ADMINISTRATION OF CRIMINAL JUSTICE IN ISLAM AND UN HUMAN RIGHTS CONVENTIONS

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T. P. ABDULLAH

CENTRE FOR STUDIES IN DIPLOMACY
INTERNATIONAL LAW AND ECONOMICS
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
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JAWAHARLAL NEHRU UNIVERSITY

Gram : JAYENU

Telephone : 652282
652114

CENTRE FOR STUDIES IN DIPLOMACY,
INTERNATIONAL LAW AND ECONOMICS
SCHOOL OF INTERNATIONAL STUDIES

New Mehrauli Road,
NEW DELHI-110067.

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Certified that the dissertation entitled "Administration of Criminal Justice in Islam and United Nation Human Right Conventions" submitted by Abdullah T.P., in fulfilment of six credits for the degree of Master of Philosophy (M.Phil.) of the University, is to the best of my knowledge a bonafide work and may be placed before the examiners for evaluation.

CHAIRMAN

SUPERVISOR

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(T.P. Abdullah)

ABBREVIATION

AAIS	Ahamadiyya Anjuman Ishaat Islam
AD	Abu-dawud
ARAMCO	Arabian American Oil Company
BU	Buhari
FSC	Federal Shariah Court
GJICL	Georgia Journal of International Comparative Law.
HR	Human Rights
ICLQ	Islamic and Comparative Law Quarterly
IIIS	Indian Institute of Islamic Studies
IRCP	International Review of Criminal Policy
IAPL	International Association of Penal Law
Tri	Trimidi
Tr	Translation
UN	United Nations
UNP	United Nations Publication
E&SC	Economic & Social Council

GLOSSARY

Afw : Pardon, forgive

Al. Muhsant : Pure and chaste woman

Amd : Aim, intention

Al-nur : Light

Amaliajarhaiya : Surgical method

Batil : void

Diyah : Blood money (compensation)

Fiqh : Science of Law (Jurisprudence in Islam)

Fasad : violance

Hadd : Punishment (pl.)Hudud)

Hakkh : Right or claim

Iddah : Waiting period (The woman after divorce)

Ijma : Consensus

Jinaya : Offence, felony (Pl. Jinayath)

Kaffara : Expiation, penance

Kasd : Purpose

Khula : Divorce at the instance of the wife

Khamar : Wine

Maharan : Near relative

Maqzuf : accused

Muhasan : Morally sound man

Muhsanah : Morally sound woman

Munkar : wrong

Maroof : right

Nisab : Quantum

Qadhf : Unchastity

Qazf : Act of unchastity

Qazif : Accusor

Qatl : Murder

Qisas : Retaliation

Qazi : Judge

Sariqa : Theft

Sunna : Tradition

Sulha : Settlement

Shaba : Companion

Shariah : Law of the God (Muslim Personal Law)

Tazir : Discretionary Punishment

Tauba : Repentence

Thiqah : Trustworthy, good character

Ulma : Scholar

Ummah : Community

Walial-dam : The next of kin

Hisbah : General

Adl : Just

Chapter I

INTRODUCTION

Criminal law and its administration today constitute a subject of discussion among the jurists, politicians, criminologists, sociologists etc. in several platforms of the world today. Most of the debate is mainly focused on the administration of criminal justice with particular reference to its relevance for Human Rights. United Nations and its various agencies are playing a major role to organise such debates and seminars on the criminal policy and its function.

In this century the revival of the Islamic Penal System according to the Sharia principle in most of the Muslim countries also gave much attention to the subject. In the countries where Islamic jurisprudence was in operation, it has been strengthened and reinforced by fresh injunctions and practices conforming strictly to the tenets of Islam. As an increasing number of countries in the Islamic world is changing over to the criminal laws and procedures prescribed under the Sharia law there were ill-informed condemnation and unfounded apprehensions from many lawyers and jurists outside those countries, who generally believed the Anglo-American system of criminal justice to be most progressive, scientific

and rational.[1] They even believe that the present system of international law also had its origin and developments in European civilization and that the rest of the world being uncivilized or undercivilised.[2]

The emergence of Islamic Sharia Law in Muslim world challenged this concept of western nations particularly the penal law of Islam and its human rights concerns. While implementing Sharia penal code they did attempt to make it relevant to the conditions prevailing in their respective States and it conform to the over-ridding principles of individual dignity and human rights. However, from the standpoint of Western Jurisprudence , many critics contended that Islamic Law and procedure, in the field of crime and punishment, fall short of the required standards or human rights principles. This study therefore seeks to examine the principal norms and procedures of Islamic criminal jurisprudence and their application in criminal justice administration, with a view to finding out the nature and scope of human rights concepts in the system.

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1. See, N.R. Madhava Menon, "Islamic Criminal Jurisprudence and Social Defence in the Modern World: An Appreciation", Islamic and Comparative Law Quarterly, Indian Institute of Islamic Studies, New Delhi, vol. 1, no. 3, 1981, p.232.

2. See, R.P. Anand, ed., Asian States and Development of Universal International Law (Delhi, 1972), p. xiv, (Introductory Part).

In the sphere of law, implementation of the "Quranic" punishment for certain crimes like adultery and theft, have attracted a great deal of attention the world over. However, devoid of its sensation, the punishment (hudud) posits the maximum punishment, with due consideration to the elements of mercy and circumstances of individual cases. The study would bring out the truth of the events as opposed to popular perceptions projected by the powerful networks of Western media which unfortunately enjoy credibility throughout the world. A survey of reportings in the Western press on developments in the Muslim world, particularly Iran, Saudi Arabia and Pakistan provides sufficient evidence of a deliberate attempt at the suppression of facts, highlighting of minor issues and events and denigration of certain teachings of the Muslim law.

Civilized States are still groping in the dark to get a grip over the causes of crime and are devising remedies for evils from which they all suffered alike. Modern theories of punishment have failed to curb the crime and violence which are growing at an alarming pace. In this context, how far does the experimentation of the Islamic law suppress the inherent dignity and rights of man? If one does an analytical study of Islamic criminal law and evidence, then it can be shown that they compare

favourably with the standards of human rights protection demanded of civilised justice. These standards are reflected in the UN Charter and the Universal Declaration of Human rights apart from the series of conventions on protection of human rights in criminal justice.

This study not only compares critically the application of human rights norms to the principles of Islamic criminal jurisprudence but also will analyse its practical applications in the legal systems of countries where it is practised.

In this way the second chapter of this thesis deals with the crime and punishment in the Muslim countries according to the Sharia. It deals with certain specific crimes such as homicide, theft, robbery, adultery and fornication. After this the third chapter discusses the jurisprudence and state practice of certain Muslim countries regarding crime and punishment. For this purpose there is mentioned some case law of certain muslim countries. The fourth chapter comprises of crime and punishment under the United Nations Human Rights Law and its Criminal Policy. The trial and punishment of the two world war criminals has been mentioned as the case law under the International Criminal Code. The fifth chapter makes a comparative analysis about crime and punishment in

Islam vis-a-vis the Human Rights principles and norms. In conclusion we examine the policy adopted by Islam to curb crime and its advantages and disadvantages while comparing the practices prevailing in western and socialist countries.

CHAPTER - II

CRIME AND PUNISHMENT IN ISLAMIC LAW

The legal system of Islam is called Fiqh which means science of Islamic law. This include the whole realm of Islamic law and criminal law is one of its parts. In Islamic law crime is defined as an act of omission or commission that would attract either hadd or tazir punishment. Such an act is known as jinaya.[1] The penal law in Islam is called Hudud according to Hadith and Fiqh. This word is the plural of Hadd, which literally means prevention, prohibition, restraint or hinderence. Theologically it means punishment which is the right of God (Hakkh Allah).

Punishments are divided into two classes one of which is called Hadd and other is Te'zir. The Hadd is a measure of punishment defined by the Quran and Sunna. In Te'zir the Court is allowed to use its discretion in regard to the form and measure in which such punishment is to be inflicted.

Punishments according to Hadd aredeath by stoning, amputation of a limb or limbs, flogging by one hundred or eighty stripes. These are prescribed for the offences of

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1. Abdull Qadir Shaheed, Islam and Modern Criminal Law, trans. Noor-ul-Amin Leghari, The Universal Message 1/4 (Karachi, 1979), p.18; Kithab-al-Ikhtiyar, (Urdu Translation by Selamet Alikhan,(1929).

adultery committed by married persons, theft, highway robbery, intoxication and slander of imputing unchastity to women. The above offences which have been forbidden or sanctioned by punishment in the Quran have thereby become crime against the religion. In other offences flogging with various numbers of lashes or imprisonment is given. The imprisonment in the view of the Islamic law is not a punishment but a corcieve measure which aims at producing repentence (Tauba) or ensuring a required standard in moral performance. There is no system of fine in this law. These punishments are the maximum punishments for the above mentioned crimes.

This can be reduced keeping in view the circumstances in which the crimes were committed, the matter of the evidence and the motive with which the criminal committed the crime.

Hadd Punishment:

The offences which are liable for the Hadd punishment have already been mentioned. Further details about the each offence and its punishment will help to understand the perspective of this penal system.

(a) Unlawful intercourse (Zina):

It includes both adultery and fornication. In Islamic law there is no separate terminology for these

two offences. Both are known as Zina or unlawful intercourse. Therefore, there is no distinction between the adultery and fornication in the sense of terminology. But in the sphere of punishment wide differences can be seen.

The ordinary meaning of the Zina is sexual intercourse between a man and woman without being legally related to each other as husband and wife. As far as the Zina is concerned, from the very beginning of the human civilisation upto this time all the societies have condemned the acts of adultery and fornication as objectionable and non-acceptable deeds to the human society. This act is morally vicked, religiously sinful and socially evil according to religious and ethical concept of the society. But in the modern period there may be some stray individuals who will argue in favour of this act in support of their lust-while forwarding certain misguided philosophy on this point. The universal unanimity of view in this respect is due to the fact that man by nature abhors Zina.[2]

Though adultery and fornication have always been accepted as evil, there are different opinions whether it is a legally punishable offence or not and this is where Islam differs from other religions and systems of

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2. Moududi - meaning of the Quran Al-nur vol. XXIV. cited in Radiance (New Delhi, September 1981), p.6

law. Social systems which have been sensitive to human nature have always considered illicit intercourse between man and woman a serious crime and prescribed severe punishments for it. But with the deterioration in moral standards, this morality grew weaker and weaker and the attitude towards this crime became more and more tolerant.

As far as Zina is concerned the majority of the countries from time immomorial have denounced the act of adultery. Different societies in different ages formulated laws and punishments to suppress this act. Christianity and Judaism, initially prescribed the same punishment for adultery as later Islam did - that of stoning to death. But the adherants of the first two religions sidestopped the penalty and even started differentiating between adultery and fornication making the latter less punishable. Islam, however, has retained with vigour the prescribed punishments of the Quran. These punishments are being critized by others as outmodted and barbaric.

The Quran and Sunna both take a very serious view of fornication and adultery, which damage and militate against the moral order of a society. There is a difference of opinion among scholars about the punishment applicable to married and unmarried persons commiting adultery. This controversy is mainly due to the non-availability of any

Quranic verses in respect of married offenders. The penalty of stoning them to death was codified and implemented by the Prophet and the four Caliphs.

There is difference of opinion amongst the jurists as to the precise nature of the punishment prescribed for adultery. There is however, no difference of opinion in that the punishment prescribed for married persons is stoning to death and for unmarried persons it is one hundred lashes. The difference is whether it is essential to combine lashing with stoning as recorded in the hadith for married persons and lashing with exile for unmarried offenders.[3]

Evidence of Zina

As regards these proofs, the requirements of the Quran are such as cannot easily be complied with and the Prophet no doubt enacted these as a protection against hasty or false accusations.

While Zina has been declared a heinous crime liable to severe punishment, the Islamic law has also fixed high standards of proof for it. The Shariah insists on at least four eye witnesses for Zina, if

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3. Sahih Muslim, Translated by H. Siddiqi, vol.3, (Lahore, 1976), p.911

it is to be punished with the Quranic punishment.[4] This rule is discernible from the Quran itself which says:

> "And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes and reject their evidence ever after: for such men are wicked and transgressors."5

This standard of proof is obligatory for the establishment of the offence of Zina; the offence cannot be said to have been proved (for the purpose of hadd) where the number of witnesses is less than four. Further, the fact that the judge himself witnessed the commission of the crime is of no avail; he cannot award hadd while relying on his own knowledge. Also, the evidence must be unambigious and clear. The fact that the parties were found alone in a posture of intimacy inside a room may make commission of Zina highly probable, but it cannot be regarded as proof of zina. It is essential that all the four witnesses must have witnessed actual intercourse. The expressions used in Arabic in this regard emphasise clear witnessing of actual and full penetration. Such a tough standard of proof itself suggests that it is very difficult to establish the offence of zina liable to hadd. Not only is it difficult

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4. S.A.H. Rizvi,"Adultery and Fornication in Islamic Jurisprudence: Dimension and Perspectives", Islam and Contemporary Law Quarterly, IIIS, (New Delhi, 1982), vol.4, p.270

5. Holy Quran, XXIV:4

to procure four eye witnesses, but the complainant would also be afraid that in case of any false evidence there is possibility of being punished for qadhf (false accusation of unchastity). Moreover, the witness should be thiqah (i.e. they should be of good character and trustworthy) and should have no enemity with the malefactor.

It is not necessary that the offenders be medically examined to establish their guilt of illicit sexual intercourse and then to get them punished according to the law.[6]

Proof of zina, if obtained in accordance with these strict principles laid down by the Islamic law, would inevitably lead to the conclusion that the malefactors are extremely approbrious and indecent, are bent upon undermining social value and that they openly disobey the law of God. Such persons are, obviously, liable to a severe punishment.

Besides proof by eye witnesses, the offence of zina can also be established by the confession of the offender. For this it is necessary that confession must be in plain and express words and that the court be fully satisfied that the offender is confessing the crime without any coercion, in full consciousness and by his free will. Mere confession is not enough. The confession

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6. S.A.A. Moududi, n.1, October 25, 1981.

which is made by a sane person with his wits about him is acceptable in the Shariah. It is narrated in one of the hadith that the holy Prophet (SA) inquired from the people of the accused tribe, as to the state of his mind and awarded him punishment after establishing the fact that there was nothing wrong with his brain.[7] In this matter the only juristically controversial matter is whether a single confession is enough or whether it should be made four times. The latter may perhaps be the substitute for the four witnesses required by the law. The jurists also agree that where, there being no external evidence, hadd for zina is being enforced on the basis of the offender's confession and the offender retracts confession before hadd has been fully executed, the execution shall be stopped and the offender acquitted.[8]

Whether, in the case of an unmarried woman, conception amounts to proof of zina has been a point of controversy among jurists.[9] Some jurists have an opinion that conception by an unmarried woman is sufficient proof of her involvement in zina and makes her liable to punishment.[10] But the majority of the jurists hold a

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7. Sahih Muslim, n.2, p.916
8. Ibid
9. As reported in thirmidhi quoted from no.3, p.271
10. Ibid

different opinion. Their reasoning is that according to Shariah the offence of zina could be proved either by evidence of four eye witnesses or by confession of the offender; nothing other than these is admissible as proof of zina. These jurists base their reasoning on the fundamental principle of Islamic jurisprudence that doubt should motivate acquittal of the accused and not his conviction. This is in accordance with what the Prophet said on two occasions:

> "Avoid punishments so long as there is room for avoiding them. Keep the Muslims away from punishments wherever possible. If there is any way out for an offender to escape punishment acquit him. It is better for a judge to err in acquittal than in conviction." 11

Method of Punishment:

The modes of punishments are as follows:

(a) flogging should affect only skin and not the flesh;

(b) the cane used as whip should be of medium girth, i.e. it should be neither too thick and hard nor too thin and soft; trenching of the cane (to which police is used to these days) to harden the stroke is prohibited;

(c) flogging should be moderate; whipper's arm

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11. Ibid, p.272

pit should not be exposed during flogging (i.e. he should not use his full strength and force);

(d) flogging should not cause wounds and it should be spread on the whole body except face and private parts;

(e) the male offender should be flogged while standing and the females in sitting posture allowing her body to be wrapped by clothes so that no part of her body is exposed (though she would not be allowed to wear as much clothing as to protect her from the effect of flogging);

(f) flogging shall not be administered in the severe warmth or severe cold; in winter it shall be done during warmth and in summer while it is cold;

(g) flogging will not be administered after tying up the offender.[12]

(b) False accusation of unlawful intercourse (Kadhf):

The slander of zina against an innocent person should be punished according to the prescribed law. On this regard the Quran says:

> "As for those persons who charge chaste woman with a false accusation but do not

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12. S.A.A. Maududi, Tafhimu-ul-quran, vol.3, pp.340-41, cited in n.1

> produce four eye witnesses flog them them with eighty stripes and never accept their evidence afterwards for they themselves are transgressors, except those who repent and reform themselves; Allah is forgiving and merciful".13

If a person accuses another of zina but is unable to prove his allegation he should be awarded eighty stripes so that he does not utter such a slander in future. Even if the accuser is an eye witness of an immoral act he should keep the secret instead of spreading it. However, if he has withessed it he should abstain from publising the matter in society but should bring the case to the notice of the authorities and get the person involved in the act duly punished by the court of law. But the legal requirement is that the person who made the allegation should produce four witnesses in order to prove the alleged charge. All the witnesses must testify as eye witnesses not merely to the act of the intercourse but to the unlawful intercourse (zina) as such. Correspondingly a confession of unlawful intercourse, in order to bring about the Hadd punishment, must be made on four separate occasions. But in the case of other offenders sanction by hadd a single confession is sufficient. A further safeguard lies in the fact that on the accusation of unlawful intercourse which is dismissed constitutes Kadhf which itself is punishable

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13. Holy Quran, XXIV: 4,5

by hadd; for instance if one of the four required witnesses turns out to be a slave or to be otherwise disqualified from giving valid evidence, or if there are discrepencies between their respective depositions, or if one of them retracts his evidence, all are punishable for the hadd of kadhf.

Though the verses only mentions al-muhsant (pure and chaste woman) the jurists are agreed that the law is not confined to accusation in respect of woman but it extends to the accusation in respect of chaste man also. It can be applied only in a case where the accuser has accused a muhsan or muhsanh i.e. "a morally sound man or woman". In case the accused is not morally pure the law cannot be applied.

For an act of qazf to be considered as punishable it is not enough that someone accuses somebody else of immorality without a proof, but there are certain conditions which are to be fulfilled in respect of qazif (accusor) maqzuf (the accused) and the act of qazf.

As for the qazif he should satisfy the following conditions:

a) He should be an adult; if a minor commits the crime of qazf he can be given a discretionary punishment but not the prescribed punishment.

b) He should possess normal common sense; an insane and mentally abnormal person cannot be given the punishment prescribed; similarly, a person under the influence of an intoxicant, other than a forbiddenable intoxicant, e.g. chloroform, cannot be considered as guilty of qazf.

c) He should have committed qazf out of his own free will or choice, and not under duress.

d) He should not be the father or grandfather of maqzur (the accused) for they cannot be given the prescribed punishment.

The conditions to be prescribed by maqzuf (the accused) are as follows:

a) He should be possessing normal common sense i.e. he should be accused of having committed zina while in the normal state of mind; the accusor of an insane person (who might or might not have become sane later) cannot be held guilt of kazf, for the insane person cannot possibly safeguard his chastity fully and even if the evidence for zina is established against him, he will neither become deserving of the prescribed punishment nor incur personal defamation. Therefore, the one accusing him also should not be held as deserving for the prescribed punishment of qazf.

b) He should be an adult i.e. he should be accused of having committed zina while be of full age legally; accusing a minor or grown up person the committed zina when a

minor, does not deserve the prescribed punishment for like an insane person, a child also cannot fully safeguard his honour and chastity.

c) He should be a Muslim i.e. he should be accused of having committed zina while in Islam. If a non-muslim commits zina he is not awarded the prescribed punishment.

d) He should be free, accusing a slave or a slave girl, or a free person that he committed zina when a slave does not call for the prescribed punishment, for the helplessness and weakness of the slave can hinder him from safeguarding his honour and chastity.[14]

e) He himself should be free from zina proper and everything resembling therewith. His day-to-day life should be such that no body could accuse him of immorality nor should he have been held guilty of lesser crime than zina before.[15]

Qazf is not a compoundable offence. If the accused does not bring the case to the court, it will be a difficult thing; but when the case is brought to the court, the accused will be pressed to prove his accusation, and if he fails to prove it, he will be awarded the prescribed punishment. The court then

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14. The Quran itself has considered the state of slavary as excluded from the state of ihsan (moral fortification) Quran, IV, 25

15. S.A.A. Moududi, n.1, p.6

cannot pardon him, nor can the accused himself. The matter can not be settled by monetary compensation, nor can the accuser escape punishment by offering repentence or apology.

C) Drinking of alcohol (shurb al-khamr):

There are two grounds for punishment, drinking wine in any quantity, and being drunk and incapable from whatever cause. The application of hadd to this crime is made difficult by the required proof that the act was voluntary; therefore the hadd cannot be applied, without further proof, to a person found drunk and incapable. The punishment is eighty lashes (forty for the slave).

d) Theft (Sarika):

Punishment for theft in Islamic law is amputation of the arm. This depends upon the gravity and nature of the offence. Provisions for this punishment were given in the Holy Quran. The Quran says "in the case of theft the hands of the thief - either man or woman - should be cut off and it is an exemplary punishment from the God's side".[16]

While inflicting this punishment there is no discrimination or favourtism regarding the status of the accused.

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16. Holy Quran V:38

When Usmah, a compansion of the Prophet recommended the case of a wealthy woman who was involved in a theft case the Prophet remarked that "your ancestors perished because they awarded punishment only to poor men and gave the clean chit to men from rich and high class families. By God my daughter Fatima if committed the crime certainly I would have punished her".[17] The cutting off of hands may be taken metaphorically, as in qata'alsinahu which literally means that he cut off his tongue but metaphorically that he silenced him.[18] But even if taken literally, it is not necessary to cut off the hands for every type of theft and this is a fact which all the jurists have recognised. As theft is not a serious crime as dacoity, the minimum punishment for it should not be more severe than the minimum punishment for dacoity which bears the punishment of amputation of leg and foot in alternative sides. Therefore it is for the judge to decide which punishment suits a particular case.

The state of society may sometimes demand the maximum punishment, even in less serious cases, but there are several circumstances which go to show that

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17. Sahih Muslim, Chap.DCL XXIX, Translated by A.H. Siddiqi (Lahore, 1976), vol.3, p.910 and also Sahih Buhari (1971), vol.2, p.622

18. Mohd. Ali, The religion of Islam, (Lahore, 1971), p.614

maximum punishment of cutting off of hands may ordinarily be reserved for habitual thieves. Firstly, the minimum punishment for dacoity, having already been mentioned in v.33, may also be taken as the minimum punishment for the much less serious offence of theft, and this would meet the end of the justice. Secondly, the cutting off of the hands, being a punishment for the more serious offences falling under dacoity, should also be reserved for the more serious offences falling under theft, and the offence of theft generally becomes more serious when it becomes habitual. Thirdly, the punishment of cutting off of hands, in cases of theft, is called exemplary punishment, and such punishment could only be given in very serious cases, or when the offender is addicted thereto, and the milder punishment of the imprisonment has no desired effect upon him. Lastly, v.39, shows that the object of the punishment is <u>reform</u> and an occasion to reform can only be given if the punishment for a first or second offence is less severe.

It is true that cutting off the hand, even for a first crime, is reported in tradition but this may be due to the particular circumstances of the society, at that time, and it is for judges to decide which punishment will suit the circumstances. For instance, according to certain tradition, the hand was cut off

when the amount stolen was one-quarter of a dinar or more; according to others when it was one dinar or more.[19] According to another, the hand of the thief was not to be cut off at all when a theft was committed in the course of a journey or an expedition.[20]

There are also conditions showing that the hand was not to be cut off for the theft of anything of a triffling nature such as wood, bamboos, grass, fish, fowls and garden stuff, or for the theft of things which quickly decay and spoil, such as milk or fruit. The cutting off of the hand is also prohibited in the case of criminal misappropriation.[21]

This punishment also excludes things of which the accused is a partial owner, including public property or to which he has a title including the counter value of a claim. The stipulation of custody excludes theft from a near relative (mahran) from a

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19. Mohammad Ali, The Religion of Islam: A Comprehensive of the Sources, Principles and Practices of Islam: (Lahore, 1971) p.615, cited from Sune of Abu Dawud, 37:12.

20. Ibid, p.615, cited from Sunan of Abu-Abd al-Raman Ahmad ibn' Ali'al-Nasa'i, 46:13. The words in AbuDawud re: "I heard the messanger of Allah say, Hands shall not be cut off in the course of journey".

21. Abu Dawud, 37. :14

house which the accused had been permitted to enter. Similarly, when the thief has been caught red handed before removing the articles from the place where the alleged theft has taken place he is not subject to this punishment. If there are several thieves, hadd takes place only if the value of object when divided by their numbers equals at least ten dirham. The hadd penalty excludes pecuniary liability only if the stolen object is still in existence and if it is returnable to the owner.

The evidence of theft may be proved in the following ways:

a) By Confession: The accused without any inducement, intimidation or torture makes a confession in the Court of Law that he has committed the theft.

b) By Evidence: The person stolen from personally or through his authorised agent, institutes a claim of theft and two sane, adult and adil (just) Muslim males appear before the Court and give evidence that they had witnessed the accused removing the stolen property from the lawful custody of the owner.

However great latitude can be allowed by the judge in the option of punishment.

e) Punishment for Dacoity and Robbery:

Dacoity and robbery were considered as crimes for which the capital punishment can be awarded. These crimes

are regarded as related to theft on the one side and to homicide on the other, but it is not subsumed under these, except in the case of active repentence before arrest; the penalities inflicted differ according to the different facts of the case.

In the Quran dacoity is spoken of as waging war against God and His Apostle. "The Only punishment of those who wage war against Allah and His Messanger and strive to make mischief in the land is only this, that they should be put to death or crucified, or their hands and their feet should be cut off on opposite side or they should be imprisoned".22 However, if the offender is a disabled person then there is no amputation and he is liable for Ta'azir.[23] If the offender has committed robbery as well as murder, his right hand and left foot are to be amputated and he is then to be slain.[24] In this case the heirs of the victims can not aprdon the offender,

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22. Muslim Sahih: Hadith No.4165, reported by Ibn Ashwa; Translated by Abdul Hamid Siddiqi, (Lahore, 1976), vol.3, p.904

23. Ta'zir, "literally means punishment. The crime which do not fall under the first two categories are the crimes of discretionary punishment. The kind and the quantum of punishment in these offences left at the discretion of judge, who awards punishment according to the circumstances of each case. These offences are innumerable". This is a variable element which response to the changes of time and place.

24. See Tanzil-ur-Rahman, Islamization of Pakistan Law, (Karachi, 1978), p.21.

as they can in the case of ordinary murder. If an offender is arrested while attempting to commit the crime but before actually having committed it, he is to be exiled;[25] but according to some jurists he is to be imprisoned.[26] These punishments are awarded to all accomplices, whatever their individual acts, be otherwise. But if one of them is exempt from hadd due to his minority then the hadd for robbery lapses for all, although each remains criminally responsible for his own individual act. However, in less serious cases of dacoity the punishment may be imprisonment alone.

f) Punishment for Intentional Murder:

The gravest and most harmful crime known to human society is taking away the life of another human being (qatl). This crime was denounced in the earliest revelation. The Holy Quran says that "and kill not soul which God has forbidden except for a just cause".[27]

The approach of Islamic law to murder is thoroughly different from those of other secular penal laws. Whatever liability is incurred through them, be it qisas (retaliation) for blood money, is the subject

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25. Holy Quran, chapter V, verses 33.

26. Sahih Bukhari: vol.2, p.622

27. Holy Quran, verses XVII: 33

of a private claim (hakk adami). The word qsias rendered as retaliation, is derived from qassa meaning he cut it or he followed his track in persuit and it comes therefore to mean retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating. The law of qisas among the Israelities extended to all these cases, but the Qur'n has expressly limited it to cases of murder (fil-qatla).[28] It speaks of retaliation of wounds as being an ordinance of the Mossic law[29] but it is nowhere prescribed as a lawfor the Muslims, who are required to observe retaliation only in the case of the slain.[30] In some traditions it is no doubt mentioned that the Prophet ordered retaliation in some cases of wounds, but this was in all likelihood due to the fact that he followed the earlier law until he received an expressed commandment to the contrary.

Deliberate intent (amd), (Kasd) the aim and purpose, which implies the use of a deadly implement; this entails retaliation but no kaffara; the wali al-dam, the next of kin who has the right to demand retaliation, may waive it, either gratuitously (this is the pardon, awf)

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28. Ali, n.19, p.611

29. Holy Quran, V:45

30. Holy Quran, II:178

or by settlement (sulh) with the culprit, for the blood-money, or for more, or for less, and then the Kaffara must be performed.

The law of retaliation in murder cases is followed by the words "the free for the free, the slave and women for the women", which have sometimes been misunderstood as meaning that if a free man has been murdered, a free man should be murdered in his place and so on. This is falsified by the very word qisas which requires that the murderer should be killed and not an innocent man. The words were means to abolish an old Arab custom, for the Arabs before Islam used to insist, when the person killed was of noble descent, upon the execution of others beside the murderer so it was made clearer that whoever it might be, a free man or a slave or a woman, the murderer himself is to be slain. An alleviation is, however allowed in case the person who suffers from the death of the murdered person makes a remission and is satisfied with diyah or blood money. Another case in which blood money takes the place of a death sentence is that of unintentional killing. The Quran says: "and a believer would not kill a believer except by mistake and he who kills a believer by mistake should free a believing slave, and blood money should be paid to his people unless they remit it as alms." But if he be from a tribe hostile to you and he is a believer, the freeing of a believing suffices;

and if he is from a tribe between whom and you there is a covenant, a blood money should be paid to his people alongwith the freeing of a believing slave."[31]

g) Homicide by Mistake:

Life is absolutely sacred in Islamic Brotherhood. But mistakes will sometime happen, as did happen in the war of Uhud when some Muslims were killed (being mistaken for the enemy) by Muslims. There was no guilty intention and therefore there was no murder. But all the same, the family of the deceased was entitled to compensation unless they freely remitted it and in addition it was provided that the unfortunate man who made the mistake should free a slave. Thus a deplorable mistake was made the occasion for winning the liberty of a slave who was a believer, for Islam discountenances slavary. The compensation should only be paid if the deceased belonged to a Muslim society or to some people at peace with the Muslim society. Obviously, it could not be paid if, though the deceased was a believer, his people were at war with the Muslim society: even if his people could be reached, it is not fair to increase the resources of enemy. If the deceased was himself an enemy at war, obviously the laws of war justify his being killed in war-fare unless he surrenders. If the man who took the life unintentionally has no means from which to free a believing slave or to give compensation he must still

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31. Ibid IV:92

do an act of strict self denial (fasting for two whole months running shows that he is cognizant of the grave nature of the deed he has done and is sincerely repentant).

h) Punishment for Unintentional Murder:

According to the books of hadith (traditions) the cases of murder in which the murderers' intention is doubtful, in those cases too blood money is to be paid.[32] And where the murderer could not be discovered, then blood money is paid from the State Treasury. There does not appear any reported case in which the murderer has been imprisoned in cases of unintentional murder, but the alleviation of punishment in such cases is clearly provided for in the Quran. The form of alleviation spoken of in the Holy Book is the payment of blood-money, but the right of the state to give that alleviation in any other form is not negatived.[33]

When a believing muslim slays another believer who is of his own people the penalty in this case is the freeing of a believer from captivity, and the payment of a certain sum to the family of the slain person. Where a believer slays another believer, but where the peoples of the slayer and the slain are at the enemity with each other, the penalty is the freeing

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32. AD 38:18,25; Ah 11, p.36, cited in Muhammad Ali, n.16, p.613

33. Abu Dawud (Sunan) 38:18, 25Ah (Musnad v.1:II, p.36

of a believer from captivity. In certain cases where the slayer has not the means to pay the required sum, he is commanded to fast for two consecutive months.

As regards to the amount of fine, the fine which is the price of blood according to the sunnas (Shariah) is a hundred camels or thousand dinars (about 500 rupees) from his who possess gold or twelve thousand dinars (about six hundred rupees) from him who possess silver. This is the fine for the killing of a free man. For a woman it is half the sum, and for a slave it is his or her value; but that must fall short of the price of blood for the free.

The confession of murder is held valid and the person whose man is killed is entitled to get Retribution. The offender has a right to beg for remission. One's confession is relied upon and is held as a positive proof against him, provided that this confession is not motivated by another designs like torture, inducement, threat or other third degree method of interrogation and that the offender is in his full conscious and senses.[34]

In certain cases murder is not intentional and is committed in a fit of rage. The Islamic law pays due regard to the circumstances in which the crime is committed and the gravity of the offence is determined by the evil

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34. Sahih Muslim, ch. DCL XXV, Kitab Al-qa-Ama, n.2, p.903 See also Indian Evidence Act Sec. 24.

intention and foul means by which the crime is done. Thus it is the duty of the judge to take atleast four things into consideration before delivering the judgement: the intention and the motive behind the crime, the condition and the circumstances in which it is committed, the weapon by which it is committed and the result of the criminal act.[35]

Another reported case during the Prophet's period was that of a person who committed an unintentional murder and who was unable to pay the required blood-wit. When the Holy Prophet (peace be upon him) asked the brother of the deceased to let him off, but he refused and insisted upon taking revenge by killing the other person. The Holy Prophet (may peace be upon him) did not like the stand taken by him and in order to subside the fire of revenge in him and to bring him round to the point of mercy and forgiveness, brought before him the said consequences in the hereafter, of this act of his which may be taken as act of transgression on his part by Allah.[36]

In Islamic penal system there is no prosecution or execution ex-officio: Even for homicide there is only a guarantee of the right of private vengeance coupled

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35. Ibid

36. Ibid, Hadith No.4165, p.904

with safeguards against its exceeding the legal limits; pardon and amicable settlement are possible, but repentance has no effect.

There is no tendency to restrict liability and the whole attitude of Islamic law here is the same as in its law of property. The concept of bonafide plays no prominant par but there is a highly developed theory of culpability which distinguishes, not quite logically, deliberate intent, quasi-deliberate intent, mistake and indirect causation. The life of the slave is protected in the same way as that of the free person, and on his part he is liable to retaliation for homicide with deliberate intent. In all other respects with regard to the jinayath (offence) committed by him and against him, he is treated as a property for which the owner is responsible and damage to which creates liability to the owner.

CHAPTER - III

JURISPRUDENCE AND STATE PRACTICE

The Islamic jurisprudence is known as "Fiqh" which relates to the process of acquiring knowledge of a particular legal issue, and of grasping the significance of the entire problem in the correct perspective of the Islamic social system to formulate the laws within the very framework of Shariah. Thus the main function of Fiqh is to keep the legislation of the Islamic State intact with its original sources. The fundamental difference between the Islamic jurisprudence and other secular jurisprudence is that the former is divine in its origin and the other one is the product of human mind and social environment.[1]

The sources of Islamic law are considered as the will of God, which is absolute and unchangeable and it cannot be regarded law in the proper sense: it is rather an ethical or moral system of rules. The conception of law in Islam is thus authoritarian to the last degree. The law, which in the constitution of the community, cannot be other than the will of God is recorded through the prophet. This is a form of the semitic principle that "The will of the sovereign is law, since God is the sole Head of the community and therefore sole legislator."[2]

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1. See Riazul Hasan Gilani. The Reconstruction of Legal thought in Islam, (Delhi, 1982), p.18

2. Gibb, Mohammadanism, (New York, 1962), p.99

The Islamic criminal jurisprudence is a part of Shariah (personal law of the Muslim) which, therefore, differs from the western idea of law in two fundamental respects. The first is that it is much wider in its application for it includes, all human action in its scope. According to a widely accepted classification every act or omission falls under one of five categories: what is commanded, recommended, left legally, reprobated or positively forbidden by Almighty God.[3] To the Muslim therefore the Shariah includes all that a western would term law - public and private, national and international, and a great deal which he would not regard as law at all, such as the details of religion, ritual and the ethics of social conduct. It is obvious, of course that much of this amalgam of law and morale would never be enforced by any court and is regularly left to the sanction of religion. The problem of social change and legal theory is of particular significance in Islamic legal philosophy. According to its natural development and methodology this jurisprudence is religion oriented and hence not applicable to social change. Secondly, it is unlike other modern secular law which can be changed, altered, reformed or codified by legislation according to social needs. And

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3. Gilani, n.1, p.18

it is not like the western law and is a doctrine of duties of ethics and not law in the proper sense. Indian philosophy also concerns itself with the progressive assumption of duty and obligation rather than right.[4] By its nature it is regarded as fundamental, religious, and divine and as such it is immutable.[5] The main reason for immutability of Islamic jurisprudence is because it is of divine origin. It does not allow change in legal concept and institution. As a corrollary to this concept, its sanction is divine and here it cannot change. The nature of its origin and its development in its formative period was isolated from the institution of legal and social change and it did not develop an adequate methodology of legal change.

RELIGIOUS FOUNDATION:

Islamic criminal jurisprudence constitutes a part of Islamic Shariah which is built on religious foundation and divine sanctity. It influences the Islam's social and criminal justice. A strong inter-connection exists between the criminal code and the social system of the

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4. See S.S. Rama Rao Pappu, "Human Rights and Human Obligation: An East West Perspective", Philosophy and Social Action (New Delhi, 1982), vol.8, No.4 P.21

5. M.K. Masud, Islamic Legal Philosophy,(Islamabad, 1977), p.15. See also J.N.D. Anderson, Islamic Law in the Modern World, (New York, 1959), p.3

religion. The objective of the religion is the creation of virtues in the individual who in all his behaviour should be averse to vice and should strive for virtues. It implants a set of values and virtues in the mind of each individual. As the result of the religious dogma the individual and community has restrained from slipping into delinquency and from going astray. The religious restraint is a powerful factor to protect an individual from falling into the crime of delinquency.[6]

Penalty and sanction in Islamic law are religious and moral, not civil and legal. The term used for a penalty, even in matters belonging to penal law is hudud Allah (The limit of God) which stresses the fact that certain offences have been committed against God and that it is His right to impose penalty.

STATE PRACTICE IN CRIMINAL ADMINISTRATION:

The system of Islamic criminal law were practiced in some of the Muslim countries of the world. During the colonial period this system of law has been suppressed and modern secular law was imposed on those countries. But after liberation many of them adopted again the Shariah law both in civil and criminal matters in their

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6. S. Abul A'la Mowdudi, Radiance (New Delhi, December 19, 1979)

respective states. Even where they have been supplanted by westernised administrative and commercial codes sharia values continue to have a significant impact on social and governmental behaviour.

Soudi Arabia has traditionally followed the shariah system of law in their legal and administrative field. In the 20th century a revival of the Muslim personal law emerged in some countries of the Islamic world. Besides Soudi Arabia; Pakistan, Jordan, Libya, Sudan, Iran, some parts of Nigeria, Edan etc. were adopting the Islamic system. A detailed study is necessary for understanding the legal system of these countries.

Soudi Arabia: Shariah punishment often brutal by the present western standards are employed in full by the Saudi judicial system. The result is the death penalty for those convicted of murder, armed robbery, adultery or rapes. But it should be inflicted only after getting the sufficient and corroborated evidence beyond the reasonable doubt. In case of murder if the deceased heirs grant pardon and the accused pays the compensation (blood money) then he will not be convicted for this offence and he shall be acquitted.

Saudi Arabia has no habeas corpus provisions, and unlimited detention may occur while government prosecuters investigate and prepare their case against the accused.[7]

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7. US Department of State, Country Reports on Human Rights cited in Georgia Journal of International & Comperative Law, University of Georgia, 1982), vol.12:31, p.76

As shariah discourages penal detention in petty offences the accused may be released on bond pending trials.[8]

Imprisonment had been used most frequently to punish obstinate indulgence in theft. Some persons are detained briefly for security reasons without facing formal charges, but most are either charged quickly or deported.

Saudi debtors may be imprisoned without lengthy formalities but they are no longer subject to periods of involuntary servitude in payment of their debt. An interesting Saudi Institution is the number of benevolent societies organised to pay debtors' obligations to obtain his release from prison. This practice manifests the Quranic emphasis on arms giving and forgiveness of debt.[9]

FAIR AND PUBLIC TRIAL:

Traditionally, trials under Shariah are public and the accused is given the right to speak on his own behalf, call witnesses, and cross-examine the witness of his adversary. There are no attorneys in western sense but an impartial judge (Qazi) is changed with questioning each party and applying the law.

In Saudi Arabia, both parties may receive a court appointed Counsellor for assistance in preparing their case, and interpretators are provided for those who do not

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8. Ibid

9. Ibid, p.77

speak Arabic. But these Counsellors are not "legal advocates" in the western sense. All trials are public except those of cases involving state security issues. Saudi judges ((Qazis) hear two types of actions - (1) public rights, usually a criminal action prosecuted by the government and (2) private right, a civil action seeking individual redress. Matters involving both types of actions are commonly decided in the same trial. Courts of first instance are the summary and general courts which most often employ a single judge. Matters involving severe punishment or the possibility of a death sentence can be heard only in a general court before three Qazis. An appallate court is composed of a chief Qazi assisted by three to five others, depending on the seriousness of the case. The Supreme judicial Council is composed of eleven ulama and serves the dual roles of advising the government on all legal matters and providing final review of all severe punishments and death sentences imposed. The King himself retains the power to plenary pardon in all cases, criminal and civil. The military judiciary assumes jurisdiction over all criminal actions involving military affairs, including those in which the defendant is a civilian. However, appeals from military courts may be made through the civilian appellate process.

CASE LAW: (Zina)

In this regard the important case was that of Maiz bin Malik Aslami. It has been reported by many narrators referring to many companions.[10] In this case accused came to the Prophet and voluntarily made his confession about his commitment of adultery. Then the prophet told him that perhaps you might have indulged in something other than the adultery like embracing or kissing. But the offender says that he had committed the very act of adultery. Than the prophet enquired about his mental condition in order to avoid the prescribed punishment to his people. And in this regard also he was perfect. After making confession four times voluntarily it was decided to award him the prescribed punishment for the adultery and consequently he was stoned to death. In this case notably no effort was made to find out from him the name of the other person (female partner) who participated in the crime, since this would have resulted in punishing two persons instead of one whereas the shariah is not bent upon unveiling and punishing the people.[11]

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10. Reported by Jabir b. Samura, (Hadith No.4198, 4199, 4200), Ibn Abbas (H. No. 4201) and Abu Said (H.No. 4202), Sahih Muslim (Lahore, 1976), vol.3, p.914 - Translated by H. Siddiqi.

11. S. Aminul Hasan Rizvi, "Adultery and fornication in Islamic Jurisprudence: Dimensions and Perspectives", Islam and Comparative Law Quarterly, (New Delhi, 1982), vol.2, No.4, p.274

CASE LAW OF TAZIR (Retaliation):

In Dehran a police man hit a boy with a stick on his head alleging of gambling in a house. The boy became unconscious in consequence of the injury sustained on his head and he was also partially paralysed. The victim's two companions were the only witnesses to the crime, were terrified to speak out against the police man and refused to identify the accused in court. The identity of the police man was established at last and the case came to trial in the Dehran Shariah Court. At the trial, the accused alleged that the injury resulted from the complainant striking his head on the door as he attempted to flee. But Qazi (Judge) after carefully studying the X-ray reports and the opinion of the doctor rules that the injury sustained to the complainant's skull was due to the lathi hit of the accused. But the accused denied all the allegations framed against him by the complainant and at last the complainant demanded to take the oath. Then accused argued that the complainant is Christian and he [illegible] does not have the right to demand an oath from a Muslim.

But the Judge did not approve of his contention and ordered to take the oath of the police man. Inspite of the repeated demand from the Court accused refused to take the oath. Thereupon the Qazi solemnly judged

the police man guilty of offence against the complainant and sentenced him to six months imprisonment and eighty lashes.

At the same time the shariah court settled also the civil aspects of the case. A committee of the medical experts was formed by the Qazi to apprise the quantum of the injury suffered by the complainant. Based on the report of the medical experts the diyah (blood money) payable to the plantiff by the defendant was decided at three hundred Saudi Riyal (about 700/- rupees).[12]

Case Law Homicide.[13]

Islamic Legal System in Pakistan:

The Pakistan government promulgated an ordinance on 10th of February 1970 amending the existing Pakistan penal code relating to certain offences affecting the property and moral and social order of the society so as to bring it in conformity with the Holy Quran and Sunna.

By this ordinance, the existing laws relating to the offence of theft, robbery, dacoity, extortion, adultery and wine-drinking have been replaced by the Islamic provisions of Hudud, the Almighty Allah's restrictive

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12. The case narrated by an American Lawyer named George. M. Barody employed in ARAMCO Soudia Arabia. Reported in Radiance Weekly, (New Delhi, April 23, 1979), p.7

13. It has already been discussed in II Chapter p32

Ordinances par excellence, the fixed punishments prescribed by the Holy Quran proved or established by the Sunnah of the Prophet on which there is an 'Ijma' (consensus) of the Holy Prophet's reverend Companions (Sahaba).

Therefore, in case of theft, the punishment of imprisonment or fine, or both, as provided in the existing Pakistan Penal Code for such offence has been substituted by the amputation of the right hand of the offender from the joint of the wrist by a surgeon causing least pain and with utmost care; He is liable to award of Hadd punishment, provided its requisite conditions relating to the quantum of the property stolen out of the safe and protected place, proved by admission or the evidence in Court by at least two truthful persons abstaining from major sins, after full scrutiny and proper cross-examination and full satisfaction of the trial Court are fulfilled on filing complaint by the person whose property has been stolen.

Safeguards:

However, in cases where the property stolen falls within the exceptions, such as wild grass, fish, bird, dog, pig, intoxicants, musical instruments, perishable food stuff[14] (except that there is an arrangement for preserving the latter for a long period), or when the thief has a share

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14. See Sahih Muslim, vol.3, ch. DCL XXIX, p.909

in the stolen property, provided that the value of stolen property after the deduction of amount of his share is less than the fixed quantum (Nisab), or where the requisite condition for theft relating to quantum of property stolen or the number of witnesses are not fulfilled, or that the property stolen is returned by the thief before the owner's filing his complaint, the Court will not award the Hadd punishment.[15]

The punishment of amputation of hand will not be imposed in some other cases when the thief is one of the progenitors or progeny of the owner of the property or is the husband or wife, or when the guest steals from the home of the host, or when the servant or employee has committed a theft in his master's or employer's house where he is allowed access, or when the creditor steals the debtor's property, provided that the value of stolen property after the deduction of the amount due to him is less than the fixed quantum (Nisab). The Hadd, punishment of amputation of hand for theft will also not be awarded when the offender is entirely without the left hand or left thumb, or at least two fingers of the left hand or the right foot of any of these is entirely unserviceable.

In case of robbery, when a person (or a group of persons) is equipped with arms, or in any other manner makes a show of force, for the purpose of taking away

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15. Ibid

openly without his consent, any such property in some one's possession, the theft of which may be liable to award of Hadd, attacks him, or causes wrongful restraint, or threatens him with murder or hurt, will be liable to Hadd, punishment, namely, if the offender takes away property to the extent of the fixed quantum, his right hand from the wrist and left foot from the ankle shall be amputated by a surgeon.

Robbery:

If he commits murder while commiting robbery, he shall be sentenced to death which shall not be remitted even if this offence is pardoned by the heirs of the murdered person.

If the offender has murdered a person as well as taken away property to the extent of fixed quantum, he shall be executed or hanged, according to the discretion of the Court.

Adultery:[16]

Section 497 of the Pakistan Penal Code dealing with the offence of adultery provides certain safeguards to the offender in as much as if the adultery is with the consent or connivance of the husband, no offence of adultery is deemed to have been committed to the eyes of the law. The

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16. See Offence of Zina (Enforcement of Hudud Ordinance, 1979) Ordinance No. VII of 1979 cited in Islam and Comparative Law Quarterly, (Indian Institute of Islamic Studies, New Delhi, 1982), vol.2, No.4, p.287

wife, under the existing law, is also not to be punished as abetter. Islamic law knows no such exception. It takes a very serious view of adultery because they damage the social health and militate with the moral order of the human society while Islam wants to preserve the human dignity.

Thus, in terms of the Holy Quran and the Sunnah the present provisions of law relating to adultery will be replaced as that the woman and the man guilty of adultery will be flogged, each of them with hundred stripes. The Islamic Law, however, recognises duress and coercion as an exception to punishment in case of fornication and adultery.

Wine Drinking:

Drinking of wine (i.e. all alcoholic drinks) is not a crime at all under the Pakistan Penal Code. In 1977, however, the drinking and selling of wine by Muslims was banned in Pakistan and the sentence of imprisonment or fine, or both, was provided in the law. But now this provision of law will be replaced by Hadd , punishment of eighty stripes on which there is an Ijma of the reverd Companions of the Holy Prophet ever since the period of the Caliph, 'Umar'.[17]

It may however be clarified that no Hadd/punishment awarded by the Court will be executed or enforced unless it is confirmed by the High Court.

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17. See Sahih Muslim, vol.3 (Hadith No.4232), p.924

Spiritual Aspect:

Islamic punishments also imply the spiritual purification of human soul and an expiation for the sin which are absent in all other legal systems of the world. This is in addition to obtaining human good in this world through implementation of its Penal Laws.

However, in Pakistan the authority is using this law for the suppression of the opposition leaders and their movement, for the restoration of democracy, in the country on the name of the Shariah value. Islam will never allow the dictatorship and military rule and at the same time Islamic law firmly stands for the democracy. During the regime of the Caliph Abubakr (R) appealed to the people to help in the administration of justice.

His words may be quoted:

> "And now ye people; verily slave received authority over you though I be not the best among you. If I do well assist me, and if I inclind to evil direct me aright. Obey me as long as I obey the Lord and His Apostle; then obedience to me shall not be obligatory upon you." 18

It is very doubtful whether the Pakistan authorities are implementing the Islamic justice in its true letter and spirit. For example, according to Shariah Law of coming

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18. A.A. Qadri - Justice in Historical Islam, (New Delhi, 1982), p.17

the evidence of two women are equivalent to that of one man.[19] It had already been rejected by the women of Pakistan. Now-a-days flogging is a usual practice in Pakistan for every minor offence and this form of physical torture is degrading, unnecessary, brutal and a direct violation of the declaration of human rights to which Pakistan is a signatory.[20]

The flogging was not dispensed under medical supervision and it was a fact that this punishment was being administered to political leaders and workers who were neither dacoits nor thief or other criminals and only held political views different from those of the establishment.

Right of dissent is permitted in Islam which champions freedom of conscience and speech. Human dignity is highly valued in Islam and its violation was not permitted under any circumstances even while punishing criminals. Most of the religious scholars of Pakistan stated and condemned that this type of torture is against the Islamic norms and values.

In Pakistan the Federal Shariah Court had to adjudicate (in the case of Hazoor Bakhsh vs Federation of Pakistan[21]) on the true Islamic basis of stoning to

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19. Holy Quran. II.283. See also Nisar Ahmed, Fundamental Teaching of Quran and Hadith, Part.II (Delhi, 1980), p.86

20. See Article 5, International Declaration of Human Rights, (Geneva, 1948).

21. PLD 1981 FSC 145 cited in Islamic and Comparative Law Quarterly, vol.2 (1982), p.276

death as punishment for adultery. It first declared it to be unQuranic, calling for an amendment of the Zina Ordinance of 1978.[22] Consequent upon this, the Shariah Court was reconstituted to include among its judges three ulama. The reconstituted Court later declared the punishment of stoning to death to be one sanctioned by the Quran.[23]

The question now lying before the Shariah bench of the Supreme Court of Pakistan. However, the controversy over this mode of punishment is yet to be decided whether this punishment is provided in Quran or not. Therefore, this has yet to be decided. A researcher is constrained to argue that, in the present situation of doubt regarding the true Islamic punishment for adultery and fornication, the oppressive measures of the Pakistan rule should remain in abeyance till the entire umma (community) is convinced of its correctness.[24]

Libyan Practice and Criminal Justice:

In 1971 the Libyan government has changed its entire legal system and decided to govern the country in future strictly in accordance with the Islamic Law and jurisprudence.

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22. See Ibid. Pakistan Zina (Enforcement of Hudud) Ordinance, 1979.

23. See Ibid. Tahir Mahmood, 'Some Notable Rulings from Muslim countries' II/2, Islamic CLQ 27 (1982).

24. 1981 The Federal Shariah Court (Hazoor Bakhsh vs Federation of Pakistan PLD 1981 FSC 145.

It was decided that the entire existing legislation would be reviewed in order to bring it in conformity with the Islamic law.[25]

The most conspicuous piece of legislation enacted by the post-revolution government in Libya related to the amendment of the penal code of 1953. The first law on the series is Act 148 of 1972 enacted on October 11, 1972 which re-introduces in Libya the penal law of the Quran relating to theft and dacoity.

The punishment for commiting theft will be amputation of an arm. If the theft is committed by an insane person or one under eighteen years old, he shall not be subjected to this penalty. For awarding the punishment the property should physically be removed from the custody of the owner and it must have the value of ten libyan Dinar.

If theft is committed in a public place where the accused is working or in another place where the accused has permission to enter is not liable for this punishment. Similarly if the accused and the owner are having blood relationship or affinity with each other then also it will not become a punishable offence. When the accused is a creditor of the owner and later has released

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25. See Tahir Mahmood, "Reflorescence of Islamic Law in Libya", in Anwar Moazzam ed: Islam and Contemporary Muslim World, (New Delhi, 1981) pp.151-52

the property from the former for the money due to him, then he is not liable to punishment. The perishable articles like fruit, fish, eggs etc. are not considered as stolen articles for this purpose. Accidental involvement in theft is not liable for punishment. If there is more than one accused in this, then it becomes difficult to ascertain the alleged liability of the crime and then also this punishment is not applicable. If the stolen property is of any interest or benefit to the accused then the scope of the infliction of the Quaranic punishment for the theft has been limited in various ways having regard to the nature and situation of the stolen property and the condition and circumstances of the accused.

Where the accused has completed seven years of age but is yet under fifteen years, the punishment would be admonition and reprimand; and where he is between ten and fifteen years of age he should be beaten having regard to his age. Persons between fifteen and eighteen years of age would be beaten, in the case of theft, and beaten and kept in a reformatory in cases of dacoity.

The Act includes also rules of procedure relating to the offences of theft and dacoity. Either of the offences can be established by the confessions of the accused or by evidence of two witnesses. The limit for the execution of punishment laid down in the act is two years from the date of conviction, except in the case of

capital punishment where it is three years. Amputation of limbs is to be performed in the hospital of the jail or in a public hospital, by surgical methods (amaliajarhaiya) and under the anaesthesia (takhdir). The hand would be cut from the wrist. The culprit would be given medical aid as and for the period advised by the surgeon.

On October 2, 1973 another principle of the traditional law of crimes, hitherto suspended, was re-introduced in Libya. This was punishment for fornication (zina), restored under Act 70 of 1973. Zina is defined in the Act as "sexual intercourse between a man and a woman who are not related to each other as lawfully married husband and wife." Thus the offence of the zina would include not only rape and adultery but also acts of coitus between persons whose marriage is known to them, but void (batil) under the Libyah law. The punishment for zina laid down under the Act is flogging, with hundred lashes or confinement with flogging, and this would be inflicted where the accused is sane, eighteen years or more of age and has intentionally committed the offence. The punishment would never be suspended, substituted by another punishment or reduced, and is unpardonable. Where the offender is under eighteen years of age, the punishments of admonition, repremand, beating or detention in a reformatory (as in the case of theft and dacoity, detailed above) would be awarded.

The Act repeals many contrary provisions and amends some rules of the Libyan Penal Code, 1953.

NIGERIA:

In Nigeria, particularly in the northern region, which is Muslim dominated, the criminal cases are handled by the native court which has been established on the basis of the fundamental principles of Shariah law. The law in both substantive and procedural aspects, has been almost entirely derived from the Maliki-book. In Nigeria two systems of criminal law have been in practice in some of the regions where Muslims are in majority. High Court and Magistrate Court were practiced according to the Nigerian Criminal Law and the native court administered by the Muslim Criminal Law. However, the Muslim Penal Laws were applied with certain restrictions particularly during the British period in the court of the Muslim emirates where they coexisted with Nigerian criminal code which has entirely different origin and inspiration, enacted and administered by the British.[26]

This leads to the strange result that even in homicide cases two widely divergent systems of the law are applied. By this, an accused may be tried by either Court and it becomes a matter of chance under which system an accused person will be tried.

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26. J.N.D. Anderson, Islamic Law in Modern World, (New York, 1959), p.84

For deliberate homicide death penalty is awarded on the demand of the heirs of the blood, whereas in unintentional murder case only blood money can be paid to the heirs of the deceased. In the case of zina the hadd penalty may be imposed if it is proved according to the required standards of evidence. In order to establish the case of zina four competent male witnesses should see the very act of zina which is required by the Shariah law. But it must be remembered that the Maliki law unlike the Hanafi or Shafi allows the punishment to be imposed on the unmarried or chaste girl only when she becomes pregnant and cannot produce adequate evidence that she was deceived or forced.[27] If it is proved, the woman will get hadd punishment by lashing and discretionary punishment such as imprisonment, fine etc. Seduction of virgin girls is liable to two year imprisonment and in the case of the girl she should be liable for the fine which may be upto five dollars.

In the case of theft the punishment is not only imprisonment but amputation of hand is also imposed if it is proved. For wine drinking eighty lashes may be inflicted upon the accused.

In Nigeria at present almost all parts of the country follow the Modern Secular Penal Law on the basis

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27. J.N.D. Anderson, Islamic Law in Africa, (London, 1970), p.201-2

of the recommendations made by a penal law reform commission. This commission visited some of the Muslim countries such as Pakistan, the Sudan etc. and submitted the report about the practices in those countries.[28] But, ironically, these countries have now adopted the Shariah system of law for their administrative machinery.

Aden:

In this country Shariah law is widely applied in most of the cases. However, there is even a recognised scale of fines atleast in some localities for different offences.

In most of the murder cases, blood fued and self-help is the system of punishment.[29]. It must be remembered that the principle of Tazir or punishment for any form of wrong-doing,at the discretion of the ruler or the Court, can be made exceedingly elastic so as to cover most of the requirements of a modern penal code.[30] In the case of homicide if the victim's heir is a minor then a public prosecutor may assist him in the proceedings. The prescribed Tazir (retaliation) is at the discretion of the heirs and they can decide whether the accused should be punished or not. However, in some cases the government can

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28. Michael Bnett, Northern Africa - Islam and Modernization, (London, 1973), p.81-82

29. J.N.D. Anderson, Islamic Law in Africa, (London, 1970), p.200.

30. Ibid

imprison the accused, on the basis of a decree awarded by Sultan in 1945. The execution of the capital punishment may be inflicted by a firing squad and no head man is provided for this punishment.

CASE LAW:

In 1945 execution of a woman for the murder of her mother-in-law was witnessed by a large number of spectators. She was stretched out on the ground beside her open grave and just before the moment of execution one of the heirs finally yielded to the plea of mercy voiced by bystanders; by which time the culprit was, not surprisingly, dazed. It was this incident indeed that provided the occasion for the issue of the decree of 1945 by which the government can do the discretionary punishment. Other forms of the hadd punishment such as stoning for zina, amputating the arm for theft and lashing etc. are prevalent. However, this form of punishment could never now be inflicted as a matter of public policy.

Besides these countries some of the western and northern African States were practising the Islamic Shariah law with certain modifications. Before the advent of the colonial expansion and European Imperialism during the eighteenth and ninteenth centuries Islamic law was prevailing throughout the Afro-Asian States. The Islamic

legal system remained in operation in India till 1864 and afterwards when India came directly under the British crown the old legal system of the Mughal yielded place to the new western system.

As a result of the large scale adoption of European laws in the Afro-Asian countries, the law of the European origin today forms a vital and integral part of the legal system of all these countries. Only Arabian peninsula remained immune to the influence of European law. In Saudi Arabia, Yeman, Aden and the principalities of the persian Gulf, traditional law has remained the main law upto the present time.

Chapter IV

CRIME AND PUNISHMENT UNDER THE HUMAN RIGHTS LAW

International criminal law is administered by both United Nations and its member states; it is not codified in accordance with its universal jurisdiction and application. The cases which deal with municipal criminal law do not come under the purview of the International Criminal Law. Some specific offences which may be dealt with by the International Criminal Law are war crime, crime against peace and humanity, genocide, piracy and hijacking, international terrorism, slavery, servitude etc. Although these matters should come under the jurisdiction of International Criminal Court it can be also tried by the member states according to their municipal criminal laws because the International Criminal Law is a product of the convergence of the international aspect of the municipal law and the criminal aspects of the international law.[1] Several seminars and conventions have been held in various places on subjects having international importance. Therefore the International Criminal Law has been developed through conventions and seminars in a compartmentalized fashion, each subject being addressed

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1. M. McDoughal and F. Feliciano, Law and Minimum World Public Order (Yale University, 1961), p. 263.

one or more conventions over a period of time without regard to developments in related areas.[2] The outcome of the various conventions, seminars and treaties became the main source of the international criminal law and it is supposed to be binding upon the individual as well as the states particularly the signatories of the treaties. Violation of provisions in these treaties is punishable either according to the International Criminal Law or to the municipal criminal law of the concerned state. The most important crime which can be tried and punished according to the International Criminal Law is war crime and genocide.

During the last three centuries a strong philosophical foundation had been established particularly in Western civilization for the limitation of the war and its conduct.[3] During this period certain normative prescriptions were formulated against unjust and aggressive wars which had come to be rejected by the shared values of the world community. As a manifestation of that attitude many states entered into bilateral and multilateral treaties to regulate their relations in terms of preventing war among them, which contributed to the development of a world consciousness

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2. M. Cherif Bassiouni, A Draft International Criminal Code, Sijthoff and Noordhoff (Netherlands, 1980), p. 27.

3. Ibid.

on the prevention of war.[4] In this period many bilateral and multilateral treaties have been signed achieving the goal of control, regulation, prevention and prohibition of all types of war in the world community. Many provisions have been included in these treaties to punish the war criminal if they violate the prescribed norms of war provided by the treaties.

The major treaties are -

1. The Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes.
2. The Treaty of Versailles of 1919 which condemned aggressive war.
3. The convenant of the League of Nations which prohibited war of aggression in 1920.
4. The Kellogg-Briand Paris Pact of 1928 on the renunciation of war as an instrument of national policy.
5. The 1945 London Charter which criminalized war.
6. The United Nations Charter of 1946 which prohibited war except in self-defence.

According to the provisions of these treaties the international war crime court, set up under League of nations and United Nations, tried the major war criminals of the world war I and II.

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4. Ibid.

Trial and Prosecution of the War Criminals of the First World War (5)

The preliminary peace conference after World War I known as Treaty of Versailles set up a commission of fifteen on 25th January 1919 to enquire into and report upon the violation of international law by Germany and her allies.[6]

Article 227 of the Treaty recognised the right of the allies and associated powers to bring before the Military Tribunal those Germans who were accused of having committed acts in violation of the laws and customs of war.[7] The commission examined the responsibility for starting the First World War and the atrocities committed during the war.

The Commission prepared a list of atrocities committed by Germany and her allies in the course of the war and it explained the violation of the rights of combatants and of the rights of civilians.[8]

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5. See, Leon Friedman, The Law of War, A documentary History, vol. 1, (New York, 1972), p. 777.

6. Ibid.

7. Ibid.

8. Ibid. See also Commission on the responsibility of the Authors of war and on Enforcement of Penalties, American Journal of International Law, vol. 14, (1920), p. 95.

The Commission recommended the necessary action to be taken against enemy nations accused of having committed war crimes. The recommendation of the Commission had an important influence on the drafting of the punitive provisions of the Treaty of Versailles on the punishment of war criminals. But the provisions of the Treaty were never realised in the sense in which they were intended. Germany made every effort to prevent the handing over of the persons charged with war crimes.[9] Consequently, the allied powers permitted Germany to try and prosecute the persons charged with war crimes, but they reserved the right to institute their own proceedings if the trial conducted by Germany should prove unsatisfactory.[10]

The German Court met at Leipzig. Of the forty five cases submitted by allies, twelve were tried by the Leipzig Court and only slight punishments were given that too to six persons. The allies were highly dissatisfied and as a protest withdrew the outcome of the Leipzig Trials.[11]

This Court proceeded with the trial in absence of allies' delegation and there followed a series of acquiattals. Some 800 cases were disposed of without any trial, on

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9. Ibid., p. 778.

10. Ibid.

11. Ibid., p. 779.

ground that the defendents' deeds were not covered by German law or on the ground that the evidence was insufficient.[12] In effect the trial of the war criminals in the First World War were not conducted by any International tribunal other than the native states of the accused.

The Nuremberg Trial

On October 18, 1945, the (Allied Powers) constituted an International Military Tribunal in Germany for the purposes of trial of the major war criminals of the world war II. The trial opened on November 20, 1945 at Nuremberg and it is known as the Nuremberg Trial. It was a monumental undertaking judged by all legal standards.[13]

The jurisdiction of the Tribunal is defined in the Agreement and Charter and the Article 6 of the Charter defined jurisdiction of the International Military Tribunal. It says, "the following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

"(a) Crime Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in

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12. Ibid.

13. Woetzel Robert K., The Nuremberg Trial in International Law (London, 1960), pp. 3-6.

violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;[14]

"(b) War Crimes: namely, violation of the laws or customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of war, or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;[15]

"(c) Crimes Against Humanity: namely, murder, extermination enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetted."[16]

These are the charges indicted against the accused of First World War.[17]

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14. Friedman, n. 5, Article 6 of the Nuremberg Trial, pp. 940-41.

15. Ibid., pp. 940-42.

16. Ibid., pp. 940-44.

17. Ibid., pp. 943-44.

Defence: The contention of the accused was that the prosecution had failed to prove that they had planned and wages aggressive wars. There could be no punishment of crimes without a pre-existing law. No sovereign power can be made responsible for such a war.

Judgement of the Tribunal: The Tribunal dealt with the fundamental legal question in four sections entitled respectively the law of the Charter, the law relating to war crimes and crime against humanity, the law of the common plan and accused organisation.

All the contentions of the defendants were rejected by the Tribunal while holding that aggressive war had been a crime under international penal law at least since "the pact of Paris of 1928". In this section they also rejected certain other general defences such as the contention that international law is concerned with the actions of the sovereign states, and provides no punishment for individual and that the defendants were under Hitler's order and therefore not responsible for their acts. They specified that a soldier was ordered to kill or torture in violation of international law of war has never been recognised as a defence to such acts or brutality though the order may be urged in malagation of the punishment. The true trust is not the existence of the order, but whether moral choices are in facts possible. By rejecting

all the contentions of the defendants the tribunal awarded punishments which varied from death to imprisonment to the convicted persons.

The Tribunal rendered its judgement on September 30 and October 1, 1946 and awarded death penalty for thirteen persons and life imprisonment for six persons who were actively involved in war crimes and atrocities against the civil as well as the army personnel. Three Nazi leaders were acquitted and the remaining were sentenced to long term imprisonment.

The Tokyo Trial: It was another major international trial conducted by the International Military Tribunal for the Far East.[18]

Charges: An indictment against 28 major Japanese War Criminals was lodged with the International Military Tribunal for the Far East on April 29, 1946. All the charges were grouped under three heads viz. crime against peace, murder and conventional war crime and crime against humanity.

Judgement: On May 3rd and 4th the indictment was read in open court. The prosecution opened its case on June 3, 1946. Closing argument and summations of the prosecution

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18. Richard H. Minear, Victores Justice: The Tokyo War Criminal Trial (New Jercy, 1971), p. 23.

and defence closed on April 6, 1948. The judgement of the Tribunal was delivered on May 4 through 12, 1948. None of the accused was acquitted on any count. Seven were sentenced to death and others were awarded different terms of imprisonment.

Terrorism: It is a criminal act directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public. The offences involved kidnapping, taking hostages, unlawful detention, and the use of bombs, grenades, rockets, or automatic fire arms if their use endangered persons' lives or liberty.

The first convention on the act of terrorism had been held at Geneva in November 16, 1937.[19] According to the provision of the convention the offender can be prosecuted under the law of the state where the act has taken place. If the offender would escape from one state to another then the law of extradition is provided or the host state can deal with the offence in accordance with the law of the land. But the rules of international law concerning the repression of terrorist activities could not guarantee international cooperation on the subject.[20]

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19. See, Hudson, International Legislation, vol. 7, p. 862, UN Doc.: A/c 6/818.

20. Maurice Bathurst, Ten Years of Terrorism (New York, 1979), p. 160.

Therefore this offence can be punished by the municipal law of the concerned state. The convention does not affect the principle that, provided the offender is not allowed to escape punishment owing to an omission in the criminal law, the characterisation of the various offences dealt within the present convention the imposition of sentences, the methods of presecution and trial, and the roles as to mitigating circumstances pardon and amenisty are determined in each country by the provisions of domestic criminal law.[21]

In the preceding paragraph are mentioned those cases which can be tried and prosecuted according to International Criminal Law. It is already explained that only certain specific cases - those having international concern such as war crimes, genocide and other crimes over which jurisdiction can be made by United Nations by international convention shall be dealt with by the International Criminal Court. In practice there is no permanent form of International Criminal Court, other than the Statute provided by the United Nations Committee on International Criminal Jurisdiction for the establishment and conduct of an International Criminal Court. The Court has met only when cases arose. Its jurisdiction extended to the trial of persons accused of crimes under International Law,

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21. Ibid., Article 19 (Hudson).

as may be provided in the convention by special agreements among States which are parties to the present statute. Most of the offences though having an international character can be dealt with by the national Court according to their municipal criminal law.

The United Nations Criminal Policy - both in principle and practice, is not the punishment of offenders according to the deterrent norms but prevention and correction as far as possible. Its attention is mainly focussed on the aspect of human rights in the administration of criminal justice and in the treatment of prisoners. Therefore the universal declaration of Human Rights proclaimed general principles concerning Human rights in the administration of justice.[22] The General Assembly in its resolution 2858 (XVII) on human rights in the administration of justice inter alia, invited the attention of the member states to the standard minimum rules for the treatment of prisoners and recommended that these be effectively implemented in the administration of penal and correctional institutions and that favourable consideration be given to their incorporation in national legislation.[23] In this context the Criminal Policy of

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22. General Assembly Resolution 217 A(iii), article 3, 5, 8, 9, 10.

23. See, First United Nations Congress on prevention of Crime and Treatment of offenders held at Geneva on 1955. United Nations Publication, sale no. 56 iv. 4, cited in IRCP, vol. 35, (1979), p. 79.

the United Nations covered many subjects those particularly regarding crime, punishment and human rights. It would be better to discuss some of the subjects in order to understand the perspective of the United Nations Criminal Policy.

United Nations Policy on Capital Punishment

The United Nations General Assembly has adopted its first resolution regarding death penalty on November 20, 1959.[24] Consequently, the Economic and Social Council considered the various aspects of the matter with particular reference to the laws and practices relating thereto and the impact of death sentence or its abolition on the rate of criminality.[25]

The general attitude of the United Nations on capital punishment is negative and it recommended all governments through a resolution of the Economics and Social Council to repeal this punishment from their respective penal code. It further insisted on making facilities available for the social and medical investigation of the case of the offender liable to capital punishment, and on ensuring the most legal procedures and the greatest possible safeguards for the accused.[26] In the case of

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24. Ibid., Resolution No. 1396 XIV.

25. Ibid., see 29th Session Resolution No. 747 (XXIX)

26. Ibid., Resolution No. 934 (XXXV), 1963.

the safeguards recommended - such as the right to appeal and the petition for pardon, the death sentence will not be carried out until the proceedings of appeal and pardon are terminated. Special attention should be given to indigent persons by providing adequate legal assistance. It also requested the governments to consider the possibility of fixing a time limit before the expiration of which the death sentence in each case would not be carried out.[27]

The main task of the United Nations was to restrict the number of offences for which capital punishment might be imposed with desirably abolishing this punishment in all countries.[28] For this purpose the organization appealed to all the States to make necessary legal procedures and safeguards which cen be applied in capital cases after studying the attitude of each State on this issue. It invited the actual and true reports about the law and practice of the member States without any false or exaggerated statements. The reason for this was that some of the States were used to supplying unbelievable reports which differed from the actual practice. Therefore, the United Nations has made

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27. Ibid., General Assembly Resolution No. 2393 (XXIII), Economic and Social Council Resolution 1337 (XLIV).

28. Ibid., General Assembly Resolution No. 2857 (XXVI).

certain prescriptions on this kind of reports which a State is expected to provide without any fault or incorrect information.[29]

In its 14th session the United Nations invited the Economic and Social Council to make a comprehensive study on this issue and prepare the list of the countries on the question of the death penalty. The list provided by the member States regarding the capital punishment were divided into five categories viz. (a) Abolitionist by law, (b) Abolitionist by law for ordinary crimes only, (c) Abolitionist by custom, (d) Retentionist and (e) country divided on the issue (some states are abolitionist other retentionist) (see Appendix-II).

Among these countries, in some of them the death penalty has been abolished by an express constitutional or legislative provision i.e. abolitionist de jure, and in some others the penal code on special statutes makes provision for the death penalty and sentences of death are passed but such sentences are never carried out by virtue of an established custom i.e. abolitionist de facto, and in other countries the death penalty is laid down only for the offences committed in certain exceptional circumstances and capital punishment has in fact virtually

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29. Ibid., vol. 31 (1974), pp. 91-92.

disappeared i.e. almost completely abolitionist.[30]

In the Sixth International Congress on Prevention of Crime and the Treatment of Offenders held at Caracas in 1980 the issue relating to the death penalty was discussed at length. The representatives of the both the abolitionist and retentionist countries personally presented their views in support of their respective positions. Some abolitionist countries went to the length of proposing a draft resolution to call upon all the States to establish a five year moratorium on capital punishment and to restrict the number of crimes for which capital punishment could be imposed. But most of the delegations did not agree to the suggestion and consequently did not succeed in finding out a solution to this problem. The problem has undoubtedly been complicated by the failure of states as yet to find out a suitable alternative to capital punishment or to introduce other penal methods sufficiently drastic and yet humanitarian. A consensus has emerged that taking the life of a person in the course of administering the justice is an extreme measure justified only by the gravest conjunctions of crime and social crisis. Even groups of governments which feel capital punishment

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30. United Nations, Capital Punishment, U.N. Publications, Dept. of Economic and Social Affairs (New York, 1962), p.76.

31. See, Social Defence, vol. 17, Ministry of Social Welfare (New Delhi, 1982), p. 33.

to be a necessity of last resort would usually be prepared to dispense with it altogether if an appropriate substitute could be devised.

For various reasons life imprisonment - a "living death in prison" - is not always considered a suitable alternative to death. It is obviously less final, it demands more resources and is apparently a difficult sentence to maintain in modern society. On the other hand, the factors of mercy and the apparent rehabilitation of the criminal who may have committed the crime in a fit of passion or outrage, have reduced the full application of life sentences. Even Nazi war criminals sentenced to life imprisonment have been released on grounds of mercy and compassion after serving a long term of imprisonment. The quality of mercy has been extended in some countries to successive reductions in the interpretation in practice of a sentence of life imprisonment so that 10 years imprisonment or less is frequently held to mean a life sentence. The effectiveness of parole has encouraged its application to more people serving life sentences and there is an obvious difference between the questions of justice related to the offence and those of justice related to the offenders' suitability for release into society.[32]

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32. n. 21, p. 93.

The debate on the death penalty continues to revolve around the two main questions of its morality and its usefulness. The moral issue is the right of any society to put any person to death, i.e. to deny him his basic human right to live. The question of utility of capital punishment turns essentially on its efficiency in preventing crime. Then there are a number of subsidiary questions arising from the offences for which the death penalty is used or from the conditions within which it might be applied. Whether, for example, it is a just penalty in some cases or inappropriate to the nature of the offence; whether it is only a last resort with every possible legal safeguard being accorded to anyone whose life is placed in jeopardy by law; whether in practice it is being applied uniformly or whether it is used discriminatorily, i.e. mainly against particular classes, ethnic groups or sections of society.

In the past the United Nations has given consideration to most of these questions. However the main focus in the 1962 and 1967 reports on this subject issued by the United Nations was on the deterrent effect of capital punishment. They concentrated more on the practical issues rather than the moral ones. The conclusion of those reports was that no significant differences in the crime rate could be found before or after the abolition of

the death penalty in abolitionist countries. They also indicated that, other things being equal, no significant differences could be found in the crime rates of countries with or without the death penalty.[33]

The international covenant on civil and political rights also says that in countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes in accordance with the law in force at that time of the commission of the crime and not contrary to the provision of the present covenant and to the convention on the prevention and punishment of the crime of genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.[34] Promoting the most careful legal safeguard for those likely to be sentenced to death is a fundamental object of United Nations. Obviously the abolition of the capital punishment by law is a best legal safeguard but failing that, the United Nations calls for the greatest care to be taken to protect the accused in danger of death before, during and after his trial. After the trial if he is sentenced to death he shall have the right to

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33. Ibid., see Economic and Social Council Resolution, 1574 (L) and General Assembly Resolution 2857 (XXVI).

34. Art. 6(2), International Covenant on Civil and Political Rights.

seek pardon or commutation of the sentence. Amnesty, pardon or commutation of sentence of death may be granted in all cases and it is also not carried out on the person below eighteen years of age and on pregnant woman.[35]

Therefore from the moral standpoint, the United Nations is following the guidance of its Universal Declaration of Human Rights. From the practical or utilatarian point of view, it is acting on the evidence so far made available, and is therefore calling only for the "eventual" abolition of capital punishment. Not all member states favour early abolition of capital punishment. Some are moving towards it. Others regard it as right even if not immediately practisable for them, and there are some who feel that capital punishment is an unfortunate but, at this, unavoidable necessity.

Criminal Law and Procedure

In criminal proceedings no person shall be deprived of his liberty and person by means of arbitrary and illegal arrest or detention. There is certain safeguards provided by all the modern criminal laws in this regard. The UN in its seminar on Human Rights and Criminal Proceedings has taken up the issue of the arbitrary and illegal arrest and detention of the person.

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35. Ibid., Art. 6 (4 and 5).

Articles 3, 5 and 9 of the Universal Declaration of Human Rights proclaim in general terms the right of everyone to life, liberty and security of person, the prohibition of torture and of cruel, inhuman or degrading treatment, and the right of everyone not to be subjected to arbitrary arrest and detention.

The International Covenant on Civil and Political Rights proclaims that the grounds and procedures for deprivation of liberty should be established by law (article 9) and that such grounds should exclude the inability to fulfil a contractual obligation (article 11). In article 1 of the draft plan principles on freedom from arbitrary arrest and detention, the term 'arbitrary' is meant to refer to an arrest or detention that is ordered either "(a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with respect for the right to liberty and security of person".[36]

The legal limits of the arrest and detention of the suspects are clearly defined in all modern criminal procedures. The Constitution of India also provides

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36. See, Study of the Rights of Everyone to the free from Arbitrary Arrest, Detention and Exile (UN Publication, Sale No. 65, XIV.2 cited in International Review of Criminal Policy No. 34 (1974), p. 27.

safeguards against the arbitrary use of preventive powers by the executive. Arrest can be made on warrants, or written orders of a competent court. Under certain circumstances both private citizen and police officer can arrest without a warrant. The police may arrest without warrant when they observe the commission of the crime or when they have reason to believe that crime has been committed by a man suspect. The arrested person must be taken before the Court without loss of time and he should not be detained for more than 24 hours.[37] This seminar further discussed the conditional release, confusions and admissions, avoidance of the delay in bringing the accused to trial, the right to legal aid, public trial and detention without trial.[38] An arrested person may secure a conditional release on bail, giving financial security for his return, or he may secure temporary release on his own recognitions or promise to return. A convicted person can also be get the conditional release on suspending the execution of his sentence by the Court during the good behaviour of the offender in prison. If he also discussed about the admission and confession caused by inducement, threat and torture.[39]

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37. Section 41, 42, 43, 57 of the Criminal Procedure Code of India.

38. See, Seminar on Protection of Human Rights in Criminal Law and Procedure, held at Baguio City, the Philippines. 1958 (ST/TAA/HR/2) cited in International Review of Criminal Policy, vol. 35, 1979, p. 80.

39. Ibid.

Such kinds of admissions and confessions cannot be established or approved by any Court of Law as evidence against the person and it can be accepted only as a preliminary admission. Similarly prolonged custody of the accused prior to the statement will not make the confession a voluntary one.

Delay in trial is a common practice in most of the countries and the seminar appealed to the state parties to avoid delay in bringing the accused to trial. The seminar considered the right to legal aid of accused and poor persons. Free legal aid service is one which a modern state and in particular a welfare state owes to its citizens. The state must therefore, accept this obligation and make available funds for providing such legal aid to poor persons of limited means. International Commission of Jurists in the Delhi declaration in January 1959 had concluded "Equal access to law for the rich and the poor is essential to the maintenance of the rule of law".[40] It is therefore necessary to provide adequate legal advice and legal representation to all those threatened as to their life, liberty, property or reputation and who are not able to pay for it. This sacred obligation of the state to provide legal advice

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40. R. Deb, Social Defence, vol. 17, no. 67 (New Delhi, 1982), p. 5.

and representation to all those who are not able to pay for it, has at best been carried out to a limited extent only in regard to criminal cases. It is also necessary to assert the full implication of the principle of equality in the eye of law and equal protection of the law in the context of legal aid for the indigent litigant.[41]

Moreover the accused person is also entitled to a public trial with the help of counsellor. The United Nations also expressed concern at the detention without trial which can be observed in many countries particularly when the political crisis takes place. Most of the countries have the provision in their respective constitutions for detention without trial during emergencies. But most of the States are using this provision to suppress the political opponents. Impartial and fair trial is the fundamental precept in administration of criminal justice. It has been discussed in another seminar held at Santiago, Chillie on 1958.[42]

The efficiency of a judiciary depends on its impartiality in criminal proceedings. The administration of justice establishes the rules of law which is the most

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41. See Art. 7, Universal Declaration of Human Rights, Art. 14 of Indian Constitution.

42. n. 34, Seminar on the Protection of Human Rights, Criminal Law and Procedure, Chillie (ST/TAA/HR/3),

cherished ideal of the democratic societies. The penal policy should be completely free from considerations as to the cast, creed, religion or status of the offender.[43] Fair and impartial trial of an accused person ensures justice in his case. The major task of the criminal Court is to make sure that the innocent should not unnecessarily be punished while those guilty of offences do not go unpunished.

An accused person is presumed to be innocent and his guilt must be established beyond reasonable doubts. This not only imposes the burden of proof upon the state but requires, in order to support penal sanction that proof to be of a highly convincing character. It is the duty of police, Magistrate and Prosecutor to determine not only whether the accused is guilty but also whether there is sufficient ground to hold him the accused for the Court.

When a trial proceeding takes place the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the

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43. See, UN, International Bill of Human Rights, Art. 2 of the Universal Declaration of Human Rights, p. 5.

44. Ibid., Art. 14, Clause 1.

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The above seminar also discussed the matter relating to rights and guarantees of accused, arrested, detained or convicted persons. One of the basic principles of those persons are their right to clear and definite charge. In accordance with the doctrine of nullum crimen sine lege[45] the jurisprudence requires that to constitute crime an act must be specifically prohibited by the criminal law. To be valid, a police arrest or warrant of arrest must be based upon such prescriptions. An indictment or information must rest upon the violation of the statutory prohibitions. The defendant may be convicted only for the offence of which he has been accused.[46]

The fact finding and evidence in criminal proceeding have been discussed at 1960 Vienna seminar on Protection of

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45. Paul W. Popp, Crime, Justice and Correction (New York, 1960), p. 337.

46. Ibid.

the Human Rights in Criminal Procedure. The rules of evidence guiding the admission of testimony provided much fuller protection against conviction of the innocent, in large part because they are applied by the professional judiciary in open hearing with a right of appeal on the record of trial. In Section 24, 25 and 26, the Criminal Procedure Code of India made provision in this regard.

Role of the Police in Protection of Human Rights in Criminal Procedure

The modern police are primarily concerned with detection of the crime and with apprehending the criminals by making arrests. They are just concerned with the protection of society against crimes and safeguarding the persons and property of the people. With a view to performing their duties effectively the police has to associate themselves with the public and seek the latters cooperation in prosecuting the offenders.

The Police has to perform the difficult task of law enforcement and preservation of peace with utmost care and caution. Its main purpose is to protect the innocent from the depredation of the criminal. Hence the police may act as a watch and ward to prevent crime and to trace out the criminal who has committed a crime in bringing before a court of justice for punishing according

to law. The police has thus a very grave responsibility demarching of the higher standard of conduct, particularly those of honesty, impartiality and indignity. It is, however, very unfortunate that the police in most of the modern societies are looked with fear, suspicion and distress by the public. This attitude of the public towards the police demoralises them to such an extent that the police men lose self confidence and are hesitant in taking adequate step to prevent violation of law for the fear of public criticism.

The increasing interference of the politician threatens the public confidence on the working of the police. Once the politician touches the department it paralyses the police arm for the enforcement of the law, it puts merit to the rear, and spreads incompetency and dishonesty in the country.[47] Political compromises by the police officials for personal gains and comforts are bound to make them corrupt, dishonest and inefficient. At the same time it will make fearless administration of law and impartial administration of justice impossible. Thus the impediments placed on the police because of political pressure make it difficult for the police man to perform their duties in an upright manner. The

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47. See, S.K. Ghosh, Law-breakers and Keepers of Peace, 2nd edn. (Calcutta, 1969), p. 15.

seminar on the role of the police in particular in the preservation of human rights held at Canberra considered questions relating mainly to the remedies against abuse of the police powers.[48]

Moreover the working group of the Experts on the Standard Minimum Rules for the Treatment of prisoners, which was convened for the first time at the UN Headquarters from 25 to 29 September 1972 provided the draft Code of Minimum Standards of Conduct for police officers in all member states, as follows:

Draft International Code of Police Ethics

Preamble

A police officer is both a citizen and a law enforcement officer, who on behalf of his or her fellow citizens, prevents crime, preserves the public peace, protects persons and property, and detects and apprehends offenders. It is the tradition of the police profession to be helpful beyond the call of duty, to all persons.

Article I	A police officer is a servant of the law.
Article II	Honesty in thought and deed should characterize a police officer's official and private life.

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48. 1963 Seminar on the Role of the Police in the protection of Human Rights held at Canberra, Australia (ST/TAO/HR/(16). cited in IRCP, vol. 35, (1979), p. 80.

Article III	A police officer must be impartial and fair to all people, whatever their social position, race or creed.
Article IV	A police officer must be incorruptible.
Article V	A police officer should have a compassionate respect for the dignity of the individual and behave to all with courtesy, self-control, human understanding and tolerance.
Article VI	A police officer must never use more force than is necessary to accomplish a legitimate purpose, nor may be ever subject anyone to any form of cruel, inhuman or degrading treatment.
Article VII	A police officer should strive continually to increase his professional skills and, in so doing, the officer should seek to gain ever greater insight into society and human behaviour.
Article VIII	A police officer must obey the orders of the legally constituted authorities and the regulations of the police organization of which the officer is a member, unless he is legally entitled to disregard them.
Article IX	Matters of a confidential nature coming to the attention of a police officer should be kept secret unless the performance of duty requires otherwise.
Article X	A police officer's conduct as a citizen should be exemplary. (49)

Torture and Criminal Justice

The subject of torture has become a widely debated subject in all public platforms. It is noticed that there are ample instances of brutal torture, violation of the

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49. See, Report of the Secretary General on the Meeting of the Working Group of Experts on the Standard Minimum Rules for the Treatment of Prisoners" (E/AC.57/8), cited in International Review of Criminal Police, no. 34, (1978), p. 86.

human rights of the subject, the accused and the prisoners in the most of the part of the world. Article 5 of the International Bill on Human Rights 1948 and 7 of the International Covenant on Civil and Political Rights 1966 provide that no one shall be subjected to any kind of torture. Article 2 of the declaration makes any act of torture, or cruel or inhuman treatment or punishment, as violative of the Charter of the United Nations. Article 3 forbids the use of torture even in case of national emergency.

Torture, a draconian mode of punishment in the past, has no place in the present day society where the member states of the world body have agreed to respect the basic human rights. These rights require the penal system to work within the civilised standards. Torture, if permitted or practised in any penal system of the day is a relic of the law of jungle. It does not treat a man as a human being but reduces his status to that of an animal. Unfortunately, torture still has a sanction of law in many countries of the world. It is in this context that General Assembly vide its resolution no. 3453, requested the Commission on Human Rights to study the question of torture, take note of the countries allowing it, and suggest effective steps for its banishment from the society. The draft Convention for prevention and suppression of

torture held at Paris on 1977 promulgated essential steps to prevention of this crime.[50] The subject has now become a matter of great concern for the world body. Amnesty International has also launched a crusade against the practice of torture.[51]

Torture by Scientific Method

Scientific experiments on the human body as a form of torture became a topic of discussion among the United Nations Community.[52] General Assembly adopted its resolution no. 2450 (XXIII) to study the problems in connection with the human rights arising from developments in the science and technology, in particular from inter alia the following standpoint: (a) respect for the privacy of the individuals in the light of the advances in recording and other techniques; and (b) protection of the human personality and its physical and intellectual indignity, in the light of the advances in biology, medicine and biochemistry.[53]

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50. Bassiouni, n. 2, p. 82.

51. United Nations, International Review of Criminal Policy: no. 34, (1978), and no. 35, (1979).

52. Final Act of the International Conference on Human Rights (United Nations Publication, Sales no. E.68 XIV.2, Chapter III, resolution XI cited in International Review of Criminal Policy, vol. 35, (1979), p. 82.

53. Ibid.

It has been reported that some of the developed countries are using the various scientific methods such as lie-detector, survelliance devices, truth drug, narco-analysis, hypnosis etc. for extracting the evidence from the suspected person. The application of the apparatus known as the lie-detector does not make any harm to the individual either physically or mentally in the slightest. It may, of course, take him to the electric chair indirectly because it assists the authorities in finding the truth elsewhere by warning them of the wrong track.[54]

The lie-detector, in short, reveals that someone is lieing but it does not make him speak the truth. The truth serum techniques consists of injecting certain drugs which compel a person while more or less unconscious to tell the truth as far as really he knows. This drug induced statements may of course incriminate himself, his closest friend or his direct enemy.[55] Recently some of the courts in the United States have rejected the poly-graphic test as well as the lie-detection devices and panathatol serum examination as unreliable means of proof in court. On the other hand, many adherents of narco analysis recommended its use for the purpose of discovering

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54. Ibid.

55. Ibid.

new clues to be followed up by other means of investigation or determining the mental state of the person in which latter case it is often referred to as a narco-diagonsis.[56]

Eighth and Fourteenth Amendments of the U.S.A. Constitution read together put an absolute ban on the use of torture in any form. The absence of such an express provision in the Indian Constitution does not make any difference. The position is the same in India as it is clear from the following observation of the Supreme Court:

> Now obviously, any form of torture or cruel, inhuman or degrading treatment (or punishment) would be offensive to human dignity and constitute an inroad into the right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with the procedure prescribed by law, but no such law which authorises and no procedure which leads to torture or cruel, or inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness; it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21, the right to protection against torture, or inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights. (57)

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56. See, Official Records of the Economic and Social Council Fiftieth Session, Supplement No. 4, Chapter XIX, Section A, cited in International Review of Criminal Policy, vol. 35, (1979), p. 82.

57. Francis Coralie Mullin vs. Union Territory of Delhi and others (1981), ISCC, p. 619, cited in Gurpal Singh, Social Defence (New Delhi), vol. 17, no. 66, (1981), pp. 24-25.

Standard Minimum Rules

United Nations has constituted a group of experts on Standard Minimum Rules for the treatment of the prisoners.[58] The task of this group of experts is to study and appreciate the condition and difficult situation currently prevailing in a number of present system through out the world. In some developed countries, new problems have arisen as a consequence of the rising expectations of prisoners. These sometimes legitimate expectations may justify a reinterpretation of the basic minimum requirements of decency and humanity in the prison regime.

The group addressed itself to the difficulties involved in obtaining universal implementation of the Rules in regions of the world. It was noted that while there is an obvious need for flexibility to accommodate the rules to wide differences in economic and social conditions, a corresponding requirement is that fundamental principles of human decency and human rights be applied to the care of prisoners everywhere.[59]

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58. United Nations, International Review of Criminal Policy, no. 36, (1980), p. 17.

59. Ibid., No. 31, 1974, p. 85.

Legal and Legislative Attitude

The present century brought in its wake a new wave of changes in the criminal policy. The new legal and legislative attitude on criminal procedure brought many reforms and changes in the system. The modern system of probation, parole, reformation and open institutions have proved potentially helpful in elimination of isolationism from which preventive and correctional schemes have suffered so far. The working of prison institutions have been modified to suit the modern corrective methods for treatment of offenders.

The development of penal science in different parts of the world has been more or less on a uniform pattern. The old brutal and barbarous methods of punishment were abandoned in favour of modern corrective measures. Semetency procedure have been radically changed to suit the requirement of the individual offender. Therefore, the modern law administrators are not relieved of their responsibility merely by sentencing and sending the convicted person to prison or a similar institution; but they have an active role to play in making the rehabilitation of the offender possible through institutional methods.

In this era "treatment and not punishment" became the cardinal principle underlying all penal reforms. Greater importance was attached to the treatment of offenders through clinical methods rather than confining them inside the close prison. Minimum security institutions such as open air camp and prison farm were established for the rehabilitation of the offenders. Discrimination on the basis of the social position and financial status of the accused ought to be stopped. For this the criminal law procedure should be so amended as to eliminate needless arrest and detention of the suspected person. The person should be detained in custody only when absolutely necessary. Uniformity of sentences for similar offences should be the guiding principle of sentencing the convicted person. The criminal law should not allow any disparity in trial or sentencing on the basis of social status of the offender.

Besides the necessity for a change in legal attitude towards correctional services there is a need for greater legislative participation in shaping of the penal policies. The law should be flexible as to adopt itself to the changing socio-economic needs of the society.[60]

Recent trends in correctional practice have proved beyond doubt that only one fourth of the total population

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60. Third United Nations Conference on Prevention and Treatment of Offenders, 1965, International Review of the Criminal Policy, vol. 35, (1979), p. 86.

of criminals are incorrigibles while the majority of them are corrigibles and respond favourably to the treatment methods. It must be reiterated that treatment of offenders through modern clinical methods symbolises society's preparedness to accept delinquents as trustworthy citizens. The concept of individualized treatment through correctional methods presupposes that offender is a deviated person who could be redeemed to normal society if adequate opportunities for rehabilitation are offered to him. The system of parole, probation, indererminates sentences and open prisons are some of the rehabilitative devices which find place in the penal programs of most countries of the world.

Alternatives to Imprisonment: A UN Proposal

The subject of alternatives to imprisonment assumes a profound significance in the light of the world wide controversy concerning the role and functions of the prison as an instrument of social control. Moreover in many countries in the world, the overcrowdness in the prisons, presents particularly serious problem in need of immediate solution.[61] Thus most of the countries in the world are

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61. See, Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Caracas, 1980 United Nation Publication, Sale No. 56. IV.4, annex IA, cited in International Review of Criminal Policy, No. 36, (1980), p. 3.

making utmost efforts to introduce, expand and improve various alternatives to imprisonment such as diversion, suspended prosecution, release on bail, probation, suspended sentence, fine, open institution, parole, remission and pardon.

The dual demand made in various countries - for an increased employment of alternative measures and a decreased and more humane use of imprisonment are based on the general requisites of humanity, justice and tolerance as well as on an objective and rational interpretation of official justice data and on the findings of sociological and penal research, confirmed again and again across various societies.[62] This experience may be summarised as follows : there is a lack of concordance between the prison institution as a "means" and the rehabilitation of imprisoned offenders as a "goal" of sentencing. Prison tends to further criminalise the convicted offender. In terms of cost-benefit analysis imprisonment is costly and wasteful especially of the human and societal resources. This concept of the prison system has been made an alternative measure for the present practice of imprisonment. Among the available methods of alternative imprisonment the most beneficial and worthy one is open prison system.

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62. Ibid.

It is a reformative measure that has been introduced in most parts of the world. This open prisons are mostly either agricultural farms or forests where the prisoners are transferred to nearing the end of their sentences. Life term convicts with good record were also sent to this open prison for training in modern method of agriculture and horticulture. Here the prisoners live in an open atmosphere with no barriers, no walls, no barbed wirefence. They just work as in their own fields and receive wages for their work besides receiving training in modern methods of agriculture and horticulture by trained personnel.

There have been several reformative and rehabilitative methods that have come to stay permanently in the prisons administration but this cannot be the end. The whole United Nations Community should continue to adopt modern concepts of correctional methods and for this purpose the cooperation of the members states is required.

The efforts of the United Nations ensure a constant increase in the well-being of people on the basis of their full participation in the development process and in the distribution of benefits acquiring therefrom. Crime control strategies must be deviced within the wider perspectives of creating conditions for all people to lead a life worthy of human dignity. For this purpose a planned development

with due alteration to the modernisation of criminal justice machinery in general and the law enforcement and correction agencies in particular should be established. The emphasis should be given to the research and training in the improvement of the criminal justice system and also technical cooperation at the International level, especially among the developing countries.

While the rights of the accused have been dealt with in numerous provisions, equal attention has been paid by the United Nations to the protection of the community and of each of its members against crime. It should be stressed that the provisions of United Nations instruments express in general terms regarding the right to life, liberty and security of person and the prohibition of torture and of cruel, inhuman or degrading treatment, as well as some other provisions concerning, inter alia, protection against arbitrary interference with one's privacy, family, home or correspondence and against attacks upon one's honour and reputation. The double standards adopted practically by the majority of the criminal courts should be changed.[63]

In short the United Nations Policy on Criminal Justice is not either retributive or reformative but respect

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63. See, Universal Declaration of Human Rights, Article 12 and 17.

for the inherent dignity of all men as well as faith in the positive effect for crime prevention and in the enjoyment of human rights have led the United Nations to adopt rather detailed standards for the protection of the rights of accused and convicted persons, especially while they are in detention. However, this concern for the rights of the accused has been kept in proper balance with the need to protect the community and each of its members against lawlessness. Thus the Universal Declaration of Human Rights, as well as other instruments, lays stress on the duties of the individual towards the community and the legitimacy of restricting the exercise of human rights in order to secure respect for the rights and freedom of others.

CHAPTER - V

COMPARATIVE ANALYSIS

In the preceding chapters we discussed the themes of crime and punishment under United Nations Human Rights Covenant as well as under Islamic Law. A comparative discussion can throw light on the nature and scope of protection, Islamic law offers to Human Rights as accepted by the world community.

First of all it would be better to look into the history of Islam and into how this present form of penal system came into existence in the Islamic society. In ancient Arabia the basic unit of life was not the state but the tribe. Moreover, tribes which were always on the move did not know of any universal law nor did they ever subject themselves to any general political order. The desert people have never tolerated any injustice inflicted upon them but resisted it with all their strength. Nothing is easier for them than recourse to the sword whenever a conflict seems insoluable under the conventional desert rules of honour, nobility and integrity.[1]

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1. Mohemmed H. Haykal, The Life of Muhammad, 8th edition, I.R.A. Fanuqui Trans. (Aligarh, 1976), p.15

During the heathen period, man slaughter and other crimes often gave rise to bloody feuds among the Arab tribes. The revenge of the injured party or of the members of his family or tribe was directed not only against the guilty person but against all who belonged to his family or tribe as well. It is true that by this solidarity of family and tribe, public safety was in some respect guaranteed but there was the disadvantage that many innocent persons had to suffer for the sin of their relatives, and that long continued blood-feuds often arose from insignificant beginnings.

Gibbon observed that "The temper of a people, thus armed against mankind, was doubly inflamed by the domestic licence of rapine, murder and revenge.....each Arab with impunity and renown, might point his javelin against the life of his countrymen.[2]

It was so deeply rooted in the customs of the ancient Arabians that it was impossible for the prophet completely to forbid it. In Islam, therefore, retaliation remained permissible, though with important restriction. Not long after the Hijra, circumstances at Medina compelled the prophet to issue regulation as to this matter, in order to prevent the old blood-feud from continuing even among

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2. Gibbon: "Decline and Fall of Roman Empire" cited in Ilyas Ahammed: The Social Contract and Islamic State, (New Delhi, 1981), p.22

the Muslims; he therefore strictly forbid a Muslim to revenge himself on a fellow-believer for blood-guiltness dating from the heathen period. If, however, a Muslim was attacked unjustly by a fellow believer, he restrained the right of retaliation and if he was killed, his heirs had also this right, but the question must hence-forth be properly investigated, and only the guilty person himself might be punished after his guilt had been proved.

In order to maintain an equilibrium of justice, the Prophet brought this regulation among the Arab tribes about 1400 years ago and it is still continuing in its letter and spirit in certain Islamic countries particularly in Saudi Arabia. According to Islamic law if the heirs of the deceased will forgive and receive the compensation (blood-money) then the accused may be let off. Therefore in a case of murder in Islam the aggrieved party has the discretion whether the accused should be punished or not. The psychology of this legal principle is that only the dears and nears of the deceased were most affected than the society or states by the act of the accused. As far the modern secular law is concerned the right to punish an accused is the right and responsibility of the State concerned. But in Islamic law in the case of a murder the deceased heirs have right of plea to punish or forgive.

Legal Safeguard

Even in the intentional or wilful murder the dependent of the deceased has the discretion to punish the offender. In modern secular law the right of punish of an offender lie in the hand of the states. In Islamic law though the state is authority for inflicting punishment, the relative or dependent of the victim has got the right of pardon and amnesty after accepting the diya (blood money). Victim's compensation in criminal cases is only being talked about today in many advanced legal system, it is a matter of great appreciation that Quran and Sunna provided for it several centuries ago.[3] If the accused is unable to pay the compensation then his relatives are liable to pay, which show collective responsibility of the offender's family on the crime committed by an individual member of such family. Under Article 6 of the Covenant on Human Rights a sentence of death may be imposed only for the most serious crime in accordance with the law in force at the time of the commission of the crime. In the case of Islamic law, it is the will of the victim's dependents notwithstanding the merit of the offence, whether it is serious or not. This is one of the greatest safeguards provided in Islamic Criminal

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3. See N.R. Madhawa Menon, Islamic and Comparative Law Quarterly, (New Delhi, 1981), vol.1;3, p.236

Proceedings. If the accused can pursuade the witnesses i.e. the relatives or dependents of the deceased somehow, then he will not be liable to the prescribed punishment. In this way it will not prejudice the feelings or the sentiments of the victim's party. The United Nations policy is also to protect the human society against victimisation.

In the case of theft, prescribed punishment in Quran is the cutting off of hands.[4] Really it is a harsh punishment but there are several mitigating considerations which would be kept in mind. In the first place, it has been uniformly held that the penalty is given only in extreme and hardened cases. The slightest elements of extenuation would procure relief for an offender. Khalifa Umar was always on the look out for any such allowance so as to reduce or modify the penalty and cases so dealt with by him became precedents for those who follows. During the famine time he has not prescribed punishment for theft. If it is understood that a theft is done due to hunger, the Islamic penal law always favours him. This quality we never see in the modern secular law even in the Human Rights covenants.

The word 'cut-off' the hands has been given wide interpretation. When taking the meaning metaphorically

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4. Holi Quran v 5:38,39, quoted from Muhammad Ali, Religion of Islam , (Lahore, 1978), p.614.

it is to prevent or obstruct.[5] It is true that the Arabic expression in the Quran, which literally construed means "cut-off their hands" was so construed in early and medieval times. In modern times, in most of the Islamic states a term of imprisonment has been substituted and the literal 'cutting-off' of hands is extracted only in a few states and in rare cases. For this the jurist and scholars have found justification in cannons of interpretation. Even at the very outset 'both hands', the term employed in the text, were not cut off for a single aggravated offence though that would be the strict literal meaning of the expression. The 'cutting off hands' would have the secondary connotation, circumscribing their capacity or activity or prohibiting their free movements. Here it is understood that Islam is not favouring the cruel and inhuman treatment or punishment. In modern sense instead of cutting the hand, the prison punishment can also be preferred. Khalifa Umar had introduced first prison system in Islamic nations. For this purpose he made a part of the building in Macca as a public jail for confining the prisoners. This system resulted in substituting many of the harsh punishments provided by law through imprisonment. The same Khalifa also introduced the system of transportation of convicts for certain period to a particular place.

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5. M. Zafarulla Khan, Islam and Human Rights,(Hague, 1963), p.73
   See also Mohd. Ali, Religion of Islam, p.630

During his period he awarded prison sentence for a drunkard instead of penalty of eighty lashes.[6] Here it is understood that the alternative to certain hadd penalty is provided in Islamic criminal law. Severing the hands for theft though provided in Shariah is no longer common in Islamic countries.[7]

In the case of adultery and fornication, Islamic law has provided very harsh punishment. But in this case, the standard of proof required is the sufficient safeguard against the punishment. According to Islamic law, the punishment as zina may be applied if the rape is committed in an open place in the presence of four honest witnesses. In such situation no witness shall simply watch the act of rape and naturally they will protect the victim. No adultery or fornication may take place in the public place but consenting parties would choose the hidden place for the purpose.[8] Therefore no person except a lunatic would commit this offence in public place and the same person is not liable for this punishment. In all these cases the Muslim Criminal Law has provided the sufficient safeguard

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6. A.A. Qadri, Justice in Historical Islam,(New Delhi, 1982), p.22

7. See Editor's Note, 'Human Rights Practices in the Arab States: The Modern impact of Sharia values.' Georgia Journal of International and Comparative Law, (1982), vol.12, p.75

8. See Tahir Mohamood, "Seminar on Adultery and Fornication in Islamic Jurisprudence ", Islamic and Comparative Law Quarterly, Indian Institute of Islamic Studies, (New Delhi, 1983), vol.2, pp.286-87.

to escape the innocent accused person and it is called the escape-vales. For instance in zina case when the required standard of proof is not got then the accused person will not be liable for punishment. Professor Jurgen Baumannis of the view that a balanced arrangement of highly deterrent action against crime and escape valve is the sine qua non of a good system of criminal law.[9]

As far as offence of zina is concerned there is some controversy over the scholars whether the stoning to death is a prescribed punishment by the Quran. The opinion of some scholars is that it is not necessary since no Quranic injunctions provided on this effect. According to Holi Quran the punishment for zina is only flogging. The Quran says "The women and the men guilty of zina - flog each of them with hundred stripes and let not compassion prevent you from executing a decree of God and let a number of believers be witness of their punishment."[10] Therefore some controversies continued regarding the punishment for zina committed by a married person because the absence of the Quranic injunction. Looking at the subject from the point of view of the Quran regarding human life we may take note of the

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9. Baumann Jurgen, "Capital Punishment within the System of Legal Reaction of State" cited in Riyazul Hasan Gilani, The Reconstruction of Legal Thought in Islam, (New Delhi, 1982), p.365

10. Holi Quran, v XXIV:2

following Quranic precept - "Unlawful it is to take away the life of a human being except for a righteous cause."[11] The 'righteous cause' is defined by the Quran as to be rebellion against Allah and his Apostle,[12] (fasad) or it can be an offence ejusdum generis. The offences of adultery and fornication can least be said to fall within fasad, since the Quran expressly and separately deals with these offences and prescribes for them the punishment of flogging.[13] Under article 6 of the Covenant on Civil and Political Rights a sentence for death may be imposed only for the most serious crime in accordance with the law in force at the time of the commission of the crime. The above mentioned version from Quran indicating that about fourteen centuries ago the provision corresponding to the article 6 of the International Covenant on Civil and Political Rights existed in Islamic law. Even though some divergency and ambguity have been found in the system, the main reason for that is the lack of proper interpretation of the Islamic law of Shariah. Whenever an issue arises, then there will be certain divergent views among the scholars

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11. Ibid v: 67

12. Ibid v: 33-34

13. Aminul Hasan Rizvi and G.S. Masood, n.8, p.283

while interpreting the law. The true position of Islamic law on adultery and fornication is thus a subject for a careful scrutiny and research. To clear doubts and remove the vagueness in the matter, ijthihad may be required.

Torture is prohibited:

The Universal Declaration and other international treaties condemned torture and inhuman punishment. In fact torture is now considered as an international crime. Amnesty International disclosed certain startling figures about the institutionalised practices of torture in recent years from the different parts of the world. Torture, a celebrated mode of punishment in the past, has no place in the present day society where the member states of the world body have agreed to respect the basic human rights. These rights require the penal system to work within the civilised standards. Torture, if permitted or practised in any penal system of the day, is a relic of the lay of jungle. It does not treat a man as a human being but reduces his status to that of an animal. Unfortunately, torture still has sanction of law in many countries of the world. The deliquent states are not confined to the developing world but are to be found in all continents and in each of the main political system particularly in western democracies and socialist countries as well as under military dictatorship

and the races regime in South Africa. In a muslim country several executions by firing court took the lives of political and military figures identified with the previous government who were accused of killing or torture or plotting to overthrow the new government. Their conviction followed summary trials conducted without any regard for due process of law. Most trends in the revolutionary courts were carried out at night, in secret, in a short time and without any right of appeal. Accused persons were not afforded the right of defence, consellor or time to prepare their own defence. In fact it was an act of political vengeance against the former regime which committed certain atrocities against the present members of the ruling class.

The crime of state cannot be justified on the authority of the Holy Quran or Traditions (Hadith) when the state murders its citizens openly and secretly without any hesitation or on the slightest pretext, because they are opposed to its unjust policies and actions or criticise it for its misdeed, and also provides protection to its hired assassins who have been guilty of the henious crime of murder of the innocent persons resulting in the fact, that neither the police take any action against such criminals nor can any proof or witnesses against these criminals be produced in the courts of law. The very

existence of such a government is a crime and none of the killings carried out by them can be called "execution for the sake of justice" in the phraseology of the Holy Quran.

But if one looks into the policy adopted by the Prophet after the conquest of Macca one finds that he proclaimed the general amnesty and pardon to people who had once persecuted and tortured him and his followers and had even made several attempts on his life. But he is the "Mercy unto World", and even his direct enemies were forgiven.[14] Repression increased world wide in this century of Human Rights but its increase in the Muslim world would not have been so tragic and painful if Muslims of the free world had strongly protested against the violation of those human rights which have been established by a Prophet to whom God said: "we have sent these on as a mercy for the universe".[15] The irony is that some Muslim rulers either ignore these atrocities or worse gloat over them. In Turkey the torture has now-a-days become wide-spread and systematic. The methods of torture includes electric shocks, beating the soles of the feet and violent assault on all parts of the body including the sexual organs.

This kind of torture is contrary to the Shariah

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14. A.H. Siddiqi, The Life of Mohammad, (Calcutta, 1982), p.252

15. Holy Quran v 21-107

and it admonishes against such practices. Compare the following incident from the Shahih Muslim, Hishman ibn Hakim ion Hizan relates that he passed by some non-Muslim peasents in Damascus who had been ordered to stand in the sun and over whose heads olive oil had been poured. He enquired what it was and was told: "You are being tormented for recovery of tax". On this Hishman said: "I bear witness that the Holy Prophet said: Allah will chastise those who torment people in this life." Then he went to the Governor and told him this. The Governor immediately ordered the man to be released.[16]

The Article 5 of the Universal Declaration of the Human Rights and Article VII of the Universal Islamic Declaration of Human Rights both provided (See Appendix) that "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In a sense fourteen hundred years ago the Prophet of Islam had anticipated this article on the dignity of the human person. The well known collection of the Prophet's tradition, the Sahih Muslim quotes a tradition specifically prohibiting the hitting of the face. Abu-Ali Sund Ibn Marqin relates: I was one of the seven Beni-Maqunin and between us was only one maid servant. The youngest of us happened to clap her and the Holy Prophet commanded that she should be set free.

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16. Barkat Ahmad, "Islam and Human Rights", Hindustan Times, (New Delhi, January 16, 1982), cited from Sahih Muslim.

Modes of Confession:

In Islamic law only the voluntary confession by oath or oral evidence by a trusted and honest witness is accepted. In the case of Zina (fornication) the Islamic law does not insist to get medically examined the persons involved in order to establish their guilt of illicit sexual inter-course to get them punished according to the law.

It has been reported from most of the western and social countries the several incidents of cruel and scientific methods of extracting evidence from the suspects are used. The discovery of the truth is the fundamental requirement of justice. It is not allowed to bring out the truth by applying any inhuman method upon the suspected person in order to extract evidence. The evidence involuntarily obtained from a suspect or the witness either consciously under some kind of physical and mental pressure or unconsciously through the application of some sort of scientific method, ought to be inadmissible and it is not consistent with the spirit of the Islamic law.

Third degree methods, or the torture of some physical or mental kind in police custody and in prison are practised all over the world and it is not permitted by the principles of Islamic criminal law as well as

Universal Declaration of Human Rights. This practice in some of the Muslim countries also in the name of Shariah is only to suppress political prisoners or other than criminals Islam does not permit to use third degree methods of torture.

About 1400 years ago all types of torture and inhuman methods of treatment upon the criminals were prohibited by Islam but it is still continuing in most part of the world including certain Muslim countries. Physical extraction through hunger and thurst, the torment of excessive and uninterupted light or noise, bodily pain and injuries of the most excruciating kind affilicted in the most fiendish ways throughout history of the world in order to extract confession from the suspect.

It is a open secret that these days the police of most countries also apply the method of sleeplessness in some way and to some degree for the purpose of wresting admissions from suspect. However, as far as information gathered in Saudi jails is concerned, no type of the cruel and inhuman method of treatment is practised and wherein a person is proved guilty he may be punished according to the prescribed Shariah law.[17]

The guilt of the defendent determined on evidence obtained by torture or threat is not acceptable in Islamic law and it is prohibited in Shariah.

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17. US Department of State Country Report on Human Rights Practices 1014, 1084 (released 1981) cited in the Georgia Journal of International and Comparative Law, (1982), vol.12, p.73

Crime detection has also its own effect on criminal psychology. Islam has a distinctive advance here too over its western counterpart. Mere suspicion is no ground for punishing a criminal until and unless crime is reported through a reliable source by the prescribed number of witnesses. The present codes do not give such safeguard. An individual may be acquitted after a lengthy process of humiliation. This generates an atmosphere of suspicion.

The Protection of Personal Freedom:

The right to liberty and security of persons is recognised as a major right to be granted to each individual and it is secured in Article 9(i) of the Civil and Political Covenant and Article 2 of the Islamic Declaration of Human Rights (see Appendix I). The protection from arbitrary arrest and detention is clearly the central feature of any system which guarantees liberty to the individuals. Most legal systems permit such law but provide constitutional or legal safeguards against any abusive excercise of this extraordinary power whether by the legislature or by the executive. Islamic law also lays down the safeguard against arbitrary arrest and detention of the person.[18]

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18. S.A.A. Mowdudi, Human Rights in Islam, (Delhi, 1982), p.28.

    See also Art. VI of the Islamic Declaration of the Human Rights.

It is prohibited in Islam that imprisonment should not be given to a person on the grounds of mere suspicion without providing him a reasonable opportunity to produce his defence. It has been reported in one Hadith that when one person was arrested by police without any reason shown then, the Prophet ordered his immediate release.[19] An injunction from the Holy Quran is very clear on this point "whenever you judge between people, you should judge with (a sense of) justice.[20] The word used here clearly indicate that justice means due process of law.[21]

Some countries have tried defendants before specially created tribunals not according to any pre-existing legal provision nor did the charges constitute penal offences under religious law or natural or international law at the time they were committed. Islamic law like other modern secular laws has provided all the guarantee necessary for the defence of the accused person. If the authority suspects that a particular individual has committed a crime or he is likely to commit an offence in the near future then they should give reasons of their suspicion

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19. S.A.A. Mowdudi, Human Rights in Islam, (Delhi, 1982), p.28

20. Holy Quran iv:58

21. See article IV of the Islamic Declaration of Human Rights held at Paris, 1981.

before a court of law and the culprit or the suspect should be allowed to produce his defence in an open court, so that the court may decide whether the suspicion against him is based on sound grounds or not and if there is good reason for suspicion then he should be informed of how long he will be in preventive detention. This decision should be taken under all circumstances in an open court, so that the public may hear the charges brought by the government, as well as the defence made by the accused and see that the due process of law is being applied to him and he is not being victimised.

It has been reported from some of the countries that political prisoners are subjected to arrest and detained without giving an opportunity to hear their charge. In Islam every individual has got the right to protest against the tyrany and misuse of the power by the state authority. Ofcourse, it strongly disapproves of abusive language or strong words of condemnation but the person who has been the victim of injustice or tyranny, God gives him the right to openly protest against the injury that has been caused to him.[22] To protest against the misuse of power by the authority is a God given right of man and no one has the authority to deny this right. The religious persecution of a minority community is also

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22. Holy Quran IV:148

strictly prohibited in Islam. It can be found in many parts of the world that some religious minority has been subjected to persecution. The Prophet said that if a non-Muslim citizen of a Muslim State is killed under the covenant (they are called dhimmis) the murderer shall not even smell the fragrance of paradise.[23] In an Islamic state the non-Islamic citizen can perform their faith according to their religions and it cannot be violated. The Quran says that there shall be no compulsion in the faith.[24] It proclaims, "it is the Truth from your Lord then whosoever will, let him believe and whosoever will let him disbelieve."[25] Therefore, any religious persecution against a particular community or race is prohibited in Islam. It advises to show piety, charity and compassion rather than penalty and punishment.

From the above discussion it can be understood that penal system of Islam is not rigid and it sufficiently safeguards human rights. Almost all the punishments in Islamic legal system are based on the objective of correction and rehabilitation of the offender and prevention of the recurrence of crime. In other words prevention of crime and treatment of offenders through correction and

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23. Bukhari and Abu Dawud.

24. Holy Quran II : 256

25. Holy Quran XVIII : 29

rehabilitation is the dominent penal policy in Islamic law.[26]

However the justification of the punishment is different in Islamic countries from those of the other countries of the world. Most of the social, scientific and criminological research results available however are derived from those other cultures. The scholars and scientists in the Islamic world are undertaking the task of evaluating the relevance of such research and studies from other cultures from their own cultural perspectives.[27]

At the general theoretical level it can be said that the reasons advanced for the desirability of other alternative sentences are acceptable also within the Islamic tradition. There are, however, certain differences which should be noted, the most important being the role of restitution as a primary function of punishment. It is noteworthy that the use of the enforced restitution from the offender to the victim, and the role of that measure in the general theory of punishment is becoming a matter of interest to western societies and policy makers. It may well be noted that experience and information should be gathered from the Muslim world so that they are available, particularly to those studying this subject matter.

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26. N.R. Madhava Menon, n.3, p.237

27. International Review of Criminal Policy, (United Nations, 1980), No.36, p.59.

CHAPTER - VI

CONCLUSION

Man is a social being endowed with natural reason which enables him to behave in society. His interests are best protected only as a member of society and every one owes certain duties towards his fellowmen. At the same time certain rights and privileges which he expects from others are to ensure him a life of dignity. One of the main purposes of the Islamic legal system like others is to protect the individual and society against evil and oppression.

Therefore, all the acts and deeds are regulated by moral sanction. Wherever the moral sanction fails only then will penal sanction be applied. The psychological principle behind this sanction is that "the behaviour of all animals, particularly human beings, is self preservation which means just the continuance of individual biological existence".[1] In other words, all that the individual wants is to protect his own body and soul from external forces. Hence he fears all kinds of corporal punishments and this compells him to refrain from the criminal activities.

Islam never prescribes punishments haphazardly nor does it execute them without due consideration. Islam holds

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1. See Thomas Hobbes, "The Political Philosophy of Hobbes, Its basis and its genesis" in George H Sabine, ed: A History of Political Theory, (Oxford, New Delhi, 1973), p.428

the balance of justice in the right manner and insists on examining all conditions and circumstances connected with the offence. On studying a crime, Islam takes into account two considerations at the same time - the view point of the criminal and that of the community against which aggression took place.[2]

In the light of such consideration Islam prescribes the fair punishment which is in accordance with the dictates of sound logic and wise reasoning and which must be effected for social good.[3]

The policy adopted for prescribing punishment in Islam firstly is to purify the entire human society from those circumstances which may lead to criminal activity. After taking due care and precaution, Islam prescribes a preventive and just punishment which may be inflicted upon persons who have no reasonable justification for their crimes.[4]

To meet this end the primary function of the Islamic institution is to provide the maximum level of moral education whereby to purify the human society. Most of

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2. Nisar Ahmad, The Fundamental Teaching of Quran and Hadith, Part-II, (New Delhi, 1980), p.94

3. Mohammad Qutub, Islam the Mis-understood Religion, (Delhi, 1975), pp.245-47

4. n,.2

the religious institutions are taking much interest in this field and encouraging it to the highest level. Moral and ethical forms of education and training are essential to reform and purify the individual and to make him a better member of the society.[5] In traditional Indian society also we can see this union of morality and law. But Indian system of punishment is very mild in comparison with the Islamic system; therefore our criminal administration becomes a failure in curbing the crimes in society. In Islamic law-making all the preventive and precautionary measures are adopted to curb the crimes in society while providing moral and spiritual instructions to both society and individuals. When these norms of morality fail then only would, the penal sanction be applied. According to Islam the theory of reformation should be applied to the entire human society and not merely to criminals. The punishment of an offender as far as Islam is concerned is a reformative activity in society because it prevents the individuals from commiting future crimes. Therefore punishment to an accused may help to reform the other guilty minded persons from commiting the offence.

In the case of crime it can be committed by any person without regard to his moral character. Even a

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5. See Basha Bakri Mohammed. The significant influence of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society: Attitudinal Comparative Study, published University Microfilm International, Michigan (USA, 1983), pp 117-18.

person possessing high moral and ethical standards, one who is well aware of the law, might commit the crime. For example, in India a sessions judge has been sentenced to death[6] for a murder case and one sub-judge has been arrested for raping a minor girl.[7] Therefore, the deterrent form of punishment should be continued in the society as dictated by Islam.

Experiences have shown that the system of Shariah law is successful as a social defence mechanism.[8] It provides a swift and impartial system of justice which becomes an important factor in the creation of a secular and safe society.[9] In Shariah law both trial and punishment of the offender are meted out in public as a warning to others. Jeremy Benthem favoured the idea of punishing the offender in public so that the punishment could have deterrent effect.[10] The object of Islamic law is to provide maximum welfare and total happiness to the community with the eradication of evil from human society. Benthem also observed that the general object which all laws ought to have, in common, is to augment the total happiness of

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6. Late Mr. Upen Rajkhowa vs State of Assam, Criminal Law Journal, 1974

7. Times of India (New Delhi, Dec. 14, 1983), p.6

8. N.R. Madhwa Menon, "Islamic Criminal Jurisprudence", Islamic and Comparative Law Quarterly, (New Delhi, 1981), vol. 1:3, p.235

9. Mohammad n.5, p.118

10. Jeremy Bentham cited in Premm Arora ed: Political Science: A Study of Selected Political Thinkers, (New Delhi, 1981), p.143.

the community.[11]

Therefore the object of all the criminal laws is to bring peace and security in society. The law of Islam is more stringent in this respect in comparison to other laws. At the same time it is more lenient also regarding the standard of proof required and hence it is practically very difficult to materialise.

The Islamic law has been practising the same system of punishment for about fourteen hundred years upto the present time. Nearly about three hundred years, it existed in Indian sub-continent and continued till the advancement of the British rule. The muslim criminal law when compared was found more refined than the English criminal law as it was in force at that time. The English criminal law still prescribed barbarous punishment and contained some glaring anomalies. Hasting observes that Muslim law was founded on the most lenient principles and abhorance of blood-shed.[12]

Another observation is that "as a system the Mohamadden Criminal Law is mild. The law seems to have been framed with more care to provide for the escape of the criminals than to find conviction on sufficient evidence and to secure the adequate punishment of the offender."[13]

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11. J. Bentham, quoted from Deahh. Clark's article "Justification for Punishment", Contemporary Crisis: Criminal Law Social Policy, (Amsterdam, 1982), p.31

12. Monckton Jones M.E., Warren Hasting in Bengal 1772-1774 (Oxford - 1918), p.337

13. Parliamentary Papers (1831-32), vol.12, p.696

During this period in England the death penalty was awarded even for petty theft.[14] Even in the twentieth century, the so-called reformative era, some of the socialist countries punished the suspected person without trial. During Stalin's period law existed side by side with terror in the Soviet Union.[15]

The United Nations criminal policy is to provide the standard minimum rules regarding the rights of accused, detenues and convicted persons to be protected against the cruel and inhuman treatment for punishment, the protection of the community against crime, standards of conduct for judges, laywers, the police and other persons involved in law enforcement process, and the principles of non-discrimination in these matters. The common criminal policy of the United Nations is prevention and correction, at the same time it is not inimical to punishing an offender who has committed a crime particularly having international concern. For instance any crime against an internationally protected person such as murder,

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14. See V.R. Krishna Iyer, Minority Civil Liberty and Criminal Justice, (New Delhi, 1978), p.124

15. Gere T. Hsiao'Communist China Legal Institution' in Rahmatullah Khan ed., An Introduction to Study of Comparative Law, (Bombay, 1976), p.81

kidnapping[16] or other attack is punishable under either International Criminal Law or existing penal law of the concerned State who is bound to make his crime punishable by appropriate penalities that take into account their grave nature.[17]

Here it can be understood that the United Nations is not totally against the punishment of an offender even if it favours death penalty for most serious crimes.[18]

Moreover in war crime particularly crime against humanity, security of peace and the crime of genocide it also makes provision for punishing the offender. The trial at the Neuremberg and Tokyo have shown the policy of United Nations regarding crime although it was a 'victor's justice' that was administered.

Therefore, one can presume that criminal law and its administration will not be perfect all over the world having its own advantages and disadvantages. In the case of Shariah law, it adopted an efficient system of criminal

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16. In Indian Penal Code these offences may be punished under Secin 302 (Murder) and Sec. 363 (kidnapping). Sec. 302 entitled capital punishment or life imprisonment.

17. See Leuis M. Bloom-field and Gerald F. Filz Gerald, Crime Against Internationally Protected Persons. An Analysis of the United Nations convention (Prager Publishers, New York, 1975), p.74

18. See Article 6 of the International Covenant on Civil and Political Rights.

law atleast to achieving the social defence mechanism in comparison with other criminal laws. It should not be considered disconcerning if in certain areas, there has been insufficient appreciation of the concept of human rights or if they have been ignored. But with strengthened human rights there must be established a just, fair and durable social order and social defence.

It is not proper to say that Islamic law is not considering the human rights norms in the field of administration of criminal justice. Research in other legal systems may tell us to what extent they conform or fail to conform to the standards of human rights and of International Law.[19] At the same time empirical studies on the criminal justice administration of the countries working under Islamic law alone can provide data for judging the performance of Islamic system and its conclusion to the establishment of social defence consist with the dignity of human rights and social justice.[20]

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19. See M.K. Nawaz, "The Concept of Human Rights in Islamic Law", Howard Law of Journal, vol.2 (1965), p.332

20. n,8, p.237-38

APPENDIX-I

ISLAMIC DECLARATION OF HUMAN RIGHTS

Following is the "Universal Islamic Declaration of Human Rights" proclaimed by the Islamic council of Europe at the International Islamic Conference held in Paris on 19th September 1980 to mark the beginning of the 15th century of the Islamic era.

The Declaration is based on the holy Quran and Sunnah.

Preamble

WHEREAS the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear oppression, exploitation and deprivation, remains largely unfulfilled;

WHEREAS the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted, or unfairly or unjustly withheld from the inhabitants of the earth;

WHEREAS Allah (God) has given mankind through His revelations in the Holy Quran and the Sunnah of His Blessed Prophet Muhammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

WHEREAS the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

WHEREAS by virtue of their Divine source and sanctions these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated.

Therefore we, as Muslims, who believe:

a) in God, the Beneficent and Merciful, the Creator, the sustainer, the Sovereign, the sole Guide of mankind and the source of all law;

b) in the Vicegerency (Khalifah) of man who has been created to fulfill the Will of God on earth;

c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;

d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and knoing that the teaching of Islam represent the quitesence of divine guidance in its final and perfect form, feel duty bound to remind man of the high status and dignity bestowed on him by God;

e) in inviting all mankind to the message of Islam;

f) that by the terms of our primeval covenant with God our duties and obligations have priority over our rights, and that each one of us is under a bounded duty to spread the teachings of Islam by word, deed, and indeed in all gentle-ways, and to make them effective not only in our individual lives but also in the society around us;

g) in our obligation to establish an Islamic order;

i) Wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, six, origin or language;

ii) wherein all human beings are born free;

iii) wherein slavery and forced labour are abborred;

iv) wherein conditions shall be established such that

the institution of family shall be preserved, protected and honoured as the basis of all social life;

v) wherein the rulers and the ruled alike are subject to, and equal before the law;

vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;

vii) Wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the law and in a manner approved by it, and with due regard for the priorities fixed by it;

viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the Quran and the Sunnah;

ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation (Shura) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;

x) Wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;

xi) wherein everyone shall in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;

xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;

xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

xiv) wherein every effort shall be made to -

a) secure unto mankind deliverance from every type of exploitation, injustice and oppression;

b) ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the Law.

Do hereby, as servants of Allah and as members of the Universal Brotherhood of Islam, at the beginning of the Fifteenth Century of the Islamic Era, affirm our commitment to uphold the following inviolable human rights that we consider are enjoined by Islam.

I. Right to Life

a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.

b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II. Right to Freedom

a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.

b) Every individual and every people has the insalienable right to freedom in all its forms - physical, cultural, economic and political - and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III. Rights to Equality and Prohibition Against Impermissible Discriminations.

a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

b) All persons shall be entitled to equal wage for equal work.

c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV Right to Justice

a) Every person has the right to be treated in accordance with the Law, and only in accordance with the law.

b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self defence against any charge that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.

c) It is the right and duty of every person to defend the rights of any other person and the community in general (Hisbah).

d) No person shall be discriminated against while seeking to defend private and public rights.

e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V. Right to Fair Trial

a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.

b) No person shall be adjudged guilty of an offence except after a fair trial and after reasonable opportunity for defence has been provided to him.

c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.

d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.

e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI. Right to Protection Against Abuse of Power

Every person has the right to protection against harrassment by official agencies. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be reasonably raised.

VII. Right to Protection Against Torture

No person shall be subjected to torture in mind or body, degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime or forced to consent to an act which is injurious to his interests.

VIII. Right to protection of Honour and Reputation

Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX. Right to Asylum

a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.

b) All Masjid Aj Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X. Rights of Minorities

a) The Quranic principle "There is no compulsion in religion" shall govern the religious rights of non-Muslims minorities.

b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

XI. Right and Obligation to Participate in the Conduct and Management of Public Affairs.

a) Subject to the Law, every individual in the community (Ummah) is entitled to assume public office.

b) Process of free consultation (Shura) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII. Right to Freedom of Belief, Thought and Speech

a) Every person has the right to express his

thoughts and beliefs so long as he remains within the limits prescribed by the Law. One one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indluge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.

c) It is the right and duty of Muslim to protest and strive(within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state.

d) There shall be no bar on the disemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.

e) No one shall hold in contempt or ridicule the religious beliefs of the others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII. Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV. Right to Free Association

a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (ma'roof) and to prevent what is wrong (munkar).

b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV. The Economic Order and the Rights Evolving Therefrom:

a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.

b) All human beings are entitled to earn their living according to the Law.

c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.

d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by Zakah, levied and collected in accordance with the Law.

e) All means of production shall be utilised in the interest of the community (Ummah) as a whole, and may not be neglected or misused.

f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.

g) All economic activities are permitted provided, they are not deterimental to the interests of the community (Ummah) and do not violate Islamic Laws and values.

XVI. Right to Protection of Property

a) No property may be expropriated except in the public

interest and on payment of fair and adequate compensation.

XVII. Status and Dignity of Workers

Islam honours work and the worker and enjoins Muslims not only to treat the worker justly but also generously. He is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure.

XVIII. Right to Social Security

Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability.

XIX. The Right to Found a Family and Related Matters

a) Every person is entitled to marry, to found a family and to bring up children inconformity with his religion, traditions and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.

b) Each of the partners in marriage is entitled to respect and consideration from the other.

c) Every husband is obligated to maintain his wife and children according to his means.

d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.

e) If parties are for some reason unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfil these obligations at public expense.

f) Every person is entitled to material support, as well as care and protedtion from his family during childhood, old age or incapacity. Parents are entitled to material support as well as care and protection from their children.

g) Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community (Ummah).

h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowment, talents and inclinations, bearing in mind their common responsibilities towards their progeny and their relatives.

i) No person may be married against his or her will, or lose or suffer dimunition of legal personality on account of marriage.

XX. Rights of Married Women

Every married women is entitled to :

a) Live in the house in which her husband lives;
b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and in the event of divorce, receiving during the statutory period of waiting (iddah) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own right.
c) Seek and obtain dissolution of marriage (Khul'a) in accordance with the terms of the law. This right is in addition to her right to seek divorce through the court.

d) inherit from her husband, her parents, her children and other relatives, according to the law;

e) Strict confidentiality from her spouse, or ex-spouse, if divorced, with regard to any information that he may have obtained about her, the disclosure which could prove determinental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI. Right to Education

a)Every person is entitled to receive education in accordance with his natural capabilities.

b) Every person is entitled to a pre-choice of profession and career and to opportunity for the full development of his natural endowments.

XXII. Right of Privacy

Every person is entitled to the protection of his privacy.

XXIII. Right to Freedom of Movement and Residence

a) In view of the fact that the world of Islam is vertiably Ummah Islamia, every muslim shall have the right to freely move in and out of any muslim country.

b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom, without recourse to due process of law.

APPENDIX-II

Table: States Members of the United Nations and Capital Punishment:

A	=	Abolitionist by law
AO	=	Abolitionist by law for ordinary crimes only
AC	=	Abolitionist by custom
R	=	Retentionist
D	=	Country divided on the issue (some states are abolitionist, others retentionist)

Afghanistan	AO	Colombia	A
Albania*	R	Congo*	R
Algeria*	R	Coste Rica	A
Argentina	R	Cuba*	R
Australia	D	Cyprus	R
Austria	A	Czechoslovakia	R
Bahrain	R	Dahomay	R
Barbados	R	Democratic Yamen*	R
Belgium	AC	Denmark	AO
Bhutan	R	Dominican Republic	A
Bolivia*	R	Ecuador	A
Botswana*	R	Egypt	R
Brazil	AO	El Salvador	R
Bulgaria	R	Equatorial Guenea	R
Burma	R	Ethiopia*	R
Burundi*	R	Fiji	R
Byelorussian SSR*	R	Finland	A
Cameroon	R	France	R
Canada**		Gabon*	R
Central African Republic	R	Gambia	R
Chad	R	Ghana	R
Chile	R	Greece	R
China	R		

Guatemala	R
Guinea*	R
Guyana	R
Haiti*	R
Honduras	R
Hungary	R
Iceland	A
India	R
Indonesia	R
Iran	R
Iraq	R
Ireland	R
Israel	AO
Italy	AO
Ivory Coast	R
Jamaica	R
Japan	R
Jordan	R
Kenya	R
Khmer Republic	R
Kuwait	R
Laos	R
Lebanon	R
Lesotho*	R
Liberia	R
Libyan Arab Republic	R
Luxembourg	AC
Madagascar	R
Malawi	R
Malaysia	R
Maldivas	R
Mali*	R
Malta	AO
Mauritania*	R
Mauritius	R
Mexico	D
Mongolia	R
Morocco	R
Nepal*	AO
Netherlands	AO
New Zealand	AO
Nicaragua	AC
Niger	R
Nigeria	R
Norway	AO
Oman*	R
Pakistan	R
Panama	AO
Paraguay*	R
Peru	AO
Phillippines	R
Poland	R
Portugal	AO
Qatar*	R
Romania	R
Rwanda	R
Saudi Arabia*	R
Senegal*	R
Sierra Leone	R
Singapore	R
Somalia	R
South Africa	R
Sri Lanka	R
Spain	R
Sudan	R
Swaziland	R
Sweden	AO
Syrian Arab Republic	R
Thailand	R
Togo	R
Trinidad and Tobago	R

Tunisia	R	United States of America**	D
Turkey	R	Upper Volta	R
Uganda	R	Uruguay	A
Ukrainian SSR	R	Vene-zuala	A
USSR	R	Yemen	R
United Arab Emirates*		Yugoslavia	R
United Kingdom	AO	Zaire*	R
United Republic of Tanzania	R	Zambia	R

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* The information concerning this Member State does not come from an official reply to the United Nations or a former United Nations Publication.

** See the section of the main report entitled Reported changes since 1965.

BIBLIOGRAPHY

I. PRIMARY SOURCES

Holy Quran

Hadith - Sahih Muslim
- Sahih Bukhari
- Abu-dawud
- Tirimidi

International Bill on Human Rights

Law Commission of India, 35th Report, vol.II (Capital Punishment), 1967, Ministry of Law, Government of India.

Islamic Declaration of Human Rights

II. SECONDARY SOURCES

1. Books

Abda Lati, Hammudah, Islam in Focus (Aligarh, 1975).

Ahmad, Ilyas, The Social Contract and the Islamic States, (New Delhi; Kitab Bhawan, 1981).

Ahamad, Nizar, The Fundamental Teachings of Quran and Hadith, (New Delhi: Kitab Bhawan, 1980).

Ali, Muhammad, The Religion of Islam, (Lahore: AAIS, 1976).

Anderson, J.N.D., Islamic Law in Modern World, (New York: Stevens & Sons Ltd., 1959).

--------- Islamic Law in Africa, (London: Frank Cass & Co. Ltd., 1970).

Anand, R.P., Asian States and Development of Universal International Law, (Delhi: Vikas Publications, 1972).

Arora, Prem, Political Science, A Study of Selected Political Thinkers, (New Delhi, 1983).

Bathurst, Maurice, Ten Years of Terrorism, (New York: Crane, Russak and Co., 1979).

Bloom-Field M. Leuis and Gerald Filzf Geral, Crime Against Against Internationally Protected Persons"An Analysis of the United Nations Convention" (New York: Prager, 1975).

Benett, Michael, Northern Africa - Islam and Modernisation (London: Cox and Wyman Ltd., 1975).

Cherif M. Bassiouni, A Draft International Criminal Code (Netherland: Sijthoff and Noordhoff, 1980).

Drost, Pieter N, Crime of State-I-Humanicide (Netherland, 1959).

_____ Crime of State-II-Genocide (Netherland, 1959).

Faruki, Kand A., Islamic Jurisprudence (Karachi, 1962).

Friedmen, Leon, The Law of War (New York: Randon House, 1972).

Gilani-Riazul Hassan, Reconstruction of Legal Thought in Islam (Delhi: Markazi Maktaba Islami, 1982).

"An Historical Survey"
Gibb, H.A:R., Mohammadanism/(New York and London: Oxford University Press, 1962).

Ghosh, S.K., Law-breakers and keepers of peace (Calcutta: Eastern Law House, 1969).

Glueck, Sheldon, War Criminals: Their Prosecution and Punishment (New York, 1944).

Hamilton, Translation of Hedaya (London, 1791).

Hussain, Wahid, Administration of Justice during the Muslim Rule of India (University of Calcutta, 1934).

Hykle, Muhammad, The Life of Muhammad (Aligarh: Cresent Publishing House, 1976).

Iyer, V.R. Krishna, Minority,Civil Liberty and Criminal Justice (New Delhi: Peoples Publishing House, 1980).

Jones, M.E. Monckton, Warren Hestings in Bengal 1772-1774 (Oxford, 1918).

Khan, Rahmatullah, An Introduction to Study of Comparative Law(Bombay: Tripati, 1976).

Khan,Muhammad Zafarulla, Islam and Human Rights (Hague, 1967).

Landau, Rom, Islam and Arabs (London: 1958).

Lewis (Benard), Islam and the Arab World (New York, 1976)

Masud, Mohammad Kalid, Islamic Legal Philosophy (Islamic Research Institute, Pakistan, 1977).

Mahajan, V. Dhar, Public International Law (Lucknow, 1973).

Mc Dougal, M. & Feliciano, Law and Minimum World Order (Yale University, 1961).

Minear, H. Richard, Victors Justice The Tokyo War Criminal Trial (New Jersy, 1971).

Moazzam, Anwar, Islam and Contemporary Muslim World (New Delhi: Light and Life, 1981).

Moududi, S. Abul-Ala, Human Rights in Islam (New Delhi: Markazi Maktaba Islami, 1982).

Muhammad, Basha Bakri, The Significant Influence of Islamic Law Decreasing Crime Rate in Soudi Arabian Society: "Attitudnal Comparative Study" (Michigan: USA, 1983)

Muhmood, Tahir, Muslim Personal Law, (New Delhi: Vikas Publications, 1977).

Muller, Gerhard G.W. & Wise M. Edward, International Criminal Law (London: Sweet & Maxwel, 1953).

Munir, Muhammad, From Jinnah to Zia (Delhi, 1981).

Qadiri, Anwar Ahamad, Justice in Historical Islam (New Delhi: Kitab Bhavan, 1982).

Qutub, Muhammad, Islam the Mis-understood Religion (Delhi: Board of Islamic Publications, 1970)

Rahman, Tanzilur, Islamisation of Pakistan (Karachi, 1978).

Robertson, A.H., Human Rights in Europe (Manchester , 1977)

Sabine, H. George, A History of Political Theory (New Delhi: Oxford and I.B.H. Pub. Co., 1973).

Schacht, Joseph, An Introduction to Islamic Law (Oxford, 1964).

Shahéed, Abdul Qadir, Islam and Modern Criminal Law (Karachi, 1979).

Siddiqi, Abdul Hamid, Tr. Sahih Muslim: vol.III (Lahore, 1976).

_____ Life of Muhammad (Calcutta: Hilal Publishing Co., 1982).

W. Paul, Crime, Justice and Correction (New York: M.C. Grawhill, 1960).

West (Ranyard), Psychology and World Order (New York: Penguin Books, 1945).

2. Articles in Periodicals

Bhattacharya, "Capital Punishment", Social Defence, vol.XVII, January 1982, p.33

Deb, R, "Legal Aid to Indigent Litigants", Social Defence, vol.XVII, No.67, January 1982, p.5

Deahh, "Justification for Punishment", Contemporary Crisis: Criminal Law Social Policy, Amsterdam,vol.6, 1982,

Editors Note: "Human Rights Practices in the Arab States: The Modern Impact of Shariah Values", GJICL, vol.12, 1982 issue 1, p.73-74,75, 76, 77 and 78.

Menon, N.R. Madhawa, "Islamic Criminal Jurisprudence and Social Defence in the Modern World"An Appreciation ICLQ, vol.1, No.3, New Delhi, 1981.

Nawaz, M.K., "The Concept of Human Rights in Islamic Law", HLJ, vol.II, Spring, 1965, p.332.

Pappu, S.S. Rama Rao, "Human Rights and Human Obligation: An East West Perspective", Philosophy & Social Action, vol.VIII, No.4, New Delhi, 1982, p.21

Rizvi, S. Aminul Hasan,and Masoodi, G.S., "Adultery and Fornication in Islamic Jurisprudence: Dimension and Perspectives", ICLQ, vol.II, No.4, New Delhi, 1982, pp. 270-72 and 278-79.

UN Secretary General (Report), "Human Rights in the Administration of Justice", IRCP, vol.35, 1979, pp 79-80

_____"Capital Punishment" ICRP, vol.31, 1974,pp.91-92 (Report of Secretary General)

Singh, Gurupal, "Perimeters of Torture in Modern Criminal Justice", Social Defence, New Delhi, vol.17, No.66, October 1981, pp 24-25

United Nations, "Capital Punishment", UNP, (ICRP), 1962, p.76

UN Secretariat Proposal, "Human Rights in the Administration of Criminal Justice, !The Division of Human Rights: activities in the field of crime prevention and criminal justice", ICRP, vol.34, 1978, p.27

3. Newspapers

Hindustan Times,(New Delhi)

Times of India (New Delhi)

Radiance (weekly) (New Delhi)