

# **The Penal Shari‘ah of Islam**

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Rendered into English by  
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### Translator's Introduction

For many centuries now, Islamic punishments have remained one of the greatest subjects of debate both inside and outside the Muslim world. 'Islamic punishments are barbaric', 'Death to the death punishment', 'Civilized societies do not flog, stone to death or amputate hands' are a few of the typical slogans and comments that echo and reverberate among the intellectual elite of this *Ummah*.

Without refuting the fact that Islamic punishments are indeed very severe, two things may perhaps help us in understanding the nature and logic of this severity.

The first thing that needs to be kept in mind is that if one reflects on the style and linguistic constructions in which these punishments are mentioned in the *Qur'ān*, it is clear that these punishments indicate the most extreme forms of reproof. They are to be given only if the extent of the crime and the state of the perpetrator of the crime deserve no leniency. In other words, it is not simply a matter of a court determining the culpability of an individual in a particular crime or not; it is equally important that contextual information, for instance, factors which led up to the crime, are taken into account. If this information results in a judge deciding that the crime has been committed with extenuating circumstances, he has the authority to punish the criminal with lesser punishments like fining him or having him beaten up. Precisely, on such grounds, in a particular case, the Caliph 'Umar (rta) refused to amputate the hand of a person who was forced to steal because of hunger simply because he thought that the circumstances were such that the person deserved leniency. It is known that there was a severe drought during his rule and it was in this drought that the incident had taken place. People think that 'Umar (rta) had abrogated the punishment, whereas, 'Umar (rta)

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thought that the criminal deserved leniency. In other words, one can easily conclude that in this particular aspect the Islamic penal code is no different from other penal codes.

The second thing that needs to be taken into consideration is that the purpose of most Islamic punishments is not merely to punish the criminal, but to make his punishment an act of deterrence for any further instance of the crime. Everyone would agree that peace and security of a society occupy fundamental importance if it is to develop and prosper. Societies which are crime ridden and in which people feel insecure obviously soon disintegrate and eventually have no role in the development of culture and civilization. As such, it is the primary responsibility of a government to make sure that the life, wealth and honour of its citizen are protected to the utmost. Besides educating and instructing people so that they have morally sound personalities, it is necessary to severely punish people who, in spite of being provided with the opportunities of life, exceed limits by abusing the life, wealth and honour of others. In order to cleanse a society from crime as much as possible, Islam wants to make an example of people who create nuisance in the society and disrupt its peace and tranquillity. Consequently, the punishments it prescribes are instrumental in bringing to the greatest degree peace and security to a society.

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In recent times, Javed Ahmad Ghamidi (b: 1951) has attempted to derive the principle guidelines that Islam has given on the subject of Islamic punishments. He has documented these guidelines in the form of the Penal *Shari'ah* of Islam. His research has led him to many important conclusions which directly relate to this law and which have arisen because of some prevailing misconceptions about Islamic punishments. As such, the research presents a fresh sight on this issue. Besides highlighting the two above discussed premises, some of his major conclusions are summarized below:

1. Islam has prescribed punishments in a limited sphere only. It has prescribed punishments for what it considers to be the five major crimes. They are *Fasād fi'l-Ard*<sup>1</sup>, murder, fornication,

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1. This term encompasses all mischievous acts of criminals who take

accusing someone of fornication and theft. The punishments of all other crimes have been left to state authorities to legislate.

2. As far as *Diyat* is concerned, though it is an everlasting law which must be obeyed in all times, yet its quantity, nature and other related affairs have been left upon the customs and traditions of a society. Consequently, no eternal quantity of *Diyat* has been fixed by Islam, nor has it instructed Muslims in any manner to discriminate between a man or a woman, a free man or a slave and a Muslim or a non-Muslim in this matter.

3. It is incorrect to conclude that Islam discriminates between married and un-married men or women who are guilty of fornication. Their punishments are essentially the same. It is only in cases when fornication is compounded by certain other elements, making the nature of the crime more severe that certain other punishments are added to the original form of punishment.

4. As far as criminal evidence is concerned, three things must be kept in consideration:

(i) Islam does not discriminate between a man and a woman. In all criminal cases, it is left to the discretion of the judge whether he accepts someone as a witness or not. If a woman testifies in a clear and definite manner, then her testimony cannot be turned down simply on the basis that there is not another woman and man to testify alongside her.

(ii) Islam does not require four eye-witnesses in ordinary cases of fornication nor has it fixed a quantity of witnesses to prove a crime. Only in two cases has it prescribed a certain quantity. The first of them is regarding prostitutes. In their case, if four witnesses testify to their ill-ways, then this is enough to punish them. The second case concerns accusing chaste and morally sound women of fornication – about whom no one can even imagine that they can commit such a crime. In their case, Islam wants four eye-witnesses to even start the proceedings of a case. In this regard, the purpose is the protection of reputation of a chaste lady. Even if she has faltered, it should be kept hidden from the society, unless of course there are four eye witnesses to this crime.

(iii) In all cases of Islamic law a crime legally stands proven

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the law into their own hands, create in the society and become a menace to public safety and social order in any sense.

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not only by the testimony of the witnesses or by the confession of the criminals themselves but also by any additional or circumstantial evidence. Medical examination, cameras, postmortem reports, finger prints and other similar aids can also be used in proving a crime.

5. The punishment of apostasy was specifically meant for the Idolaters of Arabia under a specific law of the Almighty which applies only in the age of His Messengers. According to this law people who advocated polytheism in spite of being convinced of its falsity were punished by death by the Almighty Himself through His Messengers. After the departure of the last of the Messengers, this punishment has no bearing whatsoever upon any person or nation.

6. The death sentence can only be given in two cases as per the *Qur'ān*: to a person who has killed someone or to someone who is guilty of spreading lawlessness and disorder in a society. No other person can be punished by death.

7. The jail punishment was never a part of the Islamic penal code. It is an inhuman punishment and should be done away with. It should be replaced with other forms of reproof which actually punish the criminal and not his family.

This booklet is a translation of four research articles<sup>2</sup> written by Javed Ahmad Ghamidi on Islamic punishments. The first of these 'The Penal *Sharī'ah* of Islam' is his basic research work, while the other three deal with some related issues and appear as appendices.

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2005

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2. These articles appear in his books *Mizān*, 1<sup>st</sup> ed., *Dāru'l-Ishrāq*, Lahore, 2001 / *Burhān*, 1<sup>st</sup> ed., *Dānish Sarā*, Lahore, 2000

## The Penal *Shari'ah* of Islam

The opportunity a man has to exercise his will is one of the greatest favours the Almighty has blessed him with. However, just as this freedom is a source of honour for him, its misuse is a source of dishonour for him because from every instance of misuse emanates evil and disorder. This is precisely what the angels had feared when the Almighty informed them about his intention to create man:

( : )

[Allah!] will You create someone who will spread evil in the earth and shed blood? (2:30)

In the history of mankind, the first manifestation of this evil took place through the hands of Cain, the son of Adam. Consequently, out of this incident arose the need to protect man from the evil of man. It was evident from the norms of sense and reason vested by the Almighty in human nature that the only way to shield man from such evil was to reform his environment and educate and instruct people; however, once a crime is committed, the solution is to administer appropriate punishment. What then should be the nature and extent of punishment of a specific crime? Since there is no basis in human intellect to determine these parameters, the Almighty Himself revealed His directives about these issues. Through His Prophets, He gave mankind His *Shari'ah*, in which, besides other decrees, He divinely ordained the punishments of all the grave crimes concerning life, wealth, honour and the collective system of a society.



These major crimes are<sup>1</sup>:

1. *Muḥārabah* and Spreading Disorder
2. Murder and Injury
3. Theft
4. Fornication
5. *Qadhf* (accusing someone of Fornication)

It should remain in consideration at the outset that these punishments can only be administered in an Islamic State under a properly instituted government. The reason for this condition is that the *sūrahs* in which these punishments are mentioned were revealed in *Madīnah* where an Islamic state had already been established under the rule of the Prophet (sws). Consequently, a group of persons who is not at the helm of affairs of a country has no right to administer these punishments. In the '*urf*' (usage) of the *Qur'ān*, the words 'فَجْلِدُوا' (*fajlidū*: flog [the criminal]) and 'فَأَقِمْ وِجْهَكَ لِلدِّينِ حَنِيفًا' (*faqim wujhaka lildīni ḥanifā*: amputate [the hands of the criminal]) of these verses are addressed to the rulers of the Muslims; no one else can be regarded as their addressees. *Abū Bakr Jaṣṣāṣ* writes in his *Aḥkāmū'l-Qur'ān*:

:

Any learned person who comes across these words, immediately understands that the rulers of an Islamic State are its addressees and not the common Muslims. Consequently, the implied words, for example, are: 'the rulers should amputate their hands', and 'the rulers should flog them'.<sup>2</sup>

1. The punishment of certain crimes, for example, apostasy, do not appear in this list. According to the author, the punishment of apostasy and the punishments of some other offences are a case of misunderstanding the *Sharī'ah* (see Appendix 1). He has presented his views on such offences in a separate article, the translation of which appears in this booklet as well. (*Translator*)

2. *Abū Bakr Jaṣṣāṣ, Aḥkāmū'l-Qur'ān*, 1<sup>st</sup> ed., vol 3, (Beirut: *Dāru'l-Kitāb al-'Arabī*, 1325 AH), p. 283

These are the crimes whose punishments have been divinely ordained by the *Sharī'ah*. The punishments of the lesser forms of the crimes mentioned above, and the punishments of other crimes have been left by the *Sharī'ah* to the discretion of an Islamic State with one exception: the death sentence, according to the *Qur'ān*, can only be given to a person who has killed someone or to someone who is guilty of spreading anarchy in the society. The Almighty has made it amply clear that except for these two offences neither a person nor an Islamic government has the right to kill a person<sup>3</sup>. The *Qur'ān* says:

( : )

He who killed a human being without the latter being guilty of killing another or of spreading anarchy in the land should be looked upon as if he had killed all mankind. (5:32)

In the following paragraphs, I will explain the verses of the *Qur'ān* that mention these punishments of the *Sharī'ah*.

### 1. *Muḥārabah* and Spreading Anarchy

( - : )

The punishments of those who wage war against Allah and His Prophet and strive to spread anarchy in the land are to execute them in an exemplary way or to crucify them or to amputate their hands and feet from opposite sides or to banish them from the land. Such is their

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3. A person living in the system of a state becomes authorized for this only in his own defence or in someone else's defence. (*Translator*)

disgrace in this world, and in the Hereafter theirs will be an awful doom save those who repent before you overpower them; you should know that Allah is Oft-Forgiving, Ever-Merciful. (5:33-4)

It is obvious from the style of these verses that the meaning implied by *Muḥārabah* (waging war against Allah and His Prophet (sww)) and spreading anarchy in the land) is that an individual or a group of individuals rebels against the *Sharī'ah* of the Almighty and attacks the life, wealth, honour and freedom of expression of people. Consequently, under an Islamic government, all those criminals who commit rape, take to prostitution, become notorious for their ill-ways and vulgarity, become a threat to honourable people because of their immoral and dissolute practices, because of their wealth and social status sexually disgrace women, or rise against the government in rebellion, or create a law and order situation for the government by causing destruction, by becoming a source of terror and intimidation for people, by committing mass murder, plunder, decoity or robbery, by indulging in hijacking and terrorism and by committing other similar crimes are criminals of *Muḥārabah*, and spreading such anarchy in the society should be severely dealt with.

The following four punishments are specifically prescribed for criminals mentioned in the verses quoted above:

- (1) *Taqīl* ( )
- (2) *Taşīb* ( : Crucifixion)
- (3) Amputating limbs from opposite sides
- (4) *Nafi* ( : Exile)

Their explanation follows:

*Taqīl* ( )

The words ' ' (*aṅ yuqattalū*) are used for it and imply that not only should the criminals of this category be executed but the execution should be carried out in a manner that serves as a severe warning to others. The reason is that here the word *Taqīl* has been used instead of *Qatl*. In Arabic, *Taqīl* means to execute someone in such a way that there is severity in the process of killing him. Except for burning a criminal in fire and

adopting other means of punishment prohibited by the *Sharī'ah*, an Islamic government, keeping in view this aspect, can adopt various other ways as well. In the opinion of this writer, the punishment of *Rajm* (stoning to death) is one form of *Taqīl*. The Prophet (sws) in his own times, in accordance with this directive, administered this punishment to certain criminals guilty of fornication.

*Taşlīb* ( : Crucifixion)

This word, like *Taqīl*, is also from the ‘ ’ (*tafīl*) category. Consequently, it implies that criminals should be crucified in an exemplary manner. The cross on which crucifixion takes place is an erected structure upon which a criminal is nailed through his hands and feet and abandoned till death. This form of punishment, no doubt, is exemplary but the word *Taşlīb* demands that other means which make it still more exemplary may also be adopted.

Amputating Limbs from Opposite Sides

It is evident that this form of punishment also serves as a severe warning to others. The purpose of this punishment is that if the criminal is allowed to live, then he should serve as a reminder and an example before the society and also remain incapacitated to commit future evil.

*Nafi* ( : Exile)

It is obvious that this punishment of exile is the least in intensity in this category of punishments. The first two punishments end a criminal's life. The third punishment though does not end his life, makes him an example in the society; however, this fourth punishment without harming his body in anyway, only deprives him of his house and country. The words of the *Qur'ān* require that in general circumstances this punishment should be carried out in its true form. However, if in some cases, this is not possible, the directive shall stand fulfilled if the criminal is confined in a particular area or kept under house arrest.

Since each of the punishments mentioned in the verse is separated from the other by the particle ‘ ’ (*aw: or*), it is evident that the *Qur'ān* has given an Islamic government the flexible authority to administer any of these punishments keeping in view

the nature and extent of the crime, the circumstances in which it has been committed and the consequences which it produces or can produce in a society. The relatively lighter punishment of *Nafi* is placed with the two very severe punishments of *Taqīl* and *Tastīb* so that if circumstances are such that the criminal deserves any leniency, he should be given it. Consequently, in accordance with this verse, the Prophet (sws), while taking into consideration the circumstances and the nature of crime in his own times, granted remission to certain criminals guilty of debauchery by exiling them; similarly, while obeying this verse, he stoned to death certain others who did not deserve any leniency.

The Prophet's inquiry regarding the marital status of criminals guilty of fornication was also based on the pretext of whether the criminal deserved any leniency. Our jurists have erroneously inferred from the Prophet's inquiry that the marital status of a person was actually the basis of the punishment and on this basis maintain that the directive of administering a hundred stripes (the punishment of fornication as mentioned in *Sūrah Nūr*) was abrogated for married people who indulged in fornication. Actually, the Prophet (sws) while deciding the fate of such criminals asked many questions to see whether they deserved any mitigation. The question of an offender's marital status was one such question, but our jurists concluded that it was the only question asked and, hence, made it the basis of the punishment. They, thereby, incorporated in the penal code of Islam a totally baseless addition, which is against the *Qur'ān* as well as the norms of sense and reason.

In the words of *Imām Amīn Aḥsan Iṣlāḥī*:

In such circumstances, the fact that the criminal gang has harmed wealth and property is not the only aspect which should be considered; the objectives of such criminals, the site of their crime, its consequences and circumstances should also be considered. For example, if the circumstances are such that a war is going on or lawlessness is rampant, a stern measure is required. Similarly, if the site of crime is a border area or an abode of enemy intrigue and conspiracy, again an effective action is needed. If the leader of the gang is a very

dangerous person, who if shown any leniency, would endanger the life, wealth and honour of many people, then also a severe step is required. In short, the real basis of selection between these punishments is not the mere happening of such a crime, but the collective influence of the crime and welfare of the society.<sup>4</sup>

Consequently, about certain habitual criminals of fornication, the Prophet (sww) is reported to have said:

( : )

Acquire it from me, acquire it from me. The Almighty has revealed a way for these women. If such criminals are unmarried or are the unsophisticated youth, then their punishment is a hundred stripes and exile and if they are widowers or are married, then their punishment is a hundred stripes and death by stoning. (*Muslim*, No: 1690)

In this *Hadīth*, the reference ‘ ’ (*ja'alallāhu lahunna*) is to those women about whom the following temporary directive had been given in *Sūrah Nisā*:

( : )

And upon those of your women who commit fornication, call in as witnesses<sup>5</sup> four people among yourselves to testify over them; if they testify [to their ill-ways], confine them to their homes till death overtakes them or God formulates another way for them. (4:15)

The style and construction of the phrase ‘ ’ (*allāfi ya'tīna al-fāḥishah*: those women who commit fornication) clearly

4. *Amīn Aḥsan Iṣlāḥī, Tadabbur-i-Qur'ān*, 4<sup>th</sup> ed., vol. 2, (Lahore: Faran Foundation, 1991), pp. 506-7

5. ie, those who can bear witness that these women are in fact prostitutes who habitually commit fornication.

indicates that prostitutes are being referred to. Since in this case the main offender is the woman, men are not given any mention<sup>6</sup>. The Prophet (sws) while deciding the fate of such criminals said that since they were not merely guilty of fornication but were also guilty of spreading disorder in the society as they had adopted profligacy as a way of life, those among them who deserved any mitigation should be administered the punishments of a hundred stripes according to the second verse of *Sūrah Nūr* because of committing fornication and exiled according to verse 33 of *Sūrah Mā'idah* to protect the society from their dissolute practices, and those among them who did not deserve any leniency, should be stoned to death according to the directive of *Taqīl* of the same verse of *Sūrah Mā'idah*.

The words 'unsophisticated' or 'unmarried' and 'widower' or 'married' of the *Ḥadīth* quoted above (*Muslim*, No: 1690) are meant to explain this very principle. A hundred stripes are mentioned with *Rajm* (stoning to death) merely to explain the law. *Aḥādīth* verify that the Prophet (sws) mentioned this punishment of a hundred stripes with *Rajm* but never actually administered them. The reason is that adding any other punishment to the punishment of death is against legal ethics. The punishments of whipping, jailing the offender and exacting a fine from him are given for two purposes: to make him a means of severe warning for the society and to severely admonish him for his future life. In the case of death sentence, obviously, there is no need for further admonition. Hence, if a criminal is to be punished for various crimes and the death penalty is one of the punishments, all the punishments are stated in the judgement but generally, in practice, only the death sentence is carried out.

The plurals ' ' (*yas'awna*: they strive) and ' ' (*yuḥāribūna*: they wage war) mentioned in the verse point out that if a gang of criminals has committed the crime, the punishment shall not be given to only some of the criminals but to the gang as a whole. Consequently, if a gang of criminals of this first category is guilty of such crimes as murder, hijacking, fornication, sabotage and intimidating people, there is no need to

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6. It is by not understanding this fact that the verse has been a subject of an unresolved controversy of interpretation.

investigate exactly who among the gang actually committed the crime. Every member of the gang shall be held responsible for it and dealt with accordingly.

The words ‘*dhālika lahum khizyūn fī 'l-dunyā*: such is their disgrace in this world) used in the verse indicate that while inflicting punishment upon such criminals no feelings of sympathy should arise. The Almighty who created them has ordained complete disgrace and humiliation for them, if they commit such crimes. This is the very purpose of this punishment and should always be taken in consideration. In the words of *Imām Amīn Aḥsan Iṣlāḥī*:

Their humiliation in this world will be a means of severe warning for others and for those who do not respect the law on the mere grounds that laws deserve respect and as such are useful in maintaining order and discipline in the society. In present times, the conceptions of sympathy and mercy for crimes and criminals have taken the shape of a whole philosophy. It is due to their courtesy that though today it seems as if man is developing and progressing in various fields of life, yet he is creating for himself a Hell on earth. Islam does not encourage such absurd philosophies. Its law is not based upon fantasies but upon human nature.<sup>7</sup>

The words ‘*illalladhīna tābū min qabli an taqdirū 'alayhim*: save those who repent before you overpower them) of the verse impose the condition that if such criminals come forward and give themselves up to the law before the government lays hands on them, then they shall be dealt with as common criminals. They will not be regarded as criminals of *Muḥārabah* and spreading disorder. To quote *Imām Amīn Aḥsan Iṣlāḥī*:

These special powers should only be used against those rebellious people who insist on their rebellion before the government is able to seize them and the government had to actually subdue them by force. However, those

7. *Amīn Aḥsan Iṣlāḥī, Tadabbur-i-Qur'ān*, 4<sup>th</sup> ed., vol. 2, (Lahore: Faran Foundation, 1991), p. 507



criminals who repent and mend their ways before any action by the government shall not be dealt with according to their former status and shall be dealt with according to the ordinary law about such crimes. If they have usurped the rights of common citizens, compensation shall be provided to these citizens.

If the stress of the words ' ' (*fa'lamū*: you should know) is understood, it becomes clear that no measure of retaliation by the government is permitted if the criminals repent and reform themselves before the government captures them. The Almighty is Merciful and Forgiving; if He forgives a person who repents before he comes in the grip of the law, why should His servants adopt a different attitude?<sup>8</sup>

Here, it should remain clear that those who confess simply because they have no means to escape the law are an entirely different case. In their case, the government, indeed, has the authority to refuse any mitigation.

## 2. Murder and Injury

### a. Intentional

( - : )

O you who believe! decreed for you is the *Qisās* of those among you who are killed such that if the murderer is a free-man, then this free-man should be killed in his place and if he is a slave, then this slave should be killed in his place and if the murderer is a woman, then this woman shall be killed in her place. Then for whom there has been some remission from his brother, [the remission] should

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8. Ibid., p. 508

be followed according to the *Ma'rūf* and *Diyat* should be paid with kindness. This is a concession and a mercy from your Lord. After this, whoever exceeds the limits shall be in a torment afflictive. There is life for you in *Qīṣāṣ* O men of insight that you may follow the limits set by Allah. (2:178-9)

Just as this directive of *Qīṣāṣ* has been given to us, it was given to the previous nations of the Prophets. While referring to the Old Testament, the *Qur'ān* says:

( : )

And We enjoined for them therein: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, wound for wound. Then he who forgoes [retaliation], his remission shall be an atonement for his own self. And those who do not judge according to what Allah has revealed, it is they who are the wrongdoers. (5:45)

It is evident from this verse that this directive of *Qīṣāṣ*, not only pertains to murder but also relates to wounding or injuring someone. According to the *Qur'ān*, all these crimes are heinous but as far as murder is concerned, the *Qur'ān* says that murdering a person is like murdering the whole mankind:

( : )

He who killed a human being without the latter being guilty of killing another or of spreading disorder in the land should be looked upon as if he killed all mankind. (5:32)

Furthermore, the *Qur'ān* says that a person who commits such a grave offence, particularly against a Muslim, shall face the eternal punishment of Hell:

( : )

And he who intentionally kills a believer, his reward is Hell. He shall abide therein forever, and the wrath and the curse of God are upon him. He has prepared for him a dreadful doom. (4:93)

Consequently, the duties and responsibilities which this type of murder imposes on us as Muslims can be summed up in the following words of *Imām Amīn Aḥsan Iṣlāḥī*:

Firstly, every occurrence of murder should create a tumult and commotion in the nation. Until and unless *Qiṣāṣ* is taken from the criminal responsible for it, everyone should feel that he no longer has the protection of the law he formerly had. The law is the protector of all and if it has been violated, a single person has just not been slain, but the lives of all persons are in danger.

Secondly, to search for the murderer is not just the responsibility of the heirs of the murdered person, but of the whole nation as it is not that just one life has been taken – rather all the lives have been taken.

Thirdly, if a person finds someone in danger, he should not ignore the situation by thinking that he is interfering in someone's affair; rather he should defend and protect him as much as he can, even if he has to endure difficulties; for a person who defends an aggrieved and oppressed person, in fact, defends humanity of which he himself is a part.

Fourthly, a person who hides someone's murder, or bears false evidence in favour of the murderer or stands surety for him, or gives refuge to him or legally pleads for him, or intentionally excuses him, in fact, does so for the murder of his own self, his father, his brother, and his son because the murderer of one is the murderer of all.

Fifthly, to help the government or the heirs of the slain

person in taking *Qisās* is like giving a life to the slain person because, according to the *Qur'ān*, there is life in *Qisās*.<sup>9</sup>

The Islamic law about this type of murder is that the government cannot show any lenience to the murderer without the consent of the heirs of the murdered person. It is its responsibility to help the heirs if they insist on *Qisās* and with full force implement exactly what they want.

A little deliberation shows that it is this very principle which distinguishes the Islamic Law in this regard from other systems of law. It not only leaves the criminal's fate to the people against whom the crime has been perpetrated in order to appease their spirit of revenge, but also goes a long way in ridding the society of such crimes. Writes thus *Imām Amīn Aḥsan Iṣlāḥī*:

In matters of *Qisās*, the importance which Islam has given to the will and intention of the heirs of the slain has many aspects of wisdom in it. Leaving the life of the killer directly at the mercy of the heirs of the murdered person compensates to some extent the tremendous loss caused. Furthermore, if the heirs of the slain person adopt a soft attitude at that moment, they do a big favour to the murderer and his family, which produces many useful results.<sup>10</sup>

However, this does not at all mean that the heirs of the slain person in their capacity as heirs should exceed the limits and, for example, slay others besides the slayer in frenzy of revenge or out of prejudice for their status and superiority demand the execution of a free person in place of a slave or a man in place of a woman, or kill the criminal by torturing him, or take out their venom on his dead body or adopt those methods of killing which have been prohibited by the Almighty like burning someone in fire or mutilating his corpse or in cases of injury, when there is a strong chance that *Qisās* would inflict more harm on the inflicter than the harm he himself had caused, they still insist upon limb in place of

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9. Ibid., p. 503

10. Ibid., p. 433

limb and wound in place of wound.

The *Qur'ān* says:

( : )

And whoever is killed wrongfully, We have given his heir an authority. So he should not exceed the bounds in taking a life, for he has been helped [by the law]. (17:33)

It is however apparent that in case the slain person has no heirs or if he has heirs and owing to some reason they have no interest in his affairs or if their interest resides with the slayer and his accomplices, the government no doubt has the full right to reject any leniency given by the heirs of the slain person.

The law of *Qisās* which is mentioned in *Sūrah*s *Baqarah* and *Mā'idah* is based on the following four clauses:

Firstly, *Qisās*<sup>11</sup> is an obligation imposed by the Almighty on an Islamic State. It guarantees survival to a society and is, in fact, a Divine Law which can only be breached by those who wrong their souls. Consequently, it is the responsibility of the government to search for the murderer, arrest him and implement the will of the heirs of the murdered person.

Secondly, complete equality should be observed in taking *Qisās*. Hence, if the murderer is a slave, only that particular slave should be executed and if the murderer is a free man, only that particular free man should be executed. A person's social status should never create an exception to this rule of equality nor should it be given any emphasis in this regard.

Thirdly, the heirs of the slain or wounded person have only two options: they can either demand life for life, limb for limb wound for wound or they can forgive the criminal and accept *Diyat* from him. The latter case, according to the *Qur'ān* is a favour and rebate by the Almighty to the criminal. Consequently,

11. *Qisās* is from *Qasās* which means to follow someone along his footsteps. From this meaning, it was used for the punishment in which the criminal is treated in the same way as he himself had treated the other person while committing the crime. In its general meaning, it is used both for *Qisās* in life and *Qisās* in wealth in the Arabic language.

if the heirs of the slain person accept the forgiveness of the slayer, then this shall become an atonement (*kaffārah*) for their sins before the Almighty.

Fourthly, if the wounded person or the heirs of the slain person agree to accept *Diyat*, then this should be given to them with kindness and goodwill. In the words of *Imām Amīn Aḥsan Iṣlāḥī*:

The directive of paying *Diyat* with kindness has been given because in that period in Arabia *Diyat* was generally not given in the form of cash; it was paid in kind or in the form of animals. Therefore, if the payers of *Diyat* had any ill-intention in their hearts, they could defraud the receiving party. It is easily possible in case of camels and goats or dates and other grains to pay *Diyat* as far as the agreed quantity and weight is concerned, disregarding their quality and nature. This would amount to ignoring the favour done by the aggrieved party by forgiving the murderer. Someone whose life had been left at the mercy of a person by the *Sharī'ah* had been forgiven by him and he had agreed to accept some wealth instead. This favour should be answered by a favour only, ie, the payment of *Diyat* should be done with such magnanimity and munificence that the heirs of the slain person should not feel that by accepting camels and goats in place of the life of a beloved they had committed a mistake or done something dishonourable.<sup>12</sup>

The basic objective of this law, as is mentioned by the *Qur'ān*, is to protect life. *Imām Amīn Aḥsan Iṣlāḥī* explains this in the following way:

If a murderer is executed because of his crime, it apparently seems as if a second life has been taken, but a little deliberation shows that this punishment actually guarantees the life of the whole society. If this punishment is not carried out, the mental disorder in which a person commits this crime is actually transmitted to the society. The extent of various diseases differ: diseases which result

12. *Amīn Aḥsan Iṣlāḥī, Tadabbur-i-Qur'ān*, 4<sup>th</sup> ed., vol. 1, (Lahore: Faran Foundation, 1991), p. 434

in such heinous crimes as murder, robbery, theft or fornication are like those diseases in which it is necessary to amputate some limb of the body to save the whole body. Amputating a limb may seem a callous act, yet a doctor has to be callous. If by showing sympathy to this limb he does not force himself to this cruelty, he may have to bear with the patient's death.

A society in its collective capacity is like a body. At times, its limbs get infected to the extent that the only option is to cut them off from the body through an operation. If sympathy is shown by considering it to be the limb of a patient, there is all the chance that this would fatally affect the whole body.<sup>13</sup>

*b. Unintentional*

( - : )

It is unlawful for a believer to kill a believer except if it happens by accident. And he who kills a believer accidentally must free one Muslim slave and pay *Diyat* to the heirs of the victim except if they forgive him. If the victim is a Muslim belonging to a people at enmity with you, the freeing of a Muslim slave is enough. But if the victim belongs to an ally, *Diyat* shall also be given to his heirs and a Muslim slave shall also have to be set free. He who does not have a slave, must fast two consecutive months. This is from Allah a way to repent from this sin: He is Wise, All-Knowing. (4:92-3)

In Islamic law, according to the *Qur'ān*, the punishment of

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13. Ibid., pp. 436-7

unintentionally murdering or wounding in some cases is *Diyat* and Atonement (*Kaffārah*), and in some cases only Atonement (*Kaffārah*) except if the wounded person or the heirs of the slain person forgive the criminal. In this case, life for life, wound for wound and limb for limb cannot be demanded from a person.

This law is based on three clauses:

Firstly, if the murdered person is a Muslim citizen of an Islamic State or if he is not a Muslim but belongs to a nation with which a treaty has been concluded, it is necessary for the murderer who has not been forgiven to pay *Diyat* to atone for his sin and repent before the Almighty and free a Muslim slave as well.

Secondly, if the murdered person is a Muslim and belongs to an enemy country, the murderer is not required to pay *Diyat*; in this case, it is enough that he only free a Muslim slave.

Thirdly, in both these cases, if the criminal does not have a slave, he should consecutively fast for two months.

These are the directives as far as unintentional murder<sup>14</sup> is concerned. But it is obvious that the directive of unintentionally injuring someone should also be no different. Hence, in this case also *Diyat* shall have to be paid and fasts shall have to be kept considering the amount of *Diyat* paid. For example, if the *Diyat* of a certain type of wound is fixed at one-third of the *Diyat* of murder, twenty fasts as atonement shall also have to be kept.

An important issue in these directives of intentional and unintentional murder is the amount of *Diyat* to be given and its methodology. In verse 92 of *Sūrah Nisā* quoted above, the words ‘*diyatuṅ mussalamatuṅ ilā ahlihi*’ are used. The word *Diyat* in these verses occurs as a common noun, about

14. Consequently, without a person's fault, this law shall not relate to such a case. The Prophet (sww), according to this principle, said:

( : )

If an animal kills a person, it is not the responsibility of the animal's owner; if a person falls in a well, the owner of the well is not responsible and if an accident occurs in a mine, the owner of the mine cannot be held responsible. (*Bukhārī*, No: 1499)

In other words, in such cases the owner is not to be blamed if his fault has not caused the mishap.



which we all know that its meaning is determined by its linguistic and customary usage, and by the context in which it is used. Nothing other than these are required. Therefore, in this verse *Diyat* means something which in the general custom and usage is called '*Diyat*'. And the words '*diyatuṅ mussalamatuṅ ilā ahlihi*' simply mean that the family of the murdered person should be given what the general custom and linguistic usage term as '*Diyat*'.

In verse 178 of *Sūrah Baqarah*, where the directive of *Diyat* in case of intentional murder has been given, the word '*ma'rūf*' (*ma'rūf*: custom) is used to qualify it:

( : )

Then for whom there has been some remission from his brother, [the remission] should be followed according to the *Ma'rūf* and *Diyat* should be paid with kindness. (2:178)

It is evident from the above mentioned verses of *Sūrah Nisā* and *Sūrah Baqarah* that in case of intentional as well as unintentional murder, the *Qur'ān* wants *Diyat* to be paid according to the customs and traditions of the society. It has not prescribed any specific amount for *Diyat* nor has it directed the Muslims to discriminate in this matter between a man or a woman, a slave or a free man and a Muslim or a non-Muslim<sup>15</sup>. The Prophet (sws) and his Rightly Guided Caliphs decided all the cases of *Diyat* according to the customs and traditions of the Arabian society during their own times. The quantities of *Diyat* which have been mentioned in our books of *Ḥadīth* and *Fiqh* are in accordance with this custom and tradition, which itself has its roots in the social conditions and cultural traditions of the Arabs. However, since then, the wheel of fortune has revolved through fourteen more centuries and the tide of time has sped past innumerable crests and falls. Social conditions and cultural traditions have

15. For a detailed discussion by the author on the meaning and nature of *Diyat*, see 'What is *Diyat*?' (Appendix 2) appearing in this booklet. (Translator)

undergone a drastic change. In present times, it is not possible to pay *Diyat* in the form of camels nor is it a very wise step to fix the amount of *Diyat* on this basis. The nature of ' (āqilah: community/tribe) has completely changed and various forms of unintentional murder have come into existence which could never have been imagined before. We know that the guidance provided by the *Qur'ān* is for all times and for every society. Hence, in this regard it has directed us to follow the ' (ma'rūf: custom) which may change with time. By this *Qur'ānic* directive, every society is to obey its customs, and since in our own society no law about *Diyat* exists previously, those at the helm of our state can either continue with the above mentioned Arab custom or re-legislate in this regard; whatever they do, if the society accepts the legislation, it will assume the status of our *ma'rūf*. Also, it is obvious that those in authority in any society can revise and re-structure the laws which are based on the *ma'rūf*, keeping in view the collective good of the masses.

### 3. Fornication

( - : )

The man and the woman guilty of fornication, flog each of them with a hundred stripes and let not compassion move you in their case in the enforcement of the law of God, if you truly believe in Allah and the Last Day. And let a party of the believers witness their punishment. The man guilty of fornication may only marry a woman similarly guilty or an idolateress and the woman guilty of fornication may only marry such a man or an idolater. The believers are forbidden such marriages. (24:2-3)

The initial directive of the *Qur'ān* regarding the punishment of

fornication<sup>16</sup> is mentioned in *Sūrah Nisā*. No definite punishment is mentioned there; it is only said that until some directive is revealed about women who as prostitutes habitually commit fornication, they should be confined to their homes, and the common perpetrators of this crime should be punished until they repent and mend their ways. This punishment may range from exhorting and reprimanding, scolding and censuring, humiliating and disgracing the criminal to beating him up for the purpose of reforming him.

( - : )

And upon those of your women who commit fornication, call in four people among yourselves to testify over them<sup>17</sup>; if they testify [to their ill-ways], confine them to their homes till death overtakes them or God formulates another way for them. And the man and woman among you who commit fornication, punish them. If they repent and mend their ways, leave them alone. For God is Ever-Forgiving and Most Merciful. (4:15-6)

This was the punishment of fornication in the *Sharī'ah* before a definite directive was revealed in *Sūrah Nūr*. Once this was revealed, it repealed the previous directive permanently.

16. Here it may be noted that the term 'fornication' has been used in this booklet to connote the crime regardless of the fact that its perpetrators are married or not. (*Translator*)

17. Except for calling in four witnesses to deal with prostitutes, as mentioned in this verse, and the insistence on four witnesses to register a case of *Qadhf* (24:4-9), the *Qur'ān* has not bound a court in any way to prove a crime in a particular manner. All other crimes stand proven in the eyes of the Islamic law the way they stand proven according to the general procedures employed in legal practice. (For more details regarding the author's views on evidence and testimony see 'Law of Evidence' (Appendix 2) that appears in this issue, (*Translator*)).

The directives mentioned in these verses can be explained thus:

1. The man or woman who have committed fornication, both shall receive a hundred stripes. According to the methodology adopted by the Prophet (sww) and the Rightly Guided Caliphs and according to case precedents reported in our books of *Ḥadīth* in this regard:

i) Whether a cane is used to flog a criminal or a lash, in both cases it should neither be very thick and hard nor very thin and soft.<sup>18</sup>

ii) The criminal should not be beaten bare-bodied or while tied to a tripod.<sup>19</sup>

iii) The criminal should not be flogged in a manner that wounds him nor should he be flogged on one part of the body: the flogging should be made to spread all over the body except for his face and private parts.<sup>20</sup>

iv) A pregnant woman should be flogged only after she has given birth and the period of puerperal discharge has passed.<sup>21</sup>

2. The criminal should be given this punishment publicly to humiliate him in front of the people, and to make him a lesson for those present. The verse directs the government or the court of justice to not show any lenience in this regard. This harsh treatment given to the criminal is necessary because the stability of a society relies on the sanctity of the relationships in a family and on their protection from every type of disorder. Fornication, a little deliberation shows, makes a society unstable and turns it into a herd of animals. It, therefore, deprives a society of its well-being and prosperity. Hence, such criminals should be dealt

18. *Mu'aṭṭā*: No. 1562 / *Abū Bakr Jaṣṣāṣ, Aḥkāmū'l-Qur'ān*, 1<sup>st</sup> ed., vol. 3, (Beirut: *Dāru'l-Kitāb al-'Arabī*, 1335AH), p. 262 / *Ibn 'Arabī, Aḥkāmū'l-Qur'ān*, 3<sup>rd</sup> ed., vol. 3, (Beirut: *Dāru'l-Ma'ārifah*, 1972), p. 1327

19. *Abū Bakr Jaṣṣāṣ, Aḥkāmū'l-Qur'ān*, vol. 3, (Beirut: *Dāru'l-Kitāb al-'Arabī*, 1335AH), pp. 261-2

20. *Abū Bakr Jaṣṣāṣ, Aḥkāmū'l-Qur'ān*, vol. 3, (Beirut: *Dāru'l-Kitāb al-'Arabī*, 1335 AH) p. 260 / *Ibn Arabī, Aḥkāmū'l-Qur'ān*, 3<sup>rd</sup> ed., vol. 1, (Beirut: *Dāru'l-Ma'ārifah*, 1972), p. 1327 / *Abū Dā'ūd*: No. 4493 / *Musnad Aḥmad*: No. 5955

21. *Ibn 'Arabī, Aḥkāmū'l-Qur'ān*, 3<sup>rd</sup> ed., vol. 1, (Beirut: *Dāru'l-Ma'ārifah*, 1972), p. 406

with without showing them any compassion. The words used by the *Qur'ān* are: ‘ (lā ta'khuzkum bihimā ra'fatun fi dīnillāh: let not compassion move you in their case in the enforcement of the law of God).

Writes *Imām Amīn Aḥsan Iṣlāḥī* in his celebrated commentary of the *Qur'ān*:

No lenience should be shown in the implementation of this punishment; softness should be shown to neither a woman nor a man, to neither the rich nor the poor. The limits set by Allah should be observed without granting any alleviation or showing partiality, for this is a requirement of belief in Allah and in the Hereafter. The faith in Allah and in the Hereafter of those who show weakness in this regard cannot be trusted. A noteworthy point in the statement of this punishment is that the woman is mentioned before the man. One reason for this is that without a woman's consent fornication cannot take place; secondly there is a strong possibility that being the weaker sex, feelings of compassion may arise for her; the *Qur'ān*, therefore, has mentioned her before the man so that it becomes evident from the style of the verse that in the Almighty's eyes no lenience should be shown to either the woman or the man.<sup>22</sup>

It is with these sentiments of impartiality in the observance of the limits of Allah that the Prophet (sws) is reported to have said:

( : )

By God! If *Fātimah* the daughter of Muhammad had committed this theft, I would definitely have cut off her hand. (*Muslim*, No: 1688)

3. After this punishment has been carried out, no chaste man or woman should marry men and women who commit fornication. According to the *Qur'ān*, such people can only marry among their own sort or among the idolaters. It does not allow the marriage of a pious woman with a man guilty of

22. *Amīn Aḥsan Iṣlāḥī, Tadabbur-i-Qur'ān*, 4<sup>th</sup> ed., vol. 5, (Lahore: Faran Foundation, 1991), p. 362

committing fornication nor does it permit a pious man to bring home such a woman in his house. Consequently, every such marriage is not considered legal in Islam. The words ‘*lā yankih*: he should not marry) denote prohibition of such marriages, and to explain this very aspect, the Almighty says: ‘*wa ḥurrima dhālika ‘ala’l-mu’minīn*: the believers are forbidden such marriages).

However, as stated earlier, this directive pertains only to the fornicators (both male and female) who have become liable to punishment once their crime has been proven. This is what grammatical rules dictate; ie the words ‘*al-zānī lā yankih*: the male fornicator should not marry) and ‘*al-zāniyah lā yankihūha*: the female fornicator should not marry) of the second verse refer to ‘*al-zāniyah wa al-zānī*: the female fornicator and the male fornicator) mentioned in the previous one.

4. While stating this punishment, adjectives are used to qualify the men and women who commit fornication. This is similar to the statement in which the punishment for theft is mentioned. It is evident therefore that this punishment is the utmost punishment, which should be given only when the crime has been committed in its ultimate form and the criminal does not deserve any lenience as far as the circumstances of the crime are concerned. Consequently, criminals who are foolish, insane, have been compelled by circumstances, are without the necessary protection required to abstain from committing a crime, or cannot bear the punishment are all exempt from this punishment.

About those women whom their masters force to take to prostitution, the *Qur’ān* says:

( : )

But if anyone compels them, Allah will be Forgiving and Merciful to them after their being compelled to it. (24:33)

Similarly, about the slave women who were present in the Prophet’s times, it says that they also cannot be administered this punishment because of improper upbringing and education and because of lack of family protection – so much so that if their husbands and masters have done all they can to keep them chaste

and in spite of this they commit the crime, they shall be given only half this punishment ie, fifty stripes instead of hundred. The *Qur'ān* says:

( : )

And then when they are kept chaste and they commit fornication, their punishment is half that of free women. (4:25)

5. The law of accusing someone of fornication, as explained below also indicates that the Almighty does not like that a criminal confess to his crime himself or that those who are aware of his crime report this matter to the authorities. The Prophet (sws) has said:

( : )

He among you who gets involved in such filth, should hide behind the veil stretched out for him by Allah, but if he unfolds the veil, we shall implement the law of Allah upon him. (*Mu'atta*, No: 1558)

Similarly, he once told a person:

( : )

If you had hidden the crime of this [person], it would have been better for you. (*Mu'atta*, No: 1491)

#### 4. *Qadhf*

( - : )

Those who accuse honourable women and bring not four witnesses as an evidence [for their accusation], inflict eighty stripes upon them, and never accept their testimony in future. They indeed are transgressors. But those who repent and mend their ways, Allah is Ever-Forgiving and Most-Merciful. And those who accuse their wives but have no witnesses except themselves shall swear four times by Allah that they are telling the truth and the fifth time that the curse of Allah be on them if they are lying. But this shall avert the punishment from the wife if she swears four times by Allah and says that this person is a liar and the fifth time she says that the curse of Allah be on her if he is telling the truth. (24:4-9)

This is the directive for *Qadhf*, ie accusing someone of fornication. Although, in these verses, only the accusation of women is mentioned, yet in the Arabic language this style which can be termed as ‘*alā sabil al-taghlib*: addressing the dominant element) is adopted because normally in a society only women become targets of such allegations, and the society is also sensitive about them. Consequently, there is no doubt that on the ground of ‘similarity of basis’ this directive pertains to both men and women and cannot be restricted to women only.

In the above quoted verses, two forms of *Qadhf* are stated:

Firstly, a person accuses a chaste and righteous woman or man of fornication.

Secondly, such an accusation takes place between a husband and wife.

In the first case, the law of Islam is that the accuser shall have to produce four witnesses. Anything less than this will not prove his accusation. Mere circumstantial evidence or mere medical examination in this case are absolutely of no importance. If a person is of lewd and loose character, such things have a very important role, but if he has a morally sound reputation, Islam wants that even if he has faltered, his crime should be concealed



and he should not be disgraced in the society. Consequently, in this case, it wants four eye-witnesses for the testimony to initiate the hearing, and if the accuser fails to produce them, it regards him as guilty of *Qadhf*.

According to the *Qur'ān*, the details of the punishment of *Qadhf* are:

1. The criminal shall be administered eighty stripes.
2. His testimony shall never be accepted in future in any matter, and as such he shall stand defamed in the society.

Administering eighty stripes and not considering a person eligible to bear witness are punishments of the Herein, while in the Hereafter he shall be counted among the transgressors except if he repents and mends his ways.

In the second case, ie if such an instance takes place between a husband and his wife, then according to the *Qur'ān*, if there are no witnesses, the matter shall be decided by pledging oaths. In Islamic law, this case is termed as ' ' (*Li'ān*). The husband shall swear four times by Allah that he is truthful in his accusation and the fifth time he shall swear that the curse of Allah be on him if he is lying. In reply, if the wife does not defend herself in anyway, she shall be punished for fornication<sup>23</sup>. If she refutes the allegations, she shall only be acquitted from the punishment if she swears four times by Allah that the person is lying and the fifth time she says that the wrath of Allah be on her if he is telling the truth.

The same procedure shall be adopted if the wife accuses the husband.

If such an incident takes place between a husband and wife, they shall no longer remain in wedlock according to the verse 'The man guilty of fornication may only marry a woman similarly guilty or an idolateress and the woman guilty of fornication may only marry such a man or an idolater. The

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23. Here 'punishment' means the punishment that has been mentioned in verse two of *Sūrah Nūr* (a hundred stripes) just prior to these verses. According to grammatical principles, whenever a noun has been defined by *alif-lām* and is repeated later, then if something within the context does not pose a hindrance, the repeated noun shall have the same meaning as the first. Consequently, here, no other punishment can be regarded as implied.

believers are forbidden such marriages' (24:3), and it is essential that a court legally separate them.

## 5. Theft

( - : )

As to the thief, male or female, cut off their hands as a reward of their own deeds, and as an exemplary punishment from God. For God is Mighty and Wise. But whoever repents and mends his ways after committing this crime shall be pardoned by Allah. Allah is Forgiving and Merciful. (5:38-9)

The law which has been stated in the above mentioned verses is based on the following clauses:

1. The punishment of amputating the hands is prescribed for a thief, both male (*Sāriq*) or female (*Sāriqah*). According to linguistic principles, the words *Sāriq* and *Sāriqah* are adjectives and denote thoroughness and completeness in the characteristics of the verb they qualify. Consequently, they can only be used for the type of *Sarqah* which can be called a theft and the one who commits it is called a thief. In other words, if a child steals a few rupees from his father's pocket, or a wife pinches some money from her husband, or if a person steals something very ordinary, or plucks some fruit from his neighbour's orchard, or carries away something valuable which has been left unprotected, or drives away an unattended grazing animal, or commits this ignoble offence owing to some need or compulsion, then, no doubt all these are unworthy acts and should be punished, but, certainly, they cannot be classified as acts of theft which the above given verse qualifies. Consequently, the Prophet (sws) is reported to have said:

( : )

If a fruit is hanging from a tree or a goat is grazing on a mountain side and someone steals them, then hands should not be amputated for this. But if the goat comes in a pen fold and the fruit is stacked in a field, then hands should be amputated on the condition that the fruit or the goat are at least the price of a shield. (*Mu'attā*, No: 1573)

This shows that the amputation of hands is the utmost punishment and should only be administered when the criminal does not deserve any lenience as far as the nature and circumstances of his crime are concerned.

2. This punishment, according to the *Qur'an*, should be exemplary in nature. Furthermore, the words of the verse entail the severing of the right hand, which is actually the instrument of the crime. Although the words ' (jazā aḥ bimā kasaba: as a reward of their deeds) make a subtle indication to this, the profound intellect of the Prophet (sws) inferred this result and made it a permanent principle; according to it, always the right hand shall be amputated and the word 'hand' on account of definite linguistic denotation means that part of the arm which is below the wrist.

3. The objective of this punishment is stated in the words ' (jazā aḥ bimā kasaba nakālan minallāh: as a reward of their deeds and as an exemplary punishment). *Imām Amīn Aḥsan Iṣlāḥī* explains this in the following way:

[In this verse], two reasons are stated for the amputation of hands: firstly, it is the punishment of the crime, and secondly, the punishment has to be given in an exemplary way which is a means of a severe warning to others. The *Qur'an* uses the word ' (nakāl) for such a punishment. Since both these reasons are stated adjacently without any conjunction between them, they must be regarded as essentials in carrying out the punishment ie, a means of retribution of the crime and as a means of a severe warning for the society. Those who do not simultaneously take into consideration both these aspects often end up thinking that the punishment is severer than the crime itself. The actual

fact is that this punishment is not only the retribution of the criminal act, but it is also a means to putting an end to many such crimes which may be triggered as a result if the criminals are not totally discouraged by treating them harshly. Like the craving for sex, the lust for wealth is also intense in a person. If this lust is allowed to thrive and prosper, the consequences which arise may well be observed in our own society by any keen eye. If a list of crimes committed in the most civilized of countries in one year only because of theft is prepared, it will be enough to open the eyes. The faint hearts of these civilized societies are deeply moved if hands are amputated because of theft, yet the horrendous crimes which result directly or indirectly through theft fail to rouse any feelings of concern in them. Theft is not a simple crime: it is a source of many crimes. If this crime is eliminated, these crimes shall automatically be taken care of. Consequently, it is a matter of experience that the amputation of hands on account of theft has not only reduced instances of this crime, but has also gone a long way in reducing other crimes as well. If by amputating a few hands, the life, wealth and honour of thousands of people are safeguarded, then this is not a bad deal at all; in fact, it is a very lucrative one. Regrettably the intelligentsia of this modern age fails to appreciate this.<sup>24</sup>

4. This is merely a punishment in this world. As far as the Hereafter is concerned, a person can only attain salvation if he repents and mends his ways. Repentance and the punishment of this world are not mutually exchangeable. Consequently, this punishment shall be administered even if a person repents and reforms himself, and after receiving this punishment in this world, he shall only be forgiven in the Hereafter if he repents and reforms himself.

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24. *Amīn Aḥsan Iṣlāḥī, Tadabbur-i-Qur'ān*, 4<sup>th</sup> ed., vol. 2, (Lahore: Faran Foundation, 1991), pp. 512-3



## Appendix 1

### **Islamic Punishments: Some Misconceptions**

The *Sharī‘ah* ordained by the Almighty regarding punishments has already been elaborated upon by this writer in a separate article<sup>1</sup>. It is shown in this article that the *Sharī‘ah* has specified the punishments of only five crimes<sup>2</sup>. The punishments of all other crimes have been left to the rulers of a state to legislate.

However, in this regard, as far as the prevailing concepts are concerned, four questions may arise:

(1) Has not the *Sharī‘ah* fixed the punishment of drinking as eighty stripes?

(2) Is death not the punishment for apostasy according to the *Sharī‘ah*?

(3) Can a state award death penalty in crimes whose punishments have not been ordained by the *Sharī‘ah*?

(4) Can the jail punishment be given to criminals as far as the crimes mentioned in (3) are concerned?

I now present my viewpoint in detail on these questions:

#### **1. The Punishment of Drinking**

The answer to the first question is that the punishment of drinking was fixed at eighty stripes by ‘*Umar* (rta) after he in his capacity of a Caliph had consulted the members of his *Shūrā*. In the time of the Prophet (sws), this offence was punished by punching and kicking the offender, and by beating him with twisted sheets of cloth or with twisted pieces of date-palms. The Caliph *Abū Bakr* (rta) had decreed that this crime be punishable

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1. ie, ‘The Penal *Sharī‘ah* of Islam’ translated in the preceding pages (*Translator*).

2. ie, *Muḥārabah*, Murder, Fornication, Theft and *Qadhf*.

by forty stripes, and then the Caliph 'Umar (rta) in his own times increased it to eighty stripes when he saw that people were not desisting from it. In the words of *Ibn Rushd*.<sup>3</sup>

The general opinion in this regard is based on the consultation of 'Umar (rta) with the members of his *Shūrā*. The session of this *Shūrā* took place during his period when people started indulging in this habit more frequently. 'Alī (rta) opined that, by analogy with the punishment of *Qadhf*, its punishment should also be fixed at eighty stripes. It is said that while presenting his arguments, he had remarked: 'When he [– the criminal –] drinks, he will get intoxicated and once he gets intoxicated, he will utter nonsense; and once he starts uttering nonsense, he will falsely accuse other people'.

It is evident from this, that the punishment of drinking is not part of the *Sharī'ah*. It is only the prerogative of the Prophet (sws) to regard anything as part of the *Sharī'ah*, and if he has done so in a particular case, *Abū Bakr* (rta) or 'Umar (rta) can in no way alter it. Had this punishment been part of the *Sharī'ah*, *Abū Bakr* (rta) would never have replaced it with forty stripes, nor would 'Umar (rta) have increased it to eighty stripes. It is clear that if the Prophet (sws) punished such criminals by beating them, he did so not in the capacity of a law-giver but in the capacity of a Muslim ruler. His successors punished such criminals by whipping them with forty and eighty stripes respectively in their capacity as rulers. Consequently, it can be safely said that the punishment of drinking is not a *Hadd*<sup>4</sup>; it is a *Ta'zīr*<sup>5</sup>, which the parliament of an Islamic State can adopt and if

3. *Ibn Rushd, Bidāyatu'l-Mujtahid*, 1<sup>st</sup> ed., vol. 2, (Beirut: *Dāru'l-Fikr*), p. 332

4. Punishments ordained by Allah. (*Translator*)

5. Punishments legislated by the rulers of an Islamic State. (*Translator*)

needed legislate afresh in this regard.

## 2. The Punishment of Apostasy

The answer to the second question is that the punishment of apostasy has arisen by misunderstanding a *Ḥadīth*. This *Ḥadīth* has been narrated by *Ibn Abbās* in the following way:

( : )

Execute the person who changes his faith. (*Bukhārī*, No: 3017)

Our jurists regard this verdict to have a general application for all times upon every Muslim who renounces his faith from the times of the Prophet (sws) to the Day of Judgement. In their opinion, this *Ḥadīth* warrants the death penalty for every Muslim who, out of his own free will, becomes a disbeliever. In this matter, the only point in which there is a disagreement among the jurists is whether an apostate should be granted time for repentance before executing him, and if so what should be the extent of this period. The Hanafite jurists however, exempt women from this punishment. Apart from them, there is a general consensus among the jurists that every apostate, man or woman, should be punished by death.

In the opinion of this writer, this view of our jurists is not correct. The verdict pronounced in this *Ḥadīth* has a specific application and not a general one: It is only confined to the people towards whom the Prophet (sws) had been directly assigned. The *Qur'ān* uses the words *Mushrikīn* and *Ummiyyīn* for these people.

I now elaborate upon this view.

In this world, we are well aware of the fact that life has been endowed to us not because it is our right but because it is a trial and a test for us. Death puts an end to it whenever the duration of this test is over, as deemed by the Almighty. Commonly, He fixes the length of this period on the basis of His knowledge and wisdom. However, in case of the direct and foremost addressees of a *Rasūl* (Messenger of Allah), once the truth is unveiled to them in



its ultimate form after which they have no excuse but stubbornness and enmity to deny it, they lose their right to live. The Almighty had blessed them with life to try and test them, and since after ‘

’ (*Itmāmu’l-Hujjah*<sup>6</sup>) this trial becomes totally complete, therefore the law of the Almighty in this regard is that generally such people are not given any further right to live and the death sentence is imposed upon them.

This punishment is enforced upon the direct addressees of a *Rasūl* in one of the two ways depending upon the situation which arises. In the first case, after accomplishing ‘ ’ (*Itmāmu’l-Hujjah*) upon his nation, a *Rasūl* and his companions (rta) not being able to achieve political ascendancy in their territory migrate from their people. In this case, Divine punishment descends upon their nation in the form of raging storms, cyclones and other calamities, which completely destroy them. The tribes of *Ād* and *Thamūd* and the people of Noah (sws) and Lot (sws) besides many other nations met with this dreadful fate, as is mentioned in the *Qur’ān*. In the second case, a *Rasūl* and his companions are able to acquire political ascendancy in a land where after accomplishing ‘ ’ (*Itmāmu’l-Hujjah*) upon their people they migrate. In this case, a *Rasūl* and his companions subdue their nation by force, and execute them if they do not accept faith. It was this situation which had arisen in the case of the *Rasūl* Muhammad (sws). On account of this, the Almighty bade him to declare that those people among the *Ummiyyīn* who had not accepted faith until the day of *Hajj al-Akbar* (9th *Hijra*) should be given a final extension by a proclamation made in the field of ‘*Arafāt*’ on that day. According to the proclamation, this final extension would end with the last day of the month of *Muḥarram*, during which they had to accept faith, or face execution at the end of that period. The *Qur’ān* says:

( : )

When the forbidden months are over, slay the Idolaters

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6. The unveiling of truth to the extent that they have no excuse but stubbornness and enmity to deny it. (*Translator*)

wherever you find them. Seize them, besiege them and every where lie in ambush for them. But if they repent from their ill beliefs and establish the prayer and pay *Zakāh*, then spare their lives. God is Most-Forgiving and Ever-Merciful. (9:5)

A *Ḥadīth* illustrates this law in the following manner:

( : )

I have been directed to wage war against these people until they testify to the oneness of God and to the prophethood of Muhammad, establish the prayer and pay *Zakāh*. If they accept these terms, their lives will be spared except if they commit some other violation that entails their execution by Islamic law and [in the Hereafter] their account rests with God. (*Muslim*, No: 22)

This law, as has been stated before, is specifically meant for the *Ummiyyīn* or the people towards whom Muhammad (sws) had been directly assigned. Apart from them, it has no bearing upon any other person or nation. So much so, even the people of the Book who were present in his times were exempted from this law by the *Qur'ān*. Consequently, where the death penalty for the *Ummiyyīn* is mentioned in the *Qur'ān*, adjacent to it has also been stated in unequivocal terms that the people of the Book shall be spared and granted citizenship if they pay *Jizyah*. The *Qur'ān* says:

( : )

Fight against those among the people of the Book who believe not in God nor in the Last Day, and who do not forbid what God and His Prophet have forbidden and do

not accept the religion of truth as their own religion, until they pay *Jizyah* out of subjugation and lead a life of submission. (9:29)

The foregoing discussion, outlines a law of the Almighty. There is a natural corollary to this Divine law as obvious as the law itself. As stated earlier, the death penalty had been imposed upon the *Ummiyyīn* if they did not accept faith after a certain period. Hence, it follows that if a person among the *Ummiyyīn* after accepting faith reverted to his original state of disbelief, he had to face the same penalty. Indeed, it is this reversion about which the Prophet (sws) is reported to have said: ‘Execute the person who changes his faith’.

The relative pronoun ‘who’ in the above quoted *Ḥadīth* qualifies the *Ummiyyīn* just as the words ‘the people’ (*Al-nās*) in the *Ḥadīth* quoted earlier are specifically meant for the *Ummiyyīn*. When the basis of this law as narrated in these *Aḥādīth* has been specified in the *Qur’ān*, then quite naturally this specification should also be sustained in the corollary of the law. Our jurists have committed the cardinal mistake of not relating the relative pronoun ‘who’ in the *Ḥadīth* ‘Execute the person *who* changes his faith’ with its basis in the *Qur’ān* as they have done in the case of ‘the people’ (*Al-nās*) of the *Ḥadīth* quoted above. Instead of interpreting the *Ḥadīth* in the light of the relationship between the *Qur’ān* and *Ḥadīth*, they have interpreted it in the absolute sense, totally against the context of the *Qur’ān*. Consequently, in their opinion the verdict pronounced in the *Ḥadīth* has a general and an unconditional application. They have thereby incorporated in the Islamic Penal Code a punishment which has no basis in the *Sharī‘ah*.

### 3. The Capital Punishment

The answer to the third question is that the death sentence can only be given to a person who has killed someone or to someone who is guilty of spreading disorder in a society. No other person can be punished by death. The *Qur’ān* says:

( : )

He who killed a human being without the latter being guilty of killing another or of spreading anarchy in the land should be looked upon as if he had killed all mankind. (5:32)

This is the verdict of the *Qur'ān*. Hence, except for these two offences, neither a person<sup>7</sup> nor an Islamic government has any right to administer the death sentence to a person.

#### 4. The Jail Punishment

The answer to the fourth question is that the jail punishment is not merely a punishment, it is in fact a barbarity that man has invented for himself. It is therefore not expected from an Islamic government to include it in its penal code. No doubt, dark cells, underground dungeons and castle turrets have always existed in the known history of mankind. The Prophet Joseph's tale of imprisonment has been narrated both in the *Qur'ān* and in the Bible. The historian's pen also bears witness to the tragic deaths of two great scholars of Islam, *Imām Abū Ḥanīfah* (d:767 AD) and *Imām Ibn Taymiyyah* (d:1327 AD), both of whom died in captivity. But it must be borne in mind, that before the eighteenth century jails were only used as temporary lock ups. Criminals were usually detained in them during the course of their inquiry and investigation, or when they awaited the infliction of punishments like whipping, execution and other similar sentences. The concept of confining an offender behind bars for two, four or ten years as a penalty for a crime, has originated and gained acceptance only in the past three centuries. It is now a fairly common practice to punish most criminals in this manner.

Although various institutions akin to the prison existed in Europe in the fourteenth century like the *Delle Stinche* in Florence, it is generally believed that 'The Walnut Street Jail' set

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7. A person living in the system of a state becomes authorized for this only in his own defence or in someone else's defence. (*Translator*)

up in Philadelphia in 1790 was the first modern prison. Its antecedents are to be found in the reformatories and houses of correction established in London (1557), Amsterdam (1596), Rome (1704) and in Ghent (1773), an old city of Belgium. Subsequently, as the Western civilization acquired ascendancy, prisons were established all over the world. Within the precincts of these inhuman institutions, man is made to starve the personality within him for months and years; while his offspring, unaware about the concepts of crime and punishment, spend their childhood helplessly watching him bear the agony of life.

The whipping sentence is over in a while, hands are cut once and for all, crucifixion ends a criminal's life after an extreme physical torture, and execution severs irrevocably every string of his relation with this world; but it is this punishment in which the inner personality of a person is continually tormented. Some of his daily routines, in which everyone has an unconditional freedom, become totally dependent on others. He sleeps and awakes upon the will of others. He sits and stands at the direction of others. His eating and drinking habits are governed by others, and even in a matter as personal as relieving one's self, he has to seek permission from others. He is made to beg for a glass of water, a loaf of bread and even a puff of a cigarette, and on many occasions he is made to lose his self-respect to obtain them. He is deprived from the love and affection of his parents, wife and children, and is made to suppress some of his desires upon which the Almighty has posed no restriction even in the holy month of *Ramaḍān*, during which restraint and control are the keywords. In short, he faces a Hell on earth, in which he neither lives nor perishes.

Also, it is not the criminal alone who has to endure this punishment. His entire family is made to suffer with him as well. The most affected among them is his wife. The extent of moral, psychological, social and economic problems she has to bear if her husband is jailed for nine or ten years can only be estimated by the faithful wives who themselves have undergone this traumatic experience. The children also suffer an ordeal no less. Everyone knows how adversely they are affected psychologically, when they observe their father being tortured and tormented for years and years. Whipping, cutting off hands, crucifixion and execution all are punishments which either mete out extreme physical suffering

for a while or decide the fate of a criminal once and for all. But in case of imprisonment, every time the children visit their father confined in the clutches of a murky cell, intense sentiments build up and strengthen in their minds, after which how can they be expected to have poised and balanced personalities. They can rightly question the society about the ethical grounds on which they were deprived of paternal care and affection when the Almighty had blessed them with it.

Consider also, that every society wishes that after being punished and chastised, a criminal should mend his ways and correct himself. It is quite evident that the most effective way to achieve this purpose is to keep him in healthy company and in conducive environments. Oddly enough, through this punishment he is kept isolated from people who might have a good influence upon him. His family, clan and even the society are in no way given the opportunity to reform and rehabilitate him. He is put away for years in the company of criminals in such a manner that even if he desires to reform himself, he is not given any chance to do so. Quite expectedly, during the period of confinement, his association with other criminals becomes a perfect source for stimulating his evil instincts. His criminal tendencies develop further, as he begins to view everything on their basis. This companionship also provides him with an almost unlimited opportunity of discussing, planning and perfecting the art of breaching the law. He gets to know rare techniques and unique methods to hoodwink the law through the courtesy of an underworld especially provided to bestow him with some ingenious skills. An omnipresent mafia is a source of perpetual inspiration for him to emulate the records set by the masterminds of the trade. With such a set up what good a society expects from such a highly qualified law breaker once he is injected back in the society, is something quite beyond imagination.

It should also be kept in mind that after flogging a criminal, amputating his hands and inflicting other similar punishments upon him, we have no means to know when he decides to change his ill-ways – an event that might occur anytime during his life. Common sense demands that if a criminal intends to correct himself he should be readily provided with the opportunities to change himself and to lead a life of a responsible citizen. But of all the punishments, it is this punishment in which the law fixes for

him the time when he should actually change, even though it has no means of ascertaining it.

Owing to all these evils and ill-effects, the Islamic Penal Code though understandably contains a provision for house arresting a criminal or exiling him with his family if needed, it does not sanction in any way the confining of a criminal in a prison.

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## Appendix 2

### **What is *Diyat*?**

The law of *Diyat* mentioned in the *Qur'ān* in connection with the directives of *Qisās* has generated the following questions in present times:

(1) Has the *Sharī'ah* fixed the quantity of *Diyat*, and in accordance with this, is the *Diyat* of a woman half that of a man?

(2) What is the nature of *Diyat*? Is it a financial compensation for the loss suffered by the heirs of the slain or by the wounded person himself, or is it the price of life or a limb, or something besides these two?

As an answer to the first question, consider the following verses of the *Qur'ān*:

( - : )

It is unlawful for a believer to kill a believer except if it happens by accident. And he who kills a believer accidentally must free one Muslim slave and pay *Diyat* to the heirs of the victim except if they forgive him. If the victim be a Muslim belonging to a people at enmity with you, the freeing of a Muslim slave is enough. But if the victim belongs to an ally, *Diyat* shall also be given to his heirs and a Muslim slave shall also have to be set free. He who does not have a slave, must fast two consecutive months. This is from Allah a way to repent from this sin: He is Wise, all-Knowing. (4:92-3)



The actual words of the verse are ‘  
*mussalamatuḥ ilā ahlihi*: paying *Diyat* to his heirs) Their most appropriate grammatical analysis in the opinion of this writer is to regard them as the inchoative (*mubtadā*) of a suppressed enunciative (*khabr*) ie, ‘  
*fa ‘alayhi taḥrīru raqabatiḥ mu‘minatiḥ wa diyatuḥ musallamah*: It is incumbent upon him to pay *Diyat* to his heirs). The word *Diyat* in these verses occurs as a common noun, about which we all know that its meaning is determined by the context in which it is used and by its linguistic and customary usage. For example, consider the *Qur’ānic* verse: ‘  
*Innallāha ya‘murukum an tadhbahū baqarah*: Verily, God ordains you to sacrifice a cow)<sup>1</sup>. The word ‘  
*baqarah*: cow) is a common noun. Therefore, it is absolutely certain that the Jews were directed to sacrifice an animal whose name in the linguistic and customary usage of the Arabs was ‘  
*baqarah*). If they had sacrificed any cow, they would have, no doubt, fulfilled this Divine Directive. On the other hand, let us have a look at the phrase: ‘  
*aqīmu al-ṣalāh*: establish *al-ṣalāh*). The word ‘  
*al-ṣalāh*) occurs in this verse as a proper noun. In technical parlance, it is termed as ‘  
*mujmaluḥ muftaqiruḥ ila’l-bayān*: a compact statement which needs an explanation), and if one is unable to ascertain its connotation from linguistic and customary usage, it is necessary to turn to the Law Giver for an explanation of the meaning it implies. However, had it been mentioned in the *Qur’ān* as a common noun, the implied meaning would have been evident. We would have clearly understood that we are being directed to establish something which was traditionally denoted in pre-Islamic Arabic language by the word ‘  
*Ṣalāh*). In other words, if someone obligates us about something and mentions the obligated thing as a common noun, it simply means that he has directed us to obey

1. The complete verse in Arabic reads:

the ‘*ma’rūf*’ (*ma’rūf*: the general custom and tradition) in this regard. Also, since a common noun denotes generality, every meaning associated with it shall be considered as implied, without any specification, lest something within the context poses a hindrance. Therefore, in the above verse *Diyat* means something which in the general custom and usage is called ‘*Diyat*’. And the Arabic words ‘*diyatuṅ mussalamatuṅ ilā ahlihi*: paying *Diyat* to his heirs) simply mean that the family of the murdered person should be given what the general custom and tradition terms as ‘*Diyat*’.

In verse 178 of *Sūrah Baqarah*, where the directive of *Diyat* in case of intentional murder has been given, it has been qualified by the word ‘*ma’rūf*: the general custom):

( : )

Then for whom there has been some remission from his brother, [the remission] should be followed according to the *Ma’rūf* and *Diyat* should be paid with kindness. (2:178)

It is evident from the above mentioned verses of *Sūrah Nisā* and *Sūrah Baqarah* that in case of intentional as well as unintentional murder, *Diyat* should be paid according to the custom and tradition of the society. In his own period, the Prophet (sws) obeyed this *Qur’ānic* injunction by following the prevailing ‘*ma’rūf*: the general custom) of the Arab Society. Whatever has been stated in the *Aḥādīth* is just an explanation of this ‘*ma’rūf*’ during that period. It should be clear that no directive of the Prophet (sws) obligates Muslims to follow it.

An important question that needs considerable explanation concerns the actual Arab custom about *Diyat*. A study of pre-Islamic Arabic poetry and the recorded account of battles between various Arab tribes shows that the *Diyat* of every person whose blood relation with his tribe was ‘*ṣarīḥ*: a person whose blood relation with some tribe is definite), was fixed at ten camels. The *Diyat* of an ally or a maid was half of the ‘*ṣarīḥ*’ (*ṣarīḥ*) and the *Diyat* of a woman was also half that of a man. The author of *Aghānī* while describing the events of a battle

between the tribes of *Aws* and *Khazraj* writes:

And in their custom, the *Diyat* of a ‘*mawlā*’ (mawlā: an ally) was five camels and that of a ‘*ṣarīh*’ (ṣarīh) was fixed at ten camels.<sup>2</sup>

According to Dr. *Jawwād ‘Alī*:

If the slain person was a maid’s son, his *Diyat* was half that of a *ṣarīh* and the *Diyat* of a woman was half that of a man.<sup>3</sup>

Some tribes because of their high social status accepted twice the actual amount of *Diyat*, while some paid twice the actual amount as a favour and blessing upon the other tribe. Dr *Jawwād ‘Alī* writes:

It is said that *Ghaṭārīf* or the people of the tribe *Ḥaris Ibn ‘Abdullāh Ibn Bakr Ibn Yashkur* used to accept two *Diyats* for their slain, and if it became obligatory for them to pay *Diyat*, they used to pay a single *Diyat*. Likewise, for *Baṅī ‘Āmir Ibn Bakr Ibn Yashkur*, whose ancestor ‘*Āmir*’ was, in

2. *Abu’l-Farj Aṣḥānī, Aghānī*, 2<sup>nd</sup> ed., vol 3, (Beirut: *Dāru’l-Kutub al-‘Ilmiyyah*), p. 40

3. Dr *Jawwād ‘Alī, Al-Mufaṣṣal fī Tārīkhi’l-‘Arab Qabla’l-Islām*, 2<sup>nd</sup> ed., vol. 5, (Beirut: *Dāru’l-‘Ilm Li’l-Malāyīn*, 1986), p. 592

fact, called *Ghaṭrīf*, two *Diyats* were fixed, while for the rest of the nation it was single. Similarly, according to most traditions, the tribe of *Baṅī Aswad Ibn Razan* in pre-Islamic times used to pay double *Diyat* to others.<sup>4</sup>

He goes on to say:

This regularity in paying two *Diyats* was not because of some weakness but as a favour to the family of the slain.<sup>5</sup>

The *Diyat* of kings, called the *Diyatu'l-Mulūk*, was fixed at a thousand camels. *Qarād Ibn Ḥansh al-Ṣāridī* while eulogizing *Baṅī Fazārah* says:

*Wa naḥnu rahana'l-qawsa thummut fūdiyāt  
Bi alfiṅ 'alā ḡahri'l-fazāriyyi aqra'ā*

(And we pledged a bow, and from the wealth of *Fazāriyyi* a thousand camels were given as remittance for this.)

*Bi'ashri mi'īna li'l-mulūki sa'ā biḥā  
Liyūfiya Sayyār ubnu 'Amriṅ fa asra'ā*

(Through ten hundred camels which is the *Diyat* of kings, *Sayyār Ibn 'Amr* strove to carry out this promise and fulfilled the responsibility without delay.)

A few years before the birth of the Prophet (sws), this custom underwent a drastic change. It is said that *'Abdu'l-Muṭṭalib*, the grandfather of the Prophet (sws) vowed that if God would bless him with ten sons, he would slaughter one of them as a sacrifice.

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4. Ibid., p. 593

5. Ibid.

And when God fulfilled his wish, he set out to fulfil his own pledge. A lot was cast to select which among the ten sons should be sacrificed. It fell upon 'Abdullāh. So when 'Abdu'l-Muṭṭalib was on his way to sacrifice him, some people stopped him and suggested to sacrifice a camel instead. It has been indicated before that during that time the quantity of *Diyat* was fixed at ten camels. Hence, once again, a lot was cast, this time in the name of 'Abdullāh and ten camels. Again, it fell upon 'Abdullāh and the process was repeated until the number of camels reached one hundred. According to the traditions, after this event the quantity of *Diyat* among the Arabs, particularly the *Quraysh* was re-fixed at a hundred camels. In the words of *Ibn Abbās* (rta):

During that period, *Diyat* was ten camels. It was 'Abdu'l-Muṭṭalib who first of all fixed it at one hundred camels. As a result, this quantity was adopted by the *Quraysh* and the Arabs.<sup>6</sup>

*Zuhayr* has mentioned the same amount of *Diyat* in his 'Mu'allaqah'. While eulogizing two Arab chiefs, *Haram Ibn Sanān* and *Hārith Ibn 'Awf*, because the two had paid three thousand camels as *Diyat* to stop a war between 'Abas and *Fazārah*, he says:

*Tu'affa'l-kulumu bi'l-mi'ina fa aşbahat  
Yunajjimuhā man laysa fihā bi mujrimū*

(By means of hundreds of camels the wounds shall be healed. So, those who were just innocent began to pay these camels in small lots.)

6. *Ibn Sa'ad, Al-Ṭabaqātu'l-Kubrā*, vol. 1, (Beirut: Dār Ṣādir, 1960), p. 89

It is evident from this couplet that after this war the *Diyat* of the slain was paid in installments. According to *Aghānī*:

Hence it was three thousand camels which were given in three years.<sup>7</sup>

In this *Mu'allaqah*, *Zuhayr* has pointed out that (Ifāl: young camels) were given as *Diyat*:

*Fa aşbaḥa yuḥda fihimu min tilādikum  
Maghānimu shattā min ifāliḡ muzannamī*

(From your inherited wealth, camels of various ages which are *Ifāl* ie, well bred young camels are sent to the families of the slain.)

About this specification of ‘ ’ (*Ifāl*), *Zawzanī*, a commentator of the *Sab'a Mu'allaqāt* writes:

The poet has particularly mentioned young camels because only two-year olds, three-year olds and four-year olds were given as *Diyat*.<sup>8</sup>

The *Diyat* of wounds also existed in Arabia. A study of pre-Islamic Arabic reveals that the words ‘ ’ (*arsh*) and ‘ ’ (*nadhr*) were used in this meaning besides others. According to the *Lisānu'l-'Arab*:

7. *Abu'l-Farj Aşfahānī, Aghānī*, 2<sup>nd</sup> ed., vol 10, (Beirut: *Dāru'l-Kutub al-'Ilmiyyah*), p. 297

8. *Sharḥ Al-Mu'allaqāt Al-Sab', Zawzanī*, 1<sup>st</sup> ed., (Lahore: *Dāru'l-Nashr Al-Kutub Al-Islamiyyah*), p. 80

The word ‘*arsh*’ is, in fact, ‘*khadsh*’ ie, bruise or wound. Then it began to be used for what was exacted as *Diyat* for wounds. The people of *Hijāz* used the word ‘*nadhr*’ for this.<sup>9</sup>

We have mentioned above that it was this Arabic custom which the Prophet (sws) while obeying the *Qur’ān*, enforced during his own time. Consequently, in some *Āḥādīth* it has been mentioned that the Prophet (sws) continued with the Arabic custom in the matters of *Diyat*, which had existed before his own Prophethood. To further quote *Ibn Abbās* (rta) from the *Ṭabaqāt* of *Ibn Sa‘ad*:

Among the *Quraysh* and in Arabia, the quantity of *Diyat* adopted was one hundred camels. Consequently, later on the Prophet continued with it.<sup>10</sup>

In another *Ḥadīth*, which linguists present in support of the word ‘*ma‘qulah*’ and which has also been reported in slightly different words in the *Musnad* of *Aḥmad Ibn Ḥanbal*, this matter has been stated in the following way:

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A treaty between the *Anṣār* and the *Quraysh* was documented by the Prophet in which it was written down that the *Muhājirīn* of the *Quraysh* would continue according to their previous state and the matter of *Diyat* would be conducted between them as before.<sup>11</sup>

9. *Ibn Manẓūr, Lisānu’l-‘Arab*, 1<sup>st</sup> ed., vol. 6, (Beirut: *Dār Ṣādir*, 1400 AH), p. 263

10. *Ibn Sa‘ad, Al-Ṭabaqātu’l-Kubrā*, vol. 1, (Beirut: *Dār Ṣādir*, 1960), p. 89

11. *Ibn Manẓūr, Lisānu’l-‘Arab*, 1<sup>st</sup> ed., vol. 11, (Beirut: *Dār Ṣādir*, 1400 AH), p. 462

On the contrary, in Yemen (southern Arabia), the custom was that in various forms of murder and in various types of wounds, the amount of *Diyat* was fixed by the ruler. But when Yemen became a part of the Islamic State during the Prophet's time, a letter was sent by him to the chiefs of Yemen in which he fixed the same quantity of *Diyat* for them which was enforced in his own territory. Dr *Jawwād 'Alī*, while writing about this Arabic custom, says:

*Diyat* was paid according to the custom in southern Arabia also, but no regular legislation had been done in this regard; instead, the determination of its amount had been left upon the discretion of the ruler.<sup>12</sup>

The epistle of the Prophet (sww) which he wrote to the people of Yemen<sup>13</sup> is reproduced here:

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12. Dr *Jawwād 'Alī*, *Al-Mufaṣṣal fī Tārīkhi'l-'Arab Qabla'l-Islām*, 2<sup>nd</sup> ed., vol. 5, (Beirut: *Dāru'l-'Ilm Li'l-Malāyīn*, 1986), p. 593

13. A little deliberation shows that the ratios of *Diyats* which have been stated in this epistle are the last word as far as justice and fairness are concerned. Our rulers while legislating in this regard should take them into consideration.



( : )

He who wrongfully kills a Muslim and his crime is legally proven shall be taken revenge from, except if the heirs of the murdered person agree to accept *Diyat*. In this case, the *Diyat* of life is one hundred camels and that of a nose also when it is completely cut off. The *Diyat* of a tongue or lips or testicles or the male reproductive organ or the back or both eyes is one hundred camels as well. The *Diyat* of a single foot [and a hand]<sup>14</sup>, however, is half. A wound which reaches the stomach and one which reaches the brain shall have one-third *Diyat*. The *Diyat* of an injury because of which a bone is displaced is fifteen camels. For each of the fingers of the hand and feet, the *Diyat* is ten camels, for the teeth it is five and for an injury because of which a bone is exposed, it is five as well. A man shall be executed in place of a woman and those who can pay *Diyat* only in the form of gold, the *Diyat* is one thousand *Dinārs*. (*Nasā'ī*, No: 4853)

After this explanation about the law of *Diyat*, it becomes evident that Islam has not prescribed any specific amount for *Diyat* nor has it obligated us to discriminate in this matter between a man or a woman, a slave or a free man and a Muslim or a non-Muslim. The law of *Diyat* was in force in Arabia before the advent of Islam. The *Qur'ān* has directed us to pay *Diyat* just according to this law both in case of intentional as well as un-intentional murder. By this *Qur'ānic* directive, *Diyat*, became an eternal law of the *Sharī'ah* for all times and for every society; however its quantity, nature and other related affairs have been left by the *Qur'ān* upon the customs and traditions of a society. The Prophet (sws) and his Rightly Guided Caliphs (rta) decided all the cases of *Diyat* according to the customs and traditions of the Arabian society during their own times. The quantities of *Diyat* which are mentioned in our books of *Ḥadīth* and *Fiqh* are in accordance with this custom and tradition, which itself has its roots in the social conditions and cultural traditions of the Arabs. However, since

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14. These words have been taken from another text of the *Ḥadīth Sunan Nasā'ī* in which this epistle has been recorded.

then, the wheel of fortune has revolved through fourteen more centuries and the tide of time has sped past innumerable crests and falls. Social conditions and cultural traditions have undergone a drastic change. In present times, it is not possible to pay *Diyat* in the form of camels nor is it a very wise step to fix the amount of *Diyat* on this basis. The nature of ‘*أقيلاه*’ (*Āqilah*: community/tribe) has completely changed and various forms of un-intentional murder have come into existence which could never have been imagined before. We know that the guidance provided by the *Qur’ān* is for all times and for every society. Hence, in this regard, it has directed us to follow the ‘*ما ريف*’ (*ma’rūf*: the general custom) which may change with time. As per this *Qur’ānic* directive, every society is to obey its custom, and since in our own society no law about *Diyat* previously exists, those at the helm of affairs of our state can either continue with the above mentioned Arab custom or re-legislate in this regard; whatever they do, if the society accepts this legislation, it will assume the status of our ‘*ما ريف*’ (*ma’rūf*: the general custom). It is obvious that those in authority in any society can revise and re-structure the laws which are based on the ‘*ما ريف*’ (*ma’rūf*: the general custom), keeping in view the collective good of the masses. *Ibn ‘Abidīn*, a celebrated *Hanifite* scholar, writes:

It should be noted that juristic issues either stand proven by a categorical injunction which is the first type, or stand proven by *Ijtihād* and opinion [which is the second type]. Most issues of the second category are based by the

*Mujtahids* upon the customs and traditions of a particular period in such a way that if they would have been present in this age which has a certain custom and tradition, they would have given a different opinion. Hence, about the conditions of *Ijtihād*, they also state the condition that it is necessary to have a clear understanding of the habits and common practices of the people because with the change in times a lot of the directives change. This may be due to a number of reasons. For example, a change in the general custom, requirement of a situation or a fear of disorder in the general condition of the people that if a directive is continued in its original state it might create difficulties for them or inflict a loss upon them; this would be against the principles of the *Sharī'ah* which are based upon facility, comfort, and prevention of damage and disorder.<sup>15</sup>

Consider now the second question: What is the nature of *Diyat*? In this matter, there are generally two views. One group of scholars regards it as the monetary value of human life, while another group considers it to be the monetary compensation of the financial loss inflicted by the murderer upon the family of the murdered person.

In the opinion of this writer, both these views are incorrect. The first one is merely based upon a misconception. In the pre-Islamic Arab society, cases of murder were usually settled by ' (Thār: revenge), ' (Qisās) and *Diyat* respectively. As is evident from the order, ' (Thār) was the foremost objective of the Arabs. They used to believe that the soul of the deceased is transformed into a bird which flies away, and unless revenge is taken, it wanders about in the wilderness crying out ' (Isqūnī! Isqūnī: quench my thirst! quench my thirst!). Some of them believed that only that slain person remains alive in his grave whose death had been avenged, and if his murder is not avenged, his soul dies and darkness descends upon his grave. Due to these beliefs, they always preferred ' (Thār) and accepted ' (Qisās) only when they could not help it, not to speak of *Diyat*. *Ummi Shamlah* says:

15. *Ibn 'Abidīn, Rasā'il Ibn 'Abidīn*, 1<sup>st</sup> ed., (Damascus: *al-Maktabah al-Hāshimiyyah*, 1325 AH), p. 125

*Fa yā shamlu shammir waṭlubi'l-qawma billadhī  
Uṣibta wa lā taqbal qiṣāsaṅ wa lā 'aqlā.*

(Therefore, O *Shamlah*! rise and get ready to avenge the harm inflicted upon you by your enemies and listen! Do not accept *Qiṣās* or *Diyat* at any cost.)

*Abbās Ibn Mirdās*, while inciting 'Amir, a tribesman of the *Khuḍā'ah* tribe to revenge says:

*Wa lā taṭma'an mā ya'lifūnaka innahum  
Atawka 'alā qurbāhumu bi'l-muthammalī*

(And don't even think about the *Diyat* they are tempting you with, for, in spite of having a blood relationship, they have brought a deadly poison for you.)

In this matter, the severity of their emotions, even after accepting Islam can be seen from the following verses of *Miswar Ibn Ziyādah*, when he was offered seven *Diyats* upon the murder of his father by the governor of *Madīnah*, *Sa'īd Ibn al-Āṣ*. He says:

*A ba'ad alladhī bi'l-na'afi na'afi kuwaykibiṅ  
Raḥīnati ramsiṅ dhi turābiṅ wa jandaṭī*

(What! after the person who was buried at the foot of Mount *Kuwaykab* in a grave of mud and stone.)

*Udhakkaru bi'l-buqyā 'alā man aṣābanī*

*Wa buqyāya annī jāhiduḡ hayru mu'tilī*

(I am being advised to show mercy upon a cruel person who has inflicted me with this grief. The only mercy I can show is to take revenge at all costs.)

*Fa in lam anal tha'rī mina'l-yawmi aw ghadiḡ*

*Baḡī 'amminā fa'l-dahru dhū mutaṡawwalī*

(O you, the sons of my paternal uncle, it does not matter if, today or tomorrow, I am not able to take revenge, for this world has a long life.)

*Fa lā yad'unī qawmī liyawmi karīhatin*

*la in lam u'ajjil ḡarbatan aw u'ajjalī*

(If, without any hesitation, I do not attack my enemies or become a target of their attack, my nation should never call me for any battle.)

*Anakhtamu 'alaynā kalkala'l-ḡarbi marratan*

*Fa naḡnu maḡikhuhā 'alaykum bikalkalī*

(You have placed the chest of war upon us; so listen! we have also decided that unless we place it upon you, we would not remain at ease.)

*Yaqūlu rijāluḡ mā uṡība lahum abun*

*Wa lā min akhīḡ aqbil 'ala'l-māli tu'qalī*

(Those people are offering me *Diyat* and urging me to accept money, whose fathers and brothers never fell prey to the sword

of a killer.)

Hence, it was a result of these emotions that they considered the acceptance of *Diyat* as shameful, and regarded it to be equivalent to selling the blood of the murdered person. *Rabī'ah Ibn 'Ubayd*, a poet of the tribe *Banī Naṣr* says:

*A' dhuwābu Inni lam ahabka wa lam aqum*

*Li'lbay'i 'inda taḥadhdhuri'l-ajlābī*

(O *Dhuwāb*! I have not forgiven your murder; nor in the midst of business in the market of *Ukāz* am I selling your blood (ie, accepting your *Diyat*.)

However, it is evident that such emotional utterances have got nothing to do with the actual nature of *Diyat*. They can only be regarded as sentimental statements over the loss of dear ones, and one often comes across such instances in one's life. People who have tried to ascertain the nature of *Diyat* from these utterances can only be regarded as those who are devoid of any linguistic appreciation. They probably did not realize that human life or human limbs are priceless. No mother, father, brother or son, at any rate, can ever be willing to accept *Diyat* on the pretext that the monetary worth of the deceased son, brother or father is what is actually being received. Hence, if this opinion is accepted, the result, obviously, would be that a society would never benefit from the expediency upon which the law itself is based. On these grounds, this opinion, regrettably, stands rejected.

As far as those people are concerned who regard it to be a monetary compensation of the inflicted economic loss, they must realize that the basic nature of a thing must exist in every small or large part it constitutes. Even a cursory look at the law of *Diyat* reveals that *Diyat* is not given solely in cases of murder, but in case of loss of a human organ or limb like a nose, ear, eye and tooth as well. It is quite evident that the loss of such limbs does not result in any economic loss for the affected person or family. After all, if a toe or a finger, or even a tooth is lost, what financial damage is incurred? Apart from other reasons, this

internal contradiction in the premises of the view, is enough to prove it a fallacy.

Since both the views about the nature of *Diyat* are not correct, what then is the correct view point? To answer this question, it is necessary to have a recourse to ancient Arabic traditions for a solution.

We find a lot of instances, in which the subject of *Diyat* has been discussed in pre-Islamic Arabic poetry. Episodes of homicide and murder were so rampant in the ancient Arab society that the subjects of ‘*Thār*’, ‘*Qiṣāṣ*’ and ‘*Diyat*’ were often versified in their poetical compositions. No doubt, they often used to challenge the sense of honour of those who accepted *Diyat*, and provoked them to revenge, but apart from these sentimental utterances, we find many instances where a more serious treatment of the topic reveals very clearly their own concepts about the actual nature of *Diyat*.

A careful study shows that in such instances they used the words ‘*gharāmah*’ or ‘*maghram*’ which literally means ‘penalty’. Just as in English, these words imply the exaction of fine from an offender as a punishment for a crime, the word ‘*gharāmah*’ denotes this meaning in Arabic. It has been indicated before that the Arab poets used this word in instances when they talked about the nature of *Diyat*. To quote *Zuhayr*:

*Yunajjimuhā qawmuṅ liqawmiṅ gharāmatan*

*Wa lam yuharīqu baynahum mil’a miḥjamī*

(In small lots those camels began to be given by one nation to the other, as a fine; though the givers did not even shed a drop of blood among those who were receiving it.)

This same concept about *Diyat* continued to persist in later times as well. *Ajir al-Salūli*, a poet of the *Umayyid* period has said:

*Yasurruka mazlūman wa yurḍika zālīman*

*Wa yakfika mā ḥammaltahu 'inda maghramī*

(If you are oppressed he makes you happy by taking revenge, and if you are the oppressor, he pleases you by taking your side; and as a result of this oppression, when you are paying a fine (*Diyat*), whatever amount you burden him with, he alone pays it.)

Hence, it is quite evident from this discussion that *Diyat* is neither a monetary compensation for an economic loss nor a monetary worth of human life. By nature, it is ‘*gharāmah*’ ie, a fine or penalty imposed on the criminal in lieu of ‘*Qiyās*’ (*Qiyās*) in case of intentional murder and, indeed, in all cases of un-intentional murder.

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### Appendix 3

#### **The Law of Evidence**

Since the *Qur'ān* has in no way bound the Muslims to adopt a particular method in proving a crime, it is absolutely certain that a crime stands proven in Islamic law just as it is in accordance with the universally acceptable methods of legal ethics endorsed by sense and reason. Consequently, if circumstantial evidence, medical check-ups, post mortem reports, finger prints, testimony of witnesses, confession of criminals, oaths and various other methods are employed to ascertain a crime, then this would be perfectly acceptable by Islamic law.

It is to this fact that the following words of the Prophet (sws) allude to:

( : )

To substantiate a crime is the claimant's responsibility, and the person who refutes it will have to swear an oath. (*Tirmadhī*, No: 1261)

In the words of *Ibn Qayyim*:<sup>1</sup>

The word '*Bayyinah*' in the language of the *Qur'ān*, of the Prophet (sws) and of his Companions (rta) is the name of everything by which the truth becomes evident. Hence contrary to its connotations in the terminology of the

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1. *Ibn Qayyim, I'lāmu'l-Muwwaqi'in*, 1<sup>st</sup> ed., vol 1, (Beirut: Dāru'l-Jayl, 1973), p. 90

jurists, it has a wider meaning because they only use it for two witnesses or an oath and a witness.

However, there are two exceptions to this:

Firstly, if a person accuses a chaste and righteous man or woman having a sound reputation of fornication. In this case, the *Qur'ān* stresses that the accuser shall have to produce four eye-witnesses. Anything less than this will not prove his accusation. Circumstantial evidence or medical examination in this case are absolutely of no importance. If a person is of lewd character, such things have a very important role, but if he has a morally sound reputation, Islam wants that even if he has faltered, his crime should be concealed and he should not be disgraced in the society. Consequently, in this case, it wants four eye-witnesses to testify and if the accuser fails to produce them, it regards him as guilty of *Qadhf*. The *Qur'ān* says:

( - : )

Upon those who accuse honourable women [of fornication] and bring not four witnesses as evidence [for their accusation], inflict eighty stripes, and never accept their testimony in future. They indeed are transgressors. But those who repent and mend their ways, Allah is Most-Forgiving and Ever-Merciful. (24:4-5)

Secondly, to purge an Islamic state from prostitutes who, in spite of being Muslims, do not give up their life of sin, the only thing required, according to the *Qur'ān*, is that four witnesses should be called forth who are in a position to testify that a particular woman is a prostitute by profession. In this case, it is not necessary at all that they be eye-witnesses. If they testify with full responsibility that she is known as a prostitute in the society and the court is satisfied with their testimony, then they can be given any of the punishments fixed by the *Qur'ān* for habitual criminals. The *Qur'ān* says:

( : )

And upon those of your women<sup>2</sup> who commit fornication, call in four people from among yourselves<sup>3</sup> to testify over them; if they testify [to their ill-ways], confine them to their homes till death overtakes them or God formulates another way for them. (4:15)

Barring these two exceptions, the *Sharī'ah* does not in any way bind the court to follow any prescribed procedure to ascertain a crime. Consequently, in cases of *Hudūd* punishments or in those of evidence in any other crime, in the view of this writer, it has been left to the discretion of the judge whether he accepts someone as witness or not. In this regard, there is to be no discrimination between men and women. If a woman testifies in a clear and definite manner, her testimony cannot be turned down simply on the basis that there is no other woman and a man to testify alongside her. Likewise, if a man records an ambiguous and vague statement, it cannot be accepted merely on the grounds that he is a man. If a court is satisfied by the statements of witnesses and by any circumstantial evidence, it has all the authority to pronounce a case as proven and if it is not satisfied, it has all the authority to reject it even if ten men have testified.

Except in cases where the *Qur'ān* has used the words ' ' ( *minkum*: from among you) as in 4:15 above, similar is the case with the testimony of non-Muslims: It is left to the discretion of a judge.

Here it should remain clear that our jurists hold a different view in this matter. *Ibn Rushd* has summed up the opinions of the jurists on this issue in his celebrated treatise *Bidāyatu'l-Mujtahid* in the following words:

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2. ie., Muslim women who habitually commit fornication.

3. ie., from among the Muslims.

There is a general consensus among the jurists that in financial transactions a case stands proven by the testimony of a just man and two women on the basis of the verse: 'If two men cannot be found then one man and two women from among those whom you deem appropriate as witnesses'. However; in cases of *Ḥudūd*, there is a difference of opinion among our jurists. The majority say that in these affairs the testimony of women is in no way acceptable whether they testify alongside a male witness or do so alone. The *Zahīrīs* on the contrary maintain that if they are more than one and are accompanied by a male witness, then owing to the apparent meaning of the verse their testimony will be acceptable in all affairs. *Imām Abū Ḥanīfah* is of the opinion that except in cases of *Ḥudūd* and in financial transactions their testimony is acceptable in bodily affairs like divorce, marriage, slave-emancipation and *rajū* ' [restitution of conjugal rights]. *Imām Mālik* is of the view that their testimony is not acceptable in bodily affairs. There is however a difference of opinion among the companions of *Imām Mālik* regarding bodily affairs which

relate to wealth like advocacy and will-testaments which do not specifically relate to wealth. Consequently, *Ash-hab* and *Ibn Mājishūn* accept two male witnesses only in these affairs, while to *Mālik Ibn Qāsim* and *Ibn Wahab* two female and a male witness are acceptable. As far as the matter of women as sole witnesses is concerned, the majority accept it only in bodily affairs, about which men can have no information in ordinary circumstances like the physical handicaps of women and the crying of a baby at birth.<sup>4</sup>

The jurists have based their view upon the following verse of the *Qur'ān*:

( : )

And call in two male witnesses from among your men [over the document of loan]. And if two men cannot be found then one man and two women from among those whom you deem appropriate as witnesses so that if either of them gets confused the other reminds her. (2:282)

In the opinion of this writer, this view of our jurists concerning the testimony of a woman is not correct owing to the following two reasons:

Firstly, the verse has nothing to do with the bearing of witness over an incident. It explicitly relates to testifying over a document. It is very evident that in the second case witnesses are selected by an external agency, while in the first case the presence of a witness at the site of an incidence is an accidental affair. If we have written a document or signed an agreement, then the selection of witnesses rests upon our discretion, while in the case of adultery, theft, robbery and other similar crimes whoever is present at the site must be regarded as a witness. The difference between the two cases is so pronounced that no law

4. *Ibn Rushd, Bidāyatu'l-Mujtahid*, 1<sup>st</sup> ed., vol. 4, (Beirut: *Dāru'l-Ma'rifah*, 1997), p. 311

about one can be deduced on the basis of the other.

Secondly, the context and style of the verse is such that it cannot relate to law or the judicial forums of a state. It is not that after addressing a court of law that it has been said that if such a law suit is presented before them by a claimant, then they should call in witnesses in this prescribed manner. On the contrary, this verse directly addresses people who borrow and lend money over a fixed period. It urges them that if they are involved in such dealings, then an agreement between the two parties must be written down, and to avoid disputes and financial losses only witnesses who are honest, reliable and morally sound should be appointed. At the same time their personal involvement and occupations should be suited to fulfill this responsibility in a befitting manner. The verse should not be taken to mean that a law-suit will only stand proven in court if at least two men or one man and two women bear witness to it. It is reiterated that the verse is merely a guidance for the general masses in their social affairs and counsels them to abide by it so that any dispute can be avoided. It is for their own benefit and welfare that this procedure should be undertaken.

Consequently, about all such directives the *Qur'ān* says:

( : )

This is more just in the sight of God; it ensures accuracy in testifying and is the most appropriate way for you to safeguard against all doubts. (2:282)

*Ibn Qayyim* comments on this verse in the following manner:

It relates to the heavy responsibility of testifying by which a person of wealth protects his rights. It has no concern with the decision of a court. The two are absolutely different from each other.<sup>5</sup>

In recent times, two new arguments have been advanced by

5. *Ibn Qayyim, I'lāmu'l-Muwwaqi'in*, 1<sup>st</sup> ed., vol 1, (Beirut: Dāru'l-Jayl, 1973), p. 91

various quarters to lend support to the view of the jurists concerning the testimony of women.

The first of these arguments is based on the words ‘*arba’atah shuhadā*: four witnesses) of 24:4 and ‘*arba’ataḥ minkum*: four [witnesses] among you) of 4:15. It is held that since ‘*arba’atah*’ is in the feminine gender and according to the established principle of Arabic grammar the ‘*ma’dūd*: the counted object) this ‘*adad*: the numeral) qualifies should be masculine. Consequently, by the words ‘*arba’atah shuhadā*: four witnesses) four men are necessarily implied; women cannot be included.

On a first look, this argument seems to be based on strong grounds since it is in accordance with the rules of Arabic grammar. However, a closer look reveals how baseless it actually is. Any one who has some knowledge of Arabic knows that this rule not only states that from three to ten if the ‘*ma’dūd*: the counted object) is masculine the ‘*adad*: the numeral) is feminine but also says that if the ‘*ma’dūd*: the counted object) is a noun that is used both for masculine and feminine entities, then also its ‘*adad*: the numeral) shall necessarily be feminine.

Consequently, in the following verses the ‘*adad*: the numeral) of ‘*azwāj*: pairs), which is the counted object is ‘*thamāniyah*) which is in the feminine gender:

( : )

[Take] eight pairs: of sheep a pair, and of goats a pair; say, has He forbidden the two males or the two females... (6:143)

Consider also the following verses:

( : )

There is not a secret consultation between three, but He makes the fourth among them, – nor between five but He makes the sixth. (58:7)

As in the case of ‘*arba‘ataṅ minkum*’), the ‘*ma‘dūd*: the counted object) of ‘*thalāthah*: three) and that of ‘*khamsah*: five) has been suppressed owing to its obviousness. The suppressed ‘*ma‘dūd*: the counted object) is something to the effect of ‘*nafr*: group). Since *nafr* is a word that can be spoken both for masculine and feminine genders, its ‘*adad*: the numeral) in the verse is also feminine.

Similar examples can be found in the following *Āḥadīth* also:

( : )

The food of two suffices for four. (*Dārmī*, No: 2044)

( : )

If there are three people [present] two [of them] should not whisper. (*Muslim*, No: 2183)

( : )

If three bear witness for a Muslim, he shall definitely enter paradise. (*Tirmadhī*, No: 1059)

( : )

Three people cannot be held liable: [one among them is] a person who is sleeping until he awakens. (*Abū Dā‘ūd*, No: 4398)

In these *Āḥadīth* also, the numerals ‘*arba‘ataḥ*) and ‘*thalāthah*) are feminine and any one who knows the language can in no way insist that the ‘*ma‘dūd*: the counted object) of these numerals are only men and that women cannot be implied.

The second of these arguments is that since 2:282 (quoted above) mentions that a woman might get confused thereby casting a doubt in her testimony, so in accordance with the following words attributed to the Prophet (sws) whereas a *Hadd* punishment can in no case be given in cases in which they have testified, a *Ta‘zīr* punishment can be given in such cases:



Do not enforce a *Hadd* punishment if there is a doubt.<sup>6</sup>

The following *Āḥādīth* are of similar meaning also:

( : )

Refrain from enforcing *Hudūd* on the Muslims as much as is possible for you. (*Tirmadhī*, No: 1424)

( : )

Withdraw *Hudūd* wherever you can find a plea. (*Ibn Mājah*, No: 2545)

A little deliberation shows that this argument also is baseless.

Firstly, if in a particular case a woman does in fact get puzzled while giving her testimony and the court reaches the conclusion that her testimony has become ambiguous as a result, it certainly has the right to disregard her testimony. However, how can this be made a general principle of law and on its basis a woman's testimony be forsaken for ever. Just as there is a chance that she might get puzzled while giving her testimony, there is an equal chance if not a stronger one that she may testify in a clear and unambiguous manner. The *Qur'ān* has mentioned her testifying in a state of confusion as a chance occurrence and not as a general or a certain one. A chance is just a chance and on what grounds can it be made a general principle?

Secondly, the *Ḥādīth* in no way means that if there is some doubt, a *Hadd* punishment shall not be given; it only means that in case of doubt *no* punishment at all can be given. The word *Hadd* has not been used as a term here; it is used in its literal sense for the term came into existence much after the Prophet (sws). What he has reported to have said is based on the universal principal of the ethics of law that since in case of doubt a crime does not stand proven, the criminal cannot be punished.

6. *Ibn Hajr, Talkhīṣu'l-Ḥubayr*, vol. 4, (Lahore: *Al-Maṭba'ah al-'Arabiyyah*), p. 56

Consequently, if these people say that a *Ta'zīr* punishment can be given on the basis of a woman's testimony, then this only means that the crime stands proven in their eyes. But then the question arises: If the crime stands proven, then why can't a *Hadd* punishment be given? And if they contend that if a woman's testimony always leaves room for doubt then a crime cannot be considered to be proven; so on what basis should the *Ta'zīr* punishment be administered?

A crime, obviously, cannot be regarded to be proven ten, twenty, ninety or ninety nine percent. It is either proven one hundred percent or not proven at all. Consequently, it is absolutely baseless to accept a state between proof and lack of proof in a crime and in no way can it be accepted that a *Hadd* punishment will be administered on certain grounds and *Ta'zīr* punishment on certain other grounds. No doubt that the nature of the crime and the circumstances of the criminal do have a bearing on the extent of punishment that is to be given. However, to imply that the 'extent' of proof forms a basis for punishment is something common sense totally rejects and human nature completely discards.

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