TITLE PAGE

THE CONCEPT OF CRIME AND PUNISHMENT

UNDER ISLAMIC LAW

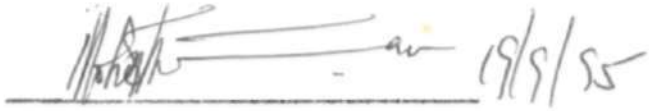
BY

MOHAMMED BELLO UTHMAN

LL.M THESIS 1995

D E C L A R A T I O N

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19/5/85

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C E R T I F I C A T I O N

This thesis entittled: THE CONCEPT OF CRIME AND PUNISHMENT UNDER ISLAMIC LAW by MOHAMMED BELLO UTHMAN meets the regulation governing the award of Masters of Law of the Ahmadu Bello University, Zaria and is approved for it's contribution to knowledge and literary presentation.

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D E D I C A T I O N

To my Parents, Abubakar Garba Uthman and Mariam Toure Uthman and all members of My dear family.

A C K N O W L E D G E M E N T

All praise is due to Allah who created man in the best of forms and gave him His laws and endowed him with good intellect and taught him by the pen, that which he knew not.

My hearty thanks go to first, my dear parents who strived so hard to educate me. I must also thank profoundly, the Doctors Ibrahim Na'iya Suda and Aminu Muhammad Gurin for teaching me so much over a very long period.

I am also indebted to Mallam Ibrahim Ahmad Aliyu and Mallam Hassan Idris of the Centre for Islamic Legal Studies, A.B.U. Zaria for all their assistance.

I must also thank Mallam Umar Aliyu Mohammed, Mallam Ahmadou Munkaree and Mallam Salihu M. Kanam for their deep and profound support and concern as they breathed so much on my neck to see me accomplish this great task.

I must also not leave out Mallam Sabo Ahmad and all the staff of the Centre for Islamic Legal Studies

and the so many individuals who assisted me in one way or the other during my research work.

My dear wife, Ikilimatu, gave me so much in terms of emotional and moral support.

Finally I must lift my cap for Mrs. D. G. Akinwande of the Islamic Law Department who put so much effort in typing my manuscript to perfection.

All mistakes and errors that may still be found are mine and I seek the Pardon of Allah (SWA) for He is the Most Merciful of all those that show mercy.

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N

A B S T R A C T

It is common knowledge that in the recent past crime rates have grown to alarming rates. This is a global problem which must be addressed properly. The Islamic Law has supplied subtle rules that, if followed, will curb the infestation of crime in Society. Unfortunately the vast majority of the people are either ignorant or mis-informed of this fact.

The topic, The Concept of Crime and Punishment Under Islam has been chosen by the researcher to bring to light the fundamental principles of the Shariah regarding crimes and their punishments, viz - a - viz the subtle differences of opinion taken by the learned men.

For this reason chapter one covers the framework of the Islamic Law in general and the legal, social, and indeed the geographical reasons for the various laws regarding crime. The wp§Elftd4ng of the law has also been touched in laying a foundation for the main substance of the topic.

Chapter two covers the nature and form of the law of crime and punishment. It also explains the various network of precepts and divisions of crime. The main

classifications of crimes in the terms of the Hudud, Qisas. and Ta'zir have also been introduced.

Chapter three discusses the Hudud offences exclusively together with all the 'fixed-offences', their variant modes of proof, defences and punishments.

Chapter four follows in explaining the two other classifications of Qisas and Ta'zir with special reference to their proper enforcement.

Chapter five concludes the thesis and therein the researcher has posed some issues related to the modern developments of the space age and their influence or effect on the laws cf the Shariah with particular reference to the laws of crime. Various reasons have been identified as being forefront in the manifestation of loose morals. Finally suggestions have been offered, within the stated laws of means to erradicate the excessive crime rates in society.

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A B B R E V I A T I O N S

A.S. - Alaihis - Salam (May Peace be on him)

H.H.S. - How High Soever

H.L.S. - How low Soever,

R.A. - Radiyallahu Anhu (May Allah be Pleased with him).

S.A.W. - Sallallahu Alaihi wa Sallam (May the Peace and Blessings of Allah be Upon Him)

(SWA) - Subhanahu wa Ta'Ala (The Sanctified, the Most High).

GLOSSARY

Adah:	Custom
Adiyyah:	Quasi-political offences.
Afw:	Pardon
Ahad:	The Tradition narrated by only one person.
Ahadith:	Plural of Hadith
Ahkam:	Legal rules
Ahl al-Hadith:	The early traditionists i.e. those Scholars who refrained from excessive use of Ijtihad.
Ahl al-Madinah:	The people of al-Madinah.
Ahl al-Ra'y:	The early scholars who advocated Ijtihad.
Ahl al-Sunnah wal Jama'ah:	The Othordoxites.
Aidiyahuma:	'Their hands' i.e. of the thieves
Aimanahuma:	'Their right hands' i.e. of the thieves.
Akhdh al-Khafiyyah:	Theft done in a Clandestine way.
Amdiyyah:	Intentional
Aman:	Sound Mental Sense.
Asr:	The Afternoon, Afternoon prayer

Ayat al-Ahkam: Verses of Legal Connotation

Ayat al-Ahkam al-Muffassal: Detailed Legal Verses.

Ayat al-Ahkam al-Mujmal: Concise Legal Verses.

Ayat al-Ahkam al Mujmal wal Muffssal: Concise cum-detailed legal verses.

Ayat al-Awamir wa Nawahi: Verses on Commands and Prohibitions.

Azara: To assist, prop up.

Azl: Coitus Interuptus

Badiah: Injury that breaks the skin and flesh.

Bagy: Rebellion.

Bait al-Mal: Public Treasury

Basitah: Whole/Complete Offences.

Bid'ah: Innovation

Bikr: Virgin, not having married.

Da'if: Weak (Traditions)

Dara'ib al-Maliyyah: Mineral/Natural resources

Dar al-Harb: Enemy or hostile territory.

Dar al-Islam: The Islamic State.

Damigah/Damiyah: Injury that Causes the Oozing Out of blood.

Dhimmi: Non Muslim Subject of the State.

Dinar: Gold Coins

Dirham: Silver Coins

Diyyah:	Blood Money
Diyyah al-Mugallaznh:	Intensified Blood Money
Diyyah al-Mukhaffafah:	Lightened Blood Money
Fahishah:	Indecency
Fai:	Spoils derived from the fleeing enemy
Fatwa:	Legal opinion
Fawdawiyyah:	Anarchism
Fiqh:	Juripprudence, Science of Law.
Ghair al-Ja'ifah:	Injury that does not bore into the head or face.
Ghairi Maljiyun:	Where there is no escape.
Ghasb:	Usurpation.
Ghazw:	Expedition, battle
Hadd:	Lit. limit (of Allah), Crimes with fixed penalties.
Hadith:	Report of the Prophets Sayings.
Hajj al-Wida:	The'Farewell Pilgrimage'
Hakim:	Judge, arbitrator
Halal:	Lawful
Haqq al-Adami/Ibad:	Interest of the Individual
Hasan:	Fair (good) Tradition
Hashimah:	The Injury that breaks the bone.
Hijrah:	The Flight, Migration.

Hiqqah:	The three year old she-Camel.
Hirabah:	Brigandage
Hirz:	Safe Custody
Hukum al-Amwat:	Ruling (assumption) of death
Hukm al-Hayat:	Ruling (assumption) of life
Husn:	Goodness
Ibaqat:	Rituals, Devotion as opposed to Mundane issues
Idrak:	Mens rea
Ihram:	The Sacred State of purity that the pilgrim assumes.
Ihsan:	Moral and physical fortification
Ijma!	Concensus of opinion of the learned.
Ijtihad:	Lit.to exert the intellect: form a legal opinion.
Illa:	'Effective Cause'
Ilm al-Kalam:	Theology
Imam:	Leader
Iqrar:	Confession
Irhabiyyah:	Terrorism
Islam:	Submission to The Faith
'Ismah:	guaranteed right or protection (especially to life).
Isnad:	Chain, link (of reporters)
Istidlal:	Reason, logic.

Istihsab:	Concordance
Istihsan:	Juristic equity
Istisab:	Control of the Markets.
Istislah:	Public good or interest
Ithm:	Wrong
I'tiyad:	Inchoate, incomplete
Jahiliyyah:	Ignorance
Jahmiyyah:	The heretical sect that were crushed at about 132 H.
Ja'ifah:	Injury that bores deep into the head or face.
Janabah:	State of ritual impurity, especially after coitus.
Janayah/Jarimah:	Crime, offence
Jara'im al-Hudud:	Offences carrying fixed penalties
Jara'im al-Qisas:	Offences subject to the retaliation.
Jidh:'	The four year old she-camel
Jild:	Lit. skin but used to refer to whipping or lashing.
Jizyah;	The tax imposed on all able-bodied non-muslims who are subject to state.
Jumu'ah:	The Friday congregation
Kaffarah:	Expiation
Kafir:	Non Believer
Khalifah:	Successor, agent, representative.

Khalwah al-Sahihah:	The valid retirement
Khamr:	Intoxicant
Kharisah:	Injury that breaks the skin only.
Khata':	Mistake, error
Khata Fil Fi'l:	Mistake in the act
Khata Fil Qasd:	Mistake in the intent
Khulafa al-Rashideen:	Rightly guided Caliphs.
Khums:	'The fifth'
Khwarij:	'The Seceders' who separated from Ali and Mu'awiyah
Kitab:	The Book
Labun:	The two year old she Camel
Lauth:	Strong Suspicion as to Murder.
Li'an:	Mutual Imprecation
Madhahib:	Plural of Madhhab (School of Thought)
Malis al-Shura:	Council meeting
Majus:	Magian
Makhad:	The one-year old she-Camel
Makruh:	Reprihensible, disliked.
Maljiyun:	Escapable, where there is a way out of duress
Ma'mummah:	Injury that reaches the tissues beneath the skull
Mandub:	Recommendable, liked.
Masalih al-Mursala:	'Unrestricted Interest'
Ma'siyah:	Wrong.

Nabidh: A substance prepared from grapes.

Nafs Min Wajhin Duna Wajhin: The embryo i.e. considered as a 'partially living being.

Nasara: The Christians

Nasl: Family

Nass: A sacred text of the Our'an or Sunnah

Nisab: The minimum standard fixed; especially for theft and dowry.

Qadariyyah: Sect that taught predestination

Qadhf: Defamation, Slander

Qasama: The oath taking procedure taken after a murder.

Qata' 'The penalty of cutting-off of the limbs of the body.

Qat al-Tariq: Highway robbery.

Qatl al-Amd: Deliberate, Intentional Homicide.

Qatl Khata': Mistaken Homicide.

Qatl Shibh al-Amd: Quasi-Intentional Homicide.

Qira'in: Pregnancy

Qisas Retaliation

Qisas Fi Nafs: Retaliation for loss of life.

Qisas Fi Ma Dunan Nafs: Retaliation in cases not involving the loss of life.

Qur'an: The Holy Scripture revealed to Muhammad (SAW).

Rafidiyyah: A heritical sect of the Shiah Persuation.

Rajm: The penalty of stonning.

Ramadan: The Ninth Month of the Islamic Calender.

Rasul: Messenger.

Riba: Usury, Interest.

Riddah: Apostacy

Sababiyyah: (Indirect) Cause.

Sadaqah: Charity

Sahabah: Companions

Sahihain: The highly Impeccable 'Compilations of al-Bukhari and Muslim.

Salaf: The first five hindred years after the Hijrah

Sariqah al-Kubra The greater theft (Brigandage)

Sariqah al-Sugra: The lighter, lesser theft (larceny)

Shahadatain: The double formula recited at the acceptance of Faith

Sharb al-Khamr: Wine drinking

Shari'ah: The Law of Islam.

Shi'ah: The Partisans

Shubhah: Doubt, uncertainty

Shubhah Fil Fi'il: Doubt as to the act done.

Shubhah Fil Jabhah: Doubt as to the legality of the act.

Simhaq: The injury that leaves only a thin tissue between it and the bone

Siyam:	Fasting
Siyasah al-Shar'iyyah:	The administration of the Shariah.
Siyasiyyah:	Political offences
Sukr:	Intoxication
Sulh:	Settlement
Sunan:	Compilation of Sunnah (Traditions)
Sunnah:	The way (of the Messenger of Allah).
Sunni:	Othordox follower of the way of the Messenger
Tabi'i:	Successor of the Companions pl. Tabi'in
Tabi ul-Tabi'in:	Successors of the Successors of of Companions.
Tagleez:	Fattening, toughening (of Compensation).
Ta'ifah:	Party, group.
Takafa':	Equality
Taklif:	Responsibility, legal capacity.
Talaq:	Divorce by the husband.
Taqlid:	Following the Precedent of Earlier jurists.
Tarafain:	Lit. the two ends i.e. the academic or scholastic relationship between Abu Hanifah and Muhammad.
Ta'wil Fasid:	A wrong interpretation.
Ta'zir:	The discretionary power of the Judge to punish.

Chapter I

I N T R O D U C T I O N

1.1 The Shariah and Islam:

The 'Shariah' or the way enjoined by Islam is technically rendered as the 'Islamic Law' in English. It literally means a path to a water hole which signifies a route or course to everlasting success. The 'Shariah' is a synthesis of political, social, cultural, religious and legal norms and values derived from the Qur'an and Sunnah; known as the roots (Usul) of law. It is a divine system in that all actions under the Shariah must agree with the will of the ultimate Being, the One, the Irresistable: who enjoined this will on all previous generations,(1) and whom He would all gather before Him to account for their actions in accordance with the divine Law.(2)

The bedrock of the Shariah is based upon the concept that all sovereignty belongs to Allah alone.(3) From this Maxim flows all the rules and regulations brought about by the 'sources' of Islamic Law. It is obvious from this, that all subsidiary sources devised by man must conform to the divine will. In the words of the Gracious Qur'an;

> "Verily your Lord is Allah (alone) who created the Heavens and the earth in six periods and then established Himself upon the Throne. (Who) makes the night cover the day and then the day follows the night swiftly; who created the Sun, the Moon and the Stars, all of which are under His Command. Behold! His is the creation and His the Sovereignty. Full of blessings is Allah, the Lord of the Worlds.(4)

In another place the Qur'an says:

> "Follow what has been sent down to you from your Lord and do not follow other patrons beside Him"(5)

The illustrious commentator, Ibn Kathir, has explained the above words "do not follow other patrons beside Him," as meaning that the revelations of Allah should not be abandoned for other laws.(6) The fundamental objective of the Shariah is to be the sole restrictor of the order of its adherents. Gibb, the Western Orientalist,has been apt to recognise this when he said;

> "It is the Shariah which, all down the Centuries, has not only represented the Master Science in the Muslim world but the most effective agent in moulding the social order and Community life of Muslim peoples and

> in holding the social fabric of Islam compact and secure through all the fluctuations of political fortune."(7)

'Shariah' is the product of Islam, which is commonly translated as 'peace' or submission. But a deeper exploration shows that it connotes much more than a simple submission. It entails complete surrender and obedience to the laws of Allah in all respects. Man should persue Husn (goodness) of life and character as expressed from time to time over the ages, culminating into the final revelation in the Qur'an and the Sunnah of the Prophet Muhammad (SAW). The Qur'an has expressed this in the following verse:

> "Lo. Religion with Allah is the surrender to His will and guidance ....."(8)

It is interesting to observe that similar statements have been recorded in earlier scriptures.(9) Islam is the Religion that was given to Mankind starting from Adam (A.S.) up to the last Prophet, Muhammad (S.A.W.) as a mercy to the worlds.(10) Through Islam the individual elevates himself from the status of a lower animal to the greatest of heights.(11)

Thus since Islam is a complete religion traversing all fields of our very existence, and also based on perfect justice and goodness, the Muslim finds peace with his Creator, his neighbour and also himself. Another verse of the Qur'an demonstrates this further by stating:

> "Then we put thee on the right way of religion: So follow it and do not follow the vain desires of the ignorant."(12)

On the spirit of the Shariah, the jurist Taftazani is quoted as saying:

> "The Islamic dispensation is one which would not have been known had there not been a divine revelation. It includes the revelations made by Allah to the earlier prophets of the Isrealities and the Nasara as confirmed by the last revelation through the prophet of Islam. The revelation to the holy Prophet is the Shariah 'par excellance'. It implies that it is only what is stated in the divine Messages, or inferred from them that come properly under the Shariah. It means in other words, that matters determined by intellectual processes are outside the scope of the sacred Law. The totality of Gods Commandments relating to the activities of man as given by Him are based upon His will bounded by no limit. The duty of Mankind is to follow it and not to judge it for causes through human intellect."(13)

1.2 Differences Between The Shariah and other Concepts:

1.2.1. Divine Sovereignty:

We have already seen that in the Shariah Sovereignty belongs wholly to Allah. This is as a result of the fact that Allah is the sole maker and fashioner of the Universe(14) and He alone has absolute knowledge about His Creation,(15) and He alone directs and orders the heavenly bodies which obey him without resistance.(16) Mankind, then, must follow the example of the Cosmos. But, in following or obeying the Commands of the Almighty Creator, Man has been given a choice to either follow or to refuse to.(17) This is because man is not a mere creation but a vicegerent of Allah; a representative who has been fully entrusted with the implementation of the divine will on earth. The Holy Quran states:

> "And recall the time when your Lord said to the Angels; "I am going to place a vicegerent on the Earth." They (humbly) enquired: Art thou going to make such a one as will cause disorder and shed blood on the Earth? We are already engaged in hymning thy praise (and carrying out thy Orders) and

> hallowing Thy name." (Allah) replied:" I know what you know not." After this He taught Adam the names of all things. Then He set these before the angels and asked: "Tell Me the names of all these things, if you are right (in thinking that the appointment of a vicegerent on Earth will cause disorder)" They replied; "Glory be to Thee! Thee alone art free from defect. We possess only that much knowledge which Thou has given us. Indeed Thou alone art All-knowing, All-Wise.(18)

It is manifest from the above verse that the term '<u>Khalifah</u>', translated as vicegerent, is one who exercises delegated powers on behalf of another. (In this case, Allah). Man, then, Is not the Master; he is only a representative or agent of the only Master and, strictly speaking, cannot possess any powers of his own except those which are delegated to him by the real Master. It is also obvious that man has no original jurisdiction to legislate and make laws for himself. Any law passed by Man must find endorsement in the <u>Qur'an</u> and <u>Sunnah</u> before it finds validity (19) Under the Shariah. It would be pure dishonesty, and also treason, for Man to claim absolute legislative rights or some form of sovereignty in any matter of his existence.(20)

The Glorious Our'an goes further to elucidate the absolute legislative competence of the Supreme Master and also the fallibility and incompetence of Man in the field of making Law. Some few examples are given below;

> "They ask: have we also got some authority? Say; 'all authority belongs to God alone" (Our'an 3:154)

> "The authority rests with none but Allah. He commands you not to surrender to anyone save Him. This is the right way (of life)" (12:40).

> "Do not say wrongfully with your tongues that this is lawful and that is unlawful" (16:116).

> "Whoso does not establish and decide by that which Allah hath revealed, such are disbelievers" (5:44).

Thus no man, nay, not even a prophet can claim absolute Law - making power for the Holy Prophet (SAW) himself has been ordered to say;

> "I do not follow anything except what is revealed to me" (6:50) (21)

The concept of sovereignty of God may be summarised as follows;

(1) No persons, class or group, not even the entire population of the state as a whole, can lay claim to sovereignty. God alone is the real sovereign; all others are merely His subjects;

(2) God is the real Law giver and the authority of absolute legislation rests in Him. The believers cannot resort to totally independent legislation nor can they modify any law which God has laid down; even if the desire to effect such legislation or change in Divine laws is unanimous; and

(3) An Islamic State (run by the Shariah) must, in all respects be founded upon the law laid down by God through His Prophet.....If it disregards the law revealed by God, its commands will not be binding on the believers.(22)

The Concept of Sovereignty Under Modern Legal Science: It has been established that under the Shariah the term 'Sovereignty', which is understood by the Modernists to mean absolute authority, cannot be claimed by Man. This term can only be used in reference or connection with the Divine Being who is the Maker of Creation. Contrary to this, Western and secular scholars have ranked man a Master in his own right and the term is used to connote Man's absolute power to reign independent of the will of the Supreme Being. Bodin was the first to develop the concept of human sovereignty. For him sovereignty means 'a perpetual, humanly unlimited, and unconditional right to make, interpret, and execute law.' And this according to him is necessary for any well ordered state. Burges defines it as 'original, absolute unlimited power over the individual subject and over all associations and subjects.' Austin has also advanced his perception of sovereignty by saying:

> If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the Society is a society, political and independent.(23)

Austin goes further to restrict law to me an

> "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."(24)

With Austin, Law is nothing more than the command of the Sovereign' with the construction that law is, stricto-senso, divorced from the concept of justice.

According to the advocates of 'Natural Law,' who run back to the Greek philosophers, wild animals, fish and birds devoured each other because law was unknown to them; but Zeus, the chief of the olympian gods, gave law to Mankind as his greatest present. It is such errors of thought that led Friedmann to tag the history of Natural Law as 'a tale of the search of Mankind for absolute justice and of its failure." It appears that over the ages the advocates of the Natural Law theory sought to establish a higher ideal than the positive law. But with the ever-changing political and legal atmosphere it did nothing more than establish that Natural Law is something that the law ought to be as distinct from the positive lawyers assertion that law is what the law is.(25)

Under Natural Law however one thing is obvious; that Materialism is not the sole determinant of law. Fairness and justice must have a place in the law which cannot be usurped by man as an absolute right. It has been said that Socrates (470 - 399 B.C.)

> "was primarily concerned with ethical metters and conduct rather than the nature of the universe. For him goodness and virtue come before knowledge. He obeyed an 'inner voice and suffered death rather than give up his philosophy. He believed in the persistence of life after death and was essentially a monotheist (26)

Positive law also had recognition with the Greek philosophers and some pre-socratic philosophers like Democritus and the pythagorean school for example, held that the citizen owned his first duty to the state and that he should subordinate himself thereto, wholly.(27 These beliefs and views have metamorphosised into present day movements for 'Democracy'(28) and 'freedom of Man' to thrive on independence to legislate and pass law as a fundamental right in contrast to the divine law.

The Holy Qur'an is firm on the issue of sovereignty belonging to Allah alone and all other theories, concepts and 'isms' are regarded as

deviations and errors. The Holy Book provides; "these are mere names (jargons) that ye call them; ye and your ancestors; to whom Allah has sent down no authority. They follow nought but guess work and their human impulses...."(29)

1.2.2. Idealism:

In its philosophical, negative sense, the term 'Idealism' means the absence of matter in the universe and that 'all that exists is simply mind or spirit.' Idealism in relation to the Shariah represents the infallibility of the Law of Allah. Allah is the Perfect Being and defectiveness can never be ascribed to His being, attributes and nature. He is the Omnipotent, the Omniscient, the Omnipresent. Thence His Law is all-prevailing all-pervading and all-comprehensive. Allah describes Himself in the Holy Book as "the First and Last, the Manifest and the Immanent and is the knower of all things.(30) And also that "Allah knows better and ye do not know."(31) According to Dr. M. Muslehuddin,

> Divine Law has combined in itself, not only what the Law 'is' but also what law 'ought to be.'

> It is, in short, the 'is' and the 'ought to' of law and, thus, positive as well as ideal, and may aptly be described as 'The Positive Law in Ideal Form.'(32)

Allah is perfect and so also are His Laws as stated in the Glorious Qur'an; "The Word of Your Lord is perfect in regard to Truth and justice; there is none who can make any change in His Decrees, for He hears everything and knows everything."(33) The Shariah of Allah is for all times and situations. Ever since the first Man up till the last hour Man's habitation on the Earth has been regulated by the all-perfect Laws of Allah Most High. Man has been reminded of this fact over and over again in the Glorious Quran. For example Allah Most High says:

> "Then We had given to Moses the Book to complete the blessing for those who adopted the righteous attitude; containing details about all important things, and was a perfect guidance and mercy (And it had been given to the children of Israel in order that) the people might believe in the (ultimate) meeting with their Lord. And likewise, now, We have sent down this Book which is a perfect blessing; so follow this and adopt the God-fearing attitude so that mercy may be shown to you.(34)

It can be noted that even the orientalists are apt to recognise this.

Jackson has made an exposition of the position thus:

> Islamic law finds it's chief source in the will of Allah as revealed to the Prophet Muhammed (SAW). It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the Qur'an, which leaves little room for additional legislation, none for critism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the Qur'an lays down rules of behaviour towards others and toward society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet (SAW), which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at peril of his future life"(35)

1.2.3. Separation Between Law and Morality:

As against the all-encompassing nature of the Shariah in dealing with all aspects of life, there is, especially in the Western World, a class of

jurisprudents who insist on separation between Law, per se, and morality and non-legal matters when legality is looked at, Per-se. This brand of Modern thought is sometimes referred to as 'Secularism' which literally presupposes what is worldly and material as opposed to what is religious or spiritual. Professor Hart has gone through great pains in attempting to prove the justification of this theory. says he;

> We may call problems which arise outside the hard core of standard instances of settled meaning, "problems of the penumbra'; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multi-dimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction; and so deductive reasoning which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area man cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.(36)

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But Professor Anderson is apt to declare;

> Traditionally the life of a Muslim has been largely dominated by the twin sciences of theology and the sacred law. If the former taught him what he should believe, it was the latter which prescribed the way in which he should behave and all that he should do and abstain from doing. The technical term for this system of duties, as it has aptly been described, is the Shari'ah.....As such it covers every aspect of the law as this is described today national and international, public and private, criminal and civil together with a vast amount that would not be regarded as law at all in contemporary western thought.....(37)

The Shari'ah defies western orthodoxy in that its laws are interwoven and laced into each other. For example the legal injunction on Adultery or Fornication which obligates chastisement(38) is a metamorphosis of the moral exhortation to cast down the eyes at the opposite sex (39) and the warning against approaching Adultery or Fornication.(40 The urging of the believers to marry up to four wives or a slave girl where one cannot afford a wife, or an extra wife as the case may be, in order to protect and preserve the moral sanity of the Community is also a tempting similitude. These moral injunctions, according to Maududi;

> "Became the source of many social laws and rules of conduct in Islam. For instance Zina (adultery or fornication) and false accusation of Zina were made coguisable offences; purdah (seclusion for women) was introduced and its rules were laid down, stringent steps were adopted to stop vulgarity and corruption, drinking was forbidden, and so were instrumental music, dancing and the making of human-likenesses - (all the Kith and Kin of Zina!); and a family law was evolved by which marriage was made easy and a simple affair and the social causes of Zina were totally eliminated."(41)

In a like manner the legal punishments for theft and robbery are suspended upon the economic stability of the community guaranteed by the implementation and enforcement of Zakat (compulsory alms giving), Sadagah (voluntary alms giving) and the absence of usurious dealings.(42)

The differences between the Shariah and other modern legal concepts are much. But a proper comprehension would be found by examining the roots of the 'Shariah.'

1.3. The Sources of The Shariah:

The sources of the Shariah are called Usul-al Fiqh in legal language. They are as follows;

(a) The Qur'an or the Book of Allah,

(b) The Sunnah or the traditions of the prophet (S.A.W.);

(c) The Ijma' or concensus of the learned; and

(d) Qiyas or analogical deductions from the above.

Jurists over the ages have propounded some subsidiary precepts for example (i) Istihsan or juristic equity; (ii) Istislah/Maslaha or public interest, (iii) Istishab or concordance; (iv) Istidlal or Reason/Logic, (v) Urf/Adah; i.e. Customs. But an indepth study is essential to comprehend the application of these sources from the core.

1.3.1. The Period of Legislation. (610-632 AD)

This period between the holy prophet's appointment as Messenger of God (marks the beginning of revelation of the Holy Qur'an) and the death of the holy prophet (S.A.W.) (end of revelation) has been coined by some writers as the 'legislative period of Islamic Law.' This period is characterised by two distinct features; the Qur'an and Sunnah. During this stage these were strictly speaking the only sources of legislation and

in a sense still hold that position for all time.

The Our'an or The Book: "This is the 'Book' .....where in there is no doubt; a guidance for those who keep their duty (to God)"(43)

This is how the Our'an introduces itself; but it all started with the first revelation which commanded; "Read! : In the name of thy Lord who created, created man from a clot. Read! and thy Lord is Most Bounteous. Who taught man with the pen what he knew not."(44) After this revelation, from Allah Most High through the Arch angel, Jibril,(45) succeeded to the holy prophet (S.A.W.) for the next twenty three years; 13 in Makka and 10 at Medina when the holy prophet was forced out of Makka and founded an Islamic Community there at.(46) These verses of the Our'an were broadly classified into two; viz:

1. Verses relating to Ilm al-Kalam:- They concern matters of belief and the gifts and mercy that the Almighty Creator has showered on Mankind, and Man's duty to reciprocate these by worship of the divine Being. A few examples of these

verses are presented below;

(a) "Which of the favours of Allah would ye then reject?"(47)

(b) "Verily in the structure of the heavens and the earth, in the alteration of the night and day, in the ships that sail the ocean laden with Cargoes beneficial to Mankind, and in the rain water which Allah sends down from the sky and thereby gives life to the earth after its death and spreads over it all kinds of animate creatures; in the blowing of the winds and in the clouds which obediently wait for orders between the sky and the earth, are signs for people with common sense"(48)

2. Verses Relating to Ahkam or Legal Matters. (technically called 'Ayat-al-Ahkam):- These verses form the sources of the Shariah. Some jurisprudents have been known to call them 'Ayat-al-Awamir Wa Nawahi (Commands and prohibitions) or, in simple language, dos and dont's of the Shariah(49) Imam al-Suyuti is of the opinion that verses with legal connotation are about 500. But there are many scholars who presuppose a number much higher than this and still a large number reckon less than this.(50) These verses have been classified into four.

(i) Ahkam-al-Mujmal (Consise Injunctions): These are compact verses. However the Qur'an does not give detail as to these commandments. For example the laws enjoining, Salat, prayer), Zakat (poor due) Sawm, (fasting) and the Hajj (pilgrimage), The detailed rules are exaplined by the Holy Prophet (S.A.W.).

(ii) Ahkam Al-Mujmal wa-al Mufassal (Consise Cum detailed Injunctions): These are commands mentioned in brief in some verses but are further explained elsewhre. Examples may be found in verses relating to War, booty, prisoners, non-Muslims etc. They are furthermore explained by the Sunnah and also by the use of Ijtihad (legal opinions by the learned).

(iii) Ahkam al-Mufassal (detailed Injunctions) Here the Qur'an gives ample elucidation; therefore there is no room for Ijtihad e.g. Hadd punishments i.e. Theft, Robbery, Zina (Adultery), Defamation, Qisas, (Retaliation) etc.

(iv) Fundamental Principles of Guidance Derived from the Qur'an:- These principles do not have clear cut definitions either from the Qur'an or Sunnah except basic norms. They are to be provided through the means of Ijtihad. There are, for e.g.:-

> Principles of freedom, justice, consultation, principles of justice, public interest and equality.(51)

The Sunnah:- Literally meaning a way or path. It really signifies the sayings, actions and implied approvals of the holy Prophet (S.A.W.). The holy Prophet (S.A.W.) has been given explicit authority by the Almighty Himself. It is only rational that for a complete faith and belief in Islam, the Sunnah must be as binding as the Qur'an. For Allah (S.W.A.) stresses; "He who obeys the Apostle, Obeys God."(52) In another verse it is said:

"So hold firmly to what the Apostle assigns to you and deny yourselves what he forbids you."(53) Furthermore the Qur'an says: "But no! By thy Lord,

they can have no (real) faith until they make thee judge in all disputes between then, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction."(54)

The duty of the 'Messenger' was not merely to deliver the message but also to explain and expound the message in the clearest way. This has base in the Our'anic provision; "...And We have sent down unto you also the Message; that you may explain clearly to men what is sent for them, and that they may give thought."(55)

The Prophet (SAW) himself is reported to have said;

> "Undoubtedly, I am given the Our'an and the like of it"(56) (i.e. Sunnah)

Based on the above texts, the Sahabah (Companions) of the holy Prophet (SAW) followed his 'way' to the best of their ability.

Ijtihad and Opinion:-

During this period the only sources of law were the Our'an and the Sunnah. Whenever there was a situation, the Companions were assured of revelation or at least, clarification by the holy Prophet (S.A.W.). Both the Our'an and the Sunnah stressed on the Companions, the

disadvantage of probing into issues of which the Qur'an was silent and also of asking irrelevant questions which might lead to onerous duties. E.g.

> "Or do you wish to question your Apostle the way Musa was questioned aforetime?..."(57)

Another similar exhortation is contained in the following;

> O ye who believe, do not ask questions concerning such things which, if made known to you, would cause harm to you, but if you will ask such questions at the time when the Qur'an is being revealed they will be made known to you. Allah has forgiven what you have done up to this time for He is for He is forgiving and Forbearing. Some people before you asked such questions: then they were involved in disbelief because of those very things.(58)

The people who were involved in disbelief were the jews. They began by involving themselves in hair spliting arguments to avoid a certain command. This led to the imposition of conditions which they could not observe. The Sahabah, as regards urgent serious matters would ask the holy Prophet (SAW) who would sometimes answer them or wait for revelation. Where, however, the Sahaba could not reach the prophet (S.A.W.) they resorted to Ijtihad or their opinions. This opinion

of theirs would then be referred to the Messenger for confirmation. Now such opinions of the companions were not always unanimous. For example on one occassion the Holy Prophet (S.A.W.S.) ordered "He who believes in Allah and the last day should not offer the Asr (afternoon) prayer except in (the land) of Bani Quraidha" (a jewish settlement). The Companions set off and along the way a group, anticipating that they would not reach their destination before sunset, stopped on the way and said their prayer. However the others said that the holy prophet (SAW) had given specific instructions not to perform the prayer save in the land of the enemy. They, thus,proceeded on and did not say their prayer (until they reached their destination. On their return the holy prophet (S.A.W.) held both views as correct.(59)

Mu'adh b. Jabal is reported to have said that when God's Messenger sent him to Yemen he asked him how he would judge when an occassion arose, and he replied that he would judge in accordance with God's Book. He asked what he would do if he could not find guidance in God's Book and he replied that he would act in

accordance with the Sunnah of God's Messenger, He asked what he would do if he could find no guidance in the Sunnah of God's Messenger and he replied that he would do his best to form an opinion and spare no pains. God's Messenger then patted him on the breast and said 'praise be to God Who has disposed His Messenger's Messenger to something with which God's Messenger is pleased."(60)

To sum up this period, the Qur'an or 'Book' was being revealed and it was always available for the believers. The Sunnah was not only explanatory to the Qur'an but also complementary to it(61) Ijtihad or opinion of the companions was used in instances where the companions could not reach the Prophet (SAWS) for one reason or the other. After the passing away of the Prophet (SAW), revelation naturally ceased; but only after providing Mankind with a complete code which expresses itself thus;

> "We have sent down to you the Book; as an explanation for everything"(62) and, "This day I have perfected your religion for you and completed My favour unto you and approved 'Islam' as the way of life for you."(63) The holy prophet (SAW) left the Companions with the 'Book' and his traditions after, "instructing them

in Scripture and wisdom"(64) and 'purifying'(65) them for the task ahead of them.

1.3.2. The Period of The Righteous Caliphs And The Birth of Ijtihad (10-40 A.H.):-

With the passing away of the holy prophet (S.A.W.S.), revelation came to an end. The companions found themselves without the security of a'new verse'which would take care of the problem. The Rasul, upon whom they relied so much, had left them; but not without setting forth complete guidance for them. The first problem they faced was the appointment of a leader to succeed the Prophet (SAW). Ijtihad was resorted to on the basis that since Abu bakr, the close friend and companion, had been delegated to lead the prayers by the Prophet (SAW) then he should be elected to supervise the affairs of the Muslims. From this time on the companions, in the absence of clear guidance from the Qur'an and Sunnah, would form council and arrive at an opinion. The short speech of Abubakr illustrates the spirit. Said he;" I am not the best among you; I need all your advice and help. If I

do well, support me; if I mistake, counsel me. To tell truth to a person commissioned to rule is faithful allegiance; to conceal it is treason... as I obey God and His Prophet obey me: if I neglect the laws of God and the Prophet, I have no more right to your obedience.(66)

Abu bakr, like his three immediate successors, based their rule on justice based on the Qur'anic principle of consultation i.e. "And their government is by mutual consultation."(67)

As a matter of fact, especially due to the widening of the Muslim territory and the ever growing jurisprudential issues relating to the Qur'an and Sunna, the Sahaba had their hands full. There was the question of new lands derived from the expeditions successfully carried out against the Byzantines and their expulsion from Syria, the conquest of Chaldea and Mesopotamia (Iraq), the taking of Persia, Palestine and Egypt — all these gave rise to new questions and perplexions which the Qur'an and Sunnah did not address directly. Political differences marred the smooth administration with the emergence

of the Shi'i's and the Kharijites. Political groups and alot of mischievious elements fanned the flames of crisis. The internal social and administrative fabric also met with new developments not anticipated by the Sahabah. The only alternative for the companions was to face the new challenges with the weapon of Ijtihad which of course enjoyed approval of the Qur'an and Sunnah.

The consultative meetings convened by the Sahabah especially under Umar B. Khattab came to be known as Ijma' (concensus of the learned). It should be noted that the companions which formed these foundations were all eminent masters of knowledge. Notable among them were the first four Caliphs, Abu bakr, Umar, Uthman and Ali. (Khalafa-i-Rashidin), Abdullah B. Mas'ud, Abdullah B. Umar, Abdullah B. Abbas, Ubayy b. Ka'b, Zaid b. Thabit, Abu Musa al Ash'ari, Abu Huraira, Aisha, the wife of the holy Prophet (S.A.W.) and a host of others. Some examples of the Ijma' are given below;

1. On the question of Zina or uhlawful intercourse with the opposite sex;

The Qur'an had laid down the punishment of a hundred stripes to be administered to the guilty

parties.[68] To this the holy Prophet added the penalty of exile. During the time of Umar (R.A.) one Ibn Sar, found guilty of the offence, received the stripes and went into exile, where he renounced Islam. The constituted assembly decided to suspend the penalty of exile under the circumstances;

2. Caliph Umar suspended the enforcement of the punishment of cutting off the hands of thieves by way of Hadd and substituted it with Ta'zir on the strength of Shubh (doubt) in cases of famine[69] i.e. when the offence was committed under painful conditions. Apart from the introduction of Ijma' under the principle of Ijtihad, Qiyas or analogical reasoning (now known as the fourth source of law) was developed. It involved the determination of a fresh point not at all contemplated directly by the Qur'an or Sunnah but which can be compared by analysis with a similar issue or point previously 'dealt' with by the Qur'an or Sunnah. A good illustration runs;

The basis for prohibiting wine is that it is an intoxicant. The principle is applied as against anything causing intoxication. Thus because of the Hadith (tradition) of the Rasul (SAW) which says:

Every intoxicant is wine and every wine is prohibited."(70) In another Council Ali said "when one drinks one gets drunk, and when one gets drunk one raves, and when one raves, one accuses falsely hence the same penalty must apply to the drinker as to the false accuser."(71) This decision was made by Ali during the tenure of Uthman as leader of the Muslims. It was unanimously accepted as 'law,' or in more technical terms, Ijma,' or concensus of opinion of the learned. It is important to note that the predecessors of Uthman R.A. i.e, Abubakar and Umar (R.A.) had all made previous attempts at Ijtihad on this subject. It has been stated,(72) that Abu bakr and Umar had given forty stripes to guilty offenders because the holy prophet (SAW) had imparted different punishments to different offenders, each suiting the specific case in which it was awarded and did not specify any single punishment for the offence.(73) It was only during the time of Uthman (R.A.) when the offenders became numerous that the punishment of eighty stripes became law through the process of Ijma'. The punishments of Abubakr and Umar (RA) were not Ijma' as there was no concensus of the companions to that effect.(74)

The Majlis-al-Shura (Council) set up by the Sahabah cut through a large spectrum of legal issues among many others. They agreed upon various topics and especially the Qur'an and Sunnah. Whenever the Companions, during this era were faced with a problem they brought heads together and would educate each other on the knowledge or relevant Sunnah or traditions to the question at hand.

Where there was no Shura or Council unanimously approved by the Sahabah decisions reached by individuals were not given the status of 'law' in the strict sense of the term, for example the decisions of Abu bakr and Umar on the punishment for intoxication. It can also been seen that Umar decided that when in a murder more than one person was involved, Qisas or retaliation should be derived from all the accomplices. Even though later jurists like Malik and Shafi'i adopted this rule, it was never regarded as 'law' as it was not passed by way of Ijma' or the majority of the Shura.(75)

Another of such non-concensus is the position of the woman whose husbands where abouts were unknown, and as a result contracted a second marriage with

the permission of the court. If the first husband happened to resurface: who would have preference between the two? The Kulafa-i-Rashideen gave quite different virdicts. However none of the decisions enjoys the status of 'the law' for the problem was never presented before the Shura and no Ijma' was ever arrived at on the issue.(76)

The question of the purishment for homosexuality is another question on which there were variances of opinion. Abubakr and Ali (RA) are of the opinion that the criminals should be killed with sword and the dead bodies should not be buried but burnt to ashes. Umar and Uthman however are of the view that the criminals be taken under the roof of a dilapidated building, which should be pulled down on them. Ibn Abbas (RA) said that they should be thrown down headlong from the top of the highest building of the habitation and then stoned to death.(77)

One outstanding reason for differences between the Sahabah was their approach to the interpretation of the Qur'an and Sunnah. Ibn Qayyim the reknown Hambali 'Modernist,' while commenting on the difference of opinion of the Sahabah on the expedition to Bani - Quraiza said that the group that insisted on praying

on the route were the ancestors of the ahl-al-Ra'y or rationalists while those that proceeded to Bani Qu rayza were the ancestors of the traditionalists(78)

The Sahabah, during this period, concentrated on establishing the new faith and spreading its teachings far and wide as taught by the Rasul (SAW) himself. Administration was organised and an army, fully commissioned to protect the empire, was planted. The holy Qur'an was compiled and put into book form. Social matters were controlled and the markets were put under the office of the 'Ishisab' to regulate morality and prevent unfairness in day to day life.

1.3.3. The Period of The Ummayyads And The Forming of Legal Trends:

The assassination of Ali R.A. in 40 H. marked the end of the period of the 'rightly guided Caliphs' who strived to establish the religion firmly. They left a heritage of large conquered land for the Ummayyad dynasty which was established by Mu'awiyya b. Abu Sufyan in 41 A.H.

The jurists of this period were mainly the young companions and the Tabi'in (Successors of the Companions). Political differences climaxed into group feelings and sentiments. Prominent among these were the Khwarij lit. Seceders, the Mu'tazilah (dissenters) and The Shiah (Partisans). Many a false tradition were reported which were intended to back political and group feelings which the majority of people or the Ahl-al-Sunnah wa-l-jama'ah (Orthodoxites) rejected. On the other hand a vast number of the Sahaba had been sent to the areas of conquest like Persia, Syria, Palestine and Egypt and had carried with them traditions which were unknown to others. They also based their teachings on these traditions, hence, the differences. In Medina there lived Abdullah b. Umar, Aishah and Abu Hurairah; In Mecca Abdullah b. Abbas; in Egypt Amr b. al-As; Basrah had Anas b. Malik and Kufah had Ali and Abdullah b. Mas'nd. The Zindigs or the false narrators used this opportunity to spread false traditions to realize their Maliscious intentions against the faith. Some illiterate ones also manufactured Ahadith (Plural of hadith) supposing it to be a religious act. This caused the Muhaddithin

(Scholars in Hadith) to work under great pains to sift the genuine traditions and collect them into works of hadith. The differences between the jurists developed into two leading schools of this period: viz the Traditionalists which were mostly followers of the Hijazi Scholars called Ahl-al-Hadith, and the Scholars of Kufah or rationalists called Ahl-al-Ra'y. The former limited their opinions rigidly to the traditions. But the latter argued that the scope of the Shariah permitted them to delve into questions of theology and answer hypothetical questions. Ibrahim al-Nakha'i was prominent amongst them.(80) The sectarians also witnessed sub-divisions especially under the Imamiyyah and Zaydiyyah Shi'ah. A summary of this period would show that this period saw a formulation of the science of receiving and transmitting of knowledge from the experienced Sahabah to the new Tabi'in who did not see the Prophet (S.A.W.) but were opportuned to inherit the great wisdom of the Sahabah. Below is given a list of the famous Sahabah of the period with their disciples from the Tabiun.

At Medina: Umm-ul-Mu'mmin, Aishah; Abdullahi b. Umar; Abu Hurairah; Said b. Musil al Makhzumi; Amr b.

Zubair b. Awwam; Abubakar b. Abdur Rahman b. Harith; Ali b. Husain b. Ali, Ubaidullah b. Abdullahi; Salim b. Abdullahi b. Umar; Nafi' Mawla Abdullahi b. Umar; Muhammad b. Muslim; Abu Ja'far Muhammad b. Ali b. Hussain al-Bagir; Yahya b. Sa'id Ansari and others. At Mecca; Abdullah b. Abbas b. Abd-al Mutlalib; Mujahid b. Jubair Mawla b. Makhzum; Ikrimah Mawla b. Abbas; Ata' b. Abi Ribah; Zubair b. Muslim At Kufah: Algamah b. Qais; Masruq b. Ajda. Ubaidullah b. Umar; Sharih b. Harith; Ibrahim b. Yazidal-Nakhai Said b. Jubair; Amir b. Jabir; Amir b. Sharahil. At Basrah: Anas b. Malik Ansari Khadim Rasul; Hasan b. Abi al-Hassan Yasarj Muhammad b. Sirin; Qatadah b. Da'mah and others:

At Syria: Abdar - Rahman b. Ghanam al-Ash- 'ari; Abu Idris al Khawlani; Ayad - Allah b. Abd-Allah; Qabisah b. Zawb; Makhul b. Abi Muslim; Riya'b. Hayat al-Kindi; Umar b. Abdul Azeez etc. Egypt: Abdullah b. Amr b. al-As; Abu'l Khair Murshid b. Abdullah; Yazid b. Abi Habib.

In Yemen: Tawus b. Kaysan al-Jandi; Wahb b. Munabbih; Yahya b. Abi Kathir etc.(81)

1.3.4. The Period of The Great Imams:

This period is marked by the emergence of the Tab'u-t-Tabi'in or the successors to the successors of the Sahabah. They did not meet the Sahabah but saw the Successors. It began from the beginning of the second century A. H. During this period the reign of the Ummayads came to an end with the death of Marwan as far as the East was concerned. AbdurRahman, the grandson of Hisham, escaped to Spain and established a foundation of the Ummayyah house in Cordova.(82) The Abbasids or the descendahts of Abbas, the Uncle of the Holy Prophet, (SAW) took over political power in 132 A.H. This period lasted till the fall of the Abbasids at the hands of Chengis Khan and Halagu Khan Via raids during the early part of 600 A.H.(83)

Various new cities were established by the Abbasids and trade and intercourse flourished with other civilizations. Translations of Greek philosophical works enjoyed state patronage. Other methods of rationalism especially those propagated by the Mu'tazilah found a home with Ma'mun (the

(the later Ummayyad). This brought academic exercises into being especially with the question of whether the Qur'an was created or not. The traditionalists suffered great persecution including Ahmed b. Hambal and it is known that Imam Shafi'i was once detained by the Abbasid, Harun - al Rashid.(84)

Because of the overflow of false traditions one of the main tasks during the early part of the period was that of compiling and sifting the authentic traditions. Malik b. Anas wrote his Muwatta which was the first book to be written after the Qur'an (85) Imam Shafi'i is reported to have said "There has never appeared on earth a book that is closest to the Qur'an than the book of Malik."(86)

Other notable works followed including that of the Kufan Scholar Sufyan al-Thawri, Awza'i in Syria, Abdul'Azeez b. Jarih in Mecca and Abdullahi b. Mubarak in Khurasan all contributed immensely to this task. Their aim was to present authentic Ahadith from the Rasul S.A.W. and also the sayings of the Righteous Caliphs. Not withstanding efforts from these great men, a second generation strove to further separate the traditions of the Rasul (SAW) from others. Imam Ahmad

b. Hambal (d. 241 AH), wrote his Musnad, Abdullahi b. Musa Kufi Ishaq b. Ibrahim, Uthman b. Abi Shaybah etc all worked through pains to present Ahadith to further generations which enjoyed authenticity.

But a third group of learned men appeared to further collect, scrutinize and select these ahadith. Prominent amongst them were; Imam Muhammad b. Isma'il al - Bukhari (d.256-11), Imam Muslim b. Hajjaj al Quraishi (d.261AH), Imam Abu Isma'il - Tirmidhi. (d.279 A.H.), Imam Abu Daud Ash'ath al-Syistani (d. 275 A.H.), Imam Ahmad b. Shuaib al-Nisai (d.303H), Imam Muhammad b. Yazid Ibn Majah al-Qazwuni (d.273 A.H.)[87] There were others but the above mentioned were the most popular. The Muhadithin, or the scholars in Hadith, applied various tests in examining the vast number of reported Ahadith. These tests were stringent and only the most authenticated were ever permitted into the compilations. It is said that Imam Malik did not include narrations from his father, Anas, for this reason.

Generally the tests were directed at the subject matter of the reported tradition called Matn

and the Isnad or chain of narrators. A Hadith would therefore be classified as Sahih (genuine), Hasan, (fair), or Daif (weak) after applying the tests.

The former experience of the Tabi'un was repeated and the major differences by in the Kufan and Hijazi schools. The elder scholars like the great Abu Hanifah (d.150 H) and Malik b. Anas (d.179 H) inherited the teachings of their predecessors i.e. the Tabi'in and the result was the emergence of two schools of thought. In Kufa Abu Hanifa with his disciples Abu Yusuf and Al-Shaybani followed the teachings of the Tabi'in of Kufah who based their thought on the companions Ali and Ibn Mas'ud (R.A.) Malik who was based in Medina (Hijaz) preferred the views of the people of Medina.

As far as traditions were concerned Abu Hanifa was ready to accept a tradition which was common with the people (Mutawatir) but Malik insisted that the tradition must be Mutawatir during the period of the Tabi'in as well as during the time of the Companions and the people did not differ from them. Shafi'i (d.204) opposed this Maliki view. The Shiah only accepted traditions reported by persons whom they

considered as authentic and rejected all others.(88) These led to the formation of the Schools.

1. The Iragian School:- The Iragis led by Imam Abu Hanifa used their opinions more freely than the others. Infact the Imam has been reported to have justified the position thus: "This knowledge of ours is an opinion; it is the best we have been able to achieve. He who is able to arrive at different conclusions is entitled to his opinion as we are entitled to our own."

He also said:"If I do not find my answers in the book of God or in the Traditions of the Prophet (SAW) I would seek the views of the prophet's Companions from whose opinion I would not deviate to the opinion of others. But when it comes to Ibrahim, al-Shu'bi, Ibn Sirin, al-Hasan, Atā', and Said b. Jubair, well, they are the people who had resorted to independent interpretation and I would do likewise."(89)

Thus the Imam made use of Qiyas (analogical deduction) to form an opinion. He also made use of the concept of Istihsan (juristic equity) or would search for a solution from the customs of the people (Urf). But he always kept in line with the spirit of the Qur'an and the traditions, and the Ijma' (concensus of opinion of the learned).(90)

Famous jurists of the Iraqian School during this period were(4) Abu Yusuf Ya'Kub b. Ibrahim al-Ansari (d. 182H), the famous disciple of Abu Hanifa. He wrote his famous book, Kitab al Kharaj which was later on followed by the Ottomans; (b) Imam Muhammad b. al-Hassan Al-Shaybani (d.189 H.): He was credited with the recording of the jurisprudence of the School; (c) Imam Zafar Ibn Qais (d. 158 H), at first a traditionist but later became a pupil of Abu Hanifa.

2. The Median School of Malik b. Anas:(91)
Malik inherited the teachings of the famous Companions of Medina i.e. Umar, Aishah, Zaid b. Thabit, Abdullah b. Umar and a host of others, through the Tabi'in. He was outstanding in Hadith which he learnt from eminent scholars like Nafi', Mawla Ibn Umar, Yahya

b. Said al-Ansari, Rabiah b. Abd-al-Ansari, Ja'far al-Sadiq among others.

The Imam would always give precedence to the Qur'an and Sunnah. In the absence of this he would fall to the opinion and view of the Companions. It was only when he failed to find a textual authority that he would resort to his analogy 'or Qiyas.' He also introduced the theory of Maslahah-al-Mursalah (unrestricted interests). An example is given below;

Beating a man accused of theft to make him confess was held lawful by Malik under the concept of Maslahah. He argued that there was no text against it. It was for the public interest that he should confess. This received heavy critism from the other Schools on the grounds that it was in the interest of the accused that he should not be forced to confess for he could be innocent. The Maliki's further argued that it would lead to the recovery of the stolen goods. Malik also preferred the established practice of the people of Medina to the Ahad Hadith (narration by one person only). But this was criticized by Laith b. Sa'ad, Abu Yusuf and Shafi'i.(92)

The Abbasid Caliph Mansur initiated that Malik write a compendum on jurisprudential issues which culminated in the famous Muwatta (beaten path). Harun al-Rashid requested that it be adopted by the State for official use but Malik refused this.

Famous pupils of the Imam were numerous. Some put the number at 1,300 Scholars that came to learn from him. However prominent among them were Yahya b. Yahya al-Masmudi (d. 234 H), Abdallah b. Salmah al-Fahri (d. 199 A.H.), Abi Abdallah Abdur-Rahman ibn Qasim (d. 191 A.H.), Muhammad b. Hassan Al-Shaybani, Imam Shafi'i, Abu Hannifa, Abu Yusuf, the Caliphs al-Mansur and Harun al-Rashid and a host of others.

At this point in time the most diverse differences existed between the Iraqian and Medinan Schools. But after travels undertaken, by Abu Hanifa and his two disciples to Madina, the gaps were narrowed extensively. Ibn Taymiyya, in his 'Raf'u al-Malam 'An al-A'immatu-al-A'Jam,' has mentioned that the Caliph Mansur appealed to the jurists of Hijaz to go to Iraq to teach and propagate their knowledge there. Thus some learned men like Hisham b. Urwah, Muhammad b. Ishaq,

Yahya b. Said al-Ansari, Hanzalah b. Abi Sufyan among others travelled to Iraq and taught there.(93)

3. Al-Shafe'is Influence on Fiqh: To Imam Muhammad b. Idris Al-Shafi'i is attributed the synthesisation of the traditional school of hijaz and the rational school of Iraq. He is generally noted for his middle course views between the older schools. With his genius over all fields of scholarship and encyclopaedic knowledge, he was able to comprehend the subtilities between his elder scholars. He recognised Qiyas as a source of law but only if it was adopted as Ijma' for, to him, to adopt a way other than the one followed by the Muslims was against the principle of Ijma'.(94) He goes on to explain that the isolated individuals are subject to error. The Imam wrote his Risala in Iraq and revised it during his last years at Eqypt. His goal was to save jurisprudence from personal ambition, reconcile and take forward the basis of the law—a sort of explainer and expounder of the law. In the process he rejected the Hanafi doctrine of Istihsan and the Maliki concept of Maslaha. On Istihsan (juristic equity), he is reported to have said ".... It is all the more necessary that God's orders as to

what is right and what is wrong should not be applied by treating a case without due consideration or by dealing with it on the basis of Istihsan"(95) He also said "he who practices preference (Istihsan) assumes unto himself the power of law making"(96) According to Shafi'i, no one is authorised to give Fatwa (legal virdict) unless supported by relevant authority from the Our'an or Sunnah or the Ijma'. If one were permitted to use Istihsan, he continued, then he would have to permit others to use the same and this would result in several 'right' decisions on one and the same matter. He stressed that "... obedience belongs only to those whom God and the Prophet have ordered that they be obeyed. Right is that which God and the Prophet have ordered to be persued and have pointed to through a text or through deduction.(97)

Shafi'i's critism of Istihsan engulfed the Maliki principle of Istislah or Maslahah. Malik would reject a tradition if it was reported by only one narrator (Ahad) in favour of the practice, of Medina, established. This was also attacked by Imam Shafi'i who pressed that a tradition could only be rejected by a manifest defect in the content or chain of

narrators. Thus traditions may only be rejected if their authenticity can be denied.(98)

Shafi'i's Istishab

Imam Shafi'i introduced Istishab (seeking for a link) under which a practice once proved to be wide spread may be presumed to be both traditional and continueing.(99) This undoubtedly bears a semblence with the theories of Istihsan and Istislah that he rejected. However Shafi'i limited its application to substantive law and the presumption held good until the contrary was proved; something like the common laws presumption of continuance. Imam Abu Hanifa used it as a one-sided sword,i.e. only to refute an assertion, but Shafi'i insisted on its application as a double-edged sword.

4. Shaybani and Laith b. Sa'ad: Muhammad al - Shaybani, one of the two disciples of Abu Hanifa, engaged in thorough discussions with Imam Shafi'i which lessened,to a great extent, the differences of opinion. Imam Shafi'i has been reported to say "The information which I learnt by heart from Muhammad b. Hassan would suffice to load a Camel"(100) Infact

the similarity between Muhammad al-Shaybani and his master, Abu Hanifa,was more to the set principles of the School than followership. His relationship with Abu Hanafa was coined, 'Tarafain' (two ends).(101) His views on the Maliki thought were softened when he visited Medina dnd learnt at the School of Malik b. Anas.

Laith b. Sa'd (d 175), the great jurist of Egypt was one of those who opposed the precept of Istislah or Masalih-al-Mussalah. He sent Malik a comprehensive message objecting the attachment of the latter to the Amal-ahl-al-Medina or the practice of the people of Medina.

5. Ahmad b. Hambal (d. 241 H) : The forth of the great four Imams that were most popular to the Muslim Community. He was a great man of Hadith and was blessed with a very strong memory. He maintained strict reverance for the traditions and accepted the daif (weak) traditions. He used to say; "Anyone who rejects any of the traditions of the Prophet brings himself at the verge of death."(102) He also had great respect for the sayings of the Companions and was against the free use of opinion. It was only

when he could not find a texturalauthority that he resorted to Qiyas but which he limited to special situations and matters under the rule of necessity.(103) In the availability of the 'Nass' (textual authority from the Qur'an or Sunnah) the Imam would reject the sayings of the Companions. There are arguments that the Imam accepted the precept of Maslahah and also that he permitted it's use in the Siyasat-al-Shariyyah governance of the Shariah).(104) He also fell out with the Mu'tazilites by his rejection of their heritical dogma, that the Qur'an was 'created.'(105)

Unfortunately unlike his predecessors the Imam did not leave behind any work on jurisprudence. His 'Musnad' is limited to a compilation of traditions.(106)

6. Other Jurists of the Period:- Besides the four Imams of the Sunni class, many other eminent jurists thrived about this time. In Syria there was Auza'i (d. 157 H), Sufyan al-Twawri (d.161 H) taught in Kufah, Bassrah had Hammed Zaid (d. 179 H). Apart from these names there were others such as D'aud b. Ali (d. 270 H), the founder of the Zahiri School. Of the Shiah persuasion Ja'afar al Sadiq

(d. 148 H) and Zaid b. Ali (d. 122 H) were all eminent scholars who had a bearing on the development of Islamic jurisprudence.

1.3.5. Taqlid (Immitation):

Taqlid, in the technical sense, implies the reliance on the decisions of others. The persons 'followed' were mainly the four Sunni Imams i.e. (Abu Hanifa, Malik, Shafi'i and Ahmad b. Hambal), Sufyan al-Thawri, Anza'i, Abu Yusuf and Muhammad al-Shaybani and Ibn - al - Qasim of the Maliki School. 'This is the information with us' as written by Ibn Jarir al-Tabari in his 'IKhtilaf - al - Fuqaha written in the third century after Hijrah. There is also a statement of Ibn Hazm, the Zahiri jurists to the same effect.(107)

Rigid taqlid can be said to have started about the early part of the fourth century after Hijrah for the occassion demanded the reproduction and respect for the works of the eminent 'legends' that did so much for the Muslim World. To deviate from the established practice would have meant innovation

for at this time there was not much for which the fore-runners had not a settled principle of law. The people of Iraq, from the time of the companions, were always ready to discuss hypothetical cases and marvel instances. Jurists considered their predecessors as more learned and closer to the spirit of the Companions and their successors. The successors of the successors (Tabi'u-t-Tabin) were more qualified for the indulging in Ijtihad than the later people. Moreover the holy Prophet (S.A.Ws) had sanctioned the obedience and copying of the Companions, their Successors (Tabi'n) and the Successors to the Successors (Tabi'u-t-Tabi'in). The jurists then felt safer to 'follow' than indulge in innovation. Works and commentaries were prepared and read by later Scholars.(108) They continued working on the statements of their leading Imams and Jurists, deducing and interpreting situations in the light of their elders, similar to how their elders dealt with legal questions. During this period, especially from the Seventh Century to the thirteenth Century A. H, rigid imitation ruled the day.

The refusal by scholars of the Medieval period to utilise the weapon of Ijtihad to propell themselves away from the strict immitation is called the 'closing of the door or gate of Ijtihad.' i.e. the non use of Ijtihad. The further spread of the Muslim expire to other parts of Asia and to European land also exposed the stagnation.

The Muslim governments needed uniformity to balance the community. For the realization of this policy, states adopted particular teachings from the schools and limited the judicial practice to such schools. The Fatimids, from the days of Salahuddin Ayyubi, patronised the Shafi'i School and the Hanafi School was adopted in the Turkish territories in West Asia and India. The Maliki thought was relied upon in Spain. Conversely this brought about jealousy among adherents of different schools.(109) In the words of Abu Zahra; "It made the law to gain further vigour and vitality and it's just criticsm made the legal system more elegant."(110) Some represent that the aim of the jurists was to make the law certain, simple, accessible, arranged, harmonious and definite. In whatever case, the law or it's

advancement stood at a standstill and new areas and questions were not approached with the advantageous machine of Ijtihad.

4.3.6. The Revival of Ijtihad:

Not withstanding the general Taqlid that followed the fourth century A. H. there were quite a number of individual movements aimed at freeing themselves from the web of imitation and setting alternate use of their intellect to answer the ever rising problems and situations of the day. Ghazzali (d. 499 AH), Ibn Taymiyya (d. 716 AH) and his pupil Ibn Qayyim al Jauzi were prominent among this class. On the issue of Maslaha Ghazzali has made his opinion very clear;

> "We have restricted use of it (Maslaha) to implementation of the purposes of the law determined by the Qur'an, Sunnah and Ijma.' Every Maslahah that does not consist of implementing the understood intent of the Qur'an, Sunnah and Ijma', is foreign and inappropriate to the operations of the Law. It is therefore void and rejected, and who ever has recourse to it is arrogating the power of legislation just as who ever uses istihsan is legislating. Every valid Maslahah is based on implementing the

> intent of the law, which must be determined by the Qur'an, Sunnah, and Ijma' and must not fall outside the scope of these sources."(111)

Ibn Qayyim has adopted the view that importance must be attached to change in Fatwa (legal virdicts). This is based on his teachers experience with a group of Tartar s who were taking alcohol and Ibn Taymiyya said: "One of my Companions wanted to reprimand them but I prevented him from doing so and said: 'God has prohibited strong drinks as they divert people from God and prayer, but strong drinks here divert these people from murder, capture of children and plunder; so leave them alone."(112)

It is obvious that this decision of Ibn Taymiyya was based on the Maxim: 'the smaller of two harms is chosen.(113) It is important to note that the change in virdict can only affect the individual virdicts of jurists and never the subject of an established text from the Qur'an or Sunnah. For Allah (SWA) says: "And thou wilt never find a change in the way of Allah...."(114) Allah (SWA) also says "The Law of Allah is not subject to change."(115) Ibn Qayyim used Maslaha, not in the free sense contemplated by the followers of Malik,but as a Hajat (need) of the

community. Ibn Taymiyya is also noted for his stance on the tripple Talaq (Divorce). He held it to be counted as one, contrary to the virdict of Umar who counted it literally.(116) But Ibn Taymiyya was advocating a return to the status - quo during the lifetime of the holy prophet (S.A.W.). Umar (R.A.) was working for public good (Maslahah) or discipline of those husbands who had adopted the practice of the tripple Talaq in contravention of the established Sunna method (i.e. one pronouncement).

Not withstanding change in Fatwa, the purported change can only attain the status of 'law' if it is adopted as such by Ijma'.(117)

Besides the above mentioned scholars there were quite a number of 'Modernists' that appeared, for example Muhammad b. Abd-al Wahhab (d.1206), Sheikh Usman b. Fodio of the Western Sudan, Muhammed Ahamad al-Mahdi of Sudan and Muhammad Abduhu of Egypt distinguished themselves for their independent approaches to jurisprudence.

1.3.7. Contemporary Trends:

This period marks the decline of Muslim political power and the boosting of European expansion and

mental indoctrination. The Muslim peoples followed alien laws during the colonisation period and carried them forward even after attaining independence. The great Ottoman civilization that had flourished for centuries was broken by the Gulhane Charter of 1839 and the Muslim uprising in India was extinguished by the Britishin 1857.(118)

> According to Coulson 'in the relationships between Muslim and Western States it was naturally the fields of public law (Constitutional and Criminal Law).....which proved particularly prominent..... Equally unsupportable to the Modernist view was the traditional form of Criminal jurisdiction....."(119)

The Ottoman empire, (or what remained of it), was found vulnerable for Western penetration. Under the penal code of 1858 which was a translation of the French Penal Code, the traditional hadd or defined punishments were all abolished except for the death penalty for apostacy.(120)

The Indian Penal Code based on the English Criminal Law was clamped on the Muslim population there and this was extended to Sudan and Northern Nigeria.(121) Algeria was forced to accept the

French Criminal Law and Dutch Criminal Law carried the day in Muslim Indonesia.

The significant developments in the era were the 'obliterating' of the application of Islamic Law and its substitution with laws repugnant to the Muslim mode of law. Laws were made to keep down the development and even the practice of the Shariah. This wielded a tremendous blow to intelectual advancement, Islam-wise. The atmosphere of political and social harmony that blessed the great men of Islam in previous ages was missing in a world that knew civilisation limited to Western values. The expansion and development of law thus grew in the wrong direction. Sad fact is that in many a Muslim land, Semi-illiterates arrogated themselves the power to legislate in the field of Islamic law under the misunderstanding that they were making profitable use of Ijtihad.

In the field of family relationship there was a sort of 'renaissance,' in the western sense of the term, in countries like Egypt, Sudan, Morrocco, Algeria, Tunisia, Iran and Pakistan. The 'so-called reforms' were passed (122) and people were plunged

into ignorance of the spirit of the law. The reforms were carried out under the 'fever' of modernism or the undue craving for 'dynamism' in the Shariah in total disregard and overlook of the fundamentals of the faith.

The present day scholar in the Shariah finds himself entangled in a web of alien dogmas painted in Shariah colours. Even the syllabi in the Western inspired places of learning do not provide the inquirer with the details of the pure characteristics of the Shariah. He finds laws which appear to be Islamic but are really parrallel to the Qur'an and Sunnah. A thorough study and reversion to the true image of the Shariah is mandatory. Coulson was very right when he said: "the Muslim jurist of today cannot afford to be a bad historian."(123)

FOOTNOTES AND REFERENCES.

1. Quran, Ch. 12 : 38 - 39,
2. Qur'an Ch. 20 : 14 - 15
3. Qur'an Ch. 25 : 2, 57 : 2, 5. 67 : 1 etc.
4. Qur'an Ch. 7 : 54
5. Qur'an Ch. 7 :3
6. Ibn Kathir, 1969; Dar-Al-Turath-al-Arabi, Beirut, Tafsir al Qur'an - al - Azeem. Vol.II P.200.
7. Gibb, 1953, O.U.P. 2nd edi, London, Mohammedanism, An Historical Survey. Pp. 9 - 11.
8. Qur'an Ch. 3 : 19
9. Bible, (John , 14 : 16, 15:26 17:7 Deut.18. 18-19 etc.).
10. Qur'an, 33:40, 21; 107
11. See Qur'an 95 : 40 5. The Impact of the verses is that by obeying Allah, one fulfils his purpose of existence but by rejecting the guidance of Allah one remains an insignificant animal who is overtaken by materialism, devoid of spiritual elevation. For more details please see Suyuti: on the Tafsir of the Two Jalaludius Dar ul-Hijrah, Beirut P.514.
12. Qur'an Ch.14 : 18

13. Culled from Qadri, (1986) Taj Company, Delhi, Islamic Jurisprudence in the Modern World, Pp. 15-16 as Taftazani's view of Shari'ah in his Commentary on the Sadrat-ush-Shariah, P.21.

14. Qur'an Ch. 59 : 24

15. Qur'an Ch. 2 : 29

16. Qur'an, Ch. 7 : 54, 21 : 22, 41.:11.

17. Qur'an, Ch. 18 : 29, 76 : 3.

18. Qur'an Ch. 2 : 30 - 32.

19. Manifest and Latent Revelations of Allah.

20. For more details please see the A. A. Mandudi, (N.d.) Board of Islamic Publications, Delhi, The Meaning of the Qur'an Vol.I Pp. 66-67.

21. There are numerous other authorities which enshrine this both in the Qur'an and Sunnah for e.g. see Qur'an Ch.6190, 3: 79, etc.

22. A. A. Maududi, (1986), Taj Company, Delhi, Islamic Law and Constitution, P. 138.

23. M. Muslehuddin, (1986), Taj Company, Delhi, Philosophy of Islamic Law and the Orientalists. P.56.

24. Friedmann, (1967) (London) Legal Theory (5th Edi.) P.258.

25. Ibid. P.95

26. Richard Clay; (the Chancer Press) 1963, Pelham Books Ltd., Suffolk (Great Britain), The Pears Cyclopaedia 1962-63 P.J.19.

27. Richard Clay (The Chancer Press) 1971, Pelham Books Ltd., Suffolk (Great Britain), The Pears Cyclopaedia 1970 - 71 p.J.48.

28. Defined by Modern Dictionaries to mean a state where sovereignty lies with the people and all other Concepts of Religion, Ethnicity, or groups and parties are shelved to make room for the interest of the electorate. But Modern Democracy still has semblance to the Greek Concept introduced by Democritus.

29. Quran 53 : 23.

30. Ibid 57 : 3

31. Ibid.

32. Dr. M. Muslehuddin, 1986, Taj Company, Delhi Philosophy of the Islamic Law and the Orientalists, P.56.

33. Quran Ch.6 : 115.

34. Qur'an Ch.6 154 - 155.

35. Jackson, 1955, Washington, (Foreward to) Law in the Middle East. Pp. 6 - 7.

36. HLA Hart "Positivism and Separation of Law and Morals" 71, Harv. L.R. P.593 at Pp. 607 - 8.

37. Anderson, J. N. (1976), The Athlone Press, London, Law Reform in the Muslim World, P.3.

38. Al-Qur'an, Ch.24 v. 2.

39. Ibid at ch.24 v 20121

40. Ibid ch. 17 v. 32.

41. A. A. Maududi, 1986, Taj Company, (Delhi) Islamic Law and Constitution p.196.

42. The Hanafi School will not enforce the Hadd punishment where theft is prompted by starvation. Also Umar (R.A.) is reported to have suspended the Hadd punishment of theft during a famine. See Bukhari, Sahih (Kitab al - Hudud, Vol.II P.65.

43. Al-Ouran ch.2 v. 2.

44. Ibid. ch. 96 v 1-5

45. i.e. Gabriel of the old scriptures and head of the angels and has been the means of revelation of scriptures from the first prophet. He has been protected from the devils and is described in the Qur'an as "Strong, noble with the Lord of the throne, obeyed (by the angels), trustworthy. See Ch. 81 v 20 - 21.

46. After the Prophets flight to Medinah he was fully equiped to establish the Islamic Empire, free from the persecution of the Makkans. In this connection, Madinan revelations contain answers to jurisprudential issues that cropped up. At Makka, the revelations contained moral and spritual verses that were the base for purifying the faith.

47. Al-Quran ch.55 v. 13

48. Ibid. ch. 2 v. 164

49. See the exposition made by Anwar Qadri, (1986) Taj Company, Islamic Jurisprudence in the Modern World, p.45.

50. The reckoning of verses differs among the jurists. This is because at the time of revelation no punctuation marks were used. The end of a verse was indicated by a circle and the early recifers did not agree to the positions of these circles hence the diference as to the 'number' of verses. The people of Kufah followed the reckoning of Ali (6,239 Verses), the Basra verses were put at 6,204 following the counting of Asim b. Hajjaj. At Sham the people followed Abdullah b. Umar who counted 6,225. In Makka they knew 6,219 verses and the people of Medinah reckoned 6,211. At, this point it must be stressed that the method of 'counting' did not affect the substance of the texts, except for the third verse of the third chapter. For further reading, please see Qadri, op. cit p.184. See also, A Khallaf 1956 (Cairo) Usual al-figh Seventh Edi. pp.34-35.

51. A. Khallaf, op.cit. p.35

52. Al-Qur'an ch. 4 v.80

53. Ibid. ch. 59 v.7

54. Ibid. ch.4 v 65

55. Ibid. ch. 16 v 44

56. Reported by Al-Bukhari, Sahih.

57. Al-Our'an ch. 2. v 107

58. Ibid. ch. 5 v 101 - 102. Some Companions used to ask some rather unnecessary questions which had no relevance to either mundane affairs or spiritual uplift for instance a certain once asked the Prophet (SAW) "Who is my (real) father." Another man also asked "Has it been made obligatory to perform the Hajj every year"? The Prophet (SAW) kept silent. The Prophet (SAW) kept silent and the man repeated the question twice. On the third occassion the Prophet (S.A.W.) retorted: "Woe to you! If I had said 'Yes', the performance of the Hajj every year would have become obligatory and people like you would have been unable to perform it and would have been guilty of disobedience." (See Ibn Kathir, Tafsir 1388 H./1969 AD Beirut, Vol.II p.105.

59. Haykal, 1976, American Trust, The Life of Muhammad (SAW), p. 311

60. Reported by Abu Dawud, al-Tirmidhi

61. Al-Our'an, ch. 16 v. 44

62. Ibid ch. 16 v. 91

63. Ibid, ch. 5 v. 3.

64. Ibid, ch. 3 v. 165.

65. Ibid.

66. Amir Ali 1926 Kitab Bhavan, A Short History of the Saracens, pp. 21-22.

67. Al-Qur'an ch. 42 v. 38.

68. Ibid. ch. 24 v 2

69. Muntaqa, Sharh Muwatta Malik, p.639

70. Reported by Muslim.

71. Malik, Muwatta Kitab Ashriba

72. al-Shatibi, N.d. Matba' Mustapha Muhammad (Cairo) al-I'tisan Vol.II, p.118.

73. Ibid

74. Ibid p.119

75. Ibid p.107

76. Ibid p. 126

77. Maududi, Board of Islamic Publications, Delhi, The Meaning of the Qur'an Vol.II, pp.222-223. The Companions and their followers differed as to the way to punish the Sodomite. For a detailed explanation see Ibn Kathir, op.cit Vol.II p.231.

78. A. M. Haj Nour Journal of Islamic and Comparative Law, The Schools of Law: Their Emergence and Validity Today (CILS) Zaria. Vol.VII p.1977 p.56.

79. He contested the Caliphate of Ali. His dynasty introduced the Monarchical principle of heriditary succession into the Islamic Polity. It lasted until the Abbasids took over power in 132 A.H.

80. Qadri, op.cit. p.57

81. Ibid p.58

82. Amir Ali, op.cit p. 183

83. The Invasion of the Mongols on Transoxiana, Khorasan and Persia, which were fourishing Centres at the time dealt a devastating blow to their civilizations. Herat and Balkh had populations of over one million each and it is said that Bukhara and Smargand had much more. These huge Communiteis were slimmed so much that at times whole towns were wiped out. The Massacre at Herat took a week and of the million people in Samargand only fifty thousand lived to tell the story. The people of Balkh were led out of the town and slaughtered; the remaining were plunged into Barbarism. The Library at Merv was burnt down by the Mongols. The invasion of the Mongols blotted out the intellectual life and development of Central Asia and although Persia and the West gradually recovered from their misfortunes, Bukhara and Samargand, never recovered their former mental activity. (see Amr Ali, op.cit pp.391 - 395. Also see Mutahhari M.(1983) Sepehr, Tehran, The Burning of Libraries in Iran and Alexandra p.41.

84. Isfahani, Kitab Hilyat - al - Awliya (Cairo) 1938 Vol.IX p.29.

85. Al Suyuti Tanwir-al-Hawalik,Sharh Muwatta Malik Dar-al-Fikr N.D. p.5.

86. Ibid, p.7

87. Known as the Sahih Sittah (six genuine compilations).

88. Qadri, op.cit. pp. 62 - 63.

89. al-Sha'rani, Kitab-al-Mizan, Cairo (1932) p.51.

90. Bagdadi, Tarikh Bagdad, (Cairo) 1931 Vol.XIII p.368.

91. i.e. Malik B. Anas (d. 179 AH). His Teachings are largely followed in Morocco, Algeria, Tunisia and West Africa.

92. Qadri, op. cit. p.114.

93. See Haj Nour, op.cit. p.62

94. Qadri, op.cit. p.64.

95. Ibid, p. 222.

96. al-Gazzali, al-Mustasfa Min Ilm-al-Usul (Cairo) al-Wajiz 1317 A.H. p. 137.

97. al-Shafei, Kitab-al-Umm, Vol.VI pp.273-274. See also Mahmassani, Falsafah-al-Tashri' fi'al-Islam, 1961 translated by Ziadeh Leiden pp.121-2.

98. Coulson, op.cit 56.

99. Qadri, op.cit. p.226.

100. Kirdoori, Manaqib al-Imam-al-A'zam, Hyderabad, 1312 H. Vol. II p.153.

101. Hindi, al-Fawa'id al-Bahiyah fi-Tarjim al-Hanafiyyah Ma'al-Ta'liqat-al-Saniyah Cairo 1324 A.H. p.248.

102. Qadri, op. cit. p.139

103. Ibn-al-Qayyim al-Jawzry al-I'lam al-Muwaqiin ^an Rabbul Alamin (cairo) N.D. Vol.I p.26. Some of the Scholars are of the view that the Imam did not recognise Qiyas but the word Nass (text) as used by Ibn al-Qayyim indicates that the Imam recognised other sources.

104. Ibid, p.294.

105. The Caliph Ma'mun accepted the doctrines of the Mu'tazilites and attempted to impose, them on the public which Imam Ahmad openly criticised. The Imam was severely punished for his stance.

106. Qadri, op.cit. p.141.

107. Haj Nour, op. cit. pp. 64-65.

108. Examples of these works are: under the Hanafi School, the Commentary on the Jami'al-Sagir by Jurjani (d.398H), Nawazil, Khazanah-al-Fiqh, written by Abu Laith, Nasar b. Muhammad Samargandi (d. 372 H). Under the Maliki School, the Bidayah-al-Mujtahid, written by Ibn Rushd al Andalusi (d. 595 H), Kitab al Wathaiq by Muhammad b. Yahya Lubabat. Under The Shafi'i thought, Kitab-al-Ahkam by Abu Bakr, Hassan Ahmad b. Ishaq al-Nisaburi, (d.342 H). Under the Hambali Scholl; Jami'al-Kabir, written by Ahmad b. Muhammad b. Harun Abu Bakr al-Khalil. (d.311H).

109. Qadri, op. cit. pp 69-70.

110. Zahrah, al-Milkyyah wa Nazariyyah-al-Aqd fi al-Shariah p.38.

111. al-Gazzali, Mustasfa, Vol.I pp. 143 - 144

112. Mahmassani, Falsafa p. 117.

113. al-Shatibi, Muwafaqat fi Usul-al-Shariah Vol.II, p.123.

114. Al-Qur'an, ch. 35 v 43.

115. Ibid ch. 30 v 30

116. Malik, Muwatta, Kitab-al-Talaq

117. The Fatwa is a mere decision of a scholar that does not per-se become law.

118. Qadri, op.cit. p.77

119. Coulson, (1964) Edinburgh, A History of Islamic Law, p.150.

120. Coulson, op.cit. p. 151.

121. See Chukkol, K. S. (1980) Zaria Defences to Criminal Liability in Nigerian Law: A Critical Appraisel, p.2.

122. For e.g. the compulsory payment of the 'death rate' in Pakistan. This has been criticised by well meaning Scholars as unjustly making the state an heir, and this cannot be justified under the Shariah. Another example is the prohibition of child marriage by the child Marriage Restraint Act 1929 of Pakistan. In Tunisia divorce is

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113. al-Shatibi, M,,wafaqat fi Usul-al-Shariah Vol.II, p.123.

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119. Coulson, (1964) Edinburgh, A History of Islamic Law, p.150.

120. Coulson, op.cit. p. 151.

121. See Chukkol, K. S. (1980) Zaria D,fences to Criminal Liability in Nigerian Law: A Critical Appraisel, p.2.

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subject to the permission of the Court (Article 32 of the Tunisian Code). In Iraq, Marriage can only be contracted after the age of 18. There is a similar law in Morrocco. (See Oadri, op. cit. pp.418-420).

123. Coulson, op.cit. p.7.

Chapter 2.

CRIME AND PUNISHMENT

Throughout human history, enforcement of state laws on defaulters has been a subject of protection. As to whether these laws were or are based on fairness and justice is more a subjective issue than an objective one. Law and punishment has from the earliest times been regarded as of fundamental importance to which there exists a general concencus amongst the peoples of this world. It is interesting to observe that even the lower animals have an inclination to some sort of organisation—the bee and the ant are good representations of this fact. Modern psychologists have even gone to the extent of claiming that "one can even detect something suspiciously like guilt in the general pattern of behaviour of a dog which has done something it shouldn't."(1) The sense of guilt is therefore ever present in humans and there is no support for the notion that man was ever free from law.

2.1 Crime and Punishment Under Earlier Scriptures:-

Modern archeological discoveries tend to establish the fact that along the ages there did actually exist,

nations and cities which were very well organised and civilised.(2) This supports the vast Qur'anic and Biblical attestations to the numerous settlements that existed in time. The Glorious Qur'an explains how prophets were sent to the people in order that they follow the Laws of God alone. Some prophets were made Messengers and were accompanied by Books or Scriptures which contained guidance for the people. In one of its verses the Holy Qur'an summarises the point as follows;

> "(O Muhammad) truely We have sent Revelation to you just as We sent to Noah and other Prophets after him. We also sent Revelation to Abraham, and Isma'il and Isaac and Jacob, and the descendants of Jacob, and Jesus and Job and Jonah and Aaron and Solomon, and We gave the Psalms to David. We also sent Revelation to those Messengers whom We have already mentioned to you and to those Messengers whom We have not mentioned to you; and We spoke directly to Moses as in Conversation.(3)

The Holy Qur'an also states: "Verily this was contained in the earlier scriptures; the scriptures of Abraham and Moses.(4) The only available similarities or comparisons to those books today besides the "Qur'an are contained in the old and New Testaments of the

Bible.(5) These books do contain references to crimes and their punishments. Some examples are provided below:-

2.1.1. The Ten Commandments (The General Law):-

It is stated in the Book of Exodus that:-

> "And God spoke all these words; "I am the Lord your God who brought you out of Egypt, out of the land of slavery
>
> Ye shall have no other Gods beside me
> Ye shall not make for yourself an idol....
> Ye shall not Misuse the name of the Lord..
> Ye shall remember the Sabath day....
> Honour your father and your mother
> Ye shall not Murder
> Ye shall not commit adultery
> Ye shall not steal
> Ye shall not give false testimony...
> Ye shall not covet your neighbours house
> Ye shall not covet your neighbours wife or his man servant or maidservant, Ox, donkey or anything that belongs to your neighbour.(6)

2.1.2. Wine Drinking:-

This can be seen in this verse;

> "You and your Sons are not to drink wine or other fermented drink whenever you go into the tent of Meeting, or you will die. This is a lasting ordinance for the generations to come. You must distinguish between the holy and the common, between the unclean

> and the clean, and you must teach the Israelites all the decrees the Lord has given them through Moses.(7)

Another verse prohibits wine drinking;

> "The Lord said to Moses, "Speak to the Israelites and say to them: "If a man or woman wants to make a special vow of separation to the Lord as a Nazirite, he must abstain from wine and other fermented drink. He must not drink grape juice or eat grapes or raisins.(8)

Besides general moral injunctions, the Law given to Moses (A.S.) provided for retaliation for personal injuries.

2.1.3. Retaliatory Punishments For Personal Injuries:

It is provided that:-

> "Any one who strikes a man and kills him shall surely be put to death...(9)
>
> .....any one who Kidnaps another and either sells him or still has him when he is caught must be put to death.....(10)
>
> If Men who are fighting hit a pregnant woman and she gives birth prematurely but there is no serious injury you are to take life for life, eye for eye tooth for tooth hand for hand, foot for foot,

> foot for foot, burn for burn, wound for wound, bruise for bruise.(11)

Else where it is provided that;

> ....The rest of the people will hear of this and be afraid, and never again will such an evil thing be done among you. Show no pity; life for life, eye for eye, tooth for tooth hand for hand, foot for foot.(12)

This form of retaliation has been reflected by the Holy Quran with a slight addition. The relevant provision is as follows;

> We had prescribed for them (jews) in it (Torah); life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and for all wounds, equal retaliation." However whoso forgoes retaliation as charity, it shall be expiation for him.....(12) (a)

The improvement in the Holy Qur'an stresses on pardon and mercy in exercising the right of retaliation for injury. This is a direct contrast with the provision of the Taurat which insists that pity should not be shown, probably as a deterrent to further acts of violence. Here it will be pertinent to note that the law given to the jews was that which best suited their life style and these were a people wandering in the

lands after their escape from Egypt. The rough and coarse life of the harsh d eserts might have influenced the nature of their laws. There is a contrast between the Mosaic law and the law of the christians as regards retaliation. In the Book of Mathew, it is stated that, "You have heard what it was said. Eye for eye and tooth for tooth. But I tell you do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also...."(13) It is also provided in the Book of Luke; "If someone strikes you on one check turn to him the other also. If someone takes your cloak do not stop him from taking your tunic.....if anyone takes what belongs to you do not demand it back...."(13)

The christians built their faith on 'Love', loving the neighbour' and 'praying for the offender and adversary.' Such a fa ith could not, then, support the doctrine of retaliation. The Holy Qur'an seeks to strike a balance in society by perfecting the previous laws, filling in the gaps, and producing an ideal setting for day-to-day life. The Holy Qur'an provides that, "Thus We have made you a Community of the 'Golden Mean' so that you may be witnesses in regard to Mankind and the Messenger may be a witness in

regard to you.(15)

A contemporary scholar has observed that "the Qur'an balances between the two extremes in law of the Taurat and that of the Injil."(16)

2.1.4. Adultery and Fornication:-

This is another long standing evil which has been frowned at by both the Qur'an and the earlier Scriptures. Infact the Mosaic law provides punishments for such offences which are reproduced hereunder;

> "If a man is found sleeping with another Man's wife, both the Man who slept with her and the woman must die. You must purge the evil from Isreal. "If a man happens to meet in a town a virgin pledged to be married and he sleeps with her you shall take both of them to the gate of that town and stone them to death-the girl because she was in a town and did not scream for help, and the man because he violated another man's wife. You must purge the evil from among you.
>
> But if out in the country a Man happens to meet a girl pledged to be married and rapes her, only the man who has done this shall die.....(17)

As regards fornication which covers unmarried, or rather, un-betrothed girls, the punishment seems to be the same i.e. stoning to death.

> "If however the charge is true and no proof of the girls virginity can be found, she shall be brought to the door of her father's house and there the men of her town shall stone her to death."(18)

The Qur'an departs from these rules by it's introducing the punishment of flogging for the unmarried and exile for a year and the Holy Prophet (S.A.W.S.) ordered the stoning of married persons who commit the act.(19)

To sum up the position it appears that the Jews were commanded to enforce punishments for various crimes against the person as in retaliation for life and other parts of the body. No alternative existed. This implies that the jews were not permitted to accept compensation in remittance of the right of retaliation or the absolute forgiving and pardoning of an injury or murder. Ibn Abbas (R.A.) is reported to have said "The children of Israel were given the law of retaliation but they did not have (the law of) compensation." Their law also instituted punishments

for Adultery and Fornication but were regarded as the same. Rape was also punishable by death, Wine drinking was made a crime in some situations contrary to the absolute bar by the holy Qur'an.

2.2 The Society And Obedience to Authority:-

It is a fundamental duty on every member of Society to enjoin good and forbid evil. The Qur'anic and traditional authorities are insistent on this norm for the establishment of a decent community, safe from mischief makers and wrongdoers. The present day Community has been given scores of instances that remind us of the earlier people and their wanton transgression of the laws of Allah and their destruction for that transgression. And for this reason the Qur'an is emphatic that "Does man suppose that he will be left free?" (without direction.)[21]

It necessarily follows that man must, in order to achieve a sound community, be guided by rules of rights and obligations. The main aim of the Shari'ah is to create an atmosphere conducive for safe living and interraction. An atmosphere where man can build and develop his relationship with the Supreme Being.

Man must strive to eradicate evil and purify Society for Worship and following the guidance given to him by God. In the light of this, the jurists have found agreement in stating that the Shariah seeks to protect five basic rights; these are; (1) Iman (faith) (2) Nafs (life) (3) Mal (property) (4) Nasl (family) (5) Aql (reason)(22) At a second galance one may notice that faith has been protected by the laws of (Riddah (apostacy and blasphemy), life by making Murder and Manslaughter punishable, property by punhishing theft and highway robbery, the family by prohibiting adultery and fornication, Reason and intellect by forbidding intoxicants. There are many auxilliary laws which fall inbetween these major offences that seek to purify the society for example gambling, divination, usury, miscellaneous illegal market practices which are based on fraud and deception, etc.

The most prominent verse of the Quran as regards this issue states as follows;

> "Ye are the best Community raised up for Mankind; for ye enjoin good and forbid evil and ye believe in Allah. And if the people of the Book had (really) believed it would have been far better for them. Amongst them were believers but most of them were evildoers.(23)

The people of the book have been made examples and what made them evil doers was their refusal to purge their society of evil. The Qur'an bears testimony to this by saying;

> "Those of the children of Isreal who disbelived were cursed by the tongues of David and Jesus, the son of Mary. That was because they disoboyed and were given to transgression. They did not try to restrain one another from the inequity which they committed. Evil indeed was that which they used to do."(24)

It is also said of the jews; "We delivered those who had admonished them, and we afflicted the transgressors with a grevious chastisement because they were rebellious."(25)

These provisions amongst a host of other sacred texts point to the indispensability of correcting wrongs in society.

The Rasūl (SAW) has been reported to have said on the authority of Huzaifah (R.A.): "By Him in whose hands is my life, you will continue to enjoin good and forbid evil, or else Allah will certainly afflict you with torment from Him.....[26]

It is also reported on the authority of Nu'man bin Basheer (R.A.) that the Holy Prophet (S.A.W.) said;

> "The case of those who observe the limits set by Allah and those who are careless about them is like passengers on a ship who cast lots to determine who should occupy the upper deck and who should be on the lower deck and disposed of themselves accordingly. Those who were on the lower deck passed through those of the upper deck whenever they had to fetch water. So they said to the occupants of the upper deck: If we were to bore a hole through our part, we would not then have to trouble you. Now, if the occupants of the upper deck were to leave the others to carry out their design they would all perish together: but if they were to stop them from carrying it out they would all be saved."(27)

Abu Said al Khudri also reports that the Apostle (SAW) said "He who from among you observes something evil should reverse it with his hand; if he is unable to

do so he should condemn it with his tongue; if he is unable to do that he should at least resent it with his heart. Beyond this there is no grain of faith.(28)

The main point in the authorities quoted above is that the Community must establish a means for preventing the perpetration of crime. It is obvious that, especially for offences of public nature, the state or hukumah must make it it's business to eradicate crime from society by implementing the various laws of the Shariah. It is also obvious that members of the Society must adopt themselves to the laws of the Shariah. The state has been charged with political and Military might which is a necessary condition for enforcing laws and preventing mischief in the land. As for state power the Qur'an says;

> ".....those who, if We establish them in the land, establish regular prayer and give the poor due, enjoin the right and forbid the evil."(29)

In the verse, the ideal nature of the obligations of the Islamic state has been stated. It is stated further in the Qur'an that;

> "Verily We sent our Messengers with clear evidences and We sent down to them Books, and the balance so that they may uphold justice for the people: and We sent down Iron in which is great power and benefits for Mankind....(30)

Commenting on this verse, Shaikh Muhammad Makhluf points out that the term al-Mizān translated as 'balance' means the equitable laws of goodness commanded by Allah. Hadid translated as 'Iron' signifies great strength i.e. Political and Military might.(31)

The Holy Prophet (SAW) has illustrated the way for enforcing the laws after a man has confessed the sin of fornication. The Rasul ordered for a cane and a broken cane was brought to him. He said; (something) "bigger than this", A cane of which its twigs has not been broken off was then brought to him, he said; 'not this.' Another cane used for riding which had become soft was brought to him and he ordered for the canning and executed it. He then declared. "Oh people ! It has dawned on you that you should keep away from the limits of Allah. He who commits anyone of these offences should keep hidden under Allah's

shelter. He who reveals to us his fault we would enforce (the punishment in) the Book of Allah on him.(32)

2.2.1. The Theory of Punishment:-

In Islam, the rights of the public are always placed above those of the individual. It is a generally accepted precept that the law will step in to prevent the individual from enforcing his right at the expense of the public. This is derived from the provision in the Holy Our'an which states "And do not give the feeble - minded people that property which Allah has made the means of your maintenance: you should, however, provide them with food and clothing and speak kind words to them."(33)

Abul-a'la Maududi Commenting on the verse above said:

> "It teaches the Muslim Community that in no case should wealth, which is so important for the maintenance of life, be entrusted to such people as are feable minded and incapable of using or managing it properly, for they might, by its wrong use, spoil its cultural and economic system and in the long run its moral system as well. It is true that the rights of private ownership must be honoured but at the

> same time they are not to be so unlimited as to allow one to use them in any way one likes and create social chaos."(34)

The aim of the Shariah is to produce a society free from social, moral, political and economic laxity. A Community which does not tolerate misuse of private legal rights can not certainly accept abuse of public rights.

The general theory of punishment is based upon the Quranic verse:

> "Do not spread chaos on the earth after it has been set in order..."(35)

It is understood from this command that the order of the community serves as a protection for the individual from committing crime. It follows, then, that a prospective wrongdoer would have very little, if any at all, encouragement to practicalise his intentions. As a result he would have no excuse to put forward for an offence committed, not out of error, mistake or compulsion, but out of pure wanton transgression.(36) For example:

(a) The punishment of stoning to death for Zina (adultery) would not be given unless the culprit is a 'Muhsan' (one who is married or has once consumated a valid marriage. It shows that the guilty person was quite protected by the fortress of marriage, or able to seek the protection of marriage but still wandered into the prohibited zones. Punishment becomesobligatory on such a person.

(b) The person who steals to satisfy his hunger would be excused from the hadd punishment of cutting off the hands. However if he steals for maliscious or mischievous purposes then the punishment must be executed.

For the purposes of this question, the above examples tend to impress that what the law seeks to punish essentially is that guilty, transgressing, mischievous soul that seeks to spread chaos and insecurity in the society. Such hooligans have been promised a lasting punishment. The Holy Qur'an says:

> "Hearken! Surely the wrongdoers are doomed to everlasting torment.!(37)

Another similar verse states:

> "Then ye would come to know who would suffer a debasing punishment (in the world) and an everlasting punishment is in store for him (in the hereafter)(38)

The notion of punishment is to act as a deterrent, to prevent further inclinations towards that crime, and to cleanse society of uncivilised behaviour. The crux of the matter lies in the fear to be struck in the minds of all those who intend to perpetrate similar offences. This is put by the Holy Qur'an in the following verse;

> "The Woman and Man guilty of fornication, flog each one of them with a hundred stripes and let not any pity for them restrain you in a matter prescribed by Allah, if you believe in Allah and the Last Day, and let some of the believers witness the punishment inflicted on them.(39)

In another verse it is stated on the punishment for theft that; ".....it is a recompense for what they have earned, and an exemplary punishment from Allah."(40)

Under the Islamic Law punishment can be said to entail three objectives:-

(a) to punish the offender for his crime against society;

(b) to prevent him from repeating the offence; and

(c) to serve as a deterrent for others.

2.2.2. Criminal Liability:-

The application of punishments would be suspended upon the fulfillment of the ingredients of each distinct offence. But on a general note, Uqubāt (punishments) would be inflicted on persons who are possessed of legal responsibility or capacity.

The law would not punish one who suffers from deficiency in his legal capacity or Ahliyyah.

There are various instances that render an ordinarily punishable act unpunishable and the scholars have gone through great effort in identifying the mitigating elements of Crimes. The jurists are guided by the following authorities from the Qur'an;

(a) "Allah does not burden any soul with a responsibility heavier than it can bear. Every one would enjoy the fruit of the good that one has earned and shall suffer for the evil that one has committed."(41)

(b) "that no soul shall bear the weight of another and Man has nought save that which he performs."(42)

(c) "and We do not punish save after sending a Messenger (warner)"(43)

In the Traditions we find the following, tradition;

> It has been reported from Ali (R.A.) and Aishah (R.A.) that the Messenger of Allah said; "The three are excused; the sleeper until he awakes, the child until he matures and the insane until he recovers."(44)

It appears that a general requirement for enforcement of punishment is the presence of sound sense (al-Aql). The Criminal must have, at the time of performing the act, been possessed, fully, of his mental fitness which would be necessary for comprehending the nature of his act and forming the requisite intent (idrāk) to justify punishment.

Idrāk has been explained by Bahnasi in the following terms;

> "There must be a positive intent: performance of the act alone is not sufficient. He must have intended to achieve what happened and did achieve it or missed it or neglected or ommitted to do the act."(45)

According to Zakiyyuddin al Sha'ban;

> 'the power of discretion can only be found where there is sound sense. This is so because it is the link between comprehension and intention (Idrak) and without it comprehension cannot hold....."(46)

Insanity is also a recognised mitigator for the same reasons i.e. that the person lacking in sanity cannot possibly 'reason' and thus form the base intention.

For the same reasons the child and the sleeper or one who looses consciousness cannot be held responsible for crimes.

Al-Sha'ban explains the position thus;

> "Majority' is known by speech and actions and when a person attains the stage of wet dreams and his speech and actions signify wisdom amongst the people he is regarded as a sensible adult. And because of this an insane cannot be responsible nor can a child before majority and the position is the same whether he is a "Mummayyiz" or not;

> all these have not satisfied the conditions of Taklif (full mental and physical responsibility). Nor does the sleeper bear responsibility while sleeping nor one who forgets while in that state nor one who faints during that state of "unconsciousness, nor the intoxicated"[47]

Analysing the quotation it is clear that the following are considered under the Shari'ah to be negativing elements:

Insanity, Minority, Sleep, forgetfulness, Unconsciousness caused by fainting or intoxication. We shall go on to study them.

(a) The Insane and the Minor;

Their capacity is affected only as regards crimes against Allah and Qisas or retaliation. But as far as private rights are concerned, the law does not recognise the deficiency. For example in the payment of Zakat, (Compulsory poor due), Minors and Insane persons are not exempt. Maintenance of the wife and family must be paid by all. So also must all faults or wrongs and injuries falling under Compensation or Diyyah. The Compensation would be paid thrugh their respective

guardians at law.(47) The jurists who maintain this position are in the majority. The Minority which consistsof Imam Muhammed al-Shaybani and Zafar argue that the Zakat al fitr (due marking the feast) is an act of 'Ibadah' and thus a right of Allah and should not be placed on the Minor and insane person.(49)

(b) Various Forms of Unconsciousness;

(i) Sleep : All statements and actions made during sleep are regarded null and void.E.g.apostacy, admissions and divorce. But if the sleeper happens to destroy another's property he would be liable to pay damages in the same way the minor and the insane would.(50)

(ii) Mistake, forgetfulness:- The offender would be afforded the benefit of doubt in reducing the impact of the liability.

Abdur Rahim submits that;

> "If an act which under ordinary circumstances would amount to an offence be done under a mistake, the person doing it will be given the benefit of the doubt; so that sentences of the nature of Hadd

> and retaliation would not be inflicted on him. But as to his liability for any injury or loss caused to anothers rights, that is, for the violation of individuals rights, mistake would not be regarded as a good excuse in Law. But it is a good ground for modifying such obligations as have a semblance of benevolence, for instance, payment of compensation.(51)

(iii) Intoxication:- The jurists draw a distinction between the methods of deriving intoxication. They classify intoxication into intoxication caused by forbidden means and intoxication caused by means, not forbidden. i.e. voluntary and involuntary intoxication. Legal capacity of a man would not be affected by voluntary intoxication. However where the intoxication is caused by something not forbidden legal capacity would then be affected in the same way as unconxiousness caused by fits or lunacy. In effect it means all disposition and actions affecting public matters would have no effect at law but he would be liable for the rights of individuals he infringes upon.

Voluntary intoxication in the words of AbdurRahim would make the offender "liable for any crimes

> and wrongs he might commit such as Murder, defamation, theft, whoredom, destruction or loss to others property and the like. The reason is that man's legal capacity is regarded as complete on his attaining majority and if a temporary suspension of his judgement and understanding due to an overpowering accession of pleasurable excitment is brought about by a wilful transgression, the law will not take notice of it...."(52)

(c) Duress and Compulsion:-

When someone is compelled by force, necessity or by threats the question arises; could he be a free agent in the understanding of the law? The general view of the jurists is that the resultant act would not be punished on the authority of the following verse;

> "But if one is forced by helplessness without intention of disobedience or transgressing; Your Lord is forgiving and Merciful"(52)

Although the jurists differ as to what would amount to coercion or duress, they are, non the less, agreed that a person who commits an offence under a compulsion would not be punished. As regards the question of compulsion to commit Zina the Holy Quran declares that;

> "And do not force your slave girls into prostitution for your own worldly gains when they themselves want to keep chaste; and if anyone forces them into it, after such a Compulsion Allah will be forgiving and Merciful to them."(54)

This was expounded further by the holy Prophet (SAW) when a man persued a lady on her way to the prayers, overpowered her and raped her. She raised an alarm and the man was caught in the act. The woman (victim) was let free while the Man (aggressor) was stoned to death.(55)

Umar (R.A.) also had a man flogged for raping a girl but the girl was not punished.(56) Where the person compelled is a male, Abu Yusuf and Muhammad apply the same law that applies to females. But the majority view of the Scholars is that the male cannot be said to be "Compelled" if his genital was errect during the act as the mere fact of errection would raise a presumption of willingness on his part. Abu Hanifah, Malik, al-Shafi'i, Ahmad and the Zaydiyyah Shiah are all said to be of this view.(56) (a)

Imam Abu Hanafa provides a condition in that if the Compulsion is by the government or authority

the man cannot be punished because when the government itself compels a man to commit a wrong it has no right to punish him. But if someone else compels him then he will be punished because sexual desire cannot be aroused by coercion. Imam Zafar also opines that the man would be punished for sexual arousal cannot be forced.

Of the three opinions Mandudi inclines to the first one and he submits a hypothesis:

> "If a tyrant imprisons a simple God-fearing man and puts a beautiful young woman stripped naked in the same cell and does not want to release him until he commits Zina and the tyrant brings four witnesses to prove it in the Court, it will not be justice to ..... flog them with stripes in utter disregard to the circumstances. This is because there is a probability that circumstances may be created whereby sexual desire may overpower a man even though he may not be a willing partner."(57)

The argument of the jurists seems to revolve around the nature of coercion or duress. For this reason most of the jurists classify duress into two:-

(1) Maljiyun:- where there is a means of avoidance of the act for example mere imprisonment or beating.

(2) Gairi Maljiyun:- where there is no reasonable means of avoidance for example threats to life or limb.

The Shafi'is however do not differentiate between the two. They consider them both to render the freedom of choice and consent void.(58)

As for Compulsion to abandon the faith (Riddah) there is a concensus of opinion among all the four schools. The concensus also includes the Zaydiyyah and the Zahiri s.(59) This is based on the Quranic provision;

> "Anyone who after accepting faith in Allah, ulters unbelief, except under Compulsion, his heart remaining firm in faith....."(60)

And the holy Prophet (S.A.W.) also said:

> "My community has been excused for the (acts committed under) Mistake forgetfulness and duress."(61)

With this background of subtle precepts surrounding the notion of crime under Islam, it may, at this stage, be material to advance the precepts sorrounding the definition and Nature of Crime.

2.3. Definition of 'Crimes' Under the Islamic Law.

Definition of Crime (al-Jarimah):

According to Muhammad Abu Zahrah, the term Jarimah must be understood in the light of other arabic terms bearing related meanings such as Ithm (Sin), Khatiah (error) and Ma'siyah (offence) as these related terms meet the technically understood meanings as well as the simple literal meanings. He goes on to say that "No one can differ to the fact that 'Jarimah' or crime means an act which entails punishment and is blameworthy"(62). Thus a crime is what Allah has forbidden and also disobedience to what Allah has ordered. Allah has provided punishment for all wrongdoers. Some have been fixed in this world and some in the next world.

The terms Ithm, Ma'siyah and Khatiah all have something in common. This is the doing of an act forbidden by the Shariah or ommitting to do an act ordered by the Shariah. Jarimah, then, is a general term encompassing the above mentioned terms signifying an act forbidden by the Shariah or a disobedience to an act commanded by the Shariah.

Dr. Abdul Aziz Amir explains the term 'Jarimah' to "include all wrongs."(63)

Abdul Qadir Audah is quoted as saying;

> "All jurists are settled that 'Jarimah' is an act which is punishable."(64)

A synonym, for the term Jarimah is 'Janāyah' and has beem used interchangeably with the term 'Jarimah.' According to Audah, the word 'janayah';

> "Is a term signifying what a person reaps or gathers or earns unlawfully; being so based upon the wrong act alone. It is a general term except where it refers to particular acts which are forbidden. The term originates from the act of reaping fruits or plucking them from a tree.
>
> Technically janayat is a term connoting acts forbidden by the Shari'ah whether such act is against life, body, property or other. But the term is used by the jurisprudents as primarily an act against life or limb such as murder, injury or battery."(65)

This subtle differentiation has however been ignored by a number of scholars including Rahuni, of the Maliki School who defines the term 'jarimah' as derived;

> "from plucking fruits with the hand and it is (also) used for whatever ill one reaps for himself by way (of infringing) of anothers property.....or the person of another in form of wrong or injury."(66)

Some jurists however prefer to be more specific than general in their definition of crimes. Ibn Rushd-al-Andalusi, also of the Maliki School says that;

> "Crimes are acts which warrant punishments stated by the law (Shariah) and are four fold: Offences against body, life and limbs which are called homicide or injury; then offences against sexual organs i.e. adultery and fornication; offences against property such as usurpation, theft or robbery; offences against human honour i.e. defamation."(67)

Some of the Hanafi jurists believe in a different grouping. For example al-Kasani, the Hanafi Scholars, has stated in his Bidayah-al-Hadithah that;

> "fundamentally crime is two fold: Crime on beasts and non-living things, and crime on human beings."(68)

He goes on to further divide crime on beasts and non-living things into two; viz usurpation and damage.(69)

From the discussion above it comes to view that the jurists consider a crime under Islam to be, in general terms, acts against the Shariah

which attract punishment. Although they differ slightly as to the technical meaning and application of some terms,(7) this nontheless does not affect the fundamental understanding of the issue. The definitions offered by the scholars obviously tends to manifest the vast scope covered by the term, crime. But for a proper understanding of the actual scope covered by crime and the necessary punishments that apply to crimes, generally, the three broad groups of Hudud, Qisas and Ta'zir must be examined under a separate heading.

2.4. The General Scope of Crime & Punishment Under Islam:

Under Islam, Crimes are divided into three broad headings in accordance with the types of punishments to be imposed. These are;

(1) al-Hudud (specified punishments)

(2) al-Qisas (retaliation for injuries)

(3) al-Ta'zir (discretionary punishments by the judge).

2.4.1. Al-Hudud:- According to Imam al-Jaziri, Hadd literally means a prevention or a bar which prevents people from transgression. The Holy Qur'an has stated that

> ".....and those who guard the limits of Allah."(71)

In another place the Holy Qur'an states that;

> .....and whomsoever transgresses the limits of Allah has surely wronged his soul....."(72)

Imam al-Jaziri further says;

> "The jurists have defined it(Hadd) to mean punishments for transgressing the rights of Allah Most High. Whenever knowledge comes to a judge about an offender who deserves punishment, it becomes obligatory for the judge to execute the punishment and he has no discretion to pardon the offence.."(73)

As to the composition of Hudud offences al-Jaziri mentions the following; al-Zina (whoredom)(74) al-Liwat (Homosexuality),(75) Sariqah (Theft), Qadhf (defamation) and Sharb-al-Khamr (wine drinking). He places al-Hiraba (Highway robbery) under the offence of Sariqah i.e. theft.(76)

According to Sayyid Sabiq;

> "(Hudud) is the plural of Hadd which literally means a thing which differentiates one thing from another. But in technical terms it means 'to prevent' and the punishment of crimes is called Hudud because it prevents the offender from repeating the offence he was punished for."(77)

Sabiq adds that Hudud are punishments which are fixed and established and they differ from Ta'zir because the punishment in the latter is left to the judge's discretion. Similarly it differs from the Qisas as it involves and applies to individual rights.(78) He further lists the Hudud offences as including; Zina (whoredom), Qadhf (defamation), Sariqah (theft) Khamar (intoxicants), Hirabah (highway robbery) Irtidad (Apostacy) and Bagy (rebellion).(79)

Another contemporary scholar, Audah, also defines Hadd offences as those offences committed against the 'rights of Allah' (SWA). They are specified punishments for which a lesser or greater punishment cannot be given either on the instance of an individual or the Community.(80) He lists the offences falling under Hudud as; Zina (whoredom), Qadhf (defamation),

Sharb-al-Khamr (wine drinking), Sariqah (theft), Hirabah (Highway robbery), Riddah (apostacy) and Bagy (rebellion).(81)

From the above discussion it is clear that under the Shari'ah, Murder (Qatl) is not regarded as a Hadd offence. It is seen as more of a Tort than a crime which is placed under the heading of Qisas offences.

2.4.2. Al-Qisas:-

al-Qisas is contrasted with al-Hudud for the reason that it entails what is called al-Haq-al-Adami (rights of the individual). This term signifies that the aggrieved party has the right and option to either retaliate or forgo retaliation.(82) Retaliation (Qisas) is a means of punishment accorded to the victim of an injury (involving life or person) to revenge the injury either personally or through his guardian. Ibn Rushd has said that 'Blood' (injuries to person) is punished by either Qisas, (retaliation) or Diyyah (compensation)."(83) The Holy Qur'an provides for Qisas where it states that;

> "O ye who believe, the Law of retribution has been prescribed for you; the free for the free, the slave for the slave and the woman for the woman. But in case the injured brother is willing to show mercy to the Murderer, the blood money should be paid in accordance with the general law and the murderer shall pay it in a genuine way. This is an alleviation and Mercy from your Lord....."(84)

It has also been reported that the Prophet (SAW) said:

> "Whosoever suffers a murder or injury has a choice from three options: he may retaliate, forgive or accept Compensation. He who desires a fourth (option) must be restrained and whoever exceeds this would have a grevious torment"(85)

Before the punishment of Qisas may be resorted to, some conditions must be satisfied. These may be compactly reduced to three where the offence involves loss of life:-

(1) The Murderer, who must be;

(a) of legal capacity (Mukallifan);

(b) Subject to the law (Ma'suman); and

(c) Not above the victim by Islam and freedom.

(2) The victim; who must be equal to the offender or above him; and

(3) The offence; which must be intentional and not mistakenly committed.(86)

2.4.3. Al - Ta'zir:

This punishment covers those offences which are not dealt with expressly by the Qur'an and Sunnah i.e. there are no fixed or prescribed punishments as to these offences; but they must be recognised in the texts.(87) Also, under Ta'zir would fall, all offences which do not measure up to the requsite standard of proof under the Hadd and Qisas. Ibn Taymiyyah has supplied some examples of Ta'zir offences in the following words;

> "Offences which do not have a specified punishment or expiation; for example where one Kisses a child (with passion) or Kisses a 'strange' woman or fondles her, or consumes something prohibited like blood or carcass or defames another with a (slander) other than Zina (whoredom), or one who steals that which is not secured in safe custody or something of little value, or breaches a trust as in the case of the public Treasury or an endowment and the property of orphans and similar matters he may breach (the trust of) as in (the case of) the agent or the partner, or dishonest acts in trade..... like the reducing of weights and measures, or gives false evidence, or the judge that accepts bribes or decides by other than

> what Allah has revealed.....and other things that are prohibited; all these may be punished with Ta'zir or correction.....in proportion to the number of times the offence is repeated....."(88)

Ta'zir is supposed to be an exemplary punishment imposed by the judge, which curtails the perpetration of higher or more serious crimes in the Society. In the Mukhtasar of Khalil it is said that;

> "The Imam (leader or judge) may punish an 'offence against Allah' or 'offence against the individual' by imprisonment, ...removing of the turban(89) and beatings with lashes and whips etc.(90)

The broad concepts of Hudud, Qisas and Ta'zir normally cover the scope of crime and punishment under the Shari'ah but some subtle points must be mentioned aside from these three headings which would provide a better framework for the practical application of the Topic.

2.5. Miscellaneous Conditions For The Enforcement of Punishments:-

The trend of the law during the Salaf(91) period was to address each distinct offence separately i.e. the conditions attached to the punishment of Zina

(whoredom) were not the same as for instance the conditions attached to the punishment of Sariqah (theft). For this reason a general category of rules limiting or codifying the rules of punishment could not have been practicable.

Non the less an attempt may be made to outline some basic precepts which would serve as relevant maxims for the application of the various punishments.

The first maxim is termed; "La Jarimah-wa la Uqubah illa bi Nass. i.e. 'All Crimes and punishments must have a basis in the Sacred Law." It is for this reason that the Shariah insists that all Hudud and Qisas offences must have a basis in the sacred texts and as a result all acts which do not come under the 'texts' would not be punishable by either Hudud or Qisas. This, in essence, means that for each punishment under Hudud or Qisas offences to be enforced, there must be a corresponding sacred textual authority which prohibits the act; and furthermore, provides the prescribed punishment.(92) Since this is the position, it goes without saying that all acts which were committed before the revelation of the various verses of the Qur'an prohibiting them were not punishable.

It is known that during the Jahiliyyah period, (before the advent of Islam) the Arabs used to marry women formerly wed to their fathers, and joined together sisters as co-wives. All these were considered henious sins and prohibited. The Holy Qur'an states;

> "And do not marry those women married (previously) to your fathers except that which has already been done. Surely it is an indecency and an abominable act and an evil practice."(93)

As to the joining of two sisters as co-wives the Qur'an further states that;

> ".....and that you join two (real) sisters (as Co-wives) except that which has already passed....."(94)

The holy Prophet (SAW)did not punish the Murders that were committed during the 'days of ignorance.' During the Hajj-al-Wida (farewell pilgrimage) the Messenger of Allah (S.A.W.) declared;

> "All the Murders of the days of ignorance are under my feet (i.e. not revengable). The first revenge which I forgo is for the killing of a member of my own family, the killing of the Son of Rabi'ah b. Harith which was committed by the Bani Hudhail. I forgive it."(95)

Another example of these unenforceable punishments is that of Usury during the days of ignorance. The Holy Qur'an states that;

> Henceforth the one who abstains from usury after receiving this admonition no legal action shall be taken against him regarding the interest he had devoured before....."(96)

The holy Prophet (SAW) re-iterated this during his farewell pilgrimage when he said;

> ".....and all usurious deals of the days of ignorance have been nullified and the first usurious deal that I start with is that of my uncle, Abbas b. Abd-al-Muttalib....."(97)

The spirit behind these unenforceable punishments is that they were all committed during the days of ignorance and so there was no 'law' to be transgressed. This notion is embedded in the Holy Qur'an where it says;

> "And We do not punish save after sending a Messenger (warner)" (98)

In another verse the Holy Qur'an states that;

> "....Verily you are one of those sent.....to warn a folk whose fathers were not warned. They are (thus) unaware."(99)

The Maxim under discussion deals with Hudud and Qisas matters. A Maxim relating to Ta'zir is discussed below;

> "La Jarimah wa la Uqubah bi la Dalil fi-l-Ta'zir" i.e. 'No Crime or punishment will fall under Ta'zir except with authority.'

Sheikh Abu Zahrah has explained this to mean the offence must sufficiently point to an established act and punishments must have roots in the sacred texts.(100) There are obviously various texts from the Qur'an and Sunnah which stand as authority for enforcement of Ta'zir. Some examples are given below:

(a) Abu Dharr had called another man 'a son of a 'black woman.' The prophet

(SAW) said to him; 'O Abu Dharr verily you still have some ignorance with you"[101]

(b) On another occassion the Prophet (SAW) said to the Companions; "I have a man here who is liable to humiliation and punishment."[102]

(c) The Holy Qur'an reads: ".....as for those women whose defiance you have reason to fear, admonish them and keep them apart from your beds and beat them. (lightly).[103]

(d) The Prophet (SAW) once ordered that three Companions of his be 'ignored' and this went on for fifty days.(104)

(e) The Prophet (SAW) also punished by imprisonment in accordance with the Qur'anic provision; "....imprison them in homes until death overtakes them or Allah opens a way for them."(105) The Messenger of Allah also imprisoned some men pending investigations at Medinah over a certain murder. He is also reported to have once imprisoned a man for half a day pending investigations. He also used to punish by beatings etc.(106)

The general scope of the crimes and punishments under Islamic Law lies in the Hudud Qisas and Ta'zir forms of punishment. This satisfies the basic analysis of the matter. It also provides a background for the division of the specific crimes and their punishments under Islamic Law.

2.6. Division Of Offences:-

Besides the broad classification of offences based upon the sort of punishment to be administeredi.e. the Hudud, Qisas and Ta'zir, offences are further divided or grouped according to their natures and forms based principally upon how they occurred. Most of the scholars accomodate them in five classes. These are;

(1) Jara'im Ijabiyyah wa Jara'im Salbiyyah
(acts and ommissions);

(2) Jara'im Amdiyyah wa Jara'im Ghair al-Amdiyyah
(intentional and non-intentional offences).

(3) Jara'im al-Basitah wa Jara'im al-I'tiyad
(whole and inchoate offences (i.e. where punishment is dependant on repetition or persistance of the offence).

(4) Jara'im Siyasiyyah wa, Jara'im Adiyyah (i.e. political offences and quasi - political offences).

(5) Jara'im 'ala - al - Jama'ah Wa Jara'im 'ala al-Ahad. (offences against the public and offences against the individual.

2.6.1. Al-Jara'im, Ijabiyyah wa Jara'im Salbiyyah (acts and Ommissions):-

From the definition of Crimes we have already seen that a Crime may be an act of Commission or ommission. The Commission of an act becomes complete by the perpetration of an act prohibited by the Shariah as in the cases of Homicide, theft, Adultery etc. 107 Ommissions on the other hand are when the offender refuses to carry out certain obligations for e.g. the obligatory prayers at the appointed time, the payment of the Zakah (obligatory tax), refusing to make good a debt while the debtor is in position to pay up, or even the refusal to return a usurped article. All such ommissions may be punished by Ta'zir (discretionary punishments by the judge),(108) whilst commissions, in most cases would be punished by Hudud (fixed punishments); and where the standard

of proof cannot be fulfilled, the Ta'zir would apply.[109]

All the jurists are agreed that the commission of an 'act' attracts culpability; but as regards ommissions, the Hanafis do not reckon them as of full culpable nature. Thus, under the school, a person who watches another starve to death or drown would not be liable for either Qisas (retaliation) or Diyyah (Compensation), even if he was aware of the likely consequence of his ommission. Infact Imam Abu Hanifah extends this rule even to the case of one who imprisons another and refuses him sustenance.[110] Bahnasi, in his Fiqh-al Jana'i al'Islami quotes the Mabsut in support of the above Hanafi views:

> "It is said in the Nawadir that if he were to detain him in a room by locking the door until he (victim) dies it would not incur liability (of Qisas) with Abu Hanifah but he would be punished by Ta'zir."(111)

The argument of Abu Hanifah is that the imprisonment of the victim per-se would not cause the death of the victim. What caused the death of the victim was of a different nature i.e. hunger or thirst.(112)

But this argument of Abu Hanifah is not accepted wholly by his two disciples, Abu Yūsuf and Muhammad. They say that the offender would be liable for the Diyyah (compensation).(113)

The majority of the scholars are completely opposed to this stand of the Hanafi jurists. Among this group, are the Malikis , the Shafi'is and the Zahiri·s. They believe that refusal of provide water or food to one in dire need would be presumed murder of the victim if he dies as a result of the ommission. "hey rely on the precedent of Umar (R.A.) who imposed the payment of Diyyah (Compensation) on some persons who allowed a person in dire need of water to die of thirst.(114)

The Malikis include the case of the mother who refuses to breast feed her child deliberately(115) and the Shafe'is include exposure to intense heat or cold under this rule.(116) Ibn Hazm has submitted the position of the Zahiri·s in the following words;

"The ruling with us (Zahiris), and our success lies with Allah, Most High, is that those that did not provide water would be regarded as intentional killers if they knew that he (victim) could not possibly reach water save through them.....But this would not include one who did not have this knowledge amongst them nor -

one who was not in a position to give water; if they were not aware (of the victim's plight) and were capable of providing water, they would (only be liable for mistaken Homicide; and for the mentally sane among them, the payment of Diyyah (compensation).."(117)

From the above discussion it appears that the majority view is that the ommission to provide water for someone in dire need of it which proves fatal to the victim would draw liability, depending upon the intention and of course the capability of the offender to have helped the situation. If both conditions are present the ommission would be intentional homicide whilst if only one condition is present the liability would fall to mistaken homicide, but where both conditions are wanting, there would be no liability.

2.6.2. Jaraim al-Amdiyyah wa Ghairal-Amdiyyah (intentional and non-intentional):

This division is sometimes called Maqsudah wa Ghairal-Maqsudah, which means the same thing as both signify intention, desire and will to commit an offence or their absence.

An offence is called Amdiyyah (intentional) where the offender is aware of the nature and consequence of his act. In other words the offender must have intended the act, had the free choice to commit the act or abstain from it, and had the knowledge of the prohibition over his act.(118) On the other hand an offence is Gair-al-Amdiyyah when one of the requirements under Amdiyyah is lacking such as where the offender did not desire the consequence of his act or was mentally or physically incapable of forming the necessary intention, or even where the actor was compelled to commit the act. As regards the question of mistake, it is capable of affecting the application of the Law.

Mistake under the Shariah is mainly of two kinds; Khata fi-al-Qasd and Khata fi-al-fi'il i.e. mistake as to intention and mistake as to the act.

Mistake as to intention is where a person, for instance, mistakes another for game, or an enemy. These instances go to show that the actor erred in his intention if the act occurred as he desired. Mistake as to the act is illustrated by a man intending to shoot a bird but misses and hits a passerby.(119) According to al-Zaila'i this type of mistake covers both mistake of intention and mistake of the act. But it must be noted that where an aggressor intended to strike at a certain limb of the victim but mistakenly hit some other limb, the defence of mistake would not be recognised.(120)

The effect of mistake (Khata) would, besides reducing the offence from intentional to non-intentional, mitigate the punishment and the Hudud or Qisas penalties would be reduced or avoided for the Ta'zir, or Diyyah (compensation) in the case of Qisas (retaliation).

It is also interesting to point out that there is no sin where there is no negligence involved in the mistake. What subjects the offender to liability is the occassioning of hurt to another, thus breaching the Maxim that a person is free to exercise his rights

on the condition that he does not cause injury to others.[121] This Maxim is based upon the words of the Holy Qur'an; "La Tazlimuna Wa la Tuzlamun" ("Do not wrong(others) and you shall not be wronged)".(122) Another effect of this Maxim is that mitigation of liability would not be complete where injury is done to another, it is only partial. In the words of Zaila'i;

> "Injury by mistake (i.e. its liability) is a necessary prevention against the shedding of blood with inpunity. But for this, (liability) verily there would have been many a mistake by the people....."(123)

2.6.3. Jara'im al-Basitah Wa Jaraim al-I'tiyad (Whole and Inchoate Offences):

It is settled amongst the jurists that all the offences that fall under Hudud and Qisas are whole (Basitah) offences.(124) Basitah, here, literally means something all encompassing. Technically it would mean an offence which is whole or complete by itself. I'tiyad offences are, rather, acts which by themselves do not strictly speaking amount to

'crimes' but may do so if repeated, hence the term I'tiyad (lit. 'returning'). Ommissions could also amount to I'tiyad if repeated persistently. Thus one who arrogantly refuses to perform the recommended practices (Mandub) would be said to commit the offence of I'tiyad. In the same way, the persistant doing of objectionable acts (Makruh) would be regarded as I'tiyad. Under this type of offence what is really punishable is not the single act by itself but the arrogant persistance of the act or ommission. The Shariah would punish anyone who, by this attitude, makes a mockery of the permission made to him in certain spheres of his actions which could in turn promote moral laxity and abuse. This has been warned against by the Holy Qur'an in the following words;

> "....and do not take the Laws of Allah for jest....."(125)

Abu Bakr. al-Siddiq is reported to have punished some people because they had abandoned the call to prayer, (adhan) for the reason that it enhanced the abandoning of prayers.(126) Umar b. al-Khattab is also reported

with the Law of Apostacy (Riddah).(130 The position is similar to that of the callers to innovation. (Ahl-al-Bid'ah). The Malikis are of the view that such 'innovators' in the faith with the intent of introducing chaos into the order of society would also be asked to repent and if they refuse, the death penalty would be imposed on them.(131) The Maliki s,non the less,stress that the advocate of innovation is to be put to death, not for his innovation, but for the chaos and anarchy he is likely to spread in the Society. It appears that the Shafe'i and Hambali jurists follow this opinion of Malik (132) except that Ahmad b. Hambal generally recommends imprisonment of the Ahl-al-Bid'ah until they repent. Ibn Taymiyyah has summarised the position of these schools. He says:

> "Some Shafe'i, Hambali and other jurists have made lawful the execution of the advocates of 'innovations' which are contrary to the 'Book' (Qur'an) and Sunnah (traditions). And so also among the Maliki scholars, for they say that Malik and others have made lawful the execution of the members of the Qadariyyah sect because of the anarchy and mischief they work in the land and not merely for their heresy"(133)

According to the Kashaf al-Qana'i, Imam Ahmad b. Hambal is reported to have held the view that the punishment for the caller to innovation is death.(134)

The Hanafis have been more explicit on this point by identifying some subtilities not discussed by the other Schools. According to Ibn Abidin;

> "Verily, Ta'zir must be imposed for every innovation that does not amount to unbelief by whatever method, if it would bring an end to it. If (the innovation) cannot be stopped by mere imprisonment or mere beatings, then it would be lawful to merge (the punishments) of imprisonment and beating. If the innovation cannot be stopped (unless by) the use of arms, it would be lawful to execute the leader of the innovators together with his followers for their constitutional crime to serve as a deterrent..... .for the reason that his (leader's) mischief would have a most tragic effect upon the religion. If the innovation amounts to unbelief it would be even the more lawful to eliminate all its adherents. If killing of all the adherents is not possible, then the leader (alone) may be killed as a deterrent...."(135)

On a broader note, offences such as 'Bagy' (rebellion), Irhabiyyah (Terrorism) and Faudawiyyah (Anarchism) all fall under the classification of Siyasiyyah offences. It must be stressed at this point that in

modern times it has become more and more difficult to define Siyasiyyah offences,as distinct from Adiyyah offences, since the latter appears to be an offence also against the political stability of the Community. However by taking a closer look, the Siyasiyyah offences seem to be restricted to offences that involve uprisings, hostilities and war against the Community such as the offence of Bagy (rebellion) and Irhabiyyah (terrorism). The condition is that the offence must involve hostilities towards the people of the Community.(136) On the other hand, all other politically tainted offences that do not involve hostilities to the Community would be referred to as 'Adiyyah' offences. (mere transgressions) The difference between the two is also identified by whether the offence is directed to the whole Community or to a single member of the Community, even if he may be the Head of government. It is for this reason that the assassinations of Umar, Ali and Uthman are termed Adiyyah and all offences were deemedto be punishable by Qisas (retaliation). This shows that the Adiyyah offence is not punished in the

same way as the Siyasiyyah offence which is more or less a sort of 'public' crime against the Community.(137)

Offences falling under Siyasiyyah would be punished by the Hadd of Bagy (rebellion) or Ta'zir.

The real nature of these offences cannot be fully grasped without touching on the last classification of offences which outlines the division between general and individual rights.

2.6.5. Jara'im 'ala-al-Jama'ah wa Jara'im ala-al Ahad (i.e. offences against the Community and Offences Against the Individual):

This division is based upon whether the offence is committed against general rights or against individual rights. A contemporary scholar has explained the division as:

> "Obligations which relate to individual interests are (called) rights of the individual, while obligations that concern interests of the public are (called) rights of Allah."(138)

It should be noted that under the Shari'ah the terms "Haqq-al-Ibad' (rights of individuals) and Huqqug-Allah (rights of Allah or the Community) are only coined

for legal purposes in order to determine the power of the individual to pardon the victim or not. This can be seen in that the 'rights of Allah' constitute the Hudud and some Ta'zir offences while the 'rights of individuals' are covered by the Qisas offences. It follows, then, that the offences against Allah or the public cannot be overlooked and must be enforced. This is even the more reason why the jurists have had to identify which rights are public in nature and which rights are private. They go on to divide all rights into three which are;

(1) Rights of Allah;

(2) Rights of the individual; and

(3) Mixed rights of Allah and the individual.(139)

1. Rights of Allah:- These rights are further divided into three i.e.

   (a) Al-Ibadat (Rituals);

   (b) Al-Uqubat (punishments); and

   (c) Al-Daraib al-Maliyyah (resources from land etc.).

(a) Al-Ibadat (Rituals): These are the acts of worship which are exclusively reserved for Allah. It consists of acts which draw the individual closer to Allah by following His Commands and abstaining from His Limits and thanking Him for His blessings. Man has no rights to reduce its performance or remove it from legal obligation.

Most of the jurists are of the view that the Zakat al-Fitr(140) falls under this and, as a right of Allah, must be removed from everyone's wealth including the minor and the insane. But Muhammad al-Shaybani and Zafar have disagreed to this and say that the minor and the Insane are not legally bound by the Zakat al-Fitr due to their obvious incapacity.(145)

(b) Al-Uqubat (Punishments):- These are the punishments which fall under the Hudud and not Qisas. They also include Secondary punishments (al-uqubat al-Thaniyah) such as the exclusion of a killer from inheriting his victim and the various expiatory acts.(142)

(c) Al-Dara'ib al-Maliyyah (resources): This includes what is obligatory to the state from the various dealings in land, the Khums (fifth)(143) from the spoils of war, what is extracted from the treasures of the Soil and its mineral resources, what Allah makes lawful for the Muslims from their enemies by non-hostile means (fai). All the above are 'public' interests which if lost, would be felt by the Community as a whole.(144) Sheikh Abu Zahrah has stated that such acts like abandoning the call to prayer, refusing to errect the banners and emblems of the religion, giving false testimony in court and all other similar acts which affect the Community as a whole and are not restricted to individual interests.(145)

2. Rights of The Individuals:- These are offences directed to the individual for example injury to person or property, defamation assault and similar acts.(146) Offences involving murder and injury to person would be punished by Qisas (retaliation) because punishment would not be exacted save on the instance of the aggrieved party or his

guardian. Retaliation may be waived by the aggrieved party and this is established in the Qur'an as:

> ".....but in case the injured brother is willing to show liniency.....this is an alleviation and a mercy from your Lord....."147

Civil rights also fall under this category such as the rights of pre-emption, reward for services, rights of lien over a pledge, loans and other similar rights.

But it must be added that the term 'individual right' (haqq-al-Ibad) is based on legal use and the individual has no authority to take the law into his hands and thus inflict retaliation without the ruling and supervision of the Court.(148)

3. Mixed Rights of Allah And The Individual:-

Where there are mixed rights of Allah and the individual the majority view of the jurists is that the Rights of Allah (Community) would take priority and the offence in question would be treated as a public offence. A classic instance of this nature is found in the offence of Qadhf i.e. defamation. It is a right of Allah in a way due to the power and authority given to the Community to punish and thus prevent the transgression.

In another way, it is also a right of the individual because of the damage or injury done to him. The majority of jurists say that the rights of Allah are stronger because it is only the Community that has the authority to inflict punishment.(149) But the minority represented by al-Shafi'i is of the view that the rights of the individual must be given priority because the defamer would not be subjected to punishment unless a formal complaint of the victim is recorded.(150)

Another necessary instance is that of Homicide which is punishsbje by Qisas in all cases except where the homicide is committed maliscicusly and treacherously. This indicates that it is generally an individual right. But the jurists interject that it is not a pure right of the individual on the authority of the following verse;

> "That was why We prescribed for the children of Israel that whoever killed a Soul without justification or for spreading chaos in the land, it would be as though he had slain all Mankind; and he who saved the life of any person it would be as though he had given life to all of Mankind....."(151)

The implication of this verse is that whoever transgresses on the individual right of a person has impliedly transgressed the rights of the Community.(152)

It is for this very reason that it is not lawful for one to take his own life or submit himself to a suicidal execution by another, or to abuse his body or wealth by taking wine or disposing of his property in a wrongful manner so long as there are rights of Allah or the Community involved.(153) It has verily been stated in the Holy Qur'an;

> "And do not give the feeble-minded people that property which Allah has made the means of your maintenance....."(154)

Under Islam, individual rights are always dependant on general rights and the individual would have to exercise his rights within the framework of the general law. This has been rightly observed by the majority of jurists for the practicality and justification of the law.

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1. The Pears Cyclopaedia, 1971-72, 1971 Pelham Books Suffolk, Great Britain p. 0.25.

2. For e.g. See Leonard Wooley, 'Abraham' , 1935 London, is an archaeological research on 'Ur' the birth place of Abraham A.S.

3. Our'an Surah 4 : 163 - 164.

4. " " 87 : 18 - 19.

5. Generally there is a Misconception about the Taur'at (Torah) and the Injil (Gospels). The Taurat Contains those commends which were given to the Prophet Moses (A.S.). over a span of about 40 years. The old testament, Compiled by Ezra and some leading scholars of his time as a history of the Isrealites. This makes up the first 17 books of the bible. Amongst these, Exodus, Leviticus, Numbers and Dueteronomi tell the life history of Moses A.S. inclusive of the some genuine verses which were available to Ezra. Thus these four books are not the Taurat but include its remnants. As far as the Injil is concerned the statement of Mofat is quoted; "Jesus wrote nothing and for a time his immediate disciples felt no impulse to write any account of him. The data of the historical Jesus, therefore is based on the vivid recollections and traditions of the primitive Palestinian disciples." Mark, the first book to be compiled was probably composed around 65-75 A.D.). Here also it is clear that the first four gospels are not the 'injil' but contain some remnants of it. The Holy Our'an only affirms those verses that are in line with the meaning of the Our'an.

6. Old Testament, Exodus, 20 : 1 - 17.
7. Old Testament,Leviticus : 1 - 17
8. Ibid Numbers 6 : 1 - 3.
9. Old Testament, Exodus 21 : 12
10. Ibid, Exodus 21 : 16
11. " " " : 22 - 25.
12. Bedteronomy 19 : 20 - 21.
12(a) Al-Qur'an Ch.5 V. 45
13. Book of Mathew 5 : 38 - 39.
14. Book of Luke 6 : 29 - 31
15. Qur'an Ch. 2 : 142
16. Gumi A. M., 1408 A. H. Radd-ul-Azhan-ila Ma'ani-Al-Qur'an Vol. I p. 147.
17. Deutoronomy 22 : 22 - 25.
18. Deutaronomy 22 : 20 - 21.
19. Qur'an Ch. 24 : 2. For the punishment of 'stoning' See, Muslim, Abu Dawud and Tirmizi.
20. See Bukhari
21. Qur'an Ch. 75 V. 36.
22. Without Protection of even oneof these, Society woul Crumble.
23. Qur'an Ch. 3 V. 110
24. Qur'an ch. 5 v. 79 - 80
25. Qur'an Ch. 7 v. 166
26. Reported by Tirmidhi

27. Reported by Bukhari

28. Reported by Muslim.

29. Al-Qur'an ch. 22 v. 41.

30. Muhammad Makhluf, Kalimat al-Qur'an, Tafsir wa Bayan N.D. Dar-ul-Hijrah, Beirut p. 458.

31. Ibid.

32. Suyuti, Tanwir al-Hawalik (Sharh Muwatta Malik) N.D. Dar-al-Fikr Vol. II p. 43.

33. Al-Qur'an ch. 4 v. 5

34. Maududi, The Meaning of the Qur'an, Board of Islamic Publications N.D. Delhi pp. 304 - 305.

35. Quran ch. 7 v. 56

36. The Messenger of Allah (S.A.W.) Said; "..... whenever exposes his fault to us we would enforce (the punishment in) the Book of Allah on him" See the Muwatta of Malik.

37. Qur'an Ch. 42 v. 45

38. Qur'an ch. 39 v. 39 - 40

39. Qur'an Ch. 24 : 2

40. Qur'an 5 v. 38

41. Al-Quran 2 : 286.

42. Al-Qur'an 53 : 38 - 39.

43. Al-Qur'an 17 : 15

44. See Abu Dawud, Nisai, Ibn Majah and Hakim for the report of A'ishah and Ahmad, and Tirmidhi for Ali's Narration.

45. Bahnasi, Nazriyyat fi al- figh al, Jana'i-al Islami 1969, 1969, Cairo Vol. I p. 17.

46. Sha'ban, Usul figh - al - Islami 1971 Dar-al-Kitab Beirut p. 275.

47. Ibid p.

48. This is paid out by every individual who is alive by the dawn of the day of the Eid Celebrations whether child or adult male or female, free of slave.

49. Ali Hasabullah, Usul al-Tashri' al Islami, 1971 Darlal-Ma'arif, (Cairo) p. 329.

50. Abdur Raheem M.A., Muhammadan Jurisprudence, Lahore 1911 p. 224.

51. Ibid, p. 225.

52. Ibid p. 227.

53. Qur'an b 146.

54. Quran 24 : 33

55. Reported by Tirmizi and Abu Dawud.

56. Reported by Bukhari.

56.(a) Andah; Al-Tashri-al Jana'i al Islami, 1968 Vol. II p.3 365.

57. See Maududi, The Meaning of the Quran, Board of Islamic Publications, Delhi Vol. IV p. 297.

58. AbdurRaheem, Muhammadan Jurisprudence, 1911 Lahore, P. 223.

59. Andah, Ibid, p. 718 op. cit, p. 718.

60. Quran Ch. 16 : 106

61. Quoted by Andah, op. cit. p. 718.

62. Abu Zahr ah, N.d. Al-Jarimah wa-l-Uqubah fi-l-Fiqh-al-Islami, Dar-al-Fikr-al-Arabi, (Cairo) p.22.

63. Amir, Sharh al ahkam-al-Ammah Il-Jarimah University of Bangazi, Libya p. 18.

64. Andah, op. cit. p. 78.

65. Ibid, Vol. JJ p.1.

66. Rahuni, Hishayat 'ala Sharh Zurgani N.d. Matba'ah al-Sa'adah, Cairo Vol. VIII, p. 2.

67. Ibn Rushd, Bidayat-al-Mujtahid wa Nahayat-al-Mugtasid N.D. Dar al-Fikr, Beirut Vol.II, p.292 elaboration on the issue please see Abu Zahrah op. cit p. 20. where he corroborates the general concensus of the jurists that Islam aims at protection of five elements i.e. (1) life (2) faith (3) reason, (4) family and (5) property.

68. Dr. Muhammad al-Farouk al-Nubhan, Mubahath fi-al-Tashri' al Jana'i al. Islami, 1977, Dar-al-Qalam, Beirut p. 17.

69. See al-Kasani's Bida'i' at Sana'i Vol. VII p.233.

70. For example the famous Tabi'i Scholar Ibn Shihab insisted that the term al-Janayah must be confined to its root which is derived from the act of wounding or cutting (Jarah).

71. Al-Quran Ch. 9 v. 112.

72. Ibid Ch. 65 Vol. I

73. al-Jaziri, Figh-ala-Madhabib-al-arba'ah N.D. Dar-al-Fikr (Cairo), Vol. V. p.7.

74. the term 'Zina' denotes both adultery and fornication. Thus this writer has opted for a broader translation which covers the two distinct offences. The term whoredom covers both adultery and fornication.

75. Some of the jurists especially the Maliki's regard Homosexuality as Zina.

76. al-Jaziri, op.cit. p.7

77. Sayyid Sabiq, Figh-al-Sunnah 1973 IInd Edu. Dar-al-Kitab-al-Arabiyyah, (Cairo), Vol. II p.355

78. Ibid

79. Ibid

80. Andah, A. al-Tashri-al-Jana'i al-Islami 1968 fifth Edu. Vol. II. p.78.

81. Ibid.

82. al-Jaziri, on. cit. p.7.

83. Ibn Rushd, Bidayah-al-Mijtahid n.d. Dar-al-Fikr, Vol.II p. 296.

84. Al-Qur'an ch. 2 v. 178 - 179.

85. Reported by Abu Dawud, Sunan

86. al-Kishnawi, M.d. Asihhal-al-Madarik (Sharh), Irshad al-Salik, Dar al-Fikr, Beirut 2nd Edi.

87. See Abu Zahrah, op.cit. p.119.

88. Ibid, see also Ibn Taymiyyah, 1306H. al Siyasah-al-Shar'iyyah, Matba'ah al-Akhbar (Cairo).

89. i.e. to serve as a humiliating punishment, especial where the offender is elderly or 'gentlemanly'. The turban is a mark of nobility and dignity. Its removal debases and reduces the respect commanded b the offender in the view of the public.

90. See al-Kishnawi, op. cit. p. 190.

91. i.e. the first 500 years after the Hijrah.

92. Abu Zahrah, op.cit p.182, see also A. Amir, op. cit. p.97.

93. Al-Qur'an ch. 4 v. 22.

94. Ibid, ch. 4 v. 23

95. Reported by Bukhari, Abu Dawud, Nisai and Ahmad.

96. Al-Qur'an Ch. 2 v. 275.

97. Reported by Bukhari, Abu Dawud, Nisa'i and Ahmad.

98. Al-Qur'an ch. 17 v. 15

99. Ibid, Ch. 36 v. 3 - 6

100. Abu Zahrah, op.cit, p.191.

101. See Amir, op.cit. p. 110

102. Ibid.

103. Al-Qur'an Ch.4 v. 34

104. Reported by Bukhari, Muslim. See also al-Qurtabi, al Jami'al-Ahkam-al-Qur'an 1939 Dar-al-Kutub, (Cairo) Vol.VIII p.281.

105. Al-Qur'an ch. 4 v.15

106. See Muhammad al-Qurtabi, Kitab-al-Aqdiyyah al-Rasul pp. 5-6.

107. A. Amir, Sharh al-Ahkam-al-Ammah li-al-Jarimah p.35.

108. Ibn Farhun, Tabsirah-al-Hukkam, Vol.II p.368

109. Ibid.

110. Abu Zahrah, op.cit; p.134.

111. Bahnasi Nazariyyah Fi Fiqh al-Jana'i al-Islami 1969 (Cairo) Vol.I p.24.

112. Ibid. p.25

113. Ibid, p.24

114. Reported in the Muhalla of Ibn Hazm, Vol.I p.22.

115. Dasuqi, Hishayah 'ala Sharh al-Kabir Vol. p.385

116. al-Ramelly, 'Nihayah-al-Muhtaj Ma Sharh al-Minhaj Vol. VII, p.7.

117. Ibn Hazm, al-Muhalla, Vol.X, p. 522.

118. Abu Zahrah, op.cit; p.143.

119. Amir, op.cit; p.60.

120. al-Zaila'i, Sharh al-Tabyin, Vol. VI p. 99.

121. Ibid.

122. al-Qur'an ch. 2 v. 279.

123. al-Zaila'i, op.cit. p.99.

124. Amir, op.cit. p. 52.

125. Al-Qur'an ch.2 v. 231.

126. Abu Zahrah, op.cit; p.123.

127. Amir, op.cit; p.53. For e.g. Sahnun Says that anyone who deliverately abandons the Witr prayer should be humiliated (by Ta'zir) even if it be the first time.

128. Abu Zahrah, op.cit: p.153.

129. See Ibid. See also Amir, op.cit; p.69.

130. i.e. put to death.

131. Ibn Farhun, Tabsirah-al-Hukkam, Vol.II pp.191, 207.

132. The Shafi'is ruled that the Rafadiyyah and Qadariyyah proponents were to be punished with death. The Rawafids were a brand of the Shiah Sect who denounced the Caliphate of Abu Bakr and Umar. They also reviled the Ithna, Ashariyyah, Isma'illiyyah and Zaydiyyah Shia's. The 'Qadariyyah' proposed that man had absolute Control over his actions. Ahmad b. Hambal opined that the 'Jahmiyyah' followers could be killed to protect the Society from their mischief. These were a sect headed by Jahm b. Safwan and were crushed towards the end of the Ummayyad rule (132 A.H.). They advocated that it was not lawful to attribute to Allah, any attribute similar to that of His creatures because this would mean, according to them, that they He would not be, the 'Living,' the 'All-knowing.' They also declared that the 'Garden' and the Hell-Fire would both come to an end sometime. (See Amir, op.cit. p.70.).

133. Ibn Taymiyyah, Siyasah al-Shar'iyyah, p.123

134. al-Bahuti, Kashaf al-Qana' an Matn al-Iqna', 1320H. Matba' ah-al-Sharfiyyah, (Cairo) Vol.IV, p.76.

135. Ibn Abidin, Hishayah, Vol.III p.307.

136. Amir, op.cit; p.79.

137. 'Public', not in the English sense, but as against the Community. After the fatal blow delivered to Ali, (RA), he said to his sons Hasan and Husain (RA);

"If I survive, then I am the guardian (Wali) of my injury." This shows that not withstanding the fact that Ali (RA) was the Head of Government, an attack against him (even if politically motivated) would be punished, not as a public offence but by the Qisas which is more of an individual interest than public. (For more details please refer to Amir, op.cit. pp. 79-80).

138. Ali Hasabullah, Usul-al-Tashir-al-Islamiy, 1971 Dar al-Ma'arif, (Cairo) p.329.

139. Bahnasi, Nazriyah fi al-Fiqh al-Jana'i al - Islam 1969, (Cairo) Jawad Husaini Vol.II p. 136.

140. i.e. the Compulsory alms giving of grain at the end of the Month of Ramadan.

141. Hasabullah, op.cit.; p.329.

142. Ibid, p. 331.

143. The Khums or fifth which is a 'right of Allah and His Messenger. It is to be put in the public treasury for public help.

144. Hasabullah, op.cit; p.331

145. Abu Zahrah, op.cit. p.152.

146. Ibid, P.152.

147. Al Qur'an Ch. 2 v. 178.

148. Hasabullah, op.cit; p.332

149. Ibid. p.331

150. Ibid. See also the Tafsir al-Alusy on the verse of dafamation (Ch.24 v. 4).

151. Al-Qur'an Ch.5 v. 32.

152. Abu Zahrah, op.cit; p.149.

153. Hasabullah, op.cit., p. 331

154. Al Qur'an, ch. 4 v. 5

Chapter 3

APPLICATION AND ENFORCEMENT OF HUDUD

The preceeding chapter briefly introduced the general scope of Criminal Law under the Shari'ah. This chapter seeks to analyse the nature and basis of the Hudud offences, their stated punishments and the how and when of such punishments under the Shari'ah.

3.1 Hudud : Definition and Nature:

'Hudud' are principally 'offences against Allah.' The term 'Hudud' is used to signify what is of interest to the community and also the punishments that have been prescribed and fixed by the Qur'an and Sunnah. These offences are generally consisted of al-Zina (whoredom), al-Liwat, (sodomy) al-Qadhf, (defamation) Sariqah,(theft) Sharb-al-Khamr, (wine drinking). Hirabah, (highway robbery) Riddah, (apostacy) and Bagy (rebellion).[1]

There is little disagreement among the jurists as to the constitution of Hudud offences. The offence of Sharb al-Khamr (wine drinking) is one of the few areas of disagreement. The majority of the leaders of the Schools are of the view that it is a Hadd offence. Abu Hanifah, Malik and Ibn Hambal put its punishment at

Eighty stripes on the authority of the Ijma' established during the reign of Umar b. al-Khattab (R.A.). Imam al-Shafi'i puts the punishment at forty stripes. His argument is that Forty stripes was the maximum the Holy Prophet (SAW) applied as punishment for this offence. Some jurists on the other hand insist that it is not a Hadd offence but a Ta'zir offence, since no specific punishment was upheld during the lifetime of the Prophet (SAW) and Abu Bakr (RA) as well, gave forty stripes. It was only during the time of Umar that the punishment was increased to eighty by using the illa (effective cause in defamation (Qadhf).[2]

One other area of disagreement among the jurists is the offence of homosexuality. Some jurists place it under Ta'zir while others, especially the Malikis, place it under the established Hadd offence of Zina (whoredom).[3]

Some of the jurists have declined also to reckon the offence of Hirabah (highway robbery) as a Hadd. They spread it under the various heads of Qisas and Ta'zir.[4]

Under the Islamic Law punishments are aimed at the preservation of the public order and social

stability of the Community. The offence of Zina (whoredom), for example, if allowed to grow in Society, would uproot the values of Modesty, Chastity and nobility thus causing destruction to the very root of society, the home. The offence of Qadhf (defamation) is a distinct offence from Zina (whoredom) but also rents similar havoc on the home and marriage (Nasl). If everyone were free to attack the ancestory or parentage of others without proof, the home would have no more weight in Society. The offence of Sariqah (theft) is a transgression against the property of others which happens to be a primary joy for the people. Members of society must be protected from this crime and the punishment prescribed for it, which is the cutting-off of the hand, is the only way to prevent or reduce its occurance. Sayyid Sabiq makes a similar observation;

> "The modern Sages are compelled into a concensus of upholding the punishment for theft after it became clear to them that imprisonment (only) would not reduce the perpetration of this Crime....."[5]

As discussed earlier in this work, the primary function of Hudud punishments is to prevent crime, establish peace and security for every member of society

in terms of his life, freedom, property and honour. This need for the enforcement of the Hudud has been aptly put by the Prophet (SAW) as;

> "The Hudd punishment which is enforced on the land is far better for it's inhabitants than forty days of rain."6

There are several points under this heading that in one way or the other affect the working or application of the Hudud punishments.

3.1.1. Intercession In Hudud Cases:

It is prohibited for anyone to intercede for an offender or negate theenforcement of the limits set by Allah most High. This would obviously go against the interests of the Community and would encourage the furtherance of Crimes. But this is understood by the doctors of the law as applicable to cases which have already reached the Courts. They base their stand on a tradition of the Prophet (SAW) reported by al-Nisa'i and Hakim as saying;

> "Overlook Hudud (charges) between yourselves. But whatever reaches me, verily becomes obligatory (to punish).

In another tradition narrated by A'ishah (R.A.) a Lady from the Makhzum stole an item and the Prophet (S.A.W.) ordered her hand to be cut off. Her people approached Usamah bin. Zaid (R.A.) and requested his intercession. He spoke to the Prophet (S.A.W.) about her and he replied thus;

> "O Usamah, it does not behove of you that you should intercede in one of the punishments of Allah, the Majestic, the Glorious!"

He then stood up and gave an address in the following words;

> "Verily those before you were destroyed because if a noble person committed theft, they would overlook it but if a lowly one were to steal, his hand would be cut off. By the One in whose hand lies my breath, if Fatimah, daughter of Muhammad were to steal, I would cut off her hand!"[7]

The position has been explained by Ibn Abd-al-Barr that there is a concensus of opinion (Ijma') that once a case reaches the judge, its enforcement becomes obligatory.[8]

3.1.2. Setting Aside of The Hudud In Cases of Doubt:

Punishments under the Shariah strike at two things; the body and the reputation of the offender. For this

reason it is not lawful to apply the Hudud on the offender unless on concrete proof beyond the shadow of doubt.

There must be no lingering doubts and fears as to the Commission of the Crime by the suspect.(9) This is established firmly by the Traditions. It has been narrated by Abu Hurairah (R.A.) that the Prophet (SAW) said:

> "Do not enforce the Hudud in cases of uncertainty."(10)

But a more detailed Tradition is narrated by A'ishah (R.A.) on the authority of the Prophet (SAW) as saying:

> "Put off the Hudud punishments on Muslims as much as you can. If he (suspect) has a way out then let him off for verily it would be better for the leader (or judge) to err in pardoning the (suspect) than to err in punishing (him)"(11)

The implication of these Traditions is that the existence of doubt or uncertainty would negate the Hadd punishment completely and only Ta'zir may be applied. The jurists have explained this by the instance of a case of Zina (whoredom), where the doer or actor mistakenly supposes that the woman is lawful for him and goes on to cohabit with her. The jurists call this al-Shubhah fi-al-Fail (error by the actor). But for the mitigating factor to

stand, there must be a genuine lack of knowledge by the doer.(12)

Another example of this is where someone has sexual intercourse with a slave-girl who only belongs to him partially (i.e. the Mushtarikah or the Mukatibah.(13) The concept of Shubhah (doubt or uncertainty) would also apply where there is a jurisprudential disagreement over the lawfulness of the act, such as the Mut'ah (temporary) Marriage and the marriage without a guardian or witnesses, and wine taken for medicinal purposes. The Shafe'is, especially, call it al-Shubhah fi-al-Jabhah.(14) The Hadd punishment would not apply also where a thief mistakenly supposes the article to be his, or a father stealing the property of his son, etc.(15)

Generally speaking, this is the view of the majority of jurists i.e. that the Hudud punishments can be mitigated in cases of uncertainty. The only group of jurists that do not agree with this is the Zahiri School. They rely upon the following authorities;

(i) The provision of the Holy Qur'an which says; "These are the limits of Allah; do not transgress them."(16)

(ii) The Tradition of the Holy Prophet (SAW) that says; "Truely your blood, property, honour, skins, are sacred."(17)

(iii) Finally they argue that the Tradition which says; "put-off the Hudud in cases of doubt" does not reach the Prophet (SAW) but stops at the Companion, Ali (R.A.).(18)

The position taken by the Zahiris is obviously unpracticable. It means that the offender, then, must be either punished by the court, closing its eyes to manifest defects in available evidence, or the court must not begin to hear the case at all.!

The correct position is that of the majority because the main aim of the Ta'zir punishment is to step in and provide a subsidiary penalty where the Hadd cannot be applied for inadequate evidence against the offender.

3.1.3 Responsibility for Enforcing The Hudud:

This point is divided into two, viz; Hudud on free persons and Hudud on slaves. As far as free persons are concerned, there is a concensus of opinion that enforcement

of the Hudud punishments is solely the responsibility of the judge (Hakim) acting under the authority of state and it is not for the individual to venture into this field.(19) Muslim bin Yasir is reported to have said: "one of the Companions used to say; "Jurisdiction belongs (solely) to the state in (Matters of) the Zakat (poor due), Hudud (punishments), fai (tax derived from the enemy by peaceful means) and the Jumu'ah (friday congregation)." It appears that this was the established practice from the times of the Sahabah (Companions) for Tahawi has added that "We do not know of any contrary view of the Companions."(20) Kharijah bin Zaid and Abu al-Zinad have also narrated from different sources that the people of Madinah (ahl al-Madinah) used to declare that; "It does not behove of any one to enforce anything from the Hudud punishments but the state authority except the case of a man enforcing the punishment of Zina (whoredom) on his slave or salve-girl."(21)

The case of a Master enforcing the Hudud over his slave is accepted by one view of the scholars and rejected by another. The majority of the jurists are

of the view that the master may do so. Among this group are eminent Companions such as Ali, ibn Mas'ud, Fatimah and Alqamah (RA). Malik, Sufyan al-Thawri and al-Shafi'i are also reported to have upheld this view.(22) They relied upon the following authorities;

(i) The tradition reported by Abu Hurairah where the Prophet (SAW) said: "where a slave girl fornicates and her sin is discovered, he (Master) should whip her but not rebuke her. If she fornicates again, he should whip her (again) but not rebuke her. But if she fornicates a third time, he should sell her even for a rope made of hair."(23)

(ii) Another Tradition reported from Ali (RA) that the Prophet (SAW) said "Enforce the Hudud on what your right hands possess (i.e. slaves).(24)

The jurists have, quite rightly, placed certain limitations over the Master's right to enforce Hudud such as;

(a) The punishment must bear the nature of lashes as in the punishment for Zina (whoredom) of those not married, Intoxication, or Defamation. The Hadd that entails execution i.e. death, is not within the jurisdiction of the Master as in the cases of Apostacy and Blasphemy. In the same way, the Master is not competent to punish his slave by Qata' (cutting-off the hands) for theft;

(b) the master must have complete ownership over the slave i.e. there must not be co-ownership with another, or even where the salve-(girl) is married to someone else;

(c) the offence must be established by clear evidence or confession; and

(d) the Master must be a major. He must also be sane and knowledgeable in the matter of Hudud and the way to enforce it.(25)

Imam al-Shafi'i adds the condition that where the slave happens to be under an agreement to free himself (Mukatib) or a Dhimmi (non-Muslim subject of the state), the Master's right would not apply.(26)

On the other hand the minority, represented by the Hanafi's, mantain that the Master has no authority to inflict the Hudud on his slave for the main reason that the Hudud fall within the exclusive jurisdiction of the state. The rationale behind this view is that one who may not inflict the Hudud on a free person cannot do so in respect of a slave. The Hanafis go on to reason that the Hudud punishments can only be enforced after clear proof by evidence or confession which in turn require upright witnesses before a valid court session such as in the case of proof of Zina (whoredom) and the rules of confession would necessarily have to apply to the slave just as it would to a free man. Hudud punishments, maintain the Hanafi s, is a pure interest of the Community as a whole especially in the punishments of death and cutting off of the hands and feet. The Hanafis rely on the following authorities;

(a) the Qur'anic provision which reads;

"then if they are guilty of indecency, after they have been fortified by wedlock, they shall be given half the punishment prescribed for free women."(27)

The argument of the Hanafi s, here, is that since exclusive jurisdiction has been given to the state as regards free women, what then many possibly justify the exclusion of the state over the slave?

(b) a tradition narrated by Ibn Mas'ud, Ibn Abbas and Ibn Zubair (R.A.) which says:

"the state has been empowered in four (matters); Hudud, (punishments) Zakat (poor due) the Jumu'ah (friday congregation) and the fai (spoils of war."

Commenting on this Tradition, the Mabsut states;

'these are rights of the Community that (only) the state may perform owing to its vested authority to the exclusion of all others....."(28)

3.1.4. Enforcement of the Hudud In The Land of The Enemy:

The position of the jurists on this is divided into two. Imam Abu Hanifah leads the minority of scholars in the view that Hudud offences cannot be punished in the land of the enemy. They rely on various Traditions of the Prophet (SAW) and some Companions, such as the narration of Yasr bin Arta'ah that the Prophet (SAW) said: "Do not cut off the hands while on a journey." This report is contained in the Sunan of Abu Dawud. In fact al-Tirmidhi has related the same Tradition except that the word 'journey' is replaced by 'expedition' (i.e. Ghazw).(29) Abu Yusuf, in his Kitab al-Kharaj, narrates a Tradition of Ibn Mas'ud and Alqamah (R.A.) when they were both asked to punish the leader of an expedition for drinking wine. They both replied; "We would not do this in the face of the enemy for it would spur them against us and weaken us against them if they should come to know"(30) Abu Yusuf relied also upon the statement of the Companion Zaid bin Thabit (R.A.) that: "Hudud offences are not punishable in the land of the enemy for fear that enforcants (Muslims) would be overcome by the enemy. This applies to all the Hudud cases."(31)

Umar (R.A.) is also reported to have suspended the Hudud punishments in enemy territory until such a time when the army returns to the land of safety.(32)

Notwithstanding the authorities cited, the majority of the scholars insist that Hudud punishments must be enforced regardless of venue i.e. whether in the land of the enemy or at home. Among the proponents of this view are Malik, Auza'i, Laith and al-Shafi'i.(33) Imam al-Shafi'i regarded the tradition of Umar (R.A.) as defective. He also contested, the authenticity of the chain of Transmitters (Isnad) of the traditions reported by Abu Yusuf.(34) Imam Auza'i analysed the matter as follows;

> "The head of the army shall enforce the Hudud punishments on his surbordinates except in the case of cutting off the hand. In such case he would suspend the execution of the punishment until he returns to the home land. However this would not apply to the head of an army in Egypt (Misra)."(35)

Imam Abu Hanifah himself understood this point. He said:

> The head of an army in the enemy land would not execute the punishment on anyone of his soldiers except if he should be in Misra (Egypt), sham (Syria) Iraq or similar land.(36)

It comes to light that the justification for suspending the Hudud in the land of the enemy is for the public good. The moral strength of the army would be greatly affected if the enemy should become aware of such a weakness amongst the ranks of the Muslims. The exception of some cities made by Imams Abu Hanifah and Auza'i point to this i.e. that these habitations are generally aware, already, of the situation of the Muslims and the occurence of a crime would not have a meaningful impact on the end result of the expedition.

3.1.5. Whether The Judge Can Punish On His Personal Knowledge Where Witnesses are Lacking.

The majority of the jurists are of the view that the Imam (leader) or his judge may not be a competent witness in Hudud cases. This is based upon the Ijma' (concensus of opinion) of the Companions (R.A.). It is reported that Umar b. al-Khattab (R.A.) happened to see

an indecency between a man and a woman. He then called a Counsel of the Companions and asked them their opinion on this. Ali b. Abu Talib (R.A.) stood up and said:

> "The Commander of the believers would have to produce four witnesses or be whipped for defamation."

Umar (R.A.) then kept quiet and did not disclose the persons.(37) Abu Bakr (R.A.) is also reported to have said: "If I were to witness a man Committing a

> Hadd offence I would not punish him, until I secure the requisite evidence."(38)

This view is also based upon the verse of the Qur'an which provides that:

> "Now that they have not brought witnesses, they themselves are liars in the sight of Allah.(39)

But the Zahiris believe that it is obligatory on the leader or his judge to inflict the punishments of Hudud, Qisas and offences against property if he has personal knowledge of its occurence. This sort of evidence,

according to them, is Superior to confessions and testimony of witnesses. They support their argument with the verse:

> "O ye who believe be ye the standard bearers of justice and witnesses for the cause of Allah....."(40)

They also rely upon the Tradition of the Prophet (SAW) which says: "Whoever amongst you sees a wrong should correct it with (the might) of his hand; but if he cannot then with his tongue...."(41) They further argue that it is for the judge to do justice and it is not justice for a judge to allow a wrongdoer to escape unchecked. If the judge does not punish him then he, also, would be a wrong doer.

This apparent difference of opinion can be easily harmonised by taking into consideration the fact that the majority are not saying that the culprit be left off completely. It is only the Hadd which would be overlooked on account of the deficient proof; but it certainly does not mean that some lower punishment cannot be issued out by way of Ta'zir.

3.1.6. Whether The Hudud Can Be Enforced In The Mosque:

Generally stated, the position under the Shariah is that serious or capital punishments cannot be executed inside the Mosques. The Malikis are guided by the saying of Malik as narrated in the Mudawwanah al-Kubra that "Hudud punishments are not to be executed in the Mosques. This includes the Qisas.....but there is no harm in the judge executing a low number of lashes as correctional punishment in the Moseques."(42) The Hanafi scholars are also of this view for the reason that the person being punished often screams out in a loud tone. This would be contrary to the teachings of the Prophet (SAW) for he said: Keep your babies, insane people and loud voices away from the Mosques."(43) In another Tradition he expressly forbade the execution of Hudud in the Mosques. The Hanafi s also say that Mujahid, the famous Tabi'i scholar, disliked the execution of Hudud in the Mosques.(44) The Zahiri s are also of this view. They quote a Tradition of the Prophet (SAW) which says:

> "The Prophet (SAW) prohibited the following in the Mosques; seeking (wordly) profit, reciting poetry and inflicting Hudud punishments therein."(45)

Ibn Hazm, commenting on this Tradition, said;

> The execution of Hudud punishments in the Mosques surely implies the filth of blood in the punishments of death and cutting-off (Qat'). It is prohibited to place anything of this sort (filth) in the Mosques, because then, the mosques would not be properly kept and purified. And moreover the Prophet (SAW) ordered the stoning of Ma'iz outside the Mosque. However the Hudud punishments of lashes are lawful whether within or without the Mosques but the execution outside the Mosque is preferred with us (Zahiri s) for the fear that the victim of the flogging may release urine or other impurity....(46)

3.1.7 Only The Evidence of Males Is Admissible In Hudud Cases:

The majority of the jurists opine that only the evidence of males is admissible in cases of Hudud. They rely upon the Qur'anic provision which states;

> "If any of your women be guilty of indecency call four witnesses from among yourselves to testify against them...."(47)

They contend that the words 'Min Kum' (among yourselves) can only mean 'among men.' Moreover al-Zuhri has said that: "During the time of the Messenger of Allah (SAW) and the first two Caliphs, women were not allowed to testify in Hudud cases."(48)

On the other hand, Ata and Hammad would accept the evidence of three men and two women in the case of Zina (whoredom). The Shiah scholars agree with them but make it a condition that this alleviation would apply only where the punishment is whipping and not where it is stoning.(49) The Zahiris also adopt a liberal approach and say that women may give evidence if there is a male to corroborate them. Some of the Malikis also accept the evidence of women in cases of defamation (Qadhf).(50)

3.1.8 Hudud As Expiation For The Wrongdoers:-

Again most of the scholars agree that the punishment of Hudud serves as a purification of the offender's crime and that he would not be punished again in the hereafter. They rely upon a Tradition of the Prophet (S.A.W.) narrated by Ibn Samit. It says:

> Convenant with me, (O believers) that you would not associate anything with Allah, that you would not commit whoredom, that you would not steal, that you would not kill a Soul which Allah has made sacred except with a just cause; he who fulfils (this) among you, his reward lies with Allah and whowver commits something of the above and is duely punished, it would be expiation for him, and whoever commits something of the above and Allah keeps it hidden, his affair would rest with Allah who would pardon him if so wills or punish him if He so wills.(51)

In another tradition narrated by Imran bin Husain (R.A.) when the funeral prayer of Ghamadiyyah was about to be said, Umar (R.A.) asked the Prophet (SAW):

> "Are we going to offer funeral prayer for this adulteress?" The Prophet (S.A.W.) replied:
>
> > "She has offered such a repentance that if it were distributed over the whole population of Madinah it would suffice for their forgiveness."(52)

Abu Hurairah has also narrated a similar incident, where after a man had been punished for wine-drinking someone said "May Allah defame him!" To this the Prophet (SAW) said: "Do not utter such wprds and thus help satan against

> Convenant with me, (O believers) that you would not associate anything with Allah, that you would not commit whoredom, that you would not steal, that you would not kill a Soul which Allah has made sacred except with a just cause; he who fulfils (this) among you, his reward lies with Allah and whowver commits something of the above and is duely punished, it would be expiation for him, and whoever commits something of the above and Allah keeps it hidden, his affair would rest with Allah who would pardon him if so wills or punish him if He so wills.(51)

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him."(53) Infact in the Sunan of Abu Dawud there is an addition to this Tradition viz: The Prophet (SAW) said: "Pray this way; 'O Allah pardon him and show mercy on him."

With this basic foundation about the general nature and character of Hudud offences, particular offences may be introduced for a complete analysis of the Hudud.

3.2.0 Al-Zina (Whoredom):

3.2.1. Definition:

Various interpretations of the term Zina (whoredom) have been given by different scholars.

According to the Hanafi s Zina refers to 'a man's sexual intercourse with a woman through the frontal sexual organ over whom he has no legal right in the slightest form.'(54) It must be noted that under this defintion, sexual intercourse with a woman through the rectum would not be Zina and thus not punishable by Hadd. Sodomy also does not fall under Zina. (whoredom).

According to the Maliki s it is "the sexual intercourse of a man, fully responsible, through the genital of a human being over whom he has no ownership and in

circumstances in which no doubt exists as to its being illegal."(55) Under this definition Sodomy and Coitus with a woman through the rectum would constitute the offence.

The Shafi'is define Zina as "the insertion of the male sexual organ into the female sexual organ with full awareness and the absence of doubt as to the (illegality of the) act committed."(56)

The Hambalis say Zina is the act of 'indecency' through the front genital or the rectum.(57)

From the above definitions, not withstanding a few variations, Zina can safely be said to be the customary act of sexual intercourse between a man and a woman over whom he has no rights of enjoyment.

3.2.2. Basis For The Prohibition:

Islam enjoins marriage as a lawful means of sexual gratification and breeding of offspring. Marriage also enhances honour, blessings and goodness by the fortification it offers mankind against moral decadence and weakness. The Holy Qur'an has prohibited the encroachment on the act of Zina through lustful glances at the opposite sex

and anything which will encourage the act of whoredom. It states that;

> "and do not approach Zina (whoredom), Verily it is an evil leading to other forms of indecency."(58)

The act of Zina, by its very nature, destorys the organisational structure of the home by prompting separation between the spouces, lack of mutual trust which erodes the love and confidence that holds a marriage together. Also Zina, if undetected, leads to the undeserved upbringing and inheritance of the illegitimate child. The holy Prophet (S.A.W.) is reported to have said:

> "There is no sin after Polytheism, greater in the sight of Allah, than a drop of semen which a man places in a womb that is not lawful for him." (59)

3.2.3. Background and Nature:

During the early stages of revelation the punishment for Zina was imprisonment for women and corporal punishment for men. This is contained in the saying of Allah Most High:

> "If any of your women be guilty of indecency, call for four witnesses from among yourselves to testify against them. If they give evidence (and prove their guilt) then confine them to their houses until death overtakes them or Allah opens a way for them. And punish the two of you who commit this crime; then if they both repent and reform themselves, leave them alone, for Allah is generous in accepting repentance, Merciful in forgiving sins."(60)

There is quite a difference of opinion, among the scholars, as to the interpretation of the above verses. (i.e. 15 and 16 of ch.4). One group which includes the Zahiri s understand the first verse as refering to the women who commit the offence with the men refered to in the second verse.(61) Another group believes that the first verse refers to married women while the second refers to unmarried men and women. This view is supported by the Commentator al-Suddi.(62) There is also another view which states that the first verse refers to lesbian women while the second refers to homosexual men. There is yet another group that believes that the second verse is an abbrogation of the first verse and thus the second verse covers the man and woman who commit the crime.(62)

Imam al-Suyuti in analysing the question opines that the words used by the Qur'an in verse 16 exclusively refer to the male gender in matters of the act, the punishment and the repentance. Al-Suyuti also eliminates the contemplation of females under verse 16 because their matter had been fully dealt with under verse 15.(64) Not withstanding the extent of disegreement under this issue, the jurists are unanimous in holding that both verses (i.e. 15 and 16) were abbrogated by the second verse of Surah al-Nur. The verse says:

> "The woman and the man guilty of fornication, flog each one of them a hundred times and let no pity for them restrain you in a matter prescribed by Allah if you believe in Allah and the last day, and let some of the believers witness the punishment inflicted on them."(65)

The Prophet (SAW) also added to this abbrogation, the famous Tradition which states:

> "Take it from me. Verily Allah has opened a way for them. For the unmarried, strike them with a hundred stipes and banish them for a year and for the married, give a hundred stripes and stone them."(66)

For a proper understanding of the nature of Zina it must be kept in mind that there are some areas agreed upon by the jurists and also some areas not agreed upon by them. Thus a general appraisal or conclusion would be more misleading than educative.

1. Area of agreement:

There are three of such areas viz:

(a) The illegal sexual intercourse (al-wat al-Muharram)

(b) Moral and physical fortification (al-ihsan) in the case of married persons; and

(c) Testimony of witnesses.

(a) Illegal sexual intercourse (al-wat al-Muharram)

There must, to say the least, be the actual penetration of the glans of the penis into the female sexual organ.(67) It is however not a condition that there be actual ejaculation of semen, or that the penetration of the penis is complete. Before establishing the offence it must be ascertained, beyond every shadow of

doubt, that there was penetration of the glans. This is clear from the thorough cross-examination of Ma'iz by the Prophet (SAW) when the former confessed that he had committed the crime of Zina. It is reported in the books of Hadith that the Prophet (SAW) asked him such questions as "Did you commit sexual-intercourse with her?", till this of yours disappeared into that of hers?; Like a Kohl stick in its bottle or a pail in a well? etc.(68) From this the jurists have deducted that nothing short of absolute proof of penetration is sufficient to prove Zina. Thus, were a man to embrace a woman with passion only the Hadd will not apply. A man once came to the Prophet (SAW) and said: "O Messenger of Allah! I met a woman and I did everything with her except the copulation." Allah Most High then revealed the following verse.

> "Establish prayer at the two ends of day and in the early part of night. Verily virtues remove evils."(69)

At this the man said: "Does this verse apply to me"? The Prophet (SAW) said "For anyone amongst My Community who does it."(70)

(b) Moral and Physical Fortification (al-Ihsan):
All the jurists agree that before a person can be subjected to the punishment of stoning (al-Rajm), he or she must be under the state of Ihsan. This means that the offender must have been protected or fortified by a fully valid and consummated marriage. This state is assumed for the rest of his or her life even though the Marriage may be terminated.(71)

Through marriage and lawful sexual intercourse the parties are presumed to be aware of the sacredness of the prohibition and also enjoy the fortification provided by the marriage. The one who has never enjoyed the benefit of lawful sexual intercourse cannot be called a person adequately fortified against the offence of Zina. Such a person obviously remains exposed and subject to the instigations of evil forces which may overpower him or her.(72)

(c) Evidence: (al-Shahadah): It is also agreed among the learned that under the offence of Zina, the least number of witnesses required to prove a case is four.(73) This is based upon the provisions of the Qur'an and Sunnah. It is stated in the Holy Qur'an that;

> "....let four witnesses from among you (Male) testify against them...."(74)

In another verse Allah Most High states;

> "Why did they not bring four witnesses?..."(75)

From the Traditions it is reported from Abu Hurairah that Sa'ad Ibn Ubadah asked the Prophet (SAW?;

> "What do you see if I were to find my wife with another man; should I restrain myself until I find four witnesses"? The Prophet (SAW) said; 'Yes'.

From the following authorities the jurists have inferred certain rules such as that the witnesses must not be less than four(76), upright and that they must have had actually seen the 'Res in Res' (thing in the thing). Other such conditions are that the witnesses must not contradict

themselves especially as to time and place. Their evidence must also be taken in one session.

2. Area of difference:

Beyond the generally agreed principles of Zina, there are some principles that find difference among the jurists. These are quite a number and fall under different headings. We have already seen that all cases that do not fully satisfy the standard of proof set by the Shariah will not be subjected to the Hudud punishments and Ta'zir will be applied instead. Also, those cases that are categorised differently by certain jurists such as the Mut'ah (temporary) Marriage, Marriage without a guardian or without witnesses, etc. Besides such cases there lies a group of offences that resemble Zina and actually have been recognised as Zina by some jurists but not by others. The first of these is;

(a) Sodomy (al-Liwat) : Quite a number of the learned including Malik, al-Shafi'i, Ahmad the Zaydiyyah Shiah and even the two disciples of Abu Hanifah, Abu Yusuf and Muhammad, are of the opinion that the sexual act done, illegally,

through the frontal genital or the rectum of a woman or a man entails the Hadd punishment of Zina.(77) They incorporate Sodomy into Zina by analogy, taking the similarity of the two acts as the simile. They further argue that Allah Most High equates the offences by referring to both whoredom and sodomy in various instances as "Fahishah" (indecency) e.g. in the following verses;

> "Verily you approach men in your wanton lust instead of women"(78)

And the verse which says;

> "Verily you approach indecency!"(79)

The contention of the jurists is that the word al-Fahishah (indecency) has been used for both Zina and Sodomy. They also back themselves with a Tradition of the Holy Prophet (SAW) narrated by Abu Musa which states; "whenever one man approaches another they both are adulterers."(80)

On the other hand Imam Abu Hanifah argues that sodomy does not fall under the heading of Zina for the simple reason that sex in the natural way is called Zina while sex in the unnatural way is called Liwat

(sodomy). Thus if they had been one and the same thing there would not have been the need to use different terms. Abu Hanifah also argues that the Sahabah (Companions) differed as to the punishment for Sodomy. This is a clear indication that sodomy is a separate offence, distinct from Zina.(81) The Zahiris are also of a similar view.(82)

It must be noted that all the jurists agree that anal coitus practiced with a wife is not punishable by Hadd and in the case with most of them, apply the Ta'zir only.(83) Infact Imam al-shafi'i regards it as an I'tiyad offence i.e. an offence punishable only if repeated without heed to warnings to desist.(84)

(b) The Act of Zina with a Dead Person: The majority of jurists led by Malik, al-Shafi'i and Ahmad hold that sexual intercourse with a dead woman who was not the wife of the offender, whether in the natural way or not, will be regarded as Zina.(85) But with Imam Abu Hanifah such an offence shall not be treated as Zina. He also held that the same law applies to the woman who inserts the genital of a dead man into her's.(86)

(c) Bestiality (al wat al-Bahimah): Here only a minority of the scholars consider this act as similar to Zina, such as some of the jurists of the Shafi'i school and the Zaydiyyah Shiah.(87) The majority however do not place this act under the offence of Zina. Abu Hanifah, Malik hold that such an offence will be punished only by Ta'zir.(88)

This view is supported by some of the Shafi'i and Hambali Scholars. Some others however insist that the Ta'zir punishment to be inflicted must be the death penalty. They support themselves with a Tradition of the Prophet (SAW) which says: "Kill whoever 'approaches' an animal and (also) kill the beast."(89)

(d) Cases of unlawful sexual intercourse with minors and Insane s: Where the Minor or Lunatic is male, there will be no Hadd on such minor or lunatic. But where the Minor is a Mummayyiz (i.e. has attained the age of discretion) he will be punished by Ta'zir. This is agreed by all jurists. But they differ as regards the woman involved. Abu Hanifah says that she shall be punished by Ta'zir only because she is, at most, the

passive partner. He also supposes that since the act of the minor or insane is not a 'complete' act of Zina, then the woman cannot be 'fully' punished for an 'incomplete' act.(90) However where the adult and Sane partner is a male he must be punished by the Hadd. Imam al-Shafi'i will punish the adult and sane offender regardless of his/her sex.(91) This view is strongly supported by the Zahiris, the Zaydiyyah Shiah and even Zafar of the Hanafi School. They argue that punishment must lie because guilty parties are punished for their separate acts and desires they quenched. Thus since the man or woman achieved this (regardless of the mental state of the other partner) he or she must be fully punished.(92) To Imam Malik, the woman who has sexual intercourse with an insane person will be punished by Hadd of Zina but not where the minor is involved. Malik con tends that sexual pleasure is not contemplatable with a minor boy but is possible with a lunatic.(93) On the other hand where a man defiles a minor girl or a female lunatic, Malik holds that he shall be punished by the Hadd of Zina. However where penetration is not practicable with such a minor girl, Malik holds that only the Ta'zir punishment will be given.(94)

(e) Sexual Intercourse with a woman Hired For The Purpose: Imam Abu Hanifah is the only jurist known to have declared that the Hadd shall not apply to such a matter. The great Imam held that where a woman is paid for sexual intercourse, that payment constitutes dowry. For this reason the Hadd must be put off. The Imam supports himself with a similar case decided by Umar b-al-Khattab, where he said "this is her dowry." Umar relied on the verse which says;

> "And for what you enjoy from them, (women), give them their rewards as an obligation."(95)

All the other jurists have not accepted this argument and the famous Zahiri, Ibn Hazm, replied Abu Hanifah as follows: "Beware ! this is a way to (encourage) Zina and a licence to unlawful indecency and assistance to the Devil in opening the gates to great sins....."(96)

Imam Abu Hanifah must not be misunderstood as letting such criminals free. The Ta'zir will be given for their immorality.

(f) Hadd on the Non Muslim: There is also a difference if opinion as to whether the infidel should be stonned to death. One group of scholars, including Imams al-Shafi'i, Abu Yusuf and Ibn al-Qassim, believe that the infidel shall be stonned to death if he is a Muhsan (i.e. married) free and sane. But Abu Hanifah, Muhammad and Yahya say that such an Infidel may only be whipped but not stonned. It appears that they pose this view because they assume that the full status of Ihsan (moral and physical fortification) cannot be attained without Islam (i.e. submission to the faith).(97) Imam Malik held that only a Dhimmi (non-Muslim subject of the state) may be subjected to the Hadd punishment.(98)

Because of the Magnitude of an accusation and effect of Zina the jurists have gone through pains to identify the scope of Zina which must be done in order that not every case of sexual involvement is tagged as a Hudud offence subject to the capital punishment for Zina. The above mentioned instances are not the only means of narrowing the scope of Zina. Infact before a case of Zina is established many a condition are placed such as

those to le examined under the following heading.

3.2.4. Proof of Zina:

Zina may be proved by four means which are;

1. Shahadah (evidence);
2. Igrar (confession);
3. Qira'in (pregnancy); and
4. Li'an (Mutual imprecation)

1. Shahadah (evidence): There is a complete concensus of opinion among the learned that the least number of witnesses to prove the offence of Zina is four. The witness must be adult, sane, of good memory, of sound speech(99) and sight,(100) upright(101) and Muslim.

2. Igrar (Confession): Confession by either the adulterer or adulteress is recognised by all the jurists as a valid means of proof. Abu Hanifah and Ahmad have said that the confession must be made four times in order to meet the standard of four witnesses. They argue that the Prophet (SAW) kept turning away from Maiz until he had made four distinct confessions.

In a narration by Nu'aim b. Hudhail (RA), the following words are found; "Verily now you have confessed four times.....". They also say that Abu Bakr al-Siddiq (RA) warned Ma'iz on the occassion by saying: "If you repeat it (i.e. Confession) a fourth time the Messenger of Allah will stone you"! Finally they say that four confessions definitely eliminates the slighest doubt as to the occurrence of the act.[102]

Imams Malik and Shafi'i however accept one single confession. They rely on the saying of the Prophet (SAW): "O Unais go to this woman and if she confesses, stone her." They say that the Prophet (SAW) turned away from Ma'iz in order to investigate into the mental soundness of the confessant. They claim that the Prophet (SAW) had sent for word on this twice from the people of Aslam.(103)

The confession must be clear and precise as to the details of the offence. The confessant must also

be throughly cross-examined. It has been reported that the Prophet (SAW) had probed Ma'iz to the minutest detail. The Prophet (SAW) had inquired whether Ma'iz was drunk or insane and this was properly investigated by one of the Companions going over to Ma'iz and smelling his mouth for the fumes of wine. The Prophet (SAW) also asked such minute questions such as : "Maybe you just lay with her....or embraced her....Did this of yours disappear into that of hers.... Do you really know what Zina is"? e.t.c. After the Confessant proves his case beyond every shadow of doubt he shall then be punished. An inquiry shall not be made into the identify of the sexual partner unless mention of him or her is made by the Confessant. All the jurists agree that if the alleged sexual partner denies the charge he or she cannot be punished. The 'false' charge will not go unpunished according to Malik, al-Shafi'i and Ahmad. The Confessant will have to take the punishment of Qadhf (defamation of an innocent lady) and also his punishment under the offence of Zina.(104) The law accepted by Abu Hanifah is very different from the above view of the majority. He says that where the alleged partner denies the act, the confession develops

a vacuum which cannot be ignored i.e. that an ingredient of the offence of Zina, being the participation of two persons together, fails to be proved.(105) Abu Hanifah also insists that the confession must be made inside the court room. The majority, however, do not subscribe to this view and will accept the confession as long as it is made before persons who testify to it in court.(106)

The Majority[107] of jurists allow the Confessant to revoke his Confession. They rely upon a Tradition reported from Abu Hurairah (RA) that "when Ma'iz felt the impact of stones he cried out: "O people take me back to the Messenger of Allah".....but the people continued until they had killed him. When we returned to the Messenger of Allah (SAW) and informed him, he said: "Would that you had left him off and brought him to me!"(108)

The Majority argue further that if the Confessant is true in his revocation, then he must be false in his Confession, and if he is true in his Confession he must be false in his revocation. This cast s a doubt over

the whole matter and the Maxim 'doubt puts off the Hudud' must apply. (109)

3. Al-Qira'in:- This is the manifestation of pregnancy in a woman who is not known to have a husband, or whose husband is known to be a minor or not accessable to her, or even a woman who has a husband butgives birth within a period less than six months.

Umar (RA) is reported to have said:

> "The stoning is obligatory on everyone who commits adultery, Male or Female who is morally fortified, if proved by evidence, pregnancy or Confession."(110)

But most of the jurists do not consider this as a conclusive proof of Zina. Some other corroborative evidence must exist. They rely upon a case decided by Ali (R.A.) where a pregnant woman was brought to him and he asked her: "Were you compelled? She replied 'No.' Ali (RA) then said: "Then may be a man 'approached' you in your sleep."

Thus because of the possibilities that cannot be overlooked, the Hadd will not be applied according to

the majority. But Imam Malik insists that the onus of proof must lie on the pregnant woman to show that she was raped, or to produce evidence of innocence, for example, reporting an incidence of rape before the manifestation of pregnancy.(111)

4. Al-Lian (Mutual Imperecation): This results from a husband finding his wife in intimacy with another man, or when a husband denies the paternity of his wife's pregnancy. The Islamic Law requires that both take Oaths by Allah to that effect and in the words of the Qur'an; "It shall avert the punishment from her if she swears four times by Allah...."(112) These words of the Qur'an have led to a difference of opinion as to whether four oaths taken by the husband can justify the Hadd punishment on the wife if she fails to swear. Malik, al-Shafi'i and Laith say the wife should be given the Hadd punishment if she refuses to swear. But Abu Hanifah says she will not be stonned but imprisoned until such a time as she decides to swear or confess her guilt. Infact this view has been justified by Abu-l Ala Maududi, thus;

"The Quran does not specify here, the nature of 'punishment', it simply mentions punishment. If it is argued that punishment here means the punishment of Zina only, the answer is that for the punishment of Zina the Qur'an has imposed the condition of four witnesses in clear words, and this condition cannot be fulfilled by four oaths sworn by one person. The husbands oaths can suffice for him to escape the punishment of Qadhf (defamation) and for the wife to face the injunction of Lian; but they are not enough to prove the charge of Zina against her. The womans refusal..... certainly creates a suspicion, and a strong suspicion indeed, but a prescribed (Hadd) punishment cannot be enforced on the basis of suspicions.."(113)

The offence of Zina is the most difficult to prove. This is perhaps due to the stern punishment that follows the commission of the offence.

3.2.5. Punishment For Zina:

Generally speaking before punishment is given, certain matters must be settled such as that the offender is a sane and adult person who knew of the prohibition and went on by his own free will to execute the crime. It has been discussed earlier on, that there

is no Hadd on the child, the Insane and the Coerced.

The punishment for Zina is twofold; i.e. the punishment for the Bikr (unmarried) and the punishment for the Muhsan (Married).

1. Punishment for the Bikr (Unmarried): For unmarried persons the punishment prescribed for the culprits is one hundred lashes and banishment for a year, regardless of the sex of the offender. The Prophet (SAW) is reported to have said:

> "Take it from me! Verily Allah has opened a way for them. For the unmarried persons, whip them a hundred times and banish them for a year."(114)

This Tradition came after the revelation of the verse of Surah al - Nur which says:

> "The fornicatress and the fornicator, strike each of them with a hundred stripes...."(115)

The jurists have however differed as to the obligation of enforcing the punishment of exile. The great Commenditator on the Qur'an, Ibn Kathir,

has explained the position thus;

> ".....The Majority have added exile from the town except Abu Hanifah as with him, it is optional (i.e. exile). The majority rely upon a Tradition contained in the Sahihain (of Bukhari and Muslim).....from Abu Hurairah and Zaid Ibn Khalid on the delegation of desert Arab s that came to the Messenger of Allah SAW...."(116)

The Hanafis on the other hand view that exile is optional for the judge depending on the circumstacnes sorrounding the case. It appears then, to them, that the punishment of exile is not a Hadd punishment but one under Ta'zir.

Meaning of Exile:

The Majority of the jurists understand 'exile' to mean the banishing of the offender to a separate town. But Imams Abu Hanifah and Malik say that it should mean Imprisonment of the offender. The view of the two elders has not been exactly followed by their disciples for the trend in the schools is to imprison the offender in a different or separate town. Imams al-Shafi'i and Ahmad both held that the exile shall be to another town without imprisonment. But just as in the case of the two elders,

Abu Hanifah and Malik, the followers of al-Shafi'i and Ahmad incline towards exile with a sort of surveillance or observation over the offender. This is also the view of the Zahiris.(117)

From an observers perspective, it is obvious that the rationale of exile is to put the offender out of public view for two purposes; the first is to protect the Society from his menance and evil and the second is to give the offender a new start in life after being subjected to the degrading punishment of lashes in public. The learned scholars surely had this in mind and this stands transparently. The fact that they opted for imprisonment in some instances may have been due to the bearing circumstances during their times and ages.

2. Punishment For The Married (Muhsan):

The Islamic Law imposes a heavier penalty for the married who commit Zina. The rationale behind this difference lies in that it is presumed that the unmarried persons who are not adequately protected from Zina should not be made to suffer the same punishment as those who

are already fortified against the crime of Zina. Also, that one who breaks his fortification and wanders into the prohibited field of Zina must have only himself to blame for the consequences.

It is then no wonder that the Shariah prescribes the penalty of stoning to death and the strokes, one hundred times, for the married persons.

The Stoning (al-Rajm):

All the scholars agree that this is the punishment to be administered except a party of the Khawarij. They argue that it is not contained in the Qur'an. But the majority rely on the various Mutawatir Traditions (i.e. very well known amongst the Companions, the Successors to the Companions and the Successors to the Successors) of the Prophet (S.A.W.) such as the case of Ma'iz al-Aslami, and woman from the tribe of Ghamid.(118)

There is however a difference of opinion as to whether the offender should be stoned as well as whipped a hundred times. The minority of jurists led by Ibn Hazm, Ishaq b. Rahuwayah and Hassan al-Basari

hold that the offender shall be whipped and then stonned to death. They rely upon the Tradition of the Prophet (SAW) which says;

> ".....lash them a hundred times and stone them."(119)

They also rely upon a decision of Ali (RA) where he lashed Sharahah on Thursday and stonned her on Friday. He then declared; "I lashed her in accordance with the Book of Allah and stonned her in accordance with the Traditions of the Messenger of Allah (SAW)."

On the other hand the Majority including the four Sunni leaders say that only the stonning shall be done because the Prophet (SAW) did not whip in both the cases of Ma'iz and Gamidiyyah. They also quote the Tradition of the Prophet S.A.W. which says;

> "O Unais go to this woman and if she confesses, stone her. (i.e. whipping not mentioned).

Finally they argue that both Abu Bakr and Umar did not include the whipping to the stonning.[120]

A logical middle course has been offered by Shaikh Dahlawi who says that;

> "It is lawful for the judge to combine stonning with lashing but it is preferrable to apply stonning only as the Prophet (SAW) did"(121)

Conditions attached to stonning: The main consideration here is al-Ihsan (Moral fortification). The elements necessary for Ihsan are;

(a) Freedom: The offender must not be a slave.

Allah Most High says;

> "Then if they are guilty of Indecency after being fortified by wedlock, they shall be given half the punishment prescribed for free, unammaried women"....."(122)

The word "Muhsanat", here, is undetstood by all the Commentators and jurists as 'free women who are not married' except some of the Khawarij and Mu'tazilites.(123) Male slaves are included into this verse by analogy.(124)

(b) Consummation of a Valid Marriage:- The fact that there was a valid retirement (Khalwah al-Sahihah) between the spouces is not enough. There must be the actual act of sexual intercourse performed in the natural way.

Sexual intercourse through the rectum or other means than the Vagina cannot possess the parties with the status of Ihsan. The marriage must also be a fully valid one, and not a void or Irregular Union. It is also an element that the marriage not be consummated during the wife's period of menstruation or while one of the parties has entered the state of Ihram.(125) In addition to the above requirements the consummation must be between spouces of equal legal capacity according to the Hanafis and a report from the Shafi'i school. This view stresses that each of the spouces must be sane and adult.(126) But Imam Malik disapproves of this condition and says that if one of the spouces is fully sane and adult then he or she must be presumed as fully fortified regardless of the mental state or age of the other spouce.(127)

(c) Islam: Only a Minority of the jurists consisting of Abu Hanifah and Malik consider Islam as a requirement. They rely upon the statement of the Prophet (S.A.W.) to Hudhaifah (when the latter sought the permission of the former to marry a

woman from the disbelievers) i.e. "Leave her alone for she will not fortify you." The Majority however hold that Islam cannot be a condition under Ihsan because the Prophet (SAW) stonned the jews and Zina is a henious sin in all religions.(128)

From the above discourse it is clear that a very high standard is set and this, if properly followed, ensures that a very limited proportion of offenders qualify for the stonning. Coupled with the equally difficult task of proving the offence the rationale of the Shariah reveals itself; this is to make the occurence extremely rare in Society. As a result, the sacredness and honour of the prohibition is maintained.

Method of Inflicting Punishment:

Quite a number of rules sorround the proper manner of executing the punishments for the offence of Zina. As regards the whipping, the following points must be observed.

(1) Punishment must be done in Public: This is due to the saying of Allah Most High,

> "...and let a party of the believers witness their punishment."(129)

There is a difference of opinion over the interpretation of the word 'Ta'ifah' (party). Hassan al-Basari says it simply means publicly. Mojahid says any number from one to a thousand. Ata says there must be at least two people. It is also the view of Ishaq b. Rahawiyyah and Said b. Jubair. Imam Malik and al-Shafi'i both held that the least number should be four in analogy with the testimony.(130)

The Islamic Law insists on the presence of members of the Community during punishment in order that the offender may be debased and made an example of. This acts as a deterrent for both the watchers and the offenders.

(ii) Lashes must be restricted to the outer skin: All the lexicographers and commentators are agreed that the word contained in the verse; i.e. 'Jild' means the skin. Thus lashes must not penetrate or cut the skin so as to reach the flesh or bones. The Prophet (SAW) insisted on a medium whip to be used(131) and Umar, also, always used a medium whip.(132)

Abu Hanifah and Malik hold that the offenders clothes shall be removed except his underware, in the case of a Man. But Imams al-Shafi'i and Ahmad insist on the removal of heavy garments only, such as may nullify the impact of the lashes. All the jurists agree that the female shall not be undressed. She shall be wrapped up securely in order to preserve her covering. She shall also be made to sit up. Malik is isolated in viewing that the male shall also be made to sit. The majority say that the man shall be made to stand up. All the sensitive parts of the body such as the head and private parts shall not be whipped. The strikes must also be of medium force. This is controlled by the executioner not raising his arm

above his head. The executioner must also be a man of knowledge. It is reported that the Prophet (S.A.W.) employed, for the purpose, such pious men as Ali, Zubair, Miqdad and Dahhak b. Sufyan.(133) The beating shall not be carried out in intense heat or cold, on the sick which includes the pregnant woman and the woman in her lochia. The punishment shall be put off until the circumsiances change. All the Sunni leaders except Ahmad hold this view. The others insist that only the case of the pregnant woman shall be stayed. Where the offender is too weak or old he may be whipped with a deterriorated whip or the tail of a garment or an object which reduces the fear of possible death.(134)

But where recovery is not forseeable, Abu Hanifa, al-Shafi'i and Ahmad hold that one hundred canes may be tied together and used once. Imam Malik however believes that each stroke must be given separately.(135) It is probable that the majority of jurists see the punishment as more of a significant exercise than a physical engagement.

The same ruling was given by Allah (SWA) in the case of Ayyub (A.S.) and his wife.(136)

As regards to punishment of stonning, all the scholars agree that the man shall not be made to stand in a pit but a pit shall be dug for the woman reaching to her chest.(137) Where the offence is proved by confession, the offender shall not be tied-up, and if he flees shall not be chased. However where the offence is proved by testimony he may be tied up if he refuses to remain still.

The stoners shall be made to stand in ranks as in the case of prayer. Each rank shall throw and turn away. It is reported that when sharahah was to be stoned, the people sorrounded her and were about to commence when Ali (R.A.) said:

> "This is not the way. You Might hit yourselves, prepare ranks as in the prayer, (one) rank after the other."(138)

Imam Abu Hanifah insists that the witnesses who gave testimony must be the ones to commence the stonning, then the Imam or his deputy, then the people. This

procedure is only recommendable according to al-Shafi'i and Ahmad, while Malik opposes it completely.

This position is taken obviously to discourage potential witnesses. The advantage here is that the false witness will not come forward if he knows the great implication of his act. Nontheless, certain sound witnesses who may be feeble or weak might be frightened away from giving evidence at all. Strangely enough, this appears to be exactly what Abu Hanifah seeks i.e. to reduce the number of such punishments actually executed.

The stoning shall be held in all whether and all the body may be freely attacked. The punishment must be completed in the fastest possible time so as not to prolong the suffering and agony of the victim. He must be killed by stones bones and mud slime, not small pebbles, or any other weapon such as a sword or gun. After death of the offender, he shall be washed, shrouded and prayed upon before being buried. The Prophet (SAW) is reported to have said of the remains of Ma'iz al Aslami; "Perform the same rites for him as you do your dead."(139)

3.3 Al-Qadhf (Defamation):

The Islamic law presumes and promotes modesty, chastity and goodness over all persons of the Islamic faith. Thus whoever alleges indecency to another must, as a matter of law, support himself with the necessary proof or face the punishment for the offence of defamation.

By Ijma', the law of defamation was initiated after the campaign against Bani Mustaliq which took place, according to the majority during the sixth year of the Hijrah.(140) It is also agreed that the verses on defamation were revealed on the occassion of the false allegation against Aishah by the hypocrites of Medinah. A case of defamation is compounded by the object being a respected member of society. The family framework is disrupted and doubts arise as to true paternity. This, obviously, creates a stain that remains for generations. It is for this reason that defamation is regarded as one of the 'Major' crimes and is punished by eighty lashes.

3.3.1. Definition: The word Qadhf literally means to 'cast' or to 'throw' an object. This appears in the Holy Quran where Allah Most High Says:

> "Recall (O Moses) when We inspired your mother; Cast the child in a box and cast the box into the river...."(141)

In the technical sense it implies 'throwing' an accusation at another. Defamation, under the Shariah has been divided into two; viz (a) defamation punishable by Hadd and (b), defamation punishable by Ta'zir. In the first case the defamer accuses a morally fortified person with the act of Zina (adultery) or challenges the paternity of the person defamed. In the second case, the defamation is not of Zina but of acts such as theft, wine-drinking, gambling etc; or an act that does not amount to the offence of Zina.(142)

3.3.2. Elements:

The jurists lay down three necessary elements which are:

1. The act of slander;
2. The person defamed; and

3. Purpose of the slanderer.

1. The Act of Slander: This happens when someone is accused of Zina or the paternity of someone is challenged. Thus where one is addressed: 'O ye adulterer', this is an act of slander (Qadhf). It must also be recognised that where someone's paternity is challenged, there is a charge of adultery labelled against the mother of the person and also an injury done to such son. It suffices then, as defamation, to simply call somone by a name other than his known father's.(143) The accusation must be that of proper Zina and not mere unlawful sexual intercourse. The addressing of another as a bull or donkey; or with wine drinking or disbelief is not defamation punishable by Hadd. But an accusation of sodomy will suffice according to the schools of Malik, Al-Shafi'i and Ahmad. If the slanderer were to slander a congregation of people individually, only one punishment shall be given. But Imam al-shafi'i says that the offender shall be punished separately for each slander of the members of that congregation.(144)

The majority of scholars hold that the ascendant (h.h.s.) cannot be punished by Hadd. However one

let him off without having him prove his charge. If he fails to do this, he would have jeopardized the future recognition and credibility of the injured party without just cause. Here the intention of the offender is not important under this offence of strict liability. He shall be punished accordingly.

3.3.3 Proof of Qadhf (Defamation):

The offence of Qadhf may be proved by either witnesses or by Confession.

1. Witnesses: As in the case of Zina, they must be adults, sane, of good memory and speech, Muslims and of respectable characters. They must not be known enemies of the accused. The minimum required is two witnesses who must be male according to the majority of scholars. Some jurists of the Maliki School however accept the evidence of one man and two women in exceptional circumstances.(159) The witnesses must be properly cross-examined as to the identity of the parties and nature of the slander. Any inconsistency between them shall render their testimonies inadmissible.

There is a difference of opinion as to whether the evidence of a person previously convicted of slander may be admitted. A group of the jurists say that such a persons evidence will never be accepted. This view is taken by many of the Iraqian scholars. They rely upon the verse which says:

> ".....And do not accept their evidence ever after: for such men are wicked transgressors."(160)

But the Medinan Scholars tend to believe that this rejection of testimony is suspended upon the transgressor's conduct. If he repents and reforms his way s his evidence may be accepted in future. They argue that the next verse following the above stated injunction supports this assertion. For it says:

> "Except those who repent thereafter and mend (their conduct); For Allah is oft-forgiving, Most Merciful."(161)

They also rely upon the statement of Umar (R.A.) to Abu Bakrah and the two other witnesses(162) who had testified in the case of Mugirah b. Shu'bah:

"If you repent, I will accept
your evidence in future,
otherwise not."

It is clear that the difference between the two views lies behind the fact that whereas the Kufans (Iraqis) understand the forgiveness to apply to only the act of slander, the Medinans include even the tag of 'Fisq', or transgression, which is the reason for refusing their testimony. However all the jurists are agreed that the repentance of the offender shall not avoid the legal punishment by way of Eighty Lashes.(163)

2. Confession: This is also considered as a means of proof if it is clear and unambigious. However Imams Abu Hanifah and Ahmad say that unlike the case of Zina a confession of Qadhf once made cannot be retracted(164)

3.3.4 Punishment For Qadhf (Defamation):

The punishment comprises three elements. These are that the offender shall be given the eighty lashes, branded as a transgressor (fasiq), and shall not be allowed to give testimony in future.(165) Strictly speaking, only the eighty strokes are the Hadd

As stated above wine is the key to all evil. It wrecks the society by causing laxity in morals and good education, violent crime and a host of other evils and indecencies which may crop up to the intoxicated persons senses.

3.4.2. Conditions For the Offence of Wine Drinking:

These conditions shall be considered under three headings which are;

1. The act of drinking (sharb);
2. The offender; and
3. Purpose of the offender.

1. The act of drinking: This, according to the general concensus of the jurists, is achieved by the offender consumming the wine through his mouth into his stomach. Intoxication derived by such means as sniffing, injecting or through the rectum is punishable by Ta'zir.(182)

The majority of the Scholars will not punish for the taking of a substance that has been completely diluted. However Malik insists that the punishment shall apply regardless of whether the taste, smell and colour of the wine has been lost.

It is however allowed for a person in dire-need of drink to take wine as a last resort under the doctrine of necessity. This view is taken by the majority of Scholars. Imam Ahmad however makes a distinction between the case of mixed and unmixed wine. He insists that the person under such a need must be shown to have diluted the wine with some other substance before taking it; except where this is not obtainable. But the majority of scholars do not extend this situation of necessity to the wine taken for medicinal purposes. They argue that the Prophet (S.A.W.) declared that:

> "Verily Allah has not placed medication in what the has prohibited."

Abu Hanifah however, allows wine to be used for medicinal needs.(183)

2. The Offender: The offender must be sane, adult and Muslim to be punished by Hadd. The non-Muslims are only punished by Ta'zir as a matter of public policy. The offender must not also have been compelled by way of duress.

3. Intent or Purpose of the Offender:

It is a necessary condition that the offender knew, at the time of taking the substance, that a great quantity consummed will cause intoxication. The position is best presented by the words of the great Hambale scholar, Ibn Qudamah:

> "It is a condition for the obligation of Hadd that the drinker knew that a great quantity will intoxicate him; if he did not know (this), he shall not be subjected to the Hadd punishment as he was unaware of its prohibition and had no guilty intention necessary to perpetrate the wrong....."(184)

Furthermore the offender shall be exempted from the punishment if he claims that he was unaware of the sin in the act of taking wine, subject to the condition that he is a new convert or that he is a muslim who lives far apart from the settlement of Muslims. The jurists hold this view in line with the decisions of both Abu Bakr and Umar to the same effect.(185)

3.4.3. Proof Of Wine Drinking:

Broadly speaking two means cover the proof of wine-drinking i.e. confession and Evidence.

1. Confession: all the jurists hold that one Confession is sufficient to prove the offence. Abu Hanifah and his disciple, Abu Yusuf stipulate that the confession must be made within a limited period i.e. from the consumption to the escape of the stench of wine from the breath of the confession.(186)

2. Evidence: it could take various forms such as discussed below;

(i) Testimony of Witnesses; two male witnesses who are honourable are sufficient. The Hanafi s stress that at the time of giving testimony the stench of wine must be lingering on the breath of the offender.(187) It is also required that the judge should cross-examine the witnesses properly in order to eliminate the possibility of duress, and to avoid uncertainty.

(ii) Intoxication: According to Malik and Ahmad, the mere fact that an individual is found in the state of intoxication is sufficient to impose the punishment of Hadd. They argue that

intoxication can only come about by way of the consumption of wine. On the other hand, Abu Hanifah and al-Shafi'i say that intoxication per-se is not sufficient to justify the Hadd punishment as there may be several causes of intoxication which may mitigate the Hadd. Imam al-shafi'i cited injection, necessity and duress. It is obvious that the Hanafis will not support this view of Malik as with them intoxication may result lawfully by some means or may only fall under the Ta'zir punishment.(188)

(iii) Vomit: This is given the same status as intoxication.(189)

(iv) Stench of wine: According to Malik and a report from Ahmad, this is sufficient to warrant the Hadd punishment. This was also the view of Ibn Mas'ud, and Umar is reported to have said:

> "I have smelt wine on his breath...I shall wait; If I observe (traits of) into xication, I will whip him."

These jurists hold that it is as strong as a Confessional statement. But Abu Hanifah and al-Shafi'i

are supported by the majority of jurists in their view that the mere stench of wine is not enough evidence to justify the Hadd.

On the whole it appears that Malik, due to his orientation, and indeed style, the defendant is not allowed to abuse the law so as to exploit and hence beat it. This view is similar to the case of a manifestation of pregnancy and the mother to be claims she was raped. Malik puts her under pressure to show that she was so raped. The other jurists however by their style give alot of room to the defendant to manouvre out of trouble, not due to his efforts, but by giving him the benefit of the doubt.

3.4.4. Punishment:

The punishment for intoxication has not been expressly stated in the Qur'an. The Messenger of Allah (S.A.W.) had also given various punishments for the offence. The Companions also gave different punishments. Abu Bakr gave forty stripes and so did Umar temporarily. But when the offence became rampant Umar called a Counsel and the Companions arrived at a concensus that the punishment be eighty lashes based on

the analogy with defamation. The analogy was supplied by Ali (R.A.) who said:

> "Verily one who drinks gets intoxicated and one who is intoxicated raves and one who raves defames and the defamer is to be lashed, eighty(times)"

This verdict has been adopted by Malik and Abu Hanifah. There is also a report of Ahmad to the same effect. Imam al-Shafi'i however, holds that the punishment of Hadd is forty lashes, (the highest given by the Messenger of Allah). According to al-Shafi'i the additional forty lashes can only constitute Ta'zir by the judge as a situational necessity.

All the jurists are settled that the punishment for wine-drinking shall be stayed until the offender becomes sober because the full effect of the punishment will not be realized.

Since the punishment of eighty lashes is based on the Ijtihad of the companions and not strictly from the Quran and Sunnah, Ali (RA) used to say:

> "I would not feel guilty about anyone who dies as a result of my inflicting Hadd on him except (the case) of the wine drinker; for if he should die (as a result of eighty lashes) I will pay his blood wit because the prophet SAW did not provide the Sunnah (precedent) for this" (190)

The Shafi'is hold this statement as authority to sticking to forty lashes as the Hadd punishment.(191)

3.5 Theft (Sariqah):

The Islamic Law treats the property of its subjects as sacred and thus will punish for wrongful trespass on the property of the individual. Such trespass may take different forms including theft (Sariqah), Highway robbery (Hirabah), usurpation (Ghasb), dishonesty and deception in trade etc. This heading is concerned with theft (Sariqah) which is also referred to as 'the minor theft' (al-Sariqah al-Sugra). This term is so-called to distinguish theft proper, from seizure of property by force which is called Hirabah (Highway robbery), and also referred to as al Sariqah al-Kubra (the major theft).[192]

3.5.1. Definition:

By the definition of the Maliki s, theft means; "the taking away of property belonging to an other, stealthfully and without permission."(193)

According to the Hanafi s it is the act of a sane adult taking away, stealthfully, property worth (at least) ten dirhams, the property having been kept in safe custody."(194)

It must be pointed out here, that even though the Malikis definition appears a little brief, they have, generally regarded the offence similar to the Hanafis. From the views of the jurists three pillars of the offence can be observed.

3.5.2. Conditions for the Offence of Theft:

There are; 1. The stealthful act;
2. Subject must be property; and
3. the property must belong to another.

1. The Stealthful Act: The jurists call this; "al akhdh al-khafiyyah" literally meaning a clandestine act or an act done with fear. In the meaning of the

law it signifies taking away of the property without the awareness and consent of the owner.(195) Where the act is committed before the presence of the owner, it is not 'theft' but appropriation. The taking away of the property must be complete. This has been explained by the scholars to mean that the thief must have removed the article from its place of custody, placed it out of the reach of its owner, and placed it under his own possession. This rule is so strict that whenever it fails to be achieved the thief shall not be punished by Hadd but by Ta'zir.(196) This is the majority stand. The Zahiris however insist that the only condition necessary to warrant the Hadd punishment for theft is that the thief place his hands on the article .(197) This view of the Zahiris appears inferior to the more practical approach of the Majority Scholars. The majority have held that were a thief to throw out the article from the room of custody he will not be subjected to the Hadd. Another thief who carts away the thrown article will also not be a subject of Hadd because neither of the two committed a whole offence. The Hadd shall also not apply where the thief consumes an article whinh dissolves after being swallowed such as sweets,milk or edible substances.(198)

2. <u>That the Subject Must Be Property</u>: The stolen article must be recognised as lawful property under the Islamic Law. For this reason it is possible to 'steal' slaves according to all the jurists, but as the only application of human beings as property capable of being stolen, (according to the Majority). The Malikis and the Zahiris however include children [199] as subject to 'theft'.[200]

The property must be moveable to satisfy the requirement of 'being removed.' It must also be corporeal such as choses in possession. Choses in action are not capable of drawing the <u>Hadd</u> for stealing.

The property must have value. Generally, the schools understand this as 'lawful.' Thus the theft of impurities such as swine and wine cannot be punished by <u>Hadd</u> - It must be something conventionally used for transactions according to Ahmad such as water, ice or snow, mud and clay, except where the article has a practical purpose such as building, or pottery. Paltry objects do not fall under valuable property. It has to be something which the people use for benefit. Imam Abu Hanifah considers the stealing of perishables

(especially foodstuff) wild animals, musical instruments, a copy of the Quran, books on Hadith, grammer and poetry as not subject to the Hadd for theft. He also considers crops on the field before harvest as falling under Ta'zir. Malik, al-Shafi'i and Abu Yusuf will however punish, by Hadd, the theft of Musical instuments and Books if the ornamentation amounts to the fixed standard (Nisab). Imam Ahmad follows Abu Hanifah and argues that the thief, in the case of musical instruments or leisure games, may have desired to destroy them.

This gives rise to uncertainty which is enough to put off the Hadd.(201) But all the jurists will put off the Hadd for the theft of crops on the field or fruits on trees.(202)

An overwhelming majority of the jurists agree that the property stolen must have been in safe custody. They refer to this as Hirz, They rely upon a Tradition narrated by Amr b. Shu'aib that the Prophet (SAW) was asked about the theft of fruits on trees and he replied;

> "Whoever wrongfully but out of necessity, plucks it (fruit) without being stealthful, there is nothing (of legal consequence) on him.....

> but whoever steals therefrom anything after it has undergone harvestation and the amount (stolen) values up to the 'standard', then he must suffer the cutting-off (i.e. Hadd)"(203)

The Zahiris on the other hand insist that Allah Most High has not given authority anywhere for the condition of Hirz (safe custody).

The Majority explain that in the above Tradition, the Prophet (S.A.W.) drew a line between objects in safe custody and objects in the open field which could induce the hungry passerby.

The jurists classify Hirz into two viz

(i) Hirz by its own right and (ii) Hirz by virtue of a guard. In the first case all buildings, stores huts, tents rooms etc may constitute a Hirz. Abu Hanifah insists that it must be a place built-up for security.(204) Malik however says that it is that place used to store or guard property regardless of walls or doors.(205) Imams al-Shafi'i and Ahmad both concur in that this type of Hirz is a

house or store used for the safe keeping of property and which must be locked up.(206) This seems to be a more complete definition.

As regards Hirz by virtue of a guard, it is usually a place that is not ordinarily used for safe-keeping such as public roads, halls and Mosques, but which attains the status of Hirz if a guard is stationed over the property. The guard according to Malik must be of discretion i.e. Mumayyiz.(207) A question arises as to private rooms which are non-the-less subject to unavoidable occupation, such as by close-relatives.(208) Abu Hanifah considers that there will be no Hadd for a theft therein by a relative. But according to al-Shafi'i and Ahmad only ascendants and descendants may enjoy this exception. Imam Malik trims the exception further by excepting the ascendant only.(209)

It is also a condition that the property stolen, in order to justify the Hadd, must value up to the fixed standard (Nisab). This is the opinion followed by the Majority who base their authority upon numerous traditions of the Prophet (SAW) especially two of them reported by Ibn Umar and Aishah (RA).(210) Some mention the Nisab as three Dirhams whilst some mention it as a quarter of a

Dinar . In a statement contained in the Musnad of Ahmad, one quarter of a Dinar at that time was equivalent to three Dirhams.

The Minority consisting of the Tabi'j, Hasan al-Basari, and Dawud hold that once theft of an item is established the punishment must be carried out regardless of the value of the stolen item. They quote the Qur'anic verse that says;

> "(For) The male and female thieves, cut off their hands, a price for what they earned, an exemplary (punishment) from Allah"(211)

They also rely upon a Tradition narrated by Abu Hurairah from the Prophet (SAW) which says:

> "Allah has cursed the thief who steals an egg and thereby gets his hand cut off, and the one who steals a rope and gets his hand cut off."

The Majority however interpret the tradition as, merely, a discouragement to new thieves who as a matter of fact begin by lifting small items and end up in big time theft.(212)

The jurists have considered the possibility of fiscal fluctuations in Dinars (gold coins) and Dirhams (silver coins). The measurement is assured where the subject matter of the theft is either gold or silver currency. But where it is not, an estimation must be made. According to Malik the article stolen must be measured based upon Dirhams i.e. the hand may be cut off if the article equals three Dirhams and whether or not the article does not reach up to a quarter of a Dinar. But on the other hand if the article measures up to a quarter of a Dinar but fails to reach three Dirhams the cutting shall not be executed. According to al-Shafi'i where the article is not gold or Silver, the criterion or standard shall be that of Dinars (gold coins).(214) The view of Ahmad is divided among his School, but it appears that with him, the lesser in value will be used. Imam Abu Hanifah says that the Nisab must be at least ten Dirhams. He allows only one Dinar as an alternative. He relies upon a Tradition narrated by Ibn Mas'ud that the Prophet (SAW) said that: "the Hands shall not be cut off

Save for one Dinar or ten Dirhams (215)

It is obvious that as usual the Imam Abu Hanifah is always more liberal in the case of offenders.

3. The Property Stolen Must Belong To Another Person Than The Thief: This is probably why the father is not to be subjected to the Hadd as he has some constructive right over the property of his issue. The position will be the same where the property stolen does not belong to anyone or where the owner displays the article in a neglectful way such as clothes left on the line without guard, left overs, etc. (216) Where the thief owns an interest in the subject-matter, such as the public Treasury (Bait al-Mal) the maximum punishment (Hadd) shall not be given.(217) This view is held by the Hanafis and the Shafi'is. However Malik, Hammad and Ibn Hazm disagree. They argue that the Hadd must apply because the Bait al Mal is a place of custody and no one becomes due for assistance therein until he becomes needy of help from it.(218)

Where one steals money from a debtor the Hadd shall apply unless the debt is due and not above the debt owed.(219) Where one steals his mortgaged or hired - out property, the Hadd shall not apply because ownership never really moves from the Mortgagor (thief). Where the thief is a joint or co-owner the Hadd shall not apply according to the majority but Malik says that this is the position only if the interest of the

aggrieved party does not measure up to the 'standard.' In the case of theft between spouces there is some difference of opinion. Al-Shirazi, the famous Shafi'i jurist, has summarised the position of the generality of the jurists into three;

(i) The Hadd shall apply whoever of the parties steals from the other;

(ii) The cutting shall not apply as the wife has a right in the husbands property and the husband has a partial right and duty to control the property of the wife; and

(iii) Only the husband is liable for the cutting as against the position of the wife. The reason being that she has a right to maintenance whilst he has no proprietory rights over her.(220)

There is also a difference of opinion as to the theft of a shroud. Imam Abu Hanifah held that the Hadd shall not apply because dead persons cannot own property and this makes the shroud a 'free' article.(221) But the majority argue that the Hadd shall not apply because

the shroud is kept in a safe haven (the grave) and the dead person paid for it.(222)

3.5.3. Proof of The Offence Of Theft:

As in the other Hudud offences, proof of theft may be by evidence or confession.

As regards evidence, two honourable male witnesses are sufficient to prove the offence. Abu Hanifah has made it a condition that before the reception of evidence, there must be a formal complaint made by a person with a good tittle over the stolen property such as the owner, his agent or guarantor. He argues that this is the only way of ascertaining whether the stolen property did belong to another.(223)

According to Malik the appearance of the aggrieved party is not even required. His argument is that Sariqah (theft) falls under the exclusive interests of Allah and hence punishment must be issued in the availability of evidence. Nay, even if the aggrieved party were to deny the incident, the Hadd will not 'fall' with Malik.

Confession also serves as a means of proof. There is however a difference of opinion as to the number of

confessions to be made. Abu Hanifah, al-shafi'i, and Muhammad say that one Confession is sufficient for a conviction. But Abu Yusuf dissents and follows the view of Ali (RA) and Ibn Abu Layla that there must be two separate Confessions made at different sittings.(224)

Abu Hanifah, al-Shafi'i and Ahmad, as in the case pf evidence, hold that Confession perse is not sufficient. It must be accompanied by a formal complaint by the aggrieved party. As seen earlier this view is not followed by Malik and Abu Yusuf.

As with the other Hudud cases it is extremely onerous to prove a charge of theft. This, on the whole, is due to the fact that the consequences of the Hudud are very grave. Thus for an individual to qualify for the punishment of cutting-off, he must have transgressed all bounds of modesty and reasonable self-control.

3.54. Punishment For the Offence Of Theft:

After a Conviction, the offender is made to suffer the punishment of amputation and surrender of the stolen item.

Authority for the amputation is the saying of Allah Most High;

> "And (for) the Male and Female thieves, cut off the hands of either of them, the price for what they earned; an exemplary punishment from Allah....."(225)

The jurists differ as to the point of amputation. The reason for this is the various interpretations of the part of the Qur'anic verse which says; "...Cut off their hands....." According to one group consisted of Abu Hanifah, Ahmad and the Zaydiyyah Shiah the right hand is to be cut off and if the offence is repeated, the left leg shall be amputated from the ankle. If he steals again no more amputations will be done but the thief shall be imprisoned for life. They support this contention by argueing that only the right hand is mentioned by the Qur'an.(225) They also quote a Tradition narrated by Abu Hurairah from the Prophet (SAW) which says:

> "If he steals cut off his hand and if he steals again cut off his foot."

They further claim that both Umar and Ali placed the maximum amputation at one hand and one leg.[226] On the other hand Malik, al-Shafi'i and Ahmad believe both hands and both feet are subject to amputation. They

rely upon a Tradition to the same effect which places the order in the right hand, then the left foot, then the left hand, then the right leg. They also claim that this was the exact precedent upheld by Umar and Ali.(227)

There is also a difference of opinion as to which joint should be amputated. The Sunni leaders are unanimous that the hands shall be cut off from the wrist while the leg shall be cut off from the ankle. The Zaydiyyah Shiah also follow this view. But the Imamiyyah Shiah say the hands shall be cut off from the finger joints and the Kwarij cut off from the shoulder. For the Imamiyyah Shiah, the foot should not be cut off completely by the ankle being saved in order to enable the offender some thing to walk on.(228)

The punishment of amputation serves two purposes. Firstly, it acts as a deterrent to further thefts and secondly physically hinders the thief from stealing conveniently. Imamal Shafi'i and Ahmad say that the amputated limb should be displayed by hanging it over the neck of the offender. But Malik and Abu Hanifah do not recognise this.(229)

Immediately the hand is cut off the gash shall be imersed into hot oil in order to stop the bleeding

and possible infection or complications.

After a conviction the thief shall be compelled to surrender the stolen article to its owner if it has not been destroyed or otherwise lost. To this there is no difference of opinion.(230) But where the article has been lost the thief shall not be required to repay its value. Malik says that the thief must make good the loss if it is not very expensive. Imam al-Shafi'i says that in all situations the thief must repay the stolen article. This is also the view taken by Hasan and al-Zuhri.(231)

The minor theft has been discussed and it may be observed that it is so titled because of the secrecy in the act and also the non-involvement of physical harm to the aggrieved party. Where threat by force or violence in the open is attached to the theft, it is called Hirabah.

3.6 Hirabah (Brigandage):

An alternative phrase for this offence is al-Qatt al-Tariq (Highway robbery). It is also called the major theft (al-Sariqah al-Kubra).(232)

3.6.1. Definition.

Imam Malik defines 'Hirabah' as the terorising of the highways, and with him it is immaterial whether the purpose is robbery or not, or outside the town, or inside it (only if the Government is weak).[233]

Imam Abu Hanifah however restricts the offences to robberies done outside the town only. However latter Hanafi's had not followed this view of the great Imam. They said;

> "The saying of Abu Hanifah, and May Allah have mercy on him, must be restricted to what he saw during his age. Verily.....during our age today.....highway robbery is committed within the towns and cities."(234)

But even before that Abu Yusuf had held that robbers who break into homes at night would fall under the definition of Hirabah.

Imam Ahmad and al-Shafi'i held for Hirabah, any situation in which the victim was helpless.(235) All definitions seem to centre on the act of one or more hooligans, taking advantage of the absence of people to exploit the property and persons of the peaceful

Community. This is the oppression and Mischief that is referred to in the Holy Quran as "....those who wage war against Allah and His Messenger and spread mischief in the land....."

3.6.2 Conditions For The Offence Of Hirabah:

I. The offender: An overwhelming majority of the jurists hold that the offender most be adult, sane and a 'protected' member of society. It also does not matter that the offender is a male or female. They argue that the Qur'an makes no such differentiation.(236) Freedom is also not a condition. One person acting alone is subject to the punishment but Imam Abu Hanifah stresses that he must have been in possession of some weapon such as a stick or stone. But according to Malik, al-Shafi'i, the Zahiris and the Zaydiyyah, it is sufficient that the offender displayed his physical might thus throwing fear or terror into the victim.(237)

The majority of the jurists regard anyone attached to the brigands at the scene as liable for the punishment; even though he might not have taken an active part. They argue that he must have been there on stand-by if his assistance was ever required. Imam al-Shafi'i however does not include the passive members of the brigandage as liable for the Hadd punishment.(238)

Imam Abu Hanifah adds that for the Hadd to apply the offence must have been committed in the Dar-al-Islam (abode of the Muslims). The majority of the jurists do not recognise this condition.(239)

2. The Victim: The jurists are agreed that the victim must be either a Muslim or a Dhimmi. He must not be an enemy or renegade. He must also have rightful possession over the property seized (i.e. he must be the owner or an agent of the owner). By analogy with theft, the descendant who is robbed by his ascendant will not be regarded as a 'victim.'

The victim may repel the strike of the brigand by all means necessary to defend his life and property. He must not however exceed limits.

3.6.3. Proof of The Offence Of Hirabah:

The offence of Hirabah may be proved by Confession or by evidence of two competent witnesses who may even be victims of the crime, according to the Majority of Scholars. It seems the only dissenters to this view are the Hambalis. They argue that the victims - cum-witnesses are (now) enemies of the offender which

relegates the credibility of their testimony against him.(240)

3.6.4. Punishment:

The punishment for Hirabah is one of the stiffest to be found under Islam. It is the only natural recourse for the dasterdly evils present in the crime. Allah Most High provides in His Glorious Quran:

> "Lo! the punishment of those who wage war against Allah and His Messenger, and strive (with might and main) for mischief through the land is: execution; or Crucifixion, or the cutting-off of the hands and feet from alternate sides, or exile from the land. This is their disgrace in this world and a great punishment waits for them in the Hereafter."(241)

A difference of opinion has arisen as to the application of the various alternatives. This is mainly due to the interpretation of the word 'au' (or). Imam Malik understands the verse to mean that the judge is given an option in all cases to choose which of the punishments to apply; except where the offence is accompanied by killing. Here, he says, that the judge must sentence the offender to death by killing (by the sword) or

crucifixion. The other pumishments shall be disregarded.(242) On the other hand, the majority of jurists including the other three Sunni leaders divide the punishments for Hirabah into four:

(i) terorising the highways without seizing of property or taking of life; under this offence, the punishment, according to Abu Hanifah and Ahmad, shall be the exile. Imam al-Shafi'i and the Zaydiyyah say that it is lawful to substitute the punishment of exile with a Taz'ir punishment: The period of exile according to them is until the manifestation of repentance by the offender.(243)

(ii) Seizure of property only; Here they say that the punishment shall be the amputation of the right hand and the left foot.(244)

(iii) Taking of life only; Here, the offender shall be executed by the sword and shall not be crucified.(245)

(iv) Seizing of property and taking of life; The majority differ slightly in that for Abu Hanifah, the judge is given the one of two

> options; (a) He may either amputate the right hand and the left leg, then execute (with the sword or by crucifixion); or (b) execute / by the sword only . Imams al-Shafi'i, Ahmad, the two disciples of Abu Hanifah and the Zaydiyyah maintain that the punishment shall be execution and then crucifixion.(246)

But it may be asked: how is the crucifixion to be carried out? Imams al-Shafi'i and Ahmad say that the offender is to be put to death and then crucified. They rely on the fact that Allah Most High mentions the former before the latter. They also make reference to some traditions of the Prophet (S.A.W.) which enjoin mercy during killing.(247) But the Malikis say that if this were the case the effect of crucifixion will not be felt at all by the 'corpse' of the offender thus negating the whole essence of the punishment. They therefore insist that the offender shall be affixed to the wooden stake and then killed whilst thereon.(248) This seems to be the view of all the Hanafis' except that they insist that the killing shall be done with a lance, speared through the body of the offender.(249)

Abu Hanifah and al-Shafi'e are of the view that after crucifixion the 'Corpse' of the offender shall be left on display for three days. Imam Ahmad says it is sufficient if the crucifixion becomes public or common knowledge.(250)

It may be safely deduced that the whole aim of the crucifixion is meant to serve as a deterrent on Society and also a humiliation to such despotable people who perpetrate the offence. If a brigand repents before he is apprehended the punishment shall not apply to him except that he must make good, the seizure of all property seized from the people and surrender his person for possible cases of retaliation (Qisas) or blood wit (Diyah).(251) This is based upon the Quranic provision that states:

> "...except those who repent before they are apprehended. Know it well that Allah is the Forgiving, the Merciful"(252)

Another offence which involves terorism and the use of force of arms is that of Bagy (treason).

3.7 Al-Bagy (Rebellion)

It is a universal rule that the socio-political stability of a state depends upon the allegiance it enjoys

from its subjects. Thus persons who cause disturbances and chaos among the society would be severely dealt with if only to preserve the sanity of the politic. Under Islam, any rightful government that does not withdraw itself from the fundamentals of the faith, must be tolerated within the stated rules. This offence has been expressly dealtwith by the Qur'an in the following verse:

> "And if two parties of the believers are at fight, make settlement between them: But if one of them oppresses against the other, then fight the oppressor until she returns to the law of Allah. If she so returns then s ettle between them with justice; and be equitable. Verily Allah loves the equitable."(252)

There are many Traditions of the Prophet (SAW) which indicate that any rightful authority must be sustained even a t the price of killing the dissenters or separatists.(253)

3.7.1. Definition:

The term 'Bagy' is derived from the literal, 'to seek' (ie something) and it is also understood to signify what a person seeks to do of evil and transgression.

The Malikis define the term as; "the act of refusing to give allegiance or obedience to a rightfully established

authority of state, by the force of arms."(255) The Hanafis say that is; "the refusal to give obedience, without justification, to a rightful government."(256)

The Shafi'is hold it to be: "Separation from the duely constituted community together with the refusal to obey the ruler and with a wrong justification (Ta'wil Fasid)."(257)

The Hambali's say that it is the separation from the ruler even though he might be unjust."(258)

All the definitions really centre on one aspect, which is, the refusal of a group of people to obey a duely constituted government. Out of this, some conditions may be deduced:

1. Separation from the government or ruler;
2. by the use of force; and
3. the evil intent of the offenders.

1. Separation from the government or ruler: The jurists have held that the disobedience must be directed at the leader of the government, or even his deputy, according to some. Such leader, must, according to all scholars, be Muslim, male and of legal capacity. A majority of the scholars have expressed that even a transgressive ruler should enjoy this obedience.

The Zahiris, however, have expressed the view that the transgressive ruler is not entittled to obedience. A few of the Maliki's are also of this view, including the great Sahnun.(259) Not withstanding the above, all the scholars are inclined to the principle laid down by the Shariah that it is obligatory on everyone to refuse to obey a command that goes against the established Shariah.(260) The Malikis have attempted to explain the position by saying that the tyrant cannot punish for Bagy except after changing his ways. A better position is taken by the majority by their saying that the tyrant cannot punish for the offence of Bagy. But according to all the scholars, before the offence is established the separatists must be given the oportunity to justify their stand. If they can justify their position they must be left alone and it becomes obligatory on the ruler or government to return all rights plundered. It is only after this procedure that the separatists may, if they persist, be punished.

2. Use of force: The rebellion must be accompanied by the use of force. A simple denouncement of the authority or failure to take the oath of fealty cannot amount to the offence of Bagy (rebellion). Such acts

were not understood as Bagy by the Companions of the Prophet (S.A.W.) for e.g. some of the Companions are known to have withheld their oath of allegiance to Abu Bakr for months. It is also recorded that both Abdullah b. Umar and Abdullah b. Zubair did not recognise Yazid. So well known also is the case of the Khwarij and the open hyprocrites of al Madinah.(261)

The Majority of jurists will reckon Bagy as soon as the rebels start using force. But Abu Hanifah held that the offence is complete as soon as their conspiracy is fulfilled.(262)

The Majority rely upon the statement of Ali (RA) (after a man had sworn to assassinate him), that the man be released. He said: "How can you kill him when he has not killed me"? Abu Hanifah seems to have been guided by public interest in holding thus. The Conspirators must not be allowed to grow and develop into complications for the Community.

3. Intention of the Offenders: Needless to say, guilty intention must be proved! The commonest way is to adduce evidence of statements and the actual use of force.

3.7.2. Punishment:

The punishment to be issued is death for the mischief and chaos spread in the Community.

3.8. Al-Riddah (Apostacy):

One of the primary aims of the Shariah is to preserve faith. This is because the whole bedrock of Islam and the Shariah rests on faith. The issue of 'faith', under Islam, is so vast that abandoning it is tantamount to withdrawing from the dominion of Allah Most High, besides the blasphemy and heresy involved. It is also a Mockery to the Islamic Community and if left unpunished, will open the door to unrestricted debasement of the sacred notions of religion. This is, perhaps why the Prophet (S.A.W.) listed the offence of Riddah (apostacy) among the 'seven destructive crimes' that may be committed. It may be asked; why Islam tolerates non-believers but should punish, so sternly, the abandonment of the faith? The answer is that whilst the non-believers are presumed not to have understood the signs of truth, the apostate cannot be supported by this argument. He is presumed to have deliberately and wantonly ignored the truth by proceeding to reject it. In the words of the Glorious Qur'an;

> "How shall Allah guide those who reject faith after they have accepted it and born witness that the apostle was true and clear signs had come unto them. But Allah guides not the unjust people....."(263)

3.8.1. Definition:

Riddah literally means returning or reverting from some situation. In legal terms it is understood as the abandoning of the Islamic faith to any other religion.[264]

3.8.2. Conditions for The Offence of Riddah:

Two conditions are necessary. They are;

1. Abandoning of the faith; and
2. The evil intention of the offender.

Under the first condition, the 'abandoning' could take the form of speech or omission, which may include express words of holding a contrary belief within the heart. However, punishment can only be issued out in the availability of concrete evidence. Examples of acts amounting to Riddah may take countless forms such as prostating to idols, the sun, moon, or other heavenly

bodies, the throwing down the written words of the Holy Book or Hadith, and even the making of jest or mockery, directed at the sacred texts. The offence of Riddah may also take the form of refusing to uphold a fundamental principle of the Shariah such as legalising a prohibited act of illegalising a lawful act. This is because Allah Most High says:

> "And whosoever does not judge by the revelations of Allah, such are the disbelievers."(265)

This principle covers a wide area and almost any thing can be a cause of Riddah (apostacy) if it satisfies the test mentioned. Magic is one area where the jurists centred upon because a difference of opinion arose as to the punishment to be given to the practicer of magic. The majority consisting of Abu Hanifah, Malik and Ahmad say that the practicer of magic shall be killed with the sword(266) and he shall not be asked to return to the faith. It seems that their rationale is that the punishment is that of the offence of Magic and not Riddah as such. On the other hand Imam al-Shafi'i and Ibu Hazm argue that he (magician) shall not be killed.(267) Not withstanding these arguments all the jurists are settled that the practice of magic is forbidden and thus

anyone who justifies or legalises its performance must be interpreted as having committed the crime of Riddah.

2. The evil intention of the offender: It must be stressed here that 'evil intention' does not mean that one who sincerely believes apostacy to be the right thing will be spared. It will suffice if the apostate committed the act knowingly and desirously. There must be the absence of uncertainty such as the occassional slip of tongue due to intense joy or passion. A person compelled to apostate will not be punished of he remained firm in faith throughout the act.

The prophet (SAW) is reported to have said to Ammar(268): How did your heart feel at that moment? He replied: "firm with faith"! The prophet (SAW) then said to him : "If they should return (i.e. torturers), repeat the act." Allah Most High then revealed the following verse:

> "Anyone who after accepting faith in Allah, utters disbelief, except under compulsion his heart remaining firm in faith....."(269)

The apostacy of the lunatic is to be ignored and so also is that of the person under intoxication. The

majority including Malik, al-Shafi'i, Ahmad and the Zaydiyyah however only allow the rule to apply to one who gets intoxicated unwillingly.(270)

The Imam Abu Hanifah however does not make this qualification.

The child is also exempt from liability. But where the child has attained the age of discretion, Malik, Abu Hanifah and Muhammad will hold him responsible. But Imams al-Shafi'i and Abu Yusuf insist that the person who has not attained the age of majority cannot be held responsible.(271)

3.8.3. Punishment

The punishment for apostacy is death whether the offender is young or old, male or female. This is the opinion of the majority of jurists. They rely upon the Tradition of the Prophet (SAW) which says:

> "Whoever changes his religion,
> Kill him"

He also said:

> "The blood of a person shall not be shed except for one of the three: the married adulterer, life for life, and the abendoner of the religion of the people"

The majority claim that there is nothing in the Traditions that makes a qualification as to age or sex. However Abu Hanifah argues that the woman is to be spared. He relies upon a Tradition to the same effect.

Before being executed, the apostate shall be given respite to return to the fold of the faith. The Malikis and the Zaydiyyah make this compulsory. This is also the predominant view under the Shafi'i and Hambali schools. According to Abu Hanifah, it is only desirable.(272)

The period of respite according to Malik is three days and nights from the day his apostacy is established. He is not to be punished at all within this period. This is also the view of Ahmad but he says the apostate must be imprisoned. Abu Hanifah puts the respite at three days. Imam al-Shafi'i however gives a very limited respite to the apostate. He says that the apostate shall be asked to return. If he refuses, punishment (execution) may proceed immediately.(273)

The repentance of the apostate within the respite given to him shall avoid the execution. He shall be required to pronounce the Shahadatain i.e. the formula or declaration of faith. Where his apostacy is veiled behind some view, he shall be required to denounce it.(274)

However some acts of apostacy cannot be saved by the repentance of the apostate, such as insults directed at Allah Most High, His blessed Messengers and angels, the Magician whose acts amount to unbelief and the Zindiq, (one who enters Islam in order to fight it from within) if he is discovered before he repents. Verily if the above acts were subject to repentance the gap would have been abused by the people.

It must also be noted that where the Hadd of Riddah falls, the offender shall be subjected to Ta'zir in the form of lashes or imprisonment, and even fines. The majority consisted of Malik, al-Shafi'i and Ahmad view that the property of the apostate who is executed is not subject to inheritance by anyone. Abu Hanifah however says the property shall be spoils for the entire Muslim Community, while Muhammad allows the inheritance of it.(275)

NOTES AND REFERENCES TO CHAPTER III

1. See al Jaziri, Figh ala Madhahib al-arba'ah N.D. Dar-al-Fikr, Vol.V p.7, S. Sabiq, Figh al-Sunnah 1973, IInd Edu, Dar al-Kitab al-arabiyyah Vol.II, p.335.
   See also Audah, al-Tashri' al-Jana'i al-Islami (1968) Vth Edu, Vol. I p.78.

2. The Ijma' or Concensus of the Companions was prompted by the Ijtihad of Ali (RA) who suggested that one who drinks raves, and one who r ave's demaes. But see al-Jazi.i, Figh ala Madhahib al-arba'ah, Vol.V, p.10.

3. Ibid, p.8 see also the definition of Khalil as to Zina. Contained in al-Azhari, Jawahir al-Iklil (Sharh ala Mukhtasar Khalil n.d. Dar al-Fikr (Kano) Vol.II p.283.

4. al-Jaziri, Figh ala Madhahib al-arba'ah p.8.

5. Sabiq, Figh al-Sunnah 1973, Dar al-Kitab al-Arabiyyah, (Beirut) Vol.II p.358.

6. Reported by Masa'i and Ibn Majah

7. Reported by Ahmad, Muslim and al-Nisa'i.

8. Please See Sabiq op.cit; P.359.

9. Sabiq, op.cit. p.360.

10. Reported by Ibn Majah.

11. Reported by al-Tirmidhi

12. Sabiq, op.cit: p.361. See also, Bahnasi, Madkhal -al. Figh al-Jana'i al-Islami N.d. Dar al-Shuruq (Cairo) p.135.

13. The Mushtarikah is a slave-girl jointly owned by two or more persons. She is not lawful for sexual intercourse. The Mukatibah is also a slave girl, but has already entered into an agreement with her Master to 'free' herself by paying periodic instalments to the Master. Since ownership cannot be said to be complete, sexual intercourse cannot be deducted.

14. Sabiq, op.cit: p.361. Also See, Bahnasi, op.cit: p.135.

15. Bahnasi, op.cit. p. 135.

16. Al-Our'an ch. 2 v. 229.

17. Reported by Bukhari, Muslim.

18. See Ibn Hazm, al-Muhalla N.d. Al-Maktab al-Tajari (Beirut) V. XI, p.153. They argue further that al-Bukhari classified the Tradition as 'Munkar' For further details see Andah; al-Tashri' al Jana'i al-Islami 1968, Vol.II, p.359.

19. Sabiq, op.cit. p.362

20. Ibid.

21. Reported by Baihaqi.

22. Bahnasi, op.cit. p.105

23. Reported by Bukhari and Muslim

24. Reported by Muslim, Abu Dawud, Ahmad, Hakim etc.

25. Bahnasi, op. cit. pp 106-107

26. Ibid, See also Zaila'i Tabyin al-Haqa'iq (Sharh, Kanz al-Daqa'iq 1313 H. Matba'ah al Amiriyyah (Cairo) Vol. III, p.171.

27. Al-Qur'an Ch. 4 v 25

28. Shams al-Deen al-Sirkhasi, Mabsut Vol.IX p.81

29. Ibn al-Athir, Jami'al-Usul Vol. IV p. 327.

30. Bahnasi, op. cit. p. 128.

31. Ibid., p. 127

32. Ibid.

33. Sabiq. op.cit. p. 365.

34. Bahnasi, op.cit; pp. 128 - 129.

35. Ibid. p. 128.

36. Sabiq, op.cit. p.365

37. Bahnasi, op.cit; pp.136-137

38. Sabiq, op.cit. p.367

39. Al-Qur'an Ch.24 V.13

40. Al-Qur'an, Ch.4 V.135

41. Reported by Muslim

42. Malik bin Anas, N.d. Al-Mudawwanah-al-Kubra, Al-Haj Muhammad Ahmad al-Tunisi, (Cairo) Vol.XVI, p.12.

43. Reported by Abu Dawud and Hakim.

44. Ibn Hamam, 1318 Fath al-Qadir, (Sharh) Matba'ah al-Kubra al Amiriyyah (Cairo) Vol.IV, p.102.

45. Reported by Abu Dawud, al-Tirmidhi,

46. Ibn Hazm op.cit. Vol. XI p.150.

47. Al-Qur'an Ch.4 v. 15.

48. Bahnasi, op.cit: p.133

49. Ibid.

50. Ibn Rushd, Bidayah al-Mujtahid, Vol.II pp.370 and 388.

51. Reported by Bukhari and Muslim.

52. Reported by Muslim.

53. Reported by Bukhari.

54. al-Kasani, Bida'i' al-Sanai' fi Tarbib al-Shara'i' Vol.VII p.33, See also Zaila'i, Tabyin al-Haqaiq, Vol.III, p.183.

55. Al-Azhari, op.cit. (Bab al-Zina) P.283.

56. al-Shirazi, N.d. Mahadhab, Matba'ah Isa al-Babi (Cairo), Vol.II p.283.

57. Ibn Qudamah, 1348 H. al-Mugni wa-al-sharh al-Kabir, Matba'ah al-Manar (Cairo) Vol.X p.151.

58. Al-Qur'an Ch.17 V.32

59. Reported by al-Bukhari, Kitab al Hudud.

60. Al-Qur'an Ch.4 V. 15-16.

61. Ibn Hazm al-Muhalla op.cit. p. 229. See also Audah, op.cit. p.376.

62. Ibid.

63. Ibid.

64. al-Suyuti Tafsir al-Qur'an al-Azeem, (Tafsir Jalalain) N.d. Dar al-Fikr p.73.

65. Al-Qur'an Ch.24 V.2.

66. Reported by Muslim, Abu Dawud and al-Tirmidhi.

67. Bahnasi, Madkhal al-Fiqh al-Jina'i al-Islami, p.54

68. Reported by Abu Dawud, al-Nisa'i and Abd al-Raziq.

69. Al-Qur'an ch. 11 V. 114.

70. Reported by Muslim, al-Tirmidhi, Abu Dawud and al-Nisa'i.

71. See Sabiq, op.cit. p. 408, Bahnasi, Madkhal p.55.

72. Audah, op.cit pp.383 - 384.

73. Bahnasi, Madkhal. p.56

74. Al-Qur'an, Ch.4 V 15

75. Ibid., Ch. 24 V. 13

76. Imam Abu Hanifah insists that such incomplete witnesses will be punished for defamation. Imam al-shafi'i however opposed this view on the ground that they were called to give evidence in good faith which they did (see Bahnasi's Madkhal p.57).

77. Please see Sharh Zurqani, Vol.VIII p.75, al-Mugni of Ibn Qudamah Vol.X p.160.

78. Al-Quran Ch.7 V. 81

79. Ibid Ch.29 V. 28

80. Reported by Abu Dawud, al-Baihaqi.

prescribed law of the Torah. (see Sabiq, op.cit. p.413).

98. Ibid.

99. Under the Maliki School even good sign language is admissible from a dumb witness. Abu Hanifah and Ahmad reject the demonstrations of a dumbperson. Abu Hanifah adds that his testimony is null even if he is capable of writing an account of the matter in dispute!

100. Some Hanafi's hold that even if the blind witness was possessed of sight at the time of the incident, his evidence whall be rejected.

101. Uprightness here means refraining from the major sins and making an effort to avoid the minor sins. This is the Maliki definition and to a great extent, that of the Hanafis (see Audah opcit. p.402).

102. Ibn Humam, op.cit Vo.1V, p.117.

103. Murgani, op.cit p.31

104. Audah, op.cit. p.435

105. Ibid.

106. Ibid p.437

107. i.e. the Hanafi's, Shafe's and Hambalis.

108. Reported by al-Tirmidhi and Ahmad.

109. Audah, op.cit. p.438

110. Ibid, p.440

111. Sabiq, op.cit. p.421

112. Al-Qur'an Ch.24 v.9.

113. Maududi, The Meaning of The Quran (op.cit.) Vol.IV Pp. 331-332.

114. Reported by Muslim, Abu Dawud and al-Tirmidhi.

115. Al-Quran Ch.24 V.2.

116. The Tradition, a very long one indeed, shows that the Prophet (SAW) decided that the son of the Plaintiff (who committed Zina with the wife of his mater) was to be flogged a hundred times and exiled for one year whilst the wife of the Master was to be stonned to death if she admitted guilt, (see Ibn Kathir, Tafsir al Qur'an al-Azeem, 1969, Dar al-Turath al-Arabi, (Beirut) Vol.II p.260). The Majority also say that Umar (R.A.) acted in the same way and none of the Companions is known to have disapproved (see Audah, op.cit p.380).

117. Audah, op.cit. p. 381

118. See Bukhari, Muslim etc.

119. Reported by Muslim, Abu Dawud and al-Tirmidhi.

120. Reported by Muslim.

121. See Sabiq, op.cit. p.414

122. Al-Qur'an, ch.4 V.25

123. It must be noted that the word 'al-Muhsanah' is applied variantly in the Holy Qur'an to mean; (a) Innocent women, (b) Married Women, (c) Women consummated in marriage; and (d) unmarried, free women who are fortified, not by husbands, but by their families, clan and freedom. The verse in question refers to this sort of 'Muhsanah'.

124. Sabiq, op.cit. p.410.

125. i.e. the state of ritual and spiritual sacredness required for the Haj (Pilgrimage).

126. Ibn Qudamah, op.cit. Vol.XI p.128, See also al-Shirazi, op.cit. p.283.

127. Zurqani, op.cit p.82

128. See Audah, op.cit. p.393

129. Al-Quran ch.24 v.2.

130. Ibn Kathir, op.cit. Vol.III, p.261

131. The Prophet (SAW) asked for a whip but as it was worn out, he said; "bring a harder one." Another whip was brought but it was too hard. He then said "bring me one between these two." (see the Muwatta of Malik).

132. See Jassas A., N.D. Ahkam al-Qur'an, Dar al-Fikr, (Beirut) Lebanon Vol.III p.321.

133. Ibn Qayyim, 1399 Zad al-Ma'ad Fi Hady Khair al-Ibad, Manar al-Islamiyyan, (Kuwait). Vol.I pp.44-45.

134. See Audah, op.cit p.450.

135. Ibid.

136. I.e. where the Prophet Ayyub was told" And take in thy hand a little grass and strike therewith break not (thy oath)" (See Al-Qur'an ch.38 V.44).

137. However Malik does, not allow a pit to be dug in all cases of stoning. (See Audah, op.cit p.445. (see also Sabiq, op.cit. p.424).

138. Ibn Qudamah, al-Mugni op.cit. p. 123

139. Audah, op.cit. pp. 447-448.

140. Ibn Hazm, Ibn Qayyim and many others support this view. (see Maududi, The Meaning of the Qur'an Vol.IV pp.269-270).

141. Al-Qur'an, Ch.20 V. 37 - 38.

142. Audah, op.cit. p.455

143. Ibid. p.462.

144. Sabiq, op.cit p.448

145. Al-Qur'an Ch.17 V. 23.

146. Ibid., Ch.2 V. 235.

147. Audah, op.cit. p.466.

148. Ibid.

149. Ibid.

150. Bahnasi, 1962 Al-Jaraim Fi Fiqh al-Islami, Al Bara-Kat al-Arabiyyah (Cairo) pp.143 - 144

151. Al-Qur'an Ch.24 V.4.

152. Audah, op.cit. pp.474 - 475

153. Ibn Qudamah, op.cit. p.215

154. al-Kasani, op.cit. p.49

155. al-Khatib, 1326H al-Igna' Fi Fiqh Imam Ahmad, Matba'ah al-Amiriyyah, al-Sharifiyyah (Halleb) Vol.IV p.260.

156. Reported by at Bukhari, Muslim.

157. Al-Qur'an Ch.49 V 13

158. A Ibid. Ch. 24 V. 13

159. Ibn Rushd. Bidayah al-Mujtahid (op.cit). Vol.II, p.370.

160. Al-Qur'an Ch. 24 V.4

161. Ibid Ch.24 V. 5

162. Abu Bakrah and two others had given Shaky testimony against an accused person. Their evidence was rejected on this ground and also as they had not satisfied the requirement of four witnesses.

163. See Bahnasi, Jaraim Fi-I-Fich al-Islami, p.168.

164. Audah, op.cit. pp.489 - 490.

165. See Quran, Ch.24 V. 4-5.

166. See Bahnasi, Jaraim, p.170.

167. Audah, op.cit p.495

168. See Brill, E. J. 1978, Leiden The Encyclopaedia of Islam, Vol.IV p. 994.

169. Ibn Qudamah op.cit Vol.X, p.326.

170. Reported by al-Tahawi

171. i.e. a type of drink which causes intoxication when taken in excess.

172. Reported by Ahmad.

173. Al-Quran ch. 2 V. 219

174. Ibid Ch. 4 V. 43

175. Ibid, Ch. 5 V. 90

176. For further reading please see the Asbab al - Nuzul lil Jalal al - Din al-Suyutii Published in the Tafsir wa Bayan of Shaikh Muhammad Makhlof, Dar al-Hijrah, (Beirut) p. 167.

177. Reported by Abu Dawud

178. Reported by Ahmad.

179. Reported by al-Bukhari

180. Reported by Abu Dawud

181. Reported by al-Tirmidhi, Abu Dawud.

182. It is note worthy to state that under the Shafi'i and Hambali Schools certain views to the contrary have been recorded i.e., that intoxication by means of sniffing, injecting etc. are both punishable by Hadd (See the al-Mugni of Ibn Qudamah, Vol.X p. 330).

183. Audah; op. cit. p. 504

184. Ibn Qudamah, Sharh al-Kabir ala-l-Mugni, Vol.X, P.334.

185. Ibid.

186. Audah, op. cit. p. 511

187. Or at the time of apprehension, according to the other Hanafi group.

188. Audah, op.cit. p.512

189. The only difference of opinion here is that of the position of the virdict of Umar based on the analogy of Uthman who said that 'Vomit of wine is only caused by the drinking of wine.' Some regard it is an Ijma' because non of the Companions disapproved of it while others see it as simply the Ijtihad of one Companion. (See Audah op. cit. p. 512).

190. See al-Shirazi; op.cit p.209.

191. Ibid.

192. Audah, op.cit. p. 514.

193. Ibn Rusha, Bidayah - al - Mujtahid, Vol. II, p.372

194. Kaila'i, Tabyin al-Haqaiq Vol. III, p.211

195. Audah, op.cit. p.517

196. Ibid p. 158

197. Ibn Hazm, al-Muhalla, Vol. XI Pp.319, 337

198. Audah, op.cit Pp.521, 522. The Malikis however will punish by Hadd if a thief consumes the stolen property, whether it is foodstuff or not, some of the Shafi'is argue that if, in the case of non-edible objects, the thief does not escape from the scene, he will not be punished by Hadd as he had not really 'removed the article from the safe custody' (see Murgani).

199. i.e. children below the age of discretion.

200. Audah, op.cit. p. 542.

201. There are a number of minute instances that the jurists use to put off the Hadd such as the theft of pet animals and birds unless the feathers or flesh amount to the 'Nisab.'

202. See the Sharh of al-Zurgani, Vol.VIII p.97, al-Ramelly Nihayah al-Muhtaj Vol. VII p.421.

203. Reported by Nisa'i, Abu Dawud.

204. al-Kasani, op.cit. p.73

205. Ibn-Rushd, op.cit P.375.

206. Ibn-Oudamah op.cit P.250

207. Ibid Pp.251, 252.

208. i.e. within the prohibited groups.

209. See al-Kasani op.cit p.75, Ibn Oudamah, op.cit Pp.284 - 286, Zurgani, op.cit. p.98.

210. Ibn Umar Reported that the Messenger of Allah executed the cutting-off for the theft of a shield valued at three Dirhams (Reported by the Jama'ah) Aishah is also reported to have said that the Messenger of Allah used to cut-off the hand of the thief who stole (an item) worth one quarter of a Dinar and above. (Reported by the Jama'ah except Ibn Majah).

211. Al-Qur'an ch. 5 v.

212. Audah, op.cit. P.580.

213. Ibid, P.581

214. al-Shirazi, op.cit. P.274

215. al-Kasani op-cit. P.77

216. Bahnasiy Al-Jarim Fi Fiqh al-Islami P.45

217. Both Umar and Ali have been reported to have given such verdicts (See al-Shirazi, op.cit., p.281).

218. Ibn Hamam, Sharh Fath al-Qadir, Vol.IV P.235.

219. Bahnasi, al-Jaraim P.48

220. Al-Shirazi, op.cit. P.281

221. al-Kasani, op.cit. p.69

222. Ibn Qudamah, op.cit. p.280

223. al-Kasani, op.cit, p.81. It appears that this is also the view of al-shafi'i and Ahmad. (see Ibn Qudamah op.cit. p.299).

224. Ibn Qudamah op.cit p.289. These Scholars rely upon a Tradition of the Prophet (SAW) to the effect that he never cut-off on a confession save after two or three confessions were made (see Ibid).

225. This is because the Hanafi's follow the recital of Ibn Mas'ud who reads the relevant portion as 'aymanahuma' and not aydiyahuma as read by the Jamhur (Majority).

226. Ibn Qudamah op.cit. pp.264, 272.

227. Zurqani, op.cit. Pp. 92, 93

228. See Audah op.cit. P. 628

229. Ibid P.629.

230. al-Jassas, Ahkam al-Quran Vol. II P.524.

231. Bahnasi, Madkhal, P.47

232. The Qur'anic text dealing directly with the offence is found in Ch.5 V.33. which provides; "The punishment for those who wage war on Allah and His Messenger....." The jurists have differed as to the cause of revelation of this verse. Some say that it was revealed concerning the pact between the Muslims and the polythe ists which the latter broke. Others say that the occassion was the case of some people who had accepted Islam and apostated, disappeared with the camels of the Prophet (SAW) and killed the herdsmen brutally (see Audah op.cit. p.639).

233. Audah op.cit. Pp.639 - 640.

234. Bahnasi, Madkhal, P.49.

235. See Ibid.

236. See al-Kasani, op.cit. p.91.

237. Ibid. P.90. See also Ibn Qudamah, op.cit. p.304, Zurqani, op.cit P.109 and Ibn Hazm, op.cit P.308.

238. Audah, op.cit. p. 641

239. Ibid. p.644.

240. See Ibn Qudamah, op.cit. p. 324.

241. Al-Qur'an Ch. 5 V.3.

242. Audah, op.cit. P. 647

243. Ibid. P.648

244. Ibid P.651

245. Ibid P.652. However one report of Ahmad says that he shall be crucified (see Ibid.)

246. Ibid P.652. By execution and crucifixion, it is probably meant that the body of the offender shall be fixed to the stake after execution.

247. Ibn Qudamah, op.cit. P.307

248. Malik, al-Mudawwanah al-Kubra Vol.XVI P.99. See also Zurqani, op.cit. P.110.

249. al-Kasani, op.cit. P.381

250. Ibid., p.95, See also Ibn Qudamah, op.cit., p.308

251. Ibn Qudamah, op.cit. p. 308.

252. Al-Qur'an Ch.5 V. 32.

253. Al-Qur'an Ch. 49 V.

254. For e.g. he is reported to have said;

> "You shall become (divided) like this and like that; Behold whoever separates from my community, while they hold together, kill him wherever you find him (Ibn Qudamah, op.cit. p.48)

In another Tradition he says;

> Whoever observes something which he dislikes in his leader should bear it, for verily whoever separates from the community by a hands span, and dies in that state would have died the death of the days of Ignorance."

He also said:

> "The best amongst your leaders are those whom you love and you reach out for them and they reach out for you: and the worst of your leaders are those whom you hate and they hate you, and you curse them and they curse you ".....He the Prophet (SAW) was then asked;...."Should we not then do away with them?" He (SAW) answered; "No." as long as they establish prayer among you" (Reported by Muslim).

255. Zurqani, op.cit. P.6

256. Ibn Abidin, nd. Hashiyah, Dar al-Sa'adah Matba'ahal-Uthmaniyyah Vol.III P.426.

257. Audah op.cit. P.674.

258. Ibid.

259. Ibid. P.675.

260. They rely on many authorities from the Qur'an and Sunnah such as:

(a) "If you differ as to anything then refer it back to Allah (Qur'an) and the Messenger (Sunnah)....." (Al-Qur'an), Ch. 4 V.59).

(b) "Whoever among your leaders commands you to disobey Allah, do not obey him" (Hadith)

(c) "There is no obedience in what Allah has forbidden. Verily obedience lies (only) in goodness" (Hadith).

261. Audah, op.cit. Pp. 687 - 688

262. Ibid.

263. Al-Quran Ch.3 V. 86. See also Ibid Ch.2 V. 217

264. Allah Most High provides in the Qur'an; 'Verily the (only accepted) religion with Allah is Islam' (See Ch. 3 V. 19). Another verse says: "Whoever Seeks a religion other than Islam it will not be accepted from him and he shall be among the loosers in the Herafter." (See Ch.3 V.85).

265. Al-Qur'an Ch.5 V. 47

266. The Prophet (SAW) is reported to have said: The punishment of the Magician is that he shall be killed with the Sword.

267. Imams al-Shafi'i and Ibn Hazm reject the above tradition.

268. Ammar B. Yasir, one of the early converts to Islam was severly tortured by the Polytheists. His beloved parents (also converts) were treacherously put to death before his very sight, and fearing the same treatment, uttered something implying apostacy. Allah (SWA) then sent down revelation exenorating him (see next footnote).

269. See Al-Qur'an, Ch. 16 V. 106

270. Audah, op.cit. p. 715

271. Ibid. P. 716.

272. Ibid., P. 724

273. Ibid., P. 725

274. Such as a belief that the Prophet (SAW) was sent only to the Arabs etc.

275. Audah op.cit. Pp. 728 - 729.

Chapter 4

QISAS AND TA'ZIR

This chapter deals with two Sections. The first covers the issue of Qisas (retaliation), while the second deals with Ta'zir (discretionary punishments by the judge).

4.1. Background of Qisas

From earlier discussions it is now known that, generally speaking, there are two types of offences under the Islamic Law; the Jara'im al-Hudud and the Jara'im al-Qisas, the former containing offences against the Community as a whole and the latter representing offences against the individual. The Hudud offences have already been dealt with and in this chapter we intend to look at the 'Qisas' offences. However, the phrase 'Qisas' (retaliation) is insufficient to cover the contents of the section. Strictly speaking Qisas is a means of punishment only and not an 'offence.' Other alternatives may lie where the requirements of Qisas have not been met or the injured party opts for compensation or even pardon. Infact this range of options is the chief distinction between the Hudud and Qisas punishments.

The Romano - Germanic jurisprudents would be apt to call this specie of 'offences', 'torts' rather than 'Crimes' especially as the punishment to be given would depend on the desire of the injured party to seek re-dress. This interpretation would fall short under the Shariah for the main reason that while torts are punished as civil wrongs, limited at damages and apologies, Janayat (injuries) are punished by a range of alternatives which may be by way of Diyyah (Compensation), or Qisas which may be translated as retaliation, depending upon the injury suffered. Thus injuries th t involve the limbs or senses of the human body would be punished by equal injury and injury involving life would be punished by life which is as penal as any other corporal or capital punishment under the other proper criminal offences. It is no wonder then that the majority of the Islamic Law jurists classify offences of homicide, injuries and battery under the heading of the term, Janayat[1] (injuries generally). Some others however would settle for the heading of Jarah which also has a similar meaning i.e. injuries. The latter group argue that it is only through injury that results of the act committed may be effected.[2] Notwithstanding the above, the term Qisas, despite its literal meaning, is

used to mean all offences which are termed, Hagg al-Adami (right of the individual).

One of the primary aims of the Shariah is the protection of life(3) This protection was necessary because before the advent of Islam, the Arab Polytheists resorted to vengeance and blood baths that ran into generations. The theory with this primitive people was that all the members of the clan of the offender were held responsible for a murder and often the aggrieved clan would insist on taking revenge on two or more innocent members of the offenders clan, or one of noble birth in the stead of the deceased. Islam changed this cruel and unjustifiable method of retaliation with the most equitable doctrine that only the offender may be the subject of retaliation. The Holy Qur'an says;

> "O you who believe the law of equality is prescribed for you in cases of the murdered: the free for the free, the slave for the slave, the woman for the woman. But if there is any remission made by the brother of the slain, then grant any reasonable demand, and compensate him with a handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exeeds the limits shall be in grave penalty."(4)

The Holy Qur'an goes on to describe the doctrine of Qisas as a 'Source of life for Mankind.'(5) The mere fact that the would-be killer knows that his own life will be put on the line, would prevent his accomplishment of the act. With this doctrine the probability of one murder growing into a tribal war was greatly reduced. But most importantly, the right of pardon was introduced and if the relatives of the deceased were to opt for compensation the life of the killer would be saved.

It is clear from the 'verse of Qisas' that the Islamic Law places the responsibility of retaliation in the hands of the Wali (guardian or relative of the deceased). This authority is further provided for in the Qur'an:

> "And for whoever is killed wrongly, We have given authority to his guardian (to retaliate) but let him not exceed limits in the killing(of the Murderer)....."(6)

The Majority of the jurists have interpreted the term, 'Wali,' (lit.guardian) as all those persons who are beneficiaries of the deceased's estate. Imam Malik however says it is the clan of the deceased.(7) Malik might have taken this view due to the strength of the clan

system in Arabia at his time. Non the less, the Wali has been given wide powers and the state would not move to deliver the prescribed punishment unless on the authority of the Wali as he may either choose to have the offender killed, or may choose compensation or pardon the offender altogether depending, of course, on the circumstances sorrounding the killing. It must be noted that the state reserves the power to reject the offer of pardon where the murder is treacherous or amounts to the offence of Hirabah (Highway robbery). On the hand, the state, according to some of the jurists, may add some other punishment by way of Ta'zir not withstanding the pardon of the relatives.(8)

Offences that fall under this category of Qisas, are divided into two; viz;

(1) Qisas fi Nafs (offences against life i.e. homicdie)

(2) Qisas fi ma Duna al-Nafs (offences not involving loss of life).

4.2 Al-Qisas Fi Nafs. (Offences involving loss of life i.e Homicide):

For the purpose of determining this type of Qisas, the jurists have classified Homicide into three(9) i.e. Qatl-al-Amd (intentional homicide), Qatl Shibh-al-Amd (Quasi-intentional homicide); and Qatl al-khata (Mistaken homicide).

4.2.1 Al-Qatl-al-Amd (Intentional Homicide):

This is defined as the act of taking of the life with the intention of killing the deceased.(10 By this definition, a deliberate act is not sufficient. There must necessarily exist, the intention of taking away the life of the deceased. Three conditions can be derived from this;

(a) The deceased must have been a living human being and not a corpse.

(b) the death of the deceased was the end result of the act of the offender; and

(c) the offender designed the result of death.

(a) The Deceased Must Have Been A Living Human And Not A Corpse: This heading suggests that the victim, prior to the act of the offender, must have been a human being and possessed of life. Thus the killing of an animal does not fall under this, so also the attack on a corpse of a human being. The jurists are unanimous in holding that should a sick person approaching death be killed by an independant act of the offender, the offender would assume full responsibility for his act and would be punished under the heading of Amd. In another illustration where the deceased is attacked by 'X' and whilst thus devastated, 'Y' cuts off his head, 'Y' would be the killer as 'Y' was the one who blotted out the life of the deceased.(11 But where the first attack is so serious as for example where the stomach is freed of its intestines, the jurists differ. Acording to one group, which includes the Hanafi s, Shafe'is, Hambali's and even someof the Maliki s, the first attacker would be the Killer. They argue that it was the first attacker who placed the victim in the vulnerable position which enabled the second attacker to finish him off with ease. These jurists apply the law or presumption

of death (Hukum al-amwat). Thus where the victim is speechless as a result of the attack, he would be presumed, by these jurists as engulfed into death, even though he might, biologically, still be alive. They extend this rule to apply to a victim who makes speeches which do not make any sense and even a demand for water would have the same legal implication as such demands are usually prompted by necessity of the situation and not full-consciousness.

On the other hand the other group of jurists who consist of the Zahiris and some of the Malikis, apply the law or presumption of life (Hukm el-Hayat). According to this group of jurists, the victim of an attack is presumed, for practical purposes, to be alive as long as his soul has not departed from his body. Thus, in our hypothesis, 'Y' would have to be the killer, according to this group of jurists. They argue that one who is not yet dead cannot be presumed to be so dead.(12)

Generally speaking, the class, religion, age, sex, weakness or reputation of the offender and victim are immaterial. All persons are understood to be protected by the law and the state would have to guarantee the

lives of its subjects. If anyone enjoying such gurantee (Ismah) is violated, the state is bound to punish the aggressor. The jurists however differ as to who enjoys this guarantee of life and body (Ismah).

According to Imams Malik, al-Shafi'i and Ahmad, the Ismah is established by Islam and Aman. (protection of the state by way of truce or payment of the poll tax Jizyah).(13) However Imam Abu Hanifah does not understand the Ismah in this way. He says that a persons blood can only be protected or secured by virtue of his being within the teritory of the state (Dar al-Islam). Whoever is situate in the Dar al-Harb, (Abode of hostility) cannot claim protection of the law even if such a person is a Muslim by faith.(14)

A'protected' person may loose his guarantee by various ways such as apostacy in the case of a Muslim and in the case of the non-Muslim, by breaking the covenant or truce which offers security. This is according to the majority of the schools. But the Schools are all agreed that the security is lost by the perpetration of certain capital offences such as Zina by the married, Highway robbery (Hirabah), intentional homicide (Qatl-al-Amd). The implication of this loss of portection

is that the person concerned, now becomes what the jurists call Mubah-al-Dammu i.e. one whose blood may be shed lawfully.

Where such a person is killed by an individual, (who takes the law into his own hands), he would not be liable to capital punishment but would be subjected to the punishment of Ta'zir for his overstep of the law. This is the popular view of all the four Sunni schools.(15

(b) The Death of The Deceased Must Be The End Result of The Act of The Offender: The offender must have introduced the action which resulted in the death of the victim. If the act of the offender cannot be linked with the death of the victim then the actor would not be regarded as the killer. The act in question may be by various means such as beatings wounding, stabbing, burning strangulating and poisoning the victim e.t.c. One single act is sufficient to satisfy the requirement of the law regardless of whether the result of the act occured after a short or long time.(16)

The leaders of the four Sunni Schools differ as to what sort of weapon or implement can be said to cause intentional homicide (Qatl al-Amd). This is of

fundamental importance as the nature of the implement used, would say alot in determining whether the act of the offender was deliberate or mistaken. The views of the leaders have, for this purpose, been classified below;

The view of Imams al-Shafi'i and Ahmad:
They understand such a weapon to be that which normally kills, such as a Sword, Spear, Gun, Poison or even a heavy stick. If the implement does not normally or ordinarily kill, the offence would not be Qatl-al-Amd (intentional) but Shibh al-Amd (qasi-intentional). A few examples of these implements are a whip, a light stick, a slap or blow with the hand, etc. These two jurists reckon a third class. This is the weapon that does not normally bring about death but when applied to the victim, becomes a weapon that would ordinarily kill such victim, for example where the victim is sick or a weakling or even an infant. The test applied by these applied by these jurists is to look at the circumstances sorrounding the event of each case; as where a weak object which rarely kills by common knowledge is used on a sensitive part of the body For instance a whip struck against the stomach or a stick to the throat could have fatal consequences.(17)

The View of Abu Hanifah: The great Imam agrees with al-Shafi'i and Ibn Hambal as to the condition that whatever weapon that normally kills its victim would raise the presumption of Qatl-al-Amd (intentional homicide). But he goes on to stipulate that the weapon used must be one which is customarily or traditionally used for killing. i.e. the implement must have primarily been invented for the purpose of killing its victim. This stipulation would in all cases override the first condition supported by al-shafi'i and Ahmad. Imam Abu Hanifah recognises weapons used for cutting, wounding or spearing or piercing the victim and it is immaterial whether the weapon is made of Iron or brass or even wood. i.e. Swords, Knives, Spears, fire, glass etc. All these objects are capable of attracting the punishment for Qatl al-Amd (intetional homicide). On the other hand where the weapon used has a potential of causing death ordinarily, but does not, by nature, cut, wound or pierce the body, the punishment would only be given under Shibh al-Amd (qasi-intentional), this, not withstanding the deadly nature or size of the weapon. The apparent intention of the offender to kill the deceased is also overshadowed, and such a weapon, which does not fall under the strict requirement would

render the homicide, Shibh al-Amd. (quasi-intentional)(18)

The View of Malik: Here, the Imam has not gone into intricacies in determining the legal consequences of the weapon or object used to commit the act of homicide. He is contented with providing general principles that cover the wide scope of homicide. His view is described in the Mudawwanah al-Kubra as follows;

> "Whatever the man (offender) uses deliberately for striking, slapping, blowing (the victim) or (by using) the gun, stone, stick etc..... .....where one grabs another by way of jest and he (other) falls and dies.....this, is mistaken homicide (Qatl al-Khata); and not deliberate homicide (Qatl al-Amd) as the offender intended (merely) to jest. But where he to intend (the act) with aggression or ferocity, or to grab the victim by the legs and he falls and dies, it would be deliberate homicide, (Qatl-al-Amd)."(19)

Some of the followers of Malik however, prefer the definition or test of 'what normally causes death.' They even include acts such as squeezing the testicles or other sensitive part of the body, and strangulation as under deliberate homicide.(20) (Qatl al-Amd).

It is obvious that the main reason for Imam Maliks difference with other jurists on this point, is the

fact that Malik refused to recognise the middle course of Qatl Shibh al-Amd (quasi-intentional homicide). He maintains that the only forms of homicide stated by the Qur'an are the Qatl Amd (deliberate homicide) and the Qatl Khata (Mistaken homicide). He went on to say that whoever adds another type of homicide has verily made an addition to the text of the Qur'an. It is clear from the above, that with Malik, the arguments of Imams Shafi'i and Ahmad as to which weapon normally causes death, does not even arise because the 'weapon theory' is used to separate the deliberate homicide from the quasi-intentional homicide.

It must be kept in mind that the weapon theory is not the only determinant of Qatl al-Amd (deliberate homicide.

Al-Mutasil bi al-Qatl (Causation):

In determining the cause of death, the jurists generally agree that the cause may be by direct means (Muba-Shirah), or by in-direct means (Sababiyyah).

The jurists classify the direct act (Mubashirah), as that which by itself causes the death of the victim, for e.g. the act of strangulation or the cutting of the

throat with a sword or knife.(21) Here the objective test is applied without having to call in circumstances sorrounding the homicide. All the jurists agree that the direct act would make the offender liable. However where there is some positive involvement of the deceased in encouraging death, i.e. where there is contributory negligence the position is debated or by the scholars.

On the other hand, the indirect cause (Sababiyyah) is that which does not, by itself, cause the death of the victim but rather, leads to it e.g. false testimony leading to the execution of the deceased, or the digging of a pit or trap on the path of the victim who falls into it and dies. The actual direct causes of death in the above cases are the execution of punishment in the first hypothesis, and the falling into the trap in the second. In all these cases, the jurists, with the exception of the Hanafi s, say that the chain of causation would be 'traced' back to the original or initial act of the offender, who would have to assume responsibility.(22)

Where there is contributory negligence by the victim, the jurists approach the problem from two angles; viz;

(a) Cases where the initial act is not, per-se, sufficient to cause death: and, (b) where the initial act is perse, sufficient to cause death. In the first case, for e.g. where the offender plunges the victim into a small pond or reservoir and the victim deliberately refuses to help the situation, and falls asleep or becomes numb as a result of cold, thus making him helpless, and vulnerable to death; the offender or actor would not be understood to be the cause of death because death was as a result of the victim remaining in the water and not the actors throwing him in it. This view is backed by the Shafe'is. They supply another case of one who is cut slightly by another and negligently allows his wound to deteriorate until death. Here also the cutter would not be held liable for the death resulted. The Hambalis however do not agree with this view, and say that since the cutter caused the wound, he must be held liable for the death of the victim.(23)

As for the second case, the contributory negligence of the victim would not avail the offender. This is the most popular view of the scholars.(24)

Imam Abu Hanifah agrees with the other jurists as to the decision that Qatl-al-Amd is cognisable whether committed directly or in-directly except that he makes a distinction between the two by applying the punishment of Qisas (retaliation) for direct causation and putting off the Qisas (retaliation) for indirect causation. He prefers that the offender by way of Sabab (indirect) means should be killed or punished by Ta'zir (other punishments by the judge), but not by way of Qisas (retaliation).(25)

All the four Sunni Schools are agreed that some acts are capable of resulting to Qatl al-Amd (intentional homicide) even though they might not be physical or material e.g. the brandishing of a sword before the victim or the throwing of a snake at the victim, who dies of fright. Imam Malik would reckon Qatl al-Amd (intentional homicide) only if it is proved that the offender did intend to cause death during a bout of fighting or hostility. If jest or play is involved, the homicide would be Khata (mistaken). Imam Abu Hanifah(26) is supported by Ahmad(27) in reckoning such a homicide as Shibh al-Amd (quasi-intentional). Imam Shafi'i distinguishes between such a victim that can discern

(i.e. understand fear) and one who cannot, such as a child, in sane or unconscious person. Thus, according to al-Shafi'i, where the victim can perceive the fear of the object used, the offence would be Qatl al-Amd (intentional) but where the victim cannot, it would be Qatl Shibh al-Amd (quasi-intentional).(28)

In the case of death caused by imprisonment or starvation the jurists also differ. Imams al-Shafi'i and Ahmad are of the view that the offence would be Qatl al-Amd (intentional homicdie) if the term of detainment and the lack of provision would cause death to an average person. This would depend upon the circumstances of each case such as extreme cold or heat, etc. Where the victim had already been afflicted with severe hunger or thirst, before the imprisonment, the offence would only be Qatl al-Amd (intentional) if the aggressor was aware of the condition of the victim. They derive this rule from analogy with the case of one hitting a weakling. In both cases, were the aggressor to be unaware of the condition of the victim, the offence would be Shibh al-Amd (quasi-intentional).(29) The controvertial argument of Abu Hanifah is that the actor cannot be held responsible, because death only resulted

from starvation or thirst. However his two disciples have dissented to this view of the great master and both hold that the least concession the actor may get is the punishment for Shibh al-Amd (quasi-intentional) because it is common knowledge that everyone needs food and drink to survive. Thus one who denies another this basic necessity must be counted as the killer of the victim.(30) The consistent view of Malik is that the murder would be Qatl al-Amd (intentional) if aggression or hostility is involved.

(c) that the offender designed the result of death:

The majority of jurists including Abu Hanifah, al-Shafi'i and Ahmad stress that this condition is indispensable. According to them even if it is shown that hostility was involved, or even that the aggressor intended to cause hurt (not to kill the victim), the offence would be Shibh al-Amd (quasi-intentional) and not Amd (intentional). It must be proved that the aggressor intended to take the life of the victim. This condition is the main barrier between Amd and Shibh al-Amd (quasi-intentional) according to these three schools.

Imam Malik, as noted earlier, does not make this a necessary condition for with him, it is enough that the act of the offender was veiled in aggression or hostility.

In determining the intent or desire, the first group apply two tests; i.e. that of the weapon which normally causes death as against what does not normally cause death. The other test is that of doubt or uncertainty. If doubt as to the intention of the offender exists, the crime would be regarded as Shibh al-Amd (quasi-intentional).

Proof Of Qatl al-Amd: From the Traditions of the Prophet (S.A.W.) it has been established that there are two ways of establishing the offence of Qatl al-Amd (intentional homicide). These are by Confession and evidence.

(i) Confession: This is established under the Tradition of the Prophet (S.A.W.) narrated by Wa'il b. Hajr. that:

> "I was sitting with the Prophet (SAW) then came a man who was dragging another.....and said: "O Messenger of Allah, this (man) has killed my brother"!.....The Prophet (SAW) asked the accused: Did you kill him"? The man replied: "Yes, I killed him ....."(31)

(ii) Evidence: This is also derived from the Qur'an and Sunnah. It has been narrated from Raf' b. Khadij that;

> "One of the (people of) Ansar was found killed at Khaybar. His relatives went to the Prophet (SAW) and informed him of the case. He (SAW) said: "Do you have two witnesses to prove that your relative was killed....."(32).

Ibn Qudamah of the Hanbali School has explained further, the position of the Schools as follows;

> "The evidence of one man and two women is not accepted in Qisas nor(the testimony of) one witness and an oath. We are not aware, as regards this matter of any difference of opinion among the learned men....."(33)

It sometimes occurs that the evidence available is not sufficient to prove murder. Where there is some form of strong suspicion or the deceased utters a dying declaration

as to the circumstances of his death, the law accepts the procedure of Qasamah (oath taking) to force the offender to at least pay compensation.

al-Qasamah (Oath taking): Literally the word means 'goodness' and 'beauty'. In the language of the Shariah it signifies the procedure of oath taking by the clan members of the deceased, according to some jurists, and of the clan members of the suspect according to some others.

According to Imam Aba Hanifah it is the members of the accuseds clan that would have to swear fifty times that; "By Allah we did not kill him and we are not aware of his killer." This procedure would be taken where the body of the deceased is found in the teritory of the suspect clan. This procedure, if followed, excepts the suspect from the Qisas (retaliation) but the Diyyah (blood-wit) must be paid. He relies on a Tradition narrated by Ziyad b. Abi Maryam that a Man came to the Prophet (SAW) and said: O Messenger of Allah, I have found my brother Murdered in the territory of so and so clan." The Messenger of Allah (SAW) said: "gather

fifty (men) to Swear by Allah that they did not kill him and that they do not know his Killer." The man then said:.....Is this all I have as regards my brother?" The Prophet (SAW) replied; 'Nay. You will have one hundred Camels."(34) The Hanafis contend that this tradition is authority that the oaths must be taken by the suspect clan and not by the Plaintiff clan as stated by some scholars. The tradition, according to them also points that the punishment is the payment of the blood-wit and not the Qisas (retaliation). The Shafi's and the Hambalis are also of the view that Diyyah (blood-wit) is the correct punishment and not Qisas(35)

According to Imam Malik however, the oath taking is to be done by the relatives of the deceased.

After the procedure, they would be entittled to take retaliation from the suspect. They stress that only one person can be killed in cases involving Qasamah (Oath taking); this also, only where (Lauth) (very strong suspicion) exists, such as sworn enmity between the suspect and the deceased or the declaration of the deceased before dying, that "So and so has my blood."(36) Where the plaintiffs fail to take the Oaths

the defendants would have to take the Oaths to free themselves from liability. Strong suspicion (Lauth) is explained by al-Shafi'i and Ahmad to be manifest enmity between the suspect and the deceased or a short span between the deceaseds entry into the habitation and his being discovered, dead.

It appears from the arguments of the jurists that the Qasamah (Oaths) procedure would not be resorted to unless there is strong circumstantial evidence which points to a positive link between the suspect and the homicide. The group of Abu-Hanifah, al-Shafi'i and Ahmad are more cautious than the Malikis in that they refuse to recognise the Qisas in such cases. This is obviously based on the lack of concrete, direct evidence.

Punishment For The Offence of Qatl-al-Amd: There are various punishments that apply to this offence. The jurists classify them into two classes. The first class consists of;

(a) al-Qisas (retaliation)

(b) al-Diyyah (blood money)

(c) al-Ta'zir (disciplinary punishment by judge); and

(d) al-Kaffarah (expiation).

The second class consists of:

(a) prevention of the offender from inheriting the deceased; and

(b) prevention of the offender from the bequest of the deceased.

The First Category of Punishments:

Under the first class it must be stated that the punishments of Diyyah (blood money) and Ta'zir (disciplinary punishments by the judge) are only alternatives (uqubah al-Badaliyyah) to the punishment of Qisas (retaliation). Where the Qisas cannot be implemented for some reason under the law, these punishments would be introduced in its stead. The Diyyah and Ta'zir may be applied together but the Qisas may not be applied together with the Diyyah or Ta'zir unless in exceptional cases such as where a man kills two persons and the Qisas happens to lapse in one of the two cases; here it is lawful to punish the same offender with Qisas (retaliation) in the one case, and with Diyyah (blood - money) or Ta'zir to cover the

other case.(37) The procedure of the Shariah is that the alternate punishments cannot be implemented unless the original punishment lapses for some justifiable reason.

1. Al-Qisas (Retaliation): The term literally means 'equality' or to follow a similar way or route. Technically it suggests retaliation by the aggrieved party for an injury or murder, as the case may be. The general law is that all cases of intentional homicide (Qatl al-Amd) would be subject to the retaliation except in the case of Hirabah (highway robbery). This rule however, is subject to many exceptions which bear a great influence in drawing the line between Qisas and Hudud.

Limitations on Qisas:

(i) Where the deceased is a descendant of the Offender:

According to Imams Abu Hanifah, al-Shafi'i and Ahmad, the father who kills his offspring will not be subjected to the punishment of Qisas (retaliation). They rely upon two Traditions of the Prophet (SAW). The first says: "The parent is not to be held liable for killing his offspring." The other Tradition says: "You and your property belong to your father"(38) The mother is regarded as occupying the same position as

the father, but the child is not reckoned within this rule. Imam Malik differs from the three leaders and says that the father would be killed by retaliation for killing his offspring if it is proved that he killed the deceased with intent for e.g. by cutting the throat or intestines, etc. But where the father is shown to have merely intended to punish or discipline the child, he would not be subject to the retaliation. The general assumption of the law is that a parents love and affection for his/her child will always overshadow his anger, hatred or intention to kill his own descendant.(39)

The above view of Malik should not be misconstrued as referring to Qatl al-Khata (mistaken homicide). It is a compromised stand between Qatl al-Amd and Qatl Shibh al-Amd i.e intentional and quasi-intentional homicide) as Malik himself says the blood money to be paid in such a case would be intensified (Mugallizah) which does not apply to Qatl al-Khata (Mistaken homicide).(40)

Al-Zuhri, the famous Successor, and Laith b. Sa'ad have, by analogy, placed the husband in the same position as the father. But the majority of scholars never contemplated this comparison.(41)

(ii) Where there is 'inequality' between the offender and the deceased:

This is a condition recognised by Malik, al-Shafi'i and Ahmad. Equality with them is freedom and Islam. Thus according to them, besides these two, there is no other means of 'inequality.' The implication is that a free-person would not be killed by Qisas (retaliation) for a slave nor the Muslim for the non-muslim. However one view of Malik states that if the non-muslim happens to be a Dhimmi (subject of the Muslim state) then the killer will be put to death, and this, only if the murder involves treachery or the property of the Dhimmi.(42)

As authority for freedom they rely upon a Tradition of the Prophet (SAW) which states that: "The free shall not be killed for the slave." Ibn Abbas is also reported to have held this view.(43) Where a slave kills a free man he would be subject to the Qisas (retaliation).(44)

The view of Abu Hanifah is that only the master who kills his slave would enjoy this exemption. He even included the case of a doubtful ownership over the slave.(4
He narrows the rule to hold only the master over his slave because of a Tradition of the Prophet S.A.W. which says;

> "There is no liability for a parent killing his child nor a Master killing his slave."

As regards Islam as an exception from Qisas Malik and al-Shafi'i argue that the Muslim cannot be killed for killing the non-muslim because of a Tradition of the Prophet (SAW) which says:

> "The 'blood' of the Muslims is ranked equally.....and the Muslim will not be killed for the unbeliever."

As in the case of freedom, the non-muslim is to be put to death for killing a Muslim.

Imam Abu Hanifah says that the Muslim must be killed for killing the Dhimmi and vice-versa. He contends that the verses relating to this question are of general application such as;

> "And we decreed for them: Life for life..."(46)

In another verse it is said that:

> "And whoever is killed wrongly, We have given authority to his guardian (to retaliate).....(47)

(iii) Where The homicide is committed in the abode of hostility:

This is an exception recognised only by Abu Hanifah. He says that the Qisas would not be imposed on such a Murderer. He distinguishes however, between a person who is situate in the abode of hostility as where someone accepts the faith but does not migrate to the land of the Muslims, and one who happens to be in the land of hostility for trade or journey. In the first case there would be no punishment, but in the second case, blood money must be paid. It may be recalled that with Abu Hanifah! Islam' alone is not sufficient to guarantee Ismah (protection by law) hence this view of his.(48) However Malik, al-Shafi'i and Ahmad regard Islam as sufficient to guarantee the Ismah regardless of the place of abode.

Imam Abu Hanifah also provides that for the Qisas to apply, the guardian of the deceased must be aware of the incident. This view however has been critisised by the other leaders of the schools.(49)

(iv) Where the Killer is compelled to commit the Offence:

According to the view held by Abu Hanifah and Muhammad, the liability will lie on the one who forces the offender to commit the homicide and not the offender. They say that the direct killer (person compelled) is here, nothing more than a weapon or instrument. It is also said that a weak (da'if) report from the Shafi'i school supports this view. On the other hand, Malik, Ahmad and a more reliable report of the Shafi'i view maintain that Qisas (retaliation) would be obligatory on both the compeller and the compelled person. The compelled and the compelled person. The compelled person, they argue, has no defence in stating that he committed the offence to save his own life. He clearly chose to overlook the sacredness of the victim's life which he could have avoided.(50)

The above limitations on Qisas are the generally accepted exceptions as stated by the jurists. The subject of Qisas (retaliation) is now better defined. But these limitations apply to the individual, subject to the retaliation. The Qisas may also fall or lapse in different circumstances.

Lapse Of Qisas: There are, broadly speaking, three situations which will cause the lapse of Qisas (retaliation). These are;

(a) Death of the offender before execution;

(b) Pardon (Afw); and

(c) Settlement (Sulh).

(a) Death of the Offender before execution:

The Qisas would lapse in such a situation and it is not lawful that another person becomes the subject of Qisas as arresult. The jurists are unanimous about this rule. They however differ as to whether the blood money (Diyyah) becomes due after the death of the culprit. The law with Imams Abu Hanifah and Malik is that the Qisas is obligatory on no one but the offender. But as regards the Diyyah (blood money), it becomes obligatory, in a case of deliberate homicide (Qatl al-Amd) only if the offender volunteers payment. The two jurists go on to argue that if the Qisas lapses on the death of the offender, how then can the Diyyah (blood money) be payable whilst the offender has not yet volunteered its payment? For this reason, the death of the offender before execution bears the legal implication that both the Qisas and the Diyyah would lapse

in such a situation.(51) Imams al-Shafi'i and Ahmad however counter this argument of the elders by saying that where the offender dies before execution, only the Qisas lapses; the Diyyah must be exacted from the estate of the offender as an alternative to the Qisas (retaliation) which has now been frustrated.(52)

(b) Pardon (Afw): All the jurists agree that the aggrived party may pardon the offender. This is better than to retaliate. They rely upon a number of verses contained in the Qur'an and Traditions of the Prophet (SAW) and the Ijma' (concensus of opinion) of the Companions. It is stated in the Qur'an that:

> "O ye who believe; retaliation has been prescribed for you in cases of the murdered;..... But in case the injured 'brother' is willing to show mercy to the murderer the blood money should be decided according to the equitable (known) law and the murderer should pay it in a genuine way. This is an alleviation and a mercy from your Lord....."(53)

In another verse Allah Most High says;

> "However whoso forgoes retaliation as charity it shall be expiation for him....."(54)

From the traditions it is reported from Anas b. Malik that the prophet (S.A.W.) always urged pardon in cases of Qisas.(55)

With Imams al-Shafi'i and Ahmad Afw (pardon) is the forgoing of Qisas either completely or by opting for Diyyah (blood money).(56) Abu Hanifah and Malik take 'Afw' to be the complete pardon only. With them, one who forgoes retaliation but accepts blood money cannot be said to have 'pardoned' the offender. This can at best, be called Sulh (settlement).(57)

It is generally accepted by the jurists that the only person who may grant a complete pardon is the descendant. They say that all secondary bearers of the right like the father, fathers father or state can only give in to settlement (Sulh) i.e. the blood money.(58) A possessor of the right of pardon must be major and sane and this is regardless of sex. Where the possessors of the right are many and one or more of them wishes to exercise the pardon, there is a difference of opinion. The majority consisted of Abu Hanifah, al-Shafi'i and Ahmad, hold that the Qisas would fall or lapse on the offender. They argue that the right of retaliation is a joint-issue between all possessors of the right. If one or more

should decline to exercise the right, the right of the others becomes defective and incomplete. They support their argument with several authorities reported from the Sahabah (Companions). A case of similar nature occured during the time of Umar (R.A.). A man was brought to him for having killed another. Some of the deceased persons sons pardoned the offender while others insisted on the retaliation. Umar then counselled Abdullah b. Mas'ud who said: "Verily the offender has been saved from death and I think that you should levy the blood money on him." Umar then said: "I also (agree with) this view."(59) Imam Malik insists that the determining factor here, is the degree of closeness. Thus, according to him, where there are two possessors of the right who are both of the same degree of closeness to the deceased and both male, one of them may cause the Qisas to fall or lapse even if the other objects. Where however, the pardoner is of a closer degree than the seeker of retaliation, the former would be given priority. Malik also gives the male a priority over the female. He says that the female has no say in the presence of her male equivalent.(60)

(c) Settlement (Sulh): There is no disagreement among the scholars that settlement may be negotiated between the possessors of the right of Qisas (retaliation) and the killer, over what is less than or even more than the conventional Diyyah or blood money(61) The basis for settlement is embodied in the Sunnah and Ijma' if the Companions. The Prophet (SAW) is reported to have said:

> "The one who kills another deliberately will be handed over to the relatives of the deceased: they may kill him if they please or they could receive blood money.....and whatever they may settle between them is permitted."(62)

It must be stated however that an increase over the prescribed blood money is acceptable only as settlement over Qisas and not over an original case of Diyyah, as this will be taking undue advantage of the situation (riba).

Execution of Qisas: The most primary issue concerning this matter is 'who has authority to perform the retaliation? According to the majority including Abu

Hanifah, al-Shafi'i and Ahmad the persons possessed of this right are the lawful heirs of the deceased not withstanding their sex, or the amount of property left by the deceased.(63) Imam Malik differs with the majority and holds that the persons entittled to retaliate are the partriarchal relatives. Thus the husband, collaterals and the maternal grand father are not permitted to retaliate unless in the absence of the father, son and son's son. The fathers father is considered closer to the deceased than the collaterals.(64) Where the deceased has no relatives there is a concensus of opinion that the state authority will assume responsibility for carrying out the Qisas (retaliation).

The possessor of the right may retaliate personally if he pleases, but only if he is sane and adult. This is unanimously accepted by the scholars. But where the possessor of the right is insane or minor, there are different views of the jurists. Imam Malik says that the guardian of the insane or minor will assume responsibility.(65) Imams al-Shafi'i and Ahmad hold that the execution of Qisas will be stayed until majority is attained in the case of the minor, and recovery from insanity by the lunatic. The case of the

lunatic is however dependant on the probability of recovery. Where there is no hope of recovery the responsibility falls on the guardian.(66) Two views have been recorded from the Hanafi School. One supports the view of al-Shafi'i and Ahmad while the other says that the state would assume the right.(67)

If the offender is a woman and happens to be pregnant the Qisas must be stayed until she has delivered her pregnancy.

Wherever it is said that execution be stayed, the offender shall be imprisoned pending the time of execution. It is reported that Mu'awiyyah (R.A.) once detained a killer until a son of the deceased came of age and no one among the companions disapproved of this.(68)

Method of Execution: The equitable norms and rules of Islam demand that justice be done in all cases. The term 'Qassa' literally means to follow the same path or route. Thus the offender must be killed as he killed the deceased. Some of the jurists interpret this rule differently as we shall observe. Abu Hanifah says that the offender should not be killed except with a Sword.

with him it is immaterial that the deceased was killed with a different weapon or instrument such as fire, drowning or strangulation. There is also one report from Ahmad to the same effect. They rely on the Tradition reported from the Holy Prophet (SAW) which says: "No punishment save by the sword." Under this view the retaliator must strike the neck of the offender only. He is not allowed to hit at a different limb of the offender even if the offender had used similar method to kill the victim. Moreover, according to this view, such a deviation in executing the retaliation will attract the punishment, of the state, as a distinct offence.(69) On the other hand Malik, al-Shafi'i and another report from Ahmad say that the retaliation must be carried out by whatever means the offender used to kill the deceased. They say that to kill the offender by any other means than that used by the offender is an oversteb of the limits of the Shariah. They support their argument with a text from the Holy Qur'an which states;

> "And when you retaliate,
> (as punishment) retaliate
> with similar....."(70)

They cement their contention also with a Tradition of the Prophet (SAW) which says:

> "Whosoever burns (another) we shall burn him, and whosoever drowns (another) we shall drown him!"(71)

According to the second group, if the murder involved a sword and another injury, the retaliator may forgo retaliation for the injury if he pleases, and kill by the sword alone. If the means of murder was by starvation, the same would be used on the offender. A question may be asked here; what if the offender does not die? Some of these jurists say the punishment will be repeated until he dies while others say that the sword would be used to finish off the offender. But even to these jurists, not all cases are subject to this rule. Thus one who kills another by sodomy would have to be killed by the Sword. So also would one who kills the deceased by sorcery or intoxication.(72) Imam Abu Hanifah adds that the possessor of the right of retaliation must be present at the time of retaliation, physically. The Imam holds that there is every possibility that compassion for the murderer might overcome him thus saving a life.(73) The other schools however

do not recognise this condition. Under intentional homicide, where the Qisas lapses and pardon has not been granted, Diyyah would be imposed on the offender.

2. Diyyah as an Alternative to Qisas Under Qatl al-Amd. (Intentional Homicide):

The basis for Diyyah (blood money) is found both in the Qur'an and Sunnah. In the Holy Qur'an it is said:

> "Whoever kills a believer by mistake shall free a Muslim Slave and pay blood money to his (deceased's) folk: unless they forgo it....."(74)

It is also narrated that the Prophet (SAW) wrote to the people of Yemen saying inter-Alia that ".....verily the compensation (blood-money) for life is one hundred Camels....."(75)

Diyyah (blood money) as discussed under Qatl al-Amd (intentional homicide) is not an original punishment but rather an alternative to the punishment of Qisas (retaliation). Thus where the relatives decline to retaliate, they have every right to demand for payment of the blood money. The same rule applies to situations where the Qisas is said to 'lapse'. But it must be recalled

that blood money will not be paid where there is a complete pardon (Afw) or the death of the offender before the execution of the Qisas, according to Abu Hanifah and Malik. The only exception to Diyyah Being an original punishment under Qatl al-Amd (intentional homicide) is in the case of the father killing his offspring.(76)

An interesting question to ask is what may be given out as blood money? According to Abu Hanifah and Malik blood money may be paid out by three means i.e. by gold, silver and camels. Each one of these suffices against the other. With Ahmad, Abu Yusuf and Muhammad, the blood money may be paid out of six means; i.e. camels cows, goats, clothes, gold and silver. They rely upon a report by Amr b. Shu'aib that when Umar (R.A.) became Caliph he observed that camels had become dear. He then made it binding upon the owners of gold to pay one thousand Dinars: upon the owners of silver, one thousand two hundred Dirhams; upon the owners of cows, two hundred cows; upon the owners of goats, two thousand goats; and upon the owners of clothes, two hundred clothes....."(77)

It is reported that Imam al-Shafi'i once held the view of Abu Hanifah and Malik but later on changed his view to hold that camels are the only means of payment. He rationalizes this way because camels are the original means of payment. All the others are mere alternatives due to the increase in the price of camels. They cannot, strictly speaking, be seen as general means of payment enjoying the perpetual recognition of the law. They would apply only where the situation necessitates the change.(78)

It is agreed by the jurists that the number of camels to be given out is one hundred and the gold to be given out is one thousand Dinars. There is a slight difference of opinion as regards silver. The majority of Malik, al-Shafi'i and Ahmad say that twelve thousand pieces should be paid out.(79) While Abu Hanifah says ten thousand Dirhams.(80)

There is also a difference of opinion as to the brand of camels to be paid out. Abu Hanifah, Malik and Ahmad say that in a case of intentional homicide four brands are to be counted; i.e. twenty five of the Makhad (the year old she-camel), twenty-five of the Labun (the

two year old she-camel), twenty-five of the Hiqqah (the three year old she-camel), and twenty-five of the Jidh' (the four year old she-camel). On the other hand Imams al-Shafi'i and Muhammad are of the view that the camels are to be divided into three groups. viz: thirty of the Hiqqah (the three year old she-camel), thirty of the Jidh' (the four year old she-camel) and forty ~~of~~ the Khilfah (the pregnant she-camel). This group relies on a Tradition reported by Amr b. Shu'aib from the Prophet (S.A.W.) that:

> "Whoever kills another deliberately shall be handed over to the relatives of the deceased and if they please, may kill him or collect blood money which consists of thirty of the Hiqqah, thirty of the Jidh' and forty of the Khilfah and whatever they may settle between themselves is permissible."(81)

Umar (R.A.) is also reported to have passed judgement in the same way. From the arguments of the jurists it appears that the majority recognise this tradition but apply it as the 'Diyyah al-Mugallizah' (i.e. intensified blood money). In other words they interpret the tradition to apply only to cases which are under the rules of

Tagliz (intensification).(82) The Maliki's for e.g. apply it in the case of a father killing his offspring in a case of intentional homicide. Imam Ahmad also permits the intensification in both the intentional and mistaken homicides.(83) From the above discussion it is obvious that the jurists who apply the division into three do not regard the notion of Tagliz (intensification) in this way. Their notion of intensification of blood money is that the offender be made to bear the sole responsibility of paying the blood money,(84) which is a rule unanimously accepted by all the jurists in the case of Qatl al-Amd (intentional homicide).

Under Qatl al-Amd (intentional homicide) the majority of jurists(85) say that payment of blood money cannot be deferred as in the case of mistaken homicide, except with the consent of the collectors. Imam Abu Hanifah however says that payment may be spread over a period of three years.(86) He believes that there is no need to further tax the offender beyond his having to bear the whole burden of the payment.

As the Diyyah may be intensified under Qatl al-Amd (intentional homicide), it may be reduced in certain circumstances such as where the victim is a woman or of inequal status. All the jurists agree that the blood-money of the woman is half that of the man. This is in analogy with the rules that the woman gets half the share of the mans inheritance, and the weight of a womans testimony is half that of the man.(87) As regards equality (Takafa')the jurists take diverse views. The majority consider equality as a mitigator of the blood-money in the cases of freedom and faith. Thus the slave and the non-muslim attract only half of the Coventional Diyyah for muslims and freemen. Imam Abu Hanifah however holds that the only issue under Takafa' equality) is freedom. He says that the blood money for the non-believer must be fully paid on the condition that he (deceased) belongs to a clan which is at peace with the believers. He relies upon the following verse:

> ".....and if he (deceased) belongs to a people with whom you have a treaty, then the blood money must be paid to his folk....."(88)

Abu Hanifah also stresses that the Prophet (SAW) decreed that the blood money of all non-believers who had a peace pact with the believers shall be one thousand Dinars (i.e. the full Diyyah). He yet advances a statement of al-Zuhri to the effect that both Abu Bakr and Umar (R.A.) had decided that the blood money for a Dhimmi (non-muslim subject of the Muslim State) was the full blood money.(89) The majority of jurists back their contention with the narration of Amr b. Shu'aib that the Prophet (SAW) said that "the Diyyah of a non-believer who is under a pact is half the Diyyah of a Muslim.

According to another Tradition, the Prophet (S.A.W.) said:

> "the blood money of the people of the book is half the blood money of the Muslim"(90)

According to the majority, the blood money due for the Majus . (Magians) . is eight hundred Dirhams.(91)

3. Ta'zir as an Alternative to Qisas Under Qatl al-Amd (Intentional Homicide):

The only jurists who make this obligatory are Malik and Laith. They hold that whenever the Qisas lapses on the offender he would not be allowed to escape without

disciplinary punishment, as a 'right of Allah' which must be derived from the Sinner. Malik suggests one hundred stripes and imprisonment for one year. According to Malik, it is immaterial whether the pardon given is complete or partial or that the Qisas becomes unenforceable due to some reason, except where the offender dies before the execution of the retaliation.(92)

The majority do not make the Ta'zir compulsory but make it permissible for the judge to add the disciplinary penalty such as where the offender is a known trouble-maker.(93)

4. Kaffarah (Expiation):

The general law recognised by the scholars is that expiation is only enforceable against one who commits the mistaken and quasi-intentional homicides. Notwithstanding this, Imam al-shafi'i extends the meaning of expiation to cover cases of intentional homicide. He argues that if Allah should command expiation for the lesser offence of mistaken homicide, why not for the more serious offence of intentional homicide? He backs his argument with a Tradition reported by Wathilah b. Asqa, that:

> "We took a fellow of ours to the Prophet (SAW) because he (fellow) had earned the fire by committing murder. The Prophet (S.A.W.) said: "Expiate by freeing a slave-girl, that Allah Most High may save, by each joint of the slave-girl, a joint of his from the fire."(94)

Some of the other jurists contend that there can be no expiation for such a killer because of the saying of Allah;

> "The recompense for whoever kills a believer deliberately, shall be the fire in which he will abide forever..."(95)

According to this group of jurists Allah has already made clear the punishment for intentional homicide which is Qisas (retaliation) unless forgone by the relatives of the deceased.(96) A middle course is offered by Malik who says that in a case of intentional homicide, expiation is permissible but not obligatory.(97) The Hanafis do not recognise Kafferah (expiation) under this type of homicide. They argue that punishments for capital offences can only be executed on the strength of clear-cut authorities from the sacred texts. Kaffarah, under

this heading does not enjoy this status and thus should not be implemented.(98)

The expiation as recognised by Malik and al-shafi'i here is that the offender should free a Muslim slave. Where he cannot afford this he may fast for two consecutive months without break.(99)

The Second Category Of Punishments Under Qalt al-Amd (Intentional Homicide):

Under this category perhaps it may be correct to call them incidencies or effects rather than 'punishments.' The offender here is simply prevented from enjoying the results of his action. The two effects are:-

(a) prevention of the offender from inheriting the deceased; and

(b) prevention of the offender from benefitting from the bequest of the deceased.

Under the first prevention, the Prophet (S.A.W.) is reported to have said:

"the Killer does not inherit"[100]

The interpretation of this Tradition has led to much difference of opinion by the jurists.

Imam Malik says that it is only in the case of Qatl al-Amd that the offender will suffer this effect. It is immaterial that the homicide was direct or indirect or that the offender was punished or pardoned. Malik holds further that the offender, in the case of mistaken homicide, will not enjoy the blood-money. Under the Maliki thought, the rule will not apply where the killer acted in self defence or was the judge or executioner under the authority of law.(101)

Imam Abu Hanifah views that all the homicides will cause a bar to inheritance, but the following conditions must be fulfilled:

(i) the murder must be direct and not indirect;
(ii) the killer must be sane and of Majority; and
(iii) the killing must involve hostility and should not be a case of self defence.(102)

The strong view according to the Shafi'i's is that the killer is to be prevented from inheriting in all cases of death. To them, it is immaterial that the killing was lawful or unlawful, or even that the killer is minor or major, sane or insane. They argue that this rule is indispensable to prevent the possible hastening of death for want of inheritance.(103) The view of Ahmad is that he excepts killings done in self-defence.(104)

Another incidence or effect of the intentional homicide is prevention of the offender from benefitting from the bequests of the deceased. This is based on some Traditions says: "No bequest to the killer." Another Tradition says "The killer is not entittled to anything." The jurists have understood 'anything' to include both inheritance and bequests. There is also a slight difference of opinion as regards the exclusion from bequest. The majority view of the Malikis is to draw a distinction between the cases of intentional and mistaken homicide. Others say that a killer may benefit from the bequest if he is benefitted by the deceased.(106) Abu Hanifah applies the same conditions that he fixes over the case of inheritance but adds that in the case of bequest the other beneficiaries are allowed to permit the killer

to partake in the bequest. This view is supported by Muhammad but not by Abu Yusuf. He dissents by saying that where the bequest stands prohibited to the killer, the other heirs have no authority to invite the killer to enjoy the bequest.(107)

Under the punishment for intentional homicide it may be observed that the law is very firm on the offender. The only concessions that he gets, are the forgoing of the stiff penalties by the relatives of the deceased. The individual has a strong influence over the enforcement of the punishment as against the case of Hudud, hence the term Haqq-al-Adami (right of the individual). It will be observed from the subsequent types of homicide that the law is softer on the offender than in the case of intentional homicide.

4.2.2. Al-Qatl Shibh al-Amd (Quasi-Intentional Homicide):

The Hanafi's define it as a blow given deliberately with a whip, stick, stone, hand or other similar object and which causes the death of the victim.(108)

According to the Shafi'is it is the combination of an intentional act with an unwanted result i.e. death of the victim[109] on the condition that the weapon used to bring about the unwanted result must not be an instrument that normally causes death.(110)

The Hambalis say it is the deliberate unlawful act with an instrument that does not normally cause death, but which results in the death of the victim regardless of whether it is done through aggression or punishment.(111)

It appears to us that all the definitions essentially signify the same thing because they all agree that there should be a deliberate act on the one hand with an instrument that is not known to cause death normally, but which non-the-less, causes the accidental death of the victim, on the other.

As stated earlier on, Imam Malik does not recognise this category of homicide. He argues that it has no basis in the Qur'an because Allah Most High declares in the chapter al-Nisa'i that;

> "And it is not for a believer
> to kill a believer except by mistake
> (Khata'a).....
> .....whoever kills a believer
> deliberately....."(112)

He argues that the only two types of homicides are the deliberate and mistaken homicides. The majority on the other hand, claim that the quasi-intentional homicide has a strong basis in the Shariah as the Prophet (SAW) said:

> "Behold! Verily among those killed
> by the whip, the stick and the stone
> (and their blood wit) is one
> hundred Camels"(113)

They also rely upon the famous Tradition of the Prophet (SAW) narrated by Amr b. Shu'aib, which states that:

> "the blood wit of the quasi-intentional
> murder (Shibh al-Amd) shall be
> calculated (intensified) as in the
> deliberate (Amd) and the killer shall
> not be killed....."(114)

The majority also contend that eminent Companions such as Umar, Uthman, Ali, Zaid b. Thabit, Abu Musa and Mugirah all recognised this type of homicide and none

of the Companions is known to have differed from them.(115) They argued that since the capital punishment is dependent on intent, which cannot be truely ascertained except by Allah, the Mighty the Glorious, man can only act on what appears in the open. (i.e. accept a middle course between intentional and mistaken homicide). As an example they offered that where a person strikes another with a weak object or something not known to cause death normally; and the victim dies as a result, this poses a question between intentional and mistaken homicide. Thus the only way to balance this phenomenon is to accept the middle course of Shibh al-Amd) (Quasi intentional).(116)

Under Shibh al-Amd two basic conditions must be satisfied i.e.

(i) that the offender performs an act that leads to the death of the victim; and

(ii) that the offender must have intended the act but; not the consequence of death.

(i) <u>that the offender performs an act that leads to the death of the victim</u>:

Here the necessary act could take various forms such as beating, wounding or injuring, drowning, burning or some form of poisoning. It is not necessary that there be a weapon. Thus one who lets loose some ferocious animal like a dog unto the victim or brandishes a Sword, or frigthtens a pregnant woman who miscarries and dies, would be a killer under <u>Shibh al-Amd</u>.[117] It would suffice if there is a direct link (Mubashirah) or an indirect link (<u>Sababiyyah</u>) regardless of the fragility of the victim, or that the death occured after a long or short period.(118)

The act committed must be an unlawful act. If the act is lawful such as punishment, medical treatment, lawful games or while administering retaliation as in <u>Qisas</u>, there will be no liability.(119)

(ii) <u>that the offender must have intended the act but not the consequence of death</u>:

This is probably the chief difference between the two, i.e. <u>Amd</u> and <u>Shibh al-Amd</u>. To discern between them the jurists apply the test of whether the instrument used

is known to kill, ordinarily. If the answer is in the positive then the presumption will be tilted towards intentional homicide whereas if the answer is in the negative the presumption will be to quasi-intentional homicide. In a case where the victim gave his express consent, the majority of the jurstis such as al-shafi'i, Ahmad, Abu Yusuf and Muhammad view that the actor will not be liable. However Imam Abu Hanifah views that the victim may give valid consent only as to injuries which do not result in death. He cannot consent to be killed and whoever obliges the request will be held guilty of Qatl Shibh al-Amd (quasi-intentional homicide).(120)

Punishment For The Offence of Qatl Shibh al-Amd (Quasi-Intentional Homicide):

The basic difference between the punishments for Qatl al-Amd intentional homicide and Shibh al-Amd (quasi-intentional homicide) is Qisas. (the retaliation). Under the quasi-intentional homicide the offender will not be subjected to the retaliation. However all the other forms of punishments applicable to the intentional killer are also applicable to the quasi-intentional killer. The original

or primary punishments under this heading are;

(i) Diyyah (blood money); and

(ii) Kaffarah (expiation).

Where these punishments cannot be enforced, there exist the alternative punishments of Ta'zir, (disciplinary punishments by the judge) in the place of Diyyah, and Siyam (fasting) for the expiation by freeing a Muslim slave. But it must be recalled that Ta'zir may pass as an original punishment here, just as it may, under the offence of Qatl al-Amd(121)

The Diyyah (blood wit) applies slightly differently in the case of Shibh al-Amd, than in the case of Amd We may recalled that the Prophet (SAW) made the blood wit of the quasi-intentional homicide, one hundred camels.(122) Therefore the blood-wit here, is an original punishment as against its being an 'alternative' punishment under Qatl al-Amd (intentional homicide). The effect of the blood wit is also cushioned by making the members of the offenders' folk to assist the offender. This is the majority view held by Abu Hanifah, al-Shafi'i and Ahmad.

However the famous Tabi'i (successors) scholars, Ibn Sirin and al-Zahri say that the offender should not be assisted. It may be said that this view is similar to the stand of Malik in the sense that Malik understands the quasi-intentional homicide to fall under the intentional homicide and under the intentional homicide, the offender must bear full responsibility of the blood money. The first group (i.e. majority) argue that there is every basis for this alleviation because of the tradition which reads;

> "Two women from the tribe of Huduhail fought and one of them threw a stone at the other, killing her and the child in her womb. The Prophet (S.A.W.) ordered that the Compesnation be paid by the clan of the offender." (123)

The majority contend that whilst in the one case (of Amd) the end result is intended, in the other case (of Shibh al-Amd) it is not. Thus the two can never be the same. As a result, the blood money, in the case of Amd, (intentional) is intensified on the offender from all avenues, i.e. by the amount to be paid and also by bearing full responsibility. It is not fair

then, to do the same under the blood-money for quasi-intentional homicide.(124) As a further alleviation, the payment of the Diyyah may be spread over a period of three years according to the majority of jurists.

All the jurists are agreed that under the Shibh al-Amd the offender must expiate for his sin by freeing a Muslim slave or fast for two consecutive months in lieu thereof. As regards the prevention of the offender from the inheritance and bequests the position is the same as under Amd (intentional homicide).

4.2.3. Al Qatl al-Khata (Mistaken Homicide):

The basis for this offence is found in the Holy Quran where it is said:

> "It does not behove of a believer to slay another believer except by error; and if one slays a believer by error, he must set free one believing slave as expiation, and pay blood money to the heirs (of the slain) unless they charitably forgo it. But if the slain muslim belonged to a people who are at enmity with you, then the expiation shall be the freeing of one believing slave: and if the slain person belonged to a non-muslim ally of yours then the blood money must be paid to his heirs

> and a believing slave set free.
> But if one cannot afford this he must fast two consecutive months. This is the way enjoined by Allah for repentance. Allah is All-Knowing, All-Wise."(125)

This verse has two connotations. One is that it establishes the crime of mistaken homicide, and secondly, fixes the punishment for the offence. It does not however, supply the various acts that fall under this offence. Some of the jur ists have interpreted this without classifying the various acts while others have insisted that the acts must be classified into two i.e. pure mistake and related cases of mistake. This group define pure mistake in terms of the act and the supposition.(126) As to the mistake of act, they give the example of where the actor aims at an animal but misses andhits a human being. Mistake as to the supposition is explained by where the actor kills the victim under the erroneous supposition that the victim was an enemy, or one lawful to be slayed, or even that the victim was an animal.

On the other hand under related cases of mistake, the scholars contemplate the cases where the actor neither intended the act nor the victim.(127) for e.g. where one in deep sleep rolls over a child or a weakling thus

killing him, or where the actor mistakenly drops a heavy object over one passing below, or even where the actor digs a hole and the victim falls therein. It appears that the essence of the distinction lies only because whilst in the former a part of the act is intended, in the latter neither that act nor the result is intended.

The jurists have however set down two tests to determine the legal consequence of a case of mistake.

(a) Liability will lie only where the actor had reasonable means of avoiding the accident and negligently failed to do so.

(b) If the act of the offender is unlawful he will be held liable whether or not he exercised reasonable care. From these two tests we may derive the prerequisites of this offence.

Pre-Requisites For The Offence Of Qatl al-Khata (Mistaken Homicide):

Two conditions are broadly fixed under this type of homicide. They are:

(i) The act which leads to the death of the victim; and

(ii) That the act was done mistakenly.

(i) The act which leads to the death of the victim:

This is the material act of the offender and could take various forms as discussed earlier, such as the shooting of a man on the erroneous supposition that he was an animal, etc.(128) What is important is the fact that the victim died as a result of the act of the offender. All that has been said of Qatl-al-Amd (intentional homicide) and Shibh al-Amd (quasi-intentional) homicide) as regards causation is relevant here. The victim must also be Ma'sum i.e. one whose safety of life is protected or guaranteed by law.

(ii) that the act was done mistakenly:

This is the chief distinguisher between Qatl al-Khata (mistaken homicide) and the other forms of homicide. In determining this, a great deal lies on whether the actor was negligent or not, and the lawfulness or otherwise of the material act which leads to the death of the victim.(129)

Punishment For The Offence Of Qatl al-Khata (Mistaken Homicide):

The primary punishments for this offence are Diyyah (blood money) and Kaffarah (expiation) as stated in verse 92 of Chapter 4 of the Holy Qur'an. Where these cannot be implemented for some legal excuse, the alternative of Ta'zir (disciplinary punishment by judge) and Siyam (fasting) may be enforced. The secondary indidencies are the exclusions of the offender from the inheritance and bequest of the deceased. Under the question of Diyyah (blood money) under this offence, it is the Diyyah al-Mukhaffafah (lightened blood money). This in essence means that the brands of camel to be paid out are lesser in value than in the case of the intensified blood money (Diyyah al-Mugalizah) which applies to the intentional and quasi-intentional homicides. The four Sunni leaders are agreed that the Camels will be grouped into five grades. To support their contention they call in a Tradition of the Prophet (S.A.W.) which says:

> "As Compensation for mistaken homicide (give) twenty of the

> Hiqqah, (three year old she-camel) twenty of the female (Makhad, (year old camel) twenty of the female Labun, (two year old Camel) and twenty of the male Makhad (year old camel).(130)

This division greatly alleviates the cost of blood money in that most of the Camel to be given out are only a year or two old.

There is also a concensus of opinion among the jurists that it is the clan of the offender that will pay out the blood wit. Payment shall also be deferred within a period of three complete years. They rely upon the Tradition of Umar to that effect and noneof the companions was ever known to disapprove of it. But where the clan fails to pay up, responsibility of payment reverts to the offender. This is the view of Malik, al-Shafi'i and Ahmad. Imam Abu Hanifah however says that their portion would be further deffered to some reasonable time.(131)

The offender is also bound to expiate for his sin by freeing a believing slave or fasting for two successive months without break. This punishment shall apply whether or not the Diyyah (blood money) lapses or not. The majority of jurists insist that the burden of discharging

this obligation lies solely on the offender. However Imam al-Shafi'i says that it is the responsibility of the public - Treasury to free the slave.(132)

The legal incidencies of exclusion from inheritance and bequest would apply with the majority of jurists but not with Malik as discussed earlier.

The three offences relating to life have been discussed along with their punishments. This is a good juncture to introduce the offences against the person whic do not involve the loss of life.

4.3. Al-Janayah Fi Ma Duna-n-Nafs (Offences Not Involving The Loss Of Life:)

The Scholars have defined this phrase to generally mean, 'all injuries caused to the body by another which do not involve the loss of life."(133) This is a very broad scope that involves all injuries, batterings, burnings, causing of paralysis to the parts of the body and loss of limbs. The chief issue under this type of offence is that death does not ensue from the act of the offender. The act may also be deliberate or by mistake as under offences involving loss of life.

As regards intentional offences two conditions are necessary i.e. the material act and that the act must have been intentional. As regards the act, it may be direct or indirect. Imams al-Shafi'i and Ahmad recognise the middle course of Shibh al-Amd (quasi-intentional) but they reckon that the Qisas (retaliation will not apply.(134) Abu Hanifah does not recognise the quasi-intentional offences except of course under offences involving life.(135)

Intention is weighted by the hostility or aggression behind the act, and the sorrunding circumstances of each case.

4.3.1. Retaliation (Qisas) For Offences Against The Body (Not Involving Loss Of Life):

Where the act is intentional the offender will be liable for the retaliation except where the Qisas lapses and where this happens the Diyyah (blood money) or Ta'zir disciplinary punishment by judge) may be applied. The rule under homicide that the Qisas cannot be merged with either Diyyah or Ta'zir applies here also but where the Qisas lapses Diyyah may be applied alongise the Ta'zir.

This is the view of the majority of Scholars Who maintain their position even where it is not practicable for the retaliation to be fully implemented. Thus according to them, the aggrieved party must make do with his 'partial' retaliation (i.e. retaliation to the extent practicable) and forgo the part he cannot retaliate for. This argument implies that the aggrieved party cannot exact retaliation and at the same time enjoy the Diyyah for the same injury. Further, according to this view, the aggrieved party will be given the option of either accepting to retaliate partially or to abandon his right to retaliate partially and opt for the full blood-money of the injury. This view enjoys the support of Abu Hanifah, Malik and some of the Hambali jurists.(136) On the other hand the minority view of al-shafi'i and some Hambali scholars says that the aggrieved party should be allowed to retaliate for one part of the injury and seek compensation for the part which cannot be retaliated for.(137)

Limitations on Qisas under offences not involving life:

Most of the issues that would put off the Qisas in cases of homicide would also cause the Qisas to lapse under offences not involving life. It may be recalled that the father is exempted and the majority of scholars view that differences in 'Islam' and 'freedom' would cause the Qisas to fall. A great majority of the jurists including the four Sunni leaders are of the view that sex does not affect the Qisas. But under offences not involving life, Abu Hanifah says that the Qisas will not be passed in non-homicidal cases where a man causes injury to a woman. Only the Diyyah will be paid. He argues that there is no half value for the limbs of the woman as against the case of life. Thus the Qisas cannot be applied in non-homicidal cases for this reason.(138)

Abu Hanifah also opposes the majority view that where several persons cause injury to an individual they should all be subjected to the Qisas. He argues further that there is no equal standard to be shared among the offenders. Thus the best way out is for all the offenders to contribute equally to the Diyyah(139)

The Qisas will also lapse where the offence amounts to Shibh al-Amd (quasi-intentional). This is limited to

the Schools of al-shafi'i and Ahmad for they are the only jurists who recognise the category of Shibh al-Amd under offences not involving loss of life.

4.3.2. Application Of Punishments For Specific Offences (Not Involving The Loss of Life):

Due to the broad scope of the area the jurists have grouped all such offences into five categories for purposes of setting a standard for liability.

1. Severing of the Limbs and Parts of the Body:

What is meant here is the actual cutting off of parts or limbs of the body such as the hands, fingers, nails, genitals, ears noses etc. It is stated in the chapter al-Maidah that:

> "And We had prescribed for them, life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and for all wounds, equal retaliation....."(140)

All the jurists are of the view that the eye can be retaliated for regardless of the age of the victim. The majority hold that Qisas will lie even if the eye injured

or removed is defective. However Abu Hanifah holds that if the victims eye contained a cateract the Qisas will fall. The Diyyah (Compensation) for the eye is the full compensation (100 camels) for the two eyes and half of the full compensation for one eye.(141)

Where the nose is removed all the jurists agree that retaliation can be exacted. They only differ as to the extent to which retaliation can be made. The majority say that the only part of the nose which is subject to retaliation is the part built from cartiledge and not the bony part. Imams al-Shafi'i and Ahmad insist that the aggrieved party can only cut off the cartiledge even if his bone was cut off. Imam Malik says the victim will be allowed to cut off the bone (of the nose) if it is practicable to do so.(142) Imam Abu Hanifah says that where the cartiledge is only partially removed, Qisas will not be allowed for the reason that exacting equal retaliation is a practical impossibility.(143) The Diyyah is also payable where Qisas lapses because the Prophet (S.A.W.) said: "The (Complete) Diyyah must be paid for the nose when the cartiledge is cut off."

It has been deducted from this Tradition that the full Diyyah is payable for less of the nose and if half or two-thirds of the nose is lost, half or two-thirds of the Diyyah.(144)

The same law of the eye applies to the ear but as regards the teeth the Qisas will not apply if the tooth can re-emerge. But if the victim has passed the age of teething Qisas will be permitted as one of the exceptions to the rule that Qisas does not apply to bones (except where the bone is cut off). The compensation for the tooth is five camels (one fifth of the Diyyah) as ordered by the holy Prophet (S.A.W.).(145)

For the other parts of the body falling under the text of the Qur'an ".....and for all injuries, equal retribution....." the general rule is analysed by Sayyid Sabiq;

> "The human body has sole faculties such as the nose, tongue and the penis: and there are also faculties made up of pairs like the eyes, the ears, the eyes, the ears, the lips, the beards (including the moustache), the hands, the legs, the testicles, the breasts.....and there are others. Thus where one damages

> one of the sole faculties of another, a full compensation must be paid and where the injured part consists of a pair and one is damaged, only a half of the compensation is due."(146)

The compensation mentioned above only applies where the Qisas lapses. Where the part cut-off is one of many on the body the compensation is different. We have already seen that the Diyyah for the tooth is five camels (one fifth of the Diyyah) and the Diyyah for the finger or toe is ten camels (one tenth) according to the Tradition reported by Amr b. Shuaib from the Prophet (SA)(147

2. Destroying the function of the limbs without removing or severing such limb from the body:

The most common acts under this group are destroying the use of the senses such as sight, hearing, touch, smell, taste, speech, sexual intercourse. Also under this falls the causing of loss of mental capacity and permanent change of skin colour etc. Under this group the implication is the same as that under the first group (i.e. severing the limb from the body). The separation between the two lies behind the fact that it would, in most cases, be impractiable to retaliate significantly. Non the less where such retaliation is feasible, the trend of the

jurisprudents is to allow the use of Qisas. But where the Qisas cannot be executed by virtue of the injury the Qisas will be replaced with the Diyyah. This is the view of the majority(147) but Abu Hanifah does not accommodate the notion of probability of practical retaliation. Thus in all cases under this group, the Qisas cannot apply according to the great Imam.(148)

The Diyyah for this group of injuries is the full compensation because loss of the use of a certain faculty of the body will undoubtedly cripple the victim. Where the damaged limb is in twos or more, the full Diyyah will not be paid as discussed earlier. But loss of the hair of the head permanently, will attract the full Diyyah. Half of the Diyyah will be paid for the loss of both eye brows, and a quarter for the loss of one eye brow.(149)

3. Exclusive head and facial injuries (Shajaj):(150)

It is accepted by all the jurists that such injuries, are not practicably retaliable but where there is no fear that the retaliator may exceed his injury retaliation for them is allowed. This is due to

the sensitivity and fragility of the face and head, especially the skull. In the light of this, the Diyyah is the most usual resort. These injuries are divided into ten. They are:

(i) al-Kharisah: This is the injury that breaks the skin.

(ii) al-Badi'ah: This injury breaks both the skin and the flesh.

(iii) al-Damiyah or Damigah: This causes the oozing of blood.

(iv) al-Mutalahimah; i.e. the injury that dips into the flesh.

(v) al-Simhaq: i.e. where the injury is so deep that it only leaves a thin tissue between it and the bone.

(vi) al-Maudihah; exposes the bone

(vii) al-Hashimah; breaks the bone

(viii) al-Munaqillah; this not only exposes the bone but causes a compound fracture to the bone.

(ix) al-Ma'mumah this is where the wound reaches the tissues under the skull.

(x) al-Jaifah i.e. the injury that bores deep into the head or face.

Under this category all injuries that do not expose the bone, i.e. not make the bone visible, will make the offender liable for paying the medical fees. In the case of the Maudihah (injury that exposes the bone), Qisas will lie if the act was done deliberately. If it was by mistake the Diyyah will be five Camels. As for the Hashimah (where the bone is fractured) one tenth of the Diyyah becomes due. This is the decision given by Zaid b. Thabit (R.A.) and none of the Companions disapproved of it. The Munaqqilah (where the bone is both exposed and fractured) is compensated for by fifteen camels. The Ma'mummah (injury that reaches the tissues beneath the skull) will cause one third of the Diyyah to be paid, by concensus of opinion of the Companions. The Ja'ifah (which bores deep into the head or face) results in one third of the compensation also by Ijma' and if there is another of such wound, two-thirds shall be paid.(151)

4. Wounds (Jarah):

Wounds here must be understood to apply to other parts of the body and not the face and head. The jurists take divergent views as regards its subjectivity to Qisas, and the interpretation of the text of the holy Qur'an,".....and for all wounds, equal retribution"(152)

Imam Malik says Qisas will apply for all wounds regardless of whether the wound breaks the bone or only the flesh, except where the wound affects the chest, neck, pelvis or thigh. Where such sensitive bones or spots are involved the Qisas will be put off.(153) Imam Abu Hanifah maintains that only wounds that lead to death can cause retaliation, and never otherwise.(154) The view of Imams al-Shafi'i and Ahmad is that the Qisas will only apply where equal retaliation can be guaranteed.(155)

As for compensation (Diyyah) for this type of injury, those injuries which are superficial only (Gair-al-Ja'ifah) are not subject to Qisas. The offender shall be liable however for the medical fees. Those injuries that go deep into the flesh only a third of the Diyyah is payable.(156)

5. Other Injuries:

Under this category falls all those hurts that do not fall under the four other groups e.g. hurts that do not leave scars or hurts that leave scars but do not physically injure the victim.(157)

The popular view of the jurists is that the Qisas will not lie in cases of injuries that do not leave scars or marks such as slaps or blows. Malik has however excepted the whip but not the stick. It may also be interesting to note that the later scholar, Ibn al-Qayyim, see's no reason for the exclusion of Qisas (retaliation) in acts that do not leave scars. He quotes the verses of the Holy Our'an;

> "and when you retaliate, retaliate with similar...."(158)

He also quotes the verse which says;

> "Then who ever transgresses against you repay him with the same standard of aggression used against you,....."(159)

He further argues that Abu Bakr, Usman, Khalid b. Walid, Umar b. Abdul-Azeez and Imam Ahmad were all of this view.(160)

The majority of jurists hold that in cases of 'Qisas' not involving life, the Ta'zir punishment should not be applied alongside the Qisas because Qisas has already been specified as 'the' punishment for the offence and to apply a different punishment will be making an addition to the sacred texts.(161) Imam Malik however is of the view that the offender must be further disciplined by Ta'zir whether the Qisas falls or not. He argues that it will act as a deterrent to future acts of unjustified violence.

The Qisas will be deemed to have lapsed where the limb subject to retaliation is lost by some other means, where the offender dies before execution of Qisas and where the offender is pardoned or some settlement is reached between the victim and the offender.

4.4 Al-Ta'zir: (Section B).

This section deals with the concept of Ta'zir, its nature and application. We have by and large considered the punishments for offences under Hudud and Qisas which

both happen to be punishments prescribed by Allah Most High for specific offences. Ta'zir differs from these two forms of punishment in that the judge is at a discretion to apply what he views as just (within the powers given to him). The Ta'zir punishments may be administered orginally to certain offences to which the punishment has not been fixed by the Qur'an or Sunnah, just as it may be applied to cases under the Hudud and Qisas that do not fulfill the standard of proof required.

4.4.1. Definition

The team 'Ta'zir' is derived from the root, 'azara' which liternally means to support. This occurs in the Holy Qur'an where it is said;

> "that you may believe in Allah and His Messenger and support...."(162)

The term also bears the meaning of to insult or rebuke. The jurists understand this term to signify the humiliation by way of punishment of a wrongdoer by subjecting him to lashes or imprisonment, etc.(163)

The justification for applying the Ta'azir lies in a Tradition of the Prophet (SAW) which states that he used to imprison or detain accused persons during investigations.(164) In another Tradition the Prophet (SAW) said:

> "Do not give more than twenty lashes except in the cases of Hudud (limits) of Allah, Most High."(165)

It is also reported that Umar b. al-Khattab (R.A.) used to debase the offender by shaving the head, exile, beatings and even burning down the places used for storing and selling wine.(166)

4.4.2. Differences Between Ta'zir and Hudud:

The basic differences arise out of the following:-

(1) Under the Hudud everyone including the leader is considered subject to the law. This is not the case with Ta'zir, for a respectable person or first - offender may be pardoned by the state or his punishment mitigated considerably.

(2) Under the Hudud, it is not permissible that the intercession be attempted to save the offender from punishment once the matter becomes known to authority (according to the majority of the jurists), contrary to the Ta'zir offences where it is permissible to make intercession even after the matter reaches the judge.

(3) In the matter of Hudud, should the offender die as a result of punishment no compensation shall be made. Under Ta'zir however, the compensation becomes due from the public Treasury, should the offender perish as a result of the punishment. It is reported that on one occassion Umar shouted at a woman who was loose in morals and she miscarried. Umar then made compensation for her loss of the child.(167)

(4) Under the Hudud and Qisas the standard of proof is very strict thus making proof very difficult, and in some cases virtually impossible.(168) Whereas under the Ta'zir, the rule is relaxed to

lesser
allow/punishment thus providing an alternative to the stringent standard of proof under the Hudud and Qisas.

4.4.3. Nature And Scope Of Ta'zir:

Ta'zir by its wide scope, may take various forms such as beatings, imprisonment or exile etc. as discussed earlier. It may also include stern warnings, the seizure of property or even the killing of the offender if it proves to be the only way of checking him. It is also allowed that the beard of the offender be shaved or that his plantations or gardens be destroyed.(169)

Some of the jurists are of the view that the highest number of lashes permitted under Ta'zir is ten. This view is adopted by Laith, Ishaq, a number of the Shafi'i jurists and a report from Ahmad.(170) The popular view among the jurists is that the Ta'zir must not reach the severity of the Hudud punishments. Thus some of these jurists place it at eighty while some limit it to forty. The view of Imam Malik stands out as a more practical approach; he says that the limit of the Ta'zir punishment depends upon the discretion of the judge,

taking in view the interest of the public and circumstances of the case. Thus it may be permissible for the Ta'zir to not only reach the Hadd but to even exceed it. Imam Malik supports this contention with a report that one Ma'an b. Za'idah defrauded the officials of the Bait al-Mal (Public Treasury) into releasing funds to him on account of the forged stamped document he produced to them. Umar (R.A.) gave him one hundred stripes and imprisoned him. Umar fussed over the matter and gave him a hundred lashes. He then fussed over it and gave him a hundred lashes and then banished him. Imam Malik also presents a Tradition of Ali (R.A.) and a person who had taken wine during the fast of Ramadan. Ali gave him the prescribed punishment for taking wine (eighty lashes) and added another twenty as punishment for breaking the compulsory fast.(171)

There is also a difference of opinion as regards the minimum number of lashes that may be given. A group of the jurists say three is the least number because anything below three will not serve the purpose of steering the offender away from the offence by instilling fear and discipline into him. Another group however believes

that even one lash may be sufficient if it (alone) would suffice in bringing about the aim of punishment.(172)

Another difference of opinion arises as to whether an offender can be put to death by way of Ta'zir, one group believes that this cannot be done because of the saying of the Prophet (SAW) that;

> "The blood of a muslim is not 'lawful' except by one of the three; apostacy after belief, adultery after fortification (Ihsan) and killing of a Soul without justification."

The other group says that in as much as the above Tradition applies, there are other Traditions which permit the taking of the life of a muslim in various situations. These are;

(1) A Tradition narrated by Ibn Abbas (R.A.) quotes the Messenger of Allah as saying:

> "Whoever you find committing the act of Sodomy, Kill the active and passive (offenders)."(173)

(2) Mu'awiyah (R.A.) narrated that the Prophet (SAW) said:

> "Whip the drinker of wine and if he repeats it (upto) a forth time, kill him" (174)

(3) It is reported that Amr b. al-As, Abdullahi b. Umar, Ata and Umar b. Abdul-Azeez all held the view that the thief is to be killed for stealing a fifth time.

(4) Bara' b. Azib narrated that "Abu Bardah b. Nayar passed by me and he was (holding up) a banner. I said: wither to? He replied: I have been sent by the Messenger of Allah (S.A.W.) to a man who married his father's wife, that I return with his head."(175)

(5) Abdullahi b. Abbas also narrated that the Prophet (SAW) said that whoever committed sexual intercourse with a prohibited woman (incest) should be killed.

According to these jurists whoever poses a problem to the law may be put to death if it is the only way of checking his mischief. It may be recalled that Malik and a number of the Shafi'i jurists held that it is lawful to put to death persons who call the Community to bad innovations (Bid'ah). It is also lawful to kill the person who refuses to pay allegiance to the lawful leader.

The offences punishable under Ta'zir have been beautifully stated by the Shaikh al-Islam, Ibn Taymiyyah in the following words:

> "As for those offences that do not have prescribed punishments nor expiatory (punishments) for e.g. one who kisses a child (with passion) or a strange woman or embraces her without actual penetration, or (one) who consumes prohibited foods like blood and the carcass, or (one) who defames another with (an allegation) other than Zina (whoredom) or, (one) who steals (property) from an unguarded spot or (property) not amounting to the Nisab (standard) or (one) who breaches a trust as in an official of the public Treasury or

> other property placed in his care such as the agent or the partner, or (one who commits) dishonest y in trade,..... one who bears false testimony, or the corrupt judge, or the judge who does not pass judgement with what Allah has revealed.....all these would be subject to the punishment of Ta'zir." (176)

4.4.4. Proof of Ta'zir Offences:

It has already been said that the standard of proof is very relaxed under Ta'zir offences, contrary to the case of the Hudud and all cases that fail the test of the standard of proof in Hudud and Qisas offences will be subject to the Ta'zir punishment if there is some justifiyable evidence subh as the evidence of only one man and a woman. The Ta'zir offences may be proved by confession of the offender.(177)

4.4.5. Enforcement of Ta'zir:

Generally speaking only the state may enforce the Ta'zir punishments as all the Muslims owe allegiance to the state authority. However there are three exceptions to this. The father or mother may correct a child in

matters of worship and morals. The Master has also been given powers to discipline his slave even in cases of the Hudud but the punishment is limited to lashes only and not the severe punishments of 'cutting off' or death. Both the Qur'an and Sunnah have given the husband authority to verbally admonish his wife and even beat her slightly if need arises especially for immorality and strongheadedness.(178) Furthermore, the husband may beat the wife (slightly), where she refuses to adorn herself for her husbands pleasure. She must not, however reveal her beauty to other strange men. The wife may also be beaten where she refuses to take the ritual bath (al-Janabah) if she is a Muslim. She may also be beaten where she leaves the matrimonial home without justification but two conditions apply to this: she must have been paid her full dowry; and the outing is illegal. Beating of the wife is also lawful where she refuses her husbands invitation to sexual intercourse without justification such as menstruation or sickeness.

The Hanafis have added that she may be beaten if she insults her husband with such words as 'donkey' or tears his clothes. She will not be beaten for her demand for her rights of maintenance.(179)

FOOTNOTES AND REFERENCES

1. A. Audah, al-Tashri' al-Jana'i al-Islami, Vol.II, P.4.

2. Ibn Qudamah, al-Mugni, (1348H), Matba'ah al-Manar, (Cairo), Vol.IX, P.318.

3. Allah Most High says in his Holy Book:

> "And do not kill the soul which Allah has made Sacred except by due process of Law" (Ch.17 v. 33), "And whoever kills a believer deliberately, his recompense would be the Hell-fire, therein would he abide forever, subjected to the anger of Allah who has cursed him and kept in store for him a great torment" (Ch.4 v. 93);
>
> "And do not kill your offspring for fear of poverty: We provide sustenance for them and (indeed) for yourselves. Verily the killing of them (offspring) has ever been a tremendous offence" (Ch.17 V 31).

The Prophet (SAW) also said:

> "Were all the inhabitants of the heavens and earth to join hands in the murder of a believer, Allah would throw them all in the Fire!" (Reported by al-Tirmidhi).

He, (SAW) also said at his farewell pilgrimage that;

> "O ye people, verily your blood and your property are as Sacred to you as this holy month of your's (Dhul-Hijjah) and this holy land of yours (Makkah)" (Reported by al-Bukhari, Muslim).

4. Al-Our'an Ch.2 V. 178

5. Ibid.

6. Al-Ouran Ch. 17 V. 33.

7. Sabiq, Figh al-Sunnah, Vol.II P.515

8. Malik and Laith Maintain that if the offender is pardoned, he must non-the-less be imprisoned for a year and given a hundred lashes. On a general note however, the jurists tolerate the additional punishment where the offender is a known trouble-shooter and the circumstances of the case justify the addition for the public good. (See Sabiq, op.cit; p.523).

9. Some of the jurists reckon only two forms as do the Malikis, others make it four and even five. The reckoning of three forms is the most popular view of the jurists.

10. Audah, op.cit; p.10. (1323H) Matba'ah al-Sa'adah, (Cairo).

11. al-Hatab, Mawahib al-Jalil, Vol.VI, p.244, See also, al-Ramally Nihayah al-Muhtaj, Vol.VIII, pp.250, 251.

12. al-Hatab, op.cit: p.233, Ibn Hazm, al-Muhalla, Vol.X p.518.

13. al-Hatab, op.cit: p.231, Khatib, al iqna' Vol.IV, p.173, Ibn Qudamah, al-Mugni, Vol.X p.476.

14. al-Kasani Bida'i' al-Sana'i', Vol.VII p.252.

15. It must also be noted that the killer of such a person would not be subject to the Qisas or its incidencies because what he killed is already lawful to be killed. Non the less for a complete escape from liability, the jurists have laid down many rules, for example, reasonable force used to repel a robber or assailant. Some of the Malikis have disputed the application of this rule to the apostate before his period of respite is lapsed. (See Audah, op.cit: pp.17-22).

16. Ibid. P.26

17. See the Nihayah of al-Ramalli, Vol.VII pp.238-239, see also al-Shirazi, Mahdhab Vol.II, p.187. For the Hambali view, see Ibn Qudamah, op.cit. p.321.

18. Audah, op.cit p.20.

19. Malik b. Anas, al-Mudawwanah al-Kubra Vol.XVI, p.108.

20. Hatab, op.cit: p.250.

21. Audah, op.cit: p.36.

22. Ibid., pp.36-37.

23. Ibn Qudamah, op.cit; p.326.

24. Audah, op.cit; p.37.

25. The argument of the Hanafi's is that since the element of Qisas is to exact equal retaliation, the subject of retaliation would be the indirect cause (pit, trap etc.) which is not feasible. (See al-Kasani, Bida'i', Vol.VII, P.229(.

26. Ibn Nujaym, (1334 H) al Bahr al-Raiq (Cairo), Vol.III, P.294.

27. Ibn Qudamah, op.cit; P.578.

28. al-Romally, Nihayah al-Muhtaj, Vol.VII p.330.

29. Ibid, p.240.

30. Ibn Niyaym op.cit. p.395.

31. Reported by Muslim al-Nisa'i.

32. Reported by Abu Dawud VII

33. Ibn Qudamah, op. cit. p.322

34. Bahnasi, Madkhal al-Fiqh al-Jana'i al-Islami, P.175.

35. Ibid.

36. al-Qayrawani (1083) al-Risalah (Translated) N.N.P.C. Zaria, p.121.

37. Audah, op.cit: p.114.

38. al-Kasani, op.cit: p.235, al-Shirazi op.cit. p.185, Ibn-Qudamah op.cit. p.359.

39. al-Dardir (1281H) al-Sharh al-Kabir ala aqrabul-Masalik, al-Walaq, Vol.IV, p.215.

40. See the Mudawwanah al-Kubra of Malik Vol.XVI p.106.

41. Audah, op.cit p.119.

42. Sabiq, op.cit. p.529.

43. Audah, op.cit. p.121.

44. Hatab, op.cit. p.236, al-Shirazi, op.cit: p.186, Ibn-Qudamah, op.cit. p.248.

45. al-Kasani, op.cit. p.235.

46. Al-Quran Ch.5 V. 45.

47. Ibid. Ch.17 V. 33

48. al-Kasani, op.cit pp.133, 127

49. Audah, op.cit. p.136.

50. Al-Dardir, op.cit: p.216, al-Shirazi, op.cit: p.186, Ibn Qudamah, op.cit. p.248.

51. Audah, op.cit. p.156.

52. al-Shirazi, op.cit. p.201.

53. Al-Qur'an Ch. 2 V. 178.

54. Ibid. Ch.5 V. 45.

55. Audah, op.cit. p.157.

56. al-Shirazi, op.cit. p.201.

57. See Zailai, al-Tabyin al-Haqaiq (1315 H) Cairo Mat'ba', at-al-Amirriyah, Vol.VI, p.107.

58. Audah, op.cit. p.158.

59. Ibid. See also Sabiq op.cit p. 523.

60. al-Dardir, op.cit. p.232.

61. Audah, op.cit. p. 167.

62. Ibid.

63. al-Kasani, op.cit. p.242, al-Shirazi, op.cit. p.196.

64. al-Dardir, op.cit. p.227

65. Hatab, op.cit. p.252.

66. al-Pamelly, op.cit. p. 285.

67. al-Kasani, op.cit. p.243.

68. Sabiq, op.cit. p.533. See also Audah, op.cit. p.148.

69. Audah, op.cit. p.151

70. Al-Qur'an Ch.16 V. 126.

71. Audah, op.cit. p.152.

72. al-Kishnawi, Asihhal al-Madarik (Sharh Irshad al-Salik Dar al-Fikr, Beruit Vol.III p.113.

73. al-Kasani op.cit. p.243

74. Al-Quran Ch.4 V. 92

75. Audah, op.cit. p.176.

76. Ibid.

77. Reported by Abu Dawud.

78. al-Shirazi, op.cit. p.209.

79. Malik, Muwatta (Kitab al-Uqul).

80. Audah, op.cit., p.178.

81. Audah op.cit. p.176.

82. al-Dardir, op.cit. p.237.

83. Ibn Qudamah, op.cit. p.499

84. See al-Shirazi, op.cit. p.210.

85. This view is upheld by Malik, al-Shafi'i and Ahmad.

86. al-Kasani, op.cit. p.257.

87. Audah, op.cit: p. 182.

88. Al-Qur'an ch. 4 v. 92

89. al-Kasani op.cit. p. 255

90. Reported by Malik in the Muwatta (Kitab al-Uqul).

91. 'Majority' here refers to Malik, al-Shafi'i and Ahmad. See Audah, op.cit. p.183.

92. Hatab, op.cit. p.268.

93. Audah, op.cit. p.184.

94. al-Shirazi, op.cit. p.33.

95. Al-Quran Ch. 4 V. 93.

96. Ibn Qudamah, op.cit. p.40.

97. Hatab, op.cit. p.34

98. Ibn Nujaym, (1334 H) al-Ba hr al-Ra'iq, (Cairo) Vol.VIII, p.291.

99. Al-Qur'an Ch.4 V. 92

100. Reported by al-Tirmidhi and Abu Dawud.

101. Hatab, op.cit., p.422.

102. Ibn Nujaym, op.cit. p.488

103. al-Shirazi, op.cit. p.26.

104. al-Khatib (1326 H) al Iqna' Matba'ah al-Amirah al-Sharifiyyah, Hallab Ed., Vol.III, p.123.

105. Audah, op.cit p.187.

106. Hatab, op.cit. 339.

107. Audah, op.cit. p.188.

108. al-Sarakhsi, al-Mabsut (1324 H) Mat'ba'ah al-Sa'adah, (Cairo) Vol. XXVI, p.64.

109. al-Shirazi op.cit. p.185.

110. al-Ramally, op.cit. p.237.

111. See Audah, op.cit. p.94.

112. Al-Qur'an ch. 4 V. 92 - 93.

113. Reported by Ahmad, Abu Dawud and alpNisa'i.

114. Reported by Ahmad and Abu Dawud.

115. Audah, op.cit. p.93.

116. Ibid.

117. Ibid p.96.

118. These terms have been discussed under Qatl al-Amd

119. As regards death resulting from punishments of Hudud and Ta'zir, Ali (R.A.) once said that he would not be bothered by such a death except in the case of the punishment for intoxication. This is due to the fact that the eighty stripes was adopted by analogy with the punishment for slander and thus not a fixed, specific punishment on its own. For this reason the great companion said he would pay the blood-with for such a death. (See Audah; op.cit. p.506).

120. Ibid, p. 102.

121. i.e. where the offender is known trouble maker e.t.c.

122. i.e. the Tradition reported by Ahmad, Abu Dawud and al-Nisa'i. See also Note 113.

123. Reported by Muslim

124. See Audah, op.cit. p.191. Imam Ahmad says that the clan can assist only upto one third of the Diyyah, while Imam al-Shafi'i says nothing stops the clan from paying a greater part of the Diyyah. Abu Hanifah says the clan must pay one half of the Diyyah (see Ibid, p.193).

125. Ch. 4 V. 92 of the Holy Qur'an

126. Audah, op.cit. p.104.

127. Ibid.

128. Ibid., p. 108

129. al-Kasani, op.cit. p.271.

130. See the Muwatta of Malik, (Kitab al-Uqul).

131. See Audah, op.cit pp.201 - 202.

132. al-Shirazi, op.cit p.209.

133. Audah, op.cit. p.204.

134. See al-Shafi'i, Kitab al-Umm (1325 H) Cairo Vol.VI, p.46.

Also See Ibn Qudamah, op.cit. p.410.

135. al-Kasani, op.cit. p.233

136. Audah, op.cit. p. 212

137. Ibid.

138. Ibid p. 215.

139. Ibid p. 216

140. Al-Qur'an Ch. 5 v. 45

141. Sabiq, op.cit. p.560.

142. Malik b. Anas, al-Mudawwanah al Kubra Vol.XVI p.123 It must be noted that most of the scholars do not permit Qisas for bones. However Malik permits it in exceptional circumstances.

143. al-Kasani, op.cit. p.306.

144. Audah op.cit. p.263.

145. Ibid, p.272.

146. Sabiq, op.cit. p.560.

147. al-Dardir, op.cit. p.224, al Shirazi, op.cit. p.199.

148. al-Kasani, op.cit. p.307.

149. Sabiq, op.cit. p.561.

150. It was also one of the pre-Islamic customs to pay blood money for injuries limited to the head or face.

151. Sabiq, op.cit. p.562.

152. Al-Quran Ch.5 v. 45.

153. Hatab, op.cit. p.246.

154. al-Kasani, op.cit. p.283. See also Sabiq, op.cit. p.561.

155. al-Shirazi, Mahdhab op.cit. p. 190.

156. Audah, op.cit. p.283. Also see Sabiq, op.cit. p.561.

157. Audah op.cit. pp. 206 - 207.

158. Al-Qur'an Ch.16 V. 126.

159. Al-Quran Ch.2 V. 194.

160. Ibn Qayyim al-Jawzi, (N.d) I'Ilam al-Muwaqqi'in, (Cairo) Vol. II, p.2.

161. Audah, op.cit. p.260.

162. Al-Qur'an, Ch. 48 V.9.

163. Sabiq, op.cit. p.589. See also Eliasi, Qamus (Modern Dictionary) 1986, Dar al-Jil (Beirut), p.43.

164. Reported by al-Tirmidhi, Abu Dawud, al-Nisa'i and al-Baihaqi.

165. Reported by al-Bukhari and Muslim.

166. Sabiq, op.cit. p.590.

167. Ibid, p. 591.

168. Such as the case of Zina, (whoredom).

169. Sabiq, op.cit. p.592.

170. Ibid. See also Bahnasi, Madkhal al-Fiqh al-Jana'i al-Islami 1972, Dar al-Shuruq (Cairo) p.186.

171. Bahnasi, Madkhal, p.185.

172. al-Sarakhsi, al-Mabsut op.cit, Vol.XI, p.6.

173. Reported by Abu Dawud and al-Tirmidhi

174. See Ibid.

175. Reported by Abu Dawud, al-Nisa'i and al-Tirmidhi.

176. Ibn Taymiyyah, al-Siyasah al-Shar'iyyah (1306 H). Matba'ah al-Akhbar, (Cairo), pp.119-120.

177. Bahnasi, op.cit. pp. 194 - 195.

178. Al-Qur'an ch.4 V. 34 provides that:

> "If you fear insubordination from them (wives) admonish them, then abandon (their) beds, then beat them (slightly); but if they show obedience to you do not seek a way against them....."

These steps are naturally endowed with the ability to reform the wife and must not be abused. Slight beating has been explained by the jurists to mean more of a significant than physical exercise such as the use of a toothbrush or slippers. The wife

must never be beaten as an animal nor struck on the face or left with a mark.

179. Bahnasi, _op.cit._ pp. 194 - 195.

Chapter 5

CONCLUSION

This chapter covers the summary of the chapters dealt with under this topic as a whole and makes some observations regarding the negative developments that have marred the pure and ideal application of the Islamic Law of crime and punishment. Some suggestions and comments are offered, which, if implemented, will go a long way in securing, for our Society, the required protection from the menace of crime perpetration.

5.1. The Summary.

The Islamic law is a synthesis of both what the law 'is' and what the law 'ought to be.' This makes it rather different from other notions of law; the main reason being that the Islamic law covers both religious and secular matters, contrary to other legal systems scattered over the world. For this reason also, so may 'acts', not placed under legal themes in the vast majority of law systems, are called 'Crimes' under the Shariah.

The growth of the Islamic law thrived on the fundumental concepts that Allah, the Lord and Creator, is the fountain of all justice. Thus every jurisprudential conclusion must find some hold or justification with the ultimate code, the Qur'an. The interpretation and explanation of the Qur'an is found in the machinery of the Sunnah (the way) of the Messenger of Allah (SAW). With these two establishments which covered general laws, the Sahabah (companions) of the Prophet (SAW) were enabled to expound the general concepts and precepts to apply to specific matters by the means of 'Ijtihad'; the most popular form being Qiyas (deductions). The successive generations, amidst various but textually based differences managed to preserve the sacred texts of the Quran and Sunnah by giving juristic virdicts (fatawa) corroborative to the fundumental sources. Flocks of men attached themselves to leading intellectual personalities and this caused the emergence of the Schools of law (Madhahib). Due to political and geographical expansion, the vast cultures of persia, Mesopotamia and Egypt, to mention a few, were blended into the Shariah. But due to the long attachment to

previous scholars, a practice of 'followership' (Taqlid) set in, and even latter competents considered themselves incapable of utilizing the great legal engine of Ijtihad, that represents the dynamism and adaptability of the Shariah to all times and ages. It still remains a fact that, notwithstanding some individual efforts at reviving Ijtihad, the position still remains virtually the same. After the fall of the great Ottoman empire and the Muslim strong holds at Africa (especially the North and West) and Central Asia, the Western world colonised a great percentage of the 'then-known' Muslim civilizations and limited the application of the Shariah to a 'mere' acts of devotion; and 'family matters' called personal status that suffered so much from western devastation seen in the 'so-called' reforms passed in the North African and Central Asian Centres.

2. Ever since the first civilizations, man has been guided by laws and crimes against both the state and the individual were recognised and punished. Islam provided a scheme which conveniently sifted the so many acts and ommissions perpetrated, into the scopes of Hudud (which covers all those offences committed against

'Allah'; a term signifying offences against the state. It also signified a set of sacred laws which may not be tampered with at all costs. Where the unique standard of proof could not be met, the punishment stated thereunder will not be executed. On the other hand the culprit shall not be allowed to exploit his position if there is some ground for suspicion. He shall then be given a punishment (Ta'zir) under the good discretion of the judge dependent of course, on the level or degree of what has been established. In the difference between these two schemes lies the beautiful composition of the law of crimes under Islam where a culprit never really escapes the two. However no one may be punished under the Shariah without justification. The third scheme of Qisas gives the individual room to manoeuvre within the framework of the law. In offences committed wholly against the individual (i.e. Murder assult or battery) the victim may, if he pleases, enforce retaliation or pardon the offender. This also manifests the delicacy of the Shariah which promotes forgiveness and mercy between brothers in the faith.

Besides this classification there are minute divisions which are more of academic use than legal practical benefit. But nontheless they expose the subtility of the Shariah and give a better insight as to the notion of punishment under Islam.

3. With the exception of a few cases the jurists agreed as to the acts falling under the heading of Hudud. The Hudud is not only a form of punishment but a wide phenomenon of legal, social and spiritual import. It reflects the prohibitions stamped on Mankind and is comprised of fine unique characteristics which depict it as the 'limits of Allah.' These unique features have been explained in detail by the jurists as to the rules that sorround the application and enforcement of the Hudud in general. The most prominent feature of the Hudud is that they cannot be enforced where uncertainty exists. The standard of proof is extremely difficult to attain. Punishment, even though stern, (i.e. such as death or amputation of the limbs) must be conducted swiftly and not maliciously or slowly to prolong pain or suffering. The Hudud must also be enforced by the state authority only and not by individuals.

The most popular range of Hudud offences is Zina (whoredom), Qadhf (defamation) Sharb (intoxication) Sariqah (theft), Hirabah (brigandage) Bagy (rebellion) and Riddah (apostacy). The Islamic law has provided the setting for the enforcement of these punishments in all times and ages. Each of these headings is defined and the various rules as to proof, punishment and justification for punishment have been dealt with, leaving only the determination of the people to adapt themselves to the Shariah.

4. But the Hudud, as seen above, cannot be applied in isolation. Thus not all criminal matters are 'packed' into it. History has shown that internal squabbles have been the main cause in the disintegrating of civilizations. Islam recognises that even though murders and assults should be punished, the enforcement of punishment, or 'retaliation' (Qisas) should be left to the pleasure or discretion of the victim. Now the victim may choose to exact retaliation, accept the customary blood-wit (or even negotiate such amount with the offender; a term called 'Sulh' or settlement) or even pardon the offender

altogether. Sometimes even though killing of the Murderer may satisfy the natural instricts, it still leaves the bereaved and aggrieved relations who would have to labour under great emotional, and indeed, economic hardships. Here the opting for compensation is the most realistic option. The pardon may also put to an end, generations of vandetta's and blood baths.

In enhancing this doctrine the Islamic law classifies homicide into three classes, namely intentional, quasi-intentional and mistaken. In the latter two, the offender cannot be put to death.

This principle also applies to acts not involving loss of life.

The form of punishment known as Ta'zir covers all those offences not specifically mentioned by the sacred texts and may be probably the widest scope of offences. There are so many petty misdemeanours, and truely severe acts such as terorism, anarchism, drug abuse and social mishaps that do not fall under the heading of Hudud. Ta'zir offers a place for these acts.

Also due to the stringent and often unattainable standards of the Hudud the offender is subjected to the Ta'zir which depends on the punishment deemed necessary by the judge (a living assessor of his time and generation) which could range from a few stripes of the cane or stern warnings to even death, if necessary to curb the evil.

As seen above the Ta'zir is a mode of punishment which steps-up or backs-up the other modes of punishment where they cannot be applied.

On a general note the Islamic mode of punishment employs all the necessary precepts that distinguish it uniquely from other forms of punishment which are limited in terms of practical and compact achievements. The world today has been overtaken by serious crime rate upsurges due to this fact. It has been recognised by all concerned that the main reasons for high crime rates have been the consumption of drugs and alcoholic beverages and lack of moral and social education especially in the homes. All these situations have been addressed under the Islamic law. The only solution lies in the enforcement of the sacred laws of the Shariah.

5.2 Observations.

Islam is a comprehensive set of dogmas that covers the whole realm of life. These rules are not static but are adaptable to various situations and generations. Alot of damage has been done to peaceful life through mans refusal to enforce the divine laws, religious ignorance and misunderstanding. Some related observations are made below.

1. The main cause of Taqlid (followership), which developed into both religious and legal stagnation, has obviously been the fall of the standard of knowledge. The result is that technological and scientific fields have been overlooked. Thus many 'acts' and crimes are openly committed under the veil of scientific persuit. To be specific many forms of murder of the child in the womb are carried out with the support and backing of the authorities as a matter of population policies without regard to divine sanctions.

Although there is a slight difference of opinion among the Islamic law Scholars as to at which stage of pregnancy a child may be aborted, Under Islam the

life stages begin with the sperm, then congealed blood, then flesh then life is given to the embryo (after four months). At this stage some jurists allow abortion especially in the case of the sperm.[1] But most of the Maliki's pronounce abortion unlawful at all stages. Among those who hold this view are some of the Hanafi s, Imam al-Gazali and Ibn Jawzi. Some other jurists hold that it is lawful to abort the embiyo before the forth month of pregnancy. In the words of Ibn Qudamah;

> "Before it is given breath, the embiyo cannot be regarded as a living soul; thus it is not prayed for as if it were non-living or mere blood."(2)

It is also reported that Umar, Ali, Zubair and Sa'ad were seated in company of the other companions (R.A.) and they made mention of Azl i.e. Coitus-interuptus) and its lawfulness. A man from amongst them said: 'It is said that it is a minor form of 'wady' (burrying of children alive)." Ali (R.A.) then said: It cannot be so unless the seven stages have occurred. These are; the geneological descent[3] from clay, then the geneological

descent[3] from clay, then the sperm, then the congealed blood, then the foetal lump, then bone, then flesh, then it becomes the distinct creation. (i.e. is given life). Umar R.A. said: You have spoken the truth, may Allah prolong your life!"(4)

It is obvious that the reason behind the overlooking of abortion in the early stages of pregnancy by these learned men is the fact that life has not been breathed into the embryo before four months and decrees concerning the life of the embryo have not been established(5).

But on the other hand, some of the scholars are of the view that the 'distinct creation' is achieved immediately after the stage of congealed blood. They quote the Quranic verse which says:

> "Was he (Man) not a drop of sperm emitted? Then did he become a leach-like (congrealed) clot; Then did Allah make and fashion (him) in due proportion. And of him made two sexes, male and female. Has not He the power to give life to the dead"?(6)

They argue that the use of the conjunctive '<u>fa</u>' after the stages of the sperm and the congealed blood shows

that life begins immediately after these stages.(7)

In the humble opinion of this researcher, the whole question of the exact moment when life commences is a field exclusively limited to Allah, the Glorious the Majestic. And it is not for man to try to investigate and place limitations on this unrestricted jurisdiction of the sublime creator. Allah Most High provides in His Glorious Book:

> "And they will question you about the Spirit. Say: The Spirit is of the Command of my Lord. Of its knowledge, only little of it has been given to you."(8)

It is then, impossible to safely pronounce a licence for abortion and child limiting. It must be understood to apply only in cases of necessity such as the fear for the life of the mother who if allowed to die, will also cause the death of the embryo. Without this excuse, the perpetrators of abortion and the destruction of human life for no other reason than fear of poverty(9) or political motives, have no justification to propagate and impose population policies upon the people of the world.

Another serious development backed by scientific research is the trend nowadays for the use of artificial inseminations. The jurists of the earlier times had not expressed any view on this since it is a modern development of the twentieth century. The Immamiyyah Shiah have however reported a decision from Hasan b. Ali (R.A.) to the effect that the wife who transfers her husbands semen to an unmarried girl, who delivers of this semen, shall bear the following legal consequence: The wife shall pay the dowry for her defilement of the girl and she (wife) be stonned to death. The girl (obviously unmarried) shall be whipped and the child returned to the husband.(10) (the true father).

A Tradition reported from the Holy Prophet (SAW) states that: "There is no sin after polytheism, greater in the sight of Allah, than a drop of semen which a man places in the womb which is not lawful for him."(11)

It can be inferred from this Tradition that the prohibition on Zina does not stop at the mere physical penetration but even the act of ejaculation of semen into

the womb. Thus any means used instead of the genitals must be punished by the means of Ta'zir. Consent of all participants cannot justify the act.

The Holy Qur'an also states that : "And Command the believing women to cast down their eyes and guard their private parts...."(12) In another verse the Holy Book states;

> "And those who guard their private parts; except from their wives or that which their right hands possess....."(13). That "whoever seeks anything beyond this (as provided in the verse) these are the transgressor"; shows, unequivocally, that only the wife and the slave-girl can be the objects of sexual interraction.

From the above authorities it is manifest that under Islam there can be no justification for the artificial insemination between parties who are not married or related to one-another by bondage as in the case of the slave girl. To permit this act of artificial insemination will be to permit artificial means of adultery and formication.

And as in the case of Zina, it confuses progeny and offspring and thus will inevitably bear the same evil consequences that Zina infests in Society. How true is the Qur'anic provision; "And do not approach Zina; For verily it is an evil leading to other modes of evil."! (14)

2. All over the world there has been, over the past few decades, an upsurge in the crime rates which continues to leap frog every year. Rules of morality have been abandoned and the precious role of the home and family has been forgotten. It is no surprise, therefore, to witness the sorry sight of wandering street kids of both sexes roaming the nights and seeking criminal climax. Governments worldwide 'tolerate' the status-quo by allowing dangerous weapons and drugs to be transmitted freely between all generations of the Society. Nay, the governments themselves participate in war crimes which reduce the worth and dignify of man to the base.(14) (a)

Economic and fiscal depressions are created by stronger nations and imposed on weaker ones. This

destroys the social security and balance of any nation that is unlucky enough to be a victim.

Books, Magazines and films are flooded into the markets which offer very little education. If any, it is education on sex and violence.

The result is uncontrolled crime as the members of the Society are ignorant of the basic moral teachings they might have learnt if they had the advantage of a proper home up-bringing.

3. But perhaps the most dangerous development in our space age is the recognition that secularism has received; especially with democracy, a theory off-shooted from the belief of the greek philosopher, Democritus who taught that the citizens first duty was owed to the state. Consequently divine laws are limited to the church only, as merely religious and spiritual concerns. It also teaches mans 'freedom' to legislate and originate laws based upon his knowledge. The Epicureans of the Hellenistic times thought that;

> "all social life is based opon self-interest and we become members of a group for our own convenience: therefore there are no absolute rights and laws-what is good is what members decide at that time to be good, and when they change their minds the law must change too....."(15)

The stoics held that the state must dominate the individual completely.

It must be pointed out that such beliefs are a direct contrast to Islam and the basic dogmas of the Shariah cannot thrive in the typical democractic society. An example is of Northern Nigeria of pre-independence times. The first step the British took to obliterate the Shariah was its separation of the state from religious matters. This systematic approach culminated with the final clamping of the codifications of the English legal norms in the forms, chiefly, of the Penal Code of 1960, the Criminal Procedure Code of 1960, and the Evidence Act of 1957. These Codes, were enacted in order to erode and dilute the forceful effects of the Islamic Criminal laws by providing a synchronization of the English laws and the Shariah which had, when applied

side by side, given rise to so many difficulties and conflicting judicial pronouncements.(16) The legislature of the then Northern Region set up a panel of jurists "to look into the possibility of establishing a system of criminal law which could both gain international acceptance', and be made applicable to the hetergeneous society of Northern Nigeria."(17)

The dilutation of the Islamic law of crimes was achieved with the Penal Code which made Adultery and intoxication offences for Muslim Culprits but punished adultery with two years imprisonment at the most (or by a fine or both),(18) and intoxication, a jail term of one to six months (depending on the venue of the offence) and/or a fine of up to one hundred pounds.(19)

To sum up this point, the Penal and Criminal Codes of 1960 proved to be a mockery of the divine sanctions of the Islamic Law and Moreover, a helpless piece of legislation that never quite succeeded in dealing with the menance of crime perpetration.

5.3. Suggestions

In the light of the above observations, the researcher now delves into possible and practical suggestions that may have a bearing upon the proper application of the Islamic Law of Crime. Two broad comments have been advanced which principally cover the areas of observation. The first covers the first three observations whilst the second refers to the last observation.

1. From a broad perspective it is clear that the setting in of Taqlid, upsurge in crime rates, and the romance with secularism all resulted from the fall of Muslim political authority which started with the colonization of various Muslim Communities world wide. Incidentally, it is a fact that crime cannot be sufficiently erradicated save under a state which is wholly inclined to the Shariah. In the Holy Qur'an Allah Most High says:

> "They are those, who if we establish them in the land, establish regular prayer and give the compulsory due, enjoin the right and forbid the wrong."(21)

It is a logical conclusion that a system that advocates social, legal, political and spiritual values must inevitably protect such rules through an authority based on similar teachings.

Thus, for a rational, healthy application of the sacred laws of crime, secularism (including all its incidencies) must be avoided completely and a reversion made to the basic rules of the Shariah. It would be rather ridiculous and awkward to attempt to enforce the penal laws of the Shariah in a 'Secular' environment. Justification for this is that the Mundane and legal laws are built upon the vast scope and foundation of pure moral and spiritual values such as; to avoid desirous glances at the opposite sex, to marry decent and modest maidens, not to be envious of each others endowments, to pay the Zakat (poor due) as a means of balancing the Community, to establish prayer which

strengthens spirituality, to be fearful of Allah, not to commit minor sins that may lead to major crimes, to be properly educated as to the rights and duties of the individual and the state, and a host of similar values that are not to be found in a society based upon the carnal instincts of man-made laws, devoid of divine assistance, debased to the level of lower animal passions. In man's quest for "halucinative freedom," lies the meaning behind the verse of the Qur'an which says:

> "Then We lowered him (man) to the lowest of the low!"(22)

One is apt to recall the feeble attempts at this harmony by the Indian, Sudanese and Northern Nigerian Penal Codes. It must also be stressed at this juncture, that the divine punishments as to the major crimes were not revealed until the people had been trained and disciplined fully in the field of right conduct and God-consciousness.

It is reported from Aishah (R.A.) that the Prophet (SAW) did not start by telling people not to drink wine and not to commit fornication. He started

by telling them about God and the Hereafter until they had firm belief in them. It was only then that he told them not to drink or commit adultery and they obeyed him. "Had he started by telling them not to drink wine or not to commit adultery, they would have said: 'We will never abandon them."

The answer or solution to high criminal activity cannot be secularism or democracy because the 'success.' proposed by the Western World has remained evasive and enigmatic uptill this day. On the other hand all the teritories that have striven to implement the penalties specified in the rules of the Shariah have enjoyed and maintained a much higher degree of peace and stability throughout history.

Under the Islamic system divorce rates are amazingly lower than in 'democractic' havens. Offspring are given a decent background who grow up to be useful members of society. Drugs and alcoholic drinks are regarded as abominations, hence the absence of the primary instigator of crimes. The observance of the Zakat caters for the needy who are thus immunised

against the vulnerability to take to theft and robbery.

The sad results of Taqlid can also be attributed to political instability. It is known that the Western Colonialists imposed on their subjects educational systems that made it impracticable for them to acquire relevant knowledge of the Islamic life and jurisprudence. In the words of Abdul-Qadir Audah;

> "....Members of this group, being educated in the European fashion, know no more about Islamic jurisprudence than the average Muslim who learns about his religion from his environment. Their majority may be expected to know more about the rules of Greek and Roman mythology than about Islam and its jurisprudence,.(23)

Needless to say, that a state run by the Shariah will establish the required means for the advancement of Shariah intellectual persuits, as this is a primary goal of the/ an authority shall bear the responsibility of informing the Muslim world of the correct position of the Shariah on matters raging in the world today and indeed in future

times to come. This task will be immensely simplified if the muslim community can free itself of the legal entanglement caused by Taqlid. According to Dr. Muhammad Tabiu, while commenting on the negative effects of Taqlid;

> ".....no such change of attitude and outlook is possible unless there is a big transformation in our system of education both as regards the curricula and the methodology..... .....I advocate for a curriculum that is so designed so as to give the student a good grounding in the sources of Islamic Law and techniques of legal deduction, while equally acquaints him with detailed knowledge of the fiqh....."(24)

2. The Western Scholars have gone through pains to find faults with the Shariah, especially the area of crimes and punishments. This critism, supposes the researcher, stems from their ignorance of the proper constitution of the Community. Under Islam, the state authority has a duty of protecting the lives, property, honour and intellects of its subjects, Without this protection life would be meaningless, anarchy and chaos would mature and ruin the very existence of the state

itself. The strictness of the Law itself. The strictness of the Law itself prevents a prospective offender from venturing into crime. According to one observer:

> "Due to the harshness of this punishment in Islam, both the hand of the thief and the life of the victim have been protected, at one and the same time, and transquility secured for all. The execution which is done publicly serves to set an example."

The aim of punishments under Islam, is to penalise the offender for his wrong act and also act as a deterrent for both the offender and other members of the community. The Holy Quran provides that:

> "Verily the (human) Soul is prone to incite evil....."(25)

Thus, the human being cannot be trusted and left to his whims and passions. Such will only result in more evil; he must be threatened with retribution for disbehaving in order to secure peace within the Community.

Under Islam also, the interests of the Community are placed before that of theindividual. It is not

justice to allow an individual to get away with a light punishment and leave the community to lick its wounds. The Holy Quran attests to this fact: It states;

> "Tumult and oppression are worse than slaughter....."[26]

According to the Commentator, Muhammad Asad,

> "It follows, therefore, that - in order to be truely Islamic, a Society must be so constituted that every individual, man and woman, may enjoy the minimum of material well-being and Security without which there can be no human dignity, no real freedom and, in the last resort, no spiritual progress: for there can be no real happiness and strength in a Society that permits some of its members to suffer undeserved want while others have more than they need....."(27)

It must be understood that any attempt by one member of society to grab or attain an easy and unjustified gain is looked at as a menace against the whole Community. It is for this reason that the Holy Qur'an refers to the highway brigands as; "those who wage war against Allah and His Apostle."

Non the less it must be borne in mind that a state can only inflict the stern punishments after providing for the basic standard of social justice and balance required for a peaceful existence amongst its members.

That is why the unmarried are not stonned to death for fornication. And in the same way one who steals to quench his need for food and drink cannot be subjected to the punishment of cutting off. Infact all the Hudud (offences against the Community) will not be inflicted without the authorities making it absolutely clear, that the culprit was fully secured against vulnerability to commit crime, fully understood the consequences of his act and voluntarily decided to transgreers all bounds of decency and morality. After such confirmation the culprit is to bear the implications of his act and no one is permitted to intercede for such a mischievous wretch.

The prescribed punishment must then be carried out as a means of disciplining the culprit and making him a better member of Society.

We are all aware of the despotic state of prison houses and the negative effects it breeds. The offender

only comes out a 'hardened' criminal, having been exposed to different shades of evil 'beasts' who spend their time indulging in feats of boasts as to their crimes perpetrated. Drugs are heard to be smuggled into the prisons and many take to sodomy and lesbianism to let off passion.

It also traverses the imagination that the Western world can provoke comments about the penalties prescribed by Islam whilst their means of punishment are not fit for animals. Right now, in some states of the United States of America, persons are executed by means of poisonous injections. These injections sometimes take about twenty minutes to kill off the victim. Gasses of similar import are also common which suffocate the victim and subject him to underscribable tortures.

These critics also frown against the punishment of flogging under Islam. The say it is humiliating and below the dignity of mankind.

Under Islam flogging is carried out by learned and pious folk who are not allowed to raise the hand above the shoulder. A medium whip should be used, and the victim of the exercise must be clothed.

On the other hand, the westeners allow brutal bouts of flogging in thier jails. According to Maududi;

> "According to the existing law, not only the court but an ordinary superintendent of the jail also is authorised to award a punishment of 30 stripes to a prisoner for disobedience or insolence, and this flogging is carried out by a specialist who keeps himself ready and fit by regular practice and the canes are wetted beforehand so that they may cut through the body like a knife. The convict is stripped of his clothes and nothing but a thin cloth wetted with tincture of iodine is left to cover his private parts. Then he is tied down to a tripod.....and the flogger comes running from a distance and strikes him with full force. Every time the same part is struck so hard that the flesh flies out like minced meat and often the bones become bare....."(28)

Even as late as the eighteenth century, the punishment for high treason in Englahd was for the offender to be hanged by a scaffold, being cut down and disembowelled while still alive; his head was cut from the body and his corpse divided into four quarters.(29)

As regards the issue of Islams discriminating of the female in cases of Hudud, this is explainable by the fact that women are biologically and emotionally weak. There is the always present fear that their testimony may be directed by pity or intimidation. It is also a scientific fact that women are given to considerable mental and physical distress during periods of menstruation and menopause.(30) Their evidence, then, cannot be sustained in serious sessions such as the Hudud which may involve the death penalty. All these flaws in the woman amount to very possible doubt and uncertainty which puts off the punishment of Hudud.

FOOTNOTES AND REFERENCES

1. i.e. Most of the Hanafi, Shafei and Hambali jurists. (See Muhammad Naʿeem Yasin, (1989) Al-Ahkam al-Ijhad,[1] Mujallah al-Shariah wa-l-Darasat al-Islamiyyah Vol.VI, No.13, Kuwait Council University, P.262.

2. Ibid, p.264

3. 'geneological descent' here means both the initial creation of man and, also, in the sense that inorganic matter and constituents of the earth are consumed into living matter by means of food, (literally the earth). It is this food that develops into the sperm.

4. Yasin, op.cit. p.270. The process mentioned by Ali R.A. is contained in the 12th, 13th and 14th verses of ch. 23 of the Holy Quran.

5. i.e. the famous tradition reported by Bukhari and Muslim which describes the stages of creation and that after four months, an angel is sent to write the sex, prosperity, lifespan and provision of the child in the womb.

6. Quran ch.75 v. 37-40.

7. Yasin, op. cit. p.269

8. Qur'an ch. 17 v. 85

9. It is mistakenly supposed, especially by the western world, that 'population explosions' can cause poverty and sufferings. This has been refuted by the Quran in many places for example: "Do not kill your children for fear of poverty: We shall provide sustenance for them and for you. Verily the killing of them is a great Sin. (Qur'an ch. 17 v 31).

10. Magniyyah, (1960) Al Fiqh 'ala Madhahib al-Khamsah. Dar al 'llm lil Malayin, Beirut 6th Edition, p. 37 . The Modern Sonnis also revile this act of artificial insemination (al-Talqih al-Sana iy) as contrary to the Shariah (See al-Sharbasi, A. N.d Dar al-Jil Beirut Yas'alunaka Fil-Dini Wal-Hayat p.

11. Reported by al-Bukhari, (Kitab-al-Hudud).

12. Al-Qur'an Ch. 24 v. 30.

13. Ibid, ch. 23 v. 4.

14. Ibid ch. 17 v. 32.

14(a) For e.g. the acts of the Nazi's during the second world war and in recent times the wars in Bosnia and Rwanda.

15. The Pears Cyclopaedia, 1962 - 3 p. J.47

16. See Chukkol, K. S. (1980) Defences to Criminal Liability in Nigerian Law: A Critical Appraisal A.B.U. Press, Zaria, Nigeria, p.4.

17. Ibid;

18. See Sections 387 and 388 of the Penal Code of Northern Nigeria Cap. 89 of 1960.

19. See Sections 401, 402, and 403 of the Penal Code Law, 1960.

20. See Shani, A.B.M. 1981, Some Aspects of Criminal Procedure In The Northern States of Nigeria. Afro-Asian Law & General Book Co., New Delhi, P.5.

21. Al-Qur'an Ch.22 v. 41

22. Ibid., Ch.95 v. 5

22.(a) Even as far back as 1969 The Reader's Digest claimed that: "Divorce is ripping asunder marriages at an unprecedented rate! Especially in the Western States, Britain, Western Europe - many countries, And for every divorce there are several other homes that are unhappy, miserable, wretched!" (See the Reader's Digest, Oct. 1969, Hazel Watson & Viney Ltd. Aglesbury, p.40).

In 1970, Cecil G. Osborne, a writer, based in the United States of America said; "Alarmists point to the fact that our divorce rate is the highest of any nation in the western world, with one marriage out of four ending in divorce, and it is predicted that the number will reach one in three within the next few years. (See C. G. Osborne, D.D. 1970, Zondervan Publishing House Grand rapids, Michigan, The Art of Understanding Your Mate. p.

23. Audah, (1971) Islam Between Ignorant Followers and Incapable Scholars. I. I. F. S. O. p.55.

24. Muhammad Tabi'u (1992) Shariah Court: Suggestion for a new outlook. The Reporter, Oct.8, p.11.

25. Al-Quran ch. 12 v. 53.

26. Ibid, ch. 2 v. 217

27. Muhammad Asad, Quoted by Siddiqi, (1976), Sahih Muslim Sh. Muhammad Ashraf Kashmiri, Basar, Lahore, Vol. III, p. 908.

28. Maududi, (N.d.) The Meaning of the Qur'an, op.cit. Vol. IV, p.309.

29. Stephen History of the Criminal Law of England Vol. 1 p. 458.

30. According to the "Complete Medical Guide; "Headache, depression, irritability, slight nausea and puffiness of the abdomen, skin and other parts of the body may precede menstruation. The reasons for pre-menstrual tension are not fully understood ....." (See Miller, B. F. (1956). The Complete Medical Guide, Simon and Schuster, New York, p.516).

As to the Menopause the same writer has affirmed that:

> "When ovulation ceases, certain hormones are no longer produced, and the whole 'switchboard' of the endocrine gland system is temporarily "jangled." The endocrine glands affect the emotions and the emotions affect the endocrine glands" (See Ibid. p. 518).

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