

**Saleh Abdulla Murad Abdulla**

“The Use of the Death Penalty  
Under the law of the United Arab Emirates”

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Philosophy of Law

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## **DECLARATION**

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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## **Abstract**

This study analyses the attitude of the legislator in the United Arab Emirates towards capital punishment and its usage. The study examines whether the legislator is moving towards abolishing this harsh punishment or is insisting in using it, and in either case asks why. This study also examines the reasons for the legislator attitude and whether it has been affected by the global trend and the global movement towards abolishing this penalty for all crimes, even for those committed in wartime. Further, the study asks whether the legislator in the United Arab Emirates follows the Western way of thinking in dealing with this punishment or whether it is still connected with its Islamic roots in using this punishment.

An overview of the crimes punished by death in the Islamic Sharia provisions is provided in the first three chapters. Chapter 4 provides the background of the formation of the UAE and the development of its legal system, clarifying how the system could avoid the execution of an innocent person. Chapter 5 deals in depth, and critically, with the details of crimes punishable by death according to the punitive laws of the United Arab Emirates to examine how far the legislator was justified in deciding such penalty for such crimes. Chapter 6 of this study deals with the rights of the defendant facing the death penalty and the evidential guarantees provided by the legislator during the interrogation and trial, and whether such guarantees would save the life of an innocent person. Then Chapter 7 along with chapter 8 examine the differences between Islamic and Western laws in the ways they deal with the death penalty and serious crimes. Chapter 9 examines the impact on the UAE legislator, at the level of the constitution and punitive laws, of the global trend with respect to the death penalty, whether the UAE legislator has been affected and

influenced by this trend, and the extent of any influence. This study concludes with Chapter 10, which discusses recommendations concerning this harsh punishment.

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## Introductory Chapter

Crime is choice, bad choice, in the balance of goodness and evil: the betrayal in Paradise, the slaying of Abel by his brother Cain. It increases as we increase now seven billion souls on the face of the planet. To survive even our own natures, crime must be punished, the harshest crimes by the harshest penalties, that much is evident. But what should be the harshest of all penalties, imprisonment until death or death itself? On that the world is divided.

This thesis is presented at a university and in a country shaped in a certain way over the question of the death penalty. Now approaching fifty years since the last person was hanged on British soil, there will be few lawyers, and fewer academics, whose practice began before abolition. But the thinking behind this work springs from fourteen hundred years of tradition, and not a tradition of superficial customs merely but of religious belief, and not a religious belief like so many others, open to every generational wind, but one whose integrity may not be dishonored. Islam is our surrender to the Almighty, the Qu'ran our recitation. The reader is politely asked to bear this in mind.

Yet if this study was simply a recital it would scarcely be worth writing, much less reading. A considerable part of what must be recounted here is an examination of the death penalty in *sharia* (Islamic law) and its practice in Islamic countries. What should be apparent is that this is a live issue for Muslims, one requiring us to exercise our intellectual resources. It is understandable, perhaps, for non-believers to imagine that all things are settled and unchangeable in law that is given to us. But this is over-simple.

Religious teaching poses many difficulties that Allah expects us to overcome by finding the best solution. Neither mercy nor punishment can be set a side. Benefit is a key concept here: how best do we deter the most serious crimes that threaten the security of the individual and society as a whole?

Since the writer is from the United Arab Emirates, a state subject to many cultural influences from outside the Arab world, we will examine its particular case in relation to the death penalty. Does it deal with capital punishment according to the provisions of the *sharia* or is it moving in line with Western thinking? Research on this topic is scarce and rather difficult to achieve in the UAE. Academics tend to avoid it as a topic difficult for the authorities to discuss. The writer has obtained new information which will be presented for the first time in the academic record, especially information related to the actual number of executions carried out in the UAE.

Many articles and reports, coming from organisations like Amnesty International, simply state that the UAE retains the death penalty. There is a complete absence of discussion as to its reasoning or to the current thinking within society. Yet it is essential to know how and to what extent capital punishment is implemented by the courts. We must also confront the question of error: what ought to be the attitude of the legislature to the possibility of executing an innocent person. Can the state itself be culpable and, if so, what should be the consequences?

These considerations form the primary task and give the writer reason to believe he can make a useful contribution to the field within his own country. Yet they would be

inadequate as a thesis without relationship and justification to the largely secular, Western world. Here is a quite different context for discussion of the death penalty, one that plunges the writer into entirely new questions as to its social meaning and disputed value. Why regulations vary so greatly across the world and why there is a powerful movement to force uniformity on abolition are issues that involve a great deal of research both contemporary and historical. Diverse sources have been used.

The thesis is divided into nine substantive chapters, six domestic and particular to Islamic law and the situation within the UAE, three that look outward and consider the nature of objections to the death penalty and their impact on Islamic society. The first chapters deal with the attitude of *sharia* to capital punishment. This begins with the implementation of the death penalty in relation to divine ordinance crimes. We examine the concept of retaliation and the penalties prescribed under Islamic law, and, in the following chapter, the discretionary penalties which are the prerogative of the ruler and whose exercise is governed by questions of security and the peace of mind of society. From this point, we move to consider the penalty as an aspect of punitive legislation within the UAE. The origins and evolution of the country's legal system are examined. In the fifth chapter, crimes punishable by death in the UAE are looked at in turn, including the narcotics code and the anti-terrorism code issued in 2005. Finally, in this section, the legal safeguards for offenders liable to the death penalty in the UAE are scrutinised and comparisons made with the disposition of other, similar legislatures. An estimate will be given as to the conduct and effectiveness of UAE policy on the death penalty.

The seventh chapter begins with a discussion of the origins of the abolitionist movement in the West. It questions the provenance and durability of this thinking and, in particular, the capacity of Human Rights activism in the United Nations and elsewhere to understand the rooted objections that stand against it. This is followed by a more general enquiry into the meaning of capital punishment and the nature of justice in secular society. It finds an extraordinary lack of historical realism and of clarity in Western thinking.

The thesis defends the right to uphold the death penalty not on grounds of cultural difference merely but as a coherent response to the existential problem of justice. Chapter nine deals with the extent of Western influence on UAE legislators. This question and others concerning different cultural responses to the death penalty are brought together in the conclusion. Here the writer's opinions and recommendations are given in a way that may be of benefit to others. May Allah grant that this work is of some value to our legal resources.

## **Methodology**

In this thesis, the researcher has used a combination of methodological approaches in order to provide a comprehensive analysis of the actual and real use of the death penalty in the United Arab Emirates, since the researcher comes from there.

In order to carry out an effective, useful and critical study of the actual situation and the reasons for the use of the death penalty in the UAE, and whether this is common, the researcher decided to base his primary on an exploration of the penal code (and other punitive codes) to discover the extent of the use of the death penalty, as well as to analyse statistics gained from the Criminal Investigation Departments and the Correctional Institutions.

The position of the researcher as a police officer in the Correctional Institutions in Dubai allowed him to gather all the information related to this matter. He has made every effort to gather similar information from the other Emirates, but their cooperation was generally not forthcoming since in each case this kind of information is rarely discussed in public because of the reluctance of government authorities to do so. They do not want to attract unpleasant media attention but prefer to deal with this matter in their own calm way.



A field study was carried out in Dubai, it being a pioneer Emirate with a Western way of thinking, more so than the other Emirates in the Union<sup>1</sup>, which were nevertheless also considered in this study.

The researcher interviewed officials connected with the issue. These were judges, public prosecutors, lawyers and police officers. The researcher also attempted to carry out a survey by questionnaire. However, since only a few people responded initially, it was decided that this method was not viable.

The legislation of the UAE has been extensively examined here, specifically the Federal Penal Code, the Criminal Procedure Code, the Anti-narcotic Code, the Anti-terrorism Code and the judgments of the Federal Supreme Court.

Library resources were also used widely in this research, especially in relation to the Holy Quran and the narratives of the Prophet. Furthermore, mainly Arabic references were used when dealing with the punishment in the Islamic *sharia* and when explaining the legal structure of the UAE. English resources were used to clarify the situation in the West and wherever they have served the study. There was frequent recourse to Internet material, newspaper articles, journal and reports from special listed organizations. A broad approach was taken to material in the international debate on capital punishment.

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<sup>1</sup> In 1963, the forward-thinking Sheikh Rashid Bin Saeed Al-maktoum of Dubai, ruler from 1958 to 1990, went to the USA to see how his vision of a Dubai of future might be implemented. He envisaged that Dubai could become the main trading centre for the region, and many of the present infra-structure projects such the international airport derive from him. To encourage outside investment, and important aspect of his policy was to harmonize Islamic and Western legal practices (see Hamza, K., Sheikh Rashid, Close Perspective, UAE Press, 2007, p. 145 & *passim*).

Reference is made to the cultural and historical background as well as to current publication in Europe and the USA.

### **Why was this subject chosen?**

In general, the UAE is facing a lack of research concerning penal law in general and the death penalty in particular since most of the existing research has been undertaken in the West, not in the UAE. It was therefore decided to take the initiative and start this research to shed light on the situation in the UAE and to explore the way to enable future researchers to continue what it started here. To the writer's knowledge, the death penalty has not been previously researched in the UAE since this subject creates embarrassment in some quarters, as it mentioned above, and is generally avoided, especially by officials.

### **Why were the Islamic *sharia* and Western laws chosen for comparison with the UAE?**

As a modern country, the United Arab Emirates from the time of its independence has attempted to adopt both the Islamic and Western forms of legislation. As an Islamic Arab country it could not adopt entirely Western legislation and as a modern country it did not want to adopt fully Islamic *sharia*. The United Arab Emirates thus provides a good example of an attempt to harmonize contrasting laws. The researcher has tried to provide a detailed account as an opportunity for others to compare the Islamic Sharia, the Western way of thinking regarding the death penalty, and the approach of the legislator in the United Arab Emirates. On the other hand, the researcher wished to

clarify to what extent the legislator in the UAE has been influenced and affected by the Western way of the thinking.

Since the researcher is a full-time police officer, he was unable to expand the research to other neighbouring countries. However, some indication of their approach to this issue has been provided in the research. Moreover, the researcher attempted to gain more statistical data; however, he faced a lack of cooperation in this endeavour. Thus, in this research, only realistic statistics were provided and only answers given by people who were interviewed and agreed to their names being mentioned are included; answers from others who preferred their names not to be mentioned are not included to preserve the honesty of this research.

## **Chapter One**

### **The Death Penalty and Divine Ordinance Crimes**

#### **Introduction:**

All divine doctrines, without exception, and the Islamic Sharia in particular, emphasise the necessity of the promotion of virtue and security among communities of mankind, stressing that such values can never be realized unless the five human necessities, namely the safeguarding of the person, his religion, lineage, intellect, and property.

However, maintaining these five essential values cannot be achieved without imposing punishments that give individuals the feeling that their lives, property and dignity are protected; that attention is given by the legislator to them; and that everybody becomes aware that infringement of these necessities is forbidden and constitutes a great danger. This is reflected in the punishment stated by Allah, and by the ruler who is responsible for the safety and security of society. Although the punishment or threat of punishment will not prevent crime, it is supposed that will keep it within acceptable limits which do not threaten safety and security, since individuals have the right to live peacefully. Perhaps the most severe punishment that may be inflicted upon a person is capital punishment, which is the subject matter of this research.

In this thesis, light will be shed on this punishment, which is in accordance with the Islamic Sharia as being a divinely ordained punishment, i.e. imposed by Almighty Allah on specific categories of crimes. Hence, in the Sharia, this punishment is a divine right

that may not be remitted or replaced with another judgement. In light of this, we will focus in this chapter on the doctrinal rules of capital punishment.

Before entering into the details of the research, it is important to stress that there are many juristic differences that will arise in the course of the discussion. However, the opinions mentioned in this regard will be examined according to the four schools of faith (religious schools of thought) stressing the Imam Malik<sup>2</sup> school of faith. This is the official religious faith adopted in the United Arab Emirates. We will consider the other three schools of faith, namely those of Imam Ahmed Ibn Hanbal<sup>3</sup>, Imam Al-Shaf'ee<sup>4</sup> and Imam Abu Hanifa<sup>5</sup>. Although there are schools of faith besides these, my discussion will essentially focus only on these four as being the best known and most widely adopted in Islamic countries. However, other schools of faith may be mentioned as opportunity permits.

To make it clear to the reader, it is worthy saying that any Muslim person should follow one of the Imams. For example, the majority of the inhabitants of the Arabian Peninsula, Sudan and North Africa are followers of the Imam Malik school of faith, whereas the majority of the inhabitants of Egypt and Iraq are followers of the Imam Abu Hanifa school of faith. Following a specific school of faith is important in order to understand the judgment taken in solving a specific disagreement. Yet differences between the schools of faith are relatively insignificant in relation to the essence of the *sharia*. The following example may make this clearer; the crime of adultery is

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<sup>2</sup> Imam Malik Ibn Anas (93- 179 A.H).

<sup>3</sup> Imam Ahmad Ibn Hanbal (164-241 A.H).

<sup>4</sup> Imam mohammad Ibn Edrees Al-Shaf'ee (150-204 A.H).

<sup>5</sup> Imam Al-Noman Ibn Thabit Ibn Al-Noman (80-150 A.H).

condemned by all schools of faith but a dispute was raised in respect of whether to consider sodomy with a woman as adultery. It is a condition for the crime of adultery that the woman is penetrated through the vulva only but not through the buttocks<sup>6</sup>. What is the judgment of the latter act? Thus, examples of such disputes will be given in this research as they arise. We will also discuss, with details, any disputed topic related to the subject of this research. As for the secondary topics, they will be mentioned briefly so that the discussion will focus only on the core and direct subject matter of the research.

According to the issues mentioned above, we will clarify here the crimes punished by death as mentioned in the Holy Qur'an and for which no pardon can be given except under specific conditions, which will be discussed. These crimes are: adultery, armed highway robbery, rebellion and apostasy. It must be understood that Islamic *sharia* is different from Western law in one significant way: judgments under Islamic Sharia have two main sources, the Holy Qur'an and the Prophetic Sunna – any utterance or deed of the Prophet Mohammad, peace be upon him, or His approval of any utterance or deed made by others (affirmation). Thus, if Islamic jurists are faced with an issue or Sharia judgment, they will examine these two sources. However, if an unambiguous decision is not found, the role is given to the third source of Sharia judgments, which is the agreement of jurists at a specific time on a specific issue provided that such judgment can be derived from either of the two main sources, the Qur'an and the Sunna. Thus, unanimity is required to infer a sub-judgment from a major judgment. On the other

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<sup>6</sup> The three Imams (Malik, Al-shafee and Ibn Hanbal) agreed that the punishment of sodomy with a woman is the same punishment of adultery, however, Iman Abu Hanifa said that sodomy deserve the same punishment but as a discretionary punishment not a divine ordinance one. (Obada, H., Divine ordinance crimes and its rules (Arabic), *Jaraem Alhudud wa ahkameha Ahshareia*, Dar Alfikr Aljamee, 2010, pp. 48-49).

hand, Western law is man-made and consequently changeable according to time and place, which makes punishments under Western law fit society's requirements. By contrast punishments according to Islamic Sharia, such as those prescribed by divine ordinance, have been established since they were revealed in the Holy Qur'an and the Prophet's Sunna more than 1400 years ago. The nature of the punishments under Islamic Sharia will be elaborated later in this thesis. In discussing some issues Qur'anic verses and authentic Prophetic sayings (Hadeeth) have been used, as mentioned by famous Hadeeth reciters who included in their books only authentic Hadeeth, such as Imam Muslim<sup>7</sup>, Imam Al-Bukhari<sup>8</sup>, Al-Tirmithi<sup>9</sup> and Abu-Dawood<sup>10</sup>.

Islam does not ignore the establishment of an integrated punitive system that assures a reduction in the phenomenon of crime and its restriction within society. Moreover, the goal of this system is not only to punish, it is also to rehabilitate criminals whenever possible and prevent others from committing the same crime. Therefore, it protects the interests of society, encourages the attainment of a virtuous character and discourages antisocial behaviour that can spoil the lives of others.

For this reason, Allah gave the divine ordinance punishments (*Al-Hudud*) and mentioned them in the Holy Qur'an, which was sent to his messenger Mohammad, peace be upon him. Islam sees the death penalty as a right of Allah, as in the case of *Al-Hudud*, which was stated in the Holy Qur'an and in the Sunna of the Prophet. This is at

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<sup>7</sup> Abu Al hussain Muslim Ibn Alhajaj Al qushairy Al naisaburi (206-261 A.H)

<sup>8</sup> Mohammed Ibn Ismael Ibn Ibrahim Ibn Al mughaira Al bukhari (194-256 A.H).

<sup>9</sup> Abu-Essa Mohammad Ibn Essa Ibn Sawra Ibn Moosa Al-tirmithi (209-279 A.H)

<sup>10</sup> Abu-Dawood Sulaiman Ibn Al-Asha'ath Ibn Is-haq Al-sejestani (220-285 A.H)

variance with the point of view of Western countries which view the penalty merely in terms of its utility in crime prevention which is a narrower perspective. The death penalty in the Islamic *sharia* is not only used for this reason: it is here a right of God<sup>11</sup>.

The discussion will now consider crimes that fall under *Al-Hudud* crimes in the Islamic Sharia, and the discussion will concentrate on crimes that imply execution, but other crimes will be discussed in the context of the research.

Islamic criminal provisions recognise seven major offences, for each of which a penalty has been prescribed in the Holy Qur'an and the Sunna of the Prophet Mohammad, peace be upon him; these punishments are called *Al-Hudud* or the fixed punishments<sup>12</sup>.

The seven offences are adultery, slander, drinking of alcohol, theft, armed highway robbery, rebellion and apostasy. Based on their severity, Allah decided the death penalty was appropriate for four crimes due to their cruelty and bad effects, whether on the criminal, the wronged person or the society, as will be explained in this research.

The *Al-Hudud* punishments in Islamic law were prescribed by Allah in the Holy Qur'an, with the exception of one offence, adultery (committed by a married person), for which the punishment is prescribed in the Sunna of the Prophet Mohammad, peace be upon him.

The reason Islamic law prescribed a punishment for each of these offences needs to be explained, as does the reason Islam mentions only these offences to be subject to the death penalty. All Muslims know that the main role of Islam is to protect lives, religion,

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<sup>11</sup> Ibn Aby Baker, Shams Aldeen Aby Abdullah Mohammad Ibn Aby Baker., The saying of Jurists taken from the intent of God (Arabic), *E'alam Almowaqe'ean An rab Alalmeen* (investigated by Taha Abdulraouf Saad), part 1, Maktabat Alkeleyat Alazharia (Cairo), p.114.

<sup>12</sup> Jafar, Ali Mohammed., Punishment philosophy in Islamic *sharia* (Arabic), *Falsafat Al oqoba fi Alsharia Alislamea*, first edition, 1997, p.47



parentage, intellect and property. Hence, Allah and his Prophet Mohammad, peace be upon him, specified these offences and left other offences to the authorities to decide the punishments suitable for them<sup>13</sup>.

In respect of this research, there are four offences that come under the *Al-Hudud* category which are subject to the death penalty, and we need to focus on them and to clarify whether, according to Islamic law, it is necessary to execute anyone who commits one of them and whether there are strict conditions to be fulfilled first before the implementation of the penalty.

### **1.1 Adultery or Fornication**

Divine doctrine states that the wisdom of the Almighty decreed that both man and woman should have distinct natures to attract one another and make each have a strong desire to bring each into contact with the other, a contact that leads to the fruit of reproduction to perpetuate mankind. However, Allah did not leave this issue without discipline but ordained marriage and gave the conditions and rules for it. Those who do not comply with the rules of Allah and do not take into consideration the rules of marriage, follow their desire and fall into *Zina* (adultery or fornication). The *sharia* is very severe towards those who do not comply and who follow their desire to commit *Zina*. The punishment prescribed by Allah, as He said in *Surat* (Al-Noor), is that the adulterer and adulteress, guilty of adultery or fornication, should be flogged with a hundred lashes. This punishment applies to the female and male fornicators who are

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<sup>13</sup> These are called discretionary punishments, will be examined in Chapter 3.

unmarried, but for those who are married the punishment is more severe, as stated in a *Hadeeth* (narrative) of the Messenger of Allah, Mohammad, which is stoning to death<sup>14</sup>. The Islamic *sharia* is severe towards adulterers and adulteresses who are married to restrain their desires and divert their thinking from committing illicit sexual intercourse. Hence if, after marriage, they still contemplate this major sin, it proves that the desire is for a prohibited enjoyment. The severity of the *sharia* is to restrain the person and prevent the crime. The punishment for adultery is deterrent in its nature: either flogging or stoning to death<sup>15</sup>.

Islam forbids adultery in order to protect lineages from confusion. If adultery is not forbidden, then lineages would intermix<sup>16</sup> and consequently individuals would not know their own lineage leaving such children lost, neglected, and corrupted from the very beginning of their lives<sup>17</sup>. Furthermore, forbidding adultery protects individuals from fatal venereal diseases<sup>18</sup>. In this regard, a Professor of Preventive Medicine in California University, Dr. John Piston, said "The evidence gathered from many studies proves that venereal diseases mostly stem from sexual intercourse practised outside of marriage

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<sup>14</sup> Alghamdi, Mohammad., The death penalty (Arabic), *Oqobat Aledam*, Maktabat Dar Alsalam (KSA), 1992, p.502

<sup>15</sup> Mansoor, Aly Aly., Hudud Crimes, in 'The Islamic Criminal Justice system', M. Cherif Bassiouni, Editor, Ocean Publications, 1982, p.196

<sup>16</sup> Some people might argue that scientific development and the DNA test could eliminate the confusion of lineage intermix. However, it is impossible to take all parents along with their children to the laboratory to establish parentage. DNA testing where there is suspicion that a particular child is legitimate. Who can prove that every child is the legitimate offspring of his father?.

<sup>17</sup> Abu-zahra, Mohammed. The crime and punishment in Islamic provisions (Arabic), *Al-jareema wa Al-oqoba fr Alsharia Alislamia* (Cairo) p.65

<sup>18</sup> Some people might argue that medical advances can cure all diseases. But can we then, for example, justify the spread of the HIV virus? Can we be sure that using contraceptives will offer a full protection against disease? There are many diseases which lead to permanent sterility (see Faraj, H., Consequences of illegal sexual relationship (Arabic), *Tawabea alelaqat aljensia alghair shareia*, Alwalaa Press, Cairo, 2006, p. 195)

relationships".<sup>19</sup> Adultery is also a main reason for youth declining to get married with consequent reduction of the birth rate.<sup>20</sup>

Islam also grants a man the right to marry up to four women at the same time provided that he is equitable to them all, and this also serves to restrain his desire. It also gave the woman the right to ask for divorce, if she realizes that her husband is not capable of satisfying her desire, in order to enable her to marry another man<sup>21</sup>. However, as the *sharia* is severe in its punishment of adultery, it is also strict in its rules of evidence to prove the crime as well, as will be discussed later when dealing with the conditions for the punishment to be carried out.

Discussion arises over whether it is better for Muslims who have committed *Zina* to avoid Allah's anger on Judgment Day by confessing the *Zina*, or to remain silent. There was a disagreement amongst Muslim scholars on this issue. Ibn Hazm<sup>22</sup> held that it is better for the individuals to confess, citing the incident of Ma'iz Ibn Malik Al-Aslami and his confession of committing *Zina*, and also the incident of a woman who confessed to the Messenger of Allah, peace be upon him, whom he ordered to be stoned to death<sup>23</sup>. The other school of thought believes that the guilty party should not reveal himself if Allah has covered up his sin. In this context, the same incident of Ma'iz being stoned is used to support this opinion because the Messenger of Allah turned his face away from

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<sup>19</sup> Al-taweel, Nabil Subhi., The Sexual diseases (Arabic), *Al-amrad Al-jensia*, Mo'asat Al-risala, p.9

<sup>20</sup> Al-Ghamdi, Mohammad., op.cit., p.507

<sup>21</sup> Elahi, Fadhl., Preventing adultery in Islam (Arabic), *Altadabeer Alwaqia men Alzina fi Alfiqh Alislami*, Edarat Turjoman Alislam (Pakistan), First Edition, 1983, p. 213

<sup>22</sup> Imam Aby Mohammad Ali Ibn Saeed Ibn Hazm (384-456 A.H)

<sup>23</sup> cf. The authentic narratives of Al-Bukhari (Arabic), *Sahih Al-Bukhari*, investigated by Ahmed Zahwa and Ahmed Enaya, Dar Alketab Alarabi, Beirut (Lebanon), 2006, p. 440

Ma'iz many times when Ma'iz came to him to confess. At the execution, Ma'iz tried to run away but people followed him and carried on stoning until he died. Some references say that the prophet said "would that you had left him alive, he would have repented and God would have been merciful to him"<sup>24</sup>. This indicates that the Messenger of Allah wanted Ma'iz to hide his crime, but when he found him to be insistent in his confession, it was not possible to withhold the punishment of being stoning.<sup>25</sup>

There is no doubt that the second opinion is the more correct one because Allah forgives all sins and if the worshipper repents sincerely and returns to his Lord, and promises Him that he will not return to his sins. The proof text here is the *Hadeeth* of the Prophet, peace be upon him, stating "any one of you who has committed a forbidden act without disclosing the same, his act will remain unrevealed. But if such wrongdoer reveals his wrong action, then he will be subject to the ordained punishment."<sup>26</sup> Thus, we find that the Islamic *sharia* is strict concerning proof of *Zina* and that, because of the severity of the punishment for it (death), it safeguards the innocent from being wrongly punished, as will be clarified later.

Furthermore, the Islamic *sharia* permits the adulterer to revoke his or her confession of adultery until the date of the execution of the ordained punishment. Such adulterer may revoke his or her confession of adultery at any time before the ordained punishment is carried out provided that adultery is not proved in a way other than by his or her confession such as the testimony of four witnesses to the adultery. This confirms the

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<sup>24</sup> Doi, Abdur Rahman I., *Women in shari'ah* (Islamic Law), Ta-Ha Publishers, London, 1989, p.123

<sup>25</sup> Auda, Abdul-Qader., *The Islamic criminal legislation*, (Arabic) *Al-Tashree Aljenaee Al-Islami*, part 2, Dar Al-ketab Alarabi, p.378

<sup>26</sup> Abu-zahra, Mohammad., *op.cit.*, p.150

interpretation that there is a preference for the adulterer not to reveal his adultery.<sup>27</sup> Later we will examine the safeguards in place to avoid imposing capital punishment against the adulterer to show the tolerance of the Islamic religion. These prove that religion does not impose severe punishments on people without sound justification or without examining the actuality of wrongdoings or crimes, and that the most severe penalties are only applied when there is no other choice.

### **1.2 The crime of *Al Harabah* (armed highway robbery)**

The second crime of *Al-Hudud* punishable by death is *Al Harabah*, armed highway robbery. This crime has three definitions according to Islamic doctrine: enmity to the public, the great burglary, and highway robbery<sup>28</sup>.

Scholars use all the above terms to express the same meaning, mostly without differentiation. The nearest meaning to *Al Harabah* is armed highway robbery, as it is originally extracted from the Arabic word *Harb*, which means war and this conforms clearly to the verses of the Holy Qur'an<sup>29</sup>. This term covers all types of harm to the public other than those included in the other two definitions, because if it is called the great burglary it directly gives the impression of taking money from others under threat of force of arms, not only on the highway or in open spaces but anywhere. If it is called armed highway robbery it also gives the implication of trespassing and preventing the

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<sup>27</sup> Al-nabrawy, Mohammad Sami., Divine ordinance crime (Arabic), *Ahkam Tashree'at Al-hudud*, Matba'at gareem (Cairo), p.84

<sup>28</sup> Najeeb, Mostafa Ahmed., in 'Security and law Gazette' (Arabic), *Mejalat Alamn Wa Alqanon*, Dubai police college publication, July 2005, p.180

<sup>29</sup> Surat Al-Maeda, verse 33

public from making their way in safety, and that it is accompanied by physical or financial assault<sup>30</sup>.

Consequently, the most accurate definition of *Al Harabah* is ‘A group or an individual who waylays on the highway, aiming to prevent members or the public from making their way, to steal from and attack or kill them’<sup>31</sup>. To elaborate further, *Al Harabah* occurs when a group of people, who have strength and force, terrify Muslims by attacking their persons or property in the desert, village or town.

The crime may include either of the following cases: to take another’s money by force, or to attack the public and prevent them from going on their way freely. These both have the condition of the use of weapons or any other instrument capable of causing physical injury, or otherwise being threatened, and if they occur in an urban situation they have the condition of a lack of help. Furthermore, to be culpable, the offender must be above 18 years of age.

As determined by the Islamic *sharia*, the objective is to safeguard people's blood, wealth and honour and to facilitate ways and means for their living, transport and travel. The highway robber, disregards these natural rights and prevents people from travelling freely by plundering their most precious assets: safety, self-worth, property and honour. Thus, highway robbers are fighters against Allah Almighty and His Prophet, and

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<sup>30</sup> Najeeb, Mostafa Ahmed., op.cit., p.183

<sup>31</sup> Ahmed, Hilali Abdellah., The Islamic criminal legislation (Arabic), *Osool Altashree Aljenae Alislami*, Dar Alnahda Alarabia (Cairo), 1999,p.188

offenders against all Muslims. The Lawgiver has aggregated their punishment, making it one of the rights of Allah where no forgiveness is accepted until deterrence and inhibition takes place<sup>32</sup>.

The crime of *Al Harabah* is proved by evidence and confession in the same way as the crime of burglary. Imam Malik stated that the testimony of the robbed against the robbers is a proof, and it is also proved by hearing independent testimony<sup>33</sup>. Imam Al Shaf'ee said that the testimony of companions may be considered when they are not claiming money related to their escort being robbed<sup>34</sup>. In cases where the limit for accepting the testimony is incomplete, such as where there are not two male witnesses or where the robber has declared his guilt but then later renounced his declaration, he shall be punished by a discretionary punishment. This is because the relevance of the testimony is related to judges' satisfaction with the evidence on which he must adjudicate<sup>35</sup>. If the judge is not satisfied, the main punishment (*Had*) is given up and discretionary punishment only can be determined. As a supplement to this, if the robber declares then withdraws his confession, the *Had* punishment (death) is given up he is only be liable for the rights or property of the robbed<sup>36</sup>.

A question may arise concerning when the punishment for the crime of *Al Harabah* can be dropped. According to the Islamic *sharia* provisions, the punishment for *Al Harabah*

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<sup>32</sup> Al-jendi, Hosni., The objectives of punishment in Islam (Arabic), *Al-maqasid Al-shareia Leloqobat fi Al-Islam*, First Edition, 2005, Dar Alnahda Alarabia (Cairo), p.230

<sup>33</sup> Auda, Abdul-qader., op.cit., part 2, p.574

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, pp.574-575

<sup>36</sup> Ibid, p.575

is dropped following the culprit repentance if he stopped in the act of committing the crime of *Al Harabah* before being discovered, and handed himself over to the police or public prosecutors before the authorities were able to arrest him. However, any reduction of the punishment because of his repentance shall not prejudice the rights of the victims and the state in respect of penalties and legal blood money (*diya*)<sup>37</sup>.

The punishment for *Al Harabah* crimes, as it is stated in the Holy Qur'an: "The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter"<sup>38</sup>. According to this verse of the Qur'an, we need to distinguish between four types of case and specify their punishment. The first is when the culprit intimidates people without killing or stealing, concerning which Imam Malik said that the ruler or the judge has the right to choose either execution or banishment according to the public interest<sup>39</sup>. The second case is when the culprit steals property only. Here, Imam Abu Hanifa and Imam Al Shaf'ee said that his left hand and his right foot have to be cut off, or the other way round, his right hand with his left foot. However, Imam Malik gives the ruler or the judge the right to choose a suitable alternative as a discretionary punishment<sup>40</sup>. In the third case, which is when the culprit kills without stealing, Imam Abu Hanifa and Imam Al Shaf'ee said that he must be executed by any means. Moreover, Imam Malik

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<sup>37</sup> Peters, R., *Crime and Punishment in Islamic Law (Theory and practise from the sixteenth to the twenty-first century)*, Cambridge Uni. Press, 2005, p.59

<sup>38</sup> Surat Al-Ma'eda verse 33, 34

<sup>39</sup> Abu-zahra, Mohammad., *op.cit.*, p.116

<sup>40</sup> Abdul-mohsin, Mostafa Mohammad., *Islamic criminal legislation (Arabic), Al-Nizam Aljennae Alislami (Al-Oqoba)*, part 1, Dar Alnahdha Alarabia, 2007, p.901



gives the judge the right to crucify the culprit<sup>41</sup>. In the fourth case, when the culprit kills and steals property, Imam Al Shaf'ee and Imam Ahmed Ibn Hanbal say that he must be executed and crucified, whereas Imam Abu Hanifa says that the ruler or the judge has the right to choose between executing him by first cutting off his hand and foot and then crucifying him, or executing him without crucifixion. Imam Malik said that the ruler has the right to choose between executing or executing and crucifying.<sup>42</sup>.

### **1.3 Rebellion (*Al Baghi*)**

Rebellion is defined by scholars as when a Muslim group, having a leader, forces people to stand against the legitimate ruler with the purpose of dismissing him based on a certain interpretation of the Islamic rules, and with a clear intention<sup>43</sup>. In other words, rebellion is when a group of Muslims stand against the ruler trying to dismiss in order to appoint another. Such people are considered oppressive. Whatever the understanding they might have relied upon in their rebellion beyond the explicit meaning of the texts which they so as violated, they have no justification.

When such rebellion occurs, the Muslim ruler and nation must resist such rebellion until the rebels change. The purpose of a war against them is to prevent not to kill, and that is why an injured person is not be killed, and anyone running away is not be pursued. They are not be held liable for any money they might have taken or people

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<sup>41</sup> Abu-zahra, Mohammad., op.cit., p.117

<sup>42</sup> Al-Ghamdi, Mohammad., op.cit., p. 293

<sup>43</sup> Mansoor, Aly Aly., op.cit., p.197

they have killed while they are away under the law of *Al hudud*. However, any person killed among the rebels is considered as having been punished according to the *Had*<sup>44</sup>.

The grounds for fighting rebels comes from a verse of the Holy Qur'an: "And if two parties or groups among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one which outrages till it conforms to the will of Allah. If it conforms, then make reconciliation between them justly, and be fair. Verily, Allah loves those who are equitable"<sup>45</sup>.

It is clear that the object of fighting is for conciliation between the Muslim parties in dispute, and Allah has named them brothers and ordered a reconciliation between them, and a lasting justice which is pleasing to Allah and His Prophet, according to the Holy Qur'an<sup>46</sup>.

During the fighting of the rebels (*Al Khawaneh*), Imam Ali Ibn Abi Talib explained the approach of the followers (*Al Sahaba*) of Prophet *Mohammad* (peace be upon him), saying "We have three commitments towards you, we shall not forbid you to enter the mosques of Allah, and we shall not forbid you from the waters and shadows, and as long as your hands are in ours, we shall not start fighting you unless you do so"<sup>47</sup>. It is clear that Imam Ali Ibn Abi Talib considers them Muslims. However, if they are out to

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<sup>44</sup> Ibid, p. 197

<sup>45</sup> Surat Al-Hujurat, verse 9

<sup>46</sup> Amer, Abdul-Aziz. The Discretionary punishment in Islamic sharia (Arabic), *Al-Tazir fe Al-Sharia Al-Islamia*, Dar Alfeker AlArabi, p.31 and thereafter.

<sup>47</sup> Al-maqdesi, Ibn Qudama., The sufficient (Arabic), *Al-Mughni*, investigated by Raed Sabri Ibn Aby Alfa, part2, Bait AlAfkhar Aldawliya, 2004, p.2163

fight against the ruler, then fighting them is only to prevent rather than to punish or kill them.

Therefore, scholars have agreed that when the Imam or the ruler is able to stop the rebels without fighting, he must do so, but if he cannot then he shall have the right to fight them. This is also why the scholars agree that there is no liability for what is destroyed by the rebels while they are acting against the ruler, unless they destroy the wealth of someone or kill or injure persons not related to the fighting, in which case they should be liable for all of that<sup>48</sup>.

Following the acts of *Imam Ali Ibn Abi Talib* concerning betrayals (*Al Khawaneh*), scholars also have no dispute concerning the ruler's right to call the rebels to return to the Muslim group, and obey their Imam. Such judgment is not referred to under crimes punishable by *had*. Judgment on those against whom the crime is proven are liable to punishment under the criminal code unless there are mitigating circumstances. This would apply to an act of death caused through negligence, for example.

Some scholars are satisfied by these rules which relate to the rebels and state that the rebels are not deviants or disbelievers because they dispute according to an interpretation they believe to be right, but is in fact wrong. The names of rebels are not to be announced publicly or insulted, and if speeches are made insulting them, the

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<sup>48</sup> Auda, Abdul-qader., op.cit., part 2, p.619

judiciary considered this to be based upon an entirely wrong scholarly interpretation<sup>49</sup>. In some schools of faith, if the rebels stand against the Imam due to an injustice, they are not considered rebels. It is the duty of the Imam to end such injustice, and the people may not support the Imam because that would be considered support for injustice. However, people shall not support the rebels either, because that would be supporting them to stand against the Imam. Following this opinion, Imam Malik, may Allah bless him, said “If the rulers are like *Omar Ibn Abdul Aziz*, people shall have to support them and fight with them, but with regard to others, you leave them to face Allah’s revenge”<sup>50</sup>. Ibn Taimia<sup>51</sup> says that under any circumstances Muslims should obey their ruler and if they believe that he acts against the Islamic Provisions then it is their duty to advise him accordingly<sup>52</sup>.

The question of rebellion is now a very a challengeable one for all Muslims. In the course of this research, the citizens of Tunisia, Egypt, Yemen, Libya, and now Syria have revolted against their governments, and we have witnessed the toppling of the Presidents of Tunisia, Egypt, Libya and Yemen. The critical question here is whether such coups constitute the crime of Rebellion proscribed by the Islamic *sharia* as previously defined, or whether these acts could be seen as resisting a state of fear, disorder and instability within these societies? In brief, and in light of these developments, it is worth giving Dr. Yousif Al karadawi’s<sup>53</sup> opinion<sup>54</sup>. He has pointed

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<sup>49</sup> Ibid, p.599

<sup>50</sup> Ibid, p.602

<sup>51</sup> Ahmad Ibn Taimia and called *The Sheikh* of Islam, a famous jurist among late Muslim jurists, died in 728 A.H.

<sup>52</sup> Ibn Taimia, Ahmad., *Fighting the rebels in Islam states* (Arabic), *Alesyan Almusalah Aw Qital Ahl Albaghi fe Dawlat Alislam wa Mawqef Alhakim menho*, investigated by Abdul-rahman Omaira, Dar Aljeel (Beirut, Lebanon), p.14 and thereafter.

<sup>53</sup> Dr. Yousif Alkaradawi is one of the very well known scholars among Muslims in the modern era.

out that it is impermissible to revolt against a fair ruler, whose leadership is found to be accepted by the people, and is satisfied with believing in God, the Prophet Mohammed and rules according to the Law of God. Thus, a revolt of the people against such a ruler requires fighting off and deterring such transgressors until they regain their senses. However, he also says that a ruler against whom a forceful revolt is for the benefit of public interest, can be permitted, if the ruler is one who is disliked by the majority of people for imposing his will, who continues to rule until death, and bequeaths his power to his son or another of his choice. This is one who does not rule by the Law of God, and under whom people must live in a state of despotism, inequality of opportunities and social position. In these circumstances, a necessary revolution cannot be regarded as a Rebellion.

Dr. Alkaradawi also adds that in response to those fearing sedition and other problems, like widespread instability and the harmful appearance of organized gangs, that such a rebellion would not persist for long, since gangs represent only a small fraction of the population and cannot intimidate everyone. Inevitably, law and order will prevail and all security matters will be soon be addressed properly. People then will live with a better ruler who will not repeat the damaging mistakes of his predecessor<sup>55</sup>.

I believe that the statement made by Dr. Alkaradawi is quite reasonable when it comes to considering the kinds of injustice that Arab citizens are subjected to under such

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<sup>54</sup> Dr. Yousif Alkaradawi expressed his opinion in; *Alsharia wa Alhayat* program, ALJAZEERA Television, 11-9-2011

<sup>55</sup> Dr. Yousif Alkaradawi's opinion was confirmed and agreed totally with by Dr. Mohammed Ali Alsabouni, head of Syrian Scholars Association, during; *Alsharia wa Alhayat* program, ALJAZEERA Television, 2-10-2011.

oppressive regimes. Leaders of the type referred to apparently believe that hoarding almost all the wealth of the nation is their sole right, and this creates a despotic and coercive atmosphere in which the vast majority of the people cannot express their opinions. Furthermore, they are deprived of basic human rights with improper access to health, education, residence and a respectable life, without being able to elect their own representatives in a parliamentary system.

#### **1.4. The crime of Apostasy (*Al Reda*)**

An apostate in the Islamic *sharia* is one who turns away from Islam, whether he embraces another religion or says that he disbelieves in Islam after having once been a believer. It is not considered to be apostasy unless committed by someone of a mature and sound capacity, who intentionally and wilfully decides to leave Islam.

In capacity, whether by insanity or some other cause, is treated in the following ways. The apostasy of the insane or mad person is not considered valid under the crime of *Alreda* because acts of madness are specifically referred to in a speech by Prophet Mohammad, peace be upon him: “These are excused, the boy until he becomes of age and mature, the person asleep until he awakens, and the insane person until he is cured”<sup>56</sup>. In the case of a drunken man who reneges when he is drunk, it is said that his apostasy is only to be considered when he become sober again. If his response is still that he insists in disbelieving in Islam he shall be sentenced to death under the law of

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<sup>56</sup> Auda, Abdul-qader., op.cit., p. 632

apostasy<sup>57</sup>. Moreover, It is also said that his apostasy is not to be considered because he is not in a normal state of mind, like that of a person who is asleep<sup>58</sup>. It is believed that the latter is the correct opinion by the majority of jurists, despite there being differences among scholars concerning this issue. Where there is doubt, the judicial instinct of a Muslim court is always to prefer a merciful interpretation. In the case of a person who is compelled to become an atheist, it shall not be considered an apostasy so long as his heart is full of belief. This is provided for in the Holy Qur'an: "Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with faith; but such as open their chests to disbelief, on them is wrath from Allah, and theirs will be a great torment"<sup>59</sup>. This is also the position taken by the *Hadeeth* which says that "Muslims are forgiven for mistakes, forgetfulness and duress"<sup>60</sup>.

As regards the will or intention in saying or performing an act of apostasy, scholars state that such an act must be intentional. In other words, such a person must know that he is committing an act of apostasy but goes ahead and does it anyway<sup>61</sup>. Thus, apostasy is a wilful action. A person who commits any act of apostasy, but who is not aware of it, is not liable to the death penalty unless he insists on the apostasy when he is sober and of sound mind.

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<sup>57</sup> Ibid, p.633

<sup>58</sup> Ibid.

<sup>59</sup> Surat Al-Nahil, verse 106

<sup>60</sup> Auda, Abdul-qader., op.cit., p.633

<sup>61</sup> This aspect of a mental action, in other words of intention, is consonant with the concept of crime under English law, known as *mens rea*.

The Holy Qur'an provides that "Whoever of you turns back from his religion and dies as a disbeliever, then his deeds will be lost in this life and in the Hereafter and they will be the dwellers of the fire. They will abide therein forever"<sup>62</sup>. Moreover, the Sunna has provided for this, and scholars are unanimous on this question. Imam Al-Bukhari reported in his book that Ekrema said:

"Imam Ali caught all the people who left Islam and ordered them to be burnt, and when Imam Ibn Abbass came to know, he said, "if it was me, I would not burn them because I heard the prophet say; do no torture people in the way god shall, I would kill them in other methods according to the *Hadeeth*; 'He who changes his religion shall be killed' "<sup>63</sup>.

In the above *Hadeeth*, religion means Islam because if a Jew or Christian embraces Islam, he shall not be killed. As for change from one religion to another (other than Islam) this is not referred to in this *Hadeeth*.

The death sentence is a general punishment for men and women, but some scholars dispute the killing of women, though all are agreed on the killing of men. Other scholars say that there is no difference between men and women in sentencing, due to the generality of the *Hadeeth*: "He who changes his religion is to be killed", and again in the *Hadeeth*: "No Muslim shall be killed except for three reasons; the married adulterer, the murderer and the apostate who turns away from his religion and group"<sup>64</sup>.

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<sup>62</sup> Surat Al-Baqara, verse 217

<sup>63</sup> Sabeq, Sayed., The Sunna principles (Arabic), *Fikeh Al sunna*, New Edition, 1998, p.305

<sup>64</sup> Iman Muslim, The authentic narratives of Iman Muslim (Arabic), *Sahih Muslim*, investigated by Mohammad Ahmed Al-Hilali, Maktabat Al-thaqafa Al-deenya, Narrative No.1676, p.435



Regarding the condemnation of an apostate, scholars say that he is not to be killed unless he is first asked to repent. The meaning here is that a person must be given time to repent and to be persuaded of his wrong if he is in any doubt. Scholars rely on the *Hadeeth* in which it is reported by Al-Darqatni that a lady named Umm Marwan reneged from Islam, but when the Prophet Mohammad (peace be upon him) came to know this, he ordered her repentance and said otherwise she must be killed<sup>65</sup>. Umm Marwan after reflection decided to repent. However, some scholars prefer to rely on the saying of the *Hadeeth*: “He who changes his religion is to be killed”.

Scholars dispute the period required for an acceptable repentance. Imam Malik says that it must be at least three days and nights from the date of turning away from Islam, because this is the time generally for an excuse to be made. Thereafter, a person should be asked to repent promptly or be killed<sup>66</sup>. It has also been said that there is no precise period, because there is always the possibility of repentance, and that Islam is merciful. This is the view of the school of faith belonging to the fourth *Calif*, Imam Ali.<sup>67</sup>

Since repentance is the desired result to relieve the mistaken person of his apostasy, it is important to understand how this can be properly achieved. Repentance there is according to the level of disbelief. In the case where the apostate disbelieves any of the obligatory rules of Islam, he shall repent by saying the *Shahadah*. But if he disbelieves in one of the prophets or does not deny a specific prohibited act, then he must declare his repentance at that time by saying the *Shahadah*: “There is no God but Allah, and

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<sup>65</sup> Abu-zahra, Mohammad., op.cit., p.130

<sup>66</sup> Auda, Abdul-qader., op.cit., part 2, p.640

<sup>67</sup> Ibid, p.641

Mohammad is his Prophet”. Here we need to clarify that apostasy is not only turning away from Islam but also occurs when a Muslim denies one of the holy books, one of the prophets or rejects one of the methods of Islamic worship. These may be prayer, paying the *Zakat*, or fasting for the month of Ramadan, since in all these cases this is considered apostasy without mitigating circumstances<sup>68</sup>.

Furthermore, he who is not aware of anything prohibited for any reason, such as having newly embraced Islam or living in a country other than a Muslim country or in the desert, shall not be considered an apostate but shall be taught and preached to. But if they continue disbelieving they shall be punished as an apostate. Those who permit a prohibited act but believe that it is not prohibited are not be considered apostates but transgressors. Consequently, Islamic *sharia* does not force people to embrace the religion but if they do, then they must not for any reasons renege and leave Islam<sup>69</sup>.

As we have said, Islam does not compel people to belong to its religious community. This is provided for in the Holy Qur’an: “There is no compulsion in religion”<sup>70</sup>. This does not involve a contradiction in the attitude towards an apostate, since his punishment is for deliberately turning from the religion into which he has been accepted and the community of which he is a part. It was reported that one of the Ansar Muslims had two sons who were Christians before the mission of the Prophet Mohammad, peace be upon him, told them: “I will not leave you until you embrace Islam”. So they went to the Prophet Mohammad, peace be upon him, and the father said “Then shall part of me

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<sup>68</sup> Ibid.

<sup>69</sup> Abu-zahra, Mohammad., op.cit., p.71

<sup>70</sup> Surat Al-Baqara, verse 256.

go to hell, while I stand watching”<sup>71</sup>. Then Allah gave them the verse concerning compulsion in religion. Islam does not accept that religion is in the hands of people to be played with, that is to say to be embraced one day and to be turned away from the next. Thus, the lawgiver is wise to permit the repentance of the apostate and to give him time to repent. If the apostate has any doubts he should be preached to and convinced. But if he does not repent, he shall be considered an apostate who intends rebellion, and may intend to create doubts among the poor and illiterate who may think that he has good reason to disbelieve. Therefore, it is important to understand that the apostate is a danger to the community of Islam, and that his actions must be checked.

At the beginning, people of other religions resorted to conspiracy in the face of the new religion of Islam. They ordered their followers to believe in the Prophet, peace be upon him, in the morning and to apostatise in the evening. They did this so that they could influence simple people in a negative way about Islam<sup>72</sup>.

Every country has at some time treated separatists, or objectors to the social and political order, as outlaws and subject to severe punishments such as deportation, imprisonment or an even harsher penalty. They have been considered traitors to their country. The apostate, for no acceptable reason, is a separatist from the Islamic group. Moreover, he is a dangerous oppressor who will try to hinder the belief of others. He disrupts the unity of Muslims by creating doubt in their religion, which is their system

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<sup>71</sup> Sunan Abu-Dawood, op.cit., p.234

<sup>72</sup> It is stated in the Holy Qur’an: ‘And a party of the people of the scripture said; believe in the morning in that which is revealed to the believers, and reject it at the end of the day, so that you may turn back’. (Surat Al-Imran, verse 72)

of belief, their behaviour, and their social, moral and political order. This is provided for in the *Hadeeth* which states that an apostate is “One who abandons his religion and separates from the group”<sup>73</sup>.

Every act of apostasy may merit the sentence of death in order to rescue people from this evil. Other societies are not different. For example, if a person in a communist country of the past had objected to communism and called for people to fight against it, what would have been the result? It is very likely he would have been killed whether by sentence of a court or extra-judicially. Or if a person has objected to a monarch or royal rule, calling for change, would he not have suffered imprisonment torture and perhaps death? And if now a person in a capitalist country calls for the introduction of communism, what is likely to be the reaction? In a country like USA, even if he is not punished in some way, he may be thought insane<sup>74</sup>. Should we therefore be surprised that the community of Islam react strongly against the apostate?

The judgment of a sentence of death for the apostate is a matter of divine law. The belief and logic of this is stated by Allah in the Holy Qur’an: “The word of Allah completed in truth and justice. No one can change these words. And he is the auditor and omniscient.” However, there are also interesting opinions rejecting the implementation of the death penalty for apostates, since it is said the duty of the Prophet

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<sup>73</sup> Imam Abu Dawood, The authentic narratives of Imam Abu Dawood (Arabic), *Sunan Abi-Dawood*, investigated by Sedqi Mohammad Jameel, part4, Dar Al-fikr, 2003, Narrative No.4352, p.113

<sup>74</sup> Those writers, actors and film-makers, brought by Senator Joseph McCarthy before the House Committee on un-American activities in the 1950’s, and who did not deny their left-wing conviction, either went into exile or were denied the right to work (source: Cambridge Encyclopedia, 2<sup>nd</sup> ed., 1994, p. 678)

and the other messengers was only to convey the message, not to compel anyone to accept it<sup>75</sup>. Another opinion says that changing religion is not a crime in itself if it is not accompanied by a declaration of war against Islam and Muslims<sup>76</sup>. In spite of these opinions, most jurists and thinkers, even modern ones, based on many authentic Hadeeth agree that the apostate deserves the death penalty<sup>77</sup>.

### **1.5 Death Sentence Safeguards in Islamic *sharia***

The *sharia* is the first point of reference in the criminal law and it includes the safeguards against the imposition of the death penalty just as can be found in contemporary, Western criminal law practice. Approximately fourteen centuries ago, it laid down general principles with regard to punishment in general and the death sentence in particular. These principles represent safeguards for individuals who come before the ruler<sup>78</sup>. The principle of crime and appropriate punishment is one of these safeguards which are expressed in contemporary law in the saying “no punishment except by the provision of law”.

It is stated in the Holy Qur’an that Allah Almighty said: “And we never punish until we have sent a messenger”<sup>79</sup>. It is just the same with the penal judiciary, as the legal authority was established at the very outset of Islam. The Prophet, peace be upon him,

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<sup>75</sup> Two writers who take this view, see Saeed, Abdulla. & Saeed, Hassan., Freedom of Religion, Apostasy and Islam, Ashgate Publishing, 2004, page 69 and *passim*..

<sup>76</sup> Shama, Mohammed., in ‘Alkhaleej Newspaper’, issue no. 10337, supplement 2, p.1, Aldeen Lelhayat supplement, 7-9-2007

<sup>77</sup> The new Egyptian president Mohammad Mursi was asked such a question by a journalist, during his presidency campaign. Because he has an Islamic background and fear of Islamic *sharia* to be implemented was a vital thought of people. He said that ‘human beings is free in adopting his belief without affecting others beliefs, however, the announcement of apostasy in front of people would not be permitted since that will affect their beliefs’.

<sup>78</sup> Auda, Abdul-qader., op.cit., part2, p.629

<sup>79</sup> Surat Al-Israa, verse 15

was himself who took up this authority. He also gave the authority to others. For example, He sent Muath Ibn Jabal as a Justice into Yemen, as it is known from the famous narration of this event. There he was asked to judge between the people, according to the provisions of Islam, in fairness and justice<sup>80</sup>.

After the Prophet's era, the judiciary became an authority through the appointment of specialist judges. The Islamic *sharia* takes into account the equality principle in punishment as penalties are laid down for both the ordinance and the retaliation crimes. It is applied to all people without distinction. With regard to the precise nature of the penalty, however, this is left to the discretion of the ruler according to circumstances. This is not a violation of the principle of the equality before the law, as its very nature and purpose is to confront the crimes of the perpetrator when certain crimes, other than ordinance and retaliation crimes, are committed. Similarly, Islamic law also takes into account the principle of personal responsibility. Its criminal provisions have held precedence in laying down the principles for almost fourteen centuries. That is when the Almighty said in the Holy Qur'an "No bearer of burdens can bear the burden of another"<sup>81</sup>.

The Islamic *sharia* lays down special safeguards with regard to the death sentence during the trial stage concerning the laws of evidence. These are examined in this section to clarify how and why Islamic *sharia* imposes the death penalty. Very few

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<sup>80</sup> Abdul-mohsin, Mostafa Mohammad., op.cit., p.935

<sup>81</sup> Surat Al-Ina'am, verse 164

people are sent to death according to the crime of divine ordinance since there are critical conditions to be met before such a sentence can be implemented.

The Islamic *sharia*, while requiring the death penalty for a number of crimes pertaining to the basic elements of society which could wreck its very structure, has laid down important safeguards. These answer the criticism directed towards this penalty by contemporary philosophers and jurists who are against this harshest of punishment. In particular, there basic thinking rest on the impossibility of reversing an execution. Judicial oversight or mistakes can not be rectified over a death sentence that has already been carried out. Therefore, there must be safeguards in the rules of evidence and procedure which try to prevent oversight and mistakes from occurring.

Rules of evidence have been carefully devised. They vary according to the nature and type of each crime, as each crime requires particular forms of evidence which may differ from that of another. Punishable crimes in this context specified by the Islamic *sharia* cover: adultery, armed highway robbery, rebellion and apostasy. Among these crimes there are some which impose their nature and which call for just one type of evidence, and others which require several, as stated in the Islamic *sharia* provisions. We shall refer to each as a separate topic. There is a special rule of evidence laid down with regard to retaliation that will discuss later. However, with regard to capital punishment, the death penalty is not imposed except for crimes of the very same nature as those for which the death sentence is stipulated by the Islamic *sharia*. The same standard of evidence is required for all these divine ordinance crimes.

The Islamic *sharia* has laid down the particular rules in the crime of adultery. These concern the admission of the perpetrator, the testimony of witnesses, and inference that can be made by the court. A confession by the perpetrator of having committed adultery, and admitting his guilt, provides that such an admission is clear and detailed and given by a responsible, sane and mature person who is physically able to copulate<sup>82</sup>. However, scholars disagree somewhat over the conditions to be met in the confession. For instance, Imam Abu Hanifa and Imam Ahmed Ibn Hanbal maintain that the confession should be made four times<sup>83</sup> and that the perpetrator should give testimony as a witness in accordance with the *Hadeeth* of Ma'iz.

The narration of this was made by a Muslim from Buraidah: “Ma'iz came to the Prophet, Peace be upon him, and confessed to have committed adultery but he was sent back. He came again the next day and again was turned away, and a messenger was sent by the Prophet to his people asking if they knew of any problem with his sanity. They denied knowing anything about his intellect except that he is one among them. He came for a third time and a messenger was sent once again asking about his sanity. He was told there was no problem with him or with his intellect. When he came to the Prophet, Peace be upon him, for a fourth time he ordered him to be stoned”<sup>84</sup>. Abu Hurairah relates this account in the following way: “A man from Al Aslamin, Ma'iz, came to the Prophet, Peace be upon him, when he was in the mosque and said ‘O messenger of Allah, I committed adultery’. The Prophet, Peace be upon him, turned his face away

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<sup>82</sup> Mansoor, Abdul-Malik., Adultery crime (Arabic), *Jaremat Al-zina*, Dar Alnoor wa Alamal (Cairo), 1985, p.88

<sup>83</sup> Al-bashar, Abdullah Abu-saif., Proving adultery (Arabic), *Torok Thobot Al-zina*, undated, p.13

<sup>84</sup> Al-asqalani, Al hafiz Ahmed Ibn Hajar., The commentary of sahih Al-Bukhari (Arabic), *Fath Albari Fi Sahih Albukhari*, partXII, p.140



from him but he again faced him and said, ‘O Messenger of Allah, I have committed adultery’. The Prophet, Peace be upon him, turned his face away from him. But he repeated it a total of four times and when he testified for the fourth time the Prophet, Peace be upon him, called him and asked: ‘Are you insane?’ He said: ‘No’. Then the Prophet, Peace be upon him, said: ‘Are you married?’ He replied ‘Yes’. Then the Prophet ordered him to be stoned<sup>85</sup>.

Although Imam Malik and Imam Al Shaf’ee considered a confession sufficient even if it were made only once<sup>86</sup>, Imam Abu Hanifa and his companions deemed that the confession had to be made before a court or before the ruler. However, the majority of scholars do not agree with either of these interpretations. If the confessor makes his confession in front of four witnesses, he satisfies the rules of evidence for testimony and adultery is proved against him. He is therefore liable to punishment unless he changes his confession and denies the charge of adultery<sup>87</sup>. Imam Abu Hanifa has insisted that only the perpetrator’s confession in front of the judge is to be accepted, and that a confession in front of someone else is to be rejected<sup>88</sup>. Here we can see why the Imam Abu Hanifa was strict in demanding prove of adultery before a court since this involves the harshest of punishment, i.e. death.

Islamic *sharia* provisions pay special attention to the testimony of witnesses in relation to their number, and the authority of the judge in accepting the sincerity of their

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<sup>85</sup> Ibid, p.141

<sup>86</sup> Jabr, Dandal., Adultery (Arabic), *Al-zina*, maktabat Almanar (Amman, Jordan), First Edition, 1985, p.34

<sup>87</sup> Auda, Abdul-qader., op.cit., p.432.

<sup>88</sup> Mansoor, Abdul-malik., op.cit., p. 94

testimony, as well as the uniformity of all who have given evidence. It lays down the general conditions of testimony to be fulfilled by the witness. He must be sane, an adult with good memory and vision, honest and a Muslim. As with evidence related to adultery, the number of the prosecution witnesses must not be less than four. This is in keeping with the saying of Allah in the Holy Qur'an "And those of your women who commit illegal sexual intercourse, take the evidence of four (reliable) witnesses from amongst you against them"<sup>89</sup>. He said also "And those who accuse chaste women, and produce not four witnesses (to support their allegations), flog them with eighty lashes"<sup>90</sup>.

The testimony of women is not accepted in adultery according to the majority of jurists such as the four Imams previously quoted<sup>91</sup>. However, it is narrated by Ataa and Hammad, the companions of Imam Abu Hanifa, that in a particular case they accepted the testimony of three men and two women to prove adultery<sup>92</sup>. Ibn Hazm deems that it is absolutely permissible to accept the testimony of women provided that the testimony of one man is acknowledged as being equal to the testimony of two women. Thus, it is permissible to accept the testimony of eight women without having one man amongst them<sup>93</sup>. It is also a condition that evidence is based on eye witness and not on the citation of another witness.

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<sup>89</sup> Surat Al-nisa, verse 15

<sup>90</sup> Surat Al-Noor, verse 4

<sup>91</sup> Mansoor, Abdul-Malik., op.cit., p.100

<sup>92</sup> Auda, Abdul-qader., op.cit., part 2, p.364

<sup>93</sup> Al-daheri, Ibn Hazm., part IX, p.395

The holding of a testimony council is also a condition and should the testimony council lapse due to delay in testifying, then the testimony of the delaying person shall not be accepted and those who gave their testimony are deemed as slanderers if their number is less than four. This means that the four witnesses should give their testimony at the same time and place.

Furthermore, it is a condition that a long time must not elapse between the occurrence of the crime and the testimony of the witnesses. This condition was maintained by Imam Abu Hanifa,<sup>94</sup> although a different line was taken by Imam Ahmed Ibn Hanbal. Other Imams, such as Al Shafei, Malik and their companions also have their own interpretations. However, the opinion of Imam Ahmed Ibn Hanbal is generally accepted, which is that delay in giving the testimony is accepted<sup>95</sup>. From what has been said above, it can clearly be seen that Islamic *sharia* is strict regarding the crime of adultery, even though it does not accept three witnesses to prove this crime, which indicates that Islamic *sharia* is merciful and does not want to condemn people to death without accurate evidence that may be almost impossible to obtain. Moreover, upon the fulfilment of all of the above terms in the testimony – general or special, even though some of them are subject to disagreement – it does not require this punishment. The matter is decided in the end by the deliberation of the judge. Witnesses might disagree with each other about the precise details of what took place as, for example, in whether the male organ was inside the vagina or not. Since punishment depends on the exact circumstances of the act, if the witnesses are mistaken or give false evidence they may themselves be liable for the harsh punishment of eighty lashes. They can also, of

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<sup>94</sup> Mansoor, Abdul-Malik., op.cit., p.101

<sup>95</sup> Al-maqdesi, Ibn Qodama., op.cit., part X, p.187

course, be variation in testimony with regards to the place and time of the act. This might lead to putting doubt into the mind of the judge, and prevent him from imposing the most severe punishment<sup>96</sup>.

We must also consider what inferences are permitted in cases of adultery. What are taken to be reliable signs in proving adultery, are, for example, the pregnancy of an unmarried woman. A charge of adultery may also be levelled against a woman who marries an adolescent before he reaches puberty. In UAE, the age of consent is generally to be taken fourteen. If a woman contracts a relationship which renders her marriage null and void, or marries an adult and gives birth to a full-grown baby within a period of less than six months, an inference of adultery can be made. Pregnancy in itself is not a clear indication of adultery; in the contrary, it may be evidence proving the opposite. Pregnancy without fornication, which can be the result of either a forcible rape or a misunderstanding on the part of the woman, is not considered adultery. These positions are maintained by the Imams, such as Imam Abu Hanifa, Imam Al Shaf'ee and Imam Ahmed Ibn Hanbal. Thus, in the situation where adultery is not proven without pregnancy or where a woman claims that copulation was forced on her, or that she did not understand what was happening, then she is not to be punished<sup>97</sup>. Moreover, Imam Malik deems that a woman is liable for punishment if pregnancy occurs, unless she can prove that she copulated through misunderstanding or under duress. If she so

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<sup>96</sup> Sharif, Muhammad., *Crime and Punishment in Islam*, Institute of Islamic Culture, 1972, p. 23

<sup>97</sup> Al-jendi, Hosni., *The women legislative in Islam (Arabic)*, *Ahkam Al-Mar'aa fi Al-Tashree Al-jenae Al-Islami*, Second edition, Dar Alnahda Alrabia, 1993, p.28

claims and was known for her chastity before the accusation, then no punishment shall fall upon her<sup>98</sup>.

Turning to safeguards to other divine ordinance crimes, the nature of the crime of armed highway robbery (*Al Harabah*) calls for the provision of evidence by two methods, namely confession and external proof. The confession of a perpetrator or perpetrators to having committed the crime of *Al Harabah* and their insistence on their confession before the Council of Judges shall be taken to be strong evidence in proving the presence of the elements of *Al Harabah*. The confession is not permissible unless it is explicit, detailed and made by a mature and sane person. The judge is responsible for checking the validity of the confession and that it is made by a person not suffering from mental illness<sup>99</sup>. The *sharia* provisions have laid down these conditions with regard to the death sentence for crime of *Al Harabah* in the manner stated above. It has also recognises the validity of recantation by the confessor.

Evidence by means of the testimony of at least two witnesses is sufficient to prove the crime against the perpetrator. A quorum cannot be constituted other than by two male, reliable witnesses, or by one male and two females. The testimony must be by those who have seen, and not merely heard of, the crime and the judge must be convinced and satisfied with the testimony. The competence of the judge to asses the evidence may be considered as a substantial guarantee for the accused. In cases where there is a

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<sup>98</sup> Ibid.

<sup>99</sup> Salama, Ma'amom Mohammad. The criminal judge limitation (Arabic), *Hedod Saltat Al-qadi Al-jenae*, Dar Ghareeb Lelteba'aa, p.87

contradiction in the testimony of witnesses, the judge can set aside such evidence and rule according to his personal understanding and conviction<sup>100</sup>.

In respect of safeguards for the crime of apostasy, which is to turn away from Islam and to forsake it as a religion, or to fail to confirm it either by words or deed, a substantial proof is required. Evidence of this crime must be shown by a clear and loud expression of turning away from Islam, or by ceasing to confirm it and resolving to remain of that mind. These elements, i.e. loud utterance and resolution, represent the material aspects of apostasy, yet the person who turns away from Islam should be given a period for repentance to think clearly about his crime. He is then asked again and advised of his position before the hearing. Elements protecting the accused in the crime of apostasy, i.e. loud utterance and resolution after a period set aside for repentance, must be satisfied before a sentence of death can be passed. Once again we observe that if the apostate person sees he is facing the death penalty, it is likely that he will revert and deny his apostasy. This attests the justice and mercy of *sharia*.

Finally, as we have seen the crime of rebellion is established if the elements agreed upon by the majority of the jurists are present, which are rebelling against the ruler and the intentional use of force against him. The rebels may not be fought against unless they are actively fighting against the ruler. The Imam or the leader must not venture to fight against them unless he has already warned them in written form and attempted to prevent them from continuing with their rebellion. He must also try to find out the reason for their unlawful behaviour. This was seen in the case of Imam Ali Ibn Abi

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<sup>100</sup> Ibid.

Talib with the *Khawarij* (apostates) at the battle of Al Jamal. In accordance with the saying of the Almighty, in the Holy Qur'an, that if two parties among the believers fall into a fight, make peace between them, but if one transgresses beyond bounds against the other, then you must fight against the one that transgresses until he complies with the command of Allah. It is to be noted here that fighting the rebels is not considered a punishment but rather a preventative measure to avoid a probable danger to society that might lead to disorder and anarchy.

## **Conclusion**

This chapter has shown that divine ordinance punishments are predetermined by Allah, and as observed, the death penalty is prescribed for four crimes: the adultery of a married man or woman, armed highway robbery, rebellion, and apostasy. Allah has prohibited adultery to protect lineage and to prevent extra-marital relations, and to prevent a person's honour from being subject to ridicule<sup>101</sup>. In addition, extra-marital relations comprise one of the main reasons for the transmission of highly dangerous diseases, such as HIV/AIDS. Allah forbids the crime of highway robbery in order to spread peace and safety in society and to permit people to move and travel freely. Allah also forbids the crime of rebellion in order to stabilize keep stability in the form of legitimate government, and to avoid the appearance of a governor whose actions may be

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<sup>101</sup> Dr. Abdulbasit Mohammad, a medical analyst at the National Research Centre in Cairo, announced that a Jewish embryology scientist, Robert Ghelhim, embraced Islam after finding that the scientific fact he thought he had discovered had already been recorded in the Holy Quran. Dr. Ghelhim proved that the sperm of a man leaves an imprint in the womb, and that this imprint disappears completely after three months, which is the period that a divorced woman must wait before getting married again. Therefore, a married woman, who is faithful, will have woman should have only one imprint which is the imprint of her husband. The surprise here was when Dr. Ghelhim applied this same analysis to his wife and discovered that she carried three imprints, and that when he tested his three children, he found that only one was his own. (Albayan Newspaper, Issue 11752, 21.8.2012, p.12)

worse than the previous one. To avoid the Islamic religion form being subject to ridicule, Allah has shown us the crime of apostasy. A person cannot belong to Islam one day and leave the next, if he adheres to Islam it must be from his will and conviction in a condition that does not change. It is stated in the verse of the Holy Qur'an: "there is no constraint in religion". But this verse should not be interpreted as meaning an individual is free to convert to Islam and then leave it since, as we explained, this must be considered as negatively affecting other believers, as well as public morality. The apostate is not at liberty to spread chaos through out society.

In this chapter, the conditions have been specified which constitute the manifestation of these crimes, and how the criminal may be identified. It has also been shown that it is not easy to prove and confirm such crimes, since there are many safeguards in place. The Islamic *sharia* guarantees that the crime of adultery cannot be proved unless the perpetrator confesses that he has committed the act and insists on his confession, or that there are four witnesses to the crime, which is in practice, extremely difficult to achieve. The *sharia* surrounds the perpetrator of the crime of armed highway robbery with safeguards to avoid the implementation of the death penalty against him.

It is essential to understand that the mind of the offender directly affects the attitude of the court to his offence in Islamic society. Thus, it is always the case that the law looks for the repentance of the wrongdoer before punishment. In this aspect, there is a clear deference between a secular society that looks mainly to the facts and consequences of a crime, and a God-believing society, that is concerned as much with the spiritual



condition of the criminal as with his actions. He is always granted the opportunity to repent. Furthermore, the Islamic *sharia* surrounds the perpetrator of the crime of rebellion with safeguards by giving him the opportunity to escape the punishment prescribed by the *sharia*, since the purpose of the law is not to kill but to prevent his aggression. In the crime of apostasy, the *sharia* asserts the importance of giving advice and guidance to one who hesitates so that he may be given a period of time to reflect and repent and, if at all possible, to come back to Islam.

We may conclude, therefore, that although the Islamic *sharia* insists upon the death penalty, implementation of the divine ordinance punishment is extremely rare<sup>102</sup>. This refutes those critics who claim that the death penalty is widely used in the Islamic countries, for, as we have seen, the standard of proof is very high. Besides, the *sharia* affords protection to the perpetrator with extensive safeguards in order to avoid implementation of the death penalty, and the perpetrator is always given the opportunity to repent and recant. Islamic *sharia* encourages the perpetrator to listen to counsel, and even to hide his sin, as in cases of adultery. When people came to confess their crimes before the Prophet, peace be upon him, he turned his face away. Many times he gave the confessor a sign that he should not confess since God would hide his sin. Thus, the Prophet, peace be upon him, asked his companions not to carry out the divine ordinance punishment where any doubt persisted. This evidence shows that the Islamic *sharia* is forgiving and merciful. In the next chapter, we will discuss the category of punishment where the death penalty is prescribed by Allah for the benefit of individuals. This is so

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<sup>102</sup> It is worth repeating at this point that no death sentence relating to divine ordinance crimes has been carried out in the UAE since the formation of the state.

they may understand that they have a choice, whether to commit a crime, or to live peaceably for the benefit of all society.

## Chapter Two

### Retaliation

#### Introduction:

In the introduction to this research, it was pointed out that there are three kinds of punishment according to the Islamic *sharia*: the first is the divine ordinance punishment, which is predetermined by the Almighty and no one can prevent the implementation of this punishment if the crime is proved against the perpetrator. This kind of punishment was discussed in the first chapter.

In relation to the question of death penalty, we will discuss the second type of punishment, which is predetermined by God but for the benefit of the individual. This kind of punishment is called retaliation. The death penalty as a retaliation is prescribed for homicide. In this chapter we will look at the reality of retaliation according to the Holy Qur'an and the narratives from the Prophet Mohammad. In addition we will review the conditions of its implementation and the conditions that should be met both by the murderer and the murdered person, for the death penalty to be implemented as a retaliation.

Throughout the discussion we must constantly address the vital question of how it is possible to avoid the use of the death penalty, and what substitute punishment can be used. We begin with the meaning of retaliation, or *Al-Qisas*, as it is known in the Islamic *sharia*, and the wisdom behind its concept.

## 2.1 The Meaning of retaliation (*Al-Qisas*)

The meaning of *Al-Qisas* is "fairness". This fits its legal meaning since linguistically it gives the sense of equality in general. In the *sharia* there is an equality or proportionality between the crime and the penalty. Also deriving from the linguistic meanings of *Al-Qisas* is the sense of to "trace", as in the idea of tracing or following in someone's tracks<sup>103</sup>. It also has also the connotation of the "*Qisas* of the forefathers" meaning the stories of our ancestors. There is a relationship between these senses and legal definition because, through *Al-Qisas*, the perpetrator is hunted down. He does not escape without a penalty, just as the victim of the crime is not left unable to vent his anger. Therefore, *Al-Qisas* involves the combined concept of the perpetrator receiving punishment and the victim of the crime venting his anger<sup>104</sup>.

Retaliation is a limited penalty with its origin being established in the Holy Book of Allah and its further specifications in the Sunna of the Prophet Mohammad. This stated many times, as for example when Allah said: "O you who believe! Retaliation is prescribed for you in the case of murder, the free for the free, the slave for the slave and the female for the female, but whoever is pardoned by his brother (i.e. the deceased's guardian) in recognition of something (blood money) then it should be adhered to properly and the payment should be given to him with good conduct. This is alleviation and a mercy from your Lord. So whoever commits aggression against the killer after taking the blood money shall have a painful torment. And in legal retaliation (*Al-Qisas*) there is saving of life for you, O you people of understanding,

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<sup>103</sup> Cf. Zaho, Ahmad Al-najdi., Homicide in Islamic (Arabic), *Alqatl Alamd fe Alfiqh Alislami*, Dar Alnahdha Alarabia (Cairo), 1991, p.17

<sup>104</sup> Cf. Abdulateef, Mohammad Saeed., Retaliation in Islamic provisions (Arabic), *Alqisas Fi Al-sharia Alislamia*, Maktabat Dar Al-Turath, 1989, p.73

that you may become pious"<sup>105</sup>.

Thus, *Al-Qisas* is entirely consistent with the punishment of the divine ordinance crime (*Al-Hudud*), since it is also a specified penalty. However, it also differs from *Al-Hudud* since it gives a negotiable right to the individual. What is meant by "a specific penalty" is that it is limited in its range, without there being a lower or higher scale within which it can vary. What is meant by legal retaliation giving a negotiable right to the individual is that the victim of the crime or the victim's relative can grant pardon, if it is acceptable to them, and thus, through this pardon, the penalty may be lowered or dropped<sup>106</sup>.

Allah the High made clear that legal retaliation is the law of all the prophets and that it is established in all of the divinely revealed laws, since He, the High, said, after relating the story of Cain killing his brother Abel through jealousy and envy, "Because of that We ordained for the Tribe of Israel that if anyone killed a person not in retaliation of murder, or to spread mischief in the land, it would be as if he killed all mankind. And if anyone saved a life, it would be as if he saved the life of all mankind. And indeed, there came to them our Messengers with clear proofs"<sup>107</sup>.

It has been narrated that the Prophet, peace and blessings be upon him, said "No Muslim's blood is allowed to be spilled except in one of three cases; the married fornicator, a life for a life (the murderer), and the one who commits apostasy from his

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<sup>105</sup> Surat Al-Baqara, verses 178, 179

<sup>106</sup> Amer, Abdul-Azeez., The discretionary punishment in Islam (Arabic), *Altazir Fi Alsharia Alislamia*, Third Edition, 1957, p.38

<sup>107</sup> Surat Al-Maeda, verse 32

religion by splitting from the Muslims community". Furthermore, the Prophet, peace and blessings be upon him, said "(Killing) with intention implies retaliation, and by mistake implies blood-money".<sup>108</sup>

## **2.2 The justification of the laws of retaliation**

Retaliation is a penalty that serves to deter crime. Yet if the criminal intentionally commits a murder, then he is liable to be punished by a justice that is equivalent to the crime. For instance, it is not acceptable for a father to lose his son, and then see the murderer coming and going while he, the father, has been deprived of seeing his child. Similarly, it is not acceptable that a man who gouges out the eye of another man, can be observed the one-eyed victim walking amongst the people. Now, if it is thought that gouging out an eye is too severe a punishment, in the same way that it might be claimed that to end a life by a legal retaliation is too severe, must it not be said that the crime was equally severe, and that the hard hearted criminal should be punished with a penalty that is equal to his crime<sup>109</sup>.

It is not logical that we consider mercy for the perpetrator and do not consider the pain of the victim or his relatives. Compassion must be for those who suffer and not just for those who cause suffering. How can one put it better than the Prophet, peace and blessings be upon him, when he said regarding this issue, "He who does not have mercy will not be treated with mercy"<sup>110</sup>.

Furthermore, legal retaliation causes the perpetrator to realise that the penalty that

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<sup>108</sup> Saheeh Aljame'a, part 4, p. 62, see also; Ahmad Alnajdi Zaho., op.cit., p.22-23

<sup>109</sup> Ibn Aby Baker, Shams Aldeen Aby Abdullah Mohammd., op.cit., p.115

<sup>110</sup> Sahih Al-Bukhari, op.cit., Narrative No. 5997

awaits him is the same as the action which he intends to commit. This must have the effect of causing him to feel less certain of his action, since he knows that there will be no escape from the penalty, and that to flee will make him a constant fugitive always hunted by the police as well as by the family or the guardian of the victim. If this deterrence is strong enough it may prevent him from committing the crime, but if he does go on to commit it, and the penalty comes to him, then he must accept his punishment with a conviction in the fairness of the ruler's justice. This is in consequence of his condition as a Muslim. He cannot justify rebellion against Allah's law, since He is the most just of judges, and this is a penalty earned by his own hands.

At the same time, retaliation vents the anger of the relatives of the victim of the crime. This is unlikely to be achieved simply through the imprisonment of the wrongdoer, however long his sentence might be. If the victims are denied a direct sense of relationship to the person who has committed an offence against them, they will rarely feel that he suffers a real penalty for his actions. Thus, the relatives of the deceased in a case of murder must gain direct authority over the murderer's life, whether to grant a limited pardon or to pursue him through the retaliation of *Al-Qisas*<sup>111</sup>.

In retaliation lies the life of society, which should be a fine respected and calm life, since it tears out evil by its roots. Because of this Allah, the Exalted and High, said "And in retaliation (*Al-Qisas*) there is saving of life for you"<sup>112</sup>. In the same way, He says that to spare a life through legal retaliation has life in it for the whole society. If there were no legal retaliation, blood would be spilled and the matter would be in the

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<sup>111</sup> Cf. Sanad, Najati., *The Theory Of Crime and Criminal Responsibility in Islam: Shari'a*, The University of Illinois at Chicago (International Criminal Justice Office), USA, p.62

<sup>112</sup> Surat Al-Baqara, verse 179

hands of the strong and powerful only. There would be no comfort for those who should have the right to choose the punishment of wrongdoers, and only the shrewd and corrupt would have the power to judge, bringing chaos to society. The life of the community is not to be found in the life of a scattered and disputatious people, in which have removed the rights of the weak, and where revenge alone takes the place of the law. Rather, the life of society is healthy and united only through mutual love and the exercise of mercy in justice. This is not possible without a retaliation which equates the penalty with the crime, so that the penalty is appropriate and proportionate to the crime even to the highest degree.

### **2.3 Conditions for the implementation of the laws of retaliation (*Al-Qisas*)**

There are some conditions that relate to the crime, which may be murder, some that relate to the perpetrator, and others that relate to the victim. Before explaining the conditions of homicide, a definition must be given of the various categories of a murder. Murder is an action in which one person causes another life of a human being to cease, since if it ceases without such an action it is called death. Following this, we can say that there are three types of murder which depend on whether the action is intentional, half-intentional or a mistake. These are outlined as follows.

Intentional murder is one of the crimes for which the Legislator (Allah) has required legal retaliation without controversy. Intentional murder is when a responsible person, being of a sound mind, pursues the killing of a human being, whose blood is inviolable, yet knowing that he is most likely to be killed for his action in retribution<sup>113</sup>. By this

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<sup>113</sup> Abdulatif, Mohammad Saeed., op.cit., p.24



definition it is understood that the crime of intentional murder cannot occur unless certain principles are fulfilled.

The first of these is that the murderer is sane, mature, and willed the murder. As to sanity and maturity, it is found in the *Hadeeth* of Ali, may Allah honour his face, that the Prophet, peace and blessings be upon him, said “the pen has been lifted from three types of people; the insane until he becomes sane, the sleeper until he wakes up, and the child until he becomes mature”<sup>114</sup>. As to the intention, it is said in the *Hadeeth* of Abu Hurairah, may Allah be pleased with him, “A man was murdered in the time of the Prophet, may Peace and Blessings be upon him, where the matter was brought to him and he referred it to the relative of the deceased. But the murderer said: “By Allah, I did not intend to kill him! So the Prophet, peace be upon him, said: ‘Verily if he is truthful and yet you kill him, you will enter the hellfire’. So the man was exempted”<sup>115</sup>.

Also, Abu-Dawood relates how the Messenger of Allah, may Allah's peace and blessings be upon him, said "With intention (in killing) there is to be retaliation, except if the relative of the deceased grants pardon"<sup>116</sup>. Ibn Majah narrated that the Prophet, peace and blessings be upon him, said "Whoever kills intentionally then retaliation is to be made, and whoever prevents it then he has the curse of Allah, His angels, and all people upon him, Allah will not accept from him any barter or fairness"<sup>117</sup>.

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<sup>114</sup> Imam Abu-dawood, opp.cit., part4, Narrative No.4401, p.131.

<sup>115</sup> Narrated by Imam Abu-dawood and Imam Al-tirmitheh

<sup>116</sup> Cf. Auda, Abdul-qader., op.cit., p.574

<sup>117</sup> Ibid.

The second principle is that the method used in an unlawful killing is a method that is liable to cause death, and there is no other condition than that it should normally cause death. This may be a specific method or a general one, since both eliminate life. Examples of methods that may be used are killing by fire, drowning in water, throwing from a high place, crushing by pushing down a wall, by strangling, by starving through prevention of food and water, or exposing to a predatory animal. These are methods likely to cause death. In addition, a killing may be made by the poisoning of food given to someone who does not suspect that it has been poisoned. If this person dies, then the poisoner is subject to retaliation under the condition of intentional murder.

The third principle is that the deceased must be a human being whose blood is held to be legally inviolable, i.e. his blood cannot lawfully be spilled.

Unless all these three conditions are met, a killing is not considered intentional. It may be, however, considered semi or half-intentional. This is when a responsible person kills a human being, whose blood is inviolable, in a way that would not normally cause death. An example might be beating a person lightly or with a small stick, or hitting someone with a small stone, in such a way that did in fact cause his death. This is legally defined as a semi-intentional murder, regardless of whether the blow was to a vital part of the body, or whether the victim was small or sick and likely to die from such a blow, or was strong and yet the aggressor continued with the blows until he died. It is called semi-intentional because the murder falls between an intention and a mistake, since the blow was intentional but the death was unintended<sup>118</sup>. It is therefore

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<sup>118</sup> Al-maqdesi, Ibn Qodama., op.cit., part 2, p.2024

neither completely intentional nor completely a mistake. If the crime is not fully intentional, retaliation does not apply because at the foundation of the law is the principle of avoiding bloodshed, and this cannot be permitted without a clear evidence of intention. On the other hand, since it is also not completely a mistake, due to the blow being intentional, a mandatory and severe amount of blood money must be paid to the family of the victim. Al-Daraqutnee relates the authority of Ibn 'Abbas, may Allah be pleased with them both, that the Prophet, may Allah's peace and blessings be upon him, said: "retaliation is obligatory only in the case of intention and in the case of a mistake there is blood-money and no retaliation, but whoever kills unknowingly with a stone or a stick then severe blood-money should be paid"<sup>119</sup>.

It has been reported by Ahmed and Abu Dawod on the authority of 'Amr Ibn Shu'aib from his father, and from his grandfather, that the Prophet, may peace be upon him, said: "The blood-money of semi-intentional killing is a severe one, like that of intention. But the one who commits it is not killed". Ahmed, Abu-Dawood and Al-Nasa'ee reported that the Prophet, may Allah's peace and blessings be upon him, spoke on the day of the conquest of Mecca, saying "Verily he who is murdered by mistake was still intended by the whip, the stick and the stone"<sup>120</sup>.

Sometimes a human being pursues an action that is allowable in itself but which fails to take the care and precaution that is legally required. He sets caution aside and happens to kill someone without wanting to do so. This is called "murder by mistake".

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<sup>119</sup> Al-maqdesi, Ibn Qodama., op.cit., part2, p. 2076, Ibn Qodama said that the prophet made a severe legal blood money for this case and equal it with the intentional murder which is one Hundred camels.

<sup>120</sup> Sabiq, Sayed., op.cit., p.345

Murder by mistake is divided into three types. The first relates to a mistaken action. An example might be when a person aiming his rifle at a bird misses the target and hits someone standing near the bird. The Pellets that have struck this person were fired by the person responsible for the death, and it cannot be disputed that he has carried out this action. However, the death caused was not intended by him, and is thus classified as a mistaken action.

The second type is of a mistaken intent. Examples might be when a weapon is fired at a person on the assumption that he is a legitimate target as in an act of war, or at a Muslim assumed to belong to an enemy force, and such a person is killed. Here, the mistake is not in the action of the perpetrator, since he aimed at a target which he intended to hit, and did actually hit it; rather, it is a mistake that lies in the assumption or belief of the perpetrator. This, therefore, is described as mistaken intent.

Additionally, there is a third case, springing from the two previous ones, which is a mistake in both the action and the intention. An example might be where the perpetrator fires in the direction of another person, believing him to be a legitimate target, but instead hits a third party. In this case, the mistake is indeed in the action, since the shot missed the original target intended by the offender, but also in the intention since the perpetrator aimed his weapon at a human being that he thought was a legitimate target. This kind of murder is not liable to retaliation because there was not intent, but blood money and expiation<sup>121</sup> are obligatory. Furthermore, the perpetrator is forbidden to inherit from the victim, had he been entitled to such an

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<sup>121</sup> Fasting for 60 days continuously or freeing a slave.

inheritance or mention in his will<sup>122</sup>. This category of murder is based on Allah the High's statement: "And never is it for a believer to kill a believer except by mistake, and whoever kills a believer by mistake then freeing of a believing slave and a blood-money should be presented to his family unless they give up their right as charity. But if the deceased is from a people at war with you and he is from a people with whom you have a treaty then blood-money should be presented to his family and the freeing of a believing slave is obligatory. And whoever does not find one or can not afford to buy one, then instead a fast for two months consecutively, seeking acceptance of repentance from Allah. And Allah is ever knowing and Wise."<sup>123</sup>

It is clear from this discussion that retaliation is under the law of *AlQisas* is only due in cases of intentional murder. In the case of semi-intentional murder or murder by mistake, blood money, and the freeing of a slave or fasting for sixty days, are obligatory. It should be stated that slavery no longer exists in Muslim state like the United Arab Emirates. Therefore, Muslims follow the specification of the *sharia* which is to give another option, a fasting for sixty days.

With regard to the murderer, the *sharia* requires that we also speak of the conditions affecting him and, in order to clarify these conditions, we must attend to the Muslim scholars of *Fiqh*. They agree that the following conditions must be fulfilled with respect to allowable retaliation against the murderer.

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<sup>122</sup> Auda, Abdul-qader., op.cit., p.588

<sup>123</sup> Surat Alnisa'a, verse 92, See also Abu-yahia, Mohammed Hassan., Retaliation in souls in Islam (Arabic), *Alqisas Fi Alnofos Fi Al-sharia Alislamia*, First Edition, Almaktab Alislami- Dar Ammar, 1989, p.31

The adult male is measured by his sexual maturity, and the adult female by her menstruation, which for most individuals is around fifteen years of age. Thus, if the perpetrator is too young or not of a sound mind, there can be no retaliation against him or her. The same restriction applies to cases of sudden or temporary insanity, as well as to individuals who were asleep or unconscious.

The justification for this is given in what Aisha, may Allah be pleased with her, narrated from the Prophet, may Allah's peace and blessings be upon him: "The pen is lifted from the sleeper until he wakes up, from the one afflicted with madness until he becomes cured, and from the child until he becomes mature".<sup>124</sup> Thus, the *Hadeeth* indicates that the lifting of the pen means the lifting of responsibility, and the lifting of responsibility prevents punishment and reprimand; as such, retaliation is not obligatory<sup>125</sup>.

Turning now to the perpetrator who is deemed to have free choice, a murderer is someone who intends to commit homicide. Thus, if a person of power forces someone to commit a murder, and this turning results in the killing of a human being, the instigator must be punished a capital offence, and not the person who has been forced. The direct perpetrator of the crime in this case is punished with a discretionary sentence. This was the opinion of Imam Abu Hanifa, and is one of the two opinions of Imam Al-Shaf'ee. The *Hanafee* or the followers of Imam Abu Hanifa say that if someone is forced to destroy a Muslim's property by having been given an order, which means that he fears for his life, then it is allowed for him to commit that act<sup>126</sup>. However, some

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<sup>124</sup> Narrated by Imam Abu-dawood.

<sup>125</sup> Shoman, Abbas., Person and property protection in Islam (Arabic), *Esmat Al-dam Wa Al-mal fi Al-fiqh Al-islam*, Dar Al-bayan (Cairo), 1996, p.342

<sup>126</sup> Ibid, p.352

scholars believe that only the one who has been compelled should be killed and not the one who forced him. This is the other opinion of Al-Shaf'ee<sup>127</sup>. Again, others, among them Imam Malik and Imam Ibn Hanbal, say that they should both be killed unless the victim's relatives grant a pardon. According to this view, if pardon is granted then blood money is obligatory, since the murderer has intended to save himself by killing someone else, and the same logic applies to the one who forced him<sup>128</sup>. If a responsible person commands a non-responsible person, such as a child or an insane person, to kill someone else then retaliation falls on the person giving the command, since the one who performed the murder is only like a tool in his hand. Therefore, *Al-Qisas* is not imposed on him; rather, it falls on the one who caused it<sup>129</sup>. Furthermore, if a ruler commands the death of someone in rebellion then either the commanded man knows that it was rebellion, or he does not know. If he knows that it was, yet carries out the command, then *Qisas* must fall on him. The victim's relative may grant pardon, but blood money is obligatory since the man pursued the killing in the knowledge that it was rebellion. He cannot be excused on the grounds that he acted against the legitimate ruler. This is in accordance with the Islamic principle which says that there is no obedience to the creation that is in disobedience to the Creator, as stated by the Messenger of Allah, may Allah's peace and blessings be upon him<sup>130</sup>. However, if the offender is unaware that the victim did not deserve to be killed, there is still to be retaliation unless the relative grants pardon or blood money. This is exacted from the one who commanded the killing and not his agent. The agent acting for the ruler out of obligation to obey his lord, would otherwise constitute a disobedience to Allah. If someone gives a murder weapon to

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<sup>127</sup> Ibid, p.353

<sup>128</sup> Ibid, p.354

<sup>129</sup> Cf. Al-maqdesi, Ibn Qudama., op.cit., part 2, p.2037

<sup>130</sup> Ibid, p.2075

another person yet does not order him to kill, this does not imply any fault on the part of giver<sup>131</sup>.

There is a further condition attaching to the murderer who is subject to retaliation but made inviolable through belief, custody or indemnity. What is meant here is specific protection different to the protection of the deceased which decrees that his blood cannot be spilt without just cause. Through this, the Muslim, the non-Muslim in custody, and the non-Muslim in indemnity, are all subject to *Qisas* if they kill someone of the same or a higher status, since they are all inviolable through Islam or a covenant of protection or safety. This applies to the Muslim who commits a violation that causes his blood to be shed in vain, either through apostasy, extra-marital fornication or by taking a life without justification. This is in accordance with the Hadeeth: "No Muslim person's blood is permitted (to be spilled) except in one of three cases; the married fornicator, and a life for a life, and he who apostates from his religion through leaving the community of the Muslim nation"<sup>132</sup>. All of the above-mentioned people are subject to retaliation if they kill someone of an equal or higher status, unless the relatives of the victim grant pardon from retribution. If pardon is granted, then legal retaliation shall be waived and blood money from the accused is obligatory. On the other hand, in the case of the killer being among forces of the enemy, then he is not killed under laws of retaliation. Rather, he is killed because he is spilling blood in vain. What is meant by his execution not being a legal retaliation is that if he is to kill while fighting and yet cannot be caught until he becomes a Muslim, then his blood is inviolable, because Islam

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<sup>131</sup> Sabiq, Sayed., op.cit., p.378

<sup>132</sup> Imam Al-Bukhari, Sahih Al-Bukhari, Narrative No.6878, p.1389



expiates him from whatever he has done before<sup>133</sup>.

There is no legal retaliation for a father who kills his son or his grandson. Al Tirmithi, writing on the authority of Ibn Omar, may Allah be pleased with him, that the Prophet, may Allah's peace and blessings be upon him, said "A father is never killed for (killing) his son"<sup>134</sup>. This is distinct from when a son kills one of his parents, since in that case he is subject to capital punishment without controversy. The explanation for this is that parents are the cause of their son's existence, and therefore the son must not be the cause of his parent's death. If he does kill one of his parents, the son is subject to legal retaliation<sup>135</sup>.

Whoever is in ignorance of the prohibition of murder, such as someone who is new to Islam, or in ignorance of the protection of the victim as, for example, a person who shoots a Muslim in a non-Muslim area of war assuming that he is of the enemy forces, then he is not subject to retaliation. This is because retaliation should avoid situations of doubt, and the murderer's ignorance of the prohibition of murder, or his ignorance of the protection of the victim, constitutes a situation of doubt. However, if he shoots someone whom he believes to be of the enemy forces in an Islamic country and thereby kills a Muslim, then he is subject to legal retaliation, for whoever is present in an Islamic land has his blood protected, as opposed to the person who is in a non-Islamic land where such killing is allowed<sup>136</sup>. Thus, a claim of ignorance, as described here, is not accepted from someone who grew up amongst Muslims even if he swore to that

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<sup>133</sup> Saleh, Abdul-Qafar Ibrahim., Retaliation in souls in Islamic sharia (Arabic), *Alqisas fi Alnafs Fi Alfiqh Alislami*, Second Edition, Matba'at Hamada (Cairo), 1998, p.78

<sup>134</sup> Abdulatif, Mohammad Saeed., op.cit., p.60

<sup>135</sup> Peters, R., op.cit., p.48

<sup>136</sup> Karar, Ali Hassan., Retaliation in souls in Islamic sharia (Arabic), *Al-Qisas fi Alfiqh Al-islami*, Dar Al-ithad Al-arabi (Cairo), 1981, p.198

ignorance. The apparent situation denies the possibility of his ignorance since the prohibition of murder is universally known. If the person said that he knew that his action was prohibited but did not know that it entailed retaliation, then he is still to be killed, since if he was aware of its prohibition, he is obliged to abstain from it<sup>137</sup>.

Regarding the condition that must be fulfilled in respect of the victim, the protection, or *Al-’Ismah*, comprises prevention and preservation. The protection of the victim is that he is protected from murder and deserving that his blood should not be spilt. This protection involves one of three things, as follows. Islamic protection is established in both the Holy Qur’an and the Sunna of the Prophet Muhammad. There is consensus that a Muslim is protected as long as he does not commit a crime that causes his blood to be spilt, i.e., apostasy, fornication after marriage, or taking a life without a life having been taken. The evidence for this is in the Holy Qur’an: "and whosoever kills a believer intentionally, his recompense is Hell to abide therein..."<sup>138</sup> and in the Sunna: "I have been commanded to fight against the people until they believe that there is none worthy of worship except Allah, so if they say it then their blood and wealth has been protected against me"<sup>139</sup> and "No Muslim's blood is permitted (to be spilled) except in one of three cases: The extra-marital fornicator, and a life for a life, and he who apostates from his religion through leaving the community of the Muslim nation". These statements demonstrate that apart from those exclusions mentioned, everybody has a fundamental protection through Islam<sup>140</sup>.

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<sup>137</sup> Saleh, Abdul-Ghafar Ibrahim., op.cit., p.85

<sup>138</sup> Surat Al Nisa’a, verse 92

<sup>139</sup> Sahih Al-Bukhari, op.cit., Narrative No. 6924, p.1399

<sup>140</sup> Saleh, Abdul-Ghafar Ibrahim., op.cit., p.87

The people of the ancient Holy Books have a covenant of protection, and a treaty with any leader of a Muslim state, who reside in the land of Islam and enjoy its nationality and its security. Accordingly, what is for them is for us, and what is against them is against us, regarding rights and obligations. Thus, their wealth and their blood become inviolable in regard to whoever acts in a hostile way towards them. They are protected through the *Jizyah*, or tribute, that they pay, and by abiding lawfully according to the tenets of the Islamic *sharia*. They are also protected by defending the sanctity of the Muslims, and his wealth and blood, and by not committing any crimes which might invalidate this covenant of protection. This ruling is based on His, the High's, statement: "Fight those who do not believe in Allah or in the day after and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth [i.e., Islam] from those who were given the Scripture (Jews and Christians), until they pay the *Jizyah* with willing submission, and feel themselves subdued"<sup>141</sup>. This protection occurs even to the extent that, if they give the *Jizyah*<sup>142</sup> and make a pact with the leader to do that, then their blood and wealth are protected.

There is an additional covenant of safety for an individual of the enemy force who enters the land of Islam under the protection of the ruler and the Muslim people. However, it extends only to their period of visiting the land of Islam, whether to visit family, or to undertake some business. At the end of this time, they return to the status of being part of an enemy force. This protection is taken from His, the Most High's, statement: "And if anyone of the Polytheists seeks your protection, then grant him

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<sup>141</sup> Surat Al-Tawba, verse 29

<sup>142</sup> Amount of money paid by non-Muslims who live in Muslim countries in the olden days but does not exist anymore.

protection so that he may hear the words of Allah [i.e., the Qur'an], and then escort him to where he can be secure, that is because they are a people who do not know."<sup>143</sup>

For retaliation to be imposed on the perpetrator, a victim must be equal to the perpetrator in blood status. This difference between people depends on one of four criteria: the status of a person's religion with respect to Islam; whether the person is a free man or a slave; whether the person is male or female; and whether it concerns one individual or a group of individuals.

It is agreed that if the deceased is equal to the murderer in any of these four criteria, then legal retaliation is obligatory. But if they differ in one or more aspects, there is some dispute between the Scholars of *Fiqh* in regard to the treatment of the perpetrator. This requires some detail to clarify the issue for the reader. The first situation might be the killing by a free man of a slave. In this case, the Scholars Imam Malik, Al-Shaf'ee and Ibn Hanbal have said that the free man is not to suffer retaliation by being killed for a slave, irrespective of whether it is his own slave or someone else's<sup>144</sup>. However, Imam Abu Hanifa and his companions said that the free man's life may be forfeit for a slave, unless it is his own<sup>145</sup>. The evidence of the first group (Malik, Al-Shaf'ee, Ibn Hanbal and those with them) is found in a statement by Him, The High: "Legal retaliation is prescribed for you in the case of murder - the free for the free, the slave for the

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<sup>143</sup> Surat Al tawbah, verse 6

- see also; Saleh, Abdul-qafar Ibrahim., op.cit., p. 88

<sup>144</sup> Zaidan, Abdul-kareem., Retaliation and legal blood money in Islamic sharia (Arabic), *Al-Qisas wa Al-Deyat fi Al-sharia Alislamia*, Dar Al-basheer, 1998, p.57

<sup>145</sup> Ibid, p.56

slave”<sup>146</sup>. The point of this verse is in its categorizations and classification, i.e. that retaliation is prescribed for the free when he kills the free, and for the slave when he kills the slave. Therefore, if a free man murders a slave he should not be killed for him. This opinion is supported by Ibn Shaybah, when he relates that the Prophet, may Allah's peace and blessings be upon him, said that a Muslim should not be killed for someone bound by treaty, nor a free man for a slave<sup>147</sup>. Moreover, Al-Daraqutnee has shown in the links between the teachings of Isma'el Ibn 'Ayash from Al-Awzaa'ee, from 'Amr Ibn Shu'aib from his father, on the authority of his grandfather, the case of a man who murdered his slave intentionally. So the Prophet, may Allah's peace and blessings be upon him, lashed him and banished him for a year, and denied him his share from among the Muslims and did not retaliate on behalf of him (the slave) but ordered him to free a slave<sup>148</sup>. A further evidence is that Abu Baker and 'Omar, may Allah be pleased with them, did not kill the free man for a slave among the Companions, and they were not criticised though they were among those most God-fearing<sup>149</sup>. Furthermore, it is agreed by every commentator that there is no legal retaliation for physical injury or impairment whether to the free or the slave in the case of injury, and therefore that murder cases should follow the same pattern<sup>150</sup>.

On the other hand and in response to this, it is said that such an agreement is nullified through what has been written by Ibn Abi Layla, according to whom there is no difference between the free and the slave with respect to a right to the sanctity of his life

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<sup>146</sup> Surat Al-Baqara, verse 178

<sup>147</sup> Zaidan, Abdul-kareem., op.cit., p.56

<sup>148</sup> Ibid, p.59

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

and protection of his person. In addition, there is the evidence from the second party (Imam Abu Hanifa and his companions) which concerns the interpretation of what is meant when the High says "O you who believe! Legal retaliation is prescribed for you in the case of murder." The evidence which is inferred here is that the verse gives a general indication that whoever takes a life should be killed for it. Moreover, this opinion also relies on evidence from the Sunna when the Messenger of Allah, may Allah's peace and blessings be upon him, said "Muslims are equal in blood, and the lowest among them strives for their protection, and a Muslim is not killed for a disbeliever (*Kafir*)"<sup>151</sup>. The point of the evidence here is that there is no distinction between the free man and the slave. Thus, the *Hadeeth* indicates that retaliation is to be imposed both for the free man and the slaves when it pertains to the sanctity of life<sup>152</sup>. Furthermore, Hassan from Samurah related that the Prophet, may Allah's peace and blessings be upon him, said "He who murders his slave will be killed, and he who injures him will face amputation"<sup>153</sup>.

In the case of the killing of a non-Muslim, a *Thimnee*, being a free person living under Muslim rule, who may be a Jew or a Christian, scholars have differed on the issue. This has resulted in three distinct opinions. One is that the Muslim is not to be killed for a *Thimnee*. Among these are Al-Shaf'ee, Ahmed Ibn Hanbal and a group of others<sup>154</sup>. Others say that he should indeed be killed, and among these are Abu Hanifa and his companions<sup>155</sup>. The third opinion is that of Imam Malik, who said that a Muslim is not

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<sup>151</sup> Imam Ahmed Ibn Hanbal, The chair (Arabic), *The Musnad*, part 2, p.191

<sup>152</sup> Abu-yahia, Mohammed., op.cit., p.42

<sup>153</sup> Zaidan, Abdul-Kareem., op.cit., p.59

<sup>154</sup> Karar, Ali Hassan., op.cit., p.143

<sup>155</sup> Ibid, p.144

killed for a *Thimnee* except if he has assassinated him<sup>156</sup>. The first party, known as the "Greater Scholars", used the following statement from the Holy Qur'an as evidence to support their views: "the free for the free, the slave for the slave and the female for the female"<sup>157</sup>. In this opinion, comparing the free with the free, the slave with the slave, and the female with the female, prevents a free man from being killed for a slave, etc. Furthermore, He, the High, has stated "And never will Allah grant to the disbelievers a way to triumph over the believers"<sup>158</sup>. Hence, to refuse equality to the disbelievers necessitates the prohibition of their right also to legal retaliation. Thus, if it is argued that they will not have equality with them, this is answered in two ways. Firstly, it is to be understood generally since the wording is general. Second, we already know from other verses that non-believers do not have equality with believers, and this is according to clear evidence and proof, and therefore it is not valid to interpret this saying with meanings that are derived from other verses<sup>159</sup>.

In contrast, the evidence cited by the second party, namely Abu Hanifa and his companions, is from the Holy Qur'an containing the following statements by the High: "O you who believe! Legal retaliation is prescribed for you in the case of murder"<sup>160</sup>, "And we ordained for them therein a life for a life"<sup>161</sup>. The point of the evidence in these verses is that they refer to both deceased. There is here no difference made between a free man and a slave, or between a Muslim and a *Thimnee*. This second party also cites

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<sup>156</sup> Ibid.

<sup>157</sup> Surat Al-Baqara, verse 178

<sup>158</sup> Surat Al-Nisa'a, verse 141

<sup>159</sup> Hassanain, Ezzat., Homicide between sharia and secular law (Arabic), *Jara'em Alqatel bain Al-sharia wa Al-qanon*, Maktabat Sayed Abdulla Wahab (Cairo), second Edition, 1988, p.67

<sup>160</sup> Surat Albaqara, verse 178

<sup>161</sup> Surat Al-Maeda, verse 45

from the Sunna the following statement of Allah's Messenger, may Allah's peace and blessings be upon him: "[For killing] with intent there is retaliation, unless the relatives accept the blood-money"<sup>162</sup>. The general meaning in this *Hadeeth* refers to both of the deceased. There is again no difference between a free man and a slave, or between a Muslim and a *Thimnee*. Moreover, it was narrated on the authority of 'Abdul-Rahman al-Baylamani that the Prophet, may Allah's peace and blessings be upon him, killed a Muslim for a non-Muslim who was protected by treaty, and then said: "I am the noblest of those who fulfil their protection"<sup>163</sup>. It is also narrated that Abu Musa al-Ash'ary wrote to Omar ibn al-Khattab, may Allah be pleased with him, to ask him about a Muslim who murdered a Christian. He replied that he should retaliate on his behalf<sup>164</sup>.

Consideration of the evidence of both parties, we might say that a difference of opinions shows the mercy of God, since the believer is thereby able to choose whichever interpretation he finds is appropriate to the situation. Islam calls upon us to find the way that is the least harmful or damaging to our life on this Earth. Due to the distinctions made by the two parties, that is to say the evidences and the opinions of both Imam Malik and Imam Abu Hanifa, and according to the fairness of Islam, it is surely logical that a Muslim might be killed for a *Thimnee*, since he is a follower of the prophets and he cannot be seen merely as a disbelievers. The Federal Supreme Court in the United Arab Emirates, in one of its judgments, took the opinion of Imam Abu Hanifa and issued a judgment saying that even atheist non-Muslims are equal in law with Muslims, and both of them are entitled to retaliation, extending even to the

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<sup>162</sup> Imam Al-Bukhari, *Sahih Al-Bukhari*, op.cit., Narrative No.6880, p.1390

<sup>163</sup> Ramadan, Said., *Islamic Law "Its scope and Equity"*, p.156

<sup>164</sup> Ibid.



payment of legal blood money<sup>165</sup>.

The third case is to kill a group for just one victim, an issue on which the scholars have differed. The greater among the Companions and those who came after them, as well as the scholars of *Fiqh*, among them Malik, Abu Hanifa, Al-Shaf'ee, and Al-Thawry, and others, said that a group is indeed to be killed for one person, whether that group is large or small. This was stated by the second *Calif*, Omar, and is found in one of the narrations from Ahmed ibn Hanbal<sup>166</sup>. Some others, such as Ibn Al-zubair and Al-zuhree, have said that a group could be killed for killing one person since it is fair to retaliate against the many for killing only one<sup>167</sup>. Malik and Al-Shaf'ee said that several hands can be cut off for just one hand. However, the followers of Imam Abu Hanifa's school of faith differentiated between a life and limbs, saying that a life is to be taken for a life, but only one limb should be cut off<sup>168</sup>.

However, the first party, who are known as the Greater Scholars, have used the following evidence as a proof for their position: "And in *Al-Qisas* there is [saving of] life for you, O you people of understanding, that you may become pious"<sup>169</sup>.

The point of this evidence is that legal retaliation is indeed ordained to prevent murder. If retaliation is not permitted following murder by a group of people, then it would lead to people killing in this fashion with impunity. The wisdom contained in the principles of discipline and prevention would be lost. The second argument is found in the

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<sup>165</sup> Appeal No.9 for the year 19, session hearing on 18/10/1997

<sup>166</sup> Abu-zaid, Mohammad Abdul-hameed., The retaliation and legal blood money (Arabic), *Al-Qisas wa Al-deyat*, Dar Alnahda Alarabia (Cairo), 1985, p.112

<sup>167</sup> Ibid.

<sup>168</sup> Ibid, p.114

<sup>169</sup> Surat Al-Baqara, verse 178

narration of the Prophet, may Allah's peace and blessings be upon him, when he said: "And you, O people of the tribe of Khuzaa' ah, you have killed this man from the tribe of Huthail and I am his legal guardian. So whoever is killed from today on, then his family has two choices; either they kill or they take the blood money"<sup>170</sup>. This narration refers to the killing by a group of people of just one victim, since the term 'whoever' can refer either to an individual or a group. Thus, a group may be killed for just one person<sup>171</sup>, and if a ruling is made giving exemption in a specific case, such a ruling should not be allowed. The first part also used as evidence that which is narrated on the authority of 'Omar, may Allah be pleased with him, that he killed seven men for the sake of one man from San'aa, and the *Calif* said "If all the inhabitants of *San'aa* had participated in the killing I would have killed all of them for him"<sup>172</sup>.

Moreover, Ali Ibn Abi Talib killed the Hururiyah<sup>173</sup> for killing Abdullah Ibn Khabab. They brutally slaughtered Abdullah Ibn Khabab in the way one slaughters a sheep, and when Ali was informed of this he said "Allahu Akbar! Tell them to bring us those who killed 'Abdullah Ibn Khabab!" So they said three times "All of us killed him!" So 'Ali said to his companions "They are indeed beneath you!" Then it was not long before he and his companions had them all killed. And Al-Mugheerah ibn Shu'bah also killed seven for just one. And Ibn Aabbas said "If a group kills one person then they are all to be killed for him even if they are a hundred"<sup>174</sup>.

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<sup>170</sup> Sunan Altirmitheh, part 1, p.264

<sup>171</sup> Sharjah Appeal Court in the United Arab Emirates, condemned 17 Indian workers to the death penalty after being convicted of killing one person from Pakistan. However, after the relatives of the victim waived their right in retaliation and accepted the legal blood money, the death sentence was commuted to two years imprisonment under the laws of discretionary punishment. (cf. Alkhaleej Newspaper, issue 11804, supplement 2, 13.9.2011, p.1)

<sup>172</sup> Imam Malik, The authentic narratives (Arabic), *Al-mowata*, part 2, p.871

<sup>173</sup> A party of the Khawarij attributed to Alharoorah, a place near Kofa (Iraq).

<sup>174</sup> Abu-zaid, Mohammad Abdul-hameed., op.cit., p.113

Finally, we can say that retaliation is constitutes a penalty which is requires a single punishment for a single crime. However, it is mandatory in dealing with a group as for a single individual. The same principle applies for example, to slander. There is legal punishment for a group that slanders someone, how much more, therefore, is a group which has committed a murder worthy to be punished? Furthermore, blood money is obligatory whether it involves just one killer or a group.

At the same time, scholars offer further scriptural evidence as proof, as firstly in the High's statement "And we ordained for them therein a life for a life"<sup>175</sup>, and in His, the High's, statement "retaliation is prescribed for you in the case of murder - the free for the free, the slave for the slave and the female for the female"<sup>176</sup>. From this, it is said that not more than one free human being should be killed for one free victim, nor more than one slave for a slave, nor more than one female for a female. Thus, there should be no more than one life for a single life<sup>177</sup>. A further evidence is His, the High's, statement "whoever is wrongfully killed then we have made an Authority for his relative. So let him not exceed in killing, verily he is aided"<sup>178</sup>. Thus, Allah forbids excessiveness in killing, and it exceeds what is right to kill a whole group for just one victim.

To discuss this evidence, others say that the Greater Scholars can find further proofs, as in the verse beginning, "Verily in His, the High's, statement: 'a life for a life...'. This verse does not contain evidence to support the view that only a single life should be

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<sup>175</sup> Surat Al-maeda, verse 45

<sup>176</sup> Surat Al-baqara, verse 178

<sup>177</sup> Abu-zaid, Mohammad Abdul-hameed., op.cit., p.115

<sup>178</sup> Surat Al-Isra'a, verse 33

considered. And in His, the High's, statement: 'the free for the free...', there is also no proof that just one free person is referred to. The same interpretation is made of His, the High's, statement: 'the slave for the slave, and the female for the female...', since it does not constitute a proof that only one slave or female is being considered. Rather, these are all words that are used collectively. Because the word '*Nafs*' (life) also refers to lives, and the free also refers to the plural, and the slave or female can also refer to many slaves or women. And what is meant is to be cautious not to implement *Al-Qisas* on a life that has not taken a life. So by this reasoning, the purpose of *Al-Qisas* in the two verses is to kill whoever has killed, no matter who it may be. It is to rebuke the Bedouin Arabs who intended to kill, in addition to the killer, hundreds or more of those who were innocent of any killing, only to brag and boast about their honour and strength<sup>179</sup>. So Allah commanded justice and fairness, which is to kill only those who have killed<sup>180</sup>. Furthermore, it seems that, the case of the people who killed Abdullah Ibn Khabab – where Ali Ibn Abi Talib asked the killers to admit that they had all kill him, and when they refused, he was satisfied of their guilt, he ordered his companions to attack and kill them all. This is consistent with the conclusion that a group may be killed for the killing of a single person in such a case.

What appears to be meant is not to kill any one except the killer himself. His, the High's, statement "So let him not exceed in killing..." what is meant is not to kill other than the killer, and His, the High's, statement "Then we have made an Authority for his relative..." necessitates that his authority is over a group as well as over a single person.

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<sup>179</sup> In this and other instances, we can see that the spread and proper understanding of Islam has gradually superseded tribal or customary law.

<sup>180</sup> Abu-zaid, Mohammad Abdul-hameed., op.cit., p.114

Thus, the verse is does not actually seem to be a proof against this evidence. The interpretation of "Verily one does not equal a group" is invalid because a single life is as sacred as that of group. We have Allah's, the High's statement, "Because of that we prescribed for the Tribe of Israel that whomsoever kills a person without right, then it is as if he has killed all people"<sup>181</sup>. Therefore the retaliation must be the same with regard to both. This contrast with the view that the killing of a group is not required for the death of a single person, even if this has been claimed by Imam Abu Hanifa, because the objective of retaliation is to spare the spilling of blood. So a group should not be killed for the death of one in order for blood not to be spilt<sup>182</sup>.

Yet it is also held that the utmost right that can be established through legal retaliation is a sanction upon a group which kills a single person, since murder is for the most part performed through conspiracy and interaction. If retaliation were not obligatory in the case of conspiracy then this would be taken as an incentive or pretext for the shedding the blood, since the perpetrators would be safe from retaliation.

From the above discussion, it becomes clear that the evidence of the opposition to the Greater Scholars is not convincing. The Scholars' claim to a general guilt stands up, and their opinion is the most influential one, as we can see from current legal practice in Arab states such as the United Arab Emirates. Serious crimes other than murder, such as burglary, if committed by more than one individual, are punishable by sentences that apply equally to all members of a gang. A group is, in fact, liable to the death penalty if

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<sup>181</sup> Surat Al-maeda, verse 32

<sup>182</sup> Abu-zaid, Mohammad Abdul-hameed., op.cit., p114

all the accused have participated in the killing, even if they have acted separately<sup>183</sup>.

In the case of the killing a male of a female, the scholars of *Fiqh* agree that a male may be punished by the death penalty for killing a female. This follows the opinion of Ibn Al-Munthir and others who found general agreement on this matter. However, 'Ali Ibn Abi Talib and his companions maintained that if a man is killed for a woman then her relatives should receive only half of the blood money, but if a woman's relatives choose to spare the offender they may do so, and receive from him the full blood money. If a woman kills a man, and the man's relatives wish for her death, they can kill her and take half of the blood money or take the full share and spare the female perpetrator's life<sup>184</sup>.

The support for this is taken from the Holy Qur'an: "And we ordained for them therein a life for a life", and "O you who believe! Legal retaliation is prescribed for you in the case of murder". Moreover, Allah's Messenger, may Allah's peace and blessings be upon him, have stated "Muslims are equal in blood, and the lowest among them strives for their protection, and a Muslim is not killed for a non-Muslim (*Kafir*)".

The preponderant opinion, due to strong and convincing evidence, is that a male is killed for a female, which has great general benefit, and Allah knows best<sup>185</sup>.

The question has already arisen of whether a father can be killed for killing his own son, and it has been stated that a father should never be killed for the death of his son. This, at least, was the consensus of the Companions, taking into account the position and

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<sup>183</sup> Abu-yahia, Mohammed., op.cit., p.52

<sup>184</sup> Abu-zahra, Mohammad., op.cit., p.269

<sup>185</sup> Ibid, p.268

noble status of the father. It is through the father that the son has life, therefore it is impossible that the demise of a father, through legal retaliation, can be justified by the death of a son<sup>186</sup>. It is worth noting here, however, that the Federal Supreme Court in the United Arab Emirates, in one of its judgements, has said that the male and female are equal under the laws of retaliation and in the amount of legal blood money that is payable<sup>187</sup>.

#### **2.4 Establishing retaliation in Islamic *sharia***

According to the Islamic *sharia*, retaliation is established through either of two methods, after the occurrence of a homicide crime, namely, by confession or witness. These methods are discussed as follows.

The meaning of confession linguistically is to establish and to obligate. It is derived from the word “confess”, meaning to tell of a matter that relates to the actions or right of another person. The basis of confession is that someone acknowledges his own actions or obligations to others, as for example, when someone says ‘I confess that there is sufficient proof against me in this matter’, or, ‘I confess that I should have done such and such a thing, because of my obligations to someone’, or, ‘I confess that by my actions, the rights of someone have been denied’. These are admissions of responsibility or guilt.

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<sup>186</sup> Auda, Abdul-qader., op.cit., part 2, p.102

<sup>187</sup> Appeal No.116, for the year 16, hearing dated on 7/1/1995

The validity of a confession depends on the confessor alone. Thus, the confession of a person on behalf of another is not accepted, and rather it is called here a testimony not a confession. The precise value here is that the confessor, in giving up his legal rights to protection before a court, spares a process from disputes and arguments in front of the judge<sup>188</sup>.

In the second method, that of the witness, great reliance is placed in the *sharia* because this is the means by which the truth is clarified and becomes apparent. Therefore, it was named “*Bayinah*”, a clear proof, and is something the judge must depend on to reach a ruling in a case of disputed evidence. As for the acceptance of witnesses in legal retaliation, it is a condition that they are male. Female witnesses are not accepted in matters of legal retaliation, whether acting together with men, or by herself, and this is the position of the majority of jurists. They follow the principle found in the narration of Imam Malik, who took it from Al-Zuhree that the Sunna made clear that a woman may not bear witness against a man in legal retaliation<sup>189</sup>.

There is also a condition that not less than two witnesses must be heard in legal retaliation. Thus, legal retaliation cannot be established without two male witnesses fulfilling the general and specific conditions, which are: maturity, sanity, freedom, Islamic belief, good conduct, ability of speech, hearing, sight and moral reliability. In addition, they must not have been previously under suspicion themselves for any

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<sup>188</sup> Saleh, Abdul-Ghafar Ibrahim., op.cit., p.427

<sup>189</sup> Ibid, p.429



testimony they have previously given<sup>190</sup>. These strict rules are imposed by the Islamic *sharia* since the punishment for false witness is severe, and may deprive a person of his life.

## **2.5 imposing the Death Penalty as a Retaliation Punishment**

In order to fulfil the terms of legal retaliation, three conditions are required. Firstly, the offender must be sane and mature. Thus, if it is a child or an insane individual then no one can substitute for them in this regard, whether father, legal guardian or ruler. Rather, in this case the perpetrator is detained until he matures or becomes sane, as the case may be, at which point he becomes liable to the punishment. This happened in the case judged by Mu'awiyah Ibn Abi Sufian when an offender called Hadbah Ibn Khashram was, in a case of legal retaliation, detained until the son of the deceased became sufficiently mature to demand or waive his rights. This was in the time of the Companions and no one criticized the judge for it<sup>191</sup>.

The second condition is that all the legal representatives agree to fulfil it, and it is not allowed for just a few of them to decide the matter on their own. Thus, if some of those represented are absent or under-age, then it is obligatory to wait for their return or until they become mature, because whoever has a say in the affair cannot be absent from the process, since the opinion of such persons would be heard or considered<sup>192</sup>.

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<sup>190</sup> Ibid, p.421

<sup>191</sup> Ibid, p.235

<sup>192</sup> Ibid.

Imam Abu Hanifa said "The elder must have their rights fulfilled in the retaliation and should not wait for the young to grow mature, thus if one of the legal guardians grants pardon then the legal retaliation is dropped because it cannot be divided into parts"<sup>193</sup>.

According to the third condition, retaliation should not go beyond the culpability of the perpetrator and harm someone else. Hence, if retaliation relates to a pregnant woman then she is not to be killed until she has given birth and has breast-fed her child, since killing her would extend to killing the foetus. Likewise to kill her before she breast-feeds is prejudicial for the child. If, however, another person can breast-feed the child, it should be given to that person, and the mother may be killed, since now someone else is responsible for the upbringing and feeding of that child. If no one is found to take care of the baby then the mother must look after it for a period of two-years. Ibn Maajah reported that Allah's Messenger, may His peace and blessings be upon him, said "If a woman murders intentionally, then she is not to be killed until she has given birth to her child if she is pregnant, and until her child then is catered for. And if she fornicates she should not be stoned until she has given birth to her child if she is pregnant and until her child then is catered for"<sup>194</sup>.

## **2.6 Waiving the Retaliation**

Retaliation in homicide cases cannot be dropped or waived unless some conditions are satisfied. The first logical issue is when the accused dies prior to the execution. In this case, paying blood money from his wealth to the relatives of the victim is obligatory. This was held by both Imam Ahmed Ibn Hanbal and Imam Al-Shaf'ee. However, both

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<sup>193</sup> Ibid, p.243

<sup>194</sup> Ibid, p.267

Imam Malik and Imam Abu Hanifa said that no blood money is to be paid in such a case since their right is to take the life of the accused, and the accused has died in this instance. This is valid unless the parties have chosen to waive their rights of retaliation and have accepted the blood money, a decision which may be given up to the point that the offender is to suffer<sup>195</sup>.

The second issue where retaliation may be waived is the granting of pardon. Scholars agree that it is permissible to grant pardon in legal retaliation and that this is the better choice. The basis for this is in the Qur'an and the Sunna: He, the High, says "*Qisas* is prescribed for you in the case of murder, but whoever is pardoned by his brother (i.e., the deceased's guardian) against something (blood money) then it should be adhered to properly and the payment should be given to him with good conduct"<sup>196</sup>. Further, He, the High, says "and we ordained for them herein a life for a life, and for wounds is legal retaliation. But whoever gives up his right as charity, it is expiation for him"<sup>197</sup>. On the other hand, Anas Ibn Malik said: "I never saw the Messenger of Allah, may His blessings and peace be upon him, having an issue of legal retaliation brought to him except that he would command to grant pardon in it"<sup>198</sup>.

There is a consensus among scholars that whoever receives the right to claim legal retaliation may grant pardon. It is, however, a condition that those pardoning are responsible persons, by virtue of their maturity and sanity. Thus, pardon is not accepted

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<sup>195</sup> Sabiq, Sayed., op.cit., p.359

<sup>196</sup> Surat Al-baqara, verse 178

<sup>197</sup> Surat Al-maeda, verse 45

<sup>198</sup> Auda, Abdul-qader., op.cit., part 2, p.138

from a child or an insane person even though such a person does have a right established in law<sup>199</sup>. Moreover, it should be noted that from among the victim's relatives, only males who can inherit from him according to the Islamic *sharia* are permitted to grant pardon. Furthermore, retaliation can be dropped if reconciliation is made between the perpetrator and the victim's representatives.

## **2.7 Legal Blood Money (*diyya*)**

Discussing the precise amounts payable as blood money is not our major concern. However, since it has already been shown that if retaliation is waived then blood money is obligatory, it is worth examining this topic must be addressed. Even in imposing blood money, the *sharia* shows that the law is merciful, since it is offering a compensation to the relatives who have suffered and lost their loved one. It recompenses them after the death of a family member, and, by direct confiscation of his assets, shows the murderer the consequences of his own action. The blood money is a punishment, but it is a punishment which gives him a new life. Thus, the offender should thank the Lord for this mercy, and think deeply before committing another homicide in the future.

Legal blood money is the amount that it becomes obligatory to pay because of a crime, and it is paid to the victim or his legal representative. It encompasses both the issue of legal retaliation as well as the issue in which there is no legal retaliation. Blood money (*diyya*) is sometimes called '*Aql*' (a collective pledge of compensation) This is derived from a time when the perpetrator who killed a victim, and had to pay blood money,

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<sup>199</sup> Abu-yahia, Mohammed., op.cit., p.291

would collect the blood money in the form of camels from his tribe. Then he would tie them up in the courtyard out side the house of the relatives of the deceased<sup>200</sup>. The old Arabs, in the pre-Islamic past, practised a system of blood money. The Holy Qur'an confirmed the principle on the basis of Allah's statement "And never it is for a believer to kill a believer except by mistake, and whoever kills a believer by mistake then freeing of a believing slave and blood money presented to his [the deceased's] family is required unless they give up their right as charity. But if the deceased is from a people at war with you and he is a believer then only the freeing of a believing slave; and if he is from a people with whom you have a treaty then blood money presented to his family and the freeing of the believing slave. And whoever does not find one or cannot afford it then instead a fast for two months consecutively, all that seeking the acceptance of repentance from Allah, and Allah is ever knowing and wise",<sup>201</sup>.

English common Law also developed an elaborate system of fines in place of the killing of a murderer. In this payment to the victim's family could be substituted, depending on an assessment of the value of the victim's life<sup>202</sup>.

Turning to what is payable, there are many accounts regarding the amount of the legal blood money. Imam Al-Shaf'ee said that it is to be one hundred camels, which, if not found, should be of the same value. Imam Ahmed Ibn Hanbal agreed with that opinion. Imam Malik, however, said that it could vary depending on the origin of the people. Consequently, the Bedouins should pay it in the form of camels, and the people of the

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<sup>200</sup> Auda, Abdul-qader., op.cit., part 2, p.582

<sup>201</sup> Surat Al-Nisa'a, verse 92

<sup>202</sup> Costanzo, M., Just Revenge, cost and consequences of the death penalty, St.Martin's Press, New York, Third Edition, 2001, p.11

city must pay it in some form of money. Imam Abu-Hanifa said that it could be paid in either gold or silver<sup>203</sup>. Some other jurists have said that the legal blood money should be ten thousand dirhams. This is according to what has come down to us from Omar Ibn Al-khatab, the second *Calif*. However, others have specified payment in the form of camels only, but that the age of the camels may vary according to the nature of the crime. They have said the blood money for homicide necessitates payment of the finest camels, but manslaughter requires payment of camels which are older or less valuable<sup>204</sup>. This all goes back to the fact that the Prophet, may Allah's peace and blessings be upon him, never estimated the blood money in any commodity other than camels. Thus, what was told by Omar Ibn Al-khatab, when he specified legal blood money to be paid in other goods, might have been responding to an increase in price of camels, or even that camels could not be found at that time. The Federal Supreme Court of the UAE has issued several judgements regarding this matter, declaring that the amount of legal blood for homicide or manslaughter should be one hundred camels.<sup>205</sup> This has been estimated by 150,000 dirhams<sup>206</sup> which later, due to the increasing price of camels, was changed to a value of two 200,000 dirhams<sup>207</sup>.

The wisdom and objective behind the principle of legal blood money is discipline, prevention, and the protection of lives. Because of this the people, who are obliged to pay this, need to be dealt with harshly: they should find it uncomfortable, painful and difficult to acquire the means to pay this penalty. It is not felt as a punishment unless the

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<sup>203</sup> Zaidan, Abdul-kareem., op.cit., p.198

<sup>204</sup> Auda, Abdul-qader., op.cit., part 1, p.58 and after, see also Abu-zahra, Mohammad., op.cit., p.423

<sup>205</sup> Appeal No.108 and 111 for the year 16, hearing dated on 17/12/1994

<sup>206</sup> This estimation came in by the federal law No.17/1991, issued by the president, and this amount equals 41 Thousand US\$.

<sup>207</sup> This estimation came in by the federal law No.9/2003, issued by the president, and this amount equals 55 Thousand US\$.

amount to be taken from their wealth is large, and they should be under pressure or difficulty to pay blood money to the victim of the crime or his inheritors. It is, therefore, really a penalty that combines both punishment and compensation<sup>208</sup>. On the other hand, the accused should feel and consider how the Lord is merciful and has given him a new life, and that he should not commit other crimes in the future.

Blood money is obligatory in cases of mistaken or semi-intentional killing, and even in the case of the intentional murder of someone who does not fulfil the conditions of being responsible, like the child and the insane. It is also obligatory in the case of intentional murder (homicide) if the victim's family gives pardon or the retaliation is waived or dropped for some other reasons<sup>209</sup>.

According to the Islamic *sharia*, blood money can be both severe and light. Light blood money is paid in the case of killing by mistake and severe blood money in the case of semi-intentional or intentional murder, if the victim's family gives pardon and the retaliation is dropped<sup>210</sup>. As to blood money for intentional murder, when pardon is granted by the legal guardian, Al-Shaf'ee and the Hanaabilah hold that, in this case, severe blood money should be paid<sup>211</sup>. Abu Hanifa holds that there is no blood money for intentional murder, if retaliation is demanded. Rather, what is obligatory in such a case is that the two sides come to an agreement, and whatever they agree on is to be

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<sup>208</sup> Auda, Abdul-qader., op.cit., part 1, p.578

<sup>209</sup> Zaidan, Abdul-kareem., op.cit., p.185 and after

<sup>210</sup> The variation on the age and kind of camels not their number.

<sup>211</sup> Auda, Abdul-qader., op.cit., p.580

carried out immediately and not postponed<sup>212</sup>. He goes on that, as for severe blood money, it should be one hundred camels, forty of which are pregnant. This is in accordance with what is reported by Ahmed, Abu Dawood, An-Nisaa'ee and Ibn Majah, from Uqbah ibn Aws, who interpreted the *Hadeeth* from one of the Companions, that the Prophet, may Allah's peace and blessings be upon him, had said:

"Verily he who is murdered by mistake was still intended by the whip, the stick and the stone. Therefore there is severe blood-money, which is one hundred camels, forty of them should be in between the age of six years and nine and each one of them should be pregnant"<sup>213</sup>.

The severity of blood money is only in relation to the kind and age of camels and not the number of the camels, since this is what was established by Islamic law. This is limited to what was heard from the Prophet, may Allah's peace and blessings be upon him, through revelation and there is no room for contrary opinion since it is a decreed matter.

Al-Shaf'ee and others hold that the blood money should be severe when the crime of murder is committed in the sacred month, the sacred land, or is done to a blood relative, because the divine legislation has magnified the sanctities of these principles. Thus, the blood money is of greater importance whenever the crime is severe. It has been told by Omar and Al-Qassim Ibn Mohammed and Ibn Shihaab that the blood money is

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<sup>212</sup> Ibid, p.581

<sup>213</sup> Saleh, Abdul-Ghafar Mohammad., op.cit., p.484



increased by close to a third<sup>214</sup>, but Imam Abu Hanifa and Imam Malik took the position that blood money is limited to the amount specified in *sharia*, and that to increase it would be a great mistake, going against the very basis of the law.

Blood money that is obligatory upon the murderer is of two kinds. The first is with regard to his or her own wealth and applies in the case of intentional murder, once legal retaliation has been dropped. Ibn Abbas said that the criminal's representatives should not be responsible to pay this on behalf of the offender when he committed his crime intentionally, or has confessed to it. This applies even after reconciliation, in the case of intentional murder, and no Companion is known to have opposed this view<sup>215</sup>. Imam Malik relates from Ibn Shihab that in the case of intentional murder where the relatives have granted pardon, the Sunna has established that blood money should only be paid from the murderer's own resources. His representatives may wish to pay it out of kindness in lesser crime cases, but they cannot pay it when it involves a killing that was intentional, or confessed, or when reconciliation has already been made<sup>216</sup>. It is the wrongdoer's mind and intention which are called for the penalty. The criminal does not deserve to be helped by his representatives bearing the cost of blood money, and they should not be allowed to pay it once he has confessed, since the blood money is obligatory upon him once the confession has been made. In addition, the confession is restricted to evidence that lies only in the hands of the confessor, and no representatives can make it for him. Furthermore, his representatives cannot pay for him in a case of reconciliation, because reconciliation is not compulsory due to the murder, rather it

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<sup>214</sup> Abu-zahra, Mohammad., op.cit., p.437

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

becomes compulsory due to the agreement of the reconciliation, so the criminal has to bear the responsibility for his crime.

The second kind of blood money that is compulsory upon the criminal, is one in which his representatives may pay to assist him, if he happens to have such representatives. This applies to both semi-intentional murder and murder by mistake. In these cases, the criminal is treated differently from any of his representatives. Al-Shaf'ee said: "it is not compulsory upon the killer to pay any of the blood-money since he is excused"<sup>217</sup>.

We need to make clear that the murderer's representatives are always taken to be the blood family of the perpetrator, that they are sane and mature male relatives on his father's side, who are wealthy and decent, and not female, young, poor, insane or anyone who has a religion different to the criminal. These conditions apply because this is an issue of assistance in which only specified persons are permitted<sup>218</sup>.

The foundation for the obligation of the representatives to pay the blood money is one of family cohesion. Traditionally, family were expected to take care of their own members, and if one went a stray his relatives were obliged to compensate for any wrong he had done. It has been authentically narrated, that once two women fought, and one of them threw a stone at the other killing the foetus in her womb. So the Messenger

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<sup>217</sup> Al-maqdesi, Ibn Qodama., op.cit., part 2, p.2081

<sup>218</sup> Ibid.

of Allah, may Allah's peace and blessings be upon him, judged that blood money should be paid by the perpetrating woman's representatives<sup>219</sup>.

The blood money that is obligated upon a perpetrator's family can be postponed for a period up to three years, and this is agreed among most scholars. As for the blood money which is strictly to be paid by the criminal out of his own wealth, according to Imam Al-Shafiee, may Allah be pleased with him, this must be paid instantly, since delay would only make it easier for the criminal's family representatives. Imam Abu-Hanifa's followers, however, hold that it can be postponed for up to three years, just as in the case of unintentional murder<sup>220</sup>.

The obligation of blood money upon the criminal's family representatives is an exception from the general principle in Islam that a human being is responsible for his own doings and judged according to his actions. As Allah, the High, says, "And a soul shall not bare the burden of another"<sup>221</sup>, and as the Noble Messenger has said, "A son is not to be held accountable for his father's nor his brother's crime"<sup>222</sup>.

There is, however, a compensating principle in parallel to the notion that the criminal must always be made to suffer. Islam ordains the cooperation of the criminal's family in paying the blood money in order to comfort and assist the criminal with regard to the crime that he has committed. This confirms the old Arab system that requires

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<sup>219</sup> Imam Abu-Dawood, *op.cit.*, Narrative No.4568, 4572 and 4577, p.192-193-195.

<sup>220</sup> Al-maqdesi, Ibn Qodama., *op.cit.*, part 2, p.2081

<sup>221</sup> Surat Al-Ana'am, verse 164

<sup>222</sup> Imam Abu-Dawood, *op.cit.*, Narrative No.4495, p.165

cooperation, mutual assistance and help between men, and there is clear wisdom behind this. Once the tribe knows that they will bear the responsibility of blood money, they will do whatever they can to prevent their members committing crimes, and they will encourage them to behave well so that they will not fall into such mistakes<sup>223</sup>.

The greater scholars of *Fiqh* hold that a criminal's family representatives do not bear anything less than a third of the blood money for an unintentional murder, and less than a third when it comes to the wealth of the criminal. But Malik and Ahmed Ibn Hanbal, may Allah be pleased with them, hold that no specific amount of blood money is compulsory upon any of the family representatives, and the ruler should do his best to decide whatever amount is easy for each of the representatives, starting with which ever family representative is most closely related<sup>224</sup>.

The blood money of the woman when she is killed unintentionally is half of that of a man. This is the position of the majority of scholars. Since it has been related on the authority of Omar, Ibn Mas'ood, Zaid ibn Thabit, and 'Ali, may Allah honour their faces and be pleased with them all, that regarding the blood money of a woman it should be half of that of a man. No-one has criticised their opinion, thus it is considered a consensus. This is because the value of a woman is held to be half that of a man in inheritance and witness<sup>225</sup>.

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<sup>223</sup> Auda, Abdul-qader., op.cit., part 2, p.583

<sup>224</sup> Ibid.

<sup>225</sup> Zaidan, Abdul-kareem., op.cit., p.205

Just as the blood money for a life is half of that of a Muslim, the blood money for injury is also only one half. This position was taken by Imam Malik and 'Omar Ibn 'Abdul-Azeez, Abu Hanifa and Al-Thawry, and it is also taken from 'Othman and Ibn Mas'ood, may Allah be pleased with them, who took the position that their blood money is the same as that of the Muslims. This was based on Allah's statement "And if he was from a people with whom you have a treaty – then blood-money should be presented to his family and the freeing of a believing slave"<sup>226</sup>.

The blood money of one of the people of the Book, whether Christian or Jew, if he is unintentionally killed, is half that of a Muslim. Thus, the blood money of one of their males is half of that of a Muslim male and the blood money of one of their females is half that of a Muslim female. This follows the teaching of Amr Ibn Shu'aib and from his father and grandfather, that the Prophet, may Allah's peace and blessings be upon him, decreed that the blood money of someone from the people of the Book is half of the blood money of a Muslim<sup>227</sup>.

However, Al-Zuhree said "The blood-money of a Jew and a Christian and every protected person is the same as that of the Muslim. This is how it was in the time of the Messenger of Allah, May Allah's Peace and Blessings be upon him, and the four *Califs*; Abu Baker, Omar, Othman and Ali, may Allah be pleased with them<sup>228</sup>. Then came the time of Mu'awiyah, and he put half of it in the Treasure House of the Muslims and gave half to the deceased. After that Omar ibn Abdul-Azeez decreed that only half should be

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<sup>226</sup> Surat Al-Nisa'a, verse 92

<sup>227</sup> Abu-zahra, Mohammad., op.cit., p.428

<sup>228</sup> Zaidan, Abdul-kareem., op.cit., p.206

paid, and cancelled the other half that Mu'awiyah had used to put in the Treasure House. But I was never able to remind Omar ibn Abdul-Azeez of this and tell him that the full blood-money used to be paid to those under covenant of protection."<sup>229</sup>

Al-Shaf'ee, may Allah pleased with him, took the position that their blood money is to be one third of that of the Muslim, while the blood money of the polytheist and pagans, who are either under protection or treaty of security, should be two thirds of a tenth of the blood money paid to the Muslim. His support for this position is that this figure represents the minimum sum of what had been said regarding the issue<sup>230</sup>.

Regarding the foetus, if a child is killed through a crime committed against its mother, either intentionally or unintentionally, and the mother does not die, then payment of a *Ghurra* (a male or female slave), becomes obligatory, whether the foetus born dead or remains within the womb and dies<sup>231</sup>. If it is born alive and dies later, then the full blood money is to be paid, namely one hundred camels for a male and fifty for a female<sup>232</sup>. The presence of life can be ascertained through sneezing, breathing, crying, screaming or moving.

Al-Shaf'ee made it a condition, in the case where the foetus dies inside its mother's womb, that it should be known whether the fetus developed to the extent that the soul has been inspired in it. He explained that this can be judged as having happened by

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<sup>229</sup> Ibid.

<sup>230</sup> Sabiq, Sayed., op.cit., p.378

<sup>231</sup> Al-maqdesi, Ibn Qodama., op.cit., part 2, p.2094

<sup>232</sup> Imam Al-Bukhari, op.cit., narrative No.6909, p.1395

whatever physical indication proves that it has the shape of a human being, such as a hand or a finger. Imam Malik, however, did not adopt the criteria and said "Whatever comes out of the woman's womb, whether it is just a piece of meat or a blood clot or whatever can show that it was to be a child, then the blood money is a *Ghurrah*". But the position of Al-Shaf'ee may be considered stronger because his argument is based on actual physical evidence"<sup>233</sup>.

The value of a *Ghurrah* had to be assessed in monetary terms since the perpetrator might not have any slaves. The equivalent of the *Ghurrah* was taken to be five hundred dirhams, according to the followers of Imam Abu Hanifa, or to one hundred sheep, as it is found in the *Hadeeth* of Abu Buraidah<sup>234</sup>. It is also said that it may be five camels. On the authority of Abu Huraira, may Allah be pleased with him, the Messenger of Allah, may Allah's peace and blessings be upon him, it is decreed that the *Ghurrah* of a foetus is either a male or female slave to be given to the deceased<sup>235</sup>.

Imam Malik and his companions said that the *Ghurra* is compulsory upon the criminal and must be paid from his own money, and the followers of Imam Abu Haneefah and Imam Al-Shaf'ee and the people of Kofah<sup>236</sup> took the position that it is only compulsory on the criminal's family representatives since it is an unintentional crime<sup>237</sup>. It has been said by Jabir, may Allah be pleased with him, that the Prophet, Allah's peace and

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<sup>233</sup> Bahnasi, Ahmed Fathi., Blood money in Islamic sharia (Arabic), *Aldeya fe Alsharia Alislamia*, Dar Alsheroouq, Cairo- Beirut, Second Edition, 1982, p.147 and after.

<sup>234</sup> Imam Abu-Dawood, *opp.cit.*, Narrative No.4578, p.195

<sup>235</sup> *Ibid*, Narrative No.4576, p.195

<sup>236</sup> A place in what called now Iraq.

<sup>237</sup> Al-maqdesi, Ibn Qodama., *op.cit.*, part 2, p.2097

blessings be upon him, judged that the *Ghurrah* is to be paid by the attacker's family representatives in the case of a foetus<sup>238</sup>.

Moreover, the followers of Imam Malik and Imam Al-Shaf'ee have taken the position that the blood money of a foetus is to be given to its inheritors, as their inheritance is laid down in the *sharia*, and its ruling is the same as that for normal blood money in the sense that it can be inherited. It is also said that the blood money should be given to the mother, since the foetus is legally as one of her body parts and that therefore the blood money is strictly for her<sup>239</sup>.

Scholars are in agreement that if the foetus comes out of the womb and then dies, there should also be expiation in addition to the paying of blood money<sup>240</sup>. But is the expiation also obligatory in addition to the *Ghurrah* if the foetus comes out dead? Imam Al-Shafi'ee said it is obligatory because he considered the expiation necessary in both unintentional and intentional murders<sup>241</sup>. Imam Abu Hanifa said it is not obligatory because the same ruling as that for intentional murder applies, and that there is therefore no expiation to be made. Imam Malik said that it was to be recommended because this is an intermediate case between intentional and unintentional murder<sup>242</sup>.

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<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid, p.2094 & *passim*

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.



## Conclusion

In this chapter, it has been shown that retaliation against the murderer is predetermined by God as a consolation to the heirs and relatives of the murdered. These might be a father, a brother, a son or a spouse. Chaos and revenge must not prevail in society, and this would be the case if a murderer is not punished as he deserves. However, it has also been shown how Almighty God encourages the relatives of the murdered to waive their rights willingly, since this is of benefit to their life on this Earth and in the life hereafter. God also expects the judge and the ruler to mediate between the relatives of the murdered and the murderer. He encourages the former to give pardon and accept blood money, but without forcing them to do so. Thus, by restricting the death penalty for murder to cases of homicide, God intends to console the relatives of the murdered, and avoids the spreading of chaos and the emergence of the law of the jungle. This shows that the Islamic *sharia* is equitable, forbidding the killing of innocent people. It also forms the basis of a reply to all those who believe that Islam and its *sharia* promote the use of the death penalty without good reasons. Islamic law encourages the blood relatives to waive their rights of retaliation against a murderer, so it avoids harsh consequences and the lack of justice for innocent people who have done nothing wrong. Not many people would face the death penalty if the courts adhere strictly to the Islamic *sharia*, that is if they accept the principles of pardon and the waiving of the right to retaliation, principles which are supported and encouraged by the Holy Qur'an and the Sunna of the Prophet. The Islamic *sharia* has legalised blood money to be paid to the victim's family as compensation if they waive their right to retaliation. This compensation might be better, in many cases, than asking for retaliation. With this compensation, the relatives of the victim might be able to afford a better life, better

education for the victim's children, and better living conditions. We may be confident that Islamic law has provided conditions to save lives, even the lives of murderers. Liability to the death penalty arises from transgressing divine ordinances, but it is more likely to be exacted for crimes of a discretionary punishment. This is the authority given by Islamic law to the rulers and governments in order to spread safety and security, provided always that they do not exceed the wisdom that lies behind it, a subject that will be discussed in the following chapter.

## Chapter Three

### Discretionary Punishment

#### Introduction

After referring to two categories of crime and punishment according to the Islamic *sharia*, we must examine in this chapter a third type, which is discretionary punishment or *Ta'azir*. This kind of punishment is prescribed by the ruler to maintain safety and security in society. Its main distinction is that it is exercised at the discretion of the ruler, and its provisions are not fixed<sup>243</sup>. The authority for discretionary punishment is, however, given at the time of the Prophet. It is granted by God to the ruler in order to deal with all types of crime and of criminal, since it is generally believed that any act which upsets the order and harmony of society must be penalised. This must be understood in the context of a religious community which sets a high value on the cohesion of its social and internal relations.

When a judge finds a certain action to be a crime, he is required to impose a specific punishment, a written record of which must be set down. Such punishments would not be known valued or reliable unless they were written down and published. This is that the public should be made aware, of avoid committing the activity or actions proscribed<sup>244</sup>. In this context the most important thing is whether it is possible for the authority to use the death penalty as a discretionary punishment. If it is, then to which

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<sup>243</sup> Lippman, M. , McConville, S. & Yerushalmi, M., *Islamic Criminal Law and Procedure*, Praeger Publishers (NY), 1988, p.52

<sup>244</sup> *Ibid.*, p.53

type of crime should it be applied, since this is the harshest of punishments, though justified by the Lord for certain crimes. The definition this kind of crime will be made clear, together with the legal grounds for it, and the wisdom behind its legality. The chapter will conclude with answers to the questions posed.

### 3.1 Definition

The word *Ta'azir* literally means chastisement in the widest possible sense<sup>245</sup>, and the meaning of it in Islamic legislation is to discipline someone for a sin for which there is no fixed punishment specified in the Holy Qur'an or the Sunna of the Prophet. This means that it is a discipline that the ruler introduces to prevent a crime or sin for which Islamic law has not specified a particular penalty. It may be that a punishment exists, but the conditions for imposing have not been satisfied. Example of such a cases are when an illegal sexual act did not arrive at the point where the private parts met, or a theft where the stolen object was not sufficiently valuable for a hand to be cut off. These might constitute crimes for which there is no legal retaliation. They might also describe a situation where retaliation has been waived, but the judge still considers that the perpetrator deserves a discretionary punishment.

As mentioned earlier, sinful crimes may be divided into three categories: a sin for which there are divine ordinance punishments or fixed punishments (*Al Hudud*); a sin for which there is retaliation (*Qisas*); and a sin where there is no *Had* or *Qisas*, and for

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<sup>245</sup> Benmelha, G., Ta'azir crimes, in *The Islamic Criminal Justice System*, M. Cherif Bassiouni, op.ct, p.211

which the ruler uses his authority to specify a punishment, which are called discretionary punishments (*Ta'zir*)<sup>246</sup>.

### 3.2 The Legality of Discretionary Punishment

The legality of the discretionary punishment is found in what has been reported by Al-Bukhari and Muslim on the authority of Haani ibn Nayar who heard the Messenger of Allah, may Allah's peace and blessings be upon him, say "Do not lash with more than ten lashes, except in a punishment legislated by Allah, the High"<sup>247</sup>.

Furthermore, it is established that Omar Ibn Al-Khatib, may Allah be pleased with him, used to punish and discipline by the shaving off of hair on the head, by expulsion, and by beating. Similarly, he would burn the wine shops in villages where alcohol was sold, and burned the castle of Sa'd ibn Abi Waqas in Kofah when he put himself so far above the people. He even carried a stick, with which he used to beat those who deserved to be beaten, and he had a house for detaining wrongdoers<sup>248</sup>. This is taken from the Sunna of the Prophet and what has been narrated from his Companions. Moreover, as discussed previously, not all crimes are prescribed in the Islamic *sharia*, and therefore rulers or leaders of Muslim communities must devise and impose punishments for what causes harm to people and society<sup>249</sup>.

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<sup>246</sup> Sedqi, Abdul-rahim., Crime and punishment in Islamic sharia (Arabic), *Al-jareema wa Al-oqoba fe Alsharia AlIslamia*, Maktabat Alnahdha Almesria, 1987, p.265

<sup>247</sup> Imam Al-Tirmithi, The authentic narratives of Imam Al-Tirmithi (Arabic), *Sunan Al-Tirmithi*, investigated by Sedqi Jameel Al-Attar, Dar Al-fokr, 2003, Narrative No.1468, p.450

<sup>248</sup> Amer, Abdul-Aziz., op.cit., p.361

<sup>249</sup> Sedqi, Abdul-rahim., op.cit., p.266

### **3.3 The Wisdom behind the legality of discretionary punishments**

As we have seen, the chief objective of punishment of any kind in Islamic law is prevention, discipline and thereby the rectification of both the society and the individual<sup>250</sup>. What is intended here is the correction and discipline prevent the criminal from repeating his crime, or continuing with criminal activity, and to stop the criminal from committing any form of crime, since he knows the punishment that will be imposed. Moreover, he knows his punishment is not only for him but it also awaits everyone who commits the same crime. Hence, benefits are obtained from both the discipline and the disciplined, since the perpetrator is prevented from returning to the crime, others are prevented from committing it and it is removed from their environment. The Islamic *sharia* prohibits everything that does not maintain these objectives. Thus, it prohibits the punishing of a criminal and the wasting of his humanity, and has removed everything that might bring about his death without justification, since punishment of this kind is not fixed. This, of course, may apply to crime that are severe and for which the authority has specified particular punishments, such as for the crime of drugs smuggling<sup>251</sup>.

### **3.4 Examples of discretionary punishment**

Discretionary reprimands through speech, such as by criticism, discipline, or admonition. They can also be exercised by actions, depending upon the situation, which might be by imprisonment, banishment, displacement, expulsion, and death<sup>252</sup>.

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<sup>250</sup> Amer, Abdul-Aziz., op.cit., 293

<sup>251</sup> Amer, Abdul-aziz., op.cit., p.243

<sup>252</sup> Benmelha, G., op.cit., p. 215

Abu Dawood reported that an effeminate man was brought before the Prophet, with painted hands and feet dyed with henna<sup>253</sup>, and He said: "What is the matter with this one?" They replied "He imitates women." So the Prophet, may Allah's peace and blessings be upon him, commanded that he should be expelled from among the people to live at Al-Baqee<sup>254</sup>. So they said "O Messenger of Allah! shall we kill him?" He replied "I have been forbidden from killing those who perform their prayers"<sup>255</sup>. Thus, the Muslim is not allowed to reprimand someone by the cutting of his beard, or by destroying his house, his gardens, fields, fruit or trees, just as it is not allowed to cut off someone's nose, ears, lips or fingertips, since these punishments are not known to have been authorised by any of the Companions.

The *Hadeeth* of Haani ibn Nayar has prohibited the giving of more than ten lashes as a discretionary punishment. This position was taken by Imam Ahmed Ibn Hanbal and a group of Imam Al-Shaf'ee followers. They said that it is not allowed to give more than the ten lashes that have been authorised under Islamic law as a discretionary punishment<sup>256</sup>. However, Imam Malik and Imam Al-Shaf'ee and others, took the position that it is permissible to add to the ten lashes but without reaching the amount prescribed for divine ordinance punishments. One group said that the discretion for a sin should never reach the level of the Hudud punishment<sup>257</sup>. Another group said that the discretion for forbidden or illegal sexual encounters between a man and a woman, such as kissing or hugging, should not reach the punishment for fornication, neither should

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<sup>253</sup> A kind of tree leaf with which, after being dried and mixed with water, women colour their hands and feet.

<sup>254</sup> A place outside Almadeena (a suburb)

<sup>255</sup> Sedqi, Abdul-rahim., op.cit., p.263

<sup>256</sup> Auda, Abdul-qader., op.cit., part1, p.597 and after.

<sup>257</sup> Ibid.

the theft of a worthless object result in the cutting off of the hand<sup>258</sup>. It is also said that the ruler should do his best to determine the penalty in relation to the benefit to society as well as the severity of the crime<sup>259</sup>.

It is permissible to reprimand someone by expropriating an offender's wealth. This is the position of Abu Yousuf<sup>260</sup>, and Imam Malik has also stated the same. Ibn Al-Qayim said "Verily the Prophet, may Allah's Peace and Blessings be upon him, reprimanded by preventing shares of the booty, and said that the reprimand for he who refuses to pay *Zakat* is to take half of his wealth. As He, may Allah's peace and blessings be upon him, said in the account given by Ahmed, Abu Dawood and An-Nasaa'ee: "Whoever gives it will have his reward, but whoever refuses then I will take it together with half of his wealth. This is a strict order from our Lord"<sup>261</sup>.

### **3.5 The right of the ruler to devise discretionary punishment**

Discretion lies in the hands of the ruler because he has been given general authority over his community. No one but the ruler has the right of discretion with people in general over the punishment of crimes. Exemption is given to three types of people, which is to discipline rather than to punish but rather to discipline. This exemption is given to the father, since he has the right to reprimand his son in relation to his learning and his behaviour. It appears that the mother also has that right while raising her son during childhood. Also, a light beating is allowed if a son does not pray when he is

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<sup>258</sup> Ibid.

<sup>259</sup> Ibid, p.595

<sup>260</sup> Abu Yousuf (Yacoub Ibn Ibrahim Ibn Habeeb Al-Ansari) is one of Imam Abu-Haneifa's students.

<sup>261</sup> Al-maqdesi, Ibn Qudama., op.cit., p.491



supposed to. However, it is not for the father to reprimand the son after maturity, even if he acts foolishly. The second exemption is given to the slave owner, who also has the right to discipline his slave with regard to himself, or to Allah, the most High, according to the most accepted opinion. The third exemption is given to the husband. He has the right to discipline his wife if she consistently disobeys him, as is made clear in the Holy Qur'an, but can he also beat her for not performing her ordained prayers? It appears that he can actually do that also if, disciplining her to change her behaviour, since it is a way to remove evil. Furthermore, the husband is responsible for removing evil with his hands or tongue or heart, but what is referred to here is only the first of these two<sup>262</sup>. It is also permissible for a teacher to discipline young children. However, the discipline is allowed under the condition that it does not exceed and go beyond that which brings about the objective. If the punisher does exceed this level, he is considered a transgressor and might be punished by the authority with a discretionary punishment<sup>263</sup>.

### **3.6 Discretionary Punishment and the Death Penalty**

The question then arises of whether it is possible to issue a death sentence as a discretionary punishment. It is understood from the scholars that in certain cases it may be possible. Imam Al-Shaf'ee, Malik, Abu Hanifa and ibn Hanbal reasoned that there are criminals who will not stop committing crimes even if they are punished. Examples are those who practise homosexuality, professional and habitual thieves, and those who spy for the benefit of the enemy. The ruler may sentence such offenders to death<sup>264</sup>. It is relevant here to report that, in some references, that the Prophet Mohammad, peace be

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<sup>262</sup> Rabah, Ghassan., op.cit., p.217

<sup>263</sup> Amer, Abdul-Aziz., op.cit., p.300 and thereafter.

<sup>264</sup> Hiba, Ahmed., Islamic provisions in punishment (Arabic), *Mojaz Ahkam Alsharia Alislamia fi Altajreem wa Al eqab*, Matba'at Alem Alkotob (Cairo), first edition, 1985, p 201

upon him, ordered death for drunkenness after a person was caught for the fourth time<sup>265</sup>. Thus, the death penalty is considered appropriate for incorrigible criminals, when the need is to protect society<sup>266</sup>. Therefore, it is possible to use the death penalty as a discretionary punishment for a definite category of crimes. These should be defined as dangerous crimes which, in their definition, may vary from one country to another and from one era to another. Moreover, it should be used for determined criminals who can not be dealt with effectively by any other form of punishment<sup>267</sup>.

Thus, dangerous crimes determine a prerogative for the ruler, which has been granted to him by God, in order that the ruler may impose order and safety in society. Along with this goes the essential qualification that the ruler must not be excessive in the exercise of this power. The use of the death penalty for minor crimes, as Imam Malik school of faith jurists believe, is wrong because the punishment should fit the nature of the crime and the character of the offender<sup>268</sup>. This merits further discussion, but here I would like to mention that the first Chairman of the Court of Cassation in Dubai, Dr. Mustapha Keera<sup>269</sup>, supported the idea of abolishing the death penalty for all discretionary crimes. He believed that it should be imposed only for those divine ordinance crimes prescribed by *sharia*. He based this thinking on the disagreement between jurists over whether the death penalty is appropriate or not as a discretionary punishment. He thought that such

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<sup>265</sup> Ibid p 201, see also Imam AbuDawood, opp.cit., Narrative No.4482 and 4484,p.160-161

<sup>266</sup> Benmelha, G., op.cit., p.215

<sup>267</sup> Al-turki, Abdulrahman A., Capital Punishment for Drug Offences In Islam and its Application In the Kingdom of Saudi Arabia; An evaluative study, unpublished Phd thesis, The University of London, 2000, p.167

<sup>268</sup> Lippman, M., op.cit., p.88

<sup>269</sup> Mustapha Keera is a well Known Egyptian jurist and he was the first Chairman for the Court of Cassation in Dubai since its foundation by the legislator in 1988. Dr. Keera died a few years ago.

disagreement was an expression of God's mercy, so why should the state determine the hardest choice, which is the death penalty, and not prefer other punishments.

## **Conclusion**

The focus in this chapter has been the death penalty as a discretionary punishment, and it has been asserted that God allows the ruler to specify a punishment for certain crimes which he thinks do harm to the people and cause disturbance and insecurity in society.

Discretionary punishments are strongly needed since both individuals and society are confronted by more and more crimes that are not categorised as either ordinance or the retaliation crimes. If the crime in question is not classified, and for one reason or another a fixed punishment cannot not be applied, then the legislator has a choice whether to exercise his discretion with the accused or not. In practise, this responsibility is devolved upon the judge in court. Moreover, there are dangerous crimes and dangerous criminals. The Islamic *sharia* provisions, as well as the Imams of the schools of faith, give the ruler authority to implement the death penalty in order to circumvent or curtail situations that are dangerous to society. Some examples have been detailed in this regard. For instance, the prophet Mohammad ordered the execution of the alcohol drinker after being caught for the fourth time, which after that period demonstrated the danger of that person in society and the likelihood that he might corrupt others. Imam Malik confirmed that the interest of society and Muslims must come first. For this reason, he allows the execution of the spy.

In this chapter we have observed that the ruler's authority in using this power should not be absolute. Therefore, he must not abuse or be excessive in the exercise of this right, since it is given him for a specific reason, which is the maintenance of safety and stability in society. He must not use harsh punishments for petty crimes. Crime and punishment should be equivalent to each other. If they are not, the ruler's punishment will be open to criticism.

In Chapter Five, we will look further at discretionary punishment in relation to the death penalty in the penal laws of the United Arab Emirates. However, it is first necessary to give the reader a clear idea of the formation of the United Arab Emirates, the roots of its legal system as well as its current development.

## Chapter Four

### The formation of the United Arab Emirates and its legal system

#### Introduction

The most significant recent change in some Islamic countries is the partial movement towards adopting Western-oriented laws. This movement has faced mass resistance from supporters of the Islamic *sharia* who think that movement towards or adoption of Western laws is responsible for the increase in the number of crimes in society and that the only way to keep it safe and secure is to return to Islamic law, which was adopted in the seventh century in Arabia and has prevailed among all Muslims since that time.<sup>1</sup> Among the Islamic countries that have started the adoption of Western laws is the United Arab Emirates, which provides an extraordinary example of a country trying to adopt both legislations, the Islamic and the Western, without contradictions or clashes.

Prior to the issuance of the Federal Penal Code for the year 1987, the United Arab Emirates apparently adhered more closely to the enforcement of Islamic *sharia*, with regard to divine ordinance crimes, retaliation (*Al-Qisas*) and legal blood money (*Diya*), and towards a greater severity in relation to crimes of discretion (*Ta'zir*) in order to fulfill the needs of the society. As with most countries in the Islamic world and their legislators, the United Arab Emirates adopted and enforced the death penalty for certain crimes.

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<sup>1</sup> Al-Shaali, Khalifa Rasid. Crime Control, Policing and Security in the United Arab Emirates, unpublished thesis, The University of Wales at Aberystwyth, 1999, p.162

Although this research has not found any recorded death sentences prior to the declaration of the Union, the federal legislator, showing his severity towards some crimes and to maintain safety and security in society, has adopted capital punishment in the Federal codes of Punishment. Moreover, the local legislators in both Abu Dhabi and Dubai adopted this harsh punishment in their penal codes issued in the year 1970<sup>2</sup>.

Here we will examine the extent to which the UAE legislator has implemented the provisions of Islamic *sharia*, and whether these provisions were written into law without the intention of extensive implementation but just to avoid the clashes that would arise if they were not on the statute book.

In this chapter, and prior to going into details about the death penalty and its implementation, the reader must first gain insight into the background of the country, its formation and its jurisprudence. Since the United Arab Emirates has a complicated judicial system, we need to examine types of courts and their formation, all those responsible for the criminal law in general and the death penalty in particular, at both the federal and local level. This involves both the Emirate of Dubai and the Emirate of Ras-Alkhaimah, since both Emirates have their own local judicial systems. In the late 2006, the Emirate of Abu Dhabi also decided to constitute its own judicial system, so that there are now three Emirates with their own independent judicial systems, while the other four Emirates still follow the federal judicial systems.

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<sup>2</sup> Both codes were abolished after the issuance of the federal Penal Code in 1987.

#### 4.1 The formation of the United Arab Emirates in Outline

The United Arab Emirates was established on the second of December 1971 as a result of the unification of seven Emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Om Al Quwain, Al Fujairah and Ras Al Khaimah. His Highness the ruler of Abu Dhabi, Sheikh Zayed Bin Sultan Al-Nahyan<sup>3</sup>, was elected by the other six rulers to be the president since he was the architect of this union<sup>4</sup>. The UAE was accepted both as a member in the United Nations and of the Arab League, and it proceeded to form a structured political entity founded on an internationally recognized basis among other countries of the world. Prior to 1971, the Emirates were known by several names that had been given to by foreigners, such as the Sheikdom of the Omani Coast, the Trucial States and the Trucial Emirates.<sup>5</sup>

As is the case with the other Arabian Peninsula countries, the UAE population is derived from Arab origins, linked with the Arab nations through common ties such as the Islamic religion, language, history as well as other close cultural ties. It is dominated by tribal characteristics. Generations belong to Arab tribes with their renowned ancestry and are named after these tribes. In the past, the Arabian Gulf countries were not separated into distinct states as the present time. Taken together, the UAE and the Sultanate of Oman were known as Oman. The first Arabs to settle in this part of the

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<sup>3</sup> Sheikh Zayed Bin Sultan died in 2003 and his son Sheikh Khalifa replaced him.

<sup>4</sup> According to the Constitution, the Federal Supreme Council should hold a meeting every five years to elect a new president. However, Sheikh Zayed was always re-elected as president of the federation without any dispute.

<sup>5</sup> Al-Sayegh, Fatma., The UAE from the tribe to the state (Arabic), *min Alqabeela Ela Aldawla*, Alain; UAE Dar Alketab Aljamey p.11 and thereafter

Arabian Peninsula were the Azide tribe, a subdivision of the Qahtani in Arab genealogy. These emigrated from Yemen in the second century A.D. The second main group was the Adnani tribe, who immigrated from the north of the Arabian Peninsula. Together, the Qahtani and Adnani tribes compose the Arab genealogy of the region<sup>6</sup>. Down the years, however, the UAE population has been subjected to considerable social intermixture deriving from foreign immigration. These have mainly come from the Indian sub-continent, from India, Iran and Africa. Coastal towns were more exposed to immigration than the desert interior, affecting its economic, social and educational structure. The Bedouins, or nomads, however, remained outside this blending, and have accordingly preserved their original Arab Heritage with all its characteristics and privileges. Before the discovery of oil, the coastal population depended on the sea as the source for their living, and approximately 90% depended on diving for and trading pearls.

Islam came to the Gulf region during the life of Prophet Mohammad, peace be upon him, and under the leadership of Amr Ibn Al As, who had liberated it from Persian occupation and included it within a large Islamic community. Since this time and up to the beginning of the sixteenth century A.D., the region was part of a greater Arab Islamic Nation. In the sixteenth century, however, Europeans began to appear in the region, seeking a foothold in its strategic places. The first conquerors were the Portuguese, who after two centuries had occupied the region despite the resistance of its people. Later the region was disputed between the Dutch, the French and the British.

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<sup>6</sup> Al-Muhairi, Butti., Conflict and Continuity: Islamization and Modernization within the UAE Penal Code, unpublished PhD thesis, The University of Kent at Canterbury 1994, p. 65



The British presence succeeded in eliminating these other European forces and was able to establish close ties with the region, that become known as the Trucial Coast. From the beginning of the nineteenth century onwards, Britain formed agreements and peace treaties with most of the Sheikhs in the regions, under the pretext of fighting off pirates in its territorial waters.

When the British Government removed its military presence from the area east of the Suez Canal by 1971 at the latest, the rulers of the area gathered and met to achieve their aim of creating a union. Hence the United Arab Emirates came into existence on the 2<sup>nd</sup> of December, 1971.<sup>7</sup> The United Arab Emirates is now open to the modern world with its tolerance of other religions and the cultural freedom given to the Western workers in the country. This is in marked contrast to most of its neighbours in the Gulf, and it has exposed it to some criticism from them.

#### **4.2 Provisions of the UAE Constitution**

Among the most significant aspects of the Constitution is the statement in Article Six, providing that the UAE shall be part of the great Arab Nation, closely knit together by common ties of religion, language and history. The Constitution also provides in Article Seven that Islam is the official religion of the Union, and that the “Islamic *sharia* is a main source of its laws”. It was declares that the official language of the Union is

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<sup>7</sup> The United Arab Emirates (A Historic Geographic Study), Publication of Documentation and Research Centre, Abudhabi: UAE, 1972. p.24

Arabic<sup>8</sup>. With these two articles, the origin of the UAE is firmly established as an Arab Nation with its Islamic heritage and traditions. This indicates that the rulers of the UAE had advocated that the UAE be an Islamic state that derives its authority and laws, or some of them at least, from the principles of the Islamic *sharia* provisions<sup>9</sup>.

Questions then arise over whether the phrase “Islamic *sharia*” is the primary source of its legislation, and how this phrase should be interpreted. Is the *sharia* deemed to be the sole source of all laws or it is implied by the phrasing of Article 7 that other sources are permitted? One opinion says that the legislator revealed his intent when he issued Article 75 of Federal Law No. 80 of 1973 regarding the Federal Supreme Court. This stipulates that the Federal Court must apply both the provisions of the Islamic *sharia*, the federal laws and other laws applicable in the member emirates of the federation, provided that such laws conform to the Islamic *sharia*. The article adds that the federal court applies the norms and tenets of natural law<sup>10</sup>. Accordingly, Article One of the federal criminal code of 1987, which has been in effect in all of the Emirates ever since, has conformed with the provisions of Article 7 of the constitution which states that “judgement pertinent to crimes involving divine ordinances, retaliation and legal blood money shall apply the provisions of the Islamic *sharia*. Other crimes and discretion shall be defined according to the provisions of this law and other punitive codes”.

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<sup>8</sup> The temporary constitution was issued on 2<sup>nd</sup> of Dec. 1971 and became provisional in 1996. At the same time was a shift from the temporary status of the capital at Abudhabi to being a permanent one.

<sup>9</sup> Al-Ghufli, Saeed M.A.O., A reconsideration of constitutional review in the United Arab Emirates; "A posteriori" or "A priori" review?, unpublished Phd thesis, The University of Wales at Aberystwyth, 2000, p.198.

<sup>10</sup> Al-Hamadi, Hassan Ahmad., Divine ordinance, retaliation and blood money (Arabic), *Al-hudud wa Al-qisas wa Al-deya*, Second Edition, Sharekat Abu-Dhabi lelteba'aa, 1998, p.27

Thus, according to this article, crimes which do not pertain to divine ordinances, retaliation and *Diya* are subject to the provisions of the federal penal code. This does not contravene the Islamic *sharia* since, as we have seen, the ruler has the right to devise penalties and adopt his own estimate of suitable punishment for what are called crimes of discretionary punishment<sup>11</sup>. Therefore, the Federal Supreme Court has ruled that if a judge hears a crime which is not governed by divine ordinances, retaliation and legal blood money, he will rule according to the provisions of the Federal Penal Code or other applicable laws.

However, it is necessary to take into account that most Arab countries have tended to assimilate aspects of Western legal codes, especially those of the French and the English, despite there being a very significant difference between their laws and those of Islamic legislation. This is especially true in the area of criminal law where the Islamic criminal legislation has two unique aspects that have no equivalent in Western legislation. These refer, of course, to the laws of divine ordinances crime and retaliation, which are therefore quite strange to a Western way of thinking. As for the criminal law of the Emirates, although it confirms the enforcement of the rules of Islamic *sharia* with respect to the crimes related to *Al-Hudud*, retaliation and legal blood money, it does not define those crimes within bounds, and has left that hard task for the judges to accomplish. Such crimes and the laws of evidence relating to them require broad jurisprudential interpretative endeavors. It was wise for the UAE legislator clearly to

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<sup>11</sup> Federal Supreme Court, Appeal No.137, hearing dated on 6.1.1996

define those crimes and whether he really wanted the enforcement of the Islamic *sharia* for the crime of *Al-Hudud* and retaliation<sup>12</sup>.

Another opinion states that during its preparation, the Federal Penal Code was not framed to contain the provisions of Islamic *sharia* and that the supreme Legislation Committee, formed by the Cabinet in 1978, objected to its omission. This committee added the Islamic *sharia* provisions thereto in respect of divine ordinance, retaliation and legal blood money (*Diya*) crimes and the law was changed from a purely secular law to a law with an Islamic colour. However, for unknown reasons, articles on divine ordinance, retaliation and legal blood money were mysteriously deleted and abbreviated into a single paragraph in Article One of the Penal Code. This was an indication that the Emirates, or at least the most powerful ones, were not willing to confine themselves to strict application of Islamic *sharia*. The reduced reference in this Article to the Islamic *sharia* provisions gives them flexibility in the implementation of *sharia* provisions. Thus, the legislator specifies discretionary punishments, to which all articles of the law refer with the exception of the first paragraph of Article One. This gives the only citation of Islamic *sharia* provisions, yet some of the discretionary punishments specified by the legislator contradict the Islamic *sharia*<sup>13</sup>.

It seems that, the UAE legislator laid down this Article reluctantly as he wanted neither to abolish the Islamic *sharia* rules, since the country is an Arab Islamic country, nor to

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<sup>12</sup> Awadh, Mohammad Awadh., in 'Security and law Gazette' (Arabic), *Mejalat Al-amn wa al-qanon*, issue No.2, July 1994, Dubai Police Academy Publication, p.170

<sup>13</sup> Al-Mansoori, Ahmad Khalfan., in 'Security and law Gazette' (Arabic), *Mejalat Al-amn wa al-qanon*, issue No.1, Jan 2005, Dubai police Academy Publication, p. 15

determine them so as to impose a binding commitment upon him and not to have discretion in implementing them. It is manifestly clear that the UAE legislator was affected by a Western way of thinking, which considers *Al-Hudud* and retaliation rules as violations of human rights, as for example, in the punishment for drinking alcohol by flogging<sup>14</sup>. In addition, the legislator in the UAE wanted to create its own unique judicial system, that is to say a mixture of Islamic provisions and modern ones to satisfy both those conscious of their Islamic roots and those with a revised outlook who proclaim that the UAE is a modern country and needs to follow the Western world. The British, when they established courts in the Gulf in the middle of the last century, held joint courts, i.e. courts which implemented *sharia* provisions for disputes between the citizens, especially those concerning marriage, divorce and other family issues, and courts which implemented secular provisions for the foreigners.<sup>15</sup> The UAE legislator is continuing to some extent a role started by the British.

### **4.3 Profile of the Judiciary in the United Arab Emirates**

The first recorded local penal codes were passed in the Emirates of Abu Dhabi and Dubai in 1970. This raises a question may be raised about the situation before the promulgation of these laws.

In 1820, a peace treaty was signed between the British Government and the Arab tribes on the Trucial coast. From this time, the practice of English common law slowly began

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<sup>14</sup> The consumption of alcohol prohibited under the laws of divine ordinance crime. This has not previously been discussed, since, as sated at the beginning of this thesis, only crimes for which the death penalty is imposed concern us here.

<sup>15</sup> Brown, N.J., *The Rule of Law in the Arab World, Courts in Egypt and the Gulf*, Cambridge University Press, 1997, p.133 and after.

to leak into the region. From 1912, Sheikh Saeed Ib Maktoum was the ruler of Dubai. His policy was that it would be better for offenders who were British, or came from some other Western country, to be tried in front of their own judges. The British, therefore, gradually began to establish their own courts for cases involving non-Muslims. Yet problems sometimes arose between the British and the local citizens. The courts found a compromise to resolve this difficulty by providing for the presence of two kinds of judge, a British and a local judge. The British used the legal system in operation in British India during 19<sup>th</sup> century<sup>16</sup>.

The problem of understanding with the period prior to 1970, in respect of the judiciary and its judgments, is that verdicts involving the death penalty were not chronicled. Not many spoke of this period prior to the formation of the Union except in some short articles published in newspapers. Such an article was written by Ibrahim Bumelha, the ex-Public Attorney General of the Emirate of Dubai, in which he wrote that the first judge in the Emirate of Dubai was called Khamees in the regime of Sheikh Maktoum Ibn Hasher Ibn Maktoum, who held the power from 1884 until 1906. At that time, the judge used his own knowledge to give his judgment according to *sharia* provisions, which he had studied in Saudi Arabia. From his knowledge of custom, he sent judgments to the ruler for endorsement or to determine what he deemed fit<sup>17</sup>. Death Penalty judgments during the period could not be traced as most of the disputes, according to this newspaper article, were commercial or concerned minor criminal

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<sup>16</sup> This is a summary of the account given by Wilson, G., *Scales of Justice; half a century of Dubai Courts*, Media Prima: Dubai- London, p57 & *Passim*

<sup>17</sup> Bumelha, Ibrahim., *The history of Dubai courts (Arabic)*, *Tareekh Alqada'a fe dubai*, retrieved 23.4.2003, from [www.dc.gov.ae](http://www.dc.gov.ae)

cases. That no death sentences were recorded does not mean, however, that none was carried out. After the era of Maktoum Ibn Hasher, and in the 1940's and 1950's, the justice system relied on a local judge called Mohammad Ibn Ahmed Al Shingeeti, who based his judgments both on the provisions of *sharia* and an understanding of the Ruler's attitude<sup>18</sup>. Capital punishment was rare, although no definite number of executions is known<sup>19</sup>.

Before discussing the profile of the courts responsible for giving sentences of capital punishment in accordance with the Criminal Procedures Law for the United Arab Emirates, it is important to consider how they are constituted. What follows therefore, must fall into two parts: in the first, the types of court used; and in the second, the establishment of the criminal courts.

The UAE, since the declaration of independence in 1971, was in no hurry to unify the judiciary for all seven Emirates, or to make local courts subject to the new federal courts. Rather, the federal legislator gave the right to each Emirate either to change its courts into Federal Courts, or to keep their local courts. In accordance with this freedom, and as stipulated in Federal Law No. 6, five Emirates elected in 1987 to shift to the Federal judicial system. The Emirates of Dubai and Ras Al Khaimah, however, decided to keep their own courts, so neither Emirate is today bound within the federal

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<sup>18</sup> cf. Wilson, G., *Scales of Justice; half a century of Dubai courts*, Media Prima: London, Dubai, 2009, pp. 62-63

<sup>19</sup> *Ibid*

judicial system. Though the formation of federal courts did not result in a big change in terms of content, a significant difference lies in litigation method and the degree of litigation permitted. The Court of Cassation for the local judiciary in the Emirates which have reserved their right to their own supreme court, and maintained their own judicial system, do not follow the decisions of the Federal Supreme Court. Furthermore, legal principles set by the Federal Supreme Court are only binding upon the Emirates which follow the Federal judiciary. For the purpose of this study, the discussion will focus on how a death penalty judgment may be challenged, whether imposed by a federal or local Court. The formation of the Federal Courts will be examined next and the formation of the Local Courts will be also discussed, particularly those, of the Emirate of Dubai. These are not different in character from the local courts of Ras Al Khaimah, which also retains their own local judicial system.

In respect of the formation of federal courts, they are constituted at three levels as follows.

### **1. Court of First Instance**

The Federal Courts of First Instance were established in the year 1978 when the Emirates of Abu Dhabi, Sharjah, Ajman and Fujairah requested their judicial system to shift from the local to the federal system. Federal Law No. 6/1978 was issued to approve this change. In the year 1991, the Emirate of Umm Al Quwain also requested such a change of a federal judicial system. Approval was given through Federal Law No. 18/1991. However, the Emirates of Dubai and Ras Al Khaimah have kept their local judicial system up to the present time.



The question here concerns how many judges the Court of First Instance actually has. Law No. 6/1978 stated that the Court of First Instance should have one judge only. Due to the seriousness of the matter in practice, this was amended by Law No. 5/1986, stipulating that the Court should comprise three judges when it hears cases involving murder, rape and theft. In a somewhat strange arrangement, appeals concerning the judgments of Courts of First Instance were to be made to the Federal Supreme Court directly but not the Court of Appeal, pursuant to Article 1 of Federal Law No. 5/1986. However, such ambiguity and confusion has been removed through issuance of the Federal Criminal Procedures Law in the year 1992, which distinguished two types of Court of First Instance. The first is the Criminal Court, comprising three judges, and the Court of Minor offences, which comprises one judge. The question arises as to how a case may be classified as a major crime or a minor offence. This will be examined later when the punishments pursuant to the Federal Penal Law 1987 are discussed. It is of great significant since the type of punishment is the criterion by which to decide which court hears a particular case.

## **2. Court of Appeal**

The Constitution was not clear in respect of the Court of Appeal, as Article 103 of the Constitution stated that appeal of the judgments of the Court of First Instance should be before the Federal Supreme Court without the Court of Appeal being mentioned. Moreover, Article 95 of the Constitution divided the Courts into two types, the Court of First Instance and Federal Supreme Court, without mentioning the Court of Appeal. In order to remove this ambiguity, the Minister of Justice requested the Federal Supreme

Court to pass its decision, noting that the two Articles 95 and 103 authorized formation of Courts of Appeal to hear appeals against judgments of the Courts of First Instance<sup>20</sup>. Practically, there are two Courts of Appeal in existence. The first is in Abu Dhabi, which hears appeals against judgments issued by the Abu Dhabi Court of First Instance. The other is at Sharjah, which hears appeals against judgments issued by the Court of First Instance in the other Emirates, with the exception of Dubai and Ras Al Khaimah<sup>21</sup>. The court comprises three judges.

### **3. Federal Supreme Court**

The Federal Supreme Court was established in year 1973 by virtue of Law No. 10/1973 and is the highest authority at the federal judicial level. This court comprises a chairman and four judges. When first established, it heard disputes between the Emirates and provided explanations for any ambiguities in the articles of the Constitution. Later, a new activity was added when it came to operate as a Court of Cassation hearing appeals against judgments of the two Courts of Appeal according to Law No. 17/1978. The judicial judgments issued by the Federal Supreme Court, although they finalize the heard case, are considered guide references to all five Emirates in any future cases and disputes of a similar nature.

The formation of the courts in the Emirate of Dubai provides an important example of the local judiciary system. As we have seen, according to the permission granted by the

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<sup>20</sup> Federal Supreme Court Decision No.1, the fourth judiciary year, dated 14 March 1976

<sup>21</sup> Al-Muhairy, Butti., op.cit., p.128

Constitution, both the Emirate of Dubai and the Emirate of Ras Al-Khaimah have their own local judiciary system. The court of Dubai will be taken here as representative of the local judiciary system since there are no significant differences between the practices of the two emirates. The first official law to establish the courts in the Emirate of Dubai was issued in 1970. The courts were of two types: *Sharia* Courts, against whose judgments no appeal could be made<sup>22</sup>. These were formed of one judge competent to hear all cases, especially in cases governed by the provisions of Islamic *shaira*, such as marriage and divorce disputes. They did not include cases under the provisions of civil statutes. Secondly, there were the civil courts comprising two entities, the Court of First Instance and the Court of Appeal. In 1988, Law No. 1 was passed authorizing a Court of Cassation to be formed as the third tier of the civil Courts. Subsequently, the Law of Court Formation, 1970, was abolished and replaced by the new Law of 1992, whereby the courts were organized into three types corresponding to the federal judiciary. Thus, litigation was divided into three stages starting from the Court of First Instance, through the Court of Appeal and finally to the Court of Cassation, which is equivalent to the Federal Supreme Court at the federal level. Thus, the term or title “Sharia Court”, as in the law of 1970, disappeared for reasons that were not explained by the authorities. It might have resulted from wanting to unify the court system and to make it analogous to the federal judicial system. Alternatively, it may be that Western influences had started to affect even the titles of the courts. The Courts of First Instance became the First Instance Division of Summary Justice and the Full Bench First Instance Division. The First Instance Division of summary justice comprises one judge to hear civil and commercial cases concerning amounts not

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<sup>22</sup> In 1988 a law was issued in Dubai, authorizing appeals against the Sharia Court in all cases except matters concerning family.

exceeding one hundred thousand of the local currency (dirham), for offences and breaches less than felonies. At the same time, the Full Bench First Instance Division comprises three judges to hear civil and commercial cases concerning amounts over one hundred thousand dirhams, and with respect to offences referred by the Public Prosecutor.

#### **4.4 Types of crime specified in the legislation of the United Arab Emirates**

The Federal Penal Code or the criminal law, issued in 1987, made a classification of crimes, dividing them into three categories<sup>23</sup>, namely divine ordinance crimes (*Alhudud*), retaliation or blood money crimes (*Diya*), and discretionary crimes (*Taz'ir*). The crimes themselves were divided into three kinds according to the punishment prescribed in the Penal Code: Felony, misdemeanour, and violation. Moreover, the code defined the punishment for each of these three kinds.

##### **1. Felony**

The legislator defined a felony as any crime punishable by one of the divine ordinance or retaliation punishments, excluding from this the punishment for drinking alcohol and slander<sup>24</sup>. Here the legislator gave no clear indication about capital punishment being imposed against a person who committed a felony crime. The legislator continues in the second paragraph of the same Article that felony is to be punished by capital punishment, life imprisonment or temporary imprisonment. It would have been logical

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<sup>23</sup> Article No. 26 of the Federal Penal Code.

<sup>24</sup> See Article 28 of the Federal Penal Code.

for the legislator to have clarified, in the first paragraph, that capital punishment could be one of the punishments applied to a felony if that felony constituted one of the divine ordinance or retaliation crimes. Also, in the second paragraph, it should have been made clear that the death penalty referred to here is as a discretionary punishment, since there is no purpose in mentioning capital punishment twice without stipulating the types of crime to which it applies in each case. Again, the legislator acted in a similar way when he neglected to mention crimes of divine ordinance, in particular failing to show his willingness to implement the Islamic *sharia* provisions. Furthermore, in stipulating the period of life imprisonment he indicated clearly that life imprisonment means that the offender shall spend his whole life in prison<sup>25</sup>. This is not, however, the case with actual terms of life imprisonment, since the offender may be released after 20 years if he or she displays good conduct, or 25 years if he or she does not.

## **2. Misdemeanour**

Misdemeanour is the second category of crime classified by the legislator. It is defined as a crime punished by imprisonment for less than three years, or a fine of over one thousand dirhams. The significant factor in this article<sup>26</sup>, defining misdemeanour crimes, is that in the final paragraph the legislator has stipulated the punishment of flogging for drinking alcohol and slander, yet in the amendment<sup>27</sup> of the article, this paragraph was deleted. The reason for the deletion is not clear. However, this is a further indication of the direction in which the UAE legislator is going. Global pressure

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<sup>25</sup> See Article 68 of the Federal Penal Code.

<sup>26</sup> See Article 29, federal Penal Code.

<sup>27</sup> This amendment was made twice: the first took place in December 2005, when the flogging punishment was included but the crimes of drinking alcohol and slander were deleted; the second amendment took place in December 2006, when the flogging punishment was deleted.

regarding sentencing has gained ground with the legislator and a significant step is that flogging has been deleted from the Penal Code.

### **3. Violation**

Violations refer specifically here to petty crimes. They may be any kind of action punishable either by custody for a period of not less than 24 hours and not more than ten days, or by a fine not exceeding one thousand dirhams<sup>28</sup>.

### **Conclusion**

In this chapter we have found that there are three<sup>29</sup> supreme or cassation courts in the United Arab Emirates, the first being the Federal Supreme Court in connection with the federal judiciary, the second being the Court of Cassation in the Emirate of Dubai, and the third being the Court of Cassation in the Emirate of Ras Al Khaimah. Since 2007, and despite being the seat of the supreme federal court, the Emirate of Abudhabi has added a fourth court of cassation, that is to say its own supreme court. Each provides its own potentially contradictory legal verdicts. This stands in marked contrast to countries around the world where there is only one Supreme Court issuing rulings that may constitute future legal principles.

Given the multiplicity of communities, nationalities and ethnicities that characterizes the UAE, Article 7 of the constitution, is unclear and open to different interpretations, in declaring that the Islamic *sharia* is one but not the sole source of law. It shows the

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<sup>28</sup> See Article 30, federal Penal Code.

<sup>29</sup> They became four after the decision of Abu Dhabi to have its own local judicial system in late 2006

uncertainty created by the confluence of Arab and Westernized legislation. A further complication springs from the fact that the Constitution was composed by an Egyptian lawyer called Waheed Ra'aft, who himself came from a country influenced by a Western way of thinking. Clearly he derived the wording of Article 7 from Article 2 of the Egyptian Constitution. As a result, Article 7 allows many interpretations, from which some have concluded that the Islamic *sharia* is only one of several sources of legislation<sup>30</sup>. An instance of how this finds practical expression is that the legislator believed that he could abolish the punishment of flogging for the crime of drinking alcohol, even though it is stipulated as a divine ordinance punishment. This shows clearly that the legislator was influenced by Western laws. In the following chapter, we will examine the extent to which the legislator has been further influenced by a Western way of thinking in relation to the death penalty.

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<sup>30</sup> Butti Sultan Ali Al-Mehairy, The Position of Sharia within UAE constitution and the federal supreme court application of the constitutional clause concerning Sharia, 11:3 Arab Law Quarterly, 219, 1996, p. 226 and after.

## **Chapter Five**

### **The Death Penalty in the Legislation of the United Arab Emirates**

#### **Introduction**

As an Arab Islamic country, of which the official religion is Islam, the United Arab Emirates could not disregard the significance of the death penalty. It is, as we have seen, one of the divine ordinance and retaliation punishments and, according to the legislator of the UAE, has a deterrent effect which creates a protection and secures the stability and security of the society. This is consistent with the feeling of the overwhelming majority of those with Arab and Muslim roots. The great question here is how far the United Arab Emirates has taken capital punishment into account in its penal legislation, and what types of offence entail the death penalty. Is the use of the death penalty necessary for certain specific crimes, or is it possible to address these successfully by other kinds of punishment, and if so, what should these alternatives be?

To answer these questions, we need first to indicate the types of crime for which the United Arab Emirates has designated the penalty of death. We must estimate whether certain crimes jeopardize internal security. Additionally, it is important to determine how far the legislator is influenced by sources other than Islamic *sharia*, and how correct he is in the assumption that the most severe crimes can be addressed by other penalties.

#### **5.1 The Death Penalty and the Federal penal code**

The Penal Code is precise in mentioning capital punishment only as a discretionary



punishment, and not as a divine ordinance or even as a retaliation punishment. The legislator, in the Federal Penal Code, dedicated eight chapters, from Article No. 1 to Article No. 434, to allocating punishments for discretionary crimes, since the legislator abbreviated the punishment for divine ordinance and retaliation crimes in the first paragraph of the first Article of this code. The first of these eight chapters deals with crimes against state security, whether internal or external, and the representatives of the regime. The second deals with crimes related to public positions, while the third deals with crimes against justice. The fourth deals with crimes of general danger and the fifth with crimes against religious beliefs and rites. The sixth chapter deals with crimes against family and the seventh deals with crimes against individuals. Finally, the eighth chapter deals with financial crimes. We will concentrate on crimes punished by capital punishment as a discretionary punishment, which are divided into three categories: crimes against state security, whether internal or external, crimes against the representatives of the regime; crimes against individuals which, in this research, is given priority. These crimes will be studied in detail to ascertain whether the federal legislator was right to impose such harsh a punishment, or whether such strictness was unnecessary as there were viable alternatives which could have been used.

### **5.1.1 Crimes against the state and its figureheads**

Since its independence in 1971, the United Arab Emirates has established diplomatic and economic relations with all world countries on the basis of international law and peaceful coexistence with all countries. However, due to the instability which the world undergoes sometimes, and the possibility that disagreements or war could break out at any time, most if not all countries take procedures to strengthen their security

and encourage their citizens not to involve themselves with hostile powers that may harm or endanger the national interest whether before or during the outbreak of war<sup>31</sup>. Hence, the federal legislator established, through the Penal Law of 1987, the strictness of the punishment for crimes which may jeopardize the security and stability of the state, and he legalized capital punishment for such crimes.

Article No. 149 of the Federal Penal Code states that "Any citizen who joins the armed forces of any country in a state of war with the country or the armed forces of any group opponent to the country shall be punished by the death penalty". After careful examination of this provision, it can be seen that the legislator has placed three conditions to be satisfied before capital punishment can be implemented:

### **1. Citizenship**

The legislator stipulates that someone who commits the crime of joining the enemy army or opponent forces must be a citizen of the country, a matter that is easily proved. Hence, if someone who is not a citizen joins the enemy forces, he is not subject to the provisions of this article as the legislator is strict here due to the nature of treason inherent in this crime. If it is a citizen who joins with hostile power, he is considered a traitor in addition to being an aggressor against the country<sup>32</sup>.

### **2. Joining the enemy forces or an armed opponent group**

The legislator has stipulated that the citizen should actually join the enemy forces. By joining is meant actually entering the service of the enemy forces, but it does not

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<sup>31</sup> The relevance of those remarks can be seen in the events of recent years in the Arab world. Although the UAE has remained quiet and stable, many of our neighbours have been effected by the upheavals of 2011.

<sup>32</sup> Alwakad, Amr., Penal law (Arabic), *Alkism Alkhas fi Qanoon Aloqobat*, 1995, p 7

necessarily imply joining the regular military service in a conventional sense. It is sufficient that he participates in any military or technical act as, for example, working on a runway to assist warplanes to take off and land, or rendering medical or logistical services<sup>33</sup>.

### **3. State of War**

The legislator has added to the above qualifications conditions the condition of a state of war existent between the UAE and another country or armed group. War is an armed conflict or struggle, whether between one country and another or between one country and an armed group aiming at usurping power<sup>34</sup>. Consequently, it is not sufficient to a state of war that the country has taken internal measures: the state of war must be officially declared<sup>35</sup>.

Thus, joining with an enemy is a crime which might critically affect the country. The legislator was right surely to apply the death penalty and be strict in the punishment of this crime, as joining forces with an enemy is considered an outrageous crime against any resident of the country, and the more severe if it is committed by a citizen who has a duty to protect and defend his homeland and the unity of its lands. Many legislatures in the world<sup>36</sup> punish their citizens with the death penalty for crimes of betrayal, during a state of war. On the other hand, since this kind of situation is very rare, so imposing the death penalty essentially means no more than that the state needs to insure that its citizens are loyal to their country and that such crime is abhorred. On the other hand,

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<sup>33</sup> Bakr, Abdulmohaimen., Penal law (Arabic), *Alkism Alkhas fi Qanoon Aloqobat*, Dar Alnahdha Alarabia, 1968, p 70.

<sup>34</sup> Suroor, Ahmed Fathi., Crimes against public interest (Arabic), *Aljaraem Almodhera Belmaslaha Alama*, Dar Alnahdha Alaraia, 1963, p 32.

<sup>35</sup> Alwakad, Amr., op.cit., p 10.

<sup>36</sup> This covered under the Egyptian Penal Code, Article 77 and in the penal codes of other Arab states, but it can even be found in the statutes of post 1945, European states, such as Netherlands, as referenced later in this thesis.

since this crime is of the discretionary type, the legislator might have imposed two punishments for it, the first being the death penalty and the second, life imprisonment. He might even have considered temporary imprisonment, in order to retain a discretionary option, depending, of course, on the particular circumstances of the case and of the perpetrator. By decreeing a mandatory sentence, the judge does not give the judge the opportunity to exercise his own judgment in cases where, for example, all the elements of the crime may be present, but where he thinks that the perpetrator does not deserve the death penalty.

Turning to a second crime punishable by death, which is giving assistance to the enemy, Article No. 150 of the Penal Law states that "The death penalty shall be the punishment of:

“(A) anyone who interferes for the interest of the enemy in any arrangement to shake the loyalty of the armed forces, or diminish their morale and resistance; (B) anyone who instigates the soldiers in a time of war to join the service of a foreign country or facilitate the same; (C) anyone who intentionally interferes in any manner to gather soldiers or men or collect money, supplies, and logistics, or arrange any of these things, in favor of a country or any group that is in a state of war with the state”.

We should note that this article details other criminal forms of helping the enemy, such as shaking the loyalty of the armed forces, and spreading fear and despair in the souls members of the armed forces in order to diminish their resistance. Paragraph (a) of this article is open to the criticism that it does not specify the condition that the criminal act must be made during a time of war, in contrast to paragraph (b), which adds the

condition that instigation to join the service of any foreign country applies to the military but not to any other category. Thus, instigation to the civilians does not satisfy the definition of the crime. Furthermore, this paragraph does not specify or make clear the type of service meant, and it states instigation to join the service of a foreign country in time of war without requiring that country to be hostile or in conspiracy against the UAE. The legislator might have been clear in this regard and criminalized only an instigation to join the service of a hostile country in a state of war with the UAE, since joining the service of a foreign country not in a state of hostility ought not to be criminalized. Work for another country may have an honorable purpose, such as the aiding of refugees or providing other humanitarian assistance<sup>37</sup>.

As for paragraph (c), it clearly criminalized persons who provide money, supplies or logistics to any country in a state of war with the UAE. It is apparent in this paragraph that the criminal intention must be clear, i.e., an intention to betray the homeland, and not merely to gain material benefits. However, we do not find any clarification of criminal intention as long as the country is in a state of war with another country, when just thinking of helping the enemy, even for material profit, is a serious matter and should not be contemplated by any loyal citizen. On the other hand, paragraph (c) might be criticized for not making clear whether it refers to things, supplies or logistics that are collected and actually sent to the enemy, or whether collection alone is sufficient. The legislator should have been clear and stated that supplies and logistics must be transferred to the enemy for the death penalty to be applicable. In view of the severity of the punishment, this crime should be identified clearly.

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<sup>37</sup> Bakr, Abdulmahaimen. op.cit., p. 183.

However, the most significant issue here is that of the following article<sup>38</sup>, Article 151, which sentences to death anyone who helps the enemy to enter the territory of the country or even handles or surrenders any part of the land, port, fort or plane or any means of transportation. This was amended for reasons not known to allow either the death penalty or life imprisonment. This change seems a strange step for the legislator to have taken since the crime is more onerous than the crime specified in Article 150. If we consider the logic here, it is Article 150 that should be amended, not Article 151. The reasons for reducing the punishment should be studied well and should apply to the less dangerous crime, not to the most dangerous. Moreover, the legislator has not defined the perpetrator here and whether he should be a member of the armed forces or just a civilian. The legislator should also vary the punishment according to the perpetrator's status. Using the word "Anyone" means all people: the citizens, the armed forces members and even the temporary residents of the country. Thus, it is surely sensible to distinguish between all these people and to vary the punishment.

Turning to the third crime punishable by death, which is the crime of espionage, Imam Malik, as noted in chapter three, prescribed the use of the death penalty as a discretionary punishment for the accused in the crime of spying and accordingly, the UAE legislator has done the same. The legislator was strict in the punishment for this crime and stated in Article 154 "the death penalty is the punishment for anyone who contacts any hostile foreign country or anyone promoting its interests or with any of them to assist it in its warlike operations or to jeopardize the country's war like operations". Therefore, from this article it can be understood that the crime of spying

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<sup>38</sup> See Article 151, federal Penal Code and its amendment made in December 2005 by law No. 34.

must be committed during a state of war between the UAE and another country or countries. However, the legislator did not make clear whether the crime of espionage must cause harm to the country and whether the crime must actually jeopardize its war operations. The two cases should not be treated equally and the same punishment given, since, if capital punishment is imposed for a crime which does not cause actual harm to the country, what punishment can be imposed for the crime that causes a real disaster? Again, the legislator should not determine a mandatory sentence for this crime and should have differentiated by allowing discretion between these cases. A principle of punishment under the criminal code of all countries is that an act is judged by its consequences not merely by its intent<sup>39</sup>.

In this context, we will discuss two further crimes punishable by the death penalty pursuant to the Federal Penal Code. The first of these is the overthrowing or usurping the regime, and the second is assaulting the safety of the representatives or figureheads of the regime.

The federal legislator was very strict in respect of this crime, provided for under Article (174), as he prescribed the death penalty for whoever initiates the overthrow or usurpation of the regime by force. Here, this crime is treated as equivalent to the crime of rebellion, which, as we have seen, comes under the category of crimes of divine ordinance and which, according to the Islamic *sharia*, is punishable by death. It is assumed here that the legislator did not intend to equate the two crimes since he did not give any conditions or rules to imply such punishment. The legislator is concerned here

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<sup>39</sup> Suroor, Ahmed Fathi., op.cit., p. 22

to insure the stability of the regime and consequently its figureheads. His motive is surely incontestable since stability and even justice itself must be felt and touched in every aspect of life. This requires strictness.

Another step was taken by the legislator when he amended Article (174) and added to it that the death penalty not only applies to those embarking upon this crime but even to those who attempt by any means to take power in the regime by force. Again, the legislator showed great strictness towards this crime, and this step was surely taken to provide more stability for the regime. Citizens of the United Arab Emirates may be confident that all people wish to live in peace which can never be gained without the stability of the regime. The country is moving steadily towards providing a better life for all its inhabitants and it needs to assure people that they live in a moderate and stable regime. Since, however, the legislator has not given further definition to the words “commence” or “attempt” in the amendment of the article, and does not specify whether such a crime must cause death or casualties, it seems advisable that a clear differentiation should be made between the two punishments – capital punishment and life imprisonment – to give more flexibility and discretion to the judge<sup>40</sup>. Without further clarification of the amendment to Article (174), there may be a danger that thought is equated with action, which would be almost impossible to establish as fact in a court of law.

Moreover, the legislator stressed the need for the imposition of the death penalty against anyone who imperils the safety or who threatens the freedom of the President or even puts his life at risk<sup>41</sup>. The same punishment is imposed if the crime is committed against

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<sup>40</sup> See Article No. 174, federal penal code (1987) and its amendment made in December 2005.

<sup>41</sup> See Article 175, federal Penal Code for the year 1987.



the Vice President or the rulers of the six other Emirates. The first of these is physical assault, next is assault on the freedom of the figureheads, and finally the putting of their lives in danger. The legislator has prescribed capital punishment for all these actions. The legislator wanted to insure that any kind of assault, whether physical or not, is punished by death. Again, this is a matter in which the stability of the regime is implicated, in this case at the highest level of society.

Furthermore, the legislator amended Article (175)<sup>42</sup> to increase its strictness by prescribing life imprisonment for anyone who ‘tries’<sup>43</sup> to commit such an action and to the death penalty if the act itself is attempted or committed. However, in the amendment, the punishment is to be imposed if the crime is committed against the President only and not against anyone else. The legislator, it seems, intentionally reduced the level of punishment by not including the Vice President or the rulers of the Emirates. He wanted to signal to observers that the country does not want to impose capital punishment but, at the same time, send a clear message that the life and safety of the president is not negotiable. However, the question arises as to what the punishment would be if a crime or the assault were to be committed against the Vice President or the rulers of the Emirates. The legislator omits to specify these sanctions in the amendment to the article. Yet it is surely essential to ascribe a punishment which should vary depending on the result of the crime. Capital punishment is applicable at least as a divine ordinance punishment if the crime of rebellion causes death, according to the

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<sup>42</sup> See amendment made to Article 175 of the federal penal code according to Law No. 34, December 2005

<sup>43</sup> The legislator used the word ‘tries’ and not ‘attempts’; although it is not a legal term it might be used here to assure more protection to the president. My concern is that this word has different meanings and it might be used here to give the power to the police to arrest anyone whom they think might be preparing for such action without a physical attempt or the commencement of the crime.

Islamic *sharia*. Furthermore, this punishment is stipulated in the case of committing the crime against presidents of foreign countries<sup>44</sup>.

### **5.1.2 Crimes by and against individuals**

After relating in some detail the punishment of crimes against the regime and its figureheads or representatives, we must examine other crimes punishable by the death penalty, such as crimes committed by one individual against another member of the public. The federal legislator has specified the death penalty for certain crimes against individuals but the question here is whether the UAE legislator is moving towards abolition of this punishment, or away from it. The focus should be on crimes expressly punishable by the death penalty rather than crimes in which the legislator has given the judge the power of discretion to choose between the death penalty, life imprisonment or temporary imprisonment. However, cases where the legislator may choose to commute the penalty will also be discussed. The subject has been divided into three sections. In the first, perjury and false notification of crimes are looked at, in the second, crimes involving public danger, in the third, crimes against individuals and homicide in particular.

A further crime affecting both the individual and the state is Perjury and false testimony in evidence. These are deemed to be among offences<sup>45</sup> for which the legislator has stipulated imprisonment. However, he can be more severe in punishment if this crime have lead to the execution of an innocent person, or to his imprisonment for life. The legislator has stressed that a witness who commits perjury or someone who falsely

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<sup>44</sup> See Article No. 179, which is identical to Article 175, even down to its amendment: the legislator used the same words and terms.

<sup>45</sup> See Articles 253 and 276 of the Federal Penal Code.

notifies a crime, thereby sending any innocent person to death or life imprisonment, should receive the same punishment. Logically, the legislator is surely correct in his strictness towards this crime as a deterrent to anyone thinking of causing harm to others. This kind of punishment complies with the Islamic *sharia* provisions as stated by the Lord in the Holy Quran: “punishment is of the same kind as the deed”<sup>46</sup>. Consequently, if an innocent person has been sent to death as a result of perjury, the false witness shall receive the same punishment as if he intended to send the innocent person to his or her death.

The legislator devoted the fourth chapter of the Penal Code to crimes involving public danger. These are dealt with in twenty-four Articles. Such crimes include attacking a means of transport and setting fire intentionally. It is strange that despite the gravity of some of these crimes, the legislator did not stipulate the death penalty for them, but was satisfied with imprisonment and a fine. In road accidents, for example, culpability may be so high that the death penalty, for both punishment and deterrence, should be considered.

It is stipulated under the penal code that life imprisonment applies to anyone who attacks an aeroplane or vessel in order to seize it, to harm the passengers or to change its route<sup>47</sup>. Despite the gravity of such crimes, in which the criminal may occasion injury to the passengers, the legislator was content to impose a penalty of life imprisonment. It may be said that the legislator restricted himself to the term “injury” and does not refer to “murder”, so the question of the death penalty does not arise. However, to attack a

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<sup>46</sup> Surat Almaeda, verse 45.

<sup>47</sup> Article 288 and 289 of the Penal Code

vessel or aeroplane carrying innocent passengers is a major crime in itself and can expose innocent passengers to injury or death. Thus, the legislator might have been stricter since this crime is similar in nature to armed highway robbery crime (*Al Harabah*). It would surely have been better to give a judge the option of two punishments, namely the death penalty and imprisonment, whether temporarily or for life, depending on the circumstances. Such leniency of the legislator here is difficult to justify, though it might be assumed that the legislator intended to indicate that this punishment was only for attacking the means of transport and not for causing the death of passengers. However, in that case, the legislator could have drawn a distinction between these two scenarios and clarified the punishment for each.

In the intentional setting of fire, the legislator stipulated imprisonment for not less than seven years for anyone who sets light to a building, factory, workshop, warehouse or inhabited dwelling, and if the fire causes the death of one person or more, then the death penalty shall be imposed<sup>48</sup>. Arguably this penalty should have been stricter and it should not be necessary to wait for innocent people to die before raising the threshold of punishment to the death penalty. It is difficult to see why the legislator was not more severe with such crimes. Moreover, in crimes of attacking means of transport such as aeroplanes and vessels, he was satisfied with stipulating life imprisonment, without defining the meaning of “disaster” (*Karetha*, as recognized in Article 288-289), or specifying whether it involved the death of one person or more<sup>49</sup>. Again, the legislator might have been more precise by suggesting two alternative punishment, namely death or life imprisonment where death has been caused, or temporary imprisonment where

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<sup>48</sup> Articles 304 and 305 of the Penal Code

<sup>49</sup> Article 289 of the Penal Code.

the crime caused no actual harm to persons or property.

We have found here that a number of comments might be made as to the limitations set by the legislator. Firstly, there appear to be instances where the legislator has not chosen to follow the precept laid down by the *sharia*, reasons for which have already been suggested and will continue to be discussed in this thesis. Secondly, there are types of crime for which, it might be argued, in a legal system that admits the death penalty, there should be capital punishment. Taking together, these suggest an attitude of growing leniency, and reluctance to apply the full severity of the law to crimes of an extreme kind.

In Chapter One, it was shown that Islamic *sharia* prescribes retaliation in crimes against individuals as this is a pure right given by Allah to the persons assaulted and their blood relatives. In crimes of intentional murder, Allah ordains retaliation against the murderer as punishment for the crime he has committed. However, Allah urges blood relatives to give pardon to the murderer and to waive their claim to retaliation; since such a waiver is much better for their life in this world and the hereafter. The federal penal law, as well as other criminal legislation, incriminates the murder of innocents but not invoking the principles of Islamic *sharia* with respect to retaliation, it does not stipulate the death penalty for intentional murder unless that act is associated with aggravated circumstances. This is in contrast to Islamic *sharia*, which does not differentiate between intentional murder and intentional murder associated with aggravating circumstances, and speak only of cases where the intention of the criminal is clear or not clear. Putting an end to a human life with a killing tool, for example, necessitates

retaliation unless the blood relatives relieve the perpetrator. The offender is then liable to pay *Diya* in addition to any discretionary penalty decided by the ruler or judge. In this section, examples of intentional murder as stated by the federal legislator are discussed along with the punishment for murder not associated with aggravated circumstances. This will be followed by a consideration of the punishment for intentional murder associated with aggravating circumstances.

### **1. Intentional murder not associated with aggravated circumstances**

The legislator in the UAE has followed other legislators, such as the Egyptian legislator<sup>50</sup>, in stipulating life or temporary imprisonment for intentional murder not associated with aggravating circumstances. It is noted that the UAE legislator has given an option to the judge in imposing the punishment to choose between the maximum limit of life imprisonment or the minimum limit of temporary imprisonment, which Article 68 specified should be for a period of not less than three years and not to exceed fifteen years. Here, the attitude of the UAE legislator gives a clear indication of being affected by Western legislation and particularly secular Arab legislation, including that of Egypt which has been greatly affected by Western legislation.

What is new here is the amendment to Article 332 of the Federal Penal Law passed in December 2005. The legislator added a paragraph which states “punishment of imprisonment for not less than one year if the blood relative waived their right of retaliation in any stage of the case procedures or before execution”. This addition was made to cover an error in Article 332 under which blood relatives waive their right of

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<sup>50</sup> See Article 332 of the UAE Penal Code and Article 234 of the Egyptian Penal Code.

retaliation and fixed mandatory punishment to the extent that the judge had no discretion to determine the same. This addition, however, introduces a viable punishment for intentional murder of imprisonment for not less than one, and not more than three years, in cases where the blood relatives have waived their rights. On the other hand, if the blood relatives refuse to waive their right, it is not clear whether the punishment is imposed in function of retaliation or as a discretionary punishment. Hence, it seems that this article was not required at all, since punishment for intentional murder is the death penalty as retaliation, pursuant to the *sharia* provisions, and pursuant to the first Article of the Penal Code. However, if the punishment is intended to be discretionary, then there is no need to add a new discretionary punishment, such as imprisonment, since this is already the specified, discretionary punishment for this crime.

## **2. Intentional murder associated with aggravated circumstances**

The legislator has followed most of the Western legislation methods which differentiate between intentional murder and intentional murder with or without aggravated circumstances. However, this distinction does not follow the provisions of the Islamic *sharia*, in which there is no such distinction. The aggravated circumstances, as stipulated by the UAE legislator, are<sup>51</sup>:

- 1- Intentional murder associated with observation or premeditation.
- 2- Association between intentional murder and another crime.
- 3- Intentional murder if the victim is an antecedent of the murderer.
- 4- Intentional murder if the victim is a public official or commissioned to render a

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<sup>51</sup> See Article 332 of the Federal Penal Code.

public service while on duty or service.

5- Intentional murder by poison or explosive material.

The aggravated circumstances indicated here will be examined in more detail to discover the reasoning behind the attitude of the legislator, whether in being strict in the imposition of the death penalty or in being more lenient, and how far these conditions have roots in the provisions of the Islamic *sharia*, and whether such conditions contradict the provisions of Islamic law.

With respect to premeditation, the first paragraph of Article 333 of the Federal Penal Code defines it as “the insistent intention, prior to the committing of the crime, against any person, and the precise and accurate preparation of all necessary methods for the committing of the act”. It should be noted that the Federal legislator, in his definition of premeditation, did not add to the phrase “the insistent intention prior to the act”. This may lead us to assume that it is sufficient in fulfillment of this condition for there to have been a lapse of time between the intention of the perpetrator and the commission of the crime. Accordingly, the main aspect in premeditation has been omitted, which is the psychological aspect. For premeditation to have occurred, the perpetrator must have thought about his crime in a calm and assured manner, forming his intention before actual engagement in the performance of the crime<sup>52</sup>. Accordingly, premeditation may be defined as the calm meditation of a crime, and the offender’s determination to carry it out, prior to committing that crime. In other words, the perpetrator in this period of time forms his intention to commit the crime in a fully conscious manner and can be presumed, therefore, to have calculated the consequences of his action.

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<sup>52</sup> Khaleel, Adli., Homicide cases (Arabic), *Jaraem Alqatl Alamd*, Dar Alkotob Alqanonya, 2002, p 403



## **1. Time Aspect**

Article 333 stipulates “the insistent intention prior to the (act)...”, which requires a lapse of a period of time, either long or short, between the intention of the perpetrator to commit the crime and his engaging in carrying it out. In fact, the aspect of time is required, yet it is essential to give an opportunity for the perpetrator to think and meditate on his crime, whilst being in a calm and assured state of mind, and free from the effect of emotions and mental disturbances. The aspect of time is therefore required as a main condition to achieve the mental aspect<sup>53</sup>.

## **2. The psychological aspect**

In the psychological or mental aspect, the perpetrator has thought about the crime, insisted upon it and engaged himself to committing it, while being in a calm state, free from all emotions and anger. This aspect is the most important characteristic of premeditation, and the reason for intensifying punishment of the crime. The perpetrator who engages in the committing of the crime after thinking and in an assured mental state expresses a dangerous mentality. He is more dangerous than the perpetrator engaging in a murder with no prior insistence, but who is under the influence of an emotional rage or mental disorder<sup>54</sup>. Accordingly, premeditation requires that the perpetrator has calmly reached his decision, thus allowing him to think further and draw up a plan to carry out his crime.

A vital question arises in relation to both 1 and 2 in the above, concerning the time

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<sup>53</sup> Salama, Ahmed Kamil., Commentary on the penal law (Arabic), *Sharh Qanoon Aloqobat*, Maktabat Nahdat Alsharq, 1987, p 38

<sup>54</sup> Suroor, Tariq., The penal law (Arabic), *Qanon Aloqobat*, Dar Alnahda Alarabia, Second Edition, 2001, p 61

period between premeditation of the crime and its execution. The Egyptian Court of Cassation, in one of its judgments, ruled that this should be determined by the court and that the judge has the right to decide this issue from the circumstances of each case.<sup>55</sup> If, given the existence of the mental and time aspects, the condition of premeditation is met and, as a consequence, the culpability for murder is intensified, then the penalty may be elevated to the death penalty. This provision cannot apply if the perpetrator has murdered another person by mistake. Yet premeditation does not necessitate that the intent to murder is defined, as premeditation exists if the intent to murder is undefined but intended for a specified or unspecified person who the perpetrator has encountered. This applies if the intent is to murder whoever is in the way, regardless of their identity, in order to create a scene and disturbance, or in order to create fear in some person or persons<sup>56</sup>. Article 333 of the Federal Penal Code elaborates this meaning further by stating “against any person”.

### **3. Premeditation and criminal participation**

Where there is agreement between two participants in a crime, the provision of premeditation is stipulated for each of them separately. Hence, co-ordination in the agreement to murder is not a decisive issue in the legal definition of premeditation, as the participants may suddenly intend to murder the victim, and agree to performing the murder at once, in such a manner that premeditation is not provided, as the period of time taken to agree does not allow for premeditation or calm thinking.

Accordingly, a reverse action may be achieved and premeditation may be provided for participants in a crime without there having been a previous agreement to commit the

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<sup>55</sup> Egyptian cassation court, appeal heard on 25<sup>th</sup>, Jan, 1931

<sup>56</sup> Meki, Mohammed Abdulhamid., Crimes against individuals (Arabic), *Jaraem Al eateda Ala Alashkhas*, Dar Alnahdha Alarabia, 2002, p 114.

murder, as the two persons may insist – each individually – on the murder, without agreement, and hence they both commit the crime at the same time, or in periods of time that are close together<sup>57</sup>.

#### **4. Proving Premeditation**

As mentioned above, premeditation is a mental state, existing in the soul of the perpetrator, which has no physical effect on the outside but is derived from external facts, circumstances and conditions.

Premeditation is not recognizable through physical actions performed by the perpetrator, and therefore cannot be proven by the testimony of a witness, but generally inferred by similarities. From that point, the perpetrator prepares his means before he commits the crime, whether he purchases a weapon that he intends to use to murder the victim, or expresses his intention to perform the crime prior to committing it, or threatens to murder the victim, or prepares in advance the means to enable him to escape after committing the crime<sup>58</sup>.

Although the Islamic *sharia* punishes by the death penalty the crime of murder in all its basic form, the Federal Penal Code in Article 332 only punishes murder with premeditation by capital punishment. Thus, as we have seen before, the federal penal code is not fully in accordance with Islamic law, and in this there is a further illustration of how the federal legislator has been influenced by Western legislators, and by other Arab states which apply Western laws.

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<sup>57</sup> Abukhatwa, Ahmed Shouki., penal law (Arabic), *Qanoon Aloqobat "Alqism Alkas"*, University of Almansoor press, 1985, p 71.

<sup>58</sup> Alsagheer, Jameel Abudlbaqi., Crimes against individuals (Arabic), *Qanoon Aloqobat "Jaraem Aldam"*, Dar Alnahdha Alarabia, 1997, p 51.

## 5. Ambush

The Federal Penal Code regards ambush as an aggravated condition in the crime of intentional murder (homicide). The second paragraph of Article 333 of the Federal Penal Code defines the circumstances as being “The ambush of a person by another in a location or in several locations for a period of time whether short or long, to reach the murder of a person or his attack by any means of violence”. Article 332 of the Federal Penal Code stipulates the punishment for the premeditated murder with ambush as being “All those who wilfully murder a soul are punishable by death if the murder was committed with ambush...”. According to this interpretation, ambush occurs when the perpetrator waits for the victim for a period of time, whether long or short, in a place in which he expects him to appear, where he may surprise and attack him, the victim being unaware of the matter, and being unprepared to defend himself. Therefore, the ambush is a sudden attack on the victim, after waiting for the victim in a certain place, whatever its nature may be. Therefore, the crime is the same whether the perpetrator hides while waiting for the victim until the surprise and sudden attack is achieved in its complete form or is unhidden, as he may be concealed behind a wall or tree or may wait in a place to which the victim is accustomed to go. It may also be possible for the perpetrator to wait for the victim in a public place, such as in a street or a hospital, or a private place such as a garden, or in a place owned by the perpetrator himself, such as in his vehicle or at his home<sup>59</sup>.

The legislator found that ambush is a means of having the killer guarantee the performance of his crime in an instance where the victim is unable to defend himself.

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<sup>59</sup> Saleh, Hassanain Ibrahim., Crimes against individuals (Arabic), *Jaraem Aleteda Ala Alashkhas*, Dar Alnahda Alarabia, 1983, p 54

Thus this method in itself is considered to call for severity of punishment, as it proves the perpetrator's villainy and his persistence in guaranteeing the success of his action in causing death and destruction from unseen places<sup>60</sup>.

There is a general distinction to be drawn between the conditions of ambush and premeditation. Premeditation, as previously mentioned, is a personal condition related to criminal intent, and is not valid except with respect to the concerned person separate from any other participants in the crime. Ambush, on the other hand, is a physical condition, related to the material facts of the crime, and is not related to criminal intent. Accordingly, it is enforceable on all participants and partners in the crime, whether they had knowledge or were ignorant of the fact.

Ambush, as mentioned in the example of premeditation, is a severe circumstance in all crimes of murder and wilful attack and, accordingly, in most cases, ambush is associated with premeditation. However, ambush can be achieved in the absence of premeditation, as ambush in itself does not presuppose premeditation. On the other hand, the general opinion in France is that ambush constitutes a type of premeditation associated with the intention to commit the crime with an external action, which is the ambush of the victim in a place, in surveillance of his presence, and the enactment of this intention<sup>61</sup>. If this opinion had prevailed, the federal legislator in the United Arab Emirates would not have needed to mention ambush, since specifying premeditation would have been sufficient. However, the uncertainty between the two conditions exists. It may be assumed that ambush is possible in the absence of premeditation, as is the

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<sup>60</sup> Meki, Mohammed Abdulhameed., op. cit., p123

<sup>61</sup> Abukhatwa, Ahmed Shawqi., Crimes against individuals in the UAE penal law (Arabic), *Aljaraem Alwaqea Ala Alashkas Fe Qanon Aloqobat Alitihadi*, Albayan press, first edition, 1990, p 121.

case when a person awaits his adversary after a fight, and then kills him, before showing the anger behind his action. Such a murder would be described as ambush without premeditation.

Nevertheless, Proving ambush is an objective matter, on which the Court of Cassation (Supreme Court) has no surveillance over the lower court, except in the soundness of its reasoning. Ambush is a physical incident which may be proven by different forms of evidence, including confession and the testimony of witnesses. The court has the final word concerning its existence or non-existence, based on what it deems permissible with regard to all aspects of proof<sup>62</sup>.

## **6. Murder correlated with another crime**

The federal legislator has stipulated conditions concerning severity in the second paragraph of Article 332 of the Penal Code by stating “The death Penalty is presented if murder is committed...correlated with another crime”. The notion of severity in the penalty of intentional murder correlated with the another crime is that the perpetrator who commits two crimes, one of them being the crime of willful murder, within a set period of time exposes the extent of the hidden criminal danger inside him<sup>63</sup>.

It is noted that the application of the general rules in the variety of crimes and punishments stipulated in Article 88 of the Federal Penal Code necessitates that the punishment for a perpetrator who commits another crime aside from wilful murder

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<sup>62</sup> Khaleel, Adli., op. cit., p 541

<sup>63</sup> Abdulsatar, Fauzia., Commentary on penal law (Arabic), *Sharh qanoon Aloqoobat*, Dar Alnahdha Alarabia, second edition, 2000, p 406.

should be more severe if the committing of both crimes would achieve a single objective, and hence the crimes were integrally associated. The federal legislator also decided the necessity of the general rules and therefore did not settle on bestowing the most severe penalty but decided to assign one severe penalty, which is the death penalty, as the other crime loses its identity and independence, leading to the impossibility of a severe condition for the crime of the murder, hence the death penalty is applied. Some other legislators<sup>64</sup> demand that the other crime should be a felony, which contradicts the UAE legislator who holds that this other crime can be of any kind.

For the condition of association in murder, the following three conditions are required: the performance of a willful murder, the performance of another crime and the existence of a temporal association between the murder and the crime. These conditions will be discussed in some detail as follows.

#### **A. The performance of a homicide crime**

For the provision of this condition, the perpetrator is required to commit the murder willfully, whether in the capacity of a direct doer, or in the capacity of a partner in causation. If the murder was a crime in error, correlated with another crime, then the condition of severity is not provided. For example, this situation would apply if a person

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<sup>64</sup> Article 234 of Egyptian Penal Code.

runs into another person with his car and kills him and while a passer-by attempts to catch him to prevent him from escaping, another one sustains permanent disablement.<sup>65</sup>

### **B. The committing of another crime**

For the provision of the condition of severity, the perpetrator is required to have committed another crime alongside the crime of willful murder, and it is not a condition for the other crime to be complete, as it may rest on the limit of intent, as the law does not punish the other crime in itself but for its being a condition of severity for the punishment of willful murder.

It is also a condition that the crime was committed alongside the willful murder but is completely independent of that murder and distinguished from it, i.e. not associated with any of its elements. Accordingly, the condition of severity is not achieved if the perpetrator commits a crime out of which two crimes result, such as if a shot was fired and injured two people, since here we face moral or false diversity, and not actual diversity. Hence, the most severe punishment is applied in accordance with Article 87 of the Federal Penal Code.

It is also a condition that the other crime is independent from the act of murder, in that if there is only one act which could be described in law under two different descriptions, or if there are actions, or a number of actions which are not found in the law except as one crime, the provisions would not apply. Moreover, the other crime should be punishable. If it is not, and if the perpetrator provides a reason of divulgence or an impediment to responsibility or punishment, the punishment would not be severe. This

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<sup>65</sup> Abukhatwa, Ahmed Shauki., op. cit., p 124.



condition is not directly expressed in the context of the provision in Article 332 of the Federal Penal Code, yet it is inferred from the prudence of severity. As the legislator did not decide upon the death penalty, except to replace the punishment for wilful murder and another crime correlated with it, it has no place except if anyone who commits an act of murder or another crime deserves a punishment for his action.

### **C. The association of time between the two crimes**

The condition for the severity of the punishment of wilful murder provided for in the second paragraph of Article 332 of the Federal Penal Code stipulated the existence of an association of time between the crime of wilful murder and the other crime. By association of time, is meant that both crimes are committed in one period of time. Without this condition, the notion of severity is non-existent, and therein lies a problem concerning it. The perpetrator who commits two dangerous crimes in a short period of time. The federal legislator has not defined the time limit within which the murder and the other crime is required to have been committed. Therefore, the provision of an association becomes an objective issue, subject to the discretion of the judge on the subject, through which he deliberates the existence of association in each case separately, in light of the notion of the legislator to increase the punishment for murder if it is associated with another crime. This issue cannot be reviewed by the Court of Cassation. The association between the crimes requires an association of time. However, at what point is it safe to say that the crimes are correlated concerning the closeness of the times at which they were committed?

It is a condition for the provision of this aspect that there is causation between the willful murder and the crime associated with it, as the federal legislator does not apply a condition that the committing of one crime leads to the other; it is sufficient that it is committed with the murder. Both crimes may be independent with respect to causation in spite of sharing an element of time. It is not required that the crimes are both committed in one place, or that they have one victim or one objective, and accordingly it is sufficient that the other crime is committed prior to or after or in association with the murder<sup>66</sup>.

## **7. Variation in felonies**

If a number of felons have contributed to the committing of a willful murder in association with another crime, this is a condition of severity for each one of them, whether he is a direct perpetrator of the crime or has participated by causation only, or has contributed to either crime in his capacity as a partner by causation.

If either of the felons contributed to one of the crimes and not the other, the condition of association is not applicable to him unless the other crime (in which the perpetrator is not involved) is the probable consequence of the first<sup>67</sup>.

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<sup>66</sup> Ahmed, Hosam Aldeen Mohammed., Commentary on penal law (Arabic), *Sharh Qanoon Aloqobat*, part 2, Dar Alnahdha Alarabia, 2000, p 84.

<sup>67</sup> Alfiqui, Amr Issa., Homicide crimes (Arabic), *Alwajeez fi jaraem Alqtl Alamdi*, Alnistr Aldhahabi press, 2000, p 84.

## **8. Premeditated murder of relatives (parricide)**

The federal legislator in the United Arab Emirates increased the severity of the punishment for wilful murder if committed against a close relation of the perpetrator. Hence, the second paragraph of article 332 of the Federal Penal Code stipulated that “The death penalty shall be applied if murder is committed....on either of the perpetrator’s first degree relations”<sup>68</sup>.

The clause clarifies that the condition of severity assumes a direct relationship between the perpetrator and the victim, consisting of the father, the mother, the grandfather, or the grandmother, and no others. There are some other legislators who include the children or grandchildren<sup>69</sup>, but the UAE federal legislator limited the scope to these relations only. The question which may arise here is why the legislator considers harsher punishment for willful murder necessary if the murderer commits the crime against his first degree relations. The reasoning behind the increase in the severity of the punishment refers to the fact that it is a horrendous crime by all standards; it indicates the dangerous criminality of the perpetrator and reflects a dangerous mentality that knows no limits. Those who murder their father, mother, grandfather or grandmother commit a crime against nature, defying human nature. Accordingly, the perpetrators of this crime should be removed from society through imposition of the death penalty<sup>70</sup>.

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<sup>68</sup> In Islam the first degree relations are father, mother, grandfather and grandmother.

<sup>69</sup> See Article 549 of the Lebanese Penal Code and Article 327 of the Libyan Penal Code.

<sup>70</sup> Abukhatwa, Ahmed Shawki., op. cit., p 138.

As mentioned in Article 332, the condition for conviction concerning the murder of a close relation is that the murder is committed willfully with all the aspects previously mentioned. The relationship between the victim and the perpetrator must be father, grandfather, mother, or grandmother. The federal personal affairs law defines the existence or otherwise of a relationship, yet there is nothing to prevent the criminal judge from deliberating concerning this relationship considering that it is only a condition of the severity of the punishment without being limited to a certain method of proof.

An additional condition concerns the moral aspect or the intent of the perpetrator. This is that he must have knowledge of his relationship to the victim at the time of committing the act, and that the victim is one of his relations. If he is ignorant of this fact, then the condition of severity is not provided.

Another question may arise here concerning why the legislation is limited to the above-mentioned relations and to no other person, such as relations in the second degree. Islam calls in the Holy Qur'an for the respect due to parents, and not to refuse their orders or demands. From this the federal legislator has insisted that the parents must be cared for and obeyed according to the provisions of the Islamic *sharia*.

## **9. Homicide of a public employee**

The Federal Penal Code increases the punishment of premeditated murder if committed against a public employee, as stipulated in Article 332; “The death penalty is applied if murder is committed...on a public employee or those who are appointed to general duty during or because of their performing of their service”. It is made clear by this clause that the condition of severity is provided through the specific description of the victim, whether his being a public employee or appointed to public service, and that he is murdered during, or as a consequence of, or with regard to his performing or practicing the duties of his office.

The prudence of increasing the severity of the punishment relates to the fact that the perpetrator has murdered a public employee performing his duty, in the name of or for the benefit of the state. This is someone considered a representative of the state through the job he is performing. The committing of a murder in this light does not entail the person of the employee, but in fact entails the job he is performing or the service he is granting. Therefore, the federal legislator intended to provide protection to public employees to perform their duties and service in peace while, at the same time, encouraging people to join the public service.

The legislator requires two conditions to be fulfilled to impose the death penalty in this crime: firstly, the capacity of the victim, and the victim being a public employee or appointed to carry out a public service; the committing of murder during the performance of his job or as a result of it.

The first condition, relates to the committing of premeditated murder of a public employee or someone who is appointed to perform a public service. The victim in the crime of premeditated murder accompanied with aggravated circumstances must be a public employee or appointed to public service. The federal legislator in the United Arab Emirates has defined a public employee in Article 5 of Federal Penal Code as follows: "In the provision of this Law, the public employees are:

1. Those bearing encumbrances of the public authority, and those working in the Ministries and Government authorities.
2. Members of the Armed Forces.
3. Heads of Legislative councils, Consultations, Municipalities and their members.
4. All those appointed by one of the public authorities to perform a certain job, in limitations of the delegated job.
5. Chairmen of Boards, their members, managers and the remaining employees in the authorities and public establishments.
6. Chairmen of Boards, their members, managers and the remaining employees in the authorities and establishments with a public benefit".

Furthermore, all those who are not categorized in this article and who are appointed with a public service under the provisions of this law, and those who perform jobs related to the public service based on an appointment issued to him from a public employee who has this power of appointing, as per the laws or applied systems concerning the appointed job, are considered included. Also applicable in the enforcement of the provisions of the previous article is that the duty or job or service is either permanent or temporary, with or without wages, and may be either voluntary or

compulsory.

The second condition, relates to the committing of a premeditated murder of an employee during, or as a consequence of, or regarding, the performing of his duties. Not only should the victim be a public employee but the crime should be committed during, or as a consequence of this. As a result of this condition, if the crime is committed against a public employee for some other reasons or purpose not related to his duty or service, the severity of this crime shall not be increased. Moreover, to implement the increase in severity, the perpetrator should know that he is committing a crime against a public employee. A question may arise here: if a public employee performs his duty or service in violation of the job or its content and a crime is committed against him, shall this condition be imposed or not? Since the law has clarified the procedures to be followed by anyone receiving an act against the law or suffering from an action performed by a public employee, he should follow the procedure and submit an appeal and no excuse can be accepted from him concerning the murder of a public employee<sup>71</sup>.

#### **10. Murder by means of poisonous substance**

The Federal Penal Code increases the severity of the punishment for premeditated murder if poisonous substances or explosives are used. The crime of murder with poisonous substances is distinguished from other crimes of premeditated murder in that the method used to cause death is "poisonous substances". Otherwise it is subject to the elements of willful premeditated murders. The prudence of the increase in the severity

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<sup>71</sup> Ibid, p143.

of this crime is based on consideration of danger and treason and betrayal on the part of the perpetrator. This type of crime occurs most generally between people with whom the victim is comfortable and whom he trusts due to their relationship, such as his wife, children, friends, relations, and servants<sup>72</sup>. In addition, poison is, in its essence, easy to conceal in the victim's food and drink, and therefore its discovery or proof of its use is not easy. With this method, murder seems easy to commit and difficult to prove.

The federal legislator, concerning using a poisonous substance, stipulated in the second paragraph of Article 332 of the Federal Penal Code that "The death penalty is applied if murder is committed .... And a poisonous substance is used". In the Federal Penal Code, using a poisonous substance is considered to be a condition of increasing the severity of the punishment for premeditated murder, where the punishment becomes the death penalty. This situation is different from that stipulated in the French Penal Code, where the utilization of poison is in itself considered to be a crime, punishable by the death penalty, which is applicable if the victim merely ingests in the poisonous substances, even if the desired result, which is the death of the victim, is not achieved<sup>73</sup>.

For the existence of this circumstance, the method used by the perpetrator must be a poisonous substance, considering that it is an additive element. This differentiates murder with poison from other premeditated murders. Further, this substance when used is required to waste the spirit, as here related:

**Firstly**, Poison refers to each substance chemically affecting the fibres of a human in a

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<sup>72</sup> Meki, Mohammed Abdulhameed., op. cit., p130.

<sup>73</sup> See Articles 301 and 302 of the French Penal Code.



way which would lead to his death, regardless of its shape. It may be in a solid or liquid form or gaseous, and regardless of its source, whether it is from an animal, such as the venom of a snake, or a plant, such as morphine and cocaine, or a metal, such as copper or arsenic<sup>74</sup>.

In reality, the idea behind describing the substance as poisonous is not to draw attention to its nature but the effect occurring in the circumstances in which it is used. The substance may be non-poisonous by nature but become poisonous if mixed with another substance. The mixture in this case would be considered poisonous, or the opposite if a poisonous substance is mixed with another substance leading to the disappearance of its harmful effects. Some may hold that in this case there is no crime, considering that this mixing would cause the substance offered to be non-poisonous. Others may have the opinion that in this incident there is an intention to kill by use of poison, as the substance offered is in reality a poisonous substance and does not lose its poisonous attributes except for reasons beyond the control of the perpetrator.<sup>75</sup>

It is a condition of the application of the second paragraph of Article 332 of the Federal Penal Code for the substance used by the murderer to be poisonous, but if it is harmful only and would not normally cause death, but the perpetrator gave it to the victim with the intention of murder and it did result in death, then the action is be considered as wilful premeditated murder without aggravated circumstances. Whether or not the substance used by the perpetrator is a poisonous substance is a technical matter,

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<sup>74</sup> Abdulsatar, Fawzia., op.cit., p401

<sup>75</sup> Ibid, p. 402.

regarding which the judge shall refer to experts.<sup>76</sup>

**Secondly**, the use of a poisonous substance is defined as any action by the perpetrator enabling the poisonous substance directly to affect the functions of life in the victim's body, leading to death. For example, the condition is fulfilled if the perpetrators puts the poison within the reach of the victim, such as mixing it with his food or drink, or if he gives it to him through an injection into the body, or through the nose by inhalation of a poisonous gas, or through the mouth by food or drink, or through an open wound.<sup>77</sup>

If the perpetrator has used a poisonous substance and the victim dies, then he would be questioned concerning the murder about the use of poison. But if the criminal result, meaning the death of the victim, is not achieved for a reason within the control of the perpetrator, or if the relation of causation is non-existent between the action of the perpetrator and the death of the victim, then this is not considered proof of an intention to murder by use of poison and would not be eligible for the death penalty. For proof of the intention to murder by use of poison, the perpetrator must go beyond the preliminary stage of preparation and enter the implementation stage of the crime. The border between preparation and implementation is defined as putting the poisonous substance within the reach of the victim, making it probable that he will acquire or in some way ingest the substance<sup>78</sup>. Accordingly, the purchase of a poisonous substance is considered part of the preparation work and for this the perpetrator is not punished.

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<sup>76</sup> Alsagheer, Jameel Abdulbaqi., Crimes against individuals (Arabic), *Qanon Aloqobat "Jaraem Aldam"* Dar Alnahdha Alarabia, 1997, p 72.

<sup>77</sup> Abukhatwa, Ahmed Shawki., Penal law (Arabic), *Qanon Aloqobat "Alqism Alkhas"* University of Almansoor, 1985, p

<sup>78</sup> Salama, Ahmed kamil., Commentary on the penal law (Arabic), *Sharh Qanoon Aloqobat "Alqism Alkhas"* Nahdhat Alsharq, 1987. p 47.

Putting the poisonous substance within the reach of the victim, such that his acquiring of the substance becomes likely, is considered to be an action punishable by law, after which if the results are not achieved for reasons beyond the control of the perpetrator, such as the victim abstaining from eating the food, the perpetrator is guilty of the intent to kill by means of poison.

**Thirdly**, for the crime of murder by poison, the poisonous substance should be used with an intent to exhaust the soul, hence it is specified that the perpetrator should fully understand the end of his action, as to the nature of the substance used in the murder, and to its being poisonous. If he has no knowledge as to the nature of the poisonous substance, or an error has occurred regarding it, then the intent to kill is not considered legally satisfied.

The use of a poisonous substance in murder in the Federal Penal Code is considered a material condition of severity related to the method of committing the crime, and accordingly, all participants in the crime are affected. Murder by use of poison is normally accompanied at the same time by premeditation, as the preparation of the poison entails time, in which the perpetrator is given an opportunity to think calmly and become comfortable with his crime. However, murder can be committed by using poison without being premeditated if the perpetrator suddenly becomes intent on murder and the poison is prepared, such as if he gives the poison to his friend after a quarrel has occurred between them<sup>79</sup>.

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<sup>79</sup> Abdulsatar, Fawzia., op.cit., p 404.

Based on this, the use of a poisonous substance is considered to be a severity condition in itself, and is sufficient to increase the punishment leading to the death penalty according to Article 332 of the Federal Penal Code. The court, when it charges the accused with poisoning is required to have evidence that the substance used is a poisonous substance, and it can refer to expert opinion to determine the type of substance used. If the lawyer of the accused applies for the opinion of experts the request should be approved. Otherwise, the judgment will be considered faulty, thus justifying an appeal<sup>80</sup>.

### **11. Murder by use of explosives**

The crime of murder by the use of explosives is distinguished by the method used to effect death, that being an “explosive substance”. Other than in that, it is subject to the same elements as obtain for the crime of premeditated murder.

The severity of punishment in the crime of murder is related to the use of explosive substances and to the dangerous consequences of the practice of this method in murder, either at the level of financial damage that may result from it, or at the level of moral and psychological damage incurred to the safety and stability of the society. Although the UAE Penal Code is similar to that in Egypt, this circumstance is not mentioned in the Egyptian Penal Code. However, this circumstance does occur in the Lebanese Penal Code<sup>81</sup>. This difference in the codes might be explained by the fact that the UAE Penal Code is newer than that of Egypt, and the UAE Penal Code was issued in 1987 when the use of explosives was becoming more familiar around the world.

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<sup>80</sup> Abukhatwa, Ahmed Shawki., Crimes against individuals in UAE federal penal law (Arabic), *Aljaraem Alwaqaaa Ala Alashkhas fi Qanoon Alogobat Alittihadi*, albayan press, 1990. p 153.

<sup>81</sup> See Article 549 of the Lebanese Penal Code.

The crime of murder by explosive substance requires the use of explosives and the intent to murder one or more persons, whether or not the perpetrator has selected the victims, since the use of explosives entails the possibility of mass and unforeseeable consequences. Thus, if the perpetrator intends to murder an appointed person with an explosive substance and it kills other persons, he will be charged with murder for having explosion to kill all of them. The use of an explosive substance is considered a severity condition on its own, and it is sufficient to increase the punishment of murder, leading to the death penalty, as stipulated in the second paragraph of Article 332 of the Federal Penal Code.

As has been seen, the UAE legislator was influenced by the Egyptian legislator when it imposed the death penalty for murder accompanied with aggravated circumstances contradicting the Islamic *sharia* provisions. The writer interviewed<sup>82</sup> Mansoor Al-Awadhi, a judge of the Dubai Criminal Court, who gained his law degree in Egypt, and questioned on this issue. The judge said that the UAE legislator was, indeed, influenced by the Egyptian laws, which in turn had been influenced by French ones. Moreover, he said that the legislator in the UAE took this step to reduce the number of murderers who might face the death penalty for murder, since most murder crimes are not accompanied by aggravated circumstances. He added that if this were not the case the judges themselves would be in an embarrassing situation, since they would be under pressure to impose many sentences of death, a position they would not favour. Judge Al-Awadhi is himself opposed to use of the death penalty for murder not accompanied by aggravated circumstances.

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<sup>82</sup> The interview took place at Dubai Criminal Court. 20.8.2007

### 5.1.3 The crime of rape

There is no doubt that protecting people from being insulted whether morally or physically is one of the priorities for modern legislations. The UAE legislator shows responsibility in this matter, in order to afford protection to people not being sexually attacked. The death penalty may be imposed as a discretionary punishment for crimes of rape. This crime, which may be committed against both genders, is defined by the force or moral compulsion. Thus, the crime of rape is different in kind to both the crime of adultery and the crime of sodomy, because of the element of force or moral compulsion. Whereas the presumption in a crime of adultery is that illegal sexual relations took place by mutual consent, the crime of rape expresses the will of one party only. Not only is force a condition of rape, the crime requires full sexual intercourse to have occurred. Without satisfying this condition, a death sentence cannot be imposed.

As has been stated the force implied here can be a moral or a physical one. Physical force might be proved by the forensic examination of a doctor and other possible consequences of the incident<sup>83</sup>. However, proving the presence of moral force is the task of the judge in his interpretation of the particular circumstances of the alleged crime. Since the age of sexual maturity is taken to be 14 in UAE legislation, consent is not an accepted plea by the offender if the victim is below this age. Thus, the legislator fully protects minors as well as those who have suffered forcible rape by allowing for the imposition of the death penalty in both cases<sup>84</sup>.

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<sup>83</sup> Pregnancy or the sudden appearance of venereal disease might be two such possible consequences

<sup>84</sup> This is a complex and difficult question for all judiciaries. By raising the threshold, for example, 16 may give age protection for sex offender but not for the victim. On the other hand depending on her sexual maturity, a female may complain falsely of an act of intercourse in which she willingly participated.

## **5.2 The death penalty in the anti-narcotic code**

After the increase of the illegal trade and circulation of narcotic substances in the world in general and in the United Arab Emirates in particular, the federal legislator issued Law No. 6 for the year 1986, further amended by Law No. 14 for the year 1995. These laws have designated severe punishment for the illegal trade and circulation of dangerous narcotic substances, up to the imposition of the death penalty.

What is significant in the context of this research is the clause on the death penalty for certain specific narcotic crimes, as stipulated in the aforementioned law, which will be studied in detail below. All punishments are discretionary since these crimes are not divine ordinance or retaliation crimes.

### **5.2.1 The Crime of instigation and dealing in substances harmful to the person**

In order to protect both society and individual human beings, the UAE legislator used his authority, provided in the Islamic *sharia*, to impose severe discretionary punishments for those who initiate or instigate the dealing of substances harmful to the mind with the intent of causing injury or harm to society and the individual. He decided to impose the death penalty if this crime led to the death of one or more persons, without violating the rights of the deceased's guardians to claim the legal blood money<sup>85</sup>. It is noteworthy here that the legislator did not distinguish between dealing in a particular quantity of drugs. This is a distinction that surely should have been made. For instance, it is easily argued that the death penalty for those who deal in large quantities of drugs might be essential, since the harmful consequences of large-scale

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<sup>85</sup> See Article 45 Of the Federal Law on Combating Narcotic Substances.

dealing are obvious. On the other hand, as a police officer, the writer can say he is reasonably confident that the majority of drug abusers, among young people in particular, trade in small quantities of drugs in often motivated by the need to earn money so that they can buy drugs for their own use. It does not seem equitable or proportionate to implement the death penalty in such cases. It might be argued that young people in these circumstances should be treated as patients suffering an illness rather than as criminals.

### **5.2.2 The crime of cultivation, manufacture, trade and possession of narcotics**

In view of the gravity of this crime, and considering that it is the main reason for the ingress of narcotics in the State, and the harm incurred by society, the legislator has strongly expressed his condemnation of such actions by increasing the severity to liability to the death penalty<sup>86</sup>. Here there is clearly a situation of an illegal trade, causing harm to people, that hides criminals who deserve severe punishment. Given the geographic situation of the United Arab Emirates, located close to countries like Iran, Pakistan, Afghanistan and India, the legislator is required to be strict in fighting such crimes to protect both individuals and society. Manufacturing or growing drugs for the purpose of trade cannot be considered a crime of little importance should be fought with a practical and severe punishment, namely the death penalty. However, the legislator might have given full discretion to the court to decide the punishment according to its circumstances and the quantity of the narcotic grown or manufactured.

The legislator differentiates between possession and the means of obtaining a narcotic

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<sup>86</sup> See Articles 6, 35, 36 and 48 of the Federal Law On Combating Narcotic Substances.



substance. As already stated, the legislator has increased the severity of the penalty for obtaining with an intent to trade, making it punishable by death. Possession is liable only to a penalty of life imprisonment, together with a minimum fine of fifty thousand dirhams. In the event of a second or subsequent offence, the legislator has decreed that this may be dealt with by imposing the death penalty.<sup>87</sup> Here again we note the legislator's intention to be more harsh towards repeat offenders, since their behaviour indicates that the original punishment was not a sufficient deterrent in their case.

### **5.2.3 The crime of assaulting employees enforcing the laws on narcotics**

The legislator safeguards employees enforcing the provisions of this law and imposes severe punishment on those who assault or oppose employees enforcing the provisions of the law. In particular officers of justice, and officers of narcotics, are protected under this law, which entails progressive punishment, as in the following:

A. For transgression or opposition without inflicting wounds or assault, the legislator provides an imprisonment for a period of not less than three years and not more than five, and a minimum fine of twenty thousand dirham minimum, not to exceed one hundred thousand dirhams.

B. For transgression or opposition with infliction of injury or assault, the legislator has made the punishment more severe in view of the greater harm being incurred by the employee who has been injured or beaten. Punishment is raised to imprisonment for a minimum of five years, not to exceed ten, and a minimum fine of twenty thousand dirhams, not to exceed one hundred thousand dirhams.

C. For transgression or opposition where the public officer suffers a permanent or

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<sup>87</sup> See Article 49 of the previous law.

incurable disability, and where the perpetrator at the time of the crime is carrying a weapon. For this he may be punished with life imprisonment, or imprisonment for a minimum period of ten years, and a minimum fine of twenty thousand dirhams, not to exceed one hundred thousand dirhams.

D. If the injury or beating leads to the death of the public officer, the legislator raises the punishment to a mandatory death sentence.<sup>88</sup>

As we can see, the legislator provides protection for the officers who work in fighting crimes involving narcotics, since these crimes are harmful not only to the individuals themselves but also to the whole of society. The legislator was surely correct in this instance in imposing the death penalty. The public officer needs to feel that the legislator has afforded him the maximum safety and security so that he can undertake his duties without fear.

The question arises as to whether it is possible to lower the deterrent sentences for combating the use and traffic of narcotics. Despite the fact that the legislator has clearly stated in the anti-narcotic code that all punishments mentioned in the law may not be decreased, reductions have been made. The judges should adhere to the provisions of Article 65, which states “the court cannot decrease the punishment mentioned in this law”, but in practice they do not. Perhaps the legislator was acting excessively in not allowing reductions in severity, since this has prevented courts from using their discretion to take each case on its merits. Although, the legislator did well to impose the death penalty for the most serious narcotics crimes, he did not specify the quantity of

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<sup>88</sup> See Articles 52 and 53 of the previous law.

drugs with which a perpetrator must have dealt. It is surely not fair to equate large and small quantities of drugs. Experience as a police officer has taught the writer that many people buy drugs simply for their own use, or occasionally to supply small quantities to others. In an interview with Dr. Ali Hassan Galadari of the Dubai Criminal Court, this judge was asked about determinate and mandatory sentencing by the legislator, and whether judges should be allowed to exercise their discretion in varying punishment to pass sentences lesser than the death penalty. His reply was that although the punishment is determinate, and article 65 clear enough, the judges should adhere to the law of criminal procedure, which provides that the three judges constituting the court must agree on the death penalty. If one of the three judges is not persuaded of the necessity for the death penalty then that punishment is waived and life imprisonment is imposed instead. Dr. Galadari added that the judge has full authority to evaluate each case on its merits, and to issue a sentence that fits all the circumstances of the case. These may include the age of the accused, the quantity of narcotic substances, and other elements<sup>89</sup>. Dr. Galadari went on to say that the death penalty is not in practice a definite punishment in narcotics cases, since the evaluation of the circumstances of each case rests with the prerogative of the judge.

### **5.3 The death penalty and the anti-terrorism code**

The United Arab Emirates legislator, after the occurrences in USA of September 11th, 2001, and as in some other countries in the world, attempted to prevent acts of terrorism<sup>90</sup>. He passed a new code in 2004 for this purpose. What is of relevance to this

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<sup>89</sup> The interview with Dr. Galadari took place in his office at Dubai Courts on 18.8.2007

<sup>90</sup> USA, for example, produced Patriot Act, effective 1<sup>st</sup> Feb. 2002, to fight terrorism.

thesis is that the death penalty would be imposed only for action when death occurs. This conforms to the provisions for murder with aggravated circumstances. Moreover, all actions provided for in the new code could have been dealt with under the penal code, since all these actions are contained within it. Examples are: attacking a means of public transport or diplomatic premises, or by using explosives. The most surprising aspect of this new code is that all the accused, charged under anti-terrorism legislation are committed for trial before the Federal Supreme Court. This applies without distinction to citizens or residents of the UAE, even in those emirates which operate their own supreme court. Yet, as we have seen, the Federal Supreme Court is the highest authority in the land, and therefore the offender or the offender will not be granted the same legal possibilities as those tried before a lower court, since the judgments of the Federal Supreme Court can not be appealed.

## **Conclusion**

The United Arab Emirates has certainly aimed at maintaining the internal security of the state through its penal legislation. It has also aimed at maintaining the security of individuals by criminalizing offences such as drug dealing, which jeopardize human life and lead consequently to disruption both in the field of work and in other important functions of society.

It is apparent that the legislator has applied strict penalties, culminating in the death penalty, and has sometimes gone further by issuing specific penalties for drug dealing offences, without giving the judge discretion to choose between a minimum and maximum limit. This issue is controversial, since the legislator might perhaps have

enabled the judge to exercise free discretion. Apparently, the judge who chooses a penalty lighter than that contained in the law is in breach. Yet in the evidence of Judge, Dr. Galadari, courts do exercise discrimination on the particular circumstance on narcotics cases. Here we can say there is a legal uncertainty between the penal code and the provisions of the laws of criminal procedure.

It is also clear that the legislator has designated the death penalty for premeditated murder with aggravated conditions, and has not designated the same for premeditated murder not associated with aggravated conditions. This is in violation of the regulations of the Islamic *sharia*, which do not provide for such a distinction. Here we can say that the legislator has pursued a penal policy that is influenced by Western legislation, as well as specifically the Egyptian Penal Code which imposes the death penalty only for homicide associated with aggravated conditions. In this case, it might have been better for the legislator to have prescribed the death penalty as a retaliation punishment, after giving notice to the blood relatives that they could choose to waive their right to retaliation and accept compensation or not. In the first Article of the Federal Penal Code, the legislator has decreed that the *shaia* must be implemented in cases of crimes of divine ordinance, retaliation and blood money, yet there appear to be contradictions to this principle in the current legislation.

## **Chapter Six**

### **The rights of the defendant and the evidential guarantees (safeguards) prior to the implementation of capital punishment within the UAE legislation**

#### **Introduction**

The legislator in the United Arab Emirates has acknowledged the death penalty for several crimes, whether they are crimes jeopardizing national security or individuals, as have most other Islamic countries. Simultaneously, he has surrounded the criminal convicted of a crime with safeguards that apply during the investigation and prior to the implementation of a punishment. The legislator has adopted strict measures in relation to of these safeguards. Politicians and rulers have also intervened in the affairs of the state to limit the use of the death penalty in discretionary crimes, in addition to using their authority to mediate in order to prevent the execution of the death penalty as a retaliation punishment, as will be seen in this chapter.

Accordingly, these safeguards will be categorized and discussed in detail, along with the right of defendants to defend themselves and the right of the judge to elaborate his own doctrine and methods of evidence. Consideration is also given to the safeguards that the legislator has secured for the defendant after the issuance of the death sentence in terms of whether the sentence implemented. Moreover, we will examine the method of implementation of the death penalty and clarify the extent to which the legislator actually uses the death penalty in the United Arab Emirates.

## **6.1 Death sentence safeguards in the procedures of the criminal court**

The intention of these procedures is to avoid as far as possible the execution of an innocent person. The discussion includes safeguards during the final interrogation, carried out by the court. After the public prosecution has completed its investigation of the crime and decided it must be transferred to the court, there are specific procedures governed by rules which the court must consider, and which are related to the final interrogation before deliberation. The general rules of the final interrogation are illustrated here, followed by the rules that govern the criminal prosecution, and finally the evidence admissible for the criminal prosecution.

### **6.1.1 The general rules of interrogation**

The source of criminal prosecution according to the Federal Criminal Procedure Law, is mainly based on the interrogation conducted by the court to determine whether the accused is guilty. This includes listening to the statements of fact presented by the public prosecution, as well as listening to the defence witnesses. As a general rule, the court session must be in public, in contrast to the initial interrogation. The public has the right to attend sessions, and this principle is inherent in all legislation<sup>91</sup>. Article 161 of Law of Criminal Procedure confirms this principle by stating "The session must be public. However, the Court in compliance with the public order or maintaining may rule that the hearing of a case may be completely or in part a closed session or to prevent the attendance of certain categories of person". Accordingly, the federal legislator under certain conditions has qualified the principle of public session to be limited to a closed session or not to be attended by some people if the court recognizes a reason for this to

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<sup>91</sup> Jihad, Jouda Hussain., Commentary on criminal procedure law (Arabic), *Alwajeez fi sharh Qanon Alejra'at Aljenaeya*, part 2, first edition, 1994. p 34.

apply, but this is to be taken as an exception to the general rule<sup>92</sup>. For example, the UAE courts hear most cases of sexual offences in closed sessions to avoid any kind of embarrassment that might occur, in particular to female victims.

The court carries out an interrogation of the incident in the session by questioning the accused on the charge and hears the witnesses and experts, all in accordance with the principle which stipulates that it is not permissible to base a judgment on any evidence which is not presented before the court in hearings<sup>93</sup>. Article 209 of the Federal Criminal Procedure Law of 1992 confirms this principle by stating "The judge passes the judgement according to the conviction formed within himself, and accordingly he may not build his judgement on any proof which is not presented against the accused before him in the hearing". Accordingly, the verbal defence is an essential guarantee of basic human rights since it is not viable to judge a person based solely on the testimony of the witnesses or documents without giving him the full opportunity to present his defence. In the Islamic *sharia* it is the plaintiff's right to make his case and claims, followed by the accused who has the right to defend himself by objecting to the evidence presented by the plaintiff. It was narrated by Ali Ibn Abi Taleb (may God be pleased with him) that the Prophet (PBUH) said "If two men came for judgment, do not judge the first one without hearing the second"<sup>94</sup>.

The final interrogation conducted by the court must take place in the presence of all the opposing counsel, and accordingly the Federal Criminal Procedure Law requires the

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<sup>92</sup> Obaid, Raouf., Procedure law principles (Arabic), *Mabade Alejra Aljenaeya*, Dar Aljeel press, 16<sup>th</sup> edition, 1985, p 639.

<sup>93</sup> Ibid, p 651

<sup>94</sup> Alhafez Abi Abdulla Mohammed Ibn Yazeed Alqazwani, Dar Alfiker, part 3, p 744, see also; Sanad, Najati., op.cit., p.81



notification and serving of all legal adversaries with the scheduled date of hearing. Notice given in the case of fines would be one full day prior to the hearing, three days for misdemeanors, and ten days for capital offences<sup>95</sup>. Moreover, the final interrogation may not be conducted without the public prosecution's representative being present, considering that it is a part of the court formation, just as the interrogation may not be conducted in the absence of the opponents, whether the session is closed or in public.

The attendance of the accused is a condition for the validity of the judgement procedures, and accordingly any procedure may not be taken in his absence or without his knowledge, otherwise the judgement shall be void for failure to follow procedure. However, an exception to this rule necessitating the presence of the accused in the session is stated in Article 164 of the Criminal Procedure Law, which requires the exclusion of the accused if he starts to behave badly during the session, and the court in this case has to inform him about the procedures undertaken during his absence<sup>96</sup>.

### **6.1.2 The right to an attorney**

The exclusion of the accused does not prevent the attendance of his representative since the ability of the accused to resort to an attorney to defend him is a principle confirmed in all documents and policies, and is stated in the International Civil and Political Human Rights Declaration, on which the General Assembly of the United Nations unanimously agreed on 16/12/1966. Furthermore, the accused must be provided with an attorney by the court if he does not have one, without burdening him with attorney fees

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<sup>95</sup> See Article 158 of the Federal Criminal Procedure Law

<sup>96</sup> Suroor, Ahmed fathi., Commentary on criminal procedure law (Arabic), *Alwaseet fe Sharh Qanoon Alejara'at Aljenaeya*, part 2 Dar alnahda alarabia, 1980. p 346

in case he does not have the capability to pay for them<sup>97</sup>.

In addition, the Islamic *sharia* confirmed the principle of the right to an attorney. The precedent for this is found in the book of *Nassab Quraish* by Al-Zobeiny, where it is stated that there was a dispute between Hassan Ibn Thabit and many people before Othman Ibn Affan, in which Othman issued a judgement against Hassan. Hassan complained to Abdullah Ibn Abbas, and Abdullah told him he was in the right. They went to Othman Ibn Affan with this, and Abdullah Ibn Abbas gave his opinion, and this right was made clear to Othman, and accordingly judgement was passed in favour of Hassan Ibn Thabit<sup>98</sup>.

UAE legislation does not stray far from this point, as it accepts the presence of an attorney without the attendance of the accused, or the attendance of the accused without the attorney, in misdemeanors and violations unless the court requires the attendance of the accused, and this necessitates both the attendance of the accused and his attorney<sup>99</sup>. As it has been shown, the attendance of an attorney is essential in capital cases where the accused might face the death penalty, and even if the accused cannot afford one, the court must provide. There is, nevertheless a troubling scenario, related to in more detail

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<sup>97</sup> In an interview with Mohammad Abdul-Malik, a well known lawyer in Dubai, this writer put it to him that a poor offender who cannot afford a good lawyer is more likely to be sentenced to the death penalty. He disagreed strongly, saying that according to the judicial system, the court must appoint a lawyer for any defendant who cannot afford one. I replied that a lawyer might not be enthusiastic to take the man's case since he might find himself not paid for his work. But Mr. Abdul-Mailk contended that in the majority of cases where a perpetrator might face the death penalty, the judge himself would appoint a lawyer who he believed would not spare any effort to defend his client, and that he had witnessed this several times. (The interview took place at Mr. Abdul-Malik's office in Dubai, 17.12.2007).

<sup>98</sup> Al-Qasimi, Dhafer., Governing structure in Islamic sharia and Islamic history (Arabic), *Nidham Al hokm fi Alsharia wa Altarikh Alislami*, Dar Alnafaes, 1978, p 382

<sup>99</sup> See Articles 194 and 195 of the Federal Criminal Procedure Law.

later, in which the accused may be unable to pay for a qualified lawyer and be poorly represented even on a capital charge.

### **6.1.3 Record of the proceedings**

The proceedings of the interrogation must be recorded in a report to prove that the testimonies of the dispute are documented. This report should also include the session date, the names of the judges, public prosecutor, clerk, and opponent, the testimony of the witnesses, the testimony of the defence, and the claims presented by all parties, even those judged to be on side issues. The senior clerk of the court must sign each page of the report<sup>100</sup>.

## **6.2 Admissible criminal evidence**

The legislator in the UAE has authorized the court to prove the innocence or the guilt of the defendant according to the evidence submitted to the court from all parties. Accordingly, the discussion here divides into two topics: the freedom of the judge to establish the conditions for a conviction; and the methodology of admissible criminal evidence. The purpose is to examine the extent to which the legislator's attempt to surround the suspect with safeguards is effective.

### **6.2.1 The Freedom of the judge to establish his Conviction**

The majority of modern legislative procedures adhere to the principle of the freedom of the conviction of the judge, that he may accept all evidence presented to him, and he has complete freedom to evaluate each piece of evidence and to accept and refuse evidence

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<sup>100</sup> Jehad, Jouda Hussain., op. cit., p52

at his discretion. The Federal Supreme Court in the United Arab Emirates has confirmed this principle<sup>101</sup>.

Further, the Federal Criminal Procedure Law applied this principle when it decided in Article 209 “The judge in the case passes judgment according to the conviction formed, and accordingly may not build his judgement on any evidence which is not presented to the opponents before him in the hearing”. In accordance with this provision, the principle which grants the judge freedom of conviction through evidence or lack of in it is not definite, and this freedom is limited as follows.

### **6.2.2 Establishing conviction according to the Evidence**

Among the main guarantees in criminal trials is the assumption of the innocence of the accused person until proven guilty<sup>102</sup>. The Islamic *sharia* confirms that it is sufficient for the judge to doubt the soundness of the charges presented against the accused in order to proclaim his innocence<sup>103</sup>.

In addition, the evidence from which the judge derives his conviction must be sound and in compliance with the law. Accordingly, the judge may disallow evidence, such as that acquired from the testimony of a witness given under duress, or evidence acquired from a false arrest or search<sup>104</sup>.

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<sup>101</sup> Appeal No. 23, hearing on 6/11/1986, Appeal No. 54, hearing on 11/3/1985.

<sup>102</sup> Appeal No. 45, hearing on 18/1/1985

<sup>103</sup> Abukhatwa, Ahmed Shawki., Commentary on Federal Criminal procedure law of the UAE (Arabic), *Sharh Qanoon Alejara'at Aljazaeya le dawlat Alemarat*, Albayan press, part 2. 1990. p 63.

<sup>104</sup> Abu-Amer, Mohammad Zaki. Crime proof in criminal issues (Arabic), *Allthbat Fe Almawad Aljenaeya*, Alfaniya lelteba'a (Alex.Egypt), 1985, p.157

The judge should not establish his judgement on evidence which is not presented to the defence in the session, and he may not build his judgement according to personal information, unless this information is a scientifically established view<sup>105</sup>. Article 152 of the Federal Criminal Procedure Law of 1992 stipulates that the court must refer to non-criminal issues in which it passes judgement in accordance with the related laws, and accordingly if a civil incident is brought before a criminal judge, and it is considered an element leading to the crime, then with regard to its proof, the court must refer to the methods of proof applied in civil law.

### **6.3 Methods of Criminal Evidence**

Methods of evidence as stipulated by the Law of Criminal Procedural are: testimony, confession, expert opinion, documentation and presumption. The methods of evidence can be divided into two parts: direct and indirect methods. The direct method is that which directly applies to the incident requiring proof. These methods are confession, testimony, expert opinion and documentation. The indirect methods do not directly apply to the incident requiring proof, but apply to the other incident having a logical and fixed connection to them. They require the judge to reason and deliberate to extract from the incident to which the evidence applies implications for the other incident requiring proof, and these methods produce “presumptions”. Accordingly, these methods, which are testimony, confession, expert opinion, documentation and presumption, are presented to establish the extent to which the legislator is strict in his judgement, with particular consideration of the death penalty and the need to avoid mistakes in executing the penalty.

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<sup>105</sup> Obaid, Raouf., op, cit., p 694.

### 6.3.1 Testimony of witnesses

The summoning of witnesses occurs in accordance with the Federal Criminal Procedure Law by instructing them to attend as per the request of one of the plaintiffs or a member of the public authority. This should be twenty four hours prior to the hearing session, not including the time required to travel to the court, except in cases where the criminal has been caught red-handed, in which event the parties may be instructed to attend at any time. These instructions can be given verbally through any member of the judicial or public authority, and the witness may appear without a summons upon request<sup>106</sup>. During deliberation of the case, the court may summon and hear the testimony of any person, even through the issuance of a court order if necessary, and it also has the right to instruct a person to appear at a further hearing<sup>107</sup>.

For the testimony to be considered as admissible evidence, certain conditions must be met by the witness, the most important being:

(1) The witness must be capable of exercising reasonable discretion and be able to distinguish actions and events. Accordingly, testimony is not accepted from a minor, from a lunatic or drunk, or from someone under undue duress, whether from a psychological or economic point of view<sup>108</sup>.

(2) The witness should swear a legal oath before giving his testimony, to tell the truth, and nothing but the truth.

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<sup>106</sup> See Article 89 of the Federal Criminal Procedure Law

<sup>107</sup> See Article 93 of the previous law.

<sup>108</sup> See Article 91 of the Federal Criminal Procedure law, which allows the court to hear testimony of someone who is not at least 16 years of age without oath and just as a reference.

(3) The witness may not be both a witness and judge at the same time. Accordingly, it is not acceptable for the judge to be a witness in the case over which he is presiding. Also, it is not acceptable that the public prosecutor attends the case as a witness in it. Identical restrictions govern the session clerk and the translator.

The federal legislator does not differentiate between the testimony of a man and a woman. He considers both their testimonies to be equally valid and reliable. This is in contravention of the Islamic *sharia*, which states that a man's testimony is equal to the testimonies of two women.

### **6.3.2 Obligations of the witness**

All those who have been summoned to testify before the case should attend on the date scheduled for the hearing. Hence, if someone fails to attend, the court may issue a warrant for the arrest of this person, and may obligate him to pay a fine. The court may also pardon him from paying the fine if he appears and presents a viable excuse for his absence.

If a witness presents an acceptable excuse for his inability to appear, then the court may dispense with his presence and delegate any judge to hear his testimony, as expressly stipulated in Article 94 of the Federal Criminal Procedure Law: "If the witness is sick, or prevented from attending, then his testimony would be heard in place of his presence".

The court may issue such a delegation by dispatching to the judge to whom the delegation is issued any written questions presented by the public prosecution or

defence, or presented by the court itself, that are related with the subject matter. Hence, the judge is required to interrogate the witness with these questions and record the witness's responses to them.

### **6.3.3 The power of testimony as evidence**

The most important issue here is how the strength of the testimony is determined in deciding the guilt of the accused. The court has full discretion in evaluating the testimonies of the witnesses, as it may accept the testimony of a witness with whom it is comfortable, and reject that of a witness if it doubts its soundness. It may also accept the testimony of a witness related to the victim, hence it cannot be blamed if it accepts the testimony of a dying victim, as long as it is comfortable with the attendant circumstances. The stipulations of Article 88 of the Federal Criminal Procedure Law are in accordance with this interpretation. The court has the right to divide the testimonies of witnesses to derive what it regards as suitable in the right of any accused person, rejecting what it sees as unsuitable. It also has the right to accept statements transferred by one witness from another, even if it is denied by the other, if it perceives that this statement is the truth and represents a legitimate defence in the case being deliberated upon<sup>109</sup>.

There is no obstacle that would prevent the court from taking oral evidence, even if contradictions exist with the technical or written evidence, as long as these contradictions do not reach an extent that makes it impossible for them to be adjusted and concealed. Moreover, contradictions in the testimonies of witnesses with regard to

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<sup>109</sup> Federal Supreme Court, appeal No. 19, hearing on 25/6/1984.  
-see also Dubai Cassation Court, appeal No. 35, hearing on 17/7/1994



any incident will not prevent the court from taking into account these incidents once convinced of them.

The court also has the right to decide the extent to which a witness is to be believed, and the value of his oral evidence, in light of the behaviour of the witness, the circumstances of the case, and facts which may be revealed during the prosecution.

Evaluating the testimony presented by the witnesses before a court, as well as in the initial interrogations, is an objective issue subject to the supreme authority of the court. Regarding this, the Court of Cassation may not exercise control, as the court is not obliged to state the cause of its conviction concerning the testimony of a certain witness, or why it has accepted the testimony of one of the accusers and rejected the testimony of another. The cause is apparent in law, which is its ease with what it accepts, and its unease with what it rejects<sup>110</sup>. From this discussion, it can be seen that the court or the judge has full authority to accept or reject a testimony of any witness or to accept one part of it and reject another part. Accordingly, the testimony cannot condemn an innocent person to be sentenced to death unless there is abundant supporting evidence against the accused.

#### **6.4 Confession**

Confession is admission by the accused that he has committed the crime, in whole or in part, in front of a judge at a court hearing<sup>111</sup>. Confession by this definition gives the court the right to judge the accused without hearing from witnesses unless it doubts the

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<sup>110</sup> Ramadan, Medhat., Commentary on the UAE criminal procedure law (Arabic), *Alwajeez fi Sharh Qanoon Alejra'at Aljazaeya Alittihadi*, The UAE University Press, p 262

<sup>111</sup> Abu-Amer, Mohammed Zaki., op. cit., p 946

confession<sup>112</sup>. Accordingly, Article 165 of the Federal Procedure Law stipulates "If the accused confesses to a charge, the court has the right to issue its judgment without hearing the witnesses unless the committed crime is punishable by the death penalty, in which case the court has to go ahead in its examination". Here the legislator gives a clear indication that he has provided safeguards for the accused who face the death penalty even after his confession, since the accused might give a false confession for some reason. Moreover, the legislator has provided further conditions that apply to the confession.

#### **6.4.1 Conditions for a sound confession**

For a confession to be admissible as prosecuting evidence, certain conditions should be met, among which are:

1. The confession should be issued by the accused against himself, as a confession issued from one accused against another, even if in the same crime or case, is not considered or taken as a confession. This is regardless of whether another accused person has confessed to the charge or denied it since the testimony of one accused person against another is considered admissible evidence.

2. The confession should be issued by a person who can distinguish between things and has free will. It is not considered to be a confession if given by a lunatic, even if he is sane when he committed the crime. It is also not considered a confession if given by a person under the influence of drugs or as a result of economic or psychological duress.

By economic distress is meant that the accused in a condition of such distress that he

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<sup>112</sup> Ibid, p 946

will willingly accede to any suggestions put to him in order to ensure his own or his family's survival. By psychological duress is meant a torture or attack, such as members of the authorities extracting a confession by telling the accused that another person has confessed and that he should therefore confess as well<sup>113</sup>.

4. The confession must be definite, clear, and reliable at the time it is made; hence, it is not feasible to accept a confession concerning any incident made at the crime scene or shortly thereafter<sup>114</sup>.

5. The confession must be given or repeated by the accused in front of the court. Statements by the accused in a report made during the investigation or the initial interrogation, or before an administrative authority or a witness, cannot be reliable. Yet the court may base its decision concerning the confession of the accused if it occurs in front of witnesses or was written by himself, and if the court feels confident concerning its soundness and consistency with the truth after prosecuting the case<sup>115</sup>.

It is perhaps a criticism that the most important condition here might not be sufficiently robust is establishing that such a confession of guilt should be given by the defendant in a manner that is free and voluntary<sup>116</sup>. This condition confirms the provisions of Islamic *sharia*, which asks the accused to hide his sin and to repent in cases such as divine ordinance crimes. Experience as a police officer has shown the writer that some policemen put the defendant under pressure to confess to crimes that he or she might not have committed, based on extraneous or corrupted evidence. Consequently, the court

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<sup>113</sup> Suroor, Ahmed Fathi., op, cit., p 335

<sup>114</sup> Ibid, p 337

<sup>115</sup> Federal Supreme Court, appeal No. 45, hearing dated on 18/1/1985

<sup>116</sup> Shaw, W. Evidence in Criminal Cases, Butterworth & Co. (Publishers), London, 1932, p.30

and judge bear a heavy responsibility to ensure that confession is given freely and voluntarily.

#### **6.4.2 The value of the confession in proving the crime**

Upon the court having been assured as to the confession, satisfying provision of the condition for its soundness, it may refer to it as evidence in a case. The court also has full liberty to estimate the value of the confession as evidence. It may accept it as soon as it is assured of its soundness and conformity to the facts of the case, because a confession conflicting with these facts may not be accepted. It may be the intention of the accused in his confession to hide the true criminal, with whom the accused may have a family relationship or interest, or to avoid his prosecution for another, more dangerous crime. Accordingly, the judge is required to investigate the extent to which the confession complies with other evidence in the case. He may accept it if he feels confident with it or exclude it if there is any doubt as to its soundness, regardless of whether the confession was made before him during the initial interrogation or in the session, and regardless of whether the accused stands by it or renounces it<sup>117</sup>. Accordingly, it is permissible for the judge to divide the accuser's confession, accepting from it what he sees as right and omitting the rest as void. As an example, if the accused acknowledges having committed the crime of murder but not premeditated murder, the acknowledgement of murder may be taken by the judge. Subsequently, the more precise circumstances of the crime will be considered with regard to premeditation or ambush,

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<sup>117</sup> Ramadan, Medhat., op. cit., p. 265.

and the accused may be convicted based on the provision of evidence from an additional source.

The principle of dividing the confession of the accused originates in the freedom of the judge to establish a conviction, and pertaining to this principle, the UAE Federal Supreme Court has stated "The judge may divide the confession, accepting what he concurs with and omitting what he doubts"<sup>118</sup>.

In serious criminal cases in the United Arab Emirates, there is no pressure on confession resulting from the practice of plea bargaining before trial. Unlike the situation in the USA, where it has recently being reported that as many as 50 percent of cases are settled before a hearing<sup>119</sup>, the prosecutor and defence counsel do not make back room deals. Moreover, the accused is not offered an incentive to confession by the practice of variable sentencing in order to avoid a heavier punishment.

## **6.5 Expert Opinion**

An expert is one who by reason of his experience or skills in a specific field is qualified to speak on points on which he is asked to come to a logical conclusion<sup>120</sup>. The UAE legislator authorizes the court, whether on its own or by the request of the opponents, to appoint one or more expert to give his technical opinion concerning an incident of

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<sup>118</sup> Federal Supreme Court, appeal No. 23, hearing on 23/4/1984

<sup>119</sup> Reported in Albayan newspaper, issue no. 11733, 2.8.2012, p.10

<sup>120</sup> Shaw, W., op.cit., p.97

significance in the criminal (penal) case which it is considering<sup>121</sup>. In essence, the court is the highest expert in a criminal case, and accordingly, it may accept or reject the report of an expert. If it is not convinced by the report of the expert, it may appoint another expert, as this process falls under the limits of the assumed authority of the court. The court may also make use of the report of an expert who is summoned in the investigation, disregard the report of an appointed expert, or make use of part of the report and disregard the remaining part<sup>122</sup>.

Pertaining to this principle, the Federal Supreme Court in the United Arab Emirates has stipulated that in penal matters, the court has full liberty to establish a conviction that it sees as soundly based on the evidence and elements of the case, and to derive from any evidence or association the proof needed for its judgment, even if it appears in the case in the form of compatibility. Accordingly, the court has complete freedom in evaluating the evidential power and authority of the expert opinion stated in the case, as long as it is comfortable with such evidence. It is not permissible to question this decision<sup>123</sup>.

Upon accepting either all or part of the expert opinion, the court is required to omit what is mentioned regarding the discussions of opponents in accordance with the principle of oral testimony and confrontation. In the event that the court is convinced by the report of the expert and refers to it in the judgment, it is not be obliged to comply with a request of an opponent to appoint another expert, or to reassign the task to the same

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<sup>121</sup> See Article 180 of the Federal Procedure Law.

<sup>122</sup> Zaidan, Adnan., Criminal procedures in UAE (Arabic), *Alejra'at Aljenaeya fi Dawlat Alemarat*, ALshurroq press, part 2, p 202

<sup>123</sup> Federal Supreme Court, appeal no 18. hearing dated on 23/11/1982

expert. It would also not be obliged to justify this or respond to it in giving reasons for the judgment<sup>124</sup>.

## **6.6 Documentation**

Documentation which is sound and may be used as evidence includes papers which contain a threat, slander, insult, abuse, false report or forgery, and may be proof of the occurrence of the crime, associating it with the accused. These may be papers that contain the confession of the accused or a written acknowledgment from a witness concerning a certain incident<sup>125</sup>. The rule is that the documentation, whether official or conventional, is not restricted to use of a specific argument in proving the crime. As with any other evidence, it depends on the discretion of the judge and, accordingly, the court is not restricted to that which is registered in the investigation or in the interrogation report, unless constrained otherwise by a provision in the law<sup>126</sup>.

Hence, the report of the interrogation conducted by the police or public prosecution, and that which it comprises, including a confession by the accused, investigators samples, and the testimonies of witnesses, are elements of proof, subject to the evaluation of the judge. These have the capacity for argumentation or discussion, in the same manner and extent as other evidence. The opponents may refute it, and the court according to its discretion may make use of it or disregard it.

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<sup>124</sup> Abukhatwa, Ahmed Shawki., op.cit., p80

<sup>125</sup> Abu-Amer, Mohammed Zaki., op. cit., p 982.

<sup>126</sup> Ibid, p. 982

Accordingly, the court may not base its conviction on a document that has not been examined by the defence or that they have not had the opportunity to view and to discuss its contents in the session, as this would be regarded as a violation of the rights of the defendant. It is worth mentioning here that the Egyptian procedure law allows most documentation as evidence, with due consideration given to the soundness of its contents. In the UAE, the permitted documentation comprises:

**1) Reports** that are considered the most significant documentation in a criminal case. This is described as “documentation recorded by specialized employees, in accordance with the conditions taken in its stance”. These reports are drafted to contain the details of violations, considered evidence of the case<sup>127</sup>. They enable the judge to gather reliable information concerning facts associated with the accused or others, without the need to conduct a final investigation with regard to the facts. Thus the judge does not have to waste time proving insignificant facts. Furthermore, the drafting of these reports is done with the knowledge of public employees of material facts related to violations, provided they are trustworthy in what they record.

**2) Judgments and session reports.** If it is mentioned in either the judgment or the session reports that a particular procedure should be applied during the deliberation of a case, and if, accordingly, it is not feasible to prove its non-association except by contesting it as being invented and untrue, or if this is not mentioned, then the concerned party may prove, using all possible means, that the correct procedure has been neglected and violated<sup>128</sup>. On the other hand, UAE legislation does not exclude

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<sup>127</sup> See Article 301 of Egyptian Procedure Law.

<sup>128</sup> See Article 420 of the Egyptian Procedure Law.



any documentation and accepts documentation, like any other method of proof, subject to the evaluation of the judge.

## **6.7 Lawful presumptions**

Lawful presumptions are the extraction or derivation of the incident requiring proof from another proven incident. In other words, it is the derivation of an unknown incident from a known one<sup>129</sup>. It is an indirect method of evidence, as it does not refer directly to the incident requiring proof, but to another one, which requires the application of logic.<sup>130</sup>

Lawful presumptions may be legal or judicial: legal presumptions are those mentioned in law for the sake of reference. If they do not accept opposed proof, presumptions are such as the acknowledgment of a law published in the official gazette, or the presumption for a lunatic or minor to lack the ability to distinguish things. The legal presumption may be simple if opposing evidence is accepted, such as the presumption of the committing of the crime of adultery from the presence of a person in a Muslim house in a place designated exclusively for women.<sup>131</sup>

Judicial presumptions, are those to be found inside the court, where the judge derives from facts proven before him by means of deliberation, and they are among the matters delegated to the discretion of the judge. As long as his conclusion regarding them

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<sup>129</sup> Shaw, W., op.cit., p.176

<sup>130</sup> Ramadan, Medhat., op. cit., p270

<sup>131</sup> Abukhatwa, Ahmed Shawki., op. cit., p 83.

complies with logic, these presumptions are unlimited. Examples of these are: the presence of a spot of blood of the same type as the murder victim on the clothing of the accused; the presence of footprints at the scene of an accident identical to the footprints of the defendant; seeing the accused leaving a victim crying for help; the presence of traces of drugs on the clothing of the accused, proving his association with those drugs; witnessing a number of people walking with someone in possession of stolen items, or entering a house with him and hiding in that house, from which can be concluded their participation in the theft<sup>132</sup>. All these are presumptions from which the judge may conclude that the accused is the perpetrator of the crime.

Presumptions are subject to the conviction of the judge, as with other aspects of evidence, and the judge may accept or omit them as he sees fit. It has been shown that the judge or the court has full authority to evaluate the methods of evidence, accepting what complies with logic and the circumstances of each case and omitting what does not. Although the crime might be proved by one or more of these definite methods, the legislator gives full authority to the court to issue a sentence according to its own evaluation. Moreover, if there is liability to the death penalty, the legislator asks the court to proceed with investigating and hearing the case, even if several methods of proof exist in the case. Although, the accused might face one or many proofs against him, the legislator has insisted in surrounding him with safeguards and gives the judge the full authority to evaluate all methods of proof to avoid condemning an innocent person. The most important safeguards given by the legislator are given by the Constitution and the Criminal Procedure Code in which authority is vested in the rulers

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<sup>132</sup> Ibid, p.83

of the Emirates to waive any punishment in general and the capital punishment in particular.

### **6.8 Implementation of safeguards in sentences of capital punishment**

After the issuance of the death penalty by the Federal Supreme Court, the sentence should be approved through a specified procedure, in which the legislator provides the accused with further safeguards, as will be clarified here.

Article 283 of the Federal Criminal Procedure Law states that at the time the Federal Supreme Court passes a final judgement in favour of an execution, the judgement must be submitted to the President of the UAE for approval. This procedure gives a chance for the criminal to obtain a pardon from the President if the punishment is discretionary. It also provides him with a second chance, since the President can intercede with those who have the right of blood if the punishment is a retaliation punishment. This happened when the late President, His Highness Sheikh Zayed, interceded with those who had the right of a citizen's blood, requesting that cede retaliation against the woman who killed their father. The President is authorized by the Constitution and legislation to pardon any punishment or to commute it, as stated plainly in Articles 54 and 107 of the Constitution of the United Arab Emirates as well as in Article 145 of the Federal Penal Code. In another recent case, His Highness Sheikh Khalifa Ibn Zayed, the President of the UAE, requested the relatives of the victim of a premeditated murder to give pardon.

His Highness paid the legal blood money and the perpetrator was released after being in custody for many years waiting for the retaliation to be imposed<sup>133</sup>.

If we seek the highest degree of justice then it would surely be advisable when the President, after being briefed on the verdict, commands a committee of lawyers specially constituted to study the verdict and express their opinion and then to submit it again to the President. After this he may confirm the judgment or uses his power of pardon, as appropriate. This would constitute an additional safeguard.

Article 165 of the Federal Penal Code states that the investigation in the court session begins when opponents and witnesses are called and when the accused is examined about his crime. If he confesses, the court may sentence him without hearing the witnesses unless the crime is to be punished by execution. In such a case, the court may not rely on his confession alone: it has to complement the investigation. Due to the gravity of the punishment, this article provides additional protection of the accused in crimes punished by execution.

Article 218 of the Federal Penal Code affirms the necessity of consensus in the opinions of the three judges (unanimous approval) concerning the passing of the sentence of execution. It affirms the necessity for the agreement of all the judges concerning the sentence, and if one of them objects, the punishment will be replaced by life

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<sup>133</sup> Alkhaleej Newspaper, issue No. 9859, 17/5/2006, p 11

imprisonment. Moreover, the judgment should indicate clearly that the three judges are agreed on the death penalty, and if this is not the case, the judgment should be considered void and appealed against<sup>134</sup>.

In this situation, it surely be better if the court were made up of five judges in order to increase the guarantee. The probability of error with five persons is less than that for three persons. Article 230 of the Federal Penal Code affirms that a sentence of execution is automatically appealed by law without the attorney or the accused being required to appeal. This is another guarantee to the person sentenced to death. The sentence of execution passed by the Court of Appeal is appealed against by law under Article 253, whereas Article 262 affirms the demand to reconsider the final judgement on the basis of the emergence of new evidence, although this does not halt the implementation of the judgment, unless this judgment is for the death penalty.

## **6.9 The implementation of the death penalty**

The legislator has organized the process of implementing execution in Articles 282 to 287 of the Criminal Procedure Law. These articles refer to the following:

After the Court of Cassation, at the local judiciary system, and the Federal Supreme Court at the federal judiciary, being the highest and the final court, passes the final judgment of execution, and after the President or the Governor confirms this verdict, the

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<sup>134</sup> Police Magazine (Arabic), *Mejlat Alshorta* (Abu-Dhabi), Issue No.436, April 2007, p.71

convict is placed in one of the punitive facilities in preparation for the execution to be carried out.

The relatives of the condemn are allowed to visit and meet him on the day appointed for implementation of the sentence and he is also allowed to meet a minister of his religion if he asks for that. The punishment is carried out in the presence of one of the members of the public prosecution, a deputy of the Ministry of the Interior, a doctor and the convict's lawyer. Nobody else is allowed to attend. In other words, the implementation is undertaken in a semi-closed manner. There is some criticism raised here because if the intent of the execution punishment is for a general deterrence, then why is it implemented in secret? In Saudi Arabia, for instance, the execution is carried out in public. This may be for two reasons: firstly to deter others from committing such crimes, but also to show people how the Islamic *sharia* is merciful even up to the last minute of an offender's life, when the blood relatives can waive their right of retaliation and set the murderer free.

After implementation of the sentence, the convict's body is given to his family. If they do not come to take it, the administration of the punitive facilities will organize a burial.

### **6.9.1 Postponement of the implementation of the death penalty**

Article 288 of the Federal Criminal Procedure Law, following Article 475 of Egyptian Procedural law, states that the execution must not be implemented on an official feast day or feast days related to the religion of the convict. Article 289 of the same law

requires the deferment of the execution of a pregnant woman until she delivers her baby and has suckled him for a full two-year period. This is in accordance with the Sunna of the Prophet Mohammed, peace be upon him, when he ordered a woman who had confessed that her pregnancy was the result of an adultery should deliver her baby and suckle him for two years and only then that she should be executed by stoning. Thus, we can see the wisdom and justice of Islamic law, which refuses to punish anyone other than the criminal. The foetus has no guilt concerning the crime the mother committed. This is referred to nowadays as the personal principle of punishment.

However, it might have been better, in cases to which discretionary punishment applies, for the UAE legislator to have taken the same steps as the Jordanian<sup>135</sup> and the Kuwaiti<sup>136</sup> legislators in this matter. They decided that if a woman sentenced to death gives birth to a living baby, the capital punishment is replaced by life imprisonment to enable the woman to bring up her child. Naturally, this will only apply to crimes of retaliation and those requiring discretionary punishment. If the capital punishment is for an *AI Hudud* crime, it is a duty to follow the principles of Islamic law, of which the most important is that an *AI Hudud* punishment is a matter concerning the right of God and that therefore pardon cannot be granted by any human agency. However, it is mentioned in Article 274 of the Criminal Procedure Law of the UAE that it is not permissible to implement hastily a judgment passed for divine ordinance and retaliation crimes. This is meant to give the relatives of the murdered person a chance to grant

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<sup>135</sup> See Article 17 of the Jordanian Procedure Law.

<sup>136</sup> See Article 59 of the Kuwaiti Procedure Law.

pardon, and to give the person found guilty the opportunity to deny his confession if there is no other evidence against him.

It is worth mentioning that Article 262 plainly requires the deferment of the capital punishment if the convict submits a petition to rehear the case. It would perhaps have been better, however, if the UAE legislator had precluded the implementation of capital punishment for those exceeding the age of sixty or seventy since persons at this age are waiting for their natural death and such punishment would be of little value. The Sudanese criminal procedure law, for instance, forbids use of the death penalty to persons over the age of seventy. Age and gender restrictions apply only to discretionary crimes. Moreover, in the UAE, in accordance with the Juvenile Code, there is a minimum age restriction of 18 with respect to capital punishment in discretionary crimes.

After the death sentence is pronounced, whether as a retaliation (*Al-Qisas*) or discretionary (*Ta'zir*) punishment and after the elapse of the period, and after all legally stipulated methods have been utilized, then sentence will be enforced by a state agency, being the police in most cases. This section will deal with the method of enforcing the death penalty as prescribed in the Islamic *sharia*, and as used by most Arab states, and as consequently is the situation in the United Arab Emirates.



### 6.9.2 The Method of enforcing the death penalty in accordance with the *sharia*

Scholars have disagreed as to the method of enforcing this punishment. Imam Abu Hanifa stated that the authority should carry out execution by sword and Imam Ahmed agreed that the punishment should not be carried out except by the striking of the sword to the neck. Imam Malik and Imam Alshafee, however, provided that the perpetrator should be punished by the same means as he (the perpetrator) assaulted the victim<sup>137</sup>.

The reason for choosing the sword as a tool for punishment is that death is swift and that this form of execution causes the least pain to the offender. However, were there to be another tool faster than the sword, and one which inflicts less pain, then there would be no legal objection to its use<sup>138</sup>. Hence, scholars have resorted to the words of Prophet Mohammad, peace be upon him: “God has ordered benevolence in everything, if you kill, kill with benevolence, if you slaughter, you have to sharpen the blade, to relieve the carcass”.

In one of its judgments, the Federal Supreme Court of the UAE left the issue of defining the method of enforcement to the authority, either by means of sword or by the fastest possible method of execution<sup>139</sup>. Practically, the United Arab Emirates resorts to shooting (firing squad) as a method for enforcing the death penalty, whether as a retaliation punishment (*Al-Qisas*) or as a discretionary punishment (*Ta'zir*). This is also the case in a large number of Arab states as well as in many other countries.

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<sup>137</sup> Imam Malik Ibn Anas, *The chair* (Arabic), *Al-Mowata*, section 3, p.123

<sup>138</sup> Auda, Abdul-qader., *op.cit.*, p.154

<sup>139</sup> Federal Supreme Court, appeal no.4, hearing dated on 18.9.1981

## **6.10 Critical Study of the Death Penalty in the punitive laws of the UAE**

It has been pointed out that the UAE legislator has approved the death penalty in the punitive laws of the UAE. This penalty is stipulated in the Federal Penal Law issued in 1987, the Narcotics Law issued in 1995, and finally the Anti-Terrorism law issued in 2004 in accordance with the international movement to fight crimes of terrorism, crimes not expected to decrease within the short term.

With the Islamic Sharia being the main source of legislation, the UAE has adopted the death penalty as divine ordinance, retaliation and discretionary punishments. It is important to this research to discuss the death penalty as a discretionary penalty to show whether the legislator has extended the application of this penalty or the approval of it within reasonable limits.

### **6.10.1 The death penalty as stipulated in the Federal Criminal Law**

It was stated at an early stage in this research that the provisions of the Islamic *sharia* were in force in the UAE until the arrival of Western colonialism when some of the Western rules were applied in each Emirate. Both the Emirate of Abu Dhabi and the Emirate of Dubai issued their own criminal law in the year 1970, which remained in force until the Federal Criminal Law was finally passed and issued in the year 1987. In addition, it was indicated that the provisions of Islamic *sharia* were summarized in the first article of the Federal Criminal Law, which states that the provisions of the Islamic *sharia* shall apply without numeration or explanation with respect to the divine

ordinance, retaliation and blood money. Although these provisions are clear, the legislator should have clarified them to avoid contradiction later on when he came to refer to discretionary crimes, since some of them come under the provisions of the Islamic *sharia*. In the remaining 433 articles, the law mentioned and explained the discretionary punishments which have come under the authority of the legislator to maintain security and order in the society, including the death penalty for a number of crimes. Crimes subject to the death penalty according to the Federal Criminal Law will be highlighted, and consideration will be given to whether such punishment suits the crime or whether the legislator went too far with this punishment.

#### **6.10.2 Crimes affecting external security of the UAE**

As with legislation in all countries, whether Islamic or Western, UAE legislation aims to protect the state and the regime so that chaos does not overwhelm the country when a new ruler or governor takes office. Such legislation is required to spread the feeling among individuals that the state is willing to deter whoever may consider disturbing the order, affecting all citizens. Some Western legislation may be in agreement with Islamic *sharia* in approving the death penalty for treason, as prescribed in the Islamic *sharia* for the crime of rebellion, a crime similar to that of treason. This is to achieve the twin aims of order and deterrence.

Priority is given here to discussion of the status in the UAE in order to show whether the death penalty as a discretionary punishment is appropriate for the crimes indicated by the Federal Criminal Law, or whether there is no comparison between the crime and

the punishment, such as a harsh punishment for petty crimes. As indicated previously, this would be rejected by the Islamic Sharia, which allows the legislator to use the death penalty as a discretionary punishment but without being arbitrary.

In the context of crimes harmful to the external security of the country, the legislator has established the death penalty against any citizen who helps the enemy forces during a state of war<sup>140</sup>. The UAE legislator does not take a dissimilar attitude in this respect to that of much Western legislation which adopts this penalty in time of war. In Turkey<sup>141</sup>, for example, although it has abolished the death penalty for ordinary crimes, maintains this penalty for crimes committed in time of war. To demonstrate that the UAE legislator has not overstepped this principle, he emphasizes that where such a crime is committed in peacetime, the punishment shall be life or temporary imprisonment, depending on the danger inherent in the crime<sup>142</sup>.

### **6.10.3 Crimes affecting the internal security of the UAE**

In respect to crimes affecting internal security, the legislator adopted the death penalty to protect the regime and its figureheads in order to protect the public interest. He established the death penalty against anyone attempting to overturn the regime by force.

In this point, the legislator adheres to the Islamic *sharia* which allows the death penalty

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<sup>140</sup> See Article 149, 150 and 151 of the Federal Criminal Code.

<sup>141</sup> The reservation states that the death penalty is retained 'in times of war, imminent threat of war and for terrorism'. (cf. Amnesty International, 'death penalty news', September 2001, A1 index: ACT 53/oo4/2001, p.3). As is discussed extensively later in this thesis, however, what actually is committed in time of war, whether by countries that are *de jure* abolitionist, or abolitionist with reservation is highly debatable.

<sup>142</sup> See Article 174 and 175 of the Federal Criminal Code.

against anyone guilty of sedition and attempting to act against the leader. However, the UAE legislator did not state, as the Islamic *sharia* does, whether the criminal deserves pardon or reduction of this punishment if he or they declare, repent and regret. As already mentioned, the Islamic *sharia* always encourages criminals to repent and regret, so that the harshest punishment the criminal might face can be waived. This principle stands in contrast to the view of the federal legislator, who does not allow for criminals to repent. This may be an indication of the impact of Western legislation, which does not place the same value on spiritual repentance as does the *sharia*. The expression of regret is not considered sufficient to justify waiving the punishment under in modern UAE legislation, although it may be a supporting factor in reducing it.

#### **6.10.4 Crimes of attacking means of transport and other public utilities**

As for assaulting means of transport, the legislator has modified his attitude cornering crimes harmful to external and internal security. He does not stipulate the death penalty for crimes such as attacking aeroplanes and ships, even though such actions may cause disasters, but is satisfied with life imprisonment. Although he has employed the term “disasters”, which bears extra meaning, he did not explain what he meant by “disasters” and left this ambiguous<sup>143</sup>. He may have realized this flaw and tried to correct it when he issued the Anti-Terrorism Law in the year 2004. Here he adopted the death penalty if the attack of a means of transportation via air, land or water leads to the death of any person<sup>144</sup>.

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<sup>143</sup> See Articles 288 and 289 of the Federal Criminal Code.

<sup>144</sup> See Article 15 of the Anti-Terrorism Law issued in 2004.

### 6.10.5 Crimes against individuals

In Chapter Five, it was stated that the UAE legislator was affected by Western legislation to a great extent in cases with aggravated circumstances, and that this was at variance with the provisions of the *sharia*. The UAE legislator prescribed life or temporary imprisonment for homicide but admitted the death penalty if the murder was accompanied by the aggravated circumstances.<sup>145</sup>

The most convincing and revealing evidence that the UAE legislator was affected by the Western legislation in cases of homicide is that despite there having been 77 separate convictions for this crime committed in the Emirate of Dubai in the three-year period, 2001-2003, some of which were with aggravated circumstances<sup>146</sup>, only one offender was executed. Most of the death sentences given were commuted to life or even to temporary imprisonment. Some of them may have received pardon from the blood relatives, according to the provisions of the *sharia*.

Since the amendment made to the Federal Criminal Code in 2005, a pardon given in place of retaliation provides for a mandatory sentence of one year's imprisonment as a discretionary punishment. It is clear that those criminals who have received a life sentence, and did not receive retaliation as provided for by the *sharia*, and who were not pardoned by the relatives of the victims have not been dealt with according to Islamic law. Here, we cannot deny the possibility of unwritten, higher instructions, favouring flexibility regarding the death penalty, and resulting from international pressure to abolish the death penalty.

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<sup>145</sup> See Article 332 of the Federal Criminal Code.

<sup>146</sup> Source; Criminal Investigation Department, Dubai Police Force,

More than 120 nationalities from all over the world live in the UAE, and the legislator may wish to reduce their exposure to the death penalty. However, as we have continually shown, as a Muslim country the UAE cannot abolish it. The legislator is surely mistaken when dealing with individuals committing the most serious crimes if he decides that he cannot impose the death penalty for those which cause the death of the victim. This denies the right of retaliation to the blood relatives who must be given the choice either to choose retaliation or to waive their right and accept the legal blood money<sup>147</sup>. The legislator is strict regarding the crime of rape, as he prescribes the death penalty against the perpetrator, and even deems the crime as having been committed by force when the age of the victim is less than 14 years<sup>148</sup>. Yet it can be certainly argued that the legislator should distinguish between cases in which the criminal kills the victim after the rape, and when the victim is left alive. If the only punishment for rape is death, then the criminal has an incentive to kill the victim so that no proof of his crime remains. Yet the legislator should surely deter the criminal from killing his victim after rape, by imposing a punishment less than the death penalty for rape without killing. There is one further issue to be raised here, which is whether the legislator should also distinguish between cases of which rape is committed against a virgin and rape of an individual who has known sex before, or is a prostitute. From a Muslim and Arabic social perspective, these cases surely differ, and thus should not be treated equally by the law. Although both constitute a gross violation of the person, the consequences for these several victims are not the same and it is the accepted principle of law in every country that a crime must be, at least in part, judged by its consequences.

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<sup>147</sup> See Article 344 of the Federal Criminal Code.

<sup>148</sup> See Article 354 of the Federal Criminal Code.

Moreover, it is important to emphasize that the cultural attitudes toward illicit sexual behaviour of any kind are quite different with respect to the Muslim and Western worlds. We have already seen that proof of adultery under the *sharia* may be simply the presence of a male person, not related to the individual with whom adultery is alleged, in an unauthorized section of the house, and that the consequences, namely the punishment applicable, is far more severe than would be contemplated in a Western country. It is in this context, therefore, that the view taken of the consequences of the rape of a virgin or innocent child should be seen.

#### **6.10.6 The death penalty in the Anti-Narcotics Code of 1995**

The legislator prescribed the death penalty for many crimes under the Anti-Narcotics Code issued in the year 1995, and emphasized in this law that the punishments are fixed punishments and the judiciary has no discretion to vary sentences between the minimum and maximum punishments allowed in the Federal Criminal Code. This mandatory and determinate sentencing does not seem logical, since a fixed punishment does not give full authority to the judge to evaluate the evidence fully. If the judge were to pass a lower punishment than that specified in the law, then the verdict will be criticized and appealed. However, the important thing in this respect is surely that the legislator should have stipulated the death penalty against importer of narcotic plants or substances, whose purpose is promotion or trade, in relation to their quantity<sup>149</sup>. As we have said before, the quantity of the plants or the amount of drugs is essential here since the harm will vary according to quantity.

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<sup>149</sup> See Article 48 and 49 of the Federal Criminal Code.



The legislator has approved the death penalty for another category of crime, which is the murder of a public official responsible for the implementation of the law, during or due to the discharging of his duty. In this regard, the legislator was surely correct to be strict in the penalty for this crime since the official must be protected so he can execute his duty fairly<sup>150</sup>. However, in Article 54, the legislator indicated that this penalty is as for a discretionary and not a retaliation punishment. Yet the legislator should surely have considered that the murder of a public official does not merit a discretionary punishment but deserves to be treated with retaliation, since a discretionary punishment may be remitted or pardoned by the Governor without reference to the blood relatives of the murdered official.

The majority of drug traders who deal in small amounts of drugs may be drug addicts, which means they are themselves ill and may be forced to commit this kind of crime through the pressure of their own personal needs. They may require money to afford either medical treatment and rehabilitation or the drugs to keep themselves alive. The legislator should therefore also distinguish between trafficking cases, and even prescribe treatment and rehabilitation for these people, which mean of course, that the death penalty would not be justified.

#### **6.10.7 The death penalty in the Anti-Terrorism Law of 2004**

The federal legislator established the death penalty for many crimes of terrorism, which are spreading around the world. However, due to the global movement for the abolition

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<sup>150</sup> See Article 53 of the Federal Criminal Code.

of capital punishment, the legislator has added conditions to the death penalty that the crime must cause the death of one or more persons, or that the criminal or criminals used explosive substances. In this, the legislator, affected by the Western world, has gone in the direction of lowering the number of crimes subject to the death penalty since, even if they do not cause death, the criminal might still have faced the death penalty if this law had been issued in the 1980s or even in the 1990s. Moreover, the Anti-Terrorism Law approved life or temporary imprisonment for the detention and captivity of a king or a president of another country, as long as the crime did not result in his death. This is a considerable concession, which indicates that the legislator is highly affected by the pressures placed by some countries and organizations to abolish the death penalty.

#### **6.10.8 Record of the use of the death penalty in the UAE**

The Emirate of Dubai has occasionally implemented the death penalty as have other emirates in the union. In spite of a large number of death sentences issued, those carried out have been very few. This may be due to the ruler not approving the sentence, or for reasons related to the waiving of the rights of blood relatives. The first death penalty to be carried out in Dubai was on 15/10/1996. It was imposed on a man who kidnapped a child, then raped and killed her. This incident aroused public fury and led to the demand for the enforcement of the death penalty<sup>151</sup>. In this case, it can be seen that the death penalty was enforced as a retaliation punishment, but it could also have been enforced

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<sup>151</sup> According to the correctional Institutions, only 7 people have ever been executed in the recorded history of Dubai. The last execution carried out was in 2011. In the other Emirates, 8 people have been executed In Abu-Dhabi (first execution in 1998) , 4 in Sharjah, and 5 in Ras-Alkhaima (since 1998). All the executions were carried out according to the provisions of retaliation.

as a discretionary punishment, since the rules on rape fall under discretionary laws whereas premeditated murder demands retaliation. In either case, the murderer might have been relieved by the exercise of the rights of the blood relatives. This particular case in Dubai, in 1996, illustrates the true significance of the rights of the blood relatives. The murdered child, whose father was no longer alive, was represented at the execution by her mother. The formality of a lawful execution is such that at the moment before the sentence is carried out, the blood relative is asked if he or she wants the execution to proceed. In this case, the mother chose to order the execution of her daughter's murderer.

The death penalty was subsequently enacted on six other convicted offenders in Dubai, after their first trial in the Court of First Instance, their second in the Court of Appeal, and review before the Court of Cassation. These crimes of homicide were associated with other crimes and with aggravated circumstances. With regard to crimes involving narcotics, despite the issuance of death sentences to twenty-seven people, and its confirmation after all stages of appeal, none has been executed. It is significant to note that twenty-seven people who were sentenced to death for drug trafficking received a pardon from the ruler of Dubai in the single year, 2007. All were foreigners and they were all deported to their home countries.

From 1998<sup>152</sup> until the present only eight people have been executed in Abu-Dhabi, four people in Sharjah and five in Ras-Alkhaima. In the three other emirates, subject to the

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<sup>152</sup> We could not find the statistics for the period prior to 1998, however, an official who preferred not to mention his name informed us that the death penalty was not implemented for 15 years and then implemented again in 1998 (excluding Dubai which implemented the first execution in 1996).

Federal Supreme Court, there have been no executions. All of the executions carried out were for crimes related to homicide and the execution implemented because the blood relatives did not waive their rights in retaliation. It can be seen that the Emirate of Dubai, in which all federal criminal laws are valid, upholds the death penalty. The scope of the application of this punishment remains narrow, and the circumstances in which it may be used are limited. It is worth mentioning here that no execution was carried out in Dubai<sup>153</sup> before the issuance of the federal penal code in 1987, and that no execution was even documented prior to this date.

Implementation of the death penalty has been confined in the narrowest terms to crimes requiring discretionary punishment, over which the leader or rulers have great authority. For crimes of retaliation, however, its implementation is delayed to give a chance to those who have the right to blood money. As for the enforcement of *Al-Hudud*, this differs from one emirate to another, and from one crime to another. It cannot be said that it is enforced to a great degree, for which there could be no clearer evidence than the incidence of thousands of adultery crimes that go unpunished, whether by flogging or stoning to death, enacted against offenders for contravention of divine ordinance laws<sup>154</sup>.

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<sup>153</sup> Since Dubai was a British protectorate and Britain itself abolished the death penalty in the late 1960's, this influenced Dubai. Thus, no execution was carried out till 1996, although the Local Penal Code of Dubai, issued 1970, imposed the death penalty for many crimes including homicide.

<sup>154</sup> Statistics from the Criminal Investigation Department in Dubai showed 122 adultery cases in Dubai during the year 2003; however, no one was executed.

## Conclusion

The discovery of oil in the United Arab Emirates was a turning point for all aspects of life. The society in the Emirates used to be simple and people made a living that was barely sufficient. Now, however, society has become open to the world and is affected by everything that is going on around the world. In particular, it is tending to imitate Western society in many matters, especially in legislation.

Initially, before the emergence of the state, the judiciary system in the United Arab Emirates used to pass their judgments and sentences in clear conformity with the Islamic *sharia*, because the society was Muslim, the UAE is geographically close to the land of Mohammad's message, and the religion of the whole region is Islam. However, after the emergence of the state and the discovery of oil, the Emirates has become a focus of attention for many nations and has begun to attract people from more than 120 countries, according to the statistics of the Ministry of Labour. In particular, the legislator in the United Arab Emirates has begun to be affected in criminal legislation and shown some inclination to abolish capital punishment.

As has been noted, the legislator drafted the Penal Code over several years. His intention was to include the Islamic *sharia* rules concerning divine ordinance, retaliation and blood-money (*diya*), but he condensed them into a single article, which included them without sufficiently interpreting them. He could not be said to have been remiss in citing the *sharia* as a source of law. However, he has not in practice required judges to abide by them. It is as if he had been driven, or had yielded to the demands of others in the federation. This may have been in order to make the law more flexible so that the state does not lose attraction to investors, by projecting the idea that this is not a country

that violates human rights. This question is especially sensitive in a Western perspective, as, in particular, the rules of retaliation, *Al-Hudud*, and blood money (*diya*) may appear extremely strange.

Many sentences of execution have been passed, but few implemented. Up to the year 2011, the number of sentences carried out in Dubai was seven, with a total of seventeen for all the other six Emirates in the Union. This provides hard evidence that the general situation has been affected by the universal context, especially that of the situation in Britain, since most if not all the heads of security and consultancy in Dubai were from the UK. In stating that the Islamic *sharia* is a ‘main’ source of legislation, but not the major or the only one, it is as if the legislator wanted to signal that the provisions of the Islamic *sharia* would be supplemented and make room for other legislation, especially those with Western features. Thus, it did not mean that the Emirates’ legislation had abandoned the rules of Islamic *sharia*, but that it was trying to adjust to a new, universal situation. In consequence, this legislation also gave the rulers and judges the right not to implement sentences of execution in discretionary crimes. It also gave the right for them to mediate with those who have the right to blood money or to cede punishment in retaliation crimes, all of which is in accordance with the Islamic *sharia*. A problem remains, however, with the *Al-Hudud* crimes which cannot be pardoned if the crime is proved. These include the crime of adultery which, as the statistics indicate, has not in practice attracted the death penalty.

The legislator has surrounded the person sentenced to capital punishment with numerous safeguards, whether at the investigation stage, in the trial, or even at implementation. This demonstrates his concern not to execute an innocent person. All these aspects underline the fact that execution is carried out only within the strictest

limits. We should not forget, moreover, that clemency is an inherent principle of Islam and not only, as we have seen, may an offender be reprieved at the last moment by the blood relatives of the victim, but the ruler may also show mercy to the condemned man. However, the principle of capital punishment is indispensable both in observance of Islamic law, and as a feature of deterrence in the punitive legislation of the United Arab Emirates.

## CHAPTER SEVEN

### **Discussion of the differences in the approaches to serious crimes of Western and Islamic laws and the use of the death penalty**

#### **Introduction**

We have examined the concepts of crime in Islamic law as they involve obligations upon ruler and ruled and in the particular application of the death penalty. And we have noted the variation in current practice within the United Arab Emirates and in relation to other Muslim countries. But a general thesis on capital punishment should not neglect the wider international environment.

As we seen in the previous chapter, foreign laws have clearly influenced attitudes in the UAE. Moreover, there is a domain in which a nation's law and jurisdiction now come into contact with those of others directly and frequently for international questions to be ignored. This new legal environment does not or should not, as will be argued here, overthrow the established national and religious law. But it does require that jurists, especially in a country as cosmopolitan as the United Arab Emirates, explain and justify its laws to those whose principles are different. This may be far from easy. With few exceptions, non-Islamic countries lack the basis of belief that the *sharia* affords to Muslims. Non-Muslims enjoy greater flexibility but at the cost of steady conviction. Towards the death penalty, the Islamic world is presented with a strange collection of foreign attitudes, ranging from fully support and usage, to a loud campaign for its abolition. These attitudes, and some of the underlying history that may explain them, form the discussion of this chapter. In particular, it will be necessary to show and



explain some of the abolitionist movement's thoughts, as seen in the Human Rights lobby at the United Nations as well as in academic literature generated by this powerful group.

Although, the campaign has been often made at the United Nations, abolition is not a condition of UN membership and accession to a treaty of abolition remains voluntary.<sup>1</sup> In the more radical environment of the European Union, however, states whose principle to retain the death penalty has to give up this principle as a condition of membership. Turkey, an EU applicant since the 1990's, was effectively obliged to surrender its independence in this policy.<sup>2</sup> For the United Arab Emirates, no pressure of such an extreme kind exists till now. Yet, as has already been seen, both the history and present social composition of the federation make members like UAE especially sensitive to the currents of international opinion.

## **7. 1 The historical background**

We should consider the context of the abolitionist movement. Undoubtedly, it received its energy from the formation of the United Nations, and this is the main issue through which it continues to operate.<sup>3</sup> Yet the location is troubling to those whose views and

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<sup>1</sup> Although Article 3 of the Universal Declaration of Human Rights (UN Doc. A/810, 1948) protects the right to life, it makes no reference to the death penalty which is thus taken to be an exception to this right. Likewise, under Article 6 the International Covenant on Civil and Political Rights (drafted several times from 1947 on; adopted by the General Assembly in 1966) there are specific caveats to the general presumption of the right to life. The most important of these are that the death penalty may only be handed down by 'a competent court' for 'the most serious crimes'; that the condemned has the right of appeal; (hence) that no one shall be 'arbitrarily deprived of his life' (UN GA Res. 2200 A (XXI)).

<sup>2</sup> Turkey removed the death penalty from its constitution in compliance with terms and preconditions for signing the New European Protocol; it has abolished this punishment in all circumstances. (Alittihad Newspaper, issue 10223, 2.7.2003, p. 35).

<sup>3</sup> Some commentators also attach considerable importance to the influence of the Royal Commission on Capital Punishment (1949-53), whose report not only prepared the way for eventual abolition in Britain but led to abolition in a number of other countries such as Canada and Australia. Zimring, an abolitionist

practices place them outside the compass of what the movement is trying to achieve. The United Nations, by its title and status in the modern world, projects an image of achieved consensus. Though its goals, as, for example, to end international conflict and mass starvation, may be no nearer fulfilment than they were sixty years ago, it has provided the world, and especially its newly-formed states, with a sense of direction. If not beyond criticism in particular situations, it represents the groundwork of a constructed social morality that has implications for law-makers everywhere. Yet for any enterprise to assume it always know best is dangerous. It restricts lateral vision. What adjustment can the UN make if one of its declared objectives is in conflict with the rooted principles of a great number of the peoples and states it claims to represent? Since it derives its existence from these peoples and states, it can hardly set itself above them. Either it scales back its ambition in areas of difference that cannot reconciled or it becomes a standing contradiction. This basic situation explains the difficult comings and goings of proceedings at the UN on abolition during the last half century.<sup>4</sup>

But does the movement for the universal abolition of capital punishment reflect a common feeling throughout the world? Is there evidence of a growing consensus to this end? Despite the claims of abolitionists, we find that globally four out of every seven people inhabit states in which capital punishment has not been abolished. Of course, this statistic sheds no light on whether the death penalty has popular support in those countries but, by the same token, it is impossible to measure actual consent in countries

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in the US, takes this to be a model document. (cf. Zimring, F.E., *American Capital Punishment*, 2003, pp.20-22)

<sup>4</sup> In the accounts of academics who take on a crusading role in this matter, such as Professor William Schabas, we hear almost as much frustration voiced over the drafting of definitions as over those who stand out as retentionists. (cf. Schabas, W., *The Abolition of the Death Penalty in International Law*, Cambridge: CUP, 3<sup>rd</sup> ed., 2002, pp. 23-39 & passim).

that have abolished it. A rough as this indicator is, it is all that we have to calculate the will of nations.

Based upon a head-count measurement, therefore, we can say that the abolitionist case is misleading. But the faults go deeper. Abolitionists put together retentionist countries as though they represented some uniform cultural standpoint.<sup>5</sup> This is far from being true. Countries choosing to keep the death penalty on their statute books are among the largest and most diverse societies on the planet.<sup>6</sup> So far from having achieved a *jus cogens*<sup>7</sup> of international jurisprudence, as some abolitionists like to claim, there is a plain misrepresentation of status.

Yet what were the circumstances that allowed such an impression to be formed? Understanding the process by which a particular moral climate was played upon and persuaded to bring in declarations, charters and treaties at the United Nations is essential to understanding what was produced in the immediate post-1945 environment. These declarations did not spring from a forum in which diverse standpoints were represented, or views put and received equally. Large areas of the world were still at that time the colonies of the historical Great Powers, and much of Africa, Asia and elsewhere had, broadly-speaking, no voice whatsoever. Moreover, the war that brought the UN itself into existence had resulted in a narrow cartel of power and influence. At the Nuremberg trials, where death sentences were demanded, a victor's justice was firmly in the hands

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<sup>5</sup> As documented hereafter, it is also frequently implied that the only serious opposition to abolition of the death penalty comes from the Muslim states.

<sup>6</sup> Examples that may be given are Nigeria, India, The United States of America, China, Egypt, Indonesia and Japan. These are societies which have little in the way of common heritage and no unified belief-system.

<sup>7</sup> A customary assumption in law

of the so-called Big Three.<sup>8</sup> The legal perspectives of countries in East Asia or Latin America were of no account. As for the Islamic world, in which societies of the Middle East and North Africa were subject, to a greater or lesser degree, to an alien jurisprudence, it is doubtful whether *sharia* law was ever recognised in the understanding of the imperial powers. Nevertheless, determinations were being made in New York which reflected a new concern for humanitarian and universal rights.<sup>9</sup>

As with the League of Nations (from 1920), and ambitious non-aggression charters going back to the Congress of Vienna (1814-15), the United Nations grew in response to an international war. First created by a coalition of nations pledging to defeat its common enemies, when the Second World War ended, it rapidly developed into a Congress of more than fifty founding states.<sup>10</sup> Their purpose was to promote peace, international cooperation and security, an intention predicated on reducing or removing the circumstances that led to aggression.<sup>11</sup> It reflected a natural desire to avoid a return to the excesses of the recent, painful past.<sup>12</sup> By the middle years of the twentieth century, extreme forms of cruelty and genocide had occurred in many parts of the globe, including societies that continued to see themselves at the forefront of economic, scientific and even cultural achievement. Yet to understand this inheritance, which gave rise to many of the assumptions made at conferences in Geneva and New York, we must go further back in time.

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<sup>8</sup> France also contributed judges and prosecutors to those of Great Britain, The United States and the Soviet Union.

<sup>9</sup> In December 1946, for example, a Children's Emergency Fund (UNICEF) was set up to alleviate the massive deprivations and displacements to women and children caused by the Second World War.

<sup>10</sup> In January, 1942.

<sup>11</sup> Fifty-one states by 24<sup>th</sup> October, 1945.

<sup>12</sup> A rational anxiety in view of the failures of the Versailles Treaty and the League of Nations after the First World War.

For five hundred years, innovations in sea-power and military technology gave European societies the means to oppress others throughout the world.<sup>13</sup> Societies at a low, or simply at a local, level of organisation were driven out or killed, mostly without consideration of their right to exist. Others, as in the Islamic world, with a settled civilisation of their own, were forced to modify their laws in conformity with those of new overlords.<sup>14</sup> This basic situation lasted for nearly five hundred years, from the earliest Spanish conquests to the last decades of the twentieth century, when branches of this loosely-knit cultural empire began to fall apart and new centres of economic power, in east Asia and the Middle East, gradually emerged. Not surprisingly, perhaps, there is a legacy of innate superiority in the legal outlook of this long-dominant grouping.<sup>15</sup>

To the European, or ‘Western’, mind, this characterisation of history may seem harsh and one-sided.<sup>16</sup> It appears to ignore the debt owed to the civilisation and creativity of the period. It ignores the Italian renaissance, the French enlightenment, English science and industrial innovation, German technology. It ignores the rise of representative institutions and of free speech – which still persuade the ‘European’ that he stands at the forefront of civilisation. Above all, in this context, it ignores the progressive, secular

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<sup>13</sup> The term European is taken here in its broadest cultural sense. It includes, therefore, societies we might call ‘neo-European’ such as the United States of America, Brazil and Soviet Russia, many of which, like Greek city states before them, were the colonising colonies of an expanding nationality.

<sup>14</sup> Although few of the Arab lands became colonies in a formal sense, the only territory that was not subject to diktat by the imperial powers belonged to tribes of the Arabian peninsula.

<sup>15</sup> It may, for example, still be as hard for a high-ranking French official to see true equivalence with his Lebanese counterpart as it is for a Jewish Israeli to recognise the moral or legal claims of an Arab Palestinian.

<sup>16</sup> The term ‘Western’, here and elsewhere, is cultural not geographic. Thus, it applies as much to Australia as to Canada. It is analytic, not self-descriptive, since a Russian, for example, might see himself as ‘European’ but not ‘Western’. Yet despite this lack of precision, it does correspond to the broad definition of ‘European’ discussed above and, in line with both common and academic discourse, is normally preferred to it in this account as giving rise to less confusion.

character of European law, which allows the social norms of one generation to be overruled by the next.

Nevertheless, this was an era of violent interference in the lives and lands of non-European peoples, transforming or uprooting their cultural outlook.<sup>17</sup> Law and religion - intertwined in pre-modern society - were among the first and most significant casualties of this interference.<sup>18</sup> In the closely linked States, unlike much of Europe, there is still a boundless enthusiasm for the narrative of expropriation, seen entirely as a process of settlement.<sup>19</sup> Taken as a whole, however, the 'Western' world was shaken to the core by the events of the 1930's and 1940's. It had good reason to drive away the past and make all new. But unless a people is massacred in its entirety, as happened to the people of Tasmania<sup>20</sup>, a memory remains. It is many centuries since European armies committed indiscriminate violence in their Crusades on Palestine, but these narratives still condition relations between peoples of the Middle East and Europe.

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<sup>17</sup> Those living on the plains of both halves of the American continent were subject to systematic extermination. Others, as in central America, after prolonged brutality and slaughter, were assimilated to the religion of their conquerors.

<sup>18</sup> Writing of the radical difference to be found in native legal traditions, Professor Glenn makes some interesting observations: 'Chthonic thought in matters of crime and criminal repression also provides an ongoing alternative to Western practices of individual guilt and incarceration. The costs of prisons are enormous, and accelerating. Chthonic people don't have any. The Cree do not have a word for guilt.' (Glenn, H.P., *Legal Traditions of the World*, Oxford: OUP, 4<sup>th</sup> ed., 2010, p.91.)

<sup>19</sup> Though less may be heard of divine assistance in concepts such as 'Manifest Destiny', the triumphalism is still evident in variations on 'the American Dream'. cf. Baron, R.C. (annual selection) 'America: One Land, One People' (Golden, Colorado: Fulcrum) in which can be found, for example, Catton, B. & Catton, W.B., *The Bold and Magnificent Dream, America's Founding Years, 1492-1815*, 1987, pp. 23- 49. By contrast, it is hard to imagine that today's readers in Germany would be comfortable with such a title as 'One Land, One People'.

<sup>20</sup> In the years following the first European settlement in 1803

### 7.1.1 Commitment and guilt

Europe's commitment to the universal abolition of capital punishment is not simply one project among many, but an issue connected to the guilt felt over its own history.<sup>21</sup>

Until quite recent times, the European penal tradition was not one that dealt leniently or compassionately with offenders. The threshold for capital crime was, even in the more advanced European states, surprisingly low.<sup>22</sup> In England, confession extracted under torture, corporal punishment and capital sentencing were commonplace. The death penalty was passed on the very young, the aged and the mentally ill.<sup>23</sup> It was applied to crimes such as petty theft, often upon evidence that in modern terms would be regarded as untested, without an established right to legal representation, and usually without appeal or the possibility of clemency.<sup>24</sup> Frequently these resulted in execution of an offender by methods that were technically incompetent.<sup>25</sup> In the light of this, it might not seem unreasonable to suggest that the practice of the death penalty in Muslim countries, which European society apparently now finds so terrible, is relatively humane, fair-minded and characterised by due process.

Over the last thirteen centuries, what is most striking in the contrast between the jurisprudence of Christian and Islamic countries are the sudden shifts of viewpoint in

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<sup>21</sup> As the displaced people of Palestine have learnt, such guilt can inflict a heavy punishment for the crimes of others upon the unknowing and the innocent.

<sup>22</sup> In English law, theft above the value of one shilling (not more than £10 in current value) was long fixed as the threshold of capital crime. (cf. Pollock & Maitland, 'History of English Law', vol ii. p. 459)

<sup>23</sup> In England, in the eighteenth century, the death penalty was imposed for 222 crimes. Even children could be sentenced to death until 1908, when execution was outlawed for people under the age of fourteen. (cf. Laurence, J., 'A History of Capital Punishment', Kennikat Press, 1971, p.4)

<sup>24</sup> From the standpoint of Islamic legal practice, the apparent unwillingness of Western judicial systems to use the instrument of clemency looks surprising and, in some contexts, inhumane.

<sup>25</sup> So incompetent, in fact, that the introduction in France of more efficient methods attributed to Dr. Guillotin (1790) was regarded as a humanitarian advance (cf. Encyclopaedia Britannica, 13ed, 1926, pp.694-695).

Christian states. ‘Cruel and unnecessary punishment’, a standard phrase in the abolitionist’s vocabulary, effectively proposes that capital punishment, even for the worst of crimes, is more brutal than any other form of punishment, and that the death penalty has no usefulness to the state. Then how can we rely on this sudden conviction that the death penalty is a pointless denial of human rights? It is only a few generations since quite opposite beliefs were reflected in the laws of Europe. Restriction upon the subject, the right to capture and own slaves, and the transportation of convicted criminals as forced labour, were accepted norms of European society.<sup>26</sup> Although these practises have now been abandoned in jurisprudence, as in common feeling, humanitarian progress has not meant a willingness to give up the right to wage war, or a compulsion to abandon military and extra-judicial killing – activities that might properly be called ‘cruel and unnecessary’.<sup>27</sup>

How, in any case, are we to decide what constitutes inhumane treatment or social ineffectiveness: what are the criteria? Assuming that for the most extreme crimes the only alternative to the death sentence is life imprisonment, we must weigh the mental and physical conditions involved in this preference.

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<sup>26</sup> Practised under French law until 1938.

<sup>27</sup> A phrase attributed to Pope John Paul II, speaking in St. Louis, Missouri (report New York Times 28.1.1999, p. A14). There are several variants of this charge against retention. ‘Cruel and unusual’ and ‘cruel, inhuman and degrading’ are prominent among them. But these are no more than flags planted in the sand. Not only should we question the meaning of cruelty and inhumanity in relation to any possible alternatives to the death penalty, we might wonder whether ‘unusual’ is a proper description for a penalty regarded as appropriate to the most extreme forms of crime since the beginning of recorded history.



‘Prison’ is shorthand for a hugely variable set of conditions, the only common factor in which is the loss of individual liberty.<sup>28</sup> It is generally believed that for long-term prisoners this deprivation is mental more than physical. Yet life sentences raise fundamental questions of morality, such as whether it is right to inflict a punishment that removes all hope of forgiveness and re-admission into society.<sup>29</sup> Cruelty takes many forms. The abolition of the death penalty is mandatory and taken for granted in national jurisdictions within the European Union. So should this relieve those societies of the duty to consider the morality of indefinite imprisonment? This question may be of little interest to those who passionately defend universal abolition of the death penalty<sup>30</sup>. Is it really noticed that their efforts may have contributed to the arguably much less humane outcome of life imprisonment, and to the years of mental torture and isolation on death-row?<sup>31</sup> For societies which do not find capital punishment morally problematic, there

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<sup>28</sup> The contrast between cages of multiple occupation for petty criminals in some countries and the types of privilege granted to Hans Breivik, a Norwegian convicted of mass murder in 2012, is an obvious example. Even within a single country, the reality of prison is far from being the same.

<sup>29</sup> Sentences which may, admittedly, be quite short in some European states. But most if not all criminal codes, where the death penalty has been abolished, have reserved categories that enforce what are effectively perpetual terms of imprisonment. (cf. Dagger, R., *Playing Fair with Punishment*, in ‘Ethics: An International Journal of Social, Political and Legal Philosophy’, 103, no.3, Univ. Chicago Press, 1993).

<sup>30</sup> Certainly, Professor Schabas, 2002, *op.cit.*, finds little to detain him here. Hood & Hoyle, on the other hand, make a passionate case for seeing Life Without Parole as inhumane as the use of capital punishment: ‘To replace the death penalty by life imprisonment without any prospect of release is to replace one human rights abuse, the lack of respect for the dignity of the individual, with another.’ (Hood, R. & Hoyle, C., *The Death Penalty*, Oxford:OUP, 2008, p.402)

<sup>31</sup> The literature in which this particular inhumanity is noticed is usually to be found only in writers with direct observational experience of the ‘death-row phenomenon’. Typically, this is in the USA and coming from a retentionist standpoint. For example, in discussing the case of a convicted murderer, Thomas Baal, who pleaded for his own execution rather than undergo a process of repeated appeals, Kozinski writes: “It has been said that capital punishment is cruel and unusual because it is degrading to human dignity, but the dignity of human life comes not from mere existence, but from that ability which separates us from the beasts – the ability to choose; freedom of will ... when we say that a man – even a man who has committed a horrible crime – is not free to choose, we take away his dignity just as surely as we do when we kill him.” (Kozinski, A., *Tinkering with Death*, in Bedau, H. & Cassell, P. 2004, ‘Debating the Death Penalty’, Oxford: OUP, 2004, p.9)

may be rather more to say about cruelty in a state where the legislator is not able or not willing to exercise clemency.<sup>32</sup>

Effectiveness, also, is a question on which quite different standpoints exist. If no effort is made to reform the prisoner, the only benefit of his or her imprisonment is removal from society. From a utilitarian perspective, these years of imprisonment represent a net loss to the state.<sup>33</sup>

## **7.2 The discourse of human rights**

For nearly seventy years, the abolitionist cause has centred on assertions of human rights. This has been promoted by a combination of academic writing and active lobbying. It is sometimes difficult to distinguish between the two. Scholarship on the subject often has the character of ‘committed’ writing and a number of self-appointed, monitoring bodies draw strength from academic research. Discourse of an official character was first seen in the consultations that led to the Universal Declaration of Human Rights (UN, 1948) and has continued through subsequent conventions, covenants and protocols. Any discussion of the death penalty in an international context must take account of human rights. Yet it is far from clear how this phenomenon should

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<sup>32</sup> In the case of the British child murderer, Myra Hindley (convicted 1966), over forty years’ evidence of reform to the prisoner’s character and outlook were not sufficient to persuade the British Home Secretary, Jack Straw, to grant her parole. In explanation, the minister cited ‘the public interest’ as his chief concern. This was, perhaps, in reference to a politician’s fear of adverse publicity.

<sup>33</sup> In countries with a high level of imprisonment, such as the US and Britain, the cost to the revenue is economically significant. This is commonly referred to but poorly quantified. Mark Cohen, who dedicates an entire book to estimating multiple examples of the costs of crime and justice in the US, manages to ignore this most obvious of issues almost entirely. He does, however, estimate ‘corrections’ at approximately 75% of the overall costs of police work. (cf. Cohen, M.A., *The Costs of Crime and Justice*, London, Routledge, 2005, p.84)

be defined. In various contexts, human rights appears as a set of concepts, a campaign, a regulatory body, and a number of supposed international laws.<sup>34</sup> Its appeal is to ‘natural justice’, but also to ‘rational justice’ since it claims both legal viability and usefulness to the state.

In some respects, human rights seems little different to other hopeful legal doctrines. Declarative statements of an optimistic and universal nature can even be found in pre-modern society.<sup>35</sup> Human rights, like Roman law, is an intended advance on existing practice and purposely incorporates peoples previously subject only to their own customs.<sup>36</sup> By its own lights, it represents superior values. Yet it is surely fair to ask if this appeal to universal recognition is genuinely inclusive, and whether its charter of human protection reflects the jurisprudence of existing states. Moreover, we may find ourselves wondering whether, as a project, it is both realistic and honest. Are the protections it demands of others consistently applied within states where this advocacy is most heard? For a long-established society to surrender its laws, it must first be persuaded that the path being urged is really better than the one it already uses. There are many historical instances of societies regretting their departure from existing norms by listening to fashionable appeals.<sup>37</sup>

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<sup>34</sup> At the moment when Eleanor Roosevelt’s UN committee was working on rules concerning the inviolability of the individual, however, allied military tribunals were straining the laws of evidence to deliver death sentences on the captured leaders of Germany and Japan.

<sup>35</sup> In its definition of justice, The Digest of Justinian begins: ‘Law is the art of the good and the fair ... we profess a knowledge of what is good and fair, separating the fair from the unfair ... desiring to make men good not merely from fear of penalties ... we lay claim, if I am not mistaken, to a true philosophy.’ (From Digest of the *Corpus Iuris Civilis* (published 533 CE) quoted in Barrow, R., *The Romans*, London: Penguin, 1949, p. 206)

<sup>36</sup> The Romans spread law-giving as a crucial instrument spreading citizenship, firstly to the other peoples of Italy, then more broadly throughout the empire. (ibid, pp. 205-214)

<sup>37</sup> This is obviously true of societies in a revolutionary phase, as in the acceptance within the USSR of Lenin’s doctrine of ‘revolutionary legality’ after 1917, and Hitler’s suspension of the Weimar Constitution of Germany (cf. Hobsbawm, E., ‘Age of extremes’, London: Michael Joseph, 1994). It can also be said of more settled societies where a new current of expert opinion is out of step with what most people believe or want.

One of the most striking aspects of the human rights movement is that, from a certain perspective, its cause is unchallengeable. Being seen as ‘enlightened’ makes all contrary opinion appear backward. But worthy causes can do harm as well as good. In times of crisis, appeals to pacifism, for example, may pose a serious threat to the values they are trying to protect. Every society looks to its own protection.<sup>38</sup> If threatened by mass disobedience or invasion, the state, acting rationally, will quickly suspend laws that assist those trying to undermine or destroy it.<sup>39</sup> In Britain, the brutal judicial killing of certain conspirators in 1605 is still a matter of national celebration. Despite the abolition of the death penalty and the compassion of the law in more peaceful times, it is reasonably certain that if the lawlessness which broke out in English cities in 2011 had continued for more than a few nights, a sharp escalation of response would have followed, and deaths resulting played down by government as ‘collateral damage’.<sup>40</sup> At this level of threat, all security forces are alike. Britain, no less than Bahrain, will defend itself against lawlessness. This response extends to the judicial authorities. Magistrates, after the events of August 2011, were instructed by government to apply exemplary and deterrent sentencing. The law is a fragile thing and its maintenance a matter of constant struggle.<sup>41</sup> However, reading the literature of human rights, we find ourselves transported into a world of reasonableness and compliance. Here a higher social morality

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<sup>38</sup> According to Hobbes, the very purpose of the office of the sovereign and the ‘supreme law’ is the safety of the people. (cf. Hobbes, T. 1651, *The Leviathan*, Part 2, ch. 30, London: Dent, ed. 1973, p. 178)

<sup>39</sup> *Perduellio* (hostile activity against the state) is the first capital crime of the XII Tables of early Roman law and was, at all times, punishable by death..

<sup>40</sup> This is an assumption, since no deaths occurred as a direct result of these riots, but there are sufficient precedents to justify the remark. In a military context, collateral damage may be an acceptable term for the unintended victims of an action, but it is surely problematic when used as a cover for enforced repression. (cf. explanations given by the Damascus government in the current struggle in Syria)

<sup>41</sup> This reflects a consistent theme of Western political thought that it is the rule of law, rather than the representative aspect of any particular system, which underpins the health of the state. (Cf. short article by Bedau, H. in ‘*The Oxford Companion of Philosophy*’, Oxford: OUP, 1995, pp. 780-781).

prevails. There is, apparently, neither the need nor scope for argument. The persistent tone is one of ‘how can anybody possibly disagree?’

The universal abolition of capital punishment is a central programme of the human rights in which a presumption of the right to life is held to be self-evident. It is assumed, rather than debated, that a right to life outweighs a right to punish the wrongdoer in equivalent terms. Thus the principle of *lex talionis* is taken to be no longer valid. Any invocation of this ancient legal concept is seen as blameworthy<sup>42</sup>.

Those unhappy at the absence of any further discussion may feel they are being told that the rights of the individual, irrespective of his crime, are of more concern than the rights of the victim.<sup>43</sup> They may sense this opens the door to the wholly unreasonable proposition that the rights of the wrongdoer are more important than the claims of justice. The human rights advocate will, of course, protest that equating the absence of the death penalty with an absence of punishment is unfair and untrue.

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<sup>42</sup> The principle of appropriate retaliation in *lex talionis* (‘an eye for an eye, a tooth for a tooth’) is found in the customary laws of traditional societies throughout the world. Hence it might be said to have a rather better claim to being representative of punishment for extreme crime than the supposedly more enlightened precepts of the abolitionist faction at the UN.

<sup>43</sup> Or, indeed, victims: in a murder, the chief wrong that survives the act relates to the families and friends of the person killed. It is significant that Western society has mostly given up the principle of compensation, whether to the individual victims of a crime or to the state. This is a contrast to earlier codes of law – Egyptian, Greek, Roman – as well as to the *sharia*.

### 7.2.1 Human rights discourse and the boundaries of critical discussion

At this point it may be difficult to see any common ground between the abolitionist and the retentionist. Yet, with respect to the Islamic law, we have noted that the *sharia* contains two well-defined types of capital crime, and that since they are not of the same standing, some aspects of retaliation are open to scholarly scrutiny and interpretation. It has also been shown that it is in the character of the *sharia* to avoid demanding the most severe penalty whenever possible.

If we set ourselves the objective of reconciling opposed views on capital punishment, we might expect to explore attitudes to the punishment of crimes which, until recent times, attracted the death penalty in every society. Though this type of evidence must be addressed with caution, statistical comparisons can be made of the effectiveness of deterrence under different penal regimes<sup>44</sup>. Approached impartially, scholarship offers the basis for rational discussion. Yet no enterprise is possible when fixed beliefs make one party feel it is indisputably in possession of the higher moral ground. Within human rights discourse and at forums<sup>45</sup>, abolitionists flatly deny any equality of viewpoint<sup>46</sup>. They appear to be so convinced of their cause, of their progress and ultimate success that

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<sup>44</sup> Statistics can be found on both sides in the literature on capital punishment and may be distorted by the language used as by the data itself. (cf. UN study 1988, updated 2002, quoted in Steiner, H.J. et al, *International Human Rights in Context*, Oxford: OUP, 3<sup>rd</sup> ed., 2007, p.20).

<sup>45</sup> Notably at the Rome Conference (1998).

<sup>46</sup> States with a mostly Muslim population argued that for a statute to be regarded as representative, it should include reference to the death penalty. In response, the Norwegian chair of the Working Group on Penalties showed his personal opposition by drafting a text that excluded all mention of it. Muslim states were rebuffed despite making an 'honest, genuine effort to bridge the gap'. (cf. Chairman's Working Paper, Art. 75, Para 1,' UN Doc. A/CONF.183/C.1/WGP/L.3/Rev.1, 1998, pp. 2-3).

they seem to think it pointless to listen to any other case that can be made<sup>47</sup>. With opponents of supposedly equivalent status, it might be assumed that debate can be engaged without one side trying to fix the outcome in advance<sup>48</sup>. This is the procedure that makes debate possible at the United Nations. Without at least the formality of respect, projects of an international character break down, losing their representative value, as well as any chance they may have of success. Yet in human rights discourse, proponents like Professor William Schabas apparently feel quite free to characterise Islamic opposition to universal abolition as the regressive doctrine of an out-of-date belief system.

False claims of consensus, jurisdiction and advocates do little to help the cause of international law. With respect to the death penalty, prominent Western commentators on international jurisprudence are clearly so committed to an agenda that it is common to find them writing as though their project had already been achieved. This appears to be a conscious strategy. Thus we find, in Professor Schabas's account, for example, a strange kind of contradiction: "Article 3 of the Universal Declaration of Human Rights is totally compatible with the abolition of the death penalty, a testimony to the foresight of its authors, even though they stopped short of stating this expressly"<sup>49</sup>. But can we ever say that there is total commitment from someone who remains silent? Even the old trick of

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<sup>47</sup> Writers such as Schabas, Hood and Hoyle actually begin their 'scholarly enquiries' with announcements of the campaign's progress. For example: "The day when abolition of the death penalty becomes a universal norm ... is undeniably in the foreseeable future". (Schabas, W., *op.cit.*, p.3). 'Six years have elapsed since the third edition...and there have been major developments in the progress towards worldwide abolition of the death penalty.' This is the very first sentence of the influential academic study, 'The Death Penalty' (Hood, R. & Hoyle, C., *op.cit.*, p.vii) It leaves the reader in no doubt that he should expect a one-sided advocacy not informed discussion in what follows.

<sup>48</sup> Equality of status may be a polite fiction in international diplomacy, but in organisations such as the U.N. it is a fundamental aspect of their existence.

<sup>49</sup> Schabas, W., *op.cit.*, p.20

maintaining that “silence gives consent” seems inadequate to such a claim. Yet, as we soon learn, this case is not to be compared with any other: “Its very general wording permits it to grow and evolve in tandem with international custom. Dynamic or evolutive interpretation is fundamental to international human rights law”<sup>50</sup>. In view of such remarks, perhaps it is understandable that Professor Schabas is never unwilling to apply damaging descriptions and tags to adverse opinion, and in particular to Islamic thinking: “very rudimentary”, “aggressive” and “obstinate” are his routine observations.<sup>51</sup> Some writers in the field apparently see themselves as catalysts quite as much as scholarly researchers. Yet, given the standards demanded of academic enquiry, this is surely unacceptable. Use of emotive language, whether in praise of abolitionists or against retentionists, undermines their credibility. A casual historical approach and distorted use of statistics may indicate a weak understanding of the subject. But these are pardonable defects when compared to the arrogant exclusion of the basis of other reasoned viewpoints, and the easy assumption that as a moral question there is really very little to be discussed.

Showing little understanding of the historical forces that shaped them, abolitionists fail to see the presumption in their own case. They display impressive passion and persistence but in a subject of such importance, and from a non-Western perspective, these attributes may not in themselves be persuasive.

Somehow we must form a view as to whether the abolitionist movement amounts to more than the opinion of a certain group, at a particular moment in time, in a relatively

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<sup>50</sup> *ibid*, p.20

<sup>51</sup> *ibid*, p.16 & *passim*



small part of the world.<sup>52</sup> The self-centredness of some of today's leading nations adds to the difficulty of accepting the human rights agenda. Representatives of these states apparently find it impossible to understand why they are not admired for their humanitarian concern. Yet to others they may look like someone who, escaping the consequences of his own crime, turns round to declare that from now on the entire community must live by different rules, and that he will be the person to say what these are.

### **7.3 Where international legal consensus is normal**

It may be difficult to avoid the suspicion that the post-war campaign for "universal rights" was in part window-dressing for a victor's justice, and that a superiority has been sustained by appearing to include the interests of others while rarely doing so. Yet setting aside these doubts, we are bound to recognise that universality is not a false or unimportant issue in the life of nations. Certain working assumptions about justice do and must exist<sup>53</sup>. This has been true at least since the movement of peoples and trade first required it.

Even in pre-recorded times, it is likely that the rights of free passage and the customs of hospitality were practised<sup>54</sup>. Enough is known of the pre-Christian Mediterranean, and of the Mesopotamian and Arab worlds, to show that a hallmark of civilisation has been a

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<sup>52</sup> The claim of abolitionists to represent a much higher proportion of the world's seven billion people than they really do is based on statistical distortions that will be examined later.

<sup>53</sup> The post-1945 settlement, in their recognition of the principles of non-interference and human rights, were clearly an advance on the terms of Versailles and the League of Nations, or of any other international treaty in modern times. (See Steiner, H.J. et al, op. cit., pp. 134-136.)

<sup>54</sup> Evidence can be found through analysis of the so-called 'iceman' (found in Italy buried under the snow). The discovery of his remains on an Alpine pass shows how it might have been possible to travel freely between widely-contrasting habitats in Europe ten thousand years ago.

developed sense of rights and obligations<sup>55</sup>. Privileges held to be typical of the modern world should not make us think that migration and individual mobility are new. In recent declarations of how people should behave towards each other, there is therefore a re-inventing of the wheel.

A great deal of social behaviour is rooted in the customary laws and practices of settled peoples. These define civility, and derive from religious principles. For example, non-judicial killing and highway robbery are inevitably outside the norms of an ordered society. A belief in their prohibition extends typically to outsiders as well as to the people for whom the laws were laid down. Moreover, it can be seen that many recently-proclaimed freedoms are, in fact, hidden restrictions. The right to travel, study and work abroad were enjoyed more fully in some parts of the world before the “privilege” of being granted a passport or visa was introduced<sup>56</sup>. For the righteous Muslim, this traditional freedom is exemplified by the coming together of nationalities at the *hajj*, the annual pilgrimage to Mecca.

Much of the novelty in today’s regulatory world lies in the working out of laws in response to communication and trade. Legal codes multiply and adapt. Rules concerning the exchange of goods and the formation of contract, for example, are made complicated to an extent commensurate with the possibilities of trade. The introduction of the telegram, telephone, telex and fax produced challenges to existing law that have

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<sup>55</sup> The journeys of the Herodotus, reporting from the Persian and Egyptian empires in the C5th B.C., are a clear indication of this (cf. Herodotus, trans. Rawlinson, G., Ware: Wordsworth, 1996). In pre-modern texts, there are references to the ‘ancient laws of hospitality’ practised towards peoples of another race or kingdom.

<sup>56</sup> ‘Until August 1914 a sensible, law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman. He could live where he liked and as he liked. He had no official number or identity card. He could travel abroad or leave his country for ever without a passport or any sort of permission.’ (Taylor, A.J.P., *The Oxford History of England*, vol. XV, 1965, p.1)

provoked adaptation or new regulation in definition and international control. Today, the virtual world of “cyberspace” is making contract formation complex and argued over in ways not previously imagined<sup>57</sup>. In modern Arab business practice, we are now very far from being able to enjoy the civilised *majlis alaqd*, or sitting together of parties, which defines the basis of contract under Islamic law. Today, reference to the *majlis alaqd* is to a legal concept rather than to a literal action<sup>58</sup>. In such technical matters, the laws of all countries keep up with changes in the way we live. The conduct of the driver of a vehicle is necessarily complicated by the mechanisation of transport, in which both the mass production of vehicles and congestion on the highway require the constant modification or refinement of regulations. They not only require legal uniformity within a single state but agreement between neighbouring ones. Barriers to human traffic, like the deserts of Arabia and the waters of the English Channel, are reduced or made meaningless by new forms of physical and electronic communication.

In an age when human interchange is as important as that of goods, the need for international norms is keenly felt. Yet how particular legal traditions are received, and how they work, often defeat attempts to reconcile one national system with that of another. In the case of the criminal code, the obvious explanation for this is that criminal law is not merely technical and administrative in nature. It deals with human behaviour at a deep level. Its fundamental regulations, concerning the sanctity or violation of human life, touch identity and belief. These are areas of the law which play an important role in distinguishing one society from another and which, we might suggest, are not

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<sup>57</sup> As in difficulties over authentication (e-signature) and fraud (e-money), ‘cyberspace’ is problematically both trans-national and intangible.

<sup>58</sup> cf. Saleh, Nabil., 2001, ‘Freedom of contract: what does it mean in the context of Arab laws?’ in Arab Law Quarterly, ALQ 16(4), pp. 346-357

easy or safe to overturn<sup>59</sup>. This is especially true in Islamic society. For the believer, there is the unchallengeable category of divine ordinance crimes.

In the arena of conferences on the death penalty, however, such dimensions are generally ignored. Making a show seems to be more important than the need to understand a radically different point of view, and the emergence of a new legal norm is sometimes falsely claimed<sup>60</sup>. To ignore deeply-held convictions in such a way only exposes the shallowness of the project, yet this is not untypical of written advocacy in human rights discourse. Removed from the deal-making of conventions, there ought to be scope for a comprehensive approach. But when, for example, the concept of equivalent retribution is made fun of as self-evidently backward thinking, it can be seen that the writer's own prejudice has infected the argument. With its extraordinary neglect of the historical record, and naive unconcern towards other forms of state-endorsed homicide, in both extra-judicial punishment and war, we may be forced to conclude that human rights discourse is in a far from healthy state<sup>61</sup>.

#### **7.4 Analytical objections to human rights discourse**

In addition to the unrealistic attitudes taken by abolitionists over capital punishment, there are other fundamental objections to their arguments. These may be less familiar to a Western than to a Muslim viewpoint.

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<sup>59</sup> The recent case (heard in Italy 2010) of the murder of Ms. Kirchner, a British student in Perugia, illustrates how three closely-related societies (Italian, American and British) have quite different expectations, as well as norms of procedure, in a judicial investigation and murder trial.

<sup>60</sup> Without offering any real evidence, William Schabas sees the position of the United States on the death penalty as moving satisfactorily towards a *jus cogens* of 'mainstream opinion'. (Cf. Schabas, W., *op.cit.*, p.376)

<sup>61</sup> Discussed at some length in the following chapter.

Firstly, a legal right may be held to be a right within society because it is felt to be an unchallengeable moral right. A legal right of this kind is likely to be supported by historical and constitutional associations which have made it widely accepted. An example might be the right to live peaceably without fear of arbitrary arrest. Although circumstances may arise that breach the exercise of this right, such as war against the state, they do not vitiate the claim to an existent moral right. Rather, the function of this right has been suspended as a result of circumstances beyond the power of an individual to control, and the individual must bow to these circumstances. However, for a Muslim, where an unchallengeable moral right derives from divine law, or a prophetic saying, it is something more than a legal right. To the defender of a particular religion, a right of this kind may be no less than a duty, observance of which is mandatory on his belief. It cannot be suspended through adverse circumstances, or open for the individual to surrender. Hence, a devout Muslim will not consider pronouncements of the *sharia* concerning divine ordinance crimes as simply legal rights to be followed or dispensed with according to circumstances. They are obligations that can never be set aside.

Principles such as these do not necessarily prevent alterations to the law. Clearly, laws vary in their degree of permanence as well as in the scale of their importance. No nation will resist forever the need to adjust traffic regulations in line with advances in technology, or fail to make its practices compatible with the laws of neighbouring states<sup>62</sup>. No Muslim country can exclude itself from trade on the grounds that e-contracts

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<sup>62</sup> Those which, like China, tried to hold back the introduction of railways and motor cars paid a heavy price in decades of arrested development. (see Rodzinski, W., 'The walled kingdom', London: Fontana, 1984, p.212)

violate the prescribed form of the *majlis alaqd*<sup>63</sup>. Yet states are founded on legal precepts as much as on their territory or language. These were at some time called the “tablets” of the law-statutes written in stone, and imprinted on the minds of the people through visual recognition and recitation. Such practices, lost to Western culture, exist in Islam. They come to us as edicts, not bills before parliament, passed down from ancient, unchallengeable sources<sup>64</sup>. If divinely inspired, they cannot be denied by the believer.

How one people’s set of beliefs is legally understood by another is central to this study, and its principal problem. If we hope to resolve incompatibilities, a mere understanding of difference is not enough. We need to recognise the precise force in the tradition that is unfamiliar and quite different to our own. This is true even where traditions overlap and have conditioned each other. The essence of this is not the form of the laws but the values that lie behind them. When it is the belief of one society that its fundamental laws are inspired by God, but of another that human intelligence has the unrestricted power and competence to invent or give up whatever laws are required, there is a deep contrast in jurisprudence, as between fixed and impermanent values. In a secular society, laws covering abortion and suicide can be varied at will. But in a state founded upon religious principles that proscribe these behaviours, acceptance of changes in the law is an indication of moral decay. In the question of the death penalty, human rights commentators and pressure groups seem unable to understand why states rooted in religious principle cannot simply abandon their objections.

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<sup>63</sup> A matter recently resolved after much discussion in Saudi Arabia, the most conservative of Islamic states.

<sup>64</sup> It is true that this direct apprehension of divine law is still followed by certain Orthodox Jews as well as Christian sects, but this that marks them out as not belonging to the mainstream of Western society.

It may be, of course, that some intellectuals do not regret the inter-generational tension and suffering that frequent changes to the law provoke. It is even possible to argue that they provide a productive dynamic in society, an expression of natural growth and responsiveness. On closer inspection, however, change is usually the product of a particular militancy, and marks the triumph of a minority interest group. Can it be claimed, for example, that the de-classification of explicit pornography has been supported by a popular movement or by any campaign in Western countries? Or would there be general agreement with the view that publicly-financed schools should promote an attitude of normality in relation to homosexual behaviour? Controversial issues such as these are untested, which makes assertive terms like “liberal democracy” and “progressive thinking” seem odd. It is surely inconsistent that European states which embrace radical shifts in social morality have rarely looked for popular endorsement. Abolition of the death penalty in Europe is a particular case in point, and a subject on which most citizens can be expected to have formed an opinion. How can it be that nations which are proud of their democratic institutions are unwilling to settle questions of the highest importance by referendum?<sup>65</sup> Yet these same nations expect to put themselves above others by their claim to having a higher democratic status.

#### **7.4.1 Culturally-specific objections to human rights discourse**

Differences of legal outlook do not just concern nations that belong to separate religious traditions but those that possess the same core structure. Islam adheres to Holy Scripture and the sayings of the Prophet, peace be upon him, but it is not unchanging in its range

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<sup>65</sup> The mechanisms for popular voting on specific issues are not prohibitively difficult or costly, as is shown by the frequent use of referendum in Switzerland and the United States of America.

of legal prescription. Aside from schisms within the faith, there is a variety of jurisprudential response to influences from outside the Islamic world.

It may seem contradictory to a non-Muslim to be told that the Islamic *sharia*, though resistant, is essentially flexible. Yet this is to distinguish the inner core of faith from the outer frame work of legal regulations. As we have seen, appropriate forms of retaliation are not all that the laws of Islam have to say about the treatment of convicted murderers. But it is an unchallengeable part of what our faith teaches us, which cannot be set aside for the convenience of non-believers. Allah Almighty is merciful, and every avenue is explored to save a person's life in ways that are permitted. The judicial instinct of the Legislator under the *sharia* is to show mercy and this may be more compassionate than that of the judiciary in non-Islamic countries. It must not be taken to imply, however, that a believer is ever able to accept that capital punishment is wrong. Simply, it is better to preserve life than to take it.

What is particularly damaging to the human rights cause, in relation to the use of the death penalty under Islamic law and in other retentionist states, is the refusal to recognise that those who do not share these beliefs have nevertheless human rights protections of their own. Nothing is less persuasive, or weaker as a strategy, than to show disrespect for those you wish to convince. What, for example, is to be made of the following?

“Perhaps there is a case for Islamic legal scholars who can demonstrate an alternative and progressive view of religious law. The intransigence of



Islamic States on the subject raises the whole issue of cultural relativism. If there is no universal agreement on the most fundamental of human rights, the right of life, how can anything more be expected in the rest of the catalogue of human rights?”<sup>66</sup>

For this writer, it is clear that a “progressive” view is no different to an “alternative” view, i.e. one that requires the Muslim to surrender articles of his faith. But this is not all. The established practice of Muslim states is ‘intransigent’- so extreme, apparently, that it calls into question the principle of accommodating or making allowance for customary difference between societies. It goes beyond the boundaries of acceptability, of what we, in the more enlightened world, can tolerate, according to Professor Schabas. The final challenge is that, failing such a basic test of humanitarian principle, Islamic law has no understanding or respect for human rights. Can any kind of justice be looked for in such places, asks Schabas, in a tone of annoyance.

The reader might imagine from the above that any inhumane and arbitrary behaviour is possible in Islamic countries. A state that offers no guarantees of protection to its citizens is, at a fundamental level, lawless. Yet the reader might also wonder how Islamic society has cohered and maintained itself for the last fourteen hundred years<sup>67</sup>. Is he supposed to imagine that it was held down by force in the exercise of arbitrary and strange rule? If so, Islamic dictatorship has been extraordinarily successful in historical

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<sup>66</sup> Schabas, W., *op. cit.*, p. 377. Throughout his lengthy account of the history of the abolitionist cause from 1945, Professor Schabas not merely refuses to engage contrary opinion but does his best to omit any mention of Islamic states and their own response to human rights initiatives.

<sup>67</sup> Islamic civilisation is a longer project, it could be said, than even the law-giving Roman state or any of its successors such as the Byzantine and Holy Roman empires.

terms<sup>68</sup>. But is he also asked to believe that Muslims are so incapable of understanding fundamental social propositions, or of thinking for themselves, that they simply put up with a hateful system?

Surely Professor Schabas totally misconceives the meaning of rights to a Muslim. Islam is predicated on a compact between ruler and ruled, the terms of which are lasting, clearly developed and binding on both parties. A Muslim's guarantees of immunity from the arbitrary behaviour of a ruler, depending, as in every society, on the individual's willingness to obey the law, are in fact precise and universal. They contain much less uncertainty and potential difficulty for the individual citizen than the shifting regulations of Western society<sup>69</sup>.

It is true that some Islamic scholars explore ways to restrict the use of capital punishment. Professor Bassiouni points to the essentially merciful character of Islam and calls for a re-opening of interpretive guidance in *ijtihad*,<sup>70</sup> both on this and other matters<sup>71</sup>. Yet commentators like Professor Bassiouni are quoted selectively and out of context in human rights literature. They are falsely displayed as Arab intellectuals fully signed-up to the "progressive" agenda of the abolitionists<sup>72</sup>.

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<sup>68</sup> Force alone offers little prospect of sustainability. In a superbly-equipped state, the emperors of Rome (after the Antonine period) rarely survived for more than two or three years.

<sup>69</sup> The argument here is that since the *sharia* has an ancient and settled ethical basis, diffused through the diffused through religion, an understanding of the law is more general in the Islamic world than in the largely secular West. It follows that a Muslim is much more likely to feel his guilt and accept his punishment than his Western counterpart.

<sup>70</sup> *Ijtihad* is the attempt by Muslim jurists to find a new answer or remedy for an unresolved problem.

<sup>71</sup> Professor Bassiouni does not argue against the principle of the death penalty, noting that it is mandatory for the crime of *al harabah*. (see Bassiouni, M.C., *Death as a Penalty in the Shar'ia*, in Hodgkinson, P. & Schabas, W. (eds.), *Capital Punishment: Strategies for Abolition*, Cambridge: CUP, 2004, pp. 169-185)

<sup>72</sup> Writers guilty of this particular deceptive strategy are, for example, Hood, R. & Hoyle, C., 2008, 'The Death Penalty', Oxford: OUP, pp. 34 & 72-73.

For people from one particular region to set themselves up as moral decision makers of the entire world is an imperialistic project which, to a Muslim, may recall the aggression of former times. It wages war for our hearts and minds. Both dangerous and counter-productive, the consequences of this are everywhere to be seen. From the incoherent rage of street demonstrations in recent times, to the emergence of new, deeply-reactionary religious states<sup>73</sup>, we see the fruits of incomprehension and intolerance.

### **7.5 The difficult case for the international jurisprudence**

The human rights movement provides a large and sometimes confusing forum in which actors, both official and unofficial, play a part<sup>74</sup>. Its public statements frequently bear the imprint of international agencies. These vary greatly in range and status. They may be appeals and resolutions at conference level, declarations of agreed policy with or without reservations, or formal treaties ratified and in force.

Broadly-speaking, treaties impose direct obligation upon private citizens of a state adhering to an agreement that the state has ratified and incorporated within its own legal framework. This alone constitutes viable law since statehood implies sovereignty<sup>75</sup>. Law cannot exist in, as it were, a weightless condition where there is neither mass nor gravity to enforce it. Hence, it is commonly said that international law is notional or non-existent.

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<sup>73</sup> For example, since the overthrow of the Iranian monarchy (2.2.1979) and the coming to power of the religious regime (*mulla's* regime).

<sup>74</sup> This comprises all "post-1945 governmental, intergovernmental and non-governmental developments in both national and international contexts in the recognition and protection of human rights." Steiner, H. et al, op.cit., preface.

<sup>75</sup> This, of course, goes to the heart of the political difficulties member states have faced since the formation of the European Economic Community. Yet whether as a free-trade bloc, Community or Union, the fundamental dilemma of sovereignty remains. However difficult the circumstances (such as the interregnum in Greece in May, 2012), even the most powerful of member states cannot legislate for the weakest.

The exception to this are circumstances in which the national legislature has become inoperative and the functions of the state are in suspension. Trials of individuals for crimes against humanity after armed conflicts have given rise to assertions of universal jurisdiction and operative international law<sup>76</sup>. But as at Nuremberg<sup>77</sup>, Tokyo and The Hague, they necessarily imply the complete breakdown and suspension of a regime and the direct intervention of other states<sup>78</sup>.

Today, there appears to be a strong lobby in the UN for humanitarian intervention where genocide is threatened. But the practice of “ethnic cleansing”, by reactionary and despotic governments against sections of their own population, is not infrequent. Desperate efforts to hold onto power within the recognised borders of the state have led to external military intervention, as has recently occurred in Yugoslavia and Libya. Yet equivalent levels of barbarity in Chechnya and, to date, Syria have not provoked invasion. The stand-off over unresolved conflicts, even those that result in the misery or flight of an entire people, has no time limit. No superior power, asserting the obligation of human rights law, has been effective in Palestine. Israel successfully defies UN resolutions against its conduct towards non-Jews, which have condemned generations of displaced people to the status of indefinite refugees<sup>79</sup>. It would be unrealistic to pretend

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<sup>76</sup> The precedent for universal jurisdiction set at Nuremberg was invoked by Israel in *Israel v. Eichmann* (1961) without giving rise either to counter-claims for extradition or international protest. Its bearing on subsequent cases, however, is unclear, especially where less moral certainty exists over the heinous nature of mass political offences. This is evidenced in the conflict of opinion among UK Law Lords, in relation to Spain’s unsuccessful attempt to gain the extradition of General Pinochet (1998) (See contrasting opinions of Lord Phillips and Lord Millett, in Steiner, H. et al, op.cit., pp. 1167-1169)

<sup>77</sup> At the time of the Nuremberg trials, Germany had become an historical or geographical expression: it had ceased to exist as a state.

<sup>78</sup> This is rarely, if at all, stated openly in ‘committed’ human rights writings. Yet their constant points of reference are either the legal innovations in the immediate aftermath of WWII or more recent collapses like that of Yugoslavia in the 1990’s.

<sup>79</sup> Displacements which have, in their turn, inevitably given rise to further conflicts, as in Lebanon (1975-1990) and currently Palestine.

that suffering is the deciding factor in whether direct intervention is made in the name of the “international community” and in compliance with “international law”. Alliance, private interest and the willingness to use military force, are the determining factors. These considerations provoke or restrain those few states that have the means to project power beyond their frontiers.

Unless governed by bilateral treaty, states will normally act to protect citizens from trial outside their own jurisdiction. Within almost any self-conscious political society, a failure to do so would be likely to cause uncertainty and unrest. Thus, it is only at the point of individual ratification, incorporating the substance of a treaty into national legislation, that international agreements can be said to have the status of law. Reviewing the current human rights literature, however, we might easily gain the impression that the reverse is true. In this make-believe world, international agencies, though often no more than nominated committees, dictate terms to national governments. With the security of those who do not require popular consent nor have to face the consequences of their own ideas, they lecture those who do not follow their prescriptions. In passing, they show no respect for the civilisational values which block their path to successes. Since much of what passes for international jurisprudence is a work in progress, it is perhaps not surprising that the approach of some writers is adversarial. Nevertheless, for their idealisation of a forward march towards an inevitable universal agreement, these activities should display a prominent health warning: “achievement here is mixed, progress far from certain”<sup>80</sup>.

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<sup>80</sup> Most of the commentary referred to here slightly pre-dates the financial and economic crisis, beginning 2008, which is currently not only causing panic in the West but effecting an actual shift in power towards non-Western countries. The reduction of confidence in Western values is already apparent in journalistic writing.

## 7.6 Categorical confusions in the human rights movement

Through its own considerable energy, the human rights movement has spread itself into various categories of human rights law, international humanitarian law and international criminal law. Quite where the boundaries begin and end is a matter of speculation. It is far from being satisfactorily resolved even by those whose work centres on applying these distinctions. Professor Provost, who writes on this topic, makes the following comments:

‘The [UN] Secretary-General’s two reports represent a significant contribution to the position that no fundamental distinction exists between human rights and humanitarian law.’ (p.4) “While human rights law derives from humanity understood as the defining characteristic of the human race (*menschheit*), humanitarian law is coloured not only by that aspect of humanity, but also by humanity understood as a feeling of compassion towards other human beings (*menschlichkeit*), so that in humanitarian law humanity–*menschheit* is safeguarded through humanity–*menschlichkeit*. It seems in fact possible to discern elements of humanity-*menschlichkeit* in human rights as well, particularly in economic, social, cultural and collective rights.’ (p.5) ‘The classic conception of human rights and humanitarian law is that they apply in different situations and to different relationships. That is, human rights are understood to regulate the relationship between states and individuals under their jurisdiction but are inapplicable in times of emergencies.’ (p.7) ‘There is an observable tendency in the literature inspired primarily by human rights law to consider humanitarian law as merely a subset of human rights. Conversely, some writers in humanitarian law have

argued for an overly rigid differentiation between human rights and humanitarian law, as a defence against the perceived threat to subsume the latter into the former.’ (p.9)<sup>81</sup>

The final point shows the territorial nature of academic enterprise, but it is surprising to find writing quite so unclear. It might make us to ask what interest or principle condemns matters that seem perfectly straightforward to such unclear categories. Put simply, human rights is a discussion; humanitarian law a looked-for or agreed procedure. Further sophistication of the subject only confuses the matter at hand.

Yet whether it is international humanitarian law or international criminal law, we should be addressing is made problematic in the work of Professor Cassese. As a jurist of long-standing and practical experience, we might expect more substance than playing with categories. His first estimate is sober:

‘International Criminal Law is a body of international rules designed to proscribe certain categories of conduct ... and to make those persons who engage in such conduct criminally liable. They consequently either authorise states, or impose upon them the obligation, to prosecute and punish such criminal conducts.’<sup>82</sup>

The signal feature, then, is that International Criminal Law rules impose obligations on individuals as well as on states. However, we soon find that the onward march of regulation is heavily obstructed. Firstly, different legal traditions, notably English common law and those derived from Roman law, govern the understanding of criminal law in the courts. Thus, International Criminal Law is not a readily-comprehensible

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<sup>81</sup> Extracts taken from Provost R., *International Human Rights and Humanitarian Law*, Cambridge: CUP, 2002.

<sup>82</sup> Cassese, A., *International Criminal Law*, Oxford: OUP, 2008, 2<sup>nd</sup> ed., p..3.

extension to a domestic criminal code but “essentially hybrid”<sup>83</sup>. International Criminal Law, we are told, is itself an outgrowth of public international law, springing from “treaties, customary, law etc”<sup>84</sup>. It is “impregnated with notions, principles, and legal constructs derived from national criminal law, international humanitarian law as well as human rights law”<sup>85</sup>.

It seems we are in greater difficulty than ever. But we can surely satisfied argument over which branch or category is senior. On the applicability of international law, what Professor Cassese appears to be admitting is that adherence to what he calls a “rudimentary” and “indeterminate” set of rules is questionable. International Criminal Law can proceed on cases of “large-scale” crime only where national jurisdictions are too weak to insist on their own rights. Again, we find that the cases cited refer to citizens of defeated or fallen states<sup>86</sup>. There is no mention of the competence of international courts to try citizens of countries powerful enough to resist extradition. Indeed, their representatives can be found exempting themselves even as they declare their public support for more “effective” rules of extradition<sup>87</sup>. This is entirely consistent with the realities of international deal-making. Powerful individuals and powerful states are not brought to account even when, as in the case of documented massacres, the truth may be finally admitted<sup>88</sup>.

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<sup>83</sup> Neither here nor elsewhere is there any mention of other legal traditions representing at least half of mankind, as in Islamic, Hindu and Confucian laws, as well as in thousands of native traditions.

<sup>84</sup> International public law is not further defined, presumably to give place in this account to international criminal law, whose principal ‘unique feature’ (despite arising from identical origins) seems to be that it is ‘new’. (cf. Cassese, *op.cit.* p.4)

<sup>85</sup> *ibid* p.7

<sup>86</sup> These were Germany, Japan, Lebanon, Yugoslavia and Rwanda.

<sup>87</sup> cf. the public statement made by ex-president G.W.Bush on the use of ‘waterboarding’ (Television interview, 5<sup>th</sup> November, 2010).

<sup>88</sup> Referring to the 14,500 Polish officers murdered on the orders of the Soviet government in 1941. This is still an affront to the people of Poland, more especially as the USSR sought the prosecution of Germany at



## 7.7 Legal competence in international disputes

Taking a “realist” view of the dimensions of international legal proceeding brings us to the question of competence. Here the jurist is frequently embarrassed by what he finds to be the actuality. For example, commenting on the decision of a war crimes tribunal, in *US v Frick* (1947), Professor Provost finds the rejection of the defence “surprising”. In this case, six German industrialists were prosecuted under the Hague and Geneva conventions for using captive prisoners as forced labour. Whereas, previously, governments alone had been thought liable, individuals in this case were prosecuted<sup>89</sup>. This involved a notable degree of retroactive justice, since the terms of the conventions were no longer accepted as legal norms in Germany after 1933. Yet the power of the prosecutors and the hatred attaching to Nazi war criminals were sufficient to overcome any legal difficulty. The verdict was subsequently relied on in similar cases.

The implications of this are plain<sup>90</sup>. A newly powerful state, claiming universality for its own definitions of humanitarian law, may assert a right to universal jurisdiction and retrospectively apply those standards to a beaten enemy. Despite recognising this difficulty, Professor Provost, in his comments on reservations, puts himself on the dangerous ground of having more regard for the spirit than the composition of the law<sup>91</sup>.

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Nuremberg and, for over forty years, succeeded in blaming the Nazi regime for a massacre that it had carried out. (cited in Provost, R., op.cit., p. 234)

<sup>89</sup> The judgement of the US Military Tribunal stated: ‘It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual.’ (US vFlick [1947] 9 L Rep. Trials War Crime. 1, 6 USMT 1 [US Mil .Trib., Nuremberg] cited in Provost, R., op. cit., p. 87)

<sup>90</sup> If taken as reliable example, what is there to prevent the future prosecution of the directors of Haliburton Oil for crimes committed after the Second Gulf War and the occupation of Iraq under the same rules? The answer is, of course, the power of the United States. Yet this is unlikely to last for ever. Even the strongest of states should beware of history.

<sup>91</sup> cf. Provost, R., op. cit., pp. 140-146

On a decision of the European Commission of Human Rights allowing a claim against Austria even though it related to a violation prior to Austria's ratification of the European Convention on Human Rights, he writes:

'If a state can bring a valid claim with respect to a violation committed at a time when it was not at all obligated under a human rights convention, then a state can clearly do the same despite having made a reservation and thus limited its claim under the convention. Adherence to the system, rather than to a specific norm, is the requirement to have standing.'<sup>92</sup>

Such thinking surely raises subjective interpretation to a dangerous level, but it is far from untypical of discussions brought about by great international causes. Amongst these is the abolition of capital punishment. It can be allowed that jurists were strongly influenced by the horror of what took place in German-occupied Europe during the Second World War, and keen to convict those few individuals brought before them, yet to admit as legal precedent the reduced standards then prevailing at military tribunals hardly serves the interests of international jurisprudence.

Adherence to established precedent and long-held tradition has been a recurrent theme of international disputes. It has often been pointed out that what is called international humanitarian law is the product of customary law. In the opinion of the US Supreme Court on the '*Paquete Habana*' dispute (1900), the custom of non-interference with "poor and industrious" fishermen was bound up in a precedent set by an English king of the Middle Ages. It had become the established practice of "civilised nations"<sup>93</sup>. This

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<sup>92</sup> In *Austria v. Italy* (1961), op. cit., p.146

<sup>93</sup> Drawn from the remarks of Mr. Justice Gray in overturning the lower court's decision that the customary principle should prevail. (cf. 175 U.S. 677, 20 S.Ct. 290, quoted and discussed in Steiner, H. et al, op. cit., pp. 61-71)

opinion overturned the decision of the Florida district court that first tried the case, and which had found no law protecting the Spanish-flagged vessel. In the view of the Supreme Court, however, where the country's behaviour was under examination by its peers, the seizure violated an important tradition. It might not be a *jus cogens* of universal standing, but it dictated a certain standard of behaviour. If the United States wished to belong to an exclusive club of nations pleased to call themselves "civilised", it was obliged to conform. Two things can be said about this. Firstly, for thousands of years nations have exercised a similar discipline, wishing to see themselves, and to be seen by others, as "civilised"<sup>94</sup>. Secondly, acts of magnanimity cannot conceal an injustice when a greater theft lies behind them. In their time, politeness would not have excused the dispossessions and exterminations of the early Roman Empire any more than they have the equivalent behaviour by Nazi Germany. Though its continued authority makes the assertion seem contentious, the US confiscation of Spanish possessions after 1898 belongs to this category.

Reservations and interpretative declarations present an obvious frustration to the proper functioning of international agreements. They may be transparently dishonest when they seek to protect an interest hostile to the spirit of the agreement signed<sup>95</sup>. Yet their persistence may simply bear witness to the depth of conviction felt within a particular society on a given topic. Abolition of the death penalty is a typical example.

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<sup>94</sup> Herodotus (op.cit) writing in the C5th B.C., gives examples of a comparable, self-conscious civility and forbearance.

<sup>95</sup> An example given by Professor Provost is when India made a reservation to Article 1(1) of the International Covenant on Civil and Political Rights: 'that the words "the right to self-determination" .... apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national sovereignty.' (ibid. p.145).

## **7.8 The dangers of universalist argumentation**

It should be noticed that today's human rights covenants have antecedents whose lifespan was remarkably short. The 1789 revolution in France, the 1917 revolution in Russia, and many less regarded, truth-claiming declarations like that of Cuba (1959), were not domestic in intention. Their aim was to re-model the world. This radical message stimulated the creative artists of Europe after 1789. With a similar desire to set the calendar at Year Zero, the Maoist zealots of Cambodia went a step further than even the French Jacobins had contemplated, by condemning every body who lived in a town or was educated to internal exile and forced labour<sup>96</sup>. What characterised the madness behind these radicals was a false sense of their own uniqueness, and the short cut they took by way of violence. Extreme force, including extra-judicial murder, was made acceptable, according to Lenin's dark phrase, as "revolutionary legality". Nice-sounding terms such as this are typical of argumentation designed to prevent the individual from seeing that he may be engaged in wrongdoing of the worst kind. In particular, they anaesthetise the conscience from recognising that extra-judicial killing is an act of homicide. Yet even in countries like Russia, with its long tradition of dictatorial rule, this has mostly led to loss of confidence, failure and collapse. Far from receiving the applause that revolutionaries expect for their idealism, these self-appointed legislators<sup>97</sup> are soon condemned for breaching the essence of what they thought they were representing: a superior view of human rights<sup>98</sup>.

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<sup>96</sup> After the Khmer Rouge revolution of 1975, the possession of reading glasses was sufficient evidence for a person to be condemned as a class enemy. For offences such as the wearing of long hair, random executions were so common (carried out by the badly-trained soldiers) that estimates of 400,000 deaths have been given for the first few weeks after the forced evacuation of Phnom Penh (see Stuart-Fox, M. & Bunheang Ung., *The Murderous Revolution*, Bangkok: Orchid, 1998, pp.17-19)

<sup>97</sup> Often coming from the professional classes, especially lawyers and teachers.

<sup>98</sup> It is interesting that Robespierre, French national leader in the most violent period of executions, was a convinced abolitionist at first.

Among the most progressive and, in its time, respected announcements of the twentieth century was Stalin's 1936 Constitution of the USSR<sup>99</sup>, issued at the height of deliberate mass starvation in the Ukraine and the lethal purge of officials throughout the Soviet Union<sup>100</sup>. It was the year in which every member of the Communist Party in Leningrad was assassinated. Outwardly concerned with a guarantee of fundamental rights, the Soviet Constitution demonstrated how the perversion of reality can be perfectly achieved in an atheist society. It has been said that its real purpose was "to make people forget ..., to force them to see what wasn't there, and to maintain the contrary of what their eyes told them"<sup>101</sup>.

Of course, it may be argued that in less radical revolutions, like that of England in the late seventeenth century, the old fabric was not torn to pieces but adapted and improved, and that this essentially non-violent model of reform gives the character to human rights projects today<sup>102</sup>. But in changing times, and for an evolving jurisprudence, such models are not without their problems. The founding laws of the federal United States, for example, are set forth as self-evident and lasting truths, yet have proved a great barrier to legal reform. Examples are the right of American states to determine their own penalties, and the right to bear arms. Worse, they ignore the claims of subject peoples not considered worthy, at the time they were drawn up, of a place within the polity. This

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<sup>99</sup> Chapter 10 of the 1936 Constitution both declares and guarantees the 'fundamental' rights of citizens, binding on all the authorities of the state. An early estimate of these arrangements can be found in Barker, E., *Reflections on Government*, Oxford: OUP, 1942, pp. 319-327. 'Since 1936 an actual dictatorship has been acting in combination with a system of formal democracy' (ibid p.321)

<sup>100</sup> Robert Conquest's cautious estimate puts the number of those dying of famine at around seven million. (cf. Conquest, R., *The Harvest of Sorrow*, London: Hutchinson, 1986, p.303)

<sup>101</sup> The passage continues: 'Hence the unparalleled harshness of the terror, and the promulgation of a constitution which was never intended to be applied...' (Pasternak, B., *Doctor Zhivago*, Glasgow: Fontana, 1958, p. 495)

<sup>102</sup> Referring to the 1689 Bill of Rights in England, guaranteeing the liberty of the individual subject, following the 'Bloodless Revolution' of the preceding year.

gave cover to the very worst practices that can occur between people of different races. It is especially, in the present time, when we see how genocide and slavery may go hand in hand with expressions of goodwill and the declaration of universal rights.

Broadly-speaking, the more recent history of attempts to set universal human rights in stone has not been promising. That it remains an urgent project cannot be discounted or ignored, yet a persistent underlying defect lies in the extent to which international law is rooted in the particular experience and interests of a select group. Inevitably, perhaps, international jurisprudence will take on the character of the ideology of a dominant power. Their convictions will be privileged above others. It may seem difficult to understand that in the matter of the death penalty the USA is retentionist. But, as will be explored, the American case is one of a very particular exception in which the combination of a settled body of constitutional law and the power of local voting are able to defy the will of the nation's intellectual and 'liberal' establishment.

The values of what called "liberal democracy" have been the drivers of international conventions on human rights since the founding of the United Nations. Recent declarations of human rights derive from a post-1945 leadership. However, as in the collapse of the Soviet system after 1989, the cultural or economic plates can shift unexpectedly and with dramatic consequences. They may advance quite different evaluations of fundamental rights<sup>103</sup>. It is far from clear how the set of values now

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<sup>103</sup> The focus and justification of Marxist-Leninist thinking is economic and collective, as distinct from libertarian and individual. Hence the juridical rights 'guaranteed' under the 1936 Soviet Constitution were aimed at making permanent the 'dictatorship of the proletariat' as understood within an all-powerful state.

dominant in international jurisprudence will fare in relation to the new importance and spread of Islam, or the rising influence of neo-Confucian values<sup>104</sup>.

## **Conclusion**

International law is a term we can safely employ for fully-ratified, multinational agreements. The requirement for it has a basis in practicality and commonsense. But law-making driven by the human rights movement, as presently understood, is neither watertight nor durable. Based on historical contingency, it is partial in scope and, in this case representing only a minority viewpoint, fails the most obvious test of universality.

Even the best-devised and well-intentioned projects are unlikely to achieve a standpoint that is genuinely universal. To achieve international agreement on the most particular and sensitive aspects of national law is not like persuading states to participate in a trade deal. Sovereignty is, among other things, a token of difference, a frontier by which nationalities define themselves against their neighbours. Hence, difference is an inherent aspect of nationality. Secondly, international law reflects the existing order of a particular time in history. Its bias and preferences are inevitably determined by the outlook of a dominant group. Just as the cultural and economic circumstances of nations are not fixed, so we can expect there to be changes and even reversals in the field of international law. Powerful secular societies in that are slaves to new millennial dreams and self-evident truths offer a fairly reliable indication that their ambitions will not trouble the world for long.

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<sup>104</sup> Given demographic projections in the first instance, and the economic power of East Asia in the second.

Inclusivity is the only ethic, or procedure, that gives international law any prospect of success. Again, this implies rather more than getting national representatives to come together at a conference. It should be like members of a family trying to agree on a common course of action under circumstances in which each has an equal right to hold to their opinion. This may seem idealistic and impossible to achieve, but any less respectful way of proceeding is certain to end in resentment and quarrelling.

Exposed to accusations of double standards and special pleading, the process of international decision-making has no value<sup>105</sup>. In much the same way, when a particular cause claims a higher morality or superior vision it quickly becomes unacceptable to those whose own beliefs lead them to disagree.

Some human rights scholars do not apparently accept that a rational argument still exists for capital punishment. They silence debate by sidestepping it entirely. But those writers whose focus is on the cause of abolitionism often ratchet their case without conscious, practising coercive tactics against those who are unsure or who disagree. This has been plainly demonstrated from the literature<sup>106</sup>.

There is also an unfortunate tendency to rely upon contemporary, or near-contemporary, examples which the writer knows personally<sup>107</sup>. As methodology, this is less than convincing. Not only is there a lack of historical perspective but a failure to notice large

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<sup>105</sup> A well-documented and sad illustration of this point can be found in ex-Yugoslavia, whereas the incoherent, if ultimately decisive, intervention in Bosnia-Herzegovina has left a dangerous cold war Muslim, Catholic and Orthodox communities.

<sup>106</sup> Chief among these is the invitation to contempt, i.e. manipulating the reader to despise those who cannot agree with the human rights agenda on capital punishment.

<sup>107</sup> Professor Cassese (op.cit.) draws most of his material from the Yugoslav War trials in which he was directly involved as a jurist.



portions of the world where the types of legal scenario mentioned do not apply, or where the measures of international law are untested and unknown<sup>108</sup>. It is scarcely necessary to insist on claims for Islamic practice when so much of the world's largest and most populous continent is left out of the picture.

The question that continually repeats itself in relation to the current international pressure to abolish the death penalty is whether it amounts to anything more than a particular historical experience. But given the degree of investment, it is difficult to shift what now appears to be established precept. With the dignity of being called "international", criticism seems almost perverse. Yet our purpose here, and in the next chapter, is to look critically at this supposed consensus.

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<sup>108</sup> Unfortunately, errors of fact underline reinforce this impression of weakness. For example, the reader is offered utterances by Mahatma Gandhi in 1958 (actual date of death, 1948) and the report of a UN Commission in 1942 (actual date of formation, 24 October, 1945) (cf. Provost, R. *op.cit.*, pp.10 & 228). Also, it is interesting to learn from Professor Cassese that piracy is now obsolete. This may surprise survivors of the Vietnamese boat exodus of 1975, and the crew of vessels passing around the Horn of Africa (cf. Cassese, A., *op.cit.* p.4).

## Chapter Eight

### Conditions and prospects for international agreement over the death penalty

#### Introduction

Up to this point, capital punishment has mostly been referred to in abstract terms. It has been assumed that whatever categories give rise to this sentence in a particular jurisdiction, and whatever standards of evidence, trial, appeal or methods of execution may apply, we can be fairly confident that we understand the phenomenon of the death penalty. A standard set of events describes how and in what circumstances an offender is rendered liable to it. Yet there are many objections and exceptions to this typical scenario that should be considered.

Firstly, a legal problem may occur when there is significant variance between the criminal code in the state where the crime was committed and that of the state in which the offender has nationality<sup>109</sup>. How, for example, is a crime of drugs trafficking to be thought of if the offence is committed in a country where the death penalty is imposed by a foreigner whose own country would only punish him with a temporary imprisonment?<sup>110</sup> Or is it possible in the case of a homicide committed in an abolitionist

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<sup>109</sup> Claims to protection in this category are rarely settled by judicial process, but give rise to political 'deal-making', trial by media and out-of-court settlements. Powerful nationalities persuade weaker ones to release their own citizens under circumstances they are unlikely to do the same in return.

<sup>110</sup> As has happened in several cases over the last ten years in retentionist Malaysia and Indonesia with respect to citizens of Australia and other states.

country to speak of a capital crime?<sup>111</sup> What term should be applied to the deliberate ending of a pregnancy: ‘infanticide’, as Muslims and many others believe, or ‘abortion’, preferred by others as a word which also describes the non-deliberate ending of life? These difficulties call into question the very nature of international law. In the reality of legal jurisdiction, a crime is only what a given society chooses to say it is. This may not only change over time, as in the West, but be at the same time quite different under different jurisdictions. Hence we are faced at the outset with a serious problem of definition.

This problem is surely only resolved by the recognition of certain conditions, namely, that for crime to have meaning, it must have location; that the nature of a crime is defined by its precise circumstances; and that for a crime to be subject to one or more conflicting jurisdictions is inherently unstable. This third condition is made obvious when we consider that the international context of competing jurisdictions can lead to an effective trouble. This may be a predictable outcome where legal authority has multiplied historically and jurisdictions, in consequence, overlap<sup>112</sup>. To take an extreme but real example, an individual can claim protection as a citizen from two different states for a crime committed in a third, against extradition proceedings carried out by a fourth?

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<sup>111</sup> The subjective nature of definition has been a major problem since the drafting of the Universal Declaration on Human Rights (see exceptions to the right to life under Article 6 as, for example, in US preference for the lack of precision in ‘the gravest of crimes’ at UN Doc. E/CN.4/AC.1/SR.2, p.10)

<sup>112</sup> In *Pratt & Morgan v. Jamaica*, a case for the violation of procedural rules was played out over 14 years between the Jamaican Court of Appeal, the Inter-American Commission on Human Rights and the Privy Council of Great Britain. (Death sentence issued January 1979; commuted November 1993) (Nos. 210/1986, 225/1997; UN Doc. A/44/40, p.222; 11 HRLJ 150)

<sup>113</sup> As in *Soering v. United Kingdom and Germany* (1989) Series A, Vol. 161, 11 EHRR 439

Secondly, there are difficult categories of domestic law that do not fall within the framework of legal killing. In these areas, we have clear sight of the change and uncertainty in Western society over the right to life. In Europe, citizens of one country may seek the legal protection of another to practise abortion or assisted suicide (euthanasia). Even within a single state, one particular sect or social group may regard these as a crime, while another claims them as a human right. The same is true of differing societies and jurisdictions within the USA. It is a measure of this uncertainty, surely, that human rights activists generally sidestep the deliberate extinction of life in what are called mercy-killing and abortion<sup>114</sup>. But is this an adequate response? Are those whose religious teaching and laws regard infanticide as deliberate homicide expected to close their eyes to killing on such a massive scale? They might, of course, exercise an attitude of giving in to local custom if they found their politeness retained<sup>115</sup>. In countries desperate to control population growth, forcible sterilisation<sup>116</sup> and infanticide<sup>117</sup> have been the unexpected consequences of state policy. This has been particularly seen at times when governments have issued legal sanctions, or offered material encouragements, in their efforts to reduce family size.

Thirdly, in times of war, there is an uncertain line to be drawn on the questions of giving aid and comfort to the enemy, the pacifist refusal to serve, the execution of deserters in

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<sup>114</sup> On abortion, writers take their cue from the drafting of the 1948 Universal Declaration of Human Rights: 'The other difficult issue was abortion. Many delegations would have preferred some mention that the right to life began 'from conception', thereby protecting the foetus. On this point, too, compromise dictated silence.' 'There was almost no discussion of the abortion issue, which had so troubled the members of the Committee.' (cf. Schabas, W., *op.cit.* pp.25 & 35) Abortion is a divisive issue. In some contexts it is discussed as murder, in others as a human right.

<sup>115</sup> This is rarely found in human rights literature. For example, in their 1,500 pages, the authors of 'International Human Rights in Context', pass over the abortion almost without discussion, but focus on a misguided view of the status of women in Islamic society. (cf. Steiner, H. et al, *op.cit.*)

<sup>116</sup> In the mostly Hindu, Indian state of Bihar in the 1970's, where the state health authority was unable to meet the quota set by the federal government for voluntary male sterilisation.

<sup>117</sup> This remains a consequence of China's one-child policy. Gender-selective infanticide has been estimated hundreds of millions. After forty years, it has produced a serious imbalance between males and females. This is reported as running at a ratio of 114:100 in favour of boys in 2001 (cf. Steiner, H. et al, *op.cit.*, pp. 191-201)

time of war, and the treatment of foreign prisoners-of-war. A host of specific problems arise in the form of reservations to treaties of abolition, even by states in which the death penalty has long been given up *de jure* for the crime of homicide<sup>118</sup>.

Lastly, the issue of extra-judicial killing raises fundamental questions of honesty in states that declare abolition. There are so many recent instances of countries which have abolished *de jure* the death penalty, yet have practised extra-judicial killing, that this could be said to amount to a pattern<sup>119</sup>. In regimes where authority is failing or not legitimated, or where gangs have overthrown constitutional practice, extra-judicial killing is almost usually the result. In such circumstances, conditions for the accused are likely to be far worse than in a retentionist state where the individual is tried before a legally constituted court. Typically, laws of evidence and the right to a defence will be inoperative, and supposed offenders condemned out of private interest even when they have not violated the laws of the state. In cases of this kind, a *de jure* abolition of capital punishment provides a convenient cover for a regime that is bent on illegality. Firstly, it gains credibility before the UN and similar regional bodies by appearing to conform to humanitarian principles. Secondly, since no court in that country is able to deliver a capital sentence, the corrupt regime can dispense altogether with the difficulty and cost of securing conviction through the courts.

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<sup>118</sup> It is interesting to note the reservations that abolitionists may put. In relation to Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1985), The Netherlands, under Section 103 of the criminal code, gave notice of the following: 'If the hostilities are carried out, or a state of war occurs, any person who enters into an understanding with a foreign power with a view to inducing that power to engage in hostilities or war against the state, to strengthening its resolve to do so, or to promising or providing assistance in the preparation of such acts ... [may] be liable to the death sentence.'

<sup>119</sup> This is obvious in states that fall apart to the extent of El Salvador, Haiti, Liberia and Somalia, but even in stable democracies panic by the authorities can lead to extra-judicial killing (cf. rioting of the 1960's and 1970's in Londonderry and at Kent State University).

## 8.1 Definitions of the death penalty

In the light of these remarks, we need perhaps to adjust our perspective on the death penalty.

On the one hand, to accept a definition that includes, in some countries, the lawful actions of a large number of people is surely unrealistic. Whatever, as Muslims, we may believe and choose to apply within our own societies, we cannot put ourselves in the position of demanding the death penalty for all those who practise infanticide/abortion. We may want to discuss it as a moral or social question, and seek to persuade others that the act itself is sinful. We can note that it is a conduct which divides jurisdictions and makes the individual liable to criminal prosecution in many. But in societies that have abolished abortion as an offence, it is beyond the legal supervision of the state to classify it as unlawful killing<sup>120</sup>. Many deliberate human actions licensed by the state are known to cause death. If subject to criminal prosecution, a number of activities considered normal and productive would be banned. Judged by the incidence of deaths, for example, the use of motorised vehicles on roads might not be permitted. Yet it is almost impossible to imagine any state imposing such a ban. Modern society accepts this cost in human lives for its overall convenience, and chooses to regard most road deaths as resulting from accident not slaughter.

On the other hand, there is clearly a danger in looking at capital crime from a narrow angle. As we have seen, a restricted definition or indeed a complete abolition of capital

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<sup>120</sup> The speed with which Western society gives up, then forgets, its prohibitions is astonishing to people from a religious tradition. Many former beliefs were held in common with Muslim society up to recent times. But who now, in any part of Europe, would consider fornication, blasphemy, sorcery or suicide to be serious offences?

punishment can serve the interests of corrupt agencies of the state. If it is the practice of a state to murder its inconvenient citizens, it may be important for that state to balance its international reputation by abolishing judicial killing<sup>121</sup>. The governments of certain countries are known to agree to things in principle that they have no intention of carrying into practice. We should be alert to the possibility that states which accept the principle of capital punishment may be more rule-based and judicious in their administration than states which have disingenuously abolished or suspended the death penalty.

### **8.1.1 The practice of the death penalty**

Of the sanction itself, it can be said that the death penalty is an act requiring a minimum of three agents: the offender, the representative of a judiciary, and the person carrying out the sentence of a court.

It has often been argued that it is immoral to ask an individual to deprive someone of his life. In Christian teaching, scripture states that it is wrong to take the life of another person or to commit violence against him: “It is the Lord who gives and the Lord who takes away”; “Let the person who is without sin throw the first stone”; “If a man strikes you on the face, turn the other cheek”; “Do not answer evil with evil”. These injunctions against violence are based on the commandment given to Moses: “Thou shalt not kill”. But does the law of Moses mean to kill or to commit murder, both translations are used? If to kill, how can this be reconciled with the specifications of capital crime, also in the form of commandments, in the Book of Exodus? “A person who strikes a man so that he

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<sup>121</sup> In any list there might be journalists who, in states like the Russian Federation, are remarkably short-lived.

dies,” it is stated, “is to be put to death without fail” This is followed by: “If a fatal accident should occur, then you must give soul for soul, eye for eye, tooth for tooth, hand for hand, foot for foot, branding for branding, wound for wound, blow for blow”<sup>122</sup>. There are many categories of capital crime, both in Exodus and the Book of Leviticus, as part of the vision given to Moses. There are laws which prescribe the death penalty and laws which expressly forbid it. They cover particular, detailed offences as well as arbitrary or non-judicial killing. These regulations of Moses established the Hebraic law.

Christianity may be admirable for its teaching that men should live without violence, but if, as the prophet Jesus states, his purpose was not to overturn but to fulfil the old laws, this Christian teaching of non-violence is in conflict with the wider body of its own scripture. As to its realism, the treatment of the prophet Jesus himself, like that of Mahatma Gandhi and Martin Luther King, is surely sufficient evidence that passive resistance offers no safeguard against the practice of evil. The Christian message offers something like a declaration of universal human rights but, like these recent expressions of the ideal, it denies the need to punish certain behaviours by use of the most severe penalty. Although it is a powerful encouragement to virtue, it fails to address the reality of how men frequently treat each other.

The question of whether it is reasonable for society to ask one human being to kill another can only be answered by defining, first, the nature of the society in which that person lives. If it is one whose fixed beliefs are that certain crimes must be punishable

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<sup>122</sup> Book of Exodus 20:12 & 20:23-25



by death, then the morality of asking a person to undertake this responsibility is not different from asking him to perform some other duty prescribed by his religion<sup>123</sup>. This may also be true of a secular society that believes in capital punishment<sup>124</sup>. Yet it is not difficult to see why a secular society, grown sick of all forms of killing, as in post-war Germany, should rush to adopt a Basic Law that outlaws every category of capital crime<sup>125</sup>. Citizens of that country are likely to feel the death penalty is wrong, whether to perform such a deed themselves or to look for someone to act for them<sup>126</sup>.

On the other hand, enquiring more widely into what society may find it reasonable to ask of its citizens produces an entirely different picture. No state appears to find it difficult, morally or practically, to raise recruits to fight and kill in its name. Young men, and even in some countries women, seem to be rather easily persuaded that this may be their duty. Neither the historical experience that wars are mostly pointless, nor the setting aside of the freedom of individual decision, weighs sufficiently against the attraction for young people of putting on uniform and conforming to a strict code of conduct. Taught not to question authority, and shown the harsh sanctions against disobedience, this self-denial may seem like submission to religion. Certainly, a faith blindly acquired, and demanding acts of extreme sacrifice, can create an environment like that of an army.

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<sup>123</sup> This might be compared to the blood sacrifices specified in Leviticus, and carried out throughout the ancient world which few people in 'advanced' countries would now be able to imagine. Though religious laws do not necessarily imply a morality we would recognise as acceptable, its more extreme forms, such as live human sacrifice, show that people will accept almost any kind of suffering prescribed by religious laws. We can say, however, of the Muslim, Christian and Hebrew religions that there have been radical shifts in practice and belief.

<sup>124</sup> A person who believes in the atheistic materialism of a totalitarian state, for example.

<sup>125</sup> Between 1933 and 1945, Germany carried out 16,500 judicial sentences of execution, using the death penalty as an expanded instrument of policy. (Evans, R., *Rituals of Retribution: Capital Punishment in Germany, 1600-1987*, Oxford: OUP, 1996, ch.5)

<sup>126</sup> The German situation was made more difficult by re-unification, after nearly half a century, with people scarred by experience of state illegality. In abolitionist Democratic Republic of Germany (1945-1990), government operated on an obsessive scale outside the law.

Partly for this reason, secular society may be afraid of religion. But that would be to confuse religion with a divisive sectarian. Belief in God is belief in a fundamental goodness. Islam is a comprehending, merciful vision of the world, and Allah requires us to develop our intelligence to improve it.

## **8.2 Deterrence or not: the profit and loss of capital punishment**

Allowing that people are nowhere sufficiently reformed to release society from the need to apply severe penalties, but continue to carry out terrible crimes against others, what can be done to prevent extreme lawlessness and serve the interests of justice?<sup>127</sup>

Defenders of capital punishment in the United States have little doubt that the existence of the death penalty reduces the incidence of the most serious crimes. Some statistical comparisons favour their argument<sup>128</sup>. A short moratorium on capital punishment in the US, between 1968 and 1976, provided an opportunity to test suppositions on both sides of the argument<sup>129</sup>. Yet even this evidence has been hotly contested<sup>130</sup>. At the same time,

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<sup>127</sup> Some argue that, at the present time, crimes of the most serious nature are becoming more and not less extreme. Examples are 'drive-by' killing; the slaughter of students by gunmen; and the rise in the cult of suicide-bombing.

<sup>128</sup> Particularly in the work of Isaac Ehrlich and Stephen Layson who show that between 20 and 28 fewer murders were committed in retentionist states. (cf. Ehrlich, I., 1975, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' in *American Economic Review* no. 65; and Layson, S., 1985, 'Homicide and Deterrence: A Re-examination of the United States Time-Series Evidence' in *Southern Economic Journal*, no. 52)

<sup>129</sup> In states that resumed with the death penalty after the federal moratorium, the balance appears to favour retentionism. Retentionists argue that there was a marked decline in the murder rate, in most comparable states, after resumption of the death penalty. Reviewing the evidence from southern states, Judge Cassell writes: "These state-by-state comparisons are bolstered by more sophisticated and recent econometric analysis that controls for the variety of demographic, economic and other variables that differ among the states. The best of these studies suggest that the death penalty has an incremental deterrent effect over imprisonment – in plainer terms that the death penalty saves innocent lives". (cf. Cassell, P. 'In Defence of the Death Penalty', in Bedau, H & Cassell, P., *Debating the Death Penalty*, Oxford: OUP, 2004, p.194)

<sup>130</sup> As in Dezhbakhsh, H. et al, 2003, 'Does Capital Punishment have a Deterrent Effect? New Data from Postmoratorium Panel Data'. (see *American Law and Economics Review*, no.5, pp. 344-376; and Shepherd, J., 2004, 'Deterrence versus Brutalization: Capital Punishment's Differing Impacts among States' in *Michigan Law Review*, no. 104, pp. 203-255)

abolitionists cite figures from Canada and Australia, as well as European states, which they see as proof that the death penalty in itself has no significant deterrent effect<sup>131</sup>.

Clearly, statistics on this subject should be approached with extreme caution. Methodology becomes problematic when highly sophisticated sampling and modelling techniques are relied on by criminologists. Not only do they fail to come up with any safe conclusions, they soon appear to lose sight of the issue itself. What exactly is the terror being measured when the death penalty is seen against the alternatives of the death-row experience or life without parole? Can we begin to grade their relative deterrent value?<sup>132</sup> Or, to take another example, why should reliable correlations or anything of statistical value be expected when the period of variable punishment is less than one year?<sup>133</sup> The idea that a criminal may choose to commit a robbery in one state rather than another, because he believes the level of punishment is lower there, may have some limited application, though the criminal may be just as likely to act on his understanding of local police efficiency and rates of conviction. But the idea that someone about to commit a murder will have in mind the latest shift in state policy is perhaps unlikely.

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<sup>131</sup> In Canada, the homicide rate in 2003 was 44% lower than it had been in 1975, the year before abolition. (cited in Hood, R. & Hoyle, C., op.cit., p.325)

<sup>132</sup> This is open, surely only to evidence taken from in-depth interviews. This offers some prospect of assessing deterrence, in relation to the fear an offender has of execution compared to imprisonment. A former prison warden from Florida, Ron McAndrew, was arguing for the death penalty to be abolished in favour of the much more severe punishment of life imprisonment when he wrote: 'The most severe penalty you could give anyone would be to lock them in a little cage made out of concrete and steel, with a steel cot, a mattress that is two inches thick, a stainless steel toilet that does not have a lid, and you leave them there for the rest of their natural life.' (Quoted in Hood, R. & Hoyle, C., op.cit., p.397)

<sup>133</sup> A 'trend' was expected from a suspension of executions in Texas between 1996 and early 1997: 'Again we find no abnormal rise (or fall) in Texas homicides during this period.' With little sense of proportion, this information is included by Hood & Hoyle, presumably because they feel it adds something to their case (see Hood, R. & Hoyle, C., op.cit., p. 328)

Searching for correlations by purely quantitative methods seems deluded. Without a clear understanding of the mind of the homicidal criminal, it is surely unreasonable to make generalisations. Yet, as countless studies have shown, there is far too great an aspect of irrationality and unpredictability in the committing of the most serious forms of crime, such as murder, rape and terrorism, to be able to form a picture of 'the criminal mind'.<sup>134</sup> Moreover, underlying this doubt lies the question: how can we guess what would have happened from what did not happen? J.S. Mill puts the same objection: 'Who is there who knows whom [the death penalty] has not deterred, or how many beings it has saved who would have lived to be murderers if that awful association had not been thrown round the idea of murder from their earliest infancy?'<sup>135</sup>

It is plain from recent literature on the subject that numbers alone are not the driving force behind the passionate arguments of retentionists and abolitionists. It has not proved to be a quantitative argument in the way the utilitarian philosophers found logical and expected would settle the matter. The calculus in Western society is based on differently-structured perspectives that cannot bring capital punishment into measurable comparison. On one side, there is popular instinct and informal evidence which, for retentionists, represent commonsense. On the other, abolitionists look to a higher morality, which they see as entitling them to develop an advanced jurisprudence. Each side claims to understand the deterrent value of sentences and neither accepts statistical evidence presented by its opponents. This is where the battle lines are drawn most sharply, particularly in the bear pit of debate in the United States. Rational criteria are

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<sup>134</sup> The concept of 'the criminal mind' is at least fifty years out of date. Experience suggest that almost everyone is capable of committing a serious crime, though in the case of murders described as 'the worst of the worst', there may be a perverted sexuality and politics.

<sup>135</sup> From Parliamentary Debates, third series, April 21<sup>st</sup>, 1868, cited in Singer, P., ed., *Applied Ethics*, Oxford: OUP, 1986, pp. 97-104

powerless to decide the issue since each side is predisposed to believe only the evidence that favours its standpoint. It is exceptional to find any writing on the question that is not severely compromised by the view of the writer. As in the televised trial of O.J. Simpson, nobody seems able to look simply at the facts.<sup>136</sup>

### **8.3 How is justice served?**

A consideration that weighs heavily with those who uphold the death penalty is the feeling that only by retaining the power of capital sentencing can justice be properly served. For Muslims, the law is denied if crimes are not subject to the rules laid down, although, at the same time, sentencing must follow the ordinance to do all that is possible to avoid taking an offender's life. In a secular view, it is society that is cheated and undermined by a failure to demand punishment. These attitudes are entirely compatible from a practical standpoint. Against this thinking, however, abolitionists are pre-occupied by the violation of the rights of the individual rather than the rights of society. They are strongly motivated by cases where an injustice is known or believed to have been committed. This attitude can be summed up as 'better a hundred go free than that an innocent man suffers the death penalty'.

In Professor Stevenson's account of *State v. MacMillian*, a classic case of multiple injustice is played out<sup>137</sup>. The defendant MacMillian, a poor black, is entrapped by a corrupt, racist police sheriff in a rural district of Alabama. This sheriff, thought to be motivated by knowing MacMillian was involved with a white girl, arrests him for a

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<sup>136</sup> Among the general public, watching live televised hearings, there was a divide along racial lines, notwithstanding that millions followed an identical presentation of the evidence.

<sup>137</sup> Summarised from *MacMillian v. State*, 616 So.2d 933 (Alabama Criminal Appeal Court) 1993. Both the judge and the state prosecutor are said to have conspired in the miscarriage of justice, and though MacMillian was eventually released, the prosecutor became an appellate judge.

murder he knows he could not possibly have committed. He hides witness statements, plants evidence and forces a white man called Myers, a convicted felon in custody, into implicating MacMillian in the murder. He does this by illegally placing Myers and MacMillian on death row and threatening them both with the electric chair. A circuit court judge takes just two days to hear the case and, accepting Myers's evidence, as well as corroborative testimony invented and paid for by the sheriff, sentences McMillian to death. This is despite a recommendation for imprisonment by a mostly white jury<sup>138</sup>.

Professor Stevenson gives a powerful account of cruelty and injustice, especially as it concerns white-black relations in the southern states of America. Yet, as evidence for the cause it is intended to serve, it is less than convincing. Stevenson includes the story, along with several like it, in a monograph setting out his case against the death penalty. It is one he knows at first-hand, having represented MacMillian himself at an appeal stage<sup>139</sup>. But his general argument is surely too simplistic. Is it really a great surprise to find that all the wrongdoing has been committed by the authorities? That they escaped unpunished, while an innocent man had a threat of death held over him for six years, was a great injustice<sup>140</sup>. But how can Stevenson claim that this constitutes an argument against the death penalty? As Professor Pojman puts it in relation to cases of unfair discrimination against the poor and ethnic minorities: "It is not true that a law that is applied in a discriminatory manner is unjust. Unequal justice is no less justice, however

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<sup>138</sup> A large number of Hollywood films, inspired by the civil rights movement of the 1960's and 70's, have a similar scenario. Two from this era ('In the Heat of the Night' and 'Mississippi Burning') were based on actual cases.

<sup>139</sup> Bryan Stevenson, professor of clinical law at NYU School of Law and executive director of the Equal Justice Initiative in Montgomery, Alabama. He has made a career out of 'challenging bias against the poor and people of colour in the criminal justice system'. (see Stevenson, B., 'Close to Death: Reflections on Race and Capital Punishment in America' in Bedau, H. & Cassell, P., 2004, op. cit. pp. 76-117)

<sup>140</sup> In many jurisdictions, past and present, these actions of the law officers would be treasonable and liable to a capital sentence.

uneven its application. The discriminatory application, not the law itself, is unjust”<sup>141</sup>. Inequity, as we know, must be fought against and, where systemic, made subject to reform. Like every form of corruption, it threatens the integrity of the law. But such principles uphold the rule of law, they are not an argument against it. If human misconduct was an argument against the law itself, then no law could be administered other than in a state of perfection<sup>142</sup>. The supposition that the law, not the administration, is at fault has a familiar ring. It can be heard when ideal has taken over from reality.

What punishment is appropriate for someone who deliberately takes the life of another human being? This is an ethical question usually avoided by abolitionists. If the answer is imprisonment, we must ask the purpose of imprisonment. In a liberal rationale this is reform, not retributive justice. If a prisoner can demonstrate he has reformed and it is thought he will not repeat the actions that were the cause of his imprisonment, he is eligible for release from his exclusion from society. That, at least, is the principle. Sentencing in most countries is structured to take account of the prisoner’s behaviour<sup>143</sup>. Yet if the certainty of reform is taken to be the sole criterion for imprisonment, the aspect of punishment might be got rid off. If, for instance, a therapy existed which could guarantee that an offender was no longer a threat to society, what would stand in the way of his immediate release? Yet would justice have been served? Futures have been

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<sup>141</sup> Pojman, L., ‘Why the Death Penalty is Morally Permissible’ in Bedau, H. & Cassell, P., op.cit., 2004, p. 70

<sup>142</sup> This is not a new problem: ‘Put the case now, that a man is accused of a capital crime, and seeing the power and menace of some enemy, and the frequent corruption and partiality of Judges, runs away for fear of the event, and afterwards is taken, and brought to a legal trial, and makes it sufficiently appear, that he was not guilty of the crime, and being thereof acquitted, is nevertheless condemned to lose his goods; this is a manifest condemnation of the Innocent. I say therefore, that there is no place in the world, where this can be an interpretation of a Law of Nature, or be made a Law by the Sentences of precedent Judges, that had done the same. For he that judged it first, judged unjustly; and no Injustice can be a pattern of Judgement to succeeding Judges.’ (Hobbes, T. 1651, op.cit., pp. 147-148)

<sup>143</sup> Normally, this is reduction of a half the sentence for good conduct. In UAE, for example, good conduct reduces a quarter the sentence.

imagined in which delinquent personalities are simply referred for treatment, then released as persons cured: the biological engineering and the use of drugs were at fault but could be rebalanced<sup>144</sup>. But would that satisfy our notion of justice?<sup>145</sup>

Conversely, if the purpose of imprisonment is to punish, how is this achieved? A person may live quite comfortably in prison with loss of few rights other than his physical freedom<sup>146</sup>. Yet the cost to society of providing him with something like the care of a hospital seems inappropriate. It places the state's concern and responsibility for a prisoner's needs higher than the consideration shown to many who have not committed a criminal offence. It is certainly disproportionate to the offender's value to society, based on his former life, and to the condition in which he left the victims of his crime. Yet, at the same time, if imprisonment is made indefinite there is an inherent cruelty which in itself breaches the duty of care that a state owes to its citizens.

Whatever the material provisions of a prison, a person struggles to live without hope of release. He is condemned to a death in mind and spirit, which, if it does not lead him to further rebellion, is likely to manifest itself in mental illness rather than reflection or feeling sorry for what he has done<sup>147</sup>. By what law that has any claim to being called humanitarian, and in function of which right that is said to be universal, can an individual be forced to live in a condition of complete hopelessness? "We'd prefer an immediate end to our lives than being cooked slowly under a flame", are words taken

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<sup>144</sup> Aldous Huxley's engages this type of scenario in *Brave New World*, (London: Penguin, 1932).

<sup>145</sup> Neither our sense of justice nor our sense of human independence. The range of mitigation is confusing the Western sense of right and wrong.

<sup>146</sup> Movement in that direction seems clear in the rights granted to prisoners under European Union legislation. Entitlements include even the right to vote in elections.

<sup>147</sup> The common use of illegal drugs in prisons also demonstrate this.



from an open letter to the French prison authorities by ten men, serving terms of life imprisonment, appealing for a return to the death penalty<sup>148</sup>.

Here, the contrast between the despair experienced within a secular society and the balance and equity offered by a religious one could not be more clear. In a legal system founded upon belief, the offender is fully aware of his offence. Since it is largely based on what has been prescribed, the individual can accept his punishment. Like the offender found by the Prophet to have committed adultery, he may even demand it<sup>149</sup>. Belief in God holds out the hope of redemption for the person who asks forgiveness, whereas imprisonment in a secular, atheist world is infinitely more cruel<sup>150</sup>. In Western countries, legislators may be content that the wrongdoer is hurt by anger and complaint. These are surely the product of a society that listen to every excuse. For the Muslim, this is not the case. The believer who knows he has sinned under Islamic law is sorry for what he has done. Is it not merciful to punish the very worst of offenders by a death that is a release from their suffering and guilt?

These arguments would not have seemed strange to a European in an age of belief. Indeed, they are to be found repeatedly in the written history of his continent<sup>151</sup>. What

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<sup>148</sup> Quoted in Hood, R. & Hoyle, C., *op.cit.*, p. 398

<sup>149</sup> In the *hadd* crime of adultery, judged by the Prophet himself, Ma'iz (the offender) confesses his guilt four times to bring punishment on his own head.

<sup>150</sup> Cases such as that of Myra Hindley, who for political reasons was never paroled, show evidence of a systemic cruelty (see no.32,chapter 7).

<sup>151</sup> 'The Roman penal system was peculiar in its distinction between public and private penalties, reflecting the division into public and private offences. The private penalty was originally a substitute for private vengeance and retaliation (*talio* = infliction on the delinquent of the same injury as that done to him). Pecuniary compensation between the parties (*pacisci*), always permissible, had become compulsory. The private penalty consisted in payment of a sum of money to the person wronged, and is to be distinguished from a *multa*, a fine inflicted as a coercive measure by a magistrate and paid to the State. The public penalty originated in the idea of public revenge, or religious expiation for crimes against the community, or religious conceptions ('*sacer esto*'), and could not be other than the death of the

factors of consideration, then, have shifted the moral landscape so radically in countries like Britain? One answer, certainly, is the fear of error. In post-war Britain, the horror of hanging the wrong man weighed heavily with those who wanted to bring about abolition. Great attention was given to the situation and presumed feelings of the public executioner. In some cases, after an execution had taken place, investigations and campaigns to prove the innocence of the person hanged were carried on for years, even decades, after the event<sup>152</sup>. Also, it was widely reported in countries of a similar composition which had abolished the death penalty that there had not been a consequent rise in the murder rate. The case for general deterrence began to fall away. Despite the evidence of sample polls showing that only a minority of adults at the time supported the change, abolition, when it came, was not met with widespread protest. The average person, it could be said, had been persuaded to accept that capital punishment might not be necessary to the continuance of civil society.

As we have noted in post-war Germany and Britain, however, the impulse behind abolition in one state is not necessarily the same as in another. A particular authority may be satisfied that the penalty is no longer required in its jurisdiction, but it does not follow that another will be influenced by the same criteria. That there is wide difference on the balance of the argument in Western society, weighing necessity and morality, is best exemplified by the incoherence of jurisdictions in the USA<sup>153</sup>. Though more specific and less kind motivations have been given, what seems most to influence

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delinquent.’ (see Berger, A., *Essay on Roman Law and Procedure* in ‘The Oxford Classical Dictionary’, Oxford: Clarendon Press, 1949, pp. 484-491)

<sup>152</sup> An important case, written about extensively, was that of Timothy Evans. Hanged in 1950, granted a pardon after death in 1965. (cf. Hood, R. & Hoyle, C., *op. cit.* pp. 42-47).

<sup>153</sup> Since the ending of the brief moratorium (1968-76), 38 out of 50 states have the death penalty on their statute books. (cf. Bedau, H. & Cassell, P., *op. cit.*, 2004, p.82)

retentionists in the USA is the aspect of deterrence<sup>154</sup>. At least two distinct meanings are implied here. Firstly, there is the argument for incapacitation, which is to say, an offender so punished cannot repeat his crime. Known also as specific deterrence, this argument rests on a claim of simple effectiveness and applies equally, of course, to imprisonment which, whatever its failings, serves to keep criminals behind bars<sup>155</sup>. Secondly, a point already made, there is informal evidence that American criminals may be deterred from carrying loaded weapons in a retentionist state, and prefer to commit their crime in an abolitionist one. Criminals, it is argued, are not radically different from the rest of mankind, in that they may calculate the cost of an offence and minimise their personal risks<sup>156</sup>.

It has also been asserted that capital punishment is simply the “best bet”<sup>157</sup>. Since we cannot know what constitutes deterrence in matters of homicide, it is rational to bet that capital punishment works, since this is to bet against the murderer and for the innocent: “If we’re right, we have saved the lives of the innocent. If we’re wrong, unfortunately

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<sup>154</sup> A very high proportion of those sentenced to death are poor and black. Some commentators suggest that retentionists want the death penalty as an instrument of social and racial control. ‘Closer scrutiny of the operation of the death penalty has also resulted in greater awareness of some of the capital punishment system’s other abuses. These include the imposition of capital punishment on the most vulnerable offenders ... One out of every three African-American men between the ages of 18 and 35 is in jail or on parole in the United States. Evidence of disparate treatment of racial minorities becomes more pronounced at each juncture of the criminal justice process as systemic decision makers, who tend to be predominantly white, frequently exercise their discretion in ways that disfavour people of colour.’ (see Stevenson, B., ‘Reflections on Race and Capital Punishment in America’ in Bedau, H. & Cassell, P., op.cit., 2004, pp. 84-85)

<sup>155</sup> Judge Cassell makes much of the case of a serial killer, Kenneth McDuff, whose career continued when he was released after the suspension of the death penalty in 1968. He was later paroled to resume killing until finally executed in 1998. (cf. Cassell, P. ‘In Defence of the Death Penalty’ in Bedau, H. & Cassell, P., op.cit. pp.183-185)

<sup>156</sup> As Cassell points out, the argument that crimes of passion murders cannot be deterred is answered by the fact that these are not aggravated, but second degree murders which are not subject to the death penalty. (ibid, pp. 189-191)

<sup>157</sup> Notably by Ernest van den Haag. (Discussed in Pojman, L. op.cit., pp. 65-67).

we've sacrificed the lives of some murderers"<sup>158</sup>. Nevertheless, the capacity of the death penalty to split opinion in Western societies is matched by few other issues.

#### **8.4 The emergence of the abolitionist case**

Abolitionists cite the C18th Italian jurist, Cesare Beccaria, as the first to offer philosophical objections to the death penalty on the grounds of human rights.<sup>159</sup> These can be summarised as follows. Firstly, the authority of a society operates on the basis of an unspoken transfer of the rights of the individual. Since no individual will freely choose to transfer power over his life to another, no agent of society such as government can take the life of a member of society in punishment. Secondly, since law, as the expression of the public will, detests and punishes homicide, it cannot expect to deter others from murder by sanctioning murder itself. Thirdly, judicial murder gives to men the example of cruelty. The first proposition, however, is open to the objection that only under ideal conditions of direct democracy could the individual expect to have the type of relationship with society's laws that is implied here<sup>160</sup>. As to the second proposition, an identical objection can be made to other forms of retaliatory punishment, such as confinement within a prison, to which Beccaria does not apparently object. Thirdly, although the last of these sounds impressive, the argument is weak<sup>161</sup>. Capital punishment is a sanction against not a promotion of cruelty, and human behaviour does not lack examples of cruelty, supreme among which is murder. Yet however imperfect, Beccaria's thinking contains germs of the abolitionist argument still regarded as viable.

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<sup>158</sup> *ibid*, p.66

<sup>159</sup> cf. Beccaria, C., 1764, 'On Crimes and Punishments', trans. Paolucci, H., Indianapolis: Bobbs-Merrill, 1963.

<sup>160</sup> In a direct democracy such as fifth-century Athens, even its leading citizens were not protected in the way that is presumed here. (cf. Stone, I.F, *The trial of Socrates*, London: Cape, 1988).

<sup>161</sup> Even to the Professor Bedau (cf. Bedau, H., *Killing as Punishment*, Boston: Northeastern University Press, 2004, pp. 76-79)

By the mid-nineteenth century, a number of smaller European states had accepted the new calculus that capital punishment was not merely abhorrent in itself but unnecessary as a deterrent<sup>162</sup>. This was taken up in jurisdictions in the Americas, both north and south<sup>163</sup>. It is revealing to look at how far the abolition movement had gained ground in the years up to the First World War. The thirteenth edition of the Encyclopaedia Britannica, which gives statistics for the first decade of the twentieth century, shows a number of states that were, according to the criterion of ten years' moratorium, abolitionist *de facto*. Yet, as we know, several of these went back on their decision and carried out executions up to or beyond 1945<sup>164</sup>.

With the 1948 Universal Declaration of Human Rights, the intention was to draw a line under behaviours of the recent Western past<sup>165</sup>. The Declaration is analogous to declarations of optimism and legal virtue in Magna Carta, and Bills of Rights announced after the English Civil War, the American War of Independence and the first deposition of the French monarchy. As many commentators have pointed out, it echoed these antecedents<sup>166</sup>. Yet those historic appeals to virtue were intended as programmes for the future government of a sovereign state. Are we to understand that there is now a kind of borderless, unlimited law-making in progress?

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<sup>162</sup> Following the wars in Europe between 1791 and 1815, the feeling of rationalist and utilitarian philosophy turned against the necessity of capital punishment. Although not denying support for the death penalty in his 1775 'Rationale of Punishment', by the time of his death in 1832, Bentham was an abolitionist (cf. 'Principles of Penal Law', Part 2, in Bentham, J., 1843 (ed. Bowring, J.), 'The Works of Jeremy Bentham')

<sup>163</sup> The earliest being Michigan, in 1846.

<sup>164</sup> Notable examples in Europe are Belgium (abolitionist *de facto* from 1863, last execution 1950); Finland (abolitionist *de facto* 1824, last execution 1944); Romania (abolitionist *de jure* 1864, last execution 1989) (Sources: Encyclopaedia Britannica, 13<sup>th</sup> ed. 1926, vol.5, pp. 279-282; and Hood, R. & Hoyle, C., op.cit., pp. 405-407)

<sup>165</sup> GA Res. 217 A (III), UN Doc. A/810

<sup>166</sup> cf. Schabas, W. op.cit., p.9 & ff.

## **8.5 International opinion-forming and the abolitionist lobby at the United Nations**

The chief domain of activity over abolition is the United Nations which, since its first appearance, has not been slow to represent itself as permanent and unchallengeable. Not being a house for some nations but a home for all, its declarations and covenants are universally prescriptive<sup>167</sup>. Yet it is difficult to see how, since 1945, the conduct of its primary business has justified either its claims or its title.

The UN is governed by a charter that recognises a power of veto for each of the five permanent members of the Security Council. For the first forty years of its existence, the organisation was preoccupied by a running hostility between its two most powerful members. These resulted not only in the universal threat of a nuclear weapons race but in wars of great brutality. Failing to maintain a peace between member states, the UN has been equally powerless to restrain the growth of social and economic inequality between them. Numerically, far more individuals are in need of a successful conclusion to the so-called “wars” on want, refugee status and child poverty than in 1945, yet these objectives seem further from achievement than ever. What, apart from rewarding its own political leadership and secretariat, is the point of supporting this huge institution which appears to consume as much as it contributes to humanity?<sup>168</sup>

The obvious answer is that, aside from advancing or withholding financial support through the IMF and the World Bank, the UN invests some of its considerable resources

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<sup>167</sup> Referring specifically to articles under the Universal Declaration of Human Rights (UNDR, 1948, op. cit.) and the International Covenant on Civil and Political Rights (ICCPR, 1976, 999 UNTS 171).

<sup>168</sup> Estimates of numbers employed are of over 50,000 in 620 posts in New York and overseas (cf. Bogdanor, V. (ed.), 1991, ‘Encyclopaedia of Social Science’, Oxford: Blackwell, p. 626). Once begun, the greatest enterprises have often contributed to the downfall of the societies that built them (as, for example, Ceauşescu’s House of the Republic).

in cultural projects like the human rights movement. Unequal to the task of creating real harmony in matters of the highest importance to nation states, it manufactures artificial ones in lesser spheres. Unfortunately, these have the tendency to meddle in, and violate cultural identity. For the United Nations to assume a right over such matters as capital punishment would imply a giving away of authority and the right to take over the defining statutes of existing states. But this has not been given. For a thousand million Muslims, it is a power that could not be given out of mere politeness or the desire for cohesion. To adapt Beccaria's observation, a willing surrender of our cultural identity is so unlikely a proposition as to be discounted immediately.

The UN's first great cultural project, the Declaration, offers under Article 3: "Everyone has the right to life, liberty and security of the person". But what does this mean? Human beings may assume a right to life until they lose it. Expectations of liberty and security are normally met unless we are particularly unfortunate, or give up the benefits of society by the lack of wisdom in our own actions. Article 3 is essentially meaning less. We might search for a closer definition of what these rights are. Different societies can mean different things by liberty and security, but will they be statements of reality, promises for the future, or mere aspirations? Do they suppose any tangible jurisdiction? They appear to be visions of a better world. Yet even their optimism is of a brittle quality. Arising out of fracture and lawlessness, Western society has already begun to experience repetitions of the social behaviour it fears most<sup>169</sup>.

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<sup>169</sup> Ethnic cleaning and genocide in the Balkans, for example.

A clear idea of what was being aimed at, however, can be found in a number of further declarations, conventions and additional protocols in the half-century that followed the Second World War. Though these might be national, regional or international in context and inspiration, Western jurists have made a conscious effort to advance in stages. A pattern has been established of increasing demands upon states that may or may not have been willing to give up their former positions. This was most apparent in Europe and the Americas<sup>170</sup>. Through post-colonial and differential power relations, weaker states found it much harder to resist pressure at the UN than those that enjoyed a greater cultural power<sup>171</sup>. Whatever motive lay behind accession to a treaty, there has rarely been any indication that change was brought about through popular opinion<sup>172</sup>. Where a specific group turned actively against the death penalty, it is a reasonable assumption that an intellectual or social leadership was responsible<sup>173</sup>.

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<sup>170</sup> This is an on-going project. In 1999, the Council of Europe threatened to cancel the rights of the parliamentary delegation of the newly-formed state of Ukraine unless it signed up to abolition without delay. (Council of Europe, Resolution 1194)

<sup>171</sup> This is clearly exemplified by the standing of the Jamaican courts (for example, in the long drawn-out contest in *Pratt v. Jamaica*, 1979-1993; cf. n.51 above) before the Inter-American Commission on Human Rights when compared to the attitude of the USA over similar complaints. In denying a request from Special Rapporteur Ndiaye to visit US prisoners on death row, the Chairman of the Senate Foreign Relations Committee wrote to the US Permanent Representative to the UN: 'Bill, is this man confusing us with some other country or is this an intentional insult to the US and to our nation's legal system?' (reported in *The Washington Post*, 8.10.1997, p.AO7). See also the Government of Trinidad and Tobago's repeated frustration with the Inter-American Commission over the stalling of decisions, fearing it was being used as a means to deny implementation of a lawful penalty (in *Hilaire* (Case No. 11.816); *Constantine* (Case no. 11.787 through 12.141); and *Benjamin et al* (Case no. 12.149)

<sup>172</sup> Polls conducted in the USA on the death penalty in the early 2000's give a range of 73-82% in favour of retention (see Marquis, J. 'Truth and Consequences: the Penalty of Death' in Bedau, H. & Cassell, P., *op.cit.*, p.123)

<sup>173</sup> Professor Schabas comments: 'One of the most common arguments opposing the abolitionist movement is continuing public support for the death penalty. Public opinion polls have not inhibited many legislators in voting to abolish the death penalty.' (Schabas, W., *op. cit.*, 2002, p.376)



### 8.5.1 Forceful tactics used within international associations

The unbalanced relationship between countries is also shown by how the *sharia* is held up as being uniquely difficult<sup>174</sup>. It is as though Islamic law alone presented blocks to international covenants on human rights. Yet, by reference to retentionist countries in other parts of the world, it can easily be demonstrated that this is not the case. We might imagine that if the death-row phenomenon existed in Arab countries but not in the USA, the practice would have been universally condemned as a cause of unnecessary suffering. Nevertheless, in their anxiety to avoid the death penalty, some abolitionists and jurists have defended the use of death-row imprisonment and life without parole<sup>175</sup>. Conversely, in retentionist Trinidad and Tobago, there has been a strong debate over whether condemned prisoners should be dealt with more quickly<sup>176</sup>.

The earliest indication of UN forcefulness is in the use made of the Declaration. We are told, in an argument that does not seem logical, that it was “not a binding treaty but a statement or codification of customary international law and an authoritative interpretation of the human rights clauses in the Charter of the United Nations ... General Assembly resolutions, even if they are not binding, may sometimes have normative

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<sup>174</sup> After expressing its satisfaction with Europe: a Death Penalty-Free Continent’ in the 43 member-state of the Council of Europe, it was reported that the only exceptions were ‘rebel-held areas’ of the Russian Federation because of their ‘fundamentalist interpretation of the Sharia’ (Council of Europe Doc. 8340, para. 44, quoted in Schabas, W., op.cit., p.299)

<sup>175</sup> ‘The Human Rights Committee has refused to construe Article 7 of the Covenant [proscribing cruel, inhuman and degrading punishment] as a prohibition of lengthy detention prior to execution, taking the view that, because Article 6 points towards abolition as a goal, it is preferable for death row inmates to be kept alive as long as possible.’ ‘Herndl and Sadi ... agreed with the Committee’s jurisprudence, whereby “the so-called death-row phenomenon” does not *per se* constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners.’ (quoted in Schabas, W., op.cit., pps. 141 & 143)

<sup>176</sup> ‘The Government of Trinidad and Tobago felt obliged to denounce the Optional Protocol. Before doing so, however, it held consultations on 31<sup>st</sup> March 1998, with the Chairperson and the Bureau of the Human Rights Committee with a view to seeking assurances that the death penalty cases would be dealt with expeditiously and completed within eight months of registration ... [Yet] no assurance could be given that these cases would be completed within the timeframe sought.’ (Kennedy v. Trinidad and Tobago (no. 845/1999) UN Doc. CCPR/C/67/D/845/1999. 6.3))

value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*<sup>177</sup>. These are striking remarks. Central to them is the notion that the right to life had, by 1948, achieved the status of *jus cogens*, which is to say, can be inferred from customary law.

There is the obvious reply that if a customary international law had been established by practices of the first half of the twentieth century, it must have been of a type that embodied massive insecurity and conditions of near anarchy. Even assuming that the coming of the United Nations expressed a confidence that the world would revert to a state of ‘*eunomia*’<sup>178</sup>, how can it be argued that the world’s multiple jurisdictions showed any clear bias towards abolition? The states which had definitively abolished the death penalty for all crimes at this time were Venezuela,<sup>179</sup> Costa Rica, Ecuador, Iceland, and a hilltop in Italy known as San Marino<sup>180</sup>. Setting aside the unstable state of Venezuela, long noted for its extra-judicial killings, the combined territory of these countries amount to roughly the size of Spain, though with just a third of Spain’s population. Could such a handful of isolated states represent a world-wide view? It is an illustration of the lack of rational proportion in the minds of abolitionists that this estimate has been made.

A similar advocate’s use is made of the Geneva Conventions. Thus, we learn from Professor Schabas that regulations adopted on the treatment of prisoners-of-war, under Geneva 1929, have implicit content. “Implicit content”, as is soon apparent, is an

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<sup>177</sup> cf. Schabas, W., op.cit., p. 23

<sup>178</sup> *Eunomia*, ‘well-lawed: the Greek concept of good governance.

<sup>179</sup> It might be thought, of course, that the various governments that ruled Venezuela in these decades were managing perfectly well without it.

<sup>180</sup> cf. Hood, R. & Hoyle, C., op. cit., Appendix 1, pp. 404-408

essential feature of the process. Without making a clear objection, the abolitionist feels free to claim positive intent from a wording that is neutral or vague. This is an example: “[Whereas] international pressure and prisoner exchanges might reduce the incidence of the death penalty, it is evident on closer examination that the goal [of the drafters of the 1949 Geneva Convention] is not regulation but elimination... States were subtly invited to abolish the death penalty”<sup>181</sup>.

We should examine the foundations of this argument. Firstly, the specific limitations of Geneva, relating only to the treatment of prisoners-of-war, were mixed together with the Declaration of 1948. Moreover, the drafters of the Declaration were unwilling to declare their intention openly on the death penalty “because of contemporary State practice”. In other words, few, even among the European states, had yet made up their minds to abolish it. To have declared an intention to end capital punishment would have meant including reservations from states yet to be fully persuaded. This would have meant issuing the sort of caveats to be found in the US Constitution, exceptions to the right to life, as, for example, that a life must not be taken “arbitrarily” or “without due process”. Any caveat has, from the abolitionist’s point of view, the unfortunate effect of preserving the fact of the death penalty, hence of legitimising it. Thus, as an instrument of change, the work of the Convention would have been severely compromised. On the other hand, to remain silent on the subject “allowed the two declarations to retain their relevance and to grow as part of an abolitionist future that their authors only faintly discerned”<sup>182</sup>. Abolitionists, therefore, had everything to gain by a strategy of dishonesty. Making the declaration of the right to life as inspecific as possible meant that

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<sup>181</sup> Schabas, W., *op. cit.*, pp. 366-367

<sup>182</sup> *ibid*, p.366

much more could be read back later into Article 3 than had been in the minds of the contracting parties. This tactic was well understood and, indeed, has been praised for its clever professionalism by commentators<sup>183</sup>.

### **8.5.2 The use of false argument**

Another aspect of the abolitionist's discourse is how every advance is counted a triumph and nothing a permanent reverse. History begins at the point most convenient to giving a sense that there has been a steady progress towards universal abolition. Mention of actual reversals, between the nineteenth and twentieth century, is routinely avoided. A construction is put on agreements to the effect that, once made, an accession to a treaty of abolition cannot be overturned<sup>184</sup>. Thus, according to its own suspect estimate, there is an inescapable and strong presumption for the universal abolition of the death penalty.

All manner of support is put together for this, even of the most degrading kind. The human rights lobby enjoys the backing of states with a notorious history of human rights abuses. Extra-judicial killing, as a systemic function and clear feature of society, is no prevention of membership of the abolitionist's association. So we find Duvalier's Haiti and Duarte's El Salvador, in a display of humanitarian concern, speaking up in support of a strengthening of the treaties of abolition<sup>185</sup>. Quite as surprising is the criticism made

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<sup>183</sup> 'The general recognition of the right to life in 1948, without reservation, has proven far-sighted, for it has allowed the two declarations to retain their relevance and to grow as part of an abolitionist future that their authors only faintly discerned.' (ibid, p.366)

<sup>184</sup> This is the case in The American Convention on Human Rights (1978), where it is stated in Article 3: 'The death penalty shall not be re-established in states that have abolished it'. But it is hard to see how this could ever be applied to the USA, with its many jurisdictions. The United States did not feel was not influenced by external opinion to end its moratorium. It did not consult any interest except its own when it repealed the prohibition on the sale of alcohol (1921-1933).

<sup>185</sup> In El Salvador alone, thousands of civilians were killed by government death squads (1979 to 1984).

by Stalin's USSR of the circumspect, British view of abolition at the United Nations<sup>186</sup>. On this particular platform, the human rights lobby apparently takes the view that every state which nominally upholds abolition should be treated as a valued colleague<sup>187</sup>. Conversely, nations which stand out against abolition, however judicious and reputable they appear to be in their domestic conduct, are simply being difficult, and can be safely regarded as unreliable in any question of human rights. Singapore, for example, a state which by some criteria can lay claim to *eunomia*, has been a prominent and strong critic of the forceful tactics used by abolitionists at the UN<sup>188</sup>. Its delegates express annoyance with the presumption that people who come from entirely different cultural circumstances know better than Singapore does about how to deter crime threatening to its state. The UK, though abolitionist *de jure*, is also often to be found on the wrong side of the argument in European discussions of international law, especially where there is pressure to shift the balance of the European relationship from a confederal to a federal arrangement<sup>189</sup>.

Occasionally, the pretence is obvious. Responding to the storm created in the French National Assembly over the loss of sovereignty implied in the ratification of a

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<sup>186</sup> Both at Geneva and the UN. (cf. Geneva Convention, 12/8/1949, 'Relative to the Protection of Citizens', Summary Record of Committee III, pp. 767-768. (Also at UN Doc. E/CN.4/AC.1/SR.2, pp.10-12). In the drafting of the 1949 Diplomatic Conference (Geneva) on the occupied territories, some countries argued that prohibition of the death penalty would provoke soldiers to take the law into their own hands. The USSR - at the time engaged in summary execution of returned prisoners, Ukrainian and Russian - argued for adherence to the articles in force for the Occupying Powers. (cf. Schabas, W., *op.cit.*, pp.220-221)

<sup>187</sup> This, of course, follows the doctrine of 'my enemy's enemy is my friend'.

<sup>188</sup> Judged by its freedom from arbitrary seizures, its court practice and low rates of crime. The Human Freedom Index report notes: 'The administration justifies its firm management of society and the economy, enforced by a comprehensive Internal security Act, by the fact that Singapore is one of the most prosperous countries in Asia, there is little social unrest, and elections confirm the people's choice of a managed system.' (Humana, C., *World Human Rights Guide*, New York: OUP, 3<sup>rd</sup> ed., 1992, pp. 287-290)

<sup>189</sup> The Swedish special *rappporteur*, Bertil Lidgard, resigned 'in bitterness and frustration' because of the behaviour of the 'intransigent English [sic] Conservatives' in the Committee on Legal Affairs, Council of Europe. This is reported by Professor Schabas (*ibid.*, p.282) as though these were representatives of an outcast state that has no business expressing doubts about a 'progressive' resolution.

protocol<sup>190</sup>, the Conseil Constitutionnel declared that accession presented no great problem since “it could always be revoked at a later date”<sup>191</sup>. Dishonesty of this kind will be familiar to students of contemporary European politics. At the Council of Europe’s Parliamentary Assembly, in discussion of the same protocol, the Turkish member, Mr. Askoy, announced that “had he been Swedish, Swiss, Norwegian, Austrian or German he would most certainly have supported the total abolition of the death penalty”<sup>192</sup>. This remark provokes no discussion in Professor Schabas’s account, yet it perfectly encapsulates a significant part of the problem. Mr. Askoy was trying to point out that the death penalty is necessarily dependent on cultural and historical conditions, and that not being a citizen of one of the afore-mentioned countries made anything he might wish to say on the subject inappropriate.

In 1994, Italy sponsored a draft resolution before the UN General Assembly on capital punishment, “to encourage states which have not yet abolished the death penalty to consider the opportunity of instituting a moratorium on pending execution with a view to ensuring that the principle that no state should dispose of the life of any human being be affirmed in every part of the world by the year 2000”<sup>193</sup>. Was this mere show- drawing attention to a supposedly Christian country over the significance of the year 2000? Singapore’s response was immediate and focused: “It strongly opposes efforts by certain states to use the United Nations to impose their own values and system of justice on

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<sup>190</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (Council of Europe, 1985)

<sup>191</sup> cf. Favoreu, L. 1985 ‘Decision of the Constitutional Council’ 22 May 1985, relative to Protocol no. 6, additional to the European Convention on Human Rights, AFDI 868

<sup>192</sup> Reported in Schabas, W., *op.cit.*, pp. 280-285

<sup>193</sup> UN Doc. A/BUR/49/234 and Adds 1 & 2 (1994)

other countries”<sup>194</sup>. What in any case, the Singaporeans may have wondered, was the meaning of “disposing of the life of any human being” in a country where the body of its Prime Minister had been found in the boot of a car<sup>195</sup>, and where special investigating magistrates were in constant fear for their lives?<sup>196</sup> Tactical manoeuvres failed to block the resolution, but an amendment proposed by Singapore contained a foreword “affirming the sovereign right of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively”<sup>197</sup>.

The Chinese of south-east Asia may be credited with having a painful, historical awareness of what happens to a society when serious drug-addiction takes hold of it. Moreover, countries like Singapore, Thailand and Malaysia have sufficient recent evidence to test and confirm their views on capital punishment. They have only to look at the lawlessness of states where drug-trafficking and drugs cartels are not controlled, yet which happen to have abolished the death penalty<sup>198</sup>.

Failing to carry the resolution in its intended form, support for the 1994 project began to fall away. Though another arrow aimed at the retentionist states had failed, it would not

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<sup>194</sup> UN Doc. E/CN.4/1998/113

<sup>195</sup> Aldo Moro, formerly professor of law and five times prime minister of Italy, was assassinated by the Red Brigades in 1978 (source: Cambridge Encyclopaedia, Cambridge: CUP, 2<sup>nd</sup> ed., 1994, p.748)

<sup>196</sup> Notorious in the 1990’s, after the setting up of special magistracies in the south, and particularly at Palermo to control the political and legal subversions of the Sicilian Mafia. The degradation of human rights in such cities as Naples and Palermo is apparently of no interest to the editors of ‘International Human Rights in Context, Law Politics & Morals’ (op.cit.) in which, in all its 1,492 pages, there is no mention of human rights failing in countries that have given up the death penalty. Italy has, of course, always supported abolitionism at the UN and in the Council of Europe.

<sup>197</sup> UN Doc. A/C.3/49/L.73

<sup>198</sup> This refers most obviously to Colombia (death penalty abolished for all crimes, 1910), where the authority of national government has scarcely existed in some regions since independence from Spain in the early nineteenth century. In Mexico (date of last judicial execution, 1937; total abolition, 2005), there is currently an even deeper crisis of street massacre and extra-judicial killing related to drug-trafficking. There are also several areas of south and south-east Asia where government is very weak and drug-production has degraded society: examples, northern Laos; Burma outside the central lowlands; north-west Pakistan; Afghanistan.

be the last. Indeed, through a variety of international bodies, the pressure to reform never stops<sup>199</sup>. Three years after Italy's initiative, a similarly forceful resolution was passed in the UN by the Commission on Crime Prevention and Criminal Justice (1996), endorsed by the Economic and Social Council (1996), and finally by the Commission on Human Rights (1997). Noting that Article 6 of the International Covenant on Civil and Political Rights (1976) refers to abolition as 'desirable', the Commission called upon parties that had not ratified or acceded to the Second Optional Protocol (1991)

“to comply fully with their international treaty obligations on the subject to observe the ‘safeguards’ guaranteeing protection of the rights of those facing the death penalty, to restrict progressively the number of offences for which the death penalty may be imposed and to make available to the public information on imposition of the death penalty. It also called upon such states to consider suspending executions with a view to completely abolishing the death penalty”<sup>200</sup>.

It appears that retentionist states have somehow failed to understand the proposition put to them and that, like immature people, they must be asked the same question over and over again until they produce the right answer. We also find an implicit accusation that these states apply the death penalty in an arbitrary and indiscriminate way<sup>201</sup>. This is a familiar tactic.

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<sup>199</sup> The High Commissioner on Human Rights regularly calls for a moratorium on or the abolition of capital punishment.

<sup>200</sup> Singapore's reaction, referred to above, was in response to a particularly forceful piece of behaviour at the UN. This came in the form of a draft resolution, tabled by Finland on behalf of EU delegates. Urging all states that still maintained the death penalty to 'comply fully with their international obligations', with respect to either a moratorium or definitive abolition, was, of course, a contradiction in terms. Singapore had undertaken no such obligations, nor was it going to. (A/C.3/54/L.8, quoted in Hood, R. & Hoyle, C., *op.cit.*, p.33)

<sup>201</sup> What else can be the meaning of 'to observe the safeguards'?



### 8.5.3 The targeting of Islam

Dishonest hints and suggestions that the death penalty may not have limited application in Muslim countries are to be found throughout the European literature on human rights. Islamic countries might well be tempted to reply like Jesse Helms: “Are they confusing us with some other place or is this a deliberate insult to our legal system?”<sup>202</sup> Authority to use the death penalty under the *sharia* is more rule-based and restricted than in the penal codes persisting in European states up to recent times. Yet as we have seen, an Islamic scholar who stresses the limited scope of the death penalty under Islamic law, even if he does not abjure the penalty itself, can be cheerfully inscribed as belonging to a school of so-called “moderate Muslims”. These, presumably, are the type of Muslims reported to have been overjoyed not to see the principles of the *sharia* accepted by the Canadian courts<sup>203</sup>.

In this distinction between moderation and fundamentalism in relation to the *sharia*, we see manipulation by means of a false choice<sup>204</sup>. The specification of crimes punishable by death under Islamic law, as outlined in this thesis, admits neither doubt nor room for variable interpretation. The Islamic position on the use of the death penalty could not be made more clear than in the statement of the Arab Charter on Human Rights (1997), Article 10, which shows that its actual practice is anything but indiscriminate. “The

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<sup>202</sup> Pojman, L., Why the death penalty is morally permissible, in Bedau, H., & Cassell, P., 2004, op.cit., p.70

<sup>203</sup> cf. ‘McGuinty, ‘Government rules out use of Sharia’ in Steiner, H. et al, op.cit., pp. 9-10.

<sup>204</sup> In which reference is made to ‘the consequence of a fundamentalist interpretation of the Sharia’ (Council of Europe Doc. 8340, para.44)

death penalty may be imposed only for the most serious crimes and anyone sentenced to death shall have the right to seek pardon or commutation of the sentence”<sup>205</sup>.

Another dishonest conflation is to be found in the frequently-made analogy of the death penalty to slavery. This informs a narrative that damns the practice of others while declaring the virtues of one’s own, for here again we find the proud image of Western civilisation on the march. It was only thanks to the brave, campaigning efforts of figures like William Wilberforce, we are told, that slavery was outlawed throughout the world. Just a few dark places have remained beyond the reach of freedom in the Arab lands and in Africa<sup>206</sup>. Once again, the source and the direction are clear. Legal enlightenment springs from the West, specifically the Anglo-American West, and flows, not without difficulty, in a single direction. In such a discourse, it would not be surprising to learn that Western ethical teaching had invented charity, or that the practice of giving has only recently been exported to Arab states. Is it impolite to point out that after the formal abolition of slavery in the British Empire (1833), large numbers of labourers were transported from the Indian sub-continent to colonies in Africa, and of prisoners to penal colonies in Australia, or that the real freeing of black people in the USA did not occur, as supposed, in 1865, but began to take effect in the southern states only during the 1960’s?<sup>207</sup> In contrast, Islamic society was governed by a legal code, regulating the

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<sup>205</sup> cf. Arab Charter on Human Rights, 18 HRLJ 151. A more ancient and satisfying expression of Islamic law’s dislike of punishment that is cruel and arbitrary can be found in the writing of Ibn Qayyim: ‘The law is pure justice, pure mercy, pure benefit, pure wisdom. Hence, anything which embodies injustice rather than justice, cruelty rather than mercy, harm rather than benefit, or folly rather than wisdom, does not originate from the law even if it happens to have been interpolated therein.’ (Quoted in Attia, G., *op.cit.*, p. 14)

<sup>206</sup> ‘Islamic sharia says a great deal about slavery, but does not require it, so as the practice of slavery disappeared the Islamic law of slavery became an inoperative part of Islamic tradition.’ (cf. Glenn, H., *op.cit.*, 2010, p. 213)

<sup>207</sup> Following the Campaign on Racial Equality and the inspirational teaching of Martin Luther King in the United States. It is noteworthy that, after the assassination of Dr. King, many leaders of the black freedom movement found their inspiration in Islam.

treatment of slaves, who were not, as in early modern Europe, regarded as sub-human types.

Yet the most important point, surely, is that the practice of slavery was not succeeded by any morally superior behaviour on the part of Western countries. The history of European expansion shows how the imprisonment and destruction of nations in every corner of the globe kept pace with the abolition of formal slavery.

The banning of slavery and torture, under the Geneva and UN conventions, has not led to a discontinuance but rather to their refinement. Slavery takes many forms. Estimates made by international organisations of the extent of human trafficking, enforced labour and captive prostitution indicate that the worst forms of slavery are not a thing of the past. The directional flow of this traffic, like that of illegal drugs, is not away from but towards the richer societies of the West. The limited efforts to acknowledge, much less prevent, the scale of this human tragedy do not support a claim to higher ethical standards in European states. Likewise, we find in 'special economic zones' that even the basic protections afforded to citizens of the poor states in which they are situated do not apply to labourers within these zones<sup>208</sup>.

There is here a certain parallel with the behaviour of states over the abolition of capital punishment, but not one that fits into the direction of the Western abolishing of slavery. On humanitarian grounds, the richer societies of the West have abolished many brutal work practices. Yet wishing to consume goods at an ever more favourable price, they have transferred manufacture to countries where poverty is so deep they can find an

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<sup>208</sup> These special zones, in countries like The Philippines, Indonesia and Sri Lanka, are a form of unlicensed business from which the Western consumer profits. The same can be said of the prostitution industry that exists in the poorer countries of non-Muslim, south-east Asia.

endless supply of labour willing to work under the same degrading conditions they have outlawed for themselves. This, then, is no more than displacement. It destroys the claim of universality in the application of humanitarian principles. It shows that these concerns are selective and that European society, while demanding universal application over the death penalty, has no such feeling about the enslavement of workers. Yet the issue of death penalty involves questions of belief and public safety, while fair employment law sacrifices cost and convenience to societies already rich and well supplied.

As for human rights concern with torture, several recent cases of illegal detention have shown how this may be carried out in special camps screened from outside interference<sup>209</sup>. If, as Professor Schabas claims, a ban on the use of torture is now a peremptory rule of international law, trumping an inconsistent treaty, how has it failed to protect Iraqi prisoners after the second Gulf War?<sup>210</sup> These detainees are beyond the protection of international conventions or the assistance of international welfare organisations such as the Red Crescent and the Red Cross. Citizenship affords them no protection, since the governments of countries to which these individuals belong may no longer exist or have the power to act<sup>211</sup>. Both the USA and the Russian Federation have greatly expanded their facilities and opportunities to conduct ‘cruel and unusual punishment’ to accommodate the needs of their so-called wars on terror<sup>212</sup>.

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<sup>209</sup> Reference here is to illegally captured and detained people, held in the US camp at Guantánamo Bay, Cuba.

<sup>210</sup> There is a report that British soldiers tortured Iraqi detainees in secret prisons in the Iraqi desert, and that one died as a result of torture. (Alkhaleej Newspaper, Issue 12090, 25.6.2012, p.21)

<sup>211</sup> Even further removed from the possibility of aid or humane treatment have been the people of Chechnya since the systematic reduction of Grozny by Russian bombing in 1994-5 (source: The Hutchinson Encyclopedia, 1999 ed., p.469)

<sup>212</sup> It is still insufficiently understood in the West how far the ‘war on terror’ is seen by Muslims as a ‘war on Islam’. A lack of understanding or respect for the *sharia* is obviously a factor in the spiral of hostility that is steadily poisoning relations between these worlds.

Looked at in a constructive sense, we can see that slavery and torture have something to offer as comparisons for measuring the practice of capital punishment. They indicate the structural and underlying problems for law and supervision in an international context. Firstly, it can be agreed that both slavery and torture are banned by most, if not all, societies, and that the disgust felt towards these brutalities is not confined to opinion-forming leaders. Secondly, these brutalities occur, and get worse, in an international context. Thirdly, they are not prevented by any exercise of international law, supposed or real. Fourthly, they occur in an environment where there are great differences of wealth or freedom within and between different societies. Finally, and most importantly, they are made worse by the absence of moral restraint.

What may be drawn from this is that the kind of show seen in idealistic human rights projects is powerless to deal with these problems. Indeed, the pretence of forming a barrier worsens the situation. It might preserve a nation's reputation at an international forum, but even where the intention is more serious it may make the mass of population believe that abuses no longer exist. Jurisprudence is not satisfied with what merely comes before the courts, but with understanding all delinquent behaviour. As with the question of capital punishment, narrow definitions of slavery and torture prevent us from addressing, or even seeing, what is happening below the surface. The comparison of slavery and torture with the death penalty will not work as an instrument to encourage Islamic countries to follow a Western lead on capital punishment. Rather, it underlines the dangers of pushing aside difficult and painful questions of commensurate justice, in the optimistic belief that we might be distracted by a show of fanciful ideas.

## 8.6 International opinion-forming: the statistical tricks

Statistics are an important part of the abolitionists' resources in the attempt to make their case seem unchallengeable. This takes several forms. As we have seen in reference to San Marino, the smallest of states is given parity with the largest. The fact that, taken together, the people of Antigua, Andorra, Cape Verde, the Cook Islands, Liechtenstein, Monaco, Nauru, São Tome and Principe, San Marino, and Seychelles might not populate the suburb of a city in China does not apparently occur to those who race to declare the large number of accessions to treaties of abolition<sup>213</sup>. It may be a polite and understandable fiction within the United Nations that member states have equal status, but it does not serve the interests of any cause to find the word "majority" used loosely. The fact that approximately four out of every seven people on the planet inhabit countries whose legal systems admit the death penalty is surely of greater significance than a simple head count of UN states<sup>214</sup>. Nevertheless, the phenomenon of recent accessions requires some explanation.

A large proportion of those listed are successor states to the break-up of the Soviet Union, whose history of state repression made new governments keen to declare a humanitarian standpoint. The end of state atheism also revived religion. Thus, Poland, the Czech Republic, East Germany, Slovakia, Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, Macedonia, Albania, Hungary, Bulgaria, Romania, Moldova, Estonia, Latvia, Lithuania, Ukraine, Russia, Georgia, Kazakhstan, Azerbaijan, Armenia,

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<sup>213</sup> This is to name just ten states given equality with China in the abolitionists account. Hood & Hoyle list each abolitionist state by a single line, then repeat it with variations, so that the abolitionists are given far more importance in their appendix than the retentionists, whose names appear in a boxed section and once only. Is this intended to have a subliminal effect on the reader, or merely a crude exaggeration of the triumph of abolitionism? (cf. Hood, R. & Hoyle, C., *op.cit.*, pp. 409-416)

<sup>214</sup> This list does not include most of the numerous Muslim and African countries that retain the death penalty such as Kingdom of Saudi Arabia and The United Arab Emirates.

Turkmenistan and Kyrgyzstan abolished, or partly abolished, the use of the death penalty between 1989 and 2007<sup>215</sup>. The release from oppressive regimes after 1989 is analogous to the European situation after 1945. It represents something like a second wave of nations promising a brighter future for themselves. A similar effect can be found in the history of decolonisation, notably in Latin America during the nineteenth century and large parts of Africa in the twentieth<sup>216</sup>.

Taken together with the likes of Kiribati, the Marshall Islands and Vanuatu - in which political sovereignty may be the only freedom one may refer to, these newly-liberated states, comprise almost all the additions referred to by the abolitionist cause. Yet even some of these do not bear close examination. The abolitionist lobby suppresses the ordinary definition of a constitutional measure by claiming for its own states that have not carried out an execution for ten years. These, we are cheerfully informed, may be called abolitionist *de facto*. Yet this interpretation is misleading. It is known that several of the states so categorised have ended their moratoria by carrying out executions in subsequent years<sup>217</sup>. As was shown by instances of re-enactment in the early twentieth century, a decade is too short a time to judge the permanence of such a change. In a secular society, only the relative safety and health of the state will determine this policy.

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<sup>215</sup> Hood, R. & Hoyle, C., op.cit. pp. 406-416. The narrow band of time indicates the atmosphere at the time this change was made, and suggests that the legislators allowed little time for reflection.

<sup>216</sup> South Africa is perhaps the most significant example (abolition for ordinary crimes, 1995; abolition for all crimes, 1997).

<sup>217</sup> Four African states, that were formerly abolitionist according to this criterion, carried out executions between 2003 and 2007. It is interesting to note that Burundi was registered as abolitionist at a time when massacres of the Tutsi nation were taking place. (Hood, R. & Hoyle, C., op. cit. p. 78)

## 8.7 How law is achieved

To this point, we have examined the thinking and tactics of the abolitionist more than the manner in which its proponents have set about turning it into law. We have noticed, however, that it is essentially fashioned from three elements, beginning with the recognition that killing is wrong. Next there is a phase of exhortation, urging others to think as you do. Finally comes the declaration that matters are further advanced than they really are. These steps towards enactment have created some dramatic occurrences without proving particularly reliable in their long-term effect<sup>218</sup>. Does this suggest a defective process or that the foundations themselves are weak?

The issue can be approached, perhaps, by comparing the nature of society with the nature of the individual. It is said that all men are created equal. This may mean to a believer that, in the eyes of God, we are born without distinction and expect to be treated fairly or indifferently. However, it is manifestly not Allah's purpose to create all men alike. The principle of equality lies in being subject to the same rules, not in having the same powers or attributes. These rules dictate that we accept the wisdom revealed to us, and use our God-given abilities to improve on what we have. In other words, our task is to understand God's purpose and to do our best. Alternatively, that all men are created equal can be taken as a proposition to mean that, at the time of our birth, and as far as we can tell, one individual has the same chance and potential as any other. Yet this is unlikely to amount to more than a partial conviction. Unless we are entirely innocent of the world, we can see that both nature and nurture favour some individuals over others.

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<sup>218</sup> We have already noted several examples of when contracting parties have brought back the death penalty. The general point is that extreme pressure on almost any administration can result in a suspension of human rights with respect to capital punishment.



What is really meant, in a secular view, is that individuals ought to have equal possibilities in life.

Whether because they believe they can make this true or, at least, make themselves popular, legislators are tempted to offer decrees and declarations to this effect. But how, if at all, does it advance the cause of equality to declare that all men are equal? The individual, seeing that he has either more or fewer advantages than his neighbour, may accept this as fateful and God-given. Conversely, he may resent the difference of fortune as an injustice. Told by decree of the legislator that he is the equal of anyone else, he may react against the actual inequality he sees himself as suffering. This can have serious consequences. They may be violent disruptions, since to be one of the masses is sufficient authority for the individual to rebel in a state that sees everybody as equal. They may be a decline in standards, since the lowest common denominator is favoured in a society that does not allow competition. The legislator, meanwhile, believing that only good will flow from a decree of virtue, is also certain to be disappointed. When it is seen that corruption, nepotism and the suppression of talent are beginning to undermine the needs of society, and damage even the principle of equality he has tried to uphold, the legislator must either give way, allowing his decree to become a dead letter<sup>219</sup>, or resist these effects by threats or violence of his own<sup>220</sup>.

To legislate on the basis of optimism and idealism, rather than on the basis of how things actually are, creates unreasonable expectations. If existence is not in this world

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<sup>219</sup> This is likely to be put into effect by trickery as in 'all men are equal but some are more equal than others' (cf. Orwell, G., 'Animal Farm' London: Penguin, 1945, p.90)

<sup>220</sup> In the manner of Robespierre, St. Just and the curiously named 'Committee of Public Safety'. (cf. Mathies, A., The Fall of Robespierre, London: Williams & Norjate, 1927)

perfectible, then the very act of pretending it can be is damaging. To offer as a universal statement of belief that “everyone has the right to life, liberty and security of the person” invites the despair of those denied these benefits<sup>221</sup>. It may also come with the qualification: “by ‘everyone’ we mean, of course, everyone sufficiently advantaged to get away with it”.

Men commit crime. In response, other members of society demand their punishment. The precise terms of retaliation we can leave aside, allowing that societies have clearly thought differently at different times. Yet commonsense and safety dictate that sanctions need to correspond to what a particular society feels is appropriate. To deny this, and to assert some other principle, is an invitation to double-dealing.

There certainly appears to be a correspondence between states keen to promote a sense of their own well-being, by signing up to abolition, and states which cheerfully ignore the rule of law altogether when it comes to handling their own rebels<sup>222</sup>. At the same time, there seems to be a connection between nations that share a long judicial tradition and tend to resist the attractive call of abolition. This may not come from any particular feature, other than a respect for the law itself, and an understanding of how law is achieved. Indeed, a variance of actual provision may have little bearing on the matter. It is surely the solidity and reliability of a system, not its specific laws, that produces social strength and confidence.

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<sup>221</sup> Article 3, Universal Declaration of Human Rights, 1948 (GA. Res. 217 A (III), UN Doc. A/810).

<sup>222</sup> The Russian Federation has the a record of crushing internal opposition since the moratorium, 1996 (see Steiner, H., et al, op.cit., pp.1008-1009 & *passim*)

The laws of ‘Anglo-Saxon’ and Islamic states, may appear so much at odds that to suggest a similarity between them sounds unlikely. Yet much of the apparent difference is superficial. In the Islamic tradition, law is handed down by a supreme legislator, likely to be a hereditary figure in the states of Arabia, after first being proposed, examined and discussed by a succession of councils and offered to open consultation with the people. In the Anglo-Saxon tradition, new legislation is offered for approval to a monarch or president after first being proposed. It is then argued over and examined by elected as well as nominated chambers, and passed through special committees to question its implications. The names and titles may be different, but there is a commonality of process<sup>223</sup>. On the other hand, it is not easy to refer to a Western tradition of law-making in quite the same way. Though the states of Europe now follow an equivalent pattern, the recent history of so many of them has been of an existing authority suddenly shattered, and a radical change of the laws. There is, it could be said, a counter tradition in Europe: one of edict and decree, and of declarations that turn out to be disappointing.

It cannot be denied that an unbroken tradition of the rule of law is the most deserving of respect. The citizen is confident that if he abides by the law he will not arbitrarily be deprived of its benefit. His society is unlikely to substitute extra-judicial for judicial forms of retaliation. In this, again, there is some comparability between Islamic and English tradition. On the one hand, Muslim countries possess a strong and portable basis for their law. Derived from sources that no believer can challenge, they are learnt by

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<sup>223</sup> The same point might be made of other systems. In the office of the praetor in the later Roman Republic, for example, the right of setting an annual edict (or legal agenda) appears to imply a dictatorial practice yet, through advice (of his *consilium*) and legal limitation (of the *ius civile*), it became an effective method of advancing new law: ‘There were certainty and definition, but also close touch with realities, constant testing by forensic and commercial practice.’ (see De Zulueta, F., ‘The Science of Law’ in Bailey, C. (ed.), *The Legacy of Rome*, Oxford: Clarendon Press, 1923, p. 191)

heart in a tradition that is still partly one of oral transmission. They are much less dependent on the complicated provision expected in a Western court. At the same time, English legal culture has a complementary aspect. A practical outlook makes English jurists suspicious of grand-sounding and novel declarations. There is an educated suspicion that these may conceal rather more truth than they embody. A long historical perspective makes it possible to see that an outbreak of some new enthusiasm often goes before a suspension of the law itself.

### **8.8 The strange case of the USA**

The USA has a tradition of independent rights and direct democracy. It seems doubtful, particularly in states of the federation with a history of persistent, serious crime, that the case for abolition will ever successfully be made. It may be argued that support for the death penalty is the consequence of a fundamental instability. In some parts of the country, displacements resulting from forced and economic migration have encouraged a reactionary fear of change. Yet even allowing such explanations does not make the American attitude to capital punishment irrational. If citizens, able to express their will by direct vote, are not persuadable, then it seems likely that the death penalty will be retained.

The United States is, however, perhaps the last country in the world about which to make confident predictions. Even before independence from Great Britain, its early jurisdictions had created a large number of different laws related to the death penalty. In the Royal Charter of Jersey (1646), for example, capital punishment does not appear on the statutes for nearly half a century. In the Massachusetts Bay Colony, by contrast, the

death penalty was exercised for thirteen separate crimes. It is an indication of its philosophical instability that so many of the categories for which offenders could be executed in Massachusetts are not even criminal acts today<sup>224</sup>. Early settlers were largely guided by interpretation of Christian religious teaching. It is, no doubt, a measure of the uncertainty in their scripture that there has been so much variance in the law. It appears to be this fundamental instability that gives rise to a continuing change on this and other social questions.

A movement to replace the death penalty with radically new correctional facilities in cities such as Philadelphia began in the eighteenth century. The view of the early reformers like Benjamin Franklin was that even the most serious offenders should be treated with a combination of strict terms of confinement and the provision of an opportunity for personal change. This Enlightenment position is still at the heart of abolitionist thinking. It displaced the spiritual aspect of recognising and accepting punishment for the denial of God's ordinance. Wickedness and sin have ceased to be concepts recognised by the criminal law<sup>225</sup>.

At the same time, the putting together of society into large urban masses has negatively affected the norms of a peaceful society. It has produced striking contrasts, each forming strands of the nation's historical narrative. The country's powerful self-image, it might be thought, struggles to contain such diverse and contradictory elements<sup>226</sup>. There is substantial abolitionist feeling, both among jurists and, more diffusely, its liberal

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<sup>224</sup> These are idolatry, witchcraft, blasphemy, adultery and sodomy. (Baird, R. & Rosenbaum, S., op. cit., p. 103)

<sup>225</sup> They still appear in terms like 'heinous' in the language of English criminal law, but the sense that a wrongdoing may be a denial of or blasphemy against God no longer has force.

<sup>226</sup> From the American Dream of perfect opportunity to night mare society of many modern films.

leaders. It is not a surprise that capital punishment produces far more debate in America than elsewhere. Yet what is notable about this discourse is the narrowness of its terms of reference. Apart from some interest in what took place in post-war England, there appears to be little awareness of what has happened outside the United States<sup>227</sup>. It is as though the country exists in isolation on the issue of capital punishment. The moratorium of the 1960's and 1970's was, in fact, only the latest in a series of policy reversals in the history of American states<sup>228</sup>. This particular legislative uncertainty deeply affected the question of deterrence. Yet it is surely the inner uncertainty of society that has more significance. This has given rise to another originating feature of the American criminal justice system, namely the length of its appeals process.

The impact of the death-row phenomenon in the USA is disturbing and strange in relation to the stated humanitarian concern that each case must be treated judiciously, and that every effort should be made to avoid condemning an innocent man. To the outside observer, it may seem a strange idea of justice that a decade or more of a prisoner's life can be taken up by a series of appeals<sup>229</sup>. In these circumstances, there is neither an admitted state of guilt nor a sense of retributive justice to occupy the mind of the offender. Instead of regret, or the search for forgiveness, there is something like a continuous court case to be attended to. This process is almost always conducted under conditions that strongly disfavour the appellant, and so the prisoner is likely to be in a

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<sup>227</sup> On both sides of the debate, there is an interest in what has happened within the legal system that most closely resembles the other but provides a wider perspective. We find citations of English legal philosophy going back to Hobbes, Bentham and Mill, up to and including modern thinkers like Wootton (cf. Wasserstrom, R., 'Punishment and Rehabilitation' in 'Philosophy and Social Issues: Five Studies,' Univ. Notre Dame Press, 1980).

<sup>228</sup> The state of Maine changed its laws three times in twenty years between 1865 and 1887. The lynching of convicted murderers led Colorado to re-instate the death penalty. Of the nine states plus Puerto Rico that had abolished between 1907 and 1917, five had re-instated it by 1921.

<sup>229</sup> Seven years is taken as the current average length of time for US prisoners to spend on death row.

constant state of fear and upset. At each turn of events, the prisoner's life must appear to hang by a thread, and his family and friends are made to endure the same agony. It is not surprising that some argue that this treatment is far less humane than execution. This is rarely, however, is the view of the condemned person.

The usual response to complaint about the law's delay, namely that, offered a choice, almost every individual will prefer life over death may be true. But it leaves out of the discussion that, in a secular and increasingly normless society, the wrongdoer is not really made to feel the wrong he has done. He cannot enter a process of admission and genuine repentance if he has been taught that the circumstances of a person's life and upbringing offer a sufficient excuse for what he has done. In historical terms, the damaged psychopath has taken the place of the bad felon; the damaged child pays for the omissions or commissions of his parents; and the wounded individual suffers for the crimes of society. Even in the category of homicide, courts are anxious to discover the underlying cause of an offender's behaviour. Whether on death row or the short walk to the death chamber, the modern wrongdoer will often believe that he is the victim, and a bad society is the cause of his undoing<sup>230</sup>.

## **8.9 The dangers of cultural transference**

It would be unreasonable to complain of the USA's cultural isolation on this issue since it is the right to difference that is defended in this thesis. More specifically, it presents an argument against cultural transferability and effective loss of sovereignty. For what has

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<sup>230</sup> In many jurisdictions, especially in Europe, pleas of manslaughter on the grounds of reduced responsibility, as well as pleas of insanity, are frequently admitted. If killing is committed in the name of a political cause, the offender may not only find himself eventually released but cleared of guilt, in the name of reconciliation, and even become for high office. (as in the case of Second Minister of Northern Ireland Martin McGuinness)

become reasonably clear is that there are at least two grounds for defending sovereignty with respect to the death penalty.

Firstly, since societies differ radically in their interpretation and treatment of extreme forms of criminal behaviour, it is unrealistic to propose a legal uniformity that will cover every cultural outlook and every practical need. Outlook and need can be seen as coming from religious teaching or views that have been shaped by a particular history. Secondly, the mixed history of abolition suggests that, in secular states, both outlook and need are subject to the uncertainty of events, and can change rather quickly<sup>231</sup>.

When change occurs, that is to say when some bad effect produces an intense pressure for alteration to the fundamental laws, the state faces a profound difficulty. If it has already given up the death penalty, it can suspend abolition and risk being ejected from international organisations. It will be treated as an outcast. Alternatively, it can follow a policy of extra-judicial punishment. The defective nature of extra-judicial proceedings lies in their willingness to employ every possible arbitrary abuse of power. Cruelty, error of identification, failure of representation or appeal, and the absence of clemency are typical of states that suspend the law. It follows, of course, that if this is the preferred option of a regime trying to defend itself, it risks losing the very values it is trying to protect.

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<sup>231</sup> Although Professor Fukuyama strongly denies he meant that the clock would actually stop, his 'end of history' is an indication of American thinking at the end of the twentieth century. His ideas are full of a sense of universal history. (Fukuyama, F., *The End of History*, London: Penguin, 1992, pp. 48-51 & *passim*)



Recognising the difficulty, it would surely be sensible for a retentionist state to avoid the problem altogether. Why would a country like the United Arab Emirates, for example, risk altering its laws by creating an opportunity for drugs cartels to flourish? This is not a question of whether it is better or worse to liberalise the laws on narcotics. It concerns the viability of law in a particular jurisdiction. In the United States, the prohibition on alcohol in the early part of the twentieth century proved a failure. Some in Europe feel that the ban on drugs is a mistake. They say that repression only helps criminal gangs to succeed. But if a society feels that only the harshest counter-measures will overturn a certain tendency it sees as wrong, and if that belief is supported by its own experience, why should it listen to the criticisms of societies that have had a quite different experience? Its calculation might be that even without evidence of deterrence, and accepting that mistakes of justice will occur, the general effect on society of maintaining the threat of capital punishment is a good one. Its reasoning might be that the state should not have to drag itself through a series of international quarrels; that keeping the sanction of the death penalty makes it less open to hostile accusations; and that it should not invite an illegality whose consequences are impossible to predict<sup>232</sup>.

Abolitionists should recognise that the refusal of retentionists to agree to their demands may be out of their respect for law. It is wrong to refer merely to backwardness and a refusal to accept change. The Athenians did not approve of the harshness of the laws of Sparta, but they admired Sparta for its *eunomia*.<sup>233</sup> Even the most stable societies can panic. There is a dark side of extra-judicial punishment in the history of all regimes. It

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<sup>232</sup> It would be fair to say that European societies, which adopted fascism in the 1920's and 1930's, were at the beginning unaware of the consequences of suspending the existing legal codes.

<sup>233</sup> The Delphic Oracle had approved the Laws of Lycurgus. They had served the state well: why change them? (Kitto, H., *The Greeks*, London: Penguin, 1951, p. 94)

appears, as we have seen, at times when there is a sudden loss of control by the civil authorities. Even in countries where the rule of law is most firmly secured, we find instances of panic. State illegalities can quickly multiply and become a habit. An illegal shooting is likely to be investigated only within a closed form of judicial proceeding whose findings are not published. The truth about a particular situation may not be revealed before the principal actors are dead or very elderly, if at all. Authorities, responsible for carrying out acts of extra-judicial punishment, operate in a secret world in ways that may harm or compromise the state<sup>234</sup>.

It is essential for abolitionists to recognise that by idealising the needs of society, they are refusing to look at a brutal alternative. Extra-judicial killing has waylaid a great many societies where a culture has suddenly become insecure. Zimbabwe, and now several of the states of Mexico, have recently followed countries like El Salvador to becoming criminal societies. These can be defined as places in which there is little or no attempt to reconcile the laws of a state with actual practice, and where the rule of law can be said to have been effectively suspended. In circumstances such as these, human life is eliminated in the cellars of a prison or picked up next day on a rubbish tip.

Wreckage caused by the displacement of a previous colonial framework has created surprising incompatibilities. The African continent offers many examples of unravelling<sup>235</sup>. From a Western perspective this may be regretted mainly for a loss of

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<sup>234</sup> This has frequently been claimed both of the American FBI (founded 1908) especially under the direction of J. Edgar Hoover (1924-1972), and of the CIA (founded 1947). (source: The Hutchinson Encyclopedia, op.cit. pp. 203 & 387)

<sup>235</sup> Currently the worst of the African continent's civil wars, leading to mass extermination, is in the eastern Congo and the neighbouring states of Rwanda and Burundi. These territories were arbitrarily

standards. But surely the worst aspect is that a loss of cultural stability made it difficult for governments to impose law of any kind<sup>236</sup>. When protection of the person or of property can only be effected through favours, bribes or bodyguards, a state of lawlessness has been reached.

## **Conclusion**

In January, 1976, the Committee on Legal Affairs presented a report to the Council of Europe which began with these words:

‘The abolition of the death penalty is one of those problems that involve the very principles of moral, philosophical, legal, criminological, political and other sciences, and yet the various questions it raises may ultimately be reduced to a single fundamental question, to that direct, crucial, blunt question which Cesare Beccaria asked more than two centuries ago: “What is this right whereby men presume to slaughter their fellows?”’<sup>237</sup>

This chapter attempts to answer Beccaria in two ways. Firstly, a right to punish by the death penalty may be a responsibility, assumed by a sovereign people, of their collective belief in God. It is only by denial of a divine ordinance, that is to say by a person’s rebellion against Allah, that someone may be punished in this way, and that only after every effort is made to bring him to his senses. Neither historical accident nor the attitude of other states can affect this. Secondly, since it is self-evidently wrong for

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divided to meet the demands of the European imperialists, and, like the Sudan, little or no attention was paid to questions of cultural difference or compatibility.

<sup>236</sup> This is perhaps most evident in the failed or failing states of east Africa, such as Somalia.

<sup>237</sup> Council of Europe Document 4509, para 1

men to slaughter each other, it is the obligation of every society to prevent this from happening. Those states which, by secular reasoning, decide that a lesser harm, in the execution of a small number of their worst criminals, may prevent the greater harm of murder, extra-judicial killing and general lawlessness have, in virtue of the responsibility assumed by a sovereign people, an absolute right to do this.

Also in this chapter, we have questioned the meanings of killing. It has been suggested that the state cannot escape accountability for capital punishment by simply manipulating its methodology and description. Either a state admits the right to order the elimination of a person it considers to have offended sufficiently for the supreme penalty to be paid, or it surrenders on moral grounds any authority to do so. It has further been suggested that it is hardly possible to find a regime in recorded history which has been forgiving of its worst offenders and opponents. By what authority, then, does a group of nations feel it can overturn the long-held beliefs and the legal constitutions of other nations? By what right does one group of nations feel it can elevate its needs and priorities over those of another?

That no court has the power to authorise a death sentence in a given country does not mean that no death sentence will be carried out in that country. To say this is not so, or that the fact is somehow irrelevant to the legal argument over abolition, is unreasonable. It is merely a tactic to restrict the terms of the discussion to those that suit the case of the abolitionist. Would the abolitionist be happy to accept the situation of a country where it

was reported that state officials were no longer in charge of dealing with serious crime because the task had been contracted out to a firm of cleansing operatives?<sup>238</sup>

States are not so careful of their citizens' rights that they will not put the individual in harm's way<sup>239</sup>. Were this the case, the proponents of Human Rights charters could add the abolition of war to the abolition of the death penalty. States have always employed certain members of society, committing them to wars in which there is certain knowledge that there will be a cost in human life<sup>240</sup>. In this, they have a strong tendency to put aside the idea of "citizen" and re-establish the meaning of "subject". There is no indication that this levy of human lives is about to end, and this writer is deeply does not believe that any campaign will make it end.

Proponents of abolition wilfully ignore a number of important points. Firstly, the right of a politically self-conscious nation to follow its own historical tradition is at the heart of the United Nations Charter. This right cannot be superseded or overthrown by pressure from interest groups acting within that international body. This is most obviously true where a nation's laws are deeply held, as in a wider religion or belief-system that it would require a violent apostasy to overturn<sup>241</sup>. Yet it is also true of nations which can

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<sup>238</sup> This is the case in Brazil (last official execution was in 1855). *Limpamento* ('cleaning') is carried out by death squads – consisting of out-of-uniform police officers and even local politicians. It is an instrument of terror in slum areas of the larger cities where the police forces may be afraid to operate.

<sup>239</sup> It is never very convincing for a constituted authority to try to excuse itself of this. When Socrates drank poison, his death could not be thought of as a voluntary suicide just because someone had whispered to him that he might not be prevented from escaping. Who placed the poison in front of him?

<sup>240</sup> This does not stop politicians from trying to reduce the impact of their decisions by claiming that 'not a life will be lost'. (cf. the words of the British Defence Secretary, John Reid, at the beginning of the recent invasion of Afghanistan)

<sup>241</sup> The preference for our own laws and customs is often overlooked. But it has often been noticed in the past: 'For if one were to offer men to choose out of all the customs in the world such as seemed the best, they would examine the whole number, and end by preferring their own; so convinced are they that their own usages surpass those of all others ... Such is men's wont herein; and Pindar was right in my judgement, when he said, "Law is king over all."' (cf. Herodotus, C5th B.C., op. cit., III.38, p. 242)

see a clear threat to their own stability and maintenance. These too must be presumed to understand their own needs. On the basis of national sovereignty and non-interference, it is reasonable that they see the pressure on them as a threat of their right of self-determination. Secondly, the failure of abolitionists to recognise that a rejection of the death penalty may be used as a cover to gain credit within international bodies is not merely naive but dishonest<sup>242</sup>. Academics who put themselves in this camp are open to the charge of a lack of poor reasoning if they do not at least acknowledge the possibilities of dishonest state diplomacy.

Although abolitionists are keen to stick to their own terms of reference, other arguments have been found even within the narrow limits they have set themselves. To take one example, the phrase ‘in countries which have not abolished’ is said to prevent restitution of the death penalty in countries that have not formally abolished it. Yet nothing in this text justifies the assertion<sup>243</sup>. What it does indicate is that abolitionists see alteration to the law as a work in progress in a way that is both directional and inevitable. As we have shown, implicit content is a favourite tactic. An unfortunate effect of this lawyerly approach, however, is that they quickly lose sight of the broader principles of humanity their efforts are intended to promote. Thus, determinative sentencing for those on death row is objected to on the grounds that it may set a deadline for execution<sup>244</sup>. Playing

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<sup>242</sup> It can be understood, though not proved, that abolition can be used as a deal-breaker by states not concerned about the formality of law.

<sup>243</sup> The text of this paragraph reads: ‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law which is in force at the time of the commission of the crime and that is not contrary to the provision of this Covenant and to the Convention on the Prevention and Punishment of the crime of genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.’ (Working Party report to the Third Committee of the UN General Assembly on the International Covenant on Civil and Political Rights (1966) at UN Doc. A/3764, para 102)

<sup>244</sup> This position is hard to reconcile with humanitarian concern for the prisoner.

with the meaning of 'arbitrary,' 'intentional' and 'mandatory' is unnecessary when the meaning of the draft is clearly 'without due process of law'<sup>245</sup>.

When Guatemala, at a moment of political crisis, re-introduced capital punishment in 1982, its action was described by one national representative on the UN Commission of Human Rights as 'scandalous'. Yet what abolitionists may fail to consider is whether, by taking this action, Guatemala was attempting to move towards the rule of law or away from it. It is surely a far easier option - as years of assassination in neighbouring El Salvador have shown - to declare one's virtue before the UN while dealing with opponents in the most arbitrary and cruel fashion<sup>246</sup>. To understand the real extent of capital punishment, how can abolitionists fail to reflect on extra-judicial killing by governments? State authorities are free, in this situation, from the rules of the courtroom. No law of *habeas corpus* or presumption of innocence is there as a safeguard when the active principles of the constitution are anaesthetised or have expired.

If reference to these violations of justice in Latin America seem historic, can it be said of the last twenty years, when so many new states have been formed and brought into the abolitionist camp, that there has been an increasing rejection of extra-judicial retaliations? Can it even be claimed that the leading lights of Western society have set a good example? Sadly, it is easier to detect the opposite. We see detainees held for increasingly long periods of time before charges are brought; prisoners left unaware of, and without the right to be told, the suspicion laid against them; policemen shooting to

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<sup>245</sup> See discussion of the drafting of the International Covenant on Civil and Political Rights in Schabas, W., op. cit., p. 45 & ff.

<sup>246</sup> Rubbish tips outside the city were used so that relatives of the murdered might find evidence of their loved ones.

kill in public, executing suspects without being answerable, on minor or mistaken evidence<sup>247</sup>.

Many government forces in the West are now empowered by the very convenient excuse of “terrorism”. Prisoners can find themselves “rendered”, which is to say, secretly despatched to third-party states willing to offer discreet facilities for torture. Elsewhere, in a condition of undeclared custody, there are prisoners who do not survive the multiple effects of sensory deprivation and indeterminate sentencing<sup>248</sup>. In these regions of inhumanity, the abuse of rights far greater in cruel and unusual deployments than the judicious use of capital punishment. The law is made fun of by states which exercise power in ways not merely illegal but pre-legal in their brutality.

Membership of the United Nations must not be used as a cover for the routine violation of fundamental laws that are common to all states<sup>249</sup>. Whether by states that retain the death penalty, or those that have dishonestly abolished it, such violations degrade not only our collective, social existence but the concept of law as the chief attribute and measure of civilisation<sup>250</sup>.

In 1999, the UN Commission on Human Rights urged states not to impose capital punishment for non-violent financial crimes and non-violent religious practices or

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<sup>247</sup> These have been new trends in state behaviour in the UK during the last decade.

<sup>248</sup> The strange, death-row type phenomenon known as ‘Guantánamo Bay’ gives so many examples of this treatment during the last decade that it would be reasonable to call the US ‘war on terror’ a ‘war of terror’.

<sup>249</sup> Such as laws of evidence, rights of trial and appeal.

<sup>250</sup> This refers to the large number of states that have acceded to treaties of abolition while continuing to practice extra-judicial killing of their own citizens. In the Philippines, the death penalty was abolished for all crimes in 1996, yet the country continues to eliminate its Muslim separatists in western Mindanao.



expressions of conscience<sup>251</sup>. This posed a direct challenge to the *sharia*, as it did to states that threaten narcotics traffickers with the death penalty. It questioned the right of a state to identify and condemn those risks it considers most prejudicial to its integrity. It also posed a difficult ethical question about the measurement of offences against society. Some commentators have felt that the deliberate fraud on a very high scale is more culpable than almost any crime that does not involve intentional murder<sup>252</sup>. Indeed, more than ten years ago, Professor Pojman argued that financial embezzlement on a large scale amounted to treason, and deserved to be treated as a capital crime<sup>253</sup>. Had it been so designated, it is possible that it might have deterred some of the behaviour that led, in part, to the current state of financial collapse in the West, with all its fateful consequences<sup>254</sup>. The least that can be said is that the definition of “most serious crime” is far from self-evident. It is surely not understood in the restricted and over-simple view that the UN Commission chooses to take of them<sup>255</sup>. Wilful infection of another person with the HIV/AIDS virus might also be thought to merit the ultimate penalty on the grounds of deterrence and social protection.

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<sup>251</sup> UN Doc. E/CN.4/1999/Res.61

<sup>252</sup> Financial crimes have affected the lives of a large number of people, as in the case of the New York financier, Bernard Madoff, who was sentenced of life imprisonment in 2009.

<sup>253</sup> ‘It [the death penalty] should also be considered for the perpetrators of egregious white collar crimes such as bank managers embezzling the savings of the public.’ ‘I have suggested that the death penalty include not only first-degree murder but also treason (wilful betrayal of one’s country), including the treasonous behaviour of business executives who violate the public trust.’ (Pojman, L., op. cit., pp. 67 & 73)

<sup>254</sup> Such as human starvation on the streets of Athens. The UNHRC, however, took the opposite view in 1999 when it urged states not to impose the death penalty for non-violent financial crimes. (cf. UN Doc E/CN.4/1999/Res.61)

<sup>255</sup> Since the ‘most serious crimes’ test covers all instances of the loss of human life, including negligent homicide (manslaughter) and felony murder (unintended killing during the commission of another criminal act), they are consistent with the provisions for acceptable capital punishment within the terms of Article 6, International Covenant on Civil and Political Rights (UN, 1976). However, the Covenant does not concern itself with any other categories of serious crime.

When in a brief reference to the Arab Charter of Human Rights, Professor Schabas called the Islamic system of human rights “still very rudimentary in comparison with the other regional systems, one which does not even [sic] contemplate abolition of the death penalty”, his observation not only seemed immune to religious differences of viewpoint, but entirely arbitrary in its sense of what constitutes a region<sup>256</sup>. From a social point of view, China, North Korea, Vietnam, Laos and Cambodia might be said to describe a distinct region, but Professor Schabas had a quite specific, geographical target: “Arab and more generally Islamic nations have been among the most aggressive advocates of the retention of the death penalty”<sup>257</sup>.

In this arguments, the original point of departure remains. There is a conviction in the fitness of the death sentence to answer for the most serious crimes against society. Yet on this point, on how justice may be served, abolitionist literature falls silent with a bare assertion. We are left with such statements as: “This progressive restriction has been crowned, in recent years, by the emergence of a norm that effectively abolishes the death penalty. Although still far from enjoying universal acceptance, its very existence testifies to its significance”<sup>258</sup>. Thus, the importance of something not yet established is proved by the idea we may have of it. We may be tempted to think that poor logic is perhaps a reliable indicator of weak content.

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<sup>256</sup> Schabas, W., op.cit., p.16

<sup>257</sup> ibid, p.16

<sup>258</sup> ibid, p.20

## **Chapter Nine**

### **The Impact of Western Legislation on the UAE Legislator**

#### **Introduction**

In previous chapters it was shown that legislation in the United Arab Emirates has been significantly affected in its penal code by tendencies in Western and international law. This chapter further explores the extent of this influence in various aspects and at various levels, especially in respect of the main concern of this thesis: the death penalty. Without repeating too much of the substance of previous chapters, this issue will be looked at from a number of different angles. It will begin with a discussion of certain aspects of the UAE Constitution (1971), and the bearing upon it of Western as well as Arab-Westernized constitutions in its formation and provisions, and enquire how far these have affected the final form of the UAE Federal Penal Code (1987) and other criminal codes.

Following this, our discussion considers the extent of this influence on the issuance of the death sentence itself, the level of application of this penalty, as well as the tests and measures of aggravation and commutation in pronouncing sentences of this severity. The attitude of the legislator regarding the implementation of the death penalty is also discussed in order to determine whether the UAE legislator is moving towards increasing or decreasing the use of the death penalty sentences, and whichever is the case, whether there is any relation between this attitude and what is happening in the rest of the world with particular reference to the abolitionist movement.

In the same context, the use of occasional pardon orders issued by Governors both for convicts sentenced to long-term confinement and the death penalty is noted, and the relationship between these exemption orders and the international trend that calls for the abolition of the death penalty is considered.

In conclusion, the extent of the influence of Western legislation on the UAE legislator in determining methods of execution are examined, along with the question of whether these methods have their roots in the provisions of Islamic law, or whether in selecting its methods the legislator has been influenced by Western legislation in countries that practise or have reinstated the death penalty.

### **9.1 When did Westernization start?**

As already noted, the federal legislation produced by the UAE legislator, following the establishment of the Union in 1971, was recognised as having been influenced specifically by Egyptian legislation. Intrinsic to this are several historical and actual circumstances peculiar to the situation of the UAE. These are that Egypt possessed a well-established, and hybridised, jurisprudence, based both on its reference and foundation in the religious laws of *sharia* and on its acceptance of the laws of other countries, being principally those of French ‘Latin’ law. It was clearly felt that Egypt provided a convenient and congenial model of law-making in relation to the newly-formed UAE, and its schools of law were open to and received many students from the Emirates<sup>1</sup>. When legislators came together to

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<sup>1</sup> From the days, when laws were at least partially codified, to the modern Egyptian Supreme Court, Egypt would have a strong influence on law and order in the Middle East. (Wilson, G., op.cit., p.134\_

devise a constitution for the federal union of the UAE, expert assistance was sought in the form of Egyptian jurists. The team that produced this constitution was headed by Jurist Rifaat Alsanhoury. Later, due to illness, he was replaced by another Egyptian, Wahid Raafat. Since the writing of the constitution rested largely in Egyptian hands, the laws that were prepared and written inevitably show the influence of Egyptian jurisprudence. It was, of course, entirely natural, for these federal laws to be constructed in a manner known to, and understood in practice, by those who framed them. The result was that UAE federal laws are identical, or at most with minor amendments, to the statute laws of Egypt.

At the same time, however, the penal codes of Abu Dhabi and Dubai (both dating from 1970), were issued under and during the time of the British mandate. For this reason they betray attitudes to particular types of law that have distinct English Common Law characteristics. One such area is the use of the death penalty, around which great debate existed in British society in the 1960's culminating in a provisional abolition at the end of that decade, especially relating to the death penalty<sup>2</sup>.

A clear trace of this Westernisation is to be found in Article 216 of the local penal code of Dubai. The Dubai legislator came to the conclusion that the death penalty enforceable for homicide must be accompanied by aggravated circumstances. Otherwise, life imprisonment would be the punishment. This decision goes against provisions of the *sharia*, which does not recognise a distinction between different types of homicide. The Dubai authority could have written the law according to Islamic law, as it is applied in neighbouring Saudi

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<sup>2</sup> First abolished 1965. See discussion in Hood, R., & Hoyle, C., *op.cit.*, 2008, pp.42-47

Arabia, for example, but it chose not to do so. Instead it elected to follow the precepts of Egyptian jurisprudence in this and other laws.

This leads us to the question of why the UAE legislator sought the assistance of Egyptian jurists. To answer this, the researcher has discussed the matter with several UAE jurists, among them the chairman of the Federal Supreme Court, Dr. Abdulwahab Abdul<sup>3</sup>. He offered a detailed historical overview of the matter, pointing out, firstly, the link between the Egyptian and French legal systems. He went on to explain that the UAE interest lay in conforming to Egyptian legislation quite as much as in pursuing a ‘modern’ Westernised legislation. After France occupied Egypt in the nineteenth century, it imposed its own laws. This was reinforced by many Egyptian law students undertaking their higher education in France. In consequence, the research work of these students was originally in French and only subsequently translated into Arabic. It was through this process that Egyptian legislation began to conform to French Latin Law. Several generations later, students from the Arabian Gulf, particularly those from the UAE, who wished to complete their university studies in the nearest politically stable Arabic-speaking country, went to the Arab Republic of Egypt. It was simply the logical outcome that they were influenced by these laws just as they were influenced by the current of Arab national thought. The Egyptians, through their studies in France, had published thousands of Latin-influenced legal research papers in Arabic. The UAE legislator, having absorbed the influential Egyptian Latin laws, shifted gradually to favour the imposition of similar laws, although local penal and procedural laws

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<sup>3</sup> The interview with Dr. Abdulwahab Abdul took place in his office at the Federal Supreme Court in Abudhabi, 26.9.2011

were at that time written according to English procedural law as a result of the British mandate. It is therefore, easy to understand why, when the UAE legislator needed a legal framework following the end of the British mandate late in the 1960's, that a shift was made to Latin law modelled on the Egyptian system.

At the same time, however, Dr. Abdulwahab Abdul affirmed that the local penal codes of Abu Dhabi and Dubai issued in 1970 were prepared in accordance with English jurisprudence. They quote from Indian and Sudanese laws arising from Great Britain's occupation of both these countries. English Common Law jurisprudence was also transferred from these countries by means of the jurists coming from Sudan, Jordan and Palestine who were involved in writing the penal codes of Abu Dhabi and Dubai due to their fluency in both Arabic and English. Following the end of the British mandate, the UAE was obliged to issue several laws including the penal code, laws of criminal procedure, civil law, as well as other regulations.

Dr. Abdul added that the first senior officers in the Justice Ministry, as well as in other important departments of government in the UAE, were those people who had studied in Egypt and were influenced by Arab nationalist thought. For this reason, and for those noted above, they asked Egyptian jurists to draft the federal laws. Dr. Abdul affirmed that it was not to conform with the will of politicians that the shift to Latin jurisprudence took place.

From this complicated evolution, we can see that both authorities in Abu Dhabi and Dubai were influenced by a Western way of thinking when first preparing the local penal laws,

and that the federal authorities continued with the same frame of mind when they issued federal laws identical to the laws of Egypt<sup>4</sup>. The most significant aspect of this, perhaps, is that the legislators shifted from an English Common Law jurisprudence to a Latin-based jurisprudence without undertaking any kind of study to determine which one was more suitable for the country. All this occurred simply because the authorities had sought the assistance of Egyptian jurists to draft the federal laws.

## **9.2 The UAE Constitution**

The Constitution of the United Arab Emirates was issued on 2<sup>nd</sup> December 1971 after the declaration of the formation of a federal state, which united seven constituent and formerly separate emirates. Under Article 7, the UAE Constitution has provided that the *sharia* is a ‘main’ legislative source. As we have seen, the qualification in the term ‘main’ implies a secondary source that may turn out to be greatly influential in areas of the penal code. In this case, the door was opened to legislators and jurists, convened to formulate the UAE Constitution, to come from a nation heavily impacted and influenced by Western and particularly French legislation. Consequently all this is reflected in the UAE Constitution and in the federation’s subsequent laws. The specification in Article 7 that the *sharia* is a ‘main’ but not ‘sole’ source of legislation has undoubtedly had a significant impact on the

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<sup>4</sup> A summary of this complex set of relationships can be found in Graeme Wislon’s account: “early on it was decided that the Dubai judicial system would be based upon the French model, with its core principles drawn from the Shariah. Indeed most legislation would comprise of a mix of Islamic and European concepts, having a common root in the Egyptian legal code established in the late 19<sup>th</sup> to 20<sup>th</sup> centuries. The French influence would emanate mostly through its civil law system, rather than the English common law system. This would seem a strange choice, given that Britain had such an overwhelming influence over the region. This was based on an array of reasons, one of the most important being that among the Trucial states, particularly Abudhabi, and others around the Gulf, a system underpinned by French law was predominating. This meant that Dubai would be in step with her neighbours, and the sheikhdoms that could be expected to be components of any future union”. (Cf. Wilson, G., op.cit., p.135)



subsequent elaboration and comprehension of UAE law. To this writer, is the clearest possible indication of the bearing that Western jurisprudence has on the UAE legislator. At the same time, it cannot be ignored that the leadership of the state might have felt a responsibility to direct the Committee which formulated the National Constitution to adopt this phrase in order to emphasise and ensure the flexibility of the Constitution. This can be explained by a need to take into consideration the general status of the UAE. From its inception, the country has embodied a large segment of foreign workers recruited to help in the construction and development of the state<sup>5</sup>. Consequently, the UAE legislator may have intended to stress the point that the *sharia* is not the only source of UAE laws, and that other legislative sources can be adopted within the framework of the Constitution to meet the rapidly-evolving needs of the federation.

The Western bearing on the UAE Constitution is reflected in all subsequent legislation and laws, as will be noted later, and the UAE is not the only Arab country which has been exposed to these influences. The majority of the Arab States which formulated their constitutions before the UAE did adopt the same formulas expression, except for the Republic of Yemen which provided, in Article 4 of its Constitution, that the *sharia* shall be the 'only' source of all laws and legislation<sup>6</sup>. In addition to Yemen, the legislator in the Kingdom of Saudi Arabia pronounces under Article 2 of its Constitution that Islam is the

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<sup>5</sup> The proportion of expatriates living in the UAE, according to the 2001 Census, is given as 75% of the whole population (cf. Whitaker's Almanack, 2004, A&C Black: London, p.1010)

<sup>6</sup> Under pressure of the international news media, however, the Yemeni Government commuted a death sentence passed on a woman for the crime of adultery in 2004. (Albayan Newspaper, issue 8691, 4.4.2004, p. 22)

official religion of the State and that the *sharia* is the 'key' source of all laws and regulations in effect.

### **9.3 The Federal Penal Code of 1987**

In spite of the fact that UAE was officially formed in 1971, the Federal Penal Code, which is in effect in all Emirates, was only issued in 1987 after many years of examination and discussion. There was a debate on the question of whether or how far to include the precise conditions of the *sharia* in this code. It was eventually decided that the Law Formation Committee should refer to all *sharia* provisions collectively under a single article, without supplying a detailed redaction in respect of punishments for divine ordinance and retaliation crimes. The legislator briefly states in Article 1 of the Federal Penal Code that Islamic law shall apply for divine ordinance crimes, retaliation crimes and legal blood money (*diya*), but elaborates no further and fails to provide any explanation for this curtailment.

Despite the formulation in Article 1, most punishments stipulated by this code contradict the stated provision. Evidence for this can be found in the division made by the legislator when he divided homicide crimes into two types, namely homicide with or without aggravated circumstances and homicide without aggravating circumstances. This distinction reveals the influence of Western and Arab-Western legislations on the UAE legislator. For comparison, the *sharia* does not speak of aggravated circumstances in premeditated murder. As such, a case of murder can present no other explanation, interpretation or mitigating circumstance, and deserves nothing less than the legal

retaliation of the death penalty unless the right of punishment is waived by the blood relatives of the murdered person.

In a partial attempt to rectify this error, the legislator has added and amended Article 332 of the Code by Law 34 (2005). This states that the punishment determined for premeditated murder with aggravated circumstances shall be one year of confinement as a discretionary punishment if the blood relatives waive their right of retaliation. As noted previously, this amendment does not add or constitute any new judgement. Firstly, the legislator is insisting that retaliation will apply in cases of homicide with aggravating circumstances. Then he turns to saying that if the retaliation is waived, then one year's imprisonment shall be imposed as a discretionary punishment despite its being the prerogative of the governor to impose any such punishment. This would be the case even if he assumes that the murderer should not be released and even if the retaliation is waived. Thus, it is clear that the legislator insists on exercising a Western way of thinking regarding the punishment of homicide.

Moreover, the legislator has imposed a discretionary punishment in Article 356 for the crime of adultery. This contradicts the first Article, which implied that this crime would be dealt with according to the punishment for divine ordinance crimes. Had the legislator been willing to impose the divine ordinance punishment for the crime of adultery, there would have been no need to mention it again among the crimes of discretion later on, since this crime is either proved or there is no punishment attaching to it. It cannot be compared to the crime of homicide, where the judge can impose a discretionary punishment if retaliation is

waived. In Chapter One of this research, it was observed that the Holy *Qur'an* stipulates the punishment for the crime of adultery. Thus, if the legislator is willing to apply Islamic law, there is surely no need to mention two punishments for the same crime. The redundancy here is itself an indication of an uncertainty within the current penal code. The punishment given under Article 1 falls squarely within the province of, and can be effected according to, the legal competence of *sharia*, yet we find a quite separate (discretionary) punishment prescribed under Article 356.

#### **9.4 Judgements given on capital crimes in the UAE**

The observer of court-issued judgements might easily conclude that they are mitigated by consideration of the judge trying his best to lessen severity of the punishment. This is especially evident in drug-trafficking cases, on which death sentences are pronounced but which are then commuted to indeterminate terms of imprisonment<sup>7</sup>. This is despite the anti-drug enforcement code not granting the judge a right to choose punishment not specified in the code, since the sentences in question are determinate. For instance, in Dubai during the year 2005, 18 people accused of drug trafficking were sentenced to death commuted to life imprisonment.<sup>8</sup> This number increased to 19 in 2006, and to 32 in 2007.<sup>9</sup> Although the judges have in practice exercised discretion in these cases, the code itself gives them no authority to do so. The determinate sentence for the crime of drug-trafficking prescribes

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<sup>7</sup> Although there are cases where the prisoner's tariff is stipulated, in most cases offenders are dealt with under the practice of discretionary punishment by which the offender must remain in prison awaiting an order of pardon.

<sup>8</sup> There is no definite period with respect to life imprisonment in UAE law. This means there is no statutory provision of parole. However, it is customary for the prisoner to submit a request for release, after twenty years in the case of a life sentence, if his conduct has been good. Otherwise he is liable to serve for a period of twenty-five years in total.

<sup>9</sup> Source: Judgment Execution Department, Dubai Correctional Institutions.

only the death penalty. Yet the code itself is surely to be criticised here. It seems unreasonable for a judge not to have discretionary power to opt for what he regards as the most appropriate sentence, based on all the circumstances and on the unfolding of a particular case in his court. It is difficult to blame the judges if they overstep the limits of their authority, since to them it may appear quite illogical to pre-determine punishment, and be expected merely to apply a mandatory sentence, knowing that this sentence will be overturned on appeal. This procedure clearly requires redefinition. The modern judge, versed and experienced in all the variable circumstances and psychology of crime, naturally expects his understanding to be reflected in a certain measure of personal discretion that is allowed him by legislation.

The current situation involves two strongly contrasting circumstances. On the one hand, the judges themselves have been influenced by an international trend that calls for the death penalty to be replaced by other penalties, such as temporary or life imprisonment, which is consistent with homicide defined as a crime of discretionary punishment. At the same time, it may be a function of the leaders of the country to guide the judges towards considering lesser penalties, and to avoid the use of the death penalty unless it is a retaliation punishment. There are several recent instances of mediation resulting in the freeing of an offender, which have come about through government- to – government requests. In the case of a Filipina who murdered the wife of her employer, the President of the Philippines, Mrs. Gloria Arroyo, visited Kuwait to request extradition of the Philippine national. Mediation was admitted and the request granted despite the fact that this was a retaliation

case<sup>10</sup>. As we have seen, even the leaders and rulers do encourage blood relatives to give pardon and waive their right to retaliation, a position that is fully in accordance with the *sharia* since, as it is related in the Holy *Qu'ran*, believers are strongly encouraged to show mercy by pardoning those who have wronged them and to seek bounty from God.

On the other hand, the increasing number of people accused of drug-trafficking is an important issue regarding deterrence. It was mentioned in previous chapters that, in 2006, 26 people, convicted of drug-trafficking and sentenced to death, received a pardon from the ruler of Dubai. All of them were deported to their respective countries, since those convicted turned out to be foreigners. It was also mentioned that this kind of pardon might affect the element of deterrence. This is, of course, extremely difficult for the UAE legislator to estimate and provide for, since it involves an understanding of peoples with a quite different cultural and religious background. Yet, it is clear from the high number of convicted foreigners, relative to the size of Dubai's population, indicates that harsh punishments may be required to maintain the credibility of the law among foreign residents.

Again, the non-implementation of the death penalty as a divine ordinance punishment in the crime of adultery shows the significant influence exerted on the UAE legislator of Western and Arab-Western legislations which do not incriminate or condemn adultery. This is quite evident in the courts of the Emirate of Dubai and in other Emirates, which although they register thousands of adultery cases, have never imposed the death penalty on the offender. Further, the legislator provides under Article 356 that the crime of adultery by mutual

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<sup>10</sup> Albayan Newspaper, issue no. 10036, 10.12.2007, p.25

consent shall be liable to a sentence of imprisonment for not less than one year. This contradicts the provisions of Article 1 of the same code, which upholds the primacy of the *sharia* in cases of divine ordinance crime, and in matters of retaliation and blood money. This disparity and anomaly illustrate the problematic or confused approach of the UAE legislator in the context of the global trends calling for the death penalty to be abandoned or abolished. It seems to the writer that the action taken by the legislator to avoid the use of the death penalty as a discretionary punishment is entirely correct. But the same cannot be said of a divine ordinance punishment, since in this case the legislator is obliged by the tenets of Islamic religious law to be stricter. This is not intended to advance the view that the thousands of people who, according to statistics, commit the crime of adultery should be executed. Rather, the responsible authority should be strict at the time of registering this crime, and register it only according to the provisions of the *sharia*. Safeguards to protect the accused, we should remember, are extremely strong. Islamic law requires that for adultery to be proved four men shall witness the crime, or that the adulterer confess, or that the guilt is inferred from the pregnancy of an unmarried woman. Thus, the legislator does not need to include Article 356 since it contradicts Article 1 of the Penal Code.

### **9.5 Implications of the delay or commutation of the death sentence in the UAE**

Once judicial rulings are finalised, and all the stages of the process complete, the sentence must be implemented. Yet it has been observed that in the UAE death sentences are not carried out immediately, whether ordered by the Court of Cassation in Dubai or Ras Al Khaimah, each maintaining its local judiciary, or by the Federal Supreme Court. Sentences rendered from Dubai and Ras Al Khaimah require the endorsement of the ruler, while

rulings issued by the Federal Supreme Court require the approval of the President. However, the endorsement of death sentences is in many cases delayed for a number of years without there being any clear legal justification for this.

Although it is not for the writer to comment on the authority of the state to postpone implementation of the death penalty, it is clear that a long delay can harm the interests of the parties involved, especially those of the blood relatives in a case of homicide. Delay might be considered an encroachment on their right to retaliation against the murderer. For instance, a Pakistani man who was accused of a homicide waited for more than 26 years in prison for the relatives to give him pardon, although the relatives did not wish to comply with the request. After all those years, however, the relatives did finally accept the legal blood money and gave the accused pardon. Their explanation was that after the passage of so long a time, the execution of the murderer would not mean anything to them, and hence they decided in the end to waive their right to retaliation and accept the blood money<sup>11</sup>.

It is surely reasonable to suppose that a delay in implementing the death penalty is positive and commendable since it gives the blood relatives an opportunity to think and consider forgiveness. Such an attitude is urged by the *sharia*. However, it ought not to be prolonged for many years since this can create psychological pressure and push the blood relatives of the victim to waive their right to retaliation out of fear or for the non-fulfilment by the authorities of their rights. In addition, delaying the implementation of the death sentence is, of course, further evidence of the international pressure calling for its abolition. Moreover,

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<sup>11</sup> Alkhaleej Newspaper, issue No. 9859, dated 17.5.2006, p.11



on many religious and national occasions, the President and the rulers of the Emirates of the UAE issue special pardon orders for numbers of convicted criminals. Sometimes, those sentenced to death as a discretionary punishment, benefit from such amnesties, especially in drug-trafficking cases<sup>12</sup>. Again, it is not intended here to comment on the authority of the Governors. However, pardoning those convicted of drug-related offences carries obvious dangers. It may be harmful to or impede the public deterrent effect, which is an explicit objective of all penal codes. Besides, these pardons are a further indication that the UAE legislator and judicial authorities are unwilling in practice to undertake a death sentence in order to avoid the negative effect of media campaigns. These may be carried out by international organisations calling for the abolition of the death sentence which, as we have seen, they consider uniquely harsh and inhumane. In the UAE, this was especially felt after the declaration by the UN General Assembly (19/12/2007), which passed a resolution calling for the freezing of the implementation of capital punishment in preparation for its total abolition<sup>13</sup>. Although this resolution was not binding on member states, its effect on some was profound.

## **9.6 influences upon the methods of implementing the death penalty in the UAE**

The UAE Federal Criminal Procedures Code (1992) does not specify the method of implementing the death penalty. However, the most commonly used method to carry out an execution, which has no roots in the teachings of the *sharia*, is by firing squad. The Kingdom of Saudi Arabia decided upon the use of the sword as the only permitted method,

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<sup>12</sup> 26 people sentenced to death in Dubai in drug-trafficking cases gained pardon from the ruler in 2006

<sup>13</sup> This resolution, as related in chapter 8, was proposed by Italy, approved by 104 countries, opposed by 54, with 29 abstentions.

both because its own enquiries suggested that this is the fastest and least painful method and because its origins are to be found in the *sharia*. In other Westernized Arab countries, such as Egypt, hanging is the commonest way to carry out an execution. In the thirty or so states of the USA where the death penalty is in force, various methods are used; they include lethal injection, hanging, electrocution, by gas, and by firing squad.

Again, the resolution of the UAE to use a firing squad indicates Western influence since this method has no support or precedent in the texts of Islamic law.<sup>14</sup> Yet it was employed at a time when the death penalty existed in Europe, and when the emirates, now bound together as the UAE, were a British protectorate. The European Union has since abolished this penalty, but it was the preferred method of many countries ruled by European military governors to deal with their most serious offenders.

The Prophet, may Peace be upon Him, urges use of the least painful way to carry out execution in crimes other than adultery. The method of punishment for the crime of adultery, however, is by stoning.

## **Conclusion**

There is sufficient indication from all the points discussed that the UAE has been influenced by Western legislation and in particular by the Western trend to oppose implementation of the death penalty. There is a very obvious tendency in the UAE to

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<sup>14</sup> Lest this appear a solecism, it should be remembered that firing squads were commonly used in the ancient world, as in Roman decimation, before the invention of gunpowder.

restrict the use of this punishment to a very narrow range of capital crimes, such as a homicide requiring retaliation either by implementation of a death sentence or by pardon from the blood relatives.

Western influence is apparent in the language of the Constitution itself, in which the *sharia* is stated to be ‘a main’ rather than ‘the sole’ source of legislation. This thinking is reflected in all the laws of the United Arab Emirates. Several years of delay before issuing the Federal Penal Code was one of the results of this Western influence, since some Emirates in the union wanted full exercise of the *sharia* while others wanted to move towards contemporary Western law. In the end, all crimes and punishments related to Islamic law provisions were put in one article without further elaboration or comment. At the level of issuing judgments, it was observed in drug-trafficking crimes that judges pass sentences other than those mentioned in the Anti-Narcotics Code, despite the Code’s mandatory sentencing for drug-trafficking, that is to say its refusal to allow judges the right to exercise discretion according to circumstances. However, these judgements almost always, on appeal, order life imprisonment rather than the death penalty, for which statistics provided here offer strong evidence. Furthermore, even in cases where there is no commutation of sentence, implementation of the death penalty may be delayed for several years. In the case of the death penalty used as a discretionary punishment, rulers may and do exercise their authority to reduce the punishment, or even grant pardon. However, a long delay in carrying out execution as a retaliation punishment has been criticised since this can put the blood relatives under pressure to waive their right even against their will. The execution method used in the UAE, the firing squad, has no roots in the *sharia*. Although we cannot

say it is brutal or causes excessive pain and suffering to the condemned, it is without legal-religious precedent. In the final chapter, an attempt is made to bring these many strands together and offer the reader the comments, concerns and recommendations thrown up in the course of this research.

## Chapter Ten

### Closing remarks and recommendations

#### Closing Remarks.

This research has attempted to shed light on capital punishment, its nature, origins and methods, and its place within the penal system of Islamic law, the current statutes of the United Arab Emirates and in the wider world. There has been much to assimilate and draw into contrast or comparison. It is an assumed function of this work that conclusions are reached, not merely as to what has occurred and does occur in our state, but in the judgements that might be made and recommendations offered. It must begin, however, with a brief résumé of the findings. The point of departure was a discussion of the three categories of punishable offence laid down in the *sharia*.

Within these categories, we have discussed four absolute offences, namely those of adultery, armed highway robbery, rebellion, and apostasy, which are divine ordinance crimes, that is to say crimes against God. It is written that these are capital offences for which no pardon can be granted, yet the laws of evidence relating to them are extremely onerous. *Sharia* asks the adulterer to repent his actions but not to confess, so that implementation of the death penalty may be avoided.<sup>1</sup> Moreover, proof of his crime, requiring multiple witness, may in practice be impossible. Concerning armed highway robbery, the *sharia* demands that the criminal repents of his crime before the governor and

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<sup>1</sup> A precedent (previously referred to) taken from the life of the Prophet when he tried to turn aside the confession of an offender.

commits himself to reform; in this way, the sentence of death can be commuted. In relation to rebellion too we found a forbearance and a legal requirement for the parties to try to make up their dispute. Only killing that results from the act of lawlessness itself is prescribed. Concerning apostasy, the *sharia* demands that the individual enter into Islam in complete knowledge, conviction and seriousness. If having done so, he blasphemes and turns against his religion, he must repent. If he does this, the law allows him to escape the supreme penalty which is not, in any event, carried out precipitately, but only after the offender has had a long time to reflect on his conduct. In sum, the death penalty is difficult to apply in divine ordinance crimes and rarely enforced.

The second area of discussion was homicide, an offence against the right of a human being to live. *Sharia* provides that relatives of the deceased (guardians) have the right to exercise a corresponding retaliation against the perpetrator. They may also accept compensation (legal blood money). The Islamic Sharia encourages them to waive the right to retaliation since mercy honours the giver, both in this life and the life hereafter. In consequence, capital punishment is seldom applied to homicide. It should be noted that Islamic law treats crimes of this nature in a way that is particular to the individuals concerned. It mediates. It does not condemn by formula.

The attitude of the law to discretionary crimes, our third discussion, is entirely different. These are not crimes specified within the holy *Qu'ran*. Their seriousness, and consequently the punishment they attract, is for the legislator to determine. In crimes such as drug trafficking, the chief concern will be for the safety of society and use of the death penalty

can be made. In this too, we can see that the *sharia* is not formulaic but adaptive; it listens to the needs of its people.

The thesis went on to outline the hybrid nature of the formation of the United Arab Emirates, its roots in tribal Arab society, and the compromises undergone in assimilating other influences on this Gulf region through migration of other nationalities. It showed how the federal code asserts both the laws of *sharia* and other adapted sources, some the laws of Western countries. The federal nature of the UAE is made further complex by the existence of three independent judiciaries, including those of Dubai, Ras Alkhaimah and, more recently, Abu Dhabi.

The death penalty in UAE legislation received extensive exposition and scrutiny. Here some uncertainty or inconsistency of approach was detected. Harsh treatment, including the death penalty, meted out to drug traffickers, is controversial for the mandate imposed on judges. Not only does this deny discretion in cases where a range of sentencing might be indicated, but it fails properly to distinguish the trafficker from the casual consumer of drugs. There is also equivocation in relation to culpable homicide, with or without aggravated circumstances. At the heart of this is a confusion between direct application of *sharia* and the interpolation of Western legal practice. It is recalled that accommodation of quite different jurisprudence, running in parallel, is the legacy of a time when British administrators in the region operated two types of court. In view of the numbers of overseas workers in the UAE, the necessity for allowing coterminous systems is unchanged.

In the final section of purely domestic concern regarding the laws of the UAE, it was found that the safeguards protecting the accused in a capital charge are both fundamental in their traditional basis and elaborated in the workings of the modern court. Presumption of innocence and the right to representation favour the defendant. The judge has extensive powers of discretion, subject to strict laws of evidence. Admissibility of confession, expert opinion and documentation are likewise tempered. Controversy within the UAE on use of the death penalty is more likely to centre on how little it is implemented rather than on how much. Under its independent jurisdiction, the death penalty has been carried out eight times in Dubai, and in the rest of the UAE just six. These executions were for the discretionary crime of homicide, acts of an extreme nature with aggravated circumstances. By contrast, drug offences have been dealt with to date by deportation of the foreign nationals involved.

Turning to the international context, a great deal was made of the historical and cultural contexts from which differences of outlook arose. The extent to which outside influence impinges on almost every aspect of UAE thinking became apparent in the account of domestic law. This suggested the importance of understanding the experience that has shaped Western jurisprudence. An attempt was made, therefore, to formulate how thinking on the death penalty has evolved, both in the 'Anglo-Saxon' countries and in continental Europe.

It was seen that the origins of contemporary opinion are not hard to find. The catastrophe of social breakdown in the larger European states, beginning with the empires of Russia, Germany and Austria-Hungary, and spreading their totalitarian infection to Italy, Portugal,



Spain and elsewhere, began as a result of mass warfare in 1914 and culminated in the near-total destruction of great swathes of the continent by 1945. This long struggle precipitated a revulsion at the blood-letting which states had practised, both against their enemies and on sections of their own people.<sup>2</sup> A humanitarian response, beginning with the Hague conventions on the treatment of combatants, and followed by the 1929 Geneva Convention, grew into a widespread conviction that states should be restrained from committing such crimes as the deliberate starvation or industrialised slaughter of their ethnic and religious minorities. In this climate, the notion of state execution came to be alienated, even for the perpetrators of horrific personal violence.

Western opinion not formed by direct experience of this mass destruction and lawlessness is more uncertain. In England, nearly a generation passed after the Second World War before a bill of abolition was accepted. This was, moreover, a tentative step knowing that popular opinion was not behind it.<sup>3</sup> In the United States, at a still greater remove, the nation was and is divided. Its differences of viewpoint, often extreme, can be regionally located, mirroring the old fault lines between Northern and Southern feeling. But they are also intellectual, as between those who see capital punishment as ‘dysfunctional violence’ within society and those who regard it as an indispensable line of defence. A more measured justification for retention can be found in a judgement of the US Supreme Court:

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<sup>2</sup> It is commonly held that Soviet soldiers preferred captivity by the enemy to repatriation; after 1945, returnees were routinely regarded as traitors and consigned to Siberian labour camps. (cf. Radzinsky, E., *Stalin*, Hodder: London, 1996, pp. 489-490).

<sup>3</sup> The Act was subject to a free vote on the subject in each new parliament of the House of Commons.

that as a legitimate expression of popular feeling it should not be overturned.<sup>4</sup> Some sophisticated proponents of the death penalty argue from a utilitarian standpoint.<sup>5</sup> Many more regard deterrence as mere ‘commonsense’<sup>6</sup> and offer the down-to-earth rejoinder that since we know crimes are often calculated against risk, it follows that lives will be saved by the existence of a death penalty.<sup>7</sup>

Compelling argument was found to suggest that the cause of universal abolitionism rests on shaky foundations. The Human Rights lobbyists neither acknowledge the particular contingency from which their movement arose nor the shallowness of its response to serious crime.<sup>8</sup> In particular, abolitionists seem a sleep to the fact that in states subject to habitual violence, where the rule of law may be suspended or scarcely observed, a constitutional abolition of the death penalty is a cover for illegality. It makes the practice of extra-judicial killing more comfortable for the law-denying state. To nations that uphold the law, their frustration is compounded by hearing themselves lectured to for retaining the

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<sup>4</sup> That states such as California had recently reinstated capital punishment for the worst crimes was, in the court’s opinion, an expression of popular will that could not be overridden by the abstract idea that the death penalty was ‘cruel and unusual punishment’. (in *Gregg v Georgia* 428 U.S. 153 (1976))

<sup>5</sup> A utilitarian view of punishment is argued by the philosopher, John Rawls. While recognising the arbitrary potential of an over-systematic application, he finds, in comparison to the retributive justification of punishment, a more comprehensive, forward-looking legislator’s standpoint in utilitarian argument. (cf. Rawls, J., *The Concepts of Rules in The Philosophical Review* (1955), pp. 3-13)

<sup>6</sup> “Unless intent on suicide, people do not jump from high mountain cliffs, however tempted to fly in the air; and they take precautions against falling ... Unlike natural dangers, legal threats are constructed deliberately by legislators to restrain actions which may impair the social order.” (cf. van den Haag, E. 1969 ‘On Deterrence and the Death Penalty’, reprinted in Baird, R. & Rosenbaum, S. (eds.) 1995 ‘Punishment and the Death Penalty’, New York: Prometheus, pp. 127-128)

<sup>7</sup> “If we impose the death penalty and thereby deter some future murderers, we spared the lives of some future victims ... In this case, the death penalty has led to a net gain, unless the life of a convicted murderer is valued more highly than that of the victim.” (ibid, pp. 133-134)

<sup>8</sup> A current case in point involves the mass murder of teenagers at a holiday camp in Norway (2011) where the perpetrator not only admitted but sought to justify his actions on political grounds. To the outrage of the population, it was reported that the court in Oslo might have to admit a plea of insanity, which would have meant the offender was put up for annual parole review to investigate his state of mind. However, in August 2012, Preivik was ruled to be of sound mind, and sentenced as a common criminal.

death penalty, even by states that routinely execute their citizens by other means. Hypocrisy pays dividends in the international arena.

It was also found that abolitionists ratchet their case in an unscrupulous manner. A pretence of even-handedness or understanding of ‘the other’ is undermined by mocking statements, and an offhand attitude towards statistics by which abolitionists present themselves as representative of the majority of the world’s population when the reverse is true.<sup>9</sup> To find key aspects of international law annexed by interest groups within the UN risks general discredit.<sup>10</sup>

This survey of international experience was left with two overriding, remaining questions. Firstly, is justice served when the court is prevented absolutely from sentencing an offender to punishment that corresponds to the nature of the crime he has committed? Secondly, if abolitionism can be said to have arisen from a particular set of historical contingencies, can it suffer reversals to its authority without popular support?<sup>11</sup>

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<sup>9</sup> The extent of this deception, as for example in the tables given by Hood, R. & Hoyle, C., 2008, *op. cit.*, cannot be overstated. Even if we ignore the Arab world, the people of China, the Indian sub-continent, the east and south-east Asian periphery, The United States of America and Nigeria amount to roughly four-sevenths of the world’s population.

<sup>10</sup> The serious and contemporary nature of this issue is obvious at a time when national leaders are being deposed, both in the Middle East and elsewhere, with the active participation of the UN and the competence of national courts to undertake their trial is called into question. It might be asked, for example, whether the people of Serbia were content with the extradition of ex-President Milošević (elected 1997) for trial at The Hague, and did not resent the apparent ‘victor’s justice’ of this proceeding.

<sup>11</sup> Given that the historical contingencies are broadly the same, this question may also be asked of the future of the European Union and its panoply of optimistic, consolidating laws.

Although the evidence presented has carried us far from the situation faced by the UAE, it raises the principle of sovereignty. A nation has the right to decide its laws in the light of its own beliefs and experience. Yet one of the specific problems confronting the UAE, as well as many of its neighbours, is that it is more than being a single nation. We can say that the *sharia*, the bedrock of our religious law, belongs to the nation of Islam, but that there also exists a particular Arab nation, bound within a federation, that must answer to its own specificities. This is not, as it may sound to the Westerner, a point of division, but an endless work of reconciliation. The UAE can no more alienate one part of its composition than choose to walk with one leg rather than with two.

Notwithstanding that the principle of capital punishment must be asserted, this study has found multiple evidence of moderation in the practice of the UAE judiciary. Executions are very few, and avoided whenever possible. This we have found is not in contradiction to the provisions of the *sharia*, but in pursuance of the mercy which is everywhere to be found in Islamic teaching. Conflict is to be avoided, harm or hurt lessened. Life is a gift the Muslim believer is taught to preserve.

## **Recommendations.**

### **10.1 Article 1 of the Federal Penal Code.**

The UAE legislator decided in Article 1 of the Federal Penal Code to implement the provisions of the *sharia* with respect to *Al-Hudud* crimes, retaliation and legal blood money. However, the legislator did not specify or define clearly these crimes. This has

created much confusion and mystery, especially as the provisions of the articles which follow contradict the provisions of Article 1.

The legislator has not implemented the provisions of *sharia* with respect to *Al-Hudud* crimes. It was made clear in this thesis that, according to the available statistics, a large number of adultery crimes and cases have been registered, yet capital punishment has not been used against the offenders. Reports confirm that stoning has never been carried out in the UAE.

Therefore, my first recommendation is to delete Article 1 of the Federal Penal Code, since the inexplicit and attenuated nature of its reference to Islamic law is unhelpful, and the legislator is not compelled to refer to it by such an article. It is obvious that the legislator's initial intention was to avoid implementation of all the provisions of *sharia*. Giving the impression that the *sharia* is merely one source of law among other sources is not consonant with the specific provisions of subsequent articles which are derived from Islamic religious law.

It may be thought that the legislator, by not mentioning *Al-Hudud* crimes in Article 1, would avoid any criticism being raised. However, the opposite result has been achieved. Such criticism has increased as it is plainly recognised that other articles in the penal code contradict the first article, while at the same time signalling that the legislator does not intend to apply the provisions of the *sharia*. This became clear when the legislator decided

that imprisonment would be the punishment for adultery and life imprisonment for homicide. Thus, my conclusion is that the first article should be deleted altogether.

### **10.2 Adultery offences.**

Since adultery cases are very frequently recorded, I recommend recording and treating such cases only within the provisions of *sharia*. These provisions require the adulterous person to confess his adultery several times in front of the justice council, in conformity with the Sunna of Prophet Mohammed. The authority or the judge must inform the perpetrator of the consequences of his confession, which tacitly invites him to refrain from confession or from recording a statement concerning an adultery case in the absence of four witnesses attending the act, which is usually impossible in practice.

The practice of adultery or any vice is strongly discouraged. However, it is of no benefit to see the legislator in a situation in which he is open to criticism of inconsistency, for on the one hand, he asserts that he wishes to implement the provisions of Islamic law, while on the other, he registers hundreds of adultery cases without imposing the required penalty.

### **10.3 Rape offences.**

My recommendation here concerns the punishment of the crime of rape in the UAE and the decision that it deserves capital punishment. There is, however, a danger of exaggerated response in this regard. If the mandatory penalty for rape is capital punishment, there is no incentive for the perpetrator not to kill his victim. If, on the other hand, rape is assigned a

less severe punishment, then the perpetrator will consider leaving his victim alive. Hence, the legislator's mandatory sentence may unintentionally cause the death of the victim.

I would recommend that the legislator amend the punishment for rape to make it variable. For example, the rape of an innocent virgin girl should not be equated with the rape of a prostitute, since there is an obvious disparity in the consequences and impacts of the two cases.

#### **10.4 Crimes against figureheads of the State.**

Moving to crimes against the figureheads and symbols of the state, the UAE legislator has surely been too severe in imposing capital punishment. This makes the crime more heinous than the crime of rebellion, since by the provisions of the *sharia*, the opportunity is given for rebels to repent and avoid their execution. Capital punishment is even imposed against anyone attempting, preparing or even thinking about committing this crime. Yet if the punishment is the death penalty for mere preparation, whether mental or material, what must it be in the event that the perpetrator actually succeeds in carrying out the act? If the punishment for the preparation or commencement of a crime is equal to that of its enactment, then the perpetrator will surely have a strong incentive to continue until the end since the consequences for him will be the same. Thus, I would recommend removing the death penalty as a punishment for all acts preceding enactment, in order to grant the perpetrator an opportunity to draw back and desist from perpetrating the crime.

The same logic, of course, applies to any preparation or attack upon the president. Hence, it is unnecessary to differentiate between the case of a president and that of some other figurehead. Emphasis should be placed on strategies to deter serious crime, and any legal distinction and variation of punishment which has the effect of lessening the risk of an attempt against the person of the ruler or other figurehead should be employed.

### **10.5 Crimes against Individuals.**

The legislator has differentiated between a homicide accompanied by aggravated circumstances and a homicide not accompanied by aggravated circumstances. This is in accordance with punitive laws in some other Arab countries influenced by Western ways of thinking, and in particular the laws of Egypt.

The specificity of aggravated circumstances may push the perpetrator to seek circumstances which avoid liability to the death penalty. Furthermore, specifying a mandatory sentence for homicide, whether or not it is accompanied by aggravated circumstances, should not allow the manipulation of the right of the guardians of the victim to waive or to claim punishment against the perpetrator.

Hence, I recommend that the legislator should not allow this black and white distinction between crimes of homicide and leave this matter to the provisions of the *sharia*.

Despite the multiplicity of cultures and peoples now living in the state, the Supreme Federal Court has emphasized that no differentiation between people of different origins



can be made with respect to the sentencing or implementation of a punishment. Although some jurists believe that there should be some distinction made, the argument against it is related to universal human rights and specifically to the right to life. Every human being has the right to be respected and forfeit of a person's life should not be dealt with in the light of any form of discrimination, whether positive or negative.

#### **10.6 The Death Penalty and Deterrence.**

Regarding the polemics over the deterrent effect of capital punishment, I recommend a committee be formed in every member state, as well as a higher committee at the collective level, of the United Nations. These committees should comprise jurists, state prosecutors, directors of prisons, psychologists, sociologists and other relevant parties in order to undertake studies regarding the efficiency and deterrence value of the death penalty, bringing together countries that both do and do not practise capital punishment. These committees should consider a very wide scope of relevant factors, including the religious, moral, economic and environmental condition of individual societies, looking at each state in turn in order to achieve accurate and comprehensive results.

#### **10.7 The death penalty and human rights.**

Regarding the instatement or abolition of the death penalty in accordance with economic, political or security circumstances, I recommend that each state clarify its attitude towards this punishment taking into consideration human rights, namely the right to live. It should be borne in mind that in all relevant criteria there may be historical change, but that the

attempt to strive for universality with respect to human rights is a noble and honourable one.

#### **10.8 Mandatory death sentences.**

I believe that it is unfair and ineffective for the federal legislator of the UAE to impose the death penalty for crimes such as spying without granting the judge the prerogative to sentence an offender according to the circumstances of a crime. Here, I recommend the articles of the penal code be amended, specifying the death penalty as a possible sentence, but allowing a choice to be made between capital punishment and temporary or life imprisonment in accordance with the evaluations of the judge pursuant to the circumstances of each case.

As to the capital sentence itself, after it becomes final but before its approval by His Highness, the President of the UAE, I recommend that it be submitted to a special committee. This should be formed under an order of the president of the state. The said committee would include experts in law including the *sharia*, and it would study and examine cases and decisions, before submitting a sentence for final approval by the president. This would serve as an additional guarantee for the person facing capital punishment. In the event that the committee finds error in the judgement, whether in the procedures or in excessive strictness, it would give its report to the president so that he may confirm or dispose of it in any manner he deems suitable.

Furthermore, I recommend that the same committee should be the mediator between the victim's guardians and the killer in cases of homicide with respect to waiving the right to claim retaliation. Therefore, I recommend that the members of the committee should be senior members of the tribes and statesmen so that their mediation would be prominent and enjoy general credit, although in no circumstances should the victim's guardians be pressured into waiving their rights.

#### **10.9. The method of implementation**

With respect to the method of implementing capital punishment, the means used in the UAE is a firing squad. This method is not prescribed by Islamic religious law, which simply requires the method to be the least painful for the criminal. However, the aforesaid method has not been proved to be the least painful for the criminal; indeed, in one case of capital punishment in Dubai, the criminal did not die immediately and had to be shot again to ensure his death. Some other methods used in the US cause severe pain for criminals, as clarified previously. Hence, I recommend the constitution of a committee comprising doctors and other experts to ascertain the least painful method of expediting capital punishment.

#### **10.10 Drug trafficking and the death penalty.**

With respect to drug-trafficking, the legislator has decreed the death penalty. However, the legislator was surely too strict in this regard. Again, he did not grant the option for the judge to choose between capital punishment and a punishment less severe, such as imprisonment. The circumstances of such cases, as we have noted, are widely variable.

Mandatory sentencing by the legislator does not grant the judge the chance to evaluate the circumstances of each case.

In particular, the legislator has not defined the quantity of drugs involved for the crime to be considered drug-trafficking and deserving of capital punishment. Thus, he makes no distinction between the trafficking of one gram of heroin and the trafficking of thousands of grams. It is scarcely necessary to reiterate the point that the trafficking of huge quantities leads to the greater harm and even to the death of thousands of people. Those who trade in very small quantities, however, may simply be drug addicts who need treatment more than punishment.

I recommend, therefore, that the legislator define the quantity of drug deserving of capital punishment. If the legislator believes that by specifying the quantity it will lead to habitual criminals dealing in smaller quantities, it should be pointed out that the criminal may succeed once in this strategy, but to keep on trafficking in smaller quantities, is very likely to bring him to the attention of the police. Furthermore, a dealer brought before the court for trafficking on a first offence should not be subject to the death penalty.

#### **10.11 Terrorism and the death penalty.**

With respect to the Anti-Terrorism Law (2004), the legislator appears to have done well in imposing capital punishment only if the crime results in the death of one or more persons. Nevertheless, he was surely incorrect in not mentioning the rights of the victim's guardians to claim punishment or to waive the same. An ensuing death is presumed as the result of the

crime, which makes it equivalent to homicide, and thus should be subject to the same provisions as homicide.

Hence, I recommend that the legislator highlight the rights of the victim's guardians if the terrorist crimes result in the death of one or more people. In addition, I recommend that the legislator prescribe a discretionary punishment proportionate to the scale, results and damage caused by the crime. Each act of terrorism should be dealt with separately. The legislator should enjoy the prerogative to decide upon a suitable punishment.

The legislator was surely too strict, under Article 9, in declaring the death penalty for crimes of damage to property employing air, sea and land transport in order to perpetrate an act of terrorism, or of taking hostages as an act of terrorism, or of obtaining some utility from the state or from other states in the use of explosives or unusual weapons in such crimes. The legislator was right, on the other hand, to be strict in prescribing capital punishment for those who use explosive materials or unusual weapons which lead to the deaths of people, where the criminal knows in advance the result of his act and crime.

Furthermore, such crimes lead to the spreading of terror among people, affect the economy of the state and create instability. They are crimes usually aimed at the state or the government, but the results of their enactment affect innocent people. Besides, the use of explosive materials engenders huge material losses. This crime is similar to *Al-Harabah* crime stated in the *sharia*. However, I recommend that the death penalty should not be the only punishment before the court. A choice should be allowed between capital punishment

and a lesser punishment according to the results and effects of such acts. This takes into account that all the punishments listed in the anti-terrorism law are discretionary, since no clause in this law refers to implementation of the provisions of the *sharia*.

The Anti-Terrorism Code of 2004 does not allow for appeal on conviction, but I find it both consistent and advisable that it should follow the same procedure as for other serious crimes. I recommend, therefore, that provision should be made for appeals.

#### **10.12 The death penalty and revenge.**

Total abolition of the death penalty for crimes such as homicide in a Muslim society like the UAE would undoubtedly spread a culture of revenge, with the victim's guardians implementing by themselves a retaliation against criminals or even their families. This principle of taking justice into one's own hands is both inimical and threatening to a modern, civilised state. It is for society, via laws that are habituated, understood and respected, to contain and control this explosive issue.

Islamic religious law provides that the victim's guardians or blood relatives have a right to retaliation, choosing either to enforce or waive their right to appropriate punishment of the offender.

There are many examples that I have witnessed during my service in the police force, one of which was the case of a person who killed his own friend intentionally. When the police took the offender to prison, the family of the victim pursued the police car, in defiance of their authority and power, in order to revenge themselves on the man by attempting to kill

him themselves. This incident took place before implementation of the first capital sentence in Dubai in 1996<sup>12</sup>.

Although enactment of the death penalty is not common in the UAE, the governments and rulers do their best to satisfy the blood relatives, so they will not seek revenge by taking the law into their own hands. The tendency of the authorities is to keep the murderer in custody for several years, so that the blood relatives can think calmly and consider pardon as the *sharia* urges them to do. The rulers too have time to meditate on the case, and if all else fails will retaliation be implemented. As a result of this policy and this process, the people trust their government and do not set their minds to revenge. However, it is implicit in this relationship of law and society, that the death penalty will occasionally be applied. A particularly heinous crime, such as the rape and murder of a child, generates a righteous anger in the people, and here a collective demand for retaliation must be satisfied. The reader may consider, in contrast to this, whether society is rendered more healthy or believing in the justice of courts, when even the most very worst killers are merely confined to a comfortable prison cell, or a hospital bed.

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<sup>12</sup> A case was reported in France involving a child who had been kidnapped and killed. Although the criminal was arrested, the father of the child stated that he kept on hearing the voice of his son calling him, and that the son appointed him to punish the criminal. The father promised to seek justice by himself take revenge for his son's death, however long it might take him. Another event happened in Germany, when a mother of a murdered girl entered the court hall where the case was being examined and shot the criminal. She said that she was carrying out justice. In both cases, the parents were entirely convinced that no punishment other than capital punishment would be fair or effective, and in neither country is the death penalty applied.(cf. Rabah, Ghassan., *The death Penalty (Arabic), Alwajeez fi oqobat aledam, Mansharat Alhalabi*, 2008, pp.243-244

### **10.13 Postscript: the United Arab Emirates and the abolition of the Death Penalty.**

The United Arab Emirates could find itself in the situation where the death penalty is *de facto* abolished yet not removed from the statute book. It could effectively be discontinued by adherence to divine ordinance punishments under *sharia* provisions, since these provide the offender with escapes. It could also be abolished in crimes of retaliation where rulers and decision-makers enforce mediation between the murderer and the victim's family, ensuring that they waive their rights and give pardon. However, this would be in defiance of the *sharia* which prohibits that pressure should be applied to the blood relatives of a victim.

The death penalty would be abandoned for all practical purposes if confined to only the most dangerous crimes resulting in mass consequences. Likewise, it would be a *de facto* abolition if the President and local rulers chose to exercise their authority to grant clemency in each case of capital sentencing that came before them. This, I believe, is the factual situation from which abolitionist may take heart. It is not, of course, the preferred option of this writer. Long research and contemplation of the subject have generated a thousand illustrations of the meanings and implications of capital punishment.

The process is sometimes uncomfortable. An Arab and a believing Muslim, confident in the long-held principles of his people, has nevertheless to see himself through the lens of other and, in particular, Western eyes. The moral requirements of those who take up the cause of human rights are not easily challenged.



Nevertheless, our analysis has shown flaws in the arguments of those who strongly oppose the use of the death penalty. They have also exposed two persistent questions, which are: how far do they really convince themselves; and, how far are the societies, whose views they claim to represent, really persuaded of the wisdom of abolishing capital punishment? Against the tendencies of modern thought, a great weight of historical experience points to the sad necessity of removing from among us those who have outraged society beyond all reasonable limits.

I hope that this research may give confidence, and be of use, to other researchers in the field. It is a subject in which people of every society feel deeply involved. Shifts of historical perspective are mysterious and unpredictable. We can only hope that by honest enquiry we arrive at conclusions which are true to our deepest convictions.

## Selected bibliography

### **The Holy Book (The Qur'an) and the Prophet Narratives (*Hadeeth*)**

The Holy Qur'an, English translation of the meaning and commentary, King Fahad Complex for the printing of the Holy Qur'an, KSA.

Imam Malik Ibn Anas, *Al-Mowata'a*, investigated by Sedqi Jameel Al-Attar, Dar Alfeker, 1998.

Imam Ahmad Ibn Mohammad Ibn Hanbal Ibn Hilal Al-Shibani, *The Musnad of Imam Ahmad Ibn Hanbal*. Dar Alfike, 2001.

Imam Muslim, *Sahih Muslim*, investigated by Mohammad Ahmad Al-Hilali, Maktabat Al-Thakafa Al-Denya (undated).

Imam Al-Bukhari, *Sahih Al-Bukhari*, investigated by Ahmad Zahwa and Ahmad Enaya, Dar Al-ketab Al-Arabi (Beirut, Lebanon), 2006.

Imam Abu-Issa Mohammad Al-Termethi, *Sunan Al-Tirmethi*, investigated by Sedqi Jameel Al-Attar, Dar Al-fiker, 2002.

Imam Abu-Dawood Sulaiman, *Sunan Abu-Dawood*, investigated by Sedqi Mahammad Jameel, Dar Al-feker, 2003.

Imam Abu-Mohammad Ali Ibn Ahmad Ibn Hazm, *Almuhalala* (Arabic), part IX, (undated).

Imam Muwafiq Al-deen Abu-Mohammad Abdullah Ibn Ahmad Ibn Mohammad Ibn Qodama Al-Maqdesi, *Al-Mughni*, investigate by Raed Ibn Sabri Ibn Aby Alfa, Bait Al-afkar Al-dawlia, 2004

### **Books and journals**

Al-Bashar, Abdulla Abu-saif. *Proving adultery* (Arabic), Torok thobot Al-zina, undated

Al-Ghamdi, Mohammad Ibn Shazar. *The Death Penalty* (Arabic), *Oqobat Al-edam*, Maktabat Dar Alsalam, 1992

Al-taweel, Nabeel Subhi. *The sexual Diseases* (Arabic), *Al-Amradh Al-jensia*, Moa'sasat Alrisla (undated).

Alnabrawi, Mohammad Sami. *Divine Ordinance crimes* (Arabic), *Ahkam Tashre'at Al-Hudud*, Almaktaba Alwatani, (undated).

Abu-zahra, Mohammad. *The Crime and Punishment In Islamic Provisions- The punishment (Arabic), Al-jareema wa Al-oqoba fi Alfiqh Alislami-Al-oqoba*, Dar Alfeker Alarabi (Cairo), 1990.

Aby Baker, Shams Aldeen Aby Abdullah Mohammad. *the saying of Jurists taken from the Intent of God*, part 1 (Arabic), *E'alam Almowaqe'ean An rab Alalmeen* (investigated by Taha Abdulraouf Saad), Maktabat Alkeleyat Alazharia (Cairo), undated.

Ahmad, Hilali Abdelah. *The Islamic Criminal legislation (Arabic), Osool Altashree Aljenaee Alislami*, Dar Al-nahdha Alarabia (Cairo), 1999.

Auda, Abdul-qader. *The Islamic Criminal Legislation (Arabic), Al-tashree Al-jenae Al-islami*, Dar Alketab Alarabi (Beirut), undated.

Auda, Abdul-qader. *The Islamic Criminal Legislation (Arabic), Al-tashree Aljenaee Alislami (Arabic), The Islamic Criminal Legislation*, Dar Al-turath (Cairo), 2005

Aljende, Hosni. *The objectives of punishment in Islam (Arabic), Almaqasid Alsharia leloqobat fe Alislam*, first edition, Dar Al-nahdha Alarabia, 2005.

Al-jende, Hosni. *The women legislative in Islam (Arabic), Ahkam Almara'a fe Altashree Aljenaee Alislami*, second editin, Dar Al-nahdha Alarabia, 1993.

Abdul-mohsin, Mostafa Mohammad. *Islamic Criminal legislation (Arabic), Alnizam Aljenaee Alislami- Aloqoba*, Dar Al-nahda Alarabia, 2007.

Alasqalani, Alhafiz Ahmad Ibn Hajr, *The commentary of Sahih Al-Bukhari (Arabic), Fath Albari fe sharh sahih Al-Bukhari*, (undated).

Abdul-lateef, Mohammad Saeed. *Retaliation in Islamic provisions (Arabic), Al-qisas fe Alsharia Alislamia*, Maktabat Dar Al-turath, 1989.

Attia, G. 2007 *Towards Realization of the Higher Intents of Islamic Law* Washington: International Institute of Islamic Thought

An-Naim, A. 2008 *Islam and the Secular State* Cambridge, Mass.: Harvard UP

Amer, Abdul-azeez. *The discretionary punishment in Islam (Arabic), Al-tazir fe Alsharia Alislamia*, Third Edition, 1957

Abu-yahia, Mohammad Hassan. *Retaliation In souls In Islam (Arabic), Alqisas fe Anofos fe Alsharia Alislamia*, First Editin, Almaktab Alislami-Dar Ammar, 1989.

Abu-zaid, Mohammad Abdul-hameed. *The retaliation and Legal Blood Money (Arabic), Alqisas wa Aldeyat*, Dar Al-nahdha Alarabia (Cairo), 1985.

Al-sayegh, Fatma. *the UAE from the tribe to the state (Arabic)*, *Al-Emarat min Alqabeela ela Aldawla*, Al-Ain; UAE: Dar Alketab Aljamey (undated).

Al-hamadi, Hassan Ahmad. *Divine ordinance, retaliation and legal blood money(Arabic)*, *Al-hudud wa Alqisas wa Aldeya*, second edition, sharekat abudhadi leltebaa'a, 1998.

Awadh, Awadh Mohammad. *Security and Law Cazette(Arabic)*, *Mejalat Alamn wa Alqanon*, issue No.2, July 1994, Dubai police Academy Publication.

Al-Mansoori, Ahmad Khalfan. *Security and Law Cazzette (Arabic)*, *Mejalat Alamn wa Alqanon*, issue No.1, Jan 2005, Dubai Police Academy Publication.

Al-Muhairy, Butti Sultan. *The position of Sharia within UAE constitution and the federal supreme court application of the constitutional cluse concerning sharia*, 11:3 Arab Law Quarterly, 219, 1996.

Al-Wakad, Amr. *Penal Law (Arabic)*, *Alkism Alkhas fe Qanon Aloqobat*, Dar Alnahdha alarabia, 1995.

Abu-Amer, Mohammad Zaki. *Proof in criminal evidences(Arabic)*, *Alithbat fe Almawad Aljenaia*, Alfaneya Lelteba'a wa Alnashr (Alex.Egypt), 1985

Abu-khatwa, Ahmad Shawki. *Penal Law (Arabic)*, *Qanon Aloqobat- Alkism Alkhas*, The University of Almansoor (Egypt), 1985.

Abu-khatwa, Ahmad Shawki. *Crimes against Individuals in UAE penal law (Arabic)*, *Aljaraem Alwaqea'a Ala Alashkhas fe Qanon aloqobat*, Alittihadi, Albayan Press, first editin, 1990.

Abu-khatwa, Ahmad Shawki. *Commentary on the criminal procedure law of the UAE (Arabic)*, *Sharh Qanon Alejra'at Aljenaeya le dawlat Alemarat*, Albayan Press, 1990.

Abu-khatwa, Ahmad Shawki. *criminology and punishment (Arabic)*, *Elm Alejram wa Aleqab*, Albayan Press, 1988.

Al-sageer, Jameel Abdulbaqi. *Crimes against Individuals (Arabic)*, *Qanon Aloqobat-Jaraem Aldam*, Dar Alnahdha Alarabia, 1997.

Abdul-sattar, Fouzia. *Commentary on penal law (Arabic)*, *Shrah Qanon Aloqobat*, Dar Alnahdha Alarabia, second edition, 2000.

Ahmad, Hosam Aldeen Mohammad. *Commentary on penal law (Arabic)*, *Sharh Qanon Aloqobat*, Dar Alnahdha Alarabia, 2000.

Alfiqi, Amr Issa. *Homicide crimes (Arabic)*, *Alwajeez fe Jaraem Alqatl Alamde*, Alnissr Aldhahabi press, 2000.

Alkilani, Abdullah Abdul-qader. *The Death penalty in Islamic Sharia and the Egyptian penal code* (Arabic), *Oqobat Aledam fe Alsharia Alislamia wa Alqanon Almisri*, Dar Alhuda lelmatboa'at (Alex. Egypt), first edition, 1996.

Aljohary, Mostafa. *Criminology and Punishment* (Arabic), *Osool Elmai Alejram wa Aleqab*, First Edition, 1997

Anwar, Yusr. *Studies in Punishment* (Arabic), *Derasat fe Alfiqh Aleqabi*, 1996.

Anwar, Yusr and Othman, Amal. *Commentary on penal law* (Arabic), *Sharh Qanon Aloqobat*, Dar Al-Thaqafa Aljameya, 1995.

Aljohary, Ali Abdul-Qader, *Criminology and punishment* (Arabic), *Elm Alejram wa Aleqab*, Aldar Aljameya Press, 1995.

Al-Qasimi, Dhafer. *Governing structure in Islamic sharia and Islamic History* (Arabic), *Nidham Alhokm fe Alsharia wa Altareekh Alislami*, Dar Alnafaes, 1978.

Baalbaki, Rohi. *Al-Mawrid Dictionary*, Dar Al-ilm Lilmalayin (Beirut), Seventh Edition, 1995.

Bahnasi, Ahmed Fathi, *Blood money in Islamic Sharia* (Arabic), *Aldeya fe Alsharia Alislamia*, Dar alsherouq (Cairo-Beirut), second Edition, 1982.

Baird, R. & Rosenbaum, S. (eds.) 1995 *Punishment and the Death Penalty*  
New York: Prometheus

Baldus, David C., Woodworth, George & Pulaski, Charles. *Equal Justice and the death penalty; A legal and Empirical analysis*, Northeastern University Press (Boston), undated.

Bassiouni, M. Cherif. *Hudud Crimes In the Islamic criminal justice*, Ocean publication, 1982.

Bedau, H.A. *Killing as Punishment* Boston: Northeastern University Press, 2004

Bedau, H.A. & Cassell, P. (eds.) *Debating the Death Penalty* Oxford: OUP, 2004

Benmelha, Ghouti. *Tazir crimes*, in "*The Islamic Criminal Justice System*", Edited by Bassiouni, M. Cherif, Ocean Publication, 1982.

Brown, Nathan J. *The rule of law in the arab world, courts in Egypt and the Gulf*, Cambridge University Press, 1997.

Bakr, Abdul-mohaimen. *Commentary on penal law* (Arabic), *Alkism Alkhas fe qanon Aloqobat*, Dar Alnahdha Alarbia, 1968.

Bedau, H. A. *The death penalty in America*, oxford university press, 1997.

Bedau, H. A. and Radelet, M. *Miscarriges of Justice in Potentially Capital cases*, Stanford Law Review, No.40, 1987.

Berns, Walter. *For the capital punishment; crime and the morality of the death penalty*, Basic Books Inc. Publishers, New York.

Cassese, A. *International Criminal Law* , Oxford: OUP, second edition, 2008

Currie, E. *Crime and Punishment in America* New York: Holt, 1998

Cohen, M. *The Costs of Crime and Justice* Abingdon, Oxon: Routledge, 2005

Calder, N. *Islamic Jurisprudence in the Classical Era* Cambridge: CUP, 2010

Costanzo, Mark. *Just Revenge (cost and consequences of the death penalty)*, ST. Martins Press (NY), third edition, 2001.

Doi, Abdur-rahman. *Women In Sharia (Islamic Law)*, Ta-Ha publishers (London), 1989.

Duff, R.A & Garland, David. *A reader on punishment*, Oxford University Press, 1994.

Elliott Currie, *crime and punishment in America "why the solutions to America's most stubborn social crisis have not worked and what will"*, A Holt paperback (Henry Holt and Company-NY),1998.

Elahi, Fadhl. *Preventing Adultery In Islam (Arabic)*, *Altadabeer Alwaqia men alzina fe Alfiqh Alislami*, Edarat Torjoman Alislam (Pakistan), First Edition, 1983.

Faraj, Hisham Abdulhameed, *Consequences of illegal sexual relationship (Arabic)*, *Tawabea Alelaqat aljensia alghair shareia*, Matabea Alwalaa Alhaditha, Cairo, 2006

Faruqi, Harith Suleiman. *Faruqi's Law Dictionary*, Third Revised Edition, Librarie Du Liban (Beirut)1991.

Glenn, H. (4<sup>th</sup> ed.) *Legal Traditions of the World* Oxford: OUP, 2010

Hamza, Kamal, Sheikh Rashi, *Close perspective (Arabic)*, *Sheikh Rashid, Nadhra an qurb*, UAE Press: Dubai, 2007

Hassanain, Ezzat. *Homicide between Sharia and secular law (Arabic)*, *Jaraem Alqatel bain Alsharia wa Alqanon*, Maktabat Sayed Abdullah Wahb (Cairo), second edition, 1988.

Harrison, M. Gilbert, G. (eds.) 2003 *Death penalty Decisions in the United States Supreme Court* Carlsbad, Ca.: Excellent Books

- Honderich, Ted. *Punishment; the supposed justifications*, Hutchinson of London, 1969
- Hood, Roger. *The death penalty; A world-wide perspective*, Oxford, Clarendon Press, revised edition, 1996.
- Hood, R. & Hoyle, C. (4<sup>th</sup> ed.) *The Death Penalty* Oxford: OUP, 2007
- Hiba, Ahmad. *Islamic provisions in punishment (Arabic), Mojaz Ahkam Alsharia Alislamia fe Altajreem wa Aleqab*, Matba'at Alem Alkotob (Cairo), first edition, 1985.
- Hanks, Gardner C. *Against the death penalty; Christian and secular argument against capital punishment*, Herald Press, USA, 1997.
- Hostettler, J. *The Politics of Punishment*, Barry Rose Law Publishers, England, 1994.
- Isenberg, I. *The Death Penalty*, the H. W. Wilson Company (NY), 1977.
- Ibn Taimia, Ahmad. *Fighting the rebels in Islam states (Arabic), Alesian Almosalah aw Qetal Ahl Albagh fe Dawlat Alislam*, Investigated by Abdul-rahman Omaira, Dar Aljeel (Beirut, Lebanon), undated.
- Ibn Yazeed, Alhafiz Aby Abdullah. Dar Alfeker (undated).
- Jabr, Dandal. *Adultery (Arabic), Al-zina*, maktabat Almanar (Amman, Jordan), First Edition, 1985.
- Jafar, Ali Mohammad. *Punishment Philosophy in Islamic Sharia (Arabic), Falsafat Al-oqoba fi Al-sharia al-islamia*, First Edition, 1997.
- Jehad, Jouda Hussain, *commentary on criminal procedure law (Arabic), Alwajeez fe sharh Qanoon Alejra'at Al jenaeya*, First Edition, 1994.
- Janin, H. & Kahlmeyer, A. *Islamic Law* Jefferson, N.C.: Mc Farland, 2007
- Jones, H. *Crime and the Penal System*, University Tutorial Press, (London), 1962.
- Karar, Ali Hassan. *Retaliation In Soul in Islamic Sharia (Arabic), Alqisas fe Alnafs fe Alfiqh Alislami*, Dar Alittihad Alarabi (Cairo), 1981.
- Khaleel, Adli. *Homicide cases (Arabic), Jaraem Alqatl Alamd*, Dar Alkotob Alqanonia, 2002
- King, Rachel. *Don't Kill in Our Names, families of murder victims speak out against the death penalty*, Rutgers University Press.
- Lacey, Nicola. *State Punishment; Political principles and Community Values*, Routledge (London-NY), 1988.

Pojman, L. P. & Reiman, J., *The Death Penalty*, Roman & Littlefield Publishers, INC, 1998.

Laurence, John. *A history of capital punishment*, Kennikat Press, 1971.

Megivern, James. J. *The death Penalty; An historical and theological survey*, Paulist press: NY, 1997

Mark A. Cohen, *the Cost of Crime and Justice*, Routledge (London-NY), 2005.

Marquis, Joshua K. *truth and Consequences*; in "*the death penalty, should America have capital punishment*", edited by Bedau, Hugo Adam and Cassell, Paul, Oxford University Press, 2004.

Meki, Mohammad Abdul-hammed, *Crimes against Individuals (Arabic)*, Jaraem Aleateda Ala Alashkhas, Dar Alnahdha Alarabia, 2002.

Mansoor, Abdul-Malik. *Adultery Crime (Arabic)*, Jaremat Alzina, , Dar Alnoor wa Alamal (Cairo), 1985.

Mansoor, Ali Ali. *Hudud Crimes*, in "*The Islamic Criminal Justice System*", Edited by Bassiouni, M. Cherif, Ocean Publication, 1982.

Muhammad Sharif, *Crime and Punishmen in Islam*, Institute of Islamic Culture, 1972.

Lippman, M. McConville, S. & Yerushalmi, M. *Islamic Criminal Law and Procedure: An Introduction*, Praeger Publishers (NY), 1988.

Najeeb, Mostafa Ahmad. *Mejalat Alamn wa Alqanon (Arabic)*, *Security and law Gazzette*, Dubai Police Academy Publication, July 2005.

Nathanson, Stephen. *An Eye for an Eye, the immorality of punishing by death*, Roman and Littlefield Publishers, USA, 2001.

Obada, H., *Divine ordinance crimes and its rules (Arabic)*, *Jaraem Alhudud wa ahkameha alshareia*, Dar Alfikr Aljamee, 2010

Obaid, Raouf. *Procedur Law Principles (Arabic)*, *Mabade Alejra'at Aljenaeya*, Dar Aljaleel press, 16<sup>th</sup> edition, 1985.

Pannick, D. *Judicial Review of the death penalty*, Duckworth Press, Undated.

Peters, Rudolph. *Crime and Punishment in Islamic Law (theory and practice from the sixteenth to the twenty-fisrt century)*, Cambridge University Press, 2005.

Prejean, Sister Helen. *The Death of Innocents*, Random House Publication, USA, 2005.



- Provost, R. *International Human Rights & Humanitarian Law*, Cambridge: CUP, 2005
- Rahman, S.A. *Punishment of apostasy in Islam*, The Other Press: Kuala Lumpur, 2006
- Rabah, Ghassan. *The Death Penalty (Arabic), Alwajeez fe Oqobat Aledam*, Manshrat Alhalabi, first editin, 2008.
- Ramadan, Medhat. *Commentary on the UAE criminal procedure law (Arabic), Alwajeez fe sharh Qanon Alejra'at Aljazaeya Alittihadi*, The UAE University Press (undated).
- Radelet, Michael L. *Deterrence and the death penalty; the views of experts*, Journal of criminal law and criminology, September 22, 1996.
- Ramadan, Said. *Islamic Law "Its scope and Equity"*, (undated).
- Sabiq, Sayed. *The Sunnah principles (Arabic), Fiqh Al-sunna*, New Edition, 1998
- Saeed, Abdulla and Hassan. *Freedom of religion, apostasy and islam*, Ashgate publishing company, 2004
- Sanad, Najati. *The Theory of Crime and Criminal Responsibility in Islam: Shri'a*, The University of Illinois at Chicago (International Criminal Justice Office), USA.
- Sedqi, Abdul-rahim. *The crime and the punishment in the Islamic Sharia (Arabic), Al-jareema wa Al-oqoba fe Alsharia AlIslamia*, Maktabat Alnahdha Almesria, First Edition, 1987.
- Sharif, Mohammad. *Crime and punishment in Islam*, institute of Islamic culture, 1972
- Sommer, Robert. *The End of Punishment*, Oxford University Press, 1976
- Schabas, W. *The Abolition of the Death Penalty in International Law* Cambridge: CUP, (3<sup>rd</sup> ed.), 2001.
- Shaw, W. *Evidence in Criminal Cases*, Butterworth & Co. (Publishers), London, Second Edition, 1932
- Shoman, Abbas. *Person and property protection in Islam (Arabic), Esmat Aldam wa Almal fe Alislam*, Dar Al-bayan (Cairo), 1996.
- Saleh, Abdul-Ghafar Ibrahim. *Retaliation In souls in Islamic Sharia (Arabic), Al-qisas fe Alnafes fe Alfiqh Alislami*, Second Editin, Maktabat Hamada, 1998.
- Zaidan, Abdul-kareem. *Retaliation and legal blood money in Islamic Sharia (Arabic), Alqisas wa Aldeyat fe Al-sharia Alislamia*, Dar Albasheer, 1998.
- Suroor, Ahmad Fathi. *crimes against public interests (Arabic), Aljaraem Almodhera belmaslaha alama*, Dar Alnahdha A;Arabia, 1963.

Suror, Ahmad Fathi. *Commentary on Criminal procedure law (Arabic), Alwaseet fe sharh Qanon Alejra'at Aljenaeya*, Dar Alnahdha Alarabia, 1980.

Salama, Ahmad Kamil. *Commentary on the penal law (Arabic), Sharh Qanon Aloqobat, Commentary on the Penal Code*, Maktabat Nahdhat Alsharq, 1987.

Suroor, Tariq. *The penal law (Arabic), Qanon Aloqobat*, Dar Alnahdha alarabia, second edition, 2001.

Saleh, Hassanain Ibrahim. *Crimes against Individuals (Arabic), Jaraem Aleteda Ala Alshkhas*, Dar Nahdha Alarabia, 1983.

Sharp, S.F. *Hidden Victims*, Rutgers University Press, USA, 2005.

Steiner, S. *International Human Rights in Context*, 3<sup>rd</sup> Edition, Oxford; OUP, 2007

Tomasic, Roman & Dobinson, Ian. *The Failure of Imprisonment: An Australian Perspective*, The Law Foundation of New South Wales & George Allen and Unwin (Sydney-London-Boston), undated.

Van den Haag, in "*Punishment and the death penalty*", Robert M. Baird & Stuart E. Rosenbaum, Prometheus Books, NY, 1995.

Walker, Nigel. *Why Punish?*, Oxford University Press (Oxford-NY), 1991.

Wacquant, L. 2009 *Prisons of Poverty* Minneapolis: Univ. Minnesota Press

Wilson, G., *Scales of Justice, half a century of Dubai Courts*, Media Prima: Dubai-London, 2009

Zaho, Ahmad Alnajdi. *Homicida In Islam (Arabic), Alqatl Alamd fe Alfiqh Alislami*, Dar Alnahdha Alarabia (Cairo), 1991.

Zaidan, Adnan. *Criminal procedures in the UAE (Arabic), Alejra'at Aljenaeya fe dawlat Alearat*, Alshuroq press (undated).

Zimrig, Franklin E and Hawkins, Gordon J. *Deterrence, the legal threat in crime control*, the University of Chicago, 1973.

Zimring, F. 2003 *American Capital Punishment* Oxford: OUP

## **PhD Thesis**

Al-Muhairy, Butti. *Conflict and continuity; Islamization and modernization within the UAE penal code*, PhD thesis, the University of Kent at Canterbury, 1994.

Al-Shaali, Khalifa Rashid. Crime and Control, Policing and security in the UAE, PhD thesis, The University of Aberystwyth, 1999.

Abdulrahman A. Al-Turki, Capital Punishment for Drug Offences In Islam and its Application In the Kingdom of Saudi Arabia; An evaluative study, PhD thesis, The University of London, 2000.

Saeed M.A.O. Al-Ghufli, A reconsideration of constitutional review in the United Arab Emirates; "A posteriori" or "A priori" review?, PhD thesis, The University of Wales at Aberystwyth, 2000.

### **Internet Materials**

Bumelha, Ibrahim. *Tareekh Alqda'a fe Dubai* (Arabic), *The history of Judicial in Dubai*, from; [www.dc.gov.ae](http://www.dc.gov.ae)

Zapor, Patricia. *Kerry and Bush at near opposite extremes on death penalty*, [www.the-tidings.com](http://www.the-tidings.com), 7.6.2005

Honeyman, Jennifer C and Ogloff, James R. P. from [www.cpa.ca/cjbsnew/1996/ful.ogloff.html](http://www.cpa.ca/cjbsnew/1996/ful.ogloff.html)

New Yorkers against death penalty, [www.nyadp.org](http://www.nyadp.org)

### **Reports**

The United Arab Emirates (a historical geographic study), publication of documentation and research centre, Abu-Dhabi, UAE, 1972

Dubai Criminal Investigation Department, Annual Report (2003).

Dubai Correctional Institutions, Annual Report (1996-2005).

Amnesty International Organization annual reports (2004-2005-2006).

Arab Organization for Social Defense, final report (1981).

### **Table of cases**

Dubai Cassation Court, appeal No. 35, session held on 17/7/1994

Federal Supreme Court, appeal no 18. Session held on 23/11/1982

Federal Supreme Court, appeal No. 45, Session held on 18/1/1985

Federal Supreme Court, appeal No. 19, Session held on 25/6/1984.

Federal Supreme Court, appeal No. 45, Session held on 18/1/1985

Federal Supreme Court, appeal No. 23, Session held on 6/11/1986

Federal Supreme Court, appeal No. 54, Session held on 11/3/1985.

Federal Supreme Court, Appeal No.137, session dated on 6.1.1996

Egyptian Cassation Court, appeal heard dated on 25.1.1931

### **Newspapers**

Albayan Newspaper, Issue No.8719, 2.5.2004

Alkhaleej Newspaper, Issue No. 9085, 3.4.2004.

Alkhaleej Newspaper, issue No. 9859, 17.5.2006.

Alittihad Newspaper, Issue No.10223, 2.7.2003.

Albayan Newspaper, Issue No.8691, 4.4.2004.

Albayan Newspaper, Issue No. 10036, 10.12.2007.

Albayan Newspaper, Issue No. 11734, 2.8.2012

Albayan Newspaper, Issue No. 11752, 21.8.2012

Alkhaleej Newspaper, Issue No. 8431, 19.6.2002.

Shama, Mohammad. In Alkhaleej Newspaper, (*Al-sharia* supplement), Issue No.10337, 7.9.2007

Al-khaleej Newspaper, Issue No.9859, 17.5.2006.

Al-khaleej Newspaper, Issue No.11804, 13.9.2011

Al-khaleej Newspaper, Issue No. 12090, 25.6.2012

## **Interviews**

Interview with Dr. Ali Hassan Galadari, A judge at Dubai Criminal Court. 18.8.2007

Interview with Mr. Mansoor Al-Awadhi, A judge at Dubai Criminal court. 20.8.2007

Interview with a defense lawyer, Mohammad Abdul-Malik. 17.12.2007

Interview with Lt. Colonel, Aref Mohammad Abdulraheem, the Head of Legal Affair Department in Dubai Police General Headquarters. 10.12.2007

Interview with Colonel, Abdulhalim Alhashemi, Head of Judgments Execution Department, Dubai Correctional Institutions. 8.6.2008

Interview with Lt. Colonel, Marwan Julfar, the head of prisoners' guard Department at Dubai correctional institutions. 15.6.2008

## **Legislations/ Statutes**

The UAE constitution (1971)

The UAE Federal Criminal Code for the year (1987) and the amendments of (2005) and (2006).

The UAE Federal Criminal Procedure Code for the year (1992).

The UAE Federal Civil Procedure Code for the year (1992).

The UAE Federal Anti-Narcotic Code for the year (1995).

The UAE Anti-terrorism Code for the year (2004)

Law No. 10 for establishing the Federal Supreme Court (1973).

Law No. 9 for defining the amount of the legal blood money (2003).

Law No. 3 for establishing Dubai Local Courts (1992).

Criminal Code for The Emirate of Dubai, 1970 (cancelled).

Criminal Code for the Emirate of Abu-Dhabi, 1970 (cancelled).