



ISSN NO. 2320-5407

Journal homepage: <http://www.journalijar.com>

INTERNATIONAL JOURNAL  
OF ADVANCED RESEARCH

## RESEARCH ARTICLE

## Some thoughts on the institution of punishment in the new Islamic punitive law

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### Manuscript Info

#### Manuscript History:

Received: 15 April 2014  
Final Accepted: 22 May 2014  
Published Online: June 2014

#### Key words:

punishment, suspension, writ,  
watchkeeping suspension

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### Abstract

A very important issue in every judicial system is punitive law and punishments which are both devices to establish law and order in the society and considered as guarantees for application in other areas of law. It is important how to determine and implement punishment and it requires lawmakers to pay close attention to this issue. The institution of suspension of punishment is a modern institution in implementing punishments. Regarded as a Western initiative, this institution has gradually found its way to punitive systems throughout the world including Iran's punitive system. Statistics indicate that the country regard suspension as a means of mitigation. This shows that regulations pertaining to suspension have not proved to be pervasive enough. Thus, the lawmaker has to change the existing laws to provide grounds for making more use of this institution by the courts. The aim of the present study is to investigate regulations of the institution of suspension of punishment in the new Islamic punitive law. The methodology is analytic-descriptive and the data are gathered from the library. The results of the present study reveals that this institution can only be used by the judge for Tazir crimes of third to eighth degree despite its importance in individualizing punishment and rehabilitation of offenders and there is no possibility for the enforcement of law in other offences.

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## INTRODUCTION

After the triple elements of crime on the one hand, and the organs of punitive responsibility on the other are proved regarding the perpetrator of offence, the punitive hearing leads to criminal conviction and enforcing punishment about the crime by granting a certain decree. But, in some cases it is possible that the court postpones enforcing punishment for some reasons. In this case, the punishment determined by the court but postponed for a definite time is called suspension of punishment and should the offender disobey the conditions determined by the court and law, the suspension is cancelled and the punishment determined in the judgment is enforced (Validi, 1999, 8). Hence, the institution of suspension of punishment is defined as a means through which the courts can lead punishment towards individualization. This institution is crucial in that sometimes a threat to enforce punishment in the future is more effective for the offender than enforcing punishment itself. Therefore, it is essential that this modern institution of criminal law be carefully investigated in order for the courts to make use of it. In this study which is done analytically-descriptively using library resources, we sought to investigate developments in the new Islamic punitive law by linking concepts together in order to first find out in which offences we can use this institution and second to find the conditions for giving suspension in substantive and formal terms. So, the following questions have arisen: 1. what is the necessity of employing the institution of suspension in Iran's judicial system? 2. What factors has the lawmaker predicted to confer the institution of punishment? The first assumption is that the institution of suspension is a means which helps a just hearing to a great deal and the second is that the factors that the lawmaker has used to confer this institution are related to the status and personality of the offender.

### 1. The concept and bases of punitive suspension

#### 1.1. The legal concept of suspension

The lawmaker has not defined suspension of enforcing punishment in the new law. However, the lawyers have provided a few definitions. Some believe that suspension of punishment includes stopping punishment for a person who is sentenced to Tazir or deterrent punishments in order that if he does not commit any other crime in a definite time and obeys the court's orders, his conviction is considered null and void (Ardabili, 2003, 240). Some other lawyers defined suspension as: "the suspension of punishment is a means of renunciation which the court gives to the offender under certain conditions. They have also stated that suspending punishment is a legal way for adjustment of punishment according to which the court can postpone enforcing punishment under certain conditions in order to rehabilitate the offender (cited in Safavi, 2007, 4). Having these in mind and looking at the new punitive regulations and considering new classification of the law in the area of punishment and removing deterrent punishment, one can define enforcing punishment as: "stopping punishment for a person sentenced to Tazir punishments of third to eighth degree in order for his conviction to be regarded as null and void in case he does not commit any other crimes after it and follows the court's orders in that period.

### **1.2. The bases of suspending punishment in the new law**

A crucial principle in punitive law is individualizing punishment i.e. punitive punishment has to match the status and character of the offender. Punitive systems provide the courts with various means for individualizing punishments. Undoubtedly, suspension of enforcing punishment is a judicial means of individualizing punishments. The experts have presented varying opinions about the bases of suspending punishments. Generally, the lawmakers and criminologists believe that by accepting the new philosophy of enforcing punishment that is to provide public order and rehabilitation of the offender through intimidating and educating him, it would not match this philosophy if in some cases the offender is punished by imposing physical inconvenience or financial loss. Therefore, use of the institution of suspension of punishment is for the offenders who are not considered as dangerous criminals because of lack of criminal record or removing the consequences and even their good life records signifies a rehabilitant character and refrain them from being regarded as a criminal (Peymani, 1973, 35). Another basis for suspending punishment is to encourage the offenders to improve their behavior. The punitive policymakers hope that the convicted persons try as hard as they could for the sake of being exempted from punishment and its consequences and by fearing enforcement of punishment through obeying the court's orders (Ardabili, *ibid*, 2003). Thus, the usefulness of this legal threat of possibility of enforcing a suspended punishment is obvious in case a new offence is committed and it can be seen how fruitful it is to make an accidental offender to live a decent life and refraining from committing a new crime.

## **2. Types and scope of suspending punishment in the new punitive law**

### **2.1. Types of suspending punishment in the new law**

In Iran's punitive system, suspending enforcement of punishment is of two types: simple and watch keeping (Shambayati, 1995, 440). Of course it does not mean that the same is true in punitive systems all over the world. The studies show that in some countries, especially common Law countries such as Britain, the U.S and Canada, there are advanced types of suspension of punishment and numerous administrative institutions have been established to control and monitor the suspension (Ashuri, 2003, 291). Accordingly, by considering the above mentioned points and the new Islamic punitive law enacted in 2013 on different kinds of the institution of suspension, it appears that the lawmaker has followed its traditional classification. In the Article 48 of the new law it states: "suspension of punishment by observing the regulations contained in postponing the grant of the decree might be simple or watch keeping". The lawmaker, despite the old law, has not defined the types of suspension. The lawmaker states in the Article 41 in defining types of suspension: "it is postponing, either of simple or watch keeping type". In paragraph a of this Article it is mentioned: "in simple suspension, the committer gives written promise that he would not commit any crime in the future during the period defined by the court, and it can be predicted from his behavior that he would not commit any crime in the future". It is stated in paragraph b of this Article that: "in watch keeping suspension, the person committing a crime promises to observe the orders and provisions defined by the court during the time of suspension or implement them as well as simple suspension circumstances.

### **2.2. The scope of enforcing suspension of punishment in the new law**

By the scope of enforcing suspension of punishment we mean for which type of crimes the court could grant a suspension writ. The lawmaker states about the area in which the court can grant a suspension writ in the Article 46 of the new Islamic punitive law: "in Tazir crimes of third to eighth degree, the court can suspend the whole of a part of the punishment from one to five years if the conditions for postponing the decree are met".

Thus, it can be said that: firstly, it is possible to suspend punishment in Tazir crimes and secondly, regarding the decrees of punishment set by the lawmaker it is only possible to suspend Tazir crimes of third to eighth degree. Of course it should be noted that the lawmaker has only limited adults in this respect since it has expanded the scope of suspension about offences done by teenagers and children to all Tazir crimes just like postponing granting of the decree. It has been stated in the Article 94 that: “the court can postpone granting the decree about all Tazir offences committed by teenagers or suspend enforcement (Borhani, 2013, 221). However, the court is authorized to grant a suspension writ.

### **3. Conditions for giving suspension of enforcement in new regulations**

The lawmaker has predicted conditions in the new law to give the institution of suspension of punishment called the conditions for giving suspension of enforcement. These conditions are divided into two categories by the lawyers: first, substantive conditions; second, formal conditions. In the old law employing suspension of punishment is conditioned upon lacking certain conviction record to one of offences requiring punishments contained under the Article 25 as follows: 1. certain conviction to Hadd. 2. Certain conviction to amputation or defection of an organ. 3. Certain conviction to imprisonment for more than a year in deliberate offences. 4. Certain conviction to punishment of fine more than 2 million Rials. 5. Two or more conviction records for deliberate offences with any extent of punishment. The other condition for using suspension of punishment is the offender's entitlement. According to paragraph B of the Article 25, suspending punishment is only allowed when the court does not regard full or partial enforcement as appropriate by considering social and life records of the losing party (Haraei, 2008, 119). Hence, what was defined as substantive conditions of suspension include lack of certain conviction in some crimes and inappropriacy of enforcing the whole or part of the decree against the accused person.

The lawmaker in the new Islamic punitive law enacted in 2013 states in the Article 46 that: in Tazir crimes of degrees 3 to 8 the court can suspend the whole or part of enforcement from one to five years in case the conditions for postponing the decree is present. The public prosecutor or punitive enforcement judge could also request suspension from the court who has granted the certain decree. Moreover, the convicted person can request for suspension from the public prosecutor or punitive enforcement judge after suffering one third of the punishment if they have legal qualifications.

Thus, as can be seen the lawmaker in the new law has first accepted suspending enforcement of punishment only in Tazir crimes, and secondly it has predicted some conditions for giving the institution of suspension and states that the court could only suspend the whole or part of enforcement of punishments just in case these conditions are met. These conditions known as substantive conditions clarified in the four paragraphs of the Article 40 of the new law include: a. presence of mitigation respects. b. predicting the committer's rehabilitation. c. compensation for losses or setting up arrangements of compensation. d. lack of effective punitive record. These conditions are in line with individualizing punishments (Chatr-e-Danesh, 2013, 54). However, some believe that suspension is a kind of contract and agreement between the losing party and the court in such a way that committing a new crime causes abrogating the suspension of punishment (Goldouzian, 2004, 36).

What is most noteworthy in the items contained in the Article 46 is that the lawmaker has considered the condition of suspending punishment as certain conviction. In the old law too the first condition to use suspension of punishment was lack of certain conviction record of allegation to one of the crimes contained under the Article 25 (Ardabili, *ibid*, 2003). Another necessary condition to benefit from the suspension is that, despite the old law, the public prosecutor, the enforcement judge and the convicted person as well as the court could also request issuing writ of suspension. Thus, the request of enforcement judge, public prosecutor and the convicted person is also another condition stated in the law. But, in addition to the substantive conditions, the formal conditions also have to be observed. According to the old law the formal conditions that the court was to observe them were: 1. Synchrony of granting the conviction and the writ of suspension. 2. The court's decree should be well reasoned out. 3. Court's warning and informing the losing party of the consequences of a behavior opposite the court's order (Shahsahebi, 2013).

The lawmaker in the new law has changed the formal conditions and has paved the way for individualizing punishments. The formal conditions of suspending punishment according to the new law are: 1. granting the writ of suspension while condemnation or after it's granted. 2. Court's warning and informing the losing party of the consequences of a behavior opposite the court's order, the content of Article 54 of the Islamic punitive law.

### **4. The effects of suspension**

No doubt, the aim of suspending punishment is actually to help rehabilitate the offenders and returning them to social life through preventing dangerous effects of imprisonment on the convicted person persons. Based on the old

law, the effects of suspension were divided into two types of optional and compulsory. The compulsory effects are those which come from the writ of suspension according to the decree of the court and do not require clarifications by the court. But, the optional effects have to be determined by the court while being granted (Rashidi Aghdam, 2008, 25). Freedom of the offender in custody after granting the writ is the first compulsory effect of suspension which is being mentioned in the Article 27. Also, according to the Article 32 if the losing party does not commit the crimes contained in the article 25 during suspension, his suspension conviction is cancelled and wiped off his punitive document. On the other hand, the lawmaker in the Article 29 of the new law has authorized the court to require the losing party to do or refrain from some actions.

The lawmaker in the new law has also determined effects for suspending punishment which are divided into two types: the first type is compulsory effects of suspending punishment including freedom of the accused person. The lawmaker states in the article 49 that: the writ of suspension of punishment is granted by the court while or after granting the conviction decree. A person whose conviction is not suspended totally is freed if he is in custody. Moreover, abrogating the writ of suspension and enforcement of the punishment is another compulsory effect of the writ of suspension. In other words, the offender gives two promises to the court while granting the writ of suspension. The first promise is that he would not commit any new crimes during the determined period; and second, in the watch keeping suspension is that the offender promises that he would obey the orders of the court in the determined period. Therefore, if the committer disobeys the orders of the court it would lead to the abrogation of the writ and enforcement of punishment.

The lawmaker in the Article 50 of the new law states: “if the convicted person whose punishment has been suspended does not obey the orders of the court during suspension without any justified excuse, the court which has granted certain conviction can add to the duration of suspension from one to two years for the first time or abrogate it. Disobeying the order of the court for the second time leads to abrogating of the suspension and enforcement of the punishment”. By the orders of the court we mean those orders issued about postponing injunction (see Article 42 of the Islamic punitive law; *ibid*, 2013, 62). The third compulsory effect of the writ of suspension is that if the convicted person does not commit a deliberate offence deserving Hadd, retaliation, compensation or Tazir up to degree seven, the suspended conviction is removed. The second type is the optional effects of suspending punishment. What can be said about the effects in the new Islamic punitive law is that the old law has authorized the court to issue some orders during suspension to the convicted person; hence no particular development has been done about the optional effects.

### 5. End of suspension of punishment

This is the last issue whose new regulations need to be investigated. Generally, the institution of suspension which is granted as a writ by the court ends in two ways:

1. The ordinary direction; in this case the court asks the convicted person that he does not commit a new deliberate offence during suspension. If the suspension is of watch keeping type, and he obeys the orders being issued according to the law and the court's decision during the determined period, the writ ends and according to the new Islamic punitive law the suspended conviction is void.
2. The extraordinary situation; this is the second direction through which the writ of suspension ends and it is called cancellation of suspension. The trial period of suspension of punishment is not absolute freedom and the court could oblige the losing party to obey the orders which have security and deterrent functions and the losing party has to obey the orders of the court during this trial period (*ibid*, 2003, 247). In this regard, the Article 50 of the Islamic punitive law enacted in 2013 states: in case the convicted person whose punishment is suspended does not obey the orders of the court without a justified excuse during suspension, the court which grants the certain conviction could for the first time add from one to two years to the period of suspension or abrogate it upon the request of the public prosecutor or the punitive enforcement judge. Committing a crime during the trial period also leads to abrogation of suspension of punishment. According to the article 52 of the new law: whenever the convicted person commits a crime deserving Hadd or Tazir up to the seventh degree, the writ of suspension is abrogated and the punishment is enforced. Comparing Article 52 of the new law with the Article 337 of the old law reveals that despite the old law in which the lawmaker has provided that in case a convicted person whose punishment have been suspended commits a crime during suspension period deserving convictions mentioned in the article 25 the writ of suspension is cancelled, the lawmaker has expanded the scope of crimes leading to the abrogation of the writ of suspension. This can be clearly inferred from the opposite content of the Article 52; the opposite content of the article 52 is that committing the following crimes during suspension of punishment causes the writ of suspension to be cancelled and the punishment being enforced:
  - A deliberate offence deserving Hadd,
  - A deliberate offence deserving retaliation

- A deliberate offence deserving compensation
- A deliberate offence deserving Tazir up to seventh degree

Another cause of abrogation of suspension of punishment according to the article 55 of the new Islamic punitive law is the court's disregarding of the offender's conviction record. According to the content of the Article 55 using the institution of suspension is conditioned upon that the convicted person does not have any effective punitive record or he does not have any certain conviction among which there is suspension and the punishment is enforced without any regard to them.

### Conclusion

The results of this study indicates that suspending punishment as a modern punitive law's achievement, if implemented according to the conditions and the circumstances of the criminals, could have a great effect on rehabilitation and improvement of the criminal's, especially the first time criminals characters. Moreover, it would be influential in removing imprisonment and reducing the number of prisoners. Thus, it is necessary that the lawmaker paves the way to making more use of this institution by the courts to improve the criminals.

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