

ISLAMIC PENAL SYSTEM & PHILOSOPHY

Dr. Muhammad Tahir-ul-Qadri



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Islamic Penal System & Philosophy

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By

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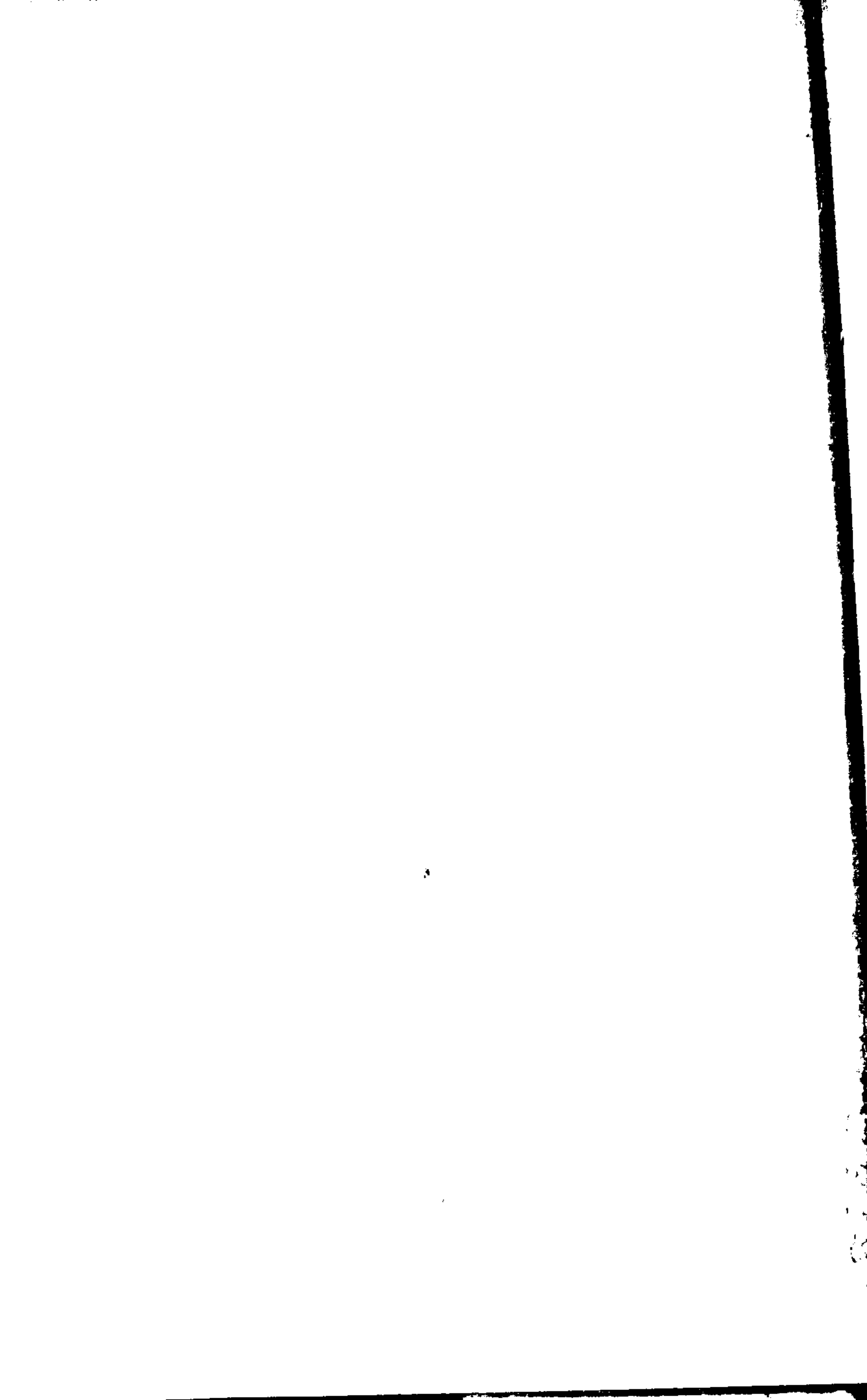
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Islamic Punishments & Western Critics

P R E L I M I N A R Y

Historical Development of Ancient Penal Law

- ✱ Hammurabi Law
- ✱ Egyptian Law
- ✱ Jewish Law
- ✱ Greek Law
- ✱ Roman Law



Historical Development Of Ancient Penal Law

1st Period: First Historical Period

The first Historical Period stretches between 5000 and 4000 B.C. It was dominated by four major civilizations. Sumerians, who ruled approximately upto 2350 B.C. The Akkadians, who followed them and ruled the earliest historical period between 2350 to 2230 B.C. ; The rule of the Gutians spread between 2230 to 2130 B.C. ; and the reign of the urrians, which had stretched from 2130 B.C. Down to 2030 B.C. , the tair end of the first historical period.

2nd Period: Old historical period

The Old Historical Period sprawled between 2030 and 1830 B.C. , ruled and dominated by the civilizations of Isin and Larsa. The fusion of the dynasties of Isin and Larsa led to the simultaneous establishment, of Eshnuna and Ashur dynasties. The old Babylonian period which witnessed the flourishing and blossoming of Hammurabi dynasty, is also placed within the broader frame-work of the old historical period.

3rd Period : Middle historical period

The Middle historical period straddled between 1790 B.C. and 782 B.C. The period between 1790 and 1682 B.C. is largely claimed by the Hammurabi. This period revolved around the dynasties of Hittites, Hurrians and Kassites, the feudal age, the first Assyrian Empire, the period of co-existence and mutual interdependence of Assyrians and Babylonians and the re-emergence of Assyria as an independent power which ruled from 933 B.C. to 782 B.C

4th Period : Late historical Period

The Late Historical Period has witnessed the rise and fall of at least ten major civilizations. The new Assyrian Empire that found its moorings in 745 B.C. and petered out towards the end of 609 B.C., the Neo-Babylonians Kingdom that stretched from 626 to 539 B.C., the Persian Empire that was sliced out of a province of the Babylonian Empire till the entire territorial chunk of Babylonia was conquered and annexed by the Persians. This period was followed by Egyptian, Jewish, Greek, christian and Roman Eras, and the history of this period was capped and crowned by the most glorious and the most human civilization introduced by the religion of Islam.

"DYNASTY OF HAMMURABI"

The Dynasty of Hammurabi, which furnishes the actual starting point of our discussion, came into existence after the fusion of the dynasties of Isina and Larsa. Hammurabi, the sixth and greatest King of the first (Amorite) dynasty of Babylon came to throne in 1792 or 1800 etc B.C. He was crowned after the death of the last King of Eshnunna in 1790 B.C. and the defeat of Rim-Sin of Larsa in 1770 B.C. He ruled from 1792 to 1750 B.C. or from 1729 to 1682 B.C. For the last decade of his 43-year reign, Hammurabi ruled over a Kingdom that extended from the Persian Gulf to Mari and Ashur and eastward to the Zagros mountains. It became the classical age of old Babylonian civilization. Hammurabi wrote letters to his governors, containing detailed instructions for the enforcement of justice and order. He composed his "Law Code" in his later years. Hammurabi law was however not the first codification known from ancient Mesopotamia. Fragments of Sumerian code of King Ur-Nammu of Ur and a Sumerian

Law Code of King Ipit-Ishtar of Isin were found before Hammurabi Law. These Sumerian Laws antedate Hammurabi Laws by 350 and 150 years respectively. There is also one in Akkadian from Eshnunna which is only about 50 Years older than the famous code of Hammurabi. The principal source of the code of Hammurabi is the imposing stone monument discovered at Susa in 1901 by the French Assyriologist Jean Vincent Scheil and preserved in the Louvre, Paris.

Code of Hammurabi

The first and only complete and comprehensive code of legislation known to the old history of Law is the "Old Babylonian code", formulated by the ruler of Babylonian Dynasty, Hammurabi. It was written in Akkadian (Semitic) language and its jurisdiction extended to the entire kingdom.

It consisted of a compilation of older Akkadian and Sumerian laws and tried to synthesize the opposing strands found in these codes.

Hammurabi Penal Law:

Some of the important features of Hammurabi Penal Law are as follows:-

(1) A- Adultery was regarded a private crime. Its punishment was meted out on behalf of the wronged party and not on behalf of the state.

B- Punishment was in the form of fines as well as in the form of corporal infliction, and the latter i.e. physical punishment could be remitted contractually through the payment of a sum of money.

- (2) the receiver of stolen goods was not a person who knowingly bought stolen property, but a person who contracted a purchase secretly, without witnesses.
- (3) Penalties were graduated according to whether the injured party were a freeman or a slave or according to the rank of the culprit.
- (4) the lex talionis (law of retaliation) was the dominating feature in the penalties prescribed by the code of Hammurabi, together with the frequent death penalty and fine, while corporal punishment as a specific penalty was of slight importance.

In Assyrian law corporal punishment (mutilation) and whipping played an important role, and in Civil law the 'bloody penalty' for breach of contract predominated.

5. A female slave or hieroduloi (who formed a special caste of temple slaves in the great temples of the neo-Babylonian period) and a female free hierduloi (a free temple girl, even the king's daughter) were forbidden to have legitimate children, they had to pledge themselves either to prostitution or to Chastity.

Mutilation of the offender was awarded in proportion to the nature and gravity of the offence.

The hand that struck the father was cut off.

The eye that pried into secrets was gouged out.

Whip punishment was awarded in the case of

the following offences:

iii) brigandage

iv) creating disorder

v) shirking of state service

vi) Criminal negligence

- (8) specified forms of execution such as gibbeting, burning impalement, drowning were inflicted upon certain criminals.
- (9) The notion 'a life for a life, had extended to such correspondence as:
- a) the execution of a creditor's son for having caused the death of a debtor's son, while holding him as a pledge
 - b) that of a builder's son for negligence in construction causing the death of a purchaser's son.
 - c) that of the daughter of a man, guilty of the manslaughter of another's daughter.
- (10) in case of wilful murder, there was an uncertainty related to its mode of punishment and the infliction of required retribution
- (11) Extravagant wives and undutiful children could be enslaved.
- (12) There was no concept of imprisonment and forced labour in the code.
- (13) Fine in the form of monetary compensation was often prescribed on the principle of restitution, but the fines were not paid to the state.

- (14) A person guilty of man-slaughter was simply fined if he could swear that the act was unintentional.
- (15) Carelessness and negligence were severely punished.
- (16) (a) A surgeon might lose his hands as the penalty for a maiming operation.
- (b) A veterinary had to repay part of the value of a beast that died through his treatment.
- (17) The owner of an ox that gored a passer-by was held responsible if it was a vicious beast.

Egyptian Law

About a dozen legal documents come from The Old Kingdom Of Egypt (3400-2475 B.C.) and several documents survive from the second period of Egypt. The Middle Kingdom (2160-1788 B.C.) Diodorus or Sesostris (sesoosis) is known to be an important law-giver of this period. New Kingdom (1580-712 B.C.) also made some significant contributions in the field of law. However little is known of Egyptian criminal law. Punishments were very severe, but offenders were sometimes allowed to commit suicide. Imprisonment is also established as one of the punishments awarded under Egyptian Law.

Jewish Law

It consists of two kinds of laws:

- (i) Codified laws
- (ii) Popular or customary laws.

Codified Laws Split Into Two Branches:

- (a) Biblical Laws
- (b) Talmudic laws

Biblical Laws

Codified Biblical laws according to the period of their composition are usually classified as follows:-

- (1) The Decalogue (Exodus XX: 1-17, Deuteronomy V:6-19)
- (2) The Covenant Code (Exodus XX:23, XXIII:19 and XXXIV: 17-26)
- (3) The twelve curses of Mount Ebal (Deuteronomy XXVII: 15-26)
- (4) The Deuteronomic Code (Deuteronomy XII-XXIV)
- (5) The Holiness code (Leviticus XVI - XVI)
- (6) The Composite Priestly Code.

All that is known historically is the existence of the book of Deuteronomy in the Kingdom of Judae during the reign of Josiah and the codified laws of the Pentateuch

Jewish Penal Law:

- (a) According to the old common law, punishments were applied in certain cases to the whole kinship group of the offender, but it was altered by the codified law of the Bible.

It is stated: "The fathers shall not be put to death for the children, neither shall the children be put to death for his own sin" (deuteronomy XXIV:16)

- (b) A sharp distinction was made between murder which called for the death sentence and homicide, which

provided for flight from the avengers to a place of asylum.

(Exodus XXI:12:13)

- (c) The lex talions:(قصاص) Related to the infliction of bodily injury, in cases where the victim was unable to work, the offender was required "to pay for the loss of his time" and "to cause him to be thoroughly healed"(Exodus XXI" 18-19)

Talmudic Laws :

Codified Talmudic laws Comprise two main sections, which constitute the original portion of these laws.

(i) The Mishnah

(ii) The Gemara

They also contain some additional laws called Baraitot and some passages from another collection called Tosefta

Mishnah is divided into six orders, each order, into tractates and each tractate, into chapters. The six orders are listed below:-

1. Zeraim (Seeds)
2. Moed (Festivals)
3. Nashim (Women)
4. Nezikin (Damages)
5. Kodashin (holy things)
6. Toharoth (purification)

The order of Nezikin (damages) partly deals with criminal law. It consists of ten tractates. The First Tractate is further divided into three parts, known as:

(i) First gate (baba Kama)

This deals with the laws of damages and injuries and those regarding theft and robbery.

(ii) Middle gate (Baba Metzia)

(iii) Last gate (Baba Bathra)

Greek Law

In Greek period, normally there were various autonomous legal systems, applying only to the individual city states, but there was a common fund of Greek legal ideas also.

There was no corpus Juris in which the law was codified. Only a scattered mass of fragmentary traditions was present, that was known to be the source of law.

Sources Of Greek Laws:

we are bound to rely largely on the following sources:

- (i) Epi graphic and Literary records which include mainly the Judicial speeches of the Attic orators.
- (ii) Ancient commentaries on the literary records, often in the lexicons (Ilexia Segueriana, Pollux, Suidax and the Like)
- (iii) An ancient fragment on contracts, Theophrastus, is also available.
- (iv) Some available inscriptions, the chief of which is code of Gortyn, first discovered in 1884 and last edited by

Kohler and Ziebarth dating from about the 5th century A.D.

- (v) Draconic Laws or Draco's code on homicide in the revised version which also dates from the 5th century A.D
- (vi) Plato's Laws and to lesser extent his "Republic" may also be considered a source.
- (vii) The Statutes consisting of four classes:
 - (a) Statutes applying to the council.
 - (b) Statutes for all officials.
 - (c) Statutes for nine archons (these were most related to the criminal law).
 - (d) Statutes on foreigners, on commerce, on homicide and on mining.
- (viii) laws on solon by Aristotle.
- (ix) Legislation by various Greek legislators of later periods, such as:
 1. Charondas of Catana
 2. Zaleucus of Epizephyrian Locrians
 3. Lycurgus of sparta
 4. Draco and Solon of Athens
 5. Hierocles of Syracuse
 6. Pheidon of Corinth
 7. Philolaos of Thebes and many others.

The study of Greek legal tradition may be facilitated by distinguishing five great periods.

Five Greek Periods :

- (1) Ancient Greek period (upto the time Greece became a roman province)
- (2) Hellenistic period (upto the foundation of the Byzantine empire)
- (3) Byzantine period (upto the fall of constantinople)
- (4) Post Byzantine period (upto the Greek revolution of 1821, the war of Greek independence)
- (5) Modern period (from 1821 down to present times). we have, however, to confine our study to the early periods in order to have a glimpse of the development of Ancient Greek penal Law.

Greek Penal Law:

- (1) Greek criminal law was Originally based on the concept of vengeance.
- (2) There was no clear-cut distinction between criminal and civil law. Originally, only the injured person or his kin might take action but at a later date it became a general rule that every citizen might prosecute offenders. (This innovation was introduced by Solon. It was not based on a division of wrongs into criminal and civil)
- (3) Suits were regarded as either private or public, depending on whether the object was the redress of private wrong or the infliction of public punishment. Every preson was free in the choice of form of suit.
- (4) prosecution for murder might be undertaken only by the relatives of the victim or a group of several families.

- (5) The relatives as well as the dying victim had a right of forgiveness.
- (6) Consequence of crime (disfranchisement) visited not only upon the offender but also upon his children.
- (7) Distinction, however, was maintained between evil intent, negligence and accident.
- (8) Some of the penalties or punishments of Greek Penal law were.
 - (i) Death
 - (ii) loss of freedom by enslavement this applied only to non-citizens
 - (iii) Fines either fixed by state or by Judicial discretion
 - (iv) Confiscation of offender's wealth
 - (v) in few states whipping especially for children and for slaves who could not pay fine.
- (9) There was no concept of mutilation and imprisonment.
- (10) The penalties for offences varied with personal status.
- (11) Rape of a free man or woman was penalized by 100 staters.
- (12) Rape of an 'apetairos' (a free man who did not belong to a political society) was penalized by 10, and of a serf by 5, but if the violator was a slave, the penalty was double.
- (13) Thieves, exiles, state debtors and the like were arrested and detained. If the prisoners admitted guilt, the "eleven" (competent council and assembly or the magistrates) were authorized to inflict summarily the penalties, one of them being ordinarily death.

- (14) Subsequently, treason and conspiracy to commit treason, betrayal of a city, ship, army or fleet, unauthorized traffic with an enemy, the acceptance by a public man of bribes were also regarded crimes, liable to be tried regularly. Punishment to be awarded for these crimes was from a minimum of 500 drachmas or less upto the maximum penalty of Death which was ordinarily accompanied by confiscation of property.
- (15) Punishment for wilful murder was death or exile. Other kinds of homicide were regarded less serious.

Roman Law

Roman Law also possesses a long history extending from the Twelve Tables of the 5th or 4th centuries B.C. throughout the whole space of antiquity down to Justinian's time (6th century A.D.) and from Middle ages down to our times.

The available sources of Roman Law of the classical period, which is the main subject of our inquiry, are very scanty, yet it can be easily inferred that the outstanding representative of Roman classical law is the "private law". Criminal law does not seem to have much developed in those days.

My contention is supported by the statement of Fritz Schulz that Roman public criminal law at the end of the Republic was still far below the standard of civil law; two centuries of revolution and war had paralysed the administrative activity and had prevented the development of criminal law. (Classical Roman Law' p.573. Oxford' 1960)

A brief survey of some criminal acts and their penalties is given below :

1. Theft was known as 'Furtum' and robbery' as 'Rapina: These were criminal acts liable to punishment under the Twelve Tables. If a free person was evidently found guilty of theft' he was severely beaten and assigned for life to the person from whom he had stolen.
2. If the thief was a slave' he was beaten and put to death as stated in 'Classical Roman Law' p.582 After sometime' as a result of republic Humanistic movement' the death penalty in case of theft was abolished and substituted.
3. In case of theft' the action allowed to the injured party was Known as 'actio vi bonorum raptorum' for claiming four times the value of the thing' if it was brought within a year' if not' for the actual value only as stated by H. Ali in his Outline of Roman Law' p.231 (Madras' 1935).
4. To restrain adultery' death punishment with the sword was awarded as stated by W.A. Hunter' in his Roman Law' p. 1061 (Edinburgh).
5. If a man without force debauched a virgin or a widow who was leading an honourable life' the penalty two kinds :
 - i) If the offender was of honourable standing' the confiscation of half of his goods.
 - ii) If he was of low degree'' bodily chastisement and banishment. (See Roman Law' p.1061)
6. Murder of blood relations or being an accomplice to it: The penalty was as follows 'He (the murderer) is to be

sown up in a sack with a dog and cock and a viper and an ape and shut up in this cramped place of death to be thrown into either the sea if near or a river that all use of the elements he may begin even in life to lack and that the sky may be taken from his while he still lives and the earth when he is dead. (Hunter's Roman Law p.1062)

7. Penalty of forgery for slaves was death with the sword and for free men the penalty was deportation
8. The penalty of public or private violence was deportation if it was armed and confiscation of the third part of the offender's goods in case it was unarmed.
9. Embezzlement involved both the actual offender and his assistants. Capital punishment was awarded if they made away with state money during their official tenure. Other were awarded the penalty of Deportation. (P-1062)
10. Bribery was also held as a criminal act liable to punishment (p.1063)

Classification Of Punishments :

According to Roman Criminal Law, punishments were divided in to two classes:

- (1) Death punishment. The following forms of this punishment had been adopted and executed in various crimes.
 - a. Crucifixion of slaves.
 - b. Burning.

- c. Decapitation.
- d. Burying alive.
- e. Fight with wild beasts.
- ii. Deprivation of freedom for life.
- iii. Forfeiture of citizenship.

These sentences under-went many changes and alterations upto the period of Constantine.

(See Roman Law, p. 1064-1065)

(2) Non Capital Punishment.

- i. Relegatio (Transportation for life or for a lesser period to an island).
- ii. Exilium (Restriction to a particular place).
- iii. Deportatio (Transportation with confiscation of property).
- iv. Corporal punishment (flogging or beating with sticks)
- v. Imprisonment (for a specific time).
- vi. Fines.
- vii. Degradation of rank, as the removal of a person from the senate or from the curia of a municipality.
- viii. Suspension from practice, as of an advocate.

(3) Some crimes were known as "violation of absolute duties." These were of the following kinds:

- i. Offences against external security. For these crimes, the punishment of death, banishment or deportation was awarded, according to the severity of the offence.
- ii. Subversion of the government or Usurpation of its

prerogatives. These offences were known as treason (majestas) and they entailed the same punishment.

- iii. Offences against public tranquillity, such as sedition or conspiracy.

This introductory chapter has presented a very brief survey of the history of Pre-Islamic Penal Law, and the chapters that follow are a detailed discussion and exposition of Islamic Penal Law which is the main subject of this book.

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PART - 1**LAW AND CRIME**

- ★ *Western Concept of Law*
- ★ *Western Concept of Crime*
- ★ *Islamic Concept of Law*
- ★ *Islamic Concept of Crime*

CHAPTER-1**WESTERN CONCEPT OF LAW**

- 1) **WHAT IS LAW?**
- 2) **DIVERSITY OF CONCEPTS.**

WHAT IS LAW?

The question of crime is the subject of Criminal Law, which forms an independent branch of law as a whole.

Before we define and specify the nature of crime, it would be rather more appropriate to find the consensus of Western Scholars on the concept of law itself.

By going through the sources of Western legal system and juridical works of the Western scholars, one can easily understand, that even the question "What is Law" have not still been unanimously settled by them.

A remarkable diversity existance among the Western Scholars on the question of defining "Law". Every jurist has given a separate definition, which differs from others as regards its origin, sanction and nature.

The history of the definition of law originates in the 13th century, with the declaration made by St. Thomas Aquinas. He stated:-

(1) "Law is an ordinance of reason, for the common good, promulgated by him who has care of the community."¹

(2) The views of **St. Thomas** influenced the Catholic thought. An authoritative Catholic work recently issued almost repeats his view. It has stated that the Law is a regulation in accordance with reason promulgated by the head of community for the sake of the common welfare.²

(3) According to this view, the validity of law is based on **reason**, but it originates from the command of the head of community.

The same authority states further that the laws are the moral norms of action, binding in conscience, set up for a self-governing community.³ According to this definition the bases of validity of law is **morality**, it gets sanction from **human conscience**, and from where does it originate, has not mentioned specifically.

(4) To **Richard Hooker** (1554-1600) law appeared as "that which reason in such sort defines to be good that it must be done."⁴ This definition, as is obvious from its words, is ambiguous and not self-explanatory.

(5) **Immanuel Kant** (1724-1804) states that the law is the sum-total of the conditions under which the personal wishes of one man can be reconciled with the personal wishes of another man, in accordance with a general law of freedom⁵ This definition is again mere

theoretical and philosophical, without any pragmatic denotation.

- (6) **Savigny**, the great historical jurist of the 19th century defines Law as "the rule whereby the invisible border-line is fixed within which the being and the activity of each individual obtains a secure and free space."⁶

Both **Kant & Savigny** have mentioned the function and objective of the law instead of defining it. They have failed to maintain the distinction between the objective of law and the 'law' itself.

The supporters of **Savigny** have propounded the **Sociological Concept of Law**. **Enger Ehrlich** is one of the modern exponents of this view.

According to them, the law is the collective Conscience of the Society. While emphasising social customs and traditions, they have again failed to distinguish between the source or sanction of law and the "Law" itself.

- (7) **Blackstone**, one of the later English jurists, says that Law, in its most general and comprehensive sense, signifies a rule of action, applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Moreover, defining the law in its strict technical sense, he says that Law is a rule of action which is prescribed by some superior, and which the inferior is bound to obey.⁷

This concept of law is also a complete negation of the concepts appreciated by Kant and Savigny.

- (8) **John Austin** defines a law as a rule laid down for the guidance of an intelligent being by another intelligent being having power over him.⁸

It means that the law, according to him is that rule of action which is made by a ruler for his subjects.

- (9) **Holland** declares that the laws are proportions commanding the doing of or abstention from certain classes of action, disobedience to which is followed by some sort of penalty or inconvenience.⁹

- (10) **Holland**, at another place, slightly differing from **Austinian** view, says that Law is "formulated and armed public opinion or the opinion of the ruling body."¹⁰

- 11) **Sir Fredrick Pollock** defines the law "as a rule of conduct binding on members of a commonwealth as such"¹¹

The definitions given by **Holland** and **Pollock** do not refer to the origin and sanction of law, hence they are incomplete, imperfect and inconsistent also with some of the concepts given by other scholars.

- 12) **Sidney Hartland** says in this context, "Law is a set of rules imposed and enforced by a society for the conduct of social and political relations."¹²

On the basis of this definition, we cannot regard the test of sanction as satisfactory, and we are driven back upon that of recognition. Therefore, this definition again provides a different view from the concepts given by **Austin** and **Holland**.

- 13) **Professor G.C.Lee** says, "Law is that body of customs, enforced by the community, by means of which man's gross passions are controlled and his conduct toward his fellow-creatures, regulated."¹³

He has exclusively concentrated on customs, which leave out of account the formal enactments and the statutes that are "laid" or "fixed", which seems to have been the essential meaning of legislation and its equivalent in other languages. This concept is again limited and inconsistent with the concepts given by many other Western Scholars.

- 14) According to **Salmond**, "Law is defined as the body of principles recognised and applied by the state in the administration of Justice."¹⁴

If origination and formulation of the law is exclusively based on the recognition and application by the State, that is, the ruling party, as stated by Salmond, Then the unjust and ulterior motives of the ruling class should also be acknowledged as "the law".

These are a few specimens taken from a vast legal literature, which suffice to illustrate the laborious efforts that

have been made through the ages to answer the question "What is law"?

Diversity Of Concepts

Robson, W.A., analysing this situation, states, "There is infinite diversity among the answers and no fundamental agreement between the writers. Much of the difficulty and confusion is no doubt due to the desire to give a single answer to a complex question."¹⁵

At another occasion, tracing the origins of law, he admits the fact in the words, "If it is difficult to define law in a satisfactory manner, it is still harder to find the beginnings of it. The origins of law are shrouded in obscurity and are, perhaps, impossible to discover."¹⁶

The main reason why the Western Scholars are unable to attain common agreement and unanimity on the exact concept of law is that they have neither the comprehensive totality of human life and its nature before them nor any persistent system and criterion of the recognition of human values, secular and spiritual.

An unchanging and perpetual concept of law cannot be originated and formulated with a distorted vision of human nature, not comprehending all of the demands of its potential and actual aspects.

All of these efforts have been made in the direction of "Trial and Error". If they had based their research on

uncorrupted divine conceptual "ground norms" and revealed knowledge of basic postulates, they would certainly have reached a different conclusion.

Their perception was blind and their conception, empty. Therefore, they were bound to indulge in the conflict of ideas on the issue of defining the law. In a modern Western Society, where the legal knowledge originates from mere worldly sources, which are themselves always subject to change and alteration, how was it possible that a persistent standard of defining the law could be achieved?

Whenever the vision of Western Society regarding their "values" is changed, the concept of law is altogether shaken. This process of constant instability can not be checked unless they accept the universal uncorrupted Qur'anic revelation as the sources, the origin, the sanction and the standard of validity of the law.

That's why Qur'an declares the fact in the words:

أَفَحُكْمُ الْجَاهِلِيَّةِ يَبْغُونَ وَمَنْ أَحْسَنُ مِنَ اللَّهِ حُكْمًا لِقَوْمٍ يُوقِنُونَ ۝

(Do they then seek after a Law (command) of Ignorance? But who for a people whose faith is assured, can give better Law than God?)¹⁷

Cicero,¹⁸ stating the opinion of the wisest men of his day, observed that law is neither contrived nor decreed by man it is an eternal principle which rules the whole universe, commanding what is right and prohibiting what is wrong

Hence, law is no mere artefact but is the divine reason bestowed by the gods on the human race.

This position today, academically, is possessed only by *Islamic System of Law*, about which **Sir Ronald Knyret Wilson** is obliged to say, "In Islam, the most conspicuous fact about Muhammad (peace be upon him) is that he was not merely a divine prophet but also a temporal ruler who governed, judged, punished and legislated. After the great flight in A.D 622 to **Madina**, when **Muhammad** (peace be upon him) acquired political power, he was sovereign as well as divine prophet, but only sovereign because of his prophetic office. The mosque was his council-chamber and hall of audience, the Friday sermon, his opportunity for declarations of policy and when he uttered his most far-reaching injunctions, he spoke as the very mouth-piece of the deity."¹⁹

In addition to the dispute existing among western jurists, another diversity relation to the concept of law is that of **Positivism and Idealism**.

The positivistic view is mainly concerned with what law is, and the idealistic view deals with what law ought to be.

John Austin, Hans Kelsen and Roscoe Pound are the main supporters of positivistic definition of law, whereas **Bryce, Gray, Dicey, Lauterpacht, Salmond and Friedman** criticize this view and support the idealistic definition. This fact can be better substantiated by studying the object of English Jurisprudence.

The **expositive aspect** of Jurisprudence deals with what the law actually is whereas the **critical aspect** deals with what the law ought to be and with the nature of the object law. Precisely speaking, the first aspect denotes the positivistic view of law and the second expounds the idealistic view.

The Western legal science has failed to reconcile between Positivism and Idealism. Both views are prone to conflicts, tensions and discrepancies. Idealism, the main subject of English Jurisprudential study is completely incapacitated to offer any perpetual of specifying the object.

The issue of object of law has also not been explicitly stipulated by the Western Scholars.

Lord Wright States :

"Law is not an end in itself. It is a part of the political system of a nation and it owes its existence to the objects of the Government. --- In the light of my experience and study, I have reached the conclusion and believe that the first and basic object of law is the search for justice."²⁰

But the question of justice in Western Philosophy is also prone to various inconsistent theories of metaphysics and philosophical reasoning, which always function in the direction of "Trial and Error". Therefore, it has remained even-changing and subject to evolutionary contradistinction.

Since the Western standards of human life, moral values, governmental objects, ethical obligations, idea of

justice and origins, sources and principles or legislations are always changing from age to age, no persistent characterization of law in Western Jurisprudence is possible

NOTES

1. Robson, W.A. Civilization and the Growth of Law, p.3.
2. Catholic Encyclopaedia, "Law" Vol.IX, p.53
3. Ibid.(R.W.& A.J. Carlyle, A History of Medieval Political Theory in the West, (Vol.V, Ch. 4).
4. Robson, W.A. Civilization and Growth of Law, P.4.
5. Ibid.
6. Ibid, P.5.
7. Ibid.
8. Ibid.
9. Holland, T.E. Jurisprudence, P.23
10. Ibid., P.90.
11. Pollock, S.F. First Book of Jurisprudence, P.29
12. Encyclopaedia of Religion and Ethics, Vol.XII, p.811
13. Lee, G. C. Historical Jurisprudence, p.5.
14. Salmond, Jurisprudence, p.36.
15. Robson, W.A. Civilization and the Growth of Law, p.7.
16. Ibid., p.10
17. Qur'an 5.50
18. Robson, W.A. Civilization and the Growth of Law, p.3.
19. Wilson, R.K. Introduction to the Study of AngloMuhammadan Law, p.11-15.
20. Lord Wright, Interpretation of Modern Legal Philosophies, p.794.

CHAPTER -II**WESTERN CONCEPT OF CRIME**

1. Problem of definition.
2. Various standards of defining Crime.
3. Difficulty of Western Criminal Law.

Problem Of Definition

The word **crime**, according to the Western scholars, has no specific and exact definition to be regarded as perfect. The task of defining crime and specifying its value in a strict technical sense has always been a matter of great difficulty to them.

The law, as stated by **Freedman**, is not generally concerned with the highest standards of morality but with the minimum standards that can be made the norm of general conduct.

In the light of this statement it can be easily concluded that crime is the violation of the minimum standards of morality. Lack of a unanimous technical definition of crime means that the Western scholars have no consensus even on the minimum level of moral values. Their present position of academic frustration is likely to continue in future also because

they have no persistent standard of ethics and morality which may be acceptable to all of them.

This fact gets further support by **Kenny's view**, when he says, "The truth appears to be that no satisfactory definition has yet been achieved, and that it is, indeed, not possible to discover a legal definition of crime which can be of value for English Law."²

According to **Turener**, "the earliest reference to the word 'crime' appears in the fourteenth century, and there is not any more precision in its meaning than there was originally in that of 'felony': it conveyed to the mind something disreputable, wicked, or base. It stood for any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interests, as endangering its safety stability or comfort. The offences of this kind are termed crimes and the procedure taken in the court in respect of them is "Criminal proceeding".³

Characteristics Of Crime

Kenny⁴ has mentioned that nearly every instance of crime presents all of the three following characteristics:-

- (1) that it is a harm, brought about by human conduct, which the sovereign power in the state desires to prevent;
- (2) that among the measures of prevention selected is the threat of punishment;

- (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.

Various Standards Of Defining Crime

Keeton⁵ has prescribed three main types of standards to define crime. These are:-

1. Public Injury test.
2. Mens rea test.
3. Sanctions test.

Various Western criminologists have been trying to define the nature and characteristics of crime in the light of these principles.

(1) **Black-Odgers**, on the basis of first standard, defines crime as "a wrongful act of such a kind that the state deems it necessary, in the interest of the public, to repress it; for its repetition would be harmful to the community as a whole."⁶

(2) **Holdsworth**⁷ defines crime on the basis of second standard, that is, the necessity of the condition of **mens rea**. According to him, any illegal act of a person does not constitute a crime unless it is performed with a criminal mind.

Professor Kenny,⁸ discussing the maxim, "**Et actus non factus reum nisi mens sit rea**," states that there are two necessary elements which constitute crime, a **physical element**

and a mental element.

According to this principle, no man may be found guilty of crime and therefore, legally punishable, unless in addition to having brought harm which the law forbids, he had, at that time a legally reprehensible state of mind.

(3) On the basis of third standard, **Kenny** again celebrates the definition of crime, "a wrong whose sanction is punitive and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all."⁹

Now some more definitions of "crime" are produced to comprehend its concept as appreciated by the Western criminologists.

(4) **Austin & Stephen** define it as "an act or omission that the law punishes."¹⁰

This idea the general concept of crime adopted by most of the scholars. It is precisely said that crime is the human behaviors punishable under an established Criminal Law.

Following the same idea, some of the penologists regard it as "an anti-social form of human behavior."

Grygier has also expressed the same view, stating,

(5) "A crime is an act for which criminal legislation prescribes sanctions aimed at the protection of society, which includes the offender."¹¹

(6) **William Blackstone** states, "Crime is an act committed or omitted in violation of a public law forbidding or commanding it."

He, further explaining the term 'public law' appreciates that the violation of the public rights and duties due to the whole community is denoted as crime.

He, in "Commentaries on the Laws of England" Vol.IV, states, that the crimes are such breaches of law as injure the community.

This idea is based on the concept of Ancient Roman authors who had called crimes "delicta publica".¹³

Difficulty Of Western Criminal Law

If we observe critically the concepts and definitions produced by various scholars, we shall find one thing common, that none of them has been able to specify, with certainty, the public law and the social behavior, violation of which is to be considered criminal conduct.

No persistent standard has been prescribed on the basis of which one's behavior is to be regarded as 'anti-social or illegal. Who is to determine and in accordance to which principle it is to be determined that this act is punishable and that one, not?

These questions have remained unattended and unanswered, because the Western legal system does not possess any persistent moral standard of its own.

This view is neither biased nor based on lack of information, because Mannheim, an eminent criminologist and a well known authority on Western Law, appreciates the same view.

He, summarising and concluding the discussion on crime, states, "If we think it unsatisfactory merely to say, *Crime is what is punishable according to the Criminal Law*, if we enquire "but why is just this kind of behavior punishable and that one not? We shall inevitably have to turn to the norms of religion, custom and morality."¹⁴

Mannheim, discussing religion, custom and morality, again appreciates in the words, "We have seen that, with all due reservations, *Those three great non-legal forces of controlling human behavior can very often decisively determine not only the contents of criminal legislation but also the ways in which men act and react to the systems of law and society under which they have to live.*"¹⁵

In order to attain a persistent standard for appreciating the definite nature of crime, which the Western Law is still lacking, Mannheim has suggested that we should turn to the norms of religion, custom and morality to which he gives the name of '**Three great nonelegal forces of controlling human behavior.**'

The fact that Western legal system does not possess any standard of morality of its own, has been undoubtedly established through this contention. That's why the concept of crime is fluctuating in that system. In order to solve the problem they have referred the case to the above-mentioned sources, considering religion and morality separate from each

other because of their secular approach towards religion. The Western scholars and even the Orientalists are unable to understand the comprehensiveness and all-embracing character of religion.

The distinction between Church and State has brought them to the conclusion of unending duality of religious and secular aspects of life. According to them *custom* and *morality* are altogether secular forces of human society. And *religion*, having absolutely separate existence, scope and jurisdiction has nothing common with them. On the basis of this limited vision of religion, they have never been capable of comprehending the extensive and universal jurisdiction and scope of applicability of Islam as a complete of life.

That's why, according to them, religion, custom and morality are external forces in relation to the entity of law, because each of them originates from separate sources. Whereas, according to Muslim view, Islam is a perfect whole, and all forces of human life, including law, custom and morality, indiscriminately derive their sanction and validity from it. Therefore, nothing is external to the entity of Islam. Thus, Islam has provided the eternal, universal and everlasting concepts of morality from which the law has derived its persistent and unchanging standards.

This shortcoming of Western Law can be easily estimated by the justification, given by **Jones, H.**, in the words, *"That can be no doubt that the criminal law is relative both to time and place. Thus what is time and place.*

Thus what is forbidden by the law changes from

year to year and is impressively transformed over longer periods. - Can such a fluctuating and indefinite thing, as the criminal law form the subject of scientific enquiry, or give rise to general and permanently valid scientific laws?"¹⁶

Mr. Jones has denied the Western Criminal Law as the stature of a scientific study. Right or wrong, these are the comments of: one of the Western authorities on law.

It is also an undoubtedly admitted fact that the idea of human and moral values in Western Thought is, in itself, relative both to time and place and hence there can be no universal and spermanent earthier to determine whether a particular moral value is to be preserved by law or not? This varying standard of moral values has created such a critical situation that a value that is preserved today is liable to be extinguished tomorrow. This uncertain and persistently wavering condition has rendered all the branches of Western Criminology indefinite, imperfect and unscientific.

This conclusion is: very well, supported by the fact that has been pointed out by **Hurwitz**, an eminent Western scholar, in the words, "That such offences as blasphemy, swearing, adultery and homosexuality, were once crimes according to Danish Law but no longer so."¹⁷

Moreover, homosexuality between men which was a serious offence in England, is now legally ignored, as also in France and in parts of Scandinavia.

This inherent self-contradiction in the Western System of Moral Principles has been discussed by **Karl Mannheim** and

he has aptely and appropriately called it "a Crisis of Values in our Society."¹⁸

This is why the Western Criminologists have absolutely failed to lay down any permanent principles of Penal Law because they do not have any comprehensive and unchangeable code of ethical principles and moral values.

Henting, talking of this crisis of his society, states, "It is, however, impossible for criminal law to be based on a principle, which appears to contradict itself and has not the character of permanency. So we must embark on the search after a principle that is independent of changes of time and place." ¹⁹

Henting has arrived at the same conclusion that **Mannheim, Hurwitz and Jones** had.

Therefore, the Western Law is a complete failure in defining crime, specifying its nature and appreciating its permanent standard and character. Most of the enlightened Western Scholars, in order to provide permanency and uniformity to the standards of their Criminal Law, are, now in search of a constant and unchangeable foundation, which they want to get from religion and morality. Since, their vision of religion is suffering from distortion, and their concept of morality is facing a crisis of values, they have no choice but to depend on the religious and moral standards prescribed by Islam, which are eternal and universal in their character.

NOTES

- 1- Friedmann, W. Legal Theory, p.315
- 2- Turner, J.W.C Kenny's Outlines of Criminal Law, p.1.
- 3- Ibid., p.2.
- 4- Ibid., p.5.
- 5- Keeton, G.W. The Elementary Principles of Jurisprudence, p.309-310
- 6- Blake-Odgers, Common Law, Vol.1, p.104.
- 7- Holdsworth, History of English Law, Vol. III, p.374.
- 8- Turner, J.W.C Kenny's Outlines of Criminal Law, pp.13-14.
- 9- Kenny, C.S. Outlines of Criminal Law, p.16.
- 10- Mercier, C. Crime and Criminals, p.70.
- 11- Mcgrath, W.T. Crime and its Treatment in Canada, p.18.
- 12- Kenny, C.S. Outlines of Criminal Law, pp.3-4.
- 13- Kenny, C.S. Outlines of Criminal Law, p.5.
- 14- Mannheim, H. Comparative Criminology, Vol. 1, p.65.
- 15- Ibid., p.67.
- 16- Jones, H. Crime and the Penal System, pp.3-4.
- 17- Ibid., p.4.
- 18- Ibid., p.5.
- (Quoted from Mannheim, K. Diagnosis of Our Time)
- 19- Hentig, H.V. Punishment: its origin, purpose and Psychology, p.127.

CHAPTER -III

ISLAMIC CONCEPT OF LAW

Robert Bolt remarks in the play 'A Man for All Seasons' that the law is a cause-way on which, so long as he keeps to it, a citizen may walk safely. John F. Kennedy said in a televised address: "Our nation is founded on the principle that observance of the law is the eternal safeguard of the liberty and defiance of the law is the surest road to tyranny." He draws attention to two aspects of law: the positive as well as the negative aspect. The positive aspect is conformity to law, the negative aspect is violation of law. Conformity to law is a guarantee of liberty, defiance of law is a passport to tyranny. But a reference to these two aspects eclipses the most vital aspect of law: the inviolability of law itself. How can one be sure about the authenticity of law one is expected to obey or fears to violate? What are its inalienable essentials? These questions remain unanswered and stick out like stale cherries on a ginger cake. The obedience or defiance of law are secondary issues; the primary issue is its essence, the origin of its nature, the inescapable ingredients of its composition. The secondary issues derive from the primary issue. They are relevant only when the relevance of the primary issue is first determined and categorically established. If any suspicion is cast on the genuineness of the primary components, the secondary components become automatically dubious. Thus the main stress is placed on defining the essence of law. Once the essence is defined, the classification of its substance becomes a more manageable affair: the validity of legal substance is contingent on the validity of legal essence. This procedure is backed up even

by the existentialist justification that essence precedes substance though the precedence in this case is stripped of metaphysical sanctions, and places greater premium on substance. Islamic law is superior to other forms of law because its essence is divinely determined. Law in Islamic terminology is signified by the word 'hukm' (**حكم**) or hukm-i-shar'i (**حكم شرعي**) which is defined as

الحكم ما ثبت بخطاب الله المتعلق بافعال المكلفين

“Law is a rule of human conduct established by a communication from God, expressive either of demand or indifference or mere declaration.”¹

The term 'hukm' (**حكم**) is not a literal signification of the words and letters contained in the commandments of Allah communicated in the form of Qur'an. It is the rule or legal value established by the divine revelation as it has been clearly elaborated by the Muslim jurists:

ان الحكم المصطلح ما ثبت بالخطاب لاهو

“The 'hukm', in its precise technical sense is that which is established by a communication, not the communication itself.”²

Thus there is no direct equivalence between legal value and divine communication. The latter only plays a determining role in defining the nature of legal value or in regulating rules and laws.

1 Sadr-ush-Sharrah: At-Ta'uzih, pp. 36-40.

2 a) Ibid., p. 40.

b) Ta'atuzani: At-Talweeh, p. 40.

This subtle distinction is sustained and reinforced by Mahalli in *Sharh-o-Jam-ul-Jawame* (شرح جمع الجوامع), by Qazi Azd-ud-Din in *Shar-ul-Mukhtasar* (شرح المختصر), by Asnawi in *Sharh-ul-Minhaj* (شرح المنهاج), by Amidi in *Al-Ahkam-fi-Usool-il-Ahkam* (الاحكام في اصول الاحكام), by Fazil Qara-baghi, Allama Bihari Qanuji and a large number of authorities on Islamic jurisprudence.

If legal significance is attached only to the explicit text of divine articulation, then all legal rules and juristic values derived from Prophetic Sunnah (سنت نبوی ﷺ) and definite Ijma (اجماع قطعی) fall outside the scope of law. But the only standard definition of law (حکم) in Islamic legal science is that 'any rule established directly or indirectly from a communication of Allah, which pertains to human acts whether it is demand, a choice between alternatives (تخییر) or a simple declaration (وضع) is known as hukm or law.

Thus the 'law' is a body of rules framed to regulate human conduct and established from (1) Qur'an which is an explicit and manifest version of Allah's communication (2) Prophetic Sunnah which is an implicit version, practical illustration and physical demonstration of Allah's communication and (3) Definite Ijma which is an authoritative device for the inference and rational explication of divine intentions and declarations.

Ingredients of law:

In the light of the three-fold derivation of law, it comprises four elements:

(1) Hakim (حاکم) or law-giver: it means Share (شارع)

- (2) Hukm (**حکم**): it means legal rule or value derived from divine communication.
- (3) Mahkum bihi (**مَحْكُومٌ بِهِ**) or Mahkum feeh (**مَحْكُومٌ فِيهِ**): it means objectives of the law.
- (4) Mahkum alayh (**مَحْكُومٌ عَلَيْهِ**): it means subjects of the law

(1) Hakim (Law-giver):

God and His holy Prophet (peace be upon him) possess an exclusive lawgiving authority in Islam. God is the Hakim in the absolute sense of the word and the holy Prophet (peace be upon him) exercises the law-giving divine authority manifestatively and representatively as he is the direct recipient of divine powers and final agency of His legislative sovereignty.

Therefore, whatever is ordained or disordained by the holy Prophet (peace be upon him) is credited with the status of a divine injunction as the holy Prophet (peace be upon him) represents nothing but the will and intention of God. Qur'an supports this view in these words:

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا

"And whatever the Apostle gives you, take it; and whatsoever forbids you, abstain from that."¹

At another place, it declares:

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ لَا يَجِدُوا فِي أَنفُسِهِمْ حَرَجًا مِّمَّا قَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا

“But no, by your Lord, they cannot be believers unless they make you judge (final authority) in all disputes between them and find in their hearts no resistance against your decisions and submit with full submission.”¹

That is why obedience rendered to the holy Prophet (peace be upon him) is actually obedience rendered to God, as there is no other way to render submission to God. The holy Prophet (peace be upon him) is the link between man and God as he is the manifestative divine presence on earth. The Prophetic statements, decisions and formulations are, therefore, the visible representations of divine intentions and not the self-styled articulations of a being of flesh and blood. The divine message is exclusively mediated through the personality of the holy Prophet (peace be upon him) as he is the only human being among the Muslims divinely blessed and empowered to reveal God’s will to human beings. Qur’an enunciates:

مَنْ يُطِيعِ الرَّسُولَ فَقَدْ أَطَاعَ اللَّهَ

“He who obeys the Messenger, obeys God indeed.”²

It declares at another place:

قُلْ إِنْ كُنْتُمْ تُحِبُّونَ اللَّهَ فَاتَّبِعُونِي يُحْبِبْكُمُ اللَّهُ وَيَغْفِرْ لَكُمْ ذُنُوبَكُمْ

“Say, if you love Allah, follow me; then will Allah love you and pardon you.”³

1. Qur’an, 4:65

2. Qur’an, 4:80

3. Qur’an, 3:31

This concept is elaborated by Ibn-i-Taimiyyah, a renowned Muslim scholar:

فقد اقامه الله مقام نفسه في امره ونهيه واخباره وبيانه
فلا يجوز ان يفرق بين الله والرسول في شي من هذه الامور

“Certainly, Allah has appointed the holy Prophet (peace be upon him) as His surrogate at His own place in case of command of commission, command of omission, disclosure of the facts and interpretation of the laws. Hence, discrimination between the status of Allah and that of the Prophet (peace be upon him) with reference to any of these issues is absolutely prohibited in Islam.”¹

Understanding the basic concept and legislative status of Prophethood in Islam, one can properly appreciate the reason. why, in Qur'an single indicative has been used for two nouns one signifying the name of God and second that of the holy prophet (peace be upon him).

It is stated:

وَاللَّهُ وَرَسُولُهُ أَحَقُّ أَنْ يُرْضَوْهُ إِنْ كَانُوا مُؤْمِنِينَ ۝

“And God and His Prophet (peace be upon him) has a greater right: they should please Him, if they are believers.”²

Here 'hu' (هُ) is the indicative, signifying the sense of one, but has been used to indicate both God and His Prophet (peace be upon him).

1. Ibn-i-Taimiyyah: *As-Sarim-ul-Maslool*, p.41

2. *Qur'an*, 9:62

At the occasion of Bay'at-ur-Rizwan in Hudaibiyyah, when the Companions placed their hands in the Prophet's hand and swore their absolute obedience and loyalty to him. God declared the fact in the words:

إِنَّ الَّذِينَ يُؤْذُونَ اللَّهَ وَرَسُولَهُ لَعَنَهُمُ اللَّهُ فِي الدُّنْيَا وَالْآخِرَةِ

“Verily those who plight their fealty to you, do no less than plight their fealty to God: The Hand of God is over their hands.”¹

Therefore, the act of rendering complete submission to the person of the holy Prophet (peace be upon him) is declared to be direct submission to God and the hand of holy Prophet is stated to be the hand of God.

The same concept is expressed in the Qur'anic verse:

وَمَا يَنْطِقُ عَنِ الْهَوَىٰ . إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ .

“Nor does the Prophet (peace be upon him) speak out of his own desire (whatever he utters) is in fact no less than revelation, sent down to him.”²

This Qur'anic verse clearly establishes total identification between the human utterance and the divine articulation. It declares, without any suggestion or implication of ambiguity, that there is no distinction between the speech of God and that of His Apostle. Since the human – divine equipollence is extrapolated by Qur'an itself, there is absolutely no scope left for any Muslim to entertain doubts or suspicious on this count, as to doubt the veracity of the Qur'anic verse is in fact to doubt the very existence of God.

1. Qur'an, 48:10

2. Qur'an, 53:3,4

The verse also provides a measure of the Prophetic stature in divine estimation; it equalizes the human and the divine status and indirectly stresses the highest place the holy Prophet (peace be upon him) enjoys among human beings as God has not conferred this super-concession on any other being except the holy Prophet (peace be upon him).

Moreover, God owns the acts of the Prophet as if He Himself has performed them. Qur'an declares:

وَمَا رَمَيْتَ إِذْ رَمَيْتَ وَلَكِنَّ اللَّهَ رَمَىٰ

“And you did not throw when you threw, but it was Allah who threw.”¹

This fact is further substantiated by a number of other Qur'anic verses which unexceptionally attach the Prophet's (peace be upon him) name to God's name to describe the nature of the relationship between 'uluhiyyat' (divinity) and 'risalat' (Prophecy). Some of the verses which stress the exceptional nature of this relationship are given below:

إِنَّ الَّذِينَ يُؤْذُونَ اللَّهَ وَرَسُولَهُ نَعْنَهُمْ اللَّهُ فِي الدُّنْيَا وَالْآخِرَةِ

“Surely, those who annoy Allah and His Apostle, Allah has cursed them in this world as well as in the world to come.”²

ذَلِكَ بِأَنَّهُمْ شَاقُوا اللَّهَ وَرَسُولَهُ وَمَنْ يُشَاقِقِ اللَّهَ فَإِنَّ اللَّهَ شَدِيدُ الْعِقَابِ

1. Qur'an. 8:17;

2. Qur'an. 33:57;

“That is because they have opposed Allah and His Apostle. And surely Allah is severe in retribution to anyone who opposes Him and His Apostle.”¹

إِنَّ الَّذِينَ يُحَادُّونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ فِي الْأَذَلِّينَ

“Certainly those who oppose Allah and His Apostle will be among the lowest.”²

لَمْ تَعْلَمُوا أَنَّهُ مِنْ عَادِدِ اللَّهِ وَرَسُولِهِ فَإِنَّ لَهُ نَارَ جَهَنَّمَ خَالِدًا فِيهَا

“Have they not known that anyone who opposes Allah and His Apostle, for him is the fire of Hell wherein he shall abide.”³

قُلْ لَأَنْفَالُ اللَّهِ وَالرُّسُولِ — وَأَطِيعُوا اللَّهَ وَرَسُولَهُ إِنْ كُنْتُمْ مُؤْمِنِينَ

“Say: the spoils belong to Allah and His Apostle. Therefore, obey Allah and His Apostle if you are believers.”⁴

قُلْ أَطِيعُوا اللَّهَ وَالرُّسُولَ فَإِن تَوَلَّوْا فَإِنَّ اللَّهَ لَا يُحِبُّ الْكٰفِرِينَ

“Say: obey Allah and the Apostle: if they turn away, then remember Allah does not like the disbelievers.”⁵

يٰۤاَيُّهَا الَّذِينَ آمَنُوا اسْتَجِيبُوا لِلَّهِ وَلِلرُّسُولِ إِذَا دَعَاكُمْ لِمَا يُحْيِيكُمْ

1. Qur'an, 8:13

2. Qur'an, 58:20

3. Qur'an, 9:63

4. Qur'an, 8:1

5. Qur'an, 3:32

“O you who believe! Respond to Allah and the Apostle when he calls you that he may give you life.”¹

Here grammatical singularity expresses indivisibility of the human and the divine; it emphasizes the inseparability of God and His Apostle; it indicates the unity and identity of their utterance and articulation; it obliterates any sense or feeling of duality; it involves a complete coalescence of their separate identities. They should be accepted as the one and the same.

فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ

“If any dispute arises between you on an issue, refer it to God and Prophet (peace be upon him) – for final verdict.”²

مَنْ يُطِيعِ اللَّهَ وَرَسُولَهُ فَقَدْ فَازَ فَوْزًا عَظِيمًا .

“And whoever obeys Allah and His Messenger shall surely attain a mighty success.”³

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ظَلَّ ضَلَالًا مُبِينًا .

“And it is not fitting for a believer, man or woman, to have any reservation about a matter when it has been decided by God and His Apostle. If anyone disobeys God and His Apostle, he is indeed on a clearly wrong path.”⁴

1. *Qur'an*, 8:24

2. *Qur'an*, 4:59

3. *Qur'an*, 33:71

4. *Qur'an*, 33:36

All of these Qur'anic verses clearly establish the fact that the law-giving authority vests simultaneously in God and His holy Prophet (peace be upon him). There is no difference, separation, disharmony and inconsonance between the two. There is no bifurcation or polarization of legislative authority in Islam. It is actually undifferentiated: it is really held by God but exercised by His Apostle to fulfil political, constitutional and legal requirements. In this sense, the holy Prophet (peace be upon him) is the sovereign of the Muslim Ummah and every Islamic state for all times to come, and all the Muslim rulers are his vicegerents, as it is elaborated in the words of Ibn-i-Khaldun:

انه نيابة عن صاحب الشريعة في حفظ الدين و سيامة الدنيا

“Khilafat is the vicegerency of the holder of Sharia (the Prophet) for the preservation of religion and the regularization of worldly affairs.”¹

He further states:

و اما تسميته، خليفة فلكونه يخلف النبي ﷺ في أمته

“The ruler of an Islamic state is known as Khalifah because he acts as vicegerent of the holy Prophet (peace be upon him) among his followers.”²

(2) Hukm (legal value):

The second ingredient of law in Islam is the legal value established directly or indirectly from the revealed communi-

1. *Ibn-i-Khaldun: Muqaddamah*, pp. 134, 153, 154.

2. *Ibid.*

cation. It may be designated as 'Shar'i Value' also. Most of the Muslim jurists believe that there are five hundred Qur'anic verses which expressly prescribe Islamic legal values. These are known as 'Ayat-ul-Ahkam'. There are approximately three thousand Prophetic traditions which directly and expressly relate to modes of human conduct. They are known as 'Ahadeeth-ul-Ahkam'. This numbering is based on specification of express provisions. In addition to these five hundred Qur'anic verses, there are another two thousand verses relating to acts of omission and commission. It means that the total number of Qur'anic verses which directly or indirectly possess legal potential comes up to two thousand and five hundred. The same applies to Prophetic traditions. Their number runs into thousands and they directly or indirectly provide legal material for the formulation of Islamic laws. Islamic jurisprudence divides law into two categories in the light of standard definition of law or hukm :

(i) Primary or defining law : **حكم تكليفي**
It is also known as Hukm-i-Taklifi

(ii) Declarative or Declaratory law : **حكم وضعي**
It is also known as 'Hukm-i-Waz'i

(i) Hukm-i-Taklifi:

It is defined as:

الحكم التكليفي هو ما اقتضى طلب فعل من المكلف ، او كفه عن فعل ، او تخبيره ، بين الفعل والكف عنه "

"Primary or defining law is the law which requires demand of commission or omission of an act (from a person legally capable) or which gives him the dis-

cretionary option between the commission or omission of a particular act.”¹

The definition makes it clear that the law of Shariah, on the basis of the nature of its content, is either in the form of a demand, discretion or mere declaration. The first two forms i.e., demand (طلب) and discretion are contained in the defining law or ‘Hukm-i-Taklifi’, and the third form of mere declaration is contained in the declarative law or ‘Hukm-i-Wazi’.

Demand: طلب

In order to understand the nature of ‘Hukm-i-Taklifi’ it is desirable to split demand into its positive and negative aspects. The positive demand is the demand of commission of an act. It is known as ‘amr’ (امر) also. The negative demand is the demand of omission of an act. It is also known as nahi (نهى). The commandments of Salat (prayer), Soum (fasting), hajj (pilgrimage), Zakat (obligatory charity), Ada-i-Amanat (discharge of trusts and obligations), and all other secular or religious acts, rights and obligations which are to be positively performed, exercised and discharged fall within the category of defining laws. The prohibitory laws fall within the same groove because they are also based on the demand of omission of an act. For example, the prohibition of murder, adultery, drinking, theft and all other forbidden acts are also covered by the category of the defining law. The implementability of these laws is the sole justification of their formulation; they are not motivated by other considerations which are only marginally relevant to

1. (a) *Amidi: Al-Ihkam fi Usul-il-Ahkam, Vol. 1, p.135 ff*
- (b) *Ghazali: Al-Mustafa, Vol. 1, p.65 ff*
- (c) *Abdul Wahab Khalaf: Usul-ul-Fiqh, p.74 ff*

their framing.

Discretion: تخيير

All laws which provide the option of choice between two alternatives are of the nature of 'takhyeer'. Their designation is self-explanatory as man has the freedom and authority to commit or omit them. All laws which are in the nature of 'Ibahat' (اباحت) and are known as 'Mubahat' () fall within this category.

'Ahkam-i Taklifi' or the defining laws are further classified into eleven grades on the basis of the strength of demand and the scales of value contained in the demand:

- | | |
|------------------------------|---------------|
| (a) obligatory | فرض |
| (b) imperative | واجب |
| (c) mandatory recommendation | سنت مؤكده |
| (d) directory recommendation | سنت غير مؤكده |
| (e) commendable | مستحب |
| (f) forbidden | حرام |
| (g) condemned | مكروه تحریمی |
| (h) disapproved | اساءت |
| (i) improper | مكروه تنزیهی |
| (j) uncommendable | خلاف اولی |

(k) indifferent, permissible or discretionary

جائز و مباح

The grades (a) to (e) and (f) to (j) form opposite pairs respectively. Each one of them in opposition to its counterpart or opposite number possesses the same strength of demand but is different in direction. The grade (k), which is optional, is common to both categories. It may be committed or omitted, and the legal consequence of its direction also follows the same pattern.

(ii) **Hukm-i-Wazi or declaratory law:** حکم وضعی

It is defined as:

الحکم الوضعی هو ما اقتضى جعل شيء سبباً لشيء او شرطاً له او مانعاً له

“Declaratory law (is the law) which declares anything to be the reason or condition or hinderance of any particular act.”¹

It is further clarified in the words:

الحکم الوضعی خطاب لله المعلق بفعل المكلف بغیر اقتضاء وتخيیر الذی وضعه الله لیبان نعلق شيء بشيء ای بالبینة او بالشرطية ، او بالمانعية

Therefore, the declaratory law neither provides any demand nor discretion relating to the commission or omission of an act. It simply mentions the relation between two things, and further explains the nature of this relationship. The nature of the relationship between two acts declared by ‘Hukm-i-Wazi’ is reducible to four categories:

(a) reason سبب

¹ Maulana Ahmad Raza Khan: *Fatawa-i-Razwiyah*, Vol. 1, pp. 173-4.

² (a) *Al-Ihkam fi Usul il-Ahkam*, Vol. 1, p. 181 ff.

(b) *Al-Mustafa*, Vol. 1 p.93 ff

(c) *Usul-ul-Fiqh*, p. 74 ff.

- (b) condition شرط
- (c) hinderance or intercepting factor مانع
- (d) essential element ركن

The concept may be clarified by the following instances.

1. Provision of the punishment of amputation of hands for the crime of theft.¹

Theft itself is a forbidden act and the punishment of the amputation of hands is given only if the act of theft is committed. Since this order of punishment is based on the reason of commission of the theft, it falls within the scope of the declaratory law.

2. Provision of the punishment of hundred stripes² or stoning³ for adultery. Adultery itself is a defining law because it is prohibited and the punishment of stripes or stoning to death (رجم) is the declaratory law because it is awarded only when adultery is actually committed. Therefore, all punishments awarded for violating the primary laws are declaratory laws.

3. Qur'an declares that the allegation of adultery can be established only through four witnesses.⁴

¹ Qur'an, 5:38

² Qur'an 24:2

³ Bukhari, Al-Jami-ul-Sahih, Vol. 2, p. 1003

⁴ Qur'an 24:2

It clearly means that the four witnesses are a necessary condition for establishing the crime of adultery. The punishment of hadd can be awarded only when the basic or essential condition is fulfilled. This provision is, therefore, in the nature of a declaratory law. It means that the hadd will not be imposed if the required number of witnesses is not available.

4. The holy Prophet (peace be upon him) said:

لا ميراث لقاتل

“The murderer cannot inherit the murdered in spite of being his legal heir.”

In this case the act of murder is declared to be the hinderance or intercepting factor in the matter of succession. That is why it is a declaratory law and not a defining one.

5. If a father murders his son, he will not be awarded the punishment of ‘qisas’. Filial or immediate maternal relationship is the hinderance or obstructing factor in awarding the ‘qisas’. It is, therefore, a declaratory law.

This relationship, however, does not rule out the award of death sentence as ‘tazir (تعزير)’ as it serves only as a preventive element in the case of death sentence as ‘qisas’. Therefore, he can be awarded death sentence for the same crime in the form of ‘tazir’. The distinction between these two capacities of punishment is that ‘qisas’ is compoundable and can be pardoned or substituted by blood money but the punishment of death by ‘tazir’ can neither be pardoned nor substituted by

(a) *Al-Ihkam fi Usul-il-Ahkam, Vol 1, p.181 ff.*

(b) *A-Mustata Vol 1 p.93 ff.*

(c) *Usul-ul-Fiqh, p.74 ff.*

blood money. In this way the death sentence by t'azir becomes a more grievous punishment than the death sentence by 'qisas'.

6. Debt is an intercepting factor in making 'Zakat' imperative. It is, therefore, a declaratory law because a person does not acquire the status of 'Sahib-i-Nisab'¹ (صاحب نصاب) in the crippling presence of debt.

Islamic legal science further divides law into the following categories :

- (a) **Azimah:** (عزيمة)

It is the ideal, original or strict law.

- (b) **Rukhsat:** (رخصت)

It is the concessional substitutory or modified law.

For example, 'wuzu' – wet ablution (وضو) is the original law and in the absence of water or in case of serious disease 'tayammum' – dry ablution (تيمم) is the substitutory law.

This rather limited classification of law is proposed only to clarify the concept of legal value or hukm. Muslim jurists, who are not circumscribed by restrictions of space or other counteractive factors, have worked out multiple criteria of classification, division and categorization of the law. A detailed treatment of these criteria is, however,

¹ These instances can be studied in detail in the following books:

- (a) *Bihari: Musallam-us-Sabut*
 (b) *Qanuji: Kashf-ul-Mubham*
 (c) *Taftazani: Tal weeh*
 (d) *Abdul Qadir Audah: Al-Tashri-ul-Jana'i*
 (e) *Mahmasani: Falsafa-i-Shariat-i-Islam*

outside the scope of the present discussion.

(3) Objects of Law: (محكوم به)

The objects of law indicate the purpose of revelation of the divine law. They embody the motives and intentions that necessitated the express manifestation of divine legal guidance. The purposes for which the divine law is revealed are three:

- (a) Acts (افعال)
- (b) Rights (حقوق)
- (c) Obligations (واجبات)

The three-fold purpose of divine revelation needs a little elaboration and each object is discussed below at some length.

First object:

Acts:

The acts, according to Islamic legal science, are of three kinds: (افعال ممتنع بالذات والعادة)

- (i) Acts impossible in nature and practice
- (ii) Acts possible in nature but impossible in practice
- (iii) Acts possible in nature and practice (افعال ممكن بالذات والعادة)

The discussion of these three categories can be studied

in detail in 'Musallam-us-Subur with its commentary 'Fawate-hur-Rahmat' written by Mohibbullah Bihari and Abdul Ali Ansari, Vol. I, page 23 (printed on the margin of 'Al Mustafa' by Imam Ghazali).

The law in Islam exempts human beings from the binding application and influence of the first two categories of acts because they are outside the scope and exercise of man's authority. God declares:

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

'On no soul does God place a burden greater than it can bear.'¹

After this open declaration, Qur'an further instructs the people to beseech the Lord in these words:

رَبَّنَا لَا تُعَلِّمْنَا مَا لَنَا بِقُوَّةٍ

'Our Lord, do not lay on us a burden greater than our capacity to bear.'²

If the first two kinds of acts were made obligatory, they could create trouble and inconvenience for mankind.

1 Qur'an, 2:286

2 Ibid

Therefore, in view of their inherent intractability, they are not made the subject of the objectives of Islamic law. Only the third category is treated as the object of law in Islam. It means that only those human beings, who are legally capable, are responsible for the acts, the performance of which is possible both in their nature and practice. Muslim jurists have classified these acts into two kinds:

- (i) Natural Acts (افعالِ حسی)
- (ii) Juristic Acts (افعالِ شرعی)

Natural acts are the physical or mental acts which are respectively known as افعالِ طبیعی and افعالِ ذہنی. The acts of speaking, eating, walking, sitting, drinking etc. which are physically perceptible to other persons are known as physical acts. Mental acts such as believing, intending, wishing, liking, disliking etc. are acts which cannot be physically perceived by others. Mental acts unless accompanied by physical acts cannot form the subject-matter of law.

The juristic act is constituted by a plurality of natural acts: for example, the act of faith, prayer, contract of marriage, commercial transaction etc. when an aggregate of natural acts constitutes a juristic act, it possesses material significance in the eyes of law but an isolated natural act does not possess any juristic significance. Physical acts are further divided into two categories:

- (i) Acts of Speech (قول)
- (ii) Acts of Conduct (فعل)

These acts possess legal character and accountability only when they are voluntarily performed because involuntary acts by their very orientation do not constitute the

subject-matter of legal science. The voluntary acts in the terminology of Islamic law are known as 'tasarrufat' (تصرفات).

Juristic acts are further classified into three kinds:

- (i) Originating Acts (انشاء)
- (ii) Informatory Acts (اخبار)
- (iii) Acts of Faith¹ (اعتقاد)

(i) Originating Acts are the acts which produce a legal result. For instance, the acts of sale, marriage and divorce etc.

(ii) Informatory Acts are the acts which are designed to convey or communicate some information e.g. testimony, admission or narration of a fact etc. These acts can be either true or false.

(iii) Acts of Faith are the aggregate of mental acts which are not the subject of law: they are in fact the subject of theology.

The Originating Acts are subdivided into two kinds:

- (i) Creative Acts (افعال مشبته)
- (ii) Extinguishing Acts (افعال مسقطه)

Creative Acts are the acts which create rights and obligations, e.g., sale, lease, gift, marriage etc.

¹ *Tauzih*, p.450, *Talweeh*, p.773

Extinguishing Acts extinguish existing rights or obligations e.g., divorce etc.¹

The originating Acts are sometimes revocable (قابل تسيخ) and sometimes irrevocable (ناقابل تسيخ). Revocable Acts are the acts whose legal effects can be washed out while it is not possible to subject the irrevocable acts to this process of legal dilution. 'Talaq-i-Raji' (طلاق رجعي) illustrates the first kind and 'Talaq-i-Mughallazah' (طلاق مغلظه) illustrates the second kind; those originating acts which establish contractual equations between the parties are known as 'Uqudat' (عقود) and those which cancel or annul the contractual bonds between the parties are called 'Mansukhat' (منسوخات).

Acts are further divided into two kinds on the basis of their mandatory or recommendatory capacity:

- (i) Acts whose performance is required by every legally capable individual.
- (ii) Acts which can be performed by some individuals on behalf of others.

The first kind is known as 'Farz-i-Ayn' (فرض عين) whereas the second kind is known as 'Farz-i-Kifayah' (فرض كفايه) and 'Sunnat-i-Kifayah' (سنت كفايه).

Constitutional elements of a juristic act:

There are two kinds of constitutional elements:

1. *Tatweeh*, p. 74

- (i) Essential ingredients (اركان)
- (ii) Necessary conditions (واجبات و شرائط)

The Essential Elements are those basic and irreducible elements which constitute the fundamental structure of the act, and absence of either of these elements renders the act null and void. Necessary conditions are the formal prerequisites which are required for the legal perfection of the act. Absence of either of these conditions does not render the act absolutely null and void but makes it imperfect.

On the basis of this classification, legal acts are divided into three kinds:

- (i) Valid Acts (افعال صحيح)
- (ii) Void Acts (افعال باطل)
- (iii) Irregular Acts (افعال فاسد)

Valid Acts are legally perfect. They are also structurally complete. They possess full legal consequences as they contain all the essential elements and fulfil all the necessary conditions.

Void Acts are the acts which do not fulfil even the primary requirement of their legality. They lack any of the essential ingredients or are characterized by the presence of some permanent illegality.

Irregular Acts are vitiated, flawed and loophole-ridden as they fail to fulfil some of the necessary conditions or are marked by the presence of some temporary illegality. The void acts can neither be corrected nor compensated whereas the irregular acts can be corrected or compensated by the

fulfilment of the required condition or removal of the temporary illegality.

This three-fold division is based on the Hanafi view while some other schools of law recognize only two classes of acts, valid and void, eliminating altogether the third category. On the basis of the perfect or imperfect legal character of the temporal and secular acts of contractual nature, jurists have classified them into the following binary poles:

- | | |
|-------------------|-------------|
| (i) Contracted | (منعقد) |
| (ii) Uncontracted | (غير منعقد) |
| (i) Authorized | (نافذ) |
| (ii) Unauthorized | (موقوف) |
| (i) Binding | (لازم) |
| (ii) Non-Binding | (غير لازم) |

The specification of acts of commission or omission, their nature and strength of demand, their range of operation and limitation, their required elements and conditions, is the first object of law in Islam. The law is revealed for the enlightenment and benefit of mankind; it is revealed in order to specify the extent and limits of human liberty by explaining the requirements of approved human conduct and behaviour. It also explains the factors which fix the stamp of disapproval and unacceptability on human conduct. Therefore, the first objective is the prescription of acts of commission or omission as well as the description of their conditions of legality, scope, nature, consequences and limits in order to determine the lawfulness and unlawfulness.

of human conduct.

Second Object:

Rights:

Right is the authority of a man recognized by the Sharia to control his action in a particular mode against whom it exists, and the latter is under obligation to act in that connection as required.

Rights are classified, in Islamic legal science, into four major categories:

- (i) Pure Rights of God (حقوق الله)
- (ii) Pure Rights of the People
- (iii) Combination of both with predominance of the first
(الجمع بين الحقين مع غلبة الاول)
- (iv) Combination of both with predominance of the second
(الجمع بين الحقين مع غلبة الثانى)

(i) Public Rights

The first category of rights is known as public rights or rights in rem. These are the rights of the society and they are framed and oriented to benefit mankind in general. There are no private features associated with these rights because they do not exist for the benefit of any particular individual. They are called public rights or rights of the society because their enforcement, preservation and the punishment awarded in case of their violation is the duty of

the society at large. These rights do not benefit God in any way though they are called rights of God. This is because God is above all needs, desires and contingencies to which human beings are subject on account of the limitations of their moral existence. The rights are equally created by God and vested by Him in human beings. Since the enforcement of these rights and the infliction of punishment on their violation is the religious duty of the Islamic state which acts on behalf of the Muslim community, they are called 'huqooq-ullah'.

(ii) Private Rights:

The second category of rights is known as private rights or rights in personum because they apply to individuals and not to the community at large. The enforcement of these rights is the option of the individual whose private right is infringed. It is his exclusive prerogative to exercise this option.

(iii) First kind of combined rights:

The third category of rights is known as combined rights which include simultaneously the rights of the community as well as the rights of the individual. They possess the dual capacity of being public as well as private rights. However, the two ingredients are blended in a manner that the communal elements prevail over the individual elements. For example, the right to punish a slanderer, who imputes unchastity to another person, is covered by this category. By such imputation, the right of the community is infringed as it involves depreciation of the honour of one of its members and the right of the individual is also violated as slander tends to destroy one's social image. According to the Hanafi

view, the person defamed does not enjoy any legal latitude to compound the offence, nor can his heir demand punishment of the offender as a legal right after his death. But the Shafe'is do not accept the Hanafi contention.

(iv) **Second kind of combined rights:**

In the fourth category of rights the individualistic character preponderates over its communalistic aspect. Retaliation (*قصاص*), the punishment for murder or voluntary hurt is covered by this category. In this case the communal element consists in disturbing and breaching the peace of the whole community, while the individualistic element springs from the fact that this act has caused loss and sorrow to the heirs of the person murdered or it has caused some hurt to the individual himself which may sometimes result in his physical dislocation or mental derangement. The private aspect of the right in this case prevails over its public aspect because only the person injured or the heirs of the murdered can either pardon the offender or accept the money as death compensation or injury substitute.

Public rights prevail in the following cases:

(i) Acts of devotion and religious observance:

(عبادات و صدقات)

For example, salat, soum, hajj, zakat, jihad.

(ii) Perfect punishments: (عقوبات كمله)

These are the 'hudood' or fixed punishments for theft, adultery, drinking, slander etc.

(iii) Imperfect punishment: (عقوبات قاصره)

For example, it is an imperfect punishment to deprive a man, who has killed another, of his right of inheritance if he is the heir of the person he has killed.

(iv) Atonements and expiations:

For the non-discharge of certain obligations or performance of certain prohibitions. They possess the characteristics of both devotion and punishment. They mostly consist of fasting, emancipating the slaves or feeding and clothing the poor.

(v) Imposts and religious taxes: (كفارات)

These rights involve acts of devotion which impose an obligation on people to make payments out of their wealth as a form of worship. These are, in fact, religious taxes other than zakat, levied by the Islamic state to meet its expenditure. For example, Ushr (عشر) or land tax payable by the Muslims and khiraj (خراج) or protection tax levied on non-Muslims because they pay neither Zakat nor Ushr.

(vi) Independent rights: (حق قائم لذاته)

These are the rights which exist independently without any obligatory implications. For example, the right of one fifth of the booty (مال غنيمت) acquired in religious wars. These rights are distinguished from dependent rights (حق قائم لذاته) because the dependent rights impose corresponding obligations. They are also associated with particular persons who are supposed to discharge specific duties towards

those who possess these rights.¹ Private rights are as follows :

(i) Right of personal safety (حق نفس)

(ii) Right of reputation (حق حرمت)

Shafe'is acknowledge it as a private right but Hanafis disacknowledge it.

(iii) Right of ownership (حق ملك)

(iv) Family Rights: (حق زوجیت)

(a) Marital right (حق ولایت)

(b) Right of guardianship

(c) Right of succession and inheritance (حق خلافت و وراثت)

(v) Right of lawful acts (حق تصرف)

Third object :

Obligation:

Rights and obligations possess a reciprocal relationship: They are interlinked and logically as well as necessarily presuppose one another: They are of three kinds:

(i) Obligations which originate out of the implication of law.

1. (a) *Bihari, Musallam-us-Subut (with commentry) Kashful-Mubham*
p.162
b) *Tauzih, p.414*

Two types of obligation fall within this category:

- (a) Obligations towards God which are taken for implementational purposes as obligations towards the state. For example, the obligation to worship and to pay taxes.
 - (b) Obligations towards individuals which spring from family relationships, namely, connubial, parental, filial etc.
- (ii) Obligations which originate from man's acts of speech.

They are related to contractual or transactional acts.

- (iii) Obligations which originate from man's acts of conduct, infringing on the rights of others. These obligations involve violation of others' right of personal safety, reputation, ownership and possession etc. These acts impose penal liability on the transgressor.

The first two kinds of obligations are called 'mandatory' and 'imperative' (**حکمی**). The third kind of obligations are called 'forbidden obligations'. There are three modes of discharge of obligations :

- (a) Ada (**اداء**) discharge of the obligation perse.
- (b) Qadha (**قضاء**) discharge of similar obligation.
- (c) T'adah (**اعادة**) repetition.

- (4) Subject of Law: (**مستکوم علیه**)

Subjects of law are the people for whom the law of

Shariah is revealed. By the term people we mean legally capable persons who are technically termed 'mukallaf' (مكلف) and the fitness of a person for the application of law to his actions is called legal capacity of Zimmah (فقه). According to Sadr-ush-Shariah, legal capacity is defined as 'the quality by which man becomes fit for what he is entitled to and what he is subject to'.¹ The right to which a person is entitled is known as 'malahu' (ماله) and the obligation to which a person is subject is known as 'maalayh'. The capacity that is formed by a combination of these two qualities is known as "taklif-i-shari'i" (تكليف شرعى) or Zimmah or ahliyyat (اهليت) and the person who fulfils the requirements of legal capacity is known as 'ahl' (اهل) or 'mukallaf' and he alone is the addressee of the divine commandments. Hence, he is the subject of the law of Shariah.

Muslim jurists define a legally capable person as 'a living free human being of mature age and understanding possessing Islamic faith, not suffering from any factor which fully or partly affects his legal capacity'.

Legal capacity is divided into two aspects:

- (i) Receptive capacity (اهليته الواجب)
- (ii) Active or executive capacity (اهلية الاداء)

The first aspect relates to the capacity for inheriting rights and obligations and the second to the capacity for the exercise of rights and discharge of legal obligations. For example, the legal capacity of a child in the mother's womb is a receptive one because it possesses the capability to hold some rights for its own interest as inheritance and

1. *Tauzih* p.419

legitimacy etc., but does not possess the power to hold responsibility for the discharge of obligations.

Legal capacity is further classified into two kinds:

- (i) Perfect capacity (اہلیۃ کاملہ)
- (ii) Defective capacity (اہلیۃ ناقصہ)

The essential ingredients of perfect legal capacity are:

- (a) Life
- (b) Freedom
- (c) Puberty (adulthood)
- (d) Sanity
- (e) Islamic faith

The legal capacity of a person is also affected by other factors which may be broadly classified into two categories:

- (a) Extra-human factors (عوارض سماوی)
- (b) Human factors (عوارض اراضی ، حوادث مکسوبہ)

The first type of factors are the circumstances beyond human control whereas the second type of factors are created and engineered by man himself through the exercise of basic human faculties. Therefore, they fall within the ambit of human manipulation.

The first type of circumstances are:

- (a) Minority, infancy or immaturity
- (b) Insanity
- (c) Idiocy
- (d) Fainting fits
- (e) Forgetfulness
- (f) Sleep
- (g) Mistake
- (h) Unconsented intoxication
- (i) Disease
- (j) Ignorance of fact
- (k) Death etc

These factors adversely affect the legal capacity of a person. If any unlawful act is committed under the influence of either of these factors, the legal responsibility of the person involved in the act is either completely washed out or suspended.

The second type of factors are:

- (a) Ignorance of law
- (b) Consented intoxication
- (c) Jest

(d) Journey

(e) Corcion etc.

Since these are humanly created circumstances, they only partially affect the legal capacity of a person, they only make it imperfect and defective.

These are the four basic ingredients of law in Islam. Thus law in Shariah is a legal value established directly or indirectly from divine communication which can be proved either through the text of the Qur'an or Sunnah or definite Ijma pertaining to the acts, rights and obligations of mankind. These divine commandments from which the Shariah value or legal rule is derived are primarily addressed to only those persons who fulfil the requirements of legal capacity. This divine value, as far as the nature of its contents is concerned, can be religious as well as secular. Thus all those state laws which are not directly and strictly derived from the text of Qur'an and Sunnah but are formulated by the Islamic states for the implementation of Islamic plans and the improvement of human society also fall within the category of law in Islam. Their legal relevance is supported and justified by the authority of 'ulil amr minkum' (أُولِي الْأَمْرِ مِنْكُمْ): 'obey the men of authority among you'. The only condition for their legal viability is that they are indirectly derived from some general or specific provision of Shariah or framed in the light of express or implied authority by Shariah and are compatible with the objectives of Islam.

ISLAMIC CONCEPT OF CRIME

Definition of Crime:

The Western concept of crime is neither universal nor permanent and perpetual. It is subject to changes and fluctuations from time to time and from place to place but the case of Islamic concept is altogether different. Islamic concept of crime, like the concept of law, is universal, permanent, unchanging and unanimous among all the scholars and schools of law: "Crime is an unlawful act for which punishment has been prescribed by the Shariah by way of fixation or discretion". Muslim jurists have unanimously defined it in the words:

الجرائم محظورات شرعية زجر الله عنها بعد او تعزير (الجريمة الجنائية)

"Unlawful acts for which punishments have been provided (directly or indirectly) by God, either fixed or discretionary."¹

An unlawful act which has been declared a crime can be either:

- (a) Commission of any prohibitory act.
- (b) Omission of any obligatory act.

1. *Mawardi, Al-Ahkam-us-Sultanlyyah, p.219*

The first aspect is known as (إتيان فعل منهي عنه)

And the second aspect is known as (ترك فعل مأمور به)

The crime is, therefore, an act or omission in which some provision of divine law, or the law formulated in the light of its direction, is violated and punishment has been provided or recommended by the Shariah for that particular violation. In Islamic legal system, crime is not deemed to be committed unless some divinely revealed provision is transgressed or the law framed under such provision is infringed. But in secular legal system the crime is considered to be committed only when any law enacted by the worldly authorities is violated. Since the secular law is itself subject to change and variation, the concept of commission of crime and the corresponding award of punishment are also variable. In the case of Islamic legal system, however, crime is only a violation of the law prescribed by Shariah. It is immaterial whether the law is expressly or impliedly revealed or formulated under the revealed authority. This is the reason that in Islamic legal system neither the concept of law nor the concept of crime is variable. Both are characterized by a rare consistency of texture as well as of content and are sustained by the vitalizing principle of constant reference to one another which derives its nourishment from their common genesis and, unlike the purely rational fabrications of the secular legal system, is not subject to the unpredictable convulsions of mood and time. Muslim jurists normally use the words 'Al-Jarimah' (الجريمه) and 'Al-Jinayah' (الجنايه) for crime, but most of the jurists have specified the term 'Al-Jinayah' for the crimes committed against persons.¹ Abdul Qadir Audah defines crime in the words:

1. (a) *Ibn-i-Nujaym, Al-Bahr-ur-Raiq, Vol.VIII, p.286.*
- (b) *Zayle'i, Tabyin-ul-Haqaiq, Vol VI, p.97.*
- (c) *Kasani, Badai'-us-Sana'i', p.233.*

هي فعلٌ او تركٌ نصت الشريعة على تحريمه والعقاب عليه

“A crime is the commission or omission of an act which is forbidden by the Shariah and punishment is recommended for it.”¹

From these definitions, we can easily conclude that according to Islamic law, crime is constituted of three ingredients:

Ingredients of Crime:

- (a) Commission or omission of an act.
- (b) Violation of a specific law of Shariah.
- (c) Prescription of punishment.

It means that the constitution of crime involves a violation of the law of Shariah. If it is a violation of a clear text of Shariah, i.e. Qur'an, Sunnah and Ijma'-i-Qat'i, it is known as express violation; and if there is violation of a rule of secular nature formulated by the state authorities under the legislative power granted by the Shariah, it is known as implied violation because it is assumed to be a transgression of the Qur'anic order:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَ أُولِي الْأَمْرِ مِنْكُمْ

“O, yee, who believe, Obey Allah, obey Prophet and those who are in authority.”²

On the basis of the argument, if the administrative laws,

1. *At-Tashri'ul-Jana'i, Vol I, p.66*

2. *Quran, 4.*

rules, regulations and policy matters framed by an Islamic State for the general welfare, betterment and promotion of public health are violated, they would come within the purview of crime because it is an indirect violation of the authority and objectives of the Shariah. Besides, these violations constitute legal infringements in all systems of law.

There are many acts and omissions in various penal systems, that are criminal in the technical sense but do not strictly possess criminal character. Such offences as violation of traffic rules, breach of building by-laws, etc., do not come under the actual concept of crime, as they involve no breach of common morality. Such breaches of law are known under the French law as 'contravention', under the English law as 'petty mis-demeanours', but can be generally termed as 'summary offences'. Some writers speak of them as 'mala prohibita' as distinguished from 'mala in se'. Continental jurists sometimes speak of crimes 'de droit commun' (e.g., offences common to all systems of law as distinguished from offences which are crimes only in a particular penal law).

Qur'an and Crime:

It is a fact that Qur'an is not a technical book of codified law because it does not use the juristic and legal terminology as adopted by the schools of law. Nevertheless it employs a number of words in particular significance which imply general or specific meanings. Muslim scholars normally derive the terminology from the words expressly or impliedly used in the text of Qur'an and Sunnah. Qur'an has used the terms 'jurm' (جرم), 'Ijram' (إجرام), and 'Mujrim' (مجرم) on different occasions and in varying contexts but in semantically identical associations. They differ only in their grammatical nature but etymologically they derive from the

same root. These words respectively mean 'crime', 'commission of a crime' and 'criminal'. Qur'an states:

وَلَا يُجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰٓ اَلَّا تَعْدِلُوْا

"And let not hatred of a people incite you to act inequitably."¹ It further states:

وَلَا يُجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ اَنْ صَدُّوْكُمْ عَنِ الْمَسْجِدِ الْحَرَامِ
اَنْ تَعْتَدُوْا

"And let not the hatred of a people - because they hindered you from the sacred mosque - incite you to exceed the limits."²

In these two verses the word 'jurm' has been used in the collocational form of 'yaj'r-i-manna' (يَجْرِمَنَّ) which means incitement for the commission of a wrong act. At another occasion this term has been exactly used in the sense of criminal and sinful act. Qur'an has stated:

قُلْ لَا تَسْأَلُوْنَ عَمَّا اَجْرَمْنَا وَلَا نُسْأَلُ عَمَّا تَعْمَلُوْنَ

"Say you will not be held liable for the crimes committed by us, nor we for the wrong acts committed by you."³

The point is further elaborated by the Qur'an in the words:

فَعَلَىٰٓ اِجْرَامِيْ وَاَنَا بَرِيْءٌ مِّمَّا تُجْرِمُوْنَ

"The liability of my commission of wrong act

1. Qur'an, 5-8

2. Qur'an, 5-2

3. Qur'an, 34-25

(crimes) is upon me and I am not accountable for the wrong acts (crimes) which you commit.”¹

In the context of these two verses, the term ‘jurm’ and ‘ijram’ are used in the sense of violation of divine law. At another place, Qur’an says:

أَنعَنُ صَدَدْنَكُمْ عَنِ الْهُدَىٰ بَعْدَ إِذْ جَاءَكُمْ بَلْ كُنْتُمْ مَجْرِمِينَ

“Did we keep you away from the guidance when it was revealed to you? (Indeed not). You yourselves were the criminals.”²

A dispassionate analysis of these Qur’anic verses clearly reveals that the word signifies an unmistakable violation of the law of Shariah. The recurrent stress on the word and its relative frequency mean that the Qur’an places a special premium on its significance. The emphasis laid on the word elevates it from casual and cursory indulgence into a word that is pregnant with wide legal relevance. Therefore, to restrict it to acts of nominal violation is to underestimate its legal import in Islam. The only reasonable interpretation of the word focusses on broadening the range of its application and includes in its ambit the ‘total spectrum of violations’ which are regarded as such by the laws of Shariah. Therefore, in all probability, the word is used in its widest sense which, in fact, means a violation of the law of Shariah, an irrefutable set of norms and values binding on all adult and sane Muslims.

According to Islamic law, there are five values³ which

1. Qur’an, 11-35
2. Qur’an, 34-32
3. Al-Mustafa, Vol II, p.66

should be cherished and preserved at any cost. These values are:

- (a) Faith and religion
- (b) Life
- (c) Property
- (d) Honour and chastity
- (e) Reason and sanity

These are the basic values which distinguish human beings from all other creatures. They also provide a visible index of the degree of civilization a particular human society has achieved during the course of its evolution. The mode and manner of nourishing and feeding these values indicates the emotional and spiritual involvement of a particular society in their preservation and perpetuation. Islam is, therefore, the greatest humanizing religion and philosophy of life as Islamic legal system aims at protecting and promoting these values in human society both at the individual and collective level. Wherever any act or omission of an act occurs against either of these fundamental values, Shariah considers it the violation of law. Therefore, it is known as 'crime'. The whole penal system of Islam revolves round these fundamentals. The concept of honour and chastity is almost unique in Islam. The high pedestal on which Muslim women are placed obviously contrasts with the way they are treated in the West. In the Western countries, they are regarded as mere chattel or physiological gadgets for the satisfaction of male lust. They are invested with erotic glamour and often transformed into bitch goddesses or femme fatales who exist more for the annihilation of the human species than for its perpetuation. In Islam, women

are invested with both physical and spiritual substance and are expected to play a healthy role in the preservation of Islamic values as well as for sustaining a sane and happy society. They are not commodities in the Western sense to be purchased or disposed of at the whims of masculine waywardness; they are actually partners in a mutually beneficial alliance which not only promotes their personal health as well as the health of their children, but also the health of the society in which they live and of which they are the indispensable members.

Structure and constituent elements of crime:

Crime is constituted by three essential elements:

1. Legal element (الركن الشرعى)
2. Material element (الركن المادى)
3. Penal element (الركن الادبى)

1. Legal Element

The legal element requires five conditions to be fulfilled in order to constitute a crime:

(i) Legal Argument

The first condition is the presence of a legal argument of Shariah which prohibits the

commission or omission of a certain act. If there is no specific legal provision of prohibition, there can be no crime.

(ii) Prescription of Punishment

The second condition relates to the prescription of punishment. The mere existence of a juristic argument of prohibition is not sufficient to incriminate a person and punish him. Therefore, the juristic argument of prohibition must be accompanied by the recommendation of punishment either in fixed or discretionary form. Hence, there can be no crime without the prescription of punishment.

These two elements are based on Qur'anic concepts of the establishment of penal liability which are expressed in the following verses:

وَمَا كُنَّا مُعَذِّبِينَ حَتَّى نَبْعَثَ رَسُولًا

“Nor would We punish until We had raised the Apostle.”¹, and

وَمَا كَانَ رَبُّكَ مُهْلِكَ الْقُرَى حَتَّى يَبْعَثَ فِي إِيَّهَا رَسُولًا

“And your Lord does not destroy any town or city unless He raises the Apostle in it (and the people of the city violate the divine guidance).”²,

and further: لَوْلَا يَكُونُ لِلنَّاسِ عَلَى اللَّهِ حُجَّةٌ بَعْدَ الرُّسُلِ

1. Qur'an, 17-15

2. Qur'an, 28-59

“so that there should not be any objection against God available to the people after the raising of the prophets.”¹

Muslim jurists have derived the legal maxim from these provisions:

لا جريمة ولا عقوبة بلانص

“There is no crime and no punishment without legal provision.”²

Islam enunciated this principle of legal justice fourteen hundred years ago but, on the other hand, this principle of criminal justice was introduced and adopted by the Western law by the end of the eighteenth century at the time of French Revolution in 1789.³ French and other Western legislations accepted it only after the crystallization of the bloody event, but before that the entire West displayed a pathetic and apathetic unawareness of the human and social relevance of the principle of criminal justice.

The Islamic principle of criminal justice that there is no crime and no punishment without legal provision equally applies to the ‘crimes of fixed punishment’, ‘crimes of retaliation and blood money’ and ‘crimes of discretionary punishment’.

1. *Qur'an*, 4-165

2. *At-Tashri'ul-Jana*, vol. I, p.118

3. *Ibid*

(iii) Enforcement of Law

The third condition is that legal prohibition and punishment should be declared or enforced before or at the time of commission of an offence. If any act was committed before it was declared unlawful or before its punishment was enforced, it cannot be deemed to be a crime and so the doer of the act is exempted from any penal liability.

This principle is primarily based on the Qur'anic verse:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ

“And don't marry the women your forefathers have married except for what is past.”¹

and also the verse:

وَ أَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ

“And to splice two sisters in one wedlock (is forbidden) except for what is past.”²

We can easily conclude from these two verses that there can be no criminal or penal liability of an act committed before the declaration or enforcement of the law. From these Qur'anic verses, Muslim jurists have unanimously derived following legal principles of criminal justice:

1. *Qur'an, 4-22*
2. *Qur'an, 4-23*

(1) First Legal Principle

لاحكم لافعال غور قبل ورود النص

“There is no prohibitory qualification for the acts committed by the adult and sane persons before declaration and enforcement of the law.”¹

(2) Second Legal Principle

It is further supported by another jurisprudential principle, which constitutes the second basis of criminal justice:

الاصل في الاشياء والافعال الاباحة

“The original characteristic of all things and acts is permissibility.”²

(3) No Retrospective Punishment

There is no punishment in Islam with retrospective effect. This principle of criminal justice is unanimously established on the basis of the third condition of the legal element of crime. Abdul Qadir Audha has discussed the issue in detail which may be encapsulated in these words:

1. (a) *At-Tshri'ul-Jana'*, Vol. I, p.115
- (b) *Al-Mustasfa*, Vo. I, p.75

2. (a) *Al-Ihkam-fi-Usul-il-Ahkam*, Vol. I, p.130 ff
- (b) *Ibn-i-Hazm*, *Al-Ihkam*, Vol. I, p.52 ff
- (c) *Musallam-us-Subut*, Vol. I, p.49

القاعدة العامة في الشريعة الاسلامية ان النصوص الجنائية
لا تسرى الا بعد صدورها وعلم الناس بها

"A general principle of Islamic Shariah is that the punishments are not enforced before they are declared and communicated to the people."¹

It clearly states that a person can be held criminally liable only if he violates the law of Shariah which has already been declared and enforced. The violation of an undeclared and unenforced law of Shariah is not a crime. The mode of punishment of various crimes and sins prescribed by God and practised by His Holy Prophet (peace be upon him) is a clear endorsement of this convention.

It was strictly observed that if any act was committed before it was declared unlawful or criminal, the doer of the act was never punished *aposteriori* for that act. If any provision of punishment was revealed for the commission of some unlawful acts and if some of the people had committed those acts before communication or revelation of the commandment of punishment, it was never awarded to the people with retrospective effect. The acts committed before they are declared unlawful and punishable are exempted from the imposition of punishment. Their *aprioristic* illegality does not constitute a crime.

(4) Place of Commission of Act

The fourth condition relates to the special factor. It implies that the offence should be committed at a place where Islamic law is actu-

1. *At-Tashri'ul-Jana'i*, Vol. I, p.261

ally enforced. If any person committed an unlawful act at a place which did not fall within the de facto jurisdiction of an Islamic state, the act could not be tried and executed on the basis of sheer inapplicability of Islamic laws to the offence.

In the light of this principle, Muslim jurists have classified the territory into two categories:

- (a) Territory of Islam (دارالاسلام)
- (b) Territory of War (دارالحرب)

Since the execution of punishment is the exclusive right of the courts of an Islamic state and since they can execute them only in those territories which are within their jurisdiction, the doers of the unlawful acts, which are not committed within the territorial jurisdiction of an Islamic state, can neither be held criminally liable by the courts nor can they be tried and punished for those offences. The juristic opinions of various leading scholars throw considerable light on this issue.

(a) Abu Hanifa's View

Imam Abu Hanifa says that all those offences committed within the territorial limits of an Islamic state, whether they are committed by a Muslim (مسلم) or a Zimmi (ذمی) (a non-Muslim subject at home) are legally punishable. Therefore, these offences possess the status of a crime. Muslims are punished because they are positively bound to follow the law of Shariah and are prohibited to violate its provisions. The non-Muslim residents of an Islamic state are punished because they have agreed to abide by the laws

of the Islamic state on the basis of guarantee of a permanent safe conduct. Those persons who commit criminal acts in states, outside the territorial limits of an Islamic state, cannot be punished, irrespective of their religious affiliations, because at the time and place of commission of crime the offender is out of the de facto jurisdiction of the Islamic state.¹

(b) Abu Yusof's View

Imam Abu Yusof, the most senior student of Imam Abu Hanifa, also considers the third category of Musta'min (مستامن) (a domiciled alien in Muslim territory) to be criminally liable and equally punishable for the crimes committed by him in a manner applicable to Muslims and non-Muslim residents. He equates the status of a Musta'min with that of a Zimmi. The only difference between the two classes is that a Zimmi is granted a 'permanent surety of safe conduct' (امان موبد) and the Musta'min is granted 'temporary surety' (امان موقت) for the period asked for by him.²

Both jurists agree that no punishment can be awarded for a crime committed by any body within the territorial bounds that are out of the de facto jurisdiction of the Islamic state.

(c) Malik's, Shafe'i's and Ibn-i-Hanbal's View

The third view has been adopted by Imam Malik³

1. (a) *Ibn-i-Hammam, Fat'h-ul-Qadeer, Vol. IV, pp.152-156*

(b) *Badai'-us-Sanai', Vol. VII, pp.131-134*

2. *Ibid., p.134*

3. *Imam Mali, Al-Mudawwanah, Vol. XVI, p.91*

Imam Shafe'i¹ and Imam Ahmad bin Hanbal.² They believe that every Muslim (مسلم), Zimmi (ذمی) and Musta'min (صتامن) is held criminally liable and granted equal punishment for the crimes committed in an Islamic state. They add that if any Muslim or Zimmi commits any crimes outside the territorial limits of an Islamic state of which they are subjects, they should be held criminally accountable and be awarded the necessary punishment. A Musta'min will be awarded punishment only for the crime committed within the territorial limits of an Islamic state and not for the crime committed outside its de facto jurisdiction, but Muslim and Zimmi, for all the crimes whether committed in 'Dar-ul-Islam' or 'Dar-ul-Harb'.

Difference between Crime and Sin:

الفرق بين الجريمة والمعصية

Muslim jurists have established the distinction between crime and sin on the basis of this principle:

“If the unlawful act conforms to the prescribed conditions, it is known as crime. If it is committed out of the de facto jurisdiction of an Islamic state where it is not cognizable by Islamic courts, it falls within the exclusive category of sin.”

Moreover, it is an established fact that every sin is not a crime in the legal sense but every crime is a sin also because it involves the element of the violation of Shariah.

(v) Besides, the unlawful act should be committed

1 Abu b'haq Shirazi, *Al-Muhazzab*, Vol. II, p.358

2 Ibn-i-Qudamah, *Al-Mughni*, Vol. X, pp439-537

by a person who is legally known as Mukallaf (legally capable). No distinction is entertained by Islamic penal law between the subordinates and super-ordinates, the high and the low, the rich and the poor, the haves and the have nots, the officials and the citizens, etc. Islamic penal law is indiscriminately applied to all classes of citizens but the Western and modern law recognizes some prerogative and exceptions in favour of the elite.

2. Material Element (الركن المادى)

By fulfilling the conditions detailed above, the legal element of crime is completed. But the legal structure of crime requires another element for its realization. This is called the material element and it involves three basic issues:

(a) Completion of Crime :

Punishment fixed by the Shariah is awarded only if the offence is completed. The crime, therefore, irrespective of its positive or negative configuration, is classified into two kinds:

- (i) Complete Crime (الجريمة التامة)
- (ii) Incomplete Crime (الجريمة غير التامة)

'Hudood' (fixed punishments) and 'Qisas' (retaliation) are awarded only for complete crimes, whereas for incomplete crimes only 'Ta'zirat' (discretionary punishments) and 'Diyat' (blood money) are awarded. If the offence remains

incomplete, it is known as 'attempt of crime', but if the
unlawful act materializes into a complete act, i.e. if it
bears consequentality, only then it is known as crime.
Therefore, all inconsequential unlawful acts are attempts
of crime. They do not constitute actual crime.

Attempt of Crime: شروع

As already mentioned in Islamic law system
the 'Mud' or 'Qasb' is regarded as an attempt of
crime. It states that the intention, pre-
meditation and good motive. The principle is based on
the Prophet's tradition.

سريع حيا و غير حيا في جميع

The law is based on the fact that a criminal
act is not complete until it has been carried
out to its full extent.

شروع و جرم

The law is based on the fact that a criminal
act is not complete until it has been carried
out to its full extent.

شروع و جرم

- 1. شروع و جرم
- 2. شروع و جرم
- 3. شروع و جرم
- 4. شروع و جرم

(ii) Cooperation by abettment الإستراك ناسب

The difference between the two kinds depends on the way the participators conduct themselves in the commission of a crime. In the first kind of cooperation, two or more persons jointly participate in the commission of the crime and their cooperation in the performance of the act is material and active. In the second kind the cooperation of the persons other than the actual doer is rooted in their consent, instigation or assistance. Their participation is not in the material aspect of the crime but in its scheming and planning.¹

Cooperation by action (الإشتراك المباشر)

It is further divided into two forms:

- (i) Form of Tawafuq (توافق)
- (ii) Form of Tamalo' (تعالو)

The form of Tawafuq means that two or more persons actively participate in the commission of a crime, but during the process of completion of the crime, they perform separate acts: for example, in an act of murder, one person cuts the throat and the second person mutilates the limbs which result in the death of the person. If the first person is held accountable for cutting the throat and the second for mutilating the limbs, this is known as 'Tawafuq'. In this form of cooperation, each one of the participants is separately and independently accountable for the act which he has literally committed. For the sake of terminological convenience, this form of cooperation may be called

1. *At-Tashri'ul-Jana'i*, Vol I, p.350

'cooperation with separate liability'. If the two persons in the particular act of murder, instead of being held separately liable for their respective acts, are collectively held liable for murder, irrespective of their differential roles in the composite act of murder, this form of cooperation is known as 'Tamalo'. It may be conveniently described as 'cooperation with joint liability'.

This distinction between two forms of active cooperation is accepted by some scholars on the idea that cooperation involving separate liability is grounded in incidental collaboration at the time of commission of the crime without any prior intention and planning. But the cooperation involving collective liability is grounded in prior intention and planning. This distinction has been created by some of the Muslim jurists. Whereas, Imam Abu Hanifa does not recognize any difference between the two forms of cooperation.¹ He believes that both forms of active cooperation possess the same legal consequence. The participants in the crime are not held separately liable. Their criminal liability is joint and collective. He, therefore, discards the creation of this distinction as a futile exercise at hair-splitting. Some of the Shafe'i and Hanbali scholars have also agreed with the views expressed by Imam Abu Hanifa.² The distinction, according to them, is not based on the existence of genuine differential features but exists in the form of a spurious dichotomy.

1 (a) *Tabyeen-ul-Haqaiq*, Vol. VI, p.114

(b) *Al-Bahr-ul-Raiq*, Vol. VIII, p.310

2 (a) *Al-Mughni*, Vol. IX, p.366 ff

(b) *Ibn-i-Qudamah*, *Ash-Sharh-ul-Kabeer*, Vol IX, p.335 ff

(c) *Al-Muhazzab*, Vol. II, p.716 ff

Cooperation by abettment (الاشتراك بالتسبيب)

There are three conditions which constitute cooperation by abettment:

- (i) The act should be criminal and punishable
- (ii) The abettment should be in the form of:
 - consent
 - or
 - instigation
 - or
 - assistance
- (iii) The abettment should be extended with the intention of committing the act of crime.¹

Imam Malik has, however, adopted a different line of reasoning. He suggests that if a person consented to the commission of a criminal act and was present at the time of its commission, he would be deemed as the 'active participant' (الشريك المباشر) and not as 'abettor', even though he did not participate actively in the crime.²

There is a consensus of juristic opinion that punishments of Hudood and Qisas are awarded only in the case of cooperation by action. The abettor is neither subject to Hadd nor Qisas: He would be awarded discretionary

1. *At-Tashri' ul-Jana'i*, Vol. I, p.366

2. *Abu Abdullah Al-Hattab, Mawahib-ul-Jaleel*, Vol. VI, p.242

punishment whether he abetted a crime of fixed punishment, retaliation or discretionary punishment.

3. Penal Element: (الركن الادبي)

This element of crime relates to the basis, reason and grades of criminal and penal liability and relevance of motive, intention, ignorance, mistake and other significant factors which affect the legal capacity of the doer. This element is also related to the circumstances and particular situations which create exemptions to legal answerability. In Islamic penal law, the criminal responsibility of a person is based on three foundational conditions:

- (i) There should be the commission of a prohibited action.
- (ii) The doer should possess the capacity to discriminate between right and wrong.
- (iii) The doer, while performing the act, should be in a position to exercise his free will.

Unfulfilment of the first condition amounts to absence of criminal responsibility (ارتفاع المسؤولية) whereas, the absence of second and third conditions, amounts to suspension of penal liability (ارتفاع العقوبة).

Qualifications which suspend the criminal liability of a person who has performed an unlawful act are as follows:

- (i) Act performed in the exercise of right of self-defence (الدفاع الشرعى).
- (ii) Act performed in the exercise of right of punish-

ment (التأديب).

(iii) Act performed as medical treatment (التطبيب).

(iv) Act performed in the implementation of law, etc. (الاهداد).

These are some instances of the reasons which cancel the criminal implications of the first condition. It means that any unlawful act committed in these situations is not deemed unlawful. Hence no criminal liability is imposed on the doer. There are other reasons and circumstances as well which neutralize the second and third condition and eliminate the penal liability of the offender:

(i) Minority (صغرا السن)

God Almighty has prescribed in the Holy Qur'an:

وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَأْذِنُوا كَمَا اسْتَأْذَنَ
الَّذِينَ مِنْ قَبْلِهِمْ

“But when the children among you come of age, let them (also) ask for permission, as do those senior to them in age.”¹

(ii) Sleep

(iii) Lunacy

Holy Prophet (peace be upon him) has stated in relation to these factors:

1. Qur'an, 24-59

ان القلم رفع عن ثلاثة عن المجنون حتى يفيق وعن
الصبي حتى يدرك وعن النائم حتى يستيقظ

“The (following) three categories of person are exempted from accountability: (a) a lunatic unless he gets well, (b) a child unless he attains puberty, and (c) a sleeping person unless he wakes up.”¹

(iv) Compulsion (الاکراه)

(v) Mistake (الخطاء)

(vi) Forgetfulness (السهو)

Qur'an explains this concept in the words:

فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا اِثْمَ عَلَيْهِ

“Whatsoever is driven by necessity, neither craving nor transgressing, is not to blame.”²

Moreover, the last three exemptions from penal liability are mentioned by the Holy Prophet (peace be upon him) in these words:

ان الله تجاوز لي عن امي الخطاء والنسيان وما استكرهوا عليه

“Surely! God has, for my sake, exempted my followers from accountability in case of mistake, forgetfulness and compulsion.”³

1 Sahib-ul-Bukhari with Tayseer-ul-Bari, Vol. V, p.208

2 Qur'an, 2-173

3 Ibn-i-Majah, Sunan, Vol. II, p.98

(vii) Unconsented intoxication (السكر)

If any criminal act is performed during the condition of voluntary intoxication, it does not waive the penal liability. Exemption to penal liability is awarded only in case of forced or unagreed intoxication.

According to Shariah, the criminal acts create legal accountability only if their commission is willed, intended or designed. In case of involuntary and unwilled acts, general exemption from penal liability has been granted. Qur'an enunciates this principle in the words:

لَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ

“There is no liability upon you if you commit an act by mistake, but you are accountable for the acts which were willed and intended by you.”¹

These three elements (Legal, Material and Penal) collectively constitute the structure of crime. If any one of these elements is missing, the act is not considered as a crime in legal phraseology. Therefore, no criminal or penal liability is clamped on the doer of the act.

Classification of Crime:

According to Islamic law, a crime is classified into various kinds on the basis of different criteria :

(1) Classification of crime according to punishments:

1. Qur'an, 33-5

On this basis crimes are classified into three kinds:

- (a) Crimes of fixed punishment (جرائم الحدود)
 - (b) Crimes of retaliation and blood money
(جرائم القصاص والدية)
 - (c) Crimes of discretionary punishment
(جرائم التعازير)
- (2) Classification of crime according to intention:

On this basis, crimes are classified into two kinds:

- (a) Intentional Offences (الجرائم المقصوده)
- (b) Unintentional offences (الجرائم غير المقصوده)

(a) In the case of first category of crime, the offence is committed by the criminal, knowingly. He intends also the commission of the crime as well as the consequences that follows its commission, but sometimes he intends only the commission of the crime and not its consequences: for example, 'homicide amounting to murder' ((القتل العمد)) and 'homicide not amounting to murder' ((القتل شبه العمد)).

(b) In case of unintentional offences, the commission of an illegal act is never intended by the offender. Illegal acts are only accidentally committed as a result of negligence. In these cases, negligence takes place in two ways:¹

- (i) The offender intends an act but he is not aware of the fact that the commission of this act will

(12) *Al-Mughni*, Vol. IX, p.320

(13) *Tabyeen-ul-Ilaqatq*, Vol. VI, p.97

(14) *Bada'i-us-Sana'i*, Vol. VII, p.234

amount to crime. For example, a man shoots another man under the mistaken impression that he is shooting an animal or a wild beast; or a soldier shoots one of his colleagues during war under the misguided impression that he is shooting an enemy.

(ii) In this case, the offender does not even intend the act: for example, he killed a person by rash and negligent driving or he kills a man during the state of sleep-walking or somnambulism.

(3) Classification of crime according to mode of performance:

On this basis crime is classified into two kinds:

- | | |
|---------------------|---------------------|
| (a) Positive crimes | (الجرائم الايجابية) |
| (b) Negative crimes | (الجرائم سلبية) |

Positive crimes are the crimes which arise from the commission of some prohibited act: for example, theft, fornication, robbery, murder, hurt, etc. Negative crimes are crimes which spring from the omission of an obligatory act: for example, to avoid giving evidence, non-payment of Zakat, etc.

(4) Classification of crime according to frequency of occurrence:

On this basis crime is divided into two kinds:

- | | |
|----------------------|-------------------|
| (a) Essential crimes | (الجرائم البسيطة) |
| (b) Habitual crimes | (جرائم العادة) |

The first kind of crimes is related to those unlawful acts, the very first occurrence of which is known as crime that creates penal liability: for example, all crimes of Hudood and Qisas. The second kind of crime relates to the commission of those unlawful acts which become crimes only by repeated occurrence. The first occurrence of that act does not constitute a crime. Therefore, these acts are not crimes in their essential nature. Only repetition of the act turns it into a crime. Some of the crimes of discretionary punishments are of this kind. This habituality of commission of the act makes it a crime right from the second occurrence, because it means simple repetition.¹

(5) Classification of crime according to nature of violation:

On the basis of this classification, crime is divided into two kinds:

- (a) Public crimes (جرائم ضد الجماعة)
 (b) Private crimes (جرائم ضد الافراد)

Crimes which are offences against the society at large and are punishable as the right of God, fall within the scope of the first category, and crimes, which are not substantively injurious to society at large but are offences against individuals and their private rights, fall within the scope of the second category. The crimes of Hudood are instances of the first kind and crimes of relation and blood money are instances of the second kind. The second kind of crimes is compoundable whereas the first kind is not.²

1. *Mawahtb-ul-Juleel, Vol VI, p.320*

2. (a) *Badal'-us-Sanaat', Vol VII, p.33*

(b) *Ibn-I-Hammam, Fath-ul-Qadeer, Vol. IV, p.12*

PART - II**CRIMINALITY**

- ★ *Western Science of Criminality.*
- ★ *Islamic Philosophy of Human Nature.*
- ★ *Pre-determined Criminality and Human Freedom.*
- ★ *Islamic Injunctions and Western Criminology.*
- ★ *Psychology of Criminals.*

WESTERN SCIENCE OF CRIMINALITY

The branch of law, that studies the social phenomenon of crime, its causes and the measures which society directs against it, is known as Criminology.¹

This branch of social study comprises four main subjects:—

- (a) *Science of criminality.*
- (n) *Criminal Psychology.*
- (c) *Criminal Policy.*
- (d) *Criminal Law.*

The first one, appreciates the investigation of the causes of crime in the mental and physical constitution of the delinquent himself or in the social and environmental condition of a given society.

The second invites the study of the nature as well as mental and social phenomenon of the commission of crime.

The third deals with the appropriate measures of social organisation whereby harmful activities may be prevented and the proper treatment to be accorded to those who have caused harm to any individual or society, through their transgressive behaviour.

Whereas, *the fourth one* is the detailed and technical instrument of criminal policy.²

As far as this part is concerned, we have to focus our attention exclusively upon the first two subjects, that is science of Criminality and Criminal psychology.

Development of Science of Criminality

In the history of western law no systematic study of criminology had been conducted until the 19th century.

About the time of the *French Revolution*, this attempt became more frequent and the methodical study of social and anthropological facts, which is the core of criminology, was conducted.

In the beginning of the nineteenth century, in France, certain scholars instituted criminal statistics and amplified and developed their methods. They are called the founders of criminology. Among these, first of all, was *Adolphe Quetelet* (1796-1874). In 1835 *Quetelet* published his work "*Sur l'homme et le de'veloppement de ses faculte's on Essay de physique sociale*" which is considered the landmark of criminology.³

One of the great students of systematic criminology, was an Italian Scholar, *Cesar Lombroso* (1836-1909), who conducted an extensive study on the causes of criminality, and, for the first time, introduced the '*Theory of born criminal*' in the history of Western Criminal Law. His most important book upon this topic is "*L'uomo delinquente*". By that time, '*Criminality*' had become an independent subject of research in the field of criminology. Therefore, various western criminologists, after their analytical observations formulated different theories regarding the *Causes of Criminality*.

Western Theories, after a thorough survey, can be primarily classified into five:—

- (a) Positivistic/Biological Theory.
- (b) Psychiatric/Pathological Theory.
- (c) Psychological/Psycho-Analytical Theory.
- (d) Sociological Theory.
- (e) Ecological Theory.

Positivistic Theory

It is also termed as *Italian, Anthropological, Scientific or Physical Theory*. It is based upon the concept of *Endogenous hereditary factors*, which act as the effective causes of a criminal conduct.

In the words of *Jones, H.* "The apostle of this pessimistic creed that is the '*Theory of Inborn Criminality*' is the famous Italian criminologist *Cesare Lombroso*, as already mentioned. He conducted a statistical research and concluded that the structure of the skulls of the criminals was biologically different from that of the normal persons. According to *Lombroso*, criminality is in-born, being the result of an *atavistic reversion* to an earlier evolutionary stage. It is a constitutional matter, that is to say, it is an essential part of the inherited nature of the criminal and cannot be changed. *Lombroso* later added the idea of *degeneration*; basic flaw in heredity, giving rise, in later generations, to the deterioration of physique and behaviour which we see in the criminal. In later editions of his book, he modified his views, and admitted that in perhaps two criminals out of three, environmental factors may be effective.⁴

Lombroso's 1st book was published in 1872, which embraced the anthropological study of 400 *venetian criminals*. By 1892, he had examined 25,000 criminals. So he gradually developed and modified his views.⁵ The quintessence of his theory, as he has gradually developed and modified it, is that a certain percentage of criminals, 35 to 40%, are born with dispositions which, irrespective of external conditions, will make them criminalistic and that anatomic and physiological characteristics may be ascertained in these criminals.⁶

Other Principal figures of this *Anthropological or Positivistic School*, *Enrico Ferri* (1856-1929) and *Garafalo* (1852-1934) also attached great importance to environmental factors.

The *positivistic Theory* of criminality has further undergone two major stages of development.

- (1) Development of Lombrosian View.
- (2) Development of Post Lombrosian Views.

1. *Development of Lombrosian View*

The *Development of Lombrosian View* has already been discussed. Moreover *Sheldon, Sutherland, E. Glueck* and many other criminologists have supported this view with slight variances.

The influence of *Lombrosian theory* according to *Mannheim*⁷ was very different in various countries, strongest in *Italy* and *South America*, weaker in *France* and *Spain*, almost completely absent in *Russia*. In *Germany* and *Austria*, after a great deal of initial opposition, there was a revival, whereas a different historical process took place some-what later in the *United States*. In *England* the two opposing trends are best represented by *Havclock Ellis* as leader of the pro-Lombrosian party, *Charless Goring* as his opponent, with *Henry Mandsley* standing in the middle. *Ellis* opposed Lombroso's use of the *concept of atavism*; he stressed that there was no uniform 'School' of criminal anthropology and no real type of born criminal, thereby preferring the phrase '*moral insensibility*' of the instinctive and habitual criminal.

Ellis, explaining *Lombroso's view*, even stresses that *Lombroso* himself did not regard the '*born criminal*' as a real type, but emphatically asserted that all that can be asserted is a greater frequency of anomalies.^{7-A}

Like *Ellis*, *Henry Mandsley* (1835-1918), the great psychiatrist, was also strongly influenced by the idea of *moral insanity* as developed earlier in the 19th century by *James C. Prichard* and others. Without completely subscribing to Lombroso's theories, he believed in the existence of individuals who, because of congenital or acquired characteristics, are entirely lacking in the capacity for moral feeling and for comprehending moral ideas.

According to *Mandsley*, *crime* and *madness* were both *antisocial products of degeneracy*, but *crime*, he wrote later, was not necessarily a symptom of degeneracy. Like *Lombroso*, however, he linked *epilepsy* with *physical stigmata of degeneration* and with *crime*.

It is interesting to observe that in spite of many differences in criminological outlook, the practical reform programmes of *Ellis*, *Mandsley* and *Goring* bear a striking resemblance. All three pin their faith in the triad of better education, in the moral sense, segregation of the dangerous criminals, and sterilization of the unfit, the last ingredient being particularly stressed by *Ellis* and *Goring*.

2) *Post Lombrosian Developments*

As far as the *Post Lombrosian developments* are concerned, various criminologists have expressed their views in modified forms regarding the same theory. These developments, as already mentioned, actually originate from the research works of *Ellis* and *Mandsley*. Because, *Charles Goring* had appeared as a well-known opponent of their views, therefore, we have associated the description of *Post Lombrosian* development with his name. These are some of the criminological views which possess historical significance, regarding the *Post Lombrosian* development.

- | | |
|--------------------------------------|--|
| i) <i>Goring's view</i> | Theory of Physical and Mental Inferiority. |
| ii) <i>Fink & Dugdale's view</i> | Theory of Heredity and Criminal Families. |
| iii) <i>Lange's views.</i> | Theory of Twin Research. |
| iv) <i>Kretshmer's view</i> | Theory of Modern Crimi-
no-Biology. |
| v) <i>Hooton's view.</i> | Neo-Lombrosian Doc-
trine. |

GORING'S VIEW

Charles B Goring (1870-1919) elaborating the Positivistic Theory, appreciated the idea of '*Physical and Mental Inferiority.*' His study showed statistically significant differ-

nces in regard to stature and weight of criminals, as he mentioned in his book "*The English Convict* (Lond. 1919 P. 121).

He further found remarkable defect in general intelligence in his group of criminals alongwith their general physical inferiority.⁸

His ultimate conclusion is that a criminal is both physically and intellectually inferior to the normal person and that both this inferiority and criminal tendencies are inherited.

Moreover, the inherent physical condition and mental constitution are independent of each other.⁹

He gave the idea that there existed in every person what he called a '*criminal dia-thesis*' a hypothetical character of some kind, a constitutional proclivity, an inward potentiality to commit crime, which if *Lombroso's Theories* were correct, should differ according to physical type.

By arranging his material, he calculated as follows:

When a sample of criminals and a sample of non-criminals are similarly constructed with regard to the proportional numbers of professional men, shopkeepers, labourers, artisans, etc. *criminals*, on the average, are seen to be *1.7 inches* less in stature than the *non-criminals* of the same professions.

In the controversy of '*heredity and environment*', he was on *Lombroso's side*, and perhaps even more than the later, he was inclined to under-rate the environmental influences. He says, "*Crime is only to a trifling extent the product of social inequalities, of adverse environment or of other manifestations of the forces of circumstances.*"

Apart from the concept of the *criminal type*, there were indeed many significant similarities between *Goring* and the *anthropological School* against which he fought.

Whereas, *W. Norwood East* investigated *4,000* young English delinquents upto *1942* and differed with *Charles Goring* upon this issue.¹⁰

FINK AND DUGDALE'S VIEW

Fink and Dugdale's, explaining the Biological Theory, have introduced the idea of *Heredity and Criminal Families*.¹¹ It was the period around the turn of the 19th century when this question was most heatedly discussed. *Lombroso* himself devoted to it a chapter of his '*Crime*' – its *Causes and Remedies* in which he presented a collection of vague and questionable statistical data of various undesirable features among the ancestors of criminals.

19th century American literature on the subject betrays, according to *Fink*, a strong belief in the inheritance of crime, but he disagrees as to what exactly it is that is inherited and how the transmission takes place: is it crime itself or merely a propensity and a predisposition to it?

Dugdale was anxious to do justice to both *hereditary* and *environmental influences* and in this regard he conducted research with the reference of *certain families*, having striking number of criminals or otherwise socially deviant members. His first work "*The Jukes*" was published in *New York-1877*, and then *two similar* studies of criminal families were published in the U.S.A. *The Nam Family* by *Estabrook and Davenport*, and *H.H. Goddard's 'The Kallikaks'*. This idea had also received strong support through the work of *William Healy*.

The studies of the *Family Histories* of this type ultimately could not provide convincing evidence.

In the latest large scale English study, *W. Norwood East's 'Adolescent Criminal'* no attempt could be made to determine the relative share of *endogenous* and *external factors*, but some figures are given to show the connection between *inherited* and *familial defects and offences* committed but there is no material on the question of *hereditary transmission*. In another work, *East* states explicitly that neither this research nor his other experiences have given

him any reason to regard criminality 'as such' transmissible.^{11-A}

LANGE'S VIEW

The German Psychiatrist *Johannes Lange* was one of the most important apostles of *Twin Research*. It was probably *Sir Francis Galton* who first recognized that there were two kinds of twins :—

- i) Monozygotic twins (Having concordant behaviour)
- ii) Dizygotic twins (Having discordant behaviour)

A lot of criminological research was conducted over these kinds of twins. The figures and data obtained through these studies concluded that, as far as crime is concerned, *monozygotic twins* on the whole reacted in a similar manner, whereas *dizygotic twins* often behaved differently, although the upbringing and environment of the two had been identical.

Lange's Theory of *Twin Research* was criticised by various criminologists on *seven different bases*, but later investigations, especially the American ones, by *Rosanoff* have considerably added to the size of *Lange's* case material and made certain improvements in his methods.

He stresses that concordant behaviour in *identical twins* is largely limited to *serious criminals* with *hereditary psychopathic tendencies*. For them he thinks, the *hereditary factor* is decisive, whereas environmental influences matter only for less serious criminals.¹²

An important contribution to *criminological twin research* has been made in Japan, where *Shufu Yoshimasu*, Professor of *criminal Psychology and Forensic Psychiatry* in *Tokyo*, has published the results of his follow-up studies between 1941 and 1961 indicating the conclusions different from those of *Lange* from the extensive literature upon

Twin Research, the following may be quoted as more significant, *Lange J. Crime and Destiny* Lond. 1931, *H.H. Newman, Twins and Super-Twins*, Lond. 1942, and *Evolution Genetics and Eugenics*, Chicago 1930, *W.C. Reckless, Criminal behaviour*, *R.S. Woodworth, Heredity and Environment*, New York 1941, *James Shields, Monozygotic Twin*, Lond. 1962, *Beveridge, Changes in Family Life*, 1932.

KINBERG'S VIEW

O. Kinberg, through his *Basic Problems of criminology*, 1935, extended his research to a new thought, that is 'Endocrinology'. He connected the criminal conduct of the delinquents with inherited disorders of pituitary or other ductless glands present in human body.¹³

Endocrinology or the *Theory of Ductless glands* has proved, according to this view, that the function and functional disturbances of these glands are extremely important to the course of physical as well as mental processes. The functioning of the instinctive and emotional life is due not only to the nature of brain, but also largely to the *blood-chemical* processes dependent on *Glandular Secretions*. The *New criminology* by 'Schlapp and Smith' has also vehemently asserted the connection between *criminality and glandular function*. It is claimed that the vast majority of all criminals, misdemeanants, mental deficient and defectives are the products of bodily disorders, that most crimes come about through disturbances of the ductless glands in the criminal or through mental defects caused by endocrine troubles in the criminal's mother (viz. during pregnancy). This trend seems to have culminated in the 1920. More recent *American criminology* has repudiated the oversimplification of the causality of criminal acts for which the *radical endocrinology* is responsible.

Wood and Waite, in *Crime and its Treatment*, New York, 1941, *Sheldon and E. F. Glueck* in *100 juvenile L. in-*

quents, USA 1939, and *D.R. Taft*, in *Criminology* New York 1945, have criticised the theory on various bases.

KRETSCHMER'S VIEW

The famous German psychiatrist *Ernst Kretschmer* conducting a constitutional study of the criminals, introduced *The Modern Crimino-Biological Theory*. This School originated in 1919-20, in *Germany, Austria and Italy*. *Eduard Mezger* was also one of the most prominent legal exponents of this theory. *Kretschmer's original object was to examine the complex relationships between various types of physique, character and mental abnormality*. He distinguished three major constitutional types of human physical structures which as he stressed were not 'Ideal types' but empirical ones:¹⁴

- a) *Asthenic type*
- b) *Athletic type*
- c) *Pyknic type*

This classification is based on external physical structures and skeletal systems relating to particular morphological similarities. Thus the persons were characterised in this manner and various criminal and non-criminal conducts were connected to these types. Particular crimes, classified in different constitutional types, were mentioned, as in case of psychoses.

Gluecks, Sheldon, Seltzer, Sutherland and many other anthropologists have criticized the *Kretschmerian view* and it has been, finally, concluded that there is no specific combination of physique, character and temperament to be found which would determine why an individual becomes a delinquent.

HOOTON'S VIEW

The recent anthropological criminal investigation is conducted by a Harvard Professor *E.A. Hooton*, introduced as '*Hooton's Neo-Lombrosian Doctrine*'.¹⁵ *Hooton* considers it as an *a-priori* assumption that the behaviouristic tendencies of man are associated in some fashion with his physical characteristics, as they are among the higher species of animals. Groups of human beings with markedly different modes of behaviour (criminal and non-criminal) must, in order to demonstrate this interrelation, be subjected to a long series of *morphological and metric* observations.

In tracing the causation of crime, *Hooton* pays attention to *moles, tattooing, freckles, quantity, texture, form and colour of hair, skin colour, eye colour, shape of forehead, form of nose, lips, prognathism* (projection of upper and lower jaw), *chin, teeth, palate, ears, neck, slope of shoulders* etc. (a total of 33 items with numerous subgroups) under *morphological investigation*. Whereas, under *metric conditions*, he mentions age, weight, height, shoulder breadth, chest depth, chest breadth, sitting height, head length, head breadth, head height, head circumference, facial height, nose height, nose breadth, ear lengths, ear breadth etc.

On the basis of *Morphological* and *Metric* investigations, *Hooton* assumes a correlation between specific physical types and modes of behaviour. Thus the criminals, considered en bloc, are a group of sociological and biological inferiors and this inferiority possesses hereditary origin.

As far as the *classification of body build types* is concerned, *Hooton* seems to be influenced by *Kretschmer*. *David Abrahamson*, in *Crime and the Human Mind* Lond. 1945, and *W.B. Tucker*, in, *Journal of Criminal Law and Criminology*, XXXI, 1940 pp. 437 have criticised *Hooton's* contention that a biological inferiority is a basic feature in criminals and that this inferiority is hereditary. The latest

investigations conducted in this connection in U.S.A have reached negative results, also as regards the *correlation* asserted by *Hooten*.

Conclusion :

The whole discussion of *Lombrosian and Post Lombrosian views*, drives us to the conclusion that criminality is mostly an *inheritedly determined factor* and somewhat an *atavistic reversion*. By this, the advocates of Positivistic/Biological School mean, *that the minds of the criminals were not fully developed to the perfect human level and still retained the animalistic tendencies. According to them the criminal commits a crime because of being so low in his evolutionary scale that he still continues to possess some furious and brutal characteristics, not present in non-criminals.*¹⁶

Thus, the criminal himself cannot be accountable to any law, because this fate for criminality is predetermined on account of the inherited biological characteristics.

Psychiatric Theory :

According to this theory, all criminality is the result of *psychiatric abnormality and mental disease.*¹⁷ There are many offences which are clearly the product of a disordered mind. All these forms of mental illness are readily diagnosable as such. *Murder, rape, arson, theft* etc. are committed due to *Schizophrenia*, a specific form of *psychosis* or *obvious neurosis*. Similarly in the course of *hysterical fugue* (a state of altered consciousness) an individual may commit many offences of which he has no recollection afterwards.

The *obsessional neurotic* also may be forced by an irresistible inner compulsion to go on committing offences, such as *stealing, sexual exhibitionism* or *wandering*.

A comprehensive *pathological survey* of the various forms of mental illness giving rise to specific crimes has been

conducted by the psychiatrists.

The psychiatrists basically divide *Psychosis into two groups* :-

1. Organic Psychosis.
2. Functional Psychosis.

Organic Psychosis

Various forms of Organic Psychosis are :

- | | | |
|----|-------------------------|---|
| a) | Dementia Paralytica | (General Paralysis of the insane) |
| b) | Traumatic Psychosis | (Injuries of brain caused by accidents) |
| c) | Encephalitis lethargica | (Sleepy sickness) |
| d) | Senile dementia | (A kind of mental illness) |
| e) | Puerperal Insanity | (Illness of the pregnant and post-pregnant mother). |
| f) | Epilepsy | (The most widely known type of mental disorder) |
| g) | Intoxication Psychosis | (Especially Alcoholic disorders) ^{1 8} |

Brief Description Of Organic Psychosis

a) Dementia Paralytica

It is characterised by a progressive deterioration of the whole personality. In its initial stages criminal acts such as *theft, fraud, forgeries*, may be committed with astonishing openness and silliness. In this case the offences are nearly always committed without accomplices as the psychotic is too deeply withdrawn into his own world; and too abnormal in his behaviour to attract associates.

b) Traumatic Psychosis

This may also produce profound personality changes

leading to criminality and may make the psychotic particularly susceptible to the effect of alcohol. These patients may easily become excited and prone to *crimes of violence*.

c) *Encephalitis Lethargica*

It has been particularly frequent among children in England after the First World War. It is an acute infectious fever, producing an inflammation of the brain, usually followed by serious changes in physique, intelligence and character. In young age, the patient develops more disagreeable anomalies of personality. Many children and adolescents after an acute attack of these become social problems and commit highly *antisocial acts, often of an explosive or sexual nature*. This may easily happen in their *post-encephalitic period*.

d) *Senile dementia*

In this case the impairment of the physical and mental faculties, emotional disturbances and loss of control over sexual urges, coupled with growing suspicion of other people, may provoke acts of *violence* or *sexual assaults* on children. The nature of crimes committed by these patients may vary according to the various forms of *Dementia*.

e) *Puerperal Insanity*

It is a form of exhaustion psychosis occurring in women in a condition of extreme anxiety due, for example, to the birth of an *illegitimate child, economic stress plus physical fatigue*. Especially *child-killing* and other offences, such as *theft* may also be committed by such patients.

f) *Epilepsy*

The attention of criminologists was drawn to it mainly by *Lombroso* who exaggerated its criminological significance by maintaining that all born criminals were *epileptics* and that among *occasional criminals* there was at least one class, the *epileptoids*, in whom a trace of *epilepsy* was the origin of their criminal tendencies.

It is commonly believed, however, that *epileptics* are prone to sudden out-breaks of apparently motiveless violence and to develop strongly anti-social attitudes. In the state of so-called epileptic Fugue patients may become disorientated, wander about aimlessly for long periods and commit minor offences.

g) *Intoxication Psychosis*

The part played by alcoholic intoxication as a potential cause of crime has for many years been a favourite subject in criminology. *Drink* has important social as well as psychological and psychiatric causes and consequences. The criminality of the children of alcoholic parents, too has often been discussed. *Burt* found *parental alcoholism to be three times as frequent among his delinquents as among his control groups*. *Norwood East* regards alcoholism as an indication of a psychopathic inheritance. Case histories of notorious criminals often contain references to alcoholism of the father.

The above mentioned facts regarding alcoholism have been statistically elaborated by *Gluecks* in 'Unravelling' p. 95, 98, 110, *East* in 'The Adolescent criminal' p. 55 and *E.G. George Godwin* in 'Peter Kurten' Lond. 1938, p. 26.

Functional Psychosis

Some of the Functional Psychosis are :

- a) Paranoia.
- b) Paraphrenia.
- c) Schizophrenia.
- d) Manic. (depressive psychosis) as discussed in detail by *H. Mannheim* in his *Comparative Criminology*.¹⁹

Some of the chief characteristics of the *neurotic psychopath* as described by *Hermann Mannheim*, are :

- i) *Affectionlessness or lack of relations of others.*

- ii) *Disregard of community group standards with anti-social behaviour.*
- iii) *Apparent absence of guilt feeling, and failure to learn by punishment.*
- iv) *Emotional liability and Immaturity, leading to short circuit reactions with immediate pleasure, satisfaction or unpremeditated violence.*
- v) *A lack of foresight.*
- vi) *Continued sexual experimentation, immaturity or aberration.*
- vii) *Undue dependence on others.*²⁰

Kurt Schneider, David Henderson and Glover are some of the eminent criminologists, who have contributed a lot to this theory.

Psychiatric/Pathological Theory can be better understood by going through the selected literature mentioned below :

1. D.K. Henderson, *Psychopathic States*, New York, 1939;
2. H. Cleckley, *The Mask of Sanity*, St. Louis, 1941;
3. Edward Glover, *The Roots of Crime*, Section 4;
4. N. East, *Society and the Criminal*, Chs. 8, 14;
5. Barbara Wootton, *Social Science and Social Pathology*, Ch. 8;
6. William & Joan McCord, *Psychopathy & De linquency*, New York, Lond, 1951;
7. Winfred Overholser, *Poineers in Criminology*;
8. Max Grunhut, *Probation and Mental Treatment*, Lond. 1963;

9. John Bowlby.

*Personality and Mental Illness.***Conclusion :**

The supporters of *Psychiatric theory of criminality* have reached the conclusion that commission of every crime is indicative of an organic or functional disease or suffering in the delinquent. According to this view, criminal propensity is not inherited but it is an internal pathological development in the personality of the criminal. Therefore, in view of the above discussion, the exclusively determinant and operative factor in the criminal behaviour of a person is the *psychiatric abnormality, mental disorder and hypochondriac disease*. Since criminal liability cannot be imposed on the delinquent therefore, there is no place for punishment.

Psychological Theory.

This theory is represented mainly by *Sigmund Freud* (1856-1939). According to this theory, an infant is considered as a young animal, with many inherent and instinctual bad characteristics, such as *selfishness, violence* and other *anti-social ambitions*. During the process of development he has to learn that these ambitions cannot be realised in a civilized human society. His *instincts* (the id) are disciplined in accordance with his developing sense of reality (the ego). The *ego* operates on the basis of simple *Expediency*, not in the strict sense of *Right and Wrong*.

The limitations in the form of *Right and Wrong* or *permitted* and *prohibited* are imposed on the instinctual ambitions (the id), later on by the society through its system of social values. The sense of these standards or traditional ideas, injected by parents during childhood, or by society, forms an organ within the mind called *supper-ego*, it roughly corresponds to what we say *conscience*.²¹

At this stage, most of the wishes are rejected because they are wrong or prohibited, not merely because they are in-

expedient. This leads to considerable inner conflicts and strains between *id* and *super ego*, tries to create consistency and compatibility by reconciling between the desires of the *id* and the checks of the *super-ego*. The strength of *ego* varies from individual to individual.

The moment the conflicting frustrated force of the *id* outweighs the grips of *super-ego* (traditional conscience), the function of *ego* is disturbed, the man violates social values and the crime is committed. The difference between a criminal and law-abiding person is that the former's *ego* is comparatively weaker and is unable to maintain the balance between instinctive desires and traditional conscience.

Sigmud Freud^{2,2} and his followers formulated in this connection *Psycho-analytical Theories* which form a vast literature.

Following books are of much significance for study of this theory :

- a) *Psycho-analytical Theory of Neurosis*, by Fenichel, O. (1945).
- b) *Theories and Structure of Psycho-analysis*, by Healy, W.
- c) *Psycho-analysis Today*, by Lorand, S. (1948)
- d) *Psycho-analysis*, by Glover, E. (1949)
- e) *Freud and the Post Freudians*, by Brown, J.A.C. (1961)

Burt^{2,3} and *Bowlly*^{2,4} in their books, have put another interpretation to this theory in the terms of Excess or Deficiency in General Emotionality.

According to *Henry Goddard* also, *feble-mindedness*, that is low-grade mentality, is the greatest single cause of delinquency and crime. A feble-minded person is known to be sure to commit crime.

Healy^{2,5} & *Bronner* have also explained the psycho-

analytical theory and considered (*Major Emotional Disturbances* as the actual cause of most of the offences.

Adler's theory of *Inferiority complex*²⁶, *Alexander's* theory of *Neurotic character*²⁷ and *Stott's* theory of *Psychological Breakdown*²⁸ are also various interpretations of the same view.

Aitchhom, in this connection, conducted a study of delinquent children. *William Healy* and some other criminologists opine that when a child comes to attain the age of puberty, he wants self assertion and liberation from the checks and limitations imposed on him by the family and the society. If these instinctual urges and desires are suppressed, and they find no way for their fulfilment, he feels dejected and frustrated. Consequently, he reacts against the commands of *traditional conscience* (super ego) and tries to comply with his urges up to his satisfaction, which amounts to criminal behaviour.

All schools of psychological theory consider a criminal as a *passive creature*, who is the victim of general and personal circumstances in which he was brought up. They have justified or explained away the crime by introducing the concept of *Psychological determinism*, that is to say, a man is free neither in his will nor in his action, due to the psychological factors which act on a predetermined pattern.

They conclude that *Temperamental defect* and *Feeblemindedness* are the main causes of a criminal conduct.

Sociological Theory :

Many of the western thinkers have treated *crime* as a product of the forces at work in the society. They include *criminality* among the other *socio-economic phenomena*. According to this school, as *Jones, H. Says*, *poverty, unemployment, mass communication media, drunkenness, gambling, decline in religious observance*, etc. are the crime producing factors in all human societies.²⁹

Crime is committed neither due to biological factor nor due to psychological factors, but it is prompted simply as a social behaviour, under the influence of socio-economic conditions prevailing at the time. Many theories have been formulated by different scholars to interpret this idea.

*Social Learning Theory*³⁰ of *Sutherland* states that a person is neither good nor bad on the basis of his biological potentials. He learns criminal behaviour through his contacts and differential associations with other people, during the process of *socialization*. The society provides all the changes, good and bad and the criminal adopts either of them on account of suitability and favourability.

Anomic Theories of *Durkheim*,³¹ *Merton*³² and *Cohen*³³ involve *normlessness* or *lack of social standards and controls*. They state that individuals are taught by their society that certain kinds of ambitions (such as acquisition of wealth, high level of comfort and luxury or specific standard of conspicuous expenditure) are the needs and inevitable necessities of social life. Then all the legitimate channels towards the realization of these objectives are blocked; hence, they are tempted to adopt illegal modes and criminal behaviours.

Durkheim says, *no living being* can be happy or even exist unless his needs are sufficiently proportioned to his means.

When the concept of need and necessities is extended over all the luxurious ambitions, taught by the society, the man commits crime, considering it as *his means* to which his so-called needs are to be proportioned.³⁴

According to *Marxist Theory*, most of the criminals are found in the lower socio-economic classes, because crime is the result of poverty in itself.

Bonger,³⁵ following the *Marxists*,³⁶ states that crime like all other social phenomena, is a by-product of the economic system.

Fiedrich Engels, too, considers crime as a futile and primitive form of individual protest against the inequities of society.³⁷

The capitalistic economy, to them, is the most relevant factor for the causation of crime, and the social conflict arising from a basic incompatibility of economic interests between different classes is the actual basis of criminality.

Jones, H. in his book, *Crime and the Penal System* Lond. 1968. has given the details of the sociological theory of criminality.

This school is also termed as *French School, Lyon School* or *Environmental School* and the head of it is *A. Lacassagne*, the forensic medicine specialist (1843-1924) as stated by *Hurwitz, S.* in his book *Criminology* Lond. 1952 (P-40).

Ecological Theory :

This theory of criminality was introduced by *Chicago School*, led by *Prof. R.E. Park* and *E.W. Burgess* who applied to human social affairs the key biological concept of 'Ecology'. It is based upon the observation of the *wide disparity in the crime rates in different localities*. It was introduced in the *middle of the 19th century* and reached *the peak of its popularity in the period between the two world wars*.³⁸

*F.M. Thrasher*³⁹ and *C.R. Shaw*⁴⁰ the two well known criminologists of this school, after their extensive researches, have concluded that most of the delinquents and criminals are found in the *central districts, factory areas* and in *bad housing conditions*. In these areas, there are many pathological environmental factors at work, but they lay great emphasis on *poverty, dissatisfaction* and *appetite for a higher standard of life*, present in their other inhabitants.

Some *British criminologists* have also made ecological studies of some particular cities, such as *London, Liverpool, Bradford, Cambridge, Coventry, Birmingham, Glasgow* and *Croydon*, and they have found them having high delinquency rates.

According to this theory, living in certain areas and in some particular communities becomes cause of adopting criminal behaviour due to the environmental conditions prevailing there.

Belonging to certain families and being brought up in certain '*Broken homes*' are also very decisive factors in the formulation of criminal behaviour.

In case of some families in which familial inheritance, whether specific abnormalities of physique, intellect, temperament or of actual criminal tendencies, is prevalent, criminality becomes an innate and inherent feature of human character. Whereas in case of '*Broken homes*' in which one or both of the parents are absent through death, desertion or divorce, delinquency often has a higher rate as compared to other homes.

Therefore, the rate of crimes differs on the basis of this ecological factor.

Following ecological factors are pointed out by *Hermann Mannheim*, which influence the commission of crime according to this theory :

1. *Density of Population* Greater density of population means greater criminality.
2. *Mobility of Inhabitants* People who move and in particular those who move frequently, are more likely to commit offences.
3. *Migration and Immigration* This factor has affected not only the rate of crimes, but the types of crimes also. Surveys conducted in UK and USA have proved this fact.

4. *Urbanization and Urbanism* The trend of migration from rural areas to towns, and the specific way of life resulting from this trend has also caused a great influence on the rate of criminality.
5. *Bad Housing Conditions* Modern study of delinquency areas has established the fact that more crimes are committed by the persons inhabiting bad conditioned houses.⁴¹

*Lunden*⁴² and *Gillen*⁴³ have also supported these views after constituting an extensive and comprehensive research from ecological view point. Moreover, *Jones, H.*, discussing the ecological theory of criminality, also appreciates the idea that the rate of crimes differs from locality to locality on the basis of the above mentioned determinant factors.⁴⁴

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25. See – *New light on Delinquency and its Treatment*,
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ISLAMIC PHILOSOPHY OF HUMAN NATURE

All the theories of criminality, propounded by the Western Criminologists, originate from the distorted vision of *human nature*, based on '*Trial and Error Method*'. None of them, on the basis of human orientated knowledge, that is still undergoing the critical, experimental and evolutionary process to achieve competence, perfection and liberation from errors, can trace the causes of defiance in human nature with certainty.

To solve the problem, we are obliged to conduct an extensive study of following issues :-

1. What is *Human Nature*, and can it be regarded inherently as criminal?
2. Whether the behaviour of the Criminal is pre-determined or is he free in his acts of *Commission* and *omission*?
3. Whether an act of offence, committed by a person suffering from any mental abnormality or psychic disorder, creates any criminal liability or not?
4. Upto what extent the criminal behaviour of a delinquent is affected by socio-economic order of a society?

The answers to these questions would automatically lead us to understand the basic postulates of "*Islamic Theory of Criminality*".

These questions have been separately discussed in various chapters.

The Islamic terminology, 'Al-Fitrah' (الفطرة) means *creation* (الخلق)¹ and signifies the concept of human nature. An eminent muslim scholar, *Imam Raghīb Asfahani* says :

الفطرة او فطر وهو ايجاد الشئ وابداعه على هيئة مترشحة لفعل من
الافعال

(Nature – it is to create and originate a thing alongwith an apparent capacity of performing any act.)²

Thus, human nature is nothing but the capability and competency of adopting any particular conduct, positive or negative, vested in a person at the time of his creation.

The term 'Fitrah' is literally derived from 'Fatarā' (فَطَرَ) that means to open and as under :

It is appreciated by Qur'an in the words :—

السَّمَاءُ مُنْفَطِرٌ بِهِ كَانَ وَعْدُهُ مَفْعُولًا ●

(The heaven shall rend as under thereby; His promise is ever brought to fulfilment)³

Fitr (فطر) and *Iftar* (افطار) are also deduced from the same origin which signify eating or drinking at the end of the fast. The action of *Iftar* denotes two aspects :

First is the commencement of new situation by the end of the previous. Previous order before sunset, during fast was the prohibition of eating and drinking, while through *Iftar* the permission was accorded.

This is to bring a new condition into existence as compared to the previous one.

Second is fulfilment of Allah's will because He has ordered the muslims to conclude the fast before the beginning of night.

Therefore, the term 'fatarā' (فَطَرَ) or 'fitrah' (فطرة) implies the action which gives existence to a

thing that did not exist previously and thus fulfils God's will.

That's why the creation of human beings is known as 'Fitrah'.

Qur'an has elaborated the concept of creation of mankind at many places :

فَأَقِمْ وَجْهَكَ لِلدِّينِ حَنِيفًا فِطْرَتَ اللَّهِ الَّتِي فَطَرَ النَّاسَ عَلَيْهَا لَا تَبْدِيلَ
لِخَلْقِ اللَّهِ ذَلِكَ الدِّينُ الْقَيِّمُ وَلَكِنَّ أَكْثَرَ النَّاسِ لَا يَعْلَمُونَ ●

(Then set your face upright for religion in the right state, the nature made by Allah in which He has made man; there is no altering of Allah's creation: that is the right path, but most people do not know)⁴

A saying of *Holy Prophet* (peace be upon him) to the same effect is reported by *Answad bin Saree'*.

كل نسمة تولد على الفطرة

(Every child is born on the right nature)⁵

The same is reported by *Jabir bin Abdullah Ansari* in these words :

كل مولود يولد على الفطرة

(Every child that is born conforms to the true path)⁶

Fitrat-e-Saleemah (فطرة سليمة) or the *right path* is vested in the creation of every child. It means that every child is born with the potential of fair thinking and fair doing. The right conduct and expediency is the dominant character of every human nature, and that is the *Right path* (الدين القيم), as mentioned in the Qur'anic verse, whether the child takes birth in the house of a Muslim or that of a Non-Muslim.

A very comprehensive declaration of the *Holy Prophet* (peace be upon him) to the same effect has been narrated by *Abu Hurayrah* :

كل مولود يولد على الفطرة فابواه يهودانه او ينصرانه او يمجسانه كمثل
لبهيمه تنتج البهيمه (جدعاء) هل ترى فيها جدعاء

(No child is born, but conforms to the right nature, then his parents make him a jew, or a christian or a magian, as a beast is born entire in all its limbs (or without a defect); do you see one born maimed and mutilated?)⁷

Then the Holy Prophet repeated (i.e. in support of what he said): the nature is made by Allah in which he has made men: there is no altering of Allah's creation: That is the right path (true religion).

Islam has introduced the Doctrine of Unity and Equality of mankind, which also supports the same idea of creation, in the words :

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ ●

(O people! be careful of (your duty to) your lord, who created you from a single being).⁸

Another declaration to the same effect is :

كَانَ النَّاسُ أُمَّةً وَاحِدَةً فَبَعَثَ اللَّهُ النَّبِيِّنَ مُبَشِّرِينَ وَمُنذِرِينَ

(All people are (basically) a single nation, so Allah raised prophets as bearers of good news and as warners.)⁹

Holy Prophet (p.b.u.h.) addressing the assembled multitude of *Hijjat-ul-Wida*, said :

ايها الناس ان الله يقول يا ايها الناس انا خلقنكم من ذكر وانثى وجعلنكم
شعوبا وقبائل لتعارفوا ان اكرمكم عندا الله اتقكم -

فليس لعربي على عجمي ولا لعجمي على عربي ولا لاسود على ابيض

ولا لا ابيض على اسود فضل الا بالتقوى الناس من آدم وادم من تراب الا

كل مائة اودم او مال يدعى به فهو تحت قدمي هاتين

(O people! God Almighty says: 'O mankind! We created you from a male and female couple and made you tribes and nations so as to be known one from the other. Verily in the eyes of God only the most righteous among you is the most honoured of you.)^{10-A}

In the light of this Qur'anic verse, the Prophet continued, no Arab has any superiority over a non-Arab, nor was a white in any way better than a black. The only criterion of superiority and respectability was the element of piety.

All created beings, (He) said, were the off-spring of Hazrat Adam and the very existence of Adam was from dust. Hence all claims to superiority, discrimination and greatness, all demands for blood or ransom, and false traits or trends of rule have been trodden under my feet.^{10-B}

After studying this comprehensive quotation, no doubt should remain in any mind regarding the equal, unexceptional and indiscriminatory attitude of Islam towards human beings and their creation. Thus, it is absolutely false and baseless to say that some of the human beings were created with bad natures, or were given birth with inherent criminal tendencies. This conclusion would undermine the universally accepted idea of unity and equality of mankind and its just and honoured creation. With different inherent natures of human beings, no just, compatible and honourable system of social life can be evolved.

The above mentioned verses and ahadith have clarified the situation by expressing the Islamic concept of human nature. *In view of Qur'an and Hadith, human nature is absolutely free of all bad potentials and wrong tendencies, and no criminal characteristic is inherent in it.*

Qur'an has also very clearly appreciated this fact in *Sura-e-Tin* :

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ • ثُمَّ رَدَدْنَاهُ أَسْفَلَ سَافِلِينَ إِلَّا الَّذِينَ
آمَنُوا وَعَمِلُوا الصَّالِحَاتِ فَلَهُمْ أَجْرٌ غَيْرُ مَمْنُونٍ

(Assurdly, we have created man in the best make. Then we render him the lowest of the low, except those who believe and do good so they shall have reward never to be cut off).¹¹

It is concluded that man has been created in the best of moulds, i.e. with enormous capability of furnishing the good and achieving the highest degree of excellence and perfection, internally and externally. The fact affirmed by this declaration is that every man is conferred with the best nature. In this principle neither any exemption nor discrimination is possible on any basis. Man is destined to realise the *Moral Ideal*, which consists in the triumph of moral good and defeat of moral evil. Now man, being free in his struggle, if he adopts the path of evil and immorality, he goes to the lowest of the low, and if he adopts the path of righteousness and morality, he gets an endless reward, by attaining the stage of highest human perfection.

All that a man gets is neither under the influence of any inborn characteristic nor due to predetermination, but it is an exclusive result of his own choice and action, whether positive or negative.

This Qur'anic verdict establishes the essential goodness of human nature in contradistinction to the 'ideal Culture, where Man has been conceived to have been born with the stigma of sin, in contradistinction to the positivistic view where Man is supposed to have atavistic reversion towards animalistic behaviour and in contradistinction to the psychological view, where man is presumed to inherit some bad instincts and urges.

Lombrosians and Freudians throw the responsibility of crime on nature, whereas Islam declares that nature is perfectly good and the seeds of criminality are not inborn but self-sown during the life of an individual. The theory of

Inborn criminality advanced by the *Biological school* of criminologists, is absolutely wrong and does not find any place in *Islamic philosophy* of criminality.

It has been very strongly asserted by the *Holy Prophet* in the words :

لا تقولوا خيبة الدهر فان الدهر هو الله

(Don't blame time (nature or fate), Indeed nature itself is God (viz it has been rightly created by Allah).¹²

Through this Hadith, a fundamental Islamic belief is being laid down, that if a person does some mischief or damage, or suffers any form of deprivation, he should not place the burden and responsibility on Nature. Nature (Time or fate) has been perfectly created by Allah, the Magnificent and Merciful. All that a man faces in his life is merely the consequence of his own conduct. No external or internal undesired predetermined compulsion has been imposed upon him to do what he does not like to do or what he likes to do.

Thus the criminal behaviour of a delinquent is neither inherited nor ingrained in his nature. Human nature is good for all purposes and one cannot be immune from criminal liability on the basis of these lame excuses.

The concept of bad human nature or inborn criminality is extremely inconsistent with the basic philosophy and purpose of creation of Man and universe, as expounded by *Qur'an*. From Islamic view point, the creation of man and universe is neither accidental nor purposeless. The idea of existence by chance is an express negation of the fundamentals of Islam; because the Existence of Allah, His being the creator of Universe, raising of Holy Prophets, Divine revelations for human guidance, distinction between good and evil, the day of judgement, and the concept of Rewards and Awards: all these basic postulates and beliefs regarding Islamic view of life are altogether shattered by accepting

this concocted explication, self-engineered perversion, and a wilful misinterpretation of the concept.

Man is purposive being and is supposed to realise the highest ideal of moral perfection through a continuous struggle against the vicious and evil forces of life.

Purposiveness of the creation of man has been affirmed by the *Qur'an* :

أَفَحَسِبْتُمْ أَنَّمَا خَلَقْنَاكُمْ عَبَثًا وَأَنَّكُمْ إِلَيْنَا لَا تُرْجَعُونَ

(What did you then think that we (had) created you in vain, and that you shall not be returned to Us?)¹³

Two facts have been clearly established by this verse :

1. Man is not created in vain. The creation of all human beings, without any exception, is for a certain purpose which is to be accomplished during his life.
2. Every man shall be returned to his Lord to meet the consequences of his deeds. Therefore, every person is responsible and accountable for his wordly actions.

As already mentioned, Man has been created with the purpose of pursuing moral ends to achieve the highest stage of perfection. Thus, *Qur'an* explains this view :

وَمَا خَلَقْتُ الْجِنَّ وَالْإِنْسَ إِلَّا لِيَعْبُدُونِ

(And I have not created the jinn and the men except that they should serve Me).¹⁴

الَّذِي خَلَقَ الْمَوْتَ وَالْحَيَاةَ لِيَبْلُوَكُمْ أَيُّكُمْ أَحْسَنُ عَمَلًا وَهُوَ الْعَزِيزُ الرَّحِيمُ

(Who created death and life that He may try you which of you is best in deeds; and He is the Mighty, the Forgiving).¹⁵

The same fact has been asserted again, in the context of creation of the Universe.

وَهُوَ الَّذِي خَلَقَ السَّمَوَاتِ وَالْأَرْضَ فِي سِتَّةِ أَيَّامٍ وَكَانَ عَرْشُهُ عَلَى الْمَاءِ
لِيَبْلُوَكُمْ أَحْسَنُ عَمَلًا

He it is who created the heavens and the earth in six periods (days) and his dominion (Arsh) extends on the water that He might try you, which of you is best in action).¹⁶

The object of the creation of man and all that has been brought into existence for him is that he should do good, because it is goodness that Allah loves.

If, as some of the Western criminologists say, some people inherit bad nature and criminal propensities, that's why they are delinquents, then the specific purpose of human creation, manifestation of noble and mean qualities and human evaluation on the basis of their deeds and actions would altogether become a vain and futile exercise on the part of Allah.

The very purpose of creation of the world itself has been stated to be the pursuit of moral good by man.

The whole Universe has also been created for the same object as stated by *Qur'an* :

أَوَلَمْ يَتَفَكَّرُوا فِي أَنفُسِكُمْ مَا خَلَقَ اللَّهُ السَّمَوَاتِ وَالْأَرْضَ وَمَا بَيْنَهُمَا إِلَّا بِالْحَقِّ
وَاجَلٍ مُّسَمًّى

(Do they not reflect within themselves : Allah did not create the heavens, the earth and what is between the two but with truth, and a specific reason).¹⁷

The term (*أجل مسمى*) is usually translated as "an appointed term or stipulated period" but, I have selected the meanings: A specific reason and a certain purpose.

The word 'AJI' also signifies the same meanings in the terminology of *Qur'an*.

مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ
فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا

(For this reason (purpose) did we prescribe to the children of Israel that who ever slays a soul, unless it be for manslaughter or for mischief in the land, it is as though he slew all men).¹⁸

(The words (أَجَلَ) (Ajal) and ' (أجل) ' (Ajl) having one and the same origin, possess identical significance)

After having discussed the unity of the purpose of creation of man and universe, it is of ample significance to describe the relationship between mankind and all other objects of the Universe.

Qur'an holds in this respect, that everything on the earth and all the objects of the Universe have not only been created for Man, but have been made subservient to him, so that every existing body of the universe should be completely harmonious and compatible with the struggle conducted by man to attain the highest moral ideal, which he was created for

هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا

(He it is who created for you 'for your service' O Mankind all that is in the earth).¹⁹

وَسَخَّرَ لَكُمْ مَا فِي السَّمَوَاتِ وَمَا فِي الْأَرْضِ جَمِيعًا مِنْهُ إِنَّ فِي ذَلِكَ لَآيَاتٍ
لِّقَوْمٍ يَتَفَكَّرُونَ ●

('O mankind' and He has subjected to you whatsoever is in the heavens and whatsoever is in the earth, all, from Himself, most surely there are signs in this for those who reflect).²⁰

That's why Man has been honoured, dignified and granted superiority over all the creatures of Universe, and is known as *أكرم الخلق*. *Qur'an* states :

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَهُم مِّنَ الطَّيِّبَاتِ
وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا ●

(And surely we have dignified the children of Adam, and we carry them in the land and the sea, and we have given them of the good things, and we have excelled them by a (high) degree of excellence of most of those whom we have created).²¹

Hence man has been made the vicegerent of God on earth and, as such supreme among all the creatures. *Qur'an* states :

وَإِذْ قَالَ رَبُّكَ لِلْمَلٰئِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً
(And when your lord said to the angels, very I am going to place a vicegerent on the earth).²²

This was the highest place that man was destined to hold in the whole of creation. Having full regard for the exegetical significances suggested by the commentators in views of this verse, one thing that can be clearly derived and understood from this verse is that it was an allegorical description of the preference and supremacy of man over the whole creation of this earth.

Some of the Muslim Scholars have also expounded that the word '*Khalifah*' here refers to the children of Adam i.e. the whole of Mankind :

هُوَ الَّذِي جَعَلَكُمْ خَلَائِفَ الْأَرْضِ وَرَفَعَ بَعْضَكُمْ فَوْقَ بَعْضٍ دَرَجَاتٍ
لِّيَبْلُوَكُمْ فِي مَا آتَاكُمْ

(And He it is who has made you successors (vicegerents) in the land and raised some of you above others by (various) grades, that He might try to you by what He has given you).²³

ثُمَّ جَعَلْنَاكُمْ خَلَائِفَ فِي الْأَرْضِ مِنْ بَعْدِهِمْ لِنَنْظُرَ كَيْفَ تَعْمَلُونَ

(Then we made you (their) successors in the land after the so that we may see how you act).²⁴

The same concept of *Khilafat--i-Arzi* (Vicegerency in the earth) regarding the humanity as a whole, has been narrated in many other verses. (See-Surah Younous, V. 73, Fatir, V. 39, AL-A 'raf, V. 69, and 73 An-Namal, V. 62 etc).

The demonstration of the angels making obeisance to Adam, thus has essentially explicated Man's superiority in the nature and creation. *Qur'an* has reported the fact :

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي خَالِقٌ بَشَرًا مِنْ صَلْصَالٍ مِنْ حَمَإٍ مَسْنُونٍ ●
فَإِذَا سَوَّيْتُهُ وَنَفَخْتُ فِيهِ مِنْ رُوحِي فَقَعُوا لَهُ سَاجِدِينَ فَسَجَدَ الْمَلَائِكَةُ كُلُّهُمْ
أَجْمَعُونَ

(And when your Lord said to the angels, Surely I am going to create a mortal of the essence of black and fashioned in shapq. So when I have made him complete and breathed into him of my inspiration, fall down making obeisance to him. So the angels made obeisance, all of them together).²⁵

The whole discussion in the light of *Qur'an* and Hadith brings us to several conclusions :

1. The whole mankind has been equally created with an identical nature.
2. The nature of human Kind is perfectly good. It has been made upon the right path and is basically free of evil and malicious tendencies.
3. There is no variation, exception or discrimination at all to this principle of creation. This signifies the eternal uniformity and equality of human creatures

4. Man, bestowed with the essential goodness of his nature has not been created vainly, but for a certain purpose to be realised in this world.
5. The object for man to accomplish is to attain the stage of highest moral perfection by struggling against the forces of immorality.
6. The purpose of creating life and death is to manifest and evaluate human beings in view of their deeds and conduct.
7. The purpose of creation of Universe and of all its objects is to provide harmony and compatibility in the human struggle for realization of the moral goal.
8. Mankind has been granted honour, glory, dignity and superiority over all other creatures of the Universe, due to the comprehensive and positive character of its nature.
9. Owing to this supremacy, competence and excellence of human nature and its creation, Man has been made the successor and vicegerent of God on the earth.
10. Thus, None of the human beings possesses bad nature or inherent criminalistic tendencies.

The positivistic (Biological) theory of criminality that vehemently negates the honour and dignity of mankind, certainly originates from the large, stretched and exaggerated theory of Human Evolution. An unending remoteness, disparity and inconsistency exists between the view of the apostles of this theory that cannot be harmonized or removed. Right from *Lamarck* and *Charles Darwin* and other commentators like *Deveries*, upto the latest evolutionist, the Dutch, Zoologist, *Adriaan Kor klandt* of the university of *Amsterdam*, the founder of *Thorny Theory*, none has been able to prove the alleged concept with certainty.

Therefore, the whole development of knowledge in this field has been in the direction of *Trial and Error*, whereas, the revealed Divine Guidance, that is undoubtedly certain and definite for ever has provided the concept of Essential goodness of human nature and nullified the idea of inborn criminality or atavistic reversion of man towards animalistic characteristics.

The question, as to what type of instinctual urges and demands are vested in human nature and under what circumstances a man is supposed to comply with them, is very much concerned with the analysis of human personality. Since man has been created to wage moral struggle, he is capable of scaling the highest perfection of his conduct as well as to sink to the lowest of the low in creation, as it is stated :

(Certainly) We created man in the best make. Then "in consequence of wrong use of his opportunities and free will" We render him the lowest of the low "he himself having destroyed his original purity and goodness". Except those who believe and practice good, so they shall have a reward never to be cut off).²⁶ This dual capacity for moral success and for moral failure is grounded in human nature, which is absolutely capable to choose either.

Therefore, in order to become acquainted with the existence of various urges and demands, ingrained in the nature of man, it is essential to observe the two aspects of human personality. These aspects are based on two phases of human nature.

- i) Potential Nature (فطرت بالقوة)
- ii) Actual Nature (فطرت بالفعل)

Potential Nature

It signifies the conscience and urges, ingrained in human soul, regarding the pursuit of highest ideals, on the basis

of which man is known to be *Ahsan-i-Taqweem* (لاحسن تقويم). These are basically four in number.

1. Distinction between Vice and Virtue

Every man possesses an urge and demand in his nature to distinguish between virtue and vice, between good and bad, between moral and immoral and between noble and ignoble. That's why man has been recognising indiscriminately some of the noble ideals, throughout the societies having different standards and traditions. Moreover, the distinction between right and wrong has also been universally acknowledged as the foundational stone for the pursuit of moral perfection. This is because of the potential instinct ingrained in the nature of every human being.

A lot of *Qur'anic* references can be provided in this connection. One of them is mentioned here to appreciate the concept. *Qur'an* states :

وَنَفْسٍ وَمَا سَوَّاهَا فَأَلْهَمَهَا فُجُورَهَا وَتَقْوَاهَا

(And (Human) mind and its perfection. So He intimated to it by inspiration its vice and its virtue).²⁷

Vice is the way of evil, that is deviation from good, whereas *Virtue* is the way of good, that is the guarding against evil. It is by avoiding the former and adopting the latter that moral perfection can be attained.

2. Acknowledgement of existence of God.

The highest among the noble ideals, ingrained in the potential nature of man, is the attainment of nearness to God and His pleasure and Blessings. *Qur'an* says :

وَرِضْوَانٌ مِّنَ اللَّهِ أَكْبَرُ ذَلِكَ هُوَ الْفَوْزُ الْعَظِيمُ

(And best of all is Allah's pleasure and that is the grand achievement).²⁸

تَرَاهُمْ رُكَّعًا سُجَّدًا يَبْتَغُونَ فَضْلًا مِّنَ اللَّهِ وَرِضْوَانًا

(You will see them bowing down, prostrating themselves, seeking grace from Allah and pleasure).²⁹

This goal cannot be realised unless the sense of existence of God is grounded in human mind.

Therefore, every child having birth in this Universe, possesses anyhow, the sense and acknowledgement of the existence of the creator in his nature.

This potential awareness of the existence of God is so much common in human mind that in various Un-Islamic, secular and even in Godless societies, people are inclined to acknowledge some powers and forces as *super-natural*, which they are unable to explain by perceptual standards. Although some of the people may not agree with this contention, yet many of the instance happenings, events and adventures of their own life are of such a nature as cannot be interpreted logically and scientifically.

Therefore, they are bound to accept them in terms of *chance* or *supernatural happening*. This acknowledgement sometimes leads them to the conclusion that there exists a super power above the scope and perception of senses and intellect.

This admission is also inherent in human nature, as stated in this Qur'anic Verse :

وَإِذْ أَخَذَ رَبُّكَ مِنْ بَنِي آدَمَ مِنْ ظُهُورِهِمْ ذُرِّيَّتَهُمْ وَأَشْهَدَهُمْ عَلَىٰ أَنفُسِهِمْ
أَلَسْتُ بِرَبِّكُمْ قَالُوا بَلَىٰ شَهِدْنَا

(And when your lord brought forth from the children of Adam, from their backs, their descendants, and made them bear witness against their own souls: Am I not your Lord? They said: Yes; We bear) 30

The people who do not have much realization of the existence of God, sometimes, when they are confronted with some extraordinary problematic situation, which does not seem to be resolved in ordinary course, are automatically

inclined to commemorate God, the Merciful.

This calling upon God becomes, at that time, an instinctual demand of man.

Qur'an also mentions this fact :

وَإِذَا مَسَّ الْإِنْسَانَ الضُّرُّ دَعَانَا لِجَنْبِهِ أَوْ قَائِمًا

(And when affliction touches a man, he calls on us, whether lying on his side or sitting or standing).³¹

وَإِذَا مَسَّ الْإِنْسَانَ ضُرٌّ دَعَا رَبَّهُ مُنِيبًا إِلَيْهِ

(And when distress affects a man he calls upon his Lord, turning to Him frequently)³²

This happens only because the sense of realising His existence lies potentially in the nature of man.

In the light of these declarations it becomes very obvious that the confession of the existence of God Almighty is ingrained in the nature of every man. It remains in the potential form, unless it is actualized through proper coaching and education.

3. *Insight of the processes of Mind*

Man is perfectly aware of the processes of his mind. This is the logical result of the first quality: *distinction between vice and virtue*.

This insight is, in fact, the self consciousness, which is the basis of discrimination between man and animal.

Qur'an appreciates this fact in the words :

بَلِ الْإِنْسَانُ عَلَىٰ نَفْسِهِ بَصِيرَةٌ ●

(Nay! man is witness against himself).³³

It means that man is quite aware of what he desires, thinks and does, and he will remember it till the day of judgement.

Qur'an says :

عَلِمْتَ نَفْسٌ مَّا قَدَّمَتْ وَأَخَّرَتْ

(Every soul shall know what it has sent before and held back).³⁴

● يَوْمَ يَتَذَكَّرُ الْإِنْسَانُ مَا سَعَى

(The day on which man shall recollect what he strove after).³⁵

These verses establish the fact that man possesses insight into all the actions of his mind and he will remember them also in the life hereafter. Therefore, the capability of being witness and critic over one's conduct, good or bad, lies itself in one's mind. Thus man himself is competent to alter, amend and reform his behaviour. Nothing can restrain him from doing so. This quality of self-consciousness makes him superior to all other creatures.

4. *Sense of responsibility of Trust*

The moral responsibility, conferred upon man, during the struggle of his life, is very well realized by him. That's why no one can deny the fact of being liable and accountable for the acts, performed voluntarily. Everyone is bound to own the consequence of one's deeds. The persons, emphasizing the philosophy of *determinism* apparently seem to be reluctant to accept the responsibility of their undersirable behaviour, but in fact, they only deceive themselves, because their minds are never satisfied with this *self-created concept of immunity*. The conscience of every person unexceptionally recognises man as a *Moral Agent*, considering this responsibility as a sacred Trust. On the basis of this well established sense, man is naturally inclined to accept himself to be answerable for his acts, whether in the earthly world or in the world thereafter.

This sense is ingrained in the potential Nature of Man as quoted in *Qur'an* :

إِنَّا عَرَضْنَا الْأَمَانَةَ عَلَى السَّمَوَاتِ وَالْأَرْضِ وَالْجِبَالِ فَأَبَيْنَ أَنْ يَحْمِلْنَهَا

● وَأَشْفَقْنَ مِنْهَا وَحَمَلَهَا الْإِنْسَانُ إِنَّهُ كَانَ ظَلُومًا جَهُولًا

(Surely we offered the trust (Responsibility) to the heavens and the earth and the mountains; but they refused to undertake it, being afraid thereof; but Man undertook it, he is certainly unjust (to himself, if he does not fulfil his responsibility in respect thereof) and ignorant (in respect of the evil consequences of not fulfilling it).³⁶

Here 'Trust' (**الامانة**) stands for moral responsibility, which is human sense of accountability for all acts of thought and conduct.

This aspect of human personality, as a natural urge, functions to balance his struggle during his life.

The combination of these four urges constitutes the *potential Human Nature*. This is known as (**فطرت خلقى**) (the created Nature of man) for which *Qur'an* says :

فَطَرَتَ اللّٰهُ الَّتِى فَطَرَ النَّاسَ عَلَيْهَا ط لَا تَبْدِيلَ لِخَلْقِ اللّٰهِ ط ذٰلِكَ الدِّىْنُ الْقِيْمُ

(The nature, created by Allah, in which He has made men; there is no altering of Allah's creation; that is the right path (ie. religion of Islam).³⁷

The same is *Fitrat-i-Saleemah* (**فطرت سليمه**) on which every child is born, as Holy Prophet (p.b.u.h.) said :

(Every child that is born, 'conforms to the true path which is his nature').³⁸

The conclusion of the whole discussion is that the *four urges*, explained above, are always ingrained in the *potential nature of human personality*, man is naturally supposed to comply with positive and noble demands, and to adopt morally an appreciable behaviour in his life. These urges collectively, can be termed as 'The sense of Reality' existing as a potential Force in the mind of every person. It is this which creates distinction between good and evil, or right and wrong.

The sub-conscious mind of man is directly influenced by this force. That's why, at the level of the sub-conscious,

the noble urges, normally possess dominating and controlling effect, and the moral good is usually recommended by this organ of human mind. Whereas the negative desires can not play much effective role at this stage.

Actual Nature

The *second aspect* of human nature, which is apparently perceived through various desires, is the *Actual Nature*. It corresponds to some materialistic instincts and ambitions which have been prescribed by some of the Western Scholars, representing the *Psycho-Analytical* theory of criminality. They have considered only this aspect and could not appreciate the former. Consequently, their view became biased and unbalanced, which amounted to the distortion of the vision of human nature.

Qur'an while describing the instinctual characteristics of the actual human nature, states :

زَيْنَ لِلنَّاسِ حُبُّ الشَّهَوَاتِ مِنَ النِّسَاءِ وَالْبَنِينَ وَالْقَنَاطِيرِ الْمُقَنْطَرَةِ مِنَ
الذَّهَبِ وَالْفِضَّةِ وَالْخَيْلِ الْمُسَوَّمَةِ وَالْأَنْعَامِ وَالْحَرْثِ ط ذَلِكَ مَتَاعُ
الْحَيَاةِ الدُّنْيَا وَاللَّهُ عِنْدَهُ حُسْنُ الْمَبَاقِ ●

(The love of desires of women and sons and hoarded treasures of gold and silver and well-bred horses and cattle and tilth, is made to seem air to men; thus is the provision of the life of this world and Allah is He with whom is the good goal (of life).⁵⁹)

This verse has affirmed that human beings are bestowed with some propensities, which prompt man in his actions as instinctive urges. These are :

1. Propensity of sexual satisfaction.
2. Propensity of racial preservation.
3. Propensity of monetary gains and hoarding.
4. Propensity of self-regarding (it is directed to collect the power and maintain the status)

Human conduct, determined through these desires and ambitions, that is the *Actual Nature*, is known as *Self-Regarding conduct*, whereas the instincts and urges ingrained in the *Potential Nature* of man produce the *Social conduct*. The former represents the temptation of the desire, and the latter, sense of the duty. This conflict between desire and duty exists in human mind due to the two fold capacity of human nature.

Man is free to act in compliance of either of these promptings. A regular human conduct means to choose any specific direction of act, which is not possible except by overcoming the existing conflict. The conflict can be overcome in *five ways* :

1. To follow the urges of potential Nature by neglecting the other nature completely.
2. To follow the urges of Actual Nature by neglecting the former completely.
3. To develop the Potential Nature and enable it to control the other nature.
4. To develop the Actual Nature and enable it to control the former.
5. To create such balance between the two as allows none of them to dominate the other.

The *first* is not appreciated by Islam. Because it leads to an extreme, that is *Rahbaniyyah* (رهبانية).

The *second* leads to complete destruction of human personality. Therefore, it is also *disapproved*.

The *fourth* is directed and inclined towards the negative perspective of the personality which can amount to moral decay, hence it is also *unacceptable* to Islam.

The *fifth* does not provide a profound and protected base for the development of noble values, because the balance means equal chances for the two. It may be appreci-

able in some aspects, but comprehensively, it can not help in achieving the stage of moral perfection. Therefore, in its overall analysis, it is concluded, that it cannot be regarded as perfect and ideal.

The *third* is the only ideal form of overcoming the conflict. That is to develop the *potential nature* into a living force and enable it to dominate and control the *actual nature*. In this way, the noble urges and moral propensities of *Potential Nature* become stronger and more effective in human mind than self-regarding instincts and ambitions of *Actual Nature*. The former, after being developed and strengthened, manages to fulfil the needs and requirements of the latter in a valid form under its control and supervision. Thus the *conflict* between the *sense of duty* and the *temptation of desire* is resolved in a positive form.

Therefore, man is neither disabled to attain the goal of moral perfection, nor is he deprived of the fulfilment of his valid desires and ambitions.

This process of purification of human mind is known as *Tazkiyyah* (تزكية). Qur'an states in this regard.

وَنَفْسٍ وَمَا سَوَّاهَا ● فَأَلْهَمَهَا فُجُورَهَا وَتَقْوَاهَا ● قَدْ أَفْلَحَ مَنْ زَكَّاهَا

● وَقَدْ خَابَ مَنْ دَسَّاهَا ●

(And (human) mind and its perfection. So He intimated to it by inspiration its deviating from right and its guarding against evil. Surely he succeeds that who keeps it pure and befalls that who corrupts it).⁴⁰

On the one hand, there is excessive love of self Regarding instinctive ambitions in human nature, whereas, on the other hand, there is the urge and propensity of the pursuit of noble ideals. This conflict between the two aspects of human nature is necessary because no moral situation can arise without such set of circumstances. It is only through such conflict that when man overcomes it in the required positive manner, he becomes the attainer of moral perfec-

tion, which is the basis of his superiority over all the creatures of the world.

At the time of the first instance of the creation of mankind, God Almighty made a declaration regarding the vicegerency, being conferred upon *Hazrat Adam*, the first man upon the surface of the earth. *Qur'an* narrates the declaration :

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً ط

(And when your Lord said to the angels, I am going to place in the earth one who shall rule (in it being My vicegerent)⁴¹. At the occasion of this allegorical statement of the preference of man above the creation on this earth, the angels raised a question saying :

قَالُوا أَتَجْعَلُ فِيهَا مَنْ يُفْسِدُ فِيهَا وَيَسْفِكُ الدِّمَاءَ ج وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ وَنُقَدِّسُ لَكَ ط

(They said: What! will thou place in it such as shall make mischief in it and shed blood, and we celebrate Thy praise and extol thy holiness? He said: surely you do not know what I know).⁴²

The angels had seen only the dark side of the picture. Their observation was confined only to the consequence of the urges and ambitions of the actual nature of man. Therefore, considering man as an *Earners of evil* and a *Shedder of blood*, they could not appreciate his capability of being the *Vicegerent of God* on earth. Infact, man possessed also vast capacity of earning good, due to the inspired knowledge and noble urges, ingrained in his potential nature, but the angels were not perfectly aware of this reality. Propensity of evil there might be in him, but the good was certainly to become preponderant.

Therefore, knowing this situation of conflict in which ultimately the good had to dominate the evil, Allah said, *"Surely I know what you do not know."* It was appreciated that the man had to attain the stage or moral perfection and superiority over entire creation, only through undergoing this conflict of the urges of potential and actual nature. If there was not struggle between temptation of desire and sense of duty, as it was in the case of the angels, because they possessed only the noble instincts, prompting them to perform their religious duties and having no sense of worldly ambitions, then no moral situation would have ever arisen. Without such moral situation, no struggle was to be regarded as an ideal and appreciable endeavour, and, consequently, man would never have deserved this great honour.

Therefore, man, being moral agent, is free to accept and develop the influence of either of these instincts. What else he adopts, he is supposed to be responsible for that, and if he is deprived of such free conduct, due to some physical or mental disability, his criminal and sinual liability is, consequently, suspended. Hence, criminality can not be accepted as an ingrained character of human nature.

NOTES

1. Zamakhshari, *Al-Kashshaf*, Vol. III, p. 377.
2. Asfahani, *Al-Mufradat*, p. 382.
3. Qur'an 73 : 18.
4. Qur'an 30 : 30.
5. *Tafseer Ibn-i-Kaseer*, Vol. III, p. 432 (quoted from Musnad Imam Ahmad)
6. Ibid.
7. *Sahih Bukhari*, Vol. 1, p. 185.
8. Qur'an 4 : 1
9. Qur'an 2 : 213.
- 10-A. Qur'an 49 : 13.
- 10-B. Shibli Numani, *Sirat-un-Nabi*, Vol. 1, p. 145.
11. Qur'an 95 : 4, 5, 6.
12. *Sahih Bukhari*, Vol. III, p. 913.
13. Qur'an 23 : 115.
14. Qur'an 51 : 56.
15. Qur'an 67 : 2.
16. Qur'an 11 : 7.
17. Qur'an 30 : 8.
18. Qur'an 5 : 32
19. Qur'an 2 : 29.
20. Qur'an 45 : 13
21. Qur'an 17 : 70.
22. Qur'an 2 : 30.
23. Qur'an 6 : 166.
24. Qur'an 10 : 14.
25. Qur'an 15 : 28, 29, 30.
26. Qur'an 95 : 4, 5, 6.
27. Qur'an 91, 7, 8.
28. Qur'an 9 : 72.
29. Qur'an 48 : 29.
30. Qur'an 7 : 172.
31. Qur'an 10 : 12.

32. Qur'an 39 : 8.
33. Qur'an 75 : 14.
34. Qur'an 82 : 5.
35. Qur'an 79 : 35.
36. Qur'an 33 : 72.
37. Qur'an 30 : 30.
38. *Sahih Bukhari*, Vol. II, p. 704.
39. Qur'an 3 : 14.
40. Qur'an 91 : 7, 8, 9, 10.
41. Qur'an 2 : 30.
42. Qur'an 2 : 30.

PRE-DETERMINED CRIMINALITY AND HUMAN FREEDOM

In order to decide whether the idea of "*Pre-determined Criminality*" either in *biological, psychiatric, psychological* or in *any other form*, is acceptable to Islam or not, we are positively obliged to study the concept of *Human Freedom*.

Status of Human Acts :

As far as the concept of *Freedom* or *Determinism* of Man in his acts is concerned, it requires keen and serious attention. There is a delicate but very vital distinction according to Islam between *Creation of an act* (*خلق عمل*) and *performance of an act* (*كسب عمل*).

The balanced and the popular view of Muslim jurists is that man is neither the *Creator* (*خالق*) of his deeds nor his actions are divinely *predetermined*. The reality exists between these two positions, as it has been said by the *Theologians* that man's authority is between *Qadr* and *Jabr* (*بين القدر والجبر*).

Although the acts and deeds in general, like mankind itself, have been indiscriminately created by Allah, yet human beings have not been deprived of their free will and choice regarding commission or omission of their acts. Thus God is the *Creator* (*خالق اعمال*) of the acts, whereas man is their *performer and operator* (*كاسب اعمال*).

The real status of human action is neither *creation* (*قدر*) nor *predetermination* (*جبر*) but it is *free performance and attainment*.

Qur'an holds the fact.

وَاللّٰهُ خَلَقَكُمْ وَمَا تَعْمَلُونَ

“And Allah has created you and what you make.”¹

This verse categorically declares that God Almighty is the creator of everything, whether it exists in the form of an accountable creature or in that of an act or deed. None of the creatures is out of His dominion and jurisdiction. But one should be very clear on this issue that nothing of this type of creation binds a man to become a criminal or to perform any specific act under a pre-determined fate which is an exclusive coercion, because the legal and normal liability is created on the basis of *Kasab* (performance), not on that of *creation*. That's why a driver, causing the death of a person on the road is held to be liable for his action, although the creator of life and death is Allah, and none else.

THREE BASIC POSTULATES

There are three basic and relevant postulates of Islamic philosophy in this connection :

1. Man has been granted the capability and authority to perform any act, good or bad, which is an essential condition of being adequately rewarded or punished by God Almighty.
2. Man has been bestowed with the sense of discrimination between Vice and Virtue, which is the foremost pre-requisite of his accountability in the life hereafter.
3. Man has been held liable for his acts and deeds, on the basis of Freedom of will and choice, without which the normal struggle would be absolutely inconceivable.

CAPABILITY OF FREE PERFORMANCE

In case of the first postulate, the *Holy Qur'an* proclaims in unambiguous terms :

وَمَا تُجْزَوْنَ إِلَّا مَا كُنتُمْ تَعْمَلُونَ

“And you shall not be rewarded except (for) what you did.”²

فَالْيَوْمَ لَا تُظَلَّمُ نَفْسٌ شَيْئًا وَلَا تُجْزَوْنَ إِلَّا مَا كُنتُمْ تَعْمَلُونَ

“So this day no soul shall be dealt with unjustly in the least and you shall not be rewarded for aught but that which you did.”³

The same fact has been emphasised vehemently in the following verses :

إِعْمَلُوا مَا شِئْتُمْ إِنَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ

“Do what you like surely, He sees what you do.”⁴

إِنَّمَا تُجْزَوْنَ مَا كُنتُمْ تَعْمَلُونَ

“You shall be requited only (for) what you did.”⁵

هَذَا مَا كَسَبَتْ وَلَكُمْ مَا كَسَبْتُمْ وَلَا تُسْأَلُونَ عَمَّا كَانُوا يَعْمَلُونَ

“They shall have what they earned and you shall have what you earn, and you shall not be called upon to answer for what they did.”⁶

The fact explained in the verse is, that God’s decision of reward and punishment is not, and can never be, capricious, arbitrary and unjust.

It follows the principle that every act, good or bad, is earned and performed by the people themselves and nobody stands answerable for the conduct of others. Here, the concept of Kasab or performance, the exact status of human action, has been mentioned, which can be further understood through the following verses :

مَا أَصَابَكُمْ مِنْ مُصِيبَةٍ فَبِمَا كَسَبَتْ أَيْدِيكُمْ

“And whatever affliction befalls you, it is on account of what your hands have wrought.”⁷

أَوَلَمَّْا أَصَابَتْكُمْ مُصِيبَةٌ قَدْ أَصَبْتُمْ مِثْلَهَا قُلْتُمْ أَنَّى هَذَا قُلْ هُوَ مِنْ عِنْدِ

أَنْفُسِكُمْ إِنَّ اللَّهَ عَلَى كُلِّ شَيْءٍ قَدِيرٌ

“What, when a misfortune befell you, and had certainly afflicted (the unbelievers) twice as much, you began to say: whence is this? Say: it is (only) from yourselves: surely Allah has power over all thing.”⁸

The words “Say: it is (only) from yourselves” require a particular attention. Here a prominent Muslim Scholar *Imam Fakhruddin Razi* says in his ‘*Tafseer-i-Kabeer*’

انكم وقعتم في هذه المصيبة بشؤم مصيبتكم

“Certainly you have faced this misfortune, as a consequence of your own misdeed (misconduct).”⁹

If the people had not been in the possession of capability, authority and free choice of performance (اختيار كسب) in their acts, God Almighty would not have charged them for their misconduct.

تَرَى الظَّالِمِينَ مُشْفِقِينَ مِمَّا كَسَبُوا وَهُوَ وَاقِعٌ بِهِمْ

“You will see the unjust fearing on account of what they have earned, and it must befall them”.¹⁰

وَالَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ فِي رَوْضَاتِ الْجَنَّاتِ

“and those who believe and do good shall be in the meadows of the gardens”.¹¹

ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ لِيُذِيقَهُمْ بَعْضَ الَّذِي عَمِلُوا لَعَلَّهُمْ يَرْجِعُونَ ●

“Corruption has appeared in the land and the sea on account of what the hands of the people have earned, that He may make them taste a part of that which they have done, so that they may return.”¹²

وَوُفِّيَتْ كُلُّ نَفْسٍ مَّا كَسَبَتْ وَهُمْ لَا يُظْلَمُونَ

“And every soul shall be fully paid what it has earned, and they shall not be dealt with unjustly.”¹³

وَلِنَجْزِي كُلَّ نَفْسٍ بِمَا كَسَبَتْ وَهُمْ لَا يُظْلَمُونَ

“That every soul may be rewarded for what it has earned and they shall not be wronged.”¹⁴

لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا اكْتَسَبَتْ

“Every soul gets (the benefit of) what it has earned and gets (the evil of) what it has wrought.”¹⁵

أُولَئِكَ لَهُمْ نَصِيبٌ مِّمَّا كَسَبُوا وَاللَّهُ سَرِيعُ الْحِسَابِ

“They shall have (their) portion of what they have earned, and Allah is swift in reckoning.”¹⁶

It has been fully established that all the *Rewards* and *Punishments* to be given to human beings on the day of *Final Judgement*, would be decided appropriately and justly, holding mankind absolutely responsible for its actions, good or evil. Whithout being capable of free performance, and immune from predestined arbitrarily imposed coercive decisions, one cannot be held responsible. Thus no question of adequate and just reckoning can arise.

As it is stated in numerous Qur’anic verses, that every body would be dealt with only on the basis of his own *earning* and *performance* (كَسَب) and no divine judgement would be passed against any soul it any act not earned by it. Then, how can a person, believing in correctness and undoubtedness of Qur’anic statement, imagine that God Almighty has not conferred the authority (اِخْتِيَار) and capability (قَدْرَت) of committing or omitting the acts, upon him, knowing that he is going to be made accountable. Moreover, how can a man, on this basis, become entitled to various rewards and punishments, for his worldly conduct.

The same idea has been very beautifully explained in these verses :

أَمْ حَسِبَ الَّذِينَ اجْتَرَحُوا السَّيِّئَاتِ أَنْ نَجْعَلَهُمْ كَالَّذِينَ آمَنُوا

وَعَمِلُوا الصَّالِحَاتِ سَوَاءٌ مِّنْهُمْ وَمِمَّا كَسَبُوا سَاءَ مَا يَحْكُمُونَ ●

“Nay: do those who have wrought evil deeds think that we will make them like those who believe and do good, that their life and their death shall be equal? Evil it is that they judge.”¹⁷

مَنْ جَاءَ بِالْحَسَنَةِ فَلَهُ خَيْرٌ مِمَّا وَمَنْ جَاءَ بِالسَّيِّئَةِ فَلَا يُجْزَى الَّذِينَ

عَمِلُوا السَّيِّئَاتِ إِلَّا مَا كَانُوا يَعْمَلُونَ ●

“Who ever brings good, he shall have better than it, and who ever brings evil, those who do evil shall be rewarded (for) aught except what they did.”¹⁸

Although, divine justice and balance is maintained equally in rewarding for good and punishing for evil, yet in case of righteousness better can be paid. But for a criminal act, penalty will not, and can never exceed the proportionate retribution. That is why, mentioning the reckoning of criminals and wrongdoers, in all the verses, an unusual and extraordinary precaution has been emphasised. This is the law of *Absolute Justice* in God's dealing with mankind, that negates every form of (Zulm) injustice, arbitrariness and capriciousness on the part of Allah.

Qur'an states :

ذَلِكَ بِمَا قَدَّمْتُمْ أَيْدِيكُمْ وَأَنَّ اللَّهَ لَيْسَ بِظَلَّامٍ لِّلْعَبِيدِ ●

“This is for what your own hands have sent before and because (it is certain that) Allah is not in the least unjust to the servants (people).”¹⁹

Declaration to the same effect has also been made in Surah *Al-Anfal* V. No. 51 and *Al-Hajj* V.No. 10. *Qur'an* asserts the distinction between the acts, good and bad regarding their consequences to be met by the persons who perform them :

مَنْ عَمِلَ صَالِحًا فَلِنَفْسِهِ وَمَنْ أَسَاءَ فَعَلَيْهَا وَمَا رَبُّكَ بِظَلَّامٍ لِّلْعَبِيدِ ●

“Who ever does good, it is for his own soul, and who ever does evil, it is against it, and Your Lord is not in the least unjust to the servants (people).”²⁰

The basic facts which have been clearly emphasized in all the verses are :

1. Man is to be rewarded only for what he does, not for anything which he has not earned.

2. No one should be dealt with unjustly in the least, in case of rewards and punishments, and no act of God can ever be arbitrary, unjust and capricious.
3. Whatever good or evil a man earns and performs, he becomes accountable for it, because God has conferred full authority and right of choice upon him in order to make him answerable (to Him).
4. All corruptions, wrongs and crimes existing in the world are simply due to the behaviour of men who are capable to perform them with their own free choice.
5. Persons struggling for moral goals and those struggling for immoral and malicious goals cannot be regarded at par.
6. No injustice of any kind can be ever possible on the part of Allah in His dealings with His creatures.

PRINCIPLE OF NECESSITY AND EXEMPTION

Because of the law of *Absolute Justice* in Allah's dealing, He has exempted man from criminal as well as sinful liability any unlawful act is committed by him under the state of *extreme compulsion*. This concept is denoted by the *Principle of Rukhsat* (رخصت), which applies to all discomfoting specific circumstances arising in human life. The flesh of some animals and other foods and drinks, normally prohibited by the Shari'ah, can be used by a Muslim in order to save his life, in certain greivous situations. *Qur'an*, after mentioning the list of the prohibited animals, creates a very significant exception which enjoys the status of a fundamental legal principle of Islam :

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخَيْزِيرِ وَمَا أُهْلَ بِهِ لِغَيْرِ اللَّهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ●

● اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ●

“He has only forbidden you what dies of itself, blood and flesh of swine, and that (animal) over which any other (name) than (that of) Allah has been invoked at the time of its slaughter, but who ever is driven to necessity not desiring, nor exceeding the limit, no sin shall be upon him, surely Allah is Forgiving, Merciful.”²¹

The same fact has been narrated in *Surah Al-Anam* V. No. 145, and *An-Nahal* V. No. 115.

Acute Stress :

Three conditions have been imposed upon this principle.

- a) (اضطرار) It signifies an extreme state of necessity, which lays an exemption to the normal conditions.

Good Intention

- b) (غير باغ) It signifies not desiring to eat for the sake of enjoyment to violate the law of Shariat.

Brief Duration

- c) (لا عادٍ) It signifies not exceeding the leave limit of necessary requirement (ضرورت).

The same principle has been expounded in *Surah Al-Mai'dah* also :—

فَمَنْ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرِ مُتَجَانِفٍ لِأُثْمِهِ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ●

“But who ever is compelled by hunger, not inclining wilfully to sin, then surely Allah is Forgiving, Merciful.”²¹

وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرُّرْتُمْ إِلَيْهِ

“He has already made plain to you what He has forbidden you, excepting what you are compelled to.”²²

The above mentioned conditions like *not desiring, not exceeding, state of hunger, and not inclining wilfully to sin,*

have been emphasised so that the real situation of necessity and compulsion may undoubtedly be signified. Thus God has removed the burden of sin and criminal liability in such a state of undesirable compulsion, where man cannot act on the basis of his free will and choice, and he is deprived of free discretion while performing a particular act or earning a specific deed..

This is the well-known and profound principle of Sharia'at, which applies to the hundreds of the instances of this nature in human life, that under the state of extreme compulsion, a criminal Ininal act, committed by a man, does not create any legal liability and that committing such an act is immune from all kinds of punishments. In the terms of Islamic Penal Law, this exemption is known as *Irtifa-ul-Masuliyyat* (ارتفاع المسئوليت). After having belief in this principle, how is it possible to accept that God has predestined all human actions and made mankind absolutely bound to his predetermined, arbitrary decision? In this condition neither any wilful choice has been left for man, nor is he freely authorised to perform the acts, whether good or bad. This certainly is a more greivous state of compulsion and necessity, in which a man has been placed by his Lord. Therefore, if this hypothesis is accepted as such, it will amount to a big conflict and inconsistency between the tenets of Islam.

Surely, Allah, who is never unjust and unfair in His behaviour, as already stated, cannot punish His creatures for the acts committed by them unwillingly under external compulsion of Divine Decision, against which one can not behave.

CONCEPT OF 'ITMAM-I-HUJJAT' AND DIVINE JUSTICE

The concept of God's justice regarding human responsibility and divine reward has been expressed under another Qur'anic principle. It is stated :

مَنْ اهْتَدَى فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ وَمَنْ ضَلَّ فَإِنَّمَا يَضِلُّ عَلَيْهَا وَلَا تَزِرُ
وَاِزْرَةَ أُخْرَىٰ وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا ●

“Who ever goes aright for his own soul does he go aright, and who ever goes astray, to its detriment only does he go astray, nor can be bearer of a burden bear the burden of another, nor do we chastise until we raise an apostle.”²⁴

Three Basic Postulates :

Three basic facts have been narrated in this verse :

- i) The advantage of adopting right path as well as dis-advantage of wrong path is one's own responsibility.
- ii) There is no concept of vicarious liability in divine reckoning, thus no one will share the burden of the wrong ful acts performed by others.
- iii) No one will be punished unless the truth has first been revealed to him through the Prophets. This is, what we say, *Itmam-i-Hujjat* (اتمام حجت). The prerequisite for the imposition of legal liability upon mankind as first fulfilled by God, only then it is held accountable for its conduct.

If God had to reward humanity arbitrarily under a pre-designed scheme leaving the people helpless, then no need would have arisen of raising the Holy Prophets and of divine revelation.

The very idea has been emphasised in another verse :

لَا تَكْسِبُ كُلُّ نَفْسٍ إِلَّا عَلَيْهَا وَلَا تَزِرُ وَاِزْرَةَ أُخْرَىٰ

“And no soul earns (evil) out against itself, and no bearer of burden shall bear the burden of another.”²⁵

This statement again denotes divine justice to be made while dealing with the men, who had performed various acts bearing legal consequences. These unambiguous declarations

of *Qur'an* make the idea of *Determinism* unacceptable to the Muslims.

The principle of *اتمام حجت* can be better understood through another verse :

وَإِذَا أَرَدْنَا أَنْ نُهْلِكَ قَرْيَةً أَمَرْنَا مُتْرَفِيهَا فَفَسَقُوا فِيهَا فَحَقَّ عَلَيْهَا
الْقَوْلُ فَدَمَّرْنَاهَا تَدْمِيرًا

“And when we wish to destroy a town, we send our commandment to the people of it who lead lives, but they transgress therein, thus the word proves true against it, so we destroy it with utter destruction.”²⁶

The fact being narrated is that the destruction of various communities and localities also takes place under a certain consequential process. Allah does not wish people to transgress, for it is plainly stated in 7 : 28, “Allah does not enjoin indecency.” and again in 16 : 90, “He forbids indecency and evil and rebellion.”

It is not understandable, that on the one hand Allah forbids the people through His Prophets, from committing indecent acts, sins and crimes, and on the other, He Himself has bound them, through His predestined decision, to earn the evil, and moreover, He also wants to punish them for the acts, in which they were not left with any freedom and authority of commission or omission. This concept is definitely not harmonious with the principle of divine justice. The simple procedure of the destruction of the nations as stated in the verse, is that Allah sends them His commandments to do good, pointing out the right way and discriminating it from the wrong, but as the people are accustomed to lead easy lives, they transgress those commands, and are, therefore, punished.

If all these Qur'anic declarations are based upon truth and reality, then one is bound to believe that man has been granted the capability and authority to perform any act, good or bad, and that the same is an essential condition of being adequately rewarded or punished by God Almighty.

This, we have stated before as the first basic postulate.

This is the only meaning of the words :

وَالْقَدْرَ خَيْرِهِ وَشَرَّهُ مِنَ اللَّهِ تَعَالَى

“That the power and authority of earning of good and evil has been conferred upon man by his Lord.”²⁷

The *third postulate*, that man has been held liable for his acts and deeds on the basis of *Freedom of will and choice*, without which the moral struggle would be absolutely inconceivable, is strictly co-related with the first postulate, discussed above.

SENSE OF DISCRIMINATION BETWEEN VICE AND VIRTUE

In order to have the full glimpse of the subject, *the second postulate*, that man has been bestowed with the sense of discrimination between vice and virtue, which is the foremost pre-requisite of his accountability in the life hereafter, should be clear in one's mind.

It is an obvious fact that unless a person possesses clear sense of right and wrong, and could differentiate between good and evil, he cannot be held liable for his acts. That's why insanity, lunacy, intoxication, coercion and minority are accepted lawful excuses in case of legal responsibility, because insane, minor, lunatic and intoxicated persons cannot fully apprehend the benefits of the good and dangers of the evil whereas a person under coercion cannot fully exercise his free will. Therefore, owing to the insensibility, incompetency and the defective capacities in which the people are unable to distinguish between do's or don'ts, they are exempted from legal punishments.

Therefore, this pre-requisite of human accountability has been already fulfilled, as *Qur'an* states :

وَنَفْسٍ وَمَا سَوَّاهَا فَأَلْهَمَهَا فُجُورَهَا وَتَقْوَاهَا

“And the (human) mind and its perfection, So He intimated to it by inspiration its deviating from good and its guarding (against) evil.”²⁸

It is through this inspiration that human mind (soul) has become perfect, because the inspiration has made the two ways clear, ‘fujur’, (*the way of deviation from good*) i.e. the way of evil, and ‘taqwa’ (*the way of guarding against evil*) i.e. the way of good.

It is by avoiding the former and adopting the latter that moral perfection can be attained. This verse has emphatically expressed the fact that man has completely been made capable to understand and know the good and the evil and to choose either of them on the basis of freedom of his will. The next two verses advance the discussion further by saying :

قَدْ أَفْلَحَ مَنْ زَكَّاهَا وَقَدْ خَابَ مَنْ دَسَّاهَا

“He will indeed be the successful who purifies it. And he will indeed fail who corrupts it.”²⁹

These verses clearly indicate that the faculties necessary for human perfection, the sense of discrimination between good and evil, and the authority and capability of choosing either of them, have been provided and that man has been left to strive and struggle freely without any internal restraint or external constraint, so that his personality may be rewarded accordingly in the life hereafter. This sense of the discrimination and faculties of perfection are ingrained in the nature of every man equally, but there are some who make them thrive by their development and other who corrupt them by allowing them to remain concealed, not displaying them to their advantage.

Qur'an has made another declaration to the same

● أَلَمْ نَجْعَلْ لَهُ عَيْنَيْنِ وَلِسَانًا وَشَفَتَيْنِ وَهَدَيْنَاهُ النَّجْدَيْنِ

effect :

“Have we not given him two eyes, and a tongue and two lips, and pointed out to him the two conspicuous ways.”³⁰

The two conspicuous ways (النجدين) are, by general consent of the commentators and according to a saying of the *Holy Prophet*, ‘نجد الشر’ and ‘نجد الخير’ i.e. the *the way of good* and *the way of evil*.

Holy Prophet (peace be upon him) said.

يَا أَيُّهَا النَّاسُ إِنَّمَا النُّجْدَانِ نَجْدُ الْخَيْرِ وَنَجْدُ الشَّرِّ فَمَا جَعَلَ نَجْدَ الشَّرِّ أَحَبَّ

الْيَكْمَ مِنْ نَجْدِ الْخَيْرِ

“O’people: These are the two conspicuous ways, the way of good and the way of evil. The way of evil has certainly not been made more attractive to you than that of the good.”³¹

Here, the concept of inherited evil or ingrained evil in human nature has also been clearly negated. Moreover, it is expressly declared that there is no such divine decision and predetermined conclusion that any one should be bound to earn the evil and discard the good. The choice is free and equal. Right and wrong have been unambiguously distinguished from each other and man, possessing all the necessary faculties and capacities has been set at liberty to adopt either of the two. Both ways are pointed out to man and he is at liberty to choose either. The two eyes (V. 8) will enable him to distinguish good from evil, which with the tongue and the lips (V. 9) he can ask, if he cannot differentiate, for himself.

This concept is further supported by another divine commandment :

إِنَّا خَلَقْنَا الْإِنْسَانَ مِنْ نُطْفَةٍ أَمْشَاجٍ نَبْتَلِيهِ فَجَعَلْنَاهُ سَمِيعًا بَصِيرًا ●

إِنَّا هَدَيْنَاهُ السَّبِيلَ إِمَّا شَاكِرًا وَإِمَّا كَفُورًا

“Surely we have created man from a small life germ uniting (itself). We mean to try him, so we have made him hearing, seeing. Surely we have shown him the way he may be thankful or unthankful.”³²

Holy Qur'an, again asserts the fact, stating :

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ

“There is no compulsion in religion, truly the right way has become clearly distinct from error.”³³

This has become very well established that man has been bestowed with a sense of clear discrimination between good and evil and is free to adopt what he wills. No compulsion, whatsoever, is placed upon him, in order to behave in a criminal manner.

FREEDOM OF WILL AND CHOICE

Now we can easily step towards the *third postulate* directly connected with the first one. The net result, concluded from the whole discussion, regarding the first and second postulate is that man is granted *Freedom of Will* and *choice* in order to perform his acts and deeds and this is the only principle upon which the validity of the entire moral struggle and its reward is based. Otherwise, it would become absolutely inconceivable.

In connection of the *third postulate*, we are confronted with three questions :

- i) What is Freedom of Will?
- ii) How can it be determined, viewing the concept of Qaza'-e-Qadr (قضاوقدر)?
- iii) Does the Holy Qur'an affirm it?

The issue has remained in dispute for a long time between *Mo'tazilah* and *Asha'irah*. The former school was of the view that the man himself was the creator of his acts and God's will had nothing to do with it. They pleaded the *Theory of Absolute Freedom*, whereas the latter viewed that God was the creator of human actions and that man was completely bound to His Divine will and intention. Therefore, they supported the idea of *Absolute Determinism*. This dispute was pacified and reconciled by *Morureedi*

School of Thought, the view of which was ultimately adopted by most of the Muslim scholars and it became the popular and generally accepted view of the Muslims. This signifies that Man is neither the creator of his acts, nor is he bound by the predestined divine fact, regarding the performance of his acts, good or bad. Man, being *Kasib* (The earner and actor) of his deeds, is absolutely free in his will, choice and intention. He is not bound by any external or internal restraint to adopt a particular conduct of behaviour because this would lead to immunity from every kind of responsibility, resulting in the extinction of the difference between morality and immorality, perfection and imperfection, right and wrong and good and evil.

This is the balanced view, as appreciated also by *Imam Jafor-as-Sadiq* stating :

لا جبر ولا قدر ولكن امر بين امرين فالله خلق الاسباب والمسببات ورتب
المسببات على الاسباب وجعل لها مدخلا في وجودها وخلق لها شرائط

وجعلها متوفقة بحيث لو لم يتحقق الشرائط لم يوجد المشروطات

There is neither determinism nor absolutism, the fact is in between the two. Allah has created the causes and effects and has composed the effects on the basis of certain causes, which have been made effective. Then, He has created the conditions for the functioning of the causes, which have been made dependent in such a manner, that, if conditions are not fulfilled, the conditioned causes cannot come into existence. (And, therefore, they cannot result into the effect, without undergoing this principled process).³⁴

The whole phenomena of the universe and human behaviour has been based upon the system of cause and effect which are mutually co-related, but are free and independent of any external predestination.

WHAT IS QAZA-O-QADR?

Concerning the first question, it is to be comprehended that "the Freedom of Will" means independence of a man in the choice of motive, will and intention while acting and behaving in various situations of moral conflict, from all kinds of compulsions and restraints externally imposed.

In the light of this explanation, we have to determine the status of Freedom of human will, viewing the concept of *Qaza-o-Qadr*. As it has already been stated, the exact status of human action is neither creation or absolutism, nor predeterminism, but it is free earning and independent performance, that is known as *Kasab* (كَسَب). Before determining it, the concepts of *Qaza* and *Qadr* should be understood, because of which a lot of confusion has often arisen in human mind.

Qaza (قضاء) means *creation* whereas *Qadr* (قدر) signifies *measure, assessment and estimation*.³⁵

In *Quran*, the word *Qaza* has been used in the sense of creation.

فَقَضَاهُنَّ سَبْعَ سَمَوَاتٍ فِي يَوْمَيْنِ

"So He created then seven heavens in two periods."³⁶

The word *Qadr* has been used in the sense of measure.

إِنَّا كُلَّ شَيْءٍ خَلَقْنَاهُ بِقَدَرٍ

"Surely we have created everything according to a measure (estimation)."³⁷

Although the term *Qaza* is mostly used in the meanings of *Command* and *Decision*, yet by getting related to the term '*Qadr*' it possesses a specific significance, as stated before.

Allama Ferozabadi states in *Al-Qamus* :

القدر محرّكة القضاء والحكم

38

"Qadr is the incentive of Divine creation and decision".

The same idea has been appreciated in *An-Nihayah*:

القدر محرّكة ما قضاه الله تعالى وحكم به من الامور

"That the Qadr is the main incentive of what is created and ordained by God Almighty in respect of various issues." 39

Qadr, as appreciated in As Sirah is :

اندازه کرده خدای بر بنده از حکم

Qadr is the estimation and assessment of man, conducted by Allah through His declaration." 40

On the one hand, *Qaza* and *Qadr* both possess the same and identical expositions, but they are quite distinct from each other in their meanings, scopes and implications.

Qaza signifies the principles of divine creation and will, whereas *Qadr* indicates Human Freedom and Authority. Allah being the creator of every thing and possessor of the keys of 'Ilm-ul-ghayb' (علم الغیب) knows about each and every creature and its conduct, before its coming into existence. *This divine knowldege is in the form of Allah's assessment and estimation regarding the conduct and behaviour of human beings, before they get physical existence and externality in the universe. Thus, on the basis of this premeditation, that is Qadr (قدر) which does not bind man to perform any particular act, God gives his declaration in the form of Qaza.*

Man has been granted with complete freedom of motive, will and intention, and alongwith this full competency and authority he has been sent in the world to earn what he wills, without any external force, coercing him in a certain direction. Since every act and its consequence has to follow a particular process of cause and effect, because this universe has been systematised upon the same principle, thus, even if man is acting freely, his whole conduct can be easily pre-estimated by Allah, through His divine meditations, known as *Qadr* (Taqdeer). This does not place any binding upon human behaviour, and was not meditated for this purpose. It is only a pre-valuation and pre-assessment of human conduct.

which was going to be exposed in the future, on the basis of the perfection and excellence of all embracing and comprehensive divine knowledge of the Creator. We, in our normal behaviour, having the erroneous and dependent sources of knowledge, can perceive any fact, only after it gets external existence and not before it, but if anybody becomes aware of what is going to happen, before the occasion, due to any extra-ordinary and un-usual source of perception, then how can this meditation be regarded as determinant and binding in case of that event. In these days of scientific and technological advancement, hundreds of astronomical, environmental and seasonal events are being predicted, sometimes, decades before. but this pre-estimation and pre-declaration by the concerning agencies is never considered to be effective in the normal conduct of the events. If the events happen positively in accordance with the premeditated knowledge then it does not mean that the prior declaration had any binding effect upon their usual course, but only the correctness of the knowledge is verified as established through such manifestations. This can further be understood through a simple example of a teacher, who, through his long and justified experience, says to a student that he will fail and not be able to qualify the examination and at the end of the year it does happen. What would be the status of teacher's declaration? Would it be regarded as a determinant factor in the student's failure? No. It only signifies the perfection and unerroneousness of the teacher's estimation. The student failed due to the causes and reasons of his own and nothing of the pre-meditation by the teacher had affected him in his course of educational conduct.

The same is the case of *Qaza-o-Qadr*. Allah, on the basis of His irrefutable divine knowledge, knows what else is going to happen till the day of Judgement and even after it. This divine knowledge existed in the form of *Qadr* and it became the incentive of every divine command and declaration as stated before.

MEANINGS OF GOD'S COMMAND AND HIS WRITING DOWN IN LOH-I-MAHFOOZ

All the human actions going to be performed by them in future with complete free motive, will and intention, in their independent courses, were pre-estimated by the Lord of the universe, and this act of premeditation was altogether independent of any compulsion over man kind. This was the *Qadr* (قدر) in the light of which God Almighty made various decisions and declarations, known as *Qaza* (قضاء). It was never an irrational, unjust, arbitrary and capricious decision. When it is said that every thing happening in the world is according to *Qaza-i-Ilahi* or is already in the knowledge of the Lord and He has written it down on *Lauh-i-Mahfooz* (لوح محفوظ) known as *Imam-i-Mubeen* (امام مبین) or *Kitab-i-Mubeen* (کتاب مبین) as stated in numerous verses of the *Holy Quran*, it should never be thought that God has bound mankind, and compelled it to adopt the predestined conducts, through His knowledge or declaration. Thus the faith, that nothing can move without His command, also does not mean such determinism.

The fact being narrated through all of these Qur'anic verses and prophetic sayings is that Allah's knowledge is so perfect, unerring, and comprehensive that even the motion of the most-minor article of the universe is already very well known to Him, and whatever act is performed by man is also within the knowing of God before its performance. The words *izn* (اذن) and *command* (قضاء) denote only the declaration and exposition of the fact meditated and estimated in the form of *Qadr* (قدر) and nothing else. That is why, a man possessing free will and complete authority (اختیار), can change his desire and intention and can adopt any other conduct by discarding the former at any stage of his course of behaviour, and no divine authority compels him to undo it. This proves the freedom of human

will. Such change and alteration, if it takes place, is also pre-meditated by God Almighty. *Qur'an* makes a very clear declaration to this effect.

يَمْحُو اللَّهُ مَا يَشَاءُ وَيُثَبِّتُ وَعِنْدَهُ أُمُّ الْكِتَابِ

“Allah abolishes and establishes what He pleases, and with Him is the basis of the Book.”⁴¹

If every thing is predestined and predetermined, and man does not possess any freedom and authority in his conduct, then no question of abolition and subsequent establishment does arise, because this would amount to unprofundness of God's intention. Since every declaration by Allah is made on the basis of *Qadr* (estimation of human conduct), if a man according to his knowledge has to adopt a specific behaviour, and subsequently, exercising his free will and authority divorces himself from the former conduct and follows the second, the first is known to be abolished and the second established, through his declaration.

Sheikh Abul Haque Dehlvi, says in this context :

فالمحو والاثبات إشارة الى القدر وعنده ام الكتاب إشارة الى القضاء

“That the abolition and establishment indicate the *Qadr* whereas the basis of the Book (*ام الكتاب*) signifies the *Qaza*.”⁴²

So *Qaza* is mainly related to Allah, and *Qadr*, to human beings, and as it is mentioned above, *Qadr* is the basis and incentive of *Qaza*; therefore, the principle of *Qaza* and *Qadr* itself recognises the idea of human freedom.

Imam Raghīb Asfahani has narrated an incident in this connection. He states :

قال ابو عبيدة لعمر لما اراد الفرار من الطاعون بالشام : أتفر من القضاء

؟ قال افر من قضاء الله الى قدر الله

“Abu Ubaidah asked Umar, when he intended to leave Syria due to plague, “Are you running away from *Qaza*?” Hazrat Umar replied, “I am moving from Allah's *Qaza* to-

wards His Qadr."⁴³

Hazrat Umar's *statement clearly indicates the freedom of will and authority to escape from any curse inflicted upon man by God Almighty.*

Moreover, it can obviously be inferred that the free course of human action, completed in all respects is pre-meditated, from its beginning to its end, by the knowledge of Allah which constitutes the *Qadr*. Therefore, the *Qadr* can absolutely be regarded as the outcome of human freedom and *Qaza* (The divine declaration) is always based upon it. It is quite clear that unless *Qadr* is constituted completely, *Qaza* never comes into existence.

Any change and alteration can be entertained by *Qadr*, due to variances occurring in human conduct at different times.

Some of the Muslim scholars have appreciated that *Qadr* is the foundation and *Qaza* is the construction based upon it. This statement is also supported by *Allamah Kirmani* as quoted in *Nihayah* (*النهاية*) and *Majma'-ul-Bihar* (*مجمع البحار*). *Shaykh*⁴¹ in the chapter (*الايان بالقدس*) states, that it is an established and certified fact, that in every person there is a quality which inclines him towards committing or omitting any act or to detract from an act after having intended and desired to perform it. The existence of this characteristic in man is as certain and definite as the existence of other physical qualities, i.e. hearing and seeing etc. This human quality is known as *Freedom and Authority*. Thus, the acts, originally created by Allah, come into actual existence only due to the performance (*كسب*) of a man, which is exclusively motivated by his free will and choice, and not by any other arbitrarily predestined decision.

An eminent Muslim Jurist, *Mullah AliAl-Qari* states that the *Qadr* (Divine Estimation) is the real base of divine declaration (*قضاء*), whereas the *Kasab* (*كسب*)

or man's performance with his free discretion, is the actual cause, with reference to which every thing is to be determined.

He further appreciates :

ان القدر في حق العباد واقع على تدبير الربوبية وذلك لا يبطل تكليفهم

العمل بحق العبودية

“The Qadr in connection with people has taken place simply on the basis of Divine Estimation, and therefore, it does not remove the liability of the commission of acts from human beings.”⁴⁴

In case of human actions, both *creation* (*خلق*) and *performance* (*كسب*) are combined in such a manner that the *creation* has become the Real Cause of an act, whereas the *performance*, its actual cause. *Real cause* (*سبب حقيقي*) means the basic reason of coming into existence of an act, not with any particular reference to a person, and *actual cause* (*سبب واقعي*) means the decisive reason of giving effect to an act. Thus *creation* is an act of God, and *performance* the act of man. Therefore, human performance, originated from free will and intention is the only means to actualize and externalize the divinely created acts. The relation between these facts, is, that Divine Creation is known as *Qaza*, which is exclusively based upon Divine Estimation termed as *Qadr*, and it is only to meditate and know the free performance of human acts with reference to their own causes and effects, before the time of their actual existence. Nothing in this process binds anybody to earn criminal or non-criminal behaviour.

The concept of combination of two capacities of preferences in an act i.e. *the creation by God* and *performance by man*, does not make it complicated. It is very well understandable that in many cases the same fact is referred to various directions due to the variance of its aspects, as in the case of land. According to Muslim faith, it is owned by Allah in respect of its *creation*, whereas it is owned by man

in respect of its *use and possession*. Similarly the two capacities of human act are combined in such a way that no confrontation does arise between them. Therefore, it is clearly stated in a very reliable and authentic book on the subject of Islamic Theology, *Sharh Aqaid Nasfi*, written by *Allamah Sa' d-ud-Din Taftazani* :

فالفعل مقدور الله تعالى بجهة الایجاد ومقدور العبد بجهة الكسب

“The human act is within the jurisdiction of Allah, as regards its creation, and within the jurisdiction of man, as regards its performance.”⁴⁵

Thus the unification of creation (*خلق*) and performance (*كسب*) does not create any confusion or misunderstanding, if they are visualized in their independent perspectives.

INTERPRETATION OF HOLY PROPHET

The same question arose in the minds of the companions of Holy Prophet (peace be upon him), when He said that the dwelling of every person, either in hell or heaven, had been already written. It is reported by *Hazrat 'Ali* that the companions asked spontaneously :

يا رسول الله افلا نتوكل على كتابنا وندع العمل

“O Holy Prophet (peace be upon him) should not we trust on what else has been written and leave the efforts”.⁴⁶

At another occasion they asked, as narrated by *Abdullah bin-Amr* :

فيم العمل يا رسول الله ان كان امر قد فرغ منه

“What is the status and necessity of legal act, if every thing has already been decided?”⁴⁷

The object of the question was to understand the real philosophy embodied in the idea of *Qaza'-o-Qadr*, because it was very obvious that if every decision had already been

made arbitrarily, then what would be the use of performing legal duties. Holy Prophet (peace be upon him) explained the idea at various occasions in a very express and unambiguous manner.

He said, according to *Abu Hurayrah* :

جف القلم بما انت لاقِ

“O Abu Hurayrah. The pen (Al-Qalam) noted down (on the Louh-i-Mahfuz) only what you were going to earn (in your own free capacity).⁴⁸

It means that what else was going to be performed by the people, with their free will and choice, that was foreseen by Allah and He declared only those acts and their consequences, whether earthly or etherial, without affecting the freedom of human behaviour. Our view point is further supported very strongly by another prophetic saying, that *the writing of Qalam or Qadr is nothing but a simple narration and description of the facts and events, which had already happened and which had to take place in the future, therefore, the declaration simply to this effect is called Qaza-i-Ilahi.*

QAZA'-O-QADIR – A DESCRIPTION OF THE EVENTS OF PAST AND FUTURE.

It is reported by ‘Ubaadah-bin-Samit, that Holy Prophet (peace be upon him) said :

ان اول ما خلق الله القلم فقال له اكتب قال ما اكتب قال اكتب القدر

فكتب ما كان وما هو كائن الى الابد

“Surely, first of all Allah created the Qalam and asked it to write. It said, “what should I write”, Allah said, “write down the Qadr”. Then the Qalam noted down what had happened before and what was to happen in future till the end of the world.”⁴⁹

The hadith clearly shows that nothing was predetermined and arbitrarily decided. All that came down through the writing of *Qadr*, was only a pre-meditation and pre-valuation of the universal events and human behaviour, which had to take place independently in their normal courses of action. God had, in fact, created the capability of foreseeing the events of the past and the future, in the *Qalam*, and therefore, it noted each and every thing down on the basis of premeditation.

It can also be a figurative illustration of Divine Knowledge, but we are not supposed to discuss this issue at this place.

The same comprehensive description of the events of past and future has also taken place in the life time of *Holy Prophet* (peace be upon him) during his addresses at various times :

Hazrat 'Umar reports :

قام فينا رسول الله مقاماً فاخبرنا عن بدا الخلق حتى دخل اهل الجنة
منازلهم واهل النار منازلهم

“Holy Prophet (peace be upon him) once narrated to us, standing at a place, the facts, events and happenings from the beginning of the universe till the moment of entering of the people to the heaven and the hell (after the day of judgement.).⁵⁰

'Amr bin Akhtab Ansari narrates :

فاخبرنا بما هو كائن الى يوم القيامة

“Holy Prophet (peace be upon him) stated each and everything, which was going to happen till the Day of judgement.⁵¹

Huzayfah says :

قام فينا رسول الله مقاماً ما ترك شيئاً يكون في مقامه ذلك الى قيام الساعة
الا حدث به

“Holy Prophet (peace be upon him) once stood between us, and (informed about each and everything). There was no single event, which was to take place till the happening of Qiyamah, which He did not narrate”.⁵²

Imam Ibn-i-Hajar 'Asqalani says in its explanation :
 دَلَّ ذَلِكَ عَلَى أَنَّهُ أَخْبَرَ فِي الْمَجْلِسِ الْوَاحِدِ بِجَمِيعِ أَحْوَالِ الْمَخْلُوقَاتِ مِنَ الْمَبْدَأِ وَالْمَعَادِ وَالْمَعِاشِ

“It implies that He (peace be upon him) reported all the events, happenings and conditions of all the creatures from their origin to their end, including the wordly life”.⁵³

This was only because Allah had conferred the knowledge of past and future upon His Holy Prophet (peace be upon him), and, thus, he was able to declare the details of what had to happen in the future in the form of events as well as the human behaviour.

The same knowledge was bestowed upon the *Qalam* which wrote down the *Qadr*, that is the detailed pre-estimated description of worldly affairs. It was merely a specific demonstration of Allah’s knowledge which stood in the name of *Qaza*, and it was never meant to pre-determine the criminal or non-criminal conduct of human beings. This has been appreciated by *Hadis-i-Rasool*, narrated by *Abdullah bin 'Amr*, whereby Holy Prophet (peace be upon him) declared :

فَلِذَلِكَ أَقُولُ جَفَّ الْقَلَمُ عَلَى عِلْمِ اللَّهِ

“That’s why I say that the Qalam wrote down in accordance with the knowledge of Allah”.⁵⁴

This kind of priority of *Divine knowledge* or *Qaza* over human conduct does not affect it in any way, as stated by the Shaykh also :

لَا يَكُونُ سَبْقُ الْقَضَاءِ بَاعْتِثًا عَلَى تَرْكِ الْعَمَلِ

“The same point of view has been adopted by the orthodox Muslim scholars in their *'Aqaid*”.⁵⁵

Allama Taftazani, an authentic theologian, says, discussing the concept of creation of human acts :

فان قيل فيكون الكافر مجبوراً في كفره والفاسق في فسقه فلا يصح تكليفهما بالايان والطاعة قلنا انه تعالى اراد منها الكفر والفسق باختيارهما فلا جبر كما انه علم منها الكفر والفسق بالاختيار

“If it is said that the disbeliever is bound to disbelieve, and other wrongdoers to commit wrong, then how can they be legally supposed to adopt faith and submission (to Allah). We will reply that Allah has perceived Kufr and Fisq from them, only on the basis of their own free choice. There is no determinism, because God simply knew that who would adopt the wrong path (الكفر والفسق) with his own free will, without being compelled or motivated by any prior decision”.⁵⁶

It is further stated :

لانه لو لم يكن للعبد فعل اصلاً لما صحّ تكليفه ولا يترتب استحقاق الثواب والعقاب على افعاله

“If man had not to perform his act with free choice and authority, he would neither have been held responsible, nor entitled to any reward and punishment.”⁵⁷

Qaza is not, in fact, an interference with the freedom of mankind in its course of action, but it is simply the Divine meditation of things and affairs, as they had to be in their own routine.

In *Sharh-u-Mawaqif* (شرح المواقف) it is stated with reference to *Ashairah* :

انّ القضاء عند الاشاعرة هو الارادة الازلية المتعلقة بالاشياء على ما هي عليه

“Surely the *Qaza*, according to *Asha'irah*, is the divine intention (knowledge), related to things and affairs, as they (had to) exist in their own course”.⁵⁸

In the light of above given explanation of the concepts of *Qaza* and *Qadr*, one can easily determine the nature, scope and capacity of human of freedom.

The idea of absolute necessity, that negates the faith in human liberty is also not recognised by Qur'an, as it has

already been substantiated by a large number of Qur'anic verses.

QUR'ANIC AFFIRMATION

Answering the third question, as to whether Qur'an positively affirms the idea of human freedom or not, I would like to provide further evidence from Qur'an. The Holy Qur'an has affirmed the idea in clear terms through its statement :

إِنَّا عَرَضْنَا الْأَمَانَةَ عَلَى السَّمَوَاتِ وَالْأَرْضِ وَالْجِبَالِ فَأَبَيْنَ أَنْ يَحْمِلْنَهَا
وَأَشْفَقْنَ مِنْهَا وَحَمَلَهَا الْإِنْسَانُ إِنَّهُ كَانَ ظَلُومًا جَهُولًا

"Surely we offered the trust (responsibility) to the heavens and the earth and the mountains, but they refused to undertake it, being afraid thereof, but Man undertook it, he is certainly unjust (to himself, if he does not fulfil his responsibility in respect thereof) and ignorant (in respect of the evil consequences of not fulfilling it).⁵⁹

It has been unanimously agreed upon by the commentators that 'Trust' (الامانة) stands here for moral responsibility, which is human sense of accountability for all acts of thought and conduct. The acceptance and undertaking of this liability by man, as it is clearly evident from the verse, was absolutely a free action, signifying his unpredetermined capacity. For accepting this offer, the first and foremost pre-requisite is *freedom of choice*, which is the real base of action of a human being, functioning as a moral agent, because without it the purpose and motive behind the offer made by Allah to man is completely nullified and the whole process of offer and acceptance, mentioned in the verse, becomes a fiction. There are some other verses which directly affirm and proclaim the possession of *freedom of will* by Man :

وَقُلِ الْحَقُّ مِنْ رَبِّكُمْ فَمَنْ شَاءَ فَلْيُؤْمِنْ وَمَنْ شَاءَ فَلْيُكْفُرْ

“And say: the truth is from your Lord, so let him who please believe and let him who please disbelieve”.⁶⁰

وَأَنْ لَّيْسَ لِلْإِنْسَانِ إِلَّا مَا سَعَى • وَأَنْ سَعْيُهُ سَوْفَ يُرَى • ثُمَّ يُجْزَاهُ

الْجَزَاءَ الْآتِي •

“And that man shall have nothing but what he strives for, and his striving shall soon be seen, then shall be he rewarded for it with the fullest reward.”⁶¹

The same idea has been emphatically stressed in *Surah-i-Hamim* : ⁴⁰ and *Surah Ad-Dahr* : ³, saying :

“Do what you will. Verily He (God) sees all that you do”
“Surely we have shown him (man) the way (of right and wrong), (now it rests on his will) whether to be grateful or ungrateful.”

Here another verse is to be noticed wherein Divine will has been mentioned with reference to the existence of evil. One can say that the existence of pre-destined divine plan about man regarding his earning of criminal behaviour is the determinant factor in human conduct and therefore, man has no choice to act in another manner. This is a misunderstanding that occurred due to not comprehending the complete essence of the verse. The verse is :

وَلَوْ شَاءَ اللَّهُ مَا أَشْرَكُوا

“And if Allah had willed (i.e. if it had been God’s plan) they would not have taken the false gods”⁶²

If one studies the verse deeply, it will become very clear that it has, in fact, negated the philosophy of necessity and determinism, in a rational and critical manner. The verse appreciates that Allah has the power to eliminate evil and to make its earning absolutely impossible for human beings, but He does not interfere when the wrongdoers adopt evil through their free will. This verse does not say that God has assisted the evil. The only thing expressed in it is, that in spite of the fact that Allah dislikes man to adopt evil, He does not impose His will upon him by restraining him actually from the wrong way through the enforcement of the divine

plan, deciding the fate of mankind. If Allah had so compelled human beings according to His will and intention, nobody would ever have been able to commit crime and follow the wrong path. It is the divine decision to leave people to their own choice, without being interfered by predetermined plans and compulsion, so that they may be capable of adopting what they will. This is the only basis of moral and legal responsibility of man as discussed above.

This point has been further clarified in another verse which reads :

وَقَالُوا لَوْ شَاءَ الرَّحْمَنُ مَا عَبَدْنَاكُمْ مَالَهُمْ بِذَلِكَ مِنْ عِلْمٍ

“And they say if it had been the will of (God) the most Gracious, we would not have worshipped these (idols). They have no knowledge thereof, they are only guessing.”⁶³

This has been established beyond doubt that Islam does not recognize the concept of determined criminality, whether it is inborn and inherent due to some biological factors, or necessarily present in a man due to some psychiatric or psychological factors, as appreciated by Western criminologists.

All theories of criminality, propounded by various Western Schools, can find no place in Islamic Theory, because Islam neither believes in the concept of atavistic reversion of human beings, nor in inherited criminality.

If it is accepted that the sin or crime originates from some biological causes due to which the criminal is compulsorily supposed to possess some furious and brutal characteristics, then no question of free will in adopting a particular conduct does arise. Man can not be considered a moral agent, because he is a born criminal and no choice has been left for him to earn either of the behaviours, on the basis of which the moral struggle and its perfection or imperfection is to be evaluated.

Therefore, any cause of criminality, that makes it determined in any form, is alien to the teachings of Islam. Accord-

ing to Islamic Theory, human conduct is not predetermined in any sense: it is exclusively self earned during his moral struggle since he is free in his acts of commission and omission.

This is the only factor that makes man morally and legally responsible for his acts and deeds.

hence Islamic concept of human freedom completely nullifies the philosophy of pre-determined criminality.

NOTES

1. Qur'an 37 : 96.
2. Qur'an 37 : 39.
3. Qur'an 36 : 54.
4. Qur'an 41 : 40.
5. Qur'an 52 : 16, 66 : 7.
6. Qur'an 2 : 134.
7. Qur'an 42 : 30.
8. Qur'an 3 : 165.
9. Fakhrud-Din Razi, *Tafseer-Al-Kabeer*, Vol. IX, p.82.
10. Qur'an 42 : 22.
11. Qur'an 30 : 41.
12. Qur'an 3 : 25.
13. Qur'an 45 : 22.
14. Qur'an 2 : 286.
15. Qur'an 2 : 202.
16. Qur'an 45 : 21.
17. Qur'an 28 : 84.
18. Qur'an 3 : 182.
19. Qur'an 41 : 46.
20. Qur'an 2 : 173.
21. Qur'an 5 : 3.
22. Qur'an 6 : 120.
23. Qur'an 17 : 15.
24. Qur'an 6 : 165.
25. Qur'an 17 : 16.
26. Iman-i-Mujmal.
27. Qur'an 91 : 7, 8.
28. Qur'an 91 : 9, 10.
29. Qur'an 90 : 8, 9, 10.
30. *Tafseer Al-Kabeer*, Vol. XXXI, p. 183.
31. Qur'an 76 : 2, 3.

32. Qur'an 2 : 256.
33. Sheikh Abdul Haq Muhaddis Dehlvi, *Lam'at-ul-Vol. 1*, p. 145.
34. *Ibid.*, 154.
35. Qur'an 41 : 12.
36. Qur'an 54 : 49.
37. Qur'an 13 : 39.
38. *Lam'at*, Vol. 1, p. 144.
39. (a) Raghīb Asfahani, *Al-Mufradat*, p. 407.
(b) Mullah 'Ali Qari, *Mirqat-ul-Mafateeh*, Vol. 1, p. 132.
40. *Lam'at*, Vol. 1, p. 154.
41. *Lam'at*, Vol. 1, p. 144.
42. *Mirqat-ul-Mafateeh*, Vol. 1, p. 125.
43. *Mirqat-ul-Mafateeh*, Vol. 1, p. 130
44. Taftazani, *Shar'h 'Aqaid Nasfi*, p. 66.
45. *Mishkat-ul-Masabeeh*, Vol. 1, p. 12.
46. *Mishkat-ul-Masabeeh*, Vol. 1, p. 21 (quoted from Tirmazi).
47. *Sahih Bukhari*, Vol. 11, pp. 759-760.
48. *Mishkat-ul-Masabeeh*, Vol. 1, p. 21 (quoted from Tirmazi, Abu-Daud, Musnad Ahmad, Tabrani).
49. *Mishkat-ul-Masabeeh*, Vol. 1, p. 506 (quoted from Sahih Bukhari).
50. *Mishkat-ul-Masabeeh*, Vol. 1, p. 543 (quoted from Sahih Muslim).
51. *Mishkat-ul-Masabeeh*, Vol. 1, p. 453.
52. *Mirqat-ul-Mafateeh*, Vol. V, p. 327.
53. *Mishkat-ul-Masabeeh*, Vol. 1, p. 22 (quoted from Musnad Ahmad, Tirmazi, Tabrani, Bayhiqi).
54. *Lam'at*, Vol. 1, p. 152.
55. Taftazani, *Sharh 'Aqaid Nasfi*, p. 63.
56. *Sharh 'Aqaid Nasfi*, p. 64.
57. Syed 'Abdul 'Aleem, *Hashiyyah Sharh 'Aqaid Nasfi*, p. 62.
58. Qur'an 33 : 72.

- 59. Qur'an 18 : 29.
- 60. Qur'an 53 : 39, 41.
- 61. Qur'an 6 : 108.
- 62. Qur'an 43 : 20.

CHAPTER -IV

ISLAMIC INJUNCTIONS AND WESTERN
CRIMINOLOGY

PSYCHIATRIC THEORY AND ISLAMIC INJUNCTIONS

This discussion pertains to whether according to Islamic injunctions, a criminal act performed by a person, suffering from mental abnormality or psychiatric disorder, creates any criminal liability?

According to Psychiatric/Pathological Theory, the cause of every criminal act and delinquency is traced in the form of mental disorder, because it supposes that all crimes originate from various kinds of psychiatric diseases. This theory leads us to the inane and contemptuous concept of "determined criminality", which is absolutely unacceptable to Islam. It is to be appreciated that the system of Islamic legislation is based upon following three fundamental principles :

- i) avoidance of hardship (عدم حرج)
- ii) lessening of difficulty (قلت تكليف)
- iii) exceptional permissibility (رخصت)

Avoidance of Hardship :

The *first principle* has been laid down by Qur'an in the words :

مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ

"Allah does not desire to put on you any hardship".¹

The same principle has been further explained in the words :

هُوَ اجْتَبَاكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

“He has chosen you and has not laid upon you any hardship”.²

Lessening of difficulty :

The *second principle* is enunciated in the Holy Qur'an, as :

لَا تُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا

“We do not impose on any soul a duty except to the extent of its ability.”³

The same concept has been given in *Surah Al-Baqarah*: 233 and 286, saying :

لَا تُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا

“No soul shall have imposed upon it a liability but to the extent of its capacity.”⁴

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا اكْتَسَبَتْ

“Allah does not impose upon any soul a responsibility but to the extent of its capability; for it is (the benefit of) what it has earned, and upon it (the evil of) what it has wrought.”⁵

This principle of liability has been appreciated again in these words :

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا

“Allah does not lay on any soul a burden except to the extent to which He has granted it (the capacity); Allah brings about ease after difficulty.”⁶

Exceptional permissibility :

The *third principle* is stated in the words :

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهْلَ بِهِ لِغَيْرِ اللَّهِ فَمَنْ

اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ●

“He has only forbidden you what dies of itself, and blood, and flesh of swine, and that animal over which any other (name) than that of Allah has been invoked at the time of its slaughter, but who-over is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him; surely Allah is forgiving, merciful.”⁷

That’s why, if man consumes a prohibited thing in an extreme state of necessity, no sin lies upon him, and even sometimes it becomes legally incumbent upon him to do it for safety of life.

The only philosophy, explained through the above-mentioned three principles is, that *Shariah* does not want any person to be placed in a state of necessity, and if it happens, then no such legal liability is imposed upon him as it is under ordinary circumstances. The spirit of Islamic law is, that whenever a man is involved in an exceptional discomfoting situation, most of the usual liabilities are suspended, because the *Shari’ah* is determined to provide ease to mankind, not difficulty.

The Holy Qur’an states the objective of the raising of the latest Prophet Mohammad (peace be upon him) in the words :

وَيَضَعُ عَنْهُمْ إِصْرَهُمْ وَالْأَغْلَالَ الَّتِي كَانَتْ عَلَيْهِمْ

“And He removes from them their burdens and shackles which were upon them”.⁸

All the commentators of Qur’an are unanimous that mankind individually and collectively was suffering from many impetuous hardships, violent burdens and unavoidable privations in its religious, legal, social, economic and political spheres, when the Holy Prophet (peace be upon him) was raised to its rescue. He declared

بِالْحَنِيفَةِ السَّمِيعَةِ

“I have been raised with an easy and right path.”⁹

Another declaration was made to the same effect by *Qur'an* :

يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ

“Allah desires ease for you, and He does not desire for you difficulty”.¹⁰

It was stated again :

● يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ وَخَلَقَ الْإِنْسَانَ ضَعِيفًا

“Allah desires that He should make light your burdens, and man is created weak.”¹¹

Holy Prophet, through these declarations, gave to mankind an easily practicable, reasonable, and extremely pragmatic religion. He liberated humanity from all kinds of violence, tyranny, injustice and oppression. All cruel and arbitrary burdens and shackles, which were inculcated on the people, due to the monopolistic dominion of man over man, were absolutely eliminated.

He provided the mankind with such an easy system of life as every body could frequently adopt it in all geographical and social environments. He captioned it with the name of *Din-i-Fitrat* (دین فطرت), which meant, that nothing in this system was inconsistent with the demands and requirements of human nature.

In the light of these principles, it becomes very clear that to impose liabilities upon a person, in an unusual state of discomfort, is neither required nor permitted by Islam. The spirit of Islam is to remove all sorts of unbearable burdens from human beings, to enable them to practise Islam easily in their ordinary course of life. That's why, whenever a man is incapacitated, mentally or physically, to act upon his own free will and choice, or is deprived of acting in accordance with his free desire and intention, he remains no more answerable for his deeds. This principle is known as “Exceptional Permissibility.” The principle of *Reduction in*

prayer (Qasr Fis-Salat) during the journey denotes the same spirit of Islam. *Qur'an* states :

وَإِذَا ضَرَبْتُمْ فِي الْأَرْضِ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَنْ تَقْصُرُوا مِنَ الصَّلَاةِ

“And when you journey in the earth, there is no blame on you if you shorten the prayer.”¹²

Morover, the duty of offering the prayer is even suspended during the condition of insensibility.

The fasts are *postponed* for a man on the journey or suffering from any disease. *Qur'an* declares :

فَمَنْ كَانَ مِنْكُمْ مَرِيضًا أَوْ عَلَى سَفَرٍ فَعِدَّةٌ مِنْ أَيَّامٍ أُخَرَ

“But whoever among you is sick or on a journey, then (he shall fast) a like number of other days”.¹³

As regards those who are suffering from any perpetual incapacity, due to some constant illness, or who are too old or too weak, the order is not to fast. In its place, if possible, the measure of one man's food is to be given away to a poor man every day, at both times, during the whole month.

It is known as *Fidyah* (فدية). *Qur'an* Says :

وَعَلَى الَّذِينَ يُطِيقُونَهُ فِدْيَةٌ طَعَامٌ مِسْكِينٍ

“And those who are able to do it (in place of fasting) may effect a redemption by feeding a poor man”.¹⁴

The same was practiced in the time of *Holy Prophet* and his *companions*.

This kind of *exemption* (رخصت), under specific circumstances, is also granted to a person under an obligation to perform *bath* or *ablution*. That is replaced by *Tayammum* (تيمم) as ordained by *Qur'an* :

وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّى تَغْتَسِلُوا وَإِنْ كُنْتُمْ مَرْضَى أَوْ عَلَى

سَفَرٍ أَوْ جَاءَ أَحَدٌ مِنْكُمْ مِنَ الْغَائِطِ أَوْ لَمَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا

صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ إِنَّ اللَّهَ كَانَ عَفُورًا غَفُورًا ●
(Do not go near prayer or mosque)

“When you are under an obligation to perform a total ablution but (when you are) passing by it until you have

washed yourselves; and if you are sick, or on a journey, or one of you came from the privy, or you have touched the women, and you cannot find water, betake yourselves to pure earth, and then wipe your faces and your hands; surely Allah is pardoning, forgiving."¹⁵

In this verse a number of instances have been mentioned that throw light on the same principle.

In a state of impurity one is prohibited to enter the mosque, but if there is no way to pass by, except through it, then the order is suspended provisionally. In some specific situations it is incumbent upon the man to have necessary bath but *Sharia'ah* has provided certain exceptions to remove the hardship and create ease.

Therefore, the man, undergoing an ailment, or on journey or having no water available, can replace the *Wuzu* or *Ghusl* by *Tayammum*. If such order had not been accordingly suspended, and the liability imposed had not been removed or substituted by an easier alternative, the people would have automatically become sinful. But Allah, the merciful wanted to forgive and pardon the people.

God has restrained the people to become criminals unwillingly and unintentionally, so that some acts of commission and omission, performed in such states of necessity, may not amount to sin or crime. This was possible only through immunising man from liabilities in these unusual situations of mental and physical incapacities.

Exemption of the Sick :

Qur'an, at various occasions, indicates the same philosophy :

لَيْسَ عَلَى الْأَعْمَى حَرْجٌ وَلَا عَلَى الْأَعْرَجِ حَرْجٌ وَلَا عَلَى الْمَرِيضِ حَرْجٌ

"There is no blame on the blind man, nor is there blame on the lame, nor is there blame on the sick."¹⁶

It is again mentioned

لَيْسَ عَلَى الضُّعَفَاءِ وَلَا عَلَى الْمَرْضَى وَعَلَى الَّذِينَ لَا يَجِدُونَ مَا يَنْفِقُونَ

إِذَا نَصَحُوا اللَّهَ وَرَسُولَهُ

“It shall be no crime in the weak, nor in the sick, nor in those who do not find what they should spend, so long as they are sincere to Allah and His Apostle.”¹⁷

These verses have emphasised that fact very obviously that all the incapable persons, whether their sufferings are temporary or permanent, are immune from criminal and penal liability, so long as they do not intend to violate the orders of *Shari'ah*.

Therefore, if a person lacks mental and rational capability due to some disease, disorder or intoxication, (not through wilful drinking) he is absolutely free from being answerable for his acts. Even with an intoxicated mind one is prohibited to offer the prayers. *Qur'an* says :

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنْتُمْ سُكَارَى حَتَّى تَعْلَمُوا مَا تَقُولُونَ

“O you who believe! do not go near prayer when you are intoxicated until you know (well) what you say.”¹⁸

The intoxicated man has been immunised from this religious duty because of a temporary mental aberration. Then, how can it be considered correct, that a man, suffering from a permanent psychiatric disease and mental disorder, should be held liable for his criminal acts? According to Islamic teachings, offences committed by psychiatric patients do not create active criminal liability. If any mental disease is accepted to be the cause of the commission of crime, then no liability can be placed anywhere, and hence, there remains no justification for any punishment.

By accepting the view of Psychiatric Theory the existence of the whole criminal law, substantive or procedural, becomes irrational and unjustified.

Therefore, the *Psychiatric Theory of criminality*, that is determined to explain away the responsibility of the criminal, is not acceptable to *Islamic Law of Criminology*.

SOCIOLOGICAL THEORY AND ISLAMIC INJUNCTIONS

The next question in this regard is the extent to which the criminal behaviour of a delinquent is affected by or originated from the socio-economic system and environmental conditions.

The idea of socio-economic effect upon human conduct has been strongly advocated by the supporters of sociological theory of criminality, whereas the effect of other environmental conditions, as mentioned in the *Theory of Ecology*, also possesses the same significance.

According to the Islamic view point, basic stress, regarding the liability of the commission of crime, has been laid on the individual himself because of his own inner urge and free choice of action, but the social and economic conditions are also emphatically recognised to have a decisive effect upon human behaviour. There are certain conditions and environmental situations that induce and compel the man to perform an act or adopt a conduct, which is a sin or a crime in ordinary set of circumstances.

That is why Islam creates an indiscriminate exemption in sinful or criminal liability in such a state of necessity.

Qur'an puts the principle in the words :

فَمَنْ اضْطُرَّ غَيْرَ تَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ

“But who ever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him.”¹⁹

Since the socio-economic system of a society is the origin and fountain of every good and evil, its effects prevail over all the moral, ethical and spiritual effects made by the individuals in their respective fields. The basic Philosophy of Islamic system appreciates the fact, that all the noble desires and endeavours at various levels do not have any bearing and determining effect upon life, unless the socio-economic conditions are reformed and improved. Islam has divided its laws into two categories :

Philosophy of Enforcement of Laws

- 1) Primary or Defining Laws (احكام تكليفى)
- 2) Declaratory Laws (احكام وضعى)

Primary laws are the laws which demand submission, compliance and application in their own right; their requirements do not originate in the commission of other acts. Their enforcement is incumbent upon every adult, sane and capable person, known as "Mukallaf". Whereas *declaratory laws* are the laws which originate only as the consequences of an existing cause, condition or violation of certain primary laws. Unless a particular legal right of an individual or the society is injured or certain provision of the penal law of *Shari'ah* is transgressed it does not require its application or enforcement.

The *primary laws* are laid down by Islam to guarantee the reformation and improvement of socio-economic order of the society, such as : commands of *Salat and Soum, Zakat and Charity, observance of the sanctity of life, honour and property, prohibition of illegal means of wealth and its concentration, and observance of all other do's and don'ts with regard to various public duties*. But the *Penal (Declaratory) laws*, such as hudood qisas and ta'zirat, are formulated only to punish the people who violate and transgress the primary laws. The essential structure of Islamic Social order is based upon the enforcement of Primary laws, whereas the second kind of law is meant only for restraining the people to disturb it.

Suspension of Punishments :

Therefore, such kind of declaratory laws can be effectively implemented in the society only after enforcement of the primary laws. If the people are not getting the necessities of their life and are living in a miserable condition of economic dead-lock, the punishment of theft, that is amputation of hands, cannot be enforced arbitrarily. This principle is derived from the practice of *Hazrat 'Imar, the second ortho-*

dox caliph, when he suspended the enforcement of the hadd of theft during the period of famine, under the impression that people might be compelled to theft by hunger. There is the consensus of the Muslim Jurists upon this provision of Islamic Penal Law.

This principle becomes more evident and better illustrated by a particular incident, regarding some youngmen, who had stolen the *she-camel* of a man from the tribe of *Muzaynah*. It is reported that *Hazrat 'Umar* suspended their punishment in spite of their confession. He said, addressing the employer of those young men, "*By God! I would have cut their hands if I had not known that you employ these people and starve them so that they are compelled to eat that which is prohibited to them. By God! since I have not cut their hands I am going to punish you with a fine that shall pain you.*"²¹ and he ordered them to pay double the price of the camel.

The instance has evidently explained the legal position of a criminal act, performed by a person in a state of necessity, because the liability in the offence of theft committed by an employee, under the pressure of starvation, has been shifted to the employer and thus he is awarded with a sort of *exemplary punishment*. These precedents provide three general principles of Islamic Penal System.

1. Socio-economic conditions prevailing in a society lead the people to commit crimes.
2. Crimes committed in such infeasible conditions do not create active penal liability upon the wrongdoer.
3. The Islamic punishment is liable to be suspended until such economic deadlock is resolved.

That's why Islam primarily emphasises the elimination of economic disparity from the society and improvement of the socio-economic order so that the creative efforts of the people be restored by providing each of them equal chances of survival and progress. Lacking the socio-economic stabi-

lity of individuals, they are even unable to preserve their religious and moral values, as *Holy Prophet (p.b.u.h.)* declared.

كاد الفقر ان يكون كفراً

“Poverty and starvation may lead to disbelief.”²²

The collective achievement of moral and spiritual ideal, according to *Qur'an*, depends upon social integrity and economic prosperity of the society. *Qur'an* affirms the fact, while addressing the muslims after they migrated to *Madinah* and reminding them of the problems and hardships of their previous days at *Meccah* in the words :

وَاذْكُرُوا إِذْ أَنْتُمْ قَلِيلٌ مُسْتَضْعَفُونَ فِي الْأَرْضِ تَخَافُونَ أَنْ يَتَخَطَّفَكُمُ النَّاسُ

فَأَوْكُمُ وَأَيَّدَكُمْ بِنَصْرِهِ وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ لَعَلَّكُمْ تَشْكُرُونَ ●

“And remember when you were few, deemed weak in the land, fearing lest people might carry you off by force, but He sheltered you, and strengthened you with His aid and provided you of the good things and food, that you may be thankful.”²³

In this verse a very significant and material comparison has been conducted between the three conditions of the Muslim community, pertaining to their historical periods of *Mecca* and *Madina*. Three terms have been used, signifying the characteristics of the collective life of the companions of Holy Prophet (p.b.u.h.) in regard of *Maccan Era* before migration.

1. ‘*Few in number*’ signifies their being in *minority* as compared to the non muslims of Mecca. Therefore, the muslims were enjoying the status of *Political subordination*.
2. ‘*Weak in the land*’ signifies their *economic instability*, because all the major sources of production had been monopolized by the *Quraysh*, who were mostly against Islam. The muslims were living in a state of *economic deprivation and deadlock* and non-muslim Capitalists of Mecca used to cri-

ticise Islam and the Prophet (p.b.u.h.) in satirical and ridiculing manner, saying that only the lower classes of Mecca had embraced Islam.

3. *'Fearing lest people might carry you off by force'* Signifies the sense of *social insecurity* which was because of their political and economic instability. Therefore, the economic and social conditions of the muslims were extremely unfavourable and they could not even attain their religious goal and spiritual destination in such a discomfoting situation. Thus the Holy Prophet (p.b.u.h.) was directed to migrate to Madina, which subsequently provided the muslims a very sound and stable socio-economic life. *Qur'an*, then, again uses three terms, explicating the changed situation.

1. *'He sheltered you'* signifies the *social integrity and security*, enjoyed by the *Migrants* which started in the form of *'Muakhat-i-Madina'*
2. *'And strengthened you with His aid'* signifies their *political stability*, which was initially achieved by the muslims in the form of *'Pact of Madina!*
3. *'And provided you of the good things and food'* signifies their *economic prosperity*, which was achieved primarily through *Muakhat* and subsequently through their *military victories and independent chances of earning*.

After mentioning this remarkable change, *Qur'an* has stated the *ultimate objective* of introducing the socio-economic stability in the life of Muslim community, and that is *لعلكم تشكرون* so that you may be thankful to your Lord.

To be thankful to Allah, certainly, is the ideal stage of moral and spiritual perfection and completion of the belief, (*تكميل ايمان*), which, accord-

ing to Qur'an, was not possible to achieve without stabilizing the socio-economic life of the muslim society. That's why Qur'an declares that the socio-economic aspect of the life of the muslim community was stabilized in order to enable them to become good and ideal muslims. lacking which, they could not attain even the religious aims perfectly. Therefore, it can easily be understood from the philosophy contained in above-mentioned verse, that socio-economic system of a society has direct bearing on the conduct of individuals. Their behaviour, moral or immoral and criminal or non-criminal is directly or indirectly, determined by the influence of economic circumstances and social conditions prevalent in the society. *The moral life of an individual can not be detached from the socio-economic set up of the society in which he breathes.* That's why Islam has attached the foremost significance to the improvement of the economy of the individuals by emancipating them from every kind of dependence and deprivation.

1. It is ordained for this very purpose, that *the people having better resources in a society, are absolutely unable to achieve the state of moral perfection unless they spend their wealth on the deserving people to liberate them from poverty and upgrade their standards of living upto the necessary level.* Qur'an states as under:

● لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ

“By no means shall you attain the righteousness until you spend (benevolently) out of what you love (i.e. wealth and money) and what ever you spend, Allah surely knows it”.²⁴

Concentration of wealth is the only cause of *disparity* in the socio-economic life of a society. Qur'an stresses the system which guarantees the *circulation of wealth* and eli-

minates the chances of its concentration. It is stated :

كَيْ لَا يَكُونَ دُولَةً بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ

“So that the wealth may not be a thing circulated only among the rich of you”.²⁵

At another place *Qur'an* emphatically declares :

وَالَّذِينَ يَكْنِزُونَ الذَّهَبَ وَالْفِضَّةَ وَلَا يَنْفِقُونَهَا فِي سَبِيلِ اللَّهِ فَبَشِّرْهُمْ
بِعَذَابِ أَلِيمٍ

“And those who hoard up gold and silver and do not spend it in Allah’s way (to resolve the deadlock of others), announce to them a most grievous and painful penalty.”²⁶

After mentioning the painful punishment in life hereafter for those who concentrate wealth and do not spend it to remove undesirable and extreme disparity of the socio-economic order which can harm even the faith of the Muslims, *Qur'an* gives a brief description of the same in the next verse, so that the people may estimate its severity :

يَوْمَ يُحْمَى عَلَيْهَا نَارُ جَهَنَّمَ فَتُكْوَى بِهَا جِبَاهُهُمْ وَجُنُوبُهُمْ
وَوُجُوهُهُمْ هَذَا مَا كَنْزْتُمْ لِنَفْسِكُمْ فَذُوقُوا مَا كَنْزْتُمْ تَكْتُرُونَ ●

“On the day when the hoarded wealth will be heated in the fire of Hell, and their foreheads, their sides and their backs shall be branded with it. “This is the treasure, you hoarded up for yourselves, therefore, taste what you had hoarded.”²⁷

Qur'an says at another place :

وَيْلٌ لِّكُلِّ هُمَزَةٍ لُّمَزَةٍ الَّذِي جَمَعَ مَالًا وَعَدَّدَهُ ● يُحْسِبُ أَنَّ مَالَهُ
أَجْلَدَةٌ ● كَلَّا لَيُنَادِينِ فِي الْحُطْمَةِ وَمَا أَدْرَاكَ مَا الْحُطْمَةُ ● نَارُ اللَّهِ الْمُوقَدَةُ ●
الَّتِي تَطَّلِعُ عَلَى الْأَفْئِدَةِ ●

“Woe to every slanderer, defamer, who amasses wealth and considers it a provision (against mishap). He thinks that his wealth makes him abide. No! he shall most certainly be hurled into the crushing disaster. And what will make you realize what the crushing disaster is? It is the fire Kindled by Allah, which rises to the hearts”²⁸

It is to be noted that Islam neither considers the *wealth*, nor its *acquisition* through fair means as an evil, then, why its collection and hoarding has been prohibited and declared a

very greivous sin? The effective cause (*علت مؤثرة*) of its prohibition is the consequential economic disparity and deadlock which ultimately leads to social deprivation, injustice, oppression and exploitation. Most of the people are deprived of their basic necessities and are finally compelled to lead immoral and criminal life. Whereas the people having unlimited hoarded wealth are also sometimes induced to adopt luxurious life which may again lead to sin and immorality.

If the economic conditions and social environment had no effect upon the moral life of individuals, Islam would not have prescribed such mandatory and awe-inspiring injunctions. Qur'an says : *وَسُيِّجِبُهَا الْآتِقَى الَّذِى يَزِنُ مَالَهُ يَتَزَكَّى* ●

“And away from the hell shall be kept: the one who guards himself. (He is) who spends his wealth in purifying himself”.²⁹

The fact derived from the verse is that the only way to purify one self and escape from the chastisement of the life hereafter is to spend the wealth for the economic betterment of the people and liberate them from worldly fears and sorrows, so that they may freely think for their spiritual perfection, which is the ultimate religious goal to be attained. When, due to an unjust socio-economic order, such an emergent situation continues to prevail in the society, that many people, not having fulfilled their necessities of life, die of starvation or sell their honour, chastity, conscience and moral life in order to survive, then a lot of *Islamic injunctions*, basically *recommendatory*, become *obligatory*. Such orders are necessarily liable to be enforced, so that such emergency may come to an end.

One of the *Qur'anic* injunctions in this connection is stated in the words :

وَيَسْأَلُونَكَ مَاذَا يُنْفِقُونَ قُلِ الْعَفْوَ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ الْآيَاتِ

لَعَلَّكُمْ تَتَفَكَّرُونَ ●

“And they ask you as to what they should spend. Say: What is surplus (from your needs). Thus does Allah make clear to you the communications that you may think over.”³⁰

Whatever is spare from basic needs and requirements of life is known as *Al-afw* (العفو), and to spend it for the economic betterment of others is no doubt a directive and recommendatory provision, but according to the practice of *Holy Prophet* (peace be upon him) and *Orthodox Caliphs*, this was many times applied in the society, as mandatory for practical purposes. Moreover, it is a fundamental principle of Islamic jurisprudence, that under such extreme state of necessity, many provisions and directives are suspended and prohibited, many prohibitions are permitted, many recommendations become legal obligation and according to the nature of circumstances, the grades of many Islamic provisions are changed. This situation may extend to years sometimes.

It is narrated by *Hazrat Abu Saeed Khudri* that during a journey, when such a situation had arisen, *Holy Prophet* (peace be upon him) ordered his companions :

من كان عنده فضل ظهر فليعد به على من لا ظهر له ومن كان عنده فضل زاد فليعد به على من لا زاد له (وذكروا من اصناف المال ما ذكر) حتى ظننا انه لا حق لاحد منا في الفضل

“The one who has conveyance, spare from the need, should return to those who have not, and the one who has food and clothes, spare from the need, should return to those who have not. (Abu Saeed Khudri says that Holy Prophet (p.b.u.h.) went on mentioning various articles) consequently we thought as if we had no right to hold what is surplus.”³¹

This fact is further supported by a *hadith*, reported by *Hazrat Usman*, whereby Holy Prophet (p.b.u.h.) said:

ليس لابن آدم حق في سوى هذه الخصال بيت يسكنه وثوب يوارى عورته

وخلف الخبز والماء

“No right vests (basically) in the son of Adam except these (three); a house to live, clothes to wear and food to eat (without hoarding it).”³²

Qur'an goes in this respect one step further mentioning the characteristics of a man, who defies the religion, it states:

أَرَأَيْتَ الَّذِي يُكَذِّبُ بِالْذِّينِ ● فَذَلِكَ الَّذِي يَدْعُ الْيَتِيمَ ● وَلَا يُحِضُّ
عَلَى طَعَامِ الْمَسْكِينِ ●

“Have you considered him who calls the religion a lie? That is the one who treats the orphan with harshness. And does not urge (others) to feed the poor.”³³

At the end of *Surah* the last but most significant peculiarity of such a person has been described :

(وَيَمْنَعُونَ الْمَاعُونَ)

“And (he is who) refuses even household necessities to supply.”³⁴

Here lies the climax of the philosophy of socio-economic welfare of human beings. None of the social and economic philosophies including *Maxist* and *Leninist* theories of *socialism*, can reach its height. Although Islam has given to man, at the minimum, an exclusive right of possessing a house, clothes and food etc. that are the basic requirements and necessities of life, yet sometimes even these necessaries and goods of utility are legally required to be shared with others. If anybody, at the time, withholds these necessaries and restrains others from their benefits and usufructs, he is deemed to be the defier of the faith, and becomes entitled to the most horrible place in the hell, known as *Wayl'* (ويل).

This concept of *common welfare* is still alien to other un-Islamic theories of socio-economic betterment. Other philosophies have, at the maximum, thought of nationalizing only the sources of production in order to associate all the other people in their benefits, whereas Islam goes to the extent of socializing the usufructs of each and every article

present in the society, but various means have been adopted to accomplish the same job.

The same idea is better illustrated by a precedent quoted by *Imam Bukhari*: it is reported by *Abdullah bin 'Umar* that during the period of famine which occurred in the time of *Hazrat 'Umar*, he put his best efforts in solving the economic problem of the people. Subsequently, he prayed to God Almighty and the situation was changed. At that time he stated:

فوالله لو ان الله لم يفرجها ما تركت اهل بيت من المسلمين لهم سعة الا ادخلت معهم اعدادهم من الفقراء فلم يكن اثنان يهلكان من الطعام على ما يقيم واحداً

“By God! If Allah had not removed the hardship I would have allowed the deserving people to reside in the house of other muslims, who had sufficient food with them, equal to the number of the members of each family, because two persons could survive on the quantity of food which was ordinarily sufficient for one”.³⁵

Another illustration of the *Prophetic era* is also remarkable in this connection, which is reported by *Salmah bin Akwa*. *Imam Bukhari* again narrates that *Holy Prophet* (peace be upon him) once, on the occasion of *'Eid-ul-Azha*, ordered the people not to retain the flesh of slaughters for more than three days. The people acted upon this directive and consequently the same practice was repeated by them next year on their own. Some of the companions informed the prophet about the practice.

قالوا يا رسول الله نعمل كما فعلنا العام الماضي ، قال كلوا وادخروا فان

ذلك العام كانوا في جهدٍ لاريدت ان تعينوا

“The people said to the prophet “we are adopting the same practice as we adopted last year.” *Holy Prophet* (p.b.u.h.) said, “Now you may eat and retain for your needs. Last year the people were facing hardship and I wanted you to help one another”³⁶

Two main points have been established through these precedents.

(i) The first is that in an unusual situation such extraordinary orders are required to be enforced, that might change the normal status, original character and usual grade of legal provisions, keeping in mind the severity of circumstances and their consequences.

(ii) The second is that the foremost requisite and urgent step towards preserving and promoting the moral and religious values of a society is to resolve the economic deadlock and to create suitable social environment for the individuals to restore and perpetuate their creative efforts. Because with infeasible socio-economic conditions, there is every chance of developing criminal tendencies in the society. That is why the struggle for the attainment of the social goal, has been considered as an ideal endeavour by the *Holy Qur'an*.

It is stated .

وَمَا أَدْرَاكَ مَا الْعُقْبَةَ ● فَكُ رَقَبَةٍ ● أَوْ أَطَعَمَ فِي يَوْمٍ ذِي مَسْفِيَةٍ ●

بَيْنَمَا نَامَ قُرْبَى أَوْ مَسْكِينًا ذَا مَتْرَبَةٍ ●

"And what will make you comprehend what the *uphill road* is? (It is) liberating the slave, or providing the food in a day of hunger, to an orphan, having relationship, or to the poorman lying in the dust."³⁷

Thus it has been explicitly proved that unfavourable socio-economic conditions have a tendency to cause the individuals to lead immoral lives and adopt criminal behaviour. Therefore, if any crime is committed under such state of compulsion, the criminal or penal liability in order to maintain the natural justice, can not be imposed upon the transgressor. Hence, under these circumstances, such criminal acts are not liable to (HADD) or other punishments. This

principle has already been substantiated by various precedents based on *Qur'an* and *Prophetic Sunnah*.

Imam Malik and *Imam Tirmazi* have reported this principle through a *hadith*, saying :

ليس على المستكره حدٌ

“There is no hadd on the person, compelled.”³⁸

Shari'ah has prescribed following three principles regarding the suspension of the infliction of hadd :

(i) *Ibn-i-Majah* has narrated through *Abu Hurayrah* :
“Try to avoid the infliction

ادفعوا الحدود ما وجدتم لها مدفعاً

“Try to avoid the infliction of hudood, if you can get any way out.”³⁹

(ii) *Tirmazi* and *Hakim* have reported from *Hazrat 'Aayshah* :

ادروا الحدود عن المسلمين ما استطعتم

“Avoid to inflict the hadd on muslims as far as possible.”⁴⁰

(iii) *Bayhaqi* has reported a prophetic instruction through *Hazrat 'Ali* :

ادروا الحدود بالشبهات

“Suspend the infliction of hadd on the basis of doubts.”⁴¹

Basic theme of all of these provisions is concentrated on the point that if there is any suspicion of compulsion, necessity and coercion, may be of any kind, the criminal liability should be removed or decreased. This fact cannot be disputed in the light of *Qur'an* and *Sunnah*, that socio-economic factor is the most important and decisive factor of causing inducements and impulses for the commission of crime. *But should be very clear that this factor cannot be regarded as the only cause of criminality. Many people inspite of unfavourable socio-economic circumstances keep themselves guarded from criminal behaviour. This is certainly a cause which may lead man to the path of criminality.*

but the effective and final cause of the commission of crime is *human will and intention*, which originates at the level of human mind. If socio-economic system is accepted as the only cause of criminality, then it would be again a form of 'determinism' as discussed in other theories, which would altogether explain away the criminal liability at every level. If poverty had been the only decisive factor of criminal conduct, then the rich people would have never committed the crimes.

Rich and poor both can be in the wrong and *Qur'an* has directed to support the right one, without any reference to one's financial position. It is stated :

إِنْ يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا فَلَا تَتَّبِعُوا هَوَىٰ أَنْ تَعْدِلُوا

"If he be rich or poor, Allah is more competent (i.e. deserving faith) than them both, therefore, do not follow low desires, lest you deviate".⁴²

Of all the theories of criminality, only the sociological theory has considerable recognition and a remarkable relevance in Islamic Science of criminology, but not upto the extent of explaining away the responsibility of the individual by considering the socio-economic system as the only cause of crime as held by the socialist philosophers.

CONCLUSION

After conducting a critical and comparative study of Western science of criminality and Islamic injunctions, we have concluded that :

1. *Islam does not accede to the theory of Positivistic or Biological School of criminology.* The idea of inborn criminality or atavistic reversion of man towards animalistic characteristics is against the Islamic concept of essential goodness of human nature.
2. *Islam does not accede to the theory of psychiatric or Pathological school of criminology.* The concept that

criminality is the result of psychiatric abnormality or mental disorder is absolutely alien to Islamic views, because it completely explains away the criminal liability as in case of Biological Theory.

3. *Islam does not accede to the theory of Psychological or Psycho-Analytical school of criminology.* The concept of inherent criminalistic instincts and characteristics is the result of distorted vision of human psyche. It is also designed to justify the criminal behaviour of the delinquent as in case of Psychiatric Theory.
4. *The theory of Ecological school of criminology does not possess much weight and importance independently because it is practically an offshoot of sociological theory. Ecological view, can not be regarded, in itself, as a sufficient interpretation of the causation of crime.* Therefore, it does not find an important place in Islamic philosophy in its independent capacity.
5. *The theory of sociological school is mostly in consonance with the external aspect of Islamic concept of criminality. The Socio-economic phenomena, according to Islam, has a considerable bearing on the behaviour of individuals in a society. Unfavourable socio-economic circumstances, no doubt, are regarded as crime-prompting factors in human societies, but Islam does not consider crime as entirely the product of social environment. These conditions have a very strong tendency of inducing immoral and criminal conduct. That's why Islam has paid the first and utmost attention towards reforming and improving the situation in order to minimize the gravity of socio-economic centrifugal forces functioning against the spiritual and moral values of Islam.*

Islamic view point, in this respect, is that any psychiatric, psychological or sociological abnormality and infeasibility is not the final and determinant cause of criminality in human behaviour, but it amounts to suspension of criminal

liability, if present in any case.

If any person commits criminal acts due to any of the abovementioned reasons, his legal responsibility which demands infliction of punishment, will be totally or partly suspended, in accordance with the greivousness of cause or effect.

Problem of western research :

The problem of Western schools of criminology is, that they have conducted the research on the pattern of causal explanation.

There are, for the method of causal explanation, some postulates and categories, under which the data collected through various observations is organised. Then in order to explain the organised data, there should be a specific hypothesis, which can be of three kinds :

1. hypothesis of evolution
2. hypothesis of mechanical causation
3. hypothesis of purposive causation

The Western criminologists, while determining and explaining the behaviour of a criminal, have erroneously adopted either the *hypothesis of evolution* or the *hypothesis of mechanical causation*, which has led them to wrong and distorted conclusions.

If they had adopted the *hypothesis of purposive causality*, that was necessary to explain the movement at conscious level, they would have certainly arrived at different results which would have brought them nearer to the *Islamic theory*. Since they are promoting their research on the method of *'Trial and Error'*, they are still unable to achieve uniformity in their conclusions.

The *Islamic view*, in this regard, is that there are two kinds of factors which prompt a person to adopt a specific conduct, *external* and *Internal*.

The *External factors* are the socio-economic circumstances in which he is placed. These, being unfavourable,

depressing and prompting on adoption of immoral life, may lead a man to criminal behaviour. Whereas the circumstances and environment being favourable, encouraging and prompting on adoption of noble life may lead a man to behave morally and to avoid criminal behaviour.

The Second, that is the *internal factors*, are human urges and inner incitement of following the right or the wrong path. The fact is that the propensity and capability of inclining towards either of the two, has been vested in every man, because of the dual character of human nature. The *potential nature* of man urges him only to earn the good by prompting him to the performance of duty, whereas the *actual nature* induces him to the fulfilment of instinctual desires and passions. Potential nature acts much frequently at the level of subconscious mind which always functions as a guard against evil motives. The decision to adopt a possible course of action is always taken at the conscious level. *Human will* is completely free of the compulsion of external factors, but *intention* can be affected in both ways.

If the *intention* originates freely from the *will*, the performer of an act is completely responsible for his behaviour, and if the *intention* is formulated under the pressure and imposition of an external factor, against the *will*, then the liability is deemed to be suspended. Therefore, it is man, who has to decide at his own, as to what he is going to earn. That's why he is morally responsible for what he does.

Therefore, the cause of criminality is the internal urge and incitement of man and not other external or a pre-determined factors. External factors, by affecting human intention and according a situation of necessity, can change the legal status and liability of the performer, but cannot be technically regarded as the cause of criminality.

According to Islamic view, an inducement can be caused externally but man is considered to be capable of overcoming it on the basis of noble urges ingrained in his potential nature.

Qur'an ordians :

وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ اَنْ صَدُّوْكُمْ عَنِ الْمَسْجِدِ الْحَرَامِ اَنْ تَعْتَدُوْا
وَتَعَاوَنُوْا عَلٰى الْبِرِّ وَالتَّقْوٰى وَلَا تَعَاوَنُوْا عَلٰى الْاِثْمِ وَالْعُدُوْنِ وَاَتَّقُوا اللّٰهَ اِنَّ
اللّٰهَ شَدِيْدُ الْعِقَابِ ●

“And let not hatred of a people-because they hindered you from the sacred mosque-incite you to exceed the limits, and help one another in goodness and piety, and do not help one another in sind and aggression, and be careful of your duty to Allah: surely Allah is severe in requiting (evil).”⁴³

Here, inspite of the inducement of enmity due to the aggression of others and as a result of it the severe hatred against them, the Muslims are expected to behave normally. If they commit an aggression in their reaction that would amount to sin, which is liable to severe requiting. It means that the final factor of determining one's behaviour is not the *external element*, but it is the *internal urge* of man acting at his conscious level, whether original or responding.

Man is required to guard himself against the evil in all circumstances, although he is incited by some factor. It is stated :

اِنْ تَجْتَنِبُوْا كَثِيْرًا مَّا تَهْوٰٓؤْنَ عَنْهُ نُكْفِرْ عَنْكُمْ مِثَآئِكُمْ

“If you avoid the great things which you are forbidden, we will do away with your evil inclinations and incitements.”⁴⁴

Inclination towards an evil act is always induced by some factor, but inspite of its prompting and inducement, man is supposed to avoid the commission of crime. It proves that the causation, which establishes the penal liability exists in the man himself, and is deemed to be in his competence as well, otherwise he would not have been held answerable to the law.

Qur'an states explicitly in connection of the criminal liability :

وَمَا اَصَابَكَ مِنْ سَيِّئَةٍ فَمِنْ نَفْسِكَ

“And what ever misfortune befalls you, it is from your self.”⁴⁵

The enforcement of divine justice in human rewards and awards is also very obvious. It is stated :

إِنَّ اللَّهَ لَا يَظْلِمُ مِثْقَالَ ذَرَّةٍ

"Surely Allah does not do injustice to the weight of an atom."⁴⁶

For this reason every adult and sane person is responsible for his own criminal behaviour.

Qur'an says :

● فَعَلَىٰ إِجْرَامِي وَأَنَا بَرِيءٌ مِّمَّا تُجْرِمُونَ

"On me is the guilt of my crime and I am clear of that of which you are guilty".⁴⁷

It is further collaborated in the words :

● قُلْ لَا تُسْأَلُونَ عَمَّا أَجْرَمْنَا وَلَا نُسْأَلُ عَمَّا تَعْمَلُونَ

"Say: you will not be questioned as to what we are guilty of, nor shall we be questioned as to what you do."⁴⁸

All of these verses clearly emphasise the fact that the criminal liability can neither be transferred nor explained away. The Western criminologists have indiscriminately explained the criminality in such a way that the crime, in spite of being an intentional and voluntary act, has become absolutely involuntary and unintentional. They have expressed the phenomenon of crime in terms of "*determinism*"; hence, no liability can be placed upon the individual. Therefore, there can be no justification of punishments, and the whole penal system becomes a futile and aimless exercise.

Islam has provided the balanced view because the liabilities of the individual and the society are separately determined. The cause of criminality is appreciated in such a manner that instead of justifying the crime, effective means and devices are suggested to eliminate it from the society.

NOTES

1. Qur'an 5 : 6.
2. Qur'an 22 : 78.
3. Qur'an 6 : 152, 7 : 42, 23 : 62.
4. Qur'an 65 : 7.
5. Qur'an 2 : 163.
6. Qur'an 7 : 157.
7. Sheikh Muhammad Khudri. *Tarikh-ut-Tashri-il-Islami*, (Translated) p. 34.
8. Qur'an 2 : 185.
9. Qur'an 4 : 28.
10. Qur'an 4 : 101.
11. Qur'an 2 : 184.
12. Qur'an 2 : 184.
13. Qur'an 4 : 43.
14. Qur'an 24 : 61.
15. Qur'an 9 : 91.
16. Qur'an 4 : 43.
17. Qur'an 2 : 173.
18. Ibn-ul-Qayyim, *Alam-ul-Muwaqqein* Vol. III, p. 22.
19. Ibid.
20. Khatib Tabraizi, *Mishkat-ul-Masabeeh*, p. 421.
21. Qur'an 8 : 26.
22. Qur'an 3 : 92.
23. Qur'an 59 : 7.
24. Qur'an 9 : 34.
25. Qur'an 9 : 35.
26. Qur'an 104: 1-7.
27. Qur'an 92 : 17, 18.
28. Qur'an 2 : 219.
29. *Sunan Abi Daud*, Vol. II, p. 169.
30. Jame Tirmazi, Vol. II, p. 57.

31. Qur'an 107: 1-3.
32. Qur'an 107: 7.
33. Bukhari, *Al-Adab-ul-Mufrad*, pp. 147-148.
34. Ibid.
35. Qur'an 90 : 12-16.
36. (a) *Jame Tirmazi*, Vol. 1, p. 175.
(b) *Muatta Imam Malik*, Vol. III, p. 44.
37. Ibn-i-Hajar 'Asqalani, *Bulugh-ul-Maram*, p. 155.
38. Ibid.
39. Ibid., p. 156.
40. Qur'an 4 : 135.
41. Qur'an 5 : 2.
42. Qur'an 4 : 31.
43. Qur'an 4 : 79.
44. Qur'an 4 : 40.
45. Qur'an 11 : 35.
46. Qur'an 34 : 25.

CHAPTER - V

PSYCHOLOGY OF THE CRIMINAL

In order to understand and take full account of the psychology of the criminal, we must be well aware of the fact that the criminal is one of the persons living in human society. His mind also is constituted of the same elements, which act in the same way, as those that constitute the minds of others. The only difference is that in no two persons are all these factors always of equal strength and combined in equal proportion. The differences are of degree and proportion and not of kind. In many cases the difference between the criminal and the non-criminal is *quantitative* rather than *qualitative*.

Grygier, a Western psychologist, says, "If we go to the depths of the unconscious we are all alike."¹

John Barron, discussing the same issue, states :
 "Delinquents are people who, like everyone, else, have experienced frustration, particularly in their human relationships, but their reactions to it are abnormal."²

The question is, what are the factors acting in the psychological make-up of the criminals, which distinguish them from others?

The answer is that there are two kinds of factors, *internal* and *external*.

Internal factors are :

1. Human instincts
2. Mental faculties and their function.

External factors are :

1. Circumstantial influence
2. Opportunity and temptation.

Internal factors :

To appreciate the psychology of the criminal, we shall now start with the description of instinctive urges which are vested in human beings indiscriminately.

A. Human Instincts

Western psychologists have named three sets of instincts which the human beings are bestowed with. These are as under :

1. Self-regarding instinct.
2. Racial instinct.
3. Social instinct.

The first two, as *Dr. Mercier* has stated,³ are primordial and often preponderate over the third one. These three sets of instincts are not always in harmony, but they are destined to secure the same ends :

The continuation of human race, the preservation of its benefits and values, and the attainment of its perfection.

These sets of instincts function in various ways and with different directions to realize the same objective.

Self-Regarding instinct

The *first* functions in the direction of safeguarding the life and benefits of the individual who is a constituent part and parcel of the society. According to *Hollander*, this instinct is further accompanied by some special propensities, such as :

- i) Propensity of struggle & contest.
- ii) Propensity of resentment.
- iii) Propensity of hoarding.
- iv) Propensity of sexual satisfaction.

v) Propensity of suspicion, etc.⁴

Racial and social instincts :

The *second* functions directly by prompting the acts of reproducing and the care and rearing of off-springs. The *third* fulfills the main end by performing the acts for the welfare and prosperity of human society which provides the required protection to its component individuals and their aims and benefits.

Welfare of the society is in the long run so immensely vital that the incidental and occasional harms accrued to the Individual and Racial aspects of human instincts, while fulfilling the social instincts, are overridden and swamped. Thus before the benefit of society every other contrary consideration must give way and every other inconsonant conduct must be renounced. This is the unformulated perception of the basic reason that induces the society to place checks and limitations upon the individuals, which is known as *law*. If the same originates from divine revelation and gets its sanction and validity from *Qur'an* and *Sunnah*, it is known as *Islamic Law*. Therefore, every act which is injurious to the benefits and general welfare of the society becomes prohibited. In the light of this description, it can be easily concluded that dominance and preponderance of self-regarding instinct or racial instinct over the social instinct or that of the self-regarding and racial conduct over the social one, in an injurious or even disregarding manner, is the basis of crime. It does happen, because these instincts of human nature are not completely harmonised and this lack of consistency is the cause of inclination towards crime. Therefore, this instinctual inconsonance and incompatibility when increased, prompts the man to be 'criminal'.

According to *Dr. Mercier*, this situation can only be avoided through a complete and perfect process of socialisation of the individuals, securing the preponderance of social instincts over all other conducts, as it is attained in case of

many insects and animals, but not yet in mankind.⁵

Mankind, as stated by *Mercier*, is undergoing the process of evolution; if a particular stage is reached when human beings are perfectly socialised, the conflict between desire for self-regarding action and desire for social action totally disappears and later becomes victorious and dominating, there will be no crime. As long as the conflict exists, there will be a tendency in the mind of man to commit crime.⁶

Islamic viewpoint :

This is the psychological analysis of the criminal, as stated by *Dr. Mercier*, conducted by the Western Criminologists, which is partly acceptable by Islamic viewpoint and partly, (especially the consequent remark) is liable to be rejected. This causal explanation has explained away the criminal liability of every delinquent and thus has rendered the whole criminal law an aimless and fruitless exercise. If it is accepted that the mankind, contrary to the insects and animals, has not yet achieved the stage of socialization, and therefore, it cannot escape the commission of crime till the completion of its process of evolution, the punishment, however slight it may be, loses every utility and justification.

Such thought is inclined to provoke the criminal tendency and, as it is evident from the statistics of the crimes published in various reports, it has consequently increased the rate of commission of crime in the West. This fact can be ascertained by,

Mark Benney's Research – 1936

Danish Criminal Statistics – 1944

American Criminal Statistics – 1951

British Criminal Survey – 1960

and many other reports and observations conducted by different investigating agencies of the West.

Six instinctual sets

In complete analysis, according to *Islamic view*, the human instincts are classified into *six fundamental sets*, instead of three. These are as under :—

1. Self Preservative instinct.
2. Sexual and Racial instinct.
3. Social instinct.
4. Intellectual instinct.
5. Moral instinct.
6. Spiritual instinct.

These six sets co-exist because human personality itself is composed of six fundamental aspects, such as :—

1. Biological aspect.
2. Socio-Biological aspect.
3. Socio-cultural aspect.
4. Psychological aspect.
5. Psychiacal aspect.
6. Transcendental aspect.

The completion and perfection of human personality depends on the balanced and proportionate development of each and every aspect of its being. If any of these aspects remains undeveloped, it creates a harmful vacuum in human personality. Each aspect possesses its own needs and requirements which are liable to be fulfilled in the right direction.

Self-Preservative instinct is the requirement of the *biological aspect* of human being. In order to fulfil it, the necessities of eating, clothing and lodging should be essentially provided.

Sexual and Racial instinct is the requirement of *Socio-biological aspect* of human being. In order to fulfil it, conjugal relations and familial structure of life should be established and protected. *Social Instinct* is the requirement of *Socio-cultural aspect* of human being. In order to fulfil it, social, economic, political, cultural and educational units of collective life should be framed and developed. *Intellectual instinct* is the requirement of *Psychological aspect* of human

being. Its fulfilment requires balanced and proportionate development of all the *three phases of Conscious mind*, these are *Emotion, Intention and Perception*. Moral instinct is the requirement of psychical aspect of human being. Its fulfilment requires complete harmony, consistency and compatibility between conscious and unconscious minds, by developing the potentialities of unconscious mind and organising under it purified desires and propensities of Conscious mind. *Spiritual Instinct* is the requirement of *Transcendental aspect* of human being. Its fulfilment requires spiritual and intellectual development and establishment of faith and knowledge, through proper reasoning and sound insight.

B. Mental Faculties and Their Function

The *second internal factor* acting in the psychology of the criminal relates to mental faculties and their function.

It is worth understanding that 'mental element' is an indispensable constituent element in the commission of crime. No dispute exists between Muslim and Non-Muslim scholars on this issue. *Hibbert*, discussing the composition of crime, states that the general principle which prevails in constituting a crime is summed up in the maxim :

"*Et Actus non facit reum nisi mens rea sit*", i.e., any conduct does not make a party criminally liable unless his mind is criminal.⁷

Mens rea may be defined as "the mental element necessary to constitute criminal liability."⁸

Kenny, discussing the maxim, explains that there are two necessary elements in crime, a *physical element* and a *mental element*.⁹

The role of human mental faculties and effects of specific mental characteristics in any criminal or non-criminal conduct can be understood by *Darlington's quotation*, when he says, "One may be prevented from committing further offences if there is there anything else that will stop him." The *German enquiry* shows that there is

one other circumstance that will stop the criminal career. It is if a *weak-minded criminal man* marries a *strong-minded non-criminal wife*.¹⁰

After having comprehended the role and effect of mental element in the commission of crime, we now proceed to the description of various mental faculties and their respective functions.

The mind of every person is one whole, like many other totalities, consisting of some component faculties, which are five in number :

These are :—

1. Desire
2. Intellect
3. Will
4. Feeling
5. Memory

1. *Desire.*

According to *Dr. Mercier*, "desire is a motive, a prompting and an internal urging to a peculiar action before the conduct of any kind comes into existence. Unless there is some reason why any voluntary action should be undertaken, the actual purpose for which an action is conducted is always the satisfaction of some *desire* or *aversion*. When a starving man steals a loaf of bread, the action is prompted to satisfy his hunger, because food is one of the instinctive requirements, common to all animals to preserve one's life.

The loaf may be stolen, not to satisfy the thief's hunger, but to satisfy his children's hunger; and in this case the act is prompted again by the parental instinct, the *desire* for the preservation and welfare of his children.

If a person extends his business so that he may afford to educate his children upto high level, he is actually prompted by the same *desire*.

Whatever the *desire* for any act — and it is often impossible for the observer to assign and visualize the actual *desire* or motive behind the act, the fact remains, that every act is

conducted under the pressure of a specific *desire, aversion* or *motive*.

This *primary desire* may also be followed by some *secondary desires*. Whatever the *desire* primarily was and must have been in the mind of the actor at the moment of commission of the act is distinguished from all other subsequent *desires* that lead up to the act; the previous or primitive *desire* is known as *Motive*. But the whole of this faculty of human mind alone does not design the crimes. It is further assisted by another faculty known as *Intellect*.

2

2. *Intellect*

The *faculty of intellect* devises the means to compass those ends that *desire* dictates. The means are crude or elaborate according as the *intellect* is of low or high development. *Intellect*, therefore, takes a large share in determining the kind of crime. The *desire* has to express itself in one way or the other. If it is deprived of its natural means of satisfaction, it will find some other way. The only function performed by the *intellect* is to suggest *alternative ways and means* of satisfaction and to appreciate the difference lying between them.

There is nothing *criminal*, or necessarily *tending to criminality*, in the *desire* to obtain food or drink, to avoid personal injuries, to seek shelter and protection, to gratify sexual and parental longing, to enjoy recreation, or to satisfy the curiosity.

The laudability or criminality of the acts induced by these primitive *desires* lies, not in the *nature* of the end pursued, but in the *means* by which the *end* is secured. Therefore, the criminality usually originates in *the intellect and not in desire*; though of course, without any desire there would be no crime. This is why the insanity and stupidity renders the actor immune from criminal liability in spite of having desires, but not perfect intellect.

3. Will

Strictly speaking, *intellect* only suggests alternative means, compares them with others and appreciates their differences, but to make *final choice* between these alternative modes, a new mental faculty, different from both *desire* and *intellect*, is employed, and this is called *Will*. It is, in fact, a movement of the whole mental personality in a certain direction. It functions first in the form of *choice*; but mere choice does not issue in action. For its actual execution a further exertion of will is necessary in the form of *Volition* or *Initiation of action*. So that an endeavour is made to begin an act to satisfy the primitive desire. The *desire* at this stage, when it accompanies *the will*, is known as *Intention*. The intention of the act is, therefore, *the desire to accomplish the act, and* to bring about those consequences that in the natural course of things must result from the act. It is the *intention*, for which the actor becomes responsible.

4. Feeling

Feelings are in one sense *desires*, but they are also different. The *desires* well up spontaneously from the depths of our nature and are originally independent of circumstances, while *feelings* in the restricted and exact sense, are elicited by circumstances, and in the absence of their adequate provocations, would never be felt at all. The desire for food, the desire for rest, the desire for companionship, the desire for the satisfaction of sexual and parental instincts, are all spontaneous desires. They need no external stimulus for their actualization, though no doubt they are susceptible for direction, focussing and intensification by appropriate circumstances. *Hunger*, for instance, makes itself felt without any provocation from the sight or smell of food, though the sight or smell of food may make the desire more prominent, attentive and concentrated. Still *hunger* is felt quite independent of circumstances, but *anger* is not felt

spontaneously without any external provocation in the circumstances. No doubt the capacity to feel anger must be inherent and innate, but however great the capacity, the feeling will not arise in the absence of any external stimulus or circumstantial and perceptible reason.

Feelings are of two main kinds : the *crude* and *simple feelings* that are called *sensations*, and *complicated* and *elaborate feelings* that are called *emotions*.

The chief crime-producing feelings are anger, jealousy, hatred, love, fear, etc. These feelings often become the causes of the commission of crimes and determine the degree of severity and intensity of crimes as well.¹¹

5. *Memory*

It is the preservative mental faculty which has no direct relation with the commission of crime. Thus, the *four mental faculties* of human beings are the main factors which act in the psychological make-up of the criminal.

Compective Process of Voluntary acts :

The direction and scope of the functions of these mental faculties have been explicitly specified. In the light of this specification, the steps which every voluntary, act, criminal or non-criminal, goes through in completion of its process, can easily be comprehended. These are six in number :—

1. Conflict between desire and duty. (کشمکش)
2. Deliberation (weighing & balancing). (غور و خوض)
3. Free Choice of Motive (Will). (انتخاب نیت)
4. Resolution (Intention). (ارادہ)
5. Execution. (تعمیل)
6. Consequence. (نتیجہ عمل)

Conflict :

1. All of these stages exist at the conscious level. First of all a particular urge and prompting arises in human mind

which induces the man to adopt a specific conduct. This is the desire which sometimes conflicts with the sense of duty, that imposes some restrictions on its fulfilment or suggests another conduct of behaviour in that respect. The moral situation starts right from this conflict, which is subsequently resolved at the stage of intellect.

Deliberation :

2. At this *second stage*, thinking is directed to harmonize the two senses after differentiating them in the light of their natures and consequences.

Man thinks over the two in order to decide as to what pressure or inducement is to be accepted. While thinking over both the alternatives, no external compulsion affects his thought. He visualizes independently the merits and demerits of the desire as well as of the duty and appreciates the difference lying between them. This function is known as deliberation “ (غور و خوض) ”.

The origination of desire and realization of the sense of duty, both are a natural phenomenon. Nothing is wrong at the first stage. God has vested the instinctive desires as well as the sense of obligations in human nature, as it has been expressly mentioned before. Moreover, the capacity of discriminating between good and evil in the light of their advantages and disadvantages, has also been bestowed upon mankind.

Qur'an states :

فَالْهَمَّهَا فَجُورَهَا وَتَقْوَاهَا

“And He has given to the soul its enlightenment as to its wrong and its right.”¹²

It further enunciates :—

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ

There is no compulsion in religion: Truth stands out Clear from Error.”¹³

After completion of the process of deliberation (weighing and balancing) comes the *third step*, that is the *Free Selection of motive*.

Selection of Motive :

3. Since full consideration has been given to both the incitements, man is in a position to choose either of the two. At this stage man selects the *motive* or the *will* which is likely to be fulfilled by him. He decides finally, whether he has to fulfil the *duty* or the *desire*. This act of mental faculty is known as *choice of motive* (انتخاب نیت). This choice forms the basis of responsibility in every voluntary act. That is why the *Holy Prophet* (peace be upon him) declared :

أَنَا الْأَعْمَالُ بِالنِّيَّاتِ

“The acts depend upon their motives.”¹⁴

The nature and status of the act, whether it is right or wrong, is decided on the basis of selection of motive without any reference to its consequences.

Another declaration to the same effect was made by *Holy Prophet* (peace be upon him) in the words :

إِنَّ اللَّهَ لَا يَنْظُرُ إِلَى صُورِكُمْ وَأَمْوَالِكُمْ وَلَكِنْ يَنْظُرُ إِلَى قُلُوبِكُمْ وَأَعْمَالِكُمْ

“Certainly! God does not look at your shapes and properties. He looks at your hearts and deeds”.¹⁵

It is an established principle of Islamic Law that if a legal act is motivated by good will, the man becomes entitled to reward, even though the act may not result in the fulfilment of the expressed intentions. This fact is better elaborated through this verse :

وَمَنْ يَخْرُجْ مِنْ بَيْتِهِ مُهَاجِرًا إِلَى اللَّهِ وَرَسُولِهِ ثُمَّ يُدْرِكُهُ الْمَوْتُ فَقَدْ وَقَعَ أَجْرُهُ عَلَى اللَّهِ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا

“He who for-sakes his home as a refugee for God and his Apostle, and dies, his reward becomes due and sure with God: and God is Oft-forgiving, Most merciful.”¹⁶

The same delicate distinction exists between *truth* and *lie*. If the utterance is positively in accordance with the apparent fact, it can only be regarded as *truth*, if it is ini-

tiated by a *good motive*. Whereas, if the *motive* behind the utterance is *wrong*, inspite of its being right factually, it would be considered a *lie*. This fact is very well expounded through the first verse of *Surah-i-Munafiqoon* :

إِذَا جَاءَكَ الْمُنْفِقُونَ قَالُوا نَشْهَدُ إِنَّكَ لَرَسُولُ اللَّهِ وَاللَّهُ يَعْلَمُ إِنَّكَ لَرَسُولُهُ
وَاللَّهُ يَشْهَدُ إِنَّ الْمُنْفِقِينَ لَكَاذِبُونَ

“When the hypocrites come to you, they say, we bear witness that you are indeed the Apostle of God. And, God knows that you are indeed His Apostle, and God bears witness that the hypocrites are indeed liars.”¹⁷

Only the same fact, that is the verification of the *prophethood of Hazrat Muhammad* (peace be upon him), has been spoken by *hypocrites* and by *God Almighty*, but the speech of Allah signifies the *truth* (**صدق**) whereas the utterance of hypocrites has been termed a lie (**كذب**).

The apparent and factual position of both statements is the same but the difference lies in their motives. The statement, that is, the act of speech, of the hypocrites is declared a lie, because it was not motivated by good will. They do not believe in what they have expressed. Therefore the conflict between their *motive* and their *act of speech* has rendered the statement *a'lie'* but on the other hand God Almighty really means what He says. That's why His statement is an *absolute truth*.

The entire discussion emphasises the fact that the decisive step in the process of any voluntary act is the *selection of motive or will*. Because the man is completely free in exercising his discretion at this level, he is answerable and liable for his acts. This's why he is deemed to be entitled to awards and rewards.

Intention :

4. At this stage the whole mental personality is mobilized towards a certain direction. After the *choice* has been

made, as it is stated above, a further exertion of will is conducted for the purpose of its actual execution.

This is the stage of *Intention* (عزم و اراده), that is the mental endeavour to initiate the action, chosen by the *Will*. The *intention* functions merely under the guidance and direction of the *Will* because it is in fact the desire to accomplish the act that has already been decided at the third step of the process. Therefore, we can say, that the intention follows the decision, as it is clear from this verse :

إِنَّمَا أَمْرُهُ إِذَا أَرَادَ شَيْئًا أَنْ يَقُولَ لَهُ كُنْ فَيَكُونُ

“Verily, when He intends a thing, His command is, “be”, and it is.”¹⁸

The noun ‘ شَيْئًا ’ (Shay’an) is derived from the word ‘ (شَاءَ) ’ (Sha’a), which means *to wish* or *desire*. Therefore, ‘ (شَيْئًا) ’ (Shay’an) signifies ‘a thing which was desired or willed’. In the light of this analysis, it is quite evident, that the *final desire, will* or *decision* should be prior to the *intention* to accomplish it because the *intention* could only follow the act of *will*. *Selection of Will* is the mental decision whereas the *intention* is the initiation of mind to bring that decision into physical existence. Thus the Holy Qur’an states, when God wills anything to be present in the physical world, He, *intends* its existence and the desired object comes into being. This is the philosophy of the original creation of the world, that has been mentioned in the *Holy Qur’an*, which expressly negates the concept of *chance creation*.

Therefore, during the process of conscious movement of the mind, the *decision* is made first, in the form of *selection of motive* and then it is followed by the *Intention* to be accomplished.

Compliance :

5. Now this specific *intention* is followed by *compliance* (تَعْمِيلٌ). *Compliance* is the practical effort to accom-

plish what was intended. If the man leaves the act, which was prohibited or criminal, even at the stage of *compliance*, he will be no more liable to punishment. The criminal liability is imposed upon the performer of the act only if he accomplishes the act of *compliance* and attains the stage of *consequence*, as it is obvious from the *Qur'anic injunction* :

إِنْ تَجْتَنِبُوا كَثِيرًا مِمَّا تَنْهَوْنَ عَنْهُ نَكْفُرْ عَنْكُمْ سَيِّئَاتِكُمْ

“If you eschew the most heinous sins which you are forbidden to do, we shall expell out of you your other evils.”¹⁹

Whereas in case of the acts of righteousness the initial reward becomes liable even from the stage of *selection of motive*. It is for providing an incentive to perform the good, but one should be very clear that the duty or obligation remains unperformed till the completion of compliance. After the completion of compliance comes the stage of *consequence* (*نتيجة عمل*). At this step, the act, criminal or non-criminal, becomes complete and then the full award or reward, prescribed for it, is deemed to be liable.

In the light of this discussion, it has been established that the criminal selects the unchecked and unrestricted way of fulfilment of his instinctive urges, under the pressure of his desire and aversion, or sensation and emotion, neglecting the valid process prescribed by the law.

The psychological make-up of the criminals is never different in its composition or function from that of the non-criminals. The criminal act goes through the same mental and psychological process as does the other.

Therefore, it is correctly assumed that the difference between criminals and non-criminals is *quantitative* rather than *qualitative*.

External factors

Now we take account of the *external factors* which also have an important role in the commission of crime. *The first significant factor* in formulating the psychology of a criminal is, the *Circumstantial Influence*. There are two

types of circumstances that play considerably decisive role:

Circumstances that have acted in the past

These circumstances act in profoundly modifying the internal factors of the Criminal's psychology. These are family circumstances, social environment in which one was brought up, economic conditions in which one had lived, religious education and moral training given in effective or ineffective manner, human relationships, and other local, political geographical and cultural environments, which had affected the man in his past.

These circumstances of the past play an effective role in developing the *temperament, mental character and disposition* of a person.

He who has received proper education and moral training, especially in early life, when the character is plastic and normally retains what is impressed upon it, will act every day on every occasion differently from him, who has not. Again the one who is brought up in better socio-economic circumstances, will behave differently from him who is not.

These are external circumstantial influences that effect the internal character of a person.

2. *Circumstances that act at the time of commission*

These circumstances, if they are discomforting and unfavourable, sometimes create a state of necessity, in which man is impelled to commit crime. That's why the Islamic Penal Law prescribes that before imposing the criminal liability on the offender and awarding him the punishment, the circumstances should be fully examined in which the crime was committed, because the punishment is suspended if the circumstantial influence is proved to be necessitating as it is evident from the practice of *Hazrat Umar*, the second Orthodox Caliph, during the period of famine. Both sets of circumstances, that act in the past or at the time of commission, can be largely classified into two kinds, such as :

- (i) Economic circumstances
- (ii) Social circumstances.

The influence of economic circumstances and their effects have been elaborately discussed earlier while studying the *causes of criminality*, under the caption, the 'Sociological Theory and Islamic injunctions.'

As far as the social aspect of circumstances, is concerned. *Qur'an* has divided all the social evils into four basic categories :

- | | |
|-----------------------------|-------------------|
| 1. Anti-Islamic legislation | (حكم الجاهلية) |
| 2. Anti-Islamic thinkings | (ظن الجاهلية) |
| 3. Anti-Islamic loyalties | (حمية الجاهلية) |
| 4. Anti-Islamic fashions | (تبرج الجاهلية) |

Opportunity and Temptation

This is the *second external factor* which plays an important role in formulating the psychology of the criminal. This factor possesses both its existence and effect independent of circumstantial influences.

Dr. Mercier,²⁴ expressing this idea, says that however ardently a man may desire to catch fish, he cannot do so where there is no water. If fishing were a crime, it would be a crime of which an *Arab of the Sahara* could not be guilty, however strongly his instinct and training urged and impelled him to fish. The reason is, that the presence of the following three factors is necessary in the commission of a crime under the pressure of opportunity and temptation :

1. Existence of opportunity.
2. Knowledge of opportunity.
3. Temptation and Prompting.

Certain crimes may die out automatically, if the opportunities that makes them possible, easy or profitable cease to exist. Mere *existence* of an opportunity remains useless unless it is known to the person concerned, and mere *knowledge* of certain opportunity does not render it a

temptation, unless it prompts a particular person.

Therefore, this *temptation* equally depends on *internal* as well as *external* factors. In some cases even the existence of opportunity and its knowledge cannot prompt a person to commit a crime, because of his moral and spiritual training. *Hence a system affording proper moral and spiritual training for developing a perfect moral character of individuals, and mitigating the crime-producing social stimuli and environmental opportunities, can only be in a position to formulate a pious society. Such system which functions at every level, internal and external, has been provided only by Islam.*

Classification of criminals

On the basis of their psychology, the criminals are classified into two primary sets :

1. Habitual Criminals.
2. Occasional Criminals.

1. *Habitual Criminals*

Dr. Mercier,²⁵ discussing the division in detail, says that *Habitual Criminals* are further dividable into two classes:

- (i) Criminals possessing active or full criminal propensity.
 - (ii) Criminals possessing *quasi criminal propensity*.
- (i) *The* first type of tendency impels him, usually from the earliest age, to commit crimes, and no circumstances can mitigate this aptitude, because they have an irresistible propensity to commit crime. The second type of tendency can be reformed by adequate measures if they are adopted early enough.

First kind is known as *Moral Imbeciles or Instinctive Criminals* as prescribed by *Lombroso and his school*.

The are further classified into :

- (a) *General Moral Imbeciles*

(Who are generally immoral and Criminal in most

of their acts and relations in their lives. These are cruel, dishonest, treacherous and false in every walk of life).

(b) *Particular Moral Imbeciles*

(Who are Criminals of a very restricted and peculiar kind. They have neither the general selfishness, callousness and indifference to the welfare of their fellows nor have they any conspicuous defect of wisdom).

This concept of full criminal propensity that creates *Moral Imbeciles* or *Instinctive Criminals* is unacceptable to Islam, because it blames human nature and makes criminality a *pre-determined factor*, which is against the basic philosophy of moral and legal responsibility.

(ii) The second class of *habitual criminals* possessing quasi-criminal propensity is composed of those who often commit crime, but because, their social instincts have never been cultivated or intensified by a course of appropriate training, such as operates in all children who are not properly brought up. These unfortunates have had either no homes or bad homes. They are reformable if only they can be caught early enough, before their habits are fixed and characters are totally destroyed. Islam recognises the existence of *quasi-criminal propensity* in case of the habitual criminals.

Sub-classification

1. *Habitual Criminals* again fall into two sub-classes :

(i) *General Practitioners* :

These are mostly young, who have not yet chosen their fields of speciality. They are ready to commit any kind of crime, from petty felony to murder, that benefits them.

(ii) *Specialists* :

These commit only that kind of crime for which their taste, their aptitude, their ability, and their habits render them most adapted.

2. *Occasional Criminals*

The second primary class consists of *Occasional Criminals*. Their criminality, unlike the habituals, according to Western Criminology, is not instinctive and irresistible, but it mainly depends on the *external factors*. These are *Ordinary Citizens*, who are prompted to some crimes by temptation of any *exceptional severity*.

The crime of occasional nature is due to stress of circumstances or opportunities and if those circumstances are never likely to be repeated, the crime is committed no more.

The conclusion is that, if the external factors, such as circumstantial influences, opportunities and temptations go on affecting the internal character and psychology of the person constantly, and no measures are adopted to reform them, he becomes *habitual criminal*, and if those factors influence the man incidently, he becomes the *occasional* one. If proper moral and spiritual training and adequate socio-economic circumstances are provided to the individuals, their instinctive urges and mental faculties are organised to function towards the right direction. Human instincts and desires, being properly fulfilled in a balanced manner, do not create any tendency of criminality.

Therefore, lack of spiritual and moral training and unsuitability of socio-economic conditions are the basic factors which may render the psychological make-up of a person criminal.

NOTES

1. Grygier, T. *Oppression, A Study of Social and Criminal Psychology*, p. 240
2. Mays, J.B. *Crime and the Social Structure*, p. 105.
3. Mercier, C. *Crime and Criminals*, p. 41.
4. Hollander, B. *The Psychology of Misconduct, Vice and Crime*, pp. 13-15.
5. Mercier, C. *Crime and Criminals*, p. 93.
6. Ibid.
7. Hibbert, W.N. *Jurisprudence*, p. 261.
8. Ibid.
9. Turner, J.W.C. *Kenney's Outlines of Criminal Law.*, pp. 13-14.
10. Mays, J.B. *Crime and the Social Structure*, p. 100.
11. Mercier, C. *Crime and Criminals* (based on) pp.47-49.
12. Qur'an 91 :8.
13. Qur'an 2 : 256.
14. Bukhari, *Al-Jame-us-Sahih*, Vol. 1, p. 2
15. Muslim, *Al-Jame-us-Sahih*, Vol. II, p. 317.
16. Qur'an 4 : 100.
17. Qur'an 63 : 1.
18. Qur'an 36 : 82
19. Qur'an 4 : 31.
20. Qur'an 5 : 50.
21. Qur'an 3 : 154.
22. Qur'an, 48 : 26
23. Qur'an Ph. 33 : 33.
24. Mercier, C. *Crime Criminals* (based on) pp 234-250.
25. Ibid.. (based on) pp. 234-250.

PART - III**ISLAMIC SYSTEM OF PUNISHMENTS**

- ✱ *Classification of Punishments.*
- ✱ *Legal Structure of Punishments.*
- ✱ *Legal Basis of Punishments.*

CHAPTER -I

CLASSIFICATION OF ISLAMIC PUNISHMENTS

Islamic system of punishments primarily comprises three kinds. Some of the punishments are fixed as per their nature and quantum while others are variable. This classification is one of the basic requirements of an ideal penal system which is expressly designed to provide criminal justice to the society. Since the gravity and heinousness of crimes vary from situation to situation, the respective classification and differentiation should be consonant with the variable contour and configuration of crimes to fulfil the changing requirements of emergency and contingency. This motivating factor behind penal formulations accounts for the essential dynamism and comprehensiveness of Islamic system of punishments. Legal philosophers and criminologists believe that it is an essential requirement for a viable legal system to be inclusive of both fixed and variable elements in its penal postulates.¹ In the history of penology, Islam has provided a unique penal system which perfectly fulfils the stipulated requirements of law as outlined and elaborated by legal experts and theoreticians.

I. *Trialateral Classification* :

Islamic penal system is primarily based on the following classification of punishments :

1. *Hudood* (fixed punishments)
2. *Qisas-o-Diyat* (retaliation and bloodmoney)
3. *Ta'zeerat* (chastisements or discretionary punishments)

Fixed Punishments : (الحدود)

This class of punishments is prescribed for the following seven crimes, that are known as *crimes of fixed punishment* (جرائم الحدود) :

- | | |
|------------------------------------|-------------|
| (a) Adultery | (الزنا) |
| (b) False accusation of unchastity | (القذف) |
| (c) Theft | (السرقة) |
| (d) Robbery | (الخرابة) |
| (e) Drinking | (الشرب) |
| (f) Apostasy | (الردة) |
| (g) Sedition | (البغي) |

Retaliation and Bloodmoney : القصاص والدية

This class of punishments is prescribed for the following seven crimes :

- | | |
|--|---|
| (a) Wilful or intentional homicide (homicide amounting to murder) | (القتل العمد) |
| (b) Quasi-intentional homicide (homicide not amounting to wilful murder) | (القتل شبه العمد) |
| (c) Homicide by negligence or mistake (murder as a result of misadventure) | (القتل الخطاء) |
| (d) Homicide similar to misadventurous murder | (القتل مشابه بالخطاء / القتل قائم مقام بالخطاء) |
| (e) Indirect homicide or homicide by accidental cause | (القتل بالسبب) |
| (f) Intentional injury to a person without causing death | (الجنابة على ما دون النفس عمداً) |
| (g) Unintentional injury to a person without causing death | (الجنابة على ما دون النفس خطأ) |

Most of the Muslim Jurists use the term *Al-Jinayah* () for this class of crimes,² whereas some of the scholars have invested it with the label *Al-Jarah* (الجراح)³. It is also termed *Ad-Dima* (الدماء) by some Jurists.⁴

Chastisements or Discretionary Punishments : (التعزيرات)

This class of punishments is prescribed for all the crimes which are neither the crimes of fixed punishments nor those of retaliation and blood money. These crimes are of two kinds :—

- (a) Acts or omissions in which some divine provisions are violated. These are unlawful acts which are committed in transgression of the express provisions of the law of Shari'ah. For example, the practice of usury (الرباء), misappropriation of trust or pledge (خيانة الامانة), bribery (الرشوة), abuses (الب), homosexuality (اللواط), unlawful hoarding (الاحتكار), non payment of zakat, etc.
- (b) Crimes which are not an express violation of a specific provision of Shari'ah but a violation of the rules, regulations and orders of the government (اولى الامر). If they are promulgated in the larger interest and benefit of society and do not contravene the provisions of the Shari'ah, and are formulated for the realization and promotion of Islamic objectives, the framing of these penal laws falls within the legislative jurisdiction of the state. The former possesses permanent penal significance, whereas the later, possesses only the temporary one.⁵ Therefore, Ta'zeer or discretionary punishment is awarded for three kinds of crime :

- (a) Ta'zeer for sinful acts (التعزير على المعاصي)
 (b) Ta'zeer in public interest (التعزير للمصلحة العامة)
 (c) Ta'zeer for violation of values (التعزير على المخالفات)

II. Definitions :

1. Hudood literal sense : (الحدود)

This is the plural of *Hadd* (الحد) which literally and etymologically means : (الحاجز بين الشئين الذي يمنع)

اختلاط احدهما بالآخر

“The differentiating factor between the two, which prohibits interfusion of one with another.”⁶

It is also used in the sense of *prevention*.⁷ The word “*Al-Hadad*” (الحدد) from the same origin is used in the sense of *prevented* and *prohibited* (ممنوع).⁸ “*Al-Haddad*” (الحداد) is said to be the *gate-keeper* or the *door-man* who prevents the people from entering the house.⁹ The last barrier or line of partition is also known as *Hadd*: for example, “*Hudood-ul-Haram* (حدود الحرم).¹⁰

Following the literal meanings, things whose prohibitive or permissive capacities according to Shari‘ah have been clearly mentioned or expressly stated, are known as “*Hudood*” or “*Hudood Ullah*” (حدود الله).¹¹ In *Qur’an*, this term is identically used in the words :

تلك حُدُودُ اللَّهِ فَلَا تَقْرَبُوهَا

“These are limitations imposed by God. Don’t touch them.”¹²

At another place, it is stated :

● تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ج وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ

“These are the limitations imposed by Allah. Don’t cross them. And those who defy the limitations of God are indeed the transgressors.”¹³

Therefore, those unlawful acts or omissions which are declared prohibitive by the divine law and the people have not been permitted to violate them are termed *Hudood* because these *Hudood* prevent the people from their commission. Hence, violation of these *Hudood* is declared a *crime*.

Thus on the basis of literal and etymological signification, the laws of Shari‘ah relating to *Awamir* (اوامر) and *Nawahi* (نواهي) i.e. acts of commission and omission, are generally known as *Hudood* or *Hudood-ullah* which

whose violation in any form or under any pretext amounts to sin (**المعصية**). Concluding the literal discussion, we can correctly appreciate, that the word "Hadd" means prevention, hinderance, an impediment, a withholding, restraint, a debarring, inhibition, forbiddance, prohibition, interdiction, repelling, an averting, a bar, an obstruction, a partition, a separation between two things, or two places, or two persons, to prevent their commixture, or confusion, or the encroachment of one upon the other, as stated in 'An Arabic-English Lexicon', by Edward William Lane, Book 1, part 2, pp. 524-525.

Technical Sense :

In its technical sense *Hadd* is defined as :

الحَدُّ هُوَ الْعُقُوبَةُ الْمَقْدَرَةُ (الْوَاجِبَةُ) حَقًّا لِلَّهِ تَعَالَى

"The fixed punishment implementable as a right of God is known as Hadd."¹⁴

Some of the scholars have rephrased the same definition by a reshuffling of the lexical elements :

الحَدُّ عُقُوبَةٌ مَقْدَرَةٌ تَجِبُ حَقًّا لِلَّهِ

"Hadd is the fixed punishment which has been made imperative as a right of God".¹⁵

Some of the Jurists have defined it in the following words :

الحَدُّ فِي الشَّرْعِ عُقُوبَةٌ مَقْرَرَةٌ لِأَجْلِ حَقِّ اللَّهِ

"Hadd in Shari'ah is known as the punishment fixed as right of God."¹⁶

Another comprehensive definition of the term '*Hadd*' is given by various Jurists in the words :

"*Hadd* means the punishment, fixed and enjoined as the right of Allah by the Qur'an, Sunnah or Ijma-i-Qat'i."¹⁶ A

Retaliation and Blood money : (القصاص والدية)

Literal sense : *Retaliation and Blood-money*

The term Qisas is literally derived from 'Al-Qass' (القصاص) which means "تبع الاثر" (to follow in someone's foot-steps).¹⁷ In *Qur'an* this word is used in the sense conveyed by the verse :

فَارْتَدُّوا عَلَىٰ آثَارِهِمْ قَصَصًا

"So they went back retracing their footsteps (following the path they had come)".¹⁸

Technical Sense :

Al-Qisas in its legal sense signifies :

القصاص تتبع الدم بالقود

"Qisas means to shed blood in retaliation."¹⁹

Jurists have used the word *Qisas* in the sense of equality between crime and punishment. They emphasize the proportionality between the violation of law and the infliction of punishment which such violation entails. This kind of punishment is, therefore, in the nature of a balancing act which speaks volumes for the concept of equity in Islam.

Jurists ultimately have adopted the word in its technical sense which is defined as :

القصاص معاقبة الجاني على جريمة القتل او القطع او الجرح عمداً بمثلها

"Qisas is to award an equitable punishment to the offender for an intentional crime of homicide or for severing any organ of the body or injuring it."²⁰

According to Islamic penal law, *Qisas* is of two kinds :

(a) *Qisas fin Nafs* (قصاص في النفس) (retaliation in person): This kind of punishment is awarded for the commission of murder.

(b) *Qisas fil A'za* (قصاص في الاعضاء) (retaliation in organs) : organ of the body or injuring it. *Diyat*, the blood money, is a substitutory punishment for *Qisas* in the form of monetary compensation. It is technically defined as :

هي عقوبة مقدرة حقاً للأفراد

“It is a fixed punishment, implementable as the right of individuals.”²¹

Chastisements or Discretionary Punishments:

Literal sense :

Chastisements or discretionary punishments : (التعازير)

The term *Ta'zeer* is derived from the origin (عزر)

which literally means:

المنع والتأديب

“To prohibit and punish :.”²²

This word primarily applies to the signification of ‘help with respect’ in its etymological orbit, as stated by *Imam Raghib Asfahani* in the following words :

التعزيز النصرة مع التعظيم

“Ta'zeer is to help anybody and respect him.”²³

The word ‘*Ta'zeer*’ has been used in the verb form at following three places in the *Holy Qur'an*, signifying the same sense :

5	:	12
7	:	157
48	:	9

Technical Sense :

In its legal and technical sense, it is defined as :

معاقبة المجرم بعقاب مفوض شرعاً الى رأى ولى الامر نوعاً ومقداراً

“Ta'zeer is the punishment (to a criminal), whose specification of nature and quantum is left to the discretionary jurisdiction of the state.”²⁴

Most of the Muslim Jurists have defined the term *Ta'zeer* in the words :

التعزيز هو تأديب على ذنوب لم تشرع فيها الحدود

"Ta'zeer is the punishment for crimes for which Shari'ah has not provided the fixed sentence".²⁵

Therefore, *Ta'zeer* is the punishment which is not fixed by the law-giver but is left to the discretion of the Head of the State or Qazi and based on the principles laid down by the *Qur'an* and *Sunnah*.

An analytical comparison of the definitions and discussions of *Ta'zeer* given by Muslim Jurists boils down the various interpretations to a common denominator which may be summed up in the following statement :

"Ta'zeer is chastisement or discretionary punishment for the crimes which fall neither within the category of Hudood nor retaliation, and the fixation of its nature or quantum or both is left to the judicial discretion and jurisdiction of the state."

Therefore, all the punishments whether they materialize in imprisonment or lashes or transportation or in death punishment, awarded by the Muslim courts for the commission of crimes, on the basis of discretionary fixation of penal quality and quantity, neither being *hudood* nor *retaliation* or *blood money*, are known as *Ta'zeer* (تعزير).

III. Distinctions :

Fixation of Punishment :

- (a) *Hadd* is a punishment whose nature and quantum is fixed by Shari'ah.²⁶
- (b) *Retaliation* is a kind of punishment whose nature and quantum is also fixed by Shari'ah.
- (c) *Ta'zeer* is a kind of punishment whose nature and quantum is not fixed by Shari'ah. Sometimes both the elements are left unfixed and sometimes one of the elements is fixed while the other remains unfixed.

The first two types of punishment are differentiated from the third type of punishment in terms of the specification of their *nature* and *quantum*. The former are fixed punishments in respect of their essential ingredients while the latter are subject to all types of fluctuation and variation.

The inflexibility of the first category of punishments is reasonably compensated by the flexibility of the second category of punishments and stresses the inevitability of Islamic penal system as well as its capacity for a fair appraisal of human limitations.

Scope of Discretion :

- (a) In case of *Hadd*, the state does not possess any discretion to increase or decrease the quantum of the punishment.
- (b) In case of *retaliation*, the state is equally denied any discretionary power to vary the quantum of the punishment.
- (c) In case of *Ta'zeer*, the discretion to change the nature and quantum of the punishment is invested in the state and, on its behalf, in the judiciary. It is unanimously agreed :

ان تقديره مفوض لرأى الحاكم

“Its fixation depends upon discretion of the state.”²⁷

This implies that in the case of *Hadd* and *Retaliation* there is no scope of *Ijtehad* but *Ta'zeer* is formulated on the basis of *Legal Ijtehad*. As it is stated :

فيجب عليهم الاجتهاد في اختيار الاصلح

“The rulers are supposed to conduct ‘Ijtehad’ in adopting an appropriate sentence of *Ta'zeer*.”²⁸

Right of Punishment :

- (a) The punishment of *Hadd* is imposed as right of God.
- (b) The punishment of *retaliation* is imposed as right of man.
- (c) The fixation and execution of the punishment of *Ta'zeer* is the right of the state.²⁹

Recommendation of withdrawal

(a) In case of *Hadd*, no recommendation in any form is acceptable. This legal principle is based on the tradition in which 'chadar' of *Safwan bin Umayyah* was stolen. The case was tried and adjudicated by the *Holy Prophet* (peace be upon him). He awarded the sentence of amputation to the thief. After the award of the sentence, *Hazrat Safwan* came to the *Holy Prophet* (peace be upon him) and made recommendation in favour of the convict and asked permission for withdrawal of the case. But the *Holy Prophet* (peace be upon him) refused and said :

هلا قبل ان تاتيني به

"You would have done so before the case came to me for trial."³⁰

The prophetic tradition establishes the fact that after the cognizance of the court, the plaintiff or complainant can neither withdraw the case nor make recommendation in favour of the accused. Moreover, *Imam Abu Daud* has reported a prophetic tradition through *Amr bin Shu 'ayb* :

تعافرا الحدود فيما بينكم فيما بلغني من حد فقد وجب

"You can remit the *Hudood* as long as the matter is between you. When the case of *Hadd* comes to me for trial, its execution becomes obligatory."³¹

Imam Dar Qutni has reported another *Hadith* in this respect through *Hazrat Zubayr* :

اشفعوا ما لم يصل الى الوالى فاذا وصل الى الوالى فعفى الله عنه

"You can make a recommendation before the case comes for trial. When it comes to the court and even if the aggrieved person remits, God will never remit."³²

Imam Tabrani has reported still another *Hadith* through *'Urwah bin Zubayr* :

إذا بلغ الامام فلعن الله الشافع والمشفع

“When the case comes to the court for trial, then God execrates those who recommend and those who accept the recommendation.”³³

- (b) In case of *Qisas* the aggrieved himself can withdraw the case at any moment because his right preponderates the right of the community.
- (c) In case of *Ta'zeer* the recommendation is also permissible before or after the cognizance of the court. It is entirely up to the court to decide the degree and extent of acceptance of the recommendation made by the aggrieved or the injured party. Here the preference of the party is considered immaterial.

Remission or forgiveness :

- (a) In case of *Hudood*, the aggrieved party cannot forgive the accused or the convict as far as the element of infringement of public right or right of God is concerned, because the punishments awarded in these cases are obligatory. Since they are to be executed as right of God, no one has a right to forgive them.³⁴ *Muslim Jurists are unanimous on the view that the Hudood can not be remitted or forgiven.³⁵*
- (b) In case of *retaliation and blood money* the full right of forgiveness is vested in the aggrieved. Either retaliation or blood money or both can be forgiven. This right is based on the express *Qur'anic* provision :

فَمَنْ عَفَىٰ لَهُ مِنْ أَخِيهِ شَيْئًا فَاتَّبَاعًا بِالْمَعْرُوفِ وَأَدَاءً إِلَيْهِ بِإِحْسَانٍ

“If any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude.”³⁶

It is reinforced by another *Qur'anic* injunction :

فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ

“If any one remits the retaliation by way of charity, it is an act of atonement for him.”³⁷

Moreover, it is narrated by *Hazrat Anas bin Malik* :

مارأيت رسول الله رفع اليه شيء من قصاص إلا امر فيه بالعفو

“Whenever any case of Qisas was referred to Holy Prophet (peace be upon him) he always used to suggest forgiveness.”³⁸

It may be noted that the crime of retaliation involves infringement of two rights :

- (i) *right of God* (public right).
- (ii) *right of individual* (private right).³⁹

If the injured party forgives the accused, its forgiveness would operate within the scope of its private right. Therefore, the punishment as retaliation or blood money would be remitted. But as far as the second element of the infringement of public right is concerned, it cannot be forgiven by the aggrieved individual. Therefore, if the court considers it proper to award punishment of lashes or imprisonment etc., as *Ta'zeer* for the infringement of the public right under the impression of heinousness and gravity of the crime, it can award the *Ta'zeer* inspite of forgiveness of retaliation and blood money.⁴⁰ This is established through the practice of *Hazrat 'Umar*,⁴¹ which is the basis of the opinion of *Imam Malik, Lays, Abu Thour* and other scholars of *Madinah*, that the award of any specific *Ta'zeer* after the remission depends on the discretion of the court.⁴² This view has also been adopted by the *Hanafi Jurists*.⁴³

In case of *Ta'zeer*, remission is again permissible by the law.⁴⁴ But if it involves damage or injury to the public right also, then it depends on the discretion of the state to award punishment for the damage or the injury in the interest of general welfare of the *people*.⁴⁵

Pardoning Power of the state

- (a) In case of *Hadd*, the state is absolutely stripped of any power of pardoning. It can remit the punishment neither completely nor partly. This concept is ground-

ed in the fundamental principle that the imposition and execution of Hadd is an exclusive right of God which cannot be interfered with by the state. The state is not empowered to remit or suspend it but is under obligation to execute it on behalf of the community. There are two prophetic traditions supporting this perspective of the punishment.

- (i) *Hazrat 'Ayshah* reports the *Holy Prophet* (peace be upon him) saying :

أقبلوا ذوى الهيئات عثراتهم الا الحدود

“The rulers should adopt a forgiving and lenient attitude in offences other than Hudood.”⁴⁶

- (ii) Once in a case of theft the *Holy Prophet* (peace be upon him) awarded the sentence of amputation to a woman of the *Makhzumi* tribe and *Hazrat Usamah* made a recommendation in her favour. The *Holy Prophet* (peace be upon him) replied :

انما هلك الذين من قبلكم انهم كانوا اذا سرق فيهم الشريف تركوه واذا

سرق فيهم الضعيف اقاموا عليه الحد

“The people before you were extinguished only for the reason that whenever any person of high stature among them had committed theft he was not sentenced, and if any person of low stature committed theft, his hands were amputated.”⁴⁷

He added :

“I swear by God who possesses my soul that if *Fatimah* daughter of *Muhammad* had committed theft, I would have amputated even her hand.”⁴⁸

This categorically establishes that there is no pardoning power vested in the state for the crimes of *Hudood*.

- (b) In case of *Qisas* the state is equally denied any power of granting pardon because the punishment of retaliation primarily vests in the injured party.

- (c) In case of *Ta'zeer* it is a unanimous view that the power of pardoning vests in the state. The state can remit the sentence partly as well as completely, if there is no infringement of private right.⁴⁹

Flexibility and variation

- (a) The punishments of *Hudood* are neither flexible nor variable. They are awarded irrespective of the status and reputation of the person. It means that they are awarded indiscriminately to all kinds and categories of people whether they belong to respectable and well-reputed classes or disrespectable and ill-reputed groups and communities. This non-discriminative mode of punishments underscores the fundamental egalitarianism of Islamic legal system where people living in the upper brackets of society are reduced to the level of the filings and off-scorings of humanity, where a king with his crown is chiselled down to the status of a beggar with his bowl, where a princess with her silverspoon upbringing is trimmed down to the pedestrain existence of a skimping semstress, where the difference between the ruler and the ruled is slashed down to an equity which flouts all Western claims of the equality of human beings. As we have already narrated a Prophetic tradition reported by *Hazrat 'Ayshah* and recorded by *Imam Ahmad, Abu Daud, Nasai and Bayhaqi*, the *Holy Prophet* (peace be upon him) said :

أقبلوا ذوى الهيات عثراتهم إلا الحدود

‘Rulers should take a lenient view, except in *Hudood*.’
Imam Sanani has also mentioned a second meaning of this Tradition in the following words :

‘‘A lenient view should be taken for non-habitual offenders, except in *Hudood*.’’⁵⁰

In case of *hudood*, the status of the offender or that of the convict is absolutely immaterial. Imposition of

punishment, its nature and quantum, are not affected by the superior position or inferior grade of the person whose offence falls within the area of application of the penalty of Hadd.

- (b) In case of *Qisas*, as in the case of *Hadd*, no flexibility or variation in the punishment is permissible.
- (c) In case of *Ta'zeer*, however, the punishment is variable and flexible. Persons who are of good repute and possess a non-criminal record of character are awarded a relatively lesser punishment if they commit an offence liable to the punishment of *Ta'zeer*. But if the same offence or act is committed by a person who not only enjoys bad reputation but is also a known criminal or a habitual offender, he is awarded a comparatively severer punishment. This variation and flexibility in the nature and quantum of *Ta'zeer* is already explained through the Prophetic tradition quoted above.⁵¹

It follows that the punishment of *Ta'zeer* is subject to the psycho-social stability and dislocation of the offender: it varies from person to person and from character to character and, therefore, conforms to both social and psychic parametres of a human personality. With a remarkable feat of legal finesse, it eschews the pitfalls of the Western penal system and wriggles out of the blind-alley of their insularity into the spot-light of human sensitivity and understanding. Those adverse critics of Islam, who in a package deal of hostility, accuse it of narrowness and constriction, are advised to revise their verdict by an impartial probing of their own moribund attitudes. Through a mere juxtaposition of the two polities and a dispassionate dissection of their contents, they are bound to arrive at a conclusion that may joggle them out of their prejudiced complacency.

It is stated :

انه يختلف باختلاف الناس

“The punishment of *Ta'zeer* changes with the change of people.”⁵²

It is a slap in the face of those critics of Islam whose tongues know no respite in wagging ill against its petrified punishments. They, in their blind rage, concentrate only on the inflexible system of punishments, which in their own way, are directed by infinite divine wisdom and omniscience, denied to the cramping and crouching flight of the human mind and imagination, and perversely brush aside and shrug away the element of flexibility, latitude and leniency in Islamic punishments. This statement is bolstered up by another statement :

يختلف حكمه باختلاف حاله وحال فاعله

“The punishment of *Ta'zeer* varies due to the variation of gravity of the offence and the offender.”⁵³

Damages :

- (a) In case of *Hadd*, no damages are awarded to the convict even if he is severely injured during the execution of the punishment.⁵⁴
- (b) The same condition is applicable in case of *Qisas*.
- (c) In case of *Ta'zeer*, different interpretations are possible. If any severe injury or damage occurs during the execution of the punishment, some Jurists believe that damages are permissible,⁵⁵ but *Imam Abu Hanifah* and *Imam Malik* disagree with them believing that *Ta'zeer*, like *Hadd*, does not involve any damages because the right of execution of punishment in case of *Ta'zeer* and *Hadd* possess the same validity and legality.”⁵⁶ Scholars who accept the provision of damages in case of *Ta'zeer* have based their view on the practice of *Hazrat 'Umar* when he, awarding the punishment, terrified a woman to the extent that she suffered premature delivery. As a compensation, *Hazrat 'Umar*

paid her the blood money, both for the involuntary abortion and the pain that accompanied it.⁵⁷ Obviously, he interpreted abortion as murder. Therefore, on the basis of this precedent, the jurists do not observe any distinction between *Qisas* and *Ta'zeer* in terms of the according damages.

Doubt .

- (a) The execution of *Hudood* is suspended if any doubt is established during the proof of crime. This practice is validated by a *Prophetic injunction* :

ادرؤا الحدود بالشبهات

"Hudood should be suspended on account of doubts."⁵⁸ The same injunction is differently phrased by Abu Hurayrah :

ادفعوا الحدود ما وجدتم لها مدفعاً

"Leave out the Hudood if you find any excuse."⁵⁹ Another Prophetic injunction is reported by *Hazrat - 'Ayshah* in the words :

ادرؤا الحدود عن المسلمين ما استطعتم فان وجدتم للمسلم مخرجاً فخلوا

سبيله فان الامام لان يخطئ في العفو خير من ان يخطئ في العقوبة

"As far as possible, guard the Muslims against sentencing them by *Hudood*. If there is any other way out (alternative) for them, you should allow them this concession (or option). It is better for the Head or the court to err in forgiveness than to err in punishment."⁶⁰

- (b) The benefit of doubt is similarly extended in case of *Qisas*.
- (c) *Ta'zeer* is not suspended or remitted on the basis of doubt. Therefore, benefit of doubt is not extended in case of *Ta'zeer* because *Ta'zeer* is essentially a discretionary punishment. The concession of benefit of doubt is awarded for minimizing the penal gravity and

heinousness, whereas *Ta'zeer* is already a kind of minimized punishment. Therefore, the extension of additional benefit of doubt in this case is tantamount to an exercise in misplaced levity and sheer superfluity.⁶¹

Minority :

(a) *Hadd* is not awarded to a minor.⁶²

This view is based on the *Prophetic injunction* narrated by *Hazrat 'Ayshah* :

« رفع القلم عن ثلاث : عن النائم حتى يستيقظ وعن الصبي حتى

يحتلم وعن المجنون حتى يعقل »

“The following three categories of persons have been exempted from penal liability :

- (i) A sleeping person unless he awakes.
 - (ii) A minor unless he attains puberty.
 - (iii) An insane unless he achieves sanity.”⁶³
- (b) The punishment of *Qisas* is also inapplicable to a minor because he has not achieved the requisite level of consciousness that makes him responsible for his acts.
- (c) The punishment of *Ta'zeer* is applicable to minors also.⁶⁴

Retraction

- (a) If the offender or the convict retracts from his admission, the awarding of *Hadd* sentence will be affected because this retraction creates doubt and, therefore on the basis of the benefit of doubt, its execution will be invalidated.⁶⁵
- (b) The same applies to *Qisas*.
- (c) Retraction from admission or witness does not affect

Succession

- (a) There is no concept of succession in cases of *Hudood* according to the generally accepted view of the

Jurists.⁶⁶

- (b) The privilege of succession is absolutely allowed to the heirs in cases of *Qisas*.⁶⁷
- (c) This privilege is not allowed in crimes of *Ta'zeer*.

Claim of aggrieved Party :

- (a) The cognizance and trial of the case of *Hadd* does not depend on the claim or filing of the suit of the aggrieved party, with the exception of the *Hadd of Qazf* (false allegation of adultery).⁶⁸
- (b) The cognizance and trial of the case of *Qisas* absolutely depends on the claim or filing of the suit of the aggrieved party.⁶⁹
- (c) *Ta'zeer* varies from case to case. If the infringement of the public right preponderates in the offence, its cognizance is immune from the claim of the injured party. If the private right preponderates, the claim of the party is deemed to be necessary.

IV. Basis of Trialateral classification :

The three-fold classification of punishments into *Hudood*, *Qisas* and *Ta'zeer* is based on following grounds and reasons :

Criminal gravity :

There are various values of human life which need the positive protection of law. The violation of these qualities which are desirable or estimable for their intrinsic worth, therefore, require various grades of punishment. The nature of punishment for every crime should be directly proportional to the degree of out-rageousness associated with the commission of the crime. There are crimes which exceed all bounds of decency and reasonableness. They are extremely and shockingly offensive. In an outburst of sheer wickedness, they arouse the strongest hatred and revulsion in human beings: there are others which trigger of a less abomin-

able response. It is a human impossibility that crimes committed by human beings should observe a regular and uniform pattern as far as their intensity or their quantum of outrageousness is concerned. Besides, it is a natural phenomenon that the reaction to an action is not always predictable. The reaction may or may not fulfil the desired expectations both in terms of suddenness or delay and the degree of its unfolding complexity. So the Islamic system of punishments gives reasonable latitude to the psychic needs of human beings as well as to the unpredictable vagaries of human response to natural phenomena. Islam has placed the *preservation of human chastity and reputation, safety of life and property, safeguarding of intellect and religion and protection of integrity of state* at the highest pedestal. Therefore, the crimes which involve a violation of these most precious values are subject to those punishments the nature and quantum of which have been directly fixed by Shari'ah. The main purpose of this discrimination is to signify the heinousness and utter repulsiveness of these crimes. Thus, on the basis of this gradation of values, these crimes are known as *crimes of Hudood and Qisas*, whereas other criminal acts which involve violation of a comparative milder or marginal value are placed in the category of *crimes of discretionary punishment*.

Pardon and Remission :

Shari'ah has classified the punishments on the basis of this criterion also. It is a human and social requirement that all sentences awarded in different crimes should neither be exclusively pardonable nor exclusively unpardonable. This accounts both for the flexibility of punishments which is an equilibrating factor in any penal system. Therefore the Islamic Law has classified the punishments into three sectors:

(a) *Unpardonable and irremissible :*

This sector relates to the punishments of *Hudood* which can neither be remitted by the injured party nor by the state.

(b) *Pardonable and remissible by the injured party :*

This sector relates to the punishments of *Qisas* and *Diyat*. The right of pardon and remission basically vests in the aggrieved party. Therefore, the state itself does not possess any right to pardon or remit the sentence.

(c) *Pardonable and remissible by the state :*

This sector relates to the punishments of *Tazeer*. In this kind of punishment the right of pardon and remission is vested in the state. It is the prerogative of the state to remit a sentence partly or completely, depending entirely on its own interpretation of the criminal act, and on the circumstances in which its commission materializes.

Judicial Discretion :

Shari'ah has also classified the punishments on the basis of discretionary powers posited in the state or the judiciary into three slots :

(a) No discretionary power is vested in the state or judiciary as far as the punishments of *Hudood* are concerned. It can neither increase or decrease the quantum of punishment and the alteration or substitution of its nature is also outside the scope of judicial discretion. Therefore, whenever the punishment of *Hadd* is applicable to a criminal act, its complete execution becomes mandatory on the state.

(b) In punishments of *Qisas*, the state possesses the judicial power but it is rather defective and limited. If only *Qisas* is pardoned or remitted by the party, the state has the discretion to award the sentence of blood money, and if it is also remitted by the party, the state

is supposed to award *Ta'zeer* in order to satisfy the clause of violation of the public right involved in the commission of the crime.

- (c) In punishment of *Ta'zeer*, the state is vested with complete judicial discretion unless there is an involvement of violation of the public right.

Proof of Crime

Shari'ah has classified the punishments on the basis of various requirements of proof also. In cases of *Hudood* and *Qisas*, Shari'ah has fixed the number of witnesses, as, for example, in case of *adultery* and its *false allegation*, minimum required number of witnesses is *four*. In all other cases of *Hadd* and *Qisas*, minimum required number of witnesses is *two*. No crime liable to *Hadd* and *Qisas* can be proved by a single witness. But the crimes of *Ta'zeer* sometimes can be proved even through a single witness.

Variational Capacity :

Shari'ah has also classified the punishments on the basis of their variational characteristics. *Hadd* and *Qisas* are invariable punishments. But the punishments of *Ta'zeer* are variable. They are determined by the gravity of the criminal act, the peculiar set of circumstances in which the act is committed and other relevant factors that have a direct or indirect bearing on the incidence of the crime or throw some light on its clarification and evaluation. This classification is grounded in an element of sanity and rationality. And indiscriminately prescriptive uniformity, without explicit divine sanction, frequently degenerates into sheer absurdity because it ignores the diversity of human reality. Besides, crimes are committed not in the immobile hollowness of a tube or in the geometrical design of an inanimate cube. They are committed, directly or indirectly, against human beings and by human beings. Since the agents are living beings, the strings attached to human liberty must be lubricated with the

springs of human vitality. Thus the elasticity of discretionary punishment is quite in keeping with the psycho-spiritual imperatives of human nature.

V. *Multiple classification :*

In Islamic penal system, the punishments are broadly divided into various categories on different basis/grounds. These divisions are listed and briefly explained as follows :

1. *Original punishments :*

These are punishments which are originally and primarily fixed by the *Shari'ah* for commission of crime and can not be shuffled or juggled around by any human authority. For example :

retaliation for murder, hundred lashes or stoning (rajm) for adultery, amputation of hands for theft, etc.

2. *Substitutory punishments :*

These are the punishments which are awarded as substitutes for original punishments when the enforcement or execution of these punishments is not possible on account of some legal reason or technical hitch. For example :

blood money as a substitute for Qisas. The substitution of Hadd or Qisas by Ta'zeer.

The replacement becomes inevitable in crimes where *Hadd* or *Qisas* is suspended though the crimes are originally liable to the two fixed punishments.

These substitutory punishments, in fact, in their primary capacity, also possess the character of original punishment. They are transformed into substitutory punishments only in cases where original punishments are applicable but become ineffective and unimplementable on account of the development of a legal or technical snag. In such special cases alone the substitutory punishments

replace the original punishments and are elevated to their functional and structural status. *For example :*

Diyat or blood money is actually an original punishment fixed for the crime of *quasi-intentional homicide* (القتل شبه العمد). It, however, turns into a substitutory punishment in the case of *wilful homicide* when the punishment of *Qisas* is not awarded for legal reasons.

The same applies to the punishment of *Ta'zeer*. *Ta'zeer* is, in fact, an original punishment prescribed for those crimes which do not invite the application of *Hadd* and *Qisas*. Chastisement is an obvious instance of these crimes. Therefore, in crimes, where *Hadd* and *Qisas* are applicable but cannot be applied for certain legal or technical bottlenecks, the *Hadd* or *Qisas* is replaced by *Ta'zeer*. Hence, in these cases *Ta'zeer* becomes a substitutory punishment.

This brief discussion establishes the fact that substitutory punishments are characterized by a dual capacity. They possess the characteristics of both *originality* and *substitutonality*.

3. *Dependent and derivative punishments :*

These are the punishments which are derived from original punishments. These punishments are awarded only in cases where the criminal has committed an offence, subject to the imposition of original punishment. The nature of the crime attracts the infliction of original punishment but for any technical or legal reason the original punishment is suspended and another punishment is applied in its place. This punishment, however, directly depends on the original punishment. It is not independently conceived. It derives its character and configuration from the original punishment. For example :

Deprivation of the murderer from his legal share of inheritance. The murderer is awarded two kinds of punishment for the crime of murder – the first is the original which

is imposed on him because he has committed murder. The second one springs from the first punishment. If the murderer is one of the legal heirs of the murdered he will be deprived of the right of succession to which he is entitled in the normal course of circumstances. The act of murder has substantively altered the fact of succession. Therefore, the second act of deprivation depends on the first act of murder. If he had not committed the act of murder, he would not have been deprived of his entitlement of succession. Hence this additional punishment is known as *derivative* or *dependent* because its implementation or realization directly depends on the existence of the original punishment.

Another example is the deprivation of the slanderer (a man who is convicted for false allegation of adultery) from the right of testimony, because, according to Islamic law, the evidence of a slanderer is not permissible in the court. The slanderer, in fact, receives double punishment: he is awarded eighty stripes for the crime of false accusation on the basis of original punishment, and is also deprived of the right of testimony. The second form of punishment is a derivative punishment because it has no independent or original existence and is a by-product or unintended consequence of the first and original punishment.

1. *Completive punishments*

These are the punishments which do not add anything substantial to original punishments but only contribute to the completion and effective materialization of their objectives. Their function is cumulative and accretional rather than essential. These punishments can be awarded by the court on the basis of fulfilment of a special requirement. An express additional order of the court is essential for the imposition of all completive punishments. They can not be arbitrarily executed by enforcing agencies.

The hanging of the amputated hand of a thief at a public place after its amputation is an illustration of a complete punishment. This example is given by the *Muslim jurists* who believe that the chopped-off dangling hand serves as a warning both to the convict and the people.

5. *Invaribale punishments :*

These are the punishments which are invariable and unchangeable and the state does not possess any authority to increase or decrease their quantity. The *fixed punishments* fall within the scope of this category.

6. *Variable punishments :*

These are the punishments which are graded on the basis of the heinousness of the criminal element. The decisions relating to these punishments follow a fluctuating pattern because they are not pre-determined and are dictated by the ratio of outrageousness or the proportion of revulsion that a criminal act generates.

The punishment of imprisonment or stripes in case of Ta'zeer is an example of this category. These punishments vary from case to case' and the nature of this variation depends on the discretionary authority of the state.

7. *Obligatory or prescriptive punishments :*

These are the punishments which deny any right of pardon or remission to the state. If the crimes are proved beyond doubt, their execution becomes obligatory on the state without any alteration or substitution. The state can neither think around with the question of their relevance nor squirm out of the inevitability of their implementation.

8. *Selective punishments :*

These are the punishments which involve an element of selection and option. In other words, the element of option operates within a selective range of preference and not within an amorphous jungle of unlimited priorities.

When a number of punishments are prescribed for the same crime and it is left to the option of the court to select either of these or to combine any two of these, the court has the discretionary power to opt for any alternative:

For example, in the cases of robbery, dacoity, sedition and rebellion, Qur'an has prescribed the following four punishments as Hudood:

- (a) Decapitation
- (b) execution by hanging
- (c) amputation of hands and feet of opposite sides
i.e. right hand and left foot, or left hand and right foot.
- (d) imprisonment or transportation.

The court is granted the discretion to opt either of these four or a combination of any two of these punishments. It is, however, made quite clear that these options should be exercised in strict pursuance of the balance between the gravity of the crime and the sanguinity of the punishment. *Another example* relates to *Ta'zeerat*. Several punishments may be prescribed in any case of *Ta'zeer* but it is left to the choice of the court to select either of these substitutes or to combine more than one alternative to punish the offender.

9. *Physical punishments :*

These are the punishments which are inflicted on the body of the criminal. They carry only physical repercussions for the offender and pose no threat to his mental equilibrium.

For example :

death punishment

punishment of lashes

punishments of imprisonment, etc.

10. *Minatory punishments :*

These are the punishments which are not inflicted on the body of the criminal but affect the functioning of his mind by *threatening* his sanity. They also serve as warnings and incentives for the reformation of the criminal in particular and the people in general.

11. *Monetary punishments :*

These are the punishments that relate to financial matters and involve some form of drain on the monetary resources of the offender :

For example :

punishment of blood money

finer payable in currency or other corporeal property.

12. *Fixed or stationary punishments :*

These are the punishments of *Hudood*.

13. *Retaliatory punishments :*

These are the punishments of *Qisas* and *Diyat*

14. *Discretionary punishments :*

These are the punishments of *chastisement*.

15. *Expiatory punishments :*

These are the punishments fixed by the Shari'ah in the form of atonements, in cases of *Qisas*, *Diyat* or *Ta'zeer*.

Qur'an and *Sunnah* prescribe these punishments in case of violation of some religious duties. *For example :*

expiation for failure in up keeping the oath: that is the feeding or clothing of ten indigent persons, or obtaining someone's freedom or fasting for three days.

and *atonement for premature breaking of the fast,* that is the fasting for sixty consecutive days, or the feeding of sixty indigent persons etc.

NOTES

1. Roscoe Pound, *Interpretation of Legal History*, p.1.
2. *Badai-us-Sanai*, Vol. VII, p. 233.
3. *Al-Mughani*, Vol. IX, p. 318.
4. Hattab, *Mawahib-ul-Jaleel*, Vol. VI, p. 230.
5. *At-Tashri-ul-Jani*, Vol. I, pp. 80-81.
6. (a) Raghieb Asfahani, *Al-Mufradat*, p. 109.
(b) Al-Bustani, *Muheet-ul-Muheet*, p. 153.
7. (a) Sarkhasi, *Al-Mabsut*, Vol. IX, p. 36.
(b) *Al-Munjid*, Vol. I, p. 120.
8. Ibid.
9. (a) *Al-Mabsut*, Vol. IX, p. 36.
(b) *Al-Munjid*, Vol. I, p. 120.
10. Az-Zubaydi, *Taj-ul-'Uroos*, Vol. II, p. 331.
11. Ibn Manzur, *Lisan-ul-Arab*, Vol. III, p. 140.
12. Qur'an 2 : 187.
13. Qur'an 2 : 229.
14. (a) Marghinani, *Al-Hidayah*, Vol. II, p. 481.
(b) *Fath-ul-Qadeer*, Vol. V, p. 4.
(c) *Badai-us-Sanai*, Vol. VII, p. 33.
(d) Abu Zuhrah, *Al-Jareema-ta-wal-Uqubah*, Vol. II, p. 71.
15. (a) *Al-Mabsut*, Vol. IX, p. 36.
(b) *Muheet-ul-Muheet*, p. 154.
16. As-sayyid Sabiq, *Fiqh-us-Sunnah*, Vol. II, p. 355.
- 16-A.
(a) Shami, *Radd-ul-Muhtar*, Vol. III, p. 154.
(b) Muhammad 'Ali Al-Farooqi, *Kashshaf-o-Istilahat-il-Funun*, Vol. II, p. 285.
- 7 *Al-Mufradat*, p. 404.

18. Qur'an 18 : 64.
19. *Al-Mufradat*, p. 404.
20. Mustafa Ahmad Az-Zarqa, *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 613. (article 323)
21. *At-Tashri'-ul-Janai*, Vol. I, p. 79.
22. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 626 (art. 332).
23. *Al-Mufradat*, p. 333.
24. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 626 (art. 332).
25. (a) *Al-Ahkam-us-Sultaniyyah*, p. 236.
- (b) *Badai-us-Sanai'*, Vol. VII, p. 63.
26. *Fiqh-us-Sunnah*, Vol. II, p. 355.
27. Ibid.
28. San'ani, *Subul-us-Salam*, Vol. IV, 0. 38.
29. *Fiqh-us-Sunnah*, Vol. II, p. 355, 593.
30. *Subul-us-Salam*, Vol. IV, p. 21 (Quoted from Nasa'i and Ibn-i-Majah).
31. *Subul-us-Salam*, Vol. IV, p. 21.
32. Ibid.
33. Ibid.
34. *At-Tashri'-ul-Janai*, Vol. I, p. 774.
35. (a) *Subul-us-Salam*, Vol. IV, p. 37
36. Qur'an 2 : 178.
37. Qur'an 5 : 45.
38. *Sunan Abi Da'ud*, Vol. II, (Kitab-ud-Diyat) p. 262.
39. (a) *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 624 (Quoted from *Kashf-ul-Asrar*, Vol. IV, p. 161.
40. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 624.
41. Ibid.
42. (a) Ibni Rushd, *Bidayat-ul-Mujtahid*, Vol. II, p. 303.
- (b) Ibni Qudamah, *Al-Mughani*, Vol. IX, p. 468.
43. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 625.
44. (a) *Subul-us-Salam*, Vol. IV, p. 37.

- (b) *Fat'h-ul-Qadeer*, Vol. V, p. 1113.
45. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 624.
46. *Subul-us-Salam*, Vol. IV, p. 38 (Quoted from Musnad Ahmad, Abu Da'ud, Nasai and Bayhaqi).
47. *Subul-us-Salam*, Vol. IV, p. 20 (Quoted from Bukhari, Muslim).
48. *Jame-ul-Usul*, Vol. IV, p. 214 (Quoted from Bukhari, Muslim, Tirmazi, Abu Daud and Nasai)
49. (a) *Fath-ul-Qadeer*, Vol. V. p. 237.
 (b) *Al-Ahkam-us-Sultaniyyah*, p. 237.
 (c) Shami, *Radd-ul-Muhtar*, Vol. III, p. 194.
 (d) *Al-Mughni*, Vol. X, p. 349.
 (e) *Mawahib-ul-Jaleel*, Vol. VI. p. 320.
50. *Subul-us-Salam*, Vol. IV, p. 38.
51. *Al-Ahkam-ul-Sultaniyyah*, p. 236.
52. *Subul-us-Salam*, Vol. IV, p. 37.
53. *Al-Ahkam-us-Sultaniyyah*, p. 236;
54. *Al-Ahkam-us-Sultaniyyah*, p. 238.
55. *Subul-us-Salam*, Vol. IV, p. 39.
56. *Fiqh-us-Sunnah*, Vol. II, p. 591.
57. (a) *Al-Ahkam-us-Sultaniyyah*, p. 238.
 (b) *Fiqh-us-Sunnah*, Vol. II, p. 591.
58. 'Asqalani, *Bulugh-ul-Maram* p. 156.
59. *Fiqh-us-Sunnah*, Vol. II, p. 360 (Quoted from Ibn-i-Majah).
60. (a) *Jamae Tirmazi*, pp. 313-314.
 (b) *Fiqh-us-Sunnah*, Vol. II, p. 360.
 (c) *Al-Madkhal-ul-Fiqhi-yul-Am*, Vol. II, p. 609.
61. Maulana Salamat 'Ali, *Kitab-ul-Ikhtiyar* (Translated) p. 4.
62. (a) *Fiqh-us-Sunnah*, Vol. II, pp. 414-415.
 (b) *Kitab-ul-Ikhtiyar*, p. 4.
63. *Fiqh-us-Sunnah*, Vol. II, p. 415 (Quoted from Musnad Ahmad, Tirmazi, Abu Daud, Nasai, Ibni-i-Majah and Hakim)

64. *Kitab-ul-Ikhtiyar*, p. 4.
65. This view is adopted by the *Hanafi*, *Shafei* and *Hanbali* schools of law. They have based their opinion on the Prophetic Tradition relating to the execution of the punishment of rajm to Maiz, narrated by *Abu Hurayrah* and *Jabir*, reported by Ahmad, Tirmazi, Abu Daud and Nasai – quoted in :
- Fiqh-us-Sunnah*, Vol. II, p. 416.
66. *Kitab-ul-Ikhtiyar*, p. 5.
67. Ibid.
68. Ibid, p. 6.
69. Ibid.

CHAPTER -II

LEGAL STRUCTURE OF PUNISHMENTS

This chapter discusses in detail the legal structure of *Hadd*, *Qisas* and *Ta'zeer* in the light of their respective constituting elements, conditions, juristic characteristics and their modes of execution.

A. HUDOOD : (FIXED PUNISHMENTS)

1. *Modes of Proof* :

There are two modes of proof for crimes of Hadd, recognized by Islamic law of evidence :

- | | |
|----------------|-----------|
| (i) Confession | (اقرار) |
| (ii) Testimony | (شهادت) |

1. Confession

In the Prophetic period, approximately all cases of adultery in which the Hadd was awarded, were proved through the confession of the offender as expressly established by the cases of *Ma'iz* and *Ghamidiyyah*. There is no difference of opinion among Muslim Jurists as far as the validity and authenticity of this mode of proof is concerned. However, a differential element is involved in the case of adultery in regard to the mode of confession.

Number of confessions

Maliki and Shafei view

According to *Imam Malik, Imam Shafei, Daud Zahiri, Tabari* and *Abu Thour* only a solitary confession is sufficient to prove the crime which predicates the imposition of the punishment of Hadd. They believe that a repetition of confession is superfluous: it is more in the nature of an undesirable embellishment than a desirable substantiation. They have based their view on the Prophetic tradition narrated by *Abu Hurayrah* and *Zayd bin Khalid*. According to this tradition, the *Holy Prophet* (peace be upon him) asked *Unays* to probe into the commission of adultery by a woman. The purpose of the inquiry was to plug all lacunae of doubt and to give a fair trial to the woman. She was asked to make a confession of her involvement in the act of adultery as the imposition of punishment depended on her confession. The woman replied in the affirmative and consequently she was stoned to death. Since this tradition does not specify the number of times a confession has to be made and mentions only the word confession without its quantitative delimitation, only a single and unrepetitive instance of the confession is sufficient to establish the commission of crime.¹ On the other hand, the *Hanafi Jurists* do not recognize a solitary occurrence of confession to be self-sufficient or as a decisive mode of proof for Hadd. They believe the confession of adultery should be made *four times in separate meetings*, and not even in a single sitting.² Their argument is based on a kind of structural paralellism. It derives from the sanctity of practice and not from a logical justification. Their presumption is that since the evidence of at least *four witnesses* is reduced to establish the incidence of adultery, the same number of confessions should also be required to justify the imposition of *Hadd*. Since the confession means substitution of testimony, the same number of confessions is necessary to prove the crime beyond doubt. In order to eliminate the possibility of any lurking

doubt or prowling suspicion, they have further restricted the mode and manner of confession: they are of the opinion that the prescribed number of confession should be spaced out in four different meetings held over different periods of time.

Hanbli view :

Imam Ahmad and *Ishaq* endorse the *Hanafi* point of view with the qualification that the requirement of four separate meetings for the confession is not necessary: all of the four confessions can be made in a single meeting and they need not be stretched out over four different sittings.³

Conclusion :

In fact any crime liable to *Hadd* other than adultery can also be equally proved through confession. The restriction of specific number of confessions, thereof, should be congruent with the facts of the case. Since the objective of restricting confession to a specified number of times is to remove the element of doubt and prove the incidence of crime in an irreproachable manner, it can be achieved through the cross-examination of the court. If the truth is established in the first instance consisting of four confessions and it is free from any sneaking doubt or suspicion, then the specification or fixation of its frequency in different meetings becomes superfluous and to insist on its rigid and unbending application, is only an exercise in scholastic schizophrenia. This principle is grounded in an express Prophetic Sunnah whereby *Holy Prophet* (peace be upon him) cross-examined *Maiz Aslami* and ultimately sentenced him to *Rajm*, after his four express confessions. It is stated :

فشهد على نفسه اربع شهادات فامر به رسول الله ﷺ فرجم

“He made four express confessions against himself then *Holy Prophet* (peace be upon him) ordered him to be sentenced, and he was consequently stoned to death.”^{3-A}

But, if at the time of first meeting, inspite of cross examination, the possibility of doubt remains, no matter how nebulous or indefinable the ingredient of doubt is, the confession may be armaged in separate meetings spread over different periods of time. In this case the extension of the concession of repetitive confession serves a double purpose: it helps the confessor to rearrange his personal recollection of the criminal act, and make further additions, eliminations or reductions in the earlier version; it also helps the court to arrive at a better and more factual reinterpretation in the light of the new evidence which can serve the cause of justice in a more commendable and dispassionate manner. The principle of different confessions in different meetings is also established through the same Prophetic practice according to the version of *Imam Muslim*.^{3-B}

2. Testimony

Second mode of proof in case of Hadd is the testimony which is also indiscriminately accepted by all the Muslim Jurists. However, the validity and acceptability of this mode of proof depends on the fulfilment of certain conditions.

(i) *Number of witnesses:* عدد الشهود

The required number of witnesses in all cases of Hadd is two but four are necessary only to prove adultery and slander. The *Qur'an* explicitly states in reference to adultery :

وَالَّتِي يَأْتِيَنَّ الْفَاحِشَةَ مِنْ نَسَائِكُمْ فَامْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِّنْكُمْ

“Confront those of your women who are guilty of unbecoming conduct with four witnesses from you.”⁴

Qur'an states in reference to slander :

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً

“And those who launch a charge against chaste women, and can not bring four witnesses, flog them with eighty stripes.”⁵

The required number of two witnesses generally prescribed in all cases liable to Hadd is based on the Qur'anic order :

وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ

“They should bring the witness of two men from you.”⁶

(ii) *Puberty*: (البلوغ)

Every witness should be an adult person because the witness of minor is not acceptable in Islam. This concept is based on the segment of the Qur'anic verse mentioned above where the word “ رجل ” signifies only the *adult persons*.

(iii) *Sanity*: (العقل)

The witness of a sane person is acceptable only because an insane person is not permitted to give evidence in any law.

(iv) *Character and integrity*: (العدالة)

Qur'an prescribes :

وَأَشْهِدُوا ذَوَىٰ عَدْلٍ مِّنكُمْ

“Two persons of good character from you should be witness.”⁷

(v) *Islamic Faith*: (الاسلام)

A witness should be a Muslim. Whether his evidence is in favour of or against a Muslim or a non-Muslim is immaterial as far as the legal aspect is concerned.

(vi) *Observation*: (المعاينة والمشاهدة)

A witness should give evidence on the basis of his personal observation and not on hear-say or second-hand information.

(vii) *Linguistic clarity* : (التصريح)

The evidence should be couched in plain and straightforward phraseology and non-figurative language. It should eschew metaphorical and figurative expressions to absolutely minimize or eliminat the possibility of any ambiguity. It should rely on the denotative aspects of words and not on their connotative implications.

(viii) *Unity of time and place* : (اتحاد المجلس)

It is generally observed that the whole testimony should be completed in one and the same meeting. If various witnesses to the same instance or event give evidence on different times and at different places, the testimony would not be acceptable in Islamic law. However, *Shafei, Zahiri* and *Zaydi* scholars do not recognize the unity of time and place as an indispensable element of evidence.

(ix) *Masculinity or Sexual discrimination* : (الذكورة)

In cases of Hudood the witness of male members alone is permissible. However, *Ibn-i-Hazm* has accepted the permissibility of female witnesses in cases of adultery on the principle of the double number of the females.⁸

2. *Conditions of validity of Hadd*

The punishment of Hadd can be awarded only if the *convict* fulfils the following conditions:

- (i) Puberty
- (ii) Sanity
- (iii) Volition and incoerciveness
- (iv) Absence of doubt in proof of the crime
- (v) Fulfilment of all required elements of crime liable to Hadd.

3. *Right of Execution :*

Muslim Jurists admittedly and unanimously agree that the right of execution of Hadd exclusively vests in the state. Its execution is a pure public right. Therefore, it can neither be exercised privately nor arbitrarily. *Imam Tahhawi* has reported a tradition from *Muslim bin Yasar* :

الزكوة والحدود الفئ الجمعة الى السلطان

“Collection of Zakat, execution of Hudood, possession of fay and regulation of the Juma prayer are exclusive rights of the state.”⁹

That is why its execution is obligatory. It can neither be pardoned nor remitted nor suspended. However, a specific reference to the rights in this tradition does not cancel the state’s responsibility to enforce other basic laws of the Shariah. There are many Prophetic traditions which refer to the responsibility of the state in other areas of social, moral, political, economic and religious liabilities. An aggregate of various traditions stresses the diverse powers of the state and contributes to the complexity of the Islamic legal system, a system which at best may be described as the holiest alliance of stringency and pliance, a system that suggests the infinite might and mercy of God Almighty and makes Islam unique among the revealed religions.

Bayhaqi has also drawn on the tradition narrated by some of the companions and their followers :

لا ينبغي لاحد ان يقيم شيئاً من الحدود دون السلطان

“No body has the right vested in him originally to enforce any Hadd except the state.”¹⁰

The courts or the implementing agencies award or execute the punishment of Hadd on the basis of the authority vested in them by the state.

Imam Marghinani has reported a Prophetic tradition :

اربع الى الولاية (فذكر منها الحدود)

“Enforcement and regularization of four things is the exclusive duty of the state; and he mentioned *Hudood* as one of them.”¹¹

The same tradition with slightly different phraseology has also been reported by *Ibn-i-Abi Shaybah* and *Al-KharKharasani*.

4. *Time of execution :*

The time of execution of Hadd is also subject to certain conditions. There are two views in this respect. The first view is framed by *Murawwazi* and the second is formulated by *Isfaraini*. The former suggests that the execution of Hadd should be avoided during *severe ailment* and *extreme weather conditions*, the punishment should not be inflicted during the spell of blood melting heat or during the span of blood-curdling cold. Extreme seasonal severities render the punishment temporarily void which may be executed on the return of temperate climatic conditions.¹² Same view is supported by *Shaukani* and most of the muslim jurists of various schools. But the latter allows this exemption only during *severe physical incapacitation*.¹³ In case of the punishment of adultery it is unanimously agreed that a pregnant woman should not be executed till delivery and completion of the period of fosterage.

5. *Mode of execution :*

(a) *Imam Abu Hanifah* and *Shaf'ei* believe that in case of execution of lashes, the stripes can be inflicted on all organs of the body except the head, the face and the private parts.¹⁴

(b) The striking part of the lash should be neither too hard nor too soft and the strokes inflicted on the body of the offender should be of moderate strength of intensity. They are presumed to be neither too severe nor too mild.¹⁵ The

striker should maintain a balance between the extremes of severity and gentility to generate the impression that during the act of flogging he is being motivated neither by unnecessary vengeance nor by misplaced sympathy.

- (c) During the infliction of strokes, the striker should neither raise his hands above his head nor come down very low. Stripes should be applied from a moderate point of vantage and not from an immoderate height or level.^{15-A}
- (d) Males should be inflicted the lashes, standing and the females, sitting, as reported by *Hazrat 'Ali*.^{15-B}
- (e) The lash should neither be metallic nor of any other material which may break the bone.^{15-C}
- (f) If the convict is a patient, sentence should be executed only after his recovery or in a tolerably lenient way.^{15-D}

6. *Constitution of Hadd :*

The punishment of Hadd is constituted by the amalgamation of two categories of rights :

- (a) Rights of God.
- (b) Rights of the people.

The rights of the people constitute the original element of the punishment whereas the right of God constitutes the concrete form of punishment.¹⁶ The execution of Hadd, that is, right of God which vests in the state, is possible only when the required conditions of a crime liable to Hadd are completely realized. If any necessary condition remains unfulfilled, or the execution of Hadd becomes improper or impossible on account of some lawful reason, then the execution of Hadd is suspended, but this suspension does not involve a negation of the original element of punishment. That is left undisturbed as it is the right of the people which can not be waived or tampered with. Therefore, the neutralization or suspension of Hadd may be replaced by the imposition of Ta'zeer. It follows that the inapplicability or un-

implementability of Hadd does not mean the cessation or termination of Ta'zeer.¹⁷

B. QISAS

1. Modes of Proof

Qisas is also proved through two modes :

- (i) Confession
- (ii) Testimony

In case of testimony the witness of only two male adults is required. Other conditions are the same as prescribed in case of Hudood.¹⁸

2. Conditions of Legality

The punishment of Qisas or blood money can be awarded only if the following conditions are fulfilled :

(i) The act of murder should be an unlawful act :

If a non-muslim was killed during state of war, or if a married convict was stoned to death or if an apostate or a rebel or a dacoit was killed under the provision of law, neither Qisas nor Diyat can be claimed because these are lawful murders. *Abdullah Ibn-i-Mas'ud* has reported a tradition of the *Holy Prophet* (peace be upon him) :

لا يجزى دم امرئ مسلم يشهد ان لا اله الا الله واني رسول الله الا باحدى

ثلاث النفس بالنفس ، والشيب الزانى ، والمفارق لدينه التارك للجماعة

“The blood of any Muslim who is witness to Tauhid and my Risalah is not permissible except in three cases: murderer, married adulterer and the apostate who causes disunity in the community.”¹⁹

- (ii) Puberty.
- (iii) Sanity.
- (iv) Intention.

The condition of volition implies the offender's freedom from coercion and external pressure. It is held by many jurists that if the head of the state or any other coercionist coerces a man to murder anybody without lawful right and he consequently commits the murder, the murderer will be awarded *Ta'zeer* whereas the coercive authority who forced the man to commit the murder, would be awarded capital punishment.²⁰ This view is adopted by *Imam Abu Hanifah, Da'ud* and *Zahiri*. One of the two reported opinions of *Imam Shafe'i* also supports this view.²¹ The second reported opinion of *Imam Shafe'i* prescribes discretionary punishment for the coercive authority and *Qisas* for the actual committer of the murder. This view is based on the ideal that the punishment of *Qisas* must be awarded even if the offence is committed under compulsion and coercion. If the act of murder is intentional, its being unconsented does not even make any difference.²²

Maliki and Hanbali view :

According to the *Maliki* and *Hanbali* view, if the legal heirs of the murdered do not remit or pardon the punishment, both the actual committer and the coercionist, would be equally awarded the death punishment of *Qisas*.²³ The conclusion is that external compulsion and coercion can at the most give rise to unconsented act but in spite of its being unconsented it remains intentional. Because an intentional act can be consented as well as unconsented. If the offender takes the plea that he was pressed or coerced by any powerful person to kill the murdered and therefore his act of murder was not a consented act, his plea should not be accepted because although the act was unconsented, yet it was intentional and the principle laid down by Islam is :

لا طاعة (لمخلوق) في معصية الله انما الطاعة في المعروف

"No obedience to any creature is permitted, if it amounts to disobedience of God. It is permitted only in the acts of piety and righteousness."²⁴

Therefore, the actual murderer cannot escape the punishment in any form.

(v) *Absence of parentage :*

The murderer should not have a parental relationship with the murdered. If a father kills his son, according to classical Fiqh, he would not be awarded the death punishment as *Qisas* : Jurists have derived this view from the Prophetic Sunnah reported by *Hazrat Umar* :

لا يقاد الوالد بالولد

"A father should not be sentenced in retaliation of his son."²⁵

Ibn-i-'Abdul Barr suggests that this is a famous tradition equally acceptable to the scholars of *Hijaz* and *Iraq*, and the practice of the people of *Madinah* presents an irrefutable endorsement of this tradition. It is on the other hand, maintained that if a son murders his father, he would be unanimously sentenced in retaliation.

Real Meanings of Prophetic Tradition

If the Prophetic Tradition is taken in its literal sense, it means the father would not be awarded death sentence for the murder of his son in any form. In my humble opinion this interpretation of the Prophetic Tradition is not correct. The fact seems to be that this tradition nullifies only the death sentence as *Qisas*, whereas the death sentence of *Ta'zeer* appears to be outside the scope of the Prophetic prohibition. The tradition simply means that if a father murders his son, he would not be awarded the death sentence in retaliation. This prohibition does not cancel out the possibility of imposing the capital punishment as *Ta'zeer*. Unfortunately, now-a-days this criminal act, i.e. the murder of son by the father, has assumed gigantic proportions. The newspapers are an incontrovertible proof of the widespread menace. Therefore, this interpretation of the Prophetic

Tradition is closer to contemporary reality and is endorsed by the jurisprudential concept which regards paternity as a prohibitive factor of the execution of Qisas.²⁶

My view is expressly supported by the explanation of this legal provision in an authentic compendium of Islamic law *'Muheet-i-Burhani'*. The author says :

رجل قتل ابنه عمدا فعليه الدية في ماله في ثلث سنين ولا قصاص عليه

“If anybody intentionally murdered his son, he should be liable to pay blood money in toto within three years and he would not be awarded the *Qisas* sentence.”²⁷

The same view is expressed by the author of *Sharh-ul-Mabsoot*; one of the eminent authorities of the *Hanafi school of law*. He states :

ثم على الاباء والاجداد اللدية يقتل لابن عمدا في أموالهم في ثلث سنين

“If a murder is committed by a father or a grand-father, they would be awarded punishment of blood money, payable from their property for the intentional murder of their son which should be paid in all circumstances within three years.”²⁸

Through an analysis of these versions we can easily conclude that the father or grandfather is awarded *Diyat* or *Blood money* and not *Qisas*, for the murder of their son. It is quite clear that the blood money is the substitute of death sentence as *Qisas* and not of the death sentence as *Ta'zeer*. When it is stated that in such a situation, the father or grand-father would not be awarded *Qisas* but they would be awarded *diyat*, it unambiguously signifies that the negation is only confined to the *Qisas* and not to the punishment of *Ta'zeer*. This interpretation makes meaning of the Prophetic tradition quite understandable. It does not mean that the father should not be awarded the death punishment in any form for murdering his son. The Prophetic tradition actually means that the father should not be awarded *Qisas*; in its place he is liable to the punishment of blood money. From

this it is clear that the father has no legal immunity against the murder of his son. As far as the capital punishment in the form of *Ta'zeer* is concerned, there is no negation because reference to the replacement of *Qisas* by *blood money* clarifies the nature of the prohibitive commandment. The point being stressed here is that *only the punishment of Qisas is negated and not the death sentence in general, because for Ta'zeer there is no blood money.*

This view is further elaborated by another provision which expressly states :

إذا شارك الأب في قتل ولده لا يجب القصاص على الشريك

“When a father cooperates in the murder of his son with another person, the person would not be liable to *Qisas*.”²⁹

Reason of Negation :

Here, again, the express mention of the word *Qisas* indicates that the provision of negation for the paternal relation is only confined to *Qisas* neither to *blood money* nor to the *capital punishment of Ta'zeer*: The father, and other relations who fall within this category, have been granted with the concession because the offence of murder is compoundable, pardonable and remissible in the law of *Shari'ah*. If the punishment of *Qisas* can be remitted, pardoned and substituted by blood money for every murderer by the initiative of the heirs, irrespective of the fact whether they are related to the deceased or not, then one may naturally ask why could this concession not be positively granted to the father or the grand-father in the offence of murder. The negation of *Qisas* and retention of the capital punishment in the form of *Ta'zeer*, in fact make no material difference in terms of the punishment. But, by all means, if the court wishes to award death sentence to the father for murdering his son, it can definitely award it as a *Ta'zeer*. The purpose served in both cases is practically the same and does not substantively differentiate one from the other. This interpretation is further supported by a Prophetic tradition, reported

by *Ibn-i-'Abbas*:

لا تقام الحدود في المساجد ولا يقاد بالولد الوالد

“Hudood should not be executed in the mosques and the father should not be awarded Qisas, for his son.”^{29-A}

The word “Al-Qoud” (اللقود) is only used for Qisas,^{29-B} therefore, the meaning of Prophetic tradition would be presumed to be confined to Qisas only. The same can be easily inferred from the statement of *Imam Malik*, which is based on the view that the father would not be retaliated for murdering his son, except when his intention of murder is clearly established and proved to be above all doubts and his act expressly amounts to wilful murder (القتل بالعمد).^{29-C}

(vi) *Unity in Faith and Equality :*

Muslim for Zimmi and Muahad

The punishment of *Qisas* would not be imposed on a Muslim if he murders a *non-Muslim at war* (الحربى), because he has not been granted the guarantee of safe conduct. For the application of *Qisas*, it is necessary that both the murderer and the murdered should be in fact or presumably, equal in faith. A ‘*Zinmi*’ (الذمى) who is a non-Muslim citizen of an Islamic state and ‘*Muahad*’ (المعاهد) who is a non-Muslim visitor of an Islamic state under the lawful permission or the treaty or peace, both have been lawfully granted the guarantee of safe conduct by Islamic state, therefore, they are treated as muslims by the law. In case anyone of them is murdered by a muslim citizen, the latter is liable to *Qisas* and the concession of exemption is withdrawn. Although the murdered is basically a non-Muslim, he is not united with the muslim murderer in faith, yet he is granted with the permanent or the temporary permission to live under the lawful protection of an Islamic state, therefore, they are extended the similar treatment and enjoy the same fundamental rights of protection of life and property as enjoyed by the Muslims.

Muslim for Musta'min

Some Jurists have excluded the *Musta'min* from the right of safe conduct. But in my humble opinion they should be equally entitled to the facility of state protection enjoyed by others.

Muslim not for Harabi

As far as the *non-Muslim 'Harabi'* is concerned, he is granted neither permanent nor temporary protection by the Islamic state. He is, on the contrary, treated as an enemy of Islam, being a friend or supporter of those who are pitched against the forces of Islam. This view is clearly based on the Prophetic tradition :

لا يقتل مسلم بكافر

"A Muslim should not be murdered for the murder of a non-Muslim (Harabi).³⁰

It is clearly established that the murder of a *non-Muslim Harabi* is absolutely not liable *Qisas*. This view enjoys the consensus of juristic opinion, because the same is acknowledged to be the sense of the Prophetic tradition.^{30A}

The view is rooted in the *Qur'anic verse* :

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنْ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ
بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصًا ط فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ ط
وَمَنْ لَمْ يَحْكَمْ بِهَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ ●

"And We have prescribed for them a life for a life and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and equitable retaliation for other injuries. Any one who waives his right, shall earn an expiation for his sins and these who defy the enforcement of divine are the wrong doers (non-believers)."³¹

In this verse the term '*a life for a life*' is used in its generic sense, therefore, we can not exclude, the *Zimmi* and the *Mu'ahad* from the scope of its application. Moreover, it is reported in the tradition narrated by *Abdur*

Rehman Al-Baylmani, quoted by *Imam Bay haqi* :

ان رسول الله ﷺ قتل مسلماً بمعاهدٍ وقال انا اكرم عن وفي بنمته

“Holy Prophet (peace be upon him) awarded the death sentence to a Muslim for the murder of a Mu‘ahad, a non-Muslim alien who had been granted safe conduct under the treaty and said. “I am the most responsible man to fulfil the promise of safe conduct.”³²

It is further supported by another Prophetic declaration reported by *Abu-Hurayrah* :

الامن قتل نفساً معاهدة له ذمة الله وذمة رسوله فقد اخضر بذمة الله

فلا يرح رائحة الجنة

“Surely! who murders any Muahad, who has been guaranteed the safe conduct by Almighty Allah and His Prophet, he definitely commits the breach of God’s promise, and, therefore, he would never enjoy even the air of Heaven.”^{32-A}

Some of the Jurists are reported to have differed with it. Since this view is extremely reasonable, sound and cogent and stresses the concept of basic human equality, therefore, it is strongly supported by *Imam Abu Hanifah*, *Ibn-i-Abi-Laylah* and others.

Muslim for Muslim

All Muslims enjoy equal status in the eyes of law. Their legal stature does not depend on their wealth or on the superabundance of other material means. They have similar fundamental rights which no one can violate with impunity. As an illustration of their identical status, their lives and properties are also equally precious. Muslims are not graded on the basis of intrinsic right of superiority or inferiority. Their worth is exclusively determined by the content and quality of their actions. Thus, there is no difference of status among them in lieu of Qisas. It is reported by *Hazrat Ali*:

المؤمنون متكافأ دماؤهم

“The blood of all Muslims is equally precious and there is an equal premium on the lives of all Muslims.”³³

Free for slave

The same is the position of a *slave* also. If a free Muslim murders a slave, he should also be awarded the death sentence because there is an equal premium on the blood of a free Muslim and a slave. The verdict of the Jurists is quite explicit on this point :

والحرّ بالعبد والعبد بالحرّ

“A free man should be murdered for a slave and a slave for a free man.”³⁴

This view is also positively expressed by *Qazi Khan*:

يقتل الملوک بالحرّ والحرّ بالملوک

“A slave should be murdered for a free man and a free man for a slave.”³⁵

This explains the unparalleled concept of Islamic justice and equality. Islam makes no difference between a male and a female, a rich and a poor, a youngster and an old man, a man who enjoys good health and a man whose health is impaired. It is clearly stated :

يقتل الرجل بالمرأة والكبير بالصفير والصحيح بالاعمى

“A man should be murdered for a woman, an old person for a youngster, a rich man for a poor fellow, a man with eyes for a blind man, and a healthy person for the one who is ailing.”³⁶

The same view is expressed by *Qazi Khan* in the words:

يقتل الصحيح وسليم الاطراف بالمریض وناقص الاطراف صورة او

معنى كالأشل ونحوه والعاقل بالمجنون ولا يقتل المجنون بالعاقل

“A healthy man and a man of perfect organs should be murdered for a patient and a man of defective organs, even if he does not possess limbs or possesses paralysed limbs; and sane for an insance. But there is an exception: if an insance mur-

ders a sane, he is not liable to Qisas on account of insanity."³⁷

This concept of equality and justice is directly based on a Prophetic tradition, reported by *Sumrah* :

من قتل عبده قتلناه ومن جدد عبده جددناه

"Whosoever murders his slave, we shall award him death sentence, and who cuts his nose, ear or any other organ, we shall cut his organ in retaliation."^{37-A}.

3. Conditions of execution

The following conditions are the prerequisites for execution of the punishment of Qisas :

- (i) *Puberty of the offender.*
- (ii) *Sanity of the offender.*
- (iii) *Consensus of the heirs of the murdered.*

The punishment of *Qisas* cannot be executed if there is a difference of opinion among the legal heirs of the murdered. If some of them demand the *Qisas* and others the *blood money*, or some are willing for *remission*, the *Qisas* cannot be executed because of its being indivisible. Therefore, the punishment of blood money should be awarded. The consensus of the heirs is an essential prerequisite for executing the punishment of *Qisas*. According to *Maliki view*, by the remission of even one of the legal heirs, punishment of *Qisas* becomes inenforceable. Some of the jurists believe that if any of the legal heirs is a minor, the execution of *Qisas* should be kept pending till he achieves puberty. *Imam Abu Hanifah* disagrees with this view, saying that the adult heirs have the right to get the punishment of *Qisas* executed."³⁸

(iv) *Suspension in case of pregnancy*

If the murderer, liable to *Qisas* is a pregnant woman, she would not be executed on account of fear of death of the child in the womb. She will be executed after the de-

livery so that no harm or damage is inflicted on the child.³⁹ This view is based on Prophetic Sunnah reported in *Ibn-i-Majah*. Holy Prophet (peace be upon him) said : *If a pregnant woman was to be awarded death punishment as Qisas, its execution should be postponed till delivery and expiry of the necessary fosterage period. And if a woman was to be awarded punishment of stoning to death, for commission of adultery, it should also be postponed till the delivery of the child and expiry of the period of fosterage.*⁴⁰

(v) *Presence of the legal heirs*

If the legal heirs of the deceased or murdered are adults, they should be present at the time of execution of *Qisas* because the absence of any one of them can amount to his disagreement.^{40 - A} If the physical presence of all of them is practically impossible, their presence can be presumed on the basis of their express agreement for the execution of *Qisas*. If all the heirs are minors, then, according to most of the Jurists, the execution of *Qisas* would be dispensed by the state on their behalf.

4. *Mode of execution*

There are two opinions on the subject of mode of execution :

- (i) Equality in form.
- (ii) Equality in penal element.

Equality in form :

(i) According to the first opinion, the punishment should show exact conformity to the crime because *Qisas* is essentially a parallel punishment. It should be awarded in the

punishment in the same form. This view is said to be based on the Qur'anic verse :

وَالْحُرْمَتُ قِصَاصٌ ط فَمَنْ اَعْتَدَى عَلَيْكُمْ فَاَعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اَعْتَدَى عَلَيْكُمْ

“And for all things prohibited, there is the law of equality. If anybody commits any excess against you, you may transgress against him in the same proportion.”⁴¹

It is supported by another verse in the *Holy Qur'an*:

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوِقْتُمْ بِهِ ط

“If any excess were committed on you, you should reciprocate in the same way.”⁴²

Moreover, this view is based on a Prophetic Tradition reported by *Hazrat Bara*, in the words :

مَنْ غَرَضَ غَرَضَنَا لَهُ وَمَنْ حَرَقَ حَرَقَنَا وَمَنْ غَرَقَ غَرَقَنَا

“If a person killed anybody with an arrow, we will punish him in the same way, if he killed him by burning, we will punish him in the same way, and if he killed him drowning, we will punish him in the same way.”⁴³

Equality in penal elements :

(ii) Second opinion derives its authenticity from the *Hanafi school* of Law. According to this view, the punishment of *Qisas* should not be awarded absolutely in the same form as discussed above. Only the condition of equality and balance is required between the crime and the *penal element*. If the murder was committed by an offender in a ruthless manner, it is sufficient to award him the punishment of death as *Qisas* but it is neither necessary nor permissible for the court or the state to execute the *Qisas* punishment in the same ruthless manner. This will amount to an act of barbarity on the part of the state. Islam, being essentially the religion of humanity, cannot encourage and patronize this inhuman treatment even against the offender. This view is based on two Prophetic traditions :

(i) The first is reported by *Hazrat Hasan* and *Abi Bakrah* quoted by *Bazzar* and *Ibn-i-Ali* :

لا قود الا بالسيف (او بحديدة)

“There should be no execution of *Qisas* except by sword.”⁴⁴

(ii) The second is based on the prohibition of inhuman ways of murdering. *Holy Prophet* (peace be upon him) said :

اذا قتلتم فاحسنوا القتلة ، واذا ذبحتهم فاحسنوا الذبحة

“When you execute any person to death, do it properly and humanely, and when you slaughter any animal, do it with the least possible torture.”⁴⁵

The first view is adopted by the *Maliki* and *Shafe'i* scholars, whereas, the second, by *Hanafi* school which permits the execution of *Qisas* only in the form of decapacitation.⁴⁶ According to *Hanafi* view, the two verses of Qur'an, mentioned by the *Shafe'i* and *Maliki* scholars in support of their view indicate only the *equality and balance* between the *gravity of crime* and the *sanguineness of punishment*. This means that the *equilibrium* which is the essence of the meaning of the word *Qisas* is confined only to the *penal element* and not to the *mode of execution*. The latter view appeals more to reason.

5. Right of execution

The right of execution of *Qisas* primarily vests in the legal heirs of the deceased. Since they are not in a position to implement its execution on their own, therefore, it is exercised on their behalf by the state.⁴⁷ There is no second opinion, according to *Jazeera*, on this view.⁴⁸ Therefore, the right of *Qisas* is available to the aggrieved party and the right of its implementation resides in the state, because the execution of *Hudood*, *Qisas* and *Ta'zeerat* has been included in the duties of the state by the *Holy Prophet* (peace be upon him).

As far as the original right of Qisas, available to the heirs is concerned, it is clearly expressed in *Qur'an* :

وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ سُلْطٰنًا .

“Whoso was murdered unlawfully, surely We have vested the right (to demand or forgive the Qisas) in his legal heir.”⁴⁹

Imam Qurtabi states that there is no opposing view on the issue that no one can execute the Qisas except the state because the whole of the society has collectively given the authority of implementing the laws to the state.⁵⁰ *Imam Sawi* argues that *the state is the authority which, in fact, empowers the heirs of the deceased to get their right enforced. It is the duty of the state to implement the option of the heirs, either in the form of Qisas, or blood money, or remission. Therefore, the legal heir of the deceased does not possess the right to execute it himself without the adjudication of the court and the legal order of its execution, because it is likely to create disturbance and disruption.* This argument is expressed in the words :

فحيث ثبت القتل عمداً عدواناً وجب على الحاكم الشرعي ان يمكن ولي المقتول من القاتل فيفعل فيه الحاكم ما يختاره الولي من القتل أو العفو أو الدية ولا يجوز للولي التسلط على القاتل عن غير إذن الحاكم لأن فيه فساداً ونخريباً

In the light of this elaboration, it is held that if anybody executes the death punishment without permission of the court, he would be awarded the sentence of *Ta'zeer* because it itself amounts to an unlawful act.⁵¹

6. Constitution of Qisas

The punishment of Qisas consists of two rights :

- (i) Public Right.
- (ii) Private Right.⁵²

The first right involves the *essential penal element* but the second involves the *formal penal element*. The former right originates from violation of the collective right of the

society and the later involves an infringement of the private right of the aggrieved party. Therefore, if the aggrieved party remits the punishment of *Qisas* or *blood money*, even then the state has a right to award the punishment of *Ta'zeer*, for preservation of the *right of Shari'ah*, that is the Public right.⁵³

C. T'AZEER

The legal structure of *Ta'zeer* comprises the following components :

1. Legal character

According to *Imam Abu Hanifah*, *Imam Malik* and *Imam Ahmad bin Hanbal*, execution of *Ta'zeer* is obligatory on the state but according to *Imam Shafe'i*, its enforcement is the discretion of the state.⁵⁴

Hanfi & Maliki View

Al-Jazeera explains that *Hanafi* and *Maliki* jurists have actually added a qualificative element to the discretionary legal character of *Ta'zeer*, that, if the state considers its physical execution necessary and indispensable for the achievement of reformatory objective, only then its execution becomes obligatory. But if it thinks that the objective can be achieved without its execution, by adopting some other measure, then it does not become an obligation of the state.⁵⁵ According to *Hanbali view*, as stated by *Jazeera*, if it is established beyond doubt that the convict deserves the punishment, its execution becomes obligatory on the state; otherwise, it remains non-obligatory.⁵⁶ *Shafe'i* view as mentioned above is that the execution of *Ta'zeer* does not carry the burden of an obligation but it can be awarded by the state as its discretion. On the basis of the varying opinions, different schools of Islamic law have adopted different views about the legal consequences of the enforcement of

Ta'zeer. *Hanafi*, *Maliki* and *Hanbali* scholars believe that the state is not subject to any *damages* if the convict dies during the execution of *Ta'zeer*.⁵⁷ Whereas, *Shafe'i* scholars believe that in case of such an eventuality, the state is liable to pay the *damages*.⁵⁸ *Imam San'ani*, citing *Imam Nawawi* from *Sharh-ul-Muslim*, explains the *Shafe'i* view, that if anybody dies during the execution of *Ta'zeer*, only then the *damages* in the form of *blood money* and *expiation*, become obligatory on the state.⁵⁹ But in case of *Hudood State's* exemption from *damages* is a unanimously accepted principle. Following this reason, the former view seems more reasonable because execution of punishment, may be a *hadd* or *tazeer*, is the legal duty of the state in order to maintain peace, security and justice. Therefore, if such a situation crops up incidentally during the exercise of its lawful duty, the state should not be liable to any *damages*, because of its bonafide intention in favour of its subjects.

2. Lawful kinds :

There are three kinds of *Ta'zeer* :

- (i) *Ta'zeer* for *sinful acts*.
- (ii) *Ta'zeer* for *public interest*.
- (iii) *Ta'zeer* for *uncommendable and undesirable acts*.

Tazeer for sinful acts

It is an established law that *Ta'zeer* is primarily awarded only for the acts which are sinful or prohibited but there is no prescription of *Hadd* or *Kaffarah*,⁶⁰ for example, eating the flesh of unslaughtered animals, pork eating, drinking of blood, dicing etc.

Sinful Acts (*Ma'asi*) are further classified into three categories :

Classification of Sinful Acts :

- (a) *Acts for which Hadd is prescribed*.

These cases generally give rise to two types of situation:-

- (i) The *first possibility* is that the criminal act is liable to Hadd, (for example, drinking, adultery, theft, etc) but it is not proved beyond all the doubts, fulfilling the required conditions of evidence. However the court is reasonably convinced that the crime was committed. The court is, therefore, legally authorized to award the punishment of *Ta'zeer* in such situations.
- (ii) The *second possibility* is that the crime liable to Hadd is established beyond doubt and the punishment of Hadd is executed, but on account of the special gravity of the crime, the court thinks it proper to award an additional punishment of *Ta'zeer* alongwith Hadd.

Hanafi,⁶¹, *Shafe'i*⁶² and *Hanbali*,⁶³ all schools of law, accept the combination of *Hadd* and *Ta'zeer* for the same crime, whenever the court considers it necessary.

(b) *Acts for which Kaffarah is prescribed.*

The crimes like premature breaking of fast, breaking of Ihram, breaking of oath, cohabitation during menstrual period, belong to this category of crimes. These are the sinful acts prohibited by *Shari'ah* but instead of *Hadd*, *Kaffarah* or *expiation* has been prescribed for these acts. Therefore, additional punishment of *Ta'zeer* can be awarded for the commission of these crimes. Some of the jurists have disagreed with this opinion but the dominant view, is that the award of *Ta'zeer* alongwith the *expiation* is permissible.⁶⁴

(c) *Acts for which neither Hadd nor Kaffarah is prescribed.*

These are, for example, necking and petting, unlawful khalwat or privacy with any woman, eating of pork or the flesh of an unslaughtered animal, embezzlement, abuses, false witness, bribery or palm-greasing etc. These are the acts which are expressly declared sinful and forbidden but neither *hadd* nor *expiation* has been prescribed for them. Therefore, a law can be framed to award the punishment of *Ta'zeer* for these acts.⁶⁵

(ii) *Ta'zeer for Public Interest :*

The general principle is that no *Ta'zeer* can be awarded for the acts which are not *sinful*. It means that the commission of acts expressly forbidden by the *Shari'ah* are only liable to *Ta'zeer*. But there is an exception to the general rule. Acts which are not *sinful* (*المعصية*) and are not prohibited by *Shari'ah* can also be subject to the punishment of *Ta'zeer* in the interest of *public good* and lawful necessity. If no punishment is prescribed for them, they may disturb and disrupt general peace and sense of security of the community. Thus *Ta'zeer* is awarded in these cases as an exception to the general principle.⁶⁵ This view is based on the following *Prophetic traditions* and precedents of the *Orthodox Caliphate* :

- (a) *Holy Prophet* (peace be upon him) confined a person to the prison simply on the allegation of theft of a camel.⁶⁶ During the process of investigation and trial he remained in prison. When it was established that he had not committed the theft, *Holy Prophet* (peace be upon him) set him free. The basis of the punishment awarded to the *Prophet's* Companion is that his imprisonment was not intended to the deterrence and punishment of the thief because the *Prophet* (peace be upon him) always forbade the imprisonment of the thief. *Holy Prophet* (peace be upon him) set him free when he was released and the prison where he was kept was destroyed. *Holy Prophet* (peace be upon him) set him free when he was released and the prison where he was kept was destroyed. *Holy Prophet* (peace be upon him) set him free when he was released and the prison where he was kept was destroyed.

could seduce *Nasar bin Hajjaj*. Hazrat 'Umar sent for *Nasar bin Hajjaj* and found him manly and extremely handsome. He had his head shaved off with a razor and transported him to *Busra* so that his manliness and masculinity may not prove an apple of discord among the women or may cause them to entertain immoral feelings towards him, but he did not ascribe to him any sinful intention. This action was taken only in the benefit of public interest. Thus both *transportation* and *confinement* were awarded in the form of *Ta'zeer* based on *public interest* and not on sinful acts.⁶⁸

(c) Moreover, the *Shari'ah* has allowed the award of slight punishments (**تاديب**) to children or minors for non-performance of prayer and for non-observance of cleanliness and purity and for the commission of sinful or criminal acts. Since the minors or children do not possess full legal capacity, they cannot be awarded the *Hadd* and their acts cannot be graded as *sins*,⁶⁹ but they can be awarded the punishment of *Ta'zeer* and *Tadeeb* (**تاديب**) in public interest.

(iii) *Ta'zeer for uncommendable and undesirable acts :*

Although the basic principle of *Ta'zeer* is that it should be awarded for the commission of forbidden acts and for the omission of mandatory acts, yet scholars and Jurists have expressed different views on the permissibility of *Ta'zeer* for the commission of *uncommendable acts* (**مكروه**) and the omission of *commendable acts* (**منلوب**). Some of the jurists do not permit *Ta'zeer* in these cases,⁷⁰ whereas the others do. The basis of difference among the jurists on this issue relates to their varying definitions of the words *Makrooh*, and *Mandoob*. Those scholars who think that neither the 'Makrooh' is prohibition nor the 'Mandoob' is an act of commission, but *Makrooh* is simply the omission of a discretionary act whereas the *Mandoob* is the commission of a discretionary act,⁷¹ they do not accept the permissibility of *Ta'zeer* for these acts. On the other hand, the scholars who, instead of placing them in the discretionary grade of legal value, consider the *Mandoob* as an act of

commission ^{and} the Makrooh as an *act of omission*,⁷² have permitted the award of *Ta'zeer* in these cases. Some of the scholars believe that the award of *Ta'zeer* for such acts should be permitted only on *repetition* of the acts and not on the first instance of commission.⁷³ Nevertheless it is necessary that the *Ta'zeer* for the commission of uncommendables and for the omission of commendables should be awarded only to preserve the general welfare of the society effectively.

3. Quantum

There are various legal forms of *Ta'zeer* established through *Qur'anic provisions*, *Prophetic Sunnah* and the *precedents of the Caliphate*. One of them is *lashes* which is normally awarded for most of the crimes. There, however, exists a difference of opinion on the quantum of this form of punishment.

Hanfi view :

Imam Abu Hanifah and *Imam Muhammad* say that the maximum limit of *Ta'zeer* in case of lashes should not exceed the number of *thirty nine* and this condition should equally apply in case of a free man or a slave.⁷⁴ The same was the view of *Imam Abu Yousof* but he is reported to have changed his opinion. He subsequently agreed up to the limit of *seventy five lashes*, and according to a second report, up to the limit of *seventy nine lashes*.⁷⁵

Malki view :

According to *Imam Malik* there is no maximum limit of lashes in case of *Ta'zeer* and it is also permitted that *Ta'zeer* can exceed the limit of *Hadd* where and when required.⁷⁶

Shafe'i view :

The *Shafe'i view* is that *Ta'zeer* should not exceed the number of *thirty nine* lashes in case of a free man, and nine-

teen lashes in case of *slave* because the punishment of a slave is normally considered to be the half of a free man.⁷⁷

This subject has been further discussed on the basis of a Prophetic tradition reported by *Abu Bardah Al-Ansari*. The *Holy Prophet* (peace be upon him) said :

لا يجلد فوق عشرة اسواط الا في حد من حدود الله تعالى

"No punishment should be awarded in excess of ten lashes except in case of Hadd from the Hudood of God."⁷⁸

This *Hadith* is also reported by *Hani bin Nayyar* in the words :

لا تجلدوا فوق عشرة أسواط ، الا في حد من حدود الله تعالى

The Jurists have also discussed the tradition in detail *Imam Ahmad bin Hanbal, Layth, Is'haq* and some of the *Shafe'i jurists* believe that in case of *Ta'zeer* no punishment exceeding *ten lashes* can be awarded because this limit has been specified by the law-giver himself i.e., the *Holy Prophet* (peace be upon him).⁸⁰

Imam Malik, Shafe'i, Zayed bin 'Ali and some other jurists have permitted the *excess from ten lashes* in case of *Ta'zeer* but have restricted it to the minimum limit of *Hadd*. They say that the *maximum quantum of Ta'zeer* should not be equal to the *minimum quantum of Hadd*. It should remain less than that as mentioned above, and that is, *thirty one lashes*.⁸¹ They have based their opinion on the prescription of *Hadd* of drinking and slander i.e., *eighty lashes*. Since the *Hadd* to be awarded to a slave is half of it, i.e., *forty lashes*, therefore, the maximum limit of *Ta'zeer* should not exceed the number of *thirty nine*. The same view has been advanced by *Imam Abu Hanifah*, basing on the following *Prophetic tradition* :

من بلغ حدا في غير حد فهو من المعتدين

"Who so achieves the limit of *Hadd* in a case not liable to *Hadd*, he would be considered among the transgressors."⁸²

Hanafi Jurists have interpreted the former *Prophetic tradition* in the sense that *no punishment should be awarded in excess of ten lashes, except in sinful acts committed in transgression of the commands of Almighty Allah i.e., 'Ma'siyyat' (مصيبة)*. Instead of translating the word *hadd* (حد) as *fixed punishment*, they have adopted the original translation i.e. *the sinful act or violation of the divine commands*. This interpretation implies that if any sinful act which amounts to an express violation of divine command is not committed, and the punishment of *Ta'zeer* is to be awarded only for *public interest or social welfare*, it should not exceed the limit of *ten lashes*. But if, on the other hand, *Ta'zeer* is to be awarded in case of a sinful act, then there is no restriction of *ten lashes*. It can exceed this number under the express permission of the *Holy Prophet* (peace be upon him).

There are other scholars who have adopted the view that the *Tazeer* can exceed even the limit of *Hadd* because it is to be awarded on the basis of the nature, gravity, sanguinity and consequentiality of the crime. This view was originally adopted by *Imam Malik* and subsequently endorsed by *Qasim* and *Hadi*. They have further supported and elaborated the view in the light of the precedent of *Hazrat 'Ali* whereby He awarded *ninety eight lashes* to a person who was caught in unlawful privacy with a woman without committing adultery.⁸³

Hazrat 'Umar is also reported to have administered *one hundred lashes* to a person who had forged the official seal of the state.⁸⁴ It is further reported that the punishment of *hundred lashes* was repeated *three times* because the convict kicked up a row at the time of execution and ultimately he was awarded the punishment of transportation and confinement also.⁸⁷

On the basis of the conflicting evidence, some of the jurists have stated that the Head of the state should be

given the discretion to fix any limit of *Ta'zeer* in proportion to the nature of the crime, and keeping in view the requirement of social necessity and public welfare.⁸⁶

Conclusion :

In the light of the discussion and the various views adopted by different scholars and schools of law we can conclude that the discretion to fix the nature and quantum of the punishment of *Ta'zeer* should be vested in the state. The state, by using its discretionary power, can award different punishments according to the gravity of the crimes and in this way eliminate the development of the criminal aptitude in the society. It can have a dampening effect on the burgeoning of more heinous crimes. The direct proportion between the nature of the crime and the quantum of punishment for the crime can serve as an effective deterrent measure to check the spread and sanguineness of criminal acts.

The same view has been explained at length by *Al-Jazeera* in *Kitab-ul-Fiqh*.

4. Right of Execution :

The *right of execution of Ta'zeer* exclusively vests in the state because it represents the Muslim community. There are, however, four exceptions to the application of this principle :

- (1) Father
- (2) Master
- (3) Husband
- (4) Teacher

(1) A father possesses the right of execution of *Ta'zeer*. He can reprimand and punish his children in order to educate them and to mould their conduct in conformity with the basic tenets of Islam. It is one of his paternal duties to prepare his children for the offering of *Salat* (prayer). This duty is a part of his other duties which are mainly concerned

with the mental and moral nourishment of his wards.⁸⁷

(2) A master can also award slight punishments of *Ta'zeer* to his slaves in order to make them discharge their religious obligations and affiliated duties. The master is like the head of a family and it is one of his duties, by virtue of his distinguished position, to maintain a sense of discipline and decorum among those who work either directly under him or who depend on him entirely for their general upkeep and daily sustenance. Since the slaves are totally dependant on their master, the master enjoys certain privileges to keep them in good gear, and one of these privileges is his right of execution of *Ta'zeer*.⁸⁸

(3) A husband is also vested with this right to some extent in order to curb the unfair attitude (*نشوز*) of his wife and to prevent her from indulging in acts which not only infringe the rights of the husband but also cross those barriers of decency which are morally and legally binding on all women and whose infringement constitutes a vilation of the law of *Shari'ah*. Therefore, a husband possesses the right to punish his wife for the non-performance of prayer and other obligatory duties as expressed in the Holy Qur'an in *Surah An-Nisa'*.⁸⁹

(4) A teacher also possesses this right for the purpose of coaching and educating his students because the future of a country depends on a proper upbringing and conditioning of the younger generation.⁹⁰

Since the right of execution of *Ta'zeer* exclusively vests in the state, leaving out the exceptions, of course, the right of pardon and remission also belongs to the state. It is clearly established through the *Prophetic Sunnah* as well. It is reported that the *Holy Prophet* never considered the execution of *Ta'zeer* obligatory in all circumstances: he sometimes used to waive the criminal liability and sometimes the penal liability in the crimes of *Ta'zeer*. This Prophetic practice positively establishes the fact that the right of execution of *Ta'zeer* exclusively vests in the state because this step of

waiving the criminal and penal liability was never taken by the Holy Prophet (peace be upon him) at his own. That is why *Imam Abu Hanifah, Imam Malik, and Imam Ahmad bin Hanbal*, the three eminent jurists, have adopted the view that if during the execution of *Ta'zeer*, the death of the convict occurs, there is neither right of damages nor right of retaliatory punishment available against the executor.

5. Mode of Execution :

As far as the mode of execution of *Ta'zeer* is concerned, it should be administered in mild and moderate doses. But there are some scholars who suggest, even insist, that the infliction of the punishment of *Ta'zeer* should be harsher as compared to the infliction of *Hadd*.⁹¹ They argue that since the punishment of *Ta'zeer* in ordinary circumstances is of a milder severity than the punishment of *Hadd*, therefore, in order to fulfil the requirement of penal element of the punishment, its infliction should be of a severer intensity than that of *Hadd*. Some of the punishments of *Ta'zeer* awarded by the Holy Prophet (peace be upon him) and the Orthodox Caliphs are reported to be extremely severe and harsh in accordance with the sanguinity of the crimes. For example, *the punishment of hanging from the peak of the hill known as Abu Nab*⁹² (*ابوناب*) awarded to a person indicates the gravity of the execution of *Ta'zeer*. This establishes the fact that the fixation of the mode of execution also depends on the discretion of the state. Since the right of execution vests in it, the right of fixation of the mode of execution is also available to the state. The option has been given to the courts either to award a *simple* or a *rigorous* punishment and if there is a punishment of imprisonment, whether it is for a shorter period or a longer period, it is also to be decided by the court. The only principle to be taken into consideration is that all those inhuman and torturous mode of execution of the punishment prohibited by the *Sharia'ah* in cases of *Hudood* and *Qisas* should also be

prohibited in case of *Ta'zeer*. Therefore, it follows that the limits prescribed by the *Shari'ah* should not exceed under any circumstances.

Constitution of Ta, Zeer

As in cases of *Hadd* and *Qisas*, the punishment of *Ta'zeer* is also constituted by a combination of two kinds of rights.

- (1) Right of Shari'ah
- (2) Right of the People

If any express commandment or provision of *Shari'ah* is violated during the commission of crime which amounts to an infringement of the *right of God* (public right), it gives rise to the *right of Shari'ah* in the penal element; on the other hand if only a private right is infringed, it gives rise to the *right of the people* in the penal element. The right of *Shari'ah* constitutes the *basic penal character* of the punishment whereas the right of the people constitutes the *formal penal character* of the punishment. If both, the penal rights are present in punishment of *Ta'zeer*, the state can only pardon the *formal aspect* of the punishment and not its *basic and original aspect*,⁹³ because it is the right of *Shari'ah* and not of the State.

D. CAUSES OF NEUTRALIZATION OF PUNISHMENT

The following factors are recognized by the Islamic penal law which neutralize or de-execute the punishments.

1. Death of the offender (موت الجانى)
2. Deprivation of the relevant organ (قويات محل القصاص)
3. Repentance of the offender (توبة الجانى)
4. Compounding and compromise (الصلح)
5. Pardon and remission (العفو)

Death of the offender :

if the punishment to be awarded to the offender is physical in its nature which can be awarded only against

his person and during his life, it would automatically be neutralized by his death. The reason is that the death of the offender cancels out the execution of the punishment. There is, however, an exception to the principle. If the punishment is *monetary*, for example, blood money, fines etc., the death of the offender does not neutralize its execution because the scope of its execution is extended over to the property of the offender and not to his person. Therefore, the execution of punishment is absolutely possible even after the death of the offender and it can be realized from his estate, and only after the subtraction of the penal amount, his legal heirs would be able to obtain their successions.

There is a difference of opinion in case of *Qisas*. According to *Imam Abu Hanifah* and *Imam Malik*, if the punishment of *Qisas* was awarded to an offender and he died before its execution, his punishment would automatically be neutralized. It would not be converted to *blood money* because the person against whom the punishment was to be executed has shuffled off the mortal coil. Since the punishment was primarily physical and not monetary, therefore, through his death, the automatic conversion of *Qisas* into *blood money* is not permissible because the blood money cannot be the substitute of *Qisas* without the consent of the offender. Therefore, according to them, by his death the purpose of the punishment has been served naturally. Therefore, he does not need any extra punishment.⁹⁴ Besides, *Imam Abu Hanifah* believes, it is quite immaterial whether the death of the offender occurred naturally, lawfully or unlawfully. In all cases the legal consequences are the same.⁹⁵

Imam Malik has, however, adopted a different view. He discriminates between the two situations of death. He differentiates between the lawful and unlawful death of the offender *Imam Shafe'i* and *Imam Ahmad bin Hanbal*, without discriminating between the lawful and unlawful death of the deceased or offender, believe that the death neutra-

lizes the punishment of *Qisas* in all situations, but it is necessarily converted into blood money which should be paid from the estate of the deceased of offender.

Deprivation of the relevant organ :

If the *organ* of the offender which was to be amputated in retaliation is accidentally cut off before the execution of the punishment, it would also be a cause of the neutralization of punishment because the scope of the retaliatory punishment is extended up to the relevant organ and its disappearance or non-presence automatically nullifies the punishment. *Maliki* view is that the neutralization of punishment cancels the provision of *blood money* also, but the *Hanafi* view is different. According to *Imam Abu Hanifah* if the offender is deprived of the relevant organ due to some uncontrollable cause, accident, disease or an unlawful aggression against him, there would be no *blood money* against the offender as the substitution of *Qisas*. But if he was deprived of his relevant organ lawfully i.e. due to the lawful execution of the retaliatory punishment in some other case, then the aggrieved party is entitled to the *blood money* against the offender as the substitute of *Qisas*.⁹⁶ *Safe'i* and *Hanbali* view in this case is altogether different. They say that the deprivation of the relevant organ neutralizes only the retaliation and not the blood money. Therefore, the *Qisas* in this case is automatically converted to blood money payable from the property of the deceased offender because they believe there are only two options of punishment available in cases of crimes of *Qisas* : either *retaliation* or *blood money*. If the first option is not available, the second becomes obligatory.⁹⁷ But the view of *Imam Abu Hanifah* is based on a different argument and a different angle of observation. He does not primarily consider the two punishments, *Qisas* and *blood money*, as two *options*, available at a time. He treats *Qisas* actually as the original and basic punishment and the *retaliation* or *blood money* avail-

able to the aggrieved party as a *substitution* of the basic punishment which depends on the consent of both the parties, the offender and the aggrieved. Therefore, he concludes, that in such cases the *Qisas* is not automatically converted to blood money but is determined by the varying situations which make its conversion inevitable. This appears to be a more rational and flexible attitude and clearly reflects the diversity of events and the unpredictability of human response.

Repentance of the offender :

In the cases of *robbery* and *dacoity*, on account of the repentance of the offender, *Shari'ah* neutralizes the punishment to the extent of the element of *right of God*, as is expressly stated in the *Holy Qur'an* :

● **إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ جَ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ**

"Except in case of those who repent before you obtain power over them. Take note that Allah is most forgiving and merciful."⁹⁸

On the basis of this verse, the Muslim Jurists unanimously agree that the repentance in case of robbery and dacoity is a recognized cause of neutralization of punishment but this should take effect positively before the state or court takes cognizance of the offender. As far as other crimes are concerned, three views generally prevail :

First view

(1) Some of the *Shafe'i* and *Hanbali* scholars think that this repentance is also effective in neutralizing the punishment in other crimes. And they agree in support of this view in the light of these *Qur'anic verses* :

وَالَّذِينَ يَأْتِيهَا مِنْكُمْ فَادْنُوهُمْ جَ فَإِنْ تَابُوا وَأَصْلَحُوا فَأَعْرِضُوا عَنْهَا

"Punish those who are guilty of unbecoming or immoral conduct, but if they repent and amend their behaviour, then

leave them alone.”⁹⁹

فَمَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ

“Whoso repents after the commission of the wrongful act and corrects himself, surely Allah will accept his repentance.”¹⁰⁰

They further substantiate the view with this *Prophetic commandment* also :

التائب من الذنب كمن لا ذنب له

“One who repents from sin is like a person who has committed no sin.”¹⁰¹

They make a further reference to the execution of the punishment of *Rajm* to *Maiz* :

هل تركتموه لعله ان يتوب فيتوب الله عليه

“Why did you not spare him so that he had repented and God had accepted his repentance.”¹⁰²

The scholars and jurists supporting the first view have adopted it with two conditions :

(i) The repentance is only effective for neutralizing the punishment if the crime is exclusively related to the *right of God*. But if the crime is a violation of the *right of people*, it loses its effectiveness as a neutralizing factor.¹⁰³

(ii) The repentance is acceptable only if it is congruent with the *subsequent corrected and reformed behaviour*. If the behaviour of the offender is not positively changed, and the reform is not literally visible in his dealings with people, the repentance is not to be treated as effective and material.¹⁰⁴

But there are some scholars of the same view who accept only the *first condition* and reject the *second condition as simply unnecessary*. They believe that only the *knowledge of repentance is sufficient and not the subsequent behaviour of the offender*. If the offender does not actually reform himself afterwards, and commits another crime, then he would accordingly be punished.

Second view :

(2) This view has been adopted by *Imam Abu Hanifah*, *Imam Malik* and some of the Jurists of *Shafe'i* and *Hanbali* schools of law. Their view is that repentance (توبة) does not neutralize the punishment except in case of *robbery* because this *exception is established through an express Qur'anic provision*. Therefore, the case of robbery may be considered an exception to the general principle that repentance is not a neutralizing factor of punishment. This principle is based on Quranic concepts clearly embodied in the following verses :

الزَّانِيَةُ وَالزَّانِيُ فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ

“The adulteress and the adulterer both should be awarded the punishment of a hundred lashes.”¹⁰⁵

The Qur'an clearly prescribes that the punishment of a hundred stripes should be awarded to *every adulterer and adulteress* without any discrimination of repentance. The repentance or non-repentance of the offender is immaterial to the infliction of punishment. Neither the act of repentance nor its absence affects the nature of the penalty. The offender is liable to the execution of *Hadd*, irrespective of his emotional and psychic state after the commission of the act. The same prescription applies to the case of *theft*.

Qur'an states :

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا

“Chop off the hands of the man who steals and of the woman who steals in retribution of their crime.”¹⁰⁶

Qur'an again stresses the indiscriminate infliction of punishment. No premium, whatsoever, is placed on the occurrence or non-occurrence of the fact of *repentance*. The execution of the punishment is equally applicable to the offenders, irrespective of their inclination or disinclination towards repentance. Moreover, it has already been mentioned that *Holy Prophet* (peace be upon him) awarded the punishment of stoning to death (رجم) to *Maiz* and

Ghamidiyyah on the basis of their *confession* and they were neither basically arrested by the officials of the state nor were they forced to make confession of their crimes. All the criminals who committed adultery and were awarded the punishment by the *Holy Prophet* (peace be upon him) are reported to have voluntarily approached the Holy Prophet (peace be upon him) and made wilful confessions of their crimes. Their voluntary admission of the criminal offence, inspite of the fact that the Holy Prophet (peace be upon him) did not insist on a fourfold formal repetition of the confession, undoubtedly establishes their *implied repentance* of the crime. The words of the *Hadith* show that the offenders asked the Holy Prophet (peace be upon him) to *purify them and purge them of the taint and stigma of sin by the imposition of the Hadd*. Their request also proves the fact that they had repented sincerely and wanted to be purified through the execution of the *Hadd of God*. In spite of all these propitiatory gestures and attenuating factors, they were awarded the punishment which is a sufficient evidence of the fact that the *act of repentance does not neutralize the punishment*. It relates only to the forgiveness of *ethereal* punishment and not of *earthly* punishment.

It is to be noted that in case of a woman who was awarded the punishment of stoning to death (*رجم*) after her death, the Holy Prophet (peace be upon him) said :

لقد تابت توبة لو قسمت على سبعين من اهل المدينة لوسعتهم

“She has made such repentance that if it were to be divided over seventy persons of Madina, it would have been sufficient for all of them.”¹⁰⁷

The *Holy Prophet* (peace be upon him) has used the word *repentance* (*توبة*) for the punishment. All these arguments support and reinforce the view-point adopted by *Hanafi* and *Maliki* schools of law. These jurists believe that repentance does not neutralize the punishment. They further believe that the claim of repentance (*توبه*)

can camouflage as an evasive tactic by any criminal to avoid the execution of punishment.¹⁰⁸ Therefore, repentance (توبة) can create practical difficulties in the administration of penal justice because it can be used as a handy and convenient ploy by any criminal to wriggle out of the clutches of law and escape the punishment after the commission of crime.

Third view :

(3) This view is adopted by *Ibn-i-Taymiyyah* and his student, *Ibn-ul-Qayyim*. Their view is that repentance not only neutralizes the penal element but also neutralizes the criminal element. According to this view, crimes which exclusively amount to a violation of the *rights of God*, are neutralized by the act of repentance. Therefore, the punishment need not be imposed after repentance. The criminal should be awarded the punishment only if he retracts from his repentance.¹⁰⁹ But they also believe that the punishment is not neutralized in the case of crimes which infringe the *private rights* of the people.

The general principle of penal law is based on the view of *Imam Abu Hanifah* and *Imam Malik*, a view which is simultaneously adopted by some of the *Shafe'i* and *Hanbali Jurists*. Since this view has the support of the majority of Muslim scholars, it finds a predominant place in the penal law. Therefore, repentance is a neutralizing factor in case of robbery only if it was committed by the offender before the cognizance of the state, and this should be treated only as an exception to the general principle. As far as other crimes and punishments are concerned, *Taubah* does not possess any neutralizing effect.

Compromise :

Compromise is also a neutralizing factor of punishment but only in the crimes of *Qisas* and *Diyat*. In the punishments of other retaliation and blood money, it does not

possess any neutralizing value. As far as *retaliation* and *blood money* are concerned, there is no difference of opinion among the Muslim Jurists. This is expressly based on *Prophe-tic Sunnah* and *Ijma'* of the Companions and that of the Ummah. *Holy Prophet* (peace be upon him) stated :

“Whosoever was murdered intentionally, his heirs are given the options of retaliation, blood money or compromise and compounding which they can exercise freely and choose any one of the options independently.”¹¹⁰

Pardon and Remission :

This is the *fifth neutralizing factor* of the penal element. Pardon can be granted by the aggrieved party or by the state in various situations. In case of crimes of *retaliation* and *blood money*, the right of pardon and remission vests in the aggrieved party itself, whereas in case of crimes of *Ta'zeer*, the right of pardon and remission normally vests in the state. The exceptions and qualifications in both situations have been discussed earlier in detail. As far as the crimes of *Hudood* are concerned, no body can grant pardon or remission because it is the exclusive *right of God*. Thus pardon and remission possess neutralizing value only for punishment in the cases of *Qisas* and *Ta'zeer*.

NOTES

1. *Fiqh-us-Sunnah*, Vol. II, pp. 415
2. Ibid.
3. Ibid.
3. A *Sahih Bukhari*, vol. II, p. 1006.
3. B *Sahih Muslim*, Vol. II, p. 67.
4. Qur'an 4 : 15.
5. Qur'an 24 : 4.
6. Qur'an 2 : 282
7. Qur'an 65 : 2.
8. *Fiqh-us-Sunnah*, Vol. II, p. 419.
9. Ibid, p. 362.
10. Ibid, p. 363.
11. *Hidayah*, Vol. II, p. 485.
12. *Fiqh-us-Sunnah*, Vol. II, p. 424
13. Ibid.
14. Ibn-i-Nujaym, *Al-Bahr-ur-Raiq*, Vol. v, p. 10.
15. *Fiqh-us-Sunnah*, Vol. II, p. 426
15. A Ibid.
15. B *Al-Bahr-ur-Raiq*, Vol. V, p. 10.
15. C Shoukani, *Mayl-ur-Autar* Vol. VII, p. 28.
15. D *Al-Bahr-ar-raiq vo, v, p. 11.*
16. Shami, *Rodd-ul-Mukhtar* , vol. 11, p. 140.
17. *Al-Madkhal-ul-Fiqh-yul-am* Vol. II, pp. 612–613.
18. *Fiqh-us-Sunnah*, Vol. II, pp. 532–533.
19. *Sahih Bukhari* Vol. II p. 1016
- 20 (a) *Bidayah-ul-Mujtahid* V II, p. 297.
- (b) *Fiqh-us-Sunnah* Vol. II. p. 525.
21. Ibid.
22. Ibid.
23. Ibid.
24. *Sahih Muslim*, Vol. II, p. 125.

25. *Tirmazi*, Vol I, p. 259
26. Qonuji, *Kashf-ul-Mubham*, pp. 78–79.
27. *Kitab-ul-Ikhtiyar*, p. 195.
28. Ibid.
29. *Fatawa Qazi Khan*, Vol. IV, p. 388.
29. A *Bidayat-ul-Mujtahid*, Vol. II, p. 300.
29. B *Kitab-ul-Ikhtiyar*, p. 189.
29. C. *Bidayat-ul-Mujtahid*, Vol. II, p. 300
30. (a) Sahih Bukhari, Vol. II, pp. 1020, 1021.
- (b) *Tirmazi*, Vol. I, p. 216. (The same is reported in Musnad Ahmad, Abu Daud, Nasai and Mustadrak Hakim).
30. A *Bidayat-ul-Mujtahid*, Vol. II, p. 299.
31. Qur'an 5 : 45.
32. *Fiqh-us-Sunnah*, Vol. II, p. 528
32. A *Tirmazi*, Vol. I, p. 259.
33. (a) *Fiqh-us-Sunnah*, Vol. II, p. 528. (Quoted from Sahih Bukhari)
- (b) *Kitab-ul-Fiqh-alal-Mazahib-il-Arba*, Vol. V, p. 526. (Quoted from Abu-Daud)
34. (a) *Kitab-ul-Ikhtiyar*, p. 190.
- (b) *Mukhtasar-ul-Qudoori*, p. 176.
35. *Fatawa Qazi Khan*, Vol. IV, p. 387.
36. *Mukhtasar-ul-Qudoori*, p. 177.
37. *Fatawa Qazi Khan*, Vol. IV, p. 387.
37. A. *Tirmazi*, Vol. I, p. 261.
38. *Fiqh-us-Sunnah*, Vol. II, pp. 533–534.
39. *Fiqh-us-Sunnah*, Vol. II, p. 534.
40. Ibid.
40. A Ibid.
41. Qur'an 2 : 194.
42. Qur'an 16 : 126
43. *Fiqh-us-Sunnah*, Vol. II, p. 535, (Quoted from Bayhaqi)

- 44 (a) *Bidayat-ul-Mujtahid*, Vol. II, p. 303.
 (b) *Fiqh-us-Sunnah*, Vol. II, p. 535.
45. Ibid.
46. *Bidayat-ul-Mujtahid*, Vol. II, p. 303.
47. *Fiqh-us-Sunnah*, Vol. II, p. 536.
48. *Kitab-ul-Fiqh*, Vol. V, p. 462.
49. Qur'an 17 : 33.
50. *Fiqh-us-Sunnah*, Vol. II, pp. 536–537.
51. *Hashiya-tus-Sawi alal Jalalayan*, Vol. II, 349.
52. *Al-Madkhal-ul-Fiqhi-yul-Am*, Vol. II, p. 622.
53. Ibid.
54. *Fiqh-us-Sunnah*, Vol. II, p. 590.
55. *Kitab-al-Fiqh*, Vol. V, p. 758.
56. Ibid.
57. Ibid, p. 759.
58. Ibid, p. 760.
59. *Subul-us-Salam*, Vol. IV, p. 39.
60. 'Abdul-Qadir 'Audah, *At-Tashri'-ul-Janai*, Vol. I, p. 128.
61. Kasani, *Badai-us-Sanai*, Vol. VII, p. 39.
62. Ibid.
63. Ibn-i-Qudamah, *Al-Mughni*, Vol. X, p. 266.
64. Ibn-ul-Qayyim, *Alam-ul-Muwaqqe in*, Vol. II, p. 221
65. *At-Tashri-ul-Janai*, Vol. I, p. 132.
66. Ibid, p. 150.
67. *Fathul Qadeer*, Vol. V, p. 117.
68. *At-Tashri-ul-Janai*, Vol. I, p. 151.
69. *Badai-us-Sanai*, Vol. VII, p. 64.
70. (a) *Badai-us-Sanai*, Vol. VII, p. 63.
 (b) Ibn-i-Hazm, *Al-Ihkam Fi usul-il-Ahkam*, Vol. I, p.43.
71. (a) Al-Ghazali, *Al Mustasfa*, Vol. I, p. 75 ff.
 (b) Amidi, *Al-Ihkam fi Usul-il-Ahkam*, Vol. I, p. 170 ff.
72. Ibid.
73. *At-Tashri'-ul-Janai*, Vol. I, p. 156.

- 74 (a) Al-Mawardi, *Al-Ahkam-us-Sultaniyyah*, pp. 236-237.
 (b) Sarkhasi, *Al-Mabsoot*, Vol. XXIV, pp. 35-36.
75. Ibid.
76. *Al-Ahkam-us-Sultaniyyah*, p. 237.
77. Ibid., p. 236.
78. 'Asqalani, *Bulugh-ul-Maram*, p. 160. (quoted from Bukhari and Muslim)
79. *Fiqh-us-Sunnah*, Vol. II, p. 590 (quoted from Abu Daud)
80. Ibid., p. 592.
81. (a) *Subul-us-Salam*, Vol. IV, p. 37.
 (b) *Fiqh-us-Sunnah*, Vol. II, p. 592.
82. (a) *Al-Mabsoot*, Vol. XXIV, p. 36.
 (b) *Al Madkhal-ul-Fiqhi-ul-'Aam*, Vol. II, p. 629,630.
83. *Subul-us-Salam*, Vol. IV, p. 37.
84. Ibid. pp. 37-38.
85. *Al-Madkhal-ul-Fiqhi-yul-'Am*, Vol. II, p. 630-631 (Quoted from Ibn-i-Qudama, *Al-Mughni*, Vol. X, Bab-ut-Ta'zeer p. 348, 357, Ibn-i-Hamam, *Fath-ul-Qadeer*, Vol. V, p. 116, 'Asqalani, *Al-Isabah*, Vol. III, p. 528, Bala-zuri, *Futuh-ul-Buldan*, p. 448, Tantawi, *Secrat 'Umar bin Al-Khattab*, p. 337).
86. *Fiqh-us-Sunnah*, Vol. II, p. 592.
87. (a) *Subul-us-Salam*, Vol. IV, p. 38.
 (b) *Fiqh-us-Sunnah*, Vol. II, p. 593.
88. Ibid.
89. Ibid.
90. *Fiqh-us-Sunnah*, Vol. II, p. 593.
91. *Al-Ahkam-us-Sultaniyyah*, p. 238.
92. Ibid. p. 239.
93. *Al-Madkhal-ul-Fiqhi-yul-Am*, Vol. II, p. 633.
94. *At-Tashri-ul-Janai*, Vol. I, p. 770.
95. *Badai-us-Sanai*, Vol. VII, p. 246.
96. *Badai-us-Sanai*, Vol. VII, p. 246 and 298.
97. *At-Tashri-ul-Janai*, Vol. I, p. 773.

98. Qur'an 5 : 34.
 99. Qur'an 4 : 16.
 100. Qur'an 5 : 39.
 101. *Ibn-i-Majah*, Chap, Zikr-ut-Taubah, p. 323.
 102. (a) *Sahih Bukhari*, Vol. II, p. 1008.
 (b) *Abu Daud*, Vol. II, p. 250.
 103. *At-Tashri-ul-Janai*, Vol. I, p. 353.
 104. Ibid.
 105. Qur'an : 2
 106. Qur'an 5: 38.
 107. *Sahih Muslim*, Vol. II, pp. 67-68.
 108. *Badai-us-Sanai*, Vol. VII, p. 6 ff.
 109. *Alamul-Muwaqqe in*, Vol. II, pp. 197-198.
 110. *At-Tashri-ul-Janai*, Vol. I, pp. 773-774.

LEGAL BASIS OF PUNISHMENTS

This chapter deals with a discussion of the legal basis of various punishments of Hudood, Qisas and Ta'zeer. By legal basis, we mean the arguments of Qur'an and Sunnah on which the legality and authenticity of the Islamic punishments is based.

HUDOOD:

As mentioned in the first chapter of this part (classification of punishments), the Hudood, according to their basic and generally accepted classification, are seven in number:

1. Adultery

(الزنا)

2. False accusation of unchastity

(القذف)

3. Theft

(السرقه)

4. Robbery

(الحرابيه)

5. Drinking

(الشرب)

6. Apostasy

(الردة)

7. Sedition

(البعث)

(1) ADULTERY

(الزنا)

Definition::

The definition of adultery unanimously adopted by the Muslim jurists of various schools of law is as follows.

الزنا فهو كل وطئ وقع على غير نكاح صحيح ولا شبهة ولا ملك يمين

Adultery (الزنا) is the sexual intercourse committed by a man and a woman who are neither married nor do they suspect that they are married to each other, and the woman is not a lawful concubine (secondary wife) of the man either.

This definition relates to the form of adultery liable to *Hadd*. The essential ingredients and constituent elements of this crime are listed below:

- | | | |
|----|--------------------------------|-------------|
| a) | maturity | (بلوغ) |
| b) | Sanity | (عقل) |
| c) | Volition | (اختيار) |
| d) | Knowledge | (علم) |
| e) | absence of doubt and suspicion | (عدم شبه) |
| f) | penetration | (دخول) |

Kinds:

- (a) *Adultery committed by an unmarried person* (زنا البكر)
 (b) *Adultery committed by a married person* (زنا المحصن)

Punishments:

- (a) Hadd punishment for the adultery committed by an unmarried person, male or female, is *one hundred stripes*.
 (b) Hadd punishment for the adultery committed by a married person, male or female, is *stoning to death* (رجم)

Arguments:

- (a) The Hadd of adultery (حد البكر) committed by an unmarried male or female is expressly based on *Qur'an*.
 (B) The Hadd of adultery (حد المحصن) committed by a married male or female is expressly based on *Prophetic Sunnah*.

Gradual Finalization of Hadd:

Muslim Jurists are of the view that the punishment of adultery was prescribed by the Shariàh in a gradual process. The first *Qur'anic* verse which deals with the punishment of adultery is:

وَالَّذِينَ يَأْتِيهَا مِنْكُمْ فَأَذَوْهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرَضُوا عَنْهَا

“Punish those men who are guilty of unbecoming conduct, but if they repent and amend themselves, then leave them alone.”²

This Qur'anic verse prescribes *physical torture* and *whipping* as the punishment for adultery. Another verse prescribes confinement and imprisonment as the punishment for adultery

وَالَّتِي يَأْتِيَنَّ الْفَاحِشَةَ مِّنْ نِّسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِّنْكُمْ جَ فَإِنْ شَهِدُوا فَأَمْسَكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّيَهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

2nd Verse:

“Confront those women who are guilty of unbecoming conduct to four witnesses. If they bear witness (and establish the commission of crime), then confine the women to their houses till they die or God provides for them some way out.”³

3rd Verse:

Through a *third verse*, the first two punishments of adultery as Hadd were repealed and the final punishment of *a hundred lashes* was prescribed:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ

“Flog the adulteress and the adulterer, each one of them, with a hundred stripes.”⁴

Question of Rajm for Married Adulterer

This Qur'anic verse had a *general implication* as for as the words ، الزَّانِيَةُ and ، الزَّانِي are

concerned. Its meaning was subsequently *specified and particularised* by the Holy Prophet (peace be upon him) for the *adultery* committed by an *unmarried male or female*. The Holy Prophet (peace be upon him) awarded the punishment of *stoning to death* (رجم) to the *married adulterer or adulteress*. The *particularization* of the verse of *Surah Noor* for *unmarried persons* has been unanimously accepted by the *companions* of the Holy Prophet (peace be upon him), their *successors, muslim scholars and jurists* of all schools of law, right from the beginning of Islamic history to the present times. It is held by the scholars in the light of the second verse of *Surah Noor* that the *Hadd of one hundred stripes* is reserved only for an *unmarried adulterer or adulteress* whereas the *Hadd of rajam or stoning to death* is reserved for a *married adulterer and adulteress*.⁵

(1) *This specification of the Quranic verse is expressly based on Prophetic tradition reported by Sayd bin Khālid Al Juhanni:*

قال سمعت النبي ﷺ فيمن زنى ولم يحصن جلد مائة تعذيب عام

"I heard that Holy Prophet (peace be upon him) ordained the punishment of a hundred stripes and the transportation for a year for unmarried adulterers."⁶

(2) *Another Prophetic tradition has been reported by Abu hurayrah:*

ان رسول الله ﷺ قضى فيمن زنى ولم يحصن بنفى عام باقامة الحد عليه

"Holy Prophet (peace be upon him) executed to the unmarried adulterers the punishment of imprisonment or transportation for year along with the infliction of the Hadd

(one hundred stripes).”

(3) Moreover, it is reported by 'Ubàdah bin Sàmat that Holy Prophet (peace be upon him) said:

خذوا عني خذوا عني خذوا عني فقد جعل الله لهن سبيلاً البكر بالبكر
جلد مائة ونفي سنة والثيب بالثيب جلد مائة والرجم

“Take it from me, take it from me, that God Almighty has opened a way for them. The unmarried adulterers should be executed a hundred stripes and imprisonment for a year and the married adulterers should be executed a hundred stripes as well as the Rajm.”⁸

These Prophetic traditions expressly establish two precedents:

the Hadd for the unmarried adulterers executed by Holy Prophet (peace be upon him) was hundred stripes whereas the Hadd for the married adulterers was Rajm (stoning to death.

These traditions further highlight two other points of information:

(a) *The addition of the punishment of imprisonment or transportation for a year for the unmarried.*

(b) *The combination of hundred stripes with Rajm for the married.*

Through a detailed observation of the *Prophetic Sunnah*, it is undoubtedly proved that the addition of *hundred stripes* to *Rajm* was subsequently discarded by the Holy Prophet (peace be upon him) and the actual punishment always practically administered to the married adulterers was only *Rajm* (Stoning to death) without its supplementation by stripes. In case of unmarried adulterers, Holy Prophet (peace be upon him) usually awarded the exclusive punishment of a hundred

stripes though in some cases he reinforced it by the addition of imprisonment for a year also. This Prophetic practice clarified the legal situation:

the Hadd of hundred stripes to the unmarried adulterers was awarded by the Holy Qur'an and the Hadd of Rajm (stoning to death) was awarded to the married adulterers by the Holy Prophet (peace be upon him) himself.

Basis of the Establishment of a Hadd:

It is a unanimous fact the the *Hadd* is not established only through *Qur'an* but it is equally established through *Prophetic Sunnah* and the *Definite Ijma'* of his companions also.⁹ *Qur'an* itself supports this view as far as the formulation and application of *Hudood* are concerned:

تِلْكَ حُدُودُ اللَّهِ وَمَنْ يُطِيعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ
خَالِدِينَ فِيهَا ذَلِكَ الْفَوْزُ الْعَظِيمُ ●

“These are the Hudood of Almighty Allah, and whoso obeys Allah and His Holy Prophet shall enter gardens through which streams flow. They will live there for ever and that is a great triumph.”¹⁰

Qur'an further states in continuation of the same concept:

وَمَنْ يُعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا ط وَ لَهُ
عَذَابٌ مُهِينٌ

“And whoso disobeys Allah and His Apostle and exceeds his Hudood (limits), He will make him enter into fire and he will dwell there. For him is the degrading punishment.”¹¹

These *Qur'anic* verses furnish us with two sets of principles:

Two Quranic Principles:

(a) *obedience to God and obedience to Holy Prophet (peace be upon him) amount to observation of Hudood.*

(b) *disobedience to God and disobedience to Holy Prophet (peace be upon him) amount to violation of Hudood.*

These two Qur'anic principles establish with meticulous clarity of the fact that the *Hudood of Shari'ah* are directly based on the *commandments of Allah* and the *commandments of the Holy Prophet* (peace be upon him). Therefore, none of the recognized Muslim School of law in the entire history of Islam has adopted the view that *Hadd* is based only on *Qur'an* and not on *Prophetic Sunnah*. Any discrimination between *Qur'an* and *Sunnah* for the establishment of the *Hadd* is absolutely prohibited as an act of dastardly perversion contrary to the unanimous consensus of the *Muslim Ummah* in all times and periods. In anticipation and refutation of actual or potential interpretative perversions, *Abdul Rehman Al Jazeeri* has narrated :

« الحدود في الاسلام ثابتة بآيات القرآن — كما انها ثابتة بالاحاديث النبوية — عليه اجماع الأمة »

“The Hudood in Islam are established from the verses of Qur'an ————— as they are established through Prophetic traditions ————— and they are established through the recognized practices of the companions also, and on this view there is the complete consensus of the Ummah.”¹²

This concept can be further understood through the study of the *third chapter of Part one* (Islamic Concept of law).

(4) There is another Prophetic tradition establishing the

punishment of *Rajm* for married adulterers reported by 'Abdullah Ibn-i-Mas'ud:

لا يجل لامرئ مسلم يشهد ان لا اله الا الله وانى رسول الله الا باحدى
ثلاث : النفس بالنفس والثيب الزانى والمفارق لدينه التارك للجماعة

“The bloodshed of a Muslim who bears witness to Tauheed and Risalat is not permissible except in either of the following three cases:

- (a) Retaliation for murder
- (b) Punishment for the married adulterer
- (c) Punishment for the apostate.”¹³

(5) This concept is also elaborated and amplified in another Prophetic tradition reported by *Hazrat A'yesah*:

- (a) *The person who committed adultery after being married should be stoned to death.*
- (b) *The person who committed sedition against Almighty Allah and His Holy Prophet (peace be upon him) should be decapitated or hanged or imprisoned.*
- (c) *The person who committed murder should be murdered in retaliation.”¹⁴*

(6) On the same subject, another Prophetic tradition is reported by *Abu Amamah bin Sahl bin Hanif*, which is based on the same words¹⁵ as narrated by *Ibn-i-Mas'ud*.

These are some of the Prophetic traditions through which his commandments prescribing the punishment of Rajm were established. There are some other traditions through which the Prophetic practices of executing the punishment of Rajm to the married adulterers are established:

- (7) The event of the execution of punishment of *Rajm* by the Holy Prophet (peace be upon him) to a Jewish couple:

reported by *Abdullah bin 'Umar*.¹⁶

(8) *The Hadith of 'Aseef* whereby the punishment of *Rajm* was awarded by Holy Prophet (peace be upon him) to a married woman who had confessed the crime.¹⁷

(9) The event of *Màiz bin Màlik* reported by *Jabir bin 'Abdullah Ansari* whereby *Màiz* being married was executed the punishment of *Rajm* on his confession.¹⁸

(10) The event of *Ghamidiyyah* who was executed the punishment of *Rajm* on her confession.¹⁹

(11) Another event of the Prophetic period reported by *Imràn bin Huseen*, relating to the execution of *Rajm* to a woman, who belonged to the tribe of *Juhaynah*.²⁰

(12) Another *Prophetic tradition* is reported by *Jabir* whereby an adulterer was awarded the punishment of *stripes*. Subsequently, when Holy Prophet (peace be upon him) learned that he was married, he ordered to execute him with *Rajm* also.²¹

(13) Another *Prophetic tradition* bearing on this aspect has been narrated by *Abu Hurayrah* :

الولد للفراش وللعاهر الحجر

“The child would belong to the husband of the adulteress and the offender would be exposed to stoning.”²²

All these *Prophetic prescriptions* and practices unequivocally establish the fact that *Hadd* of adultery for the married was always executed with *Rajm* by the *Holy Prophet* (peace be upon him) and not with *hundred stripes*. But an impression has been maliciously engineered by the adversaries of Islam to mystify and distort what is absolutely transparent. They have queried with a grin on their protruding noses and a frown on their narrow foreheads and

a black spot on their hearts whether these events of execution relating to the punishment of *Rajm* had occurred *before* or *after* the revelation of the *second verse of Surah-i-Noor*. Some people in the present era whose hearts are choked with the slime of prejudice and whose minds are clogged by the grime of ignorance and whose spiritual flight is jammed with rust-ridden brakes of the cash-nexus, have tried to negate and nullify the legality of *Rajm* as *Hadd*, and to establish that these events crystallized before the punishment of hundred stripes was revealed through *Qur'an*. Therefore, *Rajm* was repealed by the subsequent Qur'anic order of a *hundred stripes*. This allegation is absolutely baseless and against established historical facts. The event of 'Aseef, the event of *Màiz*, the event of *Ghamidiyyah* and the event of the *Jewish couple* occurred after the revelation of the verse of *Surah-i-Noor* which contains the punishment of *hundred stripes*. The *revelation* of this *verse* took place at the occasion of the event of *lfk* which had occurred on the *return* of the *Holy Prophet* (peace be upon him) and his *companions* from the *war of Banu Mustalaq*.

This occasion had taken place at all costs before fifth or sixth Hijra or in third Hijra as stated by Ibn-i-Hashshàm, Tabari, Ibn-i-Taymiyyah, Àsqalàni, 'Ayni, Qustalàni and others. But the events of execution of Rajm took place after seventh, eighth and ninth Hijra because those companions who had witnessed the events and had participated in the stoning, accepted Islam and associated themselves with the Holy Prophet (peace be upon him) in the seventh, eighth and ninth Hijra. It was only in their presence and with their participation that the execution of Rajm materialized. These facts can be easily studied through the following references:

1. *Fath-ul-Bàri*, Vol.XII, p.119.
2. *'Umdat-ul-Qàri*, Vol.XXII, p.291.

3. *Irshad-us-Sāri*, Vol.X, p.9.
4. *As-Sārim-ul-Maslool*, p.51.
5. *Tarikh-ul-Khamees*, Vol.II, p.139.
6. Mohamood Shihab Kharāsōni. *Adwār-i-Fiqh*. Vol.I, p.323.

Therefore, there is not the slightest iota of doubt or grain of suspicion that the *Hadd of Rajm* was repealed by *Qur'an* because the *Holy Prophet (peace be upon him)* repeatedly executed the *Hadd of Rajm* to the offenders even after the revelation of the *Qur'anic provision of stripes*. This *Prophetic practice* continued till the last days of his life. This fact is further supported by the *continuous practice* of the *orthodox caliphs*, in their respective eras after the demise of the *Holy Prophet (peace be upon him)*. *Hazrat 'Umar*,²³ *Hazrat 'Usman*,²⁴ and *Hazrat 'Ali*²⁵ are frequently reported to have executed the *Hadd of Rajm* to the married adulterers and they had also verbally elaborated and explained the legal significance and authenticity of the *Rajm* on many occasions.²⁶

Therefore, the *Hadd of Rajm* is not only established through the *Prophetic Sunnah* but also through the *continuous and unanimous consensus* of the *Khulafa-i-Rashideen*,²⁷ and of the whole *Muslim Ummah* as well.²⁸

(2) SLANDER

(False accusation of unchastity) (القذف)

Definition

The term *Qazf* literally means to *throw anything* and it is normally used in the sense of *throwing stones* at someone. Technically it is known as :

الرمى بوطء يوجب الحد على المقذوف

“Accusation of adultery against a person is liable to Hadd.”²⁹ In “Enforcement of Hudood Ordinance” it is stated “Whoever byt words, either spoken or intended to be read, or by signs, or by visible representations, makes or publishes an imputation of Zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings of such person is said to commit slander.”

Conditions of the accused

The conditions for lawful establishment of slander are as follows:

(1) **Sanity** The person who is accused of slander should be sane.

(2) **Puberty** The accused should be an adult person so that he can be charged with the allegation of adultery. The fact that he is an adult makes it reasonable to believe that he might have committed the offence. Since a *minor* cannot be liable to the Hadd of adultery, a false allegation levelled against him does not amount to *Qazf* liable to Hadd.

Imām Mālik has exceptionality accepted the false allegation of unchastity even against a *minor* as *Qazf*³⁰ and he considers it liable to Hadd. According to *Ibn-i-Munzer*, the view of *Ahmad bin Hanbal* is that if anyone commits such kind of slander, he should be awarded the punishment less than the Hadd. This punishment would be in the form of *Tazeer* because he has in fact spoken a lie by accusing the *minor* of adultery which is not humanly possible. Therefore, he deserves to be punished for the ejaculation of a lie.³¹

(3) **Islamic faith** The accused should be a *Muslim*. This view is adopted by the majority of the Jurists. If the accused is a *non-muslim*, the prescribed Hadd will not be awarded to the slanderer.³²

(4) **Chastity** The accused should enjoy a good moral reputa-

tion. If he already possesses bad reputation, the slanderer should be awarded the punishment of *Ta'zeer* and not of *Hadd* after the establishment of the case of *Qazf*.

(5) There is a difference of opinion in reference to the slaves. It is reported by 'Abdullah bin 'Umar that even if the accused is a *slave*, the slanderer, irrespective of his status, should be awarded the *Hadd of Qazf*. This rule applies to the master of the slave also.³³ *Imam Mâlik* and the Jurists of *Zâhiri* school of law agree with this view.^{33-A}

Punishment

The *Holy Qur'an* has prescribed *eighty stripes* as punishment for the *slanderer* :

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ
جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ ●

"The penalty of those who accuse chaste women of adultery and then bring not four witnesses, is flogging with eighty stripes. Do not admit their evidence afterwards for surely they are the transgressors."³⁴

This Qur'anic verse clearly establishes the *Hadd* of eighty stripes for slander.

Required Number of Witnesses

In order to prove the crime of *slander* liable to *Hadd*, the required number of witnesses is the *same* as in the case of *adultery*. It was revealed at the occasion of *Ifk* when the *Holy Prophet* (peace be upon him) and his companions had returned from a war. Some people came out with a false allegation of *unchastity* against *Hazrat 'Ayesha* (May God be pleased with her). These verses, approximately *twelve in number*, were revealed to the *Holy Prophet* (peace be upon

him). He stood up and recited the revealed verses. The persons who had fabricated the false allegation could not muster any evidence in favour of their claim and the *Holy Prophet* (peace be upon him) imposed on them the *Hadd* under the Qur'anic prescription. The painstaking procedure was adopted to clarify the position of *Hazrat 'Ayesha* and to rehabilitate her chaste and spotless reputation.³⁵

(3) **THEFT:** (السرقة)

Definition

Theft is defined as :

اخذ الشيء من مال الغير خفية

“Theft is to steal anything from the property of anybody else surreptitiously.”³⁶

In the Islamic laws (*enforcement of Nizam-i-Mustafa Hadood Ordinance, 1979*), it is stated “*Sarqah liable to Hadd is, whoever being an adult, surreptitiously commits, from any Hirz, theft of property of the value of the Nisab or more, not being stolen property, knowing that it is or is likely to be of the value of the Nisab or more, is said to commit theft liable to Hadd.*”

General Conditions

In the light of the definitions, some general conditions must be fulfilled to constitute the crime of *theft* liable to *Hadd*. For example :

- (i) To take property of any other person.
- (ii) To steal it clandestinely.
- (iii) The stolen property should be in safe custody.³⁷

Specific Conditions

The following conditions relate specifically to the stolen

property.

(i) Lawfulness of Property

The property should be such that could be *possessed* and *owned lawfully*. Its sale and the benefit that accrues from its sale or rent should also be lawful.³⁸ In the light of this specific qualification and reservation, the theft of *intoxicants*, *pigs* and other things which are *absolutely forbidden* in Islam, does not amount to *Sarqah* liable to Hadd. This is the view of the majority of Jurists: *Hanafis*, *Shàfeis* and others.

(ii) Nisab

The stolen property should come up to the limit of *Nisab* in its value. There is, however, a difference of opinion among Jurists on the issue of prescription of *Nisab*. According to *Imam Malik*, *Shàfei* and *Ahmad bin Hanbal*, the *Nisab* of theft liable to *Hadd* is *one-fourth* of a *dinar* which amounts to *three dirhams*.³⁹ But the view of *Imàm Abu Hanifah* and his followers is that the *Nisab* of theft is *ten dirhams*.^{39(a)} Their view is based on the fact that the property on which *amputation* of hands was awarded in the *Prophetic era* was at least of the value of *ten dirhams*.⁴⁰ as reported by *‘Amr bin Shuayb*.⁴¹ A tradition reported by *‘Abdullah Ibn ‘Abbas* which is quoted in *Bayhaqi* and *Tahhawi* also supports this view.⁴² *Sufiyan Sory* equally agrees with the view expressed by *Imàm Abu Hanifah*.⁴³

(iii) Safe Custody

The property should be stolen from the *Hirz* i.e., safe custody. Otherwise that act would not amount to theft liable to Hadd. The open and public places do not fall within the scope of *Hirz*. *Ibn-ul-Qayyim* and some other scholars have excluded many *portable items* from the scope of *theft* liable to *Hadd*.⁴⁴ Although there is a Prophetic Hadith which prescribes the concept of *Hirz*, reported by *‘Amr bin Shuayb*,⁴⁵ yet *Imàm Ahmad*, *Ishàq*, *Zufar* and the *Zàhiri* Jurists have not

recognized the condition of *Hirz*, considering the *Qurànic* commandment an *absolute* prescription of the *Hadd* of theft.

But generally accepted view of the Muslim Jurists is that, if any property is stolen from an *open* and *public* place, the thief will be awarded *Ta'zeer*, not the *Hadd*.

Kinds

There are two kinds of theft:

- (i) Theft liable to *Hadd*.
- (ii) Theft liable to *Ta'zeer*.

Theft liable to *Hadd* is established only if the commission of crime is proved beyond doubt through the fulfilment of requisite conditions. If any of the basic conditions is missing, but the commission of theft is established through evidence, then the court is supposed to award punishment of *Ta'zeer*.

The punishment of *Theft* is based on the *Qurànic* verse:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ ط وَاللَّهُ
عَزِيزٌ حَكِيمٌ ●

"Cut off the hands of the man who steals and of the woman who steals in retribution of their offence as an exemplary punishment from Allah. Allah is mighty, wise."⁴⁷

The *amputation* of hands in the *first instance* should take place from the *right hand* which is to be cut from the *wrist*.

It is established through various traditions and precedents of the *Caliphate* period that if a thief *repeats* the crime of theft in spite of the first amputation, then his *left foot* should be cut. The Jurists disagree whether at *third* instance after the amputation of hand and foot, his *left arm* and then his *right foot* should be amputated or not. *Imàm Abu Hanafah* believes

that at the *third instance* of crime, the offender should be *imprisoned* and punished with some other kind of *Ta'zeer*.⁴⁸ *Imàm Shàfe'i* and other scholars believe that at the *third instance*, his *left arm* should be amputated and at the *fourth instance* his *right foot* should be chopped off, and if he again commits the crime, then he should be awarded imprisonment.⁴⁹ However, Hanafi view seems to be more realistic.

(4) ROBBERY AND DACOITY

(الحراية)

Robbery (Al-Harabah), in Islamic legal literature, is known as *Qat-ut-Tareeq* which is defined in the words:

Definition

"When any one or more persons, sufficiently equipped, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put fear of death in him or hurt such person or persons, it is called *Al-Harabah*".

Ingredients

In the light of the definition, following are the ingredients essentially required for the constitution of this crime.

(i) *Legal Capacity*: it means that the robbers and dacoits should be *adult* and *sane* persons and possess all those legal qualities which are binding for the imposition of *Hadd*.

(ii) *Equipment with arms*: *Imàm Abu Hanifah*, *Imàm Màlik*, *Imàm Shàfe'i*, *Imàm Ahmad bin Hanbal*, *Abu Yousof*, *Abou Sour* and *Ibn-i-Hazm* consider the equipment with arms as an essential condition for robbery.⁵⁰ As far as the nature and kind of arms are concerned, there is no particular specification, but there should be at least such kind of equipment through which the show of force may become possibly effective.

(iii) *Open Exhibition*: The third condition of robbery is an

open exhibition of the crime. If any act contained in the definition is openly committed, this overt act discriminates it from *theft*.⁵¹ This condition indicates the somewhat dominating position of the robbers during the commission of crime. They have an edge over their victim and their dare-devil attitude signifies the idea of *predominance* (الشوكة) technically known as *قوة المغالبة*, which is an essential ingredient of *robbery*.⁵² However, it has to be established that the robber or the robbers on the basis of this capability were apparently in a position to accomplish the act of robbery.

(iv) *Place of commission*: Some of the Jurists think that since this crime is known as *Qat-ut-Tareeq* i.e., blockage of passage, it should be committed outside the city which is not thickly populated. If the same act is committed in a thickly populated place where the robbers can be easily confronted and overpowered, it would not amount to *robbery*. It would be categorized as some other crime.⁵³ But *Imam Abu Yousaf* and many other Jurists are of the opinion that the place whether urban or suburban is immaterial and possesses the same legal effect because the *Qur'anic* verse that prescribes the *Hadd* of *robbery* does not place such qualification. The scholars of *Shàfe'i*, *Hanbali*, *Màlki* and *Zàhiri* schools of law are in agreement with this view. *Abu Sour*, *Auzà'a* and *Layth* also support it.⁵⁴ Same is the dominant and generally accepted view of Islamic Law.

Punishments

Hadd of *robbery* and *docoity* is mentioned in *Qur'an* in the words:

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ

يُقْتَلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ
الْأَرْضِ ط

“Certainly the punishment of those who fight against Allah and His Messenger and are actively engaged in creating disorder in the land is that they should be decapitated or hanged or their hands and their feet be chopped off on alternate sides or they should be placed under arrest or expelled from the Land.”⁵⁵

Through the Qur`anic injunction, *four* punishments have been prescribed by the *Shari`ah*:

- (i) *Decapitation*
- (ii) *Hanging*
- (iii) *Amputation of hands and feet on alternate sides.*
- (iv) *Confinement or imprisonment.*

Since the word ‘*أَوْ*’, that means ‘*or*’, has been used after the prescription of every punishment, it is established that a kind of discretion for the selection of either of these punishments is granted to the *state* for implementing any one of these options but the punishment to be awarded should be in proportion to the gravity of the crime. There are three points of view which serve to explain and illustrate the nature and scope of this issue.

- (i) Complete discretion of selection.
- (ii) Prescription of selection.
- (iii) Qualified discretion of selection.

First View

This view has been adopted by *Sa`eed bin Musayyab*, *Umar bin `Abdul `Aziz*, *Muj`ahid*, *Zahh`ak*, *Nakh`i*, *Abu Sour* and *Im`am M`alik*, etc. They believe that *Qur`an* has simply prescribed the four punishments as *Hudood* and there is com-

plete discretion of selection vested in the state to choose either of these options in order to equalize or balance the gravity of crime and the imposition of punishment. It is immaterial whether the commission of murder took place during robbery or not, and whether the robbers actually managed to take away the property. It is the exclusive discretion of the state to award any of the four punishments.⁵⁶

Second View

This view is attributed to 'Abdullah Ibn-i-'Abbàs. Imam Shāfi has reported it from him in his *Musnad*. This shows that

- (a) if the robbers committed the act of *murder* and *took away the property* of the people also, they should be awarded the punishment of *hanging*.
- (b) if they committed the act of *murder* but *did not take away the property*, they should be *decapitated* only and should not be hanged.
- (c) if they *took away the property* but *did not commit murder*, their *hands and feet* should be *amputated alternately*.
- (d) if they only *threatened* and *terrorized* the people, *without the commission of murder* or the *appropriation of property*, they should be sentenced with *confinement*.⁵⁷

Kinds of Robbery

The *second view* under scores four different kinds of robbery.

- (a) Terrorizing the people without murdering them or confiscating their property.
- (b) Terrorizing people alongwith confiscation of their property but without committing murder.
- (c) Threatening people alongwith murder but without

confiscation of property.

(d) Threatening people alongwith murder and confiscation of property.

This act of 'Muharibat' is also known as '*Fasàd-fil-Ard*' (فساد في الارض)

Third View

This view is adopted by *Imàm Abu Hanifah*, *Imam Ahmad bin Hanbal*, *Imàm Shàfèi* and others. These scholars believe that the discretion of selection is granted to the state but it is qualified in the sense that no *death punishment* is to be awarded without commission of *murder* during *robbery*, no *amputation* should be awarded without *confiscation of property* and no *confinement* should be awarded except in case of simple *threat* or an act of *terrorization*.⁵⁸

According to this view, the word, 'أَوْ' (aw), which means 'or' neither indicates complete discretion nor complete prescription. It suggests that basic punishments in the light of varying sanguineness of crimes have been declared mandatory but the discretion to opt any alternative or combination of alternatives vests in the state.

(5) DRINKING (الشرب)

The prohibition of *drinking* was given through *Holy Quran* and its punishment was positively provided by *Prophetic Sunnah* which was formally finalized by the *consensus* of the *companions* during the *caliphate* of *Hazrat 'Umar*.

Prohibition Established Through Quran

The prohibition of drinking was revealed in a gradual process.

1st Step

The following Qur'anic verses were accordingly revealed to discourage and prohibit the act of drinking.

يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ ط قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ لِلنَّاسِ وَإِثْمُهُمَا
أَكْبَرُ مِنْ نَفْعِهَا ط

"They ask you about drinking and gambling. Tell them there is a great harm in both and also some profit for people, but their harm is greater than their profit."⁵⁹

Through this verse a comparison is made between the benefits and hazards of drinking and gambling. Both acts are discouraged because the demerits far exceed their merits and the basis of this discouragement lies in Islam's practical and pragmatic attitude towards social problems.

2nd Step

After the above mentioned explanation, the following verse

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنْتُمْ سُكَارَى حَتَّى تَعْلَمُوا مَا تَقُولُونَ

"O believers, you should not approach prayer when you are not in full possession of your mental faculties, until you realize the true import of your supplications."⁶⁰

Through this verse, drinking was highly *disapproved* on basis of its *intoxicating* affect.

It stresses the fact that the state of intoxication robs the person of his senses and he does not know what he is articulating from his mouth. Since he is not completely conscious of what he is uttering from his mouth, his prayer is simply

reduced to a series of mumbles and jumbles. Therefore, instead of desecrating the act of prayer, it is better not to pray during state of articulation. Sometimes a scrambled prayer is even worse than not praying because the former amounts to a wilful violation of the divine injunction, and a conscious commission of crime as compared to an unconscious slip or lapse. The act of drinking is discouraged because it is expressly inconsistent with the function of prayer which is pure contemplation and involves the highest degree of spiritual and intellectual concentration.

3rd Step

“O believers, drinking, gambling, idols and dividing arrows are but abominations. So turn wholly away from each one of them so that you may prosper. Satan desires only to create enmity and hatred between you by means of drinking and gambling and to keep you from the remembrance of Allah and from prayer. Will you, then, desist (from these acts)?”

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ
الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ● إِنَّمَا يُرِيدُ الشَّيْطَانُ أَنْ يُوقِعَ بَيْنَكُمْ
الْعَدَاوَةَ وَالْبَغْضَاءَ فِي الْخَمْرِ وَالْمَيْسِرِ وَيَصُدَّكُمْ عَنْ ذِكْرِ اللَّهِ وَعَنِ الصَّلَاةِ
فَهَلْ أَنْتُمْ مُتَّبِعُونَ ●

In this verse the following four acts:

- (i) drinking (الخمير)
- (ii) gambling (الميسر)
- (iii) slaughtering of animals and rubbing their blood on the stones in the name of their idols (الانصاب)
- (iv) dividing arrows (الازلام)

are placed on the same level in their sinful capacity. *Qur'an* expressly declared the *prohibitory* aspect of *drinking* and *gambling* by placing it at par with the acts of *shirk* i.e., attributing partners to God. Moreover, *Qur'an* has marked the following eight specifications in connection with drinking.

- (i) It is *Rijs* (ريس). That is a noxiously stinking act.
- (ii) It is an *act of Shaytàn*.
- (iii) *abstention* from drinking should be observed as an *obligation*.
- (iv) without *abstaining* from it, *religious* and *spiritual triumph* is *impossible*.
- (v) it is one of the basic causes of *mutual enmity and jealousy*.
- (vi) It keeps you from the *remembrance of God*.
- (vii) it keeps you from *prayer* also.
- (viii) it should not be indulged in at any cost and those who do not give it up are in fact the *transgressors* and *violators* of the divine commandments.

A Malicious Illusion

In the light of these verses and their analysis, it is clearly established that the *prohibition* of *drinking* is expressly based on *Qurànic commands*. People who think that the prohibition of drinking is not proved by *Qur'anic* verses are in fact labouring under an illusion and are the pathetic victims of a self connected lie. In order to cover and justify their elevation from the right path, they fabricate fictions and fake explanations, and are of these fabrications is a consciously perverse and malicious nationalization of the act of *drinking*. This wilful obfuscation of the factual position reflects both their ignorance and their half-hearted and lukewarm belief in the value of *Qur'anic* injunctions. Since *drinking* is a part of their

spiritually emaciated personalities, they try to justify it by detecting loops and flaws in the Qur'anic prescriptions. In certain cases, it amounts to downright blasphemy because the justification of an act which is a violation of any divine command, is itself a violation. Since it reinforces a criminal act, it is compounded and multiplied by the force of sheer accumulation. There pseudo-intellectuals and self-styled modern champions of Islam who have imbibed the champagne of Western culture and debunk anything that exhales an indigenous smell, are advised to read the *Qur'an* thoroughly, and with perfect concentration. Without a sense of deep involvement and commitment, they are most likely to misinterpret the sense of the *Qur'anic* verses and commit the double sin of ignorance and arrogance. How is it possible that, in spite of eight various prohibitory modes used in the description of the legal status of *drinking*, one can imagine that it is not expressly forbidden. This is perhaps accounted by the fact that the actual word *forbidden* (*حرام*) has not been used in the *Qur'an* in reference to *drinking*. People with such a frame of mind are completely ignorant of *Qur'anic* legislation. A deep and detailed study of *Qur'an* establishes the fact that the *prohibitory laws of Qur'an are embodied in its verses in various forms:*

in the form of express commandments of omission,

in the form of narration of prohibition,

in the form of declaration of its being impure, sinful or punishable in life hereafter,

in the form of being liable to any wordly punishment, or sometimes in the form of being uncommendable, loathsome, disgusting or simply against the principles of piety. All these modes of prescription possess the same legal effects and prohibitory consequences. All things which are unanimously known to be completely 'حرام' in Shari'an are not always literally stated as Haram because Qur'an is not

a technical book of codified law or a specific compendium of legal terms. *Qur'an only provides the divine will which is explained, elaborated and exemplified through the Prophetic Sunnah* and it is the duty of jurists to determine and specify the exact legal grades of the acts on the basis of the provisions of *Qur'an* and *Sunnah* in pure technical sense. The *prohibition of drinking through Qur'an was also recognised by the companions of the Holy Prophet (Peace be upon him) as stated by Hazrat Anas :*

لقد انزل الله تحريم الخمر

“Certainly, the prohibition of drinking was revealed by Almighty Allah.”⁶²

Prohibition Established Through Prophetic Sunnah

Holy Prophet (Peace be upon him) at many occasions declared the drinking as an absolutely forbidden act

(حرام) and this declaration has been reported through authentic traditions:

(1) It is reported by *‘Abdullah Ibn-i-‘Abbās:*

حرمت الخمر قليلاً وكثيرها والسكر من كل شراب

“Drinking is forbidden both in small and large quantities, and intoxication is a characteristic of every wine.”⁶³

(2) Another Prophetic tradition is reported by him in the words:

لعن الله الخمر وبائعها ومشتريها وعاصرها وحاملها والمحمولة اليه وشاربها

“God Almighty has cursed drinking and the man who sells

liquor, the man who buys it, the man who extracts and prepares it, the man who carries and serves it, the man to whom it is carried and served and the man who drinks it."⁶⁴

In *Sunan Ibn-i-Màjah*, it is further stated that any one who lives by drinking or thrives on its income is also damned by God. The same tradition is narrated by 'Abdullah-bin-'Umar and *Anas bin Màlik* also.

(3) 'Abdullah-bin-'Amr reports another Prophetic tradition in denunciation of the act of *drinking*:

الخمر أم الخبائث وأم الفواحش واكبر الكبائر

'*Drinking is the root cause of all evils and abominations and it is the greatest of all overweening sins.*'"⁶⁵

(4) Still another tradition has come down to us through 'Abdullah-bin-'Amr and 'Abdullah Ibn-i-'Abbas:

من شربها وقع على أمه

"Anyone who drinks is like a person who commits adultery (*زنا*) with his own mother."⁶⁶

Moreover, many Prophetic traditions on the same subject are reported in *Bukhàri*, *Muslim*, *Musnad Ahmad* and in other reliable books of *Hadith*.

What is meant by drinking

Literally *Khamr* (*خمر*) signifies anything which clouds and confuses the mind and upsets the normal action of the senses, but it is technically used in the sense of drinking (*شرب*). It is defined in the words : "Any kind of beverage which is potentially intoxicating is known as *Khamr*, whether it is taken in smaller or larger quantity and whether it consequently intoxicates a person or not. It can be extracted

from grapes, wheat, barley, rice, raisins or dried grapes, dates or from anything else."⁶⁷ The same definition is adopted by Imam Abu Hanifah, Màlik, Shàfèi and Ahmad bin Hanbal.

Scope of Prohibition

As far as the *scope of prohibition* of drinking is concerned, it is not confined to some specific forms of wine because the *Holy Prophet* (peace be upon him) has extended the scope of *Khamr* to every *intoxicant*. Therefore, this prohibitory act is impervious to any confusion and misunderstanding. However, modern man, in his obsessive craze for self-sustaining justifications, has tried to discriminate among various categories of wine in order to seek divine exemptions for acts which are both directly and indirectly declared abominable. This craze for explanations which run counter to the spirit of the *Qur'an* and the practice of the *Holy Prophet* (peace be upon him) basically derives from an un-Islamic or pro-Western frame of mind. It is also a continuation of the Western opposition to the element of ingrained purity that distinguishes Islam from all other religions. Their opposition is also focussed on the ingredient of balance emphasized by Islamic tenets and by the practices of the *Holy Prophet* (peace be upon him). Both the act of equilibrium and the element of purification are sore spots not only for the Western exegetes but also for those Muslims for whom Islam and its fundamentals are reduced to the level of lifeless slogans and clicks. These people deliberately twist the message of Islam and try to clamp wilful and misguided interpretations on the essentially straighty core of Qur'anic revelation and the equally uncomplicated life and style of the *Holy Prophet* (peace be upon him). These people have done a great disservice to Islam and the irony is that they still persist in their purblindness either out of a sense of vengeance or perhaps they are merely representatives of some anti-Islamic coterie whose

main purpose is to blur the many-splendoured message of Islam and create doubt and confusion among the pious Muslims.

It is reported by *'Abdullah bin 'Umar* that *Holy Prophet* (peace be upon him) stated:

(1) كل مسكرٍ خمرٌ وكل مسكرٍ حرام

“Every intoxicant is wine and every wine is forbidden (haràm).”⁶⁸

The same tradition is narrated in the words:

(2) كل مسكرٍ خمرٌ وكل خمرٍ حرام

“Every intoxicant is wine and every wine is forbidden.”⁶⁹

(3) *Hazrat Jàbir* reports the *Holy Prophet* (peace be upon him) saying :

ما أسكر كثيره فقليله حرام

“Anything which intoxicates if taken in large quantity, its smallest quantity is also forbidden (haràm).”⁷⁰

The content of this tradition is free from any doubt and ambiguity. Its meaning is absolutely clear. It prescribes total abstinence from all intoxicants, irrespective of the degree of intoxication or of the quantity that may induce the effect of intoxication. Since our so-called modern Musalmans,

whose hearts and minds are deeply stamped with the seal of Western atheistic and agnostic philosophies, they are keen to make Islam conform to the erring demands of these concep-

tual systems and want to speak more bluntly, but as a matter-of-fact they are determined to westernize *Islam* on the name of its modernization. This attitude reflects their ignorance of the basic philosophy of *Islam*. *Islam* has anticipated these attitudes and offered viable explanations to cope with them. But the trouble with our Muslims is that they ignore the positive aspects of their religion and are easily impressed by the barrage of negative criticism launched and sustained by the vituperative Western critics. In their half-illuminated state of consciousness, they indulge in fits and bouts of unnecessary hair-splitting, they try to find a legal justification for drinking liquor in small doses. But this kind of thinking is in absolute disharmony with the practice of the *Holy Prophet* (peace be upon him) and in complete contravention of the essence of the *Qur'anic* message. Since admiration and condemnation cannot exist simultaneously, and *Qur'an* is free from all such contradictions, *Islam* cannot allow and disallow an undesirable act at the same time. It is a fact that *Islam* has cursed drink, and, therefore, the quantity in which it should be taken becomes irrelevant and immaterial to the effect of implementation of the categorical verdict. Thus, a justification of a criminal act is in itself a crime, and those who try to dilute its forbidden status are guilty of a double crime.

(4) It is reported by *Hazrat 'Umar*:

الخمر ما خامر العقل

"The wine is every liquor which is intoxicant,"⁷¹

It is clear that the prohibition of drinking is not specified or confined to any particular kind of wine. Its scope is general, comprehensive and all embracing. This means that any liquor, whether it was present in *Prophetic era* or not or whether it is manufactured now-a-days in a very refined and

sophisticated form, it undoubtedly falls within the purview of *Khamr* which is *forbidden*.

(5) It is further reported by *Sa'd bin Abi Waqqàs*:

نهى رسول الله ﷺ عن قليل ماسكر كثيره

“Holy Prophet (peace be upon him) prohibited even the smallest quantity of any liquor which could intoxicate if taken in a larger quantity.”⁷²

The same Prophetic tradition has been reported by *Hazrat Àyeshah, Hazrat 'Ali, Ibn-i-'Umar, Zayd bin Sàbit, etc*⁷³

(6) *Imàm Abu Dàud* has mentioned another Prophetic tradition which narrates :

نهى رسول الله ﷺ عن كل مسكر ومفتر

“Holy Prophet (peace be upon him) forbade the drinking of every intoxicant and any thing which creates mental confusion and disorder and interferes with normal functioning of the mind.”⁷⁴

(7) *'Abdullah Ibn-i-Mas'ud* reports :

السكر خمر

“The potential of intoxication is wine.”⁷⁵

(8) *Holy Prophet (peace be upon him)* further stated :

إن أناسا من امتى يشربون الخمر يسمونها بغير اسمها

“There would be people in my *Ummah* who will drink but would give it some other names.”⁷⁶

The same anticipation and prediction has been reported by Abu Màlik Ash'ari.

Medicinal Use of Alcohol

There are two possibilities of use of wine for medical purposes:

- (i) *Exclusive use of liquor as medicine.*
- (ii) *Use of alcoholic elements in the manufacture of medicine.*

First Use

As far as the first use is concerned, it is not permissible in *Shariàh* because *Holy Prophet* (peace be upon him) has expressly declared that *Haràm* has no curative value and liquor should not be taken as medicine.

Umm-i-Salmah reports the *Holy Prophet* (peace be upon him) saying :

- (1) *إن الله لم يجعل شفاءكم فيما حرم عليكم*

“Surely Almighty Allah has not placed your cure in those things which are forbidden (*Haràm*) for you.”⁷⁷

- (2) It is reported by *Wali Al-Hazzami* that a companion *Làtiq bin suwayd* asked the *Holy Prophet* (peace be upon him):

إنها ليست بدواء ولكنها داء

“It is not the treatment but the disease itself.”⁷⁸

- (3) It is further reported by the *Holy Prophet* (peace be upon him):

إن الله تعالى حرم الخمر سلبها المنافع

“Surely when God Almighty prohibited liquor, he took away its benefits also.”⁷⁹

Second Use

As far as the *second use* is concerned i.e., inclusion of the alcoholic element in various medicines as their manufactural and preparational requirement, there is no harm in it. The reason is that in some cases during the preparation of medicines, the alcoholic elements used in them undergo a process of chemical change. Therefore, when the medicine is finally prepared and packaged, the original intoxicating characteristic, initially possessed by those alcoholic elements, is wasted out, and they no longer retain their original form. This process of chemical action and its legal consequences can be easily understood through the instance of permissibility of *vinegar* which was manufactured through the *fermentation of wine* even during the *Prophetic* and *Caliphate* periods. *Vinegar* was expressly declared as permissible, but *wine*, in the pre-fermented form as forbidden. *Secondly*, alcohol, although may not undergo any chemical change, but it is only used as a *dissolvent* for some medicines during the manufacturing process. It is not used as a *medicine* itself. Therefore, it does not contravene the Prophetic commandment: *There is no cure in Haràm.*

Conditions

The following conditions are required to constitute the crime of *drinking liable to Hadd*:

- (i) There should be the *act of drinking*, irrespective of the quantity of drinking involved in the act.
- (ii) The drinking should be of an *intoxicant*, a liquor which potentially possesses the characteristic of intoxication. It is immaterial whether it actually creates the effect of intoxication or not.
- (iii) The act of drinking should be committed *knowingly* or *intentionally*.

- (iv) It should be taken through the *mouth* and then gulped down the throat.
- (v) It is *not a criminal act* if it is taken to *save the life* of a person.

These conditions can be studied in detail through the following references:

- (a) *Radd-ul-Muhtâr*, Vol.III, p.170.
- (b) *At-Tashri'-ul-Janâi*, Vol.II, p.503.
- (c) *At-Mughni*, Vol.X, p.330.

Punishment of Drinking

There is complete consensus on the issue that drinking is one of the crimes liable to *Hadd*.

Its *Hadd* is eighty (80) stripes according to the generally accepted view, as adopted by *Imâm Abu Hanifah*, *Imân Màlik*, *Imâm Ahmad*, their followers and *Ja'fari Jurists*.⁸¹

Imâm Shâfèi accepts *forty (40) stripes* as *Hadd* of drinking,⁸¹ but he is of the opinion that it can be enhanced to *eighty (80) stripes, forty as Hadd and forty as Ta'zeer*.⁸²

It is believed by the scholars that the derivation of the hadd for drinking is based on *Sunnah* of the *Holy Prophet* (peace be upon him) and its finalization had taken place gradually through the consensus of the companions.

Prophetic Era

(1) Initially in *Prophetic* period different punishments were awarded as *Hadd* for drinking. In a tradition reported by *Anas bin Màlik* infliction of *forty beats* has been stated to be the practice of *Holy Prophet* (peace be upon him)

عن انس رضى الله عنه ان النبي ﷺ كان يضرب في الخمر بنعال والجرید

اربعين

Hazrat Anas states "Holy Prophet (peace be upon him) used to award the punishment of forty beats, with shoes and palm branches, in the cases of drinking."⁸³

Although *Imàm Shafèi* and *Zàhiri* scholars have argued in favour of the hadd being 40 stripes on the basis of the Prophetic Sunnah, *Imàm Hasan Basri*, *Sha'bi*, *Abu Hanifah*, *Màlik*, *Ahmad bin Hanbal*, *Abu Yousuf*, *Muhammad bin Hasan Shaybàni* and others have adopted the view of 80 stripes, basing it on the argument of *consensus of companions* which is reported by *Hazrat Ali*, *Khàlid bin Waleed*, *Mu'awyah bin Abi Sufyan* and some other companions and their followers. This view enjoys the consensus of the overwhelming majority of the *Ummah*. It is also supported by *Imàm Shafèi* and *Imàm Ahmad*. It is unanimously agreed that during the period of *Hazrat 'Umar*, complete consensus of the companions was established in accepting the hadd of drinking to be *eighty stripes*. There was no difference of opinion on this issue among the companions. In many traditions, it is specifically mentioned that the *Holy Prophet* (peace be upon him) usually awarded different punishments in various cases of drinking. He did not always stick to the number of *forty lashes*.

(2) It is reported by *Hazrat Anas bin Màlik* :

أَنَّ النَّبِيَّ ﷺ ضَرَبَ فِي الْخَمْرِ بِالْجَرِيدِ وَالنَّعَالِ وَجَلَدَ أَبُو بَكْرٍ أَرْبَعِينَ

"*Holy Prophet* (peace be upon him) awarded the punishment of beating with palm branches and shoes in various cases of drinking and *Abu Bakr* used to award forty lashes."⁸⁴

The *Prophetic practice* of beating the drunkards with *sandals*, *sticks*, *shoes* and *ropes*, etc., without specification of number, has also been reported by *'Uqbah bin Haris*⁸⁵ and

'Abdur Rahmàn bin Azhar,⁸⁶ Sàib bin Yazid and Abu Hurayrah, etc.

(3) Sàib bin Yazid, reports :

كُنَّا نَوْتِي بِالشَّارِبِ عَلَى عَهْدِ رَسُولِ اللَّهِ ﷺ وَأَمْرَةَ أَبِي بَكْرٍ وَصَدْرًا مِنْ
خِلَافَةِ عُمَرَ فَنَقُومُ إِلَيْهِ بِأَيْدِينَا وَنَعَالِنَا

"We used to arrest and bring the drunkard for trial in the *Prophetic era*, during the period of *Abu Bakr* and in the early days of the period of *'Umar*, and execute him the sentence of beating with hands and shoes."⁸⁷

(4) Abu Hurayrah reports :

أَتَى النَّبِيَّ ﷺ بِرَجُلٍ قَدْ شَرِبَ قَالَ اضْرِبُوهُ قَالَ أَبُو هُرَيْرَةَ فَمِنَّا الضَّارِبُ
بِيَدِهِ وَالضَّارِبُ بِنَعْلِهِ وَالضَّارِبُ بِثَوْبِهِ

"A drunkard was brought to Holy Prophet (peace be upon him): He ordered to give him a beating. Some of us inflicted blows on him, some beat him with their shoes and some with the garments."⁸⁸

These traditions make it very clear that the *Holy Prophet* (peace be upon him) did not strictly prescribe any definite punishment, but he awarded different punishments of beats and lashes in various circumstances.

(5) The same conclusion is reported by *Hazrat 'Ali*:

قَالَ مَا كُنْتُ لِأَقِيمَ حَدًّا عَلَى أَحَدٍ فَيَمُوتُ فَأَجِدُ فِي نَفْسِي الْآصَاحِبَ
الْحَمْرُ فَإِنَّهُ لَوْ مَاتَ وَدَيْتُهُ وَذَلِكَ أَنَّ رَسُولَ اللَّهِ ﷺ لَمْ يَسْنَهُ

He says: "If I impose hadd on any one, and he (in course of punishment) dies, I would not mind, except in case of a drunkard: If he dies, I would pay indemnity for him because the Messenger of Allah (peace be upon him) has laid down no specific rule for it."⁸⁹

Holy Prophet (peace be upon him) himself did not strictly specify one punishment for drinking, but the definite *Sunnah* laid down by him was to award any hadd to the drunkard as he practised it consistently in his life time.

Post Prophetic Era

After the demise of *Holy Prophet* (peace be upon him), *Hazrat Abu Bakr* also continued the same practice. He usually awarded the punishment of *forty stripes* in conformity with one of the *Prophetic practices*. During the period of *Hazrat Umar*, people in various cities or territories were becoming addicted to the evil of drinking. They thought the punishment for drinking was nominal as compared to the state of intoxication it induced in them. This increasing tendency of drinking in some people necessitated a reconsideration of the issue. It is reported that *Khàlid bin Waleed* wrote to *Hazrat Umar* about the increasing prevalence of drinking among certain people and the minimality of punishment for drinking was inadequate to restrain them from this evil practice. *Hazrat Umar* placed this issue for consultation before the *Muhàjireen and Ansàr* who were members of Parliament of the Islamic state at that time.

(6) فسألهم فاجمعوا على ان يضرب ثمانين

"He asked them, and all of them unanimously agreed that punishment for drinking should be *eighty stripes*."⁹⁰

Since *Holy Prophet* (peace be upon him) himself did not

stick to any specific number, an implied option was given to his companions to adopt any of the *Prophetic* practices. Since the *Holy Prophet* (peace be upon him) had not laid down any strict rule for it, the *consensus* of the companions on the *fixa-tion of eighty stripes* was not against the *Prophetic Sunnah*. Moreover, it is not possible for the guided companions like the *Orthodox Calips* and other seniors that they would have adopted any decision against *Prophetic Sunnah*. The *Holy Prophet* (peace be upon him) himself had indicated that *his Sunnah and that of his orthodox caliphs both are binding for the Ummah* because the conduct of *Orthodox Caliphs* is an indirect elaboration and substantiation of the *Prophetic conduct* and nothing else.

(7) It is further reported that *Hazrat 'Umar* consulted the companions for deciding this issue in the light of pressing necessity of the social circumstances and to protect the moral values by eleminating the propensity of this immoral act of drinking. On this question, *Hazrat 'Ali* replied:

“We believe that the hadd for drinking should be eighty stripes because when a man drinks, he becomes intoxicated. and when he is intoxicated, he is likely to utter non-sense. and when he utters non-sense,

he is likely to commit the false allegation of chastity i.e.. Qazf, for which the Quràn, has specified the punishment of hadd of eighty stripes. *Therefore, in the light of this possible consequence, the punishment to be awarded for drinking should also be the maximum possible so that the punishment may become inclusive of every possibility as that of Qazf.*”

Hazrat 'Umar accepted this argument because all of the companions had also agreed on the fixation of this punishment. Thus from that time, the hadd for drinking i.e., *eighty stripes* was unanimously finalized.⁹¹

(8) It is further reported by *Anas bin Màlik*:

فلما كان عمر استشار الناس فقال عبدالرحمن بن عوف اخف الحدود
ثمانين فأمر به عمر

“When *Hazrat ‘Umar* consulted the companions on the issue. *Hazrat ‘Abdur Rahman bin ‘Auf* replied that the least minimum of the hudood is eighty stripes. Therefore, *Hazrat ‘Umar* ordered to enforce the same.”⁹²

Eighty Stripes Established Through Sunnah

An extremely significant point to be considered here is that though this decision appears to be achieved either on the basis of analogy of *Qazf* or *Istihsàn-i-Zarurat* which subsequently achieved the *consensus* of the companions, yet it is to be noted that this decision had also, in fact, been based on one of the *Prophetic* practices. It was not an arbitrary decision.

(9) It is reported by *Anas bin Màlik* :

أن النبي ﷺ أتى برجل قد شرب الخمر فجلده بجریدتين نحو اربعين

“A man who had drunk wine was brought to Holy Prophet (peace be upon him). He gave him a beating with *two palm branches* upto the number of *forty*.”⁹³

Here the basic point to concentrate upon is that *Holy Prophet (peace be upon him)* awarded the punishment to the drunkard with two combined palm stripes. It means that one beat amounted to two stripes at a time and when these beats (with two combined palm sticks) reached the number of forty, they automatically became eighty stripes. Therefore, it was, in fact, the infliction of eighty stripes. *Hazrat Abu Bakr* occasionally awarded the punishment in the same form whereas the decision of the companions expressly specifying the punishment of *eighty stripes* was neither a new decision nor a devia-

tion from the *Prophetic* practice. It was simply a continuation of the some practice in a slightly different form. *Instead of inflicting stripes with two combined palm branches, a single palm branch was separately inflicted, and so eighty strokes were applied to reach the required number.* This derivation on which we have based our argument has also been pointed out by *Imàm Nawawi* in his commentary of *Sahih Muslim*.⁹⁴ and *Mulla 'Ali Qàri* in his commentary of *Mishkàt-ul-Masàbeeh*.⁹⁵

The same point has been raised by the commentator of *Sunan Abi Dàud*.⁹⁶

In the light of this discussion, the difference between the infliction of *forty* and *eighty* stripes can be resolved. Because *forty strokes meant infliction of two combined stripes at a time and eighty strokes meant infliction of single stripes.* Both practices were indicative of the same number.

(10) That is why *Muslim*, reporting from *Hazrat 'Ali*, with reference to the incident of *Waleed bin 'Uqbah*, mentioning the practices of the *Holy Prophet* (peace be upon him). *Abu Bakr* and *'Umar* categorically says:

كُلُّ سَنَةٍ

“Each of these two practices is Sunnah.”⁹⁷

(11) Moreover, *Muslim* in the same tradition, after mentioning the infliction of *eighty stripes*, says :

وهذا أحب إليّ

“and this is more appealing and attractive to me.”⁹⁸

These words are meaningful because they possess a decisive value. If there had been a material difference or inconsistency between the *Prophetic practice* and the *practice of Haz-*

rat 'Umar, then he being a loyal companion, student and disciple of the *Holy Prophet* (peace be upon him) would never have preferred the practice of *Hazrat 'Umar* to the practice of *Holy Prophet* (peace be upon him) and declared that the practice of *Hazrat 'Umar* was more appealing and attractive to him. His declaration clearly indicates that there was no substantive difference between the two practices. *It was only a question of procedure adopted by Hazrat 'Umar and other companions to achieve the same objective.*

This interpretation is supported by many traditions. We can, therefore, conclude that the traditions indicating the infliction of 40 stripes also impliedly signify the punishment of 80 strokes.

(12) It is reported that the stripe with which lashes were inflicted on *Waleed bin Uqbah* was *two-fold*

كان له طرفان فكانت الضربة ضربتين

“The *stripe two-fold*. Therefore, *one beat*, in fact, included *two beats*.”⁹⁹ (13) - *Muhammad bin 'Ali's* narration also supports this view :

انّ علياً جلد الوليد اربعين بسوط له طرفان

“*Hazrat 'Ali* applied *forty lashes* to *Waleed* with a *two-fold stripe*.”¹⁰⁰

(14) *'Urwah* reports the same view in the words:

انّ علياً جلد الوليد بن عقبة بسوط له زببان اربعين جلدة في الخمر قال وذلك في زمن عثمان بن عفان

“*Hazrat 'Ali* applied *40 lashes* to *Waleed bin 'Uqbah* for drinking with a *two-fold stripe*. This took place during the

period of *Hazrat 'Usmàn bin 'Affàn.*"¹⁰¹

This narration has made the situation very clear, because the practice of 40 lashes with two-fold stripe is also proved to be present during the Caliphate of Hazrat 'Usmàn, even after the establishment of the consensus of all the companions in the period of Hazrat 'Umar.

Moreover, the lashes are reported to be applied by Hazrat 'Ali, who had already given his opinion in favour of 80 stripes.

It does not appeal to reason that after his own argument, which ultimately became the *Ijmà' of Sihàbah*, he himself deviated from it. Therefore, the only way out is to accept the inescapable fact that the infliction of 40 strokes with a two-fold stripe, undoubtedly, meant the execution of 80 stripes. The only difference between various reported practices was the difference of the *norm of infliction*, and not of *substance* and *quantum*. All the companions unanimously agreed on the infliction of 80 stripes, while some of them awarded it with a one-fold stripe and others with a two-fold stripe. Whenever the punishment for drinking was inflicted with a two-fold stripe, it was reported to be 40 strokes. And whenever lashes were applied with a one-fold stripe, they were counted upto eighty. In fact, in both practices, the same rule of eighty beats was adopted.

Prophetic Practice of inflicting 80 stripes

The *Holy Prophet* (peace be upon him) himself sometimes awarded 40 strokes which, in fact, amounted to 80 beats.

(15) It is reported by *Abu Sa'eed*:

ان رسول الله ﷺ ضرب في الخمر بنعلين اربعين فجعل عمر رضى الله عنه بكل نعل سوطا

... *et* (peace be upon him) inflicted 40 beats separately with *two shoes* and *'Umar* simply replaced every beat of shoe with a lash."¹⁰²

This *Prophetic* practice has unambiguously explained the fact that the sentence awarded by the *Holy Prophet* (peace be upon him) for drinking was *80 beats*.

(16) Another important and remarkable tradition has been reported by *Hazrat 'Ali*, which expresses the *Prophetic* conduct in this regard:

انه جلد رجلاً في الخمر ثمانين

"Holy Prophet (peace be upon him) applied *80 lashes* to a person for drinking."¹⁰³

(17) *'Abdullah bin 'Amr* reports that the *Holy Prophet* (peace be upon him) said :

من شرب بسقة خمر فاجلدوه ثمانين

"Whosoever drinks even a single sip, execute him *80 lashes*."¹⁰⁴

The same view has been expressed by *Imàm Tabràni*.¹⁰⁵ *Imàm Tahhàwi* has also mentioned another *Mauqoof hadith* prescribing *80 lashes* as the *hadd for drinking*, which is supported by a number of other reliable traditions.

In the light of the whole discussion it has become clear that *Hazrat 'Umar*, other *Companions* and the *Orthodox Caliphs* had neither agreed to the decision of *80 lashes* without knowing the *Prophetic* conduct nor had they deviated from early practices.

That is why this matter enjoyed the *total consensus* of the *companions* which is still binding on the *Ummah* and cannot be repealed through *Ijtihad* because *Holy Prophet* (peace be

upon him) himself has ordained:

(18) عليكم بستورِ وسنة الخلفاء الراشدين المهديين

“You should follow my conduct and the conduct of the Orthodox guided Caliphs.”¹⁰⁶

The crime of drinking is so grievous in *Shariàh* that *Holy Prophet* (peace be upon him) declared the *death sentence* on its repetition at *fourth* instance.

(19) It is reported by *Hazrat Mu'awiyah* that *Holy Prophet* (peace be upon him) said :

إذا شرب فاجلدوه ثم إذا شرب فاجلدوه ثم إذا شرب الثالثة فاجلدوه ثم
إذا شرب الرابعة فاضربوا عنقه وفي رواية فاقتلوه

“If a person drinks wine, flog him, if he repeats it, flog him again, if he repeats it the third time, flog him once again but if he repeats it the fourth time, then cut his head off, and in another tradition he said decapitate him.”¹⁰⁷

6. APOSTASY

Definition

Apostasy is known as *Irtidàd* (ارتداد) or *Riddah* (ردة) which literally, means *looting*. Technically, *Irtidàd* is known as “giving up and deviating from Islam.” These words have been derived from the root *radd* (رد) which, alongwith other connotations, means “to retract, to retire, to withdraw from and fall back from.” In the term of Islamic legal science, it is defined as “*Retraction from Islam by a person who professes Islamic faith, either through any act of speech or deed or faith.*” Such person is said to be an Apos-

late (مرتد) .

There are two basic elements which constitute the crime of apostasy :

- (i) deviation from Islam after being a muslim.
- (ii) mala-fide intention¹⁰⁸.

Deviation can be in either of the *three* following forms:

- (a) deviation through utterance
- (b) deviation through action
- (c) deviation through faith

Punishment

Apostasy is liable to *death punishment*: A *Qur'anic* provision clearly supports it :

وَإِنْ نَكَثُوا أَيْمَانَهُمْ مِنْ بَعْدِ عَهْدِهِمْ وَطَعَنُوا فِي دِينِكُمْ فَقَاتِلُوا أئِمَّةَ الْكُفْرِ
إِنَّهُمْ لَا أَيْمَانَ لَهُمْ لَعَنَهُمُ اللَّهُ يَنْتَهُونَ ●

“But if they break faith after pledging it and ridicule your religion, then decapitate the leaders of disbelief so that they may be restrained from this act, for they have no regard for their pledged word.”¹⁰⁹

Moreover, the *Holy Prophet* (peace be upon him) also expressly articulated the punishment of *apostasy* at numerous occasions :

(1) It is reported by *Hazrat 'Abdullah Ibn-i-'Abbàs* that *Holy Prophet* (peace be upon him) said :

من بدل دينه فاقتلوه

“Whosoever changes his religion (of Islam) and deviates from it, award him the death sentence.”¹¹⁰

(2) *Hazrat 'Abdullah bin Mas'ud* further reports the *Holy Prophet* (peace be upon him) saying:

لا يجل دم رجل مسلم يشهد ان لا اله الا الله واني رسول الله الا باحدى
ثلاث الشيب الزانى والنفس بالنفس والتارك لدينه المفارق للجماعة

“The blood of any Muslim who certifies the *Tauhid* and the *Risalah* should not be shed except in either of the following three:

- (a) the married adulterer
- (b) the murderer
- (c) the man who deviates from the religion of Islam and gives up the group of Muslims.”¹¹¹

(3) It is reported from *Mu'az bin Jabal*, during his tenure as a *Judge* in *Yaman*, that a man embraced Islam and then deviated from it and became a *Jew*. He ordered:

لا أجلس حتى يقتل قضاء الله ورسوله فامر به فقتل

He said, “I would not rest unless he is executed to death. This is the decision of Almighty Allah and His Prophet ((peace be upon him))”. Then he ordered his execution and the *Apostate* was ultimately decapitated.¹¹²

(4) Another significant incident of the *Prophetic* period is narrated in books of *Hadith* with an extremely reliable chain. It is reported by *'Abdullah Ibn-i-'Abbàs* that a concubine of a blind man constantly abused the *Holy Prophet* (peace be upon him). The master prohibited her but she kept on abusing the *Holy Prophet* (peace be upon him). When all his efforts to stop her vituperative exercise failed, he murdered

her during the night.. *Her act of abusing the Holy Prophet (peace be upon him) was a clear deviation from Islam. Therefore, the murder of the concubine was legally justified: it had no criminal implications. When the Holy Prophet (peace be upon him) came to know about the murder, he said to the people: "Be witness to it that this murder is not punishable or avengable."*¹¹³

This declaration of the *Holy Prophet* (peace be upon him) certified the decapitation of a woman who had turned apostate on account of her vilification of the *Apostle of God*. Since an *apostate* in Islam is liable to *death punishment*, therefore, her master's act of murder was declared right and lawful.

The basic concept of apostasy is clearly spelled out in *Qur'an*. It states that any man who commits an act of verbal, actual or theological deviation from or negation of any of the basic tenets and fundamentals of Islam, is deemed to be non-believer:

وَمَنْ يَرْتَدَّ مِنْكُمْ عَنْ دِينِهِ فَيَمُتْ وَهُوَ كَافِرٌ فَأُولَئِكَ حَبِطَتْ أَعْمَالُهُمْ فِي الدُّنْيَا
وَالْآخِرَةِ وَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ●

"The works of those among you who turn back from their faith and die in a state of disbelief shall be vain in this world and the next. These are the inmates of the fire and they shall live there for ever."¹¹⁴

Conditions

The following conditions declare an act as an *Apostasy liable to death punishment*:

(i) Muslims

The person must be *initially a Muslim* because the devia-

tion of a *non-Muslim* from his religion to any other religion does not amount to *apostasy*.

(ii) **Adult**

He should be *adult* and not a minor because a minor's act of deviation does not constitute *apostasy* in the legal sense.

(iii) **Sane**

He should be *sane*. If he is not a normal person, his deviation does not fulfil the requirements of *apostasy*.

(iv) His deviation should be *voluntarily* conditioned. It should be the expression of his free will, choice or volition and should not be evinced or elicited by force or compulsion. If a Muslim deviates from his religion under coercion, his act does not tot up to *apostasy* liable to death punishment because God Almighty Himself has declared:

مَنْ كَفَرَ بِاللَّهِ مِنْ بَعْدِ إِيمَانِهِ إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ وَلَكِنْ مَنْ
شَرَحَ بِالْكُفْرِ صَدْرًا فَعَلَيْهِمْ غَضَبٌ مِنَ اللَّهِ وَهُمْ عَذَابٌ عَظِيمٌ

“Whoso disbelieves in Allah after he has believed, except the case of one who is forced to make a declaration of disbelief while his rest rests securely in faith, but one who opens his mind wide to disbelief, on him is Allah's wrath and he shall have a grievous punishment.”¹¹⁵

This verse clearly excludes the deviation under coercion from the scope of the act of *apostasy*. Therefore, this type of situation is exempted from the punishment of death. But all other forms of deviation committed freely and voluntarily fall within the purview of *apostasy*. This *Qur'anic* verse was revealed in the context of 'Ammār bin Yàsir who was coerced

to utter the word of disbelief and thereby deny the existence of God. God exempted the act of forced denial from apostasy and clarified the situation in the interest of contemporary response for all times to come.¹¹⁶

Qur'ân has further explained the consequence of voluntary deviation in the words :

وَمَنْ يَتَّبِعْ غَيْرَ الْإِسْلَامِ دِينًا فَلَنْ يُقْبَلَ مِنْهُ

“Whoso seeks a religion other than Islam, it shall not be accepted from him.”¹¹⁷

In this verse, the word “seeks” indicates *voluntary* and *free deviation* from Islam and exempts *coerced deviation* from the scope of *apostasy*.

Question of Sex

(v) There is a difference of opinion among Muslim Jurists on this issue. According to *Imâm Mâlik*, *Shâfe'i* and *Ahmad bin Hanbal*, there is no discrimination on the basis of *sex*. Both female and male apostates deserve equal punishment. But *Imâm Abu Hanifah* disagrees with this view. He believes that a female apostate is not liable to death punishment.¹¹⁸ The three schools have based their view on a tradition reported by ‘*Abdullah Ibn-i-‘Abbàs*:

تقتل المرأة المرتدة

“A female apostate should also be sentenced to death.”¹¹⁹

Another supporting argument has been quoted by *Dâr Qutni*:

ان ابابكر رضى الله عنه قتل امرأة مرتدة في خلد فتنة

“*Hazrat Abu Bakr* decapitated a woman who had turned apostate during his Caliphate.”¹²⁰

There is another *prophetic* tradition with a weak chain reported by *Hazrat Jàbir* :

ان امرأة يقال لها أم مروان ارتدت فأمر النبي ﷺ بان يعرض عليها
الاسلام : فان تابت وإلا قتلت. فأبى ان تسلم فقتلت

"A Muslim woman had become an apostate. The Holy Prophet (peace be upon him) suggested that she should again be invited to accept Islam. If she sincerely repents and re-embraces Islam, She should be forgiven. If she rejects it, she should be executed. Accordingly, she was offered to accept Islam but she rejected it. As a result of her persistence in her act of apostasy, she was hanged to death."¹²¹ Similar

instructions are reported to have been given by the *Holy Prophet* (peace be upon him) to *Hazrat Mu'áz bin Jabal* at the time of his appointment at *Yaman* which clearly indicated that there was no discrimination between the male and the female for the executing of the *death punishment* for *apostasy*.¹²²

Second View

Imàm Abu Hanifah, however, believes that female should not be murdered for *apostasy* but she should be *imprisoned*. During her confinement she should be made repeated offers of re-embracing Islam, and during this process she would either accept Islam or die a natural death.¹²³

Imàm Abu Hanifah, has based his view on a *Prophetic tradition* which prohibited the *decapitation* of woman.¹²⁴

Imàm Abu Hanifah does not rely on the *Prophetic* tradition mentioned earlier on account of the weakness of its chain of narrators.

Conclusion

My humble view in this respect is that no discrimination

should be permitted between male and female, because most of the authorities support the same idea. Moreover, if at all she has to die even during the confinement in case of rejecting the repeated offers, then why the same could not be done as a punishment.

However, she can be given more chances of re-embracing Islam, during the imprisonment, but after her final rejection, she should be decapitated without putting her in a long physical trouble of life imprisonment.

Consequences

In addition to the execution of punishment, *apostasy* is followed by *four* other legal consequences.

(i) *Annulment of conjugal relations*: If any of the couple turns an *apostate*, their marital contract is automatically annulled which means a dissolution of the marriage. If, however, the apostate re-embraces Islam and both the parties wish to revive the marital relationship, they are supposed to enter into a new contract of marriage.

(ii) *Deprivation of the right of inheritance*: The apostate cannot inherit the property of any of his muslim relatives.

(iii) *Deprivation of the right of guardianship* : An apostate cannot act as a guardian of his own minor children for their marriage. This right is enjoyed only by Muslim parents.

(iv) *Deprivation of the right of property*: There is a difference of opinion among Muslim Jurists on this issue. *Imam Mâlik, Shâfe'i and Ahmad bin Hanbal* do not agree to this view. They believe that a person does not forfeit the right of ownership through the commission of *apostasy* and nor he can be restrained from further acquisition of property. If he re-enters the fold of *Islam*, he can repossess all of his former property, but if he dies an apostate, or is murdered during apostasy, his property would be taken over by the *Islamic*

state.¹²⁵

Hanfi View

Imàm Abu Hanifah, however, believes that he *forfeits* his *right to property* also as a consequence of his act of apostasy. In case of his death or murder during this state, his property passes on to his Muslim relatives,¹²⁶ and the property he has piled up after the commission of apostasy would be claimed by the Islamic state. This is a form of *derivative punishment of apostasy*.¹²⁷

Justification of Punishment

Some scholars and critics of Islam, who are over-impressed by the canker of Westernization, have tried to generate the falso impression that the punishment for apostasy is equivalent to an unjustified suppression and eventual termination of basic human liberties. In their craze for Westernized sophistication and skin-deep elegance they have condemned the Islamic punishment of apostasy in the *Billingsgate* style. While it inflicts fractional damage on the time-tested principles of Islam, it certainly reflects not only the meanness of their mentality but also their deep-rooted and black-sooted animus against Islam and its ever-green message. They consider this punishment repugnant to the spirit of "لَا إِكْرَاهَ فِي الدِّينِ" (there is no compulsion in Islam). They believe that the punishment of apostasy contradicts and violates this fundamental tenet of Islam. Their argument is that coercion and compulsion are not permissible in Islam but the punishment of apostasy is an absolutely coercive and compulsive act and curtails the religious liberty of people. They insist that there is a basic disharmony between the message of Islam and this form of punishment. This view is obviously based on prejudice. If one takes off jaundiced spectacles and examines the Islamic punishment for apostasy dispassionately, it may not be a *Herculean* task to justify the punishment. The justifica-

tion can be easily understood from the lines given and discussed below:

Philosophy of Non Violence In Islam

(i) The *Qur'anic* verse *لَا إِكْرَاهَ فِي الدِّينِ* has been misunderstood and misinterpreted by the modernists who are against the validity of this legal punishment. This verse actually facilitates the practice of Islam for the Muslims. It chiefly signifies that there is no inconvenience, bigotry and hardship in practising Islam. It makes the understanding and implementation of the commandments of *Allah* and *His Prophet easier and smoother and aims at the elimination of all unsavoury elements that one may come across in practising the religion. Whenever there is any difficulty, a state of pressing compulsion and discomfoting situation, the normal commandments are sometimes suspended, exemptions are granted, and concessions are given to the people to meet the unpleasant necessities of the times. So that Muslims do not feel the pressure of circumstances in practising the laws of Shari'ah.* This *Qur'anic* verse has no link with the right of deviation from Islam or the punishment to be awarded for it. So the criticism of these scholars is either a case of misplaced judgement or an exercise in the rhetoric of malice and baseless propaganda.

(ii) If at all we are supposed to apply this *Qur'anic* verse to *non-Muslims*, it only signifies that they should not be forced to embrace Islam. If there are non-Muslim minorities in an Islamic society, it is the obligation of the Islamic state to provide a guarantee for protection of their religion, life and property. They are neither forced nor supposed to embrace Islam only for the reason that they are living in the dominion of Islam. Islamic history, right from the *Prophetic era* to the *20th century*, is witness to the fact that the *Muslim rulers in Islamic states* have never compelled *non-Muslim* minorities to accept

Islam. Because to compel non-Muslim to embrace *Islam* is essentially against the humane policy of Islam. This is the second implication of the verse, which is being wilfully distorted and misrepresented by the critics.

(iii) Islam ensures the betterment of *Muslims* through the protection of their religion also. Islam repeatedly stresses that the comprehensive progress and prosperity of the Muslims depend exclusively on following the teaching of Islam both in letter and spirit. According to *Shari'ah* deviation from Islam is equated with destruction of human life since Islam cannot passively watch the crumbling and collapsing spectacle of human decimation. It prescribes such severe punishments for any act that may counter the process of the preservation of basic human values. If *deviation* is the real *destruction*, the punishment of death is not too severe for apostasy because no system of belief, that claims to be a complete code of life, can afford the erosion and annihilation of its own moral and ideological institutions. When a man embraces Islam, he becomes a Muslim. This fact of acceptance vests two kinds of right in him.

(a) Rights of religion to be observed by the individual through following and practising the teachings of *Shari'ah*.

(b) Rights of the Muslims over their religion in the form of laws which are formulated by the *Shari'ah* to protect the benefits of the individual concerned.

It is one of the *primary duties* of Islam to fulfil these rights of the individual through a *guarantee of protection of his benefits*. Since it is an essential article of Islamic faith that the true benefit of a Muslim is in scrupulously acting out the tenets of Islam, it therefore, provides *conscious checks and restraints to eliminate the chances of deviation from it*. Since apostasy is a *disadvantageous and destructive act*, the imposition of such a severe punishment is actually in the *benefit of*

the *individual* himself who may be restrained by the severity of the punishment to paddle against his own *salvation*. The harshness of the punishment serves as an incentive for the individual to follow the teachings of Islam.

(iv) *Islam* declares that the *protection* of the *religion* of the *Muslims* as well as of their *life, property, reputation, prestige, business* etc., is the *primary duty* of the *state*. An individual being a muslim, becomes, through his express or implied declaration of faith, a *part and parcel* of *Islamic society* and therefore, his *religion* is no longer a *personal affair* which could not be interfered with by the *state*. Therefore, the *enforcement* of *punishments* to protect the *faith* of the *Muslims* is in fact a *public right* and not a *private* one. Because, it is the legal and moral duty of the state to check the negative acts of the individuals and to encourage positive tendencies which may result in both individual and collective happiness.

(v) *Apostasy* is in fact the negation of the *ideological basis* of an *Islamic state* which is the ultimate reason of the protection of its integrity, solidarity and prosperity. Therefore, it is considered *similar to sedition* with the only difference that *sedition operates at the religious and ideological level*. If *political liberty* that may endanger the *solidarity of the state* and act against *political cohesion of its people*, cannot be permitted for the benefit of the society, similarly *unrestrained religious liberty* can not be given to the *Muslims* to become *apostates* which ultimately threatens the *ideological solidarity and integrity of the state*.

(vi) There are, however, no checks placed on the *non-Muslims*. They are at liberty to stick to their former religion or deviate from it. But it is very clear that a *non-Muslim* should not be forced to become a *Muslim*. And the most significant and remarkable aspect of *Islamic Legal justice* is that if a *non-Muslim embraces Islam under coercion*, but afterwards he

deviates from it, his deviation would not amount to apostasy and he would not be liable to hadd i.e, death punishment.

In the light of these arguments it is not fair to claim that the imposition of the capital punishment is cruel, oppressive and inhuman, as it ensures the ideological integrity of the individual as well as of the society. It is neither against *Qur'an* nor against the *principle of human liberty*. The only condition for the imposition of *hadd of apostasy* is that before executing the punishment the apostate should be provided a fair chance to re-embrace *Islam*. His reconversion may be achieved through rational argumentation in favour of the truth of *Islam*; it may be achieved through a clarification of his doubts which have compelled him to diverge, it may be achieved through intellectual satisfaction so that he is mentally convinced about the truth and universality of Islam. If he rejects the offer after all these persuasive and explanatory measures, he can be confined and imprisoned and given some kind of physical punishment coupled with the threat of death. All this is done to discourage his act of straying, so that like a temporarily lost lamb he may return eventually to the pen of peace and security. This persuasion or physical imprisonment is of varying nature: it may spread *over three days, twenty days or possibly a month*. These *three options* represent *three different schools of law* and the matter is discussed at length in various books of *Hadith and Islamic Law*.¹²⁸

(7) SEDITION:

Definition

In Arabic terminology it is known as *بغى* which literally means to *demand anything*, but in its general sense it means *to make an attempt to get any prohibited thing with oppression and aggression*.

Muslim Jurists have defined sedition in various ways

Hanafi View

According to *Hanafi* view *baghawat* (sedition) is to come out illegally in disobedience against the lawful head of the Islamic state.²⁰

Maliki View

According to *Maliki* view, the disobedience with the use of force and power against lawful orders of the head of an Islamic state is known as *baghawat*.²¹

Shafei View

According to *Shafei* view, it is the use of force against the lawful head of the Islamic state, or a group of them, and power is used by a rebel. The punishment of the rebellion is the same as the punishment of the rebellion against the head of the Islamic state.²²

Hanbali View

The *Hanbali* view is that the rebellion is the use of force against the lawful head of the Islamic state, or a group of them, and power is used by a rebel. The punishment of the rebellion is the same as the punishment of the rebellion against the head of the Islamic state.²³

Conditions

There are some conditions which must be fulfilled for the rebellion to be considered as *baghawat*.

1. The rebellion must be against the lawful head of the Islamic state.
2. The rebellion must be against the lawful orders of the head of the Islamic state.
3. The rebellion must be against the Islamic state.

Prohibition and Punishment

The act of *Sedition* is expressly forbidden in *Qur'an* :

قُلْ إِنَّمَا حَرَّمَ رَبِّيَ الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَّنَ وَالْإِثْمَ وَالْبَغْيَ بِغَيْرِ الْحَقِّ

"Tell them: My Lord has only for-bidden indecencies, overt and hidden, and all manner of sin and *sedition* that is unlawful."¹³⁴ The punishment of *sedition* is *death* or *decapitation*, unanimously agreed upon by all Muslim schools of Law. *Qur'an* further states in reference to the punishment of *sedition*:

وَإِنْ طَائِفَتَيْنِ مِنَ الْمُؤْمِنِينَ فَاصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ

"If two parties of believers fall out with each other and start fighting, make peace between them. If one of them transgresses against the other, fight the one that transgresses until it submits to the command of Allah."¹³⁵

The act of *sedition* is declared to be *fitnah* (discord and disharmony) and it is also regarded as a crime more heinous than *murder*. *Qur'an* states:

وَالْفِتْنَةُ أَشَدُّ مِنَ الْقَتْلِ

"Discord is more dangerous than murder."¹³⁶

At another place in the *Holy Qur'an*, it has been clearly enunciated:

وَقَاتِلُوهُمْ حَتَّى لَا تَكُونَ فِتْنَةٌ

"and fight them until the discord is completely eliminated."¹³⁷

Holy Prophet (peace be upon him) at many occasions explained the legal consequences of *sedition*. ‘*Abdullah bin ‘Umar* reports the words of the *Holy Prophet* (peace be upon him).

من حمل علينا السلاح فليس منا

“Anyone who takes up arms against us is not from us.”¹³⁸

Another *Prophetic* tradition is reported by *Hazrat Abu Hurayrah*:

من خرج عن الطاعة وفارق الجماعة ومات فميتته ميتة الجاهلية

“Whoso disobeys the head of an Islamic state and upsets the unity of the *Ummah* by breaking out of it, and dies in this condition, his death is an un-Islamic death.”¹³⁹

Another tradition reported by ‘*Urfajah bin Shurayh* expressly prescribes the punishment of *sedition*:

من اتاكم وامركم جميع يريد ان يفرق جماعتكم فاقتلوا

“When you agree on the headship of a person and then somebody comes to you and creates disruption, dissonance and dissension in your group, decapitate such a person.”¹⁴⁰

It is also reported by *Hazrat Umm-i-Salmah*, one of the wives of the *Holy Prophet* (peace be upon him) that he said with reference to ‘*Ammar bin Yàsir*:

تقتل عتاراً الفئدة البالغة

“A seditious group will murder ‘*Ammar*.”¹⁴¹

In the *Prophetic* tradition, a group of persons who had openly revolted against the *Caliphate of Hazrat ‘Ali* is

declared to be the seditious group.

·*Urfajah bin Shurayh* has reported another tradition of the *Holy Prophet* (peace be upon him) which clearly prescribes the punishment of sedition:

انه سيكون هنات وهنات فمن اراد ان يفرق امر هذه الامة وهي جميع
فاضربوه بالسيف كائنا ما كان

“Surely there will be many discords and dissensions after me. Therefore, after the agreement of my Ummah on any issue, if anyone tries to generate disruption and disunity in its ranks, decapitate him with the sword, whosoever he may be.”⁴² Since the act of *sedition* is an act against the political, social and religious unity of the society, it needs to be curbed with a heavy hand. Since it is also an infectious and contagious evil, it should not be allowed to raise its ugly head. Besides, its unnecessary jauber and babel is a source of extra tension for the whole community.

Qisas And Diyat

The crimes of *Qisàs* and *Diyat* are normally known as (*Al-Janàyat*). These are in fact the crimes against persons. The crimes of *Qisàs* are primarily classified into two kinds:

- (1) *retaliation for life* (قصاص فى النفس)
- (2) *retaliation for organs* (قصاص فى الاعضاء)

The crimes against the life of a person fall within the first kind of *Qisàs* and those which do not affect the life but may injure the organs of a person fall within the scope of the second kind.

Prohibition of Murder and Sanctity of Life

God Almighty has provided human beings with the sanctity and security of their lives by prohibiting the act of murder. *Qur'àn* states:

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ

“Don't murder anybody (or take away any life) which is forbidden by Almighty Allah except for lawful purpose.”¹⁴³

It is reported by *Abdullah Ibn-i-Mas'ud* that *Holy Prophet* (peace be upon him) explained the nature of the *murder for lawful purpose*, as mentioned in the *Holy Qur'àn*:

لا يجل دم امرى مسلم يشهد ان لا اله الا الله وانى رسول الله باحدى
ثلاث : الثيب الزانى ، والنفس بالنفس والتارك لدينه المفارق للجماعة

..The murder of any Muslim who professes firm faith in Tauheed and Risalah of the Holy Prophet (peace be upon him) is not permissible except for either of these three:

- (a) a married adulterer (he should be stoned to death) .
- (b) a man who commits wilful murder (he should be awarded death sentence in retaliation).
- (c) an apostate who turns back from his religion and creates disunity in the ranks of the Muslim society (he should also be awarded the death sentence).¹⁴⁴

The *murder of children*, even on account of an apprehension of the possibility of their hunger or starvation, is expressly forbidden by the *Qur'an*:

إِنْ قَتَلْتَهُمْ كَانَ خِطَاً كَبِيراً

..Surely their murder is a stupendous sin.¹⁴⁵
clearly states at another place:

وَمَنْ يَقْتُلْ مُؤْمِناً مُتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِداً فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ
وَلَعْنَهُ وَأَعَدَّ لَهُ عَذَاباً عَظِيماً

..Whoso kills a believer deliberately, his reward shall be hell, wherein he shall abide, and Allah will be annoyed with him and will cast him away and will prepare for him a great punishment.¹⁴⁶ It further states:

أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا
وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا

“Whoso murders a person without lawful right or creates disorder in the land, it is as if he has killed all mankind; and whoso helps one to live, it is as if he has given life to all mankind.”¹⁴⁷

Holy Prophet (peace be upon him) declared murder a grievous, heinous and unparalleled sin, *Barà*, one of his companions reports him saying:

لزوال الدنيا أهون على الله من قتل مؤمن بغير حق

“To destroy the whole of the world is far more trivial and inconsiderable for God Almighty than the unlawful murder of a Muslim.”¹⁴⁸

Abdullah bin 'Amr bin-al-'Às reports the *Holy Prophet* (peace be upon him) saying:

من قتل معاهدًا لم يرح رائحة الجنة

“Whoso murders a non-Muslim, who has been guaranteed safe conduct by the state, shall not inhale even the smell of paradise.”¹⁴⁹

Punishment of Qisas

The punishment prescribed for the crime of murder in the form of Qisàs is the *death punishment* in order to balance the heinousness of crime and punishment. It is expressly stated in *Qur'an*:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ أَلْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأَنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعْ بِالْمَعْرُوفِ وَأَدَاءً

إِلَيْهِ بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنِ اعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

“O believers, equitable retribution in the matter of the murdered is prescribed for you: exact it from the free if he is the offender, from the slave if he is the offender and from the woman if she is the offender. If the offender is granted some remission by the heir of the murdered, the agreed penalty should be equitably exacted and should be handsomely discharged. This is an alleviation from your Lord and a mercy. Whoso transgresses thereafter, for him there is a grievous chastisement. There is safeguarding of life for you in the law of retribution O men of understanding that you may have security.”¹⁵⁰

A RETALIATION FOR LIFE:

In the light of the two verses cited above, the Islamic concept of Qisàs appears to be based on the following characteristics:

(1) Equality

It means that Allah has framed this law on the basis of equity and equality because, according to this law, life is taken for life. The concepts of free man for a slave, and woman for a woman, indicate the idea of equality in awarding the punishment of Qisàs.

(2) Pardon or Remission:

These verses have also granted to the heirs of the murdered the right of pardoning the murderer or remitting the punishment. That is why it is declared to be a companionable offence.

(3) Blood Money:

The punishment of *Qisàs* is also provided with a substitution of *blood money*. This provision was not available in the revealed laws of *jews* and *Christians*. *The Holy Prophet* (peace be upon him) confirms this fact in his own words:

كان في بني اسرائيل القصاص ولم تكن فيهم الدية

“There was the provision of *Qisàs* in the laws of B but there was no concept of blood money among them.”¹⁵¹

(4) Security of Life

Qur'anic law provides mankind with sufficient security of life because, taking anybody's life means to give one's own life. *Qur'an* clearly enunciates its view in support of the sanctity and preciousness of human life:

وَلَكُمْ فِي الْقِصَاصِ حَيوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

“There is safeguarding of life for you in the law of re Retribution O men of understanding, that you may have security.”¹⁵²

(5) Guardianship:

This is the only crime which gives the right of claim of punishment to the guardians and successors of the affected party. The *death* of the person does not cancel his right of claim of punishment. After his death, it operates through his heirs and successors.

Kinds of Murder

Islamic Law recognizes five kinds of murder:

(i) Qatl-i-'Amad:

Wilful/intentional homicide (homicide amounting to murder)

Definition

"when the perpetrator wilfully kills a person without any lawful right, with an actual or potential weapon of murder, it is known as Qatl-i-'Amad (القتل العمد)."¹⁵³

This crime comprises three elements:

(i) The murder should be adult and sane with an intention to kill the person.

(ii) The murdered person should be innocent

This crime comprises three elements:

(i) The murder should be adult and sane with an intention to kill the person.

(ii) The murdered person should be innocent, free from the charge of murder.

(iii) The act of murder should be committed with a weapon which carries the potential of inflicting the death injury.

Punishment:

Qur'an has prescribed ethereal as well as earthly punishment for this crime. The *first punishment* is indicated in the verse:

وَمَنْ يَقْتُلْ مُؤْمِنًا مُتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ
وَلَعْنَهُ وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا

"Whoso kills a believer deliberately, his reward shall be hell wherein he shall live and Allah will be annoyed with him and will cast him away and will prepare for him a great punishment"¹⁵⁴ And the *earthly punishment* which is to be awarded

by the *state* is the *Qisàs*. *Qur'an* state the punishment in these words:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ

“O believers, the law of retribution has been prescribed for you in cases of murder.”¹⁵⁵

At another place, it is again prescribed with reference to *Taurat*:

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ

“And we made this law obligatory on them in case of murder that life should be taken for life.”¹⁵⁶ It is reported by *Anas bin Màlik* that a *Jew* crushed a girl's head between two stones. She was asked to name and identify the person which she did. The *Jew* was not only caught but he also made the confession of his guilt. The *Holy Prophet* (peace be upon him) ordered his head to be smashed with stones.¹⁵⁷

Another incident of a *Jewish woman* is reported by *Bukhàri* and *Muslim* who had fed poisoned meat to the *Holy Prophet* (peace be upon him) and to one of his companions, *Bashar bin Barà'*. The companion died as a consequence of poisoning: *Holy Prophet* (peace be upon him) inflicted the *death punishment* on her due to the death of the companion.¹⁵⁸

Imàm Nawawi elucidates some legal points relating to the retribution and punishment of murder in the light of the incident quoted by *Anas bin Màlik*.

(a) A male can be killed in retribution for the murder of a female.

- (b) Intentional murder can be retaliated in the same form (*القتل المتماثل*).

However, *Imam Abu Hanifah, Sha'bi, Imam Nakh'i* and a few others do not agree with this explanation. The detailed discussion of this point has been given earlier.

- (c) The statement of the dying man carries substantial weight to indicate the murderer but this alone is not sufficient to establish the crime of murder liable to *Qisàs*. It must be supported by the confession of the criminal or the evidence of two reliable witnesses.

- (d) The circumstantial evidence should completely endorse the statement of the dying man and in no way believe his confession.

- (e) The murderer is deprived of the right of inheritance and bequest and, moreover, he is required to perform the expiation also.¹⁵⁹

(ii) *Qatl Shib'h-al-Amad*

Quasi-Intentional Homicide (Homicide not amounting to wilful murder)

Definition:

“It is a semblance of wilful murder where the perpetrator with the intention of killing the person without lawful right strikes him with something which is neither an actual nor a potential weapon of murder, for example to beat with a stick or hit with a pebble etc., as a result of which the man dies.”¹⁶⁰

Punishment:

- (i) The punishment for *Qatl Shib'h-ul-Amad* (*القتل شبه العمد*) is expiation in the form of fine, that is, one hundred camels payable within three years. This mode of

punishment is based on *Prophetic tradition* reported by 'Abdullah Ibn-i-'Abbàs.

من قتل في عميه بحجر او عصا او سوط فهو دية مغلظة في اسنان الابل

“Who so was murdered with a pebble or a stick or a rod, his death is liable to the blood money i.e., the fine in the form of camels.”¹⁶¹

(ii) *Imàm Ahmad bin Hanbal* and *Imàm Abu Dà'ud* have also reported a *Prophetic tradition*:

قتل شبه العمد مغلط ، كقتل العمد ولا يقتل صاحبه

“The blood money or fine for *Shib'h-ul-'Ahmad* is like the blood money of wilful murder (*Qatl-i-'Amad*) but the perpetrator would not be sentenced to death.”¹⁶²

Another *prophetic tradition* in the same context is reported in *Musnad Ahmad*, *Sunan Abi Dà'ud* and *Nasà'i* in which the *Holy Prophet* (peace be upon him) has expressed the same law.¹⁶³

It is further to be noted that the murderer in this case is deprived of inheriting the property of the slain.

(iii) **Qatl-i-Khata:**

Homicide by negligence or mistake (murder as a result of misadventure).

Definition:

If a man commits an act which is basically lawful, for example, shooting an animal for sport, but instead he hits an

innocent person who ultimately dies, it is known as *Qatl-i-Khatà* (*خطاء*).¹⁶⁴

The *negligence* or *error* in this case is further divided into two kinds:

- (a) *error in intention* (*خطاء في القصد*).
 (b) *Error in the act* (*خطا في العمل*).

Error in intention means a mistake which occurs with respect to the *subject*: a person shoots an arrow at a man supposing him to be game or at a Muslim taking him for a hostile infidel. *Error in act* means error with respect to the *act*: a person shoots an arrow at a mark but it accidentally hits a man.

Punishment:

There are two kinds of punishment for *Qatl-i-Khatà*.

The first kind of punishment is the *blood money* in the form of *fine payable within three years*. The second kind of punishment is *expiation* i.e., to free a Muslim slave from captivity or to fast for two months successively. This punishment is based on a *Qur'anic verse*:

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَنْ يَصَدَّقُوا فَإِنْ كَانَ مِنْ قَوْمِ عَدُوِّكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَابَعَيْنِ تَوْبَةً مِّنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا ●

“It does not become a believer to kill a believer unless it is by mistake. He who kills a believer by mistake shall free, or pro-

cure the freedom of, a believing slave, and provide the blood money to be handed over the heirs of the murdered, unless they remit it as charity. If the murdered person is of people hostile to you, though himself a believer, the offender shall free, or procure the freedom of, a believing slave. If he is of a people with whom you have a pact, then blood money payable to his heirs and the freedom of a believing slave shall both be due. Whoso finds not a slave to set free shall fast for two consecutive months. This concession is a mercy from Allah. Allah is all-knowing, wise."¹⁶⁵

(IV) Qatl-i-Qàimmukam bil Khatà/ Shibh-ul-Khatà.

Homicide similar to misadventurous murder

It is a semblance of homicide by negligence.

Definition: (القتل شبه الخطأ / قائم مقام بالخطأ)

"If a person walking in sleep falls upon another and crushes him to death or if a sword or a stone slips from the hand of a person and strikes another person resulting in the death of that person, it is known as homicide similar to misadventurous murder."¹⁶⁶

Punishment:

Its punishment is also similar to the punishment of *Qatl-i-Khatà*.

- (a) Blood money payable within *three* years.
- (b) *Expiation* in the form of freeing a Muslim slave or fasting for two months successively.

(V) Al-Qatl-bis-Sabab:

Indirect Homicide or homicide by accidental cause

(القتل بالسبب)

Definition:

"It is a partial semblance of *Qatl-i-Khatà*: for instance a man digs up a well on a thoroughfare or at a public place and someone falls into it and dies. This would be known as *Qatl-bis-Sabab*; if anyone places a stone in the middle of a road and someone trips over it and dies, it is also known as *Qatl-bis-Sabab*."¹⁶⁷

Punishment:

Its punishment is the *blood money* payable as in case of *Qatl-i-Khatà*. But the man is neither liable to expiation nor is he deprived of the right of inheritance.

B. BLOOD MONEY FOR LIFE (الدية)

Blood money in *Qur'àn*, has been termed as *Diyat* (دية) has been further qualified with the characteristic of *Musallamah* (امسلمة):

It is stated in *Qur'àn* :

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يُقْتَلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ
مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ

"It does not become a believer to kill a believer unless it is by mistake. He who kills a believer by mistake shall free, or procure the freedom of, a believing slave and provide the blood money to be handed over the heirs."¹⁶⁸

Definition of Diyat:

Muslim Jurists have defined the term '*diyat*' in the words

وما يعطى عوضاً عن دم القتيل الى وليه -

“*Diyat* means recompensation which is paid to the successors of the murdered in exchange of the life of the murdered. Sayyid Sàbiq has defined *Diyat* in these words :

الدية هي المال الذي بسبب الجناية وتؤدى الى المجى عليه او وليه -

“*Diyat* is the property that is liable due to the crime of retaliation and which is paid to the aggrieved persons or to their successors.”¹⁷⁰

The practice of *Diyat* was prevalent in Pre-Islamic pagan Arab society which was maintained by *Qur'an*. in this way *Diyat*, became a *Qur'anic* injunction in replacement of *Qisas*. But the details of its quantum and other relevant qualifications and conditions were provided by the *Prophetic Sunnah*.

Quantum of *Diyat*:

The quantum of *Diyat* for life is hundred camels.¹⁷¹

It is to be noted that the following substitutes in the fixation of quantum of *Diyat* are provided in their order of preference :

- (i) Hundred camels
- or
- (ii) two hundred Cows
- or
- (iii) two thousand goats
- or
- (iv) one thousand dinars
- or
- (v) twelve thousand dirhams¹⁷²

These specifications were provided by the *Holy Prophet* (peace be upon him) according to the customs of his own period.

Applicability:

The applicability of the law of *Diyat for life* is extended to four kinds of murder :

- (i) *Qatl-i-Khata*
(homicide by negligence or mistake).
- (ii) *Qatl Shib'h-ul-'Amad*
(Quasi-intentional homicide).
- (iii) *Qatl-i-'Amad* (wilful homicide) in which any of the essential legal elements is missing. For example, if the offender is a *minor* or an *insane* person, he is not liable to *Qisàs* but to *Diyat*.
- (iv) *Qatl-bis-Sabab* (indirect homicide or homicide by accidental cause) as discussed earlier.¹⁷³

Imàm Abu Hanifàh disagrees in case of *Qatl-i-'Amad*. He believes that *Diyat* is not permissible in these cases and the parties can decide on any terms of settlement through mutual concurrence. It is not necessary that the *Qisàs* of *Qatl-i-'Amad* should be recompensed by the fixed *Diyat*. It depends on the mutual agreement and discretion of the parties.¹⁷⁴

Kinds:

There are two kinds of *Diyat* recognized by the law of *Shariàh* :

- (1) *Ad-Diyat-ul-Mughallazah* (exorbitant/maximum blood money)
- (2) *Ad-Diyat-ul-Khafifah* (in-exorbitant/minimum blood money)

The *first* kind of *Diyat* is prescribed for *Qatl-i-Khata* (homicide by negligence or mistake) and *Shib'h-ul-'Amad* (Quasi-intentional homicide). According to *Imàm Shâfêi* and *Imàm Ahmad bin Hanbal*, same is prescribed for *Qatl-i-'Amad* also if the successors of the smurdered agree to compound the offence on blood money. The *second* kind of *Diyat* is prescribed for other offences involving *homicide*.

The word *Mughallazah* has been used literally by the *Holy Prophet* (peace be upon him) himself :

عقل شبه العمد مغلظ مثل عقل العمد ولا يقتل صاحبه -

“The blood money of *Shibh-ul-'Amad* (Quasi-intentional homicide) is as *exorbitant* as that of *Qatl-i-'Amad* (wilful or intentional homicide) and the offender in the crime of *Shibh-il-'Amad* should not be sentenced to death.¹⁷⁵

Specification of *Diyat-i-Mughallazah*:

One may naturally ask what is the specification of *Diyat-i-Mughallazah* or *exorbitant blood money*. It has been prescribed by the *Holy Prophet* (peace be upon him). *'Abdullah bin-'Amr-bin-al-'As* reports the *Holy Prophet* (peace be upon him) saying :

الا ان دية الخطا وشبه العمد ما كان بالسوط والعصا مائة من الابل منها اربعون في بطونها اولادها -

“Be sure that the blood money in *Qatl-i-Khata* (homicide by negligence) and *Qatl Shib'h-ul-'Ahmad* (Quasi-intentional homicide) is hundred camels, forty of which should be *pregnant or pregnable*.¹⁷⁶

Through this *hadith*, it is clearly established that there should

be a *hundred camels* to be paid as *blood money* and *forty* of them should be *females* carrying children in their bellies or they should be of a *pregnable age*. The meaning of *pregnable age* has been adopted by *Qàzi Sanà' Ullah Pànipati*,¹⁷⁷ and this is the primary specification of *exorbitant Diyat*. The detailed specification of *exorbitant* and *inexorbitant* blood money is given below.

Detailed Specification:

Exorbitant blood money (Diyat-i-Mughallazah)

It should consist of *hundred camels* or *their price* with these specifications:

- (i) *Twenty-five* of the camels should be *Bint-i-Makhàz* (بنت مخاض), it means that they should be at least *one year* of age.
- (ii) *Twenty-five* of the camels should be *Bint-i-labun* (بنت لبون): it means these camels should be at least *two years* of age.
- (iii) *Twenty-five* of them should be *Hiqqah* (حقه): it means the camels should be in their *fourth year*.
- (iv) *Twenty-five* of them should be *Jaz'ah* (جزعه): It means these camels should be in their *fifth year*.

Here the specification of camels in terms of *exorbitant Diyat* is based on *the ages of the camels*. The same specification is adopted by *Imàm Abu Hanifah* and *Imàm Abu Yusuf*.

Specification of Diyat-i-Khafifah

The specification of *inexorbitant Diyat* (Diyat-i-Khafifh) is also based on a *Prophetic tradition* reported by *Abdullah Ibn-i-Mas'ud*:

دية الخطاء خماساً عشرون حقة وعشرون جذعة وعشرون بنات مخاض
 وعشرون بنات لبون وعشرون بنى لبون وفي رواية وعشرون بنى مخاض
 (بدل بنى لبون)

The blood money of *Qatl-i-Khatà* (consisting of hundred camels) conforms to the five specifications given below:—

- (i) Twenty she-camels should be in *fourth year* of their age.
- (ii) Twenty She-camels should be in the *fifth year* of their age.
- (iii) Twenty she-camels should be in the *third year* of their age.
- (iv) Twenty she-camels should be in the *second year* of their age.
- (v) Twenty she-camels should be in the *third year* of their age.

And according to another tradition *twenty he--camels in second year of their age* have been prescribed in place of *twenty he-camels in third year of their age*.¹⁷⁸

All the four *Imams* of Fiqh agree on these specifications without any material difference.¹⁷⁹

Contemporary Consonance

These specifications of camels prescribed by the *Prophetic Sunnah* are in fact based on the *customary laws* of the *Arabs* which were approved by the *Prophet*. However, the *Holy Prophet* (peace be upon him) has not confined the quantum and nature of blood money only to *camels* or *cows* or *goats*. These specifications simply indicate the fact that if the

payment of *blood money* in the form of *camels* is feasible and practicable, it should follow these qualifications, otherwise money in cash can also be paid as *blood money*. Now the changes of customs and social conditions require that the *quantum* of *blood money* should be determined in the light of these principles. For example, the *amount of blood money* can be specified in accordance with the price of the required number of camels, cows or goats in the *legal tender* or *prevalent currency of the times*. It can also be fixed in terms of the amount equivalent to *one thousand dinars* or *twelve thousand dirhams*. Either option can be determined by its feasibility.¹⁸¹ This principle is positively based on the practices of the *Orthodox Caliphs*.¹⁸¹

Liability:

• The liability of payment of blood money falls on two categories of persons.

- (i) The murderer himself in case of *Qatl-i-'Amad* when *Qisas* is remitted or is required to be recompensed¹⁸²
- (ii) The *'Aqilah* of the murder. *'Aqilah* means the male relations of the murderer from the side of the father. These are technically known as "residuaries". They are liable to pay the blood money to the successors of the murdered when the murder is *Qatl-i-Khatà* (homicide by negligence) or *Shib'h-ul-'Amad* (Quasi-intentional homicide) or if these relatives themselves participated in the commission of the crime.¹⁸³

Justification of Aqilah's

Responsibility in Qatal-i-Khàh and Shib'h-ul-Amad

Question is that why the *Aqilah*, the residuaries of the

murderer, are presumed to be liable for the payment of *blood money* alongwith the murderer. This injunction is based on a *Prophetic Sunnah* reported by *Abu Hurayrah* which states that the *Holy Prophet* (peace be upon him) included the *'Aqilah* of a woman who murdered another woman of the *tribe of Huzeel*.¹⁸⁴

The reason for including them in this liability is that *Qatl-i-Khatà* is not an intentional act of the offender. It simply occurs on account of *negligence of intention or act*. This is the reason why *Shari'ah* has not placed full penal liability on the *offender* due to his lack of criminal intention. But since the damage has occurred to the second party in the form of loss of life, *Shari'ah* has compensated it through the *blood money*. It has ordained the *residuaries* to share the responsibility of the murderer who are otherwise his *successors* also, so that he may not bear the whole of the penal burden caused by an unintentional act. Therefore, this principle of inclusion of *'Aqilah* in the liability of *blood money* is not against the *Qur'anic principle of equity*:

لَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى -

"No bearer of a burden would bear the other's burden."¹⁸⁵

Period of Payment

All schools of *Islamic Law* agree to the principle that the *blood money* should be paid within *three years* of the adjudication of the case. Same practice was adopted by *Hazrat 'Umar* and *Hazrat 'Ali*.¹⁸⁶

It can exceptionally be paid before it or even instantly if required by any strong reason and the court considers it proper.

This provision also finds place in the Prophetic Sunnah.

RETALIATION FOR CRIMES NOT AMOUNTING TO DEATH: (القصاص في ما دون النفس)

This term is also known as *Al-Qisàs fil-A'zà* (قصاص في الاعضاء)

It is further classified into two kinds :

- (i) *Retaliation for organs* (قصاص في الاطراف)
- (ii) *Retaliation for injuries* (قصاص في الجروح)

It is enunciated in the Holy Qur'an :

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ
بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَّهُ وَمَنْ
لَمْ يَحْكَمْ بِهَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ ●

"And therein have we enacted for them a life for a life and an eye for an eye, and a nose for a nose and an ear for an ear, and a tooth for a tooth and for wounds retaliation. Whoso remits it as alms, it shall be an expiation for his sins."¹⁶⁷

This *Qur'anic* verse signifies the two kinds of retaliation *retaliation for organs* and *retaliation for injuries*.

(i) Qisas For Organs:

Three conditions are to be fulfilled in *retaliation for the organs* :

- (a) *Equality in the name and place of the organs.*
It means the punishment of cutting a hand is to be awarded if a hand is cut, and that of a foot in case a foot has been chopped off or absolutely crippled. It also means that an original organ is to be chopped away for an original one and additional organ for an

additional one. An additional organ should not be chopped away for an original organ inspite of the mutual consent of the parties. Moreover, right organ can not be cut for the left one and the left cannot be cut for the right. *Equality* demands that a forefinger should be cut for a forefinger, a thumb for a thumb and toe for a toe.

(b) *The cut should be made at the joint of the organs.*

In case the joint cannot be located or the organ is inseparable from the adjacent organ, it is not liable to *Qisàs*.

(c) *Equality in health and strength:*

A healthy organ should not be cut off for an unhealthy organ and an imperfect organ should not be cut off for a perfect organ.

Qur'ân has elaborated the concept of equality in *Qisas* :

an eye for an eye –	(العین بالعين)
a nose for a nose –	(الانف بالانف)
an ear for an ear –	
a tooth for a tooth –	(السن بالسن)

Wherever the equality in retaliation is possible, the law of *Qisas* will be enforced. But *Qisas* is replaced by blood money in case it is not implementable or its implementation amounts to cruelty.

(ii) *Qisas For Injuries*

Qisas is applicable for every intentional injury on the same conditions as discussed earlier i.e., the maintenance of equality without adopting a cruel and inhuman behaviour

because, in case of oppression and inhuman torture, *Qisàs* is replaced by *blood money*. The concept of *retaliation* for *injuries* is also clearly spelled out in the *Holy Qur'àn* :

وَالْجُرُوحُ قِصَاصٌ

“There is retaliation for wounds (also).”¹⁸⁹

The basic principle to be followed in this respect is that retaliation for wounds should be executed after the healing of injuries. This view is adopted by *Imàm Abu Hanifah* and *Ahmad bin Hanbal*. They have based their view on *Prophetic Sunnah* narrated by *Hazrat Jàbir* whereby a person was injured and he requested the *Holy Prophet* (peace be upon him) for quick retaliation of his injuries. But the *Holy Prophet* (peace be upon him) said : ‘*retaliation shall be effected after your wounds heal up.*’¹⁹⁰

But *Imàm Shàfe'i* is of the opinion that the retaliation should be executed quickly and it should not be made contingent on the healing of the wounds.

It is possible that the postponement of retaliation by the *Holy Prophet* (peace be upon him) might have been effected to ascertain the nature and consequence of the injuries. Because if the injuries amount to murder, then the retaliation is altogether different.

According to my humble opinion, if the injury is not so severe and there is no such need of ascertainment, then *Imàm Shàfe'o's* view may be adopted.

(B) BLOOD MONEY FOR CRIMES OF RETALIATION SHORT OF LIFE

For the purpose of blood money, the organs of the human

body are divided into *three* categories :

(1) *Unitary organs :*

They are single organs, for example, nose, tongue, penis, etc.

(2) *Binary organs :*

They exist in pairs, for example, eyes, ears, legs, hands, arms, lips, jaws, breasts, feet, testicles, etc.

(3) *Multiple organs :*

They are more than two in number, for example, teeth, fingers, toes, etc.

If *unitary or binary* organs are mutilated in the injury, *full blood money* should be paid.¹⁹¹ If *one of the binary organ* is mutilated, *half* of it should be paid and if *any of the multiple organs* is mutilated, then *proportionate blood money* is to be paid.

Blood Money For Defunctionalizing Injuries

There are some *injuries* which do not *mutilate* the *organs* but make them *non-functional*. For example, if an injury damages the *sanity* of a person or permanently damages his power of *seeing, hearing, tasting, touching* and *speaking*, *full diyat* is required for all these damages and injuries.¹⁹²

This principle is based on a precedent in which a person injured another person, damaging his *auditory* and *visual* powers as well as his *sanity* and *sexual* potency but the injured remained alive. On it *Hazrat 'Umar* awarded the *blood money* four times.¹⁹³

If the sight of *one of the eyes* or the hearing power of *one of the ears* is lost, *half a blood money* should be paid to the injured party.¹⁹⁴

Catagories of Injuries:

The wounds and injuries for the purpose of blood money have been classified into *ten* categories :

- (1) *Al Khàrisah* : (الخارصه)
It is the injury that tears and splits the skin. It may be called 'epidermal' injury as it affects only the skin.
- (2) *Al Bazi'ah* : (الباضعه)
It is the injury that tears and lacerates the flesh beneath the skin.
- (3) *Ad-Dàmi'yah/Ad-Dàmi'ghali* : (الداميه ، الدامغه)
It is the injury that affects the blood vessels and causes the blood flow.
- (4) *Al-Mutalàhimah* : (المتلاحمه)
It is the injury that reaches down to the innermost layer of flesh.
- (5) *As-Samhàq* : (السمحاق)
The injury is inflicted in a manner that a delicate skin remains suspended between the flesh and the bone.
- (6) *Al-Muzihah* : (الموضحة)
It is the injury that splits or bursts the bone open.
- (7) *Al-Hashimah* : (الهاشمة)
It is the injury that amounts to fracture of the bone. All serious fractures are included in this type of injury.
- (8) *Al-Munqillah* : (المنقلة)
It is the injury that amounts to compound fracture and dislocation of the bone.
- (9) *Al-Mamumah* : (المأمومة)

It is the injury that damages the skin of the brain.

(10) *Al-Jà'ifah* : (الجائفة)

It is the injury that affects the belly. ¹⁹⁵

These injnuries are not liable to *Qisas*. They are liable to *blood money*, the *amount* of which varies from injury to injury. Some of these injuries require *tenth part* of the blood money which means either *ten camels* or the *price* of ten camels. Some of them require *twentieth part* of the blood money which means *five camels* or the equivalent *price* of five camels. Some wounds require *fifteen camels* or their equivalent *price*. A few wounds require *one third* of the blood money, approximately *thirty three camels* or their *price*. The details of these specifications are primarily based on the *Prophetic* injunctions which are found in the letter addressed to 'Amr bin Hazm. The letter contains clear instructions for the people of *Yaman*. The tradition is reported by *Abu Dà'ud*, *Nasà'i*, *Ibn-i-Khuzaymah*, *Ibn-i-Jarud*, *Ibn-i-Hibban*, *Imàm Ahmad* and others. The wording of the letter is as follows :

انّ من اعتبط مومنا قتلا عن بينه فانه قود الا ان يرضى اولياء المقتول وانّ
 في النفس الدية مائة من الابل وفي الانف اذا أوعب جدعه الدية ، وفي
 العينين الدية ، وفي اللسان الدية وفي الشفتين الدية وفي الذكر الدية وفي
 البيضتين الدية وفي الصّلب الدية ، وفي الرجل الواحدة نصف الدية ،
 وفي المامومة ثلث الدية ، وفي الجائفة ثلث الدية ، وفي المنقلة خمس عشرة
 من الابل وفي كل اصبع من اصابع اليد والرجل عشر من الابل وفي السن
 خمس من الابل ، وفي الموضحة خمس من الابل وانّ الرجل يقتل بالمرأة

وعلى اهل الذهب الف دينار

"A person who kills a believer should be handed over for retaliation to the heirs of the deceased. If the heirs agree, retaliation may be converted into blood money. If a living person (may be a man or a woman) is murdered, the blood money for every murder is *hundred camels*; and those who possess gold should pay *one thousand gold dinars*. If the nose is chopped off completely, the blood money is full (hundred camels). There is blood money in breaking and smashing the teeth; there is blood money in slashing the lips, there is blood money in rendering both the testicles useless, or cutting the male organ:

There is blood money in damaging the spine, there is blood money in slitting eyes. (Hundred camels are to be paid for cutting or breaking both hands and fifty camels are to be paid for cutting one hand. Full blood money is required for cutting or crippling both feet) and half blood money is to be paid for cutting one leg/foot. If the injury reaches the brain-membrane, the blood money to be paid is one-third of the total amount; if it reaches the kernel of the brain, the blood money is again one-third of the total amount. If the injury dislocates the bone, fifteen camels are to be paid as blood money, if a finger or a toe is fractured or chopped, ten camels are to be paid as blood money; if a tooth is broken, the blood money is five camels. If the injury splits or bursts the bone open, the blood money is five camels.

And man should be awarded death punishment for the life of a woman and for those persons who possess gold, the blood money of the woman's murder is also thousand dinars. **196

Blood money of a Woman

The wellknown letter of thehas elaborately explained the question of the *blood money of females*.

Two express provisions have been laid down in this respect.

(i) *Holy Prophet* (peace be upon him) declared the fact :

وان في النفس الدية مائة من الابل -

“If a living person (whether a male or a female). is murdered, the blood money is hundred camels.”¹⁹⁷

The word “ *النفس* ” (a living person) indiscriminately signifies every individual, irrespective of the fact, whether it is a male or a female. *Therefore, according to this statement blood money of a woman, has been declared to be the same as that of a man.*

(ii) . The last sentence of the letter has further clarified the situation, stating :

النفس - ان الرجل يقتل بالمرأة ، على اهل الذهب الف دينار -

“A man should be awarded death sentence for the life of a woman and for those who possess gold, the blood money for a woman’s life is thousand dinars.”¹⁹⁸

Since the *blood money* prescribed for a *male’s life* is also *thousand dinars*, it can be easily concluded that no distinction has been maintained in this respect by the *Holy Prophet* (peace be upon him) *between a male and a female*.

The *Jurists* who are of the view that the *blood money* of a woman is *half* of the *blood money* of a *man*, have been unable

to trace even a single authentic tradition of the *Holy Prophet* (peace be upon him) expressively mentioning this concept. They have based their view on some weak reports of the companions and some juristic views, attributed to some of the scholars.

Whereas the law of the equality of a male and a female in case of *diyat* is positively based on *Qur'anic* injunctions and the *Prophetic* instructions for the people of *Yaman*, reported by *Abi Bakr bin Muhammad bin 'Amr bin Hazm*.

Imam Shâfêi, Ibn 'Abd-il-Barr, 'Uqayli, Yaqub bin Sufyan, Hakim, Ibn-i-Hibbân, Bayhaqi, Ibn-i-Kaseer and many other eminent scholars have certified the authenticity of the letter.¹⁹⁹

Sheikh 'Abd-ul-Haq Muhaddis Dehlavi, explaining the famous *Prophetic* tradition, "المسلمون تكافأ دمائهم -"

"(all the muslims are equal in premium of their lives) states :

گفت آنحضرت مسلمانان برابر ست خونہائے ایشان در
قصاص و دیت ، فضل نیست دران شریف را بر و ضعیف و
کبیر را بر صغیر و عالم را بر جاہل و مرد را بر زن برخلاف
عادت جاہلیت و گفته اند این یکے ازا احکامے سب کہ
در صحیفہء علی بودہ رضی اللہ عنہ

Holy Prophet (peace be upon him) said that all the muslims had an equal premium of their lives, in *Qisas* as well as in *Diyat*. There is no superiority for a respectable over an irrespectable, neither for an elder over a youngster, nor for a literate over an illetrate, nor for a male over a female, against the prevalent practice of the pagan Arab Society. It is said that this was one of the laws written in the compendium of *Hazrat*

*Ali*²⁰⁰

Ta'zeerat

As already discussed in detail, Islamic system of punishments is basically grounded in *three* categories, *Hudood*, *Qisàs* and *Ta'zeeràt*. In the pages that follow we intend to discuss the *legal basis of Ta'zeeràt*, the discretionary punishments according to the law of Shariàh. The concept of *Ta'zeer* originates from *Holy Qur'àn* and *Prophetic Sunnah*.

In the light of the provisions of *Qur'àn* and *Hadith* we can formulate *ten major kinds* of discretionary punishments:

Major Kinds

(1) Admonition (الوعظ)

Qur'àn has mentioned three kinds of discretionary punishment in the context of disobedience of wives to their husbands. The first kind of punishment is *admonition*. It is stated :

وَالَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ

“Women from whom you fear disloyalty and ill conduct, admonish them first.”²⁰¹

This kind of punishment must be restricted to those offenders who commit *minor offences* for the *first time* and the court is convinced that it would suffice to *reform* the offender and restrain him from further violation of the sanctity of law.²⁰²

(2) Reprimand (التوبيخ)

It can be *verbal* as well as *physical*, depending on the purpose of its imposition. It can vary according to the hein-

ousness of the offence and gravity of misconduct of the transgressor. This form of punishment is also established through *Prophetic Sunnah*. 'Abdur Rehman bin 'Auf was once extremely annoyed with his slave and expressed his resentment in the form an abuse: 'O son of black!: The Holy Prophet (peace be upon him) was terribly displeased with him. He grasped his hand and said : "There is no such right available to the son of a white person over the son of a black person." 'Abdur Rehman bin 'Auf felt highly ashamed about his conduct. He rubbed his cheek on the ground and said to his slave : "You keep on rubbing the soil into my cheek till you are satisfied."²⁰³

The same punishment is also established through another *Prophetic tradition* reported by *Hazrat Abu Zar*.²⁰⁴

(3) *Threat* (التهديد)

This punishment is supposed to dissuade the offender in the commission of crime by injecting into him an element of fear and scare. It can materialize in the shape of pronouncement and a sentence and then delaying its execution till the offender commits another crime or reforms himself. It is like *Democles' sword* hanging over the criminal's head or like the steady glare of a high-power bulb in a prisoner's cell. The threat of punishment can take many forms: it may be awarded in the form of flogging, imprisonment or other forms of punishment. However, it should be kept in mind that the punishment must be sincere and efficacious.²⁰⁵

(4) 'Boycot' (الهجر)

This Ta'zeeri punishment is also primarily recommended by the *Holy Qur'an*:

وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ

“Keep them off your beds”²¹⁷

This punishment was awarded by *Holy Prophet* (peace be upon him) at various occasions as Ta'zeer. It is authoritatively quoted that holy prophet awarded the punishment of boycott to three persons who did not participate in the battle of *Tabuk*. These persons were *Ka'b bin Malik*, *Mararah bin Rabi'ah Amri* and *Halal bin Umayyah*. Holy Prophet (peace be upon him) desisted from talking with them as a consequence of the punishment of excommunication.²¹⁷

After the expiry of *fifty days* the following *Qur'anic verse*, reflecting the event, was revealed:²¹⁸

وَعَلَى الثَّلَاثَةِ الَّذِينَ خَلَفُوا حَتَّىٰ إِذَا ضَاقَتْ عَلَيْهِمُ الْأَرْضُ بِمَا رَحُبَتْ
وَضَاقَتْ عَلَيْهِمْ أَنفُسُهُمْ وَظَنُّوا أَن لَّا مَلْجَأَ مِنَ اللَّهِ إِلَّا إِلَيْهِ ثُمَّ تَابَ عَلَيْهِمْ
لِيَتُوبُوا إِنَّ اللَّهَ هُوَ التَّوَّابُ الرَّحِيمُ

“He has also turned with mercy to the three who had been left behind, who were sore distressed and whose lives became a burden to them and who became convinced that there was no refuge against the wrath of Allah except in Himself. He turned to them with mercy that they might turn to him in repentance. Surely it is Allah, who is compassionate and merciful.”²¹⁸

The second Orthodox Caliph *Hazrat Umar* is also reported to have awarded this form of punishment alongwith the punish-

ments of whipping, confinement and transportation. The pronouncement of punishment was always accompanied by the instruction that no body should talk with the offender till he repents and reforms himself. He awarded this form of punishment to various high executive officials also. ²¹⁰

(5) *Public Exposure* (التشهير)

This is the stigmatizing punishment. It was fairly wide spread in the early days of Islam. The purpose of this form of punishment was to expose the criminal by publicly disclosing his criminal act to prevent its repetition. For example, a person who is implicated in false evidence or who performs an act of adulteration deserves this type of punishment to protect innocent people against his nefarious designs. ²¹¹ *Holy Prophet* (peace be upon him) reportedly awarded this punishment to a *collector of Zakât* who divided the whole collection into two portions. He reserved one portion for himself and deposited the other into *Bayt ul-Mâl*. He had the cheek to claim that one portion had been presented to him for his personal use by the people. *Holy Prophet* (peace be upon him) not only recovered the amount from him but also awarded him the punishment of public exposure which humiliated him in the eyes of the people. ²¹²

Qazi Shurayh, a well-known Judge during the *Orthodox Caliphate*, held that the false witness must be publicly identified to warn the people against his criminal intentions. ²¹³ It has been held by the jurists that such persons should be paraded in the streets and other parts of the town and publicly exposed through the courts.

(6) *Fine* (الغرامة)

This form of punishment was also awarded during the Prophetic period. The *Holy Prophet* (peace be upon him) is

reported to have said :

ومن خرج بشيء فعليه غرامة مثليه

“Whosoever took anything (surreptitiously) would be liable to double fine and punishment.”²¹⁴

It should be noted that the person who refuses to pay zakàt is, inter alia, liable to the imposition of fine which can be drawn from his property.²¹⁵ *Imàm Màlik, Abu Yusof, Ahmad bin Hanbal* and some of the *Shàfe'i scholars* are positively in favour of the permissibility of this financial punishment in relation to the offence.²¹⁶

There are some *Hanafi jurists*, like *Imam Tahàwi* and others, who believe that independent punishment of fine was practised in the early days of Islam but was subsequently abrogated. Therefore, they think that now it does not exist as an independent and general punishment.²¹⁷ But the claim of abrogation, as *Ibn-i-Taymiyyah* and *Ibn-ul-Qayyim* have discussed, is not established through evidence. Moreover, the continuity of the *Prophetic Sunnah* in this respect is further supported by the practices of the *companions* and *Orthodox Caliphs*.

It is reported that in some cases the *Holy Prophet* (peace be upon him) himself fixed the amount of the fine as punishment. Moreover, he awarded the punishment of fine in a case of theft where the stolen property did not reach the *minimum Nisàb* required for the imposition of *Hadd* and in some cases of dereliction in the payment of *Zakàt* also. Normally, the fixation of this amount is left to the discretion of the state.

(7) 'Termination/suspension of subsidy'

(العزل من الوظيفة)

This form of punishment can be awarded by the state to any of its citizens on the commission of any specific criminal act.²¹⁸

(8) 'Deprivation of Rights' (الحرمان من الحقوق)

This form of punishment can be awarded by depriving anybody of the *right of witness* or *booty* or by denying him the *use of other facilities* that belong to him as a matter of right.²¹⁹

(9) 'Seizure of property' (المصادرة)

This form of punishment is also established through *Prophetic Sunnah* and other precedents of Islamic legal history.

(10) 'Abolition and Extinction' (الازالة)

This form of punishment relates to the dismantling of places where seriously forbidden and socially harmful acts are habitually carried on, as *Hazrat Umar* ordered the demolition of those houses and places where wine was manufactured.²²⁰

(11) 'Imprisonment' (الحبس)

In *Shari'ah* the punishment of imprisonment is prescribed both as *Hadd* and *Ta'zeer* which is further divided into two kinds:

- (a) Imprisonment for limited period.
- (b) Imprisonment for unlimited period.

The minimum prescribed period for the first kind of imprisonment is *one day*. But there is a difference of opinion among Muslim Jurists about the *maximum* specification of its duration. Some of them hold that it should not exceed *six months* but *Shàfe'i Jurists* believe in the span of *one year*. Most of the Jurists do not prescribe any *maximum limit* and leave its fixation to the *discretion* of the *state*.²²¹ The punishment of *imprisonment* as *Ta'zeer* is established through both *Qur'àn* and *Sunnah*. *Qur'àn* says :

وَأْتَى يَاتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهَدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّيَهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

“Confront those of your women who are guilty of unbecoming conduct with four witnesses. If they bear witness, then confine them to their houses till death overtakes them or Allah opens a way for them.”²²² The words “

فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ” (confine them to their houses) clearly prescribe the *punishment of imprisonment*. All the commentators of *Höly Qur'àn* unexceptionally hold the view that through this *Qur'ànic* verse the punishment of imprisonment has been expressly commanded. They interpret these words as

فاحبسوهن واجعلوها عليهن سجنا

“Confine them in the houses and make the houses prisons for them.”²²³

According to the command of this *Qur'ànic* verse the punishment of life imprisonment for such women was enforced as *Hadd* before the enforcement of the laws of *flogging* and *stoning*. After the prescription of subsequent

punishments, the nature of life imprisonment as *Hadd* was changed to *Ta'zeer*. Permissibility and legality of the punishment of imprisonment according to Islamic law is unambiguously established through various Prophetic practices commands and even through the precedents of the Orthodox Caliphs. Hundreds of books on Islamic law contain details of the punishment of *imprisonment*. It is further held that this punishment can be extended till the *criminal repents* or *dies*, as the gravity of the crime requires.

Various words like Al-Habs. (الحبس) As-Sijn. (السجن) An-Naf'y (النفي) Al-Imsàk (الإمساك) Al-'Azl (العزل) and Al-Taghrib (التغريب) have been frequently used in *Qur'àn* and *Prophetic traditions* in regard to the punishment of *imprisonment*. *Surah Yusof* of the *Holy Qur'àn* mentions the concept of imprisonment at about nine places.²²⁴

According to *Qur'àn* and *Prophetic Sunnah*, the punishment of imprisonment is prescribed for the crimes of *robbery*, *docoity*, *theft*, *adultery*, *drinking*, etc. The following books of Hadith contain a number of *Prophetic traditions* in support of this statement.

- (a) Musnad Imàm Shafèi
- (b) Musannaf Ibn-i-Abi Shaybah
- (c) Sunan Bayhaqi
- (d) Kitab-ul-Àsàr, reported by Imam Muhammad bin Hasan Shaybàni
- (e) Musannaf Abdur Razzàaq
- (f) Musnad Ahmad bin Hanbal
- (g) Tirmazi

Sàeed bin Jubayr, Ibràhim Nakh'i, Hasan Basri, Qatàdah, Atà'-al-Khràsàni, Makhul, Ibn-i-Salmah, Ibn-i-

Amir, Samak, Sa'eed bin Mansoor, Zahri, Hamnad, Sufyan Sauri, Auza'i, Nafe, Masruq bin Ajd, Zayd bin 'Ali, Imam Abu Muhammad Ja'far As-Sadiq and a host of other Muslim Jurists have reported a number of Prophetic traditions, juristic opinions, decisions of the Orthodox Caliphs and other companions which establish beyond doubt the existence of the punishment of imprisonment in the Prophetic period, the Caliphate and afterwards. All the Muslim schools of law including Hanafi, Maliki, Shafei, Hanbali and Ja'firi, unanimously agree on the punishment of imprisonment.

(12) 'Flogging' (الجلد)

We have discussed earlier the punishment of flogging as *Hadd*. Now we are mentioning its capacity as *Ta'zeer*. All Muslim Jurists agree on its validity and necessity. The difference exists only on the issue of the fixation of *maximum limit* of lashes as *Ta'zeer*. Five views have emerged out of the discussion that has raged around the subject.

Maximum Punishment:

First View:

Ta'zeer in the form of flogging should not exceed the number of *ten lashes*.²²⁵

Second View:

The lashes in *Ta'zeer* can be awarded upto the number of *thirty nine*.²²⁶

This view is adopted by *Imam Abu Hanifah* and *Imam Muhammad*.

Third View:

The punishment can be awarded upto the number of *seventy five* or *seventy-nine lashes*. This view is

adopted by *Imàm Abu Yusof*.²²⁷

Fourth View:

The punishment can be awarded upto the number of *ninety-nine* but it should remain *below hundred*.

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Fifth View:

It can be awarded upto *one hundred* lashes and it can even *exceed* this limit depending on the gravity of the crime.²²⁹ This is the view adopted by *Imàm Malik*.

Minimum Punishment:

As far as the *minimum number of lashes* in *Ta'zeer* is concerned, some scholars have fixed the limit of *three lashes* while others do not fix the minimum limit. They believe that the fixation of the minimum limit depends on the discretion of the state or the court and it is awarded on the basis of the nature of crime and the stature of the criminal.²³⁰

Its legal basis and other relevant details have already been discussed in earlier chapters.

(13) 'Death penalty' (التعزير بالقتل)

Normally *Ta'zeer* deals with less serious offences and death penalty is usually awarded for more serious crimes. Therefore, the general principle of Islamic penal law is that death penalty should not be preferably awarded in case of *Ta'zeer*.²³¹

However, most of the Jurists agree on the *exception* that whenever *public interest* or *legal necessity* requires, the *death penalty* can also be awarded as *Ta'zeer*. For example, if a

*criminal creates serious disturbance and disruption which cannot be stamped out except by awarding him death sentence, or the death sentence for a spy or for a person who innovates bad norms and practices in Islam.*²³²

The *Hanafī Jurists* also accept the death punishment as *Ta'zeer* for specific heinous crimes. Some of the *Hanbali scholars*, like *Ibn-i-Taymiyyah* and *Ibn-ul-Qayyim* are also of the same view. Some of the *Mālikis* support this view too. But the *Shāfe'i school* is not in agreement with this view. In Islamic penal system, there are *five crimes of Hudood* and *Qisas* for which *death penalty* has been prescribed.

- (a) Adultery (committed by a married person)
- (b) Dacoity
- (c) Sedition
- (d) Apostasy
- (e) Qatl-i-'Amad.

Muslim Jurists have added *ten more crimes* to the list in which death penalty can be awarded as *Ta'zeer*.²³³

Therefore, the total number of crimes in Islamic penal law tots up to *fifteen* whereas in *Western criminal law*, the position is entirely different. By the end of the eighteenth century there were approximately *two hundred crimes* in *English criminal law* for which death penalty was prescribed and there were *one hundred and fifteen crimes* liable to death penalty in *French criminal law*.²³⁴ In the *nineteenth century* or towards the end of the *eighteenth century*, a movement was launched against the penal provisions, and the legislatures, courts of the number of *death penalties*. The same reductive trend continues down to the present times. But its application is limited and restricted in Islamic penal system. It is normally awarded

to those habitual and diehard criminals whose existence is absolutely detrimental to the existence of a sane and stable society. Since there is no other effective method to stop their anti-social and anti-human activities, the application of death penalty becomes an inevitable necessity. This is the reason death penalty has always been regarded an extraordinary punishment and its permission is granted only in cases of absolute necessity.

(14) 'Hanging' (الصلب)

It is one of the various fixed punishment for *dacoity* and *robbery* prescribed by the *Qur'an*. It is also permissible as *Ta'zeer* in cases which do not fulfil the conditions for the imposition of *Hadd*. *Holy Prophet* (peace be upon him) is reported to have executed the punishment of hanging to a person on a hill known as *Abu Nab*.²³⁵

The *Màliki* and *Shāfe'i* Jurists have explicitly discussed the punishment of hanging in the books of Islamic law under the relevant chapters whereas the *Hanafi* and *Hanbali* scholars have not given specific captions for this punishment. They normally consider it as a part of the *death penalty*.²³⁶

(15) 'Miscellaneous' (متفرق)

In addition to these forms of punishment, Islamic law also recognizes various other modes of punishment as *Ta'zeer*. These punishments are established through the *Prophetic Sunnah*. Moreover, Islamic state, on the basis of its specific legislative power, can formulate new laws to cope with the incidence of unexpected and unforeseen crimes.

Capital punishment is justified only as the last resort to

deal with heinous crimes. When all other methods and strategies fail to curb the occurrence of serious crimes, the use of *capital punishment* is justified because through its imposition, the state can restore law and order and protect the life, honour and dignity of its citizens. *Capital punishment*, e.g. can be a very effective measure to root out the rapidly spreading evil of *kidnapping*. Parents with young daughters can breathe in a climate of safety and security against the prowling potential abductors of their daughters. If such stringent measures are not adopted, kidnappers can carry on their immoral and inhuman practices without check and restraint and wreak havoc in the social and moral fabric of the society.

Illegal Sexual Intercourse and Capital Punishment

Similarly, if *illegal sexual intercourse* between married people is not crushed with a heavy hand, the society becomes a cesspool of moral pollution and there can be no limit to the unending increase of bastards, as is the case in the Western Society, where legitimacy is always suspect.

Thus the provision of capital punishment in Islamic penal system is not based on inhuman considerations, as it is frequently trumpeted by the hostile critics of Islam. On the contrary it is grounded in absolutely human considerations. The Islamic system is far more rational and comprehensive because it believes in the elimination of the individual for the sake of the society, and not in the elimination of the society for the sake of the individual. The Western overemphasis on individualism has resulted in collective maladies of formidable magnitude and their experts are simply dazed by the amount of way-wardness and eccentricity by which their young people are consistently plagued.

Crimes of Ta'zeer and Scope of Legislation

The crimes for which the punishments of *Hudood* and *Qisàs* have been fixed are specifically mentioned in *Qur'àn* and *Sunnah*. But there are other crimes as well which neither fall within the category of *crimes of Hudood* nor that of *Qisàs* but the punishments for them have been mentioned in Islamic law, either on the basis of *Qur'ànic provisions*, *Prophetic Sunnah*, the precedents of *Orthodox Caliphs* or on the recommendation of *Muslim Jurists*. But no amount of prescribed punishments can adequately cope with the burgeoning and mushrooming growth of crime in a society. There are hundreds and thousands of crimes for which effective punishments should be prescribed as *Ta'zeeràt*. Some of the crimes mentioned below have been expressly prohibited by *Qur'àn* and *Sunnah* but no specific injunctions are available in regard to the *mode*, *quantum* and *nature* of the punishment to be awarded for them. Therefore, it is the duty of the Islamic legislature to prescribe the necessary punishments for the eradication of these evil practices. The *scope of legislation* in the field of *crimes of Ta'zeer* is open, and such kind of legislative act is also reinforced by the *Prophetic injunctions*. In strict pursuance of a *Qur'ànic command*, the *Holy Prophet* (peace be upon him) urged on the people that if a debtor is in financial straits, the creditor must give him a chance to pay the debt. *Holy Prophet* (peace be upon him) said that if a rich man refuses to pay his debt, he should be punished. In this tradition, punishment is recommended by the Prophet but its nature, kind, quantum and mode are not indicated. This obviously means that the scope of legislation in this field is left open for Muslim Jurists and Islamic legislatures.

Crimes Which Require Penal Legislation

The following crimes represent the terrain of criminal activity in which penal legislation can be made.

1. Eating of prohibited food (اكل المطاعم المحرمة)

Qur'an has very clearly specified the prohibition of the following eatables :

حُرِّمَتْ عَلَيْكُمْ الْمَيْتَةُ وَالِدَّمَ وَلَحْمُ الْخِنْزِيرِ وَمَا أَهْلَ لِغَيْرِ اللَّهِ بِهِ وَالْمُنْخَنِقَةُ
وَالْمَوْقُوذَةُ وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ السَّبُعُ إِلَّا مَا ذَكَّيْتُمْ وَمَا ذُبِحَ عَلَى
النُّصَبِ - الآية

“Forbidden to you is the eating of a dead animal, and blood, and the flesh of swine, and that on which the name of other than Allah is invoked, and the flesh of an animal that has been strangled, or is beaten to death or is killed by a fall, or is gored to death; and of which a wild animal is eaten, unless you have slaughtered it properly before its death; and that which has been slaughtered at an altar.”²³⁷

Moreover, *Holy Prophet* (peace be upon him) has forbidden the flesh of a number of animals which are not mentioned in the *Holy Qur'an*. For example, *the flesh of a dog, a snake, a rat, etc.*

Eating of all these forbidden foods is expressly prohibited in *Shari'ah*. Therefore, the *cooking* and *serving* of these foods is not permissible in an Islamic State. Hence it is a *crime* for which a *discretionary punishment* can be prescribed by the state. Muslim rulers who connive at these acts or remain silent spectators out of misplaced courtesy or a misguided conception of what constitutes a civilized attitude are, in fact, indirect

abettors of the crime and must be punished like other criminals. Their attitude and conduct amount to a perversion of Qur'anic prescription and therefore the punishment extended to them should be proportionate to the burden of their responsibility. If a Muslim ruler is present in a party where the flesh of swine is being served, his presence indirectly puts the seal of approval on the forbidden act and by implication he becomes an accomplice in it. A number of our Muslim rulers in the present world are dazzled by the spurious light of Western mores and priorities as a result of their chronic inferiority complex or they are swayed by other diplomatic pressures and allow the performance of the acts expressly forbidden in Islam. These dumb stooges and puppets may call themselves civilized in the Western sense but from the Islamic point of view they are criminals and therefore should be dealt with accordingly.

2. Usury (اكل الربا)

Holy Qur'an has expressly forbidden usury in various verses:

(a)

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا ●

Those who devour interest stand like one whom satan has smitten with insanity. That is so because they keep saying: The business of buying and selling is also like lending money on interest; whereas Allah has made buying and selling lawful

and has made the taking of interest unlawful. **238

(b)

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ مُؤْمِنِينَ فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ

“O believers be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers. But if you do it not, then beware of war from the side of Allah and His Messenger. **239

In the light of Qur`anic prescriptions, it falls within the legislative power of the state to formulate rules for the eradication of these evils. If the state hesitates or expresses reservations to frame and enact rules or is under pressure from some influential quarters, then it is not performing its duties and functions as an Islamic state and it does not deserve the designation Islamic because to call such a state Islamic is a wilful distortion and disfigurement of the spirit and message of Islam.

3. Breach of trusts (خيانة الامانات)

It is enjoined by the *Holy Qur'an* at various places :

(a)

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا

“Allah commands you to make over the trusts to those best fitted to discharge them or who deserve them the most. **240

(b)

● يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَخُونُوا اللَّهَ وَالرَّسُولَ وَتَخُونُوا أَمْنِيَكُمْ وَأَنْتُمْ تَعْلَمُونَ

“O believers, prove not unfaithful to Allah and the Messenger, nor prove unfaithful to your trusts designedly. **241

وَأَتُوا الْيَتَامَىٰ أَمْوَالَهُمْ وَلَا تَتَبَدَّلُوا الْخَيْرَ بِالْطَّيِّبِ وَلَا تَأْكُلُوا أَمْوَالَهُمْ إِلَىٰ أَمْوَالِكُمْ إِنَّهُ كَانَ حُوبًا كَبِيرًا ●

“Hand over their property to the orphans and do not exchange the bad for the good, and do not devour their property mixing it with your own. Surely, that is a great sin.”²⁴²

It is, therefore, the duty of the state to prescribe punishments for these *breaches of trusts*. These verses of the *Holy Qur'an* vest the requisite power in an Islamic state to frame and implement these punishments. If the state does not take any initiative in this respect, a kind of social and moral chaos may be created which can ultimately result in the total paralysis of the society.

4. *False testimony.* (شهادت الزور)

The *Holy Qur'an* has condemned false testimony in explicit terms:

(a)

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ
أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ

“O believers, be strict in observing justice and bear witness only for the sake of Allah, even if it is against your own selves or against parents or blood relations or other who are closely related to you.”²⁴³

(b)

فَاجْتَنِبُوا الرِّجْسَ مِنَ الْأَوْثَانِ وَاجْتَنِبُوا قَوْلَ الزُّورِ

“Thus shun the abomination of idols, and shun all words of falsehood.”²⁴⁴

It is, therefore, legislative duty of the state to prescribe rules which not only effectively deal with acts of false testimony but also serve as deterrent factors to eliminate or minimize the occurrence of this hideous phenomenon.

5. *Insults and Abuses* (السب)

To insult a human being, even if the insulted person is an infidel, is a forbidden act in Islam. This reviling and maligning act has been condemned by *Qur`an* at many places:

(a)

وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ

“You should not revile those whom they worship beside Allah, lest they, out of spite, should revile Allah in their ignorance.”²⁴⁵

(b)

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرْ قَوْمٌ مِنْ قَوْمٍ عَسَىٰ أَنْ يَكُونُوا خَيْرًا مِنْهُمْ وَلَا نِسَاءٌ مِنْ نِسَاءٍ عَسَىٰ أَنْ يَكُنَّ خَيْرًا مِنْهُنَّ وَلَا تَلْمِزُوا أَنْفُسَكُمْ وَلَا تَنَابَرُوا بِالْأَلْقَابِ بِئْسَ الْإِسْمُ الْفُسُوقُ بَعْدَ الْإِيمَانِ

“O believers, let no people deride another people; they may perhaps be better than the former; nor let one group of women deride another, the last may perhaps be better than the first. Defame not your people nor call them names. Ill indeed it is to earn an evil reputation after having believed.”²⁴⁶

These Qur`anic verses stress the honour and dignity of indi-

viduals, irrespective of their faith, creed and gender. It is the obligation of the state to implement these Qur'anic instructions in order to guarantee the moral cleanliness of the Muslim society and to prevent people from indulging in acts of vituperation, vilification, mud-slinging, muck-raking and character assassination.

6. Bribery (الرشوة)

Qur'an has prohibited in transparent phrasology the offer as well as the acceptance of bribe in any form. It declares:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ
أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ ●

“Do not devour each other's wealth among yourselves through deceit and falsehood, nor offer your wealth as a bribe to the authorities that you may deliberately devour a part of other people's wealth through injustice.”²⁴

The *Holy Prophet* (peace be upon him) has cursed both the parties, those who offer the bribe and those who accept the bribe.

Bribery is a heinous act and must not only be condemned in the strongest terms but effective and foolproof measures should be adopted to root it out completely. Bribery, as a matter of fact, is the greatest social evil in the Muslim countries. It is worse than cancer because cancer is not infectious and affects only a particular individual; but the worm of bribery is highly contagious and affects the moral and spiritual health of the entire community. At present we are hopelessly trapped in its beastly clutches and it is nibbling away at the vitals of our society. Therefore, it is the legal and moral duty of

the state to legislate rules and regulations for the total extinction of this most dangerous evil. The deplorable and highly regrettable tendency in our rulers is to slur over this evil or to deliberately underplay its heinousness. In many cases an act of *bribe* is consciously mislabelled as an act of *voluntary donation* and as an *expression of affection and devotion* or a material manifestation of *gratitude*. By hesitating to call a spade a spade, our rulers and bureaucrats try to deface reality. But the fact remains that an act of bribe is an act of bribe and by conferring on it positive labels one does not change its reality. Moreover bribe is not always necessarily in the form of notes and hard cash.

A large number of our officials and people think that only the offer and acceptance of money constitute an act of bribery. This view is consciously adopted to stifle the stirrings of their conscience but the justification actually makes them doubly culpable. Bribe can also be in the forms of donations and presents. It is the duty of the state to eradicate the evil of bribery and corruption in all forms: it should pay particular attention to its disguised manifestations because bribery has no place in the fabric of an *Islamic state*.

7. Gambling

(القمار والميسر)

Holy Qur'an has declared gambling at par with drinking and acts of blasphemy 'Shirk'.

إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ

"Liquor, gambling, idols and divining arrows are but abominations and satanic devices."²⁴⁸

8. Short measure and adulteration

(غش المكايل والموازين)

Short measuring as well as doctoring food are expressly forbidden in *Shari'ah*. *Holy Qur'an* has stated :

(a)

وَيْلٌ لِّلْمُطَفِّفِينَ • الَّذِينَ إِذَا اكْتَالُوا عَلَى النَّاسِ يَسْتَوْفُونَ • وَإِذَا كَالُوا لَهُمْ
أَوْ وُزِنُوا لَهُمْ يُخْسِرُونَ •

"We condemn those who give short measure and those who, when they take by measure from other people, take it full; but when they give by measure to others or weigh out to them, give them less..."²⁴⁹

(b)

أَوْفُوا الْكَيْلَ وَلَا تَكُونُوا مِنَ الْمُخْسِرِينَ • وَزِنُوا بِالْقِسْطَاسِ الْمُسْتَقِيمِ •
وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تَعْثَوْا فِي الْأَرْضِ مُفْسِدِينَ •

"Give just measure and cause no loss (to others by fraud). And weigh with scales true and upright. And do not withhold things that justly belong to men and do not make mischief and spread evil in the land..."²⁵⁰

9. Homosexuality

(لواطه)

As already mentioned in the beginning of this discussion, the nature, quantum and mode of sentence are prescribed for some of the crimes of discretionary punishment, but in a large number of cases this triple specification is left to the discretion of Muslim Jurists and Islamic states. We have already offered

some illustrations from that category of crimes for which the *Ta'zeerát* or chastisements have not been recommended in a codified form. But mentioned below is the crime of homosexuality for which the punishment is prescribed through *Prophetic Sunnah* and the practice of *Orthodox Caliphs*. There is, however, a difference of opinion among Muslim Jurists whether it should be treated as *Hadd* or as *Ta'zeer*. Most of the Muslim Jurists have accepted it as *Ta'zeer*. *Qur'an* has expressly forbidden homosexuality.

(a)

- وَلَوْ طَا إِذْقَالَ لِقَوْمِهِ أَتَأْتُونَ الْفَاحِشَةَ مَا سَبَقَكُمْ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ ●
- إِنَّكُمْ لَتَأْتُونَ الرِّجَالَ شَهْوَةً مِنْ دُونِ النِّسَاءِ بَلْ أَنْتُمْ قَوْمٌ مُّسْرِفُونَ ● وَمَا كَانِ جَوَابَ قَوْمِهِ إِلَّا أَنْ قَالُوا أَخْرِجُوهُمْ مِنْ قَرْيَتِكُمْ إِنَّهُمْ أَنْاسٌ يَتَطَهَّرُونَ ● فَانجَيْنَاهُ وَأَهْلَهُ إِلَّا امْرَأَتَهُ كَانَتْ مِنَ الْغَابِرِينَ ● وَأَمْطَرْنَا عَلَيْهِمْ مَطَرًا فَانظُرْ كَيْفَ كَانَ عَاقِبَةُ الْمُجْرِمِينَ ●

“We also (sent) Lût. He said to his people : “Do you commit lewdness such as no people in creation (ever) committed before you? For why you practise your lusts on men in preference to women. You are indeed a people transgressing beyond bounds. And his people gave no answer but this: They said, “Drive them out of your city. These are indeed men who want to be clean and pure. But we saved him and his family, except his wife: She was of those who lagged behind. And we rained down on them a shower (of brim-stone): Then see what was the end of those who indulged in sin and crime.”²⁵¹

(b)

فَلَمَّا جَاءَ أَمْرُنَا جَعَلْنَا عَالِيَهَا سَافِلَهَا وَأَمْطَرْنَا عَلَيْهَا حِجَارَةً مِنْ سِجِّيلٍ
 مَنضُودٍ مُسَوَّمَةٍ عِنْدَ رَبِّكَ وَمَا هِيَ مِنَ الظَّالِمِينَ بِبَعِيدٍ ●

“When Our decree issued, We turned the city upside down, and We rained upon it stones of clay, layer upon layer, marked for them in the decree of your Lord. Such chastisement is not far from the wrong-doers of any age.”²⁵²

‘Abdullah Ibn-i-‘Abbas reports the *Holy Prophet* (peace be upon him) saying :

من وجدتموه يعمل عمل قوم لوط فاقتلوا الفاعل والمفعول به

“If you find anybody committing the act of the people of Lût – homosexuality – decapitate both the parties involved, the active and the passive partners.”²⁵³

There are *three* views of Muslim Jurists on the punishment of this crime.

- (i) its punishment is the award of *death sentence*.
- (ii) its punishment is that of adultery (flogging for the unmarried adulterers and death for the married adulterers).
- (iii) its punishment is that of any heinous crime.

First View

(Death Penalty)

The *first view* is adopted by *Imam Shāfe'i* and some other Jurists. They have based their view on the *Prophetic Sunnah* mentioned above and on other statements made by the *Holy Prophet* (peace be upon him).

Ali's View:

Hazrat 'Ali is reported to have said that such persons should be stoned or incinerated to death.²⁵⁴

Abu Bakr's View

Hazrat Abu Bakr said that the homosexual should be decapitated by sword and his body should be cremated.²⁵⁵

Umar' and Usman's View:

The homosexual should be crushed to death.²⁵⁶

Abdullah's View:

'Abdullah Ibn-i-'Abbàs reports the view that the homosexual should be pushed down from a high building.²⁵⁷

Sha'bi View:

Sha'bi, Zàhri, Màlik, Ahmad, Is'hàq, Nakh'i, and some other jurists are of the view that the homosexual should be stoned to death.²⁵⁸ All these companions, Jurists and Caliphs agree on the prescription of *death punishment* for the crime of homosexuality but the difference exists only in the mode and method of execution.

Second View

The *second view* is adopted by *Sa'eed bin Musayyab, Ata bin Abi Ribàh, Hasan, Qatàdah, Nakh'i, Sourì, Auza'i* and according to one report *Imàm Shàfe'i* and others.²⁵⁹

This view prescribes the punishment of *stoning to death* for the *married adulterers* and *flogging* for the *unmarried adul-*

terers. They have based their view on the *Prophetic tradition*:

إذا أتى الرجل فهما زانيان

"When a man (male) commits sexual act with a man (male), both are adulterers."²⁶⁰

Third View (Any Greivous Punishment)

The *third view* is adopted by *Imàm Abu Hanifah* and some others. This view treats the act of *homosexuality* as a crime of *Ta'zeer*, and on the basis of its heinousness and sanguineness, *Islamic State* can prescribe severe penalty in the light of traditions and practices of the *Holy Prophet* (peace be upon him), the *Orthodox Caliphs* and other *companions*. By mentioning some instances of crime and their prohibitive commandments from *Qur'un* and *Sunnah*, we want to elaborate the fact that it is incumbent on an *Islamic State* to enforce the punishments for safeguarding of these *Qur'anic* laws from their violation and transgression.

Same is the philosophy behind the legislation for *Ta'zeeràt*.

It should be kept in mind that *Islamic approach* to punishments is a perfect blend of legality and humanity. In *Islam* the legal aspect is never divorced from its human aspect. This inter-play between the two aspects makes *Islam* a unique religion. Of course there is no denying the fact that the human aspect and the legal aspect are interlinked in other religions as well but the fact of the matter is that the link exists only as a causal phenomenon. They pay little attention to details.

The distinctions exist only as generalized formulations

and not as specific articulations. There is normally overlapping between various categories which creates a blurring impact, But in Islam the distinctions are clearly spelled out and a clear picture emerges from the chaos and debris of amorphous materials. Islam is not a religion of half-measures and half-doses. It is a complete prescription for life. And it is not life in the abstract but as it is lived by human beings of flesh and bone. Therefore, the way Islam emphasizes the linkage between the human and the legal is hardly matched by any other religion in the world.

The grading of punishments in Islam, as the chapter illustrates, makes full acknowledgement of the emotional and psychic preferences of human beings. Men are instinctively inclined towards the establishment of a clean and pure society. Therefore, these punishments are primarily focussed on the achievement of this primary goal. The charge of the hostile critics of Islam that its penal system is based on vindictiveness and a deep-rooted sense of vengeance sounds like bewildered hotch-potch. The penal system of Islam is rooted in an objective and dispassionate assessment of criminal situations, and the severity of the punishment depends on the sanguinity of the crime. What could be a more just and natural system of punishment! Islam believes in the creation of an absolutely clean society. It believes in both physical and moral cleanliness. Therefore, its penal laws are geared to the formation of such a society. Since Islam is also fundamentally concerned with social pragmatic, its punishments are expressly oriented to achieve practical results.

NOTES

1. Ibn-i-Rushd, *Bid'ayat-ul-Mujtahid*, Vol. II, p.324.
2. Qur'an 4:16
3. Qur'an 4:15
4. Qur'an 24:2

5.(a) Commentaries on Qur'an :

Tafseer

Tabari, Kashshaf, Tafseer Ibn-i-Abbàs, Tafseer Kabeer by Ràzi, *Ah'kam-ul-Qur'an* by Ibn-ul-Arabi, *Tafseer Qurtabi*, *Tafseer Madarik* by Nasfi, *Tafseer Baghwi*, *Tafseer Khàzin*, *Tafseer Ibn-i-Kaseer*, *Tafseer Bayzàwi*, *Tafseer Jalàlayn*, *Tafseer Maz'hari* by Qàzi Sanà'Ullah Pànipatti, *Tafseer Fat'h-ul-Qadeer* by Shaukàni, *Tafseer Rüh-ul-Ma'ani* by Àlusi, *Tafseer Al-Maràghi*, *Tafseer Fi Zilal-il-Qur'an* by Sayyed Qutub, *Tafseerät-i-Ahmadiyyah* by Mullah Jiwan Ambaithwi.

(b) Books on Islamic Law.

Hanafi View: *Al-Mabsüt*, (Kitàb-ul-Hudood) *Al-Hidayah*, Vol. II, p.72.

Màliki View: *Al-Mudawwanat-ul-Kubrà*, (Kitàb-ul-Hudood)

Shàfe'i View: *Kitàb-ul-Umm*, (Kitàb-ul-Hudood)

Hanbali View: *Al-Mughni*, (Kitàb-ul-Hudood)

Ja'fari View: *Al-Furu' min-al-Kàfi*,
(Kitàb-ul-Hudood)

Sharà'i'-ul-Islàm, Vol. II, p.245.

Zàhiri View: *Al-Muhallà*, (Kitàb-ul-Hudood)

(c) *Other Scholars of Eminence:*

- (i) Ibn-i-Rushd, *Bidayàt-ul-Mujtahid*, Vol. II, p.325.
 - (ii) Shàtibî, *Al-I'tisàm*, Vol. II, p.315 ff.
 - (iii) Ibn-i-Taymiyyah, *As-Siyàsat-ush-Shar'iyyah*, (Chap. V) p.88.
 - (iv) *Shah Waliyullàh Dehlavi*, *Hujjat-ullàh-il-Bàlighah*, Vol. II, p.760.
 - (v) Màwardi, *Al-Ahkàm-us-Sultàniyyah*, (Chap. Fi Ahkàm-il-Jarà'im) p.224.
 - (vi) Abdul Qàdir Audah, *At-Tashri'-ul-Janà'i*, Vol. I, p.538.
 - (vii) *Al-Jairi*, *Kitàb-ul-Fiqh-'alal-Mazàhib-il-Arba*, Vol. 5, (Kitàb-ul-Hudood).
 - (viii) As-Sayyid Sàbiq, *Fiqh-ul-Sunnah*, Vol. II, p.408.
 - (ix) Az-Zarqà, *Al-Madkhal-ul-Fiq'hi-yul-'Àm*, Vol. II, p.606.
 - (x) Ibràhim Al-Waqfi, *Tilka Hudoodullah*, p.152.
6. *Sahih Bukhàri*, Vol. II, p.1010.
 7. Ibid.
 8. *Sahih Muslim*, Vol. II, p.65.
 9. Shàmi, *Radd-ul-Muhtàr*, Vol. III, p. 153-154
 10. Quran 4:13
 11. Qur'àn 4:14

12. *Al-Fiq'alal Mazàhib-il-Arbà*, (Kitàb-ul-Huddod) p.7.
13. *Sahih Bukhàri*, (Kitàb-ud-Diyàt) Vol.II, p.1016.
14. *Abu Dà'ud*, (Kitàb-ul-Hudood) , Vol.II, p.242.
15. *Abu Dà'ud*, (Kitàb-ud-Diyàt)
16. (a) *Sahih Bukhàri*, Vol.II, p.1007.
(b) *Sahih Muslim*, Vol.II, p.69.
17. (a) *Sahih Bukhàri*, Vol.II, p.1008.
(b) *Sahih Muslim*, Vol.II, p.69.
18. (a) *Sahih Bukhàri*, Vol.II, p.1006.
(b) *Sahih Muslim*, Vol.II, p.67-68.
19. *Sahih Muslim*, Vol.II, p.68.
20. *Sahih Muslim*, Vol.II, p.68.
21. Muhammad Ali Sàbùnì, *Rawà'e-ul-Bayàn*, Vol. II, p.27. (Quoted from *Sunan Abi Dà'ud*.)
22. *Sahih Bukhàri*, Vol.II, p.1007.
23. *Sahih Bukhàri*, Vol.II, p p.1008-1009.
24. Imàm Màlik, *Mu'attà*, p.559.
25. *Sahih Bukhàri*, Vol.II, p.1006.
26. (a) *Sahih Bukhàri*, Vol.II, p.1008.
(b) *Musnad Ahmad*, (with Commentary of Ahmad Muhammad Shàkir) Vol.I, p.157.
27. (a) *al-Mughni*, Vol.IX, p.5.
(b) *Rawà-ul-Bayàn*, Vol.II, p.21.
28. (a) Imàm Nawawì, *Sharh-ul-Muslim*, Vol. II, p.65.
(b) *Rawàe-ul-Bayàn*, Vol. 2, p.21, 24.
(c) Àyat-ullah Muntazirì, *Kitàb-ul-Hudood*, Vol.I, p.70.

29. *Subul-us-Salàm*, Vol.IV, p.15.
30. *Fiqh-us-Sunnait*, Vol.II, p.442.
31. Ibid.
32. Ibid.
33. *Subul-us-Salàm*, Vol.IV, p.18.
- 33.A. Ibid.
34. Qur'ân 24:4
35. *Subul-us-Salàm*, Vol.IV, pp.15-16 (Quoted from Musnad Ahmad, Tirmazi, Abu Dâ'ud, Nasâ'i, Ibn-i-Mâjah).
36. (a) *Badâi-ud-Sunâ i'*, Vol. VII, p.65.
 (b) *Bidâyat-ul-Mujtahid*, Vol.II, pp.333-334.
 (c) *Fiqh-us-Sunnah*, Vol.II, p.486.
 (d) *Fat'h-ul-Qadeer*, Vol. VII, p.219.
 (e) *Al Muhallâ*, Vol. XI, p.337.
37. *Fiqh-us-Sunnah*, Vol. II, p.487.
38. Ibid., p.493.
39. Ibid., pp.496-497.
- 39-A Ibid.
40. *Bidâyat-ul-Mujtahid*, Vol. II, p.335.
41. (a) *Subul-us-Salàm*, Vol. IV, p.19.
 (b) *Fiqh-us-Sunnah*, Vol. II, p.497.
42. (a) *Bidâyat-ul-Mujtahid*, Vol. II, p.335.
 (b) *Subul-us-Salàm*, Vol. IV, p.19.
 (c) *Fiqh-us-Sunnah*, Vol. II, p.447.
43. *Subul-us-Salàm*, Vol. IV, p.19.
44. *Fiqh-us-Sunnah*, Vol. II, p.499.
45. Ibid.

46. Ibid.
47. Qur'ân 5:38.
48. *Fiqh-us-Sunnah*, Vol.II, p.504.
49. Ibid.
50. (a) *Bidâyat-ul-Mujtahid*, Vol.II, p.340.
(b) *Fiqh-us-Sunnah*, Vol.II, p.467.
51. (a) *Al Mughni*, Vol.X, p.304.
(b) *Fiqh-us-Sunnah*, Vol.II, p.468.
52. *Bidâyat-ul-Mujtahid*, Vol.II, p.430.
53. *Fatâwâ Âlamgiri*, Vol. II, p.182.
54. (a) *Fiqh-us-Sunnah*, Vol.II, p.468.
(b) *Bidâyat-ul-Mujtahid*, Vol.II, p.340
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56. *Fiqh-us-Sunnah*, Vol.II, p.472.
57. Ibid., p.473.
58. *Bidâyat-ul-Mujtahid*, Vol.II, p.341.
59. Qur'ân 2:219
60. Qur'ân 4:43
61. Qur'ân 5:90, 91
62. 'Asqalâni. *Bulûgh-ul-Marâm*, p.159 (Quoted from *Sahih Muslim*).
63. *Subul-us-Salâm*, Vol.IV, p.34 (Quoted from *Sunan Nasâ'i*).
64. (a) *Minhaj-us-Sâliheen*, p.589.
(b) *Fiqh-us-Sunnah*, Vol.II, p.371 (Quoted from *Musnad Imâm Rabi, Abi D'aud, Ibn-i-Mâjah and Tirmazi*).
65. *Fiqh-us-Sunnah*, Vol.II, p.371.

66. (a) *Fiqh-us-Sunnah, Vol. II, p.371 (Quoted from Tabaràni Al Kabeer).*
(b) *Tilka-Hudood-ullah*
67. *Al-Tashri'-ul-Janà'i, Vol. II, p.499.*
68. *Bulugh-ul-Maràm, p.159 (Quoted from Sahih Muslim).*
69. *Fiqh-us-Sunnah, Vol. II, p.376 (Quoted from Musnad Ahmad and Abi Dà'ud).*
70. *Bulugh-ul-Maràm, p.159 (Quoted from Tirmazi, Abu Dà'ud, Nasà'i, Ibn-i-Màjah, Musnad Ahmad and Sahih Ibn-i-Hibbàn).*
71. *Bulugh-ul-Maràm, p.159 (Quoted from Sahih Bukhàri, Sahih Muslim).*
72. *Subul-us-Salàm, Vol. IV, p.35 (Quoted from Nasà'i, Dàr Qutni, Sahih Ibn-i-Hibbàn).*
73. Ibid.
74. Ibid.
75. Ibid.
76. Ibid.
77. (a) *Bulugh-ul-Maràm, pp.159-160.*
(b) *Subul-us-Salàm, Vol. IV, p.36. (Quoted from Bayhaqi, Sahih Ibn-i-Hibbàn, Musnad Ahmad and Bukhàri).*
78. *Bulugh-ul-Maràm, p. 160 (Quoted from Sahih Muslim and Abu Dàud).*
79. *Subul-us-Salàm, Vol. IV, p.36.*
80. (a) *Fat'h-ul-Qadeer, Vol. IV, p.186.*
(b) *Al-Mughni, Vol. X. p.326, 329.*
(c) *Bidàayat-ul-Mujtahid, Vol. II, p.332.*
(d) *Tilka Hudood-ullah, p.201.*

- (e) *Fiqh-us-Sunnah*, Vol. IV, p.395.
 (f) *Minhàj-us-Sàliheen*, p.588.
81. *Fiqh-us-Sunnah*, Vol.II p.385.
82. *Al-Mughni*, Vol.X, p.329.
83. *Sahih Muslim*, Vol.II p.71.
84. *Sahih Bukhàri*, Vol.II, p.1002.
85. Ibid.
86. *Abu Dà'ud*, Vol. II p.260.
87. *Sahih Bukhàri*, Vol.II, p.1002.
88. Ibid.
89. Ibid.
90. *Subul-us-Salàm*, Vol. IV, p.30 (Quoted from Abu Dà'ud and Nasà'i).
91. *Subul-us-Salàm*, Vol. IV, p.30.
92. *Sahih Muslim*, Vol.II p.71.
93. *Sahih Muslim*, Vol.II p.71.
94. *Shar'h Nawawi*, Vol. II, p.71.
95. *Mirqàt-ul-Mafàteeh*, Vol.IV, p.100.
96. Maulànà Fakhr-ul-Hasan Gangohi, *Hàshiyah Abi Dàud*. Vol.II, p.259.
97. *Bulugh-ul-Maràm*, p. 159.
98. Ibid.
99. *At-Tahàwi*, Vol.II, (*Kitàb-ul-Hudood*) p.100.
100. (a) Ibid.
 (b) 'Asqalàni, *Fat'h-ul-Bàri*, Vol.XII, p.71.
101. (a) *At-Tahàwi*, Vol.II, p.100.
 (b) *Fat'h-ul-Bàri*, Vol.XII, p.71.
102. *At-Tahàwi*, Vol.II, p.101.

103. *Ibid.* p. 100.
104. *Ibid.*, p. 102.
105. *Mirqât-ul-Mafâieeh*, Vol. IV, p. 100.
106. *Abu Dâ'ud*, Vol. II, p. 279.
107. (a) *Abu Dâ'ud*, Vol. II, p. 260.
(b) *Bulûgh-ul-Marâm*, p. 159 (Quoted from Musnad Ahmad, Tirmazi, Nasâi, and Ibn-i-Majah).
108. *At-Tashri'-ul-Janâ'i*, Vol. II, p. 706.
109. Qur'an 9:12.
110. (a) *Bulûgh-ul-Marâm*, p. 153 (Quoted from Sahih Bukhari).
(b) *Tirmazi*, p. 230.
111. *Abu Dâ'ud*, Vol. II, p. 598.
112. *Bulûgh-ul-Marâm*, p. 152 (Quoted from Bukhari, Muslim and Abu Dâ'ud).
113. *Bulûgh-ul-Marâm*, p. 153 (Quoted from Abu Dâ'ud).
114. Qur'an 2:217.
115. Qur'an 16:106.
116. *Fiqh-us-Sunnah*, Vol. II, p. 450.
117. Qur'an 3:85.
118. (a) *Subul-us-Salâm*, Vol. IV, p. 265.
(b) *Fiqh-us-Sunnah*, Vol. II, p. 456.
119. *Subul-us-Salâm*, Vol. IV, p. 265.
120. *Ibid.*
121. *Fiqh-us-Sunnah*, Vol. II, p. 456. (Quoted from Dâr Qutni and Bayhaqi).
122. *Subul-us-Salâm*, Vol. IV, p. 265.

123. *Fiqh-us-Sunnah*, Vol.II, p. 456.
124. *Subul-us-Salàm*, Vol.IV, p.265 (Quoted from Musnad Ahmad).
125. (a) *Fiqh-us-Sunnah*, Vol.II, p. 460.
(b) *Tilka Hudoodullah*, p.277.
126. (a) *Tilka Hudoodullah*, p.278.
(b) 'Izzud-Din Baleeq, *Minhaj-us-Sàliheen*, p.600.
127. *Ibid.*
128. (a) *Al-Ahkàm-us-Sultàniyyah*, p.55.
(b) *Subul-us-Salàm*, Vol.IV, p.265.
(c) *Fiqh-us-Sunnah*, Vol.II, pp.457-459.
(d) *Tilka Hudoodullah*, p.277.
129. (a) *Fat'h-ul-Qadeer*, Vol.IV, p.48.
(b) *Raad-ul-Muhtàr*, Vol.III, p.426.
130. *At-Tashri'-ul-Janà'i*, Vol.II, p.673.
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132. *Ibid.*
133. *Ibid.*
134. Qur'an 7:33.
135. Qur'an 49:9.
136. Qur'an 2:191.
137. Qur'an 2:192.
138. *Bulugh-ul-Maram*, p.151 (Quoted from Bukhari & Muslim).
139. *Bulugh-ul-Maram*, p.151 (Quoted from Sahih Muslim);
140. (a) *Bulugh-ul-Maram*, p.152 (Quoted from Sahih Muslim).
(b) *Mishkjàt-ul-Musàbeeh*, Vol.II, p.319.

141. *Bulugh-ul-Maràm*, p.152 (Quoted from Sahih Muslim).
142. *Mishkjät-ul-Musàbeeh*, Vol.II, p.319.
143. Qur`àn 17:33.
144. *Fiqh-us-Sunnah*, Vol.II, p. 508 (Quoted from Bukhàri & Muslim).
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146. Qur`àn 4:93.
147. Qur`àn 5:32.
148. *Fiqh-us-Sunnah*, Vol.II, p. 509 (Quoted from Ibn-i-Màjah).
149. *Fiqh-us-Sunnah*, Vol.II, p. 509 (Quoted from Sahih Bukhàri).
150. Qur`àn 2:178-179.
151. *Fiqh-us-Sunnah*, Vol.II, p. 514 (Quoted from Sahih Bukhàri).
152. Qur`àn 2:179.
153. (a) *Tafseerät-i-Ahmadi*, Vol. I, p.338.
(b) *Fiqh-us-Sunnah*, Vol.II, p. 516.
154. Qur`àn 4:93.
155. Qur`àn 2:178.
156. Qur`àn 5:45.
157. *Fiqh-us-Sunnah*, Vol.II, p. 517 (Quoted from Bukhàri & Muslim).
158. Ibid.
159. *Sharh-ul-Muslim*, vol.II, p.58.
160. (a) *Tafseerät-i-Ahmadi*, Vol.II, p.338.
(b) *Fiqh-us-Sunnah*, Vol.II, p. 518.
161. *Fiqh-us-Sunnah*, Vol.II, p. 518 (Quoted from Dàr Qutni).

162. *Fiqh-us-Sunnah*, Vol.II, p. 518.
163. *Ibid.*, p.519.
164. (a) *Ibid.*
(b) *Tafseeràt-i-Ahmadi*, Vol. I, p.338.
165. Qur'àn 4:92.
166. (a) *Minhaj-us-Sàliheen*, pp.609-610.
(b) *Tafseeràt-i-Ahmadi*, Vol. I, p.338.
167. *Tafseeràt-i-Ahmadi*, Vol. I, p.338.
168. Qur'àn 4:92.
169. Qurtabi, *Al Jàme' li Ahkàm-il-Qur'àn*, Vol.V, p.315.
170. *Fiqh-us-Sunnah*, Vol.II, p. 551.
171. (a) *Tafseer—Al—Qurtabi*, Vol.V.p.315.
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(b) *Subul—us—Salàm*, Vol.III, p.249 (Quoted from Abu Dà'ud, Nasà'i, Ibn—i—Màjah and *Sahih Ibn—i—Hibbàn*).
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178. *Bulugh—ul—Maràm*, p.149 (Quoted from Dàr Qutni, Tirmazi, Abu Dà'ud, Nasà'i, Ibn—i—Màjah, Ibn—i—Abi Shaybah).
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185. Qur'an 6:165.
186. (a) *Ahkàm-ul-Qur'an*, Vol. I, p.475.
(b) *Fiqh-us-Sunnah*, Vol. II, p. 557.
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196. (a) *Bulugh-ul-Maràm*, p.149.
(b) *Subul-us-Salàm*, Vol. III, pp.244-245.
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201. Qur'an 4:34.
202. *At-Tashri'-Janà'i*, Vol. I, p702
203. Ibid., p.703.
204. Ibid., pp.147,703.
205. *At-Tashri'-ul-Janà'i*, Vol. I, p.703
206. Qur'an 4:34.
207. *As-Siyágat-ush-Shar'iyyah*, pp.120-121.
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209. Qur'an 9:118.
210. *At-Tashri'-ul-janá'i*, Vol. I, p. 702.
211. Ibid., p.704.
212. *Mishkát-ul-Masàbeeh*, Vol. I, p.560.

213. *Al-Mabsút*, Vol. I, P. 145.
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217. (a) *al-Mughni*, Vol. X, p. 348.
(b) *Fat'h-ul-Qadeer*, Vol. IV, p. 212.
218. *At-Tashri' -ul-Janà'i*, Vol. 1, p. 704.
219. *Ibid.*, p. 705.
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(b) *Fat'h-ul-Qadeer*, Vol. IV, p. 216.
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223. *Al-Mazhari*, Vol. II, p. 44.
224. *Qur'àn* 12:25, 32, 33, 35, 36, 39, 42 and 100.
225. (a) *Fatàwà Ibn-i-Taymiyyah*, Vol. IV, p. 178.
(b) *Al-Mughni*, Vol. XV, p. 347.
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(c) *Al-Ba'hr-ur-Rà'iq*, Vol. V, p. 51.
228. *Al-Ahkàm-us-Sultàniyyah*, p. 206.
229. (a) *Tabsarat-ul-Hukkàm*, Vol. II, pp. 262-263.
(b) *Mawàhib-ul-Jaleel*, Vol. VI, p. 319.
230. (a) *Fat'h-ul-Qadeer*, Vol. IV, p. 215.
(b) *Badà'i' -us-Sanà'i'*, Vol. VII, p. 94.
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233. *At-Tashri' -ul-Janà'i*, Vol. I, p. 689.
234. *Ibid.*
235. (a) *Al-Ahkàm-us-Sultàniyyah*, p. 239.
(b) *Al-Tashri' -ul-Janà'i*, Vol. I, p. 701.

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237. Qur'àn 5:3.
238. Qur'àn 2:275.
239. Qur'àn 2:278, 279.
240. Qur'àn 5:58.
241. Qur'àn 8:27.
242. Qur'àn 4:2.
243. Qur'àn 4:135.
244. Qur'àn 22:30.
245. Qur'àn 6:109.
246. Qur'àn 49:11.
247. Qur'àn 2:188.
248. Qur'àn 5:90.
249. Qur'àn 83:1-3.
250. Qur'àn 26:181-83.
251. Qur'àn 7:80-84.
252. Qur'àn 11:82-83.
253. *Fiqh-us-Sunnah*, Vol.II, p.428 (Quoted from Abu Dà'ud, Tirmazi, Nasà'i and Ibn-i-Màjah)
254. *Ibid.*, p.433.
255. *Ibid.*
256. *Ibid.*
257. *Ibid.*
258. *Ibid.*
259. *Fiqh-us-Sunnah*, Vol.II, p.434.
260. *Ibid.*

PART - IV

PHILOSOPHY OF PUNISHMENTS

- ★ *Western Philosophy of Punishments.*
- ★ *Islamic Philosophy of Punishments.*

Islamic Punishments & Western Critics.

CHAPTER - I

WESTERN PHILOSOPHY OF PUNISHMENTS.

1. *Objectives of Punishments.*
2. *Nature of a proper punishment.*
3. *Qualities of a proper punishment.*

In an exhaustive study of criminology, two basic viewpoints emerge regarding the punishments.

- (1). Punishment as a method of protecting the society by reducing the occurrence of crimes.
- (2). Punishment as an end itself.

Research, relating the ultimate goal of criminal justice, has been conducted from the time of Plato & Aristotle. The theories evolved from the long history of inquiry can be divided into two classes.

Collectivist Philosophy:

The first is the reflection of Collectivist Philosophy and accordingly the criminal Law is primarily required to preserve and increase the welfare

through the infliction of specific punishments, that are the means of realizing the aim.

Individualist Philosophy:

The second is clearly allied with Individualist Philosophy which provides mainly an ethical conception and is concerned with the treatment of an individual as an individual

and not as a unit in a group. This view is advanced by Kant and Hegel.

Kant¹ says in his "Science of Right" "Judicial punishment can never be administered merely as a means for promoting a good society but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime "Justice, therefore, is not a means to an end. It is an end in itself, and punishment is inflicted for no other than that it is merited by the wrong doer".

The nature and forms of punishment are to be determined exclusively in the light of its specific objective. The operation of at least six objectives has been traced in this connection.²

1. *Deterrence.*
2. *Reformation.*
3. *Prevention*
4. *Expiation*
5. *Restitution.*
6. *Retribution,*

The first three of these approaches, as salmond³ states, regard the punishment as a means of protection of the community from further commission of offences, whereas the last three treat the punishment as an end in itself.

Punishment As A Means:

Deterrence:

The purpose of deterrent punishment is to incorporate the regard for law in the person on account of the fear of punishment in case he intends to commit the crime.

Flugel⁴ explains that deterrent punishments are the ally of the law-abiding individual in his struggle to keep his own anti-social wishes under control.

He Says, the criminal, by his flouting of law and moral rule constitutes a temptation to our primitive wishes and instincts by saying:

"If he does it why should not we"?

This stirring of criminal impulses within ourselves calls for an answering effort on the part of our conscience, in the words that crime does not pay. This reply becomes more efficacious and decisive by a demonstration on the person of a criminal in the form of punishment. By punishing him we are not only showing him that he; can not get away with it but holding him up as a terrifying example to our own tempted and rebellious selves"⁵.

Therefore, this theory of deterrence holds that the individuals are restrained from committing the crime. However the required effect of fear of the deterrent punishments depends on the extent to which the criminal law is enforced and exact punishments are awarded. If there are chances of avoiding detection in a society, the fear of punishment loses much of its persuasive force. the efficiency of the law-enforcing agencies is, therefore, of the first importance.

Mark Bennies research published in 1936.⁶

Danish Experience of 1944⁷

American Statistics Published in 1951⁸

British Survey of 1960⁹

and many other reports and observations have disclosed the fact that many criminals, who constitute a substantial proportion of our die-hard offenders, are quite

incapable for learning even from the experience of punishment, much less from the threat of it.¹⁰

Hence this theory finds no more support from recent pragmatic researches and practical observations conducted in the West.

2. Reformation

According to this view, the criminal is considered to be curable during imprisonment by adopting some proper corrective and reformatory means, while undergoing imprisonment, the criminal are persuaded coaxed and wheedled to abandon their evil Inclinations and proclivities through religious training and moral education.

In England an act, regarding the appointment of Preachers in Jails, was passed in 1773, and according to John Howard, many people were thus appointed to make its application effective.¹¹

As Simon has mentioned, many great preachers like John and Charles Wesley prayed with and ministered to the prisoners.¹²

The Chaplain is still supposed to perform an important reformatory function in British prisons and borstals, and there is great official pressure on prisoners to attend religious services.¹³

After the introduction of Lombrosian view in the history of Criminology, attention is increasingly being directed towards scientific reformatory education of criminals, and the improvement of their environmental circumstances.

By the advancement of Psychological theory, psychological treatment of criminals during imprisonment has also been acknowledged to be necessary in more obviously abnormal cases.

By the development of Psychiatric Criminological theory, the criminal is no longer a "bad man" but a "Sick man". Therefore, proper treatment of psychotic diseases has also been suggested by some specialists. Hence, deterrent punishment is not only undesirable for this purpose, but it absolutely negates the idea of reformation of the criminals.

However, this philosophy has also been strictly criticized by many other Western criminologists for the reason that this concept if widely accepted, may damage the moral fiber of the whole community.¹⁴

Dr. Mannheim, in this Context, says "But on principle, to divorce the idea of punishment by the state from moral considerations has in the long run, proved a fatal error. Only on a moral basis is possible to argue with the law-breaker."¹⁵

3. Prevention

This is to prevent the criminal from committing the crime at least during the period of his sentence. Because in prison, the offender can not commit any crime he is effectively prevented from doing so. This is the very idea of "Preventive detention" often meted out of persistent offenders.

There are two types of prevention.

1. *Prevention by making the criminal physically incapable of committing the crime. This is its permanent form. Capital punishment, is of course, a complete prevention in this sense, as is Castration used in Scandinavian Countries to bring to an end to a long career of sexual offences.¹⁶ Other drastic corporal punishments also fall in this category.*
2. *Prevention through detention, as mentioned above.*

This may extend to even life-imprisonment. The second type of prevention is further classified into two kinds.

1. *General Prevention: This exercises a deterrent effect also on the rest of the population.*
2. *Individual Prevention: This has its effect upon the criminal himself, either as a deterrent, or if he was imprisoned, also as a physical restraint during the period of sentence.*

Punishment As An End :

Expiation According to this theory, punishment becomes a moral and spiritual aim in itself. The Expiatory view possesses an important place in religious doctrines and practices. Most of the great religions of the World testify to its significance¹⁷ through the means which they prescribe for its achievement vary widely from one religion to another. The essence of this view is that the offender in suffering his punishment, thinks that he has paid for his crime and that his account is therefore, clear. The infliction of punishment lightens the burden of guilt on the criminal. It seems to be a fundamental need of our moral nature.

5. Restitution

Every person, who is the victim of an offence, naturally experiences some sense of revenge and he feels the need of compensation in one way or the other.

According to this view, the criminal is legally and morally bound to make good the loss and damage inflicted by him upon his victim. Thus punishment is the necessary mode of compensation for criminal infringement of the rights of the people.

When the sense of revenge of the person victimised, is justly satisfied in the form of punishment, awarded to the offender, then furtherance of the criminal action is no more required by him. In primitive periods, compensation or revenge was exacted by the victim himself or his kin,¹⁸ but as crime became more and more a public matter, so did the punishment take on correspondingly the character of a state duty. Mannheim¹⁹ stressing the utility of the RESTITUTION, attaches much importance to the provision of more opportunities for real reparation and compensation of the victim in the present system of law and presents some important suggestions.

Margery Fry²⁰ has gone further, and has suggested that if the culprit is incapable of making proper restitution to his victim, the state should do so in his stead.

6. Retribution

The idea of retribution is that one who commits crime should be punished simply for his commission of offence. It is punishment in its present form. No other motive is involved in this case than that of inflicting pain or loss on the offender as a result of his criminal act. Lord Justice Fry, supporting this idea, has exactly said that, "The object of punishment is to adjust the suffering to the sin."²¹

Kenny²² and Stephen, both insist upon the Importance of retaining this idea. Stephen says, "It is highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred and to justify it."²³ Good heart has very clearly expressed his views, saying,

"Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not

given recognition then the disapproval may also disappear.²⁴

A community which is too ready to forgive the wrong doer may end by condoning crime. Some of the Western criminologists have criticized this theory also on various grounds (i.e. Religious concept of forgiveness, Difference of sensitivity in various individuals, existence of tempting social circumstances, etc).

NATURE OF A PROPER PUNISHMENT

According to J.Heath, "Punishment may be defined as an evil, by threatening which the sovereign seeks to deter his subjects from breaking the law, and which, if they do break the law, he visits upon them in just proportion to their offences, with a view to obtaining some future benefit - This is to secure the safety and good of the community."²⁵

The definition may be split into the following essential characteristics:

1. *Punishment is not a desirable act in itself.*
2. *It is an evil.*
3. *It should possess a deterring effect in all circumstances.*
4. *It should be proportional to the gravity of offence committed.*
5. *Its nature should be retributive.*
6. *It should cause preventive effect in future.*
7. *It should also be destined to secure the safety and welfare of the Society.*

8. *It should be imposed only through the sanction of the sovereign (power).*

The main and ultimate purpose of punishments is to secure the safety and welfare of the community, but there may be different means of realizing this purpose. The particular nature of crime committed under the specific circumstances of each case, the damage accruing to the victim and many other factors determine which mode is preferable.

Blackstone, considering the general nature of punishment says, "These are evils or inconveniences consequent upon crimes and misdemeanors, being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate whose conduct such laws were respectively made."²⁶

One more essential ingredient has been mentioned by Blackstone, i.e. the punishment can only be inflicted upon those criminals who are the subjects of the state laws.

The proper end of punishment is to stop the repetition of the offence, whether by its deterring and retributive or its preventive effects.

According to Beccaria, Blackstone, Romilly, Paley and Fenerback, preventing the repetition of the offence is not only the main object, but the sole permissible object of inflicting criminal punishment."²⁷ It may effect the prevention of crimes in at least three different ways.

- (a) *It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence, i.e. Imprisonment, Physical disablement or Death penalty etc.*
- (b) *It may act on the offender's mind, eradicating his*

criminal trends either through the fear or the moral influence.

(c) *It may act on the minds of others?*²⁸

All objects are contained in one main purpose, and that is "Prevention of Repetition of Crime."

Bentham²⁹ opines that all punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it at all is to be admitted; it ought only to be admitted in as far as it promises to exclude some greater evil.

It is of the greatest importance that the punishment should succeed the crime as immediately as possible.

QUALITIES OF A PROPER PUNISHMENT: According to Bentham, a proper punishment should have the following qualities.

1. *It ought to be susceptible or divisible. There should be possibility of increase or decrease in it.*
2. *It should be equal to itself. It signifies that it should be same for all like criminals but variable in terms of age, sex, condition and circumstances, etc.*
3. *It should be commensurable.*
4. *It should be analogous to the offence. It signifies that an eye for an eye, a tooth for a tooth.*
5. *It should be exemplary.*
6. *It should be economical. Only that degree of severity should be applied which is absolutely necessary to achieve the end.*
7. *It should be remissible or revokable.*³⁰

NOTES

1. Keeton . G.W. *The Elementary Principles of Jurisprudence* p.326 .
2. Jones, H. *Crime and the penal system* p.134
3. Fitzgerald, P.J. *Salmond on Jurisprudence* p.94
4. *Crime and the penal system* p.142
5. *Ibid*
6. Benny, M. *Law Company* p.291
7. Hurwitz,. S. *Criminology* p.303
8. See Kafauver, E. *Crime in America (1951)*
9. See Howe, *Criminal Statistics (1960)*
10. *Crime and the penal system* p.140
11. Hinde, R.S.E. *the British Penal System* p.17
12. See Simon, J.S. *John Wesley ;and the Religious Societies (Lond.1921)*
13. FORX, L. *British Prison and Borstal System* Chap.XII
14. Goodhear, A.L. *English Law and the Moral Law*, p.93
15. Mannheim H. *Dilemma of Penal Reform* p.21
16. *Crime and the Penal System* p.145\
17. Westermarck, E. *Origin and Development of Moral ideas* p.356
18. Hobhouse, L. T. *Morals in Evolution*, Chap.III
19. *The dilemma of Penal Reforms* pp.223.228
20. *Crime and the Penal System* p.136
21. Kenny, C.S. *Outlines of Criminal Law*, p.33

22. *Ibid*
23. *Crime and Penal System p.145*
24. *Goodheart, A.L. English Law and the Moral Law, p.29*
25. *Heath, J. Eighteenth Century Penal Theory p.98*
26. *Eighteenth Century Penal Theory p.181*
27. *Outlines of Criminal Law p.32*
28. *Ibid*
29. *Bentham, Principles of Morals and Legislation, p.170*
30. *Bentham, Theory of Legislation Chap.VI(The Choice of Punishment)*

ISLAMIC PHILOSOPHY OF PUNISHMENTS

Almighty Allah has stated, expressing the nature of revelation and divine commandments:

قَدْ جَاءَتْكُمْ مَوْعِظَةٌ مِنْ رَبِّكُمْ وَشِفَاءٌ لِمَا فِي الصُّدُورِ
وَهُدًى وَرَحْمَةٌ لِلْمُؤْمِنِينَ

“There has come to you a direction from your Lord and a healing for the (diseases) in your hearts, and for those who believe, a guidance and a mercy.”¹

Characteristics of Qur’anic Guidance.

In this Qur’anic verse the following four basic characteristics have been attributed to the Holy Book “Al-Qur’an” as a whole and to all of its commandments separately.

1. Moue’zah (effective advice)

It means the Qur’an does not embody wishy-washy and impracticable advice nor does it offer an inconsequential prescription. On the contrary, its injunctions are replete with wisdom and pragmatic suggestions which help human beings in charting out a comprehensive timetable for their individual and collective lives. Its practical orientation and its inclusive configuration distinguish it from other books of philosophy and knowledge. The suggestions and prescriptions contained in these books usually border on

1. Qur’an, 10:57

exercises in pure abstraction and are only remotely related to man's practical problems but Qur'anic advice relates to the broad spectrum of human needs and urges and is intended to offer a practical solution of the entire gamut of his mundane and supra-mundane problems.

Qur'an does not treat man as a two-dimensional reality; it treats him as three-dimensional, capable of achieving sublime heights and landing in ignoble depressions. Besides, Qur'anic advice is fruitful and rewarding, it eschews the infructuous results of other philosophies. Therefore, any one who follows Qur'anic advice truly is sure to reap the fruit of his efforts.

2. Shifa (Recuperation)

Qur'anic direction has a curative function as well, and its cure does not only apply to the diseases of the body but it cures the diseases of the heart as well. Rather the emphasis is on the latter. Since the Qur'an is a book of purity, anyone who reads and follows it sincerely, is purged of all the greed, malice and other negative feelings that afflict the human heart. Qur'anic advice is the best antidote against the poison of hypocrisy which apparently seems incurable. The hearts of the present-day generation are blackened by the tar of greed and lust. Since all other solutions to treat this cancerous growth have miserably failed, Qur'an offers the only viable solution for these seemingly intractable maladies of the contemporary world.

3. Hidayah (Guidance)

It means the Qur'an is primarily a book of guidance for human beings. There are other books which claim

themselves to be rivals of the Holy Qur'an but these books contain only half-chewed and indigestible doses of partial guidance and a guidance that is partial is no guidance. If a book guides you through the blind alleys of the world but ignores the desolate lanes of man's spiritual odyssey, it fails as a book of life or as a complete explanation of the mysteries of the universe in which man exists as a speck of life. Qur'anic guidance is complete and anyone who allows himself to be guided by this book from the core of his heart and not from the core of his body or from the cuticle of his nails is guaranteed his final redemption and salvation. Besides, there is no doubt about the authenticity of Qur'anic guidance because it is the word of God and a unique distillation and crystallization of divine wisdom.

4. **Rahmah** (mercy and blessing)

Qur'anic guidance promises divine mercy and blessing to all those who not only follow its message in theory but also practise it to the best of their capacity. Qur'an is not intended to be placed on polished and gilded shelves as a piece of decoration, it is intended to be recited, understood and followed by all the believers and play such a fundamental and vital role that each gesture they make, each posture they assume and each act they perform, is tinged with the perfume of its eternal message. When the human beings are saturated with its divine aroma, the blessings of God are showered on them in immeasurable doses. Infinite quantities of divine mercy are petalled on them which is a proof of the fact that God is pleased with them and they are pleased with God. The manifestation of mercy in their lives is the sense of peace and harmony which they experience in the daily routine of their existence. The lack of disharmony in their lives is an indication of that deep-rooted and pervasive peace that comes to human beings

as a reward for piety and righteousness and which is the most transparent expression of divine mercy and blessings.

Two-fold Objective

All of these characteristics indicate the two-fold objective of divine commandments:

- (i) Protection and promotion of human values.
- (ii) Protection and promotion of public interests.

The same idea prevails in Islamic concept of punishment. The punishments in Islamic penal system are not prescribed as ends in themselves, as propagated by the 'Western individualistic philosophy' advanced by Kant and Hegel. The punishments are, in fact, a means of promoting the moral values and general welfare of human society. The philosophy of Islamic punishments is remarkably different from and highly superior to the penal philosophy advanced by Western criminologists. In order to understand this concept, we are obliged to study the subject from the following angles:

- | | |
|-------------------------------|----------------|
| (1) Philosophy of objects | (فلسفہ مقصدیت) |
| (2) Philosophy of enforcement | (فلسفہ تنفیذ) |
| (3) Philosophy of severity | (فلسفہ شدت) |
| (4) Philosophy of efficacy | (فلسفہ تاثیر) |
| (1) Philosophy of Objects: | (فلسفہ مقصدیت) |

Since Islamic punishments are means and not ends, they have been placed within the purview of 'declarative laws of Shariah' ((حکم وضعی)) and not within the ambit of 'primary

and defining laws' (حکم تکلیفی). Therefore, the structure of an Islamic society is laid through the enforcement of primary laws and the process of its erosion and disintegration is checked and safeguarded through the enforcement of punishments. The purpose of this bifurcation is to encourage and promote basic human values and to discourage their violation. The character of Islamic punishments is comprehensive and all-embracing as compared to that of the secular system. As already mentioned, there are six differing and mutually exclusive philosophies of objects relating to punishments, which are adopted by different schools of criminology. However, no attempt is made in Western penal law to combine and coordinate the various angles of approach. But the philosophy of objects of Islamic punishments is altogether different as it is based on inclusive perception and evaluation. Islamic punishments, therefore, possess the following characteristics simultaneously and synchronically:

- (i) Retributive character
- (ii) Preventive character
- (iii) Deterrent character
- (iv) Redressive character
- (v) Restitutive character
- (vi) Reformative character
- (vii) Protective character
- (viii) Expiative character

Retributive Character

The first objective of Islamic punishments is to award punishment to the culprit equal to the magnitude of his

guilt because this is inflicted in exchange for the crime he has committed. Since the commission of a crime itself is a violation of a divine commandment, therefore, it requires the imposition of punishment. It is backed by the presumption that each and every act must be followed by a positive or a negative response. It also finds an express elaboration in the words of the Holy Qur'an:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ
اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

“As to the thief, male or female, cut off his or her hands. This is a retribution, by way of example, from God, for their crime: and God is exalted in power.¹

The Qur'anic verse explains that the punishment of amputation of hands is prescribed simply as retribution of the criminal act of theft and the words جزاء - نكالا explain the fact that the idea of retribution is rooted in Islamic philosophy of punishment which is awarded by God Almighty on the clear assumption that the suffering originating from a sinful or criminal act cannot be adjusted without punishment. The prescription of punishment by the Shariah for sins and crimes is motivated by social and moral considerations and not by personal feelings of revenge alone. Its primary aim is to induce a sense of strong hatred and revulsion in the criminal as well as in the entire society of which the criminal happens to be a member. The Islamic law has enunciated this principle as a declaration of disapproval, disapprobation and denunciation of the criminal act.

The same principle is explained in the verse which prescribes the punishment for robbery and dacoity:

1. Qur'an, 5:41

انَمَا جَزَاؤُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ
فَسَادًا أَنْ يُقْتَلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ
خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا
وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ .

“The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land, is execution or crucifixion or the cutting off of hands and feet from opposite sides or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the next world.”¹

It is further established through another Qur’anic verse:

وَالَّذِينَ يَأْتِيْنَهَا مِنْكُمْ فَادُوْهُمَا

“If two men among you are guilty of lewdness, torture them both.”²

Here the words فَادُوْهُمَا (torture them both) again indicate the retributive capacity of the punishment.

Preventive Character

Islamic punishments at the same time possess the preventive character through the infliction of some physical discomfort and handicap. For example, death penalties, amputation of hands or feet, imprisonments, transportation, confinements, etc. The criminals are prevented from repeating the crime either due to a permanent or temporary disability.

1. Qur’an, 5:36

2. Qur’an, 4:16

Qur'an, prescribing the various punishments for robbery, declares it as 'an act of mischief and disruption in the world'. It states:

وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا

"And they create mischief and disruption in the world."¹

In order to punish this crime, the preventive confinement has also been prescribed as one of the Hudood which is declared in the words:

أَوْ يُنْفَوْنَ مِنَ الْأَرْضِ

"These people should be removed from the hub of activity."²

This order signifies that they should be transported to distant and unfrequented places, so that through exile they could be prevented from committing crimes.

This Qur'anic verse clearly explains that the punishment of imprisonment or transportation is prescribed in order to prevent the criminal from spreading disruption. The same idea is derived from another Qur'anic verse where the first punishment for immorality and prostitution is prescribed in unambiguous terms:

فَأَسْكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّهِنَّ الْمَوْتُ

"Confine them to houses until death claims them"³

1. Qur'an, 5:36

2. Qur'an, 5:36

3. Qur'an, 4:15

The concept of 'confinement till death' stresses the relevance of punishment as preventive measure.

It is reported by Mak'hul that Hazrat 'Umar ordered in case of the third occurrence of a crime of theft:

اجسوه عن المسلمين

"Imprison the thief to prevent him from (harming) the Muslims."¹

Deterrent Character

The third objective of Islamic punishment is its deterrent capacity. The Shariah has recommended that the punishments should be executed publicly because public display of the imposition of sentence possesses a deterrent effect. As a consequence of this public demonstration, all those who had even the slightest inclination towards the commission of crime would restrain themselves in view of the punishment it entails. In order to achieve this objective, Shariah has clearly commanded that the fixed punishments of Islam should not be reduced or mitigated even under pressure of the sentiment of mercy. It is stated in Holy Qur'an:

وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ
وَالْيَوْمِ الْآخِرِ

"Let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day."²

The Qur'anic command prescribed that if the guilt is

1. Qazi Sana-ullah Panipati, *Al-Mazhari*, Vol. III, p.109 (quot. from *Musannaf Ibn-i-Abi Shaybah*)
2. *Qur'an*, 34:2

proved, the offender must be punished at all costs and the punishment should not be tampered with compassion and leniency because any such tincturing or blending may vitiate the effectiveness of the punishment. The untinkered infliction of punishment on the criminal is one of the requirements of 'Din' of Almighty Allah which must be fulfilled under all circumstances.

In the same verse, it is further ordained:

وَلِيَشْهَدَ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ .

“And let a party of the believers witness their punishment.”¹

Therefore, the purpose of awarding severe punishment is to put fear of prosecution into the public as a deterrent measure. This deterrent and exemplary aspect of Islamic punishment has a psychological impact on all those who have criminal inclinations and propensities. They curb their criminal tendencies for fear of the ensuing punishment and the accompanying public demonstration of its execution. This is the basic object of gathering the people on the occasion of punishing the adulterers. The same purpose is served by hanging the chopped hands and feet of the criminal and by the punishment of stoning in broad daylight.

Redressive Character

In most of the crimes, the aggrieved party becomes revengeful and if this feeling of revenge is not satisfied and washed out of the mind through redress, the spread of criminal activity cannot be checked, specially the crimes relating to murders or vital injuries. If these crimes are not redressed, they lead to an almost unending chain of tension and conflict, murders and counter-murders between the

1. Qur'an. 34:2

parties. Although in modern and secular law, the state is a party to get the criminal punished for such crimes, it remains unmindful of whether the real feeling of revenge has been satisfied or not. It is a landmark of Islamic penal system that all crimes of this category have been declared compoundable offences and the punishments prescribed for them are marked by a rare degree of balance and equilibrium as is stated by the Hcly Qur'an:

يَا أَيُّهَا الَّذِينَ آمَنُوا كَتَبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحَرِّ
بِالْحَرِّ عَذَابُ النَّيْمِ . وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي
الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ .

“O believers: The law of retaliation is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. In the law of equality and retaliation there is life to you. O you men of understanding that you may restrain yourselves.”¹

The object of this law of Qisas is to satisfy the feeling of revenge by redressing the aggrieved party through inflicting on the offender the same physical damage or punishment as inflicted by him on the victim. The law of eye for eye, ear for ear, limb for limb and life for life is the best way of redressing the physical feeling of revenge. Moreover, on the basis of the characteristic of compoundability of this offence, the injured party is also given the right of accepting blood money in place of retaliation, in case it wishes to be compen-

1. Qur'an, 2:178-179

sated monetarily and not physically. Therefore, the aggrieved party has the option either to satisfy his feeling of revenge through compensation or to forgive the criminal altogether. The only way to check the proliferation of evil in society is that the state should not interfere with the right of the aggrieved and the aggrieved should be given a chance to satisfy and redress himself in the way he likes. Thus, the redressive form of punishment is an important aspect of Islamic system of punishments.

Restitutive Character

The punishments of blood money and monetary compensation which are prescribed in replacement of retaliation, as discussed above, possess the restitutive character also. When the sense of revenge of the person victimized is justly satisfied on his own demand in the terms prescribed by Shariah then he cannot intend to reenact the crime. This idea is stressed in the verse discussed above.

فَمَنْ عَفَىٰ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْهُ بِالسَّمْعِ وَالْأَدَاءِ إِلَيْهِ
بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنْ أَعْتَدَىٰ بَعْدَ
ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ

“But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in a grave penalty.”¹

This means that the monetary compensation which is declared to be handsome gratitude is, in fact, the restitution of the aggrieved. After this permissible dose of satisfaction, the aggrieved has no right of additional satisfaction of his revenge because such an act would amount to exceeding the limits of Shariah. This act would in itself be considered a

crime. Thus the law of retaliation gives redressive character to the punishment whereas the law of blood money gives restitutive character to the punishment.

Reformative Character

Most of the punishments in Islam aim at the reformation of the criminal, and sometimes if reformative purpose is achieved before the cognizance of the criminal in the form of his repentance, then, in some cases, remission is also awarded. It is stated in the Qur'an in case of theft:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ
اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ . فَمَن تَابَ مِن بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ
اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ .

“As to the thief, male or female, cut off his or her hands as a punishment by way of example, from God, for their crime. And God is exalted in power. But if the thief repents after his crime, and amends his conduct, God turns to him in forgiveness, for God is most forgiving and merciful.”¹

The second verse explicitly prescribes the reformative object of penal law. This concept is further supported by the Prophetic tradition already mentioned, according to which the Holy Prophet (peace be upon him) said to one of his companions that the remission could be awarded to the thief before cognizance of the court. At another occasion, it is mentioned in case of Qazf that the false adulterer should be deprived of the right of witness. If this punishment achieves the actual object, that is, if the offender repents after the commission of the crime and reforms himself, then he can be exempted from the punishment. It is stated in the Qur'an:

¹ Qur'an, 5:41-42

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ
 ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ
 الْفَاسِقُونَ . إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ
 غَفُورٌ رَحِيمٌ .

“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) flog them with eighty stripes and reject their evidence ever after. For such men are wicked transgressors: Unless they repent thereafter and mend (their conduct) or reform themselves; for God is most forgiving and merciful.”¹

The verse clearly states that the adulterer on the basis of repentance and reformation is exempted from the imposition or continuation of punishment which indicates that the real object of this kind of punishment is the reformation of the criminal.

The same concept is further elaborated in Qur'an in the context of the punishment of dacoity and robbery:

إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ فَاعْلَمُوا أَنَّ اللَّهَ
 غَفُورٌ رَحِيمٌ .

“Except for those who repent before they fall into your power in that case, know that God is most forgiving and merciful.”²

These Qur'anic verses stress the reformatory aspect of Islamic punishments.

Hazrat 'Umar, the second orthodox Caliph, is reported

1. Qur'an, 24:4-5

2. Qur'an, 5:37

to have said:

احبسه حتى اعلم منه التوبة

“I would confine the criminal in the jail unless I am convinced that he has repented and reformed himself.”¹

Imam Abu Hanifa endorses this purpose of punishment. It is stated:

المراد بالنفي عند ابي حنيفة ان يحبس حتى يظهر منه التوبة

“The meaning of imprisonment is to confine the criminal in a place till his repentance and reformation.”²

The reformatory character of jails and prisons is also established through the Qur’an with reference to the imprisonment of Hazrat Yousof (peace be upon him). During his confinement, he tried to tone up the faith and conduct of the prisoners. Qur’an says:

يٰصَاحِبِ السِّجْنِ ءَاَرْبَابٌ مُّتَفَرِّقُونَ خَيْرٌ اِمَّ اللّٰهُ الْوَاحِدُ الْقَهَّارُ
مَتَّعِدُونَ مِنْ دُوْنِهِ اِلَّا اَسْمَاءَ سَمَّيْتُمُوْهَا اَنْتُمْ وَاٰبَاؤُكُمْ مَّا
اَنْزَلَ اللّٰهُ بِهَا مِنْ سُلْطٰنٍ اِنْ اَنْحٰكُمْ اِلَّا لِلّٰهِ اَمْرًا اَلَّا تَعْبُدُوْا اِلَّا
بِهٖ ذٰلِكَ الدِّيْنُ الْقَيُّمُ وَلٰكِن اَكْثَرَ النَّاسِ لَا يَعْلَمُوْنَ .

“O my two companions of the prison (I ask you): Are many lords differing among themselves better, or the one God, supreme and irresistible? If not Him, you worship nothing but names which you have named – you and your fathers – for which God has

1. *Al-Mahari, Vol. III, p.90*

2. *Ibid.*

sent down no authority; the command is for none but God. He has commanded that you worship none but Him: that is the right religion but most men understand not.”¹

This verse shows that the reformative activities of Hazrat Yousof (peace be upon him) seem to spring from his confinement in prison. Indirectly, it reflects the prophetic attitude towards the inmates of the jail in particular and the role of these places of confinement in general. The conduct of Hazrat Yousof (peace be upon him) makes it clear that jails and prisons are not dens and breeding grounds for criminals, social outcasts and drifters; but they are first and foremost nurseries and centres of reformation.

This concept of the reformative function of punishment is not introduced by the Western penology, as is erroneously claimed by its exponents and uncritically endorsed by people all over the world. The fact is that it was first introduced by Islam and its main purpose was to turn offenders into better citizens and not to convert them into hardened criminals. It originates thousands of years back from today in the Prophetic conduct of Hazrat Yousof (peace be upon him). It is a pity that the credit for this extra-ordinary innovation has been taken by Western reformers, which amounts to a glaring distortion of reality.

Protective Character

The most significant role of Islamic punishments along with other characters and objects is protective and preservative. In order to understand the protective philosophy of Islamic punishments, we can classify human values into two levels:

Human Values

I. Individual level

II. Social level

Individual Level

Individual level possesses two kinds of values:

- (a) Spiritual values
- (b) Corporal values

The most vital spiritual values, as recognized by the Shariah and required to be protected by the penal laws, are:

- (i) Faith (عقیده)
- (ii) Honour and chastity (عزت و آبرو)
- (iii) Reason (عقل و شعور)

The vital corporal values are:

- (i) Property (مال)
- (ii) Life (جان)

By a thorough analysis of Islamic punishments we can conclude that most of the punishments, whether in the form of Hudood or Qisas, are prescribed only for the protection of these values.

Protection of Faith

The punishment of apostasy is prescribed for the preservation of faith which possesses crucial importance for a Muslim in particular and for an Islamic society in general and which is deemed to be one of the fundamental duties of the state.

Protection of Honour and Chastity

The punishment of adultery, fornication and false

allegation of immorality is prescribed for the preservation of honour and chastity. Since Western penal system does not attach any significance to the preservation of chastity and modesty of a woman, therefore, it does not treat fornication as a crime. In this system, adultery is a crime only to the extent that the adulteress has violated the right of the husband. If the husband has no objection, the penal liability is altogether removed. But Islam has attached topmost priority to the protection of chastity and honour of a woman as well as of a man. That is why Islam has prescribed the severest punishments to protect these values. For adultery committed by a married person, the punishment of stoning to death has been prescribed; for fornication committed by an unmarried person, hundred stripes have been prescribed; for false accusation, eighty stripes are prescribed to insulate the honour and chastity of a person from capricious and malicious damage.

Protection of Reason

The punishment of drinking is prescribed for the protection of reason. Islam voluntarily accepts the responsibility of protecting the people from drinking because on the basis of its general effects, it damages the rational faculties of human beings. Even if there are individual exceptions, they do not negate the applicability of the general principle because exception proves the rule. Modern medical science has also proved that drinking not only damages the smooth operation of mental faculties but it also upsets and puts out of gear the total system of health by germinating the following diseases:

- | | |
|--|-------------------------|
| (i) Inflammation of the stomach and other digestive diseases | (سوزش معدہ - امراض بضم) |
| (ii) Peptic ulcer | (زخم معدہ) |
| (iii) Cancer of the stomach | (سرطان معدہ) |
| (iv) Cirrhosis of the liver | (استسقاء) |

(v) Pancreatitis (سوزش لبلبہ)

(vi) Cardiac diseases (امراض قلب)

It is proved that drinking helps in blood clotting which is a prelude to heart attacks.

(vii) Reduction of vitamins (حیاتیات کی کمی)

Protection of Property and Life

The punishment of theft is prescribed for the protection of property and the punishments of Qisas and Diyat are prescribed for the protection of life of the individuals.

Social Level

It also includes two kinds of social values:

(a) Socio-economic values

(b) Socio-political values

The punishment prescribed for dacoity and robbery is to preserve the socio-economic values of the society whereas the punishment of sedition is prescribed for the preservation of socio-political values. No penal system in the world can provide peace and prosperity to the citizens without guaranteeing the protection of these values at the individual and collective levels. It is only Islamic law which possesses a penal system with an all-embracing and comprehensive capacity.

Expiative Character

Some of the punishments in Islamic penal system also possess an expiatory character as a means of moral and spiritual purification of the criminal. This idea has always enjoyed an important place in the religious doctrines and philosophies of the world. The imposition of the expiative punishment for crimes which are neither liable to Hudood nor to Qisas lightens the burden of the guilt on the criminal: for example, the expiation prescribed for breaking fast, for

dishonouring the oath and for the commission of some prohibited acts during the performance of Hajj, etc., – the punishment seems to be a fundamental need of our moral nature because the burden of sin and its consequential answerability in the life hereafter is removed through the atonement. If Islam had not prescribed these kinds of punishment, its penal system would have remained incomplete and primitive. It is a remarkable feature of Islamic penal system that it has created a balance between the mundane and spiritual aspects of human life by prescribing physical punishments to eliminate earthly liability and expiatory punishments to eliminate ethereal accountability.

(2) Philosophy of Enforcement: (فلسفہ تنفیذ)

Islamic system of punishments exemplifies another philosophical aspect which pertains to its mode of enforcement. As already explained, the punishments in Islam are not the primary laws. They are only the declaratory laws which are always enforced as a condition or consequence and as a vindication of the primary structure of Islamic society. Therefore, the Islamic state first of all undertakes to remove and eliminate the crime-originating factors from the society so that the required structure of social life could be raised on invulnerable foundations. These factors are, for example, 'the environment of immorality', 'the conditions creating economic deadlock and deprivation', 'the conditions generating social disparity', etc. By enforcing the primary laws of Shariah, an attempt is made to extinguish these factors, because only through their elimination the enforcement of the penal system can produce the required results. For example, it is ordained by Qur'an that women should be forbidden to display their beauty and make-up and to wear attractive ornaments while coming out of their houses so that this display may not create an

يَضْرِبْنَ بَأَرْجُلِهِنَّ لِيُعْلَمَ مَا يُخْفِينَ مِنْ زِينَتِهِنَّ وَتُوبُوا
إِلَى اللَّهِ جَمِيعًا أَيُّهُ الْمُؤْمِنُونَ لَعَلَّكُمْ تُفْلِحُونَ .

“Say to the believing men that they should lower their gaze and guard their modesty. That will make for greater purity for them. And God is well acquainted with all that they do. And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands’ fathers, their sons, their husbands’ sons, their brothers or their brothers’ sons, or their sisters’ sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And O believers! Turn you all together towards God that you may attain bliss.”¹

A man can commit fornication not only through his sexual organs but through all of his senses. For example, ‘staring’ or ‘eye-feasting’ is a fornication of the eyes, passion rousing and seductive way of talk is a fornication of tongue and ‘to enjoy the prohibited voice’ is a fornication of the ear, ‘to touch a prohibited object and to walk for an immoral act’ is fornication of the hands and the feet. By fulfilling the primary requirements a pious environment is created in

1. *Qur'an, 24:30-31*

the society and through the imposition of punishments, a check is placed on the preservation of that environment. Thus, the impositional philosophy of Islamic punishments comprises two aspects:

(a) Internal

(b) External

At 'internal level' it removes and eliminates the chances of the commission of crime and at 'external level' it obviates the occurrence of criminal violation through the enforcement of punishments.

The same philosophy is adopted to eliminate the conditions which affect the economic, social and political structure of the society. Through a complete and organized revolution, economic deadlocks and stalements of the people are stamped out by restoring their creative capacities. Social disparities are eliminated through the provision of equal opportunities for progress and development. These arrangements guarantee the effective enforcement of punishments and make them adequately serve the purpose for which they are prescribed.

(3) Philosophy of Severity: (فلسفہ شدت)

The orientalist and Western scholars normally criticize Islamic punishments on the basis of severity. Broadly speaking, two kinds of objections have been raised against these punishments.

As to Their Nature

(i) It is contended that these punishments are very severe, cruel, barbarous and inhuman.

As to Their Applicability

(ii) It is contended that these punishments were formulated and applied in conditions more or less primitive, keeping in view the geo-physical climate of those times. Therefore, their application to the advanced and civilized society of the twentieth century era is not permissible. The punishment of theft, i.e. amputation of hands, and the punishment for adultery, i.e. flogging or stoning to death have been criticized in extremely harsh accents. It is ironically and sarcastically stressed that the Muslims believe in cutting the hands of a thief even for a paltry sum of five pennies. These objections are raised in complete illiteracy and ignorance of the system and philosophy of Islamic punishments. Before we embark on a critical dissection of this absurd and 'prejudice - oriented criticism', it should be noted that these objections of barbarity and inhumanity are raised primarily by the scholars of those nations who practically justify the use of nuclear weapons for subjugating and monopolizing free and independent nations, killing millions of innocent men, women and children. They are obsessed with their psychopathic craving for power and they satisfy their hunger and urge for power by decimating millions of otherwise inculpable and peace-loving citizens of other nations. Their performance in Africa, Vietnam, Nagasaki, Hiroshima, etc., is a brazen and unblinking proof of their inhumanity and barbarity. It is actually these nations who have billions of such skeletons stacked away in their cupboards on account of their massive and indiscriminate massacre of innocent people. Therefore, before hurling abuses and insults against Islamic punishments, they should first probe into their own blood-stained, hatred-hewn and jealousy-prone hearts. However, irrespective of their bias-based criticism, we would like to explain the nature of cruelty and inhumanity as objectively as

possible and to explain the relationship between these two concepts and the concept of punishment.

Factors Determining Cruelty of Punishments

There are five major factors, the existence or non-existence of which determines the humanity or inhumanity of the punishment:

(i) **Imbalance :**

If there is no balance between the sanguineness of crime and the severity of punishment and the penal element far exceeds the nature of the criminal act, the punishment may be called cruel and inhuman.

(ii) **Torture :**

If any punishment or the mode of its execution or the method of its infliction is torturous, cruel and painful, the punishment may be criticized as inhuman.

(iii) **Contemptuousness and humiliation:**

If a punishment degrades and humiliates mankind in general or its mode of dispensing is indecent and shameful, it may be dubbed inhuman.

(v) **Frequency:**

If the severe punishments are awarded frequently

and there are no optional palliatives or alternatives available, the system of punishments may be described as a cruel and inhuman system.

(v) Inconsequence:

If the execution of punishments is not effective and does not possess the actual preventive capacity, inspite of the complete enforcement of punishments, they may be styled cruel because, on account of their ineffectiveness, they possess only harming effects and lack positive attributes. Besides a negatively-oriented punishment is always inhuman.

Analysis of the Criticism

By making a complete, extensive and thorough study of Islamic system of punishments, we can easily reach the conclusion that this system is essentially based on the following characteristics which absolutely eliminate all doubts of cruelty and shadows of inhumanity. These characteristics have transformed the Islamic system of punishments into an appropriate and acceptable system which is neither barbarous nor unenforceable in the present civilized era. The attitude that since these punishments were framed fourteen hundred years ago and were mainly inspired by the desert conditions of Arabia, therefore, their application to highly sophisticated contemporary settings is both superfluous and irrelevant, is formed on purely materialistic and distorted ideas that emphasize the temporary and transient nature of culture and civilization and also those legal principles and conventions on which the twin-pillars of their so-called humanitarianism are based. The minds of these finicky and crank faultfinders are impervious to the permanent and perpetual nature of any culture and civilization and the everlasting enforceability of their laws, just as

the jumping frogs fail to appreciate the aerial somersault of the birds and the ugly nauseating toads cannot admire the many-splendoured and multispangled beauty of the peacocks. The laws they inherited from ancient materialistic civilizations, such as Hammurabi, Egyptian, Jewish, Roman, etc., induced in them a frame of mind which preconditioned them to visualize and evaluate Islamic culture, legal system and punishments from a restricted and a squint-eyed perspective. Since Islam is the final and definitive addition of Divine Revelation, obviating the necessity of another religion or Prophet, God has blessed it with an unending, inexhaustible, self-refreshing and self-replenishing, everlasting and premanently enforceable system of punishments. Therefore, whether it is fourteen hundred years old desert of Arabia or the present world of technology, the enforceability and consequentiality of Islamic laws possess the same validity and applicability. The factors which make the Islamic system of punishments an adequate, humane and the finest penal system are as follows:

Maintenance of Balance

The first important characteristic of Islamic penal system is that it has maintained over the centuries, and still maintains, and will continue to maintain, on account of its most sensitive perception and evaluation of man's emotional and psychic needs, an ideal balance between criminal gravity and penal severity. The reason of its apparent lack of balance in the eyes of Western scholars is rooted in the basic difference of values which regulate the two cultural systems.

Adultery and its Punishment

Since the Western law does not recognize fornication as a crime unless it is forcibly committed or unless it is an encroachment of the right of a married woman, the rape acquires the status of a crime only on account of the act of encroachment of the rights of the husband or as violation of the free will or consent of the woman. But in Islamic society as discussed above, the preserva-

tion of chastity is itself the most essential value of human life against the Western practice. Therefore, adultery is to be punished as severely as possible because it infringes the most precious, cherished and sacred value of human life, and as far as the act of encroachment is concerned, it is an additional crime which requires extra penalty. But if the woman is married – irrespective of the fact whether she consented to it or not – is again an additional crime against the purity and sanctity of conjugal life which aims at the recognition of the inviolability of paternity. This is the reason that Islam has prescribed the severest punishments for the offence of adultery.

Theft and its Punishment

As far as the balance between the crime of theft and the punishment of amputation is concerned, it is again justified by the sanguineness of the criminal element. Theft, as a matter of fact, is psychologically more heinous than murder because the very act of theft may amount to a murder of the occupant or possessor of the property, and the loss involved in theft may be of a graver and more portentous nature than that involved in murder only. Therefore, theft is the crime that may damage the emotional and mental equilibrium of a person as well as induce in him a maximum feeling of insecurity. Besides, it causes a multiplicity of other crimes which collectively and cumulatively shatter the tranquility and security of its victim to a million shreds and ribbons. Since theft is an extremely heinous crime whose consequences are frustratingly harmful and detrimental, Islam has prescribed for it the most severe punishment. To describe this punishment as cruel and inhuman is to underplay its criminal element which is in itself an imbalanced approach and accounts for the lopsided nature of the Western penal system.

Prohibition of Torture

Shariah has sternly prohibited the infliction of torturous punishments and the use of painful and agonizing methods of their execution. Torture is highly disfavoured and disapproved even in awarding the death penalty; it is equally condemned in the case of flogging. The specification of infliction of lashes and the principles regulating other punishments have been laid down in clear-cut details, the violation of which is in itself an offence. For example, prohibition of burning someone to death, disfigurement and flogging on the soft and delicate parts of the body. These extenuations are coupled with a number of other concessions to reduce the severity of the punishments and make them humanly bearable: for example, prohibition of cruel and sadistic killing, the act of refraining from flogging a sick person till the period of his recovery, the non-permissibility of flogging a pregnant woman till delivery and expiry of the period of fosterage. These are sufficient and substantive arguments to establish the humanity of Islamic punishments.

Prohibition of Indignity and Humiliation

Humiliative, indignitive and contemptuous punishments are also absolutely prohibited in Islam. For example, the criminal should not be completely stripped before flogging is administered to him. Even the concept of imprisonment aims at the restoration of the dignity and social prestige of the criminal by reforming and transforming him through proper education and training into a useful and respectable citizen. Imprisonment in Islam is not dispensed with a feeling of vengeance but its primary purpose is to convert the criminals into law-abiding citizens and rehabilitate their rights as civilians. Therefore, Islam has prescribed that abuses and insults should not be hurled at the criminals since they are in themselves criminal

acts and, therefore, they are expressly forbidden by the Holy Prophet (peace be upon him).

The purpose and motive behind Islamic punishments is to punish the criminal and not to humiliate him. Though he has committed a crime and acquired the temporary status of a criminal, he remains essentially a human being and, therefore, deserves human treatment.

Check on Frequency of Punishments

Islam has placed many checks and restraints to prevent the frequency of the application of punishments. For example, in case of theft:

- (i) The amputation of hands is the maximum punishment that can be awarded, not the minimum punishment. Other alternatives in the form of discretionary punishment are also available.
- (ii) It is an established principle of Islamic law that the Hadd of amputation will not be awarded if the stolen property is less than 'Nisab' (the fixed amount equal to the value of ten Dirhams in the times of Prophetic era which becomes a huge amount in terms of its prevalent value and varies with the constant revaluation of the currencies).
- (iii) The Hadd cannot be awarded if food is stolen to satisfy the pangs of hunger.
- (iv) The Hadd is not applicable either if the stolen property is not taken from proper custody.
- (v) The imposition of Hadd is also avoided in the presence of the slightest evidence which provides the benefit of doubt to the offender.

(vi) The Hadd is also not awarded to the criminal if the act was committed under an extreme state of coercion and compulsion.

All these principles are clearly established through Qur'an and illustrated through the Prophetic Sunnah and the practices of the Orthodox Caliphs. The same applies to the imposition of Hadd of adultery and all other fixed punishments.

The basic propulsion of Islamic penal law is to give maximum benefit to the offender on the principle that to pardon a criminal is better than to punish an innocent person. Therefore, a system of preconditions and prerequisites for the imposition of Islamic punishments, relating to substantive as well as to procedural penal laws, has been formulated to check the frequent application of severe punishments. Discretionary punishments are mostly awarded in place of fixed punishments which is a significant proof of the humane basis of Islamic punishments. Legal study of various periods of Islamic history reveals that Hudood have been very sparingly applied as compared to the available statistics of the Western countries where the range and frequency of punishments is much wider.

Consequentiality of Punishments

There is no doubt that Islamic punishments are the most consequential as compared to any system of punishments ever enforced in human history. If a punishment is consequential and definite in preventing the rate and frequency of crime, then even according to Salmond, a Western authority on jurisprudence, the punishment of burning alive can be awarded to all the offenders. He has very clearly stated that if the deterrent effects of severity were certain and complete, the best law would be the one which by means of the most severe punishments effectively extinguished the crime. If the human nature were so constituted that

a threat of burning all offenders alive could with certainty prevent all breachers of the law, it would be the just fitting penalty for all offences from high treason to petty larceny. In support of the discussion, we can quote the comments of Cordon Gaskell (Reader's Digest, February, 1967): "Foreigners consider this amputation for theft a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world".

The allegation of severity and cruelty against Islamic punishments is, therefore, absolutely baseless, false and biased which is rooted either in sheer ignorance or scholastic dishonesty.

(4) Philosophy of Efficacy: (فلسفہ تائیر)

As already discussed, an Islamic system of punishments is the most effective, efficacious and consequential system in the world. Its efficacy operates on the following levels:

- (i) Psychological
- (ii) Moral
- (iii) Social
- (iv) Economic
- (v) Political

Psychological Level

The psychological level of the efficacy of Islamic punishments is determined by the fact that the element of fear and the psychological feeling of insecurity of life, honour and property is completely eliminated through their application and a healthy psychological environment

is created for the individual through their enforcement.

Moral Level

The moral level is illustrated by the fact that, through the enforcement of Islamic punishments, the criminal and sinful tendencies are minimized in the society which provides morally pure surroundings to the people.

Social Level

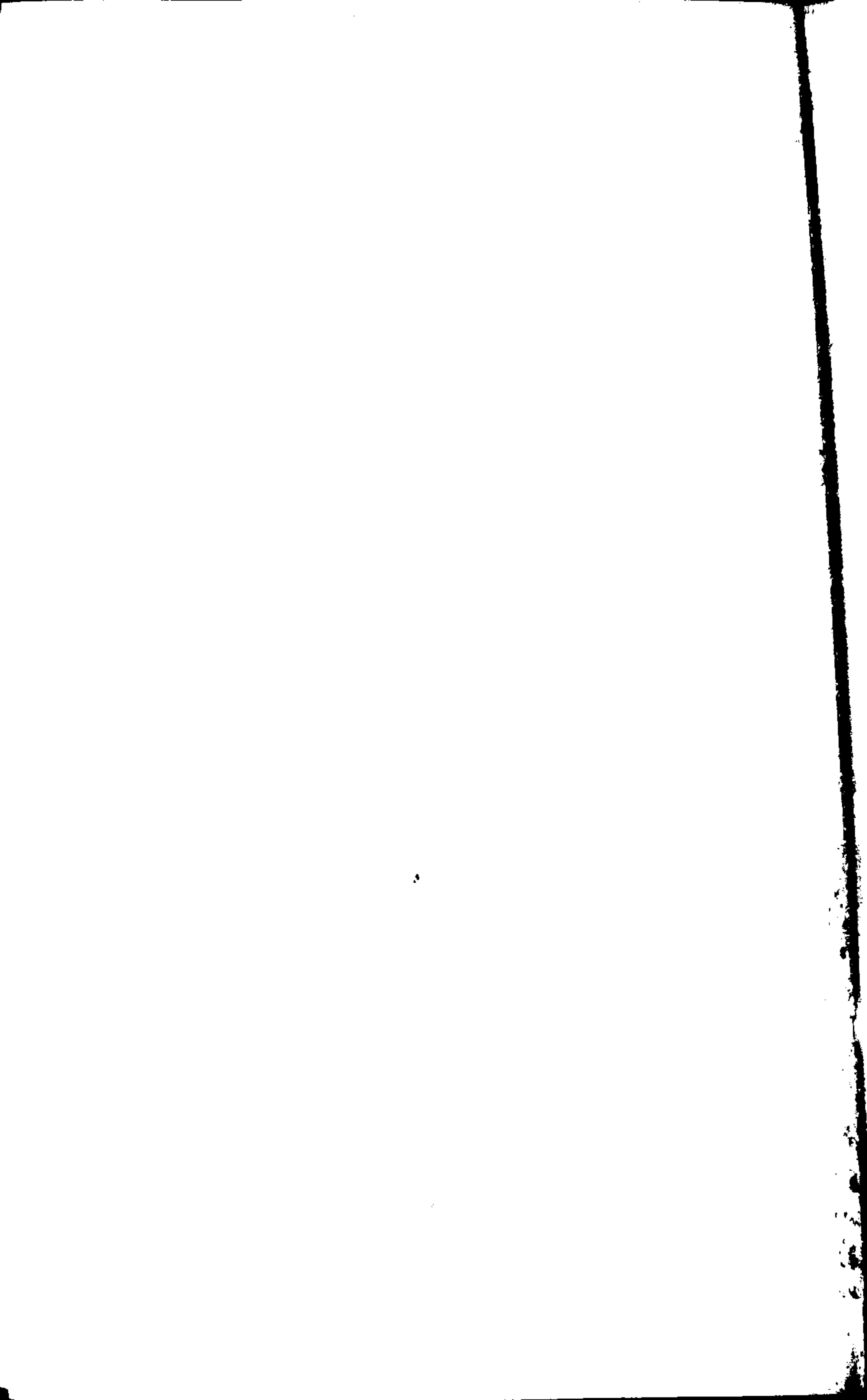
The social level is projected by the fact that, through the complete enforcement of Islamic penal system, the society enjoys an ideal peace, prosperity and tranquility which is an essential requirement for the individual and collective growth of its members.

Economic Level

The economic level manifests itself in the fact that, through the implementation of Islamic punishments, the resolution of economic deadlock is achieved. The application of primary laws guarantees the restoration of the creative capacities and fundamental rights of the individuals. The chances of violation of the laws are drastically reduced if not completely liquidated through the enforcement of punishments which provide security to the economic efforts of the people by declaring the illegal acts like graft, theft, hoarding, smuggling, interest, black-marketing, embezzlement, etc., as punishable offences, because they create unnatural economic disparity in the society.

Political Level

The political level is highlighted by the enforcement of punishments for sedition, rebellion, apostasy and other crimes which endanger the integrity and solidarity as well as the ideological basis of the state.



ISLAMIC PUNISHMENTS

&

WESTERN CRITICS

ISLMAIC PUNISHMENTS & WESTERN CRITICS.

The most serious allegation hurled against Islamic punishments by western Critics and other adversaries of Islam is that they are uncivilized, that they are designed not for ordinary creatures of flesh and blood but for extraordinary monsters, that instead of serving the interests of humanity, they promote the causes of barbarity, and to implement these punishments as effective measures to check crime is in fact to strike at the vitals of human civilization. The vacuity of these objections is apparent from the fact that they are raised by people whose ignorance of Islam is pathetic as well as pervasive and who have developed an irrational prejudice against its enduring values because it superseded both the Jewish and the Christian order of values. These hostile critics have not been able to ignore the fact of supersession. The fact has, as a matter of reality, rankled in their hearts and minds and now, with the rapid influence of Islam in the modern world, it has assumed cancerous proportions which is spreading fast into the veins, cells and arteries of their total life pattern the result is now frequently visible in their vitriolic and stinking out bursts against the most effective and Stream-lined system of punishments ever projected by a religion. Their objections are also nullified when we evaluate the concepts of society and civilization in terms of the critique provided by some of the most sensitive western observers, and in terms of the actual mode of operation of these concepts and the role they have played in moulding the present-day Western society and civilization.

Nature of Western Society

Emerson observes in an essay "Worship" in 'The conduct of Life' that Western society is "a masked ball, here everyone hides his real character and reveals it in hiding".

The remark obviously refers to Western society because balls and dances, where men and women display their physical parts in a shameless manner, are an integral part of the Western civilization. Those who claim that this observation refers to the society in general fail to interpret the image of the 'ball' properly. Thus the Western society is a 'masked ball' where everybody is trying to excel each other in an uninhibited display of the body. There is hardly any reference to any moral values which may check this immoral demonstration. The obvious conclusion is that this society, in which men and women are naked, lacks any moral basis. It is rooted in deceit and duplicity and the deceit is mutual because in this society everybody uses everybody else and sincerity is absent on both sides. The members of this society deliberately lie to one another. Their lives are unending rituals of pretence and posture. By eschewing a frank confession and expression of ideas they cultivate an air of doubt and suspicion which suffocates the entire society. It is further confirmed by Pascal in 'Pensees' who offers mutual duplicity as the only justification for the survival of this society.

"Human society is founded on mutual deceit; few friendships would endure if each knew what his friend said of him in his absence."

The obvious question that pops up is that when a society is based on negative values, how can it play any positive role in the promotion of human values. A society motivated by compromises and adjustments of convenience is hardly expected to encourage the development of those virtues which make man the most superior creature in the scheme of the universe. Logan Pearsall Smith wrote in 'After-thoughts': "There is a toad in every social dish, however well they cook it". Thus, in the eyes of one of their own highly cherished writers, Western society is a society of toads. Toads are well-known for their creepy philosophy of life and for their ugliness. It is not possible

for them to appreciate the flight of the eagles and the beauty of their wings. A society of toads cannot admire a society of eagles and Islamic society is essentially a society of eagles.

سے پرواز ہے دونوں کی اسی ایک جہاں میں
رگس کا جہاں اور ہے شاہین کا جہاں اور

The punishments in Islam are, therefore, designed to eliminate all the amorphous, clumsy and humpy toads and establish a society of pure eagles whose flight is marked by a remarkable poise and balance of wings. The Western people's lack of sympathy with Islamic punishments is the outcome of their toad-like limitations and also of their cramped and duplicitous view of life. Their allegations boomerang on them because it is they who replicate the primitive ages, it is they who are hampering real human progress by advancing and solidifying false notions of human development, and it is they who are the victims of a rampant irrationality by consciously discarding the higher values of life. Since the purpose of Islamic punishments is to establish and preserve a clean society, a society which is not based on the suppression of real feelings but on their unrestrained expression, a society based on the enviable principles of equity and justice, a society based on the sanctity of human life. Islam does not hesitate from inflicting the most severe punishment on an offender or a criminal whose acts and practices tend to hamper the smooth flow of its progress. These punishments are not motivated by personal self-aggrandizement or by other sadistic feelings of revenge. Their aim is the purgation of evil from society and what could be nobler than a complete exorcization of the devil. Hence the drastic nature of Islamic punishments. They are not uncivilized but civilized in the highest sense of the word, a sense which is not properly grasped by the Western critics of Islam who are swamped by their own marshy handicaps, and have become permanent victims of their prejudices.

Western Civilization of Alcohol

Now let us dissect the claim of the Western people that they are the most civilized creatures of the earth, and that all other people are uncivilized and barbarians. Havelock Ellis states in 'The Dance of Life': "There is held to be no surer test of civilization than the increase per head of the consumption of alcohol and tobacco. Yet alcohol and tobacco are recognizably poisons, so that their consumption has only to be carried far enough to destroy civilization altogether". The writer believes that the civilized attitude is based on the consumption of the twin poisons of tobacco and alcohol. In other words, the Western people call themselves civilized because they regularly imbibe in their blood stream these poisons. And the logical inference that may be drawn from this process is that a civilization which is nourished on poison is certainly a poisonous society. In the eyes of the writer, Western civilization is identified with poison which is the most scathing criticism of Western attitudes. It also follows that this civilized attitude is, in fact, a poisonous attitude. Therefore, the allegations of these poison-packed civilized people against the viability of Islamic punishments should be placed in their true perspective. And our people, who are impressed by the glittering facade of the Western civilization, should reflect 'dispassionately on the actual implications of a civilized attitude in the Western sense. The writer further believes that these two poisons, if indulged in excessively, can result in the total collapse of the Western civilization. The practice of the past civilizations and contemporary trends are clear indicators that these two addictions are rarely indulged in moderately, and the tendency among the addicts is always to consume them in immoderate quantities. The result of their excessive use is nothing but destruction.

Islamic Prohibition of Alcohol

This is the reason Islam has prohibited both of these addictions and has prescribed severe punishments for

alcohol drinking on account of its deleterious effect on human health and morals. Therefore, Islamic prescription is motivated by the dictates of higher morality and to rid human civilization of the canker that may ultimately nibble away its vitals. Thus, it is the height of perversion to describe a punishment as uncivilized when it is exclusively prescribed for the purpose of preserving the values and essential mores of human civilization.

Emerson remarks in the essay 'Civilization' in his collection of essays 'Society and Solitude', "The true test of civilization is not the census, nor the size of cities, nor the crops-no, but the kind of man the country turns out".

Nature of Western life

It is true that the Western countries have big cities, they are technologically advanced, they are marked by a degree of visible affluence. But all these advances are accretive advances; they are materialistic and adventitious. The real advance is in terms of human growth and progress: it is not to turn out a sophisticated gadget but a complete human being. Now when we look at the Western specimen, male or female, we are impressed by his or her surface sophistication. But when we try to understand him a little deeply, we are nauseated by the confusion and contradiction of his views. He picks up all the manners that contribute to his elegance and refinement. He knows how to wield the fork and knife, how to scrape away a singed toast, how to clean up his plate, how to conduct table talk and how to pick up all the odds and ends of a trivial and flaccid routine. But inwardly he is a victim of moral inelegance and impropriety. No amount of outer refinement can dress the moral and spiritual vacuum which is his inevitable predicament because physical over-sophistication is a form of moral under-sophistication. The consequence of this attitude is graphically portrayed in Elbert Hubbard's 'The Philistine': "In a state of nature, the weakest go to the wall; in a state of over-refinement, both the weak and the strong go to the

gutter". The Western people are in fact Philistines and their civilization is a gutter civilization. Islamic punishments are an attempt to pull such people out of the gutter. Like all filthy creatures they resist this attempt and condemn their severity as inhuman failing to look beyond the pain of the operation into the new dawn of convalescence and health.

Uncivilized Punishments of the Greek Law.

These Western critics who criticize Islamic punishments as uncivilized and primitive consciously and calculatingly close their eyes to the extremely uncivilized, even irrational and absurd, punishments meted out to the offenders during Greek, Roman and Christian eras. Greek period, which is generally considered to be the 'ne plus ultra' of the human civilization, treated slaves and women in a manner that is not at all consistent with the dictates and imperatives of a civilized attitude. Women were treated like purchasable and disposable commodities and slaves were treated with an almost barbaric discrimination.

Islamic aptitude of equality

The punishments in certain cases doubled those of free men in the case of slaves which violated the principles of humanity and equality, but Islam does not discriminate between the slave and master in the award and execution of punishment. The nature of the penalty is decided in proportion to the gravity of the crime, and not in proportion to the status of the criminal. What could be a clearer example of equality and non-discrimination and yet Islamic punishments have been labelled cruel and uncivilized. And as a further compensation for slavery the punishments of slaves are halved in many cases.

Inhuman Punishments of Roman Law

Similarly some of the punishments prescribed by Roman law which is considered another pillar of human civilization are also extremely inhuman and flout the

sanctity of human life in the most ruthless and unapologetic manner. The punishments of burning alive, burying alive, and making the offender fight with wild beasts are so cruel and insulting that one simply sheds tears of blood for the poor victims who bore the brunt of these punishments. None of these punishments are found in Islam. And yet these Western critics crack up the Roman civilization and crack down Islamic civilization which is, in fact, nothing but the chagrined expression of a deep-rooted prejudice against the civilizing impact of Islam. The absurdity of some of their punishments can be estimated from Salmond's preface to the 'Law of Torts'. He refers to the prevalence of an extremely inhuman and unjust law in Europe in the 18th century of Christian era. According to him, if an accident occurred by a horse-drawn cart, the horse, the driver, the cart and the passenger sitting in it were all to be punished. Could one find a greater illustration of absurdity and irrationality.

Present day America and Rate of crime

In present-day America, the statistics relating to wife battering and husband battering are simply staggering. This phenomenon is called 'the silent crime' because the American law takes no cognizance of it as a crime. According to September 5, 1983, issue of 'Time Magazine', the figures are as follows:

"Nearly 6 million wives are abused (beaten and battered) by their husbands in any one year. Some 2000 to 4000 women are beaten to death annually. The nation's police spend one-third of their time responding to domestic violence calls."

Battery is the simple major cause of injury to women, more significant than auto accidents, rapes or muggings. 'Time' further states:

“A 1979 FBI report stated that 40% of women killed were murdered by their partner and 10% of men by theirs (many of the women acted in self-defence).”

Present day Europe and homosexuality

Examples of child abusing are also frequent in this society and yet it boasts about human rights. In certain European countries where the disease of the community of lot, homosexuality, has been legalized, the homosexuals are falling victim to an incurable disease called AIDS (auto immune deficiency syndrome). The disease might well be the divine verdict against the unnatural practice of the homosexuals, and in view of the fast-spreading disease the governments in European countries may be forced to ban homosexuality and ultimately prescribe punishments for those who persist in it in spite of legal prohibition. It would be another victory for Islam, a resounding justification of the philosophy of Islamic punishments and a reverberating slap on the face of the dilldallying and shilly-shallying Western legal experts who have down-graded the severity in formulation of the criminal laws in naive ignorance of the inevitability of severity in extreme cases or in acts that may create extreme situations.

Islamic Punishments are comprehensive, effective and balanced

Islamic punishments are, therefore, not only civilized but also comprehensive and highly effective. They are comprehensive because they do not ignore any aspect or detail of human life and they do not entirely rely on the principle of fixation or prescription. They are in fact a mixed bag of fixed and discretionary punishments which is quite compatible with man's emotional and psychic compulsions. Man, on account of his constitutional framework and conceptual configuration, likes neither complete freedom nor totalitarianism. If he is completely free, with-