

Imprisonment And Its Application Injunction In Islamic Law

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Abstract

There are various theories about the Habus punishment injunction that leads to some misconceptions, misunderstandings, and ambiguity in societies. The goal of the study was to clarify the permissibility of imprisonment as a punishment in the view of Sharia in junction in relation to rational, legislative, and statutory laws. In the Holy Qur'an, Hadith, and Islamic Fiqah, the term "Habus" is frequently used instead of "imprisonment". As result of this study, it was found that the legitimacy of Habus is proven by verses of Qur'an, Hadiths, consensus of Sahaaba, jurists (Foqaha) and Mujtahidhin, as well has in rational and civil law. According to the evidence, imprisonment punishment has been applied before Islam, during Islam, and during and after the Khulafa-e Rashidin regime in different places such as in houses, tents, Masjed and prisons. In order to control criminals, and to have an organized and disciplinary community, Habus punishment is recognized as a necessity. In certain conditions particularly when the rights of the community members are not acquired in other ways, some of the Islamic scholars (Foqaha) consider imprisonment as obligatory (Wajib). However, the Habus can't be a replacement for Islamic rule (Hudud). The rational, legislative, and statutory legitimacy of imprisonment is also proven.

Keywords: Habus, Islamic law, Injunction, Legitimacy

1. Introduction

Islam is not just a religion, rather, it is a complete system that governs all aspects of our lives, whether they are morals or acts of worship, or political, economic and societal matters, or whether such matters are related to foreign policy or education system. Islam has suitable injunction (Ahkaam) which provides us complete and comprehensive guidance on all matters (Ahmad, et al., 2020).

The primary objective of Islamic penal system is to protect society from the dangers of

crime. Society must be protected from the activities of criminals and hoodlums. Social life must be peaceful and devoid of insecurity. The severity of Islamic penal system is aimed at discouraging criminal behavior using specific, defined and legitimate rules as well as tools. To overcome the aim, the justice and punishment system is developed as a tool that includes but may be not limited to imprisonment (Al-Alfi, 1982).

In the Holy Qur'an, Hadith and Islamic Fiqah, the term "Habus" is frequently used

instead of "imprisonment". Habus is recognized to be a necessary tool for a disciplinary society in order to maintain a better justice among the members. Habus punishment in Fiqah is thought to be derived from Hadith and Islamic Fiqah as an applied constitution in a community. We, in the realm of religion, prefer to the implementation of Hadith, application of constitution, and Islamic Fiqah rules in society.

It can be stated that the instruction or guidance of Hadith, applied constitution, and Islamic Fiqah are the basic requirements and have important and academic value in a society. Meanwhile, it is suggested that human life is based on Islamic origin's rules and regulations. The available literature, especially in English language about this issue, is still lacking. Therefore, it is necessary to conduct a critical review of the previous research and results so as to summarize the previous findings and fulfill the knowledge gap. However, various theories on this issue are available in Sharia, but the variations among the theories cause ambiguity, a misconception, misunderstanding, and mis-constitution among the communities. Therefore, the purpose of this study was to extract the findings of the available evidence and literature to create a suitable response to the current scientific ambiguity in the injunction of Habus. The research will also help to enrich Islamic literature in English rather than in Arabic from the standpoint of Fiqah and constitution.

2. Methodology

This is a qualitative research following ideas, perceptions, statement and opinions about the study problem (Mulyana, 2010 & Nazir, 2011). The study is conducted at the form of library research to collect data from various sources such as in the form of books, journals, interpretation, statements of Mujtahidin, Fiqaha, etc. The main sources of data were verses of Qur'an and Hadiths, Mujtahidin, Islamic scholar interpretation and statements about the imprisonment in different times such as before

and during Islam. Also, the imprisonment legitimacy is studied in the light Sharia in view of Holy Qur'an, prophet Hadith, consensus of Sahaaba as well as in terms of mentally and statutory law. The source of primary data is the Holy Qur'an and its translation as well as interpretation that directly related to the research subject. The opinions and ideas sources are book, journals and magazine from related institutions (Najati, 2015). The method of data collection is documentation in the form of commentaries, expression and statements (Mulyana, 2015 & Afrizal, 2014). Data analysis uses a thematic approach by collecting the verses of the Qur'an that have the same purpose or intent, discussing themes, elaborating verses, comparing verses and drawing conclusion (Al-Farmawi, 2016; Brown & Swan, 2017). The author compared the interpretation, statement and opinion of commentators.

3. Result and discussion

3.1. Imprisonment (Habus) Punishment

3.1.1. The literary meaning of Habus

The word "Habus" means to prevent or prison. Thus, it means to stop something forever, as stated by Gajrati (1967).

The word "Habus" has been given other meanings also and is described by the scholar as "الحبس: المنع و الامساک و التخلية" that means to avoid, to keep, and to empty (Zbidi). Habus is also called to break a lock (Firoz A., 2005). Habus is a place or location where criminals can be kept, as it is a well-known phenomenon in our social and traditional cultural (Mustafa). Researchers have different views regarding the literal meaning of Habus. It is also defined as

“هو تعويق الشخص و منعه من التصرف بنفسه والخروج الى اشتغاله و مهماته الدنية و الاجتماعية”

Meaning: To prevent and stop a person from engaging in organizational, social, or religious activities (Ministry of Auqaf, 2005).

3.1.2. Idiomatic meaning of Habus

Arresting of live fighter prisoners of the opposite party when they fall into your hand-control is called Habus (Qala, 1988).

Based on the above definition, the Fiqah scholars stated that Habus can occur when a person is arrested. As per the above discussion, it can be concluded that a specific place (prison) is not an important factor for Habus; imprisonment can happen everywhere. As per the statement of Fiqah scholars, when a person is tied to a tree, kept in a closed room or in a masque, all such types of situations are called Habus (Ministry of Auqaf, 2005). Meanwhile, in the law punishment of Afghanistan, Habus is defined as "to imprison a person after the final verdict of law in a court in one of the prisons which are allocated by the government for such purpose" (Ministry of justice, 1396).

Similarly, Ibn-e- Taymiyyah has stated about the Sharia prison:

السِّجْنُ الشرعي هو المكان الذي يعوق فيه الشخص و يمنع من التصرف بنفسه، سواء اكانه فى بيت اوفى مسجدى

Meaning: "The prison in Sharia is a place where human being is incarcerated so that he could not do anything on his own well; even though, the place might be a house or mosque i.e. call a jail".

Ibn-e-Nujaim defines Sharia prison (jail) as following: "Jail or prison is a place where no quilt and comfort (luxury goods) available to the captive; no one will go to see him except his relatives and neighbor".

Ibn-e-Abidin Shami narrates the opinions of jurists by affirming and explaining the definition of Ibn-e-Nujaim: "Captive not to be allowed to perform Jumma prayer, praying together, Hajj, funeral and prayers of both Eids".

According to Ibn-ul-Qayyim the meaning of jail is wider than what Ibn-e-Nujaim stated. As per his opinion, there is some convenience for the captives. "Imprisoning the captives in darkest and narrow room is not a lawful confinement. Rather they should be placed in wider house and be provided with food clothes along with other requirements from the public treasury (Baitul Mal) (Ahmad, et al., 2020).

3.2. The Synonym of Habus Term

The term "Habus" has many synonyms because of the rhetoric of Arabic language as following:

- a) **Hajar:** Means to ban or to stop. Among Fiqah scholars, it is very popular term and has been used to prevent a person from getting financial authorization. The term (Hajar) also been used to ban a person from professional activities such as adjudicating from ruling, doctors from patient treatment, and teachers from teaching. (Ministry of Auqaf, 2005)
- b) **Hasar:** It is used to prohibit, detain, and imprison a person. This term is also used in the Holy Qur'an with the same meaning. (وَجَعَلْنَا جَهَنَّمَ لِلْكَافِرِينَ حَصِيرًا) (Surah Asra, Verse 8).

Meaning: "We have made the hell for closing-in of non-Muslims".

Jurists' (Faqaha) have used the term "Hasar" for banning and prohibition in Haj affairs. The term Hasar is also used together with Habus with the meaning of stopping and prohibition, and without Habus also can be used as the prisoner has no control over his prison. There is a relationship between the two words in terms of general as well as particular (Ministry of Auqaf, 2005).

- c) **Waqaf:** Habus is also used with the meaning of Waqaf / devotion. The plural form of Waqaf is Awaqaf and the plural form of Habus is Ahbas.

Popular jurists (Faqaha) define Waqaf as prohibiting something based on an injunction in order to obtain Allah's permission and reward. It has to be mentioned that the term of Habus is used for people and Waqaf is used for things.

- d) Nafi:** Habus is also used with the meaning of Nafi or negation and declining. It is important to mention that there are differences among scholars' opinions. Malikis, Hanblis and Shafeia used Nafi with the meaning of declining, and Hanalis scholars used the term with the meaning of banning and stopping (Ministry of Auqaf, 2005).

3.3. History of the Habus punishment

To understand the actual form and purpose of Habus, it is important to discuss it at the different periods such as before Islam and Islam. During the literature time (writing and reading period) which was begun 3000 years Before Christian (BC) and ended 476 years BC, the imprisonment was applied due to the followings.

3.3.1. Due to the diversity of tribes, societies and parties among the people, certain social problems and illegal actions among the people could happen. Therefore, it seemed necessary to determine the Habus punishment for the guilty in order to control criminal activity and have an organized and disciplinary community.

3.3.2. The ancient laws during the Hammurabi rule (1750 BC), Muhib Al-Ferawn law (1130 BC), and Manu Al-Hindi law (1280 BC) also contained anti-criminal text. As all these laws contained anti-criminal and punishment text in their context, punishment existed.

3.3.3. At the time of Ferawn enrolment also Habus punishment was existed. However, they have applied different types of punishment, whereas they were more familiar with imprisonment punishment. In the Holy Qur'an Allah mentioned about Hazrat-e-Yosuf) imprisonment, that however, the Ferawn knew that he is singles, but they kept him in the jail for precautionary purpose. Two more people, one a baker and the other a king's butler, were arrested on suspicion of murdering the king and kept as pensioners alongside of Hazrat-e-Yosuf. Therefore, it was approved that Ferawn also used Habus as a cautionary tool or action and punishment method. Similarly, imprisonment as a form of punishment existed in the middle centuries that began in 476 BC and lasted until 1453 AC. This is divided into two different periods.

A: The Persia governance: At this time, similar penalties of imprisonment and prison exist such as in other governments in which those individuals, who have been against the government and have broken the laws, have been punished. They were kept in prisons constructed especially for this purpose. One of the most famous prisons of that time was Saabat's prison in Mada-en city (Abu Ghada, 1978).

B: During pre-Islam period: The imprisonment penalty during pre-Islamic period in the Arabian community was such that they did not have their own prisons, whereas they kept the prisoners in their homes or tied them to the trees of date. As time passed and the Romanians rose to power, the Arabian people learned administrative and management skills and built prisons of which the most famous prison was Senin. Similarly, near

the ascent of Islam, the Quraysh also had prisons and they kept those who were against their government. After Islam came, they used to keep those in prison who had converted to Islam such as Abu Baker Sadiq, Talha Bin-e-Obaidullah, Usman Bin-e-Afan (R.A.A) and several other Sahaaba. Most of the prisoners have been kept in the houses of their leaders, such as Said Bin-e-Noman Ansar, who was captured by Abu Jehl and kept in the house of Abu Sufian (Abu Ghada, 1978).

Schneider (1995) also stated that imprisonment, a generally accepted form of punishment in modern legal systems, existed also in Islamic law in the pre-classical and classical periods.

3.4. Imprisonment penalty during Islam period

During the Islam period, the penalty of imprisonment is studied comprehensively from every aspect, in which all the rights of a prisoner are considered in comparison to previous religious or ignorance (Jehalat) periods. It is crystal clear from Hadith and historical proofs that there were no special arrangements for prison in times of the Prophet Muhammad^(ﷺ) and the first Caliph Hazrat Abu Bakr Al-Sidique (May Allah be pleased with him). However, it does not mean that construction of building for jail is dispensable since it was not as much obligatory that time as it is today (Ahmad et al., 2020). The imprisonment penalty during Islam's time itself is divided into two periods:

3.4.1. The penalty of imprisonment at Nabawi period

As per the available literature, the Habus penalty existed during the Nabawi period. However, there was no special place (prison) for keeping the captives, whereas the action of imprisonment has taken place (Ab. Wahab, 2014).

The permissibility of imprisonment is proven in the Sunnah of the Prophet, driven from the Hadith bellow,

عن النبي صلى الله عليه وسلم قال: إذا أمسك الرجل الرجل وقتله الآخر يقتل الذي قتل ويحبس الذي أمسك (Islam, 1018)

Meaning: "The Prophet as saying, if a man seizes a man and another kills him, the one who killed him is to be killed and the one who seized him is to be imprisoned."

The places where imprisonment was applied during the Nabawi period are as follows:

A. Nabawi (PBUH) Masjed: As per the available literature, Samamata-Bin-e-Asal Hanafi was one of the examples who were tied to a pillar in Nabawi Masjid. Contemporary scholars describe this action of the Prophet (Peace be upon him) as Dar-ul Thadib imprisonment. As Samamata-Bin-e-Asal Hanafi was the leader of a tribe, his penalty was modified, which in the present western world is defined as surveillance penalty (Mafthoh) (Ad. Wahab, 2014).

B. Houses and cottages: In the early Islam period, especially in the Prophet's time, the imprisonment penalty was applied in houses and cottages also. The principle of this practice is derived from the verse of the Holy Qur'an as it states:

(وَاللَّائِي يَأْتِيَنَّ الْأَعْيُنَ مِنْ أَعْيُنِنَا فَوَسِّدْنَ فِي الْبُيُوتِ حَتَّى يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا) (Surat-e Nesa, Verse Number 15).

Translation: "And the women who commit adultery, find four witnesses from among you, and if witnesses testify, keep the women against whom the testifying is done in your homes until they die or Allah choose another way for them".

Similarly, one of the houses that were used as the prison belonged to the Prophet's Mohammad's wife Bi Bi Hafasa. It was built

when they came from the Badr Ghaza and Sohail Bin-e-Umrow was kept there.

C. Tents: Imprisonment in the early period of Islam, especially during Nabawi rule, also took place in tents. Because when the Prophet (peace and blessings of Allah be upon him) was freed after the war (Ghaza), the prisoners who had been captured would be put in tents. The reason was that there was no safe place for keeping prisoners other than tents in the field of war (Ab. Wahab, 2014; Ahmad, et al., 2020).

The habit of the Prophet (peace and blessings of Allah be upon him) was that when he became free from war, he would stay and observe there for three days and keep there the prisoners who were captured during the war. As an example from Badr, the prisoners that were kept in the tents for three days and nights were distributed as the war booty (Ab. Wahab, 2014).

3.4.2. Imprisonment implementation during the Khulafa-e-Rashidin regime: It is discussed earlier how the imprisonment was carried out during the Nabawi period and where it was carried out. During Abu Bakr Siddiq's period it was similar to that of the Nawabi period (Ahmad, et al., 2020), but during the Umar (R. A) period, he used the old method for a while, and afterwards he bought a house and implemented the imprisonment there. Anthony S. (2009) stated that the adoption and construction of more formal prison-like structures and institutions were neither immediate nor comprehensive in the early conquest era. Of course, there is also a view that, for the first time, a prison was created during the period of Ali (A. S)'s caliphate/succession (Ahmad et al., 2020), whereas some literature cited that during the Umar (R. A) period, he was the first he bought a house for the prisoners and used it as a prison. Therefore, for the first time during Ali (A. S) caliphate, a special place was allocated as a prison such as Kofa, and the

imprisonment penalty was being applied in that prison (Ab. Wahab, 2014; Ahmad, et al., 2020). There are two different views of Islamic jurists upon construction of a particular building for prison. Firstly, the Amir (commander) or the judge have legitimate authority to construct a building for offenders as prison with reformatory purpose (Ahmad, et al., 2020).

3.4.3. Imprisonment implementation after the Khulafa-e-Rashidin regime: After the Khulafa-e-Rashidin period was over, the number of people who accepted Islam as well as conquest increased. Sham, Iraq and Egypt were conquered, meanwhile corruption also increased. Therefore, the authorities were obliged to implement the imprisonment penalty in an organized manner and system so as to control illegality and crimes (Al-Alfi, 1982). The first organized prison which had security guards was also established during the Maweia Bin-e-Abu Sufian (R.A) period. The prison system was organized further and management was improved during the Omer Bin-e-Abdul Aziz period. After Khulafa-e-Rashidin regime, special administrative offices were established so as to enhance the prison management. The famous prisons were as Dameshq, Halab, Iraq, Shareh in Kofa, Madina, Maka, Yaman, Qahera, and Askandaria prison in Egypt were established and have been used for imprisonment penalty implementation (Ab. Wahab, 2014).

3.5. Imprisonment Legitimacy

3.5.1. The legitimacy of imprisonment in the Holy Qur'an: There are many reasons that prove the legitimacy of imprisonment as Allah^(c) says in Qur'an.

“وَاللَّائِي يَأْتِيَنَّ الْأُفْحَشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَقَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا” (Nisa Surah , Verse 15).

Translation: And the women who commit adultery, find four witnesses out of you, and if witnesses testified, so keep the women against

whom the testifying is done in your homes until they die or Allah chooses another way for them.

From the above verse, it's proven that in the early period of Islam, prisons existed after absolute approval. However, then Allah sent other instructions for those women (Razi, 1994).

Islamic many scholars have stated about the above verse, mentioned below,

The above verse is not abrogated, but the last verse is came for its interpretation and statement because abrogation is meant to completely remove a command (law), but when the command is conditional and the condition is removed, it is not called abrogation. Because Allah has stipulated in the verse that unless another order is revealed, the statement of the revelation of the other commandment is made and is not considered an abrogation (Qudama, 2010).

Jurists have various discussions and deduced from Qur'an regarding the imprisonment legitimacy of criminal or the alleged, e.g. Allah said:

"فَإِذَا لُفِيْتُمْ الَّذِينَ كَفَرُوا فَضَرْبَ الرِّقَابِ حَتَّىٰ إِذَا أَثَخِنْتُمُوهُمْ فَاسُدُّوا
الْوُجُوهُ" (Surah Mohammad, Verse 4)

Translation: Incarcerate your enemies as and when they are defeated and many of their men killed.

By the way, many evidence are available from Qur'an that proof the legitimacy of imprisonment of guilty, and suspected person for precautionary purpose so that to ensure a better justice among the community members.

3.5.2. The legitimacy of imprisonment in the prophetic Hadith: There are numerous prophetic Hadiths related to imprisonments proof and argumentation, an example as following:

عن أبي هريرة رضي الله عنه: أن النبي صلى الله عليه وسلم حبس رجلا في تهمة يوما وليلة استظهارا واحتياطاً (Albaya-A., 1990).

Translation: It is narrated from Abi Harira that the prophet (peace and blessings of Allah be upon him) imprisoned a person a night and day for caution so that he could seek information from him if he was criminal and so that he should not go anywhere else to prevent losses the rights of other people.

The argument of the scholar from the above Hadith is proof of the legitimacy of imprisonment, even if the prisoner is under accusation (Sidiqi, 1993).

3.5.3. The legitimacy of the imprisonment with the consensus of the Sahaaba: For the legitimacy of imprisonment, the Sahaaba (Associate of Prophet Mohammad) and all the jurists (Faqaha) and Mujthahidin agreed that imprisonment is a permissible punishment in order to control criminals and have a disciplinary and organized community. Similarly, the imprisonment was maintained during the Khulafa-e-Rashidin period as well as thereafter, and no one has denied it.

From the above discussion, it is proven that both, Faqaha and Mujthahidin agree on the legitimacy of imprisonment. A similar alliance exists among the four religions, as sufficient literature on justice and Aflas has been written that presents imprisonment events (Afandi, 2000). The Mujthahid scholars who have the similar opinions about the imprisonment consider imprisoning of a guilty or a suspect as an exclusive punishment with the aim that this punishment can't be a replacement of the religious (Islamic) rule (Hudud). When the Islamic Hudud are canceled, the guilty or suspect is imprisoned (Al-hamam).

Abu Yusuf told Haroon Rashid when he served as a judge during his Khelaphate that "If you order the application of Islamic law (Hudud), the use of imprisonment penalties will be reduced,

the wrong people will be scared and they will correct their pathway (Abu Ghada, 1978). The above context also represents the legitimacy of imprisonment, as it existed during Khulafa-e-Rashidin time.

3.6. Rational legitimacy of imprisonment

As discussed earlier, religiously, imprisonment is considered to be permissible and a lawful action; moreover; it is a social necessity. Therefore, it is important to investigate the legitimacy of imprisonment using mental contest also. Since Sharia law permits imprisonment, the intellect also recognizes it as acceptable. When an accused is arrested by the police, it is not clear whether the suspected is a sinful or sinless person. As a result, the suspect should be detained so that they can gather conclusive evidence and reach a better decision. Thus, by the way, the rights of other members of the community are also reserved / maintained (Mosali, 2005).

The imprisonment is the best way to prevent the rights of other people from offensive person. If such people are released without proper investigation, the rights of the people in the society will be lost. This is more important when the corrupted people involved in crimes and the Islamic rules (Hudud) are not applicable, and then imprisonment is the best solution. When such need exists in society, intellects demand is that the imprisonment be used to meet the community requirement. In certain conditions, particularly when the rights of the community members are not acquired in other ways, some of the Islamic scholars (Foqaha) consider imprisonment as obligatory (Wajib). Therefore, the application of imprisonment is Wajib at this time so that the community members' rights can be obtained (Abu Ghada, 1987) properly. The Islamic scholars state that imprisonment itself is not intended, but as a result of its imposition, we can seek that it is a way of obtaining the rights of community members (Mosali, 2005).

3.7. The verdict of imprisonment in statutory (applied) laws

As discussed earlier, imprisonment is a permissible penalty in Sharia and even considered as a necessity for a society's management. Some of the Islamic scholars (Foqaha) stated that in certain situations, imprisonment is considered obligatory (Wajib), as the concept of principle rules is also the same. As per the principles, the injunction of an action or a tool reaching towards a Wajib objective is also Wajib.

Some Islamic scholars (Foqaha) also mean that in some cases, people's rights cannot be acquired, and community discipline cannot be implemented without the use of imprisonment. Based on these requirements, it is considered a necessity in a disciplinary society. The legislatures of the laws are in agreement with the Islamic scholars (Foqaha) and recognized imprisonment as an important requirement of communities. In addition, the legislatures agree with the legality of imprisonment and have also announced its types and chosen special punishment for each one. With the lawful consent of imprisonment, different types of imprisonment as well as punishment for each type of crime are identified (Al-Alfi, 1982).

In the sense that all criminals are not the same, imprisonment as a punishment is divided to different categories. In addition, different categories of people are available, such as non-guilty, suspected, and accused, while all may be kept in prison but with different intensity of punishment (Ministry of justice, 2017).

Too much attention and care is observed in Islam on reformation of captives during the prison but one should not construe that there is improper concession about prisoner or their punishment might be reduced upon disposal of the judge. Sharia jail does not put captives in severe physical exertion to become physically so

weak to look like living carcass (Ahmad, et al., 2020).

Therefore, as per the article 147th of panel regulation of the Afghan government, the period of each type of imprisonment is as follows: 1) a short period of imprisonment ranging from one to three months; 2) a medium period of imprisonment ranging from one to five years; and 3) a long period of imprisonment ranging from five to sixteen years (Ministry of justice, 1396).

According to the above discussion, it can be summarized that imprisonment is an acceptable punishment under statutory (applied) law. Similarly, the legislation also recognizes imprisonment as a permissible action based on Islamic law and an important acquisition for the community.

4. Conclusion

It can be concluded that imprisonment is a permissible type of punishment in Sharia, proven by verses of the Qur'an, Hadiths, consensus of Sahaaba and recommended by Foqaha. Its legitimacy is also proven in rational and statutory laws and is an acceptable and applicable form of punishment where it is required. In order to control criminal actions, have an organized and disciplinary community, Habus punishment is recognized as an important pillar. In certain conditions, particularly when the rights of the community members are not acquired in other ways, some of the Islamic scholars (Foqaha) consider the imprisonment as an obligatory (Wajib). Sharia jail is not purposely premeditated for revenge but for rectification, reformation and discipline of individuals.

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