ABSTRACT
Generally, Islamic law regulates state barriers between crimes and their commissions in order that no excuse could be pleaded by anybody who breaks the barriers and penetrates into the restricted boundary of Allah to commit the crime. Thus, the punishment that awaits a criminal should be so deterrent as to discourage people from committing crimes. The punishment of a crime goes in line with its gravity and effect on the society. Consequently, each punishment has one or more of the possible objectives such as deterrence, retribution, reform or denunciation. It will be difficult to confine the objective of a punishment under Islamic law to any one of the above mentioned objectives. This paper discussed how these qualities permeate into the notion of punishment under Islamic law in comparison with theories of punishment under English (Common) Law.

Keywords: crime, punishment, Islamic law, English Law

INTRODUCTION
Islamic law possessed a unique concept of punishment in which the prevention of crimes is given priority over their punishments. If the machinery of prevention should be found wanting, the punishment may be wholly waived or mended, especially when the fault could be attributed to the state authority.

General Islamic law regulates state barriers between crimes and their commissions, in order that no excuse could be pleaded by anybody who breaks the barriers and penetrates into the restricted boundary of Allah to commit the crime. Thus, the punishment that awaits a criminal should be so deterrent as to discourage people from committing crimes.

The punishment of a crime goes in line with its gravity and effect on the society. Consequently, each punishment has one or more of the possible objectives i.e deterrence, retribution, reform or denunciation. It will be difficult to confine the objective of a punishment under Islamic law to any one of the above mentioned objectives.

In this paper we shall see how these qualities permeate into the notion of punishment under Islamic law in comparison with theories of punishment under English (Common) Law.

DEFINITION OF CRIME
This paper would not be complete without defining crime in both penal systems (Islamic and English Laws), because punishment always follows the commission of crime. Crime is defined in English law as an act or default which offends the prejudice of the community and is forbidden by law on pain of punishment inflicted at the suit of the state (Salmond, 1966:235).

But crime is defined in Islamic law as, to do what Allah forbids man not to do or to refrain from doing what he commands man to do (Abu Zaharat :52).

Punishment is defined as, the infliction of pain, suffering, loss or social disability as direct consequences of some actions or commission on the part of the person punished (Encyclopedia Brittanica, Vol 15:281).

No doubt you would agree with me that crime has to be defined separately from punishment. Although the two are different, crime cannot be fully discussed in isolation of punishment and vice-versa., they go side by side.
OBJECTIVE PUNISHMENT
Many scholars of English law have carried out an extensive study of criminal justice and have ultimately come out with valuable results as regards the main philosophy of punishment. The objective of punishment is categorized into four or five classes, depending on individual writers. They are as follows:-

(1) Deterrence
(2) Prevention
(3) Retribution
(4) Denunciation
(5) Reformation

Each of these theories is going to be elaborated on to enable us know the effectiveness of each. But before that, let us take a look at the Islamic law aspect. The objective of punishment in Islamic law may be based on two basic principles, namely:

(1) Protection of human honour, intellect, offspring etc.
(2) Protection of the society as a whole.

These two can be explained as follows: that the philosophy of punishment under Islamic law may be protection, deterrence, retribution and reformation. It should be noted that these divisions which are also incorporated into the concept of Islamic Law and aims of punishment do not mean that the writer is trying to justify the division in Islamic law. However it will be made clear later how this conclusion is reached. Islamic law prescribes various punishments to serve as compensation for the wrong done to the victim, as well as to prevent the culprit from repeating the same offence.

It is very important to bear in mind that the Islamic legal system cannot be separated from the faith, because belief in Allah is a fundamental principle of the Islamic religion. Therefore, they must go side by side and this ensures that the society is fully and well protected by the divine laws ordained by the Almighty Allah. A man abides by what he believes, if he does not believe in a system it may be very difficult for him to abide by it.

To achieve this aim and objective, Muslim jurists have categorised the philosophy of punishment into the following based on the above mentioned principles (Mawardi, 1966:49).

(1) Protection of Religion or Faith
(2) Protection of human life
(3) Protection of offspring
(4) Protection of intellect and

Deterrent Theory
The primary object of criminal justice, as propounded by many scholars of the English law in punishing the offender is the philosophy of deterrence. In other words to deter people from committing crime and to administer a stern warning to potential perpetrators of crime so that they can keep away from committing the crime. Of course, if an offender is to pay severely for his wrong, he would naturally be deterred and thus is criminal propensities are placed under control.

The inducement to promote one’s selfish interest is the bedrock of most criminal behaviour, therefore the provision and awarding of adequate penalty and exemplary punishment will definitely create fear and thus restrain people from crime (Raja:49).

Deterrence is often characterized by a justification for punishment which aims at the prevention of crime. In this respect, it is contrast to the theory of retribution which is often said to be a justification for punishment which refers to the past i.e to the offence as an event.

The recognition of the deterrent aspect of punishment in Islamic law is deeper and stronger than in any other system. In fact, deterrence is recognised as the predominant justification for punishments, particularly in Hadd punishment. That is why Mawardi’s definition of crime is relevant here. He defines it
as punishment which Allah established to prevent man from committing what he forbids and from neglecting what he commands (El-Awa, 1982: 29-30).

According to him, deterrence is to be achieved by means of severe punishment (Ibn Qayyim :95). However, this is what Muslim jurists meant by the protection of human life which was mentioned earlier. To achieve this aim, according to Islamic law, the murderer is put to death for the crime he committed to prevent the commission of further offences. In the light of this, the punishment becomes deterrent to other persons. To substantiate this point Allah says:

\[ O \text{ ye who believe, the law of equity is prescribed to you in case of murder, the free from the free. The slave for the slave, the woman for the woman, But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your lord, After this whoever exceeds the limits shall be in grave chastisement. In the law of equity there is (Saving of) life to you. O ye men of understanding (Quran, 2:178-179). \]

According to these verses it is clear that the punishment prescribed will prevent the commission of further offences, both by the offender, if this commission of the offence is not intentional and other members of the society.

The dual notions of general and special deterrence are known to Muslim jurists and supported as one of the basic motivations behind the Hadd punishment (Muhammad, 1982 :30).

The most common example given by contemporary scholars as evidence of the deterrent effect of the Hadd punishment is the enormous decrease in the crime rate in Saudi Arabia, since the re-introduction of Hadd punishment in 1920. The Hambali School of Islamic law in its entirely, including those related to the penal law has been adopted to form the basis of the legal system (Conference report, 1970:4). Thus, the crimes of murder and adultery accommodate this theory for their gravity and the irreparable damage that they can cause to the victims.

Each of the two penal systems stand to achieve its goals if it is strictly applied or practiced in any given society. The law is always applied on poor people while noble people who committed offences go scot free except in rare occasions. In a society where such practices exist the system receive no support from the society, and it fails to create fear in the minds of the people. Thus, it becomes difficult for the system to achieve its objectives.

**Preventive Theory**

The second philosophy of punishment is preventive theory. According to English law, it is to prevent the offender from repeating the same crime by way of disabling him from committing same. The adherents of this theory support the individualisation of punishment by which punishment is given the culprit to fit and it is the parameter of awarding him the punishment of imprisonment or banishment. The punishment in question serves in two ways it prevents the said criminal from committing the same crime and prevents some members of the society from emulating him (Salmont, 1966:249).

Looking at the nature of punishment in Islamic law, the preventive theory is well founded and emphasised. For any crime, Islamic penal system prescribes proportionate punishment for the offender in order to prevent him and keep others away from committing the like. No doubt that, Islamic penal law and Islamic law in General possesses a unique system of punishment. It concentrates on preventing the commission of offences by making life so easy and peaceful for man and by removing all what could induce him to commit crime.

After all these and coupled with the warning given in Islamic criminal law, whoever commits a crime would be proportionately punished in order to serve as a restraining factor for others and perhaps as a reformation for the culprit himself. Examples of this could be seen in the punishments for fornication and Qazf (Defamation). These punishments are prescribed to protect offspring and human dignity.
Allah Says:

The woman and man guilty of fornication, flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by Allah if ye believe in Allah and last day and let a party of the believers witness their punishment (Quran 24:2).

Allah has prescribed a severe punishment for this type of act, which perhaps entails two punishments stated in the holy Quran; flogging and witness by the public. Although, this may seem to us as nothing but for those who care and value their honour and dignity it will restrain them from the commission of such offence. In a nutshell it would prevent the culprit as well as others from committing such offence again. The punishment for Qazf (defamation) Allah says:

And those who lunch a charge against chaste woman and produce not four witnesses (to support their allegation) flog them with eighty stripes, and reject their evidence ever after, for such men are wicked transgressors (Quran 24:4).

In relation to the offence of Qazf i.e. defamation, it also entails two punishments as well. Flogging the offender with eighty stripes and rejection of his testimony. The most fundamental qualification of a witness is to be imbued with a high moral integrity which is known as ‘Adalah’. Jurists classify those who are convicted of qazf offence and punished to be lacking this qualification. Consequently, they are unfit to give evidence before the court. This rejection is also to be interpreted as a means of preventing or deterring people from committing the offence in question since the person who is not Adl i.e. of high moral integrity, would not be considered as reliable and no one who is concerned about his good repute would risk it (Kurtubi: 159-182).

However, by mere looking at the preventive theory in the two penal systems you will see that each of them prescribes punishment for a culprit in order to prevent him from repeating the same crime as well as to prevent society from emulating him.

Although, it may be asked whether the punishment prescribed by each of the two systems would actually be adequate to prevent the offender and other members of society from committing the same offence. English penal system prescribed a certain punishment which according to it, it deems fit to prevent the culprit from repeating the offence. For example imprisonment or banishment is seen to be a punishment for the commission of theft. The above punishment is considered to be severe punishment for offence of theft, and according to English law it will prevent the culprit particularly and the society at large from committing the same. But a critical look at this fact reveals that the punishment in question may likely prevent the first offender and not habitual criminal. To him it is not a severe punishment. A habitual criminal needs a more severe punishment than mere imprisonment and banishment to enable him seize completely from committing alike.

However, Islamic penal law simply prescribes two punishments for each one of the crimes i.e. fornication and defamation. The offence of fornication attract the punishment of flogging and publicity of its implementation. That is to say, that the punishment must carry two messages. First, to receive reward of his criminal act which is flogging. Second, to be seen by an uncountable number of people to whom he might have been hiding his criminal propensity, which consequently would serve as a prevention for him and for the huge number of people that would witness the sentence.

In addition to these, the Muslim jurist prescribed a third punishment, if the offender had become a habitual criminal, then he should be banished from his present place. It may be necessary for the reader to know the difference between banishment in Islamic law and in English law or common law. In English law, imprisonment is the first and only punishment prescribed for the offender who commits theft whether first time or habitual. But, Islamic law draws the distinction between the two. That is to say, if the first time offender is sent to the prison together with hardened criminals he will instantaneously become a habitual criminal, except few ones for this Islamic law believes in Punishment being gradual.

Similarly, the offence of defamation of character entails two punishments. Flogging and rejection of the offender’s evidences and witness. The flogging must be executed in public too. The implication of this punishment which is not different from that of fornication is that the convicted person will loose his
integrity in the society. Consequently, he will unfit to give evidence before the court of law, unless he repents and make upright his behaviours. Then he may be accepted by the society.

**Retributive Theory**

Retributive philosophy of punishment according to the English law means basically that the wrong doer pays for his wrong doing. The suffering which the criminal undergoes restores the balance which the crime he committed has disturbed. This notion is clearly connected with the primitive conception of justice which is based on private vengeance. It is utilitarian and moralistic in approach. It is also predicated on the infliction of commensurate and proportionate pain, as a sort of retaliation as was offered by the criminal in the course of the crime.

Thus, it clearly requires the existence of a victim as well as a wrong doer (Fitzerald, 1966:95). Psychologically, proportionate suffering on the part of the offender may give some comfort to the victim. Furthermore, the principle of life for life, eye for eye, tooth for tooth, and hand for hand should, according to this philosophy be a guiding rule for the proper scheme of criminal justice. This explains the maxim: “Punishment to fit the crime.” However, the retributive philosophy is also calculated to give the culprit the opportunity to pay for his crime and thus to relieve his conscience (Amankwan, 1986:13). Furthermore, in accordance to the classical schools of law, which examine human capacity, “every individual possesses the free will to discern what is right and wrong and should therefore be held responsible for his actions before the law irrespective of his social status.” They assumed that individuals were rational agents capable of defining their self interest and tampering their actions according to the dictates of reason. Consequently, they should be rewarded according to their energy and skills and conversely, punished according to the social harm which they inflict on others and the larger society (Philip, 1982:76).

Retributive philosophy of Hadd punishment in Islamic law is the one most commonly discussed by Muslim jurists. Retribution is mentioned in the Holy Quran as the purpose of punishment in many verses referring to punishment both in this world and in the hereafter. According to Islamic penal law, two points should be borne in mind with respect to retribution as a feature of the Hadd punishment.

1. The severity of the punishment and
2. The prohibition of any mediation.

The penalties prescribed for some offences in Islamic law may be as severe as other penal systems had prescribed for similar offences. Inspite of the severity of Islamic penal law, it is still accepted by hundred and millions of people and even if choice were given to them they would not choose otherwise. A prominent Islamic scholar, Muhammad Qutub said that, the severity of punishment is based on psychological considerations.

In order to combat the criminal inclination to break the law, the Islamic penal system prescribes severe punishments which draw attention to the consequences of the crime, acting as a deterrent to its further commission (Qutub, 1980:231). Although, the degree of severity of any given punishment is a basis of controversy among philosophers, some hold the view that treatment rather than punishment is what the criminal needs. However, Muslim jurists are in support of severity of Hadd punishment and justify it with the following argument.

The argument was that Allah created man, defines what is wrong and right for him and prescribed adequate punishment for wrong doing. Allah knows the type of punishment that would make his creature refrain from committing or repeating the same crime (Muhammed, 1982:26). Allah says:

*Should he not know He that created, and He is the subtle the aware (Quran, 67:14)*.

Almighty Allah in this verse is showing that He knows what He created and is aware of what the creature can and cannot do, so if anything is prescribed as punishment for the creature’s wrong doing. Allah’s reasons of such is more perfect than our conception of its appropriateness. Therefore, the severity of punishment prescribed for man cannot be challenged by human beings. The second point in which had punishments seem to be retributive is the obligatory nature of their execution once the crime has been proved. In a well known hadith of a woman of makhasumiyat tribe, the prophet prohibited any mediation
in carrying out the hadd punishment on her and indicated that even if his daughter Fatimah had committed hadd crime, he would impose punishment on her like anyone else (Ibn Rushid, 1975:446). This prohibition of mediation may be understood as a retributive feature in hadd punishment. If mediation were allowed or if the hadd punishment could be replaced by any other punishment their retributive effect would no longer exist (Muhammad, 1982:27).

It would be clear to the reader that the retributive theory as far as the two systems are concerned are similar here in terms of its philosophy. Both penal systems believe that the culprit should proportionately suffer in accordance with the offence he or she has committed. The principle of life of life, eye for eye, tooth for tooth and hand for hand is a fundamental principle as far as Islamic law is concerned. It may not be a surprise that this believe also exist in retributive theory which made them similar.

Inspite of conformity of the two systems, there is a fundamental difference between them in respect of execution of punishment prescribed by the Law. If it involves a noble person, that is, according to the English law, somebody could mediate for him and the punishment may not be carried out at all. That is to say it depends on the influence of the mediator and his position in the society. The English penal law does not forbid such mediation which indirectly means the approval of it, which may eventually defeat the objective of punishment, and it makes the society have no respect for the law of the land like what happens in our society today.

Contrarily, Islamic penal law as you might have noticed, believes in severity of punishment. That is to say, it makes the offender to pay proportionately for the crime he committed to sever as deterrent to him and others. This system forbids any mediation by anybody for anyone that commits a hadd offence. The stand of the prophet of Islam is clear on that, by saying “if may daughter Fatimah had committed a hadd crime” I would have applied hadd punishment on her.

This may sound strange to some people, as if Islamic penal law does not gave respect to nobility in the society. But the point is that, everybody is equal before the law in Islamic society, and where Islamic are properly observed and obeyed.

If this practice can be emulated definitely the purpose of punishment would be achieved and the society would have full confidence in the law of the land.

**Denunciation Theory**

Denunciation philosophy of punishment is only a different type of the retributive philosophy. According to English Law, it is the punishment in which the society expresses its denunciation of wrong doing, therefore, it was said that the punishment inflicted for grave crime should adequately reflect the revulsion felt by a great majority of the citizens. Perhaps, it is not enough, to consider the purpose of punishment as being only deterrent or reformative or preventive. Because the ultimate justification of the theory of punishment is not merely a deterrent but denunciation.

Irrespective of whether it will serve as a deterrent or not, the criminal must be made to suffer for his wrong doing in order to compensate the society. Punishment for violating the rules of conductor laid down by the law is necessary if the law is to maintain its sufficient way of keeping the community as a whole law abiding. Therefore, without adequate punishment for violating these rules, the law becomes merely a guide and an exhortation to right conduct (Rupercross, 1979:113).

As far as denunciation theory is concerned in Islamic law, there is not much difference between it and the retributive theory earlier discussed (Qadir: 647). The Muslim community has to denounce a crime outright to avoid the continued commission of such crime in the society. This theory could be found in the crimes which are under Ta’zir punishment in which a Qadi is empowered to adjudicate according to his own discretion to suit the interest of the public.

The denunciative theory is very important and most relevant to our society. It is not enough for a community to denounce a crime by insisting that the culprit should get equal punishment for the fact that the offender deserves it, especially in the present time that the offender may be punished or not. It is more important for the community to denounce the commission of crime in their presence instead of allowing its commission and then seeking for redress which may not be forthcoming.
Reformative Theory

Some offences can be prevented by a change of motives or by a change of character, since they are committed through the influence of motives upon character. The punishment which aims at such changes is called reformative punishment (Dhirender:27).

Crime is just like ordinary disease which also needs proper examination and diagnosis and to be treated scientifically. It is very important for any society to take effective measures of uprooting the crime by any way otherwise the society will loosing. In the absence of adequate security, people will always be apprehensive for the safety of their lives and property. Consequently, trade and commerce cannot flourish and this will definitely hinder real progress and economic development of the country. It is obvious that no state will buy that idea but as a result, the country will waste a lot of resources in preventing and detecting crime.

Some scholars of English law are of the view that the criminal is a menace to life and happiness, he imposes a financial burden for being an obstacle to social progress. Above everything else, we cannot afford to be wasteful in our energies and extravagant in our expenses by pursuing a useless policy in his treatment. This shows that crime is a great disease which need to be cured at all costs and according to this theory, hanging is not psychologically a fitting punishment for murder for in this way we lose the criminal instead of curing him. The flogging and corporal punishment are not fitting punishments. Therefore, the solution prescribed or suggested by this theory to cure the disease is imprisonment. The imprisonment would serve as punishment to this set of people in order that the offender may be transformed into a good citizen by physical, intellectual and moral training. It advocates that the prisons must be turned into dwelling houses where the criminals may be given opportunity to learn about their misconduct-in order to improve themselves, a chance which they never had before. However, it is obvious that there are some people who are incurably bad, men who by some vice of nature are even in their youth beyond the reach of reformative influence and with whom crime is not so much a bad habit as ineradicable instinct. The theory according to Salmond, is of the view that the perfect system of criminal justice is based on neither reformative nor the deterrent theory exclusively. But both have to be given in juxtaposition whereby each of these theories should be applied where it can be properly effective. In addition, the society should not underrate any of these theories, we must allow each theory to play its role in curing and purifying the minds of criminals. Of course, the chances of effectiveness in first offenders by the theory of reformation is greater than in adults who have fallen into crime more than once (Salmond, 1966:111).

The reformatory theory of Islamic law is available in the discretionary punishment which the law allows the Qadi or judge to award. Reformative theory is given no consideration in the justification of Hadd punishment of Islamic law because the hadd punishments are based on what Allah has decreed. He alone has prescribed these punishments for the stated crimes.

And He said:-

*Should He not know He that created and He is the Subtle the Aware (Quran, 67:14).*

Inspite of this fact, however, a renowned scholar of Hanbali School of law, Ibn Qayyym, said that the hadd punishments are of reformative as well as retributive and deterrent value. He referred to the value of established fact among the Muslim jurist that an individual who has received punishment for an offence he has committed in this world will not be punished for it in the hereafter (Muhammed 1982:30). Despite this explanation by Ibn Qayyym and even though the statement is supported with some sound authorities that does not, from the penological point of view, imply that hadd punishments have a reformative element in the sense in which the word “reform” is understood in legal writing; This view, however, has one exception, that is in respect of punishment of Hirabat i.e highway robbery, which Allah gives discretion to the Imam to choose one among the prescribed punishment for this offence. If nafy i.e exile is chosen by the judge or imprisonment in the modern term, the offender could be exiled or imprisoned until he makes amends and display good behaviour and does not seem likely to commit another crime. This sort of punishment is categorically prescribed to improve and reform the criminal character. Hence, in this
senesce one can say that it is aimed at reformation and therefore, it is an exception to the general philosophy of hadd punishments (Abu Zaharat :175).

The reformatory theory would have been the best theory among these theories if it is carefully and consciously applied together with others. It is true that the aim and objective behind the punishment of the offender is not to loose him, but it is to cure him, that is, after the proper diagnosis of his diseases in order to prevent him from repeating the offence and prevent other people from emulating him. But unfortunately, the administrative system of prison in this country is nothing to write home about. The people in charge of prison man-handle the prisoners, lack of care, educative and religious programmes are other menaces of our prisons. There is nothing that society could rely upon top expect that they are to be properly reformed. Consequently, the aims and objectives of imprisonment are abortive. Unless and until we reorganise our prison system no good result is attainable. This theory is irrelevant and unuseful to our society as we stand now. And if the present system of our prison has to continue, it is better to stand loosing the criminals than to expect any impossible reformation as suggested by this theory.

The writer believes that after taking necessary actions to correct our prison system there is a lot that this theory could do in curing criminals.

The prison system and its standard in Islamic country is very good and is far ahead of our own system. The prisoners are treated like normal people, they are given good maintenance and facilities and they are provided with both religious and educative programmes in order to enable them to stand on their feet after serving their terms.

CONCLUSION

The law usually prescribes the maximum punishment which may be given for a particular offence. It sometimes prescribes minimum punishment required. It is therefore an elementary proposition of any criminal justice, be it Islamic or English, that sentence in each case should be proportionate to the nature and gravity of the crime.

Consequently, we can come to the conclusion that each of the theories discussed has its own role to play in curbing crime in the society and purifying the minds of criminals. So the society should not underrate any of them. However, it may be observed through our discussion that there is not much difference in the philosophy of punishment in the two penal systems, both of them ultimately aim at the same goal, that is to deter the offenders as well as members of society from committing crimes. Although it is clear that the method of the application of each of the penal laws (Islamic and English penal law) is different. For the English law sees that the best way of curbing crime in the society is to award a lesser punishment to the offender instead of losing him by way of hanging even if he deserves it. But Islamic law observes that to uproot the crime completely in the society it is imperative to award actual punishment prescribed divinely for an offence. Of course completeness may not be possible but at least it would reduce it.

It appears the enforcement of law in this society does not seem to have been helping the situation in reducing the commission of crime. Perhaps English penal law in accordance with the theories advanced above is not meant for a society like ours. The law itself leaves many loopholes which makes it to be incapable of uprooting crimes in the society. This is the reason why the criminals are increasing in our society, even with the implementation of all the theories.

The basic difference between the two systems is that all the punishments prescribed in Islamic law are Divine punishments that could not be altered by the judge. Islamic law first and foremost, advocates for the establishment of faith and the fear of Allah in the minds of individual members of the society. That is to educate them properly so that evil can easily be uprooted or expunged from their minds. Because a man abides by what he believes in; if he does not believe in a system it will be very difficult for him to abide by it. Perhaps that is why one sees that in jurisdictions where Islamic law is enforced, the crime rate is drastically reduced. In an Islamic state one of the paramount needs of a society is protection of its creed, faith and social order and the totality of the social order is based upon Islam. The creed and faith of the great majority in such a state is Islam. It is then natural that whatever laws are introduced into such a society they should completely be in accord with Islamic jurisprudence. Unfortunately, this is not the case
with laws presently enforced on the huge number of Muslims of this country. Why not give Islamic law a chance since we have tried other laws and one need not to be told about its results. Islamic law should also be put into practice in our society irrespective of any sentiment in the name of peace and security. Enforcing such law does not necessarily change the country into an Islamic State.

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