PUNISHMENTS IN ISLĀM

THEIR

CLASSIFICATION & PHILOSOPHY

(1984)

DOCTORAL THESIS
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PRELIMINARY

1. Problem of Research.

2. Historical Development of Ancient Penal Law

i) Hammurabi Law

ii) Egyptian Law

iii) Jewish Law

iv) Greek Law

v) Roman Law
PRELIMINARY

The research on the philosophy of punishments gives rise to a three-pronged problem. What are various punishments in Islam, what is their mode of classification and what is the philosophy that governs and regulates their formulation and implementation?

The problem arises in the perspective of specific Islamic order that insists on the creation, promotion and preservation of human values, which originate and develop in pursuit of ideals pertaining to individual and collective life. They can be preserved through enforcement of law in case they are violated and trampled upon by criminal elements in the society.

Islam divides its laws into two categories:--

1. Primary laws (الاصلية)
2. Declaratory laws (البيانات)

Primary laws are framed to create certain values in life which possess the status of intrinsic values that is, ends in themselves. The socio-moral and politico-economic order of Islamic society is based on these values. Declaratory laws are framed to preserve these values through specific guarantees of their non-violation. Punishment is one of the declaratory devices to preserve the basic Islamic order. Its prescriptive and obligatory nature is, therefore, dictated by the preventive strategies that are required to check crime, that is, the violation of intrinsic values. Thus the problem of research resolves itself into the following slots:--

(i) What is law, its scope and purpose?
(ii) What is crime and psychology of the criminal?
(iii) What are the causes of criminality?
(iv) What is the system of punishments, prescribed by Islam, to eradicate the crime?
(v) What is the philosophy of Islamic punishments and how does it function to realize the objectives?

The research to solve these problems is conducted not only to obtain an understanding of the nature of crime and punishment, but also to achieve the emancipation and liberation of the individual from criminal inclinations and antisocial trends and tendencies and to ensure the establishment of a purified and morally hygienic society. If only the causal explanation of crime, and punishment inflicted upon the criminal, is pursued, it would explain away the responsibility of the criminal.

Our study initially involves the historical perspective of the subject, to determine the developmental process of the penal law in general.

**Historical Development of Ancient Penal Law.**

**1st Period:**

**First historical period**

The First Historical Period stretches between 5,000 and 4,000 B.C. It was dominated by four major civilizations. Sumerians, who ruled approximately up to 2,350 B.C. The Akkadians, who followed them and ruled the earliest historical period between 2,350 to 2,230 B.C. The rule of the Gutians spread between 2,230 to 2,130 B.C., and the reign of the Urrians, which stretched from 2,130 B.C. down to 2,030 B.C., the tail end of the first historical period.

**2nd Period:**

**Old historical period**

The Old Historical Period sprawled between 2,030 and
1830 B.C., ruled and dominated by the civilizations of Isin and Larsa. The fusion of the dynasties of Isin and Larsa led to the simultaneous establishment of Eshnuna and Ashur dynasties. The old Babylonian period which witnessed the flourishing and blossoming of Hammurabi dynasty, is also placed within the broader framework of the old historical period.

3rd Period: Middle historical period

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

4th Period: Late historical period

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

Dynasty of Hammurabi.

The Dynasty of Hammurabi, which furnishes the actual starting point of our discussion, came into existence after the fusion of the dynasties of Isin and Larsa. Hammurabi,
the sixth and greatest king of the first (Amorite) dynasty of Babylon, came to throne in 1792 or 1800 etc B.C. He was crowned after the death of the last king of Eshnunna in 179 B.C. and the defeat of Rim-Sin of Larsa in 1770 B.C. He ruled from 1792 to 1750 B.C. or from 1729 to 1682 B.C. For the 1a decade of his 43-year reign, Hammurabi ruled over a kingdom that extended from the Persian Gulf to Mari and Ashur and eastward to the Zagros mountains. It became the classical a of old Babylonian civilization. Hammurabi wrote letters to his governors, containing detailed instructions for the enforcement of justice and order. He composed his "Law Code" in later years. Hammurabi law was however not the first codification known from ancient Mesopotamia. Fragments of a Sumerian code of King Ur-Nammu of Ur and a Sumerian Law Code of King Lipit-Ishtar of Isin were found before Hammurabi Law. The Sumerian laws antedate Hammurabi laws by 350 and 150 years respectively. There is also one in Akkadian from Eshnunna which is only about 50 years older than the famous code of Hammurabi. The principal source of the code of Hammurabi is the imposing stone monument discovered at Susa in 1901 by the French Assyriologist Jean Vincent Scheil and preserved in the Louvre, Paris.

Code of Hammurabi

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

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

Some of the important features of Hammurabi Penal law are as follows:

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

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

3. The receiver of stolen goods was not a person who knowingly bought stolen property, but a person who contracted a purchase secretly, without witnesses.

4. Penalties were graduated according to whether the injured party were a freeman or a slave or according to the rank of the culprit.

5. The lex talionis (law of retaliation) was the dominating feature in the penalties prescribed by the code Hammurabi, together with the frequent death penalty and fine, while corporal punishment as a specific penalty was of slight importance.

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

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

(6) Mutilation of the offender was awarded in proportion to the nature and gravity of the offence.
   i) The hand that struck the father was cut off.
   ii) The eye that pried into secrets was gouged out.

(7) Death punishment was awarded in the case of
i) false allegation
ii) theft
iii) brigandage
iv) creating disorder
v) shirking of state service
vi) criminal negligence

(8) Specified forms of execution such as gibbeting, burning, impalement, drowning were inflicted upon certain criminals.

(9) The notion 'a life for a life' had extended to such correspondence as:
   a) the execution of a creditor's son for having caused the death of a debtor's son, while holding him as a pledge.
   b) That of a builder's son for negligence in construction causing the death of a purchaser's son.
   c) that of the daughter of a man, guilty of the man-slaughter of another's daughter.

(10) In case of wilful murder, there was an uncertainty related to its mode of punishment and the infliction of required retribution.

(11) Extravagant wives and undutiful children could be
enslaved.

(12) There was no concept of imprisonment and forced labour in the code.

(13) Fine in the form of monetary compensation was often prescribed on the principle of restitution, but the fines were not paid to the state.

(14) A person guilty of man-slaughter was simply fined if he could swear that the act was unintentional.

(15) Carelessness and negligence were severely punished.

(16) A surgeon might lose

a) his hands as the penalty for a maiming operation.

b) A veterinary had to repay part of the value of a beast that died through his treatment.

c) The owner of an ox that gored a passer-by was held responsible if it was a vicious beast.

EGYPTIAN LAW

About a dozen legal documents come from the Old Kingdom of Egypt (3100-2475 B.C.) and several documents survive from the second period of Egypt. The Middle Kingdom (2160-1788 B.C) Diadorus or Sesostriis (Sesoasis) is known to be an important law-giver of this period. New Kingdom (1580-712 B.C.) also made some significant contributions in the field of law. However little is known of Egyptian criminal law. Punishments were very severe, but offenders were sometimes allowed to commit suicide. Imprisonment is also established as one of the punishments awarded under Egyptian Law.
JEWISH LAW

It consists of two kinds of laws:
(i) Codified laws
(ii) Popular or customary laws.

Codified laws split into two branches:
(a) Biblical laws
(b) Talmudic laws

Biblical Laws

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

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

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

Jewish Penal Law:

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

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

(b) A sharp distinction was made between murder which called for the death sentence and homicide, which provide
for flight from the avengers to a place of asylum. (Exodus XXI: 12-13)

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

Codified Talmudic laws comprise two main sections which constitute the original portion of these laws:

(i) The Mishnah
(ii) The Gemara

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

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

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

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

(i) First gate (Baba Kama)

This deals with the laws of damages and injuries and those regarding theft and robbery.
(ii) Middle gate (Baba Netzia)
(iii) Last gate (Baba Bathra)

GREEK LAW

In Greek period, normally there were various autonomous legal systems, applying only to the individual city states, but there was a common fund of Greek legal ideas also. There was no corpus juris in which the law was codified. Only a scattered mass of fragmentary traditions was present, that was known to be the source of law.

We are bound to rely largely on the following sources:

(i) Epigraphic and Literary records which include mainly the judicial speeches of the Attic orators.
(ii) Ancient commentaries on the literary records, often in the lexicons (Lixia Segueriana, Pollux, Suidax and the like)
(iii) An ancient fragment on contracts, 'Theophrastus' is also available.
(iv) Some available inscriptions, the chief of which is Codex of Gortyn, first discovered in 1884 and last edited by Kohler and Ziebarth dating from about the 5th century A.D.
(v) Draconic Laws or Draco's code on homicide in the revised version which also dates from the 5th century A.D.
(vi) Plato's Laws and to lesser extent his 'Republic' may also be considered a source.
(vii) The Statutes - consisting of four classes:
(a) Statutes applying to the council.
(b) Statutes for all officials.
(c) Statutes for nine archons (these were most related to the criminal law).
(d) Statutes on foreigners, on commerce, on homicide and on mining.

(viii) Laws on Solon by Aristotle.
(ix) Legislation by various Greek legislators of later periods, such as:

1. Charondas of Catana
2. Zaleucus of Epizephyrian Locrians
3. Lycurgus of sparta
4. Draco and Solon of Athens
5. Hierocles of Syracuse
6. Pheidon of Corinth
7. Philolaos of Thebes and many others.

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

Five Greek periods:

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

Greek Penal Law:

(1) Greek criminal law was originally based on the conc
of vengeance.

(2) There was no clear-cut distinction between criminal and civil law. Originally, only the injured person or his kin might take action but at a later date it became a general rule that every citizen might prosecute offenders. (This innovation was introduced by Solon. It was not based on a division of wrongs into criminal and civil).

(3) Suits were regarded as either private or public, depending on whether the object was the redress of private wrong or the infliction of public punishment. Every person was free in the choice of form of suit.

(4) Prosecution for murder might be undertaken only by the relatives of the victim or a group of several families.

(5) The relatives as well as the dying victim had a right of forgiveness.

(6) Consequence of a crime (disfranchisement) visited not only upon the offender but also upon his children.

(7) Distinction, however, was maintained between evil intent, negligence and accident.

(8) Some of the penalties or punishments of Greek Penal Law were:

(i) death

(ii) loss of freedom by enslavement: this applied only to non-citizens

(iii) Fines—either fixed by state or by judicial discretion

(iv) confiscation of offender's wealth

(v) in few states whipping especially for children and for slaves who could not pay fine.
(9) There was no concept of mutilation and imprisonment.

(10) The penalties for offences varied with personal status.

(11) Rape of a free man or woman was penalized by 100 staters.

(12) Rape of an 'apetairos' (a free man who did not belong to a political society) was penalized by 10, and of a serf by 5, but if the violator was a slave, the penalty was double.

(13) Thieves, exiles, state debtors and the like were arrested and detained. If the prisoners admitted guilt, the "eleven" (competent council and assembly or the magistrates) were authorized to inflict summarily the penalties, one of them being ordinarily death.

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

(15) Punishment for wilful murder was death or exile. Other kinds of homicide were regarded less serious.

ROMAN LAW

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

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

My contention is supported by the statement of Fritz Schulz that Roman public criminal law at the end of the Republic was still far below the standard of civil law; two centuries of revolution and war had paralysed the administrative activity and had prevented the development of criminal law; the statutes of quaestiones were insufficient. Thus the penal actions served as a supplement to the unsatisfactory criminal law. (Classical Roman Law, p.573. Oxford, 1900)

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

1. Theft was known as 'Furtum' and robbery, as 'Rapina'. These were criminal acts liable to punishment under the Twelve Tables. If a free person was evidently found guilty of theft, he was severely beaten and assigned for life to the person from whom he had stolen.

2. If the thief was a slave, he was beaten and put to death as stated in 'Classical Roman Law' p.582. After sometime, as a result of Republic humanistic movement, the death penalty in case of theft was abolished and substituted.

3. In case of theft, the action allowed to the injured party was known as 'actio vi honorum raptorum', for claiming four times the value of the thing, if it was
brought within a year, if not, for the actual value
only as stated by H. Ali in his Outline of Roman Law,
p.231 (Madras, 1935).

4. To restrain adultery, death punishment with the sword
was awarded as stated by W.A. Hunter, in his Roman
Law, p.1061 (Edinburgh).

5. If a man without force debauched a virgin or a widow
who was leading an honourable life, the penalty was
of two kinds:
i) If the offender was of honourable standing, the
   confiscation of half of his goods.

ii) If he was of low degree, bodily chastisement and
    banishment. (See Roman Law, p.1061)

6. Murder of blood relations or being an accomplice to it:
The penalty was as follows "He (the murderer) is to be
sown up in a sack with a dog, and cock, and a viper,
and an ape and shut up in this cramped place of death
to be thrown into either the sea, if near, or a river,
that all use of the elements he may begin even in life
to lack, and that the sky may be taken from his while
he still lives, and the earth when he is dead" (Hunter,
Roman Law, p.1062)

7. Penalty of forgery for slaves was death with the sword
and for free men the penalty was deportation.

8. The penalty of public or private violence was deporta-
tion, if it was armed and confiscation of the third
part of the offender's goods in case it was unarmed.

9. Embezzlement involved both the actual offender and his
assistants. Capital punishment was awarded if they made
away with state money during their official tenure.
Others were awarded the penalty of deportation (p.1062).

10. Bribery was also held as a criminal act liable to punishment (p.1063).

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

(1) Capital Punishment.

i. Death punishment. The following forms of this punishment had been adopted and executed in various crimes.
   a- Crucifixion of slaves.
   b- Burning.
   c- Decapitation.
   d- Burying alive.
   e- Fight with wild beasts.

ii. Deprivation of freedom for life.

iii. Forfeiture of citizenship.

These sentences underwent many changes and alterations up to the period of Constantine. (See Roman Law, p.1064-1065).

(2) Non-Capital Punishment.

i. Relegatio (Transportation for life or for a lesser period to an island).

ii. Exilium (Restriction to a particular place).

iii. Deportatio (Transportation with confiscation of property).

iv. Corporal punishment (flogging or beating with sticks).

v. Imprisonment (for a specific time).

vi. Fines.
vii. Degradation of rank, as the removal of a person from the senate or from the curia of a municipality.

viii. Suspension from practice, as of an advocate.

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

i. Offences against external security. For these crimes, the punishment of death, banishment or deportation was awarded, according to the severity of the offence.

ii. Subversion of the government or "Usurpation of its prerogatives. These offences were known as treason (majestas) and they entailed the same punishment.

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

This introductory chapter has presented a very brief survey of the history of Pre-Islamic Penal Law, and the chapters that follow are a detailed discussion and exposition of Islamic Penal Law which is the main subject of our thesis.
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***
PART - 1

LAW AND CRIME

1. Western Concept of Law

2. Western Concept of Crime

3. Islamic Concept of Law

4. Islamic Concept of Crime
CHAPTER I

WESTERN CONCEPT OF LAW

1. What is Law?

WHAT IS LAW?

The question of crime is the subject of Criminal Law, which forms an independent branch of law as a whole. Before we define and specify the nature of crime, it would be rather more appropriate to find the consensus of Western scholars on the concept of law itself.

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

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

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

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

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

(3) According to this view, the validity of law is based on reason, but it originates from the command of the head of community. The same authority states further that the laws are the moral norms of action, binding in conscience, set up for a self-governing community.³ According to this definition the basis of validity of law is morality, it gets sanction from human conscience, and from where does it originate, has not been mentioned specifically.

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

(5) Immanuel Kant (1724-1804) states that the law is the sum-total of the conditions under which the personal wishes of one man can be reconciled with the personal wishes of another man, in accordance with a general law of freedom."⁵ This definition is again mere theoretical and philosophical, without any pragmatic denotion.
Savigny, the great historical jurist of the 19th century defines Law as "the rule whereby the invisible border-line is fixed within which the being and the activity of each individual obtains a secure and free space." 6

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

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

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

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

This concept of law is also a complete negation of the concepts appreciated by Kant and Savigny. 8

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

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

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

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

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

The definitions given by Holland and Pollock do not refer to the origin and sanction of law, hence they are incomplete, imperfect and inconsistent also with some of the concepts given by other scholars.
(12) Sidney Hartland says in this context, "Law is a set of rules imposed and enforced by a society for the conduct of social and political relations."\(^{12}\)

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

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

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

(14) According to Salmond, "Law is defined as the body of principles recognised and applied by the state in the administration of Justice."\(^{14}\)

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

These are a few specimens taken from a vast legal literature, which suffice to illustrate the laborious efforts that have been made through the ages to answer the question "What is law"?

**DIVERSITY OF CONCEPTS**

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

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

The main reason why the Western Scholars are unable to attain common agreement and unanimity on the exact concept of law is that they have neither the comprehensive totality of human life and its nature before them, nor any persistent system and criterion of the recognition of human values, secular and spiritual.
An unchanging and perpetual concept of law cannot be originated and formulated with a distorted vision of human nature, not comprehending all of the demands of its potential and actual aspects.

All of these efforts have been made in the direction of 'Trial and Error'. If they had based their research on uncorrupted divine conceptual 'grund norms' and revealed knowledge of basic postulates, they would certainly have reached a different conclusion.

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

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

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

أَنْخَمْكَ الْيَاهِلِيَةِ بِيِّنَآ أَنْمَا أَحْسَسْنَ مِنَ اللَّهَ عِلْمًا
لِقَوْمِ يَوْمَ الْقِيَامَةِ

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

Cicero,\textsuperscript{18} stating the opinion of the wisest men of his day, observed that law is neither contrived nor decreed by man; it is an eternal principle which rules the whole universe, commanding what is right and prohibiting what is wrong. Hence, law is no mere artefact but is the divine reason bestowed by the gods on the human race.

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

In addition to the dispute existing among western jurists, another diversity relating to the concept of law is that of Positivism and Idealism.
The positivistic view is mainly concerned with what law is, and the idealistic view deals with what law ought to be.

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

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

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

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

Lord Wright states:

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

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

Since the Western standards of human life, moral values, governmental objects, ethical obligations, idea of justice and origins, sources and principles of legislations are always changing from age to age, no persistent characterisation of law in Western Jurisprudence is possible.
NOTES

1. Robson, W.A. Civilisation and the Growth of Law, p.3.


5. Ibid.

6. Ibid., p.5.

7. Ibid.

8. Ibid.


10. Ibid., p.90.


16. Ibid., p.10.

17. Qur’ān 5:50.

18. Robson, W.A. Civilisation and the Growth of Law, p.3.


CHAPTER - II

WESTERN CONCEPT OF CRIME

1. Problem of definition.


3. Difficulty of Western Criminal Law.
PROBLEM OF DEFINITION

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

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

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

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

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

CHARACTERISTICS OF CRIME

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

(1) that it is a harm, brought about by human conduct, which the sovereign power in the state desires to prevent;

(2) that among the measures of prevention selected is the threat of punishment;

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

VARIOUS STANDARDS OF DEFINING CRIME

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

1. Public Injury test.
2. Mens rea test.
Various Western criminologists have been trying to define the nature and characteristics of crime in the light of these principles.

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

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

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

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

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

Now some more definitions of 'crime' are produced to comprehend its concept as appreciated by the Western criminologists.
(4) Austin & Stephen define it as "an act or omission that the law punishes."¹⁰

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

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

Grygier has also expressed the same view, stating,
(5) "A crime is an act for which criminal legislation prescribes sanctions aimed at the protection of society, which includes the offender."¹¹

(6) William Blackstone states, "Crime is an act committed or omitted in violation of a public law for-bidding or commanding it."¹²

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

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

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

DIFFICULTY OF WESTERN CRIMINAL LAW

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

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

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

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

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

Mannheim, discussing religion, custom and morality, again appreciates in the words, "We have seen that, with all due reservations, those three great non-legal forces of controlling human behaviour can very often decisively determine not only the contents of criminal legislation but also the ways in which men act and react to the systems of law and society under which they have to live." 15
In order to attain a persistent standard for appreciating the definite nature of crime, which the Western Law is still lacking, Mannheim has suggested that we should turn to the norms of religion, custom and morality to which he gives the name of 'Three great non-legal forces of controlling human behaviour.'

The fact that Western legal system does not possess any standard of morality of its own, has been undoubtedly established through this contention. That's why the concept of crime is fluctuating in that system. In order to solve the problem they have referred the case to the above-mentioned sources, considering religion and morality separate from each other because of their secular approach towards religion. The Western scholars and even the Orientalists are unable to understand the comprehensiveness and all-embracing character of religion.

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

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

This shortcoming of Western Law can be easily estimated by the justification, given by Jones, M., in the words, "There can be no doubt that the criminal law is relative, both to time and place. Thus what is forbidden by the law changes from year to year and is impressively transformed over longer periods. Can such a fluctuating and indefinite thing, as the criminal law form the subject of scientific enquiry, or give rise to general and permanently valid scientific laws?"¹⁶

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

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

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

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

This inherent self-contradiction in the Western System of Moral Principles has been discussed by Karl Mannheim and he has aptly and appropriately called it "a Crisis of Values in our Society."18

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

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

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

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


3. Ibid., p.2.

4. Ibid., p.5.


11. McGrath, W.T. Crime and Its Treatment in Canada,


15. Ibid., p.67.


17. Ibid., p.4.

18. Ibid., p.5
   (Quoted from Mannheim, K. Diagnosis of Our Time)

CHAPTER - III

ISLAMIC CONCEPT OF LAW

1. Definition.

2. Ingredients/Essential Elements.
In Islamic Legal Science, the concept of 'Law' is unanimous among all the jurists and the schools of law right from early periods till today. No dichotomy or conflict of opinion upon this issue does exist in Islam. Therefore, in Islamic Jurisprudence, the term 'Law' possesses a permanent and universal character, which is not subject to any alteration.

"Law", in Islamic terminology signifies the word 'Hukm' (حكم) or 'Hukm-i-Shar'i' (حكم شري), which is defined as:

الحكم ما نبت بخطاب الله المعطى بالنقل والمتنقلين بالاجتماع والتفصيل والوضوح

(Law is a Rule of human conduct established by a communication from God, expressive either of demand or indifference or mere declaration).¹

The term 'Hukm' (حكم) does not signify the words and the letters literally contained in the commandments of Allah, communicated in the form of Qur'an. It is the rule or legal value established by the communications of Allah, as it has been clearly elaborated by Muslim Jurists, stating:

أين أليكم المصطلح ما نبت بالخطاب لا هو

(The 'Hukm' in its exact technical sense is, 'that what is established by a communication, not the communication itself')².

The same is expressed by Mahalli in Shar'h-o-Jam'-il-
Jawāme' (جوابم), by Qazi Azd-ud-Din in Sharḥ-ul-Mukhtasar (شرح المختصر), by Asmauli in Sharḥ-ul-Mināj (شرح المنيا), by Amidi in Al-Iḥkām (الإحكام), by Fāzil Qarābāghi, Allama Bihāri, Qanūji and many other authorities on Islamic Jurisprudence.

If only the explicit text of the commands of God had the significance of Law (ال工委), then all legal rules and juristic values based upon Prophetic Sunnah (>iṣlaḥ البخاري<) and Definite Ijmāʾ (إجماع مصوب) would necessarily have to be considered out of the scope of 'Law'. But the only standard definition of 'Law' (工委) in Islamic Legal Science is, that, "Any rule, established, directly or indirectly from a communication of Allah, which pertains to human acts, whether it be demand (الocurrency) a choice between alternatives (الريع) or a simple declaration (الهجة) is known as Hukm or Law".

Therefore, the 'Law' is a body of rules with reference to human conduct, established from: Qur'an, (because it is an explicit and manifest version of Allah's communications),

"Prophetic Sunnah", (because it is an implicit version, practical denotation and physical demonstration of Allah's communications),

and 'Definite Ijmāʾ', (because it is an authoritative device of knowing and inferring what has been divinely communicated to mankind).
EDIENTS

It follows that Law comprises four elements namely:

(i) Hakim (الحاكم) or Law-giver that means Share' (شاعر).

(ii) Hukm (الحكم) that means legal rule or value established through communication itself.

(iii) Mah kūm bihi or Mah kūm feeh (mahkūm bihi/feeh) that means objectives of the law.

(iv) Mah kūm alayh (mahkūm aleyh) that means subjects of the law.

HAKIM

'GIVER)

God Almighty and His Holy Prophet (peace be upon him) possess an exclusive lawgiving authority in Islam. God is known to be the Hakim in real and ultimate sense whereas the Prophet Muhammad (peace be upon him) exercises His lawgiving authority, manifestatively and representatively, being the direct recipient of His divine powers and final agency of His legislative sovereignty.

Therefore, whatever is ordained or abstained by the Holy Prophet (peace be upon him), is exactly known as the command of God Himself. Qur'an has narrated this fact in the words:

وَمَا نُزِّلَ لَنَا مِنْ نُصْرَانِهِ وَمَا نُنْصَرُونَ عَلَيْهِ

(And whatsoever the Apostle gives you, take it; and whatsoever he forbids you, abstain from that). 3
At another place it is stated:

لا يبدوا في أنفسهم عرضاً مما تضيّت ويسبراتلها

(But no, by thy Lord, they cannot be believers until they make you judge (Final authority) in all disputes between them, and find in their hearts no resistance against your decisions, and submit with full submission). 4

That's why the obedience rendered to the Holy Prophet (peace be upon him) is nevertheless obedience rendered to the commands of God. There is absolutely no way to render submission to God Almighty except submitting it to the person of the Holy Prophet (peace be upon him), as it is obviously enunciated by Qur'an in the words:

س من يطع الرسول فقد اطاع الله

(He who obeys the Apostle, obeys God indeed). 5

and:

قل ان كنتتم تطيعون الله فاطعرون في عباده

و يغفر لكم الذنوب

(Say, 'If you love Allah, follow me': then will Allah love you and forgive you your faults). 6

This concept has been very explicitly elaborated by Allamaah Ibn-i-Taimiyyah, a renowned muslim scholar in the words:

فقد أقام الله مقام نفسه في أمره ونوميه وعباده وبيان

فلا بدر من يفرق بين الله ورسول في شيء من هذه الأمور

(Certainly, God has put His Prophet Muhammad (peace be
upon him) at His own place in case of command of commission, command of omission, disclosure of the facts and interpretation of the laws. Hence, discrimination between the status of Allah and that of the Prophet (peace be upon him) with reference to any of these issues is absolutely prohibited in Islam.⁷

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

It is stated:

وَأَوَّلَهُ، وَرَسُولُ ۖ اِنْ تُضَرَّعُواَ إِن كَانُواَ آمِنِينَ

(And God and His Prophet (Muhammad) has a greater right: they should please Him, if they are believers).⁸ Here 'hū' (He) is the indicative, signifying the sense of one, but has been used to indicate both God and His Prophet.

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

انَّ الَّذِينَ بَيَعُونَكَ اِنْ تُبَيِّنُونَ اللهَ فِي دُرَّ اَيْدِي هُمْ

(Verily those who plight their fealty to you, do no less than plighted their fealty to God: The Hand of God is over their hands).⁹
Here, the act of rendering complete submission to the person of Holy Prophet has been declared to be the direct submission to God, and the hand of Holy Prophet has been stated to be the Hand of God.

The same philosophy is repeated in this verse:

(Nor does the prophet say of (his own) desire. (whatever he utters) it is in fact no less than Revelation, sent down to him).10

Here, the utterance of the prophet Muhammad (peace be upon him) is equated with the commandment of God Himself. No distinction is allowed between the speech of God and that of His Apostle.

Moreover, the acts of the Prophet are also owned by God, as if they were performed by Allah Himself. It is stated in this connection:

(And you did not throw when you threw, but it was Allah Who threw).11

This fact is further substantiated in the light of under-mentioned verses, in which the Prophet's name is unexceptionally attached to God's name to describe the nature of the relationship between Ulūhiyyat and Risālat. (Verily, those who annoy Allah and His Apostle, Allah has
cursed them in this world and in the Hereafter)\(^{12}\)

(That is because they have opposed Allah and His Apostle. And who so opposes Allah and His Apostle, then Allah is surely severe in retribution).\(^{13}\)

(Certainly those who oppose Allah and His Apostle will be among the lowest).\(^{14}\)

(Have they not known that who-so opposes Allah and His Apostle, for him is the fire of Hell, wherein he shall abide?)\(^{15}\)

(Say, 'The spoils belong to Allah and the Apostle. And obey Allah and His Apostle, if you are believers)\(^{16}\)

(Say, 'obey Allah and the Apostle;' if they turn away, then remember that Allah does not like the disbelievers).\(^{17}\)

(O' ye who believe! respond to Allah, and the Apostle when he calls you that he may give you life).\(^{18}\)

Here, again single indicative is used to denote the two, God and the holy Prophet. This indicates that their call, announcement, declaration, order and injunction should not be taken
as different from each other. Both should be accepted as the one and the same.

(If any dispute arises between you, upon an issue, refer it to God and Prophet (for final verdict)).

(And who-so obeys Allah and His Messenger, shall surely attain a mighty success).

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

All above-mentioned verses of Holy Qur'an expound the fact that the lawgiving authority vests in Almighty Allah and His Holy Prophet. There is no difference, separation, conflict and inconsonance between the two. Legislative Authority is actually the same, which is really held by God Almighty and exercised by His Apostle to fulfil political, constitutional and legal requirements. In this sense, Holy Prophet (peace be upon him) is the sovereign of the Muslim Ummah and every Islamic State for all times to come, and all the Muslim rulers are always known to be his vicegerents, as it is elaborated by Allama Ibn-i-Khaldun in the words:
Second ingredient of the law is the legal value which, as mentioned in the definition, is established directly or indirectly from the revealed communication. It may be designated as 'Shariah value' also. According to most of the Muslim Jurists, there are five hundred Qur'anic verses which expressly prescribe the legal values. These are known as Ayat-ul-Ahkam. There are approximately three thousand prophetic traditions which directly and expressly deal with the modes of human conduct. They are known as Ahadeeth-ul-Ahkam. This numbering is based on specification of express provisions. In addition to the five hundred Qur'anic verses mentioned above, there are another two thousand verses which deal with acts of omission and commission. It means that the total number of Qur'anic verses which expressly or impliedly possess legal material comes up to two thousand and five
hundred. The same applies to prophetic traditions. Their number runs into thousands and they directly or indirectly provide legal material for formulating Islamic laws. In the light of standard definition of law or Hukm, Islamic Jurisprudence divides it into two classes:

(i) Primary or defining law:

it is known as Hukm-i-Taklīfi (َْكَمٍّ-ِ-تْكِلْفِي)

(ii) Declarative or declaratory law:

it is known as Hukm-i-Waz‘i (َْكَمٍّ-ِ-وُزَّي)

(i) HUKM-I-TAKLIFI

Hukm-i-Taklīfi is defined as:

"الْإِكْرَامُ التَّكْلِيفِ هُوَ مَا أقْتَصَفَ طَلَبَ فَعْلًا مَنَالْكَفُّ "وَأَكْفَهُ

"من فعَّل، أو كَبِيرُهُ بِهِنَّ الفَعْلَ وَالْكِفَفَ عَنْهَا"

"Primary or defining law is the law which requires demand of commission or omission of an act (from a person legally capable), or which provides him the discretion between the commission or omission of a particular act."23

The definition makes it clear that the law of Shari‘ah, on the basis of the nature of its content, is either in the form of a demand or indifference and discretion, or mere declaration. The first two forms i.e., demand (طلب, أَطْلَبُ) or indifference and discretion (تَبَنَّىٰ) are contained in the defining law or Hukm-i-Taklīfi, and the last form of mere declaration (ِْدَخُ) is contained in the declarative law or Hukm-i-Waz‘i.
we should observe that the demand or طلب may be either positive or negative. The positive demand means the demand of commission of an act. It is known as Amr (آمر) also. The negative demand means the demand of omission of an act. It is also known as Nahi (نهی). The commandments of šalāt (prayer), šoum (fasting), Hajj (pilgrimage), Zakāt, Adā-i-Amanāt (discharge of trusts and obligations), and all other religious or secular acts, rights and obligations which are positively required to be performed, exercised and discharged fall within the category of defining laws. The same is the position of the prohibitory laws which are based on the demand of omission of an act. For example, the prohibition of murder, adultery, drinking, theft and all other forbidden, disliked, disapproved and uncommendable acts are also covered by the category of the defining law. These are the laws whether positive or negative, which themselves are required to be acted upon. They do not come out of any other reason or condition.

Indifference and discretion

(b) Indifference and discretion (نیت): All laws which provide the option of choosing between two alternatives are of the nature of Takhyeer. They are known as Takhyeer because man has been granted freedom and authority to commit or omit them. All laws which are in the nature of Ibāhah (باحت) and are known as Mubāhah (مباحات), fall within this category.
Ah'kām-i-Takleefī or the defining laws on the basis of the strength of demand and scales of value contained in the demand are further classified into eleven grades:

(i) Obligatory (فرض)
(ii) Imperative (واجب)
(iii) Mandatory recommendation (سند مکرر)
(iv) Directory recommendation (سند غير مکرر)
(v) Commendable (مستوب)
(vi) Forbidden (جرام)
(vii) Condemned (مکروه تری)
(viii) Disapproved (اساءت)
(ix) Improper (مکروه زنی)
(x) Uncommendable (خلاف ادیلب)
(xi) Indifferent, permissible or discretionary (جایز، صاح) 24

The grades one to five and six to ten are opposite to one another respectively and each of them in opposition to the second possesses the same strength of demand but is different in direction. The eleventh grade, which is indifferent, is common to both categories. It may be committed or omitted; and the legal consequence of its direction is also the same.

(ii) HUKM-I-WAZ'I

Hukm-i-Waz'i (حکم وضیعی) or declaratory law is defined as:

"الکم الوضیعی هوا انتقان جعل شی، سبیا لشی، اس شریا اد مانع لی" 

"Declaratory law is the law which declares anything to be done or to be left undone. It is a law by which a state of affairs is declared to exist or not to exist."

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the reason or condition or hinderance of any particular act. 25

Same is further clarified in the words:

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

(i) Reason. (سبب)
(ii) Condition. (شرط)
(iii) Hinderance or intercepting factor. (ورية)
(iv) Essential element. (ركن)

The following instances may help in clarifying the concept:

(a) For example, the provision of the punishment of amputation of hands for the crime of theft. 26

Theft itself is a forbidden act which is demanded to be omitted. That is why it is primary or defining law whereas the punishment of the amputation of hands is given only if the act of theft is committed. Since this order of punishment is based on the reason of commission of the
theft, it falls within the scope of the declaratory law.

(b) The provision of the punishment of hundred stripes or stoning for adultery. Adultery itself is a defining law because it is prohibited and the awarding of the punishment of stripes or stoning to death (ṣi'ah) is the declaratory law because it is given only for the reason of commission of adultery. Therefore, all punishments awarded only for the reason of violating the primary laws are declaratory laws.

(c) Qur'an says that the allegation of adultery can be established only through four witnesses. This law provides that the four witnesses are a necessary condition for establishing the crime liable to Hadd. The punishment of Hadd can be awarded only when the basic or essential condition is fulfilled. This provision is, therefore, in the nature of a declaratory law. It means that if the required number of witnesses is not available, Hadd will not be imposed.

(d) The Holy Prophet (peace be upon him) said:

لا ميراة لنتانث

"The murderer cannot inherit the murdered inspite of being his legal heir." 30

In this law, the act of murder has been declared to be the hindrance or the intercepting factor in succession. That is why it is a declaratory law and not a defining one.
(e) If a father murders his son he will not be awarded the punishment of Qisas. The existence of filial or immediate paternal relation is the hindrance or obstructing factor in awarding the Qisas. It is, therefore, a declaratory law.

One should not be confused because this relationship serves as a preventing element only for awarding the death sentence as Qisas not as Ta'zīr (تَذْيِير). He can be awarded the death sentence for the same crime in the form of Ta'zīr. The distinction between these two capacities of punishment is that Qisas is compoundable which can be pardoned or substituted by blood money whereas the death punishment by Ta'zīr can neither be pardoned nor substituted by blood money. In this way, the death sentence by Ta'zīr becomes a more grievous punishment than the death sentence by Qisas.

(f) Debt is a hindrance in making Zakāt imperative. That is why it is a declaratory law because in the presence of debt, a person will not be considered Sahib-i-Nisāb (صاحب النصاب).

Islamic Legal Science further divides law into the following categories:

a) Azimah: (عِزَیَة): it is the ideal, original or strict law.

b) Rukhsat: (رَخْصَت): It is the concessional, substitutory or modified law.
For example, Wuzu (\\textit{\/وژو}) is the original law and in the absence of water or in case of serious disease, the Tayammum (\\textit{/تیامم}) is the substitutary law.

This rather limited classification of law is listed only to elaborate the concept of legal value or Hukm. Muslim Jurists, who are not circumscribed by restrictions of space or other counter-active factors, have worked out multiple criteria of classification, division and categorization of the law. A detailed discussion of these criteria is, however, outside the scope of the present thesis.

OBJECTS OF LAW

By objects of law, we mean the purpose for which the divine law is revealed. They embody the motives and intentions that necessitated the express manifestation of divine legal guidance. The purposes for which the divine law is revealed are three:-

(a) Acts. (دائعال\\textit{\	extit{د}}}\\textit{)\\textit{ال})
(b) Rights. (حقوق\\textit{\	extit{حق})\\textit{وق})
(c) Obligations. (واجبات\\textit{\	extit{ب})\\textit{اجب})

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

First object

ACTS

The acts, according to Islamic Legal Science, are
of three kinds:

(i) acts impossible in nature and practice
( انحال ممكن بالنذات بالعادة )

(ii) acts possible in nature but impossible in practice
( فعال ممكن بالنذات ممكن بالعادة )

(iii) acts possible in nature and practice
( انثال ممكن بالنذات والعادة )

The discussion relating to these three categories can be studied in detail in Musallam-us-Šubūt with its commentary Fawāte-hur-Rahmūt written by Mohibullah Bihāri and Abdul Ali Asgari, Vol.,I, page 123 (printed on the margin of Al Mustaṣfā by Imām Ghazāli).

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

لا يكلف الله نفسي إلا وسعها

"On no soul does God place a burden greater than it can bear."\(^{32}\)

After this open declaration, Qur'ān has further educated the people to pray in these words:

"سَبِّبِنَا وَلَا تُحِلْنَا مَالًا طَاغِيًا لَنا"\(^{33}\)

"Our Lord, do not lay on us a burden greater than we have strength to bear."

Since the obligatory status of the first two kinds
of acts could create trouble and inconvenience for mankind, they have not been made the subject of the objectives of Islamic Law. Only the third category is treated as the object of law in Islam. It means that human beings, who are legally capable are alone responsible for those acts, the performance of which is possible both in their nature and practice. Muslim jurists have classified acts into two kinds:

(i) Natural acts (انحال طبيعي)
(ii) Juristic acts (انحال شريعي)

Natural acts are the physical or mental acts which are respectively known as انحال القلب and انحال الجوارح. The motion of any organ of human body, for instance, speaking, eating, walking, sitting, drinking, etc., which are physically perceptible to other persons are known as physical acts. Mental acts such as believing, intending, wishing, liking, disliking, etc., are acts which cannot be physically perceived by others. Mental acts unless accompanied by physical acts cannot form the subject-matter of law.

The Juristic act is constituted by more than one natural acts. For example, the act of faith, prayer, contract of marriage, commercial transaction, murder or theft, etc. When the aggregate of more than one natural acts constitutes a juristic act, it possesses material significance in the eyes of law, but a natural act independently does not possess a separate and perfect existence in the eyes
of law.

Physical acts are further divisible into:

(i) Acts of speech

(ii) Acts of conduct

These acts possess legal character and accountability only when they are voluntarily performed because involuntary acts are not the subject-matter of legal science. The voluntary acts in the terminology of Islamic law are known as Tasarrufāt (تَسَارِعَات).

Jurisprudential acts are further classified into three kinds:

(i) Originating act.

(ii) Informatory act.

(iii) Act of faith.

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

(ii) The Informatory acts are the acts which describe the existence or non-existence of an event, such as testimony, admission or narration of a fact etc., one can assign the character of truth or falsehood to these acts.

(iii) The Acts of faith are the aggregate of mental acts which are not the subject of law, and are, in fact, the subject of theology.

The originating acts are further classified into two kinds:
(ii) Extinguishing acts

Creative acts are the acts which create rights and obligations, for instance, sale, lease, gift, marriage, etc.

Exinguishing acts extinguish already existing rights or obligations such as release, divorce, etc. 35

The originating acts, moreover, are sometimes revocable (رعارع) and sometimes irrevocable (عراة). Revocable acts are the acts whose legal effects can be undone whereas the legal effects of irrevocable acts cannot be undone. Talaq-i-Raji (تلاق راجي) illustrates the first kind and Talaq-i-Mughallažah (تلاق مغلالذ) illustrates the second kind; those originating acts which establish contractual relations between the parties are known as uqūdat (عقدات) and which cancel or annul the contractual relations between the parties are called Fusukha’t (فسوخت).

As far as the mandatory or recommendatory capacity of the acts is concerned, these are divided into two kinds:

(i) Acts whose performance is required by every legally capable individual.

(ii) Acts whose performance by some individuals is accepted on behalf of the others also.

The first category is known as Farz-i-Ayn (فرض این) and Sunnat-i-Ayn (سنت این) whereas the second category is known as Farz-i-Kifayah (فرض كفایه) or Sunnat-i-Kifayah (سنت كفایه).
Constitutional elements of a Juristic Act

There are two kinds of constitutional elements:

(i) Essential ingredients (elements)
(ii) Necessary conditions (براملات)

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

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

(i) Valid acts (انحلال صحیح)
(ii) Void acts (انحلال باطل)
(iii) Irregular acts (انحلال ناسیح)

Valid acts are legally perfect and correct. They possess full legal consequences on the basis of the fulfilment of all essential elements and necessary conditions.

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

Irregular acts are vitiated, faulty and defective on account of unfulfilment of any necessary
conditions or the presence of any temporary illegality. The void acts cannot be corrected or compensated whereas the irregular acts can be corrected or compensated by the fulfilment of the required condition or removal of the temporary illegality.

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

(i) Contracted
(ii) Uncontracted

(i) Authorized
(ii) Unauthorized

(i) Binding
(ii) Non-binding

The specification of some acts for commission or omission, their nature and strength of demand, their scope and limitations, their required elements and conditions, is the first object of the law in Islam. The law is revealed for mankind in order to specify the extent and limits of human liberty by explaining the requirements of approved human conduct and behaviour and by explaining the factors which fix the stamp of dis-approval and unacceptability on
human conduct. Therefore, the first objective of Islamic Law is to prescribe the acts, whether to be committed or omitted, their conditions of legality, scope, nature, consequences and limits etc. to determine the lawfulness and unlawfulness of human conduct.

Second object

**RIGHTS**

Right is the authority of a man recognized by the Shariah to control his action in a particular mode against whom it exists, and the latter is under obligation to act in that connection as required. Rights are classified in Islamic Legal Science into four major categories:

(i) Pure rights of God

(ii) Pure rights of the people

(iii) Combination of both with predominance of the first

(iv) Combination of both with predominance of the second

(i) **Public Rights**

The first kind of rights is known as public rights or rights in rem. These are the rights of the whole of society which relate to benefits for mankind in general. There are no private features associated with these rights because they do not exist merely for the benefit of any particular individual. They are called public rights or rights of society because the enforcement, protection and punishment on their violation is the duty of the society at large. This should not be understood to imply that these rights are
called rights of God because they are of any benefit to Him. God is, in fact, above all needs, wants, desires and requirements to which human beings are subject on account of the limitations of their mortal existence. The rights are equally created by God and vested by Him in human beings. Since the enforcement of these rights and awarding of the punishment on their violation is the religious duty of the Islamic State which acts on behalf of the Muslim community, they are called Huqooq-ullah.

(ii) Private Rights

The second kind of rights is known as private rights or rights in personum because they apply to individuals and not to the community at large. The enforcement of these rights is the option of the individual whose private right is infringed. He has full authority to exercise his option if he chooses to do so.

(iii) First kind of Combined Rights

The third kind of rights is known as combined rights, which include simultaneously the rights of the community as well as the rights of the individuals. They possess the dual capacity of being public as well as private rights. In this kind of rights, the communal elements prevail over the individual elements. For example, the right to punish a slanderer (تاذب) who imputes unchastity to another person, is covered by this category. By such imputation, the right of the community is infringed as it involves depreciation of the honour of one of its members and the right of
the individual slandered is also violated in as much as slander tends to destroy one's honour in society. According to Hanafi view, the person defamed is not entitled to compound the offence nor in the case of his death can his heir demand punishment of the offender. But the Shafe'i view is to the contrary.

(iv) Second kind of Combined Rights

The fourth kind of right is again the combined right in which the individualistic character preponderates over its communal aspect. Retaliation (قساو), the punishment for murder or voluntary hurt is covered by this category. In this case the communal element consists in disturbing and breaching the peace of the whole community, whereas the individualistic element arises from the fact that this act has caused loss and sorrow to the heirs of the person murdered or it has caused some hurt to the individual himself which may sometimes result in his physical and mental dislocation. The private right in this case prevails over the other element because the person injured or the heirs of the murdered can pardon the offender or accept the money in satisfaction of the death or the injury. Moreover, it is his or their right to enforce the punishment.

Public Rights: (حقوق الله) are prevalent in the following cases:

(i) Acts of devotion and religious observance

(عبادات وسنات), for example, salāt, ṣoum, Hajj, Zakāt, Jehād, etc.
(ii) **Perfect punishments** (عِقْرَبَاتُ كَاملُ):
These are the Hudood or fixed punishments for theft, adultery, drinking, slander, etc.

(iii) **Imperfect punishments** (عَقْرَبَاتُ نَامِئَةُ):
For example, depriving a man, who has killed another of his right of inheritance if he is the heir of the person he has killed.

(iv) **Atonements and expiations** (كَفَّارَاتُ) for the non-discharge of certain obligations or performance of certain prohibitions. They possess the characteristics of both devotion and punishment. They mostly consist of fasting or emancipating the slaves or feeding and clothing the poor.

(v) **Imposts and religious taxes:**
These rights involve acts of devotion which impose an obligation on people to make payments out of their wealth with a sense of worship. These are, in fact, religious taxes other than the Zakat, levied by the Islamic State to meet its expenditure. For example, Ushr (عِشْرُ) or land tax payable by the Muslims and Khiraj (خُرَاجُ) or protection tax levied on non-Muslims because they neither pay zakat nor ushr.

(vi) **Independent Rights:** (كَرَامَةُ لَزَايِنُ)
These are rights which exist by themselves without any corresponding active obligation. For example, the right of one fifth of the booty (مال غنيمت) acquired in religious wars. These rights are distinguished from dependent rights (كَرَامَةُ لَغْنِيِّي) because the dependent rights impose corresponding obligations, also which exist against particular persons who are supposed to discharge certain duties towards the possessor of the right.

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Private Rights: (حقوق العباد) are enumerated as follows:

(i) **Right to safety of person** (حقَّ نِسَم)  
(ii) **Right to reputation** (حق حرمت)  
Shafe'Ies acknowledge this private right but Hanafis hold the opposite view.

(iii) **Right of ownership** (حق ملك)  
(iv) **Family rights.**  
(a) **Marital right** (حق زوجيت)  
(b) **Right of guardianship** (حق وليت)  
(c) **Right of succession and inheritance** (حق خلافة وراثة)  
(v) **Right of lawful acts** (حق الفتر)  

Third Object
OBLIGATION

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

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

Two types of obligations fall within this category:

(a) **Obligations towards God** which are taken for implementational purposes as obligations towards the State. For example, the obligation to worship and to pay taxes.
(b) Obligations towards individuals which arise out of family relationships, namely, connubial, parental, filial and kinship, etc.

(ii) Obligations which originate from man's acts of speech. For example, which arise from admissions and other contractual or transactional acts.

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

The first two kinds of obligations are designated as mandatory and imperative. (زائض واجبات).

The third kind of obligations is designated as forbidden (عشرات).

There are three modes of discharge of obligations:

(a) Adā (داء): discharge of the obligation per se.

(b) Qazā (قضاء): discharge of similar obligation.

(c) I'adah (عذاء): repetition.

Subjects of law are the people for whom the law of Shariah is revealed. By the term people we mean legally capable persons who are technically termed as Mukallaf (مكلفة) and the fitness of a person for the application of law to his actions is called legal capacity or Zimmah (زمر).
According to Sadr-ush-Shariah, Zimmah or legal capacity is defined as the quality by which man becomes fit for what he is entitled to and what he is subject to.\(^37\)

The right to which a person is entitled is known as Mā Lahū (مَلاَه) and the obligation to which a person is subject is known as Mā Alayh (مَعْلَه). The capacity constituted by combining both the qualities is known as Ta-kli̱f-i-Shar'i (تكلف شری) or Zimmah or Ah'liyyat (اہلیت), the person fulfilling the requirements of the legal capacity is known as Ah'il (اہل) or Mukallaf (مکلف), and he alone is the addressee of the divine commandments. Hence, he is the subject of the law of Shariah.

Muslim Jurists have defined a legally capable person in the words:

"A living free human being of mature age and understanding possessing Islamic faith, not suffering from any factor which fully or partly affects his legal capacity."

Legal capacity or Ah'liyyat is divided into two aspects:

(i) **Receptive capacity**

(ii) **Active or executive capacity**

The first aspect relates to the capacity for inheriting rights and obligations and the second, to the capacity for the exercise of rights and discharge of legal obligations. For example, the legal capacity of a child in the mother's womb is a receptive one because it possesses the capability to hold some rights for its own interest as inheritance, wills and legitimacy etc.; but, does not possess the power to hold responsibility for the discharge of obligations.
Legal capacity is further classified into two kinds:

(i) **Perfect capacity** (العيب كامل)
(ii) **Defective capacity** (العيب ناقص)

The essential ingredients of perfect legal capacity are given below:

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

The legal capacity of a person is also affected by other factors which may be broadly classified as follows:

(a) **extra-human factors** (عوارض سائر)
(b) **human factors** (عوارض إنسان)

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

The first type of circumstances are listed as follows:

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

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

The second type of factors which are under human control may be reduced to the following points:

(a) Ignorance of law
(b) Consented intoxication
(c) Jest
(d) Journey
(e) Co-ercion, etc.

Since these are humanly created circumstances, they do not completely affect the legal capacity of a person but can make it only imperfect and defective but are not in a position to remove or suspend it completely.

These are the four basic ingredients of law in Islam. Briefly speaking, law in Shariah, is a legal value established directly or indirectly from divine communication which can be proved either through the text of Qur'an or Sunnah or definite Ijma, pertaining to the acts, rights and obligations of mankind. These divine commandments from which the Shariah value or legal rule is derived are
primarily addressed to only those persons who fulfil the requirements of legal capacity. This divine value, as to its nature of contents, can be religious as well as secular. All those State laws which are not directly and strictly derived from the text of Qur'an and Sunnah but are formulated by the Islamic States for the administration of Justice, enforcement of Islamic plans and the achievement of prosperity in human society also fall within the category of law in Islam, under the authority of Ulil-Amr-i-Minkum (أولى الأمر منكم), "Obey the men in authority amongst you": The only condition for their legal viability is that they should be indirectly derived from any general or specific provision of Shariah or framed under any express or implied authority provided by Shariah and are positively or permissibly in consonance with the objectives of Islam.
NOTES

1. Şadr-ush-Shariah, At-Tauğîh, pp.36-40.

2. (a) Ibid., p.40.

(b) Taftazani, At-Talweeh, p.40.


17. Qur'ân 3:32.


22.A. Ibid.


(c) Abdul Wahhâb Khalâf, Usûl-ul-Fîsh, p.74 ff.

    (c) Usūl-ul-Fiqh, p. 74 ff.


    (c) Usūl-ul-Fiqh, p. 74 ff.

31. These instances can be studied in detail, in addition to the references given in Notes (30) in the following books:
    (a) Musallam-us-Šubūt by Bihārī.
    (b) Kashf-ul-Mubhām by Qanūji.
    (c) Talweh by Taftazānī.
    (d) Al-Tashri-ul-Janāi by 'Abdul Qādir'Audhāh.
    (e) Falsafa-i-Shari'at-i-Islām by Mahmasānī.

32. Qur'ān 2:286.

33. Ibid.

34. (a) Taузīh, p. 450.
    (b) Talweh, p. 773.

35. Talweh, p. 74.

36. (a) Bihārī, Musallam-us-Šubūt (with its commentary Kashful-Mubhām) p. 162.
    (b) Taузīh, p. 414.

37. Taузīh, p. 419.
CHAPTER IV

ISLAMIC CONCEPT OF CRIME

1. Definition.

2. Essential Elements.

3. Classification.
ISLAMIC CONCEPT OF CRIME

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

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

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

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

The first aspect is known as

The second aspect is known as

The crime is, therefore, an act or omission in which some provision of divine law, or the law formulated in the light of its direction, is violated and punishment has been provided recommended by the Shariah for that particular violation. In Islamic legal system, crime is not deemed to be committed unless...
some divinely revealed provision is transgressed or the law framed under such provision is infringed. But in secular legal system the crime is considered to be committed only when any law enacted by the worldly authorities is violated. Since the secular law is itself subject to change and variation, the concept of commission of crime and the corresponding award of punishment are also variable. In the case of Islamic legal system, however, crime is only a violation of the law prescribed by Shariah. It is immaterial whether the law is expressly or impliedly revealed or formulated under the revealed authority. This is the reason that in Islamic legal system neither the concept of law nor the concept of crime is variable. Both are characterized by a rare consistency of texture as well as of content and are sustained by the vitalizing principle of constant reference to one another which derives its nourishment from their common genesis and, unlike the purely rational fabrications of the secular legal system, is not subject to the unpredictable convulsions of mood and time. Muslim Jurists normally use the words Al-Jarimah (الجريمة) and Al-Jinayah (الجنayah) for crime, but most of the jurists have specified the term Al-Jinayah for the crimes committed against persons.\textsuperscript{2} Abdul Qadir Audah defines crime in the words:

"A crime is the commission or omission of an act which is forbidden by the Shariah and punishment is recommended for it."\textsuperscript{3}

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

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

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


dâyahu ala'in min waliya al-huda rabbihuma rabbihuma rasuulu'allah wa dilli al-imamum

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

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

**Qur'ān and Crime**

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

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

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

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

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

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

"The liability of my commission of wrong acts (crimes) is upon me and I am not accountable for the wrong acts (crimes) which you commit."

In the context of these two verses, the terms jurm and ijrām are used in the sense of violation of divine law. At another place, Qur'ān says:

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

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

According to Islamic law, there are five values which should be cherished and preserved at any cost. These values are:

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

These are the basic values which distinguish human beings from all other creatures. They also provide a visible index of the degree of civilization a particular human society
has achieved during the course of its evolution. The mode and manner of nourishing and feeding these values indicates the emotional and spiritual involvement of a particular society in their preservation and perpetuation. Islam is, therefore, the greatest humanizing religion and philosophy of life as Islamic legal system aims at protecting and promoting these values in human society both at the individual and collective level. Wherever any act or omission of an act occurs against either of these fundamental values, Shariah considers it the violation of law. Therefore, it is known as crime. The whole penal system of Islam revolves round these fundamentals. The concept of honour and chastity is almost unique in Islam. The high pedestal on which Muslim women are placed obviously contrasts with the way they are treated in the West. In the Western countries, they are regarded as mere chattel or physiological gadgets for the satisfaction of male lust. They are invested with erotic glamour and often transformed into bitch goddesses or femme fatales who exist more for the annihilation of the human species than for its perpetuation. In Islam, women are invested with both physical and spiritual substance and are expected to play a healthly role in the preservation of Islamic values as well as for sustaining a sane and happy society. They are not commodities in the Western sense to be purchased or disposed of at the whims of masculine way-wardness; they are actually partners in a mutually beneficial alliance which not only promotes their personal health as well as the health of their children, but also the health of the society in which they live and of which they are the indispensable members.
Structure and constituent elements of crime

Crime is constituted by three essential elements:

(a) Legal element (الركن الشرعي)
(b) Material element (الركن اللازم)
(c) Penal element (الركن الإلزامي)

LEGAL ELEMENT

1. Legal Element (الركن الشرعي)

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

(i) Legal Argument

The first condition is the presence of a legal argument of Shariah which prohibits the commission or omission of a certain act. If there is no specific legal provision of prohibition, there can be no crime.

(ii) Prescription of punishment

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

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

"Nor would we punish until we had raised the Apostle."
and

وَمَا كَانَ سَيْلُكُ مُهِلَّتُ البَرِّ حَتَّى بَعَثَ اِلَّهُ فِي أَمْهَامَ سُولاً

"And your Lord does not destroy any town or city unless He raises the Apostle in it (and the people of the city violate the divine guidance)"\(^{11}\)

and further:

إِلَّا يَكُونَ لِلْمُتَّقِينَ عَلَى اِلْلَّهِ حَيَّةً حَيَّةً بَعْدَ الْمُرْسَلِ

"so that there should not be any objection against God available to the people after the raising of the prophets"\(^{12}\)

Muslim Jurists have derived the legal maxim from those provisions

لا جريمة ولا عقوبة إلا لمس

"There is no crime and no punishment without legal provision"\(^{13}\)

Islam enunciated this principle of legal justice fourteen hundred years ago but, on the other hand, this principle of criminal justice was introduced and adopted by the Western law by the end of the eighteenth century at the time of the French Revolution in 1789. French and other Western legislations accepted it only after the crystallization of the bloody event, but before that the entire West displayed a pathetic and apathetic unawareness of the human and social relevance of the principle of criminal justice.

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

(iii) Enforcement of Law

The third condition is that legal prohibition and punishment should be declared or enforced before or at the time of commission of an offence. If any act was committed before it was declared unlawful or before its punishment was enforced, it can not be deemed to be a crime and so the doer of the act is exempted from any penal liability. This principle is primarily based on the Qur'anic verse:

"وَلَا شُكْرُوا مَا نَكَّحُّ أَبَا بُكْرَةَ مِنَ الْجُنُوبِ إِلَّا مَا قَدْ سَلَفَ"

"And don't marry the women your forefathers have married except for what is past"\(^{15}\)

and also the verse:

"وَانَّ تَجَمَّعَتْ بَيْنَ الْأَخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ"

"And to splice two sisters in one wedlock (is forbidden) except for what is past"\(^{16}\)

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

(1) First Legal Principle

"لا غم لِّأَذْمَال العقلاء فِي وَقُود النص"

"There is no prohibitory qualification for the acts committed"
by the adult and sane persons before declaration and enforcement of the law."\textsuperscript{17}

(2) **Second Legal Principle**

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

"الأصل في الأشياء ولا فعال الإباحة"

"The Original characteristic of all things and acts is permissibility"\textsuperscript{17-A}

(3) **No Retrospective Punishment**

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

"A general principle of Islamic Shari'ah is that the punishments are not enforced before they are declared and communicated to the people."\textsuperscript{18}

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

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

(iv) Place of commission of act.

The fourth condition relates to the spatial factor. It implies that the offence should be committed at a place where Islamic law is actually enforced. If any person committed an unlawful act at a place which did not fall within the de facto jurisdiction of an Islamic State, the act could not be tried and executed on the basis of sheer inapplicability of Islamic laws to the offence.

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

(a) Territory of Islam (دار الإسلام)
(b) Territory of War (دار الحرب)

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

(a) **Abu Hanifah's View**

Imām Abu Hanifah says that all those offences committed within the territorial limits of an Islamic state, whether they are committed by a-Muslim (ر) or a Zimmi (ژ) (a non-Muslim subject at home) are legally punishable. Therefore, these offences possess the status of a crime. Muslims are punished because they are positively bound to follow the law of Shari'ah and are prohibited to violate its provisions. The non-Muslim residents of an Islamic state are punished because they have agreed to abide by the laws of the Islamic state on the basis of guarantee of a permanent safe conduct. Those persons who commit criminal acts in states, outside the territorial limits of an Islamic state, cannot be punished, irrespective of their religious affiliations, because at the time and place of commission of crime the offender is out of the de facto jurisdiction of the Islamic state.¹⁹

(b) **Abu Yusof's View**

Imām Abu Yusof, the most senior student of Imām Abu Hanifah, also considers the third category of Musta'min (مستأجن) (a domiciled alien in Muslim territory) to be criminally liable and equally punishable for the crimes
committed by him in a manner applicable to Muslims and non-Muslim residents. He equates the status of a Musta'min with that of a Zimmi. The only difference between the two classes is that a Zimmi is granted a permanent surety of safe conduct (امان مُرْتِب) and the Musta'min is granted temporary surety (امان مُرْتَت) for the period asked for by him. 20

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

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

The third view has been adopted by Imam Malik, 21 Imam Shafe'i 22 and Imam Ahmad bin Hanbal. 23 They believe that every Muslim (مسلم), Zimmi (زمٰم) and Musta'min (مستمَن) is held criminally liable and granted equal punishment for the crimes committed in an Islamic state. They add that if any Muslim or Zimmi commits any crimes outside the territorial limits of an Islamic state of which they are subjects, they should be held criminally accountable and be awarded the necessary punishment. A Musta'min will be awarded punishment only for the crime committed within the territorial limits of an Islamic state and not for the crime committed outside its de facto jurisdiction, but Muslim and Zimmi, for all the crimes whether committed in Dar-ul-Islam or Dar-ul-Harb.

Difference between crime and sin: (الرقاب، العبارة، العميقة)

Muslim jurists have established the distinction
between crime and sin on the basis of this principle. If the unlawful act conforms to the prescribed conditions, it is known as crime. If it is committed out of the de facto jurisdiction of an Islamic state where it is not cognizable by Islamic courts, it falls within the exclusive category of sin. Moreover, it is an established fact that every sin is not a crime in the legal sense but every crime is a sin also because it involves the element of the violation of Shariah.

(v) Besides, the unlawful act should be committed by a person who is legally known as Mukallaf (legally capable).

No distinction is entertained by Islamic penal law between the subordinates and super-ordinates, the high and the low, the rich and the poor, the haves and the have nots, the officials and the citizens, etc. Islamic penal law is indiscriminately applied to all classes of citizens but the Western and modern law recognizes some prerogatives and exceptions in favour of the elite.

2. Material Element (الكتلة الادارية)

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

(a) Completion of crime:

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

(i) Complete crime (الجريمة التامة)
(ii) **Incomplete crime**

Hudood (fixed punishments) and Qisas (retaliation) are awarded only for complete crimes, whereas for incomplete crimes only Ta'zirat (discretionary punishments) and diyat (blood money) are awarded. If the offence remains incomplete, it is known as attempt of crime, but if the unlawful act materializes into a complete act i.e., if it bears consequentiality, only then it is known as crime. Therefore, all consequential unlawful acts are attempts of crime: They do not constitute actual crime. 24

(b) **Attempt of crime:**

As already mentioned, in Islamic legal system no Hadd or Qisas is executed for an attempt of crime. It attracts only the discretionary punishment and blood money. The principle is based on the Prophetic tradition

"Who(ever) awarded any Hadd for a criminal act which was not liable to Hadd, he would be deemed to be a persecutor or a transgressor." 25

(c) **Participation in crime:**

The crime may be committed singly or jointly. If any crime is committed by more than one person, it is known as participation or cooperation in crime. There are two kinds of cooperation:

(i) Cooperation by action (الاستمرار بالمشاركة)

(ii) Cooperation by abettment (الاستمرار بالسبيل)

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

Cooperation by action (الشراكة بالإمكانيّة)

It is further divided into two forms:

(i) Form of Tawāfuq (توافق)
(ii) Form of Tawālo' (توافق)

The form of Tawāfuq means that two or more persons actively participate in the commission of a crime, but during the process of completion of the crime, they perform separate acts: for example, in an act of murder, one person cuts the throat and the second person mutilates the limbs which result in the death of the person. If the first person is held accountable for cutting the throat and the second for mutilating the limbs, this is known as Tawāfuq. In this form of cooperation, each one of the participants is separately and independently accountable for the act which he has literally committed. For the sake of terminological convenience, this form of cooperation may be called cooperation with separate liability. If the two persons in the particular act of murder, instead of being held separately liable for their respective acts, are collectively held liable for murder, irrespective of their differential roles in the composite act of murder, this form
of cooperation is known as Tamālo'. It may be conveniently
described as cooperation with joint liability. This distinction between two forms of active cooperation is accepted by some scholars on the idea that cooperation involving separate liability is grounded in incidental collaboration at the time of commission of the crime without any prior intention and planning. But the cooperation involving collective liability is grounded in prior intention and planning. This distinction has been created by some of the Muslim Jurists. Whereas, Imam Abu Hanifah does not recognize any difference between the two forms of cooperation. He believes that both forms of active cooperation possess the same legal consequence. The participants in the crime are not held separately liable. Their criminal liability is joint and collective. He, therefore, discards the creation of this distinction as a futile exercise at hair-splitting. Some of the Shafei and Hanbali scholars have also agreed with the views expressed by Imam Abu Hanifah. The distinction, according to them, is not based on the existence of genuine differential features but exists in the form of a spurious dichotomy.

**Cooperation by abettment:**

There are three conditions which institute cooperation by abettment:

(i) The act should be criminal and punishable.
(ii) The abettment should be in the form of:

- Consent
- Instigation
or

—assistance.

(iii) The abettment should be extended with the intention of committing the act of crime. 29

Imam Malik has, however, adopted a different line of reasoning. He suggests that if a person consented to the commission of a criminal act and was present at the time of its commission, he would be deemed as the active participant (الشريك المباشر) and not as abettor, even though he did not participate actively in the crime. 30

There is a consensus of juristic opinion that punishments of Hudood and Qisas are awarded only in the case of cooperation by action. The abettor is neither subject to Hadd nor Qisas: He would be awarded discretionary punishment whether he abetted a crime of fixed punishment, retaliation or discretionary punishment.

3. Penal Element: (الكرن الأدنى)

This element of crime relates to the basis, reason and grades of criminal and penal liability and relevance of motive, intention, ignorance, mistake and other significant factors which affect the legal capacity of the doer. This element is also related to the circumstances and particular situations which create exemptions to legal answerability.

In Islamic penal law, the criminal responsibility of a person is based on three foundational conditions:

(i) There should be the commission of a prohibited action.
(ii) The doer should possess the capacity to discriminate between right and wrong.

(iii) The doer, while performing the act, should be in a position to exercise his free will.

Unfulfillment of the first condition amounts to absence of criminal responsibility (اِرْتِفَاعُ الْمَرْطُوبَةِ) whereas, the absence of second and third conditions, amounts to suspension of penal liability (اِرْتِفَاعُ العِقْوَةِ).

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

(i) Act performed in the exercise of right of self-defence (الدفاع الشرعي).

(ii) Act performed in the exercise of right of punishment (النَّادِيبِ).

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

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

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

(i) Minority (صُغرَاءِ)

God Almighty has prescribed in the Holy Qur'ān:
"But when the children among you come of age, let them (also) ask for permission, as do those senior to them in age." 31

(ii) Sleep ( النوم )
(iii) Lunacy ( الجذع )

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

انَّ القُلُوب مُرْفَعٌ عن ثلاثَةٍ من الجنّة حتّى يَذْهَبُونَ وَالصَّبَّى
حتى يَرْكَبُونَ وَالنَّهَارُ حتّى يَتَّبِعُونَ

"The (following) three categories of person are exempted from accountability (a) a lunatic unless he gets well (b) a child unless he attains puberty (c) and a sleeping person unless he wakes up." 32

(iv) Compulsion ( الإجْرَاه )
(v) Mistake ( الإِثْبَاء )
(vi) Forgetfulness ( السَّيْبَاء )

Qur'ân explains this concept in the words:

فَمَن اضْطُرَّ غَيْرَ بِغَيْرٍ وَلَا عَادٍ فَلا أُنفِيْهِ

"Whosoever is driven by necessity, neither craving nor transgressing, is not to blame." 33

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

انَّ اللهُ غَفُورٌ رَحِيمٌ وَمَنْ كَفَرَ كَرَسْتَهُ عَلَىٰ

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

(vii) Unconsented intoxication (السک)

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

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

ولبس عليه جناح فيما اختطتم به، ولكن العدّة فلا يلومكم

"There is no liability upon you if you commit an act by mistake, but you are accountable for the acts which were willed and intended by you."35

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

CLASSIFICATION OF CRIME:

Classification of crime:

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

(1) Classification of crime according to punishments:

On this basis crimes are classified into three
kinds:-

(a) Crimes of fixed punishment (ةُّرَمُ التَّغْرُدُ)

(b) Crimes of retaliation and blood money (ةُّرَمُ التَّقْسِيَمَةَ الضَّرْيَةَ)

(c) Crimes of discretionary punishment (ةُّرَمُ التَّنازِعِ)

A discussion of this classification is given in Part III dealing with the system of punishments.

(2) Classification of crime according to intention:

On this basis, crimes are classified into two kinds:

(a) Intentional Offences (ةُّرَمُ المُقْصُودُ)

(b) Unintentional Offences (ةُّرَمُ المُقْصُودُ)

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

(b) In case of unintentional offences, the commission of an illegal act is never intended by the offender. Illegal acts are only accidentally committed as a result of negligence. In these cases, negligence takes place in two ways. 36

(i) The offender intends an act but he is not aware of the fact that the commission of this act will amount to crime. For example, a man shoots another man under the mistaken impression that he is shooting an animal or a wild beast; or a soldier shoots one of his colleagues during war under the misguided impression that he is shooting an enemy.
(ii) In this case, the offender does not even intend the act: for example, he kills a person by rash and negligent driving or he kills a man during the state of sleep-walking or somnambulism.

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

On this basis crime is classified into two kinds:

(a) Positive crimes (الأفعال الإكابية)
(b) Negative crimes (الأفعال السلبية)

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

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

On this basis crime is divided into two kinds:

(1) Essential crimes (الجرائم البسيطة)
(2) Habitual crimes (الجرائم العادية)

The first kind of crime is related to those unlawful acts, the very first occurrence of which is known as crime that creates penal liability: for example, all crimes of Hudood and Qiṣaṣ. The second kind of crime relates to the commission of those unlawful acts which become crimes only by repeated occurrence. The first occurrence of that act does not constitute a crime. Therefore, these acts are not crimes in their essential nature. Only repetition of the act turns it into a crime. Some of the crimes of discretionary punishments are of this
kind. This habituality of commission of the act makes it a crime right from the second occurrence, because it means simple repetition.\textsuperscript{37}

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

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

(a) Public crimes (\پیام\ جرایم غلابیه)

(b) Private crimes (\پیام\ جرایم خصوصی)

Crimes which are offences against the society at large and are punishable as the right of God, fall within the scope of the first category, and crimes, which are not substantively injurious to the society at large but are offences against individuals and their private rights, fall within the scope of the second category. The crimes of Hudood are instances of the first kind and crimes of retaliation and blood money are instances of the second kind. The second kind of crimes is compoundable whereas the first kind is not.\textsuperscript{38}
NOTES

   (c) Kasāni, *Badāi-us-Ṣanā'ī*, p. 233.
8. Qur'ān 34:32.
10. Qur'ān 17:15.
14. Ibid.
     (c) Musallam-us-Ṣubūt, Vol. I, p. 49.
     (b) *Badāi-us-Ṣanā'ī*, Vol. VII, pp. 131-134
20. Ibid., p. 134.
25. (a) Sarkhāsi, Al-Mabsūt, Vol.XXIV, p.36.
26. Ibid., p.357.
35. Qur’ān 33:5.
PART II

CRIMINALITY

1. Western Science of Criminality.
2. Islamic Philosophy of Human Nature.
3. Pre-determined Criminality and Human Freedom.
4. Islamic Injunctions and Western Criminology.
5. Psychology of Criminals.
CHAPTER I

WESTERN SCIENCE OF CRIMINALITY

1. Positivistic Theory.
2. Psychiatric Theory.
3. Psychological Theory.
5. Ecological Theory.
The branch of law, that studies the social phenomenon of crime, its causes and the measures which society directs against it, is known as Criminology.¹

This branch of social study comprises four main subjects:

(a) Science of criminality.
(b) Criminal Psychology.
(c) Criminal Policy.
(d) Criminal Law.

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

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

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

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

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

DEVELOPMENT OF

SCIENCE OF CRIMINALITY

In the history of western law no systematic study of
criminology had been conducted until the 19th century. About the time of the French Revolution, this attempt became more frequent and the methodical study of social and anthropological facts, which is the core of criminology, was conducted.

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

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

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

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

-PATIVISTIC THEORY:

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

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

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

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

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

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

1. Development of Lombrosian View

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

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

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

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

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

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

2) Post Lombrosian Developments

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

i) **Goring's view**

   Theory of Physical & Mental Inferiority.

   ii) **Fink & Dugdale's view**

   Theory of Heredity and Criminal Families.

   iii) **Lange's view.**

   Theory of Twin Research.

   iv) **Kinberg's view**

   Theory of Endocrinology.

   v) **Kretschmer's view**

   Theory of Modern Crimino-Biology.

   vi) **Hooton's view.**

   Neo-Lombrosian Doctrine.

1. **GORING'S VIEW**

Charles B Goring (1870-1919) elaborating the Positivist Theory, appreciated the idea of 'Physical & Mental Inferiority.' His study showed statistically significant differences in regard to stature and weight of criminals, as he mentioned in his book *The English Convict* (Lond. 1919 P.121)

He further found remarkable defect in general intelligence in his group of criminals along with their general physical inferiority. His ultimate conclusion is that a criminal is both physically and intellectually inferior to the normal person and that both this inferiority and criminal tendencies are inherited.
Moreover, the inherent physical condition and mental constitution are independent of each other.⁹

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

By arranging his material, he calculated as follows:

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

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

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

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

2. **FINK AND DUGDALE'S VIEW**

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

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

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

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

In the latest large scale English study, W.Norwood East's 'Adolescent Criminal' no attempt could be made to determine the relative share of endogenous and external factors, but some figures are given to show the connection between inherited and familial defects and offences committed but
there is no material on the question of hereditary transmission. In another work, East states explicitly that neither this research nor his other experiences have given him any reason to regard criminality as such transmissible. 11-A

3. LANGE'S VIEW

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

i) Monozygotic twins (Having concordant behaviour)

ii) Dizygotic twins (Having discordant behaviour)

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

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

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

An important contribution to criminological twin
research has been made in Japan, where Shufu Yoshimasu, Profess
or of criminal Psychology and Forensic Psychiatry in Tokyo, has
published the results of his follow-up studies between 1941 and
1961, indicating the conclusions different from those of Lange.
From the extensive literature upon Twin Research, the following
may be quoted as more significant, Lange J. Crime and Destiny
Lond. 1931, H. H. Newman, Twins and Super-Twins, Lond. 1942, and
Evolution Genetics and Eugenics, Chicago 1930, W. C. Reckless,
Criminal behaviour, R. S. Woodworth, Heredity and Environment,
New York 1941, James Shields, Monozygotic Twin, Lond. 1962,
Beveridge, Changes in Family Life, 1932.

4. KINBERG'S VIEW

Q. Kinberg, through his Basic Problems of criminolo
ogy, 1935, extended his research to a new thought, that is 'Endo
crinology’. He connected the criminal conduct of the delinquent
with inherited disorders of pituitary or other ductless glands
present in human body. 13

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


5. KRETSCCHMER’S VIEW

The famous German psychiatrist Ernst Kretschmer conducting a constitutional study of the criminals, introduced The Modern Crimino-Biological Theory. This School originated in 19120, in Germany, Austria and Italy. Eduard Mezger was also one of the most prominent legal exponents of this theory. Kretschmer’s original object was to examine the complex relationships between various types of physique, character and mental abnormality. He distinguished three major constitutional types of human physical structures which as he stressed were not ‘Ideal types’ but empirical ones:¹⁴

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

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

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

6. Hooton’s View

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

In tracing the causation of crime, Hooton pays attention to moles, tattooing, freckles, quantity, texture, form and colour of hair, skin colour, eye colour, shape of forehead, form of nose, lips, prognathism (projection of upper and lower jaw), chin, teeth, palate, ears, neck, slope of shoulders etc. (a total of 33 items with numerous subgroups) under morphological investigation. Whereas, under metric conditions, he mentions age, weight, height, shoulder breadth, chest depth, chest breadth, sitting height, head length, head breadth, head height, head circumference, facial height, nose height, nose breadth, ear lengths, ear breadth etc.
On the basis of Morphological and Metric investigations, Hooton assumes a correlation between specific physical types and modes of behaviour. Thus the criminals, considered en bloc, are a group of sociological and biological inferiors and this inferiority possesses hereditary origin.

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

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

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

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

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

A comprehensive pathological survey of the various forms of mental illness giving rise to specific crimes has been conducted by the psychiatrists.

The psychiatrists basically divide psychosis into two groups:

1. Organic Psychosis.
2. Functional Psychosis.

Organic Psychosis

Various forms of Organic Psychosis are:

a) Dementia Paralytica (General Paralysis of the insane)
b) Traumatic Psychosis (Injuries of brain caused by accidents)
c) Encephalitis lethargica (Sleepy sickness)
d) Senile dementia (A kind of mental illness)
e) Puerperal Insanity (Illness of the pregnant and post-pregnant mother).
f) Epilepsy (The most widely known type of mental disorder)
BRIEF DESCRIPTION OF ORGANIC PSYCHOSIS

a) Dementia Paralytica

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

b) Traumatic Psychosis

This may also produce profound personality changes leading to criminality and may make the psychotic particularly susceptible to the effect of alcohol. These patients may easily become excited and prone to crimes of violence.

c) Encephalitis Lethargica

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

d) Senile dementia

In this case, the impairment of the physical and mental faculties, emotional disturbances and loss of control over sexual
urges, coupled with growing suspicion of other people, may
provoke acts of violence or sexual assaults on children. The
nature of crimes committed by these patients may vary accord-
ing to the various forms of Dementia.
e) Puerperal Insanity
It is a form of exhaustion psychosis occurring in
women in a condition of extreme anxiety due, for example, to
the birth of an illegitimate child, economic stress plus physi-
cal fatigue. Especially child-killing and other offences, such as
theft may also be committed by such patients.
f) Epilepsy
The attention of criminologists was drawn to it mainly
by Lombroso who exaggerated its criminological significance by
maintaining that all born criminals were epileptics and that
among occasional criminals there was at least one class, the
epileptoids, in whom a trace of epilepsy was the origin of their
criminal tendencies.

It is commonly believed, however, that epileptics are
prone to sudden out-breaks of apparently motiveless violence and
to develop strongly anti-social attitudes. In the state of so-
called epileptic Fugue patients may become disorientated, wander
about aimlessly for long periods and commit minor offences.
g) Intoxication Psychosis
The part played by alcoholic intoxication as a potent-
ial cause of crime has for many years been a favourite subject
in criminology. Drink has important social as well as psycholog-
ical and psychiatric causes and consequences. The crimina-
tiy of the children of alcoholic parents, too has often been discus-
sed. Burt found parental alcoholism to be three times as
frequent among his delinquents as among his control groups. Norwood East regards alcoholism as an indication of a psychopathic inheritance. Case histories of notorious criminals often contain references to alcoholism of the father.

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

**FUNCTIONAL PSYCHOSIS**

**SOME OF THE FUNCTIONAL PSYCHOSIS** are:

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

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

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

ii) **Disregard of community group standards with anti-social behaviour.**

iii) **Apparent absence of guilt feeling, and failure to learn by punishment.**

iv) **Emotional liability and Immaturity**, leading to short circuit reactions with immediate pleasure, satisfaction or unpremeditated violence.

v) **A lack of foresight.**

vi) **Continued sexual experimentation, immaturity or aberration.**
vii) Undue dependence on others. 20

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

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


2. H. Cleckley, The Mask of Sanity, St. Louis, 1941;


4. N. East, Society and the Criminal, Chs. 8, 14;

5. Barbara Wootton, Social Science and Social Pathology, Ch. 8;


7. Winfred Overholser, Pioneers in Criminology;

8. Max Grunhut, Probation and Mental Treatment, Lond. 1963;


The supporters of Psychiatric theory of criminality have reached the conclusion that commission of every crime is indicative of an organic or functional disease or suffering in the delinquent. According to this view, criminal propensity is not inherited but it is an internal pathological development in the personality of the criminal. Therefore, in view of the above discussion, the exclusively determinant and operative factor in the criminal behaviour of a person is the psychiatric abnormality, mental disorder and hypochondriac disease. Since criminal liability cannot be imposed on the delinquent, therefore, there is no place for punishment.
This theory is represented mainly by Sigmund Freud (1856-1939). According to this theory, an infant is considered as a young animal, with many inherent and instinctual bad characteristics, such as selfishness, violence and other anti-social ambitions. During the process of development he has to learn that these ambitions cannot be realised in a civilized human society. His instincts (the id) are disciplined in accordance with his developing sense of reality (the ego). The ego operates on the basis of simple Expediency, not in the strict sense of Right and Wrong.

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

At this stage, most of the wishes are rejected because they are wrong or prohibited, not merely because they are inexpedient. This leads to considerable inner conflicts and strains between id and super-ego, tries to create consistency and compatibility by reconciling between the desires of the id and the checks of the super-ego. The strength of ego varies from individual to individual.

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

Sigmund Freud and his followers formulated in this connection Psycho-analytical Theories which form a vast literature.

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

a) Psycho-analytical Theory of Neurosis,  
by Fenichel, O. (1945)

b) Theories and Structure of Psycho-analysis,  
by Healy, W.

c) Psycho-analysis Today, by Lorand, S. (1943)

d) Psycho-analysis, by Glover, E. (1949)

e) Freud and the Post Freudians, by Brown, J.A.C. (1961)

Burt and Bowly in their books, have put another interpretation to this theory in the terms of Excess or Deficiency in General Emotionality.

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

Healy & Bronner have also explained the psycho-analytical theory and considered (Major Emotional Disturbances) as the actual cause of most of the offences.

Adler's theory of Inferiority complex, Alexander's theory of Neurotic character and Stott's theory of Psychological Breakdown are also various interpretations of the same view.
Aichhorn, in this connection, conducted a study of delinquent children. William Healy and some other criminologists opine that when a child comes to attain the age of puberty, he wants self assertion and liberation from the checks and limitations imposed on him by the family and the society. If these instinctual urges and desires are suppressed, and they find no way for their fulfilment, he feels dejected and frustrated. Consequently, he reacts against the commands of traditional conscience (super ego) and tries to comply with his urges up to his satisfaction, which amounts to criminal behaviour.

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

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

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

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

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

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

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

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

According to Marxist Theory, most of the criminals are found in the lower socio-economic classes, because crime is the result of poverty in itself.
Bonger, following the Marxists, states that crime like all other social phenomena, is a by-product of the economic system.

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

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


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

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

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

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

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

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

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

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

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

2. **Mobility of Inhabitants**— People who move and in particular those who move frequently, are more likely to commit offences.

3. **Migration and Immigration**— This factor has affected not only the rate of crimes, but the types of crimes also. Surveys conducted in UK and USA have proved this fact.

4. **Urbanization and Urbanism**— The trend of migration from rural areas to towns, and the specific way of life resulting from this trend has also caused a great influence on the rate of criminality.

5. **Bad Housing Conditions**— Modern study of delinquency areas has established the fact that more crimes are committed by the persons inhabiting bad conditioned houses.\(^4^1\)

Lunden\(^4^2\) and Gillen\(^4^3\) have also supported these views after constituting an extensive and comprehensive research from ecological viewpoint. Moreover, Jones, W., discussing the ecological theory of criminality, also appreciates the idea that the rate of crimes differs from locality to locality on the basis of the above mentioned determinant factors.\(^4^4\)
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CHAPTER 11

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

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

1. What is Human Nature, and can it be regarded inherently as criminal?

2. Whether the behaviour of the Criminal is pre-determined or is he free in his acts of commission and omission?

3. Whether an act of offence, committed by a person suffering from any mental abnormality or psychic disorder, creates any criminal liability or not?

4. Upto what extent the criminal behaviour of a delinquent is affected by socio-economic order of a society?

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

These questions have been separately discussed in various chapters.

In Islamic terminology, 'Al-Fitrāh' (الحفاظ) means creation (الإنشاء) and signifies the concept of human nature. An
eminent muslim scholar, Imam Râghib Asfahâni says:

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

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

The term 'Fitrah' is literally derived from 'Fatara' (فَتْرَ) that means to open and asunder:

It is appreciated by Qur'ân in the words :-

(The heaven shall rend asunder thereby; His promise is ever brought to fulfilment)

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

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

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

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

Therefore, the term 'Fatara' (فَتْر) or 'Fitrah' (فِتْر) implies the action which gives existence to a thing
that did not exist previously and thus fulfills God's will.

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

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

"نَاتِمًا وَجَاهًا لِلدِينَ حَنِيفًا،* خَطَّرَ اِنْطَلَاقًا وَلَا تَبََّدِيلٌ،
لْحَلَّقِ اِنْطَلَاقًا لِلَّدِينِ الْقَيمِ وَلَا أَكْثَرُ الْجَنَّةِ لا يَعْلَمُونَ"

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

A saying of Holy Prophet (peace be upon him) to the same effect is reported by Aswad bin Sareeq.

"كل نسمة تولد على الفطرة"

(Every child is born on the right nature)⁵

The same is reported by Jābir bin Abdullah Ansāri in these words:

"كل مولود يولد على الفطرة"

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

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

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

كل موالٍ إلَّا على نفسه غالبًا ميزانه أو بنصران أو يعساق
كنك البهيمة تنغَّي البهيمة جمعاً هل ترى فيها جداء

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

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

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

يا إخوان الناس اتقوا ربكما الذي خلقكم من نفس واحدة (الإية)

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

Another declaration to the same effect is:

كان الناس إحداً وقعت النعمة عادتان مبشرين ومنذرين (الإية)

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

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

إِيَّاكُمْ اللَّهُ وَإِيَّاكُمْ نَفْسُكُمْ وَإِيَّاكُمْ مَا خَلَقْتُ فِي الْأَرْضِ نَفْسًا ثَانِيَةً وَلَا أُضْعِفْ عَلَى الْإِنسَانِ شَيْئًا وَلَا أَضْرِبْ عَلَى الْأَمْثَالِ فَضِلْ إِلَّا بِأَنْفُسِكُمْ بالثَّنَائِيَّةِ النَّاسِ فِي الْأَرْضِ وَلَا أَضْرِبْ عَلَى الْإِنسَانِ أَيْضًا وَلَا أَضْرِبْ عَلَى الْأَمْثَالِ بِشَيْءٍ فَضِلْ إِلَّا بِأَنْفُسِكُمْ إِنَّمَا ضَلَّتْ قَدْ ضَلَّتُوا هُنَاكَ


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

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

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

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

The above mentioned verses and hadith have clarified the situation by expressing the Islamic concept of human nature. In view of Qur'ān and hadith, human nature is absolutely free of all bad potentials and wrong tendencies, and no criminal characteristic is inherent in it.
Qur'ān has also very clearly appreciated this fact in Sura-e-Tīn:

[Arabic text]

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

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

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

This Qur'ānic verdict establishes the essential goodness of human nature in contradistinction to the ideational Culture, where Man has been conceived to have been born with the stigma of sin, in contradistinction to the positivistic view where Man is supposed to have atavistic reversion towards animalistic behaviour and in contradistinction to the psychological view, where man is presumed to inherit some bad instincts and urges.
Lombrosians and Freidians throw the responsibility of crime on nature, whereas Islam declares that nature is perfectly good and the seeds of criminality are not inborn but self-sown during the life of an individual. The theory of inborn criminality advanced by the Biological school of criminologists, is absolutely wrong and does not find any place in Islamic philosophy of criminality.

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

لَا تَذْعَمَا نَاسٍ وَلَا شَيْءَ، وَلَا تَرَنْ نَارَ النَّارِ، سُؤُولُوا الْخَيْرَةَ الْمَهْرَى، فَأَنْتُمُ الْمُتَّقُونَ

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

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

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

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

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

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

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

Two facts have been clearly established by this verse:

1. Man is not created in vain. The creation of all human beings, without any exception, is for a certain purpose which is to be accomplished during his life.

2. Every man shall be returned to his Lord to meet the consequences of his deeds. Therefore, every person is responsible and accountable for his worldly actions.

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

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

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

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

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

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

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

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

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

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

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

The word 'Ajl' also signifies the same meaning in the terminology of Qur'an.

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

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

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

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

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

'Ο Mankind' and He has subjected to you what-soever is in the heavens and whatsoever is in the earth, all, from Himself, most surely there are signs in this for those who reflect). 20

That's why Man has been honoured, dignified and granted superiority over all the creatures of Universe, and is known as

Qur'ān states:

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

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

(And when your Lord said to the angels, verily I am going to place a vicegerent on the earth). 22

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

Some of the Muslim Scholars have also expounded that the word 'Khalifah' here refers to the children of Adam i.e. the whole of mankind. The correctness of this view is also corroborated by the Qur'an itself, which says at many places referring to the whole of Mankind:

"هَذَا الْإِنْسَانُ مِنْ نَفْسِهِ المَيْئَةَ وَرَزَعَهُ اللَّهُ بِعَضْدَمَا نَفْسِهِ كَيْفَ يَعْبُدُنَّهُمَّ
اِلْبَلَوْلَةَ مِنَ الْأَرْضِ وَرَجُلَ وَسَادَةَ وَأَشْرَقَةَ لَيْلَةٍ وَشَمْسَةَ رُحْتٍ",

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

"فَإِذَا مَنَّا عَلَى الْأَرْضِ مِنْ فِرْعَوْنَ لَنَظْرِكُمْ تَعَمَّلُونَ
(Then we made you (their)successors in the land after them so that we may see how you act) 24

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

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

"وَأَيُّ خَلْقٌ رَبِّ الْأَلْبَاطُ الْأَعْظَمَ لِتُخَلِّفَ الْمَلَائِكَةَ مِنْ بَعْضِهَا فَإِذَا
سُوْيَتَ وَعَفُوَّتَنَّ بِمِنْ رَوْاهَا فَخَلَّتْ سَحْبَتُهَا وَفَسَعَ الْمَلَائِكَةَ كِلِّهَا
أَجْعَموُنَّ
(And when your Lord said to the angels, Surely I am going to create a mortal of the essence of black mud fashioned in shape. So when I have made him complete and breathed into him of My
The whole discussion in the light of Qur'an and Hadith brings us to several conclusions:

1. The whole mankind has been equally created with an identical nature.

2. The nature of Human Kind is perfectly good. It has been made upon the right path and is basically free of evil and malicious tendencies.

3. There is no variation, exception or discrimination at all to this principle of creation. This signifies the eternal uniformity and equality of human creatures.

4. Man, bestowed with the essential goodness of his nature, has not been created vainly, but for a certain purpose to be realised in this world.

5. The object for man to accomplish is to attain the stage of highest moral perfection by struggling against the forces of immorality.

6. The purpose of creating life and death is to manifest and evaluate human beings in view of their deeds and conduct.

7. The purpose of creation of Universe and of all its objects is to provide harmony and compatibility in the human struggle for realization of the moral goal.

8. Mankind has been granted honour, glory, dignity and superiority over all other creatures of the Universe, due to the comprehensive and positive
character of its nature.

9. Owing to this supremacy, competence and excellence of human nature and its creation, Man has been made the successor and vicergerent of God on the earth.

10. Thus, None of the human beings possesses bad nature or inherent criminalistic tendencies.

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

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

The question, as to what type of instinctual urges and demands are vested in human nature and under what circumstances a man is supposed to comply with them, is very much concerned with the analysis of human personality. Since man has been created to wage moral struggle, he is capable of scaling the highest perfection of his conduct as well as to sink to the
lowest of the low in creation, as it is stated:
(Certainly We created man in the best make. Then "in consequence of wrong use of his opportunities and free will" We render him the lowest of the low "he himself having destroyed his original purity and goodness". Except those who believe and practice good, so they shall have a reward never to be cut off). 26 This dual capacity for moral success and for moral failure is grounded in human nature, which is absolutely capable to choose either.

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

i) Potential Nature (زورت بالقوة)

ii) Actual Nature (زورت بالفعل)

It signifies the conscience and urges, ingrained in human soul, regarding the pursuit of highest ideals, on the basis of which man is known to be Ahsan-i-Taqweem (أحسن التقوى). These are basically four in number.

1. Distinction between Vice and Virtue

Every man possesses an urge and demand in his nature to distinguish between virtue and vice, between good and bad, between moral and immoral and between noble and ignoble. That's why man has been recognising indiscriminately some of the noble ideals, throughout the societies having different standards and traditions. Moreover, the distinction between right and wrong has also been universally acknowledged as the foundational stone for the pursuit of moral perfection. This is because of the potential instinct ingrained in the nature of every human being.
A lot of Qur'ānic references can be provided in this connection. One of them is mentioned here to appreciate the concept. Qur'ān states:

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

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

2. Acknowledgment of existence of God.

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

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

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

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

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

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

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

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

 Anda زا ن دا ن ب ن ي م س ت ن ا م ع ن ن د و و ن ز ر ي ن ج و ا ش ي ن و ه ع ن ا ن ف س م م

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

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

This calling upon God becomes, at that time, an instin-
cntual demand of man.

Qur'an also mentions this fact:

 "وَأَعْلَمُ الْإِنسَانَ يُضُرُّ عَلَى الْخَيْرِ

(And when affliction touches a man, he calls on us, whether
lying on his side or sitting or standing). 31
(And when distress affects a man he calls upon his Lord, turning to Him frequently). 32

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

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

3. Insight of the processes of Mind

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

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

Qur‘an appreciates this fact in the words:

(‘An al-insan ‘ali ‘anhu ‘a’sirha) 33

(Nay! man is witness against himself).

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

Qur‘an says:

(‘An kalim sinna ‘an fasilat wawakirat)

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

(‘An ‘a’mam akhur al-insan masellti)

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

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

1. **Sense of responsibility of the Trust**

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

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

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

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

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

The combination of these four urges constitutes the potential Human Nature. This is known as (الإنسان المشارك) (the created Nature of man) for which Qur'ān says:

"فَطَرَتْ اللَّهُ النَّاسَ عَلَيْهَا لَا تَتَمَهَّلُوا لِقَلْبِ الْمَلِكِ الْأَعْلَى" (46:8)

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

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

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

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

The sub-conscious mind of man is directly influenced by this force. That's why, at the level of the sub-conscious, the noble urges, normally possess dominating and controlling effect,
and the moral good is usually recommended by this organ of 
human mind. Whereas the negative desires can not play much 
effective role at this stage.

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

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

"Wa anna manhu yasqala lihasan al-"umma wa anna min al-ha"ul wa al-husn wa al-"uda"ul wa al-"umma wa al-an'am wa allat-zil'il man'ah al-"umma al-diniya."

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

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

1. Propensity of sexual satisfaction.
2. Propensity of racial preservation.
3. Propensity of monetary gains and hoarding.
4. Propensity of self-regarding (it is directed to collect the power and maintain the status)
Human conduct, determined through these desires and ambitions, that is the Actual Nature, is known as Self-Regarding conduct, whereas the instincts and urges ingrained in the Potential Nature of man produce the Social conduct. The former represents the temptation of the desire, and the latter, sense of the duty. This conflict between desire and duty exists in human mind due to the two fold capacity of human nature.

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

1. To follow the urges of potential Nature by neglecting the other nature completely.

2. To follow the urges of Actual Nature by neglecting the former completely.

3. To develop the Potential Nature and enable it to control the other nature.

4. To develop the Actual Nature and enable it to control the former.

5. To create such balance between the two as allows none of them to dominate the other.

The first is not appreciated by Islam. Because it leads to an extreme, that is Rabbaniyah (رَبَّانِيَّة).

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

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

The fifth does not provide a profound and protected
base for the development of noble values, because the balance means equal chances for the two. It may be appreciable in some aspects, but comprehensively, it can not help in achieving the stage of moral perfection. Therefore, in its overall analysis, it is concluded, that it cannot be regarded as perfect and ideal.

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

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

This process of purification of human mind is known as Tazkiyyah (تَزكية). Qur’ān states in this regard.

وَنِنِّعُ مَا سَوُى مَا فَسَدَهُ وَلَا تَفْرَجُوا مِنْ زَكَّاهُ وَقَذَانُ.

(And (human) mind and its perfection. So He intimated to it by inspiration its deviating from right and its guarding against evil. Surely he succeeds that who keeps it pure and befalls that who corrupts it). 40

On the one hand, there is excessive love of self-
Regarding instinctive ambitions in human nature, whereas, on the other hand, there is the urge and propensity of the pursuit of noble ideals. This conflict between the two aspects of human nature is necessary because no moral situation can arise without such set of circumstances. It is only through such conflict that when man overcomes it in the required positive manner, he becomes the attainer of moral perfection, which is the basis of his superiority over all the creatures of the world.

At the time of the first instance of the creation of mankind, God Almighty made a declaration regarding the vice-gerency, being conferred upon Hazrat Adam, the first man upon the surface of the earth. Qur'an narrates the declaration:

"أَوَلَىٰ نَفْسِكُمْ مِنْ نَفْسِي فِي الْإِرَادَةِ خَليَّةٍ (And when your Lord said to the angels, I am going to place in the earth one who shall rule (in it being My vicegerent))."

At the occasion of this allegorical statement of the preference of man above the creation on this earth, the angels raised a question saying:

"إِنَّا أَتْبَعْنَاهُ فِي مَا يَشَاءُ وَلَا يُضَلُّ الْعَلَمُ عَلَيْهِ إِلَّا وَهُوَ وَهُوَ أَلْبَاسٌ إِلَيْهِ مُخْتَلِفٌ (They said: What! will thou place in it such as shall make mischief in it and shed blood, and we celebrate Thy praise and extol thy holiness? He said: surely you do not know what I know)."

The angels had seen only the dark side of the picture. Their observation was confined only to the consequence of the urges and ambitions of the actual nature of man. Therefore, considering man as an Earner of evil and a Shedder of blood, they could not appreciate his capability of being the Vicegerent of God on earth. Infact, man possessed also vast capacity of
earning good, due to the inspired knowledge and noble urges, ingrained in his potential nature, but the angels were not perfectly aware of this reality. Propensity of evil there might be in him, but the good was certainly to become preponderant.

Therefore, knowing this situation of conflict in which ultimately the good had to dominate the evil, Allah said, "Surely I know what you do not know." It was appreciated that the man had to attain the stage of moral perfection and superiority over entire creation, only through undergoing this conflict of the urges of potential and actual nature. If there was not struggle between temptation of desire and sense of duty, as it was in the case of the angels, because they possessed only the noble instincts, prompting them to perform their religious duties and having no sense of worldly ambitions, then no moral situation would have ever arisen. Without such moral situation, no struggle was to be regarded as an ideal and appreciable endeavour, and, consequently, man would never have deserved this great honour.

Therefore, man, being moral agent, is free to accept and develop the influence of either of these instincts. What else he adopts, he is supposed to be responsible for that, and if he is deprived of such free conduct, due to some physical or mental disability, his criminal and sexual liability is, consequently, suspended. Hence, criminality cannot be accepted as an ingrained character of human nature.
NOTES

6. Ibid.
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CHAPTER III

PRE-DETERMINED CRIMINALITY

AND

HUMAN FREEDOM
In order to decide whether the idea of "Pre-determined Criminality" either in biological, psychiatric, psychological or in any other form, is acceptable to Islam or not, we are positively obliged to study the concept of Human Freedom.

As far as the concept of Freedom or Determinism of Man in his acts is concerned, it requires keen and serious attention. There is a delicate but very vital distinction according to Islam between Creation of an act (خلق) and performance of an act (كسب).

The balanced and the popular view of Muslim jurists is that man is neither the Creator (خلق) of his deeds nor his actions are divinely predetermined. The reality exists between these two positions, as it has been said by the Theologians that man's authority is between Qadr and Jabr (بين القدر والرابر).

Although the acts and deeds in general, like mankind itself, have been indiscriminately created by Allah, yet human beings have not been deprived of their free will and choice regarding commission or omission of their acts. Thus God is the Creator (الإِسْلَامُ) of the acts, whereas man is their performer and operator (کسب اعلان).

The real status of human action is neither creation (مُحْيَّة) nor predetermination (٨٠٦) but it is free performance and attainment.

Qur'an holds the fact-

وَإِذَا هَمْ ذُوقُوا نِعَمَ الْكَبِيرِ (1)

"And Allah has created you and what you make." 1

This verse categorically declares that God Almighty is
the creator of everything, whether it exists in the form of an accountable creature or in that of an act or deed. None of the creatures is out of His dominion and jurisdiction. But one should be very clear on this issue that nothing of this type of creation binds a man to become a criminal or to perform any specific act under a pre-determined fate which is an exclusive coercion, because the legal and normal liability is created on the basis of Kasab (performance), not on that of creation. That's why a driver, causing the death of a person on the road is held to be liable for his action, although the creator of life and death is Allah, and none else.

THREE BASIC POSTULATES

There are three basic and relevant postulates of Islamic philosophy in this connection:

1. Man has been granted the capability and authority to perform any act, good or bad, which is an essential condition of being adequately rewarded or punished by God Almighty.

2. Man has been bestowed with the sense of discrimination between Vice and Virtue, which is the foremost pre-requisite of his accountability in the life hereafter.

3. Man has been held liable for his acts and deeds, on the basis of Freedom of will and choice, without which the normal struggle would be absolutely inconceivable.

CAPABILITY OF FREE PERFORMANCE

In case of the first postulate, the Holy Qur'an proclaims in unambiguous terms:
"And you shall not be rewarded except (for) what you did."  

"So this day no soul shall be dealt with unjustly in the least and you shall not be rewarded for aught but that which you did."  

The same fact has been emphasised vehemently in the following verses:

"Do what you like surely, He sees what you do."  

"You shall be requited only (for) what you did."  

"They shall have what they earned and you shall have what you earn, and you shall not be called upon to answer for what they did."  

The fact explained in the verse is, that God's decision of reward and punishment is not, and can never be, capricious, arbitrary and unjust.

It follows the principle that every act, good or bad, is earned and performed by the people themselves and nobody stands answerable for the conduct of others. Here, the concept of Kasab or performance, the exact status of human action, has been mentioned, which can be further understood through the following verses:

"And whatever affliction befalls you, it is on account of what your hands have wrought."
"What, when a misfortune befell you, and had certainly afflicted (the unbelievers) twice as much, you began to say: whence is this? Say: it is (only) from yourselves: surely Allah has power over all thing."  

The words "Say: it is (only) from yourselves" require a particular attention. Here a prominent Muslim Scholar Imam Fakhruddin Razi says in his 'Tafseer-i-Kabeer'

"Certainly you have faced this misfortune, as a consequence of your own misdeed (misconduct)."

If the people had not been in the possession of capability, authority and free choice of performance (اختيار) in their acts, God Almighty would not have charged them for their misconduct.

"You will see the unjust fearing on account of what they have earned, and it must befall them".

"and those who believe and do good shall be in the meadows of the gardens".  

"Corruption has appeared in the land and the sea on account of what the hands of the people have earned, that He may make them taste a part of that which they have done, so that they may
return.\textsuperscript{11}

وَرَأَى كُلُّ نَفْسٍ مَا كَسَبَتْ وَهُمْ لا يَظَلُّمُونَ

"And every soul shall be fully paid what it has earned, and they shall not be dealt with unjustly."\textsuperscript{12}

لَتُغْرِقُ نَفْسُكُمْ فَيْنَاسِمُوهُم وَهُمْ يَظَلُّمُونَ

"That every soul may be rewarded for what it has earned and they shall not be wronged."\textsuperscript{13}

لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا كَسَبَتْ

"Every soul gets (the benefit of) what it has earned and gets (the evil of) what it has wrought."\textsuperscript{14}

أَوْلَئِكъ لَهُمْ نَعَشُبُ مَعَاكَسُبَاوَاللَّهُ سَرِيحُ النَّاسِ

"They shall have (their) portion of what they have earned, and Allah is swift in reckoning."\textsuperscript{15}

It has been fully established that all the Rewards and Punishments to be given to human beings on the day of Final Judgement, would be decided appropriately and justly, holding mankind absolutely responsible for its actions, good or evil. Without being capable of free performance, and immune from predestined arbitrarily imposed coercive decisions, one cannot be held responsible. Thus no question of adequate and just reckoning can arise.

As it is stated in numerous Qur'\textsuperscript{ā}nic verses, that every body would be dealt with only on the basis of his own earning and performance (كسب) and no divine judgement would be passed against any soul in any act not earned by it. Then, how can a person, believing in correctness and undoubtedness of Qur'\textsuperscript{ā}nic statement, imagine that God Almighty has not conferred the
authority (اختيار) and capability (قدرة) of committing or omitting the acts, upon him, knowing that he is going to be made accountable. Moreover, how can a man, on this basis, become entitled to various rewards and punishments, for his worldly conduct.

The same idea has been very beautifully explained in these verses:

"Nay: do those who have wrought evil deeds think that we will make them like those who believe and do good, that their life and their death shall be equal? Evil it is that they judge." 16

"Who ever brings good, he shall have better than it, and who ever brings evil, those who do evil shall be rewarded (for) aught except what they did." 17

Although, divine justice and balance is maintained equally in rewarding for good and punishing for evil, yet in case of righteousness better can be paid. But for a criminal act, penalty will not, and can never exceed the proportionate retribution. That is why, mentioning the reckoning of criminals and wrongdoers, in all the verses, an unusual and extraordinary precaution has been emphasised. This is the law of Absolute Justice in God's dealing with mankind, that negates every form of (Zulm) injustice, arbitrariness and capriciousness on the part of Allah.

Qur'ān states:

"This is for what your own hands have sent before and because
(it is certain that) Allah is not in the least unjust to the servants (people).”^{18}

Declaration to the same effect has also been made in Surah Al-Anfal V.No.51 and Al-Hajj V.No.10. Qur’an asserts the distinction between the acts, good and bad regarding their consequences to be met by the persons who perform them:

من عمل صالحًا فلنفسه ومن أساء فعليها وما بذل بظلمٌ للعبيد

"Who ever does good, it is for his own soul, and who ever does evil, it is against it, and Your Lord is not in the least unjust to the servants (people).”^{19}

The basic facts which have been clearly emphasized in all the verses are:

1. Man is to be rewarded only for what he does, not for anything which he has not earned.

2. No one should be dealt with unjustly in the least, in case of rewards and punishments, and no act of God can ever be arbitrary, unjust and capricious.

3. Whatever good or evil a man earns and performs, he becomes accountable for it, because God has conferred full authority and right of choice upon him in order to make him answerable (to Him).

4. All corruptions, wrongs and crimes existing in the world are simply due to the behaviour of men who are capable to perform them with their own free choice.

5. Persons struggling for moral goals and those struggling for immoral and malicious goals cannot be regarded at par.
6. No injustice of any kind can be ever possible on the part of Allah in His dealings with His creatures.

PRINCIPLE OF NECESSITY AND EXEMPTION

Because of the law of Absolute Justice in Allah's dealing, He has exempted man from criminal as well as sinful liability if any unlawful act is committed by him under the state of extreme compulsion. This concept is denoted by the Principle of Rukhsat ( نحوش ), which applies to all discomforting specific circumstances arising in human life. The flesh of some animals and other foods and drinks, normally prohibited by the Shari'ah, can be used by a Muslim in order to save his life, in certain previous situations. Qur'an, after mentioning the list of the prohibited animals, creates a very significant exception which enjoys the status of a fundamental legal principle of Islam:

إِنَّا حَرَّمْنَا عَلَيْكُمُ الْمَيْتَةَ وَالْمَزَرَاعَةَ وَالَّذَيْنَ نَفَسَاهُمْ مَمَّا سَخَّرَنَّاهُمْ مُّلِّيْكَ إِلَيْهِ رَحْمَةً

"He has only forbidden you what dies of itself, blood and flesh of swine, and that (animal) over which any other (name) than (that of) Allah has been invoked at the time of its slaughter, but who ever is driven to necessity not desiring, nor exceeding the limit, no sin shall be upon him, surely Allah is Forgiving, Merciful." 20

The same fact has been narrated in Surah Al-An'am V.No. 145, and An-Nahal V.No.115.

Three conditions have been imposed upon this principle.
Intention

b) (تَفْرَقْ) It signifies not desiring to eat for the sake of enjoyment to violate the law of Shari'ah.

Duration
c) (لا عابِر) It signifies not exceeding the leave limit of necessary requirement (شروط).

The same principle has been expounded in Surah Al-Ma'!'idah also:

خس اضطرّل نخصصي غير تيالتي فلا نمّر نان الله عفر رحيم

"But who ever is compelled by hunger, not inclining wilfully to sin, then surely Allah is Forgiving, Merciful."^{21}

وقد فَصَلْ نَهْل مَهْم أَعْلَى كَانَ مَا اضطرَّنَم اليد

"He has already made plain to you what He has forbidden you, excepting what you are compelled to."^{22}

The above mentioned conditions like not desiring, not exceeding, state of hunger, and not inclining wilfully to sin, have been emphasised so that the real situation of necessity and compulsion may undoubtedly be signified. Thus God has removed the burden of sin and criminal liability in such a state of undesirable compulsion, where man cannot act on the basis of his free will and choice, and he is deprived of free discretion while performing a particular act or earning a specific deed.

This is the well-known and profound principle of Shari'ah, which applies to the hundreds of the instances of this nature in human life, that under the state of extreme compulsion, a criminal act, committed by a man, does not create any legal liability and that committing such an act is immune from all kinds of punishments. In the terms of Islamic Penal Law, this exemption
is known as Irtifāʿ-ul-Masʿūliyyat (الإرتياح المسولية). After having belief in this principle, how is it possible to accept that God has predestined all human actions and made mankind absolutely bound to his predetermined, arbitrary decision? In this condition neither any willful choice has been left for man, nor is he freely authorised to perform the acts, whether good or bad. This certainly is a more grievous state of compulsion and necessity, in which a man has been placed by his Lord. Therefore, if this hypothesis is accepted as such, it will amount to a big conflict and inconsistency between the tenets of Islam.

Surely, Allah, who is never unjust and unfair in His behaviour, as already stated, cannot punish His creatures for the acts committed by them unwillingly under external compulsion of Divine Decision, against which one can not behave.

**CONCEPT OF 'ITMĀM-UL-HUJJAT' AND DIVINE JUSTICE**

The concept of God's justice regarding human responsibility and divine reward has been expressed under another Qur'ānic principle. It is stated:

من اهتدى نائماً يمتدى لنفسه ومن ضلَّ نائماً يضل عليه ولا تزور وازرأ وزر أخرى مما كنا معذبين حتى شعبت رسول

"Who ever goes aright for his own soul does he go aright, and who ever goes astray, to its detriment only does he go astray, nor can be bearer of a burden bear the burden of another, nor do we chastise until we raise an apostle."23

**Three basic facts** have been narrated in this verse:

i) The advantage of adopting right path as well as dis-advantage of wrong path is one's own responsibility.

ii) There is no concept of vicarious liability in
divine reckoning, thus no one will share the burden of the wrongful acts performed by others.

iii) No one will be punished unless the truth has first been revealed to him through the Prophets. This is, what we say, litmānu-i-hujjat (آمانت‌نی‌ال‌هوجیت). The prerequisite for the imposition of legal liability upon mankind is first fulfilled by God, only then it is held accountable for its conduct.

If God had to reward humanity arbitrarily under a pre-designed scheme leaving the people helpless, then no need would have arisen of raising the Holy Prophets and of divine revelation.

The very idea has been emphasised in another verse:

لا تكسب كل نفسي الالعليها ولا تزر وازرة وازرة أخرى

"And no soul earns (evil) but against itself, and no bearer of burden shall bear the burden of another." 24

This statement again denotes divine justice to be made while dealing with the men, who had performed various acts bearing legal consequences. These unambiguous declarations of Qur'ān make the idea of Determinism unacceptable to the Muslims.

The principle of āmānu-i-hujjat can be better understood through another verse:

وأزارة رزاق فرجة امرئا مترفها ففسقروانها فحق عليها القول فزارة وازرة

"And when we wish to destroy a town, we send our commandment to the people of it who lead easy lives, but they transgress therein, thus the word proves true against it, so we destroy it with utter destruction." 25

The fact being narrated is that the destruction of various
communities and localities also takes place under a certain consequential process. Allah does not wish people to transgress, for it is plainly stated in 7:28, "Allah does not enjoin indecency."

and again in 16:90, "He forbids indecency and evil and rebellion!"

It is not understandable, that on the one hand Allah forbids the people through His Prophets, from committing indecent acts, sins and crimes, and on the other, He, Himself has bound them, through His predestined decision, to earn the evil, and moreover, He also wants to punish them for the acts, in which they were not left with any freedom and authority of commission or omission. This concept is definitely not harmonious with the principle of divine justice. The simple procedure of the destruction of the nations as stated in the verse, is that Allah sends them His commandments to do good, pointing out the right way and discriminating it from the wrong, but as the people are accustomed to or lead easy lives, they transgress those commands, and are, therefore, punished.

If all these Qur'anic declarations are based upon truth and reality, then one is bound to believe that man has been granted the capability and authority to perform any act, good or bad, and that the same is an essential condition of being adequately rewarded or punished by God Almighty. This, we have stated before as the first basic postulate.

This is the only meaning of the words:

وَالْقَدْرُ خَيْرٌ وَشَرَّةً مِنَ اللَّهِ ﷺ

"That the power and authority of earning of good and evil has been conferred upon man by his Lord."²⁶

The third postulate, that man has been held liable for his acts and deeds on the basis of Freedom of will and choice,
without which the moral struggle would be absolutely inconceivable, is strictly co-related with the first postulate, discussed above.

**SENSE OF DISCRIMINATION BETWEEN VICE AND VIRTUE**

In order to have the full glimpse of the subject, the second postulate, that man has been bestowed with the sense of discrimination between vice and virtue, which is the foremost pre-requisite of his accountability in the life hereafter, should be clear in one's mind.

It is an obvious fact that unless a person possesses clear sense of right and wrong, and could differentiate between good and evil, he cannot be held liable for his acts. That's why insanity, lunacy, intoxication, coercion and minority are accepted lawful excuses in case of legal responsibility, because insane, minor, lunatic and intoxicated persons cannot fully apprehend the benefits of the good and dangers of the evil whereas a person under coercion cannot fully exercise his free will. Therefore, owing to the insensibility, incompetency and the defective capacities in which the people are unable to distinguish between do's or don'ts, they are exempted from legal punishments.

Therefore, this pre-requisite of human accountability has been already fulfilled, as Qur'an states:

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ذکرتفس وناماسبها دفاسمها جوردها غنیمها
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"And the (human) mind and its perfection, So He intimated to it by inspiration its deviating from good and its guarding (against) evil." 27

It is through this inspiration that human mind (soul) has become perfect, because the inspiration has made the two ways clear, 'fujur', (the way of deviation from good) i.e. the
way of evil, and 'taqwa' (the way of guarding against evil) i.e. the way of good.

It is by avoiding the former and adopting the latter that moral perfection can be attained. This verse has emphatically expressed the fact that man has completely been made capable to understand and know the good and the evil and to choose either of them on the basis of freedom of his will. The next two verses advance the discussion further by saying:

"He will indeed be successful who purifies it. And he will indeed fail who corrupts it." 28

These verses clearly indicate that the faculties necessary for human perfection, the sense of discrimination between good and evil, and the authority and capability of choosing either of them, have been provided and that man has been left to strive and struggle freely without any internal restraint or external constraint, so that his personality may be rewarded accordingly in the life hereafter. This sense of the discrimination and faculties of perfection are ingrained in the nature of every man equally, but there are some who make them thrive by their development and other who corrupt them by allowing them to remain concealed, not displaying them to their advantage.

Qur'an has made another declaration to the same effect:

"Have we not given him two eyes, and a tongue and two lips, and pointed out to him the two conspicuous ways." 29

The two conspicuous ways are, by the general consent of the commentators and according to a saying of the
Holy Prophet, i.e. the way of good and the way of evil.

Holy Prophet (peace be upon him) said.

"O people: These are the two conspicuous ways, the way of good and the way of evil. The way of evil has certainly not been made more attractive to you than that of the good." 30

Here, the concept of inherited evil or ingrained evil in human nature has also been clearly negated. Moreover, it is expressly declared that there is no such divine decision and pre-determined conclusion that any one should be bound to earn the evil and discard the good. The choice is free and equal. Right and wrong have been unambiguously distinguished from each other and Man, possessing all the necessary faculties and capacities has been set at liberty to adopt either of the two. Both ways are pointed out to man and he is at liberty to choose either. The two eyes (V.8) will enable him to distinguish good from evil, which with the tongue and the lips (V.9) he can ask, if he cannot differentiate, for himself.

This concept is further supported by another divine commandment:

"Surely we have created man from a small life germ uniting (itself). We mean to try him, so we have made him hearing, seeing. Surely we have shown him the way he may be thankful or unthankful." 31

Holy Qur'ān, again asserts the fact, stating:
"There is no compulsion in religion, truly the right way has become clearly distinct from error."

This has become very well established that man has been bestowed with a sense of clear discrimination between good and evil and is free to adopt what he wills. No compulsion, whatsoever, is placed upon him, in order to behave in a criminal manner.

FREEDOM OF WILL AND CHOICE

Now we can easily step towards the third postulate directly connected with the first one. The net result, concluded from the whole discussion, regarding the first and second postulate is that man is granted freedom of will and choice in order to perform his acts and deeds and this is the only principle upon which the validity of the entire moral struggle and its reward is based. Otherwise, it would become absolutely inconceivable.

In connection of the third postulate, we are confronted with three questions:

i) What is Freedom of Will?

ii) How can it be determined, viewing the concept of Qaza'-o-Qadr (قضاوتدر)?

iii) Does the Holy Qur'an affirm it?

The issue has remained in dispute for a long time between Moltazilah and Ash'airah. The former school was of the view that the man himself was the creator of his acts and God's will had nothing to do with it. They pleaded the Theory of Absolute Freedom, whereas the latter viewed that God was the creator of human actions and that man was completely bound to His Divine
will and intention. Therefore, they supported the idea of Absolute Determinism. This dispute was pacified and reconciled by Māturidī School of Thought, the view of which was ultimately adopted by most of the Muslim scholars and it became the popular and generally accepted view of the Muslims. This signifies that Man is neither the creator of his acts, nor is he bound by the predestined divine fact, regarding the performance of his acts, good or bad. Man, being Kasīb (The earner and actor) of his deeds, is absolutely free in his will, choice and intention. He is not bound by any external or internal restraint to adopt a particular conduct of behaviour because this would lead to immunity from every kind of responsibility, resulting in the extinction of the difference between morality and immorality, perfection and imperfection, right and wrong and good and evil.

This is the balanced view, as appreciated also by Imām Ja'far-as-Ṣādiq stating:

لا إجـر ولا تأوـر ولا إمـر للـذين أفسخـت الأسباب والسببـات ودـنـب السبـبات على الأسباب وجعل لها شرائـط وجعلها مترفقة عليها بحـيـث لا نعم في سـبب ولا تحقق الشرائـط لم يوجد المـشروطات

"There is neither determinism nor absolutism, the fact is in between the two. Allah has created the causes and effects and has composed the effects on the basis of certain causes, which have been made effective. Then, He has created the conditions for the functioning of the causes, which have been made dependent in such a manner, that, if conditions are not fulfilled, the conditioned causes cannot come into existence. (And, therefore, they cannot result into the effect, without undergoing this principled process)." 33

The whole phenomena of the universe and human behaviour has been based upon the system of cause and effect which are
mutually co-related, but are free and independent of any external predestination.

**WHAT IS QAZĀ-O-QADR?**

Concerning the first question, it is to be comprehended that "the Freedom of Will" means independence of a man in the choice of motive, will and intention while acting and behaving in various situations of moral conflict, from all kinds of compulsions and restraints externally imposed.

In the light of this explanation, we have to determine the status of Freedom of human will, viewing the concept of Qazā-o-Qadr. As it has already been stated, the exact status of human action is neither creation or absolutism, nor predeterminism, but it is free earning and independent performance, that is known as Kasāb (کسب). Before determining it, the concepts of Qazā and Qadr should be understood, because of which a lot of confusion has often arisen in human mind.

Qazā (قزاء) means creation whereas Qadr (قدر) signifies measure, assessment and estimation. 34

In Qur'ān, the word Qazā has been used in the sense of creation. 34

"So He created then seven heavens in two periods." 35

The word Qadr has been used in the sense of measure.

"Surely we have created everything according to a measure (estimation)." 36

Although the term Qazā is mostly used in the meanings of Command and Decision, yet by getting related to the term 'Qadr',
it possesses a specific significance, as stated before.

Allama Ferozabadi states in Al-Qamus:

"Qadr is the incentive of Divine creation and decision".

The same idea has been appreciated in An-Nihayah:

"That the Qadr is the main incentive of what is created and
ordained by God Almighty in respect of various issues."

Qadr, as appreciated in As Sirah is:

"Qadr is the estimation and assessment of man,
conducted by Allah through His declaration."

On the one hand, Qaza and Qadr both possess the same and
identical expositions, but they are quite distinct from each ot-
er in their meanings, scopes and implications.

Qaza signifies the principle of divine creation and will,
whereas Qadr indicates Human Freedom and Authority. Allah being
the creator of every thing and possessor of the keys of 'Ilm-ul-
'ghayb' (علم الغيب) knows about each and every creature and its
conduct, before its coming into existence. This divine knowledge
is in the form of Allah's assessment and estimation regarding
the conduct and behaviour of human beings, before they get phys-
ical existence and externality in the universe. Thus, on the bas-
is of this premeditation, that is Qadr (قدر) which does not
bind man to perform any particular act, God gives his declarati-
on in the form of Qaza.

Man has been granted with complete freedom of motive,
will and intention, and along with this full competency and auth-
ority he has been sent in the world to earn what he wills, without any external force, coercing him in a certain direction. Since every act and its consequence has to follow a particular process of cause and effect, because this universe has been systematised upon the same principle, thus, even if man is acting freely, his whole conduct can be easily pre-estimated by Allah, through His divine meditations, known as Qadr (Taqdeer). This does not place any binding upon human behaviour, and was not meditated for this purpose. It is only a pre-valuation and pre-assessment of human conduct, which was going to be exposed in the future, on the basis of the perfection and excellence of all embracing and comprehensive divine knowledge of the Creator. We, in our normal behaviour, having the erroneous and dependent sources of knowledge, can perceive any fact, only after it gets external existence and not before it, but if anybody becomes aware of what is going to happen, before the occasion, due to any extra-ordinary and un-usual source of perception, then how can this meditation be regarded as determinant and binding in case of that event. In these days of scientific and technological advancement, hundreds of astronomical, environmental and seasonal events are being predicted, sometimes, decades before, but this pre-estimation and pre-declaration by the concerning agencies is never considered to be effective in the normal conduct of the events. If the events happen positively in accordance with the premeditated knowledge then it does not mean that the prior declaration had any binding effect upon their usual course, but only the correctness of the knowledge is verified as established through such manifestations. This can further be understood through a simple example of a teacher, who, through his long and jurified experience, says to a student that he will fail and not be
able to qualify the examination, and at the end of the year it
does happen. What would be the status of teacher's declaration?
Would it be regarded as a determinant factor in the student's
failure? No. It only signifies the perfection and unerroneous-
ness of the teacher's estimation. The student failed due to the
generally and reasons of his own and nothing of the pre-meditation
by the teacher had affected him in his course of educational
conduct.

The same is the case of Qazā-o-Qadr. Allah, on the basis
of His irrefutable divine knowledge, knows what else is going to
happen till the day of Judgement and even after it. This divine
knowledge existed in the form of Qadr and it became the incenti-
ve of every divine command and declaration as stated before.

MEANINGS OF GOD'S COMMAND AND HIS
WRITING DOWN IN LOUH-I-MAHFOOZ.

All the human actions going to be performed by them
in future with complete free motive, will and intention, in th-
their independent courses, were pre-estimated by the Lord of the
universe, and this act of premeditation was altogether indepen-
dent of any compulsion over mankind. This was the Qadr ( ﷿)
in the light of which God Almighty made various decisions and
declarations, known as Qazā ( ﷺ). It was never an irration-
unal, unjust, arbitrary and capricious decision. When it is said
that every thing happening in the world is according to Qazā'-i-
Ilahi or is already in the knowledge of the Lord and He has
written it down on Louh-i-Mahfooz ( ﷺ) known as Imām-
i-Mubeen ( ﷺ) or Kitāb-i-Mubeen ( ﷺ) as stated
in numerous verses of the Holy Qur'ān, it should never be thou-
ght that God has bound mankind, and compelled it to adopt the
predestined conducts, through His knowledge or declaration. Thus
the faith, that nothing can move without His command, also does
not mean such determinism.

The fact being narrated through all of those Qur'anic verses and prophetic sayings is that Allah's knowledge is so perfect, unerring, and comprehensive that even the motion of the most minor article of the universe is already very well known to Him, and whatever act is performed by man is also within the knowing of God before its performance. The words 

\(\text{إِذَا} \) and command (تَحْمَل) denote only the declaration and exposition of the fact meditated and estimated in the form of Qadr (قْدَر) and nothing else. That is why, a man possessing free will and complete authority (اختيار), can change his desire and intention and can adopt any other conduct by discarding the former at any stage of his course of behaviour, and no divine authority compels him to undo it. This proves the freedom of human will. Such change and alteration, if it takes place, is also pre-mediated by God Almighty. Qur'an makes a very clear declaration to this effect.

"Allah abolishes and establishes what He pleases, and with Him is the basis of the Book." 37

If every thing is predestined and predetermined, and man does not possess any freedom and authority in his conduct, then no question of abolition and subsequent establishment does arise, because this would amount to unprofoundness of God's intention. Since every declaration by Allah is made on the basis of Qadr (estimation of human conduct), if a man according to His knowledge has to adopt a specific behaviour, and subsequently, exercising his free will and authority divorces himself from the former conduct and follows the second, the first is known to be abo-
lished and the second established, through his declaration.

Sheikh Abdul Haque Dehlvi, says in this context:

"That the abolition and establishment indicate the Qadr whereas the basis of the Book (الكتب) signifies the Qaza."

So Qaza is mainly related to Allah, and Qadr, to human beings, and as it is mentioned above, Qadr is the basis and incentive of Qaza; therefore, the principle of Qaza and Qadr itself recognises the idea of human freedom.

Imām Rāghib Asfahānī has narrated an incident in this connection. He states:

"Abu Ubaidah asked Umar, when he intended to leave Syria due to plague, "Are you running away from Qaza"? Hazrat Umar replied, "I am moving from Allah's Qaza towards His Qadr."

Hazrat Umar's statement clearly indicates the freedom of will and authority to escape from any curse inflicted upon man by God Almighty.

Moreover, it can obviously be inferred that the free course of human action, completed in all respects is premeditated, from its beginning to its end, by the knowledge of Allah which constitutes the Qadr. Therefore, the Qadr can absolutely be regarded as the outcome of human freedom and Qaza (The divine declaration) is always based upon it. It is quite clear that unless Qadr is constituted completely, Qaza never comes into existence.

Any change and alteration can be entertained by Qadr, due to variances occurring in human conduct at different times.

Some of the Muslim scholars have appreciated that Qadr
is the foundation and Qaza is the construction based upon it. This statement is also supported by Allama H.Kirmānī as quoted in Nihayatul-Elamiyah and Majma-ul-Bihar. Shāykh in the chapter states, that it is an established and certified fact, that in every person there is a quality which inclines him towards committing or omitting any act or to detract from an act after having intended and desired to perform it. The existence of this characteristic in man is as certain and definite as the existence of other physical qualities, i.e., hearing and seeing etc. This human quality is known as Freedom and Authority. Thus, the acts, originally created by Allah, come into actual existence only due to the performance of a man, which is exclusively motivated by his free will and choice, and not by any other arbitrarily predestined decision.

An eminent Muslim Jurist, Mullah Ali Al-Qāri states that the Qadr (Divine Estimation) is the real base of divine declaration, whereas the Kasab or man's performance with his free discretion, is the actual cause, with reference to which every thing is to be determined.¹⁴²

He further appreciates:

"The Qadr in connection with people has taken place simply on the basis of Divine Estimation, and therefore, it does not remove the liability of the commission of acts from human beings."¹⁴³

In case of human actions, both creation and performance are combined in such a manner that the creation has become the Real Cause of an act, whereas the perfor-
performance, its actual cause. Real cause (سبب حقیقی) means the basic reason of coming into existence of an act, not with any particular reference to a person, and actual cause (سبب ذاتی) means the decisive reason of giving effect to an act. Thus creation is an act of God, and performance the act of man. Therefore, human performance, originated from free will and intention is the only means to actualize and externalize the divinely created acts. The relation between these facts, is, that Divine Creation is known as Qaza, which is exclusively based upon Divine Estimation termed as Qadr, and it is only to meditate and know the free performance of human acts with reference to their own causes and effects, before the time of their actual existence. Nothing in this process binds anybody to earn criminal or non-criminal behaviour.

The concept of combination of two capacities of preferences in an act i.e. the creation by God and performance by man, does not make it complicated. It is very well understandable that in many cases the same fact is referred to various directions due to the variance of its aspects, as in the case of land. According to Muslim faith, it is owned by Allah in respect of its creation, whereas it is owned by man in respect of its use and possession. Similarly the two capacities of human act are combined in such a way that no confrontation does arise between them. Therefore, it is clearly stated in a very reliable and authentic book on the subject of Islamic Theology, Sharh Aqid Nasfi, written by Allamah Sа'd-ud-Dīn Taftazānī:

"The human act is within the jurisdiction of Allah, as regards its creation, and within the jurisdiction of man, as regards its performance."\textsuperscript{44}
Thus the unification of creation (خلق) and performance (کسب) does not create any confusion or misunderstanding, if they are visualized in their independent perspectives.

**INTERPRETATION OF HOLY PROPHET**

The same question arose in the minds of the companions of Holy Prophet (peace be upon him), when He said that the dwelling of every person, either in hell or heaven, had been already written. It is reported by Hazrat 'Ali that the companions asked spontaneously:

بيامرسولاناللهأخلانشتملكعناكتابناوندداعمال

"O Holy Prophet (peace be upon him) should not we trust on what else has been written and leave the efforts". 45

At another occasion they asked, as narrated by Abdullah-bin-Amr :

فُمَهُ العمل بِيامرسولانالله ان كان امُرًا تمد فرَغ منه

"What is the status and necessity of legal act, if every thing has already been decided?" 46

The object of the question was to understand the real philosophy embodied in the idea of Qazā'-o-Qadr, because it was very obvious that if every decision had already been made arbitrarily, then what would be the use of performing legal duties. Holy Prophet (peace be upon him) explained the idea at various occasions in a very express and unambiguous manner.

He said, according to Abu Hurayrah :

جفِ اقتُمر بما انتِ لاقي

"O Abu Hurayrah. The pen (Al-Qalam) noted down (on the Louh-i-Mahfuż) only what you were going to earn (in your own free capacity)." 47
It means that what else was going to be performed by the people, with their free will and choice, that was foreseen by Allah and He declared only those acts and their consequences, whether earthly or etherial, without affecting the freedom of human behaviour. Our viewpoint is further supported very strongly by another prophetic saying, that the writing of Qalam or Qadr is nothing but a simple narration and description of the facts and events, which had already happened and which had to take place in the future, therefore, the declaration simply to this effect is called Qaza‘i-llahi.

QAZA‘I- QADR - A DESCRIPTION OF THE EVENTS OF PAST AND FUTURE.

It is reported by ‘Ubaadah-bin-Ṣāmit, that Holy Prophet (peace be upon him) said:

إنّا أذل مأخذت الله القلم فقال لم أكتب قال ما أكتب قال ما أكتب قال أكتب القلم

"Surely, first of all Allah created the Qalam and asked it to write. It said, "what should I write", Allah said, "write down the Qadr". Then the Qalam noted down what had happened before and what was to happen in future till the end of the world".48

The hadith clearly shows that nothing was predetermined and arbitrarily decided. All that came down through the writing of Qadr, was only a pre-meditation and pre-valuation of the universal events and human behaviour, which had to take place independently in their normal courses of action. God had, in fact, created the capability of foreseeing the events of the past and the future, in the Qalam, and therefore, it noted each and every thing down on the basis of promediation.
It can also be a figurative illustration of Divine Knowledge, but we are not supposed to discuss this issue at this place.

The same comprehensive description of the events of past and future has also taken place in the lifetime of Holy Prophet (peace be upon him) during his addresses at various times:

Hazrat 'Umar reports:

"Holy Prophet (peace be upon him) once narrated to us, standing at a place, the facts, events and happenings from the beginning of the universe till the moment of entering of the people to the heaven and the hell (after the day of judgement)."

'Amr bin Akhtab Ansari narrates:

"Holy Prophet (peace be upon him) stated each and everything, which was going to happen till the Day of judgement."

Huzayfah says:

"Holy Prophet (peace be upon him) once stood between us, and (informed about each and everything). There was no single event, which was to take place till the happening of Qiyamah, which He did not narrate."

Imam Ibn-i-Hajar Asqalani says in its explanation:

"It implies that He (peace be upon him) reported all the events,
happenings and conditions of all the creatures from their origin to their end, including the worldly life". 52

This was only because Allah had conferred the knowledge of past and future upon His Holy Prophet (peace be upon him), and, thus, he was able to declare the details of what had to happen in the future in the form of events as well as the human behaviour.

The same knowledge was bestowed upon the Qalam which wrote down the Qadhr, that is the detailed pre-estimated description of worldly affairs. It was merely a specific demonstration of Allah's knowledge which stood in the name of Qazā, and it was never meant to pre-determine the criminal or non-criminal conduct of human beings. This has been appreciated by Nādis-i-Rasool, narrated by Abdullah bin 'Amr, whereby Holy Prophet (peace be upon him) declared:

"I am only the scribe who was charged by Allah with the knowledge of Allah". 53

This kind of priority of Divine knowledge or Qazā over human conduct does not affect it in any way, as stated by the Shaykh also:

"The same point of view has been adopted by the orthodox Muslim scholars in their 'Aqā'id. 54

Allama Taftāzānī, an authentic theologian, says, discussing the concept of creation of human acts:
"If it is said that the disbeliever is bound to disbelieve, and other wrongdoers to commit wrong, then how can they be legally supposed to adopt faith and submission (to Allah). We will reply that Allah has perceived Kufr and Fisq from them, only on the basis of their own free choice. There is no determinism, because God simply knew that who would adopt the wrong path (الكفر والفسق) with his own free will, without being compelled or motivated by any prior decision."³⁵

It is further stated:

لا تكون للعبد فعل إصلاح لما صنعه ولا يترتب استحقاق الشرواب والعتاب على افعاله

"If man had not to perform his act with free choice and authority, he would neither have been held responsible, nor entitled to any reward and punishment."³⁶

Qazā is not, in fact, an interference with the freedom of mankind in its course of action, but it is simply the Divine meditation of things and affairs, as they had to be in their own routine.

In Sharh-u-Mawâqif (شرح المواقف) it is stated with reference to Ashâ'irah:

إن القضاء الفعّال الأصلي هو الرادة الأصلية المتعلقة بالأشعّة على ما هي عليه

"Surely the Qazā, according to Ashâ'irah, is the divine intention (knowledge), related to things and affairs, as they (had to) exist in their own course."³⁷

In the light of above given explanation of the concepts of Qazā and Qadr, one can easily determine the nature, scope and capacity of human freedom.

The idea of absolute necessity, that negates the faith
in human liberty is also not recognised by Qur'ān, as it has already been substantiated by a large number of Qur'ānic verses.

**QUR'ĀNIC AFFIRMATION**

Answering the third question, as to whether Qur'ān positively affirms the idea of human freedom or not, I would like to provide further evidence from Qur'ān. The Holy Qur'ān has affirmed the idea in clear terms through its statement:

اَنَّا عِلَى الْعُرْفٍ اَلْبِرِّ وَالْلَّهِ الْعَلِيمُ الْحَكِيمُ

وَاتَّلَعَ النَّاسُ رِيشًا مِنْها فَعَالَ ادْعَاءُهُمْ

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

It has been unanimously agreed upon by the commentators that 'Trust' (الإمتياز) stands here for moral responsibility, which is human sense of accountability for all acts of thought and conduct. The acceptance and undertaking of this liability by man, as it is clearly evident from the verse, was absolutely a free action, signifying his unpredictable capacity. For accepting this offer, the first and foremost pre-requisite is freedom of choice, which is the real base of action of a human being, functioning as a moral agent, because without it the purpose and motive behind the offer made by Allah to man is completely nullified and the whole process of offer and acceptance, mentioned in the verse, becomes a fiction. There are some other verses which directly affirm and proclaim the possession of freedom of will by Man:
"And say: the truth is from your Lord, so let him who please believe and let him who please disbelieve". 59.

"And that man shall have nothing but what he strives for, and that his striving shall soon be seen, then shall be he rewarded for it with the fullest reward." 60

The same idea has been emphatically stressed in Surah-i-Hāmīm:40 and Surah Ad-Dahr:3, saying:

"Do what you will. Verily He (God) sees all that you do".

"Surely we have shown him (man) the way (of right and wrong), (now it rests on his will) whether to be grateful or ungrateful."

Here another verse is to be noticed wherein Divine will has been mentioned with reference to the existence of evil. One can say that the existence of pre-destined divine plan about man regarding his earning of criminal behaviour is the determinant factor in human conduct and therefore, man has no choice to act in another manner. This is a misunderstanding that occurred due to not comprehending the complete essence of the verse. The verse is:

"And if Allah had willed (i.e. if it had been God's plan) they would not have taken the false gods". 61

If one studies the verse deeply, it will become very clear that it has, in fact, negated the philosophy of necessity and determinism, in a rational and critical manner. The verse appreciates that Allah has the power to eliminate evil and to
make its earning absolutely impossible for human beings, but He does not interfere when the wrongdoers adopt evil through their free will. This verse does not say that God has assisted the evil. The only thing expressed in it is, that in spite of the fact that Allah dislikes man to adopt evil, He does not impose His will upon him by restraining him actually from the wrong way through the enforcement of the divine plan, deciding the fate of mankind. If Allah had so compelled human beings according to His will and intention, nobody would ever have been able to commit crime and follow the wrong path. It is the divine decision to leave people to their own choice, without being interfered by predetermined plans and compulsion, so that they may be capable of adopting what they will. This is the only basis of moral and legal responsibility of man as discussed above.

This point has been further clarified in another verse which reads:

وَأَوَّلَوْهَا الرَّحْمَـٰنَ مَا عِيدَّنَـهُم مِّنْ هَـٰذِلَكَ مِنْ عِلْمِهِ

"And they say if it had been the will of (God) the most Gravious, we would not have worshipped these (idols). They have no knowledge thereof, they are only guessing." 62

This has been established beyond doubt that Islam does not recognize the concept of determined criminality, whether it is inborn and inherent due to some biological factors, or necessarily present in a man due to some phychiatric or psychological factors, as appreciated by Western criminologists.

All theories of criminality, propound ed by various Western Schools, can find no place in Islamic Theory, because Islam neither believes in the concept of atavistic reversion of human beings, nor in inherited criminality.
If it is accepted that the sin or crime originates from some biological causes due to which the criminal is compulsorily supposed to possess some furious and brutal characteristics, then no question of free will in adopting a particular conduct does arise. Man can not be considered a moral agent, because he is a born criminal and no choice has been left for him to earn either of the behaviours, on the basis of which the moral struggle and its perfection or imperfection is to be evaluated.

Therefore, any cause of criminality, that makes it determined in any form, is alien to the teachings of Islam. According to Islamic Theory, human conduct is not predetermined in any sense: it is exclusively self earned during his moral struggle since he is free in his acts of commission and omission.

This is the only factor that makes man morally and legally responsible for his acts and deeds.

Hence Islamic concept of human freedom completely nullifies the philosophy of pre-determined criminality.
NOTES

4. Qur'ān 41:40.
17. Qur'ān 28:84.
22. Qur'ān 6:120.
23. Qur'ān 17:15.
26. İmān-i-Mujmal.
27. Qur'ān 91:7,8.
28. Qur'ān 91:9,10.
29. Qur'ān. 90:8,9,10.
31. Qur'ān 76:2,3.
32. Qur'ān 2:256.
34. Ibid., 154.
35. Qur'ān 41:12.
36. Qur'ān 54:49.
44. Taftāzāni, Shar'h ‘Aqā'id Nasfii, p.66.
47. Sahīh Bukhāri, Vol.11, pp.759-760.
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CHAPTER IV

ISLAMIC INJUNCTIONS

AND

WESTERN CRIMINOLOGY

1. Psychiatric Theory and Islamic Injunctions.

2. Sociological Theory and Islamic Injunctions.

3. Conclusion.
PSYCHIATRIC THEORY AND ISLAMIC INJUNCTIONS

This discussion pertains to whether according to Islamic injunctions, a criminal act performed by a person, suffering from mental abnormality or psychiatric disorder, creates any criminal liability?

According to Psychiatric/Pathological Theory, the cause of every criminal act and delinquency is traced in the form of mental disorder, because it supposes that all crimes originate from various kinds of psychiatric diseases. This theory leads us to the inane and contemptuous concept of "determined criminality," which is absolutely unacceptable to Islam. It is to be appreciated that the system of Islamic legislation is based upon following three fundamental principles:

1) avoidance of hardship
2) lessening of difficulty
3) exceptional permissibility

The first principle has been laid down by Qur'ān in the words:

 ما هو رأب للحكم من درح

"Allah does not desire to put on you any hardship". ١

The same principle has been further explained in the words:

 وما أعجكك وما جعل عليك من حرح

"He has chosen you and has not laid upon you any hardship". ٢

The second principle is enunciated in the Holy Qur'ān, as:

 لا نكلف نفساً إلا وسعماً
"We do not impose on any soul a duty except to the extent of its ability." 3

The same concept has been given in Surah Al-Baqarah:255 and 286, saying:

لا تكلَّف نفسًا إلا وسعها

"No soul shall have imposed upon it a liability but to the extent of its capacity."

لا يكلِّف الله نفسًا إلا وسعها ما كسبت وعلىها ما كسبت

"Allah does not impose upon any soul a responsibility but to the extent of its capability; for it is (the benefit of) what it has earned, and upon it (the evil of) what it has wrought."

This principle of liability has been appreciated again in these words:

لا يكلِّف الله نفسًا إلا ما كسبت عليه ما كسبت

"Allah does not lay on any soul a burden except to the extent to which He has granted it (the capacity); Allah brings about ease after difficulty." 4

The third principle is stated in the words:

إنه لا يحرون عليكم البهائم والماء المفطر ولا ينهركم في البهائم إلا ضررًا عبر باغ ولا يمكر على أن الله غفور رحيم

"He has only forbidden you what dies of itself, and blood, and flesh of swine, and that animal over which any other (name) than that of Allah has been invoked at the time of its slaughter, but who-ever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him; surely Allah is forgiving, merciful." 5
That's why, if man consumes a prohibited thing in an extreme state of necessity, no sin lies upon him, and even sometimes it becomes legally incumbent upon him to do it for safety of life.

The only philosophy, explained through the above-mentioned three principles is, that Shari'ah does not want any person to be placed in a state of necessity, and if it happens, then no such legal liability is imposed upon him as it is under ordinary circumstances. The spirit of Islamic law is, that whenever a man is involved in an exceptional discomforting situation, most of the usual liabilities are suspended, because the Shari'ah is determined to provide ease to mankind, not difficulty.

The Holy Qur'an states the objective of the raising of the latest Prophet Muhammad (peace be upon him) in the words:

"And He removes from them their burdens and shackles which were upon them." 6

All the commentators of Qur'an are unanimous that mankind individually and collectively was suffering from many imperious hardships, violent burdens and unavoidable privations in its religious, legal, social, economic and political spheres, when the Holy Prophet (peace be upon him) was raised to its rescue. He declared:

"I have been raised with an easy and right path." 7

Another declaration was made to the same effect by Qur'an:

لقد أعده الله لكم اليسر ولا يضركم الحسر
"Allah desires ease for you, and He does not desire for you difficulty".8

It was stated again:

يريد الله ان يخفف عهلك وخلق الإنسان ضعيفاً

"Allah desires that He should make light your burdens, and man is created weak."9

Holy Prophet, through these declarations, gave to mankind an easily practicable, reasonable, and extremely pragmatic religion. He liberated humanity from all kinds of violence, tyranny, injustice and oppression. All cruel and arbitrary burdens and shackles, which were inculcated on the people, due to the monopolistic dominion of man over man, were absolutely eliminated.

He provided the mankind with such an easy system of life as every body could frequently adopt it in all geographical and social environments. He captioned it with the name of Din-i-Pitt-rat (دين پیرت), which meant, that nothing in this system was inconsistent with the demands and requirements of human nature.

In the light of these principles, it becomes very clear that to impose liabilities upon a person, in an unusual state of discomfort, is neither required nor permitted by Islam. The spirit of Islam is to remove all sorts of unbearable burdens from human beings, to enable them to practice Islam easily in their ordinary course of life. That's why, whenever a man is incapacitated, mentally or physically, to act upon his own free will and choice, or is deprived of acting in accordance with his free desire and intention, he remains no more answerable for his deeds. This principle is known as "Exceptional Permissibility." The
principle of Reduction in prayer (Qaṣr Fīṣ-Ṣalāt) during the journey denotes the same spirit of Islam. Qur'ān states:

"And when you journey in the earth, there is no blame on you if you shorten the prayer." 10

Moreover, the duty of offering the prayer is even suspended during the condition of insensibility.

The fasts are postponed for a man on the journey or suffering from any disease. Qur'ān declares:

"But whoever among you is sick or on a journey, then (he shall fast) a like number of other days". 11

As regards those who are suffering from any perpetual incapacity, due to some constant illness, or who are too old or too weak, the order is not to fast. In its place, if possible, the measure of one man's food is to be given away to a poor man every day, at both times, during the whole month.

It is known as Fidyah (نفي). Qur'ān Says:

"And those who are able to do it (in place of fasting) may effect a redemption by feeding a poor man". 12

The same was practiced in the time of Holy Prophet and his companions.

This kind of exemption (نمت), under specific circumstances, is also granted to a person under an obligation to perform bath or ablution. That is replaced by Tayammum (طه و تط) as ordained by Qur'ān:
(Do not go near prayer or mosque)

"When you are under an obligation to perform a total ablution but (when you are) passing by it until you have washed yourselves; and if you are sick, or on a journey, or one of you came from the privy, or you have touched the women, and you cannot find water, betake yourselves to pure earth, and then wipe your faces and your hands; surely Allah is pardoning, forgiving."

In this verse a number of instances have been mentioned that throw light on the same principle.

In a state of impurity one is prohibited to enter the mosque, but if there is no way to pass by, except through it, then the order is suspended provisionally. In some specific situations it is incumbent upon the man to have necessary bath but Shari'ah has provided certain exceptions to remove the hardship and create ease.

Therefore, the man, undergoing an ailment, or on journey or having no water available, can replace the Wuzu or Ghusl by Tayammum. If such order had not been accordingly suspended, and the liability imposed had not been removed or substituted by an easier alternative, the people would have automatically become sinful. But Allah, the merciful wanted to forgive and pardon the people.

God has restrained the people to become criminals unwillingly and unintentionally, so that some acts of commission and omission, performed in such states of necessity, may not amount to sin or crime. This was possible only through immunising man
from liabilities in these unusual situations of mental and physical incapacities.

Qur'ān, at various occasions, indicates the same philosophy:

"There is no blame on the blind man, nor is there blame on the lame, nor is there blame on the sick." 14

It is again mentioned:

"It shall be no crime in the weak, nor in the sick, nor in those who do not find what they should spend, so long as they are sincere to Allah and His Apostle." 15

These verses have emphasised the fact very obviously that all the incapable persons, whether their sufferings are temporary or permanent, are immune from criminal and penal liability, so long as they do not intend to violate the orders of Shari'ah.

Therefore, if a person lacks mental and rational capability due to some disease, disorder or intoxication, (not through wilful drinking) he is absolutely free from being answerable for his acts. Even with an intoxicated mind one is prohibited to offer the prayers. Qur'ān says:

"O you who believe! do not go near prayer when you are intoxicated until you know (well) what you say." 16

The intoxicated man has been immunised from this religious duty because of a temporary mental aberration. Then how can
it be considered correct, that a man, suffering from a permanent psychiatric disease and mental disorder, should be held liable for his criminal acts? According to Islamic teachings, offences committed by psychiatric patients do not create active criminal liability. If any mental disease is accepted to be the cause of the commission of crime, then no liability can be placed anywhere, and hence, there remains no justification for any punishment.

By accepting the view of Psychiatric Theory the existence of the whole criminal law, substantive or procedural, becomes irrational and unjustified.

Therefore, the Psychiatric Theory of criminality, that is determined to explain away the responsibility of the criminal, is not acceptable to Islamic Law of Criminology.

SOCIIOLOGICAL THEORY AND ISLAMIC INJUNCTIONS

The next question in this regard is the extent to which the criminal behaviour of a delinquent is affected by or originated from the socio-economic system and environmental conditions.

The idea of socio-economic effect upon human conduct has been strongly advocated by the supporters of sociological theory of criminality, whereas the effect of other environmental conditions, as mentioned in the Theory of Ecology, also possesses the same significance.

According to the Islamic view point, basic stress, regarding the liability of the commission of crime, has been laid on the individual himself because of his own inner urge and free choice of action, but the social and economic conditions are also emphatically recognised to have a decisive effect upon human behaviour. There are certain conditions and environmental situations, that induce and compel the man to perform an act or adopt a conduct, which is a sin or a crime in ordinary set of circums-
stances.

That is why Islam creates an indiscriminate exemption in sinful or criminal liability in such a state of necessity. Qur'ān puts the principle in the words:

"But whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him."

Since the socio-economic system of a society is the origin and fountain of every good and evil, its effects prevail over all the moral, ethical and spiritual effects made by the individuals in their respective fields. The basic Philosophy of Islamic system appreciates the fact, that all the noble desires and endeavours at various levels do not have any bearing and determining effect upon life, unless the socio-economic conditions are reformed and improved. Islam has divided its laws into two categories:

1) Primary or Defining Laws (أحكام تأسيسية)
2) Declaratory Laws (أحكام دستورية)

Primary laws are the laws which demand submission, compliance and application in their own right; their requirements do not originate in the commission of other acts. Their enforcement is incumbent upon every adult, sane and capable person, known as "Mukallaf". Whereas declaratory laws are the laws which originate only as the consequences of an existing cause, condition or violation of certain primary laws. Unless a particular legal right of an individual or the society is injured or certain provision of the penal law of Shari'ah is transgressed it does not require its application or enforcement.
The primary laws are laid down by Islam to guarantee the reformation and improvement of socio-economic order of the society, such as: commands of Salāt & Sāum, Zakāt & Charity, observance of the sanctity of life, honour and property, prohibition of illegal means of wealth and its concentration, and observance of all other do's and don'ts with regard to various public duties. But the Penal (Declaratory) laws, such as hudood qisas and ta'zirat, are formulated only to punish the people who violate and transgress the primary laws. The essential structure of Islamic Social order is based upon the enforcement of Primary laws, whereas the second kind of law is meant only for restraining the people to disturb it.

Therefore, such kind of declaratory laws can be effectively implemented in the society only after enforcement of the primary laws. If the people are not getting the necessities of their life and are living in a miserable condition of economic dead-lock, the punishment of theft, that is amputation of hands, cannot be enforced arbitrarily. This principle is derived from the practice of Hazrat 'Umar, the second orthodox caliph, when he suspended the enforcement of the hadd of theft during the period of famine, under the impression that people might be compelled to theft by hunger. There is the consensus of the Muslim Jurists upon this provision of Islamic Penal Law.

This principle becomes more evident and better illustrated by a particular incident, regarding some youngmen, who had stolen the she-camel of a man from the tribe of Muzaynah. It is reported that Hazrat 'Umar suspended their punishment in spite of their confession. He said, addressing the employer of those young men, "By God! I would have cut their hands if I had not known that you employ these people and starve them so that they are
compelled to eat that which is prohibited to them. By God! since I have not cut their hands I am going to punish you with a fine that shall pain you," and he ordered them to pay double the price of the camel.

This instance has evidently explained the legal position of a criminal act, performed by a person in a state of necessity, because the liability in the offence of theft committed by an employee, under the pressure of starvation, has been shifted to the employer and thus he is awarded with a sort of exemplary punishment. These precedents provide three general principles of Islamic Penal System.

1. Socio-economic conditions prevailing in a society lead the people to commit crimes.

2. Crimes committed in such infeasible conditions do not create active penal liability upon the wrong-doer.

3. The Islamic punishment is liable to be suspended until such economic deadlock is resolved.

That's why Islam primarily emphasises the elimination of economic disparity from the society and improvement of the socio-economic order so that the creative efforts of the people be restored by providing each of them equal chances of survival and progress. Lacking the socio-economic stability of individuals, they are even unable to preserve their religious and moral values, as Holy Prophet (p.b.u.h.) declared.

"Poverty and starvation may lead to disbelief." 20

The collective achievement of moral and spiritual ideal, according to Qur'an, depends upon social integrity and economic
prosperity of the society. Qur'ān affirms the fact, while addressing the muslims after they migrated to Madīnah and reminding them of the problems and hardships of their previous days at Meccah in the words:

واعذركوا أئمتكم متعنقو في الارض فتخافون ان يهدكم الناس فاودكم وديركم بنصرة ورزقكم من اللطيف لعلكم تشكرون

"And remember when you were few, deemed weak in the land, fearing lest people might carry you off by force, but He sheltered you, and strengthened you with His aid and provided you of the good things and food, that you may be thankful." 21

In this verse a very significant and material comparison has been conducted between the three conditions of the Muslim community, pertaining to their historical periods of Mecca and Madīnah. Three terms have been used, signifying the characteristics of the collective life of the companions of Holy Prophet (p.b.u.h.) in regard of Maccan Era before migration.

1. 'Few in number' signifies their being in minority as compared to the non muslims of Mecca. Therefore, the muslims were enjoying the status of political subordination.

2. 'Weak in the land' signifies their economic instability, because all the major sources of production had been monopolized by the Quraysh, who were mostly against Islam. The muslims were living in a state of economic deprivation & deadlock and non-muslim Capitalists of Mecca used to criticise Islam and the Prophet (p.b.u.h.) in satirical and ridiculing manner, saying that only the lower classes of Mecca had embraced Islam.
3. 'Fearing lest people might carry you off by force' signifies the sense of social insecurity which was because of their political and economic instability. Therefore, the economic and social conditions of the Muslims were extremely unfavourable and they could not even attain their religious goal and spiritual destination in such a discomforting situation. Thus the Holy Prophet (P.B.U.H.) was directed to migrate to Madina, which subsequently provided the Muslims a very sound and stable socio-economic life. Qur'an, then, again uses three terms, explicating the changed situation.

1. 'He sheltered you' signifies the social integrity and security, enjoyed by the Migrants which started in the form of 'Mu'akhat-i-Madina'.

2. 'And strengthened you with His aid' signifies their political stability, which was initially achieved by the Muslims in the form of 'Pact of Madina'.

3. 'And provided you of the good things and food' signifies their economic prosperity, which was achieved primarily through Mu'akhat and subsequently through their military victories and independent changes of earning.

After mentioning this remarkable change, Qur'an has stated the ultimate objective of introducing the socio-economic stability in the life of Muslim community, and that is 'so that you may be thankful to your Lord.'

To be thankful to Allah, certainly, is the ideal
stage of moral and spiritual perfection and completion of the belief, (الإيمان), which, according to Qur'an, was not possible to achieve without stabilizing the socio-economic life of the Muslim society. That's why Qur'an declares that the socio-economic aspect of the life of the Muslim community was stabilized in order to enable them to become good and ideal Muslims, lacking which, they could not attain even the religious aims perfectly. Therefore, it can easily be understood from the philosophy contained in above-mentioned verse, that socio-economic system of a society has direct bearing on the conduct of individuals. Their behaviour, moral or immoral and criminal or non-criminal is directly or indirectly, determined by the influence of economic circumstances and social conditions prevalent in the society. The moral life of an individual can not be detached from the socio-economic set up of the society in which he breathes. That's why Islam has attached the foremost significance to the improvement of the economy of the individuals by emancipating them from every kind of dependence and deprivation.

1. It is ordained for this very purpose, that the people having better resources in a society, are absolutely unable to achieve the state of moral perfection unless they spend their wealth on the deserving people to liberate them from poverty and upgrade their standards of living upto the necessary level. Qur'an states as under:
By no means shall you attain the righteousness until you spend (benevolently) out of what you love (i.e. wealth & money) and what ever you spend, Allah surely knows it.  

2. Concentration of wealth is the only cause of disparity in the socio-economic life of a society. Qur'ān stresses the system which guarantees the circulation of wealth and eliminates the chances of its concentration. It is stated:

"So that the wealth may not be a thing circulated only among the rich of you."

3. At another place Qur'ān emphatically declares:

"And those who hoard up gold and silver and do not spend it in Allah's way (to resolve the deadlock of others), announce to them a most grievous and painful penalty."

4. After mentioning the painful punishment in life hereafter for those who concentrate wealth and do not spend it to remove undesirable and extreme disparity of the socio-economic order which can harm even the faith of the Muslims, Qur'ān gives a brief description of the same in the next verse, so that the people may estimate its severity:

"On the day when the hoarded wealth will be heated in the fire of Hell, and their foreheads, their sides and their backs shall be branded with it. "This is the treasure, you hoarded up for
yourselves, therefore, taste what you had hoarded."  

5. Qur'ān says at another place:  

"Woe to every slanderer, defamer, who amasses wealth and considers it a provision (against mishap). He thinks that his wealth makes him abide. No! he shall most certainly be hurled into the crushing disaster. And what will make you realize what the crushing disaster is? It is the fire Kindled by Allah, which rises to the hearts".  

It is to be noted that Islam neither considers the wealth, nor its acquisition through fair means as an evil, then, why its collection and hoarding has been prohibited and declared a very grievous sin? The effective cause (العَلَتْ مَرَّهُ) of its prohibition is the consequential economic disparity and deadlock which ultimately leads to social deprivation, injustice, oppression and exploitation. Most of the people are deprived of their basic necessities and are finally compelled to lead immoral and criminal life. Whereas the people having unlimited hoarded wealth are also sometimes induced to adopt luxurious life which may again lead to sin and immorality.  

6. If the economic conditions and social environment had no effect upon the moral life of individuals, Islam would not have prescribed such mandatory and awe-inspiring injunctions. Qur'ān says:  

"And away from the hell shall he kept the one who guards himself. (He is) who spends his wealth in purifying himself".
The fact derived from the verse is that the only way to purify one self and escape from the chastisement of the life hereafter is to spend the wealth for the economic betterment of the people and liberate them from worldly fears and sorrows, so that they may freely think for their spiritual perfection, which is the ultimate religious goal to be attained. When, due to an unjust socio-economic order, such an emergent situation continues to prevail in the society, that many people, not having fulfilled their necessities of life, die of starvation or sell their honour, chastity, conscience and moral life in order to survive, then a lot of Islamic injunctions, basically recommendatory, become obligatory. Such orders are necessarily liable to be enforced, so that such emergency may come to an end.

7. One of the Qur'anic injunctions in this connection is stated in the words:

ويسوفونك ماذا ينفقون فلجعل_white
العفو كذلك بين الله لكم

"And they ask you as to what they should spend. Say: What is surplus (from your needs). Thus does Allah make clear to you the communications that you may think over."28

Whatever is spare from basic needs and requirements of life is known as Al-afw (العفو), and to spend it for the economic betterment of others is no doubt a directive and recommendatory provision, but according to the practice of Holy Prophet (peace be upon him) and Orthodox Caliphs, this was many times applied in the society, as mandatory for practical purposes. Moreover, it is a fundamental principle of Islamic jurisprudence, that under such extreme state of necessity, many provisions and directives are suspended and prohibited, many prohibitions are permitted, many recommendations become legal obligation and according
to the nature of circumstances, the grades of many Islamic provisions are changed. This situation may extend to years sometimes.

8. It is narrated by Hazrat Abu Sa'eed Khudri that during a journey, when such a situation had arisen, Holy Prophet (peace be upon him) ordered his companions:

من كان عنده فضل ظهر عليه من لازمه ومن كان عنده فضل
نأخذ ف труб عليه من لا نراه وذكر من أصناف المال ما ذكر حتى ظننا
أدى لا حق لاحذ مثالي الفضل

"The one who has conveyance, spare from the need, should return to those who have not, and the one who has food and clothes, spare from the need, should return to those who have not. (Abu Sa'eed Khudri says that Holy Prophet (p.b.u.h.) went on mentioning various articles) consequently we thought as if we had no right to hold what is surplus."29

9. This fact is further supported by a hadith, reported by Hazrat Usman, whereby Holy Prophet (p.b.u.h.) said:

ليس لا بن أدع في بئس من الإسلام بيت يسكنه وذبح لرعي
عمر ترابي صغير معروض

"No right vests (basically) in the son of Adam except these (three); a house to live, clothes to wear and food to eat (without hoarding it)."30

10. Qur'ān goes in this respect one step further mentioning the characteristics of a man, who defies the religion, it states:

أوأبي الذي يكذب بالدين فكل ذلك الذي يدع الدين لا يضع على
طعام السكينين

"Have you considered him who calls the religion a lie? That is the one who treats the orphan with harshness. And does not urge (others) to feed the poor."31

11. At the end of Surah the last but most significant peculiarity of such a person has been described:
"And (he is who) refuses even household necessaries to supply."

Here lies the climax of the philosophy of socio-economic welfare of human beings. None of the social and economic philosophies including Marxist and Leninist theories of socialism, can reach its height. Although Islam has given to man, at the minimum, an exclusive right of possessing a house, clothes and food etc. that are the basic requirements and necessaries of life, yet sometimes even these necessaries and goods of utility are legally required to be shared with others. If anybody, at the time, withholds these necessaries and restrains others from their benefits and usufructs, he is deemed to be the defier of the faith, and becomes entitled to the most horrible place in the hell, known as 'Wayl' (نار).

This concept of common welfare is still alien to other un-Islamic theories of socio-economic betterment. Other philosophies have, at the maximum, thought of nationalizing only the sources of production in order to associate all the other people in their benefits, whereas Islam goes to the extent of socializing the usufructs of each and every article present in the society, but various means have been adopted to accomplish the same job.

The same idea is better illustrated by a precedent quoted by Imam Bukhari: it is reported by Abdullah bin 'Umar that during the period of famine which occurred in the time of Hazrat 'Umar, he put his best efforts in solving the economic problem of the people. Subsequently, he prayed to God Almighty and the situation was changed. At that time he stated:

"أذن Behavioral to اللّه ﴿لا تشرّبوا ما أدركت أهل بيت من السياقين لحم سعة إلا أدركت معه" اعترافاً من الفقراء، فلم يكن أشخاص يطلقان من الطعام على ما يقيم واحداً."
'By God! If Allah had not removed the hardship I would have allowed the deserving people to reside in the house of other Muslims, who had sufficient food with them, equal to the number of the members of each family, because two persons could survive on the quantity of food which was ordinarily sufficient for one". 

Another illustration of the Prophetic era is also remarkable in this connection, which is reported by Salmah bin Akwa. Imam Bukhari again narrates that Holy Prophet (peace be upon him) once, on the occasion of 'Eid-ul-Azha, ordered the people not to retain the flesh of slaughters for more than three days. The people acted upon this directive and consequently the same practice was repeated by them next year on their own. Some of the companions informed the prophet about the practice.

"The people said to the prophet "we are adopting the same practice as we adopted last year." Holy Prophet (p.b.u.h.) said, "Now you may eat and retain for your needs. Last year the people were facing hardship and I wanted you to help one another".

Two main points have been established through these precedents.

(i) The first is that in an unusual situation such extraordinary orders are required to be enforced, that might change the normal status, original character and usual grade of legal provisions, keeping in mind the severity of circumstances and their consequences.

(ii) The second is that the foremost requisite and urgent step towards preserving and promoting the moral and religious values of a society is to resolve the economic deadlock
and to create suitable social environment for the individuals to restore and perpetuate their creative efforts. Because with infeasible socio-economic conditions, there is every chance of developing criminal tendencies in the society. That is why the struggle for the attainment of the social goal, has been considered as an ideal endeavour by the Holy Qur'an.

It is stated:

"And what will make you comprehend what the uphill road is? (It is) liberating the slave, or providing the food in a day of hunger, to an orphan, having relationship, or to the poorman lying in the dust."^{35}

Thus it has been explicitly proved that unfavourable socio-economic conditions have a tendency to cause the individuals to lead immoral lives and adopt criminal behaviour. Therefore, if any crime is committed under such state of compulsion, the criminal or penal liability in order to maintain the natural justice, can not be imposed upon the transgressor. Hence, under these circumstances, such criminal acts are not liable to hadd or other punishments. This principle has already been substantiated by various precedents based on Qur'an and Prophetic Sunnah.

15. Imam Malik and Imam Tirmazi have reported this principle through a hadith, saying:

"There is no hadd on the person, compelled."^{36}

16. Shariah has prescribed following three principles regarding the suspension of the infliction of hadd:

(i) Ibn-i-Majah has narrated through Abu Hurayrah:
"Try to avoid the infliction of hudood, if you can get any way out."³⁷

(ii) Tirmazi and Hakim have reported from Hazrat 'Aisyah:

Avoid to inflict the hadd on muslims as far as possible."³⁸

(iii) Rayhaqi has reported a prophetic instruction through Hazrat 'Ali:

"Suspend the infliction of hadd on the basis of doubts."³⁹

Basic theme of all of these provisions is concentrated on the point that if there is any suspicion of compulsion, necessity and coercion, may be of any kind, the criminal liability should be removed or decreased. This fact cannot be disputed in the light of Qur'ān and Sunnah, that socio-economic factor is the most important and decisive factor of causing inducements and impulses for the commission of crime. But one should be very clear that this factor cannot be regarded as the only cause of criminality. Many people in spite of unfavourable socio-economic circumstances keep themselves guarded from criminal behaviour. This is certainly a cause which may lead man to the path of criminality, but the effective and final cause of the commission of crime is human will and intention, which originates at the level of human mind. If socio-economic system is accepted as the only cause of criminality, then it would be again a form of 'determinism' as discussed in other theories, which would altogether explain away the criminal liability at every level. If poverty had been the only decisive factor of criminal conduct, then the rich people would have never committed the crimes.
Rich and poor both can be in the wrong and Qur'ān has directed to support the right one, without any reference to one's financial position. It is stated:

إِنْ يَكُونَ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَكْثَرُهُمْ غَنِيَّةً وَأَكْثَرُهُمْ فَقِيرًا.

"If he be rich or poor, Allah is more competent (i.e. deserving faith) than them both, therefore, do not follow low desires, lest you deviate." 40

Of all the theories of criminality, only the sociological theory has considerable recognition and a remarkable relevance in Islamic Science of criminology, but not upto the extent of explaining away the responsibility of the individual by considering the socio-economic system as the only cause of crime as held by the socialist philosophers.

CONCLUSION

After conducting a critical and comparative study of Western science of criminality and Islamic injunctions, we have concluded that:

1. Islam does not accede to the theory of Positivistic or Biological School of criminology. The idea of inborn criminality or atavistic reversion of man towards animalistic characteristics is against the Islamic concept of essential goodness of human nature.

2. Islam does not accede to the theory of psychiatric or Psychopathological school of criminology. The concept that criminality is the result of psychiatric abnormality or mental disorder is absolutely alien to Islamic views, because it completely explains away the criminal liability as in case of Biological Theory.
3. Islam does not accede to the theory of Psychological or Psycho-Analytical school of criminology. The concept of inherent criminalistic instincts and characteristics is the result of distorted vision of human psyche. It is also designed to justify the criminal behaviour of the delinquent as in case of Psychiatric Theory.

4. The theory of Ecological school of criminology does not possess much weight and importance independently because it is practically an offshoot of sociological theory. Ecological view, can not be regarded, in itself, as a sufficient interpretation of the causation of crime. Therefore, it does not find an important place in Islamic philosophy in its independent capacity.

5. The theory of sociological school is mostly in consonance with the external aspect of Islamic concept of criminality. The Socio-economic phenomena, according to Islam, has a considerable bearing on the behaviour of individuals in a society. Unfavourable socio-economic circumstances, no doubt, are regarded as crime-prompting factors in human societies, but Islam does not consider crime as entirely the product of social environment. These conditions have a very strong tendency of inducing immoral and criminal conduct. That's why Islam has paid the first and utmost attention towards reforming and improving the situation in order to minimize the gravity of socio-economic centrifugal forces functioning against the spiritual and moral values of Islam.

Islamic viewpoint, in this respect, is that any psychiatric, psychological or sociological abnormality and infirmity is not the final and determinant cause of criminality in human behaviour, but it amounts to suspension of criminal liability, if
present in any case.

If any person commits criminal act due to any of the above-mentioned reasons, his legal responsibility which demands infliction of punishment, will be totally or partly suspended, in accordance with the proximity of cause or effect.

**Research:** The problem of Western schools of criminology is, that they have conducted the research on the pattern of causal explanation.

There are, for the method of causal explanation, some postulates and categories, under which the data collected through various observations is organised. Then in order to explain the organised data, there should be a specific hypothesis, which can be of three kinds:

1. hypothesis of evolution
2. hypothesis of mechanical causation
3. hypothesis of purposive causation

The Western criminologists, while determining and explaining the behaviour of a criminal, have erroneously adopted either the hypothesis of evolution or the hypothesis of mechanical causation, which has led them to wrong and distorted conclusions.

If they had adopted the hypothesis of purposive causality, that was necessary to explain the movement at conscious level, they would have certainly arrived at different results which would have brought them nearer to the Islamic theory. Since they are promoting their research on the method of "Trial and Error", they are still unable to achieve uniformity in their conclusions.

The Islamic view in this regard is that there are two kinds of factors which prompt a person to adopt a specific conduct, External and Internal.

The External factors are the socio-economic circumstances
in which he is placed. These, being unfavourable, depressing and prompting on adoption of immoral life, may lead a man to criminal behaviour. Whereas the circumstances and environment being favourable, encouraging and prompting on adoption of noble life may lead a man to behave morally and to avoid criminal behaviour.

The second, that is the internal factors, are human urges and inner incitement of following the right or the wrong path. The fact is that the propensity and capability of inclining towards either of the two, has been vested in every man, because of the dual character of human nature. The potential nature of man urges him only to earn the good by prompting him to the performance of duty, whereas the actual nature induces him to the fulfilment of instinctual desires and passions. Potential nature acts much frequently at the level of subconscious mind which always functions as a guard against evil motives. The decision to adopt a possible course of action is always taken at the conscious level. Human will is completely free of the compulsion of external factors, but intention can be affected in both ways.

If the intention originates freely from the will, the performer of an act is completely responsible for his behaviour, and if the intention is formulated under the pressure and impulsion of an external factor, against the will, then the liability is deemed to be suspended. Therefore, it is man, who has to decide at his own, as to what he is going to earn. That's why he is morally responsible for what he does.

Therefore, the cause of criminality is the internal urge and incitement of man and not other external or a pre-determined factors. External factors, by affecting human intention and creating a situation of necessity, can change the legal status and
liability of the performer, but cannot be technically regarded as the cause of criminality.

According to Islamic view, an inducement can be caused externally but man is considered to be capable of overcoming it on the basis of noble urges ingrained in his potential nature.

Qur'ān ordains:

ولا يُبِيرِمُكمُ شَنَائُ قُوُّيَانِ يُخْرِجُونَ بِالسَّمَاءِ الْفَرَطِ وَيَنْمُونَ عَلَيْهِمْ مَشَيْأَهُمْ

"And let not hatred of a people—because they hindered you from the sacred mosque—incite you to exceed the limits, and help one another in goodness and piety, and do not help one another in sin and aggression, and be careful of your duty to Allah: surely Allah is severe in requiting (evil)."

Here, inspite of the inducement of enmity due to the aggression of others and as a result of it the severe hatred against them, the Muslims are expected to behave normally. If they commit an aggression in their reaction that would amount to sin, which is liable to severe requiting. It means that the final factor of determining one's behaviour is not the external element, but it is the internal urge of man acting at his conscious level, whether original or responding.

Man is required to guard himself against the evil in all circumstances, although he is incited by some factor. It is stated:

"إن تَجَنِّبَاكُمَا أَبْيَضُمَا نَهْنُونَ عَنْهَا كَفَّارًةَ عِنْكَمْ سِيَّآتَهُمْ"

"If you avoid the great things which you are forbidden, we will do away with your evil inclinations and incitements."

Inclination towards an evil act is always induced by some factor, but inspite of its prompting and inducement, man is supposed to avoid the commission of crime. It proves that the
causation, which establishes the penal liability exists in the man himself, and is deemed to be in his competence as well, otherwise he would not have been held answerable to the law.

Qur'ān states explicitly in connection of the criminal liability:

وَيَا الصَّابِرُ مِن سُبْحَاء حَمَّامَ مُنْفَضَبٍ

"And whatever misfortune befalls you, it is from yourself." 47

The enforcement of divine justice in human rewards and awards is also very obvious. It is stated:

"Surely Allah does not do injustice to the weight of an atom." 44

For this reason every adult and sane person is responsible for his own criminal behaviour.

Qur'ān says:

"أَنَّ اللَّهَ لَا يَظْلِمُ مَثَلًا مَثَلًا

"On me is the guilt of my crime and I am clear of that of which you are guilty." 45

It is further collaborated in the words:

"قَالَ ائْتُوا عَلَى جَمَاعَتِنَا وَلا تُعْسَ بَيْنَ عَمَّา تُعْسُونَ

"Say: you will not be questioned as to what we are guilty of, nor shall we be questioned as to what you do." 46

All of these verses clearly emphasise the fact that the criminal liability can neither be transferred nor explained away.

The Western criminologists have indiscriminately explained the criminality in such a way that the crime, in spite of being an intentional and voluntary act, has become absolutely involuntary and unintentional. They have expressed the phenomenon of crime in terms of "determinism"; hence, no liability can be placed upon
the individual. Therefore, there can be no justification of punishments, and the whole penal system becomes a futile and aimless exercise.

Islam has provided the balanced view because the liabilities of the individual and the society are separately determined. The cause of criminality is appreciated in such a manner that instead of justifying the crime, effective means and devices are suggested to eliminate it from the society.
7. Sheikh Muhammad Khudri, Tārīkh-ut-Tashri'il-Islāmi, (Translated) p.34.
19. Ibid.
24. Qur'ān 9:34.
34. Ibid.
35. Qur'ān 90:12-16.
    (b) Mu'attā Imām Mālik, Vol. III, p. 44.
38. Ibid.
39. Ibid., p. 156.
41. Qur'ān 5:2.
42. Qur'ān 4:31.
43. Qur'ān 4:79.
44. Qur'ān 4:40.
45. Qur'ān 11:35.
46. Qur'ān 34:25.
CHAPTER V

PSYCHOLOGY OF THE CRIMINAL

1. Internal Factors.

2. External Factors.

3. Classification of Criminals.
PSYCHOLOGY OF THE CRIMINAL

In order to understand and take full account of the psychology of the criminal, we must be well aware of the fact that the criminal is one of the persons living in human society. His mind also is constituted of the same elements, which act in the same way, as those that constitute the minds of others. The only difference is that in no two persons are all these factors always of equal strength and combined in equal proportion. The differences are of degree and proportion and not of kind. In many cases the difference between the criminal and the non-criminal is quantitative rather than qualitative.

Grygier, a Western psychologist, says, "If we go to the depths of the unconscious we are all alike."¹

John Barron, discussing the same issue, states:
"Delinquents are people who, like everyone else, have experienced frustration, particularly in their human relationships, but their reactions to it are abnormal."²

The question is, what are the factors acting in the psychological make-up of the criminals, which distinguish them from others?

The answer is that there are two kinds of factors, internal and external.

Internal factors are:
1. Human instincts
2. Mental faculties and their function.

External factors are:
1. Circumstantial influence
2. Opportunity and temptation.
To appreciate the psychology of the criminal, we shall now start with the description of instinctive urges which are vested in human beings indiscriminately.

A - Human Instincts

Western psychologists have named three sets of instincts which the human beings are bestowed with. These are as under:

1. Self-regarding instinct.
2. Racial instinct.

The first two, as Dr. Mercier has stated, are primordial and often preponderate over the third one. These three sets of instincts are not always in harmony, but they are destined to secure the same ends:

- The continuation of human race,
- the preservation of its benefits and values,
- and the attainment of its perfection.

These sets of instincts function in various ways and with different directions to realize the same objective.

The first functions in the direction of safeguarding the life and benefits of the individual who is a constituent part and parcel of the society. According to Hollander, this instinct is further accompanied by some special propensities, such as:

i) Propensity of struggle & contest.
ii) Propensity of resentment.
iii) Propensity of hoarding.
iv) Propensity of sexual satisfaction.
v) Propensity of suspicion, etc.

The second functions directly by prompting the acts of
reproducing and the care and rearing of off-springs. The third fulfills the main end by performing the acts for the welfare and prosperity of human society which provides the required protection to its component individuals and their aims and benefits.

Welfare of the society is in the long run so immensely vital that the incidental and occasional harms accrued to the Individual and Racial aspects of human instincts, while fulfilling the social instincts, are overridden and swamped. Thus before the benefit of society every other contrary consideration must give way and every other inconsonant conduct must be renounced. This is the unformulated perception of the basic reason that induces the society to place checks and limitations upon the individuals, which is known as law. If the same originates from divine revelation and gets its sanction and validity from Qur'an and Sunnah, it is known as Islamic Law. Therefore, every act which is injurious to the benefits and general welfare of the society becomes prohibited. In the light of this description, it can be easily concluded that dominance and preponderance of self-regarding instinct or racial instinct over the social instinct or that of the self-regarding and racial conduct over the social one, in an injurious or even disregarding manner, is the basis of crime. It does happen, because these instincts of human nature are not completely harmonised and this lack of consistency is the cause of inclination towards crime. Therefore, this instinctual inconsonance and incompatibility, when increased, prompts the man to be 'criminal'.

According to Dr. Mercier, this situation can only be avoided through a complete and perfect process of socialization of the individuals, securing the preponderance of social instincts over all other conducts, as it is attained in case of many insects
and animals, but not yet in mankind.⁵

Mankind, as stated by Mercier, is undergoing the process of evolution; if a particular stage is reached when human beings are perfectly socialised, the conflict between desire for self-regarding action and desire for social action totally disappears and later becomes victorious and dominating, there will be no crime. As long as the conflict exists, there will be a tendency in the mind of man to commit crime.⁶

This is the psychological analysis of the criminal, as stated by Dr. Mercier, conducted by the Western Criminologists, which is partly acceptable by Islamic viewpoint and partly, (especially the consequent remark) is liable to be rejected. This causal explanation has explained away the criminal liability of every delinquent and thus has rendered the whole criminal law an aimless and fruitless exercise. If it is accepted that the mankind, contrary to the insects and animals, has not yet achieved the stage of socialization, and therefore, it cannot escape the commission of crime till the completion of its process of evolution, the punishment, however slight it may be, loses every utility and justification.

Such thought is inclined to provoke the criminal tendency and, as it is evident from the statistics of the crimes published in various reports, it has consequently increased the rate of commission of crime in the West. This fact can be ascertained by,

Mark Benney's Research - 1936

Danish Criminal Statistics - 1944

American Criminal Statistics - 1951

British Criminal Survey - 1960
and many other reports and observations conducted by different investigating agencies of the West.

In complete analysis, according to Islamic view, the human instincts are classified into six fundamental sets, instead of three. These are as under:

1. Self Preservative instinct.
2. Sexual and Racial instinct.
4. Intellectual instinct.
5. Moral instinct.

These six sets co-exist because human personality itself is composed of six fundamental aspects, such as:

1. Biological aspect.
2. Socio-Biological aspect.
4. Psychological aspect.
5. Psychical aspect.
6. Transcendental aspect.

The completion and perfection of human personality depends on the balanced and proportionate development of each and every aspect of its being. If any of these aspects remains undeveloped, it creates a harmful vacuum in human personality. Each aspect possesses its own needs and requirements which are liable to be fulfilled in the right direction.

Self-Preservative instinct is the requirement of the biological aspect of human being. In order to fulfil it, the necessities of eating, clothing and lodging should be essentially provided.
Sexual and Racial instinct is the requirement of Socio-biological aspect of human being. In order to fulfil it, conjugal relations and familial structure of life should be established and protected. Social Instinct is the requirement of Socio-cultural aspect of human being. In order to fulfil it, social, economic, political, cultural and educational units of collective life should be framed and developed. Intellectual instinct is the requirement of Psychological aspect of human being. Its fulfilment requires balanced and proportionate development of all the three phases of Conscious mind, these are Emotion, Intention and Perception. Moral instinct is the requirement of psychical aspect of human being. Its fulfilment requires complete harmony, consistency and compatibility between conscious and unconscious minds, by developing the potentialities of Unconscious mind and organising under it purified desires and propensities of Conscious mind. Spiritual Instinct is the requirement of Transcendental aspect of human being. Its fulfilment requires spiritual and intellectual development and establishment of faith and knowledge, through proper reasoning and sound insight.

3- Mental Faculties and Their Function

The second internal factor acting in the psychology of the criminal relates to mental faculties and their function.

It is worth understanding that 'mental element' is an indispensable constituent element in the commission of crime. No dispute exists between Muslim and Non-Muslim scholars on this issue. Hibbert, discussing the composition of crime, states that the general principle which prevails in constituting a crime is summed up in the maxim:

"Et Actus non Facit reum nisi mens rea sit", i.e., any conduct does not make a party criminally liable unless his mind
is criminal. 7

Mens rea may be defined as "the mental element necessary
to constitute criminal liability." 8

Kenny, discussing the maxim, explains that there are two
necessary elements in crime, a physical element and a mental
element. 9

The role of human mental faculties and effects of speci-
fic mental characteristics in any criminal or non-criminal con-
duct can be judged by Darlington's quotation, when he says, "One
may ask: is there anything else that will stop further offences?
The German enquiry shows that there is one other circumstance
that will stop the criminal career. It is if a weak-minded crim-
inal man marries a strong-minded non-criminal wife." 10

After having comprehended the role and effect of mental
element in the commission of crime, we now proceed to the descrip-
tion of various mental faculties and their respective func-
tions.

The mind of every person is one whole, like many other
totalities, consisting of some component faculties, which are
five in number:

These are:

1. Desire
2. Intellect
3. Will
4. Feeling
5. Memory

1. Desire

According to Dr. Mercier, "desire is a motive, a prompt-
ting and an internal urging to a peculiar action before the con-
duct of any kind comes into existence. Unless there is some
reason why any voluntary action should be undertaken, the actual purpose for which an action is conducted is always the satisfaction of some desire or aversion. When a starving man steals a loaf of bread, the action is prompted to satisfy his hunger, because food is one of the instinctive requirements, common to all animals to preserve one's life.

The loaf may be stolen, not to satisfy the thief's hunger, but to satisfy his children's hunger; and in this case the act is prompted again by the parental instinct, the desire for the preservation and welfare of his children.

If a person extends his business so that he may afford to educate his children upto high level, he is actually prompted by the same desire.

Whatever the desire for any act - and it is often impossible for the observer to assign and visualize the actual desire or motive behind the act, the fact remains, that every act is conducted under the pressure of a specific desire, aversion or motive.

This primary desire may also be followed by some secondary desires. Whatever the desire primarily was and must have been in the mind of the actor at the moment of commission of the act is distinguished from all other subsequent desires that lead up to the act; the previous or primitive desire is known as Motive. But the whole of this faculty of human mind alone does not design the crimes. It is further assisted by another faculty known as Intellect.

2. Intellect

The faculty of Intellect devises the means to compass those ends that desire dictates. The means are crude or elaborate according as the intellect is of low or high development.
Intelet, therefore, takes a large share in determining the kind of crime. The desire has to express itself in one way or the other. If it is deprived of its natural means of satisfaction, it will find some other way. The only function performed by the intellect is to suggest alternative ways and means of satisfaction and to appreciate the difference lying between them.

There is nothing criminal, or necessarily tending to criminality, in the desire to obtain food or drink, to avoid personal injuries, to seek shelter and protection, to gratify sexual and parental longing, to enjoy recreation, or to satisfy the curiosity.

The laudability or criminality of the acts induced by these primitive desires lies, not in the nature of the end pursued, but in the means by which the end is secured. Therefore, the criminality usually originates in the intellect and not in desire; though of course, without any desire there would be no crime. This is why the insanity & stupidity renders the actor immune from criminal liability inspite of having desires, but not perfect intellect.

3. Will

Strictly speaking, intellect only suggests alternative means, compares them with others and appreciates their differences, but to make final choice between these alternative modes, a new mental faculty, different from both desire and intellect, is employed, and this is called Will. It is, in fact, a movement of the whole mental personality in a certain direction. It functions first in the form of choice; but mere choice does not issue in action. For its actual execution a further exertion of will is necessary in the form of Volition or Initiation of action.
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So that an endeavour is made to begin an act to satisfy the primitive desire. The desire at this stage, when it accompanies the will, is known as Intention. The intention of the act is, therefore, the desire to accomplish the act, and to bring about those consequences that in the natural course of things must result from the act. It is the intention, for which the actor becomes responsible.

4. Feeling

Feelings are in one sense desires, but they are also different. The desires well up spontaneously from the depths of our nature and are originally independent of circumstances, while feelings in the restricted and exact sense, are elicited by circumstances, and in the absence of their adequate provocations, would never be felt at all. The desire for food, the desire for rest, the desire for companionship, the desire for the satisfaction of sexual and parental instincts, are all spontaneous desires. They need no external stimulus for their actualization, though no doubt they are susceptible for direction, focusing and intensification by appropriate circumstances. Hunger, for instance, makes itself felt without any provocation from the sight or smell of food, though the sight or smell of food may make the desire more prominent, attentive and concentrated. Still hunger is felt quite independent of circumstances, but anger is not felt spontaneously without any external provocation in the circumstances. No doubt the capacity to feel anger must be inherent and innate, but however great the capacity, the feeling will not arise in the absence of any external stimulus or circumstantial and perceptible reason.

Feelings are of two main kinds: the crude and simple feelings that are called sensations, and complicated and elabor-
the feelings that are called emotions.

The chief crime-producing feelings are anger, jealousy, hatred, love, fear, etc. These feelings often become the causes of the commission of crimes and determine the degree of severity and intensity of crimes as well. 11

5. Memory

It is the preservative mental faculty which has no direct relation with the commission of crime. Thus, the four mental faculties of human beings are the main factors which act in the psychological make-up of the criminal.

The direction and scope of the functions of these mental faculties have been explicitly specified. In the light of this specification, the steps which every voluntary act, criminal or non-criminal, goes through in completion of its process, can easily be comprehended. These are six in number:

1. Conflict between desire and duty. ( konflikts )
2. Deliberation (weighing & balancing). ( razm o razm )
3. Free Choice of Motive (Will). ( razayeb )
4. Resolution (Intention). ( tawil )
5. Execution.
6. Consequence.

1. All of these stages exist at the conscious level.

First of all a particular urge and prompting arises in human mind which induces the man to adopt a specific conduct. This is the desire which sometimes conflicts with the sense of duty, that imposes some restrictions on its fulfilment or suggests another conduct of behaviour in that respect. The moral situation starts right from this conflict, which is subsequently resolved at the stage of intellect.
2. At this second stage, thinking is directed to harmonize the two senses after differentiating them in the light of their natures and consequences.

Man thinks over the two in order to decide as to what pressure or inducement is to be accepted. While thinking over both the alternatives, no external compulsion affects his thought. He visualizes independently the merits and demerits of the desire as well as of the duty and appreciates the difference lying between them. This function is known as deliberation "_VERBOSE".

The origination of desire and realization of the sense of duty, both are a natural phenomenon. Nothing is wrong at the first stage. God has vested the instinctive desires as well as the sense of obligations in human nature, as it has been expressly mentioned before. Moreover, the capacity of discriminating between good and evil in the light of their advantages and disadvantages, has also been bestowed upon mankind.

Qur'an states:

"And He has given to the soul its enlightenment as to its wrong and its right." 12

It further enunciates:

"There is no compulsion in religion: Truth stands out Clear from Error." 13

After completion of the process of deliberation (weighing and balancing) comes the third step, that is the Free Selection of motive.
3. Since full consideration has been given to both the incitements, man is in a position to choose either of the two. At this stage man selects the motive or the will which is likely to be fulfilled by him. He decides finally, whether he has to fulfil the duty or the desire. This act of mental faculty is known as choice of motive (استحباب). This choice forms the basis of responsibility in every voluntary act. That is why the Holy Prophet (peace be upon him) declared:

إِنَّيْ لَمَا يَنظُرُ إِلَّا عَمَالٍ وَأَمَرَأٍ إِلَّا يَنظُرُ إِلَّا قَامَيْكَمْ وَأَعْمَالَكَ

"The acts depend upon their motives."¹⁴

The nature and status of the act, whether it is right or wrong, is decided on the basis of selection of motive without any reference to its consequences.

Another declaration to the same effect was made by the Holy Prophet (peace be upon him) in the words:

إِنَّ بَيْنِي وَمَبَانِيْكُمْ وَأَمَرَأَكُمْ وَأَعْمَالَ الْمَكْرُ وَأَعْمَالَ الْمَكْرَ

"Certainly! God does not look at your shapes and properties, He looks at your hearts and deeds."¹⁵

It is an established principle of Islamic Law that if a legal act is motivated by good will, the man becomes entitled to reward, even though the act may not result in the fulfilment of the expressed intentions. This fact is better elaborated through this verse:

"وَمَنْ يَذْهِبُ عِنْدِ الرَّسُولِ إِلَى الْمَكْرِ وَإِنَّ اللَّهَ عَلَى أَشْرَكَةَ

"He who for-sakes his home as a refugee for God and his
Apostle, and dies, his reward becomes due and sure with God: and God is Oft-Forgiving, Most Merciful. "It.

The same delicate distinction exists between truth and lie. If the utterance is positively in accordance with the apparent fact, it can only be regarded as truth, if it is initiated by a good motive. Whereas, if the motive behind the utterance is wrong, inspite of its being right factually, it would be considered a lie. This fact is very well expounded through the first verse of Surah-i-Munafiqueen:

"When the hypocrites come to you, they say, we bear witness that you are indeed the Apostle of God. And, God knows that you are indeed His Apostle, and God bears witness that the hypocrites are indeed liars." 17

Only the same fact, that is the verification of the prophethood of Hazrat Muhammad (peace be upon him), has been spoken by hypocrites and by God Almighty, but the speech of Allah signifies the truth (صبر) whereas the utterance of hypocrites has been termed a lie (كذب).

The apparent and factual position of both statements is the same but the difference lies in their motives. The statement, that is, the act of speech, of the hypocrites is declared a lie, because it was not motivated by good will. They do not believe in what they have expressed. Therefore, the conflict between their motive and their act of speech has rendered the statement a lie but on the other hand God Almighty really means what He says. That's why His statement is an absolute truth.

The entire discussion emphasises the fact that the
decisive step in the process of any voluntary act is the selection of motive or will. Because the man is completely free in exercising his discretion at this level, he is answerable and liable for his acts. That's why he is deemed to be entitled to awards and rewards.

4. At this stage the whole mental personality is mobilized towards a certain direction. After the choice has been made, as it is stated above, a further exertion of will is conducted for the purpose of its actual execution.

This is the stage of Intention (نَطْلَةُ البَلْقُح), that is the mental endeavour to initiate the action, chosen by the Will. The intention functions merely under the guidance and direction of the Will because it is in fact the desire to accomplish the act that has already been decided at the third step of the process. Therefore, we can say, that the intention follows the decision, as it is clear from this verse:

اَلْحَمْرَاءُ يَأْتِيَ رَبُّكُمُ دَاوُدَ يُنَفِّقُ لِكُلٍّ نُبُوَّةً

"Verily, when He intends a thing, His command is, "be", and it is."¹⁸

The noun 'شَيْءاً (Shay'ān) is derived from the word 'شَاءَ (Sha'ā), which means to wish or desire. Therefore, 'شَيْءاً (Shay'ān) signifies 'a thing which was desired or willed'. In the light of this analysis, it is quite evident, that the final desire, will or decision should be prior to the intention to accomplish it because the intention could only follow the act of will. Selection of Will is the mental decision whereas the intention is the initiation of mind to bring that decision into physical existence. Thus the Holy Qur'ān states, when God wills anything to be present in
the physical world, He intends its existence and the desired object comes into being. This is the philosophy of the original creation of the world, that has been mentioned in the Holy Qur'an, which expressly negates the concept of chance creation.

Therefore, during the process of conscious movement of the mind, the decision is made first, in the form of selection of motive and then it is followed by the intention to be accomplished.

**5.** Now this specific intention is followed by compliance (تَعِيل). Compliance is the practical effort to accomplish what was intended. If the man leaves the act, which was prohibited or criminal, even at the stage of compliance, he will be no more liable to punishment. The criminal liability is imposed upon the performer of the act only if he accomplishes the act of compliance and attains the stage of consequence, as it is obvious from the Qur'anic injunction:

ان تَجَدِوا أَكْتَبَهَا مَنْشُورًا فِي كُلِّ فَضْلٍ عَنَّكُمْ بَصِيرًا نَعْمَاءٌ

"If you eschew the most heinous sins which you are forbidden to do, we shall expell out of you your other evils."19

Whereas in case of the acts of righteousness the initial reward becomes liable even from the stage of selection of motive. It is for providing an incentive to perform the good, but one should be very clear that the duty or obligation remains unperformed till the completion of compliance. After the completion of compliance comes the stage of consequence (تَكُون).

**6.** At this step, the act, criminal or non-criminal, becomes complete and then the full award or reward, prescribed for it, is deemed to be liable.
In the light of this discussion, it has been established that the criminal selects the unchecked and unrestricted way of fulfilment of his instinctive urges, under the pressure of his desire and aversion, or sensation and emotion, neglecting the valid process prescribed by the law.

The psychological make-up of the criminals is never different in its composition or function from that of the non-criminals. The criminal act goes through the same mental and psychological process as does the other.

Therefore, it is correctly assumed that the difference between criminals and non-criminals is quantitative rather than qualitative.

Now we take account of the external factors which also have an important role in the commission of crime. The first significant factor in formulating the psychology of a criminal is, the Circumstantial Influence. There are two types of circumstances that play considerably decisive role:

1. Circumstances that have acted in the past

These circumstances act in profoundly modifying the internal factors of the Criminal's psychology. These are family circumstances, social environment in which one was brought up, economic conditions in which one had lived, religious education and moral training given in effective or ineffective manner, human relationships, and other local, political geographical and cultural environments, which had affected the man in his past.

These circumstances of the past play an effective role in developing the temperament, mental character and disposition of a person.
He who has received proper education and moral training, especially in early life, when the character is plastic and normally retains what is impressed upon it, will act every day on every occasion differently from him who has not. Again the one who is brought up in better socio-economic circumstances, will behave differently from him who is not.

These are external circumstantial influences that effect the internal character of a person.

2. **Circumstances that act at the time of commission**

These circumstances, if they are discomforting and unfavourable, sometimes create a state of necessity, in which man is impelled to commit crime. That's why the Islamic Penal Law prescribes that before imposing the criminal liability on the offender and awarding him the punishment, the circumstances should be fully examined in which the crime was committed, because the punishment is suspended if the circumstantial influence is proved to be necessitating as it is evident from the practice of Hazrat 'Umar, the second Orthodox Caliph, during the period of famine. Both sets of circumstances, that act in the past or at the time of commission, can be largely classified into two kinds, such as:

(i) Economic circumstances

(ii) Social circumstances.

The influence of economic circumstances and their effects have been elaborately discussed earlier while studying the causes of criminality, under the caption, the 'Sociological Theory and Islamic injunctions'.

As far as the social aspect of circumstances is concerned, Qur'an has divided all the social evils into four basic categories:
1. Anti-Islamic legislation - (مجرات الديانات)
2. Anti-Islamic thinkings - (فک اسلامی)
3. Anti-Islamic loyalties - (عشق اسلامی)
4. Anti-Islamic fashions - (نماد اسلامی)

Opportunity and Temptation

This is the second external factor which plays an important role in formulating the psychology of the criminal. This factor possesses both its existence and effect independent of circumstantial influences.

Dr. Mercier, expressing this idea, says that however ardently a man may desire to catch fish, he cannot do so where there is no water. If fishing were a crime, it would be a crime of which an Arab of the Sahra could not be guilty, however strongly his instinct and training urged and impelled him to fish. The reason is, that the presence of the following three factors is necessary in the commission of a crime under the pressure of opportunity and temptation:

1. Existence of opportunity.
2. Knowledge of opportunity.
3. Temptation and Prompting.

Certain crimes may die out automatically, if the opportunities that make them possible, easy or profitable cease to exist. Mere existence of an opportunity remains useless unless it is known to the person concerned, and mere knowledge of certain opportunity does not render it a temptation, unless it prompts a particular person.

Therefore, this temptation equally depends on internal as well as external factors. In some cases even the existence of opportunity and its knowledge cannot prompt a person to commit a crime, because of his moral and spiritual training.
Hence a system affording proper moral and spiritual training for developing a perfect moral character of individuals, and mitigating the crime-producing social stimuli and environmental opportunities, can only be in a position to formulate a pious society. Such system which functions at every level, internal and external, has been provided only by Islam.

CLASSIFICATION OF CRIMINALS

On the basis of their psychology, the criminals are classified into two primary sets:

1. Habitual Criminals.
2. Occasional Criminals.

1. Habitual Criminals

Dr. Mercier, discussing the division in detail, says that Habitual Criminals are further divisible into two classes:

(i) Criminals possessing active or full criminal propensity.

(ii) Criminals possessing quasi criminal propensity.

(i) The first type of tendency impels him, usually from the earliest age, to commit crimes, and no circumstances can mitigate this aptitude, because they have an irresistible propensity to commit crime. The second type of tendency can be reformed by adequate measures if they are adopted early enough.

First kind is known as Moral Imbeciles or Instinctive Criminals as prescribed by Lombroso and his school.

They are further classified into:

(a) General Moral Imbeciles

(Who are generally immoral and Criminal in most of their acts and relations in their lives. These are cruel, dishonest, treacherous and false in every walk of life).
Particular Moral Imbeciles
(Who are Criminal of a very restricted and peculiar kind. They have neither the general selfishness, callousness and indifference to the welfare of their fellows nor have they any conspicuous defect of wisdom).

This concept of full criminal propensity that creates Moral Imbeciles or Instinctive Criminals is unacceptable to Islam, because it blames human nature and makes criminality a pre-determined factor, which is against the basic philosophy of moral and legal responsibility.

(ii) The second class of habitual criminals possessing quasi-criminal propensity is composed of those who often commit crime, but because, their social instincts have never been cultivated or intensified by a course of appropriate training, such as operates in all children who are not properly brought up. These unfortunates have had either no homes or bad homes. They are reformable if only they can be caught early enough, before their habits are fixed and characters are totally destroyed. Islam recognises the existence of quasi-criminal propensity in case of the habitual criminals.

classification: 1. Habitual Criminals again fall into two sub-classes:

(i) General Practitioners:
These are mostly young, who have not yet chosen their fields of speciality. They are ready to commit any kind of crime, from petty felony to murder, that benefits them.

(ii) Specialists:
These commit only that kind of crime for which their taste, their aptitude, their ability, and their habits
render them most adapted.

2. Occasional Criminals

The second primary class consists of Occasional Criminals. Their criminality, unlike the habituals, according to Western Criminology, is not instinctive and irresistible, but it mainly depends on the external factors. These are Ordinary Citizens, who are prompted to some crimes by temptation of any exceptional severity.

The crime of occasional nature is due to stress of circumstances or opportunities and if those circumstances are never likely to be repeated, the crime is committed no more.

The conclusion is that, if the external factors, such as circumstantial influences, opportunities and temptations go on affecting the internal character and psychology of the person constantly, and no measures are adopted to reform them, he becomes habitual criminal, and if those factors influence the man incidently, he becomes the occasional one. If proper moral and spiritual training and adequate socio-economic circumstances are provided to the individuals, their instinctive urges and mental faculties are organised to function towards the right direction. Human instincts and desires, being properly fulfilled in a balanced manner, do not create any tendency of criminality.

Therefore, lack of spiritual and moral training and unsuitability of socio-economic conditions are the two basic factors which may render the psychological make-up of a person criminal.
NOTES


6. Ibid.


8. Ibid.


18. Qur'ān 56:82.


25. Ibid., (based on) pp. 234-250.
PART - III

ISLAMIC SYSTEM OF PUNISHMENTS

1. Classification of Punishments.

2. Legal Structure of Punishments.

3. Legal Basis of Punishments.
CHAPTER - I

Classification of Punishments

1. Trilateral Classification.

2. Definitions.

3. Distinctions.

4. Basis of Trilateral Classification.

5. Multiple Classification.
Classification of Punishments:

Islamic system of punishments primarily comprises three kinds. Some of the punishments are fixed as per their nature and quantum while others are variable. This classification is one of the basic requirements of an ideal penal system which is expressly designed to provide criminal justice to the society. Since the gravity and heinousness of crimes vary from situation to situation, the respective classification and differentiation should be consonant with the variable contour and configuration of crimes to fulfill the changing requirements of emergency and contingency. This motivating factor behind penal formulations accounts for the essential dynamism and comprehensiveness of Islamic system of punishments. Legal philosophers and criminologists believe that it is an essential requirement for a viable legal system to be inclusive of both fixed and variable elements in its penal postulates.¹ In the history of penology, Islam has provided a unique penal system which perfectly fulfills the stipulated requirements of law as outlined and elaborated by legal experts and theoreticians.

I. **Trilateral Classification:**

Islamic penal system is primarily based on the following classification of punishments:

1. **Hudood** (fixed punishments) -
2. **Qisās-o-Diyat** (retaliation and bloodmoney) -
3. **Ta'zeerāt** (chastisements or discretionary punishments) -

**Fixed Punishments:**

This class of punishments is prescribed for the follow-
ing seven crimes, that are known as crimes of fixed punishment (زِراتِ الإِثْمِ) :

(a) Adultery (الزنا)
(b) False accusation of unchastity (القذيف)
(c) Theft (السرقة)
(d) Robbery (المرأة)
(e) Drinking (الشرب)
(f) Apostasy (الردة)
(g) Sedition (البغي).

and Bloodmoney:

Retaliation and Bloodmoney: (رَاتِبَةٌ وَالدِّمَانُ)

This class of punishments is prescribed for the following seven crimes:

(a) Wilful or intentional homicide (homicide amounting to murder) (القتل العمد)
(b) Quasi-intentional homicide (homicide not amounting to wilful murder) (القتل شبه العمد)
(c) Homicide by negligence or mistake (murder as a result of misadventure) (القتل الخطأ)
(d) Homicide similar to misadventurous murder (القتل متباين بالضرر، وتباين معاً بالخطأ)
(e) Indirect homicide or homicide by accidental cause (القتل بالسبب)
(f) Intentional injury to a person without causing death (إِجْناَيَةٌ عَلَى مَوْتِ النَّفْسِ عِمْراً)
(g) Unintentional injury to a person without causing death (إِجْناَيَةٌ عَلَى مَوْتِ النَّفْسِ عُدُوًّا)

Most of the Muslim Jurists use the term Al-Jināyah (الإِجْناَيَة) for this class of crimes, whereas some of the scholars have invested it with the label Al-Jarāh (الإِجْناَيَة).
It is also termed Ad-Dīmā (الذيَّة) by some Jurists.¹

Chastisements or Discretionary Punishments: (التعزيرات)

This class of punishments is prescribed for all the crimes which are neither the crimes of fixed punishment nor those of retaliation and blood money. These crimes are of two kinds:

(a) Acts or omissions in which some divine provisions are violated. These are unlawful acts which are committed in transgression of the express provisions of the law of Shariah. For example, the practice of usury (الرِّب), misappropriation of trust or pledge (خيانة الأمانة), bribery (المظفرة), abuses (السب), homosexuality (الترامة), unlawful hoarding (الإحشار), non-payment of zakāt, etc.

(b) Crimes which are not an express violation of a specific provision of Shariah but a violation of the rules, regulations and orders of the government (الاشرار). If they are promulgated in the larger interest and benefit of society and do not contravene the provisions of the Shariah, and are formulated for the realization and promotion of Islamic objectives, the framing of these penal laws falls within the legislative jurisdiction of the state. The former possesses permanent penal significance, whereas the later, possesses only the temporary one.⁵ Therefore, Ta'zeer or discretionary punishment is awarded for three kinds of crime:

(a) Ta'zeer for sinful acts (التعزير العامي)
(b) Ta'zeer in public interest (التعزير لصالح العام)
(c) Ta'zeer for violation of values (التعزير للأخلاقات).
II. Definitions:

I. Hudood (ححدود).

This is the plural of Hadd (حد) which literally and etymologically means: (ğızmin isteksinin, zikr mingah sırık bıhı rahı)

"The differentiating factor between the two, which prohibits interfusion of one with another." 6

It is also used in the sense of prevention. 7 The word "Al-Hadad" (الحداد) from the same origin is used in the sense of prevented and prohibited (ترمغ). 8 "Al-Hadad" (الحداد) is said to be the gate-keeper or the door-man who prevents the people from entering the house. 9 The last barrier or line of partition is also known as Hadd: for example, "Hudood-ul-Haram" (حدود الحرام). 10

Following the literal meanings, things whose prohibitive or permissive capacities according to Shariah have been clearly mentioned or expressly stated, are known as "Hudood" or "Hudood Ullah" (حدود الله). 11 In Qur'an, this term is identically used in the words:

"These are limitations imposed by God. Don't touch them." 12

At another place, it is stated:

"These are the limitations imposed by Allah. Don't cross them. And those who defy the limitations of God are indeed the transgressors." 13

Therefore, those unlawful acts or omissions which are declared prohibitive by the divine law and the people have not
been permitted to violate them are termed Hudood because these Hudood prevent the people from their commission. Hence, violation of these Hudood is declared a crime.

Thus on the basis of literal and etymological signification, the laws of Shariah relating to Awāmir (اءاير) and Nawāhi (ناي) - i.e., acts of commission and omission, are generally known as Hudood or Hudood-ullah which are strictly required to be observed by the Muslims and whose violation in any form or under any pretext amounts to sin (العمية). Concluding the literal discussion, we can correctly appreciate, that the word 'Hadd' means prevention, hindrance, an impediment, a withholding, restraint, a debarring, inhibition, forbiddance, prohibition, interdiction, repelling, an averting, a bar, an obstruction, a partition, a separation between two things, or two places, or two persons, to prevent their commixture, or confusion, or the encroachment of one upon the other, as stated in 'An Arabic-English Lexicon', by Edward William Lane, Book 1, part 2, pp. 524-525.

In its technical sense Hadd is defined as:

"The fixed punishment implementable as a right of God is known as Hadd."^14

Some of the scholars have rephrased the same definition by a reshuffling of the lexical elements:

"Hadd is the fixed punishment which has been made imperative as a right of God". ^15

Some of the Jurists have defined it in the following words:

الحجة في الشع عقوبة مقصرة لاجل حق الله.
"Hadd in Shari‘ah is known as the punishment fixed as right of God."\textsuperscript{16}

Another comprehensive definition of the term 'Hadd' is given by various Jurists in the words:

"Hadd means the punishment, fixed and enjoined as the right of Allah by the Qur’ān, Sunnah or Ijma-i-Qatī."\textsuperscript{16-A}

\underline{Blood-money:}

Retaliation and Blood-money (القصاس والردة)

The term Qisās is literally derived from 'Al-Qasās' (القصس) which means "تتبع الأقدار" (to follow in someone’s foot-steps).\textsuperscript{17} In Qur’ān this word is used in the sense conveyed by the verse:

قُلُواَ اتَّخَذُواْ مَا فِي الْقُرْآنِ آيَاتٍ اسْتَفْلَىَتْ مُجَابَهَةَ (Q54:10)

"So they went back retracing their footsteps (following the path they had come).

\underline{Al-Qisās in its legal sense signifies:}

القصاص تبع الدية بالقروا

"Qisās means to shed blood in retaliation."\textsuperscript{19}

Jurists have used the word Qisās in the sense of equality between crime and punishment. They emphasize the proportionality between the violation of law and the infliction of punishment which such violation entails. This kind of punishment is, therefore, in the nature of a balancing act which speaks volumes for the concept of equity in Islam.

Jurists ultimately have adopted the word in its technical sense which is defined as:
"Qisas is to award an equitable punishment to the offender for an intentional crime of homicide or for severing any organ of the body or injuring it."\(^{20}\)

According to Islamic penal law, \(\text{Qisas}\) is of two kinds:

(a) \(\text{Qisas fil Nafs} \) (رثاء في النفس) (retaliation in person):

This kind of punishment is awarded for the commission of murder.

(b) \(\text{Qisas fil A'zā} \) (رثاء في الأعضاء) (retaliation in organs):

This kind of punishment is awarded for cutting any organ of the body or injuring it. Divat, the blood money, is a substitutory punishment for \(\text{Qisas}\) in the form of monetary compensation. It is technically defined as:

"It is a fixed punishment, implementable as the right of individuals."\(^{21}\)

Chastisements or discretionary punishments: (التعازير)

The term \(\text{Ta'zeer}\) is derived from the origin (عذر) which literally means: المعنى والتآديب

"To prohibit and punish".\(^{22}\)

This word primarily applies to the signification of 'help with respect' in its etymological orbit, as stated by \(\text{Imām Rāghib Asfahānī}\) in the following words:

"Ta'zeer is to help anybody and respect him."\(^{23}\)
The word 'Ta'zeer'' has been used in the verb form at following three places in the Holy Qur'an, signifying the same sense:

5 : 12
7 : 157
48 : 9

In its legal and technical sense, it is defined as:

"Ta'zeer is the punishment (to a criminal), whose specification of nature and quantum is left to the discretionary jurisdiction of the state."24

Most of the Muslim Jurists have defined the term Ta'zeer in the words:

التعزير هو تاديب على ذنوب لترشع فيها الخمر

"Ta'zeer is the punishment for crimes for which Shariah has not provided the fixed sentence".25

Therefore, Ta'zeer is the punishment which is not fixed by the law-giver but is left to the discretion of the Head of the State or Qa'izi and based on the principles laid down by the Qur'an and Sunnah.

An analytical comparison of the definitions and discussions of Ta'zeer given by Muslim Jurists boils down the various interpretations to a common denominator which may be summed up in the following statement:

"Ta'zeer is chastisement or discretionary punishment for the crimes which fall neither within the category of Hudood nor retaliation, and the fixation of its nature or quantum or both is left to the judicial discretion and jurisdiction of the state."
Therefore, all the punishments whether they materialize in imprisonment or lashes or transportation or in death punishment, awarded by the Muslim courts for the commission of crimes, on the basis of discretionary fixation of penal quality and quantity, neither being hudood nor retaliation or blood money, are known as Ta'zeer (تَزِير).

III. Distinctions:

(a) Hadd is a punishment whose nature and quantum is fixed by Shariah.  

(b) Retaliation is a kind of punishment whose nature and quantum is also fixed by Shariah.  

(c) Ta'zeer is a kind of punishment whose nature and quantum is not fixed by Shariah. Sometimes both the elements are left unfixed and sometimes one of the elements is fixed while the other remains unfixed.

The first two types of punishment are differentiated from the third type of punishment in terms of the specification of their nature and quantum. The former are fixed punishments in respect of their essential ingredients while the latter are subject to all types of fluctuation and variation. The inflexibility of the first category of punishments is reasonably compensated by the flexibility of the second category of punishments and stresses the inevitability of Islamic penal system as well as its capacity for a fair appraisal of human limitations.

cope of discretion: (a) In case of Hadd, the state does not possess any discretion to increase or decrease the quantum of the punishment.  

(b) In case of retaliation, the state is equally denied
any discretionary power to vary the quantum of the punishment.

(c) In case of Ta'zeer, the discretion to change the nature and quantum of the punishment is invested in the state and, on its behalf, in the judiciary. It is unanimously agreed:

"Its fixation depends upon discretion of the state." 27

This implies that in the case of Hadd and Retaliation there is no scope of Ijtehad but Ta'zeer is formulated on the basis of Legal Ijtehad. As it is stated:

"The rulers are supposed to conduct 'Ijtehad' in adopting an appropriate sentence of Ta'zeer." 28

Light of Punishment: (a) The punishment of Hadd is imposed as right of God.

(b) The punishment of retaliation is imposed as right of man.

(c) The fixation and execution of the punishment of Ta'zeer is the right of the state. 29

Recommendation of withdrawal (a) In case of Hadd, no recommendation in any form is acceptable. This legal principle is based on the tradition in which 'chadar' of Safwān bin Umayyah was stolen. The case was tried and adjudicated by the Holy Prophet (peace be upon him). He awarded the sentence of amputation to the thief. After the award of the sentence, Hazrat Safwān came to the Holy Prophet (peace be upon him) and made recommendation in favour of the convict and asked permission for withdrawal of the case. But
the Holy Prophet (peace be upon him) refused and said:

"You would have done so before the case came to me for trial." 30

The prophetic tradition establishes the fact that after the cognizance of the court, the plaintiff or complainant can neither withdraw the case nor make recommendation in favour of the accused. Moreover, Imam Abu Daud has reported a prophetic tradition through Amir bin Shu'ayb:

"You can remit the Hudood as long as the matter is between you. When the case of Hadd comes to me for trial, its execution becomes obligatory." 31

Imam Dar Qutni has reported another Hadith in this respect through Hazrat Zubayr:

"You can make a recommendation before the case comes for trial. When it comes to the court and even if the aggrieved person remits, God will never remit." 32

Imam Tabrani has reported still another Hadith through 'Urwah bin Zubayr:

"When the case comes to the court for trial, then God execrates those who recommend and those who accept the recommendation." 33

(b) In case of Qisās the aggrieved himself can withdraw the case at any moment because his right preponderates
the right of the community.

(c) In case of Ta'zeer, the recommendation is also permissible before or after the cognizance of the court. It is entirely up to the court to decide the degree and extent of acceptance of the recommendation made by the aggrieved or the injured party. Here the preference of the party is considered immaterial.

Remission or Forgiveness: (a)

In case of Hudood, the aggrieved party cannot forgive the accused or the convict as far as the element of infringement of public right or right of God is concerned, because the punishments awarded in these cases are obligatory. Since they are to be executed as right of God, no one has a right to forgive them. Muslim Jurists are unanimous on the view that the Hudood can not be remitted or forgiven.

(b) In case of retaliation and blood money, the full right of forgiveness is vested in the aggrieved. Either retaliation or blood money or both can be forgiven. This right is based on the express Qur'anic provision:

"If any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude."  

It is reinforced by another Qur'anic injunction:

"If any one remits the retaliation by way of charity, it is an act of atonement for him."  

Moreover, it is narrated by Hazrat Anas bin Malik:
"Whenever any case of Qigās was referred to Holy Prophet (peace be upon him) he always used to suggest forgiveness."

It may be noted that the crime of retaliation involves infringement of two rights:

(i) **right of God** (public right).
(ii) **right of individual** (private right).

If the injured party forgives the accused, its forgiveness would operate within the scope of its private right. Therefore, the punishment as retaliation or blood money would be remitted. But as far as the second element of the infringement of public right is concerned, it cannot be forgiven by the aggrieved individual. Therefore, if the court considers it proper to award punishment of lashes or imprisonment etc., as Ta'zeer for the infringement of the public right under the impression of heinousness and gravity of the crime, it can award the Ta'zeer inspite of forgiveness of retaliation and blood money. This is established through the practice of Hazrat 'Umar, which is the basis of the opinion of Imām Mālik, Lays, Abu Thour and other scholars of Madinah, that the award of any specific Ta'zeer after the remission depends on the discretion of the court. This view has also been adopted by the Hanafi Jurists.

(c) In case of Ta'zeer, remission is again permissible by the law. But if it involves damage or injury to the public right also, then it depends on the discretion of the state to award punishment for the damage or the injury in the interest of general welfare of the
In case of Ḥadd, the state is absolutely stripped of any power of pardoning. It can remit the punishment neither completely nor partly. This concept is grounded in the fundamental principle that the imposition and execution of Ḥadd is an exclusive right of God which cannot be interfered with by the state. The state is not empowered to remit or suspend it but is under obligation to execute it on behalf of the community. There are two prophetic traditions supporting this perspective of the punishment.

(i) Hazrat ʿAyshah reports the Holy Prophet (peace be upon him) saying:

"The rulers should adopt a forgiving and lenient attitude in offences other than Ḥudood."  

(ii) Once in a case of theft the Holy Prophet (peace be upon him) awarded the sentence of amputation to a woman of the Makhzumī tribe and Hazrat Usāmah made a recommendation in her favour. The Holy Prophet (peace be upon him) replied:

"The people before you were extinguished only for the reason that whenever any person of high stature among them had committed theft he was not sentenced, and if any person of low stature committed theft, his hands were amputated."  

He added:

"I swear by God who possesses my soul that if Fatimah daughter of Muhammad had committed theft, I would have
amputated even her hand. 48

This categorically establishes that there is no
pardonimg power vested in the state for the crimes of
Hudood.

(b) In case of Qisas the state is equally denied any
power of granting pardon because the punishment of
retaliation primarily vests in the injured party.

(c) In case of Ta'zeer it is a unanimous view that the
power of pardoning vests in the state. The state can
remit the sentence partly as well as completely, if
there is no infringement of private right. 49

Flexibility

nd variation (a)

The punishments of Hudood are neither flexible nor
variable. They are awarded irrespective of the status
and reputation of the person. It means that they are
awarded indiscriminately to all kinds and categories
of people whether they belong to respectable and well-
reputed classes or disrespectful and ill-reputed gro-
ups and communities. This non-discriminative mode of
punishments underscores the fundamental egalitarianism
of Islamic legal system where people living in the
upper brackets of society are reduced to the level of
the filings and off-scorings of humanity, where a king
with his crown is chiselled down to the status of a
beggar with his bowl, where a princess with her silver-
spoon upbringing is trimmed down to the pedestrian ex-
istence of a skimping semstress, where the difference
between the ruler and the ruled is slashed down to an
equity which flouts all Western claims of the equality
of human beings. As we have already narrated a Prophetic
tradition reported by Hazrat 'A'ishah and recorded by
Imâm Ahmad, Abu Daud, Nasâî and Bayhâqî, the Holy Prophet (peace be upon him) said:

إِقِيرًا ذَوِي الْهَيْثَائِينَ إِشْرَابُهمَّ الْلَا يَغْفِرُونَ

"Rulers should take a lenient view, except in Hudood."

Imâm Sanâî has also mentioned a second meaning of this Tradition in the following words:

"A lenient view should be taken for non-habitual offenders, except in Hudood."50

In case of hudood, the status of the offender or that of the convict is absolutely immaterial. Imposition of punishment, its nature and quantum, are not affected by the superior position or inferior grade of the person whose offence falls within the area of application of the penalty of Hadd.

(b) In case of Qīṣâṣ, as in the case of Hadd, no flexibility or variation in the punishment is permissible.

(c) In case of Ta'zeer, however, the punishment is variable and flexible. Persons who are of good repute and possess a non-criminal record of character are awarded a relatively lesser punishment if they commit an offence liable to the punishment of Ta'zeer. But if the same offence or act is committed by a person who not only enjoys bad reputation but is also a known criminal or a habitual offender, he is awarded a comparatively severer punishment. This variation and flexibility in the nature and quantum of Ta'zeer is already explained through the Prophetic tradition quoted above.51

It follows that the punishment of Ta'zeer is subject to the psycho-social stability and dislocation of the offender: it varies from person to person and from character to character and, therefore, conforms to both
social and psychic parameters of a human personality. With a remarkable feat of legal finesses, it eschews the pitfalls of the Western penal system and wriggles out of the blind-alley of their insularity into the spot-light of human sensitivity and understanding. Those adverse critics of Islam, who in a package deal of hostility, accuse it of narrowness and constriction, are advised to revise their verdict by an impartial probing of their own moribund attitudes. Through a mere juxtaposition of the two polities and a dispassionate dissection of their contents, they are bound to arrive at a conclusion that may joggle them out of their prejudiced complacency. It is stated:

"The punishment of Ta'zeer changes with the change of people." 52

It is a slap in the face of those critics of Islam whose tongues know no respite in wagging ill against its petrified punishments. They, in their blind rage, concentrate only on the inflexible system of punishments, which in their own way, are directed by infinite divine wisdom and omniscience, denied to the cramming and crouching flight of the human mind and imagination, and perversely brush aside and shrug away the element of flexibility, latitude and leniency in Islamic punishments. This statement is bolstered up by another statement:

"The punishment of Ta'zeer varies due to the variation
of gravity of the offence and the offender." 53

(b) In case of Hadd, no damages are awarded to the convict even if he is severely injured during the execution of the punishment. 54

(c) The same condition is applicable in case of Qisās.

In case of Ta'zeer, different interpretations are possible. If any severe injury or damage occurs during the execution of the punishment, some Jurists believe that damages are permissible, 55 but Imam Abu Hanifah and Imam Malik disagree with them believing that Ta'zeer, like Hadd, does not involve any damages because the right of execution of punishment in case of Ta'zeer and Hadd possess the same validity and legality. 56

Scholars who accept the provision of damages in case of Ta'zeer have based their view on the practice of Hazrat 'Umar when he, awarding the punishment, terrified a woman to the extent that she suffered premature delivery. As a compensation, Hazrat 'Umar paid her the blood money, both for the involuntary abortion and the pain that accompanied it. 57 Obviously, he interpreted abortion as murder. Therefore, on the basis of this precedent, the jurists do not observe any distinction between Qisās and Ta'zeer in terms of the accruing damages.

The execution of Hudood is suspended if any doubt is established during the proof of crime. This practice is validated by a Prophetic injunction:


Hudood should be suspended on account of doubts." 58

The same injunction is differently phrased by Abu
"Leave out the Hudood if you find any excuse." 59

Another Prophetic injunction is reported by Hazrat 'A'ishah in the words:

"As far as possible, guard the Muslims against sentencing them by Hudood. If there is any other way out (alternative) for them, you should allow them this concession (or option). It is better for the head or the court to err in forgiveness than to err in punishment." 60

(b) The benefit of doubt is similarly extended in case of Qisas.

(c) Ta'ezeer is not suspended or remitted on the basis of doubt. Therefore, benefit of doubt is not extended in case of Ta'ezeer because Ta'ezeer is essentially a discretionary punishment. The concession of benefit of doubt is awarded for minimizing the penal gravity and heinousness, whereas Ta'ezeer is already a kind of minimized punishment. Therefore, the extension of additional benefit of doubt in this case is tantamount to an exercise in misplaced levity and sheer superfluity. 61

Minority (a) Hadd is not awarded to a minor. 62

This view is based on the Prophetic injunction narrated by Hazrat 'A'ishah:

"The following three categories of persons have been exempted from penal liability:
(i) A sleeping person unless he awakes.
(ii) A minor unless he attains puberty.
(iii) An insane unless he achieves sanity. 63

(b) The punishment of Qisāṣ is also inapplicable to a
minor because he has not achieved the requisite level
of consciousness that makes him responsible for his
acts.

(c) The punishment of Ta'zeer is applicable to minors
also. 64

retraction (a) If the offender or the convict retracts from his admi-
session, the awarding of Hadd sentence will be affected
because this retraction creates doubt and, therefore,
on the basis of the benefit of doubt, its execution
will be invalidated. 65

(b) The same applies to Qisāṣ.

(c) Retraction from admission or witness does not affect
Ta'zeer.

acession (a) There is no concept of succession in cases of Hudood,
according to the generally accepted view of the Juri-
sts. 66

(b) The privilege of succession is absolutely allowed to
the heirs in cases of Qisāṣ. 67

(c) This privilege is not allowed in crimes of Ta'zeer.

claim of aggrieved party: (a) The cognizance and trial of the case of Hadd does not
depend on the claim or filing of the suit of the aggr-
rieved party, with the exception of the Hadd of Qazf
(false allegation of adultery). 68

(b) The cognizance and trial of the case of Qisāṣ absolu-
ently depends on the claim or filing of the suit of the
aggrieved party. 69

(c) Ta'zeer varies from case to case. If the infringement of the public right preponderates in the offence, its cognizance is immune from the claim of the injured party. If the private right preponderates, the claim of the party is deemed to be necessary.

IV. Basis of Trilateral Classification:

The three-fold classification of punishments into Hudood, Qisas and Ta'zeer is based on following grounds and reasons:

There are various values of human life which need the positive protection of law. The violation of these qualities which are desirable or estimable for their intrinsic worth, therefore, require various grades of punishment. The nature of punishment for every crime should be directly proportional to the degree of outrageou

ness associated with the commission of the crime. There are crimes which exceed all bounds of decency and reasonableness. They are extremely and shockingly offensive. In an outburst of sheer wickedness, they arouse the strongest hatred and revulsion in human beings; there are others which trigger off a less abominable response. It is a human impossibility that crimes committed by human beings should observe a regular and uniform pattern as far as their intensity or their quantum of outrageou

ness is concerned. Besides, it is a natural phenomenon that the reaction to an action is not always predictable. The reaction may or may not fulfil the desired expectations both in terms of suddenness or delay and the degree of its unfolding complexity. So the Islamic system of punishments gives reasonable latitude to the psychic needs of human beings as well as to the unpredictable vagaries of
human response to natural phenomena. Islam has placed the preservation of human chastity and reputation, safety of life and property, safeguarding of intellect and religion and protection of integrity of state at the highest pedestal. Therefore, the crimes which involve a violation of these most precious values are subject to those punishments, the nature and quantum of which have been directly fixed by Shariah. The main purpose of this discrimination is to signify the heinousness and utter repulsiveness of these crimes. Thus, on the basis of this gradation of values, these crimes are known as crimes of Hudood and Qisas, whereas other criminal acts which involve violation of a comparatively milder or marginal value are placed in the category of crimes of discretionary punishment.

Shariah has classified the punishments on the basis of this criterion also. It is a human and social requirement that all sentences awarded in different crimes should neither be exclusively pardonable nor exclusively unpardonable. This accounts both for the flexibility of punishments which is an equilibrating factor in any penal system. Therefore, the Islamic Law has classified the punishments into three sectors:

(a) Unpardonable and irremissible:
This sector relates to the punishments of Hudood which can neither be remitted by the injured party nor by the state.

(b) Pardonable and remissible by the injured party:
This sector relates to the punishments of Qisas and Divat. The right of pardon and remission basically vests in the aggrieved party. Therefore, the state itself does not possess any right to pardon or remit the sentence.

(c) Pardonable and remissible by the state:
This sector relates to the punishments of Talzeer. In
this kind of punishment the right of pardon and remission is vested in the state. It is the prerogative of the state to remit a sentence partly or completely, depending entirely on its own interpretation of the criminal act, and on the circumstances in which its commission materializes.

Shariah has also classified the punishments on the basis of discretionary powers posited in the state or the judiciary into three slots:

(a) No discretionary power is vested in the state or judiciary as far as the punishments of Hudood are concerned. It can neither increase or decrease the quantum of punishment and the alteration or substitution of its nature is also outside the scope of judicial discretion. Therefore, whenever the punishment of Hadd is applicable to a criminal act, its complete execution becomes mandatory on the state.

(b) In punishments of Qisas, the state possesses the judicial power but it is rather defective and limited. If only Qisas is pardoned or remitted by the party, the state has the discretion to award the sentence of blood money, and if it is also remitted by the party, the state is supposed to award Ta'zeer in order to satisfy the clause of violation of the public right involved in the commission of the crime.

(c) In punishment of Ta'zeer, the state is vested with complete judicial discretion unless there is an involvement of violation of the public right.

Shariah has classified the punishments on the basis of various requirements of proof also. In cases of Hudood and
Qisās, Shariah has fixed the number of witnesses, as, for example, in case of adultery and its false allegation, minimum required number of witnesses is four. In all other cases of Hadd and Qisās, minimum required number of witnesses is two. No crime liable to Hadd and Qisās can be proved by a single witness. But the crimes of Ta’zeer sometimes can be proved even through a single witness.

Shariah has also classified the punishments on the basis of their variational characteristics. Hadd and Qisās are invariable punishments. But the punishments of Ta’zeer are variable. They are determined by the gravity of the criminal act, the peculiar set of circumstances in which the act is committed and other relevant factors that have a direct or indirect bearing on the incidence of the crime or throw some light on its clarification and evaluation. This classification is grounded in an element of sanity and rationality. An indiscriminately prescriptive uniformity, without explicit divine sanction, frequently degenerates into sheer absurdity because it ignores the diversity of human reality. Besides, crimes are committed not in the immobile hollowness of a tube or in the geometrical design of an inanimate cube. They are committed, directly or indirectly, against human beings and by human beings. Since the agents are living beings, the strings attached to human liberty must be lubricated with the springs of human vitality. Thus the elasticity of discretionary punishment is quite in keeping with the psycho-spiritual imperatives of human nature.

V. Multiple classification:

In Islamic penal system, the punishments are broadly divided into various categories on different basis/grounds.
These divisions are listed and briefly explained as follows:

1. Original punishments:

These are punishments which are originally and primarily fixed by the Shariah for commission of crime and cannot be shuffled or juggled around by any human authority. For example:

- Retaliation for murder,
- Hundred lashes or stoning (rajm) for adultery,
- Amputation of hands for theft, etc.

2. Substitutary punishments:

These are the punishments which are awarded as substitutes for original punishments when the enforcement or execution of these punishments is not possible on account of some legal reason or technical hitch. For example:

- Blood money as a substitute for Qisās.
- The substitution of Hadd or Qisās by Ta'zeer.

The replacement becomes inevitable in crimes where Hadd or Qisās is suspended though the crimes are originally liable to the two fixed punishments.

These substitutary punishments, in fact, in their primary capacity, also possess the character of original punishment. They are transformed into substitutary punishments only in cases where original punishments are applicable but become ineffective and unimplementable on account of the development of a legal or technical snag. In such special cases alone the substitutary punishments replace the original punishments and are elevated to their functional and structural status. For example:

- Diyat or blood money is actually an original punishment fixed for the crime of quasi-intentional homicide (القتل غير العمد).
It, however, turns into a substitutory punishment in the case of wilful homicide when the punishment of Qisās is not awarded for legal reasons.

The same applies to the punishment of Ta'zeer. Ta'zeer is, in fact, an original punishment prescribed for those crimes which do not invite the application of Hadd and Qisās. Chastisement is an obvious instance of these crimes. Therefore, in crimes, where Hadd and Qisās are applicable but cannot be applied for certain legal or technical bottlenecks, the Hadd or Qisās is replaced by Ta'zeer. Hence, in these cases Ta'zeer becomes a substitutory punishment.

This brief discussion establishes the fact that substitutory punishments are characterized by a dual capacity. They possess the characteristics of both originality and substitutiveness.

3. Dependent and derivative punishments:

These are the punishments which are derived from original punishments. These punishments are awarded only in cases where the criminal has committed an offence, subject to the imposition of original punishment. The nature of the crime attracts the infliction of original punishment but for any technical or legal reason the original punishment is suspended and another punishment is applied in its place. This punishment, however, directly depends on the original punishment. It is not independently conceived. It derives its character and configuration from the original punishment.

For example:

Deprivation of the murderer from his legal share of inheritance. The murderer is awarded two kinds of punishment
for the crime of murder - the first is the original which is imposed on him because he has committed murder. The second one springs from the first punishment. If the murderer is one of the legal heirs of the murdered, he will be deprived of the right of succession to which he is entitled in the normal course of circumstances. The act of murder has substantively altered the fact of succession. Therefore, the second act of deprivation depends on the first act of murder. If he had not committed the act of murder, he would not have been deprived of his entitlement to succession. Hence this additional punishment is known as derivative or dependent because its implementation or realization directly depends on the existence of the original punishment.

Another example is the deprivation of the slanderer (a man who is convicted for false allegation of adultery) from the right of testimony, because, according to Islamic law, the evidence of a slanderer is not permissible in the court. The slanderer, in fact, receives double punishment: he is awarded eighty stripes for the crime of false accusation on the basis of original punishment, and is also deprived of the right of testimony. The second form of punishment is a derivative punishment because it has no independent or original existence and is a by-product or unintended consequence of the first and original punishment.

Complete punishments: 4. Complete punishments

These are the punishments which do not add anything substantial to original punishments but only contribute to the completion and effective materialization of their objectives. Their function is cumulative and accretional rather than essential. These punishments can be awarded by the court on the
basis of fulfilment of a special requirement. An express additional order of the court is essential for the imposition of all completeive punishments. They can not be arbitrarily executed by enforcing agencies.

The hanging of the amputated hand of a thief at a public place after its amputation is an illustration of a completeive punishment. This example is given by the Muslim jurists who believe that the chopped-off dangling hand serves as a warning both to the convict and the people.

5. Invariable punishments:

These are the punishments which are invariable and unchangeable and the state does not possess any authority to increase or decrease their quantity. The fixed punishments fall within the scope of this category.

6. Variable punishments:

These are the punishments which are graded on the basis of the heinousness of the criminal element. The decisions relating to these punishments follow a fluctuating pattern because they are not pre-determined and are dictated by the ratio of outrageousness or the proportion of revulsion that a criminal act generates.

The punishment of imprisonment or stripes in case of Tal'zeer is an example of this category. These punishments vary from case to case and the nature of this variation depends on the discretionary authority of the state.

7. Obligatory or prescriptive punishments:

These are the punishments which deny any right of pardon or remission to the state. If the crimes are proved beyond doubt, their execution becomes obligatory on the state without
any alteration or substitution. The state can neither think around with the question of their relevance nor squirm out of the inevitability of their implementation.

Selective punishments:

These are the punishments which involve an element of selection and option. In other words, the element of option operates within a selective range of preference and not within an amorphous jungle of unlimited priorities.

When a number of punishments are prescribed for the same crime and it is left to the option of the court to select either of these or to combine any two of these, the court has the discretionary power to opt for any alternative:

For example, in the cases of robbery, dacoity, sedition and rebellion, Qur'an has prescribed the following four punishments as Hudood:

(a) decapitation.
(b) execution by hanging
(c) amputation of hands and feet of opposite sides i.e., right hand and left foot, or left hand and right foot.
(d) imprisonment or transportation.

The court is granted the discretion to opt either of these four or a combination of any two of these punishments. It is, however, made quite clear that these options should be exercised in strict pursuance of the balance between the gravity of the crime and the sanguinity of the punishment. Another example relates to Ta'zeerāt. Several punishments may be prescribed in any case of Ta'zeer but it is left to the choice of the court to select either of these substitutes or to combine more than one alternative to punish the offender.
9. Physical punishments:
These are the punishments which are inflicted on the body of the criminal. They carry only physical repercussions for the offender and pose no threat to his mental equilibrium. For example:
- death punishment
- punishment of lashes
- punishment of imprisonment, etc.

10. Minatory punishments:
These are the punishments which are not inflicted on the body of the criminal but affect the functioning of his mind by threatening his sanity. They also serve as warnings and incentives for the reformation of the criminal in particular and the people in general.

11. Monetary punishments:
These are the punishments that relate to financial matters and involve some form of drain on the monetary resources of the offender:
For example:
- punishment of blood money
- fines payable in currency or other corporeal property.

12. Fixed or stationary punishments:
These are the punishments of Hudood.

13. Retaliatory punishments:
These are the punishments of Qisas and Diyat.

14. Discretionary punishments:
These are the punishments of chastisement.
Expiatory punishments:

These are the punishments fixed by the Shariah in the form of atonements, in cases of Qisās, Divat or Ta'zīer. Qur'ān and Sunnah prescribe these punishments in case of violation of some religious duties. For example:

expiation for failure in up keeping the oath: that is the feeding or clothing of ten indigent persons, or obtaining someone's freedom or fasting for three days

and atonement for premature breaking of the fast: that is the fasting for sixty consecutive days, or the feeding of sixty indigent persons etc.
NOTES

    (b) Al-Munjīd, Vol.I, p.120.
8. Ibid.
    (b) Al-Munjīd, Vol.I, p.120.
    (c) Badāʻīʻus-Sanāʻi, Vol.VII, p.33.
15. (a) Al-Mabsūt, Vol.IX, p.36.
    (b) Muheet-ul-Muheet, p.154.

16-A.

18. Qur'an 18:64.
25.(a) Al-Ahkām-us-Sultāniyyah, p.236.
27. Ibid.
30. Subul-us-Salām, Vol.IV, p.21 (Quoted from Nasāʾi and Ibn-i-Mājah)
32. Ibid.
33. Ibid.
37. Qurʾān 5:45.
41. Ibid.
   
44. (a) *Subul-us-Salām*, Vol.IV, p.37.
   
47. *Subul-us-Salām*, Vol.IV, p.20 (Quoted from Bukhārī, Muslim).
   
   (b) *Al-Ahkām-us-Sultanīyyah*, p.237.
   
   
   
53. *Al-Ahkām-us-Sultanīyyah*, p.236.
54. *Al-Ahkām-us-Sultanīyyah*, p.238.
57. (a) *Al-Ahkām-us-Sultanīyyah*, p.238.
   
60. (a) Jāme Tirmazi, pp. 313-314.


(b) Kitāb-ul-Ikhtiyār, p. 4.

63. Fīgh-us-Sunnah, Vol.II, p. 415 (Quoted from Musnad Ahmad, Tirmazi, Abu Dā'ud, Nasāi, Ibn-i-Majah and Hākim)

64. Kitāb-ul-Ikhtiyār, p. 4.

65. This view is adopted by the Hanafi, Shāfei and Hanbali schools of law. They have based their opinion on the Prophetic Tradition relating to the execution of the punishment of rajm to Māiz, narrated by Abu Hurayrah and Jābir, reported by Ahmad, Tirmazi, Abu Dā'ud and Nasāi — quoted in: Fīgh-us-Sunnah, Vol.II, p. 416.


67. Ibid.

68. Ibid, p. 6.

69. Ibid.
CHAPTER - II

LEGAL STRUCTURE OF PUNISHMENTS

A. HUDOOD

1. Modes of Proof.
2. Conditions of Validity.
3. Right of Execution.
4. Time of Execution.
5. Mode of Execution.

B. QISĂS

1. Modes of Proof.
2. Conditions of legality.
3. Conditions of Execution.
4. Mode of Execution.
5. Right of Execution.

C. TA'ZEER

1. Legal Character.
2. Lawful Kinds.
3. Quantum.
4. Right of Execution.
5. Mode of Execution.

D. CAUSES OF NEUTRALIZATION OF PUNISHMENT
LEGAL STRUCTURE OF PUNISHMENTS

This chapter discusses in detail the legal structure of Hadd, Qisâq and Ta'zeer in the light of their respective constituting elements, conditions, juristic characteristics and their modes of execution.

HUDDOD: (FIXED PUNISHMENTS)

Modes of proof.

I. Modes of Proof:

There are two modes of proof for crimes of Hadd, recognized by Islamic law of evidence:

(i) Confession (اَعْتراف)
(ii) Testimony (شَهَادَة)

In the Prophetic period, approximately all cases of adultery in which the Hadd was awarded, were proved through the confession of the offender as expressly established by the cases of Maiz and Ghâmidivyah. There is no difference of opinion among Muslim Jurists as far as the validity and authenticity of this mode of proof is concerned. However, a differential element is involved in the case of adultery in regard to the mode of confession.

Number of Confessions

Maliki & Shafei View

According to Imam Malik, Imam Shafei, Da'ud Zahiri, Tabari and Abu Thour only a solitary confession is sufficient to prove the crime which predicates the imposition of the punishment of Hadd. They believe that a repetition of confession is superfluous: it is more in the nature of an undesirable embellishment than a desirable substantiation. They have based their view on the Prophetic tradition narrated by Abu Hurayrah and Zayd bin Khâlid. According to this tradition, the Holy
Prophet (peace be upon him) asked 'Umayr to probe into the commission of adultery by a woman. The purpose of the inquiry was to plug all lacunae of doubt and to give a fair trial to the woman. She was asked to make a confession of her involvement in the act of adultery as the imposition of punishment depended on her confession. The woman replied in the affirmative and consequently she was stoned to death. Since this tradition does not specify the number of times a confession has to be made and mentions only the word confession without its quantitative delimitation, only a single and unrepetitive instance of the confession is sufficient to establish the commission of crime.¹ On the other hand, the Hanafi Jurists do not recognize a solitary occurrence of confession to be self-sufficient or as a decisive mode of proof for Hadd. They believe the confession of adultery should be made four times in separate meetings, and not even in a single sitting.² Their argument is based on a kind of structural paralellism. It derives from the sanctity of practice and not from a logical justification. Their presumption is that since the evidence of at least four witnesses is required to establish the incidence of adultery, the same number of confessions should also be required to justify the imposition of Hadd. Since the confession means substitution of testimony, the same number of confessions is necessary to prove the crime beyond doubt. In order to eliminate the possibility of any lurking doubt or prowling suspicion, they have further restricted the mode and manner of confession: they are of the opinion that the prescribed number of confessions should be spaced out in four different meetings held over different periods of time.

Imām Ahmad and Ishāq endorse the Hanafi point of view
with the qualification that the requirement of four separate meetings for the confession is not necessary: all of the four confessions can be made in a single meeting and they need not be stretched out over four different sittings.\(^3\)

In fact any crime liable to Hadd other than adultery can also be equally proved through confession. The restriction of specific number of confessions, therefore, should be congruent with the facts of the case. Since the objective of restricting confession to a specified number of times is to remove the element of doubt and prove the incidence of crime in an irreproachable manner, it can be achieved through the cross-examination of the court. If the truth is established in the first instance consisting of four confessions and it is free from any sneaking doubt or suspicion, then the specification or fixation of its frequency in different meetings becomes superfluous and to insist on its rigid and unbending application, is only an exercise in scholastic schizophrenia. This principle is grounded in an express Prophetic Sunnah whereby Holy Prophet (peace be upon him) cross-examined Meiz Aslami and ultimately sentenced him to Rajm, after his four express confessions. It is stated:

"مَنْ شَهَرَ عَلَى نَفْسِهِ أَرِبَعَ شَهَادَاتٍ فَأَمْرَهُ يَسْتَوِيَ اللَّهِ الطَّالِبِ وَسُلَطَانَ غُرْمَ "

"He made four express confessions against himself then Holy Prophet (peace be upon him) ordered him to be sentenced, and he was consequently stoned to death."

But, if at the time of first meeting, in spite of cross examination, the possibility of doubt remains, no matter how nebulous or indefinable the ingredient of doubt is, the confession may be arranged in separate meetings spread over different periods of time. In this case the extension of the concess-
ion of repetitive confession serves a double purpose: it helps the confessor to rearrange his personal recollection of the criminal act, and make further additions, eliminations or reductions in the earlier version; it also helps the court to arrive at a better and more factual reinterpretation in the light of the new evidence which can serve the cause of justice in a more commendable and dispassionate manner. The principle of different confessions in different meetings is also established through the same Prophetic practice according to the version of Imam Muslim. 3-B

II. Testimony

Second mode of proof in case of Hadd is the testimony which is also indiscriminately accepted by all the Muslim Jurists. However, the validity and acceptability of this mode of proof depends on the fulfillment of certain conditions.

(i) Number of witnesses: (غمر الأشدود)

The required number of witnesses in all cases of Hadd is two but four are necessary only to prove adultery and slander. The Qur'ān explicitly states in reference to adultery:

"Confront those of your women who are guilty of unbecoming conduct with four witnesses from you." 4

Qur'ān states in reference to slander:

"And those who launch a charge against chaste women, and can not bring four witnesses, flog them with eighty stripes." 5

The required number of two witnesses generally prescribed in all cases liable to Hadd is based on the Qur'ānic order:
"They should bring the witness of two men from you." 6

(ii) **Puberty:** (البلوغ)

Every witness should be an adult person because the witness of a minor is not acceptable in Islam. This concept is based on the segment of the Qur'anic verse mentioned above where the word "٦٦" signifies only the adult persons.

(iii) **Sanity:** (العقل)

The witness of a sane person is acceptable only because an insane person is not permitted to give evidence in any law.

(iv) **Character and integrity:** (العدالة)

Qur'an prescribes:

"Two persons of good character from you should be witness." 7

(v) **Islamic Faith:** (الإسلام)

A witness should be a Muslim. Whether his evidence is in favour of or against a Muslim or a non-Muslim is immaterial as far as the legal aspect is concerned.

(vi) **Observation:** (المعاينة والشاهد)

A witness should give evidence on the basis of his personal observation and not on hear-say or second-hand information.

(vii) **Linguistic clarity:** (التصریخ)

The evidence should be couched in plain and straightforward phraseology and non-figurative language. It should eschew metaphorical and figurative expressions to absolutely minimize or eliminate the possibility of any ambiguity. It should rely on the denotative aspects of words and not on their connotative implications.
(viii) **Unity of time and place:** (٢) **ارتداد**

It is generally observed that the whole testimony should be completed in one and the same meeting. If various witnesses to the same instance or event give evidence on different times and at different places, the testimony would not be acceptable in Islamic law. However, Shāfei, Zahirī and Zaydi scholars do not recognize the unity of time and place as an indispensable element of evidence.

(ix) **Masculinity or Sexual discrimination:** (٢) **الذكَرَةُ

In cases of Hudood the witness of male members alone is permissible. However, Ibn-i-Hazm has accepted the possibility of female witnesses in cases of adultery on the principle of the double number of the females. 8

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**Conditions of validity of Hadd:**

2. **Conditions of validity of Hadd**

The punishment of Hadd can be awarded only if the convict fulfils the following conditions:

(i) Puberty
(ii) Sanity
(iii) Volition and incoerciveness
(iv) Absence of doubt in proof of the crime
(v) Fulfilment of all required elements of crime liable to Hadd.

**Right of execution:**

3. **Right of Execution:**

Muslim Jurists admittedly and unanimously agree that the right of execution of Hadd exclusively vests in the state. Its execution is a pure public right. Therefore, it can neither be exercised privately nor arbitrarily. Imam Tahhawi has reported a tradition from Muslim bin Yasār:
"Collection of Zakat, execution of Hudood, possession of fay and regulation of the Juma prayer are exclusive rights of the state." 9

That is why its execution is obligatory. It can neither be pardoned nor remitted nor suspended. However, a specific reference to the rights in this tradition does not cancel the state's responsibility to enforce other basic laws of the Shariah. There are many Prophetic traditions which refer to the responsibility of the state in other areas of social, moral, political, economic and religious liabilities. An aggregate of various traditions stresses the diverse powers of the state and contributes to the complexity of the Islamic legal system, a system which at best may be described as the holiest alliance of stringency and pliancy, a system that suggests the infinite might and mercy of God Almighty and makes Islam unique among the revealed religions.

Bayhaqi has also drawn on the tradition narrated by some of the companions and their followers:

لا يحق لاحترامٍ يقيم شيا من الخ medidas دون السلطان

"No body has the right vested in him originally to enforce any Hadd except the state." 10

The courts or the implementing agencies award or execute the punishment of Hadd on the basis of the authority vested in them by the state.

Imam Marghinani has reported a Prophetic tradition:

إمزج إلإ للولاية (خُذُّرِكْ لِلْفَرْدُ)

"Enforcement and regularization of four things is the exclusive duty of the state; and he mentioned Hudood as one of them." 11
The same tradition with slightly different phraseology has also been reported by Ibn-i-Abi Shaybah and Al-Kharāṣi
ni.

**Time of execution:**

4. **Time of execution:**

The time of execution of Hadd is also subject to certain conditions. There are two views in this respect. The first view is framed by Murawwazi and the second is formulated by Isfarā'īni. The former suggests that the execution of Hadd should be avoided during severe ailment and extreme weather conditions, the punishment should not be inflicted during the spell of blood melting heat or during the span of blood-curdling cold. Extreme seasonal severities render the punishment temporarily void which may be executed on the return of temperate climatic conditions.12 Same view is supported by Shaukānī and most of the Muslim jurists of various schools. But the latter allows this exemption only during severe physical incapacitation.13 In case of the punishment of adultery it is unanimously agreed that a pregnant woman should not be executed till delivery and completion of the period of fosterage.

**Mode of execution:**

5. **Mode of execution:**

(a) Imam Abu Hanifah and Shafī' believe that in case of execution of lashes, the stripes can be inflicted on all organs of the body except the head, the face and the private parts.14

(b) The striking part of the lash should be neither too hard nor too soft and the strokes inflicted on the body of the offender should be of moderate strength or intensity. They are presumed to be neither too severe nor too mild.15 The striker should maintain a balance between the extremes of severity and gentility to generate the impression that during the act of
flogging he is being motivated neither by unnecessary vengeance nor by misplaced sympathy.

(c) During the infliction of strokes, the striker should neither raise his hands above his head nor come down very low. Stripes should be applied from a moderate point of vantage and not from an immoderate height or level. 15-A

(d) Males should be inflicted the lashes, standing and the females, sitting, as reported by Hazrat Ali. 15-B

(e) The lash should neither be metallic nor of any other material which may break the bone. 15-C

(f) If the convict is a patient, sentence should be executed only after his recovery or in a tolerably lenient way. 15-D

Constitution of Hadd:

6. Constitution of Hadd:

The punishment of Hadd is constituted by the amalgamation of two categories of rights:

(a) Rights of God.

(b) Rights of the people.

The rights of the people constitute the original element of the punishment whereas the right of God constitutes the concrete form of punishment. 16 The execution of Hadd, that is, right of God which vests in the state, is possible only when the required conditions of a crime liable to Hadd are completely realized. If any necessary condition remains unfulfilled, or the execution of Hadd becomes improper or impossible on account of some lawful reason, then the execution of Hadd is suspended, but this suspension does not involve a negation of the original element of punishment. That is left undisturbed as it is the right of the people which can not be waived or tampered with. Therefore, the neutralization or suspension of
Modes of Proof

Hadd may be replaced by the imposition of Ta'zeer. It follows

1. Modes of Proof

Qisas is also proved through two modes:

(i) Confession

(ii) Testimony

In case of testimony the witness of only two male adults is required. Other conditions are the same as prescribed in case of Hudood.18

Conditions of Legality

2. Conditions of Legality

The punishment of Qisas or blood money can be awarded only if the following conditions are fulfilled:

(i) The act of murder should be an unlawful act:

If a non-Muslim was killed during state of war, or if a married convict was stoned to death or if an apostate or a rebel or a dacoit was killed under the provision of law, neither Qisas nor Diyat can be claimed because these are lawful murders. Abdullah Ibn-i-Masud has reported a tradition of the Holy Prophet (peace be upon him):

لا يحل ذمّ أمراً; مسلم يشهدان لا إله إلا الله و.rnnw رنٌامٌ الله الآخر ربنا

النفسي بالنفسي، والثيب الزاني، والمفارض لدينها النازك للجماعة

"The blood of any Muslim who is witness to Tauhid and my Risalah is not permissible except in three cases: murderer, married adulterer and the apostate who causes disunity in the community."19

(ii) Puberty.

(iii) Sanity.

(iv) Intention.
The condition of volition implies the offender's freedom from coercion and external pressure. It is held by many jurists that if the head of the state or any other coercions coerces a man to murder anybody without lawful right and he consequently commits the murder, the murderer will be awarded Ta'zeer whereas the coercive authority who forced the man to commit the murder, would be awarded capital punishment. This view is adopted by Imam Abu Hanifah, Daud and Zahir. One of the two reported opinions of Imam Shafei also supports this view.

The second reported opinion of Imam Shafei prescribes discretionary punishment for the coercive authority and Qisas for the actual committer of the murder. This view is based on the idea that the punishment of Qisas must be awarded even if the offence is committed under compulsion and coercion. If the act of murder is intentional, its being unconsented does not even make any difference.

According to the Maliki and Hanbali view, if the legal heirs of the murdered do not remit or pardon the punishment, both the actual committer and the coercions, would be equally awarded the death punishment of Qisas. The conclusion is that external compulsion and coercion can at the most give rise to an unconsented act but inspite of its being unconsented it remains intentional. Because an intentional act can be consented as well as unconsented. If the offender takes the plea that he was pressed or coerced by any powerful person to kill the murdered and therefore his act of murder was not a consented act, his plea should not be accepted because although the act was unconsented, yet it was intentional and the principle laid down by Islam is:
"No obedience to any creature is permitted, if it amounts to disobedience of God. It is permitted only in the acts of piety and righteousness." 24

Therefore, the actual murderer cannot escape the punishment in any form.

(v) Absence of parentage:

The murderer should not have a paternal relationship with the murdered. If a father kills his son, according to classical Fiqh, he would not be awarded the death punishment as Qisas. Jurists have derived this view from the Prophetic Sunnah reported by Hazrat 'Umar:

لا يقعد الرائد بالولد

"A father should not be sentenced in retaliation of his son." 25

Ibn-i-'Abdul Barr suggests that this is a famous tradition equally acceptable to the scholars of Hijaz and Iraq, and the practice of the people of Madinah presents an irrefutable endorsement of this tradition. It is on the other hand, maintained that if a son murders his father, he would be unanimously sentenced in retaliation.

Real meanings of Prophetic tradition:

If the Prophetic Tradition is taken in its literal sense, it means the father would not be awarded death sentence for the murder of his son in any form. In my humble opinion this interpretation of the Prophetic Tradition is not correct. The fact seems to be that this tradition nullifies only the death sentence as Qisas, whereas the death sentence of Ta'zeer appears to be outside the scope of the Prophetic prohibition. The tradition simply means that if a father murders his son, he would not be awarded the death sentence in retaliation. This prohibition does not cancel out the possibility of impos-
awarded diyat, it unambiguously signifies that the negation is only confined to the Qisás and not to the punishment of Ta’zeer. This interpretation makes meaning of the Prophetic tradition quite understandable. It does not mean that the father should not be awarded the death punishment in any form for murdering his son. The Prophetic tradition actually means that the father should not be awarded Qisás; in its place he is liable to the punishment of blood money. From this it is clear that the father has no legal immunity against the murder of his son. As far as the capital punishment in the form of Ta’zeer is concerned, there is no negation because reference to the replacement of Qisás by blood money clarifies the nature of the prohibitive commandment. The point being stressed here is that only the punishment of Qisás is negated and not the death sentence in general, because for Ta’zeer there is no blood money.

This view is further elaborated by another provision which expressly states:

اذَا اشتكى الاب في مقتل ولد لا يجب القصاص على الشرب

"When a father cooperates in the murder of his son with another person, the person would not be liable to Qisás."

Here, again, the express mention of the word Qisás indicates that the provision of negation for the paternal relation is only confined to Qisás neither to blood money nor to the capital punishment of Ta’zeer: The father, and other relations who fall within this category, have been granted with the concession because the offence of murder is compoundable, pardonable and remissible in the law of Shariah. If the punishment of Qisás can be remitted, pardoned and substituted by blood money for every murderer by the initiative of the heirs,
irrespective of the fact whether they are related to the deceased or not, then one may naturally ask why could this concession not be positively granted to the father or the grand-father in the offence of murder. The negation of Qisās and retention of the capital punishment in the form of Ta'zeer, in fact, make no material difference in terms of the punishment. But, by all means, if the court wishes to award death sentence to the father for murdering his son, it can definitely award it as a Ta'zeer. The purpose served in both cases is practically the same and does not substantially differentiates one from the other. This interpretation is further supported by a Prophetic tradition, reported by Ibn-i-Abbās:

لا زكاء العداد في المساجد ولا زكاء بالولد الولد

"Hudood should not be executed in the mosques and the father should not be awarded Qisās, for his son."\textsuperscript{29-A}

The word "Al-Qoud" (القُود) is only used for Qisās, therefore, the meaning of Prophetic tradition would be presumed to be confined to Qisās only. The same can be easily inferred from the statement of Imam Mālik, which is based on the view that the father would not be retaliated for murdering his son, except when his intention of murder is clearly established and proved to be above all doubts and his act expressly amounts to wilful murder (القتل بالذر).\textsuperscript{29-C}

(vi) Unity in Faith and Equality:

The punishment of Qisās would not be imposed on a Muslim if he murders a non-Muslim at war (أجلي), because he has not been granted the guarantee of safe conduct. For the application of Qisās, it is necessary that both the murderer
and the murdered should be in fact or presumably, equal in faith. A 'Zimmi' (النّازل) who is a non-Muslim citizen of an Islamic state and 'Muḥād' (المحتاج) who is a non-Muslim visitor of an Islamic state under the lawful permission or the treaty of peace, both have been lawfully granted the guarantee of safe conduct by Islamic state, therefore, they are treated as Muslims by the law. In case anyone of them is murdered by a Muslim citizen, the latter is liable to Qīṣāṣ and the concession of exemption is withdrawn. Although the murdered is basically a non-Muslim, he is not united with the Muslim murderer in faith, yet he is granted with the permanent or the temporary permission to live under the lawful protection of an Islamic state, therefore, they are extended the similar treatment and enjoy the same fundamental rights of protection of life and property as enjoyed by the Muslims.

Some Jurists have excluded the Muṣta'lim from the right of safe conduct. But in my humble opinion they should be equally entitled to the facility of state protection enjoyed by others.

As far as the non-Muslim 'Harābī' is concerned, he is granted neither permanent nor temporary protection by the Islamic state. He is, on the contrary, treated as an enemy of Islam, being a friend or supporter of those who are pitched against the forces of Islam. This view is clearly based on the Prophetic tradition:

لا يقتل المسلم надо في خلافه

"A Muslim should not be murdered for the murder of a non-Muslim (Harābī)."

It is clearly established that the murder of a non-Muslim Harābī is absolutely not liable to Qīṣāṣ. This view
enjoys the consensus of juristic opinion, because the same
is acknowledged to be the sense of the Prophetic tradition.30-A

The view is rooted in the Qur'ānic verse:

وَكَذَٰلِكَ نَزَّلَنَا عَلَيْكَ الْكِتَابَ مُخْتَصَصًاٖ وَلِيَخْتُرُواً فِي نَفۡسِهِمۡ وَلَيۡتُمۡ لِلَّهِ مِنّمَّا تُفْسِدُونَ

"And We have prescribed for them a life for a life and an eye
for an eye, and a nose for a nose, and an ear for an ear, and
a tooth for a tooth, and equitable retaliation for other injur-
ies. Any one who waives his right, shall earn an expiation
for his sins and those who defy the enforcement of divine are
the wrong doers (non-believers)."31

In this verse the term 'a life for a life' is used in
its generic sense, therefore, we can not exclude, the Zimmi
and the Mūḥad from the scope of its application. Moreover,
it is reported in the tradition narrated by Abdur Rehman Al-
Baylmani, quoted by Imam Bayhaqi:

اِنَّ مَرْسَوْلَ اللَّهُ صلى الله عليه وسلم ۖ تَعَلَّمَ مَنْ مَسَّهُ بِمَعَادٍ وَدَخَلَهَا بِأَكْرَمِهَا مِنْ دِينِهَا

"Holy Prophet (peace be upon him) awarded the death sentence
to a Muslim for the murder of a Mūḥad, a non-Muslim alien
who had been granted safe conduct under the treaty and said,
"I am the most responsible man to fulfil the promise of safe
conduct."32

It is further supported by another Prophetic declara-
tion reported by Abu-Hurayrah:

إِنَّ مَنْ نَفَسَ مَعَاهِدَةً لَّهُ ذَمَّةُ اللَّهِ وَذَمَّةُ مُسۡلِمٍ فَقَدْ أَخَفَّى بِذَمَّةَ اللَّهِ فَلَا يَنۡبِرۡ قَلۡبُهُ الَّذِي بِقَلۡبِهِ عِلۡمٌ

"Surely! Who murders any Mūḥad, who has been guaranteed the
safe conduct by Almighty Allah and His Prophet, he definitely
commits the breach of God's promise, and, therefore, he would never enjoy even the air of Heaven."32-A

Some of the Jurists are reported to have differed with it. Since this view is extremely reasonable, sound and cogent and stresses the concept of basic human equality, therefore, it is strongly supported by Imam Abu Hanifah, Ibn-i-Abi-Laylah and others.

All Muslims enjoy equal status in the eyes of law. Their legal stature does not depend on their wealth or on the super-abundance of other material means. They have similar fundamental rights which no one can violate with impunity. As an illustration of their identical status, their lives and properties are also equally precious. Muslims are not graded on the basis of intrinsic right of superiority or inferiority. Their worth is exclusively determined by the content and quality of their actions. Thus, there is no difference of status among them in lieu of Qisas. It is reported by Hazrat Ali:

***The blood of all Muslims is equally precious and there is an equal premium on the lives of all Muslims."33***

The same is the position of a slave also. If a free Muslim murders a slave, he should also be awarded the death sentence because there is an equal premium on the blood of a free Muslim and a slave. The verdict of the Jurists is quite explicit on this point:

***"A free man should be murdered for a slave and a slave for a free man."34***
This view is also positively expressed by Qāżī Khān:

"A slave should be murdered for a free man and a free man for a slave."\(^{35}\)

This explains the unparalleled concept of Islamic justice and equality. Islam makes no difference between a male and a female, a rich and a poor, a youngster and an old man, a man who enjoys good health and a man whose health is impaired. It is clearly stated:

"A man should be murdered for a woman, an old person for a youngster, a rich man for a poor fellow, a man with eyes for a blind man, and a healthy person for the one who is ailing."\(^{36}\)

The same view is expressed by Qāżī Khān in the words:

"A healthy man and a man of perfect organs should be murdered for a patient and a man of defective organs, even if he does not possess limbs or possesses paralysed limbs; and a sane for an insane. But there is an exception: if an insane murders a sane, he is not liable to Qisās on account of insanity."\(^{37}\)

This concept of equality and justice is directly based on a Prophetic tradition, reported by Sumrah:

"Whosoever murders his slave, we shall award him death sentence, and who cuts his nose, ear or any other organ, we shall cut his organ in retaliation."\(^{37-A}\)
3. Conditions of execution

The following conditions are the prerequisites for execution of the punishment of Qisās:

(i) Puberty of the offender.

(ii) Sanity of the offender.

(iii) Consensus of the heirs of the murdered.

The punishment of Qisās cannot be executed if there is a difference of opinion among the legal heirs of the murdered. If some of them demand the Qisās and others the blood money, or some are willing for remission, the Qisās cannot be executed because of its being indivisible. Therefore, the punishment of blood money should be awarded. The consensus of the heirs is an essential prerequisite for executing the punishment of Qisās. According to Mālikī view, by the remission of even one of the legal heirs, punishment of Qisās becomes inenforceable. Some of the jurists believe that if any of the legal heirs is a minor, the execution of Qisās should be kept pending till he achieves puberty. Imam Abu Hanifah disagrees with this view, saying that the adult heirs have the right to get the punishment of Qisās executed.”

(iv) Suspension in case of pregnancy

If the murderer, liable to Qisās is a pregnant woman, she would not be executed on account of fear of death of the child in the womb. She will be executed after the delivery so that no harm or damage is inflicted on the child. This view is based on Prophetic Sunnah reported in Ibn-i-Majah. Holy Prophet (peace be upon him) said: If a pregnant woman was to be awarded death punishment as Qisās, its execution should be postponed till delivery and expiry of the necessary fosterage period. And if a woman was to be awarded punishment of stoning
to death, for commission of adultery, it should also be post-
poned till the delivery of the child and expiry of the period
of fosterage. 40

(v) Presence of the legal heirs

If the legal heirs of the deceased or murdered are
adults, they should be present at the time of execution of
Qisās because the absence of any one of them can amount to his
disagreement. 40-A If the physical presence of all of them is
practically impossible, their presence can be presumed on the
basis of their express agreement for the execution of Qisās.
If all the heirs are minors, then according to most of the
Jurists, the execution of Qisās would be dispensed by the sta-
to on their behalf.

Mode of Execution: 4. Mode of execution

There are two opinions on the subject of mode of
execution:

(i) Equality in form.

(ii) Equality in penal element.

Equality in form:

(i) According to the first opinion, the punishment should
show exact conformity to the crime because Qisās is essential-
ly a parallel punishment. It should be awarded in the same way
and in the same form in which the crime was committed. If the
murderer murdered the deceased by sword, he should be decap-
itated by sword. If he killed him by pushing or throwing him in-
to the burning fire, he should be awarded the punishment in
the same form. This view is said to be based on the Qur'ānic
verse:

والغَرَّةْ قَصَصَ فَسَنِ اعْتَدَّى عَلَيْكُمْ فَاعْتَدَدَ أَعْلَيْهِ

"And for all things prohibited, there is the law of equality.
If anybody commits any excess against you, you may transgress
against him in the same proportion.”

It is supported by another verse in the Holy Qur’an:

وَإِنَّ عَرَقَةَ عَرَقَةً عَوَّابُ مَا عَرَقَتْ بَيْنَهُا

"If any excess were committed on you, you should reciprocate in the same way.”

Moreover, this view is based on a Prophetic Tradition reported by Hazrat Darā’, in the words:

مَن عَرَقَ عَرَقَّاهُ وَمِن حَرَقَ حَرَقَاهُ وَمِن عَرَقَ عَرَقَاهُ

"If a person killed anybody with an arrow, we will punish him in the same way, if he killed him by burning, we will punish him in the same way, and if he killed him by drowning, we will punish him in the same way.”

(ii) Second opinion derives its authenticity from the Hanafi school of Law. According to this view, the punishment of Qisās should not be awarded absolutely in the same form as discussed above. Only the condition of equality and balance is required between the crime and the penal element. If the murder was committed by an offender in a ruthless manner, it is sufficient to award him the punishment of death as Qisās but it is neither necessary nor permissible for the court or the state to execute the Qisās punishment in the same ruthless manner. This will amount to an act of barbarity on the part of the state. Islam, being essentially the religion of humanity, cannot encourage and patronize this inhuman treatment even against the offender. This view is based on two Prophetic traditions:

(i) The first is reported by Hazrat Hasan and Abi Bakrah quoted by Bazzar and Ibn-i’Ali:

لا تُوَلِّوا السيف (أَدِيدًةً)

"There should be no execution of Qisās except by sword.”
(ii) The second is based on the prohibition of inhuman ways of murdering. The Holy Prophet (peace be upon him) said:

إذا قتلتم فأخسروا الفعلة، داراذا يرحم فأحسسوا الذرة

"When you execute any person to death, do it properly and humanely, and when you slaughter any animal, do it with the least possible torture." 15

The first view is adopted by the Mālikī and Shāfī scholars, whereas, the second, by Hanafī school which permits the execution of Qīsās only in the form of decapitation. 16 According to Hanafī view, the two verses of Qur'ān, mentioned by the Shafei and Mālikī scholars in support of their view indicate only the equality and balance between the gravity of crime and the sanguineness of punishment. This means that the equilibrium which is the essence of the meaning of the word Qīsās is confined only to the penal element and not to the mode of execution. The latter view appeals more to reason.

5. Right of execution

The right of execution of Qīsās primarily vests in the legal heirs of the deceased. Since they are not in a position to implement its execution on their own, therefore, it is exercised on their behalf by the state. 47 There is no second opinion, according to Jazeeiri, on this view. 48 Therefore, the right of Qīsās is available to the aggrieved party and the right of its implementation resides in the state, because the execution of Hudood, Qīsās and Ta'zeerat has been included in the duties of the state by the Holy Prophet (peace be upon him).

As far as the original right of Qīsās, available to the heirs is concerned, it is clearly expressed in Qur'ān:
"Whoso was murdered unlawfully, surely we have vested the right (to demand or forgive the Qisāṣ) in his legal heir." 19

Imām Qurtābi states that there is no opposing view on the issue that no one can execute the Qisāṣ except the state because the whole of the society has collectively given the authority of implementing the laws to the state. 50 Imām Sawi argues that the state is the authority which, in fact, empowers the heirs of the deceased to get their right enforced. It is the duty of the state to implement the option of the heirs, either in the form of Qisāṣ, or blood money or remission. Therefore, the legal heir of the deceased does not possess the right to execute it himself without the adjudication of the court and the legal order of its execution, because it is likely to create disturbance and disruption. This argument is expressed in the words:

"... wherein it is said in the twelfth fatwa, if the first and the second party agree that the execution of Qisāṣ under any condition does not represent the state's authority, it is not allowed."

In the light of this elaboration, it is held that if anybody executes the death punishment without permission of the court, he would be awarded the sentence of Ta'zīzer because it itself amounts to an unlawful act.

Constitution of Qisāṣ:

6. Constitution of Qisāṣ

The punishment of Qisāṣ consists of two rights:

(i) Public Right.

(ii) Private Right. 52

The first right involves the essential penal element but the second involves the formal penal element. The former
right originates from violation of the collective right of the society and the later involves an infringement of the private right of the aggrieved party. Therefore, if the aggrieved party remits the punishment of Qisas or blood money, even then the state has a right to award the punishment of Ta'zeer for preservation of the right of Shariah, that is the Public right. 53

C-TA'ZEER

Ta'zeer

The legal structure of Ta'zeer comprises the following components:

1. Legal Character

According to Imam Abu Hanifah, Imam Malik and Imam Ahmad bin Hanbal, execution of Ta'zeer is obligatory on the state but according to Imam Shafei, its enforcement is the discretion of the state. 54

Hanafi & Maliki View

Al-Jazeeri explains that Hanafi and Maliki jurists have actually added a qualitative element to the discretionary legal character of Ta'zeer, that, if the state considers its physical execution necessary and indispensable for the achievement of reformatory objective, only then its execution becomes obligatory. But if it thinks that the objective can be achieved without its execution, by adopting some other measure, then it does not become an obligation of the state. 55 According to Hanbali view, as stated by Jazeeri, if it is established beyond doubt that the convict deserves the punishment, its execution becomes obligatory on the state; otherwise, it remains non-obligatory. 56 Shafei view as mentioned above is that the execution of Ta'zeer does not carry the burden of an obligation but it can be awarded by the state as its discretion. On the basis of the varying opinions, different schools of Islamic
law have adopted different views about the legal consequences of the enforcement of Ta'zeer. Hanafī, Mālikī and Hanbālī scholars believe that the state is not subject to any damages if the convict dies during the execution of Ta'zeer.57 Whereas, Shāfeī scholars believe that in case of such an eventuality, the state is liable to pay the damages.58 Imām Sunnāni, citing Imām Nawawī from Sharh-ul-Muslim, explains the Shāfeī view, that if anybody dies during the execution of Ta'zeer, only then the damages in the form of blood money and expiation, become obligatory on the state.59 But in case of Hudood State's exemption from damages is a unanimously accepted principle. Following this reason, the former view seems more reasonable because execution of punishment, may be a hadd or tazeer, is the legal duty of the state in order to maintain peace, security and justice. Therefore, if such a situation crops up incidentally during the exercise of its lawful duty, the state should not be liable to any damages, because of its bonafide intention in favour of its subjects.

2. Lawful kinds

There are three kinds of Ta'zeer:

(i) Ta'zeer for sinful acts.
(ii) Ta'zeer for public interest.
(iii) Ta'zeer for uncommendable and undesirable acts.

Ta'zeer for sinful acts

It is an established law that Ta'zeer is primarily awarded only for the acts which are sinful or prohibited but there is no prescription of Hadd or Kaffārah,60 for example, eating the flesh of unslaughtered animals, pork eating, drinking of blood, dicing etc.

Sinful Acts (Ma'āsi) are further classified into three categories:
Acts for which Hadd is prescribed.

These cases generally give rise to two types of situation:

(i) The first possibility is that the criminal act is liable to Hadd, (for example, drinking, adultery, theft, etc) but it is not proved beyond all the doubts, fulfilling the required conditions of evidence. However, the court is reasonably convinced that the crime was committed. The court is, therefore, legally authorized to award the punishment of Ta'zeer in such situations.

(ii) The second possibility is that the crime liable to Hadd is established beyond doubt and the punishment of Hadd is executed, but on account of the special gravity of the crime, the court thinks it proper to award an additional punishment of Ta'zeer along with Hadd.

Hanafi, Shafi', and Hanbali, all schools of law, accept the combination of Hadd and Ta'zeer for the same crime, whenever the court considers it necessary.

Acts for which Kaffarah is prescribed.

The crimes like premature breaking of fast, breaking of Ihram, breaking of oath, cohabitation during menstrual period, belong to this category of crimes. These are the sinful acts prohibited by Shari'ah but instead of Hadd, Kaffarah or expiation has been prescribed for these acts. Therefore, an additional punishment of Ta'zeer can be awarded for the commission of these crimes. Some of the jurists have disagreed with this opinion but the dominant view, is that the award of Ta'zeer along with the expiation is permissible.
(c) Acts for which neither hadd nor kaffarah is prescribed.

These are, for example, necking and petting, unlawful khilwat or privacy with any woman, eating of pork or the flesh of an unslaughtered animal, embezzlement, abuses, false witness, bribery or palm-greasing etc. These are the acts which are expressly declared sinful and forbidden but neither hadd nor expiation has been prescribed for them. Therefore, a law can be framed to award the punishment of Ta’zeer for these acts.65

(ii) Ta’zeer for Public Interest:

The general principle is that no Ta’zeer can be awarded for the acts which are not sinful. It means that the commission of acts expressly forbidden by the Shari'ah are only liable to Ta’zeer. But there is an exception to the general rule. Acts which are not sinful (لاذ) and are not prohibited by Shari'ah can also be subject to the punishment of Ta’zeer in the interest of public good and lawful necessity. If no punishment is prescribed for them, they may disturb and disrupt general peace and sense of security of the community. Thus Ta’zeer is awarded in these cases as an exception to the general principle.66 This view is based on the following Prophetic traditions and precedents of the Orthodox Caliphate:

(a) Holy Prophet (peace be upon him) confined a person to the prison simply on the allegation of theft of a camel.67 During the process of investigation and trial he remained in prison. When it was established that he had not committed the theft, Holy Prophet (peace be upon him) set him free. The basis of the argument derived from the Prophetic Sunnah is that this imprisonment was not awarded to the person as a punishment of theft because the regular punishment was always
awarded after the proof of the crime. Since it was in the benefit of the society and the person whose property was stolen that the man alleged to be the thief should have been confined to prison. Therefore, in order to satisfy the affected and aggrieved party, Holy Prophet (peace be upon him) thought it proper to confine the accused on a simple allegation of theft. It follows that this kind of Ta'zeer can be awarded for those acts which are not even sinful in their own nature but if allowed unchecked, may damage and endanger the public interest.

(b) There is another precedent of Hazrat 'Umar, the second Orthodox Caliph. It is reported that he was patrolling the streets of Madinah when he heard a woman declaring "Is there any way that I could drink and is there any way that I could seduce Nasar bin Hajjaj." Hazrat 'Umar sent for Nasar bin Hajjaj and found him manly and extremely handsome. He had his head shaved off with a razor and transported him to Busra so that his manliness and masculinity may not prove an apple of discord among the women or may cause them to entertain immoral feelings towards him, but he did not ascribe to him any sinful intention. This action was taken only in the benefit of public interest. Thus both transportation and confinement were awarded in the form of Ta'zeer based on public interest and not on sinful acts. 68

(c) Moreover, the Shariah has allowed the award of slight punishments ( ََِِّ ) to children or minors for non-performance of prayer and for non-observance of cleanliness and purity and for the commission of sinful or criminal acts. Since the minors or children do not possess full legal capacity, they cannot be awarded the Hadd and their acts cannot be graded as sins, 69 but they can be awarded the punishment of Ta'zeer and
(iii) Ta’zeer for uncommendable and undesirable acts:

Although the basic principle of Ta’zeer is that it should be awarded for the commission of forbidden acts and for the omission of mandatory acts, yet scholars and jurists have expressed different views on the permissibility of Ta’zeer for the commission of uncommendable acts (تازیر) and the omission of commendable acts (تذیب). Some of the jurists do not permit Ta’zeer in these cases, whereas the others do. The basis of difference among the jurists on this issue relates to their varying definitions of the words Makrooh and Mandoob. Those scholars who think that neither the 'Makrooh' is prohibition nor the 'Mandoob' is an act of commission, but Makrooh is simply the commission of a discretionary act whereas the Mandoob is the commission of a discretionary act, they do not accept the permissibility of Ta’zeer for these acts. On the other hand, the scholars who, instead of placing them in the discretionary grade of legal value, consider the Mandoob as an act of commission and the Makrooh as an act of omission, have permitted the award of Ta’zeer in these cases. Some of the scholars believe that the award of Ta’zeer for such acts should be permitted only on repetition of the acts and not on the first instance of commission. Nevertheless it is necessary that the Ta’zeer for the commission of uncommendables and for the omission of commendables should be awarded only to preserve the general welfare of the society effectively.

There are various legal forms of Ta’zeer established through Quranic provisions, Prophetic Sunnah and the precedents of the Caliphate. One of them is lashes which is normally awarded for most of the crimes. There, however, exists a
difference of opinion on the quantum of this form of punishment.

Nafi view:

Imam Abu Hanifa and Imam Muhammad say that the maximum limit of Ta'zeer in case of lashes should not exceed the number of thirty-nine and this condition should equally apply in case of a free man or a slave. The same was the view of Imam Abu Yousof but he is reported to have changed his opinion. He subsequently agreed up to the limit of seventy-five lashes, and according to a second report, up to the limit of seventy-nine lashes.

Iliki view:

According to Imam Malik there is no maximum limit of lashes in case of Ta'zeer and it is also permitted that Ta'zeer can exceed the limit of Hadd where and when required.

Shafi'i view:

The Shafi'i view is that Ta'zeer should not exceed the number of thirty-nine lashes in case of a free man, and nineteen lashes in case of a slave because the punishment of a slave is normally considered to be the half of a free man.

This subject has been further discussed on the basis of a Prophetic tradition reported by Abu Bardah Al-Ansari. The Holy Prophet (peace be upon him) said:

لا يتمدد فقوط عشرة أسوأت إلا في حد من حدود الله العامل

"No punishment should be awarded in excess of ten lashes except in case of a Hadd from the Hudood of God." 78

This Hadith is also reported by Hani bin Nayyar in the words:

لا يتمدد فقوط عشرة أسوأت إلا في حد من حدود الله العامل

The Jurists have also discussed the tradition in detail. Imam Ahmad bin Hanbal, Layth, Ishaq and some of the Shafei jurists believe that in case of Ta'zeer no punishment exceeding
ten lashes can be awarded because this limit has been specified by the law-giver himself i.e., the Holy Prophet (peace be upon him). 80

Imam Malik, Shafei, Zayd bin 'Ali and some other jurists have permitted the excess from ten lashes in case of Ta'zeer but have restricted it to the minimum limit of Hadd. They say that the maximum quantum of Ta'zeer should not be equal to the minimum quantum of Hadd. It should remain less than that as mentioned above, and that is, thirty nine lashes. 81 They have based their opinion on the prescription of Hadd of drinking and slander i.e., eighty lashes. Since the Hadd to be awarded to a slave is half of it, i.e., forty lashes, therefore, the maximum limit of Ta'zeer should not exceed the number of thirty nine. The same view has been advanced by Imam Abu Hanifah, basing on the following Prophetic tradition:

من بلغ حد في غير حد فهم من المتدينين

"Who so achieves the limit of Hadd in a case not liable to Hadd, he would be considered among the transgressors." 82

Hanafi Jurists have interpreted the former Prophetic tradition in the sense that no punishment should be awarded in excess of ten lashes, except in sinful acts committed in transgression of the commands of Almighty Allah i.e., 'Ma'isiyyat (محصت). Instead of translating the word hadd ( حد) as fixed punishment, they have adopted the original translation i.e., the sinful act or violation of the divine commands. This interpretation implies that if any sinful act which amounts to an express violation of divine command is not committed, and the punishment of Ta'zeer is to be awarded only for public interest or social welfare, it should not exceed the limit of ten lashes. But if, on the other hand, Ta'zeer is to be awarded
in case of a sinful act, then there is no restriction of ten lashes. It can exceed this number under the express permission of the Holy Prophet (peace be upon him).

There are other scholars who have adopted the view that the Ta'zeer can exceed even the limit of Hadd because it is to be awarded on the basis of the nature, gravity, singularity and consequentiality of the crime. This view was originally adopted by Imam Malik and subsequently endorsed by Qasim and Hadi. They have further supported and elaborated the view in the light of the precedent of Hazrat 'Ali whereby he awarded ninety-eight lashes to a person who was caught in unlawful privacy with a woman without committing adultery. 85

Hazrat 'Umar is also reported to have administered one hundred lashes to a person who had forged the official seal of the state. 84 It is further reported that the punishment of hundred lashes was repeated three times because the convict kicked up a row at the time of execution and ultimately he was awarded the punishment of transportation and confinement also. 85

On the basis of the conflicting evidence, some of the jurists have stated that the Head of the state should be given the discretion to fix any limit of Ta'zeer in proportion to the nature of the crime, and keeping in view the requirement of social necessity and public welfare. 86

In the light of the discussion and the various views adopted by different scholars and schools of law, we can conclude that the discretion to fix the nature and quantum of the punishment of Ta'zeer should be vested in the state. The state, by using its discretionary power, can award different punishments according to the gravity of the crimes and in this way eliminate the development of the criminal aptitude in the
society. It can have a dampening effect on the burgeoning of more heinous crimes. The direct proportion between the nature of the crime and the quantum of punishment for the crime can serve as an effective deterrent measure to check the spread and sanguineness of criminal acts.

The same view has been explained at length by Al-Jazeeri in Kitāb-ul-Fiqh.

Right of Execution: The right of execution of Ta’zeer exclusively vests in the state because it represents the Muslim community. There are, however, four exceptions to the application of this principle:

1. Father
2. Master
3. Husband
4. Teacher

(1) A father possesses the right of execution of Ta’zeer. He can reprimand and punish his children in order to educate them and to mould their conduct in conformity with the basic tenets of Islam. It is one of his paternal duties to prepare his children for the offering of Salāt (prayer). This duty is a part of his other duties which are mainly concerned with the mental and moral nourishment of his wards.

(2) A master can also award slight punishments of Ta’zeer to his slaves in order to make them discharge their religious obligations and affiliated duties. The master is like the head of a family and it is one of his duties, by virtue of his distinguished position, to maintain a sense of discipline and decorum among those who work either directly under him or who depend on him entirely for their general upkeep and daily sustenance. Since the slaves are totally dependant on their master,
the master enjoys certain privileges to keep them in good gear, and one of these privileges is his right of execution of Ta'zeer. The husband is also vested with this right to some extent in order to curb the unfair attitude (العدو) of his wife and to prevent her from indulging in acts which not only infringe the rights of the husband but also cross those barriers of decency which are morally and legally binding on all women and whose infringement constitutes a violation of the law of Shariah. Therefore, a husband possesses the right to punish his wife for the non-performance of prayer and other obligatory duties as expressed in the Holy Qur'an in Surah An-Nisa.

A teacher also possesses this right for the purpose of coaching and educating his students because the future of a country depends on a proper upbringing and conditioning of the younger generation.

Since the right of execution of Ta'zeer exclusively vests in the state, leaving out the exceptions, of course, the right of pardon and remission also belongs to the state. It is clearly established through the Prophetic Sunnah as well. It is reported that the Holy Prophet never considered the execution of Ta'zeer obligatory in all circumstances; he sometimes used to waive the criminal liability and sometimes the penal liability in the crimes of Ta'zeer. This Prophetic practice positively establishes the fact that the right of execution of Ta'zeer exclusively vests in the state because this step of waiving the criminal and penal liability was never taken by the Holy Prophet (peace be upon him) at his own. That is why Imam Abu Hanifah, Imam Malik, and Imam Ahmad bin Hanbal, the
three eminent jurists, have adopted the view that if during the execution of Ta'zeer, the death of the convict occurs, there is neither right of damages nor right of retaliatory punishment available against the executor.

Mode of Execution:

As far as the mode of execution of Ta'zeer is concerned, it should be administered in mild and moderate doses. But there are some scholars who suggest, even insist, that the infliction of the punishment of Ta'zeer should be harsher as compared to the infliction of Hadd. They argue that since the punishment of Ta'zeer in ordinary circumstances is of a milder severity than the punishment of Hadd, therefore, in order to fulfill the requirement of penal element of the punishment, its infliction should be of a severer intensity than that of Hadd. Some of the punishments of Ta'zeer awarded by the Holy Prophet (peace be upon him) and the Orthodox Caliphs are reported to be extremely severe and harsh in accordance with the sanguinity of the crimes. For example, the punishment of hanging from the peak of the hill known as Abu Nabut awarded to a person indicates the gravity of the execution of Ta'zeer. This establishes the fact that the fixation of the mode of execution also depends on the discretion of the state. Since the right of execution vests in it, the right of fixation of the mode of execution is also available to the state. The option has been given to the courts either to award a simple or a rigorous punishment and if there is a punishment of imprisonment, whether it is for a shorter period or a longer period, it is also to be decided by the court. The only principle to be taken into consideration is that all those inhuman and torturous mode of execution of the punishment prohibited by the Shari'ah in cases of Hudood and Qisas should also be prohibited in case of Ta'zeer.
Therefore, it follows that the limits prescribed by the Shariah should not exceed under any circumstances.

**Constitution of Ta'zeer:** As in cases of Hadd and Qiṣṣṣ, the punishment of Ta'zeer is also constituted by a combination of two kinds of rights.

1. Right of Shariah
2. Right of the People

If any express commandment or provision of Shariah is violated during the commission of a crime which amounts to an infringement of the right of God (public right), it gives rise to the right of Shariah in the penal element; on the other hand, if only a private right is infringed, it gives rise to the right of the people in the penal element. The right of Shariah constitutes the basic penal character of the punishment whereas the right of the people constitutes the formal penal character of the punishment. If both, the penal rights are present in punishment of Ta'zeer, the state can only pardon the formal aspect of the punishment and not its basic and original aspect, because it is the right of Shariah and not of the State.

**D. CAUSES OF NEUTRALIZATION OF PUNISHMENT**

The following factors are recognized by the Islamic penal law which neutralize or de-execute the punishments:

1. Death of the offender (مَرَتُ الْمَبْلَغِ)
2. Deprivation of the relevant organ (نَزَاهَةُ الْقَصَاصِ)
3. Repentance of the offender (وَهُوَ الْمُتَّقِ)
4. Compounding and compromise (الْمَصْرَعِ)
5. Pardon and remission (الْغَفْرُ)

**Death of the offender:** If the punishment to be awarded to the offender is physical in its nature which can be awarded only against his
person and during his life, it would automatically be neutralized by his death. The reason is that the death of the offender cancels out the execution of the punishment. There is, however, an exception to the principle. If the punishment is monetary, for example, blood money, fines etc., the death of the offender does not neutralize its execution because the scope of its execution is extended over to the property of the offender and not to his person. Therefore, the execution of punishment is absolutely possible even after the death of the offender and it can be realized from his estate, and only after the subtraction of the penal amount, his legal heirs would be able to obtain their successions.

There is a difference of opinion in case of Qisás. According to Imam Abu Hanifah and Imam Malik, if the punishment of Qisás was awarded to an offender and he died before its execution, his punishment would automatically be neutralized. It would not be converted to blood money because the person against whom the punishment was to be executed has shuffled off the mortal coil. Since the punishment was primarily physical and not monetary, therefore, through his death, the automatic conversion of Qisás into blood money is not permissible because the blood money cannot be the substitute of Qisás without the consent of the offender. Therefore, according to them, by his death the purpose of the punishment has been served naturally. Therefore, he does not need any extra punishment. 94 Besides, Imam Abu Hanifah believes, it is quite immaterial whether the death of the offender occurred naturally, lawfully or unlawfully. In all cases the legal consequences are the same. 95

Imam Malik has, however, adopted a different view. He discriminates between the two situations of death. He differentiates between the lawful and unlawful death of the offender.
Imām Shafī‘ī and Imām Ahmad bin Hanbal, without discriminating between the lawful and unlawful death of the deceased or offender, believe that the death neutralizes the punishment of Qisās in all situations, but it is necessarily converted into blood money which should be paid from the estate of the deceased offender.

Deprivation of the relevant organ: If the organ of the offender which was to be amputated in retaliation is accidentally cut off before the execution of the punishment, it would also be a cause of the neutralization of punishment because the scope of the retaliatory punishment is extended up to the relevant organ and its disappearance or non-presence automatically nullifies the punishment. Mālikī view is that the neutralization of punishment cancels the provision of blood money also, but the Hanafī view is different. According to Imām Abu Hanifah if the offender is deprived of the relevant organ due to some uncontrollable cause, accident, disease or an unlawful aggression against him, there would be no blood money against the offender as the substitution of Qisās. But if he was deprived of his relevant organ lawfully i.e., due to the lawful execution of the retaliatory punishment in some other case, then the aggrieved party is entitled to the blood money against the offender as the substitute of Qisās. Shāfe‘ī and Hanbali view in this case is altogether different. They say that the deprivation of the relevant organ neutralizes only the retaliation and not the blood money. Therefore, the Qisās in this case is automatically converted to blood money payable from the property of the deceased offender because they believe there are only two options of punishment available in cases of crimes of Qisās: either retaliation or blood money. If the first option is not available, the second becomes obligatory.
But the view of Imam Abu Hanifah is based on a different argument and a different angle of observation. He does not primarily consider the two punishments, Qisas and blood money, as two options, available at a time. He treats Qisas actually as the original and basic punishment and the retaliation or blood money available to the aggrieved party as a substitution of the basic punishment which depends on the consent of both the parties, the offender and the aggrieved. Therefore, he concludes, that in such cases the Qisas is not automatically converted to blood money but is determined by the varying situations which make its conversion inevitable. This appears to be a more rational and flexible attitude and clearly reflects the diversity of events and the unpredictability of human response.

Repentance of the offender:

In the cases of robbery and dacoity, on account of the repentance of the offender, Shariah neutralizes the punishment to the extent of the element of right of God, as is expressly stated in the Holy Qur'an:

إِذَا افْتَرَقَتْ النُّفْسُ أَنْ تُقَدِّرِ دَائِمًا عَلَيْهِمْ فَاعْلِسْ أَنَّ اللَّهَ غُفُوٰرٌ رَحِيمٌ

"Except in case of those who repent before you obtain power over them. Take note that Allah is most forgiving and merciful." 98

On the basis of this verse, the Muslim Jurists unanimously agree that the repentance in case of robbery and dacoity is a recognized cause of neutralization of punishment but this should take effect positively before the state or court takes cognizance of the offender. As far as other crimes are concerned, three views generally prevail:

First View: Some of the Shafei and Hanbali scholars think that this repentance is also effective in neutralizing the punishment
in other crimes, and they agree in support of this view in the light of these Qur'anic verses:

وَالَّذِينَ يَإِثَبُونَ مَعَنَا فَأَذُوحَا قَاتِلَانَاهُمَا وَأَصِلَّفَا عِصَا عَلَيْهِمَا

"Punish those who are guilty of unbecoming or immoral conduct, but if they repent and amend their behaviour, then leave them alone." 99

خَلَفَ نَابِيَنَّ مِنْ بَعْدِ فَأَصلَحُْ فَإِنَّ الْمَيْتَوْبِ عَلَيْهِ

"Whoso repents after the commission of the wrongful act and corrects himself, surely Allah will accept his repentance." 100

They further substantiate the view with this Prophetic commandment also:

النَّابِيُّ مِنْ الدُّنْبِ كَمْ لَا ذَنَيْنَ لَهُ

"One who repents from sin is like a person who has committed no sin." 101

They make a further reference to the execution of the punishment of Rajm to Mu'izz:

هَلَّا تُوكَتُوَّهُ لَعْلَهُ تَمِينَ فَيَنْتَابُ بِاللهِ عَلَيْهِ

"Why did you not spare him so that he had repented and God had accepted his repentance." 102

The scholars and jurists supporting the first view have adopted it with two conditions:

(i) The repentance is only effective for neutralizing the punishment if the crime is exclusively related to the right of God. But if the crime is a violation of the right of people, it loses its effectiveness as a neutralizing factor. 103

(ii) The repentance is acceptable only if it is congruent with the subsequent corrected and reformed behaviour. If the behaviour of the offender is not positively changed, and the
reform is not literally visible in his dealings with people, the repentance is not to be treated as effective and material.104

But there are some scholars of the same view who accept only the first condition and reject the second condition as simply unnecessary. They believe that only the knowledge of repentance is sufficient and not the subsequent behaviour of the offender. If the offender does not actually reform himself afterwards, and commits another crime, he would accordingly be punished.

Second View: (2) This view has been adopted by Imam Abu Hanifah, Imam Malik and some of the Jurists of Shafei and Hanbali schools of law. Their view is that repentance (إِذَا رَأَيْتُ) does not neutralize the punishment except in case of robbery because this exception is established through an express Qur'anic provision. Therefore, the case of robbery may be considered an exception to the general principle that repentance is not a neutralizing factor of punishment. This principle is based on Qur'anic concepts clearly embodied in the following verses:

الزاني والزانية هما جلدان آكبو ورمي وصيامان جلد.

"The adulteress and the adulterer both should be awarded the punishment of a hundred lashes." 105

The Qur'ān clearly prescribes that the punishment of a hundred stripes should be awarded to every adulterer and adulteress without any discrimination of repentance. The repentance or non-repentance of the offender is immaterial to the infliction of punishment. Neither the act of repentance nor its absence affects the nature of the penalty. The offender is liable to the execution of Hadd, irrespective of his emotional and psychic state after the commission of the act. The same prescription applies to the case of theft. Qur'ān states:
"Chop off the hands of the man who steals and of the woman who
steals in retribution of their crime." 106

Qur'ān again stresses the indiscriminate infliction of
punishment. No premium, whatsoever, is placed on the occurrence
or non-occurrence of the fact of repentance. The execution of
the punishment is equally applicable to the offenders, irrespec-
tive of their inclination or disinclination towards repentance.
Moreover, it has already been mentioned that Holy Prophet (peace
be upon him) awarded the punishment of stoning to death (ston) to Ḍa'īz and Ghāmidiyah on the basis of their confession and
they were neither basically arrested by the officials of the
state nor were they forced to make confession of their crimes.
All the criminals who committed adultery and were awarded the
punishment by the Holy Prophet (peace be upon him) are reported
to have voluntarily approached the Holy Prophet (peace be upon
him) and made wilful confessions of their crimes. Their volun-
tary admission of the criminal offence, in spite of the fact that
the Holy Prophet (peace be upon him) did not insist on a four-
fold formal repetition of the confession, undoubtedly estab-
ishes their implied repentance of the crime. The words of the
Hadith show that the offenders asked the Holy Prophet (peace be
upon him) to purify them and purge them of the taint and stigma
of sin by the imposition of the Hadd. Their request also proves
the fact that they had repented sincerely and wanted to be pur-
ified through the execution of the Hadd of God. In spite of all
these propitiatory gestures and attenuating factors, they were
awarded the punishment which is a sufficient evidence of the
fact that the act of repentance does not neutralize the punish-
ment. It relates only to the forgiveness of ethereal punishment
and not of earthly punishment.

It is to be noted that in case of a woman who was awarded the punishment of stoning to death (فَعْلَى) after her death, the Holy Prophet (peace be upon him) said:

"She has made such repentance that if it were to be divided over seventy persons of Madina, it would have been sufficient for all of them."107

The Holy Prophet (peace be upon him) has used the word repentance (ثُمَّ) for the punishment. All these arguments support and reinforce the viewpoint adopted by Hanafi and Maliki schools of law. These jurists believe that repentance does not neutralize the punishment. They further believe that the claim of repentance (ثُمَّ) can camouflage as an evasive tactic by any criminal to avoid the execution of punishment.108 Therefore, repentance (ثُمَّ) can create practical difficulties in the administration of penal justice because it can be used as a handy and convenient ploy by any criminal to wriggle out of the clutches of law and escape the punishment after the commission of crime.

hird View:

(3) This view is adopted by Ibn-i-Taymiyyah and his student, Ibn-ul-Qayyim. Their view is that repentance not only neutralizes the penal element but also neutralizes the criminal element. According to this view, crimes which exclusively amount to a violation of the rights of God, are neutralized by the act of repentance. Therefore, the punishment need not be imposed after repentance. The criminal should be awarded the punishment only if he retracts from his repentance.109 But they also believe that the punishment is not neutralized in the case of crimes which infringe the private rights of the people.
The general principle of penal law is based on the view of Imām Abu Hanifah and Imām Malik, a view which is simultaneously adopted by some of the Shāfi‘ī and Hanbali jurists. Since this view has the support of the majority of Muslim scholars, it finds a predominant place in the penal law. Therefore, repentance is a neutralizing factor in case of robbery only if it was committed by the offender before the cognizance of the state, and this should be treated only as an exception to the general principle. As far as other crimes and punishments are concerned, Taubah does not possess any neutralizing effect.

Compromise: Compromise is also a neutralizing factor of punishment but only in the crimes of Qisāṣ and Diyyat. In the punishments other than retaliation and blood money, it does not possess any neutralizing value. As far as retaliation and blood money are concerned, there is no difference of opinion among the Muslim jurists. This is expressly based on Prophetic Sunnah and Ijmā‘ of the Companions and that of the Ummah. Holy Prophet (peace be upon him) stated:

"Whosoever was murdered intentionally, his heirs are given the options of retaliation, blood money or compromise and compounding which they can exercise freely and choose any one of the options independently." 110

Pardon and remission: This is the fifth neutralizing factor of the penal element. Pardon can be granted by the aggrieved party or by the state in various situations. In case of crimes of retaliation and blood money, the right of pardon and remission vests in the aggrieved party itself, whereas in case of crimes of Ta‘zeer, the right of pardon and remission normally vests in the state. The exceptions and qualifications in both situations have been
discussed earlier in detail. As far as the crimes of Ḥudood are concerned, no body can grant pardon or remission because it is the exclusive right of God. Thus pardon and remission possess neutralizing value only for punishment in the cases of Qisas and Ta’zeer.
NOTES

2. Ibid.
3. Ibid.
6. Qurʾān 4:15.
15. Ibid.
18. Ibid.
28. Ibid.
22. Ibid.
23. Ibid.
28. Ibid.
29-B. Kitâb-ul-Ikhtiyâr, p. 189.
   (b) Tirmazî, Vol. I, p. 261. (The same is reported in
       Nasnad Ahmad, Abu Dâ'ûd, Nasâî and Mustadrak Hâkim)
31. Qur'ân 5:45.
33. (a) Fiqh-us-Sunnah, Vol. II, p. 528. (Quoted from
       Şahîh Bukhârî)
       (Quoted from Abu-Dâ'ûd)
34. (a) Kitâb-ul-Ikhtiyâr, p. 190.
   (b) Mukhtasar-ul-Qudoori, p. 176.
36. Mukhtasar-ul-Qudoori, p. 177.
10. Ibid.

40-a. Ibid.

41. Qur'ān 2:194.

42. Qur'ān 16:126.

43. Fīqh-us-Sunnah, Vol.II, p.535. (Quoted from Bayhaqi)


45. Ibid.


49. Qur'ān 17:55.


53. Ibid.


56. Ibid.

57. Ibid, p.759.

58. Ibid, p.760.


62. Ibid.


66. Ibid, p.150.
70. (a) Badā‘i‘-us-San‘ā‘i‘, Vol. VII, p. 63.
72. Ibid.
74. (a) Al-Mā‘wārdi, Al-Ahkām-us-Sultānīyyah, pp. 236-237.
(b) Sarkhesi, Al-Mabsoot, Vol. XXIV, pp. 35-36.
75. Ibid.
76. Al-Ahkām-us-Sultānīyyah, p. 237.
77. Ibid., p. 236.
78. ‘Asqalānī, Bulugh-ul-Narām, p. 160. (quoted from Bukhārī and Muslim)
80. Ibid., p. 592.
81. (a) Subul-us-Salām, Vol. IV, p. 37.
82. (a) Al-Mabsoot, Vol. XXIV, p. 36.
84. Ibid., pp. 37-58.
88. Ibid.
89. Ibid.
91. *Al-Ahkām-us-Sultānīyah*, p. 238.
92. Ibid., p. 259.
98. Qur'ān 5:34.
100. Qur'ān 5:39.
104. Ibid.
105. Qur'ān :2
106. Qur'ān 5:38.
LEGAL BASIS OF PUNISHMENTS

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LEGAL BASIS OF PUNISHMENTS

This chapter deals with a discussion of the legal basis of various punishments of Hudood, Qisas and Ta'zeer. By legal basis, we mean the arguments of Qur'an and Sunnah on which the legality and authenticity of the Islamic punishments is based.

As mentioned in the first chapter of this Part (classification of punishments), the Hudood, according to their basic and generally accepted classification, are seven in number:

1. Adultery (الزناء)
2. False accusation of unchastity (الغشط)
3. Theft (السرقة)
4. Robbery (السرد)
5. Drinking (الردة)
6. Apostasy (الإبغي)

(1) ADULTERY (الزناء)

Definition

The definition of adultery unanimously adopted by the Muslim Jurists of various schools of law is as follows:

الزنا الذي وقع خارج نطاق شهية ولا ولاء

"Adultery (الزناء) is the sexual intercourse committed by a man and a woman who are neither married nor do they suspect that they are married to each other, and the woman is not a lawful concubine (secondary wife) of the man either."

Ingredients:

This definition relates to the form of adultery liable to Hadd. The essential ingredients and constituent elements of this crime are listed below:

a) maturity (بلغ)
b) Sanity (عقل)
c) Volition (اختيار)
d) Knowledge (علم)
e) absence of doubt and suspicion (عدم الريب)
f) penetration (النور)

Kinds:
(a) Adultery committed by an unmarried person (زنا العبد)
(b) Adultery committed by a married person (زنا الناسخ)

Punishments:
(a) Hadd punishment for the adultery committed by an unmarried person, male or female, is one hundred stripes.
(b) Hadd punishment for the adultery committed by a married person, male or female, is stoning to death (stoning to death).

Arguments:
(a) The Hadd of adultery (حذائض العبد) committed by an unmarried male or female is expressly based on Qur’ān.
(b) The Hadd of adultery (حذائض الناسخ) committed by a married male or female is expressly based on Prophetic Sunnah.

Gradual Finalization of Hadd:
Muslim Jurists are of the view that the punishment of adultery was prescribed by the Sharī‘ah in a gradual process. The first Qur’ānic verse which deals with the punishment of adultery is:

والذين يأتين النساء فذائدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم فأذدهم

"Punish those men who are guilty of unbecoming conduct, but if they repent and amend themselves, then leave them alone."²

This Qur’ānic verse prescribes physical torture and whipping as the punishment for adultery. Another verse prescribes confinement and imprisonment as the punishment for adultery:

وَالَّذِينَ يَأْتِينِ النَّسَاءَ فِي الْبُيُوتِ حَتَّى يَسْتَمِعُوا الْمَرْدَةَ أَوْ يَسْتَمِعُوا عَلَى أَمْرِهِنَّ أَمْرًا لأَنْتَجَوْا فِي الْكَوْنِ نَسَبًا

² "Confront those women who are guilty of unbecoming conduct to four witnesses. If they bear witness (and establish the comiss-
ion of crime), then confine the women to their houses till they die or God provides for them some way out."

Through a third verse, the first two punishments of adultery as Hadd were repealed and the final punishment of a hundred lashes was prescribed:

إِلَّا أَمْرُ نَارٍ وَأَمْرُ نَارٍ وَأَمْرُ نَارٍ

"Flog the adulteress and the adulterer, each one of them, with a hundred stripes."

Question of Rajm for married adulterers:

This Qur'anic verse had a general implication as far as the words 'أَمْرُ نَارٍ' and 'إِلَّا أَمْرُ نَارٍ' are concerned. Its meaning was subsequently specified and particularised by the Holy Prophet (peace be upon him) for the adultery committed by an unmarried male or female. The Holy Prophet (peace be upon him) awarded the punishment of stoning to death (َّثُوبُ) to the married adulterer or adulteress. The particularization of the verse of Surah Noor for unmarried persons has been unanimously accepted by the companions of the Holy Prophet (peace be upon him), their successors, Muslim scholars and jurists of all schools of law, right from the beginning of Islamic history to the present times. It is held by the scholars in the light of the second verse of Surah Noor that the Hadd of one hundred stripes is reserved only for an unmarried adulterer or adulteress whereas the Hadd of rajm or stoning to death is reserved for a married adulterer and adulteress. 

(1) This specification of the Qur'anic verse is expressly based on Prophetic tradition reported by Zayd bin Khalid Al-Juhanni: نَالُ سَمَتَ الْشِّمَالِ، وَسَمَتَ سَلَامًا، وَأَمَرَنَّهُ مَعِيَّنًا، وَأَمَرَنَّهُ مَعِيَّنًا، وَتَحْرِيضًا عَامًا
"I heard that Holy Prophet (peace be upon him) ordained the punishment of a hundred stripes and the transportation for a year for unmarried adulterers."\(^6\)

(2) Another Prophetic tradition has been reported by Abu Hurayrah:

إنَّ رَسُولَ اللَّهِ ﷺ سَمَّى سَمَّى فَخَلَفَنَا وَلاَمَّا رَجَعَنَا
بِنَتَّى عَاكِبَةَ قَامَةَ المَعْلُوبَةَ

"Holy Prophet (peace be upon him) executed to the unmarried adulterers the punishment of imprisonment or transportation for a year along with the infliction of the Hadd (one hundred stripes)."\(^7\)

(3) Moreover, it is reported by `Ubádhah bin Sámat that Holy Prophet (peace be upon him) said:

خَذَوَاعْتِي خَذَوَاعْتِي خَذَوَاعْتِي فَخَلَفَنَا سَمَّى سَمَّى سَمَّى وَلاَمَّا رَجَعَنَا
جُلِّدُمَاكَآ وَتَطَمَّ سَيْنَةَ وَالْتَّلْبَ بِالْثَّلْبِ جَلْدُمَاكَآ وَالْرُّجُمُ

"Take it from me, take it from me, that God Almighty has opened a way for them. The unmarried adulterers should be executed a hundred stripes and imprisonment for a year and the married adulterers should be executed a hundred stripes as well as the Rajm."\(^8\)

These Prophetic traditions expressly establish two precedents:

- the Hadd for the unmarried adulterers executed by Holy Prophet (peace be upon him) was hundred stripes whereas the Hadd for the married adulterers was Rajm (stoning to death).

These traditions further highlight two other points of information:

(a) The addition of the punishment of imprisonment or transportation for a year for the unmarried.
(b) The combination of hundred stripes with Rajm for the married.

Through a detailed observation of the Prophetic Sunnah, it is undoubtedly proved that the addition of hundred stripes to Rajm was subsequently discarded by the Holy Prophet (peace be upon him) and the actual punishment always practically administered to the married adulterers was only Rajm (stoning to death) without its supplementation by stripes. In case of unmarried adulterers, Holy Prophet (peace be upon him) usually awarded the exclusive punishment of a hundred stripes though in some cases he reinforced it by the addition of imprisonment for a year also. This Prophetic practice clarified the legal situation:

the Hadd of hundred stripes to the unmarried adulterers was awarded by the Holy Qur'ān and the Hadd of Rajm (stoning to death) was awarded to the married adulterers by the Holy Prophet (peace be upon him) himself.

It is a unanimous fact that the Hadd is not established only through Qur'ān but it is equally established through Prophetic Sunnah and the Definite Limma' of his companions also. Qur'ān itself supports this view as far as the formulation and application of Hudood are concerned:

"These are the Hudood of Almighty Allah, and whose oboys Allah and His Holy Prophet shall enter gardens through which streams flow. They will live there for ever and that is a great triumph."

Qur'ān further states in continuation of the same concept:
"And whoso disobeys Allah and His Apostle and exceeds his Hudood (limits), He will make him enter into fire and he will dwell there. For him is the degrading punishment."11

These Qur'ānic verses furnish us with two sets of principles:

(a) obedience to God and obedience to Holy Prophet (peace be upon him) amount to observation of Hudood.
(b) disobedience to God and disobedience to Holy Prophet (peace be upon him) amount to violation of Hudood.

These two Qur'ānic principles establish with meticulous clarity of the fact that the Hudood of Shari'ah are directly based on the commandments of Allah and the commandments of the Holy Prophet (peace be upon him). Therefore, none of the recognized Muslim School of law in the entire history of Islam has adopted the view that Hadd is based only on Qur'ān and not on Prophetic Sunnah. Any discrimination between Qur'ān and Sunnah for the establishment of the Hadd is absolutely prohibited and an act of dastardly perversion contrary to the unanimous consensus of the Muslim Ummah in all times and periods. In anticipation and refutation of actual or potential interpretative perversions, Abdul Rehman Al Jazeeri has narrated:

"The Hudood in Islam are established from the verses of Qur'ān as they are established through Prophetic traditions and they are established through the recognized practices of the companions also, and on this view there is the complete consensus of the Ummah."12
This concept can be further understood through the study of the third chapter of Part One (Islamic Concept of Law).

(4) There is another Prophetic tradition establishing the punishment of Rajm for married adulterers reported by 'Abdullah Ibn-i-Nas'ud:

لا يحك ذم اسمى، مسلمين يشهد أن لا إله إلا الله وأن محمداً رسول الله
باجد يتلف النفس بالنفس والثيب الزارة بالمغارة لدهنة التأميم لجماعة

"The bloodshed of a Muslim who bears witness to Tauheed and Risalat is not permissible except in either of the following three cases:

(a) Retaliation for murder
(b) Punishment for the married adulterer
(c) Punishment for the apostate."

(5) This concept is also elaborated and amplified in another Prophetic tradition reported by Hazrat 'Ayesah:

(a) The person who committed adultery after being married should be stoned to death.

(b) The person who committed sedition against Almighty Allah and His Holy Prophet (peace be upon him) should be decapitated or hanged or imprisoned.

(c) The person who committed murder should be murdered in retaliation."

(6) On the same subject, another Prophetic tradition is reported by Abu Amamah bin Sahl bin Hanif, which is based on the same words as narrated by Ibn-i-Nas'ud.

These are some of the Prophetic traditions through which his commandments prescribing the punishment of Rajm were established. There are some other traditions through which the Prophetic practices of executing the punishment of Rajm to the
Married adulterers are established:

(7) The event of the execution of punishment of ṭalā‘ah by the Holy Prophet (peace be upon him) to a Jewish couple reported by Abdullah bin ‘Umar. 16

(8) The Ḥadith of Aṣṣaf reported by Abu Hurayrah and Zayd bin Khālid whereby the punishment of ṭalā‘ah was awarded by Holy Prophet (peace be upon him) to a married woman who had confessed the crime. 17

(9) The event of ʿAṣṣaf bin Wālik reported by Jabir bin ‘Abdullah Ansari whereby ʿAṣṣaf being married was executed the punishment of ṭalā‘ah on his confession. 18

(10) The event of Ghamidiyah who was executed the punishment of ṭalā‘ah on her confession. 19

(11) Another event of the Prophetic period reported by İmām bin Huseen, relating to the execution of ṭalā‘ah to a woman, who belonged to the tribe of Juhaynah. 20

(12) Another Prophetic tradition is reported by Jabir whereby an adulterer was awarded the punishment of stripes. Subsequently, when Holy Prophet (peace be upon him) learned that he was married, he ordered to execute him with ṭalā‘ah also. 21

(13) Another Prophetic tradition bearing on this aspect has been narrated by Abu Hurayrah:

الولد للخراش و للجامان

"The child would belong to the husband of the adulteress and the offender would be exposed to stoning." 22

All these Prophetic prescriptions and practices unequivocally establish the fact that Hadd of adultery for the married was always executed with ṭalā‘ah by the Holy Prophet (peace be upon him) and not with hundred stripes. But an impression has been
maliciously engineered by the adversaries of Islam to mystify and distort what is absolutely transparent. They have queried with a grin on their protruding noses and a frown on their narrow foreheads and a black spot on their hearts whether these events of execution relating to the punishment of Rajm had occurred before or after the revelation of the second verse of Surah-i-Noor. Some people in the present era whose hearts are choked with the slime of prejudice and whose minds are clogged by the grime of ignorance and whose spiritual flight is jammed with rust-ridden brakes of the cash-nexus, have tried to negate and nullify the legality of Rajm as Hadd, and to establish that these events crystallized before the punishment of hundred stripes was revealed through Qur'ān. Therefore, Rajm was repealed by the subsequent Qur'ānic order of a hundred stripes. This allegation is absolutely baseless and against established historical facts. The event of Aaseef, the event of Maiz, the event of Ghamidiyyah and the event of the Jewish couple occurred after the revelation of the verse of Surah-i-Noor which contains the punishment of hundred stripes. The revelation of this verse took place at the occasion of the event of Ifk which had occurred on the return of the Holy Prophet (peace be upon him) and his companions from the war of Banu Mustalaq.

This occasion had taken place at all costs before fifth or sixth Hijra or in third Hijra as stated by Ibn-i-Hhashshām, Tabari, Ibn-i-Taymiyyah, Asgālānī, Ayni, Qustalānī and others. But the events of execution of Rajm took place after seventh, eighth and ninth Hijra because those companions who had witnessed the events and had participated in thestoning, accepted Islam and associated themselves with the Holy Prophet (peace be
upon him) in the seventh, eighth and ninth Hijra. It was only in their presence and with their participation that the execution of Rajm materialized. These facts can be easily studied through the following references:


Therefore, there is not the slightest iota of doubt or grain of suspicion that the Hadd of Rajm was repealed by Qur'ân because the Holy Prophet (peace be upon him) repeatedly executed the Hadd of Rajm to the offenders even after the revelation of the Qur'ânic provision of stripes. This Prophetic practice continued till the last days of his life. This fact is further supported by the continuous practice of the orthodox caliphs, in their respective eras after the demise of the Holy Prophet (peace be upon him). Hazrat 'Umar, Hazrat 'Usman, and Hazrat 'Ali are frequently reported to have executed the Hadd of Rajm to the married adulterers and they had also verbally elaborated and explained the legal significance and authenticity of the Rajm on many occasions.

Therefore, the Hadd of Rajm is not only established through the Prophetic Sunnah but also through the continuous and unanimous consensus of the Khulafa-i-Rashideen, and of the whole Muslim Ummah as well.
(2) SLANDER (False accusation of unchastity)

Definition:

The term Qazf literally means to throw anything and it is normally used in the sense of throwing stones at someone. Technically it is known as:

الرذب: جرّب الحمد على المشهد

"Accusation of adultery against a person is liable to Hadd." 29

In "Enforcement of Hudood Ordinance" it is stated "Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, makes or publishes an imputation of Zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings of such person is said to commit slander."

Conditions of the accused:

The conditions for lawful establishment of slander are as follows:

1. The person who is accused of slander should be sane.

2. The accused should be an adult person so that he can be charged with the allegation of adultery. The fact that he is an adult makes it reasonable to believe that he might have committed the offence. Since a minor cannot be liable to the Hadd of adultery, a false allegation levelled against him does not amount to Qazf liable to Hadd.

Imam Malik has exceptionally accepted the false allegation of unchastity, even against a minor as Qazf 30 and he considers it liable to Hadd. According to Ibn-i-Munzer, the view of Ahmad bin Hambal is that if anyone commits such kind of slander, he should be awarded the punishment less than the Hadd. This punishment would be in the form of Tazeer because he has in
fact spoken a lie by accusing the minor of adultery which is not humanly possible. Therefore, he deserves to be punished for the ejaculation of a lie.\textsuperscript{31}

(3) The accused should be a Muslim. This view is adopted by the majority of the Jurists. If the accused is a non-Muslim, the prescribed Hadd will not be awarded to the slanderer.\textsuperscript{32}

(4) The accused should enjoy a good moral reputation. If he already possesses bad reputation, the slanderer should be awarded the punishment of Ta'zeer and not of Hadd after the establishment of the case of Qazf.

(5) There is a difference of opinion in reference to the slaves. It is reported by Abdullah bin 'Umar that even if the accused is a slave, the slanderer, irrespective of his status, should be awarded the Hadd of Qazf. This rule applies to the master of the slave also.\textsuperscript{33} Imam Malik and the Jurists of Zahir school of law agree with this view.\textsuperscript{33-A}

Punishment:

The Holy Qur'an has prescribed eighty stripes as punishment for the slanderer:

وَالَّذِينَ يُرِنُونَ الْجَنَّةَ مُنْتَجِرَاتٍ يَأْتِيُّهَا بِمَيِّتَةٍ أَمَامَهُمْ ذَلِكَ الْكَفَّارَةُ أَدَلِّيْكَ هُمُ الْفَسَقُونَ

"The penalty of those who accuse chaste women of adultery and then bring not four witnesses, is flogging with eighty stripes. Do not admit their evidence afterwards for surely they are the transgressors."\textsuperscript{34}

This Quranic verse clearly establishes the Hadd of eighty stripes for slander.

In order to prove the crime of slander liable to Hadd, the required number of witnesses is the same as in the case of adultery. It was revealed at the occasion of Ifk when the Holy
The Holy Prophet (peace be upon him) and his companions had returned from a war. Some people came out with a false allegation of unchastity against Hazrat 'Ayesha (Nay God be pleased with her). These verses, approximately twelve in number, were revealed to the Holy Prophet (peace be upon him). He stood up and recited the revealed verses. The persons who had fabricated the false allegation could not muster any evidence in favour of their claim and the Holy Prophet (peace be upon him) imposed on them the Hadd under the Qur'anic prescription. The painstaking procedure was adopted to clarify the position of Hazrat 'Ayesha and to rehabilitate her chaste and spotless reputation.\(^{35}\)

(3) **THEFT**

\[السرقة\]

Theft is defined as:

\[أخذ الشيء من المال الغيرخفية\]

**Definition:** "Theft is to steal anything from the property of anybody else surreptitiously."\(^{36}\)

In the Islamic laws (enforcement of Nizam-i-Mustafa Hudood Ordinance, 1979), it is stated "Sarqah liable to Hadd is, whoever being an adult, surreptitiously commits, from any Hirz, theft of property of the value of the Nisab or more, not being stolen property, knowing that it is or is likely to be of the value of the Nisab or more, is said to commit theft liable to Hadd."

In the light of the definitions, some general conditions must be fulfilled to constitute the crime of theft liable to Hadd. For example:

(i) To take property of any other person.

(ii) To steal it clandestinely.

(iii) The stolen property should be in safe custody.\(^{37}\)
The following conditions relate specifically to the stolen property.

(i) The property should be such that could be possessed and owned lawfully. Its sale and the benefit that accrues from its sale or rent should also be lawful. In the light of this specific qualification and reservation, the theft of intoxicants, pigs and other things which are absolutely forbidden in Islam, does not amount to Sargah liable to Hadd. This is the view of the majority of Jurists: Hanafis, Shafiis and others.

(ii) The stolen property should come up to the limit of Nisab in its value. There is, however, a difference of opinion among Jurists on the issue of prescription of Nisab. According to Imam Malik, Shafi and Ahmad bin Hanbal, the Nisab of theft liable to Hadd is one-fourth of a dinar which amounts to three dirhams. But the view of Imam Abu Hanifah and his followers is that the Nisab of theft is ten dirhams. Their view is based on the fact that the property on which amputation of hands was awarded in the Prophetic era was at least of the value of ten dirhams, as reported by 'Amr bin Shu'ayb. A tradition reported by Abdullah Ibn 'Abbas which is quoted in Bayhaqi and Tahhawi also supports this view. Sufiyan Qory equally agrees with the view expressed by Imam Abu Hanifah.

(iii) The property should be stolen from the Hirz i.e., safe custody. Otherwise that act would not amount to theft liable to Hadd. The open and public places do not fall within the scope of Hirz. Ibn-ul-Qayyim and some other scholars have excluded many portable items from the scope of theft liable to Hadd. Although there is a Prophetic Hadith which prescribes the concept of Hirz, reported by 'Amr bin Shu'ayb, yet Imam Ahmad, Ishaq, Zufar and the Zahir Jurists have not recognized the
condition of Hirz, considering the Qur'anic commandment an absolute prescription of the Hadd of theft.

But generally accepted view of the Muslim Jurists is that, if any property is stolen from an open and public place, the thief will be awarded Ta'zeer, not the Hadd.

There are two kinds of theft:
(i) Theft liable to Hadd.
(ii) Theft liable to Ta'zeer.

Theft liable to Hadd is established only if the commission of crime is proved beyond doubt through the fulfilment of requisite conditions. If any of the basic conditions is missing, but the commission of theft is established through evidence, then the court is supposed to award punishment of Ta'zeer.

The punishment of Theft is based on the Qur'anic verse:

وَالسَّالِقَانِيَةَ فَاقْطَعْهَا أَيْدَيْهَا جَرَاءٌ

"Cut off the hands of the man who steals and of the woman who steals in retribution of their offence as an exemplary punishment from Allah. Allah is mighty, wise." 47

The amputation of hands in the first instance should take place from the right hand which is to be cut from the wrist.

It is established through various traditions and precedents of the Caliphate period that if a thief repeats the crime of theft inspite of the first amputation, then his left foot should be cut. The Jurists disagree whether at third instance after the amputation of hand and foot, his left arm and then his right foot should be amputated or not. Imam Abu Hanifah believes that at the third instance of crime, the offender should be imprisoned and punished with some other kind of
Ta'zeer. 48 Imam Shafei and other scholars believe that at the third instance, his left arm should be amputated and at the fourth instance his right foot should be chopped off, and if he again commits the crime, then he should be awarded imprisonment. 49 However, Hanafi view seems to be more realistic.

(4) ROBBERY AND DACOITY

Robbery (Al-Harabah), in Islamic legal literature, is known as Qat'ut-Tareeq which is defined in the words: "When any one or more persons, sufficiently equipped, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put fear of death in him or hurt such person or persons, it is called Al-Harabah."

Ingredients

In the light of the definition, following are the ingredients essentially required for the constitution of this crime.

Legal capacity

(i) Legal Capacity: it means that the robbers and dacoits should be adult and sane persons and possess all those legal qualities which are binding for the imposition of Hadd.

(ii) Equipment with arms: Imam Abu Hanifah, Imam Malik, Imam Shafei, Imam Ahmad bin Hanbal, Abu Yousof, Abu Sour and Ibn-i-Hazm consider the equipment with arms as an essential condition for robbery. 50 As far as the nature and kind of arms are concerned, there is no particular specification, but there should be at least such kind of equipment through which the show of force may become possibly effective.

Open exhibition:

(iii) Open Exhibition: The third condition of robbery is an open exhibition of the crime. If any act contained in the definition is openly committed, this overt act discriminates it from theft. 51 This condition indicates the somewhat dominating position of the robbers during the commission of crime. They have an edge over their victims and their dare-devil attitude signi-
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ifies the idea of predominance (الشريعة) technically known as فرقة الغالبة which is an essential ingredient of robbery. However, it has to be established that the robber or the robbers on the basis of this capability were apparently in a position to accomplish the act of robbery.

(iv) Place of Commission: Some of the Jurists think that since this crime is known as Qa‘it-Tareeq, i.e., blockage of passage, it should be committed outside the city which is not thickly populated. If the same act is committed in a thickly populated place where the robbers can be easily confronted and overpowered, it would not amount to robbery. It would be categorized as some other crime. But Imam Abu Yousof and many other Jurists are of the opinion that the place whether urban or suburban is immaterial and possesses the same legal effect because the Qur‘anic verse that prescribes the Hadd of robbery does not place such qualification. The scholars of Shafi‘i, Hanbali, Maliki, and Zahir schools of law are in agreement with this view. Abu Sour, Auzai‘i and Lays also support it.

Same is the dominant and generally accepted view of Islamic law.

Punishments: Hadd of robbery and dacoity is mentioned in Qur‘an in the words:

"Certainly the punishment of those who fight against Allah and His Messenger and are actively engaged in creating disorder in the land is that they should be decapitated or hanged or their hands and their feet be chopped off on alternate sides or they should be placed under arrest or expelled from the land."
Through the Qur'ānic injunction, four punishments have been prescribed by the Sharī'ah:

(i) Decapitation
(ii) Hanging
(iii) Amputation of hands and feet on alternate sides.
(iv) Confinement or imprisonment.

Since the word 'या' (ya), that means 'or', has been used after the prescription of every punishment, it is established that a kind of discretion for the selection of either of these punishments is granted to the state for implementing any one of these options but the punishment to be awarded should be in proportion to the gravity of the crime. There are three points of view which serve to explain and illustrate the nature and scope of this issue.

(i) Complete discretion of selection.
(ii) Prescription of selection.
(iii) Qualified discretion of selection.

**First View**

This view has been adopted by Sa'eed bin Musayyib, 'Umar bin 'Abdul 'Aziz, Mujahid, Zahhāk, Nakh'ī, Abu Sura and Imām Mālik, etc. They believe that Qur'ān has simply prescribed the four punishments as Hudood and there is complete discretion of selection vested in the state to choose either of these options in order to equalize or balance the gravity of crime and the imposition of punishment. It is immaterial whether the commission of murder took place during robbery or not, and whether the robbers actually managed to take away the property. It is the exclusive discretion of the state to award any of the four punishments.56

**Second View**

This view is attributed to 'Abdullah Ibn-i-Abhān. Imām...
Shāfei has reported it from him in his Musnad. This shows that:

(a) if the robbers committed the act of murder and took away the property of the people also, they should be awarded the punishment of hanging.

(b) if they committed the act of murder but did not take away the property, they should be decapitated only and should not be hanged.

(c) if they took away the property but did not commit murder, their hands and feet should be amputated alternately.

(d) if they only threatened and terrorized the people, without the commission of murder or the appropriation of property, they should be sentenced with confinement.

The second view under scores four different kinds of robbery.

(a) Terrorizing the people without murdering them or confiscating their property.

(b) Terrorizing people along with confiscation of their property but without committing murder.

(c) Threatening people along with murder but without confiscation of property.

(d) Threatening people along with murder and confiscation of property.

This act of 'Muharibat' is also known as 'Fasād-il-Ard' (نَشَارِبِ الْأَرْضِ).

This view is adopted by Imam Abu Hanifah, Imam Ahmad bin Hanbal, Imam Shafei and others. These scholars believe that the discretion of selection is granted to the state but it is qualified in the sense that no death punishment is to be awarded.
without commission of murder during robbery, no amputation should be awarded without confiscation of property and no confinement should be awarded except in case of simple threat or an act of terrorization.

According to this view, the word ـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُ~

(5) **DRINKING** ـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُـُ~

The prohibition of drinking was given through Holy Qur'ān and its punishment was positively provided by Prophetic Sunnah which was formally, finalized by the consensus of the companions during the caliphate of Hazrat 'Umar.

The prohibition of drinking was revealed in a gradual process. The following Qur'ānic verses were accordingly revealed to discourage and prohibit the act of drinking:

> "They ask you about drinking and gambling. Tell them there is great harm in both and also some profit for people, but their harm is greater than their profit."  

Through this verse a comparison is made between the benefits and hazards of drinking and gambling. Both acts are discouraged because the demerits far exceed their merits and the basis of this discouragement lies in Islam's practical and pragmatic attitude towards social problems.

After the above-mentioned explanation, the following verse was revealed:
"O believers, you should not approach prayer when you are not in full possession of your mental faculties, until you realize the true import of your supplications."

Through this verse, drinking was highly disapproved on basis of its intoxicating affect.

It stresses the fact that the state of intoxication robs the person of his senses and he does not know what he is articulating from his mouth. Since he is not completely conscious of what he is uttering from his mouth, his prayer is simply reduced to a series of mumbles and jumbles. Therefore, instead of desecrating the act of prayer, it is better not to pray during state of articulation. Sometimes a scrambled prayer is even worse than not praying because the former amounts to a wilful violation of the divine injunction, and a conscious commission of crime as compared to an unconscious slip or lapse. The act of drinking is discouraged because it is expressly inconsistent with the function of prayer which is pure contemplation and involves the highest degree of spiritual and intellectual concentration.

"O believers, drinking, gambling, idols and dividing arrows are but abominations. So turn wholly away from each one of them so that you may prosper. Satan desires only to create enmity and hatred between you by means of drinking and gambling and to keep you from the remembrance of Allah and from prayer. Will you, then, desist (from these acts)?"
In this verse the following four acts:
(i) drinking (الشرب)
(ii) gambling (الخيار)
(iii) slaughtering of animals and rubbing their blood on the stones in the name of their idols (الأنصاف)
(iv) divining arrows (الأنوار)
are placed on the same level in their sinful capacity. Qur'an expressly declared the prohibitory aspect of drinking and gambling by placing it at par with the acts of shirk i.e., attributing partners to God. Moreover, Qur'an has marked the following eight specifications in connection with drinking:
(i) it is Rijj (رِجْج). That is a noxiously stinking act.
(ii) it is an act of Shaytān.
(iii) abstention from drinking should be observed as an obligation.
(iv) without abstaining from it, religious and spiritual triumph is impossible.
(v) it is one of the basic causes of mutual enmity and jealousy.
(vi) it keeps you from the remembrance of God.
(vii) it keeps you from prayer also.
(viii) it should not be indulged in at any cost and those who do not give it up are in fact the transgressors and violators of the divine commands.

A malicious illusion.

In the light of these verses and their analysis, it is clearly established that the prohibition of drinking is expressly based on Qur'ānic commands. People who think that the
prohibition of drinking is not proved by Qur'ānic verses are in fact labouring under an illusion and are the pathetic vic-
tims of a self-concocted lie. In order to cover and justify their deviation from the right path, they fabricate fictions and fake explanations, and one of these fabrications is a consciously perverse and malicious rationalization of the act of drinking. This wilful obfuscation of the factual position reflects both their ignorance and their half-hearted and lukewarm belief in the value of Qur'ānic injunctions. Since drinking is a part of their spiritually emaciated personalities, they try to justify it by detecting loops and flaws in the Qur'ānic prescriptions. In certain cases, it amounts to down-right blasphemy because the justification of an act which is a violation of any divine command, is itself a violation. Since it reinforces a criminal act, it is compounded and multiplied by the force of sheer accumulation. There pseudo-intellectuals and self-styled modern champions of Islam who have imbibed the champagne of Western culture and debunk anything that exhales an indigenous smell, are advised to read the Qur'ān thoroughly, and with perfect concentration. Without a sense of deep involv-
ment and commitment, they are most likely to misinterpret the sense of the Qur'ānic verses and commit the double sin of igno-
rance and arrogance. How is it possible that, in spite of eight various prohibitory modes used in the description of the legal status of drinking, one can imagine that it is not express-
ly forbidden. This is perhaps accounted by the fact that the actual word forbidden ( fuḥūl) has not been used in the Qur'ān in reference to drinking. People with such a frame of mind are completely ignorant of Qur'ānic legislation. A deep and detai-
led study of Qur'ān establishes the fact that the prohibitory
laws of Qur'ān are embodied in its verses in various forms: in the form of express commandments of omission, in the form of narration of prohibition, in the form of declaration of its being impure, sinful or punishable in life hereafter, in the form of being liable to any worldly punishment, or sometimes in the form of being uncommendable, loathsome, disgusting or simply against the principles of piety. All these modes of prescription possess the same legal effects and prohibitory consequences. All things which are unanimously known to be completely ' ḥaraq ' in Shari'ah are not always literally stated as Haram in Qur'ān because Qur'ān is not a technical book of codified law or a specific compendium of legal terms. Qur'ān only provides the divine will which is explained, elaborated and exemplified through the Prophetic Sunnah and it is the duty of jurists to determine and specify the exact legal grades of the acts on the basis of the provisions of Qur'ān and Sunnah in pure technical sense. The prohibition of drinking through Qur'ān was also recognised by the companions of the Holy Prophet (peace be upon him) as stated by Hagrat Anas:

"Certainly, the prohibition of drinking was revealed by Almighty Allah." 62

The Holy Prophet (peace be upon him) at many occasions declared the drinking as an absolutely forbidden act ( ḥaraq ) and this declaration has been reported through various authentic traditions:

(1) It is reported by 'Abdullah ibn-i Abbās:
"Drinking is forbidden both in small and large quantities, and intoxication is a characteristic of every wine."\(^{63}\)

(2) Another Prophetic tradition is reported by him in the words:

\[\text{إِنَّ الْحَقَّ بِالْمَحْرُوبَةِ مِنْ مَعْرِفَةِ وَعَامِرَةِ وَخَمَرَةِ وَحَمَالَةِ الْمَحْرُوبَةِ.}\]

"God Almighty has cursed drinking and the man who sells liquor, the man who buys it, the man who extracts and prepares it, the man who carries and serves it, the man to whom it is carried and served and the man who drinks it."\(^{64}\)

In Sunan Ibn-i-Majah, it is further stated that any one who lives by drinking or thrives on its income is also damned by God. The same tradition is narrated by 'Abdul-lah-bin-'Umar and Anas bin Malik also.

(3) 'Abdullah-bin-`Amr reports another Prophetic tradition in denunciation of the act of drinking:

\[\text{الَّذِيْنِ مَهْرُوْرُبَةُ وَغَمْضَةُ وَأَقْبَلَ الْكَبَِاءُ.}\]

"Drinking is the root cause of all evils and abominations and it is the greatest of all overweening sins."\(^{65}\)

(4) Still another tradition has come down to us through 'Abdullah-bin-`Amr and Abdullah Ibn-i-`Abbās:

\[\text{مِنْ شَرِّهَا دَقَّةٌ عَلَيْ أَمْمِيَّةٍ.}\]

"Anyone who drinks is like a person who commits adultery (اِنْكَرَ) with his own mother."\(^{66}\)

Moreover, many Prophetic traditions on the same subject are reported in Bukhāri, Muslim, Musnad Ahmad and in other reliable books of Hadith.
Latterly Khámîr (کلم) signifies anything which clouds and confuses the mind and upsets the normal action of the senses, but it is technically used in the sense of drinking (کلم). It is defined in the words: "Any kind of beverage which is potentially intoxicating is known as Khámîr, whether it is taken in smaller or larger quantity and whether it consequently intoxicates a person or not. It can be extracted from grapes, wheat, barley, rice, raisins or dried grapes, dates or from anything else." The same definition is adopted by Imam Abu Hani‘ah, Malik, Shafi‘i and Ahmad bin Hanbal.

Scope of prohibition: As far as the scope of prohibition of drinking is concerned, it is not confined to some specific forms of wine because the Holy Prophet (peace be upon him) has extended the scope of Khámîr to every intoxicant. Therefore, this prohibitory act is impervious to any confusion and misunderstanding. However, modern man, in his obsessive craze for self-sustaining justifications, has tried to discriminate among various categories of wine in order to seek divine exemptions for acts which are both directly and indirectly declared abominable. This craze for explanations which run counter to the spirit of the Qur‘an and the practice of the Holy Prophet (peace be upon him) basically derives from an un-Islamic or pro-Western frame of mind. It is also a continuation of the Western opposition to the element of ingrained purity that distinguishes Islam from all other religions. Their opposition is also focussed on the ingredient of balance emphasized by Islamic tenets and by the practices of the Holy Prophet (peace be upon him). Both the act of equilibrium and the element of purification are sore spots not only for the Western exegetes but also for those Muslims for whom Islam and
its fundamentals are reduced to the level of lifeless slogans and clicks. These people deliberately twist the message of Islam and try to clamp wilful and misguided interpretations on the essentially straightly core of Qur'ānic revelation and the equally uncomplicated life and style of the Holy Prophet (peace be upon him). These people have done a great disservice to Islam and the irony is that they still persist in their purblindness either out of a sense of vengeance or perhaps they are masked representatives of some anti-Islamic coterie whose main purpose is to blur the many-splendoured message of Islam and create doubt and confusion among the pious Muslims.

It is reported by 'Abdullah bin 'Umar that Holy Prophet (peace be upon him) stated:

1) 
كلاً منسكر خمرٍ و كل منسكر حرام

"Every intoxicant is wine and every intoxicant is forbidden (harām)." 68

The same tradition is narrated in the words:

2) 
كلاً منسكر خمرٍ و كل خمر حرام

"Every intoxicant is wine and every wine is forbidden." 69

3) Hazrat Jābir reports the Holy Prophet (peace be upon him) saying:

ما يسكر كثير فقليل حرام

"Anything which intoxicates if taken in largely quantity, its smallest quantity is also forbidden (harām)." 70

The content of this tradition is free from any doubt and ambiguity. Its meaning is absolutely clear. It prescribes total abstinence from all intoxicants, irrespective of the degree of intoxication or of the quantity that may induce the effect of intoxication.
whose hearts and minds are deeply stamped with the seal of Western atheistic and agnostic philosophies, they are keen to make Islam conform to the erring demands of these conceptual systems and want to speak more bluntly, but as a matter-of-fact they are determined to westernize Islam on the name of its modernization. This attitude reflects their ignorance of the basic philosophy of Islam. Islam has anticipated these attitudes and offered viable explanations to cope with them. But the trouble with our Muslims is that they ignore the positive aspects of their religion and are easily impressed by the barrage of negative criticism launched and sustained by the vituperative Western critics. In their half-illuminated state of consciousness, they indulge in fits and bouts of unnecessary hair-splitting, they try to find a legal justification for drinking liquor in small doses. But this kind of thinking is in absolute disharmony with the practice of the Holy Prophet (peace be upon him) and in complete contravention of the essence of the Qur'anic message. Since admiration and condemnation cannot exist simultaneously, and Qur'an is free from all such contradictions, Islam cannot allow and disallow an undesirable act at the same time. It is a fact that Islam has cursed drink, and, therefore, the quantity in which it should be taken becomes irrelevant and immaterial to the effect of implementation of the categorical verdict. Thus, a justification of a criminal act is in itself a crime, and those who try to dilute its forbidden status are guilty of a double crime.

(4) It is reported by Hazrat 'Umar:

"The wine is every liquor which is intoxicant."
It is clear that the prohibition of drinking is not specified or confined to any particular kind of wine. Its scope is general, comprehensive and all-embracing. This means that any liquor, whether it was present in Prophetic era or not or whether it is manufactured now-a-days in a very refined and sophisticated form, it undoubtedly falls within the purview of Khamr which is forbidden.

(5) It is further reported by Sa‘īd bin Abī Waqqās:

"Holy Prophet (peace be upon him) prohibited even the smallest quantity of any liquor which could intoxicate if taken in a larger quantity." 72

The same Prophetic tradition has been reported by Haẓrat Ayeshah, Haẓrat ‘Alī, Ibn-i-‘Umar, Zayd bin Sābit, etc. 73

(6) Imām Abu Dūḍ has mentioned another Prophetic tradition which narrates:

"Holy Prophet (peace be upon him) forbade the drinking of every intoxicant and any thing which creates mental confusion and disorder and interferes with normal functioning of the mind." 74

(7) ʻAbdullāh Ibn-i-Mas‘ūd reports:

"The potential of intoxication is wine." 75

(8) Holy Prophet (peace be upon him) further stated:

"There would be people in my Ummah who will drink but would give it some other names." 76
The same anticipation and prediction has been reported by Abu Malik Ash'ari.

Medicinal use of alcohol

There are two possibilities of use of wine for medicinal purposes:
(i) Exclusive use of liquor as medicine.
(ii) Use of alcoholic elements in the manufacture of medicine.

As far as the first use is concerned, it is not permissible in Shariah because Holy Prophet (peace be upon him) has expressly declared that Harām has no curative value and liquor should not be taken as medicine.

Umm-i-Salmah reports the Holy Prophet (peace be upon him) saying:

(1) إن الله لم يجعل شفاءك فيم ما حرم عليكم

"Surely Almighty Allah has not placed your cure in those things which are forbidden (Harām) for you." 77

(2) It is reported by Wā'il Al-Hagrami that a companion Tāriq bin Suwayd asked the Holy Prophet (peace be upon him) about the wine which he wanted to manufacture for medicinal purposes. The Holy Prophet (peace be upon him) replied:

إنهاليست بدأ ولكلها داء 

"It is not the treatment but the disease itself." 78

(3) It is further reported by the Holy Prophet (peace be upon him):

إنه لا حرم لما حرم الحمر سبيهما النانع

"Surely when God Almighty prohibited liquor, he took away its benefits also." 79
As far as the second use is concerned i.e., inclusion of the alcoholic element in various medicines as their manufacture and preparational requirement, there is no harm in it. The reason is that in some cases during the preparation of medicines, the alcoholic elements used in them undergo a process of chemical change. Therefore, when the medicine is finally prepared and packaged, the original intoxicating characteristic, initially possessed by those alcoholic elements, is wasted out, and they no longer retain their original form. This process of chemical action and its legal consequences can be easily understood through the instance of permissibility of vinegar which was manufactured through the fermentation of wine even during the Prophetic and Caliphate periods. Vinegar was expressly declared as permissible, but wine, in the pre-fermented form as forbidden. Secondly, alcohol, although may not undergo any chemical change, but it is only used as a dissolvent for some medicines during the manufacturing process. It is not used as a medicine itself. Therefore, it does not contravene the Prophetic commandment: There is no cure in Haram.

The following conditions are required to constitute the crime of drinking liable to Hadd:

(i) There should be the act of drinking, irrespective of the quantity of drinking involved in the act.

(ii) The drinking should be of an intoxicant, a liquor which potentially possesses the characteristic of intoxication. It is immaterial whether it actually creates the effect of intoxication or not.

(iii) The act of drinking should be committed knowingly or intentionally.

(iv) It should be taken through the mouth and then gulped
down the throat.

(v) It is not a criminal act if it is taken to save the life of a person.

These conditions can be studied in detail through the following references:

(b) At-Tashrī'ul-Janā'ī, Vol.II, p.503.

There is complete consensus on the issue that drinking is one of the crimes liable to Hadd.

Its Hadd is eighty (80) stripes according to the generally accepted view, as adopted by Imām Abu Hanifah, Imām Mālik, Imām Ahmad, their followers and Ja'fari Jurists.  

Imām Shāfeī accepts forty (40) stripes as Hadd of drinking, but he is of the opinion that it can be enhanced to eighty (80) stripes, forty as Hadd and forty as Ta'zeer.  

It is believed by the scholars that the derivation of the hadd for drinking is based on Sunnah of the Holy Prophet (peace be upon him) and its finalization had taken place gradually through the consensus of the companions.

(1) Initially in Prophetic period different punishments were awarded as Hadd for drinking. In a tradition reported by Anas bin Mālik infliction of forty beats has been stated to be the practice of Holy Prophet (peace be upon him)

عن أسعد بن محمد بن عامر عن أسعد عن عبد الرحمن بن عثمان عن أبي عبد الله بلال عن النبي ﷺ

Hazrat Anas states "Holy Prophet (peace be upon him) used to award the punishment of forty beats, with shoes and palm branches, in the cases of drinking."  

Although Imām Shāfeī and Zāhiri scholars have argued in
favour of the hadd being 10 stripes on the basis of the Prophetic Sunnah, Imam Hasan Basri, Sha'bi, Abu Hanifah, Malik; Ahmad bin Hanbal, Abu Yousuf, Muhammad bin Hasan Alqaymi and others have adopted the view of 80 stripes, basing it on the argument of consensus of companions which is reported by Hazrat 'Ali, Khalid bin Waleed, Mu'awiyah bin Abu Sufyan and some other companions and their followers. This view enjoys the consensus of the overwhelming majority of the Ummah. It is also supported by Imam Souri, Aza'i, Thaydullah bin Hasan, Ismaq and according to a report by Imam Shafei and Imam Ahmad. It is unanimously agreed that during the period of Hazrat Umar, complete consensus of the companions was established in accepting the hadd of drinking to be eighty stripes. There was no difference of opinion on this issue among the companions. In many traditions, it is specifically mentioned that the Holy Prophet (peace be upon him) usually awarded different punishments in various cases of drinking. He did not always stick to the number of forty lashes.

(2) It is reported by Hazrat Anas bin Malik:

"Holy Prophet (peace be upon him) awarded the punishment of beating with palm branches and shoes in various cases of drinking and Abu Bakr used to award forty lashes." 84

The Prophetic practice of beating the drunkards with sandals, sticks, shoes and ropes, etc., without specification of number, has also been reported by Uqbah bin Raris 85 and 'Abdur Rahman bin Azhar, 86 Saib bin Yazid and Abu Hurayrah, etc.

(3) Saib bin Yazid, reports:

The event of the conquest of Yemen by Thalathin al-Madhina and Damascus.
"We used to arrest and bring the drunkard for trial in the
Prophetic era, during the period of Abu Bakr and in the early
days of the period of Umar, and execute him the sentence of
beating with hands and shoes."  

(4) Abu Hurayrah reports:

أَعْلَىَّ اللَّهُ عَلَيْهِ السَّلَامُ جَعَلَ رَجُلًا سَوَى جَعَلَةً مَّكَانًا يَنْخِذُهَا فَقَالَ اسْتَرَبِّهَا فَالْمُرْضٌرُهَا
فَسَالَ مَعْلَمًا بِحَجَّةٍ وَمَعْلَمًا بِمَلْكٍ

"A drunkard was brought to Holy Prophet (peace be upon him). He
ordered to give him a beating. Some of us inflicted blows on
him, some beat him with their shoes and some with the garments."  

These traditions make it very clear that the Holy Prophet
(peace be upon him) did not strictly prescribe any definite
punishment, but he awarded different punishments of beats and
lashes in various circumstances.

(5) The same conclusion is reported by Hazrat Ali:

نُقَلَ مَا كَانَ لَكُمْ حَدٌّ أَوْلَىَّ عِنْدَ اللَّهِ مَعْلَمٌ فَأَخْذَهُ فَأَخْذَهُ فَنُفُّضُ الْمَعْلَمَةَ لَعَلَّهُ يَضُنِّهَا

He says: "If I impose hadd on any one, and he (in course of
punishment) dies, I would not mind, except in case of a drunkard.
If he dies, I would pay indemnity for him because the Messenger
of Allah (peace be upon him) has laid down no specific rule for
it."  

Holy Prophet (peace be upon him) himself did not strict-
ly specify one punishment for drinking, but the definite Sunnah
laid down by him was to award any hadd to the drunkard as he
practised it consistently in his life time.

Post-Prophetic era

After the demise of Holy Prophet (peace be upon him),
Hazrat Abu Bakr also continued the same practice. He usually
awarded the punishment of forty stripes in conformity with one of
the Prophetic practices. During the period of Hazrat 'Umar, people in various cities or territories were becoming addicted to the evil of drinking. They thought the punishment for drinking was nominal as compared to the state of intoxication it induced in them. This increasing tendency of drinking in some people necessitated a reconsideration of the issue. It is reported that Khālid bin Waleed wrote to Hazrat 'Umar about the increasing prevalence of drinking among certain people and the minimality of punishment for drinking was inadequate to restrain them from this evil practice. Hazrat 'Umar placed this issue for consultation before the Muhājireen and Ansār who were members of Parliament of the Islamic state at that time.

(6)

"He asked them, and all of them unanimously agreed that punishment for drinking should be eighty stripes." 90

Since Holy Prophet (peace be upon him) himself did not stick to any specific number, an implied option was given to his companions to adopt any of the Prophetic practices. Since the Holy Prophet (peace be upon him) had not laid down any strict rule for it, the consensus of the companions on the fixation of eighty stripes was not against the Prophetic Sunnah. Moreover, it is not possible for the guided companions like the Orthodox Caliphs and other seniors that they would have adopted any decision against Prophetic Sunnah. The Holy Prophet (peace be upon him) himself had indicated that his Sunnah and that of his orthodox caliphs both are binding for the Ummah because the conduct of Orthodox Caliphs is an indirect elaboration and substantiation of the Prophetic conduct and nothing else.
(7) It is further reported that Hazrat 'Umar consulted the companions for deciding this issue in the light of pressing necessity of the social circumstances and to protect the moral values by eliminating the propensity of this immoral act of drinking. On this question, Hazrat 'Ali replied:

"We believe that the hadd for drinking should be eighty stripes because when a man drinks, he becomes intoxicated, and when he is intoxicated, he is likely to utter nonsense, and when he utters nonsense, he is likely to commit the false allegation of chastity i.e., Qazf, for which the Qur'an has specified the punishment of hadd of eighty stripes. Therefore, in the light of this possible consequence, the punishment to be awarded for drinking should also be the maximum possible so that the punishment may become inclusive of every possibility as that of Qazf." Hazrat 'Umar accepted this argument because all of the companions had also agreed on the fixation of this punishment. Thus from that time, the hadd for drinking i.e., eighty stripes was unanimously finalized.91

(8) It is further reported by Anas bin Malik:

فَلَمْ تَكَانَ عَمَرُ أَسْتَنْعَامُ النَّاسِ فَقَالَ دِيَ الدَّرَجَةَ مِن عَرْف
ْأَخِفِ الْيَدِ الْمَهْمَيْنَ فَأَمَرَهُ عَمَرَ

"When Hazrat 'Umar consulted the companions on the issue, Hazrat 'Abdur Rahman bin 'Auf replied that the least minimum of the hudood is eighty stripes. Therefore, Hazrat 'Umar ordered to enforce the same."92

An extremely significant point to be considered here is that though this decision appears to be achieved either on the basis of analogy of Qazf or Istihsan-i-Zarurat which subsequen-
tly achieved the consensus of the companions, yet it is to be noted that this decision had also, in fact, been based on one of the Prophetic practices. It was not an arbitrary decision.

(9) It is reported by Anas bin Malik:

"A man who had drunk wine was brought to Holy Prophet (peace be upon him). He gave him a beating with two palm branches up to the number of forty."\(^{93}\)

Here the basic point to concentrate upon is that Holy Prophet (peace be upon him) awarded the punishment to the drum kornd with two combined palm stripes. It means that one beat amounted to two stripes at a time and when these beats (with two combined palm sticks) reached the number of forty, they automatically became eighty stripes. Therefore, it was, in fact, the infliction of eighty stripes. Hazrat Abu Bakr occasionally awarded the punishment in the same form whereas the decision of the companions expressly specifying the punishment of eighty stripes was neither a new decision nor a deviation from the Prophetic practice. It was simply a continuation of the same practice in a slightly different form. Instead of inflicting stripes with two combined palm branches, a single palm branch was separately inflicted, and so eighty strokes were applied to reach the required number. This derivation on which we have based our argument has also been pointed out by Imam Nawawi in his commentary of Sahih Muslim.\(^{94}\) and Mulla ‘Ali Qari in his commentary of Mishkat-ul-Masabeh.\(^{95}\)

The same point has been raised by the commentator of Sunan Abi Daud.\(^{96}\)

In the light of this discussion, the difference between the infliction of forty and eighty stripes can be resolved.
Because forty strokes meant infliction of two combined stripes at a time and eighty strokes meant infliction of single stripes. Both practices were indicative of the same number.

(10) That is why Muslim, reporting from Hazrat 'Ali, with reference to the incident of Waleed bin 'Uqbah, mentioning the practices of the Holy Prophet (peace be upon him), Abu Bakr and 'Umar categorically says:

"Each of these two practices is Sunnah." 97

(11) Moreover, Muslim in the same tradition, after mentioning the infliction of eighty stripes, says:

"And this is more appealing and attractive to me." 98

These words are meaningful because they possess a decisive value. If there had been a material difference or inconsistency between the Prophetic practice and the practice of Hazrat 'Umar, then he being a loyal companion, student and disciple of the Holy Prophet (peace be upon him) would never have preferred the practice of Hazrat 'Umar to the practice of Holy Prophet (peace be upon him) and declared that the practice of Hazrat 'Umar was more appealing and attractive to him. His declaration clearly indicates that there was no substantive difference between the two practices. It was only a question of procedure adopted by Hazrat 'Umar and other companions to achieve the same objective.

This interpretation is supported by many traditions. We can, therefore, conclude that the traditions indicating the infliction of 40 stripes also impliedly signify the punishment of 80 strokes.
It is reported that the stripe with which lashes were inflicted on Waleed bin 'Uqbah was two-fold.

"The stripe was two-fold. Therefore, one beat, in fact, included two beats."99

Muhammad bin 'Ali's narration also supports this view:

"Hazrat 'Ali applied forty lashes to Waleed with a two-fold stripe."100

'Urwah reports the same view in the words:

"Hazrat 'Ali applied 40 lashes to Waleed bin 'Uqbah for drinking with a two-fold stripe. This took place during the period of Hazrat 'Ugman bin 'Affan."101

This narration has made the situation very clear, because the practice of 40 lashes with two-fold stripe is also proved to be present during the Caliphate of Hazrat 'Ugman, even after the establishment of the consensus of all the companions in the period of Hazrat 'Umar.

Moreover, the lashes are reported to be applied by Hazrat 'Ali, who had already given his opinion in favour of 80 stripes.

It does not appeal to reason that after his own argument, which ultimately became the Ijmā' of Sihābah, he himself deviated from it. Therefore, the only way out is to accept the inescapable fact that the infliction of 40 strokes with a two-fold stripe, undoubtedly, meant the execution of 80 stripes. The only
difference between various reported practices was the difference of the norm of infliction, and not of substance and quantum. All the companions unanimously agreed on the infliction of 80 stripes, while some of them awarded it with a one-fold stripe and others with a two-fold stripe. Whenever the punishment for drinking was inflicted with a two-fold stripe, it was reported to be 40 strokes. And whenever lashes were applied with a one-fold stripe, they were counted up to eighty. In fact, in both practices, the same rule of eighty beats was adopted.

The Holy Prophet (peace be upon him) himself sometimes awarded 40 strokes which, in fact, amounted to 80 beats.

(15) It is reported by Abu Sa'eed:
إن رسول الله صلى الله عليه وسلم ضرب في الحرم بالمعلمين اثنين
مجعل فجعل عمر صرخة لا تنام لعل سرطا

"The Holy Prophet (peace be upon him) inflicted 40 beats separately with two shoes and 'Umar simply replaced every beat of shoe with a lash."102

This Prophetic practice has unambiguously explained the fact that the sentence awarded by the Holy Prophet (peace be upon him) for drinking was 80 beats.

(16) Another important and remarkable tradition has been reported by Hazrat 'Ali, which expresses the Prophetic conduct in this regard:

إنه جلد ماء في الحمر شباني

"The Holy Prophet (peace be upon him) applied 80 lashes to a person for drinking."103

(17) 'Abdullah bin 'Amr reports that the Holy Prophet (peace be upon him) said:

من شرب بسعة خمراء تقدمت 80 لصا

"Whosoever drinks even a single sip, execute him 80 lashes."104
The same view has been expressed by Imam Tabrani. 105

Imam Tahlawi has also mentioned another Yougoof hadith prescribing 80 lashes as the hadd for drinking, which is supported by a number of other reliable traditions.

In the light of the whole discussion it has become clear that Hazrat 'Umar, other Companions and the Orthodox Caliphs had neither agreed to the decision of 80 lashes without knowing the Prophetic conduct nor had they deviated from early practices.

That is why this matter enjoyed the total consensus of the companions which is still binding on the Ummah and cannot be repealed through Ijtihad because Holy Prophet (peace be upon him) himself has ordained:

عليكم بسنن وسنة الخلفاء الراشدين الصحابي

"You should follow my conduct and the conduct of the Orthodox guided Caliphs." 106

The crime of drinking is so grievous in Shariah that Holy Prophet (peace be upon him) declared the death sentence on its repetition at fourth instance.

(19) It is reported by Hazrat Nu‘awiyah that Holy Prophet (peace be upon him) said:

إذا شرب فاجلعدة دم إذا شرب فاجلعدة دم إذا شرب ثلاث فاجلعدة

"If a person drinks wine, flog him, if he repeats it, flog him again, if he repeats it the third time, flog him once again but if he repeats it the fourth time, then cut his head off, and in another tradition he said decapitate him." 107

(6) APOSTASY

Apostasy is known as Irtidā (ارتداد) or Riddah (ردة)
which literally means 
looting. Technically, ḥadd is known 
as "giving up and deviating from Islam."

These words have been derived from the root ṭaḍ ( ) which, 
along with other connotations, means "to retract, to retire, to 
withdraw from and fall back from." In the term of Islamic 
legal science, it is defined as "Retraction from Islam by a 
person who professes Islamic faith, either through any act of 
speech or deed or faith." Such person is said to be an Apostate 
( ṭalīṣ).

There are two basic elements which constitute the crime 
of apostasy:

(i) deviation from Islam after being a Muslim.
(ii) mala-fide intention

Deviation can be in either of the three following forms:
(a) deviation through utterance
(b) deviation through action
(c) deviation through faith

Apostasy is liable to death punishment. A Qur'anic pro-
vision clearly supports it:

وَالَّذِينَ اعْتَصَمُوا بِالْكَفْرِ اذْعَرُوا لِلْهُمْ لَهُمْ لَيُقَذَّبُونَ

"But if they break faith after pledging it and ridicule your 
religion, then decapitate the leaders of disbelief so that they 
may be restrained from this act, for they have no regard for 
their pledged word."  

Moreover, the Holy Prophet (peace be upon him) also exp-
ressly articulated the punishment of apostasy at numerous occa-
sions:
(1) It is reported by Hazrat 'Abdullah Ibn-i-'Abbās that Holy Prophet (peace be upon him) said:

من بذل دينه فاقتدهم

"Whosoever changes his religion (of Islam) and deviates from it, award him the death sentence." 110

(2) Hazrat 'Abdullah bin Mas'ud further reports the Holy Prophet (peace be upon him) saying:

لا يحل دم مرجل مسلم يشهد أن لا إله إلا الله وحده لا شريك له

النبي والرسول النفس والنفس واللفك لا بذل دينه لم يذكر له

"The blood of any Muslim who certifies the Tauhid and the Rasālah should not be shed except in either of the following three:

(a) the married adulterer
(b) the murderer
(c) the man who deviates from the religion of Islam and gives up the group of Muslims." 111

(3) It is reported from Mu'āz bin Jabal, during his tenure as a Judge in Yaman, that a man embraced Islam and then deviated from it and became a Jew. He ordered:

لا أجلس حتى يقتل قضا الله ورسوله فامر به قتلا

He said, "I would not rest unless he is executed to death. This is the decision of Almighty Allah and His Prophet (peace be upon him)." Then he ordered his execution and the Apostle was ultimately decapitated. 112

(4) Another significant incident of the Prophetic period is narrated in books of Hadith with an extremely reliable chain. It is reported by 'Abdullah Ibn-i-'Abbās that a concubine of a blind man constantly abused the Holy Prophet (peace be upon him). The master prohibited her but she kept on abusing the Holy Prophet (peace be upon him). When all his efforts to stop her
vituperative exercise failed, he murdered her during the night. Her act of abusing the Holy Prophet (peace be upon him) was a clear deviation from Islam. Therefore, the murder of the concubine was legally justified: it had no criminal implications. When the Holy Prophet (peace be upon him) came to know about the murder, he said to the people: "Be witness to it that this murder is not punishable or avengable." 113

This declaration of the Holy Prophet (peace be upon him) certified the decapitation of a woman who had turned apostate on account of her vilification of the Apostle of God. Since an apostate in Islam is liable to death punishment, therefore, her master's act of murder was declared right and lawful.

The basic concept of apostasy is clearly spelled out in Qur'ān. It states that any man who commits an act of verbal, actual or theological deviation from or negation of any of the basic tenets and fundamentals of Islam, is deemed to be non-believer:

ومن يرتدون منكم عن دينهم فتهم ومركاش فأولئك حبشت أعمالهم في الذنوب والأخيرة و أومئلاً أصَحب السَّارِ هم فيها خلدون

"The works of those among you who turn back from their faith and die in a state of disbelief shall be vain in this world and the next. These are the inmates of the fire and they shall live there for ever." 114

**Conditions**

The following conditions declare an act as an apostasy liable to death punishment:

**Muslim**

(i) The person must be initially a Muslim because the deviation of a non-Muslim from his religion to any other religion does not amount to apostasy.

**Adult**

(ii) He should be adult and not a minor because a minor's act of deviation does not constitute apostasy in the legal
(iii) He should be sane. If he is not a normal person, his deviation does not fulfill the requirements of apostasy. (iv) His deviation should be voluntarily conditioned. It should be the expression of his free will, choice or volition and should not be evinced or elicited by force or compulsion. If a Muslim deviates from his religion under coercion, his act does not tot up to apostasy liable to death punishment because God Almighty Himself has declared:

من كفر بالله من بُدِد أيمنه إلا من آرة و كلبة مخطوبين بالابياب ولكن من

شريج بالكفر وما فعلهم عضب من الله و لله عذاب عظيم.

"Whoso disbelieves in Allah after he has believed, except the case of one who is forced to make a declaration of disbelief while his rest rests securely in faith, but one who opens his mind wide to disbelief, on him is Allah's wrath and he shall have a grievous punishment." 115

This verse clearly excludes the deviation under coercion from the scope of the act of apostasy. Therefore, this type of situation is exempted from the punishment of death. But all other forms of deviation committed freely and voluntarily fall within the purview of apostasy. This Qur'anic verse was revealed in the context of 'Ammār bin Yāsir who was coerced to utter the word of disbelief and thereby deny the existence of God. God exempted the act of forced denial from apostasy and clarified the situation in the interest of contemporary response for all times to come. 116

Qur'ān has further explained the consequence of voluntary deviation in the words:

و من بيع غفر الإسلام ديماً فن نبئ منه.
"Whoso seeks a religion other than Islam, it shall not be accepted from him." 117

In this verse, the word "seeks" indicates voluntary and free deviation from Islam and exempts coerced deviation from the scope of apostasy.

(v) There is a difference of opinion among Muslim Jurists on this issue. According to Imam Malik, Shafi'i, and Ahmad bin Hanbal, there is no discrimination on the basis of sex. Both female and male apostates deserve equal punishment. But Imam Abu Hanifah disagrees with this view. He believes that a female apostate is not liable to death punishment. 118 The three schools have based their view on a tradition reported by 'Abdullah Ibn-i-'Abbās:

"A female apostate should also be sentenced to death." 119

Another supporting argument has been quoted by Dār Qutni:

"Hazrat Abu Bakr decapitated a woman who had turned apostate during his Caliphate." 120

There is another Prophetic tradition with a weak chain reported by Hazrat Jābir:

"A Muslim woman had become an apostate. The Holy Prophet (peace be upon him) suggested that she should again be invited to accept Islam. If she sincerely repents and re-embraces Islam, she should be forgiven. If she rejects it, she should be executed. Accordingly, she was offered to accept Islam but she
rejected it. As a result of her persistence in her act of apostasy, she was hanged to death.\textsuperscript{121}

Similar instructions are reported to have been given by the Holy Prophet (peace be upon him) to Hazrat Mu'\textsuperscript{a}z bin Jabal at the time of his appointment at Yaman which clearly indicated that there was no discrimination between the male and the female for the executing of the death punishment for apostasy.\textsuperscript{122}

 Imam Abu Hanifah, however, believes that female should not be murdered for apostasy but she should be imprisoned. During her confinement she should be made repeated offers of re-embracing Islam, and during this process she would either accept Islam or die a natural death.\textsuperscript{123}

 Imam Abu Hanifah, has based his view on a Prophetic tradition which prohibited the decapitation of woman.\textsuperscript{124}

 Imam Abu Hanifah does not rely on the Prophetic tradition mentioned earlier on account of the weakness of its chain of narrators.

My humble view in this respect is that no discrimination should be permitted between male and female, because most of the authorities support the same idea. Moreover, if at all she has to die even during the confinement in case of rejecting the repeated offers, then why the same could not be done as a punishment.

However, she can be given more chances of re-embracing Islam, during the imprisonment, but after her final rejection, she should be decapitated without putting her in a long physical trouble of life imprisonment.

In addition to the execution of punishment, apostasy is followed by four other legal consequences.

(i) **Annulment of conjugal relations:** If any of the couple
turns an apostate, their marital contract is automatically annulled which means a dissolution of the marriage. If, however, the apostate re-embraces Islam and both the parties wish to revive the marital relationship, they are supposed to enter into a new contract of marriage.

(ii) Deprivation of the right of inheritance: The apostate cannot inherit the property of any of his Muslim relatives.

(iii) Deprivation of the right of guardianship: An apostate cannot act as a guardian of his own minor children for their marriage. This right is enjoyed only by Muslim parents.

(iv) Deprivation of the right of property: There is a difference of opinion among Muslim Jurists on this issue. Imam Malik, Shafei and Ahmad bin Hanbal do not agree to this view. They believe that a person does not forfeit the right of ownership through the commission of apostasy and nor he can be restrained from further acquisition of property. If he re-enters the fold of Islam, he can repossess all of his former property, but if he dies an apostate, or is murdered during apostasy, his property would be taken over by the Islamic state. 125

Imam Abu Hanifah, however, believes that he forfeits his right to property also as a consequence of his act of apostasy. In case of his death or murder during this state, his property passes on to his Muslim relatives, 126 and the property he has piled up after the commission of apostasy would be claimed by the Islamic state. This is a form of derivative punishment of apostasy. 127

Some scholars and critics of Islam, who are over-impressed by the canker of Westernization, have tried to generate the false impression that the punishment for apostasy is equivalent to an unjustified suppression and eventual termination of basic
human liberties. In their craze for Westernized sophistication and skin-deep elegance they have condemned the Islamic punishment of apostasy in the Billingsgate style. While it inflicts fractional damage on the time-tested principles of Islam, it certainly reflects not only the meanness of their mentality but also their deep-rooted and black-hearted animus against Islam and its ever-green message. They consider this punishment repugnant to the spirit of لَا آكَرِئَةٌ فِي الدِّينِ (there is no compulsion in Islam). They believe that the punishment of apostasy contradicts and violates this fundamental tenet of Islam. Their argument is that coercion and compulsion are not permissible in Islam but the punishment of apostasy is an absolutely coercive and compulsive act and curtails the religious liberty of people. They insist that there is a basic disharmony between the message of Islam and this form of punishment. This view is obviously based on prejudice. If one takes off jaundiced spectacles and examines the Islamic punishment for apostasy dispassionately, it may not be a Hercelean task to justify the punishment. The justification can be easily understood from the lines given and discussed below:

1. The Qur’ānic verse لَا آكَرِئَةٌ فِي الدِّينِ has been misunderstood and misinterpreted by the modernists who are against the validity of this legal punishment. This verse actually facilitates the practice of Islam for the Muslims. It chiefly signifies that there is no inconvenience, bigotry and hardship in practising Islam. It makes the understanding and implementation of the commandments of Allah and His Prophet (peace be upon him) easier and smoother and aims at the elimination of all unsavoury elements that one may come across in practising the religion.
Whenever there is any difficulty, a state of pressing compulsion and discomforting situation, the normal commandments are sometimes suspended, exemptions are granted, and concessions are given to the people to meet the unpleasant necessities of the times. So that Muslims do not feel the pressure of circumstances in practising the laws of Shariah. This Qur'anic verse has no link with the right of deviation from Islam or the punishment to be awarded for it. So the criticism of these scholars is either a case of misplaced judgement or an exercise in the rhetoric of malice and baseless propaganda.

(ii) If at all we are supposed to apply this Qur'anic verse to non-Muslims, it only signifies that they should not be forced to embrace Islam. If there are non-Muslim minorities in an Islamic society, it is the obligation of the Islamic state to provide a guarantee for protection of their religion, life and property. They are neither forced nor supposed to embrace Islam only for the reason that they are living in the dominion of Islam. Islamic history, right from the Prophetic era to the 20th century, is witness to the fact that the Muslim rulers in Islamic states have never compelled non-Muslim minorities to accept Islam. Because to compel non-Muslim to embrace Islam is essentially against the humane policy of Islam. This is the second implication of the verse, which is being wilfully distorted and misrepresented by the critics.

(iii) Islam ensures the betterment of Muslims through the protection of their religion also. Islam repeatedly stresses that the comprehensive progress and prosperity of the Muslims depend exclusively on following the teaching of Islam both in letter and spirit. According to Shariah, deviation from Islam is equated with destruction of human life since Islam cannot passively
watch the crumbling and collapsing spectacle of human decimation, it prescribes such severe punishments for any act that may counter the process of the preservation of basic human values. If deviation is the real destruction, the punishment of death is not too severe for apostasy because no system of belief, that claims to be a complete code of life, can afford the erosion and annihilation of its own moral and ideological institutions. When a man embraces Islam, he becomes a Muslim. This fact of acceptance vests two kinds of right in him.

(a) Rights of religion to be observed by the individual through following and practising the teachings of Shariah.

(b) Rights of the Muslims over their religion in the form of laws which are formulated by the Shariah to protect the benefits of the individual concerned.

It is one of the primary duties of Islam to fulfil these rights of the individual through a guarantee of protection of his benefits. Since it is an essential article of Islamic faith that the true benefit of a Muslim is in scrupulously acting out the tenets of Islam, it therefore, provides conscious checks and restraints to eliminate the chances of deviation from it. Since apostasy is a disadvantageous and destructive act, the imposition of such a severe punishment is actually in the benefit of the individual himself who may be restrained by the severity of the punishment to paddle against his own salvation. The harshness of the punishment serves as an incentive for the individual to follow the teachings of Islam.

(iv) Islam declares that the protection of the religion of the Muslims as well as of their life, property, reputation, prestige, business etc., is the primary duty of the state. An individual being a Muslim, becomes, through his express or
implied declaration of faith, a part and parcel of Islamic society and therefore, his religion is no longer a personal affair which could not be interfered with by the state. Therefore, the enforcement of punishments to protect the faith of the Muslims is in fact a public right and not a private one. Because, it is the legal and moral duty of the state to check the negative acts of the individuals and to encourage positive tendencies which may result in both individual and collective happiness.

(v) Apostasy is in fact the negation of the ideological basis of an Islamic state which is the ultimate reason of the protection of its integrity, solidarity and prosperity. Therefore, it is considered similar to sedition with the only difference that sedition operates at the political level but apostasy operates at the religious and ideological level. If political liberty that may endanger the solidarity of the state and act against political cohesion of its people, cannot be permitted for the benefit of the society, similarly unrestrained religious liberty can not be given to the Muslims to become apostates which ultimately threatens the ideological solidarity and integrity of the state.

(vi) There are, however, no checks placed on the non-Muslims. They are at liberty to stick to their former religion or deviate from it. But it is very clear that a non-Muslim should not be forced to become a Muslim. And the most significant and remarkable aspect of Islamic Legal justice is that if a non-Muslim embraces Islam under coercion, but afterwards he deviates from it, his deviation would not amount to apostasy and he would not be liable to hadd i.e., death punishment.
In the light of these arguments it is not fair to claim that the imposition of the capital punishment is cruel, oppressive and inhuman, as it ensures the ideological integrity of the individual as well as of the society. It is neither against Qur'ān nor against the principal of human liberty. The only condition for the imposition of hadd of apostasy is that before executing the punishment the apostate should be provided a fair chance to re-embrace Islam. His reconversion may be achieved through rational argumentation in favour of the truth of Islam: it may be achieved through a clarification of his doubts which have compelled him to diverge, it may be achieved through intellectual satisfaction so that he is mentally convinced about the truth and universality of Islam. If he rejects the offer after all these persuasive and explanatory measures, he can be confined and imprisoned and given some kind of physical punishment coupled with the threat of death. All this is done to discourage his act of straying, so that like a temporarily lost lamb he may return eventually to the pen of peace and security. This persuasion or physical imprisonment is of varying nature: it may spread over three days, twenty days or possibly a month. These three options represent three different schools of law and the matter is discussed at length in various books of Hadith and Islamic Law. 128

(7) SEDITION:

Definition: In Arabic terminology it is known as "جُمُهُر" which literally means to demand anything, but in its general sense it means to make an attempt to get any prohibited thing with oppression and aggression.

Hanafi View According to Hanafi view baghāwat (sedition) is to come
out illegally in disobedience against the lawful head of the Islamic state.¹²⁹

According to Mālikī view, the disobedience with the use of force and power against lawful orders of the head of an Islamic state is known as sedition.¹³⁰

According to Shāfī‘ī view, to come out in disobedience against the lawful head of the Islamic state with a show of force and power is known as sedition. The justification or non-justification of the cause of the rebels is immaterial to the fact of its occurrence.¹³¹

The Hanbali view reduces it to disobedience of the head of an Islamic state with a demonstration of force and power, and with or without a justification of the insurrection or the cause of the rebellious parties.¹³²

There are three essential elements which constitute the act of sedition:

(i) Coming out against the head of the state.
(ii) Use of force and power.
(iii) Mala-fide intentions.¹³³

The act of Sedition is expressly forbidden in Qur‘ān:

فَلَيْنِمَّا نُصْبَتُو مِنَ الفَوْاحِشِ وَالْبَغْرَاءِ وَلَا أَنْبِيَاءِ

Translation: "Tell them: My Lord has only forbidden indecencies, overt and hidden, and all manner of sin and sedition that is unlawful."¹³⁴

The punishment of sedition is death or decapitation, unanimously agreed upon by all Muslim schools of law. Qur‘ān further states in reference to the punishment of sedition:

إِنَّمَا طَبَابَتْ مِنَ النُّصُبِ أَنْ تَسْتَنْدِرَا وَأَصْلُحَا بَيْنَهُمَا فَإِنْ تَفَغَّتْ

Translation: "If you can pair and discipline them, better for them is that you pair and discipline, as to Allah."
"If two parties of believers fall out with each other and start fighting, make peace between them. If one of them transgresses against the other, fight the one that transgresses until it submits to the command of Allah." 135

The act of sedition is declared to be fitnah (discord and disharmony) and it is also regarded as a crime more heinous than murder. Qur‘ān states:

والفتنة أشد من القتل

"Discord is more dangerous than murder." 136

At another place in the Holy Qur‘ān, it has been clearly enunciated:

وقتلوهم حتى لا ينكرون فتنة

"and fight them until the discord is completely eliminated." 137

Holy Prophet (peace be upon him) at many occasions explained the legal consequences of sedition. ‘Abdullah bin ‘Umar reports the words of the Holy Prophet (peace be upon him):

من حمل علينا السلاح فليس منا

"Anyone who takes up arms against us is not from us." 138

Another Prophetic tradition is reported by Hazrat Abu Hurayrah:

من خرج عن الطاعة وقادر الجماعة ومات فسيتم بتهمة جاهليّة

"Whoso disobeys the head of an Islamic state and upsets the unity of the Ummah by breaking out of it, and dies in this condition, his death is an un-Islamic death." 139

Another tradition reported by Urfa‘ah bint Shurayh expressly prescribes the punishment of sedition:

من اكتفى وأمركم جميع يريدان بنفروا جماعة فانتقلوا
"When you agree on the headship of a person and then somebody comes to you and creates disruption, dissonance and dissension in your group, decapitate such a person." 140

It is also reported by Hazrat Umm-i-Salmah, one of the wives of the Holy Prophet (peace be upon him) that he said with reference to 'Ammar bin Yasir:

"A seditious group will murder 'Ammar." 141

In the Prophetic tradition, a group of persons who had openly revolted against the Caliphate of Hazrat 'Ali is declared to be the seditious group.

'Urfajah bin Shurayh has reported another tradition of the Holy Prophet (peace be upon him) which clearly prescribes the punishment of sedition:

"Surely there will be many discords and dissensions after me. Therefore, after the agreement of my Ummah on any issue, if anyone tries to generate disruption and disunity in its ranks, decapitate him with the sword, whosoever he may be." 142

Since the act of sedition is an act against the political, social and religious unity of the society, its needs be curbed with a heavy hand. Since it is also an infectious and contagious evil, it should not be allowed to raise its ugly head. Besides, its unnecessary jabber and babel is a source of extra tension for the whole community.
QISĄS AND DIYAT (Retaliation and Blood Money)

The crimes of Qisąs and Divat are normally known as Al-Janąvat. These are in fact the crimes against persons. The crimes of Qisąs are primarily classified into two kinds:

1. Retaliation for life (قصاص في النفس)
2. Retaliation for organs (قصاص في الأعضاء)

The crimes against the life of a person fall within the first kind of Qisąs and those which do not affect the life but may injure the organs of a person fall within the scope of the second kind.

God Almighty has provided human beings with the sanctity and security of their lives by prohibiting the act of murder. Qur‘ān states:

ولا تعتَرَفوا بالنفساترى حرَم أَللهَا البَالغ

"Don't murder anybody (or take away any life) which is forbidden by Almighty Allah except for lawful purpose."

It is reported by 'Abdullah Ibn-i-Masıud that Holy Prophet (peace be upon him) explained the nature of the murder for lawful purpose, as mentioned in the Holy Qur‘ān:

لا يحل دم أموك مسلم يشهد ان لا ألللله إلا وحيد
ثلاث: البغيذا والنفس بالنفس والثالث، والتحكم لذين صمدا للجماعة

"The murder of any Muslim who professes firm faith in Tauheed and Risālah of the Holy Prophet (peace be upon him) is not permissible except for either of these three:

(a) a married adulterer (he should be stoned to death)
(b) a man who commits wilful murder (he should be awarded death sentence in retaliation).
(c) an apostate who turns back from his religion and
creates disunity in the ranks of the Muslim society (he should also be awarded the death sentence)." 144

The murder of children, even on account of an apprehension of the possibility of their hunger or starvation, is expressly forbidden by the Qur'ān:

إنّ قتلهم كان خطأً كبيراً

"Surely their murder is a stupendous sin." 145

Qur'ān clearly states at another place:

ومن يقتل مؤمنًا من بعد أن علّمه الله الإسلام فرض على له عبادة جزاءها

"Whoso kills a believer deliberately, his reward shall be hell, wherein he shall abide, and Allah will be annoyed with him and will cast him away and will prepare for him a great punishment." 146

It further states:

إنّ من قتل نساء بغرض قتل أمهاتهم فرض على له عبادة جزاءها

"Whoso murders a person without lawful right or creates disorder in the land, it is as if he has killed all mankind; and whoso helps one to live, it is as if he has given life to all mankind." 147

Holy Prophet (peace be upon him) declared murder a grievous, heinous and unparalleled sin. Barā, one of his companions reports him saying:

لزوال الدنيا أشيء على الله من قتل مرّ من بني مهاج

"To destroy the whole of the world is far more trivial and inconsiderable for God Almighty than the unlawful murder of a Muslim." 148

'Abdullah bin 'Amr bin-al-'Ās reports the Holy Prophet (peace be upon him) saying:

...
"Whoso murders a non-Muslim, who has been guaranteed safe
conduct by the state, shall not inhale even the smell of
paradise." 149

The punishment prescribed for the crime of murder in
the form of Qisas is the death punishment in order to balance
the heinousness of crime and punishment. It is expressly stat-
ed in Qur'an:

"O believers, equitable retribution in the matter of the murde-
red is prescribed for you: exact it from the free if he is the
offender, from the slave if he is the offender and from the
woman if she is the offender. If the offender is granted some
remission by the heir of the murdered, the agreed penalty shou-
l be equitably exacted and should be handsomely discharged.
This is an alleviation from your Lord and a mercy. Whoso tran-
sgresses thereafter, for him there is a grievous chastisement.
There is safeguarding of life for you in the law of retribution,
0 men of understanding that you may have security." 150

1). RETALIATION FOR LIFE :

In the light of the two verses cited above, the Islamic
concept of Qisas appears to be based on the following characte-

istics:

(1) It means that Allah has framed this law on the basis of
equity and equality because, according to this law, life is tak-
en for life. The concepts of free man for a slave, and a woman

quality
for a woman, indicate the idea of equality in awarding the punishment of Qisās.

(2) These verses have also granted to the heirs of the murdered the right of pardoning the murderer or remitting the punishment. That is why it is declared to be a compoundable offence.

(3) The punishment of Qisās is also provided with a substitution of blood money. This provision was not available in the revealed laws of Jews and Christians. The Holy Prophet (peace be upon him) confirms this fact in his own words:

"Kaān bi-Dinī Isrā'īlīl alqasās, wa-l-aqīdān fī hām al-dīrāh"

"There was the provision of Qisās in the laws of Bani Isrā'īl but there was no concept of blood money among them."

(4) Qur'ānic law provides mankind with sufficient security of life because, taking anybody's life means to give one's own life. Qur'ān clearly enunciates its view in support of the sanctity and preciousness of human life:

"Wakkum fī alqasās ẖirīṭa ẖadarī al-riyāb. Allāh tālā kātub tumāqūn 0"

"There is safeguarding of life for you in the law of retribution, O men of understanding, that you may have security."

(5) This is the only crime which gives the right of claim of punishment to the guardians and successors of the affected party. The death of the person does not cancel his right of claim of punishment. After his death, it operates through his heirs and successors.

Islamic Law recognizes five kinds of murder:

Qatl-i-'Amad Wilful/intentional homicide (homicide amounting to murder)
When the perpetrator wilfully kills a person without any lawful right, with an actual or potential weapon of murder, it is known as Qatl-i-Awwad (کُفْلِ الْعَوْد).

This crime comprises three elements:

(i) The murderer should be adult and sane with an intention to kill the person.

(ii) The murdered person should be innocent, free from the charge of murder.

(iii) The act of murder should be committed with a weapon which carries the potential of inflicting the death injury.

Qur'ān has prescribed ethereal as well as earthly punishment for this crime. The first punishment is indicated in the verse:

وَسَمَّى مَا مَاتُتِهِ أَنْفُذَةٌ جَهَّاُمَّةٌ وَفَخَّرَهُ عَلَى وَلَدَيْهِ وَأَعْلَمْهَا عَذَابًا أَعْظَمًا

"Whoso kills a believer deliberately, his reward shall be hell wherein he shall live and Allah will be annoyed with him and will cast him away and will prepare for him a great punishment!" And the earthly punishment which is to be awarded by the state is the Qisās. Qur'ān states the punishment in these words:

بِيَانِ الَّذِينَ أَمْشَأَتْ مُنْهَكَهُمْ عَلَى الْقُسُصِ فِي الْقُتُلِ

"O believers, the law of retribution has been prescribed for you in cases of murder."

At another place, it is again prescribed with reference to Taurāt:

وَكَتَبْنَاهُمْ فِي هُنَاكَ الْقُسُصَ بِالْقُتُلِ

"And we made this law obligatory on them in case of murder that life should be taken for life."
It is reported by Anas bin Malik that a Jew crushed a girl's head between two stones. She was asked to name and identify the person which she did. The Jew was not only caught but he also made the confession of his guilt. The Holy Prophet (peace be upon him) ordered his head to be smashed with stones. 157

Another incident of a Jewish woman is reported by Bukhari and Muslim who had fed poisoned meat to the Holy Prophet (peace be upon him) and to one of his companions, Bashar bin Baru'. The companion died as a consequence of poisoning: The Holy Prophet (peace be upon him) inflicted the death punishment on her due to the death of the companion. 158

Imam Nawawi elucidates some legal points relating to the retribution and punishment of murder in the light of the incident quoted by Anas bin Malik.

(a) A male can be killed in retribution for the murder of a female.

(b) Intentional murder can be retaliated in the same form (الإحراز). However, Imam Abu Hanifah, Sha'bi, Imam Nakhfi and a few others do not agree with this explanation. The detailed discussion of this point has been given earlier.

(c) The statement of the dying man carries substantial weight to indicate the murderer but this alone is not sufficient to establish the crime of murder liable to Qisas. It must be supported by the confession of the criminal or the evidence of two reliable witnesses.

(d) The circumstantial evidence should completely endorse the statement of the dying man and in no way belie his confession.
(e) The murderer is deprived of the right of inheritance and bequest and, moreover, he is required to perform the expiation also.\(^{159}\)

**Qatî Shibh-ul-Amad**  
**Quasi-Intentional Homicide (Homicide not amounting to wilful murder)**

**Definition:**  
"It is a semblance of wilful murder where the perpetrator or with the intention of killing the person without lawful right strikes him with something which is neither an actual nor a potential weapon of murder, for example to beat with a stick or hit with a pebble etc., as a result of which the man dies.\(^{160}\)

**Punishment:**  
(i) The punishment for Qatî Shibh-ul-Amad (قَتِيلُ شِبْحِ عَلِ الْأَمَّد) is expiation in the form of fine, that is, one hundred camels payable within three years. This mode of punishment is based on a Prophetic tradition reported by 'Abdullah Ibn-i-Abbas.

من قُتِلَ بِعَبْدَة نَفْسَهُ مَعْلَامَة فُسْطَنَّة في أَسْمَاعِ الْأَوْلِيَاء

"Who so was murdered with a pebble or a stick or a rod, his death is liable to the blood money i.e., the fine in the form of camels."\(^{161}\)

(ii) Imam Ahmad bin Hanbal and Imam Abu Dâ'ud have also reported a Prophetic tradition:

عقل شبه العمد مغفل، كعقل العمد ولا يقتل صاحبه

"The blood money or fine for Shibh-ul-Amad is like the blood money of wilful murder (Qatî-i-Amad) but the perpetrator would not be sentenced to death."\(^{162}\)

(iii) Another Prophetic tradition in the same context is reported in Musnad Ahmad, Sunan Abi Dâ'ud and Nasâî in which the Holy Prophet (peace be upon him) has expressed the same law.\(^{163}\)
It is further to be noted that the murderer in this case is deprived of inheriting the property of the slain.

**Homicide by negligence or mistake** (murder as a result of misadventure).

If a man commits an act which is basically lawful, for example, shooting an animal for sport, but instead he hits an innocent person who ultimately dies, it is known as Qatl-i-Khatā (القتل الخطأ). 164

The negligence or error in this case is further divided into two kinds:

(a) **Error in intention** (الأخطار الفصل).

(b) **Error in the act** (الأخطار العامل).

Error in intention means a mistake which occurs with respect to the subject: a person shoots an arrow at a man supposing him to be game or at a Muslim taking him for a hostile infidel. Error in act means error with respect to the act: a person shoots an arrow at a mark but it accidentally hits a man.

**Punishment:**

There are two kinds of punishment for Qatl-i-Khatā.

The **first kind of punishment** is the blood money in the form of fine payable within three years. The **second kind of punishment** is expiation i.e., to free a Muslim slave from captivity or to fast for two months successively. This punishment is based on a Qur'anic verse:

> وما كان لمؤمن أن يقتل مأمونًا إلا خطأً ومن ثلاث مأمونًا فتحريض
> مقصودة مسألة إلى أهل الدين الذين ينازعونه، فإن كان من قومه
> عبد الله وهو من تحرير سنة مساندة، وإن كان من نوايته بيدك،
> وبهم شهيدان ندين مسألة إلى أهل الدين تحرير سنة مساندة، فلن يذكَر
> بعد فسقيهم شهر مُنًى من الردة من الله، وإن الله علِيماً حكِيماً.
"It does not become a believer to kill a believer unless it is by mistake. He who kills a believer by mistake shall free, or procure the freedom of, a believing slave, and provide the blood money to be handled over the heirs of the murdered, unless they remit it as charity. If the murdered person is of people hostile to you, though himself a believer, the offender shall free, or procure the freedom of, a believing slave. If he is of a people with whom you have a pact, then blood money payable to his heirs and the freedom of a believing slave shall both be due. Whoso finds not a slave to set free shall fast for two consecutive months. This concession is a mercy from Allah. Allah is all-knowing, wise."

Qatl Qā'im Muqām bil Khatā/Shibhul-Khatā. Homicide similar to misadventurous murder (القتل شبه العاطل/نافكة بالباطن) It is a semblance of homicide by negligence.

Definition: "If a person walking in sleep falls upon another and crushes him to death or if a sword or a stone slips from the hand of a person and strikes another person resulting in the death of that person, it is known as homicide similar to misadventurous murder."

Punishment: Its punishment is also similar to the punishment of Qatl-i-Khatā.

(a) Blood money payable within three years.
(b) Expiation in the form of freeing a Muslim slave or fasting for two months successively.

Qatl-bis-Sabab Indirect Homicide or homicide by accidental cause (القتل بالسبب)

Definition: "It is a partial semblance of Qatl-i-Khatā: for instance a man digs up a well on a thoroughfare or at a public place and someone falls into it and dies. This would be known as Qatl-bis-
Sabab: if anyone places a stone in the middle of a road and someone trips over it and dies, it is also known as Qatl-bis-Sabab. **167**

Its punishment is the blood money payable as in case of Qatl-i-Khatâ. But the man is neither liable to expiation nor is he deprived of the right of inheritance.

B). BLOOD MONEY FOR LIFE (الدية)

Blood money in Qur'ân, has been termed as *Diyat* (ديت) and has been further qualified with the characteristic of *Musall-amah* (مسالمة).

It is stated in Qur'ân:

> ردالان لمن يقتل مرتبلاً خطاً ومن قتل مرتقبًا
> "It does not become a believer to kill a believer unless it is by mistake. He who kills a believer by mistake shall free, or procure the freedom of, a believing slave and provide the blood money to be handled over the heirs." **168**

**Definition of Diyat:**

Muslim Jurists have defined the term 'diyat' in the words:

> مايعطي عوضاً عن ذم القتل إلى ولية

"Diyat means recompensation which is paid to the successors of the murdered in exchange of the life of the murdered." **169**

Sayyid Sabiq has defined *Diyat* in these words:

> الدية على المال الذي يجب بسبب الجناية، ولوزى إلى الرجل عنه أوليّه

"Diyat is the property that is liable due to the crime of retaliation and which is paid to the aggrieved persons or to their successors." **170**

The practice of *Diyat* was prevalent in pre-Islamic pagan Arab society which was maintained by Qur'ân. In this
way Divat, became a Qur'anic injunction in replacement of Qisās. But the details of its quantum and other relevant qualifications and conditions were provided by the Prophetic Sunnah.

The quantum of Divat for life is hundred camels. It is to be noted that the following substitutes in the fixation of quantum of Divat are provided in their order of preference:

(i) Hundred camels
or
(ii) two hundred Cows
or
(iii) two thousand goats
or
(iv) one thousand dinars
or
(v) twelve thousand dirhams

These specifications were provided by the Holy Prophet (peace be upon him) according to the customs of his own period.

Licability: The applicability of the law of Divat for life is extended to four kinds of murder:

(i) Qatl-i-Khaṭā (homicide by negligence or mistake).
(ii) Qatl Shīh-ul-ʿAmad (Quasi-intentional homicide).
(iii) Qatl-i-ʿAmad (wilful homicide) in which any of the essential legal elements is missing. For example, if the offender is a minor or an insane person, he is not liable to Qisās but to Divat.
(iv) Qatl-his-Sabab (indirect homicide or homicide
by accidental cause) as discussed earlier.  

Imām Abu Hanifah disagrees in case of Qatl-i-'Amad. He
believes that Divat is not permissible in these cases and
the parties can decide on any terms of settlement through
mutual concurrence. It is not necessary that the Qisas of
Qatl-i-'Amad should be recompensed by the fixed Divat. It
depends on the mutual agreement and discretion of the parties.  

Kinds:

There are two kinds of Divat recognized by the law of
Shari'ah:

(1) Ad-Divat-ul-Mughallażah (exorbitant/maximum blood money)
(2) Ad-Divat-ul-Khañifah (in-exorbitant/minimum blood money)

The first kind of Divat is prescribed for Qatl-i-Khaña (homicide by negligence or mistake) and Shīb-ul-Amad (Quasi-intentional homicide). According to Imām Shāfei and Imām
Ahmad bin Hanbal, same is prescribed for Qatl-i-'Amad also if
the successors of the murdered agree to compound the offence
on blood money. The second kind of Divat is prescribed for
other offences involving homicide.

The word Mughallażah has been used literally by the Holy
Prophet (peace be upon him) himself:

عقل شبه العمدة مغلف مثل عقل العمدة لا يقتل صاحبه

"The blood money of Shīb-ul-Amad (Quasi-intentional homicide)
is as exorbitant as that of Qatl-i-'Amad (wilful or intentional
homicide) and the offender in the crime of Shīb-ul-Amad should
not be sentenced to death.  

One may naturally ask what is the specification of
Diwat-i-Mughallażah or exorbitant blood money. It has been
prescribed by the Holy Prophet (peace be upon him). 'Abdullah-
bin-'Amr-bin-al-'As reports the Holy Prophet (peace be upon him)
"Be sure that the blood money in Qatl-i-Khata (homicide by negligence) and Qatl Shibh-ul-Amad (Quasi-intentional homicide) is hundred camels, forty of which should be pregnant or pregnant."

Through this hadith, it is clearly established that there should be a hundred camels to be paid as blood money and forty of them should be females carrying children in their bellies or they should be of a pregnant age. The meaning of pregnant age has been adopted by Qa'izi Sanâ'Ullah Pânipati, and this is the primary specification of exorbitant Diyat. The detailed specification of exorbitant and inexorbitant blood money is given below.

**Exorbitant** blood money (Diyat-i-Mughallazah)

It should consist of hundred camels or their price with these specifications:

(i) **Twenty-five** of the camels should be Bint-i-Makhâz (بنت مخاز): it means that they should be at least one year of age.

(ii) **Twenty-five** of the camels should be Bint-i-labun (بنت لبن): it means these camels should be at least two years of age.

(iii) **Twenty-five** of them should be Hâgh (حق): it means the camels should be in their fourth year.

(iv) **Twenty-five** of them should be Jaz'âh (جزأ): it means these camels should be in their fifth year.

Here the specification of camels in terms of exorbitant Diyat is based on the ages of the camels. The same specification
is adopted by 'Abdul Abudh al-Faham and 'Abdul Abu Yusuf. The specification of inextricable Diwat (Diwat-i-Khafifah) is also based on a Prophetic tradition reported by 'Abdullah Ibn-i-Husayn:

In the name of Allah, Most High. May peace be upon him and his family. Allah's blessings upon his relatives.

The blood money of Qur'il-i-Khatah (consisting of hundred camels) conforms to the five specifications given below:-

(i) Twenty she-camels should be in fourth year of their age.

(ii) Twenty she-camels should be in the fifth year of their age.

(iii) Twenty she-camels should be in the third year of their age.

(iv) Twenty she-camels should be in second year of their age.

(v) Twenty he-camels should be in third year of their age.

And according to another tradition twenty he-camels in second year of their age have been prescribed in place of twenty he-camels in third year of their age. 178

All the four Imams of Fiqh agree on these specifications without any material difference. 179

These specifications of camels prescribed by the Prophetic Sunnah are in fact based on the customary laws of the Arabs which were approved by the Prophet. However, the Holy Prophet (peace be upon him) has not confined the quantum and nature of blood money only to camels or cows or goats. These specifications simply indicate the fact that if the payment of blood money in the form of camels is feasible and practicable, it should follow these qualifications; otherwise money in cash can also be paid as blood money. Now the change of customs and social conditions require that the quantum of blood money should be determined in the light of these principles. For example, the amount of blood money can be specified in accordance
with the price of the required number of camels, cows or goats in the legal tender or prevalent currency of the times. It can also be fixed in terms of the amount equivalent to one thousand dinars or twelve thousand dirhams. Either option can be determined by its feasibility. 180 This principle is positively based on the practice of the Orthodox Caliphs. 181

The liability of payment of blood money falls on two categories of persons:

(i) The murderer himself in case of Qatl-i-’Amad when Qisās is remitted or is required to be recompensed. 182

(ii) The ’Āqilah of the murderer. ’Āqilah means the male relations of the murderer from the side of the father. These are technically known as "residuaries". They are liable to pay the blood money to the successors of the murdered when the murder is Qatl-i-Khatā (homicide by negligence) or Shībḥ-ul-’Amad (Quasi-intentional homicide) or if these relatives themselves participated in the commission of the crime. 183

ustification of qilah’s esponsibility n Qati-i- nath and hiB-ul- mad :

Question is that why the ’Āqilah, the residuaries of the murderer, are presumed to be liable for the payment of blood money along with the murderer. This injunction is based on a Prophetic Sunnah reported by Abu Hurayrah which states that the Holy Prophet (peace be upon him) included the ’Āqilah of a woman who murdered another woman of the tribe of Huzeel. 184

The reason for including them in this liability is that Qatl-i-Khatā is not an intentional act of the offender. It simply occurs on account of negligence of intention or act. This is the reason why Shariah has not placed full penal liability on the offender due to his lack of criminal intention. But since the
damage has occurred to the second party in the form of loss of life, Shari'ah has compensated it through the blood money. It has ordained the residuaries to share the responsibility of the murderer who are otherwise his successors also, so that he may not bear the whole of the penal burden caused by an unintentional act. Therefore, this principle of inclusion of غلال in the liability of blood money is not against the Qur'anic principle of equity:

لا آثر واردة ونهر آخر

"No bearer of a burden would bear the other's burden."

All schools of Islamic Law agree to the principle that the blood money should be paid within three years of the adjudication of the case. Same practice was adopted by Hazrat 'Umar and Hazrat 'Ali. 186

It can exceptionally be paid before it or even instantly if required by any strong reason and the court considers it proper.

This provision also finds place in the Prophetic Sunnah.

A). RETALIATION FOR CRIMES NOT AMOUNTING TO DEATH:

This term is also known as Al-Qisas fil-A'zā cohorts. It is further classified into two kinds:

(i) Retaliation for organs (قصاص في الأطراف).

(ii) Retaliation for injuries (قصاص في الجرح).

It is enunciated in the Holy Qur'an:

وكتبنا عليهن فيهن النفس بالنفس والعين بالعين والأنف بالأنف والاذن بالاذن واللسان باللسان والجروح قصاص فمن تمدث به فهو كفارة لهم ومن لم يحكم به فانزل الله علما لكل هم الظلمون

"And therein have we enacted for them a life for a life and an eye for an eye, and a nose for a nose and an ear for an ear, and a tooth for a tooth and for wounds retaliation. Whoso remits it
as alms, it shall be an expiation for his sins." 187

This Qur'ānic verse signifies the two kinds of retaliation: retaliation for organs and retaliation for injuries.

Three conditions are to be fulfilled in retaliation for the organs:

(a) Equality in the name and place of the organs.

It means the punishment of cutting a hand is to be awarded if a hand is cut, and that of a foot in case a foot has been chopped off or absolutely crippled. It also means that an original organ is to be chopped away for an original one and additional organ for an additional one. An additional organ should not be lopped away for an original organ inspite of the mutual consent of the parties. Moreover, right organ can not be cut for the left one and the left cannot be cut for the right. Equality demands that a forefinger should be cut for a forefinger, a thumb for a thumb and toe for a toe,

(b) The cut should be made at the joint of the organs.

In case the joint cannot be located or the organ is inseparable from the adjacent organ, it is not liable to Qisās.

(c) Equality in health and strength:

A healthy organ should not be cut off for an unhealthy organ and an imperfect organ should not be cut off for a perfect organ.

Qur'ān has elaborated the concept of equality in Qisās:

an eye for an eye – (العين بالعين)
a nose for a nose – (الأنف بالأنف)
an ear for an ear – (الأذن بالأذن)
a tooth for a tooth – (السَّن بالسَّن)
Wherever the equality in retaliation is possible, the law of Qisas will be enforced. But Qisas is replaced by blood money in case it is not implementable or its implementation amounts to cruelty.

Qisas for injuries

Qisas is applicable for every intentional injury on the same conditions as discussed earlier i.e., the maintenance of equality without adopting a cruel and inhuman behaviour because, in case of oppression and inhuman torture, Qisas is replaced by blood money. The concept of retaliation for injuries is also clearly spelled out in the Holy Qur'an:

"There is retaliation for wounds (also)."

The basic principle to be followed in this respect is that retaliation for wounds should be executed after the healing of injuries. This view is adopted by Imam Abu Hanifah and Ahmad bin Hanbal. They have based their view on Prophetic Sunnah narrated by Hazrat Jabir whereby a person was injured and he requested the Holy Prophet (peace be upon him) for quick retaliation of his injuries. But the Holy Prophet (peace be upon him) said: 'retaliation shall be effected after your wounds heal up'.

But Imam Shaafi'i is of the opinion that the retaliation should be executed quickly and it should not be made contingent on the healing of the wounds.

It is possible that the postponement of retaliation by the Holy Prophet (peace be upon him) might have been effected to ascertain the nature and consequence of the injuries. Because if the injuries amount to murder, then the retaliation is altogether different.
According to my humble opinion, if the injury is not so severe and there is no such need of ascertainment, then Imām Shāfei's view may be adopted.

B). **Blood Money for Crimes of Retaliation Short of Life**

For the purpose of blood money, the organs of the human body are divided into three categories:

1. **Unitary organs**: They are single organs, for example, nose, tongue, penis, etc.

2. **Binary organs**: They exist in pairs, for example, eyes, ears, legs, hands, arms, lips, jaws, breasts, feet, testicles, etc.

3. **Multiple organs**: They are more than two in number, for example, teeth, fingers, toes, etc.

If unitary or binary organs are mutilated in the injury, full blood money should be paid. If one of the binary organs is mutilated, half of it should be paid and if any of the multiple organs is mutilated, then proportionate blood money is to be paid.

Blood money for defunctionalizing injuries

There are some injuries which do not mutilate the organs but make them non-functional. For example, if an injury damages the sanity of a person or permanently damages his power of seeing, hearing, tasting, touching and speaking, full *diyat* is required for all these damages and injuries.

This principle is based on a precedent in which a person injured another person, damaging his auditory and visual powers as well as his sanity and sexual potency but the injured remai-
ned alive. On it Hazrat 'Umar awarded the blood money four times. 193

If the sight of one of the eyes or the hearing power of one of the ears is lost, half blood money should be paid to the injured party. 194

Categories of injuries:
The wounds and injuries for the purpose of blood money have been classified into ten categories:

1. **Al Khārisah** (اللقص):
   It is the injury that tears and splits the skin. It may be called 'epidermal' injury as it affects only the skin.

2. **Al Bāzi'ah** (البازحة):
   It is the injury that tears and lacerates the flesh beneath the skin.

3. **Ad-Dāmi'iyah / Ad-Dāmi'ighah** (الدمية / الدامئة):
   It is the injury that affects the blood vessels and causes the blood flow.

4. **Al-Mutalāhimah** (المتلاحمة):
   It is the injury that reaches down to the innermost layer of flesh.

5. **As-Samāq** (المطوق):
   The injury is inflicted in a manner that a delicate skin remains suspended between the flesh and the bone.

6. **Al-Muzīyah** (الموضحة):
   It is the injury that splits or bursts the bone open.

7. **Al-Hāshimah** (الباحمة):
   It is the injury that amounts to fracture of the bone. All serious fractures are included in this type of injury.

8. **Al-Mungillah** (النقلة):
   It is the injury that amounts to compound fracture and
dislocation of the bone.

(9) **Al-Ma‘umuḥah** (المَعُوْمَةُ)

It is the injury that damages the skin of the brain.

(10) **Al-Jāḥifah** (الجَاهِفَةُ)

It is the injury that affects the belly.

These injuries are not liable to Qisas. They are liable to blood money, the amount of which varies from injury to injury. Some of these injuries require tenth part of the blood money which means either ten camels or the price of ten camels. Some of them require twentieth part of the blood money which means five camels or the equivalent price of five camels. Some wounds require fifteen camels or their equivalent price. A few wounds require one third of the blood money, approximately thirty three camels or their price. The details of these specifications are primarily based on the Prophetic injunctions which are found in the letter addressed to Amr bin Hazm. The letter contains clear instructions for the people of Yemen. The tradition is reported by Abu Da‘ud, Nasai, Ibn-i-Khuzaymah, Ibn-i-Jarud, Ibn-i-Hibban, Imam Ahmad and others. The wording of the letter is as follows:

انَّمِ اعْتَبِطْ مَوْمًَا قَتَلَهُ بَيْنَهَا فَقَدْ أَمَّنَ يُرِسُّ الْوَلَدَ الْمَقْتَلَ أوَّلًا، المَقْتَلَ وَأَنَّمِ النَّفْسُ الْذِّيْهُ مَمَّا نَمْلَ يُنَفِّسُهَا، أَذْ أَرَادَ النَّفْسُ الْذِّيْهُ، فِي الْعِينِينِ الدَّمَّةِ، فِي الْلِّسَانِ الدَّمَّةِ، فِي الشُّفْهَينِ الدَّمَّةِ، فِي الْبِيضِينِ الدَّمَّةِ، فِي الْكِتَابِ الدَّمَّةِ، فِي الرَّجَلِ الْوَاحِدَةِ نَفْسُ الدَّمَّةِ، فِي المَأْمُومَةِ ثَلَاثَ الدَّمَّةِ، فِي الْجَلاَدَةِ ثَلَاثَ الدَّمَّةِ، فِي المَنْفَلِةِ خَمسَ عَشَرَةِ منَ الْإِبلِ، فِي كُلِّ إِسْبَعِ مَبْتَنِيَّةِ الْيَدَ وَالرَّجَلِ عَشَرَةُ مِنَ الْإِبلِ، فِي السَّنَينِ خَمسَ مِنَ الْإِبلِ، فِي الرَّضْعِ خَمسَ مِنَ الْإِبلِ، وَإِنَّ الرَّجَلَ يُقْتِلُ بِالمَرَأَةِ، وَعَلَى أَحْلَ الْذِّيْهُ الْفَدْرُ دِينَانِيَّ.
"A person who kills a believer should be handed over for retaliation to the heirs of the deceased. If the heirs agree, retaliation may be converted into blood money. If a living person (may be a man or a woman) is murdered, the blood money for every murder is hundred camels; and those who possess gold should pay one thousand gold dinars. If the nose is chopped off completely, the blood money is full (hundred camels). There is blood money in breaking and smashing the teeth; there is blood money in slashing the lips; there is blood money in rendering both the testicles useless, or cutting the male organ.

There is blood money in damaging the spine, there is blood money in slitting eyes. (Hundred camels are to be paid for cutting or breaking both hands and fifty camels are to be paid for cutting one hand. Full blood money is required for cutting or crippling both feet) and half blood money is to be paid for cutting one leg/foot. If the injury reaches the brain-membrane, the blood money to be paid is one-third of the total amount; if it reaches the kernel of the brain, the blood money is again one-third of the total amount. If the injury dislocates the bone, fifteen camels are to be paid as blood money, if a finger or a toe is fractured or chopped, ten camels are to be paid as blood money; if a tooth is broken, the blood money is five camels. If the injury splits or bursts the bone open, the blood money is five camels.

And man should be awarded death punishment for the life of a woman and for those persons who possess gold, the blood money of the woman's murder is also thousand dinars."

Blood money of a Woman

The well-known letter of the Holy Prophet (peace be upon him) has elaborately explained the question of the blood money
of females.

Two express provisions have been laid down in this respect.

(i) **Holy Prophet** (peace be upon him) declared the fact:

"If a living person (whether a male or a female), is murdered, the blood money is hundred camels."\(^{197}\)

The word "النّاس" (a living person) indiscriminately signifies every individual, irrespective of the fact, whether it is a male or a female. Therefore, according to this statement blood money of a woman, has been declared to be the same as that of a man.

(ii) The last sentence of the letter has further clarified the situation, stating:

إن الرجل يقتل بالمرأة وعلى أهل الذهب ألف دينار

"A man should be awarded death sentence for the life of a woman and for those who possess gold, the blood money for a woman's life is thousand dinars."\(^{198}\)

Since the blood money prescribed for a male's life is also thousand dinars, it can be easily concluded that no distinction has been maintained in this respect by the **Holy Prophet** (peace be upon him) between a male and a female.

The **Jurists** who are of the view that the blood money of a woman is half of the blood money of a man, have been unable to trace even a single authentic tradition of the **Holy Prophet** (peace be upon him) expressively mentioning this concept. They have based their view on some weak reports of the companions and some juristic views, attributed to some of the scholars.

Whereas the law of the equality of a male and a female in case of **diyat** is positively based on Qur'anic injunctions
and the Prophetic instructions for the people of Yaman, reported by Abi Bakr bin Muhammad bin 'Amr bin Hazm.

Imām Shāfī'i, Ibn 'Abd-il-Barr, 'Uqayli, Yaqub bin Suffyan, Hākim, Ibn-i-Hibbān, Bānāhi, Ibn-i-Kaseer and many other eminent scholars have certified the authenticity of the letter. 199

Sheikh 'Abd-ul-Haq Mahaddīs Dehlavi, explaining the famous Prophetic tradition, "السُّنَّةُ ثُنَّاءَانَهُما *الْمُسْلِمُونَ تَسْكَانُونَ دَمًا سُلَمًا *" (all the Muslims are equal in premium of their lives) states:

"Holy Prophet (peace be upon him) said that all the Muslims had an equal premium of their lives, in Qisas as well as in Divat. There is no superiority for a respectable over an irre respectable neither for an elder over a younger, nor for a literate over an illiterate, nor for a male over a female, against the prevalent practice of the pagan Arab Society. It is said that this was one of the laws written in the compendium of Hazrat 'Ali." 20

C. TA'ZEERAT

(Chastisements or discretionary punishments)

As already discussed in detail, Islamic system of punishments is basically grounded in three categories, Hudood, Qisas and Ta'zeerat. In the pages that follow we intend to discuss the legal basis of Ta'zeerat, the discretionary punishments according to the law of Shari'ah. The concept of Ta'zeer originates from Holy Qur'ān and Prophetic Sunnah.

In the light of the provisions of Qur'ān and Hadith we can formulate ten major kinds of discretionary punishments:

1. Admonition (الإرشاد)

Qur'ān has mentioned three kinds of discretionary punish-
ment in the context of disobedience of wives to their husbands. The first kind of punishment is **admonition**. It is stated:

"Women from whom you fear disloyalty and ill conduct, admonish them first." 

This kind of punishment must be restricted to those offenders who commit minor offenses for the first time and the court is convinced that it would suffice to reform the offender and restrain him from further violation of the sanctity of law.

(2) **Reprimand** (الترمجد)

It can be verbal as well as physical, depending on the purpose of its imposition. It can vary according to the heinousness of the offense and gravity of misconduct of the transgressor. This form of punishment is also established through Prophetic Sunnah. 'Abdur Rahman bin 'Auf was once extremely annoyed with his slave and expressed his resentment in the form of an abuse: 'O son of black!' The Holy Prophet (peace be upon him) was terribly displeased with him. He grasped his hand and said: "There is no such right available to the son of a white person over the son of a black person." 'Abdur Rahman bin 'Auf felt highly ashamed about his conduct. He rubbed his cheek on the ground and said to his slave: "you keep on rubbing the soil into my cheek till you are satisfied."

The same punishment is also established through another Prophetic tradition reported by Hazrat Abu Zar.

(3) **Threat** (التهديد)

This punishment is supposed to dissuade the offender from the commission of crime by injecting into him an element of fear and scare. It can materialize in the shape of pronouncement of
a sentence and then delaying its execution till the offender commits another crime or reforms himself. It is like Democles' sword hanging over the criminal's head or like the steady glare of a high-power bulb in a prisoner's cell. The threat of punishment can take many forms: it may be awarded in the form of flogging, imprisonment or other forms of punishment. However, it should be kept in mind that the punishment must be sincere and efficacious.\textsuperscript{205}

(4) 'Boycot' (بُعْرَةٌ)

This Tā'zeeri punishment is also primarily recommended by the Holy Qur'ān:

وَأَصْبِحُوا فِي السَّمَاعِ

"Keep them off your beds."\textsuperscript{206}

This punishment was awarded by Holy Prophet (peace be upon him) at various occasions as Ta'zeer. It is authoritatively quoted that Holy Prophet (peace be upon him) awarded the punishment of boycot to three persons who did not participate in the battle of Tabūk. These persons were Ka'b bin Mālik, Marārah bin Rabī'ah Amri and Hālāl bin Umayyah. Holy Prophet (peace be upon him) desisted from talking with them as a consequence of the punishment of excommunication.\textsuperscript{207}

After the expiry of fifty days the following Qur'ānic verse, reflecting the event, was revealed: \textsuperscript{208}

وَاعْلَمُوا أَنَّ اللَّهَ لَهُ الْمُلْكُ لَهُ الْرَّحْمَةُ لَيُبَشِّرَ الْمُتَّقِينَ

"He has also turned with mercy to the three who had been left behind, who were sore distressed and whose lives became a burden to them and who became convinced that there was no refuge against the wrath of Allah except in Himself. He turned to
them with mercy that they might turn to him in repentance. Surely it is Allah, Who is compassionate and merciful. "

The second Orthodox Caliph, Hazrat 'Umar is also reported to have awarded this form of punishment along with the punishments of whipping, confinement and transportation. The pronouncement of punishment was always accompanied by the instructions that nobody should talk with the offender till he repeats and reforms himself. He awarded this form of punishment to various high executive officials also.  

(5) 'Public Exposure'  

This is the stigmatizing punishment. It was fairly widespread in the early days of Islam. The purpose of this form of punishment was to expose the criminal by publicly disclosing his criminal act to prevent its repetition. For example, a person who is implicated in false evidence or who performs an act of adulteration deserves this type of punishment to protect innocent people against his nefarious designs.  

Holy Prophet (peace be upon him) reportedly awarded this punishment to a collector of Zakāt who divided the whole collection into two portions. He reserved one portion for himself and deposited the other into Bayt-ul-Māl. He had the cheek to claim that one portion had been presented to him for his personal use by the people. Holy Prophet (peace be upon him) not only recovered the amount from him but also awarded him the punishment of public exposure which humiliated him in the eyes of the people.

Qazi Shurayh, a well-known Judge during the Orthodox Caliphate, held that the false witness must be publicly identified to warn the people against his criminal intentions.

It has been held by the jurists that such persons should be paraded in the streets and other parts of the town and publicly
exposed through the courts.

(6) 'Fine' (الغرامة)

This form of punishment was also awarded during the Prophetic period. The Holy Prophet (peace be upon him) is reported to have said:

ومن خرج بثني تعلية عرامة مثله

"Whosoever took anything (surreptitiously) would be liable to double fine and punishment." 214

It should be noted that the person who refuses to pay zakāt is, inter alia, liable to the imposition of fine which can be drawn from his property. 215

Imām Mālik, Aqū Yusof, Ahmad bin Hanbal and some of the Shāfī scholars are positively in favour of the permissibility of this financial punishment in relation to the offence. 216

There are some Hanafi jurists, like Imām Tahāwi and others, who believe that independent punishment of fine was practised in the early days of Islam but was subsequently abrogated. Therefore, they think that now it does not exist as an independent and general punishment. 217 But the claim of abrogation, as Ibn-i-Tavmiyyah and Ibn-ul-Qayyim have discussed, is not established through evidence. Moreover, the continuity of the Prophetic Sunnah in this respect is further supported by the practices of the companions and Orthodox Caliphs.

It is reported that in some cases the Holy Prophet (peace be upon him) himself fixed the amount of the fine as punishment. Moreover, he awarded the punishment of fine in a case of theft where the stolen property did not reach the minimum Niṣāb required for the imposition of Hadd and in some cases of dereliction in the payment of Zakāt also. Normally, the fixation of this amount is left to the discretion of the state.
(7) 'Termination/suspension of subsidy' (العزل من الراتبة)

This form of punishment can be awarded by the state to any of its citizens on the commission of any specific criminal act. 218

(8) 'Deprivation of Rights' (ال剥夺 من الحق)

This form of punishment can be awarded by depriving anybody of the right of witness or booty or by denying him the use of other facilities that belong to him as a matter of right. 219

(9) 'Seizure of property' (المصادرة)

This form of punishment is also established through Prophetic Sunnah and other precedents of Islamic legal history.

(10) 'Abolition and Extinction' (الالغاء)

This form of punishment relates to the dismantling of places where seriously forbidden and socially harmful acts are habitually carried on, as Hazrat 'Umar ordered the demolition of those houses and places where wine was manufactured. 220

(11) 'Imprisonment' (السجن)

In Shari'ah the punishment of imprisonment is prescribed both as Hadd and Ta'zeer which is further divided into two kinds:

(a) Imprisonment for limited period.

(b) Imprisonment for unlimited period.

The minimum prescribed period for the first kind of imprisonment is one day. But there is a difference of opinion among Muslim Jurists about the maximum specification of its duration. Some of them hold that it should not exceed six months but Shafi'i Jurists believe in the span of one year. Most of the Jurists do not prescribe any maximum limit and leave its fixation to the discretion of the state. 221 The punishment of impris-
sonment as Ta'zeer is established through both Qur'ān and Sunna. Qur'ān says:

"Confront those of your women who are guilty of unbecoming conduct with four witnesses. If they bear witness, then confine them to their houses till death overtakes them or Allah opens a way for them." 222

The words "ذامسكرون البيوت" (confine them to their houses) clearly prescribe the punishment of imprisonment. All the commentators of Holy Qur'ān unexceptionally hold the view that through this Qur'ānic verse the punishment of imprisonment has been expressly commanded. They interpret these words as

"Confine them in the houses and make the houses prisons for them." 223

Mullah Jivan, Ibn-ul-'Arabi, Muhammad Ali Sabuni and other commentators have discussed it in detail in their commentaries of the same Qur'ānic verse.

According to the command of this Qur'ānic verse the punishment of life imprisonment for such women was enforced as Hadd before the enforcement of the laws of flogging and stoning. After the prescription of subsequent punishments, the nature of life imprisonment as Hadd was changed to Ta'zeer. Permissibility and legality of the punishment of imprisonment according to Islamic law is unambiguously established through various Prophetic practices commands and even through the precedents of the Orthodox Caliphs. Hundreds of books on Islamic law contain details of the punishment of imprisonment. It is further held
that this punishment can be extended till the criminal repents or dies, as the gravity of the crime requires.

Various words like Al-Habš (الحبس), As-Sijj (السنج), An-Nafîk (النافك), Al-Imsâk (الإمساك), Al-Azîl (الأزيل) and Al-Taghrib (التغريب) have been frequently used in Qurʾān and Prophetic traditions in regard to the punishment of imprisonment. Surah Yūsuf of the Holy Qurʾān mentions the concept of imprisonment at about nine places.224

According to Qurʾān and Prophetic Sunnah, the punishment of imprisonment is prescribed for the crimes of robbery, dacoity, theft, adultery, drinking, etc. The following books of Hadith contain a number of Prophetic traditions in support of this statement.

(a) Musnad Imam Shāfe‘ī
(b) Muṣannaf Ibn-i-Abi Shaybah
(c) Sunan Bayhaqi
(d) Kitāb-ul-Āsār, reported by Imam Muhammad bin Hasan Shaybānī
(e) Muṣannaf Abdullah Razzaq
(f) Musnad Ahmad bin Hanbal
(g) Tirmāzi

Sa‘eed bin Jubayr, Ibrāhīm Nakh‘ī, Hasan Basri, Qatā‘dah, A‘z-al-Khrāsānī, Nakhib, Ibn-i-Salimah, Ibn-i-Amir, Samāk, Sa‘eed bin Mansur, Zāh‘rī, Hammād, Sufyān Saurī, Auzā‘ī, Nāfe‘, Nasrūq bin A’dā‘, Zayd bin ‘Ali, Imam Abu Muhammad Ja‘far As-Sādiq and a host of other Muslim jurists have reported a number of Prophetic traditions, juristic opinions, decisions of the Orthodox Caliphs and other companions which establish beyond doubt the existence of the punishment of imprisonment in the Prophetic period, the Caliphate and afterwards. All the Muslim schools of law including Hanafi, Mālikī, Shāfe‘ī, Hanbali and Ja‘fri, unani-
mously agree on the punishment of imprisonment.

(12) **Flogging** (الفَكَّرُ)

We have discussed earlier the punishment of flogging as *Hadd*. Now we are mentioning its capacity as *Ta'zeer*. All Muslim Jurists agree on its validity and necessity. The difference exists only on the issue of the fixation of maximum limit of lashes as *Ta'zeer*. Five views have emerged out of the discussion that has raged around the subject.

**First View:** (1) *Ta'zeer* in the form of flogging should not exceed the number of ten lashes.\(^{225}\)

**Second View:** (2) The lashes in *Ta'zeer* can be awarded up to the number of thirty-nine.\(^{226}\)

This view is adopted by Imam Abu Hanifah and Imam Muhammad.

**Third View:** (3) The punishment can be awarded up to the number of seventy-five or seventy-nine lashes. This view is adopted by Imam Abu Yusof.\(^{227}\)

**Fourth View:** (4) The punishment can be awarded up to the number of ninety-nine but it should remain below hundred.\(^{228}\)

**Fifth View:** (5) It can be awarded up to one hundred lashes and it can even exceed this limit depending on the gravity of the crime.\(^{229}\) This is the view adopted by Imam Malik.

**Last View**

As far as the minimum number of lashes in *Ta'zeer* is concerned, some scholars have fixed the limit of three lashes while others do not fix the minimum limit. They believe that the fixation of the minimum limit depends on the discretion of the state or the court and it is awarded on the basis of the nature of crime and the stature of the criminal.\(^{230}\)
Its legal basis and other relevant details have already been discussed in earlier chapters.

(15) ‘Death penalty’ (الإعدام)

Normally Ta'zeer deals with less serious offences and death penalty is usually awarded for more serious crimes. Therefore, the general principle of Islamic penal law is that death penalty should not be preferably awarded in case of Ta'zeer. 251

However, most of the jurists agree on the exception that whenever public interest or legal necessity requires, the death penalty can also be awarded as Ta'zeer. For example, if a criminal creates serious disturbance and disruption which cannot be stamped out except by awarding him death sentence, or the death sentence for a spy or for a person who innovates bad norms and practices in Islam. 232

The Hanafi jurists also accept the death punishment as Ta'zeer for specific heinous crimes. Some of the Hanbali scholars, like Ibn-i-Taymiyyah and Ibn-ul-Qayyim are also of the same view. Some of the Malikis support this view too. But the Shafi'is school is not in agreement with this view. In Islamic penal system, there are five crimes of Hudood and Qisas for which death penalty has been prescribed.

(a) Adultery (committed by a married person)
(b) Dacoity
(c) Sedition
(d) Apostasy
(e) Qat-i-Amad.

Muslim jurists have added ten more crimes to the list in which death penalty can be awarded as Ta'zeer. 233

Therefore, the total number of crimes in Islamic penal law totals up to fifteen whereas in Western criminal law, the pos-
ition is entirely different. By the end of the eighteenth century there were approximately two hundred crimes in English criminal law for which death penalty was prescribed and there were one hundred and fifteen crimes liable to death penalty in French criminal law. In the nineteenth century or towards the end of the eighteenth century, a movement was launched against the penal provisions, and the legislatures, courts as well as the people worked for the reduction and minimization of the number of death penalties. The same reductive trend continues down to the present times. But its application is limited and restricted in Islamic penal system. It is normally awarded to those habitual and diehard criminals whose existence is absolutely detrimental to the existence of a same and stable society. Since there is no other effective method to stop their anti-social and anti-human activities, the application of death penalty becomes an inevitable necessity. This is the reason death penalty has always been regarded an extraordinary punishment and its permission is granted only in cases of absolute necessity.

(14) Hanging (الصلب)

It is one of the various fixed punishments for dacoity and robbery prescribed by the Qur'ān. It is also permissible as Ta'zeer in cases which do not fulfil the conditions for the imposition of Hadd. Holy Prophet (peace be upon him) is reported to have executed the punishment of hanging to a person on a hill known as Abu Nab. 

The Māliki and Shāfīi Jurists have explicitly discussed the punishment of hanging in the books of Islamic law under the relevant chapters whereas the Ḥanafī and Ḥanbali scholars have
not given specific captions for this punishment. They normally consider it as a part of the death penalty.

(15) 'Miscellaneous' (مختصر)

In addition to these forms of punishment, Islamic law also recognizes various other modes of punishment as Ta'zeer. These punishments are established through the Prophetic Sunnah. Moreover, Islamic state, on the basis of its specific legislative power, can formulate new laws to cope with the incidence of unexpected and unforeseen crimes.

Capital punishment is justified only as the last resort to deal with heinous crimes. When all other methods and strategies fail to curb the occurrence of serious crimes, the use of capital punishment is justified because through its imposition, the state can restore law and order and protect the life, honour and dignity of its citizens. Capital punishment, e.g. can be a very effective measure to root out the rapidly spreading evil of kidnapping. Parents with young daughters can breathe in a climate of safety and security against the prowling potential abductors of their daughters. If such stringent measures are not adopted, kidnappers can carry on their immoral and inhuman practices without check and restraint and wreak havoc in the social and moral fabric of the society. Similarly, if illegal sexual intercourse between married people is not crushed with a heavy hand, the society becomes a cesspool of morel pollution and there can be no limit to the unending increase of bastards, as is the case in the Western Society, where legitimacy is always suspect. Thus the provision of capital punishment in Islamic penal system is not based on inhuman considerations, as it is frequently trumpeted by the hostile critics of Islam. On the contrary it is grounded in absolutely human considerations.
Islamic system is far more rational and comprehensive because it believes in the elimination of the individual for the sake of the society, and not in the elimination of the society for the sake of the individual. The Western overemphasis on individualism has resulted in collective maladies of formidable magnitude and their experts are simply dazed by the amount of waywardness and eccentricity by which their young people are consistently plagued.

**Crimes of Ta’zeer and Scope of Legislation**

The crimes for which the punishments of Hudood and Qisās have been fixed are specifically mentioned in Qur'ān and Sunnah. But there are other crimes as well which neither fall within the category of crimes of Hudood nor that of Qisās but the punishments for them have been mentioned in Islamic law, either on the basis of Qur'ānic provisions, Prophetic Sunnah, the precedents of Orthodox Caliphs or on the recommendation of Muslim Jurists. But no amount of prescribed punishments can adequately cope with the burgeoning and mushrooming growth of crime in a society. There are hundreds and thousands of crimes for which effective punishments should be prescribed as Ta'zeerāt. Some of the crimes mentioned below have been expressly prohibited by Qur'ān and Sunnah but no specific injunctions are available in regard to the mode, quantum and nature of the punishment to be awarded for them. Therefore, it is the duty of the Islamic legislature to prescribe the necessary punishments for the eradication of these evil practices. The scope of legislation in the field of crimes of Ta'zeer is open, and such kind of legislative act is also reinforced by the Prophetic injunctions. In strict pursuance of a Qur'ānic command, the Holy Prophet (peace be upon him) urged on the people that if a debtor is in financia
straits, the creditor must give him a chance to pay the debt. 
Holy Prophet (peace be upon him) said that if a rich man refuses to pay his debt, he should be punished. In this tradition, punishment is recommended by the Prophet but its nature, kind, quantum and mode are not indicated. This obviously means that the scope of legislation in this field is left open for Muslim Juri-
stes and Islamic legislatures.

The following crimes represent the terrain of criminal activity in which penal legislation can be made.

1. Eating of prohibited food (اكل المحرّم)

Qur'ān has very clearly specified the prohibition of the following edibles:

حرّمت عليكم بيّتة الدّمّ و لحم الخنزير وما قلله نّور الله و مما غزلت به المختنقة
والبردلة والتركتية والنسجية وما كل السّبع الآماد كِسَمَت وما ذبح على
النصب السّلائية

"Forbidden to you is the eating of a dead animal, and blood, and the flesh of swine, and that on which the name of other than Allah is invoked, and the flesh of an animal that has been stran-
gled, or is beaten to death or is killed by a fall, or is gored to death; and of which a wild animal is eaten, unless you have slaughtered it properly before its death; and that which has been slaughtered at an altar." 237

Moreover, Holy Prophet (peace be upon him) has forbidden the flesh of a number of animals which are not mentioned in the Holy Qur'ān. For example, the flesh of a dog, a snake, a rat, etc.

Eating of all these forbidden foods is expressly prohib-
ited in Shariah. Therefore, the cooking and serving of these foods is not permissible in an Islamic State. Hence it is a crime for which a discretionary punishment can be prescribed
by the state. Muslim rulers who connive at these acts or remain silent spectators out of misplaced courtesy or a misguided conception of what constitutes a civilized attitude are, in fact, indirect abettors of the crime and must be punished like other criminals. Their attitude and conduct amount to a perversion of Qur'ānic prescription and therefore the punishment extended to them should be proportionate to the burden of their responsibility. If a Muslim ruler is present in a party where the flesh of swine is being served, his presence indirectly puts the seal of approval on the forbidden act and by implication he becomes an accomplice in it. A number of our Muslim rulers in the present world are dazzled by the spurious light of Western mores and priorities as a result of their chronic inferiority complex or they are swayed by other diplomatic pressures and allow the performance of the acts expressly forbidden in Islam. These dumb stooges and puppets may call themselves civilized in the Western sense but from the Islamic point of view they are criminals and therefore should be dealt with accordingly.

2. **Usury** (اختلف)

**Holy Qur'ān** has expressly forbidden usury in various verses:

(a) 
الذين يأكلون الرزق للاجر، ونذر فسادًا مما يفرقوه، الذؤب يختبئه السُمَّ من السماء،

ذلك بقيد قلبه قائدًا للبيع مثل الزَّربانَة، وأحلَّ الله البائع وحرَّم الزَّربانَة.

"Those who devour interest stand like one whom satan has smitten with insanity. That is so because they keep saying: The business of buying and selling is also like lending money on interest; whereas Allah has made buying and selling lawful and has made the taking of interest unlawful."

(b) 
بِإِنْبِغَاءِ الْذِّينَ أَمَنَّهُمُ اللَّهُ فَذَاتَانِ إِلَّا قَبْقَائِي من الزَّربانَاتَ كَثْرُ

تميمين، فإن لَّم تفعلا فإن ذائبا بحرب من الله ورسوله.
"O believers be mindful of your duty to Allah and relinquish
your claim to what remains of interest, if you are truly belie-
evers. But if you do it not, then beware of war from the side
of Allah and His Messenger."239

In the light of Qur'ānic prescriptions, it falls within the
legislative power of the state to formulate rules for the erad-
ication of these evils. If the state hesitates or expresses
reservations to frame and enact rules or is under pressure from
some influential quarters, then it is not performing its duties
and functions as an Islamic state and it does not deserve the
designation Islamic because to call such a state Islamic is a
wilful distortion and disfigurement of the spirit and message
of Islam.

3. Breach of trusts (خيانة الاٍمات)

It is enjoined by the Holy Qur'ān at various places:

(a) ان الله يا مشركين ترذو الاٍمات الى اهلها

"Allah commands you to make over the trusts to those best fitt-
ed to discharge them or who deserve them the most."240

(b) يأمروا الذين أمنروا الاتخاذ الله والرسول وتخولوا أمتكم

وانت تتمامها

"O believers, prove not unfaithful to Allah and the Messenger,
nor prove unfaithful to your trusts designedly."241

(c) وإذا كان فيكم نساؤكم ترراءه عورات

والاموالكم وإن كان خربًا كبيرًا

"Hand over their property to the orphans and do not exchange the
bad for the good, and do not devour their property mixing it
with your own. Surely, that is a great sin."242
It is, therefore, the duty of the state to prescribe punishments for these breaches of trusts. These verses of the Holy Qur'an vest the requisite power in an Islamic state to frame and implement these punishments. If the state does not take any initiative in this respect, a kind of social and moral chaos may be created which can ultimately result in the total paralysis of the society.

4. False testimony. (شهادة الزور)

The Holy Qur'an has condemned false testimony in explicit terms:

(a)

"O believers, be strict in observing justice and bear witness only for the sake of Allah, even if it is against your own selves or against parents or blood relations or other who are closely related to you." 243

(b)

"Thus shun the abomination of idols, and shun all words of falsehood." 244

It is, therefore, legislative duty of the state to prescribe rules which not only effectively deal with acts of false testimony but also serve as deterrent factors to eliminate or minimize the occurrence of this hideous phenomenon.

5. Insults and Abuses (السب)

To insult a human being, even if the insulted person is an infidel, is a forbidden act in Islam. This reviling and maligning act has been condemned by Qur'an at many places:

(a)

وَلَاتَّسْبِبَآأَلَلَّهُ بِدَعُونَ مِن وَرَءَةَ اللَّهِآ أَعْلَمَ بِغَيْرِ عِلْمٍ
"You should not revile those whom they worship beside Allah, lest they, out of spite, should revile Allah in their ignorance." 245


"O believers, let no people deride another people; they may perhaps be better than the former; nor let one group of women deride another, the last may perhaps be better than the first. Defame not your people nor call them names. Ill indeed it is to earn an evil reputation after having believed." 246

These Qur'ānic verses stress the honour and dignity of individuals, irrespective of their faith, creed and gender. It is the obligation of the state to implement these Qur'ānic instructions in order to guarantee the moral cleanliness of the Muslim society and to prevent people from indulging in acts of vilification, vilification, mud-slinging, muck-raking and character assassination.

6. Bribery (الشرة)

Qur'ān has prohibited in transparent phraseology the offer as well as the acceptance of bribe in any form. It declares:


"Do not devour each other's wealth among yourselves through deceit and falsehood, nor offer your wealth as a bribe to the authorities that you may deliberately devour a part of other people's wealth through injustice." 247

The Holy Prophet (peace be upon him) has cursed both the parties, those who offer the bribe and those who accept the bribe.
Bribery is a heinous act and must not only be condemned in the strongest terms but effective and foolproof measures should be adopted to root it out completely. Bribery, as a matter of fact, is the greatest social evil in the Muslim countries. It is worse than cancer because cancer is not infectious and affects only a particular individual; but the worm of bribery is highly contagious and affects the moral and spiritual health of the entire community. At present we are hopelessly trapped in its beastly clutches and it is nibbling away at the vitals of our society. Therefore, it is the legal and moral duty of the state to legislate rules and regulations for the total extinction of this most dangerous evil. The deplorable and highly regrettable tendency in our rulers is to slur over this evil or to deliberately underplay its heinousness. In many cases an act of bribe is consciously mislabelled as an act of voluntary donation and as an expression of affection and devotion or a material manifestation of gratitude. By hesitating to call a spade a spade, our rulers and bureaucrats try to deface reality. But the fact remains that an act of bribe is an act of bribe and by conferring on it positive labels one does not change its reality. Moreover bribe is not always necessarily in the form of notes and hard cash.

A large number of our officials and people think that only the offer and acceptance of money constitute an act of bribery. This view is consciously adopted to stifle the stirrings of their conscience but the justification actually makes them doubly culpable. Bribe can also be in the forms of donations and presents. It is the duty of the state to eradicate the evil of bribery and corruption in all forms; it should pay particular attention to its disguised manifestations because bribery has no
place in the fabric of an Islamic state.

7. Gambling (إِبْلِهِمْ) 

The Holy Qur'an has declared gambling at par with drinking and acts of blasphemy 'Shirk'.

"Liquor, gambling, idols and divining arrows are but abominations and satanic devices." 248

8. Short measure and adulteration (غش الميال والموزين) 

Short measuring as well as doctoring food are expressly forbidden in Shariah. Holy Qur'an has stated:

(a) "We condemn those who give short measure and those who, when they take by measure from other people, take it full; but when they give by measure to others or weigh out to them, give them less." 249

(b) "Give just measure and cause no loss (to others by fraud). And weigh with scales true and upright. And do not withhold things that justly belong to men and do not make mischief and spread evil in the land." 250

9. Homosexuality (نَكَاةٌ) 

As already mentioned in the beginning of this discussion, the nature, quantum and mode of sentence are prescribed for some of the crimes of discretionary punishment, but in a large number of cases this triple specification is left to the discretion of Muslim Jurists and Islamic states. We have already offered some
Illustrations from that category of crimes for which the Ta'zeerat or chastisements have not been recommended in a codified form. But mentioned below is the crime of homosexuality for which the punishment is prescribed through Prophetic Sunnah and the practice of Orthodox Caliphs. There is, however, a difference of opinion among Muslim Jurists whether it should be treated as Hadd or as Ta’zeer. Most of the Muslim Jurists have accepted it as Ta’zeer. Qur’ān has expressly forbidden homosexuality.

(a) ككمن ضاقت الأبهام وال которون نافذةً من دون النساء، للذين أتراكهم سراً. وما كان جواب قومهم إلا أن أنزلهم عالماً كأنما اعتمدنا بيطموها. وأعلاها الأمران كأنما تعلمهم. وأعثمت علىهم قتلاً في الطريج كأنها عقبة المجرمين.

"We also (sent) Lūṭ. He said to his people: "Do you commit lewdness such as no people in creation (ever) committed before you? For why you practise your lusts on men in preference to women. You are indeed a people transgressing beyond bounds. And his people gave no answer but this: They said, "Drive them out of your city. These are indeed men who want to be clean and pure. But We saved him and his family, except his wife: she was of those who lagged behind. And we rained down on them a shower (of brim-stone): Then see what was the end of those who indulged in sin and crime." 251 (b)

"When Our decree issued, We turned the city upside down, and We rained upon it stones of clay, layer upon layer, marked for them in the decree of your Lord. Such chastisement is not far
from the wrong-doers of any age."  

‗Abdullah Ibn-i-‘Abbās reports the Holy Prophet (peace be upon him) saying:

من وجد نار عمل عمراً حرفاً فاقتلو الفاعل والفاعل به

"If you find anybody committing the act of the people of Lūt - homosexuality – decapitate both the parties involved, the active and the passive partners."  

There are three views of Muslim Jurists on the punishment of this crime.

(i) its punishment is the award of death sentence.
(ii) its punishment is that of adultery (flogging for the unmarried adulterers and death for the married adulterers).
(iii) its punishment is that of any heinous crime.

The first view is adopted by Imam Shāfe‘i and some other jurists. They have based their view on the Prophetic Sunnah mentioned above and on other statements made by the Holy Prophet (peace be upon him).

Hazrat ‘Ali is reported to have said that such persons should be stoned or incinerated to death.  

Hazrat Abu Bakr said that the homosexual should be decapitated by sword and his body should be cremated.  

The homosexual should be crushed to death.

‗Abdullah Ibn-i-‘Abbās reports the view that the homosexual should be pushed down from a high building.

Sha‘bi, Zāhri, Mālik, Ahmad, Išāq, Nakh‘i, and some
other jurists are of the view that the homosexual should be stoned to death.\(^{258}\)

All these companions, Jurists and Caliphs agree on the prescription of death punishment for the crime of homosexuality but the difference exists only in the mode and method of execution.

The second view is adopted by Saeed bin Musayyab, ‘Ata bin Abi Ribah, Hasan, Qatada, Nakh’i, Souri, Auzai and according to one report Imam Shafe’i and others.\(^{259}\)

This view prescribes the punishment of stoning to death for the married adulterers and flogging for the unmarried adulterers. They have based their view on the Prophetic tradition:

"إذا ارتكب الرجل الرجل فخمس راتب
When a man (male) commits sexual act with a man (male), both are adulterers."\(^{260}\)

The third view is adopted by Imam Abu Hanifah and some others. This view treats the act of homosexuality as a crime of Ta’zeer, and on the basis of its heinousness and sanguinility, Islamic State can prescribe severe penalty in the light of traditions and practices of the Holy Prophet (peace be upon him), the Orthodox Caliphs and other companions. By mentioning some instances of crime and their prohibitive commandments from Qur’an and Sunnah, we want to elaborate the fact, that it is incumbent on an Islamic State to enforce the punishments for safeguarding of these Qur’anic laws from their violation and transgression.

Same is the philosophy behind the legislation for Ta’zee-fat.

It should be kept in mind that Islamic approach to punishments is a perfect blend of legality and humanity. In Islam
the legal aspect is never divorced from its human aspect. This inter-play between the two aspects makes Islam a unique religion. Of course there is no denying the fact that the human aspect and the legal aspect are interlinked in other religions as well but the fact of the matter is that the link exists only as a causal phenomenon. They pay little attention to details.

The distinctions exist only as generalized formulations and not as specific articulations. There is normally overlapping between various categories which creates a blurring impact. But in Islam the distinctions are clearly spelled out and a clear picture emerges from the chaos and debris of amorphous materials. Islam is not a religion of half-measures and half-doses. It is a complete prescription for life. And it is not life in the abstract but as it is lived by human beings of flesh and bone. Therefore, the way Islam emphasizes the linkage between the human and the legal is hardly matched by any other religion in the world.

The grading of punishments in Islam, as the chapter illustrates, makes full acknowledgement of the emotional and psychic preferences of human beings. Men are instinctively inclined towards the establishment of a clean and pure society. Therefore, these punishments are primarily focussed on the achievement of this primary goal. The charge of the hostile critics of Islam that its penal system is based on vindictiveness and a deep-rooted sense of vengeance sounds like bewildered hotchpotch. The penal system of Islam is rooted in an objective and dispassionate assessment of criminal situations, and the severity of the punishment depends on the sanguinity of the crime. What could be a more just and natural system of punishment? Islam believes in the creation of an absolutely clean society. It
believes in both physical and moral cleanliness. Therefore, its penal laws are geared to the formation of such a society. Since Islam is also fundamentally concerned with social pragmatic, its punishments are expressly oriented to achieve practical results.
2. Qur'ān 4:16
3. Qur'ān 4:15
4. Qur'ān 24:2
5.(a) Commentaries on Qur'ān:

(b) Books on Islamic Law:
   Mālikī View: Al-Mudawwanaat-ul-Kubrā, (Kitāb-ul-Hudood)
   Shāfe‘i View: Kitāb-ul-Umm, (Kitāb-ul-Hudood)
   Hanbali view: Al-Mughni, (Kitāb-ul-Hudood)
   Ja‘fari view: Al-Furu‘min-al-Kāfī, (Kitāb-ul-Hudood)
   Žāhiri view: Al-Muhallā, (Kitāb-ul-Hudood)

(c) Other Scholars of Eminence:
(x) Ibrahim Al-Waqfi, Tilka Hudoodullah, p.152.

7. Ibid.
10. Qur'an 4:13
11. Qur'an 4:14
15. Abu Daud, (Kitab-ud-Diyat)
   (b) Sahih Muslim, Vol.II, p.69.
   (b) Sahih Muslim, Vol.II, p.69.
   (b) Sahih Muslim, Vol.II, pp.67-68.
   (Quoted from Sunan Abi Dā'ud)
   (b) Muṣnad Ahmad, (with Commentary of Ahmad Muhammad Shakir)
31. Ibid.
32. Ibid.
33-A. Ibid.
34. Qurʾān 24:4
35. Subul-us-Salām, Vol.IV, pp.15-16 (Quoted from Muṣnad
       Ahmad, Tirmazi, Abu Dā'ud, Nasā'i, Ibn-i-Majah)
   (c) Fīqh-us-Sunnah, Vol.II, p.486.
38. Ibid., p.493.
39. Ibid., pp.496-497.
39-A. Ibid.
   (b) Subul-us-Salām, Vol.IV, p.19.
   (c) Fiqh-us-Sunnah, Vol.II, p.447.
45. Ibid.
46. Ibid.
47. Qur'ān 5:38.
49. Ibid.
55. Qur'ān 5:33.
57. Ibid., p.473.
60. Qur'ān 4:43.
61. Qur'ān 5:90, 91.
Rabi‘, Abi Dā‘ud, Ibn-i-Majah and Tirmazi).


66. (a) Figh-us-Sunnah, Vol. II, p. 371 (Quoted from Tabarāni Al-Kabeer).

(b) Tilka Hudoood-ullah, p. 181.


68. Bulugh-ul-Maram, p. 159 (Quoted from Sahih Muslim).


71. Bulugh-ul-Maram, p. 159 (Quoted from Sahih Bukhāri, Sahih Muslim).

72. Subul-us-Salām, Vol. IV, p. 35 (Quoted from Nasā‘i, Dār Quṭni, Sahih Ibn-i-Hibbān).

73. Ibid.

74. Ibid.

75. Ibid.

76. Ibid.

77. (a) Bulugh-ul-Maram, pp. 159-160.

(b) Subul-us-Salām, Vol. IV, p. 36 (Quoted from Bayhaqi, Sahih Ibn-i-Hibbān, Musnad Ahmad and Bukhāri).

78. Bulugh-ul-Maram, p. 160 (Quoted from Sahih Muslim and Abu Dā‘ud).

   (d) *Tilka Hudood-ullah*, p.201.
   (f) *Minhāj-us-Sāliheen*, p.588.

85. Ibid.
88. Ibid.
89. Ibid.
90. *Subul-us-Salām*, Vol.IV, p.30 (Quoted from Abu Dā'ud and Nasā'i)
98. Ibid.
100. (a) Ibid.
103. Ibid., p. 100.
104. Ibid., p. 102.
    (b) *Bulugh-ul-Marâm*, p. 159 (Quoted from Musnad Ahmad, Tirmazi, Nasâî and Ibn-i-Majah).
110. (a) *Bulugh-ul-Marâm*, p. 153 (Quoted from Sahîh Bukhâri).
    (b) Tirmazi, p. 230.
112. *Bulugh-ul-Marâm*, p. 152 (Quoted from Bukhâri, Muslim and Abu Da'ud).
115. Qur'an 16:106.
120. Ibid.


(b) *Tilka Hudoodullah*, p. 277.

126. (a) *Tilka Hudoodullah*, p. 278.

(b) 'Izzu-d-Din Baleeq, *Minhāj-us-Sāliheen*, p. 600.

127. Ibid.

128. (a) *Al-Ahkām-us-Sultāniyyah*, p. 55.

(b) *Subul-us-Salām*, Vol. IV, p. 265.


(d) *Tilka Hudoodullah*, p. 277.


131. Ibid., p. 674.

132. Ibid.

133. Ibid.

134. Qur'ān 7:33.


139. *Bulugh-ul-Marām*, p. 151 (Quoted from Sahīh Muslim).

140. (a) *Bulugh-ul-Marām*, p. 152 (Quoted from Sahīh Muslim).


141. *Bulugh-ul-Marām*, p. 151 (Quoted from Sahīh Muslim).


143. Qur'ān 17:33.

146. Qur'ān 4:95.
147. Qur'ān 5:52.
149. *Fīqh-us-Sunnah*, Vol.II, p.509 (Quoted from *Ṣahīh Bukhārī*).
151. *Fīqh-us-Sunnah*, Vol.II, p.514 (Quoted from *Ṣahīh Bukhārī*).
152. Qur'ān 2:179.
156. Qur'ān 5:45.
158. Ibid.
163. Ibid., p.519.
164.(a) Ibid.
165. Qur'ān 4:92.
166.(a) *Minhāj-us-Sāliheen*, pp.609-610.


173. Ibid., p.553.

174. Ibid., p.555.

175. *Bulūgh-ul-Marām*, p.150 (Quoted from Dār Qutni).

176.(a) Ibid., p.149.

(b) *Subul-us-Salām*, Vol.III, p.249 (Quoted from *Abu Dā'ud, Nasā'ī, Ibn-i-Mājah and Sahīh Ibn-i-Hībbān*).


181. Ibid.


183. Ibid., p.556.

184. Ibid., p.557.


187. Qur'ān 5:45.


189. Qur'ān 5:45.
192. Ibid., p.561.
193. Ibid.
194. Ibid.
195. Ibid., p.562.
196. (a) Bulūgh-ul-Maraş, p.149.
   (b) Subul-us-Salām, Vol.III, pp.244-245.
197. Ibid.
198. Ibid.
201. Qur'ān 4:54.
203. Ibid., p.703.
204. Ibid., pp.147, 703.
206. Qur'ān 4:54.
207. As-Sīyāsat-ush-Shar'iyah, pp.120-121.
209. Qur'ān 9:118.
211. Ibid., p.704.
   (b) Fat'h-ul-Qadeer, Vol.IV, p.212.
219. Ibid., p.705.
(b) Fatḥ-ul-Qadeer, Vol.IV, p.216.
222. Qurʿān 4:15.
224. Qurʿān 12:25, 32, 35, 36, 39, 42 and 100.
(b) Al-Mughni, Vol.XV, p.547.
227.(a) Ibid., p.36.
228. Al-Ahkām-us-Sultāniyyah, p.206.
(b) Badāʾ-us-Sanāʾī, Vol.VII, p.94.
234. Ibid.
235.(a) Al-Ahkām-us-Sultāniyyah, p.239.
237. Qurʿān 5:5.
238. Qurʿān 2:275.
239. Qurʿān 2:278, 279.
240. Qur'ān 1:58.
243. Qur'ān 4:133.
244. Qur'ān 22:50.
247. Qur'ān 2:188.
248. Qur'ān 5:90.
249. Qur'ān 83:1-5.
251. Qur'ān 7:80-84.
252. Qur'ān 11:82-83.


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255. Ibid.
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257. Ibid.
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PART - IV

PHILOSOPHY OF PUNISHMENTS

1. Western Philosophy of Punishments.

2. Islamic Philosophy of Punishments.
CHAPTER - 1

WESTERN PHILOSOPHY OF PUNISHMENTS

1. Objectives of Punishments.

2. Nature of a proper punishment

3. Qualities of a proper punishment
In an exhaustive study of criminology, two basic viewpoints emerge regarding the punishments.

1. Punishment as a method of protecting the society by reducing the occurrence of crimes.

2. Punishment as an end itself.

Research, relating the ultimate goal of criminal justice, has been conducted from the time of Plato & Aristotle. The theories evolved from the long history of inquiry can be divided into two classes.

The first is the reflection of **Collectivist Philosophy**, and accordingly the criminal law is primarily required to preserve and increase the welfare of society through the infliction of specific punishments, that are the means of realizing the aim.

The second is clearly allied with **Individualist Philosophy**, which provides mainly an ethical conception, and is concerned with the treatment of an individual as an individual, and not as a unit in a group. This view is advanced by Kant and Hegel.

Kant says in his "Science of Right": "Judicial punishment can never be administered merely as a means for promoting a good society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime." Justice, therefore, is not a means to an end. It is an end in itself, and punishment is inflicted for no other reason than that it is merited by the wrong doer.

The nature and forms of punishment are to be determined exclusively in the light of its specific objective. The operat-
ion of at least six objectives has been traced in this connection.  

1. Deterrence.
2. Reformation.
4. Expiation.
5. Restitution.
6. Retribution.

The first three of these approaches, as Salmond\textsuperscript{5} states, regard the punishment as a means of protection of the community from further commission of offences, whereas the last three treat the punishment as an end in itself.

\textbf{1. Deterrence}

The purpose of deterrent punishment is to incorporate the regard for law in the person on account of the fear of punishment in case he intends to commit the crime.

Flugel\textsuperscript{4} explains that deterrent punishments are the ally of the law-abiding individual in his struggle to keep his own anti-social wishes under control.

He says, "The criminal, by his flouting of law and moral rule, constitutes a temptation to our primitive wishes and instincts by saying, 'If he does it, why should not we?" This stirring of criminal impulses within ourselves calls for an answering effort on the part of our conscience, in the words that 'crime doesn't pay.' This reply becomes more efficacious and decisive by a demonstration on the person of a criminal in the form of punishment. By punishing him we are not only showing him that he can't get away with it but holding him up as a terrifying example to our own tempted and rebellious selves."\textsuperscript{5}
Therefore, this theory of deterrence holds that the individuals are restrained from committing the crime. However, its required effect of fear of the deterrent punishments depends on the extent to which the criminal law is enforced and exact punishments are awarded. If there are chances of avoiding detection in a society, the fear of punishment loses much of its persuasive force. The efficiency of the law-enforcing agencies is, therefore, of the first importance.

Mark Benney’s research published in 1936, 6

Danish Experience of 1944, 7

American Statistics published in 1951, 8

British Survey of 1960 9 and many other reports and observations have disclosed the fact that many criminals, who constitute a substantial proportion of our die-hard offenders, are quite incapable of learning even from the experience of punishment, much less from the threat of it. 10

Hence this theory finds no more support from recent pragmatic researches and practical observations conducted in the West.

2. Reformation

According to this view, the criminal is considered to be curable during imprisonment by adopting some proper corrective and reformative means. While undergoing imprisonment, the criminals are persuaded, coaxed and wheedled to abandon their evil inclinations and proclivities through religious training and moral education.

In England an act, regarding the appointment of preachers in jails, was passed in 1773, and according to John Howard, many people were thus appointed to make its application effective. 11
As Simon has mentioned, many great preachers like John and Charles Wesley prayed with and ministered to the prisoners. 12

The Chaplain is still supposed to perform an important reformatory function in British prisons and borstals, and there is great official pressure on prisoners to attend religious services. 15

After the introduction of Lombrosian view in the history of Criminology, attention is increasingly being directed towards scientific reformatory education of criminals, and the improvement of their environmental circumstances.

By the advancement of Psychological theory, psychological treatment of criminals during imprisonment has also been acknowledged to be necessary in more obviously abnormal cases.

By the development of Psychiatric Criminological theory, the criminal is no longer a "bad man" but a "Sick Man." Therefore, proper treatment of psychotic diseases has also been suggested by some specialists. Hence, deterrent punishment is not only undesirable for this purpose, but it absolutely negates the idea of reformation of the criminals.

However, this philosophy has also been strictly criticized by many other Western criminologists for the reason that this concept, if widely accepted, may damage the moral fiber of the whole community. 14

Dr. Mannheim, in this context, says, "But on principle, to divorce the idea of punishment by the state from moral considerations has, in the long run, proved a fatal error. Only on a moral basis is possible to argue with the law-breaker." 15

3. Prevention

This is to prevent the criminal from committing the
crime at least during the period of his sentence. Because in prison, the offender can not commit any crime, he is effect-
ively prevented from doing so. This is the very idea of "Preventive detention", often meted out to persistent offen-
ders.

There are two types of prevention.

1. **Prevention**, by making the criminal physically incapable of committing the crime. This is its permanent form.

   Capital punishment, is, of course, a complete prevention in this sense, as is Castration used in Scandinavian Countries to bring to an end to a long career of sexual offences.\(^{16}\) Other drastic corporal punishments also fall in this category.

2. **Prevention through detention**, as mentioned above. This may extend to even life-imprisonment.

   The second type of prevention is further classified into two kinds:

   (i) **General Prevention**: This exercises a deterrent effect also on the rest of the population.

   (ii) **Individual Prevention**: This has its effect upon the criminal himself, either as a deterrent, or if he was imprisoned, also as a physical restraint during the period of sentence.

4. **Expiation**

   According to this theory, punishment becomes a moral and spiritual aim in itself. The Expiatory view possesses an important place in religious doctrines and practices. Most of the great religions of the world testify to its significance,\(^{17}\) though the means which they prescribe for its achievement vary
widely from one religion to another. The essence of this view is that the offender, in suffering his punishment, thinks that he has paid for his crime, and that his account is, therefore, clear. The infliction of punishment lightens the burden of guilt on the criminal. It seems to be a fundamental need of our moral nature.

5. **Restitution**

Every person, who is the victim of an offence, naturally experiences some sense of revenge and he feels the need of compensation in one way or the other.

According to this view, the criminal is legally and morally bound to make good the loss and damage inflicted by him upon his victim. Thus punishment is the necessary mode of compensation for criminal infringement of the rights of the people.

When the sense of revenge of the person victimised, is justly satisfied in the form of punishment, awarded to the offender, then furtherance of the criminal action is no more required by him. In primitive periods, compensation or revenge was exacted by the victim himself or his kin, but as crime became more and more a public matter, so did the punishment take on correspondingly the character of a state duty. Mannheim stressing the utility of the Restitution, attaches much importance to the provision of more opportunities for real reparation and compensation of the victim in the present system of law and presents some important suggestions.

Margery Fry has gone further, and has suggested that if the culprit is incapable of making proper restitution to his victim, the state should do so in his stead.
6. Retribution

The idea of retribution is that one who commits crime should be punished simply for his commission of offence. It is punishment in its present form. No other motive is involved in this case than that of inflicting pain or loss on the offender as a result of his criminal act. Lord Justice Fry, supporting this idea, has exactly said that, "The object of punishment is to adjust the suffering to the sin." 21

Kenny 22 and Stephen, both insist upon the importance of retaining this idea. Stephen says, "It is highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred and to justify it." 23 Goodheart has very clearly expressed his views, saying, "Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear." 24

A community which is too ready to forgive the wrong doer may end by condoning crime. Some of the Western criminologists have criticised this theory also on various grounds (i.e. Religious concept of forgiveness, Difference of sensibility in various individuals, existence of tempting social circumstances, etc.)
offences, with a view to obtaining some future benefit — That is to secure the safety and good of the community."\(^{25}\)

The definition may be split into the following essential characteristics:

1. Punishment is not a desirable act in itself.
2. It is an evil.
3. It should possess a deterring effect in all circumstances.
4. It should be proportional to the gravity of offence committed.
5. Its nature should be retributive.
6. It should cause preventive effect in future.
7. It should also be destined to secure the safety and welfare of the Society.
8. It should be imposed only through the sanction of the sovereign (power).

The main and ultimate purpose of punishments is to secure the safety and welfare of the community, but there may be different means of realizing this purpose. The particular nature of crime committed under the specific circumstances of each case, the damage accruing to the victim and many other factors determine which mode is preferable.

Blackstone, considering the general nature of punishment says, "These are evils or inconveniences consequent upon crimes and misdemeanors, being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made."\(^{26}\)

One more essential ingredient has been mentioned by
Blackstone, i.e., the punishment can only be inflicted upon those criminals who are the subjects of the state laws.

The proper end of punishment is to stop the repetition of the offence, whether by its deterring and retributive or its preventive effects.

According to Beccaria, Blackstone, Romilly, Paley and Fangerbaek, preventing the repetition of the offence is not only the main object, but the sole permissible object of inflicting criminal punishment."²⁷ It may effect the prevention of crimes in at least three different ways.

(a) It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence, i.e., Imprisonment, Physical disablement or Death penalty, etc.

(b) It may act on the offender's mind, eradicating his criminal trends either through the fear or the moral influence.

(c) It may act on the minds of others.²⁸

All objects are contained in one main purpose, and that is "Prevention of Repetition of Crime."

Bentham²⁹ opines that all punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it at all is to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

It is of the greatest importance that the punishment should succeed the crime as immediately as possible.

According to Bentham, a proper punishment should have the following qualities.

1. It ought to be susceptible or divisible. There should
be possibility of increase or decrease in it.

2. It should be equal to itself. It signifies that it should be same for all like criminals but variable in terms of age, sex, condition and circumstances, etc.

3. It should be commensurable.

4. It should be analogous to the offence. It signifies that an eye for an eye, a tooth for a tooth.

5. It should be exemplarv.

6. It should be economical. Only that degree of severity should be applied which is absolutely necessary to achieve the end.

7. It should be remissible or revokable.
NOTES


3. Fitzgerald, P.J. Salmond on Jurisprudence, p.94.


5. Ibid.


8. see Kefauver, E. Crime in America (1951).

9. see Howe, Criminal Statistics (1960).


12. see Simon, J.S. John Wesley and the Religious Societies, (Lond. 1921).

13. Fox, L. British Prison and Borstal System, Chap.XII.


22. Ibid.


28. Ibid.
CHAPTER II

ISLAMIC PHILOSOPHY OF PUNISHMENTS


2. Philosophy of Objects.

3. Philosophy of Enforcement.

4. Philosophy of Severity.

5. Philosophy of Efficacy.
ISLAMIC PHILOSOPHY OF PUNISHMENTS

Almighty Allah has stated, expressing the nature of revelation and divine commandments:

"There has come to you a direction from your Lord and a healing for the (diseases) in your hearts, and for those who believe, a guidance and a mercy."

In this Qur'ānic verse, the following four basic characteristics have been attributed to the Holy Book Al-Qur'ān as a whole and to all of its commandments separately.

(1) *Mawqūfah* (effective advice)

It means that Qur'ān does not embody wishy-washy and impracticable advice nor does it offer an inconsequential prescription. On the contrary, its injunctions are replete with wisdom and pragmatic suggestions which help human beings in charting out a comprehensive time-table for their individual and collective lives. Its practical orientation and its inclusive configuration distinguish it from other books of philosophy and knowledge. The suggestions and prescriptions contained in these books usually border on exercises in pure abstraction and are only remotely related to man's practical problems but Qur'ānic advice relates to the broad spectrum of human needs and urges and is intended to offer a practical solution of the entire gamut of his mundane and supra-mundane problems.

Qur'ān does not treat man as a two-dimensional reality; it treats him as three-dimensional, capable of achieving sublime heights and landing in ignoble depressions. Besides, Qur'ānic advice is fruitful and rewarding, it eschews the infructuous results of other philosophies. Therefore, any one
who follows Qur'ānic advice truly is sure to reap the fruit of his efforts.

(2) Shīfā (Recuperation)

Qur'ānic direction has a curative function as well, and its cure does not only apply to the diseases of the body but it cures the diseases of the heart as well. Rather the emphasis is on the latter. Since the Qur'ān is a book of purity, anyone who reads and follows it sincerely, is purged of all the greed, malice and other negative feelings that afflict the human heart. Qur'ānic advice is the best antidote against the poison of hypocrisy which apparently seems in-cur-able. The hearts of the present-day generation are blackened by the tar of greed and lust. Since all other solutions to treat this cancerous growth have miserably failed, Qur'ān offers the only viable solution for these seemingly intractable maladies of the contemporary world.

(3) Hidāyah (Guidance)

It means that Qur'ān is primarily a book of guidance for human beings. There are other books which claim themselves to be rivals of the Holy Qur'ān but these books contain only half-chewed and indigestible doses of partial guidance. And a guidance that is partial is no guidance. If a book guides you through the blind alleys of the world but ignores the desolate lanes of man's spiritual odyssey, it fails as a book of life or as a complete explanation of the mysteries of the universe in which man exists as a speck of life. Qur'ānic guidance is complete and anyone who allows himself to be guided by this book from the core of his heart and not from the core of his body or from the cuticle of his nails is guaranteed his final redemption and salvation. Besides, there is no doubt
about the authenticity of Qur'ānic guidance because it is the word of God and a unique distillation and crystallization of divine wisdom.

(4) Rahmāh (mercy and blessing)

Qur'ānic guidance promises divine mercy and blessing to all those who not only follow its message in theory but also practise it to the best of their capacity. Qur'ān is not intended to be placed on polished and gilded shelves as a piece of decoration, it is intended to be recited, understood and followed by all the believers and play such a fundamental and vital role that each gesture they make, each posture they assume and each act they perform, is tinctured with the perfume of its eternal message. When the human beings are saturated with its divine aroma, the blessings of God are showered on them in immeasurable doses. Infinite quantities of divine mercy are petitioned on them which is a proof of the fact that God is pleased with them and they are pleased with God. The manifestation of mercy in their lives is the sense of peace and harmony which they experience in the daily routine of their existence. The lack of disharmony in their lives is an indication of that deep-rooted and pervasive peace that comes to human beings as a reward for piety and righteousness and which is the most transparent expression of divine mercy and blessings.

All of these characteristics indicate the two-fold objective of divine commandments.

(i) Protection and promotion of human values.

(ii) Protection and promotion of public interests.

The same idea prevails in Islamic concept of punish-
The punishments in Islamic penal systems are not prescribed as ends in themselves, as propagated by the Western individualistic philosophy advanced by Kant and Hegel. The punishments are, in fact, a means of promoting the moral values and general welfare of human society. The philosophy of Islamic punishments is remarkably different from and highly superior to the penal philosophy advanced by Western criminologists. In order to understand this concept, we are obliged to study the subject from the following angles:

1. Philosophy of objects
2. Philosophy of enforcement
3. Philosophy of severity
4. Philosophy of efficacy

Since Islamic punishments are means and not ends, they have been placed within the purview of declarative laws of Shariah and not within the ambit of primary and defining laws. Therefore, the structure of an Islamic society is laid through the enforcement of primary laws and the process of its erosion and disintegration is checked and safeguarded through the enforcement of punishments. The purpose of this bifurcation is to encourage and promote basic human values and to discourage their violation. The character of Islamic punishments is comprehensive and all-embracing as compared to that of the secular system. As already mentioned in the first chapter of this part, there are six differing and mutually exclusive philosophies of objects relating to punishments, which are adopted by different schools of criminology. However, no attempt is made in Western penal law to combine and coordinate the various angles of approach. But
The philosophy of objects of Islamic punishments is altogether different as it is based on inclusive perception and evaluation. Islamic punishments, therefore, possess the following characteristics simultaneously and synchronically:

1. Retributive character
2. Preventive character
3. Deterrent character
4. Redressive character
5. Restitutive character
6. Reformatory character
7. Protective character
8. Expiative character

The first objective of Islamic punishments is to award punishment to the culprit equal to the magnitude of his guilt because this is inflicted in exchange for the crime he has committed. Since the commission of a crime itself is a violation of a divine commandment, therefore, it requires the imposition of punishment. It is backed by the presumption that each and every act must be followed by a positive or a negative response. It also finds an express elaboration in the words of the Holy Qur’ān:

"As to the thief, male or female, cut off his or her hands. This is a retribution, by way of example, from God, for their crime: and God is exalted in power."²

The Qur’ānic verse explains that the punishment of amputation of hands is prescribed simply as retribution of the criminal act of theft and the words "لا یَکْسِبَانِRESSUB” explain the fact that the idea of retribution is rooted in Islamic philosophy of
punishment which is awarded by God Almighty on the clear assumption that the suffering originating from a sinful or criminal act cannot be adjusted without punishment. The prescription of punishment by the Shariah for sins and crimes is motivated by social and moral considerations and not by personal feelings of revenge alone. Its primary aim is to induce a sense of strong hatred and revulsion in the criminal as well as in the entire society of which the criminal happens to be a member. The Islamic law has enunciated this principle as a declaration of disapproval, disapprobation and denunciation of the criminal act.

The same principle is explained in the verse which prescribes the punishment for robbery and dacoity:

اذْنَ أَجِزَّنَكُمُ الْكَفَايَةَ مِنَ الْجَحَمِ وَعَسَى مَا فِي الْامْسِكِ فَادْخِلُوهُ وَلَعِبْنَاء

"The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land, is execution or crucifixion or the cutting off of hands and feet from opposite sides or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the next world." 3

It is further established through another Qur'anic verse:

"If two men among you are guilty of lewdness, torture them both." 4

Here the words "torture them both" again indicates the retributive capacity of the punishment.
Islamic punishments at the same time possess the preventive character through the infliction of some physical discomfort and handicap.

For example, death penalties, amputation of hands or feet, imprisonments, transportation, confinements, etc. The criminals are prevented from repeating the crime either due to a permanent or temporary disability.

Qur'ān, prescribing the various punishments for robbery, declares it as "an act of mischief and disruption in the world." It states:

وَيُعَمِّرُونَ فِي الارّضِ فَضَايِداً

"And they create mischief and disruption in the world."\(^5\)

In order to punish this crime, the preventive confinement has also been prescribed as one of the Ḥudūd which is declared in the words:

أو ينقومن الأمن

"These people should be removed from the hub of activity."\(^6\)

This order signifies that they should be transported to distant and unfrequented places, so that through exile they could be prevented from committing crimes.

This Qur'ānic verse clearly explains that the punishment of imprisonment or transportation is prescribed in order to prevent the criminal from spreading disruption. The same idea is derived from another Qur'ānic verse where the first punishment for immorality and prostitution is prescribed in unambiguous terms:

ذَامِسُكُومُنَّ فِي السَّيْوَاتِ حَتَيۡنَ يَهْيَّسُنَّ السُّمَومَ

"Confine them to houses until death claims them."\(^7\)

The concept of confinement till death stresses the
relevance of punishment as a permanent preventive measure.

It is reported by Makhul that Hazrat Umar ordered in case of the third occurrence of a crime of theft.

"Imprison the thief to prevent him from (harming) the Muslims."

The third objective of Islamic punishment is its deterrent capacity. The Shariah has recommended that the punishments should be executed publicly because public display of the imposition of sentence possesses a deterrent effect. As a consequence of this public demonstration, all those who had even the slightest inclination towards the commission of crime would restrain themselves in view of the punishment it entails. In order to achieve this objective, Shariah has clearly commanded that the fixed punishments of Islam should not be reduced or mitigated even under pressure of the sentiment of mercy. It is stated in Holy Qur'an:

\[ 
\text{وَلَا تَحْزَبُوا مِن فَهْمِهَا فِي دُرْبِ اللَاّهِ أَنْ تَؤْمِنُوا بِاللَّهِ وَاليَوْمِ الْآخِرِ.}
\]

"Let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day."

The Qur'anic command prescribes that if the guilt is proved, the offender must be punished at all costs and the punishment should not be tampered with compassion and leniency because any such tincturing or blending may vitiate the effectiveness of the punishment. The untinkered infliction of punishment on the criminal is one of the requirements of Din of Almighty Allah which must be fulfilled under all circumstances.

In the same verse, it is further ordained:

\[ 
\text{وَلَيْسَ الْمُؤْمِنُ مِنْهَا بِمَاطَرَةٍ مِّنَ الْمُؤْمِنِينَ.}
\]
"And let a party of the believers witness their punishment."

Therefore, the purpose of awarding severe punishment is to put fear of prosecution into the public as a deterrent measure. This deterrent and exemplary aspect of Islamic punishment has a psychological impact on all those who have criminal inclinations and propensities. They curb their criminal tendencies for fear of the ensuing punishment and the accompanying public demonstration of its execution. This is the basic object of gathering the people on the occasion of punishing the adulterers. The same purpose is served by hanging the chopped hands and feet of the criminal and by the punishment of stoning in broad daylight.

Redressive character:

In most of the crimes, the aggrieved party becomes revengeful and if this feeling of revenge is not satisfied and washed out of the mind through redress, the spread of criminal activity cannot be checked, specially the crimes relating to murders or vital injuries. If these crimes are not redressed, they lead to an almost unending chain of tension and conflict, murders and counter-murders between the parties. Although in modern and secular law, the state is a party to get the criminal punished for such crimes, it remains unmindful of whether the real feeling of revenge has been satisfied or not. It is a landmark of Islamic penal system that all crimes of this category have been declared compoundable offences and the punishments prescribed for them are marked by a rare degree of balance and equilibrium as is stated by the Holy Qur'an:

"O believers: The law of retaliation is prescribed to you in cases of murder; The free for the free, the slave for the slave,
the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.

In the law of equality and retaliation there is (saving of) life to you, O you men of understanding that you may restrain yourselves. 11

—. The object of this law of Qisas is to satisfy the feeling of revenge by redressing the aggrieved party through inflicting on the offender the same physical damage or punishment as inflicted by him on the victim. The law of eye for eye, ear for ear, limb for limb and life for life is the best way of redressing the physical feeling of revenge. Moreover, on the basis of the characteristic of compoundability of this offence, the injured party is also given the right of accepting blood money in place of retaliation, in case it wishes to be compensated monetarily and not physically. Therefore, the aggrieved party has the option either to satisfy his feeling of revenge through compensation or to forgive the criminal altogether. The only way to check the proliferation of evil in society is that the state should not interfere with the right of the aggrieved and the aggrieved should be given a chance to satisfy and redress himself in the way he likes. Thus the repressive form of punishment is an important aspect of Islamic system of punishments.

Restitutive character:

The punishments of blood money and monetary compensation which are prescribed in replacement of retaliation, as discussed above, possess the restitutive character also. When the sense of revenge of the person victimized is justly satis-
fied on his own demand in the terms prescribed by Shariah, then he cannot intend to reenact the crime. This idea is stressed in the verse discussed above:

"But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in a grave penalty." 12

This means that the monetary compensation which is declared to be handsome gratitude is, in fact, the restitution of the aggrieved. After this permissible dose of satisfaction, the aggrieved has no right of additional satisfaction of his revenge because such an act would amount to exceeding the limits of Shariah. This act would in itself be considered a crime. Thus the law of retaliation gives repressive character to the punishment whereas the law of blood money gives restitutive character to the punishment.

Reformative character:

"Most of the punishments in Islam aim at the reformation of the criminal, and sometimes if reformative purpose is achieved before the congnizance of the criminal in the form of his repentance, then, in some cases, remission is also awarded. It is stated in the Quran in case of theft:

"As to the thief, male or female, cut off his or her hands as a punishment by way of example, from God, for their crime. And God is exalted in power. But if the thief repents after his crime, and amends his conduct, God turns to him in forgiving..."
The second verse explicitly prescribes the reformatory object of penal law. This concept is further supported by the Prophetic tradition already mentioned, according to which the Holy Prophet (peace be upon him) said to one of his companions that the remission could be awarded to the thief before cognizance of the court. At another occasion, it is mentioned in case of Qazaf that the false adulterer should be deprived of the right of witness. If this punishment achieves the actual object, that is, if the offender repents after the commission of the crime and reforms himself, then he can be exempted from the punishment. It is stated in the Qur'ān:

وَالَّذِينَ بَرَمُونَ الْمَحْصُونَ فَقَالَ طَلَبْنَا بِآدَمَنَا وَإِلَّا إِلَّا إِلَّا نَفَّضُوا هُمُّ الْعَفَّاءَ وَالْعَفُّاءَ وَالْعَفُّاءَ وَالْعَفُّاءَ مِنْ بَعْدَ ذَلِكَ وَأُصِيلُوا وَإِنَّ اللَّهَ عَفُوٌّ رَحِيمٌ

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) Flog them with eighty stripes and reject their evidence ever after. For such men are wicked transgressors; Unless they repent thereafter and mend (their conduct) or reform themselves; for God is most forgiving and merciful."

The verse clearly states that the adulterer on the basis of repentance and reformation is exempted from the imposition or continuation of punishment which indicates that the real object of this kind of punishment is the reformation of the criminal.

The same concept is further elaborated in Qur'ān in the context of the punishment of dacoity and robbery:

إِلَّا النِّيَّةُ نَأْبَدُهَا فَإِنَّ اللَّهَ عَفُوٌّ رَحِيمٌ
"Except for those who repent before they fall into your power
in that case, know that God is most forgiving and merciful."¹⁵

These Qur'ānic verses stress the reformatory aspect
of Islamic punishments.

Hazrat 'Umar, the Second Orthodox Caliph, is reported
to have said:

اِحْسِنَ حَتَّى أَعْلَمْ مِنَ الْتَرْجِمَةَ

"I would confine the criminal in the jail unless I am convin-
ced that he has repeated and reformed himself."¹⁶

Imām Abu Hanifah endorses this purpose of punishment.

It is stated:

المراد بالني عند من حنيفة إن يحسن حتى يظهر من الترجمة

"The meaning of imprisonment is to confine the criminal in a
place till his repentance and reformation."¹⁷

The reformatory character of jails and prisons is also
established through the Qur'ān with reference to the imprisom-
ment of Hazrat Yousof (peace be upon him). During his confine-
ment, he tried to tone up the faith and conduct of the prison-
ers: Qur'ān says:

"O my two companions of the prison (I ask you): Are many lords
differing among themselves better, or the one God, supreme and
irresistible?

If not Him, you worship nothing but names which you have named-
you and your fathers — For which God has sent down no authori-
ty; the command is for none but God. He has commanded that you
worship none but Him.: that is the right religion but most men
understand not."¹⁸
This verse shows that the reformative activities of Hazrat Yousof (peace be upon him) seem to spring from his confinement in prison. Indirectly, it reflects the Prophetic attitude towards the inmates of the jail in particular and the role of these places of confinement in general. The conduct of Hazrat Yousof makes it clear that jails and prisons are not dens and breeding grounds for criminals, social outcasts and drifters; but they are first and foremost nurseries and centres of reformation.

This concept of the reformative function of punishment is not introduced by the Western penology, as is erroneously claimed by its exponents and uncritically endorsed by people all over the world. The fact is that it was first introduced by Islam and its main purpose was to turn offenders into better citizens and not to convert them into hardened criminals. It originates thousands of years back from today in the Prophetic conduct of Hazrat Yousof (peace be upon him). It is a pity that the credit for this extra-ordinary innovation has been taken by Western reformers, which amounts to a glaring distortion of reality.

**Protective character:** The most significant role of Islamic punishments along with other characters and objects is protective and preservative. In order to understand the protective philosophy of Islamic punishments, we can classify human values into two levels:

1. Individual level
2. Social level.

**Individual level**

This level possesses two kinds of values:

1. Spiritual values
Corporal values

The most vital spiritual values, as recognized by the Shariah are required to be protected by the penal laws, are:

(i) Faith (عِیَنَهُ)
(ii) Honour and chastity (فَضْرَتُ وَرُؤْنِیُّ)
(iii) Reason (بَلْوَاتُ رُؤْنِیُّ)

The vital corporal values are:

(i) Property (نَشَال)
(ii) Life (پاں)

By a thorough analysis of Islamic punishments we can conclude that most of the punishments, whether in the form of Hudood or Qisas, are prescribed only for the protection of these values. The punishment of apostasy is prescribed for the preservation of faith which possesses crucial importance for a Muslim in particular and for an Islamic society in general and which is deemed to be one of the fundamental duties of the state.

Punishment of faith:

The punishment of adultery, fornication and false allegation of immorality is prescribed for the preservation of honour and chastity. Since Western penal system does not attach any significance to the preservation of chastity and modesty of a woman, therefore, it does not treat fornication as a crime. In this system, adultery is a crime only to the extent that the adulterer has violated the right of the husband. If the husband has no objection, the penal liability is altogether removed. But Islam has attached top-most priority to the protection of chastity and honour of a woman as well as of a man. That is why Islam has prescribed the severest punish-
ments to protect these values. For adultery committed by a married person, the punishment of stoning to death has been prescribed; for fornication committed by an unmarried person hundred stripes have been prescribed; for false accusation, eighty stripes are prescribed to insulate the honour and chastity of a person from capricious and malicious damage.

The punishment of drinking is prescribed for the protection of reason. Islam voluntarily accepts the responsibility of protecting the people from drinking, because on the basis of its general effects, it damages the rational faculties of human beings. Even if there are individual exceptions, they do not negate the applicability of the general principle because exception proves the rule. Modern medical science has also proved that drinking not only damages the smooth operation of mental faculties but it also upsets and puts out of gear the total system of health by germinating the following diseases:

(i) Inflammation of the stomach and other digestive diseases (سكتة المعدة)
(ii) Peptic ulcer (فعلة)
(iii) Cancer of the stomach (سرطان المعدة)
(iv) Cirrhosis of the liver (امراض الكبد)
(v) Pancreatitis (سكتة الكبد)
(vi) Cardiac diseases (أمراض القلب)

It is proved that drinking helps in blood clotting which is a prelude to heart attacks.
(vii) Reduction of vitamins (نقص في العناصر الغذائية)

The punishment of theft is prescribed for the protection of property and the punishments of Qisās and Diyāt are prescribed for the protection of life of the individuals.
It also includes two kinds of social values:

(a) Socio-economic values
(b) Socio-political values

The punishment prescribed for dacoity and robbery is to preserve the socio-economic values of the society whereas the punishment of sedition is prescribed for the preservation of socio-political values. No penal system in the world can provide peace and prosperity to the citizens without guaranteeing the protection of these values at the individual and collective.

It is only Islamic law which possesses a penal system with an all-embracing and comprehensive capacity.

Expiatory character:

Some of the punishments in Islamic penal system also possess an expiatory character as a means of moral and spiritual purification of the criminal. This idea has always enjoyed an important place in the religious doctrines and philosophies of the world. The imposition of the expiatory punishment for crimes which are neither liable to Hudood nor to Qisas lightens the burden of the guilt on the criminal: For example, the expiation prescribed for breaking fast, for dishonouring the oath and for the commission of some prohibited acts during the performance of Hajj, etc., - The punishment seems to be a fundamental need of our moral nature because the burden of sin and its consequential answerability in the life hereafter is removed through the atonement. If Islam had not prescribed these kinds of punishment, its penal system would have remained incomplete and primitive. It is a remarkable feature of Islamic penal system that it has created a balance between the mundane and spiritual aspects of human life by prescribing physical punishments to eliminate earthly liability and
expiable punishments to eliminate ethereal accountability.

(2) **Philosophy of Enforcement:**

Islamic system of punishments exemplifies another philosophical aspect which pertains to its mode of enforcement. As already explained, the punishments in Islam are not the primary laws. They are only the declaratory laws which are always enforced as a condition or consequence and as a vindication of the primary structure of Islamic society. Therefore, the Islamic state first of all undertakes to remove and eliminate the crime-originating factors from the society so that the required structure of social life could be raised on invulnerable foundations. These factors are, for example, the environment of immorality, the conditions creating economic dead-lock and deprivation, conditions generating social disparity etc. By enforcing the primary laws of Shariah, an attempt is made to extinguish these factors, because only through their elimination the enforcement of the penal system can produce the required results. For example, it is ordained by Qur'ān that women should be forbidden to display their beauty and make-up and to wear attractive ornaments while coming out of their houses so that this display may not create an uninhibited environment of immorality and lewdness:

"And stay quietly in your houses, and make not a dazzling display, like that the former times of ignorance."

Qur'ān further ordains:

"ليْحَضْنَا الْحَيْثَ ُنْجَلَٰكُمْ وَلَنْنَ كُنْ عَزْرَاءٌ مُّؤْمِنَاتٌ يَفْقَهُنَّ مِنْ مَّا بِيَتٍٖٖ،ٖ َلَا يُحَرَّضُنَّ قَدْ أَفْتَرَىٖٖ رَحِيمًاٖ"
"O Prophet: tell your wives and daughters and the believing women that they should cast their outer garments over their persons (when abroad): that is most convenient that they should be known (as such) and not molested. And God is most forgiving and merciful."\(^{20}\)

At another place in the **Holy Qur'an** a very comprehensive command is given hearing directly on this matter:

قِيلَ لِلْمُؤْمِنِينَ يَغْفِرُ اللَّهُ ذُنُوبَهُمْ وَيَفْعَلُوا
ذُنْوَىٰ لَهُمْ وَيَفْغَمُوا
قلِ السَّمَّائِينَ يَغْفِرُ اللَّهُ ذُنُوبَهُمْ وَيَفْغَمُوا
قِيلَ لِلْمُؤْمِنِينَ يَغْفِرُ اللَّهُ ذُنُوبَهُمْ وَيَفْغَمُوا

"Say to the believing men that they should lower their gaze and guard their modesty. That will make for greater purity for them. And God is well acquainted with all that they do. And say to the believing women that they should lower their gaze and guard their modesty; that they should not..."
display their beauty and ornaments except what (must ordinarily) appear; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And 0 believers! turn you all together towards God that you may attain bliss." 21

A man can commit fornication not only through his sexual organs but through all of his senses. For example, staring or 'eye-feasting' is a fornication of the eyes, passion-rousing and seductive way of talk is a fornication of the tongue and to enjoy the prohibited voice is a fornication of the ear, to touch a prohibited object and to walk for an immoral act is fornication of the hands and the feet. By fulfilling the primary requirements a pious environment is created in the society and through the imposition of punishments, a check is placed on the preservation of that environment. Thus, the impositional philosophy of Islamic punishments comprises two aspects:

(a) Internal

(b) External

At internal level it removes and eliminates the chances of the commission of crime and at external level it obviates the occurrence of criminal violation through the enforcement of punishments.
The same philosophy is adopted to eliminate the conditions which affect the economic, social and political structure of the society. Through a complete and organized revolution, economic deadlocks and statements of the people are stamped out by restoring their creative capacities. Social disparities are eliminated through the provision of equal opportunities for progress and development. These arrangements guarantee the effective enforcement of punishments and make them adequately serve the purpose for which they are prescribed. This aspect has been discussed in detail in Part-II Chap.1

(3) Philosophy of Severity

The orientalists and Western scholars normally criticize Islamic punishments on the basis of severity. Broadly speaking, two kinds of objections have been raised against these punishments.

(1) It is contended that these punishments are very severe, cruel, barbarous and inhuman.

(2) It is contended that these punishments were formulated and applied in conditions more or less primitive, keeping in view the geo-physical climate of those times. Therefore, their application to the advanced and civilized society of the twentieth century era is not permissible. The punishment of theft i.e., amputation of hands, and the punishment for adultery i.e., flogging or stoning to death have been criticized in extremely harsh accents. It is ironically and sarcastically stressed that the Muslims believe in cutting the hands of a thief even for a paltry sum of five pennies. These objections are raised in complete illiteracy and ignorance of the
system and philosophy of Islamic punishments. Before we embark on a critical dissection of this absurd and prejudice-oriented criticism, it should be noted that these objections of barbarity and inhumanity are raised primarily by the scholars of those nations who practically justify the use of nuclear weapons for subjugating and monopolizing free and independent nations, killing millions of innocent men, women and children. They are obsessed with their psychopathic craving for power and they satisfy their hunger and urge for power by decimating millions of otherwise in culpable and peace-loving citizens of other nations. Their performance in Africa, Viet-nam, Nagasaki, Hiroshima, etc., is a brazen and unblinking proof of their inhumanity and barbarity. It is actually these nations who have billions of such skeletons stacked away in their cupboards on account of their massive and indiscriminate massacre of innocent people. Therefore, before hurling abuses and insults against Islamic punishments, they should first probe into their own blood-stained, hatred-hewn and jealousy-prone hearts. However, irrespective of their bias-based criticism, we would like to explain the nature of cruelty and inhumanity as objectively as possible and to explain the relationship between these two concepts and the concept of punishment.

There are five major factors, the existence or non-existence of which determines the humanity or inhumanity of the punishment.

(i) Imbalance: If there is no balance between the sanguineness of crime and the severity of punishment and the penal element far exceeds the nature of the criminal act, the punishment may be called cruel and inhuman.
(ii) **Torture:** If any punishment or the mode of its execution or the method of its infliction is torturous, cruel and painful, the punishment may be criticized as inhuman.

(iii) **Contemptuousness and humiliation:** If a punishment degrades and humiliates the mankind in general or its mode of dispensing is indecent and shameful, it may be dubbed inhuman.

(iv) **Frequency:** If the severe punishments are awarded frequently and there are no optional palliatives or alternatives available, the system of punishments may be described as a cruel and inhuman system.

(v) **Inconsequence:** If the execution of punishments is not effective and does not possess the actual preventive capacity, in spite of the complete enforcement of punishments, they may be styled cruel because, on account of their ineffectiveness, they possess only harming effects and lack positive attributes. Besides a negatively-oriented punishment is always inhuman.

**Analysis of Criticism**

By making a complete, extensive and thorough study of Islamic system of punishments, we can easily reach the conclusion that this system is essentially based on the following characteristics which absolutely eliminate all doubts of cruelty and shadows of inhumanity. These characteristics have transformed the Islamic system of punishments into an appropriate and acceptable system which is neither barbarous nor unenforceable in the present civilized era. The attitude that since these punishments were framed fourteen hundred years ago and were mainly inspired by the desert conditions of Arabia, therefore, their application to highly sophisticated contemporary settings is both superfluous and irrelevant. It is formed on purely materialistic and distorted ideas that
emphasize the temporary and transient nature of culture and civilization and also those legal principles and conventions on which the twin-pillars of their so-called humanitarianism are based. The minds of these finicky and crank fault-finders are impervious to the permanent and perpetual nature of any culture and civilization and the everlasting enforceability of their laws, just as the jumping frogs fail to appreciate the aerial somersaults of the birds and the ugly nauseating toads cannot admire the many-splendoured and multi-spangled beauty of the peacocks. The laws they inherited from ancient materialistic civilizations, such as Hammurabi, Egyptian, Jewish, Roman, etc., induced in them a frame of mind which preconditioned them to visualize and evaluate Islamic culture, legal system and punishments from a restricted and a squint-eyed perspective. Since Islam is the final and definitive addition of Divine Revelation, obviating the necessity of another religion or Prophet, God has blessed it with an unending, inexhaustible, self-refreshing and self-replenishing, everlasting and permanently enforceable system of punishments. Therefore, whether it is fourteen-hundred years old desert of Arabia or the present world of technology, the enforceability and consequentiality of Islamic laws possesses the same validity and applicability. The factors which make the Islamic system of punishments an adequate, humane and the finest penal system are as follows:

Maintenance of balance: The first important characteristic of Islamic penal system is that it has maintained over the centuries, and still maintains, and will continue to maintain, on account of its most sensitive perception and evaluation of man's emotional
and psychic needs, an ideal balance between criminal gravity and penal severity. The reason of its apparent lack of balance in the eyes of Western scholars is rooted in the basic difference of values which regulates the two cultural systems. Since the Western law does not recognize fornication as a crime unless it is forcibly committed or unless it is an encroachment of the right of a married woman, the rape acquires the status of a crime only on account of the act of encroachment of the rights of the husband or as violation of the free will or consent of the woman. But in Islamic society as discussed above, the preservation of chastity is itself the most essential value of human life against the Western practice. Therefore, adultery is to be punished as severely as possible because it infringes the most precious, cherished and sacred value of human life, and as far as the act of encroachment is concerned, it is an additional crime which requires extra penalty. But if the woman is married—irrespective of the fact whether she consented to it or not—is again an additional crime against the purity and sanctity of conjugal life which aims at the recognition of the inviolability of paternity. This is the reason that Islam has prescribed the severer punishments for the offence of adultery.

As far as the balance between the crime of theft and the punishment of amputation is concerned, it is again justified by the sanguineness of the criminal element. Theft, as a matter of fact, is psychologically more heinous than murder because the very act of theft may amount to a murder of the occupant or possessor of the property, and the loss involved in theft may be of a graver and more portentous nature than that involved in murder only. Therefore, theft is the crime
that may damage the emotional and mental equilibrium of a person as well as induce in him a maximum feeling of insecurity. Besides, it causes a multiplicity of other crimes which collectively and cumulatively shatter the tranquility and security of its victim to a myriad shreds and ribbons. Since theft is an extremely heinous crime whose consequences are frustratingly harmful and detrimental, Islam has prescribed for it the most severe punishment. To describe this punishment as cruel and inhuman is to under-play its criminal element which is in itself an imbalanced approach and accounts for the lop-sided nature of the Western penal system.

**Prohibition of torture:** Shariah has sternly prohibited the infliction of torturous punishments and the use of painful and agonizing methods of their execution. Torture is highly disfavoured and disapproved even in awarding the death penalty; it is equally condemned in the case of flogging. The specification of infliction of lashes and the principles regulating other punishments have been laid down in clear-cut details, the violation of which is in itself an offence. For example, prohibition of burning someone to death, disfigurement and flogging on the soft and delicate parts of the body. These extenuations are coupled with a number of other concessions to reduce the severity of the punishments and make them humanly bearable: for example, prohibition of cruel and sedolic killing, the act of refraining from flogging a sick person till the period of his recovery, the non-permissibility of flogging a pregnant woman till delivery and expiry of the period of foster-age. These are sufficient and substantive arguments to establish the humanity of Islamic punishments.
Humiliative, ignominious and contemptuous punishments are also absolutely prohibited in Islam. For example, the criminal should not be completely stripped before flogging is administered to him. Even the concept of imprisonment aims at the restoration of the dignity and social prestige of the criminal by reforming and transforming him through proper education and training into a useful and respectable citizen. Imprisonment in Islam is not dispensed with a feeling of vengeance but its primary purpose is to convert the criminals into law-abiding citizens and rehabilitate their rights as civilians. Therefore, Islam has prescribed that abuses and insults should not be hurled at the criminals since they are in themselves criminal acts and, therefore, they are expressly forbidden by the Holy Prophet (peace be upon him).

The purpose and motive behind Islamic punishments is to punish the criminal and not to humiliate him. Though he has committed a crime and acquired the temporary status of a criminal, he remains essentially a human being and, therefore, deserves human treatment.

Islam has placed many checks and restraints to prevent the frequency of the application of punishments. For example, in case of theft,

(i) the amputation of hands is the maximum punishment that can be awarded, not the minimum punishment. Other alternatives in the form of discretionary punishment are also available.

(ii) It is an established principle of Islamic law that the Hadd of amputation will not be awarded if the stolen property is less than Nisab (the fixed amount equal to the value of ten dirhams in the times of Prophetic era which becomes a huge
amount in terms of its prevalent value and varies with the constant revaluation of the currencies).

(iii) The Hadd cannot be awarded if food is stolen to satisfy the pangs of hunger.

(iv) The Hadd is not applicable either if the stolen property is not taken from proper custody.

(v) The imposition of Hadd is also avoided in the presence of the slightest evidence which provides the benefit of doubt to the offender.

(vi) The Hadd is also not awarded to the criminal if the act was committed under an extreme state of coercion and compulsion.

All these principles are clearly established through Qur'ān and illustrated through the Prophetic Sunnah and the practices of the Orthodox Caliphs. The same applies to the imposition of Hadd of adultery and all other fixed punishments.

The basic propulsion of Islamic penal law is to give maximum benefit to the offender on the principle that to pardon a criminal is better than to punish an innocent person. Therefore, a system of preconditions and pre-requisites for the imposition of Islamic punishments, relating to substantive as well as to procedural penal laws, has been formulated to check the frequent application of severe punishments. Discretionary punishments are mostly awarded in place of fixed punishments which is a significant proof of the human basis of Islamic punishments. Legal study of various periods of Islamic history reveals that Hudood have been very sparingly applied as compared to the available statistics of the Western countries where the range and frequency of punishments is much wider.
Consequentiality of punishments:

There is no doubt that Islamic punishments are the most consequential as compared to any system of punishments ever enforced in human history. If a punishment is consequential and definite in preventing the rate and frequency of crime, then even according to Salmond, a Western authority on Jurisprudence, the punishment of burning alive can be awarded to all the offenders. He has very clearly stated that if the deterrent effects of severity were certain and complete, the best law would be the one which by means of the most severe punishments effectively extinguished the crime. If the human nature were so constituted that a threat of burning all offenders alive could with certainty prevent all breaches of the law, it would be the just and fitting penalty for all offences from high treason to petty larceny. In support of the discussion, we can quote the comments of Cordon Gaskell (Readers' Digest, February, 1967) "Foreigners consider this amputation for theft a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world."

The allegation of severity and cruelty against Islamic punishments is, therefore, absolutely baseless, false and biased which is rooted either in sheer ignorance or scholastic dishonesty.

(4) Philosophy of Efficacy

As already discussed, an Islamic system of punishments is the most effective, efficacious and consequential system in the world. Its efficacy operates on the following levels:

(i) Psychological

(ii) Moral
(iii) Social
(iv) Economic
(v) Political

The psychological level of the efficacy of Islamic punishments is determined by the fact that the element of fear and the psychological feeling of insecurity of life, honour and property is completely eliminated through their application and a healthy psychological environment is created for the individuals through their enforcement.

The moral level is illustrated by the fact that, through the enforcement of Islamic punishments, the criminal and sinful tendencies are minimized in the society which provides morally pure surroundings to the people.

The social level is projected by the fact that, through the complete enforcement of Islamic penal system, the society enjoys an ideal peace, prosperity and tranquility which is an essential requirement for the individual and collective growth of its members.

The economic level manifests itself in the fact that, through the implementation of Islamic punishments, the resolution of economic deadlock is achieved. The application of primary laws guarantees the restoration of the creative capacities and fundamental rights of the individuals. The chances of violation of the laws are drastically reduced if not completely liquidated through the enforcement of punishments which provide security to the economic efforts of the people by declaring the illegal acts like graft, theft, hoarding, smuggling interest, blackmarketing, embezzlement, etc., as punishable offences, because they create un-natural economic disparity in the society.
The political level is highlighted by the enforcement of punishments for sedition, rebellion, apostasy and other crimes which endanger the integrity and solidarity as well as the ideological basis of the state.
NOTES

2. Qur'ān 5:41.
5. Qur'ān 5:56.
10. Ibid.
17. Ibid.
CONCLUSION
Islamic punishments are, therefore, not only civiliz-
ed but also comprehensive and highly effective. They are comp-
prehensive because they do not ignore any aspect or detail of
human life and they do not entirely rely on the principle of
fixation or prescription. They are in fact a mixed bag of fixed
ed and discretionary punishments which is quite compatible with
man's emotional and psychic compulsions. Man, on account of his
constitutional framework and conceptual configuration, likes
neither complete freedom nor totalitarianism. If he is comple-
tely free, without any checks and restraints, he drifts away
like a log of wood on a tempestuous sea and can rarely chart
out a sane and sensible course for his drifting and wayward
tendencies. This is the condition of the Western man who has
been spoiled by extremes of freedom and consequently he now
depends more on tranquillizers and "joy pills" than on any
coherent and self-sustaining programme of life. He has lost
the sense of poise which is essential for balanced living.
Similarly, if man is unnecessarily suppressed, his creative
faculties are permanently stifled and damaged and he becomes
a perennially pledged pawn in the hands of external forces
which strip him mercilessly of all force of initiative. This is the condition of the so-called communist or socialist who is the victim of total suppression as a result of which he has lost the power of acting on his own and is reduced to the status of a puppet who is constantly pushed around by people who hold the strings of power.

It is Islam alone that provides a creative balance between the extremes of freedom and restriction, by adjusting both of them to the needs of the individual and the needs of the human society. The severe punishments are designed only to achieve this creative synthesis, and not to realize any self-serving motives. The philosophy behind Islamic punishments is that crime is crime and that it has to be checked. Evil should not be taken lightly, because, if unchecked and unpunished, it can wrap the entire society in its hideous blanket. This fundamental Islamic thesis is supported by many Western observers who are appalled by the gigantic proportions crime has assumed in their societies and the voicing of protest against its tentacular nature goes far back into Western mytholology and history.

**Aesop:**

Aesop says in *The Swallow and the other Birds* "destroy the seed of evil or it will grow up to your ruin" because evil enters like needle and spreads like an oak tree.

**Martin Luther:**

Martin Luther King Jr. strongly condemns the passive acceptance of evil or connivance at its commission. He remarks in *Strides Towards Freedom*: "He who passively accepts evil is as much involved in it as he who helps to perpetrate it. He who accepts evil without protesting against it is really cooperating with it."

**Max Lerner:**

Max Lerner remarks in *Politics and the Connective Tissue* in
his collection of essays "Actions and Passions" "When you choose the lesser of two evils, always remember it is still an evil."

Shakespeare observes in the first scene of first Act of 'The Taming of the Shrew' "There is small choice in rotten apples." Criminal acts are like rotten apples and we cannot prefer one over the other by conferring on it meliorative epithets or by glossing it over through other euphemistic devices. Besides evil is so pervasive that it affects every department of human life.

Charles Colton: Charles Caleb Colton says in 'Lacon': "We are more apt to catch the vices of others than their virtues, as disease is far more contagious than health."

Charles Warner: Charles Dudley Warner observes in "Fifteenth Week" in his diary, 'My Summer in a Garden': "Sin travels faster than they that ride in chariots."

Aristotle states in 'Nicomachean Ethics' "A bad man can do a million times more harm than a beast."

Bertolt Brecht: Bertolt Brecht writes in 'The Three-Penny Opera' "The wickedness of the world is so great you have to run your legs off to avoid having them stolen from under you."

Shakespeare again observes in one of his sonnets: "Liberic that fester small far worse than weeds." The nature of crime and evil justifies the imposition of harsh punishments because without the ingredient of severity the intended effect may be completely liquidated. But the severity in Islam is not for the sake of severity, it is intended to reform the criminal and to rehabilitate him as a useful member of society. Severity is useless if it is not accompanied by a change of heart and it is this "change of heart" that the punishments in Islam intend to achieve without which any punishment peters out into an
failure of the Western penal system is stressed by R. Joseph Novogrod, Director Criminal Justice Department, Long Island University, New York, in Letters to the Editor Column, Time April 15, 1981 "Speeding realities have left academic theories and political rhetoric tumbling rides on fantasy highways. Ordinary people have lost faith and patience in the criminal justice process. Victims have moved from fear to hate. Unreconstructed criminals have started to rehabilitate society in their image on release".

And Bruce F. Sterling in the same issue of the magazine stresses the failure and futility of mild punishments and emphasizes the need for severe penal impositions even if some of the cherished liberties and rights have to be placed as oblations at the altar of a dictatorial regime.

"If we can reform our criminal justice system and get control of violent crime without becoming too severe, then let's do so. But if all our reforms prove futile, the American people out of desperation will eventually have to sacrifice their rights and liberties for the safety and security of an authoritarian state."

Since the Western penal system has totally collapsed to check and curtail effectively the rising graph of crime, the only effective alternative to minimize crime is the Islamic system of punishments which can curb it through its creative blend of fixed prescriptions and discretionary options based on proportionate doses of mildness and severity.
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