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# THE MUSLIM PERSPECTIVE ON THE CLERGY-PENITENT PRIVILEGE

*Azizah al-Hibri\**

## I. INTRODUCTION<sup>†</sup>

Before Jones confesses his crimes to Imam Ahmad, he should be clear on the duties and role of the imam of a mosque. The imam's duties usually consist of leading prayers and providing advice and assistance to those in the community who seek them. Imams are chosen for their knowledge in matters of religion. It is possible, however, that the community has more knowledgeable persons within it who are not interested in the position of imam. In such cases, when a more knowledgeable person visits the mosque, the Muslims present at that time, including the imam, may choose that visitor to lead the prayers.

The absence of a hierarchical clerical structure in Islam makes it possible for every Muslim to have a voice in religious debates on issues about which they are knowledgeable. In fact, if they are

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† This Essay contains citations to Arabic Islamic sources which are not available in English. For these sources, the *Loyola of Los Angeles Law Review* relied entirely upon Professor al-Hibri's translation and interpretation. Professor al-Hibri is a native speaker of Arabic and has studied the *Qur'an* throughout her life. She regularly revises loose translations which alter the basic meaning of *Qur'anic* passages, and recently contested certain Arabic interpretations of *Qur'anic* words as patriarchal. See Azizah al-Hibri, *Mashrou' Bahth Naqdi Li Qawanin al-Ahwal al-Shakhsyah Fi Buldan Arabiah Mukhtarah (Critique of Personal Status Codes in Selected Arab Countries)* published in Arabic by ESCWA, United Nations, as part of the background papers for the regional conference held in Jordan, 1994, in preparation for the Fourth World Conference on Women, held in Beijing, 1995. Copies of the sources are on file with the *Loyola of Los Angeles Law Review*.

sufficiently knowledgeable, they may even engage in *ijtihad*.<sup>1</sup> A popular story in Islamic literature recounts that Khalifah (Caliph) 'Umar gave a speech in a mosque suggesting that a ceiling be placed on the amount of *mahr*<sup>2</sup> women were demanding at that time. An old woman stood up and disagreed vehemently, saying, "You shall not take away from us what God has given us." She then cited a passage from the *Qur'an* to prove her point. 'Umar stood corrected, saying, "A woman is right and 'Umar is wrong."<sup>3</sup>

The name of this woman was never mentioned in any of the books, indicating that she was not well-known—or powerful—in her community. Furthermore, it is very unlikely that her overall religious knowledge was superior to that of the Khalifah. Still, she was sufficiently knowledgeable on the issue of *mahr* to show him his error. Recognizing that error, 'Umar readily backed away from his proposed law, *despite being the leader of all Muslims*. This story clearly illustrates the absence of a centralized spiritual authority in Islam having the sole power to interpret the religious text, and the right of each Muslim to enter religious debates on matters about which they are knowledgeable. Incidentally, every Muslim, whether male or female, has the unrestricted right, indeed duty, to pursue knowledge, including religious knowledge.

Thus, imams cannot and do not derive their legitimacy from any centralized spiritual authority. Like other Muslims, they derive both their legitimacy and moral authority from the community's recognition of the quality and extent of their religious knowledge.<sup>4</sup> Consequently, their role tends to be advisory and consultative. So, Jones should not expect the imam to have any special powers, duties, or responsi-

1. *Ijtihad* is jurisprudential activity involving the interpretation of the *Qur'an*, the *hadith*, and various secondary religious sources.

2. *Mahr* has been improperly translated as dowry. In fact, it is a sum of money specified by a woman and accepted for payment by her prospective husband as partial consideration for the woman's entry into marriage. It is the full property of the woman and may be due immediately, in part or in full, or at a later specified date or upon divorce or the death of the husband. As such, it is a financial safety net for the woman. If not paid, it constitutes a senior debt against the husband's estate and is different from the inheritance share the wife receives.

3. 1 A. AL-GHAZALI, 'IHYA' 'ULUM AD-DEEN [THE REVIVAL OF RELIGIOUS STUDIES] 50 (11 Century, reprint, Cairo, 1939); IBN MAJAH, SUNAN [NORMS] 81 (6 Century, reprint, 1939). See also a reference to this incident in Azizah al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 25 (1992).

4. There have been historical exceptions, but these involve oppressive worldly authorities imposing on the community imams holding favored views.

bilities towards him. The imam is simply another member of the community who can give sound religious advice.

## II. CONFIDENTIALITY

Muslims are required to treat other people's confidences with the utmost respect. Prophet Muhammad calls such confidences "trust[s]."<sup>5</sup> On one occasion the Prophet mentioned six qualities that would help a person enter Paradise. Keeping a trust was among them.<sup>6</sup> These Prophetic *hadiths*—or *ahadith*, statements—shed light on the *Qur'anic* injunction which says: "O ye that believe! Betray not the trust of God, and the Messenger, and do not betray your trusts knowingly."<sup>7</sup> In two other places, the *Qur'an* defines believers in identical language, saying that they are those "who faithfully observe (respect) their trusts and their covenants."<sup>8</sup>

Thus, observing the relationship of trust is very important in Islam, and it is the duty of every Muslim. Consequently, the imam, like other Muslims, is subject to this general confidentiality requirement. It is possible to argue, however, that as a knowledgeable individual who has a deeper understanding of the religion, the imam ought to be held, perhaps, to a higher standard of compliance.

Additionally, many jurists have argued that it is desirable for Muslims not to publicize the bad deeds of others committed in private. This is referred to as the duty of *sitr*.<sup>9</sup> For example, if a

5. 3 AL-GHAZALI, *supra* note 3, at 129.

6. *Id.* at 132.

7. QUR'AN 8:27. The translation used herein is that entitled *The Holy Qur'an: English Translation of the Meanings and Commentary*, published by the Saudi Arabian Ministry of Hajj and Endowments (1410 A.H./1990 A.D.). The author modified the translation wherever it was necessary to improve the accuracy of meaning. *The Meanings and Commentary* translates the last part of the verse referred to here as "Nor misappropriate knowingly things entrusted to you." The translation provided in this Essay is closer to the Arabic original which does not contain the Arabic word for "misappropriate." The actual word used is "takhunu" which derives from the Arabic word "khan," meaning "to betray." "Allah," the Arabic word for "God," was replaced with the corresponding English word "God."

8. *Id.* at 23:8, 70:32.

9. A. BAHNASI, AS-SIYASAH AL-JINA'YAH FI AL-SHARI'AH AL-ISLAMIAH [POLICY ON CRIMINAL MATTERS IN ISLAMIC LAW] 370 (Cairo 1983) [hereinafter BAHNASI, CRIMINAL MATTERS]; see also M. ABU ZAHRAH, AL-UQUBAH [THE PUNISHMENT] 48-49 (Cairo n.d.) (classifying wrongs or crimes into two categories: those that can be established without spying on individuals and violating their privacy—which is protected by *sitr*, and those that cannot; and referring to the *Qur'anic* injunction not to spy on others, suspect them, or gossip about them).

Muslim man drinks alcohol in the privacy of his home—avoiding public display of his acts—and another Muslim inadvertently learns about his drinking, it is recommended that he refrain from publicizing it. Several jurists regard such violations as a private matter that concerns the relationship of the violator with his God.<sup>10</sup> Such jurists would also argue, however, that the person possessing the information should, if at all possible, help the violator overcome his shortcomings.<sup>11</sup>

At first blush the confidentiality requirement would work to protect Jones, so he should now be willing to share his confidences with the imam. But in fact, the imam has other considerations to take into account. There is more to the situation than the confidentiality requirement alone. There is the fact that Jones caused a grievous harm to two other human beings, the murder victim and Smith, to the whole community, and to humanity at large. He has killed a soul, and the *Qur'an* says that killing a soul unjustly is like killing all humans.<sup>12</sup> Thus, the confidence that Jones wants to share with imam Ahmad is of a different order than one pertaining to victimless crimes or crimes involving marital or financial troubles. Moreover, the obligation not to embarrass another by publicizing his misdeeds is not absolute. For example, it may be overridden if the misdeed is not victimless or if the perpetrator has publicized it himself.<sup>13</sup>

### III. KILLING

We cannot appreciate the dilemma facing imam Ahmad without first understanding the gravity of taking another person's life, and the different rights that are violated, under Islamic law. The taking of life is viewed as a dual violation of God's rights—which concern the public interest, or *maslaha*, of his creatures—and human rights.<sup>14</sup> In

10. BAHNASI, *CRIMINAL MATTERS*, *supra* note 9, at 370-71.

11. This obligation derives from the Qur'anic passage which states, "Let there arise out of you a group of people inviting to all that is good, enjoining what is right and forbidding what is wrong." QUR'AN, *supra* note 7, at 3:104.

12. *Id.* at 5:32.

13. BAHNASI, *CRIMINAL MATTERS*, *supra* note 9, at 371-73.

14. M. ABU ZAHRAH, *supra* note 9, at 56-57, 62, 72, 474; *see also* 1 A. AWDAH, AL-TASHRI' AL-JINA'I AL-ISLAMI [ISLAMIC CRIMINAL LAW] 81 (Cairo n.d.) (noting that the state may not preempt the victim—or the victim's family—in granting forgiveness for crimes of *qisas*; and noting that the victim—or the victim's family—and the state each has a separate right to forgive, but the forgiveness of the state may not adversely affect the victim's rights—or those of the family—which are primary); A. BAHNASI, SHARH WA TA'LIQ 'ALA RISALAT AL-MARHOUM AL-SHEIKH MAHMOUD SHALTUT FI AL-

what follows, I will focus on the crime of intentional killing since it is the main concern of this hypothetical. Unintentional killing is treated much less severely in Islamic jurisprudence. The discussion will proceed in stages, describing various elements in the *Qur'anic* treatment of intentional killing, ranging from execution to forgiveness.

The *Qur'an* states that killing a single soul unjustly is tantamount to killing the whole of humanity,<sup>15</sup> and that an unjustified killing deserves death as *qisas*.<sup>16</sup> *Qisas* is a punishment best understood in the West through the biblical concept of "an eye for an eye."<sup>17</sup> Abu Zahrah, a modern Egyptian scholar, argues that the purpose of the punishment of *qisas* is the preservation of life.<sup>18</sup> This argument relies on the *Qur'anic* verse which addresses those who "understand," saying that "there is life in *qisas*."<sup>19</sup> Abu Zahrah understands that verse in a way that many other Muslim scholars have, namely, that the murderer's execution has the long-term effect of preserving the life of the community.<sup>20</sup> Of course, no punishment will be meted out unless due process is observed at trial and extenuating circumstances are absent.<sup>21</sup> Furthermore, in the case of an unintentional killing, punishment differs significantly and usually consists of simply paying damages—*diyah*—to the victim's family.<sup>22</sup>

Despite the grave adverse effects murder has on society as a whole, the *Qur'an* treats the particular interests of the murder victim as paramount in this world. After all, the victim suffers the most direct and egregious effects of the murder. His family is, therefore,

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MAS'ULIYAH AL-JINA'IYAH [EXPLANATION AND COMMENTARY ON THE THESIS OF THE LATE SHEIK MAHMOUD SHALTUT ON CRIMINAL RESPONSIBILITY] 155 (Cairo 1987) [hereinafter BAHNASI, EXPLANATION] (stating that by providing separate rights to punish or forgive a killer, to the victim—and the victim's family—and the State, the Law Giver clearly desired to bring attention to the fact that killing is grave and concerns both the victim—and the victim's family—and the security of society as a whole).

15. QUR'AN, *supra* note 7, at 5:32.

16. *Id.* at 2:178.

17. The *Qur'an* mentions this biblical rule in 5:45.

18. ABU ZAHRAH, *supra* note 9, at 300-02.

19. QUR'AN, *supra* note 7, at 2:179.

20. ABU ZAHRAH, *supra* note 9, at 301; *see also* 5 A. AL-JAZIRI, KITAB AL-FIQH 'ALA AL-MATHAHIB AL-ARBA'AH [THE BOOK OF ISLAMIC JURISPRUDENCE BASED ON THE FOUR SCHOOLS OF THOUGHT] 260-61 (Beirut 1986) (arguing that the objective of *qisas* is saving lives, ending aggression on human lives, and fostering peace and security in the community). Note that *qisas* is translated sometimes as the "Law of Equality."

21. ABU ZAHRAH, *supra* note 9, at 368-69, 453-54; 1 AWDAAH, *supra* note 14, at 82; BAHNASI, EXPLANATION, *supra* note 14, at 107-11.

22. QU'RAN, *supra* note 7, at 4:92. *See* discussion on this point in 5 AL-JAZIRI, *supra* note 20, at 276.

given the right to seek the punishment of *qisas* against the murderer in court. The family alone has standing to demand *qisas* in the courts. If it does not, the state has standing to bring the case to court on its own initiative. But the state may not demand *qisas* as punishment. It may demand, however, some other—usually significantly lesser—form of punishment. This fact indicates that while public *maslaha* is also affected by the commission of a murder, it is comparatively secondary to the family's interest.<sup>23</sup>

But the God who gives the victim's family the right to demand *qisas* from the courts is also the God who urges forgiveness. So, while the *Qur'an* specifies death as the appropriate *qisas* for intentional killing, it also urges the victim's family to forego *qisas* and forgive.<sup>24</sup> Forgiveness is repeatedly described by the *Qur'an* as better than revenge or punishment.<sup>25</sup> Indeed, those who forgive earn a reward from God.<sup>26</sup>

Forgiveness, a difficult act under most circumstances, is particularly encouraged in the case of intentional murder. This is suggested by the expanded window of opportunity available to the victim's family to forgive. Unlike other types of crime under Islamic law, the victim's family continues to have the opportunity to forgive the killer even after the court system becomes involved in the case.<sup>27</sup> If the family decides to forgive, and the state takes no further action, then the murderer is free to go into this world but still must face God in the afterlife.<sup>28</sup> The afterlife punishment for unjustified killing is that of eternal Hell.<sup>29</sup> However, there are verses in the *Qur'an* which suggest that God the All-Merciful may forgive even a killer.<sup>30</sup> Thus, repentance by the murderer is encouraged regardless of any wordly

23. QUR'AN, *supra* note 7, at 17:33; *see also* discussion in 5 AL-JAZIRI, *supra* note 20, at 262 (arguing that giving the victim's family the right to choose the punishment once the accused is found guilty helps the family deal with its grief and eliminates the possibility that its members will take the law into their own hands).

24. QUR'AN, *supra* note 7, at 2:178, 42:40; *see also* 5 AL-JAZIRI, *supra* note 20, at 258-59 (discussing forgiveness).

25. QUR'AN, *supra* note 7, at 42:40.

26. *Id.* at 5:45; 2 AWDAAH, *supra* note 14, at 157; BAHNASI, EXPLANATION, *supra* note 14, at 183.

27. 5 AL-JAZIRI, *supra* note 20, at 5-6, 258; BAHNASI, EXPLANATION, *supra* note 14, at 155.

28. 5 AL-JAZIRI, *supra* note 20, at 258; *see also* 1 AWDAAH, *supra* note 14, at 245 (stating the view of the majority of jurists that unless required by public interest, *ta'zir* punishment is not required if the victim's family has forgiven the perpetrator).

29. QUR'AN, *supra* note 7, at 4:93; 5 AL-JAZIRI, *supra* note 20, at 258.

30. QUR'AN, *supra* note 7, at 4:48.

punishment or forgiveness. Repentance, however, is an intensely personal matter between the murderer and God.

In addition to the spiritual rewards of forgiveness, Islamic law provides another nonspiritual incentive for the victim's family to drop its demand for *qisas*. Recognizing the hardship—financial and otherwise—a whole family suffers when one of its own is prematurely taken away from its midst, Islamic law gives the victim's family the substitute right to seek monetary damages instead of *qisas*. Consequently, the family may forgive the killer and drop its right to *qisas*. At that point, it may either demand *diyah*—monetary damages—or go further and forgive the payment of *diyah* as well.<sup>31</sup> It is also possible for the murderer to genuinely repent and pay damages to the victim.<sup>32</sup> If the family accepts such damages, then execution would be barred. Acceptance of damages is viewed as implicit forgiveness.

By exercising the right to forgive, the family may leave a society with a recalcitrant unrepentant murderer roaming the streets. This is a worrisome prospect from the point of view of the public interest. For this reason, Islamic law gives the state an independent—though in the view of the majority, a lesser—right to punish, or forgive, the murderer.<sup>33</sup> If the state feels that the forgiven murderer is a menace to society, it can pursue its own remedies through the laws of *ta'zir*—discretionary punishment. The laws of *ta'zir* aim at protecting the public order but are not divinely ordained. Thus, they may vary significantly from one state to another. In the case of the hypothetical at hand, one state may demand a life sentence for the forgiven murderer, but in another a one-year prison sentence, together with

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31. ABU ZAHRAH, *supra* note 9, at 498; 5 AL-JAZIRI, *supra* note 20, at 263; 2 AWDAH, *supra* note 14, at 176. Some jurists do not recognize the act of accepting *diyah* instead of *qisas* as forgiveness. Rather, they view it as an act of reconciliation. Only when both *qisas* and *diyah* are forgiven are these jurists willing to call the act one of forgiveness. For more on this point, see 2 AWDAH, *supra* note 14, at 158-59.

32. Jurists were divided as to the significance of repentance for the *ta'zir* punishment. Some worry that a criminal may claim to have repented only to avoid punishment. Consequently, while the acceptance of *diyah* bars the *qisas* punishment, many argue that the *ta'zir* punishment is not barred by it. For more on this, see 1 AWDAH, *supra* note 14, at 353-55. See also BAHNASI, CRIMINAL MATTERS, *supra* note 9, at 132 (arguing that repentance bars *ta'zir* punishment).

33. 1 AWDAH, *supra* note 14, at 245; 2 AWDAH, *supra* note 14, at 158, 183-84.



other punishments, may suffice.<sup>34</sup> It all depends on the threat felt by the community and its views on intentional murder.

The influence of community views on law making is not unique to Islamic criminal law but reflects the general approach of Islamic jurisprudence. In accordance with this approach, jurists prefer to specify a basic set of laws necessary for an orderly and just Muslim society, and then allow each community to select supplementary laws according to its own practices and customs. The only requirement placed upon such supplementary laws is that they do not conflict with Islamic laws and principles. This approach rests on the explicit *Qur'anic* recognition of the importance of cultural diversity and the jurisprudential recognition of the role of historical development in such communities, and other similar factors.<sup>35</sup>

In short, murder is viewed as an extremely serious crime that violates God's laws, societal well-being, and individual human rights. Consequently, all these parties have a say in the punishment of the criminal, and no one party's forgiveness impacts the rights of the other parties.

#### IV. THE INTERACTION OF THE CONFIDENTIALITY REQUIREMENT WITH THE LAWS ABOUT KILLING

An imam cannot ignore the rights of any of the parties involved in a murder. In fact, the imam, like any other Muslim, is obligated to advance justice in society and to serve the societal *maslaha*. Consequently, the imam has no standing to forgive the confessing murderer and is in no position to ignore the crime.

Furthermore, the confidentiality requirement is not absolute. Its limits are rapidly approached when the act of observing it causes harm to others in the community. The rationale for this result lies in the fact that the confidentiality requirement itself was rooted in an argument for societal *maslaha*. It is based on a recognition of the harm and disrespect that befalls those who confide as a result of a

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34. 2 AWDAH, *supra* note 14, at 183-84. It is important to note that while the punishment is discretionary it is not arbitrary. For more on this point, see 1 AWDAH, *supra* note 14, at 148-54.

35. 2 W. AL-ZUHAILI, 'USUL AL-FIQH AL-ISLAMI [FOUNDATIONS OF ISLAMIC JURISPRUDENCE] 1116-18 (1986); S. MAHMASSANI, FALSAFAT AL-TASHRI' FI AL-ISLAM [THE PHILOSOPHY OF LEGISLATION IN ISLAM] 200-01, 214 (1961); *see also* al-Hibri, *supra* note 3, at 8 (discussing briefly the jurisprudential principle that laws change with time and place, and its corollary regarding customs).

breach, as well as the harm that befalls society.<sup>36</sup> The latter harm tears at the fabric of society and weakens the bond of brotherhood/sisterhood that keeps it together. Similar considerations have led scholars to excuse, for example, lies that save an innocent life.<sup>37</sup>

Muslims view the harm befalling society as a result of a murder to be significantly greater than that resulting from disclosure of a confidence. This position is based on the *Qur'an* itself, which denounces murder as a major and abhorrent crime. Consequently, society's *maslaha* is a more primary consideration in our scenario than that of confidentiality. Where the two conflict, everything else being equal, societal *maslaha* wins out. Therefore, the imam has no option but to advise Jones to confess and to inform the authorities of the confession if Jones refuses to do so himself.

But suppose that the imam is in a jurisdiction that automatically executes intentional killers if proven guilty, even in the presence of extenuating circumstances. Suppose further that the victim's family has forgiven Jones, so that under Islamic law, he is free to go. Does the imam now have a greater reason to keep the confidence of Jones? No. According to some jurists, the state is entitled to execute a murderer as part of its *ta'zir* punishment.<sup>38</sup> Furthermore, under this particular scenario, there is an additional independent argument in favor of breaching the confidentiality requirement. There is another innocent party, Smith, who would lose his valuable life if the truth about the murder is not revealed.

Since, in the *Qur'an*, God forbids unjust killings and strongly advocates the preservation of life, imam Ahmad cannot let Smith be executed without sharing responsibility for taking away his life. Imam Ahmad possesses information that could save Smith's life. True, Smith is a criminal, but he did not commit this murder and should not be punished unjustly for it. Thus, if imam Ahmad withholds information from the authorities, he would be one of those guilty of the injustice that has befallen Smith. Society would also suffer because of this injustice and because an unrecognized killer continues to run loose in its midst. Thus, observing the confidentiality requirement in this case leads to very serious repercussions affecting societal *maslaha*.

There remains one final question. Suppose, under the last scenario, that Smith died of a heart attack while the imam was deliberat-

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36. 3 AL-GHAZALI, *supra* note 3, at 128.

37. *Id.* at 134.

38. 2 AWDAH, *supra* note 14, at 184.

ing this matter. Thus the killing of an innocent life is no longer a consideration. Can the imam now abide by the confidentiality requirement or duty of *sitr*? The answer remains in the negative. First, the duty of *sitr*, as stated earlier, does not apply to such crimes. Second, assuming that Jones has repented and/or the victim's family has forgiven him, there is still the matter of Smith's reputation. Even after his natural death, the fact that Smith was convicted of murder will continue to impact surviving members of his family in material as well as nonmaterial ways. The family, therefore, has a right to Smith's vindication, and the imam has no right to deny them such vindication.

Finally, Muslims have a duty to abide by the laws of the jurisdiction in which they live—or become conscientious objectors. If these laws are unfair, they should be changed properly, and not by taking the law into one's own hands. This suggests that even if Smith has no surviving family, imam Ahmad still has no right to keep Jones's confession confidential. Given imam Ahmad's lack of special spiritual authority, he has no standing to forgive Jones or to preempt secular law. He still has an obligation to uncover the truth, preferably by having Jones do it personally.

## V. CONCLUSION

The confidentiality requirement in Islam is extremely important, but is not absolute. It may be overridden in a specific case if observing it would cause greater harm to society or particular individuals in it. Murder is viewed in Islam as such a heinous crime that it would provide sufficient justification for overriding the confidentiality requirement. The preservation of Smith's life, without more, would also justify overriding the confidentiality requirement. Consequently, imam Ahmad has no choice but to inform the authorities of the crime.

Still, imam Ahmad's role is not limited to that of informing the authorities. He can do much more. He can show Jones that he really cares by interceding under American law to achieve the same forgiveness results advocated under Islamic law. For example, the imam can be a character witness. He can help the defense gain insight into Jones and the circumstances of the murder. He can also talk to Jones and help him see the error of his ways. He can help collect funds for his defense. All of these actions would be helpful to Jones while, at the same time, upholding the basic principles of justice in our society.