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A Comparative Study of The of Rights of Prisoners Under the Shari'ah And the Contemporary Legal System of Pakistan

ABSTRACT

A thorough analysis of the Quran, the Sunnah, practices of four Caliphs and the principles given by the different Islamic Schools show that the fundamental requirements of the Islamic criminal justice system are relief, reclamation and rehabilitation of prisoners. Thus the ultimate purpose to imprison the offender should be to correct him in a way that he desists from the crime upon the completion of his sentence. However at the same time Islam allows the use of non-custodial measures and the penalties other than the imprisonment. A comparative study of rights of prisoners discussed under the Shari'ah and the Pakistani law confirm that the basic structure of Pakistani statutes on prisons is similar to that of the Shari'ah. Therefore this is the duty of the Pakistani courts also to pronounce their decisions in pursuance of the guiding principles of Islam.

INTRODUCTION

This paper will discuss the rights of prisoners generally protected under Islam. Further it will focus upon the specific rights of prisoners such as, the right to be dealt through non-custodial measures in certain cases, the availability of conjugal rights, the right to reform and rehabilitate etc as discussed under the Shari'ah and the Pakistani law. It will also give a brief comparison of approach towards rights of prisoners under Shari'ah and the contemporary regimes.

1 CONCEPT OF PRISON UNDER ISLAMIC HISTORY

The *Holy Quran* uses the word *Al-Sijn* to describe the expression „Prison“. ¹The other words traditionally used in Arabic for defining imprisonment are, *Al-Habs*, *Al-Hasr*, ²*Al-I'iqāl*, *Al-Imsāk*, ³*Al-ithbāt*. ⁴The technical meaning of the expression '*Al-Sijn*' is discussed by various Islamic scholars. For example, *Ibn-al-Taimiya* defines it as, “a place of confinement to restrain and restrict the offender's free movement”. For this purpose he may be held in a house, mosque or may be given in the custody of his opponent or the agent of the opponent. ⁵*Al-Sijn* is also described as a punishment laid down by Allah Almighty for a wrong done by an offender with the particular purposes of betterment of society together with reforming and disciplining an individual. ⁷

The *Quranic* revelations give details of the existence of penitentiaries in the periods of earlier Prophets (AS). ⁸However the concept of „Prison“ as a „proper institution“ is unfounded in early period of Islam. Nevertheless the legitimacy of imprisonment is proven through several verses of the *Holy Quran*, ⁹the narrated *Ahadith* of Prophet (PBUH) ¹⁰ and practices of rightly guided four Caliphs. ¹¹*Al-Shaukani* says that, the Holy Prophet

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¹ See, the *Quran*, 12:33.

² See, *Ibid*, 17:08.

³ See, *Ibid*, 4:15.

⁴ See, *Ibid*, 8:30.

⁵ For a detailed discussion on these terminologies see, Ahmad Bin Yusuf al-Draiweesh, *Huqooq-ul-Sijna Fi-Shari'ah-al-Islamiyah wa Tatbiqataha Fin Nazmat-ul-Mulkat-ul-Arabiya-al-Saudia* (2014), 10-11. (Draiweesh, *Huqooq-ul-Sijna*, hereinafter)

⁶ *Ibid* 12.

⁷ *Ibid*.

⁸ The *Quran*, 12:25, 35; 26:29; 38:37, 38.

⁹ *Ibid*, 5:33; 5:106.

¹⁰ For a detailed discussion on the topic see, Draiveesh, *Huqooq-ul-Sijna*, 15-16.

(PBUH), his companions and their successors and those who came after them adopted the punishment of imprisonment in all ages and in all countries. And that they found many visible advantages in this method.¹²

During the time of Prophet (PBUH) though no regular prison complexes were found yet the prisoners were kept in mosques,¹³ houses¹⁴ and tents.¹⁵ The same practice continued throughout the reign of Hazrat Abu Bakar (may Allah be pleased with him) and in early period of Caliph Hazrat Umar (may Allah be pleased with him). However Hazrat Umar (may Allah be pleased with him) confined prisoners in deserted wells also; for example, *al-Hatiah* was imprisoned in a well by Umar. During Umar's later period in office he purchased a house and declared it a prison. It was the first assertion of proper institutionalization of prison in Islam. Usman (may Allah be pleased with him) carried on with similar practice whereas Ali (may Allah be pleased with him) was the first who ordered to especially construct a house for imprisoning the offenders; this „prison house“ was named as *Nafi* (beneficial).¹⁶ Since then the Muslim Governments have been using the prisons as an effective tool of punishment for transgressors.

2 GENERAL RIGHTS GIVEN UNDER ISLAMIC INJUNCTIONS WITH REFERENCE TO ADMINISTRATION OF JUSTICE

According to Islamic teachings, Allah created all the human beings with egalitarianism. The fact mentioned in the *Quran* that, “man is created from clay”,¹⁷ is the clear declaration of equality of all mankind without any distinction. The *Quran* also proclaims that every human being is worthy of respect and dignity.¹⁸ It further decrees that all human beings, irrespective of sex, caste, colour, creed, community, country and other man made divisions are equal.¹⁹ Then Allah declares the right over his bounties without distinction of man and woman.²⁰ These all arrangements are made because Islamic jurisprudence pre-supposes that all the human beings are equal and enjoy the same set of liberties and limitations. The revelation of the *Holy Quran* in fact introduced the concept of unity of human race.²¹

Similarly the right to choose has been given to all men and women.²² This is why it is said by the *Quran* that, “no one shall bear the burden of any other soul”,²³ and that “everyone is accountable for his own deeds”²⁴. Further the *Quran* highlights that the only thing which scratches the principle of „equality by birth“, is the good or bad deeds of a human being.²⁵ Therefore the principle derived from all these revelations collectively is that, all human beings are equal but at the same time each individual is a class in himself. The concept of reasonable restriction is also enshrined under Islamic teachings. For example, „right of life“ on one hand is respected to such an extent that the killing of one person without legal sanction is declared equal to the killing of entire humanity²⁶ nevertheless on the other hand the rule of *Qisas* is also well recognized by the *Holy Quran*. Alike as against the right that no one shall cause injury to human body,²⁷ the principle of retaliation permits causing similar injury to the offender.²⁸ The *Quran* also says, “And do not kill any one whom Allah has forbidden except for a just cause...”²⁹ Therefore the *Holy Quran* along with giving the concept of human dignity³⁰ also allows to retaliate against any injustice and to punish the wrongdoer. The *Holy Quran* says,

Say: “come, I will rehearse what God hath (really) prohibited you from”: join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; - We Provide sustenance for you and for them; - come not nigh to shameful deeds, whether open or secret; take

¹¹ Ibid, 17.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid, 23.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ The *Quran*, 38:76.

¹⁸ Ibid, 17:70.

¹⁹ Ibid, 3:195; 4:32, 124; 49:13; 16:97; 33:35.

²⁰ Ibid, 2:22, 29.

²¹ Ibid, 2:213; 10:19; 30:32; 33:35; 7:173.

²² Ibid, 6:104; 18:29.

²³ Ibid, 67:164.

²⁴ Ibid, 2:202.

²⁵ Ibid, 4:19; 57:10; 4:94, 96; 6:132.

²⁶ Ibid, 5:32.

²⁷ Ibid, 2: 178, 179, 194.

²⁸ Ibid, 5:45.

²⁹ Ibid, 17:31.

³⁰ Ibid, 17:70.

not life, which God hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.³¹

Islam came to strengthen the justice; and Islamic injunctions direct towards the achievement of this goal. *Surah Al-Hadeed* is to the effect that the Prophets were commissioned with book and balance so that people stand for justice.³²*Surah-An-Nisa* commands that trusts be handed over to the deserving and justice should be done.³³*Surah-Al-Nahl* indicates that Allah commands the doing of *Adl* (Justice) and *Ehsan* (Equity).³⁴*Surah-Al-Anaam* tells that the word of God finds fulfillment in truth and justice.³⁵*Surah-An-Noor* shows that tenderness for culprit should not affect administration of criminal justice.³⁶The element of equality between human beings has been commanded by the Holy Prophet (PBUH) also in *Khutaba Hujjat-al Wida*. He (PBUH) told in his sayings that the cause of fall of nations is relatable to the fact that rich and dominant culprits were let off while the penal provisions were imposed only upon those who belonged to poor section of society. The wife of Prophet (PBUH), Aisha (may Allah be pleased with her) narrates that the people of *Quraish*(tribe) were worried for the girl of *Bani Makhzum* who was caught under the charge of theft. They asked Usama bin Zaid to mediate for her with Prophet (PBUH). When Usama spoke about that to Allah's Apostle (PBUH), He said, "do you try to intercede for somebody who is connected to a case of Allah's prescribed punishments?"Then he stood up for delivering a sermon. Prophet (PBUH) said, "what destroyed the previous nations was that they used to inflict the punishments on the poor and forgive the rich. By Him in Whose Hand my soul is! If Fatima, the daughter of Muhammad stole, I would cut off her hand."³⁷ Hence it is established that the element of discrimination is ultra-vires to the Injunctions of Islam.

Though a very few verses of the *Holy Quran* or traditions of Holy Prophet (PBUH) may be found to provide wide-ranging principles on the topic of prison discipline upon which the existing prison legislation can rest. Nonetheless certain Islamic injunctions of general import relevant with administration of justice, human dignity and human welfare are extended in case of prisoners too. These are basically founded on the principle of relationship between „*Hukm* and *Hikmat*’. One set of these rules is termed as, „*Maqasid ul Shar’ah*” or the „fundamental objectives of *Shar’ah*” (or the „higher objectives of *Shar’ah*”) according to which the purpose of revealing the Injunction was in fact preservation of certain values, freedoms or rights which are essential for maintenance of balance among society. These *Maqasid* are preservation of faith, life,³⁸ property,³⁹ intellect,⁴⁰ progeny⁴¹ and according to some, it also includes the preservation of reputation.⁴² Therefore this is the responsibility of a Muslim to safeguard these rights of him; and the one who damages any of them is liable for punishment. The other rights protected through injunctions of Islam are freedom from human bondage,⁴³ equality without gender discrimination,⁴⁴ right to protest representation/appeal,⁴⁵ sanctity of covenants at domestic and international level,⁴⁶ justice must prevail⁴⁷ and must be tempered only with mercy,⁴⁸ preservation of human dignity,⁴⁹ right to chastity,⁵⁰ no one shall be held responsible for the evil of another,⁵¹ right to remuneration,⁵² human liberty,⁵³ unity of human race,⁵⁴ freedom from

³¹ Ibid, 6:151.

³² Ibid, 57:25.

³³ Ibid, 4:58.

³⁴ Ibid, 16:90.

³⁵ Ibid, 6:115.

³⁶ Ibid, 24:02.

³⁷ *Sahih Bukhari*, 4: 681.

³⁸ This right is however subject to the right of retribution in the field of administration of justice. The *Quran*, 2: 178; 6: 151; 32:05.

³⁹ Ibid, 2:188; 4:11, 29.

⁴⁰ Ibid, 2:31-33; 96:3-5.

⁴¹ Ibid, 2:205, 233; 6:151.

⁴² Ibid, 4:148; 49:11, 12.

⁴³ Ibid, 3:79.

⁴⁴ Ibid, 3:195; 4:1; 33:35; 49:13.

⁴⁵ Ibid, 4:148; 58:1.

⁴⁶ Ibid, 2:177; 17:34.

⁴⁷ Ibid, 4:135; 5:8.

⁴⁸ Ibid, 16:90; 6:153; 7:29; 4:135.

⁴⁹ Ibid, 17:7.

⁵⁰ Ibid, 24:2; 12:23; 66:12.

⁵¹ Ibid, 12:79.

⁵² Ibid, 39:70; 53:39.

oppression (compulsion),⁵⁵ freedom of choice,⁵⁶ preservation of places of worship of different religions,⁵⁷ Knowledge as a permanent value⁵⁸-the prevalence of merit⁵⁹-freedom of conscience (religion)⁶⁰-right to raise family⁶¹-presumption of innocence⁶²freedom from exploitation⁶³-equality before law⁶⁴-everyone is accountable for his own deeds⁶⁵-human affairs are decided by mutual consultation,⁶⁶ maintenance of rule of law,⁶⁷labour must be compensated,⁶⁸supremacy of rule of law,⁶⁹-ight to notice and explanation before pronouncement of verdict.⁷⁰ It is also maintained that Allah does not lay a responsibility on any one beyond his/her capacity. Then no one shall bear the burden except his own. In other words no one is held responsible for another person.⁷¹

These all Islamic injunctions clearly indicate that there must be a comprehensive judicial system maintained in every society which can protect the legal rights of citizens of that society and can award justified punishment on infringement of those rights.

3 AN ANALYTICAL STUDY OF THE RIGHTS OF PRISONERS UNDER ISLAMIC INJUNCTIONS

3.1 General Rights of Prisoners in Islam

The Quran says,

It is not righteousness that ye turn your faces towards east or west; but it is righteousness-- to believe in God and the last day, and the angels, and the book, and the messengers; to spend of your substance, out of love for him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for ransoming the captives (prisoners) to be steadfast in prayer, and practice regular charity; to fulfil the contracts which ye have made and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing.⁷²

The early Islamic history does not recognize „prison“ as a proper institution thus does not provide rich substance on the „rights of prisoners“ however a few examples especially of later periods can be quoted. These examples are the general picture of currently available rights under prison manuals. For instance, a prisoner (who was held hostage because two Muslims had been captured by his tribe) entreated the Holy Prophet (PBUH) for food and water. The Prophet (PBUH) said approvingly that, “this is your need.”⁷³It proves that this is the duty of the authorities to provide all basic necessities to the captives. Hazrat Abu Yusuf (the renowned disciple of Hazrat Imam Abu Hanifa) dispatched a letter to the Abbasid Caliph Haroon al-Rashid and gave advice on prominent rights of prisoners. He wrote,

“Provide them (the prisoners) proper food and drink. And give them a monthly allowance because if you order to provide them the bread, the guardians of prison will take it away. And appoint upon them a warden who possesses good character. He should record the names of all inmates to pay them a monthly charity. He should make them seated and call them with their names. And order the related authority to provide the prisoners, a shirt and a robe in winter and a shirt and pants in

⁵³ Ibid, 7:157.

⁵⁴ Ibid, 2:123; 30:32; 10:19.

⁵⁵ Ibid, 2:256; 10:99.

⁵⁶ Ibid, 18:29.

⁵⁷ Ibid, 2:115; 22:40.

⁵⁸ Ibid, 2:31-33; 96:3-5.

⁵⁹ Ibid, 4:58; 46:19; 49:13.

⁶⁰ Ibid, 2:256; 9:6; 10:99; 16:125; 18:29.

⁶¹ Ibid, 4: 3-17.

⁶² Ibid, 24: 12-16.

⁶³ Ibid, 39:70; 53:39.

⁶⁴ Ibid, 2:48,123,286; 10:15.

⁶⁵ Ibid, 2:202.

⁶⁶ Ibid, 42: 38; 3:159.

⁶⁷ Ibid, 57:25.

⁶⁸ Ibid, 39:70; 53:39.

⁶⁹ Ibid, 5:44, 45, and 47.

⁷⁰ Ibid, 7:12; 15:32-38; 17:61.

⁷¹ Ibid, 2:286; 7:42; 23:62; 3:24.

⁷² Ibid, 2:215.

⁷³ As quoted in Muhammad Aslam Khaki and others vs. The State and others, PLD 2010 FSC 01 (Para

summer. And forbid the prison-keepers from abusing and smacking the prisoner. Provide enough space, proper bedding and all accessories necessary for taking bath to the prisoners. And provide them pen and paper. Do not proscribe them from having a meeting with their visitors once a week. Appoint a postman to deliver their letters to their family. If they owe a debt allow them to go out and defend their case.”⁷⁴

According to *Maliki* point of view,⁷⁵ to safeguard the family ties, it is encouraged that the prisoners who are relative should not be separated in the same jail from each other.⁷⁶ *Maliki* jurists also recommend that the prisoner must be allowed for visits made by his relatives and friends in the jail.⁷⁷

These directions made for authorities present a good piece of evidence of recognition of generally available human rights to the prisoners. A few other instances mentioned by *the Quran* are important to be noted here with relevance to the prisoners’ rights. The narrative of Hazrat Yusuf (AS) as given in 12th *Surat* of *the Quran* establishes a few rights available to prisoners during incarceration. For example, the fact that two other inmates narrated their dreams to Yusuf to get them interpreted from him shows that communication between prisoners was not prohibited even in old times.⁷⁸ Yusuf was also not debarred from preaching within the prison.⁷⁹ These *ayaat* and above quoted examples are indicators for Muslim jurists to define the generally available rights to a prisoner during incarceration. However the specific rights discussed in this research in modern scenario (in the other chapters of this work) are also protected by Islam. An analysis is given here.

3.2 Specific Rights of Prisoners in Islam

Islamic injunctions based on the *Quran* and the *Sunnah* provide ample material with regard to several specific rights of prisoners available under the modern legal regimes of the world.

(A) Alternative Sentencing Measures

There are numerous instances of espousal of alternative measures of punishment in Islamic and Pre-Islamic history (and which are discussed by the *Quran* in a positive or recommended comportment). These instances show that the authorities had been accustomed to alter a severe punishment with a soft penalty in suitable cases, such as, insertion of imprisonment at the place of corporal punishment⁸⁰ or award of release on probation or parole instead of sentencing through incarceration to the subject. Considerably, there is no jurist found who did argue on enhancement of captivity period beyond one year instead the jurists usually went in favor of immediately imposable corporal punishments such as whipping or supported the imposition of damages and compensation. The basic theme behind alteration of punishment under Islamic law is to achieve the real purpose of the penalty. This is to restrain the offender from a fresh crime and to rehabilitate him in a constructive manner through imposition of either direct or indirect penalty. For example, the *Quran* lays down the system of payment of blood-money (*Diyat*) as an alternative punishment of retaliation (*Qisas*).⁸¹ Then a *Taaziri* punishment may also be placed instead of *Qisas* or *Diyat*.⁸² The other alternatives to incarceration include, *arsh*, *Al-Islah* (reformatory treatment),⁸³ *Tazkiyah* (purification),⁸⁴ *Afw* (pardon allowed by the Court or the victim),⁸⁵ *Sulh* (mutual settlement),⁸⁶ *Tauba* (repentance),⁸⁷ *Kuffara* (Atonement or expiation)⁸⁸ and *fidya*⁸⁹.

⁷⁴ Draiveesh, *Huqooq-ul-Sijna*, 51-52, Supra note 357.

⁷⁵ The Maliki School was founded by Imam Malik b. Anas (d. 179/795).

⁷⁶ Draiveesh, *Huqooq-ul-Sijna*, 59, Supra note 357.

⁷⁷ Ibid, 60.

⁷⁸ *The Quran*, 12:36.

⁷⁹ Ibid, 12:39, 40.

⁸⁰ For instance, while quoting the narrative of Hazrat Yusuf’s tale, the *Holy Quran* states that the lady who made a frivolous complaint against Yusuf demanded for his imprisonment or the infliction of grievous chastisement as the mode of administering justice. Upon which the Emperor chose to detain Yusuf in a prison. This shows that the customary law of that old time permitted imprisonment as an alternative to corporal punishment (as a lesser penalty). (The *Quran*, 12:25, 32.)

⁸¹ The *Holy Quran*, 2:178.

⁸² Ibid, 4:92.

⁸³ Ibid, 4:16, 114; 5:39; 6:48, 54; 7:35, 56; 8:01; 16:119; 24:5.

⁸⁴ Ibid, 111:9.

⁸⁵ Ibid, 3:178; 4:43; 7:199.

⁸⁶ Ibid, 4:128.

⁸⁷ Ibid, 4:9; 5:4, 11; 6:54; 11:2, 52, 90; 16:119; 24:5; 25:69.

⁸⁸ Ibid, 4:92.

⁸⁹ Ibid.

However, the difference of comprehensiveness is visible between past Islamic practices and contemporary Pakistani practice. The Islamic practices give a complete structure of non-custodial measures inclusive of procedure. For example, there are several places where the *Quran* refers to the system of parole. Such as, while interpreting the dreams of his two inmate colleagues, Yusuf prophesized to one of them that he was to be inducted as chief butler at the palace of the emperor of Egypt.⁹⁰The *Quran* also indicates that this convict was released on parole and was given employment as post-conviction rehabilitative measure. Hazrat Yusuf also became the ultimate parolee.⁹¹Later he was appointed as advisor of food and agriculture of that emperor.⁹²This shows that parole is an old-dated sentencing methodology which is acknowledged by the *Quran* along with its mode and mechanism of employment. Non-custodial system of punishment for instant treatment of offender is discussed in *Surah-e-Anfall* also. It reveals the instance of first use of parole by the Holy Prophet (PBUH) for the prisoners of battle of Badar.⁹³The modern prevailing concept of imposition of community sentences was employed hundreds of years back against these prisoners when they were later asked to carry out community work for their release. Under the prescribed stipulations of this community work requirement each prisoner could win his freedom by making ten Muslims able to read and write. Therefore the system of probation and parole of Prophetic time was in fact a community based sentencing method.⁹⁴ However the legal contemporary features of probation in Pakistan do not include the community work as their part of strategy rather the courts simply on usual bases allow the probation bonds without inclusion of community work. Despite that on factual grounds this is the community sentencing which rehabilitates the offender and fulfills the original purpose of non-custodial sentencing.

(B) Reformation and Repatriation of Prisoners

Once Caliph Umar (may Allah be pleased with him) imprisoned a person and said: "I shall keep him imprisoned till I find repentance in him."⁹⁵

„Rule of Repentance“ given in Islamic Criminal Law is repeatedly explained in the *Holy Quran*. At one place it is said, "And those two of you who commit it, torture them both. But if they repent and amend, turn away from them. Surely, Allah is Most-Relenting, Very-Merciful."⁹⁶In another verse it orders in this way, "But those who repented before you have control over them then know that Allah is Forgiving, Merciful."⁹⁷At another place it emphasizes, "Then who so repents after his injustice and amends then Allah will turn to him with His Mercy, Undoubtedly, Allah is Forgiving, Merciful."⁹⁸(There are several other orders present in the *Quran* and the *Sunnah* relating to the same topic).⁹⁹These verses order to accept the repentance in case of one of the most heinous crimes which is adultery and fornication. Abdul Qadir Auda¹⁰⁰ elaborates some conditions while describing this principle of repentance of Islamic Criminal Justice System. He deliberates that,

- 1- All Islamic schools of thought are unanimously agreed to accept the repentance of that person who committed a crime against a single individual. Hence this principle of remorse is not acceptable for those crimes which are committed against group or society at large;
- 2- He clearly asks for pardon;
- 3- He tries at maximum level to compensate his crime;
- 4- And most importantly, this remorse is conditional with his reformation of character.¹⁰⁰

In such case, if the injured party himself or his legal heirs acknowledge that request of pardon, his repentance should be accepted by the society and people should not point fingers upon him. This is exactly that procedure of expungement which is adopted by modern legal regimes of this era. In Pakistan, the first point of this

⁹⁰ Ibid, 12:36-41.

⁹¹ Ibid, 12:50, 54.

⁹² Ibid, 12:55.

⁹³ The battle was fought on 13th March 624 AD or 17th Rama^{dan} 2 AH.

⁹⁴ Later under Islamic schools of thought, some *Maliki* jurists also recognized the release of prisoners on parole for certain purposes, such as, to visit his sick relatives and to attend their funeral prayer. However they stress that during such visits he must be escorted by a guardian who is now in modern times replaced by security personnel. Draiwesh, *Huqooq-ul-Sijna*, 60, Supra note 357.

⁹⁵ Draiwesh, *Huqooq-ul-Sijna*, 19, Supra note 357.

⁹⁶ the *Holy Quran*, 4:16

⁹⁷ Ibid, 5:34.

⁹⁸ Ibid, 5:39

⁹⁹ Ibid, 3:135; 25:70; 4:146; 39:53; 2:37; 4:48; 39:53; 25:69-71; 2:222; 66:08; 24:31; *Sahih-al-Bukhari*, 8:75:319; *Sahih-al-Bukhari*, 8:75:321.

¹⁰⁰ Abdul Qadir Auda^a, trans. Sajid ur Reman Siddiqui, *Islam Ka Fojdari Quanoon(Part I)* (Lahore, Pakistan: Islamic Publications Private Limited, 2006), 440-442.

principle is virtually applicable in the cases of *Qisas* in comparison to the cases falling under the anti-terror regime. The principles of remorse and pardon are fundamentally devised keeping in contemplation the reformation, rehabilitation, repatriation and expungement of prisoner for his smooth readjustment in the society. However since at that time of revelation of the *Quran*, the Prophet (PBUH) was himself there to accept the repentance made by people which he could gather through divine disclosure, therefore the procedure of acceptance of remorse was very much in its complete form.¹⁰¹ But now the legislature and the judiciary need to devise certain rules to establish the truthfulness of remorse made by the offender. Therefore this is a requisite to define a proper procedure for expungement of past criminal record of an offender.

(C) Conjugal Rights of Prisoner

The *Holy Quran* contains the declaration that, “O people! be careful of (your duty towards) your Lord who created you from a single being and created its mate of the same kind and spread from these too many men and women.”¹⁰²In this verse the unity of human race is classified into two main sets of men and women which are basically meant for continuation of human race. Both genders are declared ‘*Zauj*’ of each other. This is that they both complement one another but each of them enjoys a distinct legal capacity with a separate but specific biological role though the twain in the social, economic, political and religious domain, have the same rights and obligations. As a matter of general principle, the *Holy Quran* has formed the entire creation into pairs. In other words the principle of classification is an innate attribute amongst the mortals.¹⁰³ *Surrat-Al-Zariat* declares, “And of everything We have created pairs that you may be mindful.”¹⁰⁴Then Allah says in *Surrat-Al-Hujurat* that, “O you people, We have created you of a male and a female, and made you tribes and families that you may know each other, surely the most honorable is the one among you who is most careful (of his duties); surely Allah is knowing and aware.”¹⁰⁵There are many other verses to the same effect.¹⁰⁶

As the second phase of this argument that man and woman are *Zauj* for each other, *Surrat-Al-Nisa* declares men as the protectors and maintainers of women.¹⁰⁷ In spite of equality of rights the classification has been prescribed on rational basis. In such situation a husband cannot refrain from his responsibilities towards his wife and kids. Similarly the wife also has duties towards the husband and children. Correspondingly all have undeniable rights towards one another. Therefore the fact that any one of the *Zauj* has been imprisoned cannot kill many of the natural rights. Hence the benefit of system of parole which has been accepted by the Shari’ah for the offenders should be extended to include temporary parole under which a prisoner might be allowed to perform his family responsibilities.

(D) Gravity of Crime and Punishment should correspond

The *Holy Quran* permits retribution alone for the wrong done by an accused but at the same time it refers to the two attributes of Allah that Allah is pardoning and forgiving.¹⁰⁸The *Holy Quran* does not sanction severe treatment or added agony for condemned accused. It also reminds the believers that punishment should not exceed the injury actually inflicted. It says, “And if you take your turn, then retaliate with the like of that with which you were afflicted; but if you are patient, it will certainly be best for those who are patient.”¹⁰⁹The other significant principle again and again enunciated by *the Quran* is that no one shall bear a burden greater than he can bear.¹¹⁰ The lesson therefore is that a severe punishment may be awarded to a criminal but authorities have no right to treat him inhumanly for a decade or so before he finishes his lawful penalty. A prisoner cannot be kept under a constant fear of death in hostile surroundings for an uncertain period. The basic rationale of detention of an accused (during trial) or a prisoner (imprisoned during the pendency of his appeal) is to limit his movement and ensure that he does not

¹⁰¹ The *Quranic* revelations about Hazrat Yusuf (AS) point toward an idea of expungement of prisoners and their reintegration back in to the society through commencing a professional life as happened with Yusuf or his co-inmate who was later chosen as royal butler.

¹⁰² See, *Holy Quran*,04:01

¹⁰³ Main concept behind this interpretation is elaborated and used by Federal Shariat Court in *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1.

¹⁰⁴ See, *The Quran*, 51:49.

¹⁰⁵ See, *Ibid*, 49:13.

¹⁰⁶ See, *Ibid*, 53:45; 75:39; 6:143; 39:6; 42:11.

¹⁰⁷ See, *Ibid*, 4:34; 2:233.

¹⁰⁸ See, *Ibid*, 22:60.

¹⁰⁹ See, *Ibid*, 16:126.

¹¹⁰ See, *Ibid*, 2:233, 286; 4:84; 7:42; 23:62; 65:7

escape till the time his case is finally decided.¹¹¹ So if the purpose of confinement is to secure the attendance of a condemned prisoner to face execution (if so decided ultimately) it does not give a license to jail authorities to treat the convict in a cruel manner during this gap. Protracted harsh treatment with a detainee already confined in a prison only because he is awaiting decision of his appeal is indeed a violation of the *Quranic* principles of *Ehsan*. Similarly unfriendly treatment is covered by the mischief of *Zulm* as pronounced by the *Holy Quran*.¹¹² Prophet (PBUH) gave a golden principle which is equally applicable in case of prisoners that, "Be gentle to them and oppress them not, attract them by good countenance and repulse them not by an ill demeanor. Be careful of the distress call of the oppressed. , Between him and Allah no screen exists."¹¹³ Another *Hadith* says, "Make things easy for the people, do not create difficulties, give good tidings, do not create circumstances which generate hatred."¹¹⁴ The *Quran* says, Allah also intends facility for human beings.¹¹⁵

The theme of securing basic human rights and the establishment of justice runs through the entire fabric of Divine Message. The number of times the commandment to do justice has been mentioned in *Holy Quran* is an indication that justice is almost an article of faith for the Muslims. *Holy Quran* not only use of the term *ADL* (Justice) but it, at the same time, introduces terms like *Qist*, *Ehsan* and *Meezan* to give widest possible meanings and connotations to the concept of justice in Islamic jurisprudence.¹¹⁶

Therefore the Muslim administrations should devise the rules and policies which are constructive and benevolent for prisoners who are entirely dependent upon their administration. The accused must be given a fair and clear chance to defend himself and the court should keep the rules of justice in mind while making any decision. During imprisonment he should be dealt reasonably and compassionately by the controlling authorities and when he gets released from prison after finishing his lawful punishment, he should be given a chance of peaceful reintegration back in to the society. The society should avoid repeating the stories of his previous guilt because Allah terms the Muslims as the best of nations raised up for (the benefit of) humanity who enjoin what is right and forbid what is wrong and believe in Allah.¹¹⁷

4 CONCLUSION

That is the best of men who dislike the power. Beware! Ye are all guardians; and ye will be asked about your subjects; then the leader is the guardian of the subject, and he will be asked respecting the subject; and a man is a shepherd to his own family, and will be asked how they behaved, and his conduct to them; and a wife is guardian to her husband's house and children, and will be interrogated about them; and a slave is a shepherd to his master's property, and will be asked about it, whether he took good care of it or not.¹¹⁸

The Pakistani modern statutes are sometimes procedurally weak however this is not the situation with different rules available under the Shari'ah. For example, one can easily gather the sound concept of substance and procedure of non-custodial mechanisms in the *Quran* and the *Sunnah*. These mechanisms are not left open-ended instead the community sentences were declared as part of these measures for making them meaningful. In Pakistan, the alternative methods to imprisonment are adopted without slotting the community sentence into them. This deficiency makes the non-custodial measures less effective. Islam introduced the alternative sentencing methods primarily for the reformation of offenders; however this aspect is deficient in Pakistani statutes on prisons. Their formation must be revised. Even during incarceration Islam offers the chance of reformation and rehabilitation to the hardest criminals whereas Pakistani statutes, in several cases, specifically exclude certain convicts from the loop of treatment and therapy which is in fact wrong because ultimately nearly all the prisoners come out of the prison and again reintegrate into society. At this moment the rehabilitated offenders join the peaceful part of the social gatherings and non-rehabilitated prisoners again unite to make a bond with their criminal society. The post-imprisonment repatriation aspect for prisoners has also been discussed under the Islam. This is that if an offender repents for his offence, his repentance should be accepted provided he completes certain requirements. The law in Pakistan also discusses the repentance and remorse made by a guilty person nevertheless it does not thrash out its

¹¹¹ See, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1 (Para 137).

¹¹² Ibid.

¹¹³ *Sahih Bukhari*, 9.

¹¹⁴ *Sahih-al-Bukhari*, 78:152.

¹¹⁵ See, *the Quran*, 2:185.

¹¹⁶ See, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1 (Para 156).

¹¹⁷ See, *the Quran*, 3:110; 3:113; 7:157; 9:67, 71,112.

¹¹⁸ *Sahih-al-Bukhari*, 09:252.

procedural portion. That procedure must also be devised by the legislature through promulgation of a separate statute or by the judiciary through giving certain governing principles to extend pardon to a previous criminal.¹¹⁹ In short, Pakistan is a Muslim country where the FSC time and again checks the validity of laws in consonance of Islamic law. The decisions given by the FSC conclude the Pakistani law on prisons compatible with Sharia^h practices.¹²⁰ This is however recommended that the FSC must also point up those deficiencies which exist in smooth implementation of those laws.

¹¹⁹ For detailed study, see, Tariq, Aisha. Policy Perspective; Islamabad Vol. 17, Iss. 1, (Jun 2020): 35

¹²⁰ See for example, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 01; *Muhammad Aslam Khaki and others vs. Government of Punjab and others*, PLD 2005 FSC 03.