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Mohamed A. Arafa

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“If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise.”¹

“Knowledge is a treasure, but practice is the key to it.”²

CORRUPTION AND BRIBERY IN ISLAMIC LAW: ARE ISLAMIC IDEALS BEING MET IN PRACTICE?

MOHAMED A. ‘ARAFA³

I. PART ONE: INTRODUCTION

Corruption is a deep-rooted phenomenon that exists in innumerable forms, knows no cultural boundaries, operates in the private as well as

1. SAHIH AL-BUKHARI, KNOWLEDGE, no. 356, 311, Vol. 1, bk. 3, *translated in* Univ. So. Calif., Center for Muslim-Jewish Engagement, <http://cmje.org/> (quote of The Prophet Mohammad Ibn ‘Abdullah, 570-632).

2. ABD AL-RAHMAN ABOŪ ZAYD IBN MUHAMMAD IBN KHALDUN, AL-MUQADDIMAH [THE INTRODUCTION, OR PROLEGOMENON] 21 (Dar AlShaab 1959). Ibn Khaldoun was a lawyer, sociologist, economist, and Muslim jurist. He wrote his masterpiece, *Muqaddimah or Prolegomenon*, in 1377 A.D. It is the first volume of seven volumes of *Kitab Al-‘Ibar [Lessons]*. For an English translation, see IBN KHALDOUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY (N. J. Dawood ed., Franz Rosenthal trans., 1958).

3. Adjunct Professor of Islamic Law at Indiana University Robert H. McKinney School of Law; Assistant Professor of Criminal Law and Criminal Justice Systems at the Alexandria University Faculty of Law (Alexandria, Egypt). S.J.D., Indiana University Robert H. McKinney School of Law (2013); LL.M., University of Connecticut School of Law (2008); LL.B., Alexandria University School of Law (2006). Likewise, Professor ‘Arafa is a Visiting Professor of Business Law at the Arab Academy for Science, Technology, and Maritime Transport (“College of Business Management”). Moreover, Professor ‘Arafa served as an Associate Trainee Attorney and Executive Attorney Assistant at ‘Arafa Law Firm (2007). Of course, all errors remain with the author. For any comments or questions, please contact the author at marafa@iupui.edu or arafadr_mohamed@yahoo.com. Special gratitude is due Nathan Schwartzman, my editor, as well as Professors M. Cherif Bassiouni, Peter J. Henning, Ahmad E. Eldakak, and Ahmad A. Alshorbagy for their insightful feedback, invaluable comments, and useful suggestions. Special thanks to Roderick Brown and Margaret Greene for their kind editing assistance of this article. This article based on portions of the author’s doctoral dissertation thesis. This article was presented at the Indiana International and Comparative Law Review “II&CLR” Annual Symposium entitled: Recent Developments in the War on Corruption: The United States Foreign Corrupt Practices Act (“FCPA”) and Beyond—Towards A New Anti-Corruption Law in New Egypt After Mubarak: Based on a Comparative Study between the FCPA, Anti-Bribery Egyptian Law, and Islamic Law, Indianapolis, Indiana, U.S.A., March 2, 2012.

the public sector, occurs in rich countries and poor, and defies comprehensive definition.⁴ Despite the adverse impact of corruption on governance, financial architecture, and social and economic development, the attention that it has received in the literature on Islamic economics is meager.⁵ This is particularly puzzling since religio-ethical norms constitute the defining point for the discourse on Islamic economics.⁶ Accordingly, this article will analyze the Islamic perspective on corruption, in particular bribery as a common form of corruption under Islamic criminal law. As this article will uncover, change has brought Western and Islamic law much closer together, as *Sharie'a* condemns corruption as a severe threat to proper social, economic, and ecological balance.⁷

Islam looks to a significant degree to moral development within the individual to strengthen resolve and foster self-restraint.⁸ The focus is upon shaping the higher-order preferences elaborated in the *Qur'an* and the *Sunnah*⁹ through the law of *Sharie'a*, reinforced by a powerful spiritual incentive system.¹⁰ Both legal systems—domestic and international—can learn from the Islamic legal system.¹¹ To get a better understanding of this law, Part I will present a brief survey of Islamic law and *Fiqh* (“Islamic Jurisprudence”), sources of this law, the famous Islamic schools of jurisprudence (“*Fiqh Al-Mazaheb/madhhab*”), and then an overview of the fundamental legal principles in the *Sharie'a* penal system.¹²

4. See generally M. CHERIF BASSIOUNI, INTRODUCTION TO ISLAM (1988).

5. ZAMAN HASANUZ, ECONOMIC FUNCTIONS OF AN ISLAMIC STATE (THE EARLY EXPERIENCE) 108 (rev. ed. 1991).

6. YUSUF 'ABDULLAH AL-QARDAWI, ISLAM BAYN AL-HALAL WA AL-HARAM [THE LAWFUL AND THE PROHIBITED IN ISLAM] (Shams Pirzada trans., 1996).

7. 'Abdulwahab Saleh Babeair, *The Role of the 'Ulama in Modern Islamic Society: An Historical Perspective*, 37 THE ISLAMIC QUARTERLY 80 (1993).

8. AHMAD FARRAG HUSSEIN, AL-MADKL LE DERASSAT AL-SHARIE'A AL-ISLAMIA: AL-KITAB AL-AWAL [AN INTRODUCTION TO THE STUDY OF ISLAMIC SHARIE'A: BOOK I] (2006). See also RAMADAN 'ALI AL-SHORONBASY, AL-MADKL LE DERASSAT AL-FIQH AL-ISLAMIA: AL-GOZE'E AL-AWAL [AN INTRODUCTION TO THE STUDY OF ISLAMIC JURISPRUDENCE: PART I] 5 (2003).

9. Youssef Kassem, *Masader Al-Fiqh Al-Islami* [Sources of Islamic Law] 65 (2000).

10. Maged Ibn Helal Ibn Hamadan El-Hagry, *Al-Rashoua Wa Ahkameiha: Derassa Fiqhiia Mokma* [Bribery and its Provisions: Comparative Juristic Study in Islamic Sharie'a Law] (Spring 2003) (unpublished LL.M thesis, on file with the author, University of Al-Albiet School of Juristic and Legal Studies, Department of Juristic Principles).

11. Islamic societies can benefit from the practical stratagems, administrative, and civil reforms, i.e. better governance. They can also benefit from freedom of press and public debate, which exert pressure for accountability and transparency and help to curb and detain the arbitrary use of power and privilege options all too often prevalent in Islamic countries.

12. For instance, the principle of criminal responsibility, the principle of legality of crimes and punishments, and the principle of non-retroactivity of criminal laws. See *infra* Part II, 2 for more information.

The purpose of this article is to present a comprehensive Islamic legal description on corruption in so far as its definition, elements and types of crimes, causes, and remedies are concerned, which will be covered in Parts II and III.¹³

Part V concludes that like positive criminal laws, bribery and corruption are taboo in *Sharie'a* law because they are considered grave criminal offenses and a great sin. However, Muslim nations have been deficient in addressing the issue in their national laws and have failed to meet the lofty standards of Islam.

II. PART TWO: ISLAMIC LEGAL REGULATION OF CORRUPTION AND BRIBERY

A. *SHARIE'A* LAW: DEFINITION AND DESCRIPTION

Islam is the predominant¹⁴ religion in the Middle East. Muslims are split into *Sunnis* and *Shi'aas*.¹⁵ Although they share the same religion, *Sunnis* and *Shi'aas*¹⁶ differ in their visions of history, politics, and government.¹⁷ Islam, unlike other religions, dictates all behavior undertaken by Muslims,¹⁸ including commercial relations.¹⁹ Islam stresses the

13. In addition, this article responds to this assertion by demonstrating how Muslims have practiced business transactions with non-Muslims without any immoral or corrupt behavior or bad intentions. It also offers for the first time an analysis of the provisions of the *Qur'an* and *Sunnah* on corruption and bribery to support the contention that Islam permits dealing in business transactions both on the local and global scale without any corrupt behavior.

14. However, Middle-Eastern Muslims represent only about 20% of the world's Muslim population; the largest Muslim population lives in the Asia-Pacific region, which makes up about 62% of the global Muslim population. *The Future of the Global Muslim Population: Executive Summary*, PEW RESEARCH CENTER (Jan. 27, 2011), available at <http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx>. See also *Fast-growing Islam winning converts in Western world*, CNN.COM (Apr. 14, 1997), <http://www.cnn.com/WORLD/9704/14/egypt.islam/>.

15. The largest group of Muslims is the "Sunnis." *The Future of the Global Muslim Population: Sunni and Shia Muslims*, PEW RESEARCH CENTER (Jan. 27, 2011), available at <http://www.pewforum.org/future-of-the-global-muslim-population-sunni-and-shia.aspx>. The term means people of the tradition of Prophet Muhammad (PBUH). BILAL A. PHILIPS, *THE EVOLUTION OF FIQH* 100 (3rd ed. 1992). See also A.D. AJJOLA, *INTRODUCTION TO ISLAMIC LAW* 92 (2nd ed. 1983). *Zaydi Shi'aa* ("ZaidiyyalZaidism" or "Zaydi") is a *Shia'aa* school of Islam named after Zayd ibn 'Ali. Followers of the *Zaidi fiqh* are called "Zaidis," or occasionally, "Fivers". Like all Muslims, the *Zaydi Shi'aa* affirm the fundamental tenet of Islam known as the ("*Shahadah*") or testament of faith that there is no god but God and Prophet Muhammad (PBUH) is His Messenger.

16. Muslims were divided between "Sunnis" and "Shi'aa" after the arbitration between 'Alī ibn Abī Ṭālib (the fourth rightly guided *Caliph*) and Ma'waia ibn Abi Soufyian. *Shi'aa* constitutes 10% or fewer of the Muslim world and they predominantly live in Iran, Iraq, Syria, Lebanon and are minorities in North Africa, Bahrain, Pakistan, and Saudi Arabia. For a more detailed introductory description about *Shi'aa* and their subgroups, see BILAL A. PHILIPS, *supra* note 15; M. CHERIF BASSIOUNI, *supra* note 4, at 36-37.

17. KASSEM, *supra* note 9.

18. MOHAMED AL-ZORKANI, *SHARH AL-MUWAT'A'A* [EXPLANATION OF MUWATA'A: THE SMOOTH PATH] 23 (1978) at 30.

importance of the spiritual factor in every realm of human activity, including the economic one, to ensure it is in harmony with the goals and values of Islam.²⁰

The term "Islamic Law" is generally used in reference to the entire system of law and jurisprudence associated with the religion of Islam,²¹ including the primary sources of law and the subordinate sources of law, as well as the methodology used to deduce and apply the law.²² Islamic law is divided into worship ("*Ibadat*") rules governing the relationship between an individual and God ("*Allah*") and transaction ("*Mo'amalat*") rules governing the relationship between individuals and societal norms, which are changeable and develop according to time and place.²³

Islamic law²⁴ (*Sharie'a* or "the right/straight path" in Arabic) is one of the world's main legal systems.²⁵ *Sharie'a* is a conglomeration of Islamic law principles. It includes chief and supplementary sources.²⁶ The primary source of Islamic law is the *Qur'an*.²⁷ Muslims believe the *Qur'an* is the word of God which Prophet Muhammad (PBUH)²⁸ relayed

19. "As the second most popular religion in the world and the fastest growing religion in Western Europe and the United States, Islam represents the ideological foundations for political institutions and the main source of law in many countries. Moreover, Islamic law is an excellent subject for exploring the ideas of ethics, morality, and law because Islamic law purports to be a divine law, coming from God." *Id.*

20. In other words, as Islam is very much a "law-oriented" religion, it sets the framework for permissible economic, social and political systems, and formulates the principles and rules upon which laws and regulations can be established through which people should deal with one another. In effect, it provides a wealth of prescriptions and guidelines governing legal relationships as well as inspiration for spiritual relationships. *Id.*

21. See FAREED H. NU'MAN, *THE MUSLIM POPULATION IN THE UNITED STATES* 11 (1992); ISMAIL R. AL-FARUQI & LOIS L. AL-FARUQI, *THE CULTURAL ATLAS OF ISLAM* 279 (1986).

22. Normal Calder, *Legal Thought and Jurisprudence*, in 2 *THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD* 450, 456 (John L. Esposito ed., 1995).

23. *Id.* at 23.

24. HUSSEIN & AL-SHORONBASY, *supra* note 8, at Introduction ("The Islamic legal system is unusual in that its origins are in religious doctrine. Yet like other legal systems, Islamic ("*Sharie'a*") law has its own distinctive processes of identifying and developing legal norms. The role of jurists in framing rules of law is also unusual in Islamic law, in large part because it is both a religion and a means toward establishing a legal and social order in civil and criminal matters. As such, it comprises rules concerning devotional obligations as well as rules that create a comprehensive and integrated guide to all aspects of political, economic, national, and even international affairs.").

25. IAN EDGE, *ISLAMIC LAW AND LEGAL THEORY* xv (1996).

26. AL-ZORKANI, *supra* note 18, at 22 ("In other words, Islamic law is an all-encompassing system combining religion; ethics, inter-personal values, standards of behavior, and law... Islamic law is one of the oldest systems of law in practice today. There are over 1.4 billion Muslims today worldwide, over 20% of the world's population. There are thirty-five nations with population over 50% Muslim, and there are another twenty-one nations that have significant Muslim populations. There are approximately nineteenth nations that have declared Islamic law as part of their respective constitutions.").

27. *Id.* at 148.

28. "PBUH" is an abbreviation which means "Peace and Blessing be Upon Him."

through revelations from 610 A.D. until 632 A.D.²⁹ Starting with Al-Fatiha (the first “*Surah/Surat*, or chapter) and ending with Al-Naas (the final “*Surah*”). The *Qur’an* was revealed in Arabic, so although the *Qur’anic* text is reproduced in other languages, only the Arabic text is binding as the primary source of law.³⁰ The *Qur’an* is composed of 114 chapters of varying length, each known as “*Surah*.”³¹ It contains 6,236 verses (“*Ayahs/Ayats*”).³² Many verses deal with legal matters (“*Khitab*”: message). Each of these judicial verses bears a command, either an order (“*’Amr*”) or a prohibition (“*Nahi*”).³³ The *Qur’an* represents the Constitution of all Muslims; a source that trumps all other sources and is regarded by Muslims as the highest authority in all facets of life, including legal, social, political, and economic matters.³⁴

The second principal source of Islamic law is the *Sunnah*, or the traditions of Prophet Muhammad (PBUH).³⁵ The *Sunnah* consists of compilations of Muhammad’s actions, sayings, judgments, attitudes, and

29. The *Qur’an*, the holy book of Muslims, represents the first and the major source of *Sharie’a* law in which the word of God was revealed to the Prophet Muhammad (PBUH) verbally through the Angel Gabriel over a period of 22 years (610-632 C.E.). *Qur’an* was memorized, recited, and written down by the Prophet’s Companions (“*Sahaba*”) after every revelation as dictated by the Prophet. It was not compiled in one text but during the reign of the first *Caliph* Abou-Bakr. It is regarded as the culmination of a series of divine messages that began with the revelations of Adam, *Suhuf* of Ibrahim (“Scrolls of Abraham”), the Torah, the *Zabur* (“Book of Psalms”), and the Bible. In this respect, it is should be noted that a great resemblance between *Qur’an* and the holy books of Judaism and Christianity exists. *Id.*

30. KASSEM, *supra* note 9 (“In this regard, it should bear in mind that any translation of *Qur’an* is not *Qur’an*. Only the original Arabic version of *Qur’an* is the source of law, therefore. Admittedly, it is not easy for non-native Arabs, and even for many Arabs, to comprehend the *Qur’anic* provisions. It takes profound knowledge to understand the real meanings of *Qur’an* words; knowledge that is available only to scholars.”).

31. HUSSEIN & AL-SHORONBASY, *supra* note 8. Meccan *Surats* establish the majority of *Qur’an* and mostly deal with beliefs and argumentation with unbelievers. In contrast, Madinan *Surats* deal with legal rules regarding family, politics, economics, crimes and punishments, society, etc. Its legal material is contained in about 500 *Ayahs* and the large part of the *Qur’anic* legislation is given in broad outlines.

32. HUSSEIN & AL-SHORONBASY, *supra* note 8.

33. M. CHERIF BASSIOUNI, *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 152-153 (1982) (“Out of each judicial verse, a decision (“*Hukum*”) arises which is analogous to a judgment and is a specific legal rule.”).

34. KASSEM, *supra* note 9, at 42. What characterizes *Qur’anic* prescriptions is their general formulation. In other words, as Prof. Cherif Bassiouni said,

The *Qur’an* is a code which governs religious and social life. It has foreseen everything, so that all is implicitly or explicitly regulated. When a new situation arises, or a new need is found, it is met with the help of the principles which are laid down in the *Qur’an*. In its entirety, the *Qur’an* aims at prohibiting all acts detrimental to society....

Id. The true reading of the *Qur’an* is not possible except by resorting to its commentaries or interpretations (“*Tafsir*”). See also ‘ABDULKADER ‘AWDAH, AL-TASHRI’ AL-JINAI’ AL-ISLAMI [ISLAMIC PENAL LAW] 165 (2nd Ed. 1969).

35. M. Cherif Bassiouni & Gamal Badr, *The Sharia’h: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 150 (2002).

opinions during his lifetime.³⁶ The *Sunnah* does not rank as high as the *Qur'an* but is considered an important source in the interpretation of *Qur'anic* verses.³⁷ This source is outside revelation, yet is still sacred and divinely inspired.³⁸ The importance of following Muhammad's (PBUH) decisions and examples is confirmed by several *Qur'anic* verses, for example, "Obey Allah and obey the Messenger..."³⁹

Muhammad's decisions are collected in the *Sunnah* and known as the *Hadith*(s). The *Hadith* generally take one of three forms: (1) a *Sunnah* uttered by the Prophet; ⁴⁰ (2) a *Sunnah* of reported facts about the Prophet. For example, Muhammad (PBUH) applied the penalty of stoning to death in case of admitted adultery and inflicted amputation of the right hand in case of theft; and (3) a *Sunnah* by confirmation of the

36. KASSEM, *supra* note 9, at 21. See also AL-FARUQI, *supra* note 21, at 252. *Sunnah* is the collective word for the mass of texts which tell of the Prophet's spoken words, or are an account of acts or the absence of acts attributed to him. In other words, it is the oral or the habitual traditions—practice, life style, and conduct of Prophet Muhammad (PBUH)—("Sunnat al-Nabi"). These comprise the tradition, or more literally, the path of the Prophet (PBUH) which Muslims strive to follow.

37. MOHAMED N. 'AWADIN, MASDER AL-FIQH AL-ISLAMI [SOURCES OF ISLAMIC LAW] 37 (3rd ed., 2001). The *Qur'an* has priority over *Sunnah*, because of: its divine origin; as it is recited by the Prophet himself; as *Sunnah* largely plays an explanatory role of the *Qur'anic* provisions and the Prophet orders; and as *Qur'an* enjoys the precedence over all sources of the *Sharie'a*. Consequently, the *Qur'an* prevails in the cases of real conflict.

38. L. MILLIOT, A L' ETUDE DU DROIT MUSULMAN [A STUDY IN ISLAMIC LAW] 106 (1925). See also BASSIOUNI, *supra* note 33, at 153.

39. MUHAMMAD 'ABDUL RAUF, AL-HADITH 11 (1974). Moreover, jurists exclude the features of the Prophet (PBUH) from the *Sunnah*. The *Sunnah* is narrated mainly by six of the Prophet's Companions: Aboū-Hourairah, 'Abduallah Ibn 'Ummar, 'Aisha, Jabir Ibn 'Abduallah, Ibn 'Abbas, and Anas Ibn Malik (RA). *Sunnah* was compiled over a period of 300 years by various methodologies. Between 850-915 C.E., the *Sahih* ("Authentic") movement verified the authenticity of written sayings ("*Hadiths*"). From this movement, the Six Books ("Six Acclaimed *Hadiths*") were compiled by recognized scholars of high character. These compilers are: Al-Bukhari, Muslim, Aboū Dāwūd, Al-Tirmidhi, Al-Nasā'i, and Ibn Majah. Up till now, it still not agreed upon the number of *hadiths*, but the prevailing opinion stated that there are 4400 strong *hadith* ("*Hadith Sahih*"), with 500 legislating *hadith* including religious and legal *hadith*. This verbal *Sunnah* ("*Hadith*") illustrates one such example: Narrated ('Abduallah Ibn 'Ummar "RA"):

"A man said to the Prophet, 'Shall I participate in Jihad?' The Prophet (PBUH) said, 'Are your parents living?' The man said 'yes.' The Prophet (PBUH) said, 'Do Jihad for their benefit.'" The English translation of the *Qur'anic* provisions given in this article has been taken from 'ABDULLAH YUSUF 'ALI, available at www.islam101.com/quran/yusufAli/index.htm. See THE QUR'AN, *Surat* (Chapter) An-Nisa'ā, II: 4 Verse 59. In his own words, Muhammad (PBUH) said: "I have bequeathed to you two things; if you hold fast to them you will never go astray. They are the *Qur'an* and my *Sunnah*."

40. For instance, Muhammad (PBUH) has communicated the punishment for fornication, "As for the virgin, one hundred lashes, and banishment for one year." Also, for wine drinking, he said, "The one who drinks wine, scourge him—and he drinks again, then scourge him." MUHAMMAD IBN ISM'AIL AL-BUKHARI, KNOWLEDGE, no. 763, Vol. 8, bk. 81, translated in Univ. So. Calif., Center for Muslim-Jewish Engagement, <http://cmje.org/>. (Generally Book: 81; The Book of Limits and Punishments Set by Allah: "KITAB AL-HUDUD: BOOK OF PUNISHMENTS") [hereinafter SAHIH AL-BUKHARI].

Prophet (PBUH), who validates an act either expressly or through his silence.⁴¹

The *Sunnah* became a means of developing the principles found in the words of the *Qur'an* and thus the most important source for understanding the *Qur'an*, both in the development of religious dogma as well as judicial norms.⁴²

Ijm'a is the third fundamental source of Islamic law. It is the unanimous consensus of the community (“*Ummah*”) through its competent representatives.⁴³ In other words, *Ijm'a* is the agreement of jurists among the followers of the Prophet in a particular age on a particular question of law.⁴⁴ The community is viewed as all Muslims living at a given time, linked by the same faith and the same submission to the legitimate sovereign.⁴⁵ *Ijm'a* is dynamic and may be re-formulated at any point in time. As a source of law, *Ijm'a* has to be supported by either a verse in the *Qur'an* or a *Hadith* in the *Sunnah*.⁴⁶ In various *Hadiths*, Muhammad (PBUH) said: “My *Ummah* (community) shall never unite upon error...”⁴⁷ Therefore the unanimous opinion of jurists enjoys the same

41. For example, independent judicial reasoning was validated in a *Hadith*.

When Muhammad (PBUH) sent Mu'adth Ibn Jabal as a judge (“*Qadi*”) to Yemen, he asked him: ‘How will you decide when a question arises?’ He replied: ‘According to the Book of God. ‘And if you don’t find the answer in the Book of God?’ ‘Then according to the *Sunnah* of the Messenger of God.’ ‘And if you find the answer neither in the Book nor in the *Sunnah*?’ ‘Then I shall come to a decision according to my opinion without hesitation.’ Then Muhammad (PBUH) slapped Mu'adth on the chest with his hand saying: ‘Praise be to Allah who has led the messenger of the Messenger of Allah to an answer that pleased him.’

AL-HADITH, *supra* note 39, at 11. For a full account of information about the other taxonomies of *Sunnah*, see ‘AWDAH, *supra* note 34 at 175-176; HUSSEIN & AL-SHORONBOSY, *supra* note 8.

42. BASSIOUNI, *supra* note 33, at 154 (“If a *Hadith* narrative, like a *Qur'anic* verse, gives general application to a special case, it has a force of a principle for all similar case.” However, if despite the generality of its terms, its formulation intimates that it has been laid out only for the specific case, then it should not give rise to a principle which would extend to other circumstances.”).

43. *Id.* at 154-155. In other words, *Ijm'a* means consensus, and technically it refers to the unanimous opinion of the recognized religious authorities at any given time on a subject matter. When one is faced with an obscure *Qur'anic* passage or apparently contradictory texts, or is in a position where no available *Hadith* explains or anticipates the situation, Islam finds the solution in the form of collective action. This is the legislative process called *Ijm'a*, the consensus of the Prophet’s Companions (“*Sahaba*”), and their disciples and followers.

44. KASSEM, *supra* note 9, at 25.

45. *Id.* at 154, 156.

46. ‘AWADIN, *supra* note 37, at 60.

47. SAHIH AL-BUKHARI, *supra* note 40.

weight in Islamic law as *Qur'anic* texts and the *Sunnah*. However, few solutions are based solely on *Ijm'a*.⁴⁸

Ijm'a is also the source which underlies the laws, regulations, and decrees of an Islamic state, because a parliamentary body may be considered a competent representative of the community.⁴⁹ *Ijm'a* ensures the unity of the Muslim community and guarantees the correct interpretation of the *Qur'anic* and *Sunnah* passages.⁵⁰

Qiyas ("Analogical Deduction") represents the fourth source of Islamic law. It literally means measuring or ascertaining the length, weight, or quality of something. Technically, it is the extension of a *Sharie'a* ruling in one case to a new, similar case due to the resemblance of both cases' effective cause.⁵¹ As Prof. Bassiouni wrote,

Analogical reasoning in Islamic law is not an autonomous source since it depends on the existence of a model case, or a model body of rules, in either the *Qur'an* or the *Sunnah*. Also, it is a specifically Semitic mode of logic, using only two terms. It operates simply from like to like, from like to contrary, from more to less, [and] from less to more, without a universal intermediary term as in the typical Aristotelian syllogism, and here always referring to the argument of the Supreme Authority who furnished the text.⁵²

48. For instance, it was on the basis of the consensus of the Prophet's Companions that jurists of the various doctrines have commonly agreed that the *Diyya* ("legal compensation") for a woman is half of that for a free man.

49. BASSIOUNI, *supra* note 33 ("Penal laws may be among the provisions proceeding from the authority which a legislature exercises at the proper moment, regularly undertaken, and promulgated and proclaimed in the conditional forms. These provisions are called laws in western terminology if they are announced by a Parliament, or regulations or orders ("in-council") if they are proclaimed by the executive authority or its agencies. These laws, regulations, and decrees also make up Islamic law.").

50. HUSSEIN & AL-SHORONBOSY *supra* note 8. *Ijm'a* is formed by two kinds. An Express or Explicit *Ijm'a* is one in which the scholars at one time explicitly agree on or accept a certain interpretation, and a Tacit or Implicit *Ijm'a* is one in which the interpretation is accepted by all scholars. *Ijm'a* is not feasible anymore because of the huge number of scholars.

51. BASSIOUNI, *supra* note 33, at 156. In other words, *Qiyas* is an individual form based on analogical deduction. Therefore, analogical reasoning may be used to broaden the application of an existing rule of law derived from a decision ("*Hukum*"). Systematic reasoning, disciplined by the rules of analogy, projects the rule beyond its immediate applicability onto a different plane. For instance, the solution to a case at hand may be found by analogy to a similar case found in the *Qur'an* or the *Sunnah* and thus already settled by text.

52. *Id.* See also MILLIOT, *supra* note 38, at 134. The prohibition on alcoholic beverages is one such example. The use of analogy illustrates the mechanism of extending an existing rule to an unregulated situation, and in restricting the application of an existing rule to the situation it was originally meant to regulate. The prohibition on alcoholic drinks is clear in the *Qur'an*. When narcotic drugs came to be known in the Islamic world, the question arose as to whether they too

Thus, analogy may be employed only if no guidance on the point is available under discussion in any of the three previous sources of law.⁵³ The use of *Qiyas* in criminal law is carefully limited. Most scholars limit its applicability to seven strictly prescribed offenses (*Hudud*, discussed below), in retribution (*Qesas*, discussed below)⁵⁴ or compensation, by virtue of explicit text in the *Qur'an* and *Sunnah*.⁵⁵ *Qiyas* and *Ijm'a* offer criteria to determine positive law. They involve rational interpretation of the normative written law from which they themselves derive.⁵⁶ Eventually *Qiyas* was recognized by all four *Sunni* schools of *Fiqh* (*Al-Mazaheb*, discussed below) as a legitimate device for deriving law from the *Qur'an* and *Sunnah*, but only where there was no precedent set by *Ijm'a* or *Ziydi Shi'aa*.

Qiyas is composed of *Ijtihad* (“individual reasoning”), which literally means striving or exerting mentally to reach a certain rule on a question that was answered by neither the *Qur'an* nor *Sunnah*.⁵⁷ Technically, it means putting forth every effort to determine a question of *Sharie'a*.⁵⁸ *Ijtihad* is important in helping bring to light the universality of Islam through coping, by addressing the world’s development and finding solutions to evolving issues. For example, *Jihad* (“striving in the way of God by all legitimate means or to struggle to improve one’s self and/or society”),⁵⁹ organ transplants, a Muslim woman remaining married to a

were prohibited. By use of the analogical method, jurists reached the conclusion that they were also prohibited, thus extending the application of the existing rule to a new situation and formulating a new rule by analogy. The argument they used was as follows: Alcohol is prohibited because it is intoxicating (“major premise: *Asl*”); narcotic drugs are intoxicating (“minor premise: *Far*”); narcotic drugs are prohibited (“conclusion: *Hukum*”). In other words, it is a usage of a particular society, both in speech and in action.

53. 'AWADIN, *supra* note 37, at 38. See also LOUIS GARDET, *L' ISLAM RELIGION ET COMMUNAUTE* (L'Ordinaire) (French Ed.) at 184.

54. A detailed discussion of these various sorts of classification of criminal offences into *Hudud*, *Qesas* and *Diyya*, and *Ta'azir* in Islamic criminal law appears later. See *infra*.

55. *Id.* On the other hand, it is from *Qiyas* that the five classifications of acts—obligatory (“*Wajib*”), recommended (“*Mobaah*”), indifferent (“*Mandoub*”), reprehensible (“*Makrouh*”), and forbidden (“*Moharam*”)—derive. For further details concerning the classifications of acts in Islam, see AHMAD FARRAG HUSSEIN, 'USUL AL-FIQH AL-ISLAMI [PRINCIPLES OF ISLAMIC JURISPRUDENCE] (Arabic book) (2006). See also MOHAMMAD IBN 'ALI EL-SHWAKANY, NAYL AL-AWATAR (No English Title) 305 (2nd Ed. 1344 H.J.), quoted by Gamal Al-Din, *De la Legalite Criminelle*, REVUE DE SCIENCES JURIDIQUES ET ECONOMIQUES [THE CRIMINAL PRINCIPLE OF LEGALITY, ECONOMIC AND JURIDICAL SCIENCE LAW REVIEW] 448 (1974).

56. BASSIOUNI at 156. *Ijm'a* is a collective task, whereas *Qiyas* is largely a process of individual initiative by a jurist. Analogy permits the derivation of a new solution from an already accepted one.

57. 'AWADIN, *supra* note 37, at 38.

58. Nazeem Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 MICH. L. REV. 1443, 1444-45 (2006). This article explains *Ijtihad* as a source of law in Islamic law, its definition, theoretical underpinnings, and historical development of the concept throughout the diverse eras of Islam.

59. See JOHN ESPOSITO, *ISLAM: THE STRAIGHT PATH* 93 (3rd ed. 1998). In that sense, *jihad* has aspects other than the military one. In light of that, one may understand recent interpretations of

non-Muslim man after he converts to Islam, banking, and insurance.⁶⁰ The rough equivalent of this phenomenon in American law would be the promulgation of a statute that restricted all judges to render decisions solely via common case law and the Stare Decisis Doctrine (“adherence to decided cases, under a system of government where the legislative body is defunct and thus incapable of enacting new law in response to the current needs”).⁶¹

Moving on to secondary sources, *Istihsan* (“juristic preference”) is one of the most important. Literally, it means to deem something preferable.⁶² Technically, it is the exercise of personal opinion to avoid any rigidity and unfairness which could result from literal application of the law.⁶³ In

jihad as a civil society activism. The confusion regarding the Islamic concept of *jihad* happened as some writers unknowingly have used this word interchangeably with different words like *al-harb* (“war”).

60. HUSSEIN & AL-SHORONBOSY *supra* note 8. In other words, *Ijtihad* represents a part of Islamic jurisprudence in which the endeavor to derive or formulate a rule of law in an issue whose ruling is not mentioned in the *Qur'an* and *Sunnah* but on the basis of the evidence found in those sources by a qualified jurist. Goolam, *supra* note 58. In order to be a “*Mujtahid*” in Islam, the following is required: (1) ultimate awareness of legislating *Ayahs(ts)* (“*Ayat Al'Ahkam*”), (2) knowledge of the *Sunnah* and the reliability of the narrators, (3) knowledge of abrogating and abrogated rules (“*Nask'h*”), (4) knowledge of *Ijm'a*, (5) knowledge of ‘*Ilm 'Usul Al-Fiqh*’ (“The Science of the Islamic Jurisprudence Principles which determine then methodology of *Ijtihad*”), (6) complete understanding of reasoning by analogy “i.e., rules and methodology,” (7) mastering the Arabic language, (8) through better understanding of the *Sharie'a* objectives (“*Makasid Al-Sharie'a Al-Islamia* which are five essential things guaranteed in Islam: religion, life, mind, posterity, and property”), (9) piety and Islam. In this regard, it should be noted that there is a distinction between “*Fatwa*” and “*Ijtihad*.” HUSSEIN, *supra* note 55. The former means the application of the ruling of the major Islamic schools of doctrine to specific incidents. *Fatwa* is superior than *Ijtihad* and it pertains to a particular situation, In contrast, the latter is more general than the former. Similar conditions as required for *Mujtahid* are required for *Mufti*, in addition to the *Mufti*'s knowledge of the particular event. For further elaboration on this issue, see HUSSEIN, *supra* note 55.

61. See generally Kristi Kernutt, *Civil Law v. Common Law Systems: Are They So Different?*, 19 OR. L. REV. 1161 (1990). As is generally well-known, in common law systems, judges take fact patterns, look to applicable statutes, if any, and then have the freedom to apply a measure of judicial authority in deriving the final decision of the court. While in civil law systems they are thought to have very little judicial discretion, and, instead, merely apply the facts to the statutes and briefly state the outcome of the decision. In addition, common law judges are bound by Stare Decisis, while civil law judges are bound by the detailed statutes and written codes that are formulated by their legislative bodies, which are always Parliaments.

62. In other words, *Istihsan* is the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one. This is the process of selecting the best solution for the public interest in the form of *Ijtihad*.

63. AHMED AL-HAJ, THE URGENCY OF IJTIHAD 39 (1992). See also ‘ABDURRAHMAN I. DOI, SHARIA'H: THE ISLAMIC LAW 131-132 (2007); Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 A.J. COMP. L. 199 (March 2010). See also BASSIOUNI *supra* note 33, at 9 (“It is also the deviation from certain rules based on precedents derived from other rules based on relevant legal reasoning.”).

Western law this is most similar to the doctrine of equity. *Istihsan* allows Muslims jurists to be literalists without causing injustice.⁶⁴

Al-Maslahah Al-Mursalah (“consideration of the public interest”) represents another source or tool of Islamic law. Etymologically, *Maslahah* means “benefit” or “interest,” *Mursalah* means “free of restrictions,” and *Maslahah Mursalah* means benefit or interest not mentioned in a primary source.⁶⁵ *Maslahah Mursalah* consists of considerations which secure a benefit or prevent harm.⁶⁶ This source grants a Muslim legislator a great deal of freedom in the resolution of new questions in the absence of a primary source of law.⁶⁷ For example, the companions (“*Sahaba*”) issued currencies and the *Caliph* Aboū-Bakr complied with the *Qur’an*.

Al-Istihab (“presumption of continuity”) is also considered a source of law. This device is more a rule of evidence than a method of process and is well known by other names in Western law, such as “beyond a reasonable doubt.”⁶⁸ It stands for the proposition that a thing or situation known to exist continues to exist until the contrary is proven. An example is the fundamental Islamic criminal principle that a person is innocent until proven guilty.⁶⁹

Finally, *Al-‘Urf* (“custom and usage”) is a source of Islamic law in which recurring practices are acceptable for people of sound nature.⁷⁰ In other

64. For instance, oral testimony was the standard form of evidence in Islamic law. Photography, voice recording, and laboratory analysis have become more reliable means of proof. Therefore, with *Istihsan*, we can employ the latter means.

65. AL-HAJ, *supra* note 63. Muslim scholars use this tool to answer new questions. Imam Al-Ghazali, a very well respected Islamic scholar, established this doctrine in his quest for solutions to new economic, social, and political concerns that arose with the development of Islamic community. This source refers to all new ideas that have neither permitted nor prohibited by one or more agreed-upon sources of Islamic law. In judging whether an idea or solution is approved according to *Masalah Mursalah*, scholars look to whether it promotes social welfare. Further, the rule derived from this source must be logical and must not contradict the principles of the *Qur’an*, *Sunnah*, and the overall spirit of *Sharie’a*. See MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 238 (3rd ed. 2003).

66. *Id.* In many ways, benefits, interests, and social welfare are all soft terms which are relative and not absolute. If there is a conflict between benefits to some and harm to others, the rule deduced through this technique should achieve a significant public interest or benefit to the majority. Muslim responses to concepts such as foreign investment, communism, and political or economic boycotts have all been developed through this strategy.

67. *Id.* KHIZR MUAZZAM KHAN, *Juristic Classification of Islamic Law*, 6 HOUS. J. INT’L. L. 23 (1983-1984). See also ARSKAL SALIM, *CHALLENGING THE SECULAR STATE: THE ISLAMIZATION OF LAW IN MODERN INDONESIA* 12 (2008).

68. KHAN, *supra* note 63.

69. DOI, *supra* note 63, at 81.

70. KHAN, *supra* note 67. For example, at the outset of Islam, slavery was not prohibited, but after hundreds of years, it was abolished. According to *‘Urf* (custom), it is prohibited now in all Muslim countries. All in all, we can conclude that Islamic law is based upon hierarchical sources;

words, it is the typical usage of a particular society, both in speech and in action. It is subdivided between general and special rules. Rulings based on *Ijtihad* are usually influenced by custom.⁷¹ Thus, if custom changes, rulings may also change.⁷² The law that applied in pre-Islamic Arabia consisted of customary rules derived from the practice of the members of the community in marketplaces and other arenas of social, commercial, interpersonal, and intertribal interaction.⁷³ Islamic law did not reject out of hand such customary rules and adopted as its own those which were not incompatible with the new faith.⁷⁴

Additionally, treaties, pacts and other conventions, contracts, and the jurisprudence of judges are supplemental sources of Islamic law.⁷⁵

It should be noted that Islamic law is different from Islamic *Fiqh* ("jurisprudence").⁷⁶ *Fiqh* refers to the understanding of Islamic rules and principles.⁷⁷ There are four major schools of jurisprudential thought (*Fiqh Al-Mazaheb/madhhab*s) in Islam, and these schools have impacted the development of *Sharie'a*.⁷⁸ Islamic law is jurist-oriented, meaning its rules have been developed throughout history by the writings of Muslim scholars.⁷⁹ The four main schools of *Fiqh* are split into two main categories. The first is the school of opinion ("*Madrasat Al-Ra'ye wa Al-*

the primary sources are unchangeable. *Ijtihad* as a secondary source of law is very essential as incidents are endless and texts are limited and a qualified *Mujtahid* can find solutions to several pressing issues facing Islamic law.

71. *Id.*

72. IRSHAD ABDAL-HAQQ, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 56 (2002) (defining Islamic law, explaining the main elements of the *Sharie'a*, and discussing the methodologies and schools of the Islamic jurisprudence).

73. *Id.*

74. *Id.*

75. MUHAMMAD HAMIDULLAH, *THE MUSLIM CONDUCT OF STATE* 18 (4th ed. 1961). *Sharie'a* considers a contract the binding law between the parties so long as it does not violate its overall spirit.

76. 'AWADIN, *supra* note 37, at 89.

77. *Id.*

78. Bassiouni & Badr, *supra* note 35, at 137 ("Islamic law may be characterized as a jurist's law, while Roman law is a legislator's law and the Common law is essentially a judge's law.").

79. *Id.*

Ijtihad: Hanafi and Shafi'i)⁸⁰ and the second is the school of tradition (“*Madresat Al-Hadith: Maliki and Hanbali*”).⁸¹

Sharie'a in Practice

Islamic law as a comprehensive legal system is not used today in any Muslim country except Iran. Although Iran may be the only country that currently has a legal system granting primacy to Islamic law, with Pakistan being the nearest other country, Islamic law has a great influence on the legal and political systems of many countries with mixed Islamic and civil law systems, in particular in the Middle East and South Asia.

Many countries in the Middle East—including Egypt, Syria, United Arab Emirates, and Iraq—adapted most of their laws from European civil law systems.⁸² Except for Saudi Arabia, Islamic law is generally applicable only to family and inheritance issues throughout most of the Middle East.⁸³ And even in Saudi Arabia, where Islamic law is dominant, commercial law is based on a mix of Islamic and civil law.⁸⁴

80. 'AWADIN, *supra* note 37, at 57-68. In this respect, the *Hanafi* school was founded by Abou Hanifa Thabet Ibn Zoty. He was born in Koufa, Iraq, and died in Baghdad. The *Hanafi* School, which has been adopted in many Muslim countries, including Egypt and Indonesia, is famous for employing analogy to formulate legal rules. The *Shafi'i* school was founded by Abou 'Abdullah Muhammad bin Idris Al-Shafi'i. He descended from the *Hashimi* family of the *Quaryesh* tribe, to which the Holy Prophet (PBUH) belonged. This school is predominant in East Africa and Southeast Asia.

81. *Id.* at 72. See also HUSSEIN & AL-SHORONBOSY, *supra* note 8; HUSSEIN, *supra* note 55. *Maliki* is Anas Malik Ibn 'Amer El-Asbahi. The *Maliki* school is one of the two main schools of tradition (“*Hadith*”). This school is adopted in the legal system of some Muslim countries such as Morocco and Malaysia. The *Hanbali* school was founded by Ahmad ibn Hanbal (780—855 A.D.). He was an important Muslim scholar and theologian born in *Khorassan* to a family of Arab origin. It is adopted in Saudi Arabia.

82. The Organization of Islamic Conference (“OIC”) has fifty-seven member-states: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei-Darussalam, Burkina Faso, Cameroon, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyz Republic, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Tunisia, Turkmenistan, Turkey, Togo, Uganda, United Arab Emirates, Uzbekistan, and Yemen. See Membership of the Organization of Islamic Conference, http://www.oic-oci.org/member_states.asp (last visited Dec. 30, 2011).

83. Law No. 25 of 1920 (The Family Law), *Al-Jarida Al-Rasmiyya* (Egypt) adopts the *Hanafi* School. See generally BELAL MEHRAN, AL-ZAWAG FI AL-SHARIE'A AL-ISLAMIA [MARRIAGE IN ISLAMIC LAW] 239 (2003). See also AHMAD FARRAG HUSSEIN, AHKAM AL-ZAWAG FI AL-SHARIE'A AL-ISLAMIA: AL-KITAB AL-AWAL [PRINCIPLES OF MARRIAGE IN ISLAMIC LAW: Book I] (2004). Law No. 25 of 1929 (Law of Personal Status), *Al-Jarida Al-Rasmiyya*, 1929 (Egypt); Decree No. 25 of 1929, as amended by Law No. 1 of 2000, *Al-Jarida Al-Rasmiyya*, Jan. 2000 (Egypt).

84. MEHRAN, *supra* note 83. The civil and criminal codes in Egypt, United Arab Emirates, Algeria, Tunisia, Kuwait, and Iraq are all modeled after French civil code and common law.

Nevertheless, Islamic law is relevant in contemporary legal applications because it influences the application of civil and criminal law and is a principal originating source of legislation in the United Arab Emirates, Bahrain, Iran, Egypt, and many other countries.⁸⁵ The recent victory of Islamists in the recent parliamentary elections in Egypt, Turkey, and Algeria signals the possibility of enacting Islamic legislation. These Islamists call for the application of Islamic law. These groups are appealing to people who support Islamic rule of law in the Middle East.⁸⁶ Finally, *Sharie'a* defines the legal culture in the Middle East and is often used to frame the public policy and social order of these countries.⁸⁷

The term *Sharie'a*⁸⁸ is often erroneously equated with Islamic law. Although both in Western and Muslim discourses it is common to use "*Sharie'a*" interchangeably with "Islamic law," *Sharie'a* is a much

85. Article 2 of the Egyptian Abrogated Constitution (1971) states, "Islam is the religion of the state and Arabic is its official language. Principles of Islamic *Sharie'a* are the principal source of legislation." See, e.g., ABROGATED CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, Mar. 26, 2007, as replaced, Mar. 20, 2012, at art. 2 (Egypt) available at <http://www.egypt.gov.eg/english/laws/Constitution> and the link to the TEMPORARY EGYPTIAN CONSTITUTIONAL DECLARATION at <http://www.egypt.gov.eg/english/laws/constitution>. See ABROGATED EGYPT CONSTITUTION "*al-Dostor al-Masry al-Saqat*" at Art. 2, EGYPT TEMPORAL DECLARATION Art. 2 (Egypt). See e.g. CONSTITUTION OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, art. 2 (implementing Islamic law as the main source of law in Bahrain) available at www.confinder.richmond.edu/admin/docs/Bahrain.pdf; ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1989, arts. 4, 12 (Iran) (providing that "[t]he official religion of Iran is Islam and the Twelver Ja'fari [Shi'aa] school" and that "[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria") available at www.servat.unibe.ch/icl/ir00000.html; THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 2. (providing that "Islam is the religion of the State") available at www.law.yale.edu/rcw/rcw/.../asw/jordan/jordan_const_eng.pdf; CONSTITUTION OF THE UNITED ARAB EMIRATES, Dec. 2, 1971, art. 7 (providing that "[t]he Islamic Tiara's shall be a main source of legislation") available at www.worldstatesmen.org/uae_const.doc. See generally Mohamed 'Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1 (2011) (providing further elaboration concerning the Egyptian Temporal Constitutional Declaration issued on March 30th, 2011 after the January 25th Revolution—which ousted President Mubarak and his regime—and the debate concerning the application of Islamic law in Egypt).

86. In a poll conducted by Zogby International in Egypt, Jordan, Lebanon, Morocco, Saudi Arabia, and the United Arab Emirates, majorities in four of the six countries supported governing business under Islamic law, with pluralities in all six countries indicating that further interpretation was required to enable businesses in the Muslim world to integrate into the global community.

87. Amir Khoury, *Ancient and Islamic Sources of Intellectual Property in the Middle East: A Focus on Trademarks*, 43 IDEA 151, 159 (2003). See also Mohamed Y. Mattar, *Women Entrepreneurs in the Islamic World: Characteristics of Islamic Law and its Main Sources*, in THE JOHN HOPKINS UNIV. SCHOOL OF ADVANCED INT. ST. J. OF HUMAN RIGHTS AND CIVIL SOCIETY 12 (2010).

88. See generally Khaled Abou El-Fadl, *The Islamic Legal Tradition: A Comparative Law Perspective*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW (Mauro Bussani & Ugo Mattei eds., forthcoming). In the remainder of this article I will use the word *Sharie'a* in the proper sense of the word, i.e. to refer to the foundational pathway to goodness and the natural principles of justice. I will use the expression *Sharie'a* law to refer to positive Islamic law or the ("*ahkam*: rules"), the positive legal commandments deduced and expounded through centuries of cumulative legal practice.

broader concept. For theologians, ethicists, and jurists, the broad meaning of *Sharie'a* is the way or path to well-being or goodness, the life source for well-being and prosperity, and the natural and innate order created by God.⁸⁹ Hence, in Islamic literature the term is employed to refer not just to the way of life, or what one may call the philosophy and method of life of Muslims, but also to any other group of people bonded by a common set of beliefs or convictions.⁹⁰ Therefore, Islamic literary sources such as the *Qur'an* will often speak of “the ways of previous generations” (“*shra'lsharie'at man sabaq* or *man qablana*”), or “the Jewish way of life” (“*sharie'at al-yahud*”) or even “the methods of the Greek logicians” (*shar' al-falasifa* or *tariqat al-falasifa*).⁹¹

In Islamic legal usage, typically, the expression *sharie'at* Allah or *shar' Allah* refers to the broad concept of the all-inclusive and total path to God, which is equated with the path leading to social goodness (“*ma'ruf*”) and moral goodness (“*husn* or *husna*”). *Shar' Allah* or *Sharie'a* does not denote a positive set of divine commands with which humans must comply, but rather the ultimate good God desires for human beings.⁹²

On the other hand, Islamic law, or what is called *al-ahkam al-Shar'iyya* or *ahkam al- Sharie'a*, refers to the cumulative body of the jurisprudential thought of numerous communities and schools of thought regarding the “divine will” and its relation to the public good.⁹³ Islamic law is thus the fallible and imperfect attempt by human beings over centuries to explore right and wrong and discern what is good.⁹⁴ The moral and ethical foundations and principles of natural justice in *Sharie'a* are accessible and cognizable by human beings, but this does not necessarily lead to a determinative system of law.⁹⁵ *Sharie'a*, as the foundation of and pathway to goodness, is everlasting, unchangeable, eternal, and perfect. But this pathway is not perfectly cognizable by human beings.⁹⁶ Moreover, positive legal commandments that follow

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. For further discussion in this regard, see MATTHEW LIPPMAN, SEAN MCCONVILLE, & MORDECHAI YERUSHALMI, *ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION*, foreword (1988).

94. *Id.*

95. NISRINE ABIAD, *SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY* (2008).

96. *Id.*

from or are based on these foundations and pathways are indeterminate, changeable, and contextual.⁹⁷

B. THE FUNDAMENTAL LEGAL CRIMINAL PRINCIPLES IN THE *SHARIE'A* PENAL SYSTEM

As Islamic jurisprudence is unique in assuring the right of personal security, Al-Imam Al-Ghazali, one of the most famous Islamic scholars, established what are known today as the “Five Essentials,” which have become the objective criteria for scholars to determine whether an idea or solution promotes the public interest.⁹⁸ Accordingly, Islam guarantees five essential things (“*Makasid Al-Sharie'a Al-Islamial Al-Daruriat Al-Khams*”) to all individuals and prohibits unwarranted violation of them by the state. These essentials are (1) protecting religion, (2) protecting lives, (3) protecting lineage, (4) protecting posterity and intellect, and (5) protecting property.⁹⁹ Furthermore, Islamic law presents the organizational framework for a community by maintaining the legal relationships among persons and protecting the interests of one person from being attacked by another. It also protects individual peace and security when an individual is accused of a crime by defining the relationship between the individual and the state.¹⁰⁰ In this regard, the most important principles laid down in *Sharie'a* are:

- (i) The principle of individual “uniform” criminal responsibility;
- (ii) The principle of the relationship of crime and punishment (the principle of legality of crimes and punishments); and,
- (iii) The principle of non-retroactivity of criminal laws.

97. *Id.*

98. *Id.*

99. In his illustration of the bases for incrimination and punishment in Islamic law, Al-Ghazali writes: “All then that secures conservation of these five elements is an interest [*Maslahah*], and all that jeopardizes them is corruption [*Mafsadah*] prevention of which is an interest....” See ABOŪ HAMID AL-GHAZZALI, AL-MUSTAFA MIN ‘ILM AL-‘USUL [CHOOSING FROM ISLAMIC JURISPRUDENCE] 286-287 (1894). See generally James Naify, *Al-Ghazali*, in THE PIMLICO HISTORY OF WESTERN PHILOSOPHY (Richard H. Popkin ed., 1999) (providing background information on this important Muslim scholar). See also W. MONTGOMERY WATT, THE FAITH AND PRACTICE OF AL-GHAZZALI (1951); MUHAMMAD ABOŪ ZAHRAH, AL-JARIMAH WA AL-‘UQUBAH FI AL-FIQH AL-ISLAMI [CRIME AND PUNISHMENT IN ISLAMIC JURISPRUDENCE] (1974); 2 FI-AL-‘UQUBAH [PUNISHMENT] 38.

100. BASSIOUNI, *supra* note 33, at 56. As Islamic criminal law embodies fundamental principles to ensure the achievement of criminal justice aimed at balancing the interests of the state in enforcing criminal laws and the individual’s interests. Western positive legal systems did not reach at this balance till many centuries later.

As will be discussed, each principle has its flaws. No one model of the three alone can, explain and account for the complicated criminal behavior; rather, each of them provides a piece of the puzzle.

1. The Principle of Individual “Uniform” Criminal Responsibility

This principle is considered one of the most important foundations of personal security in Islam. It means that the actor himself is the only person who can be accused of a particular offense, and no one shall escape impunity regardless of blood ties or friendship to the victim (or to the judge or ruler).¹⁰¹ A person who has participated in a prohibited act, whether as principal or accomplice, must be incriminated according to the rules of criminal accountability.¹⁰²

The *Qur'an* repeatedly sets forth the principle of individual liability in the following verses: “And that man hath only that for which he maketh effort,”¹⁰³ “Whoso doeth right, it is for his soul and whoso doeth wrong, it is against it,”¹⁰⁴ “Each soul earneth on its own account,”¹⁰⁵ “No burdened soul can bear another’s burden,” and “He who doth wrong will have the recompense thereof.”¹⁰⁶

The *Sunnah* confirms this rule. The Prophet (PBUH) said to Abi-Ramhah and his son, “He does not commit a crime against him.”¹⁰⁷ The Prophet (PBUH) also proclaimed “A soul is not held responsible for acts committed by his father or by his brother.”¹⁰⁸ Hence, Islam developed and applied this rule fourteen centuries ago, while it took place in Western positive law only after the French Revolution.¹⁰⁹ Before that, a person was held liable not only for acts he had committed but also for acts committed by others, although he had not participated in them and had no control over the offender.¹¹⁰

101. BASSIOUNI at 57. Many jurists do not distinguish among the principle of individual criminal responsibility, the rule of unaccountability for acts committed by others, and the principle of the individualization of punishments. Concerning these distinctions, see ROGER MERLE, & ANDRE VITU, *TRAITÉ DE DROIT PÉNAL* [TREATISE ON CRIMINAL LAW] 407, 507 (1974).

102. *Id.* See also LIPPMAN, MCCONVILLE & YERUSHALMI, *supra* note 93.

103. THE QUR'AN, *Surat* (Chapter) Al-Najm, LIII: 53 Verse 39.

104. *Id.* at *Surat* (Chapter) Fussilat, XLI: 41 Verse 46.

105. *Id.* at *Surat* (Chapter) Al-An'am, VI: 6 Verse 165.

106. *Id.* at *Surat* (Chapter) Faatir, XXXV: 35 Verse 18 or VI: 165, *Surat* (Chapter) An-Nisa'a, *supra* note 39, at (Verse 123).

107. SAHIH AL-BUKHRAI, *supra* note 40.

108. *Id.*

109. BASSIOUNI, *supra* note 33 at 58.

110. See AL-SA'ID, MOUSTAFA AL-SA'ID, AL-AHKAM AL-'AMMAH FI KANUN AL-'UKUBAT [THE GENERAL RULES IN THE PENAL LAW] 17 (4th ed., 1962); see also AHMAD 'AWAD BELAL,

2. The Principle of Legality of Crimes and Punishments

The legality principle—in Roman law, “*Nullum Crimen Nulla Poena Sine Lege*”—creates a fundamental guarantee of individual liberty against abuse of power, corruption in the criminal system, and the arbitrariness of judges.¹¹¹ This is a right of individuals and a duty of society.¹¹² Under this principle there shall be no offense and no punishment except by virtue of law; thus, no act may be considered a violation of law if it has not been explicitly anticipated in a penal law in force at the time the act was committed.¹¹³ The law may punish only those acts committed after their prohibition by law; the judge may impose upon the offender only those penalties which are sanctioned by law.¹¹⁴

In contrast to the western legal systems which did not recognize this basic rule until the end of the eighteenth century, Islam conceived of this principle some fourteen centuries ago. Its existence under Islamic law is shown by the following verses from the *Qur'an*: “We never punished until we have sent a messenger;”¹¹⁵ “That I may warn you therewith, you and whomsoever it may reach;” and, “Every nation had its messenger raised up to warn them.”¹¹⁶

Furthermore, this rule was particularly explicit in several acts of legislation that existed in the time of Prophet Muhammad (PBUH).

MABAD'E KANUN AL-'UKUBAT AL-MASRY: AL-KESM AL-'AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK (1): THE THEORY OF CRIMINAL OFFENCES] 321 (2004).

111. *Id.*

112. M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 28-31 (1978). *See also* M. CHERIF BASSIOUNI & V. M. SAVITSKI, *THE CRIMINAL JUSTICE SYSTEM OF THE USSR* 130-144 (1979).

113. *Id.*

114. BELAL, *supra* note 110, at 58-59. In Egypt, Article 66 of the Abrogated Egyptian Constitution (1971) confirms this meaning when it stipulates that: “There shall be no crime, no punishment except by a virtue of a law. There shall be no punishment except by a judicial decision.” ABOGATED EGYPTIAN CONSTITUTION art. 66. Article 19 of the Egyptian Temporal Constitutional Declaration provides that: “Personal Penalty. There is no crime or penalty except according to the law. Punishment will not take place except by judicial ruling, nor will punishment occur for acts that take place before enactment of the relevant law.” EGYPT TEMPORAL CONSTITUTIONAL DECLARATION art. 19 (Egypt). It is also implied in Article 5 of Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952 as amended by Law No. 95 of 2003 and Law No. 147 of 2006), *Al-Jarida Al-Rasmiyya [The Official Gazette]*, 1937, art. 5 (Egypt), which provides that: “Offences shall be punished in accordance with the law in force at the time at which they are committed....”

KANUN AL-'UKUBAT AL-MASRY [EGYPTIAN PENAL CODE]. For further details on the historical perspective of this principle, its scope of applicability, and its evaluation in positive legal systems, see AL-'SAID & BELAL, *supra* note 110; BASSIOUNI, *supra* note 33 at 58-62; 'AWDAH, *supra* note 34; ABOU ZAHRAH, *supra* note 99.

115. THE QUR'AN, *Surat* (Chapter) Al-Isr'a, XVII: 17 Verse 15.

116. *Surat* (Chapter) Al-An'am, *supra* note 105, at Verse 19; *Surat* (Chapter) Faatir, *supra* note 106, at Verse 25.

Sharie'a was against several practices of the Arabs in pre-Islamic times.¹¹⁷

Al-Sharie'a Al-Islamia applies the principle of legality to all offences, although not in a regular manner.¹¹⁸ Therefore, the scope of its application differs depending on whether crimes of *Hudud*, *Qesas* and *Diyya*, or *Ta'azir* are in question. Generally speaking, *Hudud* offenses are based on the principle of legality, with precise determination of both crime and punishment and some flexibility for the judge depending upon the intent of the accused and the quality of the evidence.¹¹⁹ On the other hand, *Qesas* and *Diyya* crimes, which are left to individuals and families to punish, show their basis in the legality principle by being bound to specific procedures and appropriate penalties in the process of retribution and compensation.¹²⁰ *Ta'azir* crimes allow a great deal of flexibility to the judge but are still implicitly tied to the general principle of legality.¹²¹

In order to get a better understanding of the classification of crimes and their punishments under the principle of legality in Islamic criminal legislation, the following is an illustration of such taxonomy. This will allow us to conclude under which category of these crimes corruption and bribery would be classified.

(a) The Islamic Taxonomy of Crimes and Punishments

(i) *Qesas* and *Diyyas* Offenses

The word *Qesas* means “equality” or “equivalence.” It implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming the other person.¹²² Western scholars refer to these crimes as retaliation, which implies revenge rather than the redress of a wrong by equalizing the harm.¹²³ There are five *Qesas* crimes: murder, voluntary or intentional killing or manslaughter, involuntary killing, intentional physical injury or

117. BASSIOUNI, *supra* note 33, at 160. For instance, during the era of paganism, Arab men married their sisters. Islamic Legislation (in Arab Muslim countries) against that act included a similar exception: “Forbidden unto you for marriage are your...sisters...except what hath already happened.” *Surat* (Chapter) An-Nisa’ā, *supra* note 39, at Verse 23.

118. BASSIOUNI, *supra* note 33.

119. *Id.* at 59.

120. *Id.* at 61.

121. *Id.* at 60-62.

122. *Id.* at 203.

123. *Id.*

maiming, and unintentional physical injury or maiming.¹²⁴ These criminal acts are defined both in the *Qur'an*¹²⁵ and *Sunnah*¹²⁶ and establish two kinds of sanctions: retaliation (the principle of "Talion") and *Diyya* ("legal compensation").

Qesas crimes are divided into two categories. The first is homicide (intentional and unintentional), for which the sanctions are diverse. The second is battery, which includes the infliction of either intentional or unintentional bodily harm resulting in permanent and serious injury. This category includes maiming, beating, wounding, and other forms of physical disfigurement.

Therefore, crimes of blood are punished either by retribution or by compensation. Only victims and their representatives possess the right to prosecute the criminal; the public authorities have no power to intervene, unlike the Western legal system.¹²⁷ This achieves the goal of realizing both general and specific deterrence as well as reparation to the victim to terminate the conflict between the criminal and the injured party.¹²⁸ The idea is that retribution consists of having the criminal undergo the same form of death or the same injury which he caused to the victim.¹²⁹ For legal compensation, the victim's family may ask for payment within the

124. BASSIOUNI, *supra* note 33, at 230-282. Currently, in non-Muslim criminal laws these criminal acts would be considered murder, voluntary or involuntary homicide, or manslaughter.

125. THE QUR'AN, *supra* note 39, at *Surat* (Chapter) Al-Baqarah, II: 2 Verse 178 says: "O ye who believe! Retaliation is prescribed for you in the matter of the murdered. The freeman for the freeman, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his injured brother, prosecution according to usage, and payment unto him into kindness. This is alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom."). See also *Surat* (Chapter) Al-Māi'idaha, V: 5 (Verse 45) which reads: "We ordained therein for them: Life for life, eye for eye, nose or nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers." However, there are different texts in the *Qur'an* concerning other penalties for *Qesas* and *Diyya* crimes such as exile and prohibition from inheritance.

126. The same is summarized in a *Hadith* reported by a Tirmidhi: "If a man is murdered, his parents have two choices: either to kill the murderer, or, if they prefer, to accept compensation." See ABŪ 'ĪSĀ MUḤAMMAD IBN 'ĪSĀ IBN SAWRAH IBN MŪSĀ IBN AL ḌAḤḤĀK AL-SULAMĪ AL-TIRMIDHĪ [hereinafter JAMĪ'A AL-TIRMIDHĪ, SUNAN AL-TIRMIDHĪ].

127. AHMAD FATHI SOROUR, LES ORIENTATIONS ACUTELLES DE LA POLITIQUE CRIMENELLE [THE ACTUAL DEVELOPMENTS IN THE CRIMINAL POLICY], DES PAYS ARABES [THE ARAB COUNTRIES], 2 ARCHIVES DE POLITIQUE CRIMINELLE [CRIMINAL POLITICS LAW REVIEW] (1977). See also MILLIOT, *supra* note 38 at 745.

128. 'AWDAH, *supra* note 34, at 78, 663. It is worth mentioning that the purposes or objectives of punishment in Islamic law are general and specific deterrence, rehabilitation and retribution, and achieving justice, especially criminal justice.

129. BASSIOUNI, *supra* note 33, at 162 citing BRODENET-KRAUTTER, AL-QISAS [ISLAMIC TALION] 150 (Paris, 1973/Ph.D. Dissertation); SHARAF AL-DIN, LE TALION EN DROIT EGYPTIEN ET MUSULMAN [EQUIVALENCE IN EGYPTIAN CRIMINAL LAW AND ISLAMIC LAW], REVUE DE SCIENCE CRIMINELLE [CRIMINAL SCIENCE LAW REVIEW] 393, 401 (1954); A.F. BAHNASSI, LE TALION EN DROIT MUSULMAN [EQUIVALENCE IN ISLAMIC LAW](1964).

period of time when the exercise of retribution is still permitted. However, any compensation must meet the requirement of the consent of the perpetrator.¹³⁰

(ii) *Hudud* Offenses

The legality principle is strictly realized in this type of offense. *Hudud* (the plural of “*Had*”) are offenses sanctioned by fixed legal penalties.¹³¹ *Hudud* crimes are those that bring injury and harm to the essential interests of an Islamic community. There are seven such crimes: theft (“*Al-Sariqah*”), fornication (“*Al-Zena*”), slander and defamation (“*Al-Qazf wa Al-Tashir*”), brigandage (“*Al-Baghi*”), drinking wine (“*Shorb Al-Khamr*”), apostasy (“*Al-Ridda*”), and rebellion against the legitimate authority (“*Al-Haraba*”).¹³² Under the principle of legality, the judge has at least minimal discretion in the imposition of the fixed penalties.¹³³ Islam creates these sanctions to safeguard the institutions of the society, guarantee a free and honorable life, and remove the root of crime in general.¹³⁴

For instance, drinking alcoholic beverages (“*Shorb Al-Khamr*”) is normally punished by 80 lashes. Drinking wine as a habit spread among the Arabs before Islam. So a complete prohibition was not immediately inflicted, but came gradually. It is stated in the *Qur’an*: “They ask thee concerning wine and gambling. Say, in them is great sin, and some profit, for men. But the sin is greater than the profit.”¹³⁵ Further in the *Qur’an*, another teaching was revealed in the *Qur’an*: “Ye who believe, approach not prayers with a mind befogged, until ye can understand all

130. This rule is indicated by the following *Hadith*: “The possessions of a Muslim are not legally appropriated except through his consent. Thus, if the murderer prefers to undergo the infliction of retribution, the rightful claimants of the victim may not impose upon him instead the payment of any ransom whatsoever.” SAHIH AL-BUKHARI, *supra* note 40.

131. BASSIOUNI, *supra* note 33 at 163-164, citing AL-MAWARDI, AL-AHKAM AL-SULTANIYYA 219 (E. Fagnan, trans.). Al-Mawardi died in 1058 in Baghdad, where he was a judge (“*Qadi*”). He left several well-known works; among them is *Al-Ahkam Al-Sultaniyya*. Al-Mawardi defines this category of crimes as follows: “*Hudud* are penalties established by God (“Allah”) for purpose of preventing the commission of forbidden acts or omission of prescribed regulations.”

132. *Id.*

133. Consequently, *Hudud* penalties are imposed by Islamic law in order to maintain peace, security, and the balance stability of the society. So, punishment is important in particular for those who have a tendency to commit crime. If the penalty is not effective, persons will commit crime without fear and encourage others to do so. In contrast, if it is severe, criminals will fear the results of their prohibited and unexpected criminal acts, as they will hesitate before doing any act will bring harm to society.

134. *Id.*

135. *Surat* (Chapter) Al-Baqarah, *supra* note 125, at Verse 219; *Surat* (Chapter) Al-Mā'idaha, *supra* note 125, at Verse 90.

ye say.”¹³⁶ Later, Islam become more stringent in prohibiting wine and alcoholic beverages, as evidenced in the following *Qur'anic* verse:

O ye who believe, intoxicants and gambling, (idolatry), and divination by arrows, are an abomination and Satan's handiwork. Avoid them so that you may prosper. Satan's plan is but to create enmity and hatred in you, with intoxicants and gambling, and to hinder you from remembrance of God and from prayer. Will ye not then abstain?¹³⁷

Islamic communities have wronged themselves by failing to use *Hudud* penalties. As stated in the magnificent *Qur'an*: “There are the limits ordained by God; so do not transgress the limits ordained by God.”¹³⁸

(iii) *Ta'azir* Offenses

Ta'azir is the third group of crimes in Islam. It encompasses all offenses for which *Sharie'a* does not prescribe a punishment. Penalties for these crimes emerge from the discretionary power delegated to the judge (“*Qadi*”).¹³⁹ Literally, *Ta'azir* means discipline, rehabilitation or discretionary correction. *Ta'azir* offenses are not subject to the legality principle in the same manner as *Hudud* and *Qesas* crimes.¹⁴⁰ All acts which infringe private or community interests of the public social order are falls into the *Ta'azir* category. Therefore, the public authorities have a duty to lay down rules penalizing all conduct detrimental to the society's interests, values, or public order. In this wider scope of classification of *Ta'azir*, a double taxonomy of punishments exists, one

136. *Surat* (Chapter) An-Nisa'a, *supra* note 39, at Verse 43. Thus, it was impossible to drink wine at any time of prayer from dawn until sunset; As a result, people stopped drinking wine in order to act according to this teaching.

137. *Surat* (Chapter) Al-Mā'idaha, *supra* note 125, at Verses 91, 92. *See also* the following *Hadith*: “He who drinks wine, whip him.” (applied to all who drank wine in the days of the Prophet (PBUH)). Aggravating and mitigating factors, such as circumstances surrounding the crime, the economic status, and the age of the offender cannot be taken into consideration with respect to both *Qesas* and *Hudud* offenses. For further information about the rules governing *Qesas* and the policy of *Hudud* crimes, see BASSIOUNI, *supra* note 33, at 196-209; 'AWDAH, *supra* note 34, at 80-87; ABOŪ ZAHRA, *supra* note 99, at 187-195.

138. *Surat* (Chapter) Al-Baqarah, *supra* note 125, at Verse 229. Furthermore, God says: “And any who transgresses the limits of God, does verily wrong his own soul.” *See* THE QUR'AN, *Surat* (Chapter) Al-Talaq, LXV: 65 Verse 1.

139. BASSIOUNI, *supra* note 33, at 212. For instance, Al-Mawardi defines *Ta'azir* as: “Punishment inflicted in cases of offences for which the law [*Sharie'a*] has not enacted written penalties. The rules relating to it differ depending upon who is inflicting it and upon whom it is inflicted.” AL-MAWARDI, *supra* note 131.

140. *Id.*

related to the criminalized act, and the other based on the nature of the sanction inflicted.¹⁴¹

PUNISHMENT FOR OFFENSES OF CRIMINAL COMMISSIONS AND OMISSIONS

There are three classes of discretionary penalties in this group. First, there are criminal acts *per se* sanctioned by penalties which relate to *Hudud*.¹⁴² For example, attempted robbery or larceny (petty theft), and attempted adultery. In all such cases, the violation is not so serious as to require the imposition of *Had*.¹⁴³ The second kind includes criminal acts which are normally punished by *Hudud*, but because of the offender's situation, as in the case of theft among relatives or where there is doubt, the *Had* penalty is replaced by *Ta'azir*.¹⁴⁴ Finally, all acts which fall under the law but are not penalized by *Had* are subject to *Ta'azir*.¹⁴⁵ This applies, for instance, to the consumption of pork, testamentary guardianships, slander, false testimony, gambling, usury, and corruption in all its forms including extortion and bribery.

TA'AZIR PUNISHMENT FOR INJURIES TO THE PUBLIC INTEREST OR PUBLIC ORDER

To guarantee a community's protection and safeguard its welfare, public interest notions allow severe sanctions.¹⁴⁶ Given the deterrent purpose of punishment, it is subject to specific restrictions.¹⁴⁷ First, the perpetrator must have committed a crime which caused actual damage to the public order and the harm done must represent a threat to the public interest or order. Second, the substance of the punishment must justify the penalty itself.¹⁴⁸ Last, the justification of the penalty must allow for flexibility in each situation in order to create an adequate and appropriate protection of the public interest.¹⁴⁹

The judge's freedom in this group of crimes rests primarily in the application of the penalty anticipated by law in light of the gravity of the

141. *Id.* at 213.

142. *Id.* at 166.

143. *Id.* at 167.

144. *Id.*

145. *Id.*

146. *Id.* at 213.

147. *Id.*

148. *Id.* at 214. The discretionary authority of the judge to classify acts or render a decision on the bases of his own personal knowledge is not absolute if contrary to the public good and public social order.

149. *Id.*

crime.¹⁵⁰ The judge must take into account the objective and subjective culpability, the nature of the crime, and the status and character of the offender.¹⁵¹ According to the predominant argument of the three schools of thought in Islam, penalties in *Ta'azir* must always be more lenient than those in *Hudud* in order not to transgress the principle of legality in the Islamic criminal justice system.¹⁵²

The available penalties include traditional physical (corporal) punishments, some of which are applied under *Ta'azir* such as the death penalty, which is rarely imposed, and flagellation.¹⁵³ Deprivation of liberty is another penalty.¹⁵⁴ Under *Ta'azir*, Islamic law imposes this kind of punishment through imprisonment or the less restrictive manners of local banishment, displacement, or expulsion.¹⁵⁵ Moreover, it is accepted by Muslim jurists that fines as compensation and reparation for injury under *Ta'azir* be pecuniary.¹⁵⁶ Further, there is an area of social control, where the judge's intervention is essential and his discretionary power is manifest.¹⁵⁷ This is obvious in certain penalties which fall outside the scope of purely penal law and relate more to the moral, ethical, and educational theories of penology.¹⁵⁸ There are several punishments designed to instill morality, such as exhortation by the judge to do good and avoid evil deeds, blame ("reproach"), and dismissal from employment for abuse of confidence.¹⁵⁹

In sum, the judge has wide discretion in *Ta'azir*, but still not, if properly understood, beyond the legality principle's bounds.¹⁶⁰ Judicial power is confined by the guidelines described above in ascertaining the crime and setting the punishment.¹⁶¹ *Ta'azir*, like other offenses in Islamic law, is not based on the principle of legality which is explicitly formulated in all contemporary western positive legal systems. Nevertheless, all which that principle represents is, embodied in the *Ta'azir* categories of

150. *Id.*

151. *Id.*

152. *Id.* In this respect, the *Shafi'i* school of doctrine stated that even the death penalty is available if necessary in a *Ta'azir* crime. See generally BASSIOUNI, *supra* note 33.

153. *Id.*

154. LIPPMAN, MCCONVILLE & YERUSHALMI, *supra* note 93.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. And, the judge in this respect may order the public exposure of the culprit's deeds. For further discussion on the penalties of *Ta'azir*, see generally BASSIOUNI, *supra* note 33. See also 'AWDAH, *supra* note 34, at 126-156; ABOŪ ZAHRAH, *supra* note 99, at 191-195.

160. *Id.*

161. *Id.*

crimes.¹⁶² *Ta'azir* invokes two penological principles of social retribution which seek to achieve social order through deterrence.¹⁶³

3. The Principle of Non-Retroactivity of Penal Laws

To protect individual security and prevent the abuse of power, individuals cannot be accused of crimes for acts which were allowed when committed. Thus, Islamic law has realized the principle of non-retroactivity of criminal laws as one of the most important foundations of its criminal justice system.¹⁶⁴ In essence, this rule means that criminal laws have only prospective and not retroactive effect.¹⁶⁵

The non-retroactivity principle has been an integral part of Islamic law for fourteen centuries.¹⁶⁶ It is worth mentioning that Article 66 of the Egyptian Abrogated Constitution of 1971 provides that "... shall only be punishable acts that take place after the coming into force of law..." and Article 187 expressly prohibits the promulgation of retroactive criminal legislation.¹⁶⁷ The only exception to this principle in Islamic jurisprudence is that a criminal law has retroactive effect if it favors the accused. For example if the new law provides for a lesser penalty than the existing law at the time the crime was committed then in that case the less severe punishment is applicable.¹⁶⁸ This is very similar to the principle of lenity in Western legal systems.¹⁶⁹

162. *Id.* For further discussion on the conditions for infliction of *Ta'azir* concerning the role of the judge, criminal prosecution, and the issues which affect *Ta'azir* punishment such as aggravating and mitigating circumstances, see generally BASSIOUNI, *supra* note 33, at 219-224.

163. *Id.* These principles inspire indirectly the advocates of modern social defense and the movement for the individualization of punishment by taking into account the personality of the offender. Also, they have led to putting more discretion in the hands of the criminal judges in evaluating crimes and criminals than in the past.

164. *Id.*

165. This principle is embodied in the constitutions of several Muslim countries, and it represents a constitutional value applicable to all the authorities of the government. The universal recognition of this rule in Islamic law is due to the emphasis placed on the principle of legality. See e.g. CONSTITUTION OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, *supra* note 85, at art. 20; THE CONSTITUTION OF KUWAIT, Nov. 14, 1962, art. 179 available at www.pm.gov.kw/ConstitutionEnglish.pdf; THE CONSTITUTION OF THE UNITED ARAB EMIRATES, Dec. 2, 1971 art. 27, available at www.dubai.usconsulate.gov/uae_irf_2010.pdf (explaining the scope of applicability of the principle of neo-retroactivity of penal law).

166. Although it had its origin in positive legal systems within Article 8 of the French Declaration of the Rights of Man in 1789. For further historical discussion about this principle under various positive laws, see AL-SA'ID & BELAL, *supra* note 110, at 107-108.

167. *Id.* See also ABROGATED EGYPT CONSTITUTION 1971, *supra* note 85, at art. 66; EGYPT TEMPORAL CONSTITUTIONAL DECLARATION, *supra* note 85, at arts. 19, 20, 21, 22, 23. In the same sense, the rule is also implied in the KANUN AL-'UKUBAT AL-MASRY [Criminal Code] (Egypt) *supra* note 114, at art. 5 ("Offenses shall be punished in accordance with the law in force at the time at which they are committed...").

168. BASSIOUNI, *supra* note 33, at 64-65.

169. *Id.* at 63.

The *Qur'an* cites many instances in which this principle was applied. For instance, God forbids a man from marrying his father's wives and condemns the practice as obscene, but He did not condemn such acts done prior to the existence of Islam.¹⁷⁰ Also, the Prophet (PBUH) said to 'Amr Ibn al-'as when the latter embraced Islam: "The religion of Islam cuts off what any conduct that preceded it."¹⁷¹

Finally, in order to prevent moral and social corruption, this principle applies when the ruler determines that restrictions must be placed on what is permissible for the public good.¹⁷²

Following this summary of the principles of criminal law in *Sharie'a*, the next sub-section deals with corruption as a criminal offense in Islamic criminal law in more detail. We start with a general discussion of immoral behavior under Islamic criminal law and then identify the various forms of corruption, the different corruption-related crimes in Islam, and the elements of corruption.

III. PART THREE: CORRUPTION AND BRIBERY IN ISLAMIC CRIMINAL LAW

It is generally accepted that societal values and concepts of social justice design the frame of moral conduct.¹⁷³ For many people, religion is an important influence, but for Muslims it is an overriding consideration. Muslims account for about one-fifth of the world's population, and form a majority of the population in over fifty countries. Muslims are by definition bound by a common faith, Islam. Accordingly, what is the Islamic position on immoral behavior ("*Ifsad*") which leads to corruption ("*Fasad*")?

In the *Qur'an* and *Sunnah*, corruption refers to a broad range of behavioral digressions that threaten the social, economic, and ecological balance. Such acts are clarified at various places in the *Qur'an* in plain language,¹⁷⁴ in terms of being just or unjust, with reference to their

170. *Surat* (Chapter) Al-Nisa'a, *supra* note 39, at Verse 22. See also THE QUR'AN, *Surat* (Chapter) Al-Anfal, VIII: 8 Verse 38 ("Tell those who disbelieve that if they cease from the persecution of believers that which is past will be forgiven them.").

171. SAHIH AL-BUKHARI, *supra* note 40.

172. BASSIOUNI, *supra* note 33, at 65. For example, the ruler may order the placing of road obstacles and barriers to the flow of traffic, but in all such events no penalty can be imposed unless the ruler first gives notice.

173. MARK TURNER & DAVID HULME, GOVERNANCE, ADMINISTRATION AND DEVELOPMENT (1997). See also Mark Hayllar, *Accountability: Ends, Means and Resources*, 3 ASIAN REVIEW OF PUBLIC ADMINISTRATION 2, 10-22 (1991).

174. For further details, see *infra* at p. 203-205. This part examines rules on bribery with respect to prohibitions in the *Qur'an*, *Sunnah*, and other Islamic sources.

detrimental impact on social organization, and within relation to the standards of moral virtue.

A. THE CATEGORIZATION OF CORRUPTION AND BRIBERY IN *SHARIE‘A*

Muslim jurists differ in defining corruption. Literally, corruption (“*Fasad*”) encompasses mischief, abuse, rottenness, spoiledness, decay, decomposition, putrefaction, depravity, wickedness, viciousness, iniquity, dishonesty, and pervertedness.¹⁷⁵ There are numerous definitions among Muslim jurists. Some scholars state that bribery (“*Rashwa*”) is the principle form of corruption and define it as what is given to invalidate a right (“*Haq*”) or to validate a deception or falsehood (“*Batil*”).¹⁷⁶ Others say that bribery is a gift, whether in real or monetary terms, presented to judges and other decision makers to facilitate a favorable ruling or judgment.¹⁷⁷ Other jurists say bribery is an abuse of judicial or administrative power or of political authority, trust, or financial prowess.¹⁷⁸

From these concepts, we can say that most Muslim jurists see bribery as epitomizing corruption as “something given by the briber and received by the bribed irrespective it is a material or a moral thing, money or a benefit. Moreover receiving gifts—as “*Hanafi*” School said—in the terms of reaching deceptiveness or a false included in this definition.”¹⁷⁹ Thus, having canvassed Muslim scholars, we can describe corruption as “cover[ing] the matters of governance, decision making, rules through reproaching the abuse of trust placed in officials by the state through acts such as accepting gifts, outright theft of public funds, and undermining rules in exchange for bribes, on recommendation or due to family and tribal considerations. Finally, individuals in general are prohibited from making recommendations in exchange for gifts as such behavior falls under *rashwa*.”¹⁸⁰

175. HANS WEHR, THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC (J.N. Cowan, ed., 3rd ed. 1976). See also AL-FYOUMI, AL-MESBAH AL-MOUNIR (Vol.1/ Part I) 43, MOKTAHER AL-SHAH 103, IBN MANZOUR, LESAN AL-‘ARAB, Part: 14, 322; AL-MO‘GAM AL-WASIT (Vol. I), 347; and MOHAMED SELIM EL-‘AWA, FI ‘USUL AL-NIZAM AL-JINAI‘ AL-ISLAMI [PRINCIPLES OF ISLAMIC CRIMINAL SYSTEM] 290 (2nd ed. 1983).

176. See El-Hagry, *supra* note 10, at 4.

177. *Id.* See e.g. Surat (Chapter) Al-Baqarah, II: 2, *supra* note 125, at Verse 188 (prohibiting rulers, judges, decision makers, and parties to a conflict from facilitating the unjustified appropriation of the property of others or public property by obtaining a favorable ruling in exchange for bribery. It calls such behavior “*Batil*” (falsity or deceptiveness) and “*Ithm*” (criminal, sinful, inappropriate)).

178. *Id.*

179. *Id.* at 7. See also IBN AL-‘ATHIR quoted by EL-TAHANAWY.

180. MOUSTAFA ABOU ZIED FAHMI, FAN AL-HUKUM FI AL-ISLAM [PRINCIPLES OF GOVERNANCE IN ISLAM] 155-166 (2003). See also ‘ABD ELGHANY BASSIOUNI ABDUALLAH, ‘USUL

B. OTHER CONCEPTS CATEGORIZED AS BRIBERY IN ISLAM

Various concepts are in close connection with bribery, including illegal earnings, gifts, charity, and salaries.

(1) Al-Soht (“Illegal Earnings”)

Al-Soht means prohibited earnings and the maximization of profits in an illegitimate manner (“*Al-Haram Al-zy La Yahal Kesbhe wa Akleh*”).¹⁸¹ From this concept, the *Maliki* School¹⁸² defines *Al-Soht* as “bribery given to the witness to testify, the judge to rule, and the price of power.” It is the kind of corrupt behavior explained by the following *Qur’anic* verse: “They are fond of listening to falsehood, of devouring anything forbidden.”¹⁸³ *Qur’anic* commentators generally agree that the meaning of *Al-Shot* in this verse is “bribery.”¹⁸⁴

(2) Al-Hadiya(a) (“Gifts”)

Al-Hadiya means to give something without any compensation in a real or a monetary form.¹⁸⁵ It is supported by this *Qur’anic* verse:

To Allah belongs the dominion of the heavens and the earth. He creates what He wills and plans. He bestows children male or female according to His Will and Plan, Or He bestows both males and females, and He leaves barren whom He will: for He is full of Knowledge and Power.¹⁸⁶

Thus, the goal of both a gift and a bribe is to transfer the benefit to the other, although with a gift there is no compensation expected.¹⁸⁷ In contrast, the briber anticipates his private benefit from the bribee.¹⁸⁸

‘ILM AL-IDRA AL’AMA: DERASAH LE ‘USUL WA MABADE’E ‘ILM AL-IDARA AL’AMA FI AL-ISLAM WA AL-WALAYEAT AL-MOTAHEDA AL-AMRICIYA WA FRANSA WA MASER WA LEBENAN [PRINCIPLES OF PUBLIC ADMINISTRATION: STUDY OF THE GENERAL PRINCIPLES OF PUBLIC ADMINISTRATION IN ISLAM, THE UNITED STATES OF AMERICA, FRANCE, EGYPT, AND LEBANON] 84-101 (2006).

181. *Id.* at 90-95.

182. El-Hagry, *supra* note 10, at 24.

183. *Surat* (Chapter) Al-Māi’idaha, *supra* note 125, at Verse 42.

184. El-Hagry, *supra* note 10. From this definition, it is obvious that there is a close relationship between bribery and illegal earnings, as some Muslim scholars recognize illegal earnings as “bribery” and others considers it “as a kind of bribery.” In any event, illegal earnings are prohibited (“*Haram*”) in Islamic law as a kind of corrupt behavior in the form of to facilitate getting something or obtaining an illegal right through the exchange of bribes.

185. *Id.*

186. THE QUR’AN, *supra* note 39, at *Surat* (Chapter) Al-Shoura, IIIX: 42, at Verses 49, 50.

187. EL-HAGRY, *supra* note 10.

188. *Id.*

(3) Al-Sadaqah (“Charity”)

Al-Sadaqah is derived from the Arabic root S-d-q¹⁸⁹ and means giving charity to poor people in order to be blessed and receive the mercy of God, which is the only true purpose of giving *Sadaqah*.¹⁹⁰ This *Qur’anic* verse explains charity:

If ye disclose acts of charity, even so it is well, but if ye conceal them, and make them reach those really in need, that is best for you: It will remove from you some of your stains of evil. And Allah is well acquainted with what ye do.¹⁹¹

Furthermore, Sayyidina ‘Abdullah ‘Ibn ‘Ummar (RA) reported that Prophet Muhammad (PBUH) said, “*Zakāh* is not lawful for a rich man and for one who is strong and healthy.”¹⁹²

Accordingly, charity involves giving without any monetary or non-monetary compensation.¹⁹³ On the other hand, sometimes the bribee is a poor person or the briber gives whatever he wants to give in order to be

189. *Al-Sadaqah* also appears as (“Sadaka” and “Sadakah”; the plural of “*Sadaquat*” or “*Sadakat*”). Derivations of the root include *Sadiq* (“honest”), *Siddiq* (“virtuous”), and *Sidk* (“honesty” and “sincerity”). The hallmark of the sincere Muslim is sharing one’s wealth with the needy. It is only a modest gift for someone in need. In fact, under Islam, simple kind words and just treatment of people is better than giving *Sadaqah* followed by humiliation or insult to its recipient. It does not have to be a financial gift; it can be by helping others or simply by refraining from evil doing. There is no obligation to restrict *Sadaqah* to Muslims; it can be given to Jews or Christians as well. See Salma Taman, *The Concept of Corporate Social Responsibility in Islamic Law*, 21 IND. INT’L & COMP. L. REV. 481, 490-492 (2011) (providing further elaboration concerning charity in Islamic law).

190. Thus, giving *Sadaqah* in order to draw attention to one’s wealth does not attract a reward. In other words, it means “purification” or “small daily acts of charity in order to be blessed and receive the mercy of God.” This can be in the form of small amounts of money given to the poor but also practical acts, such as helping a foreigner find his way or carrying a load for an elderly person. In fact, under Islam, simple kind words and just treatment of people is better than giving *Sadaqah* followed by humiliation or insult to its recipient. It does not have to be a financial gift; it can be by helping others or simply by refraining from evil doing. Strictly speaking, there is no obligation to give *Sadaqah*. However throughout the *Qur’an*, God encourages Muslims to give *Sadaqah* to the needy whenever they can, by stressing the generous multiplication of rewards for those who freely give of their assets and time. On the other hand, there is no specific time or amount required by the *Qur’an* for giving *Sadaqah*. TALLAL ALIE TURFE, *UNITY IN ISLAM: REFLECTIONS AND INSIGHTS* 132 (2005).

191. *Surat* (Chapter) Al-Baqarah, II: 2, *supra* note 125, at Verse 271.

192. “RA” is an abbreviation which means, “may Allah bless him.” JAMIA’A TIRMIDHI (SUNAN AL-TIRMIDHI) *supra* note 126. [AHMAD 6812, ABOŪ DĀWŪD 1634], *The Book on Zakāh* (*Hadith* no. 652: Narrated from Allah’s Messenger). In this sense, the Prophet (PBUH) was accepted gifts but not charity. Therefore, if a person gives something in order to be closer to God, it will be a charity and if the person gives something in order to be closer to someone else, it will be a gift. *Zakāh* is the financial obligation on Muslims. Further discussion on *Zakāh* as an Islamic commitment will appear later. See *infra*.

193. El-Hagry, *supra* note 10, at 30.

closer to him, but in reality he has a private interest.¹⁹⁴ In such an event, charity becomes disguised bribery (“*Rashwa Mukna‘h*”).¹⁹⁵

(4) Al-Ga‘al (“Salary”)

Al-Ga‘al literally means a wage. From the Islamic point of view, salary is a known monetary obligation upon a certain work, whether known or unknown.¹⁹⁶ Although *Ga‘ala* was originally permitted, some doctrines—namely the *Hanafi* and *Shafi‘i*—prohibit it in certain occasions where it might disguise fraudulent transactions.¹⁹⁷ For instance, *Goumhour Al-Fouqaha‘a* (“major scholars”) prohibit *Ga‘ala* for judges or if it represents an obstacle to the realization of other legitimate public interests.¹⁹⁸ Obviously, the reason for such prohibition is that, upon receiving the bribe, the bribee may represent it as his wage for the achievement of the briber’s permissible private benefit.¹⁹⁹

It is relevant here that the Prophet (PBUH) declined many who sought public appointments on the grounds that such positions are a trust and given only to those possessing appropriate merit. In disapproving one request he said:

Authority is a trust, and on the Day of Judgment it is a cause of humiliation and repentance except for one who fulfills its obligations and properly discharges the duties attendant thereon.²⁰⁰

The second *Caliph* (“Leader”), ‘Ummar Ibn Al-Khattab (RA), used to record the possessions of his officials at the times of their appointments and confiscated wholly or partly whatsoever they added while in office on suspicion of benefiting from their offices.²⁰¹ Also, the *Caliph*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. ABOŪ AL-HUSSEIN MUSLIM IBN AL-HAJJAJ IBN MUSLIM IBN WARAT AL-QUSHAYRI AL-NISABURI, SAHIH MUSLIM, KNOWLEDGE, no. 4491, Vol. 1, bk. 20, translated in Univ. So. Calif., Center for Muslim-Jewish Engagement, <http://cmje.org/> [hereinafter SAHIH MUSLIM]; The Book on Government: KITAB AL-IMARA, Chapter 4: Undesirability of Getting a Position of Authority without Necessity, translated in <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/003.sbt.html>.

201. ABU AL-‘ABBAS AHMAD IBN JABIR BALADHURRI KITAB FUTUH AL-BULDAN [THE ORIGINS OF THE ISLAMIC STATE] 125-26, 344-45 (Philip Khuri Hitti trans., 1968). ‘Ummar ibn Al-Khattab (RA) is the second of the four “rightly guided” *Caliphs*. ‘Ummar also codified Islamic law, and was known for his simple lifestyle and modest living. For further elaboration regarding ‘Ummar ibn Al-Khattab, see generally JUAN EDUARDO CAMPO, ENCYCLOPEDIA OF ISLAM 685 (2009).

instructed one of his commanders to adjust the values of gifts offered to him—which he had dispatched to the central treasury—against the tax liability of the people, because taking anything more than the stipulated *Jizya(h)* (“poll tax”) would have been unjust.²⁰²

Caliph ‘Ummar Ibn ‘Abd Al-‘Aziz (RA) said that:

I am of the view that the ruler should not trade. It is also not lawful for the officer to trade in the area of his office... because when he involves himself in trade he inadvertently misuses his office in his interest and to the detriment of others, even if he does not like to do so.²⁰³

These examples suggest that corruption is understood in Islam as an abuse of trust through the misuse of judicial powers, administrative powers, riches, and political authority.²⁰⁴

C. THE LEGAL CHARACTERIZATION OF CORRUPTION AND BRIBERY AS CRIMINAL OFFENSES UNDER THE UMBRELLA OF THE ISLAMIC CRIMINAL JUSTICE SYSTEM: *TA‘AZIR* CRIMES

Corruption and bribery are serious crimes which Islamic law considers to be simultaneously religious and criminal offenses due to the serious harm caused by them to the community. Therefore, they are punished by

202. HASANUZ ZAMAN, *supra* note 5, at 108. See also FAHMI, *supra* note 180, at 177-193; BASSIOUNI, *supra* note 180, at 92-97. Under Islamic law, “*Jizyah*” is a per capita tax levied on a section of an Islamic state’s non-Muslim citizens who met certain criteria. The tax was levied on able-bodied adult males of military age with some exemptions. From the point of view of the Muslim rulers, *jizyah* was material proof of the non-Muslims’ acceptance of subjection to the state and its laws, “just as for the inhabitants it was a concrete continuation of the taxes paid to earlier regimes.” In return, non-Muslim citizens were permitted to practice their faith to enjoy a measure of communal autonomy, to be entitled to the Muslim state’s protection from outside aggression, and to be exempted from military service and the *Zakāh* taxes obligatory upon Muslim citizens. In short, *Jizyah* is the tax imposed on the people of religions (“People of Book” “[*Z*]himmis”) other than Islam for their protection. See Javed Ahmed Ghamidi, *The Islamic Law of Jihad* (2001).

203. *Id.* at 128. Any doubts that remain for the believer after such contextual elaboration are to be resolved at the personal level through conscientious reflection (“*Ijtihad*”). See G.R., HAWTING, *THE FIRST DYNASTY OF ISLAM: THE Umayyad Caliphate AD 661-750*, 77 (giving a detailed biography about ‘Ummar Ibn ‘Abd Al-‘Aziz).

204. THE QUR’AN says: “Truly Pharaoh elated himself in the land and broke up its people into sections, depressing a small group among them: their sons he slew, but he kept Alive their females: for he was indeed a maker of mischief.” THE QUR’AN, *Surat* (Chapter) Al-Qasas, V: 28 Verse 4. Also, it says: “And with Pharaoh, lord of stakes? All these transgressed beyond bounds in the lands, And heaped therein mischief on mischief.” *Id.* at *Surat* (Chapter) Al-Fajr, V: 89 Verses 10, 12. Moreover, it is recited in the *Qur’an*: “But seek, with the wealth which Allah has bestowed on thee, the Home of the Hereafter, nor forget thy portion in this world: but do thou good, as Allah has been good to thee, and seek not occasions for mischief in the land: for Allah loves not those who do mischief.” *Id.* at *Surat* (Chapter) Al-Qasas, *supra* note 204, at Verse 77.

Ta'azir explained in Section I above.²⁰⁵ And it is obvious that bribery is a mischief (“*Ifsad*”) which threatens social order.²⁰⁶ This does not mean that considering corruption in all its forms as a *Ta'azir* moral offense means it is considered less serious than other criminal offenses. It is simply that *Ta'azir* encompasses all offenses, including corruption, for which *Sharie'a* does not prescribe a specific penalty.²⁰⁷

The punishment of corruption and bribery is left to the discretionary power delegated to judges. Judges, should take into account the nature of the crime, the actual damage to the public order or the interest protected, whether the harm done represents a threat to the public interest or order, the status and personality of the offender, and most significantly, the importance of the property to be protected, whether public or private, as it is considered one of the five essential things guaranteed in Islam.²⁰⁸

In such an event, the public authorities (“*Imam[s]*”) must lay down rules penalizing all conduct which seems detrimental to the society’s interests, moral values, or public order while applying the principles of justice and the rules of flexibility to each situation in order to create a proportionate, adequate, and appropriate protection of society.²⁰⁹ As a result, corruption and bribery are considered *Ta'azir* offenses in Islam, and can be punished by imprisonment.²¹⁰

D. RULES REGARDING CORRUPTION AND BRIBERY IN ISLAMIC CRIMINAL LAW

The majority of Muslim scholars are in favor of the prohibition (“*Hormat*”) of corruption in all its shapes including nepotism, extortion, and bribery and they deduce this rule from various Islamic law sources such as the *Qur'an*, *Sunnah*, and *Ijm'a*.

205. BASSIOUNI, *supra* note 33. Based on the distinction between “*Sharie'a*” and “Islamic Law”, the rule is that the *Ta'azir* offences and punishments considered a part of Islamic Law and not a part of *Sharie'a*. See *supra* text.

206. *Id.*

207. FAHMI, *supra* note 180.

208. *Id.* See also BASSIOUNI, *supra* note 180.

209. *Id.* See also FAHMI, *supra* note 180.

210. *Id.* In this respect, the *Maliki* school stated that there is no way to determine such a *Ta'azir* punishment as it is delegated to the judge as the final target of this penalty is chastisement, rehabilitation, or discretionary correction. Consequently, it can reach the penalty of *Had* or more. This appears later in a detailed discussion in Part 2 *infra*, concerning the various punishments of corruption including bribery as a *Ta'azir* criminal behavior.

1. The Prohibition of Bribery in the *Qur'an*

The *Qur'an* expresses the prohibition of corruption, including bribery, to further the prosperity of the people. Many verses emphasize and confirm this principle. *Surat* (Chapter) *Al-Baqarah* verse 188 reads, “And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of other people’s property.”

This verse forces an injunction against illegal acts because it prohibits rulers, judges, decision makers, and parties to a conflict from facilitating the unjustified appropriation of the property of others or of public property by obtaining a favorable ruling in exchange for bribes. It calls such behavior “*Batil*” (falsehood or deception) and “*Ithm*” (criminal, sinful, inappropriate).²¹¹

Correspondingly, *Surat* (Chapter) *Al-Māi'idaha* verse 42 states: “They are fond of listening to falsehood, of devouring anything forbidden.” This verse refers to certain Jews who had committed the forbidden act of *Haram* and “eating property” through bribery. On another occasion, someone asked the Prophet Muhammad (PBUH), “What is the *Al-Soht*? He (PBUH) said: It is bribery.”²¹²

2. The Prohibition of Bribery in the *Sunnah*

Muslims put considerable weight on events that took place in the early years of Islam, during the life of the Prophet (PBUH) and the early *Caliphs*. These years provide illustrations of appropriate behavior. In this respect, the *Sunnah* embodies the application of the *Qur'an* to both concrete disputes and hypothetical questions that arose during the Prophet’s life. The importance of the *Sunnah* stems from the relationship between it and the *Qur'an*. The *Sunnah* may explain the rules and principles in the *Qur'an*, and it may present new principles and rules to supplement the *Qur'an*.

The *Sunnah* confirms the above prohibition through a general sanction that censures the givers and receivers of bribes. To illustrate this principle, it was said by ‘Abdullah Ibn ‘Amr Ibn al-‘as that “The Apostle

211. El-Kalby (one Muslim scholar) interprets the meaning of rulers or governors in this context as false testimony in exchange for bribes to facilitate a favorable ruling or judgment. See ABOŪ AMRAN MUSA OBEIDALLAH AL-KORTOBI, *AL-GAMA'E LI AHKAM AL-QUR'AN* [SUMMARY OF THE QUR'AN PRINCIPLES], Part II at 340, Part IIIV at 183.

212. *Id.* at Part IIV 140. See also ATFIESH, TYESEER AL-TAFSIR, Part III 97; AL-ALOUSY, ROH AL-MA'ANI, Part IIV 140. The *Qur'an* is filled with numerous verses that forbid corruption in business transactions

of Allah (PBUH) cursed the one who offers bribe as well as the one who accepts bribe.”²¹³ Professor Yusuf Al-Qardawi discusses the same *hadith* through Musnad Ahmad, Al-Tirimidhi, and Ibn Hibban adding the word “*fi Al-hukum*”, which means matters of governance, decision making, and rules.²¹⁴ He brings another *hadith* through Musnad Al-Hakim that adds condemnation of the mediator between the briber and the bribee.²¹⁵ These provisions endorse the prohibition of bribery. This prohibition is inferred because the Prophet (PBUH) cursed the briber and the bribee in addition to the intermediary between them and stated that all of them are barred from God’s mercy. This is, the most severe punishment on the Day of Judgment. As the Prophet (PBUH) stated, “Both the briber and the bribee will be in hell.”²¹⁶

Furthermore, Abu Humaid al-Sa’idi said:

The Messenger of Allah (PBUH) appointed a man from the *Azd* tribe called Ibn Al-Utbiyya, in charge of *Sadaqat* to be received from *Banu Sulaim*. When he came back, the Messenger of Allah (PBUH) asked him to render his account. He said: This wealth is for you (i.e. for the public treasury) and this is a gift presented to me. The Messenger of Allah (PBUH) said: You should have remained in the house of your father and your mother, until your gift came to you if you spoke the truth; then he addressed us. He praised God and extolled Him, and afterwards said: I appoint a man from you to a responsible post sharing with the authority that God has entrusted to me, and he comes to me saying: This wealth is for you (i.e. for the public treasury) and this is a gift presented to me. Why did he not remain in the house of his father and his mother and his gift came to him, if he was truthful? By God, any one of you will not take anything from the public funds without any justification, but will meet his Lord carrying it on himself on the Day of Judgment. I will recognize any one of you meeting Allah and carrying a growling camel, or a cow bellowing or a goat bleating. Then he raised his hands so

213. ABOŪ DĀWŪD SULAYMAN IBN ASH’ATH AZDI SIJISTANI, KNOWLEDGE, no. 3573, Vol. 1, bk. 24, translated in Univ. So. Calif., Center for Muslim-Jewish Engagement, available online at <http://cmje.org/> [hereinafter SUNAN ABOŪ DĀWŪD]. The Book on The Office of the Judge: KITAB AL-AQDIYAH, translated in <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/003.sbt.html>.

214. AL-QARDAWI, *supra* note 6.

215. *Id.*

216. Narrated by AL-ṬABARĀNĪ & AL-BZAR.

high that whiteness of his armpits could be seen. Then he said: O my Lord, I have conveyed Thy Commandments.²¹⁷

One Muslim scholar interprets this as saying that accepting gifts in order to be in a close relationship with state officers, rulers, judges, and decision makers is forbidden and is considered bribery.²¹⁸

3. The Prohibition of Bribery in *Ijm'a*

Muslim scholars are in favor of the bribery prohibition which was reported by the Prophet's (PBUH) Companions ("Sahaba")²¹⁹ in the Islamic state within the interpretation of the *Qura'nic* verse mentioned above, "They are fond of listening to falsehood, of devouring anything forbidden," mentioned above. By the same token, it has been reported that 'Alī ibn Abī Ṭālib said: "Al-Shot is bribery in ruling and governance..." Other Muslim jurists said²²⁰ that illegal earnings are bribery. Reslan is quoted in El-Shwakany's book *Nayl Al-Awtar* as saying that bribery is forbidden by consensus.²²¹

E. VARIOUS CORRUPTION-RELATED CRIMES IN ISLAMIC CRIMINAL LAW (TYPES OF BRIBERY)

In the Islamic criminal system, there are different forms of bribery. Each form has its own controlling rules and principles. According to certain doctrines, all such forms fall under one of four categories: bribery of judges and governors; bribery of mediators and intercessors; state bribery of others; and other bribes meant to lift injustice and unfairness. Accordingly, in order to get a better understanding of these corruption-related offenses in the Islamic criminal justice system, each is illustrated in the following section.

217. SAHIH MUSLIM, KNOWLEDGE, no. 4511, Vol. I, bk. 20; The Book on Government: KITAB AL-IMARA, *supra* note 200, at Chapter 7. *See also* SAHIH AL-BUKHARI, *supra* note 40; THE BOOK ON JUDGMENTS: KITAB AL-AHKAAM / CHAPTER 8: STATE OFFICERS GIFTS, Vol. 9, bk. 89.

218. MOHAMMAD IBN 'ALI EL-SHWAKANY, FATH AL-KADIR AL-GAME'A BIN FANY AL-RWAYA WA AL-DRAYA MN 'ILM AL-TAFSIR, Part I 188 (1834).

219. Vol. (8) at 309. Like 'ALĪ IBN ABĪ ṬĀLIB, 'UTHMAN IBN 'AFAAN, ABOŪ-HORAIRA, and MUJĀHID (RA).

220. Like AL-ĤASAN, QATĀDAH, IBRAHIM, and MUJĀHID (RA).

221. JAMIA'A TIRMIDHI (SUNAN AL-TIRMIDHI), *supra* note 126. Accordingly, it is clear that the Muslim community has agreed upon the prohibition of corruption and bribery through its competent representatives among the followers ("Tabi'een") of the Prophet (PBUH). AL-SHAWKANI, *supra* note 55. Reslan is one of the Muslim scholars of the early Islamic state illustrating bribery as the famous form of corruption in Islamic law.

1. Bribery of Judges and State-Governors

Because of the vital role played by judges and public prosecutors in the achievement of justice within the application of the equality principle between individuals, the judiciary represents one of the most fundamental positions in the Islamic state.²²²

Muslim scholars include within the category of “judges and state-governors” prosecutors, decision makers, rulers, and other public officials. This form of bribery consists of either paying bribes to hold a judicial position or to facilitate an illegal favorable ruling or judgment, especially in the form of gifts.²²³

Bribery to Obtain a Judicial Position

Muslim scholars agree upon the absolute prohibition “*Al-Horma Al-Motlaqa*” on obtaining a judicial position in exchange for bribes as it represents “eating up” property for vanity, lack of integrity, dishonesty, and abuse of confidence and trust. This prevailing opinion²²⁴ can be deduced from the following evidence.

First, ‘Abd al-Rahman ibn Samura said:

The Messenger of Allah (PBUH) said to me: ‘Abd al-Rahman, do not ask for a position of authority, for if you are granted this position as a result of your asking for it, you will be left alone without God’s help to discharge the responsibilities attendant thereon, and if you are granted it without making any request for it, God will help you in the discharge of your duties.²²⁵

Likewise, it is related by ‘Abdullah Ibn ‘Amr Ibn al-‘as that “The Apostle of Allah (PBUH) cursed the one who offers bribe as well as the one who accepts bribe.”²²⁶

Second, *Surat* (Chapter) *Al-Baqarah* verse 188 provides, “And do not eat up your property among yourselves for vanities, nor use it as bait for the

222. AL-QARDAWI, *supra* note 6.

223. HUSSEIN MADKUR, *AL-RASHWA FI AL-FIQH AL-ISLAMI MUKARNAN BELKANOUN [BRIBERY IN ISLAMIC JURISPRUDENCE: A COMPARATIVE ANALYSIS BETWEEN ISLAMIC LAW AND POSITIVE LAW]* (1984).

224. This opinion is widespread among the four *Sunni* schools of Islam, which are *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*.

225. SAHIH MUSLIM, KNOWLEDGE, no.4487, Vol. I, bk. 20 [The Book on Government: KITAB AL-IMARA / Chapter 3: Prohibition of a Desire for a Position of Authority and Covetousness Thereof], *supra* note 200.

226. ABOU DAWUD (SUNAN ABOU DAWUD), *supra* note 213.

judges, with intent that ye may eat up wrongfully and knowingly a little of other people's property."²²⁷

Therefore, within the context of honesty at all times, this *Surat* sounds another warning against usurping other people's possessions. The verse refers specifically to presenting false and fraudulent evidence before a judge or other arbiter in order to obtain a favorable judgment giving one the right to appropriate another's property.²²⁸ To reinforce the sense of deterrence, this warning follows immediately after reference to the bounds set by God and the call for more consciousness and fear of Him.²²⁹

Accordingly, judges should decide on the basis of "*prima facie*" evidence and the onus of honesty is on the litigants. They are left to their own conscience.²³⁰ Thus, we can see how this matter is also closely linked to righteousness ("*Taqwā*"), or the ideal of being God-fearing.²³¹ Judicial rulings should represent parts of a harmonious and divinely-ordained way of life, firmly bound together in a common framework of maintaining *Taqwā*.²³²

Bribes to Facilitate an Illegal Favorable Ruling or Judgment by Accepting Gifts

In this regard, Muslim scholars in their opinions on accepting gifts are diverse. Some state that it is legitimate for a governor or judge.²³³ Others say it is unlawful for a judge or state-governor ("*Imam*" or "*Wali*") to

227. *Surat* (Chapter) Al-Baqarah, II: 2, *supra* note 125.

228. AL-QARDAWI, *supra* note 6.

229. *Id.* Commenting with this verse, Ibn Kathir cites a report by 'Ali ibn Abi Ṭalḥah who quotes Ibn 'Abbās, a cousin and companion of the Prophet (PBUH), as saying that the verse refers to someone owing money to another. Knowing that the creditor has no document to prove the debt, the debtor denies liability altogether. He would then put the matter before a judge, knowing very well that he is in the wrong, taking what is unlawful to him, and has no case whatsoever. He adds that Muḥāhid, Sa'id ibn Jubayr, 'Ikrimah, Al-Ḥasan, Qatādah, Al-Suddi, Muqātil ibn Ḥayyān, and 'Abd al-Rahmān ibn Zayd ibn Aslam have all warned against contesting a dispute when one knows oneself to be in the wrong. Ibn Kathir also refers to accounts in Al-Bukhārī and Muslim in which Umm Salamah quotes the Prophet (PBUH) as saying:

I am only human. When you come to me for judgment, some of you may have a clearer piece of evidence, and I might be inclined to rule in their favor. If I give someone anything which is not rightly his, it would be as if I have given him a brand of fire; it is up to him to take it or leave it.

SAHIH MUSLIM, *supra* note 200 & SAHIH AL-BUKHARI, *supra* note 40.

230. *Id.*

231. *Id.*

232. *Id.* This makes Islam a potent and well integrated system which cannot be fragmented or disconnected, taking some parts of it and discarding others. That would be a gross transgression and a most vile offense against God.

233. El-Hagry, *supra* note 10.

accept a gift.²³⁴ *Surat* (Chapter) *Al-'I ['O]mran* verse (161) reads, "It does not behoove a Prophet to act dishonestly, for he who acts dishonestly shall be faced with his dishonesty on the Day of Resurrection. Everyone will then be paid in full what he has earned, and none shall be wronged."²³⁵

The *Surat* refers again to the moral qualities associated with the Prophet (PBUH) to stress the importance of honesty and to forbid deceit and cheating. It reminds people that they will be held accountable for their deeds and that everyone will be given their fair reward.²³⁶

The Prophet (PBUH) is reported to have said, "Anyone who does an assignment for us and conceals even a needle, or anything bigger, acts dishonestly. He will be faced with his dishonesty on the Day of Judgment."²³⁷ In the same vein, the Prophet said:

A black man from the Anṣār [whose name is, according to Mujāhid, Sa'd ibn 'Ubādah] said: "Messenger of God, accept from me what you have assigned to me." The Prophet (PBUH) said: "What do you mean?" He said: "I have heard what you have just said." The Prophet (PBUH) said: "And I repeat it entirely: Whoever does an assignment for us, let him bring it all,

234. *Id.*

235. THE QUR'AN, *supra* note 39, at *Surat* (Chapter) *Al-'I ['O]mran*, III: 3 Verse 161.

236. One of the reasons which tempted the archers in the Battle of Uḥūd to abandon their positions on top of the hill was that they feared that the Prophet (PBUH) might not give them a share of the spoils of war *Ghanima*. *Ghanima* is "the share of the Islamic state in the proceeds of war." Some of the hypocrites had earlier suggested that a portion of the spoils of war the Muslims collected at Battle of Badr had disappeared. They were so impudent as to even mention the Prophet (PBUH) by name in this connection. Here, the *Surat* delivers a general statement which makes it clear that no prophet could ever act dishonestly. No prophet would take money or a portion of the spoils for himself or his family, or give one section of the army more of the spoils than another, or commit any deceitful action whatsoever: "It does not behoove a prophet to act dishonestly." This is inconceivable. Dishonesty is against the very nature of prophet hood; it is repugnant to all prophets. The use of the negative here does not mean that it is not lawful for a prophet to act dishonestly, but to make it plain that it is both inconceivable and impossible that a prophet would ever do so. A prophet is by nature honest, just and well-contented. Hence, to be dishonest is to act against his own nature. It is perhaps useful to add that according to the reading of Imām Al-Ḥasan Al-Baṣri of this verse, the passive voice is used here, which means that it is totally unlawful that a prophet should be deceived, or that his followers allow themselves to hide something from him. This interpretation fits perfectly with the rest of the verse. Those who are dishonest and try to take something which belongs to the public treasury, or keep for themselves what booty they may be able to lay their hands upon, are issued this fearful warning: "He who acts dishonestly shall be faced with his dishonesty on the Day of Resurrection. Everyone will then be paid in full what he has earned, and none shall be wronged."

237. SAHIH MUSLIM, *supra* note 200; ABOŪ DĀWŪD (SUNAN ABOŪ DĀWŪD), *supra* note 213.

big or small. Let him take what he is given and leave alone what he is not given.”²³⁸

The above *Qur’anic* verse, in conjunction with the Prophet’s (PBUH) *hadiths*, has worked wonders in the molding of the Muslim community. Further, the worldwide Muslim community is unique in the value it attaches to honesty and the repugnance with which it views corruption, deceit, and cheating.²³⁹

For example, an ordinary Muslim may, in war, lay his hand on something valuable when no one is watching him.²⁴⁰ If he does, he should take it to his commander, entertaining no thought of keeping it for himself, so that he does not expose himself to what this *Qur’anic* verse says, and so that he does not meet the Prophet (PBUH) on the Day of Resurrection in such a shameful condition.²⁴¹ A true Muslim would not like to imagine himself coming face to face with the Prophet (PBUH) and standing in front of God, as the Prophet (PBUH) has described. This is the reason for his scrupulous nature,²⁴² because the hereafter is part of Muslim reality, not a remote promise or threat. Muslims entertain no doubt that everyone will be rewarded for what he does, and that everyone will be paid in full what they earn.²⁴³

All in all, it is obvious that the accepting of gifts by the state-governor is forbidden and *Haram* in whole.²⁴⁴ As for judges, some scholars permit gifts from individuals, irrespective of family and tribal considerations,

238. *Id.* See JA’FAR MUHAMMAD IBN JARIR AL-TABARI. He was a prominent and influential scholar and exegete of the *Qur’an* from Persia. His most influential and best known works are his (“*Tarikh Al-Rusul wa Al-Muluk*”) often shortened to (“*Tarikh Al-Tabari*”) and (“*Tafsir Al-Tabari*”). In his comprehensive book on (“History”), Al-Ṭabari reports that when the Muslims conquered Al-Madā’in and collected the spoils of war, a man came with something to give to the one in charge of those spoils. He and his assistants said:

“We have never seen anyone like this man. None of our people can be compared to him.” They asked him: “Have you taken any part of it for yourself?” The man answered: “By God, had it not been for my fear of God, I would not have given it to you.” They asked him his name, but he said: “I am not telling you or anyone else my name in order to be praised. I praise God and I am content with His reward.” When he left, they sent one of them to follow him until he arrived in his camp. He enquired about him and they learnt that he was called Āmir ibn ‘Abd Qais.”). Moreover, after the Battle of Qādisiyyah, the spoils of war were sent to ‘Ummar (RA) in Madinah. Included in them was the crown of the Persian Emperor and his throne. They were priceless. ‘Ummar (RA) looked at them happily and said: (“Soldiers who tender this to their ruler are certainly honest.”).

239. El-Hagry, *supra* note 10.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

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who have no case before them in the present or past.²⁴⁵ Other jurists claim that it is preferable for a judge not to accept any gifts at all in order to prevent the appearance of impropriety, including nepotism, favoritism, or partiality as kinds of bribery.²⁴⁶

2. Bribery of Mediators and Intercessors

In the bribery of mediators and intercessors there are two parties, the mediator bribee and the briber. Each party is dealt with through rules clarified by Muslim scholars. To clarify my analysis, I focus on the following two sets of inquiries.

Muslim jurists differ widely in how they regard the mediator bribee when he receives a gift from the briber by achieving his own interest through an order by the prince “under compulsion (“*Ikraah*”) of the *Sultan*,” which is called in contemporary legal systems “trading in influence.”²⁴⁷

The *Hanbili* School stated that it is forbidden for the mediator to receive any kind of gifts in order to negotiate with the *Sultan*.²⁴⁸ By and large, the reason for this prohibition is the general principle in Islamic law that there shall be “no salaries, wages or gifts for the achievement of the public interests.”²⁴⁹ Mediation or negotiation was considered a public interest connected to the benefit of the whole Muslim community in the early Islamic state.²⁵⁰

Maliki jurists argue that any gifts received by a mediator are unlawful. They say it depends on the efforts achieved by the mediator in order to realize the benefit.²⁵¹ They argue that trading in influence is forbidden (“*Haram*”) as it neither requires making any effort nor is it used in achieving illicit acts.²⁵² On the other hand, if the mediator puts forth a lot of effort it is legal for him to receive a gift—whether monetary or otherwise—for which the benefit has been realized and the gift is considered a salary or wage.²⁵³

245. *Id.*

246. *Id.* Similarly, accepting gifts is permitted to *Muft'i* and religious teachers for their role in preparing students in a good manner unless it includes any intention of, for instance, achieving something illegal concerning the students' grades.

247. *Id.*

248. FAHMI & BASSIOUNI, *supra* note 180.

249. *Id.*

250. El-Hagry, *supra* note 10, at 54-55.

251. *Id.*

252. *Id.*

253. *Id.*

Hanafi and *Shafi'i* scholars, which hold the predominant opinion, state that if the mediator knowingly and purposely asks for gifts to achieve a forbidden *Haram*, it is unlawful.²⁵⁴ In contrast, if the mediation required considerable effort it is permitted.²⁵⁵ *Surat* (Chapter) *Al-Māi'idaha* verse 2 says "...but rather help one another in furthering righteousness and piety, and not help one another in furthering evil and aggression...."²⁵⁶ Besides, the Prophet (PBUH) said: "Support your brother, whether he is the victim or the perpetrator of injustice."²⁵⁷

Hanafi jurists agreed upon the prohibition of receiving a bribe if the purpose for giving it is deception ("*Batil*") or asking for a certain legal right.²⁵⁸ In contrast, they are in favor of finding it lawful to receive a gift as long as there is no connection.²⁵⁹ Sayyidina Aboū-Hourairah (RA) reported that, "Allah's Messenger (PBUH) borrowed a young camel. He returned a better, younger camel young. He said, 'The best of you are those who repay debts in an excellent manner.'"²⁶⁰

3. State Bribery "International Bribery"

This category of bribery comprises three different cases in which the state itself pays a bribe. First are truces ("*Hou'dna*" or "*Mousal'hah*"), which the *Shafi'i* School permits only in the case of necessity.²⁶¹ The legitimacy of this belief emerges from the following *Qur'anic* verses: "...slay the idolaters wherever you find them, and take them captive, besiege them, and lie in wait for them at every conceivable place,"²⁶² and,

254. *Id.*

255. *Id.* at 55-56.

256. *Surat* (Chapter) *Al-Māi'idaha*, *supra* note 125, at Verse 2. Commenting on this verse, It is a great divide that separates a community governed by such blind loyalty, fanaticism, and a community governed by a constitution stating in *Surat* *Al-Baqarah*, II: 2 Verses 2, 149 ("And from whatsoever place you come forth, turn your face towards the Sacred Mosque; and surely it is the very truth from your Lord, and Allah is not at all heedless of what you do."). That great divide was removed by the only force that could remove it, namely, Islam.

257. SAHIH MUSLIM, *supra* note 200; SAHIH AL-BUKHARI, *supra* note 40.

258. El-Hagry, *supra* note 10.

259. *Id.*

260. JAMIA'A AL-TIRMIDHI (SUNAN AL-TIRMIDHI), *supra* note 126; SAHIH AL-BUKHARI (2305), *supra* note 40; SAHIH MUSLIM (160), *supra* note 200, at chapter 75 [The Book on Buying and Selling; KITAB AL-BA'IE' WA AL-SHERA'A: Borrowing a Camel or any other Animal] *Hadith* 1320. In contrast, the *Maliki* and *Shafi'i* doctrines absolutely permit receiving gifts whether before or after the achievement of benefit and whether the giver required it or not in order to gain a legal right or abstain unfairness or injustice. For further details, *see infra*.

261. BASSIOUNI, *supra* note 33, at 192. Necessity in Islamic law is a state that makes a person violate the law in spite of himself to prevent an inescapable evil befalling him, even though it is in his power not to transgress the law and allow the evil to befall him or someone else. *Sharie'a* law exempts such a person from penalty.

262. THE QUR'AN, *supra* note 39, at *Surat* (Chapter) *Al-Tawbah*, III: 9 Verse 5.

Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the religion of Truth, even if they are of the People of the Book, until they pay the *Jizyah* with willing submission, and feel themselves subdued.²⁶³

The instructions in these verses were issued to the Prophet (PBUH) and Muslims to extend a hand of welcome to those idolaters with whom they had been at war should the idolaters turn to God in repentance.²⁶⁴ Such repentance should be genuine, confirmed by their observance of the main duties of Islam.²⁶⁵ That is because God never rejects anyone who turns to Him in sincere repentance, no matter how great his sins are: "For God is much forgiving, merciful."²⁶⁶

On the other hand, the *Maliki* doctrine absolutely permits truces even if there is no necessity if the *Imam* discerns that public interest requires it. However, the truce should not include any false conditions ("*Shrt Fased*")²⁶⁷ or it becomes unlawful. *Surat Al-Anfāl* verse 62 reads: "But if the enemy inclines towards peace, do thou also incline towards peace, and trust in Allah: for He is One that heareth and knoweth all things."²⁶⁸

The Prophet Muhammad (PBUH) said:

'Some of God's servants who are neither prophets nor martyrs shall have on the Day of Judgment a position very close to God that prophets and martyrs would love to have.' His Companions said: 'Messenger of God, will you please tell us who these people are.' He said: 'These are people who love one another for the sake of God only. They have no relation of kinship or business interests with one another. By God, their faces are radiant with light, and they have light. They shall experience no

263. *Id.* at Verse 29.

264. El-Hagry, *supra* note 10.

265. *Id.*

266. See SAYYID QUTB, *FI DHILAL AL-QURA'N [IN THE SHADE OF THE QUR'AN]*, Vol. VIII, *Surat 9* at 100-107.

267. See e.g. ABOŪ AMRAN MUSA OBEIDALLAH AL-KORTOBI, BEIDAY'T AL-MOU'JTAAHED WA NEIHAY'ET AL-MOUKTASED 399 (8th ed.). For example, if they require that a prisoner of war "*asir*" be in their hand or if they ask for a remote Islamic region to be under their possession.

268. *Surat* (Chapter) *Al-Anfāl*, VIII: 8, *supra* note 170, at Verse 66. When God instructed Prophet Muhammad (PBUH) to accept the state of non-belligerency from any community which offered him it and to incline to peace whenever they so inclined, He also directed him to rely on Him and place his trust in Him. He further reassured him that He knows precisely what all people hide as guarded secrets: "If they incline to peace, then incline you to it as well, and place your trust in God. He alone hears all and knows all." *Id.* at Verse 61.

fear or sadness when other people are overtaken by fear and sadness.²⁶⁹

God's Messenger (PBUH) made several statements on this point. His actions confirm that such love and unity constitutes an essential factor in his message.²⁷⁰ The community that he built on the basis of love provides the best proof that such love was not merely flowery words or idealistic actions by a few individuals.²⁷¹ It was a firmly established reality that came into being by God's will. It is only He who can bring about such a real unity of hearts.²⁷²

Next is the case of giving to those whose hearts are to be won over ("Al-I'taa Li Ta'lief Al-Kolub") in which *Surat* (Chapter) *Al-Tawbah* verse 60 recites:

Charitable donations are only for the poor and the needy, and those who work in the administration of such donations, and those whose hearts are to be won over, for the freeing of people in bondage and debtors, and to further God's cause, and for the traveller in need. This is a duty ordained by God, and God is All-knowing, Wise.

Thus, *Zakāh*, (charitable donations), occupies an important position in Islamic law and the Islamic social system.²⁷³ *Zakāh* is to be given as neither a favor nor a gift.²⁷⁴ Its amount is properly levied.²⁷⁵ It is a major

269. ABOŪ DĀWŪD (SUNAN ABOŪ DĀWŪD), *supra* note 213. The Prophet (PBUH) also said: "When a Muslim meets his Muslim brother and they shake hands, their sins shall fall off just like leaves fall off a dry tree on a windy day. Their sins shall be forgiven them, even though they appear to be as huge as sea foam." [Related by ABOŪ AL-QASIM SULAIMAN IBN AHMAD IBN AL-TABARANI]. Also, *Maliki* confirmed that in which the Prophet (PBUH) make a truce with the unbelievers in ("*Sulh Al-Hudyyibeia*."). In the contrast, *Hanbili* scholars had forbidden truce in whole if it includes giving money to the unbelievers.

270. AL-KORTOBI, *supra* note 267.

271. *Id.*

272. *Id.*

273. EGBERT HARMSSEN, ISLAM, CIVIL SOCIETY, AND SOCIAL WORK: MUSLIM VOLUNTARY WELFARE ASSOCIATIONS IN JORDAN BETWEEN PATRONAGE AND EMPOWERMENT 174 (2008). See also VIRGINIA B. MORRIS & BRIAN D. INGRAM, GUIDE TO UNDERSTANDING ISLAMIC INVESTING IN ACCORDANCE WITH ISLAMIC SHARIAH 12 (2001); MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE 106 (2001).

274. Taman, *supra* note 189, at 488-490 (explaining the notion of *Zakāh* as one of the clearest manifestations of Corporate Social Responsibility in Islam and the eligibility of the Muslim to pay *Zakāh* from his/her wealth under Islamic law).

275. The basis of the Islamic system is work, in all its various ways. It is the duty of the Muslim state to make sure that anyone who is able to work has a job. It should provide training opportunities, and it should take the necessary measures for job creation. Furthermore, it should ensure that those who work receive fair wages. Those who are able to work have no claim to *Zakāh*, because *Zakāh* is a social security tax that functions between those who are able and those who are deprived. The state administers its collection and distribution when any society runs its affairs on the basis of Islam,

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Islamic duty that can be discharged either by directly allocating the money to one of the uses designated by Islamic law or by simply allocating the money to the public treasury (“*Beit Al-Mal*”)²⁷⁶ to spend on particular social services. The one who gives it does not hold a favor for doing so, and the beneficiary does not have to beg for it.²⁷⁷

The group of *Zakāh* beneficiaries are the poor and needy.²⁷⁸ The poor are those who have less than what they need to live on.²⁷⁹ The needy are in the same position, but they do not show their need or ask for help. (“And those whose hearts are to be won over.”) This description applies to several groups of people.²⁸⁰ Among them may be people who are newcomers to Islam, who it is believed may be helped to consolidate their conviction of its truth. Also included in this category are those whom Muslims hope to win over to the faith.²⁸¹ Similarly, it also includes

putting God’s law into effect, seeking no law or social system other than that devised by God. In other words, *Zakāh* is an obligatory religious tax, calculated annually on a minimum of possessions at a fixed rate paid to assist the poor. For a full account of discussion of *Zakāh* system in Islam, see QUTB, *supra* note 266, at 153-156. See also ANGELA WOOD, RELIGION FOR TODAY: ISLAM FOR TODAY 24 (2008).

276. In other words, “Islamic State Exchequer.” It was first established by Prophet Muhammad (PBUH) and was then further developed at the time of the *Caliph* ‘Ummar ibn al-Khittab. The idea of (“*bitul mal*”) is similar to that of an insurance company. It was the revenues of the state were collected and where any citizen facing a financial crisis found sanctuary. It was the one of the first social solidarity institutions in the world, and also served for the redistribution of wealth to achieve a balance between the rich and the poor and to diminish the gaps between the classes of society. See generally EDWIN E. HITTI, BASIC MECHANISMS OF ISLAMIC CAPITALISM IV (2007). It constituted a pool where all taxes were collected and spent whenever a citizen needed financial help. As for those who were entitled to receive money from this institution, the Holy *Qur’an* defines them in this verse: “Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the cause of Allah, and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom.” *Surat* (Chapter) Al-Tawbah, IIIX: 9, *supra* note 262, at Verse 60.

277. Mandatory Financial Obligation on Muslim (“Purification/Alms”). It is one of the five fundamental pillars of Islam, and its observance distinguishes true believers from mere nominal Muslims, as it represents a behavior required by Muslims to demonstrate their faith and devotion to God. In practice, *Zakāh* is an amount of money paid by Muslims at the end of the year as an obligatory donation to the needy and vulnerable members of society, in particular orphans, widows, and the elderly, who can no longer work and provide for themselves. Muslim society is divided into two halves: one half is obligate to give *Zakāh* and the other entitled to take it. What determines whether a Muslim belongs to the half that gives or the half that takes is whether he or she possesses the (“*Sahib el-Nisab*”: “wealthy person”). It is not necessarily have to be paid in money; it can be paid in the form of agricultural products, specifically in the form of food for the hungry. Thus, *Zakāh*, or charitable donations, occupies an important position in Islamic law and the Islamic social and economic justice system. *Zakāh* is to be given as neither a favor nor as a gift. Its amount is properly levied. Accordingly, it is a major Islamic duty that can be discharged either by directly allocating the money to one of the uses designated by Islamic law or by simply allocating the money to the public treasury (“*Beit Al-Mal*”: “Public Treasury”) to spend on particular social services. The one who gives it does not hold a favor for doing so, and the beneficiary does not have to beg for it.

278. MORRIS & INGRAM, *supra* note 273.

279. *Id.*

280. WOOD, *supra* note 275.

281. USMANI, *supra* note 273.

people who have already become Muslim, but may be given *Zakāh* to win over some of their colleagues and friends who may start to think about Islam when they see that those who have become Muslim are being given gifts.²⁸²

There are differences among scholars²⁸³ as to whether this category of beneficiaries still exists, because Islam is already firmly established. However, given the nature of the Islamic system and the various situations in which the Muslim community may find itself, there may often be a need to pay this form of *Zakāh*.²⁸⁴ The purpose may be either to strengthen converts' resolve to follow Islam, if they are being subjected to discrimination on account of having adopted Islam, or to help potential converts form favorable ideas about Islam.²⁸⁵ This may apply to people who are not Muslim themselves, but may render some service to Islam by speaking favorably of it in their own circles.²⁸⁶

The third case of state bribery is described in *Surat* (Chapter) *Al-Nisā'* verse 141: "...And never will Allah allow the unbelievers a way to win a complete triumph over the believers." Some suggest that this verse applies to the Day of Resurrection, when God will judge the believers and the non-believers.²⁸⁷ At that point, the non-believers will have no means of scoring a triumph against the believers.²⁸⁸ Others suggest that the statement applies in this life, whereby God will never give the unbelievers a chance to eradicate the believers, although they may at times score a victory against the Muslims in some battles.²⁸⁹ Therefore, Muslim scholars are in favor of the prohibition of giving money from believers to non-believers.²⁹⁰

4. Bribes to Lift Injustice and Unfairness

The prevalent perspective among Muslim scholars—*Hanafi*, *Maliki*, *Shafi'i*, and *Hanbili*—is that it is permitted to pay a bribe in order to

282. QUTB, *supra* note 266, at 154.

283. EL-HAGRY, *supra* note 10, at 62.

284. *Id.* at 63-64. See also MADKUR, *supra* note 223, at 427-433.

285. *Id.*

286. *Id.* This is the predominant opinion among Muslim jurists, in particular *Shafi'i*, *Hanbili*, and some *Maliki*.

287. *Id.*

288. QUTB, *supra* note 266.

289. *Id.* at 65. THE QUR'AN says, "If two parties among the believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye all against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair and just." THE QUR'AN, *supra* note 39, at *Surat* (Chapter) *Al-Hujuraat*, XLIX: 49 Verse 9.

290. *Id.*

obtain a right or benefit unlawfully or unjustly taken away. This applies only in the case of necessity “where a person has to violate the law in spite of himself to prevent an inescapable evil befalling him, even though it is in his power not to transgress the law and allow the evil to befall him or someone else.”²⁹¹ *Sharie’a* exempts such a person from penalty because all of the other legitimate means failed to repeal the aggression and the unfairness was realized. For example, if the individual must protect his religion, family, dignity, honor, and property.²⁹²

Muslim jurists consider the legality of this kind of bribery as representing an application of a basic Islamic law principle which permits prohibited acts when necessary. The situation is then evaluated by its importance (“*Al-Darourat Tobei’h Al-Mahzourat wa Toukader Bekaderha*”).²⁹³ Moreover, *Surat Al-Baqarah* verse 286 reads: “God does not charge a soul with more than it can bear.”

It is within this framework of divine mercy and justice that a Muslim views—with total confidence and satisfaction—his obligations as God’s vicegerent on earth, the challenges he faces in fulfilling those obligations, and the ultimate reward he receives.²⁹⁴ He is content in the belief that God is fully aware of his abilities and limitations, and will not overburden him or subject him to any duress or coercion.²⁹⁵ Not only does this fill a believer’s heart with contentment and peace of mind, but it also inspires him to discharge his duties to the best of his ability.²⁹⁶ He

291. YOUSSEF KASSEM, NAZARYIT AL-DAROURA [THEORY OF NECESSITY] 271 (1993). See also BASSIOUNI, *supra* note 33, at 192. Examples of this abound: (“But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then he is guiltless.”) and (“He has explained to you in detail what is forbidden to you except under compulsion of necessity.”). Therefore, if a man or woman is forced to commit adultery and the conditions for necessity obtain, neither is punished. In this context, it has been reported that ‘Abduallah ibn Maso’ud when he was at *Habash’a* gave a bribe in order to get out of prison. See THE QUR’AN; *Surats* (Chapters) Al-Baqarah, II: 2, *supra* note 125, at Verses 2, 173; Al-An’aam, VI: 6, *supra* note 105, at Verses 119, 145; An-Nahl, XV: 16 Verse 115; An-Nour, V: 24, Verse 31; SAHIH MUSLIM, *supra* note 200.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* THE QUR’AN says, “Allah does not charge a soul except [with that within] its capacity. It will have [the consequence of] what [good] it has gained, and it will bear [the consequence of] what [evil] it has earned. Our Lord, do not impose blame upon us if we have forgotten or erred. Our Lord, and lay not upon us a burden like that which You laid upon those before us. Our Lord, and burden us not with that which we have no ability to bear. And pardon us; and forgive us; and have mercy upon us. You are our protector, so give us victory over the disbelieving people.” *Surat* (Chapter) Al-Baqarah, II: 2, *supra* note 125, at Verse 286.

296. *Id.* Those who give in to powers other than God’s, except those people subjected to duress or coercion, have only themselves to blame and shall have to face the full consequences of their actions. On the Day of Judgment, no one shall intercede on behalf of anyone else, and everyone shall stand alone to face God’s judgment. This inspires healthy individualism, spurring every member of society to fulfill his or her obligations towards the community, which derive from their obligations towards God. Individuals are obliged to share their wealth, labour and wisdom, and the

is fully aware that any weakness he may experience is not because the task is excessive, but due to his own shortcomings, and this, in turn, motivates him to strengthen his resolve and strive for excellence in his actions.²⁹⁷

F. ELEMENTS OF BRIBERY AS A CRIMINAL OFFENCE IN ISLAMIC PENAL SYSTEM

The fundamental question is: what is the *actus reus* and the *mens rea* required for the commission of bribery in Islamic criminal legal system?

1. The Actus Reus²⁹⁸

The ordinary model of a criminal offense in all legal systems, including Islamic criminal legal systems, is that a person commits all the constituent elements of a crime. Hence, this section discusses the Islamic law elements of bribery, which may be positive, in the form of commission, or negative, in the form of omission. The object of the bribe, and the purpose of the act committed by the bribee, will also be demonstrated.

(a) The Criminal Activity

As a general principle in Islamic criminal law, in the purely psychological stage of the criminal project, the idea of the offense is born and may harden into a resolution or an internal determination to commit it before an overt act has been done. This stage falls altogether outside the scope of criminal law.²⁹⁹ Criminal law has nothing to do with what the individual internalizes—it is not concerned with any stage prior to tangible activity such as mere desires, intentions, and resolutions.³⁰⁰ Therefore, it is unanimously admitted among Muslim jurists that there

responsibility to bring about good and fight evil and falsehood, and earn their respective reward individually and directly from God Almighty. Also, the Prophet (PBUH) stated:

(“Allah has forgiven my nation “*Ummah*” on error, forgetting, and what they have been forced to do.”). SAHIH AL-BUKHARI, *supra* note 40; SAHIH MUSLIM, *supra* note 200.

297. *Id.*

298. In other words, the material element of the crime in Islamic criminal law is an act or say in which constitutes a serious harm and mischief to the public social order, morals, and interest of the whole community in which the offender commits what is forbidden (“*Haram*”) by the legislator (“Allah”) or abstaining from what he permits or required to do (“*Halal*”).

299. SAHIH AL-BUKHARI, *supra* note 40, at Vol. 7, bk. 63 [The Book on Divorce: KITAB AL-TALAQ], KNOWLEDGE, no. 194.

300. *Id.* In other words, there are no criminal punishments ‘*may be moral*’ if the prohibited acts—as intentions evaluated by God—have not converted to tangible or material acts in which constitutes harm of the public interest of the whole community. It has been reported by Aboū-Hourairah that the Prophet (PBUH) said, “Allah has forgiven my followers the evil thoughts that occur to their minds, as long as such thoughts are not put into action or uttered.”

shall be no offence in the absence of external activity on the part of the offender. The offender's activity reflects what took place within his or her psyche.³⁰¹

Accordingly, bribery in Islam is "giving or accepting the bribe agreed upon [by] both briber and bribee for whatever purpose."³⁰² It is not sufficient to promise to give the bribe to the bribee because this would only be the crime of attempted bribery, discussed later.

(b) Object of Bribery (Consideration)

Anything of value presented for any purpose represents an essential part of the *actus reus*. Bribes may take various forms, including cash and monetary instruments,³⁰³ so that almost any form of direct or indirect benefit could constitute a bribe. The value of the bribe does not matter.³⁰⁴ There are virtually no limitations on what can be construed as "anything of value," because what may be significant in terms of value could be perceived quite differently from persons of differing means. Therefore, value may depend upon the circumstances.³⁰⁵

(c) Purpose of Bribery "To Assist in Obtaining or Retaining Business"

Generally speaking, it is not sufficient for the realization of this crime in Islam that the bribe is taken or received from the briber or under the request of the bribee.³⁰⁶ Another element is that there must be a purpose for the bribe. For instance, obtaining or retaining business for or with, or directing business to, a person; influencing an official act or decision; inducing a person to do or omit to do any act in violation of his or her

301. MADKUR, *supra* note 223.

302. See *supra* Text, at 188-190. And the other concepts stated before among the Muslim scholar. As a result, giving or accepting bribes represent the act of the criminal activity and the realization of the briber's benefit considers the criminal result in which both criminal conduct and criminal result has a direct causal link between them in defining offender's criminal liability.

303. MADKUR, *supra* note 223, at 217, 570-572. As for example, giving a loan to public official is prohibited if it is presented for the purpose of retaining or abstaining from some thing or benefit, as in such an event it will considers a disguised bribery and a form of usury "*riba*" at the same time in which both are forbidden in Islam. Furthermore, it is prohibited on a public servant or a judge to borrow from individuals as it considers bribery. In Islamic law, it is not accepted for the judge to borrow cash or buy some property from somebody less than its real value. Moreover, it is preferable to the judge not to control selling and buying transactions and hire an agent for doing these sorts of transactions in order to prevent any unexpected relation might create nepotism or favourism. See Taman, *supra* note 189 (explaining the commercially prohibited activities under Islamic Law including Usury: "*Al-Riba*") at 496-498.

304. *Id.* at 222. It may be huge or trivial. On the other hand, this might include a benefit to a family member or a right or ability to designate to whom a benefit is directed.

305. *Id.*

306. *Id.*

lawful duty; or to influence any government act or decision; or securing any other improper purpose.³⁰⁷

(d) Attempted Bribery

Muslim jurists agree that there shall be no criminal attempt until there has been a sufficient step on the way to the commission of the offense. This is not always an easy matter to prove.³⁰⁸ In the preparatory stage, the offender goes some steps further towards the commission of the offense; as he/she prepares to set the criminal thought into motion.³⁰⁹ According to the general principle in Islamic law, it is unanimously accepted by Muslim jurists that preliminary acts leading to the commission of a prohibited act are forbidden (“*Al-Waseila il’a Al-Haram Haram*”).³¹⁰

On the other hand, the commencement of the execution stage is considered a sin or fault and punishable by *Ta’azir*.³¹¹ Thus, any attempted criminal act that is forbidden is penalized by *Ta’azir*.³¹² Accordingly, does the commission of bribery without its consummation represent a punishable attempted bribery offense in Islamic criminal law? To determine this, Muslim writers, jurists, and scholars distinguish whether the offender’s non-completion of the bribe was voluntary or involuntary.

Abandonment offers relief from liability only when it is due to the purely internal will of the would-be offender, without any external constraint on his decision.³¹³ This means that he could have gone further and completed the offense, but preferred of his own free will not to do so.³¹⁴ Motives in this case are immaterial; he might desist from fright or a

307. *Id.*

308. See HANAN MOHAMMAD MALIKA, *GRA’EM AL-FASAD: AL-RASHWA WA AL-AKHTELAS WA TAKSOUB AL-MOUAZAF AL-’AMM MN WAR’A WAZIFATO FI AL-FIQH AL-ISLAMI WA KANOUN MOUKAFAHT AL-FASAD AL-GAZA’RI MOUKARNN BEBA’D AL-TESHRIA’AT AL-’ARABIYA [CORRUPTION CRIMES: BRIBERY, EMBEZZLEMENT OF PUBLIC FUNDS, AND TRADING IN INFLUENCE IN ISLAMIC JURISPRUDENCE AND THE ALGERIAN COMBATING LAW ON CORRUPTION COMPARED WITH SOME ARABIC LEGISLATIONS]* 51-60 (2010).

309. *Id.* at 53.

310. MADKUR, *supra* note 223, at 226-227. Muslim scholars do not recognize a specific general theory of attempted crimes but do distinguish consummated and non-consummated offenses.

311. *Id.* at 227. For further discussion about *Ta’azir* offenses and punishments under Islamic criminal justice system, see *supra* at pp. 192-195 & 203.

312. *Id.* at 231.

313. *Id.*

314. *Id.* (“We support—in favor with Muslim scholars—that the acts constitute the commencement of execution in which it is committed by one of the bribery’s parties in which the crime is not consummated irrespective of the abandonment is voluntarily or involuntarily represents a crime of attempted bribery in which the accused shall be punished leniently rather than in the case of consummated offences.”)

sudden repentance or out of pity for the intended victim.³¹⁵ In this sort of abandonment, Muslim scholars agree on punishing the offender under *Ta'azir* and taking into consideration the circumstances of the crime, its nature, and the personality of the offender.³¹⁶

If the abandonment is involuntary, the offender shall be liable for attempt.³¹⁷ Involuntary abandonment is one which is due to reasons independent of the will of the offender.³¹⁸ This entails some obstacles the offender faced which interrupted his conduct or made it fail.³¹⁹ Muslim jurists favor punishing this sin as an attempted crime under *Ta'azir*.³²⁰

In summation, preparatory acts such as gathering cash or talking indirectly to the person to be bribed are considered attempt crimes, although they are not considered sins *per se* because they do not cause any harm to the rights of third parties. As a result, there is no sin to be punished if the offender's abandonment is voluntary.

Regarding secondary participation in bribery under Islamic law, participation entails some involvement in the offense that does not amount to primary responsibility.³²¹ Under the Islamic penal system, it goes without saying that there shall be no complicity without a punishable principal act being committed.³²² Therefore, Muslim scholars state that the prohibition of Haram includes a prohibition of being an accomplice.³²³ The penalty prescribed for bribery is stricter for the bribee than for accomplices.³²⁴ Accordingly, Muslim jurists treat accomplices to the crime of bribery—the mediator and the beneficiary—as principals in addressing both criminal punishment and criminal accountability.³²⁵

315. *Id.*

316. The offender in this situation could be punished by a lenient *Ta'azir* penalty such as blame or reproach.

317. *Id.*

318. *Id.*

319. For instance, if he meets some resistance on the part of the victim or another or a third party intervenes by holding, for example, the hand of the would-be aggressor.

320. *Id.*

321. *Id.*

322. Consequently, if no such act is proved to have been committed, there can be no act of criminal complicity.

323. *Id.*

324. *Id.* at 293-295.

325. *Id.*

2. The Mens Rea³²⁶

As in all forms of criminal intent, the offender's criminal intent is composed of two elements: knowledge of all elements constituting the offense and a will directed towards their realization. Both elements of knowledge and free will without compulsion must be realized for criminal intent to exist; otherwise, the *mens rea* will collapse.³²⁷

Culpability is determined by the intent rather than the actions of the briber, i.e. (volition of some official duty in order to be "corrupt").³²⁸ There is no requirement that the bribe actually be paid but rather that the bribee have the intention of being corrupted by the briber by either benefiting from doing an illegal act or abstaining from a legal one. Accordingly, intent can be inferred from the objective factual circumstances, and the use of circumstantial evidence is permitted.³²⁹

Having presented the necessary background on Islamic law and how it characterizes corruption and bribery as grave crimes, the next section deals with the issues of proving bribery as a criminal offense under the Islamic criminal rules of evidence and its punishment as a *Ta'azir* crime. Further, it explores other methods of combating corruption in *Sharie'a* and in modern Muslim countries.

IV. PART FOUR: IS CORRUPTION THROUGH BRIBERY A SERIOUS MATTER IN ISLAM?

An Islamic state has to protect four individual freedoms. These freedoms are (1) life, (2) religion, (3) acquisition and ownership of wealth and poverty, and (4) human dignity.³³⁰

326. *Id.* In Islamic criminal law, the mental ("moral") element denotes the part of the structure of the crime related to the will of the offender and his liability for the act or omission attributed to him. In other words, the offender should have accomplished that act or omission while possessing a free conscious and guilty will. The guilty or blameworthy will normally takes the form of a criminal intent, unless the provision—verse in the *Qur'an* or a Prophet's saying—contents itself with criminal negligence or recklessness.

327. *Id.* at 282-284. *See also* 'AWDAH, *supra* note 34, at 409. As a general rule in Islamic criminal legislation, the offender must have knowledge of all essential facts which constitute the offence, particularly the essence of his act—the dangerousness his act represents to the criminally protected interest—and its criminal result—the occurrence of the offence as a consequence of his act—as this sort of knowledge relating to a future fact described as "prediction." It does not suffice that the offender be aware of his act and predicts the result thereof; it is also a requisite that his will be directed at his act. He should have manifested a will to joint his act with other factors leading to the result. If his will was not directed at the occurrence of the offence following his act, the criminal intent would be lacking.

328. *Id.*

329. *Id.*

330. MUHAMMAD KHAN & M.H. SYED, *ENCYCLOPEDIA OF ISLAMIC ECONOMY* 24 (2009).

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A. PROVING BRIBERY AS A CRIMINAL OFFENSE IN ISLAMIC LAW

The principles which regulate evidence and standards of proof in any legal system reflect the intellectual achievement and cultural values of its society. Hence, the Islamic criminal evidence rules seek to balance and harmonize the rights of the accused with the rights of the community.³³¹ The principle of the presumption of innocence and its impact on the burden of persuasion represents the fundamental backbone of Islamic criminal evidence.³³² Consequently, the burden of proof is on the prosecution.³³³ These rules are implicated in the following *Qura'nic* verse: "And those who produce not four witnesses to support their allegation flog them with eighty stripes."³³⁴ Moreover, these rules are also found in this *Hadith* of the Prophet (PBUH):

If men were to be granted what they claim, some will claim the wealth and lives of others. The burden of proof is on the proponent; an oath is incumbent on him who denies.³³⁵

331. BASSIOUNI, *supra* note 33, at 122-237. See also MA'AMOUN M. SALAMA, AL-MABAD' E AL-'AMMAH LI AL-ITHBAT AL-JINAI FI AL-FIQH AL-ISLAMI [THE GENERAL PRINCIPLES OF CRIMINAL EVIDENCE IN ISLAMIC JURISPRUDENCE]. A Report presented by Professor Ma'amoun Salama at the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System (The Protection of Human Rights under Islamic Penal Procedure) was held in Siracusa, Italy (May 28-31, 1979). He said: "...Since anyone may be accused of committing a crime, the rights of the accused must be respected. However these rights must be balanced against the right of the society to impose punishment..."

332. *Id.* In essence, the principle is that the ("the accused is presumed innocent; whoever claims otherwise must prove it."). From its inception, Islamic law has recognized this rule as a right of all individuals. The Prophet (PBUH) stated that: "Every infant is born primitive; it is his parents who subsequently convert him to a Jew, a Christian or a Magus." SAHIH AL-BUKHARI, *supra* note 40, at [The Book on Expiation for Unfulfilled Oaths: KITAB KAFFARAT AL-AIMAN, no.699, Vol. 8, bk.79].

333. The Islamic jurists interpret this norm by saying that the status of the accused is that of one who is in fact innocent, or that his condition is that of collateral innocence. Further, it is essential that the rule be strictly discharged, since the law recognizes that without this presumption the accused faces the onerous if not impossible burden of proving he did not commit the crime. It is also significant that the post-conviction legislation prescribes the means for attacking the sentences and gaining a new trial in certain types of cases. Newly discovered evidence proving innocence after conviction results in vacating a conviction. Thus, it is far preferable as a safeguard to presume the accused to be innocent from the time he is accused of the criminal act until he is convicted. See BASSIOUNI, *supra* note 30, at 66-67.

334. *Surat* (Chapter) An-Nour, *supra* note 291, at Verse 4.

335. SAHIH MUSLIM, *supra* note 200, [The Book of Oaths: KITAB AL-AIMAN, bk.15] & *Id.* at SAHIH AL-BUKHARI, *supra* note 334. By the same token, The Prophet (PBUH) stated: "Your evidence or his oath." *Id.* And he (PBUH) also said: "Prevent punishment in case of doubt." It is worth mentioning in that context that the universal declaration of this principle is evident from the International Declaration of Human Rights, adopted by the United Nations General Assembly, U.N.G.A. 10 Dec. 1948 (entered into force 1976) at art.11, available at www.un.org/rights/HRToday/declar.htm; and the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) at art.14, available online at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en. The principle is also recognized in many national

These rules embody the presumption of innocence and place the burden of proof on the accuser.³³⁶ In Islamic jurisprudence, evidence in criminal matters essentially consists of testimony (“*Al-Shhada*”).³³⁷ The majority of Muslim jurists restrict proof to the testimony of witnesses.³³⁸ In addition to testimony there are confessions (“*Al-Iqarat*”).³³⁹

Evidence takes the form of evidentiary presumptions (“*Al-Qara'in*”).³⁴⁰ In Islamic criminal procedure, all financial crimes, including bribery, must be proved by these modes of evidence. The following discussion examines the requirements of each mode.

1. Bribery’s Criminal Evidence Modes

(a) Testimony of Witnesses (“*Shahada Al-Shohoud*”)

The *Hanafi*, *Shafi'i*, and *Hanbili* schools of thought require that the witness begin his or her testimony³⁴¹ with the word *ashhadu* (“I testify”), which indicates being certain of one’s testimony in addition to taking the oath.³⁴² No other word may be substituted as it would be less affirmative and the door would be open for doubt.³⁴³ Testimony must meet certain

constitutions. See e.g. THE CONSTITUTION OF KUWAIT, *supra* note 165, at art. 34; EGYPT TEMPORAL DECLARATION *supra* note 85, at art. 20. Compare ABROGATED EGYPT CONSTITUTION at art. 67.

336. In Islamic law, the burden of proving innocence is not imposed on the accused, for the application of this principle required that the accuser be charged with the duty of proving his accusations. The defendant in that case is not required to produce negative evidence. As charging the criminal with the duty of adducing positive proof is based on in the words of the Prophet (PBUH): “Had men been believed only according to their allegations, some [p]ersons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.” Another commentator states, “The positive evidence lies on the accuser and an oath is required of one who denies.” 10 AHMAD IBN AL-HUSAYN AL-BAYHAQI, *KITAB AL-SUNAN AL-KUBRA*, 253 at 26-38. Likewise, any doubt is resolved in favour of the accused. If the judge has reasonable doubt of guilt based on all evidence before him, he must conclude that the accused is not guilty. This principle is based on the saying of the Prophet (PBUH): “Prevent a punishment in case of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing.” For further discussion in this regard, see ABOÛ ZAHRAH, *supra* note 99, at 218.

337. Bassiouni, *supra* note 33 at 115.

338. *Id.*

339. MAHMOUD MOUSTAFA, *AL-ITHBAT FI AL-MAWAD AL-JINA'IYAH FI AL-KANUN AL-MUKARIN [EVIDENCE IN CRIMINAL ARTICLES OF COMPARATIVE LAW]* 56 (1977).

340. Bassiouni, *supra* note 33 at 115.

341. *Id.*

342. BASSIOUNI, *supra* note 33, at 115.

343. Accordingly, they decided it to be rejected in accordance with the principle (“Doubt nullifies the *Had* punishment.”). *Malik* did not require that testimony begin with these words in case the substance indicated direct eye witnessing. There is also no condition that the witness should be a male or that the testimony of a female witness carries only half the weight of that of a male. In support of testimony as the most recognizable means of proof in Islam, The *Qur'an* recited:

If they party liable is mentally deficient, or weak, or unable himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that one of them errs, the other can remind her. The witnesses should not refuse when they are called

general criteria in all crimes, including bribery. A witness must possess the following attributes.

As a general rule, a minor's testimony is inadmissible even if the minor understands the nature of their testimony.³⁴⁴ The witness must be mentally sound both when he witnesses the incident and when he testifies to it.³⁴⁵ The witness must be able to speak.³⁴⁶ The witness must possess sufficient memory to collect and retain his observations in addition to his ability to understand what he is testifying about.³⁴⁷ Visual observance and audible perception of the incident are required to be in the witness's testimony.³⁴⁸ *Hanafis* require that the witness have sight when he gives testimony and the majority of Muslim jurists stated that the testimony of the blind is inadmissible.³⁴⁹ The witness must be of good character regarding moral integrity, trustworthiness, persistent avoidance of grave and venial sins, no record of serious or petty crimes, manliness, and fulfillment of religious duties.³⁵⁰ In this respect, scholars diverge regarding the authenticity condition by which the witness must have noticed the event with his own senses.³⁵¹ In any event, indirect testimony ("hearsay") is admissible only if authentic or direct testimony cannot be presented due to death, sickness, or travel.³⁵² Muslim jurists agree that acceptance of the Islamic faith is a prerequisite to permitting a witness to testify.³⁵³ This perspective is based on the verse: "And call to witness two just men among you."³⁵⁴

on for evidence. Disdain not to reduce to writing your contract for a future period, whether it be small or big: it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But neither take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do such harm, it would be wickedness in you.

Surat Al-Baqarah, II: 2, *supra* note 125, at (Verse 282).

344. *Id.* at 116.

345. *Id.*

346. *Id.* *Hanafis* reject the testimony of deaf-mutes whether written or through sign-language. On the contrary, *Maliki* accepts such testimony if the mute has some means of communication. *Ibn Hanbal* admits him as a competent witness only if he is capable of writing and can write his own testimony. *Shafi'i* jurists are split on this issue.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. For further discussion on transmitted or second-hand testimony, see BASSIOUNI, *supra* note 33, at 117.

352. *Id.* at 118.

353. Bassiouni, *supra* note 33 at 117.

354. *Surat* (Chapter) *Al-Talaq*, LXV: 62, *supra* note 138, at (Verse 2). Regarding the testimony of a non-Muslim against a Muslim, see IBN -TAYMIYYA, IBN AL-QAYYIM, and other Islamic schools of law perspectives.

A witness's testimony can be legally disqualified on any of several bases under Islamic criminal law. The position of all Muslim scholars today is that if there is a relationship between the witness and one of the parties which suggests a personal interest, that interest may be advanced by the witness through his testimony.³⁵⁵ The majority of Muslim jurists are in favor of the inadmissibility of testimony of those in the major and minor branches of the parties' families ("blood relations").³⁵⁶ Hostility between a witness and a party to a conflict arising out of worldly matters disqualifies the witness.³⁵⁷ However, the witness cannot be disqualified if he has the quality of '*adl*' ("justness or fairness") even if the animosity was created by a matter involving the (divine) rights of God.³⁵⁸

(b) Confessions and Oaths ("Al-Ie'trafat wa Al-Aimaan")

Confession is the second form of evidence which Islamic jurisprudence admits to prove criminal guilt. *Surat Al-'I* [*'O*]mran verse 82 reads in support of confessions: "'Do ye agree, and take this my covenant as binding on you?' They said: 'We agree.' He said: 'Then bear witness, and I am with you among the witnesses'..."³⁵⁹

From this verse, it is obvious that confession means by definition, "the admission by the accused of having committed the act that incurs punishment when the judge is convinced of it."³⁶⁰

In order for a confession to be admitted as criminal evidence, six requirements must be fulfilled. All Muslim scholars require that the confessor must be of age; this implies a capacity to understand what is being admitted to and its legal consequences. The confessor must be sane, capable of self-expression, and acting on his own free will.³⁶¹ *Hanafis* argue that self-expression should be verbal and not in writing or

355. BASSIOUNI, *supra* note 33, at 118.

356. *Id.* With the exception of some *Shafi'is*. Furthermore, The *Hanafi*, *Maliki*, and *Hanbali-Shafi'is* does not—schools disqualify spouses from testifying for or against each other.

357. *Id.*

358. *Id.*

359. *Surat* (Chapter) Al-'I [*'O*]mran, III: 3, *supra* note 235, at Verse 82. The Qur'an says, "Others there are who have acknowledged their wrong-doings..." *Surat* (Chapter) Al-Tawbah, III: 9, *supra* note 262, at Verse 102. Further, it has been reported on the authority of Ibn 'Abbas that Prophet Muhammad (PBUH) said to Ma'iz ibn Malik: "Is it true what has reached me about you? He said: What has reached you about me? He said: It has reached me that you have committed adultery with the slave-girl of so and so? He said: Yes. He (the narrator) said: He testified four times. He (the Holy Prophet) then made pronouncement about him and he was stoned to death." See also SAHIH MUSLIM, *supra* note 200, at KNOWLEDGE, no.4201, Vol. I, bk.17 [The Book on Pertaining to Punishments Prescribed by Islam: KITAB AL-HUDUD / Chapter 5: He Who Confesses his Guilt of Adultery].

360. BASSIOUNI, *supra* note 33, at 119.

361. *Id.*

sign language.³⁶² Any torture, pressure, or deception by the judge nullifies the confession.³⁶³ Moreover, the confession must be clear, explicit, and unequivocal as to the crime.³⁶⁴ The confessor must describe in detail the acts he committed in a way that leaves no doubt (“*Shubha*”) as the *Sunnah* bars doubtful confessions.³⁶⁵ A confession will be invalid if made outside the court. Thus, it must take place during a legal hearing. A confession proves guilt and incurs penalties only when the judge is persuaded of it and the confession meets the aforementioned legal criteria with corroboration of the facts confessed.³⁶⁶

Hanafis stress that the accused must repeat the confession the same number of times as that of the required number of witnesses.³⁶⁷ In this context, Muslim scholars are in favor of confessions that implicate only the accused and not his accomplices or co-conspirators.³⁶⁸ This emerges from the principle of individual criminal responsibility set forth above. The accused may withdraw his confession at any time before or after sentencing, or during its execution. In the latter case, the judgment will be nullified if based solely on the confession.³⁶⁹

(c) Legal Presumptions (“*Al-Qara’* in *Al-Kanounia*”)

A presumption (“*Qarina*”) may be weak or strong evidence; sometimes it is considered conclusive while in other situations it might only be probative, i.e., *prima facie*.³⁷⁰ Only when it is strong is the presumption significant as criminal evidence. Muslim jurists define *Qarina* as “that by virtue of which the matter becomes definitive, a sign which makes the matter certain.”³⁷¹ Like the other methods of evidence, *Qarina* must meet the conditions of conclusiveness and certainty. *Surat* (Chapter) *Yusuf* verse 75 states that: “They replied: ‘He in whose camel-pack it is found

362. Thus, the mute could not make a legally effective confession. However, *Maliki*, *Shafi’i*, and *Hanbili* admit the confession of the mute person if his signs are obvious and understandable. Also, all of them admit the blind’s confession.

363. Hence, the judge is not allowed to mislead the accused during cross-examination and must not encourage confessions. SAHIH AL-BUKHARI, *supra* note 40; SAHIH MUSLIM, *supra* note 200, *supra* note 293.

364. *Id.* at 120.

365. *Id.*

366. *Id.*

367. Therefore, if two witnesses are necessary, as in case of bribery, then two separate confessions are necessary. Moreover, *Maliki* and *Shafi’i* accept an extra-judicial confession—and apply this to all lawsuits—if it is witnessed by two people. Generally speaking, within the matters of *Ta’azir*, if the admission is stated once, it will be sufficient to establish criminal culpability.

368. *Id.*

369. *Id.* Withdrawal of the confession may take a public form or the form of the convicted person’s escape impunity.

370. The distinction between conclusive and probative is similar to irrebuttable and rebuttable presumptions except that it is based on the legal logic of the fact and not operation of law.

371. BASSIOUNI, *supra* note 33, at 121.

shall be enslaved in punishment for it. Thus do we punish the wrongdoers.’...’³⁷²

This illustrates that bribery can be proven by irrebuttable presumptions (“*qarina qat’ah*”). For example, if the bribee is arrested while holding an amount of cash with known numbers or with specific marks.

Accordingly, if the public interest lies in eradicating corruption from society and deterring wrongdoers, then it is in the interest of both the individual and the community that no innocent person be punished. These are the goals of the rules of Islamic criminal evidence which guarantee the balance and consistency of the human right to good reputation and dignity respectability.

B. LEVELS OF PUNISHMENTS OF CORRUPTION AND BRIBERY IN ISLAMIC PENAL LAW

Islamic scholars agree that punishment cannot be imposed unless three requirements have been satisfied. The punishment must: (1) be consistent with the principle of legality;³⁷³ (2) be individualized,³⁷⁴ and (3) apply equally to all persons.³⁷⁵ Thus, in the earliest days of the Islamic state, determining the criminality of acts and prescribing their penalties was left to the ruler, who decided himself or delegated the authority to judges under the system of *Ta’azir*.³⁷⁶

372. See THE QUR’AN, *supra* note, at *Surat* (Chapter) Yusuf, IXX: 12 Verse 75. Commenting on this verse, Muslim interpreters said that since Joseph’s brothers were certain of their innocence; they accepted that their law should be enforced against the one who might be proved to have stolen the goblet and the existence of the goblet in one’s possession considers an irrebuttable presumption on its theft. Their reply defined the punishment in their own legal system as stated in the above verse. A thief is a wrongdoer and wrongdoers must be treated according to the law. It is noteworthy in this respect, that the modern Muslim scholars with *Istihsan*—and within the perspective of *Ijtihad*—accept to employ the recent means of evidence to prove bribery as the famous form of corruption as photography, sound recording, and hand-prints as events are endless and provisions are limited.

373. See Kamel Taymour, *The Principle of Legality and Its Application in Islamic Criminal Justice* & ‘Osman ‘Abd el-Malek Al-Saleh, *The Right of the Individual to Personal Security in Islam*, in BASSIOUNI, *supra* note 33, at 56-90, 150-169.

374. A basic principle in Islamic law, as expressed in various number of *Qura’nic* verse, is that responsibility for a crime is the criminal’s alone and cannot be borne by anyone else. This is fundamental, whether as to *Had*, *Qesas* or *Ta’azir*. BASSIOUNI, *supra* note 33, at 230.

375. The equality of all people as a universal principle in *Sharie’a* prevents discretionary power with respect to *Hudud* and *Qesas* penalties, since these are determined by the *Qur’an*. Therefore, most jurists agree within the equality concept, the *Had* punishment can be imposed even on the “Imam” (“The Head of State”).

376. See BASSIOUNI & SAVITSKI, *supra* note 112, at 139-140. See also BASSIOUNI, *supra* note 33, at 228-232. Islamic jurists point out that the ruler is bound in the criminalization and penalization of such acts to Islamic values and the public interest taking into account changing conditions and times in order to adjust—within the equality of punishment—the form and severity of punishment to

Contemporary Islamic jurists call for the need to codify all crimes and penalties. For instance, the Kingdom of Saudi Arabia, where *Sharie'a* serves as public law, has specified some *Ta'azir* crimes and their punishments in its statutes. Egypt, which has a criminal code, also began a project to reform its penal law in accordance with Islamic legal principles, including the legality principle.³⁷⁷ Observing the three objectives of punishment (justice, general deterrence, and rehabilitation or reformation) under *Sharie'a*,³⁷⁸ Islamic law retains the traditional penalties of deprivation of liberty and pecuniary sanctions:

In addition to these categories of punishment, there are other penalties which are designed to instill morality. Islamic scholars consider penalty as a deterrent before the act and suppression after it. Thus, knowledge of punishment is intended to prevent the commission of the criminal act, and its execution thereafter should prevent the offender from in engaging in similar conduct in the future.³⁷⁹

As for *Ta'azir* sanctions, the consensus is that their basic goal is discipline and correction.³⁸⁰ This form of punishment is designed to apply to the majority of crimes and to include any penalty which the ruler or judge finds appropriate, such as imprisonment, exile, flagellation and verbal admonishment.³⁸¹ The success of criminal and penal policies in any society is measured by the degree to which they harmonize these goals. Thus, rehabilitation of the criminal must be considered during the

the seriousness of the crime and the degree of guilt. *Ta'azir* offences were not codified at the beginning of the Islamic state in order to give the judge the flexibility to respond to the subsequent circumstances through the instrumentality of the criminal law. For that reason, special emphasis was placed on the qualification of judges to whom so much discretion was given. In this regard, stated that: ("*Ta'azir* resembles the doctrine of analogy which was relied upon at one time in Soviet and Socialist law."). In any event, appeal to the ruler could always redress the injustice.

377. *Id.* at 229.

378. *Id.* at 231 ("Since crime is deemed to be a challenge to the prevailing values of society and a violation of the victim's rights, it must seek justice for the victims of the crimes. This is not to imply that the penalty is nothing more than thoughtless impulse of revenge. Rather the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the victim and his family is a necessary part of that search, which in turn plays an important role in the process of social control."). ("On the other hand, the deterrent function of punishment serves as a warning to the public not to commit crimes, to forbid them from imitating the criminal lest they suffer his fate, and to guarantee the safety of those who refrain from crime. Public deterrence is not achieved merely by defining the crime and prescribing the sanction. It depends essentially on the speed with which the accused is tried and punished.")

379. This definition includes all the objectives of punishment, for achieving justice is basic to all the regulations and precepts of Islamic law. This also refers to the classical distinction between general and specific deterrence.

380. BASSIOUNI, *supra* note 33, at 231.

381. *Id.*

punishment stage to the degree it is compatible with the actual punishment imposed.³⁸²

1. Traditional Penalties

Corporal Punishment (“Al-Darb wa Al-Gald”)

Corporal punishment is recommended most often on the grounds that it can be readily imposed and thereby causes minimal deprivation of liberty for the accused.³⁸³ The accused must still be able to attend to his business and serve the interests of his family.³⁸⁴ It is also in the interest of the community, which avoids having to take care of the accused, as is necessary in the case of imprisonment.³⁸⁵ By the same token, the delinquent who avoids imprisonment is saved from being corrupted by the influence of the other prisoners.³⁸⁶ Muslim jurists are not unanimous as to the number of lashes which the criminal must receive.³⁸⁷ Because of the difficulty in determining the number of lashes to be administered, the *Malikis* maintain that this decision should be left to either the authorities or the sovereign according to the circumstances.³⁸⁸

The following *Qura’nic* verses supports the legitimacy of this punishment.

The woman and the man guilty of adultery or fornication flog each of them with a hundred stripes... And those who launch a charge against chaste women, and produce not four witnesses to support their allegations flog them with eighty stripes.³⁸⁹

382. *Id.*

383. *Id.* In principle, Islamic penal law imposes the death penalty for acts which violate the duties incumbent upon Muslims toward God. The death penalty is rarely inflicted as *Ta’azir*. Its sphere of application is naturally limited because the judge’s discretionary power is not very broad. The sovereign determines criminal acts which are punishable by death, but only if absolute necessary. For example the death penalty is proper in the case of incorrigible or habitual offender only when it is indispensable to protect society and ensure the political order, espionage and heresy Rehabilitation, which is the overall purpose of *Ta’azir*, should be kept in mind.

384. *Id.* See also MILLIOT, *supra* note 38.

385. *Id.*

386. With regard to carrying out this penalty, flagellation is administered by means of striking the offender with a stick or unknotted whip. Strokes are applied over the whole body after protecting the areas where they might be fatal. Each area of the body must receive its share; thus, blows should not be limited to a single area.

387. See AL-MAWARDI, *supra* note 131, at 505-507. The maximum number varies between thirty-nine and sixty-five with a minimum of three. With regard to carrying out this penalty, flagellation is administered by means of striking the offender with a stick or unknotted whip.

388. *Id.*

389. *Surat* (Chapter) An-Nour, *supra* note 291, at Versess 2, 4.

In addition, the Prophet (PBUH) stated that: “No one should flagellates more than ten lashes unless it is in the rights of Allah.”³⁹⁰ Accordingly, the *Ta‘azir* penalty of flagellation will apply to the briber, bribee, and the mediator.

Deprivation of Liberty (“Al-Habes”)

In matters of *Ta‘azir*, Islamic law also authorizes freedom-depriving penalties, whether total, such as imprisonment, or in a less restrictive manner through local banishment, expulsion, or displacement.

Confinement is inflicted on first-time offenders and common (repeat) criminals for those crimes normally penalized by *Ta‘azir*.³⁹¹ Only if flagellation is ineffective may imprisonment be imposed. The duration varies from one day, to six months, to even a year.³⁹² The maximum period is left to the judge or other competent authority.³⁹³ Besides imprisonment for a fixed term, there are also indefinite sentences. Usually this penalty is reserved for incorrigible criminals and dangerous recidivists.³⁹⁴

The *Caliphate* of ‘Alī ibn Abī Ṭālib paid surprise visits to jail to hear complaints from prisoners and to insure that the jailers did not mistreat them. Also, the state is expected to provide the basic necessities of life such as food, clothing, and medical care to the prisoners because depriving them of these essentials could lead to their deaths. Muslim jurists also established conditions against violating any of a prisoner’s rights, in particular his freedom of opinion and the integrity of his beliefs, mind, body, honor, and dignity.³⁹⁵ “Regardless of the offense, no prisoner should be insulted, humiliated, beaten, tortured or chained (except to prevent flight).”³⁹⁶

390. See ‘ABD-EL-‘AZIZ ‘AMER, *AL-TA‘AZIR FI AL-SHARIE‘AH AL-ISLAMIA [AL-TA‘AZIR PENALTY IN ISLAMIC SHARIE‘A LAW]* 267-268, 379, 382, 389 (1957). In this regard, Abou-Bakr, ‘Ummar, ‘Uthman (RA), and the other Prophet’s (PBUH) companions are in the consensus—*Ijm‘a*—within the applicability of this criminal penalty to crimes causes social disturbance and degradation—like bribery offences and the like—to the public interest of the whole society.

391. *Id.*

392. *Id.*

393. *Id.*

394. The offender must submit to the penalty of imprisonment without interruption unless he actually repents and truly reforms. In such a case, he is released because he does not pose a danger to society. This form of penal sanction is associated with security and punitive measures in which is recognized by contemporary law as a means of repressing crime.

395. Bassiouni, *supra* note 33 at 235.

396. *Id.*

In addition to occasional visits to inspect the treatment prisoners received, traditional Islamic scholars went beyond modern penal systems concerning the sexual problems of prison life.³⁹⁷

Other sanctions include local banishment and exile.³⁹⁸ Local banishment must be confined in space and duration and must be accompanied by supervision outside the delinquent's domicile.³⁹⁹ The movements of the offender must be restricted so that he does not become an example for others by his presence at the location where he committed his crime.⁴⁰⁰

Muslim jurists accepted fines as punishment for *Ta'azir* crimes, but not without reservations. They worried that the availability of this penalty might lead judges to employ it to excess and plunder the accused.⁴⁰¹ A fine is imposed by calculating a portion of the criminal's wealth in lieu of corporal punishment.⁴⁰² If the criminal's behavior improves, the fine is returned to him. But under no circumstances is the amount withheld to be appropriated by the judge or added to the public treasury.⁴⁰³

2. Other *Ta'azir* Penalties Applied to Bribery

Several punishments are designed to instill morality in those who have committed a simple mistake, such as exhortation by the judge to do good and avoid evil deeds, blame ("reproach"), and dismissal from employment for abuse of confidence bringing injury to the public

397. Since the eighth century, some demanded that the wives of married prisoners be allowed to visit them occasionally on a periodic basis for conjugal privileges. This practice is followed today in Saudi Arabia. Also, the *Sunnah* contains examples of caring for prisoners and the Prophet's exhortations that the man to whom he had entrusted a prisoner care for him and treat him deferentially. "There is the instance where the Prophet (PBUH) confined an individual as a prisoner in the house of a follower and recommended to the guardian not only to take care of him, but to treat him with respect." SAHIH MUSLIM, *supra* note 200. Every other day the Prophet (PBUH) would stop by to ask about the conditions of the prisoner. All of that clearly indicates how Islamic law protects human rights, and how it is humane towards prisoners.

398. Among the offenses which require the imposition of these penalties, Islamic law has specified forgery, deceit, and the fundamental misinterpretation of the *Qur'an*. See LEVASSUR G. STEFANI, DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNAL [THE GENERAL PENAL LAW AND CRIMINAL PROCEDURE] 296.

399. BASSIOUNI, *supra* note 33, at 218.

400. *Id.* at 219.

401. EL-'AWA, *supra* note 175, at 277. See also El-Hagry, *supra* note 10, at 110-124. Some scholars consider fines as principal penalties while others see them as supplementary. In any event, Islamic law does not seem to require fines except for exceptional and supplementary causes.

402. *Id.*

403. *Id.*

interest. Also, the judge may order public exposure of the culprit's deeds, particularly for crimes of fraud, deceit, and false witness.⁴⁰⁴

The judge also may ostracize the offender by excluding him from interaction with others until he admits his error and expresses a willingness to return to the straight path. In other words, he must express repentance.⁴⁰⁵ In Islamic law, repentance retains a religious character, so that the criminal intends to return to the right path and truly reform as outlined by religious morality, and to regain favor in the eyes of the community.⁴⁰⁶

In brief, a just system of crime prevention must use both deterrence and rehabilitation. First, the penalty must result in deterring the criminal and punishing him proportionately to his deed. Second, the punishment must lead to his rehabilitation. Islamic law insists on deterrence rather than repression, which leads to torture and the violation of human dignity.

3. Aggravating Grounds

If the offender repeats the same crime, then he becomes liable to censure. If he becomes a habitual offender then his punishment may escalate to lashes and imprisonment until he reforms.⁴⁰⁷ "Aggravation of punishment is accomplished through successive degrees of severity."⁴⁰⁸ There are harsher penalties for the perpetrator of repeated grave offences, who demonstrates himself to be dangerous to other individuals and society through his recidivism.⁴⁰⁹

404. *Id.* In this sense, the judge's task is to determine whether plain advice is sufficient for the offender to refrain from repeating his mistake in the future. The accused is summoned to court before a judge who reproaches him, using harsh words without resorting to insults or polemics and without inflicting injury.

405. *Id.*

406. *Id.* Moreover, if the crime constitutes a violation of divine right, or causes disturbance to the society, the repentance of the offender is admitted. And it will be effective even when the acts infringe the individual's rights. In some occasions, judge can assure notification to the convicted party by summoning him in private or to court in public as this proceeding will have a psychological impact upon the criminal.

407. Bassiouni, *supra* note 33 at 222.

408. *Id.* at 223.

409. *Id.* Within the mitigating circumstances, it is evaluated by the judge in each case as it depends on the gravity, the nature of the offense, and the personality of the offender as explained before. For example, the judge considers the physical condition of the criminal which might involve hunger, disease or disabilities of his mental faculties and push him to break the law because of the necessities imposed on him by nature. Also, he should consider his moral state which may result from physiological, pathological conditions or moral constraint or duress exercised upon him, or as a result of self-lawful defense. Islamic law, which envisages *Ta'azir* as a very fixable system to suppress crime, holds that the perpetrator of the crime avoids punishment only for reasons linked to a genuine penological policy and social benefit. This policy is based essentially on the role of judge

4. Non-Application of Penal Sanctions for Bribery in *Sharie'a*

Criminal liability will not apply in case of the death of the criminal, pardon, or prescription (statutes of limitations). Corporal punishment or deprivation of liberties is abrogated with the demise of the convict. Pecuniary penalties are, however, maintained. The fine is inflicted and deducted from the convict's estate as it represents a debt of the deceased.⁴¹⁰

Grace (“*afw*”) is defined by Muslim jurists as “a waiver by the community of its rights to impose punishment which it acquired by virtue of the commission of the offence. The community whose peace has been disturbed has the chance to exact reparation by penalizing the criminal. Also, it has the right to revoke the penalty totally or partially.”⁴¹¹ Grace implies the revocation of punishment before it is imposed as well as the decision not to prosecute.

The majority of Muslim jurists state that prescription may apply to the penalty itself or the public action. The competent authority carries out this procedure in the light of public needs taking into account individual rights.⁴¹²

Regarding the investigation and primary-questioning stage of bribery, it is subject to the general rules for indictments in Islamic criminal procedures, taking into consideration the rights of the accused regarding searches, seizures, eavesdropping, interrogation, and pre-trial preventive detention.⁴¹³ Furthermore, the rights of the accused during a criminal trial include the adoption of legal evidence, trial before a competent, fair, and

who has extensive power at his disposal, which he employs more often in cases of aggravating or mitigating circumstances than in cases of immunity.

410. *Id.* Regarding bribery prosecution, this right belongs to the judge pursuant to his duty, or on the instructions of the sovereign, or upon the lodging of a complaint by any injured person. However, once set in motion, the prosecution may not be stopped or suspended by the injured party because the *Ta'azir* penalty is inflicted by reason of social disturbance caused by the offense. In order to achieve conclusiveness in the evidence, the time and place of the crime must be specified and must be consistent with other evidence adduced by the judge. Also, evidence must remain conclusive until the execution of punishment and its presentation should not be delayed. BASSIOUNI, *supra* note 33, at 112-113. Furthermore, the right of defense is a principal right which attaches at the accusation stage. It enables the accused to deny the accusation, either by showing the insufficiency or invalidity of evidence or submitting evidence to prove innocence. *Id.* at 95.

411. They explain the significance of the grace through Prophet's traditions and teachings. He (PBUH) said: “Forgive honorable people their wrongdoings” and “Avoid punishing virtuous people.” SAHIH MUSLIM, *supra* note 200.

412. Islamic law is silent on the issue of the duration of the prescription on public action or punishment. *See generally* ‘ABD AL-FATATH MOUSTAFA AL-SAFEY, AL-AHKAM AL-‘AMMAH LI AL-NIZAM AL-JINAI’ FI AL-SHARIE’A AL-ISLAMIA WA AL-KANOUN [THE GENERAL PRINCIPLES OF THE CRIMINAL SYSTEM IN THE ISLAMIC SHARIE’A AND POSITIVE LAW] 483-509 (1997).

413. *See generally* BASSIOUNI, *supra* note 33, at 92-100.

impartial judge and jury, the right to counsel his or her own defense, the right to speak or remain silent, and the indemnity of an erroneous conviction.⁴¹⁴

C. THE *SHARIE'A* ATTACK ON CORRUPTION

In order to eradicate corruption as an epidemic, Islamic law adopts various strategies on both local and global levels. All Muslim scholars, classical and modern, seek ways to tackle corruption. One of these strategies takes the form of *Ta'azir* penal sanctions regarding bribery, discussed above. More broadly, the vast Islamic intellectual heritage suggests that education, law, and administrative reform are the three key pillars in the Islamic fight against corruption. We consider each in turn.

1. Moral Education

The starting point for curing corruption lies in reforming social values, grounding them in appropriate concepts of social justice, and linking them with a broader worldview. This is the basis of the Islamic moral education program. This program should be achieved with reference to standards revealed in the *Qur'an* and personified by Prophet Muhammad (PBUH).⁴¹⁵ This means seeking and strengthening faith not only in worship and reflection but also in every action undertaken in life; seeking God by participating righteously in every action; viewing all action through the lens of an origin–destiny framework in which human beings are unable to escape accountability; and internalizing.⁴¹⁶ In this respect, *Surat* (Chapter) *Qa'af* verses 17 and 18 read, “Behold, two guardian angels appointed to learn his doings learn and noted them, one sitting on the right and one on the left. Not a word does he utter but there is a sentinel by him, ready to note it.”⁴¹⁷

Therefore, education in Islam is aimed at instilling in believers broad agreement on and a clear second-order preference for a catalogue of justice so as to arbitrate among raw instincts and competing first-order desires, and self-actualize obedience to the *Sharie'a*.⁴¹⁸ Harry G. Frankfurt stated that:

414. *Id.* at 102-107. See also AL-SAFEY, *supra* note 402.

415. ZAFAR IQBAL & MERVYN K. LEWIS, *Governance and Corruption: Can Islamic Societies and the West Learn from Each Other?*, 19 AM. J. OF ISLAMIC SOCIAL SCIENCES 2, 12-13 (2002).

416. *Id.*

417. THE QUR'AN, *Surat* (Chapter) *Qa'af*, VV: 50 Verses 17, 18.

418. IQBAL & LEWIS, *supra* note 415.

As he distinct between first-order preferences (i.e., “basic” desires) and second-order preferences (i.e., desires directed at their desires), since people are distinguished by the criterion that they have higher-order attitudes, namely attitudes toward attitudes and, especially, attitudes toward their own attitudes. Moreover, desires can be evaluated not only from the viewpoint of their practical realizability, but according to standards that represent something other than simply desiring. However, while shortcomings and failures at the personal level are recognized and a hope for the infinite mercy of God is always within reach, actions that have a negative bearing on communal relationship are to be externally regulated through the law of the *Sharie’a*....⁴¹⁹

2. Law and Incentives

The core law in Islam is “God-given.” As Professor Khurshid states, “It focuses on making vicegerency of man a practical proposal by protecting the building blocks of social life, faith, intellect, life, family, and property.”⁴²⁰

There is a revealed obligatory punishment (“*Had*”) for crimes undermining each of these foundations. Such punishment is consonant with the model of human nature depicted in the *Qur’an*.⁴²¹ For punishment of all crimes other than *Hudud*, including corruption, the *Sunnah* provides guidance and there is scope for enacting discretionary punishment (“*Ta’azir*”) by rulers, legislative assemblies, and judges⁴²² as discussed above.

However, punishment should be commensurate with the misdeed and must not exceed it.⁴²³ In this sense, birth, rank, and ethnicity offer no protection. Islam teaches the equality of people, irrespective of race or tribe, as the only criterion of merit is goodness and piety.⁴²⁴ As Lewis points out, “The principle that the ruler is not above the law, but subject

419. Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 1 JOURNAL OF PHILOSOPHY 68 (1971).

420. Khurshid Ahmad, Islamic Economics Lecture to MIHE Students, available online at http://www.islamicfoundation.com/audio/khurshid_mihelecture3.ram.

421. Mohamed Selim El-’Awa, Punishment in Islamic Law: A Comparative Study 98-113 (1983).

422. *Id.* at 110.

423. *Id.* at 111-113.

424. *Id.*

to the law no less than the humblest of his underlings is central to the classical Islamic teaching on the state.”⁴²⁵

More succinctly, In Islam:

The relationship between the *Caliph* and his subjects is contractual. The word “*bay‘ah*” denoting ... a contract by which the subjects undertook to obey and the *Caliph* in return undertook to perform certain duties specified by the jurists. If a *Caliph* failed in those duties—and Islamic history shows that this was by no means a purely abstract point—he could, subject to certain conditions, be removed from office.⁴²⁶

Furthermore, Gellner contends, “A socially and politically transcendent standard of rectitude was ever accessible, beyond the reach of manipulation by political authority... if it sinned against it.”⁴²⁷

Conversely, there is a complementary and powerful spiritual incentive structure that focuses on risks and rewards both in life and in the hereafter.⁴²⁸

3. Administration and Managerial Government

Gellner observes that, “a certain kind of separation of powers was built into Muslim society from the beginning, or very nearly from the start.”⁴²⁹ While Gellner is talking about the separation of the executive and legislative branches, another distinction between the executive and judiciary also evolved quite early in the history of Islam.⁴³⁰ By rooting legislation in a handful of transcendent rules that can be expanded only through analogy (“*Qiyas*”), the very structure of Islamic law has historically created a class of jurists that were not necessarily under the control of the state.⁴³¹

On the other hand, Babeair illustrates the other side of the coin by elucidating the role that traditional jurists have played in learning and

425. See generally Bernard Lewis, *The West and the Middle East*, FOREIGN AFFAIRS (1997).

426. See generally Bernard Lewis, *Islam and Liberal Democracy*, THE ATLANTIC (1993).

427. See ERNEST GELLNER, POSTMODERNISM, REASON, AND RELIGION, 7 J. ROYAL ASIATIC SOC'Y GR. BRIT. & IRELAND 108 (1992).

428. *Id.* In the life, the corrupt will feel dissatisfaction and the virtuous will experience a peace (“*Salami*”). In the hereafter, there is the rendering of accountability and justice, and the *Sharie'a* exerts that the most excellent trade is that a believer gives himself to the commandments of God in the here, in return for blessings in the hereafter.

429. *Id.*

430. *Id.*

431. *Id.*

spreading moral education, and by acting as a force for moderation through mediating between the rulers and the masses.⁴³² All three of these pillars for curbing the roots of corruption were achieved under Islamic public administration.⁴³³

D. THE LINKAGE BETWEEN CORRUPTION AND DEVELOPMENT: TOWARDS THE ISLAMIC PERSPECTIVE

In the early Islamic community, equality, accountability, and a high degree of transparency in the early *Caliphate* saw public funds handled with great caution and care, with military expeditions to prevent corruption.⁴³⁴ Acceptance of what constitutes corrupt behavior is culture-specific and various from country to country. Did pre-Islamic Arab cultural values overtake Islam's universal values? Or did the failure result from the Muslims' inability to actualize their preferred set of norms via rationally designed institutions, lately even for such simple tasks as education in Islamic ethics? The suggestion now is that ethics can empower as well as constrain.⁴³⁵ Ethical norms, and the leading institutions by giving force to them, can widen horizons and choices, enabling individuals to do more than would have been possible in their absence. An Islamic-type approach that relies solely on seeking a moral rebirth from within the individual is seriously deficient. While consciousness-raising is needed, reliance upon self-restraint is not enough.

According to some writers, "the problem is that mainstream western philosophy does not distinguish between values (in which there is a "right" and "wrong" and therefore a second-order preference exists) and tastes (in which there is no "right" or "wrong")."⁴³⁶

In contrast to the Platonic concept of the good and the Kantian focus on the ought and its justification, modern analytic philosophy has sought to develop against the backdrop of a value-neutral world.⁴³⁷

432. BABEAIR, *supra* note 7, at 80-94.

433. FAHMI & BASSIOUNI, *supra* note 180, at 46-101.

434. BERNARD LEWIS, *THE ARABS IN HISTORY* 64 (1966, 1993). This is confirmed by the following report, *citing* AL-TABARI in his book, Lewis records, ("Ummar (RA) the second *Caliph* asked Salman: "Am I a king or a *caliph*?" and Salman answered: "If you have levied from the lands of the Muslims one dirham, or more, or less, and applied it unlawfully, you are a king, not a *caliph*." And 'Ummar wept."). AL-TABARI, *supra* note 237.

435. *See generally* ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, (eds. D. D. Raphael & A. L. Macfie, Glasgow ed., 1759 (Oxford: Oxford University Press, 1976).

436. *See generally* HENRY B. VEATECH, *FOR AN ONTOLOGY OF MORALS: A CRITIQUE OF CONTEMPORARY ETHICAL THEORY* (1971).

437. *Id.*

In the words of Joas, “[i]n analytic philosophy, substantive clarifications of ethical questions were temporarily replaced by the attempt to construct a neutral metaethics, that is to say, a discipline that sets itself the goal of clarifying ethical statements, but is itself at the same time governed by the norm of value-freedom.”⁴³⁸

In this emphasis upon the empowering effects of ethics, modern social science and strands of classical Islam would seem to have drawn closer together. Al-Ghazali (1058-1111) said, “[c]learly recognize the importance of incentives and “external” institutional constraints without diluting the role of ethics, there is also an important tradition in Islamic political philosophy which emphasizes the role of second-order preferences in fighting corruption.”⁴³⁹ On the other hand, one Muslim expert of corruption stated that:

There are several reasons behind the fight against corruption: spread of information, greater participation in the decision-making process, the large size of government in developing countries, and the shift from aid and grants to loans. The secular solution rests almost completely upon the assumption that accountability is achieved from different checks and balances imposed upon individuals from the society to secure noble behavior; like fairness, honesty, equity, justice, and efficiency. Islam recognizes the importance of the social checks and balances; goes further than that by relating that accountability starts first from within the individual himself. Islamic values stress this very important point. Man may escape from secular law, but he cannot escape his mischievous deeds on the Day of Judgment. Allah knows fully every act, even feeling, and man will be fully rewarded accordingly. Nothing is capable of developing internal immunity against evil deeds more than depending [on] the Muslim belief that his Creator is watching him in all times, in all forms, and in all places...” Thus all forms of injustice, bribes, biases, transgression, and mischief are all condemned. Internal accountability should be supplemented with an external one based on check and balance...Promoting conductive environment can be achieved through reducing the size of government and in cracking on monopoly. The simplification in the decision-making and the increase in people’s awareness of their right are required.... It is true that Islam encourages private enterprise, but Islam at the same time

438. HANS JOAS, *THE GENESIS OF VALUES* 125 (Gregory Moore trans., 2001).

439. AL-GHAZALI, *supra* note 99.

emphasizes a leading and effective public sector. Islam is for good and effective governance, which protects the weak and curbs the strong. Without a solid public sector, the weak are left prey to the whims of the profit-oriented businessman. Often selfish pursuit damages the psyche of the consumer. Commercial advertisement using all lustful means imposes on the consumer wants and goods he is not in need of. A large portion of consumers is indebted through the length of their lives because they are pushed to buy more than their incomes or gains.⁴⁴⁰

Accordingly, internal accountability should be supplemented by external checks and balances.⁴⁴¹ Thus, privatization of public institutions and the application of the familiar cost-benefit approach to the provision of social goods is another safeguard.⁴⁴² Also, making use of highly qualified internal and external auditors is essential.⁴⁴³ The recruitment of government officials should be based upon competence and integrity, and they should be paid adequate wages. The law should be clear enough and justly applied to all. A freely elected legislative body that represents all groups of society should exist and its decisions should be binding on all, including the head of state. Also of centrality is the existence of an independent judiciary system and free press. The educational system is of vital importance to transmit Islamic values.⁴⁴⁴

I propose, as does Professor Al-Yousif, the adoption of Islamic values to eliminate corruption. Unfortunately, Islamic standards and norms are not often appreciated by states in the Muslim world.

Thus, we have to accept plurality in politics, adopt the party system, practice free and honest elections, build an independent judiciary system, and open the door for freedom of the press and official transparency. We need to revive our forgotten Islamic institutions, such as the *Zakāh*, the *Waqf*,⁴⁴⁵ the *Hisbah*,⁴⁴⁶ and the *Shoura*.⁴⁴⁷ In the past, these institutions

440. Yousif Khalifa Al-Yousif, *Economic Development in the United Arab Emirates: 1975-1990*, 8 J. OF ECONOMICS AND ADMINISTRATIVE SCIENCES, 23-78 (1990). See also Yousif Khalifa Al-Yousif, *Corruption and Development: An Islamic View* (unpublished research paper on file with author).

441. *Id.* Promoting conducive environment can be achieved through reducing the size of government and in cracking on monopoly. The simplification in the decision-making and the increase in people's awareness of their right are required.

442. *Id.*

443. *Id.*

444. *Id.*

445. See Monica M. Gaudiosi, *The Influence of the Islamic Law of Waqf on the Development of the Trust In England: The Case of Merton College*, 136 U. OF PENN. L. REV., 1231-1261 (1988). See also ALASTAIR HUDSON, *EQUITY AND TRUSTS* (4th ed. 2005); A ("Waqf") also spelled ("Wakf") formally known as ("Waqf-alal-aulad") is an inalienable religious endowment in Islamic law,

typically denoting a building or plot of land for Muslim religious or charitable purposes. The donated assets are held by a charitable trust. The grant is known as ("*masru'att-ul-khidmat*"); while a person making such dedication is known as ("*Waqif*"). According to Hanafi School of thought, ("*Waqf*") is "the detention of specific thing in the ownership of *Waqif* and the devoting of its profit or products 'in charity of poor or other good objects'." There is no direct injunction of the *Qur'an* regarding *Waqf*, but there is a Hadith in which Ibn 'Ummar (RA) reported that, "Ummar ibn Al-Khattab got land in Khyber, so he came to the Prophet Muhammad (PBUH) and asked him to advise him about it. The Prophet said (PBUH), 'if you like, make the property inalienable, and give the profit from it to charity'."

In other words, *Waqf* means the permanent dedication by a Muslim of any property for any purpose recognized by the Muslim law as religious, pious or charitable. "It allows private contribution to public good as it is not subject to transactions and endowment's yield is devoted to the needy people." For further discussion about the *Waqf* System and its various sorts in Islamic Law, see generally RAMADAN 'ALI AL-SHORONBASY, *AHKAM AL-WASYIA WA AL-WAQF FI AL-SHARIE'A AL-ISLAMIA* [THE GENERAL PRINCIPLES OF THE WILLS AND TRUSTS IN ISLAMIC SHARIE'A] (2005); Tahir Mahmood, *Islamic Family Waqfs in Twentieth Century Legislation*, VIII ISLAMIC CLQ 1 (1988).

446. BASSIOUNI & BADR, *supra* note 35, at 148; The Prophet (PBUH) founded the first Islamic state in 622 A.D., when he left Mecca for Medina. He used to visit the markets to check on business practices, and Caliphs followed the same practice. Neither the Prophet (PBUH) nor *Caliphs* engaged themselves in any commercial dealings. Instead, they regulated trade to keep commerce in harmony with Islamic teachings and tenets. When the Islamic state stretched beyond the Arabian Peninsula, it became impossible for *Caliphs* to perform these duties. This led to the establishment of ("*Hisbah*"). *Hisbah* literally means "arithmetical problem." The institution of *Hisbah* is defined by Al-Mawardi as, "A system of enjoining what is just and right if it is found to be neglected or disregarded and to forbid what is unjust and indecent if it is found to be practiced."

Abou-Youssef describes *Hisbah* as follows, "On the spot checking of weights and measures, quality of commodities offered for sale, honesty in dealings and the observance of modesty and courtesy in salesmanship."

The role of the Islamic state focused on the ethical part of commercial dealings. The Islamic state does not control the market but provides through *Hisbah* an ethical framework to ensure that all parties to commercial dealings have their fair share of information. The ("*Muhtasib*") supervises the market to ensure there is no violation of any Islamic norms which are: fulfillment of trusts and prohibition of all evils and misdemeanor like lying and dishonesty. They preserve the public order by ensuring '*Ibadat* is followed and monitoring commercial activities. This supervisory role includes prohibition of interest, gambling "*Al-Maisir*", *Gharar* contracts ("*Speculative Activities*") "which is the sale of probable items whose existence or characteristics are not certain, due to the risky nature which make the trade similar to gambling.", unfair competition, corruption, and combating monopoly. Qualifications requisite to be the *Muhtasib*: he has to be a male, Muslim and have a good reputation. The *Muhtasib* is not authorized to force the merchants to sell their merchandise for a price to which they do not agree. If the prices have risen because of either a scarcity of commodity or an increase in the numbers of buyers, then the *Muhtasib* is not allowed to force the traders to sell the commodity for a prescribed price. Further, he is supposed to supervise the whole economic enterprise. He must check on the practice of hoarding, prevent the instances of fraud in all sorts of transactions, keep an eye on all trades, and make sure that those who work in a trade are well qualified for the job and know the rules of *Sharie'a* regarding their trade. It can be compared to market and control mechanisms such as the Securities and Exchange Commission's control of stock transactions. BASSIOUNI, *supra* note 4, at 54-55. *See also* Taman, *supra* note 189 (illustrating the notion of *Al-Gharar* contracts and Gambling ("*Al-Maisir*") and their prohibition in Islamic Law in order to prevent disputes and to protect the weaker parties to an agreement) at 498-499. *See generally* 'ALI KHORSIHD, *ISLAMIC INSURANCE: A MODERN APPROACH TO ISLAMIC BANKING* 31 (2004).

447. *See* JAWAD SADEK SULAIMAN, *THE SHURA PRINCIPLE IN ISLAM*, 2 THE ARAB AMERICAN DIALOGUE, Vol. 9, 19-22 (1997). *See also* BASSIOUNI & FAHMI, *supra* note 180, at 51-56, 179-255. The principle of *Shoura* constitutes one of the four essential principles in the Islamic perspective on socio-political organization. The other three are justice, equality, and human dignity. *Shoura* is also a central issue in the on-going debate among Muslims over political reform. *Shoura* principle in Islam is parallel to the democratic principle in Western political thought, having analogous aspects and

produced an exemplary nation free from poverty and corruption. *Sharie'a* encompasses and governs every aspect of life and any of its specific provisions, including the penal system, must be seen in the totality of its moral, socio-economic, political, and educational dimensions.

V. PART FIVE: ADDENDUM, CONCLUSION, AND POLICY RECOMMENDATIONS

An Islamic model cannot be secured unless we establish a powerful and large state, strong in its economy, social institutions, education, etc. It must be a nation that produces enough to let its citizens enjoy a decent life and freedom from poverty and corruption. Furthermore, enlightened religious leaders are supposed to address social problems and raise their voices against injustice, corrupt governments and red-tape practices.

To conclude, the following inferences can be drawn about corruption and bribery on the basis of Islamic doctrine.⁴⁴⁸ The terms used for corruption, “*fasad*,” “*batil*,” and “*rashwa*,” are powerfully negative, indicating severe approbation. In addition, there is a helpful distinction between corruption (“*fasad*”) as a broad concept encompassing unfaithfulness, dishonesty, betrayal of trust, misuse, iniquity, and deceit in private and public dealings, and bribery (“*rashwa*”) as private gain from public office or seeking recompense for rendering duties ordinarily considered non-compensable. Gifts to public officials are termed *rashwa* and are also prohibited. At the moral level, there is “zero tolerance” for bribery

about the same tendency or direction. It is predicated on three basic precepts. First, that all persons in any given society are equal in human and civil rights. Second, those public issues are best decided by majority view. And third, that the three other principles of justice, equality, and human dignity, which constitute Islam’s moral core, and from which all Islamic conceptions of human and civil rights derive, are best realized, in personal as well as public life, under *Shoura* governance. *Shoura*, as a principle, is rooted in the *Qur’an* itself. The *Qur’an* has presented *Shoura* as a principle, is rooted in the *Qur’an* itself. The *Qur’an* has presented *Shoura* as a principle, and not as a system of governance. The distinction is important to note, because the *Qur’an* thereby has left it to successive generations of Muslims to continue to strive toward a more perfect realization of the *Shoura* principle. God says: “Those who hearken to their Lord, and establish regular prayer; who conduct their affairs by mutual consultation; who spend out of what We bestow on them for sustenance are praised.”

Id. at Surat (Chapter) Al-Shoura, III: 42, *supra* note 186, at (Verse 38). Also, God said in His Holly Book:

Thus it is due to mercy from God that you deal with them gently, and had you been rough, hard hearted, they would certainly have dispersed from around you; pardon them therefore and ask pardon from them, and take counsel with them in the affair; so when you have decided, then place your trust in God; surely God loves those who trust.

Id. at Surat (Chapter) Al-‘I‘Ojmrān, *supra* note 235, at (Verse 159).

448. IQBAL & LEWIS, *supra* note 415. From an Islamic perspective, “lying” and “corruption” are as clearly understood as “truth” and “honesty.” They are part of a universally understood parcel of vice and virtue ingrained in human conscience, linguistic differences notwithstanding.

in Islam; and Islam rejects any idea that bribery serves as “the grease that oils the economic wheels.”⁴⁴⁹ There is no scope for legalizing corruption in the name of commissions, gifts, donations, advances, soft loans, loan write-offs, or anything else.

Last but not least, corruption can be tackled by moral education designed to inculcate in believers a clear second-order preference for virtuous behavior, reinforced by legal structures, and administrative systems reflecting and supporting this stance.⁴⁵⁰ Equally important are the significant ethical and moral dimensions to reducing corruption, if only because there are situations where the external constraints confronting officials are weak and self-restraint is needed.⁴⁵¹ Recent social scientific thinking lends some support to this reasoning. Ethics can be empowering, as well as making good practical sense, since ultimately everyone benefits from the behavioral boundaries that ethics dictate. There is room for both lines of attack upon corruption.

This is how Islam molded the Muslim community. When we hear such stories, we may think they are legends. But the fact is that there is no legend in all this; it was the plain reality.

449. MUHAMMAD AYUB, AN INTRODUCTION TO TAKAFUL—AN ALTERNATIVE TO INSURANCE 1, available at <http://www.sbp.org.pk/departments/ibd/Takaful.pdf>.

450. *Id.*

451. *Id.*