

VIEWPOINTS

Exploring Facets of Islam on Security and Peace: Amnesty and Pardon in Islamic Law

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Amnesty, pardon, and forgiveness are the means, in Islamic theology and law, as in most other world traditions, of relieving someone from punishment, blame, civil liability or religious obligation. The same result is often achievable by recourse to certain other methods such as reconciliation, arbitration, and judicial order. The *fiqh* positions explored here derive from the Qur'ān, normative teaching or *Sunnah* of the Prophet Muḥammad and general consensus (*ijmā'*) of scholars for generations. Yet instances are found where *fiqhī* interpretations of the relevant scripture are reminiscent of historical settings and conditions of their time, which may, upon reflection, warrant further scrutiny and interpretation more in tune with the contemporary conditions of Muslims. These have occasionally been explored in a quest for alternative answers. This approach is in line with the spirit of *ijtihād* that seeks the continuity of scriptural guidelines and their application to the changing conditions of society. A mere reproduction of scholastic positions is not always the best approach, not even recommended by the leading Imams and thinkers of Islam.

Amnesty and pardon would be insignificant without the reality of an adverse consequence or punishment. For pardon without the ability to strike back is tantamount to helplessness and anger without recourse. Yet reconciling pardon and punishment in the sphere of criminal justice, especially in a post-conflict setting, poses questions often of conflicting interests. At the theological level, the Qur'ān clearly tells Muslims that God is both merciful and just, but how does the law meaningfully reconcile these two objectives? How can people act with mercy and forgiveness when a crime has been committed against them? These questions raise issues sometimes beyond legalities. Textual guidelines and *fiqh* rulings on justice, mercy, repentance and forgiveness are not always self-evident nor provide for facile combinations. Developments in science, economic conditions, education and culture of Muslim communities, not to mention tribalism and entrenched customary practices, also reflect on the *fiqh* positions. Phases of development and modernist culture may bring up patterns of behaviour and accentuate fear of rampant mischief-making by individuals and groups that call for more rigorous legal interpretation. In a post conflict setting, the quest for healing and social harmony may sometimes need to look

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beyond legalities. Hence it is important to reflect on some of the broader teachings of the Qur'ān and Prophetic teachings and *Sunnah*, as well as principles, such as that of *siyāsah shar'īyah* (*shar'ah*-oriented policy) that provide for a measure of flexibility and pragmatism.

ʿAfw literally means omission (*isqāt*) or waiver and it is defined as exempting the wrongdoer by not taking him to account. Another Arabic synonym of *ʿafw* is *al-ṣafh*, which means to turn away from someone but also to widen the space and incline toward reconciliation. In this sense *al-ṣafh* involves taking a step beyond *ʿafw*. In *fiqh* terminology, *ʿafw* means a waiver of a duly warranted punishment for wrongdoing – this being the special meaning of *ʿafw* as *ʿafw* does not always lead to omission of punishment.

The Qur'ān and *Sunnah*: An Overview

ʿAfw is a major theme of the Qur'ān and takes a high profile in the Islamic order of values, being the subject of over thirty verses in the Qur'ān that subsume legal, religious, moral and cultural dimensions. The Qur'an often speaks in praise of those who take a forgiving attitude toward people; *ʿafw* is designated as a manifestation of *ihsān* (beauty and goodness; 2:178). Then also God associates His illustrious self with forgiveness and speaks of His love and affection for those who forgive without vindictiveness, especially when they are overwhelmed with the urge for revenge (3:134). Pardoning is especially meritorious when granted by someone who can avenge but chooses to exonerate and forgive. Yet Islam also puts a high premium on justice that may well demand sternness, especially from a leader or judge, to bring the wrongdoer to account. Justice and forgiveness often moderate and temper one another but can also conflict. To quote the Qur'an:

God commands justice (*al-ʿadl*) and the doing of good (*al-ihsān*) and generosity to one's kindred, and He forbids indecency, wrongdoing and oppression (16:90).

Justice in this verse is joined side by side with *ihsān*, and the juxtaposition implies that it is not always the measure-for-measure approach that is desired; justice should be tempered, whenever appropriate, by *ihsān*, which in this context can imply amnesty. Punishing the wrongdoer is the normal course enjoined by the *shar'ah*, but amnesty may be preferable at times. God thus praises

Those who spend in the way of God, in times both of prosperity and hardship, and those who control their anger and forgive their fellow humans. Truly God loves the *muḥsinīn* (those who persist in *ihsān*) (3:134).

Elsewhere the Qur'ān speaks of proportionality and equivalence in punishment, but espouses it in the meantime, with a recommendation for forgiveness:

And the recompense of an evil is an evil equal thereto, but he who forgives (an evil deed) and seeks reconciliation, his reward shall be with Allah, and Allah does not love the wrongdoers (42: 40).

The succeeding passage in the same *sūrah* then reads:

But (remember) one who endures with fortitude and forgives, that indeed is a most distinctive of all deeds – *min ʿaẓm al-umūr* (42:43).

The Qur’ān also ordered the Prophet to “hold to forgiveness, enjoin kindness, and turn away from the ignorant” (7:199). Amnesty and kindness thus go hand in hand and the one is indicative of the sincerity of the other. As for those who fall in error out of ignorance, one is best advised to turn a blind eye and not let oneself be provoked by their behaviour. The Prophet himself strongly praised the virtue of Forgiveness, as in the *ḥadīth*: “forgiveness does not fail to bring honour to a servant of God when he grants it (for His sake).”¹

Al-ʿAfuww (most forgiving) is one of the Excellent Names of God as in the verse: “whether you do good openly or in secret, whether you pardon the misdeeds of those who wronged, God is Ever-Forgiving, All-Powerful (*ʿAfuwwan Qadīran*) (4:149).” Interestingly enough, God’s act of pardoning is here juxtaposed with His ability to do otherwise. Pardoning is also a distinctive virtue of Prophets and should therefore be emulated by everyone, especially in dealing with one’s parents and family.²

Amnesty and Repentance: The *Ḥudūd* Crimes

There is a logical connection between repentance (*tawbah*) and amnesty, as amnesty is usually due when the offender shows remorse and repents. Muslim jurists have also discussed amnesty and repentance in the context of *ḥudūd* penalties (note that *ḥadd* and its plural *ḥudūd* are used for prescribed crimes and punishments both) and *qisās* (just retaliation).

Looking at amnesty and *ḥudūd* together, it is to be noted that *ḥudūd* consist of two main components, namely the Right of God (*ḥaqq* Allah) and Right of Man (*ḥaqq al-adamī*), or a combination of the two. The legal consequences of amnesty vary according to the manner in which it relates respectively to infringement of the Right of Man, or private right, and the Right of God, or public right. Juristic views vary on which of the *ḥudūd* crimes consists of each of these rights and in what proportion.

Tawbah

Tawbah (repentance, atonement and self-correction) is a major theme of the Qur’ān, occurring in over 120 places, and much emphasis is also found in the *Sunnah*. This circumstance is undoubtedly reflective of Islam’s essence of forgiveness, without

compromising on the rule of law aspect of combating lawlessness and crime. Only with regard to terrorists and highway bandits is there a limitation in the text as already reviewed. The wider implications of that verse regarding other *ḥudūd* penalties have also been seen in two different ways, one in favour of repentance and amnesty, even after subjugation and arrest, and the other against. Textual interpretation on penalties should be on the side of leniency, as is indicated in the following hadith:

ʿĀ'ishah reported that the Prophet said: "Suspend the punishments whenever there is doubt (*idra'ū 'l-ḥudūd^a bi 'l-shubhāt* – note that *ḥudūd* at that time was used in reference to all punishments, not to *ḥudūd* alone as this expression acquired a technical meaning much later) and find a way out of them for Muslims whenever you can. If the Imam errs, it is better that he errs on the side of forgiveness rather than punishment.³

The present writer has elsewhere discussed repentance in the Qur'ān with a view to integrating it into the theory of *ḥudūd* in a wider study. I have advanced the view that when reformation and repentance are so integrated into the fabric of *ḥudūd*, then one must depart from the notion that *ḥudūd* are fixed and mandatory penalties over which the judge, the head of state and *mujtahid* have no role other than enforcing them upon proof. For juristic strictures that characterises the *ḥudūd* discourse in *fiqh* have made the *ḥudūd* difficult to implement; because of the severity of some of the punishments involved, judges are reluctant to enforce them. But improvement would be possible if one were to open the *ḥudūd* to reasonable levels of interpretation and *ijtihād* that can be sustained by the textual evidence.⁴

Textbook writers are almost unanimous on the following three conditions to qualify a repentance as valid: it must be indicative of remorse over what has happened, it must express determination not to repeat the conduct in question, and there should be no actual recurrence. Yet it is added that the first two of these are mental conditions that are hard to prove by evidence. All that one can do is to scrutinise the veracity of the statement the accused person makes before the court. As for the third condition, this too is difficult to ascertain as it involves future conduct. There is general agreement, however, that *ḥadd* punishment is suspended for an offender who maintains a clean record, after a duly recorded repentance for a long period of time.

Conclusion and Recommendations

The twin objectives of this article have been to review the provisions in Islamic law on amnesty and pardon as expounded by its leading schools and scholars, and then also to explore the prospects of needed reform of some of its relevant provisions. This approach coincides with the binary concern of Islamic law for continuity and

change, and the origins/fundamentals of Islamic jurisprudence (*uṣūl al-fiqh*) provide a number of principles and formulas to facilitate this concern.

- The *sharāḥ* is often characterised as diversity within unity. Diversity is due to a degree of flexibility and openness in the language of the text, especially of the Qur’ān, to fresh interpretation and *ijtihād*.
- The unifying interest of the *sharāḥ* is served largely by its recognition of the overriding authority of *tawḥīd* (Divine Oneness and the oneness of being), and the principle of consensus (*ijmāʿ*).⁵ These and certain other principles of Islamic jurisprudence account for the continued relevance of the *sharāḥ* to the applied laws of Muslim countries to this day.
- Yet if it is to retain its vitality and relevance, the *sharāḥ* needs to be read side by side with the changing facets of social reality and the living conditions of Muslims.

Notes

1. Muslim b. Ḥajjāj al-Nisābūrī, *Mukhtasar Ṣaḥīḥ Muslim*, ed. Muḥammad Nāṣir al-Dīn al-Albānī (Beirut: Dār al-Maktab al-Islāmī, 1404 AH/1984, 2nd ed.), 475, *ḥadīth* no. 1,790.
2. Cf., Ḥannān ‘Atiyyah al-Juhnī, “Dawr al-wālidayn fī tanshī’at al-abnā’ ‘alā khuluq al-‘afw,” *Majallah Jāmi‘ah Umm al-Qurā’ li ‘l-‘Ulūm al-Tarbawiyah wa ‘l-Nafsiyyah* [Saudi Arabia] 2, no.2 (Rajab 1431 AH/July 2010), 279.
3. Abū ‘Abd-Allāh al-Khaṭīb al-Tabrīzī, *Mishkāt al-maṣābīḥ*, ed. Muḥammad Nāṣir al-Dīn al-Albānī (Beirut: al-Maktab al-Islāmī, 1399 AH/1979), 2:1061, *ḥadīth* no. 3,570. This is a select collection of *aḥādīth* from the authoritative ‘Six Collections’, known as *al-ṣiḥāḥ al-sittah*. See on the expression *ḥudūd* also Mohammad Hashim Kamali, *Punishment in Islamic Law* (Petaling Jaya, Malaysia: Ilmiah Publisher, 2000), 45f.
4. See for details Kamali, *Punishment*, especially Sections III, entitled “An Analysis of *Hadd* in the Qur’ān, *Sunnah* and *Fiqh*” (pp. 45-85), and IV entitled “The Philosophy of *Ḥudūd*” (pp. 85-90).
5. See for details on *tawḥīd* Mohammad Hashim Kamali, *Shari‘ah Law: An Introduction* (Oxford: Oneworld, 2008), 17-19. There is also a chapter on *ijmāʿ* in idem, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003), 228-264.