

***ḤUDŪD* (ISLAMIC PENAL CODE)
AND THE QUESTION OF HUMAN RIGHTS**

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by

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DECLARATION

The Registrar
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Dear Dr. E. Mneney

I, **ABBAS KHAN**, (Student Registration no. 9608922) do hereby declare that my D. Phil. thesis entitled:

***HUDŪD (ISLAMIC PENAL CODE) AND
THE QUESTION OF HUMAN RIGHTS***

is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other University.

All work for this thesis was completed at the University of KwaZulu-Natal.

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23-03-2005.

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INTRODUCTION

Hudūd punishments are divinely ordained punishments that are to be inflicted upon Muslims who, for example, steal, commit adultery, falsely accuse a woman of adultery, consume alcohol, etc. The term *hudūd* itself denotes the limits set by *Allāh* ﷻ which are sacrosanct and thus transgressors have to suffer the consequences for violating those divine limits.

Some of the *hudūd* punishments pertain to cutting off the right hand of the thief; stoning to death those who commit adultery; flogging the person who falsely accuse someone of adultery with one hundred stripes, flogging the drunkard with eighty stripes, etc.

In certain Muslim countries like Saudi Arabia, Iran and Sudan, *hudūd* laws are implemented and perpetrators of crimes liable to *hudūd* punishments have to face the consequences of their actions. However, such punishments are viewed in the non-Muslim world as barbaric and there is growing outcry that such punishments contravene human rights and ought not to be meted out.

At this juncture, it is important to shed light on what is human rights? The United Nations has described human rights as follows:

Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings.

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.¹

It is also pertinent to note that the new Constitution of the Republic of South Africa (1996) abolished capital punishment primarily on the grounds that such a punishment defies human rights.

¹ United Nations. *Human Rights: Questions and Answers*, 4 (1987).

Thus the objectives of this study are:

Firstly, to examine the concept of crime and punishment in Islam.

Secondly, to discuss the various types of *ḥudūd* punishments with the aim of unraveling the rationale for the implementation of such extreme forms of punishments which are embodied in the Islamic Penal Code.

Thirdly, to sift out certain clauses of the United Nations Universal Declaration of Human Rights and the South African Bill of Rights in order to determine whether Islam is amenable to these rights.

Fourthly, to address the issues of “harsh” punishments and the death penalty with the view of ascertaining whether the *ḥudūd* punishments do in fact infringe upon human rights. This will necessarily entail determining whether it is at all possible to subject the *ḥudūd* punishments under the scrutiny of human rights and if not why?

Chapter One

THE CONCEPT OF CRIME AND PUNISHMENT IN ISLAM

INTRODUCTION

Islam adopts a zero tolerance attitude towards crime which is evident from the punishments it prescribes for the various offences it deems detrimental to the welfare and well-being of both the citizens and the Islamic State.

Islam is not a religion in its narrow sense, but is regarded by its followers to be a complete Code of Life. Islam has provided its adherents with guidance in every sphere of life. In other words, there is no division between the “Church” and the State.

The Islamic expectation is that every Muslim conforms to Qur’anic norms which guarantee salvation in both the worlds. Any disregard for the dictates of the *Qur’ān* and the teachings of the Messenger of *Allāh*, the Prophet *Muḥammad* (s.a.w.s.), are viewed in a very serious light. Disobedience to Qur’anic norms stifles the moral and spiritual growth of the believer. Islam, as a religion in the broader sense, has provided checks and balances

to monitor the health or decay of law and order in society. Islam aims at safeguarding the life, honour and property of the citizens of the Islamic State as well as the security of the State. Islam prescribes punishments for crimes to serve as deterrent for would-be criminals. As a religion, Islam has played a great role in educating its adherents on matters of morality, rights and obligations. Hence, those that internalize the Qur'anic norms do become law-abiding Muslims, whereas those that display contumacious behaviour are subjected to negative sanctions, in the form of *ḥudūd* punishments.

1.1 ROLE OF RELIGION IN CURBING CRIME

Some prominent criminologists are of the view that religion does play a positive role in curbing crime. For example, Henri Joly in his book *La France Criminelle* expresses the view that poverty did not play such a tremendous part in the causation of criminality but that irreligiousness was in fact the principal cause.¹

¹ Van der Walt. *Criminology an Introduction*. Pretoria. Haum Educational Publishers. 1989, p. 70.

Moreover, L. Proal stated in his book *Le crime et la peine* that it was not accurate to think that the poor man is predestined for crime. On the contrary very many among the poor are as honest as possible and exist through honest work, whereas statistics prove that the rich are as guilty of crime as the poor. Even if all men had sufficient means and adequate education there would always be criminals. Most crimes are committed not to escape want but rather to obtain luxury and pleasures.²

Furthermore, the Belgian, M. de Baets concedes in his *Les influences de misere sur la criminalité* that poverty undeniably has a big influence on crime and states that the worst effect of poverty is the obtaining of things necessary for man's welfare by illegal means. However, he points out that there are other factors that can militate against the influence of the environment. He is of the view that man can combat temptations to indulge in crime and evil by taking refuge and finding support in moral strength. He goes further and states that if the poor and unhappy were asked what helped to keep them from crime, their answer would be that it was their awareness of duty which stemmed from their submission to the absolute authority of

² Ibid.

God. This was the great strength, and the weakening of that great strength was the cause of tremendous increase in crime.³

Again, F.A.K.Krauss writes in his book *Der Kampf gegen die Verbrechensursachen* that irreligiousness, which was penetrating more and more into the broad strata of the population, and the resultant immorality of the outlook on life, was the food of crime. He contends that true morality is impossible without religion.⁴

The religionists too hold the view that the lack of faith in God leads to increase in crime. It is important to note that religion has supported morality and has made our mores allegedly more effective by sanctifying them. Crime has not only been seen as wrong in the eyes of the law and court, but equally so in the eyes of God.”⁵

The great commentator of the *Holy Qur’ān* Fakhr al-Dīn al-Rāzī states:

³ *Criminology an Introuction*, op. cit., p. 70.

⁴ Ibid.

⁵ Donald R, et. al. *Criminology*. New York. Mcmillan Publishing Co.1964, p. 219.

Religious precepts are based on traditional norms meant for the masses. When they adhere to these norms they avoid transgression and every person abides by his responsibility, resulting in reformation on the earth and its inhabitants. By abandoning religious precepts an individual tends to follow his own whims and fancies, ultimately resulting in chaos and turmoil.⁶

1.2 **ḤUDŪD IN THE CONTEXT OF THE LIMITS SET BY ALLĀH ﷻ**

The following five verses of the *Holy Qur'ān* speaks of *ḥudūd Allāh* i.e., the limits imposed by *Allāh ﷻ*:

- i. *"A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits (ḥudūd) ordained by Allāh. If*

⁶ Al-Rāzī, Fakr al-Dīn. *Al-Tafsīr-al-Kabīr*. Tehran. Dār al-Kutub al-'Ilmiyah. N.D., Vol.2, p. 66.

you (judges) do indeed fear that they would be unable to keep the limits ordained by Allāh there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allāh; so do not transgress them. If any do transgress the limits ordained by Allāh such persons wrong (themselves as well as others).” (Al-Baqarah, 2:229)

ii. *“So if a husband divorces his wife (irrevocably) he cannot after that remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they reunite provided they feel that they can keep the limits (ḥudūd) ordained by Allāh. Such are the limits ordained by Allāh which He makes plain to those who understand.” (Al-Baqarah, 2:230)*

iii. *“In what your wives leave your share is a half if they leave no child; but if they leave a child you get a fourth; after payment of legacies and debts. In what*

you leave their share is a fourth if ye leave no child; but if you leave a child they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants but has left a brother or a sister each one of the two gets a sixth; but if more than two they share in a third; after payment of legacies and debts; so that no loss is caused (to anyone). Thus does Allah ordain it and Allāh is All-Knowing Most Forbearing. "Those are limits (ḥudūd) set by Allāh: those who obey Allāh and His Apostle will be admitted to Gardens with rivers flowing beneath to abide therein (for ever) and that will be the Supreme achievement." (Al-Nisā', 4:12-13)

- iv. *"The Arabs of the desert are the worst in unbelief and hypocrisy and most fitted to be in ignorance of the command (ḥudūd) which Allāh hath sent down to his apostle: but Allāh is All-Knowing All-Wise."*

- v. *“But those who divorce their wives by ḡihār then wish to go back on the words they uttered (it is ordained that such a one) should free a slave before they touch each other: this are ye admonished to perform: and Allāh is well-acquainted with (all) that ye do. And if any has not (the wherewithal) he should fast for two months consecutively before they touch each other. But if any is unable to do so he should feed sixty indigent ones. This that ye may show your faith in Allāh and His Apostle. Those are limits (ḡudūd) (set by) Allāh. For those who reject (Him) there is a grievous Penalty.”*(Al-Mujādalah, 58: 3-4)

The first two citations are in reference to divorce. Citations three is in reference to inheritance and citation four is in reference to the ignorance of the Bedouin Arabs. Citation five is also in reference to divorce.

The warning concerning the “limits of Allāh ﷻ” is that if anyone dares to transgress these divine limits does so at his own peril. For example the *Holy Qur’ān* states:

“Those are limits set by Allāh: those who obey Allāh and His Apostle will be admitted to Gardens with rivers flowing beneath to abide therein (for ever) and that will be the supreme achievement. But those who disobey Allāh and His Apostle and transgress His limits will be admitted to a fire to abide therein: and they shall have a humiliating punishment.” (Al-Nisā’, 4: 13-14)

These limits have been imposed to safeguard the social fibre from disintegrating and for the protection of individual rights.

1.3 THE RATIONALE FOR PUNISHMENT

For maintaining peace and tranquility in the society and for the protection of the honour and property of its adherents Islam has offered a set of laws namely the *Hudūd* Laws. These laws are divinely sanctioned and as such they are not subject to change and alteration.

Commenting on *“and do no mischief on the earth after it has been set in order”*, al-Rāzī states:

Do not corrupt anything on earth, which includes destroying lives through murder and amputation of limbs, destruction of wealth through usurpation, theft and various deviations, the corruption of religion through infidelity and innovations and the destruction of lineage by indulging in adultery, sodomy and the destruction of mental health through the consumption of intoxicants.⁷

In the Islamic Penal Code these limits are known as *Ḥudūd* Laws. The critics of the *Ḥudūd* Laws have labelled the punishments that are meted out for the contravention of the above laws as savage and barbaric. Defending the Islamic standpoint on the *Ḥudūd* Laws, *Mawlānā* Abū al-A‘lā Mawdūdī writes:

The truth is that it is not the severity of the punishments in Islam which the upholders of modern civilization abhor, for they resort to even more tortuous punishments themselves. The reason for their hysteric outbursts against this alleged “barbarism” lies actually in the

⁷ *Al-Tafsīr-al-Kabīr*, op. cit. Vol.14, p.133.

perversion of moral values - that is, in the fact that they do not think that crimes like drunkenness and adultery deserve even a word of reproach, what to speak of painful punishments. Had they been opposed to these punishments on humanitarian considerations, they would have likewise condemned the brutal punishments given to people on flimsy political and economic grounds. They complain in respect of Islam only because they do not at all deem as a sin or crime many a thing condemned by it.⁸

The recent uproar via the television channels surrounding the Amina Lawal case in Nigeria is a good example of the biased approach of even the Human Rights groups on matters that are of vital interest to Islam and Muslims.

An eminent Muslim jurist, *Muftī Aḥmad Yār Khān* states:

The amputation of the hand is not in lieu of property (stolen) instead it is the punishment of contravening a

⁸ Mawdūdī, Abū al-A'ālā . *Islamic Law and Constitution*. Lahore. Islamic Publications Ltd. N.D., p. 61.

law. Law is of great value. At times, for breaking a law, an entire nation is destroyed. If the amputation of a single hand brings an end to theft in the entire country, it is not a heavy price to pay. As long as this was the punishment for theft, people lived in relative peace.⁹

He further states:

Nowadays even non-believers say that in Arab countries, peace exists due to Islamic punishments. The late Prime Minister of India, Jawaharlal Nehru had said: 'introduce Islamic punishments in India.' By meting out severe punishment to an offender and thereby creating stability in the state, is the essence of justice.... The severe punishments in Islam have resulted in dacoits being reformed into leaders. If one thief loses his hand in full view of the public, *Allāh*-willing, for the next fifty years there will be no theft in the country."¹⁰

⁹ Khān, Aḥmad Yār. *Tafsīr-e-Na'imī*. Lahore. Na'imī Maktab-e-Islāmīyah. 1973. Vol. 6, p. 438.

¹⁰ *Tafsīr-e-Na'imī*, op. cit. Vol.6, pp. 438 and 464.

There has been great amount of support by fair-minded scholars on the question of the potency of the Islamic Penal Code in stemming of crime and as a deterrent. The high rate of crime prevalent in South Africa has cast a gloomy shadow over prospects of this country claiming its proper place alongside prosperous nations of the developing world.

Commenting on the inefficacy of the justice system in South Africa, the Editor of the *Daily News* states:

There is something terribly wrong with the administration of justice in this country when a police officer is murdered in a court of law. The criminal justice process is frequently a lengthy and convoluted one which moves from the initial scene of the crime through various stages of investigation until hopefully providing the state with enough evidence for a prosecution.

When a case finally comes to court one would expect proceedings to be conducted with every degree of decorum. Indeed, a basic precept of any justice system is

that a courtroom should be a sanctuary of probity where judges or magistrates can conduct trials fairly and freely- and in safety.

This, tragically and inexplicably, did not happen in the Durban Magistrate's Court this week when a court orderly was overpowered and killed by seven awaiting trial prisoners while he was escorting them to holding cells below the court precincts.

To expect one man to control so many potential dangerous prisoners is expecting too much of even the best-trained officer. These men had earlier appeared on charges relating to attempted murder, armed robbery and hijacking. They were not a group of choirboys ready to submit to authority, especially with their freedom at stake.

Escape from courts has become all too common in recent years. Not only does it make a mockery of the frequently

complex police investigations required to finally bring suspects to court, but it places enormous stress on and can cause severe trauma to victims involved in a case. Not surprisingly, they fear for the worse with a potentially dangerous criminal on the loose. If law and order cannot be guaranteed within the sanctuary of a court of law, then where can it be guaranteed? The public has a right to feel safe when they enter a courtroom. Police management owes them some speedy and reassuring answers.¹¹

Commenting on the Penal Law of Islam, The late Dr. Muḥammad Hamīdullāh writes:

Of the Penal Law of Islam, I do not require to speak in detail of the evils of alcoholic drinks. From the very beginning, when whipping is administered, it is easily eradicated. Capital punishment for deliberate murder is provided, but it is not obligatory: the accused has the

¹¹ Pather, Dennis. "Courting Criminality" in the *Daily News*. Durban. Independent Newspapers. June 4, 2003.

possibility of capitalizing his crime, and escape by paying blood money if the heirs of the victim agree to it. Lapidating of the adulterer is to take place only when four eyewitnesses testify to the gravity of the shamelessness. When such rigorous evidence is not available, the court cannot apply the penal law (Old Testament also has the same penalty). Rests the theft, for which amputation of hand is provided. I remember, when the Turks left Ḥijāz after the First Great War, under Sharīf Ḥusain no pilgrim was sure to return home safe. Some people who had seen both the Turkish and the Sharifian regimes, as inhabitants of the country, had told me that Sharīf Ḥusain did not hesitate to receive part of the “booty” of the brigands. When Ibn Sa‘ūd expelled the corrupt regime, he restored the Muslim Penal Law. After the first few applications of the penalty, months passed without a single theft being committed in the whole territory, as I had read in journals of Mecca in 1932.¹²

¹² Hamidullah, Muhammad. *Muhammad Rasulullah* 𐤀. Paris. Centre Cultural Islamique. 1974. Series No. 4, p. 321.

Abū al-Ḥasan al-Māwardī (d. 450 A.H./ 1058 C.E.) states:

Islamically, crimes are prohibited. For the prevention of crime, Almighty *Allāh* has provided a set of laws in the form of *ḥudūd* and *ta'zīr*.¹³

Writing on the success of the Islamic Legal system Māwardī, “the Hugo Grotius of Islamic Public law” states:

In the reign of ‘Umar the Great ﷺ such was the state of justice and fairness that there was a decrease in lawsuits. Morality was in the ascendancy and malice was non-existent. Regarding Salmān Ibn Rabī‘ah Bahilī who was the judge of Kūfā, Abu Wā’il says, “I visited him continuously for forty days and I did not see any group with lawsuits visit him.”¹⁴

¹³ Al-Māwardī, Abū al-Ḥasan. *Al-Aḥkām al-Sulṭānīyah fī Siyāsah al-Madīnah*. Karachi. Mohd. Saeed & Sons. N.D., p. 461.

¹⁴ Ibid, p. 30.

Commenting on the punishment prescribed for highway robbery by the *Holy Qur'ān*, Pīr Karam Shāh, an eminent Indian scholar writes:

Two reasons have been forwarded for this punishment (a) that it is a punishment for one's own misdeed and (b) it serves as a warning to others. Both the objectives can only be achieved according to the Qur'anic injunctions. There are many of those that regard these punishments as very severe and harsh and in their opinion that this form of punishment was for that uncivilized and uncultured society in the environment of which the *Holy Qur'ān* was revealed. Some of the present-day translators and commentators have forcefully advocated the idea that these punishments are only for habitual criminals who fail to reform even after serving terms in imprisonment. But the reality is, the foundation which the *Holy Qur'ān* has laid for a crime free society in which a balance is maintained concerning the rights and obligations of every individual of the nation and the responsibility of the protection of the life, respect and wealth has been placed

under the care of the Islamic Government, keeping all these in focus, though these punishments are severe they are full of wisdom.

You be the judge: Who is more deserving of your sympathy, the widow, the orphan and the peace-loving citizen who has been robbed of all their life's savings or the robust thief? From the time the criminal and the robber have become the focus of sympathy as compared to the victim there is a noticeable increase in crime and criminals. In our own midst, we have the police, and the magistrates and yet the prisons are full to capacity, crime is on the rise.¹⁵

Pīr Karam Shāh further states:

Who does not understand the fact that the progress of a nation and its prosperity depends on safety and security.

¹⁵ Karam Shāh, Pīr Muḥammad. *Ḍiyā' al-Qur'ān*, Lahore Chowdri Ghulam Rasool & Sons. N.D. Vol.1, p. 200.

The roads have to be safe, commercial goods must reach their destiny without fear of being looted; the populace must be able to move without any fear whilst in quest of it's livelihood and all it's needs. The corrupt element which is involved in destroying the peace and tranquility of the country by robbing buses and cars on the freeways, by uprooting railway tracks, by stealing electric and telegraph cables and by killing unarmed travelers, they do not deserve mercy and compassion.”¹⁶

‘Abd Allāh Yūsuf ‘Alī in his English Translation and Commentary on the *Holy Qur’ān* writes:

Punishment really does not belong to mortals, but to God alone. Only, in order to keep civil society together, and protect innocent people from crime, certain principles are laid down on which people can build up their criminal law. But we must always remember that God not only

¹⁶ Ibid, p.199.

punishes but forgives, and forgiveness is the attribute which is more prominently placed before us.”¹⁷

For the double crime of treason against the state, combined with treason against God, as shown by overt crimes, four alternative punishments are mentioned, any one of which is to be applied according to circumstances, viz, execution (cutting of the head) crucifixion, maiming or exile. These are features of the Criminal Law then and for centuries afterwards, except that tortures and as “hanging, drawing, and quartering” in English Law, and piercing of eyes and leaving the unfortunate victim exposed to the tropical sun, which was practiced in Arabia, and all such tortures were abolished. In any case sincere repentance before it was too late was recognized as a ground for mercy.¹⁸

¹⁷ Ali, Abdullah Yusuf. *The Holy Qur'an, Text, Translation and Commentary*. Qatar. Presidency of Islamic Courts and affairs. N.D., p. 254.

¹⁸ Ridā, Muḥammad Rashīd. *Tafsīr al-Manār*. Lebanon. Dār al-Maʿrifah. N.D, Vol. 6, p. 359.

Commenting on the verse related to crime *Mawlānā* Amīn Aḥsan Iṣlāhī writes:

Any person or group or organization that tries to disrupt the administration of Truth and Justice perforce and unashamedly which *Allāh* and His messenger has established, if such a vile attempt is made by enemy forces from without, to combat such a threat the rules of *Jihād* and warfare have been explained in detail. Here, instead of dealing with external enemies the Penal code is being laid down to deal with the internal enemies of the Islamic regime who being the citizens of the Islamic State immaterial whether they be Muslims or non Muslims pose a challenge to its law and order setup. One aspect of disobedience to law and order is that an individual commits a crime in which case action will be taken against such an offender in accordance with the

regulations of *Hudūd* Laws and Discretionary (*Ta'zirāt*)

Laws.¹⁹

Commenting on crime, the Egyptian scholar, *Shaykh* Muḥammad Rashīd Riḍā, states:

The verse explicitly refers to the fact that this punishment is for those that spread corruption on the earth by looting, plundering or killing or destroying cultivation and human lives or similar crimes or violate dignity and honour.²⁰

1.4 VIEWS OF WESTERN SCHOLARS

Western scholars too concede that punishment has a role to play in society. On the issue of moral rules, law and order A. Macbeath, a famous anthropologist points out:

¹⁹ Islāhī, Amīn Aḥsan. *Tadabbur-e-Qur'ān*. Lahore. Faran Foundation. 1991. Vol. 2, p. 505.

²⁰ *Tafsīr al-Manār*, op. cit. Vol. 6, p. 359.

Any tolerable form of social life requires that there should be rules governing the relations between persons in regard to such matters as intercommunications, return for services rendered, sex relations, respect for life and property etc; and that they should be generally obeyed. And the rules contained in lists of prima facie obligations are in general such obvious conditions of individual and social well-being that most of them are included in the moral codes of most peoples.²¹

Basil Mitchell writes:

For the upkeep of the moral fibre of the society Islam has promoted the principle of Justice. Every member of the society has the rights to live with respect and dignity. Anyone that steps out of line will have to be dealt with justly. No one has the rights to infringe on the rights of others. What is universally demanded by the members of moral community is something like the abstract virtue of

²¹ Macbeath, A. *Experiments in Living*. London. Macmillan Publishing Co. 1952, p. 369.

justice; a man should not insist on a particular claim while refusing to acknowledge any reciprocal claim.²²

Human life is such that people have needs which can be met and purposes which can be realized only if they recognize obligations to help one another and to refrain from harming one another in certain specifiable ways.

He further states:

We may argue that, since society depends on mutual acceptance of obligations, a man who enjoys the advantages of society, while repudiating its obligations, is cheating his neighbour and is in grave danger of being found out and cut off from society: and, furthermore, that, even if he succeeds in evading detection, this policy of concealment must restrict that 'free and unfeigned

²² Mitchel, Basil. "Morality: Religious and Secular" in *Philosophy*. Ed. By I.T. Ramsey. Oxford. Clarendon Press. 1961, p. 47.

intercourse with our fellows'. which is an essential condition of human happiness.²³

Islam does believe in compassion and Divine forgiveness at the same token Islam is a strong advocate of Justice. Justice as in merited reward or punishment and justice as understood in the administration of the law.

Professor Bernard Phillips of Boston University writes:

The principle of retaliation is one fundamental component of our present legal system. It involves the idea that justice is achieved much as a product might be weighed. The crime on one scale is to be balanced by the punishment on the other scale. Other principles of values are also involved in contemporary law. For example, there is the share goal of rehabilitating the offender. The emphasis here is on changing his or her personality structure so that, upon being released, the offender will be able to resist pressures to break laws in

²³ Ibid, p. 139.

the future. A third principle is that of protecting other members of society, achieved by imprisoning the offender. And a fourth principle is deterrence, where the certainty or severity of punishment influences people to avoid crime.”²⁴

It is to be noted here that Islam enjoins justice under all circumstances. The *Holy Qur’ān* states:

“O you who believe! Be you maintainers of your pact with Allāh (stand out firmly for Allāh), as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is nearer to duty: and fear Allāh. For Allāh is well acquainted with all that ye do.” (Al-Mā’idah, 5:8)

It is important that there are certain scholars who oppose to inflicting punishment to the offenders. For example, Marshall B. Clinard explains:

²⁴ Philips, Bernard. *Sociology from Concepts to Practice*, New York. Mc Graw Hill Book Co. 1979, pp. 96-97.

All societies and groups develop ways of dealing with behaviours which fall outside the range of tolerance of given societal or group norms. These methods are ordinarily called “negative sanctions” because they impose penalties on those whose behaviour has transcended the range of tolerance of the norms. “Positive sanctions”, on the other hand, consist of special rewards, such as praise, recognition, or prestige which are bestowed on persons whose behaviour has conformed or has exceeded conformance, to prescribed norms.”²⁵

On the other hand one ought to take cognizance of what C.R. Snyder has to say about the concept of punishment:

A distinction is made between the absolute theory and the relative theories of punishment. (The latter are also sometimes referred to as the purpose theories.) There is only one absolute theory, namely, the retributive theory, while there are a number of relative theories. According

²⁵ Marshall, B. *Sociology of Deviant Behaviour*. New York. Holt, Rinehart and Winston Inc. 1968, p .205.

to the absolute theory, punishment is an end in itself, while according to the relative theories; punishment is only a means to a secondary end or purpose (hence the name “relative theories”). This secondary purpose differs from one relative theory to the next: according to the preventive theory it is the prevention of crime; according to the deterrent theory it is deterring the individual or society from committing a crime, and according to the reformatory theory it is the reformation of the criminal. The absolute theory is of a retrospective nature; one only looks at the past that is at the crime that is committed. If on the other hand, one follows the relative theories, one looks at the future: the emphasis is on the object (for example prevention or reformation) which one wishes to achieve by means of the punishment.²⁶

The Islamic Punishment in essence serves as a deterrent to crimes and aims at bringing about reformation in the society as a whole. As much as Islam aims at eradicating crime from the society through its Penal Code, there are

²⁶ Snyman, C. R. *Criminal Law*. Durban. Butterworths .1995.pp.18-19.

certain legal requirements to be fulfilled before even administering the punishment to the accused, some of which are enumerated hereunder:²⁷

- i. The offender has to be mentally of sound mind, if he/she is insane he/she will not be punished.
- ii. The one who has committed the crime must not be under the influence of alcohol.
- iii. The offender must be in good health and not be ill or feeble.
- iv. In the case of adultery, there must be four witnesses who have actually seen the offenders engaging in sexual act. Moreover, these witnesses must be reliable witnesses.
- v. In a case of doubt, punishment will not be administered
- vi. If a person commits adultery under duress, that person will not be punished.
- vii. In the case of theft and larceny, the stolen property must not be of less than 10 *dirhams* in value. Moreover, the stolen goods must have been taken stealthily from a protected place.

²⁷ Ali, Muhammad Amjad. *Bahar-e-Shari'at*. Lahore. S. Ghulam Ali & Sons. N.D. Vol. 9, p. 83.

CONCLUSION

Undoubtedly, there is growing interest in the domain of Islamic Criminal Law in view of the failure of the justice system in western countries to curb crime and violence. More and more people are becoming convinced that only through the implementation of the Islamic Penal Code would law and order and security of life and property be restored in society due to its zero tolerance towards crime and violence.

Chapter Two

HUDŪD PUNISHMENTS

INTRODUCTION

Hudūd (sing. *ḥadd*) literally means to delimit, demarcate, restrict, or impede.¹ *Ḥadd* is a type of mandatory punishment that is to be inflicted upon the offender, the quantum of which has been established by the *Sharīʿah*. This quantum cannot be tampered with.² The aim and object of *ḥadd* is to deter others from engaging in similar acts of crime which the criminals had committed. It ought to be mentioned here that in Islam, the criminal that is punished is not purged of his sins by merely receiving the punishment, but also has to sincerely repent to *Allāh* ﷻ and resolve to refrain from engaging in any particular criminal act.

In the Islamic legal system, crime is referred to as *jarīmah* and *maʿāṣī* which imply disobedience of Divine Laws. Islamic Criminal Law in essence aims at providing protection in the following four areas of civil life:

¹ Madina, Maan Z. *Arabic English Dictionary*. New York. Pocket Books. 1973, p. 145.

² Amjad, Muḥammad ʿAlī. *Baḥār-e-Sharīʿat*. Karachi. Makatab-e-Razviyyah. N.D. Vol. 9, p. 73.

- i. Public safety - by outlawing indulgence in narcotics and alcoholism.
- ii. The family - by prohibiting extra- marital sexual activities.
- iii. Property - by punishing acts of theft.
- iv. State and Religion- by prohibiting subversive activities.

2.1 *MODUS OPERANDI*

A precursory glance at the *modus operandi* of the *Hudūd* Laws is as follows:

Firstly, it ought to be emphasized at the very outset that Muslims have been advised by the Prophet Muhammad ﷺ to avoid effecting the *ḥadd* punishments as far as possible in view of the fact that once a *ḥadd* case reaches the authorities and proof of guilt has been established there can be no recommendations made for leniency. Even if a recommendation for leniency is made, it is not permissible for the judge to oblige to it. This is evident from the following report by *Sayyidatunā Umm al-Mu'minīn* 'Ā'ishah (r.a.):

The Quraysh were concerned as regards the case of a Makhzumī woman accused of theft. They deliberated amongst themselves on the issue of appointing a representative to the Prophet ﷺ to plead the case of the said lady. They all consented to ‘Uthāma Ibn Zayd ؓ, the beloved companion of the Prophet ﷺ as being the best to raise the issue with the Prophet ﷺ. ‘Uthāma took up the matter with the Prophet ﷺ. The Prophet ﷺ responded by saying: “Are you pleading (for leniency) in one of the Divine Limits appointed by *Allāh* ﷻ?” Thereafter the Prophet ﷺ stood up and delivered a sermon saying, “Those prior to you were destroyed due to similar reasons-if a nobility committed theft he was overlooked and if a weakling committed theft, he would be subjected to the *ḥadd* punishment. I swear in the name of *Allāh*, if Fāṭimah (r.a.) the daughter of Muḥammad stole, I would have her hand amputated.”³

³ Al-Tirmidhī, Muḥammad Ibn ‘Isā Ibn Sūrah. *Jāmi‘ al-Tirmidhī*. Karachi. Qur’ān Maḥal. 1967. Ḥadīth no. 1457. Vol. 1, p. 646.

In *Ṣaḥīḥ al-Bukhārī*, the above incident is documented as follows:

The Prophet's ﷺ face changed colour (out of anger). He ﷺ asked: "Do you plead for leniency in one of the Divine Limits of *Allāh*?" On noticing the disapproval and anger of the Prophet ﷺ, 'Usāmah said, "Seek repentance on my behalf O Messenger of *Allāh* ﷺ." The Prophet ﷺ issued an order concerning that woman and her hand was amputated. The woman repented and she married after this incident. This incident transpired on the day of the Conquest of Makkah. If the culprit repents prior to the case reaching the authorities, the *ḥadd* punishment will fall away.⁴

Secondly, it is the prerogative of the Muslim ruler or his deputy to execute the *ḥadd*. The Prophet ﷺ, in a *Ḥadīth* that four cases, namely that which concern *ṣalāh*, *zakāh*, *ḥudūd* and *qiṣāṣ*, were to be referred to the ruler.⁵ In light of this *Ḥadīth*, a father cannot impose the *ḥadd* punishment on his son,

⁴ Al-Ḥaskafī, 'Alā-al-Dīn. *Al-Durr al-Mukhtār*. Karachi. H.M. Saeed Co. N.D. Vol.1, p. 315.

⁵ Al-Marghinānī, Burhān al-Dīn. *Al-Hidayah*. Karachi. Kalam Co. Vol. 2, p. 511.

nor can the master effect the *ḥadd* on his slave. The imposition of the *ḥadd* is contingent upon the following conditions which have to be adhered to:

- i. The recipient of *ḥadd* punishment has to be sane of mind and in good state of health;
- ii. a person under the influence of liquor will only be punished after he becomes sober; and
- iii. the sick will only be punished after recovery from illness.⁶

2.2 CRIMES LIABLE FOR *ḤUDŪD*

The *ḥudūd* punishments are effected upon those who are found guilty of having committed the following crimes:⁷

- i. *Zinā* (adultery or fornication), rape and also sodomy
- ii. *Shurb al-Khamr* (consumption of intoxicants)
- iii. *Qadhaf* (falsely accusing someone of *zinā*).
- iv. *Sariqah* (stealing other people's properties)

⁶ Burhanpurī, Nizām al-Dīn. *Fatāwā 'Ālamghīrī*. Karachi. Dār-al-Isha'at. 1989. Vol. 3, p. 294.

⁷ Anwarullah. *The Criminal Law of Islam*. Kuala Lumpur. A.S. Noordeen. 1997, p. 112.

- v. *Ḥirābah* (highway robbery)
- vi. Spreading dissension or discord
- vii. *Irtidād* (apostasy)

2.2.1 Definition of *Zinā*

Zinā, which necessitates the hadd punishment, pertains to engagement into unlawful sexual intercourse between a man and a willing woman. The sexual act that takes place involves the frontal privacy of the woman by penetration of the man's glans penis (*ḥashfah*) into it. The offender must be responsible for his/her actions, i.e. he/she must not be dumb or coerced to commit the offence.⁸ The term *zinā* applies to both fornication and adultery.

2.2.1.1 *Hadd* punishment for *zinā*

The *Holy Qur'ān* spells out the punishment for the ones who are found guilty of having committed *zinā* in the following words:

⁸ *Al-Durr al-Mukhtār*, op. cit. Vol.1, p. 315.

“The woman and the man guilty of zinā, flog each of them with hundred stripes. Let not compassion move you in their case, in a matter prescribed by Allāh, if you believe in Allāh and the Last Day: and let a party of the believers witness their punishment.” (Al-Nūr, 24:2)

2.2.1.2 *Rajm* punishment meted out for *zinā* during the time of the Prophet Muhammad ﷺ

In the *Ḥadīth* literature mention is made of at least three cases of *rajm* that were effected on one man and two women who committed *zinā* during the lifetime of the Prophet Muḥammad ﷺ:

- i. *Sayyidunā* Abū Hurayrah ؓ reports that Mā‘īz Ibn Mālik al-Aslamī approached the Messenger of Allāh ﷺ stating that he had committed adultery. The Messenger of *Allāh* ﷺ turned his face away. He approached the Messenger of *Allāh* ﷺ from the opposite direction stating that he had committed adultery. The Messenger of *Allāh* ﷺ turned his face away. The third time he approached the Messenger of Allah from another direction stating that he

committed adultery. The Messenger of *Allāh* ﷺ turned his face away. On the fourth occasion, the Messenger of *Allāh* ﷺ ordered him to be lapidated. He was escorted to a stony area and stoned. On feeling the pain of the stones, he fled. He happened to pass by a man with camel jawbones. The man struck him with a jawbone and the others caught up with him and they beat him up to death. The people mentioned that to the Prophet ﷺ, that he had fled feeling the pain of the stones and the pain of death. The Messenger of *Allāh* ﷺ responded by saying, “Why did you not let him escape.”⁹

Another narration of the same incident throws further light in which mention is made that when Mā'iz Ibn Mālik asked the Messenger of *Allāh* ﷺ to purify him, the Messenger of *Allāh* ﷺ said, “Woe unto you! Return and seek repentance from *Allāh* ﷻ by turning towards Him.” He left, returning after a short while requesting to be purified. The Messenger of *Allāh* ﷺ repeated the previous instruction. After the fourth occasion the Messenger of *Allāh* ﷺ asked him, “Purify you of what?” The man replied, “From adultery.” The Prophet ﷺ asked him if he was insane to which the man

⁹ *Al-Jāmi' al-Tirmidhī*, op. cit. Ḥadīth no. 1455. Vol.1. p. 645.

replied in the negative. The Prophet ﷺ asked him if he was under the influence of alcohol. A man stood up and approached his mouth to ascertain from the odour that also proved negative.¹⁰

It is important to note from the above *ḥadīth* that the Messenger of *Allāh* ﷺ set a precedent by questioning the offender so as to ascertain the offence and by giving the offender all the opportunity to repent and reflect over his claims before commanding that the *ḥadd* punishment be inflicted upon him.

The second incident of stoning pertains to the Ghāmidiyyah lady:

- ii. When the Ghāmidiyyah lady approached the Messenger of *Allāh* ﷺ asking him to purify her, he replied, “Woe unto you! Return and seek forgiveness and repentance from *Allāh* ﷻ.” She responded by saying, “I see that you want to turn me down as you did in the case of Mā‘iz.” The Prophet ﷺ asked her what was her problem. She replied that she was pregnant through adultery. The Prophet ﷺ asked her, “Are you?” Seeking confirmation. She replied, “Yes”.

¹⁰ Al-Naysabūrī, Muslim Ibn al-Ḥajjāj Ibn Muslim Al-Qushayrī. *Ṣaḥīḥ Muslim*. Cairo. Dār al-Sha‘b. Bāb Ḥadd al-Zinā. Vol. 4, pp. 275-276.

He ﷺ told her, (your case is postponed) till you give birth. A man from the Anṣār took care of her till she gave birth. The man came and informed the Prophet ﷺ of the birth of the child. The Prophet ﷺ said that we would not stone her leaving the small child without any foster care. A man from the Anṣār stood up offering to undertake to foster care the child. Upon this (undertaking) the woman was stoned.¹¹

In another narration, description is given of how she was lapidated:

Her clothes were fastened around her and she was stoned. The burial rites were offered. *Sayyidunā* ‘Umar ؓ asked: “O Messenger of *Allāh* ﷺ! Do you offer prayers for her although she committed adultery? The Messenger of *Allāh* ﷺ responded by saying, “Her repentance is such if it is divided amongst seventy people of Medina it would suffice them. Can you find a better act of repentance than

¹¹ Ibid, pp. 276-277.

this, that she sacrificed her life for (the pleasure of) *Allāh*

ﷺ¹².

- iii. The third incident of stoning being effected is reported by *Sayyidunā* Abū Hurayrah and *Sayyidunā* Zayd Ibn Khālid al-Juhnī ﷺ that they were in the company of the Prophet ﷺ when two men came in quarelling before the Prophet ﷺ. One of them approached the Prophet ﷺ saying, “I beseech thee in the Name of *Allāh* ﷻ, give your decision in a matter between us two in accordance with the Book of *Allāh*. He employed my son and he (my son) committed *zinā* with his wife. The people informed me that my son would have to be lapidated. In lieu of the lapidation I donated as ransom hundred goats and I set a slave free. Thereafter, I met a few learned people who informed me that my son deserves a hundred lashes and he must be banished for a year and the woman would have to be lapidated. On hearing that, the Messenger of *Allāh* ﷺ said, “I swear in the Name of He ﷻ Who controls my soul I will decide between you in the light of the Book of *Allāh*. The hundred goats and the slave will go back to you, your son will be

¹² Ibid, p. 280.

awarded one hundred lashes and he will be banished for a year. Unays go to this man's wife and if she accepts her guilt, have her lapidated. He went to her. She acceded to her guilt and she was stoned.”¹³

There is a concensus of the *Ṣaḥābah* (Companions of the Prophet Muḥammad) on the issue of *rajm* (stoning).¹⁴

According to *al-Hidayah*, the punishment of flogging in the case of a married offender has been abrogated by an *āyah* which reads: “when a man and a woman commit adultery stone them.” This *āyah* itself was abrogated as far as the recitation was concerned, but the Prophet Muḥammad and his immediate successors upheld the law of *rajm*.¹⁵ For example, Sayyidunā ‘Umar, the second Caliph, elaborates upon this as follows:¹⁶

Allāh raised the Prophet with the Truth and revealed the Book to him which contains the verse of *rajm*. The Prophet applied the punishment of

¹³ Ibid, pp. 281-282.

¹⁴ *Al-Hidayah*, op. cit. Vol. 2, p. 509.

¹⁵ Ibid, p. 509.

¹⁶ *Ṣaḥīḥ Muslim*, op. cit. Vol. 4, pp. 265-26.

rajm and after him we upheld this practise. Stoning (as a punishment) is mentioned in the *Qur'ān* and it is the Truth. Stoning is for him/her, who commits adultery and is married, provided there are witnesses to the adultery or pregnancy or admission of guilt.”

There is a consensus of opinion regarding the stoning of married adulterers.¹⁷ Ibn Hajar also cites consensus on the issue of stoning. He says, “It is the consensus of the Companions and all the *Imāms* of Islamic State that if a married person commits adultery, knowingly, without coercion and of free will such an individual will be stoned.”¹⁸

The Khawārij and the Mu‘tazilites do not prescribe stoning as a punishment. The Khawārij hold that the Qur’anic *āyah* speaks of lashing as punishment for adultery and for not stoning, thereby overlooking the practical demonstration of the Prophet Muḥammad ﷺ as far as the Qur’anic injunction is concerned. Furthermore, *Imām* Abū Bakr al-Jaṣṣāṣ states:

¹⁷ Ibn Rushd, Abū Walīd Muḥammad Ibn Aḥmad Ibn Muḥammad. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. Egypt. Muṣṭafā al-Bābi al-Ḥalabī wa Awlādūh. N.D. Vol. 2, p. 434.

¹⁸ Al-Asqalānī, Shihāb al-Dīn Ibn Hajar. *Fath- al-Bārī*, Beirut. Dār al-Ma‘rifah. Vol.12. p.104.

The *Ḥadīth* regarding stoning of an adulterer/adulteress has been reported by the following companions: Abū Bakr, ‘Umar, ‘Alī, Jābir Ibn ‘Ubayd Allāh, Abū Sa‘īd al-Khudrī, Abū Hurayrah, Burayda al-Aslamī, Zayd Ibn Khālid and others.¹⁹

‘Allāmah al-Suyūṭī states that the reason for the *āyah* of *rajm* not being retained in the *Qur’ān* for recital purposes, though the law was retained, is the severity of the punishment and there is all the reason to believe that it is recommended not to publicise such cases.²⁰

The above clearly indicates that *rajm* for those who committed adultery in the days of the Prophet Muḥammad and his companions was not an isolated incident. The Rightly Guided Caliphs also upheld this practise.²¹

It may also further be pointed out here that the *āyah* on lashing as a punishment for adultery was revealed in 5 *Hijrī* and the lady of

¹⁹ Al-Jaṣṣās, Abū Bakr Aḥmad ‘Alī al-Razī. *Aḥkām-al-Qur’ān*. Beirut. Dār al-Kutub al-‘Arabī. N.D. Vol. 3. p. 324.

²⁰ Al-Suyūṭī, Jalāl al-Dīn. *Al-Itqān fī ‘Ulūm al-Qur’ān*. Beirut. Dār al Nadwat al Jadīdah. N.D. Vol. 2, p. 26.

²¹ Karam Shāh. Muḥammad Pir. *Sunnat-e-Khayr al-An‘am*. Diyā’ al-Qur’ān Publications. Lahore. N.D., p. 255.

Ghāmidīyyah and Mā‘īz were stoned for adultery by the Prophetic decree in 9 *Hijrī*.²² This serves as historical evidence that the Prophet Muḥammad ﷺ decreed the punishment of *rajm* even after the verse of lashing as a punishment for adultery was revealed.

‘Allāmah al-Suyūṭī states that the reason for the *āyah* of *rajm* was not being retained in the *Qur’ān* for recital purposes, though the law was retained, is the severity of the punishment and there is all the reason to believe that it is recommended not to publicise such cases.²³

However, insofar as the punishment for *zinā* is concerned, the Prophet Muḥammad ﷺ, made a distinction between a married offender known as a *muḥṣin/muḥṣinah* and an unmarried offender known as *thayyib/thayyibah* in the application of the *ḥadd* punishment for *zinā*. The married offender must be subjected to the punishment of stoning known as *rajm* and the unmarried offender must be flogged one hundred times.²⁴

²² ‘Abd al-Ḥaqq, *Madārij al-Nubuwwat*, Karachi, Madina Publishing, N.D. Vol. 2, pp. 573-574.

²³ *Al-Itqān fī ‘Ulūm al-Qur’ān*, op. cit. Vol. 2, p. 26.

²⁴ *Al-Hidāyah*, op. cit. Vol. 2, p. 509.

2.2.1.3 Method of lashing the offender

If the offender is unmarried he/she will receive one hundred lashes. The whip must not have a knot on the end and neither of its side must be too hard. It is reported that *Sayyidunā* ‘Alī ؑ used a whip of similar specification.²⁵ The lashes must be of medium intensity. When raising the whip to strike it must not be raised above the head and must not be pulled from the body surface. When whipping, focus must not be made on only one part of the body. The face, the head and the privities of the offender must not be lashed.²⁶ This precaution is taken to avoid scarring the generally exposed area of the body and at the same causing injury to the reproductive organs. When whipping, a male would be stripped of his clothing besides his trousers. The purpose of stripping a male’s clothing is to make him feel the pain. A woman will not be stripped, protecting her body from exposure. If she is wearing a wollen garment over her clothing, the wollen garment would be removed. The man would be made to stand and the woman would be made to sit when being lashed. This is in accordance with the saying of *Sayyidunā* ‘Alī ؑ, “men be awarded *ḥadd*

²⁵ Ibid.

²⁶ *Al-Durr- al-Mukhtār*, op. cit., p. 317.

standing and women sitting.”²⁷ If the man refuses to stand he would be tied to a pole.²⁸ Moreover, it is to be noted that the lashing could be spread out over a period of two days, first day fifty lashes and the second day the other fifty.²⁹

Stoning and lashing cannot be combined, neither can the offender be lashed and banished. Banishment is not part of *ḥadd* punishment. If the judge deems it fit due to circumstances he is entitled to banish the offender for a few days.³⁰ Furthermore, banishment could lead to further acts of sexual misconduct. If the offender is allowed to stay within the reach of the family circle, it could help maintain shame and modesty. In the case of banishment, the fear of survival could lead a person into trading in sex. Hence banishment of the offender could defeat the very purpose of *ḥadd*.

If the woman is pregnant, her prosecution will come under effect only after the birth of her child. If she were to be stoned in pregnancy, it would result in the loss of her baby. If there is someone available to take care of the

²⁷ *Al-Hidāyah*, op. cit., p. 509.

²⁸ *Fatāwā ‘Ālamghīrī*-vol.3 p.261

²⁹ *Al-Durr- al-Mukhār*, op. cit., p. 317.

³⁰ *Ibid.*

child, the prosecution will be immediate and if not, after two years.³¹ This ruling is in keeping with the advice the Prophet Muḥammad ﷺ gave the lady of Ghāmidīyah when she confessed having committed adultery. He told her, “Go till you give birth.” She returned after the child was born. She was carrying the child in her arms, and the child had a piece of bread in his hand. She told the Prophet Muḥammad ﷺ, “the child has eaten.” The child was given in the care of a Muslim. A trench was dug and the people were summoned, and she was stoned.³²

2.1.2.4 Method of stoning the offender

The offender/offenders are to be stoned to death in an openfield and surrounded by those who would be involved in stoning.³³ The stones must neither be too big nor too small.³⁴ An important point ought to be mentioned here is that in case the conviction was on the basis of eyewitnesses, then the eyewitnesses ought to begin by stoning the offender, followed by the *Imām* (head of the locality) and then the general public. In the event that the eyewitnesses refuse to participate in the stoning then the sentence would be

³¹ Ibid, p. 318.

³² *Al-Hidāyah*, op. cit. Vol. 2, p. 513.

³³ *Alamgiri*.vol.3.p.258.

³⁴ *Ṣaḥīḥ Muslim*, op. cit. Vol. 4, pp. 278-279.

annulled. On the other hand, if the conviction is on the basis of confession then the Imam would begin by stoning the offender, followed by the public.³⁵ Moreover, the execution by stoning must be effected in the presence of a group of believers on the basis of the following Qur'anic imperative:

“And let a party of believers witness their punishment.” (Al-Nūr, 24:2)

This would serve as a deterrent for those who are inclined to commit *zinā*.

2.1.2.5 Evidence in the case of adultery

A case of adultery will only be regarded as genuine if four male eyewitnesses bear testimony that the accused has committed adultery by using the word *zinā* and not *jimā*³⁶ (intercourse). If they use the term intercourse, the case of adultery will not be entertained.³⁶ After the

³⁵ *Fatāwa 'Alamghīrī* Vol. 3, p. 260.

³⁶ *Ibid.* Vol.3, p. 255.

testimony of the witnesses, the judge will ask them what is copulation? Under what circumstances the act took place, whether under duress? Who was the accused woman? Where did the offence take place, whether it was in a country, which was at war with Islam? In that case, the *ḥadd* punishment would not be imposed. After ascertaining all these factors there will be a query concerning the rectitude of the witnesses, if this is established then the accused would be questioned regarding his /her marital status; the meaning of *muḥṣan*, i.e., being married, would be ascertained from both the accused and the witnesses. If the marital status is established, the punishment would be meted out and if he denies being married and the witnesses fail to prove otherwise, a punishment of hundred lashes would be meted out.³⁷

If the witnesses could not provide sufficient statement on the nature of the offence or if some did, and others did not, *ḥadd* will not be imposed. Similarly, if they could not ascertain the identity of the woman, the *ḥadd* will not be effected.³⁸

³⁷ Ibid.

³⁸ *Baḥār-e-Shari'at*, op. cit. Vol.9, p. 75.

If one of the witnesses withdraws his evidence after a person accused of adultery had been stoned, only that one person would be given the *ḥadd* applicable in the case of false accusation. He would have to give a quarter of the blood money. If he withdrew before the accused could be stoned, then all the witnesses would receive the *ḥadd* applicable in the case of false accusation.³⁹

Here it ought to be noted that if the witnesses stated that they intentionally looked at the act of *zinā* being performed, they will not be regarded as being irreligious in their conduct, though it is *ḥarām* to look at the privities of another person. Due to circumstances they could not avoid looking since they had to bear testimony. It is like the case of a midwife, or a doctor performing circumcision. But if they had ulterior motives, such as being spectators for fun, they would be disqualified as irreligious in their behaviour and their evidence would be rejected.

2.2.1.6 Rape

In *al-Tirmidhī* there is a report of the case of a woman who was raped by a man. A wrong man was identified as the assailant. The alleged assailant was

³⁹ Ibid.

arrested and brought to the Prophet Muḥammad ﷺ. After the Prophet Muḥammad ﷺ had passed the judgement, the main culprit owned up to the crime. The lady was acquitted and asked to leave, and the man wrongfully accused was dealt with politely and the rapist was stoned to death.⁴⁰

Here it ought to be noted that the above *Ḥadīth* is classified as *gharīb* (rare) and does not qualify as an authentic narration. Muslim jurists are inclined not to classify rape as *zinā* since *zinā* takes place between two consenting parties and the victim of rape is not a consenting party. They thus hold the view that rape is a more heinous crime than *zinā* and hence the perpetrator ought to be liable to a severe punishment like death or a long term imprisonment irrespective whether that person was married or not.⁴¹

2.2.1.7 Sodomy and homosexuality

The *Holy Qur'ān* makes special reference to the people of Prophet Lūṭ عليه السلام who indulged in homosexuality. The entire community besides those that believed in the message preached by Prophet Lūṭ عليه السلام were wiped in the

⁴⁰ *Al-Jāmi' al-Tirmidhī*, op. cit. Vol.1 . p. 658.

⁴¹ Vahed, Muhammad. *Crime and Punishment*. Durban. Al-Noor Publications. 2003, p. 78.

punishment that visited them in what was known as Sodom and Ghomorrah. The *Holy Qur'ān* states:

“We also (sent) Lūṭ: He said to his people: ‘Do you commit lewdness such as no people in creation (ever) committed before you? For ye 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 that lagged behind. And We rained down on them a shower (of brimstone): Then see what was the end of those who indulged in sin and crime! (*Al-Aʿrāf*, 7: 80-84)

The destruction of the People of Sodom and Gomorrah is again related to demonstrate the disapproval of the Creator to unnatural sexual practices.

‘*Allāmah* Yūsuf ‘Alī states:

The cities of Sodom and Gomorrah were utterly destroyed, and even their precise positions cannot be identified. But the brimstone plain of the tract still exists, right on the highway between Arabia and Syria. To the traveler in the neighbourhood of the Dead Sea the whole locality presents a scene of desolation which truly suggests the awful punishment for unspeakable crimes.⁴²

Muslim jurists consider the following punishments as valid for the person found guilty of sodomy:⁴³

- i. that a wall be dropped upon the offender;
- ii. that the offender be dropped from a high place facing downwards and be pelted with stones;
- iii. that the offender be imprisoned till he dies or repents. If the offender has frequently indulged in sodomy then he deserves death sentence.

⁴² Ali, Abdullah Yusuf. *The Holy Qur'an – Text Translation and Commentary*. Qatar. Presidency of Islamic Courts and Affairs. 1946. Footnote no. 1998, p. 650.

⁴³ *Bahār-e-Sharī'at*, op. cit. Vol. 9, p. 82.

Sodomy is rated as more repulsive than *zinā*. The reason for this offence being exempt from *ḥadd* is that according to some jurists, *ḥadd* is meant to purify an offender, but this offence is so heinous that the sodomist can never attain purification without repenting sincerely. It has been further argued that sodomy is unlike adultery to merit the same punishment of *ḥadd* because it does not result in confusion as regards parentage as opposed to adultery, then it is also rare and not as common as adultery and in most cases the encouragement is one sided as opposed to adultery. It is the opinion of the majority of scholars that one who regards sodomy as *ḥalāl* (lawful) is an unbeliever.⁴⁴

2.2.2 *Qadhf* (False accusation of adultery)

Qadhf literally means to defame, accuse or slander. In terms of Islamic Law, it refers to falsely accusing an innocent person of sexual misconduct.⁴⁵ The *Shari‘ah* views *qadhf* in a serious light, for it damages a persons reputation; it breeds animosity between two families and it could also lead to bloodshed. Only in the case of falsely accusing anyone of adultery, the

⁴⁴ Ibid.

⁴⁵ *Fatāwā ‘Ālamghīrī*, op. cit., p. 285.

ḥadd punishment would be effected. Accusing an individual of sodomy, though it is a grave sin, will not evoke the *ḥadd* punishment and in that case only discretionary punishment will be evoked.⁴⁶

2.2.2.1 Punishment for *qadhf*

The *Holy Qur'ān* stipulates the the punishment for *qadhf* as follows:

“And those who accuse chaste women (of adultery) and produce not four witnesses (in support of their allegation), flog them with eighty stripes; and reject their evidence ever after:for such persons are wicked transgressors; unless they repent thereafter and mend (their conduct); for Allāh is Oft Forgiving and Most Merciful. (Al-Nūr, 24:4-5)

The following Qur'anic citations further depicts the gravity of falsely accusing people of adultery:

⁴⁶ *Baḥār-e-Sharī'at*, op. cit. Vol. 9, p. 82.

- i. *“Those who slander chaste women, indiscreet but believing, are cursed in this life and in hereafter. For them is a grievous penalty.” (Al-Nūr, 24:23)*
- ii. *“And those who annoy Believing men and women undeservedly, bear (on themselves) a calumny and a glaring sin.” (Al-Aḥzāb, 33:58)*

‘Allāmah Yūsuf ‘Alī commenting on āyah (ii) above states:

In that passage we are told that anyone who was himself guilty but accused an innocent man of his guilt, was obviously placing himself in double jeopardy: first, for his own original guilt, and secondly for the guilt of a false accusation. Here we take two classes of men instead of two individuals. The men and women of faith (if they deserve the name) are doing all they can to serve God and humanity. If they are insulted, hurt, or annoyed by those whose sins they denounce, the

latter suffer the penalties of a double guilt, viz., their sins to start with, and the insults or injuries they offer to those who correct them. Instead of resenting the preaching of truth, they should welcome it and profit by it.⁴⁷

For the slanderer to be punished, the one accused of adultery has to be:

- (a) a Muslim ;
- (b) intelligent;
- (c) mature;
- (d) free, not a slave; and
- (e) pious.

Moreover, the accused must not be:

- (a) the son or the grandson of the slanderer;
- (b) dumb;

⁴⁷ *The Holy Qur'an – Text Translation and Commentary*, op. cit. Footnote no. 3753, p. 1126. Quran, vol. 2, p. 1126

- (c) must not be castrated;
- (d) his genitals must not be severed from the root;
- (e) if it is a woman that has been slandered she must be capable of being copulated.

It is to be noted here that if the person becomes an apostate after *qadhf*, or becomes insane, or had illegal sex or the person became dumb, *hadd* punishment will not be administered to the accuser. Moreover, *hadd* punishment will only be awarded if the accuser uses the term adultery explicitly whilst levelling the accusation. For example, he says, “you are an adulterer “or you committed adultery”. But if the accuser says “you engaged in unlawful sex” *hadd* punishment will not be awarded on the slanderer. However, calling an individual bastard, or a child born out of wedlock or referring to a woman as an adulteress, entails *hadd* punishment to be effected upon the slanderer. Moreover, if the accused died and the heir that suffers due to the accuser’s defamation makes a demand for *hadd* punishment to be imposed upon the slanderer, it will be awarded. For example, if the paternal grandparents, parents, son or daughter are accused

and they die, the heir reserves the right to demand for *ḥadd* and his demand will be acceded to.⁴⁸

Any person who had served his punishment for *qadhf*, his evidence would not be held valid in any matter, besides acts of devotion. If a slanderer who was a non-believer was awarded the punishment involving non-believers, his evidence would not be accepted in matters relating to non-believers. However, if he accepts Islam, his evidence will be valid.

2.2.2.2 *Li'ān* (Slander of one spouse by another)

Li'ān is in terms of Islamic Law the act of slandering which pertains specifically to one spouse being slandered by another.⁴⁹ The *Holy Qur'ān* states in this regard:

“And those who accuse their wives, but have no witnesses except themselves, his solitary evidence (can be received) if he bears witness four times

⁴⁸ *Fatāwā 'Alamghiri* Alamgiri.vol.3.p.293

⁴⁹ *Bahār-e-Shari'at*, op. cit. Vol. 8, p. 943.

(with an oath) by Allāh that he is solemnly telling the truth. And the fifth (oath) should be that he invokes the curse of Allāh on himself, if he is telling a lie. But it shall avert the punishment (of stoning to death) from the wife, if she bears witness four times with (an oath) by Allāh that he is telling a lie. And the fifth (oath) should be that the wrath of Allāh be upon her if he speaks the truth.” (Al-Nūr, 6-9)

An important point that ought to be noted here is that once this procedure has been completed, the *Qāḍī* shall then order the dissolution of their marriage and they would never be allowed to re-marry each other again.⁵⁰

2.2.3 Drinking of *al-khamr* and consuming other intoxicants

Khamara literally means “it veiled, covered or concealed” a thing.⁵¹ Wine and other intoxicants fall under the category of *khamr* because they veil the intellect and obscure the moral sensibilities of a human being.

⁵⁰ Ibid. Vol. 9, p. 91.

⁵¹ *Arabic English Dictionary*, op. cit., pp. 202-203.

The prohibition for the consumption of *khamr* came gradually. In reference to the first stage of its gradual prohibition, the *Holy Qur'ān* states:

“They ask thee concerning wine and gambling.

Say: ‘In them is great sin, and some profit, for men; but the sin is greater than the profit.’” (Al-Baqarah, 2:219)

In the above *āyah*, the sinful aspect of consuming *khamr* is mentioned as it outweighs the profit aspect. Even prior to the prohibition of alcohol in Islam, there were right-minded people who abhorred the habit of indulging in alcoholism. It is said that *Sayyidunā ‘Umar* ؓ and *Sayyidunā Mu‘ādh Ibn Jabal* ؓ sought guidance from the Prophet Muḥammad ﷺ concerning alcohol saying that the habit of drunkenness robbed one of one’s mind and made a hole in one’s pocket. As a result, the above *āyah* was revealed.⁵²

As for the second stage of its gradual prohibition, it is mentioned in the *Ḥadīth* literature that one day *Sayyidunā ‘Abd al-Raḥmān Ibn ‘Awf* ؓ invited some friends and offered them alcohol. Towards the evening they

⁵² Karam Shāh. Muḥammad Pīr. *Ḍiyā’ al-Qur’ān*. Lahore. Ḍiyā’ al-Qur’ān Publications. N.D. Vol. 1, p. 58.

were quite drunk. Someone from among them led them into *ṣalāt* (obligatory prayer) and while reciting the *Sūrat* entitled *al-Kāfirūn* omitted the word “*lā*” which means “not” and that changed the meaning altogether resulting in the negative connotation being replaced in the *āyah* by a positive one. On account of this incident the following verse was revealed:⁵³

“O you who believe! Approach not prayers with a mind befogged, until ye can understand all that you say.” (Al-Nisā’, 4:43)

There are many reports in the *Ḥadīth* literature which alludes to how the final stage for the prohibition of consuming *khamr* came about. One such incident pertains to ‘Utbah Ibn Mālīk ؓ who had arranged a get together and served alcohol. With the free flow of alcohol, some of the guests had consumed huge quantities. Once under the influence of alcohol they began extolling the virtues of their tribes and running down the others. Someone insulted the *Anṣār*, and one *Anṣārī* took hold of a jawbone of a camel and struck the one that had recited satirical lines gashing him on the head. The complaint reached the Prophet Muḥammad ﷺ and Sayyidunā ‘Umar ؓ

⁵³ *Madārij al-Nubuwwat*, op. cit. Vol. 1, p. 267.

prayed for clear directives concerning alcohol and the following *āyah* was revealed:⁵⁴

“O you who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan’s handiwork: eschew such (abomination) that ye may prosper. Satan’s plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allāh, and from prayer: will ye not then abstain.” (Al-Mā’idah, 5:93-94)

The Qur’anic use of the word *khamr* was originally understood to mean fermented juice of the grape, and by analogy to all fermented wine, and by further analogy to any intoxicating liquor and drugs which are prevalent in the market today. The Prophet Muḥammad ﷺ categorically stated:

Every intoxicant is forbidden.⁵⁵

⁵⁴ Ibid.

⁵⁵ *Mishkāt al-Maṣābiḥ*, p. 317.

The Prophet Muḥammad ﷺ further clarified Islam's position on the consumption of alcohol on the basis of the following *Aḥādīth*, leaving no ambiguity as to its content and nature.

1. *Sayyidunā* Ṭāriq Ibn Suwayd ؓ asked the Messenger of *Allāh* ﷺ regarding alcohol, saying that they prepared it as medicine. The Messenger of *Allāh* ﷺ said: "It is not medicine, it is a disease."⁵⁶
2. *Sayyidunā* Anas Ibn Mālīk ؓ says that the Messenger of *Allāh* ﷺ cursed the following ten people as regards alcohol: the manufacturer, the consumer, the transporter, the client, the receiver, the wine steward, the retailer, the one that lives on the sales of alcohol, the buyer and the one for whom it is purchased.⁵⁷
3. *Sayyidunā* Abū Dardā' ؓ says, "My bossom friend (the Messenger of *Allāh* ﷺ) said: "Do not consume alcohol, it is the key to every evil."⁵⁸

⁵⁶ *Ṣaḥīḥ Muslim*, op. cit. Vol. 4, p. 163.

⁵⁷ Ibn Mājah, 'Abd Allāh Muḥamad Ibn Yazīd. *Sunan Ibn Mājah*. Karachi. Nur Mohammed Publications. N.D., p. 242.

⁵⁸ *Ibid*, p. 241.

4. *Sayyidunā* Abū Hurayrah ؓ reports the Messenger of *Allāh* ﷺ said, "An adulterer does not commit adultery in a state of *īmān* (faith), a thief does not commit theft in a state of faith and one does not consume alcohol in a state of faith."

From the *Ḥadīth* no. 4, it becomes apparent that the Light of Faith is automatically removed from the heart of the person whenever he indulges in any of the prohibitory acts.⁵⁹

2.2.3.1 Punishment for consuming intoxicants

Before discussing the hadd punishment for the consumption of intoxicants, the following ought to be noted:

- i. If a sane and mature Muslim, without being under duress, knowing that alcohol is unlawfull, consumed even a drop of alcohol, he would be given the *ḥadd* punishment.

⁵⁹ *Mishkāt al-Maṣābīḥ*, op. cit., p. 17.

- ii. If a non-believer consumed alcohol he would be exempted from *ḥadd* punishment on the grounds of following a different religion.
- iii. An insane person would also be exempted from *ḥadd* punishment because of non-cognizance of his actions.
- iv. An under age person would also be exempted from *ḥadd* punishment because the law applies to a mature person.
- v. A dumb person may not be in a position to state his/her case properly, and the possibility exists that he/she could have been forced to consume alcohol and thus he/she would be exempted from from *ḥadd* punishment.
- vi. If a person dying of thirst drank an amount sufficient to save his life, *ḥadd* punishment would not be effected upon that person. However, if that person were to drink more than the required amount, *ḥadd* punishment would be effected upon that person.

- vii. A person who drank under coercion is not liable for *ḥadd* punishment.⁶⁰

It is to be noted here that whenever a case of drunkenness is brought before *Qāḍī* (judge) and the witnesses bear testimony, it is the duty of the judge to ascertain the following facts before awarding *ḥadd* punishment: How was alcohol consumed? Was it consumed of free will or under duress? Where and when was it consumed? Because after a lapse of time, *ḥadd* punishment will fall away and if it was consumed in a *Dār-al Ḥarb* (outside in a non-Muslim country) then too *ḥadd* punishment would not be applicable. After ascertaining these facts, the accused would be detained. The character of the witnesses would be ascertained to establish their integrity and only after that had been ascertained would *ḥadd* punishment be awarded.⁶¹

However, if the statement of the witnesses are in conflict with each other, *ḥadd* punishment would not be inflicted, instead, discretionary punishment would be awarded. Moreover, if the drunkard makes a personal admission, a single admission is sufficient for *ḥadd* punishment to be

⁶⁰ *Al-Durr al-Mukhtār*, op. cit., Vol.1, p. 322.

⁶¹ *Ibid.*

effected, provided he does so in a state of sobriety, if he does so in a state of stupor, that admission would not be regarded as valid.⁶² Furthermore, if alcohol was found in the premises of an irreligious person, or in the gathering of a few individuals where alcohol was available, and no one had seen them indulge in alcohol, they would not receive *ḥadd* punishment and instead they would be subject to discretionary punishment.⁶³

The *ḥadd* punishment of consuming intoxicants is established on the basis of a report by *Sayyidunā* Qaṭādah ؓ from *Sayyidunā* Anas Ibn Mālīk ؓ that a drunkard was brought to the Messenger of *Allāh* ﷺ and the man was lashed with two date palm branches about forty lashes. *Sayyidunā* Abū Bakr upheld that very practise ؓ. Subsequently, however, during the *khilāfah* of *Sayyidunā* ‘Umar ؓ, the punishment was increased to eighty lashes after he had consulted the people on the matter.⁶⁴ The lashes are to be spread over the different parts of the body as explained in the section on the lashing of the person who commits *zinā*.⁶⁵

⁶² Ibid.

⁶³ *Bahār-e-Sharī‘at*, op. cit. Vol. 9, p. 91.

⁶⁴ *Ṣaḥīḥ Muslim*, op. cit. Vol. 4, pp. 290-291.

⁶⁵ *Fatāwā ‘Ālamghīrī*, op. cit. Vol.3, p. 285.

The rationale from forty to eighty lashes can be established from the following report:

Drunkards were given forty lashes till the reign of *Sayyidunā* ‘Umar ؓ till a man from the early *Muhājirūn* was brought to him in the state of intoxication. He was ordered to be lashed. He said, “Why do you intend lashing me whereas the Holy Book is in between us? *Allāh* has said, “There is no sin on those that believe and do good deeds in matters of what they consume. Ibn ‘Abbās ؓ said.

- “This verse is an excuse for those that were in the past and it serves as an argument for those that remain.” *Sayyidunā* ‘Umar ؓ asked, “What is the people’s opinion?” *Sayyidunā* ‘Alī Ibn Abī Ṭālib ؓ said, “In our opinion if a person consumes alcohol he will get intoxicated and when intoxicated he will talk irrationally and when this happens he will fabricate lies. A liar deserves

eighty lashes.” Sayyidunā ‘Umar ؓ ordered the man be given eighty lashes.⁶⁶

It is to be noted that drunkards ought not to be verbally abused nor cursed and that is evident from the following *Aḥādīth*:

Sayyidunā Abū Hurayrah ؓ reported that a drunkard was brought to the Messenger of Allāh ﷺ and he ordered the man to be punished. Sayyidunā Abū Hurayrah ؓ added, “Some of us hit him with our hands, others hit him with sandals and there were those that hit him with cloth. When the man left, someone from those who were present said, ‘May Allāh disgrace you.’ The Messenger of Allāh ﷺ said, ‘Do not say such words. Do not assist Satan against him.’”⁶⁷

Sayyidunā ‘Umar Ibn Khaṭṭāb ؓ reported that a man named ‘Abd Allāh who was also known as

⁶⁶ *Al-Hidāyah*, op. cit. Vol. 2. p. 528.

⁶⁷ *ibid.*

Himar used to amuse the Messenger of *Allāh* ﷺ was lashed for drunkenness. A man from amongst the people said, “O *Allāh* curse him, how often he indulges in this.” The Messenger of *Allāh* ﷺ said, “Do not curse him. By *Allāh* ﷻ you don’t know that he loves *Allāh* ﷻ and His Messenger ﷺ.”⁶⁸

Another point to be noted here is that if during the course of the *ḥadd* punishment s being administered the offender escapes and re-arrested and brought forth after a lapse of time, that person would be set free on account of the lapse of time, but if he were to be apprehended immediately then the punishment would be completed. If he were to drink again he would be punished again.⁶⁹

2.2.4 *Sariqah* (theft)

Sariqah is defined as the surreptitious taking away of the property of another person without his/her knowledge and consent.⁷⁰

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ *Bahār-e-Sharī‘at*, op. cit., p. 107.

The *Holy Qur'ān* stipulates the punishment for the thief as follows:

“As to the thief, male or female, cut off his or her hands: A punishment by way of example, from Allāh, for their crime, and Allāh is the Mighty, the Wise.” (Al-Mā'idah, 5:41)

The *ḥadd* punishment in the form of amputation of the thief's hand would be effected only if the value of the stolen property at the time of the commission of the crime was equivalent to 10 dirhams or 4.457 grams of gold.⁷¹

2.2.4.1 Method of amputation

The thief's right hand will be cut upto the wrist and branded in boiling oil.⁷²

If the weather is extremely hot or cold the amputation will be postponed and the thief will be kept in prison till the weather improves. The thief will bear the cost of the oil, the person that cuts and the person that brands and the

⁷¹ *The Criminal Law of Islam*, op. cit., p. 183.

⁷² Branding the wrist in oil after the hand is severed is done to stop bleeding. Today, other methods can be opted for to stop bleeding.

cost of boiling the oil. Thereafter, if he steals again, his left foot will be amputated till the joint of the ankle. If he steals again there is no amputation he will be imprisoned and punished till he repents sincerely.⁷³

The condition for amputation is dependent upon the owner demanding the return of his property, immaterial whether there have been witnesses to the theft or the thief had owned up to his crime. Moreover, the owner has to be present at the time of testimony and at the time of amputation.⁷⁴

2.2.4.2 Conditions for the execution of the *ḥadd* punishment

There are conditions set out for the execution of *ḥadd* punishment in the case of larceny. Some of them are as follows:⁷⁵

1. The thief has to be, in the Islamic legal terms regarded as being, responsible of his actions. He must not be a minor and neither mentally unsound. It does not matter whether the thief is a male or female.

⁷³ *Baḥār-e-Sharīʿat*, op. cit., pp. 112-113.

⁷⁴ *Ibid.*

⁷⁵ *Ibid*, p. 107.

2. The thief must not be dumb.
3. The thief must not be blind for he/she could have mistaken the item to be his/hers.
4. The item stolen has to be of the value of ten dirhams and above and the value has to remain at ten dirhams and above till the time of meteing out the punishment.
5. The item stolen has to be moved from its location such as from a house.
6. The property has to be taken stealthly. If the thief enters stealthly but leaves with the loot openly, his hand will not be amputated.
7. During the period of drought, the hand of the thief will not be amputated for stealing grains, rice and wheat.

2.2.4.3 Conviction of the thief

The thief can be convicted on the basis of: (a) personal confession and (b) the testimony of two witnesses.

The judge will ascertain the following facts also, from the witnesses, before execution of the punishment: (a) How was the theft committed? (b) Where was it committed? (c) How much was stolen? And (d) whose property was stolen?⁷⁶

2.2.5 *Hirābah* (highway robbery)

Hirābah literally means to quarrel or fight and in terms of Islamic Law, it implies taking away the property of a person openly by using or threatening to use force, e.g. highway robbery and dacoity. Here, a distinction ought to be made between *sariqah* and *hirābah*. *Sariqah* is the taking away of the property of another person surreptitiously while *hirābah* is the taking of the property of another person publicly and by force.⁷⁷

⁷⁶ Ibid, p. 109.

⁷⁷ See *The Criminal Law of Islam*, op. cit., pp. 174 and 190.

2.2.5.1 Conviction for *Ḥirābah*

Conviction for *ḥirābah* is done on the basis of either the confession of the accused or the testimony of two adults, sane and credible witnesses other than the victims.⁷⁸ In the event that there be no other witnesses besides the victims, then some jurists hold the view that the testimony of two victims as long as they do not testify for their own property or hurt.⁷⁹

2.2.5.2 Punishment for *Ḥirābah*

The *Holy Qur'ān* lays down *ḥadd* punishment for *ḥirābah* in the following text:

“The punishment of those who wage war against Allāh 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

⁷⁸ See *Crime and Punishment*, op. cit., p. 87.

⁷⁹ See *The Criminal Law of Islam*, op. cit., p. 191.

punishment is theirs in the hereafter; except for those who repent before they fall into your power: In that case, know that Allāh is Oft-Forgiving, Most Merciful.” (Al-Mā'idah, 5:36-37)

From the above Qur'anic citation, it is apparent that the punishment for those convicted of highway robbery and dacoity may be effected in four ways: (a) death; (b) crucifixion; (c) amputation of hand and foot from opposite sides; and (d) banishment.

The Prophet Muḥammad ﷺ justifies the death sentence to be imposed upon the Muslim found guilty of *ḥirābah* in the following *Ḥadīth*:

The blood of a person that bears witness to the oneness of *Allāh* and the Apostleship of His Messenger is not lawful to be shed except in the following three cases: he is married and he indulges in adultery, he should be stoned; he who murders will pay with his life; and he who rebels against *Allāh* and His Messenger and fights against

the Muslims, he will be killed, hanged or banished;.⁸⁰

In what follows, some scenarios are discussed with the types of punishments that could be effected for those accused and found guilty of highway robbery and dacoity:

- a) If the robbers killed a Muslim or a *dhimmi* but did not take any loot they will be executed and if they took the loot and also killed people, the Muslim ruler has the option to amputate their hands and legs and execute them or hang them; or execute them after amputating the hands and legs and then hang them or only execute them or execute them and then hang them or only hang them. If they are hanged they must be hanged alive and thereafter their stomachs be pierced and left to die. Their bodies will be left hanging for three days and thereafter their families could arrange for their burials. They will not be accorded Islamic prayers (*ṣalāt-al-janāzah*, i.e. funeral prayer).⁸¹

⁸⁰ *Al-Jāmi‘ al-Tirmidhī*, op. cit. Ḥadīth no. 947, p. 635.

⁸¹ *Fatāwā ‘Ālamghīrī*, op. cit. Vol. 3, p. 331.

- b) If the robbers have in their possession the loot, it will be returned. If their limbs have been amputated or they have been executed, there will be no compensation. Similarly there will be no compensation for lives lost and for injuries suffered.⁸²
- c) If only one of the robbers intimidated the people, or killed someone or stole from people, the entire gang will be punished.⁸³
- d) If the robbers did not kill, but took the goods and caused injury, their hands and legs will be cut and there will be no compensation for the injury. If they only caused injury without taking the goods and without killing or they killed and took the goods, but repented before being arrested and returned the goods, or if amongst them there is someone who is not capable of being responsible for his actions or is dumb or is related to one of the wayfarers, In all these cases *ḥadd* will not apply.⁸⁴

⁸² *Al-Durr al-Mukhtār*, op. cit., p. 338.

⁸³ *Fatāwa 'Ālamghūrī*, op. cit. Vol. 3. p. 331.

⁸⁴ *Baḥār-e-Sharī'at*, op. cit., p. 115.

For the persons involved in *ḥirābah* to merit *ḥadd* punishment, the following conditions apply:

- i. Travellers ought to be powerless when confronted by them. They may have committed the crime with weapons, sticks or with stones and in today's context, by having used sophisticated weapons.
- ii. The crime was committed within the city or outside the city and and/or committed in the night by using weapons.
- iii. The robbery must have been committed in an Islamic state.
- iv. The robbers have to be apprehended by the authorities before repenting and returning the stolen goods.⁸⁵

It is important to mention here that if those involved in *ḥirābah* repent before being arrested, then the *ḥadd* punishment will not be effected upon them based on the following Qur'anic citation:

⁸⁵ *Fatāwā 'Ālamghīrī*, op. cit. Vol. 3, p. 330.

“Except those who repent before they fall into your power: in that case, know that Allāh is Oft-Forgiving, Most Merciful.” (Al-Mā'idah, 5:34)

However, the offenders would be liable to return the properties taken by force from their victims. But if the repentance takes place after their being apprehended, *ḥadd* punishment would still be effected upon them.

2.2.6 Spreading dissension or discord

According to Dr Aḥmad Fathī Bahnasī, this crime encompasses transgression against the Muslim leader (*Imām*) and conspiracy to overthrow him; opposing the consensus of the majority and segregating oneself from the majority with the aim of spreading discord within the Muslim community.⁸⁶ One ought to note that all citizens within the Islamic State are duty-bound to obey the Muslim righteous ruler as is evident from the following Qur'anic text:

⁸⁶ Bahnasī, A.F. *Madkhal fī al-Fiqh al-Jinā'ī al-Islāmī*. Beirut. Dār al-Shurūq. 2nd Edition. 1980, p. 7.

“O you who believe! Obey Allāh and obey the Apostle and those of you who are in authority (power).” (Al-Nisā’, 4: 59)

‘Allāmah ‘Abd Allāh Yūsuf ‘Alī commenting upon the above *āyah* states:

As Islam makes no sharp division between sacred and secular affairs, it expects ordinary government to be imbued with righteous Imām, and we must respect and obey such authority; otherwise there will be no order and discipline. Where, in actual fact, there is a sharp division between law and morality, between secular and religious affairs, as in the case of most countries at the present day, Islam still expects secular authority to be exercised in righteousness and on that condition, enjoins obedience to such authority.⁸⁷

⁸⁷ *The Holy Qur’an – Text, Translation and Commentary*, op. cit. Footnote no. 580, p. 198.

People would be guilty of rebellion if their actions aim at the following:⁸⁸

- i. Deposition of the ruler.
- ii. Engaging in a revolution or civil war to achieve their desired goal.

2.2.6.1 Punishment for spreading dissension or discord

Spreading dissension and discord within the community is tantamount to disturbing internal peace and security, which could lead to anarchy and corruption. *Hadd* punishment for people indulging in such a crime or crimes is death as is evident from the the Qu'ranic citation above (*Al-Mā'idah*, 36-37) and in the following Qur'anic text:

“If two parties among the believers fall into quarrel, make peace between them; but if one of them transgresses beyond bound against the other, then fight all against the one that transgresses until it complies with the command of Allāh. But if it complies, then make peace between them with

⁸⁸ See *The Criminal Law of Islam*, op. cit., pp. 199-203.

justice, and be fair: For Allāh loves those who are fair (and just).” (Al-Hujurāt, 49: 9)

The Prophet Muḥammad ﷺ clearly spells out the fate of the rebel in the following *Ḥadīth*:

Whoever makes commitments of allegiance to his *Imām* is under the obligation to obey him as far as possible. If anyone tries to wrest the leadership of his *Imām*, behead him.⁸⁹

Here it ought to be pointed out that the Muslim ruler is expected to hear out the grievances of the rebels and should not be the first to resort to suppress their rebellion by force as Dr ‘Abd al-Qādir ‘Awdah aptly explains:

The jurists further agree that when a group of people rebel against a Muslim ruler, the ruler first has to dialogue with them and try his best to satisfy

⁸⁹ As cited in ‘Awdah, ‘Abd al-Qādir. *Criminal Law of Islam*. Karachi. International Islamic Publishers. 1994, p. 59.

them by any possible way other than fighting with arms. And when all avenues to satisfy them have been exhausted and the rebels insist to continue their rebellion and start attacking and destroying public and government property by using force, then it would be permissible for the state to kill them. Fairness and justice should strictly be adhered to in this serious matter.⁹⁰

Again, consistent with the imperative in the latter part of the Qur'anic citation above, the Muslim ruler shall be under obligation to pardon the rebels when he has been able to quell the rebellion and the rebels have laid down their arms.⁹¹

2.2.7 *Irtidād* (apostasy)

Apostasy is the renunciation or abandonment of Islam by one who professes the Islamic faith. Apostasy may be committed with reference to belief, word

⁹⁰ Ibid, pp. 680-681.

⁹¹ *The Criminal Law of Islam*, op. cit., p. 203.

or deeds; or even willful conscientious repudiation of the obligatoriness of the truthfulness of the obligatory practices.⁹²

2.2.7.1 Punishment for *irtidād*

Regarding *ḥadd* punishment for the Muslim who apostasizes, the *Holy Qur'ān* states:

“And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein.” (Al-Baqarah, 2:217)

and

“But if they violate their oaths and after their covenant, and attack your religion with disapproval and criticism, then fight the leaders of disbelief. Lo! They have no binding oaths – so that they may desist.” (Al-Tawbah, 9: 12)

⁹² Rahman, S.A. *Punishment of Apostacy in Islam*. Lahore. Institute of Islamic Culture. 1972, p. 9.

The Prophet Muḥammad ﷺ categorically spelt out the punishment for the one who is guilty of apostasy. He said:

Whosoever substitutes his din (religion) for another, put him to death.⁹³

It is important to point out here that whenever any Muslim apostasizes and does not repent for this crime, he or she is to be killed according to the jurists.⁹⁴ Whilst the *Shari'ah* holds all humans free to choose or follow any religion, but being a Muslim and residing in the Islamic State and apostasising is tantamount to exiting from the political affiliation with the *Ummah* or the Islamic State. This would be tantamount to treason and hence the justification for the death penalty to be imposed upon that person.⁹⁵

However, one must take cognizant of the fact that the Muslims jurists concur that an apostate shall not be punished with death until he is given sufficient opportunity and asked to repent, and if he repented he shall not be punished.

⁹³ Karim, al-Haj Muhammad Fazlul. *Al Hadis: An English Translation and Commentary of Mishkat al Mashabih*. Lahore. The Book House. N.D. Vol. II. Ḥadīth no. 74, p. 524.

⁹⁴ *Madkhal fi al-Fiqh al-Jinā'ī al-Islāmī*, op. cit., p. 97.

⁹⁵ Ebrahim, Abul Fadl Mohsin. *Biomedical Issues – Islamic Perspective*. Kuala Lumpur. A.S. Noordeen. 1988, p. 128.

According to some jurists the period of repentance is three days, and according to *Imām* Abū Ḥanīfah, the period of repentance is left to the discretion of the judge.⁹⁶

2.2.7.2 Conviction of the *murtad* (the person who apostasizes)

Some of the conditions that should be taken into consideration before someone may be convicted as an apostate are:

1. The person must be intelligible. Coming of age, reaching the age of puberty is not a condition in deciding a case of apostacy. If a child or an insane utters words of *kufr* (disbelief), it will not negate their faith. A child of understanding has been defined as one that understands that Islam guarantees salvation from the damnation of Hell, understands the difference between permissible (*ḥalāl*) and impermissible (*ḥarām*), between cleanliness and impurity and between sweet and sour. In an Islamic society, that could be a child of seven years of age.⁹⁷

⁹⁶ *The Criminal Law of Islam*, op. cit., p. 205.

⁹⁷ *Fatāwā 'Ālamghīrī*, op. cit. Vol. 3. p. 447.

2. If a person's insanity is not permanent and the person recovers for a period and then relapses, if such a person utters words of disbelief in a state of having recovered, though for a short period, it will be regarded as genuine apostasy.⁹⁸
3. Soberity. If a person utters words of disbelief under intoxication, it will not affect his faith.⁹⁹
4. Volition. If words of disbelief are uttered under duress and compulsion, it does not affect the state of one's belief.¹⁰⁰
5. The issue of gender is also not a deciding factor in matters of apostasy. If a person reneges on Islam, it is recommended that Islam is presented to such a person and his/her doubts removed. If the person asks for respite, the person should be granted respite and kept behind bars for a period of three days, with Islam being presented to him/her every day. Even if the person did not ask for respite, and if there are strong indications that the said person will revert to Islam,

⁹⁸ Ibid.

⁹⁹ *Bahār-e-Sharī'at*, op. cit. Vol. 9, p. 143.

¹⁰⁰ Ibid.

the person should be kept behind bars for three days. If the person accepts Islam, well and good, failing which the person should be executed.

6. If a person converts to Judaism or Christianity, thereafter he/she wants to revert to Islam, he/she will have to express dislike for those religions when reverting to Islam.¹⁰¹

7. If the apostate has denied any fundamentals of Islam, he/she will have to confirm belief in that fundamental of Islam, merely reciting the dictum of faith will not suffice.¹⁰²

The following points are important to be noted here in regard to someone who apostasizes and thereafter repents:¹⁰³

1. An apostate that has repented will have to validate his /her marriage. If the wife, who has separated due to the husband's apostasy does not want to remarry him, he cannot compel her to marry him. However, if the wife has recanted Islam and she reverts to Islam she will be

¹⁰¹ Ibid, p. 144.

¹⁰² Ibid.

¹⁰³ Ibid, pp. 144-145.

compelled to remarry her husband whom she was married to before her apostasy.

2. Due to apostasy all the good deeds will be invalidated. If the person had performed *Hajj* before his apostasy, that stands invalidated. He/she will have to perform *Hajj* again.
3. Due to someone's apostasy, an animal slaughtered by that particular apostate will not be regarded as *ḥalāl*.
4. An apostate cannot be a witness in any matter.
5. An apostate cannot be an heir. However, the Muslim wife will inherit from an apostate husband.

2.2.7.3 Contempt for the Prophet Muḥammad ﷺ

Muslim jurists concur that *ḥadd* punishment must be applied upon any person who reviles any of the Prophets ﷺ, including the Prophet Muḥammad ﷺ. This ruling is in accordance with the *Ḥadīth*:

Kill the person who abuses a Prophet ﷺ and whip
the one who abuses my Companions ﷺ.¹⁰⁴

All Prophets (a.s.) were chosen by *Allāh* ﷻ to lead mankind. They possessed unblemished character so that they were in a position to lead their peoples by example. Hence, accusing Prophets (a.s.) of sinful acts is tantamounts to disbelief (*kufr*).¹⁰⁵ Likewise, showing disregard to Prophet Muḥammad's ﷺ *Sunnah* constitutes an act of disbelief.¹⁰⁶

This is so because Muslims are reminded in the *Holy Qur'ān* to imitate the practices of the Prophet of Islam ﷺ. In this regard, the *Holy Qur'ān* states:

*“Say: ‘If you do love Allāh, Follow me: Allāh will
love you, and forgive you your sins: And Allāh is
oft Forgiving, Most Merciful.’”*(Āl ‘Imrān, 3:31)

¹⁰⁴ Qāḍī ‘Iyād Ibn Mūsā al-Yashūbī. *Al-Shifā’*. Cairo. Maṭba‘at al-Mashhad al-Ḥusaynī. N.D. Vol. 2, p. 240.

¹⁰⁵ *Fatāwā ‘Ālamghīrī*, op. cit. p. 459.

¹⁰⁶ *Ibid.*

“Say: ‘Obey Allāh and His Apostle.’ But if they turn back, Allāh loveth not those who reject Faith.” (Āl ‘Imrān, 3:32)

Muslims are expected to obey the Prophet Muḥammad ﷺ and to imitate him in view of the fact that Allāh ﷻ has declared his ﷺ life pattern a model for them. The *Holy Qur’ān* reinforces this as follows:

“You have indeed in the Apostle of Allāh a beautiful pattern of (conduct) for anyone whose hope is in Allāh and the Final Day, and who engages much in the praise of Allāh.” (Al-Aḥzāb, 33:21)

There are several incidents in the annals of Islamic history which confirm that people were actually executed for reviling the Prophet Muḥammad ﷺ. For example, Quraybah, who was a songstress and belonged to the tribe of Ibn Khatl, and was engaged in the vilification of the Prophet Muḥammad ﷺ was executed.¹⁰⁷ Likewise, Huwayrith Ibn Naqīd who was a poet and was

¹⁰⁷ Ibid.p. 506.

actively involved in reviling the Prophet Muḥammad ﷺ was also executed by Sayyidunā ‘Alī ؑ on the day of the Conquest of Makkah.¹⁰⁸

However, there are other historical records which corroborate that the Prophet Muḥammad ﷺ forgave some people who had actually reviled him ﷺ. One such person was Ka‘b Ibn Zuhayr. An order of execution was issued against him. His brother, Nahr Ibn Ashraf, who had embraced Islam pleaded for immunity on his behalf. The Prophet Muḥammad ﷺ granted him immunity. Subsequently, he met the Prophet Muḥammad ﷺ and he sincerely repented for his folly and embraced Islam. The Prophet Muḥammad ﷺ gave him his shawl as a gift.¹⁰⁹

It is thus apparent that reviling the Prophet Muḥammad ﷺ or any other Prophet ﷺ is viewed in a serious light and this accounts for the late Ayatullah Khomeini issuing the *fatwā* of death on the Indian born novelist Salam Rushie for ridiculing the teachings of Islam and abusing the Prophet Muḥammad ﷺ in his contemptuous novel *Satanic Verses*.

¹⁰⁸ Ibid.p. 500.

¹⁰⁹ Ibid.pp. 501-502.

CONCLUSION

While the *Holy Qur'ān* upholds the sanctity of life, it allows for the death penalty to be imposed in the form of *ḥudūd* punishments for those involved in any one of the seven categories of crime discussed in this chapter. The general Qur'anic imperative which sanctions imposing the death penalty is:

*“And do not take any human being’s life- (the life)
which Allāh has willed sacred – otherwise (in the
pursuit) of justice.” (Banī Isrā’īl, 17:33)*

Involvement in all such crimes which are liable for *ḥudūd* punishments are in effect transgression against the limits set by the Creator of humankind, namely *Allāh* ﷻ. It is thus the prerogative of *Allāh* ﷻ Who bestowed life to decree under what circumstances and for what crimes the death penalty may be imposed. It is precisely for the sake of curtailing crimes, ensuring peace, security and tranquility within society that Islam prescribes just punishments for all such acts injurious to life and the welfare of the people without reasonable justification.

A valid question that may be raised over here is whether there is any room for repentance for the persons who are found guilty of committing such crimes which are liable for *ḥudūd* punishments? Of the seven crimes discussed in this chapter only *ḥirābah* and *irtidād* offences could be nullified by repentance. However, in the case of *ḥirābah*, the armed robber must repent before being arrested. His repentance after being arrested would in no way nullify the *ḥadd* punishment. As for the apostate, there is a report that when *Sayyidunā* ‘Umar ؓ was told that the people had killed an apostate without giving him opportunity to repent, he told them that why did they not give him opportunity for repentance so that he might have repented.”¹¹⁰ As for the other five categories of crime, repentance would in no way nullify the *ḥadd* punishment. Advocate M.A. Vahed explains the rationale behind that in the following words:

However, when a crime liable for *ḥadd* is proved, the repentance of the offender may not annul the punishment. Repentance is a secret thing and its veracity cannot be determined until regard is had to the offender’s future conduct. Moreover, if

¹¹⁰ *The Criminal Law of Islam*, op. cit., p. 205.

repentance in every offence removes punishment,
then every criminal will repent and no one will be
punished.¹¹¹

¹¹¹ *Crime and Punishment*, op. cit. pp. 92-93.

Chapter Three

HUMAN RIGHTS

INTRODUCTION

The United Nations (UN) has described human rights as follows:

Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings.

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.¹

¹ United Nations. *Human Rights: Questions and Answers*. 4 (1987).

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948 at its meeting in Paris as a resolution having no force of law. This document may be regarded as the first landmark in contemporary history in the development of the concept of human rights. Moreover, the Declaration has formed the basis for enacting regional Conventions on human rights, such as European Convention on Human Rights and Fundamental Freedoms, 1950 and American Convention on Human Rights, 1969. Furthermore, the provisions of the Universal Declaration have also influenced various national Constitutions which have been particularly enacted after its adoption in 1948.² The Constitution of the Republic of South Africa may here be cited as an example in which Chapter 2: Bill of Rights³ reflect the Civil and Political Rights mentioned in the Declaration in articles 3 to 21.

The provisions of the Universal Declaration may be classified into four categories:⁴

² See Jaswal, Paramjit S. and Jaswal, Nishtha. *Human Rights and the Law*. New Delhi. Abish Publishing House. 1996, pp. 32, 38 and 41.

³ See the Constitution of the Republic of South Africa which was adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, pp. 6-24.

⁴ *Human Rights and the Law*, op. cit., p. 34.

- i. General (articles 1 and 2)
- ii. Civil and Political Rights (articles 3 to 21)
- iii. Economic, Social and Cultural Rights (articles 22 to 27)
- iv. Concluding (articles 28 to 30)

The Constitution of the Republic of South Africa was adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. Chapter 2 deals with Bill of Rights.

In this chapter, only four of the 21 articles that appear in category (ii) of the Universal Declaration of Human Rights and four clauses in the South African Bill of Rights are addressed. The primary aim of this chapter is to assess whether Islam is amenable to the rights envisaged in both these documents.

3.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.⁵

⁵ *Human Rights and the Law*, op. cit., p. 280.

Article 3

Everyone has the right to life, liberty and security of person.⁶

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁷

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁸

3.2 SOUTH AFRICAN BILL OF RIGHTS

Equality

9. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex,

⁶ Ibid.

⁷ Ibid.

⁸ Ibid, p. 282.

pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁹

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.¹⁰

Life

11. Everyone has the right to life.¹¹

Freedom and security of person

12. (1) Everyone has the right to freedom and security of the person, which includes the right –
- (d) not to be tortured in any way and
- (e) not to be treated or punished in a cruel, inhuman and degrading way.¹²

⁹ *The Constitution of the Republic of South Africa*. South Africa. TYPEFACE MEDIA. 1996, p. 7.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

3.3 THE ISLAMIC NOTION OF DUTIES VERSUS RIGHTS

While one has to concede that the term “human rights” is not found in the Scriptures of the various religions, one cannot overlook the fact that theology presents a basis for a human rights theory which emanates from a law higher than the State and whose source is the Supreme Being.¹³ Hence, rights that emanate from the Divine are inalienable by mortal authority. Moreover, equality of all human beings in the eyes of God would necessarily be based on their common creation by God, but what is important to note is that all religions do impose limitations on individual freedoms. However, if one were to accept our common creation by a Compassionate God, it would imply that “God certainly endows men and women with a worth and dignity from which there can logically flow the components of comprehensive human rights system.”¹⁴

However, Islam emphasizes ‘obligation’ or ‘duty’ in contrast to ‘right’. The reason for this is that when one speaks of right, it implies a right against someone. In other words, right means that someone else owes something to

¹³ Shestack, Jerome J. “The Jurisprudence of Human Rights” in Theodor Meron (Ed.). *Human Rights in International Law: Legal Policy Issues*. Oxford. Clarendon Press. 1984, p. 74.

¹⁴ Ibid, pp. 76-77.

us. On the other hand, when we say: 'it is our duty', it means that someone has a right against us. The late *Mawlānā* Dr Muḥammad Fazl-ur-Raḥmān Anṣārī elaborating upon the issue of duty versus right states:

The emphasis on duty creates harmony in social life, because if everyone were to concentrate on his or her duty, the emphasis on grumbling for rights will naturally vanish. On the contrary, the emphasis on rights creates strife, because if everyone were to think about his rights on others, he would hardly have the mind to think about his duties towards others. The immense increase in quarrels, and strifes between the different classes of human beings, as for instance, between the labourers and capitalists, and between races and nations, which we find in the world today, is the direct outcome of the emphasis on rights. As regards the political life in different countries, the subjects or citizens clamour for their rights more than taking pains for fulfilling their duties towards

their fellow-beings, the state and the country. Everyone tries to transfer the blame to the shoulders of others, and the confusion gets even worse. This state of affairs will not improve unless the world adopts the Qur'anic emphasis on duty.¹⁵

3.4 ROLE OF ALLĀH ﷻ IN THE UNIVERSE

The Institute of Islamic Information and Education (III & E) of Chicago, Illinois, in its Brochure Series, No. 7, describes the role of *Allāh* ﷻ as follows:

Since *Allāh* ﷻ is the Absolute and the Sole Master of men and the universe, He ﷻ is the Sovereign Lord, the Sustainer and Nourisher, the Merciful, Whose Mercy enshrines all beings; and since He ﷻ has given each man human dignity and honor, and breathed into him of His ﷻ own spirit, it

¹⁵ Ansari, M F R. *The Qur'anic Foundations and Structure of Muslim Society*. Kuala Lumpur. Islamic Book Trust. 2001. Vol. II, pp. 5-6.

follows that, united in Him ﷻ and through Him ﷻ, and apart from their other human attributes, men are substantially the same and no tangible and actual distinction can be made among them, on account of their accidental differences such as nationality, color or race. Every human being is thereby related to all others and all become one community of brotherhood in their honorable and pleasant servitude to the most compassionate Lord of the Universe. In such a heavenly atmosphere the Islamic confession of the Oneness of *Allāh* ﷻ stands dominant and central, and necessarily entails the concept of the oneness of humanity and the brotherhood of mankind.¹⁶

3.5 HUMAN RIGHTS IN ISLAM

At the very outset, it is imperative to point out that human rights in Islam in reality implies the rights that have been conferred by *Allāh* ﷻ on humans.

¹⁶ The Institute of Islamic Information and Education. (No date) *Human Rights in Islam*. [online]. Chicago, The Institute of Islamic Information and Education. Available from: <http://www.Angelfire.Com/ny/dawah/doc7.html> [Accessed 4 July 2004].

These rights have undoubtedly not been granted by any king or by any legislative assembly. The late *Mawlānā* Abū al-A‘lā Mawdūdī aptly states:

The rights granted by the kings or the legislative assemblies, can also be withdrawn in the same manner in which they are conferred. The same is the case with the rights accepted and recognized by the dictators. They can confer them when they please and withdraw them when they wish; and they can openly violate them when they like. But since *Allāh* ﷻ has conferred human rights, no legislative assembly in the world or any government on earth has the right or authority to make any amendment or change in the rights conferred by *Allāh* ﷻ. No one has the right to abrogate them or withdraw them. Nor are they basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like

philosophical concepts which have no sanctions behind them.

Moreover, *Mawlānā* Abū al-A‘lā Mawdūdī makes a pertinent observation:

The charter and the proclamations and the resolutions of the United Nations cannot be compared with the rights sanctioned by *Allāh* ﷻ; because the former are not applicable on anybody while the latter are applicable on every believer. They are a part and parcel of the Islamic Faith. Every Muslim or administrator who claims himself to be Muslim, will have to accept, recognize and enforce them. If they fail to enforce them, and start denying the rights that have been guaranteed by *Allāh* ﷻ or make amendments and changes in them, or practically violate them while paying lip service to them, the verdict of the *Holy Qur’ān* for such government is clear and unequivocal:

"Those who do not judge by what Allāh has sent down are the disbelievers." (Al-Mā'idah, 5:44)¹⁷

3.5.1 Equality in dignity and rights

Both Article 1 of the Universal Declaration of Human Rights and the South African Bill of Rights acknowledge the equality of humankind. Islam too concurs to that, but points out that despite the fact that all humans are equal they are nevertheless not identical. In other words, they possess different abilities, potentials, ambitions, wealth, etc. Yet, none of these differences can by itself establish a status of superiority of one man or race to another. The only distinction which *Allāh* ﷻ recognizes is the distinction in piety, and the only criterion which *Allāh* ﷻ applies is the criterion of goodness and spiritual excellence.¹⁸ In this regard, the *Holy Qur'ān* states:

"O humankind! Verily, We have created you from a single (pair) of a male and female, and have made you into nations and tribes, that you may know each other. Verily, the most honoured of you

¹⁷ Mawdudi Abul A'la. *Human Rights in Islam*. Leicester. The Islamic Foundation. 1976, p. 14.

¹⁸ Abdalati, H. *Islam in Focus*. Indianapolis. American Trust Publications. 1977, p. 35.

*in the sight of Allāh is the most righteous.” (Al-
Hujurāt, 49:13)*

Hammūdah ‘Abd al-‘Āṭī enumerates some of the principles behind equality of humans as follows:

1. All men are created by the One and the Same Eternal God, the Supreme Lord of all.
2. All mankind belong to the human race and share equally in the common parentage of Adam and Eve.
3. God is just and kind to all His creatures. He is not partial to any race, age, or religion. The whole universe is His dominion and all people are His creatures.
4. All people are born equal in the sense that none brings any possession with him, and they die equal in the sense that they take back nothing of their worldly belongings.
5. God judges every person on the basis of his own merits according to his own deeds.
6. God has conferred on man, man as such, a title of honour and dignity.¹⁹

¹⁹ Ibid.

However, attention ought to be drawn here to the fact that in the South African Bill of Rights under Equality, it is stated that “the state may not unfairly discriminate directly or indirectly against anyone on any one or more grounds, including sexual orientation....” In other words, the state may not discriminate against homosexuals and lesbians. Islam would not endorse this statement in view of the fact that the *Holy Qur’ān* makes special mention in the *Holy Qur’ān* of the people of the Prophet Lūṭ ﷺ who were destroyed by *Allāh* ﷻ for indulging in homosexuality. We are told that the entire community, besides those that believed in the message preached by the Prophet Lūṭ ﷺ, were totally wiped out in the punishment that visited them in what was known as Sodom and Ghomorrah. The *Holy Qur’ān* states:

“We also (sent) Lūṭ: He said to his people: ‘Do you commit lewdness such as no people in creation (ever) committed before you? For 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 that lagged behind. And We rained down on them a shower (of brimstone): Then see what was the end of those who indulged in sin and crime!’ (Al-*A‘rāf*, 7:80-84)

The destruction of the People of Sodom and Gomorrah is related to demonstrate the disapproval of the Creator to unnatural sexual practices. Commenting on the magnitude of their destruction, ‘*Allāmah* ‘Abd Allāh Yūsuf ‘Alī states:

The cities of Sodom and Gomorrah were utterly destroyed, and even their precise positions cannot be identified. But the brimstone plain of the tract still exists, right on the highway between Arabia and Syria. To the traveler in the neighbourhood of the Dead Sea the whole locality presents a scene of

desolation which truly suggests the awful
punishment for unspeakable crimes.²⁰

Sodomy/homosexuality is considered by Muslim jurists to be more repulsive than *zinā*. The reason for this offence being exempt from *ḥadd* is that according to some jurists, *ḥadd* is meant to purify an offender, but this offence is so heinous that the sodomist can never attain purification without repenting sincerely. It has been further argued that sodomy is unlike adultery to merit the same punishment of *ḥadd* because it does not result in confusion as regards parentage as opposed to adultery, then it is also rare and not as common as adultery and in most cases the encouragement is one sided as opposed to adultery. It is the opinion of the majority of scholars that one who regards sodomy as *ḥalāl* (lawful) is an unbeliever.²¹

It is unfortunate that despite the alarming spread of AIDS in South Africa, homosexuality is nonchalantly being promoted through the news media. The slogan is “be proud of who you are” and “it does not matter with who you do it, as long as you are happy, that’s important.”

²⁰ Ali, Abdullah Yusuf. *The Holy Qur'an – Text Translation and Commentary*. Qatar. Presidency of Islamic Courts and Affairs. 1946. Footnote no. 1998.p. 650.

²¹ 'Alī, Amjad. *Baḥar-e-Sharī'at*. Karachi. Makatab-e-Razviyyah. N.D. Vol. 9, p. 82.

The AIDS pandemic is the outcome of the modern sexual revolution. The most common cause of transmission is through sexual intercourse, more importantly through anal penetration. There is no known cure for AIDS as yet besides anti retroviral drugs that slow the pace of the full development of Aids. These drugs are expensive and are coupled with side effects. In Africa, where the population is being decimated through AIDS related deaths not enough is being done by governments to fight the pandemic.

Poverty is adding to the misery of the AIDS sufferers. People are suffering from malnutrition and with the onset of the HIV virus the body succumbs without much of a fight. There are more than 11 million children living in poverty in South Africa despite the Child Grant being allocated to the single parents by the government.

The wrong message that is being fed to youths is that they are capable of making their own decisions on sexual activities. They are told that 'safe sex', i.e. engaging in sex by making use of a condom is the safest form of sex. But it is also a known fact that most of the youngsters are not willing to condomise, thereby exposing their partners to the risk of contracting HIV.

The youth culture has become such that they thrive on experimenting with multiple sexual partners and quite often they indulge in sexual activities under unhygienic conditions. Gay bars and restaurants are on the increase in South Africa and throughout the world. Gay marriages are also being solemnized and the Gay Pageant is becoming a regular feature in the major cities of South Africa. The alarming rate at which people are dying of AIDS has made no difference in the lifestyle of some people. They are not prepared to change their attitude towards sex even after seeing the devastation being wreaked by the AIDS pandemic.

The change in attitude will only come if the purpose of sex is properly understood, which is procreation and not the gratification of one's lust. Educating and conscientising has to take place to bring about a change in attitude as far as sexual activity is concerned. But to say that it is one's right to be homosexual or to be promiscuous will not in any way arrest the spread of the AIDS pandemic.

3.5.2 Right to life, liberty and security of person

Islam regards human blood to be sacred and that it should not be spilled without justification. Thus if anyone violates the sanctity of human blood

by killing a soul without justification, the *Holy Qur'ān* equates that to the killing of entire humankind:

“Whoso slays a soul not to retaliate for a soul slain, nor for corruption done in the land, it shall be as if he had slain humankind altogether.” (Al-Mā'idah, 5:32)

According to the teachings of Islam, life is given to humans by *Allāh* ﷻ and He ﷻ is the Rightful One to take it back, and hence no one else has the right to destroy a life. From that it follows that Islam forbids suicide and self-destruction. In essence, life is regarded as a trust from *Allāh* ﷻ and it ought to be safeguarded.²²

The Prophet Muḥammad ﷺ made the following statement during the Farewell *Hajj* (Pilgrimage):

²² *Islam in Focus*, op. cit., p. 28.

*Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection.*²³

In other words, not only the lives of people ought to be safeguarded, even their properties ought not to be violated.

The Prophet Muḥammad ﷺ has also warned his ﷺ followers to value the lives of the *dhimmīs* (the non-Muslim citizens of the Muslim state). He ﷺ said:

*One who kills a man under covenant (i.e., dhimmī) will not even smell the fragrance of Paradise.*²⁴

Insofar as security of person is concerned, *Mawlānā* Mawdūdī states:

Islam has also laid down the principle that no citizen can be imprisoned unless his guilt has been

²³ *Mishkāt al-Maṣābīh*. Bab Qur'ān Maḥal. N.D. Kitāb al-Ṣayd wa al-Dhabā'ih, p. 357.

²⁴ Al-Tirmidhī, Muḥammad Ibn 'Isā Ibn Sūrah. Jāmi' al-Tirmidhī. Karachi. Qur'ān Maḥal. 1967. Ḥadīth no. 1457. Vol. 1, p. 646.

proved in an open court. To arrest a man only on the basis of suspicion and to throw him into a prison without proper court proceedings and without providing him a reasonable opportunity to produce his defence is not permissible in Islam.²⁵

Islam also recognizes the right to the privacy of every citizen. The *Holy Qur'ān* states in this regard:

“Do not spy on one another.” (Al-Ḥujurāt, 49:12)

It further states:

“Do not enter any houses except your own homes unless you are sure of their occupants consent.”

(Al-Nūr, 24:27)

This prohibition could even be extended to the right of all citizens not to have their home phones bugged and mails intercepted. After all, the Prophet Muḥammad ﷺ prohibited people from peeping into other people's homes.²⁶

²⁵ *Human Rights in Islam*, op. cit., p. 28.

²⁶ Al-Qushayrī, Muslim Ibn al-Ḥajjāj Ibn Muslim. *Al-Ṣaḥīḥ li Muslim*. Karachi. Nūr Muḥammad Aṣaḥḥ al-Maṭābi'. 1956. Bāb Taḥrīm Naẓar fī bayt ghayriḥ. Vol. 2, p. 212.

3.5.3 Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment

The *Hudūd* punishments are viewed by the west to be barbaric. There is no denying the fact that the punishment for adultery is certainly severe, but one must not lose sight of what *Leviticus* 20 prescribes for the same crime. It states:

“If a man commits adultery with another man’s wife – with the wife of his neighbour – both adulterer and adulteress must be put to death.”²⁷

It is imperative to point out here that there are two ways by which the adulterer/adulteress may end up being stoned to death:

- (i) Four witnesses must have witnessed the act of adultery for the offender/s to be convicted. However, in many instances, it would be practically impossible to find four witnesses who would have witnessed the act simultaneously.
- (ii) The adulterer/adulteress must have confessed to the crime.

²⁷ *New International Version of the Holy Bible*. New York. New York International Bible Society. 1978, p. 127.

Insofar as retraction of confession is concerned the *Shari'ah* grants the accused permission to retract his/her confession before or after the announcement of the judgment or even during the execution of the punishment. This retraction shall *ipso facto* nullify the *ḥadd* punishment.²⁸

But what is even more interesting to note is that the *Shari'ah* is not bent upon punishing the culprit. In fact, the Prophet Muḥammad ﷺ said:

Try to avoid punishing Muslims whenever possible and if there is any way for an accused to escape punishment, let him off. An error of the judge in letting off an accused is better than one in punishing him.²⁹

Moreover, the *Shari'ah* even encourages the concealment of the wrongdoings of others rather than their being openly disclosed. In this regard, the Prophet Muḥammad ﷺ said:

²⁸ See *Crime and Punishment*, op. cit, pp.137-139.

²⁹ *Al-Jāmi' al-Tirmidhī*, op. cit. Ḥadīth no. 1449. Vol. 1, p. 643.

Whoever conceals (the shortcomings of a) Muslim
in this world, *Allāh* will conceal his shortcomings
in the Hereafter.³⁰

Furthermore, the *Shari‘ah* does not entertain the application of the *ḥadd* punishment if the crime is proved by the circumstantial evidence.³¹ Hence, we see that every precaution is taken to avoid the necessity of inflicting the sentence.

Despite the fact that the nature of the *ḥudūd* punishments is severe, one has to concede that such punishments have a deterrent effect on the community at large. In contrast to that, attention may be drawn here to the prevalence of some specific crimes in the absence of *Ḥudūd* Laws:

3.5.3.1 Extra-marital affairs

Indulgence in extra-marital affairs have become a norm in westernized societies and daily adverts continue to appear in the newspapers, despite the

³⁰ *Al-Jāmi‘ al-Tirmidhī*, op. cit. Ḥadīth no. 1451. Vol. 1, p. 644.

³¹ See *Crime and Punishment*, op. cit., p. 132.

threat that the AIDS pandemic pose to the survival of the human race, announcing the holding of morally degenerating parties such as wife swapping, etc.

Teachers in South African schools have been advised to treat children with kindness because the majority of them are HIV positive and they have a life span of ten to fifteen years! Why, we may rightfully ask, must innocent children pay for the wrongdoings of their parents? Do men who go around infecting women with the AIDS virus and results in children being born with HIV possess a conscience? Are the upholders of liberalism still going to promote promiscuity by using the logo ‘be wise and condomise’?

3.5.3.2 Sexual permissiveness

In an atmosphere of permissiveness young learners are experimenting with sex without realizing the moral, spiritual and physical hazards of their actions and not to speak of the psychological damage that they may incur as a result of their misadventures. The champions of libertinism silence those that speak from a moral platform by labeling them “old mother grundys.”

3.5.3.3 Incestuous relationships

Incest is another area of serious concern in South Africa. Since it is a sexual relationship between two individuals who are biologically linked, it leads to the betrayal of the victim's trust and at the same time destroys the innocence of the victim. In most cases children that fall prey to the advances of their perpetrators, do not know who to turn to or either they are bullied into silence.

According to the KwaZulu-Natal Correctional Services report, "More than 23,000 people, 3, 345 of them children, are languishing in South African prisons awaiting trial or serving sentences for sex offences."³² What fate awaits these children? Would they not be turned into hardened criminals by the time they are released, for they are not even safe in prisons where sexual molestation is rife?

3.5.3.4 Prostitution

Insofar as prostitution is concerned, today helpless young women are being brought into South Africa with false promises of lucrative jobs in the

³² Statistics cited in *Sunday Times* dated October 13, 2000.

country from Asian countries and are forced into sex labour to defray their expenses and pay extortion fees to their uncouth agents. Alas, in the so-called civilized world, women are still being exploited.³³ Ironically, in South Africa where the HIV/AIDS statistics keep on increasing, there is a move to legalize prostitution and prostitutes are being referred to as 'sex workers'. Furthermore, what is interesting to note is that the west has succeeded to condone illicit sexual encounters that result in the birth of a child by referring to a child born out of wedlock as a love child.

3.5.3.5 Pornography

Adding to the woes of our country, E-T.V. screens soft porn movies for public viewing. Although such movies carry an age restriction, yet it cannot be guaranteed that minors are not viewing such sleazy material in the absence of their parents.

³³ A documentary was telecast by the SABC, Assignment programme on Saturday 24-05-2003 highlighting the plight of women brought into South Africa from Thailand and forced into prostitution by a criminal syndicate.

Again, with the abundance of pornographic material available on the websites, paedophiles are having a field day luring children into sexual debauchery and the child sex racket is on the increase.

Lifestyle, a supplement of the *Sunday Times*, gives us an insight into the porn industry in America:

325,000 US children aged 17 or younger are prostitutes, performers in pornographic videos or have otherwise become victims of commercial sexual exploitation, according to a Pennsylvania study.

27.5 million visits were made to adult- oriented pornographic web sites in the US in January 2002, says Net Ratings. The amount people pay to view Internet porn sites is \$3-billion. 60% of all websites are sexual in nature. 100,000 Websites worldwide offer child pornography, which is illegal in every country across the globe. There

was a 345% increase in child porn sites between February and July 2001. 25 million Americans visit porn sites between one and ten hours each week.”³⁴

Addiction to porn websites inevitably also leads to a breakdown of family life.

3.5.3.6 Rape

Rape should actually be termed sexual assault for it is the intentional, unlawful sexual intercourse by force with another person without his/her consent. Rape victims endure a great amount of trauma and stress. In some cases it damages them psychologically. It instils fear into victims for strangers. They feel violated. Today, the greatest fear is that of contracting AIDS from rapists.

In South Africa, a woman is raped every two seconds. More than 80 percent of the world's HIV-positive people are in Southern Africa. In South Africa alone, it is estimated that 15,000 people are infected with the virus daily.³⁵

³⁴ “The facts about porn” in *Sunday Times Lifestyle*. April 6, 2003, p. 9.

³⁵ “Date Rape” in *True Love*. Sandton. Media 24 Magazine. July 20001, p.24

The reality is that rape is on the increase in South African schools. Last year, the former Minister of Education, Professor Kader Asmal made this shocking statement:

South African teachers were involved in more than 460 cases of rape, indecent assault of pupils during the past two years.³⁶

Child rape is another form of sexual crime that is making headlines in South Africa. Children are being subjected to the horrifying ordeal of being violated sexually, and deaths of toddlers are being reported by the news media quite frequently.³⁷

3.5.3.7 Alcohol and drug addiction

In this age of newly earned “freedom” and promiscuity especially the youth have to bear in mind since the intake of intoxicants lowers inhibitions, it is found that unwanted pregnancies are the result of sex after booze. Such

³⁶ Louw, Barnie. “Rape cases in schools” in *Educators Voice*. Pietermaritzburg. The Natal Witness and Publishing Company. May 2003. Vol.7.p. 21.

³⁷ Jurgens, Andre. “Child Rape” in the *Sunday Times*. November 17, 2002.

unthoughtful action could also lead to contracting HIV/AIDS, herpes and other sexually transmitted diseases. The breweries, the *shebeens*, the pubs and taverns are enriched at the expense of the alcoholics.

Alcoholism has a negative impact on the family life, in some cases leads to marital breakdown. Pub brawls, gun fights, fatal accidents and teenage suicides have all been attributed to the bottle. It goes without mentioning, the next morning hangover and a big hole in the pocket.

At nightclubs teenagers are being targeted by drug-peddlers. Drugs such as ecstasy or amphetamines are mixed with alcohol and offered to unsuspecting youths, knocking them unconscious. In some cases these dangerous cocktails proved fatal!

With the grim statistics before us, yet alcoholic beverages get a wide coverage on T.V. commercials, luring unsuspecting youngsters to experiment with intoxicants. The question that needs to be posed is: What leads people to becoming alcoholics?

Criminologists are of the opinion that some people drink due to lack of self-respect. There are those that drink to escape from reality. It is also found that killing a friend is often alcohol related. There are those that become permanent jailbirds because of their conduct after they have indulged in alcoholism. The fact remains that today's predatory crime, racketeering, car accidents, marital tensions, economic failure and many other human woes are very often closely related to excessive use of alcohol, regarded by many as one of our major social problems.³⁸ It is further stated that even when taken in small amounts, alcohol often weakens inhibition and some violent personal crimes like murder, aggravated assault and forcible rape are to a certain extent alcohol related.³⁹

The South African National Council on Alcoholism and Drug Dependence (SANCA) reveals that although illegal drugs are becoming a serious cause for concern, alcohol is still probably the most widely abused substance-not just amongst youngsters but among adults too.⁴⁰

³⁸ *Criminology*, op. cit. pp. 223-224.

³⁹ *Sociology Deviant Behaviour*, op. cit., p. 397.

⁴⁰ Segar, Susan. "Help your kids beat booze" in *Readers Digest*. Cape Town. Readers Digest Association. November 1997. Vol. 151. No. 907, p. 64.

Studies provide dramatic evidence of the extent of the problem. A 1994 Human Sciences Research Council survey of urban black South Africans between the ages of 10 and 21 found that 40,4 percent of males and 32,4% of females described themselves as current drinkers. Almost 27% of both groups had had their first drinks between the ages of ten and thirteen.⁴¹

3.5.4 Right to freedom of thought, conscience and religion

Dr Hammudah 'Abd al-'Āṭī rightly points out that Islam recognizes that all humans are born free from subjugation, sin, inherited inferiority and ancestral hindrance and that this freedom is sacred as long as they not violate the Law of *Allāh* ﷻ or desecrate the rights of others.⁴² In other words, Muslims are not totally free in view of the fact that they believe in *Allāh* ﷻ and follow the *Sharī'ah*. Hence, Islam gives conditional right of freedom of thought and expression. Muslims are expected to use this right for the propagation of virtue and truth and not for spreading evil and wickedness. Under no circumstances would Islam allow evil and

⁴¹ Ibid, p. 64.

⁴² *Islam in Focus*, op. cit, pp. 33-34.

wickedness to be propagated.⁴³ Moreover, Muslims are not expected to hurt the feelings of others. Dr Rahim Ebrahim sums up the wisdom in that as follows:

Such evil practices like malicious exposure of people's faults, character assassination, i.e. slandering, either verbally or in writing, sarcasm, i.e. passing derogatory remarks against a person, either directly or indirectly, and looking down upon the poor, can erode the bond of brotherhood and result in destabilising peace and harmony within a community."⁴⁴

Insofar as freedom of conscience and religion is concerned, Islam has laid down the following injunction:

"There should be no coercion in the matter of faith." (Al-Baqarah, 2:256)

⁴³ *Human Rights in Islam*, op. cit, p. 31.

⁴⁴ Ebrahim, Rahim. *Sūrat al-Ḥujurāt – An explanation of its major themes*. Durban. Galaxy Printers. 1998, p. 47.

This means that everyone has the right to exercise the freedom of belief, conscience and worship. This accounts for the *dhimmīs* being accorded the right to worship in the annals of Islamic history. Moreover, Islam also accords to non-Muslims the right to express their religious sentiments and that whatever they believe in would not be ridiculed:

“Do not abuse those they call upon besides Allāh.”

(Al-An‘ām, 6: 108)

However, whilst the *Sharī‘ah* holds all humans free to choose or follow any religion, Muslims who reside within the Islamic State are not allowed to renounce Islam and convert to any other religion for that would in effect be tantamount to exiting from the political affiliation with the *Ummah* or the Islamic State. After all, the Sovereign within the Islamic State is *Allāh* ﷻ and one’s exit from the fold of Islam would in essence imply defying the authority of *Allāh* ﷻ.

CONCLUSION

There is no doubt that Islam is amenable to the clauses envisaged in both the Universal Human Declaration of Human Rights and the South African Constitution. One must not lose sight of the fact that in no human society can any individual be free in the absolute sense of the word. It is common practice that in every state or country, there are some limitations placed upon its citizens in one form or another for the sake of security of its citizens and to ensure that law and order prevail. Within the Islamic system, *Allāh* ﷻ is regarded to be the Absolute Sovereign and hence if any of the so called human rights violate His *Shari'ah*, it would not be upheld. It is precisely for this reason that Islam lays emphasis upon duties rather than rights.

Chapter Four

***HUDŪD* PUNISHMENTS AND HUMAN RIGHTS**

INTRODUCTION

In chapter three of this dissertation, it was argued that *hudūd* punishments ought not to be viewed as infringements upon human rights, but rather, as a check on safeguarding that the rights of others conferred upon them by their Creator are in no way violated by any unscrupulous person. It may be appropriate to recap here that *hudūd* punishments have been prescribed for certain specific offences which violate the honour, property and life of the citizens and the security of the State. Hence, crimes that merit the *hudūd* punishments pertain to the interests of the individuals and are as follows:¹

- i. Crimes relating to honour can be in the form of:
 - (a) slandering chaste women;
 - (b) fornication and adultery;
 - (c) homosexuality.

¹ *Qur'anic Foundations and Structure of Muslim Society*, op. cit. Vol. II, p. 411.

- ii. Crimes relating to property can be in respect of:
 - (a) theft;
 - (b) robbery.

- iii. Crimes relating to life can be effected by:
 - (a) murder;
 - (b) mutilation.

- iv. Crimes which pertain to the interests of the State is on the basis of:
Treason.

In this chapter an attempt is made to determine the sanctions behind the *ḥudūd* punishments and this would entail discussing the Sovereignty of *Allāh*, the legislative authority of Prophet Muḥammad ﷺ and whether the *Qāḍī* (Muslim judge) has the right to suspend the imposition of *ḥudūd* punishments. Another important point to be addressed is whether *ḥudūd* punishments do in fact infringe upon human rights.

4.1 ALLĀH'S ﷻ SOVEREIGNTY

The notion of sovereignty of *Allāh* ﷻ is different in definition and application from the way that it is perceived in secular societies. In such societies, sovereignty is derived from people and/or can be abrogated by a ruler, i.e. a king or dictator, who then attributes it to his own person.

The Qur'anic concept of sovereignty, on the other hand, implies that *Allāh* ﷻ is the only Supreme Sovereign Power in the entire universe as is explicitly stated in the *Holy Qur'ān*, which Muslims regard to be the verbatim Word (*Kalām*) of *Allāh* ﷻ:

“To Allāh belongs the dominion of the heavens and the earth; and Allāh has power over all things.”
(*Āl ‘Imrān*, 3:189)

“Your Guardian-Lord is Allāh, Who created the heavens and the earth in six days, and is firmly on the Throne (of authority): He draws the night as a veil over the day, each seeking each other in rapid

succession: He created the sun, the moon, and the stars, (all) governed by laws under His command. Is not His to create and to govern? Blessed be Allāh, the Cherisher and Sustainer of the Worlds!"
(Al-A'raf, 7:54)

Professor Haroon Khan Sherwani sheds light on how the Sovereignty of Allāh ﷻ operates within the Islamic State:

It is obvious, however, that God does not exercise His authority directly in political matters but delegates it to human beings. The whole conception of the supremacy of God and the vicegerency of man rests on the principle that God exercises His power and authority through human agency and that there should be uniformity in the behaviour of the vicegerents as have faith and are prone to do good deeds, for without this even an

attempt at obedience to the universal Laws of Nature would not be possible.²

Hence, the Muslim ruler is different from the “sovereign” as conceived by western political scientists in that according to the Qur’anic teachings, no person can be an autocrat as Professor Manzooruddin Ahmed rightly points out that within the Islamic political system the very basis of political power implies *amānah* (trust) and *wilāyah* (delegation) which entails responsibility.³

In other words, the Muslim ruler as well as his subjects have to fulfil their moral, legal and social obligations as decreed by Divine Law, for ultimate accountability is with *Allāh* ﷻ. Thus the person who is empowered with political authority has to accept the universal principles laid down in the *Holy Qur’ān*. Moreover, he has to take all the necessary measures for the enactment and enforcement of Divine Laws for combating all tendencies,

² Sherwani, H K. *Studies in Muslim Political Thought and Administration*. Lahore. Sh. Muhammad Ashraf. 1970, p. 274.

³ Ahmed, Manzooruddin. *Islamic Political System in the Modern Age – Theory and Practice*. Karachi. Saad Publications. 1983, p. 27.

acts and forces that are detrimental to the cause of moral welfare, and for punishing the actual offenders.⁴

It is thus evident that within the Islamic framework, Allāh ﷻ is the absolute Law Giver and the authority of absolute legislation rests in Him ﷻ. It follows that Muslims who have been vested with political authority cannot resort to total independent legislation, nor can they modify any law which has been Divinely ordained. The *Holy Qur'ān* emphatically warns:

“If any fail to judge (by the light) of what Allāh has revealed, they are (no better than) unbelievers.”
(*Al-Mā'idah*, 5:47)

“And if any do fail to judge (by the light) of what Allāh has revealed, they are (no better than) wrongdoers.” (*Al-Mā'idah*, 5:48)

⁴ *Qur'anic Foundations and Structure of Muslim Society*, op. cit. Vol. II, p. 64.

“If any do fail to judge (by the light) of what Allāh has revealed, they are (no better than) those who rebel.” (Al-Mā'idah, 5:50)

Hence, those who exercise political authority are entrusted to enforce all Divine injunctions including the *Hudūd* punishments as laid down by the *Holy Qur'ān* and ratified by the Prophet Muḥammad ﷺ and this brings us to the issue of the legislative authority of the Prophet Muḥammad ﷺ.

4.2 LEGISLATIVE AUTHORITY OF THE PROPHET MUḤAMMAD ﷺ

In order for one to be in a position to grasp the legislative authority of the Prophet Muḥammad ﷺ one has to come to terms with the fact that the *Holy Qur'ān* contains some rules and regulations which have not been dealt with in detail and the Prophet Muḥammad ﷺ was entrusted by *Allāh* ﷻ to interpret these injunctions either in word or deed:

“....We have sent down unto you (also) the Message; that you may explain clearly to men what is sent for them” (Al-Naḥl, 16:44)

Thus, the Prophet Muḥammad ﷺ, through his *Sunnah*, supplemented the details for the implementation of the Divine commandments. Moreover, interestingly *Allāh* ﷻ describes the Prophet Muḥammad ﷺ as the “legislator”:

*“Those who follow the Apostle, the unlettered Prophet, whom they find mentioned in their own (Scriptures), -----in the Law and the Gospel; -----
- for he commands them what is just and forbids them what is evil; he allows them as lawful what is good (and pure) and prohibits them from what is bad (and impure); he releases them from their heavy yokes that are upon them. So it is those who believe in him and follow the Light which is sent down with him, -- it is they who will prosper.” (Al-A‘rāf, 7:157)*

Furthermore, what is to be noted here is that the Prophet Muḥammad’s ﷺ decisions, judgments and commandments have binding authority in all

spheres of human life. *Allāh* ﷻ endorses obedience to the Prophet Muḥammad ﷺ and in this regard states:

“He who obeys the Apostle, obeys Allāh.” (Al-Nisā’, 4:80)

Hence, the legislative authority of the Prophet Muḥammad ﷺ emanates from the Creator Himself ﷻ and Muslims in general ought to cautious not to contradict his ﷺ authority:

“But those who disobey Allāh and His Apostle and transgress His limits will be admitted to a Fire, to abide therein: And they shall have a humiliating experience.” (Al-Nisā’, 4:14)

The Prophet Muḥammad ﷺ further stresses the consequence of disobeying what he has promulgated and enacted in the following *Ḥadīth*:

All my people will enter Paradise except those who refuse. On being asked who refused, he

replied: “He who obeys me will enter Paradise and he who disobeys me has refused.”⁵

4.3 PECULIARITY OF *ḤUDŪD* PUNISHMENTS

As pointed out in chapter two of this dissertation, *ḥudūd* are mandatory punishments that are to be inflicted upon the offenders for having been found guilty of indulging in certain specific crimes. The forms that these punishments ought to take have been determined by the *Wahī* (Divine Revelation) and the *Sunnah* of the Prophet Muḥammad ﷺ. It is thus evident, from what has been discussed in this chapter thus far, that for all such crimes that fall within the *ḥudūd* category, the *Qāḍī* would have no discretion to alter or reduce the prescribed punishment once the crime is proved beyond doubt or the offender has confessed to the crime.

Gauging these punishments from the perspective of human rights, one would most certainly conclude that they are severe and harsh. However, the

⁵ Robson, James. *Mishkāt al-Maṣābīḥ – English Translation with Explanatory Notes*. Lahore. Sh. Muḥamad Ashraf. 1968. Vol. 1, p. 39.

observation of the late Dr Muhammad Hamidullah gives us an insight into the nature of Islamic law and morality:

Islam is based on the belief of Divine revelation sent to men through prophets as intermediaries. Its law and morality, even its faith, are therefore based on Divine commandments. It is possible that in the majority of cases human reason also should arrive at the same conclusion but essentially it is the Divine aspect which has the decisive significance in Islam and not the reasoning of a philosopher, a jurist or a moralist, the more so because the reasoning of different individuals may differ and lead to completely opposite conclusions. Sometimes the motive of discipline is found underlying an obligation and practice which is apparently superfluous.

One may divide human actions, first of all, into good and evil, represented by orders and

prohibitions. The acts from which one must abstain are also divided into two big categories: Those against which there is temporal sanction or material punishment in addition to condemnation on the day of the Final Judgement and those which are condemned by Islam without providing a sanction other than that of the Hereafter.”⁶

From the elucidation of Dr Muhammad Hamidullah, it can be deduced that Islam attaches special importance to morality. Through its *ḥudūd* punishments, Islam aims “to attack the very sources of evil and not merely certain of its manifestations”.⁷ This is in essence the stance of Islam with respect to law, morality, prevention of evil, and its system of punishment. But what needs to be noted is that “in order to establish the guilt of the culprit in *ḥudūd* cases, a very difficult legal proof is always required. In fact the rules of the Muslim canon-law offer everybody the opportunity for escaping such punishments. Practically there is only one ground on which the legal evidence and the execution of ‘determined punishments’ may be

⁶ Hamidullah, M. *Introduction to Islam*. Qum. Ansariyah Publication. 1982, p. 86.

⁷ *Ibid*, p. 139.

based, namely the confession of the culprit himself; so that in this respect, the “determined punishments” have the character of penitence.”⁸

Therefore, for us to be in a position to fully grasp and comprehend the peculiar nature of *ḥudūd* punishments, it is imperative to highlight some of the differences between the Islamic and western ideologies: “Firstly, Islam does not believe in the principle of separation of the spiritual and the temporal, the sacred and the profane nor the church and the state. Secondly, unlike in the western system, Islam does not separate the treatment of the moral and the legal. Islamic law is essentially a code of moral standards which are to be observed in a Muslim Society and the function of the law is to enforce these moral standards even by punishments. Islamic Society’s standard of morality is indeed very much higher and strict than those of other societies. Thirdly, sexual immorality is considered particularly reprehensible in Islam for two of the seven *ḥudūd* punishments are related to the sexual offenses of fornication, adultery and false accusation of chastity. Finally, Islam makes no distinction between private and public morality. The Islamic concept of personal freedom is thus the complete

⁸ Gibb, H.A.R. and Kramers, J. H. *The Shorter Encyclopedia of Islam*. Leiden. E.J. Brill.1995, p. 15.

opposite of contemporary western thought. According to Islam, personal freedom is available and permissible only in respect to matters which are not regulated by the injunctions and prohibitions laid down by the *Holy Qur'ān* and the *Sunnah*, for these are expressions of the inherent Divine Wisdom manifested through the Divine Will.”⁹

4.4 HUMAN RIGHTS AND THE DEATH PENALTY

Article 3 of the Universal Declaration of Human Rights proclaims:

“Everyone has the right to life, liberty and security of person”.

This right is particularly important to be upheld for one to be able to enjoy all other rights.

It is important to note that on 25 November 1981, the General Assembly decided to consider the idea of elaborating upon a draft of a Second Optional

⁹ <http://www.Angelfire.Com/ny/dawah/doc7.html>

Protocol to the International Covenant on Civil and Political Rights aiming at the abolishment of death penalty.¹⁰

At this juncture, a pertinent question that may be posed is why is it necessary for member States to consider and implement the abolition of death penalty? The obvious answer is that death penalty violates Article 3 of the Universal Declaration of Human Rights which proclaims that everyone has the right to life. Hence, abolition of the death penalty is considered desirable for the enhancement of human dignity. Interestingly though, there is one important exception that is made in regard to the imposition of death penalty. Mention is made that any State Party ratifying the Second Optional Protocol may make a reservation at the time of ratification or accession that provides for application of the death penalty in times of war pursuant to a conviction for a most serious crime of a military nature committed during war time. The State Party making such a reservation is required to communicate to the Secretary General of the United Nations the relevant provisions of its national legislation applicable during wartime. The State Party making such reservation is also required to notify the Secretary

¹⁰ *Human Rights and the Law*, op. cit., p. 56.

General of the United Nations of any beginning or ending of a state of war applicable to its territory.¹¹

Before attempting to address whether the imposition of the death penalty infringes upon human rights, it is important to note the progress made by the United Nations members in the abolishment of the death penalty. Richard C. Dieter, Executive Director, Death Penalty Information Center, points out that while in 1986, 46 countries had abolished the death penalty for ordinary crimes, sixteen years later, the number of countries that had abolished the death penalty had almost doubled to 89. Moreover, another 22 countries had stopped using the death penalty in practice, bringing the total of non-death penalty countries to 111, far more than the 84 countries which retain an active death penalty.¹²

Various nations have abolished the death penalty for different reasons. For example, Spain abandoned the last vestiges of its death penalty in 1995, stating that: “the death penalty has no place in the general penal system of advanced, civilized societies . . . What more *degrading or afflictive*

¹¹ *Human Rights and the Law*, op. cit., p. 57.

¹² Dieter, Richard C. *The Death Penalty and Human Rights: U.S. Death Penalty and International Law*
<http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>

punishment can be imagined than to deprive a person of his life . . . ?” Switzerland, on the other hand, abolished the death penalty because it felt that the death penalty constituted “a flagrant violation of the *right to life and dignity*.” Insofar as South Africa is concerned, Justice Chaskalson, the current Chief Justice of South Africa, stated in a historic opinion banning the death penalty under the new constitution that: “The rights to life and dignity are the most important of all human rights And this must be demonstrated by the State in everything that it does, including the way it punishes criminals.”¹³

At this juncture, it may be appropriate to point out that not all member states of the United Nations consider the death penalty to be a human rights issue. This became apparent when the United Nations General Assembly considered a resolution in 1994 to restrict the death penalty and encourage a moratorium on executions. Singapore asserted: “Capital punishment is not a human rights issue.” The resolution failed to be passed since 74 countries abstained from voting on that particular resolution. However, we cannot deny the fact that for an increasing number of countries the death penalty is a critical human rights issue. Thus in 1997, the U.N. High Commission for

¹³ <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>

Human Rights approved a resolution stating that the “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.”

The member states of the Council of Europe have established Protocol 6 to the European Convention on Human Rights calling for the abolition of the death penalty. The European Union (EU) went a step further and made the abolition of the death penalty a precondition for entry into the Union. This prompted many eastern European countries which had applied for membership to the EU to halt executions resulting in the halting of executions in many eastern European countries. For example, Poland, Yugoslavia, Serbia and Montenegro had all voted to halt the death penalty.¹⁴

Moreover, challenging the death penalty is not seen solely as an internal matter among nations. Many European countries, along with Canada, Mexico, and South Africa, have resisted extraditing persons to countries like the United States unless there are assurances that the death penalty will not be sought.¹⁵

¹⁴ Ibid.

¹⁵ Ibid.

4.5 INHUMAN PUNISHMENTS AND HUMAN RIGHTS

Article 5 of the Universal Declaration of Human Rights stipulates:

No one shall be subjected to torture or cruel,
inhuman or degrading treatment or punishment.

In 2000, Justice Chibesakunda at the High Court in Zambia did away with corporal punishment in the country with a stroke of the pen. The following report on this issue makes interesting reading:

A landmark High Court ruling has cheered human rights activists and many others alike. The ruling quashing corporal punishment is to many such groups a victory for human rights. It is a ruling that arose from a case in which the Law Association of Zambia (LAZ) through Henry Chanda had appealed against a decision of the subordinate court to mete out a sentence of 10 strokes of the cane on a 19-year-old Lusaka youth. The youth

had been charged with causing malicious damage to property.

In his grounds of appeal, Chanda argued that the sentence of 10 strokes of the cane was too brutal, inhuman and barbaric. He described this punishment as a legacy from the colonial past where the black person was the target and that throughout the colonial period, no court ever imposed corporal punishment on a white person. In passing judgement, Judge Chulu said corporal punishment was a wrong principle and sections of the penal code which allowed it be struck of the Act.

According to a 1998 local study carried out by the Inter-African Network for Human Rights and Development (AFRONET), a human rights group, the law vests the power to impose this sentence in the local court. The local court justices said that

they did not inflict this punishment. They were unanimous that it is an inhuman and degrading punishment. Many of the justices blame magistrates for inflicting corporal punishment more often.

This observation was confirmed by a majority of magistrate respondents in the survey. The magistrates accepted the proposition that corporal punishment was inhuman and degrading and thus in conflict with article 15 of the Constitution. In the absence of an authoritative ruling by the High Court outlawing this form of punishment, they felt inclined to use this as an option to imprisonment.

The study also revealed that one magistrate felt very strongly against corporal punishment. There is a provision that a person sentenced to suffer corporal punishment should be detained while waiting for the sentence to be confirmed. This

provision technically constitutes double punishment for one offence.

The Permanent Human Rights Commission (PHRC) a statutory human rights body, is among them, but it has called on the Supreme court to confirm the banning of corporal punishment made in a landmark ruling by High Court judge Elliot Chulu in Lusaka. PHRC chairperson Lombe Chibesakunda said the ban was in line with what the commission had always advocated.¹⁶

It may safely be stated here that Article 5 greatly influenced Justice Chibesakunda's passing of that landmark judgement.

Let us now try to determine whether Islam upholds the two articles, namely 3 and 5 of the Universal Declaration of Human Rights. In order for us to be in a position to assess that, it is imperative that we that on the basis of the

¹⁶ Sibanda, Newton. "Judge quashes oppressive law" in *Africa News online*. Kenya. Word Corporal Punishment Research www.corpun.com [Accessed on 11/11/04].

broad teachings of the original sources of Islam, namely, the *Holy Qur'ān* and *Ḥadīth* (the Prophetic Traditions).

4.5.1 Right to life, liberty and security of person

Islam upholds the sanctity of life as is evident from this Qur'anic citation:

“And if anyone saved a life, it would be as if he saved the lives of the whole of humankind.” (Al-Mā'idah, 5:35)

On the occasion of his first and last *Ḥajj* (Pilgrimage), the Prophet Muḥammad ﷺ made the following statement in his famous *Khutbat al- al-Wadā'ah* Farewell Sermon:

*Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection.*¹⁷

¹⁷ *Mishkāt al-Maṣābīh*, op. cit. Bāb Qiṣṣat Ḥajjat al-Wadā'ah, p. 225.

Insofar as the security of life of the *dhimīs* (the non-Muslim citizens of the Muslim state) is concerned, the Prophet Muḥammad ﷺ gave this stern warning:

*One who kills a man under covenant (i.e., dhimmī)
will not even smell the fragrance of Paradise.*¹⁸

However, it is pertinent to note that the *Holy Qur'ān* does sanction Muslims to recourse to fight people (which implies that there would be loss of life) for the sake of ensuring that the fundamental human rights of others are upheld:

*“And why should you not fight in the cause of
Allāh and of those who, being weak, are ill-treated
(and oppressed)? Men, women and children whose
cry is: “Our Lord rescue us from this town whose
people are oppressors (Al-Nisā’, 4:75)*

¹⁸ Al-Tirmidhi, op. cit. Ḥadīth no. 1426. Vol. 1, p. 635.

Likewise, as we have seen in chapter two of this dissertation, it cannot be denied that the *Holy Qur'ān* also stipulates the death penalty for certain specific crimes. However, what ought to be reiterated here is that if the offenders sincerely repented for their having committed some of the specific crimes, their lives would be spared.

It may be appropriate here to address the issue of murder, which was not addressed in chapter two of this dissertation, since it does not fall within the category of *ḥudūd*, but rather of a different category altogether known as *Qīṣāṣ* (Equitable Retribution).

The *Holy Qur'ān* asserts the sacredness of life in the following citation:

“.....that if anyone killed a person – not in retaliation of murder, or for spreading mischief in the land – it would be as if he had killed all of mankind....” (Al-Mā'idah, 5:35)

The term *Qīṣāṣ* is derived from the Arabic root verb *qaṣṣa*, which means: 'he followed after his track of footsteps or endeavoured to track him'. It thus

follows that in view of the fact that the murderer is tracked down and punished; this procedure of retribution is known as *Qiṣāṣ*. In other words, in case of murder, a life should be taken for a life. However, this does not imply that the culprit should be killed in the same manner in which he chose to kill his victim. It only signifies that the life of the culprit should be taken since he took the life of his victim.¹⁹ In this regard, the *Holy Qur'ān* states:

*“And there is (a saving of) life for you in equitable
retribution, o men of understanding, that you may
become Allāh-fearing.” (Al-Baqarah, 2: 179)*

Thus, by taking the life of the murderer other lives of people in the community would be protected. In practically every country of the world where the serial killer was not apprehended and brought to justice, we found that security of life was at stake.

The *Holy Qur'ān* also makes provision for the family members of the victim to opt to accept what is termed as *Diyah* (Blood Money) in a lump-sum

¹⁹ Siddiqi, M.I. *The Penal Law of Islam*. Lahore. Kazi Publications. 1985, pp. 145 and 148.

payment as agreed upon with the offender in a ‘pact of compromise’.²⁰ The Holy Qur’ān states:

“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 our Lord. So after this if whoever exceeds the limits shall have a painful torment.” (Al-Baqarah, 2: 178)

The Prophet Muḥammad ﷺ gave another option to the family of the victim. He said:

Whoever intentionally causes death to a person shall be liable to *Qiyās*, i.e. death, unless the victim’s heirs forgive him.²¹

²⁰ *Crime and Punishment*, op. cit., p. 100.

²¹ *Mishkāt al-Maṣābiḥ*, op. cit. Bāb al-Diyah, p. 302.

However, *Allāmah* ‘Abd Allāh Yūsuf ‘Alī’s commenting on the forgiving of the culprit makes an important point:

Even where the injured one forgives, the state or ruler is competent to take such action as is necessary for the preservation of law and order in society. For crime has a bearing that goes beyond the interests of the injured person.²²

It is thus evident that although Islam does not totally abolish the death penalty, its laws are nevertheless not devoid of compassion. Moreover, the death penalty can only be imposed when a court of law sanctions it.

This then brings us to the question of the method of execution. Death penalty for *Qiṣāṣ* (equitable retribution) is to be carried out by means of a sword or a rifle. The method of execution during the Prophet Muḥammad’s ﷺ time was in the form of beheading by the sword. This was considered to be a swift way of ending the life of the murderer. In this context, the Prophet Muḥammad ﷺ emphasized that the instrument used for *Qiṣāṣ* ought to be to

²² Holy Qur’an, Text, Translation and Commentary, op. cit. Footnote 754, p. 257.

thoroughly checked in order to ensure that it is sharp to avoid unnecessary suffering. He ﷺ said:

Efficiency is desired by *Allāh*; so when you kill a man or slaughter an animal, do it efficiently and swiftly so that the slain person or animal does not suffer unnecessarily.²³

This proves that compassion is shown even at the time of execution. Moreover, the *Sharī'ah* stipulates that the murderer that is brought to be executed is not to be tortured or humiliated before being executed and nor should his corpse be mutilated after execution. Furthermore, the *Sharī'ah* even enjoins upon Muslims to offer the *ṣalāt al-janāzah* for the deceased murderer and to bury him in a Muslim cemetery.²⁴

A question that may be rightly posed here, especially after the spate of beheadings that have recently taken place in Iraq, is why Muslims do not consider other humane forms of execution to replace beheading like

²³ Al-Dīn, Walī Muḥammad Ibn 'Abd Allāh. *Mishkāt al-Maṣābiḥ*. Karachi. Qur'ān Maḥal. N.D. Kitāb Qiṣṣat Ḥajjāt al-Wadā'ah. p. 225.

²⁴ *Crime and Punishment in Islam*, op. cit., p. 96.

electrocution as is done in the United States of America? Electrocution is said to be a swift and efficient form of execution. Here, we may reiterate the point out that the other mode of execution which the *Shari'ah* allows is by means of a rifle. As for electrocution, Muslim jurists are opposed to it on two grounds: firstly, the colour of the corpse changes and secondly, this form of execution is considered harsh treatment after death.²⁵

4.5.2 Right not to torture or to cruel, inhuman or degrading treatment or punishment

There is no doubt that some of the punishments which Islam prescribes for certain crimes, like the amputation of the hand of the thief, are seen to be in violation of this particular right. However, it is important to note that Islamic Law stipulates that punishment that is to be meted out to the offender ought to be free of any spirit of vengeance or torture. In case of amputation of the thief's hand, the following is to be noted:

- i. The hand of the thief is to be severed swiftly by person appointed by the State.

²⁵ Ibid, p. 97.

- ii. The thief is to be seated motionless so that no other part of his body is injured.
- iii. Once the amputation is over, the wound is immediately cauterized to stop bleeding.²⁶

What needs to be noted here is that the amputation of the hand of the thief will not be carried out if the offence was committed out of dire necessity. For example, if one steals food to feed his family or if he himself is starving and steals then there would be no grounds to amputate that person's hand. *Sayyidunā* 'Umar ؓ suspended the *ḥadd* punishment for theft during the time of famine.²⁷

Islam does not condone torturing a person to the point of taking his/her life. This is can be deduced from the following *Ḥadīth* of the Prophet Muhammad ﷺ:

Punishment by fire does not behove anyone except
the Master of the Fire.²⁸

²⁶ *Crime and Punishment*, op. cit., p. 85.

²⁷ *Ibid.*

²⁸ Al-Bukhari, Ismā'īl Muhammad. *Sahih al-Bukhari*. Karachi. Aṣṣaḥ al-Maṭābi'. 1961. Bāb La Yu'adhdhab bi Adhab Allah. Vol. 1, p. 423.

CONCLUSION

It is important to point out that the United Nation is in no position to enforce the Universal Declaration of Human Rights. However noble they may be, the very countries which endorsed these rights are guilty of violating some of these rights. For example, Article 9 states:

No one shall be subjected to arbitrary arrest,
detention or exile

and ironically post 9/11 attack on the Twin Towers in New York, America has lobbied for their allies to legislate the Anit-terrorism Bill into law which is stands in direct conflict with Article 9 of the Universal Declaration of Human Rights.

On the other hand, human rights conferred upon humans by *Allāh* ﷻ cannot be amended and changed by any legislative assembly or any government.²⁹ It is precisely in order to ensure that these human rights are not violated that the *Shari'ah* make provisions for the death penalty to be imposed upon the

²⁹ Mawdudi, Abul A'la. *Human Rights in Islam*. Leicester. The Islamic Foundation. 1976, p. 14.

perpetrators of certain specific crimes. But, what ought to be reiterated here is that even in the pursuit of justice, Muslims are not allowed to take the law into their own hands and for this reason execution of the offenders can only be carried out under the strict supervision of the Islamic Court.

Moreover, it is important to note that Muslims, by virtue of their professing the Islamic Faith, are not entirely free to do what they please. They are bound to follow the *Shari‘ah* which in reality restrict them from acting arbitrarily which would most certainly result in their jeopardizing the rights of others and causing chaos and insecurity in society. It is precisely to ensure that the rights of others are not violated that the *ḥudūd* punishments have been put into place. Thus, *ḥudūd* punishments ought not to be viewed as infringements upon human rights, but rather, as a check on safeguarding that the rights of others conferred upon them by their Creator are in no way violated by any unscrupulous person.

CONCLUSION

The justice system in western countries has failed to curb crime and violence. On the other hand, the Islamic criminal justice system has succeeded in restoring law and order in society due to its zero tolerance towards crime and violence.

Insofar as the death penalty is concerned, Professor William Schabas of the Department of Law at the University of Quebec, Montreal rightly points out:

The debate about the imposition of capital punishment has been transformed, in the last half of the twentieth century, with the injection of a new element, the international law of human rights. Initially addressing the issue implicitly, with the proclamation of the right to life and the prohibition of cruel, inhuman, and degrading treatment or punishment, in articles 3 and 5 respectively of the 1948 Universal Declaration of

Human Rights, the law has steadily and inexorably developed in this area. By the end of the twentieth century, some sixty states had ratified international treaties prohibiting capital punishment, and the issue itself had become one of the pre-eminent debates in such important international forums as the General Assembly of the United Nations and the Rome Conference on the International Criminal Court.¹

It was pointed out that capital punishment is a mandatory penalty under the *Shari'ah* for only a small category of crimes. One cannot ignore the fact that the Bible too acknowledges capital punishment for such crimes as magic, violation of the Sabbath, blasphemy, adultery, homosexuality, relations with animals, incest and rape. However, the reason why Judeo-Christian jurists rarely argue that this ancient text must dictate contemporary legal practice is due to the fact that they do not recognise God Almighty as the Absolute Sovereign.

¹ See Schabas, William. "Islam and the Death Penalty" in *William and Mary Bill of Rights Journal* 9:1. December 2000, pp. 223-237.

While the *Holy Qur'ān* upholds the sanctity of life, it allows for the death penalty to be imposed in the form of *ḥudūd* punishments for those involved in any one of the seven categories of crime discussed in chapter two of this thesis. Involvement in all such crimes which are liable for *ḥudūd* punishments are in effect transgression against the limits set by the Creator of humankind, namely *Allāh* ﷻ. It is thus the prerogative of *Allāh* ﷻ Who bestowed life to decree under what circumstances and for what crimes the death penalty may be imposed because within the Islamic system *Allāh* ﷻ is the Absolute Sovereign and it is precisely for the sake of curtailing crimes, ensuring peace, security and tranquility within society that He ﷻ prescribes such punishment for all such acts which are injurious to life and the welfare of the people without reasonable justification.

However, it was pointed out that that only for those who commit the offences of *ḥarābah* and *irtidād* could have their punishments nullified by repentance, but the other five categories of crime, repentance would in no way nullify the *ḥadd* punishment in view of the fact that if repentance in every offence were to remove punishment, then every criminal would repent and no one would ever be punished.

In chapter three of this, it was argued that Islam is amenable to the clauses envisaged in both the Universal Human Declaration of Human Rights and the South African Constitution, but one ought not too lose sight of the fact that in no human society can any individual be free in the absolute sense of the word. Undoubtedly, in every state or country, there are some limitations placed upon its citizens in one form or another for the sake of security of its citizens and to ensure that law and order prevail.

Chapter four of this thesis emphasized the fact that within the Islamic system, *Allāh* ﷻ is regarded to be the Absolute Sovereign and hence if any of the so called human rights violate His ﷻ *Sharī'ah*, it would not be upheld. But, what ought to be reiterated here is that even in the pursuit of justice, Muslims are not allowed to take the law into their own hands and for this reason execution of the offenders can only be carried out under the strict supervision of the Islamic Court.

Moreover, it is important to note that Muslims, by virtue of their professing the Islamic Faith, are not entirely free to do what they please. They are bound to follow the *Sharī'ah* which in reality restrict them from acting

arbitrarily which would most certainly result in their jeopardizing the rights of others and causing chaos and insecurity in society. It is precisely to ensure that the rights of others are not violated that the *ḥudūd* punishments have been put into place. Thus, *ḥudūd* punishments ought not to be viewed as infringements upon human rights, but rather, as a check on safeguarding that the rights of others conferred upon them by their Creator are in no way violated by any unscrupulous individual.

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