THE THEORY OF PUNISHMENT

IN ISLAMIC LAW

A COMPARATIVE STUDY

by

MOHAMED 'ABDALLA SELIM EL-AWĀ

Thesis submitted for the Degree of Doctor
of Philosophy in the University of London,
School of Oriental and African Studies,
Department of Law

March 1972

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

ABSTRACT

This thesis deals with the theory of Punishment in Islamic law. It is divided into four chapters. In the first chapter I deal with the fixed punishments or "al ḥudūd"; four punishments are discussed: the punishments for theft, armed robbery, adultery and slanderous allegations of unchastity. The other two punishments which are usually classified as "ḥudūd", i.e. the punishments for wine-drinking and apostasy are dealt with in the second chapter. The idea that they are not punishments of "ḥudūd" is fully explained. Neither of these two punishments was fixed in definite terms in the Qūr'ān or the Sūnna, therefore the traditional classification of both of them cannot be accepted.

The third chapter discusses the punishment for homicide and injury. It is usually said that homicide is treated under Islamic law rather as a tort than a crime, and an attempt is made to explain and elucidate this.

The fourth chapter deals with the discretionary punishments or "al-ta'zir", and the fifth chapter deals with the law of evidence in criminal cases.

In this thesis I have tried to explain the philosophy underlying the theory of punishment in Islamic law, so a survey in which Islamic law is examined in the light of modern penologists' ideas has been added to each of the first four chapters.

The conclusion is devoted to a discussion of the poss-

ibility of applying the Islamic Penal System in present Muslim societies. I have tried to explain that unless Islamic law is accepted and enforced as a complete and comprehensive system, the Islamic penal system cannot be adopted.

Acknowledgement

This thesis was prepared under the supervision of Professor N. J. Coulson, to whose valuable suggestions and criticism I am deeply indebted. I must also express my gratitude to my wife, not only for typing the proofs, but also for the unlimited time she spent with me in discussing my ideas and conclusions. I am grateful to my eminent teacher Sheikh Muhammad Mustafa Shalabī, Head of the Department of Islamic Law in Alexandria University, with whom I exchanged a series of very helpful letters about the subject, and to Mrs. Jyl Francis for her help in correcting my English. I would also like to express my deep thanks to my close friend and teacher, Mr. H. M. A., without whose help this work could have never been completed.

Needless to say, none of these people is responsible for any errors which may remain, or indeed for any of my conclusions.

CONTENTS

INTRODUCTION

All penal systems are concerned, in the first place, with the punishment of the offender. The study of the theory of punishment, therefore, is an essential step towards the understanding of any penal system. At the same time, one cannot justify the application of a particular penal system unless it has become clear that its theory of punishment can successfully achieve the required ends and objectives. In Western penal systems, broadly speaking, the theories of punishment are based on, and justified by, considerations of social utility, while in Islamic law, the theory of punishment is said to be based on divine revelation contained in the Qūr'ān and the Sūnna.

The fact is that the Qūr'ān and the Sūnna contain very little theorisation, if any at all. The Qūr'ān and the Sūnna contain only some basic rules and commands usually expressed in a very broad way and usually capable of varying interpretations. There are also some specific injunctions and prohibitions but they are very few and concern a variety of subjects. The formation of theories in Islamic law started at a comparatively later stage when the schools of Islamic law emerged in the second century after the "Higra" and in subsequent centuries.

The writings of the scholars of each school contain

volumes dealing with the criminal section of the Islamic legal system. Different interpretations of the Qūr'ān and the Sūnna, and different views about what is good and what is evil, as well as different social, economic, and political circumstances led to the formation of various legal theories on almost all the legal provisions, including, of course, the penal system.

In the last fifty years, lawyers educated and trained according to modern trends in legal education, have started to be attracted by the study of the Islamic penal system. Thus a lot of research work has been published concerning one topic or another. Also in some European languages, writers have dealt with various aspects of the subject. In many cases the Islamic penal system was either completely rejected, or strongly defended on grounds of wide generalities or deep misunderstanding. So it appears necessary for a careful study to analyse and illustrate the underlying philosophy of the theory of punishment in Islamic law in the light of the modern approach to the subject. This research was undertaken to this end.

In dealing with the subject I have divided this thesis into five chapters. The first one is devoted to a discussion of the punishments known as "hūdūd" or fixed punishments. Classical treatises classify the punishments of six offences as "hadd" punishments.

However, it seems to me that only four out of these six offences appear to have been correctly described as "hadd" offences. Accordingly the second chapter is concerned with the remaining two offences. Here I must refer to the fact that some jurists add to the "hadd" offences a seventh one, i.e. the so-called offence of "baghy" , or armed resistance to the political authority in Muslim states. This offence, if it can be rightly so called, as known to Islamic law, is understood to be committed by a group of Muslim opponents who do not agree with the political authority on certain matters and justify their attitude,though erroneously, by their dogmatic conviction. If they do not fight the authority, or rather, the Muslim community, they are not to be attacked; and if they do, only the defence necessary to defeat them is legitimate. Therefore I consider the treatment of the "bughat" to come under the doctrine of legitimate defence or "daf'al-sa'il", with which this research is not concerned. Consequently no reference has been made to the treatment of the "bughat"; a brief account of it, however, may be found in the Encyclopaedia of Islam (II, p.828).

The third chapter deals with the Islamic approach to the punishments for homicide and injury. In dealing with this topic it is mentioned that the place given to

the personal rights of the victim or his relatives, is the main feature in the Islamic concept of retaliation or "qisās". So an attempt was made to clarify this point, especially with reference to the relatives' right to waive the punishment.

The fourth chapter deals with the doctrine of "ta'zir" or discretionary punishments. As the Islamic penal system recognizes only four, or, according to the classical authorities, six offences for which a fixed punishment is prescribed, discretionary punishments have a very important place. The philosophy underlying this doctrine and its general principles, has not been treated with as much attention as it probably deserves. Recent works on the subject have enabled me to deal more specifically with it, particularly in the context of the place of the doctrine in the general theory of penal law, and its part in protecting and enforcing the moral values of Islam.

Throughout my research, I have felt the need to say something about the methods of proof in criminal cases according to Islamic law. So I have devoted the fifth and last chapter to explaining, though briefly, the law of evidence in criminal cases.

In writing about any Islamic topic one must overcome many difficulties, two of which are worth mentioning.

The first is the collection of the relevant material from the enormous available sources for each school of law, particularly as the jurists' method of writing requires a good deal of orientation and familiarity with the expressions and possible headings under which they may deal with one problem or another.

In the main, I have concentrated on the four Sūnnī schools, i.e. the Hanafī, Mālikī, Shāfi'ī and Hanbalī. The views of the Ẓāhirī school are often mentioned, but I have omitted the Shi'is, except in some cases where the Zaydīs views have been referred to. However, it must be mentioned that as far as the theory of punishment is concerned, all schools agree as to the main principles and the philosophy underlying them. The differences of opinion appear only in details of their application and interpretation.

The second difficulty is that of the translation from Arabic into English, especially where the Qūr'ān or the "Hadith" are concerned. For the Qūr'ān many translations have been consulted, but on a few occasions necessary changes have been made. Yet, it must be remembered, to quote Professor Arberry, that "the Qūr'ān (like all other literary masterpieces) is untranslatable". As for the "Hadith" the translation of Mishkāt al-Masābih, by Fazlūl Kārim, was very helpful, but many amendments were unavoidable.

Bearing in mind the fact that Muslims, when they write about the Islamic penal system, are generally either apologists or opponents, I have tried my best to be objective in dealing with the various topics contained in this thesis. The views expressed here may not all be agreed upon, but I have always tried to support what I thought to be harmonious with the spirit of Islam.

Finally, in discussing punishment, and especially the Islamic theory of it, one may quote Professor Balnshard who said that "punishment is unpleasant to inflict and not particularly pleasant to discuss. But we clearly need to discuss it".

CHAPTER I

THE FIXED PUNISHMENTS "AL-HUDUD"

According to the classical manuals of Islamic law, Islamic criminal law contains six major offences, each of which has a penalty prescribed in fixed terms in the "Qur'an" or the "Sunna". These offences are known to Muslim jurists as offences of "hudud".[1]

1. Definition:-

The word "hadd" pl. "hudud" in the Islamic legal sense means a punishment defined by God, in the revealed text of the Qur'an or the Sunna, and due to Him, or "haqq Allah". In Islamic law all duties and obligations are divided into two categories; one is known as "haqq Allah" and the other is known as "haqq Adami".[2] In the penal context, where a punishment is classified as "haqq Allah" this indicates three features. The first is that this punishment is prescribed in the public interest; the second is that it cannot be reduced or made heavier;

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1. The word "hudud" s. "hadd" in Arabic has many different meanings. .The limit of something e.g. place, or a piece of land is its "hadd". The man who carries out the punishment is called "haddad", which derives from the same word. See: Subki.and 'Abd al-Hamid, mukhtar al-Sihah, Cairo, 1953, A.H. pp.94: Ibn Hajar, Fath al-Bari, vol. XII, Cairo, 1939, p.47-8..

2. Qarafi, Furuq, vol.I, Cairo, 1344, A.H. p.140-142.

the third is that, after being reported to the judge, it is not to be pardoned by him, the political authority, or the victim of the offence.[3] The unchangeability of the "hadd" punishment is supported by the interpretation of the Qūr'anic verse "These are the limits of Allah. Do not transgress them".[4] The third feature of the "hadd" punishment is based on a Prophetic report related by "Bukhārī" and "Muslim", to which reference will be made shortly.[5]

II. Classification:-

The six offences generally recognized as offences of "hūdūd" are: wine-drinking, theft, armed robbery, illicit sexual relations, slanderous allegation of unchastity, and apostasy. Apart from retaliation or "qisas" which is the punishment for homicide and injury all other offences, under the Islamic penal system, are punishable by discretionary punishments or "ta'zir". However, to classify an offence as a "hadd" offence, it must be established that the punishment for it is determined

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3. Kāsānī, Badāi', vol.VII, Cairo, 1910, pp.33.56.; 'Ūda, al-Tashri' al-Jina'i al-Islami, vol.I, Cairo, 1959, p.79.; Abu Zahra, al-Jarimah, Cairo (n.d.) p.56.

4. Qūr'an, Sūrah II, Verse 229; See: Ibn Taymiyya, al-Siyasa' al-shar'iya', Cairo, 1951, pp.69-70, 125.

5. Below, the punishment for theft.

in fixed terms in the Qūr'ān or the Sūnna. Although the majority of the jurists agree as to the classification of the afore-mentioned offences, some authorities hold a different view either by adding to these six offences or reducing their number.[6] Taking into consideration that a "hadd" punishment is a punishment defined by God in the Qūr'ān or the Sūnna, it appears to me that only four of the six mentioned offences can be classified as offences of "hūdūd". The remaining two, namely apostasy and wine-drinking, cannot be so classified as neither of them warrants a strictly defined punishment in the words of the Qūr'ān or the Sūnna. Accordingly, this chapter will be devoted to discussing the four "hadd" punishments for theft, armed robbery, illicit sexual relations, and slanderous allegation of unchastity. Though this thesis is concerned, in the first place, with the philosophy underlying the Islamic theory of punishment, the jurists' traditional pattern in dealing with those punishments will be followed in order to illustrate the kind of punishment prescribed for each offence, and what conduct constitutes this offence. Then a survey of the "hadd" punishments as a whole will deal with its purposes and underlying philosophy.

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6. Ibn Hajar, op.cit. p.47.; Ibn Taymiyya, pp.66-126.; Shu'rani Mizān, vol.II, Cairo, 1318 A.H. p.134.

III. The Punishment for Theft "al-Sariqā":-

The punishment for theft is prescribed in the Qūr'ān "As for thieves, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah...". (Surah V, verse 38.).[7]

This punishment was practised by the Prophet himself, as is related in Bukhārī and Muslim. The Prophet cut off the thief's hand, and ordered that a female thief's hand be cut off.[8] In the same tradition the Prophet prohibited any mediation in executing the "hudūd".[9] From this last Prophetic report the jurists deduced the rule that no "hadd" punishment is remissible, a rule which characterizes this category of punishment and distinguishes it from both "ta'zir" or discretionary punishments which cover the largest part of the offences under the Islamic penal system and "qisās" or retaliation, the punishment for homicide and injury. Both "ta'zir" and "qisās" are remissible even after being reported to the judge.

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7. Unless otherwise stated, the translation of the Qur'anic verses quoted in this thesis is that of Pickthall, M.M., Pub. by Taj Company Ltd., Karachi, (n.d.).

8. Bukhārī, op.cit. vol. 12, p.90; Muslim, vol.V, pp. 114-5.

9. Ibn Taymiyya, op.cit. pp.69-70, 125.

However, the jurists defined theft as: "taking somebody else's property by stealth".[10] This definition is subject to almost complete agreement among the jurists, but they are not so unanimous about the value of the stolen property, how the hand should be cut off, and the question of the places from which property is stolen, i.e. the problem of custody.

These are the main controversial points regarding the offence of theft which we will deal with here.

III. 1. The Value of the Stolen Property "Nisāb al-Sariqa":-

According to the majority the value of the stolen property should exceed, or at least be worth, a minimum fixed by the law. The punishment for theft is not to be inflicted where the value of the stolen property is less than this minimum. The schools of Islamic law hold different views about the determination of this minimum.

According to the Hanafī school, the punishment for theft cannot be inflicted unless the value of the stolen property is ten dirhams or more. They support this view on one hand, by the alleged Prophetic report: "No amputation

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10. Kāsānī, Badāi', vol.III, Cairo, p.65.; Ibn al-Hūmām, vol.IV, Cairo, 1316 A.H., p.218.; Siyaghi, al-Rawd al-Nadir, vol.IV, Beirut, 1968, p.511.; Ibn Qudamā, al-Mughni, vol.IX, Cairo, 1969, p.104.

is due unless for ten dirhams". On the other hand, they claim that the consensus "Ijma'" is that for ten dirhams the punishment should be inflicted, but for less than ten dirhams there are different opinions. So there is doubt about the justification of inflicting the punishment for such value, and in cases of doubt, the "hadd" punishment cannot be inflicted.[11]

According to the Malikī school, the punishment can be inflicted for stealing property worth three dirhams or one fourth of a dinar. That is, they claim, the value for which the Prophet inflicted the punishment for theft and so did Osmān b. 'Affān, the third caliph.[12] At the same time Malik draw a parallel between the minimum amount of dower and the minimum value of the stolen property. It is reported that he said "I do not think that a woman should be married for a dower of less than one-fourth of a dinar; and this is the minimum value for which the hand is to be amputated". So, by way of analogy "qiyās", Malik fixed the minimum value at one-fourth of a dinar.[13]

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11. Kāsānī, Badāi', vol.VII, p.77.; Ibn 'Ābdin, al-Hashiya, vol.V, Cairo, 1966, p.83.; Ibn al-Hūmām, op.cit.p.221.

12. Mālik b.Anas, al-Mūwaṭṭa', Kitāb al-Sha'b Pub., with the comment of 'Abd el-Bāqī M.F., Cairo, 1951, p.519.

13. Ibid., p.327, 520.

The Hanbalī school hold the same view as the Malikī, but they justify it on grounds of Prophetic reports and not by way of analogy.[14]

According to the Shāfi'ī school the minimum value of the stolen property should be one quarter of a dinar, and they declared that a dinar was twelve dirhams in the Prophet's time, so three dirhams are equal to a quarter of a dinar.[15] So the three schools, Mālikī, Shāfi'ī and Hānbalī hold the same view about the minimum value of the stolen property, while the Hanafī school raised it to ten dirhams. With the Hanafī school is the Shi'ī school of the Zaydīs.[16]

On the other hand the Zāhirī school, represented by Ibn Hazm in his book "al-Muhalla", holds a view according to which there is no fixed minimum value for stolen property, but for gold, the minimum value is one quarter of a dinar[17], and for everything else the punishment should be inflicted when the value of the

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14. al-Mughnī, vol.VIII, pp.242-44.; Abū Ya'la, al-Ahkam al-Sultaniya, Cairo, 1357 A.H., p.250.; 'Ūda, al-Tashri' al-Jina'i al-Islami, vol.II, Cairo, 1960, pp.581-82.

15. Shāfi'ī, al-Ūmm, vol.VI, Kitāb al-Sha'b, Cairo, 1968, p.134.

16. Siyāghī, op.cit. vol.IV, p.514.

17. Ibn Hazm, al-Muhalla, vol.XI, Beirut (n.d.) p.352.

property is equal to the value of a shield "tūra" as this was the value for which the Prophet inflicted the punishment for theft.[18] But Ibn Hazm did not fix the value of the "tūrs" and it is clear that it should be fixed according to custom or "'ūrf".

The above discussion about the minimum value of the stolen property has a definite purpose, that is to avoid the infliction of the severe punishment for theft unless the stolen property is of considerable value. So all the schools agree that if the stolen property is worthless the punishment should not be inflicted. Of course the culprit will be liable to a "ta'zir" punishment, but not to the "hadd" prescribed for the crime of "sariqa".[19]

It is noteworthy that all these discussions are only of historical value today. This seems obvious, when we take into account the changeability of the value of money, and the sum which is considered worthless in given circumstances, e.g. from one society to another, from one time to another, etc.

Consequently, no rule can be imported from any of the Islamic law schools, and applied today. It is the lawmakers' duty in each country to decide what should be the minimum value for which the punishment can be

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18. Ibid., p.353.

19. The above mentioned reference esp. al-Muhalla, p.352.

inflicted.

Some may argue that this does not accord with what the Prophet determined as the minimum value of the stolen property, and therefore it cannot be accepted within Islamic law. In reply to such an argument, one can say that this tradition was based upon what suited the prophetic community. Indeed, it may have been suitable too, for one or two centuries after the prophet's time, but not today. There are countless examples of changing what does not serve a particular aim after it was done or said by the Prophet or even by the Qūr'ān. Generally, any verdict which is based on grounds of the public interest "maslaha"[20] is changeable according to the change in circumstances[21], as is firmly established among the Muslim jurists of the origins of Islamic law "Ūsūl al-Fiqh"[22].

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20. A verdict based on "Maslaha" is a verdict which provides the best solution of a particular problem to meet the community's need and protect its interest. Some of the Qur'anic and Prophetic verdicts are of this kind, as well as a great deal of the jurists' reasoning. See below. F.N.21.

21. Shalabī M.M., al-Fiqh al-Islami Bayn al-Mithāliya Wal-Waqi'ya, Alexandria University press 1960, pp. 110-117, 165-177. See for details his book, Ta'lil al-Ahkam, al-Azhar University, Pub.Cairo 1949, esp. pp.307-322.; al-Shaṭibī, al-Muwafaqat, vol.IV, Cairo (n.d.), p.149 et seq.

22. al-Shaṭibī, ibid, and in many pages of this four vol. book.; Shalabī, ibid. throughout the study.

With regard to this particular aspect, Ibn al-Qayyim stated that the philosophy of considering one quarter of a dinar as the minimum value here, is that this value was sufficient for the average man, for his daily maintenance.[23] If this is true, and it was true, it is clear that the determination of one quarter of a dinar as the minimum value of the stolen property was based on grounds of social circumstances which are certainly variable. Therefore, this determination may be reviewed in the light of contemporary social circumstances. On the other hand, this minimum value was fixed according to the value of the golden money which was in use at the Prophet's time, but it is no longer used. This reason also justifies the need to review the minimum value.

III. 2. How the Hand should be Cut Off "Makan al-Qat'":-

Concerning this aspect there are three main views among the jurists. In fact nearly all the jurists agree that for the first theft, the thief's right hand should be cut off from the wrist.[24] But they hold different opinions about the next theft (or thefts). According to the four Sūnnī schools in the second theft the thief's left foot should be cut off. The Hanafī's hold that for

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23. I'lām al-Mūwaqqi'in, vol.II, Cairo, 1955, p.64.

24. Shū'rānī, op.cit., vol.II, p.142.

further offences nothing can be cut off and that the only way to punish the offender is by "ta'zir".[25]

On the other hand, the Mālikīs, the Shāfi'īs and Ahmad b. Hanbal, held the view that for the third theft the left hand should be cut off; and in the fourth, the right foot.[26]

The third view was expressed by Ibn Hazm in al-Muhalla. He claimed that the Qur'ānic verse previously mentioned allowed nothing to be cut off, but the thief's hands. So according to this verse, as Ibn Hazm understood it, in the second theft the left hand should be cut off. But for further crimes none of the thief's organs should be amputated.[27]

The Zaydī school held the same view as the Hanafī school, so did Ibn Qudāmah of the Hanbalī school.[28]

At the same time it is related that Ibn 'Abbās and "Atā" allowed the thief's right hand to be cut off for the first theft; and nothing but "ta'zir" for any theft

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25. Kāsānī, op.cit. vol.VII, p.86.; Shu'ranī, ibid.

26. For Mālikī school see: Ibn Juza'iy, Qwānin, Beirut, 1968, p.390. For b. Hanbal see: Ibn Qudama, al-Mughni, vol. VIII, Manar Ed. Cairo 1367 A.H. p.264.; For Shafi'i see: al-Muzanī, Mukhtaṣar al-Umm, Pub. on the margin of al-Umm, Kitab al-Sha'b, vol.V; Cairo, 1968 p.171.

27. al-Muhallā, vol.XI, pp.356-7.

28. For the Zaydī school, see al-Siyāghī, op.cit., p.524; see also Mughnī, op.cit. p.259, 264.

after it.[29] When someone asked "'Atā" about the second theft he insisted that no further "hadd" punishment could be inflicted after the cutting off of the right hand for the first theft. "'Atā" supported his view by quoting the Qūr'ānic verse "and your Lord was never forgetful"[30], i.e. if God had wanted anything else to be cut off he would have mentioned it.

This latter view, I think, is the nearest one to the spirit of Islamic law. As one of the contemporary scholars stated "the aim behind this sanction is to retribute (or to deter); and that can be easily achieved by indicating that it is applicable..."[31]. By adding to this what Ibn Hazm said about the original illegality of cutting off someone's hand ..., and that we should not go beyond what is prescribed in the Qūr'ān and Sūnna about this punishment[32], one can say that the "hadd" punishment for theft is the cutting off of the thief's right hand for the first theft. By committing another theft, he becomes liable to a "ta'zir" punishment as will be explained later.

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29. al-Muhalla, op.cit. pp.334-5.; Siyāghī, op.cit. p.525.
30. Qūr'ān, Sūrah XIX, verse 64.
31. Shalabī, op.cit. p.207.
32. al-Muhalla, op.cit. p.357.

This can be supported by the well known rule "every wrong for which there is no hadd, makes its doer liable to ta'zir".[33]

Moreover, there is nothing that can be annexed to the retributive or deterrent function of the punishment by applying the majority's views and cutting off further organs.

Finally, it is important to mention the Mālikī view that the thief's hand should be cut off from the elbow.[34] But this view is unacceptable to all the other jurists; and it cannot find any support, either in the practice of the Prophet and his followers, or in the usage of the word hand "yad" as it is understood in the Arabic.[35]

III. 3. The Problem of Custody "al-Hirz":-

Stolen property is property taken illegally from its owner. Owners usually keep their goods in a proper place in which they are safe. The storage place, or the custody of the goods is known to Muslim jurists as "hirz". The dispute concerning this topic centres on the question of whether or not the taking of property

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33. For the application of this rule with regard to theft, see 'Amer, A., al-Ta'zir Fil Shari'a al-Islamiya, 3rd Ed., Cairo, 1957, pp.154-195.

34. Ibn Jūza'iy, op.cit. p.390., and compare with Shū'rani, op.cit. p.142.

35. For fuller discussion, see al-Muhalla, op.cit., pp.357-358. Siyāghī, op.cit., pp.525-6.

which was not, at the time of its taking, in its proper place may be classified as theft. The four Sunnī schools and the Zaydī, are unanimous that to classify the taking of somebody else's property as a theft, it must be proved that this property was being kept in its proper place "hirz Mithlih".[36]

The Zāhirī school, on the other hand, disagree with this view and holds that the taking of property belonging to other people is a theft even if this property was not being kept in its proper place.[37]

The majority view is supported by a Prophetic report in which the Prophet allowed no "hadd" punishment to be inflicted unless the stolen goods were taken from their "hirz". This report is held to be authentic in the view of the majority, while the Zāhirī school consider it false. The debate is, therefore, centred on the classification of that report as false or otherwise. It was related by Mālik in al-Muwatta', and classified as authentic by the scholars of "hadith".[38] Accordingly, the view of the majority is the one to be supported.

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36. Ibn al-Humām, op.cit. p.238; Mālik, op.cit. p.519; Shafi'ī, Umm, vol.VI, p.135-6; Mughnī, vol.VIII, p.248; Siyāghī, op.cit., pp.516-22.

37. Muhalla, vol.XI, pp.319-27.

38. Tabrizī, Mishkat al-Masabih, with the commentary of Albani vol.II, Damascus.Ed., 1961, p.297, 301.

It must be mentioned, however, that what is considered as a "hirz", or proper place for keeping something, is determined according to the custom of "'urf". Consequently, it is changeable from one locality to another, and from one time to another.[39] With regard to this, the jurists have had debates on the classification of : stealing from the public treasury "bayt al-mal", embezzlement "ikhtilas", stealing from a mosque or a public bathroom etc., all these debates were raised because the custom in one locality or a given time was unlike the custom in another locality or time. So these matters should be discussed with reference to the circumstances at the time, and nothing should be imported from juristic writing.

To sum up: the amputation of the thief's hand as the "hadd" punishment for theft is to be inflicted where the stolen property reaches a minimum value, and has been taken from its proper custody or "hirz". Where one of these two conditions is lacking, no "hadd" punishment is to be inflicted, but the offender may be liable to a "ta'zir" punishment.

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39. Umm, op.cit., p.135-6; Ibn Juza'iy, op.cit. p.389; Mughni, op.cit. p.248-9. For the changeability of all customary rules in Islamic law see a scholarly chapter in Shalabi, al-Fiqh al-Islami, ibid., pp.61-94.

IV. Armed Robbery "al-Hirāba":-

This crime has three names, "al-Hirāba", or Armed Robbery, "al-Sariqa al-Kūbra", or the Great Theft, and "Qat' al-Tariq", or Highway Robbery. The three names are used interchangeably by the jurists and in the books of Fiqh.[40] The first name, "al-Hirāba", is the preferable one in my view as it expresses the spirit of the crime contained in the Qūr'ānic verses concerned.

It is noteworthy, in passing, that the difference between the crime of theft and the crime of armed robbery appears in the basic element of each crime. In theft the basic element, as was mentioned before, is the taking of somebody else's property by stealth. But in armed robbery, the basic element is the intention to steal the property by force. Accordingly, the culprit in the latter is liable to punishment even without having committed the complete crime, e.g. theft, killing of passers-by, etc.[41] In other words it is a complete crime in itself to wait on the travellers' road in order to commit the crime.

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40. Sarakhsī, al-Mabsūt, vol.IX, Cairo, 1324 A.H., p.195. Sahnūn, al-Mudawwanah, vol.XV, Cairo, 1323, A.H.p.98. Ibn Rushd, Bidayat al-Mujtahid, vol.II, Cairo, 1966, p.493. Ibn 'Abdin, op.cit., vol.IV, p.113.

41. Sahnūn, al-Mudawwanah, Ibid. 'Ūda, al-Tashri' al-Jina'i al-Islami, op.cit., vol.II, p.638.

There are many definitions in the books of Fiqh of this crime; but the fullest one is "Waiting by the way (or highway) to steal travellers' property by force, and thereby obstructing travel on this road."[42]

The punishment of this crime is a "hadd" punishment and it is stated in the Qūr'ān that "The only reward for those who make war upon Allah and his messenger and strive after corruption in the land will be that they will be killed, or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. After theirs will be an awful doom. Save these who repent before you overpower them. For know that Allah is forgiving and merciful." Sūrah V, Verses 33-34.

In the Prophet's time, it is related, a group from the tribe of 'Ūkal or 'Ūrayana came to al-Madina; then they became ill. The Prophet advised them to go to the place where the camels were grazing ... after their recovery, they killed the camel's protector and took the camels. The Prophet sent some of his companions after them, and they were arrested. Then he punished them by cutting off their hands and feet, and gouging

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42. Kāsānī, op.cit. vol.VII, p.90. Māwardī, al-Ahkam al-Sultaniya, Cairo (n.d.), p.62.

out their eyes, exactly as they had done to the camel's guard.[43]

There are two views about the link between this case and the above Qūr'ānic verses. First, some commentators on the Qūr'ān claim that this case was dealt with solely according to the Prophet's decision; and then the Qūr'ānic verses were revealed to show him his fault in punishing by more than what is stated therein.[44]

Secondly, there is the view held by the majority of the jurists i.e. that these verses were revealed after the punishment of the above mentioned group, to indicate that this punishment was the right one.[45] Other punishments which are not mentioned in the Qūr'ānic verses were executed according to some general rules of the Qūr'ān itself e.g. "... and one who attacks you, attack him in the same manner as he attacked you." Sūrah II, Verse 194, "The guerdon of an ill-deed is an ill the like thereof." Surah XLII, Verse 40.[46]

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43. Bukhārī, op.cit. vol.XII, p.91-94. Muslim, op.cit., Vol.V, pp.101-102.

44. See for this view: al-Ṭabarī, Tafsir, vol.VI, Cairo Ed. p.119. and against it, Ibn Ḥazm, al-Muḥallā, vol.XI, pp.310-312. see also 'Ūda, op.cit. vol.I, pp.267-8.

45. Ibn Hazm, ibid.

46. For this view see: 'Ūda, ibid.

However, it is interesting to note that some jurists and even some Western writers understood the punishment of "al-hirāba" which is mentioned in the Verses and which was executed in the case of the people of 'Ūkal and 'Urayna by the Prophet, to be the punishment for apostasy. This view will be discussed later. But it is necessary to indicate, in passing, that the preferable view, if not the only accepted view among the jurists, is that this punishment is applicable only in cases of "hirāba".[47]

The jurists hold different views about some aspects concerning the crime of "hirāba". We will limit our study to three of the controversial points only, i.e. the possibility of committing the crime in a town or a village[48], the problem of the carrying out of the punishment, and the execution of the punishment of banishment "nafy".

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47. Ibn Hajar, his commentary on al-Bukhārī, vol.III, Cairo, 1379 A.H., p.78. Umm, vol.VI, pp.139-140.

48. The word village in Qūr'ānic or rather generally Islamic law terminology does not have the same sense as it does in ordinary usage today; it means an inhabitated place, or contrary to what is called sahrā' (desert) or an uninhabitated place. See 'Āisha 'Abd al-Rahmān, al-Qūr'ān Wal-Tafsir al-'Asrī, Cairo, 1970, pp.51-52.

IV. 1. Where "Hirāba" can be Committed:-

According to Abū Hanifa, the founder of the Hanafī school, armed robbery cannot be committed except on the highway "al-tariq", or in other words, the crime cannot be committed in a town or a village where the victims can be helped.

Sarakhsī, in supporting this view, claimed that the name of the crime "qat' al-Tarik" indicates this condition, so the punishment cannot be inflicted unless the crime is committed in an uninhabited place.[49]

But according to the Mālikī, Shāfi'ī, Zāhirī, Zaydī and Imamī schools, the "hadd" punishment is applicable wherever the criminal act is committed.[50] In the Hanbalī school there are two views, like the two mentioned above. The reason for this was that Ahmad b. Hanbal gave no answer when he was asked about this point. So, some of the Hanbalī jurists hold a view similar to the view of Abū Hanifa, and some hold the contrary view.[51]

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49. Sarakhsī, al-Mabsūt, op.cit. vol.IX, p.195 et seq.

50. Ibn Rūshd, Bidāyat al-Mūgtahid, vol.II, p.493. Ghazali, Wajiz, vol.II, Cairo, (n.d.) p.179. Muhallā, vol.XI, pp.302-7. Hasani, Tatimat al-Rawd al-Nadir, vol.V, Riyad, 1968, pp.30-31. Hilli, Shara'i' al-Islam, vol.II, Beirut (n.d.) p.257.

51. Mardāwī, al-Insāf, vol.X, Cairo, 1957, pp.291-2.

Some of the jurists put this condition in other words, i.e. they consider that it is a crime of "hirāba" when the victims of the criminal act cannot be helped if they ask for help.[52] It seems that they were led to this by what they thought to be the nature of the crime. But to evaluate this view one can see that this crime has a basic element which separates it from an ordinary theft. That is to say that it can only be committed with disregard of the public order and the security of the community.[53] This element can be found both in the committing of a crime on the travellers' way, or far from a place in which help can reach the victims, as well as in the committing of it in a town or village, or where help can be found.

A very similar statement was made by Shāfi'ī in his book "al-Ūmm" concerning the committing of this crime in a town.[54] As for the possibility of helping the victims, it is sufficient to note that the first case in which the punishment for "hirāba" was inflicted, was a case where help could have reached the victims. So, there is no room for such a condition.[55] Therefore it can be

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52. Ghazālī, ibid. Ramlī, Nihāyat al-Muḥtāj ila' Sharḥ al-Minhāj, a Shāfi'ī text, vol.VIII, Cairo, 1938, p.2.

53. Abū Zahra, Falsafat al-'Ūquba, Cairo, 1966, p.6.

54. Ūmm, vol.VI, p.140.

55. Ḥasanī, op.cit. vol.V, p.31.

said that one should not give any special consideration with regard to the place where the crime is committed and if the culprit who commits his crime in a town is not of more dangerous character than the one who commits it elsewhere, he certainly cannot be considered less dangerous.[56]

IV. 2. The Carrying out of the Punishments "Tanfidh al-'Uqubat":-

The above mentioned Qūr'ānic verse prescribed four punishments for the crime of "hirāba" i.e. death, crucifixion, cutting off the opposite hands and feet (the right hand and the left foot or vice versa) and banishment "nafy".

The jurists hold different views about the infliction of this punishment. Banishment will be discussed later in further detail; but now we will discuss their views about the other three punishments.

There is almost complete agreement among the jurists that the death penalty should be inflicted by sword.[57] But this way of killing should be discussed too. It may be argued that any other way of killing would not be accepted with regard to consensus or "Ijmā'". But this argument is faulty, simply because this agreement expressed

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56. Shāfi'ī, Ūmm, vol.VI, p.140.

57. Mūhalla, vol.XI, p.318.

basically that the jurists considered the common method of execution in their time to be the relevant way of inflicting capital punishment. When this common method goes out of use it should not be insisted upon, as the only way of executing the punishment. It is again a question of changing the verdict in accordance with the change in what it was based upon.[58] It has been said before that any verdict which was based upon public interest "maslaha" or custom "'urf" should be changed when circumstances change.[59]

As for crucifixion there are two views among the Sunni schools. The first is that the culprit should be crucified alive and then be thrust by a javelin. This view is held by the Hanafi school and Ibn al-Qasim of the Maliki school.[60]

The second view is that the culprit should be killed first in the ordinary way, and then crucified for three days to be a deterrent to others. This view is held by the Shafi'i and the Hanbali schools, and some of the Maliki jurists.[61]

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58. See above, F.N. 22 and 23.

59. For fuller discussion see Shalabi, op.cit. pp.81-86.

60. Zayla'i, his commentary on Kanz al-Daqa'iq, vol.III, Cairo, 1313 A.H., p.237. for the view of b. al-Qasim see al-Mudawanah al-Kubra, vol.XV, Cairo, 1323 A.H. p.99.

61. Nihayat al-Muhtaj, op.cit. p.5. al-Insaf, op.cit. vol.X, p.293. Bidayat al-Mujtahid op.cit. vol.II, p.494.

According to Ibn Hazm, crucifixion is a separate punishment which should not be inflicted in conjunction with any other punishment whether before or after it. So, if the judge chooses to execute this punishment the criminal should be crucified alive, left till he dies and then taken down and buried.[62]

The main element in prescribing crucifixion as I see it, is to prevent the committing of this grave crime by the threat of this unusual punishment. In addition to that the Qūr'ānic verse, as b. Hazm stated, does not mention that crucifixion should be used after or with the death penalty. Thirdly, if the deterrent or preventative element is, as I think, the fundamental element, there is no point in adding the death penalty to crucifixion while it is sufficient to attain this fundamental end.

With regard to these three points, I should say that this punishment is a completely separate one. Moreover, it is noteworthy that Mālik, when he was asked about it, did not reply, but said "I have never heard about anyone who was crucified except a man called al-Hārith who was crucified in the time of Abd al-Malik b. Marawān after claiming to be a Prophet."[63]

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62. Muhalla, vol.XI, p.317-318.

63. al-Mudawwanah, op.cit. vol.XV, p.99.

This reply of Mālik gives me the impression that this punishment is prescribed solely to threaten the criminal. I get this impression also from the fact that although this punishment is the most severe one, the Prophet did not inflict it upon the people of 'Ūkal and 'Ūrayna. In a contemporary text, the writer compared this puhishment with death by shooting under the military law of some countries;[64] claiming that they are nearly the same punishment. But this view is far from reality because the differences between the two sorts of punishment are so very clear that they cannot be compared.

Finally, in the texts of Islamic law, there are long discussions about the priority of inflicting the punishments prescribed by the Qūr'ānic verses previously mentioned. To summarize these discussions,[51] one can divide the jurists into two groups. The Mālikī and Zāhirī schools hold the view that the judge has the right to choose which punishment is suitable in each case and inflict it.[65] To explain this freedom of choice al-Qarāfī, stated that the judge had to do his best to find out what is most beneficial to the community and to do it.[66]

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64. 'Ūda, op.cit. vol.I, p.657.

65. Mūhalla, vol.XI, p.317. Mūdawwanah, vol.XV, pp.98-105.

66. Qarāfī, Fūrūq, vol.III, Cairo, 1346 A.H. p.18.

On the other hand the Hanafī, Shāfi'ī and Hanbalī schools denied this authority to the judge, and held that this crime has more than one punishment, according to the ways in which the criminal act can be committed. So if the criminal killed his victim he should be sentenced to death; if he stole his money he should have his right hand and left foot cut off; if he threatened the passengers he should be liable to banishment. In other words, the administration of the punishments should differ according to the crime, but not according to the personal character of the criminal.[67]

This last statement shows that the two views are the outcome of different approaches. The jurists who hold the first view differentiate between the punishments in accordance with the personal character of the criminal[68], while the other jurists justify the application of one punishment or the other in accordance with the offence committed.

IV. 3. Banishment "al-Nafy":-

There are three views among the Sūnnī school about this punishment. The Hanafī school's view is that banishment means imprisonment.[69] The Mālikī school understand

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67. Shāfi'ī, Ūmm, vol.VI, p.140. Zaylaī, Tabyeen al-Haqai'q, op.cit. vol.III, pp.235-7. Mardawi, al-Insaf, op.cit. p.292-5.

68. Qarāfī, ibid.

69. Zayla'ī, op.cit. p.235.

it as imprisonment in another country, not in the criminal's own country.[70] The Shāfi'ī and Hanbalī schools claim that the meaning of the word "nafy" is the pursuing of the criminal from country to country if he escapes.[71]

Now to review the situation, one can say that the view of the Shāfi'ī and Hanbalī schools has no evidence to back it up, while the Hanafī school has the most acceptable view on the subject. The Mālikīs, by adding to the imprisonment the condition that it should be out of the criminal's country try to apply both senses of the word "nafy" but there is no need to do so as imprisonment is a separate punishment which is known independently of the Qūr'ānic usage. Here the Qūr'ān uses the word banishment "nafy" and not imprisonment "habs".

Anyhow, the punishment of banishment "nafy" is to be inflicted upon the culprit until he displays a better character, and does not seem likely to commit another crime, or in the jurists' words, until his repentance is proved.[72]

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70. Mūdawwanah, vol.XV, pp.99-100.

71. Ghazālī, Wajiz, vol.II, p.179. Mardāwī, Insāf, vol.X, p.298.

72. See the references mentioned before, and 'Ūda, op. cit. vol.I, p.660-661.

This principle can be compared to some extent with the law of corrective training introduced in England by the Criminal Justice Act, 1948.[73]

Moreover, there are two questions which remain unanswered. The first is the common argument that it is hard to conceive that a religious Prophet could prescribe such savage punishment.

This argument was answered by one of the most distinguished defenders of Islamic law, the late Egyptian Judge 'Ūda. In his book, previously referred to, he answered it by comparing the punishment for "hirāba" with the punishment of imprisonment in modern penal systems. 'Ūda used the well-known fact that most of the prisoners who come out of prison are more dangerous and more expert in methods of committing crime without being prosecuted; then he asked who can claim that a man without one of his two hands and with one foot only can be of any danger to society. As the aim of this punishment is solely to retribute the offender, he continued, this is the best punishment to serve such an aim.[74]

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73. See for this law, Cross and Jones, "Introduction to Criminal Law", 6th Ed., London, 1968, p.352-353, however corrective training has been abolished under the Criminal Justice Act, 1967.

74. 'Ūda, op.cit. vol.I, p.659-660.

But a contemporary scholar of Islamic law used another approach to reject this argument; Abū Zahra, in his afore-mentioned book explains that Islamic law, like the sacred Jewish law of the Torah, are both aiming to achieve public security and peace for the rest of the community, as well as the retribution of the criminal minority. Therefore the necessary means to achieve this last and were allowed in both the Torah and the Qūr'ān.[75]

The second question is concerned with the law of pardoning the offenders who repent, and whether the punishment for "hirāba" should be considered as a dead letter because of this law.

To answer this question, one should again bear in mind that this punishment and all the "hūdūd" punishments in the Islamic penal system are prescribed mainly to protect society from crime. In order to achieve this purpose Islamic law prescribed punishments, and then made it possible for criminals to be pardoned when they realized that they were doing evil conduct which they would like to give up.

This does not contradict what was quoted before from Abū Zahra. It is only the punishment which will not be executed, while all the wrongs and damages the

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75. See the introduction to his book, al-Jarima wal-'Uquba, op.cit., pp.6-11.

criminal has done against individuals will be subject to remedies.[76] So the society has not lost anything. On the contrary, it has gained a new member who, if he had not been given the chance to repent, would have been considered forever as an outsider.

V. Illicit Sexual Relations "Zinā":-

In modern penal laws, generally speaking, voluntary sexual relationships outside marriage are not considered as crimes. Such a sexual freedom is completely unknown to all the sacred laws; the Jewish law, the Biblical law, and the Islamic law all forbid, and make punishable, all sorts of sexual relationships outside marriage.

The differences between these laws appear in what is considered unlawful and punishable sexual relations, and the punishments prescribed for the prohibited practices. In this section we will try to compare these laws as far as possible.

As for Islamic law the definition of the crime is different from one school to another. The best definition is the one given by the Hanafī school: "sexual intercourse between a man and a woman, without legal right or without the semblance of legal right (al-Milk or Shūbhat al-Milk)".[77]

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76. Mirghinānī, Hidāya, vol.IV, Cairo, 1316 A.H. p.272. Chazalī, Wajiz, op.cit. p.179. Ibn Juzaʿiy, op.cit. p.392 et seq. Mardawī, Insaf, op.cit. vol.X, p.299.

77. Kāsānī, op.cit. vol.VII, p.33. for other definitions see: ʿUda, op.cit., vol.II, p.349.

In spite of all the differences in defining the crime of "Zinā" among the Islamic law schools, all jurists agree that the main element in this crime is unlawful intercourse.

Accordingly, any sexual relationship between a man and a woman which does not contain intercourse cannot be punishable by the "hadd" punishment. These relations cannot be considered legal "mūbāh"; on the contrary they are prohibited "harām", but their punishment is a "Ta'zir" one and not the "hadd" for "zinā".[78]

However the punishment of the crime of "zinā" is prescribed in the Qūr'ān "The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes, and let not pity for the twain withhold you from obedience to Allah ... And let a party of believers witness their punishment." Sūrah XXIV, Verse 2.

This is the last verse to be revealed concerning the crime of "zinā". Before this verse there were the two verses in Sūrah V, i.e. "As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to their houses until death take them or (until) Allah appoint for them a way (through

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78. Fath al-Qadir, op.cit. vol.V, p.150. 'Ūda, ibid.

new legislation). And as for the two of you who are guilty thereof, punish them both ...".[79]

According to these verses the punishment for an adulteress was that she was to be imprisoned in her family's house until she died or until another piece of legislation came into force. For a man who committed the same crime, the punishment was to do him harm.[80] But soon afterwards another piece of legislation came in the verses of Sūrah XXIV, determining one hundred lashes for both the unmarried male and female who commit adultery, together with the punishment prescribed by the Sūnnā for the married male or female, i.e. stoning to death. After the new legislation, the first one was cancelled according to the view of the majority.[81] But according to Mūjāhid, a companion of Ibn 'Abbās, it is applicable only in cases of homosexuality.[82]

However, it is clear that the punishment for adultery was at first a sort of "ta'zir", and later it became a

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79. Verses 15-16.

80. Ibn Kathir, Tafsir al-Qūr'ān, vol.I, Cairo (n.d.), p.462. Ibn al-Jawzi, Zad al-Masir Fi 'Ilm al-Tafsir, vol.II, Damascus, 1965, p.33-36. Sayed Qūtb, Fi Zilāl al-Qūr'ān, vol.XVIII, 5th Ed. Kuwait, 1967, p.57-58.

81. Sūyūty Itqān, vol.II, Cairo, 1951, p.23.

82. Ibn Kathir, ibid.

"hadd" punishment and the "hadd" varies according to the marital status of the culprit.

This is agreed upon by all the Muslim jurists except the "Khārijī" group of "al-Azāriqa" who denied stoning to death to be the punishment for married adulterers.[83] The above agreement was always respected until comparatively recently when some writers denied stoning to death to be an applicable punishment and claimed that it had been cancelled by the revelation of the above-mentioned verses of Sūrah XXIV.[84] The evidence on which they relied needs to be discussed. So we will discuss this view first, then explain the nature of this punishment in its two aspects, and then the distinction between a married culprit "muhsan" and an unmarried one "ghir muhsan".

V. 1. Stoning as a Punishment "al-Rajm":-

According to the majority, the punishment of stoning is prescribed by the Sunna. But it is related that a Qur'ānic verse was revealed prescribing this punishment. According to the majority too, the formulation of this

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83. See, 'Abd al-Qāhir al-Baghdādī, al-Farq Bayn al-Firaq, Cairo, 1965, p.84.

84. Darwazat, al-Dustur al-Qur'āni, Cairo, 1956, p.193 et seq. The same view was related by al-Albani in his commentary on Mukhtasar Sahih Muslim, vol. II, Kuwait, 1969, p.36. F.N.3, but he did not mention who holds it.

verse, was abrogated but its verdict continued to be applied.[85]

It is also related that the Prophet ordered this punishment to be carried out in four cases, in one of which the criminals were a male and female of the Jewish community of al-Madina.[86] It is controversial, however, whether the Prophet ordered the two Jews to be stoned according to their own law or according to Islamic law.[87] But for the other cases, it is clear that there was no reason to apply the Jewish law as all the criminals were Muslims.

Those who deny the punishment of stoning support their view as follows:-[88]

i. The abrogation of the words of a Qūr'ānic verse and the continuity of its verdict is a controversial point, so it cannot be of any help to claim that the Qūr'ān prescribed stoning as a punishment.

ii. It is possible that the Prophet stoned the Jews according to their law; and then he inflicted the same

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85. Bukhārī, op.cit. vol.XII, pp.119-124. Sūyūṭy, Itqān, vol.II, p.25. Muḥalla, vol.XI, pp.232-237.

86. Bukhārī, op.cit. vol.XII, pp.101, 108, 115-118. Muslim, op.cit. vol.V, pp.117,120-122. Mishkat al-Masabih, op.cit. vol.II, pp.287-293.

87. Bukhārī, ibid. pp. 140-145.

88. This is summarized from: Darwazat, op.cit. pp.193-197.

punishment upon the Muslims as there were no revelations concerning the offence.

iii. It is possible, too, that this punishment was prescribed by the Qūr'ān, as is related, but it was abrogated afterwards.

iv. al-Bukhārī related that someone asked Ibn abī-Awfā, a companion of the Prophet, if the Prophet had ordered stoning to be carried out after or before the prescription of one hundred lashes in Sūrah XXIV and Ibn abī-Awfā said that he did not know which it had been.[89]

As for the abrogated Qūr'ānic verse, what they said is true; surely also one can add to this that in some of the traditions concerning this verse 'Umar asked the Prophet to allow him to write it but the Prophet refused, and this is self-evidence of its abrogation.[90] But the point is not that this punishment was prescribed by the Qūr'ān only, but that it was prescribed also by the Sūnna. Muslim, in his Sahih[91] and the authors of the books of sūnan "Ashab al-Sūnan" i.e. Abū Dāwūd, Ibn Mājah, al-Nasā'ī, al-Tirmidhī, al-Bayhaqī and Ahmad b. Hanbal, all related that the Prophet received the revelation "Wahi" and then he told his companions that a new piece of

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89. Bukhārī, op.cit. pp.140.

90. Ibid., p.120. Muhalla, op.cit. p.235.

91. Muslim, vol.V, p.115.

legislation had been revealed to him, i.e. that a married male or female should be given one hundred lashes and then stoned to death, and an unmarried male or female should be given one hundred lashes and then just expelled for one year.[92] So according to this Prophetic report all the jurists enforced the punishment of stoning. It is true that they are not all agreed about the flogging of the married culprit, or the banishment of the unmarried one.[93] But this disagreement exists because when the Prophet ordered the punishment of stoning to be carried out he did not order flogging to preceed it. Nor did the Prophet order banishment with the flogging except in one case in which bamishment claimed to be based on public interest.[94] This disagreement, however, does not affect the main point which is agreed on, i.e. the punishment of stoning for the married offender.

As for the second and third possibilities, these are merely assumptions and there is no evidence to support them. Particularly for the third it is hard to say that this punishment was abrogated in the ignorance of all

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92. Ibn Kathir, op.cit. p.462. Zād al-Masir, op.cit. vol. VI, p.5 F.N.1.

93. Muḥalla, op.cit. vol.XI, p.183 et seq. Shu'rānī, Mizān, vol. II, p. 135 et seq.

94. Mughnī, op.cit. vol. VIII, p. 160 et seq and 166 et seq. Fath al-Qadir, op.cit. vol. IV, p.135 et seq.

the companions, simply because this may lead to a claim of abrogation for every rule in Islamic law.

As for the tradition of Ibn abī-Awfā, there is no evidence in it to support the view of those who denied it. All one finds in this tradition is that Ibn abī-Awfā did not know if the Prophet's infliction of the punishment in question was before or after the revelation of the verses in Sūrah XXIV. But this does not mean that the punishment was abrogated, especially when one knows that the Prophet's companions inflicted the same punishment later on.[95]

So one can say that the punishment of stoning to death is prescribed by the Sūnna and not by the Qūr'ān. Moreover it is the only "hadd" punishment, as far as I know, which is prescribed by the Sūnna.

It is noteworthy that stoning to death was prescribed in the Torah as a punishment for many crimes, among them adultery.[96]

So it may be argued that the Prophet of Islam added this punishment to Islamic law by borrowing it from Jewish law. But the link between the two systems of law can be found rather in the fact that both are

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95. Mūghnī, ibid.

96. The Jewish Encyclopaedia, vol.I, London, 1901, under 'adultery", and vol.III, under 'capital punishment.'

Divine laws. As the source of the two is God's revelation, it is expected that many verdicts would be similar. Therefore, this fact of similarity, instead of being used as evidence of Muhammad's borrowing from Jewish law can be used as evidence of the Divine nature of Islamic law. The differences between Jewish and Islamic law are undeniable, but that is simply a result of the different circumstances in which each law was revealed. In other words, in the changeable aspects the divine law changed from Moses to Muhammad. But for the unchangeable aspects the law remained the same.[97]

V. 2. The Nature of the Punishment for Adultery:-

Among surviving penal systems, the Islamic penal system is unique in its punishment for adultery. It is true that this punishment was prescribed in Jewish law, but it is no longer applied nor is there any suggestion that it be re-enforced. The only explanation for the prescription of such a punishment may be found in the fact that Islamic law, or rather, Islam itself, is completely based on morality. Any moral transgression is thus seriously condemned by means of severe punishments.

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97. See for the similarity between the two systems, Abu-Zahra, al-Jarima wal-'Uquba, op.cit. pp.9-10.

In a legal system where "all acts and relationships are measured by a scale of moral evaluation"[98], it is natural to find such a deep concern with the enforcement of sexual morality. It was the same situation under Jewish law where, to quote the Jewish Encyclopaedia, "law and morality went hand in hand to prevent the commission of the crime".[99] The intention to protect public morality against corruption by the publicization of the offence, is the reason behind limiting the methods of proof to the offender's confession, and the testimony of four adult male Muslims who have seen the very act of sexual intercourse.[100]

On the other hand the widest publicity should be given to the carrying out of the punishments in order to deter potential offenders. This appears in the rule that all punishments, especially for adultery, should be carried out in public, or as the Qūr'ān commands "and let a party of believers witness their punishment."[101]

The connection between the Islamic penal system and the moral values of the community is the factor behind

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98. Coulson, N.J., A History of Islamic Law, Edinburgh, U.P., 1971, p.83.

99. The Jewish Encyclopaedia, vol.I, p.217.

100. See below, chapter V, The Law of Evidence in Criminal Cases.

101. Sūrah XXIV, Verse 2, See for juristic application, Kāsāni, Badai', op.cit., p.60-61; and Ibn Farhūn, Tabsirah, vol.II, Cairo, 1301 A.H. p.183.

many punishments and prohibitions in Islam, but its clearest effect appears with regard to the punishment for "zinā". However, more will be said about that in the third chapter when we discuss "ta'zir" punishments.

In view of modern ideas about personal freedom, and in particular, sexual freedom, the Islamic treatment of the offence of "zinā" appears very unusual. Here it must be remembered that the Islamic concept of personal freedom is in no way similar to that of the post-war generation in the West. Personal freedom according to Islamic concept is granted only outside the area of life for which injunctions and prohibitions were laid down in the Qūr'ān and the Sūnna - the Divine Will. Such a limitation by a supreme authority is absolutely absent in the contemporary Western image of the relation between law, society and the individual. That may explain many differences between Islamic and Western legal systems.

V. 3. <u>The Distinction between Married "Muḥsan" and Unmarried "ghir-Muḥsan"</u>:-

It has been said before that the stoning punishment which was determined by the Sūnna is the punishment for a married male or female who has committed the crime of "zinā", while the punishment for an unmarried male or female, prescribed by the Qūr'ān, is one hundred lashes. This number is agreed upon, but nevertheless there are

two things which are not similarly agreed upon; the flogging before stoning for a married culprit; and the banishment for one year after flogging for an unmarried one.

For the first aspect, the Hanafī, Mālikī and Shāfi'ī schools allow only the stoning to be inflicted upon the culprit, as the flogging before stoning was abrogated.[102]

The Hanbalī, Zāhirī and Zaydī schools hold a view according to which a married culprit "muhsan" should be flogged first and then stoned to death.[103] These schools support their view by a Prophetic report related by Muslim and other collectors of the "hadith", in which the Prophet prescribed both punishments for a "muhsan". But it is clear enough from what was stated by Shāfi'ī in his book "al-Risālah", that this prescription of two punishments was afterwards abrogated by the Prophet himself.[104]

As for the second aspect, all the schools except the Hanafī school consider the punishment for an unmarried culprit "ghirmuhsan" to have two parts, i.e. one hundred

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102. Badāi' al-Ṣanāi', vol.VII, p.39; Ibn Jūzaiy, op.cit. p.384; Umm, op.cit., Vol.VI, p.119. And for details see al-Risalah, with the commentary of Shakir, A.M., Cairo, 1940, p.130 et seq. and 245 et seq.

103. Mughni, op.cit., p.160 et seq. Muhalla, op.cit. vol.XI, p.234. al-Rawd al-Nadir, op.cit.vol.IV, p.481.

104. al-Risālah, op.cit. pp.130 et seq. and 245 et seq.

lashes, and one year's banishment "taghrib". There are long discussions in the books of "Fiqh" about this banishment.[105] But for us it is enough to say that the majority view is the preferable one as its evidence is more acceptable than the evidence used by the Hanafī school.[106] The only point which should be added to the majority view is that "taghrib" here, as "nafy" in "hiraba" could be imprisonment and not necessarily banishment as the word literally implies.[107]

However, the distinction between "muhsan" and ghir-muhsan" is based on the fact that the married person has no reason to commit "zinā" as he could enjoy lawful sexual relations with his wife (or a woman with her husband). This is an opportunity which is not available to the unmarried; so their punishment should be lighter than the punishment of the married.[108]

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105. al-Risālah, ibid., and al-Muhalla, op.cit. vol.XI, pp.181-188 and pp.232-233.

106. Badā'i' al-Ṣanā'i', op.cit., vol.VII, p.39. Fath al Qadir, op.cit. pp.134-137.

107. See Anderson, J.N.D., Islamic Law in Africa, H.M.S.O. London, 1954, p.196 for replacing banishment with imprisonment in Northern Nigeria.

108. See Ibn al-Qayyim, I'lām al-Muwaqqi'n, op.cit. vol.II, p.107 et seq.

In other words, the punishment of adultery, like all other punishments, is based on moral grounds, and as it cannot be claimed that the immorality of this act when committed by a married person is the same as when committed by unmarried one, the punishment is different in each case.[109]

This distinction can be rationally understood. One cannot understand, however, the continuity of the status of "ihsān" after the dissolution of the marriage. If the reason behind imposing a severe punishment upon a married person is that he can enjoy sexual relations lawfully with his wife, this condition of "ihsān" should be considered to exist if, and only if, the culprit has committed adultery during a valid marriage. But if the reason behind this punishment is that the person has had lawful sexual relations at one time then what was said about the continuity of the status of "ihsān" could be right, but still beyond understanding.[110]

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109. It is noteworthy that "muḥṣan" in this respect is one who has ever enjoyed sexual intercourse in a valid marriage. See: Sa'di Jelbi, his Hashiya on al-'Inaya, Pub. in margin of Fath al-Qadir, op.cit. vol.IV, p.130, and Anderson, ibid, F.N.(2).

110. The conditions of "Iḥṣān" are not subject to agreement among the jurists, but we need not go beyond marriage as the most fundamental and important one. See for details Mughni, op.cit. p.161 et seq. and 'Uda, op.cit. vol.II, p.389 et seq.

However, it is related that the well-known Egyptian jurist and reformer Muhammad 'Abduh, holds that the punishment prescribed by the Prophetic words and practice for the "muhsan" adulterer, is exclusively applicable in cases of offenders who, at the time of committing the offence, are enjoying a valid marital relationship. The punishment for the offender, 'Abduh says, who had been married, but no longer is, should be lighter or at most equal to that of the unmarried offender.[111]

Finally, it is worth concluding by quoting a contemporary scholar's view about the punishment for adultery; Prof. Shalabi stated, in accordance with the above-mentioned requirement of proof, that "this punishment is prescribed in fact for those who committed the crime openly ... with no consideration for the law or for the feeling of the community...".[112]

No doubt, the commission of the crime in this way justifies the punishment prescribed for it.

VI. Slanderous Allegations of Unchastity "Qadhf":-

The fourth crime for which the "hadd" punishment is prescribed in the Qur'an is "qadhf". This offence may be defined as an unproved assertion that someone has committed

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111. Rida, M.R., Tafsir al-Manar, vol.V, Cairo (n.d.) p.25.

112. Shalabi, al-Fiqh al-Islami, op.cit. p.201.

"zinā".[113] The accused person should be "muḥsan" but "iḥsān" here has a different meaning than in "zinā", i.e. it means chaste.[114] Jurists of the sunnī schools hold that, in order to consider such an assertion an offence, the accused person must be a sane adult Muslim who is known to be a chaste person. In my opinion, the preferable view is the Ẓāhirīs one which was expressed by Ibn Hazm in al-Muḥalla.[115] This view can be summarised by saying that "iḥsān" in its above meaning, is the only condition to be required on the accused's part; as it is the only condition required by the Qur'ān. At the same time there is nothing to support the other school's view, in requiring other conditions.[116]

The punishment for slander "qadhf" is prescribed in Surah XXIV "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never accept their testimony. They indeed are evil-doers. Save those who afterwards repent and make amends." verses 4-5. It is controversial whether

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113. Mughnī, op.cit. pp.215-216. Muḥalla, vol.XI, p.265 et seq.

114. 'Ūda, op.cit. vol.II, p.473 et seq.

115. Muḥalla, vol.XI, pp.272 et seq.

116. For the other schools' view see Mughnī, op.cit. pp.216-17. Khirshi, his commentary on Mukhtaṣar Khalil, a Maliki text, vol.V, Cairo Ed. 1308 A.H. p.328 et seq. Fath al-Qadir, op.cit. vol.IV, p.190 et seq. Qurtubi, Tafsir al-Qur'an, vol.XII, 2nd Ed., Cairo, 1942, p.174 et seq.

these verses were revealed because of the false accusation against 'Āisha, the Prophet's wife, which was mentioned in the same Surah, verses 11-22 or not.[117]

According to those who hold that this punishment was prescribed because of 'Āisha's case, the punishment has a retroactive force; while according to the others who hold that the verses concerned were revealed before this case, the punishment does not have this force.[118]

However, it is true that the first case in which this punishment was inflicted was the case of 'Āisha.[119] In this case three were punished, i.e. Hassān b. Thābit, Mistah b. Athātha, and Himna b. Jahsh.[120]

The jurists hold different views concerning some aspects of the problems raised concerning the punishment for "qadhf". In this study we will limit our research about these controversial points to three, i.e. a) the question as to whether the accusation must be clear, or can be merely intimated; b) the categorisation of the punishment into "haqq ādamī" or "haqq Allah"; c) the effect of the criminal's repentance.

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117. For the two views see, 'Ūda, op.cit., vol.I, pp.266-270.

118. Ibid.

119. and 120. Qūrtūbī, Tafsir, op.cit. vol.XII, pp.201-2. Ibn-Kathir, Tafsir, vol.V, Beirut, 1966, p.67 et seq.

But before starting to discuss these points, it is worth saying that the punishment for this crime is an exception to the rule that every crime should not result in more than one punishment. As for "qadhf", the Qur'anic verses previously mentioned prescribed three punishments, of which two should be carried out in this world, i.e. one hundred lashes and the rejection of the criminal's testimony [121]; and the third merely appears in the relation between the culprit and his creator, i.e. he will be considered as a sinner. The first two punishments are our main concern in this study.

VI. 1. The Clarity or Intimation of the Accusation:-

A clear accusation means that it should be expressed in a word which does not have more than one meaning. That is a word derived from the word adultery "zina" or any word with the same meaning. An intimated accusation means that the accuser uses a word which means among other things that the accused has committed the crime of "zina".

Except for the Maliki school, all jurists agree that there can be no "hadd" punishment unless the accuser

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121. Indeed all "hadd" offences result in a temporary rejection of the offender's testimony, but here this is determined as a punishment, while in other "hadd" offences it is a juristic view based on the fact that the "hadd" offences destroy "'adala", which is the primary condition for the acceptance of testimony.

has used an unambiguuus word.[122] But the Mālikī school holds that the intimated accusation does not differ from the clear one, insofar as the accused person can understand that the accuser was implying "zinā" and accusing him of having committed it.[123]

In fact it is a linguistic problem, in which one must find out whether an intimation can be considered, linguistically, as a clear word or not. As far as the Arabic language is concerned the Qūr'ān is the highest authority for solving any problem of Arabic usage. In the Qūr'ān one finds that there are many verses which distinguish between intimation and clarity.[124] So one can say that the majority view is the preferable one.

At the same time when someone uses a word which has several meanings one of which can be understood as "qadhf" he may be liable to a "ta'zir" punishment when the "hadd" punishment cannot be applied.[125]

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122. Muhalla, vol.XI, pp.276-281. al-Rawd al Nadir, vol.IV, p.493 et seq. Fath al-Qadir, vol.IV, p.190 et seq. Mukhtaṣar al-Muzani, op.cit. vol.V, p.168. Mughni, vol.VIII, p.222 et seq. It is noteworthy that some of the Ḥanbali jurists hold the Maliki view, but Ahmad b. Ḥanbal in his latest view preferred the opposite.

123. Khirshī op.cit. vol.V, p.329. Mawwāq, his commentary on Mukhtaṣar Khalil, vol.VI, Cairo, 1329 A.H. p.301.

124. e.g. verse 235 Surah II.

125. al-Rawd al-Nadir, vol.IV, p.494. 'Āmer, op.cit. p.161.

VI. 2. The Categorisation of the Punishment

There are three views among the jurists about the categorization of the punishment for "qadhf". The Hanafī and Zāhirī schools hold the view that this punishment pertains to the public sphere or to use a modern expression, is a state punishment, as the punishment is prescribed to safeguard the public interest in terms of protecting an individual's good repute; so it belongs to the part of the criminal law, which is known in Islamic terminology as "haqq Allah".[126]

According to the Shafi'ī and Hanbalī schools the punishment for "qadhf" is "haqq ādami". So it cannot be inflicted unless the accused person or his representative demands; if he forgives his accuser there is no punishment.[127]

The Mālikī jurists make a distinction between the case before it is reported to the judge and after it has been reported. Before it is reported it is "haqq ādami" and afterwards it is "haqq Allah".[128]

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126. Kāsānī, Badāi', vol.VII, pp.56 et seq. Muḥalla, vol.XI, p.281.

127. For Ḥanbalī school see: al-Mughnī, op.cit. Vol.VIII pp.217-8. For Shafi'ī school see: al-Haytamī, Tuḥfat al-Muḥtaj, vol.IIV, p.120 with the commentary of Shirawānī.

128. Khirshī, op.cit. vol.V, p.332 et seq. Mawwāq, op. cit. vol.VI, p.305.

This distinction in fact is applied in all the punishments of "hudūd", and it is recommended by several Prophetic reports to forgive the wrong-doers before they are reported to the judge. But once the crime has been reported, the punishment must be inflicted.[129] Nevertheless, this recommendation has nothing to do with the categorization of the punishment, so its use by the Mālikī school in this particular case cannot be accepted.

Although Hanafī scholars hold the view that this punishment is "haqq Allah" they do not consider that it should be inflicted unless requested by the accused person or his representative.[130] To justify this view one should look at the Qur'ānic verses and traditions concerned. Neither in the Qur'ān nor in the Sunna is there any proof that the infliction of this punishment should depend on the request of the accused. It is clear that the Prophet, when he inflicted the punishment for "qadhf" upon those who committed it against 'Āisha[131], did not ask her if she wanted the punishment to be inflicted upon her accusers.[132] So this condition cannot

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129. Mishkāt al-Maṣābiḥ, op.cit. vol.II, trad. 3567-8-9-70. Bukhārī with the commentary of b. Ḥajar, vol.XII, p.72 et seq.

130. Badā'i' vol.VII, p.52 et seq.

131. Muḥalla, op.cit. vol.XI, p.289; see also the references mentioned in F.N. 119 and 120.

132. Muḥalla, ibid.

be proved and the Zāhirī's view remains the preferable one.

On the other hand the Hanbalī and Shāfi'ī schools supported their view about the categorization of this punishment as "haqq ādami" by the agreement that they claimed to have existed about the condition of the accused's request for punishment. But as this condition is no longer accepted, their view should therefore not be approved.[133]

To sum up, the punishment for "qadhf" is a punishment pertaining to the public interest, "haqq Allah". The infliction of the punishment is not dependent upon the request of the accused person but once the crime is proved either by testimony or by confession it must be punished. The principle of forgiveness before any report being made to the judge still applies to the crime of "qadhf" but without affecting the fact that its punishment must be "haqq Allah".[134]

VI. 3. The Effect of the Criminal's Repentance:-

It has been mentioned that the Qur'ānic verses concerned with "qadhf" indicate "save those who afterwards repent ..." verse 5, Surah XXIV, but the effect of this repentance is controversial.

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133. See the references mentioned above in F.N. 127.

134. This means that I prefer, or rather hold, the view which Ibn-Hazm expressed in al-Muhalla, vol.XI pp.265-300.

According to the Hanafī school, this repentance does not affect the future rejection of the criminal's testimony; his testimony cannot be accepted thereafter.[135] The Shāfi'ī, Mālikī, Hanbalī and Zaydī schools hold a contrary view, according to which the testimony of the criminal can be accepted after his repentance.[136]

The controversy about this among the jurists derives from their differences of opinion as to the interpretation of the part of the above-mentioned Qūr'ānic verse. Those who think that this exception "save those who afterwards repent ..." applies merely to the sentence before it "they indeed are evil-doers" i.e. the jurists of the Hanafī school hold the view that the criminal's repentance does not affect the rejection of his testimony. On the other hand, the jurists who think that this exception applies to the whole verse before it hold the other view.[137]

At the same time all jurists agree that this exception does not affect the "hadd" punishment, but does affect the verdict of considering the criminal as an"evil-doer.[138]

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135. Sarakhsī, Mabsūt, vol.XVI, pp.125-129.

136. Shirbinī, commentary on Nawawī's Minhāj al-Tālibīn, vol.IV, Cairo, 1308 A.H. p.403 et seq. Mawwāq, commentary on Mukhtaṣar Khalil, vol.VI, Cairo, 1329, A.H. p.161. Mūghni, vol.X pp.178-181. al-Ḥawd al-Nadir, vol.IV, p.85-87.

137. 'Ūda, op.cit. vol.II, p.491-2.

138. Mawdūdī, Tafsir Sūrat al-Nūr, translated from Urdu, Damascus, 1959, p.97-8.

This concludes our discussion of the "hadd" punishment, but we still have to survey it in order to explain its underlying philosophy.

VII. A Survey of the "Hadd" Punishment:-

The "hadd" punishments in Islamic law were prescribed by Allah in the Qūr'ān, except for one offence, i.e. adultery committed by a married person where the punishment is prescribed in the Sūnna.

Very little has been said about the nature and purpose of this part of Islamic criminal law. The Muslim jurists were not interested in explaining very much about this as they saw these punishments as the province of Allah alone. They are prescribed in specific terms and should be inflicted without question. It was therefore unnecessary to say much about the purposes they served or the reasons for which they were prescribed.

The first Muslim jurist who, as far as I know, spoke about these aspects of the "hadd" was Ibn al-Qayyim in his book "I'lām al-Mūwaqq'in"[139] and in other works.

But unfortunately, after him the subject returned to its former oblivion. It was not until comparatively recently that some of the Muslim jurists turned their

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139. See: pp.93-111 of vol.II, Cairo, 1955.

attention to this subject and wrote various works on it.[140] At the same time all that has been written is far from being comparable with Western penology, or rather far from being more than an explanation of one aspect or another of Islamic criminal law.

Thus, a survey of the "hadd" punishment is not an easy undertaking especially when one tries to compare it with Western thought.

In Western penology it is almost universally accepted that punishment has three principle purposes, retribution, deterrence and reformation, though sub-divisions may be necessary and boundary lines are not always clear.[141]

The belief in the importance of retribution is universal. In England not only is the public usually adamant in demanding retributive punishment for the offender, but the doctrine has a well-established place in British jurisprudence and philosophy. Even the religious teachers give it their support.[142] As Goodhart stated "retribution

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140. e.g. 'Ūda in his two vols. book, al-Tashri' al-Jinā'ī al-Islami first pub. 1947 in Cairo and reprinted five times till 1969. Abu Zahra, al-Jarima Wal-'Uquba, pub. about 1959. 'Amer, al-Ta'zir, pub. 1955 and reprinted three times till 1957. Ibrahim, A., al-Qisās, pub. 1944. Abū Haif, al-Diya, pub. 1932.

141. See: Howard Jones, Crime and the Penal System, 3rd Ed., London 1965, pp.134-145. Hall Jerome, Since and Reform in Criminal Law, University of Pennsylvania Law Review, Philadelphia, April 1952, vol.100, No.6, p.794 et seq. Canham, H.A. The Nature of Punishment, Ph.D. Thesis, London University, 1966, 'unpub.' p.19.

142. Jones, ibid. p.136.

in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning crime."[143]

Very recently, the retributive theory of punishment has been the subject of a wide philosophical debate. It was the theory of the great eighteenth century's philosopher, Immanuel Kant, which has been given more attention than any other retributive theory formula.[144] Kant's theory may be summarized in this sentence "... punishment can never be administered merely as a means for promoting another Good, either with regard to the criminal himself, or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime."[145] This theory, however, has suffered from several misinterpretations. None of these interpretations will be discussed here, but the most sensible

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143. Goodhart, A.L., English Law and the Moral Law, London, 1953, p.93.

144. For example, see chapter two "Retribution" of Ted Honderich's 'Punishment - The Supposed Justification', 2nd Ed., Pelican, 1971, pp.22-47. Michael Lessnoff, Two Justifications of Punishment, The Philosophical Quarterly, April, 1971. and Jeffrie Murphy, Three Mistakes about Retributivism, Analysis, April 1971.

145. Kant, Philosophy of Law, translated by W. Hastie, Edinburgh, 1887, pp.195 et seq. quoted in Ted Honderich, ibid.

one is that which has been offered by John Rawls, and illustrated by Ted Honderich.[146] They hold that retributionists do not advocate, as an institution, "legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering". But what they rightly insist upon is "that no man can be punished unless he is guilty, that is, unless he has broken the law".[147]

It is not of any use to this study to proceed further in a discussion of the arguments for and against the theory. Our main concern is to call attention to the justification given to the theory in legal and philosophical writing in order to illustrate its application in the Islamic penal system. For this, it may be said, in short, that "the consequences of punishment, other than the immediate deprivation suffered by the criminals are irrelevant to its justification."[148]

Finally, retribution has much in common with the motive of expiation, to the extent that it is often confused with it. Both retribution and expiation are concerned with rooting out the criminal's evil. Having

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146. Ibid. pp.25-34. John Rawls concept in his article Two Concepts of Rules, Philosophical Review, 1955.

147. Rawls, ibid., p.7.

148. Michael Lessnoff, op.cit., p.141. Honderich, ibid, pp.22-51.

the retributive element in punishment means that sanctions have been imposed on the criminal for his wrongdoing. Expiation on the other hand, means that the criminal has "paid" for his crime and that his account with society is then clear.[149]

VII. 1. Retribution and the "hadd" Punishments:-

The retributive purpose of the "hadd" punishment is the purpose that is most commonly discussed by Muslim jurists (in addition, indeed, to the deterrent purpose to which we will shortly refer).

Retribution is mentioned in the Qūr'ān as the purpose of punishment in many verses, referring to both punishment in this world and in the hereafter.[150] It is interesting to note that the Arabic word for retribution "jazā" in the Qūr'ānic usage implies both punishment and reward.[151] This indicates that both punishment and reward are used as means for the same end. Hence it can be compared with the similar function of punishment and reward in modern philosophy.[152]

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149. Howard Jones, op.cit. Goodhart, ibid. also Winferd, A.E. The English Penal System, Pelican Book, 1957, p.31-33.

150. e.g. Sūrah V, Verses 33 and 38, Sūrah XII, Verses 25 and 75, Sūrah XLII, Verse 40, and Sūrah X, Verse 27.

151. e.g. Sūrah III, Verse 145. Sūrah V, Verse 58, Sūrah LV, Verse 60.

152. Duncasse, C.J. Philosophy & Wisdom in Punishment and Reward, in Philosophical Perspective on Punishment, ed. by Madden and others, New York Univ. 1968, p.3-19.

Retribution appears in the "hadd" punishments prescribed in the penal system in two aspects: the severity of the punishment, and the prohibition of any mediation, or rather the necessity of its infliction, after the crime has been proved.

The punishments prescribed in Islamic law for the crimes of "ḥudūd" are the most severe punishments known to mankind for such crimes. There were more severe punishments prescribed in English law, for instance, in the eighteenth and nineteenth centuries, but they are neither accepted nor do they exist today[153], while the punishments prescribed in Islamic law are still accepted by hundreds of millions of people, and are executed in some countries e.g. Saudi Arabia. Nevertheless, the demand for their application in other countries becomes stronger from time to time.[154]

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153. Hibbert, The Roots of Evil, 2nd Ed. Penguin Books, 1966, pp.19-94. Rolph, C.H., Common Sense about Crime and Punishment, London, 1961, p.102, et. seq. Canham, op.cit. pp.60, 82-3.

154. The best representative of this demand are the writers of 'the Muslim Brotherhood Society' in Arab countries, and 'The Islamic Society' in Pakistan. The same demand was put forward in the Arab Regional Conference of Crime and the Treatment of Offenders, Co-sponsored by the U.N. and the L.A.S. held in Kuwait 4-9th April 1970. See the English copy of the final report pp.8-14, 18, 23-4, 29. The conference was attended by delegates, mostly of the legal profession, representing all the Arab states and Emirates and it was a preparatory conference for the 4th U.N.C. on the same subject.

According to Muhammad Qūtb, the severity of the punishment is based on psychological grounds. In order to defeat the criminal's desire to break the law, Islam prescribed severe punishments drawing attention to the consequences of the crime, so that people would not commit it.[155] The same explanation is given by 'Ūda in his book "The Islamic Criminal Legislation".[156]

Severity of punishment is a controversial point. On one hand, one finds that some philosophers hold the view that "treatment" and not punishment is what the criminal needs.[157] On the other hand one finds that some judges demand severer punishment, including corporal punishment to be reintroduced in Western countries, as the only means to control the increasing crime rate.[158]

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155. Manhaj al-Tarbiya al-Islamiya, 3rd ed. Beirut, 1967, p.231-4.

156. Op.cit. vol.I, p.636 et seq.

157. Baylis, Immorality, Crime and Treatment, in 'Philosophical Perspective on Punishment', op.cit. pp.36-48. cf. Pratt's comments on Ducasse's paper, ibid. p.24.

158. Rolph, op.cit. p.128 et seq. where the writer referred to the view of Lord Parker, the former Chief Justice, who told the Cadogan Committee that it is desirable to "retain the (then) existing power to impose sentences of corporal punishment" for certain offences. And p.12 F.N.(1) where the writer quoted that Mr. Harlof Sturge whom he described as "one of the most human of Magistrates". At Old Street Court, 18th June 1960, he said: "people who say that pain must be taken out of all punishment do not seem to understand much".

Whatever view one holds about this point, no doubt retributive punishment can be nothing but severe punishment. For this reason, I think the Muslim jurists justify the "hadd" punishment as retributive punishment.[159]

Nevertheless the degree of severity is not, and cannot be, agreed upon.[160] The Muslim jurists justify the severity of the "hadd" punishments because they are prescribed by "Allah", so they cannot be objected to, and are eternally to be considered the most proper punishment for the crimes for which they are prescribed.[161] At the same time they quote the Qūr'ānic verse "should He not know what he created? And He is the subtle, the Aware". (Surah LXVII, verse 14) to illustrate that God created people, defined for them what is right and what is wrong and determined suitable punishments for wrongdoers.

On the other hand to try to justify the "hadd" punishments in secular, or in other words, modern terms, would take us beyond the limits of this study, and might not reach any point of agreement.

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159. Ibn al-Qayyim, Ḥādī al-Arwāḥ, pp.273, and I'lām al Muwaqq'in, vol.II, p.100 et seq.

160. For a philosophical view about the degree of severity, see Michael Clark, The Moral Gradation of Punishment, The Philosophical Quarterly, April 1971, pp.132-140.

161. Ibn al-Qayyim, ibid.

The second aspect in which "hadd" punishments seem to be retributive is the necessity of their infliction once the crime has been proved. In a well known Prophetic report "hadith" the Prophet prohibited any mediation in executing the "hadd" punishments, and indicated that if his daughter (Fatimah) had committed a crime of "hadd" he would punish her.[162]

This prohibition of mediation, or the necessity for the execution of punishment, I interpret as a retributive feature in "hadd" punishment. That is to say: if mediation were allowed, or the "hadd" punishments were able to be replaced by any other sort of punishment, the retributive effect of them would no longer exist. So the severity of the punishment and the necessity of its infliction, both give it as much retributive effect as possible.

So far, only the role of the retributive theory in the general rules concerning "hadd" punishments, has been discussed. But the clearer and more important influence of it appears in jurists' approaches and views about some more detailed aspects.

One of the aspects concerned is the problem of inflicting cumulative sentences against one offender "ta'adud al-'Uqubat". Sentences may be cumulative where the same

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162. Bukhari, vol.XII, p.72 et seq. Muslim, op.cit. vol. V, p.114-5.

person has committed various offences before he stands trial, or before he has been punished for any one of them. Offences committed by the same person may be either of the same nature, e.g. theft, highway robbery, and house-breaking, or of a different nature, e.g. theft, adultery, and wine-drinking. In the first case it is agreed that the offender deserves one punishment for all his offences.[163] In the second case one does not find such an agreement. The three schools, Hanafī, Mālikī and Hanbalī stand on one side, and the Shāfi'ī school at the other. With its non-recognition of the practice of abrogation "jabb", (to which we will return later), the Shāfi'ī school understands the predominant role of retributive theory in this context. Their view is that the offender deserves as many sentences as his offences. All the sentences deserved are to be carried out, starting with those pronounced for offences classified as "haqq ādamī".

If, however, the offender has been sentenced to death for homicide (which is "haqq ādamī"), then the penalty must be carried out last, i.e. the death penalty must be the last punishment, disregarding the classification of the offence for which it has been given.[164] To explain

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163. Fath al-Qadir, vol.IV, p.208. Ansārī, commentary on Matn al-Bahja of Ibn al-Wardi, vol.V. Cairo 1900, p.99. Mughni, vol.IX, p.81. Mudawwanah, vol.IV, pp.385, 404.

164. Ansārī, ibid. p.193.

this view the Shāfi'ī scholars give the example of an unmarried man who commits adultery, unproved accusation of fornication, theft, armed robbery (for which he has been sentenced to death) and homicide (for which he has also been sentenced to death). In this case, they say, the punishments are to be inflicted starting with the lightest; so the offender should be punished first for the unproved accusation of fornication; second for adultery; third for theft; and then he is to be executed for homicide, and his execution works for both homicide and armed robbery.[165]

The Shāfi'ī view crystalises the strong effect of their belief in retribution as the philosophy underlying the theory of punishment. The Shāfi'īs' view is an application of the principle of 'Jus talionis' as explained by the retributionists, i.e. "A man must be punished if he has performed an act for which he deserves a penalty. Further, he must not be given a lesser penalty than he deserves for his action."[166]

The retributive theory is also predominant according to the view held by the Shāfi'ī and Hanbalī schools on the infliction of the punishment on an insane man whose guilt has been established by testimony. It assumes,

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165. Ibid., and 'Ūda, vol.I, p.750, where he quoted Muhadhdhab, vol.II, p.305.

166. Honderich, op.cit. p.24.

of course, that the offender has committed his offence while in full possession of his faculties, and that he was tried and sentenced while he was sane. Then he became insane, after the passing of the sentence and before its carrying-out. The Shāfi'īs and Hanbalīs hold that, in such a case, the offender should be punished as he committed his offence while sane and responsible for his deeds.[167]

One view that is held unanimously is that a sentence pronounced against a pregnant woman should be suspended until she has given birth to her child, and recovered from her confinement.[168] This view is based on the fact that the authority has no right to harm the child by punishing his mother. The mother deserves punishment, but the child does not.[169] This rule of limiting the effect of punishment to the person who deserves it, is well established within the retributive doctrine.[170]

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167. For Shāfi'ī school see Ibn Ḥajar al-Haytamī, Tūḥfat al-Muḥtaj, vols.VIII, and IX, Cairo, Ed., 1938, A.H. pp.401 and 118 respectively; for the Ḥanbali school see: Mughnī, vol.VII, Cairo Ed. 1947, A.C. p.665

168. Mūghnī, vol.IX, Cairo, 1969, p.46-7.

169. Ibid., Siyāghī, al-Rawd al-Nadir, vol.IV, p.486-7.

170. Honderich, ibid. p.26.

VII. 2. The Concept of Expiation:-

It has been said that retribution is often confused with expiation. The expiatory view may be summarized as "that in suffering his punishment the offender has purged his guilt, has 'paid for' his crime, and that his account with society is therefore clear. This is the attitude for example which lies behind the commonly expressed reluctance to hold a man's record against him after his discharge from prison."[171]

The concept of expiation in Islamic law has a different end. It is not to clear the person's account with society, but with God. The Arabic word for expiation is "Kaffāra" which is mentioned in the Qūr'ān in relation to some deeds such as accidental homicide, swearing a false oath, and failing to observe religious duties during "hajj" or pilgrimage. But these cases are clearly, except for the case of accidental homicide, not connected with the penal system of Islam. But they are all concerned with man's relation to his creator. Even in the context of the "hadd" punishments, when expiation was mentioned, it referred to man's relation with God and not with his fellow citizens or society. It is related that the Prophet said "whoever commits a crime of "hadd" and receives its

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171. Quoted from Howard Jones, op.cit. p.134 ff.

punishment, this will be its expiation."[172] That is to say that the offender who has been punished in this world will not be punished in the next world. So it is not the legal concept of expiation as known to Western lawyers, but a mere religious one, which cannot be considered as part of the theory of punishment in its legal context.

VII. 3. Deterrence and the "Hadd" Punishments:-

According to Professor Blanchard "whatever else it may be, punishment is commonly supposed to be a deterrent of crime."[173] Deterrence is often characterized as a justification of punishment which looks to the future, i.e. to the prevention of crime. It is contrasted in this with the retribution theory which is often said to be a justification of punishment which looks to the past, i.e. to the offence as an event isolated from possible future events. Retributionists, however, may argue that their theory is not that a man's punishment is wholly justified by an event in the past. "It includes the contention that a man's punishment provides satisfaction" to the victim of his offence and to others. This

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172. Mishkāt al-Masābih, Fazlul Karim Translation, vol. II, p.477.

173. Blanshard, B., Retribution Revisted, in 'Philosophical Perspective on Punishment', op.cit. p.59.

satisfaction, in the deterrance theory, is "of relatively small importance. What is taken to be of supreme importance is that punishment prevents offences."[174]

The deterrent effect is known to be double-sided. There is the general deterrent, i.e. the preventive effect of a penal system (or a particular aspect of it) on criminality in the population at large. And the particular deterrent, i.e. the inhibitive effect of punishment on an individual.[175] The general deterrent is to be achieved by giving the punishment, when it is inflicted, the widest possible publicity. The individual deterrent comes into play when an offender suffers his penalty.[176] Individual deterrence involves making the offender reluctant to offend again. So it is difficult to distinguish it from reformation which is supposed to achieve the same end. In some theories a line is drawn between moral improvement ar reformation which makes the offender repudiate crime on moral grounds, and

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174. Honderich, op.cit.p52, where he quoted Jeremy Bentham, in "Principles of Penal Law".

175. See the working paper prepared by the U.N. Secretariat for the 4th U.N.C. on Prevention of Crime and Treatment of Offenders, "Organisation of Research for Policy Development in Social Defence" U.N. Pub. 1970, p.19. The conference was held in Koyoto, Japan, 17-26 August 1970.

176. Rolph, Common Sense, op.cit. p.15 ff.

prevention which frightens him off. But others regard this frightening-off process as coming under the heading of deterrence.[177]

However, this is one instance of the unclarity of the boundary lines between the different theories of punishment; and it is this question of the frightening-off of the individual as a means of protecting society from crimes, which raises the major criticism against deterrence. Howard Jones points out that the aim in deterrent punishment is to instil into the individual a regard for the law because of his fear of the punishment which will follow if he transgresses. He also mentioned the critical question of "whether legally correct behaviour maintained for such reasons is worth having".

To pose the question in such a way, Jones continued, "seems to me to be very naive". The element of fear "does already enter to a very considerable extent into the social training of all of us."[178] This fact was pointed out clearly by Archbishop Temple when he said "this fear in no way derogates from the value of the sentiments we afterwards build on these foundations. They may begin as rationalizations for our real motives

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177. Lord Longford, The Idea of Punishment, op.cit. p.20-21.

178. Howard Jones, Crime and the Penal System, op.cit., pp.139 et seq.

of fear, but they develop into sincerely held moral principles, to which, when they are matured, we cling in the face of the most appalling temptations and difficulties."[179]

However, this is only one objection to the deterrent theory. Philosophers are engaged in putting forward and replying to many other objections. Though it is interesting to participate in some of these arguments, my inclination here is to conclude that, in spite of all the objections against the deterrence theory, it is still universally recognized as a valid justification of punishment.[180] Similar, or rather wider and stronger, is the recognition of the deterrence theory in the Islamic penal system. Here deterrence is recognized as the predominant justification for punishments and particularly for "hadd" punishments. Māwardī, influenced indeed by the place given to the deterrence theory in Islamic legal works, defined the "hudūd" as "deterrent punishments which Allah established to prevent man from

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179. Ethics of Penal Action, 1st Clark Hall lecture, 1934, p.26-7, quoted in Howard Jones, ibid.

180. In addition to the above mentioned references, see Harris's Criminal Law, 21st Ed. (Hooper, A. Editor), London 1968, p.3. Fitzgerald, Criminal Law and Punishment, Oxford, 1962, p.210. Lord Lloyd, The Idea of Law, 4th revised Ed., London, 1970, p.64 FF. A clear summary of the arguments, especially philosophical arguments, for and against deterrence may be found in Honderich, ibid., pp.52-89.

committing what He forbade and from neglecting what He commanded."[181] If deterrence was to be achieved by means of severe punishments, as it was argued[182], then we need not say much about the deterrence theory as the justification of punishment in Islamic law. But the fact is that punishment is justified, according to the deterrence theory, because it prevents the commission of further offences, both by the offender and by other members of the public. The two notions of general and special deterrence are known to Muslim jurists and supported as one of the basic motivations behind the "hadd" punishments.[183]

The most common example given by contemporary Muslim writers as evidence for the deterrent effect of the "hadd" punishments is that of the enormous decrease in the crime rate in Saudi Arabia since the re-enforcement of "hadd" punishments. During the Ottoman administration in the Arab Peninsula the "hadd" punishments were not applied. In the early 1920's when the Saudis took over, they re-introduced them by ordering the judges to follow the teaching of the Hanbalī school in all aspects, including

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181. al-Aḥkām al-Sulṭāniya, Cairo (n.d.) p.221. cf. Levy, The Social Structure of Islam, Cambridge U.P. 1969, p.331.

182. See Honderich, ibid. p.60.

183. Ibn al-Qayyim, Ḥadī al-Arwāḥ, Cairo, 1938, pp.268, 272, 279 and his I'lām al-Muwaqq'in, vol.II, p.95 ff.

the penal charges. Soon afterwards the crime rate fell demonstrably.[184] It is said that the official figures indicate that the "hadd" punishment for theft, for example, has never been carried out in Saudi Arabia more than twice a year.[185] This was stressed in the Arab Conference on 'Crime and Treatment of Offenders' held in Kuwait in 1970.[186]

It is interesting, in this context, to mention that a similar punishment to that prescribed for theft by the Qūr'ān, has stopped all sorts of theft in the Irish City of Ardoyne. It was administered by the I.R.A. and reported sensibly,in the Times as "Rough Justice".[187] Moreover, and rather astonishingly, an American philosopher stated that "touching a hot stove and getting once painfully burned causes one automatically to refrain from touching a hot stove again. So, if pick-pockets were similarly painfully burned or cut by the purse they reach for, they would similarly stop picking pockets."[188] It is the

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184. 'Ūda, vol.I, p.712. Shalabī, al-Fiqh al-Islāmi, op. cit. p.207-8. Abu Zahra, al-Jarimah, op.cit. p.14.

185. 'Āmer, al-Ta'zir, Cairo, 1957, p.452.

186. See the conference's final report, p.14.

187. The Times, 8th April 1971.

188. Professor Ducasse, C.J., Philosophy and Wisdom in Punishment, in 'Philosophical Perspective in Punishment', p.16.

need for deterrent punishments and the belief in the validity of the deterrence theory which underlies both the American philosopher's view and the Irish Republican Army's experience. The success of the Saudi Arabian experiment is often mentioned as evidence of the effectiveness of "hadd" punishments.

Leaving the practical side, the jurists of all schools of Islamic law have laid great stress on the deterrence theory. According to Ibn al-Hūmām[189], the well-known Hanafī jurist, the "hadd" punishments are prescribed for general deterrence, but when an individual suffers the punishment for one of the "hadd" offences, it is here where individual deterrence comes into play. The same view is expressed by many of the commentators on the Qūr'ān.[190] It is agreed also that all "hadd" punishments should be carried out in public in order to give the punishment its fullest deterrent effect. The Qūr'ān commands the punishment for adultery to be carried out in public. Hence, the jurists extended this command to all other "hadd" punishments.[191] This is a clear application of the deterrence theory as was mentioned above.

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189. Fath al-Qadir, vol.IV, p.112.

190. See for example, Jaṣṣāṣ, Ahkām al-Qūr'ān, vol.III, Istanbul, 1335 A.H., p.264.

191. Kāsānī, Badāi' vol.VII, p.60 ff. 'Ūda, vol.I, p.764, ff.

However, the views expressed by the jurists on certain aspects, may give a clearer illustration. Two aspects will be dealt with here in some detail, i.e. disinheritance, as an incidental punishment for homicide, and the rejection of the offender's testimony, as an incidental punishment for a slanderous allegation of unchastity and other "hadd" offences.

VII. 3. 1. Disinheritance and Deprivation of Legacy:-

In cases of deliberate homicide, and apart from retaliation "qisās" or the payment of blood-money "diya" when the murderer happened to be an heir of the victim, or when the victim had appointed the murderer as his legatee, the murderer could be deprived of his right as an heir or legatee. This rule of deprivation is known as (al-hirmān min al-mirāth wal-wasiyah). It was based on a Prophetic report related in many different ways "turūq", the most trustworthy of which runs "nothing will be given to the murderer."[192] All the schools of Islamic law agree on the application of this rule. Nevertheless, each school, or group of schools, holds its own view as to how this rule is to be interpreted.[193]

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192. Abū Dāwūd, vol.IV, p.313-314. See also the commentary of A. M. Shākir on the Risalah of Shāfi'ī, p.171-172.

193. Shū'rānī, Mizān, vol.II, pp.89-91. Coulson, Succession in the Muslim Family, Cambridge U.P. 1971, p.176.

The Hanafī, Shāfi'ī, Hanbalī and Zaydī schools apply the rule to both deliberate and accidental homicide.[194] This view is based on the generality "'ūmūm" of the words of the Prophetic reports, on the one hand, and on the other, on the accepted rule of "ūsūl al-fiqh" known as the prevention of excuses "sadd al-dharāi'". That is to say that if the murderer was allowed, in a case of accidental murder to be granted his right to inherit, this would encourage every murderer to claim that he had committed accidental homicide. So it is better to avoid it altogether by applying the deprivation rule to all cases of homicide.[195]

The jurists of the Mālikī school hold that only deliberate and unlawful murder should be considered as a bar to inheritance. Accidental, and deliberate, but lawful homicide, e.g. as in carrying out a punishment or in self-defence, has no effect on inheritance.[196] This view is based on the nature of disinheritance as a punishment which may be inflicted only for a wrong, or a crime committed. At the same time, they say, the reason for

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194. Kāsānī, vol.VII, p.339. Shirbinī, Mughnī al-Muhtāj, vol.III, p.24. al-Rawd al-Nadir, vol.V, p.119-120.

195. al-Keshkī, al-Mirath al-Muqāran, 3rd Ed. Baghdad, 1969, p.51.

196. Khalīl, Mukhtasar with the commentary of Zūrqānī, vol.VIII, p.281.

the deprivation of inheritance is that the murderer had tried, or is assumed to have tried, to get his portion of the inheritance before the due time, and this is not the case in either accidental or lawful murder.[197]

As for the deprivation of legacy, the Islamic law schools are again divided into three views.

The Hanafī, Zaydī, Hanbalī and some of the Shāfi'ī scholars, hold that the nature of legacy is the same as inheritance. So they apply the same rule of deprivation by way of analogy "qiyās".[198]

The rest of the Shāfi'ī scholars, and the Mālikī school, hold that homicide is not a proper reason for the deprivation of legacy even in cases of deliberate homicide.[199] In other words they restrict the application of the above-mentioned Prophetic report to inheritance, while the holders of the opposite view extend it to cover legacy as well. The third view is held by some scholars who differentiate between two assumptions regarding legacy. The first is that the murdered person had made his legacy before his death, or before the action which

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197. Ibid. Shū'ranī, Mizān, vol.II, p.90.

198. Kāsānī, op.cit. p.339. al-Rawḍ al-Nadīr, op.cit. p.158-9. Shirbini, op.cit. p.40. Bahutī, op.cit. p.358. c.f. 'Uda, vol.I, p.681-3.

199. Zūrqānī, on Mukhtasar Khalil, op.cit. p.220-1. Shirbini, ibid.

led to his death. In this case they deprive the murderer of his right of legacy. In the second case, they assume that after the act which resulted in his death, the victim ordered some of his bequest to his murderer. Here they granted the murderer his right to take the money on the grounds that the rule behind the deprivation rule, i.e. that the murderer had tried to possess his heritage before its due time, is inapplicable.[200]

The rule that killing is a bar to inheritance and legacy, is to be interpreted in the light of the fact that the Islamic penal system is generally based on deterrence philosophy. It is true that homicide is not a "hadd" offence, but this does not affect the use of this example. Homicide in Islamic law is regarded, as we will see in due course, as a private wrong or a tort rather than a public wrong or a crime. The murderer under Islamic law may be punished by the death penalty, or by paying blood-money "diya". The choice lies in the hands of the victim's relatives, who may, even, pardon the offender altogether. Such an attitude in treating homicide, led the jurists to make good use of the above-mentioned Prophetic report. As it was said some apply it even to cases of accidental homicide, where any criminal

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200. See Zūrqānī, Bahūtī and 'Ūda, ibid. For this rule see, Ibn-Nūjaym, vol.I, p.190.

intention is absolutely absent. This cannot be understood unless it is related to the jurists' aim to deter people from committing the offence.[201]

VII. 3. 2. Rejection of the Offender's Testimony:-

In dealing with the punishment for "qadhf" it was mentioned that there are in fact two punishments: flogging and the rejection of the offender's testimony. Here we are not concerned with every minute detail discussed by the jurists. However, more may be said later about the qualifying conditions for witnesses. The most fundamental condition is that a witness must possess "a quality of high moral integrity, which is known as 'adāla".[202]

Jurists classified any one who has been convicted of the commission of a "hadd" offence and punished for it as lacking this condition, and therefore as not qualified to give evidence before the court.[203] Generally it is held that this rejection of testimony should come to an end as soon as the offender repents.[204]

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201. Homicide as a bar to inheritance is excellently surveyed in Coulson, ibid. pp.176-85.

202. Coulson, N.J. Conflicts and Tensions in Islamic Jurisprudence, Chicago, 1969, p.62. See also below Chapter V on the law of evidence in criminal cases.

203. al-Rawd al-Nadir, vol.IV, p.86. Mughnī, vol.X p.148.

204. Sarakhsī, Mabsūt, vol.XVI, Cairo, Ed. p.132. Shāfi'ī Umm, Vol.VII, p.41-2. Ibn Hazm, Muhalla, vol.IV. pp.431-33.

This rule of rejection has no basis in the Qūr'ān or the Sūnna except in cases of "qadhf". For other "hadd" offences, the jurists apply the rule on grounds that the offender has lost his "moral integrity" or "'adāla". This also, is to be interpreted as a means to deter people from committing the offences in question. Since the person who is not "'adl" would not be considered as a respectable person, no one would risk it, at least no one who is aware of his personal reputation would risk it. This is the only explanation I can see for the extension of the rule of rejection of testimony to all the "hadd" offences, despite its Qūr'ānic restriction to the offence of "qadhf".

VII. 4. Reformation and the "Hadd" Punishments:-

Due to scientific research on the subject of crime and punishment during the last hundred years, reformation has become one of the major ends which punishment is supposed to achieve.[205]

For many criminologists "reformation" is rapidly becoming synonymous with "cure". The criminal is no longer a "bad man" but a "sick man".[206]

The belief in the need for reformative punishment seems to have reached its peak during the last ten years,

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205. Howard Jones, op.cit. p.143 et seq.

206. Ibid.

so some philosophers argue that "a convict needs treatment. He is genuinely ill, perhaps physically, almost certainly mentally, and psychiatrically. He is truly a sick man. He needs help. Something has gone wrong which leads him to react in an antisocial way in situations which stimulate others to constructive actions."[207]

The increased emphasis on reformation has had a great deal of effect on the types of punishment and the penal system in nearly all Western countries.[208]

On the other hand, criticism still arises against the reformative theory and the discussion is still going on.[209]

Whatever may be the place of the reformative theory in Western penology, such a theory has no place in the "hadd" punishments of Islamic law. That is because these punishments are based on nothing but the will of Allah. Allah prescribed these punishments for the related crimes, whether or not they will reform an offender, in the sense

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207. Baylis, C.A. Immorality, Crime and Treatment, in 'Philosophical Perspective on Punishment,' op.cit. p.47 et seq.

208. Canham, op.cit. p.19 and see the 4th U.N.C. on the Prevention of Crime and Treatment of Offenders, working paper on "the Standard Minimum Rules for the Treatment of Prisoners."

209. Howard Jones, ibid. and see the comments on Professor Baylis's paper, ibid. pp.50 et seq.

of reform referred to above as treatment - this is not a relevant question in this issue.[210]

In spite of this fact, Ibn al-Qayyim claimed that the "hadd" punishments are of reformative value as well as retributive and deterrent.[211] He explained this value by referring to the fact, well-established among the Muslim jurists, that an individual who has received his punishment in this world will not be sent to hell in the next world.[212] But this explanation, although supported by some reports "ahādith" related to have been said by some of the Prophet's companions, and in harmony with the divine nature of Islamic law, does not from a lawyer's point of view, imply that the "hadd" punishments have a reformative element in the sense of the word "reform" known in legal writing.

Consequently, the "hadd" punishments, in my view, are only of retributive and deterrent value as was seen before.

But this view has one exception; that is in regard to the fourth aspect of the "hadd" punishment for "hiraba"

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210. For similar view see, 'Ūda, op.cit. vol.I, p.611 et seq. and esp. p.616 et seq.

211. Hādī al-Arwāh, op.cit. pp.268, 272, 273, 279.

212. Ibid. p.267.

i.e. "nafy". It has been said before that the offender who has been sentenced to this punishment is to remain in exile or imprisoned till he displays good character and is not expected to commit another crime.

This sort of punishment is clearly prescribed to improve the criminal's character, therefore in this case one can say that it is aimed at reforming him, and this is the only exception to the general theory of the "hadd" punishment.

CHAPTER II

CATEGORIZATION OF THE PUNISHMENTS FOR WINE-DRINKING AND APOSTASY

(SHURB AL-KHAMR WA AL-RIDDA)

I. Traditional Islamic Law:-

The overwhelming majority of the Muslim jurists classify the punishments for wine-drinking and apostasy as "Hadd" punishments.[1] So do the Western scholars of Islamic law.[2] The Western scholars in fact follow the views stated in one or another of the Islamic law texts. But to establish an objective study about these two punishments one should consult the texts of Prophetic reports, especially those of jurists who concentrated their research on reports of a legal nature "ahādith al-ahkām". It is necessary to study the punishments for drinking wine and apostasy in this way because they are both prescribed by some Prophetic reports. They have not been mentioned in the Qur'ān, and the Prophet dealt with the crimes in different ways on different occasions.[3]

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1. See for example, Kāsānī, Badāi' al-Ṣanāi', vol.VII, pp.33 et seq. Shirwani and 'Abbadi, Ḥawashi Tuḥfat al-Muḥtaj, vol.IX, Cairo, 1938, p.166 et seq. 'Ūda, op.cit. vol.I, p.648 et seq. and vol.II, p.496 et seq.

2. e.g. Coulson, History, p.124. and for drinking wine, see J. Schacht, An Introduction to Islamic Law, p.175, 179. For Apostasy see: S. M. Zwemre, The Law of Apostasy in Islam, London, 1924, throughout the book.

3. This is particularly applied to the crime of drinking wine.

Therefore, it is a question of understanding and explaining the Prophetic reports concerned rather than writing a treatise on a specific legal clause.

This appears to be a departure from the traditional approach to the various topics of Islamic jurisprudence. The traditional approach is to explain the law as it stands in the Medieval legal manuals, and to condemn any attempt to reinterpret the authorities and sources of the "shari'a" i.e. the Qūr'ān and the Sūnna, on the grounds of the finality and exclusive authority of these manuals as the expression of the "shari'a". This, briefly, is the doctrine of "taqlid" which was established as early as the mid-seventh century A.H.[4] This is a doctrine which has gained very wide support on the basis of the infallibility of the alleged consensus "ijma'". Without going any further into this doctrine, it is becoming clearer that the need to reinterpret principles contained in the Qūr'ān and the Sūnna is an urgent one for any reform within the Islamic legal system.[5]

Such a view may be criticized as putting forward a description of the law as it ought to be, not as it is.

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4. Shalabī, Ūṣūl al-Fiqh, Beirut, 1967, p.22-31 and his al-Madkhal Lil Fiqh al-Islami, 8th Ed. Beirut, 1969, p.138 ff.

5. A clear though brief account of this view is to be found in Coulson, ibid., p.202-3. For the invalidity of the alleged consensus see Shalabī, Ūṣūl al-Fiqh, ibid.

Indeed, such a criticism is sound, but one cannot refrain from pointing out that the Islamic legal manuals are wrong when they are. Nevertheless, for those who may not like it, I would say that the views expressed in this chapter are by no means the innovations of an unauthorised student of Islamic law. Fortunately authoratative jurists have mentioned them, not literally, but by clear implication.

To turn to our subject, first we will deal with the punishment for wine-drinking, and then with the punishment for apostasy.

II. The Punishment for Wine-Drinking:-

Wine-drinking, or "shūrb al-khamr" is one of the topics which has been given a good deal of attention on the part of Muslim jurists. Under this heading, there are many topics for discussion, e.g. what wine is, what it is made of, which kind of wine is prohibited "harām" ... etc. But in this study there is no room to discuss all the relevant topics. What we are concerned with is the punishment for drinking.[6] It is important, however, to note that the Prophet defined wine as "any drink which makes a person drunk"; and declared all drinks of

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6. See for details, no.(1) of the Encyclopedia of Islamic jurisprudence, the preliminary Ed., Ministry of Awqāf, Kuwait, 1969.

this sort to be forbidden "haram".[7]

In the Qūr'ān, drinking wine, and many other things, e.g. usury "ribā" and eating the meat of the pig, "akl al-khanzir" are simply declared to be forbidden "harām". The drinking of wine, however, was the most common of these acts among Arab tribesmen, so the Prophet imposed a punishment for it, while the others remained purely as civil matters,[8] or as crimes for which there can be a "ta'zir" punishment.[9]

As the definition of the "hadd" punishment implies, it can only be prescribed by God. In the one case when it was prescribed not in the Qūr'ān, but in the Sūnna, the Prophet made it crystal clear that he was acting according to divine revelation "Wahy".[10]

On the other hand, when the Prophet imposed a punishment for wine-drinking he neither declared that he had imposed it according to revelation nor did he prescribe it in specific terms, i.e. he did not fix a definite sentence as the punishment.

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7. Muslim, with the comment of al-Nawawī, pub. in the margin of al-Bukhari, vol.X, p.172.

8. Coulson, op.cit., p.11-12.

9. As the definition of "ta'zir" punishment was extended to overcome every sin for which there is no "hadd" punishment or penance "Kaffara."

10. See what has been said above about stoning to death as a punishment for a married adulterer.

The Prophetic reports concerned with wine-drinking are related by all the collectors of reports "ahādith"; but in none of these reports can one find the Prophet saying that the punishment was a definite number of lashes as is claimed by Muslim jurists.

All the schools of Islamic law consider the drinking of wine to be a crime for which there is a "hadd" punishment. Although they disagree about the number of lashes which should be the "hadd", they all claim it to have been fixed by the Prophet.

According to the Hanafī school the punishment for drinking wine is 80 lashes.[11] The same view is held by the Mālikī and Hanbalī schools.[12] According to another Hanbalī view, and to the Shāfi'ī, Zāhirī and Zaydī schools the punishment is only 40 lashes.[13]

This variety of views about the number of lashes due to be inflicted is a result of the different views ascribed to the companions of the Prophet. It was

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11. Kāsānī, Badāi', vol.VII, p.57 and 60. Ibn al-Hūmām, Fath al-Qadir, vol.VI, p.183 et seq.

12. For Mālikī school see, Sharh al-Hattāb on Mukhtaṣar Khalik, vol.VI, p.317 and Sharh al-Mawwāq in the margin of the same book, p.317. For Hanbalī school al-Ruhaybani, Matalib uli al-Nuha, vol.VI, Beirut, 1961, p.212.

13. Mughnī, vol.VIII, p.307, for Shāfi'ī school see, Nawawī, Minhaj al-Ṭalibin, vol.IV, p.174, for Zāhirī school, al-Muhalla, vol.XI, p.365, for Zaydī school: Rawd, op.cit. vol.IV, p.505 et seq.

related that the first Caliph Abū Bakr used to impose 40 lashes upon the person who drank wine, so did 'Omar in the first few years of his caliphate. Afterwards when the number of people who drank wine increased unprecedently, 'Omar consulted the Prophet's companions, who were at al-Madina, about it. 'Ali or, according to some, 'Abd al-Rahmān, b. 'Awf suggested that the punishment for drinking wine should be parallel with the punishment for slander"qadhf".[14] In accordance with this, some jurists hold the view that the "hadd" is 40 lashes and the other 40 lashes are "ta'zir"; while others consider the "hadd" to be 80 lashes, supporting their view by claiming that this resulted from consensus "ijma'".[15]

II. 1. Facts about the Prophetic Reports:-

Now to turn to what was related to have been said or done by the Prophet about the subject, one finds that in none of the related reports did the Prophet say that the person who drank wine should be given 40 lashes or 80 lashes. All that is related is that the Prophet ordered the offender to be beaten, "beat him" is the clearest word which is related to have been said by the

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14. Bayhaqī, al-Sūnan al-Kūbrā, vol.VIII, Hidar Abād Ed., 1354 A.H. p.320.

15. Shawkānī, Nayl al-Awtār, vol.VII, Cairo, 1357 A.H. pp.138-143.

Prophet.[16] In addition to that in some cases the Prophet ordered his companions to reprimand the offender but not in other cases. The Prophet took some dust and threw it in the offender's face, but not in every case. At the same time when one of his companions reprimanded a drunken man after he had been punished, the Prophet prevented him from doing so on the grounds that this may help the devil lead the offender to commit more sins.[17]

There were no specific methods of beating the offender, in the Prophet's time. In some cases they were beaten by clothes, hands and sandals.[18] But in other cases they were beaten with sticks and palm branches in addition to sandals.[19]

Moreover, the exact amount of beating an offender should receive was not known to the Prophets' companions. Bayhaqī and Abū Dāwūd both related that when Abū Bakr, the first Caliph, faced the problem of drunkenness he asked some of the Prophet's companions, but they did not know exactly how many lashes drunkards used to receive in the Prophet's time. Accordingly they guessed how many

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16. A collection of the reports concerned will be found in Shawkani, op.cit. p.138; and Mishkat al-Masabih, vol.II, Damascus, 1961, pp.304-8.

17. See Mishkāt al-Masābih, ibid. esp. pp.305 and 308.

18. Ibid, and what is related by Ahmad b. Hanbal, Bukhārī, and Abū Dāwūd.

19. See ibid., p.305 and Shawkānī, op.cit. p.138, where he quoted Ahmad b. Hanbal and Bukhari.

it had been and estimated it at about 40 lashes. Then Abū Bakr imposed this amount as the punishment for drinking.[20] When 'Omar b. al-Khattāb was asked by some of the Prophet's companions to review the punishment for drinking as the number of drunkards had noticeably increased, he consulted the Prophet's companions at al-Madina and it is related that they agreed to raise it to 80 lashes bringing it level with the punishment for slander.[21] But that was by no means the only punishment which 'Omar imposed for drinking. There were cases in which he banished the drunkard, shaved his head, and gave 60 and 40 lashes instead of 80.[22]

'Osman b. 'Affān and 'Alī b. Abī Tālib, both punished the drunkard with 40 lashes, but it is also related that 'Osmān punished him with 80 lashes as well.[23]

Apart from this, it is related by trustworthy people that the Prophet said "if a person drinks wine, lash him for the first three times, and put him to death

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20. Bayhaqī, op.cit. p.319-320; and Abū-Dāwūd, al-Sūnan, with the treatise of 'Awnu al-Ma'būd, India, 1323, A.H., vol.IV, p.284.

21. Bayhaqī, ibid., p.320 and Nayl al-Awtār, op.cit. pp.140-142.

22. Mūhalla, vol.XI, p.365.

23. Mūhalla, ibid. and Nayl al-Awtār, op.cit. p.138-139.

for the fourth."[24] But when a man was brought for the fourth time before the Prophet's court, he did not put him to death, but simply ordered him to be beaten.[25]

All these reports show clearly that there was no fixed punishment for drinking wine in the Prophet's time, nor was such punishment known during the epoch of his companions. In spite of that, all the schools of Islamic law hold the view that the punishment for drinking is a "hadd" punishment, as was mentioned before. At the same time they claim that the death punishment for a recidivist is abrogated and is no longer applicable (with the exception of the Zāhirī school which holds the view that a man should be sentenced to death for the fourth offence).[26]

II. 2. The Alleged Consensus:-

Moreover, the jurists claim that there is a consensus "ijma'" that the punishment for the drinking of wine is a "hadd" punishment. Accordingly, they disapprove of the view expressed by some jurists that the punishment for the drinking of wine is a "ta'zir" punishment.[27]

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24. Abū Dāwūd, op.cit. 280-2 and Nayl al-Awtār, op.cit. p.146-7, where he quoted Ahmad b. Hanbal, Bukhārī, Muslim and Tirmidhī.

25. Ibid. and Mishkāt al-Masābih, op.cit. p.305.

26. See the above mentioned references in F.N. 11, 12, 13 and Muhalla, op.cit. p.365-370.

27. Shawkānī, op.cit. p.142.

This alleged consensus "ijma'" about some controversial topics is a very common method, among Muslim jurists, of rejecting the view of the opposition.[28] But, fortunately, it has no legal value.[29]

To explain this, one should know that consensus "ijma'" according to the jurists of "Ūsūl al-Fiqh" or origins of Islamic law, is the agreement of all the learned men of Islam about a legal verdict at certain time.[30] This sort of agreement in theory gives the agreed verdict an everlasting and infallible legal value.[31]

There is much to be said about this legal value, and about consensus itself. But for us it is sufficient to say that the authoritative jurists give examples of it, which in fact show that it was not, as is defined, "the agreement of all ..." but simply the majority view about the subject in question.

All the examples of it are no more than the majority view[32] and sometimes the majority of one school of law

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28.) Shalabī, Ta'lil al-Ahkām, Cairo, 1949, al-Azhar,
29.) U.P., p.5-6.

30. Khallāf, Ūsūl al-Fiqh, 8th Ed. Kuwait, 1968, p.45.

31. Khallāf, op.cit. p.46 et seq.

32. Ibn al-Qayyim, I'lām al-Mūwaqq'in, vol.I. p.62.
Khallaf, ibid. p.49.

only. This applies even to consensus among the companions of the Prophet. A contemporary scholar, after investigating all the topics where there was a claim to consensus among them stated that it was no more than their majority's view. Then he concluded by saying that the consensus known to the jurists of Islamic law could not come about except by chance or through the unanimity about something like ritual prayers or fasting during the month of "Ramadān".[33]

In accordance with this, one can say that the claim for consensus with regard to the punishment for wine-drinking does not close the door to research into the correct classification of the punishment. That is to say that even if there were a consensus, (which is the view of the majority), it could not establish a legal verdict which did not exist before; nor could it be of infallible everlasting legal value as the jurists claim.

From the historical facts previously discussed, it is clear that the Prophet's companions held various views about the punishment for wine-drinking. Even the Prophet himself imposed different punishments, and in some cases he did not punish the offender at all.[34]

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33. Shalabī, al-Fiqh al-Islami, op.cit. pp.147-8.

34. Abū Dāwūd, op.cit. vol.IV, p.277, and Shawkānī, op.cit. p.148-9.

Taking these facts into consideration, one can give no credence at all to the Islamic law schools' view about the punishment for wine-drinking. All that can be agreed upon is that drinking wine is a sin, like any other sin, and makes a person who commits it liable to a "ta'zir" punishment, which can be defined briefly as an (unfixed punishment) for every sin for which there is no "hadd" punishment or penance.[35]

This definition is nearly universally agreed upon, and although all the followers of the Islamic law schools wrote about it, none of them classified the punishment for wine-drinking as a "ta'zir" punishment.

The reason for this, as I see it, was the tendency towards unquestioning adoption of the view of one or another of the "imitated" scholars "taqlid Imām" on the one hand; on the other hand the fear of contradicting the common view among jurists. So only those who were not affected by these two considerations stated clearly that the punishment for wine-drinking was really a "ta'zir" punishment. This view is supported by what b. 'Abbās is related to have said "the Prophet had not determined a fixed punishment "hadd" for the drinking of wine."[36]

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35. Al-Māwardī, al-Aḥkām al-Sūlṭāniya, op.cit. p.224; and see below Chapter IV on "ta'zir".

36. Abū Dāwūd, op.cit. vol.IV, p.277, and Shawkānī, op.cit. p.148 where he quoted Ahmad b. Hanbal.

II, 3. Individual Juristic Views:-

Among the jurists who hold this view are Ibn al-Qayyim, Shawkānī and Ibn Farḥūn; and among contemporary scholars Professor Shalabī.[37] Shawkānī, Ibn Farḥūn and Shalabī were interested in showing that the claim of consensus is untrue and they declared how various punishments were imposed both by the Prophet himself and by his companions.[38] Ibn al-Qayyim explained that this diversity of punishments, means that the punishment is a "ta'zir", and he considered the verdict in the Prophetic report which ordered the offender to be sentenced to death as the most severe sort of "ta'zir" which can be inflicted among the punishments suitable for the recidivist offender.[39]

This Prophetic report, in my opinion, shows that in this case, the case of the recidivist offender, the court may go beyond the limits drawn for "ta'zir" punishments in another report related by Bukhārī, Muslim, Tirmidhī, Ibn Mājah and Abū Dāwūd.[40] There are different

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37. Ibn al-Qayyim, I'lām al-Mūwaqq'in, vol.II, p.97. Shawkani, op.cit. p.142. Ibn Farḥun, Tabṣirah, vol. II, p.205. Shalabī, Ta'lik al-Aḥkam, p.59-62.

38. Ibid.

39. I'lām al-Mūwaqq'in, vol.II, p.97.

40. Shawkānī, Nayl al-Awṭār, vol.VII, p.149-150. Mishkāt al-Maṣābiḥ, vol.II, p.310. The words of the report are "It is not allowed to give more than 10 lashes, except for a "hadd" which belongs to Allah."

views about what this report implies, but whatever one thinks about it, it does limit the punishments of "ta'zir" for the less important sins to 10 lashes. As for the more major sins, the Prophet made it possible to exceed this limitation when necessary for the public interest "Maslaha".

By understanding the matter in this way, one need not hold a view which contradicts the Prophet's practice, i.e. the view claiming that the punishment for wine-drinking is a "hadd" punishment; nor the view that the Prophet abrogated the report in which he gave the death penalty for the fourth crime. This view is unsubstantiated, and is based simply on the fact that no-one has ever been sentenced to death for drinking wine more than three times.[41] At the same time, our view about this punishment, avoids the danger brought about by the extreme view of the Zāhirīs who consider the death penalty for the fourth crime of drinking as a "hadd" punishment.[42]

To summarise what has been said in this section one can say that the drinking of wine in Islamic law is a sin which one should not commit.[43] There is no punishment

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41. See for this view, Shawkānī, ibid. p.147 et seq.

42. Muhalla, vol.XI, p.365-370.

43. Qur'ān, Sūrah V, verse 90 et seq.

in the Qūr'ān for this sin; it is declared to be forbidden "harām", but nothing more. The Prophet, as wine-drinking was a common habit among the Arab tribesmen, imposed different kinds of punishment, mainly beating the drunkards.[44] Most of the jurists claim that there is a "hadd" punishment for this sin, but this claim has been shown to be untrue and unnecessary.

One remaining argument for the majority view, is that the word "hadd" refers to the offence rather than to the punishment. Therefore, as wine-drinking is declared in the Qūr'ān to be "harām" it is right to consider it as a "hadd" offence. But this argument ignores the fact that a "hadd" offence is, by definition, an offence for which a fixed punishment has been prescribed in the Qūr'ān or the Sūnna. Otherwise, all prohibited acts and omissions should be, or are, offences of "hūdūd". This has never, and can never be, defended. It is worth mentioning that recently the punishment for wine-drinking was referred to as a "penalty stated in the Qur'an",[45] but this is evidently an error. Accordingly nothing can prevent the law-maker in a Muslim

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44. See for the habit of drinking among Arabs, Ta'lil al-Ahkām, op.cit. p.15.

45. Reuben Levy, The Social Structure of Islam, Cambridge U.P. 1969, p.346.

community from prescribing any suitable punishment for this sin, on the same grounds as those on which he can establish a punishment for any sin which has become in certain circumstances common enough among the people of a society to threaten the existence of the community, the good of the majority, or the public interest.

III. The Punishment for Apostasy:-

The Arabic word for apostasy is "ridda" or "irtidād" which means literally "turning back". The former is usually used to signify turning back from Islam to another religion or to unbelief, while the latter has this meaning among others; a person who leaves Islam for unbelief or for another religion is called "murtadd" (apostate).[46]

The common view among Muslim jurists, as well as among Western orientalists, is that apostasy from Islam is a crime for which the death penalty is prescribed. The majority of the Muslim jurists, it has been remarked, classify this punishment as a "hadd" punishment.[47]

It has already been noted that "hadd" punishments are punishments determined by the Qur'ān or the Sunna, and that they should be carried out in each case where the crime has been proved. Now in order to see whether

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46. al-Mukhtār min al-Sihāh, p.190.

47. See for example, Shāfi'ī, al-Umm, vol.VII, p.156. 'Ūda, op.cit. vol.I, p.79.

apostasy is a crime for which Islamic law prescribed the alleged "hadd" punishment or not, one should consult the relevant verses of the Qūr'ān, the Prophetic reports concerned and the practice of the Prophet's companions, which indicates how they understood both the Qūr'ān and the Sūnna in relation to the subject. In this way it can be seen whether what is commonly accepted among Muslim jurists is right or wrong.

III. 1. Apostasy in the Qūr'ān:-

Apostasy is mentioned in the Qūr'ān in 13 verses in different chapters "Sūwar", but in none of these verses can one find any mention of punishment to be carried out in this world. On the contrary all that these verses contain is the threat that the apostate will be punished in the next world.[48] Some examples of these verses may be useful to indicate this fact.

In verse 106, Sūrah XVI, the Qūr'ān says "anyone who, after accepting faith in God, utters unbelief, except under compulsion, his heart remaining firm in faith - but such as those who open their breasts to unbelief, on them is wrath from God and theirs will be a dreadful penalty."[49] This verse was revealed in the late Mecca

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48. e.g. Sūrah II, verse 217, Sūrah III, verses 90-91, and Sūrah V, verse 54.

49. Here I quote the translation of Yūsūf 'Alī, 4th Ed., New York, 1946, vol.I, p.685.

period, and it is clear from the words that the apostate is threatened only with punishment in the next world.

At al-Madina, where the Prophet established his state shortly after his migration "hijra", Sūrah II was revealed. In this Sūrah the mention of apostasy was also accompanied by the threat that the apostate would be punished in the next world, (verse 217). At al-Madina too, the Prophet received the revelation of the third Sūrah of the Qūr'ān, in which apostasy was again mentioned in many verses, but always with the declaration that the apostates would be punished, not in this world, but in the next (verses 86-91). Yet, in another Madina revelation, the Qūr'ān simply declared "O you who believe! Should one of you turn back from his religion, then Allah will bring a people whom He shall love, and they too shall love him" (Sūrah V, verse 45). In this verse the "mūrtadd" is certainly exempt from any sort of punishment in this life.

On the other hand one can say that the death penalty for apostasy - especially when it is considered as a "hadd" punishment contradicts the Qūr'ānic law declared in Sūrah II, verse 256 "No compulsion in religion". Ibn Hazm, to escape this criticism, claimed that this verse was abrogated and that compulsion is allowed in religion,

so the punishment for apostasy does not contradict the Qūr'ān.[50] But this claim is untrue as the jurists of Qūr'ānic studies calculated all the abrogated verses and this verse was not among them.[51]

Accordingly, one can say with the Encyclopaedia of Islam "In the Qūr'ān the apostate is threatened with punishment in the next world only."[52]

III. 2. The Sūnna and Apostasy:-

It is a common practice among the Muslim jurists to quote one or another of the Qūr'ānic verses dealing with apostasy, when introducing their discussion of it. At the same time, the strongest evidence they use to prove that apostasy is punishable by the death penalty as a "hadd", is that of two reports of the Prophet's words and the report about the group from the tribe of 'Ūkal to which reference was made in the first chapter of this study.[53]

As for the report concerning the group from the tribe of 'Ūkal, some of the Muslim jurists claimed that they were punished because of their apostasy.[54] The

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50. Mūhalla, vol.XI, p.195.

51. Sūyūṭī, Itqān, vol.II, Cairo, 1951, p.22-24.

52. Heffening, Encylcopaedia of Islam, vol.III, London, 1936, p.736 under Murtadd.

53. See above the section dealing with punishment for "ḥirāba"

54. See Fatḥ al-Bārī, vol.XII, p.91. Ibn Ṭaymiyya, al-Ṣārim al-Maslūl, 1st Ed. Hidar Abad, India 1322 A.H. p.319 for this view, and p.322 for its criticism.

same view was held by some Western orientalists. Zwemre, in his book, "The Law of Apostasy in Islam", described the case of the 'Ūkal as the earliest case of apostasy. He quoted Muslim in it, and commented that the text shows how "the earliest apostates were tortured by Muhammad."[55]

On the other hand, the prevalent view among Muslim jurists is that the case of this group of 'Ūkal and 'Ūrayna was a case of "hirāba" (armed robbery); therefore they received the punishment for "hirāba".[56] The text itself shows this very clearly. It is true that most of the jurists used to classify them as apostates "mūrtaddūn" and fighters against God and his Prophet, Muḥāribūn", but the name apostate came to be used incidentally or because the people of 'Ūkal and 'Ūrayna, in addition to their having committed the crime of "hiraba", were apostates too. It is not a legal clause implying that the punishment which was inflicted upon them is applicable in every case of apostasy. Accordingly nothing can be inferred from this report to serve in determining the punishment for apostasy.

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55. Samuel Zwemre, The Law of Apostasy in Islam, Marshall Brothers Ltd., London, 1924, p.39-40, and opposite p.64 where the writer presents a photocopy of a page from Muslim Kitāb al-Ṣaḥiḥ and comment on it; Coldziher, Muslim Studies, London, 1967, p.16 (trans. from German by C. R. Barber and S. H. Stern.)

56. See Ṭabarī, Tafsir, vol.VI, Cairo, 1326 A.H. pp.132-46. Ibn al-Qayyim, Zad al-Ma'ad, vol.III, Cairo, 1379 A.H. p.78. Ibn Ḥajar, Fath al-Bari, ibid. where he criticised Bukhari's view.

Another Prophetic report commonly used in discussing the subject, is the report related by Bukhārī, Muslim and Abū Dāwūd "The life of a Muslim may only be taken in three cases, i.e. in the case of a married adulterer, one who has killed a human being "qatal nafsan" and one who forsakes his religion and separates himself from his community "al-murtadd 'an dinihi al-mufāriq lil-jamā'a".[57] According to this "hadith" the jurists say that the Prophet allowed the death penalty for a Muslim if he apostatized.[58] But this report was related in Abū Dāwūd in different words; the Prophet explains what he meant by "one who forsakes his religion and separates himself from his community". In the latter version he was described as "a man who went out (from the community) to fight against God and his Prophet, and should then be put to death, crucified, or imprisoned."[59] Ibn Taymiyya explained that the crime referred to in this report is the crime of "hirāba" (armed robbery), in order to reconcile the words of the report with the words of the Qur'ān (Surah V, verses 33-34). He holds that this is an explanation of the former version: "one who forsakes his religion...".

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57. Bukhārī, vol.XII, p.169. Muslim, vol.IX, with the commentary of Nawawī, Cairo (n.d.), p.89-90. Abū Dāwūd, al-Sunan, vol.IV, p.22-3.

58. See the commentary on Bukhārī, Muslim and Abū Dāwūd, ibid.

59. Abū Dāwūd, vol.IV, p.223.

Therefore, this report has nothing to do[60] with the case of simple apostasy, i.e. apostasy which is not accompanied by fighting against God and his Prophet. In other words, this report indicates that any one who commits the crime of "hirāba",in fact, separates himself from his religion because a Muslim would never commit such a crime. Again the law for apostasy cannot be inferred from this report.

The strongest emphasis is laid on a report which was related by Ibn 'Abbās in which the Prophet said "whoever changes his religion, kill him".[61]

On this the jurists based their view that an apostate should be sentenced to death. Their work on the subject generally[62] shows them to interpret the words "kill him" as a grammatical imperative "sighat al-amr", i.e. as an order which must be carried out.

In his book, "The Religion of Islam" Muhammad 'Alī defended the view that Islam knows of no death penalty for apostasy unless the apostate joins forces with the enemies of Islam in a state of actual war, and therefore

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60. Ibn Taymiyya, al-Sārim al-Maslūl, op.cit. p.315-96.

61. Bukhārī, vol.XII, p.228. Abū Dāwūd, vol.IV, p.222. Nayl al-Awtār, vol.VII, p.190-191.

62. I have said generally because there is at least one jurist who has seen apostasy to be merely a sin for which there is no "hadd" punishment, as will be seen later.

he is killed not because of his apostasy, but simply as any other fighter against Islam "Muḥārib".[63] He explained his view by saying that the above report, unless we apply this limitation to its meaning, cannot be reconciled with other reports or with the principles laid down in the Qur'ān.[64] Moreover, the words of this report are very wide-sweeping, in that they include every change of faith, from one religion to any other. Thus even a non-Muslim who becomes a Muslim, or a Jew who becomes Christian, must be killed. On these grounds Muhammad 'Ali stated that the "hadith" cannot be accepted without placing a limitation upon its meaning.[65]

This last statement is already agreed upon by the majority. All schools except the Ẓāhirī, and some Shāfi'ī jurists, allow that a non-Muslim who changes his religion to another non-Muslim religion, should be left unharmed, but a Muslim who leaves Islam for any other religion should be sentenced to death unless he returns to Islam.[66]

The Ḥanafī school puts another limit on the meaning of this report by applying it to the male apostate only.

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63. Muḥammad 'Alī, The Religion of Islam, Cairo, 1967, p.596.

64. Ibid.

65. Ibid. and for details of his view, see pp.591-99.

66. Muwaṭṭa', with the comment of al-Bājī, vol.V, Cairo, p.281 et seq. Nayl al-Awṭār, op.cit. vol.VII, p.193.

According to their view a female apostate is not liable to the death penalty as she is not in any position to fight against Islam: the reason for killing an apostate.[67]

But these limitations on the meaning of the above report do not lead to the conclusion approached by Muhammad 'Alī, i.e. that an apostate cannot be killed unless he is in a real state of war against Islam. A careful objective study of the subject, avoiding the apologists' view which influenced Muhammad 'Alī, may lead to an entirely different one.

IV. A View about Apostasy:-

It has already been mentioned that nothing in the Qur'ānic verses mentioned can be taken as a justification of the death penalty as a "hadd" punishment for apostasy. As for the Sunna, it has been said that one of the two reports concerned has nothing to do with the point in question. The other report is the one which ordered the apostate to be put to death, and which was understood as a clear order prescribing the death penalty for apostasy as a "hadd" punishment.

The jurists usually tried to avoid the execution of the penalties as far as possible, either by the principle of doubt, or through the law of proof. But with regard to

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67. Sarakhsī, Mabsūt, vol.X, pp.108-110,

apostasy they have widened the cases in which the punishment can be carried out, by extending the acts and words which might be considered as formal apostasy, to an extent entirely beyond the actual meaning of "apostasy" or "changing" one's religion.[68]

The jurists were led to this, I think, by the emphasis placed on the question of faith by Islamic law and the feeling that after changing his religion, a man might become an example which may be imitated. Moreover it is common knowledge among Muslims, that nothing is worse than becoming a disbeliever after being a Muslim. They were also influenced by the literal meaning of the report which ordered the apostate to be killed. I will concentrate my inquiry into the punishment for apostasy on this last consideration.

To understand an Islamic legal clause one should consult the authorities on the origins of Islamic law "'Ulamā' al-uṣūl". The point one should be sure of here is the meaning of the imperative mood (sighat al-amr) in Arabic generally and in Qur'ānic and Prophetic usage particularly.

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68. Examples of this may be taken beyond the limits of this study, but it may be found in any book of fiqh, e.g. Minhāj al-Ṭālibin, vol.IV, p.123-132. Khirshī, his commentary on Mukhtasar Khalil, vol. IV, pp.304-316. And the commentary of Shikh 'Ali al-'Adawī in the margin of the same text.

The jurists who wrote about the subject indicated that the imperative may be used in sixteen different ways; amongst them are recommendation, inimitability, threat, permission and the literal meaning of the imperative, which implies a command or an order.[69]

In the Prophetic report concerned, the imperative mood is said to be a command or order. So the jurists generally classified the punishment for apostasy as a "hadd" punishment. The imperative mood, however, cannot be said to imply one particular meaning, unless there is factual evidence to support it.

The factual evidence in the case in question by no means supports the view that this imperative indicates an order. First the Qūr'ānic verses concerned did not prescribe any punishment for apostasy but simply declared it to be a great sin. Secondly, the Prophet who said these words about apostates never killed an apostate. There were some cases in which people apostatized after being converted to Islam, but the Prophet never ordered anyone to be killed.[70] On the contrary, Bukhārī and

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69. Baydāwī, Nāṣir al-Dīn, Minhāj al-Wūṣūl, ilā 'ilm al-Uṣūl, Cairo, 1326 A.H. p.37-8. Nasafī, Manār al-Anwār Fī Uṣūl al-Fiqh, Asitanah, 1315 A.H. p.24-9. Khallaf, Uṣūl al-Fiqh, p.194-95. Examples for these forms of usage may be found in the first authority.

70. Nayl al-Awṭār, op.cit. vol.VII, p.192 where Shawkānī indicated that all the reports according to which the Prophet killed an apostate are not trustworthy.

Muslim related[71] that "an Arab (a bedouin) came to the Prophet and accepted Islam; then fever overtook him while he was still at al-Madina, so he came to the Prophet and said 'Give back my pledge' but the Prophet refused, then he came the next day and said to the Prophet: 'Give me back my pledge', and the Prophet refused. The Arab did the same a third day and the Prophet refused." The report goes on to say that the man afterwards left al-Madina unharmed. This is a clear case of apostasy in which there was no punishment. It is clear from the words of the report that the bedouin was seeking to return to his old religion, or at least to leave Islam, and in spite of that he went unharmed.[72] There is another case of apostasy in which the apostates were a group of Jews who accepted Islam and then returned to their original religion. The case is mentioned in the Qūr'an Sūrah III, verses 71-73. These Jews used to pretend that they had accepted Islam in the first part of the day, and show that they did not believe in it at the end of the day. This was, according to the Qūr'ān, in order to detach

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71. Bukhārī, with the comment of Ibn Ḥajar, vol.IV p.77 and XIII p.170. Muslim with the comment of al-Nawawī, vol.IX, p.391 et seq.

72. Ibn Ḥajar, Fatḥ al-Bārī, ibid. Nawawī, his commentary on the text of Muslim, vol.IX, p.391 et seq. where he quoted qadi 'Iyad, a well known Shafi'i jurist as saying that this bedouin was definitely an apostate. According to Zamakhsharī, quoted in Fatḥ al-Bari, the name of this bedouin is Qays Ibn Hazim (probably al-Minqarī).

newly-converted Muslims from Islam.[73] At this time, the Prophet was the ruler of al-Madina and one cannot imagine how such people could do this under a government which punishes apostasy with the death penalty, and not be punished in any way.

This is the factual evidence surrounding the Prophetic report concerned. And according to it, I understand apostasy to be punishable by "ta'zir" punishment and not by "hadd". The words 'kill him' in the report concerned make it possible for the judge to go beyond the limits for "ta'zir" laid down in another report, which was mentioned before.[74] This is the same as the report in which the Prophet ordered a man who drank wine for the fourth time to be sentenced to death, as a "ta'zir" punishment.[75]

In spite of the view that apostasy is punishable by a "hadd" punishment, which is a death penalty, there are jurists who consider its punishment to be "ta'zir". This view has been expressed during different eras of Islamic law. During the Caliphate of 'Omar, a man came to him from a group of the army, who were fighting for Islam, and the Caliph asked him what they had done with some people who were known to have apostatized. The man told 'Omar that

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73. Ibn Kathir, Tafsir, vol.I, Cairo, (n.d.), p.373.

74. See above, p.108, F.N. 40.

75. See above what has been said about the punishment for wine drinking.

they had been killed in battle. 'Omar said that if he could have taken them in peace it would have been the best thing for him. The man asked 'Omar what he would have done if he had taken them in peace and the Caliph replied that he would have asked them to adopt Islam again, and if they refused he would have imprisoned them.[76]

It is clear that imprisonment is not one of the "hudūd" punishments, and it could not be inflicted except in cases of "ta'zir".

Among the followers of the Prophet's companions, Ibrahim al-Nakh'ī (d. 95 A.H.) and Sufyān al-Thawri (d. 161 A.H.), hold the view that the apostate should be invited back to Islam and should never be sentenced to death.[77]

Bājī, the distinguished Mālikī jurist, made it crystal clear that apostasy is "a sin for which there is no 'hadd' punishment".[78] A sin of this sort can be punished by nothing but a "ta'zir" punishment.

Finally, Ibn Taymiyya stated categorically that the punishment for apostasy is a "ta'zir" punishment; it is or it should be a severe punishment, but still it is a

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76. Nayl al-Awtār, vol.VII, p.191. Ibn Taymiyya, al-Sarim al-Maslūl, op.cit. p.320.

77. Ibn Taymiyya, op.cit. p.318. Mughnī, vol.VIII, p.126. Shu'rānī, Mizān, vol.II, p.134.

78. Bājī, his commentary on al-Muwatta', vol.V, p.282. Baji died 494 A.H.

punishment of "ta'zir".[79]

Moreover, the jurists who think that the apostate should be sentenced to death, do not all agree that this is a "hadd" punishment. They sometimes call it "hadd" and sometimes not.[80] According to the Hanafī, Shāfi'ī, and Zāhirī schools, the death penalty for apostasy is a "hadd" punishment.[81] But according to the Hanbalī school it is not a "hadd", but still an apostate should be killed because of his unbelief "kufr". Ibn Qudāmah, in al-Mughnī, went on without categorizing the punishment as "ta'zir" or anything else.[82] The Islamic penal system recognizes three sorts of punishment: "hadd" (fixed punishment), "qisās" (retaliation), and "ta'zir" (discretionary punishments). The second is certainly out of the question here. It cannot be proved that the punishment for apostasy is a "hadd" punishment. So it can only be a punishment of "ta'zir". All my remarks about the reasons for claiming wine-drinking to be punishable by "hadd" apply here and need not be repeated.[83]

To sum up, the Qur'ān knows no punishment in this life for apostasy. The Prophet never sentenced a man to

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79. Ibn Taymiyya, al-Siyasat al-Shar'iya, Cairo, 1951, p.124.

80. See the Encyclopaedia of Islam, vol.II, London 1928, p.8927.

81. Sarakhsī, Siyar, vol.IV, p.211. Shāfi'ī, Umm, vol.VI, p.156.

82. Mughnī, vol.VIII, p.128.

83. Above p.107.

death for it; some of the companions of the Prophet recognized apostasy as a sin for which there was a "ta'zir" punishment, and so did some jurists. Actually, Islamic law considers apostasy as the most major sin and the limits for "ta'zir" are not, in its case, of obligatory force. So a court may sentence an apostate to death, imprison him, or may simply leave him unharmed. The lawmakers of a Muslim community may fix for it whatever punishment they see fit and in the public interest.

V. A Survey of Wine-Drinking and Apostasy Punishments:-

A conclusion made in the two former sections was that wine-drinking and apostasy cannot be categorized as crimes for which there is "hadd" punishment. Both are sins which a Muslim is highly recommended not to commit. But a "ta'zir" punishment is prescribed for both under Islamic law, and such a punishment, by its nature, is expected to vary according to the culprit's personal character, the circumstances, the time and according to the way in which the crime was committed.

Some may question the basis for prescribing punishments for these two sins. To put such a question in fact shows a complete misunderstanding of the whole conception of Islamic criminal law. Islamic criminal law knows of no distinction between sin and crime. Such a distinction is well-established among Western thinkers, and in Western

writing, in both law and philosophy. But as the function of "ta'zir" in Islamic law is to provide a legal sanction for every sin for which there is neither "hadd" punishment, nor penance "kaffāra" [84], the distinction between sin and crime, or between criminal action and moral guilt, no longer exists.

Accordingly, the use of the word sin "ma'siya" pl. "ma'āsī" in this text, and in Islamic legal writing, should be understood to refer to an action or ommission, for which there is no "hadd" punishment, or penance, but which makes its doer liable to a "ta'zir" punishment.

This question, then, should be rephrased. One should ask: why did the lawmaker of Islam mention the penalties for some particular sins, whereas others are left to the discretion of judges or rulers? A simple explanation could be that he ordered punishment for the major sins in order to draw his followers' attention to them, and not to allow those who committed them to go unharmed. Islam, in the Qūr'ān, threatens every misdeed with grave punishment in the world hereafter; this may lead people, and it has led some, to say that nothing should be done about it in this world, or through the state's authority. To avoid this result, the Prophet drew attention to some major misdeeds, and taught his followers that such conduct must

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84. 'Āmer, al-Ta'zir, p.36.

be punished. By the expression "major misdeeds", I mean two main things: a) an act or ommission which may become so widespread among the people as to threaten the public interest; b) an act or ommission which is likely to harm an individual, either physically or mentally, so that its spread is undesirable. In other words, any sort of conduct which threatens the existence or the efficiency of the community, either directly or indirectly, could be considered a major sin in this sense.

The purpose behind punishing such conduct is merely to deter people from indulging in it. It has been shown before[85], that deterrence is one of the major purposes of punishment in Islamic law. But here, deterrence plays the role of a mere means, while there it could be considered as an end in itself. The sorts of conduct mentioned before should not exist in a Muslim community, simply because they may harm it. It is the right and the duty of the state, at the same time, to protect the community from such conduct or harm. Penalty is one of the means by which society can be protected.

Protection of society is universally accepted as a purpose of punishment.[86] It assumes that crime is an evil

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85. Above, pp.80-92.

86. Thorsten Sellin, his foreword of Punishment and Social Structure, Columbia Univ. Press, New York, 1939. Leo Page, Crime and the Community, Faber and Faber, London, 1937, p.79-89.

against the public interest which should be prevented. On the other hand, it is to the good of the individual not to commit this sort of action again, even if the means of preventing him are necessarily painful.[87]

The protection of society is, I think, the purpose behind such punishments as those in question, i.e. punishments for wine-drinking and apostasy.

Islamic law prescribed deterrent punishments for such crimes(or misdeeds), in order to protect Muslim society from their consequences.[88] To support this view, one should show what effect these misdeeds could have upon the community, and how they could harm its existence or efficiency. For the sake of clarity, the subject is divided into two sub-sections.

V. 1. Wine-Drinking:-

Alcohol is as old, no doubt, as civilized man; nearly every society appears to have discovered it, in one or another of its many preparations.[89] In Western social life, alcohol has an honoured and traditional place. Prof. Kessel and Dr. Walton stated in the very beginning of their

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87. Page, ibid. esp. p.83.

88. Muslim Writers treated these two crimes among the offences of "hudud", so what has been said about the inadequacy of their work there is applicable here. See p.67.

89. Carstairs, G.M. in his foreword of Alcoholism, Pelican Original, 3rd revised edition, London, 1969.

book "Alcoholism" that "it is the abstainer who strikes us as the more abnormal".[90]

As for the reasons behind this universal habit of drinking wine, the same authority declared: "with alcohol we offer hospitality and display our sociability ... over a glass we enjoy old friends and make new ones, proclaim our loyalties, discuss affairs, negotiate and seal bargains ... strangers relax and mingle if alcohol is provided ... drinks will make them (the strangers) socialize ... they will become less inclined to judge others critically. Oiling the social wheels is at the centre of society's approbation of regulated drinking."[91]

The situation was very much the same among Arabs; the Qūr'ān indicates that wine has some usefulness.[92] But the same verse indicates that the drinking of wine is a great sin and its bad outweighs its good. This great sin was explained simply, in a later revelation in terms of the effect which the devil "shaytān"[93] had upon those who drink; and accordingly it was declared to be forbidden "harām". The Qūr'ān classifies wine as an impure thing or "rijs". This may be questioned as the actual reason for its pro-

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90. Op.cit. p.11.

91. Ibid., pp.11-12.

92. Sūrah II, Verse 219.

93. Sūrah V, Verse 91.

hibition. But the Qūr'ānic verse in which wine is so classified gives the reasons for this classification. It runs: "the Devil seeks only to cast among you enmity and hatred by means of drinking and gambling, and to turn you from remembrance of Allah and worship." (Sūrah V, verse 91). So one can say that the evil effect of wine on men led to its classification as an impure thing and to its prohibition. Yet the latter is borne out by the fact that the above verse was revealed when a group of Muslims who, after getting drunk, engaged in a fight among themselves, whereupon the verse was revealed and wine declared to be forbidden.[94] It is therefore right to say that wine-drinking was prohibited in order to protect the society and the individual from its harmful effect.[95]

However, the prohibition and its explanation were accepted among Muslims and they still accept it, merely as the will of God, who has the right to determine for his creatures what is right and what is wrong, or in the expression of Muslims, what is lawful "halāl" and what is unlawful "harām".[96]

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94. Ibn al-Jawzī, Zād al-Masir fī'Ilm al-Tafsir, vol. II, Damascus, p.417.

95. Shalabī, Ta'lil al-Ahkām, op.cit. pp.15-17.

96. This right of making things lawful and unlawful was reserved to "Allah" in many Qur'anic verses, e.g. Sūrah II, verse 275, Sūrah VI, verse 119, Sūrah VII, verse 32, Sūrah X, verse 59, etc.

Accordingly, Muslim writers have said very little about both the utility and the harmful effect of alcohol drinking.[97] In fact, the vast majority of Muslims, if not all, disapprove of it, simply as it is not allowed by the religious law of Islam.

In recent times, scientific research has made a good contribution to our knowledge about the harmful effects of alcohol. Doctors, criminologists, psychotherapists and sociologists, have all proved alcohol to have a considerable effect on both physical and mental health and therefore on criminality and the crime rate.

An important chapter of Kessel's and Walton's book "Alcoholism" is the one dealing with the harmful effects of alcohol on the brain and the body. These effects can differ, from malnutrition to the destruction of brain cells. Symptoms of each effect are different, and the chances of recovery are different too; while some may recover completely, some may suffer permanent damage.[98]

Dr. Frances Smart discussed some cases which proved an effective causal relationship between alcoholic addiction and the committing of crime. In one of these cases, a man of forty-two had had periods of compulsive fire-

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97. See for example what Ibn Kathir wrote about it in Vol.I, p.255 of his Tafsir al-Qur'an.

98. Kessel and Walton, op.cit. pp.30-42.

raising. The fire-raising had always followed fairly heavy drinking, or, to use the man's words, he "only thought about fire-raising when he was in a particular mood, and this only came on after he had been drinking."[99] There are other cases to which Dr. Smart referred, connected with drinking and the committing of crime, but this case is the most serious one.[100]

The relationship between drunkenness and crime was discussed in different parts of Hermann Mannheim's distinguished book "Comparative Criminology".[101] In this book, the relationship between drink and motoring offences was discussed, and a reference was made to a report by the Medical Research Council about the effect of small doses of alcohol on driving, which indicated that drivers under the influence of alcohol are responsible for about 500 deaths, and 2000 or 3000 injuries annually.[102]

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99. Frances Smart, Neurosis and Crime, Ed. by B.C. Brown, Gerald Duckworth and Co. London, 1970, pp.24-5. See also Sir Norwood East, Society and the Criminal, H.M.S.O. London, 1960, pp.281-293. The Report of the Working Party on Habitual Drunken Offenders, H.M.S.O. London, 1971.

100. Op.cit. pp.15, 23, et seq. 68 et seq.

101. First Ed. Routledge & Kegan Paul, London, 1965, vol. I, ch. 14 and 18, vol.II, ch.26.

102. Ibid. p.248 and F.N. 40. The report was concerned with motoring accidents in the U.K. and its results were published in the Observer, 6.10.59.

Moreover, the connection of alcohol with homicide cases and juvenile delinquency, was discussed too. For the latter, the same authority quoted some researchers' results which proved an indisputable relationship between alcoholic parents and children who committed crimes.[103] For homicide, drinking was the cause of motive of 90 cases out of a total of 551 of murders committed in England and Wales during the twenty years ending in 1905.[104] Mannheim also referred to some researchers who illustrated the relationship between alcohol and homicide.[105]

Figures and statistics referred to by C. Hibbert, prove a very close relationship between drinking and crime, in various Western countries, including the United States.[106]

What has been said, about the harmful effects of drinking, on both the individual and the community, and especially about its relationship with crime, is enough to support the prohibitionists' view. These facts were completely unknown at the time when Islam prohibited drinking, but they are often used in recent writing to

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103. Ibid. p.248-49.

104. Fry, Arms of the Law, Victor Gallancz, London, 1951, p.189.

105. Mannheim, ibid.

106. C. Hibbert, The Roots of Evil, London, 1963, p.255-259.

justify the "hadd" punishment that was claimed to have been applied for it.[107] A better approach, I think, could be that these facts are clear evidence for the harm which may befall the person who drinks, and his society.[108] Therefore, it justifies, and could underlie, the state's intervention, by means of punishment, against drunkards. But this punishment should be determined in each society in order to meet the real needs in particular circumstances.

As far as classical Islamic law is concerned, these facts have nothing to do with the punishment dealt with in the legal manuals. That was a punishment established on religious grounds i.e. to follow the Prophet's, or rather his companions' "sahāba" teaching. But as far as modern Muslim societies are concerned, such facts were the grounds on which the prohibition of drinking and of its production and trade, were introduced in Kuwait.[109]

However, it is interesting that the punishment prescribed by the penal code of Kuwait is not the claimed "hadd" punishment, in spite of the strong influence of

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107. See e.g. 'Ūda, op.cit. vol.I, p.651.

108. See Ted Honderich, Punishment: the Supposed Justification, Hutchinson & Co., London 1969, p.176.

109. The explanatory memorandum of the articles 206 and 206 A, B and C of the penal code of Kuwait.

conservative circles and organizations there; the punishment fixed by the penal code varies according to the crime committed. Its minimum is six months' imprisonment or 50 dinars' fine, and the maximum penalty is 10 years' imprisonment or 300 dinars' fine. Such a punishment could be classified as a "ta'zir" punishment, but not as a "hadd"; and it has been proved to be successful in serving the aim of protecting society from the dangerous effects of drinking.[110]

To summarize, we can say that the underlying philosophy of the punishment for drinking in Islamic law is the protection of society, by means of a deterrent punishment. Society needs to protect itself against the spread of such a habit because of its undoubted harmful effects, and also because of its relationship to crime. A reference has been made to the pioneer experiment of introducing a punishment for drinking and wine-trading in Kuwait, which has shown that the so called "hadd" punishment for wine drinking in a largely conservative Muslim community was replaced by a "ta'zir" punishment in terms of fines and imprisonment, and that was with regard to the facts brought to light through modern scientific research.

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110. Although there are no figures available concerning the effectiveness of the new punishment in Kuwait, I have served there in the Legal Dept. of the Council of Ministers from 1967 to 1969 and my own experience led to the stated conclusion.

Attention may be given here to the similarity between the offence of drinking and that of drug addiction. It is common knowledge that drug addiction is a habit which, through its harmful effect on individuals, endangers society. In the West, and almost all over the world, the campaign against drug addiction is now wider and stronger than ever. Yet the habit is still increasing alarmingly.

The Muslim jurists who dealt with the problem of drug addiction agreed to the prohibition of drugs, but disagree as to the penalty for it.[111] Mainly the Islamic legal manuals deal with the addiction to cannabis or "hashish". But the agreed prohibition, evidently, covers all other drugs. To return to the Kuwait experiment again, it is interesting that under the Kuwait penal code, drugs are treated in the same section as wine drinking and the related offences are punished by very similar penalties.[112]

V. 2. Apostasy:-

Apostasy is less discussed than drinking. The subject is completely unknown to Western writers; some orientalists have written about it, but only to explain the Muslim

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111. Ibn Taymiyya, al-Siyasa al-Shar'iya', pp.116-19. Qarāfī, Furūq, vol.I, p.216.

112. Articles 207, 208.

point of view, as they understood it. It was dealt with in the Jewish Encyclopaedia, but only as a matter of historical importance, and without any attempt to explain the philosophy behind its punishment in Jewish law.

As for Muslim writers, it has been mentioned that there are two different views about it. The most common is that the punishment for apostasy is the death penalty, and it is a "hadd" punishment. A less common view, but well-documented, is that it is a "ta'zir" punishment, which could be as severe as a death penalty, and which must, like all "ta'zir" punishments, be determined according to the particular circumstances in each case. This view I have agreed with. But none of the supporters of either of these two views have tried to approach the purpose behind prescribing a punishment for such conduct. The holders of the first view did not analyse its purpose because it was, according to them, a "hadd" punishment which need not be widely discussed, but completely accepted as the will of Allah. Those who hold the second view do so unquestioningly because they concentrate on presenting evidence and proof of their view. Indeed one can find, in some of the Islamic law texts, some general expressions about the reasons behind the punishment for apostasy, especially in the Hanafī school books, but such general comments do not contribute much towards fulfilling the aims of an attempted modern legal study.

I assumed, in the beginning of this section, that the philosophy behind the punishment of drinking and apostasy is the protection of society against the possible or actual harm of such acts. This has been adequately proved with regard to drinking. Whether or not it is right, too, with regard to apostasy, is the subject of the next pages.

Some preliminary knowledge is necessary for this. The first thing is the widely-believed principle among Muslims that Islam provides a whole system of life, starting from birth, extending throughout every minute of life, and governing the events following death. The laws of child-feeding and nursing, marriage and divorce, legacy and inheritance, bargains and contracts, war and peace, international relations, the treatment of minorities and many others have in one way or another legal rules relating to them in the sources of Islamic law. Secondly, Muslims, and especially Muslim jurists, considered all these aspects, as having the same importance as, let us say, that of ritual prayer and fasting. The problems of arising should be treated and solved in the way recommended by, or at least in harmony with, the related rules in Islamic law.[113] Accordingly, all aspects of Islamic law

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113. See e.g. Ibn al-Qayyim, al-Ṭurūq al-Ḥukmiya, Cairo, 1953, p.13. 100 et seq. Mawdudi, The Political Theory of Islam, Arabic trans. 3rd Ed. Damascus, 1967, p.49-51.

should be taken and accepted as a unity, or as one picture which one cannot subdivide.[114] With regard to these principles, some jurists think that if the government or the ruler "al-Ḥākim" acts against some of the rules of Islamic law, he should be advised by the learned men to rectify the error in harmony with them, and to remedy the harm, if any, brought about by his actions. If he, or the government, does so the matter is over. But if not, the believers should fight for their right to be governed in accordance with the divine rules of Islam.[115]

Thus, a Muslim state should be shaped, and the various authorities in it should be given their power, in accordance with, and not outside, the limits of the law of Islam. This principle is recognised as a very fundamental one, to the extent that all conflicts and challenges which have been raised against the rulers of one or another Muslim country, were connected with it.[116]

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114. Al-Shāṭibī, al-I'tiṣām, vol.II, Cairo, 1332 A.H. p.244-245.

115. Ibn Ḥazm, al-Milal wa'l-Niḥal, vol.IV, Cairo, Ed. (n.d.), pp.171-176. 'Udat Islam and our Political Affairs, al Islam wa'awda'una al-Siyasiya', 2nd Ed., Beirut, 1967, pp.151-153.

116. It was this principle which underlay the conflict led by some of the Shi'i leaders against the Ummayad and 'Abbassid States, behind the conflict between 'Ali b. Abi Talib and al-Khawarij, and between the Wahhabis and the Ottoman Empire in the nineteenth century.

Even recently the demand to adopt this principle was behind the conflict between the Islamic movement and some of the Arab governments.[117]

It is quite natural, according to such principles, to consider loyalty to the laws of the community as a highly necessary condition for the enjoyment of the protection of the law and the authority of the state. At the same time, it is natural to consider disloyalty as a reason for justifying the deprivation of such protection.

This was the explanation given for the punishment for apostasy by some modern writers on the subject.[118]

The question which remains is - how disloyalty to the Islamic law could be an act harmful to society, and its punishment be justified. For this point we can give two explanations. The first one is that of the case referred to in the Qūr'ān,[119] i.e. the case of the Jews who used to pretend that they accepted Islam at the beginning of the day, and then at the end of it they used to say that they had rejected it, in order to detach newly converted Muslims from their religion.[120]

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117. The example of this is the conflict between the Egyptian government and the movement known as "The Society of the Muslim Brotherhood" during the years 1954-65. See for a brief but careful survey, Ḥassān 'Ashmāwī, one of the foremost leaders of the movement, in al-Fard al-'Arabī wa'Mushkilat al-Ḥukm, Beirut, 1979, pp.174-180.

118. 'Ūda, op.cit. vol.I, pp.534-538.

119. Surah III, verse 72.

120. See above, pp.122-3.

The second is the case of those who apostatize from Islam and join hands with its enemies in an actual state of war, or collect people against Islam or the Muslim state and then fight against it.

Both cases are clearly harmful to the society; the first leads people towards the rejection of the law and order of the society which is based on its religion, by rejecting the religion itself, and the second involves the raising of war, or helping those who raise it, against the apostate's own state. In both cases punishment is justified, I think, in order to protect society from the harm brought about by the apostate's action. In any other case, however, i.e. the cases of simple change of religion, the punishment cannot be justified. Thus I understand the Hanafī school's view of punishing the male apostate only, and leaving the female apostate unpunished because she is not able to fight against the Muslim country, while the male apostate is able to do so.[121]

This view was understood by some as based on "potentiality to fight", so it was therefore not accepted.[122]

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121. Sarakhsī, Mabsūt, vol.X, Cairo, 1324 A.H. p.110.

122. Muhammad 'Alī, The Religion of Islam, p.599.

But the fact is that it is based on what usually happens, and not on the mere potentiality. The proof is that some of the Hanafī school jurists said that "an apostate could not be punished for mere unbelief, but to prevent the mischief of war" which follows his rejection of Islam.[123]

Finally, the conception of punishing a person who displays disloyalty towards his country is well known to all legal systems.

In modern legal systems, it may be called treason, or conspiracy,[124] but the concept is nearly always the same.

A summary of what has been said could be as follows. Islam is regarded by Muslims not as a mere religion, but as a complete system of law. Its rules are prescribed not only to govern the individual's conduct, but also to shape the basic laws and public order in the Muslim state. Accordingly, apostasy from Islam is classified as a crime for which there is a "ta'zir" punishment. The punishment is applied in cases where there is harm brought about by the apostate. So in exceptional cases where

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123. Fath al-Qadir, vol.IV, op.cit. p.389. Sarakhsī, ibid.

124. See Mozley and Whiteley's Law Dictionary, under Treason and Treason Felony, 8th Ed. Butterworths, London, 1970, pp.368-369. The second book of the Egyptian penal code, Khalifa, al-Nazariya' al-'Amma lil-Tajrim, Cairo, 1959, pp.250-253.

someone simply changes his religion the punishment cannot be applied. But it must be remembered that this is only a rare exceptional case, and the common thing is that apostasy is accompanied by some harmful actions against the state. A comparison between the concept of punishing those who commit treason in modern systems of law, and those who commit apostasy under Islamic law could be useful towards understanding the notion of punishing apostates according to the law of Islam. The notion of protecting society is the underlying philosophy of this punishment.

CHAPTER III.

RETALIATION (QISĀS)

PUNISHMENT FOR HOMICIDE AND WOUNDING

Undoubtedly the greatest crime known to mankind is murder. It has been punishable in all systems of law from early history, and throughout the ages up to today. The punishment prescribed in Islamic law for murder - and the infliction of injury - is what is called "Qisās" or "Qawad" (retaliation), i.e. causing the culprit harm exactly equal to the harm he inflicted on his victim;[1]

In studying the law of "qisās" in Islam, the most important point is the classification of the act of homicide, i.e. is it a crime for which the state must interfere by means of punishment, or is it a civil wrong, or tort, for which a remedy is available for the wronged individual if he so requests. The place given under

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1. The word "qiṣāṣ" is derived from the verb "qaṣṣa" meaning 'he cut' or 'he followed his track in pursuit' and it came therefore to mean retaliation by killing for killing, and wounding for wounding. The word "Qawad" is derived from the verb "qada" meaning to drive and to lead. Its usage in the meaning of "Qiṣāṣ" is due to the fact that the culprit was often led by something (e.g. a piece of rope) to the place of execution, or because he was led by his action to the result which followed, i.e. the execution of the "qiṣāṣ" against him. However, the word "qiṣāṣ" is much more common in Islamic legal writing than the word "qawad". See for details Ibn Manẓūr, Lisān al-'Arab, vol.VIII, Cairo, p.341. Ibn Fāris, Mu'jam Maqayis al-Lughat, vol.V, Cairo 1369 A.H. p.11. Sharabāṣī, al-Qiṣāṣ fīl-Islam, Cairo, 1954, p.17.

Islamic law to the individual's wishes, in the context of "qisās" distinguishes the treatment of homicide there, from its treatment under modern legal systems. For under Islamic law homicide appears to be essentially a civil wrong the remedy for which is the victim's concern, or his relatives', and not as a crime in the strict sense. Such is one's first impression of the subject when one reads Islamic law texts. But a close investigation may lead to a slightly different conclusion. We will turn to this later in this chapter.

The following aspects will be dealt with now: the historical background of the law of "qisās", retaliation and blood-money "diya", some disputed points, and the application of "qisās" under the penal codes of some Muslim countries. Afterwards the problem of classifications will be approached.

I. The Historical Background:-

Among the Arab tribesmen of pre-Islamic Arabia, the feeling of hostility was characteristic. Friendly co-operation in life was known only among the members of the same tribe.[2] One of the main features of this state of hostility was personal revenge for homicide. The obligation

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2. Ahmad Ibrāhim, al-Qiṣāṣ fil-Sharī'ati'l-Islamiya (a Ph.D. thesis) Cairo, 1944, p.9. It is noteworthy that the Qur'ān mentioned this fact in more than one verse in different chapters, e.g. Sūrah III, verse 103, Sūrah VIII, verse 63.

of vengeance (tha'r) was imbred in the Arabs' very nature.[3] Historians often refer to cases of revenge between two or more of the tribes which lasted for several years and began for a very trivial reason such as a female camel or a stupid word.[4] It was by no means rare for the motive of vengeance to turn into an actual war between two tribes; the war between the tribe of Banū Bakr and the tribe of Banū Taghlib lasted for 40 years because one of Banī Taghlib killed a female camel belonging to a woman of Banī Bakr![5] An attempt at a peace settlement was made after the killing of the son of a distinguished Arab i.e. Shās b. Zūhayr b. Judhaymah, but the father asked the representative of the killer's tribe to do one of three things in order to stop him from taking revenge for his son: to return his son to life, to fill his garment "ridā'" with the stars, or to hand over all the killer's tribe to him to be killed. "Still" the father continued, "I will not be compensated for my son."[6]

One of the strongest causes behind the motive of revenge "tha'r" among Arab tribesmen was their belief

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3. Anderson, Homicide in Islamic Law, B.S.O.A.S. 1951, p.811.

4. Ibn 'Abd-Rabbih, al-'Iqd al-Farid, vol.VI, Cairo, 1940, pp.40, 71-77.

5. Kulayb b. Rabi'a killed a female camel belonging to al-Basus bint Munqidh. See, ibid.

6. Shafi'ī, Umm, vol.VI, p.7.

that after the death of a murdered person a night-bird, known as "hāma" would stand on his grave and cry: "I am thirsty, give me a drink" i.e. the revenge should take place to quench her thirst![7]

Moreover, revenge used to be taken not only against the murderer but against any of his fellow-tribesmen, and frequently tribal pride would only regard several victims as an equivalent to one fellow-tribesman and the same was applied to the infliction of injury.[8]

Blood-money "diya" was known among the Arab tribesmen as a peaceful alternative to revenge. But it varied according t the position of the murderer and his tribe. Ad for Qūraish, the customary blood-money was a hundred camels but for the nobles (Ūmarā, s. Amir) it was one thousand. It was very common, on the other hand, for the blood-money for some tribes to be half that of other tribes, a rule which was due largely to the difference in strength and prestige between one tribe and another.[9]

The law of "qisās" was introduced by Islam into this society. Just retaliation allowed one life, i.e. the life of the culprit only, to be taken for the life of the

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7. Damirī, Hayat al-Ḥayawān, vol.II, Cairo, (n.d.), p.437-40. al-Jahiz, Kitab al-Hayawan, vol.II, Cairo 1356, A.H. p.298.

8. Ibrāhim op.cit. p.9. Anderson, op.cit. p.812.

9. Ibrāhim, op.cit. p.10. Ibn Kathir Tafsir, vol.I, p.209.

murdered person, or a fixed amount of money to be exacted as blood-money. This was not to vary from one tribe to another or according to the victim's position in his tribe. The law of "qisās" will shortly be discussed in detail but at this stage one should note that the Qur'ānic law "radically altered the legal incidents of homicide"[10] from the pre-Islamic custom of revenge "tha'r" to the Islamic law of "qisās". The distinction is illustrated by the change of terminology. Justice is now to be measured "in accordance with the moral standard of just and exact reparation for loss suffered".[11] Moreover, the maxim "a life for a life" stems from the religious principle that all Muslims are equal in the sight of God.[12] It was in terms of these principles that the punishment for "qisās" was prescribed; and it should be understood accordingly.

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10. Coulson, A History of Islamic Law, p.18.

11. Ibid.

12. Ibid. It is noteworthy that Prof. Coulson here considered the majority's view which claims equality between Muslims but not between them and non-Muslims. But according to the Ḥanafī school, equality in relation to this particular question is based not on religion but on being a human being. So "qiṣaṣ" should be executed when a Muslim kills a non-Muslim, while the majority's view does not allow "qiṣaṣ" in this case, but only blood-money.

II. Retaliation and Blood-Money:-

The punishment for homicide and the infliction of injury in Islamic law could be either "qisās" (retaliation) or "diya" (blood-money). "Qisās" itself is divided into two categories: "qisās" for homicide "fī'n-nafs) and "qisās" for wounding (fī'mā dūn'an-nafs). For the former it is more common to use the term "qisās", while for the latter to use the term "qawad". As for "diya", the term is commonly used for blood-money owed for killing, while the term "arash" is used for blood-money owed for wounding. Again "diya" and "kaffāra" or penance are remedies for accidental homicide, but we will not deal with them at this stage as we are more concerned here with the punishment for deliberate homicide or wounding.

In the Qūr'ān both kinds of homicide are mentioned: deliberate and accidental. For deliberate homicide the punishment prescribed in the Qūr'ān was the killing of the culprit, or blood-money if the relative(s) of the victim did not demand "qisās". In Surah II, verses 178-9 the Qūr'ān says: "O believers, prescribed for you is retaliation for killing freeman for freeman, slave for slave[13], female for female. But if aught is pardoned a man by his brother,

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13. Here and throughout this thesis I am omitting all that is found in the books of Fiqh about slaves, simply because it has long been a matter of historical concern only.

let the pursuing be honourable, and let the payment be with kindliness. That is a lightening granted for you by your Lord, and mercy; and for him who commits aggression after that - for him there awaits a painful chastisement. In retaliation there is life for you ..." [14]. In Sūrah IV verse 92 the law for accidental homicide was laid down "never should a believer kill a believer; but if it so happened by mistake ... he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely ...". [15] Taking these verses together, the jurists laid down the principle that there is no "qisās" owed for accidental homicide, but only the blood-money and penance or "kaffāra". [16]

For deliberate homicide the punishment of "qisās" means the taking of the culprit's life on account of his murder. This is, in modern terms, the death penalty for murder. The jurists are agreed on this, but their opinions vary about the means by which the death penalty should be carried out in cases of "qisās". [17] The Hanafī and Hanbalī schools

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14. Prof. A.J. Arberry's translation, The Qūr'ān Interpreted, Oxford Univ. Press, in the World's Classics, 1969.

15. Yūsūf 'Alī's translation, New York, 1946.

16. Jassās, Ahkām al-Qur'ān, vol.II, p.222 et seq. Shāfi'ī Ūmm, vol.VI, pp.4 et seq.

17. It would be clearer to discuss this point here, than to add it to the other controversial points to which we will turn afterwards.

hold that the culprit should be killed by the sword whether or not he had killed his victim in this way.[18] On the other hand, the Mālikī, Shāfi'ī and Zāhirī schools think that the murderer should be put to death in the same way as that which he had used to kill his victim.[19] The first view assumes that the purpose of prescribing "qisās" as a punishment is to put the murderer to death for his crime, so it should be done only in the easiest and most effective way.[20] The second view depends on an interpretation of the meaning of the word "qisās" as "equality"; therefore equality should be considered both in the taking of the culprit's life, and in the means by which it should be taken.[21]

According to the late Sheikh Shaltūt, one should not concern oneself with the jurists' views about such a subject. It is related that the Prophet ordered the believers to improve the method of killing (even for animals). So whatever quick, easy and efficient means of execution can be found should be used.[22] Therefore,

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18. Jassās, ibid. vol.I, pp.160-3. Matālib ūlī al-Nūhā, Sharh Ghayat al-Muntaha, vol.VI, p.52.

19. Mūdawwanah, vol.IV, pp.495-6. Ūmm, vol.VI, p.54. Muhalla, vol.X, pp.370-78.

20. Jassās, ibid. p.161. Matālib Ūlī al-Nūhā, op.cit. p.52.

21. Muhalla, ibid. p.370 et seq. Jassās, ibid.

22. Mahmud Shaltūt, Islam 'Aqida wa-Shari'a, 2nd Ed. Cairo, 1964, p.383. See also a decision (Fatwā) of the Azhar jurists' committee, Majallt al-Azhar, vol.VIII, p.503, referred to in Ibrahim's al-Qisas, op.cit. p.208.

one can conclude that retaliation for deliberate homicide is the punishment prescribed in the Qūr'ān, and it should be carried out in the way that causes the least possible amount of pain.

Unlike retaliation for homicide, retaliation for wounding was not prescribed in clear terms either in the Qūr'ān or in the Sūnna. The verses of the Qūr'ān on which the jurists based the law of retaliation for wounding are all controversial. The most important one is verse 45, Sūrah V "We prescribed for them (the Israelis) a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for a wound retaliation.."[23] But to interpret this verse as a source for the law of retaliation for wounding is unjustified as it concerns what was revealed and prescribed for the Jews in the Torah. It is a part of a set of verses concerning the law prescribed for the Jews and the Christians. Accordingly it is not the proper verse on which to base a verdict, particularly when the last statement but two of this set of verses says: "For each of you (the Prophets) we have appointed a divine law and a traced-out way."[24] as it indicates the fact that every Prophet has his own law revealed to him.[25]

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23. Arberry's translation; see Jaṣṣāṣ, op.cit. vol.II, p.232. Mughni, vol.VIII, Cairo, 1969, p.320-21.

24. Qur'an, Surah V, Verse 48.

25. Shaltūt, ibid. pp.403-5.

The other verses which are used in the same way are: verse 194 Sūrah II, and verse 126 Sūrah XVI. Again all these verses are irrelevant in this context as they were revealed to determine the relationship between the Muslim state and the non-Muslim states, but not to be adopted by Muslim society.[26]

As for the Sūnna there is only one report in which the Prophet is said to have ordered retaliation for wounding. This is the report related by Bukhārī and Muslim: a woman broke another woman's tooth, and the Prophet ordered her tooth to be broken in retaliation, but her brother Anas b. al-Nadr swore that his sister's tooth could not be broken. Then the victim's relatives accepted the "diya" instead of "qisās".[27] This report was subject to discussion: many points in this report are the subject of dispute, was it Anas b. al-Nadr who swore that the sister's tooth could not be broken, or was it his mother? Did this happen once, or twice? The collectors of "hadith" are not unanimous about the Prophet's words either. Moreover, it is only

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26. Ibid. p.405. Kāsānī, Badāi', op.cit. vol.VII, p.295.

27. Mishkāt al-Maṣābih, vol.II, p.261. It was related too by the other six collectors of "hadith" except Tirmidhī. See, Shaltūt, op.cit. p.402.

"information of one"[28] which the scholars of "Ūsūl al-Fiqh"[29] deny to be a sound basis for establishing a law.

Accordingly, one can say that the law of "qisās" for wounding is not laid down by the Qūr'ān or Sūnna. Can we then find another source for it? According to Shikh Shaltūt it is based on consensus "ijma'"; the jurists from the time of the Prophet until today are agreed about it (although each school or single jurist on a different basis). It is not a case of "ta'zir" which can either be adopted or not, but a law established on consensus which should be followed according to all the schools of Islamic law.[30]

The conditions required for "qisās" for wounding can be summarized as follows: a) the wound must be deliberate

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28. "Information of one" refers to the reports related by one follower of the Prophet in their age (ʿaṣr aṣ-ṣahaba) and by one of their followers (attabi'un) and so on till it was written in the collections of reports. On the other hand there are the reports handed down to the collectors in "regular succession" i.e. related in each age by a great number of narrators, so the idea of their having combined in telling falsehoods is excluded. The first kind of report is known as "hadith ahad" and the second as "hadith mutawatir" to which the power of establishing a new verdict or law is mostly agreed upon. See, Khallaf, Usul al-Fiqh, pp.36-44. Shaltūt, ibid. pp.73-76.

29. Shaltūt, ibid. p.406.

30. Ibid. p.404. Jaṣṣās, op.cit. p.232. Shāfi'ī, Ūmm, vol.VI, p.44. Where both authorities related the consensus.

"'amd" and not accidental "khata'". b) the part of the body on which "qisās" may be inflicted must be the same, and in the same condition, as the part of the victim's body which was injured by the culprit. c) it must be practicable to inflict "qisās" i.e. the injury must involve cutting off from a joint as for example from the wrist.[31] If all these conditions are fulfilled, "qisās" must be inflicted, according to Mālik and Shāfi'ī by experts in order to avoid any possible error.[32] The jurists of the Hanafī school agreed that "qisās" for wounding should be inflicted, in two cases only: the case of an injury which reaches the skull-bone (al-muwaddaha) and the case of articular injury (al-jināya 'alā-mifṣal).[33]

All other cases of injury are either unanimously held not to be subject to "qisās", or agreed upon among the Hanafī jurists but not among others, or subject to dispute

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31. Mughnī, op.cit. pp.320-21. Maṭālib Ūlī al-Nuhā, op. cit. pp.63-9. Umm, vol.VI, p.44. Badai' al-Ṣanai', vol.VII, pp.297 et seq. Ḥattab, his commentary on Mukhtaṣar Khalil, op.cit. p.246 et seq.

32. Mudawwanah, vol.IV, p.499. Ḥattāb, ibid. p.247. Umm, ibid. p.52. Prof. J. Schacht in his article, Qiṣaṣ, in the Encyclopaedia of Islam referred to Mālik only as requiring this condition.

33. Shaltūt, op.cit. pp.399-401. It is noteworthy that he rightly described this latter case as a mere assumption.

among the Hanafī scholars themselves.[34] However, in the texts of Islamic law there is quite a long discussion concerning the different kinds of wounds and the possibility of equality in retaliation for each; together with the possibility of fulfilling the other conditions required. All these discussions I have left untouched, as I think it is a matter for expert knowledge and not a matter for legal knowledge. One must accept the opinion of a surgeon, for example, about when just retaliation is physically possible, and when it is not.

A scholar of Islamic law, however, has nothing to do with such a decision as it is completely beyond his field of experience and knowledge. It is possible that the jurists made correct decisions about some of the topics, but at any rate they cannot be taken as the final word for the above reason.[35]

It remains, now to explain the other aspect of the punishment for homicide and wounding. The "diya" or blood-money is the sole punishment for quasi-deliberate homicide (shabah al-'amd). It is due in cases of deliberate

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34. I have left the question of "qiṣāṣ" for wounding by a man of a woman at this stage as it will be referred to later on among other disputed points.

35. Ibn Ḥazm, for instance, considered that all wounds make the culprit liable to "qiṣaṣ", Muḥalla, vol.X, p.461. It is interesting that he allows it even for defloration committed by a man, see pp.455-6.

homicide if, and only if, the nearest relatives of the victim do not insist on the carrying out of "qisās" against the murderer.[36] At the same time "diya" (together with the kaffāra) is the remedy for accidental homicide.

"Diya" as a remedy for homicide and wounding was prescribed by the Sūnna only. It is related that the Prophet said "as for quasi-deliberate homicide (Shibhi al-'amd) the blood-money is one hundred camels of which 40 are pregnant."[37] The same number of camels (100) was determined in another report as the "diya" for deliberate homicide.[38] Unlawful homicide, however, is subdivided into categories which vary from one school to another, or even from one jurist to another within the same school. The widest subdivision is that of the Hanafī school which contains five varieties: "deliberate "'amd", quasi-deliberate "shabah al-'amd", accidental "Khata'", equivalent to accidental "jārī majrā al-Khata" and indirect "bisabab".[39] Qisās may be carried out for the first sort of homicide only while the remedy for the other four is

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36. More will be said about the relatives' right later.

37. Mishkāt al-Masābih, vol.II, p.268, where Nassā'ī Dārimi and b. Magah are quoted.

38. Ibid., where he quoted, Nasa'ī and Dārimī, see also Malik, al-Muwatta', Cairo, 1951, p.530.

39. Anderson, op.cit. p.818.

the exaction of blood-money.[40] These five subdivisions came into existence as the Hanafī school's view after the famous Hanafī jurist al-Jassās (died 370 A.H.) wrote his book "Ahkām al-Qur'ān". Before him, as he stated, the Hanafī jurists used to divide homicide into the first four only.[41] The Shāfi'ī, Hanbalī and Zaydī schools recognize three subdivisions only: deliberate, quasi-deliberate and accidental. The Mālikī and Zāhirī schools divide it into two categories only: deliberate and accidental.[42]

The definition of each of these categories is disputed not only among different schools but also among different individual scholars of the same school. It is, as Prof. Anderson rightly stated, a matter of "much complexity and confusion, for often the same writer

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40. Ibn-Nūjaym, al-Bahr, al-Rā'iq Sharh Kanz al-Daqāi'q, Cairo,(n.d.), vol.VIII, p.287. Anderson, ibid.

41. See Ahkām al-Qur'ān, vol.II, p.222-3. and Sarakhsī, Mabsut, vol.XXVI, p.59.

42. Mughnī, op.cit. p.260. al-Rawd al-Nadir, vol.IV, p.547. Muhalla, vol.X, p.343. Mawwaq, his commentary on Mukhtasar Khalil, Cairo, 1329 A.H. vol.VI, p.240. It is interesting that some of the Maliki and Hanafi jurists hold a view according to which the varieties of homicide are the first four of the five held by the majority of the Hanafi school. See e.g. Kasani, Badai', op.cit. p.233. and Dardir, al-Sharh al-Kabir, a commentary on Mukhtasar Khalil Cairo, (n.d.), vol.IX, p.319.

will in places assert that deliberate homicide means homicide committed with the actual intention to kill, while in other places he will state or imply that it means homicide which results from an intentional use of any weapon or means intrinsically likely to kill."[43]

Whether or not the accused intended to kill is something that only he can know. The difficulty of ascribing the intention to kill to the accused, in the absence of adequate proof, led to a divergence of views among the schools of Islamic law as to the circumstances in which a homicide should be classified as deliberate. Generally speaking, the Hanafī, Shāfi'ī and Hanbalī schools classify as deliberate "cases of homicide in which the killer intended to kill and employed some means likely to have that result." Other cases of homicide which result from an act or omission which is not likely to kill are classified as "quasi deliberate" homicide. The first category only makes the offender liable to "qisās", while the second makes him liable to blood-money.[44]

The Mālikī school, on the other hand, considers "a person guilty of deliberate homicide if he causes the

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43. Anderson, ibid. p.819. However for generally accepted definitions, see Coulson, Succession in the Muslim Family, Cambridge, 1971, p.177-8.

44. Anderson, ibid.

death of another by any intentional act or omission, directed against a human being which is either hostile or intrinsically likely to kill."[45]

However, in cases of deliberate homicide the punishment is the death penalty by means of "qisās". But "qisās" could be ruled out if the victims' nearest relatives did not demand it or, in other cases, when it was impossible to carry it out.[46] Then they may ask for the payment of "diya" or forgive the killer altogether. In the case of their demand for "diya" to be paid, it is to be a hundred camels, and the same "diya" is due in all cases of quasi-deliberate homicide as this does not incur "qisās" (but here too forgiveness may take place).[47] So, "diya" is the only remedy in cases of quasi-deliberate homicide and it is a substitute punishment for deliberate homicide. It is in both cases to be one hundred[48] camels, according

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45. Coulson, ibid. p.177. cf. 'Ūda, vol.II, pp.78-83.

46. For these cases and the different views about them see, 'Ūda, op.cit. pp.155-75. Ahmad Ibrahim, op.cit. pp.178-94.

47. The "diya" is of two categories: Mughallaza, i.e. in the higher amount, and Mukhaffa, i.e. in the lighter amount. Both are one hundred camels, the difference appears in kind and age of camels only.

48. There are other substitute and incidental punishments, i.e. "ta'zir", kaffara and al-hirman min al-mirāth wal-waṣiya "deprivation of inheritance and legacy"; to the third reference has already been made, the first will be treated afterwards, while the second will not be considered as it cannot be classified as a punishment in the legal sense of the word.

to one view, on the heavier or higher rate, and according to the other on the ordinary or lighter rate. The same dispute existed concerning quasi-deliberate and deliberate homicide.[49] It has been already mentioned that the "diya" is due to be paid originally in camels, but it is almost universally admitted that it can be paid by an equivalent amount of money, either gold or silver, cows, sheep or garments. As for the Zāhirī school they believe that it should be paid only in camels unless this is impossible, there being no camels available, in which case it can be paid by the price equivalent to a hundred camels.[50]

In cases of deliberate homicide, the culprit himself is to pay the "diya" from his own property. However, various opinions among the schools concerning deliberate homicide committed by an insane man or a minor "saghir". The three schools, except the Shāfi'ī (its prevalent view), agree that the "diya" in such a case is to be paid by the "'āqila" (tribal group to which the culprit belongs). This is based on the fact that the minor and the madman are not able to discriminate one act from

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49. 'Ūda, op.cit., pp.180-181, 190 and of the references he cited, see Dardir, op.cit. vol.IV, p.237 et seq.

50. 'Ūda, ibid, p.170-8 and Ibn Ḥazm, Muḥalla, op.cit. pp.388 et seq.

another or are possessed of a defective power of discrimination. Moreover, Islamic law is not regarded as applicable to those who have not reached puberty or who are insane.[51] The Shāfi'īs prevalent view allows the "diya" to be paid from the insane and minor's own property by method of analogical reasoning "qiyās" on the ground that they are subject to "ta'zir" for their deeds.[52]

In cases of quasi-deliberate homicide, the "diya" is to be paid by the "'āqila" of the culprit in all the schools' views except that of the Mālikī school, who do not recognize quasi-deliberate homicide (nor do the Zāhirī school of course).[53] An important difference between the payment of the "diya" in deliberate and quasi-deliberate homicide, is that in the former it is to be paid immediately after the case is closed by the court, while in the latter it is to be paid after three years, starting either from the day of the victim's death (according to the Shāfi'ī and Hanbalī schools), or from the day of the case being closed by the court (according to the Hanafī school).[54] There are indeed some points of dispute and

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51. 'Ūda, op.cit. p.179. Anderson, ibid., p.825.

52. Abū Ishāq al-Shirāzī, Muhadhdhab, Cairo, (n.d.), Vol.II, p.210.

53. Mughnī, vol.VIII, p.375 et seq. Badā'i', vol.VII, p.255.

54. Ibid. the Mālikīs hold the same view as the Hanafī's in relation to accidental homicide, see Mawwāq, op. cit. p.267.

contradictory opinions, but we need not go through any of them.[55] Among the points of universal agreement in Islamic law is that the blood-money of a woman is half that of a man.[56] It is interesting, however, that all jurists are agreed that it is allowed to the nearest relative of the victim and the culprit to settle the matter peacefully "sūlhan" on the basis that the culprit may pay the victim's relatives more money than the fixed amount for "diya".[57]

Up to now we have summarized the principles of the law of "diya" for homicide and it remains for us to consider the law of "diya" for wounding.

The subject, in the texts of Islamic law, is very complex and confusing. Nearly every part of man's body was discussed in relation to the amount of "diya" or "arash" which was due to be paid for its injury, and most of the points were disputed. As we are not concerned here with explaining the law but with stating the general principles of it in order to know the philosophy behind

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55. For detail see 'Ūda, op.cit. pp.192-8. The articles "Qiṣaṣ, Katl and Diya" in the Encyclopaedia of Islam, vols.I & II. Homicide in Islamic Law by Prof. Anderson, and Ibrahim, al-Qiṣaṣ, op.cit.

56. Shū'rānī, Mizān, vol.II, p.127. al-Rawd al-Nadir, vol.IV, p.568 et seq.

57. Mūghnī, op.cit. p.363. Shirbinī, Mūghnī al-Muhtāj, vol.IV, Cairo, 1308 A.H. p.45.

the punishments prescribed for crimes, we will not go through these disputed points at all. It is sufficient, I think, to say that for some injuries the full amount of "diya" is due, e.g. the eyes, nose, lips etc; and for some others a fixed amount, or percentage of it, should be paid (although there are different views about some injuries as well). When there was no fixed amount (either whole or part of the full diya" the victim would be entitled to some compensation known as "hukumat 'adl". This was an amount of money to be fixed by the judge "qadi" and paid to the victim for the loss suffered.

The fixed amounts were assessed either from what the Prophet reportedly laid down in his letter to 'Amr b. Hazm when he was appointed to represent the Prophet in Yemen[58], or from personal opinion "ijtihad".[59]

However, all jurists agreed that the blood-money (diya or arash) may replace retaliation when it is not possible to inflict it or when a peaceful agreement "sulh" is achieved.[60] Blood-money is due also, according to some jurists, if the culprit has already lost the part of his body parallel to that which he injured of the victim's

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58. Shafi'i, Risalah, op.cit. p.422-3. Mughni, ibid. p.367.

59. Muwatta', Cairo, 1951, p.535.

60. Mughni, ibid. 'Uda, op.cit. vol.II, p.261.

body. But according to other jurists nothing is due in such a case.[61] The payment of "diya" in cases of injury is the duty of the culprit himself. Here the "'āqila" is exempt from any responsibility. The deed is the culprit's alone and so should be the loss of money due for it. On this point, complete agreement has been established among all the schools of Islamic law.[62]

III. Disputed Points about the Infliction of "Qisās":-

Under this heading three points will be treated: the execution of "qisās" against a group of people for killing a single person, against a Muslim for killing a non-Muslim "dhimmī" and against a father for killing his son. Indeed , there are many other disputed points treated in the texts of Islamic law, but these are the most important ones as they are directly concerned with the fundamental principle of "qisās" itself. "Qisās" was prescribed to discourage the motive for killing in man's nature. "There is life for you in retaliation"[63] , is the obvious reason

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61. The first view is held by the Ḥanbalī and Shāfi'ī schools, while the second is held by the Mālikī and, with little modification, the Ḥanafī, see 'Ūda, op.cit. p.257-8. It is noteworthy however that the same dispute is raised in cases of homicide.

62. Jaṣṣās, op.cit. vol.I, p.157 et seq. Bājī, al-Muntaqā, vol.VII, Cairo (n.d.), p.103. Nawawī, Minhāj, in the margin of Tuhfat al-Muhtaj, op.cit. vol.IV, p.87. Mughnī, ibid. p.382. Muḥallā, vol.XI, p.50. al-Rawd al-Nadir, op.cit. p.56.

63. Qur'ān, Sūrah II, verse 179.

given by the Qūr'ān for legalizing this punishment. To hold the view that "qisās" in the above mentioned cases cannot be inflicted is to demolish the theory of "qisās" itself. So, here we will try to see what evidence supports such a view and to what extent it can be accepted.

III. 1. A Group for a Single Person:-

Murder can be committed by one person or by a group of people against one person. In the first case there is no problem about inflicting "qisās" on the culprit. But in the second case some of the Muslim jurists think that a man can be executed for killing one man but a group cannot be executed for doing so. This view was reportedly held by - among others - Zūharī, Ibn Sirin, and Habib b. Abī Thābit. The Hanafī, Mālikī, Shāfi'ī and Zāhirī schools hold an opposite view according to which a group can be punished by means of "qisās" for killing one person. It is not clear, however, which view was held by Ibn 'Abbās and Ahmad b. Hanbal as both views were attributed to both of them.[64]

Those who hold the first view support it by an interpretation of the two Qūr'ānic verses in Sūrah II and V, as it is mentioned there that one person can be killed for one. Accordingly, they claim, two or more

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64. Mūghnī, op.cit. pp.189-90. Muhalla, vol.X, p.512.

people are not "equal" to one, and the law of "qisās" is based on "equality", so it is not justifiable to kill more than one person for killing one person. In fact it is easy to refute this claim by saying that "qisās" is a punishment for a specific act, i.e. the killing of a person, and any punishment should be inflicted for the commission of the act for which it was prescribed, disregarding the number of people who shared in it. Thus, when four people shared in killing a boy in Yemen, 'Omar ordered his representative there to carry out "qisās" against them. The same was done by 'Alī when three men killed a single man.[65] Moreover, if the first view is right, it will open the door to anyone who wants to kill another by allowing him to seek the cooperation of a third person and so escape the punishment.[66]

So the preferable view in relation to this point is the majority one which allows "qisās" to be inflicted upon a group of people for killing one person. The same applies in cases of "qisās" from a man for killing a woman.

III. 2. A Muslim for a non-Muslim:-

It is characteristic in religious laws to consider the follower of religion as superior to other people who

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65. Mughnī, op.cit. p.290. Jassās, vol.I, p.145.

66. Shaltūt, op.cit. p.393. Badāi', vol.VII, p.238.

do not believe in this religion. This distinction is clearly expressed in the Qūr'ān and the Sūnna in relation to the position of the people in the sight of God, especially in the hereafter.[67] According to this distinction the majority of Muslim scholars hold that a Muslim is not liable to "qiṣaṣ" if he has killed a non-Muslim, "dhimmī".[68] Only the Hanafī school allows the "qiṣās" to take place in such a case.[69]

The majority view is supported by Qūr'ānic verses which declared that non-Muslims were not equal to Muslims, and a Prophetic report which forbade the killing of a Muslim on account of his killing a non-Muslim "kāfir".[70] The Hanafī school supports its view by insisting on the application of the general meaning of the Qūr'ānic verses relating to "qiṣās" as these verses did not discriminate between a Muslim and a non-Muslim but simply declared "qiṣās" to be the punishment, for homicide disregarding the faith of the victim.[71] One can add to this the

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67. Aḥmad Ibrāhim, op.cit. p.119.

68. A "dhimmī" is a non-Mulsim living in a Muslim state.

69. According to the Mālikī school a Muslim is liable to the death penalty for killing a non-Muslim by way of deceiving "ghila" as it is in the Mālikī view a sort of "ḥiraba" for which the death penalty is prescribed as a "ḥadd" punishment. See Mukhtaṣar Khalil, with the commentary of al-Mawwaq and al-Ḥattab, vol.VI, pp.230-3. Dardir, in the margin of Ḥashiyat al-Dusuqi, vol.IX, p.383.

70. Mūghnī, vol.VIII, pp.273-4. Muḥalla, vol.X, pp.347-59. Umm, vol.VI, pp.32-34.

71. Jaṣṣāṣ, op.cit. pp.140-44.

Prophetic report related by Bukhārī, Muslim and Abū-Dāwūd. "The life of a Muslim may be taken in three cases only - i.e. in the case of a married adulterer, one who has killed a human being "qatal nafsan" and one who has forsaken his religion and separated himself from his community."[72] In the second case mentioned in this report, the committing of homicide was described as against "a human being" and not a Muslim human being.

Moreover, to limit the infliction of "qisās" to cases of killing a Muslim only is contradictory to the general principle of the law of "qisās" itself, as was stated before. This law was made in order to protect human life, and if one imposes such a limitation on it, this clearly contradicts its purpose. One cannot deny that the law of "qisās" is based on equality but equality in what? This is the question. The Hanafī school rightly hold that equality here means that both the killer and the victim must be human beings, therefore, any human being who kills another human being should be liable to "qisās" disregarding the religion of the victim.

The verses used by other schools to support their view that there is no equality between a Muslim and a non-Muslim, are all concerned with the situation in the

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72. See above, p. 116-117.

next world. So none of these verses is relevant to this discussion.[73]

As for the Prophetic report concerned, its words were not clear about the verdict intended by the Prophet, so an explanation was necessary. It is obvious from what Jassās said about it that the explanation given by the Hanafī school is harmonious with the general spirit of the Islamic law rather than the explanation given by the majority.[74]

It may be said here that the Hanafī's view, and that of the Mālikīs in cases of "ghila" assume that "qisās" is a punishment by the authority for the sake of justice. The majority view on the other hand is influenced by the pre-Islamic distinction between individuals according to their social or tribal position, a distinction which Islam completely condemned. On this basis, the contemporary scholars are generally in favour of the Hanafīs' view rather than that of the majority.[75]

At the same time a parallel may be drawn between the Hanafīs' view and the view unanimously agreed upon about theft. It is subject to consensus that if a Muslim

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73. Muḥalla, ibid. and Aḥmad Ibrāhim, op.cit. pp.121-23.

74. Jassās, vol.I, p.142-143.

75. e.g. Aḥmad Ibrāhim, ibid. Shaltūt, op.cit. p.393-5. 'Uda, vol.I, p.339 and Vol.II, p.124. Sharabāṣi, op. cit. p.132-3.

steals a non-Muslim's property and the crime is proved, the Muslim's hand should be amputated; the cause or "'illa" of this is the protection of the non-Muslim's property. It is clear enough how illogical it is to grant more protection for the non-Muslim's money, than for his life.[76] This view may be objected to on the grounds that the punishment for theft is due to God, "haqq Allah" and therefore it must not be equal to "qisās" as the latter is essentially due to the victim or his relatives, i.e. "haqq ādamī". Such an objection is not valid. This parallel does not affect the fact that the punishment for theft is "haqq Allah", but it has the clear object of prescribing a punishment for theft, i.e. the protection of property.[77]

III. 3. "Qisās" from a Father for Killing his Son:-

There are two views among Muslim jurists concerning this point. The Hanafī, Shāfi'ī and Hanbalī schools hold that a father who kills his son is not liable to "qisās".[78] The Mālikī school hold an opposite view according to which the father is liable to "qisās" for killing his son where

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76. Jassās, ibid. p.144.

77. Shalabī, al-Fiqh al-Islami, op.cit. p.200, 204-5.

78. Badāi', op.cit. p.235. Jassās, vol.I, p.144. Nawawī, Minhaj, vol.IV, p.17. Mughni, op.cit. pp.285-6.

the homicide is proved to be deliberate.[79]

The three schools' view is based on many arguments. Firstly, there is the alleged Prophetic report "no retaliation is due in cases of a father who kills his son". Secondly, they say that "qisās" is prescribed to prevent the commission of homicide, and the love of the father towards his son is enough to prevent him from such an act. Thirdly, they claim that the father was the direct cause of his son's being alive, therefore it is not fair that the son should become the cause of his father's death.[80] To consider this evidence, it is clear that the second and the third pieces are not based on any legal principle, but are emotional statements which have nothing to do with a legal topic. The third piece of evidence, again, is in fact a mere falsification. It is not true that the son in such a case may be the cause of his father's death. It is the father's deed which causes his death. The son was the father's victim, and he is merely facing his punishment in being subject to "qisās".[81] As for the Prophetic report, it is sufficient to say that at least three of the scholars of "hadith"

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79. Bājī, Muntaqā, vol.VII, p,105. Kinānī, al-'Iqd al-Munazzam, vol.II, Cairo 1301 A.H. (in the margin of b. Farhun Tabsirat al-Hukkam), p.253.

80. See the references cited in F.N. 81.

81. Ahmad Ibrāhim, op.cit. pp.104-8. Shaltūt, op.cit. pp.398.

declared it to be related by untrustworthy people, such a "hadith" cannot be used as evidence or refutation of any legal view.[82]

The Mālikī view is supported by the general meaning of the Qur'ānic verses which do not distinguish one killer from another or one victim from another.

Again this view is supported by all the contemporary writers about the subject as it is in harmony with the Islamic legal principles of equality as applied in the law of "qisās".[83]

It is clear that the Mālikī view fits the idea of punishment administered by the state for the sake of justice, which allows no distinction between offenders based on their relationship to the victim. The majority view, on the other hand, considers homicide as a civil wrong for which, according to another Prophetic report, no remedy is granted to the son against his father.[84]

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82. Ibn al-'Arabī, Ahkām al-Qur'ān, vol.I, Cairo, p.28 and Qurtubi, Tafsir, vol.II, Cairo, p.249 where he quoted that Tirmidhi denied that report to be authentic.

83. Ahmad Ibrāhim and Shaltūt, ibid. It is interesting that the same principle is applied for mothers as well. Also the word father in Arabic means father and grandfather, or rather generally, all ancestors.

84. See al-Rawd al-Nadir, vol.IV, p.583-4, where he quoted the Prophetic report "you (the son) and your property are belonging to your father".

A final remark about all these disputed points may be that the chosen view in each point is applicable in cases of "qisās" for wounding as well.

IV. The Application of "Qisās" in Muslim Countries:-

Here we will concern ourselves with considering the possibility of applying the law of "qisās" in Egypt under the current penal code. This discussion came up in relation to the explanation of the first article of the Egyptian penal code of 1883. A reservation was made in this article: that no interference with the personal rights granted according to Islamic law "shari'a" should result from the adoption of the penal code. Soon after the adoption of the code, a case known as the case of "Fyrūz Aghā" started the conflict between the law of "qisās" and the punishment prescribed in this code for homicide. The defendant of the culprit claimed that the prosecutor had no right to demand the infliction of the death penalty as this demand is the "right of the relatives of the victim according to the Shari'a".[85] The court rejected this claim and explained the reservation in the first article as referring only to "diya", while the punishment is wholly a "government task". This view

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85. Būstāni, Sharh Qānūn al-'Ūqūbāt al-Misrī, Cairo, 1894, pp.14-17.

was approved by the court of appeal in 8th September 1889.[86] The commentators, thereafter, discussed the problem and were divided into three groups. The first held the view that the punishments prescribed in this code for homicide and wounding abrogated the law of "qisās", but they allowed by the reservation in article (1) the right that "diya" could be claimed by the injured party.[87] The second held the view that "qisās" was still a part of the penal law according to the above-mentioned verdict, but a court would not operate it as it contradicts the principles of modern penal law which were introduced into the Egyptian penal code of 1883. Such a decision would be against the law, so this reservation should be abolished.[88] The Egyptian penal code was altered in 1937 but the verdict was reintroduced in article (7) of the new code. Dr. A. Ibrāhim in his thesis "al-Qisās" defended a third view according to which the law of "qisās" is a part of the Egyptian penal law, and the court should adopt it where all the conditions laid down by the "Shari'a" are fulfilled.[89] According to

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86. Ibid. the same verdict was reintroduced in the Egyptian penal code of 1904, and it remains in the current penal code of 1937.

87. Būstānī, ibid.

88. Abū Haif, al-Diya, Ph.D. thesis, Cairo, 1932, p.134.

89. Ahmad Ibrāhim, op.cit. pp.27-34.

his view a crime of homicide or wounding has two punishments determined by the law: a) the punishment of "qisās" as laid down in the "shari'a", and b) the punishment prescribed in the penal code. A conflict between the two punishments may be solved on the basis of article 32 of the 1937 penal code which allows the severer punishment only to be inflicted in such a case.[90]

Though the evidence used by Dr. Ibrāhim is theoretically quite sound, in practice his view cannot be accepted for many reasons. The most important one is the question of which school "madhhab" among the Islamic law schools the court should take as its model, and act according to its precepts. We have seen some of the disputed points among the schools but there are many more disputes. In a modern state, it is the legislator who must decide which school or opinion should be followed. It should not be forgotten that this difficulty was the reason behind recent legislation on inheritance and legacy in most of the Muslim countries. With the law of "qisās" the situation is likely to be even worse and more intolerable. Moreover, a realistic view about the verdict of article (1) in the 1883 code or article (7) 1937 code, is that both articles came into the codes to satisfy the

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90. Ibid. p.34.

common belief that the "shari'a" is the basic law of the country and it should not be overruled by any legislation. But this was just a pretence as it is clear that none of the "shari'a" punishments were enforced by these codes. Evidence for this is that no one except Dr. Ibrāhim has expressed or supported his view, and, as far as I know, the criminal courts have never faced the problem of adapting the law of "qisās" since the case of "Fyrūz Agha" in 1889. If the law of "qisās" is to be adopted in Egypt, or in any Muslim country, this should be through a piece of legislation to avoid the difficulties expected from its adoption according to Dr. Ibrāhim's view. But insofar as the circumstances remain the same, this is very unlikely to happen. On the contrary, one can say that the reservation of article (7) of the current penal law in Egypt is on the way to being abolished in the new penal code now in preparation. It was made, as has been said, for a particular reason which no longer really exists; therefore it is meaningless to retain it.[91]

V. Classification of Homicide:-

In the very beginning of his article "Homicide in Islamic Law", Prof. Anderson draws attention to the fact

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91. Ahmad Khalifa, al-Nazriya al-'Āmma lil-Tajrim, Cairo, 1959, pp.115-116.

that homicide in the text books of Islamic law is treated rather as a tort than as a crime. Here the question of the classification of homicide between these two categories will be considered.[92] It may be helpful to start here with a definition of both tort and crime in order to clarify the subject, and then to see whether homicide is treated under Islamic law as a tort, a crime, or as both at the same time. Indeed, the matter of defining both tort and crime is far from being settled, but we need not add anything to the current arguments on the subject. It would be better to take one of the many definitions provided by the writers on each subject as the basis for this study. As for tort, the best definition known in English law for tortious liability is that of Winfield: "Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages."[93] Tortious liability is distinguishable from criminal liability by the fact

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92. A detailed study was done by Prof. Anderson in his article, Homicide in Islamic Law, B.S.O.A.S. op.cit. pp.811-8,cf. with regard to the North Nigerian practice, Prof. Anderson's book, Islamic Law in Africa, H.M.S.O., London, 1954, pp.198-218.

93. Winfield on Tort, 8th Ed. by J. Jolowicz and E. Lewis, Sweet and Maxwell, London, 1967, p.3. This definition is preferred by Clerk and Lindsell, Torts, 13th Ed. by A. L. Armitage and others, London, 1969, p.1., and also by Fleming in the Law of Tort, 3rd Ed. Sydney, 1965, p.1.

that a crime is "a wrong the sanction of which involves punishment".[94] Or, we can define criminal prosecution as concerned with the imposition of penalties upon the wrong-doer, in order to protect society as a whole, while "tort liability on the other hand exists primarily to compensate the person injured by compelling the wrong-doer to pay for the damage he has done."[95]

According to these definitions, one can say that the distinction between a tort and crime, generally speaking, appears in the purpose underlying the court's decision. If it is to compensate the wronged party, then it is a case of tort. On the other hand, if it is to punish the wrong-doer, it is a criminal case. The wronged party has nothing to do with the trial or the carrying out of the court's decision in the latter case, while in the former, he will benefit from this decision by the compensation payable to him or the repair of his damaged property.[96]

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94. Kenny, Outlines of Criminal Law, 16th Ed. 1952, p.539, quoted in Winfield, ibid. p.6.

95. Fleming, ibid. p.2.

96. It is possible that a criminal court may order a compensatory sum of money to be paid by the wrongdoer to the injured party. But this is distinguished from tort cases by: a) it is obtainable only in addition to a punishment, or an order in the nature of punishment, inflicted or made by the court; and b) in a crime the compensation which may benefit the injured party is not claimable in the first instance; but in a tort it may be. Winfield, op.cit. p.6.

Now to turn to homicide in Islamic law, the victim or his nearest relatives have three rights: first the right to demand the execution of "qisās" against the murderer, second, the right to pardon the murderer in return for his paying the fixed amount of blood-money, and, third, the right to pardon him freely, i.e. to pardon the offender without taking the blood-money. Here these three rights will be considered respectively in order to reach the correct classification of homicide. It is the right of the nearest relative of the murdered person to demand retaliation or "qisās", and without this demand it cannot be inflicted. The jurists added, that when "qisās" is demanded it is the right of the murdered relatives to carry it out and he cannot be deprived of this right if he is capable of using it in the proper way.[97] This is the view of the four Sunnī schools, and it is clear that the old tradition of personal revenge was the reason behind this view.[98] This view, however, was supported by an interpretation of the Qur'ānic verse "... and if any one is slain wrongfully we have given his heir authority" XVII, 33. To explain this "authority" which was said to have

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97. Mughnī, op.cit. p.307. Badā'i', op.cit. p.242 et seq. Umm, op.cit. p.17. Hattāb, his commentary on Mukhtaṣar Khalīl, op.cit. p.250.

98. Anderson, Homicide in Islamic Law, p.818.

been given to the heir, the majority hold that it is the authority to kill the culprit. On the other hand, some of the commentators on the Qūr'ān explain it as his (the heir's) authority to demand the execution of "qiṣāṣ" or to remit it. But the execution itself is the ruler's or judge's duty and not anybody else's.[99] In the majority view, "qiṣāṣ" is clearly a matter of private justice or rather personal revenge. But in the other view the idea of crime and punishment emerges. This view is held by all the contemporary writers on the subject.[100] The strongest evidence they use to support their view is that in the Qūr'ān "qiṣāṣ" was described as the duty of the Muslim community, who could not carry it out except through a representative who would be, in this case, the judge or ruler. To explain this concept, Shaltūt stated that the duties of the community in Islam are two-fold. Firstly, there are the duties incumbent on each individual, like prayer, fasting and the payment of alms, and secondly there are those carried out by a representative acting for the community, it being impossible for each individual

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99. Qūrṭūbī, Tafsir, vol.II, pp.245, 256. See also: Shaltūt, op.cit. pp.385-88, where he quoted Rāzī, Qurṭubī and Muḥammad 'Abdū, in al-Manar (Tafsir).

100. Shaltūt, ibid. Ahmad Ibrāhim op.cit. pp.215-218. 'Ūda, op.cit. vol.II, p.155. Sharabaṣī, op.cit. p.134 et seq. Sayed Sabiq, Fiqh al-Sunna, vol.X, Kuwait, 1968, p.61-63.

to do them. One of these is the carrying out of the "qisās" when it is demanded.[101]

As for the second right of the victim's relatives, i.e. the right to remit retaliation and to receive the "diya", it is here where homicide appears to be more of a tort, or completely so. The "diya" is, above all, a compensation, fixed to satisfy the victim's relatives. This is even more clear in cases where the matter is settled out of court for an amount greater or smaller than the fixed "diya". If it could be argued that it is a sort of punishment in cases where the "diya" is ordered to be paid by the court, such an argument is completely unfounded in the other case.

Moreover, the victim's relatives have the right to remit retaliation freely, without being paid anything. This right may be exercised even after the court has ordered "qisās" to be executed against the culprit. The Qūr'ān and the Sūnna recommend the remission of retaliation.[102] Or, to use Prof. Anderson's words, "It is regarded as more meritorious to remit retaliation, and for this reason most jurists hold that if any adult,

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101. Shaltūt, op.cit. p.386, attention is drawn to other juristic views, according to which the concept of a punishment for a crime is predominant, see Section III, above.

102. Qūr'ān, II, 178 and for Sūnna see Abū Dāwud, vol. II, p.478.

sane heir waives this right, the others have no option but to comply."[103] According to most of the jurists, if the right of remission was exercised, the culprit would not be liable to any punishment. But the Mālikī school allow a discretionary punishment "ta'zir" to be inflicted in this case, and indeed, in all cases of deliberate homicide where, for one reason or another there was no retaliation.[104] Here, unlike in the other view, the concept of crime which should be punished for the sake of justice, emerges.[105]

It can be said, therefore, that neither the concept of crime nor that of tort is dominant. Therefore, it may be rightly said that homicide and its punishment in Islamic law have a dual nature, that of a crime for which punishment is given, and that of a tort which makes the wrongdoer liable to pay a compensation from which the wronged party may benefit. Of course, such a dual system, with regard to homicide, is completely divorced from the modern idea of crime and punishment. But it is the heritage of the old pre-Islamic Arabian tradition which was merely modified by Islamic law, and by no means

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103. Ibid. p.812.

104. Mawwāq, op.cit. p.268. Anderson, op.cit. p.818.

105. See Anderson, ibid., for other points concerning this topic.

completely changed.[106] Indeed the concept of punishment inflicted by the state for homicide is clearly, as far as the Arabs were concerned, an innovation of Islam, but this does not mean that there was a complete change in the pre-Islamic conception.

VI. A Survey of the Law of "Qisās":-

Several points need to be discussed in this part of the study. Perhaps the first interesting one is that of the origin of the law. It is said in the Qūr'ān that "qisās" was prescribed for the Jews in the Torah. This fact can be found in the Torah itself in nearly the same words as those recited in the Qūr'ān. In the Old Testament one of the ten commandments says: "You shall not kill" and the punishment for disobedience came shortly after it: "Whoever strikes a man so that he dies shall be put to death".[107] The command and the punishment for killing were both revealed again in the Qūr'ān in almost the same words.[108] Again the detailed law of "qisās" for injuries which was stated in the Qūr'ān, V, 33,

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106. Shaltūt, p.335-6. Sayed Sābiq, p.23. A. Ibrāhim, p.10. However, many points of the subject were ignored in this study as they are beyond its scope, which is limited to the general principles of the theory of punishment. For details see the references mentioned throughout this chapter.

107. Exodus, 20:13 and 21:12. Nelson's Ed. London, 1965.

108. Qūr'ān, XVII, 33 and II, 188.

is found in the Old Testament: "a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound."[109] The rule that gives the nearest relative of the victim the right to ask for the punishment of the culprit, or even to carry it out himself, is as well known in the Torah.[110]

According to some Muslim commentators, the law of "qisās" was omitted in the Bible. This view is supported by what is written in Matthew: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth' But I say to you, do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also."[111] But these verses of the Bible should be interpreted in the light of what is said by Christ in the same version: "Think not that I have come to abolish the law and the Prophets; I have come not to abolish them but to fulfil them."[112] The law of "qisās" was a part of the law of Moses which Christ came to fulfil. Its fulfilment in this context was through the addition

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109. Exodus, 21: 23.4.5.

110. Numbers, 35:19,21.

111. Matthew, 5:38,39. This view was supported by A. Ibrahim, op.cit. p.5, but opposed by Shaltut, op.cit. p.326-7, where he quoted Muhammad 'Abdu.

112. Ibid. 5:17.

of the command of forgiveness and pardon to the concrete law of retaliation as was laid down by Moses in the Torah. Once more, the command of forgiveness itself was revealed again in the Qūr'ān, and it cannot be said that it contains any contradiction to the law of "qisās".[113] In accordance with this, it can be said that the three major religions of the world approve the law of "qisās" as a part of their commandments for the control of Mankind's behaviour. Islam did not initiate the law of "qisās". It was known before to the followers of Judaism and Christianity. Its introduction in Islam was a re-assertion that it is God's law which must be obeyed.

However, we have here to consider the law of "qisās" in the light of modern penologists' theories and ideas. It has been mentioned above that "qisās" for homicide means inflicting the death penalty as a punishment for the crime, whereas "qisās" for injuries, where it can be applied, means a corporal punishment. The notion of "diya" or blood-money, may be compared with the modern concept of compensation to the victim or the wronged party.

To start with capital punishment, it is well known that the argument for and against it has been going on

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113. See the Qūr'ānic verses mentioned before, together with many others, e.g. Sūrah XLI, verse 34.

for a long time. Most of the European countries have abolished it. The last country to do so was England. The Abolition of the Death Penalty Act of 1965, abolished it as a punishment for murder. It can still be inflicted for treason, piracy with violence, and setting fire to H.M. ships. But this possibility seems to be, in the present circumstances, much more theoretical than practical. In other parts of the world such as the United States and the Arab countries, capital punishment is the penalty for murder. In the American States, generally speaking, it can be pronounced for deliberate murder which falls within the category of "murder in the first degree"[114], in the Arab countries for murder committed deliberately. If the argument has ended in England and most European countries in favour of the "abolitionists", it is still going on in other countries on almost the same grounds as in the countries which have abolished it. So a brief account of the relevant evidence will be sufficient.[115]

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114. See the brief account and definition given for the law of homicide in U.S. in M. E. Wolfgang, Patterns in Criminal Homicide, New York, 1966, pp.22-24.

115. As far as England is concerned, the argument seems to be about to start again, if it has not already started. Since the murder of Supt. Gerald Richardson, the Blackpool Police Chief, on 23rd Aug. 1971, many voices have reopened the case, demanding the reintroduction of the death penalty. See The Times, 27.8.71. and the following three issues.

In the first place, those who defend the abolition of the death penalty support their argument by the fact that its abolition in other countries has proved successful. There are also other objections to the punishment itself, such as "the irrevocability of the death sentence, and the consequent danger of the execution of an innocent person, ... the depressing, and indeed demoralising, effect of execution upon both the officers of the prison and other prisoners; the false glamour which the existence of the death penalty throws over murder trials."[116]

The supporters of the death penalty, on the other hand, argued that "these arguments are erroneous. Law exists for the protection of the community. It is not necessary to show that capital punishment is an absolute preventative of murder, or even that it is the only deterrent. If it can be shown that it is more effective as a deterrent than any other punishment, then I shall be satisfied that it should be retained. To hold otherwise is surely to forget the innocent victims of murder in the interests of their murderers. And I have no doubt at all that the fear of the gallows is the most powerful of all deterrents".[117] As for the other points, Page

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116. From Leo Page, Crime and the Community, London, 1937, p.131. See also Fry, Arms of the Law, London, 1951, pp.181-197.

117. Page, ibid., p.132.

stated: "The most searching examination of records for the past fifty years (up to 1937) has failed to bring to light a single case in which it can be suggested that an innocent person has been hanged."[118] Experts in prison administration are usually quoted as supporters of capital punishment, and great stress was laid on this by Page, as well as on the fact that social circumstances are different from one country to another, and what may justify the abolition in one, may not be at all relevant in another.[119] The deterrent effect of capital punishment was very often discussed, and it was always suggested that life imprisonment would be a similar, if not a better deterrent.[120] But, as far as the English penal system is concerned, life imprisonment means from ten to fifteen years imprisonment. The Home Secretary announced on 22 April 1970

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118. Even the case of Christie and Evans, which is widely known as a case of hanging an innocent man, is a disputed case. See Hibbert, The Roots of Evil, Penguin, 1966, pp.417 et seq. and 420-421. of the report on the case by Mr. J. Scott Henderson, QC presented by the Secretary of the State for the Home Dept., to Parliament on 14 July 1953 (cmd 8896).

119. Page, p.132-4. The fullest discussion of this topic may be found in the Royal Commission on Capital Punishment (report) 1949-1953. Cmd. 8932, reprinted 1965, H.M.S.O, p.17-24 and Appendix 6, pp1328-80.

120. See the Royal Commission Report, ibid. and Page, p.132.

that 172 convicted murderers had been released from prison since 1960, most of them having served nine years or less of their statutory life sentence. Only five of this number had served 12 years or more, while nine had served six years or less and one had completed only six months.[121] Life imprisonment as an alternative deterrent to capital punishment must therefore be evaluated on this basis.

As far as the Arab countries are concerned, the argument was imported from the West. There are two main trends of opinion, one for abolition and one for retention, as well as a middle one which holds that it must be abolished in general but retained for some serious offences and political crimes.[122]

To turn to corporal punishment, it must be noted that this has been abolished in most countries for a relatively long time. Even in Arab countries, where it is considered part of the religious law of Islam, it was abolished almost everywhere early in the twentieth century. In some countries it was reintroduced in wartime as a punishment for some crimes, but it no longer exists. An exception to this abolition is for crimes

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121. The Times, 23rd April 1970.

122. See Ibrāhim, al-Qiṣāṣ, pp.236-42. 'Ūda, vol.I, pp.731-2. Sharabaṣī, pp.59-114, where he quoted some lawyers' and judges' views as well as those of religious men.

committed in prisons and by members of the national forces during their service.[123] We need not discuss the different views on corporal punishment as there is no practical value in this. From the theoretical point of view, all that is said about capital punishment may be applied to corporal punishment as well. The topic was fully discussed, however, in the Report of the Departmental Committee on Corporal Punishment in England, 1938. The Committee's unanimous opinion at the end of their inquiry was that "corporal punishment was of no special value as a deterrent and should be abolished."[124] Once again, the argument was imported into the Arab countries, but it was less important than that of capital punishment.[125]

The other punishment for homicide or wounding, in Islamic law, is the blood-money, or "diya" for homicide and "arash" for wounding. It has been seen that the "diya" or "arash" must be paid to the victim in cases of injury

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123. 'Ūda, ibid. pp.712-4. Compare for corporal punishment in England, Fry, op.cit. p.108 and appendix F. pp.234-6.

124. Fry, op.cit. p.234, see the recommendation of the committee in its report Cmd.5684, pp.124-7 (1963 publication). The advisory council on the treatment of offenders, came to largely the same conclusion, see the Report on Corporal Punishment, Cmd. 1213, 1960, pp.26-8. (1961 publication).

125. See 'Ūda, op.cit. pp.708 et seq. A. Ibrāhim, op. cit. pp.242-6.

and to his nearest relative(s) in cases of homicide. According to 'Ūda, "diya" is a compensation to the victim and his relatives as well as a punishment inflicted upon the culprit. He argued that it is a punishment because it is determined by the law and when the victim or his relative remit retaliation freely (without taking diya), the culprit may be punished by a discretionary punishment "ta'zir".[126] But this view may be objected to as its evidence is not, as claimed, the concrete law on the subject. The amount of "diya" determined was seen above to be by no means mandatory. The parties concerned may agree to settle the matter for more, or even for less, than the amount determined for the case. The discretionary punishment is not universally agreed upon. Some jurists allow it to be imposed while others do not agree, or at least have hot expressed their view in relation to it.

So the preferable view about "diya" may be that it is an institution established in order to satisfy the victim or his relatives by compensating them for the harm suffered. It may have some penal function similar to that of punishment, but that is only an incidental or secondary function. The idea of compensation to those

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126. 'Ūda, vol.I, pp.668-9.

who suffered harm or damage is well established in Western law systems in civil procedure.[127] As for criminal procedure, a compensatory system is not yet common in Western countries. It was discussed in relation to victims of crimes of violence in England and Wales in two reports submitted to the House of Commons in 1961 and 1964; but has not yet entered current legislation.[128] The discussion in the two reports concentrated on the idea that the state may pay the proposed compensation in order to help those who were affected by a crime of violence. It is here that we see the difference between the idea as introduced in Western thought, and as it is known in Islamic law. It was suggested that the state must take the responsibility of paying the "diya" or blood-money in Muslim countries in cases where the culprit could not afford it, but still it is primarily the culprit's responsibility, while in the above-mentioned reports it was proposed as a social duty to be carried out by the state.[129]

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127. See the references mentioned above on the Law of Tort.

128. Cmd. 1406, 2323 respectively, published by H.M.S.O.

129. Ibid., and 'Ūda, vol.I, p.677 et seq. It is noticeable that he was speaking there about the "diya" as a punishment for quasi-deliberate and accidental homicide, but what he stated can be generalized to all cases in which the "diya" is due (see especially p.678) An interesting discussion concerning the difference between compensation and punishment is in Qarafi, Furūq, vol.I, p.213, where he is inclined to the classification of "diya" as a compensation not as a punishment.

It is interesting, however, that the 1971 Criminal Justice Bill contained a section dealing with compensation orders against convicted persons. Under this Bill, it is proposed that a court may order the offender to pay compensation in respect of any personal injury or any loss of, or damage to, property caused by the offence for which the offender has been tried before the court, or any offence which was taken into consideration by it. If this Bill gained the approval of Parliament, the compensation order may be rightly compared with the rules of "diya" and "arash" in Islamic law.

CHAPTER IV

THE DISCRETIONARY PUNISHMENT

"AL-TA'ZIR"

It has been previously mentioned that the Islamic penal system recognizes three kinds of punishment: "Hadd" punishment, "Qisās" and "Ta'zir". In the first chapter we dealt with the "hadd" punishment, in the third with the law of "Qisās", while the second chapter was devoted to discussing two punishments traditionally classified as "hadd". There, the punishments for wine-drinking and apostasy were shown to be "ta'zir" punishments and not, as traditionally categorized, "hadd" punishments. Here, the third kind of punishment recognized in Islamic penal system will be discussed.

I. Definition:-

Etymologically, the word "ta'zir" is derived from the verb "azar", which means to prevent, to respect and to reform.[1] The verb was used in its first and second meanings in the Qūr'ān.[2] However, in Islamic legal writing "ta'zir" is a punishment aimed firstly at preventing the criminal from committing further crimes, and secondly, at

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1. Mukhtār al-Ṣihāh, op.cit. under "'azr". 'Āmer al-Ta'zir, op.cit. p.36.

2. Sūrah, V, verse 12. VII, 157, and XLVIII, 9.

(at) reforming him. This may remind us of the confusion between the reformative and deterrent theories of punishment. In the Islamic penal system, "ta'zir" is a typical case of this confusion. In his well known book, "Tabsirat al-Hukkam", Ibn Farhun tried to define the aim of "ta'zir" by saying that it is a "disciplinary, reformative and deterrent punishment ...".[3] This indicates the fact that the two aspects, i.e. reformative and deterrent, are combined here. Since "disciplinary" can mean nothing but deterrent, it is right to say that it is the real basis of "ta'zir" while reformation became, in fact, a means to deter.

However, "ta'zir" was defined as "discretionary punishment to be delivered for transgression against God, or against an individual for which there is neither fixed punishment, nor penance (or kaffara)".[4]

This definition excludes, as well, all crimes for which the "qisas" is prescribed. Where "hadd", "kaffara", or "qisas" are applied, "ta'zir" cannot intervene or replace any of them. It is possible that "ta'zir" appears as an alternative (and/or) additional punishment in some cases, as will be seen shortly, but not as the sole

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3. Ibn Farhun, Tabsirah, vol.II, p.200.

4. Sarakhsi, Mabsut, vol.IX, p.36. Shirbini, Mughni al-Muhtaj, vol.IV, Cairo, (n.d.), p.176.

punishment.[5]

According to some orientalists, "ta'zir" punishment is not mentioned in the Qūr'ān. The Sūnna have very little to record about it.[6] This view leads us to investigate the possible origin "asl" of the"ta'zir" punishment in both the Qūr'ān and Sūnna. From this starting point we will discuss the different aspects of the punishment with special reference to "ta'zir" by the death penalty, and by seizure of property, as well as to the possibility of inflicting "ta'zir" in addition to other punishments, e.g. "hadd" or "qisās".

II. "Ta'zir" in the Qūr'ān and Sūnna:-

It must be admitted that the word "ta'zir" was never used in the Qūr'ān or in the Sūnna in the sense in which it is used in Islamic legal writing. On the other hand, the Qūr'ān and the Sūnna referred to some types of crimes for which there is no fixed punishment and where it was left to the judge or the ruler to decide what sort of punishment to impose, and how to inflict it. One instance of these crimes was mentioned in the Qūr'ān. "If two men among you are guilty of lewdness, punish them both."[7]

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5. Ibn Nūjaym, al-Bahr al-Rā'iq_Sharḥ Kanz al-Daqā'iq, vol.V, p.44 et seq. Ibn al-Humam, Fatḥ,al-Qadir, vol.Iv, p.211 et seq.

6. e.g. Encyclopaedia of Islam, vol.IV, p.710, under "Ta'zir".

7. Sūrah IV, verse 16.

This verse, according to the commentators, refers to homosexual relations between men.[8] The order "punish them both" is given to the ruler of the community without determining the sort of punishment or its amount, or how it must be carried out. The decision therefore, is entirely left to the ruler or the judge.

Another case in which the authority to punish is given in the Qūr'ān in similarly flexible terms as in the above case, is to be found in verse 34 of Sūrah IV. The verse runs "As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, and (last) beat them (lightly)."[9] This verse is concerned with the treatment of wives who disobey their husbands. Although the methods of dealing with such wives are laid down and were to be used consecutively, there is a lot left to the discretion of the husband, who is the head of the household. He is to have a free hand in deciding how to use his authority.[10]

It was this authority which some jurists considered as the origin of the "ta'zir" punishment, "al-asl fi-l

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8. Ibn Kathir, Tafsir, vol.I, Cairo, p.462. Sayed Qūtb, Fī-Zilal al-Qurān, vol.IV, p.257. Ibn al-Jawzī, Zād al-Masir fi'ilm al-Tafsir, vol.II, Beirut, 1965, p.34.

9. Here and for the above verse, see Yūsūf Alī's transaltion.

10. For the husband's authority over the house, or rather, the wife, the Qūr'ān says "men are in charge of women, because Allah has made the one of them to excel the other" Sūrah IV, Verse 34.

ta'zir".[11] This view may be interpreted by way of analogy "qiyās". That is to say that the husband as the ruler of the basic unit of society has been given such an authority in order to safeguard the interest of his unit and its members. Consequently, the ruler of the whole society and his representatives, e.g. the judges, must have the same authority over the society or the parts of it with which they are concerned. In this way the ruler, and consequently the judge, are enabled to safeguard the society's interest when it is threatened by actions or omissions which fall outside the very limited area of the fixed punishments "al-hudūd" and the punishment of retaliation "al-qisās".

A Third verse in the Qur'ān may be even more directly concerned with "ta'zir". In this verse the Qur'ān puts forward a general principle: "The recompense of an evil is an evil the like of it."[12] This verse indicates a legal rule concerned with the treatment of any misdeed, i.e. that it cannot be punished with anything but an equal misdeed. This "equality" does not indicate the minimum penalty but the maximum one. For the next version of the verse runs: "But if a person forgives and makes reconciliation, his reward is due from God".[13] As far as I know,

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11. Mughnī al-Muḥtāj, op.cit. p.176.

12.) Surah XLII, Verse 40, see Arberry's translation for
13.) the first part of the verse, and Yūsuf'Alī for the second part of it.

this verse "The recompense of an evil ..." has not been mentioned in this context. But I see it as a valid source for the law of "ta'zir" because it is assumed that the person who is liable to "ta'zir" has done what is considered evil to either the community or to another person. His punishment, therefore may be justified by the rule laid down in this verse. At the same time, the other two verses in Sūrah IV may be understood as applications of this principle.

Accordingly it cannot be said, as it has been that the "Qūr'ān does not know this kind of punishment". On the contrary the Qūr'ān laid down the principle from which the "ta'zir" punishment was deduced and also mentioned some of its applications. It was the jurists' reluctance to admit the Qūr'ānic origin of this punishment which led to such a dubious statement. By paying more attention to these three verses one may say that the legal principles of"ta'zir" are expressed in the Qūr'ān, by implication, if not directly.

In the Sūnna, more examples and cases of "ta'zir" may be found. All these cases were used afterwards, in one way or another, to construct the juristic formulation of the "ta'zir" as part of the Islamic penal system. So far as the jurists are concerned, they are indebted to these Prophetic reports for their knowledge

and understanding of "ta'zir". It is true that the decisions of the Prophet's companions relating to "ta'zir" appear more clearly in the manuals of Islamic law, especially the decisions of 'Omar. But these decisions, in turn, are based on Prophetic reports and practices.[14] Moreover, there are many examples of Prophetic reports concerned with "ta'zir". The following are some of them, taken from both the words and actions of the Prophet.

The most important example of Prophetic practice concerning "ta'zir" punishment is the punishment for wine-drinking. In chapter II the view that it was a "ta'zir" punishment was fully explained, so we do not need to concentrate on it here. This was by no means the only example. Once a companion of the Prophet injured a slave of his, as a punishment for his having had sexual relations with a female slave. When the Prophet saw the injured slave, he freed him. This was a punishment for the slave's owner because of the harm he had done to him.[15] Muslim and Abū-Dawūd related a report according to which the Prophet deprived a man

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14. See Ibn al-Qayyim, Ighāthat al-Lahfān, vol.I, Cairo, 1939, p.333. Shalabi, Ta'lil al-Aḥkam, op.cit. p.60-61 in relation to wine-drinking.

15. Ibn al-Qayyim, ibid. p.332. The report was related by Ahmad b. Hanbal, Abu-Dawūd and Ibn Majah.

of his share of the spoils of a battle because of a misdeed committed against the Commander of the army.[16] Among the Prophet's companions who did not go with him to the battle of Tabūk, were Ka'b b. Mālik, Mūrārah b. al-Rabi', and Hilāl b. Ūmaya. After the Prophet's return to al-Madina some of those who had not gone with him gave him false excuses, but these three men told the truth, which was that they had had no real reason to stay at home in al-Madina and not join the army. The Prophet ordered the Muslims to avoid any contact with them; their wives were not even allowed to share their beds. Fifty days later, a Qūr'ānic verse was revealed saying that Allah had forgiven them and accepted their repentance.[17] This Prophetic order to avoid and ignore the men, was a "ta'zir" punishment imposed upon them for their absence from the Muslim army.[18]

To turn to the Prophet's words concerning "ta'zir", punishment, again we must refer to chapter II where the punishment for apostasy was mentioned. It was explained there that the penalty for apostasy can be nothing but a sort of "ta'zir". Once more it is not the only Prophetic saying concerning the subject.

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16. Ibid. and I'lām al-Muwaqq'in, vol.II, op.cit. p.98.

17. Qūr'ān, Sūrah IX, Verse 118.

18. Ibn al-Qayyim, Zād al-Ma'ād, vol.III, Cairo, 1379 A.H. pp.11-13. See also Ighathat al-Lahfan, op.cit. p.332.

For the theft of fruit of a value less than that for which the "hadd" punishment may be applied, the Prophet said that the thief must pay "double its value and be liable to punishment." The "doubled value" is a fine which can be interpreted as a "ta'zir". But a more obvious reference to "ta'zir" is the last statement of the report: "and be liable to punishment", because both the kind and amount of punishment here are left entirely to the discretion of the judge.[19]

In relation to the giving of alms, the Prophet said "who gives them will be rewarded (by God), and who refuses to give them, from him they will be taken, and we will take one half of his property, not for Muhammad or his family but for the state treasury." This fining of the offender is also a sort of "ta'zir" punishment.[20]

It is a Qūr'ānic command that if a debtor is in financial straits, the creditor must give him a chance to pay his debt. But if a rich man refused to pay his debt the Prophet allowed him to be punished. In this report, again, the Prophet did not explain what kind of punishment he meant to be inflicted for this deed or its amount.[21] This is, I think, because such a situation

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19. Mishkāt al-Masābih, vol.II, p.146 and Ibn al-Qayyim, ibid.

20. Ibid. p.331.

21. Mishkāt al-Masābih, op.cit. p.112.

must be dealt with in the light of the circumstances of both the creditor and the debtor, as well as the general financial situation of the community at a given moment. What is important however, is that this report represents a case for which the Prophet ordered a "ta'zir" punishment.[22]

In the light of this we reach the conclusion that "ta'zir" punishment is based on the Qūr'ānic verses previously mentioned, and on the above Prophetic reports. It is true that the development of this system of punishment was expressed at a comparatively later stage by the different schools of law. But this does not justify the claim that the Qūr'ān does not know it, and the Sūnna have very little to record about it.[23]

It was important to illustrate the Qūr'ānic and Prophetic origins of this punishment for two reasons; the first is that it has not been examined, and the second is that it will help to determine our viewpoint in many of the ensuing topics.

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22. I have omitted many other reports relating to the subject because it may be argued that they were invented (by the jurists) to support one or the other of the different views about this punishment.

23. Compare the article "ta'zir" in the Encyclopaedia of Islam, vol.IV.

III. Kinds of "Ta'zir" Punishment:-

Unlike the "hadd" punishment or the punishment of "qisās", "ta'zir" punishments are not determined in specific terms. The judge, in cases of crimes for which "ta'zir" punishment is prescribed, has a wide variety of punishments from which he can choose the one suitable for the particular crime, according to the criminal's circumstances, his record, and his psychological condition.[24] The judge's authority is limited by his obligation not to order a punishment which is not allowed by Islamic law. He cannot, for example, order the offender to be whipped naked.[25]

Here the punishments allowed as "ta'zir" will be briefly discussed; but the most important ones will be dealt with in more detail. However, these punishments are by no means the only punishments which could be applied in cases of "ta'zir". That is to say, any punishment which may serve the purpose of "ta'zir", i.e. to prevent any further crime, and reform the offender, can be used as long as it does not contradict the general principles of Islamic law. Therefore, the ensuing punishments represent what was known, and actually used, in

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24. Ibn Nūjaym, al-Bahr al-Rā'iq, vol.V, p.44. 'Ūda, op.cit. vol.I, pp.685-708.

25. 'Ūda, op.cit. p.143.

Islamic legal texts and practice, but any other useful punishment could be legally used.[26]

Apart from the determination of the punishment, the ruler or the judge is traditionally granted the right to determine whether an act is criminal or not. This is the key concept of "ta'zir", it is defined as a punishment for "any transgression". Transgressions cannot be foreseen, so this right was granted to the ruler, or the judge, to meet the needs of the society and protect it against all sorts of transgression.[27]

III. 1. Admonition "al-Wa'z":-

Admonition means reminding the person who has committed a transgression that he has done an unlawful thing. It was prescribed in the Qūr'ān (IV, 34) as the first stage in dealing with wives in cases of disobedience. The purpose of admonition is to remind the offender if he had forgotten that he had done something or to inform him if he was not aware that he had done something wrong.[28] This sort of treatment of the offender must be restricted to those who commit minor offences for the first time, provided that the judge thinks it is enough to reform the offender and prevent him from any further transgression.[29]

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26. Ibid. p.687.
27. Qarāfī, Furūq, vol.IV, p.179-80.
28. 'Āmer, al-Ta'zir, op.cit. p.369. Where he quoted Ibn 'Ābdin.
29. 'Ūda, op.cit. p.702.

III. 2. Reprimand "al-Tawbikh":-

Reprimand may be through any word or act which the judge feels to be sufficient to serve the purpose of "ta'zir". The jurists usually refer to some specific words and acts as a means of reprimand, but it is not necessary to concentrate on these means as they vary according to the offence and to the offender. One example of this punishment led a companion of the Prophet to free his slaves and repent of having insulted somebody.[30]

III. 3. Threat "al-Tahdid":-

Threat is a "ta'zir" punishment which was supposed to serve its aims by making the offender fear the punishment he was threatened with. It may be carried out by threatening the offender with punishment if he repeated what he had done, or by pronouncing a sentence against him and delaying its execution till the offender committed another offence (within a limited period of time). Besides the normal condition of the suitability of the "ta'zir" punishment, the threat must be sincere.[31]

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30. Mishkāt al-Maṣābiḥ, vol.II, p.586 where he quoted Bayhaqī in Shu'ab al-Iman.

31. 'Ūda, ibid. p.703.

This way of dealing with offenders who commit offences punishable by "ta'zir" may be compared with the modern penal concept of suspended sentences which is known to almost all modern penal systems. Under the English Criminal Justice Act of 1967 (section 39), for instance, a court which passes a sentence of imprisonment for a term of not more than two years may suspend the sentence for a specified period. This period is known as the "operational period" of the suspended sentence, and may not be less than one year or more than three years. Under the Islamic penal system the matter of determining the "operational period" is left entirely to the judge's discretion. Another difference between the two systems is that under English law a court has no power to suspend a sentence other than that of imprisonment, whereas traditional Islamic law grants the judge the authority to suspend any sentence whether of imprisonment or anything else.[32]

III. 4. Boycott "al-Hajr":-

Boycott as a "ta'zir" punishment is recommended by the Qūr'ān (IV, 34), and it was practiced by the Prophet in the case of the men who did not attend the army in the

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32. Cross and Jones, Introduction to Criminal Law, p.354; The Sentence of the Court, a Handbook for Courts on the Treatment of Offenders, H.M.S.O., London, 1970.

battle of Tabūk.[33] It was also inflicted by 'Omar upon a man who used to ask about, and discuss, difficult words in the Qūr'ān in order to confuse peoples' minds.[34]

According to some writers, boycott as a punishment is not practical in our time because it was based on a powerful religious feeling among the people which no longer exists. The defendants of this punishment may argue that it can be inflicted by preventing the offender from communicating with other people, but then it would be a sort of imprisonment rather than the intended boycott.[35]

III. 5. Public Disclosure "al-Tashhir":-

Public disclosure has been known as a punishment since the earliest Islamic era. The Prophet sent a man to collect alms "zakāt" and when he came back to al-Madina he gave some of what he had collected to the Prophet, and kept the rest, claiming that it had been given to him as a present. Then the Prophet addressed the people:-

"I appointed one of you to do some public services; afterwards he divided what he had collected into two

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33. See above, and Muslim, op.cit. vol.VIII, p.106-12. Ibn-Taymiyya, al-Siyasa' al-Shar'iya', Cairo, 1951, p.120-21.

34. Ibn Farhūn, Tabsirat al-Hukkām, ibid., p.202.

35. 'Āmer, op.cit. p.375.

portions: one for the public treasury and the other for himself; if the appointed man had stayed in his father's or his mother's home would anyone have given him a present or not.[36]

According to Shurayh, a well-known judge who served 'Omar and 'Alī, the false witness must be publicly identified so as to warn people not to trust him.[37] On this point all the schools of Islamic law are agreed.[38] The means of public disclosure was usually the taking of the offender, by some of the judge's representatives, to every part of the city and telling the people that he had committed an offence for which he had received a "ta'zir" punishment. The purpose of this punishment was to call the public's attention to the fact that this offender was not to be trusted.[39]

Public disclosure in our days cannot be made in the same way. As the media of public information have developed enormously it may be done by publishing the court judgement in the newspapers, or by broadcasting it on the radio and the television, or by any other means which will tell people about the offence.

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36. Mishkāt, al-Maṣābiḥ, vol.I. p.560.
37. Sarakhsī, Mabsūṭ, vol.16, Cairo, p.145.
38. Sarakhsī, ibid. Bahūtī, Kashshāf al-Qinā', vol.VI, Riyad (n.d.), p.125. Shirbini, Mughni al-Muḥtaj, vol.IV, p.178. Ibn Farhun, ibid. p.214.
39. Ibid.

According to the jurists, this punishment is relevant for offences where the trustworthiness of the offender is questionable. But it may be used for any other crime where the judge thinks it suitable.

Finally, it must be noted that it is an additional punishment. The jurists usually prescribe other punishments such as imprisonment or beating for offences where they also advise public disclosure.[40]

III. 6. Fines and Seizure of Property "al-Gharāmah Wal-Musdarah":-

It has been said before that the Prophet imposed and ordered financial punishments as "ta'zir" punishments. But the jurists are divided into three groups as to its legality: according to some it is illegal to punish by fine or by seizure of property, the second group regards it as legal, and the third group regards it as legal only if the offender doesn't repent.

The first view is held by the Hanafī school and some of the Shāfi'ī school.[41] According to Mālik, Ahmad b. Hanbal, Abū Yūsuf (the famous Hanafī jurist), and some

40. Bahūtī, op.cit. pp.127-128. Sarakhsī, op.cit. pp.145 et seq. 'Āmer, op.cit. pp.388-419.

41. Ibn Nūjaym, al-Bahr al-Rā'iq, vol.V, p.44. Ibn al-Humām, Fath al-Qadir, vol.IV, p.212. Shubrāmulsī, his commentary on Sharh al-Minhaj of al-Ramlī, vol. VII, Cairo, 1292 A.H., p.174.

of the Shāfi'īs', financial punishments are allowed as "ta'zir" punishments.[42] The Hanafī commentators explained that the view of Abū Yūsūf means that the judge or the ruler does not take the offender's money for the public treasury, but in order to keep it away from him until he has repented. They support this view by saying that nobody is allowed to take another's money without legal reason (bisabab shar'ī). If it seems, afterwards, that the offender will not repent then the ruler may order the money to be spent on public requirements.[43] The reason they give for this explanation is that to allow the judge or the ruler to take the offender's money for the public treasury straight away, would be open to abuse by unjust judges or rulers.[44]

On the other hand, the jurists who deny financial punishment as a legal "ta'zir" punishment claim that it was legalized in the beginning of Islam but abrogated afterwards. The first jurist who expressed this view is the Hanafī jurist Tahāwī in his famous book 'Sharh

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42. Ibid. Ibn 'Ābdin, vol.IV, p.61. Ibn Farhūn, p.203. Ibn al-Qayyim, al-Turuq al-Hukmiyya, Cairo, 1961, p.286-290. Bahuti, vol.VI, p.125. Compare Fath al-Qadir, ibid.

43. Ibn Nūjaym, ibid., vol.IV, p.44. Ibn 'Ābdin, vol. IV, p.61. Sa'di Jelbi, his commentary on al-'Inaya Sharh al-Hidaya, in the margin of Fath al-Qadir, vol.IV, p.212.

44. Ibid.

Ma'ānī al Āthār' (Explanation of the Meanings of Traditions).[45] This abrogation claim was strongly rejected by Ibn Taymiyya and his successor Ibn al-Qayyim on evidence taken mainly from the Prophet's practices and from some of his companions' decisions.[46] Ibn al-Qayyim added "these are well-known cases which have been truly related. Those who claim that financial punishment was abrogated are wrong. Their view may be refuted by the cases ascribed to great companions of the Prophet. Neither the Qūr'ān nor the Sūnna can help them in supporting their claim, nor is there any consensus about it. Even if there was a consensus, it would have no power to abrogate the Sūnna. The only thing they may say is: in our schools' view it is not allowed; that means they take their own view as a standard of what is accepted and what is not."[47] Other Hanbalī, Hanafī and Mālikī commentators hold this view, and defend it mainly in Ibn al-Qayyim's words.[48] According to Ibn al-Qayyim's evidence, both parts of the financial

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45. Sa'dī Jelbī, ibid. Ibn Nūjaym, ibid. p.44. Ibn 'Ābdin, ibid.

46. Ibn Taymiyya, al-Ḥisba fi'l-Islam, Cairo, (n.d.), p.43. Ibn al-Qayyim, al-Ṭuruq al-Ḥukmiyya, op.cit. pp.286-90. Ighathat al-Lahfan, vol.I, pp.231-3. A detailed discussion may be found in 'Amer, al-Ta'zir, pp.331-6.

47. al-Ṭurūq al-Ḥukmiyya, p.287-8.

48. Ibn-Farḥūn, Tabṣirah, vol.II, p.202-3. Bahūtī, op.cit. p.125. Ṭarabulsī, Mu'in al-Ḥukkam, Cairo, A.H. p.190.

punishment (i.e. fine and seizure of property) are allowed in Islamic law. In some cases its amount was determined by the Prophet, e.g. in the cases of theft which does not amount to the minimum value required for inflicting the "hadd" punishment, refusing payment of alms, etc. But in other cases it is not so determined and it is left to the judge to decide how much the culprit should be fined. Indeed, there is nothing to stop the lawmaker of any Muslim country from listing crimes and their fines as he requires them to be applied by the courts.

Therefore, the statement that: "there are no fines in Islamic law" is incorrect.[49] The most which can be claimed is that fines, or rather, financial punishments are a subject of controversy, but it cannot be justifiably said that the Islamic penal system does not know this sort of punishment.

III. 7. Imprisonment "al-Habs":-

Imprisonment in Islamic law is of two kinds: imprisonment for a definite term and imprisonment for an indefinite term. Imprisonment for a definite term can be inflicted for minor offences, as the jurists prefer

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49. J. Schacht, An Introduction to Islamic Law, p.176, and compare Shaltut, al-Islam, op.cit. p.314.

flogging as the punishment for major or dangerous "ta'zir" offences.[50] The minimum period for imprisonment is one day.[51] But the schools hold different views about the maximum period. The Mālikī, Hanafī and Hanbalī schools do not fix a maximum period for the "ta'zir" imprisonment as it varies for each offence and from one individual to another.[52] According to the Shāfi'ī school, the maximum period of imprisonment is one month for investigation and six months as punishment, and in any case it must last for less than a year. This view is based on an analogy "qiyās" with the punishment for adultery committed by an unmarried person. Banishment for adultery is for one year, so the "ta'zir" punishment, if it is to be imprisonment, must not be longer than that of an unmarried adulterer, which is a "hadd" punishment, according to the Shāfi'ī jursits.[53] However, among the Shāfi'ī jurists there is another view which is similar to that of the three schools.[54] Therefore, one may say

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50. 'Ūda, vol.I, p.694.

51. Mughnī, vol.X, Manār Ed. Cairo, p.347-8. Ibn Farhūn, op.cit. p.225.

52. Ibn Farḥūn, ibid. Abū Ya'lā, al-Aḥkām al-Sulṭāniya, Cairo, 1938, p.263. al-Durr al-Mukhtar, in the margin of Ḥashiyat Ibn 'Ābdin, vol.IV, Cairo, 1966, p.62.

53. Tabṣirat al-Ḥukkām, op.cit. p.225. 'Ūda, op.cit. pp.694-5. 'Āmer, op.cit. pp.309-10.

54. This view was ascribed to Māwardī and Ramlī, see the references cited above.

that the majority view is that the judge is free to determine the maximum period for a definite term of imprisonment, as he sees fit for the criminal and his crime. It is allowed, according to all the schools of Islamic law, to inflict imprisonment as an additional punishment if the circumstances so require.[55]

As for imprisonment for an uhlimited term it is imposed on habitual criminals who, in the judges' view, cannot be reformed by ordinary punishments. All the schools of Islamic law authorised this punishment to last either till the criminals' repentance or his death in the case of a dangerous criminal.[56] This sort of imprisonment is similar to that of the "hadd" punishment for armed robbery "hirābah" where one of the punishments prescribed is banishment, interpreted as imprisonment, to be inflicted till the achievement of the criminal's repentance, or until his death. However, there is an important condition for the infliction of this punishment as "ta'zir", i.e. it can only be inflicted so long as the reform of the offender by any

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55. Fath al-Qadir, vol.IV, p.216. Abū Ya'lā, op.cit. p.267. Ibn Farḥun, p.225-6. Anṣari, Asna al-Maṭalib Sharḥ Rawḍ al-Ṭalib, vol.IV, Cairo (n.d.), p.199.

56. Ibn 'Ābdin, op.cit. p.67. Ibn Farḥūn, p.227. Bahūtti, Kashshaf al-Qina', vol.VI, p.126. Ramli, Nihayat al-Muḥtaj, vol.VIII, Cairo, (n.d.) p.272.

other punishment is impossible.[57] It is on this condition only, that unlimited imprisonment is justified.

Another "ta'zir" punishment, with which the modern writers on the subject have dealt separately, is banishment "al-nafy". "Nafy" was referred to when we dealt with the punishment for adultery. We said that the Hanafī school consider this punishment as an additional "ta'zir" punishment for the unmarried adulterer, while other schools consider it as "hadd", regarding the "hadd" punishment for the unmarried person as two-fold, i.e. one hundred lashes and one year's banishment.[58] Apart from adultery, banishment is considered as a "ta'zir" punishment for those who may encourage other people to imitate their conduct.[59]

Banishment may last either for the period mentioned in the sentence, or until the offender's behaviour is believed to have improved.[60] However, banishment nowadays cannot be anything but imprisonment. Banishment may be from one place, e.g. from one city to another in the same country, or from the criminal's country of origin (or

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57. See ibid.

58. See above, the chapter on "hadd" punishment.

59. Abū Ya'lā, op.cit. p.263. Ibn Farhūn, op.cit. p.225.

60. 'Ūda, op.cit. p.699-700.

residence) to a foreign country. The first does not serve the purpose of banishment which is to prevent the offender from encouraging others to imitate him. The second is not possible today, because no country will accept offenders from other countries (as immigrants). It was common in many European countries during colonial times to banish offenders to a colony, but this cannot be done any longer. Therefore, I see banishment nowadays as imprisonment.

III. 8. Flogging "al-Jald":-

Flogging is a common punishment in Islamic penal law. It has already been referred to as a "hadd" punishment for the crime of "qadhf" (80 lashes), and for adultery, committed by an unmarried person (100 lashes). As a "ta'zir" punishment, it was mentioned when we dealt with the crime of wine-drinking. The point which will be discussed here is the maximum number of lashes allowed in "ta'zir" cases. The problem, for Muslim jurists, is known as the possibility of exceeding the "hadd" punishment in cases of "ta'zir" "hal yūtajāwaz bil-ta'zir miqdār al-hadd".

The most liberal view in this context is the Mālikī one. According to Mālik, the "ta'zir" punishment

may exceed the "hadd" punishment as long as the judge or the ruler thinks the circumstances require it.[61] The opposite view is held by the Ẓāhirī and Zaydī schools, and part of the Ḥanbalī school, who believe that flogging as a "ta'zir" punishment cannot exceed ten lashes.[62] Intermediate views are held by the Ḥanafī and Shāfi'ī schools and some Ḥanbalī scholars. There is no unanimity about the maximum number of lashes among the holders of this view; according to some it is 75 lashes, others hold it to be 99, . . some fix it at 39, and others do not allow more than 20.[63]

This controversy is based on two Prophetic reports. The first, in which the Prophet forbade more than ten lashes to be inflicted except in cases of "hadd" punishment, was related by Muslim and Bukhārī.[64] The second was related by Bayhaqī; in this report the Prophet labelled those who exceed the limits of the "hadd" punishment, in a "non-hadd" crime, as transgressors,

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61. Ibn Farḥūn, op.cit. pp.204-2-5. Zūrqānī, his commentary on Mukhtaṣar Khalil, vol.VIII, Cairo, (N.d.) p.143.

62. Muḥalla, vol.XI, p.404. al-Rawḍ al-Nadir, vol.IV, p.178, Ibn al-Qayyim, al-Ṭuruq al-Ḥukmiyya op.cit. p.116. Where he mentioned some Ḥanbali scholars who hold this view.

63. 'Ūda, op.cit. pp.690-3. Ibn al-Qayyim, ibid. Muḥalla, op.cit. p.401-4-2.

64. Mishkāt al-Maṣābiḥ, vol.II, p.310. Zūbaydī, al-Tajrid al-Ṣariḥ, vol.II, Beirut (n.d.), p.151. Mundhirī, Mukhtaṣar Ṣaḥiḥ Muslim, with the commentary of Albānī, Kuwait, 1389 A.H. vol.II, p.39.

"mū'tadūn".[65]

The dominant view about the first report is that it was abrogated; this is deduced from the fact that the companions of the Prophet did not act in accordance with it. It is related that 'Omar and 'Alī inflicted more than ten lashes in cases of "ta'zir" with no objections from the other companions, so the report, according to the majority view, must have been abrogated.[66]

Another interpretation of this report was given by Ibn Taymiyya and Ibn al-Qayyim. They saw this report as relevant to the relations between father and son, husband and wife, and master and servant, i.e. relationships in which one may need to use some means of punishment for disciplinary reasons. In such cases if the proper means is beating, it must not exceed 10 lashes. But this report has nothing to do with the relationship between the individual and the state, and the amount of "ta'zir" punishment, if it happens to be by flogging, is left to the authority concerned.[67] According to this

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65. Bayhaqī, al-Sūnan al-Kūbrā, vol.VIII, p.327.

66. Fath al-Qadir, vol.IV, p.215, 'Ūda, vol.I, p.692. Ibn Farḥun, vol.II, p.204.

67. Ibn Taymiyya, al-Siyāsa al-Shar'iya, p.125. Ibn al-Qayyim, I'lām al-Muwaqq'in, vol.III p.29-30. This view is also held by Ibn al-Shaṭ, a Maliki scholar, see his commentary on Qarafi's Furuq, vol.IV, p.177.

view there is no need for the abrogation claim as the report is not relevant to the case in question. However, the jurists who do not accept the abrogation theory, or the interpretation of Ibn Taymiyya and his companion, hold the view that a "ta'zir" punishment by flogging should not exceed 10 lashes.[68]

The second report, although incompletely transmitted "mursal"[69], was accepted by all the Sunni schools except the Maliki. Those who accepted this report interpreted it in different ways, therefore they hold varying views about the maximum "ta'zir" punishment. The first interpretation is that this report forbade "ta'zir" punishment to exceed the lesser "hadd" punishment. Yet, they vary as to what the lesser "hadd" punishment is: some consider it to be 80 lashes (the "hadd" punishment for slander or "qadhf"), and others consider

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68. e.g. Shawkani, Nayl al-Awtar, vol.VII, Cairo, 1357 A.H. p.150-1.

69. i.e. a Prophetic report resting on a chain of authorities that goes no further back than the second generation after the Prophet. The validity of this kind of report to establish a legal obligation is controversial. See: Shafi'i, al-Risala, p.465. Ibn Kathir, Mukhtasar 'Ulum al-Hadith, with the commentary of Ahmad Shakir, Cairo (n.d.), pp.37-41. Ibn Hazm, al-Ihkam fi'Usul al-Ahkam, Shakir Ed. Cairo, Vol.II, pp.2-6. Naysaburi, Ma'rifat 'Ulum al-Hadith, with the commentary of Dr. Muzzam Husain, Beirut, (n.d.), pp.25-27.

it to be the slave's "hadd" punishment which is 40 lashes (i.e. half of the freeman's "hadd" punishment.) The second interpretation is that the report forbade "ta'zir" to equal the "hadd" punishment in cases of incomplete crimes for which, if they were completed, a "hadd" punishment would be prescribed. That is to say a crime of theft, for which the "hadd" cannot be inflicted, may result in "ta'zir" of one hundred lashes as the original punishment is the amputation of the offender's hand. A sexual relationship (which has not involved intercourse), may be punished by more than one hundred lashes if the culprit was a "muhsan" or married; but it should not reach 100 lashes if he was unmarried because his original "hadd" punishment is 100 lashes. Other interpretations are also available, but they are less important than these two.[70]

The minimum number of lashes allowed as "ta'zir" was also discussed: some jurists fixed it at 3, but the majority does not agree with this view as it contradicts the main feature of "ta'zir", i.e. its variation from one crime to another according to the offender's character and other circumstances.[71]

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70. 'Uda, vol.I, pp.692-3, where he briefly discussed the various interpretations of this report.

71. Fath al-Qadir, op.cit. p.215. Ibn 'Abdin, vol.IV, p.60.

However, the view expressed by Ibn Taymiyya and his companion is I think, the most relevant view both practically and logically. In practice they allow any suitable punishment and avoid the strict limitation imposed on the ruler's power to inflict "ta'zir" punishment. From the logical point of view they limit the Prophetic report about the number of lashes allowed for "non-hadd" punishment to a particular province and are, therefore, not forced to use the abrogation claim as other scholars do. This, too, is in harmony with a principle of Islamic law, recommending the application of every legal verdict rather than its neglect "i'māl al-kalām khayrūn min ihmālihi".[72]

III. 9. The Death Penalty "al-Ta'zir bil-Qatl":-

"Ta'zir" punishment is the part of the Islamic penal system which deals with the less serious offences. The death penalty is usually imposed for the most serious crimes. In Islamic law it is the punishment of two "hadd" offences and, as a retaliation, for homicide. The jurists, accordingly, are normally against its being inflicted as a "ta'zir" punishment[73], but exceptional cases in which

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72. Ibn Nūjaym, al-Ashbah wal-Nazā'ir, vol.I, Cairo, 1290, A.H. pp.168 et seq.

73. Ibn Farḥūn, vol.II, p.205. Kinānī, al-'Iqd al-Munazzam, in the margin of Tabṣirat al-Ḥukkām, vol.II, p.266. Bahūttī, op.cit. vol.VI, p.124. Ibn 'Ābdin, vol.IV, p.63.

"ta'zir" by the death penalty is allowed are mentioned in the texts of almost every school. Examples of people who can receive the death penalty are given in the Hanafī texts; the habitual homosexual, the murderer on whom "qisās" cannot be imposed because of the means used in the crime, "al-qatl bil-mūthqil", the habitual thief who attacks a man's house, and who cannot be prevented from doing harm by other punishments.[74] For the Mālikī school, "the principle that the ta'zir punishment should fit the crime, the criminal, and the victim is of absolute application. Thus the death penalty is permissible in certain cases, where either the offence itself is of a very serious nature, such as spying for the enemy or propagating heretical doctrines or practices which split the community, or the criminal is a habitual offender whose wickedness can only be so stopped."[75] The Shāfi'ī and Hanbalī schools allow the death penalty to be inflicted in the same cases for which it is allowed in the view of the Mālikī school.[76]

However, it must be remembered that there are some

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74. Ibn 'Ābdin, ibid. pp.27, 62-4. Ibn Nūjaym, al-Bahr al-Rā'iq, vol.V, p.45.

75. Quoted fromProf. Coulson's article: The State and the Individual in Islamic Law, International and Comparative Law Quarterly, January 1957, vol.VI, p.54. See also Ibn Farhun, vol.II, pp.200 et seq.

76. Ibn al-Qayyim, al-Turūq al-Hukmiyya, p.286. Bahūttī, op.cit. p.126. Matalib Uli al-Nuha, vol.VI, p.224.

Prophetic reports which allow the death penalty as a "ta'zir" punishment. Therefore the different relevant views must be justified in the light of these reports. Some of these reports have been mentioned before. Here a reference can be made to the case of spying for the enemy in which the Prophet ordered the offender to be sentenced to death.[77]

At the same time, the death penalty as a "ta'zir" punishment is an exception. So, it must be applied in the minimum possible number of cases, i.e. only when made necessary either by the criminal's character or by the nature of the offence. Therefore one should support the view expressed by some contemporary writers, that the ruler or legislator in each country must restrict its application only to the cases where it is necessary for the above reasons. Such a supreme penalty should not be left to the discretion of the judge, but applied only according to legislation made by the authority concerned.[78] It may be said that there is no harm in leaving the death penalty to the judge's discretion, as the jurists have defined the cases in which it may be inflicted.

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77. See above, Chapter II, and Ibn al-Qayyim, Zād al-Ma'ād, vol.II, Cairo, 1379 A.H., p.68.

78. 'Ūda, vol.I, p.688.

But that makes no difference, because the jurists' decisions are only taken, and can only be taken, as simple illustrations and guides.[79]

III. 10. "Ta'zir" as an Additional Punishment:-

Islamic law, generally speaking, imposes one punishment for one crime. This is taken from the Qur'ān,[80] where a related rule is expressed in many chapters. But exceptions to this principle were permitted by the jurists with regard to some crimes.

The Hanafī school allows "ta'zir" punishment to be inflicted in addition to any "hadd" punishment where the circumstances so justified. It is on this basic principle that they interpret the punishment of one year's banishment for the unmarried adulterer, as has been mentioned before.[81] Ibn Taymiyya declared that the Hanafī school permits the "hadd" punishment to be exceeded if the authority concerned, i.e. the Imām, thinks that this is necessary in certain cases. They even allow the death penalty to be inflicted for repeated crimes, any one of which does not deserve this punishment, and call it

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79. Coulson, ibid. p.53.

80. e.g. Sūrah XLII, verse 40, Sūrah VI, verse 160, Sūrah XL, verse 40, Sūrah X, verse 27 and Sūrah V, verse 95.

81. al-Sārim al-Maslūl, op.cit. p.12. It was quoted by some Hanafi authorities describing their own school's view, e.g. Ibn 'Ābdin, vol.IV, pp.62-3, 214-5, where he confirmed that what Ibn Taymiyya said is the Hanafi school's view.

"al-qatl siyāsatan" i.e. the death penalty justified on the basis of public interest.[82] The punishment which may be added to the "hadd" can be nothing but a "ta'zir" punishment.

According to the Mālikīs "ta'zir" punishment may be inflicted in cases of wounds or injury, even when "qisās" is applicable, and has actually been inflicted. They consider this punishment to be an effective deterrent for the criminal himself, as well as for other potential criminals.[83]

From these examples, it is clear that "ta'zir" may be either the original punishment for crimes which have no fixed punishment or an additional punishment for crimes which deserve "hadd" or "qisās" punishment. It is worth mentioning that under the doctrine of "ta'zir" the Islamic penal system allows the judge to pass more severe sentences against a recidivist offender. The above mentioned examples are usually quoted as evidence for this.[84]

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82. For the doctrine of "Siyāsa" see Coulson, The State and the Individual, pp.51-2. A History of Islamic Law, Edinburgh, 1971, pp.132-4, 184-5, and Conflicts and Tensions in Islamic Jurisprudence, Chicago U.P. 1969, pp.68-9. cf. Dr. Bassiouni, Islam Concept, Law and World Habeas Corpus, Camden Law Journal, vol.7, No.2, 1969.

83. Ibn Farḥūn, vol.II, p.159. Mawāhib al-Galil, a commentary on Mukhtaṣar Khalil, op.cit. vol.VI, p.247.

84. 'Āmer, al-Ta'zir, pp.243-8.

To summarise what has been said in this section, it may be stated that "ta'zir" punishments range from a simple reprimand to imprisonment, and from flogging to the death penalty. Fines and seizure of property may also be inflicted. There is no restriction, as far as the Islamic law manuals are concerned, on the judges' authority to choose the punishment he considers suitable for the crime, the criminal's character and the victim where applicable. It has been suggested that "ta'zir" punishments must be listed in accordance with the various crimes for which they may be inflicted, and particularly that restriction must be put on the cases where capital punishment is applicable. "Ta'zir" is not always applied as the only punishment, but it may also be applied in addition to other punishments if necessary.

IV. The Judge's Discretionary Power:-

The most common notion about "ta'zir" is that the ruler or the judge is completely free in the determination of the offences and their sanctions. The extensive scope of the ruler's or judge's discretion outside the field of "hadd" and "qisās" offences is indeed intolerable to modern lawyers' minds, and is contrary to the accepted constitutional principles of today. It was described by a contemporary Shari'a scholar as "extensive powers at the ruler's disposal, to discipline any one, for anything, with any punishment, (yū addibu man shā' 'alā mā shā' bi mā

shā')."[85] Such a wide scope of discretionary power is entirely contrary to the universally accepted constitutional principle "Nulla Poena Sine Lege". This section will be devoted to illustrating how far this common notion about the judge's discretionary power reflects reality. It is important that jurists have shown some evidence of a desire to make "ta'zir" offences and their sanctions more specific. But this will not be dealt with here as it can only be understood as "simple illustrations and guides".[86] However, the judge must do his best to choose the proper punishment in each case of "ta'zir", by way of conscientious reasoning "ijtihād".[87] Thus he "must not pronounce penalties at his mere whim or pleasure or turn from one to the other in an arbitrary fashion: for this would be injustice "fūsūq" and contrary to consensus "ijma'".[88] Therefore the judges' discretionary power in relation to the punishment must be interpreted as his duty to pronounce the best penalty to fit the case in question, i.e. to correct the offender's behaviour and safeguard the public interest by preventing further offences.

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85. Shaltūt, al-Islam Aqida wa Shari'a, p.314.

86. Coulson, The State and the Individual, op.cit. p.53.

87. al-Qarāfī, Furūq, vol.III, pp.16-20.

88. Furūq, vol.IV, p.182, translated in Prof. Coulson's article, ibid.

The ruler's (or judge's) authority in the determination of "ta'zir" offences is our main concern in this section. "Ta'zir" offences may be either of the same essential nature as the "hadd" offences but of a less serious degree or may qualify simply as "transgressions."[89] In both cases the determination of the punishment is at the judges' discretion in the way mentioned above. But in the case of a "transgression" it is usually said that the ruler or judge has to determine the offence as well. To see how much of the truth this idea contains we must refer to the definition of "ta'zir" as a punishment to be delivered for transgression against God, or against an individual, for which there is neither "hadd" punishment nor "kaffāra". The right to determine what is a transgression and what is not is reserved in Islamic law for Allah only, as the Muslims believe that Islamic law is the final will of God.[90] God's will is expressed in the Qūr'ān and the truely related Prophetic reports, "al-Ahādith al-Sahihah" which are known as the Sūnna. The Qūr'ān and the Sūnna contain many statements which forbid some types of human activity and classify them as sins "m'āsī". For these forbidden things the ruler's or

89. Ibid.

90. Shalabī, al-Fiqh al-Islami, op.cit. p.42. 'Ūda, vol.I, pp.223-37. The Qūr'ān stressed this principle in various chapters, e.g. Sūrah XII, verses 40 & 67. Sūrah VI, verses 57 & 62. Sūrah XVIII, verse 26. Sūrah V, verse 48. and Sūrah LXII, verse 21.

judge's task will be merely to choose the punishment applicable in each case, but he has nothing to do with the determination of the offence as it has already been determined by the Qūr'ān or the Sūnna. Examples of such cases are innumerable but it will help to give some of the most important ones.

IV. 1. Usury "al-Ribā":-

The Qūr'ān forbade usury in five verses in Sūrahs II, III, and LIX. One of the verses runs "O believers, fear you God; and give up the usury that is outstanding if you are believers. But if you do not, then take notice that God shall war with you ..." Another verse says: "God has permitted trafficking, and forbidden usury". Usury therefore is a prohibited activity; its doer deserves punishment which has not been fixed in the Qūr'ān or Sūnna. The duty of the judge is to choose the proper punishment for it. But he does not determine the crime. The jurists are not unanimous about what may be considered usury and what may not. Therefore the ruler or the judge has to determine this question. But some may argue that this is not the determination of the offence, it is simply the determination of whether the offender's act constitute prohibited conduct or not. Such is the role of any court in relation to any sort of crime: to establish, in the light of the evidence provided, the offender's guilt, after which the penalty can be pronounced. Even

when one disagrees with such an explanation, he cannot but agree that the prohibition of usury is the will of God.

IV. 2. False Testimony "Shahādt al-Zūr":-

False testimony was condemned in the Qūr'ān and believers were recommended to state the truth when asked to do so. One verse says "O believers, be you securers of justice, witnesses for God, even though it be against yourselves, or your parents and kinsmen". Another verse describes believers as "those who witness no falsehood". A third verse orders the believers to "shun the abomination of idols, and shun the speaking of falsehood."[91] The jurists have said quite a lot about the punishment of a false witness, but the crime was defined by the Qūr'ān and what the jurists said applies to the stage of choosing the punishment for the crime rather than its determination.

IV. 3. Breach of Trusts "Khiyānat al-Amānah":-

The Qūr'ān stated "God commands you to deliver trusts back to their owners". In another verse it is said "O believers, betray not God and the Messenger, and betray

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91. Sūrah IV, verse 135. Sūrah XXV, verse 72. and Sūrah XXII, verse 30.

not your trusts."[92] There are many other Qūr'ānic verses concerned with breach of trusts, but these two are enough to indicate that these offences were formulated in the Qūr'ān.

IV. 4. Insults "al-Sabb":-

To insult a human being, according to the Qūr'ān, is forbidden even if the insulted person is an infidel, or as the Qūr'ān says "Abuse not those who pray apart from God". As for the Muslims among themselves, the Qūr'ānic command says "O believers, let not any people scoff at another people who may be better than they; neither let women scoff at women who may be better than themselves. And find not fault with one another, neither revile one another by nicknames. An evil name is ungodliness after belief."[93] According to these verses and other similar ones, the jurists classified insults as a "ta'zir" offence.

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92. Qūr'ān, Sūrah IV, verse 58, and Sūrah VIII, verse 27. To prove the offensive nature of breach of trusts, some writers referred to verse 72, Surah XXXIII. But this verse is irrelevant to this subject. The word (amanah) there means the religious duties while in the verses quoted it means financial trust. cf. 'Ūda vol.I, p.139.

93. Qūr'ān, Sūrah VI, verse 108. and XLIX, verse 11.

IV. 5. Bribery "al-Rishwa":-

As the Qūr'ān forbade usury and considered it an unlawful way of making money, all means of making money by dishonesty are forbidden. About bribery the Qūr'ān says "Consume not your property between you in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other men's property, intentionally."[94] According to the prohibition of bribery stated in this verse, it is considered as a "ta'zir" offence for which the authority concerned (the ruler or the judge) may impose a punishment.

For all the examples above many Prophetic reports were related, sometimes to explain what was meant by a Qūr'ānic verse, and sometimes to illustrate how hated and wrong is the forbidden behaviour in the sight of God and his Messenger.[95] These five examples are enough to prove that "ta'zir" offences are mainly determined in the Qūr'ān. It is not claimed, by saying this, that the ruler has no right, outside the province of the Qūr'ān or the Sūnna, to establish offences and their punishments. But the right to do so is limited to what is necessary for the achievement of the aims and ends approved by Islamic law.

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94. Qūr'ān, Sūrah II, verse 188.

95. For other examples and for Prophetic reports conderned with the five given above, see 'Ūda, op.cit. pp.138-143.

V. The Determination of Offences Under the "Ta'zir" Doctrine:-

The final end of Islamic law "Shari'a" is the protection of religion, life, lineage, mind and property. This is agreed by all Muslim jurists, although it has not been mentioned in the Qūr'ān or the Sūnna in these exact words. This agreement was achieved by way of induction from all the legal verdicts in Islamic legal sources.[96] For the achievement of these ends all the legal obligations and prohibitions of Islamic law were ordered. The ruler, therefore, must act to serve the public interest in terms of these five objects. Any transgression of one or more of them should be considered unlawful, and if necessary, punishable. Some of the possible transgressions have been mentioned in terms of prohibition, "tahrim", in Qūr'ān and the Sūnna, but there are many others which have not been mentioned there. Here, the ruler's power to create or consider these transgressions as offences and to determine their sanctions, may be considered. Some Muslim jurists refer to this power, when they add, to the above five objects, the object of the elimination of any "transgression".[97] The ruler's power must be exercised on the basis of the general principles of the law, and

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96. Shāṭibī, Muwāfaqāt, vol.I, p.38 and vol.II, p.10.

97. Ibn Farḥūn, vol.II, p.106. See also: Coulson, ibid., p.51.

with the intention of protecting their ends which shape the public interest. Moreover, the ruler's power to determine such offences and their punishments is not based only on juristic reasoning "ijtihād" but also on the general commands which prohibit transgressions and corruption. These commands are expressed in more than one Qūr'ānic verse and Prophetic report.[98] Many of these Qūr'ānic verses command the Muslim community to "enjoin what is right and forbid what is wrong." The right and the wrong are not listed in one place in the Qūr'ān or the Sūnna, but they can be known by investigation of the whole text of the Qūr'ān, and the collection of Prophetic reports. Even so, they cannot be known in detail, but in general terms, according to which each individual act can be classified.[99] In this province, the ruler can exercise his legislative power to enforce the "right" and prohibit the "wrong", even when what he enforces or prohibits is not mentioned specifically, in either the Qūr'ān or the Sūnna.

This legislative power of the ruler may be seen to contradict what was said above about the Muslim's

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98. e.g. Sūrah II, verse 190, XXII, verse 41, III, verses 104, 110 and 114.

99. Shāṭibī, Mūwafaqāt, vol.II, pp.7-14. Shalabī, al-Fiqh al-Islami, op.cit. pp.110-112.

belief that the right to determine right and wrong is reserved to God. But the fact is that there is no contradiction in this context. God's legislative right was exercised in the Qūr'ān and the Sūnna, but neither the Qūr'ān nor the Sūnna has given, or is expected to give, detailed laws to control every aspect of human life. It is only the general principles which may be found therein. The details are left to the discretion of the community "Ūmma" which must decide what is suitable and productive according to the circumstances. Indeed the legislation passed by the ruler must not contradict the general principles laid down by the Qūr'ān and the Sūnna, and when this condition is considered, the ruler or rather the "Ūmma" is completely free to pass whatever legislation is needed.[100] This legislative right is known as "siyāsa sharī'iya", or governmental authority. The only condition on which this "siyāsa" is legitimate is that it does not contradict what is said in the Qūr'ān or the Sūnna. According to Ibn al-Qayyim any means which establishes justice and prevents injustice is "legitimate siyāsa".[101]

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100. Qarāfī, Iḥkām, Damascus, Ed. pp.26-31.

101. al-Ṭuruq al-Ḥukmiyya, pp.14-20. The same view was supported by Ibn-Farḥun, op.cit. p.104, and Ṭarabulsī's Mū'in al-Ḥukkām, op.cit. p.164.

From this review it can be said that this discretionary power (which may be the main objection to the law of"ta'zir" when expressed in words like those quoted in the beginning of this section), is evidence of the flexibility of the Islamic penal system. Without the law of "ta'zir" the Islamic penal system would certainly have been inadequate after the first Islamic era. Within the law of "ta'zir" the Muslim state's legislative authority, or, in the language of the texts, the ruler, is given the necessary power to safeguard the public interest by making harmful and disturbing behaviour unlawful, and prescribing punishments for it. The jurists dealing with the subject imply that for the sake of public interest the ruler need not do that in advance. That is to say that he may punish any conduct he considers harmful to the public interest without declaring to the public that this conduct will be considered criminal.[102] This is a clear exception to the application of the general principle that no punishment can be inflicted except for an offence which has been so defined in advance. This exception allows the ruler or the judge a very wide authority to punish harmful acts and omissions which may threaten the public interest in the widest sense,

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102. 'Uda, vol.I, p.150-152.

Some authorities have tried to deny that the classification of this discretionary power is an exception to the rule "Nulla Poena sine lege". The argument for this view is that the "lege" exists in the general principles which command the Muslim community and the Muslim ruler to protect the public good.[103] But the fact is that these general principles are very flexible, and their interpretation controversial. Therefore, one cannot agree with the above view.

It was this discretionary power which led another contemporary author to urge that "ta'zir" offences and punishments should, if the Islamic penal system is to be adopted, be codified.[104] If this view is approved, it may be through legislation that the discretionary power for punishing acts which threaten or harm the public interest can be used.

However, the ruler's authority, in this context, is related to the Qūr'ānic command to the Muslim community to "enjoin what is right, and forbid what is wrong."[105] At the same time, the clear order of the Qūr'ān "obey God, His Prophet and those in authority (in charge of

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103. Ibid. pp.152-154.

104. 'Āmer, al-Ta'zir, pp.404-8.

105. Ibn 'Ābdin, Minhat al-Khāliq, a commentary on al-Bahr al-Rā'iq of Ibn Nujaym, vol.VI, op.cit. p.45. Ibn Nujaym, Risalah fi Iqamat al-Qadi al-Ta'zir, supplemented to his Ashbāh wa-Naza'ir, vol.II, pp.46-8.

your affairs)". (Qūr'ān, IV, 59), justifies, and was used to justify, the discretionary authority in the context of "ta'zir".

It is interesting to draw attention to the similarity between the law of "ta'zir" as was explained, and the part of the English criminal law which originated in and is governed by the rules of the common law. Here crimes and their punishments are contained in the common law, i.e. "the part of English law which originated in common custom and was unified and developed by the decisions and rulings of the judges."[106] Although in modern times statutes have played an increasingly important part in criminal law, there are still several crimes which exist in common law only. This means that their definitions and punishments cannot be found in an Act of Parliament, but in the rulings of the judges.[107] However, several statutes prescribe specific punishments for certain common law crimes. A clear example of this is the case of murder, which remains as a common law crime, but its punishment is governed by statute.[108] However, the question of common law offences raises the discussion about the proper sphere of the criminal law, one aspect of which is

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106. Cross and Jones, Introduction to Criminal Law, p.16.

107. Ibid. p.17.

108. Up to 1965 it was the death penalty, but the 1965 Abolition of Death Penalty Act abolished it for murder.

whether it is right or wrong to grant the judges a residual power to add to the criminal law.[109]

VI. A Survey of the Law of "Ta'zir":-

The ultimate object of "ta'zir" is to punish wrong deeds which may disturb the society, or the rights of an individual. In the first place it is a deterrent punishment intended to prevent the commission of crimes. At the same time it is a reformatory punishment, which is intended to correct the offender. Moreover, it is the means by which a Muslim society may enforce the moral standard recommended by Islamic law. It is this last aspect, that of the enforcement of morality, which will concern us here as we have said enough about deterrence in previous shapters.

Islamic law is essentially a code of moral standards which are expected to be observed in a Muslim society. The function of the different rules and duties in Islamic law is to enforce this moral standard, even by punishment. Of the four "hadd" punishments, two are concerned with sexual immorality in terms of "zinā" or adultery, and "qadhf" or false accusation of unchastity. The Qūr'ān

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109. See Cross and Jones, ibid. pp.18-21. The question was recently discussed after the House of Lord's decision in the case of Shaw v. Director of Public Prosecution (1961), to which we will shortly refer.

prescribed the severest punishment known to Islamic law, in order to enforce sexual morality.[110] But outside the field of the "hadd" punishment, the moral values of Islam are enforceable by means of "ta'zir" punishment. Examples are found in the texts of acts which were considered immoral and their sanctions, according to the jurists' views. But what we will concentrate on here is the basic issue: is it the function of the penal law to enforce the standard of conventional morality by punishing deviation from it?[111]

The problem of law and morality, particularly sexual morality, was the subject of lively discussion among lawyers and philosophers in England. It follows the famous decision of the House of Lords in the case of Shaw v. the Director of Public Prosecutions, in 1961. Mr. Shaw had published a magazine entitled "The Ladies' Directory", which listed the names and addresses of prostitutes and included some photographs and indications of their particular sexual practices. The House of Lords dismissed Mr. Shaw's appeal against conviction for three offences, one of which was "conspiring to corrupt public morals". The formulation, or re-formulation, of this

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110. See above, Chapter I.

111. A discussion of the subject is found in: Coulson, Conflicts and Tensions, op.cit. pp.77 et seq.

offence by the English law Lords, stimulated the debate about the problem of law and morality.[112] It is interesting that the debate about law and morality is expected to attract lawyers and philosophers again after two recent cases. The first is the case of the Director of Public Prosecutions v. Richard Neville and others. This is the case known as the "OZ" case. Mr. Neville and two of his colleagues published number (28) of the "OZ" magazine called "School Kids OZ". They were convicted at the Central Criminal Court on July 28, 1971, and sentenced on August 5, 1971 (Judge Argyle, Q.C.). The three men were sentenced to 15, 12 and 9 months imprisonment. The Court of Appeal suspended the sentences on November 5, 1971. In this case the conviction was made according to the Obscene Publications Act 1959; and the Post Office Act 1953. But the three men were acquitted of conspiracy to corrupt public morals. The second case is that of the Director of Public Prosecution v. Stage I (publishing company). The publishing company published a book entitled "The Little Red School-Book". It aimed at informing school-boys and girls about almost everything in life.

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112. See H.L.A. Hart, Law, Liberty and Morality, London, Oxford Univ. Press, 1969, pp.6-12. Coulson, ibid., p.77. B. Mitchell, Law, Morality and Religion in a Secular Society, O.U.P. 1970, pp.12, 61. for a general discussion on the subject, see Lord Patrick Devlin, The Enforcement of Morals, O.U.P. 1969, (3rd Ed.).

The section on sex (26 pages) was declared obscene by The Magistrate Mr. John Denis Purcell, on July 1, 1971. The court based its verdict on grounds that this section was likely to "deprave and corrupt" young people. Unlike in the "OZ" case the appeal made against the court decision has not yet been heard.[113]

However, among British Lawyers there are two views about the role of law in the enforcement of morals. The first view was held by the English Lords, expressed in their decision in Shaw's case, and defended by some writers afterwards.[114] According to this view criminal law must enforce public morality or the accepted standard of morals. It is admitted, according to some, that the morality which the law presupposes is not beyond criticism, and ought to be open to informed discussion and debate.[115] This view was criticized by those who hold that the law must not interfere with private morality, and the criticism is from both moral and legal points of view.[116]

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113. i.e. up to 26.11.71. see for both cases: The Times, August 6 and 9, July 2, and November 6, 1971.

114. e.g. A. L. Goodhart, Law Q.R., vol.77, p.567, 1961. B. Mitchell, op.cit. pp.134-135.

115. B. Mitchell, ibid. p.134.

116. H.L.A. Hart, op.cit. The Morality of the Criminal Law, London, O.U.P. 1965. See also the references he cited in p.12-13 of Law, Liberty and Morality.

Islamic law, on the other hand, presents a view according to which no distinction may be made between private and public morality. It is true that the standard of proof required to establish the offence of adultery, for example, would certainly mean that the offender, where the offence is proved by testimony, had committed an offence of public indecency, even under English law.[117] But the offender is required to repent when he commits such an offence in private and is not brought before a court. This doctrine of repentance "tawbah", means that an immoral sexual act, even in private, amounts to an offence from which the offender must repent, or he will be punished in the world hereafter.[118] Such a doctrine is the result of the religious nature of Islamic law, which the court has nothing to do with, and it is irrelevant to secular law. But examples may be easily found, in the texts, of acts which would be considered merely immoral in a secular state, while they are considered offences of "ta'zir" under Islamic law. Although there is no clear distinction in the Qūr'ān between moral and legal rules, as Qūr'ānic precepts merely indicate the standards of conduct which are acceptable or not acceptable to God,[119] every

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117. Coulson, ibid. p.78.

118. Coulson, ibid. p.80.

119. Shalabī, al-Fiqh al-Islami, op.cit. pp.24-32.
Shaltūt, op.cit. p.459.

unacceptable act is "ma'siya" or "corruption" for which a "ta'zir" punishment may be inflicted. When the transgression is committed in circumstances which cannot justify the court's intervention, the offender is always obliged to repent in order to escape the punishment in the next world. This doctrine of repentance is, by nature, a self-reformatory way which is assumed to serve the same purpose as the "ta'zir" punishment. Therefore it can be said that among the purposes of the "ta'zir" punishment is the enforcement of the standard of morals approved by Islamic law, in terms of punishing immoral or morally disapproved conduct.

"Ta'zir" punishment, therefore, must differ in each case, as has been said, as to the offender, the crime and the victim where applicable. For this reason some jurists classified offenders, or rather citizens, into four distinct classes: a) the most distinguished of the upper classes, i.e. officials and officers of the highest rank; for them a personal communication from the judge through a confidential messenger would be sufficient as a punishment. b) the upper classes, i.e. intellectual elite and scholars of "Shari'a"; they may be summoned before the judge and admonished by him. c) the middle classes, i.e. the merchants; they should be punished by

imprisonment. d) the lower strata of the people; they should be punished with imprisonment or flogging.[120] But other jurists, however, reject this external classification according to social status and lay stress on the inner worth of the individual, his attitude to religion and his mode of life.[121]

A final question which may be asked about "ta'zir" being a reformatory punishment, is how it can be so considered when it punishes with the death penalty or flogging, which are mainly deterrent punishments, as has been previously observed. Here it must be noted that the reformatory function appears in the deterrence value of these punishments which is supposed to result in the prevention of further similar crimes. It was necessary, too, to allow such punishments as "ta'zir", as, to use Lord Simond's words, "no one can foresee every way in which the wickedness of man may disrupt the order of society".[122]

Now, to conclude, one can say that the law of "ta'zir" provides Muslim states in modern times with the principles according to which they can formulate, outside the limited

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120. Kāsānī, Badāi' al-Ṣanāi', vol.VII, p.64. Encyclopaedia of Islam, vol.IV, p.710.

121. Ibn 'Ābdin, Ḥāshiya, op.cit. p.62. Encyclopaedia of Islam, ibid.

122. Quoted in Hart; Law, Liberty and Morality, p.9.

area of the "hadd" punishment, modern penal codes to be applied by the courts adopting modern law systems. The variety of punishments allowed as "ta'zir" can save the modern Muslim states from borrowing their penal laws from Western models as has happened in most of the Arab countries. At the same time, for those who demand the application of Islamic criminal law there is no better course than to concentrate on illustrating the law of "ta'zir" as the best proof for their claim that the Islamic theory of punishment is valid and can be adopted in modern times.

CHAPTER V

THE LAW OF EVIDENCE IN CRIMINAL CASES

I. Introductory:-

The relation between the infliction of punishment and the evidence required to prove crimes is a very clear one. Where the court is not absolutely certain of the accused's guilt the punishment cannot be inflicted. Methods of proof in any penal system reflect the legislator's desire to widen or limit the number of cases in which a particular punishment may or may not be inflicted. Therefore, a brief account of the law of evidence in criminal cases under the Islamic penal system will help us to form a more precise image of the theory of punishment in Islamic law.

The aim of the law of evidence in Islamic legal theory, in general, was rightly described as "the establishment of the truth of claims with a high degree of certainty".[1] Thus the normal evidence is the oral testimony of two adult Muslims who must be known to the judge as having the highest degree of moral and religious probity "'adāla". This normal standard of proof should be, as a general rule, fulfilled in all criminal and civil cases. But there are

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1. Coulson: A History of Islamic Law, p.126.

some recognized alternatives to it in both civil and criminal cases. The alternative methods of proof in criminal cases which will be dealt with here are: the criminal's admission or confession "iqrār", the judge's personal observation "'ilm al-Qādī" and the circumstantial evidence "al-Qarā'in". The pre-Islamic method of proof in cases of homicide known as oath "qasāmah" will not be dealt with in this context as I do not see it as a recognized system under Islamic law.[2] The most important exception to the normal standard of proof in criminal cases is that of requiring four male witnesses to prove the offence of adultery "zinā", so this will be treated separately.

II. Testimony "Shahāda":-

Most criminal charges are to be proved by the oral testimony of two adult male Muslims. Of the "hadd" crimes this rule applies to the crimes of "qadhf", and "hirābah", and it also applies to the most serious "ta'zir" offences, i.e. wine-drinking and apostasy.[3] "Qisās" for the crimes of homicide cannot be inflicted unless the crime is proved in the same way. The Mālikī school

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2. See for details, Ahmad Ibrāhim, al-Qisās, pp.228-35, where he expressed a similar view.

3. Ibn Farhūn, Tabsirah, vol.I, p.212-3.

only differentiates between "qisās" for homicide and for injuries, and relax the rule of the two male witnesses for the latter by allowing it to be proved by the testimony of one witness and the oath of the victim, or one male and two female witnesses.[4] It is clear, then, that the jurists pay a good deal of attention to the witnesses' evidence and when it can be accepted. The most important part of their discussion is the one concerned with the witnesses' character, or the condition of "'adāla".

The origin of this condition of "'adāla" is its mention in the Qūr'ān. The Qūr'ān says "and call to witness two just men..."[5]. Differences among the schools of Islamic law about what is meant by "'adāla" are generally of no importance. Nevertheless, some are worth mentioning. The Hanafī, Mālikī and Shāfi'ī schools consider a Muslim "'adl" if he usually does what is required of him, and avoids doing what is forbidden.[6] The Hanbalī jurists add to this what they call "isti'māl al-mūrūa", or the sense of honour. It was explained by a Hanbalī jurist as the avoidance of what makes a person not

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4. Ibid. p.215. 'Ūda, vol.II, p.316. Bājī, Muntaqā, vol.V, p.215.

5. Surah LXV, verse 2.

6. Mabsūt, vol.XVI, p.121. Muntaqā, vol.V, p.195. Bājirmī, Tuhfat al-Habib 'ala Sharh al-Khatib, vol.IV, p.339 et seq.

respectable, and the upholding of what makes him respectable.[7]

The Zāhirī school hold that a person is "'adl" if he is not known to have committed any serious crime, or grave offence "kabira", and has not openly committed a venal sin "saghira".[8] By "kabira" they mean what the Prophet called "kabira", and that for which there is the threat of punishment in the Qūr'ān or the Sūnna.[9] Ibn Hazm supported this view by quoting the Qūr'ānic verse "if you avoid the great sins which are forbidden, we will remit from you your evil deeds..."[10]. He says that according to this verse, everything is remissible as long as a Muslim does not commit any great sin "kabira". What is remissible in the judgement of God, Ibn Hazm continued, cannot incur blame or reprimand for its perpetrator. At the same time, anyone who commits "kabira" and afterwards repents should be considered "'adl", as though he had never committed it.[11]

It is interesting to note that the schools of Islamic law are divided on the question of whether a Muslim should

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7. Hajāwī, Matn al-Iqnā', published with Bahūttī, Kashshaf al-Qina', vol.VI, p.422. See also Mughni, vol.X, p.149.

8. Muhalla, vol.IX, p.393 et seq.

9. Ibid. See also Qarafī, Furūq, vol.IV, pp.66-70.

10. Sūrah, IV, verse 31.

11. Muhalla, ibid.

be considered "'adl" unless proved not to be, or whether he should not be considered "'adl" until his "'adāla" is proved. The first view is held by the Zāhirī and Hanafī schools, while the second is held by the Mālikī, Shāfi'ī, Hanbalī and Zaydī schools.[12]

Finally, it is noteworthy that Ibn al-Qayyim and his teacher, Ibn Taymiyya, hold that all criminal and civil claims can be proved by the testimony of one witness if the judge is satisfied that he is telling the truth. The only exception to this is in the case of crimes for which there are "hadd" punishments; these crimes are to be testified by two male witnesses except in the case of "zinā" where four are required.[13]

II. 1. Testimony in Cases of Adultery:-

The evidence required in cases of adultery is the oral testimony of four adult male Muslims who have seen the very act of sexual intercourse. This is derived from the Qur'ānic verse "As for those of your women who are guilty of lewdness, call to witness against them four of you."[14] All jurists agree on the number of witnesses and their sex. Women's testimony is not accepted in

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12. Muḥalla, op.cit. Bājī, op.cit. p.193. 'Ūda, vol.II, p.404-5.

13. Ibn al-Qayyim, al-Ṭurūq al-Ḥukmiyya, Cairo, 1961, p.73, 77, 82 and 176-8.

14. Qur'ān, Sūrah IV, verse 15.

cases of adultery, or any "hadd" offence.[15] The witnesses must be able to state where and when the offence took place, and must be able to identify the other partner. Testimony, moreover, must be delivered before the court at one time "fī-maglisin wāhid".[16]

The punishment for "qadhf" is inflicted on the witnesses if they are less than four. So if four people saw the offence but only three of them are prepared to give witness before the court, they can be convicted of the offence of "qadhf" and punished accordingly, disregarding the reasons which prevented the fourth from giving his testimony.[17]

These requirements indicate the difficulty, if not the impossibility, of inflicting the "hadd" punishment for adultery. Some jurists expressed the view that the deterrent effect of punishment in Islamic law is indicated by the fact that these punishments are theoretically prescribed, but not actually inflicted. This is as true for the rest of the "hadd" punishments, as for adultery.[18]

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15. Mughnī, vol.IX, pp.69-70.

16. Ibid. p.71. Kāsānī, Badā'i', vol.VII, p.48. Ibn-Farḥūn, Tabṣirah, vol.I, p.212. This last condition is not necessary according to the Shafi'ī school.

17. Mughnī, ibid. p.72. Kāsānī, ibid. Mudawwanah, vol.IV, p.399. Haytami, Tuhfat al-Muhtaj, vol.IX, p.115.

18. See above Chapter I, and Shalabī, al-Fiqh al-Islami, p.207.

The severity of punishment in Islamic law indicates the law-maker's desire to threaten the people and prevent them from committing the offences in question. But the obvious difficulty of proving the offence, reflects his desire to regard the existence of these punishments as a mere threat. The fact that we can cite no case where guilt of adultery was established through testimony throughout Islamic history is very significant. It must be noted, however, that it is not only the number of witnesses required which makes it difficult to prove adultery, but also the threat of being punished for "qadhf" if they failed to agree on every minute detail. Practically speaking, no one would risk giving testimony when he could expect to be punished if one of the witnesses, for any reason, did not testify, or if the statements of the four differed in any way.

III. Confession "Iqrār":-

An alternative method of proof in criminal cases which will occupy us in this section is the establishment of proof by the criminal's confession "iqrār".

It is agreed that the criminal's confession is sufficient for the establishment of his guilt, and that on his confession the appropriate punishment can be inflicted. One confession is enough in all criminal cases

other than adultery, where the question of the necessary number of confessions is disputed. According to the Hanafī, Hanbalī and Zaydī schools, the confession of "zinā" must be repeated four times, as the minimum number of witnesses in such a case is four, and because in the case of Mā'iz who confessed adultery four times before the Prophet. It was only after the fourth confession that the Prophet started his inquiry into the reality of his confession, his state of mind and his knowledge of the punishable act.[19]

The Mālikī, Shāfi'ī and Zāhirī schools disagree with this view and consider that one confession is sufficient to establish the confessor's guilt. They see a difference between testimony and confession: the former rests on the mere assumption that the witnesses are telling the truth, so a large number of witnesses are necessary in order to avoid any possibility of false testimony. The latter rests on the confessor's mere volition, where there cannot be any shadow of doubt as to its credibility. Moreover, they quote another Prophetic report in which the Prophet did not require the confession to be repeated.[20]

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19. Kāsānī, Badā'i', vol.VII, p.50. Mughnī, vol.IX, p.64. al-Rawḍ al-Nadir, vol.IV, p.470 et seq.

20. Zurqānī, his commentary on Mukhtaṣar Khalil, vol, VIII, p.99-100. Bajirmi, op.cit. p.139. Muḥalla, vol.XI, p.176-181.

The Zaydīs, on the other side, think that the point of requiring the confession to be repeated four times is to give the confessor an opportunity to withdraw his confession and escape the "hadd" punishment by repentance, which is a recommended practice.[21]

Apart from this dispute about "zinā" between different schools, another dispute exists within the Hanafī school. In cases of "qadhf", theft and wine-drinking, Abū Yūsūf, the second founder of the school, holds that a confession must be repeated twice. But the Imām, i.e. Abū Hanifā, did not require the repetition of the confession. Abū Yūsūf based his view on the fact that the punishment of these crimes is the right of God "haqq Allah", so it must be inflicted after the taking of all possible precautions "ihtiyat". But Abū Hanifā considered that confession is the communication of a piece of news "ikhbār" which cannot be strengthened by repetition. The difference between these crimes and adultery is that the four confessions for the latter derive from the Prophet's practice, where nothing similar is available for any of the other "hadd" crimes.[22] Analogy "qiyās", a Hanafī jurist stated, cannot help Abū Yūsūf to prove his view, because it is not applicable in such cases.[23]

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21. al-Rawd al-Nadir, op.cit. p.473.

22. Kāsānī, ibid.

23. Jaṣṣāṣ, Aḥkām al-Qur'ān, vol.II, p.429, see also pp.427-8.

Confession should be made in detail, showing that the confessor is aware of what he has done and proving that it was really the crime for which a punishment is prescribed. For if it was accepted that a summarized confession might be made, someone might confess that he had committed "zinā", for example, while he really had not. Then such a person might be unjustly punished. To avoid this possibility a detailed confession is required and it is the judge's duty to ask the confessor about the minute details of his offence.[24] Associated with this rule is the rule that a confession must be in clear explicit words, as an indirect confession, i.e. by way of "kināya", is not accepted as proof in criminal cases.[25] Accordingly, the Hanafī school did not accept the confession of a mute person, even if he made it in writing, because they consider writing as indirect declaration, whereas the other Sūnnī schools disagree with this view and accept his confession as long as his signs or his writing are comprehensible.[26]

A confession in criminal cases, but not in civil cases, can always be withdrawn even after sentence has

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24. Mūghnī, vol.IX, p.65. Kāsānī, ibid. p.49-50. 'Ūda, vol.II, pp.433-5. al-Rawd al-Nadir, op.cit. p.473-4.

25. Kāsānī, ibid. 'Ūda, ibid. p.436.

26. Kāsānī, ibid. Mūghnī, op.cit. p.67. 'Ūda, op.cit. p.436.

been passed, or during the execution. In cases of its withdrawal after the sentence, a "hadd" punishment should no longer be carried out, but a "ta'zir" punishment may be carried out even after the withdrawal of the confession. The difference is that the withdrawal of the confession causes doubt "shubha" and so the "hadd" punishment cannot be carried out, but this rule is not applicable to "ta'zir".[27] Moreover, it is recommended to the judge that when someone confesses to having committed a crime considered as "haqq Allah", he should be given a chance to withdraw his confession. This recommendation is based on the fact that in such cases the criminal's repentance is better than his punishment.[28]

In all cases the confession only applies to the confessor. Therefore when a man confesses that he and another man have been drinking, but the alleged participant denies it, only the confessor can be punished. If the crime cannot have been committed by a single person, e.g. in the case of adultery, the schools of Islamic law are divided as to the authority of one partner's confession when the other partner mentioned

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27. Kāsānī, p.52. Ibn Nujaym, al-Ashbāh wal-Nazā'ir, vol.II, p.164. Khalil, Mukhtaṣar, with the commentary of Zurqānī, op.cit. p.100. Mughnī, op.cit. pp.68-9.

28. Shu'rani, Mizān, vol.II, p.137. Mughnī, opcit. p.80. Shalabī, al-Fiqh al-Islami, pp.206-210.

denies the alleged crime. The Hanbalī and Shāfi'ī schools hold that the confessor should be punished according to his confession regardless of the other person's denial, and the same view is held by Abū Yūsuf and Muhammad b. al-Hassan (the two companions of Abū Hanifa).[29] According to Abū Hanifa, if the alleged partner in such a crime denies the allegation, neither of the two partners can be punished. He says that such a crime cannot be committed except by two people and if the act of one of them is not proved, the other's role is not definitely established, so we could neither punish the confessor and leave the other, nor punish them both. Logically, this view seems more acceptable than the former since the partner's denial sheds doubt on the correctness of the confessor's statement, and, as we saw, "hadd" punishments are not to be inflicted when there is any sort of doubt, however small.[30]

With these conditions required for a valid confession, and with the possibility of its withdrawal at any stage even after the beginning of the carrying out of the sentence, one can say that confession in criminal cases has a very limited role as a method of proof. This is true especially when we consider the severity of the "hadd"

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29. Mūghnī, vol.IX, p.65. Shāfi'ī, Ūmm, vol.VII, p.141. Fath al-Qadir, vol.IV, pp.158-9.

30. Fath al-Qadir, ibid.

punishments, which might prevent even the most pious man from confessing his guilt. Evidence of this view is that since the Saudi Arabian Kingdom revived the application of the Islamic punishments more than 52 years ago, only one case of adultery is known to have been proved by confession.[31]

IV. The Judge's Personal Observation "'ilm al-Qāḍī":-

The Ẓāhirī school is the only school which allows a judge to make judgements according to his own observation in all criminal cases. Ibn Hazm in his famous text "al Muḥalla", stated: "It is the judge's duty (fard) to give judgements according to his personal observation in all civil and criminal cases ... the fairest judgement is that which is based on the judge's personal observation, then on the defendant's confession, then on testimony". Ibn Hazm defended this view by relating the judiciary's job to the duty of "enjoining what is right and forbidding what is wrong". It is every Muslim's duty to do so, and the judge is no exception to this rule.[32]

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31. It was during the time of the 'Hajj' in 1957 when two Muḥṣans committed adultery and afterwards confessed it. They were stoned to death after the day of "'Arafa". This case was brought to my knowledge by many eye-witnesses who were there for the "hajj", but no official records are available.

32. Muḥall, vol.IX, p.426-29.

The Hanafī, Mālikī and Hanbalī schools forbid the judge to give judgement according to his personal observation in all criminal cases (with the exception of "ta'zir" cases, according to some). They hold that the judge cannot act except according to the evidence delivered before him. His own observations are no more valuable than those of any single witness. At the same time the judge is not allowed to add his own testimony to that of other witnesses in order to complete the number of witnesses required in a given case, because it is impossible to be a judge and a witness at the same time.[33] The two views are said to be held by the Shāfi'ī school, but the majority of the Shāfi'ī scholars hold the latter.[34] The majority view was defended by Ibn al-Qayyim who supported it by quoting some Prophetic reports and views attributed to the companions of the Prophet.[35]

The Zaydī school makes a distinction between cases of "qisās" and "qadhf", where the judge is allowed to act on his own knowledge, and other criminal cases, where he is not allowed to do so. Such a distinction is unknown

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33. Badāi' al-Ṣanāi', vol.VII, p.52. Bājī, Muntaqā, vol.V, p.186. Mughnī, vol.IX, p.78-9.

34. Mughnī, ibid. Muntaqā, ibid. 'Uda, vol.II, p.431. where he quoted Muhadhdhab, vol.II, p.320.

35. al-Turūq al-Hukmiya, op.cit. pp.210-217.

to other schools who either allow it in all cases or in none. Also one cannot find any logic in it, or any sound argument for its validity.[36]

One can say then that the Zāhirī view seems to contradict the principles laid down in the Qūr'ān and the Sūnna in relation to the methods of proof. Where the Qūr'ān requires four adult male witnesses to establish guilt in cases of "zinā", the Zāhirīs allow it to be established with only one witness if he happened to be the judge. Thus the relation between the Qūr'ānic command to enjoin the right and forbid the wrong and the judge's duty may be interpreted in an entirely different way. That is to say that it is "wrong" to pass judgements without the evidence required by the law.

Therefore, the majority view is the most convincing one, as either the Zāhirīs nor the Zaydīs view is valid.

V. Circumstantial Evidence "al-Qarā'in":-

The generally accepted view is that circumstantial evidence "qarā'in" is not one of the methods of proof recognized under Islamic law. At the same time some jurists consider circumstantial evidence as a proper means of proof in the absence of others. Ibn al-Qayyim

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36. 'Ūda, op.cit. pp.431-2, where he quoted Sharh al-Azhar, vol.IV, p.320.

and the Mālikī scholar, Ibn Farḥūn, are the two main representatives of this view.

Circumstantial evidence is a valid way of proof, according to the above authorities, in all civil and criminal cases except "hadd" offences, though the offence of adultery may be proved against an unmarried woman if she is pregnant.[37] There are other examples of criminal cases for which circumstantial evidence may be sufficient proof. Wine-drinking, for instance, may be proved by the smell of the breath of the accused or if a man vomits wine, a rule which is associated with 'Omar and Ibn Masū'd, the companions of the Prophet.[38] In cases of "qisās" circumstantial evidence is sufficient when a man runs out of a house with a knife in his hand, a man bleeding to death is immediately found there, and there is no sign of any other possible assailant. In such a case the running man is obviously the killer.[39] In a similar case, the Chief Alkali of Bida, Northern Nigeria, commented that this evidence was "better than testimony".[40]

The procedure of "qasāma", in the context of "qisās" also, is a good example of circumstantial evidence being

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37. Ibn al-Qayyim, al-Ṭurūq al-Ḥukmiyya, op.cit. p.7. Ibn Farḥūn, Tabṣirah, op.cit. vol.II, p.97.

38. Ibid.

39. Ibn Farḥūn, p.97.

40. Anderson, Islamic Law in Africa, London, 1954, p.194.

considered a justification for swearing the oaths and inflicting the "qisās", or exacting the "diya".[41]

The Ibādī school, usually referred to as a part of the Khāriji sect[42], consider that "qarā'in" is proper evidence in cases of homicide. This view is based on a Prophetic report according to which the Prophet gave the loot of a murdered man, after the battle of Badr, to a member of the Muslim army because of circumstantial evidence that he had killed the enemy.[43] To this view some contemporary scholars give a good deal of credence.[44]

However, this view has not traditionally been supported, as the Sūnnī schools generally stick to the testimony of two male witnesses.

The arguments put forward by Ibn al-Qayyim and Ibn Farhun, may, at least, disprove the idea that Islamic law does not recognize circumstantial evidence in its

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41. Ibn Farḥūn, ibid. p.96. Ibn al-Qayyim, I'lām al-Muwaqq'in, op.cit. vol.III, p.20-21.

42. A well-authorised view that it is not is expressed in 'The Ibadis fi Mawkib al-Tarikh' by Shikh 'Ali Yahya Mu'ammar, vol.I, Cairo, 1964, pp.19-35. A more advanced discussion of this topic is to be found in Studies in Ibadism, by Dr. 'Amr Khalifa Ennamī, Unpub. Cambridge Univ. Thesis, 1971, pp.9-43.

43. Atfayyish, M.B. Yūsūf, Sharḥ al-Nil, vol.VII, Cairo, pp.548 et seq.

44. Ibrāhim, al-Qisās, pp.225-7, where he quoted the famous Egyptian Ḥanafi jurist Shikh Ahmad Ibrahim in his book, Turūq al-Ithbāt al-Shar'iya, Cairo, 194.

formulation of the law of evidence.[45] But where circumstantial evidence is the only method of proof available, the court must take all possible precautions to avoid injustice or misjudgement.[46] When definite evidence is almost impossible, writes one Hanafī jurist, the nearest to it must be accepted.[47]

It is interesting that according to Qarāfī, the famous Mālikī jurist, circumstantial evidence may be considered only by the court of "wālī al-Jarā'im" or the official in charge of crimes. But another Mālikī authority, Ibn Farhūn, considers that the ordinary Shari'a court or the "qādī" may also take circumstantial evidence into consideration.[48] Here, it seems that the latter authority was influenced by the very strong argument of Ibn al-Qayyim and by his conclusion that the final purpose of the law of God is to establish justice among people, therefore whatever means may be used for this is legitimate.[49]

Intentially in this chapter, I have avoided any comparison between Islamic law and modern penal system, because such a comparison in this particular context may not add any significant contribution to the subject, let alone any practical importance.

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45. Ibn al-Qayyim, al-Ṭurūq al-Ḥukmiyya, p.13.

46. Ibrāhim, al-Qiṣāṣ, p.226-7.

47. Ibid.

48. Ibn Farḥūn, ibid. p.111-2, where he quoted Qarāfī in Dhakhira, his unpub. work on Mālikī law. cf. Coulson, A History of Islamic Law, p.127-8.

49. Ibn al-Qayyim, ibid. p.15.

CONCLUSION

THE ISLAMIC PENAL SYSTEM

AND

PRESENT MUSLIM SOCIETIES

So far, we have dealt with the theory of punishment in Islamic law in an attempt to illustrate its main characteristics and underlying philosophy. The findings of this research may be summarized by saying that Islamic law has its unique philosophy of punishment; a philosophy which in part cares very little for the criminal and his reform, and concentrates on preventing the commission of offences. This is the part of the penal system in Islamic law known as the "hadd" punishments. Here, nothing was left to the legislator in Muslim society; he could not add anything to, omit anything from, or alter any of the rules laid down in the Qūr'ān and the Sūnna relating to these punishments. Equally noteworthy is the Islamic way of dealing with the crime of homicide, with its dualistic notion of punishment for a crime, and compensation for a tort. Thus, the concept of "ta'zir", or discretionary punishments, with the wide authority given to the ruler or legislator to create crimes and their punishments, and with its direct concern with public morality, presents an everlasting basis on which the needs and requirements of Muslim society can be met.

On the other hand the restrictions on inflicting the punishments, especially "hadd" punishments, in terms of difficulty of proof, recommendation of forgiveness and the possibility of repentance, greatly limit the number of cases in which these punishments can be inflicted.

It can be generally said, that punishment in Islamic law is mainly based on deterrent and retributive philosophy, but scope is available for reformative elements particularly within the provisions of "ta'zir".

However, in connection with the theory of punishment, the most controversial aspect discussed in contemporary Islamic circles is the possibility of applying the Islamic penal system in modern societies. Those who are involved in the dispute comprise two groups, one of which may be called "the advocates" of the application of the Islamic penal system, and the other may be called "the opponents". The discussion has not always been objective, for the opponents often accuse the advocates of being backward, narrow-minded, reactionary and even barbarous. At the same time, the advocates are not less aggressive than their attackers; their list of accusations contains: ignorance, being under foreign, particularly Western, influence and lack of faith.

Apart from this exchange of accusations, both parties present a considerable variety of arguments for and against the case. The advocates, to defend their view, adduce many arguments of which the two most important are: that the Islamic penal system is a part of the law of God which must be obeyed and enforced, and that the application of this system has proved successful in the past, as well as in modern times. Here they usually quote the example of Saudi Arabia to which we have already referred.[1] As a matter of fact both these arguments are right, but the question is whether or not they justify the application of the Islamic penal system in present Muslim societies.

On the other hand, the most important arguments against the case are: that the penal system known to Islamic law is not, like other Islamic legal rules, of any use to present-day society, because of its antiquity and lack of sophistication; and that the Islamic penal system in particular, cannot be applied today as it is

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1. Another example, which may be referred to, is that of Kuwait. The Islamic penal system, including "ḥadd" punishments was theoretically enforced there up to 1960 when the first penal code was formed. The only exception to that was the "ḥadd" punishment for theft which was postponed by an order of the late Shikh Jabir al-Ahmad in 1931. The order was made according to a "fatwā" (formal legal opinion) issued by the (then) Muftī of Kuwait. This information was given to me in a letter of reply from Major General A. F. Thuainī, the Under Secretary of State for the Interior of Kuwait, to whom I am grateful.

very severe, inhuman, and barbarous. No doubt the punishments recognized in Islamic law are very severe, but all the other allegations were adequately replied to by the other side. However, it is not my intention here to go through all the details of this discussion, but to state briefly its main points in order to approach the problem.

The starting point, in dealing with the application of the Islamic penal system, is the understanding of its place within the Islamic legal theory as a whole, or rather within Islam itself. It is well-known that Islam provides a complete scheme for running and supervising every aspect of human life. The rules and regulations, injunctions and prohibitions, laid down by the Qūr'ān and the Sūnna, or derived from them, produce an entire image of the Muslim community from which no part can be removed without the rest being damaged. Equally, no isolated part of this scheme can make any sense, or be of any use.

The philosophy of punishment, in any legal system, is an integral part of this system, and cannot be understood or applied except within its principles, to protect the values recognized by it. If this is true, and it is perfectly true, it must be completely wrong to borrow the penal philosophy of one legal system and adapt it to another, of different principles and values or to apply

the philosophy of punishment laid down by Islamic law to a community in which any part of the Islamic scheme of life is lacking.

To turn to the contemporary Muslim societies one can hardly say that the Islamic way of life is adopted, or even well-understood. There is no exception to this statement even the widely-used example of Saudi Arabia. Again it is not worth going into details, but anyone who has even a modest knowledge of Muslim societies would agree with this.

Therefore, it is nonsense to say that we have to apply the Islamic penal system to present-day Muslim societies, in their present circumstances. It is nonsense to amputate the thief's hand when he has no means of support but stealing. It is nonsense to punish at all for adultery, let alone to stone to death, in a community where everything invites and encourages unlawful sexual relationships.[2] Above all it is nonsense to say that the penal code now in operation in a country like Egypt is almost legitimate under the doctrine of "ta'zir" recognized in Islamic law. Such a code simply has no connection with Islamic law, and does not seek its legality

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2. A similar view was expressed by Abūl A'lā Mawdūdī, in his book Islamic Law and Constitution, 3rd Ed. Lahore, 1967, pp.53-59.

in the recognition of it, but in its suitability to the present circumstances there.[3] Those who try to justify some of the current systems in Muslim countries only prove their lack of understanding of the Islamic image of life as laid down in the Qūr'ān, the Sūnna and the scholars' teaching.

From this point of view, i.e. the impossibility of the isolation of one part, or more, of the Islamic scheme of life, one can say that the application of the Islamic penal system in the present circumstances would not lead to the achievement of the ends recommended by this system. This leads us to consider two points made by the advocates of its application. The first is that the Islamic penal system proved to be successful in the past and the present, in preventing crimes, or at least in minimising the crime rate. As for the past, one of the great advocates claims that "the Islamic penal code was in vogue up to the beginning of the nineteenth century."[4] This claim can hardly be proved. Abū Yūsūf, the second founder of the Hanafī school tells us in his famous text "al-Kharāj" about the extent of the application of the

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3. Compare, for example, Abū Zahra, al-Jarimah wal 'Ūquba, Cairo, p.126-8.

4. Mawdūdī, op.cit. p.65.

Islamic penal system during the era of Hārūn al-Rashid, the Abbāsid Caliph. His statement leaves the reader definitely sure that, by this time, the Islamic penal system was far from being enforced.[5] Abū Yūsūf died in the year 182 A.H. So it was after less than two centuries that the circumstances made it necessary to relax the enforcement of the Islamic penal system. This was due to the fact that the society for which this system was framed no longer existed after the widespread expansion of Islam among people of totally different values. It is the very same consideration, i.e. the non-existence of the society visualized by Islam, which led us to say that the application of the Islamic penal system nowadays would not achieve its ends. The well-known example of its successful application in Saudi Arabia can only be used as evidence for this view.

The second point one may consider is the claim that the Islamic penal system is preferable to any counterpart, because Islam, and the Muslim jurists, discovered and legalized all modern theories known to penal codes and legislations. This early advancement, say the advocates, is a point in favour of the application of this penal system. This point has often inspired articles, speeches,

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5. See, al-Kharāj, Cairo Ed. 1352 A.H. pp.149-152.

and even text books. To me it has no relevance to the application of the penal system of Islamic law. It may be of great value in research concerned with legal or social history, but certainly it has nothing to do with the application of a legal system. The only justification for operating one legal system and not another is that the enforced one provides the community with all possible "good" and protects it from all possible "bad". The "good" and the "bad" are to be measured in accordance with the majority's needs and requirements, or, in other words, the majority's approval. No doubt, the Islamic legal system had such qualifications in the past, when the circumstances were appropriate for its enforcement. Also, there is no doubt, at least to the Muslims, that the will of God as revealed in the Qūr'ān and the trustworthy Sūnna, has an everlasting value and the ability to safeguard the community's interest. But first, and before we can demand the enforcement of the Islamic penal system, it must be proved, beyond the slightest shadow of doubt, that the Muslim community visualized in the Qūr'ān and the Sūnna had became an existent fact.

Moreover, it must be remembered that Islamic law is an ideal legal system, i.e. it is not a customary law which grew up within the society in which it was applied;

it is a legal system which was formulated in order to realize an ideal society, i.e. the Islamic society. This idealism is clear enough from the Qūr'ānic injunctions and prohibitions concerned with the social life of Muslims. Nevertheless, it is even clearer in the jurists' work, not only on social but also on legal and even political topics. Islamic law measures the realities in society according to Islamic standards and approves or disapproves them. This is not because of what people do or abstain from doing, but because things are "good" or "bad" in the abstract. Apart from the rules of public interest "maslaha", necessity "darorah" misuse of right "isāat isti'māl al-haqq" and other similar rules, this emphasis on ideal concepts is the general tendency in Islamic law. Therefore, one can say that when that ideal society does not exist, Islamic law as expressed in the jurists' manuals cannot be applied. Even historically this was so, as for instance in the establishment of the court of the official in charge of the crimes "wālī al-Jarā'im" to deal with criminal cases on a different basis, both in matters of procedure and substance, than that of the usual court of the "qādī".[6]

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6. For further details see, Shalabī, al-Fiqh al-Islami bayn al-Mithaliya wal-Waqi'ya, pp.6-19, and Coulson, Conflicts and Tensions in Islamic Jurisprudence, pp.58-76. each one of these two writers has approached the subject in a different way, but they both contribute to it.

We conclude, therefore, that the Islamic penal system, or rather Islamic law, is to be applied only within the above-mentioned Islamic society. Whenever this society exists, Islamic legal system will be able to operate without any need to "the advocates" and in spite of all the objections of "the opponents". Whether or not this society will come into being is a matter beyond my own judgement.

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* The letter after the title of each book indicates the author's school, as follows: (H) Hanafi, (M) Maliki, (Sh) Shafi'i, (B) Hanbali, (Z) Zahiri, (Zd) Zaydi, (I) Imami, and (D) Ibadi

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