

## **THE LEGAL PROTECTION FOR WOMEN PRISONERS IN ISLAMIC LAW**

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*The infliction of imprisonment is not meant to deny the prisoner's dignity as a human being but rather it is mainly for discipline and correction both of which can be achieved by self-reflection. Thus, the prisoners, men and women alike, are entitled to have their fundamental rights be respected. They are also entitled to get equal treatment with their male counterparts. Rather, women prisoners have special needs, which require special consideration and attention. As far as Muslim women prisoners is concerned, they may have more specific needs since the treatment provided to them must always observe the Shari'ah rulings, particularly in terms of food, clothing, performing religious duties etc. This paper examines the legal protection provided for women prisoners under the Islamic Law.*

### **INTRODUCTION**

Fundamental rights of a detained person must always be protected, as the purpose of detaining is not only to make the detainee to suffer but also to educate (*ta'dib*) and prevent him from repeating the crime; and at the same time, to deter others from committing the same.<sup>1</sup> Since prisoners' right to free movement is withdrawn, the state should provide sufficient food, proper clothing and medical care, as well as other maintenance, which are essential to his life.<sup>2</sup>

The rights of prisoners mentioned above are applicable to all prisoners regardless of their status, religion, race and gender. Nevertheless, some adjustments have to be made in order to suit the specific needs of the inmates and to ensure their human rights are protected. As regards to women prisoners, they require slightly different treatment as compared to men. In this respect, the Sixth UN Congress on the Prevention of Crime and the Treatment of

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Offenders<sup>3</sup> adopted a resolution on the specific needs of women prisoners highlighting, amongst other things, that:

- because of the small number of women offenders, they often do not receive the same attention and consideration as do male offenders;
- this inattention often results in limited access for women to the necessary programmes and services, including placement in detention facilities far from their families and home communities; and
- that women most of the time have major responsibilities for children.

The above issue has also been given a considerable attention by Islamic law. The subject matter of imprisonment and the rights of prisoners are explained in several verses of the Qur'an and *Sunnah* (tradition of the (s.a.w.)), practices of the companions of the Prophet (s.a.w.) as well as the opinions of the jurists. Thus, this paper seeks to deliberate on this issue from the Islamic law perspective. It examines relevant legislation of imprisonment in Islam and the extent of which the rights of prisoners particularly that of women are protected under the Islamic law.

### **IMPRISONMENT IN ISLAM**

The Islamic conception of imprisonment according to those who legalise it is different from the Western notion. Imprisonment is a basic or fundamental punishment in the latter's system; whereas in Islamic criminal law, it is a preventive measure aimed at encouraging repentance or reformation. It is to be imposed only for simple offences for short periods. The judge shall not sentence the convict to imprisonment if it is not likely to reform the offender. More often flogging is considered as an adequate punishment for serious crimes and dangerous criminals.

Jurists are not in agreement on the legislation of imprisonment. Those who do not recognise it hold that neither the Prophet (s.a.w.) nor did the great companion Abu Bakr ever put a criminal in prison. The other jurists who support the legislation of detention affirm

that the Prophet (s.a.w.) did impose this type of punishment, since there is a report that the Prophet (s.a.w.) confined a man accused of murder but then released him when it was revealed that he was not guilty. Another report also mentions that the Prophet (s.a.w.) inflicted the punishment of beating and detention at the same time.<sup>4</sup> There was no specific place for detention during the period of the Prophet (s.a.w.) and Abu Bakr and there were no any building as prisons as being understood nowadays and the detainees used to be detained in houses, passageways, mosque and tents.<sup>5</sup>

However, the situation changed during the time of Umar ibn al-Khattab, since the expansion of the Muslim territories, and the need for a specific place to detain criminals became essential in order to maintain the stability and security of the Muslim lands. Thus ‘Umar bought a house in Mecca from Safwan for four thousand *dirhams* to place criminals in. This practice was acted upon by other Caliphs.<sup>6</sup>

It is reported that during the time of Umar ibn al-Khattab he imprisoned al-Hutay’a who was guilty of defamation (*hajw*), and Subaigh who was guilty of raising doubt about the Islamic texts. Uthman ibn Affan imposed the punishment of life imprisonment on Dabi’ ibn al-Harith the robber. It is reported that Ali ibn Abi Talib built a prison in Kufa from cane sticks which was known as *Nafi*‘ in which he placed robbers and built another from clods of earth which was known as *Makhis*.<sup>7</sup>

These jurists also support their view regarding the legislation of imprisonment by mentioning the following Qur’anic text:

*If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them.*<sup>8</sup>

In the above text, the words “confine them to houses until death” means imprisonment for life.<sup>9</sup>

Some jurists state that the word “*nafy*” (exile) in the Qur’anic text concerning the punishment for armed robbery (*hiraba*), means imprisonment.<sup>10</sup>

Another Qur’anic verse, which indicates the legality of imprisonment, is as follows:

*... Then fight and slay the pagans wherever ye find them, and seize them, and beleaguer them,...*<sup>11</sup>

The word 'beleaguer' (*hasr*) means to confine, i.e. captives are kept in the prison for a certain time.<sup>12</sup>

Besides the Qur'anic texts, there are ample *ahadith* of the Prophet (s.a.w.) that confirm the application of this type of punishment during his lifetime, for examples as follows:

It is reported that the Prophet (s.a.w.) said: "*If one man holds another man to be killed by a third man, kill the murderer and keep the holder in prison*".<sup>13</sup> Based on this hadith, Ali ibn Abi Talib imposed *qisas* on the murderer and imprisoned a criminal who assisted the murderer by holding the victim until he died in the prison.<sup>14</sup>

In another instance, it is reported that a man killed his slave, thus, the Prophet (s.a.w.) flogged him and imprisoned him, besides commanding him to free a slave.<sup>15</sup> It is also reported that the Prophet (s.a.w.) imprisoned some men from Bani Quraiza in the house of Bint al-Harith, and imprisoned some others in the house of Usama ibn Zayd before killing them due to their treachery.<sup>16</sup> The Maliki jurist Ibn Sha'ban reported that the Prophet did impose the punishment of imprisonment.<sup>17</sup>

It is interesting to note that this type of punishment was also imposed on women during the early days of Islam. There is a report that a woman, Saffanah bint Hatim was brought to the place of the captives whom are the people of Tay'. She was detained in a partition beside the mosque's door where the women captives were placed.<sup>18</sup>

From the above discussion of the Qur'anic texts and *ahadith* and practices of the companion of the Prophet (s.a.w.), it is clear that the punishment of imprisonment is recognised in Islamic law. It can also be said that imprisonment is equally applicable to both men and women. However, based on their nature and biological needs, women prisoners are treated differently on this respect.

### **RIGHTS OF WOMEN PRISONERS UNDER ISLAMIC LAW**

It is important to note that even though most of the time, the Qur'anic verses and hadiths seem to only mention the ruling referring to men; it does not mean that the ruling is not applicable to women. This is

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due to the average occurrence (*ghalib*) that in most cases during the lifetime of the Prophet (s.a.w.) it involved men. In fact, Islam does not differentiate the punishment between men and women as can be seen in the following texts of the Qur'an and *Sunnah*:

*The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes.*<sup>19</sup>

*As those who commit theft male or female cut off their hands...*<sup>20</sup>

Zayd ibn Khalid al-Juhani narrated: *I heard the Prophet ordering that an unmarried man and woman guilty of illegal sexual intercourse be flogged one hundred stripes and be exiled for one year.*<sup>21</sup>

In other words, there is no discrimination based on gender, for if a man can be imprisoned so does a woman.

However in terms of application, there is slight difference between men and women to suit the needs of different gender, capability and others. The women's specific needs may include the observation of '*awrah*', taking care of their children, privacy etc. The details of these rights are as follow:

#### **Humane Treatment**

The prisoners' right to integrity of his person, body, mind, and honour must be respected. The humane treatment of detained persons is generally covered by the rules of *asir* (i.e. captive in the custody of the state) based on the following Qur'anic verse and *Sunnah* that state:

*And they feed for the love of Allah, the indigent, the orphan, and the captive.*<sup>22</sup>

It is reported that the Prophet (s.a.w.) had ordered the Muslim army during the Battle of Badr to treat prisoners of war humanely, He said:

*Take heed of the admonition to treat prisoners fairly.*

Ali ibn Abi Talib, the fourth Caliph, was reported to make a surprise visits to prisons to ensure that the inmates received humane treatment and to hear their complaints beside fulfilling and preserving the rights of those held in custody.<sup>23</sup>

Abu Yusuf, in his *Kitab al-Kharaj*, discusses the humane treatment of prisoners. He states that a prisoner cannot be locked up in a very small place where he cannot stand up to perform the prayer. His feet cannot be chained unless he is to be executed with the death penalty. If a prisoner dies and he has no relatives, the state should prepare the deceased for burial. When a prisoner is discharged, he cannot be left without any source of income, which will cause him to live poverty-stricken and force him to beg from other people.<sup>24</sup>

### **Fair and Equal Treatment**

Islam emphasizes the principle of equality among human being. All are equally entitled to the same rights, duties and freedoms. As such there is no discrimination of any kind, and all humans, regardless of race, colour, gender, language, religion or social status. Allah (s.w.t.) said to the effect:

*O mankind! We created you from a single (pair) of a male and a female, and made you into nations and Tribes, that ye may know Each other (Not that ye may despise (each other). Verily the most honoured of you In the sight of Allah is (He who is) the Most righteous of you.)...*<sup>25</sup>

The Prophet (s.a.w.) is well known of his fair and equal treatment to the people around him; be it Muslims or non-Muslims, men or women, rich or poor. The Prophet (s.a.w.) said to the effect:<sup>26</sup>

*Narrated by Urwah bin Al-Zubayr that the Prophet (s.a.w.) said: It was usual practice in the past that if ordinary persons committed a crime they were punished, but if an important person was found guilty he was let off. If Muhammad's daughter, Fatimah, is ever found guilty of stealing I would have her hands cut.*

Based on the above, it can be said that as human being, all prisoners must be treated equally regardless of gender, status, position etc. No special treatment shall be given to the rich as compared to the poor. Thus all prisoners shall be provided with same clothing, food, and facilities available in the prison. However, those with special needs such as the sick person should be treated differently. This includes women prisoners who need special treatment due to their biological needs. This can be seen practised by the Prophet (s.a.w.) pertaining

to a woman from Juhainah who came before him confessing that she was pregnant out of adultery. The Prophet (s.a.w.) delayed the execution of *hadd* until she delivered the baby. The Prophet (s.a.w.) said to her guardian: “*Be kind to her and when she delivered her baby bring her to see me and the guardian did so...*” In another incidence, the Prophet (s.a.w.) gave similar treatment to a woman from Ghamid where an Ansar came forward to guarantee her.<sup>27</sup>

### **Fulfilment of Basic Needs**

Self-preservation (*hifz al-nafs*) is one of objectives of the *Shari'ah* that can be considered as necessity (*al-maqasid al-daruriyyat*). Thus, the detained person, as a human being, must be provided with all basic needs to ensure his survival while being detained. The Qur'an mentions:

*And they feed, for the love of Allah, the indigent, the orphan, and the captive.*<sup>28</sup>

Al-Tabari remarks that the captive in the above verse also includes those who are detained legally<sup>29</sup>

In supplying the basic needs, there are certain rules need to be followed by the authority, among others:

- (a) All the basic needs have to be supplied in a reasonable way, for example, the essential nutritive content of food, clean water and appropriate clothing for winter and summer. This is to make sure the maintenance self-preservation.
- (b) All Islamic rules regarding these basic needs must also be considered. For instance, clothes must cover one's shame (*'awrah*) according to Islamic law, food, for a Muslim who has fulfilled all the conditions for fasting must be served at night during Ramadan (The fasting month). The basis for this rule is the principle of “*ma la yatimm al-wajib illa bihi fahuwa wajib*” (Anything that must exist to complete the obligatory is also obligatory). For example, it is obligatory for a Muslim to pray, and he cannot perform it properly without clothes that can cover his *'awrah*, so the supplying of such clothes is also obligatory.<sup>30</sup>

Though the scope of basic needs may vary from one place to another, it is the wisdom of the State to decide on this matter.

### **Sufficient Foods and Nutritious Diet**

Food is the most important thing that every person needs to survive, and it represents all other basic needs. It is considered as one of the basic necessities (*daruriyyat*) of human being. Allah (s.w.t.) says to the effect:

*Eat of the good things We have provided for you ...*<sup>31</sup>

Pertaining to the rights of the prisoners to be provided with sufficient food, it has been reported that the Prophet (s.a.w.) once instructed that a captive from Thaqif who was detained by Muslims to be given food. The Prophet (s.a.w.) asked his own family to prepare the food and send it to the detainee.<sup>32</sup>

Some Muslims allocated a portion of bread for a captive known as Abu Aziz from their meal that is for breakfast and dinner as advised by the Prophet (s.a.w.). They followed the Prophet's advice till the captive is embarrassed by the abundance of food brought for him. In another case, i.e. upon the detention of Jews of Bani Qurayzah in the battle of Ahzab, where the weather was very hot, the Prophet (s.a.w.) commanded his companions:

*Do not expose them to the heat of the day and the heat of the weapons, let them have drink and rest, and nap during noon.*

It is also reported that when the Prophet (s.a.w.) detained them he commanded that they be given load of dates and they ate them at night.<sup>33</sup>

The companions and the leaders who came after them continue to practice this tradition. For example, Caliph Umar (r.a.) ordered that an apostate be detained for three days and given food and drink. In Ibn Muljam's case who stabbed Ali, he said: "*Give him food and drink and treat him well and if I live, I will be the protector of my own blood.*" He was the first person who ordered that food and drink to be provided for prisoners and it was practiced in Iraq when he set up the prison system. During the time of Caliph Umar ibn Abdul Aziz, he wrote a letter to his governors instructing them to provide the



most suitable food for the prisoners and fulfil their physical needs. Thus the governors follow the order accordingly.

*Qadi* Abu Yusuf once wrote a reply letter to the Caliph Harun al-Rashid and advised him to supply sufficient food for prisoners and its expenses taken from Bayt al-Mal. He also advised him to set aside a portion of excessive money to be given to the prisoners every month as a substitute of food feared to be under the control of impious prison officers. In another case, it is reported that Caliph al-Rashid observed the punctuality of food or meal serving for his political enemies from 'Alawiyyin. He ordered that the meal be brought everyday to the prison and eaten by two of his enemies, Yahya al-Barmaki and his son, al-Fadl.<sup>34</sup>

The above examples indicate that Islamic law lays emphasis on the treatment given to the prisoners in terms of fulfilling their basic needs.

### **Proper Clothing**

In Islamic law, clothing is generally for covering the body for the enhancement of the human dignity. It serves as cover for private parts, adornment, and protection against atmospheric hazards. Due to prohibition of adultery and fornication under Islamic law, both men and women are required to dress modestly and not to expose sensuous parts of their body seductively in public. Specifically, the Qur'an directs the women to 'draw their veils over their bosoms' and not to publicly display their beauty 'except for what must ordinarily appear'.<sup>35</sup>

It is mentioned in *al-hadith al-Sahih* that when the Prophet (s.a.w.) saw al-Abbas who was a captive of the battle of Badr and he was undressed. The Prophet (s.a.w.) looked for a shirt and clothed him with it.<sup>36</sup> Ali set a good example as he supplied the prisoners with two different types of clothes a year that was during winter and summer. Mu'awiyah and the caliphs followed this tradition after him.

During the reign of Caliph al-Rashid, he was advised by *Qadi* Abu Yusuf to take some measure in providing particular cloth depends on the season. As for women prisoners, they were also given the same clothes, which covered their whole body. It is interesting to mention

that colours of prisoners' clothes are different from other prison's staff as practised during the reign of Hajjaj.<sup>37</sup>

It can be observed from the above discussion that prisoners are entitled to be provided with proper clothes to suit the weather and condition. It is also permissible to use colour-coded dress to differentiate the prisoners from other staff. It is important to note that clothes provided for inmates must always be consistent with Islamic principle, i.e. to cover the *'awrah*.

### **Bedding**

The requirement of bedding has not been dealt with in detail by Muslim jurists on the basis that the Prophet (s.a.w.) himself did not mention directly on the requirement of having separate beddings for prisoners of war except for the food in the case of Thumamah, al-Abbas, Abu Aziz and others.<sup>38</sup> There was even a strong objection from al-Zaila'i as the objective of imprisonment is to restrict their freedoms and to educate them.<sup>39</sup>

However contemporary view suggested that separate bedding for prisoners is a requirement and the basis lies in the action taken by Qadi Shurayh during the Abbasid<sup>40</sup> period where in his judgement he ordered the food and bed to be made available for a detainee.<sup>41</sup> Based on the above statements it is reasonable to conclude that the provision for separate bedding is necessary in order to avoid any unlawful contacts that may lead to other wrongful acts and harmful effects to prisoners. The provision is in line with the *hadith* of the Prophet (s.a.w.) that reads:<sup>42</sup>

*Ask your children to pray of the age of seven, and beat them if they do not perform it at the age of ten, and separate them in their beds.*

Based on the above *hadith*, separation of bedding for children is to promote sexual segregation in the form of prevention from young age and to respect privacy especially in case of different gender. This has been explained in another *hadith* where the Prophet (s.a.w.) said:<sup>43</sup>

*There should be bedding for a man, bedding for a woman, and a third for a guest.*

The above *hadith* strengthens the need to have separate bedding for every individual. Therefore it can be inferred that this principle is applicable in all situations including the necessity to provide proper facilities in prison such as bedding.

### **Segregation of Men and Women Prisoners**

Islamic law prohibits men and women to privately isolate (*khalwah*)<sup>44</sup> themselves in a place as they may indulge themselves in adultery.<sup>45</sup> Association of men and women is not permissible<sup>46</sup> and considered as *munkarat*, which needs to be prohibited. The Muslims jurists unanimously agreed to adopt the principle of *sadd al-dhara'i'* (blocking of the means that may lead to unlawful acts).<sup>47</sup> This principle forms the basis for the segregation of male and female held in custody.<sup>48</sup> It is reported that the Prophet (s.a.w.) specifically designed a detention place for women. The Prophet (s.a.w.) detained Ibnah Hatim in a partition near the mosque's door where the women detainees were detained.<sup>49</sup> In another occasion, the Prophet (s.a.w.) commanded that the captives al-Maryasya' being placed at one particular area and they were supervised by Buraydah ibn al-Hasib, while the women and the children were kept in another area and put under the supervision of his *mawla*<sup>50</sup>, Shaqran.<sup>51</sup> The Prophet (s.a.w.) also once detained the men of Bani Qurayzah at a place or a specific area while their women and children were detained at a separate place.<sup>52</sup>

The above discussion proves that segregation of the women prison from men's is obligatory. This is proven from several practices in Islamic history where, for instance, the Prophet (s.a.w.) appointed his *mawla*, Shaqran, whose righteousness and piety is well known to manage the captives of al-Maryasya' and Caliph Umar ibn Abdil Aziz established or designed a separate prison for women<sup>53</sup>, otherwise they should be detained under the supervision or guardian of a trustworthy man, or else a pious man such as a husband, father or a son whose piety is well known.<sup>54</sup>

### **The Right to Perform Religious Observances**

The prisoner is the person who is in greater need of behavioural reformation, repentance's guidance, and the observation of communal

system or regulations. As such, the Muslim jurists emphasize the performance of religious observances by inmates particularly the prayer, as it is the most preferable bodily religious observances or acts of worship as well as fasting. They dictate that one of the duties of the *muhtasib* (ombudsman<sup>55</sup>) officer is to observe the performance of compulsory religious observances by inmates.<sup>56</sup>

On this premise, the authority must provide facilities for the prisoner to perform his obligatory religious duties such as five time daily prayers, fasting during Ramadan, and paying *zakah* provided that it will not cause any unnecessary hardship to the authority in controlling the detainees. As such, the authority must also provide all forms of necessary assistance for the inmates to be able to perform the duties in such a perfect way while being detained. This rule is based on the principle that those duties become obligatory by the command of Allah (s.w.t.) and no one has the right to change it arbitrarily except if there is a necessity for doing so. For example, most Muslim jurists are of the opinion that the authority may forbid a prisoner from performing the obligatory Friday Prayer in a congregation held in a mosque outside the prison. This measure is a precaution to ensure that the prisoner does not use the Friday prayer as an opportunity to escape.<sup>57</sup> The prisoner is neither allowed to perform *hajj*, nor attend a funeral, nor even celebrate the *eid* feast. This is to ensure that the achievement of the objective of imprisonment that is to withdraw the offender's freedom in order to make him feel forlorn and thus realise his mistake and repent.<sup>58</sup>

The above shows that providing proper facilities for prisoners in terms of their religious observance is a part of reformatory actions especially in the context of spiritual rehabilitation and self-contentment.

### **Maintaining Prisoners' Health**

Maintaining health is also part of the rights deserved by the prisoners. It is reported that the Prophet (s.a.w.) commanded his companions to treat Thumamah kindly, as he was sick. As mentioned before, the Prophet (s.a.w.) also asked his companions to give kind treatment to the two pregnant women out of adultery until the two of them deliver

their babies. Pregnancy is similar to a sickness as it causes weakness as stated in the Qur'an:

*... in travail upon travail did his mother bear him, and in years twain was his weaning: (hear the Command), "Show gratitude to me and to Thy parents: to me is (thy final) Goal."<sup>59</sup>*

While in Kufah, the Fourth Caliph, Ali ibn Abi Talib inspected the prisons and the conditions of those held in custody. He used to help the sick prisoners and allocate the fund or expenditure to provide them with treatment. The Abbasid Caliph, Umar ibn Abdil Aziz wrote to his governors reminding them to observe the prisons' affairs including the prisoners as well as to look after those who were sick among them.<sup>60</sup> It is reported that the doctors frequently visit the sick prisoners to give them treatment and to take care of them.

It is also reported that in the year 279H, Caliph al-Mu'tadid set in the budget an amount of 1500 dinar monthly for the prison's expenditure i.e. staple food, supply, water and the medical treatment, medicines and others related to medical affairs.<sup>61</sup>

### **Maintaining Cleanliness**

The prisoner's cleanliness is one of the issues closely related to the duty to maintain prisoners' health. There are general legal texts, which can be deemed as fundamentals in establishing the principles of individual cleanliness. This particularly in relation to the personal and attires of the individual Muslim as well as certain characters he is required to present and observe diligently in all circumstances.<sup>62</sup> Allah (s.w.t.) says:

*.... for Allah loves those who turn to Him constantly and He loves those who keep themselves pure and clean<sup>63</sup>*

The Prophet (s.a.w.) explained innate matters, which consider cleanliness as its essence. It consists of *istinja'*, washing *knuckles*, cutting nails, trimming moustache, inhaling water, and brushing teeth etc.

There are many *ahadith* of the Prophet (s.a.w.) that encourage the act of taking the ablution in a complete manner, and motivate the act of washing the mouth frequently (*siwak*), and advise the

washing of hands upon waking up from sleep and before dipping them in the basin, and recommend the act of removing nose's excrement, and emphasize on taking bath on Friday, and other factors that realised the individual cleanliness and eventually prevent the illness and diseases.

In this regard, the jurists concluded that it should apply the same to prisoners on the basis that such recommended acts are also available in prison. Undoubtedly the prisoner's duty to safeguard the means of cleanliness as mentioned before worth of protecting them from infection and ailment. Hence, they should not be prohibited from getting water to be used for ablution and others.<sup>64</sup>

### **Continuing Relationship with Family, Relatives and Friends**

Maintaining good relationship is one of the duties stressed by Islamic teachings as stated in the following Qur'anic verse and *hadith* of the Prophet (s.a.w.):

*Serve Allah, and join not any partners with him; and do good to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess: for Allah loveth not the arrogant, the vainglorious.*<sup>65</sup>

*Narrated by Jubair bin Mut'im that he heard the Prophet (s.a.w.) said: The person who severs the bond of kinship will not enter Paradise.*<sup>66</sup>

It is clear that Allah (s.w.t.) and His Messenger (s.a.w.) have emphasized on several guidelines, which can be used to maintain and strengthen the relationship among Muslims. These guidelines are general and applicable to all including those who are under detention. Accordingly, there is an opinion stated that the authority should allow the visit of an inmate's relatives, neighbours, and friends while he is in detention. However, they should not be allowed to stay longer than necessary to avoid the feeling of excitement on the part of the prisoner. On the other hand, for the inmates who are detained due to failure to pay debts, the visit of family and neighbours are encouraged to motivate them to settle their debts.<sup>67</sup>

In the context of husband and wife's conjugal rights, the inmate should also be given the opportunity to be with his or her spouse in

a suitable room in prison.<sup>68</sup> The Muslim jurists are divided in allowing this right to be exercised where some of them are opposed to the privilege while others consider it as one of lawful rights of an inmate and a basic need which can be exercised in a private and conducive place on the argument that if such privilege is prohibited it will lead to the commission of unlawful acts such as masturbation etc.<sup>69</sup>

For security measures, the authority should prevent the visit of someone who may harm the prisoner or disturbs the process of investigation and detention, such as someone who may give the idea of escaping from prison to the prisoner.<sup>70</sup>

The Muslim jurists are in disagreement on the right to allow an inmate to attend the funeral and to visit his or her sick members of family or relatives. In cases of attending the funeral, the diversity of opinion is among others due to the difficulty in balancing the effect of comfortableness to the prisoners and the deterrent effect of imprisonment such as in the case of debt. Meanwhile in cases of attending the sick family members, the jurists are divided into two opinions; one of them held that the prisoner shall not be allowed to do so and another maintained that the prisoners shall be released temporarily on bail to visit their parents, son, brother, and close relatives provided that the illness is critical.<sup>71</sup>

The duty to protect the relationship between the prisoner and his or her family is greater if it is between a mother and her child. The Prophet (s.a.w.) said:

*Whoever separates a mother from her child, Allah will separate him from his beloved ones on the Day of Resurrection.*<sup>72</sup>

Though the hadith mentions about the female slave and the prohibition of the separation between her and her child, it is equally pertinent in the context of a free person.

### **Rights to Education**

Islam shows a great concern for knowledge and urges the Muslims to take continuous effort to acquire it.<sup>73</sup> The inmates are in greatest need of learning, reformation, guidance, and remembrance of Allah (s.w.t.). This is due to the fact that in most cases, the commission of crime is closely related to forgetfulness and ignorance. Thus, the Muslim

jurists dictate that the learning of the rulings of the *deen* is compulsory, particularly to know Allah (s.w.t.) and to clarify the *halal* and *haram*. They unanimously opine that the objective of imprisonment is to rehabilitate as well as to educate the prisoner in order to ensure that he or she will be prevented from committing or repeating the crime. There is no doubt that a useful knowledge is a main factor which contributes to realize the objective of rehabilitation and reformation of the prisoner. The useful knowledge will enhance the prisoner's intellectual and perception, rectify the wrong way of thinking, and keep him or her away from negligence and ignorance.<sup>74</sup>

Islam pays a great attention to prisoners' education in correctional facilities since it serves as a key factor to achieve the objective of imprisonment as well as to change the mindset of the inmates and to purify their soul. The basis for education of the inmates lays on the act of the Prophet (s.a.w.), where he detained Thumamah in a mosque to let him to get acquainted with the Muslim's lives and that he would be influenced by their moral values. It is reported that after spending three nights with the Muslims, who taught him about the *deen* of Islam, he converted to Islam.<sup>75</sup>

The Caliphs also practised the same tradition. For instance, Caliph Ali ibn Abi Talib carried out an inspection on prisoners and examined their conditions and this includes education, teaching and learning. Umayyad Caliph, Umar ibn Abdil Aziz wrote to his governors insisting them to inspect the conditions of the prisoners and engage with them even on Saturdays and provide them with education, counselling, and guidance. With regard to the role of education as a tool of treatment for apostates, the Muslim jurists emphasize that the objective of imprisoning the offender, is to make him or her repent. This can be done by reminding him (or her) of Islamic faith, giving him much more exposure to the *deen*<sup>76</sup>, and keep repeating the teaching so that he or she attains soul purification and finally he or she will return to the *deen*.<sup>77</sup>

It is obvious that the right to education is also extended to prisoners as a form of self-reformation and at the same time, it works as a preventive measure for prisoners not to repeat the commission of wrongful acts.



### **Rights to Work**

It has been an established principle in Islamic law that the earning for living and to support the family is essential for human survival.<sup>78</sup> It should apply the same in case of prisoners in order to provide necessary support especially after they are released from prison. It is clear that working has its contribution towards realization of the objective of detention. By working, the inmate will be equipped with new skills that would contribute in changing his behaviour and keeping him away from bad deeds. This would further prepare him in good stead to rejoin the society. Umar said, "*It is better for a man to earn a living with his own skill rather than begging and asking from people.*"<sup>79</sup>

It is reported that during the period of the Prophet (s.a.w.) some of the captives of the Battle of Badr were employed to teach the children of the Muslims to write. This involved the captives who were not able to pay for their ransoms.<sup>80</sup> During the golden days of the reign of Abbasid caliphate, the detainees were required to work in prison to produce basket and knit the belt and others, which consist of light work that needs skill, proficiency, and patience.<sup>81</sup>

It can be said that Islam supports the participation of the expert vocational trainers in prisons' programmes. This will help them to gain lawful sustenance upon completing their sentences and to make them occupied as well as to hold them from returning to detention centres. In fact, all the payment for goods produced by the inmates will be kept in their account and not the states'.<sup>82</sup> However, Islam does not acknowledge the ill-treatment towards the prisoners and burdened them with gruelling work and were carried out in hunger, thirst, and inconvenience.<sup>83</sup> Islam also gives precaution on the act of decreasing the workers' pay as it is mentioned in the Qur'an<sup>84</sup> and *Hadith Qudsi*.<sup>85</sup> Based on this fact, it is not permissible for the authority to deny the prisoners from their pay or they are given the amount of pay, which is lesser from what should be received by them.

The inmates certainly have their own financial commitments to be fulfilled such as providing sustenance to his spouse and children and repayment of his debts whether to individuals or the society. Thus, when he is not given the opportunity to work while in prison

which leads to inability to carry out his financial commitments, such a situation is considered a huge disaster. It is emphasized in *fiqh* that providing sustenance to members of family and repayment of loans are parts of obligation. All these financial commitments require sources of earnings especially working.<sup>86</sup>

The abundance of time enjoyed by the prisoners in prison would probably cause them to find ways to be involved in negative activities. Thus, it is good for an inmate to be occupied with useful activities such as teaching, learning or working in prison. In fact, this has been a tradition practised by the previous generations of Muslim societies. The lesson learnt from this enables us to understand the reason why an inmate is allowed to work and to generate incomes as it entails soul purification, fulfilment of needs, and the fight against unemployment.<sup>87</sup>

## **CONCLUSION**

As discussed above, Islamic law respects prisoners' rights by providing detail principles governing their protection while serving their jail sentences. These include fulfilment of basic needs and rights to ensure their health maintenance such as food, water, medical treatment, bedding, and clothing as well as to assist spiritual purification and self-contentment such as educational classes, performance of religious duties and others. It is, thus, clear that the one of the important objectives of imprisonment is to deliver the rights of the prisoners to be reformed and rehabilitated. Concurrently, it ensures the rights of the society to live in peace and harmony without fear toward the threat of criminal acts.

The Prophet (s.a.w.) has demonstrated a great example by offering kind and fair treatment to prisoners during his time, particularly pregnant women where the execution of the punishment only took place after the babies were delivered and the mothers were given ample time and opportunity to suckle their babies. The relevant authorities should take a cue from the action of the Prophet (s.a.w.) particularly in matters regarding pregnant inmates. This is due to the fact that a pregnant woman has special needs to be attended to and that pregnancy is the most crucial period in her life. This is also the time

when she requires support, understanding, and sympathy. Besides, the emotional effect that she has to bear throughout the period of pregnancy somehow affects her baby.

Therefore the suggestion that non-custodial sentence such as community service and probation or even flogging to serve as the alternative to imprisonment seems reasonable to be prescribed involving female prisoners. In addition, Islamic law also provides an extensive discussion on the aspect of human rights for prisoners though the legal basis is founded in general rules. However, practical experiences of the Prophet (s.a.w.) and companions in the early period of Islam serve a useful reference on how prisoners are to be treated and respected.

#### **Notes**

1. Ahmad Fathi Bahnasi, *Al-'Uqubah fi al-Fiqh al-Islami*, 1989, Dar al-Shuruq, 18.
2. Al-Bahuti, *Kashshaf al-Qinac*, vol.vi, 126, al-Ramli, *Nihayat al-Muhtaj*, vol. viii, 22.
3. See also: Article 10, United Nations International Covenant on Civil and Political Rights which states in part: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". And also: Article 5, Universal Declaration of Human Rights which provides: "No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment".
4. Ibn Faraj, *Aqdiyat Rasulillah*, 11.
5. Hasan Abu Ghuddah, *Abkam al-Sijn wa Mu'amalat al-Sujana' fi al-Islam*, Kuwait: Maktabah al-Manar, 1987, 279.
6. Bahnasi, *al-Uqubah*, 210.
7. Bahnasi, *al-Uqubah*, 210.
8. Qur'an, 4: 15.
9. Al-Qurtubi, *al-Jami' li Ahkam al-Qur'an*, vol.v, 56, Ibn al-Humam, *Sharh Fath al-Qadir*, vol.v, 230, Ibn Qudamah, *al-Mughni*, vol.viii, 156.
10. See, Qur'an, 5: 33.
11. Qur'an, 9:5.

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12. Ibn Kathir, *Tafsir al-Quran al-Azim*, vol.ii, 526.
13. Al-Shawkani, *Nayl al-Awtar*, vol.vii, 169.
14. *Ibid.*
15. Ibn Faraj, *Aqdiyat Rasulillah*, 11.
16. Ibn Qayyim, *Zad al-Ma'ad*, vol.ii, 74, al-Shawkani, *Nayl al-Awtar*, vol. vii, 212.
17. Ibn Faraj, *Aqdiyat Rasulillah*, 11.
18. Abu Ghuddah, 279.
19. Qur'an, 24: 2.
20. Qur'an, 5: 38.
21. Al-Bukhari, *Sahih al-Bukhari*, vol. viii, 142.
22. Qur'an, 76: 8.
23. Mashood A. Baderin, *International Human Rights and Islamic Law*, 91-92.
24. Abu Yusuf, *al-Kharaj*, 151.
25. Qur'an, 49: 13.
26. Ahmad ibn Hanbal, *Musnad al-Imam Ahmad ibn hanbal*, Beirut: Mu'assassah al-Risalah, 2001, vol. xxxviii, 474.
27. *Ibid.*, 348.
28. Qur'an, 76: 8.
29. Al-Bahuti, *Kashshaf al-Qina'*, vol.vi, 126, al-Ramli, *Nihayat al-Muhtaj*, vol.viii, 22, Al-Alfi, *Punishment in Islamic Criminal Law*, 236.
30. Ashraf Md Hashim, *Rights of Suspect and Accused under Islamic and Malaysian Law*, ILBS, 2004, 49-50.
31. Qur'an, 2: 57.
32. Umar ibn Shabbah, *Tarikh al-Madinah li Ibn Shabbah*, n., 1399H, vol. ii, 435.
33. Abu Ghuddah, 348.
34. Abu Ghuddah, 351.
35. Mashood A. Baderin, *International Human Rights and Islamic Law*, 64.
36. Al-Bukhari, *Sahih*, vol iv, 60.

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37. Abu Ghuddah, 349.
38. Abu Ghuddah, 352.
39. Al-Zaila'ie vol.iv, 182; Abdul Aziz Amir, 383.
40. It was during the reign of the Caliph al-Muqtadir in 313H.
41. It is reported that the detainee was his son, 'Abdullah. See also: Abu Ghuddah, 352.
42. Imam Ahmad, vol. xi, 369. See also: Abu Ghuddah, 348-351.
43. Abu Dawud, *Sunan Abu Dawud*, translated from Arabic by Ahmad Hasan, New Delhi: Kitab Bhavan, 1990, vol. iii, 1153.
44. See: *Al-Mawsu'ah al-Fiqhiyyah*, vol. xix, 265.
45. Ashraf, 51.
46. Ibn Qudamah, vol. i, 402.
47. Abu Ghuddah, 310.
48. Ashraf, 51.
49. ibn Hajar al-'Asqalani, *Al-Isabah fi Tamyiz al-Sahabah*, Beirut : Dar al-Kutub al-'Ilmiyyah, 1415H, vol. viii, 180. See also: Abu Ghuddah, 279.
50. A person whose lineage is unknown is associated as a brother with someone whose lineage is well-known. For further details see: *Al-Mawsu'ah al-Fiqhiyyah*, vol. xxxix, 343.
51. Al-Kattani, *Al-Taratib al-Idariyyah wa al-'Ummalat wa al-Sina'at wa al-Mutajir wa al-Halah al-'Ilmiyyah allati Kanat 'ala 'Abd Ta'sis al-Madaniyyah al-Islamiyyah fi al-Madinah al-Munawwarah al-'Ilmiyyah*, Beirut : Dar Ihya' al-Turath, n.d., vol.i, 258. See also: Abu Ghuddah, 310.
52. Al-Zarqani, *Sharah al-Zarqani 'ala al-Mawahib* vol.iii, 86. See also: Abu Ghuddah 310.
53. Ibn Sa'd, *al-Tabaqat al-Kubra*, vol. v, 356.
54. *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaytiyyah*, vol. xvi, 317. See also: Abu Ghuddah, 311.
55. Among the main duty of the muhtasib is to enjoin what is right and forbid what is wrong. For further details, see: Ibn Taymiyyah, 16.
56. Abu Ghuddah, 387.

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57. Ashraf, 54.
58. Al-Nawawi, *Rawdah al-Talibin*, vol. iv, 140; Al-Sarakhsi, vol. xx, 90; *Al-Mawsu'ah al-Fiqhiyyah*, vol. xvi, 321.
59. Qur'an, 31: 14.
60. Abu Ghuddah, 370.
61. *Ibid.*, 374.
62. *Ibid.*
63. Qur'an, 2: 222.
64. Abu Ghuddah, 396.
65. Qur'an, 4: 36.
66. Al-Bukhari, *Sabih al-Bukhari*, 10/508 (vol. viii, v).
67. Al-Sarakhsi, vol. xx, 90; Abu Ghuddah, 496.
68. Ashraf Md Hashim 59.
69. For further details, see: Al-Dusuqi, *Hashiah Dusuqi*, vol. iii, 281; Ibn 'Abidin, *Hashiah Ibn 'Abidin*, vol. v, 378; al-Nawawi, *Raudah al-Talibin*, vol. xi, 155; *al-Fatawa al-Hindiyyah*, vol. iii, 418.
70. Abu Ghuddah, 496.
71. *Ibid.*, 414.
72. al-Naysaburi, *al-Mustadrak ala al-Sahihayn*, Beirut: Dar al-Kutub al-Ilmiyyah, 1990, vol. 2, 63.
73. See: Qur'an, 39: 9.
74. Abu Ghuddah, 382.
75. Ibn Shabbah, vol. ii, 433-438; Abu Ghuddah, 382. See also: The interpretation of Qur'anic verses 12:39-40 in Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, (n.p.: Dar Tibah, 1999), vol. iv, 390.
76. Lajnah 'Ulama' bi Ri'asah Nizamuddin al-Balkhi, *Al-Fatawa al-Hindiyyah*, n.p.: Dar al-Fikr, 1310H., vol. iii, 253.
77. Ibn Qudamah, *Al-Mughniy*, vol. ix, 6; Al-Nawawi, *Rawdah al-Talibin*, vol. x, 76.
78. See: Quran, 34: 11-13.
79. Abu Ghuddah, 436.

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80. Ibn Kathir, *Al-Bidayah wa al-Nihayah*, Beirut : Dar al-Fikr, 1986, vol. iii, 329.
81. Abu Ghuddah, 437.
82. *Ibid.*
83. *Ibid.*, 438.
84. The Qur'an condemns the act of the Fir'aun who forced Bani Isra'il to carry out the gruelling work and denied them their rights and their pay. See: Qur'an, 2: 49.
85. The Prophet (s.a.w.) said to the effect, "Allah the Almighty says, 'I will be against three persons on the Day of Resurrection... and one who employs a labourer and gets the full work done by him but does not pay him his wages.'" See: Al-Bukhari, *Sahih al-Bukhari*, vol. iii, 82 & 90.
86. Abu Ghuddah, 438.
87. *Ibid.*

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