

# **Criminal Law in Islām**

## **(Dissertation)**

**Title: CRIMINAL LAW IN ISLĀM**

BY

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**DECLARATION**

I, Ismail Rahim, (student number 61063525) hereby declare that the dissertation entitled CRIMINAL LAW IN ISLĀM, is my own work and all sources have been acknowledged with full references.

Signature

Date

6<sup>TH</sup> June, 2019

## **SUMMARY**

After justifying my rationale for this study, I have briefly propounded anthropological and philosophical perspectives for the institution and development of law in human society. Thereafter I have focused on the criminal law of Islām. With regards to invariable penalties for certain offences and variable penalties for others I have also stressed the oft-neglected issue of rehabilitation. Besides, I have also appraised criminal procedure and then concluded by refuting objections raised against Islāmic criminal law by critics.

In sum, the following comes to light:

- The Islāmic laws encompass all facets of criminality.
- Islām believes in nipping the evil in the bud: treating the wound and then applying the plaster. If it comes to the worst that the wound becomes incurable, then for the betterment of the patient and others, it may as well be amputated. Its aim is not to castigate the criminals; rather to reprimand them and bring reform in the society.
- How crucial this topic is and how urgently it should be addressed.
- How temperate the Islāmic laws are in weeding out crimes from the societies.
- Crime is a crime, whether it is perpetrated by an individual or state.

## MOST COMMONLY USED TERMS

- 1) **Ḥadīth**: Sayings of the Prophet.
- 2) **Muḥārib**: Offender.
- 3) **Ḥudūd**: Penalties that constitute fixed, mandatory punishments.
- 4) **Irtifāqāt**: Requirements, necessities or useful things of life.
- 5) **Qāḍī**: Judge.
- 6) **Qiṣāṣ**: Retaliation with equality.
- 7) **Shurb Khamr**: Consuming of liquor.
- 8) **Ta'zīr**: Variable discretionary penal punishments or offences not punishable by fixed penalties.
- 9) **'Ulamā'**: Religious authorities.
- 10) **Ummah**: nation.

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Finally, after thanking the Al-Mighty Creator for the ability He enabled me with to undertake this celebrated academic career at the University of South Africa for a post graduate course, I must acknowledge my deep appreciation and express my gratitude in accordance with the proverb *من لم يشكر الناس لم يشكر الله* to my esteemed Professor Yusuf Dadoo for his guidance and useful suggestions throughout the years. Had it not been his tireless effort, meticulous supervision and dexterous keen sightedness, it would not have been possible for me to submit this dissertation to the higher authorities at the university. Indeed, he was an inspiration to me from the first day of my meeting with him. Undeniably, words cannot justify his selfless contribution to this daunting task. May he and all others who supported me in my career be rewarded abundantly.

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## Glossary

- 1) **‘Āqīlah**: Close friends, co-workers or relatives of the assailant.
- 2) **‘Arsh**: Financial compensation paid to the victim for the physical harm or wound caused to him.
- 3) **Āhād**: Sayings of the Prophet transmitted through isolated reports.
- 4) **Amānat**: Trust.
- 5) **Amīr al-Mu’minīn**: Leader of the Believers – a title of the ruler after Prophet Muḥammad.
- 6) **Anṣār**: Residents of Madīnah.
- 7) **Athar**: Tradition relating to the utterances of the Companions of the Prophet.
- 8) **Azīmah**: Absolute and decisive ruling.
- 9) **Bagh’y**: rebellion
- 10) **Barakah**: Blessings.
- 11) **Bāṭil**: void, absurd
- 12) **Bayt Allāh**: House of Allāh.
- 13) **Bayt al-Māl**: Public treasury or state exchequer.
- 14) **Bint Labūn**: Two-year-old camel.
- 15) **Bint Makhāz**: One-year-old camel.
- 16) **Dhimmi** : People of the Book living in an Islāmic state and paying annual tax.
- 17) **Diyah al-Mukhaffafah**: A lesser scale of blood money: a hundred camels of five different ages.
- 18) **Diyah al-Muthaqqalah**: A higher scale of blood money: a hundred camels of four varying ages.
- 19) **Diyah**: Blood money. Monetary compensation. Wealth offered in lieu of a victim’s soul.
- 20) **Fahshā’** : Misconduct
- 21) **Ghayr-Muḥṣin**: An unmarried person who commits adultery.
- 22) **Ḥadd**: Penalty.
- 23) **Ḥadīth**: Sayings of the Prophet.
- 24) **Hākīm**: Governor.
- 25) **Ḥarabah**: Highway robbery.
- 26) **Ḥarām**: Unlawful acts.
- 27) **Ḥijābah**: Office for safekeeping of the keys of the Ka’bah.
- 28) **Ḥiqqah**: Three years old camel.
- 29) **Ḥirz**: Secured or guarded place.
- 30) **Ḥudūd**: Penalties that constitute fixed, mandatory punishments stipulated by the Qur’ān or Ḥadīth, such as adultery, theft and calumny.
- 31) **Ḥuqūqadh-Dhātī**: Individual’s proprietary rights.
- 32) **Imām**: Ruler
- 33) **Iqrār**: This is when a person, who is guilty of committing adultery, confesses four times in the presence of the Imām that he/she is guilty of committing the act.

- 34) **Irtifāqāt**: Requirements, necessities or useful things of life.
- 35) **Jāhiliyah**: Days of ignorance.
- 36) **Jild**: Flogging inflicted on an unmarried person for committing fornication.
- 37) **Jināyah**: A crime committed against a person or his property.
- 38) **Jiz'ah**: Four years old camel.
- 39) **Ka'bah**: The Holy House in Makkah.
- 40) **Khalīfah**: Successor of a Muslim state.
- 41) **Kufr**: To deny Faith.
- 42) **Ma'āṣī**: All such acts that are considered sinful in Islām.
- 43) **Maghrib Ṣalāh**: Post sunset prayer.
- 44) **Maḥram**: Close relative with whom marriage is not permissible.
- 45) **Makrūh**: Detestable act.
- 46) **Maṣlaḥah-ʿĀmmah**: Acts of public interest.
- 47) **Mudhārabah**: Profit/loss sharing contract.
- 48) **Muḥārib**: Offender.
- 49) **Muḥṣin**: A sane and free (not a slave) person who married according to Islāmic rights and even consummated the marriage.
- 50) **Mujtahid**: Jurist consult: a legist who formulates independent decisions in legal or theoretical cases, basing on the interpretation and application of the four principal sources of Islām.
- 51) **Mukallaf** or **Taklīf-Sharʿī**: Major, sane person; one who is accountable for his deeds or who is eligible to be rewarded or punished for his actions.
- 52) **Munkar**: Abomination
- 53) **Muqām-Ibrāhīm**: Station of Prophet Ibrāhīm.
- 54) **Mushārahah**: Active partnership.
- 55) **Mustaḥab**: Desirable.
- 56) **Nabī**: An Apostle.
- 57) **Nakālan**: Admonitory punishment.
- 58) **Niṣāb**: Minimum amount of property liable to payment of Zakāh.
- 59) **Nūr**: Illumination.
- 60) **Qabīh li Dhātihī**: Evils that are malevolent by themselves.
- 61) **Qabīh li Ghayrihī**: Evils that are malevolent for external reasons.
- 62) **Qadhaf**: Calumny.
- 63) **Qadhīb min Irāk**: Branch of Salvadora Persica tree.
- 64) **Qāḍī**: Judge.
- 65) **Qasāmah**: An unusual way of substantiating suspicion. Islām has instituted it as evidence of a murder case.
- 66) **Qat' at-Tarīq**: Banditry.
- 67) **Qatl-ʿAmad**: Intentional murder.
- 68) **Qatl-Khaṭāʾ**: Murder by mistake.
- 69) **Qatl-Shib'h-ʿAmad**: Quasi intentional murder.
- 70) **Qiblah**: Direction faced during prayers.
- 71) **Qiṣāṣ and Iqtisāṣ**: Retaliation with equality. The former is legislation executed by the state and the latter exercised by the individual.

- 72) **Qīṣāṣ, Qawad** and **Musāwāh**: In different respects these three words stand for the same meaning - equality in retaliation.
- 73) **Rajm**: Stoning the married adults for committing adultery.
- 74) **Rijs**: Filth.
- 75) **Rukhṣat**: Concessions which the Sharī'ah has granted on certain practices.
- 76) **Sadānah**: The office of trusteeship of the Ka'bah.
- 77) **Ṣahābah**: Companions of the Prophet.
- 78) **Ṣalāh**: Prayer.
- 79) **Sātir**: Concealment.
- 80) **Shurb Khamr**: Consuming of liquor.
- 81) **Siqāyah**: The office for providing water to the pilgrims.
- 82) **Ṣiyām**: Fast
- 83) **Siyāsah al-Madani**: Government policies of the country.
- 84) **Suht**: To receive bribery against the Command of Allāh.
- 85) **Ta'zīr**: Variable discretionary penal punishments or offences not punishable by fixed penalties.
- 86) **Ta'zīr-Siyāsah**: Punishments for crimes not measuring up to the requirements of the *Al-Hudūd* punishments.
- 87) **Tābi'ī**: A Muslim of the second era after the Prophet.
- 88) **Tadbīr al-Manzil**: Maintenance of family life.
- 89) **Tanzīm al-Mu'āsharah**: Setting up of social order.
- 90) **Taqṭīl** and **Taṣlīb**: Executing the offenders or hanging them in public.
- 91) **Tawāf**: Performing circumambulation of the Holy House.
- 92) **Ṭīnah al-Khibāl**: Perspiration or filthy matter from the bodies of the dwellers of Hell.
- 93) **'Ulamā'**: Religious authorities.
- 94) **Ummah**: Nation
- 95) **Wājib**: Obligatory practices.
- 96) **Wuḍū'**: Ritual ablution before prayer.
- 97) **Zājir**: Something that reproofs.
- 98) **Zindīq**: Heretic.
- 99) **Zinābil-Jabr**: Rape.
- 100) **Zinābil-Riḍā'**: Adultery by mutual consent.

## CHAPTER ONE

### Introduction

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

**In the name of Allāh, the Most Beneficent, the Most Merciful.**

اللهم يسّر ولا تعسر وتمم بالخير وبك نستعين

**Preamble:** This chapter covers the following topics: introduction and research preliminaries, like motivation, literature reviews, research approach and methodology.

Authorities mention that since Islāmic laws of crime are divinely inspired and they are eternally sought, the Qur'ān declares:

“Is Allāh not most equitable of all the judges?” (Q: 95:8)

While the criminal laws of Islām seek to defend the public from crimes, it also endeavours to reform the criminals. In doing so, it embraces a comprehensive, scientific and technical theory in its penalties. The penal punishments are not awarded to avenge personal feelings or to vent one's anger; they are strictly executed in compliance with divine commands. Psychologists and socialists attest that people have the potential to become either the best of the creations or the worst of them. When they reform, they are saints that bring grace to others, and when they go astray, they drop from the pedestal of humanity and bring disgrace to others. They are the ones that can create hopes for the future and despondency as well.

While referring to the excellence of Islamic laws the Qur'ān says:

“This day, I have perfected for you your religion, completed upon you My Favours and preferred Islām as a religion for you.” (Q: 5:3)

Furthermore, these laws are characterised by moderation; as the following verses declare:

“This is how We made you a temperate (justly balanced) nation.” (Q: 2:143)

“If you seek to avenge yourselves, then avenge yourselves in proportion to the infliction caused on you; and if you exercise patience, then that is better for those who persevere.”

(Q: 16:126)

These verses of the Qur'ān are explicit in that the Islāmic Laws is entirely based on moderation (*Wasat*).

*Şirāṭ-Mustaqīm* (straight path) is another name for *Wasat*.

The author of *Al-Baḥr al-Madīd* pens:

الوسط هو العدل الخیر الفاضل ، ثم استعير للخصال المحمودة ؛ لوقوعها بين طرفي إفراط  
وتقريط

(*Wasat* means a moderate, preferred and an excellent way of life. Then the word was used figuratively for laudable habits and traits. This is because it stands for something that is between two extremes of under-performance and over-performance of something.)<sup>1</sup>

Obviously, for the smooth functioning of any system, whether it pertains to social, spiritual or mundane life, avoidance of extremity is essential, without which the system will become lopsided and irregular; and it is certain that any system that is unbalanced is doomed to fail in the long run. This is because laws and statutes are formulated and meant to punish the criminals as well as reward the innocent. But no sooner had this basic rule been undermined in any court of law than chaos and anarchy became the order. Hence, imbalance in any system is not only unworkable; it recoils on the very law-makers.

Mutrif narrated that the Prophet said:

خير الأمور أوسطها

(The best of courses is the middle course.)<sup>2</sup>

'Abdullāh ibn Mas'ūd narrated that the Prophet said:

ما عال من اقتصد

(He who spends moderately never suffers poverty.)<sup>3</sup>

'Alī is reported to have said:

عليكم بالنمط الأوسط ، فإليه ينزل العالي ، وإليه يرتفع النازل

(You should adopt moderation because it is this level to which a person of a lofty rank descends and a person of a lower rank ascends.)<sup>4</sup>

<sup>1</sup> - Ash-Shāthly, Aḥmad ibn Muḥammad ibn Mahdī. *Al-Baḥr al-Madīd*, 2002, Beirut, Dār an-Nashr/Dār Kutub al-'Ilmiyyah, vol. 1, p. 176

<sup>2</sup> - As-Suyūṭī, 'Abdar-Raḥmān ibn Kamāl Jalāl ad-Dīn. *Ad-Durr al-Manthūr*.1993, Beirut: Dār al-Fikr, vol. 5, p. 277. Hereafter referred to as *Ad-Durr al-Manthūr*.

<sup>3</sup> - Shaybānī ibn Ḥanbal, Aḥmad Abū 'Abdullāh. *Musnad Aḥmad ibn Ḥanbal*.2009, Cairo. Muassasat Al-Qurtuba. vol. 1, p. 447. Hereafter referred to as *Musnad Aḥmad*.

Accordingly, the punitive measures Islām has adopted are midway courses that produce two results:

- (1) The culprit is brought to book without fear or favour and the innocent is rewarded.
- (2) In the order of Islām, the innocent does not suffer for the ill-doings of the criminal, as the Qur'ān says: "Neither shall you deal unjustly nor shall you be dealt with unjustly." (Q: 2:279)

In the justice system of the Islāmic Law, human beings are regarded as the most honourable creation of Allāh; therefore, to address their needs with honour and equality is among its principal precepts. In the Qur'ān, admonition against maltreating people is mentioned 299 times while extending fairness to them is stated at least 16 times in the least. Likewise, although the Qur'ān is not a legal text, it contains approximately 500 injunctions<sup>5</sup> from the legal perspective to guide people that they adopt honesty in their social interaction and commercial dealings. The Laws are provided as a cure for every crime without leaving people with any negative aftermath or (leaving them) to their personal whims and caprices against others.

In Islām, 'justice' is neither a detached rule nor is it an optional matter; it is a principal concept interwoven in every Command of Allāh. Neither is administering justice something of personal choice nor is it disconnected from the principle rules of the Sharī'ah. It is preserved in its charter and integrated into every facet of human life. Islām believes that any judgement or practice administered unjustly stands invalid. It also maintains that one of the chief objectives for the appointment of Prophets was the elimination of oppression and injustice from the world. Therefore, everyone is bound to observe the rules of justice without exception.

Peer Muḥammad Karam Shah al-Azharī says:

"Islām's dominant aim is that in whichever land its standard is hoisted, crime is weeded out and peace and security are established so that people can direct/invest their capabilities more fruitfully and in constructive projects."<sup>6</sup>

In connection to this, Matthew Lippman has mentioned in his article *Islamic Criminal Law and Procedure*:

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<sup>4</sup> - *Al-Jāmi' li Aḥkām al-Qur'ān*. vol. 2, p. 154

<sup>5</sup> - *Is 90% of the Quran a legal document?* at <https://www.joebradford.net/90-percent/> (Accessed on 19-11-19)

<sup>6</sup> - Rasūlpūrī, Munīr Aḥmad. *The Role of Ḥudūd and Ta'zīr in Establishing Peace*. 2018, publisher unknown, vol. 3, p. 134.

“The Islamic criminal justice system recognizes the right of both the plaintiff and the accused to present evidence at trial and to have the privilege of being represented by counsel during pre-trial interrogation, at trial, and, upon conviction, at the execution of the sentence. The privilege of counsel is based upon the Islamic theory of "protected interests" which guarantees an individual's freedom of religion; the right to self-preservation; freedom of thought, expression, and knowledge; the right to procreation; and the right to property. The right of self-preservation includes the safeguarding of individual liberty and dignity and the protection of individual well-being. The theory of "protected interests" recognizes the right of an individual to receive the assistance of others in safeguarding his or her interests. This right of assistance forms the basis of the right to counsel. Professor Osman Abd Malek al-Saleh writes: ‘It is clear that the principle of preservation of self is enhanced by the extension of the right to counsel to those accused of crimes, as it provides the accused with the means to establish innocence and to defend himself.’<sup>7</sup>

The rights of individuals or their attorneys to present evidence find support in the Sunnah. When granting ‘Ali the governorship of Yemen, the Prophet advised him, ‘If two adversaries come for arbitration, do not rule for the one, before you have similarly heard from the other.’ The Caliph ‘Umar ibn ‘Abd al-‘Aziz advised judges: ‘If an adversary, whose eye has been blinded by another, comes to you, do not rule until the other person attends, for perhaps the latter had been blinded in both eyes’.<sup>8</sup>

Therefore, in light of the moderate rulings of Islām, I wish to pen a few relevant points on its just system and working plan, as much as I intend to explain *The Criminal Laws of Islām* in slight detail. I will also deal with the following questions intermittently:

- 1) What the Islāmic Laws are?
- 2) Besides being sacred commands, how practical and effective can those laws be in this age?
- 3) Why is it asserted that enforcement of the Sharī‘ah laws is a solution to the world problems and for acquiring world peace?
- 4) Pragmatically what methods can be adopted in the modern age for enforcing the Islāmic Laws?

However, before embarking on those issues, I wish to explain briefly the points that motivated me to undertake the topic under discussion.

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<sup>7</sup> -. *Islamic Criminal Law and Procedure* - at <http://lawdigitalcommons.bc.edu/cgi/viewcontent>. (Accessed on 19-11-19)

<sup>8</sup>- Matthew Lippman. *Islamic criminal Law and Procedure*. 2019, p. 49. at <https://www.amazon.com/Islamic-Criminal-Law-Procedure-> (Accessed on 12-12-18)

### **Motivation for Selecting this Topic**

It is obvious that no writer can address any topic accurately without him realising its real and desperate needs in practical life. Moreover, without a call within him and proper perception on the given topic, it will not be possible for him to offer insight on the topic, prepare a workable table or improve the situation at hand. Hence, after analysing the essential aspects of social life and the different levels of the public's refinement and temperament, I was drawn to believe that without law and order, peace cannot be achieved. Probably this was the prime cause that prompted me to reflect on the topic of crime and its impact on the societies in this age.

Besides, among the points that inspired me to this topic are as follows:

- 1) **Current situation of the world:** While viewing it from the rate of crimes that are increasing in the modern age, criminologists fret whether the situation will ever improve. The efforts of sociologists and legislators are constantly countered by escalating crimes. With the state of turmoil globally, people are horror-stricken. Despite striving relentlessly to turn the fate of the people towards the better, religious leaders and philanthropists worry whether there will ever come a period of relief for mankind in future or is the situation transfixed up to Doomsday.
- 2) **Neglect of scholars towards the topic of Islāmic legislation:** This is a topic that is largely neglected, particularly by the Muslim scholars of our age. Other than marriage, divorce and inheritance cases that are addressed in the framework of the MPL (Muslim Personal Law), the criminal laws of Islām are scarcely discussed; when it is known that numerous verses of the Qur'ān and hundreds of Traditions of the Prophet have discussed this topic in-depth. If this subject is left in abeyance, then we may ask that how will the disturbed souls that are looking forward to radical change know of the dynamism of the Islāmic legislation on crimes and how will they find peace when they are witnessing crimes being perpetrated by culprits regularly?
- 3) **Islāmic criminal Laws:** Since the Islāmic criminal laws are capable of rescuing mankind from the dilemma in which they are embroiled, there are ample hopes to improve the situation if these are discussed, explored and then enforced.
- 4) **To familiarise the legal experts:** There is a need to apprise the authorities of this subject and stimulate in them the need to study the *Al-Hudūd* and *At-Ta'zīr* laws of Islām. Perhaps they will foresee therein a brighter future.
- 5) **To remove the one-sided or skewed perception among certain people in respect of the Islāmic Laws:** The larger part of the world is acquainted with Islām only as a religion that emphasises worship and ethics, but they are not aware that it also comprises of an independent legislation and a code of

penal laws that promises remedies to the ongoing woeful plight in which people are embroiled. Some people have taken the Islāmic laws to be obsolete or incompatible with our age.

In sum, the purpose for selecting this topic is to address the rising crime rate in the world. It is unfortunate to note that the same human beings who were supposed to be self-conscious and guardians for everyone else's health and wealth have become a challenge to world peace. The constructors of the world of yesterday have become destroyers of today and to our misfortune, the situation is deteriorating at a fast pace.

However, before I commence with the main topic of law, order and their related issues, I wish to address two issues, of which I had promised previously in my research proposal. (I) Literature review (II) Research approach and methodology.

## **(I) Literature Review**

### **(1) *CRIMINAL LAW OF ISLAM*. Oudah, 'Abdul Qader. Delhi, J. R. Printers, 1991.**

The author commences with some comparative points between Islāmic law and modern law, in which he highlights how much man-made laws lack as against the Islāmic laws. In his sight, Egyptian law remains the format from which he draws significant rules.

He outlines the different Schools of Islāmic jurisprudence and explains how the jurists in the early years of Islām had derived the laws from the four original sources and how well adaptable those laws are to contemporary society. He also goes on to recount briefly the evolutionary stages of modern law.

After addressing the crime issue with its Islāmic and modern classifications, he touches on the powers allocated to the Qāḍī in executing, withholding and annulling his judgement and the concept of punishment in Islām.

Indeed, Mr. 'Oudah has written an admirable piece of work on criminal law by dealing with the development stages of jurisprudence and also divergent avenues of human life. He also emphasises that law enforcement is essential, without which peace and stability cannot be realised. His work has been of great inspiration to me because it is identical to the discussion I have undertaken in this dissertation of mine.

How much I wish that he had shed light on the most burning questions about how Islāmic laws can be practically enforced in modern times, too. Seeing that the Islāmic laws were instituted for all times and climes, had he brain-stormed this

aspect of it, it would have been a valuable contribution on his behalf. Probably because he was among those few personalities who wrote on this topic in the early days, he could not focus on this point entirely. Thanks to his superb contribution.

**(2) CRIME AND PUNISHMENT IN ISLAMIC LAW. Theory and Practice from the Sixteenth to the Twenty-first Century - RUDOLPH PETERS** Print publication year:2006. Online ISBN:9780511610677, at <https://doi.org/10.1017/CBO9780511610677>

The author discusses the topic of the penalties of the Islamic Law, general principles of substantive criminal law, homicide, discretionary punishment on the strength of *Ta'zīr*, the implementation of Islamic criminal law in the pre-modern period (Ottoman Empire), the example of Saudi Arabia, the reintroduction of the Islamic criminal law in consideration to the human rights standards, legal discourse on crime and punishment, and how the actual practice of Islamic criminal law was related to this discourse. Sweeping through five centuries, he has indeed highlighted many of the salient points related to the subject of crime and punishment.

While his work enlightens the research student and also corresponds with the topic of criminology I am dealing with, it also creates awareness in the common readers and jolts their minds in that it brings to their notice the various forms of crimes prevalent in our times.

As I will move on with this writing of mine we will notice how much Mr Rudolph Peter's special treatise on the *Ta'zīr* penalties of Islām bears resemblance to it.

In the same vein, while he has included in his book so many features of the criminal law of Islām, had he touched on the backdrop in which those laws were revealed in the first century of Islām, it would have had a better appeal to his readers because it was the state of affairs, culture and mindset of the populace in those days that had inspired them to submit to the Islāmic statutes wholeheartedly. Today, too, if loyalty towards the state and affection for the human race could be created among the people, crimes can be reduced to the minimum.

**(3) GOVERNMENTAL AND JUDICIAL AUTHORITY CONCERNING THE ENFORCEMENT OF THE SHAR'Ī PUNISHMENT. 'Abdul Ghaffār.**

The author commences his book with the title 'Hardship and its redress,' and then explains how challenges can be overcome through Islāmic legislations.

Furthermore, he emphasises that juristic deduction should not be made against the recognised principles of Islām, meaning that, the jurists and governments should not swerve from the principle rules set out in the sourcebooks because if the ruling party is given leeway to alter the *Hudūd* and *Qisās* laws at random, then there will

remain no difference between the *Hudūd* (invariable rules) and *Ta'zīr* (discretionary and variable rules) penalties of Islām.”

He mentions that Muḥammad Khālid ‘Attāsī elaborates under the rule pertaining to *Ta'zīr* as follows:

“لا ينكر تغير الاحكام بتغير الازمان” (Secondary rules are amenable to change by the requirement of time,) This suggests that besides those rules that are amendable on basis or custom and habits, all other fundamental rules are fixed and unalterable.

He also stresses that without justice and fairness in the judges and law-makers, the implementation of the Islāmic laws will only remain a dream. Those who are given to injustice will always find difficulty in accommodating the Islāmic laws in their system because these laws cut against their wishes.

Towards the end, he laments that in modern times, one of the chief reasons the courts in the Muslim countries hesitate from passing the Islāmic sentence is that they are constantly under pressure from the outside forces and are unduly targeted with criticism.

But then he asks that in which way did those advocates, who view the Islāmic Laws unfavourably, succeed in uprooting crimes through their own legislation?

Indeed, he has touched vital issues on the topic, especially the one on justice in the judiciary circles, saying that an unjust authority is a body without a soul. How can he/she occupy the seat of a judge when he/she does not qualify for it? Justice is a cardinal point. It is demonstrative of one’s conscience. It is a key virtue in a judge which motivates him/her to restore each rightful person his/her rights.

In that way, I found many of Mr. ‘Abdul Ghaffār’s discussions comparable with certain subjects discussed in *Hujjat Allāh Bālighah of Shah Wali Allāh* and *Ihyā ‘Ulūm ad-Dīn* of Imām Ghazālī.

I must also admit that after reading his book and noticing how many points are common between my current discussion on the criminal laws of Islām and his, it gave me confidence.

**(4) الجريمة والعقوبة في الفقه الاسلامي (Offences and penalties in Islāmic jurisprudence.)**

**Imām Muḥammad Abū Zahrah**

The writer commences his paper with the definition of crime, and then while recounting various types of crimes, he focuses on two points: firstly, what impact do crimes have on society, and secondly, on what basis an act is identified as a crime in Islām.

Moreover, quite dexterously he discusses the issue of سد ذرائع والابواب (closing those pockets that lead to crimes) in which he made specific mention of billboards and televisions screens, which are often the causes for the increase in the crime rate in societies. Therefore, he questions the sincerity of the law-makers and advocates of criminology, who perform as if they are deadly against crimes, yet promote it wittingly or unwittingly in practice.

While discussing the qualification which the *Wālī* (office bearer) should possess before executing a penalty, he also stresses that unless a Qāḍī is not acquainted with عرف عامة and مصلحة (integration of custom and practices that are for the welfare of the people) he will not justify his post, as much as his judgements will be wanting.

He says that other than identifying a crime as a crime, its seriousness also should be measured by the gravity of damage/harm caused to the victim or society.

One rule which Mr. Abū Zahrah reminds the readers of is that لا عقاب علي النية (Penalties cannot be executed on a person merely on the basis of his intention.) Then he cites examples to support this rule.

He also answers the question about the status of a criminal who repents earnestly in the presence of the judge; what is his situation and what stand should the judge adopt in respect of him?

Another question he poses and then answers is that if a doctor errs in his treatment, can that be regarded as a crime and to what extent can he be held responsible or unaccountable in the court?

Indeed, it is pleasing to see how he has addressed multiple issues on criminal law and has answered and offered useful guidelines to many of them. Several points of his are the very points I have included in this present work of mine. In that way, there are many subjects that are shared between us.

I was also pleased to see how he has offered insight into cybercrimes and other sophisticated methods of hacking into people's private accounts, which have not only taken centre stage in modern times, but are also operated on a large scale through high profile mafia groups and syndicates. It is my contention that unless thinkers like him will not brainstorm such sensitive issues and offer effective solutions to the menace, people will remain unenlightened and related problems will only escalate.

**(5) REFORMING *ḤUDUD* ORDINANCES TO RECONCILE ISLAMIC CRIMINAL LAW WITH INTERNATIONAL HUMAN RIGHTS LAW - Mark A. Gabriel. 2016. The University of Cape Town.**

After reading through this book, I discovered how passionate its author is in seeking to reconcile the Islāmic Laws with those pertaining to criminal issues. Much of his suggestions are informative and even applicable to modern times.

But while I agree with many of his suggestions, it is my earnest view that he should reconsider his standpoint on the following issues of which he is so emphatic, which I quote here verbatim:

- (1) "The thesis differentiates between 'Shari'ah' and 'Islamic law'. It argues that Shariah refers to the divine rulings recorded in the Qur'an and correct Sunnah, while Islamic law is not fully divine, for it includes also such prescriptions that have been developed by the human effort of Islamic jurists."
- (2) "... requires that Muslims read the teachings of the Qur'an and the Sunnah in the context of their own time and environment."

In my view, he has confused the *Ḥudūd* invariable penalties, which he calls 'Shari'ah', and the *Ta'zīr* discretionary penalties, which he calls 'Islāmic laws'.

Firstly, I may ask, are the Sharī'ah laws not identical to the Islamic laws?

Secondly, besides being two sides of the same coin, are they not the same, as the following verses testify to?

"Indeed, religion in the sight of Allāh is only Islām." (Q: 3:19)

"For each, We have prescribed a specific Divine Law (Shari'ah)." (Q: 5:48)

Legislations interpreted reliably by the 'competent authorities and derived through any of the four sources of Islām' were always classified as Shari'ah, to which Muslims were bound and the observance of which was regarded as compliance with the Shari'ah. Had it not been so, how would the Shari'ah perpetuate till the Last Day in the face of changing conditions?

I am certain that he is aware that the *Ta'zīr* laws, too, are secondary laws that are pronounced by the authorities and Qāḍī (according to their discretion) of different ages in consideration to the prevailing situation without distorting or misrepresenting the principle laws of Islām.

The Qur'ān says: "These are the Bounds of Allāh, so do not exceed them." (Q: 2:29)

All governments reserve certain mother rules, transgressing which is considered an offence and violation against the statutes of the country.

Probably his attempt was to describe the *Ta'zīr* laws as 'Muslim laws.' Or maybe he attempted to say that Islāmic jurisprudence contains two components: (1) Divine and prophetic legislation. (2) Human juridical interpretation of these legislations.

Seeing that I have addressed the obvious differences between these two topics extensively in this thesis of mine, I suffice on this brief response to the above and refer the readers to its relevant chapters herein.

In sum, between the works of the two of us, there are certain points we agree and other points we disagree.

### [Shariah | Definition, History, & Examples | Britannica](#)

“**Shariah**, the fundamental religious concept of Islam—namely, its law. The religious law of Islam is seen as the expression of God's command.”<sup>9</sup>

Necessarily, the criminal laws of the Shari'ah are not confined to the fixed penalties and discretionary penalties of the Qaḍī.

- Shari'ah is a comprehensive term that applies to all avenues of a Muslim's life and a legal code that regulates all his activities: contracting deals with people and interacting with them in social life.
- It reminds a person how he should stay within his limits and avoid encroaching other people's rights.
- It discusses about what is lawful and what is unlawful, as much as it directs a person to socialise with others and conduct commercial trade with them without betraying them or jeopardising their dues.
- It covers all legal topics starting from agency, interest, finance, Shar'iyyah compliant banking, collateral, pre-emption, slaughter of animals, committing homicide, theft, crime, consuming liquor and a host of other issues.
- It represents the immutable Will of Allāh that is derived from the Qur'ān and Sunnah and imparted to humanity by the Prophet.

**(6) PĀLANPURĪ, SA'ĪD AḤMAD. *Raḥmat Allāh al-Wāsi'ah 'Alā Hujjat Allāh al-Bālighah li Shah Wali-Allāh. Caption: Al-Ḥudūd. 2013. Karachi, Zamzam publishers.***

This book is a commentary on the work of Shah Wali Allāh.

It is heartening to note how excellently the author (Shah Wali Allāh) made in-depth studies of the criminal laws of Islām and then explained their philosophies in a unique manner seldom heard from others.

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<sup>9</sup> - *The Shari'ah*. at <https://www.britannica.com/topic/Shariah> (Accessed on 21-11-19)

In his book, under the caption *Al-Hudūd*, he has first outlined the wisdoms underlining the Islāmic penalties prescribed for different crimes and then classified penalties into three categories: (1) capital punishment for homicide (2) flogging for adultery and (3) arrest or banishment for minor crimes.

He also mentions that it is not always possible for victims to avenge themselves for the injustices done to them or crimes committed against them; therefore, they are compelled to resort to the state for redress.

At one stage, he explains that repentance or regret in a person for committing a crime does not absolve him from the penalty. The penalty will be awarded to him irrespective, whether he repents or not; otherwise, every offender will take recourse to repentance and, therefore, seek to escape the penalty, which will inevitably make the *Hudūd* penalties redundant. Besides, how will the Qaḍī verify the sincerity of the offender's repentance and what yardstick will he use for that? Therefore, until the penalty is not meted out to the person, verbal repentance is no assurance that he will not repeat the crime.

Hence, persuasively the author explains the *raison d'être* and philosophies enriching the criminal laws of Islām, which naturally convinces the reader how animated the ordinances of Islām are. Indeed, his book calls us to study the penalties of Islām scrupulously and understand the core purposes of each of them.

I am pleased to realise how passionate the author is for the implementation of the criminal laws and how confident he is that if reasonable measures against the criminals are enforced, together with some rehabilitation schemes, it will help in curbing the crime rate to a large extent.

This naturally blends in with the topic and points of argument I am engaged with.

But while he has offered remarkable information on the spirit latent in the criminal laws of Islām and has emphasised earlier in his book that all the Commands of Islām are based on deep insight - which is well acknowledged –it is important to note that a Muslim's loyalty to those laws is not contingent on him knowing those wisdoms. 'Islām' stands for submission; therefore, he is obliged to practise on them at all cost, even if those wisdoms are not known to him. 'Islām' stands for submission whether the person is enlightened or unenlightened.

**(7) SHARĪ'AH: THE ISLAMIC LAW. 'Abdur Raḥman Doi. Ta Ha publishers LTD, London. ISBN 0907461 04 2.**

It is encouraging to notice how competently the professor has given an overview of various subjects on the criminal Laws of Islām, in which he includes homicide, adultery, defamation, highway robbery, theft, liquor and others. After explaining

how the Islāmic criminal laws evolved, he goes on to give their definitions and a brief outline of each of them. He also mentions how people in the early days of Islām were advised through the sayings of the Prophet and the verses of the Qur'ān to maintain peace in the community. He states that to show regard for the properties and safety of others and to abide by the laws of the country are essential for each citizen of the country, for these are the backbones to the prosperity of the nation. Together with that, he explains how effective rehabilitating schemes can be for weeding out crimes and reinstating the criminals as productive members into society.

He says that until a crime was not established beyond error - either through evidence or confession of the perpetrator - the Prophet did not mete out punishment to the suspect. This was in accordance with the principle rule that 'every person is innocent until proven guilty.'

After citing the examples of the woman who was guilty of committing theft and of the son of 'Umar who had consumed liquor, for which both of them were charged, the author concludes that under the Islāmic rule no one is beyond the law.

Likewise, he refers to various other cases that had occurred during the propitious days of the Prophet. He says that these penalties had to be enacted to set precedence for the future generations, otherwise, people of later times would not have known how those laws should be implemented in practice.

It seems as if the wavelength of thinking of the professor in relation to the overall criminal laws is similar to mine. We both seem to be moving in the same direction and offering suggestions very close to each other to treat the social menace and to bring the crime and criminal activities to a complete halt.

While I appreciate his mode of deliverance and the way he explains the differences between *Hudūd*, *Ta'zīr* and *'Uqūbāt*, what I really find interesting is his excellent way of quoting citations and applying them to certain crimes prevalent in current times. I am confident that research scholars will appreciate much of the information he has offered.

**(8) عقوبة التعزير في الشريعة الإسلامية (THE DISCRETIONARY PENALTIES IN THE SHARĪ'AT OF ISLAM. Muṣṭafā 'Imrān ibn Rābi'. 2015**

While focussing on the *Ta'zīr* penalties, the author mentions that practically all these rules were either derived from the Qur'ān and Sunnah or from the cases which the Companions encountered during the days of the Khulafā' Rāshidīn (righteous successors).

These penalties are inflicted in several ways:

- (1) **Reprimand or advice**, as the Prophet did with Abū Dhar when the latter used a disparaging word against the mother of Bilāl.<sup>10</sup>
- (2) **Exposure**, as ‘Umar did with the person who offered false evidence.<sup>11</sup>
- (3) **Boycott or ex-communicate**, as the Prophet did with a person for being two-faced<sup>12</sup> or as ‘Umar did with Subaygh.
- (4) **Arrest**: when the grandfather of Hirmās ibn Ḥabīb brought his debtor to the Prophet, the Prophet told him to arrest him. After some time, he enquired: “O brother of Banī Tamīm! What did you do with your prisoner?”<sup>13</sup>

Likewise, the author has given a list of offences in which *Ta’zīr* penalties are inflicted.

What is noteworthy in his work is that he did not mention those penalties in isolation; rather he related all of them either to the judgements of the Prophet or his Companions. This evidently gives confidence to the reader that the penal laws of Islām are not pronounced at random; they are grounded in the principal sources.

I acknowledge that Mr Muṣṭafā’s work is supportive of my work in several ways. The essence of our message is the same with certain differences in approach and content.

Despite that, the question is that when it is evident that scores of crimes and unprecedented offences are surfacing regularly in all ages, how can they all be traced to the first century of Islām? Seeing that the author is of our contemporary age; had he ventured on these cases, too, and offered us guidelines to relate them with the original sources of Islām – as the jurists during the early centuries of Islām had formulated, it would have certainly added credit to his thesis.

## **9) DUE PROCESS IN ISLAMIC CRIMINAL LAW. Sādiq Rezā**

### **New York Law School. Faculty Scholarship Articles & Chapters 2013**

It goes without saying that the author has admirably discussed the procedural rules of Islām on crimes and its execution.

He also draws our attention to a rule that ‘to enforce Islam's criminal punishments without recognizing its procedural rules are to practice Islamic criminal law inaccurately, hence un-Islamic.’

He says encouragingly that in the early centuries of Islām there have been codes of conduct for judges (*Ādāb li-Qāḍī*), manuals to guide inspectors of the markets and

<sup>10</sup>- Al-Bukhārī, Muḥammad ibn Ismā‘īl Al-Ju‘fī. *Sahīh al-Bukhārī*. 1282, Beirut, Dār Ibn Kathīr, vol. 1, p. 61, Hereafter referred to as *Al-Bukhārī*.

<sup>11</sup>- Ibn Humām, as-Ṣan‘ānī Abū Bakr. *Muṣannaf ‘Abd Ar-Razzāq*. 1982, Beirut, Maktabah al-Islāmī. vol. 8, p. 252.

<sup>12</sup>- Ibn Abī Shaybah, Abū Bakr. *Muṣannaf ibn Abī Shaybah*. 2011, Ashbiliya, Dār Kunūz. Hadīth No. 28103. Hereafter referred to as *Muṣannaf ibn Abī Shaybah*.

<sup>13</sup>- As-Sajistānī, Abū Dawūd Sulaymān ibn Ash-ath. *Sunan Abū Dawūd*. 2011, Beirut. Dār Kutub Al-‘Arabī. vol. 4, p. 306. Hereafter referred to as *Sunan Abū Dāwūd*.

morals of people (*muhtaşibs*) and collections of legal opinions (*fatwā*), which can serve as guidelines for modern-day judges, too.

He grieves that though the framework of a Sharī'ah penal code-was established over a thousand years ago, currently only about a dozen of the forty-four Muslim-majority countries formally practise the Islāmic criminal laws.

But I defer with him in his statement when he says: "Several reports in the Sunnah 'reflect' a preference that *Al-Hudūd* crimes - for all their seriousness - are 'not to be prosecuted at all,' even if they satisfy the 'manifest' requirement discussed above."

In this, his statement 'not to be prosecuted at all' is misrepresentation or misinterpretation of the Sharī rule. Actually, the emphasis in the Sunnah is that maximum precaution in passing a judgement against a suspect should be exercised, and not that the law must be evaded altogether. Once the guilt is established and there is no factual or legal reservation about it, there is no reason why the sentence should not be imposed, because if the *Hadd* is not enforced even after confirmation, will the entire legal code of Islām not become outmoded? Mā'az and Ghāmidīyah's events were evident cases that until the Prophet was not fully satisfied with the reports, he did not pronounce the judgement. But once they were confirmed through their confession together with evidence, he did not hesitate in enforcing the Divine Law.

Besides, I also stand to disagree with him in his following statement:

- (1) "The early scholars never set out a corresponding set of rules that govern officials in investigating offenders and prosecuting them in terms of limitations that bind the state and rights that accrue to suspects and defendants, ... such as those in the Bill of Rights to the U.S. Constitution. Nor has such a framework been established in modern times.
- (2) The Quran and the Sunnah are traditionally seen as saying little directly on the subject, and pre-modern jurists developed no comprehensive theory or framework of criminal procedure.'
- (3) It is no aberration in world history that pre-modern Muslim jurists did not provide a template for criminal procedure."

These statements could only be an outcome of he being uninformed of the *Usūl-Fiqh* (Fundamentals of Islāmic jurisprudence) set out by the jurists in the earlier stages of Islām, the principal author of which was Imām Shāfi'ī. In this science, the Imām has set out such profound principles and elementary standards that can serve as a guideline for all ages to determine the crime and then award a fitting ruling to the criminal.

Moreover, how did the Islāmic jurisprudence develop into a magnanimous science had it not been by reflecting on the Qur'ān and Sunnah and then deriving rules from the two? The Qur'ān is laconic; therefore, it is not necessary that every command should be spelt out explicitly therein? What about the juristic derivations? How did the jurists succeed in deriving thousands of rules throughout the ages had there not been principal guidelines?

**(10) *The Role of Ḥudūd and Ta'zīr in Establishing Peace.* Munīr Aḥmad Rasūlpūrī. 2018**

From the offset, the author examines the criminal laws of Islām comprehensively.

During my perusal of the book I have derived the following conclusion from it:

The author underscores that Islām is a religion of peace and, therefore, it takes all measures to establish peace and prevent instability.

In fact, the penalties it prescribes are for the same reason; otherwise, nobody's life and properties will be safe.

By endowing people with the Sharī'ah, which contains the *Ḥudūd* and *T'azīr* penalties, Allāh has removed the fear of insecurity from the people and provided harmony for the society.

He continues to say that every society looks at crimes with disdain and suggests that criminals should be punished duly. Despite that, history testifies that governments have been striving to eliminate crimes, but always encountered hurdles. It was in favour of Islām that within a brief span of twenty-three years, crimes were brought to a minimum and the society that was embroiled in crimes was purged, so much that the people who were looters of people's properties yesterday, became givers to people of today despite their own desperate needs. The salutary effect of that was that in the entire thirty years age of the four righteous successors, only six cases of theft were reported. This is evidence that in Islām the purpose is not to punish the criminals but to reform them.

According to '*Usūl al-Fiqh* (Elementary science on legal theory), verses pertaining to legislative rules are of four categories. Such verses are studied in light of any of those four:

- 1) **Zāhir**: external and literal meaning (specific of Qur'ān and Prophetic Tradition.)
- 2) **Khafī**: equivocal.
- 3) **Muḥkam**: invariable.
- 4) **Mushkil**: ambiguous

**(II) Research Approach and Methodology**

Firstly, in this thesis, I will derive material from the primary sources (Qur'ān and Sunnah) and secondary sources (Islāmic jurisprudence and its history).

Secondly, I will base my study on qualitative research and not quantitative research. This is because the latter will be inapplicable for studies of this nature.

I will also study Islāmic source books on criminology, contemporary literature and journals available on the topic and scan through the internet for authoritative material on the subject.

The criteria I will use to scan through the internet will be to determine the differences between the Islāmic and modern laws of criminality, and then conclude which of the two is more effective in eliminating crimes in our age. I will employ my judgement to see how an advocate of the secular court of law views a given case in comparison to the Qaḍi under the Islāmic law.

Obviously, the template I will use to derive conclusions will not be isolated cases, it will be wholistic.

The analysis I will use will be to determine whether the rulings passed by the judges are simply to suppress the crime (like applying a bandage over a wound without treating it) or eradicating the menace altogether.

Hence, it will be a theoretical, qualitative effort that will utilise print and electronic material available in English, Arabic and Urdu.

Its starting point shall be clarification for the need of a legal framework for any human society based on the views of Shah Wali Allāh and Edward Tylor (the Anthropology being the latter's introduction to the study of human beings and civilisation). Details from the latter will be included as a comparison with Shah Wali Allāh's philosophical views.

What if a person objects and says that the Shari'ah should be refined for the future?

Firstly, the Shari'ah is refined from day one, as much as it is in total harmony with nature.

***"This day, I have perfected for you your religion."* (Q: 5:3)**

Imām Ahmad ibn Hanbal says:

إِنَّ هَذَا الدِّينَ مَتِينٌ فَأَوْغَلُوا فِيهِ بِرَفْقٍ

(This religion is firm and established; so, enjoy its flavour gently.)<sup>14</sup>

Secondly, we also need to define what refinement means.

If it means subjecting the Shari'ah to the whims and culture of the people, then will that not force the law makers to go through a series of amendments and a constant process of trial and error, seeing that cultures of people are constantly in the state of flux and change situation, mostly at the cost of his human values?

In Islām, refinements are fine as long as its immutable laws are not tempered with and its elementary rules are not twisted. Circumstances do change about from age to age; therefore, refinement in the secondary rules are admissible according to the needs.

Nevertheless, at this stage, the question is that when it is known that the Islāmic laws were enforced only in the seventh century CE, while mankind is in existence from time immemorial, then what system was adopted prior to Islām and how was law and order introduced among those people?

In response to this question, I embark in the next chapter on outlining the anthropological or social/prehistoric perspective for the development of law.

## **CHAPTER TWO**

## Law, its Status, Purpose and Related Issues

**Preamble:** This chapter will highlight the development of law in human society by presenting the anthropological views of Edward B. Tylor and Shah Walī Allāh. A more philosophical view of this subject by the latter will then be given.

### **The Anthropological Perspective: Development of Human Societies and the Eventual Need for Legislation and Communal Order.**

Before delving into this topic, I present an excerpt from *An introduction to the study of man and civilisation on Anthropology* by Tylor Edward as follows:

“Life may be roughly classed into three great stages, Savage, Barbaric, Civilized, which may be defined as follows. The lowest or savage state is that in which man subsists on wild plants and animals, neither tilling the soil nor domesticating creatures for his food. Savages may dwell in tropical forest where the abundant fruit and game may allow small clans to live in one spot and find a living all the year round, while in barer and colder regions they have to lead a wandering life in quest of the wild food which they soon exhaust in any place. In making their rude implements, the materials used by savages are what they find ready to hand, such as wood, stone, and bone, but they cannot extract metal from the ore, and therefore belong to the Stone Age. Men may be considered to have risen into the next or barbaric state when they take to agriculture. With the certain supply of food which can be stored till next harvest, settled village and town life is established, with immense results in the improvement of arts, knowledge, manners, and government. Pastoral tribes are to be reckoned in the barbaric stage, for though their life of shifting camp from pasture to pasture may prevent settled habitation and agriculture, they have from their herds a constant supply of milk and meat. Some barbaric nations have not come beyond using stone implements, but most have risen into the Metal Age. Lastly, civilized life may be taken as beginning with the art of writing, which by recording history, law, knowledge, and religion for the service of ages to come, binds together the past and the future in an unbroken chain of intellectual and moral progress. This classification of three great stages of culture is practically convenient, and has the advantage of not describing imaginary states of society, but such as are actually known to exist.”<sup>15</sup>

But a much more sophisticated account of this development is depicted by Shah Wali Allāh, which I quote next under the heading of *Irtifāq*. He says that because animals have set patterns and purposes of life, they continue serving the causes for which they are created without seeking to improve or develop it. Improving and progressing is not part of their system. For instance, the cow and bee; as much as

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<sup>15</sup>-Tylor, Edward B. *Anthropology: An introduction to the study of man and civilisation*. 1896, New York, Appleton and company. The international scientific series. vol. 62, p. 24.

they have been producing milk and honey from their genesis, they continue doing so today in exactly the same way without making any modification. But unlike the animal kingdom, human beings are endowed with the instinct of evolution in them by nature, just as they are favoured with reason, which drives them to devise and project. Therefore, progressing and innovating are in man's genes. He/she believes in refining and cultivating things for the betterment and convenience of his/her future.

Hence, seeing that there are various perspectives on the evolution of human society, I quote in the following pages an excerpt from *Hujjat Allāh al-Bālighah* inclusive of its four stages with its commentaries:

### ***Irtifāqāt* Studied in Terms of Human Being's Progression in History and his Ever-Growing Needs.**

Note: *Al-Irtifāqāt* is an Arabic term. It is a special term coined by Shah Wali Allāh, which he used often in his magnum opus *Hujjat Allāh al-Bālighah* under the chapter titled *Al-Irtifāq*. It is translated as 'requirements,' 'necessities', 'useful things of life', 'seeking things that benefit people' or 'devising schemes for people's comfort.' Anyhow, for our research purpose we shall be translating it as 'requirements,' or 'necessities.'

"Psychologists mention that since the temperament, natural disposition and intelligence of all human beings are different from one another, the opinion each individual offers also differs: some people's opinions are constructive and other people's opinions are experimental. Basing on that, the following three abilities that are exclusive to humankind (and are not shared by animals) are not found in all human beings on an equal basis:

- (1) To devise beneficial schemes for the advantage of the public.
- (2) To uphold refined policies for the accomplishment of the community's mundane needs.
- (3) To offer positive ideas, concepts and designs through contemplation or to forward constructive proposals for the upliftment of the people.

This is why people's necessities of life and their evolutionary stages in history are classified into four categories, one leading to the other:

**First stage of *Irtifāq*:** This was the early stage of human civilization.

It was the primitive stage when people were wandering about like nomads, settling on peaks of mountains and inhabiting the undeveloped regions of the world. This was the rudimentary stage of *Irtifāq*.

**Second stage of *Irtifāq*:** This is the progressive or urbanised stage of civilization.

At this stage of human evolution, when people start progressing, occupying cities and living in civil societies, they will necessarily be in need of people of insight to guide them. Such people will also be gifted with high morals and noble character. Crowded towns, mounting necessities and added experience are factors that drive people to discover substantial new ways to earn their livelihood, which eventually help them to increase their living standards and provide convenience for all. During such times, monarchs also get engrossed in sumptuous living while their courts often become centres of assemblage for sages, poets and men of administrative expertise.

**Third stage of *Irtifāq*:** This is a stage for the establishment of a government that will enforce law and order.

Historically it is a proven fact that once people interact with one another in their dealings and social lives, the evils of jealousy, prejudice, conflicts, procrastinating in payments, reneging on promises, disregarding fealty and failing in the fulfilment of people's rights, also creep in them perceptibly or imperceptibly, to the extent that their despicable desires rise, which even prompt them to plunder and perpetrate murder. This is when the need to draw up codes of living and then having them enacted by people of authority are perceived. But at the same time, there are always some personages and highly qualified public-figures in the community who are able to devise such valuable schemes (for the benefit of the nation) which cannot be accomplished by individuals, such as constructing roads, dams, railroads and bridges. In the end, these are such factors that induce the nation to ordain a king who will address their mega needs like these. He will also pronounce judgement with equity in the dispute of the people, reprimand recalcitrant elements, resist rebels and collect tax for the welfare of the country and upliftment of the downtrodden.

Generally, people are selfish and self-centred by nature; therefore, some of them perform things that are only to their own advantage, even if those things are to the disadvantage of the public. Equally, they refrain from performing certain other duties that are to the advantage of the public. Their selfish argument is: "Why should we lose one rand of ours to save the thousand rands of others when our one rand is of sentimental value?" This is why, it is often noticed that for the sake of a few coppers, a thief would not hesitate to stake the public's peace or even take their lives.

In such cases, if law and order are not enforced in the land and the hard-core criminals are not reprimanded duly, the menace will spread and everyone's peace will be compromised. This is where the penal laws of Islām should be enacted so that the criminals are castigated and the crimes are eliminated. This falls in line with the *modus operandi* of the Islāmic rule that the obedient should be rewarded and the criminal be chastised.

**Fourth stage of *Irtifāqāt*:** This is a stage of establishing a super government to oversee other governments under its constituency.

Once the regional or local governments are established, it becomes unavoidable for those people to form a broader government that will manage and supervise over the lower governments, lest the latter should fail in their duties or transgress the rights of others. This is a need that is perceived daily, because when several governments are established, and each of them is in control of its coffers and exclusive forces, inevitably its rulers are incited by self-conceit, chauvinism, rivalry and bigotry, which by and large lead to internecine warfare. This is when a broader government above them will supervise, intervene or reconcile among them as the need will warrants.<sup>16</sup>

The above guidelines have been derived by the jurists as well: through explicit texts of the Qur'ān, Sunnah, concurrence of opinion of authorities on criminal law and analogy.

Hence, we realise how important law and order are to cherish a healthy and sound social life and to be able to develop further amenities for human beings in mundane activities, without which their lives can become fixed and progress retarded. Therefore, in order to obtain true insight on this issue, I intend to discuss in the following section the value of law in academic and social life.

### Chronological list of Hudūd During the Days of the Prophet

- *Ḥadd al-Riddah* (penalty for apostasy): 2 A.H. Jamād al-Ākhir, 2 months before the Battle of Badr.
- *Ḥadd Shurb al-Khamr* (penalty for consuming liquor): 3 A.H. after the Battle of Uhud.
- *Al-Qiṣāṣ* (equal retribution for murder): 3 A.H. After the Battle of Badr
- *Al-maysir* (gambling). 3 A.H. together with liquor.
- *Al-Baghy* (Rebellion/Political crimes): 6 A.H. Sha'bān. After the battle of Banil Muṣṭalaq.
- *Ḥadd al-Ḥarabah* (penalty for highway robbery): 6 A.H. before the other verses of chapter Maedah.
- *Ḥadd al-Zina* (penalty for adultery): 8 A.H. after the chapter An-Naṣr.
- *Ḥadd al-Qadhaf* (penalty for calumny): 8 A.H. after the chapter An-Naṣr
- *Ḥadd al-Saraqah* (penalty for theft): revealed during the latter years in Madinah.

### Was there need for police during the time of the Prophet?

<sup>16</sup>- Pālanpurī, Sa'īd Aḥmad. *Raḥmat Allāh al-Wāsi'ah Alā Ḥujjat Allāh al-Bālighah li Shah Wali-Allāh*.2013, Karachi, Zamzam publishers, vol. 1, p. 417. Hereafter referred to as *Raḥmat Allāh al-Wāsi'ah*.

During those propitious days, every person was a policeman to himself, as much as each person was conscious of the safeguard of the health and wealth of others as well. This was peculiar of that age. His Faith in Allāh and awareness of the presence of his Creator restrained him from committing wrong.

The incidents of theft, adultery, kissing of a strange woman and then reporting it to the Prophet to have the penalty enforced on them, testified that they were self-conscious. They were endowed with inbuilt supervisors that kept policing over them and keeping a tight watch over them even in the dead of the night when nobody was watching them other than Allah.

Of course, this is something unbelievable in this age. But when such incidents were a reality in those days and history bore testimony to it, how could it be denied.

One day while ‘Umar was patrolling the city of Madīnah at night, he heard a mother telling her daughter to add water to the milk that was for sale. The daughter said: “The Amīr has prohibited us from doing that.” The mother replied: “There is no Amīr around here to see us.” The daughter said: “But what about the Rabb of the Amīr? Is He not here to see us?”

But alas, as time went by, when people’s consciousness started waning, recklessness set in them and trust was lost from them, the need for a establishing a police force was perceived and law and order under strict supervision had to be introduced.

Today despite all the forces, constables and law enforcement, criminals are roaming about freely and rampaging the cities wildly.

## **Value of Law in Academic and Social Life.**

### **Introduction**

The jurists on the Islāmic penal law mention that when the Sharī’ah stipulates a penalty on a given act, it inevitably emphasises that the act is injurious to the society, to the extent that if it becomes widespread, it can jeopardize the peace of the people and even bring about their downfall.

Worse, when such acts/crimes get soaked into the fabric of the society, they become virtually impossible to eradicate, while the victims, too, are no longer able to defend themselves.

It is also experienced that merely through kind advice and sermons from the pulpits, neither are the culprits deterred nor are the hardcore offences eliminated

from the community. Both have to be addressed through stringent laws and reasonable penalties.

This is explained by Justice Oudah Shahīd:

“Punishment is the requital for the disobedience of the law-giver laid down for the collective interest of people. The object of prescribing punishment for the violation of the Law Giver’s edict is to reform the society, deliver the individuals from evil, save them from ignorance, lead them out of a life of aberration, prevent them from committing sins, and induce them to obey Allāh and His Messenger. Prophets were entrusted with the duty to convey and disseminate the divine message and serve as mercy personified for mankind.”<sup>17</sup>

Penalties in Islām are like medicine, which people take to attain good health.

In this connection, Ḥāfiẓ ibn Qayyim said that Allāh made the penalties atonement for those on whom it is inflicted. Once they undergo the prescribed penalty, they will not be answerable for the offence in the Hereafter, esp. if they had offered penitence thereafter. It is, therefore, stated in a narration:

عن يزيد بن خزيمة بن ثابت ، عن أبيه ، أن النبي صلى الله عليه وسلم قال : « من أصاب حدا ثم أقيم عليه الحد كفر الله عنه ذلك الذنب

(Whoever commits a pang of guilt for which a penalty was enforced on him; Allāh will remit that sin from him – because the penalty served as atonement for him.)<sup>18</sup>

Nevertheless, seeing that human beings pass through different phases and avenues of life, they do encounter obstacles all the way. Therefore, to counter those challenges we need to understand them broadly under the following captions:

- I. What makes social life important?
- II. Distinctive human features.
- III. The social structure of society.
- IV. Social order and ethics.
- V. Social life founded on five institutions.
- VI. Protection of social life under Islāmic law.
- VII. Social amenities of life.

#### **i) What makes social life important?**

“Human beings are social animals, and the tenor of our social life is one of the most important influences on our mental health. Without positive, durable relationships,

<sup>17</sup>- “Oudah ‘Abdul Qader. *Criminal Law of Islam*. 1991, Delhi, J. R. Printers, vol. 1, p. 29. Hereafter referred to as *Criminal Law of Islam*.

<sup>18</sup>- Bukhārī, Muḥammad ibn Ismā‘īl. *Al-Aḥādīth al-Marfū‘ah min at-Tārīkh al-Kabīr li al-Bukhārī*. 2009, Dāirat al-Ma‘ārif al-‘Uthmānī. vol. 2, p. 82. <http://www.alsunnah.com>

both our minds and our bodies fall apart. ... And the nature of that relationship typically influences all the others in our life.”<sup>19</sup>

Throughout history, social values have been changing from nation to nation and from region to region. But there were certain values that never changed. Across the world, they were collectively recognised by everyone as their birth rights, such as protection of life, family, property and religion.

There are some needs, such as food, shelter and mating that are shared by human beings and other creatures. Therefore, like human beings, other creatures also have numerous physical requirements, meaning that, these natural requirements are not instilled in human beings only; they are instinctively instilled in other creations, too. The Qur’ān declares:

"Our Sustainer is He Who granted everything its natural form and then He ‘directed’." (Q: 20:50)

"Your Cherisher instilled into the bee, "Prepare cells in the mountains, trees and in what people thatch." (Q: 16:68)

But there are other features that are bestowed on human beings only and not to other creatures, such as the talent for making tools, manufacturing instruments and planning for the future.

## ii) Distinctive Human Features

Likewise, it is in light of the inner capabilities and superiority of human beings that they are blessed with three distinctive features as opposed to other creatures:

- a. **Reason**
- b. **Aesthetics**
- c. **Intellectualism**

- a. **Reason:** Animals act, react and follow their instincts; they are not governed by reason or rules. They graze from anyone’s grassland and seasonally copulate with any female partner with no pre-arrangements or pre-agreements. But, on the other hand, human beings do not strive to satisfy their bodily urges at random; they administer order in their lives and endeavour to satisfy their needs intelligently and systematically. They wittingly strive for their livelihood, add seasoning to their food, attempt to improve their character and enforce discipline in the country to receive salvation in the life after death.
- b. **Aestheticism:** Striving for gracious and refined tastes is another feature specific to humankind. They wish to accomplish their needs in an excellent and pretty manner. Other than the fulfilment of their physical needs, they also desire for the coolness/satisfaction of the eyes and rich taste of the tongue. This is why they long for beautiful spouses, tasty foods, attractive clothing and gracious and spacious

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<sup>19</sup>- Kaja Perina. *Psychology Today*. 2017 New York. Sussex Publishers.

<https://www.psychologytoday.com/intl/collections/201308/facebook-friends>. (Accessed on 5-5-2019)

homes. But for the animals, they are content with the mere fulfilment of their physical needs and simple dens and caves they live in.

- c. **Intellectualism:** This is something non-existent in the animal kingdom altogether. Among human beings, there are those of high acumen, wisdom and expertise, who devise schemes and manufacture instruments for the fulfilment of their needs. They even deduce intelligently remarkable ideas for the community and provide effective means for its attainment.<sup>20</sup>

Undeniably, all the people perceive the need for those items, but due to lack of competence and expertise, it is not possible for all of them to manufacture or provide those items. Therefore, no sooner did the product of the intellectuals come to their notice than it was appreciated by them, too, because that was in conformity with their natural taste and desire. For instance, a layman, who is hungry and thirsty or is frustrated because he does not find food to eat, reflects how to satisfy his needs, but fails. Just then he meets someone who underwent a similar situation. Previously this person had inspected the method of sowing seeds, irrigating the land from distant canals and wells, ploughing, harvesting, threshing and storing the grain. Now, this hungry person learns the entire procedure from him to satisfy his needs. This is the first useful strategy he adopts for the fulfilment of his requirements. But again, the hungry person does not know how to consume it and how to avoid suffering indigestion. Eventually, he meets up with another person who teaches him how to cook and prepare meals. This is when the second beneficial scheme of his is fulfilled.

Hence, throughout human history, new schemes were regularly sought and civilisation continued progressing. During the primitive days, fire was produced by the striking of two stones against each other, but now that is replaced by matchsticks and so on.

In sum, these are two factors: one is that certain requirements are instinctive to living creatures, which are shared by human beings and animals; and the second are the three features enumerated above, which are specific to human beings. Both things are compared with our breathing. Breathing, as we know, is essential for life; therefore, people breathe naturally and involuntarily because they have no other option. Yes, taking a long breath or short breath is within their option. Likewise, although instinctive knowledge is bestowed on all human beings, to expand it and make further research through it in order to acquire greater means of comfort, is within their means.<sup>21</sup>

### (iii) Social Structure of Society

**The Social Structure of society is based on the following four institutions:**

- a. **Tadbīr al-Manzil:** Maintenance of family life.
- b. **Ḥuqūq-Dhāti:** Individual's propriety rights.
- c. **Tanzīm al-Mu'āsharah:** Setting up of social order.
- d. **Siyāsāt al-Madanī:** Government policies of the country.<sup>22</sup>

<sup>20</sup> - *Raḥmat Allāh al-Wāsi'ah*. vol. 1, p. 419.

<sup>21</sup>- *Raḥmat Allāh al-Wāsi'ah*. vol. 1, p. 419.

<sup>22</sup> - *Tadbīr Al-Mutawahḥid*. at <https://www.mominoun.com/articles>. (Accessed on 19-11-19)

**(a) *Tadbīr al-Manzil***: maintenance of family life.

All goodness stems from a well-brought-up family, and it is this that brings peace and soundness to all activities of life, without which there is no unification.

Likewise, it is through the union of man and woman and the procreation of offspring that the human race is sustained.

Several individuals form a family; several families form a society and; several societies form a government. The institution of family life is the nucleus around which all activities of life revolve, as much as all social patterns and government policies are pinned to the family life directly or indirectly.

**(b) *Ḥuqūq-Dhātī***: the individual's proprietary rights

Basic requirements for the prosperity of an individual are food and clothing for survival, home for shelter, medical requirements, basic necessities, social peace and security of life and property.

These are the fundamental needs of each person. They comprise of the institution of private ownership, which is primary to human desire and nature. Socialism and Communism strove assiduously to retain collective and communal ownership of property as against individual ownership, but they failed in suppressing the institution of private ownership for being contrary to human nature.

**(c) *Tanzīm al-Mu'āsharah***: organising social order.

Family system and the individual's propriety rights cannot be realised without security and social order.

Human beings are weak by nature as the Holy Qur'ān declares: "And humankind is created frail." (Q: 4:28)

This is why, people are dependent on others, as much as their needs are multiple. Therefore, without the support of society and mutual cooperation, they cannot make progress in life. This inevitably calls for a social order that assures them their needs and provides them with their refuge.

**(d) *Siyāsat al-Madanī***: government policies of the country

Besides their basic needs, people have other legal requirements, too: official recognition of their wealth and property. Therefore, in order to achieve safety and social order, it is crucial to establish a sound and authoritative government that will:

- Give recognition to people's legal rights and guard them against the encroachment of others.
- Build bilateral ties with other countries, which will make it possible for its citizens to interact and trade with the global market.
- Set up courts of justice, provide utilities and create a nation-wide network and infrastructure for its citizens.

Note: Although the above four institutions are essential for people to develop a social structure, it cannot be denied that a social structure, on the whole, is created by people who are endowed with certain qualities, without which the structure will wobble. Those are the qualities I wish to focus on in the caption hereafter:

#### **iv) Social Order and Ethics**

To create social order is indeed a challenge; it is realised through people with will power, foresight and determination and is accomplished by exemplary people: those who have the concern for the peace of others and who are willing to stake their own comforts for the betterment of the commonweal. Hence, it is only those who are endowed with true value and worth that ultimately succeed in achieving the goal of developing social order.

This is why the authorities on ethics have stated that generally people are endowed with three faculties: (1) intelligence (2) desire or animalistic tendency and (3) anger.

From these three, another four features develop - depending on the nurturing people receive, the environment they abide in and abilities they possess: (1) justice and moderation (2) wisdom (3) chastity (4) bravery.

We now analyse the former three faculties:

- Intelligence:** Through this faculty, people are able to comprehend the essence and consequence of things, as much as they are gifted with the knack to differentiate between the artificial and real.
- Desire or animalistic faculty:** This tempts people to overcome things that are to their disadvantage and procure things that are to their advantage.
- Anger:** This induces people to challenge their foes and seek ascendancy over them.

#### **Role of Rights to Life**

After discussing previously, the importance of maintaining of a family life, individual property and social order, I now explain why the safeguard of such human rights are essential and what role does law and order play in this regard.

The principal right of all human beings is the safety of their lives. 'Life' is a divine gift bestowed on people. But as much as all human beings acknowledge their own lives as precious gifts on behalf of Allāh, it is also vital that they accord the same sentiment to the lives and properties of others, that is, they should treat the properties of others as inviolable as their own. A person living in the east of the world should have regard for the life and property of another person living in the west and reckon the person to be an integral member of the human community. Each person should treat others as he/she wishes to be treated by them. This is the norm of justice.<sup>23</sup>

This explains the significance of mutual interaction. But it is always possible that because people's interaction is based on different requirements and; therefore, each of them will seek the maximum for himself/herself and mutual opposition and resistance will arise due to conflict of interest. Therefore, to set their requirements in order and to maintain soundness in their relationship, the society urgently needs canonical laws so that no one would impinge the rights of another.

#### **(v) Social Life Founded on Five Institutions**

On this subject, religious scholars have agreed that people's social life is founded on five institutions, known as '*Al-Darūriyāt* or *Al-Maṣāliḥ al-Khamsah*. Each of them is essential for the evolution of human society. The scholars even emphasize that people's progress in life is dependent on these institutions. If it improves, the entire society will improve; and if it deteriorates, the entire society will deteriorate.

Imām al-Ghazzālī clarifies this point in detail in the following excerpt, which has been annotated verbatim by Shaykh 'Izz ad-Dīn in his *Al-Qawā'id*:

"Allāh has created mankind in a state of dependence on one another, that is, each person is reliant on the other for the accomplishment of his needs. The object of the Sharī'ah are five: protection of progeny, life, mind, wealth and religion. Anything that contributes to the safeguard of these five is favourable and is in the interest of people and whatever clashes with these five is unfavourable, hence unwanted."<sup>24</sup>

Likewise, Muḥammad Asad pens:

<sup>23</sup>- *Al-Qur'ān*: 5:28.

<sup>24</sup>- Shaykh ibn 'Abd as-Salām, 'Izz ad-Dīn ibn 'Abd al-'Azīz. *Al-Qawā'id al-Aḥkām fi Maṣāliḥ al-Anām*. 2013, Dubai, UAE, Dār al-Qalam, vol. 2, p. 67.

“A true Islamic state must protect, inter alia, citizens' dignity and honour and the privacy of their homes, and calling for constitutional enactments that guarantee these protections and prohibit governments from violating them.”<sup>25</sup>

“In Western democracy, religious affiliation is subordinate to citizenship, as the state is the final authority - a civil religion. In an Islamic state, the state is an institution of religion and legislatively prevents conversions from Islam. Personal civil law and criminal law are under the jurisdiction of Shari'a courts. 'Secularism is itself a religion with its own worldview.' (Van der Walt 2007:151).<sup>3</sup>”

Gibon, an English historian mentions:

“The reason why the religion of Muḥammad has spread in the East and West of the world in such a short space of time is that its injunctions are so precise that it appeals to logic swiftly. People who accuse the religion for spreading by the sword are truly mistaken.”

Authorities have mentioned that to acquire serenity in social life there are two pertinent rules:

- a. جلب المنفعة و دفع المضرّة (To acquire all such things that are beneficial for people and to avoid all such things that are harmful to them.) Therefore, serenity among the people will be acquired only by founding the society on virtuous principles and avoiding everything detrimental to it. This is a positive aspect.
- b. درء المفساد مقدم على جلب المصالح (Removing harmful factors takes precedence to acquiring beneficial factors.) This is acquired by uprooting all negative factors from the people even before deciding to develop society. This is its negative aspect.<sup>26</sup>

Islām has provided a comprehensive mechanism through its imperatives and prohibitions through which both these goals can be achieved.

Among these authorities was ‘Allāmah ibn Taymiyyah. *Maqāṣid ash-Sharī‘ah ‘inda Ibn Taymīyyah* makes reference to his statement, as mentioned in the footnote hereunder.

#### (vi) Protection of Social Life Under Islāmic Rule

Islām is not a religion that promises spiritual upliftment only; it is the mainstay for the socio-economic development of people’s mundane lives as well.

<sup>25</sup>- Muḥammad Asad. *The principles of state and government in Islam*. 1961. University of California Press.

<sup>26</sup>- Ibn Taymīyyah, Taqī ad-Dīn Aḥmad. *Maqāṣid ash-Sharī‘ah ‘inda Ibn Taymīyyah*. 2000, Jordan, Dār an-Nafāis. Discussion 1, p. 441.

Ash-Shāṭabī writes in his *Al-Muwāfaqāt*:

الشارع قد قصد بالتشريع اقامة المصالح الاخروية والدينية

(Allāh's purpose for promulgating the Shar'ī Laws is that people's requirements in this life and the Hereafter are fully provided for.)<sup>27</sup>

At another occasion the same author says:

ومقصود الشرع من الخلق خمسة: وهو ان يحفظ عليهم دينهم و نفسهم و عقلمهم و نسلهم و مالهم ، فكل ما يتضمن هذه الاصول الخمسة فهو مصلحة ، و كل ما يفوت هذه الاصول فهو مفسدة و دفعها مصلحة

(The aims of the Sharī'ah in respect of the creation are five: to safeguard their religion, lives, intelligence/minds, wealth and progeny. Whatever promotes the five basic necessities is helpful; and whatever undermines these five are harmful, hence, to be discarded.)<sup>28</sup>

Among the measures for the protection of social life prescribed by Islām is the reformation of people's minds, actions and communal relationship. 'Allāmah ash-Shāṭabī has explained this in some detail, which is covered under the discussion of the five basic needs outlined below.

He says at one stage:

“The object of the Sharī'ah is to protect the following five core needs of every individual:

- a. Protection of religion
- b. Protection of life
- c. Protection of the mind
- d. Protection of family life and lineage
- e. Protection of property

These are five requirements upon which people's security is contingent. If they are deprived of any of them, it is certain that they will experience hardship and their lives will become unmanageable.

### (a) Protection of Religion

This is acquired in two ways:

- I. **From the positive angle:** Islām did not only ordain principle rules; it also stressed upon its adherents to abide by them, such as confessing Faith and discharging the duties of Ṣalāh, Zakāh, Fast and Ḥajj.

<sup>27</sup>- Ash-Shāṭabī, Abū Ishāq Ibrāhīm ibn Mūsā. *Al-Muwāfaqāt*. 2008, Cairo, Dār Ibn 'Affān, vol. 2, p. 28.

<sup>28</sup>-*Al-Muwāfaqāt*. vol. 1, p. 179.

- II. **From the negative angle:** Islām also guarded the adherents of the religion from all such activities that might obstruct them from practising their religion. In this context, it prescribed certain penalties and deterrents against those people who might seek to obstruct the Believers from exercising their religious freedom.

#### Hamza Accepts Islam - A.D. 615

'Muhammad, the Apostle of God, though safe under the protection of his uncle, Abu Talib, was not immune from harassment by the polytheists. Whenever they found an opportunity to pester him, they didn't miss it.

On one occasion Abu Jahl found him alone, and used much vulgar and offensive language toward him. The same evening when his uncle, Hamza ibn Abdul Muttalib, came home from a hunting expedition, his slave-girl recounted to him the tale of Abu Jahl's gratuitous insolence toward Muhammad and the latter's forbearance, of which she had been an eye-witness.

Hamza was a warrior, a hunter and a sportsman, and was little interested in the day-to-day affairs of the city. But Abu Jahl's conduct toward his nephew so roused his anger that he seized his bow, and went into the assembly of the Quraysh where he (Abu Jahl) was reviewing the events of the day to his compeers. Hamza struck him on his head with his bow, causing it to bleed, and said: "I too have become a Muslim."

Apostasy from Islām has two aspects: one is the personal decision of the apostate to repudiate the religion, which is something he believes he has the freedom to do. The other is the wilful rebellion against Allāh's laws, through which he may influence other naïve Muslims, too. This is akin to treason, which no government tolerates. Evidently, on basis of the latter, Islām seeks to remove his misgivings and emphasises on him to reconsider his stand.

#### (b) Protection of Life

This also is achieved in two ways:

- I. **From the positive angle:** Islām has emphasized on people to consume lawful foods and drinks ("O people! Eat the pure and lawful things of the earth." (Q: 2:168), cover themselves with garments ("O children of Adam! Indeed, We sent down garment upon you that covers your secret and that serves as adornment." (Q: 7:26), and secure a shelter for themselves to reside under. ("Allāh made for you your houses places to reside in." (Q: 16:80)  
These are basic requirements upon which rests the protection of body and life of each individual.
- II. **From the negative angle:** Islām has decreed penalties on criminals, who seek to commit homicide, dismember people's bodies and imperil their lives.  
In context of homicide, the Qur'ān says: "O you who believe! 'Equal Retribution' (*Qīṣāṣ*) in respect of the murdered is prescribed on you: the

free person for the free person; the slave for the slave and; the female for the female.” (Q: 2:178)

While dealing with the issue of dismembering people’s bodies, the Qur’ān says: “We had ordained upon them in the Torah a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and on specific wounds there are equal retributions.” (Q: 5:45)

Therefore, not only did the Sharī’ah consider the protection of the lives of the individuals ; it has also set penalties on those who disregard the safety of the general public and disrupt their social order. (“The only reprisal of those, who... strive to create subversion in the land, is that they should be executed ...” (Q: 5:33)

### **(c) Protection of the Mind**

Islām has accorded the mind a lofty position in human life. But in the same vein, it has bound the mind with religious obligations and soundness of conscience. Seeking knowledge, reflecting, discerning and distinguishing between right and wrong are among the many ways of refining and culturing the mind. This was the prime reason the Qur’ān at the very outset banned liquor and even set penalties for abusing the rule, lest the people should lose their balance and resort to inhuman behaviour. A person that suffers disorder of the mind loses track of what is legal and what is illegal.

However, protection of the mind also is accomplished in two ways:

- I. **From a positive angle:** Islām has directed people to employ their thoughts and reasoning to draw suitable conclusions. The Qur’ān says repeatedly: “Will they not discern?” “Will they not reason?” “Will they not apply their minds?”
- II. **From the negative angle:** Islām has declared intoxicants unlawful, as much as it has decreed a *Ta’zīr* (quantitatively discretionary) penalty against it, such as flogging.

### **(d) Protection of Family life and lineage**

Ordering of family life is amongst the principal requirements of normal life and human culture, as much as it is among the vital directives of all religions. A family is a nucleus around which all activities of a person revolve - the ancestral roots being the most vital aspect of it. Therefore, at all cost, every person should preserve his/her lineage against adulteration. A sound and unblemished lineage of the progeny is a pride for the family. No sooner had the lineage of the family been disturbed than the family life was thrown into disarray. This is why Islām has adopted strict measures against any

degree of defilement of the family line. It maintains that a clean society is a sacred gift; therefore, any person that seeks to tarnish the lineage of the progeny through illegal courting and mating should be dealt with severely. Islām approves of a person marrying a second or third spouse if he wishes, but never consents on any person letting his soul be soiled or progeny's reputation be blotted through illicit contact no matter in which type of a culture he is surrounded by, for that is not of him. He is a pride of the world; therefore, it is essential for him to maintain his individuality and family reputation.<sup>29</sup>

Protection of family life and lineage also is resolved in two ways:

- I. **From the positive angle:** In order to satisfy the carnal passion of people and to gratify their natural sexual urge, Islām has instituted the rules pertaining to marriage, guardianship of children and maintenance of the family etc.
- II. **From the negative angle:** In order to defend the chastity of the spouses and avoid from sullyng the reputation and lineage of the family, Islām has prescribed penalties for fornication and calumny.

#### (e) Protection of Property

This also is attended to in two ways:

- I. **From the positive angle:** In order to develop the material empire through legal channels, Islām has enacted laws pertaining to commerce, agency, legal contracts, import, export and international trade.
- II. **From the negative angle:** Islām has declared theft, treachery and bribery unlawful. In fact, for each of them it has decreed penalties, some specified and others unspecified. For theft, the penalty is specified, whereas for other offences, the judge is authorized to decree a penalty according to his discretion or as he sees appropriate in respect of the gravity of the act and welfare of the public.”<sup>30</sup>

#### (vii) Social Amenities of Life

In order to live comfortably and avoid hardship, people require - besides the above basic needs - other amenities, too, without which there can be neither order in life nor stability; rather life can be full of turbulence and constrictions, and instead of being a bed of roses it can become a bush of thorns.

These amenities are classified into three categories:

- a. Requirements of life

<sup>29</sup>-*Raḥmat Allāh al-Wāsi'ah' Alā Ḥujjat Allāh al-Bālighah li Shah Wali-Allāh*. vol. 1, p. 414.

<sup>30</sup>- Ibn 'Ashūr, Muḥammad Ṭāhir. *Al-Mufīd fi Maqāṣid as-Shar'īyyah al-Islāmiyyah*. 2018, Egypt. Dār al-Kutub.

- b. Aesthetics and refinement of life
- c. Mutual relationship

### **(a) Requirements of Life**

For the realization of these requirements and the preservation of such needs, Islām has prescribed certain laws under the caption of worship. This is, apart from decisive rulings (*'Azīmat*), some concessions (*Rukhṣat*) also are granted, such as those granted to the travellers and the sick during the fasting month. In this category, purity of the body, covering of the modest part of the body and drawing close to Allāh through voluntary performance, such as charity and prayers, are included.

### **(b) Aesthetics and Refinement of Life**

These are the ethical and virtuous requirements of life. People require these to live respectable, convenient and refined lives. If these are absent, life can become relatively straightened, which sometimes can even culminate in embarrassment. The prohibition of illegal transactions is included in this category.<sup>31</sup>

### **(c) Mutual Relationships**

Social dealings, mutual relationship and recognizing people's rights are the backbones for cooperation, teamwork and serenity in the community. These factors occupy a wide scope in people's lives, as the maxim goes: "Mankind is a social being by nature." Therefore, to support and seek support from one another are both essential for an individual, because people are unable to accomplish their needs all by themselves.<sup>32</sup>

## **Summary of the above discussion in words of Imām al-Ghazzālī and Shah Walī Allāh**

Imām al-Ghazzālī says:

"The object of the Sharī'ah in these five essentials of life is to protect people from hardship. Therefore, whatever contributes towards the protection of these five is good, and whatever imperils it in any way is bad. It is for the preservation of these that the Sharī'ah has promulgated certain laws that will protect the rights of the

<sup>31</sup> - Ash-Shāṭibī, Abū Ishāq Ibrāhīm ibn Musā. *Risālat al-Bayān*, 2005, Maktabah Dār Hudā, Madīnah, vol. 2.

<sup>32</sup> - *Raḥmat Allāh al-Wāsi'ah' Alā Hujjat Allāh al-Bālighah li Shah Walī-Allāh*. vol. 1, p. 414.

individual when he/she is in possession of it and restore the rights when he/she is dispossessed or robbed of it.”<sup>33</sup>

Shah Walī Allāh declares:

Oppression is of three types:

- (1) To transgress on the lives of the people.
- (2) To transgress on the limbs and organs of their bodies.
- (3) To transgress on the properties and wealth of the people.

Allāh’s wisdom requires that such penalties are stipulated on cruelties that will restrain the criminals from ever perpetrating them in future.

But it is not appropriate for all penalties to be of equal level, because the killing of a person cannot be equal to dismembering his body nor can dismembering his body be equal to causing damage to his properties. Besides, the motives of the criminals for committing crimes are various. Therefore, committing unintentional homicide cannot be treated equally to committing intentional homicide.

Committing homicide is the most heinous crime. It is the gravest of sins as confirmed unanimously by all religions. This is because in homicide the faculty of anger is subdued by the ego, which is the prime cause for the spread of mayhem in the land. It changes the pattern of people’s lives and also shakes the foundations of religion.”<sup>34</sup>

## Conclusion

Analysis in this chapter concentrated on the broad legacy bequeathed by Muslim scholars to the study of crime in Islām from an anthropological and rational stance. Hence, from the foregoing categories and discussion, we have realised how important social life and protection of religion and property are for people to live in ease and peace. The cleric, social workers, criminologists and law-makers are constantly engaged in making these goals a reality in every possible way. But tragically, just as poisonous weeds, which sap the energy of the earth, grow alongside the grass, criminal elements in all societies also rise to thwart the efforts of the well-wishers and hamper their goals. Every new law that is passed and every new security system that is invented are been circumvented by these elements. For many of them, crime has become a second nature or a hobby on which they thrive. Damaging people’s properties is a pleasure to them and killing the people is a norm.

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<sup>33</sup>- Al-Ghazālī, Imām Abū Ḥāmid. *Ihyā' 'Ulūm ad-Dīn*. 2010, Beirut, Dār al-Ma'rifah. Hereafter referred to as *Ihyā' 'Ulūm ad-Dīn*.

<sup>34</sup>- *Raḥmat Allāh al-Wāsi'ah 'alā Ḥujjat Allāh al-Bālighah*. p. 431

Therefore, in the face of the crimes that are shredding our societies, I now turn in the forthcoming chapter to the topic of crime, its repercussion on the human society and its related laws, which are equally essential subjects studied in legal circles.

## CHAPTER THREE

### Crimes and their repercussion on the society

#### Preamble

Firstly, crimes from a western perspective are analysed in terms of etymology and legality, as well as their fundamental elements and subsections. Then follows a discussion about convictable crimes. An Islāmic view of crime is then preferred in terms of its definition, categories, fundamental elements, components, major and subcategories.

#### (1) Etymology of the Word Crime

“The word crime is derived from the Latin root *cernō*, meaning "I decide; I give judgment". Originally the Latin word *crīmen* meant "charge" or "cry of distress."<sup>35</sup>

#### The Legal Definition of Crime

Crime is an action or omission which constitutes an offence and is punishable by law.

“Crime is a commission of an act prohibited or omission of a duty that is commanded.”<sup>36</sup>

“The Concise Encyclopedia of crime and criminals has defined 'crime' thus: “A crime is an act or default which prejudices the interests of the community and is forbidden by law under pain of punishment. “<sup>37</sup>

“An illegal act for which someone can be punished by the government; especially (1) a gross violation of the law. (2) A grave offence especially against morality.”<sup>38</sup>

“A crime or offence (or criminal offence) is an act harmful not only to some individual but also to a community, society or the state ("a public wrong"). Such acts are forbidden and punishable by law.”<sup>39</sup>

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<sup>35</sup>- Ideablwg, *lets-talk-about-the-word-crime*. at [www.ideablwg.ca/blog/2011/12/29/lets-talk-about-the-word-crime.html](http://www.ideablwg.ca/blog/2011/12/29/lets-talk-about-the-word-crime.html).(Accessed on 3-1-2019)

<sup>36</sup>- Anon. *definition/crime*. at <https://www.definitions.net/definition/crime>. (Accessed on 3-1-2019)

<sup>37</sup>- Merriam Webster Dictionary, at (<https://www.merriam-webster.com/dictionary/crime>) (Accessed on 3-1-2019)

<sup>38</sup>- Merriam Webster Dictionary, at <https://www.merriam-webster.com/dictionary/crime>. (Accessed on 3-1-2019)

<sup>39</sup>- Newsbell 24, *legal-definition-of-crime-and-different-types*, n.d. at <https://newsbell24.com/legal-definition-of-crime-and-different-types/>(Accessed on 3-1-2019)

“Crimes are defined by criminal law, which refers to a body of federal and state rules that prohibit behaviour the government deems harmful to society. ... Personal Crimes – “Offenses against the Person”: These are crimes that result in physical or mental harm to another person. Personal crimes include Assault.” Jun 26, 2018<sup>40</sup>

Shaykh Hasan Handāwī writes in his *Maqāṣid at-Tashrī al-Jināi al-Islāmī*:

“Crime according to Islāmic jurisprudence applies to every unlawful act in the Sharī’ah, whether it was committed on someone’s person, his wealth or anything else. Hence, this definition includes all such crimes that entail *Hudūd* (penalty ordained by the Sharī’ah, *Qisās* (capital punishment) or *Ta’zīr* (penalty awarded by the Qāḍī).”<sup>41</sup>

### Subcategories of Crimes

Crimes are of different types:

- (a) **Violent crimes:** Murder, homicide, rape, assault, robbery.
- (b) **Property crimes:** Burglary, arson, larceny, theft.
- (c) **Visible crimes:** Shoplifting and homicide.
- (d) **Victimless crimes:** Offences against morality, such as gambling.
- (e) **Occupational crimes:** Crime in the context of legal business or profession, such as theft by employees.
- (f) **Organised crimes:** Network within which the crime occurs, such as mafias or gangs.
- (g) **Political crimes:** Crimes against the government, such as damaging government properties.
- (h) **Cyber-crimes:** Crimes involving the use of computers or the internet, such as hacking personal accounts of people.
- (i) **Drug crimes.** The drug-crime category encompasses a range of offences connected with the use, transportation, purchase, and sale of illegal drugs.
- (j) **Street crime.** The most common forms of predatory crime—rape, robbery, assault, burglary, larceny, and auto theft—occur most frequently on urban streets. Racial minority citizens account for a disproportionately high number of arrests for street crimes.
- (k) **White-collar crime.** White-collar crimes are offences that persons commit while acting in their legitimate jobs and professions. Criminals behave in unethical ways for self-gain (for example, embezzlement) or for the benefit of a business (for example, corporate price-fixing). Victims of white-collar crime include the economy, employers, consumers, and the environment.<sup>42</sup>

### Convictable Crimes

<sup>40</sup>- Anon. *What Are the Different Types of Crimes?* | Legal Match. at <https://www.legalmatch.com/law-library/.../what-are-the-different-types-of-crimes.html>. (Accessed on 11-5-2019)

<sup>41</sup>- Al-Handāwī, Hasan. *Maqāṣid at-Tashrī’ al-Jināi al-Islāmī*. 2015. <https://www.alukah.net/>.

<sup>42</sup>- Raskolnikov, an impoverished student. *Cliffs notes, Criminal-justice*. at <https://www.cliffsnotes.com/study-guides/criminal-justice/crime/types-of-crime>. (Accessed on 10-4-2019)

Crimes regarded by contemporary law as grave for which the criminal is convicted are four: (1) Felony (2) Misdemeanours (3) Inchoate offences (4) Offences

Note: Perjury, tort nuisance and incitation to offence are another three crimes of a lower class.

### **Felony Battery**

“This is a crime regarded by law as grave, and usually involves violence, such as unintentional and un-consented touching or striking, which results in great bodily harm to another person or which occur after a previous conviction for battery. The offence is a third-degree felony, with maximum penalties of up to 5 years in prison.”<sup>43</sup>

“Battery is an unlawful physical attack, or threat of violence, *on* an individual, with or without ... In most jurisdictions, assault and battery is a crime committed when a person ... Modern laws pair the offences of assault and battery together as one, with the .... to harm the other party, that the perpetrator acted in defence of his property.”<sup>44</sup>

A person commits felony battery if he/she:

- (1) actually and intentionally touches or strikes another person against that person’s will.
- (2) causes great bodily harm, permanent disability or permanent disfigurement to the person.

### **Two Degrees of Felony**

- (2) murder, rape, kidnapping, arson, fraud.
- (3) aggravated assault, felony assault, arson, manslaughter, possession of a controlled substance or child molestation.

### **Misdemeanour**

“(USA) A crime of lesser seriousness than a felony where the punishment might be a fine or prison for less *than* one year. ... "At common *law*, *crimes* fell into two categories: indictable offences which included treason, felonies and misdemeanours, ... Felonies involve more heinous crimes such as murder, burglary and rape ...”<sup>45</sup>

Depending on the jurisdiction, examples of misdemeanours may include petty theft, prostitution, public intoxication, simple assault, disorderly conduct, trespass,

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<sup>43</sup>- Hussein and Webber, *Violent Crimes*, 2018, at [www.husseinandwebber.com/crimes/violent-crimes/felony-battery](http://www.husseinandwebber.com/crimes/violent-crimes/felony-battery).(Accessed on 15-11-2018)

<sup>44</sup>- Anon, *Assault and Battery*, 3 June 2015, at <https://legaldictionary.net/assault-and-battery/> (Accessed on 15-11-2018)

<sup>45</sup>- Duhaime's Criminal Law Dictionary, *Duhaime.org*. at [www.duhaime.org](http://www.duhaime.org) › Legal Dictionary. (Accessed on 12-11-2018)

vandalism, reckless driving, discharging a firearm within city limits, possession of cannabis, indecent exposure before public and battery.

### Inchoate Offences

"... something which has, "*just begun and so not fully formed or developed.*" When ... Examples of *inchoate offences* include *attempt*, solicitation, and conspiracy."<sup>46</sup>

"Offence is the British spelling of offence, meaning "a punishable act." If you break a law for the first time, it's your first offence. The noun offence comes from the Latin word offender, which means "strike against." Any time you break a law or a rule it is an offence against that law or rule."<sup>47</sup>

### Incitation to an Offence

Incitation is a felony. It is to spur and arouse someone to commit a crime.

### Perjury

"Making False Statement Under Oath Aug 2, 2016 - Any intentionally false statement made under oath or affirmation is perjury ... to commit perjury — the swearing of a false oath to tell the truth in a ... different oaths (Contravention of Section 319 (point number 3) Act 56 of 1955)."<sup>48</sup>

### Tort of Nuisance

"Introduction Nuisance is a common law of tort. It means that which causes offence, annoyance, trouble or injury. A nuisance can be to the public."<sup>49</sup>

## (2) Crime as Defined in Islām and its Categories

Note that in Islāmic jurisprudence, crimes are discussed under the category of *Al-Jurm wal Jināyat*.

(Committing an offence or crime)

An offender is called *Mujrim*.

وَلَا يُرَدُّ بِأَسْهُ عَنِ الْقَوْمِ الْمُجْرِمِينَ

<sup>46</sup>- Anon, *Crimemuseum.org*. at <https://www.crimemuseum.org> › Crime Library › Criminal Law. (Accessed on 12-11-2018)

<sup>47</sup>- *vocabulary.com/dictionary/offence*. at <https://www.vocabulary.com/dictionary/offence>. (Accessed on 12-11-2018)

<sup>48</sup>- Anon. *making-false-statement-under-oath*. <https://www.news24.com/MyNews24/making-false-statement-under-oath-20160802>. (Accessed on 12-11-2018)

<sup>49</sup>- Anon. *Tort\_of\_Nuisance*.at [www.academia.edu/10537046/Tort\\_of\\_Nuisance](http://www.academia.edu/10537046/Tort_of_Nuisance). (Accessed on 12-11-2018)

(And Allāh’s Might will not be drawn away from those who perpetrate forbidden actions.) (Q: 6:147) <sup>50</sup>

### Definitions of *Al-Jurm wal Jināyat*

Literal meaning:

The word *Jurm* means to split or to sever something. Arabs say جرم صوف الشاة (He sheared the wool of the sheep.) It implies committing an offence or a crime.

*Jināyat* also means to reap something, whether that thing is good or bad, such as وَجَى الْجَنَّتَيْنِ دَانٍ (The fruit of the two orchards – in Paradise - will be hanging low.” (Q: 55:54) In this case, *jināyat* is used to reap something favourable.

Sayyid Sābiq explains *Jināyat* in his *Fiqh al-Sunnatas* follows:

“The word جنابة is derived from the syntax جني يجني , which means ‘to be seized for.’  
جنا علي قومه جنابة اي اذنب ذنبا يؤاخذ به (He committed an offence against his people for which he was held guilty.)

Technical meaning:

*Jurm* implies contravening a prohibition or Commands of Allāh or committing a crime against a person or his property. It entails a *Ta’zīr* penalty, such as fine, imprisonment, flogging or banishment.

*Jināyat* is defined as:

الجريمة فعل ما نهى الله عنه وترك ما امر به

(*Jarīmah* is to commit what Allāh has prohibited and to forsake what He has commanded.)<sup>51</sup>

Muḥammad Abū Zahrah explains *al-Jurm* as follows:

“The word جريمة is derived from جرم, which means to acquire or cut. Apparently, this word is used from ancient times for committing something detestable or undesirable. It also stands for committing a sinful act. Therefore, it is permissible to apply this word to the perpetration of every such act that is contrary to truth, justice and the straight way of life.” <sup>52</sup>

*Jināyat* is also defined as:

كل فعل محرم لما فيه ضرر واقع علي الدين او النفس او العقل او العرض او المال ،

<sup>50</sup>- Q: 6:147

<sup>51</sup>- Abū Zahrah Imām Muḥammad. *Al-Jarīmah*. 2013, Beirut, Dār al-Fikr al-‘Arabī.

<sup>52</sup>- Abū Zahrah. *Al-Jarīmah*. Cairo, 2008, Dār al-Fikr al-‘Arabī, p. 19.

(*Jināyat* is every such unlawful act that causes harm to a person in respect of his religion, body, mind, honour or wealth.)”<sup>53</sup>

The criminal laws of Islām are divine codes that define crimes and rules. They also decree charges of fixed and variable nature, modes of treating the crimes and trials against the criminals and suspects.

**Crimes are of two types: positive and negative.**

- 1) Positive crimes: This is to perpetrate crimes that are prohibited in Islām, such as committing homicide, gambling and receiving bribery.
- 2) Negative crimes: This is to abstain from observing such practices that are commanded in Islām, such as honouring a trust and standing up for justice.

<sup>54</sup>

### **Components of Crimes**

“Crimes in the Sharī‘ah or positive laws are of three classes:

- 1) Legal element: This falls under the rule that there can be no crime without text.
- 2) Physical element: This is represented in the act of crime. Therefore, a person cannot be convicted if he was not party to the murder.
- 3) Moral element: This is the intention of the criminal.”<sup>55</sup>

**Penal crimes/offences are classified into three broad major categories:**

- 1) *Ma‘āṣī*: Punishment for disobeying the rules of the Sharī‘ah. This covers all such practices that are considered sinful in Islām. It means that the offender commits unlawful (*Ḥarām*) acts and omits obligatory (*Wājib*) acts.
- 2) *Maṣliḥah-‘Āmmah*: Punishment for committing an act against public interest, such as driving a vehicle without license or driving on the wrong side of the road.
- 3) *Mukhālafah*: Punishment for delinquency. It applies chiefly to the commission of a detestable (*Makrūh*) act. Generally, juvenile offenders are guilty of these crimes.

### **Three Fundamental Elements of Crime from the Islāmic Perspective**

Justice Oudah writes:

<sup>53</sup>- Sayyid Sābiq. *Fiqh as-Sunnah*.1983, Beirut, Dār al-Fikr, vol. 2, p. 427.

<sup>54</sup> - *Al-manhiyyāt as-Shar‘iyyah*. at <https://www.baynoona.net>. (Accessed on 21-11-19)

<sup>55</sup>- Proceedings of symposium in Riyadh. *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia*. Publisher: Minister of Interior. 1976.

- 1) "An explicit provision for prohibiting an act constituting crimes and specifying punishment thereof. In modern legal terminology, this is known as the legal element of crimes.
- 2) Doing of an act, the commission or omission of which goes up to make an offence. In modern terminology, this is known as a substantial element of crimes.
- 3) Maturity, responsibility and accountability of the offender. In modern legal terminology, this is known as the cultural element of a crime."<sup>56</sup>

### **Bird's Eye View of the Analyses on Crime in the Islāmic law**

In the Islamic law, the major crimes or the felony category and the minor crimes or the misdemeanour category and its punishments are mentioned either in the Qur'ān or in the Traditions of the Prophet. Some of them are mentioned explicitly and others implicitly.

It should be noted that complicity, abetment or incitation are indeed offences, but the offenders will be punishable by way of *Ta'zīr* only if they had participated in the crime personally and practically.

### **Conclusion**

This chapter has presented a broad outline on crimes between the western and Islāmic laws, starting from violent crimes up to property, occupational, organised, political, cyber, drug, street and white-collar crimes. Some are inherited and others are influenced by peers. The harm of some are restricted to individuals and others extended to the public. Some are confined to a generation and others are passed on to generation to avenge the past.

To the above, Editor Brown Steven David has the following to comment:

"Crime and corruption flourish while a development lags. This deepened social cleavage, scarce away investors and encourages the flight of domestic capital and brain drain." (Antonio Maria Costa)<sup>57</sup>

### **(3) Crimes in the Modern Age**

"Turmoil has surfaced on the land and in the ocean on account of that what man's hands have acquired." (Q: 30:41)

### **Introduction**

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<sup>56</sup>- *Criminal Law of Islam*. vol. 1, p. 124.

<sup>57</sup>- Brown, Steven David (Editor). *Combating International Crime*. 2008, Abingdon, Routledge Cavendish, p. 20.

History bears out that in the 7<sup>th</sup> century prior to the advent of Islām, crimes were soaring, homicide, larceny, highway robbery and molestation were rampant, people were seized by tyranny, internecine fighting was fashion, safety of life and wealth were only dreams, injustice was the order of the day, plundering was a norm and manslaughter was a daily state of affair. Eventually, Allāh favoured humanity with Islām when He revealed legal laws and precepts to eliminate crimes from the earth. Islāmic penal law aim at nipping the crime in the bud: eradicating the causes and treating the malady from its roots before it becomes widespread and beyond control.

Tragically, in modern times, the roles of virtue and vice have been often reversed. Delinquency, peer pressure, broken homes, juvenile deviance, alcohol addiction, behaviour aberration and economic problems are growing out of proportion.

Cinema, fashion industry, beauty competition, pornography and escort agencies are tearing the civil fabric of the human society into shreds and leading people to degenerate levels unheard of in human history.

Spiritual values are wearing out from people's lives as much as the social and moral structure of communities is disintegrating. Fraud scandals, drugs, divorce and depression are such ongoing episodes that it is difficult to say whether people will ever extricate themselves from these in future.

People are gasping for life while suffocation is gripping them. They thought that material affluence and physical pleasures would bring relief to them, but alas, when they did acquire the material, they found themselves in deeper desperation. They imagined the mirage to be water, but when they reached the spot, they found it to be nothing more than an illusion.

Chaos has swept across the land; evil became rampant and immorality fashion of the day. Increase in death rates, drowning, conflagration, wars, looting, plundering, atrocity, massacre, epidemic and pandemic deceases have increased to incredible proportions. It seems as if science and technology, instead of bringing meaning and ease to life, have added uneasiness and agony to life.

Encyclopaedia Britannica elaborates:

“The uniform crimes of the United States for 1969 shows that, while the population of the United States rose 13% between 1960 and 1970, the overall crime indicated by the index of offences described above rose 148 percent; violent crimes rose 130 percent,

and property crimes rose 151 percent. In England and Wales from 1938 to 1960, crimes of violence increased by 130 percent.”<sup>58</sup>

“In many countries, drunkenness itself is not a crime. But there are other kinds of conduct that are closely related to it, such as disorderly conduct or disturbing the peace. It is estimated that of about 70,000,000 Americans who drink, 4,700,000 are alcoholics. A substantial proportion of these of alcoholics is made up of skid row drunks, who, in an endless procession, are brought before the courts, given a few days in jail, and released, only to be picked up again for vagrancy, disorderly conduct, or some other public nuisance offence. It is generally agreed that these people are not helped by incarceration, but there appear to be no ready solutions to the problem.”<sup>59</sup>

Double standard rules and atrocity have become the order of the legal system, so much that some of the injustices that are wreaked against the innocent have even eclipsed the horrors caused by the Pharaoh’s of the past ages; only if these legislators know that when the ship will sink, it will sink with all its occupants, including the captain and crew.

Some advocates in modern days are not only actively promoting crimes; they are legally even defending the criminals.

To add to the social malaise of our time, obnoxious pictures are displayed and the populace is supplied with depraved material on the screens and billboards, just as misleading ideas are injected into the minds of the naive youth, such that have put the Satans to shame.

All this is done at the expense of the victims who are sobbing and waiting for justice.

This type of lawlessness has become the overall concern of the legal philosophy of our times. Legislators argue that virtue and evil have nothing to do with the laws; it is ‘expedience’ that counts. Others favour the utilitarian doctrine of a law that brings the greatest happiness to the greatest number of people, based on hedonistic norms. To them, ethics is a secondary issue.

“Give them what they want,” they say, “even if they are naïve to know what they really should want, for this is what will bring them in line with *our agenda*.”

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<sup>58</sup>- Anon. Encyclopaedia Britannica: *Crimes and Delinquency*, at <https://www.britannica.com/topic/juvenile-delinquent>. (Accessed on 15-11-2018)

<sup>59</sup> - Anon. Encyclopaedia Britannica: *Disturbing-the-peace*. p. 271, at <https://www.britannica.com/topic/disturbing-the-peace>. (Accessed on 15-11-2018)

This grave situation calls the lawman and layman to brainstorm the situation and seek an effective solution. Other than the laws that are framed by our legal courts, some disciplinary measures, deterrents and preventive schemes, too, should be enforced to create responsiveness in the public so that they take the matter seriously.

### **Criminals Work in Cahoots with one Another.**

Organised crimes, professional gangs (acting in concert) and crime syndicates in the countries are abounding, to an extent that some governments are compelled to set up separate juvenile courts and send the minors to detention centres for the felonies they commit. In some places, gang-fighting, warlords, drug peddling and collective robberies are symptomatic of the failure of the law. In a word, the current situation of the world is threatening. People's blood has become cheaper than water while animals are granted greater rights. The world is wallowing in the whirlpool of corruption, profligacy and obscenity.

### **People with Evil Instincts Incline to Evil Performances.**

Therefore, if evil is not uprooted in the first instance, the threat will only spread further. If the criminals are not penalised duly, the tendency is that the crime rate will escalate, become a second nature of the criminals, influence the innocent ones and eventually take the entire nation in its sweep. This is why it may be better to be cruel on the few elements in order to be kind on the majority.

### **Rights affected by crimes are of two types:**

- (1) ***Huqūq Allāh***: These are either solely the Rights of Allāh or such rights in which the Rights of Allāh are paramount. It is evident that 'Allāh's Rights' does not entail His need. He is beyond all needs. These rights are entitled *Huqūq Allāh* simply to give sanctity to the interest of people. His Rights are those of communal need and are ordained for the public interest.
- (2) ***Huqūq al-'Ibād***: These are either solely the rights of the people or such rights in which their rights preponderate. They are rights of individuals; therefore, they can be waived or relinquished by the individuals. However, if the issue is viewed from a wider scale, it becomes evident that the rights of the people, too, fall under the category of Rights of Allāh, especially when the rights of individuals are undermined and the rights of the general public prejudiced.  
Rights of communal interest will receive precedence to the rights of individual interest.

Rights of Allāh on the servants are of two types: one those that pertain to His Grandeur and worship. The second are those that are related to His Shari'ah: to abide by the Tenets, Bounds, Commands and prohibitions He has promulgated.

Mu'āth says: "The Prophet asked me, "Do you know what are the Rights of Allāh upon the servants and the rights of the servants upon Allāh?" I replied: "Allāh and His Messenger know best." He said: "The Rights of Allāh on the servants is that they should worship Him and avoid ascribing a partner to Him. And the rights of the servants upon Allāh is that once they do that, He will not punish them."<sup>60</sup>

إِنَّ مِنْ حَقِّ الْعِبَادِ عَلَى اللَّهِ سُبْحَانَهُ وَتَعَالَى الْإِتِّزَامُ بِصَالِحِ الْعَمَلِ وَعَدَمُ الْإِسْرَارِ عَلَى فِعْلِ  
الْمَعَاصِي

(Among Allāh's Rights is that a servant should perform righteous deeds and not persist on disobedience.)

يَا عِبَادِي إِنِّي حَرَّمْتُ الظُّلْمَ عَلَى نَفْسِي وَجَعَلْتُهُ بَيْنَكُمْ مُحَرَّمًا فَلَا تَظَالَمُوا يَا عِبَادِي

(O my servants! I have prohibited oppression on Myself, and so did I prohibit it upon you; therefore, do not oppress on anyone. )<sup>61</sup>

Sometimes the Rights of Allāh and the rights of people combine, such as when robbers steal people's properties and wound the people as well. In this case, the Rights of Allāh will be upheld and the rights of people will be set aside, that is, the hand and legs of the culprits will be amputated, but the penal punishment for the wounds will be discounted.

Shawkānī says in his *Fath al-Qadīr Al-Jāmi' Bayn Riwayah wa ad-Dirāyah*:

وَإِنْ أَخَذَ مَالًا ثُمَّ جَرَحَ فُطِعَتْ يَدُهُ وَرَجُلُهُ وَبَطَلَتْ الْأَجْرَاحَاتُ لِأَنَّهُ لَمَّا وَجِبَ الْأَحْدُ حَقًّا لِلَّهِ سَقَطَتْ  
عِصْمَةُ النَّفْسِ حَقًّا لِلْعَبْدِ كَمَا تَسْقُطُ عِصْمَةُ الْمَالِ

(If a robber stole wealth and wounded the people as well, the robber's hand and leg should be amputated, but the wounds he inflicted on the people would be disregarded. This is because when *Hadd* was enforced on him as the Rights of Allāh, the innocence of the victim's personality was no more regarded, just as the soundness and validity of the stolen property were no more considered.)<sup>62</sup>

### The Raison D'être of Punishment in the Sight of other Authorities.

<sup>60</sup> - *Al-Mu 'jam al-Kabīr*. vol. 20, p. 135

<sup>61</sup> - *Ṣaḥīḥ Muslim*. vol. 8. p. 16

<sup>62</sup>- Shawkānī, Muḥammad ibn 'Alī. *Fath al-Qadīr Al-Jāmi' Bayn Riwayah wa ad-Dirāyah*.2014, Saudi Arabia, copied from publication of Ḥalabī, Egypt. Wazārat al-Awqāf, vol. 12. p. 355.

- **“Rousseau:** The *raison d’être* of punishment is social contact. The purpose of punishment is to safeguard society against the harm the criminals may do.
- **Beccasia:** It is an individual’s right of defence which he forgoes in favour of the community and it is designed to chastise the criminal.
- **J. Bentham,** who propounded the utilitarian doctrine: The *raison d’être* of punishment is collective utility, because its object is to protect the society from crime. Punishment should be adequate to prevent the offender from committing the crimes, as well as to warn the non-criminals.
- **Emanuel Kant:** The *raison d’être* of punishment is justice.”

Note that in the above views, the authors took only the crime, nature of the crime and its effects on the community into consideration. The criminal is disregarded.

- **“Italian view of punishment:** Punishment should be in keeping with the mental set-up of the offender, his structure, historical background and the magnitude of danger posed by his person. A person who is a criminal by nature should, according to this scientific view, be isolated from the society forever or executed.
- **Other legal experts:** The object of punishment is to correct or reform the offender so that he becomes acceptable to the community and a useful citizen to the country.”<sup>63</sup>

Note that contrary to the above, in these two views the authors have taken only the criminal into consideration. The crime is disregarded, meaning that, in these cases, the authorities have rendered one-sided views. They have taken either the **crime or the criminal only into account.**

**But in the Islāmic legislation, both the crime and criminal are regarded.**

“One is only criminally liable and subject to punishment if the following requirements are met.

1 It must be proved, beyond any reasonable doubt, that the accused committed some wrongful conduct which coincided in time with a culpable/guilty mental state. For illustration purposes, it will be helpful to bear the definition of the crimes of murder and culpable homicide in mind.

2. Murder is defined as the intentional unlawful killing of another human being. Culpable homicide is defined as the negligent unlawful killing of another human being. Notably, the two crimes are identical, except that murder requires intention, while culpable homicide requires negligence.

3 Wrongful/Unlawful conduct (also known as the *actus reus*) requires conduct, in the form of an act or omission, which is voluntary and is wrongful/unlawful.

4. A culpable mental state (also known as *mens rea*) requires, on the current law, at least ‘capacity’ and – at least for all serious crimes – some form of fault (intention or negligence).”<sup>64</sup>

<sup>63</sup>- *The Criminal Laws of Islam*, p. 17.

<sup>64</sup> - *Critical Criminal Law James Grant - SAFLII* at <http://www.saflii.org/images/criticalcrimlaw.pdf> (Accessed on 21.11.19)

Perhaps it will not be out of place if I quote the following two verses that refer to the first crime committed by the son of Adam:

*"The criminal (Qābil) said, "I will certainly kill you."*

*"Then his (base) soul induced him to slay his brother. Hence, he slew him and became of those who were ruined." (Q: 5:27, 30)*

Qābil left behind a diabolical precedence to be practiced by others after him, of which the Prophet had mentioned:

'Abdullāh ibn 'Umar said:

إن أشقى الناس رجلا لابن آدم الذي قتل أخاه، ما سُفِكَ دم في الأرض منذ قَتَلَ أخاه إلى يوم القيامة، إلا لحق به منه شيء، وذلك أنه أول من سنَّ القتل.

(The most wicked person was that son of Adam who murdered his brother. Now up to Doomsday whoever's blood will be shed he will be partially liable for it. This is for setting that criminal procedure.)<sup>65</sup>

## Conclusion

It should be noted that the Islāmic penal laws were revealed first. How could the public appreciate the laws or comply with them without Faith, self-consciousness, honesty and trust been inculcated in them? Will it not be like tying fruit to a tree that has no roots? History bears out that up to thirteen years in Makkah, the Prophet gave his Companions grounding of Faith before the volumes of laws were imparted to them through Qur'ān and Sunnah. This explains the reason why they were addressed in the Makkan verses as: "O people" and the Madinite verses as: "O you Believers." It was for this reason that the Companions of the Prophet used to say: "تعلمنا الايمان ثم تعلمنا القرآن" (We imbibed the Faith in us before learning the Qur'ān.)

From the foregoing discussion the following points come to light:

- Crimes are creating tension in the community.
- Criminals are on the rampage and because they lack feelings for their human brethren, they roam about freely to find soft targets.

In such circumstances, what should be done, what are the factors that lead to crimes and how can they be uprooted? These are questions that have become a nightmare even for the authorities. In this regard, criminologists have been

debating, just as the politicians and social workers are constantly engaged in finding out solutions to eradicate the menace.

Nevertheless, there are hopes that the malaise can be treated for the better with the proviso that proper reformatory measures are exercised and suitable environments and opportunities are provided for the criminals to disentangle themselves from the crime circles and gangs in which they are embroiled. In fact, the mental state of criminals can be managed through psychoanalysis and psychotherapy, too. With this view in mind, I intend to elaborate on this issue in the next chapter, anticipating that leaders of the communities will heed the need and focus on adopting measures for rehabilitation, establishing reformatory centres and providing healing treatments and therapy for those who are seized by criminal activities.

## CHAPTER FOUR

### Rehabilitation and dignity for criminals

#### Preamble

In this chapter, several methods in respect of rehabilitation from the social and psychological points of view are explored. While guarding the innocent (victim) and imposing the penalties on the criminals are emphasised, concealing the crimes of the latter to whatever extent possible is not ignored.

#### (a) Punishment and Public Exposure.

It is important to note that Islām does not confine itself to penalties to combat crimes, instead it strives beforehand to prevent its commission by fortifying the would-be criminals and making them conscious of the evils of crimes and its vitriolic effects on them, their families and societies. It also believes in educating them, warning them in advance and rewarding them for making amends. Therefore, it has instituted deterrents and reformative rules to ensure that peace prevails in the society and offenders are put back onto track. Instead of making the criminals feel despondent, Islāmic laws create hope in them.

#### (b) Rehabilitation Measures

‘Abdullāh ibn ‘Abbās narrated that the Prophet said:

التائب من الذنب كمن لا ذنب له

(One who repents from sin is equal to the one who did not commit the sin.)<sup>66</sup>

Of course, being absolved of the sin will not absolve the criminal of the penalty if he was convicted by the judge.

The author of *‘Ināyah* mentions: اصل الحدود الانزجار عما يتضرر به العباد (*Hudūd* are awarded to the culprit to reproof them against any such crime that may be prejudicial to the public.)<sup>67</sup>

#### (c) Dignity of Criminals

Jalāl ad-Dīn Suyūṭī writes in his *Jāmi‘ al-Aḥādīth*:

من أصاب حدًّا فعجل عقوبته في الدنيا فالله أعدل من أن يثنى على عبده العقوبة في الآخرة ومن أصاب حدًّا فستره الله عليه و عفا عنه فالله أكرم أن يعود في شيء قد عفا عنه

<sup>66</sup>- *Al Bayhaqī*. vol. 5, p. 436.

<sup>67</sup>- Badr ad-Dīn ‘Aynī, Muḥammad Muḥammad ibn Aḥmad. *Bināyah Sharḥ Hidāyah*. 2019, Damascus., Dār al-Fikr, vol. 6, p. 256.

(Whoever was guilty of a *Hadd* and he was penalized for the guilt in the world - by the judge - it is beyond the justice of Allāh that He should repeat the punishment on him in the Hereafter. Likewise, whoever was guilty of a *Hadd*, and Allāh had concealed it or pardoned him, then Allāh's kindness requires that He will not seize the person – in the Hereafter - for what he was pardoned once.)<sup>68</sup>

Ibn Baṭṭāl mentioned: "From this, it can be deduced that on whomsoever the penalty is executed should not be disparaged. However, it is permissible that before the case is raised to the Qāḍī, some stern words of reproof be said to him. But once the case is filed by the Qāḍī, the chapter should be closed."

Ibn al-'Arabi mentions:

فَأَمَّا الْعَاصِي الْمُعِينُ ، فَلَا يَجُوزُ لَعْنُهُ اتِّفَاقًا ، لِمَا رُوِيَ { أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ جِيءَ إِلَيْهِ بِشَارِبِ خَمْرٍ مَرَارًا ، فَقَالَ بَعْضُ مَنْ حَضَرَهُ : مَا لَهُ لَعْنَةُ اللَّهِ ، مَا أَكْثَرَ مَا يُؤْتَى بِهِ ، فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : لَا تَكُونُوا أَعْوَانًا لِلشَّيْطَانِ عَلَى أَخِيكُمْ } ؛ " و روي عبد الرزاق عن النبي صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إنه لا ينبغي للإمام إذا انتهى إليه حد إلا أن يقيمه، إن الله عفو يحب العفو، وليعفوا وليصفحوا، ألا تحبون أن يغفر الله لكم والله غفور رحيم . ؛ فَجَعَلَ لَهُ حُرْمَةَ الْأُخُوَّةِ ، وَهَذَا يُوجِبُ الشَّفَقَةَ ،

A person is allowed to condemn criminals in general to some extent.

(But for him to curse a particular offender, the 'Ulamā' have concurred that it is not permissible. In this respect, they quote an incident that once when a person under the influence of liquor was repeatedly summoned before the Prophet, some of those who were present in the assembly remarked: 'How often is this person summoned for his guilt!' This is when the Prophet said: "Do not be supporters to the Satan against your brother by taunting him. [The Satan makes bold by hearing this type of a comment.] Allāh pardons and loves pardoning. "Let them pardon and let them overlook. Do you not wish that Allāh should forgive you? Allah is Oft-Forgiving, Most Merciful." (Q: 24:22) Therefore, you should observe the sanctity of your brotherhood, which calls for affection.)<sup>69</sup>

وأخرج عبد الرزاق وابن أبي حاتم وابن أبي الدنيا في ذم الغضب والخرائطي في مكارم الأخلاق والحاكم والطبراني وابن مردويه والبيهقي في سننه عن أبي وائل قال : رأيت عبد الله أتاه رجل برجل نشوان فأقام عليه الحد فقيل : يا رسول الله كان هذا شق عليك قال : " لا ينبغي أن تكونوا للشيطان عوناً على أخيك فانه لا ينبغي للحاكم إذا انتهى إليه حد إلا أن يقيمه وان الله عفو يحب العفو ثم قرأ وليعفوا وليصفحوا ألا تحبون ان يغفر الله لكم "

(The Prophet said: "When a case is established before the Imām, he (Imām) is obliged to execute the penalty. Allāh is Oft-Pardoning and He loves to forgive.")<sup>70</sup>

Hence, other than the punishment that is inflicted on the criminals for a given crime, the Sharī'ah does not permit anyone to belittle them because the policy of Islām is to rehabilitate them and not to humiliate them.

<sup>68</sup>- Suyūṭī, Jalāl ad-Dīn. *Jāmi' al-Ahādīth*. n.d. vol. 19, p. 469.

<sup>69</sup>-Al-Burhān Fawrī, 'Ala' ad-Dīn 'Alī ibn Hisām. *Kanz al-'Ummāl fi Sunan al-Aqwal wa Af'al*.1981, Beirut, Mu'assasah Ar-Risālah, vol. 12, p. 661. Hereafter referred to as *Kanz al-'Ummāl*.

<sup>70</sup>- Ibn al-'Arabi al-Mālikī, Qāḍī Abū Bakr. *Aḥkām al-Qur'ān*. 2003, Beirut, Dār Kutub al-'Ilmiyyah. vol. 1, p. 90.

This is why after purging the criminals from sin and wiping off the smudge of criminality from them through the *Hadd* or *Ta'zīr* penalties, Islām strives to transform the criminals into dignified people. It maintains that commission of a crime does not mean that the criminals are permanently debased. Rather, even after erring, they remain members of the society. When the punishment is meted out to them, every effort is made to resettle them into public life and accommodate them once again as normal people. They are advised to retract from their misdoings until they follow an ideal behavioural pattern. Likewise, instead of ostracizing them from the community, they are encouraged to find employment and get back into the mainstream of life. In this way, the punishment inflicted on them benefits them as well as the society in several ways. Islām addresses the whole criminal state of affairs in a refined way.

Anyway, it may be asked that in the case of *Rajm*, when the person will have been stoned to death, in which way can he be reformed?

Commentators of the Qur'ān compare this case with a murderer of which the Qur'ān says even after capital punishment was meted out to him: ***“O men of prudence! In the law of Just Retribution there are (protections of) lives for you; perhaps you would abstain.” (Q: 2:179)***

The criminal law of Islām seeks to address a dual purpose: retribution on the criminal and deterrence to the would-be-criminals in future. Such laws are framed for overall effect: to penalise the offenders and keep a tab on others. This is reason why the Qur'ān reminds: ***“Let a group of Believers witness the scourge.” (Q: 24:2)***

Naṣar ibn 'Alqamah says the presence of people is not to humiliate the person, but to invoke forgiveness and pardon for the concerned person as well as serve as admonitory punishment to others.

It is evident that evil is inborn in all individuals; therefore, to prevent them from falling prey to it, the following measures should be adopted:

- Cultivate in them human consciousness.
- Awaken in them the sense of human rights through education. Failing which,
- Inflict deterrent punishments on them.

Probably this is why the Sharī'ah has imposed corporal punishments instead of enforcing only pecuniary charges, because in the latter case the person hardly perceives physical pain. Criminals just pay the fine and then continue their habits as usual.

By contrast, plain reformatory/correctional measures are the following:

With the pretext of making punishment more humane and tolerant, advocates of modern laws are looking at such alternative penal measures that will castigate the criminals without causing physical pain or bringing humiliation on them, such as educating them, reforming them, re-socializing them, rehabilitating them and making them productive and responsible members of the society. Many of these correctional procedures are upheld by Islām as well.

In some countries, a juvenile committing an offence is subject to procedures of shelter, aid, supervision, reformatory and education according to the stipulations legislated.

On offenders, who are guilty of socially dangerous offences, necessary measures of medical nature are used in accordance with the law of mental health and welfare of mentally defective persons.

“The English Criminal Law recognizes the following purposes of punishment: Retribution - punishment is morally acceptable as a response that satisfies the aggrieved party, their intimates and society; Deterrence – of an individual and society; Rehabilitation – change an offender for better; Isolation – protection of society; Reparation — repayment to victim(s) or to community; Denunciation – censuring an offender for committing a criminal offence [7]

An adult released from criminal liability or released from a penalty may be subject to the following penal sanctions: a) Payment of a Contribution to the Fund of Crime Victims; b) Confiscation of Property; c) Unpaid Work; d) Compensation for or Elimination of Property Damage; e) Prohibition to Exercise a Special Right [3].”<sup>71</sup>

## **Important Rulings and Etiquettes in Relation to Penalty Enforcement**

### **(I) Concealing of Crimes at a Pre-trial Level.**

Another psychological step in direction of rehabilitation adopted by Islām is advising the guilty person to conceal his/her crime. This is done either by the criminal or by the witnesses. It is reported by Zayd ibn Aslam that after flogging the guilty person, the Prophet proclaimed:

يا أيها الناس قد آن لكم أن تنتهوا عن حدود الله ، فمن أصاب من هذه القاذورات شيئاً فليستتر  
بستر الله ، فإنه من يبدي لنا صفحته نقم عليه كتاب الله عز وجل

(O people! The time has arrived that you abstain from the penalties of Allāh. Whoever commits any of these evils let him conceal it by the concealment accorded to him by Allāh. This is possible before the matter is raised to us. But once

<sup>71</sup>- Anon. Punishment and other criminal measures. *European Scientific Journal*. at <https://eujournal.org/index.php/esj/article/view/51/551> February /Special/ edition vol. 8, No.2 ISSN: 1857 – 7881 (Print) (Accessed on 5-6-2018)

the offence is reported to our office, we shall enforce the Book of Allāh on him at every event.)<sup>72</sup>

Yahyā ibn Saʿīd reported a narration from Muḥammad ibn Munkadir:

عن النبي ( صلى الله عليه وسلم ) للذي شهد عنده في الحد « لو سترته بثوبك لكان خيرا لك »  
 وقوله عليه السلام : من ستر على مسلم عيبا ستر الله عليه في الدنيا والآخرة (فستر المرء على  
 نفسه أولى به من ستره على غيره) ما من امرئ ينصر مسلما في موضع ينتهك فيه عرضه  
 وتستحل حرمة الا نصره الله تعالى في موطن يحب فيه نصرته ، وما من امرئ خذل مسلما  
 في موضع تنتهك فيه حرمة الا خذله الله تعالى في موضع يحب فيه نصرته  
 وهذا يوجب على المرء أن يستر على نفسه إذا واقع ذنباً ولا يخبر به أحداً لعل الله تعالى أن  
 يستره عليه

(The Prophet said to a person who confessed his guilt of committing an act of *Hadd* penalty: “Had you concealed it with your cloth, it would have been better for you.” The Prophet also said: “Whoever conceals a fault of a Muslim Allāh will conceal his faults in the world and the Hereafter. Whoever supports a Muslim at an occasion where the latter’s honour is likely to be tainted and his dignity blotted, Allāh will support him when he will seek His help. Whoever disparages a Muslim at an occasion when the latter’s honour can probably be stained; Allāh will disparage him when he will be desperate for His help.”<sup>73</sup>

This narration urges a person to keep his own sins undercover if he is guilty of any. He should conceal them just as Allāh will conceal them in the Hereafter. Besides, if concealing the faults of others is so rewarding, then concealing one’s own faults should be rewarding all the more.

## (II) Guarding the Innocent Through Mandating Irrefutable Evidence

While Islām has stipulated explicit laws against the guilty, it has also promulgated certain rules for the protection of the innocent.

‘Abd al-Muḥsin al-‘Ibād says in his *Sharḥ as-Sunan Abū Dawūd*:

عن أبي ظبيان قال هناد : الجنبي قال: أتى عمر رضي الله عنه بامرأة قد فجرت فأمر  
 برجمها فمر علي رضي الله عنه فأخذها فخلى سبيلها، فأخبر عمر قال: ادعوا لي علياً ،  
 فجاء علي رضي الله عنه فقال: يا أمير المؤمنين! لقد علمت أن رسول الله صلى الله عليه  
 وسلم قال: (رفع القلم عن ثلاثة: عن الصبي حتى يبلغ، وعن النائم حتى يستيقظ، وعن  
 المعتوه حتى يبرأ)، وإن هذه معتوهة بني فلان، لعل الذي أتاها أتاها وهي في بلائها قال:  
 فقال عمر : لا أدري، فقال: علي رضي الله عنه: وأنا لا أدري إذأ: فالمسألة محتملة،  
 والحدود تدرأ بالشبهات، فترك عمر رضي الله عنه إقامة الحد عليها.

(Abū Zabyān reported on the authority of Ḥannād that a woman, who had committed obscenity, was brought before ‘Umar. ‘Umar enforced the penalty on her. Just then ‘Alī passed by the scene of the penalty and released her. When ‘Umar

<sup>72</sup>- Al-A’zamī, Muḥammad Ḍiyā’ ar-Raḥmān. Editor/annotator of *As-Sunan as-Ṣughrāil-Bayhaqī*. 2001, Riyadh, Maktabat al-Rushd, vol. 7, p. 400.

<sup>73</sup>- Baṭṭāl, Al-Quṭubī Al-Bakarī. *Sharḥ Saḥīḥ al-Bukhārī*, 2003, Riyadh, Maktabat al-Rushd, vol. 8, p. 444.

was informed of it, he called for ‘Alī and asked him what his opinion was. ‘Alī said: “O Amīr Al-Mu’minīn! Are you not informed that the Prophet said, ‘Penalties are withheld from three people: a child until he reaches puberty; a sleeping person until he awakes and a deranged person until he recovers’ This is a deranged woman from such and such a tribe; perhaps the person who made a sexual approach to her did so when she was in her state of lunacy.” ‘Umar said: “I do not know.” ‘Alī said: “Even I do not know. So, the issue is in doubts, and penalties in doubtful cases should be avoided.” Hence, ‘Umar withdrew the case.)<sup>74</sup>

Shaykh Ibrāhīm an-Naīmī mentions in his paper *حكمة العقوبة في الاسلام* under the title “Warding off penalties”:

“Penalties in Islām are not framed to vent one’s anger or make the criminal an example for others or unsettle him; rather they are meant to reform him, draw him out of the wrong habit he is involved in and finally caution others from taking to that route. This is why the Sharī’ah does not inflict a penalty on the criminal until it does not employ all factors that may help in curbing the crime, and that, too, while minimising the pain on the criminal and the suffering endured by the victim. The Qādī is also advised to be affectionate towards the perpetrators, commute the penalty to whatever extent possible and avoid exacting the penalty in doubtful cases. He should also encourage them to offer penitence. The general Muslims also, on the other hand, are called to overlook the offence caused by the offender, especially when the guilt was committed in secret.”<sup>75</sup>

‘Ā’ishah reported that the Prophet said:

ادْرءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ مَخْرَجٌ فَخَلُّوا سَبِيلَهُ فَإِنَّ الْإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ

(Abstain to the best of your ability from enforcing penalties on the Muslims. If the convict has a valid reason for his innocence, then release him. It is better for a ruler to err in his pardoning than him erring in penalizing; meaning that, a mistaken acquittal on behalf of the authority is preferable to a mistaken conviction, esp. when it pertains to *Hadd* offences.)<sup>76</sup>

### (III) A Certain Degree of Laxity in the Execution of *Hudūd*.

S’ad ibn ‘Ubādah reported an incident that a sickly person was summoned before the Prophet for committing adultery with a slave woman of his tribe. The Prophet ordered that the person should be struck with a branch of a palm tree that contained a hundred twigs.<sup>77</sup>

<sup>74</sup>- Al-‘Ibād, ‘Abdul Muḥsin. *Sharḥ Sunan Abū Dawūd*.2016, Cairo, Madīnah An-Nasr, Maktabat al-Īmān.vol. 25, p. 334.

<sup>75</sup>- An-Naīmī, Ibrāhīm. *Ḥikmah Al-‘Uqūbah fil Islām*.2010, Yemen, San‘ā’. Jāmiyah Al-Īmān.

<sup>76</sup>- Al-Misrī, Abū Muḥammad. *Arshif Mulṭaqāah-at-Tafsīr*.2013. Cairo, Maktabah Shāmilah. vol. 9, p. 512.

<sup>77</sup>- Al-Khatīb al-‘Umarī at-Tabrezī, Shaykh Wali ad-Dīn Abū ‘Abd Allāh Muḥammad ibn ‘Abd Allāh. *Mishkāt-al-Maṣābīh*. 2010, Beirut, Dār al-Kutub al-Ilmiyyah. Ḥadīth no. 3574.

Shah Wali Allāh expounds on this incident:

“If a person, who is naturally weak or physically handicapped, committed a crime, and was unable to endure the penalty, the *Hadd* should be executed on him, too, even if it is mitigated to some extent. If he is excused altogether, the importance of the *Hudūd* will wear out in the sight of the people. Therefore, the characteristics of those laws which Allāh has ordained as natural requirements should be given force at every cost. The execution of *Hudūd* is essential just as life is for natural things is.”<sup>78</sup>

#### (IV) Disparity in Minor Punishment on People of Different Strata.

‘Ā’ishah reported that the Prophet said:

أَقْبِلُوا دَوَى الْهَيْئَاتِ عَنَرَاتِهِمْ إِلَّا الْخُدُودَ

(Condone the ‘slips’ of people of social status other than *Hudūd*.)<sup>79</sup>

Shah Wali Allāh expounds on this *Hadīth* as follows:

“Person of social status is a person of ideal manhood, either because:

- (1) he was known to be a religious person, then inadvertently he committed an error. In his case, it is advisable to overlook the error.
- (2) he was a brave commander of the army or a political figure.

If people of such standing are penalised for every minor or major fault, the way to rebellion and mutual enmity and prejudice against them will open up to the public, because most probably their hearts will not endure such things.

As for the *Hudūd*, these should be executed on them unless there is some valid legal reason to avoid it, because not executing *Hudūd* on them will be against the welfare of the people in the future, as much as the advantages of those penalties will become null and void.”<sup>80</sup>

The Prophet is reported to have said:

أَنْزَلَ النَّاسَ مَنَازِلَهُمْ مِنَ الْخَيْرِ وَالشَّرِّ، وَأَحْسَنَ أَدْبَهُمْ عَلَى الْأَخْلَاقِ الصَّالِحَةِ

(Receive the people according to their positions of virtue or vice, and discipline them with courtesy and virtuous conduct.)<sup>81</sup>

‘Alī said:

مَنْ أَنْزَلَ النَّاسَ مَنَازِلَهُمْ دَفَعَ الْمَوْتَةَ عَنْ نَفْسِهِ وَمَنْ رَفَعَ أَخَاهُ فَوْقَ قَدْرِهِ اجْتَرَّ عِدَاوَتَهُ

(Whoever receives the people according to their status staves off the burden from him, and whoever raises his brother beyond his status calls for his enmity.)<sup>82</sup>

#### Details on the Disparity in Minor Punishment in Accordance with the Status of Certain People

<sup>78</sup>- *Raḥmat Allāh al-Wāsi’ah*. vol. 5, p. 310.

<sup>79</sup>- *Sunan Abū Dāwūd*. vol. 4, p. 232 .

<sup>80</sup>- *Raḥmat Allāh al-Wāsi’ah*. vol. 5, p. 309.

<sup>81</sup>- *Kanz al-‘Ummāl*. vol. 3, p. 109 .

<sup>82</sup>- *Kanz al-‘Ummāl*. vol. 3, p. 700.

- 1) **People of religious nobility, such as the ‘Ulamā’ and jurists:** The *Ta’zīr* penalty on them will be mere notification, that is, the Qāḍi will send the sheriff to notify them that such and such offence of theirs has reached his attention. They are reminded to guard against it in future.

Likewise, if a person, who was known to be pious and peace-loving and not bent on harming anyone, was accused of murder or theft; the charge against him should be reviewed closely by the authorities, in which case the circumstances of the person and the situation in which he committed the crime would be examined.

Ibn ‘Adī reported from Ibn ‘Abbās that the Prophet said:

وأقبلوا الكرام عثراتهم أي زلاتهم بأن لا تعاقبواهم عليها

(Overlook the lapses of people of dignity – do not penalize them for that.)<sup>83</sup>

Question: Are the above unequal treatments not tantamount to discrimination or favouritism towards the elite against others?

Answer: People of status occupy a place of honour in the hearts of their followers. Winning them over equals to winning their followers over. Likewise, extending favour to them is extending favour to the followers. Persons of status command influence on their community. Overlooking some of their ‘pardonable’ offences or treating them courteously can have a salutary effect on the people consequently. This is precisely how the Prophet treated the leader of the hypocrites ‘Abdullāh ibn Ubay. Eventually, in response to his kind gesture towards Ibn Ubay, a thousand hypocrites repented and embraced Islām. Conversely, if they are degraded in the sight of their people, they can lose face as well as following. Hence, the advantage of condoning some of their offences can outweigh the disadvantages.

- 2) **People of social status, such as leaders and ministers of portfolio:** *Ta’zīr* in their case will be summoning, cautioning, verbal reprimand, frowning or expressing displeasure through gesture by the judge or ruler. These forms of penal punishment are suggestive, especially on the elite, because they are expected to mend their ways by slight admonition, too.
- 3) **Commoners, such as all and sundry:** *Ta’zīr* on them will be notification, summoning and imprisonment.
- 4) **The layman, such as the proletariats and labour class:** *Ta’zīr* on them will be notification, summoning, imprisonment and beating.

#### (V) Punishment and Public Exposure.

Penalties are executed in public and not in private.

<sup>83</sup>- Al-Manāwī, Al-Imām Zayn ad-Dīn. *At-Taysīr bi Sharḥ Jami’ as-Saghīr*, 1988, Riyadh Dār an-Nashr, vol. 1, p. 105.

It is true that people do not approve of being condemned and humiliated in public, especially when they are bashful. But in the case of hard-core culprits, the exposure may help in preventing them from repeating the crime. But even after the exposure, if they repeat the offence, they deserve to be dealt with rigorously seeing that their senses are numb and the tendency of committing crimes is ever-present in them. They fall under the state of insensible people, as it is expressed in the following Tradition:

‘Abdullāh ibn Mas‘ūd narrated that the Prophet stated:

ان مما أدرك الناس من كلام النبوة الأولى اذا لم تستح فافعل ما شئت

(Among the pearls of wisdom which people have received from the early speeches of prophethood is that ‘when you are bereft of shame, you may do as you wish.’)<sup>84</sup>

### **Wisdom and Philosophies of the Penal Laws of Islām and their Method of Execution**

#### **(A) Punishments are based on moral values; therefore, penalties are legislated on humanitarian, psychological and social grounds dominated by righteousness.**

In the Islāmic penal laws, the physical, material or social needs in awarding penalty are not undermined. The laws maintain a balance between these. While taking every aspect of human life into consideration, the Laws guide people thoroughly.

Imām ibn Rushd says in his *Kitāb al-Jināyāh*:

“The crimes for which the Sharī‘ah has stipulated penalties are five: (1) Crimes on the body, person or limb of a person, e.g. homicide and dismembering someone. (2) Crimes for abuse of genitals, e.g. fornication and adultery. (3) Crimes on wealth, e.g. theft. (4) Crimes on people’s honour, e.g. calumny. (5) Crimes committed by seeking to legalize those foods or drinks which the Sharī‘ah has declared unlawful, e.g. liquor.”<sup>85</sup>

Shahr ibn Hawshab reported on the authority of ‘Abd ar-Raḥmān ibn Ghanam that ‘Amr ibn Khārijah reported that while he was holding the reigns of the camel of the Prophet, he heard him say:

ان الله قد اعطي كل ذي حق حقه

(Allāh has allocated for each rightful person his rights.)<sup>86</sup>

<sup>84</sup>- At-Ṭabarānī, Sulaymān ibn Aḥmad. *Al-Mu‘jam al-Kabīr*. 1983, Musil, Maktabat al-‘Ulūm wa Hikam, vol. 17, p. 236.

<sup>85</sup>- Al-Andulūsī, Abū al-Walīd Muḥammad ibn Aḥmad ibn Rushd. *Kitāb al-Jināyāh*. atkutubpdfnet@gmail.com, 1988. (Accessed on 12-12-2018)

<sup>86</sup>- Al-Baghawī, Muhy as-Sunnah Ibn Mas‘ūd. *Ma‘ālim at-Tanzīl*. 1997, Riyadh, Saudi Arabia, Dār at-Ṭaybah, vol. 1, p. 192. Hereafter referred to as *Tafsīr Al-Baghawī*.

That was the *modus operandi* the Prophet had adopted with his Companions during the thirteen years of Makkah. Consequently, when in Madīnah the laws were been revealed, the Companions embraced them convincingly and submissively, leaving an indelible message for mankind that true laws are those to which the public look forward to receive and not to elude. It was the conscientiousness of those personalities and their appreciation for the legislation that gave value to the Islāmic Laws; otherwise, who would have cared to know what the laws were all about. Indeed, it was the purity of their souls that played the role, and it was their cultured selves that motivated them to obey every command, for it was certain that without that spirit the laws would have faded into oblivion.

The Qur'ān calls people to be conscious of their commitment to their Creator. This awareness serves as a law above every law, and it is this that touches the hearts of its adherents and calls them to submit unremittingly to every wish and command of the Creator. Hence, while Islām pronounces laws, it also nurtures the minds of the criminals and alerts the general public to beware of the consequence if they, too, abuse the law.

### **(B) The Procedure of Evidence.**

Ibn Abī Mulaykah reported on the authority of 'Abdullāh ibn 'Abbās that the Prophet said:

الْبَيِّنَةُ عَلَى الْمُدَّعِي ، وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ

(Upon the claimant is to produce evidence in substantiation to his claim and upon the defendant is to swear a solemn oath for denial of his guilt.)<sup>87</sup>

This is a general rule set out for the litigants to resolve their disputes; otherwise, confusion in relation to their conflict will persist and more lives and properties will be claimed, as the Prophet had said:

لَوْ يُعْطَى النَّاسُ بِدَعْوَاهُمْ ، لَادَعَى نَاسٌ دِمَاءَ قَوْمٍ وَأَمْوَالَهُمْ

(If people are left free to make their own choices, they will claim the lives and properties of others.)<sup>88</sup>

### **(C) Equality in the Sight of the Law**

In an Islāmic state, each person is governed by the book, whether he is of the noble class or he is a proletariat. If a ruler, monarch or person of authority is guilty of a penal crime, the penalty will be executed on him, too, seeing that he is a member of the public and is under obligation to observe the laws like everyone else.

<sup>87</sup>- *Sunan al-Kubra al-Bayhaqī*, vol. 9, p. 235

<sup>88</sup>- At-Taḥāwī, Abū J'afar al-Ḥanafī al-Miṣrī. *Mushkil al-Āthār li Ṭaḥāwī*. 2018, Lebanon, Dār Īlmiyyah, vol. 10, p. 3 .

Allāh’s laws favour His entire creation equally. No one enjoys preference to another person unjustifiably. All parliamentary rules are subject to the rules of the Sharī’ah and all likes and dislikes are attuned to the likes and dislikes, pleasure and displeasure of Allāh. “Is Allāh not most equitable of the judges?” (Q: 95:8) The laws are free of extremity and inequality and are applicable to every person without favouritism or discrimination. Whatever rule is passed for the poor person on the street is passed for the monarch in his palace; whatever is authorised for the indigent people is authorised for the affluent and; whatever is approved or disapproved for the insiders is approved or disapproved for the outsiders, too.

Maulana Maudūdī declares:

“Islam emphasises that all officials of the Islamic State, whether he is the head or an ordinary employee, are equal in the eyes of the law. None of them is above the law or can claim immunity. Even an ordinary citizen in Islam has the right to put forward a claim or file a legal complaint against the highest executive of the country. The Caliph ‘Umar said, "I have myself seen the Prophet, may God's blessings be on him, taking revenge against himself (for some slip or miss)." On the occasion of the Battle of Badr, when the Prophet was straightening the rows of the Muslim army, he hit the belly of a soldier in an attempt to push him back in line. The soldier complained: "O Prophet, you have hurt me with your stick." The Prophet immediately bared his belly and said: "I am sorry; you can revenge it by doing the same on me." The soldier came forward and kissed the abdomen of the Prophet and said that this was the occasion he waited for and this was all he wished for.”<sup>89</sup>

In relation to the above, we cite the following instances:

During the Khilāfat of ‘Umar, a young Coptic of Egypt came to Madīnah and lodged his complaint with ‘Umar. He said: “I entered a horse-race with Muḥammad - the son of the governor of Egypt ‘Amr ibn ‘Āṣ. At one stage, when I outraced him, he took offence, went into a rage and struck me with a whip, saying, “What induced you to outrace the son of the honourable?” (كيف تجرأت علي ابن الاكرمين؟)

‘Umar hosted the Coptic for a few days at his place and summoned ‘Amr ibn ‘Āṣ and his son from Egypt. When they appeared before ‘Umar, the latter handed a whip to the Coptic and said: “Stand up and strike the son of the honourable.” This was done in public.

After striking the son, when the Coptic was about to return the whip to ‘Umar, the latter said to him: "Strike one lash on the *honourable* governor, too. His son would not have struck you were it not for the false pride he had in him of his father's high office."

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<sup>89</sup>-Moududi, Syed Abul A'la. *Human Rights in Islam*. 2017, Lahore, Shah Ālam. p. 20.

The plaintiff submitted: "O Amīr al-Mu'minīn! I have avenged myself on the one who struck me; now I see no need to turn to the father."

'Umar said: "I swear by Allāh that had you struck him, too, I would not have reproached you for doing so. You have spared him on your own accord."

Then 'Umar turned towards the father 'Amr ibn 'Āṣ and said,

”متي استعبدتم الناس وقد ولدتهم امهاتهم احراراً؟“

(Since when have you enslaved the people when it is evident that their mothers had begotten them as free people?)<sup>90</sup>

'Ā'ishah related an incident of a woman from the Makhzūmiyyah tribe, who committed theft during the battle of Faṭḥ. The matter bore heavily on the Quraysh, who wished that the penalty of amputation be waived in consideration of the affluent family from which the woman was.

Some people discussed: "Is there anyone that can intercede with the Prophet on her behalf to have her hand spared?"

Others said: "None other than Usāmah ibn Zayd - the beloved of the Prophet - can make bold to approach the Prophet on the matter."

When Usāmah approached the Prophet and requested him to exempt the hand of the woman from the penalty, the Prophet's face turned pale expressing disapproval of the request, and then he remarked: "O Usāmah! Will you intercede with respect to a Tenet of Allāh?"

Usāmah instantly pleaded: "O Messenger of Allāh! I apologise; kindly seek forgiveness for me."

In the evening, the Prophet stood up in the Masjid and after praising Allāh, addressed the audience:

فإنما أهلك الناس قبلكم أنهم كانوا إذا سرق فيهم الشريف تركوه وإذا سرق فيهم الضعيف أقاموا عليه الحد ثم قال والذي نفسي بيده لو أن فاطمة بنت محمد سرقت قطعتم يدها

(The former nations were ruined because whenever a noble person among them committed theft, they spared his hand; and when a low-class person committed it, they executed the penalty on him in light of the Book. I swear by Allāh, Who controls my soul that even if Fātimah bint Muḥammad had committed theft, I would have amputated her hand.)<sup>91</sup>

This was the high level of justice on which the world was sustained that even had it been his daughter, the Prophet would not have spared her hand because the law must be enforced and the guilty person must be brought to book and fair play, irrespective.

<sup>90</sup>- Kanz al-'Ummāl, vol. 12, p. 661.

<sup>91</sup>- *Al-Bukhārī*, vol. 1, p. 15.

When the Khalifah ‘Umar’s grandson Abū Shahmah ibn ‘Abdur Raḥmān ibn ‘Umar consumed liquor in Egypt, the governor - ‘Amr ibn ‘Āṣ - inflicted a nominal punishment on him in consideration of his relationship with the Khalīfah of the Muslims. When that news was brought to the attention of ‘Umar, the first thing he did was to caution ‘Amr that the favouritism could result in his dismissal from his post. Then he summoned Abū Shahmah to Madīnah.

‘Abdur Raḥmān ibn ‘Auf interceded that Shahmah should be spared, as the penalty was already inflicted on him once.

Abū Shahmah, too, pleaded to the father: “O my father! I am ill. I fear that I may die if you flog me further.”

But ‘Umar retorted: “I will inflict the scourge of forty lashes on you at every cost; and if you die in that interim, I will follow up the balance of the lashes on your grave.”

Then without wavering, ‘Umar had the son flogged. Abū Shahmah succumbed to the infliction and died after a month. <sup>92</sup>

When Qudāmah ibn Mad’ūn - brother-in-law of ‘Umar- consumed liquor, ‘Umar enforced the law on him, too.

‘Umar once proclaimed in public: “Whoever was treated harshly or unjustly by any of my governors let him raise his complaint to me; I would square the score for him.”

‘Abdullāh ibn ‘Amr interjected: “O leader of the Believers! Will you castigate your appointee who is only performing his duty by admonishing the creation of Allāh?”

‘Umar replied:

والذي نفس عمر بيده إذ لأقصنه منه وقد رأيت رسول الله صلى الله عليه وسلم يقص من نفسه

(By Him Who controls the soul of ‘Umar, I will avenge it on him because I saw the Prophet of Allāh calling his Companions to settle the score with him, too.)<sup>93</sup>

Usayd ibn Haḍayr related that there was a person in Madīnah who had a great sense of humour. When he discussed with people, he made them laugh. One day, Rasūlullāh poked him in his waist with a stick. He said: “Revenge O Messenger of Allāh.” Rasūlullāh said: “Yes, you may take your revenge.” He said: “But you have a shirt on when I did not have a shirt on.” No sooner did Rasūlullāh remove his shirt

<sup>92</sup>- *Authenticity of the Story Regarding the Son of ‘Umar ...at <https://www.ilmgate.org/authenticity-of-the-story-regarding-the-son-of-...>*

<sup>93</sup>-*Musnad Aḥmad ibn Ḥanbal*. vol. 1, p. 41.

than the person clung to Rasūlullāh and began to kiss him on the body, saying: “This is what I wished for.”<sup>94</sup>

Abū Firās said that ‘Umar once addressed them: “I did not appoint my governors on you for them to strike you and confiscate your properties. Whoever was treated in that way by them let him raise his case to me; I shall avenge it on him.”<sup>95</sup>

A person came to Khalifah Abū Bakr complaining to him that the ruler in his country cut his hand for no valid reason. Abū Bakr said: “If that is confirmed, I will impose *Qiṣāṣ* (Equal Retaliation) on him.”

### Encapsulation of Analysis

- 1) Penalties for criminals are essential, just as medicine is for patients; both bear a sense of affliction. Medicine is administered to the patient despite being bitter; otherwise, the illness can exacerbate physical health.
- 2) Penal laws are instituted as warnings to the criminals before they commit the crime and as deterrents to them even after they commit the crime. Crimes are repelled before the commission and weeded out after commission.
- 3) It is certain that the objectives of Islāmic laws are not an outcome of extraneous factors or external policies as **Sayyid Subhī al-Mahmassani** seeks to convey in his *The philosophy of Islamic Legislations*. In fact, the elementary laws/rules and its objectives are affirmations of the Original Source – the Qur’ān and Sunnah.<sup>96</sup>

At this juncture, an erroneous belief of the Mu’tazilah sect needs to be dispelled.

The Mu’tazilah sect maintains that it is essential that the Commands of Allāh should be based on the convenience and needs of human beings, meaning that, it is ‘essential’ for Allāh to base His commands on the expedience of the people. But the Ahl as-Sunnah (those who subscribe to the Qur’ān and Sunnah and strictly abide by it) assert that Allāh is under no obligation to institute any command for the convenience of anyone. He does whatever He wishes. Hence, the point of

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<sup>94</sup> - *Jāmi’ al-Usūl Fi Ahādīth ar-Rasūl*. vol. 11. p. 56

<sup>95</sup> - *Sunan Abū Dāwūd*. vol. 3, p. 314.

<sup>96</sup> - *Philosophy-behind-the-legislation-of-islam*. at <https://blog.islamiconlineuniversity.com/.../philosophy-behind-the-legislation-of-islam...> (Accessed on 12-5-19)

'essentiality' is inapplicable to Him. Yet it is understood that though He commands only what He wishes, His commands are always in favour of human beings and never against it. "He is ever accomplishing whatever He decides." (Q: 85:16)

The topic of the Mu'tazilah is extensive and their differences with the Ahl-Sunnah are crucial and multiple, such as a person losing his Faith by committing a major sin and the impossibility of beholding Allāh even in the Hereafter. Therefore, for any person to know what surrounds their arguments we will suffice in mentioning their following concept:

ان المعتزلة يجعل الشريعة تابعة والعقل متبوعة لها ، وان اهل السنة والجماعة تجعل العقل تابعا والشريعة متبوعة له  
(The Mu'tazilah sect made the Shari'ah subject to the intellect and made the intellect the master, whereas the Ahl-Sunnah wal Jamā'ah made the intellect subject to the Shari'ah and made the Shari'ah the master.)

### Conclusion

This chapter analysed strategies for rehabilitating the criminals and ensuring their human dignity through recourses like concealment of crimes at pre-trial stages. Then after discussing the need to guard innocent persons through mandating irrefutable evidence and equality before the law, certain philosophies of the penal laws of Islām were highlighted.

Tragically, even after all measures adopted and after all said and done, it is noticed that not all criminals respond to it or reform through it. This is why some stringent measures have to be adopted. It was this that prompted me to embark in the following chapter onto the topic of certain crucial crimes for which the Shari'ah has prescribed specific punishments called *Al-Ḥudūd*. Since these acts constitute the core of crimes, the Qur'ān has decreed specific penalties on each of them to uproot them altogether from human society.

*The Qur'ān declares:*

*"And those who failed to judge in accordance with what Allāh has revealed are actually iniquitous." (5:45)*

'Abdullāh ibn 'Umar narrated that the Prophet said:

ومن حالت شفاعته دون حد من حدود الله فقد ضاد الله في حكمه

(Whoever's intercession impedes the establishment of a single legal tenet of Allāh has indeed opposed Allāh in respect of His commands.)<sup>97</sup>

<sup>97</sup>-Ibn Humām, as-Ṣan'ānī Abū Bakr. *Muṣannaf 'Abd Ar-Razzāq*.1982, Beirut. Maktabat al-Islāmī, vol. 11, p. 425. Hereafter referred to as *Muṣannaf 'Abd Ar-Razzāq*.



## CHAPTER FIVE

### ***Al-Ḥudūd*(invariable sentences)**

تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ، وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ

“These are the Bounds of Allāh; do not exceed them. Whosoever exceeds the Bounds of Allah it is they that cause harm to themselves.” (Q: 2:229)

#### **Preamble**

In this chapter, we will first study the definition of *Ḥudūd* penalties and the prophetic saying in this context. Then after scrutinizing the difference between *Qīṣāṣ*, *Ḥudūd*, *Ta’zīr*, object of *Ḥudūd* and its various categories, we will reproduce Professor Bassiouni’s paper on pre-Trial Interrogation of human rights.

**Penalties contained in the criminal laws of Islām are of two types: *Al-Ḥudūd* and *At-Ta’zīr*.** The *Ḥudūd* penalties are discussed here while the *Ta’zīr* penalties will be discussed in chapter seven.

***Al-Ḥudūd*:** These are penalties prescribed for certain major crimes, such as adultery, theft and calumny. They are mandatory penalties stipulated in the Qur’ān or Ḥadīth to establish Divine Rights, whose method of execution and degree of punishment are both fixed, meaning that, they are not amenable to any change or modification by anyone. Yes, the Qāḍī could commute it prior to the establishment of the charge. But once the guilt of the criminal is established, the Qaḍī is obliged to pass the sentence. Neither can he waive them nor can the victim pardon the offender or settle with him through pecuniary recompense.

#### **Definition and Literal Meaning of *Al-Ḥudūd***

***Ḥudūd*** (pl. for *Ḥadd*) means restraint, prohibition, restriction or limitation, hence, restrictive penalties prescribed by Allāh as Rights of Allāh.

In Arabic:

- Iron is called *Ḥadīd* because it *prevents* the weapon from reaching or penetrating the body.
- A doorkeeper or warden of prison is called *Ḥaddād* because he *prevents* the inmates from exiting the prison cells and the outsiders from entering the cells.

- The state in which a woman passes her mourning period is called *Hidād* because during those days she is *prevented* from applying cosmetics and decorations. <sup>98</sup>

### Prophetic Sayings on *Al-Hudūd*

‘Ubādah ibn Ṣāmit narrated that the Prophet said:

أقيموا حدود الله في القريب و البعيد . ولا تأخذكم في الله لومة لائم

(Establish the Bounds of Allāh among those who are close to you as well as among those who are at a distance from you. Let the taunting of the taunters not withhold you from executing the laws of Allāh.)<sup>99</sup>

‘Abdullāh ibn ‘Abbās reported that he heard the Prophet say:

إني آخذ بحجزكم ، أقول : إياكم وجهنم ، إياكم والحدود ، إياكم وجهنم ، إياكم والحدود ، إياكم وجهنم ، إياكم والحدود ، ثلاث مرات

(On the Day of Judgement, I will seize you by your collars and say: “Were you not forewarned of Hell, and were you not told to beware of violating the Bounds set out by Allāh – three times?”)<sup>100</sup>

Abū Hurayrah narrated that the Prophet said:

حَدُّ يُقَامُ فِي الْأَرْضِ خَيْرٌ لِأَهْلِ الْأَرْضِ مِنْ أَنْ يُمَطَّرُوا ثَلَاثِينَ صَبَاحًا

(To enforce a single tenet of Islām in the land is more beneficial for the people than rain pouring on them for thirty mornings.)<sup>101</sup>

Crimes are of four types:

- 1) Those for which *Hadd* is prescribed, such as adultery, larceny and calumny.
- 2) Those for which penal punishments (*Ta’zīr*) are inflicted, such as gambling and rebellion.
- 3) Those for which only atonement is prescribed, such as mating with one’s spouse during the fasting hours of Ramaḍān, committing an offence against the rules of *Ihrām* or breaking the fast of Ramaḍān.
- 4) Those for which none of the above penalties is prescribed, such as stealing an item that values less than ten dirhams, stealing from the house of a *Maḥram* (relative with whom marriage is not permissible) or meeting a strange woman in private.

### Purpose of *Hudūd* Penalties

<sup>98</sup>- Anon, at <https://www.almaany.com/ar/dict/ar-ar/الحد>/*Ma ājam Lughat al-Arabiyyah*. (Accessed on 10-4-2019)

<sup>99</sup>- Al-Qazwīnī, Muḥammad ibn Yazīd Abū ‘Abd Allāh. *Ibn Mājah*. 1998, Beirut, Dār al-Fikr. n.d. vol. 2, p. 849. Hereafter referred to as Ibn Mājah.

<sup>100</sup>- Al-Ḥafīz Al-Bazzār, Abū Bakr Aḥmad Al-Basrī. *Musnad Al-Bazzār*. 2009, Madīnah, Maktabah ‘Ulūm wa Ḥikam. vol. 2, p. 194.

<sup>101</sup>- *Ibn Mājah*. vol. 2, p. 848.

- 1) To prevent the habitual criminals from committing crimes, admonish them and bar others from taking to that route.
- 2) To reprove people against the prohibitions of Allāh.
- 3) To restore security in the country and create social order.
- 4) To focus on the rights of the individuals and the welfare of the community.
- 5) To purge the society from crimes and mend the ways of the criminals.<sup>102</sup>

Justice Tanzīl al-Rahmān says:

“The purpose of the institution of penalties in Islām is that vice and crimes should not take root in the society. Therefore, not even the thought of harming anyone has place in Islām. This is spelt out in the verse: “And do not cause mischief in the land after it is set to order.” (Q: 7:56)<sup>103</sup>

The author of *Hidāyah* mentions: “*Al-Ḥudūd* has two benefits: one is to be a *Ẓājir* (something that reproves) through which the culprit is cautioned, and the second is to be a *Sātir* (concealment) through which the culprit is purged of sin.”<sup>104</sup>

About *Zawājir* (prevention and suppression of crimes), Shaykh Qarāfi says:

“*Zawājir* are inflicted on the criminal to prevent him from committing an offence and to prevent others who may be contemplating committing an offence in future, lest these, too, should be summoned for the penalty as those. Hence, the penalty serves a dual purpose. Although consequently, the penalty does amount to causing pain to the culprit, the pain per se is not the purpose for its infliction.”<sup>105</sup>

**Shāfi‘ī:** *Kitāb Al-Fiqh al-Manhajī ‘Alā Madh’hab al-Imām Shāfi‘ī.* at <https://al-maktaba.org> (accessed on 22-11-19)

**Ḥanbalī:** ‘Abdullāh ibn Aḥmad ibn Qudāmah. *Al-Mughnī fi Fiqh Al-Imām Aḥmad ibn Ḥanbal ash-Shaybānī.* *Al-Hudūd wal Qisās.* at <http://www.uj.edu.sa>. (accessed on 22-11-19)

**Mālikī:** Mālik ibn Anas. *Mu’attā Imām Mālik.* Chapter Mā Jā’ fi Ḥadd az-Zinā. at <https://www.islamweb.net>. (accessed on 22-11-19)

### **Dominant and Basic Rules in Respect of the Provisions of *Qisās* and Crimes.**

<sup>102</sup> - Doi, ‘Abdur Raḥman. *Shariah the Islamic law*, Ta Ha publishers LTD, 2011, London. p. 86.

<sup>103</sup> -Juma ‘Alī Khawlah. at <https://www.facebook.com/khawla.juma> Madīnah. 1980. (Accessed on 10-4-2019)

<sup>104</sup>- Burhān ad-Dīn, al-Farghānīal-Marghinānī. *Al-Hidāyah.* 1996, *Sharḥ Bidāyah al-Mubtadī*, 1996, Karachi, Idārat al- Qur’ān wa ‘Ulūm al-Islāmyyah. Hereafter referred to as *Al-Hidāyah*.

<sup>105</sup>- Khan, Salīm Allāh. *Kashf al-Bārī ‘Ammā fi Ṣaḥīḥ al Bukhārī.* 2013, Karachi, Maktabah Fārūqiyyah. vol. 3, p. 75. at <https://www.albalaghbooks.com/.../kashf-al-bārī-sharḥ-saḥīḥ-al-bukhari-maulana-sal...> (Accessed on 2-6-2018)

The author of *Hidāyah* has mentioned the following provisions under chapter *Al-Ḥudūd*:

- (1) الحدود والقصاص تتدرؤ بالشبهات (*Al-Ḥudūd* and *Al-Qiṣāṣ* are annulled through doubts.)

‘Umar said: “In a doubtful case I will prefer to hold the penalty in abeyance until it is endorsed instead of enforcing it instantly.”

However, the act of postponing the penalty on grounds of doubt is not so slack that every convict can take recourse to it at random. The convict will have the benefit of the doubt until such time that the guilt is established through witnesses or confession. Once the guilt is confirmed, the penalty will be executed. Therefore, moderation in the rule and consideration of the two sides are essential; lest the culprit should exploit it while the victim awaits justice in vain.

This is unlike the procedure in some of the legal cases of modern times that doubtful cases are interpreted in favour of the convict, which is sometimes so lopsided that the culprit walks away with a smile while the victim looks on in the void. Therefore, until a balance is not struck between the statutes, the statutes of the constitution will only remain in paper and order in the air.

On this basis, before executing the *Ḥadd* or *Qiṣāṣ*, the Imām or Qāḍī should observe the following points as a precautionary measure:

- a.
  - i. He should abstain from enforcing a penalty in doubtful cases:
 

ان الامام لان يخطئ في العفو خير له من ان يخطأ في العقوبة  
(That the Imām errs in pardoning is better than erring in the penalty itself.)<sup>106</sup>
  - ii. He should take extenuating factors into account when deciding a penalty.

- (2) It is reported in a *Hadīth* that the Prophet said: “Abstain from punishing a Muslim wherever you find scope to do so.”<sup>107</sup>

- (3) ‘Abd Allāh ibn ‘Aṣ has reported a saying of the Prophet:

ادروا الحدود عن المسلمين ما استطعتم

(Avoid inflicting penalties on the Muslims to the best of your ability.)<sup>108</sup>

- (4) If the number of four witnesses in adultery or slander and of two witnesses in theft is not available, or the credibility of the witnesses is not established, then, too, the penalty is revoked.

<sup>106</sup>- *At-Tirmidhī*. Ḥadīth no. 1424.

<sup>107</sup>- *Ibn Mājah*. p. 31.

<sup>108</sup> - *At-Tirmidhī*. الحدود ما جاء في درء الحدود. p. 573

- (5) The penalty is imposed on the culprit only if he commits the crime in full. But, for instance, if the thief merely transfers an item from one room to the other, and is apprehended before he removes the item from the house; he cannot be convicted for theft. Likewise, if a person simply meets a strange woman and does not engage in fornication, the penalty for fornication is not enforced on him. Yes, the Qāḍī can execute a *Ta'zīr* penalty on him commensurate with the offence for the infringement of the general rules of Islām.
- (6) Penalties are meted out to a person for his/her utterances and actions and not for his/her thoughts or intentions.<sup>109</sup>

‘Ā’ishah reported that the Prophet said:

إن الله تجاوز عن أمتي ما حدثت به أنفسها ما لم يتكلم به أو يعمل به

(Allāh has overlooked from my Ummah the thoughts that cross their minds/hearts until they do not utter it or put it into practice.)<sup>110</sup>

### Pre-Trial Interrogation: Shari’ah and Human Rights

Professor Bassiouni explains:

“Pre-trial interrogation is conducted by the minister of complaints. As under the common law, the accused has the right to refuse to answer questions and the accused person’s silence may not be used as evidence of guilt.

The accused is to be treated humanely and is to be encouraged to deny his or her guilt.

When an individual confessed to adultery, the Prophet urged retraction of the confession: "Maybe you only kissed her? Maybe you only touched her?" The Prophet also coaxed a woman accused of theft to withdraw her confession: "Did you steal? I do not think you did. Say, no.

The Koran explicitly prohibits the use of beatings, torture, or inhuman treatment to extract a confession. This type of treatment violates the dignity of the accused, results in a loss of confidence in the Islamic system of justice, and creates a risk of false confessions. The use of torture is a sin.

The Prophet warned that "God shall torture on the Day of Recompense those who inflict torture on people in life.

The incorporation of the Shari'a into domestic criminal codes presents various human rights issues.

Most Islamic scholars view the Shari'a as consistent with the requirements of international human rights instruments. In Islamic jurisprudence "the dignity of man is foremost for he is the prize creation of Allah; equality and justice are therefore a natural corollary.

<sup>109</sup>- *Al-Hidāyah*. vol. 1 p. 498

<sup>110</sup>- ‘Uqaylī, Dhuafā al-Kabīr. *Mauqa’ Jami’ al-Hadith*. Publisher unknown. vol. 1, p. 345. at <http://www.alsunnah.com> (Accessed on 2012-2018)

He also writes that the Shari'a is a "policy-oriented system" and "[i]t is not as has been represented, or practised by some states which purport to apply Islamic law as a rigid and repressive system ... In fact, many of the most forward-looking concepts in today's criminal justice system have been the mainstay of the Islamic approach for centuries.

The First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System concluded "that all the guarantees of human rights set forth in international conventions and reflecting the current international consensus on the minimum standards of any humane penal justice system, are by no means incompatible with the letter and spirit of Islamic law."

The Conference recognized that "for western jurists, certain aspects of the Islamic system are difficult to reconcile with their concept of penal justice."<sup>111</sup>

### **Noteworthy Points in Relation to *Hudūd*.**

- Whoever violates the Divine Rights – whether by committing a prohibition or avoiding an imperative – will be liable for *Hadd*. Those who commit offences that fall within the category of *Hudūd* are guilty of committing acts that are contrary to the Commands of Allah and public welfare. In other words, *Hudūd* are requitals for the contravention of the Laws of Allāh and the breakup of public interest.
- *Qīṣāṣ* is not classified as *Hadd*. This is because it is the right of contract and; therefore, can be settled through monetary recompense, too. Likewise, *Ta'zīr* is not classified as *Hadd*. This is because its penalty is not prescribed; it is discretionary.
- It is recorded in Islāmic history that it was in consequence of the enforcement of the Islāmic laws that during the entire twenty-three years span of the prophetic days, only a few cases of adultery, theft and other crimes were reported. Indeed, this nominal number of cases during such a lengthy period left an indelible effect on the minds of truth-seeking souls, as much as it served as an effective restraint on the minds of criminal elements.
- An address presupposes sanity and maturity; therefore, *Hudūd* are inflicted only on those who are eligible to be addressed, such as adults and sane people. Minors and feeble-minded people are not addressed, hence, *Hudūd* penalties are not inflicted on them.
- Evil deeds are of two types: Those that are malevolent in themselves (*Qabīḥ li Dhātihī*) and those that are malevolent due to external factors (*Qabīḥ li Ghayrihī*).

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<sup>111</sup>- Professor Bassiouni. *Pre-Trial Interrogation and the Shari'ah and Human Rights*. The AALCO Secretariat. March 2012, Vasant Vihar New Delhi– India.

- Restraints and penalties are classified as قبيح لذاته حسن لغيره (Evil by themselves, but virtuous by external reasons.) This means that intrinsically penalties are evil because it is an infliction of pain on the criminal. But they are virtuous because they are in the interest of the public, such as, if the criminal makes amends after the penalty, it will bring peace and security to the society. Accordingly, though punishment is in itself an evil of the first category, it (punishment) falls under the evil of the second category because of external reasons – deterrence to the culprit and public security – thus justified. The advantages of the punishment in these cases overwhelm their disadvantages. Alternately, punishments can be termed as *Ḥasan li Ghayrihī* (virtuous for an external reason) rather than *Ḥasan li Dhātihī* (virtuous by itself).
- Both the major and minor offences call for different punishments. Therefore, the judge should first determine the category under which a given crime falls. Once he does so, he will be in a better position to decide the appropriate punishment to be awarded to the criminal, whether *Ḥadd* or *Ta'zīr*.

Question: Although both the crimes (of the *Qīṣāṣ* nature, such as homicide and injury, and of the *Ḥudūd* nature, such as adultery, theft and calumny) are detrimental to the community, why is it that in the former case (*Qīṣāṣ*) the Sharī'ah has granted the aggrieved family option to pardon, mitigate the *Qīṣāṣ* or settle with the murderer on *Diyah* (blood money), whereas in the latter cases (*Ḥudūd*) it did not grant the offended person option to pardon the offender or settle with him financially?

Answer: Though the negative effects of *Qīṣāṣ* reach the community, the greater suffering is experienced by the individual (or aggrieved family), whereas in *Ḥudūd* cases, its prejudicial effects are perceived directly and severely by the community more than the victim. In the *Ḥudūd* cases, the sufferings of the victims are assumed as secondary.

In other words, the *Qīṣāṣ* situation can be described as personal vengeance against a particular individual and not against others. If the criminal does not succeed in murdering his target person, he will not aim for anyone else. In that way the hazard created by him is limited. But against that, the *Ḥudūd* crimes are a nuisance to the public overall, as they affect the vulnerable, and especially the youth, just as they endanger the peace of the people and damage the moral fabric of the nation. For instance, if a thief or adulterer does not succeed in accomplishing his purpose with one person, he will target another person. The menace created by these crimes is widespread.

Crimes that fall under the *Ḥadd* category and for which penalties are decreed are seven:

- 1) *Zinā* (adultery)
- 2) *Saraqah* (theft)
- 3) *Al-Qadhaf* (calumny or false accusation of adultery)
- 4) *Shurb al-Khamr* (consuming liquor)
- 5) *Al-Ḥarābah* (bloodshed and plunder)

*Ar-Riddah* (apostasy)

6) *Al-Baghy* (rebellion)

We now examine each of them below.

### **(1) *Hadd az-Zina* (Penalty for adultery)**

#### **Islām Accentuates the Need for a Pure Society**

“An adulteress and an adulterer; you should flog each of them a hundred stripes. And let compassion for the two (guilty ones) not move you from (executing) the Law of Allāh if you have Faith in Allāh and in the Last Day. Let a group of Believers witness the scourge.” (Al-Qur’ān, An-Nūr: 2)

‘Abdullāh ibn ‘Amr ibn ‘Āṣ reports that the Prophet said:

يتسافد الناس في الطرق تسافد الحمر

(Before the Day of Resurrection, people will cohabit with women on the streets as donkeys do.)<sup>112</sup>

Islāmic law divides adulterers into two classes:

**(1) *Ghayr-Muḥṣin*:** This is an unmarried person who commits adultery.

**(2) *Muḥṣin*:** This is a married person who commits adultery. He is a married, sane and free (not a slave) person who marries according to Islāmic rights and even consummates the marriage.

Literally, *Hiṣn* (حصن) means a *fort*. Once a person is married, he/she has protected himself/herself within the fort of marriage. They are now well guarded against the onslaughts of evil temptations. Despite that, if any of them transgresses the security limits of legal mating between the spouses and seeks sexual satisfaction outside the marriage bounds, then as a safety measure for the protection of human integrity, the Sharī‘ah will bring its penal law to bear upon them for exceeding the sanctity of marriage delimited by law. This is why the penalty on married people is more stringent.

Adultery is an abomination that constitutes an outrage against the system of the family as well as the society.

At the outset, it is important for people to realise that they are a pride of this earth, and because of this pride, they are repeatedly admonished and reminded to regulate their lives according to ethical norms. Modesty among people and purity of the society are not words to be defined through dictionaries; they are words to be embraced, imbibed and

<sup>112</sup>- *Kanz al-‘Ummāl*. vol. 14, p. 568.

developed through one's conscience. These qualities cannot be explained; they are to be understood.

To our misfortune, in present times, morality and chastity are words found only in dictionaries and not in people's lives and culture. This is because advocates of hedonism have rated modesty as old-fashioned.

It is no secret that adultery is a base act that soils a person's body, soul and personality. It ruins the social structure of the country, upsets the lineage of the families, disrupts matrimonial relationship, exposes society to moral corruption, dissuades the youth from entering a decent and holy matrimony, floods the society with illegitimate children, disrupts the social fabric of the society and creates a total disorder in the human race.

Matīn Hāshimī says;

"A child that is born out of wedlock cannot be an asset to the society because of lack of education and disciplining on behalf of a father. In fact, often he gets involved in criminal behaviour and spoils the habits of other children of the society."<sup>113</sup>

Unlike contemporary law that treats consensual intercourse with strange women, legal, Islām treats adultery (which involves such persons who were already married) and fornication (which involves such persons who had never married), illegal and; therefore, punishable to different degrees. Women have no authority to consent to what is divinely declared unlawful; likewise, men have no rights to legalise what is divinely pronounced unlawful. As much as a woman has no rights to allow anyone to stab her or injure her for no valid reason, she has no right to consent to adultery, too, for this is demeaning her personality.

'Abdullāh ibn 'Abbās narrated that the Prophet said:

إذا ظهر الزنا و الربا في قرية فقد أحلوا بأنفسهم عذاب الله

(When adultery and interest become widespread in a community, the people involved in it will have indeed justified the chastisement of Allāh on them.)<sup>114</sup>

This is why, Islām spares no words in condemning adultery, exposing its seriousness, passing stringent laws against it and inflicting the severest of penalties on it.

But while Islām considers adultery the most odious crime, present-day culture is illustrative of the permissiveness of unchecked behaviour on adultery and debauchery. Licentiousness and libertinism have become part of the modern-day way of life. Not only are people told that such indulgence is their personal affair and that it has nothing to do with the society, they are also encouraged in different ways and through adverts to indulge in it. Little is this repulsive crime, which eventually even throws the family structure overboard, monitored.

<sup>113</sup> - Rasūlpūrī, Munīr Aḥmad. *The Role of Ḥudūd and Ta'zir in Establishing Peace*. 2018, vol. 3, p. 135.

<sup>114</sup>- Al-Bayhaqī, Abū Bakr Aḥmad ibn Hussayn. *Shu'b Al-Imān, Al-Bayhaqī*. 1990, Beirut. Dār Al-Kutub al-'Ilmiyyah. vol. 4, p. 397. Hereafter referred to as *Al-Bayhaqī*.

It is a truism that whichever nation takes the crime of adultery casually is doomed to lose its family heritage and lineage.

Chastity is always seen as a jewel in a person. Any degree of disregard displayed towards it must bring disaster on humanity. Every individual is a son or daughter of the nation; therefore, each person is duty bound to guard his/her modesty and show optimum respect to it.

Abū Umāmah reported that a person came to the Prophet and said: “O Messenger of Allāh! Permit me to commit adultery.” The Companions present were taken aback by the outrageous request the person made directly to the Messenger of Allāh. But calmly the Prophet told them to put him at ease. The person drew closer and sat before the Prophet. The Prophet asked him if he would approve of such an act to be committed with his mother.

The person: No.

The Prophet: The people, too, would not approve of that with their mothers. Tell me, would you approve of it with your daughter?

The person: No.

The Prophet: People also would not approve of it with their daughters. Would you approve of it with your sisters?

The person: No.

The Prophet: The people also would not approve of it with their sisters.

Then the Prophet placed his hand on the chest of the person and prayed: “O Allāh! Remit his sins, cleanse his heart and guard his modesty.”<sup>115</sup>

This was the peak of Human Rights, which the Prophet of Islām had conferred upon the people. He broadened the conscience of the youth so that he could decide what would be best for him. The Prophet impressed it upon him that women were sisters of the nation of today and mothers of the nation of tomorrow. Their chastity could not be compromised at any cost.

Therefore, it is about time the advocates of Human Rights revise and redefine what *true* Human Rights are.

The following considerations in relation to adultery are paramount.

- In adultery, the aim of the person is to satisfy his/her carnal appetite and sexual desire through immodest means at the expense of his/her chastity.
- Illicit sexual intercourse reflects the irresponsible attitude of such individuals towards the society as well.
- The mere thought that strange men and women meet illicitly leaves an uncomfortable feeling, especially on the minds of those who really wish to live a modest life.
- In the constitutions of the governments, only rape (*Zinā bil Jabr*) is an offence, whereas adultery by mutual consent (*Zinā bir Riḍā'*) is overlooked as a *necessity* and *goodwill* between two *sweethearts*. This is why modern cities are flooded with

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<sup>115</sup> - *At-Ṭabrānī*. vol. 8, p. 183.

flirts, just as debauchery has become the order under the slogan of *freedom of choice*. The youth are roaming around the cities late at night with no check on them from their parents.

- Adultery is one of those hard-core evils; the noxious effects of which are widespread and which takes progenies - if not whole generations - into their sweep. What affection will the person have for a child - born out of this type of a union - who is suffering an identity crisis and with a stigma of illegitimacy for no guilt of its own?

Huzayfah narrated that the Prophet proclaimed: "O assembly of people! Abstain from adultery because it is followed by six miseries: three in this world and three in the Hereafter. As for the three in the world: it deprives the guilty person of glory; afflicts him/her with impoverishment and; reduces his/her age. As for the three in the Hereafter: Allāh will be displeased with him/her, his/her Record of deeds will reach him/her from the left side, and he/she will suffer eternal doom in Hell."<sup>116</sup>

### Progressive Penalties Against Adultery

Penalty for adultery was gradually intensified in Islām.

- 1) Initially, the penalty on the adulteresses was just to confine them to their houses.

"So, if four persons from among you do testify against them, then confine those women to the houses." (Q: 4:15)

- 2) This ended with the second stage when only pain was prescribed on them.
  - a. "... you should inflict them with pain."
  - b. But at this stage, the pain was not yet defined. Seeing that it was a *Ta'zīrī* (discretionary) penalty, the Qāḍī could apply his own judgment in inflicting the severity of pain.

In that way, the above verse closed up with "... or Allāh decree some alternate way for them."

- 3) Subsequently, the alternate way was revealed in the verse under discussion: "... flog each of them a hundred lashes." (Q: 24:2) When this verse of chapter *Nūr* was revealed, 'Abdullāh ibn 'Abbās said: "These hundred lashes are in response to the promise Allāh made in the chapter *Nisā'* ("... or Allāh decree some alternate way for them.") Now *Rajm* (stoning) will be enforced on a married person and hundred lashes on an unmarried person."<sup>117</sup>

### Procedure for Enforcing the Islāmic Rule of Fornication

<sup>116</sup>- Ar-Rāzī, Ash-Shāfi'ī, Muḥammad ibn 'Umar. *Tafsīr Al-Fakhr Ar-Rāzī*. 1981, Lebanon, Dār al-Fikr, vol. 1, p. 3265.

<sup>117</sup>- *Al-Bukhārī*. vol. 1, p. 12.

In the case of fornication, it is stated that the judge should pose such questions to the perpetrator that will give the person some reason to defend himself/herself, similar to how the Prophet had approached the two persons – Mā'iz al-Aslamī and Imra' al-Ghāmidīyah - who had confessed their guilt.

The word فاجلدوا in relation to this punishment in the Qur'ān is from جلد (skin), which signifies that flogging should be done mildly in a manner that it will simply graze the skin and not leave a deep gash in it. This is why to avoid aggravating the infliction the lash should be free of knots.<sup>118</sup>

Yahyā ibn Abi Kathīr narrated that an unmarried person came to the Prophet and confessed:

“O Nabi of Allāh! I have committed a crime that calls for a penalty. I request you to execute the (rule of the) Book of Allāh on me.” The Prophet called for a lash. When it was brought to him, he found it to be of a hard texture, besides having knots on it. The Prophet called for a softer one. The Companions presented another one. But this one was broken and too soft. The Prophet requested for a third lash. When a moderate type of lash was presented to him, he said, ‘This is fine.’ Then he had the person flogged.”<sup>119</sup>

### **The relevant verse “flog each of them a hundred lashes” (Q: 24:2) will now be scrutinised**

According to Imām Abū Hanīfah, this command is addressed to the Muslim rulers. Therefore, the masters of the slaves are not authorised to unilaterally execute Islāmic penalties on their slaves/subordinates – if they are found guilty - without a pronouncement on behalf of the ruler of the state.

But the other three Imāms hold that the masters are authorised to execute the penalty on them even without the ruling of the ruler.<sup>120</sup>

One day while seated on the pulpit of the Prophet, ‘Umar ibn Khattāb said: “Allāh appointed Prophet Muḥammad with the message of truth and revealed the Book on him. Among the verses that were revealed to him was the verse on *Rajm* (stoning). We read it, preserved it and understood it. The Prophet enforced the penalty of *Rajm* and so did we enforce it after him. Now I fear that after a stretch of time, a person may rise up and argue, ‘We do not find the penalty of *Rajm* in the Book of Allāh.’ Thus saying, he will go astray for disregarding an ordinance of Allāh. I advise you not to forget that *Rajm* on an adulterer (in the light of the Book of Allāh) is a decisive command, whether the sinner is a male or a

<sup>118</sup>- *Al-Hidāyah*. vol. 1, p. 501. *Ṣifatu Jildiz-Zāni. ghayr al-Muḥṣin*. at <https://islamqa.info/ar/answers> (Accessed on 21-11-19) *Aysar at-Tafāsīr li Kalām Al-'Aliy Al Kabīr*. vol. 3, p. 547

<sup>119</sup>- *Sharḥ Fath al-Qadr*, vol. 5, p. 230

<sup>120</sup> - Pāni Patī, Qāḍī Thanā Allāh. Pakistan. *Tafsīral-Mazhari. Urdu version*, 1999, Karachi, Dār Ishā'at. vol. 6, p. 416. Hereafter referred to as *Tafsīr al-Mazharī*.

female. Once the guilt is established through witnesses, pregnancy or confession of the persons involved, the Qāḍī should enforce the penalty’.”<sup>121</sup>

“And let compassion for them not move you...” (Q: 24:2)

This command does not prohibit the people from expressing natural affection and feelings for the guilty; it only prohibits them from exhibiting such fervent affection that may induce the judge to waive the *Rajm* rule altogether.

Imām Mujāhid says: “Let affection not prompt you to annul the penalty.”<sup>122</sup>

Sympathy for the guilty should be exercised by the heart and not by amending the law. Such provisions are prescribed to protect society from lawlessness and licentious behaviour. Therefore, the laws should be executed without fail.

Allāh is kinder and more compassionate on people than what they are to one another. Had there been any good in restraining the penalty, He would have indeed commanded us to do so.

It is undeniable that compassion for people is rewarding, but despite that, the above crimes need rigorous redress. If they are left unaddressed, they can spread and become a nightmare for the communities. Therefore, it will be injustice to exercise compassion on the few criminals at the expense of the public interest and social order.

If pardoning a single offender affectionately is a virtue, then not pardoning him/her in consideration for the welfare of the commonweal is a fortiori virtue.

### **Punishment scene**

Hasan al-Baṣrī and Qatādah say the flogging should be done in public. Allāh commands that a group of Believers should be present at the scene so that the law-enforcement may serve an admonitory purpose to everyone. <sup>123</sup>

**Qatādah and Nasar ibn ‘Alqamah say that the clause ‘people should be present at the scene’ is not to humiliate the guilty person, but to invoke Allāh’s forgiveness and pardon for him/her and as an admonition to others. <sup>124</sup>**

<sup>121</sup>- Muslim ibn Hajjāj, Naishapūrī al-Qushayrī Abul Husayn - *Ṣaḥīḥ Muslim*.2006, Madīnah, DārṬaybah, vol. 5, p. 116. Hereafter referred to as *Ṣaḥīḥ Muslim*.

<sup>122</sup>- Thawrī, Sa‘īd ibn Masrūq Abū ‘Abd Allāh. *Tafsīr Thawrī*.1982, Beirut, Dār al-Kutub al-‘Ilmiyyah, vol. 1, p. 220.

<sup>123</sup>- Ibn Abi Ḥātim, Ar-Rāzī Al-Ḥāfiẓ Abū Muḥammad ‘Abdur Raḥmān. *Tafsīr ibn Abi Ḥatim*.1997, Riyadh, Maktabah Nazzār Muṣṭafā al-Bāz. vol. 8, p. 2521.

<sup>124</sup> - Ibn Kathīr. Chapter Nūr. Vol. 3. p. at <http://quran.ksu.edu.sa/tafseer/katheer/sura24-aya2.html>. (Accessed on 22-11-19)

### **There are two ways to confirm adultery: through witnesses or confession.**

Note that a case against adultery can be filed only if it is substantiated by four unimpeachable witnesses or by the confession of the perpetrator. It should be attested by four adult men of integrity, who will testify to witnessing the act personally. The act cannot be proven through less than four witnesses. The condition for four witnesses is probably the most stringent stipulation recorded in the books of jurisprudence. It is a standard that is difficult if not impossible to provide, especially when the act is generally committed in private. How sure can the witnesses be that they are not mistaken?

However, even after imposing such strict conditions, if the act is finally established beyond doubt, then the Sharī'ah will not hesitate to apply the rule of the Qur'ān. At such times, the Qāḍī should neither take to compassion nor should he be seized with sympathy for such perpetrators who seek to adulterate the human race and progeny.

### **Adultery Confirmed Through Confession (*Iqrār*)**

Confession means that the guilty person admits to committing the act.

In a situation where no witnesses are available to testify to the case, if the adulterer confesses four times that he/she is guilty of committing the act, the guilt will be confirmed and the penalty will be enforced, provided that:

- (1) the person is sane and an adult,
- (2) the confession is made at four different places, and
- (3) the confession is made in the presence of the Imām.

One of the beliefs of the legal system of Islām is that both 'confession' on behalf of the offender and 'punishment' on behalf of the Qaḍī are there to serve as atonement for the sins committed, as testified to by all the authorities on the criminal laws of Islām.

Throughout the lifetime of the Prophet, not a single adultery case was established through the evidence of four witnesses. The few cases that were established were through self-confession by the guilty persons.

### **Rulings pertaining to Adultery**

If the adulterer was a (1) married (2) sane and (3) free person, then *Rajm* would be executed on him. But if any of the three conditions was absent from him/her, then flogging would be enforced.

According to Imām Abū Ḥanīfah, Imām Mālik and Imām Muḥammad, another condition for the enforcement of *Rajm* is that the person should be a Muslim.

‘Abdullāh ibn ‘Umar narrated from the Prophet that whoever ascribes a partner to Allāh, meaning that he is not a Muslim, is not a *Muḥsin*.<sup>125</sup>

But according to Imām Shāfi‘ī, Imām Aḥmad and Qāḍī Abū Yusuf the adulterer does not have to be a Muslim. *Rajm* will be enforced on him irrespective of his religious affiliation.

If both the guilty persons are married, then *Rajm* will be enforced on both.

If both are unmarried, then both will be flogged.

If one is married and the other unmarried, then *Rajm* will be enforced on the married person, while the unmarried person will be flogged.

Before concluding this section, it is noteworthy that adultery is condemned in all celestial religions and by other personages, too.

The following quotes suffice:

### Bible

“Then shalt thou bring forth that man or that woman, which have committed that wicked thing, unto thy gates, even that man or that woman, and shalt stone them with stones, till they die. At the mouth of two witnesses, or three witnesses, shalt he that is worthy of death be put to death, but at the mouth of one witness, he shall not be put to death. The hands of the witnesses shall be first upon him to put him to death, and afterwards the hands of the people.” (Deuteronomy: 17:5.6.7)

“And there followed another angel, saying, Babylon is fallen, is fallen, that great city because she made all nations drink of the wine of the wrath of her fornication.” (Revelation 14:8)

“And you shall not commit adultery.” (Revelation 14:8) (Matthew: 5:32)

“Among the Greeks, and also early Rome, illicit sexual intercourse was no crime at all, unless a married woman was involved. Even in Great Britain, it was reckoned a spiritual offence that is cognizable by the spiritual courts only. The common laws took no further notice of it than to allow the party aggrieved an action of damage.”<sup>126</sup>

“In Judaism, adultery is considered one of the most grievous sins. ... Adultery (sexual intercourse between a married woman and a man other than her ... The Talmud implies that the biblical verse (Deuteronomy 23:3) that states the mamzer may ...”<sup>127</sup>

<sup>125</sup> - *Muṣannaf ibn Abī Shaybah*. vol. 10. p. 68

<sup>126</sup> - Shailer Mathews, Christopher Johnston, Robert Francis Harper and others. Journal article, *Cheyne and Black's encyclopaedia Biblica*.1920. The University of Chicago Press, vol. I.

<sup>127</sup> - at <https://www.myjewishlearning.com/article/adultery> (Accessed on 23-11-19)

In conclusion, from the above, it is obvious that the evil of adultery can never be over-emphasised. Social workers should conduct regular programmes to create awareness of its abhorrence among the youth.

I close the chapter with the following article

“The delict (violation of the law) of adultery was abolished in many foreign jurisdictions such as England, Scotland, Canada, Australia, France, the Netherlands, Germany and most states of the United States of America (which countries have no less regard for the sanctity of marriage than any other parts of the world), have recognized and accepted that the action is not desirable or necessary to protect the institution of marriage. The origins of the claim are deeply rooted in patriarchy. Originally only a man had the right to pursue a claim against a third party that had committed adultery with his wife. Wives were viewed as mere chattels. And that probably explains why the claim was available only against the third party, and not the wife who – in essence – was a co-wrongdoer. As time went on, South African courts began questioning the discriminatory nature of the claim. Making contentions based on Christian principles of fidelity, which are applicable both to husbands and wives.

The Constitutional Court was of the opinion that love and respect are foundations of a solid marriage and not legal rules. Those are within the control of the spouses themselves. After all, it is they who undertook to be truthful and faithful to each other.

The court further made the point that our modern day idea of the sacrosanctity of marriage and its concomitant protection by the law are by no means what they were in, say, the times of King Henry VIII, who – because of Roman Catholic tenets, at a time when there was not much separation between church and state – could not even get a divorce and was forced to decree that thenceforth the Church of England would be separated from the papal authority of the Roman Catholic Church. Needless to say, he was then free to follow his heart’s desire, although he was excommunicated by the Pope for this conduct. We have come a long way from those strictures and gymnastics.”<sup>128</sup>

After the evil of adultery, theft is another crucial crime that brings about a downfall of the communities; therefore, it needs immediate redress and the criminals should be dealt with firmly. In Islām, sympathy for all human beings is well emphasised, but of course not when it jeopardises the health and wealth of others. Therefore, in the following pages, I intend to discuss the topic of theft in some detail.

## **(2) Ḥadd as-Saraqah (Penalty for theft)**

“The male thief and the female thief; you should amputate their hands in retribution for ‘all that’ they perpetrated, as an admonitory punishment from Allāh. And Allāh is the All-Mighty, All-Wise.” (Al-Qurān 5:38)

### **Introduction**

<sup>128</sup> - Anon. Divorce and *Adultery-laws*. At <https://www.divorcelaws.co.za/adultery-law.html>. (Accessed on 15-4-2019)

In Islām, wealth and property are regarded as inviolable assets, just as they are the backbones of a nation. The Qur’ān says: “Wealth and children are adornments of the worldly life.” (Q: 18:46)

As much as Islām reminds us how to live an honourable life, it also emphasises upon us how to value wealth and utilize it appropriately because it is a means to accomplish our needs, without which our lives and comforts can be imperilled.

The wealth which people earn through lawful means is certainly to their advantage. For the Believers, wealth is a worthy asset, provided it is earned through legal channels. This is why the Sharī’ah takes stern action against any person who seeks to interfere with the wealth of others, whether through misappropriation or theft.

Abū Umāmah narrated that the Prophet said:

مَنْ اقْتَطَعَ حَقَّ امْرِئٍ مُسْلِمٍ بِيَمِينِهِ فَقَدْ أُوجِبَ اللَّهُ لَهُ النَّارَ وَحَرَّمَ عَلَيْهِ الْجَنَّةَ

(Whoever usurps the rights of a Muslim through his [false] oath; Allāh will ordain for him the Fire and prohibit Paradise upon him.)

When the Companions heard this narration, they asked: “O Messenger of Allāh! Will it be even if it is a trivial item?”

The Prophet replied: “وان قضيبا من اراك” (Even if it is a branch of a *Salvadora Persica* tree.)<sup>129</sup>

### Definition of theft

السرقه في اللغظ اخذ الشئ من الغير علي سبيل الخفيه و الاستسرار و منه استراق السمع قال الله تعالي الا من استرق السمع وقد زيدت عليه اوصاف في الشريعة ، والمعني اللغوي مراعي فيها ابتداء و انتهاء او ابتداء لا غير كما اذا نقب الجدار علي الاستسرار و اخذ المال من المالك مكابرة علي الجهار

(Lexically, theft means to take away something from a person stealthily and surreptitiously. The word ‘eavesdrop’ is derived from the same. Allāh says: “*But yes, if any (of them) seek to eavesdrop.*” [Q: 15:18] However, certain additions have been made to its description. In the literal meaning of theft, the beginning and ending or only the beginning is considered, such as to break through a wall stealthily or openly snatch an item from a person.)<sup>130</sup>

Theft is defined by Encyclopaedia Britannica as follows:

“Theft, in law, is a general term covering a variety of specific types of stealing, including the crimes of larceny, robbery, and burglary. Theft is defined as the physical removal of an object that is capable of being stolen without the consent of the owner and with the intention of depriving the owner of it permanently.”<sup>131</sup>

We now scrutinize larceny. What is larceny?

An act will be classified as larceny on the following conditions:

- 1) If the stolen item valued ten dirhams or more.

<sup>129</sup> - *Ṣaḥīḥ Muslim*. vol. 1, p. 85.

<sup>130</sup> - *Al-Hidāyah*. vol. 1. p. 524

<sup>131</sup>- Anon, *theft*, at <https://www.britannica.com/topic/theft>. (Accessed on 20-1-2018)

- 2) The property was stolen clandestinely, that is, the item was snatched from a safe and protected place (*Hirz*) such as jewellery from the cupboard or a horse from the stable or something that was within physical sight or under security guards.
- 3) It was confirmed either by the confession of the thief or testimony of two persons of reliability.
- 4) The item was possessed by the thief. Therefore, if the thief only transferred the item from its place of safety but did not take possession of it, the penalty would not be applied to him.<sup>132</sup>

Jābir ibn ‘Abdullāh narrated that the Prophet said:

ليس على خائن ولا منتهب ولا مختلس قطع

(The hand of one who steals by cheating, snatching or pick-pocketing should not be amputated.)<sup>133</sup>

This is because they perpetrate these acts in broad public and not in *Hirz* (secured or guarded places.)

**The word *Nakālan* (admonitory punishment) in this case is elaborated as follows:**

The aim of the Sharī‘ah is not to deprive the thief of his hand, but to admonish him and serve him as well as others a lesson until the evil of stealing is rooted out altogether from the society.

This is the *raison d’être* of all the Islāmic penal laws. The same policy applies to the law of equal retaliation (*Qiṣāṣ*) in intentional homicide: “And for you O men of prudence! There are (preservation of) lives in the provision of ‘just retribution’; perhaps you would abstain.” (Q: 2:179)

**The Enforcement of Theft-Penalty During Pre-Islāmic Days**

The law of amputation of the hand was enforced during the pagan days, too.

The author of *Qurṭubī* mentions:

... "أن القطع كان في الجاهلية، وأول من حكم بذلك هو الوليد بن المغيرة، وأقره الإسلام، وكان أول سارق طبق عليه الحد من الرجال الخييار بن

(Walid ibn Mughīrah was the first person in the Dark Ages who amputated the hand of Maliḥ ibn ‘Urwah ibn Khurazā from the Dawbak tribe, who stole treasures of the Ka’bah. Subsequently, that law was formalised separately in Islām by the command of Allāh.)<sup>134</sup>

**The Enforcement of Theft-Penalty in Islām**

<sup>132</sup>- *Al-Hidāyah*. vol. 1, p. 526

<sup>133</sup>- As-Salamī, Muḥammad ibn ‘Īsā. *Sunan At-Tirmīdhī*, 1998, Beirut, Dār al-Gharb al-Islamī. n.d. vol. 4, p. 52. Hereafter referred to as *At-Tirmīdhī*

<sup>134</sup> - *Ahkām al-Qur’ān Qurṭubī*. vol. 6, p. 160. / Qaṭ‘u Yadis Sāriq. *Kitāb Fatāwā Darul Iftā’ Al-Miṣriyyah*. p. 208 at <https://al-maktaba.org>. (Accessed on 22-11-19)

Enforcing of the *Hadd* is mandatory. Here are some cases:

Imām Qurṭubī asserted that the foremost male whose hand was amputated in Islām was Khiyar ibn ‘Adiy ibn Nawfal ibn ‘Abd Manāf, and the foremost female was Murrah bint Sufyān ibn ‘Abd al-Asad from the Makhzūm tribe.

‘Amr ibn Shu‘ayb said the first penalty that was enforced in Islām was on a person who was apprehended for stealing. He was brought before the Prophet along with the witnesses. The Prophet decreed that his hand should be amputated. People surrounded the person until he became the focus of attention. He looked towards the Prophet as if he was contrite for his misdeed, just as the episode bore heavily on the conscience of the Prophet as well.

The Companions said: “O Messenger of Allāh! It seems as if the episode of theft and the decision for amputation have brought discomfort to you?”

The Prophet said: “Yes, but what would prevent me from executing the Law of Allāh when you were the ones that supported the Satan against your brother (by not advising him and admonishing him beforehand).”

The Companions suggested: “Then can we not release him O Messenger of Allāh?”

The Prophet said: “Why did you not release him before bringing him over to me? Be informed that once a case is raised before an Imām, it is no more within his jurisdiction to waive its penalty.”<sup>135</sup>

‘Abdullāh ibn ‘Amr reported that a woman committed theft during the days of the Prophet. People brought her in the presence of the Prophet and filed the complaint against her. Her relatives offered to pay its ransom, but the Prophet ruled that her hand should be amputated. They insisted that they would pay five hundred dinars in ransom, yet the Prophet reiterated that her hand should be amputated. Finally, her right hand was amputated.

Thereafter she asked, هل لي من توبة يا رسول الله قال نعم أنت اليوم من خطيئتك كيوم ولدتك أمك (O Messenger of Allāh! Is there any way my penitence will be granted?)

The Prophet said: “Yes, today you became innocent of your sins just as you were the day your mother begot you.”<sup>136</sup>

‘Alī narrated:

أتي رسول الله صلى الله عليه وسلم برجل قد سرق فأمر فقطع يده، ثم بكى فقلت: لم تبكي قال: وكيف لا أبكي وأمتي تقطع بين أظهركم، قال: يا رسول الله أفلا عفوت عنه؟ قال: ذاك سلطان سوء الذي يعفو عن الحدود، ولكن تعافوا الحدود بينكم

(Once a person, who had stolen something, was summoned to appear before the Prophet. After ordering the Companions to amputate his hand, the Prophet began to weep.

<sup>135</sup> - *Muṣannaf ‘Abd Ar-Razzāq*, vol. 7, p. 313.

<sup>136</sup> - *Musnad Aḥmad ibn Ḥanbal*, vol. 2, p. 177.

I said: “O Messenger of Allāh! Why are you weeping?”

The Prophet replied: “Why should I not weep when a hand of one of my followers will be amputated in your presence?”

I said: “O Messenger of Allāh! Will you then not pardon him?”

The Prophet said: “That person is an evil king who pardons people against the Bounds of Allāh. Yes, you should overlook the penalties among yourselves before raising it with the Imām”)<sup>137</sup>

This is the balanced order of Islām. On the one hand, the Prophet weeps when a crime is brought to his notice and then he even advises his Companions to pardon the criminal as far as possible. But, on the other hand, when the crime is established, the Prophet does not flinch in the least from enacting the Divine Law. The moral of this is that Islām focuses on reformation and not castigation. Its aim is not to punish the creation of Allāh, but to set their ways of life aright.

Safwān ibn Umayyah related: “I was sleeping in the mosque when a person entered and stole the sheet from under my head. I apprehended him and brought him to the Prophet.”

The Prophet ruled that his hand should be amputated.

I submitted: “O Messenger of Allāh! That was not my purpose. I am gifting the sheet to him.”

The Prophet replied: “Why did you not gift it to him before bringing him to me?” Hence, the Prophet had his hand amputated.

Note: Since the gift was offered only after the Sharī ruling was pronounced, it could not be retracted. Prior to the ruling, the case was classified as human rights (*Ḥaqq al-‘Abd*), but after the ruling, it was classified as a tenet of Islām or a Right of Allāh (*Ḥaqq Allāh* or *Ḥadd Allāh*).<sup>138</sup>

‘Abdullāh ibn ‘Amr ibn ‘Āṣ narrated that the Prophet said:

عن عبد الله بن عمرو أن رسول الله صلى الله عليه وسلم قال : تعافوا الحدود فيما بينكم فما بلغني من حد فقد وجب

(Pardon your cases of penalties within yourselves because whichever case [that warrants penalty] is brought to my attention, the enactment of its penalty becomes binding.)<sup>139</sup>

‘Abdur Raḥmān ibn Qāsim related on the authority of Qāsim that a Yemenī person, whose one hand and one leg were amputated, arrived in Madīnah. He alighted at Abū Bakr’s residence and complained that the governor of Yemen had arbitrarily amputated his hand. In the meantime, while at the residence of Abū Bakr, the person engaged himself in worship even at nights. One day Abū Bakr said to him: “By Allāh, your nights did not match

<sup>137</sup> - *Kanz al-‘Ummāl*, vol. 5, p. 548

<sup>138</sup> - *Sunan Abū Dāwūd*. p. 13.

<sup>139</sup> - *Sunan an-Nasāī al-Kubrā*. vol. 4, p. 330.

the nights of thieves.” Anyhow, shortly after that, the necklace of Asmā’ bint Umays (spouse of Abū Bakr) was found missing. People searched for it while this person also joined them searching for it. He even supplicated: “O Allāh! Whoever stole the necklace last night from this noble family, we leave it up to You to apprehend him.” Eventually, the necklace was found by a jeweller. When they asked him from whom he bought it, he mentioned that he bought it from some one-handed person; only to discover that it was the same Yemenī person. After confirmation through the testimony of the jeweller and confession of the person, Abū Bakr had his left hand amputated. Abū Bakr said: “His curse upon himself turned out more injurious to him than his theft.”

It is reported that ‘Umar amputated the hand of Ibn Samurah - the brother of ‘Abdur Raḥmān ibn Samurah - for stealing a necklace.<sup>140</sup>

### **Theft Cases when the Penalty is not Enforced, such as Stealing Out of Desperation.**

Note that from the above rule, food is an exception. If a thief steals food out of desperation, the penalty will not be enforced on him.

Rāfi’ ibn Khadīj narrated that the Prophet said:

لَا قَطْعَ فِي ثَمَرٍ وَلَا كَنْزٍ

(Hands should not be amputated for the theft of fruit and the bud of a date palm.)<sup>141</sup>

‘Umar once said: “During the days of famine the laws of amputation should not be applied (providing that the theft was of basic staple-foods.)”

It was reported that during ‘Umar’s reign some boys were employed by Ḥāṭib ibn Balta‘ah. The boys stole a camel of someone from the Muznah tribe. Upon ‘Umar’s interrogation, when the boys admitted their crime, he ordered their hands to be amputated. But after ‘Umar heard the underlying story, he addressed Ḥāṭib: “I swear by Allāh that I would have amputated their hands had I not learnt that after taking them in your service you had starved them, which compelled them to steal. Now I will redirect a financial penalty on you to bring pain on you.” Then he charged Ḥāṭib with payment of double the price of the camel.<sup>142</sup>

عن جابر بن يزيد الجعفي قال : أتى عمر بن عبد العزيز برجل قد سرق دجاجا , فأراد أن يقطعه , فقال أبو سلمة كان عثمان يقول : لا قطع في طير ؟ فخلى عمر سبيله .وبه يقول أبو حنيفة , وأحمد بن حنبل , وأصحابهما , وإسحاق بن راهويه

(Jābir ibn Yazīd related that a person was summoned to appear before ‘Umar ibn ‘Abd al-‘Azīz for stealing a chicken. The latter almost pronounced a ruling for the amputation of

<sup>140</sup> -Al-Qurṭubī, Abū ‘Abdullāh Muḥammad ibn Aḥmad Al-Khajrajī. *Al-Jāmi’ li Ahkām al-Qur’ān*. 2003, Riyadh. Dār Ālam al-Kutub. Hereafter referred to as *Tafsīr Al-Qurṭubī*.

<sup>141</sup>-Abū Dāwūd, vol. 4, p. 237

<sup>142</sup>- Muṣannaf ‘Abdar-Razzāq. 18799. Muṭṭā. p. 1321

the person's hand when Abū Salmah intervened and said that 'Uthmān ibn 'Affān said: "The hand should not be amputated in respect of birds." Then 'Umar ibn 'Abd al-'Azīz released the person.

This view is held by the Imāms Abū Ḥanīfah, Aḥmad and Ishāq ibn Rahwayh as well.)<sup>143</sup>

Ibn 'Abbās related that a person offered a slave to the *Bayt al-Māl* (public exchequer) as his Zakāh payment. The slave stole something from the *Bayt al-Māl*. When the case was reported to the Prophet, he spared his hand from amputation, saying: "One property of Allāh stole from another property of Allāh."

'Alī said that if a person steals from the *Bayt al-Māl*, his hand should not be amputated.<sup>144</sup>

A person's hand will not be amputated if he stole from a property in which he was a shareholder or from the public treasury (*Bayt al-Māl*), seeing that he was one of its beneficiaries.

If a creditor stole from the debtor to the extent of his credit, his hand should not be amputated. It would be treated as if he recovered his own rights.

If parents steal the wealth of their children, their hands should not be amputated because the Prophet said to a person's son: "You as well as your property belong to your father."<sup>145</sup>

Al-Marghīnānī mentions in his *Al-Hidāyah*:

ولا قطع علي الضيف اذا سرق ممن اضافه لان البيت لم يبق حرزا في حقه لكونه ماذونا في دخوله ولانه بمنزلة اهل الدار فيكون فعله خيانة لا سرقة

(If a guest steals an item from the house of the host, his hand will not be amputated. This is because the item was exposed and was no longer under security (*Hīrz*) seeing that he was permitted to enter, hence became as if a member of the family. His act will be classified as disloyalty rather than theft.)<sup>146</sup>

If a *Maḥram* relative (close relative with whom marriage is not permissible) steals from his *Maḥram*, then according to Imām Abū Ḥanīfah his hand should not be amputated, but according to the other three Imāms, it should be amputated.

### The Minimum value (*Nisāb*) of the Stolen item for the Execution of the Penalty

<sup>143</sup>- *Al-Mausū'ah al-Fiqhiyyah al-Kubrā. Al-Maḥallībil Āthār w Sharḥ al-Mujallā*. [http://madrasato-mohammed.com/mawsoa%20fiqhia/pg\\_034\\_0062.htm](http://madrasato-mohammed.com/mawsoa%20fiqhia/pg_034_0062.htm). (Accessed on 8-5-2019)

<sup>144</sup> - *AL-Bayhaqī*. 1989.n.d.

<sup>145</sup>- *Al-Bukhārī*, vol. 3, p. 1425.

<sup>146</sup> - *Al-Hidāyah*. vol. 1, p. 531

The above verse prescribes the amputation of the hand, but does not specify the value of the item for which the hand should be amputated nor which hand should be amputated at the first instance of the theft or from where the hand should be amputated. These details are available in the *Aḥādīth* of the Prophet.

أن يكون سرق من حرز ، وأن يكون نِصَابًا ، وهو ربع دينار ، أو ثلاثة دراهم ، أو ما يساويهما عند مالك والشافعي ، وقال أبو حنيفة : لا قطع في أقل من عشرة دراهم ،

(Among the conditions for the amputation of the hand is that the person stole the object from a secured place and its value was equal to a *Nisāb* (minimum amount of property liable to payment of Zakāh.), which according to Imām Shāfi'ī and Imām Mālik was a quarter dinar or three dirhams, and according to Imām Abū Ḥanīfah ten dirhams.)<sup>147</sup>

Note: Ten dirhams are equivalent to one dinar.

‘Ā’ishah narrated that the Prophet said: “The hand of a thief should not be amputated unless the stolen item valued a quarter dinar or more.”<sup>148</sup>

‘Urwah reported from his father:

لم تكن يد السارق تقطع على عهد رسول الله صلى الله عليه وسلم في الشيء التافه ولم تكن تقطع على عهد رسول الله صلى الله عليه وسلم في أقل من ثمن مجن أو ترس

(During the days of the Prophet, the hand of a thief was not amputated for a trivial item nor was it amputated for anything that valued less than a shield or armour.)<sup>149</sup>

Therefore, if a band of thieves steal an item, but when they distribute the item among themselves, each of them receives in monetary terms less than a punishable amount - one dinar - then according to Imām Abū Ḥanīfah and Imām Shāfi'ī, none of their hands should be amputated.

Al-Marghīnānī states in his *Al-Hidāyah*:

و ان اخذوا مال مسلم او ذمي و المأخوذ اذا قسم علي جماعتهم اصاب كل واحد منهم عشرة دراهم فصاعدا قطع الامام ايديهم ، و شرط كمال النصاب

(If a band of robbers plundered the property of a muslim or Dhimmī, and each of them received ten or more dirhams, the Imām should amputate their hands. In sum, a full Niṣāb is conditional.)<sup>150</sup>

<sup>147</sup>- *Al-Baḥr Al-Madīd*. vol. 2, p. 245.

<sup>148</sup>- *Ad-Durr Al-Manthūr*. vol. 3, p. 73.

<sup>149</sup> - Ibn Rahwayh, *Al-Ḥanẓalī Is'ḥāq ibn Ibrāhīm ibn Mukhallad. Musnad Ibn Rahwayh*.1991, Madīnah, Maktabat Al-Īmān, vol. 2, p. 232.

<sup>150</sup> - *Al-Hidāyah*. vol. 1, p. 540

### The Plurality of Accomplices and Direct Complicity

‘Plurality of Accomplices’ means that several individuals join a banded leader to support him in his criminal moves. These individuals will be classified as accomplices only if the agreement with the leader was reached before the commissioning of the crime.

‘Direct complicity’, on the other hand, is if the arrangement was not made beforehand. In this case, the individuals will be treated by law as direct offenders, hence, liable for the crime in accordance with the role they played.

### Method of Amputation and Nursing of the Hand.

After the hand or leg of the thief is amputated, it should be branded to prevent fatal bleeding. According to Imām Shāfi‘ī and Imām Aḥmad, branding of the hand or leg after amputation is *Mustaḥab* (desirable). They based the view on the following Ḥadīth.

### Theft Established Through Confession

Muḥammad ibn ‘Abdur Raḥmān ibn Thowbān narrated:

أُتي النبي صلى الله عليه وسلم بسارق سرق شملة (1) ، فقال : « سرقت ؟ ما أخالك فعلت » فقال : بلى قد فعلت فقال : « اذهبوا به ، فاقطعوه ، ثم أحسموه ، ثم انتوني به

(A person who stole a sheet was brought to Rasūlullāh. Rasūlullāh asked: “Did you steal? I do not assume you stole.” He said: “Yes, I did steal.” Rasūlullāh ruled: “Take him and amputate his hand. Then after branding it bringing him to me.”

When he was brought back, the Prophet said to him: “Will you not offer repentance to Allāh?”

He said: “Yes I repent to Allāh.”

The Prophet prayed: “O Allāh! Relent upon him just as he repented to You.”<sup>151</sup>

### Comments of Critics, such as the Orientalists, against the Islāmic Law of Amputation

We now respond to some of the questions asked about the law of amputation.

Question: Why are the hands and feet of a thief amputated?

The hands are like the two wings of a bird. They support a person to run at a fast speed, just as a bird flies with its wings. The bird’s flight is hampered even if one wing is clipped off. Likewise, a thief commits theft stealthily and then runs at a speed with the brisk movements of his hands and legs. But after the amputation of his hand, his running speed

<sup>151</sup> - *As-Sunan al-Kubrā lil Bayhaqī*. Vol. 7, p. 206

slackens, thus either apprehended or the theft is exposed. Then even after suffering the first penalty, if he refuses to take heed and persists on repeating the crime, the law of the Sharī'ah will weaken him further by amputating his feet.

Question: Why it is that only the hand is amputated and not the other organs when the theft is committed by the joint effort of all the organs?

A straight forward answer is that the purpose of amputation is reformation and not castigation.

Cutting off other organs will paralyse the culprit totally, which is not the purpose of the penalty. If the eyes are gauged for looking at evil, ears cut off for listening to evil and tongue pulled out for speaking evil, then how will the perpetrators survive without those vital organs? The object is to uproot the crimes and not to uproot the criminal.

The amputation of the thief's organs on the alternate sides explains that the object is not to paralyse him altogether.

'Abdullāh ibn Salmah related that once a thief was brought to 'Alī. 'Alī had the person's right hand amputated. When the same person committed theft for a second time, 'Alī had his left leg amputated. But when the person was summoned the third time for theft, 'Alī exclaimed: "If I amputated his left hand as well, how would he eat and cleanse himself during the call of nature? Likewise, if I were to cut off his right leg at the fourth occasion, how would he walk? Really I feel ashamed before Allāh to do that." Hence, he had the person beaten and imprisoned permanently.<sup>152</sup>

In one instance, a thief, whose right hand and left leg were already amputated on previous accounts, was brought forward to 'Alī for stealing for the third time. 'Alī sought counsel from the Companions of the Prophet about what penalty would they suggest against the person. They ruled that his left hand should be amputated. 'Alī said: "In that case, it would be as if I killed him altogether when he was not guilty of homicide. Besides, how would he eat, perform ablution and take a bath against seminal impurity?" Hence, 'Alī had him imprisoned for a few days and then sought a second opinion on his matter from the Companions. This time again the Companions offered the same opinion and 'Alī advanced the same reasoning against it. Eventually, he had him flogged rigidly and then released.

Question: Critics on the amputation of the hand of the thief mention that this law is not in consonance with the laws of criminology of this progressive age. They also renounce it as being too brutal for the modern age as it will increase the number of maimed and unemployed. They say that partial *Qīṣāṣ* increases the number of maimed.

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<sup>152</sup> -Al-Bayhaqī, Abū Bakr Aḥmad ibn Husayn ibn 'Alī. *As Sunan Al-Kubrā li Bayhaqī*. 1989, Al-Madīnah. Maktabah ad-Dār. Hereafter referred to as *Al-Bayhaqī*.

Answer: But we may ask what is meant by progressiveness or how do they define it?

- Is it eradicating the menace of theft or promoting it?
- Is it encouraging the thieves to continue threatening the lives and properties of the people or discouraging them?
- Is it rewarding the thieves and punishing the innocent or vice versa?
- Will it be wiser for the state to have sympathy for the culprit, exempt him from an admonitory penalty and let him continue victimizing the people or penalize him to spare the lives of the billions? Frequently it is noticed that theft leads to the murder of the victim.

Muslim authorities mention that Islāmic penalties and *Qiṣāṣ* are in the best interest of society. This is borne out by the following facts:

- Is it not that the innocent people are suffering while the thieves are escaping without restraint?
- Most of the times, to avoid imprisonment these thieves even resort to killing.
- As for the number of maimed people, it is minimal in the countries where the law of amputation is enforced in comparison to those countries where it is not enforced.

Conversely, man-made laws which are apologetic and subject to the amendment are looked upon as progressive.

The critics also argue:

- 1) “Whenever anyone mentions the Islamic law of theft, a vision of the severing of human hands almost automatically comes to mind. It is a distressing vision, in fact, it is designed to be distressing, as a permanent mark of the body of the guilty party ...  
We judge the policy as harsh and in no way fitting the crime. The fact, that mutilation, maiming and torturing a thousand years ago may give us a reason not to judge the practice as severely as we might be inclined.”
- 2) “Abū A’la al Ma’arrī - known for his deviation from the tenets of Islām - composed a poem against the amputation of the thief’s hand:  
“How could a hand be amputated for the theft of something worth a miserly quarter of a dinar when the *diyyah* (blood wit) of the hand is five hundred dinars? We cannot but keep quiet and seek refuge with Lord from the punishment of Hell.”<sup>153</sup>

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<sup>153</sup>-Ṭāhir Maḥmūd, *Criminal Law in Islam and the Muslim World*. 2012, New Delhi, Institute of Objective Studies. p. 100.

Answer:

Qāḍī ‘Abdul Wahhāb Mālikī answers:

انها لما كانت امينة كانت ثمينة ، فلما خانت هانت

(So long as the hand was trustworthy, it had a price tag on it; but when the hand lost its trust, it lost its value, too.)<sup>154</sup>

As long as the hand retained its trust and credibility, it was priceless. But no sooner did it soil itself through theft than it lost its value. Now it is not worth ten dirhams, too.

The following details are noteworthy:

1) ‘Allāmah Shabbīr Aḥmad ‘Uthmānī says:

“Amputation of the hand of a thief is not in lieu of the item; it is for the act of the theft to caution the criminals and root out the menace of crimes. The advocates of modernism, who brand the law of amputation as barbaric, should ask themselves that if the Islāmic penalty is so much intolerable to them, then to what extent did their imprisonment and mild punishments of the thieves uproot or in the least scale down theft from the modern societies?”<sup>155</sup>

In place of *Qiṣāṣ* (capital punishment), criminologists in the modern age suggested swift and efficient means of execution through electrocution. But when they found it unworkable because it was changing the colour of the body, they rescinded the law. Hence, modern laws are still passing through a trial and error stage.

2) It is said that ‘honesty’ is the most valuable quality in a person, whereas ‘treachery’ is the cheapest thing in him.

3) Judge ‘Abdul Qadir Oudah mentions in his *Criminal Law of Islam*:

“Punishment inflicted on the thief by the Shariah is the best in the world. Just as it succeeded in preventing crime in the past, it does the same now; it has transformed a chaotic society into a responsible, secure and peaceful society.”<sup>156</sup>

## Conclusion

Theft is such a nuisance to the community that it leaves no one to rest in peace. No one knows whether he is earning for himself or for the thieves, especially when theft and cyber stalking have become commonplace in modern times. Read the following:

“Cybercrime in its many forms (e.g., online identity theft, financial fraud, stalking, bullying, hacking, email spoofing, information piracy and forgery and intellectual

<sup>154</sup>- ‘Abd ar-Raḥmān. *Fatḥar-Rabbānī ‘alā Bulūgh al-Amānī*. n.d. Beirut, DārIḥyā’ at-Turāth al-Arabī, vol. 16, p. 110.

<sup>155</sup>- ‘Uthmānī, Maulana Shabbīr Aḥmad. *Tafsīr ‘Uthmānī*. 1989, Madīnah, Malik Fahad printing complex. p.150 .

<sup>156</sup>-*Criminal Law of Islam*. vol. 1, p. 29.

property crime) can, at best, wreak havoc in victims' lives through major inconvenience and annoyance.”<sup>157</sup>

These days, not only are people’s properties unsafe, but even their dignities are at risk. Indicting people and laying false charges against them have become common place. Most people go about making statements by hearsay without verifying the truth. They seem to be taking pleasure in the disrepute of others. Indeed, it is a lamentable situation of our generation that the courts of justice are flooded with more false cases than true cases. Therefore, in the forthcoming pages, I wish to make further input on this topic known as *Hadd al-Qadhaf* in the penal law of Islām.

### **(3) *Hadd al-Qadhaf* (Penalty for calumny)**

“Those who launch a charge (of adultery) against chaste women, and then they do not produce four witnesses; you should flog them eighty lashes and never accept their testimony. Such are the wicked ones.” (Q: 24:4)

#### **Introduction**

Dignity is a gift on behalf of our Creator on human beings. Every person wishes to live with honour.

A person would strive to maintain his/her reputation even if it means staking his/her life. This is why to make derogatory remarks about a person or to level allegations against anyone is scandalous. False accusation is a serious matter in Islām. It can incite enmity and internecine fighting among the people. Therefore, it is essential to ascertain the truth before concluding and making fallacious remarks about someone. And even if the news heard from someone is true, there is a dignified way of responding to it.

In connection with this topic, I provide a commentary of verse Q: 24:4 by first defining some terms.

#### **Human Dignity and its Definition:**

“An individual or group's sense of self-respect and self-worth, physical and psychological integrity and empowerment. ... "Human dignity is inherent to every human being, inalienable and independent of the state.”<sup>158</sup>

“Everyone has inherent dignity and the right to have their dignity respected and protected. Dignity is a concept which talks about a person's intrinsic worth - a value of all

<sup>157</sup>- Anon, *identity-theft-fraud-cybercrime*, at <https://staysafeonline.org/stay-safe-online/identity-theft-fraud-cybercrime/> (Accessed on 20-12-2018)

<sup>158</sup>- Anon, *Duhaime.org*, at [www.duhaime.org](http://www.duhaime.org) › Legal Dictionary. n.d. (Accessed on 12-11-2018)

people, which they are born with as human beings. Dignity is the right of a person that is to be valued and respected for their own sake and to be treated ethically. It is of significance in morality, ethics, law and politics as an extension of the Enlightenment-era concepts of inherent, inalienable rights.”<sup>159</sup>

### Calumny

“The making of false and defamatory statements about someone in order to damage their reputation; slander.”<sup>160</sup>

“To tell lies about another person is called calumny or slander. ... It is an internal act of the mind by which one person attributes evil actions or motives to another.”<sup>161</sup>

### Qadhaf

*Qadhaf* means to impute adultery to a chaste woman or to level a false charge, defamation or unfounded slander against her dignity. If the slanderer does not produce four witnesses to substantiate his charge, and he is a free person (not a slave), he will be liable to a penalty of eighty lashes, but if he is a slave, then forty lashes. If the accused is a *Ghayr-Muḥṣin* - a slave for instance - then the accuser will suffer *Ta'zīr* (legal penalty) according to what the judge deems fit.

Al-Marghīnānī states in his *Al-Hidāyah*:

ومن قال لامرأته يا زانية فقالت ر بل انت حدث المرأة

(If a husband says to his spouse: “O you adulteress!” Then she says: “In fact you are such.” The penalty of accusation will be inflicted on her.)<sup>162</sup>

Imām Mālik, and in one report even Imām Aḥmad, maintain that the penalty will be enforced on a person even if he accuses the woman through gesture.

But Imām Abū Ḥanīfah and Imām Shāfi'ī hold that penalty will not be enforced on such a person.

الحنفية، والشافعية في أحد آرائهم قالوا: لا يجب الحد في التعريض وإن نوى القذف المالكية قالوا: يجب إقامة الحد في التعريض مطلقاً، نوى به القذف، أو لم يقو، وذلك لأنه لا يخلو من قصد احد بذلك في نفسه، فنأخذ له حقه منه

(According to one view of Imām Abū Ḥanīfah and Imām Mālik is that a penalty will not be meted out on a husband who slanders his wife with gestures. However, Imām Aḥmad is of the view that penalty will be inflicted on him at all cost, whether he had intended to accuse

<sup>159</sup> - Anon, *Duhaime.org*, at [www.duhaime.org](http://www.duhaime.org) › Legal Dictionary. (Accessed on 12-11-2018)

<sup>160</sup> - Anon. *definition/calumny*, at <https://en.oxforddictionaries.com/definition/calumny>- (Accessed on 10-12-2018)

<sup>161</sup> -Anon, *calumny-and-detraction*, at <https://www.catholiceducation.org/en/culture/catholic.../calumny-and-detraction.html>. 2014. (Accessed on 10-12-2018)

<sup>162</sup> - <sup>162</sup> - *Al-Hidāyah*. vol. 1. p. 520

her or not because it is certain that he must have focussed his intention to someone. Hence, we may conclude that his wife could have been the only target.)<sup>163</sup>

If a woman was guilty of adultery in the past, and then she repented and made amends, yet someone accused her of committing adultery, the penalty of calumny - eighty lashes – would not be inflicted on the accuser, because his statement in relation to her past history was true.

Anyhow, the judge should mete out some other penalty (according to his discretion) to the accuser.

If the accused woman acknowledges her guilt of adultery, or if the accuser produces four witnesses to attest his charge, the accuser will be spared of the penalty.

### Witnesses

The verse under discussion confirms that the slanderer should produce four witnesses to substantiate his statement.

The Qāḍī should assemble all four witnesses in one gathering and not in separate places. Therefore, if the accuser does produce four witnesses - but in separate gatherings - then according to Imām Abū Ḥanīfah neither will the woman be penalised for adultery, because the witnesses were not gathered in one place, nor will the accuser be penalised for calumny, because he did produce the required number of witnesses.

[في مجلس واحد] هو مجلس الحكم والقضاء، فلا بد في الشهادة أن تكون في مجلس القضاء، وعلى هذا؛ إذا شهد الشهود الأربعة فإنهم يأتون القاضي في مجلسه ويشهدون هذه الشهادة، قالوا: لأن الأصل أن يكون في مجلس واحد، فلو شهد ثلاثة في مجلس، أو جاء أربعة فشهد ثلاثة منهم، وامتنع الرابع؛ فحينئذ يقام عليهم حد القذف، وتسقط شهادتهم؛ لأنها لم تستتم العدد المعتبر، لا بد أن يكونوا أربعة،

(The testimony has to be in one assembly, which is the assembly of rule and judgement. Accordingly, if they are four witnesses, then they should be present in the court of the Qāḍī to testify. The jurists mention that in principle they should be in one assembly. So, if three of them testify in a given place, or four did arrive, but only three of them testified, and the fourth abstained, penalty will be inflicted on all four, as much as they will lose their credibility in future for not meeting the required number of four.)<sup>164</sup>

If the witnesses were less than four, their testimony would be rejected, and eighty lashes would be inflicted on them because when they could not produce the full number of

<sup>163</sup> - *Al-Fiqh Alal Madhāhib al-Arba'* Chapter Ḥadd al-Qadhaf. vol. 5, p. 191. *Kulliyāt Fiqh al-Ḥanbalī*. at <http://www.islamilimlari.com>. (Accessed on 22-11-19)

<sup>164</sup>- Shanqīṭī. *Sharḥ Zād Al-Mustaqnī'*. Bāb Ḥadd az-Zina. at <http://www.islamilimlari.com/Kulliyat/Fkh/4Hanbeli>. (Accessed on 24-11-19)

witnesses, it was appropriate of them not to testify, knowing that their testimony would be rebuffed by the Qāḍī. Yet, when they took up the courage to testify, it would be assumed that they had plotted jointly to defame the accused. Now the charges would be directed to them.

The witnesses should be such people whose testimony is acknowledged in the Sharī'ah. The testimony of the blind, those who were penalised in the past for calumny and the slaves, is not recognised. Their testimony will be treated as insufficient to establish the adultery of the accused. Conversely, a penalty for calumny will be inflicted on them for not meeting the requirements of a witness.

If the slanderer could not produce four witnesses to substantiate his charge, he would be inflicted eighty lashes, on condition that the accused made a counter-claim against him by the Qāḍī. If the accused did not claim for the penalty on the slanderer, the penalty would be waived.

Note: There are five conditions for a person to be a *Muḥṣin* (chaste person): He should be a (1) Muslim (2) sane (3) adult (4) free person and (5) was never charged for adultery.

“The ‘Ulamā’ differ about whether the penalty of defamation is one of the Rights of Allah or rights of man. Imām Abū Ḥanīfah favours the former view, while Imām Mālik and Imām Shāfi’ī favour the latter view. The outcome of this difference will be as follows: If the penalty of defamation is among the ‘Rights of Allāh’, then:

- The Qāḍī will enforce the penalty on the defamer even if the defamed did not make counter-claim for it.
- Penitence will be to the advantage of the defamer.
- The penalty will be halved on a slave.

اختلف الفقهاء في تكييف حد القذف، هل هو حق لله تعالى أو حق للعباد  
قال الحنفية: إن حد القذف فيه حقان: حق للعبد، وحق لله تعالى، إلا أن حق الله تعالى فيه غالب؛ لأن القذف جريمة تمس الأعراض، وفي  
إقامة الحد على القاذف تتحقق مصلحة عامة: ودفع الفساد عن الناس.  
وقال الشافعية والحنابلة: إن حد القذف حق خالص للآدمي المقذوف؛ لأن القذف جنائية على عرض المقذوف، فكان البدل (وهو العقاب)  
حقه، كالقصاص.

(The jurists have differed in their description of Hadd of slander, whether it is among the Rights of Allāh of rights of man. The Ḥanafī view is that it comprises of both, only that the Rights of Allah predominates because it is a crime that dents people’s reputation. By establishing the penalty, the general public’s rights are guarded and it averts mischief from the people. However, the Imāms Shāfi’ī and Ḥanbalī mention that this Ḥadd is specifically the rights of man because it is an offense against the reputation of people. By penalising

the offender, justification is restored to the victim similar to capital punishment on the murderer.)<sup>165</sup>

But if the penalty on defamation is among the ‘rights of man’, then:

- The Qāḍī will not enforce the penalty until the defamed makes a counter-claim for it.
- If the defamed person pardons him, the penalty will be waived.
- If the defamed person does not pardon the defamer, penitence will not help in waiving the penalty.”<sup>166</sup>

### Number of Lashes

If the slanderer is a free person, but is unable to provide four witnesses to substantiate the slander, then eighty lashes will be inflicted on him. Nevertheless, if he is a slave, then only forty lashes will be inflicted on him. This is through analogy with the penalty for adultery.

“... and then if the slave women commit grave lewdness, then the penalty on them will be half the penalty that is on free women.” (Q: 4:25)

‘Abdullāh ibn ‘Āmir ibn Rab’ī reported that he found Abū Bakr, ‘Umar, ‘Uthmān and their successors inflicting forty lashes on slaves for defaming people.

### ***“and never accept their testimony.”***

The testimony of a person, who is flogged for accusing someone, will not be valid in general dealings, such as in commerce. Being a convict, he loses his credibility as much as his testimony will remain disqualified. However, in religious issues, such as the sighting of the crescent or narrating of *Ḥadīth*, his testimony will be accepted if he repents.

### Imām Abū Ḥanīfah’s View on Penalty after Repentance

Imām Abū Ḥanīfah says the advantage of repenting is that Allāh pardons the guilt of the defamer and erases the stigma of wickedness from him.

As for the penalty, it will still be enforced because it (penalty) is instituted against human rights. The penalty will help in disciplining the defamer for attempting to accuse a chaste woman, stigmatising her personality and bringing disrepute to her in public.

### Conclusion

From the above discussion, it has come to light how significant human dignity is and how important it is to address people honourably, avoid slandering them or using offensive

<sup>165</sup> - Zuhaylī. *Al-Fiḡh al-Islāmī w Adillatuhū*. at <http://www.islamilimleri.com> (Accessed on 22-11-19)

<sup>166</sup>- Qurṭubī, Abū ‘Abd Allāh Shams ad-dīn. *Al-Jāmi’ li Ahkām al-Qur’ān*. 2003, Riyadh, Dār ‘Ālam al-Kutub, vol. 12, p. 171

language against them. Had that not been of any importance, Islām would not have set such stringent rules against it.

Of course, the same principle should be applied to self-respect and self-integrity. Human beings are the nerve centre of the world because they are the only creation that are endowed with intellect and reason through which they harness the resources of nature and interact with the people.

This is why, they are expected to think intelligently and apply their minds judiciously; walk aright and lead others aright and; behave righteously and guide others to righteousness.

But when they take to drunkenness, they lose their leadership. They waver from the correct path and become victims of voluntary insanity.

In this connection, I intend to discuss under the caption of *Ḥadd Shurb al-Khamr* the topic of liquor and its concomitant dangers on the consumer and society.

#### **(4) Ḥadd Shurb al-Khamr (Penalty for consuming liquor)**

“O you who believe! Indeed, intoxicants, gambling, idols and divination by arrows, are sheer filth - from the handiwork of Satan. Therefore, abstain from it; perhaps you would prosper.” (Q: 5:90)

#### **Introduction**

The effect of every person’s activity and commitment to life is dependent on his/her sobriety. As long as the person is sober, his/her thinking power is matured, thus discussion and promise reliable. But when the person is inebriated, he/she is unable to speak wisely or even make wise moves in life. Indeed, liquor is the key to the downfall of the human personality. The following study throws light on this issue in-depth.

#### **Liquor and its Literal Meaning**

Liquor is called *Khamr* because it obscures the mind.

*The word Khamr* is from the root *Khimār* (downy). Liquor obscures and covers the intelligence of a person just as a downy covers the head and face of a woman.

Anas ibn Mālik says liquor is called *Khamr* because people store it in barrels until it ferments.<sup>167</sup>

### Liquor Banned in Stages

To loosen the knot of the old age addiction of liquor that was rooted in the Arabs for centuries, Allāh revealed several commands in stages.

First, it was banned after the Battle of Banu Naḍīr in Rabi' al-Awwal 4 A.H. (March, 625 CE.) when the verse Q: 2:219 was revealed.

Then it was banned after the Battle of *Aḥzāb* in Dhul Qa'dah, 6 A.H. (March, 627 CE when the verses Q: 5:90,91 were revealed.

### First Stage

Baghawī said the first verse that was revealed concerning liquor was “And of the fruit of date palms and grapevines, you prepare intoxicants and wholesome nourishment.” (Q: 16:67) This verse was revealed in Makkah even before liquor was declared unlawful. But in it, Allāh merely recounted to man His favours of dates and grapes, which the people used to squeeze to prepare wine. Neither was a ruling concerning its lawfulness or unlawfulness pronounced nor did the word رزقا حسنا (and wholesome nourishment) allude to it.

### Second Stage: Prohibition from Utilizing Four Types of Vessels

This prohibition was a preventive measure to develop abhorrence of liquor in those who consumed it.

Ibn 'Abbās narrated a Ḥadīth:

ونهاهم رسول الله صلى الله عليه وسلم عن اربع عن الحنتم والدباء و النقيير والمزفت

(The Prophet prohibited the deputation of 'Abd al-Qays from using the following four types of vessels:

- 1) حنتم: This was an earthen pot that was coated with a greenish paste or a substance that helped in stimulating the strength of the alcoholic beverage.
- 2) والدباء : This was marrow. After removing the core from it, the Arabs filled it with date-juice to stimulate fermentation.
- 3) النقيير : This was timber or roots of date-palms. After scraping out the inner part of palm timber, the Arabs shaped it into a bowl and then soaked dates in it. This helped in speeding up fermentation of the date-juice.

<sup>167</sup> -Ath-Tha'ālabī Al-Jazāirī, 'Abd ar-Raḥmān ibn Makhlūf. *Al-Jawāhir al-Hisān fi Tafsīr al-Qur'ān*. 1997, Beirut, Dār Turāth al-'Arabī. Beirut. v. I, p. 229

- 4) والمزفت : This was a pot, which the Arabs coated with gild or enamel and then fermented their juices in it.<sup>168</sup>

### Third Stage

Upon arrival in Madīnah, the Prophet found the Madīnites addicted to wine and gambling. When some Companions asked the Prophet the ruling on the two habits, the following verse was revealed:

“They ask you regarding wine (intoxicants) and gambling. Say, ‘There are factors of major sins in both, and there are certain advantages, too, for men. And the degree of sin in the two exceeds their advantages’.” (Q: 2:219)

Everything in the world has its advantages and disadvantage. It is for the individuals to weigh the situation and see which of the two factors will be consequently favourable and which one unfavourable to him. This weighing should be done on the scales of finance, ethics and religion. Once people realise that the disadvantages outweigh the advantages, it becomes easy for them to decide the way forward.

This verse foreshadowed the final prohibition. It is reported that already at this early stage of Divine Revelation, some Muslims cut down on their daily consumption of liquor and others discarded it from their lives altogether.

### Fourth Stage

(a) Suddī says that even after the revelation of the verse “There are factors of major sins in both ...,” some Companions continued consuming liquor on the grounds that it was not banned outright yet. One day, ‘Abd ar-Raḥmān ibn ‘Auf invited few Companions for a meal at his residence; among them was ‘Alī ibn ‘Abī Ṭālib. ‘Abd ar-Raḥmān served them with food and liquor. After meals, all of them proceeded for the evening prayer (*Maghrib Ṣalāh*), and one of them was requested to lead the prayers.

In Ṣalāh, instead of reading ما تعبدون لا اعبد (I do not worship the deity which you worship) the Imām read اعبد ما تعبدون (I worship the deity which you worship).

The Imām made this error owing to the influence of liquor on him. This is when the following verse was revealed: “O you who believe! Do not draw close to Salāh while you are under the influence of liquor until you start grasping what you utter.” (Q: 4:43)<sup>169</sup>

<sup>168</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 1, p. 287.

<sup>169</sup> - At-Ṭabarī, Muḥammad ibn Jarīr Abū Ja‘far. *Jāmi‘i al-Bayān fi Ta‘wīl al-Qur‘ān*. 2000, Madīnah. Majm‘a al Malik Fahad., vol. 4, p. 334. Hereafter referred to as *Tafsīr At-Ṭabarī*.

Some Companions reflected that if liquor could interrupt their Salāh, certainly it could not be a wholesome drink; therefore, from that day onwards they shunned it in total. Others continued drinking while being mindful of the Ṣalāh times.

### **Fifth and Final Stage on the Categorical Banning of Liquor**

‘Umar had an acute loathing for liquor. He invoked Allāh repeatedly:

اللهم بين لنا في الخمر بيانًا شافيًا، فإنها تذهب بالعقل والمال!

(O Allāh! Reveal to us a definite directive in respect of liquor. Liquor is detrimental to our intelligence and wealth.)<sup>170</sup>

‘Utbān ibn Mālīk invited some Companions for a meal, among whom was Sa’d ibn Abi Waqqās. ‘Utbān roasted the head of a camel and dished it out for them. After partaking of it, the guests consumed liquor. While under the influence of liquor, they held a session in which each person sang poetry in praise of his ancestors and even criticized one another. Sa’d read out an ode reviling the Ansār and eulogizing his own clan. One of the Anṣār was offended. He grabbed the jaw of a camel and wounded Sa’d seriously. Sa’d forthwith repaired to the Prophet and complained of the Anṣārī. Here again ‘Umar intervened and cried out: “O Allāh! Reveal to us a precise ruling on the issue of liquor.”<sup>171</sup>

Eventually, several days after the Battle of Aḥzāb the following verse was revealed “O you who believe! Indeed, intoxicants and gambling and idols and divination by arrows, are sheer filth, from the handwork of the Satan; therefore, abstain from it.” (Q: 5:90)<sup>172</sup>

When ‘Umar was called and the verse in question was read out to him up to the imperative: “... therefore, abstain from it,” he responded instantly, saying: انتهينا انتهينا (We have abstained; we have abstained).

### **Comments on its Descriptor (*Rijs/filth*)**

The Qur’ān refers to this in other verses, too:

“Carrion or running blood or swine flesh - for undoubtedly it is *Rijs* (filth, impure).” (Q: 6:145)

“Now keep away from the *Rijs* (defilement) of the idols.” (Q: 22:30)

Abū Bakr Jaṣṣāṣ said that Allāh named liquor and gambling *Rijs* (filth) and then commanded the Believers to abstain from it. This explains how loathsome these habits are.<sup>173</sup>

<sup>170</sup> - *At-Ṭabarī*. vol. 10, p. 567.

<sup>171</sup> - *Al-Baghawī*. vol. 1, p. 249.

<sup>172</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 2, p. 351.

<sup>173</sup> - Jaṣṣāṣ. Abū Bakr. *Aḥkām al-Qur’ān*. vol. 2, p. 3

والرجس في كلام العرب كل مستقذر تعافه النفس رجسٌ - قَدَّرَ أَوْ نَجَسَ أَوْ حَرَّمَ ، ويؤيده أنه صلى الله عليه وسلم أمر بإراقة الخمر فلو كانت فيها منفعة أخرى لبينها، كما بين جواز الانتفاع بجلود الميتة، ولما أراقها.

(*Rijs* among the Arabs are all such things which people abhor. It translates as filth, impure or unlawful. The filth of liquor is confirmed by the fact that Rasūlullāh commanded us to spill it. Had there been any benefit in it, he would have mentioned it, as he did about the permissibility of utilising the skin of carrion.)<sup>174</sup>

الرجس: المستقذر حساً كان أو معنى، إذ المحرمات كلها خبيثة وإن لم تكن مستقذرة.

(*Rijs* is something that is abhorred by body and mind because everything unlawful is impure even if it is not abhorred.)

**Lesser quantity, such as one drop or few drops, is unlawful even if it may not inebriate.**

This is to eliminate the consumption of liquor altogether. A single drop of liquor of today can lead a person to become a habitual drunkard of tomorrow, just as a puff of cigarette of today can lead a person to become a chain smoker or drug addict of tomorrow.

Jābir ibn ‘Abdullāh reported that the Prophet said: ما أسكر كثيره فقليله حرام (Whichever drink intoxicates in a larger quantity its lesser quantity, too, is unlawful.)<sup>175</sup>

### Liquor Sale Banned

‘Abdur Rahmān ibn Wa‘lah related that he enquired from Ibn ‘Abbās about the sale of liquor, whether it was permissible or not. He replied that in the tribe of Thaḳīf or Daws there was a friend of the Prophet. On the Day of the Conquest, he came to the Prophet with a leather bag containing liquor and offered it to the Prophet as a gift.

The Prophet said: “Are you not aware that Allāh has declared liquor *Harām*?”

The person turned towards his slave and ordered him to go and sell it.

The Prophet asked him: “What did you instruct him to do?”

He said: “I instructed him to sell it.”

The Prophet said: “The One Who has declared its consumption *Harām* has also declared its sale *Harām*.”<sup>176</sup>

### Overwhelming Response to the Ban on Liquor

Upon this final revelation, the rest of the Muslim population spilt their entire leftover. The streets of Madīnah were found flowing with liquor, so much that whenever it rained its

<sup>174</sup> - *Aḍwā al-Bayān fi Iḍā’ al-Qur’ān bil Qur’ān*. vol. 6, p. 173

<sup>175</sup> - *Sunan At-Tirmidhī*. vol. 4, p. 297.

<sup>176</sup> - Ibn Kathīr, *Al-Qurashī Ad-Damishqī Abū Fidā’*. *Tafsīr Ibn Kathīr*. 1999, Riyadh, Dār Ṭaybah. vol. 3, p. 181.

stench would rise. The effect of divine injunctions on the Companions was so profound that within a brief period, all the trade stock from the homes and stores of Madīnah was cast out. Indeed, it demanded strong willpower for the Companions to give up such an established habit.

It is undeniable that without the above gradual process, Islām would not have succeeded in banning liquor. Unless the hearts were not purged, minds not refined and the social and cultural orientation of the populace not achieved, all efforts and expenditure to abolish liquor would have gone to waste and all warnings would have fallen on deaf ears. History testified that the Muslims forsook liquor on a single proclamation. Their minds were already attuned towards submission to the Commands and Will of Allāh, after which there were no *ifs* and *buts*. They believed that Allāh was the Authority. The fact that He has declared it unlawful was good enough for them. *آمَنَّا وَصَدَقْنَا وَسَلَّمْنَا* (We have believed, verified and surrendered) was their spontaneous response. Nothing besides the high spirit of theirs, sculptured by Imān, induced them to discard liquor until the world saw how those heavy drinkers of yesterday dropped their rate of drinking to zero on a single proclamation without the force of state-law or persuasion. This was the miracle of Islām that succeeded in weeding out such hardcore social ills from them.

In modern times, where governments are failing in banning liquor despite spending billions of dollars, the miracle of Imān played its role 1500 years ago in ruling it out permanently.

Jābir ibn ‘Abdullāh mentioned that there was a Companion of the Prophet who delivered liquor from Khaybar to Madīnah and sold it to the Muslims. At one stage, when he arrived in Madīnah with his stock, a person met him and informed him that liquor was outlawed. He covered the liquor with a sheet, left it on the spot and repaired to the Prophet.

The Companion observed: “O Messenger of Allāh! I am informed that liquor is declared unlawful. Is that true?”

The Prophet said: That is true.

Companion: Is it permissible for me to return it to the seller?

The Prophet: No, it is not permissible.

Companion: Can I gift it to someone, who can compensate me for it in some other way?

The Prophet: Neither is that permissible.

Companion: A certain percentage of its capital belongs to the orphans in my care.

The Prophet: When the revenue of Bahrain reaches us, you should come to me; I will compensate the orphans with something from it. (As for the liquor, it is unlawful outright.)<sup>177</sup>

‘Abdullāh ibn ‘Umar said: “The Prophet instructed me to bring him a knife. When I brought it, he set out with some of his Companions for the market where fresh liquor imported

<sup>177</sup> - Abū Ya‘la, Al-Musīlī At-Tamīmī Aḥmad ibn ‘Alī. *Musnad Abū Y‘alā*.1984, Damascus. Dār Al-Ma‘mūn li at-Turāth. vol. 3, p. 404.

from Syria was stored. He took the knife from me and ripped open the leather bags. After returning the knife to me, he instructed other Companions that they should accompany me to other stores in the town and assist me. He ordered me not to spare a single leather bag containing liquor in the town but to rip it up.” Hence, I executed his instructions to the end.<sup>178</sup>

Ibn ‘Umar recorded: “When the following verse was revealed “O you who believe! Indeed, intoxicants, gambling, idols and divination by arrows, are sheer filth,” we went out onto the streets with our casks. Some of us smashed their casks and others washed their casks thoroughly with soil and water, as a result, the soil in the alleys of Madīnah was soaked with liquor, to the extent that the streets were abandoned for several days. Whenever it rained, the red colour of liquor would appear and the smell spread.”<sup>179</sup>

The fervour in the Prophet’s Companions for compliance with the Command of Allāh drove them to abandon liquor overnight. The verse in question eradicated the evil, which no detoxification scheme or anti-drug drive could succeed in doing.

### ***Ḥadīth Denouncing Liquor***

Abū al-Dardā’ says:

أوصاني خليلي صلى الله عليه وسلم أن لا تشرب الخمر فإنها مفتاح كل شر

(My Khalīl - the Prophet - advised me not to consume liquor, for it is the key to all evils.)<sup>180</sup>

Jābir ibn ‘Abdullāh narrated that the Prophet said: “Every intoxicant is unlawful. Allāh forewarns that He will let the person who consumes intoxicants drink from *Ṭīnat at-Khibāl*. The Companions enquired: “What *Ṭīnat al-Khibāl* is O Messenger of Allāh?”

The Prophet said: “It is the perspiration of the inmates of Hell or the filthy matter drained out from their bodies.”<sup>181</sup>

Wāil al-Ḥaḍramī narrated on the authority of his father that a person, called Suwayd ibn Ṭāriq, enquired from the Prophet about liquor, which he had prepared.

The Prophet prohibited him from consuming it.

The person submitted: “But I only prepared it for medical purpose.”

The Prophet said: “That is an illness and not a cure.”<sup>182</sup>

Ibn ‘Umar related that the Prophet said:

<sup>178</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 2, p. 132.

<sup>179</sup> - *Tafsīr Al-Baghawī*. vol. 1, p. 250.

<sup>180</sup> - *Sunan ibn Mājah*. vol. 2, p. 133.

<sup>181</sup> - Al-Baghdādī, ‘Alā ad-Dīn. *Tafsīr Al-Khāzin*. 1979, Beirut. Dār al-Fikr, vol. 1, p. 209.

<sup>182</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 4, p. 317.

كُلُّ مُسْكِرٍ خَمْرٌ وَكُلُّ مُسْكِرٍ حَرَامٌ

(Every intoxicant is *Khamr*, and everything that intoxicates is unlawful.)<sup>183</sup>

Mu'adh ibn Jabal narrated that the Prophet said:

لا تشربن خمرا فانه رأس كل فاحشة

(Never consume liquor; it is the prime cause to all forms of lewdness.)<sup>184</sup>

Abū Mālik al-Ash'arī said he heard the Prophet say:

ليشربن ناس من امتي الخمر يسمونها بغير اسمها

(Some people in my Ummah will consume liquor under different labels.)<sup>185</sup>

'Ā'ishah reported that the Prophet said:

وما أسكر كثيره فقليله حرام وما أسكر الفرق فالمجة منه حرام مسكر حرامكلاً

(Every drink that intoxicates is unlawful. Whichever drink intoxicates in a larger quantity is unlawful in a lesser quantity, too. If a *Faraq* (a measure of 60 *Sā'* or 16 pounds) intoxicates, then a single draught of it, too, is unlawful)<sup>186</sup>

Ibn 'Abbās narrated that he heard the Prophet say:

الخمر أم الفواحش وأكبر الكبائر من شربها وقع على أمه وخالته وعمته

(Alcoholic beverages are the root causes for obscenity and gravest of all vices. Whoever consumes it nothing can stop him from committing incest with even his mother and maternal or paternal aunts.)<sup>187</sup>

Ibn 'Umar narrated that the Prophet said: "Liquor is cursed for ten reasons: for its nature, its consumer, its server, its purchaser, its seller, its transporter, its squeezer, for whom it is squeezed, for whom it is transported and for the one who receives its payment."<sup>188</sup>

### Condemnation of Liquor by other Personalities

Once 'Umar said - while addressing liquor:

أقرنت بالميسر والانصاب والازلام ، بعداً لك و سحفاً

(You have been listed with gambling, idols and divination by arrows. Away with you and be at a distance.)<sup>189</sup>

<sup>183</sup> - *Ṣaḥiḥ Muslim*. vol. 6, p. 100.

<sup>184</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 3, p. 392.

<sup>185</sup> - *Sunan Abū Dāwūd*. vol. 3, p. 379.

<sup>186</sup> - Al-Baghdadī, 'Alī ibn 'Amr. *Sunan Ad-DārQuṭnī*. 1966, Beirut, Dār Al-Ma'rifah, vol. 4, p. 250.

<sup>187</sup> - At-Ṭabarānī, Abū al-Qāsim Sulaymān ibn Aḥmad. *Al-M'ujam al-Awsaṭ*. 1994, Cairo, Dār Al-Ḥaramayn, vol. 3, p. 276.

<sup>188</sup> - *Sunan Ibn Mājah*. vol. 2, P. 121.

<sup>189</sup> - *Radd al-Muḥtār*. vol. 6, p. 59. *Al-Qur'ān* 5:90.

'Allāmah Zamakhsharī mentions in his *Kashshāf* that the condemnation of liquor and gambling in the Qur'ān as Satanic acts and its comparison in the *Hadīth* with idol worship, speak for itself how obnoxious these habits are.<sup>190</sup>

### Liquor - a Veritable Evil that Degrades Man's Personality

عن أبي العالية الرياحي قال: قيل لأبي بكر الصديق: هل شربت الخمر في الجاهلية؟ فقال: أعوذ بالله! فقيل له: ولم قال: كنت أصون عرضي وأحفظ مروءتي فإن من شرب الخمر كان مضيعا في عرضه ومروءته، قال: فبلغ ذلك رسول الله صلى الله عليه وسلم فقال: صدق

(Abul 'Āliyah reported that someone asked Abū Bakr: "Did you taste liquor during the days of *Jāhiliyah*?"

Abū Bakr replied: "May Allāh protect me from it."

The person asked: "What made you abstain from it during those days?"

Abū Bakr replied: "To protect my dignity and guard my sense of honour. Whoever consumes liquor destroys his dignity and integrity."

When the Prophet heard that reply of Abū Bakr, he said: "Abū Bakr spoke the truth."<sup>191</sup>

When some people insisted on 'Abbās ibn Maradas to consume liquor, he replied: "I am not to transfer my intelligence from my head to my stomach nor is it seemly for me to upgrade myself as a leader of the people in the morning and downgrade myself as a fool in the evening."

What are the negative effects of alcohol?

"The liver is an organ which helps break down and remove harmful substances from your body, including alcohol. Long-term alcohol use interferes with this process. It also increases your risk of chronic liver inflammation and liver disease. The scarring caused by this inflammation is known as cirrhosis."<sup>192</sup> Jun 9, 2017

### Harmful Effects of Liquor

- Liquor overpowers a person's reasoning and subdues his mind.
- It leads to a disorder of the psyche.
- It leads to loss of the sense, which prompts the person to commit anti-social crimes and go about blurting like a lunatic. Being *high*, he is found many times communicating with the stars.

<sup>190</sup> - Zamakhsharī, Al-Khawārimī Abu al-Qāsim al-Mahmūd Jār Allāh. *Al-Kashshāf 'ān Haqāiq at- Tanzīl*. 2001, Lebanon, Dār Ma 'rifat. vol. 1, p. 675. Hereafter referred to as *Al-Kashshāf*.

<sup>191</sup> - *Kanz Al-'Ummāl*. vol. 112, p. 487.

<sup>192</sup> - Anon. *Alcohol rehab guide*. at <https://www.alcoholrehabguide.org/alcohol/effects/>. (Accessed on 10-5-2019)

- It creates dullness in the mind.
- The addict loses control of his balance.
- Besides being a curse to the addict's personality, its evil becomes manifested on his offspring, too.
- During his drunkenness, when an addict loses his discretion or sense of judgement, he is unable to restrict his consumption of liquor.
- He suffers from mental disorder and inactiveness of the nervous system.
- His faculty of reasoning becomes dull and sense of discriminating gets suppressed until he loses self-control.
- He loses his wit and can no longer differentiate between right and wrong, daughter and wife.
- He goes about vomiting, bumping into people, behaving like a madcap and speaking in the air as if he is in his own world; cut away from human society.
- He staggers while walking or becomes giddy.
- He also loses control of his speech, thoughts and performances. He speaks incoherently and indistinctively.
- He defies law and authority.

Its minimal harm is that it renders the person irresponsible and indifferent towards moral and social values. It is no wonder that the Prophet of Islām named it the deadliest of evils.

### **Physical Damage**

Alcohol passes by the walls of the stomach and instantly gets taken into the blood-stream, which carries it to the brain and central nervous system.

“When alcohol is consumed, it enters the stomach, where it can be absorbed into the bloodstream. ... Most alcohol absorption into the body happens in the small intestine. The presence of fatty food can significantly slow the absorption of alcohol into the bloodstream.”<sup>193</sup>

The channel alcohol passes through from the stage of fermenting of the juices until it throws out froth and changes in odour, has a direct effect on the alcoholic.

The beverages contain many chemical substances, including ethyl alcohol, which is its basic ingredient.

### **Physical Hazards**

Liquor has numerous undesirable effects on the human self and his life:

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<sup>193</sup> - Anon, *how-is-alcohol-absorbed-into-the-body*, at <https://sites.duke.edu/apep/module-1.../content-how-is-alcohol-absorbed-into-the-body/> n.d.. (Accessed on the 12-12-2018)

- Criminologists have found that a high percentage of nervous and mental disease as well as perversion and immorality are due to excessive use of alcohol by the addict or inherited from such parents.
- It deteriorates health.
- Upsets the normal function of the body, power of reasoning, the ability of the mind and structure of the society.
- Causes delirium.
- Produces gastric irritation.
- Overtaxes the heart.
- Causes cardiac diseases.
- Weakens the cardiac muscles.
- Reduces the resistance in the body.
- Neither nourishes the body nor forms into blood; it is nothing but toxic waste.
- Weakens the nerves and muscles.
- Inflames the optic nerve.
- Causes disorder in the mucous membranes of the mouth.
- Settles a white coating on the tongue, which often develops into cancer of the tongue.
- Inflames the gullet.
- Leads to digestive ulcers.
- Creates iron-deficient anaemia.
- Reduces sexual potency.
- Causes chronic inflammation in the mucous membrane of the stomach and deprives it of the acid necessary for digestion.

Read the following quotes:

- “Almost anything can be preserved in alcohol, except health, happiness, and money.”
- “One key symptom of alcoholism is that the individual comes to need a drink for every mood--one to calm down, one to perk up, one to celebrate, one to deal with disappointment, and so on.”
- “Alcohol may be man’s worst enemy, but the bible says love your enemy.”<sup>194</sup>

### **Moral Decline and Loss of Personality**

- Liquor degrades the drunkard in the society.
- It drops his moral and social standards.
- It stimulates the carnal passions, which leads the person to commit immoral acts, which results in loss of chastity.
- It has a penetrating effect on his personal behaviour.
- It ultimately makes him a dope-pusher and stick-on champion.
- It makes him lethargic and indolent.

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<sup>194</sup>- Mary, Phyllis and Frank respectively. *Wise old sayings*. at <http://www.wiseoldsayings.com/liquor-quotes/>

- He becomes subject to mockery.

### Social Menace

While liquor is projected as a relaxing agent:

- It frustrates the tranquillity of society.
- It leads to humiliation in the society.
- It begets hatred.

“The British Medical Association advised an All Party Group of MPs that alcohol is a factor in 60-70% of homicides, 75% of stabbings, 70% of beatings and 50% of fights and domestic assaults.”<sup>195</sup>

### Penalty

Ibn ‘Abbās said that during the days of the Prophet, drunkards were beaten with the hands, shoes and clubs. After the demise of the Prophet, Abū Bakr contemplated stipulating a legal penalty on them. Then by analogy on the penalty inflicted on them during the days of the Prophet, he stipulated forty cuts, which was then enforced even during the reign of ‘Umar.

أَنَّ الْفُقَهَاءَ اِخْتَلَفُوا فِي مِقْدَارِ الْجُلْدِ، فَجَاءَ عَنِ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ، أَنَّهُ قَالَ: (جَلَدَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي الْخَمْرِ وَأَبُو بَكْرٍ أَرْبَعِينَ، وَكَمَلَهَا عُمَرُ ثَمَانِينَ وَكُلُّ سَنَةٍ)، [١١] فَذَهَبَ الْإِمَامُ الشَّافِعِيُّ إِلَى الْقَوْلِ بِأَنَّ حَدَّ الشَّرْبِ مِقْدَارُهُ 40 جَلْدَةً، وَذَهَبَ الْإِمَامُ مَالِكٌ وَأَبُو حَنِيفَةَ إِلَى الْقَوْلِ بِأَنَّ مِقْدَارَ حَدِّ الشَّرْبِ 80 جَلْدَةً. [١٢]

(‘Ali reported: “Rasūullāh and Abū Bakr inflicted forty lashes on the person, whereas ‘Umar inflicted eighty.”

Basing on that, the jurists held different views on the penalty for consuming liquor: Imām Shāfi‘ī decided on forty lashes, whereas Imām Abū Ḥanīfah and Imām Mālik decided on eighty.)<sup>196</sup>

Pre-requisites for the penalty are:

- Sanity.
- Majority.
- The drunkard was seized while the smell of wine was emitting from his mouth and he had lost his sense of distinguishing between things.

“The British Medical Association states ‘Alcohol misuse is associated with crime, violence and antisocial behaviour, and can impact significantly on family and community life.’

‘This begs the question as to whether in light of such research; do the Muslims have an appreciation as to why the consumption of alcohol is prohibited in Islam’.”<sup>197</sup>

<sup>195</sup> - Anon, *Alcohol and Crime: Breaking the Link*. All-Party Group on Alcohol Misuse, July 1995.

<sup>196</sup> - *Sunan Abū Dawūd*. vol. 4, p. 2

<sup>197</sup> - Attahir, Shehu Mainiyo, *Islamic Criminal Justice*, at <https://www.researchgate.net>. 2018, p. 10

## Drugs – a Melancholy State of Human Beings and its Products

- All types of drugs, such as dagga, LSD, ecstasy, cocaine, heroin, mandrake, hashish and opium, fall under the above category of intoxicants and illegal drugs, whether sniffed or sipped. Hallucinogens that are used to get a thrill or feeling of calm are part of the same family. All of these drugs impair the mind and body seriously.
- These drugs benumb the brain and nerves because of the poisonous substances it contains called CIDICIANIDRIC.

Hirām ibn Mu‘āwiyah said ‘Umar ibn Khattāb wrote to them the following pieces of advice:

- Never live in the neighbourhood of swine.
- Never eat from a table-spread where wine is served.<sup>198</sup>

## An Observation

It was rightly asserted that where modern-day advocates have failed in weeding out the evils of the society, such as gambling, liquor, theft and adultery, Islām succeeded in eliminating them with a single stroke of Faith in Allāh.

To appreciate this phenomenal success of Islām, the following report on the restrictions imposed by governments in modern times and the laws enacted on elimination of liquor and its miserable result is reproduced hereunder by way of comparison:

“America promulgated laws to banish liquor in 1919 which was ridiculed as ‘dry law’. It remained in force for 14 years until it had to be abolished. In 1933 all methods of enhancing public awareness to its harmful effects, including publications, radios, 60 million spent in campaigning against drinking. Millions of pages were written against it. 250 million dollars were spent, yet 300 alcoholics were executed and 500000 were imprisoned. Fines exceeding 16 million were imposed. The Government confiscated properties worth 400 million dollars.”<sup>199</sup>

## Bible and Alcohol

“Wine is a mocker, strong drink is raging: and whosoever is deceived thereby is not wise.”  
(Proverbs: 20:1)

“It is good neither to eat flesh, nor to drink wine, nor any thing whereby thy brother stumbleth.”  
(Romans: 14:21)

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<sup>198</sup> - *Al-Bayhaqī*.

<sup>199</sup>- Anon, *document.php*, at

<https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1928080700>. (Accessed on 19-1-2019)

“For he shall be great in the sight of the Lord; and shall drink neither wine nor strong drink.”  
(Luke: 1:15)

After learning from this chapter that liquor is the mother of all evils, the following thought can occur. Can liquor not lead to other serious crimes and addictions, which not only damage the brain but even the purse? Among the serious crimes is highway robbery about which I wish to write a few pertinent points in the following pages.

### **(5) Ḥadd al-Ḥarābah or Qaṭ‘ at-Ṭarīq (Penalty on highway robbery and banditry.)**

“The only reprisal of those, who wage war against Allāh and His Messenger and strive to create subversion in the land, is that they should be executed, crucified, hands and feet amputated on the alternates side or should be banished from the land.” (Q: 5:33)

#### **Definition of Al-Muḥārabah**

معني الغوي للحرب: قتال ويزال بين فئتين ، عكسه سلم

(Al-Ḥarrb stands for battle and conflict between two factions. Its opposite is reconciliation.)

#### **Technical meaning of Al-Muḥārabah:**

Robbery means to take or attempt to take an item of value from someone by force or threat. A combat, esp. unpremeditated, between two person, animals or parties.

*Al-Muḥārabah* means to cause disorder in the land by taking the law into one’s hand and publicly defying the Sharī order that is in operation under a just and legitimate government. People who commit rape, bring dishonour to the people, threaten their lives and properties, molest women, create uprisings and mutiny against the state, violate the law, intimidate the public, disrupt people’s peace, engage in high jacking, murdering and plundering; are all menaces that fall under the category of *Al-Muḥārabah*.

#### **Definition of Highway Robbery**

Highway robbers are those who go into public thoroughfares with the motive of preventing their passage or seizing their properties.

They disturb the peace and safety of the public, jeopardise their lives, deprive them of their properties and even disturb the free flow of traffic on the roads. In other words, they brandish their weapons to terrorise others outside the city where people seldom pass or where the possibility of government personnel and aid reaching the victims is slim. People feel threatened to travel to their destinations because of them. If they are dealt with leniently, most probably they will exploit the situation for further mischief.

Ibn ‘Abbās says the verse outlines four penalties for four different cases of banditry, as follows:

- 1) If the robbers committed murder only and did not steal the properties, they should be executed and not hung.
- 2) If the robbers murdered and plundered as well, they should be crucified to death.
- 3) If the robbers looted only, their hands and feet should be amputated on alternate sides.
- 4) If the robbers only terrorized the area and did not cause any other damage, they should be exiled from the land.<sup>200</sup>

Please note the differences between execution and hanging in the following references:

Al-Jazāirī, Jābir ibn Mūsā says:

معني "ان يصلبوا" هو ان يشدوا على أعواد الخشب حتي يموت بنفسه

(That ‘they should be crucified’ means they should be kept tied to wooden poles until they die.)<sup>201</sup>

Ibn Al-Qāsim says:

وقيل : يصلب حيًا ليراه أهل الفساد فينزعروا وهو قول ابن القاسم

(the criminals should be hung alive so that other mischief mongers may see it and take admonition.)<sup>202</sup>

Al-Khafājī Aḥmad says:

أن يقتلوا من غير صلب

(It means to behead them without hanging them.)<sup>203</sup>

The author of *Hidāyah*- Al-Farghānī- mentions:

“If a group of highway robbers assaulted the travellers, and were arrested before they could plunder or kill anyone, the Imām should imprison them until they offered penitence. And if they plundered the property of a Muslim or *Dhimmī*, and had they succeeded in distributing the property among themselves, they would have each received ten dirhams or more, then the Imām should amputate their hands and their feet on the alternate sides.”<sup>204</sup>

### Penalties Meted Out on Basis of *Qiṣāṣ* (Equal Retaliation)

Ibn ‘Abbās narrated a Tradition that a group of eight people from the ‘Uqul (‘Uraynah) tribe arrived in Madīnah under strained conditions. They embraced Islām and took fealty at the hands of the Prophet. But they could not get acclimatised to Madīnah, so their hands, feet and skin became dry, faces turned yellow and bellies swelled. They came complaining to the Prophet about it. The Prophet suggested that they should join the shepherds at the

<sup>200</sup>- *At-Ṭabarī*. vol. 10, p. 258.

<sup>201</sup>- Al-Jazā’irī, Jābir ibn Mūsā ibn Jābir Abū Bakr. *Aysir al-Tafāsīr li Kalām Al-Āliyy Al-Kabīr*. 2003, Al-Madīnah, Maktabat al-‘Ulūm wa Ḥikam, vol. 1, p. 624.

<sup>202</sup>- Ibn Jazay. *At-Tashīl li ‘Ulūm At-Tanzīl*. 1995, Lebanon, Dār Kutub al-‘Ilmiyyah. vol. 1, p. 348.

<sup>203</sup>- *Al-Kashshāf*, vol. 1, p. 661.

<sup>204</sup>- *Al-Hidāyah*. vol. 2, p. 522.

outskirts of Madīnah and drink the milk and urine of the camels of charity over there for the cure. Hence, they stayed there for a few days. But unpredictably, when they recovered and gained strength, they recanted from Islām, murdered the shepherds of the Prophet and drove away the camels from the pasture. Jibrīl urged the Prophet to send his Companions in pursuit of them and read out the following prayer: “O Allāh! Decidedly the heavens are Yours, the earth is Yours, East is Yours and West is Yours. O Allāh! Make the land narrow upon the culprits until they are subdued.” Eventually, after the Companions gave chase for them, they were apprehended at a short distance from Madīnah and brought to the Prophet.

Jibrīl descended and said to the Prophet:

- 1) If the culprits looted properties and committed murder as well, they should be hung.
- 2) If they murdered but did not loot, they should be executed.
- 3) If they looted but did not murder anyone, their hands and legs should be amputated on the alternate sides.<sup>205</sup>

Abū Qilābah says the ‘Uraynah people had killed, looted, conflicted with Allāh and His Messenger and even endeavoured to spread mischief in the land.

The Prophet had their hands and feet chopped off, their eyes poked with hot rods and their corpses cast in a place called Ḥarrah. They appealed for water but their appeal was turned down until they met their ill-fated death.

The jurists hold different views on the penalty accorded to the ‘Uraynah people. Some say that after the revelation of verse 5:33 the above penalties were abrogated because mutilation (amputation of the nose, ears and genitals) was declared unlawful.

Others say besides amputating the nose and blinding the eyes, the rest of the penalties are still valid.

Qatādah quoted Muhammad ibn Sierīn for saying that those penalties were executed when penal laws of the Shari’ah in that context were not revealed yet.

Abū az-Zanād says after Rasūlullāh ﷺ had enforced those laws on the ‘Urniyyīn, Allāh revealed the penal laws and prohibited Rasūlullāh ﷺ from committing mutilation. Hence, Rasūlullāh ﷺ ceased mutilation altogether, to the extent (as reported by Qatādah) that he urged the Companions to offer charity for the mutilation they had committed and prohibited them from mutilating in future.

Imām Aḥmad maintained that the governor should proclaim to the public that they should drive away the culprits wherever they are found so that they do not find shelter anywhere.

## Rules

There is no single blanket penalty for all crimes. If the robbers only wound the wayfarers and do not kill or loot their properties, then the law of equal retaliation will be applied to

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<sup>205</sup> - As-Suyūṭī, Jalāl ad-Dīn ‘Abd Ar-Raḥmān ibn Abū Bakr. *Ad-Durr al-Manthūr*. 2008, Beirut, Dār al-Fikr, vol. 3, p. 68.

them, in which case they will either suffer physical retribution or pay monetary compensation. But if the victim wishes, he may pardon them.

All four penalties fall under the category of *Rights of Allāh*. Therefore, if the owner of a looted property or the guardian (who is not an heir) of a murdered person decides to pardon the culprit, the penalties will not be waived. Human beings are not authorised to waive the Rights of Allāh.

Imām Mālik says that the governor is authorised to inflict any of the four above penalties on them as per the crime they are guilty of.

Note that these Sharʿī penalties will be inflicted only if the looted properties are of a certain value and not for something insignificant or valueless. Likewise, to enforce the penalties on the robbers, it is necessary that the victims are registered citizens or are given recognition by the state, such as Muslims or *Ahl-Kitāb (Dhimmī)* who are under pledge with the Islāmic state.

Mak'hūl said that the first person who imprisoned the robbers was 'Umar. He proclaimed: "I will keep them arrested until they repent. But I will not banish them, lest they should harass people in the foreign land."

But Muḥammad ibn Jubayr is of the view that the robbers should be transferred from the prison of their hometown to the prison of another town.

In the above offences, the culprit will be pardoned of those penalties that fall under Rights of Allāh (حقوق الله) only if he repents before he is apprehended.

It is reported that Ḥārithah ibn Badr committed murder and plunder and then escaped. But before he was captured, he repented and surrendered to 'Alī. 'Alī waived the penalty.<sup>206</sup>

According to the consensus of the 'Ulamā', if the robbers cause damage to the property, then that cannot be waived because the property falls under human rights - حقوق العباد.

If a person commits murder and plunders as well, but repents before he is apprehended, the heirs of the victim reserve the right to either pardon him or have him executed.

If the plundered item is still with him, he should return it to the owner; and if he destroyed it or utilised it, he should pay for it.

Burhan ad-Dīn al-Marghīnānī mentions in his magnum opus *Al-Hidāyah*:

وإن أخذ بعد ما تاب وقد قتل عمدا فإن شاء الأولياء قتلوه وإن شاءوا عفوا عنه لأن الحد في هذه الجناية لا يقام بعد التوبة للاستثناء المذكور في النص

<sup>206</sup> - *Ibn Abī Shaybah*. vol. 6, p. 107.

(If the robber was apprehended after he repented, but after committing wilful murder, then if the guardians of the victim wish, they can have him executed, and if they wish, they can pardon him, because *Hadd* in this offence cannot be enforced after repentance, owing to the declaration in the verse.)<sup>207</sup>

Shaykh Ashraf ‘Ali Thanwī writes:

“If the robbers repent before you apprehend them, then be informed that Allāh will pardon them His Rights, meaning that the penalties mentioned above in the verse are *Hadd*s and Rights of Allāh, which only He can wave, such as executing them, crucifying them, amputating their hands and feet on alternate sides or banishing them from the land. These are not *Qisās* or rights of man, which can be waived by man. When the robbers repented before being apprehended, then *Hadd*, which was the Right of Allah, will be waved. But the rights of man will remain. If the robbers looted wealth, they will be liable to pay its penalty, and if they had killed, then *Qisās* will apply on them. However, the owners of the looted properties and the family members of the murdered person will have the rights to wave the liability or *Qisās*.”<sup>208</sup>

### Highway Robbery Being a *Hadd*.

That ‘highway robbery is a *Hadd*’ implies that it cannot be pardoned by anyone. If the ruler, Imām or Qāḍī forgives the robbers, he will be guilty for it.

فَلِذَا لَا يَعْفُوهُ وَلِيٌّ ( أَيُّ لِكُونِهِ حَدًّا خَالِصًا حَقًّا لِلَّهِ تَعَالَى لَا يَسْعُ فِيهِ عَفْوٌ غَيْرُهُ فَمَنْ عَفَا عَنْهُ عَصَى اللَّهَ تَعَالَى

(Since this is a *Hadd* that is exclusively the Right of Allāh, the guardians are not allowed to pardon the rebels. No one is authorised to pardon the culprits. Whoever does so will have disobeyed Allāh.)<sup>209</sup>

From the above details, it became apparent that the stipulations that are required for *Qisās* are not necessary for the execution of penalties on the robbers. In highway robbery, even if all the conditions of *Qisās* are not found, the robbers will still be executed on grounds of them opposing the Commands of Allāh and violating the rules set out by the Sharī‘ah. In the same tone, like robbers, they and their supporters will be executed, even if it is not known which were the weapons, they employed for attacking.

The author of *Radd al-Muhtār* said:

( قَوْلُهُ وَلَا يُسْتَنْرَطُ إِلَّا بِأَيِّ فَيُقْتَلُ الْقَاتِلُ وَالْمُعِينُ سَوَاءً قَتَلَ بِسَيْفٍ أَوْ حَجْرٍ أَوْ عَصَا

(The killer and his supporters will be executed, whether they used a sword, rock or staff.)<sup>210</sup>

<sup>207</sup>- *AL-Hidāyah Sharh al-Bidāyah*. vol. 2, p. 133

<sup>208</sup> - *Bayān al-Qur‘ān* vol. 1, p. 468

<sup>209</sup>- Ibn ‘Ābidīn, ‘Allāmah Muḥammad Amīn. *Radd Al-Muhtār ‘alā Durr al-Mukhtār*. (popularly known *Ash-Shāmī*.) 1978, Quetta, Pakistan, Maktabah Rashīdiyyah, vol. 6, p. 2245. Hereafter referred to as *Radd Al-Muhtār*.

## Conclusion

The above events reveal that in a desperate and don't care state people resort to just any crime, as long as it serves their selfish purposes. How much does the public suffer in that interim does not concern them?

This type of reckless attitude occasionally leads them to defy religion, too. When they cannot make their way through other channels, they conveniently place the blame at the door of religion, thus not only do they apostatise, they even justify the renunciation of religion through arguments that are mostly contrary to reason. Then, because such people lack the true concept of religion, most of them cling to and resort to just any belief system. In that way, most of the times such people take religion to be a plaything or something of experimentation.

Hence, from among those seven crimes that fall under the *Ḥadd* category and for which penalties are decreed, apostatising from Islām is one, which I wish to discuss under *Ḥadd Ar-Riddah* in the following caption.

### **(6) Ḥadd Ar-Riddah (Penalty for apostasy)**

"Whosoever among you takes to apostasy and dies in the state of disbelief, such people's deeds will become futile in the world and the Hereafter." (Q: 2:217)

"Whoever seeks a religion other than Islām, never will it be accepted from him; and in the Hereafter, he will be among those who will suffer loss." (Q: 3:85)

### **Definition of Apostasy in Islām**

"Apostasy in Islam (Arabic: ردة *riddah* or ارتداد *irtidād*) is commonly defined as the conscious abandonment of Islam by a Muslim in word or through the deed. It includes the act of converting to another religion by a person who was born in a Muslim family or who had previously accepted Islam. The definition of apostasy from Islam, and whether and how it should be punished are matters of controversy – Islamic scholars differ in their opinions on these questions. Apostasy in Islam includes within its scope not only the wilful renunciation of Islam by a Muslim through a declaration of renunciation of the Islamic faith (whether for another religion or religiosity), or (in the absence of a declaration) by specific deed of undergoing the rites of conversion into another religion, but also even denying, or merely

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<sup>210</sup> - *Radd Al-Muḥtār*. vol. 15, p. 384

questioning, any "fundamental tenet or creed" of Islam, such as the divinity of God, prophethood of Muhammad (pbuh), or mocking God, or worshiping one or more idols." <sup>211</sup>

Apostasy is defined as conscious abandonment of Islām by a Muslim. It is to rebel against the Laws of Allāh and the Sharī'ah with evil designs and to repudiate its tenets manifestly, as was defined during the propitious days of the Prophet and his successor Abū Bakr. It is undermining its inviolability and putting others into doubt about its validity. It is also conflicting with the Islāmic state and contravening the authentic orders of Islām. In sum, it is akin to treason, which no government ever tolerates.

تعريف الردة لغة واصطلاحًا الردة لغة الرجوع في الطريق، والتحول عن الشيء إلى غيره ، أما الردة اصطلاحًا فهي قطع المرء إسلامه بنية الكفر، ويكون ذلك بقول، أو فعل، أو اعتقاد، أو شك، سواء كان قول الكفر استهزاءً، أو اعتقادًا، أو عنادًا، فالمرتد إذاً هو الراجع عن إسلامه، الكافر به، ولا تصح الردة باتفاق أهل السنة والجماعة إلا من عاقل، حيث لا تصح ردة المجنون، أو الطفل، أو من لا عقل له، كمن زال عقله لعرض ، أو مرض، ونحوه.

(The literal definition of apostasy is retracting from a particular way or turning away from one track to the other. As for the technical meaning of apostasy, it is to sever one's allegiance from Islām with the motive of denying Faith, whether through expression, action, belief or scepticism, or whether he did it by way of derision, conviction or grudge. Hence, an apostate is one who retracts from Islām and declines its principles. However, according to the consensus of the Ahl-Sunnah wal Jamā'ah, apostasy is confirmed only of a sane person; and not of an insane, infant or deranged person, who lost his memory due to dementia or illness. )<sup>212</sup>

An apostate is one who abjures Islām by renouncing any of its essentials in word or action, desecrating the Qur'ān, performing an act contrary to the principles of Islām, declining any of its essentials, degrading the Prophet to any extent or using derogatory or inappropriate language against Allāh. Such people are capable of influencing others and misleading the naïve Muslims, too. The motive of such uprising is to create disarray among the Muslims. He is a traitor to His Creator. But if he reverts to Islām, all the Sharī laws will apply to him in the world, and he will be immune to the torments in the Hereafter.

Shah Wali Allāh has mentioned in his *Hujjat Allāh al-Bālighah*:

و تثبت الردة بقول يدل علي الصانع او الرسل او تكذيب او فعل تعمد به استهزاء صريحا با لدين و  
كذا انكار ضروريات الدين

<sup>211</sup>- Anon, [apostasy-in-islamapostasy-in-islam](https://www.facebook.com/.../apostasy-in-islamapostasy-in-islam), at <https://www.facebook.com/.../apostasy-in-islamapostasy-in-islam>. (Accessed on 31-3-2019)

<sup>212</sup> - *Mā Hiya Ar-Riddah?* at <https://mawdoo3.com>. (Accessed on 23-11-19)

(Apostasy is established against a person who utters a word against the Creator or a Prophet, falsifies or performs an act that manifestly tantamount to scoffing the religion or he declines an essential of the religion.)<sup>213</sup>

In *Bukhārī's* version instead of التارك لدينه the word is المارق من دينه (one who hastily parts from his religion.)

مارق is to exit from somewhere at a speed and to depart from it entirely, to the extent that the person loses touch with his place of origin.

The Khawārij sect is called *Māriqah* for the same reason. They departed from Islām altogether.

### Freedom of Religion

Islām recognises freedom of thought and religion. This is why it believes in the principle rule of not forcing anyone to embrace it. This is accordance with the unequivocal declarations of the Qur'ān:

“There is no coercion in the religion (of Islām) (Q: 2:256)

“Say, ‘Truth is on behalf of your Sustainer. Now whoever wishes let him believe; and whoever wishes let him disbelieve’.” (Q” 18:29)

It also counsels the Muslims:

“Do not contend with the people of the Scripture but in a manner that is most seemly, except with those among them who committed excesses.” (Q: 29:46)

In fact, it goes further to admonish them:

“And do not revile those (deities) whom these people worship apart from Allāh, lest - having no knowledge - they should aggressively revile Allāh. This is how We decked up for every nation their deeds. To their Sustainer alone is their return, then He will notify them of their actions.” (Q: 6:108)

Hence, Islām recognizes the free conscience of each individual, and; therefore, it places no compulsion on anyone in respect of religion. Whoever turns to Islām does so through his own free will and for his own good.

Maulana Sayyid Moudūdī elaborates on the above verses:

“If somebody does not accept Islam, Muslims should recognize and respect his decision, and no moral, social or political pressure should be placed on him to change his mind.”<sup>214</sup>

<sup>213</sup>- *Raḥmat Allāh al-Wāsi'ah 'Alā Hujjah Allāh al-Bālighah li Shah Wali-Allāh*. 2013, Karachi, ZamZam publishers, vol. 5, p. 345.

<sup>214</sup>- Riaz Aḥmad Sa'īd. *Quranic Concept of Freedom of Expression*. Al-Qalam June 2013, p. 76

### Rulings on an Apostate.

Muslim ibn Mas'ūd narrated that the Prophet said:

لا يحل دم امرئ مسلم يشهد أن لا إله إلا الله وأني رسول الله إلا بإحدى ثلاث الثيب الزاني والنفس بالنفس والتارك لدينه المفارق للجماعة

(Shedding the blood of a Muslim, who testifies that there is none worthy of worship besides Allāh and that I am the Messenger of Allāh, is not lawful but against three persons:

- 1) A married person who commits adultery.
- 2) A soul for a soul – a murder case.
- 3) One who forsakes his religion and segregates from his Islāmic group.)<sup>215</sup>

Mu'ādh ibn Jabal related that when the Prophet saw him off for Yemen as a governor, he said to him: "O Mu'ādh! If a male person turns to apostasy, you should advise him on Islām. If he repents and reverts to Islām, you should accept his repentance. If a woman renounces Islām, you should exhort her to revert to Islām. If she repents, you should accept her repentance; otherwise, leave her to what she is."<sup>216</sup>

The author of *Muṣannaḥ ibn Abi Shaybah* has quoted:

حَدَّثَنَا أَبُو دَاوُدَ ، عَنْ أَبِي حَرَّةَ ، عَنْ الْحَسَنِ ؛ فِي الْمَرْأَةِ تَرْتَدُّ عَنِ الْإِسْلَامِ ، قَالَ : لَا تُقْتَلُ تُحْبَسُ

(When Hasan al-Baṣrī was asked the ruling of a woman who renounces Islām, he said: "She should be imprisoned and not executed.")<sup>217</sup>

'Alī ibn Nāif mentions in his *Al-Mufaṣṣal fi Sharḥ-Ḥadīth Man Baddala Dīnahū*:

المالكية قالوا: وإنما يستتاب المرتد وجوباً ذلك القدر، صوناً للدماء، ودرأً للحدود بالشبهات، ويعرض عليه الإسلام عدة مرات، وتزال الشبهة التي تعرش له، ويهمل للتفكير، عسى أن يرجع ويتوب في هذه المدة،

(The Mālikī School of thought maintains that an apostate should compulsorily be induced to repent for the protection of his blood. His doubts also should be cleared. Islām should be presented to him repeatedly, and in that interim whatever doubts he may have should be addressed. He should also be offered an opportunity to reflect over his case; perhaps he will retract his decision and repent.)<sup>218</sup>

Imām Mālik reports from 'Umar and 'Uthmān that an apostate should be advised and reminded three times to repent, as reported in the following excerpt:

<sup>215</sup> - *At-Tirmidhī*. vol. 4, p. 19.

<sup>216</sup> - *Al-M'ujam Al-Kabīr*. vol. 20, p. 53.

<sup>217</sup> - *Muṣannaḥ ibn Abī Shaybah*. vol. 10, p. 140.

<sup>218</sup> - Ash-Shuḥūd, 'Alī ibn Nāif. *Al-Mufaṣṣal fi Sharḥ-Ḥadīth Man Baddala Dīnahū ...* vol. 2, p. 59.

ل: تصرفات المرتد في رده بالبيع والهبة ونحو ذلك موقوف إن أسلم. تيباً... قضاء الله ورسوله ثلاث مرات فأمر به - فقتل متفق عليه ولم يذكر استتابته ولأنه يقتل. الكفرة، فلم ... فمدتها ثلاثة أيام روي ذلك عن عمر رضي الله عنه وبه قال مالك وإسحاق، وأصحاب<sup>219</sup>

The Imām should discuss with the apostates and attempt to clear their doubts about Islām if any. After giving grace to them to reconsider their stand, the Imām should also exhort them to repent and revert to Islām.

‘Alī ibn Nāif ash-Shuhūd writes in his *Al-Mufaṣṣal fi Sharḥ Ḥadīth “Man Baddala Dīnahū fa Uqtulūhū.”*:

مهما يكن جرم المرتد فإن المسلمين لا يتبعون عورات أحدٍ ولا يتسورون على أحدٍ بيته ولا يحاسبون إلا من جاهر بلسانه أو قلمه أو فعله مما يكون كفراً بواحاً صريحاً لا مجال فيه لتأويل أو احتمال إن التهاون في عقوبة المرتد المعالين لردته يعرض المجتمع كله للخطر ويفتح عليه باب فتنة لا يعلم عواقبها إلا الله سبحانه. فلا يلبث المرتد أن يغرر بغيره ، وبذلك تقع الأمة في صراع وتمزق فكري واجتماعي وسياسي ، وقد يتطور إلى صراع دموي بل حرب أهلية تآكل الأخضر واليابس. جمهور الفقهاء قالوا بوجوب استتابة المرتد قبل تنفيذ العقوبة فيه بل قال شيخ الإسلام ابن تيمية هو إجماع الصحابة - رضي الله عنهم - وبعض الفقهاء حددها بثلاثة أيام وبعضهم بأقل وبعضهم بأكثر ومنهم من قال يُستتاب أبدأ والمقصود بهذه الاستتابة إعطاؤه فرصة ليراجع نفسه عسى أن تزول عنه الشبهة وتقوم عليه الحجة ويكلف العلماء بالرد على ما في نفسه من شبهة حتى تقوم عليه الحجة إن + [كان يطلب الحقيقة بإخلاص وإن كان له هوى أو يعمل لحساب آخرين ، يوليه الله ما تولى. ، واستثنوا من ذلك الزنديق ؛ لأنه يظهر خلاف ما يبطن فلا توبة له وكذلك ساب الرسول صلى الله عليه وسلم لحرمة رسول الله وكرامته فلا تقبل منه توبة وألف ابن تيمية كتاباً في ذلك أسماه " الصارم المسلول على شاتم الرسول"

(No matter how serious the offence of the apostate may be, the Muslims do not probe into the secrets of people nor do they scale into their houses to pry nor do they seek accountability from anyone unless there is a person who is guilty for declaring *Kufr* by his tongue, actions or pen so evidently that in no way can his statement be interpreted or construed favourably.

Laxity in imposing the penalty on a person who apostatises publicly can lead to other dangers and even fling open the gates of strife, the consequence of which only Allāh – the All-Pure - knows. An apostate will then strive to mislead others. Thus, the Ummah (nation of Islām) will be in constant struggle and breakup psychologically, socially and politically. In fact, it can lead to bloodshed and internecine warfare, which can consume everything dry and wet.

Anyway, the united body of theologians maintains that before awarding a punishment to an apostate, he/she should be called to repent and retract the view. In fact, Shayk al-Islām Ibn Taymiyyah said that this ruling was the consensus of the Companions of the Prophet. While some jurists have limited the calling to three days and less or more, others prefer that it should be forever.

United body of theologies refer to the ‘Ulamā’ Ahl Sunnah was Jamā’ah.

ويؤيد ذلك أيضاً ما ذكره الشيخ ابن تيمية: [أن النبي صلى الله عليه وآله وسلم قد قبل توبة جماعة من المرتدين (This is attested to by what is reported by Ibn Taymiyyah that Rasūlullāh accepted the repentance of the group of apostates.)<sup>220</sup>

<sup>219</sup> - *Al-Mughnī*. at <https://www.cia.gov/library/abbottabad>. (Accessed on 23-11-19)

The purpose of calling the person to repent is to give grace to him/her to contemplate his/her case; perhaps the doubts will be cleared. The learned scholars are obliged to address the doubts of the person until the proof is confirmed if he/she was earnestly seeking the real truth. But if the person was swayed by whims or was performing for the pleasure of others, then Allāh will entrust him/her to what he/she has assumed for himself/herself.

However, from among such apostates, the theologians have made an exception of a *Zindīq* (heretic). He will not be given grace, because he declares overtly contrary to what he believes covertly. There is no repentance for him. Similar is the ruling concerning the one who utters a vulgar word against the Prophet. The excellence and dignity of the Prophet has to be foremost. With regards to this person, Ibn Taymiyyah has authored a book called '*Aṣ-Ṣārim al-Maslūl 'alā Shātīmar-Rasūl'* - stern action against one who swears the Prophet.)<sup>221</sup>

### **Interpretation of the Qur'ānic ruling "such people's deeds will become futile in the world and Hereafter."**

"An apostate's deeds becoming futile means:

- He is deprived of his protection of life and wealth.
- His marriage with a Muslim wife is annulled.
- If any of his Muslim relatives dies, he does not inherit from him.
- His virtuous deeds and philanthropic services lose their value.
- Upon his death, neither will burial *Salāh* be performed on him nor will he be buried in the graveyard of the Muslims. <sup>222</sup>

Other authorities interpret:

'The deeds of an apostate becoming futile in the world' means he will not be accorded protection of his self and wealth.

'His deeds becoming void in the Hereafter' means his virtuous deeds and philanthropic services will not bear rewards in the life after death.

Imām Shāfi'ī maintains that after renouncing Islām, if the person dies on disbelief, his deeds will become void; but if he reverts to Islām, his deeds of the past days of Islām will remain valid. This is based on the above verse, which mentions two things: apostasy and death in the state of disbelief

<sup>220</sup> - *Shubhah al Qawl bi Qatlil Murtd*. Dārul Iftā Al-Miṣr at <http://www.dar-alifta.org>. (Accessed on 23-11-19)

<sup>221</sup>- *Al-Mufaṣṣal fi Sharḥ Ḥadīth "Man Baddala Dīnahū fa Uqtulūhū"*. vol. 3, p. 160.

<sup>222</sup>- Ibn 'Āshūr, Muḥammad at-Ṭāhir. *At-Taḥrīr wa Tanwīr*. 2008, Tunis, Dār- Saḥnūn, vol. 6, p. 178.

Imām Abū Ḥanīfah holds that such a person’s past deeds and social services will become void as soon as he renounces Islām. Allāh says: “And whoever rejects Faith, indeed his deeds will be void.” (Q: 5:5)

### Concluding Points Relating to Apostasy

Hence, in all religions, apostasy is looked at as a misleading crime, seeing that it gives a false message or misconception to others of the religion. He tries to convey to others that he did not find the religion to be sound, notwithstanding the fact that such manoeuvres are largely motivated by some agenda.

### Apostasy in the Bible

#### Deuteronomy 13:6-11 ESV / 135 helpful votes **Helpful Not Helpful**

“If your brother, the son of your mother, or your son or your daughter or the wife you embrace or your friend who is as your own soul entices you secretly, saying, ‘Let us go and serve other gods,’ which neither you nor your fathers have known, some of the gods of the peoples who are around you, whether near you or far off from you, from the one end of the earth to the other, you shall not yield to him or listen to him, nor shall your eye pity him, nor shall you spare him, nor shall you conceal him. But you shall kill him. Your hand shall be first against him to put him to death, and afterward the hand of all the people. You shall stone him to death with stones, because he sought to draw you away from the LORD your God, who brought you out of the land of Egypt, out of the house of slavery. ...”

#### Galatians 1:8-9 ESV / 137 helpful votes **Helpful Not Helpful**

“But even if we or an angel from heaven should preach to you a gospel contrary to the one we preached to you, let him be accursed. As we have said before, so now I say again: If anyone is preaching to you a gospel contrary to the one you received, let him be accursed.”

#### 2 Chronicles 15:13 ESV / 104 helpful votes **Helpful Not Helpful**

“But that whoever would not seek the LORD, the God of Israel, should be put to death, whether young or old, man or woman.”

Actually, the above treatment towards an apostate is not against his apostasy, because the penalty for apostasy is immense and inestimable, which will be truly meted out to him in the Hereafter; they are for him giving a false image of Islām. His apostasy could be for personal grievance, mischief, material motives or to play into the hands of outsiders.

In this light, views about the non-application of the penal code to apostates is supported by Al-Awani,<sup>223</sup> Rahman,<sup>224</sup> Kamali<sup>225</sup> and Muhammad ‘Ali<sup>226</sup>. Yet there are other jurists like Az-Zuhātī who have strongly supported the imposition of the death penalty for apostasy.<sup>227</sup>

*Bagh’y*(rebellion) is another crime that creates disorder in the land and disrupts the peace of society. This is the topic which I now seek to explore in the coming pages.

### **(7) Ḥadd Al-Bagh’y (Rebellion/Political crimes)**

“If two parties among the Believers fight, you should create peace between them. (After that, too) if one of them commits an outrage against the other, then fight the revolting party until it turns back to the command of Allāh. If that party turns back, then make peace between them equitably and be fair; truly Allāh prefers those who are fair.” (Q: 49:9)

#### **Ḥadd Al-Bagh’y (Rebellion/Political Crimes)**

Literally, *Baghā* means to seek. Allāh says **ذَلِكَ مَا كُنَّا نَبْغُ** (“*Mūsā said, ‘That is exactly the occasion we were in search for’.*” Q: 18:64)

In another verse, Allāh says: **فَإِنْ أَطَعْتَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا** (*If the spouses comply with you, then you should not seek any pretext against them.*” Q: 4:34)

#### **Those Who are Classified as Rebels**

In the Islāmic Shari‘ah, insurgents are those who muster their own forces, acquire defensive strength, decline to comply with the Imām of the central government on false premises and nominate their own Imān. The ruling is that the Imām should call them to comply with the central rule and be loyal to it. If they have any complaints that are within reason, the Imām should redress it. But if they have no complaints, yet they rise against the central legitimate government, then the Imām is at a liberty to suppress their revolt. He should encounter them until they surrender. But of course, their captives, those who suffered casualties and those who retreated from them should not be killed.

<sup>223</sup>- Al-Alwanī, T.J. *Apostasy in Islām*, 2012, Herndon, VA, International Institute of Islamic Thought.

<sup>224</sup>- Rahman, SA, *Punishment of Apostasy in Islam*. (revised addition) 2006, Kaula Lumpur,

<sup>225</sup>- Kamālī. *Freedom of expression in Islām*. 1997, Cambridge, Islamic Text Society, p. 87 – 116.

<sup>226</sup>- Alī Muḥammad. *Religion of Islam*. 1990, Lahore, Aḥmadiyya, Anjuman Ishā‘at, p. 437, at [www.aaii.org](http://www.aaii.org). (Accessed on 2-6-2019)

<sup>227</sup>- Az-Zuhaytī, *W Qaḍayā I-Fiqhwa li-Fiqr al-Mu‘āsir*, 2006, Damascus, Dār Al-Fikr, p. 366 - 748

Rebellion is akin to uprising, revolt, insurrection, mutiny, revolution and insurgency. It is:

- To refuse to comply with an established government that enforces the laws and tenets of the Sharī'ah.
- To make a statement or commit a crime that is prejudicial to the communal interest.
- To do something that may disturb the social life, security and harmony of the nation.
- To engage in covert operations with the motive of overthrowing the central government.
- To plot in order to depose a legitimate ruler who was elected by the public and given recognition by the state.
- To participate in an activity of armed resistance in order to establish an independent splinter regime.

These are factors that jeopardise the peace of the people and the smooth running of the government, such as tyranny. It is akin to uprising, revolt, insurrection, mutiny, revolution and insurgency that is generally created by organized groups rather than individuals.

### **Rebels and their Motives**

Rebels are largely those who refuse to pledge allegiance to the Khalīfah of the time, recognise his authority or take orders from him.

They are also of a revolutionary nature, who plan to create chaos in the country. If the crimes flare up into public upheaval, it can be reckoned as an aim motivated by politics; otherwise, part of the natural waywardness of such rebels.

Note that the effects of political crimes are far-reaching, whereas the effects of habitual crimes are restricted to individuals. The motive of both is different.

Political crimes are motivated by political aims, whereas habitual crimes are motivated by personal gratification.

'Umar - who was assassinated by Abū Lu'lu' - and 'Alī - who was assassinated by 'Abdur Raḥmān ibn Muljīm al-Murādī - were both victims of political crimes.

Therefore, politically motivated people will be treated as rebels. They will be charged until they rationalise their arguments and cogently explain their demands on human and religious grounds. The Imām is authorized to suppress their revolt in whichever way possible.

قاتل عمر بن الخطاب .. من هو؟ . فيروز النهاوندي اسمه "فيروز" ويكنى أبو لؤلؤة نسبة إلى ابنته،

(The person who assassinated ‘Umar ibn Khawas Abū Lu’lu’ Fayrūz an-Nahāwindī. His name was Fayrūz and was nicknamed Abū Lu’lu’ - ascribed to his daughter.)<sup>228</sup>

A rebel is not one who rises against the central government all by himself; rather he is one who rises by dint of a force with him. To overthrow the government, he receives his strength from a band of agitators who have common aims.

### Rulings

Ibn Juzay says in his *At-Tashīl li ‘Ulūm at-Tanzīl* that in the above verse (Q: 49:9) Allāh commanded the Believers to combat the rebel group once it is established that they are up to mischief.

But what if this leads to strife among the Muslims; should we encounter them? Authorities have offered two opinions on this:

- I. It is not lawful at any cost to march against them. This opinion was held by Sa’d ibn Abī Waqqāṣ, Abū Dhar and a group of Companions. They based their view on the saying of the Prophet: “To combat the Believers is tantamount to disbelief.”
- II. To march on the rebels to subdue them is essential. This was the opinion of ‘Alī, ‘Ā’ishah, Ṭalhah, Zubayr and a host of Companions. The same view was held by Imām Mālik ibn Anas among the jurists. This group substantiates its view through the verse in question.<sup>229</sup>

‘Alī maintained that only a counter-attack on the rebels was permissible. Unless the rebels did not make an offensive on the civilians, no military operation against them should be waged. It is reported that when a group of Khawārij deserted ‘Alī and assembled at Nahrawān, he appointed his deputy to suppress their revolt and then rule over them. Initially, the rebels complied with the appointee, as much as the appointee overlooked their lapses. But after some time, the rebels revolted against him, too, and assassinated him. ‘Alī instructed them to hand over the assassin to him, but they declined to comply. They argued that they were all party to the plot and; therefore, guilty for the assassination. Eventually, when they renounced loyalty, ‘Alī instructed his men to wage a military attack on them.

The Khawārij were members of a sect that appeared in the first century of Islām during the First Fitnah related to the crisis of leadership.

الخوارج إحدى الفرق الضالة المارقة ، ثبت ذلك بالنص والإجماع ؛ فروى ... مِنْهُ قَوْمٌ يَقْرَءُونَ الْقُرْآنَ لَا يُجَاوِزُ تَرَاقِيهِمْ ( يَمْرُقُونَ مِنَ الْإِسْلَامِ مُرُوقَ السَّهْمِ مِنَ الرَّمِيَّةِ ) .

<sup>228</sup> - *Kunūz at-Tarīkh wadh-Dhikriyyāt*. at <https://ar-ar.facebook.com/Badriamylove/posts/> (Accessed on 23-11-19)

<sup>229</sup>- Ibn Juzay, *At-Tas’hīl li ‘Ulūm at-Tanzīl*, 1995. Dār Kutub al-Ilmiyyah. Lebanon. vol. 1, p. 2109

(Khawārij is one of the deviant sects who have deserted [Islām]. It is stated in Hadīth that the Khawārij will be a sect that will recite the Qur’ān, but it [the message of the Qur’ān] will not exceed their collarbones. They will pass through Islām just as an arrow passes through the prey.)<sup>230</sup>

أن أول الخوارج هو عبد الله ذو الخويصرة التميمي أول خارجي خرج في الإسلام وأفته أنه رضي برأي نفسه ولو وقف  
... لعلم أنه لا رأي

(‘Abdullāh Dhū al-Khuwayṣarah At-Tamīmī was the foremost Khārijī that deserted Islām. His greatest downfall was that he treated his personal opinion superior to the authentic decisions of Islām. Had he contemplated earnestly; he would have realised that his opinion was of no significance.)<sup>231</sup>

Ibn Abī Shaybah reported on the authority of ‘Abd Khayr that on the day of the Battle of the Camel, ‘Alī said to his men: “Do not pursue those who turn on their backs and flee, nor attack those who lay down their weapons, for they are entitled to peace. Likewise, do not kill the captives.”<sup>232</sup>

Ibn ‘Abbās says Allāh commanded the Prophet and the Believers: “When two factions of the Believers have a fallout, you should call them to the ruling of Allāh and then pronounce judgment between them equitably. If they assent to it, you should enforce the Book of Allāh among them until justice is restored to the oppressed. But if any of them dissents from it, he be degrading himself as a rebel. In this case, the governor and the Believers should fight him until he surrenders and submits to the Command of Allāh and acknowledges the ruling of Islām.”<sup>233</sup>

Al-Māwardī reported that on the day of Şifḫīn, a captive was brought before ‘Alī. ‘Alī said: “I will not behead you. Indeed, I fear Allāh the Rabb of the world.”<sup>234</sup>

During the battles, ‘Alī made similar other proclamations to the rebels. Anyhow, neither of the two factions (mentioned above) would be liable for reparation for the damage it incurred, whether it related to health or wealth.

Abū Bakr says that one day the Prophet was delivering a sermon while Ḥasan ibn ‘Alī was with him on the pulpit. Occasionally, the Prophet looked at the audience and occasionally he looked at Ḥasan. Then he said: “This son of mine (referring to Ḥasan) is a Sayyid. Allāh

<sup>230</sup> - at <https://islamqa.info/ar/answers> (Accessed on 23-11-19)

<sup>231</sup> - *Ad Durar as-Saniyyah. Nashatul Khawārij.* At <https://dorar.net/firq>. (Accessed on 23-11-19)

<sup>232</sup> - Zaghālūl, Muḥammad Sa’īd, *Mawsū’ah Atrāf al-Hadīth an-Nabawī ash-Sharīf*, 2008, Dār al-Kutūb al-Ilmiyyah, vol. 1, p. 275-827.

<sup>233</sup> - *Tafsīr At-Ṭabarī.* vol. 22, p. 293.

<sup>234</sup> - Māwardī, AbūḤasan ‘Alī ibn Muḥammad ibn Ḥabīb al-Baṣrī. *Al-Hāwī al-Kabīr al-Māwardī*, 1994, Beirut, Dār an-Nashr. vol. 13, p. 251.

will probably reconcile between two large opposing factions of the Muslims through him.” Eventually, that is what happened that when Ḥasan pledged allegiance to Mu‘āwiyah, Allāh reconciled between the people of Iraq and Syria after fierce battles had ensued between them.<sup>235</sup>

Ḥārith al-A‘awar mentioned in an *Athar* (Tradition relating to the utterances of the Companions of the Prophet) that when ‘Alī had encountered the opposition forces in the battles of Siffīn and Jamal, someone asked him: “Are these rebels, polytheists?”

‘Alī replied: “No, rather they are the ones that fled from polytheism.”

Again, the person asked: “Then are they hypocrites?”

‘Alī replied: “No, hypocrites rehearse the name of Allāh seldom.”

Once more the person asked: “Then how do you grade them?”

‘Alī said: “They are our brothers who have rebelled against us.”<sup>236</sup>

‘Allāmah Ibn Humām mentions that if a group of Muslims revolt against the Imām and it has a force of combatants to fight, then the Imām should call the group to pledge allegiance to him. But he must also address their grievance. If their grievance is that the Imām has confiscated their properties unjustly or that he has dealt with them discriminatorily on certain matters, then it will not be permissible for him (Imām) to fight them. In fact, other Muslims should stand up in support of this group until everyone’s rights are restored and justice is established.

The Imāms Shāfi‘ī, Mālik and Ḥanbal say that it will not be permissible for the Imām to take up arms against a party, until the latter does not first take up arms against him. Fighting the Muslims is permissible only for defence purpose. These are Muslims. Allāh says regarding them: “(After that, too) if one of them commits an outrage against the other, then fight the revolting party until it turns back to the Command of Allāh.” (Q: 49:9)

The author of *Tafsīr Ḥaqqī* writes in detail:

“The splinter group of Khawārij that broke away from ‘Alī said to him: “Judgement rests with Allāh alone.” Though they used this slogan in order to call ‘Alī to pass judgement in accordance with Allāh’s decree, their agenda was quite the opposite.

‘Alī said: “ *كلمة حق اريد بها الباطل* ” (This is a true word twisted for ulterior motives.)

They were twelve thousand strong who declined to accept the Khilāfat of ‘Alī. They united in opposition to ‘Alī under one banner and their modus operandi was nothing but to commit highway robbery and shed blood. ‘Alī marched against them and called them to surrender.<sup>237</sup>

<sup>235</sup> - *Sunan Abū Dāwūd*. vol. 4, p. 177.

<sup>236</sup> - Muḥammad ibn Ḥasan. *Al-Mu‘atta Riwāyat Muḥammad ibn Hasan*. 1991, Damascus, Dār Al-Qalam, vol. 3, p. 515.

<sup>237</sup> - Ḥaqqī, Ismā‘īl ibn Muṣṭafā al-Istanbūlī, *Tafsīr Ḥaqqī*. 2016, Cairo, DārTurāth al-‘Arabiyyah, vol. 12, p. 360.

‘Abdullāh ibn ‘Umar reported that the Prophet said:

من خرج من الجماعة قيد شبر فقد خلع ربة الإسلام عن عنقه حتى يراجعه ومن مات وليس عليه إمام  
جماعة فإن موته ميتة جاهلية

(Whoever segregates from the congregation, even as little as a hand-span, casts away the rope of Islām from his neck until he turns back to the group. Whoever died without aligning himself with an Imām will have died the death of *Jāhiliyyah*.)<sup>238</sup>

While seeking evidence from the verse of the Qur’ān “O you who believe! Obey Allāh and obey the Messenger and the men of authority among you.” (Q: 4:59), Shaykh Sa’diyyah writes in his *Al-Khurūj ‘Alal Ḥukkām ...*

“Maintaining unity in the community is among the paramount principles of Islām. This is why the Sharī‘ah has made it mandatory on the public to obey the ruler in all righteous matters because security and stability will prevail only through compliance with him. Rising against him is not lawful, because the dangers that can set on the Muslims by rebelling against him can outweigh the dangers of him (ruler) swerving from the track or tyrannising the people. It is regrettable to say that once the sword is unsheathed among the people, it leads to great upheaval and untold strife.”<sup>239</sup>

Shaykh ‘Alī Ḥasan Ḥāzim writes:

“In Islām, insurgents are those who revolt against the just Imām of the time. They muster their own forces, acquire defensive strength, decline to comply with the Imām of the central government on false premises and nominate their own Imām. The de facto sovereign should call them to comply with the central rule and pledge allegiance to it. If they have reasonable complaints, the Imām should redress it. But if they have no complaints, yet they rise against the central legitimate government, then the sovereign has the rights to suppress their revolt. He should encounter them until they surrender. But of course, their captives, those who suffered casualties and those who retreated from them should not be killed.

In the case of agitation to overthrow a leader, the jurists have mentioned that if the Imām was righteous, and he was not a despot nor did he commit injustice against the populace, then it would be unjustified for the rebels to rise against him. But if he was a tyrant and wicked person on all fronts, then according to some authorities, replacing him with a just ruler would be more favourable than keeping him in office. However, this could be done through negotiations through sound arguments and even-handedness rather than agitation and turmoil in the country. The object at such times, too, should be restoration of the Sharī order and freeing of the public from strife.

If the rebels start to destroy public properties, breakthrough military bases or attack the army, the state should repulse them or subjugate them until they surrender.

<sup>238</sup> - *Ad-Durr al-Manthūr*. vol. 2, p. 286.

<sup>239</sup> - Sa’diyyah AḥmadIbrāhīm Yusuf. *Al-Khurūj ‘alal Ḥukkām w atharuhūfi Tafriq al-Ummah*, Yambū’, Majallah Jāmi’ah Ṭayyibah, no. 13, 2018, p. 339

Once the rebellion is quelled, the state should confiscate their arms but restore their properties to them.”<sup>240</sup>

Some authorities quote the saying of the Prophet reported by Abū Hurayrah:

صلوا خلف كل بر وفاجر وصلوا على كل بر وفاجر وجاهدوا مع كل بر وفاجر

(Perform Ṣalāh behind every pious and impious person; perform burial Ṣalāh upon every pious and impious person and strive along with every pious and impious person.)<sup>241</sup>

The jurists have concurred that whenever the Imām encounters rebelliousness from a Muslim group, he should open dialogue with them before taking up arms against them, in which case he should seek ways to meet their demands to the best of his ability as long as their demands are not unrealistic, un-Islāmic or injurious to those of the general public.

These authorities say that in light of this saying of the Prophet, it will not be appropriate for the insurgents to depose the ruling Imām. Justifying one’s plea for unjust ends against an established government is not permissible unless the ruler himself is guilty of violating the Sharī commands flagrantly, undermining the rights of the populace or living sumptuously and recklessly while being oblivious to the public’s miseries.

Hākīm has mentioned in his *Mustadrak* as Bazzār did in his *Musnad*, on the authority of Kawthar ibn Ḥakīm through Nāfi’ and Ibn ‘Umar that the Prophet said: “O Ibn Umm ‘Abd (nickname of Ibn ‘Umar)! Are you not aware of the ruling Allāh has passed concerning a rebel of this Ummah?”

Ibn ‘Umar replied: “Allāh and His Messenger know best.”

The Prophet said:

فَإِنَّ حُكْمَ اللَّهِ فِيمَنْ بَغَى مِنْ هَذِهِ الْأُمَّةِ أَنْ لَا يُقْتَلَ أَسِيرُهُمْ ، وَلَا يُجْهَزُ عَلَى جَرِيحِهِمْ ، وَلَا يُنْبَعُ مَدِيرُهُمْ ... " وَلَا يُفْسَمُ فِيهِمْ ، هَكَذَا حُكْمُ اللَّهِ فِيمَنْ بَغَى مِنْ هَذِهِ الْأُمَّةِ

(It is that the wounded should not be attacked; the captives should not be killed and; their properties should not be dispensed as booty.)<sup>242</sup>

The Imām’s men can utilise the weapons confiscated from the rebels to fight the rebels or even mount their animals to fight them.

However, the Imāms Shāfi’ī, Mālik and Ḥanbal hold a contrary view.

If the rebels caused damage to the properties of the Imām and his people, and their plea was that they fought on religious grounds, and they were in possession of an offensive

<sup>240</sup>- Shaykh ‘Alī Ḥasan Ḥāzim. *البيغاة : تعرفهم وأحكامهم*. *Rebels: their definition and ruling*. 1988, Damascus, Majallat Thaḳāfat al-Islāmiyyah. Anon. at <https://darulghorbah.wordpress.com/...> Accessed on 11-4-2019

<sup>241</sup> - *Sunan Dār Al-Quṭnī*. vol. 2. p. 57.

<sup>242</sup> - *Qurtubī*: vol. 16, p. 312

force, then they will not be obliged to pay reparation for the damage they caused to the properties of the Imām and his people.

### **Conclusion**

While rebellion is seen as a serious crime against the serenity of the people, murder/homicide of innocent people is no less a serious crime. It is a fear that haunts the mind of everyone. No one knows whether he/she is not followed by an assassin. This is why Islām has adopted strict measures against anyone who seeks to endanger people's lives. It was in consideration to the gravity of murder that I decided to examine the topic of *Qīṣāṣ* at length in the forthcoming chapter.

## CHAPTER SIX

### *Al-Qiṣāṣ* (Equal retribution for murder)

“O you who believe! Even Retribution in respect of the murdered is prescribed on you: the free person for the free person; the slave for the slave and; the female for the female.” (Q: 2:178)

#### Preamble

Throughout history, homicide has been haunting the minds of human beings. This is why everyone has been desperately seeking a solution. In this chapter, I first give the definition of murder and then after explaining it from the Qur’ānic point of view, I explore its rulings pronounced by the jurists, categories, harmful aftermath and forms of expiations. Towards the end, I also address certain objections raised by the critics against capital punishment in Islām.

#### Dictionary Definition of Murder

“Murder is the unlawful killing of another human without justification or valid excuse, especially the unlawful killing of another human being with malice aforethought.”<sup>243</sup>

Literally, *Qiṣāṣ* translates ‘to retaliate with equality or retribute with justice’. It denotes retaliation on an equal basis for intentional homicide.

والقصاص مأخوذ من قص الأثر، وهو إتباعه، ومنه القاص لأنه . بي اللغة العربية القصاص هو مطلق المساواة والتتبع يتبع الآثار،

(*Qiṣāṣ* is derived from ‘following the traces’, that is to follow. The word *Qāṣ* (story teller) is taken from this.)

The word *Qiṣāṣ* is also taken from the root word *Qaṣṣa*, which means *to cut* with a pair of scissors (مقص). Just as the two blades of a pair of scissors are equal in size and shape, revenge in a murder case, too, should be on equal basis. Exceeding that will be considered transgression.

Technically, *Qiṣāṣ* means to avenge the murder of one’s victim and have the culprit executed by the Islāmic state on the basis of even retaliation.

<sup>243</sup>- Anon. *Malice*. at <https://www.merriam-webster.com/dictionary/>. (Accessed on 20-11-2018)

*Qiṣāṣ*, *Qawad* or *Musāwah* are three words used to convey the meaning of ‘equality in retaliation’ in different respects.

There is a difference between *Qiṣāṣ* and *lqtiṣāṣ*: The former is legislation for the society and the latter is legislation for the individual. *Qiṣāṣ* is executed by the state in consideration to public safety in future, whereas *lqtiṣāṣ* is the claim of the victim party for their losses.

*Qiṣāṣ* is one of those crimes that involve penalty (*Hadd*), meaning that, *Qiṣāṣ* is included in *Hudūd* because its penalty is divinely ordained. It is similar to *Hudūd* in that it is circumscribed – neither less nor more. But it is also different from *Hudūd* because it is subject to private claims: the family of the victim has the rights to have the murderer executed, pardon him or settle with him by compensation.

### Backdrop to the Revelation of the Verse. (2:178)

During the pagan days, retaliation for execution and blood money were practised disproportionately among the high and low classes of people. Penalties were levied indiscriminately by the superior tribe on the inferior class. The superior class would demand several innocent heads in lieu of a single life they had suffered at the hands of the lower class; and if the crime was settled on blood money, the superior class would demand in lieu of their victim, double the ransom they would have paid to the lower class had they been guilty of the murder. Moreover, the revenge was not limited to the offender, but sometimes it extended to the tribe that defended him, too.

A person from the Ghani clan murdered Shās ibn Zubayr. When the guilty party offered to pay the blood money, Shās’ father Zuhayr ibn Judhaymah said: “I will not settle on anything less than one of three things: either my son is revived, my turban is filled with the stars of the heaven or your entire tribe surrenders to me for execution. And even then, I will not have avenged my son’s murder adequately.”

و زهير بن جذيمة بطن من جذيمة من عبس من غطفان من العدنانية وقال ابن الأثير: كان زهير بن جذيمة أمير عبس وأحد سادات العرب المعدودين في الجاهلية وكانت هوازن تهابه حتى تكاد تعيده...، من ذلك ان رجلا من غنى قتل شأس... بن زهير العبسي وأنكر بنو غنى أن يكونوا هم القتلة فأرسل زهير امرأة

(Zuhayr ibn Judhaymah was a branch of the Judhaymah tribe of ‘Abas ibn Ghiṭfān al-‘Adnāniyyah. Ibn Athīr says Zuhayr was an Amīr of Abas tribe and was among the few reputed leaders of Arabia during the Days of Jāhiliyyah. Hawāzin used to dread him to the extent that they almost worshipped him. Among the events of those days was that a person from the Ghani clan murdered Shās ibn Zuhayr. But the children declined killing him ...)<sup>244</sup>

<sup>244</sup> - at <https://ar.wikipedia.org/wiki/> (Accessed on 24-11-19)

Banū Naḍīr and Banū Qurayzah – the two Jewish tribes - were always at war against each other. Banū Naḍīr considered itself superior to Banū Qurayzah, so much that if a Naḍīrī murdered a Qurayzī, the Naḍīrī got away with the murder by paying merely hundred *Wasaqs* (6 manns or 60 *Sā'* or a camel load) of dates. But if a Qurayzī murdered a Naḍīrī, the latter either executed the Qurayzī or demanded a ransom of two hundred *Wasaqs* of dates from them.

Sa'īd ibn Jubayr says that before the advent of Islām there raged internecine feuds between two Arab tribes. Bloodshed and reprisals were common between them, to the point of even killing women and slaves. When claiming for blood money, each side exercised gross injustice and made excessive claims. The tribes used to swear oaths not to settle the score until they did not execute a male in lieu of their female victim or a free person in lieu of their slave victim. It was against that backdrop that this verse was revealed.<sup>245</sup>

### **Rulings of Imām Shāfi'ī and Imām Mālik.**

Against those injustices, Imām Shāfi'ī and Imām Mālik arrived at the following Islāmic ruling in light of the verse in question. They said that the law of equal retaliation stipulates:

- a) If a free person murders anyone, only he will be executed in retaliation and no one else. Therefore, it will be unlawful for the heirs of the victim to execute two persons of the murderer's clan in lieu of their one victim, on the plea that their victim was nobler or superior in any way, as was customary.
- b) Likewise, if a slave of one tribe murders a slave of another tribe, only the guilty slave will be executed and not a free person in his place. The owner of the victim-slave cannot execute a free person on grounds of his (master's) nobility or on basis of the skill the victim-slave had possessed.
- c) Similarly, if a woman kills a woman, only the guilty woman will be executed and not a male in her place on the claim that the victim was superior."<sup>246</sup>

### **Rulings of Imām Abū Ḥanīfah**

Imām Abū Ḥanīfah explains the same as follows:

- (1) "The verse under discussion mentions only this much that a free person should be executed in lieu of a free person, a slave in lieu of a slave and a female in lieu of a female. But for the execution of a free person in lieu of a slave and vice versa, or the execution of a male in lieu of a female and vice versa, or the execution of a Believer in lieu of a Disbeliever; this verse does not make any reference to these. These cases are inferred from the verse "And We ordained upon them in the Torah that a life is for a life ..." (Q: 5:45)
- (2) Hāfiẓ ibn Kathīr and 'Allāmah Ālūsī stated that during the days of Jāhiliyyah, there were two tribes, between whom cases of execution were often raised. Unfortunately, those days the social order was in disarray, injustice was widespread and the strong exploited the weak. If

<sup>245</sup>- Rāzī ibn Abī Ḥatīm, Abū Muḥammad 'Abd ar-Raḥmān ibn Idrīs at-Tamīmī, *Tafsīr ibn Abī Ḥatīm*, 1998, Sidon, Al-Maktabah al-Aṣariyyah, vol. 1, p. 293.

<sup>246</sup>- Ash-Sharbīnī, Muḥammad Khaṭīb. *Mughni Al-Muḥtājilā Ma'rifah Ma'ānī Alfāz Al-Minhāj*. 2008, Beirut. Dār al-Fikr. vol. 4, p. 14.

a slave of a reputable person was killed, that person (master) would avenge it on a free person of the culprit's family, instead of having the culprit alone executed.

- (3) In respect of execution, Islām denounces discrimination between the superior class and inferior class. Each soul is treated equally; therefore, to execute an innocent person in place of the criminal is injustice and un-Islāmic.”<sup>247</sup>

‘Abdullāh ibn ‘Abbās narrated that the Prophet said:

المسلمون تتكافأ دماؤهم

(The blood of all Muslims is equal.)<sup>248</sup>

The relevant verse (Q: 2:178) continues:

“This is a concession and beneficence on behalf of your Sustainer.”

Touching on the general criminal laws of Islām, this verse succinctly mentions the pre-emptive stance which the Sharī‘ah adopts in respect of intentional homicide. It suggests that though the criminal law of *Qīṣāṣ* seems stringent, it contains wisdom and easing for an entire community in the long run, if not for the entire human race if it is enforced universally.

### **Three Types of Murder**

#### **The first type of murder**

**Intentional murder (*Qatl-‘Amad*):** According to Imām Abū Ḥanīfah, ‘*Qatl-‘Amad*’ is when a person intentionally murders someone with a lethal weapon or a weapon that can disintegrate the body, shred the flesh and cause blood to flow, such as a metallic instrument, sharp-edged bamboo, sharp-edged marble-stone or fire.

The Imām supports his view through the Narration reported by ‘Alī:

لا قود إلا بحديدة ولا قود في النفس وغيرها إلا بحديدة

(Execution will be imposed only if the homicide is committed with a metallic instrument.)<sup>249</sup>

This murder entails sin as well as capital punishment.

As for the sin, the Qur’ān pronounces: “Whoever kills a Believer deliberately; his requital is Hell in which he will abide for a lengthy period.” (Q: 4:93)

But for capital punishment, Allāh says: “O you who believe! ‘Equal Retribution’ is prescribed on you in respect of the murdered.” (Q: 2:178)

Ibn ‘Abbās narrated that the Prophet said:

العَمْدُ قَوْدٌ ، إِلَّا أَنْ يَعْفُوَ وَلِيِّ الْمَقْتُولِ.

(The penalty on intentional murder is capital punishment unless the heirs or guardians of

<sup>247</sup>- *Al-Hidāyah*. vol. 2, p. 666.

<sup>248</sup>- *Sunan Ibn Mājah*. vol. 2, p. 897.

<sup>249</sup>-Al-Baghdādī, *Ad-Dār Al-Quṭnī ‘Alī ibn ‘Amr. Sunan Dār Quṭnī*.1966, Beirut, Dār Al-Ma‘ārif, vol. 3, p. 87.

the victim pardon the criminal.)<sup>250</sup>

The verse (Q: 2:178) will be scrutinised in stages hereafter.

The Qur'ān says: "Whoever (murderer) is somewhat pardoned (of execution) on behalf of his (aggrieved Muslim) brother, this prosecution (by the aggrieved claimant) should be pursued reasonably (without pressurising the murderer)" (Q: 2:178)

This verse states that just as the victim's family have the rights to prosecute the murderer in court, they also have the rights to settle the crime through pecuniary compensation with him (murderer) or pardon him charitably.

As for pardoning the culprit, Allāh has encouraged it because it spares a soul and probably the culprit will repent: "Whoever exercises patience and forgives, indeed these acts (of patience and forgiveness) are of the works of resoluteness." (Q: 42:43)

Ibn 'Abbās said that according to the Judaic Law, the Israelites were permitted to execute the culprit only and nothing less. Pardon, in their case, or ransom was not permissible. As for the Christians, they were permitted to charge the murderer blood money only; their law did not permit them execution on the basis of Equal Retribution.<sup>251</sup>

But in Islām, *Qiṣāṣ* is not binding irrevocably. Rather the guardian of the victim has one of three options: (1) have the murderer executed (2) pardon him or (3) settle on a *Diyah* (blood money) with him. The two parties – heirs of the murdered and murderer - should choose one of the three options.

From this the following possibilities arise:

- 1) If the guardian says that he has pardoned the murderer *altogether*, he will have forfeited his rights to *Qiṣāṣ* or *Diyah*.
- 2) In an intentional murder case, if the heirs of the murdered commute the *Qiṣāṣ*, the *Qiṣāṣ* will be annulled and the culprit will be liable for blood money or financial recompense (*Diyah*). The blood-money should be paid to the heirs of the victim. Likewise, in an unintentional murder case, the *Diyah* should be forwarded straight to the heirs of the murdered, without the go-between of *Qiṣāṣ*.
- 3) If all the heirs pardon the murderer, *Qiṣāṣ* will be waived altogether. But if only some of them pardon him, then though *Qiṣāṣ* will be waived, the other heirs (who did not pardon) should be paid out (by the murderer) blood money proportionately.

<sup>250</sup> -*Muṣannaḥ ibn Abi Shaybah*. vol. 9, p. 365.

<sup>251</sup> -*Sunan Dār Quṭnī*, vol. 3, p. 86

- 4) In this case of pardoning, though the murderer will be absolved of *Qīṣāṣ*, he should comply with the condition the heirs stipulate upon him, provided the condition, too, is within reason and not rigid. For instance, if the heirs say, “We pardon you on condition that you remain in our slavery lifelong,” then such a condition will not apply.

Instead of the corporal penalty (*Qīṣāṣ*) the alternative compensation of *Diyah* (blood money) is proposed. This is to alleviate the animosity and tone down the ill feelings that affected the two parties. This explains that the apparent severity of divine penal punishments is based on total wisdom. How else will the vengeful feeling in the heart of the victim be quenched if the punishment is not meted out adequately to the offender, and what will deter the offender from repeating the crime if he does not suffer the pain of his ill-performance?

### **Differences of Opinions on Pardoning**

Imām Abū Ḥanīfah holds that the heirs of the victim cannot resolve to settle the crime on blood money unilaterally; they must seek the consent of the murderer. This is confirmed through the verse of the Qur’ān and Sunnah of the Prophet.

Moreover, *Qīṣāṣ* entails equality and resemblance; and wealth does not resemble the *life* of the murdered (one being financial and the other physical), whereas capital punishment does resemble the life of the murdered. Thus, the rule is *life for life* and not *wealth for life*. However, if the murderer also agrees to pay the blood money, then there is no objection. But if he disagrees to it, then the capital punishment will be confirmed.

But Imām Shāfi’ī’s dominant opinion is that the heirs of the victim can opt for blood money unilaterally. He says that it is essential for every human being to save lives in the best way they can. In cases of murder, the heirs of the victim should be compensated for their loss somehow. So, if the compensation can be made through blood money, then why not, especially when it will also spare the life of one soul - the murderer?

### **Crimes upon which *Diyah* is enforced are:**

- 1) Crimes which warrant *Qīṣāṣ*, but the *Qīṣāṣ* is either remitted by the victim’s family or is not enforceable for some reason.
- 2) *Qīṣāṣ* which is commuted into *Diyah* with the consent of the aggrieved party.
- 3) Killing done by mistake.
- 4) Dismembering of a limb by mistake.
- 5) Inflicting of an injury by mistake.

The relevant verse continues:

“... on behalf of his (aggrieved Muslim) brother.”

The word ‘brother’ in this verse conveys a subtle message to the victim’s party: “Though the murderer has killed your kin, do not forget that you are Muslim brothers; therefore, do not forego your brotherly approach towards him.”

Furthermore:

“This is mitigation and beneficence on behalf of your Sustainer.” (Q: 2:178)

This verse reflects Islam’s overriding objective of mitigating hardship and relieving the society from living in constant fear of the criminal elements, whose aim is nothing besides bringing discomfort and alarm to the masses.

These are the bounds of Allāh and concession on His behalf. Allāh Himself has instituted the penal laws so that no Amīr or Qāḍī can relieve or pardon the murderer as he wishes, exercise favouritism or settle the matter through bribes.

Finally:

“Then after this ruling, whoever transgresses ...” (Q: 2:178)

Samurah ibn Jundub narrated that the Prophet said: “If a person kills the murderer even after receiving a ransom from him, I will not pardon that person.”<sup>252</sup>

This Ḥadīth suggests that the Prophet will never settle on ransom with such a victim’s party, who, even after settling with the murderer on a ransom, kills him. The Prophet will have this second transgressor executed for his transgression.

Note: Equality (*Qīṣāṣ*) will be observed only in the execution itself and not in the method of execution. Therefore, if a person burns someone to death or drowns him, he will not be penalised in a like manner. He will be penalised through execution and not by burning or drowning him.<sup>253</sup>

### **The second type of murder**

**Quasi intentional murder (*Qatl Shib’h-‘Amad*):** This is when a person killed someone intentionally, but he was not aware of it, which in modern terms is called ‘harm leading to death’, or he made a person the direct target, but the weapon he used, in either case, was not lethal, such as a rock, piece of wood, staff or stick. Although these instruments are not usually used for killing, the person did die by it.

<sup>252</sup> -*Sunan Al-Bayhaqī*. vol. 8, p. 54 (2) ‘Uqaylī, vol. 8, p. 356. Publisher unknown.

<sup>253</sup> - Ad-Damishqī, al-Ḥanbalī Ḥafṣ. *Al-Lubāb fi ‘Ulūm al-Qur’ān*. 1998, Beirut, Dār Kutub al-‘Ilmiyyah. vol. 14, p. 133.

In this case, besides being sinful, the murderer will be liable to pay blood money. Though he will not be executed (because he used a non-lethal weapon), he will be liable for blood money because the killing was intentional.

***Diyah al-Muthaqqalah***: heavier degree of blood-money: hundred camels of ‘four’ varying ages.

According to Imām Abū Ḥanīfah and Imām Abū Yusuf, indemnity for quasi wilful murder also is a hundred camels; only that it is from the *Diyah al-Muthaqqalah*.

‘Abdullāh ibn Mas‘ūd says the penalty on quasi wilful homicide is to offer from the *Diyah al-Muthaqqalah* four types of camels:

25 x *Bint Makhāz* – one-year-old.

25 x *Bint Labūn* – two years old.

25 x *Ḥiqqah* – three years old.

25 x *Jiz‘ah* – four years old. <sup>254</sup>

### The third type of murder

#### **Murder by mistake (*Qatl-Khata’*)**

The Qur’ān says:

“It is not becoming of a Believer to kill a Believer but by mistake. And whoever kills a Believer by mistake, a believing slave should be set free and blood indemnity should be offered to the victim's household unless they remit it by way of charity.” (Q: 4:92)

This is when a person kills someone or causes physical harm to him unintentionally. For instance, the person aims his gun or arrow at a human being imagining him to be an animal, or while pointing his gun towards an animal the bullet deflects towards a human being, or he kills a Muslim thinking that he is someone from the hostile camp.

In the above verse, the last case is discussed because this type of mistake usually occurs often when fighting enemies.

Though unintentional murder does not entail sin, the person will be liable for *Diyah al-Muthaqqalah* as explained above.

‘Abdullāh ibn ‘Umar narrated that the Prophet said:

: ألا إن في قتل العمد والخطأ بالسوط أو العصي مائة من الإبل مغلظة منها أربعون خلفه في بطونها أولادها

(Behold, unintentional murder is that a person kills someone with a whip or cane.) <sup>255</sup>

There is no capital punishment in unintentional killing; however, the culprit will be required to offer a hundred camels in ransom.

Abū Bakr ibn ‘Amr ibn Ḥazam reported from his father and he from his father that the

<sup>254</sup> - *Al-Hidāyah*. vol. 4, p. 177

<sup>255</sup> - *Musnad Ash-Shāfi‘ī*. vol. 1, p. 198

Prophet wrote to the residents of Yemen that the blood money - if offered in gold coins – should be a thousand dinars.<sup>256</sup>

The Prophet ordained the blood indemnities as 100 camels, 200 cows, 2000 sheep 800 dinars or 8000 dirhams. But if a person decided to offer it in any other form, he should calculate it on the basis of the market value of these coins in consideration of the escalation of prices, as ‘Umar did during his Khilāfat.

In places where camels are not available, the *diyāh* can be paid in silver at a rate of 30.63 kg. or its equivalence by value in gold.

“The doctrine of *diyāh* can be applied as a monetary compensation against capital punishment. A *diyāh* is 12,000 dirhams which are equivalent to 30.63 kg of silver value ...”<sup>257</sup>

***Diyāhal-Mukhaffafah***: lighter degree of blood-money: hundred camels of ‘five’ varying ages.

‘Abdullāh ibn Mas‘ūd narrated that the Prophet ordained a hundred camels of five different classes on the culprit if the homicide was committed by mistake:

- 1) 20 x *Bint Makhāz*: A ‘female colt’ that entered the second year in age. It is called such because its mother is probably expecting another young.
- 2) 20 x *Ibn Makhāz*: A ‘male colt’ that entered the second year in age. It is called such because its mother is probably expecting another young.
- 3) 20 x *Bint Labūn*: A female colt that entered the third year in age. It is called such because its mother may be nursing young that was born after this one.
- 4) 20 x *Hiqqah*: A camel that entered the fourth year in age. It is called such because at this age it is capable of bearing load.
- 5) 20 x *Jiz‘ah*: A camel that entered its fifth year in age. It is called such because of the growth of particular teeth. Once those teeth become apparent Zakāh becomes binding on its owner.

### **A Band of People Murdering One Person**

If a group of people wounded one person and then the person succumbed to the wound and died, *Qishāsh* would be executed on all of them. But if only some of them had wounded the person, then *Qishāsh* would be executed on those few only. Nevertheless, if they were highway robbers, *Qishāsh* would be executed on all of them for backing one another.

<sup>256</sup> - *Ad-Durr al-Manthūr*. vol. 2, p. 618.

<sup>257</sup> - [Quantum of Damages in Takaful \(Islamic Insurance\)](https://www.jstor.org/) at <https://www.jstor.org/> (Accessed on 24-11-19)

During the reign of ‘Umar, seven people jointly murdered a slave in Yemen. ‘Umar executed all of them and then said: “Had the whole of San‘ā’ collaborated in the crime, I would have executed them all.”<sup>258</sup>

**Islām has offered *diyyah* as a substitute for blood vengeance to which the pagan Arabs were accustomed.**

The Qur’ān closes up the subject of *Qiṣāṣ* with a touching note: “O men of prudence! In the law of just retribution, there are (protection of) lives for you; perhaps you would abstain.” (Q: 2:179)

In this verse, Allāh urges people of reason, understanding and intellect to consider the pearls of wisdom inherent in the law of equal retaliation (*Qiṣāṣ*) in Islām.

A brief analysis of its semantic components is offered below.

الباب (plural of لبّ) means *core* or *brain*. It is only people of prudence and those who are endowed with reason and fairness that appreciate such laws of Allāh.

*Taqwā* (piety and fear for Allāh) is a comprehensive word; it restrains a person from committing inadmissible deeds and inspires him/her to perform virtuous deeds.

*Qiṣāṣ* (law of equal retribution) in the verse serves as *life* in the following ways:

- Imām Mujāhid, Sa’īd ibn Jubayr and Abū ‘Āliyah said: “Allāh has described *Qiṣāṣ* as *life*. This is to dissuade others from committing murder. Many people contemplate committing murder, but then desist from it for fear of execution.”<sup>259</sup>
- Though *Qiṣāṣ* is executed on one or two persons, its advantages are enjoyed by millions. It serves as a deterrent to thousands and millions of would-be culprits. The advantage of executing the culprit is that it purges him from evil tendencies, as much as it serves as atonement for him. The advantage to the heir of the victim is that his anger is abated.
- Through *Qiṣāṣ*, the family of the murdered person perceive a sense of justice. Therefore, they desist from taking further action against the relatives of the murderer. This is part of the saving of lives.
- Everyone agrees that the loss of individuals is tolerable against the losses of great numbers of people.<sup>260</sup>

<sup>258</sup>-Malik, ibn Anas. *Muattā Mālik*. 1985, Beirut. Iḥyā’ At-Turāth al-Arabī, vol. 5, p. 1281.

<sup>259</sup>- *Ad-Durr al-Manthūr*. vol. 1 p. 422

<sup>260</sup> - *At-Taḥrīr wat-Tanwīr*. vol. 6, p. 178.

The author of *Tafsīr al-Mazharī* states: “As much as this sentence indicates the wisdom underlying the criminal laws of Islām, it explains the raison d'être of the law of *Qīṣāṣ*.”

In this verse *الْقِصَاصِ* is a proper noun whereas *حَيَاةً* is a common noun. The verse denotes that in the execution of specific *Qīṣāṣ* (capital punishment), there is an unspecified promotion of life. In other words, the very thought that he (the would-be-murderer) will be executed creates awe him, thus the law saves two lives - the would-be murderer and the would-be victim.

Besides, during the pagan days, people used to kill several people to avenge the murder of a single person. Then in retaliation, the one tribe attacked several tribes, and in that way, the attack and counter-attacks flared. But now the law of *Qīṣāṣ* has contained the situation from flaring. Once the murderer is executed, the rest of people surrender.

*Qīṣāṣ* became a means of preservation of their lives.

The law is also a means of life for the offender in the Hereafter. Once he is executed in the world, he will not be seized for the crime in the Hereafter.”<sup>261</sup>

### **Wisdom in the *Qīṣāṣ* Ordinance of Islām**

The law of *Qīṣāṣ* was a superb favour of Allāh on mankind in that He Himself stipulated the penalty for murder and freed the people from taking the decision themselves; otherwise, most likely people would have erred or taken a lopsided decision in the matter. In either case, it would have aggravated the animosity between the parties and led to further bloodshed. Each party would have sought revenge and counter-revenge without recourse to the law, as is witnessed in modern times.

Moreover, the *Qīṣāṣ* ruling has even protected the judges from people's hatred and vengeance because under the law of *Qīṣāṣ* everyone will be informed that the judges do not promulgate the law; they only enact it. They are subject to the law and are not its legislators.

### **Loss to the Public**

One may imagine what an awful crime murder is. The nation loses a soul who could have been of great potential to the country. Besides killing an innocent soul, the murderer has struck fear and insecurity in the masses' hearts.

### **Loss to the Family**

The harm that the murderer causes to the victim's household is incalculable; perhaps the victim was the only breadwinner. How will the family meet its commitments after the murder?

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<sup>261</sup> - *Tafsīr Mazharī*. vol. 1, p. 185.

Therefore, the law of *Qisās*, which is free of abnormality, has touched the pulse and addressed this most appalling state in a balanced way.

The Qur'ān says:

“And who, when outrage is afflicted on them, take only equal revenge. The requital of evil is evil proportionate to that. Then whoever pardons and reconciles; his reward is with Allāh. Really Allāh does not love the unjust. Whoever avenges (on an equal basis) after he was oppressed; on such person, there is no blame. Blame is only on those who oppress the people and cause transgression in the land unjustly. They are the ones for whom there is a grievous chastisement.” (Q: 42:39,40,41,42)

## Killing

Murdering someone is the most heart-breaking crime. It stands first in the list of crimes. The Qur'ān says: “Do not slay the soul which Allāh made sacred, but in the course of justice.” (Q: 17:33)

AbūHurayrah narrated that the Prophet said:

لو أن أهل السماء وأهل الأرض اشتركوا في دم مؤمن لأكبهم الله في النار

(If the creation of the sky and earth join forces in killing a Believer, Allāh will cast all of them into the Fire headlong.)<sup>262</sup>

## Rulings

- a. If a Muslim kills a Muslim unintentionally, its atonement is dual: one is that he should emancipate a Muslim slave; and second is that he should offer blood money to the victim's household, which will be distributed among his (victim's) heirs according to their respective allotment, provided that they are Muslims. But if the heirs pardon the culprit, then he (culprit) will be excused from paying the blood money, depending on whether they (heirs) pardon the entire sum or partial. But if the heirs are non-Muslims, then the blood money will be deposited into the public treasury.
- b. If the victim was a Muslim, but due to some reason he could not migrate, therefore, while living among non-Muslims, another Muslim killed him assuming that he was one of the non-Muslims, the culprit will be liable to atonement only: he will be liable to emancipate a slave only and not to pay the indemnity.
- c. If the victim was a non-Muslim but was of a community that had a peace accord with the Muslims, then he would be entitled to the same protection as the Muslims were. The Muslim murderer should offer blood money to the victim's household, as well as set free a believing slave.

If the culprit does not find the wherewithal to free a slave, he should fast for two consecutive months. According to the general 'Ulamā', these Fasts will be a substitute only for freeing the slave and not for the blood money, meaning that, if he is unable to free a

slave, he can fast for two months, but the blood money for which he is liable will be binding on him at every cost; whether he is poor or rich. In the former case (poverty), his *'Āqilah* (to be defined shortly) will be liable because the murder was unintentional. This view is upheld by both Imām Abū Ḥanīfah and Imām Aḥmad.

### Expiation (*Kaffārah*)

The right of *Qīṣāṣ* vests in the heirs or the victim's bereaved family. But they are not authorised to take the law in their hands, that is, they cannot enforce the execution of the murderer themselves, for this may upset the order of the country. Only the state is authorised to execute the penalty through their trained appointee.

### *'Āqilah* (solidarity group, associates or agnatic male relatives)

مأخوذة من : المعاقلة ..... لسياسة الشرعية التي انتهجتها الدولة الإسلامية في زمن النبي صلى الله عليه وسلم .  
العقل وهي ربط يد ا. لإبل لثلا. تتحرك. ، وهي كناية عن دخول الشخص في العاقلة وهم من يؤدون. دية القتل.

(*'Āqilah* are agnate male relatives of a murderer from his father's side or his associates from whom financial support is expected or who are obliged to support him.

During the pre-Islāmic days, it was customary that when a person committed a crime, the entire tribe supportively paid the *diyāh* wherever applicable so that they could keep a tab on the members of the family and tribe, lest anyone from among them should resort to delinquency or violence. Checking criminal elements and their activities was a communal effort which rested squarely on the adults of the community or the organisation, failing which they were called up to foot the bill for the crime that was committed by any individual of the community, which was indirectly a fine on them for their neglect. This rule was retained by Islām. The difference was that the pagans applied that policy to every murder case, whether it was done intentionally or unintentionally, whereas Islām applies it only to unintentional and quasi-murder cases.)<sup>263</sup>

The emancipation of a slave or fasting should be borne by the culprit, whereas the blood money should be borne by the party that aided him, which is known as *'Āqilah*. The *'Āqilah* rule is instituted because generally, a person perpetrates an offence by dint of his supporters in the society. If the supporters are cautioned that if they aided their man in the murder, they would be burdened with the penalty, then probably they would endeavour to discipline the would-be-culprit or prevent him from perpetrating the murder.

Of course, in this case of *'Āqilah* payment, the culprit, too, will be required to pay his proportionate share of the *'Aql* together with this group

In a situation where the culprit has no *'Āqilah* or the *'Āqilah* is financially not in a position to pay the *diyāh*, the state will be liable for the payment. <sup>264</sup>

<sup>263</sup> - *At-Taḥaluf as-Siyāsī*. <http://alabasirah.com/download>

<sup>264</sup> - *Al-Hidāyah*. vol. 2. p. 636.

Abū Hurayrah reported that two women of the Huzayl tribe had fallout. One of them flung a rock at the other, which killed the woman as well as the foetus in her stomach. The Prophet pronounced a judgement: “As for the victim, her *‘Āqilah* will be liable for the ransom. But for the foetus, the offender will pay its ransom.”<sup>265</sup>

Note that besides the seven *Ḥudūd* penalties, *Qīṣāṣ* also is a *Ḥadd* for which the Sharī‘ah has stipulated a penalty; only that in other *Ḥudūd* cases the victim is bound to have the penalty executed – he has no option to pardon - whereas in *Qīṣāṣ* the bereaved family is granted choice between having the murderer executed, settling with him for recompense or remitting the case altogether without reparation. In this sense, *Qīṣāṣ* stands between *Ḥudūd* and *Ta‘zīr*.

These rules assure peace for the citizens that if the social, political and economic setup of the countries is fine-tuned with the laws of Islām, people will live harmoniously.

Now it is appropriate to turn to the criticisms against the Islāmic penalty of *Qīṣāṣ*

### **First Comment of the Critics**

Capital punishment is cruelty to the offender. In *Qīṣāṣ* there is no protection of life. *Qīṣāṣ* is ruining people’s lives instead of saving them. In fact, it increases bloodshed. Therefore, compared to capital punishment, imprisonment is favourable. In this way, a soul will be saved, and probably after indoctrination, the offender will prove to be a creative and useful member for the society. Moreover, the introduction of the death sentence does not have any appreciable effect on the murder rate.

### **Our Response**

#### **Points for consideration on the above:**

- Does exercising compassion on the culprit and leaving the injured party lingering not entail preferring the murderer to the victim and his/her family?
- If punishment is not meted out adequately to the murderer, then in which way will the rancour of the hearts of the victim party be soothed, and in which way will pecuniary compensation appease the hearts of those people, whose dear one has been murdered?
- Besides, if the victim’s family does not feel justified on behalf of the law-makers, then is there not a possibility that the family will take the law in its own hands and seek to avenge its suffering in a more drastic way, sometimes even by targeting innocent ones or several people in lieu of their one victim to exert retribution, as is

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<sup>265</sup> - *Sunan Abū Dāwūd*. vol. 4, p. 317.

happening often these days? How long will the grief in the heart of the family of the victim be suppressed? Someday it will spill out, perhaps disproportionately, too.

- Moreover, the victim could have been the sole breadwinner of the family. Now, what happens to the livelihood of a family of five or ten members who were all dependent on him/her for their food, education, rental and utility bills? Was the killing of one breadwinner of the family not tantamount to killing of a whole family? Will we favour the reckless culprit to a host of innocent people?

The author of *Al-Manār* explains the role of equal retaliation (*Qīṣāṣ*) thus:

“This is something unique of Islām. Such stipulations and this type of modus operandi are not to be found in any other religion. This is why, while enforcing the Law, Allāh coaches the parties. Time and again after stating the rule of *Qīṣāṣ*, He cautions the Believers ‘Fear Allāh; do not exceed limits and; do not be unjust’.”<sup>266</sup>

Yes, Islām has suggested alternative ways of resolving problems by encouraging the victim’s family to pardon or settle the killing through blood money.

### Answer to the Imprisonment Issue

‘Allāmah Ibn Qayyim answers:

“Because the critics do not reflect over every aspect of the issue of equal retaliation, they keep sinking in the morass of doubts; otherwise, who does not know that homicide and bloodshed is a cause to the downfall of any country?

If a crime is committed, yet no penalty is meted out to the criminal, or if a penalty is meted out, but it is not commensurate with the offence, then in both cases the restoration of peace in the country will be virtually impossible, because then neither will the government succeed in wielding its authority on the public nor will the public enjoy serenity. The criminals will continue roaming about freely without any check and balance while the public will keep themselves arrested within closed doors. Let the legislators of crime and security know that crimes can be eliminated only if the punishment is proportionate to the crime, and that, too, severe enough to serve as a deterrent.”<sup>267</sup>

With regard to the question of imprisonment for *Qīṣāṣ*, the authorities mention, *(as A.R. Cornelius, and others spoke on the topic hereunder)* that simply imprisoning criminals is a costly affair. Again, prison cells are often institutions for advanced training in criminality. The criminals often develop strong prison-buddies to plot and devise for future crimes once they are released. In fact, with the criminal gang, they enjoy greater authority in the prisons than outside the prisons. Under the prison rights act, they live as lords while demanding greater services.

<sup>266</sup>-'Alī Riḍā, Rashīd. *Tafsīr Al-Manār*. 1990, Cairo, Dār al-Manār, vol. 2, p. 171.

<sup>267</sup>-*I'lām al-Mūqī'in*. vol. 2, p. 162.

While addressing the Third Commonwealth and Empire Law Conference, *A.R. Cornelius spoke on the topic 'Can Islamizing a Legal System Ever Help Promote Liberal Democracy'*

"At a time when the common person all over the world is finding it increasingly difficult to provide substances for himself, there is something of absurdity involved in the consideration that he can procure such substances and a good many amenities besides (such as medical care) by simply committing a crime. The possibility is known to be exploited by individuals in every country. Although it would be too much to say that conviction and imprisonment have totally lost their deterrent effect, except perhaps in relation to political offences, yet the ever-increasing burden of maintaining prisons and highly paid staff to provide accommodation, care, proper food and other amenities for persons of proved anti-social quality is one from which an intelligent citizenry may justifiably seek to be relieved if alternative methods, cheaper and less effective, can be found to create the desired effected of punishment, retribution and reformation."<sup>268</sup>

"Theoretically, a prison is intended to promote the reformation of the criminal, but in the light of its practical methods, and actual operation probably nothing more ineffective or vicious could be devised as a method of protecting society from the depredations of the anti-social classes. Almost everything that could possibly contribute to the debasement and demoralisation of the human personality characterises present-day prisons and the contemporary methods of penal administration ... breeds professional criminals. It is the introduction to the organised under-world which receives here its material substructure and its ideological foundation ... Even the best-administered prison is the counterpart of a deeply disorganised society. In confinement there is no relationship of equal men; all human relations are unreal, fictitious, counterfeit ... on the driest sands of the social Sahara we want non-swimmers to learn to swim. We speak of delinquency areas, of degraded and degrading neighbourhoods and of the ascendancy of bad companionship. Like a burning-lenses, prison concentrates all these malignant forces on turn them on the convict."<sup>269</sup>

**"Britain's failing jails are so violent and dangerous that they have become a "fertile breeding ground" for future terrorists and street gang leaders, ..."** <sup>270</sup>

Sādiq Reza mentions in his *Due Process in Islamic Criminal Law*:

"Imprisonment is not among the *Hadd* penalties in the classical template of Islamic criminal law. Rather, it is a discretionary punishment (*Ta'zir*) that is available when proof of a *Hadd* crime fails, or criminal conduct falls outside of *Hadd* categories. Detention is also authorized before trial, in most views, for interrogation or simply to hold defendants until

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<sup>268</sup>- Lombardi, C.B. *Can Islamizing a Legal System Ever Help Promote Liberal Democracy?* 2010, University of St, Thomas, Law Publisher Journal, vol. 7, no. 3 pg. 649 -691.

<sup>269</sup>- Barnes and Teeters. *New Horizons in criminology*. 1943, New York, Prentice Hall, p. 26

<sup>270</sup> - ***Failing prisons are a hotbed of extremism, Government ...*** at <https://www.telegraph.co.uk/news> (Accessed on 24-11-19)

their cases are adjudicated. Also, outside of criminal cases-in, pre-modern times in Muslim lands and elsewhere-individuals could be imprisoned for the non-payment of debts.”<sup>271</sup>

### **Second comment of the critics**

If the murderer is wealthy, financial repayment will be a plaything for him because every time he commits a fresh murder, he will pay the *diyyah* and continue his life as usual. What is a big deal for him?

### **Our Answer**

But the Muslim jurists assert that the argument against *diyyah* could be valid only had the decision to pay and be freed been exclusively the prerogative of the culprit. But when the decision is with the victim’s family, the argument falls aside. Once the latter opt for one of the three - execution, compensation or pardon - the problem is resolved and other factors become irrelevant.

### **Third comment of the critics**

Since the beginning of the nineteenth century, the advocates of positive laws have been declaring that the age of corporal punishment has elapsed and now punishment should be meted out to the criminals either through imprisonment or pecuniary payments. “This is now the age of temperance,” they say, “Therefore, punishments should be scaled down or moderated.”

### **The Islāmic Viewpoint**

But when defiling people’s lives and bringing shame on their honour are ingrained in the culprits, how will such kind bits of advice check them from repeating the offence? Besides, how will they desist from offending others when they have made it (offence) a means of their livelihood? Has it not become evident to us how the governments are fighting a losing battle against the criminals? The worldwide scenario has falsified their claim of overcoming the criminals. Crimes are becoming rampant and the solution seems unattainable. Even after serving the sentence in prison and paying the financial charges, the criminals do not feel deterred. In fact, they become bolder and challenging. To them, it is a norm or just another experience of life. The reason is obvious: they suffer no pain for their misdoings.

Laxity in law enforcement encourages the greater commission of crimes. In the final analysis, when the heirs of the victim will notice that the law is no more protecting them, they will seek self-retribution, even if it has to be on an unequal basis.

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<sup>271</sup>- Reḍa Ṣadiq. *Due process in Islamic criminal law*. 2013, New York Law School. Faculty Scholarship Articles & Chapters, p. 23.

Finally, a unique form of information gathering is presented below to conclude decisions on murder.

### ***Qasāmah***

*Qasāmah* is derived from the word *Qasam*, which means to swear an oath.

وهي في اللغظ اسم وضع موضع الاقسام  
و في الشرع ايمان تقسم بها اهل محلة او دار

(Literally, *Qasāmah* is a name that is coined for extracting oaths.

Technically it is an oath which is extracted from people of one neighbourhood or locality.)

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It is another source of evidence in a murder case and an unusual way of substantiating suspicion.

*Qasāmah* procedure is a means to complement insufficient evidence. This ruling of the Sharī'ah is related to a murder case when the murderer cannot be identified, such as in a hit and run case. If the corpse is sound or more than half of it is still intact, then the Qāḍī will call fifty people from the adjacent locality to swear oaths that they were not involved in the death case, as defined by 'Allāmah Ibn Humām:

"*Qasāmah* in the terminology of the Sharī'ah is to summon the residents of the town close to the place where the victim was found and call them to swear oaths that neither were they involved in the killing nor do they have any knowledge of it. These oaths are also received from those at the outskirts of the town and from those who are residing so close to the spot of murder that if anyone screams from there, it can be heard."<sup>273</sup>

Rāf'ī ibn Khadīj reported that an Anṣār victim was found murdered in Khyber. His guardians approached the Prophet and explained the episode.

The Prophet said: "You should produce two witnesses who will testify to the murder of your man."

They said: "O Messenger of Allāh! There was no Muslim over there. There were only people of other religions, and they have boldly committed worse things than this."

The Prophet said: "Then you should choose fifty of the residents and call them to swear oaths."

The guardians approached fifty of those people and called them to swear the oath, but they declined to swear the oaths.

Consequently, the Prophet paid the *diyyah* to the aggrieved party.<sup>274</sup>

<sup>272</sup> - Footnote *Al-Hidāyah*. vol. 2, p. 621

<sup>273</sup> - Ash-Shawkāni. *Faṭḥ Al-Qadīr*.2010, Beirut, Dār al-Ma'ārif. vol. 24, p. 87.

<sup>274</sup> - Al-Shanqīṭī, Muḥammad Amīn. *Aḍwā al-Bayān fi Ṭdāḥ al-Qur'ān bil Qur'ān*.1995 Jeddah, Majma' al-Fiqh, al-Islāmī, vol. 18, p. 237.

**Ruling**

If the residents are less than fifty, the oaths should be repeated by the same people until the number is made up.

According to Imām Abū Ḥanīfah, *Qasāmah* is conducted to protect an innocent suspect from blame. It is enforced if the corpse is found on a land that belongs to someone or a place that is used by people of a certain locality only. But if the body is found elsewhere, such as a public place, and there is substantive evidence against a suspect, then the *Qasāmah* procedure will not apply.

**Conclusion**

After discussing the invariable penalties (*Al-Ḥudūd*) in the earlier chapter and then giving a detailed account of homicide, I now embark upon the chapter of variable penalties, called *Ta'zīr*, which are the penal laws of a discretionary nature.

## CHAPTER SEVEN

### ***At-Ta'zīr* (Variable Discretionary Penal Punishments or Offences Not Punishable by Fixed Penalties.)**

#### **Preamble**

This chapter comprises of the following topics: firstly, it explains the definition of *Ta'zīr* and in which way does it (*Ta'zīr*) differ from *Hudūd*; secondly, the pre-emptive and severity roles of *Ta'zīr* penalties are discussed. Then after exploring the multiple application for *Ta'zīr* penalties, such as imprisonment, banishment, fine and public exposure, the chapter closes with the topic on the maximum punishment that can be awarded in *Ta'zīr* penalties.

Penalties in Islām are of two categories: *Al-Hudūd* and *Al-Ta'zīr*. This chapter deals with the *Ta'zīr* penalties while the *Al-Hudūd* penalties were discussed in chapter five.

#### ***Ta'zīr***

The criminal jurisprudence of Islām has rich sources of prohibitions and commandments. Among those is *Ta'zīr*:

- The *Hudūd* laws are mandatory and fixed while in the *Ta'zīr* case the Qāḍī applies his judgement in light of the Qur'ān and Ḥadīth.
- *Ta'zīr* are supplements to the elementary laws.
- Whichever criminal case does not fall under the *Hudūd* and *Qisās* categories, are addressed through the penal laws of *Ta'zīr*.

In this way, *Ta'zīr* performs an integral role in the legislative laws of Islām. The *Hudūd* cases can be placed under the caption of felony while *Ta'zīr* cases can be placed under the caption of misdemeanour.

Indeed, Islām has developed a unique approach towards the protection of life and property through its *Hudūd* and *Ta'zīr* penalties.

The rulings on the major crimes that were committed by people during the lifetime of the Prophet were pronounced by him. But rulings on other crimes that were not known previously and were performed at a later stage were pronounced by the jurists through consensus or analogy to the rules available in the Qur'ān and Sunnah. In other words, besides stipulating specific *Hudūd* punishments for major crimes, the Sharī'ah has also laid criteria to award punishments for relatively minor crimes. Seeing that crimes are multiple – major and minor - the Qur'ān with its concise mode of expression did not stipulate independent penalties for each of them. Minor crimes are addressed through *Ta'zīr* penalties.

Some jurists have explained the above as follows:

*Ta'zīr* is variable penalties, the judgement of which is vested with the Qāḍī. Seeing that many of the *Ta'zīr* (secondary) level crimes were not committed during the twenty-three year of the Prophet, the need for prescribing penalties for all of them at that stage was not perceived. But then as time passed and the people committed other crimes, sometimes of a lesser degree, the need to frame rules for these became a necessity. This is when the Qāḍī was vested with the authority to pronounce penalties on these cases in accordance with his discretion, but of course in light of the Qur'ān and Hadīth.

وعندما تلا أبو بكر هذه الآية أيقن عمر بن الخطاب والمسلمون أن مُحمَّدًا قد توفي بحق، وقد .... فأشار عمر بن الخطاب على أبي بكر أن يجمع الآيات المكتوبة على الورق وعلى الجلد ... من الحيرة وأطراف العراق وصالح أهلها من المسيحيين العرب على أن يدفعوا الجزية، ثم ..... إلا أن هذه الصلاحيات لم تتسع لتشمل السلطة المالية التي ... بقيت في أيدي عمال الخراج

(Abū Bakr instructed 'Umar to compile some basic laws and rules, make copies of them and then send them to the governors of the Islāmic states. It is recorded that after the demise of the Prophet, this was the foremost official charter prepared, which was adopted to codify the laws relating to *Ta'zīr* penalties. These penalties were ordained and defined to serve as blueprints to judges in future times.)<sup>275</sup>

### Definitions of *Ta'zīr* and its Applications

Literally, *Ta'zīr* means a reprimand or reproof on behalf of the Imām or his deputy against certain crimes.

Lexically it is derived from the word '*azzara* meaning to strengthen or support.

لِنُؤْمِنُوا بِاللَّهِ وَرَسُولِهِ وَنُعَزِّرُوهُ وَنُقَرِّبُوهُ (... so that you believe in Allāh and His Apostle, assist Allāh ('s religion) and revere Him. (Q: 48:9)

Its legal definition is:

تأديب علي ذنب لا حد فيه و لا كفارة

(A disciplinary punishment for a crime for which neither a specific *Hadd* (penalty) nor any form of expiation is prescribed in the Qur'ān or Sunnah.)

Therefore, its decision rests with the Qāḍī (judge), Hākim (governor) or the Imām (ruler). They will employ their discretion and decide within the framework of the Sharī'ah the appropriate penalty in relation to the crime, circumstances, seriousness of the offence, the offender's background and the public interest. These executive officers are authorised to punish offenders who are guilty of any type of delinquent behaviour or a social or political undesirable act.

<sup>275</sup> - *Al-Khilāfah ar-Rāshidah* at <https://www.wikiwand.com/ar> (Accessed on 24-11-19)

*Ta'zīr* is awarded to the offender for acts regarded to be sinful or destructive to public order. Though they are not punishable as *Hadd* or *Qisās*, they fall under the general prohibitions of the Qur'ān: "And do not cause mischief in the land after it is set to order." (Q: 7:56) and the saying of the Prophet: "وَأَحْسِنُوا إِلَىٰ عِبَادِ اللَّهِ كَمَا أَحْسَنَ اللَّهُ إِلَيْكُمْ" (Be kind on the creation of Allāh just as Allāh has been kind on you.)<sup>276</sup>

*Hudūd* range from death and imprisonment to local banishment and a variety of fines.

### ***Ta'zīr* Versus *Hudūd* Penalties**

- 1) *Ta'zīr* penalties are formulated from time to time by the Imām or Qāḍī as the need demands. As for the *Hudūd* penalties, the Sharī'ah has placed only a limited number of crimes under it. This is due to the seriousness and the mayhem those crimes create in society.
- 2) *Ta'zīr* penalties are reformatory measures on offences whose rulings change by the changing of the condition of its perpetrator and the situation in which the crime is perpetrated. They resemble *Hudūd* in the sense that they are a means to reform the culprit.
- 3) *Ta'zīr* is instituted only to reprimand the person; it does not include the meaning of atonement, whereas *Hudūd* includes atonement as well. However, *Ta'zīr* is a preventive measure; it serves as a deterrent and prevents a person from drawing closer any major crime that may entail a *Hadd* penalty in future.
- 4) *Ta'zīr* is an unspecified punishment and is amenable to changes from one condition to the other and from one age to the other. Occasionally, the political state of the country and the public's preferences are taken into account in determining it. Sometimes the punishment is intense and at other times benign, depending on the crime and the criminal. These different penalties in varying situations testify that there is a certain degree of latitude and consideration in the *Ta'zīr* penalties compared to the *Hudūd* penalties.<sup>277</sup>

### **Differences Between *Hudūd* and *Ta'zīr***

- 1) *Hudūd* are prescribed punishments, whereas *Ta'zīr* are non-prescribed punishments. *Hudūd* being prescribed, the Qāḍī is not authorised to alter it, whereas *Ta'zīr* being non-prescribed, the Qāḍī may weigh the situation and employ his prudence before passing judgement. If many options are proposed, then he may choose an appropriate one that will serve as an effective deterrent to the culprit in the future. Penalties are not meant to simply punish, but to improve the situation, reform the offender and set a precedent for the future.
- 2) *Hudūd* are irrevocable and immutable, whereas *Ta'zīr* are subject to circumstances in its applicability and degree (severity).

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<sup>277</sup>- *Criminal law of Islam*. vol. 1. p. 144

- 3) *Hudūd* and *diyāh* penalties are limited, while *Ta'zīr* penalties are multifarious.
- 4) *Hudūd* remain *Harām* at every cost, whereas *Ta'zīr* is sometimes relaxed if they are in the interest of the public.
- 5) In *Hudūd*, the guilt must be established beyond a reasonable doubt; therefore, *Hudūd* are revoked if there is any doubt in its establishment. But *Ta'zīr* can be enforced, more or less, even with any degree of doubt in the crime.
- 6) *Hudūd* should be inflicted on the guilty person in full, even if the offender expresses regret for committing the crime, whereas *Ta'zīr*, may be relaxed with regrets and promise to reform.
- 7) A minimum number of four witnesses is essential for the enforcement of adultery, and two witnesses for other cases pertaining to *Hadd*, whereas for the enforcement of penal punishment (*Ta'zīr*), one witness also can suffice.

Note that while *Hudūd* and *Ta'zīr* are the same in their preventive and disciplinary motives, they differ in the following points:

- 1) The infliction of a *Ta'zīr* penalty on people of low conduct should be harsher than its infliction on people of integrity and reputation.
- 2) عن ابي موسى ان النبي صلى الله عليه وسلم ( كان اذا اتاه طالب حاجة أقبل على جلسائه ؛ وقال ( اشفعوا تؤجروا ؛ ويقضى الله على لسان نبيه مايشاء  
(Abū Mūsā al-Ash'arī narrated that when a needy person approached the Prophet to seek help, the Prophet turned to his Companions and said: "You should intercede [in favour of the people] because that will be a means of reward for you. Allāh pronounces a judgement through the tongue of his Messenger whatever He decides.)<sup>278</sup>
- 3) *Ta'zīr* accommodates intercession, whereas *Hudūd* do not. The Prophet said: "Come to me with your intercession. Allah passes his (*Ta'zīr*) penalties through me."
- 4) Hāfiẓ Ibn 'Abd al-Barr said: "I am not aware of any opposing view to this idea that intercession in respect of the one who has committed sins is a virtue and is in favour of the intercessor until it reaches the ruler. Once it reaches his notice, he is obliged to enforce the penalty."<sup>279</sup>
- 5) *Hudūd* are annulled through doubts, whereas *Ta'zīr* is commuted.
- 6) أما شرط وجوب التعزير فالعقل فقط؛ فيعزر كل عاقل ارتكب جنائية إلا الصبي فإنه يعزر  
تأديبا لا عقوبة  
(Allāmah Kāsānī says: "As for discretionary penalties, sanity is the only condition. Every sane person who is guilty of committing a crime will be penalised. But for an infant, he will be meted out punishment by way of discipline and not by way of penalty.)<sup>280</sup>

<sup>278</sup>-Musnad Aḥmad ibn Ḥanbal. vol. 4, p. 409

<sup>279</sup>-Musnad Aḥmad ibn Ḥanbal, v. 4, p. 400

<sup>280</sup>-C:\Users\user\AppData\Roaming\Microsoft\Word\at <https://www.islamweb.net/fatwa/index>. Accessed on 12-4-2019 Abū Zahrah, Muḥammad, *Al-Jarīmatu wa 'Uqūbat fi Fiqh al-Islāmī*. 1998, Cairo, Dar-Fikr al-Arabī, p. 339.

### Cases in which *Hudūd* punishments are replaced by *Ta'zīr*

Although the under mentioned four cases fall under *Hudūd*, only a *Ta'zīr* penalty will be enforced on its perpetrators and not *Hadd*. This is either because of deficiency in evidence or certain extenuating factors:

- 1) Stealing from a *Maḥram* (close relatives whom the person cannot marry) or failing to confirm a trial due to insufficient witnesses.
- 2) Consuming pork or usury, a public authority breaching a trust, offering false testimony, receiving bribery, being guilty of contempt of court, committing sodomy and misleading the public through sorcery, fortune telling, astrology and palmistry.
- 3) Defying social standards, promoting pornography, wearing provocative dressing, displaying delinquency in public, disrupting social order and being insubordinate to the husband.
- 4) Attempting to commit adultery, assaulting or committing theft of an item that falls short of the prescribed value for *Hadd*. وكذا لك اذا نقصت قيمتها من النصاب (The hand will not be amputated if the stolen item has dropped [in value] to lower than a prescribed *Niṣāb*.)<sup>281</sup>

### Two principle roles of *Ta'zīr*

#### (1) Pre-Emptive Role

It is pronounced only in such cases where no *Hadd* is prescribed. It is enforced to uphold the Rights of Allāh, rights of people or both. However, the ruler is strongly advised to follow the Islāmic rules in his judgement. He should also consider what is most expedient and what is in agreement with the Sharī'ah. Its implementation will certainly have an impact on the would-be-criminal in that it will make him reflect that when the Qāḍī did not pardon anyone for committing a minor crime of a *Ta'zīr* degree, then in which way would he pardon anyone for committing a major crime of a *Hadd* degree? This will deter him and dissuade him from committing any offence, whether minor or major.

#### (2) Severity in the Execution of *Ta'zīr*.

*Ta'zīr* penalties are not restricted; they can be inflicted beyond the degree of *Hudūd* penalties, too. If a particular criminal case demands that a benign punishment will not be effective enough on the culprit to prevent him from committing further crimes, then the degree of *Ta'zīr* penalty can be intensified. Penalties will be measured by the seriousness of the crimes.

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<sup>281</sup>- *Al-Hidāyah*. vol. 1, p. 536

التعزير في الشريعة التعزير لغة: ضرب دون الحد، لمنع الجاني عن المعاودة وردعه عن المعصية. ... يسيرا أو يخون أمانته كولاية ... أموال بيت المال أو الوقوف ومال اليتيم ونحو ذلك ... وهو من باب السياسة الشرعية، بل قد اعتبر بعض الفقهاء السياسة

(If the government personnel enforce the *Ta'zīr* penalties (even if they have to enforce capital punishment) to reprimand or discipline the criminals, then its (*Ta'zīr's*) definition will be as follows: "Politically *Ta'zīr* means intensification of the punishment wherever and on whomsoever it is required in order to eliminate the cause of evil.)<sup>282</sup>

*Ta'zīr* varies according to the time and place, as much as it serves as a preventive measure against other major crimes. In order to dissuade a person from committing fornication, the judge should flog him by way of *Ta'zīr* even for interfering with women, sitting in the private company with strange women or committing other obscene acts that may draw him closer to fornication. This will be in compliance with the verse: "Do not draw close to fornication." (Q: 17:32) *Ta'zīr* has multiple advantages, chiefly prevention of the growing evil.

### Rehabilitation Through *Ta'zīr*

Though the strict conditions of *Hadd* do not apply to *Ta'zīr* punishments, when awarding the latter the Qāḍī should bear the psychological condition and background of the offender in mind.

*Ta'zīr* can rightfully be interpreted as a corrective or remedial measure. It counteracts the reckless behaviour of the individual for bearing false testimony or stealing an item that does not meet its stipulated value.

The Qāḍī or Imām is authorized to waive the *Ta'zīr* with the proviso that it does not prejudice the rights of the victim. Likewise, the victim is allowed to pardon the culprit. But that is possible only to the extent of his rights and not when it jeopardizes the rights of others.

Sometimes perpetrators of crimes deserve a *Hadd* punishment, but due to some doubt it cannot be applied. For instance, the hand of a thief is amputated for theft. But the amputation penalty will not be enforced on all types of theft, such as pick pocketing, snatching or stealing coffins from the graves.

( و لا قطع علي منتهب و لا مختلس ولا علي النباش يأخذ الكفن )

Likewise, the *Hadd* penalty of eighty lashes is awarded to the person who levels defamation of adultery against his spouse. But this penalty will not be meted out to him if he simply curses her. In these cases probably a mild *Ta'zīr* will be enforced.<sup>283</sup>

<sup>282</sup> - *At-ta'zīr fish-Shari'ah*. at <https://www.alukah.net/sharia>. (Accessed on 24-11-19)

<sup>283</sup> - *Al-Hidāyah*. vol. 1, p. 528.

### The Mandatory Nature of *Ta'zīr* and its Stipulations

Muṣṭafā 'Imrān ibn Rābi' mentions in his عقوبة التعزير في شريعة الاسلامية (The discretionary penalties in the Sharī'at of Islām.)

“The two jurists Mālik and Aḥmad maintain that the *Ta'zīr* execution is obligatory on the Imām because it is among the established rights of Allāh. Qarāfi says: “*Hudūd* are executed by law, and its enforcement is upon the Imāms.”

As for the *Ta'zīr*, the jurists have differed in their opinions:

Imām Mālik says if the penalty falls under the category of the Rights of Allāh, then it will be obligatory like *Hudūd*.

Ustādh Abū Bakr says: “From the generality of these penalties it is deduced that if the victim claims for its execution, it will be essential, otherwise not.”

However, Imām Shāfi'ī's view is that if the *Ta'zīr* penalty is related to the Rights of Allāh, such as the person committing an act that may lead to adultery, then the Imām has the option to pardon him (if he discerns true repentance in the person) or charge him. But if the *Ta'zīr* is related to human rights, such as uttering an offensive word against someone, then the Imām is not authorised to pardon the offender until the offended person does not pardon the offender in his presence.

The same opinion is held by Imām Abū Ḥanīfah.

Jurists mention that sanity is the only condition stipulated for the execution of *Ta'zīr*. If a sane person commits an act which is not covered by a specific *Hadd*, whether he is a Muslim or non-Muslim, free person or slave, male or female, adult or child, the *Ta'zīr* will be meted out to them; except that the grown-up infant will be punished by way of reproof and not by way of *Ta'zīr*.<sup>284</sup>

To illustrate this point further the Prophet said: “Once a child is seven years old, you should instruct him/her to perform Salāh. When he reaches ten years, strike him for neglecting Ṣalāh.”<sup>285</sup>

### Liability for Undue Harm Caused through *Ta'zīr*.

<sup>284</sup> - Rābi'ah, Muṣṭafā 'Ammān. 'Uqūbat at-Ta'zīr fi al-Shari'at al-Islāmiyyah. *Majalla Al-Jāmi'ah al-Asmariyyah al-Islāmiyyah*.p. 46.

<sup>285</sup> - *Abū Dāwūd*.vol. 1, p. 133.

Whoever dies through the penalty inflicted by the Imām his blood is in vain, meaning that the Imām or state will not be liable for that, as held by the Imāms Abū Ḥanifah, Aḥmad and Mālik. This is recorded by the [author of Hidāyah: Burhān ad-Dīn Abul Hassan Ali ibn Abū Bakr Al-Farghānī Al-Marghīnāni](#) as follows:

“The execution of the Imām was in compliance with the Sharī law; and a person who is charged with duty cannot be bound to the condition of safety, like a copper.

Nevertheless, Imām Shāfiī holds that the indemnity for the bodily injury caused to the offender will be on the relatives of the person and not on the public treasury. He inferred this rule from the event of ‘Umar when he sent a person to a woman of whom he had received some unwelcomed news. When the woman heard of ‘Umar’s enquiry, she aborted the child. ‘Umar sought counsel from others on the issue. Some said: “You hold the office for disciplining the people; therefore, are not answerable for the consequence.”

When ‘Alī heard of the episode, he said: “If ‘Umar applied his discretion for the ruling, then it is certain that he had erred in his discretion; and if he did not apply his discretion, then he was led into delusion; hence, liable for blood compensation.”

‘Umar said: “I urge you not to sit until you charge the indemnity on your people.” <sup>286</sup>

### **Restriction of Judgement Pertains to *Ḥudūd* and *Qisās* only and not to *Ta’zīr***

Unlike the *Ḥudūd* penalties, which the Qāḍī or victim cannot pardon, *Ta’zīr* punishments can be pardoned by either of them. *Ta’zīr* penalties are vested with the authorities to execute, suspend, commute or pardon the offender as they may deem fit, with the proviso that they do not infringe upon the personal rights of the victim. Likewise, the victim also is entitled to pardon the offender as long as it does not violate any rule of the Sharī’ah. This means that he may pardon the rights of personal nature only.

On the contrary, in modern laws it is laid that the powers of the court are circumscribed; therefore, the court cannot go lower than the minimum limit, commute the sentence or suspend it. Legal personnel of secular laws do admit that because the courts are not vested with the freedom as the Qāḍī is, they cannot address or overcome certain difficulties which they encounter frequently in court cases.

But in the same vein, while the Qāḍī enjoys the freedom of discretion, he is not authorised to pronounce judgement at random. The Sharī’ah did not confer upon him unqualified rights to decide as he wishes. Nor is he authorised to declare an act lawful what the Sharī’ah has declared unlawful or vice versa, or set a penalty for an act which is not repulsive or prohibited in the Sharī’ah. The Sharī’ah, on the whole, has prescribed certain provisions derived from the Qur’ān and Sunnah, basing on which the authorities can

<sup>286</sup>- Rābi’ah, Muṣṭafā ‘Ammān. *‘Uqūbat at-Ta’zīr fi al-Sharī’at al-Islāmiyyah. Majalla Al-Jāmi’ah al-Asmariyyah al-Islāmiyyah.* p. 60.

declare an act as an offence and even determine the punishment. *Ta'zīr* penalties are from among them. They are deduced from the general and particular rules of the Qur'ān and Sunnah. However, because of the subtlety of some of those rules, the jurists have dexterously delved into the sources and extracted them as guidelines for us.

#### **Pertinent Points in Relation to *Ta'zīr*.**

- 1) The powers the Sharī'ah has conferred on the Imām are not authoritative; they are suggestive. They only make it easy for him to assess the situation in which the crime is committed as well as the state of the criminal, and then propose a fair judgement. This is to ensure that all obstacles on the way to justice are removed so that an innocent person may not have to suffer the consequence of what he is not guilty.
- 2) *Ta'zīr* is not an exclusive right of the victim; it is the right of the community as well. Therefore, he (victim) cannot prevent its enforcement. The judge executes it on behalf of the community.

#### **Multiple Application for *Ta'zīr* Penalties**

There are several types of *Ta'zīr* penalties, ranging from cautioning, lashing, imprisonment and banishment. They vary from offence to offence and from person to person. The psyche and circumstances of the offender also are taken into account in passing the judgement. The Qāḍī is authorised to commute the penalty or extend it

Categories of these offences are:

- **Commercial offences**, such as appropriating interest, dealing in bribery, hoarding, usurping people's wealth, dealing in unlawful commodities and confiscating people's properties, etc.
- **Ethical offences**, such as advertising obscene literature, enticing the public with pornography and arranging entertainment of vice, etc.
- **Health offences**, such as under-treating and overcharging by medical personnel, throwing filth in public places, polluting public water reservoirs and selling expired food or medicine to people, etc.
- **Family offences**, such as neglecting the basic needs of the family or depriving the children of education and true upbringing.
- **Public roads offences**, such as driving such vehicles or riding such animals that may render the roads defective or endanger the safety of the pedestrians.
- **Courts of justice offences**, such as injustice on the part of the judges, passing judgement contrary to the legal rules and favouring some clients against others through bribery and others.

The following also are listed:

- **Aggravated burglary.**
- **Indecent assault.**

- **Drug trafficking offences.**<sup>287</sup>

### Penal Punishments

Before executing these penal laws, the Qāḍī should investigate the circumstances which motivated the offence and then pronounce the punishment accordingly.

These range from light to rigorous punishment: from exhortation to censure, intimidation, deportation, public denunciation, confiscation of property, payment of fines, confining, flogging, condemning to death, reprimanding, boycott, public disclosure and imprisonment.

‘Umar ibn Khattāb executed the *Ta’zīrāt* as follows:

- 1) **Beating:** The number of stripes and its degree of severity, depending on the individual. For instance, ‘Umar lashed a person 300 stripes for stealing an item from the public treasury. He lashed Subaygh ibn ‘Asal gravely for repeatedly enquiring on the allegorical verses of the Qur’ān. He also lashed a person somewhat a hundred stripes for being in the company of a strange woman at night.
- 2) **Banishment:** When ‘Umar feared that Subaygh ibn ‘Asal’s queries on allegorical verses of the Qur’ān would influence the people, he banished him.
- 3) **Boycotting the offender:** ‘Umar ordered people to excommunicate Subaygh.
- 4) **Imprisonment:** ‘Umar arrested Huṭīah when the latter criticised the Muslims and disparaged them. He even imprisoned those who were found guilty of offering false testimony. Sometimes he put certain criminals on probation. But this sentence was conditional on the convict promising good behaviour.
- 5) **Burning down a residence:** ‘Umar burnt down the palace of Sa’d ibn Abi Waqqās when the latter, while he was a governor, restricted people from reaching him freely. He even burnt down an off-sale shop for selling liquor. The owner’s name was Ruwayshidath-Thaqafi. ‘Umar said to him: ‘You are a *Fuwaysiq* and not *Ruwayshid*.’
- 6) **To bring shame on the offender by blackening his face, shaving his head and publicising him in public:** ‘Umar did this with a person who was found guilty of offering false testimony. The person was stripped off his outer garments, brought into public view and then an announcer proclaimed: “This is so and so person, guilty for this and that offence.” In another incident ‘Umar shaved the head of a false testifier, blackened his face and made him ride a donkey sitting in reverse.
- 7) **Confiscating the wealth:** This is what ‘Umar did with some of his governors and a person who was found begging while he had sufficient funds at home for his needs.

<sup>288</sup>

<sup>287</sup>- Anon. *criminal, crime,types-of-offences*, at

<https://www2.gov.bc.ca/gov/content/.../criminal...criminal...crime/.../types-of-offences>. (Accessed on 12-4-2019)

<sup>288</sup>- Muḥammad Baltajī. *Al-Janīyyāt w ‘Uqūbātihā fil Islām*.2012, Cairo. Dār As-Salām., p. 60. at <https://www.google.com/search?> (accessed on 12-4-201)

### Punishments are awarded in three different ways:

- 1) **Corporal**, such as capital punishment, lashing and arrest.
- 2) **Pecuniary**, such as *diyyah* and confiscation of wealth or property.
- 3) **Psychical**, such as mental pressure and intimidation.

‘Umar ibn Khattāb executed *Ta’zīr* on the following people:

- Hundred lashes on Ma‘ān ibn Zaydah who forged a seal of the exchequer and abused it to collect funds from the public treasury.
- A person, who had consumed liquor in Ramaḍān, was brought before ‘Umar. ‘Umar said: “May your nose be soiled. Are you not aware that even our children observe fast during Ramaḍān?” Then he struck him eighty lashes and banished him to Syria.
- In another case of liquor consumption during Ramaḍān, ‘Umar struck the person a hundred lashes: eighty for the liquor and twenty for desecrating the month of Ramaḍān.
- Forty lashes on a person who bore false testimony.
- Thirty lashes on a person who had mistreated Umm-Salmah (spouse of the Prophet) for the loan her nephew – who had died - was owing to him.<sup>289</sup>

### Imprisonment

This is an institution that was in vogue since primitive days. Prophet Yusuf was also arrested for several years. It is a place where an accused or suspect is arrested to await trial.

Baḥz ibn Ḥakīm narrated from his father, and he from his father:

أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حَبَسَ رَجُلًا فِي تَهْمَةٍ.

(The Prophet imprisoned a person for slandering someone.)<sup>290</sup>

It is reported that the Prophet detained a person, who was suspected of homicide, for a few hours.<sup>291</sup>

‘Abdullāh ibn ‘Umar related an incident of two people: one of them seized a person and the other murdered him. The Prophet had the murderer executed and the other person imprisoned.

<sup>289</sup>- *Fiqh ‘Umar ibn al-Khaṭṭāb*, p. 170. at <https://ar.islamway.net/article/46702/> (accessed on 12-4-2019)

<sup>290</sup>- *Sunan Abū Dāwūd*. vol. 3, p. 350.

<sup>291</sup>- Al-Bayhaqī, Abū Bakr Aḥmad ibn Husayn. *Shu‘b al-Imān. Sunan Al-Kubrā Bayhaqī*. 1990, Beirut. DārAl-Kutub al-‘Ilmiyyah. vol. 6, p. 348.

Basis for this classification of *Ta'zīr* is to capture this topic from as many angles as possible and to explain a wholistic view of the penal code of Islām, that it (penal code) is capable of handling the situation from whichever viewpoint it may be.

Though imprisonment is a penal punishment, it is not as effective in ruling out the crime or reforming the criminal as it is expected. This gang of hard-core criminals - when they are locked up in one place - unite and contrive for future transgressions. They learn from one another the technique of committing crimes and then execute it once they are released. When they become habitual perpetrators of crimes, they are immune to going in and out of jail. Some of them even lose their sense of responsibility and become more lethargic. Some others cash up on the free services rendered to them by the tax man's money. This is why, in Islām rather than imprisonment only, penal laws are enforced on the criminals.

### **Banishment**

This is to exile a criminal from his hometown to another town or country.

Imām Shāfi'ī maintains that banishment for one year of an unmarried adulterer is classified as *Hadd*, whereas the other Imāms classify it as *Ta'zīr*. However, banishment should not be enforced in all circumstances. It should be enforced only when the Qāḍī senses that the criminal's stay in his hometown will not be in favour of the public. Sometimes by remaining in the company of other like-minded characters, he can adversely influence others, especially the youth.<sup>292</sup>

Other authorities maintain that if it is feared that the criminal will become more daring in a foreign environment where he is a stranger and, therefore, will commit crimes more boldly, the Qāḍī should imprison him instead of driving him out of the town.

The period of banishment varies from person to person. It is on the Qāḍī to decide what will be most appropriate in consideration to the crime and also the time required for the reformation of the criminal.

It is reported that 'Umar banished Rabī' ibn Umayyah ibn Khalaf to Khyber for consuming liquor. Rabī' fled from Khyber and united with Heraclius in Byzantine Rome. When 'Umar was informed of it, he said: "I will never banish a Muslim after today."<sup>293</sup>

Likewise, when two unmarried persons committed adultery, 'Ali pronounced a ruling that they should be flogged and not exiled, for exiling is a tribulation of its own type.<sup>294</sup>

<sup>292</sup>- *Al-Majmū' Sharh al-Muhadhdh*. vol. 20. p. 14

<sup>293</sup>- Al-Fakhr Ar-Rāzi, Muḥammad ibn 'Umar Ash-Shāfi'ī. *Tafsīr Fakhr ad-Dīn Ar-Rāzī*. 1981, Beirut. DārIhyā' al-Turāthī, vol. 1, p. 326. Hereafter referred to as *Tafsīr Fakhr al-Dīn al-Rāzī*.

‘Abdullāh ibn ‘Umar reported that when a slave woman of ‘Alī committed adultery, he (‘Alī) flogged her but did not exile her.

Therefore, the ‘Ulamā’ mention that had exiling been an established rule for adultery, it would not have remained a secret to the senior Companions.<sup>295</sup>

### **Juristic Verdict in Today’s Time**

Looking at the geographical and political scene of the world of primitive days, the banishment of criminals was not a problem. Laws were lax and restrictions were less. But now in the modern age when countries have augmented immigration laws and visa restrictions, banishment may not be a practical solution. Therefore, currently, the jurists have suggested imprisonment as an alternative punishment.

### **Fine – a Pecuniary Punishment.**

‘Fine’ is one of the punishments imposed on crimes liable for *Ta’zīr*.

‘Umar even charged those people a fine who refused to pay Zakāh on their properties.

### **Public Exposure**

Whereas in modern times certain criminals are exposed through newspapers and blacklisting, in the Islamic Shari’ah it was done by bringing out the culprit in public and exposing him and his crimes. They were even exposed for embezzling funds, defrauding or giving false evidence.

Bearing false witness is a *Ta’zīr* offence punishable by *Tash’hīr* (public labelling), which entails parading the offender through the city and proclaiming to the public that he is not to be trusted.

The four Imāms maintain that an offender should not be subjected to both punishments - *Ḥadd* and *Ta’zīr*. If he is inflicted with *Ḥadd* for an offence, penal punishment should not be inflicted on him. Yes, if an occasion demands that a particular offender should be inflicted with penal punishment together with the *Ḥadd*, then that will not be contrary to the law. Imām Mālik makes one exception. He says that combining the two is not permissible if the *Ḥadd* was a death penalty because it will serve no purpose. But if the death sentence is withdrawn for any reason, then *Ta’zīr* may be enforced. He reasons that *Qīṣāṣ* is the rights

<sup>294</sup>-*Tafsīr Fakhr al-Dīn ar-Rāzī*. vol. 1, p. 328.

<sup>295</sup>-*Tafsīr Fakhr al-Dīn ar-Rāzī*. vol. 1, p. 326.

of the Sharī'ah seeing that it is in retribution for the offence, whereas *Ta'zīr* is the rights of man seeing that it is a disciplinary measure. لا العقر لانه لا يجتمع مع الحد. <sup>296</sup>

### The Maximum Punishment in *Ta'zīr* Penalty

اختلف الفقهاء.... الهدف من البحث: الوقوف على الرأي الراجح في مسألة طالما كثر فيها النزاع بين علماء الشريعة، قال ابن القيم الحنبلي: "وأما التعزير بالعقوبات المالية فمشروع ... في حكم التعزير بأخذ المال على قولين: القول الأول أيضا في مواضع مخصوصة في ..... ويمكن رد هذا الجواب بأن عمل أهل المدينة ليس حجة وقد عمل بهذا الحديث أنمة من غير

Ibn Qayyim mentions that the jurists differ on this topic:

- 1) Imām Shāfi'ī's opinion is that there is no limit to *Ta'zīr* penalties. It is entirely upon the Qāḍī to decide what is most appropriate. He should take the person and the crime into account.
- 2) Imām Aḥmad's view is that a *Ta'zīr* punishment should not exceed *Hadd* punishments, such as the penalties for adultery and theft etc. <sup>297</sup>

While Islām has promulgated laws on worship and has emphasised on ethics, it has also formulated laws on criminal acts called *Jināyāt* and *'Uqūbāt* (as discussed earlier under the caption of crimes). Allāh was aware of the sentiments of mankind; therefore, he revealed laws that were in harmony with their temperament and in keeping with their natural disposition.

The Qur'ān says: "Does He, Who created (the heart), not know? He is the Knower of all subtleties; Well Informed." (Q: 67:14)

Therefore, among the categories of penal (*Ta'zīr*) are:

Gambling, suicide, abortion, interest, bribery, *Al-'Uqūbāt*, injustice, a breach in trust and hoarding. Each of these is a hazard against the smooth progress of human life.

They affect the serenity of life in different ways and contribute to chaos and disorder of the society both physically and financially. How can these be eliminated? It calls for thoroughgoing tasks. This is why I wish to touch on each of these topics in the following pages.

### (1) *Maysir* (Gambling)

"O you who believe! Indeed, intoxicants, gambling, idols and divination by arrows, are sheer filth - from the handiwork of Satan. Therefore, abstain from it; perchance you would prosper." (Q: 5:90)

<sup>296</sup> - Ibn 'Ābidīn, 'Allāmah Muḥammad Amīn. *Radd al-Muḥtār* (popularly known as *Ash-Shāmī*.) *Kitāb Jināyāt*, 1978, Pakistan, Quetta, Maktabah Rashīdiyyah. vol. 5, p. 222.

<sup>297</sup>- *Ḥukm at-Ta'zīr bil Māl fil Fiqh al-Islāmī*. at <http://lam.edu.ly/ar/images>. (Accessed on 24-11-19)

## Gambling Addiction and its Psychological Setbacks

*Maysir* (gambling) is from the root word *Yusr*, which means *easiness*. A gambler lives an inactive and idle life. He lives on hopes and only waits for ‘easy money’ to flow from the gambling tables.

Gambling is a game of chance. Ṭāūs, Mujāhid and ‘Aṭā’ say all games of chance are classified as *Maysir*.

A gambler’s greatest fallacy is the probability of his win in the next bet basing it on his previous random win (called hot-hand effect) or on the belief of his *luck*, which may strike by chance; least does he realize that every bet is independent of the other. Each bet has an equal probability of success or failure. This persistence lasts until he is dispossessed of all his assets. Gamblers seldom win; and if they do, then seldom do they enjoy the winning.

One of the reasons for the prohibition of gambling is provided in the verse:

“Satan only seeks to excite hostility and grudge among you through wine and gambling.”  
(Q: 5:91)

‘Abdur Rahmān al-Khatamī said he heard his father say that he heard the Prophet say:

مثل الذي يلعب بالنرد ثم يقوم فيصلى مثل الذي يتوضأ بالقيح ودم الخنزير ثم يقوم فيصلى

(The parable of the one, who plays backgammon and then performs *Salāh*, is like one who performs *Wuḍū* with pus and swine blood, and then performs *Ṣalāh*.)<sup>298</sup>

Abū Mūsā al-Ash‘ari narrates a Hadīth that whoever plays backgammon, disobeys Allāh and His Messenger.<sup>299</sup>

Abū Hurayrah narrated that the Prophet saw a person running behind doves (for gambling). He said: “Here is a Satan chasing a Satan.”<sup>300</sup>

All the authorities (such as ‘Ikramah and Sa‘īd ibn Jubayr) are unanimous that gambling is among the major sins, as recounted hereunder:

- Gambling was a matter of pride with the Arabs. Declining a gambling bout was considered dishonourable and humiliation to them.

<sup>298</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 5, p. 370.

<sup>299</sup>- Al-Ḥākim An-Naysāpūrī, Muḥammad ibn ‘Abd Allāh. *Mustadrak ‘Alā Ṣaḥīḥayn lil Ḥākim*, 1990, Beirut, Dār Al-Kutub Al-‘Ilmiyyah, vol. 1, p. 114.

<sup>300</sup> - *Sunan Ibn Mājah*, vol. 2, p. 1238.

- A Tabi'ī theologian Qatādah reports that it is often noticed that a gambler stakes all his earnings on a single bet and walks away in disgust as he sees his assets passing over into the hands of his rival. Such events frequently lead to bitter feuds.<sup>301</sup>
- Qatādah also says that a person gambles at the expense of his family and his wealth. When he loses in his bout, he sinks into deep anxiety for his deprivation and contemplates every scheme to avenge the loss on his gambling partner.
- Through gambling, money gets concentrated in the hands of a few gambling lords. The situation of casino bosses is only a win-win at every turn of the wheel. They never lose; and even if they do lose, it is to their advantage, for that is how they entice the clients to make a come-back until they are entangled. Whatever they acquire is a fortune with no effort on their behalf. Their interest is to absorb people's money, while pacifying the public and attracting them with the lucrative words, "Join in with us. You have more to win than to lose." Instead of guiding the public towards productive ventures where profits are real, gambling masters play with the senses of the naïve public.

Gambling eventually leads the entire nation onto the pathway of destitution and suicide.

- A gambler dwells in a make-believe world, saying: 'It is coming my way', 'I spoke to the priest, and the priest said that he has made divination that *luck* is on its way and will soon bless me with millions that will raise me to the brackets of money-lords.' But the dream just doesn't come through. Of course, the prediction of the priest was not without the lubrication of his hands. He had already gambled himself out with a handsome fee before the client could see his share of the gambling dividends.
- The gambler lives a life of misery and dies a death of misery under the curse of the casino and gambling dens. This is because the benefits of gambling are only whimsical and the harms are real.
- A gambler is always penniless; therefore, he borrows money while staking his properties and sometimes even his household items. He has a goal which has to be met, and he is determined to make it even if he has to bargain the dignity of his wife and family. Is it not often noticed that after losing his wealth on the gambling table, the husband comes home and settles the score with his spouse?
- A gambler, when he fails in obtaining a loan for his chips, he opens up a more lucrative chapter: stealing instead of working for his livelihood. Rather than becoming active in real life, he becomes static and lives on hopes and lust
- Gamblers are generally cruel and callous towards people, though they are friends among themselves.
- A gambler loses the glow of his face and life.
- قال العلماء أن الميسر هو القمار و كل شيء فيه قمار فهو من الميسر ... و نتائجه كذكر الشرب و الصياح و غيرهما مما يصحب الميسر من الملهيّات عن الذكر و الصلاة ...  
(The scholars have mentioned that betting is equivalent to gambling; and every form of gambling is a product of betting. The outcome of gambling and its

<sup>301</sup>- *Tafsīr At-Ṭabarī*. vol.4, p. 326.

accompanied menaces, such as consuming liquor, screaming about and other amusement is to be distracted from the remembrance of Allāh and prayer.)<sup>302</sup>

Qāsim ibn Muḥammad is reported to have said:

عن القاسم بن محمد ، أنه قال : « كل ما لهى عن ذكر الله ، وعن الصلاة فهو ميسر

(Anything that distracts from the remembrance of Allāh and Salāh is classified as gambling.)<sup>303</sup>

### Casinos - Potent Centres for Evil

An article that appeared on Google.com observes:

"Gambling has been aptly described as "the treasure chest of the underworld."

Syndicated and organized crimes are largely sustained by gambling gold. Money from gambling also finance other criminal ventures, such as the distribution and sale of narcotics, loan sharking, houses of prostitution, and innumerable semi-legitimate and legitimate business ventures, owned or controlled by the underworld.

Gambling operations are usually monopolistic ventures, with types of distribution and sales of narcotics, loan sharking, houses of prostitution, and ... and this industry has its little men, its middlemen and its tycoons."<sup>304</sup>

### Gambling and Suicide

Says an English chronicler speaking of the eleventh century England:

"Suicide was a thing that happened very often during this extraordinary period as a result of heavy betting... and the insidious decease spread to women as well. Among the women gambler's the greatest tragedy was that many of them paid the debts, which they could not meet in cash, by the sacrifice of their honour. Liquor, lottery and other games of chance are addictions."<sup>305</sup>

## (2) Suicide

The following article retrieved from the website sheds sufficient information on the risks pertaining to suicide. It enlightens us on its chief causes and long-lasting consequences and what preventive measures should be adopted when such dangers are perceived.

<sup>302</sup>- 'Akhbarak' is an Egyptian news aggregator that gathers news from over 100 different Egyptian news sources. It is powered by <http://www.akhbarak.net>. [www.akhbarak.net/blog/](http://www.akhbarak.net/blog/). (Accessed on 8-5-2019)

<sup>303</sup> - *As-Sunan As-Ṣaghīr lil-Bayhaqī*. vol. 9, p. 66.

<sup>304</sup>- Anon. *New Approaches to Gambling, Prostitution, and Organized Crime* <https://scholarship.law.nd.edu/cgi/viewcontent>. (Accessed on 12-5-19)

<sup>305</sup>-Anon. *Hammerton's Encyclopaedia of Modern Knowledge*: 1936, The Amalgamated Press, p. 2386.

**“Definitions:** Suicide, from Latin *suicidium*, is ‘the act of taking one's own life’.

**Attempted suicide or non-fatal suicidal:** behaviour is self-injury with the desire to end one's life that does not result in death.

**Murder-suicide (or homicide-suicide):** the individual aims at taking the life of others at the same time.

### Key facts

- Close to 800 000 people die due to suicide every year.
- For every suicide, there are many more people who attempt suicide every year. A prior suicide attempt is the single most important risk factor for suicide in the general population.
- Suicide is the second leading cause of death among 15–29-year-olds.
- 79% of global suicides occur in low- and middle-income countries.
- Ingestion of pesticide, hanging and firearms are among the most common methods of suicide globally.

Every year close to 800 000 people take their own life and there are many more people who attempt suicide. Every suicide is a tragedy that affects families, communities and entire countries and has long-lasting effects on the people left behind. Suicide occurs throughout the lifespan and was the second leading cause of death among 15–29-year-olds globally in 2016.

Suicide does not just occur in high-income countries but is a global phenomenon in all regions of the world. In fact, over 79% of global suicides occurred in low- and middle-income countries in 2016.

Suicide is a serious public health problem; however, suicides are preventable with timely, evidence-based and often low-cost interventions. For national responses to be effective, a comprehensive multi-sectoral suicide prevention strategy is needed.

### Who is at risk?

While the link between suicide and mental disorders (in particular, depression and alcohol use disorders) is well established in high-income countries, many suicides happen impulsively in moments of crisis with a breakdown in the ability to deal with life stresses, such as financial problems, relationship break-up or chronic pain and illness.

In addition, experiencing conflict, disaster, violence, abuse, or loss and a sense of isolation are strongly associated with suicidal behaviour. Suicide rates are also high amongst vulnerable groups who experience discrimination, such as refugees and migrants; indigenous peoples; lesbian, gay, bisexual, transgender, intersex (LGBTI) persons; and prisoners. By far the strongest risk factor for suicide is a previous suicide attempt.

### Methods of suicide

It is estimated that around 20% of global suicides are due to pesticide self-poisoning, most of which occur in rural agricultural areas in low- and middle-income countries. Other common methods of suicide are hanging and firearms.

Knowledge of the most commonly used suicide methods is important to devise prevention strategies which have shown to be effective, such as restriction of access to means of suicide.

### **Prevention and control**

Suicides are preventable. There are a number of measures that can be taken at population, sub-population and individual levels to prevent suicide and suicide attempts. These include:

- reducing access to the means of suicide (e.g. pesticides, firearms, certain medications);
- reporting by media in a responsible way;
- introducing alcohol policies to reduce the harmful use of alcohol;
- early identification, treatment and care of people with mental and substance use disorders, chronic pain and acute emotional distress;
- training of non-specialized health workers in the assessment and management of suicidal behaviour;
- follow-up care for people who attempted suicide and the provision of community support.

Suicide is a complex issue and therefore suicide prevention efforts require coordination and collaboration among multiple sectors of society, including the health sector and other sectors such as education, labour, agriculture, business, justice, law, defence, politics, and the media. These efforts must be comprehensive and integrated as no single approach alone can make an impact on an issue as complex as suicide.

### **Challenges and obstacles**

#### **Stigma and taboo**

Stigma, particularly surrounding mental disorders and suicide, means many people thinking of taking their own life or who have attempted suicide are not seeking help and are therefore not getting the help they need. The prevention of suicide has not been adequately addressed due to a lack of awareness of suicide as a major public health problem and the taboo in many societies to openly discuss it. To date, only a few countries have included suicide prevention among their health priorities and only 38 countries report having a national suicide prevention strategy.

Raising community awareness and breaking down the taboo is important for countries to make progress in preventing suicide.

#### **Data quality**

Globally, the availability and quality of data on suicide and suicide attempts are poor. Only 60 Member States have good-quality vital registration data that can be used directly to estimate suicide rates. This problem of poor-quality mortality data is not unique to suicide, but given the sensitivity of suicide – and the illegality of suicidal behaviour in some countries – it is likely that under-reporting and misclassification are greater problems for suicide than for most other causes of death.

Improved surveillance and monitoring of suicide and suicide attempts are required for effective suicide prevention strategies. Cross-national differences in the patterns of suicide, and changes in the rates, characteristics and methods of suicide highlight the need for each country to improve the comprehensiveness, quality and timeliness of their suicide-related

data. This includes vital registration of suicide, hospital-based registries of suicide attempts and nationally representative surveys collecting information about self-reported suicide attempts.

### WHO response

WHO recognizes suicide as a public health priority. The first WHO World Suicide Report “Preventing suicide: a global imperative” published in 2014, aims to increase the awareness of the public health significance of suicide and suicide attempts and to make suicide prevention a high priority on the global public health agenda. It also aims to encourage and support countries to develop or strengthen comprehensive suicide prevention strategies in a multi sectoral public health approach.

Suicide is one of the priority conditions in the WHO Mental Health Gap Action Programme (mhGAP) launched in 2008, which provides evidence-based technical guidance to scale up service provision and care in countries for mental, neurological and substance use disorders. In the *WHO Mental Health Action Plan 2013–2020*, WHO Member States have committed themselves to work towards the global target of reducing the suicide rate in countries by 10% by 2020.

In addition, the suicide mortality rate is an indicator of target 3.4 of the Sustainable Development Goals: by 2030, to reduce by one-third premature mortality from non-communicable diseases through prevention and treatment, and promote mental health and well-being.<sup>306</sup>

Note that it is manifest that this detailed article evades mentioning the harmful effects of gambling on suicide, which I have stressed upon in the previous section.

### Suicide and the Islāmic Viewpoint

Abū Hurayrah narrated that the Prophet said:

مَنْ قَتَلَ نَفْسَهُ بِحَدِيدَةٍ فَحَدِيدَتُهُ فِي يَدِهِ يَتَوَجَّأُ بِهَا فِي بَطْنِهِ فِي نَارِ جَهَنَّمَ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا وَمَنْ شَرِبَ سَمًّا فَقَتَلَ نَفْسَهُ فَهُوَ يَتَحَسَّاهُ فِي نَارِ جَهَنَّمَ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا وَمَنْ تَرَدَّى مِنْ جَبَلٍ فَقَتَلَ نَفْسَهُ فَهُوَ يَتَرَدَّى فِي نَارِ جَهَنَّمَ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا

(Whoever slays himself with metal will suffer pain in his stomach permanently in Hell with the metal in his hand. Whoever kills himself by sipping poison will continue sipping it forever in Hell. Whoever jumps down from a mountain to commit suicide will fall continuously from a mountain in Hell.)<sup>307</sup>

#### Outstrip

Jundub reports that the Prophet said:

كان برجل جراح فقتل نفسه فقال الله بدرني عبدي بنفسه حرمت عليه الجنة

(A person was suffering from wounds, so he slew himself. Allāh said: “My servant exceeded Me by taking his life. I have barred him from entering Paradise.)<sup>308</sup>

<sup>306</sup>-Anon. *Suicide*, at <https://www.who.int/news-room/fact-sheets/detail/suicide>. (Accessed on 13-4-2019)

<sup>307</sup>- *Ṣaḥīḥ Muslim*, vol. 1, p. 72.

<sup>308</sup>- *Al-Bukhārī*, vol. 1, p. 459.

The following is an excerpt from the author of الانتحار وموقف الإسلام منه Ash-Shaykh Aḥmad Abū ʿĪd:

“Islām reminds us of the precious life Allāh has graced us with and; therefore, for us to discount its rights is the gravest of sins. Seeing that Allāh is the Master of our soul, it is rightful that He should decide how long to retain it in us and when to withdraw it, and only He should have the prerogative to let us live in this world sometimes with ease and at other times with unease. We cannot seek to override His decision by resorting to suicide.”

The Qurʾān says:

“And do not slay your own selves. Whoever does that through aggression and injustice soon We shall consign him to the Fire. And upon Allāh that is easy.” (Q: 4:29,30)

Because we are trustees of our bodies and not its proprietors, Islām does not suffice on declaring only suicide unlawful on us, it goes further to even prohibit us from abusing or misappropriating our bodies in any way, even if it is by consuming such foods and drinks that may degrade it physically or mentally, for this, too, is suicidal in its own way, as alluded to in the verse:

“And do not be cast into destruction at your own hands.” (Q: 2:195)

ʿAllāmah ibn Ḥazam mentions:

“Authorities have concurred that it is not lawful for anyone to take his life nor to cut any organ of his body nor to cause pain to himself without a medical reason.” (*Marātib al-Ijmāʿ*)

Will a person resort to suicide owing to the despondency of life? Does he not know that his Creator is able to turn the tables of his life from despondency to hope and from cheerlessness to cheerfulness? Moreover, even if he is undergoing certain adversities in life, why should he become dejected when he has the blissful of life after death in his favour. Why does he not focus his energies on those days for which life is only a sojourn? Will it be wise to bring a downfall in both the worlds?<sup>309</sup>

“By the time you finish reading this list of notable people who died by suicide, somewhere in the world another person will have done the same, about one every 40 seconds (around 800,000 a year), making suicide the 10th leading cause of death in the U.S. Why?”

Depression is commonly fingered in many suicide cases, yet most people suffering from depression do not kill themselves (only about 5 percent Bering says), and not all suicide victims were depressed. “Around 43 percent of the variability in suicidal behaviour among the general population can be explained by genetics,” Bering reports, “while the remaining 57 percent is attributable to environmental factors.” Having a genetic predisposition for suicidality, coupled with a particular sequence of environmental assaults on one's will to live, leads some people to try to make the pain stop.

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<sup>309</sup>- *Suicide and the Islāmic stance towards it*. 2015 [www.awkafonline.com/portal/wp-content/...](http://www.awkafonline.com/portal/wp-content/...) (Accessed on 5-4-19)

In the vast majority of cases, people kill themselves because of other people,” Bering adduces. “Social problems—especially a hypervigilant concern with what others think or will think of us if only they knew what we perceive to be some unpalatable truth—stoke a deadly fire.”<sup>310</sup>

**In general, people try to kill themselves for six reasons:**

1. They're depressed. This is, without question, the most common reason people die by suicide.
2. They're psychotic. Malevolent inner voices often command self-destruction for unintelligible reasons. Psychosis is much harder to mask than depression, and is arguably even more tragic.
3. They're impulsive. Often related to drugs and alcohol, some people become maudlin and impulsively attempt to end their own lives. Once sobered and calmed, these people usually feel emphatically ashamed.
4. They're crying out for help, and don't know how else to get it. These people don't usually want to die but do want to alert those around them that something is seriously wrong.
5. They have a philosophical desire to die. The decision to die by suicide for some is based on a reasoned decision, often motivated by the presence of a painful terminal illness from which little to no hope of reprieve exists.
6. They've made a mistake. This is a recent, tragic phenomenon in which typically young people flirt with oxygen deprivation for the high it brings and simply go too far. The only defence against this, it seems to me, is education.<sup>311</sup>

وقال النبي ﷺ: من قتل نفسه بشيء عذب به يوم القيامة. ... وكبيرة من كبائر الذنوب ولكنه  
... لا يخرج به من الإسلام، إذا كان مسلماً قبل ذلك

(... However, the person, who was a Muslim prior to committing suicide, does not fall out of the pale of Islām by his commitment.)<sup>312</sup>

### (3) Abortion

The Qur’ān says: “Indeed We gave honour to the children of Adam.” (Q: 17:70)

Accordingly, Allāh has conferred upon every human soul honour, whether he/she is fully born or impartially born. This is why even a stillborn child should be buried with honour.

On the contrary, we have a group of scientists and philosophers who do not attach honour to the human embryo. They argue that while the living beings merit honour, the same does not apply to human tissues, seeing that it does not fall under the category of *person* yet. Man, according to them, is characterized as *human* only when he/she reaches the level of

<sup>310</sup> - *Why Do People Kill Themselves?* - Scientific American

at <https://www.scientificamerican.com> (Accessed on 24-11-19)

<sup>311</sup> - Alex Lickerman M.D. at <https://www.psychologytoday.com/za/blog/happiness-in-world/201004/the-> (Accessed on 24-11-19)

<sup>312</sup> - *Ḥukmul Intihār wa Fāiluhū. Ibn Bāz.* at <https://binbaz.org.sa/fatwas/> (Accessed on 24-11-19)

employing reason. Therefore, the foetus is a right to choose, that is, the mother is entitled to freedom of choice. As for the foetus, it only has the potential to grow and not actual.

### Islāmic Viewpoints

But Muslim scholars intensely dismiss this view. They assert that in Islām the foetus has right to life; therefore, it should be protected at every cost. The Catholic Church has equally opposed abortion. Abortion is akin to infanticide. The foetus is a *human soul* from the moment of conception and fertilisation. Genetically the egg has everything that is required for it to develop into a *person*. Therefore, the question, ‘who has the right to life, whether the foetus or parent’, is inapplicable.

- In Islām, the foetus is given a status of a normal person. This is why for the protection of the foetus, the mother is allowed to miss her obligatory Fasts, too. In this case, she will be compared with a sick person who fears his/her health, hence, entitled to concession.<sup>313</sup>
- The relation of the child to the mother is like the fruit is to the tree. Therefore, just as it is inappropriate to pluck the fruit from the tree before ripening or maturity, it is inhuman to sever the child from its mother prematurely. This does not only deprive the child of his natural right of survival, it also jeopardises the health and sometimes endangers the life of the mother, as testified by the following report of The World Health Organization:  
“Abortion operations performed by 1976 were 25 million, and now with the escalation it has reached 50 million. Statistics show that between 70,000 to 100,000 of those women lost their lives.”<sup>314</sup>
- It is mentioned in *Mughnī* that if a pregnant woman drinks a certain type of medicine to abort the foetus, she will be held liable for the damage caused. As much as she will be required to pay its indemnity, she will also not inherit from the foetus, as normally a mother inherits upon the death of her child.<sup>315</sup>
- The scholars are unanimous that if the husband died while his spouse was pregnant, the child to-be-born will inherit from him.<sup>316</sup>
- Note that ‘murder’ is applicable only to a living person. Accordingly, when the semen has only reached the stage of congealed blood, there is no soul in it; hence, not a living being. Therefore, the guilt of murder will not apply to the woman aborting it at that stage.<sup>317</sup>

### Right to the Soul Belongs to Allāh.

<sup>313</sup> - Ibn Ābidīn. *Footnote Radd al-Mutar*. vol. 2, p. 449.

<sup>314</sup> - *Times magazine*. Aug, 1984. Extracted from *Aḥkām al-Ijāz fi Fiqh al-Islāmī*. p. 107.

<sup>315</sup> - *Māwardī*. vol. 16, p. 231

<sup>316</sup> - Qurtūbī. vol. 5, p. 44

<sup>317</sup> - Ibn Hazam. *Al-Maḥalla*. vol. 11, p. 33,34

More than it being the progeny (generation) of the mother, it is a creation of the Almighty Allāh. In this case, the right of the Creator has precedence even to that of the right of the mother. Therefore, in Islām, abortion is condemned as a crime against human rights. Abortion is another ploy of its activists to promote promiscuity and soil the earth with the hard-core vice of adultery with the sole aim to struck down the family order from human society altogether.

Islām values human life and, therefore, does not endorse any inhuman practice on it. Those men and women who go about seeking illegal sexual pleasure are the ones who find abortion a safety valve to avoid childbearing and family caring. They find it an easy escape from responsibilities - just a question of blackening the face every time the urge arises and carry on. Adultery is a major reason for abortion; otherwise, why should the mating party opt for abortion when a child is a blessing? The only reason the party consents to abortion is because the child-to-be-born does not belong to them!

Could this not be seen as the height of oppression that an innocent soul (foetus) that has not even seen the rays of the sun should be deprived of life?

If a fully grown new-born is honoured (for he/she is a human being) on grounds of having potentiality to attain a full rational age, then why should the human tissue, embryo and foetus not be accorded honour and human status on similar grounds of having prospective potentiality to develop into a full-fledged human being, especially when it is already part of human parents, possessing human genetic structure and features?

It is true that rape has become commonplace in today's time; therefore, women feel they are justified in undergoing an abortion to cast off the unwanted *load*. But what are the causes of rape and who is to blame, needs to be studied carefully to develop a clean society. This paper does not permit us to delve into that subject.

Multitudes of children do not even know their roots. What could be expected of such a child in future when his/her very birth is stained? When the mother is *visited* by several persons, what does the child know who his/her father is?

Moreover, to the mother, too, abortion carries several immediate or eventual health hazards, such as:

- Heavy or persistent bleeding.
- Infection or sepsis
- Damage to the cervix
- Scarring of the uterine lining.
- Perforation of the uterus.<sup>318</sup>

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<sup>318</sup>- Anon. *Unplanned-pregnancy/abortion-side-effects*, at <https://americanpregnancy.org/unplanned-pregnancy/abortion-side-effects/> (Accessed on 12-4-2019)

### The Qur'ānic Declaration on this Topic

- “The mothers will suckle their infants for two full years. (This period is) for him who intends to complete the suckling term. And upon him (father), to whom belongs the child, is the provision and clothing of those women according to custom. No soul shall be obliged (to any ordinance) beyond its ability.” (Q: 2:233)  
This verse reveals how important the preservation of the wellbeing of the foetus is that from the day of conception the couple is obliged to adopt optimum care in its sound development.
- “And when the female infant (who was buried alive) will be asked, for which sin was she killed.” (Q: 81:8.9)
- “Then We made him a drop of semen, which remained in a receptacle, well secured.” (Q: 23:13) This verse describes the womb as ‘secured receptacle’. Once the semen reaches this stage, it is not permissible to interfere with its sacredness but for a valid reason.<sup>319</sup>
- “Do not slay the soul which Allāh made sacred, save in the course of justice.” (Q: 17:33)

### Hadīth and Opinions of the Authorities

- Khudāmah ibn Wahab reported that the Prophet was asked about ‘Azl (withdrawing oneself while mating before discharge). He replied:  
“ذاك وأد خفي” (that is a subtle form of infanticide.)<sup>320</sup>
- The author of *Al-Baḥr ar-Rāiq* Zayn ad-Dīn ibn Nujaym mentions:  
“To kill one soul for the survival of another is not mentioned anywhere in the Sari’ah. This is because once the soul is breathed into the foetus, it becomes an independent being. Therefore, transgressing on it in order to save the mother is not permissible. The sanctity of one human being cannot be compromised for another human being.”<sup>321</sup>
- Shaykh Jadul Ḥaqq Alī Jadul Ḥaqq mentions:  
“There are certain rights that are due to the mother as much as there are other rights against her. As much as she has exclusive right to life, she cannot sacrifice the rights of the child who did not even taste the sweetness of life not cherish the sunlight.”<sup>322</sup>

### Rulings

Abortion is permissible only under exceptional cases:

<sup>319</sup> - Muḥammad ibn Ṣāliḥ al-‘Uthaymīn. *Sharh al-Arbāin an-Nawawīyyah*, vol. 3, p. 28

<sup>320</sup> - Ālūsī: vol. 6, p. 69

<sup>321</sup> - Ṭawārī. *Takmilah Baḥr ar-Raiq*. vol. 8, p. 233

<sup>322</sup> - *Talqīh as-Ṣanā’ī wal Ijtihād*. Azhar magazine No. 55. 1892

- 1) If it is an emergency case where the mother's life is in danger, that is, if it is confirmed by reliable medical personnel that abortion is the only alternative for the safety and survival of the mother. Unless the risk is not confirmed medically, staking the life of the innocent foetus is inhuman and unlawful.
- 2) If it is before hundred and twenty days after conception, because after that period, life is instilled into the body. To compromise one soul (foetus) for another soul (mother) is not reasonable.

### **Opinions of the Four Imāms on Abortion**

#### Hanafī View

If the child is alive, then to abort the child prematurely to the extent of risking its life (for the safety of the mother), is not permissible, because in this case the fear that the mother may die is just a suspicion. Therefore, to kill a human being basing on speculation is not permissible.<sup>323</sup>

If it is confirmed medically that the child is dead and that the mother's survival is at risk, then abortion is permissible. But if the child is alive, then abortion is not permissible, because nowhere is it mentioned that sacrificing one soul for another is permissible.<sup>324</sup> To cause harm to the foetus in any form is unlawful. This is because it is graded as a soul; hence, part of the human body.<sup>325</sup>

#### Shāfi'ī View

Abortion after the soul is breathed in the foetus is not lawful.<sup>326</sup>

#### Mālikī view

Abortion is unlawful from the day of conception.<sup>327</sup>

#### Hanbalī view

Abortion is permissible only within the first forty days of conception. Abortion after forty days of conception, when the initial stages of clot of congealed blood and chewed-like lump of flesh are formed, is not permissible at any cost.<sup>328</sup>

## **(4) Interest**

<sup>323</sup> - *Radd al-Muḥtār*. vol. 2, p. 252.

<sup>324</sup> - *Baḥr Rāiq, Sharḥ Kanz Daqāiq*. vol. 8, p. 233.

<sup>325</sup> - *Oudah. Criminal law of Islam*. vol. 2, p. 292

<sup>326</sup> - *Al-Ramalī. Nihāyat al-Muḥtāj*. vol. 8. p. 442

<sup>327</sup> - *Mawāhib al-Jalīl lil Ḥaṭṭāb*. vol. 3. p. 477

<sup>328</sup> - *Mardāwī. Al-Inṣāf*. vol. 1, p. 386.

“Those people who devour interest will not rise (on the Day of Resurrection) except like that person rises whom the Satan dements by a touch.” (Q: 2:275)

Seeing that the topic on interest is extensive, I intend to suffice on addressing it from the arguments tendered by the proponents of interest - whether ancient or modern - and then offer a counter-reply to it from the Islāmic perspective.

### Definition of Interest

Imām Abū Bakr Al-Jaṣṣāṣ says:

هو القرض المشروط فيه الاجل وزيادة مال علي المستقرض

(If a person offers a loan on the condition that the borrower should return the principal sum together with an additional amount; that additional amount is called interest.)<sup>329</sup>

‘Alī reported that the Prophet said:

كُلُّ قَرْضٍ جَرَّ مَنَفَعَةً، فَهُوَ رِبًا

(Every loan that attracts a profit is called interest.)<sup>330</sup>

The only loan that is permissible in Islām is *Qard-Ḥasanah* (benevolent loan or interest-free loan).

The Funk and Wagnall’s Standard Dictionary has defined interest as:

“Payment for the use of money, or money so paid, and agreed statutory compensation accruing to a creditor during a time that a loan or debt remains unpaid, reckoned usually as a yearly percentage of the sum owed.”<sup>331</sup>

Even before it promulgates its laws, Islām takes a holistic view of human life and man’s financial requirement. This is in consonance with the wholesome laws it comprises in guiding human beings towards prosperity in all fields of life. It makes the same approach towards interest. It condemns interest categorically, no matter what form it assumes and how it is dressed.

<sup>329</sup>-Al-Jaṣṣāṣ, Abū Bakr Aḥmad ibn ‘Alī Ar-Rāzī. *Aḥkām Al-Qurān – Jassās*. 1984. Beirut. DārIhyā At-Turāth Al-‘Arabi.

<sup>330</sup>. ‘Asqālāni, Ibn Ḥajar. *Bulūgh al-Murām min Adillat al-Aḥkām*. vol. 1, p. 327. www.almeshkat.net

<sup>331</sup>- at <https://www.ravellaw.com/opinions/257ea>. (Accessed on 18-2-20)

This is why, in Islām the miserable consequence of loans forwarded on the micro-level or macro-level, through microeconomics or macroeconomics or labelled as interest or usury, are all the same; hence condemned as *Ḥarām*.

### Definition of Interest

#### The Modern Concepts of Usury and Interest.

#### Consumption Loans against Investment/Production Loans.

- 1) In the modern concept of interest, it is argued that the *Riba* (interest) that the Qur'ān had censured referred to the primitive way of money-lending when the lenders advanced loans to people for their basic necessities and provisions of life. Indeed, it was cruel for such money lenders to charge *usury* on the poor who were constrained to acquire a loan for their day-to-day expenses. Certainly, the Qur'ān was justified in prohibiting *usury*.

As for the present-day *interest* - which is a nominal charge on the borrower for investing the lender's finance in corporate commercial enterprises and for productive purposes, such as industries and trade etc. - it is reasonable for the borrower to pay interest to the lender whose finance enables him to earn profits. So, while differentiating between usury and interest, they say that the Qur'ān only declared usury unlawful and not interest unlawful.

Their argument is as follows:

"The Qur'ān condemns interest and not usury. The interest during the Prophet's days was unlawful because it was against consumption loans. To charge the desperate people interest on the loan they received for their basic needs was callousness, hence, unlawful. But to charge interest on investment/production loans was reasonable seeing that the borrower drew handsome returns for himself."<sup>332</sup>

- 2) Tragically, certain translators of the Qur'ān and modern thinkers in the Muslim circle also fell into the trap. They have been remiss in translating; comprehending and interpreting the Qur'ānic term *Riba*. While playing with words they have translated it as *usury* instead of honestly translating it as interest.

### The Islāmic Concept of Interest

The aim of the above approaches is untenable on grounds of the following:

Compared to the above, the Islāmic economic equity and money lending systems are most comprehensive and promising. They are based on fairness and consideration for both the

<sup>332</sup>- Anon. *bayanelislam*, at [bayanelislam.net/Suspicion.aspx?id](http://bayanelislam.net/Suspicion.aspx?id). (Accessed on 12-4-2019)  
ادعاء أن الإسلام محرر من الجاهلية دون تغيير همتنا أو أعالربا - بيان الإسلام

parties - seller and buyer, lender and borrower. Overall, an Islāmic transaction is a system that refutes all forms of cheating, unfair dealings, interest and usury. Unlike the lopsided economic system prevalent in modern times, Islām maintains equilibrium in the economic system across the board.

To interpret the verse as ‘consumption loan’ is to misconstrue it. Rather, the verse refers to all such loans where the borrower is encumbered with an additional payment on the day of maturity, irrespective of what the scale of the borrowing is, because the sufferings are proportionately equal in both. As for the need of desperate people, it is the duty of the Muslim community or the state to address their needs until they acquire self-sufficiency. The very uncertainty that the borrower will have to pay a percentage of interest, irrespective of the outcome of the business, is the potent source for the instability in the stock market and scarcity in the economy.

Shaykh Abū Zahrah mentioned:

“There is no proof to establish that the *ribā* of the Dark Ages was on consumption loans and not on investment loans. Rather, the loans for which research scholars find support in history were production loans. The circumstances of the Arabs, the position of Makkah and the trade of Quraysh, all lend support to the assertion that the loans were for production and not consumption purposes.”<sup>333</sup>

To the liberal translators, our response is that unless taken in its wider context rather than its technical meaning, this translation can be misleading or it can be misconstrued by those who wish to undermine the Islāmic economic system as against the Western system. They seek to restrict the definition of *Riba* in the Qur’ān to usury and not to interest by arguing that it is usury that is not permissible and not interest. In other words, usury, which is intended for the basic requirements of the poor, is not permissible, whereas *Riba* (interest) on a macro level that is designed for multiplying the finance of the rich is permissible. These interpreters wish to differentiate between *consumption loan* and *investment loan*. They contend that to charge interest on consumption loan is unlawful, whereas loan for investment or production is lawful.

Little do they realise that the term *usury* is coined by those who are deeply engrossed in interest. They do not realise that deeper interest involvement and higher interest rates spell further troubles. By downplaying the seriousness of interest, they are only falling into the abyss of ruin, as explained in the verses under discussion. To play around with words is to avoid the core message of the subject, while it is no secret that the fear that governments have of the economic collapse is owing to *Riba*, whether the word is interpreted as *interest* or *usury*. Reality cannot be screened simply by changing the title.

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<sup>333</sup>-Abū Zahrah Imām Muḥammad. *Buḥūth fi al-Ribā*. 2008, Cairo, Dār al-Fikr al-Arabī.  
at. <https://www.feghbook.com/?book=بحوث-في-الربا> (Accessed on 6-2-2919)

Coining different names to *Riba* is comparable to coining different names to liquor, as explained in the following Tradition:

Abū Mālik Ash'arī said he heard the Prophet say:

ليشربن ناس من امتي الخمر يسمونها بغير اسمها

(Some people in my Ummah will consume liquor under different labels.)<sup>334</sup>

### Interest and its Vitriolic Effects

There is an outcry that the poorer communities and third world countries are becoming poorer because of their abstention from interest dealings.

But the Qur'ān declares:

“Satan intimidates you of poverty and induces you to indecency. And Allāh promises you forgiveness on His behalf and Grace.” (Q: 2:268)

“Allāh exterminates interest and nourishes charities.” (Q: 2:276)

### Trade and Legal Investment

Often, trade is confused with interest, as confirmed in the following verse:

“This is because they allege that trade is like interest.” (Q: 2:275)

While placing *interest* on footings with *trade*, the pagan Arabs argued: “Trade is similar to interest.” They sought to reason that if interest is unlawful, then trade, too, should be unlawful, seeing that the two are twin-sisters. In modern times, too, similar rationality is tendered by interest barons. They argue that had the lender retained his money, he could have invested it in some other venture and earned a lucrative profit. But now that he has lent it out instead of investing it, there is no reason why he should not be entitled to a certain percentage of its profits/interest, especially when the client/debtor will be enjoying the bulk of its proceeds?

### ‘Trade is similar to interest’ (أئما البيع مثل الربى)

Trade is similar to interest’ (أئما البيع مثل الربى).

This is the version of the pagan Arabs. They compared trade with interest by making *interest* the key premise and trade the second premise. Thus doing, they sought to convey: “As for interest, its lawfulness is established; there is no debate about it. Now the only

<sup>334</sup> -Sunan Abū Dāwūd. vol. 3, p. 379

question outstanding is whether trade is permissible or not. But since the proceeds of trade are similar to interest, trade also is lawful.”

Rightfully, to justify *their* cause of argument, they would have said, ‘Interest is similar to trade’ (إنّما الربى مثل البيع) in which trade would have been the prime premise and interest the second premise, meaning that ‘when trade is permissible, then there is no reason why interest, too, should not be permissible.’

But to dismiss the charge against them for being involved in the illicit trade of interest and to accentuate the need and justification of it, they reversed the phrase as explained.

The contention of the Arabs was based on this bogus supposition that “the goal of both *Riba* and commerce is nothing but financial gain, and that the only difference is that the proceeds or surplus returns in interest are guaranteed to the lender even without any active involvement on his behalf, whereas the proceeds or profits in trade are based on speculation and risk; nothing is guaranteed.”<sup>335</sup>

### The Islāmic View

Had the pagans taken the pain to study the technical differences between the two, they would not have compared one with the other.

Furthermore, it is irrespective, whether trade is compared with interest or vice versa, in either case interest dealing cannot be proven lawful.

### Summary of the analogies which the pagan Arabs had drawn between trade and interest and their reasoning to it:

1. As much as the trade of commodities involves an exchange of money, interest, too, is another form of exchange with the interest being another form of commodity. Therefore, if trade is legal, there is no reason why interest should not be legal.
2. If a person purchased a piece of cloth for 20 dirhams, it is lawful for him/her to sell the cloth for 22 dirhams. Likewise, if a person exchanges 20 dirhams for 22 dirhams or pays 22 dirhams in lieu of 20 dirhams after a given time, this too should be lawful. Both transactions are exchanges in different ways.

Of course, discussion pertaining to *Ṣarf/forex*, rules and conditions apply. The Qur’ān says “a trade contracted by mutual consent is lawful.” (Q: 4:29) So just as trade contracted through mutual consent is lawful, the interest that is contracted through mutual consent also should be lawful.

### Our Response

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<sup>335</sup>- *Rūh al-Ma’ānī*. vol. 2, p. 375.

Those analogies of the Arabs were similar to the Theory of the Triple Contract proposed by the interest-deal promoters of modern times. These day financial companies argue that an interest deal is akin to three independent contracts: a sleeping partner's share; an insurance agreement against any losses suffered; and an insurance deal against changeability in the proceeds. So, if it is lawful for three persons or companies to contract each of these deals independently, then why should it not be lawful for a single company to contract all three deals from one office?

### **Trading of Commodity and not Trading of Currency**

Allāh replied to the above analogies of the Arabs tersely: "... Allāh made trade lawful and interest unlawful." (Q: 2:275)

### **Differences Between Trade and Interest**

**The above analogies of the pagans are absurd on the following grounds:**

- 1) Trade is an outcome of one's effort and exertion, whereas interest is exploitation of someone's desperation.
- 2) Trade is to invest one's finance into commodities to reap profits *via* finance, whereas interest is to circulate people's finance *directly* to receive dividends.
- 3) In trade, items and commodities are involved, the value of which rise and fall, appreciate and depreciate; whereas in interest, only money is involved (and not a commodity), whose value does not appreciate or depreciate. Money is merely an instrument for business transactions. In light of this difference, for the pagan Arabs to conceive a comparison between a commodity and an instrument was absurd.
- 4) Imām Fakhr ad-Dīn ar-Rāzī mentions that while the earning of profit in a business deal is uncertain, the payment of interest in an interest deal is predetermined and certain. In other words, in commerce, dividends and profits are indefinite, whereas in an interest-bearing deal the share of the creditor is pre-determined.
- 5) As much as a commercial transaction holds out hope for profits to the seller and buyer, it also carries risks for losses, whereas in an interest deal the lender does not suffer any risk at all; his/her percentage and package is assured at every cost, even if the borrower suffers a slump in his business.
- 6) Trade is joint cooperation in which both the parties either enjoy the privilege of sharing the profits or suffer the consequence of bearing the losses. But in an interest-bearing loan, nothing of this kind applies.
- 7) Profits obtained through trade are in exchange for a commodity, whereas the surplus money accrued through an interest deal is in exchange of time, which is not a commodity. For instance, if a person purchases a piece of cloth for one dirham and sells it for two dirhams; the one dirham will be in lieu of the cloth, and the second dirham will be his profit of the same cloth/commodity. Fluctuation in prices and values of commodities are natural phenomena of commerce.  
On the other hand, if he sells or exchanges one dirham for two dirhams; the one dirham will be in lieu of the one dirham, but the second dirham will be in lieu of *time*

*element*, which is unlawful. Liquid cash cannot appreciate by itself; it appreciates via the deal of something tangible, and that, too, after employing one's labour and intelligence.

In the first deal, the cloth and dirham are two different items – dirham against a cloth. The objects and usages of both (dirham and cloth) are different. But in the second deal, the exchanges on either side are identical – dirham against a dirham with an addition.

- 8) In trade, it is the needs of the individuals that are compared. Every person's needs are different. One person may be so desperate for liquid cash that he will even sell his goods at a rock bottom price to arrange for the cash. Another person may be so desperate for a cloth that he will not mind paying triple the price more than the market value to acquire the cloth. So, in normal trade, it is 'need' and 'desperation' that counts.

Therefore, it is permissible to purchase a piece of cloth for one dirham and sell it for a hundred dirhams. Ninety-nine dirhams, in this case, will be treated as profit and not interest because it is an exchange between currency and commodity.

In this case, the aggregate sum of hundred dirhams will be reckoned as payment towards the entire piece of cloth and not that certain fragments and fractions of the sum will be made against certain portions of the cloth.

But if one dirham is exchanged for two dirhams, then fractions of the one dirham will be reckoned as against certain fractions of the two dirhams, because when the same currency is available on either side, it is possible to make an equation and comparison between the dirhams of the two sides. While one dirham will be in exchange for the one dirham, the second dirham will stand aloof without anything parallel to it; and that is what is called interest.

However, it should be noted that overcharging and exploiting the needs of the consumers is unfair and unethical. Islām does not condone that at any cost.

Jābir ibn 'Abdullāh narrated that the Prophetﷺ said:

رحم الله رجلا سمحا إذا باع وإذا اشترى وإذا اقتضى

(Allāh bestows mercy on a person who is lenient when he sells, buys and claims for his rights.)<sup>336</sup>

AbūHurayrah narrated that the Prophetﷺ said:

مَنْ عَشَّ فَلَيْسَ مِنِّي

(Whoever cheats, is not of me.)<sup>337</sup>

Question: What about market prices? Can the legality of over-charging (as indicated above) not be seen as exploitation?

<sup>336</sup>- *Al-Bukhārī*. vol. 2, p. 730.

<sup>337</sup>- *Ṣaḥīḥ al-Muslim*. vol.1, p. 69.

Answer: To avoid the loss of market prices, Islām urges the people not to hoard their cash money; rather they should convert it into 'kind', that is, instead of keeping it idly stacked or deposited in the banks, they should invest it into properties and commodities, which will eventually bring dividends to them as well as to the public. The public, too, will enjoy their share through their overall involvement in it, either through construction work, production of items or labour for the financiers. Once the cash will be invested, the question of market price and its losses will no longer apply.

- 9) Trade is based on equal benefits in different ways between the seller and purchaser. While the supplier (seller or creditor) invests his time, influence and prudence to provide the commodities and make it available to the purchaser, the purchaser (the debtor) also invests his labour and skill to sell the products.
- 10) Likewise, trade is based on mutual support and benefit. The advantage of the energy, skill, mental forces and time that the seller and purchaser employ in the deal go to the two directly and then to the nation indirectly. All three enjoy the product and its gains in some way or the other.
- 11) A business transaction is two-way traffic in which the buyer and seller both enjoy some benefits. The buyer enjoys the utility of the item he purchases, whereas the seller receives money for the profession, skill and effort he invests in producing the item or making it available to the consumer.  
But interest is one-way traffic. The lender reserves for him a definite percentage of interest, whereas the borrower receives nothing other than *easing of time*, which is not a commodity. In Islām, unless the lender, too, does not suffer the risk of potential loss like the borrower, the financial deal is invalid.
- 12) In trade, once the transaction is finalised between the seller and purchaser, the deal is closed and whatever benefits the two were to receive will be shared by them respectively. In other words, once the sale is done the deal is closed. Whatever profits accrue thereafter go to the purchaser; the seller has no stake in it. The lender (seller) had profited from the loan once only. But in an interest deal, the lender benefits from the loan regularly from month to month and from year to year, until the loan is fully paid to him. He is an endless shareholder with the debtor/borrower, even if the debtor/borrower has used up the loan long ago. The kickbacks never stop for the lender until the borrower either makes the full payment or he goes insolvent. Each time the lender gives grace of time, there is another benefit for him, whether the borrower profited through the loan or not. The truth is that in the final analysis, the *easing-time* is more of grace to the lender than to the borrower.
- 13) As far as the lender is concerned, he has no overheads other than making entries, whereas the borrower has so many disbursements to meet, after which he may be fortunate to see some money for himself.
- 14) In trade, the profits are shared by the partners after the funds are invested and after the business is operated for a set period of time, and never before that. But in an interest deal, the lender fixes his percentage even before his money is invested or circulated in the market and even before the borrower commences his business. The lender demands his share of interest even if his funds lied idle and did not produce

any dividends yet. How can shares be fixed on money before it is invested or put into circulation?

- 15) Trade is valid only if contracted by mutual consent. The Qur'ān reads: "O you who believe! Do not usurp your properties among yourselves unduly unless it is a trade contracted by mutual consent." (Q: 4:29)  
Against that, in an interest-bearing deal, the consent is one-sided. The lender is immensely pleased while the borrower is immensely displeased. The latter is borrowing reluctantly out of desperation. In that way, an interest devourer is guilty of committing theft and sucking the blood of the indigent.
- 16) Profits and losses in businesses are never stable; they always fluctuate in varying degrees. But in an interest deal, the lender stipulates a fixed percentage of interest for him, while the borrower does not even know what the outcome of his business will be or what the profit margins will be.
- 17) Profit enhances production, whereas interest retards it.
- 18) Profit in trade fluctuates and is uncertain; therefore, it has to be earned. Whatever the profit will be, it will be a reward for his hard earnings. But interest, besides, there being a fixed rate to it and is assured, there is no effort involved in it. The devourer receives the surplus against *time element*.<sup>338</sup>

### **Arguments Raised by the Capitalists Against the Interest-free System and some of their Misconstrued Points.**

#### **First Argument**

While seeking to justify interest, some capitalists argue on the basis of the verse "Do not usurp your properties among yourselves unduly." (Q: 4:29) They contend that only such a property or item is unlawful that is received without the consent of its owner, such as items possessed through plunder, theft or treachery, etc. But if wealth or property is received through its owner's consent, such as interest, there should be no objection against it.

#### **Our response**

Firstly, the commentary rendered of the word *Bāṭil* in the verse is in itself *Bāṭil* (void). According to the commentators of the Qur'ān, all un-Islamic and illegal methods of acquiring wealth are included in the consumption of someone's property illegally (اكل باطل), whether acquired through the consent of its owner or not. The owner's consent is immaterial as against Allāh's consent. Allāh's concern and consent precede people's concern and consent.

انّ الله لا يأمر بالفحشاء (Allāh does not enjoin obscenity - Q: 7:28) And He has declared interest unlawful.

<sup>338</sup> - Moudūdī, Abul A'alā, *Tafhīm al-Qur'ān*, 1992, Lahore, Maktabah Ta'mīr Insāniyyat. vol. 1, p. 216. Urdu version.

Imām Qurṭubī says if a person takes someone’s item against the rule of the Sharī’ah, the item will be illegal for him, even if the owner consents to it.<sup>339</sup>

The rules of the Sharī’ah take precedence to every other rule. All rules are subject to the Laws of Allāh.

Again, the same verse (4:29) continues: “... unless it is a transaction contracted by mutual consent.” Had the consent of the two parties been sufficient to conclude a deal, there would not have been a need to add the word ‘transaction’. This word suggests that any transaction that was concluded without the item being in the possession of the seller was void, even if the deal was closed with the consent of the two. In our discussion of interest, the interest money was nowhere in *existence*. So, how and where did the consent apply?

### Second Argument

There are others who seek to reason oddly: “When we have taken the risk of offering a loan to a person, why should we be deprived of some of the financial harvests, which the borrower reaps through our funds, especially when we are also apprehensive that he/she may not make payment of the capital on due time? Are we not entitled to some dividends against the risk we undertake?”

### Our Counter-reply

Surely offering a loan to someone is a virtuous deed; it relieves the borrower from his financial burdens. But that loan can bring relief to him/her only if it is interest-free (*Qarḍ-Ḥasanah*); otherwise, it will only be an escape from one problem of desperation for funds into another duplicate and complex problem of debt plus interest payments.

As for the fear that the borrowers may fail in their payments on the due date or they may not honour their payment at all, authorities have suggested for the safeguard of the loan that the lenders should request the borrowers for collaterals to the value of the loans. This will be in favour of both the parties: it will serve as a surety for the lenders, as much as it will make the borrowers feel free to utilise the loan without pressure.

### Third Argument

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<sup>339</sup>- Al-Qurṭubī, Shams Ad-Dīn Abū ‘Abd Allāh. *Al-Jām’i li-Aḥkām al-Qur’ān*.2003, Riyadh, Dār Ālam Al-Kutub. at <https://www.noor-book.com/الكتاب-الجامع-لأحكام-القرآن-تفسير-ال> (Accessed on 2-6-2019)

In an interest-free loan, the lenders provide an opportunity to the borrowers. The borrowers, in turn, invest the finance to develop their business and reap its profits while the lenders see no dividends at all. Is this not injustice to the lenders who had parted with their hard-earned money?

### **Our Reply**

We say to the lender that to avoid this one-sidedness of profit, why does he/she not consider entering into a partnership with the borrower in one of the two following contracts?

- 1) ***Al-Muḍārabah*** (profit/loss sharing contract in which the financier comes in not as a lender but as an investor.)
- 2) ***Shirkah or Al-Mushārah*** (active partnership)

### **Fourth Argument**

It is evident that producing or investing is not possible without finance. People are driven by needs and opportunities. Sometimes they need an item desperately. At other times an opportunity arises where a given property, for instance, is going for sale at a giveaway price, but to their misfortune, they do not have the funds to make the purchase. To avoid disappointment in any of the two situations, they will be just too pleased to borrow finance from someone, even if it is on an interest basis. Now, while these people (the debtors) will be enjoying the benefits and profits of that finance at the strength of the creditor's funds, should the creditors not be entitled to some dividends in the entire deal for the finance they made available?

If a property, for instance, was going for sale in an auction for a reasonable price, the lenders could have themselves invested their finance in purchasing it or in growing their business. But they made a sacrifice out of consideration for the borrowers and, therefore, parted with their immediate financial advantages for an uncertain and speculative future. They were not sure when and how the borrowers would meet their requirements.

Likewise, sometimes manufacturers wished to produce an item, but they were lacking the finance to buy raw material.

In both the above cases, if the finance was not arranged in good time, the property that was for sale at a reasonable price would no more be available or the manufacture of the product would be delayed which would make the item more expensive in future. This is why to accelerate the production, lending and borrowing was in favour of both the parties - lenders and borrowers.

Now when the lenders suffered the losses and took the 'risks' for the sole benefit of the borrowers, should they (lenders) not be entitled to a token share for their 'sacrifice', their part of the contribution and the finance they parted with for the borrower, whether that share is called dividends, interest or 'rental'?

**The above arguments are untenable.**

Firstly, in which way can this loan be termed 'sacrifice' on behalf of the lenders when they offer only part of the surplus money in their possession?

Moreover, the money that was loaned did not belong to them, especially when it was a bank or any financial institution; it belonged to the clients.

Secondly, 'risk' is not an item for which a price could be set.

Thirdly, to name it 'rent' is a misnomer. *Rent* has to do with usufruct of a rented item, whereas money is not used; it is spent.

**Fifth Argument**

'Time' is a commodity that has value; therefore, 'Time element' plays an essential role between producing and utilizing the goods. In other words, interest is a price, and like all other prices, it serves as a means to distribute the available funds through loans to the public. The only favourable way for distributing the resources in proportion to the lender's credit base is to lend the public on the basis of interest.

**Our Response**

'Time' is not a tangible item to which a price tag can be attached; it is something abstract. Nor is it an instrument like a commodity in trade. Nor is it a go-between through which something is exchanged. It is something to which no value can be set. What rights has anyone to say that his/her 'time' is more valuable than another person's? But yes, he/she can say that his/her *item* is more valuable than another person's.

**Sixth Argument**

Interest-free loan (*Qard-Hasanah*) is fine if it is readily available. But the question is that to what extent it will be available to carry the business entrepreneurs? Will large scale interest-free loans always be available to them?

**Our Reply**

Because interest-free loan will not always be available, especially on a large scale for big businesses, the entrepreneur will necessarily be obliged to seek a financier who will be willing to join him on *Muḍārabah* or *Mushārah* basis, in which he (entrepreneur) will be bound to pay a profit to the partner as mutually agreed upon.

Al-Muḍārabah:

شراكة بين صاحب رأس المال ويسمى رب المال، وبين من يقوم بالعمل بجهده ويسمى المضارب، ...<sup>340</sup> ويكون توزيع الربح بين الجانبين حسب الاتفاق. وهو إحدى

This proposition is workable provided the contract is legally and securely bound. The credibility of the partners should be checked out, documents and agreements must be binding and assets of the partners should be scrutinized; all done under the supervision of high-profile authorities, and if possible, endorsed by the government office. This is a workable solution, of course with the proviso that correct procedures are followed and legal documents are drafted out and official ordinances are followed with exactitude. Every partner must be bound by the law supervised by auditing firms. They should be under legal obligation with trust being a binding factor between them.

### Seventh Argument

- Is it ever possible to survive without involving oneself in interest dealings?
- How can the people unshackle themselves from the grasp of interest when they are already involved in it deeply?
- How can banks sustain themselves without charging interest for the 'benevolent' service of safekeeping people's money?

### Our Answer

When an unjust system comes in vogue, the public becomes accustomed to that unjust system; and when a just system comes into vogue, the public becomes accustomed to that just system.

During the pre-Islāmic days, the same evil system was in vogue, which prompted the Arabs to cry out: *أئما البيع مثل الربى* (trade is identical to interest). But when the Qur'ān proclaimed that Allāh made trade lawful and declared interest a war against Allāh and His Messenger, the same Arabs yielded to the healthy system of Islām; through which they thrived to reach such heights that they no longer saw the need to repeat their previous absurd reasoning of 'trade being identical to interest.'

<sup>340</sup>- 'Aqd al-Muḍārabah. at <https://www.aljazeera.net/encyclopedia/econ>. (Accessed on 24-11-19)

Consequently, for centuries the Muslim world cherished the economic progress under the interest-free order of Islām.

This is but one example. This truism is applicable to every facet of life. The interest-free order of Islām is so evident that even in this modern age, if it is introduced into our financial dealings, its dividends will be cherished by both the lenders and borrowers.

### ليس هناك عزر في الشريعة

الله الحكيم، الله الذي ... غلظ الله جريمة الربا حتى صارت أعظم من عند الله من خمسة وثلاثين زنية يعلم النفس البشرية لم يدع هذا الأسلوب، لم يدع الإنسان دون أن يضع له في ... عبارة: {أخذناهم} أخذ، وكان إذا كان هناك [بركة] في ... أي أخذ كان: نقص في البركات، أو خزي في الدنيا، أو ذلة، أو ... منطقة تقريباً لا أحد يحتاج إليها إلا في النادر،

This explains that, though there is no stipulated penalty against a usurper of interest, is this not enough a scourge on him that Allāh has sounded a war against him, or that he will be deprived of blessings and suffer humiliation in the world (for those who believe in blessings and honour dignity). Imām Mālik mentions that this punishment outpaces all other punishments.<sup>341</sup>

### **Eighth Argument:**

Are interest institutions not linked to global transactions that service the economy?

### **Our Reply**

Why is the issue analysed selfishly? Why should it not be looked at from the negative impacts interest has on the overall scene in the financial world and the ultimate suffering of people on a wide scale?

Is the interest system not designed for the advantage of the financial institutions, mega companies and finance barrens whose ratio to the destitute people of the world does not exceed 10 to 90? Is interest not turning the wheels of the haves against the have-nots or is the wealthy community not burdening the destitute people to service their interest debts?

**As an alternative, I propose to reproduce an article from the New York Times in respect of the Shar'ī banking and financial laws.**

“Islamic banking and finance are a rapidly expanding industry that seeks to harmonize modern business practices and traditions religious norms. Classical sharia prohibits riba, the charging of interest. It also condemns excessive profits and requires Muslims to invest only in ventures that are consistent with Islamic principle, for example investing in brewery or casino is forbidden. The Islamic finance industry with estimated assets of

<sup>341</sup> - *Mā dhā yu 'nā fi Harb Minallāhi wa Rasūlihī*. at <https://www.nthnews.net/cultur-art> (Accessed on 24-11-19)

\$200 billion to \$ 300 billion, represents a small chunk of the global marketplace, but is 'already playing a significant role in the financial system in the Middle East," said John Ba Taylor, U.S. under-secretary of the Treasury, in a 2004 address."<sup>342</sup>

## (5) Bribery

"Do not consume each other's properties in vain nor raise its (false) suit to the judges so that you may knowingly (and offensively) usurp a portion of the people's belongings." (Q: 2:188)

'Abdullah ibn 'Amr ibn 'Āṣ narrated:

لعن رسول الله الراشي والمرتشى

(The Prophet cursed the one who offered a bribe and the one who received it.)<sup>343</sup>

Ibn 'Abbās narrated that the Prophet said:

رشوة الحكام حرام ، وهي السحت الذي ذكر الله في كتابه

(Bribery, which the rulers receive, is unlawful. It is an illicit gain of which Allāh mentions in His Book.)<sup>344</sup>

فَيُسْحِتْكُمْ بِعَذَابٍ

سُحِتْ means to eradicate or uproot something.

Ibn Humām illustrated the outcome and rulings based on bribery as follows:

- To acquire the post of a Qāḍī through bribery. This is illegal and a person involved in it does not qualify for the post of an Islāmic Qāḍī.
- To pronounce judgement through bribery. In this case, the Qāḍī's judgement will be invalid and unofficial.
- If a person offers bribery to a judge to secure the rights that are due to him, to avoid anything harmful of which he is innocent or to have his case accorded official status, then though it will be permissible for the client to offer the bribe, it will not be permissible for the Qāḍī to accept it.

<sup>342</sup> - [The New York Times > CFR > International > Q&A: Islam and Sharia at www.nytimes.com/cfr/international/slot2\\_031405.html? \(Accessed on 12-5-2019\)](http://www.nytimes.com/cfr/international/slot2_031405.html?)

<sup>343</sup> - *As-Sunan As-Ṣuḡhrā li-Bayhaqī*. vol. 9, p. 55.

<sup>344</sup> - Ibn Abi Ḥātim, *Ar-Rāzi Al-Ḥāfidh Abū Muḥammad 'Abdur Raḥmān. Tafsīr ibn Abi Ḥatim*. 1997, Riyadh, Maktabah Nazzār Mustafā al-Bāz/Ṣaida, Dār An-Nashr, Al-Maktabah Al-Aṣriyyah. vol. 4, p. 1134

Masrūq said: "I asked 'Umar whether *Suḥt* meant to receive bribery against a command of Allāh."

He said: "No, that is disbelief (*Kufr*). Allāh says, 'Those who failed to judge in accordance with what Allāh has revealed are actually the Disbelievers'." (Q: 5:44) Bribery is that a person has some need (of which he is entitled) from a king. But the latter does not accede to his need without receiving a gift. Now for the person to offer the king something for that is bribery."

Ḥasan al-Baṣrī elaborated on this that when some people of the Book came to the judges, they brought with them bribes, which they concealed in their sleeves and then unveiled it to the judges when presenting their cases. This is what is referred to as 'They are habitual listeners of falsehood; devourers of illicit gain.' (Q: 5:42)

Farrā' says the root meaning of *Suḥt* is the hunger of a dog. Arabs say 'the man's bowels are run down,' meaning that, he is a glutton. He who receives bribery or consumes anything unlawful is no better than a glutton. Some commentators say *Ḥarām* (something unlawful) is called *Suḥt* because it strips a person off his human integrity. A judge that receives bribery is a miscreant, and judgement on behalf of a miscreant is unacceptable.

It is permissible for a person to offer a judge or governor something as a token of appreciation for the protection of health and wealth received from him or for the fair judgement pronounced by him. However, it is not permissible for the judge or governor to accept it because according to Imām Abū Ḥanīfah he is obliged to provide security and adjudicate among the people fairly. He is performing his duty, hence, doing no favour

It is narrated that the Prophet said:

"The Fire is the most fitting place for every piece of flesh that develops by consuming illicit income."

The Companions asked: "O Messenger of Allāh! What is illicit income?"

The Prophet answered: "It is to receive bribery for pronouncing judgement."<sup>345</sup>

'Allāmah Ibn al-'Arabi al-Māliki, Qāḍī Abū Bakr says in his *Aḥkām al-Qur'ān*:

السحت؟ قال: "الرشوة في الحكم". "كل لحم نبت بالسحت فالنار أولى به" قالوا: يا رسول الله؛ وما وروي عن وهب بن منبه أنه قيل له: الرشوة حرام في كل شيء؟ فقال: لا؛ إنما يكره من الرشوة أن ترشي لتعطي ما ليس لك، أو تدفع حقا قد لزمك؛ فأما أن ترشي لتدفع عن دينك ودمك ومالك فليس بحرام.

قال أبو الليث السمرقندي الفقيه: وبهذا نأخذ؛ لا بأس بأن يدفع الرجل عن نفسه وماله بالرشوة. وهذا كما روي عن عبدالله بن مسعود أنه كان بالحبشة فرشا دينارين وقال: إنما الإثم على القابض دون الدافع؛

<sup>345</sup>- *Al-Jām'ī li Aḥkām Al-Qur'ān*. vol. 6, p. 183.

(Someone asked Wahab ibn Munabbah: “Is bribery unlawful in everything?”

He replied: “No, only that bribery, which you offer in lieu of what you are not entitled to, is undesirable (*Makrūh*). But if you have to offer bribery to defend your religion, blood or wealth, then that is not unlawful.”

Abul Layth as-Samarqandī al-Faqīh says: “This is what we believe that there is no harm in offering bribery for the safety of one’s self or property.”

This is similar to what was reported of ‘Abdullāh ibn Mas‘ūd that when he was in Abyssinia, he offered two dinars in bribery, saying that the sin is on the receiver and not on the one who offers.)<sup>346</sup>

Note: Though there is no punishment/penalty ordained against a person dealing in bribe, there are certain measures that can be exercised on basis of *Siyāsah* on such people, such as imprisonment, especially when it is prejudicial to the public. Note the following:

ورجال الأمن الذين يأخذون مبلغاً من المال من أجل التسهيل على بعض اللصوص السرقة في محطة أو ميناء أو مطار ليلاً، يعاقبون بالسجن من عشرين إلى ثلاثين سنة بمجرد وقوع الاتفاق السابق حتى ولو عدل اللصوص عن هذه السرقة وهكذا<sup>347</sup>

## (6) Al-‘Uqūbāt

(Penalty meted out in revenge.)

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ

If you retaliate, then you should retaliate commensurately to the infliction caused on you.

(Q: 16:126)

The root letters of ‘Uqūbat are ع ق ب, which stand for *consequence*. ‘Uqūbat presupposes a crime. ‘Uqūbat are penalties meted out upon crimes committed.

The same meaning applies to the words عقاب (an offence that is followed by a punishment) and عاقب (that what follows).

مجموع التشريعات التي تحدّد نظام العقوبات المفروضة على مرتكبي المخالفات والجناح

(These are penal laws promulgated to prevent people from committing anything contrary to it.)<sup>348</sup>

<sup>346</sup> - *Al-Jām‘i li Ahkām Al-Qur‘ān*. vol. 6, p. 184.

<sup>347</sup> - ‘Uqūbah ar-Rishwah. at <https://maraje> (Accessed on 24-11-19)

<sup>348</sup> - *Ma‘na Al-‘Uqūbah bil ‘Arabī*. at <https://www.almaany.com/ar/dict/ar>. (Accessed on 24-11-19)

وَلِلَّهِ عَاقِبَةُ الْأُمُورِ (And to Allāh alone belongs the sequel of all affairs. (Q: 22:41)

Islām exhorts the victim to forgive and forget, and then anticipate its rewards from Allāh. But if the victim persists on avenging himself/herself, then let him/her retaliate within their rights and not exceed the bounds.

“The requital of evil is evil proportionate to that. Then whoever pardons and reconciles, his reward is with Allah. Really, Allāh does not love the unjust.” (Q: 42:40)

The above verse emphasises that revenge should be commensurate to the infliction caused to a person if he does decide to take revenge. This includes the force, measure and depth of the infliction caused to him. If the victim uses a weapon or employs a greater force than what was employed on him/her, then that will not be considered as defence or revenge; it will be transgression for exceeding the limits. Conversely, on the spur of the moment, if the victim uses a lesser force or milder weapon to deter the aggressor, then that will be preferable because the object of retaliation is defence and not offence.<sup>349</sup>

## (7) Injustice and Islām

“Indeed, Allāh enjoins (upon man) justice, kindness and offering to the kinsfolk; and He forbids misconduct, abomination and rebellion. He gives you counsel; perhaps you would pay heed.” (Q: 16:90)

### Commentary of this Verse

‘Allāmah Bayḍāwī says that even had no other verse besides this one been revealed, the Qur’ān qualified for its role as “an illustration for everything, guidance, beneficence and glad tidings for the Muslims.” (Q: 16:89)<sup>350</sup>

إن عمر بن عبد العزيز رحمه الله تعالى قد قام بأمر عظيم في نفسه وهو شعوره ... عليه، فإنك لست  
في زمان عمر، وليس عندك رجال عمر، فإن نويت الحق وأردته أعانك ....  
... بعض بني أمية يلعنون علياً على المنابر، فلما تولى عمر بن عبد العزيز ما هذه

Jalāl al-Dīn Suyūṭī noted that some Imāms of Banū Umayyah made derogatory remarks/statements against ‘Alī in their sermons on Friday. Then in 99 A.H. when ‘Umar ibn ‘Abd al-‘Azīz was appointed Khalīfah, he barred those Imāms from making such remarks

<sup>349</sup> - Naysāpūrīath-Tha‘labī, Abū Ishāq Aḥmad ibn Muḥammad. *Al-Kashfwa Bayān*. 2002, Beirut, Dār an-Nashr, DārIhyā at-Turāth al-‘Arabī. vol. 6, p. 52.

<sup>350</sup> - *Tafsīr Bayḍāwī*. vol. 1, p. 416.

and substituted those remarks/statements with the verse in question. By the grace of Allāh that practice has continued up to this day.<sup>351</sup>

Some wise people have mentioned that the endurance and stability of any kingdom are based on the six points mentioned in this verse. All laudable conducts (اخلاق حميده) and despicable conducts (اخلاق رذيله) are compressed in it.

In the verse, the second set of etiquettes is in contrast with the first set: an abomination is the opposite of justice; misconduct is the opposite of kindness and; rebellion is the opposite of offering to kinsfolk.

Authorities mention that there are three faculties in each person:

- 1) Faculty of passion and animalism (قوة شهوية و بهيمية)
- 2) Faculty of anger and beastliness (قوة غضبية و سبعية)
- 3) Faculty of diabolic and delusive tendencies (قوة وهمية و شيطانية)

Above the three faculties, Allāh has endowed human beings with ‘intelligence’ to regulate those and keep them under check.

*Fahshā’* relates to the faculty of passion.

*Munkar* relates to the faculty of anger

*Bagh’y* relates to the faculty of delusive tendencies.

Sufyān ibn ‘Uyaynah says that when a person’s outer condition is in consonance with his inner condition, it is called ‘*Adl*’; if his inner condition is better than his outer condition, it is called *Ihsān* and; if his outer condition is better than his inner condition, it is called *Fahshā’* and *Munkar*.<sup>352</sup>

This is why Islām emphasises that human rights (based on justice and morality) should be placed at the centre of all negotiations, provided that such human rights are in harmony with the divine laws of the Sharī’ah.

***“Indeed, Allāh enjoins (upon man) justice, kindness and offering to the kinsfolk; and He forbids misconduct, abomination and rebellion. He gives you counsel; perhaps you would pay heed.” (Q: 16:90)***

<sup>351</sup> - Muhāmmad Sālih al-Munjid. *Ar-Rajul Allathi Faqadathu al-Ummah*. at <https://almunajjid.com/speeches/lessons>. (Accessed on 24-11-19)

<sup>352</sup> - *Tafsīr Al-Baghawī*. vol. 5, p.39.

We now analyse the divisions of the verse

### Justice

Abū Hurayrah narrated that the Prophet said:

عدل ساعة خير من عبادة ستين سنة

(To dispense justice for a single moment is more virtuous than sixty years of worship.)<sup>353</sup>

The Qur'ān mentions:

“And when you judge among the people, you should judge with equity.” (Q: 4:58)

“Indeed, We sent Our Messengers with visible tokens, and We revealed with them the Scripture and the Balance so that man might stand forth in justice.” (Q: 57:25)

“O Dāwūd! We have appointed you as a ruler on earth; therefore, pronounce judgement among the people with equity.” (Q: 38:26)

‘Abdullāh ibn Mas‘ūd mentioned:

لان اجلس قاضيا بين اثنين احب الي من عبادة سبعين سنة

(For me to sit and adjudicate between two persons is more beloved than engaging myself in worship for seventy years.)

Abū Sa‘īd al-Khudri related that while the Prophet was distributing something among his Companions, a person leaned on him (probably to receive a share). The Prophet struck him with a tree branch. But instantly he became wary and instructed the person to strike him back.

The person said: “I have pardoned you O Messenger of Allāh.”<sup>354</sup>

The following event and discussion that transpired between the Amīr of the Muslims and a monarch, explains the just system of Islām:

After the Christian monarch of Ghassān – Jablah ibn Ayham - embraced Islām, he came to visit the Amīr al-Mu‘minīn ‘Umar ibn Khaṭṭāb. At that time, a Bedouin bumped into him accidentally. The monarch took offence and struck him. The Bedouin lodged his complaint to the Khalifah ‘Umar.

‘Umar said to Jablah: “Either you please the Bedouin or be prepared for revenge.”

The monarch said: “O Amīr al-Mu‘minīn! Will an ordinary citizen raise his hands on a monarch? Is there no difference in your sight between a monarch and a Bedouin?”

<sup>353</sup> - Al-Isfahānī, Abū Nu‘aym. *Faḍīlat al-‘Ādilīn min w man am‘ama an-Naḍara fi Hāl al-Ummah as-Sa‘at*, n.d. Riyadh, Dār al-Waṭan, p. 117,

<sup>354</sup> - *Sunan Kubrā An-Nasai*. vol. 4, p. 227

'Umar replied: *الاسلام قد جمعك واياہ* (Islām has combined the two of you – made you par with each other.)<sup>355</sup>

To avenge oneself on an equal basis is the rule of Islām unless the person pardons the offender. The only scope for honour and personality is through piety. Each person in the sight of our Prophet was equal, and that is the tutoring his successors had received." Then 'Umar recited the verse:

"If you wish to avenge yourselves, then avenge yourselves in proportion to the infliction caused on you. And if you exercise patience, then that is better for those who persevere." (Q: 16:126)

Once Ubay ibn Ka'bh had a dispute on some issue with the Amīr 'Umar ibn Khattāb. After agreeing to have their dispute adjudicated by Zayd ibn Thābit, they both proceeded to meet Zayd. On seeing the Amīr arriving, Zayd cleared the place around him and said: "O Amīr al-Mu'minīn! Be seated over here."

'Umar said disapprovingly: *"هذا أوّل جور جُرت في حكمك ، اجلسني و خصمي مجلساً"*

(This is the first injustice you have committed in your post. You should have let me and my disputant sit on one level.)<sup>356</sup>

'Justice' means to deal with a person as he is entitled to and deserves to be dealt with, and not to overstep his rights. The scales of a person's justice should be so accurate that no friendship or enmity should allow any of its two pans to incline on either side. Justice should be administered with all and sundry, whether it is with a friend or foe.

Buraydah narrated from his father, and he from the Prophet:

*الْقَضَاءُ ثَلَاثَةٌ وَاجِدٌ فِي الْجَنَّةِ وَاثْنَانِ فِي النَّارِ فَأَمَّا الَّذِي فِي الْجَنَّةِ فَرَجُلٌ عَرَفَ الْحَقَّ فَقَضَى بِهِ وَرَجُلٌ عَرَفَ الْحَقَّ فَجَارَ فِي الْحُكْمِ فَهُوَ فِي النَّارِ وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ فَهُوَ فِي النَّارِ*

(On the Day of Judgement, judges will be of three categories: one will be of Paradise and two will be of Hell. The ones of Paradise will be those who will have identified the truth in the world and judged among the people in light of the truth. But of the two of Hell, one will be those who despite knowing the truth of a given case had judged arbitrarily or unjustly among the people, and the other will be those who will have pronounced judgement without verifying the true nature of a case.)<sup>357</sup>

Muslims are obliged to comply with their Amīr as long as his judgements and rulings are in consonance with the Sharī'ah and not otherwise. Differences of opinions should be compared with the Qur'ān and Hadīth. Whichever opinion conforms to either of the two should be upheld.

A rule or government can never subsist through oppression. Sooner or later the tyranny catches up with the tyrant. And by the time the tyrant realises the disaster coming upon him, it is too late to retract. A just ruler is shielded by Allāh and is constantly under His

<sup>355</sup> -Ibn Asākir, Abul Qāsim 'Alī ibn Hasan ibn Hibat Allāh. *Tārīkh Damishq*. 1995, Damascus. Dār Fikr. vol. 5, p. 370.

<sup>356</sup> - *As-Sunan al-Kubrā li-Bayhaqī*. vol. 10, p. 243.

<sup>357</sup> - *Sunan Abū Dāwūd*. vol. 3, p. 324

shelter.

**“Be just, that is closer to piety.” (Q: 5:8)**

*Taqwā* is a special *Nūr* (illumination) that a person perceives in his heart. It is generally acquired by abstaining from those things which the Sharī‘ah declares unlawful. In light of the above verse, the most effective way to acquire *Taqwā* is through administering justice.

The word شهوداء (witnesses or those who are present) alludes to the fact that until a person was not certain of something or was not present at the scene to witness the case; it is not permissible for him to testify in favour of it or against it merely on basis of his thought, speculation or hearsay.

Ibn ‘Abbās says: “Allāh urges us to speak the truth, even it has to be against ourselves or our parents and children. No one should favour the affluent on the basis of their affluence nor the destitute on account of their destitution. Rather he should bear true testimony and not be swayed by his/her whims, immaterial what the outcome will be. Neither should favouritism for the affluent nor affection for the indigent drive anyone away from bearing true testimony.”<sup>358</sup>

Suddī says that this verse was revealed when two persons - one rich and another poor - raised their disputes with the Prophet. The Prophet favoured the poor in the belief that generally, they do not oppress the rich. In the verse, Allāh urged the Muslims to administer justice to both of them, whether the person was poor or rich. Justice should receive precedence to sympathy and considerations.<sup>359</sup>

Qatādah says the testimony is for Allāh and not for people. Allāh Himself is pleased with justice. Fairness and justice are Allāh’s Scales on earth. Through it, He defends the weak from the strong and the truthful from the untruthful. Through it, the truth of the truthful is verified, the false of the liar is exposed and the transgressor is reprovved.<sup>360</sup>

Justice draws victory and aid. Justice is the axis around which human existence turns.

**Abomination**

Ibn ‘Abbās says *Fahshā’* is fornication, and *Munkar* implies all such vices which the Sharī‘ah has declared evil.

Qāḍī Bayḍawī writes:

“*Fahshā’* is to exceed limits in satisfying the carnal passions and to subject oneself to the faculty of desires, such as committing adultery and consuming liquor, because these vices are prompted by the faculty of desires.”

<sup>358</sup>- *Tafsīr Ṭabarī*. vol. 9, p. 304.

<sup>359</sup>- *Tafsīr At-Ṭabarī*. vol. 9, p. 303

<sup>360</sup>- *Tafsīr Ibn Abī Ḥātim*. vol. 4, p. 1087

*Munkar* is to perpetuate an act that is (rationally and customarily) classified as evil, and to subject oneself to the faculty of anger, such as committing homicide, looting or persecuting people.”

*Munkar* (misconduct) are practices that are classified as undesirable in the Shari‘ah.

Abomination: Though by way of the Shari‘ah no specific penalties are legislated for crimes, such as bribe, breach of trust, hoarding etc., by way of Siyāsat some penalties can be imposed by the Qāḍi in light of his discretion to maintain law and order and purge the communities from crime. I have suggested certain measures under the title “Rehabilitation and dignity for criminals.”

### Rebellion

*Bagh’*y is to seek domination over others unjustly out of rebelliousness and pride. This is prompted by the ‘diabolical faculty’ in a person.<sup>361</sup>

Kindness wins over hearts and brings reputation.

Offering anything to relatives creates fondness and acquaintance.

## (8) Breach in Trust

“Indeed, Allāh enjoins upon you that you should restore the trusts to its rightful owners and that when you judge among the people you should judge with equity. Excellent is that of which Allāh advises you. Indeed, Allāh is All-Hearing, All-Seeing.” (Q: 4:58)

Ibn ‘Abbās narrated that when Makkah passed over to the Muslims, the Prophet called for ‘Uthmān ibn Abi Ṭalhah and bade him fetch the keys of the Ka‘bah from home for him. ‘Uthmān brought the keys. When he stretched out his hand to offer it to the Prophet, ‘Abbās – the uncle of the Prophet - advanced and said: “O Messenger of Allāh! May my parents be dedicated to you; seeing that the offices of *Siqāyah* (providing water to the pilgrims) and *Sadānah* (trusteeship) are with our family, can we not have the office of *Hijābah* (safekeeping of the keys) as well?” On hearing that, ‘Uthmān withheld the keys.

The Prophet said: “Let me see the keys O ‘Uthmān.” ‘Uthmān stretched out his hand to offer them, but when ‘Abbās repeated his plea, ‘Uthmān again withheld his hand.

The Prophet said: “O ‘Uthmān! If you have Faith in Allāh and the Last Day, pass over the keys to me.”

‘Uthmān said: “Here it is in the trust of Allāh.”

The Prophet stood up, opened the door of the Ka‘bah and entered it. He found in it an

<sup>361</sup>- Al-Bayḍāwī, *Anwār at-Tanzīl was Asrār at-Ta‘wīl*. 2000, Beirut, Dar ar-Rashūd, vol. 2, p. 277, 278

image of Ibrāhīm with an arrow in his hand, which the pagans employed as a divining arrow. The Prophet remarked: “What is wrong with the polytheists? May Allāh ruin them? What did Ibrāhīm have to do with these arrows?” Then the Prophet called for a pot of water and submerged the arrow and image in it. He also transferred the *Maqām Ibrāhīm* from there, which was at that point and time inside the Ka’bah, and proclaimed: “O people! This is the Qiblah” - referring to the *Bayt Allāh*. He performed the *Ṭawāf* and sat in the Masjid while the keys of the Ka’bah were still in his hand.

‘Alī approached him and pleaded: “O Messenger of Allāh! May Allāh grant you peace; assign the two offices of *Siqāyah* and *Hijābah* to our family.”

Just then Jibrīl descended with the verses under discussion, which declared that the keys should be restored to ‘Uthmān.<sup>362</sup>

*Amānah* (Trust) is of three categories: (1) human being’s dealing with his Lord. (2) the human being’s dealing with other human beings (3) human being’s doing with himself/herself.

The three are explained as follows:

- 1) To obey Allāh’s commands and abstain from His prohibitions.
- 2) To restore the trust of the people in the very state it was entrusted to you. Kings and rulers should entrust the affairs of the public to trustworthy, qualified and Allāh-fearing people. The ‘Ulamā’ should convey the message of Islām without fail to the populace in the light of the Sharī’ah.
- 3) To avoid employing the limbs and organs of the body in such futile deeds that may draw Allah’s displeasure in the world and in the Hereafter.<sup>363</sup>

Abū Hurayrah narrated that the Prophet said: “You should restore the rights of the people to them. On the Day of Judgement, even a sheep with horns will seek revenge from a hornless sheep.”<sup>364</sup>

Once two children brought their written material to Ḥasan ibn ‘Alī to seek his verdict that whose writing was better. ‘Alī said: “O my son! Be careful in your judgement. This is a judgement you are to pronounce between two persons, for which you will be answerable in the Court of Allāh.”

Abū Dhar said: “O Messenger of Allāh! Nominate me as a ruler of a state (or of the affairs of the Muslims).”

The Prophet said: “O Abū Dhar! You are weak, and this (rule) is a trust. It can be a cause of

<sup>362</sup> -Al-Ālūsī, Abū Faḍl Shihāb al-Dīn Maḥmūd ibn ‘Abd Allāh Al-Husaynī. *Tafsīr Ālūsī*. 2008, Beirut, Ihyā’ At-Turāth Al-‘Arabi. vol. 4, p. 102.

<sup>363</sup> - Anon. *Categories of trust*. at <https://mawdoo3.com> › موضوعات إسلامية أنواع الأمانة – موضوع (Accessed on 12-5-19)

<sup>364</sup> - Ibn Ḥibbān, Abū Ḥātim Muḥammad At-Tamīmī Al-Bustī. *Ṣaḥīh Ibn Ḥibbān*. 1993, Beirut, Muassasahar-Risālat, vol. 16, p. 363.

embarrassment and regret on the Day of Judgement, except for him who receives it with its due rights and then fulfils its duties.”<sup>365</sup>

In another narration, the Prophet said: “O Abu Dhar! I find you weak. I prefer for you what I prefer for myself. My advice to you is that you should neither pass judgement between two people nor assume trusteeship over the property of an orphan.”<sup>366</sup>

‘Umar ibn Khaṭṭāb narrated that the Prophet said: “The first thing that will be raised from the people will be ‘trust’; and the last thing that will remain (in the Ummah) will be Ṣalāh. And how many a performer of Ṣalāh is there who has no virtue in him.”<sup>367</sup>

Ibn ‘Umar said: “Do not judge a person by his *Ṣalāh* (prayer) or *Ṣiyām* (fasting); judge him by the truthfulness of his speech when he speaks; his honesty when he is trusted with something and; his piety when he desires for something.”<sup>368</sup>

Sufyān ibn ‘Uyaynah says whoever does not have financial capital in life let him make *trust* his capital of life.<sup>369</sup>

Anas ibn Mālīk says the household whose members betray people are devoid of *Barakah* (blessings).<sup>370</sup>

Anas ibn Mālīk narrated that the Prophet said: “Restore the trust to the person who trusted you with it, and avoid betraying the person who betrayed you.”

Anas ibn Mālīk narrated that the Prophet said in his sermon:

لا إيمان لمن لا أمانة له ولا دين لمن لا عهد له

(His is no Faith who has no trust in him, and his is no religion who does not honour his pledge.)<sup>371</sup>

‘Alī ibn Abi Ṭālib says it is incumbent upon the ruler to pronounce rulings in accordance with the Divine Revelation of Allāh, restore the trust to its rightful persons and abide scrupulously by his promise. If he does that, it will be the duty upon the people to give ear to him, comply with him and respond to him when he calls them.<sup>372</sup>

<sup>365</sup> - *Ṣaḥīḥ Muslim*. vol. 6, p. 6.

<sup>366</sup> - *Ṣaḥīḥ Muslim*. vol. 6, p. 61.

<sup>367</sup> - *Bayḥaqī Shu‘b al-Imān*. vol. 4, p. 325.

<sup>368</sup> - *Al-Durr al-Manthūr*. vol. 2, p. 572.

<sup>369</sup> - *Bayḥaqī Shu‘b al-Imān*. vol. 4, p. 327.

<sup>370</sup> - *Al-Durr al-Manthūr*. vol. 2, p. 573.

<sup>371</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 3, p. 135.

<sup>372</sup> - *Tafsīr At-Ṭabarī*. vol. 8, p. 490

One night ‘Umar was calculating the wealth of the endowment of the public treasury under the light of a lantern. Just then ‘Alī arrived. ‘Umar summarily extinguished the candle. ‘Alī asked him the reason for extinguishing the lantern. ‘Umar replied: “The oil of the lantern belonged to the *Bayt al-Māl* (state exchequer). Had I discussed with you while keeping it burning, it would have meant abusing the trust; and had I not discussed with you, it would have been discourteous of me.”

والحفيد عمر بن عبد العزيز الخليفة الراشد الخامس رضي الله عنه يطفئ سراج بيت مال المسلمين حين يتحدث مع رفيقه عن أمور خاصة. ... لم يهمل الرقابة التنفيذية والشعبية وقد جسد الخليفة العادل عمر بن الخطاب رضي الله عنه مفهوم الرقابة<sup>373</sup>

### (9) Hoarding

Hoarding staple foods is a repulsive act (*Makrūh*) because the general public’s rights are attached to it. Refusing to sell them or withholding the foodstuffs until the prices rise - owing to scarcity - is to deprive the people of their rights.

‘Umar ibn Khattāb reported that the Prophet said:

الجالب مرزوق والمحتكر ملعون

(An importer of commodities is favoured with additional sustenance and a hoarder is deprived of sustenance.)<sup>374</sup>

Mu‘ādh asked the Prophet concerning a hoarder. The Prophet said:

بئس العبد المحتكر ان أرخص الله الاسعار حزن وان أغلاها الله فرح

(Terrible is the person who hoards. When Allāh reduces the prices of the items, he [the hoarder] is aggrieved; and when Allāh hikes the prices, he is delighted.)<sup>375</sup>

‘Abdullāh ibn ‘Umar narrated that the Prophet said:

من احتكر طعاماً أربعين ليلة فقد برئ من الله تعالى وبرئ الله تعالى منه

(A person who hoards foodstuff for forty nights; Allāh is absolved of him and so is he absolved of Allāh.)<sup>376</sup>

<sup>373</sup> - *Riqābah aḍ-Damīr ‘Inda mā Yuṣbih al-Fard Raqīban ‘Alā Nafsihī* at <https://blogs.aljazeera.net/blogs> (Accessed on 24-11-19)

<sup>374</sup> - *Sunan Ibn Mājah*. vol. 2, p. 728.

<sup>375</sup> - *Al-Mu‘jam al-Kabīr*, vol. 20, p. 95

<sup>376</sup> - *Musnad Aḥmad ibn Ḥanbal*. vol. 2, p. 22.



## CHAPTER EIGHT

### Miscellaneous issues

#### (a) Difference Between Divine Laws and Man-Made Laws

##### Preamble

While this chapter explains that Islāmic penalties are awarded to the criminal in proportion to the offense he/she commits, it also highlights the dynamism of Islāmic laws and the major differences between man-made laws and divine laws, as much as it provides cogent replies to the objections raised by the critics against the criminal laws of Islām. Towards the end, it replies the question that is often raised, 'are the Islāmic laws currently implemented in the constitution of any country or not?'

##### The Dynamism of the Islāmic Laws in General.

They are typified by the vitality in which if a ruling is not traced explicitly, then the judge can search for it under the general principles.

- It was explained previously that the Sharῑ Laws of Islām are so comprehensive that they embrace every aspect of human life from the domestic order to the administration of the state and from the national to the international trade and bilateral relations of countries. Likewise, its penalties are commensurate to the crimes, starting from flogging the criminals up to executing them.
- They are of a universal nature and capable of solving the needs of people of every age. They are unique in that they are not restricted to acts of worship; rather they spread out to every facet of life. This is why, when the learned Imām Abū Ḥanīfah was asked what Islāmic jurisprudence was, he answered: هو معرفة النفس ما لها وما عليها: (It is to recognise the soul in respect of all that is in its advantage and all that is to its disadvantage.) Its implementation in every age is thoroughly in favour of humanity and any neglect towards it is detrimental to them.

**At this stage, I wish to enumerate a few differences that exist between the divine laws of Islām and man-made laws.**

1) A. K. Oudah pens:

"In modern law as the society rise in the scale of evolution its laws develop correspondingly with the tempo proportional to the pace of social progress. As the needs of the society multiply and diversify, and as they are enriched with the wealth of thought, knowledge and manners, its scope progressively expands and its principles become more and more inclusive. But the Islamic laws did not go through that process, beginning with a few rules that gradually multiplied or with rudimentary concepts refined by the cultural process with the passage of time. It is

not meant exclusively for any particular community nation or state. They are designed for the entire humanity."<sup>377</sup>

- 2) Man-made laws curb crimes and transgressions to some extent, that is, they restrain certain misdeeds of the criminals.  
But the Islāmic laws nurture the criminals and guide them as well. They aim at creating self-consciousness and awareness in the criminals.
- 3) Modern laws are based on certain punitive concepts, which are interpreted variously by the legal experts. In other words, in conventional criminal laws of countries, there are no general definitions of penal measures or set rules. Though legal experts work laboriously to harmonise conventional laws and make those universal, they fail to do so. Eventually, each country frames its independent laws and takes its own course. This inevitably leads to awkwardness in providing a standard rule/punishment that can be acknowledged universally.  
But conversely, the Islāmic Laws are inclusive as they enjoy a collective nature. Its Laws are identical right across the globe.
- 4) Before pronouncing a ruling, modern laws determine the nature of an act or crime in relation to its perpetrator, as well as its time and place. This naturally gives the legislators leeway to amend and adjust the provision as per their will.  
But the fundamental legislation of the Sharī'ah are absolute and are not amenable to alterations through persons, time and circumstances. This is why the judge cannot adjust the laws for fear or favour.
- 5) In modern laws, ethics or moral aspect are not considered - no matter how heinous the crimes may be - as long as they do not prejudice the security of the individuals involved and do not disturb the serenity of the community. In those laws ethics is a secondary issue. Accordingly, extramarital dating and consensual mating are not crimes. Yes, rape is a crime because it is committed without the *consent* of the partner. Adultery and other obscene offences are viewed as personal affairs.  
But in Islām, such acts are not only anti-social; they are culpable and punishable. They are treated as communal issues seeing that they have direct bearings on the public. To call it a *private affair* is to minimize the seriousness of the crime. Such immoral acts have direct bearings on the culture of the community and are detrimental to sound upbringing, especially to the youth.  
Likewise, in Islām, consuming liquor is an unpardonable crime and is a nuisance to the public, whether it is taken indoors or out in the public and whether while driving or while striving. A crime is a crime, immaterial of the circumstances. Since these anti-social crimes degrade the personality of the criminal, Islām appends it directly with ethics, whether the criminal seeks to justify it on the basis of a personal affair and freedom of choice or not. Islāmic legislation considers the wellbeing of people in general. This is why it sets careful laws to ensure that the environment is purged from all social and moral ills, and does not allow any person

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<sup>377</sup>- *Criminal Law of Islam*, vol, 1, p. 21.

to soil the atmosphere on grounds of personal choice. In sum, while the modern legal system has implemented the principle of relative choice, Islām has considered punishment a social necessity and a means to protect society.

- 6) Conventional laws are subject to alteration with the ever-changing conditions of society. They are prone to changes under social pressure and according to the wishes of those who keep them in force.

But the fundamental laws of Islām are not amenable to change. This is owing to the generality and dynamic character of the rules it comprises of. Its Laws enjoy permanence and immutability. Neither does the passing of time alter them nor does the changing of governments modify them. (“There is no alteration in the Words of Allah.” (Q: 10:64) Yes, within its framework, it does accommodate adjustment in its subsidiary rules according to the circumstances, but of course, without compromising its essentials.

- 7) Positive laws are subjective. They are framed according to the ideology of law-makers and rulers. They also follow the trend, custom and era. Predictably, laws that may be good for one country may not be good for other countries. Likewise, laws that may be appropriate and compatible for one age may not be so for another age. Therefore, many deeds which were considered crimes in the last century have become accepted norms in this century and are given legal status. For instance, sodomy that was always viewed as an obscene and depraved act during the past ages is condoned by our law-makers of the twenty-first century. Certain drugs that were condemned throughout the ages are sanctioned by the same lawmakers today. In that way secular laws are liable to amendment from time to time. They are based on expedience, often modified by individuals to suit their personal agenda or bring them in tune with their culture. Sometimes evil is explained scientifically, which gives the perpetrators justification and pride to further indulge in it. Why should they not get engrossed in it when the crime is now *sanctified* under the label of science? Sometimes evil is interpreted as art or progress. Naturally, with that notion, the culprits will perpetrate the evil more courageously with a feeling of comfort that now they have even received intellectual support and approval.

But Islām has one set of rules, which are constant. It maintains that an act, once a crime, is a crime forever. It does not bend its rules to accommodate the warped tendencies of people.

- 8) Man-made laws and penalties are largely not commensurate with the crimes, whereas the Islāmic laws are. Theft is committed by the hand, so it is the hand that is made to suffer the pain and penalty. “A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and on (specific) wounds there is equal retribution.” (Q: 5:45)
- 9) In divine laws, penalties are executed only as a final measure. For instance, in the case of theft, amputation is the final measure. It is executed only when other preventive measures and remedies cease to be effective. It’s beginning phase is to inculcate in the would-be culprits, abhorrence of theft and set a mechanism

through which they can earn their bread; and if that is not workable, then to provide a livelihood for them through social welfare aid or state grants. Likewise, in the case of adultery; the first stage is to get the two persons married, failing which they are induced to observe fast.

10) Whereas in modern law, disciplining and indoctrinating of the criminal is done (in the prison cells) only after the crime is committed, the Qur'ān alerts the criminals to the evil consequence of the crime even before they commit it. Virtually at every stage, whenever the Qur'ān pronounces legal rules it calls the would-be-criminals to repent. In the Islāmic penal laws, though the physical body of the criminal is given pain, the heart is disciplined. This measure of Islām is to strike a balance between the heart and body through the awareness it creates in the criminal. Repentance denotes regret for contravening the Law. Repentance also calls for making amends in future; otherwise, the purpose of repentance is defeated. This is borne out by the verse:

“Then whoever repents after his transgression and makes amends Allāh will indeed relent upon him.” (Q: 5:39)

Shaykh Abū Hafṣ ad-Damishqī elaborates on the verse: “Allāh relents upon the one who reforms after the penalty is meted out to him. This implies that mere verbal repentance is insufficient. It should be accompanied with immediate sincerity, resolute intention to abstain from the crime in future and free of other motives.”

Quite often it is noticed that after experimenting a new law for a given period of times when the law-makers perceive that it has failed them in resolving the dilemma, they decide to scrap it and replace it by another and then another law. And this carries on continuously with no end. In the meantime, the situation becomes grave by the day. But the Islāmic laws are absolute as we have noticed. They have been revealed in consideration to the welfare of human beings of all time and climes.

## **(b) Objections of Critics to the Criminal Laws of Islām**

### **Prologue**

It is an acknowledged fact that in every field of life and in every institution and company, strangers and outsiders initially do find it awkward to adapt with the new environment, comprehend its intrinsic factors and adjust with its alien rules and regulations. This remains their state until such time that they become acquainted with the new set-up by intimately studying the laws and earnestly learning its inner mechanics and wisdom from those who have a thorough insight of it, for this is when their strangeness turns into familiarity. This applies to the penal laws of Islām as well that unless people of other religions do not study it intimately with an open mind and hear from its scholars the true nature of a given topic, its wisdom will not reveal to them.

### **First comment of the critics**

**Penalties in Islām are inflicted on the criminal to punish a person with no regard to his personality, honour and humanity. Neither is compassion shown to the culprit nor is he/she pardoned.**

In this connection ‘Allāmah Ibn al- ‘Āshūr has stated:

“The weeding out of harmful activities from the society is among the prime object of the Islāmic laws. It was with the aim to improve the conditions of the people that restrictions, punitive measures and penalties were enforced; and that, too, to the extent they were needed, neither less nor more. This is because had a less stringent penalty been sufficient to reform people and amend the situation, Islām would not have opted for more rigorous penalties. Similarly, had the penalty been harsher or beyond the required degree, it would have been redundant and would not have served any real purpose. Certainly, these laws do not comprise of agonising and unbearable penalties. It goes to the extent that even during the infliction of the penalty, which is apparently a painful process, the criminal is covertly shown favour. The penalties Islām has stipulated may be painful outwardly, but inwardly they carry great advantages.”<sup>378</sup>

### **Second comment of the critics**

**Because Divine Laws disregard human needs and sentiments, we should opt for man-made laws.**

But this also is a misrepresentation of the true nature of the Islāmic laws. Islāmic penal laws do not divorce the physical, material, psychic or social needs of people at any stage. They are balanced and executed in harmony with human nature and needs. They leave no room for other laws to creep in. It has considered every aspect of human life without leaving people in perplexity. Take the Law of Succession, for instance, Allāh has compressed the entire science within three passages of the Qur’ān, which in normal circumstances would have required volumes to expound. It has left not a single aspect of Succession Law unexplained from whichever angle it is analysed, and that, too, while maintaining justice among all the heirs.

In Islām, the question of segregation between divine laws and secular laws, and between spiritual and mundane activities of life does not apply; rather there is a marriage between the two. Islām has combined the two and graded them as divine in that both the divine and secular laws are subject and complimentary to each other.

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<sup>378</sup>- Al-Ḥandāwī, Hasan. *Maqāṣid at-Tashrī’ al-Jināī al-Islāmī*. 2015. Alukah. P. 4.

Sādiq Reḍa mentions in his *Due Process in Islamic Criminal Law*:

“To identify Islamic rules and principles of criminal procedure is to endorse what much of the modern world sees as an inhumane system of crime and punishment, indeed to encourage it. In other words: why not argue against Islamic criminal law as a whole, rather than propose adjustments to its practice?”

My response is two-fold: “First, to question the theory or practice of Islamic criminal law is nothing new; prominent Muslim voices have long done this, and they continue to do so. Second, Muslims who practise or advocate Islamic criminal law deeply and genuinely believe in that law as a divine mandate.”<sup>379</sup>

As for the above comment of ‘disregard for the human sentiment of the criminals’, the jurists pose the following questions to the critics:

- By the way, do the criminals have true sentiments?’
- Is it not that because these criminals have put the sentiments of the public on the wayside, they are now striking them mercilessly? Is ‘sentiments’ not just a beautiful word tossed about with no real purpose?
- Will it be wise to regard the sentiments of a handful of culprits and disregard the sentiments of the millions?

From this discussion, it has come to light that most of the above comments are rooted in lack of knowledge of the modus operandi of Islām in respect of its criminal laws, its underlying wisdom and long-term/overall benefits to the communities. But if these laws are studied scrupulously and open-mindedly, we are certain that not only will the critics be convinced of the accuracy of the Islāmic laws, they will even find much reason in it and insist for its implementation to improve the current moribund state of the world.

### **(c) Implementation of Islāmic Law in the Constitution of Countries**

At the outset, it merits commentating that no country has enshrined the penal law in total into its constitution, which has given rise to many distorted perceptions and misgivings among observers. Example of selective implementation is given below:

#### **1.**

“Most Middle Eastern countries continue to incorporate some traditional sharia into their legal codes, especially in the area of personal status law, which governs marriage, divorce and inheritance. In other areas of the law, such as the criminal code, most Islamic nations have attempted to limit the application of sharia, replacing it either with secular legislation or with laws characterized as modern interpretations of sharia. Iran and Saudi Arabia are exceptions. They claim to implement sharia fully in all areas of the law.”<sup>380</sup>

<sup>379</sup>- Reḍa Ṣādiq *Due process in Islamic criminal law*. 2013, New York Law School. Faculty Scholarship Articles & Chapters, p. 13.

<sup>380</sup> - Anon. n.d. at <https://www.aiu.edu/applications/.../> (Accessed on 15-11-2018)

2.

“Islamic principles still form the foundations of the legal code governing marriage, divorce and inheritance in most Islamic nations. On the other hand, many nations have changed classical sharia restrictions, often to expand the rights of women. Such changes have become the major human rights issue in the Women’s world.”<sup>381</sup>

3.

“Sharia or Islamic law influences code in most Islamic countries, but the extent of its impact varies widely. Avowedly, secular Turkey is at one extreme. It doesn’t base its laws on the Quran and some government-imposed rules, such as a ban on women’s veils, are contrary to practice often understood as Islamic. At the devout end of the spectrum is the Islamic Republic of Iran, where mullahs are the ultimate authority, and Saudi Arabia where the Quran is considered the constitution.”<sup>382</sup>

“Elements of sharia are present, to varying extents, in the criminal justice system of many Muslim majority countries. Saudi Arabia, Yemen, Brunei, Pakistan, United Arab Emirates, Iraq, Iran, Afghanistan, Sudan and Mauritania apply the code predominantly or entirely while it applies in some parts of Indonesia.”<sup>383</sup>

“The role of law in Saudi Arabia, as in Islamic societies generally,<sup>28</sup> is not to create and protect the rights of citizens, a purpose common or civil law lawyers might assign to their legal systems, or to instruct citizens on ways they might become more perfect members of society, as socialist lawyers might observe about the role of law in their society. Islamic law serves, and is the expression of, God's will. It both provides its adherents with the knowledge of their duties so that they might more properly conduct this life and prepare for the next and enforces God's will that one “Malaysia’s government throws support behind Islamic penal code that includes amputations and stoning.”<sup>384</sup>

“Malaysia’s government has caused widespread outrage in the multi-ethnic country after adopting an Islamic penal code that will introduce amputation and stoning as punishments for some crimes. Prime Minister Najib Razak’s coalition government unexpectedly submitted the bill that had been proposed by the Islamic group Part-Islam-se-Malaysia.

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<sup>381</sup>- Anon. n.d. NYtime archives. at <http://archive.nytimes.com/www.nytime.com/cfr/international>. (Accessed on 15-11-2018)

<sup>382</sup>- Anon, *Islam and Sharia*, [The New York Times > CFR > International > Q&A: Islam and Sharia](http://www.nytimes.com/cfr/international/slot2_031405.html), at [www.nytimes.com/cfr/international/slot2\\_031405.html](http://www.nytimes.com/cfr/international/slot2_031405.html)? (accessed on 12-5-19)

<sup>383</sup>- Anon, *countries/sharia-law*, at [worldpopulationreview.com/countries/sharia-law-countries/](http://worldpopulationreview.com/countries/sharia-law-countries/) (Accessed on 12-5-19)

<sup>384</sup> - [Aspects of Saudi Arabian Law and Practice ...](http://lawdigitalcommons) at <http://lawdigitalcommons>. (Accessed on 24-11-19)

They say it applies only to certain offences and this comes under the jurisdiction of the sharia court and is only applicable to the Muslims. It has nothing to do with non-Muslims.”<sup>385</sup>

When the Prophet parted from the world, serenity had prevailed in the then Islāmic world. With the Laws of Allāh reigning supreme, the Arabs were free to move about in the entire peninsula without fear of being assaulted or molested.

The effect of those Laws is perceived even today in certain countries where jewellery shops remain open even late at night without guards or bulletproof glass fitted.

The most enlightening part of it is that in those countries although we hear very seldom of someone’s hand been amputated because of theft, the Law of Allāh serves as sufficient deterrent to the would-be thieves. The mere legislation of the laws had a potent deterrent effect on the criminal elements, with hardly any need to execute the penalty; and if it were executed, at all, then a penalty on few individuals sufficed to root the crimes from all others. It is the ordinance of the Sharī’ah that reigns over the conscience of such people. The very awareness of the Omni-Presence of Allāh dissuades them from committing any act that may draw His displeasure.

In conclusion, the criminologists have tacitly testified that whenever and wherever the criminal laws of Islām were applied, it proved its mettle.

An Article of Pakistan 227(1) of the Pakistani constitution reads:

“All existing laws shall be brought in conformity with the injunction of Islam as laid down in the Holy Quran and Sunnah ... and no law shall be enacted which is repugnant to such injunctions.”

“Many Islamic nations, such as Jordan, Kuwait, Pakistan, and Yemen have certain criminal law that reflects traditional Islamic practice banning Muslims, for example, from drinking or selling alcohol. Enforcement of these laws is often spotty and non-Muslims are generally exempted. The vast majority of Islāmic nations no longer apply the traditional corporal punishment for violation of specific Quranic criminal laws. These punishments include flogging, amputation and stoning.”<sup>386</sup>

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<sup>385</sup>- Anon, *Outrage-in-multi-ethnic-malaysia*, at <https://www.reuters.com/...malaysia.../outrage-in-multi-ethnic-malaysia-as-governmen...> (Accessed on 15-11-2018)

<sup>386</sup>- Anon, n.d. *Islam-governing-under-sharia-discussing*, at <https://mahaguru58.blogspot.com/2008/.../islam-governing-under-sharia-discussing.ht...> (Accessed on 15-11-2018)



## CHAPTER NINE

### Conclusion

After covering the major discussions in the foregoing chapters on the criminal law of Islām and studying it from the various related aspects, whether it is pertaining to the *Ḥudūd* penalties or *Ta'zīr* penalties, it has become evident that to develop a healthy society and create worldwide peace, the Islāmic laws in this respect should be considered. Though its implementation may be bitter in the beginning, in the long run, it will be appreciated by all peace-loving people. Time is against us and, therefore, we are not free for trial and error. The situation out there needs urgent redress. The Islāmic states in the past have already experimented its effectiveness and enjoyed its glories.

#### Benefits of Divine Laws

Ibn Hishām writes:

“The Prophet succeeded in establishing in Madīnah a multi-religious political community, based on a set of universal principles that constituted the Pact of Madīnah (*Ṣahīfah al-Madīnah*). The various rules enunciated in the Pact were aimed at maintaining peace and cooperation, protecting the life and property of the inhabitants of Madīnah, fighting aggression and injustice, regardless of tribal or religious affiliations, and ensuring freedom of religion and movement. It is remarkable that this Pact placed the rules of justice above religious solidarity and affirmed the right of the victim of aggression and injustice to rectitude solely on humanitarian grounds.”<sup>387</sup>

The object was to ensure serenity to the entire human creation.

‘Abdullāh ibn ‘Umar narrates that the Prophet said:

إن لله عبادا اختصهم بحوائج الناس يفرع الناس إليهم في حوائجهم أولئك الأمنون من عذاب الله

(There are certain people whom Allāh has chosen for the service of mankind. People resort to them for their needs. Those are the ones who will be secured from the punishment of Allāh.)<sup>388</sup>

Anas ibn Mālik narrates that the Prophet said:

الخلق عيال الله و أحب عباد الله إلى الله أنفعهم لعياله

(The creations are the children of Allāh, and the most beloved person in the sight of Allāh is he who is most beneficial to the creation of Allāh.)<sup>389</sup>

<sup>387</sup>- Ibn Hishām, *Al-Himyarī Abū Muhammad Abū Ayyūb ‘Abd al-Mālik. Sīrah Ibn Hishām*. 1955, Cairo, Dār al-Kutub al-‘Arabī, vol. 1, p. 17. at <https://www.amazon.com> (Accessed on 1-11-2018)

<sup>388</sup>- *Al-Mu‘jam al-Kabīr*, vol. 12, p. 358.

<sup>389</sup>- Bayhaqī, *Kitāb al-Īmān*, vol. 6. p. 43

Finally, after studying the human society from the anthropology perspective and analysing the crimes from the standpoints of its repercussion on human society, rehabilitation, *Hudūd*, *Qiṣāṣ* and *Ta'zir* (in which I tried to close as many pockets as possible that were obstructive to our peace) my contribution to this most crucial topic was to create an awareness in the rulers and ruled that this issue needs to be addressed seriousness if we wish to save the distraught humanity from annihilation. Government personnel should not only promulgate laws, but they should also set pragmatic examples to the public to impress it on them that there is only one way for our prosperity in future, and that is the right way. I also emphasised that peace for society is peace for oneself and consideration for the rights of others is securing one's own rights. We work as a single human race for the benefit of the entire globe and for true world peace.

At this stage, I must also admit that with my incapability, restricted studies and limited resources I could not justify this topic. It was only when I pursued this subject, did I realise how wide and extensive it is. Therefore, with its scope being so vast, I am confident that future scholars will add brighter ideas and further insight into it through their research, especially those that relate to copyright and cybercrimes etc. because with the advent of the network and internet system, criminals are hacking, phishing and are perpetrating several other illegal activities. Hence, while I acknowledge my inability, I anticipate from my seniors that they will overlook my shortcomings and make space in their generous hearts for this humble contribution of mine.

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