

## Policy of Criminalization under Islamic Criminal Justice System: A New Paradigm of Analysis

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### Abstract:

The rationale in Islamic law behind criminalization of some unbecoming acts has some distinguishing features which are basically meant to showcase the distinctive comprehensiveness and super eminence of the law of Allahu swt over all other legal systems – be they man-made, spiritual or celestial. Islamic penal system as an integral part of Islamic law is faith-based. The relationship between a Muslim and his creator is a very strong one, and so is his conviction in the religion of Allahu swt and in Islamic law. It is this strong bond of man with Allahu swt that compels the impressive rate of man's compliance with the dictates of Shari'ah often times. This solid bond of communion enables the Islamic criminal law to be effective in taming the tide of crime spread and achieving maximum good of the society. The positive effect of the divine law in this regard is stronger, more pronounced and better felt when compared to other legal paradigms across the globe. The man-made laws are found to be lacking in this divinity-inspired awe and diffidence from the public who are expected to obey the so-called laws with dispatch. As a result, neglect and indifference to the commandments designed by man to shape and regulate the world become a usual occurrence and thus horrible crimes of different forms and volumes continue to spread around on daily basis. In addition to the foregoing on the effectiveness of Islamic law in tackling the menace of crime, mention must be made of the deep-rooted principle of Islam that there shall be no punishment/sanction except there is criminalization, and there can never be criminalization except through a given text. Quite unlike the practice in the man-made law of crime, this principle is under the divine law given a so wide and elastic compass of interpretation that no perpetrator of unbecoming act will escape punishment upon trial and establishment of guilt. The writers follow a doctrinal method of consulting relevant primary and secondary materials of shari'ah to analyze the special salient features of this law which have made combating crimes possible. Upon employing this literary method, the need finding is that combating crimes is not only possible, but also easier, faster and less expensive to engage in.

**Keywords:** Policy, Criminalization, Criminal justice system, Paradigm of analysis.

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## Introduction

The divine nature of Islamic law makes it comprehensive and holistic in grasping at once all that must be regulated in the affairs of man. The Law-giver (*Allahu swt*) is Omnipotent, Omnipresent and Omniscient (all knowing). He creates mankind and knows what catalogue of legislation will best suit their affairs now and in the near and far future. This explains why His laws are never susceptible to review, let alone corrections or amendments.

The focus of the Law-giver always revolves around the interest welfare, and benefit of man. In the same vein, divine legislations are aimed at repulsion or mitigation of turpitude and depravity in the society. This, in an Islamic jurisdiction, often leads to attainment of secured and successful environment where justice is upheld and hope of good living both here and in the hereafter is guaranteed (Tuwaijary, 2009: 12).

In consonance with the above focus of the Law-giver, no prohibited act in Islam will be found to portend true benefit for the mankind except timely benefit mixed up with dark end. In the same vein, a deep look at each of the criminalized acts under Islam will reveal that the prohibition always is informed by an inherent harm in the particular act. The harm may be personal or general to a group of people. It may also be one which has bearing with either the creed, morality, health, economics or any other phenomenon which should be left without exposure to any harmful threat for the welfare of mankind and overall betterment of the society (Zahim, 1991: 31).

Having said the foregoing, the authors' preoccupation in this literary piece shall, among others, discuss the fundamental objectives of *shari'ah* in its penal laws. These are; protection of all interests (*Hifz al-Masalih*), societal sympathy (*Rahmah al-Mujtama'*) upholding of justice (*Iqamah al-'Adl*) and correction of the offender (*Islah al-Jani*). Before analyzing these, it shall be necessary to dedicate attention to a detailed discourse on the conceptual framework of criminalization under Islamic law as well as the distinguishing characteristics of the said criminalization. The ultimate objective in all this is to direct the attention of all to the veritable potential which Islamic law has in curbing all the crimes and other unbecoming acts in the society. It is also in the mindset to show that this legal system (*shari'ah*) has what it takes to achieve a peaceful and serene society where security of lives and properties is guaranteed.

## Conceptualizing *Jarimah*

Literally, the Arabic word '*Jarimah*' or '*Jurm*' stands for offence, crime and delict (General and Scientific Dictionary, 2005: 298). *Jurm* or *Dhanb* is also said to connote guilt or infamy (*Kabirah* or *Amalun Shaain*) (General and Scientific Dictionary, 2005: 298). This same idea of connotation is given for the term *Jarimah* in a pure Arabic dictionary where the morphological origin of the term is given in three alternative formats. These are the three lettered, four lettered and five lettered Arabic verbal forms of '*jarama*', '*ajrama*' and '*ijtarama*' respectively (Al-Munjid, 2003: 88). Each of these three verbal patterns is in the past tense form and they all share the same meaning of "*he or someone has committed a non-civil wrong*" (Al-Munjid, 2003: 88). For their present tenses, '*jarama*' becomes '*yajrimu*', '*ajrama*' becomes '*yujrimu*', while '*ijtarama*' becomes '*yajtarimu*', and they all share the same meaning also in their present tense forms (Al-Munjid, 2003: 88).

Crime as the watchword of the various interpretations of '*jarimah*' further implies a grave offence especially against morality (Robert, 2001: 328). It also connotes violation of law or an instance of this, punishable by the state (Robert, 2001: 328). The usage of the word 'crime' in this concept features in

the glorious Qur'an, where *Allahu swt* says: "Say to them, you will not be called to account for the acts of crime (*'amma ajramna*) that we commit ..." (Q, 34: 25). Another Quranic usage of the term comes in the noun form '*ijram*' from '*ajrama*', the past tense of the four lettered verbal form earlier mentioned. The Quranic portion where this occurs, among others, is where *Allahu swt* says: "If they say, 'he has invented it (*Qur'an*) himself; say to them, 'If I have indeed invented this myself, then may I be punished (*fa 'alayya*) for my crime (*ijrami*) which I have committed; I am innocent of the crimes that you commit" (Q, 11: 35).

Aside the above, it is instructive to note that jurists also make use of the term '*jinayah*' to represent '*jarimah*' in meaning and usage. In this sense, the word '*jinayah*' is often used interchangeably with the words '*jarimah*', '*jarirah*' and '*dhanb*' (Ibn Manzur, 1414AH: 129). In the same vein, '*jinayah*' is also used for '*jurm*' to connote an unbecoming act of man which subjects him to penalty or retaliation here in this life and in the hereafter (Ibn Manzur, 1414AH: 154).

### Technical Concept of *Jarimah*

In Islamic Jurisprudence, '*jara'im*', the plural form of '*jarimah*', as a term denotes proscribed or forbidden acts on the strength of *Shari'ah* either by way of  $\times add^1$  (prescribed punishment) or '*ta'adhir*' (corrective punishment, the residual class of offences/crimes not covered by *Hudud* and *Qisas* offences). At the point of arresting a person by the security agent(s) for committing a *jarimah* (crime) prohibited by the Law-giver, the legal policy of criminalization of Islamic law presumes the person innocent of the crime, being a mere suspect at the time of arrest and ahead of trial. However, with the establishment of his guilt upon trial, he ceases from being so presumed. The judicial verdict would have convicted him in the circumstance. He is then regarded as a convicted criminal. This is a long-time standing principle of Islamic law which seems to have been borrowed later by other legal systems (Al-Mawardi, nd: 192).

Instructions of the Law-giver are said to be disobeyed by violating His commandments and negating His proscriptions. When the prohibitions of *Allahu swt* are violated, what this means is that positive crimes (*Jara'im Ijabiyyah*) are committed, because that is the doing of what is forbidden by the Law-giver such as homicide or *zina* etc. However, the negative crimes (*Jara'im Salbiyyah*) comes in whenever one abstains from performing what *Allahu swt* commands such as abandonment of daily prayers and refusal to pay *zakah* (Shazily, nd: 12).

*Hudud* punishments are nothing but dreadful policies of *Allahu swt* which are put in place in order to achieve resistance from moving near all forms of divine prohibitions. These divine policies (dreadful) are needed as a veritable combatant to play down the negative effect of human penchant for excessive materialism which makes man forgetful of the warning about the torment of the hellfire. Through this, one who is ignorant of the awaiting repercussions of espousing misconducts and unbecoming acts will take caution and get deterred. The fear of the pain of consequential penalties and the ensuing public opprobrium and rebuke therefrom will inspire and inform the deterrence. The impressive implication of this is actualization of the overall societal interest/benefit through unhindered extension of mercy and compassion towards the mankind.

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<sup>1</sup> The plural of *Hadd* is *Hudud*, an Arabic terminology denoting a special category of crimes, seven in number, few of which are mentioned in the Sunnah of the Prophet (SAW) but majority of which are prohibited with prescribed penalties in the Qur'an. They include Theft, Rape, Zinah, Alcoholic consumption etc.

Al-Mawardy, while discussing a similitude of the above issue, refers to a relevant legal Quranic verse “*We have not sent you (Oh Muġammad) to the entire world except that you will be a mercy for them*”. His juristic interpretation of the verse discerns the constituents of this prophetic mercy as his efforts at rescuing the mankind from ignorance, stopping them from engaging in offences and atrocities, and guiding them from delusion to the right path of *Allahu swt*. Al-Mawardy concludes that a combination of these it is which ultimately guarantees restoration of the interests/benefits of mankind here and in the hereafter (Al-Mawardy, nd: 325).

Considering crime (*jarimah*) in the above colouration implies that the unbecoming act of crime has gotten a prescribed punishment, otherwise the notion of crime will not arise under *shari’ah*. This is so because tripartite objectives are usually established as the main goals of Islamic law. These are: reform of matters of the creed (*Islāġ al-’Aqaid*), reform of morals and attitudes (*Islāġ al-’Akhlaq*) and reform of man’s relationship with his creator, the most High and with his society wherein he lives with another who may be alone or a group of people, and while alive or dead. In all these situations, Islamic law has put in place a long list of commandments and prohibitions the compliance with which is meant to actualize man’s benefit and keep man at a distance from harm and discomfort. This arrangement is particularly designed to create a comfortable and secure environment whose stability and peaceful co-existence cannot be threatened by any egoist or dare devil either privately or in public (Shazily, nd: 12).

It is therefore lucid from the foregoing that the need to actualize interest in all forms is the rationale behind criminalization of nefarious acts under Islamic law. Although one may argue that the same objective and goal seems to be the driving force behind criminalization in many other legal systems across the globe, this paper submits that the expansive compass/horizon of man’s interests which the *shari’ah* focuses on is such that has no match in all the man-made laws. As said earlier, the divine and religious colouration of Islamic law is a catalytic factor to reckon with in this respect. In Common law jurisdictions, this beautiful spiritual aspect is lacking, and the compliance rate is ridiculously low. The result is the sporadic spread and littering of crimes and atrocities in those climes (Shazily, nd: 28).

### **Legality of Criminalization**

Criminalization is one of the important elements of criminal law under both *shari’ah* and Common law. The concept of criminalization dates to the classical era when mankind first lived on earth. The need for the concept became more pronounced with realization of the imperative of achieving collective interest of the populace which requires putting in place of strict protective measures for the purpose. For this reason, the policy of criminalization is indeed one of the long existing means in *shari’ah* which is employed to guard and ensure continuous existence of the society under a secured and stable atmosphere.

However, in view of the importance of this concept (criminalization) being an exception to the general principle of permissibility of all acts from the onset, attachment of the need to satisfy the condition of acceptable legality to the said criminalization becomes necessary. The condition is to ensure that only the Law-giver Who Alone has the legislative capacity takes charge of creating crimes from acts of man with corresponding punishments to those crimes. Under Islamic Jurisprudence, this is the function of *Allahu swt*, the creator, whose laws are devoid of shortcomings and thus, not subjectable to reform, repeal, amendment or replacement. This breeds stability and permanence of what the notion of crimes and punishments is in the society. The narrative under the common law is

not completely so (Shazily, nd: 27-28). Below is an array of some Quranic authorities heralding the principle of legality of criminalization under Islamic Law. *Allahu swt* says: “*We made their fate (punishment of despise and turning to apes) an example to their own generation and to those who followed them and a lesson to those who fear God*” (Q, 2: 66). In his exegetic efforts on the verse above, Al-Sha’rawi refers to the policy of criminalization under *shari’ah* as discernible from the verse. As he puts it, those made to turn to apes, despised were transgressors of *Allahu swt*’s instructions and they have been forewarned (Al-Sha’rawy, nd: 387). The scholar (exegete) further refers to another Quranic authority similar to the one under reference as an additional proof of the principle of criminalization from the Qur’an. The scholar’s comment on this other authority “... *We shall not punish until we have sent forth a messenger to forewarn them*” (Q, 17: 15) is that the messenger sent by *Allahu swt* had the duty of explaining what acts crimes and their penalties were. The paper concurs with Al-Sha’rawi’s position that there is justification for carrying out the prescribed punishment(s) at any particular time on an erring member of the society who chose not to heed the warning by engaging in the forbidden act(s) of crime.

There are other similar proofs in the Qur’an, such as 2: 209, 5: 19, 8: 20, 14: 52, 22: 8-10, and 26: 208-209, on the platitude that criminalization always precedes infliction of prescribed punishments under the *shari’ah*. Still on this position of Islamic law, Ibn Ashur is said to have commented on Qur’an 17 verse 15 in the same way with the pattern of Al-Sha’rawi (Ibn Ashur, 1984, vol. 15: 51 and Tantawi, nd, vol. 4: 120) as earlier paraphrased. What this points to is that the admonitions and sermons by the messengers of *Allahu swt* to the people in their community are but a message of criminalizing unbecoming acts and misconducts which are to be followed by appropriate penalties. This platitude is clear from a portion in the Qur’an which narrates pitiable scene of homicide which transpired between two out of the wards of Prophet Adam ‘AS, Qabil and Qabil. The Quranic verses which contain the episode are herein under quoted in part;

If you raise your hand to kill me, I will not raise mine to kill you. I fear God, the Lord of the Universe, and I want you to bear your sins against me as well as your own sins and become an inhabitant of the fire. Such is the reward of the wrongdoers (Q, 5: 28-29).

Almost immediately after the Quranic rendering of the above verses on Qabil and Qabil episode, the verse that follows also contains an exposition that legality of criminalization in Islamic law usually comes ahead of the infliction of punishment. It reads as follows;

That was why we laid it down for the children of Israel that whoever killed a human being-except as a punishment for murder or for spreading corruption in the land shall be regarded as having killed all mankind, and that whoever saved a human life shall be regarded as having saved all mankind. Our messengers came to them with clear signs, but many of them continued to commit excesses in the land (Q,5: 32).

In his exegesis of the Qabil and Habil Quranic verses earlier rendered, Üanİawi offers a comment which is descriptive of many measures employed by Habil (the victim) to dissuade his violent brother from going ahead to murder him (Habil). At start, Habil was said to have told Qabil to be among the pious from whom alone *Allahu swt* accepts the deeds of worship. Thereafter, Habil referred his brother to the rights of brotherhood (*Ukhuwwah*) which entail intense exchange of love, softness and tolerance. The third and fourth measures as discerned by Tantawi touch on Habil’s self-deprivation from revenge

due to fear of *Allahu swt* and his dislike for the punishment of hell fire on the day of resurrection if he should also commit murder (Tantawi, nd, vol. 4: 120). The authors submit that a careful perusal of those measures shows well rootedness of the policy of criminalization of misconducts ahead of punishment infliction in Islamic law of crime.

In the same vein, the Sunnah of the Prophet *s'aw* also contains an avalanche of evidence on this policy in Islamic law of crime. One of these is a narration by Imam Muslim in his *Sahih* compendium of prophetic sayings. In the *hadith*, Mu'awiyah, the son of al-Hakam al-Silmy, and a disciple of the Prophet *S'aw*, entered the *Masjid* and joined an ongoing *salat* being observed. While the prayer was still on, someone in the congregation sneezed and Mu'awiyah spoke out to tell him '*yarhamuka Allahu*' (May *Allahu swt* be merciful to you) usually offered upon sneezing by one. Mu'awiyah said this out as he wasn't aware at the time that allowance to talk during prayer sessions had been abrogated. He was thus surprised that nobody responded to him upon making the statement. He also noticed that worshippers stared at him in a way. He queried the look instantly and the worshippers resorted to the use of hand signals to quieten him.

According to Mu'awiyah in the *Hadith*, Mu'ammad *s'aw*, at the end of the prayer, "*proved to be the best teacher, correcting me in the mildest mode without shouting nor beating nor rebuking me*". Mu'awiyah quoted the Prophet *s'aw* as further saying that "*it is no longer valid to communicate while offering salat. Rather, worshippers should restrict themselves to the acts of glorifying and magnifying the name of Allahu swt as well as Quranic recitation*" (Muslim, hadith 121). Imam al-Shafi'i expatiates the concluding part of this scenario by stressing the link between the offence and the preceding criminalization (Al-Shafi'i, nd, vol. 7: 268-269). The paper hereby adopts his position.

The prophet *s'aw* did not punish Mu'awiyah in whatever form when the prayer was over. Not even a punishment under the residual class of offences (*ta'azir*) was invoked. This possibly was due to the fact of recency of the new law at the time, which abrogated communication while praying. So, the recency of the new law at the time must have been liberally considered to have warranted treating the communication by Mu'awiyah as a crime-free act. This implies that the situation was regarded as if that act by Mu'awiyah in the *Masjid* had not been criminalized at the period. Thus, no punishment was inflicted.

There is a number of other sayings of the Prophet *s'aw* on the application of the legality of policy of criminalization in Islamic law. One of them goes thus;

Verily, the spilled blood of the pre-Islamic period (*Jahiliyyah*) shall not be queried. Same thing applies to the usury (*Riba*) engaged in at that period. However, my starting point of prosecution on these two will be the unlawful blood spilling of al-Harith 'Abdul-Mutallib's blood and the usury practice of my uncle, al-'Abbass the son of 'Abdul-Mutallib respectively (Muslim, hadith 1218).

The Prophet *s'aw*, aside the above, is reported to have said, pointing to Amir the son of Al-ÑAsy that "*Islam condemns and overlooks all the nasty pre-Islamic practices*" (Muslim, hadith 537 and Jami' hadith 2265). It is from the totality of the above Quranic and prophetic authorities and similar others that jurists developed two jurisprudential maxims. These two are believed to be the offshoots of the Islamic law principle "*No crime and no punishment except there is a legal text/proof of it*". One of the two jurisprudential maxims is "*compulsion does not precede legislation*". The second maxim is "*everything is permissible from the onset*" (Al-'Awa, 1983: 58-59).

### **Connotations of the Policy of Criminalization**

In his *al-Muqaddimah*, Ibn KhaldĒn describes crime as a societal occurrence often experienced here and there. To combat or mitigate it, he suggests the need for a good and caring administrator before whom welfarism of subjects is crucial. Such a person will always rule his people in consonance with the laws of *Allahu swt*. And where the circumstance warrants, he may employ his well guided intellect to determine some given affairs of the followership. Where applying the latter approach, he must be mindful of taking measures that will be compliance – driven for the subjects (Wahid, 1996: 156). This is what is technically referred to as the Policy of legality which is defined in some quarters as: Making room for the doing of what easily leads to the good and equity of people and for the neglect of what leads to corruption among people. This should be the ultimate goal and objective in all societies whether or not it is mentioned in both the Qur'an and the Sunnah (Ibn Qayyim, nd, vol. 3: 3).

Further, this has also been conceptualized as a discretionary expansion open to those in charge of the affairs of mankind to do whatever will make man realize his lawful interest. This must always be done by the leadership even when no legal authority is on ground to back it up (Hasary, 1993, vol. 1: 106). The only caution is to be wary of such being in clash with the basic principles of Islam.

Having said the foregoing, it is perhaps most appealing to succinctly say that the policy of the legality of criminalization lies in doing what best secures man's interest and what best protects man from harm or corruption. This objective should always be sought after when complying with the laws of *Allahu swt* on ground or while exercising personal reasoning efforts of jurists at discerning Islamic law rulings where the law is silent or unclear. Adequate consideration must always be given to this thought in all affairs of man – be it economic, political, administrative, cultural, moral, social or otherwise. Sight must also not be lost of this great concern in times of choice or necessity and in periods of peace or war (Busaq, 2002: 15).

By and large, striving towards actualization of man's interests/benefits and prevention of what can harm him is the twin purpose of the policy of legality under discussion. The criminal policy of Islam is an integral part of the entire policy of Islamic law. They both aim at solidifying the twin purpose highlighted above by shutting the door against any evil that is envisaged or that can come from committed crimes if the crimes are prevented. The said twin purpose is further guaranteed by the government efforts at providing security to the masses on their lives and properties and upholding their fundamental human rights and other similar rights. Policy of criminalization and prescription of harsh punishments in some instances as well as the institution of *ta'azir* are also all in place in order to protect man's interest and guide him against evil.

Corollary to the above, Islamic law places high premium on good morals and considers same as the foundational pillars of integrity and stability for the society. This is why the legal system of Islam punishes all acts of mankind which are considered crime-like and contrary to good morals (Awdah, nd, vol. 1: 69). Upholding of high moral standard in the society is in a way a fulfilment of the religious instructions on good conducts as this is the bedrock of having a righteous society. It is also the major goal which the objectives or purposes of *shari'ah* (*Maqasid al-Shari'ah*) are designed to attain (Awdah, nd, vol. 1: 70).

These objectives come in five basic principles and the most important of them all is protection of faith or religion (*Hifz al-Din*). The position of primacy which this particular objective enjoys is informed by its status as a major key player in the regulation of Islamic environment/society. Apostacy

(*Riddah*) is made a serious offence with corresponding harsh punishment under Islamic law of crime in order to ensure that the religion (*Din*) remains strongly preserved.

Protection or preservation of human soul (*Hifz al-Nafs*) is the next objective of *shari'ah* in the order of importance of the entire five. It is with a view to preserving the life of man that all forms of unlawful attack against it are criminalized with serious penal consequences. After this comes the protection of intellect (*Hifz al-'Aql*). The need to preserve human intellect gives rise to forbiddance of liquor, consumption of harsh drugs and all other forms of intoxicant. Protection of the objective of property or wealth (*Hifz al-Mal*) in its own case necessitates the prohibitory stance of Islamic law towards of theft (*Sarqah*), usurpation (*Ghasb*), fraud/cheating (*Ghissh*) and deceit (*Najash*). As for protection of progeny or family (*Hifz al-Nasl*), Islamic law recognizes and values the need to preserve this objective and thus, unlawful sexual intercourse (*Zina*) and wrongful accusation of chaste women (*Qadhf al-Muhsanat*) for coitus are proscribed by the law (Usayni, 2017: 173).

Generally speaking, the entire five purposes or objectives of *shari'ah* highlighted above are divided by al-Ghazali into two broad divisions; purposes of the hereafter (*Diniyy*) and purposes pertaining to this ephemeral world (*Dunyawiyy*). Further, each of these twin typologies is divisible into securing of the interest (*Tahsil*) and preservation of the interest (*Ibqa'*). *Tahsil* is the securing of a benefit (*Manfa'ah*) and *Ibqa'* is the repelling of harm (*Madarra*). The phrase 'preservation of the *Maqasid*' (*Ri'ayah al-Maqasid*) is used to indicate both *Tahsil* and *Ibqa'* (Al-Ghazali, nd: 142).

The worldly purposes (*Dunyawiyy*) are constitutive of the last four of the five purposes of *shari'ah* i.e., the preservations of life, intellect, wealth and family or progeny. Each of these four purposes is meant and created to serve the sole purpose of the religious objective (Nyazee, 2000: 202). This explains the authors' earlier submission that the purpose of religion is the most important of them all.

The purposes of *shari'ah* are an important and yet somewhat abandoned science of the *shari'ah*. The *shari'ah* is generally predicated on benefits to the individual and the community, and its laws are designed to guard these benefits and to facilitate the improvements and perfection of the conditions of human life on earth. The authority in the Qur'an which is expressive of this singles out the most important purpose of the prophethood of Muhammad thus "we have not sent you but as a mercy to the world" (Q, 21: 107). This can also be seen in the Quranic characterization of itself as "a healing to the (spiritual) ailments of the hearts" and "a guidance and mercy" for the believers and mankind (Q, 10: 57).

Numerous instances abound in the Qur'an where the purpose, rationale and benefit of the laws of Islam are explained in a way to see that the laws are goal-oriented. This trait of the Qur'an reflects through both ritual worship (*Ibadah*) and civil transaction (*Mu'amalat*) (Kamali, 2009: 396). This calls for the addition by the Law-giver on the ritual of ablution (*Wudu'*) that "Allahu does not wish to inflict hardship on you, but to make you clean and to complete his favours on you" (Q, 5: 6).

The somewhat detailed exposition on the science of *Maqasid al-Shari'ah* above is to explain the nexus between criminalization of unbecoming acts and the *Maqasid* in Islamic law. Criminalization as reiterated above is done to acquaint the populace in the society with criminal acts that would warrant infliction of the punishments on the perpetrators. Exception in a responsible society is for the subjects to shun crimes and behave responsibly. Their knowledge of the prescribed punishments on ground is sufficient to infuse good conduct in them which implies that their benefits and interests are not tampered with, and their interests are kept protected. This is the good result which comes from the

synergy of criminalization and *Maqasid al-Shari'ah*. More indices of this result shall be observed in this discourse on the features of the policy of criminalization under *Shari'ah* which shall come up immediately after the philosophy of criminalization hereinbelow.

### **Philosophy of Criminalization in Islamic Thought**

The Islamic idea of the reason behind the spirit of criminalization under *shari'ah* depends upon the standpoint of the monotheistic school of thought being considered. For instance, the ideology in the *Jabariyyah* school views human being as lacking the power to create his deeds (Al-Sabky, 1998, vol. 4: 961) as he also lacks freewill (*Iradah*) and choice making or power of selection (*Ikhtiyar*). In this monotheistic school, man is absolutely a weapon just like the knife in the hand of a cutter (Al-Ansari, 1936: 167).

The school ratiocinates the above position on the argument that *Allahu swt* alone is the Creator of all things including the state of mind of man and his deeds. This, as the school puts it, means that human beings are not to be reckoned with in the initiation and control of what they do. It will be unacceptable to so reckon with them even if it is on the basis of allegory or metonymy (*Majaz*) (Usayni, 2017: 173). The implication of this ideology is impropriety of obligating man to do good on earth since the active power to select the type of deed to be done does not reside in him but in *Allahu swt* (Al-Aġġar, nd: np). The conclusion in the school from the foregoing is invalidity of either rewarding or punishing man respectively for the good he does or neglects.

*Mu'tazilah* also maintains the point that *Allahu swt* is the Creator of all things. However, they go further by saying that man is endowed by *Allahu swt* with the innate power to create his freewill, deeds and the causative factors for his deeds. The school justifies the grant of human reward and punishment infliction on him with this explanation (Usayni, 2017: 173). In support of this stand, reference is made to the Quranic provisions “*We showed him the way, whether we shall be grateful or ungrateful*” (Q, 76: 3) and “*Have we not shown him the two paths?*” (Q, 90: 10).

Another monotheistic school, the *al-'Asha'irah*, is the last school to consider its idea of Islamic thought on the policy of criminalization. The doctrine in this school shares the conviction that human beings are divinely endowed with active powers and capacities and with free wills. However, the school believes that no effect is to be accorded to these powers of man in the ability to perform his deeds. He has the power to initiate a state of mind to perform a deed. It is *Allahu swt* Who has the ultimate power to enable him to actualize his intended action and so, he is considered as being in charge of what he does. *Allahu swt* is Only The Enabler of his deeds (Ibn Ashur, 1984, vol. 15: 51).

After having relayed each of the ideas in the tripartite monotheistic schools mentioned and discussed in relation to the rationale behind criminalization, this paper submits in favour of the *Mu'tazilites'* opinion. In their school of thought, which the paper aligns with, *Allahu swt* is the Ultimate Creator of all things but He enables man the power to think and initiate his state of mind on what he wants to do. He also enables him to forge ahead and carry out the thought in his mind. According to this opinion, the consequence of whatever man does has been made known to him as he has also been equipped with the divine knowledge of what is good to do and what is not. This is the justification by *Allahu swt* to either punish or reward mankind depending on what they choose to do.

On the other way round, to go by the twin stands of both the *Jabariyyah* and *Al-'Asha'irah*, this paper observes some form of injustice traits therein. It seems unjust in the thinking of the authors to punish some and reward others on different deeds, none of which man (the doer) possesses the capacity

and power to do. This is the standpoint of the Jabariyyah whose view sees *Allahu swt* as The Enabler of man in all that he does – whether good or bad. The position by the authors is that this opinion will unconsciously locate injustice on the side of *Allahu swt* as punishment of and reward for man in the circumstance will be for what man does unwillingly. This will be a sort of absurdity which is against the practice of *Allahu swt* who stresses in the glorious Quran that: “*Whoever does what is just and right, does so for his own good; and whoever does evil does so to his own detriment; and God is never in the least unjust to His creatures*” (Q, 41: 46).

Akin to the above is the authors’ reaction to the perspective of al-‘Asha’irah on the issue at hand. To them, man is in control of forming his own state of mind to do anything – whether good or bad, but they don’t see man as having the active powers to carry out such mindset. According to them, to do these falls within the exclusive preserve of *Allahu swt* Who helps man carry such out usually. This paper does not seem comfortable with the conclusion in this monotheistic school as it will be unjust to punish man for doing bad when, in the true sense of it, he is not the real and actual doer, but *Allahu swt* as explained above. This paper maintains same position with respect to one who is to be rewarded for doing good. In so far as the ‘Asha’irah see all deeds of man as being powered and enabled by *Allahu swt*, and not by man, to reward such a man will in the circumstance be like a benefit offered without justification. This will be tantamount to manifestation of partial practice from the side of *Allahu swt* which is an impossible phenomenon on the strength of the earlier quoted Quranic verse, Qur’an 41 verse 46.

By and large, the submission of the paper favours the line of thought of the Mu’tazilite monotheistic group which accords man the freewill to choose the deeds he performs – whether good or bad – after having being shown the way forward and the correct path. Not only this, he is also acquainted with the penal and juicy consequences awaiting his bad and good deeds respectively. Thus, it is in furtherance of the need to equip man with the necessary knowledge he requires in life that *Allahu swt* through *shari’ah* criminalizes certain unbecoming acts ahead of committing the acts. Anyone who neglects the cautionary words of *Allahu swt* and decides to espouse the ugly acts would therefore find nobody but himself to blame. There would be no injustice or cheating if such a person is made to meet his Waterloo and face some horrible end as punishment of his criminal act which he has been forewarned against.

### **Characteristics of the Policy of Criminalization under Islamic Law**

As said somewhere in the beginning of this paper, the pattern of Islamic law in its policy of criminalization is such that places emphasis on comprehensiveness and sublimity of *shari’ah* over and above all other legal systems – whether spiritual or man-made. Above is expressive of some of the characteristics of the Islamic law policy of criminalization. Aside these two, other basic features in this regard are graduality in the Islamic criminal legislation and focusing on the generality of the legislation approach instead of restrictive fractional approach over matters. By design, this paper has chosen to deliver in a detail of some sort, into the analysis of the last two characteristics mentioned above for lucidity and precision.

### **The Point of Graduality**

The state of absolute permissibility (*Ibahah Mutlaqah*) in which the pre-Islamic Arabs had been with respect to all affairs and acts necessitated the legislation of Islamic law to be gradual in making upon the advent of Islam. This graduality approach was also the fate of Islamic criminal legislation as an

integral part of the entire Islamic law. At that early period, a number of Arabian practices were found to be anti-human interest. The change of tune required by the dawn of the new religion (Islam) was so enormous and the targeted people could be discouraged from the religion if they were to be mandated to eschew all the vices once and for all. The characteristic mercy and sympathy (*Rahmah*) of Islam towards its adherent then came into play and the new reformative rules of the divine legal system started coming in piece meal to suit the peculiarity of the people, and not as a whole bundle of laws descending at once (in 'The Policy of Criminology under the Islamic Penal System', prepared by students of College of Law, Tanjah, 2003/2004, p. 5).

A most relevant example to drive home this point of graduality is perhaps the prohibition of alcohol which came in stages before finality of its proscription was announced by the Law-giver (Al-Qattan, 1998: 54). Earlier, the Arabs, in the pre-Islamic era, were so accustomed to the practice of liquor consumption to the extent of incorporating and reflecting the praise of it in their prose and poetry. The Law-giver considered their depth in and intensity of this practice and the end result out of divine sympathy for them was *Allahu swt*'s resort to forbidding it in stages (Abu Ja'afar, 2000, vol. 4: 334). The first Quranic declaration against it presents the issue in a not too clear manner, but which can only be understood through pragmatism. The relevant Quranic verse here says: "*From the fruit of the date palm and the grapes, you derive intoxicants as well as wholesome food. Surely in this, there is a sign for men of understanding*" (Q. 16: 67).

The above verse merely draws a wall of difference between lawful foods and intoxicants. As put by al-Qurtuby, the inclusion of the preposition 'as well as' after the mention of intoxicants (*Sakaran*) in the verse is an indication that 'wholesome food' which is stated after as well as is not in the same unpleasant category with 'intoxicants' mentioned first (Al-Qurtuby, 1964, vol. 12: 128). From that early stage, some disciples of the Prophet *s'aw* were able to discern the point of prohibition but they couldn't keep off from consuming it (Al-Qurtuby, 1964, vol. 12: 128). After the first stage above, *Allahu swt* says: "*They ask you (Prophet) about alcohol and gambling. Say 'There is great sin in both, although they have some benefit for people: but their harm is greater than their benefit...'*" (Q, 2: 219). Upon revelation of this second stage Quranic verse, some Muslims in the prophetic era abandoned consumption of the illegal liquid content for disdain of the sin therein and fear of the depravity it portends (Usayni, 2017: 173). On the third stage of proscription of the unlawful drink, some Muslims were still taking it but only after '*Isha*' and before *Subh* prayers (Usayni, 2017: 173). The tone of the prohibition at the third stage limits the forbiddance to the time of prayers and thus, the Muslims who still took it went ahead but they honoured the time of prayers. The relevant verse here reads: "*Believers, do not approach your prayers when you are drunk, until you understand what you say...*" (Q, 4: 43).

After the above came the last stage of prohibiting alcohol consumption. The tone employed here is definite and unequivocal. The relevant Quranic verse at this stage doesn't mince word in declaring liquor as devil's work which has the propensity to lead man to turpitude and pervasion and which can bring about brain disorder in man. *Allahu swt* says in the relevant Quranic verse at the final stage under reference:

Believers, intoxicants and gambling and (occult dedication of) stones and divining arrows are abominations devised by Satan. Avoid them so that you may prosper. Satan seeks to sow enmity and

hatred among you by means of wine and gambling, and to keep you from the remembrance of *Allahu* and from your prayers. Will you not then abstain?" (Q, 5: 90-91)

In complementing the finality of prohibition of alcohol as shown in the content of the Quranic verse above, the following two prophetic sayings are directly apposite. The first one says: "*it is unlawful to consume small quantity of what intoxicates in its large quantity*" (Al-Tirmidhi, hadith 1865 and Abu Daud, hadith 3681), and the second says:

The messenger of *Allahu swt s 'aw* reported *Allahu swt* as having cursed ten people in connection with alcohol; the one who presses it, the one who demands that it be pressed, the one who carries it, the one to whom it is carried, its driver, its seller, the one who drinks it, the one who buys it, the one for whom it is bought and the one who consumes its price (Al-Tirmidhi, hadith 1295; Ibn Majah, hadith 3380 & 3381; and Al-Maqdisi, 2000, vol. 6 hadith 2187–2190: 182)

### **The point of General Focus of Islamic Legislation**

Ibn Ashur's comment on the universal nature of each of the legislations of Islam is relevant here. As he puts it, each branch of law under Islamic legal theory is developed in a manner so comprehensive and elastic as to accommodate all species of conditions – whether existing or not – that may be ancillary to the particular condition(s) being treated under a given branch of law. This has the potential of non-elusion whatsoever, in the handling of all familiar or similar matters in all environments to the branch of Islamic law already treated (Ibn Ashur, 2011: 317).

Islamic criminal law is a part and parcel of general Islamic law and thus, Islamic criminal legislations must be reflective of this generality or universality of approach in its holistic contents and exhaustive comprehensiveness. An additional factor for the largeness of horizon in this regard is non-susceptibility of Islamic criminal law and the entire Islamic law to modulation, alteration, amendment, repeal, or replacement. This feature of the divine legislations will make same embrace the trait of flexibility (*Murunah*) and generality (*'Umum*) in their constructive methodology. The wisdom in this is for such legislations to possess the potential to flow with whatever human development and modernization which may be introduced newly at any place or time.

The universal peculiarity explained above usually opens a wide platform of opportunity to those in charge of governance in an Islamic law environment to always encourage enlargement of the policy of criminalization. This enlargement concept will enable accommodation of all subsequent emerging acts of misconduct similar to the ones already criminalized. Ibn Ashur supports this position and submits that the concept of the purposes of Islamic law (*Maqasid al-Shari'ah al-Islamiyyah*) is against the idea of branchment (*Tafri'*) in the exercise of legislation (Ibn Ashur, 2011: 401).

In his further comment on the generalization concept, Ibn Ashur refers to Islamic rulings on the issue of worship (*Ibadat*) as being about the most monotonous and segmented *fiqh* topic ever discussed. According to the jurist, the peculiarity of the topic requires such depth in its discussion. Other issues such as transactions do not attract such length or detail of analysis and exposition except in limited optional matters (Ibn Ashur, 2011: 401) where surrounding circumstances go against permanence of some Islamic rulings (Ibn Ashur, 2011: 401). Ibn Ashur on this notes the appropriateness of placing concern by the *Faqih* on the descriptive attributes of something which has gotten a ruling, rather than the specific name of the thing.

He notes further that following the pattern of descriptive attributes would leave enough space behind to incorporate other items similar to the earlier attributes (Ibn Ashur, 2011: 409). Through this, the

mistake of categorizing the snuffing of tobacco leaves as hemp is not likely to occur again. The mistake was propelled initially because hemp was the name by which snuffing of tobacco leaves was called in the beginning of 18<sup>th</sup> century when snuffing the leaves was first known. Some jurists at the time made the mistake of declaring the snuffing practice a prohibited act. This was because of the name calling (hemp) then instead of placing reliance on the descriptive attributes of the particular item (Usayni, 2017: 173).

### **Theft as a Case Study of Criminalized Act**

Theft or *Sarqah* is a known unbecoming act of taking what belongs to another person and converting it to one's with a mind of disintitling the original owner of its ownership and use forever. The Quranic verse which criminalizes theft prescribes hand amputation as punishment for it (Q, 5: 38). The jurists have conceptualized *sarqah* as taking away something secretly without the knowledge and consent of the true owner. If the item is taken away in the presence of the owner while not being coerced nor overcome in a contest, the act will not be regarded as theft, but defalcation or larceny (*Ikhtilas*). However, where a property is taken behind the owner but with his consent, no crime at all has taken place (Abu Zahrah, nd, vol. 2: 122).

From the above definition, one can conclude that the following are the pillars of this crime (theft); secret taking of the property, that ownership of the property belongs to another and to form criminal intent to carry out the act. The Quranic verse earlier referred to is identified with comprehensive criminalized ruling that is not delimited by branchment or compartmentalization. To this extent, all other subsequent similar acts which share the same attributes with theft (*sarqah*), which is already an act of crime, shall so be judged and categorized. The same prescribed punishment for theft will also be applicable to all the similar case(s). These include all the modern-day theft-related crimes such as computer and internet-induced fraud, invention and copyright fraud and all other recent forms of property which were crimes not in the reckoning when the Quranic verse on theft was revealed. This is the verse whose general horizon and flexibility allow this subsequent extension.

### **Conclusion**

What often comes to thought on why some unbecoming acts are criminalized in various legal systems around the globe is the usual need to show that laws must always be forward looking and not otherwise. To punish someone for committing a reprehensible act, which is outside the catalogue of crimes in a given jurisdiction and has gotten no specific penalty earlier stated, is in sharp contradistinction to this age-long practice. This paper has established that *shari'ah* had been in tandem with this phenomenon much long before same was known in the common law spheres.

Also stressed in this work is the availability in *shari'ah* of the residual class of offences (*Ta'azirat*) by which an Islamic Judge is vested with the discretionary powers to punish even where the act of condemnation committed has not been earlier criminalized. This excellent arrangement is an exclusive preserve of Islamic law with no equivalent whatsoever in the man-made laws. The paper has also discussed an additional layer of special advantage of Islamic law in this regard. This is the feature of generality of interpretation and focus on issues under Islamic legislations. This often is based on the comprehensive and elastic attributes of the various legal issues being addressed rather than having concern being placed on specific names of issues which may be quite narrow, restrictive and

unreceptive. All these, as the paper submits, are extra miles and further extent the divine law of Islam has gone in actualizing its pro-people policy on criminal justice system.

By criminalization, this paper has pointed out that the major reason behind its concept is to create an enabling environment for realization and actualization of human benefits or interests on the surface of the earth. The comprehensive and holistic nature of the *shari'ah* provisions on criminal law has been discussed in the paper by revealing the reason behind it as the penchant for not leaving out any escape route for perpetrators of crime. As explained in the paper, achieving this objective will surely pave way for the main purposes of *Shari'ah* (*Maqasid al-Shari'ah*) to be realized with dispatch. This is the super connection between the theme of this treatise and the science of *Maqasid al-Shari'ah*. It is thus recommended that attention must always be drawn to the discerning and intellectual capacities of judges in Islamic law jurisdictions and in other jurisdictions where there is window of Islamic law application. This is with a view to ascertaining that judges at the helms of affairs in those courts will make it a herculean task for perpetrators of reprehensible acts to escape penalties merely based on same acts being unlabeled as crimes. This should be the most correct norm which appeals to reasoning and to go contrary will to say the least be counterproductive.

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