside the most fundamental consequence of the Rule, which is the interpretation of any *lacuna juris* as a negative opinion of the law, in other respects, full application of the Rule can only be seen in respect of the prescribed punishments or *hudud*, the enforcement of which is regarded to be the right of God, and in respect of which the Rule was initially prescribed by the prophet. The flexible nature of the discretionary punishments or *t'azirat*, and the greater role judicial discretion plays in them, and also the fact that retaliation or *qisas* is seen as an individual right of the victim of the crime, and not a public right as such, has resulted in a less extensive application of the Rule in respect of these latter punishments.