CAPITAL PUNISHMENT A COMPARATIVE STUDY WITH EMPHASIS ON SAUDI ARABIA

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CONTENTS

Abstract

This study is a modest investigation into the Islamic understanding of capital punishment. The main areas covered are the historical antecedents of the death penalty in human history; a review of death penalty across the world; death penalty in Islam; death penalty in Saudi Arabia. The thesis also examines the pros and cons of the death penalty debate. In addition to the argument of deterrence.

CHAPTER ONE

INTRODUCTION

1.1. Nature of the Study

The issue of capital punishment has, in recent years, been the subject of much debate. Execution, that deliberate act of society which deprives a person of life because of an alleged act of major, and usually violent, deviance, has tended to evoke the deepest of human emotions. Those who have experienced a direct effect in their lives due to a major crime, those who work at the formulation and enforcement of laws, and especially those who work in the judicial processes which lead to the ultimate sanction of law--the death penalty-- are often quite willing to express an opinion regarding this issue. Not merely those who are directly affected by crime and punishment but every citizen of society has an interest, realized or not, in the capital punishment debate. Recent news accounts have reflected the ongoing

nature of the debate. For example, the latest U.S. Supreme Court ruling held that, under proper procedural guidelines, the death penalty is constitutional. Consequently, it is almost certain that some of the nearly 600 prisoners under sentence of death will soon be executed, ending a nine-year moratorium on the use of capital punishment. In the U.S. this development has generated increased interest among Americans in the pros and cons of the debate because of the Oklahoma bombing.[1] Elsewhere in the world, the murders of young children in Britain, political prisoners in Iran, and the recent death sentences for dissenters in Nigeria (to cite only a few cases) have attracted international interest in the issue.

Many people have contributed to the discussion surrounding capital punishment including scholars who are competent in the legal dimensions of the question and those with training in other disciplines. Legal scholars have been most concerned with the death penalty as it relates to the rationality of legal codes and the functional quality of legal sanctions. Criminologists and sociologists have sought to apprehend a comprehensive picture, based on facts and statistics, of

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[1] "The Death Penalty Revived," *Time*, July 1995,

the social processes surrounding capital punishment. Those scholars of the humanities who have approached the subject have been concerned with the meaning of the death penalty for human life, individually and collectively. Each of these perspectives is necessary since each contributes to a comprehensive understanding of capital punishment. Assuming the desirability and necessity for interdisciplinary input into the formulation of public policy regarding capital punishment, one might ask what insights can be gained from the study of religion. Since religious scholarship concerns itself with symbolization, religious action, and religious institutions, questions arise regarding the relationship of these aspects of religion to capital punishment. Where religion and capital punishment overlap, the social implications of this relationship are paramount. The scholarly burden of this specific question falls to the sociology of religion, that discipline which strives to understand the place of religion within the complex of social processes of which capital punishment is a part. The sociology of religion contributes to the general understanding of capital punishment in a number of ways. For example, in its analysis of society's definition of deviance (e.g. sin, crime) as indicative of a value -hirerarchy, the sociology of religion offers a certain under-

standing of the function and significance of maximum sanctions. It is this scholarly discipline which perhaps most effectively blends the perspectives of social science and humanities in a view of capital punishment.

This study will attempt to contribute to such a view by analysing the religious origins and dimensions of capital punishment. It will do so by tracing, historically and cross culturally, the relationship of religion and capital punishment within the conceptual framework and vocabulary of the sociology of religion. The study will address itself to three questions which arise regarding the religious dimensions of capital punishment:

(1) What theoretical insights into the relationship of religion and capital punishment in society are available from the perspective of sociology of religion?

(2) In what sense is capital punishment related to the religious phenomenon of propitiation?

(3) How has capital punishment developed historically, especially in the modern secular era, as a social mechanism which serves to maintain collectively defined sacred reality?

1.2. The Socio-Religious Definition of Capital Punishment.

Capital punishment is the response of society to what is perceived as a major deviation from normative behaviour on the part of the criminal. Major deviant behaviour poses a threat to socially defined reality; the degree of the threat determines the social definition of the degree of deviance. Therefore, the definition of crime is directly related to what is valued as "real" in a given society. This explains the fact that different societies have set different limits on the behaviour of their individual members; in short, crime is culturally relative.[2] The socially defined reality often operates quite implicitly, standing behind the laws and sanctions which appear as a part of everyday life.

Examination of the limits of human behaviour in a given society is thus

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[2]Knudten, R.D. *Crime in a Complex Society*, Dorsey Press, 1970, pp.54-55

a clue to its assumed view of reality. The definition of deviance establishes the "social boundaries" of behaviour which are keys to a "society's normative structure and value-hierarchy." Major deviance demands a response from society since the very core of its self-identity is threatened by the transgression of these boundaries. There is a very strong fear that insufficient or inappropriate response to deviance will threaten the basic structure of the social organization:

"The central issue has always been one of social control, behind which lay the fear that if crime (as well as other forms of deviance) were not controlled through effective action there will be societal breakdown and ethical standards will break asunder."[3]

Religion has a dual role in the social process which results in the definition of deviance and the response to deviance. Religion serves to provide the ultimate rationale for a society's definition of reality. Thus, laws are either seen to issue directly from the divine sphere or at least to receive legitimation therefrom. This first aspect of the role of religion in the social process is called the "word-construction"

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[3]Erikson, K.T. *The Wayward Puritans: A Study in the Sociology of Deviance*, John Wiley, 1966, p.20.

function.[4]

The second aspect of religion's role in the social dialectic, that of helping to maintain the socially defined reality in the face of threats such as those posed by major deviance, deviance which calls into question the reality concept of a society creates a collective marginal situation. The marginal situation demands an explanation, or legitimation, which guards against the perceived breakdown of "reality" and avoids the disintegration of the plausibility structure. According to Peter Berger, the administration of capital punishment occurs in response to collective "marginal situations" in which reality, as defined by a social group, is put in question or threatened. Religion functions to maintain "the socially defined reality by legitimating [such] marginal situations in terms of an all-encompassing sacred reality."[5] Religion therefore provides the justification for the deprivation of the life of the violator. But the action of executing a member of society, albeit a deviant member, itself creates a marginal situation, since death is the most mysterious and ultimate threat to the

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[4]Einstadter, W.J. "Introduction", to Heinrich, O., *The Rationale of Punishment*, Patterson Smith, 1975, p.xii.

[5]Berger, P. *The Sacred Canopy*, Anchor Books, 1969, 25ff.

reality or plausibility structure. Religion functions to legitimate the marginal situation created by the anticipated execution. It does so by giving a cosmic meaning to the "official exercise of violence," by providing the executioner with an identity as a "role-carrier," and by providing for religious symbolisations and religious actions to be employed in the execution.[6]

"Killing under the auspices of the legitimate authorities has... been accompanied from ancient times to today by religious paraphernalia and ritualism... men are put to death amid prayers, blessings, and incantations. The ecstasies of fear and violence are, by these means, kept within the bounds of "sanity," that is, of the reality of the social world."[7]

The sociology of religion, therefore, provides a principal category for an understanding of the relationship of religion to capital punishment. That category is the function of world-maintenance in the face of a marginal situation. Those religious symbolisations and religious actions

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[6]*ibid.p.*44

[7]*ibid. p.114.*

which accompany executions, it will be shown in the subsequent chapter, are most adequately explained with reference to the religious phenomenon of propitiation. This was especially true in ancient times when societies manifested the full integration of religion with public life, the sinner or criminal was considered accursed and was executed in the name of the god (s) in a ceremony involving symbols and rites in terms of which the killing was justified.

This propitiatory death of the violator was necessary for the maintenance of certain sacred, social constructions of reality. Thus, in the earliest historical eras, it is found that religion was directly involved in the social process which leads to execution. In later historical stages, it will be shown in the subsequent chapter, there is an evolution of the phenomenon of capital punishment corresponding to changes in the socially perceived reality. The role of religion also changed with this evolutionary process, it was decreasingly involved in the actual ceremony of execution while remaining as a principle legitimating agent. The world-maintenance function still summarizes the role of religion with regard to capital punishment. Furthermore, the process of secularization in the modern era has resulted in the partial

transposition of the world-maintenance function and the legitimation of capital punishment from the sphere of the influence of religion to that of the state and its political ideology. Secular justifications for the death penalty tend to predominate. The narrowly "religious" or ritualistic aspects of capital punishment fade away, yet, the world-maintenance function and legitimations remain.

The socio-religious definition of capital punishment is, therefore,

1) a social response to a marginal situation which is created by major deviant behaviour defined as a boundary of sacred reality and,

2) a collective action which is legitimated by religion as a necessary protection of the plausibility structure which is the base of this sacred reality. There are, of course, other possible definitions of capital punishment from the perspective of law, criminology, and other disciplines. However, the sociology of religion offers an understanding based on the function of religion in world-construction and world-maintenance. The significance of religion's role in the legitimation of capital punishment has been expressed by Albert Camus. Camus pointed out that the maximum sanction goes against the human solidarity against death; therefore, it must be justified by a truth

or principle "superior to man... only religious values... can serve as a basis for the supreme punishment."[8] Camus argued eloquently against capital punishment and other forms of killing and violence which are justified by a socially conceived reality: "Those who cause the most blood to flow are the same ones who believe they have right, logic and history on their side."[9]

1.3. Central Thesis

The definition of capital punishment offered by the sociology of religion,[10] as elaborated above, informs the central thesis of this study. If the maintenance of a sacred reality sometimes requires the legal taking of human life in order to appease the wrath of the god (s) then this act may be seen in religious terms. Specifically, therefore, the thesis of this study is that capital punishment, in its origins, development, and present ideological dimensions, is a type of

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[8]Camus, A., "Reflections on the Guillotine," reprinted in *Resistance, Rebellion, and Death,* Vintage Books, 1974, p.222.

[9]*ibid.* p.227.

[10]It should be noted that the particular sociology of religion reflected in this study follows the conceptual framework and terminology of Peter Berger's *The Sacred Canopy.*

propitiatory rite which serves to maintain a socially constructed reality. In simplest terms, capital punishment is a propitiation for the sake of a social order.

1.4. Method of the Study

In order to fulfil the purpose of this study, to analyse the relationship of religion and capital punishment, the examination of available literature and the integration of different aspects of the issue were necessary. Therefore, the methodology involved the examination of the literature on the philosophy of punishment and capital punishment to discover and expose those aspects of the question which reflect socio-religious dimensions.[11] This approach included the construction of a thorough bibliography on capital punishment and the selection of those sources which are most relevant to ideological, religious, and sociological aspects of capital punishment.

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[11]The selection of literature was based on a certain understanding of the term "socio-religious." Throughout this study the term is intended to signify those aspects of religion which directly contribute to the social process. Since such aspects, along with political aspects, contribute to the ideological characteristics of societies, the term "socio-religious" is close in meaning to the term "politico-religious."

The literature on the philosophy of punishment from the most ancient times to the present has been vast and varied. The pros and cons of capital punishment are first mentioned with regard to specific cases of individuals or groups whose actions were subjected to public scrutiny. Opposition to the use of the death penalty was stated in terms of certain mitigating circumstances or for the sake of mercy. Modern philosophical discussion of capital punishment was sparked by the Italian jurist Cesare Beccaria in his classic eighteenth-century work, *On Crimes and Punishments (1764).*[12] Beccaria's opposition to the penalty of death attracted immediate and widespread interest among the avant-garde of Europe and America. Kant, Hegel, and others contributed to the debate by defending capital punishment. The principal source regarding the role of religion in the origins and justifications of capital punishment is Heinrich Oppenheimer's *The Rationale of Punishment (1913).*[13] In the twentieth century, there has been an abundance of religious debate over capital punishment. This literature primarily concerns the ethical arguments regarding the issue.

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[12]See translation by Henry Paolucci, Bobbs-Merrill, 1963.

[13]Originally published by Hodder and Stoughton for University of London Press.

For example, liberal Protestantism, in its desire for social reform, has sometimes argued against capital punishment and sought its abolition. The best recent contribution to the religious and philosophical discussion, from an existentialist perspective, is Albert Camus's *Reflections on the Guillotine* (1957).[14] The literature of this century which seeks to relate religion and capital punishment is rich in ethical insights. Camus and others, in providing ethical treatments of the issue, have occasionally hinted at certain socio-religious dimensions of capital punishment. But, although many[15] have noted a close relationship between capital punishment and certain religious phenomena no one, to this researchers knowledge, has explored this relationship from the perspective of the sociology of religion.

The limitations of this study arise from the availability of the sources and the nature of the study itself. The literature upon which the study is based has been drawn from that which is available in English from the library of the University of Wales. Undoubtedly, the prodigious amount of literature available from earlier historical eras and in other

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[14]Camus, A. *op.cit.*

[15]Scott, R. G. *The History of Capital Punishment*, Torchstream Books, 1950, pp.21-22.

languages would offer valuable details for a general socio-religious understanding of capital punishment. But the full and detailed story of the relationship of religion and capital punishment is beyond the scope of this type of study. Furthermore, the generality of the subject matter of this study did not allow the reading of all related literature, since this would include the entire bibliography of capital punishment. Therefore, the selection process employed in the integration of diverse ideas and facts was crucially important.

The delimitations of this study have been chosen in order to fulfill the purpose of exposing the socio-religious dimensions of capital punishment. Therefore, although a conscious attempt has been made to achieve an integrative and interdisciplinary perspective on capital punishment, certain aspects of this subject have received less emphasis in order to emphasize those aspects, mentioned above, which are of primary importance. Receiving less emphasis are: 1) the study of the details of various Islamic legal codes and their mutual influence historically; 2) the close empirical analysis of the facts regarding executions in Saudi Arabia, which is, unfortunately, only available for relatively recent times and only in certain jurisdictions; and 3) the

evaluation and criticism, based on formal logic, of the various ethical arguments regarding the death penalty. In addition, the attempt to focus on those aspects of capital punishment which are related to religion has resulted in a de-emphasis of certain secular understandings and legitimations of capital punishment. Yet a deliberate effort has been made in the seventh chapter to illustrate the enduring Islamic socio religious dimensions of capital punishment after the historical unfolding of the secularization process.

1.5. Structure of the Thesis

This introductory chapter presents the purpose, methodology, and rationale of the inquiry. The second chapter examines the concept of capital punishment; the third chapter straces origins of capital punishment in ancient times, giving special attention to the view that the first executions constituted a type of propitiatory rite administered by priest-executioners. The phenomenon of propitiation as a religious category is shown to be directly related to the processes of world-construction and world-maintenance as aspects of socially defined reality. The evolving place of religion within society is related to the

changing theoretical and practical aspects of capital punishment. The fourth chapter explores the socio-religious dimensions of the subject in the secular era; the fifth chapter examines the developmental shift in capital punishment throughout the world; the sixth chapter looks at the Islamic religion and capital punishment after the rise of the modern secular state which begins to take over the world construction, world-maintenance, and legitimating functions of religion.The seventh chapter gives an overview of the application of capital punishment in Saudi Arabia. In the final chapter the findings and conclusions of the inquiry are summarized.

Finally, implications for further debate and research, with specific emphasis on the ethics of capital punishment, are proposed. It is the objective of this study to approach the subject of capital punishment, about which much has been written, from a new perspective, namely, that of religion. Within this conceptual framework and vocabulary it is hoped that those with a previous interest in capital punishment will find fresh insights on the subject. For those who are already aware of sociological theories of religion, this essay will hopefully present capital punishment as a case study of society's (and religion's

legitimation) of official violence to maintain the particular hierarchical distributions of wealth and power which define its "reality." Thus, the present study is relevant not only to the academic study of religion but also to the broader range of interdisciplinary studies by which public policy should be informed.

CHAPTER TWO

THE CONCEPT OF PUNISHMENT

2.1. Aims of Punishment

Some philosophers have confused the aims of punishment with its nature, or have defined punishment at least partially of its supposed aims. This can be misleading, for by packing into its definition those aims of which one approves, one can refuse to allow behaviour that has some other aim to be called punishment, even though such behaviour is quite generally considered to be a form of punishment. Such question-begging techniques and attempts at persuasive definition do not resolve questions. They merely add to the confusion that already exists. It is best, therefore, to consider the aims of punishment separately from its nature.

The aims or goals of punishment have traditionally fallen into the following categories:

1. Protection of society from the depredations of dangerous persons.

2. Reform of the offender, or deterring the offender from future violations.

3. Deterring persons other than the offender.

4. Vengeance, retribution, or righting the scales of justice.

2.1.1. Protection Of Society

In addition to all of the preceding motives, one of the most important is that of affording the innocent members of society protection from the depredations of dangerous persons. One of the major purposes of establishing and maintaining governments is the need of all persons to band together to protect one another from all forms of danger. The skin of man is soft and easily pierced. Whether the danger is from tooth or claw, or from the knives or bullets of members of his own species, man is susceptible to attack. He lacks the instincts and the built-in

capacities of some of the lower animals that provide them with protection against the predators that would feed upon them. Men have therefore had to learn to work together with other members of their own kind for mutual protection.

The enjoyment of the earth's bounties is impossible, then, to men who live in a state of anarchy, where all men are in perpetual terror that their lives may be brought to a sudden end. In such a state, there is no true freedom, for there is no security. As Hobbes said long ago, in state of anarchy.

"there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts, no letters; no society; and, which is worst of all, continual fear and danger of violent death; and the life of man solitary, poor, nasty, brutish, and short."[16]

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[16] Thomas Hobbes, *Leviathan,* Part 1, Chapter 13. Library of Liberal Arts ed. p.107.

Our ancestors, then, in ages far more remote than historical records go, must have organised themselves into bands or troops or tribes, at least partly because of their instinctive drive for self-preservation. And this same instinctual drive undoubtedly brought them to the conclusion that when a man became a threat to the community or to the individuals within it, the community or its members had the right to use all means necessary to protect themselves from him, including banishment or death, where other means failed. For by violating the primary purposes for which the group had constituted itself, he literally made himself an outlaw - that is, one who is outside the law. By repudiating the discipline of the group, either through his words or through his actions he placed himself outside the group, and thus lost the immunities that membership in the group conferred upon him, including immunity from physical harm by other members of the group.

2.1.2. Reform

It is easiest to secure general agreement on the use of punishment to

secure reform of the offender. If the infliction of a certain degree of harm will induce a person to conform to standards of behaviour that he has previously tended to ignore or to violate, and if his violation of those standards is harmful to others, then it might be reasonable to inflict that harm upon him. Presumably from the painful experience of being punished, he will emerge a "better" man than he was before, less likely to engage in unacceptable behaviour. Having been punished once, the fear of another penalty - even more severe than the first, perhaps - may suffice to deter him from future offences.

Reform by punishment often goes hand in hand with efforts at rehabilitation, but the two should not be confused. Out of humane considerations, and a desire to offer the convict the opportunity to find a useful place in society once he has paid his debt to society, modern penal institutions commonly provide educational and vocational services, as well as facilities for religious services, recreation, and so on. But, though these services may serve the same long-term goal as the penalty that is inflicted upon him, and though they may be administered by the same persons who administers the penal institution of which they are a part, they are not part of the penalty

itself. If a prisoner had been sentenced to forty lashes, and if, after the penalty was inflicted, the authorities provided him with bandages and soothing ointments, no one would suppose that the bandages and ointment were any part of his punishment. The recreational and educational programs of penal institutions should not be considered a part of the punishment of their inmates, but a separate enterprise that may be intended to achieve the same overall results.

2.1.3. Deterrence

People learn from the experiences of others as well as from their own. Reading reports of one or two tragic automobile accidents that have resulted from heavy drinking is sufficient to persuade some people not to drive after they have been drinking, or not to drink if they intend to be driving. It is not necessary for them to go through such a tragic experience themselves. Similarly, reading a few reports of the penalties inflicted upon persons who have broken the law is enough to persuade many people not to risk incurring similar penalties for themselves.

As a general rule, as the penalty becomes more severe, people become less likely to engage in the proscribed conduct. If the fine for overtime parking is $1, many people will feel that it is worth the risk, because in the long run, it may turn out to be less expensive than utilising private parking lots. If the fine is raised to $5, fewer people are likely to take the risk. If it is raised to $15, violators will be fewer still. As the fines go up, the propensity to risk having to pay them goes down. And as other penalties, such as jail terms, corporal punishment, and death are imposed, one may assume that people will become even more reluctant to subject themselves to the suffering and deprivation that these entail. Punishment, then, may serve not only to reform those who have violated the rules, but also to deter those who might otherwise be tempted to violate them.

2.1.4. Vengeance or Retribution

There is widespread feeling that justice requires that no man should be allowed the advantage that accrues to him from his misdeeds; that any man who has committed a crime should somehow pay his debt to

society, regardless of whether he is reformed by having to do so and regardless of the deterrent effects such payment may have upon others. By his wrongful act, it is said, the offender has tipped the scales of justice out of balance, and it is necessary to rectify the imbalance by taking from him what he has taken from others.

Some thinkers have said that when injustice has been committed in the world, there is a stain that must somehow be washed away. The Hebrew bible and the tragedies of ancient Greece are full of incidents that seem designed to illustrate this concept. Once Oedipus has violated the moral law by committing patricide and incest, misfortune comes to his kingdom and remains until his guilt is expiated. In the Hebrew Bible many passages clearly presume that the earth itself is stained by the guilt of the murderer, and that nothing can cleanse it of this stain but punishment of the guilty or some form of expiation. Thus, after Cain has murdered his brother Abel, God says to him, "What have you done? The blood of your brother is crying out to me from the ground! Now you are cursed by the earth that has opened its mouth to swallow the blood of your brother that you have spilled."[17]

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[17] *Genesis* 4:10-11.

And again, in connection with the need to punish the murderer, God commands the children of Israel by saying, "You must not defile the land in which you reside, but blood defiles the earth; and there is no way to cleanse the earth of the blood that has been spilled upon it but by the blood of him who has spilled it."[18]

In modern times, the popular demand for retribution is often expressed when the public, informed of a particularly brutal crime, demands revenge, feeling that justice is served only when the guilty party has been punished. Many of those who advocate the return of the death penalty argue that murderers should be put to death because they deserve to die for their crimes. The popular demand for punishment is often unaccompanied by any thought of reform or deterrence; rather, it seems to be activated by the thought that the criminal ought to get what is coming to him or get what he deserves. There is little evidence of any popular feeling that the earth has been defiled by spilt blood. But some expressions, such as, the victim of this crime will not rest easy until her killer has been caught and justice has been done, reveal an underlying sentiment that derives from the same source. There

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[18] *Numbers* 32:33. Cf. Also *Deuteronomy* 21:1-9, *et passim*.

seems to be a feeling, too, that one who commits a crime owes a debt that he must pay, and that so long as that debt remains unpaid, there is an imbalance in the community or in the universe, a kind of state of being - injustice - that can be rectified only with the punishment of the wrongdoer.

One of the most respected moral thinkers of modern times, Immanuel Kant, maintained that from a moral point of view, punishment is primarily retributive. In discussing the problem he went so far as to say that if the world were about to come to an end, and it was therefore evident that no one would benefit from punishment of prisoners, those prisoners who has been sentenced to death should be executed nevertheless, in the interest of righting the balance of justice.[19]

Thus far, it has been discussed in this chapter the various aims of punishment without attempting to evaluate them. It is necessary now to turn to that task.

First, it should be noted that each of the justifications or aims

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[19] Kant, I. *Philosophy of Law, T&T Clark, 1887, p.198.*

discussed above has in fact been considered by respectable philosophers and moralists to be a proper goal for particular penalties or for punishment in general. Furthermore, each of them has a certain plausibility of its own. Whether one considers criminal punishment or the kinds of penalties that parents impose upon their children or that referees assess against ballplayers, the same kinds of rationale seem to be involved. Consider a game for a moment, and see how penalties are exacted and the reasons that might be given for them.

In hockey, a player can be sent to the penalty box for high-sticking. By sitting in that box for a certain period of time, he is, in a sense, subjected to a kind of humiliation that may help to deter him from breaking the rules of the game as he has done. Because his penalty is also a penalty against his team, he has an even greater incentive to reform, for a player who consistently sits in the penalty box is less valuable to his team than one who is out on the ice scoring goals. When one man is excluded from playing, the entire team is weakened, so that the other players have a stronger reason than usual for refraining from engaging in behaviour that might be construed by the referees to be rule infractions. Thus, there is both a reformative effect

and a deterrent effect in the imposition of penalties upon hockey players.

In addition, there is a clear sense in which the penalty constitutes a righting of the unbalanced scales of justice. When members of one team engage in high-sticking, or when they play off-side, they gain an advantage over the other team that ought to be rectified. They should be deprived of their unfair gain, and the other team should be compensated, somehow, for the loss that it incurred as a result of the unfair playing of their opponents. Thus, in basketball, the victimised team gets a free throw, in football the offending team loses yardage, and so on.

Players who commit grave offences may be assessed heavy fines, in professional play, and if their offences are so serious as to warrant even more serious action, they may be suspended from the league or the association, or be forbidden to play altogether. Thus, the association of players outlaws the offender, removing him entirely from the society of participants in that game, on the ground that to permit him to continue to play constitutes a danger, either to the

personal safety of the other participants or to the respectability of their sport as a whole.

Some people have insisted that some of these justifications for punishment are really no justification at all. The one that has come under the strongest and most consistent attack is the third one, retribution. Some philosophers, particularly those associated with the utilitarian tradition, maintain that only forward-looking penalties (that is, penalties that are principally intended to have some effect upon the future well-being of mankind) ought to be imposed, and that any sanction that is imposed primarily to settle a score for something that has already taken place is unworthy of a civilised society.[20] If no good can reasonably be expected to result from the imposition of the penalty, they say, it is barbarous to impose it. Some (like Hobbes) have gone so far as to say that any penalty that is not forward-looking is no punishment at all, but naked hostility or brutality.[21]

Although these views have some plausibility, they are also subject to

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[20] Acton, H.B. *The Philosophy of Punishment,* St. Martin's, 1969. p.34.

[21]Hobbes, *op.cit.*

serious objections. Popular acceptance or rejection of a theory is not necessarily an indication of its correctness, but it is nevertheless a factor that may not be overlooked. As we have already noted, many people accept the view that punishment is at least partially retributive, though few would go so far as Kant went in his extreme formulation of the retributive theory of punishment. The popularity of the retributive view, in spite of powerful attacks upon it over a number of centuries, may be attributed, in part, to a strong feeling on the part of many people that justice is not done unless a criminal suffers for his crime. The sense of justice, or the sense of injustice, may be overlooked. As Edmund Cahn once observed,

> "The evolutionary connectedness of human life and of man's relations is the root fact of law.....Justice, as many attempted definitions have rather clearly demonstrated, is unwilling to be captured in a formula. Nevertheless, it somehow remains a word of magic evocations.....Perhaps the human mind does contain self-evident truths concerning justice, from which legal norms less obvious in their nature may be deduced."[22]

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[22] Cahn, E. *The Sense of Injustice: An Anthropomorphic View of Law*, New York Univ. Press, 1949. p.12.

When a murderer is convicted of a murder he did not commit, or a gangster who cannot be convicted of any of the crimes that everyone knows he did is convicted of income tax evasion, there is little feeling that injustice has been done, because there is a feeling that somehow, they have gotten what they deserved. Such feeling cannot be overlooked by the philosopher.

Suppose that reform and deterrence are the only goals thought to be worth entertaining in so far as punishment is concerned, and that retribution is thought to be irrelevant or uncivilised. It then becomes possible to conceive of circumstances in which one might be able to justify the punishment of innocent persons; that is, of persons whose guilt has not been established in accordance with proper procedures in a court of law. Suppose, for example, that there is a serious riot and that the entire fabric of society is threatened with destruction. Suppose further that the lives and property of thousands of innocent persons are at stake and that the authorities are unable to apprehend those responsible for the insurrection. Finally, suppose that the authorities have good reason to believe that if one or two of the insurrectionists are brought to justice, the others will be shocked into submission and

that the insurrection will thus be brought to an end. In order to deter others from continuing with their unlawful activity, then, it becomes imperative that at least one person be hanged for his part in the insurrection. However, because the authorities do not know the identity of any of the insurrectionists, they have only one choice: to select someone at random, to stage a trial for him, to convict him of complicity in the insurrection, and to execute him in such a way that the loosely knit band of revolutionaries abandons its violent tactics, thus restoring relative tranquility to the state.

Because, according to the supporters of the utilitarian theory, the purpose of punishment is reform or deterrence, and because the settling of old scores or the righting of the unbalanced scales of justice has nothing to do with punishment, it is difficult to see why only the guilty should be punished. For deterrence, at least, it is quite obvious that the punishment of the innocent will work quite as well. And if reform is the aim, it might be argued that one who has been punished once, even for a crime that he has not committed, will be even less likely to commit it than he would have been had he never tasted the lash or known what it is to be deprived of his liberty, unless

the punishment is hanging, in which case there is no point to any talk of reform, whether the punished party is innocent or guilty.

It would seem, then, that unless some considerations other than reform or deterrence are brought to bear, it is possible to justify the punishment of the innocent - a conclusion that is scarcely likely to commend itself to those who reject retribution on the ground that it is barbarous and uncivilised. On the contrary, it would seem that some element of retribution must be involved if we are to make sense of the theory that only the guilty ought ever to be punished.

Some people confuse the retributive theory of punishment with certain moral views of what are and what are not proper attitudes to hold toward those who have committed various kinds of wrongful acts. It is proper they say, to be forgiving, and it is uncharitable to be vengeful. Retributive punishment is therefore morally wrong, though punishment inflicted for reform or deterrent purposes might be acceptable since it is more concerned with the future well-being of mankind than with the past misdeeds of a single individual.[23]

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[23] Barnes, H. *The Repression of Crime,* Montclear, 1969, pp.126-134.

This objection is open to several objections. First of all, one may claim that it confuses legal punishment with moral vindictiveness. There is a sense in which legal punishment may be bound up with moral vindictiveness, but it is necessary to sort out the various functions being served and the persons who are operating in the legal system in order to find out just where such vindictiveness may lie, if it exists at all. One might say, for example, that the judge who sentences the defendant is being vindictive; but clearly there is a difference between a judge carrying out the duty prescribed for him by law - a duty that may be very unpleasant both for him and for the defendant who must suffer the penalty he pronounces - and the same person (i.e., the judge) in his private capacity, as a citizen seeking vengeance against someone who has wronged him. A person who, acting in an official capacity, performs an act that is required of him by the laws, rules, or regulations governing his performance in his job, may sometimes not be said to have the attributes that he would be said to have if he did the same thing as a private citizen. For example, a person who dispenses large sums of money to the poor may properly be described as generous and charitable. But if he is the director of a welfare agency, though he is distributing large sums of money to the

poor, that fact alone is not sufficient to justify calling him either generous or charitable. It is not his money, after all, that he is distributing; it is his job to distribute it; and, though one might say that the government is generous in its welfare program, it would be incorrect to say that the agent who signs the cheques is generous and charitable (though he might be both, of course, in his private life). In the same way, the judge who dispenses harsh sentences required by law may not be a harsh man at all. But feeling bound to do what he is required to do by conditions imposed upon him by the position he holds in the structure of government, he regretfully hands down harsh sentences. It might be appropriate to say that the laws are harsh, or that the government that passed the laws is harsh; but it is not strictly correct to say that the judge who administers those laws is harsh.

Still, a plausible case can be made for the view that the welfare clerk and the judge are generous and vindictive men, respectively. One might point out that either man could find another job, and that both men probably took the jobs that they have because of the kinds of people they are. The judge swears to uphold the law so long as he remains on the bench; but it is always open to a judge to resign his

position if he finds that he cannot stomach the laws he is asked to support. If the laws are harsh and vindictive, then, one may argue that a judge who rules in accordance with them, rather than stepping down or finding some loophole, is a harsh and vindictive man.

Still another might point out that more than one judge has ruled in accordance with a law or a precedent of which he strongly disapproved, but remained on the bench because he felt that his presence there enabled him to perform an important and valuable public service. Weighing all the factors and the alternatives, he might conclude that he would have a greater opportunity to make the administration of justice less harsh from his position in the judiciary, even though he might occasionally have to make rulings that went very much against his own convictions, than he would as a private citizen. Similarly, the welfare clerk might have taken his job precisely because he was a man of generous spirit, wanting to have a part in distributing money - even if it had to be other people's money - to those who were in need of it. The moral quality of the individual who acts in an official capacity is obviously not amenable to simple solution. This has been of central importance in discussions of war crimes and crimes against

humanity.

A second objection against those who maintain that retributive punishment is wrong because it is proper to be forgiving and charitable rather than vengeful is based upon the fact that it is not at all clear what it would be like to be forgiving in the criminal law. Does it make any sense to speak of anyone forgiving the criminal but his victim? The district attorney, the judge, the jailer, all of these have jobs to do. Their jobs require that they administer the law. If a person has committed a crime, it is the district attorney's job to prosecute him, the judge is supposed to preside over his trial, and, if he is convicted and sentenced to a prison term, it is the jailer's duty to attend to him for the duration of his stay in prison. None of these people, though, has been harmed by the offender; at least, none of them has been harmed more than any other citizen has. It makes no sense, then, to suggest that any of these officials or employees of the government might forgive him, for only those who have been injured by him can forgive him.[24]

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[24] Blumberg, A. S. *Criminal Justice*, Quadrangle Books, 1967, p.89.

There is a sense in which he might be forgiven by the prosecuting attorney or the judge; that is, if the former decided to abandon the prosecution of his case, or if the latter decided to dismiss the case in spite of the evidence pointing to the defendant's delinquency. But strictly speaking, the state and its officials do not have the power to forgive, though they may excuse certain forms of wrongful behaviour under appropriate circumstances.

A disposition to forgive is not to be confused with the virtues of mercy or compassion. Though no one but the victim may forgive the criminal who has harmed him, anyone - whether he is victim, judge, prosecuting attorney, or interested bystander - may have compassion for the man who has been found guilty in a criminal court. In a criminal case, no one but the judge may be merciful toward the defendant who has been found guilty, for none but the judge is in a position to dispense mercy by mitigating the sentence. Even the judge may be unable to be merciful toward the guilty party, despite any compassionate feelings he may have for him, because his discretionary powers are limited by the law that he is sworn to uphold.[25]

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[25] *ibid.*

There is no reason to suppose that the world be significantly improved if judges were allowed wider discretion than they are. One of the purposes of law is to take certain important matters of public interest out of the hands of individuals and to provide a certain regularity and uniformity of expectation for all the members of the society. This aim would be defeated if judges were given wide powers of discretion in individual cases.

Third, the effect that one man's punishment may have on others, by way of example, is not an adequate reason for punishing him. If it were, penalties could be adjusted by determining how severe they ought to be to deter potential offenders. But in fact, penalties are made more or less severe depending upon the seriousness of the crime that has been committed. And so it ought to be. No man should be deprived of his life, his liberty, or his property simply in order that others might be deterred from committing a crime in the future, or in other words, that John should be punished for the crime that Joe might commit. This scarcely seems to be consonant with the sense of justice that enjoins against punishing one for the crime of another, and even more against punishing one man for the possible future crime of some other.

In actual practice, all of these motives enter into the treatment accorded to criminal offenders. In some parts of the criminal law there seems to be greater concern for reform or deterrence, and in others for retribution. The legislators's quandary, when he considers changes in the penal code, rests upon the kinds of confusions that have been discussed. Should the penalty be more or less severe? If it is more severe, will it be too harsh for the crime committed? Consider the drug problem as an example. Many legislators seem to feel, rightly or wrongly, that the use of certain drugs is a practice that ought to be discouraged by the law. The penalties for such use are severe, but they could be more severe or more lenient. There is a demand on the part of some people that penalties for drug use be made more lenient. If they are, the opponents argue, the drug problem will increase, for fewer people will be deterred. If they are not, say advocates of reform, our society is guilty of inflicting a harm upon certain persons far out of proportion to the gravity of the offense that they have committed. Notice that the one is arguing on deterrent grounds, the other on retributive. Notice too that retributivists can argue for less severe penalties on retributivists principle, in spite of their reputation for

heartlessness and lack of compassion.[26]

2.2. Excusing Conditions

In law and in morals it is recognised that no person should be held responsible or be blamed for any act over which he has no control, as in the following mock case.

The Knife-Wielding Mother

A rare form of epilepsy causes its victims to repeat, automatically and blindly, certain forms of behaviour that can result in great harm to others. In one case, a young mother was slicing a loaf of bread when she was suddenly stricken by an attack of this form epilepsy. In a trance, completely unaware of what she was doing, she wandered about the kitchen, continuing to make the slicing motions that she had been making when the attack struck her. When she recovered, she was horrified to discover her baby's slashed and mutilated body.

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[26] Cahn, L. *Confronting Justice*, Little Brown, 1966, p.245.

There is no meaningful sense in which this unfortunate woman can be considered to be guilty of causing her baby's death. Where there is no intention to cause harm, and no negligence, there is no guilt or responsibility. Nevertheless, the state has the right to protect other persons against the harm that a person suffering from such a malady might unwittingly inflict upon them in similar circumstances. To be sure, the woman in this case was sick and should not have been punished for the death of her infant. But the state may institutionalise her until it is quite certain that she is cured of her illness, or that her illness is so completely under control that she no longer poses a serious threat to anyone, just as it may quarantine a person with a dangerously infectious disease.

The law recognises a number of excusing conditions that are sufficient to render a person immune to criminal punishment. All of them presuppose that the defendant could not have helped doing what he did or that he could reasonably have been expected to foresee the consequences of his actions, and that he ought not, therefore, to be held responsible for the action or its consequences. They all entail the absence of *mens rea*, the intention that is necessary as part of any

criminal act. Generally, actions that are not preceded or accompanied *mens rea* (criminal intention) are not criminal acts. Thus, it is possible to distinguish between murder that is committed by using an automobile as the weapon and an accident, he has no intention to kill the pedestrian.

These excusing conditions are known as *mistake*, *accident*, *provocation*, *duress*, and *insanity*. In addition, some persons, such as very small children, are presumed to be incapable of forming the intention to commit a criminal act.[27]

Suppose a person is charged with manslaughter because he lit a match in a place whose atmosphere was permeated with gas fumes and thereby caused a violent explosion that took the lives of several persons. Suppose also that he lit the match with the intention of lighting a cigarette, completely unaware of the presence of the explosive fumes which had entered the atmosphere undetected from a leak in a gas main. It would be quite unreasonable for the law to hold him responsible for the deaths of the victims of the explosion, for he

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[27] Hart, H.L. *Punishment and Responsibility*, Oxford Univ. Press, 1968, p.56.

had no knowledge of the presence of the dangerous gas; he performed an act that was in itself completely innocent and without malice, and no reasonable person could have expected him to foresee the disastrous consequences of igniting a match in that place at that time. Because his action was not malicious, there were no evil inclinations (none that are revealed by his act of lighting the match, at any rate) that punishment might rid him of. Because neither he nor anyone else in similar circumstances could foresee the consequences of lighting a match, no punishment, no matter how severe, could deter others from similar acts in the future. It is hard to see in what sense he might be guilty of the deaths of the victims of this tragic accident.

One should not be misled into thinking that *mens rea* is narrowly construed in the law. It is not. For example, it is sometimes assumed that "malice aforethought" and "premeditation" exclude the possibility of a man's being convicted of murder if he fires a gun on a sudden impulse. This is not the case. A man may be convicted of first degree murder in some jurisdictions even if his intention to fire his weapon was formulated only a split second before he fired it , or, as the law sometimes puts it, "if the time that separated the intention from the act

was that that separates one thought from the next. Furthermore, for a conviction of first-degree murder, it is not necessary for the defendant to have intended to kill his victim. If he intended only to wing the person at whom he was shooting, and if, when the bullet struck the victims's arm, it shattered his bones in such a way that bone fragments pierced his chest, causing fatal wounds, the defendant may be guilty of first-degree murder in some states.[28] In New York, for example, the Revised Penal Code of 1967 states that a person is guilty of murder when under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. In some cases a person may be guilty of murder even when he did not pull the trigger himself and never intended to participate in an action that would cause serious injury to another person. Thus, in the state of New York, a person may be found guilty of murder if he is engaged in an attempt to commit robbery, burglary, or any one of a number of other crimes and if, while engaged in that crime, he, or another participant, if there be any, causes the death of a person other than one of the participants.

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[28] *ibid.* p.153

It is obvious, therefore, that in the criminal law, the concept of intention, or *mens rea*, is not identical with the common-sense definition of the term that one might encounter in daily, nontechnical conversation. Although the notion of criminal responsibility is closely related to common-sense conceptions of responsibility, it is not identical with them. In the course of its growth and development, the law has evolved special, technical uses of terms that are also employed in nontechnical ways by laymen. It can be dangerous for the layman to confuse the technical and the nontechnical uses of such terms.

2.3.1. Strict Determinism

Strict determinism is not so much a means of defining an excusing condition under which some persons may be absolved of criminal responsibility as a theory which, if accepted, would lead to the conclusion that all persons should be excused of whatever allegedly criminal misconduct they might have engaged in. It holds that no one is genuinely free, no one can chose his own actions, everyone's actions are determined by pre-existing conditions over which no one has

control. It concludes, therefore, that no one ought to be punished or blamed or held responsible for any acts in which he might have participated.[29]

If this theory were true, the conclusion that no one should ever be held responsible for anything would certainly follow. Because excellent treatments of the deterministic theory abound, the following points will suffice for our purposes.

1. If determinism were true, it would follow that no one should ever be rewarded for his good deeds, as well as that no one should ever be punished for his evil deeds. People should not be held responsible for their behaviour, whether it is admirable or totally abominable.

2. If the advocates of determinism were consistent, they would have to admit that it is not appropriate to blame the judges and other officers of the state for punishing the criminals who came their way. For the actions of the judges and the jailers and the executioners are as much the inevitable outcome of their genetic heritage and upbringing as the

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[29] Madden, E. *Philosophical Perspectives on Punishment*, C.C. Thomas, 1968, pp.187-89.

criminal behaviour of their victims is of theirs. But determinists generally tend to condemn the behaviour of judges and other officers of the state. If the criminal cannot help fulfilling his destiny, the jailer and the executioner cannot help fulfilling theirs. A fully consistent determinist would have to refrain from criticism of political leaders, even when the latter plunge their nation's into unjust wars. But those who advocate merciful treatment of criminals on deterministic grounds are often merciless in their denunciations of presidents, secretaries of state, and secretaries of defense.[30]

3. If determinism were true, the statements made by determinists would actually not be statements at all. If a statement is merely a automatic product of a long sequence of events, it is not an intelligent statement, but merely another event, a brute fact. If strict determinism were true, the statement made by determinists would be such brute facts and would have no more meaning than the exclamations of parrots and the grunts of hogs. Determinism, too, would merely be fulfilling their destiny by uttering their so-called theories (how can a series of noises emanating from an automaton be a theory?), and

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[30] *ibid.*

would no more be entitled to be heeded than would a parrot trained to utter the same sounds. Indeed, it would make no sense to speak of heeding the determinist, because, according to his own theory, everyone does what he is programmed to do anyway.

2.3.2. All Criminals are Sick.

One often hears that all criminals are sick and that instead of subjecting them to the brutal treatment that is entailed in punishment, whatever form that might take, a civilised society ought to provide some form of treatment for them as it does for all its sick and disabled members. The criminal, it is said, is unable to do other than he does. He is the unfortunate victim of the heredity with which he was endowed and the environment into which he was thrust. He chose neither. Yet both his heredity and his environment have made him what he is. If only he had been raised in other circumstances, he would not have become what he did infact become. If only he had been born to parents other than his own, or if only the chromosomes that made up the germ plasm from which he came had had slightly different

genetic coding, he would have been a very different kind of person from the one that he is today. He is much the master of his own actions as the epileptic is of his when he trashes about in a *grand mal* seizure. It makes as much sense to punish the murderer as it does to punish the epileptic or the insane; and, indeed, it was not so very long ago that the latter were treated much as the criminal is treated today. Samuel Butler, in his remarkable novel *Erehwon,* pictured a society where criminals were provided with special hospitals where they might be treated, but persons suffering from various forms of illness were hauled into court and subjected to increasingly severe penalties, according to the severity of their illness. Thus, for a common cold, a man might be required to pay only a moderate fine, but for pneumonia he might be sentenced to several years in prison. The burglar, the rapist, and the arsonist, however, were given the benefit of the latest medical advances and once their treatments were completed they were sent on their way, because they were cured.

Butler's point is obvious. He is suggesting that there is no significant difference between the kinds of conditions that we call illness and the kinds that we call criminal behaviour, and that the form of treatment

accorded to each ought to be similar. He suggests that it is no more sensible to subject a burglar to fines or prison sentences than it would be to subject persons suffering from gout to such treatment. Thus, for example, John Hospers, after describing an incident in which a woman refused to do what was necessary to save the life of her child until it was too late, concludes:

"Was she responsible for her deed? In ordinary life, after making a mistake, we say, 'Chalk it up to experience.' Here we should say, 'chalk it up to the neurosis.' *She* could not help it if her neurosis forced her act this way - she didn't even know what was going on behind the scenes, her conscious self merely acted out its assigned part. This is far more true than is generally realized: criminal actions in general are not actions for which their agents are responsible; the agents are passive, not active - they are victims of a neurotic conflict. Their very hyperactivity is unconsciously determined."[31]

Hospers goes on to explain that this is not to say that society should punish criminals. He explains that for societys own protection, it must

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[31] Hospers, J. "Free will and Psychoanalysis," in *Philosophy and Phenomenological Research*, 1950.

remove them from societys midst so that they can no longer molest and endanger organised society. But such means of self-defense are not quite what is meant by punishment. They are a form of preventive detention. The criminal is not punished for his crime, under this scheme, but for the danger he poses to society. In this respect, his treatment does not differ at all from the detention enforced upon the epileptic in our earlier example, or from the victim of tuberculosis, who can legally be required to be hospitalised and quarantined until all danger of infection has been eliminated.

This theory, that all criminals are sick, sounds suspiciously as though it might be guilty of begging the question. What definition of sickness entitles one to claim that criminal behaviour is necessarily symptomatic of some form of illness? Is it not possible that some criminals are actually quite in possession of all their faculties, but that, unlike most persons, they have chosen to achieve their ends by illegal means rather than by the conventional, legal means that most persons use? In another mock case.

The Man who Blew Up His Mother

A young man once purchased a large insurance policy on his mother's life just before she boarded an airliner that was about to depart from Denver's airport. He had previously placed a bomb in one of her suitcases. The bomb exploded, causing the plane to crash, killing its entire crew and all its passengers, including the young man's mother. He collected the insurance money, but as a result of a careful investigation, he was finally apprehended. Many people are inclined to believe that no one who is in full possession of his faculties, and who is not seriously deranged, would be capable of such monstrous crime. But the psychiatrist who was assigned to the case concluded that the defendant knew perfectly well what he was doing, that he planned and executed his scheme as carefully as any merchant might have done if he were embarked on a major business enterprise, and that it was impossible to diagnose any particular mental illness as being responsible for his bizarre behaviour. The defendant was accordingly found guilty and was executed in Colorado's gas chamber.

Those who say that all criminals are sick often have in mind those

offenders who have engaged in the most brutal forms of crime - rape, armed robbery, murder, and the like. There is little reason to doubt that some people who commit such crimes are sick. Some of them are subject to uncontrollable fits of rage and passion, others are known to be subject to delusions and hallucinations. Whether the usual procedures of the criminal law should be brought to bear upon such persons, and whether they should be subject to punishment in the usual sense, has been discussed previously. But the proponents of the theory now under discussion tend to forget another very important class of criminals - those who clearly do not act in fits of passion, but with due deliberation, carefully and methodically working out their plans of action, sometimes alone, but often in concert with others. Their motives are frequently the same as those of perfectly normal persons. They want the better things in life; they want the leisure to enjoy the benefits of their prosperity; they want to provide their families with nice homes, nice clothes, and the little amenities that our society provides and that most people consider to be good and desirable. The manner in which they attempt to achieve those goals, however, is not legal. Ordinarily, those who engage in such illegal activities do so with the hope that they will not be caught. They are

often quite clear-headed about the entire business. They seldom become involved because of paranoid delusions or schizophrenic flights from reality. And interestingly enough, they seldom receive the attention of the press or become the objects of campaigns of citizens demanding that they be considered the unfortunate victims of circumstances. Consider the embezzler, for example, and the businessman who is convicted of income tax evasion. Consider also the corporation executive who engages in illegal restraint of trade or monopolistic practices, and the food processor who allows his products to become contaminated. And finally, consider the logger who deliberately encroaches upon national park land, felling trees that will not be replaced for generations, if ever; and the operator of a steel mill who knows that his smokestacks and the sewer lines of his plant are pouring out effluents that are poisoning the atmosphere and the water supplies of the town down-river. If these persons were called to account for their lawless behaviour, for their callous disregard of the public welfare and their duties as citizens, and for their unjust encroachments upon the property of the state and their depredations against their fellow citizens, it is unlikely that those who argue so vehemently on behalf of the rights of murderers and rapists would form

committees to secure lesser penalties for these businessmen; and it is even less likely that they would urge the public to think of these men as the victims of their genetic heritage and their environment, or that they would plead that they were unable to choose to do other than they did and that they should therefore be given medical treatment rather than the full penalties prescribed by law.

Those who urge that criminal punishment be abandoned in favour of some form of medical treatment tend to forget about such crimes as fraud, forgery, counterfeiting, perjury, bribery, graft, corruption of public officials, and contempt. It is difficult to see how a case be made for the view that such crimes are exclusively the products of diseased minds or of persons who are incapable of behaving other than they do. The con artist who sets up an elaborate plot to persuade an old widow to hand over to him her life's savings acts with as much deliberation and foresight as the scientist who sets up a new experiment in his laboratory, the public official who plans a new election campaign, the sales manager of a large firm who sets up an elaborate advertising campaign, or the architect who draws up the blueprints for a new building.

2.3.3. Insanity

The laws governing pleas of insanity are among the most seriously disputed of all. According to the M'Naghten Rules, which still govern many cases, insanity is defined as a state in which, if true, would relieve him of responsibility, or is so deranged that the commission of his act is the natural consequences of his delusion. When any of these conditions is present, the perpetrator of the act is regarded as insane and is not criminally responsible. In some jurisdictions, the Durham Rule, which provides that the accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect, has been adopted.[32]

Under the older and more widely accepted M'Naghten Rules, the jury had the onerous task of determining whether the accused was capable of distinguishing right from wrong at the time he committed the act in question. Under the Durham Rule, the existence of a state of mental disease or mental defect at the time of the crime is treated as an objective fact upon which expert testimony can be given.

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[32] Mueller, S.O. *Crime, Law, and the Scholars,* Univ. of Washington, 1969.

In spite of the liberalization of the rule governing the definition of insanity, relatively few cases end with a verdict of insanity. Not the least of the reasons is the confusion of the experts themselves. For every psychiatrist that the defense is able to produce, the prosecutions is able to produce twenty who are prepared to testify that the defendant may be malingering, feigning mental illness. And finally, there is the utter absurdity of the views of some of the psychiatrists who are called upon to testify in criminal trials. For example, one noted psychiatrist, explaining why prostitutes steal money from their clients, offered the following explanation: "A prostitute is by the nature of her occupation a robber of men's strength. She steals their virility. Unconsciously, therefore, she seeks continuously to carry out this robbery of men, though in another form." He called this form of larceny a "castration complex." One critic wondered whether the explanation might be somewhat simpler. Perhaps, he said, prostitutes take money from the pockets of their clients because they like money![33]

In another case a psychiatrist was called to speak on behalf of a young

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[33] *ibid.*

man who pleaded guilty to a charge of indecent assault. He testified that the lad had defective eyesight, and that this handicap was the cause of certain emotional disturbances which were the real cause of the man's behaviour. The psychiatrist advised the court that what the prisoner really needed was not punishment for the crime of rape, but a new pair of eyeglasses!

Such ludicrous opinions scarcely serve the interests either of defendants or of justice. They do serve to indicate how far the practitioners of psychiatry may really be from having any scientific justification for being given the last word on the dispensation of criminal justice. This is not intended to deny the importance of psychiatric testimony in some cases. It is merely to suggest that we are a very long way indeed from the day when we should be prepared uncritically to accept any psychiatrist's claim that all criminals are so ill at the time when they commit their crimes as to deserve to be declared innocent by reason of insanity.

Nevertheless, there are cases in which the accused are clearly suffering from serious mental diseases which so impair their judgement

or functioning as to render them totally incapable of making reasoned decisions or of behaving in any way other than in a violent and destructive one. Such persons should not be punished for their acts, for the latter are as little responsible for their acts as they would have been if they had occurred by accident or by mistake. The most serious problem is the difficulty of proof. How does one distinguish between a person who has suffered from an irresistible impulse and one who has simply not resisted the impulse that he had? There are cases where the evidence is so strong that it would be unreasonable to conclude that the defendant could have acted other than he did. From the existence of doubtful cases, one should not conclude that there are no meaningful criteria for distinguishing between situations where the defendant is lying or malingering and those where he is not. Clearly, much work remains to be done in this area. It will not do, however, to conclude out of hand either that all persons who have committed criminal acts are criminally responsible or that none of them are.

2.4. Imprisonment

From the early Middle Ages until relatively modern times, punishment was as much for the salvation of the sinner's soul as it was for the

protection of the innocent and the deterrence of crime. If nothing else would bring the sinner to cry out to his Lord for mercy, the lash, the rack, the gallows, or the flames could be counted upon to convince him to do so.[34]

Some groups of Puritans concluded that a long stretch of absolute silence, combined with isolation, the stench of human excreta, vermin, and a starvation diet would encourage those who did the work of Satan to repent. Thus, for the glory of God, they built sanctuaries of penitence which were called, appropriately, penitentiaries.[35]

In the late eighteenth century, and on into the nineteenth and twentieth centuries, movements for prison reform have been a constant feature of the social and political scene in England and in North America. The argument has generally centered upon the wisdom of coddling criminals by allowing them to live in quarters that had at least minimal

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[34] Conrad, J. *Crime and its Correction*, Univ. of California, 1965, p.203.

[35] *ibid.*

standards of hygiene and comfort. At times, too, the debate has been devoted to the question of the kind of treatment that ought to be accorded prisoners in the penitentiaries. Should they be forced to engage in hard labour, labour that was basically useless, serving no function other than its supposed "softening" effect upon the criminals themselves? The inmates of some prisons have been forced to work at splitting rocks, forever having to start a new pile when the old one was depleted. Others have had to walk treadmills or turn cranks that merely plowed through piles of sand - backbreaking, degrading, dehumanising labour.

In some prisons, inmates were confined in long rows of steel cages. They were cut off, not only from the rest of humanity, but even from the world of nature. In some prisons the sanitation was so primitive that disease was rampant, sometimes spreading to the general community through delivery men, visitors, and released prisoners. The sanitation system consisted of buckets and were left in each cell. These were emptied by the prisoners once a day into open holes or trenches that carried the waste out, whenever they were not blocked.[36]

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[36] *ibid*.p.265.

Over the years, reformers have managed to overcome some these *Christian* sentiments, and have brought some measure of humanity to the administration of a few prisons. The addition of medical treatment for the sick, wholesome food, opportunities for education, libraries, meaningful work, and counselling services have done much to alleviate the suffering of hundreds of thousands of men and women who are consigned to spend years in penal institutions.[37]

Nevertheless, there remain many vestiges of the primitive and barbaric prisons of the eighteenth century. In the United States a third of all prisons in use were built in the last century, more than seventy years ago. Those that are in use sometimes house two, three, or even four times as many prisoners as they were built to accommodate. Small cells became crowded dormitories. Experiments have repeatedly demonstrated that rats forced to live in overcrowded conditions go mad, becoming vicious and destructive and exhibiting the symptoms of schizophrenia. The same thing happens to men, but the lessons seems to have made no difference in prison architecture or in the budgets allotted by state legislatures to the penal system. Nor has

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[37] Lindner, R.M. *Stone Walls and Men*, Doubleday, 1958, p.67.

knowledge of this fact had much effect upon the thought of those who continue to believe that prison sentences are suitable penalties to inflict upon men who have committed crimes against society.

When a man is sent to prison, what is the penalty that is being imposed upon him? Clearly, it must be the deprivation of the liberties that are taken away from him. He is taken away from his wife, from his parents, from his children. He is deprived of every opportunity to engage in useful work. He is unnaturally deprived of every possible normal outlet for his sexual impulses, and is thus left with no alternative but homosexual relations and masturbation to relieve himself of the agony of sexual starvation. He cannot choose his own associates, but must live in close quarters with every manner of derelict. His conversation may be confined to talk about sex, crime, and money, for lack of anyone with whom to discuss other topics. He may be subjected to sexual assaults by fellow inmates, to physical assaults by inmates or guards, and to a constant psychological conditioning that renders him outwardly subservient and dependent while he rages inside. After several years of such torment, he is supposed to emerge from his cell a grateful member of the society

which condemned him to it. It is hardly surprising that of every thousand persons in maximum security prisons in Canada, five either commit suicide or attempt to do so. This nearly five times the rate for all Canadians.[38]

When he comes out, his job is gone, his wife may be gone, his family life is destroyed. He must learn to be independent again, to find his own way, to make his own meals, to find gainful employment and to stay out of trouble. But his criminal record follows him everywhere, making it impossible in most instances to find a decent job. Try as he may, he may not be able to find an employer who is willing to hire an ex-con, to trust him with his goods or to give him access to his money. How, then, is it possible that people are surprised when they read the sorry statistics that reveal that more then half of all the men and women released from prison are back again within five years? These are the ex-prisoners who are caught and convicted! No one knows how many are not, though they too may have returned to a life of crime because nothing else was open to them.[39]

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[38] Morris, P. *Prisoners and their Families,* George Allen Unwin, 1965. pp.34-67.

[39] *ibid.*

In spite of the efforts of some foresighted penologists, too many institutions today are still too small, too crowded, and too backward in their treatment of the criminal offender. Though they claim to be principally interested in reform, they still function as if they were primarily interested in vengeance. Clearly, when a man's is condemned to a prison sentence, his punishment is the deprivation of liberty itself. The prison is not a place which is supposed to add to this most fundamental deprivation by degrading him and de-humanising him and taking away every vestige of human dignity that is left to him. To pile punishment upon punishment day after day is neither humane nor civilised. Many prisons are no better than the old slave ships, though if anyone were to propose that the latter be returned to service, an outraged howl of protest would immediately - and rightly - be raised.

No one who has ever read an account of a Siberian prison camp written by a former inmate would suppose that it is a civilised form of penal institution. It is cruel and inhuman. But in some respects, it is superior to the American prison. For one thing, convicts sent to Siberia are frequently allowed to bring their wives along, so that they are able to maintain some degree of sexual normalcy in their lives and are not

completely separated from their families.[40]

In a few parts of the United States, arrangements are made for prison inmates to spend some time alone with their wives. Parcham Prison in Mississippi, for example, has cottages on the prison grounds that married men may occupy on weekends with their wives. In this way, the men are able to maintain some semblance of a normal sex life, and their wives are able to do so as well, without resorting to adultery or divorce. But such facilities are available to a very small percentage of all the prison inmates in the United States.[41]

In a few institutions, weekend passes are available; in others, it is possible for inmates who are nearing the end of their terms to work on the outside, returning to the institution at night and on weekends. Thus, the men begin their rehabilitation before they leave their prison cells for good. Elsewhere, there are halfway houses or other rehabilitation centres that devote their efforts to making the transition from prison life to life outside the prison walls a little easier.[42]

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[40] Glueck, S. *Crime and Correction,* Cambridge, Mass. 1952. pp.97- 105.

[41] *ibid.* p.89.

[42] Lindner, *op.cit.*

It must be pointed out once again that one ought not to confuse rehabilitation with punishment, at least from a purely philosophical point of view. Nevertheless, if one is concerned about the long -run results of the penal system and its moral justifications, then one must consider both the effects that imprisonment has upon the prison population and the extent to which prison conditions are degrading and dehumanising to those persons who are subjected to them.

Vocational training, an important aspect of the rehabilitation work of any modern prison, is often handicapped by lack of skilled instructors and even more by opposition from unions and industries who object to competition from prison labourers. More than one farsighted project has been scuttled by just such opposition on the part of powerful forces within the community.[43]

Mental health services, so obviously important to any meaningful rehabilitation of that very large proportion of prison inmates who are mentally ill, are quite minimal. It is not likely that they will be improved significantly, in view of the extreme shortage of trained

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[43] Conrad, *op.cit.*

personnel and the general unwillingness of lawmakers to allocate large sums of money to such programs.[44]

Most personnel in these systems (some 80% in the United States) are concerned solely with custodial duties.[45] In short, they are guards and maintenance personnel who supervise the prisoners while they are in custody. The remainder perform the many other tasks that make the penal system, including the so-called rehabilitative tasks, parole supervision, and the like. Because there are so few of them, and because they must supervise such large numbers of prisoners or parolees, it is impossible for them to give meaningful attention to any of the convicts who come under their jurisdiction. When they are saddled with a myriad of other tasks in addition, it becomes all but impossible for them to do more than give token attention to the rehabilitation of the men and women whom they are supposed to help.

The so-called rehabilitative function of the prison system is, for the most part, purely fictitious. Prisons breed contempt for the entire legal

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[44] Glueck, *op.cit.*

[45] *ibid.*

system in the minds of those who must serve time in them. When a man is sent to jail, he knows as well as anyone that he is being sent there not because society is genuinely interested in making him a better man, in giving him a new opportunity to remake his life, but because society wants to punish him for a crime that he has been found guilty of having committed. He knows as well as anyone that his punishment is to consist of a multitude of deprivations. But no one can ever anticipate the genuine reality of prison life unless he has to live through it himself. Far from being the *hotel* that so many conservative critics say it is, even the most modern prison facility is still a penitentiary - a place where men are supposed to repent but where instead they learn more about techniques of crime as they are brutalised and degraded by the institution. If education consists at least partially of character building, then prisons must be considered antieducational institutions, because they serve so often to destroy character and to instil hatred, anger, and brutality in those who enter them.

Some contemporary reformers argue in favour of the indeterminate

sentence.[46] By setting up an upper limit, they believe that the judge is able to permit the introduction of a degree of flexibility into the penal system that ultimately will result in better administration of justice and better treatment of the offender; for the latter will be able to win his release much earlier by cooperation with the authorities. There is some reason to doubt, however, whether placing such power in the hands of prison officials or parole boards is necessarily beneficial. How is the system improved if the sentencing is done, in effect, by a prison official or a parole board, rather than a judge? Will they have meaningful information on the chances of a particular prisoner's returning to a life of crime that the judge does not possess? Are they more or less likely to be influenced in their decisions by such considerations as the administrative burden of maintaining an overcrowded prison facility, or by personal whims and prejudices? How meaningful can such a proposal be when one of the strongest advocates of the indeterminate sentence admits that the cunning of some prisoners is such that even the most skilled professional prison officials can be fooled by them? In the next breath he admits that we know most prisoners who are released will commit more crimes.

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[46] Thomas, D.A. *Principles of Sentencing*, Heineman, 1970, p.165.

The prisons, as it exists in the modern democracies, is an archaic relic of an outmoded and cruel religious and social ethic. The thesis that life in prison is somehow a more desirable fate than death in the gas chamber is dubious at best. Most penal institutions are inhumane places where men are deprived, not only of their liberties, but even of such elementary rights as will enable them to preserve their human dignity. Prisoners may be stripped of their rights as citizens, including the right to return to the practice of their occupations, once they have paid their debts to society. How, then, have they been helped along the way to repentance or atonement?

One common rejoiner is this: no one is to blame but the criminal himself. He knew the price of his misbehaviour before he misbehaved. It was his own mischief that brought this fate down upon him. Now let him suffer the consequences.

But this answer is too facile. It will not do under the reformative theory, under the rehablitative theory, or for that matter, even under the deterrent theory. If the aim of punishment is reform or (as some people incorrectly suppose) rehabilitation, then clearly a form of treatment

that demonstrably fails to perform either function can hardly be appropriate for such functions. As for deterrence, one would hope not only that other potential criminals would be deterred from further offenses. Any treatment that actually increases both the number and the quality of offenses (as the school of criminals manifestly does) can hardly serve as a model of deterrence. When even the men who have been to prison are not deterred by the fear of being returned there from committing further crimes, one may suspect that its deterrent effects on others may be quite minimal.

As for the retributive theory, there is nothing in the theory itself that would justify such cruel and unrelenting forms of punishment. A retributivist can quite properly advocate the death penalty, but insist that prison is too cruel and inhuman to be tolerated in a civilised society. He might add the observation that under his theory, if a man has been punished for his crime once, there is no justification for punishing him further. If a man has been deprived of all his liberties for a period of time, it is unjust to deprive him of anything, including any of the rights he might have enjoyed in society if he had never been convicted of a crime, once he has been punished. Having paid his debt,

he should not be asked to continue to pay. The exaction of interest upon such a debt is the worst of usury imaginable.

During the Middle Ages, men and women were sometimes "immured" as a form of punishment for the worst sorts of crimes. They were forced to stand in a given spot, and a brick wall was then built all around them. Once the last brick was laid in place, it was not long before they would die of suffocation - or, if the wall was not airtight, of thirst and starvation. Prisons, however, were unknown, except for certain relatively small institutions that were used for the incarceration of suspects and criminals prior to their trials and executions. In ancient times, prisons were used on occasion, as we can see in the Biblical story of Joseph, but those occasions seem to have been quite rare. The ancestors of many races generally executed criminals, mutilated them, or lashed them and sent them home. They sometimes sent them off to exile or enslaved them. According to the Talmud, in ancient Israel, when a man was convicted of a noncapital crime, he was fined or flogged if the law called for that kind of punishment. Otherwise, he was sold into slavery for a period not to exceed six years. During that six-year period, he was permitted to engage in any occupation that was

suitable to his station in life prior to his conviction. If he were a physician, for example, he might continue to practice medicine. If he were a skilled labourer, he would continue to do the kind of work that he was trained to do, and all of his earnings would go to the family of the person who had been harmed by his violation of the law. No one, however, could be sent to prison, or stripped of his dignity as a human being. In some Scandinavian countries, men convicted of criminal offenses are permitted to return to their families and to do their jobs, unless they are deemed to be too dangerous to themselves or to others that they must be institutionalised, but a portion of their earnings is turned over to the victims of their crimes. Thus, the offender is not required to pay his debt to society by being deprived of rights or liberties. Instead, he must literally pay the debt he owes to the person whose rights he violated. He must compensate him for the harm he has done. Compensation is not punishment, though the two bear some resemblances to one another. If one is prepared to give up punishment altogether, for some crimes, at least, then some form enforced compensation would seem to be a reasonable substitute. It is certainly less damaging to the offender and his family, and thus to society, in the long run, than the prison system with all its manifest evils. And it has

the further advantage that those who are hurt most by the criminal's behaviour - his victims and their families - are compensated, to some extent, at least, for the losses they have suffered. The criminal whose life is wasted away in prison can contribute nothing to the alleviation of the suffering of his victims. Instead, suffering is added to suffering with no evident advantage to society, which not only loses a potentially productive member, but must provide for all his needs in an expensive custodial institution, and then suffer from his further offenses once he is released. It is difficult to conceive of a form of punishment that has more disadvantages - socially, economically, and morally - than the imprisonment of men who might otherwise be doing useful work.

CHAPTER THREE

THE DEATH PENALTY THROUGH HUMAN HISTORY

The idea of the death penalty is of recent development. There is no explicit mention of the death penalty in the works of Plato and Aristotle, nor does this concept appear anywhere in the ancient records, in the philosophy and religion of India, Persia, Rome, or other early civilizations. What is now called "the death penalty" was referred to by primitive societies and people in the Middle Ages as "vengeance". The classical 17th and 18th century's concept of the death penalty traced its legal lineage to the doctrine of retaliation, the intellectual origins of which are rooted in Hammurabi's criminal code, and later, in the moral teachings of the three major religions; Judaism, Christianity, and Islam. This chapter will trace the concept of the death penalty through human history. It will also present the contemporary arguments for and against the death penalty.

3.1. The Death Penalty in Early Civilizations

Before starting to trace the concept of the death penalty, there is a need to first understand the meaning of the death penalty. According to the International Encyclopaedia of the Social Sciences, "death penalty" means "the officially authorized execution of the death penalty on persons determined by appropriate legal procedures to have committed a criminal offence".[47]

The idea of legal procedures governing human relations in society exerted considerable influence on social thinkers from ancient history to the Christian era. Scholars believed that the "law" was that which everyone was aware of, and through which everyone became conscious within himself of what was right and wrong. However, because of the absence of an established order of the law, people usually took the law in their own hands. Indeed, historical records show that man's first drive was to punish his enemies through the infliction of retaliatory measures. This was the norm in primitive societies.

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[47] *International Encyclopaedia of the Social Sciences*, vol. 1&2, Macmillan, pp.290

In primitive and savage societies, revenge was the only way to get even with the offender, and it was done individually. Later on, men lived as collective groups (many families) together, but separate from the other groups. Consequently, any attack on any member of any specific group was considered an attack on the entire group. All members of that group would assist its wronged member against the outsider. Thus, the concept of revenge changed from individual revenge to collective revenge. This sort of action "contain [ed] a rough notion of justice," and sent a clear message that "no one can intrude upon the rights of another suffering the consequences."[48] It was out of these feeling of revenge that the idea of justice by a community emerged, and it has become "the specific form of punishment to which [society] lends its sanction or its aid."[49]

Indeed, the purpose of community justice in primitive societies was to make the wrongdoers pay for their crimes. "*The lex _talionis*, or principle of equivalence in punishment . . . is found in the idea of life for life, wound for wound, eye for eye, tooth for tooth."[50] The natural

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[48] *Encyclopaedia of Religion and Ethics*, p.248.

[49] *ibid.*

[50] *ibid.*

tendency was to establish order and to create an atmosphere of equity which developed into the law "an eye for an eye" or "wergeld." Indeed, blood-revenge for murder was considered as a sacred and moral duty, which it [was] disgraceful and irreligious to avoid. Besides revenge, there was the concept of blood-money, in which the offender paid money to the victim's family. This method originated in the custom of paying blood-money to the relatives of a murdered man.[51]

3.1.1. Hammurabic

While the execution of justice among primitive societies was left largely to the individual or to his family to deal with, the execution of justice during Hammurabi's regime was unified and centralized. In the year 2,250 BC, Hammurabi established codes of civil and criminal laws. Such laws were allegedly the first attempts at legal codification on a multinational level. Within the Babylonian Empire were the Elamites, Canaanites, Chaldeans, Persians, Amorites, Arabians, and Armenians. Each nation had its own specific customs and traditions. Controlling such a diversity of cultures and peoples together under one

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[51] *ibid*, p.252.

central government and one legal system was but the genius of the Babylonian legislator. Thus, the codes of Hammurabi applied the death penalty to various offenses ranging from the safety and the integrity of a man, such as false accusation of killing and false accusation of sorcery, the property of a man, such as theft, house breaking . . . and assisting a palace slave to escape. Furthermore, there were other offenses punishable by death, such as a soldier hired a substitute, and infidelity and incest.[52]

3.1.2. Greco-Roman

According to the most important literary records, early Greek law shows that retaliation was the norm and many crimes continued to be treated as in primitive communities, as wrongful acts done to an individual, for which he was entitled to claim compensation. However, later on, a new religious influence had grown up, strong enough to modify completely the Greek conception of murder.[53]

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[52] *ibid*. P.273.

[53] *ibid*. p.274.

Consequently, execution of justice was no longer in the hands of the individual avenger, but was prescribed by the state, and the death penalty became a part of Greek law. One can say the same thing about Roman Law.

Early Roman law reveals the same attitude as held by the ancient Greeks toward crime in general and murder in particular. Criminals were "left to the vengeance of heaven."[54] Like Greek law, Roman criminal law evolved from single-family to tribal, and from tribal to state. Thus, "the state recognizes as offenses against itself only a few acts--treason, aggravated murder, arson, theft of grain from the soil, lampooning, and possibly false witness."[55]

According to the "Code of Decemvirs known as the 'Twelve Tables'" (450 BC), these offenses carried the death penalty. But unlike Greek law, the Roman legal system guaranteed to criminals the right of appeal. During the fifth and fourth centuries before Christ, the death penalty was hardly ever exacted, but later on, the execution of

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[54] *ibid*.p.296

[55] *ibid.p*.296

criminals was a frequent occurrence. Indeed, in the first two centuries the death penalty became more and more common, and the number of offenses to which [it was] allotted was continually increased.[56] Likewise the methods of punishment also changed. The old method was that the criminal was usually beheaded. Later on, they used new methods, such as crucifixion, starvation, or burning, and the most common execution method was throwing the criminal into the arena to face "wild beasts."[57]

Before the fall of the Roman Empire, Christianity became the empire's religion. Thereafter, religion was no longer considered to be a private privilege, so Roman criminal law was expanded to include heresy as an offense punishable by death. In fact, the code of Theodosius (AD. 438) specified over eight crimes punishable by death . Thus, many people accused of heresy were often condemned and punished by death.

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[56] *ibid.*

[57] *ibid.* P.300

3.1.3. Judaic and Christianity

After the Babylonian Empire disintegrated, the nations which had grown powerful under its protection continued to administer its laws. They exported them to the nations with which they came in contact, including those of the Semitic tribes. Canaan and all Western Asia were from an early period, dominated by Babylonia; the conquests of Saigon I of Akkad (c.1700 BC) extended to the Mediterranean, so that the institutions of Canaan were partly shaped by Babylonian influence.[58]

Moses, the leader of the Hebrew tribes in their exodus from Egypt, formulated a code of laws for his people, who were the descendants of Abraham, a Chaldean chieftain. Mosaic law reflected the theocratic nature of Hebrew society. All crimes were moral deviations and punishable only as transgressions against the will of God. The death penalty was widely employed. The Torah indicates that all crime was regarded as sin against God, and that the administration of justice rested on Divine authority. Moses selected what he regarded as the

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[58] *ibid.* p.283

best of the laws of other nations, particularly the laws of Babylonia and Egypt. Like Hummurabi, who received his laws from the Sun-god, Shamash, Moses received his laws from God. Consequently, the actual legal system of Israel was regarded as a Divine institution.[59] Before the discovery of Hammurabi's code of laws, the Mosaic laws of "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning and stripe for stripe,"[60] were accepted not only as divine laws delivered to Moses, but also as being without precedent.

A comparison of the two codes of law shows many striking similarities between them. Hammurabi's law stated: "if a son strikes his father, his hand shall be cut off; if a man puts out the eye of another man, his eye shall be put out; if he breaks another man's bone, his bone shall be broken; and if a man knocks out the teeth of another man, an equal number shall be knocked out."[61] The death penalty, as it emerged in Judaism, presupposed a system of criminal law to prevent the repetition of the offense by other parties, and acted as a deterrent, and

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[59] *ibid.* p.282.

[60] *Exod* 11 21:23-26.

[61] *Encyclopaedia of the Religion and Ethics.* p.282

to secure the extinction of the crime itself and of its consequences: "Thou shall put away the wrong from the midst'; and all Israel shall hear and shall sin no more."[62] Thus, the Covenant code of the Hebrews not only did authorize the death penalty, but it specified the methods of execution: lapidation (stoning), burning, decapitation, strangulation, and crucifixion. The Torah also specifies the death penalty for offenses such as incest, sodomy, bestiality, blasphemy, idolatry, sorcery, Sabbath- breaking, the cursing of parents, intercourse with a betrothed virgin, the inviting of others to adultery, the perverting of a whole city, the practice of magic, rebellious son, murderers, a false prophet, and the bearing of false witness against a priest's daughter.

Christianity tended to subsume crime under ecclesiastical law, treating sin and crimes as of the same nature and substance. Sexual offenses were severely punished. Although the martyrdoms that marked the early part of Christian history had left an abhorrence of such punishments as crucifixion and stoning, the church showed no aversion to execution by burning or decapitation. As might be expected, heresy

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[62] *ibid.* p.282

ranked high on the list of crimes.

The Bible also specifies the methods of execution for each crime. For example, in Leviticus 24:16, we read:

"And he that blasphemeth the name of the Lord, he shall surely be put to death, and all the congregation shall certainly stone him: as well the stranger, as he that is born in the land, when he blasphemeth the name of the Lord, shall be put to death."

The death penalty is also specified for cursing one's parents and for adultery.

" For every one that curseth his father or his mother shall be surely put to death: he hath cursed his father or his mother; his blood shall be upon him." (Lev. 20:9).

"And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death."(Lev. 20:10).

The Biblical view of the crime of murder is very clear. The Bible emphasizes the fact that any crime is a sin against God. No human legislature has any control over the subject in so far as the crime of murder was concerned, and the repeal of the law would be offensive to God and unsafe for the community. Christ spoke of hate and murder: "You have heard that it was said to the men of old, 'you shall not kill; and whoever kills shall be liable to judgment [death penalty].' But I say to you that everyone who is angry with his brother shall be liable to judgment [death penalty]".[63]

It is obvious that Jesus was not condemning the established law concerning the death penalty, but was actually saying that hate deserves the death penalty. Certainly, one can draw the conclusion from this statement that God has ordained the infliction of the death penalty for murder; the murderer must receive the equivalent to his evil deed. The Bible says "whosoever strikes a man so that he dies shall be put to death . . . If a man willfully attacks another to kill him treacherously, you shall take him from my altar that he may die."[64] In

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[63] *Matt*.5:21-22.

[64] *Exod*. 21:12-14.

Leviticus 24:17 we read,- "He who kills a man shall be put to death." In another passage we read in more detail on the subject: "If any one kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness. Moreover, you shall accept no ransom for the life of a murderer who is guilty of death; but he shall be put to death. . . . You shall not thus pollute the land in which you live; shed the blood for blood pollutes the land, and no expiation can be made for the land, for blood that is shed in it, except by the blood of him who shed it. You shall not defile the land in which you live in, the midst of which I dwell; for I lord dwell in the midst of people of Israel."[65] (Compare Deut. 17:6-7 and 19:11-13.)

Indeed, this divine ordinance embraces all mankind, regardless of time, space, race or any other earthly consideration. The basis for this assumption is found in the Noahs Ark Covenant between Noah and Jehovah, following the flood, in which the Lord is recorded as having said: "And God went on to bless Noah and his sons and to say to them . . . and, besides that, your blood of your souls shall I ask

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[65] *Numbers* 35:30-34.

back. From the hand of every living creature shall I ask it back; and from the hand of man, from the hand of each one who is his brother, shall I ask back the soul of man. Anyone shedding man's blood, by man will his own blood be shed, for in God's image he made man."[66]

In looking closely at the death penalty in both Judaism and Christianity, one finds that Christianity tends to be more lenient than Judaism. One needs to remember that Jesus Christ was a Jewish teacher who meant to mitigate the hardship of certain Mosaic laws as they were being interpreted in his time. In a dispute of a man dismissing his wife without recourse on her part, Jesus said: "For the hardness of your heart Moses imposed on you this commandment."[67]

In Matthew it is reported of Jesus: "You have heard that it was said, an eye for an eye, and a tooth for tooth; however, I say to you: Do not resist him that is wicked, but whoever slaps you on your right cheek, turn the other also to him."[68] Therefore, Jesus' intention was to mitigate the rigidity of the Mosaic laws of retaliation. Those would include the laws requiring punishment for injuries and the death penalty for homicide.

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[66] *Gen.* 5:6

[67] *OT.*24: 1-4.

[68] *Matt.* 5:38-39.

3.1.4. Persian

The criminal law of the ancient Persians was very lenient. Most of the crimes were punishable by a certain number of stripes. "The number of such stripes prescribed for different crimes ranges between five and ten thousand."[69] Although homicide was punishable by 90 stripes, burying, burning, and eating of dead matter, and sodomy were punishable by the death penalty.

3.1.5. Byzantine

In contrast to the medieval West, where a relatively loose, atomized feudal system obtained, Byzantium, for most of the period, had a highly centralized state organization with a well-developed penal system--a type of government in which virtually all activities were at the command of the emperor.

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[69] *Encyclopaedia of Religion and Ethics*, p.294

Contrary to common belief, the evolution of Byzantine law did not cease with the reign of Justinian. Because of the great social changes which came about in the empire, the code of laws had to be modified and even expanded by the Macedonian dynasty in the 10th century, at which time all laws were systematically reshaped in Greek.

In the early stages of the Byzantine Empire, the death penalty was widely practiced. Indeed, many capital crimes were treated as they had been in primitive societies--as wrongful acts done to an individual, who was entitled to retaliation as well as compensation. Yet later on, the proscription of any crime, including homicide, was conducted by the state through the court system. Besides the death penalty for voluntary homicide, there was a new punishment for involuntary homicide. For example, "killing of a slave, a resident alien, or a foreigner . . . and a non-citizen" was punishable by banishment, a long period of exile.[70]

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[70] *ibid.* p.274.

3.1.6. Indian

Crime, strictly speaking, is an offense against religion under Indian law. The purpose of punishment is to keep the whole world in order. Although compensation was the most common punishment, the death penalty in various aggravated forms, such as impaling on a stake, trampling to death by an elephant, burning, roasting, cutting to pieces, devouring by dogs, and mutilations, were also frequently inflicted, even for a comparatively light offence. [71] Killing a Brahman (clergyman) as well as the killing of a cow, the sacred animal of the Hindus, were punishable by death.

3.1.7. Arab

Retaliation and compensation for criminal acts were practiced by the Arabs during the pagan period. During that period, there was no central government or competent court to which an individual could resort in case of being ill-treated. Only those serious cases in which

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[71] *ibid.*p.284

clans were involved could be entertained by a sort of arbitrary council. The clan became the basic organ of society. Every tent represented a family. A number of clans grouped together composed a tribe. All members of each clan considered themselves as one brotherhood and submitted to the authority of one tribal chief. If a member of a clan, murdered another person within the clan, he would not be defended by his fellow clansmen. In case of escape, he became an outlaw. If a member committed a crime of murder outside the clan, everyone in the clan was morally and legally bound to defend that member even to the point of forfeiting his own life, without asking whether the accused was right or wrong. During the heathen period, according to Arabian customary law, the call for revenge was a conventional right. A blood-feud might last for decades. The conventional rules of the clan demanded limitless and unconditional loyalty to fellow clansmen. The revenge of the injured party or the members of his family or tribe extended not only to the guilty person who had killed or injured any one, but also to all who belonged to the same family or tribe.[72]

There were no divine law and no codified rules to follow except the

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[72] *ibid.* P.290.

custom and the tradition of the society. Hence, among pre-Islamic Arabians, like many other primitive societies, their judgments were compatible with natural laws and human instinct.

Pre-Islamic Arabians believed that the soul resided in the blood, and when death came the soul escaped through the mouth in the form of breath. In case of murder, the soul of the deceased was imagined to flutter around the tomb in the form of an owl crying with thirst. It would not cease doing this until vengeance or compensation took place. Blood-guiltiness was something bought off by means of great numbers of camels, but the acceptance of such a price of blood (*diya*) was often regarded as a humiliation.[73]

With the advent of Islam, the old system was subject to change, at least in principle and ideology.[74] As a religion, Islam appeared first in Makka, and remained there for 13 years, yet its legal system was not shaped until after the Prophet Muhammad's migration to Medina, as a religious and political leader, the Prophet had to determine his

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[73] *ibid.* pp.290-291.

[74] Hitti, pp.9-20.

position toward the established system of law and order. As he began to enforce the Islamic legal system, he accepted the status quo of prevailing customary law, at least in principle. At the same time, he introduced a number of modifications which thenceforth characterized the Islamic legal system. In Islam, therefore, retaliation remained permissible, though with important restrictions. The Justifiable institutions of the old penal system, such as retaliation (*qisas*) and compensation (*diyah)*, were in any case adopted. When anyone kills a believer and the evidence is clear, he is liable to be killed in retaliation unless the representative of the murdered man is satisfied with a payment of *diyah*. The Holy Quran clearly supports this pre-Islamic method of punishment with its pecuniary indemnity. The Quran points out that life is absolutely sacred. It must not be destroyed by a believer deliberately, although it can sometimes happen on the part of a believer through error. When such unfortunate incidents take place in society, the family of the deceased is entitled to compensation unless they freely remit it. The Holy Quran reads:

"Never should a believer kill a believer, but if it so happens by mistake, compensation is due; if one kills a believer, it is ordained that

he should free a believer slave and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you and was a believer, the freeing of a believing slave is enough. If he belonged to a people with whom you have a treaty of mutual alliance, compensation should be paid to his family. A believing slave should also be freed. For those who find this beyond their means, a fast of two months is prescribed."[75]

Retaliation (*qisas)* has been divinely promulgated to the new Muslim society. The Holy Quran reads:- "O, ye who believe, the law of equality is prescribed to you in case of murder, the free[man] for the free [man], the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain. Then grant any reasonable demand and compensate him with handsome gratitude; this is a concession and a mercy for your Lord. After this, however, he who exceeds the limits shall be in grave penalty."[76]

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[75] Verse: 4:92.

[76] Verse:2:178.

The Quran in the same chapter emphasizes the fact that "in the law of equality (*qisas)* there is saving of life to you, O ye men of understanding that ye may reatrain yourselves." Obviously, the compensation (*diyah*) can only be paid if the deceased belongs to a Muslim society or to a non-Muslim society which is in peacful alliance with Muslim society. Also clear is that "redemption of the blood-feud" was permitted for Muslim, and the acceptance of the compensation instead of retaliation was made as a religious duty.

While Islam used the concept of retaliation (*qisas*) as a framework, it did not admit its details as it was applied in ancient Arabia. The words of the verses quoted above contain three important factors: First, the acceptance of the retaliation (*qisas*) as a part of the Islamic penal system; second, the abrogation of unjust practices which prevailed in the pre- Islamic era, such as killing innocent people other than the murderer himself and the failure to take into consideration the motive of the offender, or the reasons for and circumstances in which the offense in question was committed. This is the first time that Arabs came to recognize that retaliation (*qisas*) refers to murder only and is not applicable to manslaughter due to mistake or accident. Prior to

the advent of Islam, any homicide was considered to be a murder. Vengeance on the offender and his kinsmen was exercised accordingly, regardless of any reasons or justifications. According to Islamic law, there would be no capital punishment; the compensation (*diyah*) was applicable in its place.

The third factor is that the quoted verses carry the spirit of reconciliation between the parties involved, as opposed to the then-prevailing custom in which everything, after the occurrence of murder, was calculated to escalate the enmity between the families involved. Thus, Islamic law abolished the old Arabian practice of the private vengeance of tribal retaliation.

The law of retaliation (*qisas*) under the Islamic legal system allows the aggrieved party to receive the right of private vengeance. Consequently, the life of the culprit can be saved as well, but only through the aggrieved party can the murderer's life be saved. Neither the judge nor the head of the state is allowed to entertain any intercession on behalf of the murderer or to alter or mitigate the divinely described punishment if the appeal does not come from the

victim's next of kin. All the rules and regulations concerning the legal punishment are written in the Holy Quran and are contained in the tradition of the Prophet Muhammad, the Sunnah; both played a significant role in respect to the abolition of the institution of blood revenge. These two sources of Islamic law were able to eradicate the roots of the old Arabian customary law within less than 10 years, or at least to alter the values upon which such customary law was based.

3.2. Contemporary Arguments For and Against the Death Penalty.

Debate over the merits of the death penalty continues unabated. Many people argue whether their nation should or should not have the death penalty. Not surprisingly, a myriad of statistical, moral, religious, and ethical arguments characterise these debates.

Proponents of the death penalty defend it for many reasons. One of the strongest arguments put forward by the proponents of the death penalty is that of deterrence (discouragement of others from doing the same thing). By imposing the death penalty, one can deter others from

committing any crime which has this extreme penalty as a sanction. If the perpetrators of homicide are executed, there will never be any risk that they will ever again be free to commit similar crimes. Proponents believe that the death penalty is a fitting punishment for murder, and executions maximise public safety through deterrence.

Retribution is not be confused with a narrow concept of revenge. Retribution reflects society's determination to reject the kind of horrible crimes that necessitate the death penalty; it reflects society's determination simply not to tolerate these kinds of crimes. Proponents respond to the notion that the death penalty can be equated with the murders which it aims to punish by saying that the death penalty is different from murder in that the person being executed committed a vicious crime, was tried and found guilty of it, and deserves to be punished. They also believe that the murderer preys upon the innocent people, and that the idea of any comparison between lawfully carried out execution, after a fair trial and appeal, and a murder committed by a criminal disputes the very foundations of a civilised society.

In addition, the people who support the death penalty argue that there

is no evidence that shows that the penalty is not a deterrent. After all, rational men fear death more than anything else. Consequently, the use of the death penalty has a potentially greater general deterrent effect than any other punishment. It would be foolish to expect to find that punishment of any sort deters. The fact is, crime pays and criminals know it, and they act accordingly.

Furthermore, the supporters of the death penalty, do not see it as a barbaric way to eliminate crimes. To them, the death penalty must be the only way to punish crimes of cold-blooded murder cases in which any other form of punishment would be inadequate and, therefore, unjust. Certainly, the death penalty strengthens the value of human life. Life is sacred, and the death penalty helps to affirm this fact. Many who support the death penalty offer many quotations from the Bible to prove that the death penalty is divinely prescribed. "Whoever strikes a man so that he dies shall be put to death....If a man wilfully attacks another to kill him treacherously, You shall take him from my alter that he may die."[77] Also, in another passage of the Bible, "He who kills a

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[77] *Exod.*21:12,14.

man shall be put to death."[78]

Finally, proponents believe that the death penalty does influence those who are rational enough to be influenced. They strongly believe that the death penalty has been very effective, precisely because very few murders are committed by rational persons.

The opponents of the death penalty, on the other hand, reply that there is no evidence that the murder rate fluctuates according to the frequency with which the death penalty is used. They argue that there is not one bit of strong evidence that the death penalty deters capital crimes or any other crime, for that matter. The death penalty, according to them, is a vindictive hateful, irrational, and unfair response to the serious problem of crime in a free society. They also object that *lex talionis* (law of retaliation, or a life for a life) is not a sound principle of criminal justice.

The basic arguments of death penalty opponents is that justice demands that murderers must be punished and common sense demands

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[78] *Leviticus* 24:7.

that society must be protected from them. But neither justice nor self-preservation demands that we must kill them. Opponents claim that the death penalty is barbaric; they cite many tales of lingering death upon hanging at the gallows, of faulty electric chairs, or of agony in the gas chamber. Furthermore, they argue that an innocent person might be executed by mistake, and they say that history is full of examples of innocent persons falsely condemned and sentenced to death. Judeo-Christian history affirms that for the state to assume the power of absolute judgement is to assume a power that belongs only to God. The risk of executing innocent persons is simply not worth taking, because the death penalty is not the only punishment available for violent crime.

Furthermore, another issue that concerns death penalty opponents is that of the value of life. The death penalty, to them, cheapens the value of human life. They are especially concerned with what the death penalty does to a society that inflicts it. In denying the humanity of those that society put to death, even those guilty of the most terrible crimes, society denies its own humanity and life is further cheapened. Nothing good is achieved by taking one more life or adding one more

victim. By inflicting the death penalty, society sinks to the same level of violence and cruelty which it rejects in criminal behaviour.

Finally, opponents claim that the death penalty is state-sanctioned murder. The state, acting as an agent, kills the accused murderer in the name of the victim. By claiming that, indirectly they are saying that the state is no better than the murderer.

3.2.1. Religious General Arguments

Retaliation and compensation in response to criminal acts are not practiced only under Islamic penal law, they are also commonly practiced throughout the world. Indeed, retaliation in criminal cases is a universal system documented in the Old Testament and modified, but not abrogated, in the New Testament. It was revealed to the Prophet Moses and accepted as divine law by Jews almost 3,000 years ago, and it is still part of their Scriptures. Likewise, retaliation is not an alien concept to the Christian community. Therefore, those who adhere to the three revealed religions of Judaism, Christianity, and Islam should respect the divine penal systems as applied in some forms.

Renouncing the concept entirely could lead to renouncing all divine scriptures.

3.2.2. Humanistic Arguments

In response to the atrocities that some nations committed against humanity during the second world war, and in the hope of creating an international framework for preserving world peace, on December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights. In this document the members of United Nations committed themselves to the "promotion of universal respect for and observance of human rights and fundamental rights and fundamental freedom" (Universal Declaration of Human Rights, Preamble). Despite this agreement and the widespread belief in human rights, many human rights, including some of the most basic ones, are too often violated. When it comes to the death penalty, the United Nations' position is a product of compromise between those nations who want it completely abolished, those who want it limited to very serious crimes, such as murder or treason, and those who want it left up to each nation to decide. The following statement on the death penalty was included in

the International Covenant on Civil and Political Rights which the United Nations' General Assembly passed in its Resolution 220 of December 16, 1966. Article 6 of the agreement reads:

1. Every human being has the inherent (is born with) right to life. This right shall be protected by law. No one shall be arbitrarily deprived (killed without a trial) of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. . . . This penalty can only be carried out . . . by a competent court.

3. Anyone sentenced to death shall have the right to seek pardon or commutation (life impriosonment instead of death) of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

4. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

General Assembly Resolution 2857 of December 20, 1971, observed that:

In order to gurantee fully the right of life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.

The latest report of the Secretary General on the death penalty (Feb.8, 1980) noted that:

"The United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed, on the question of the death penalty, to a position favoring the eventual abolition of the death penalty. From the moral standpoint, the United Nations has followed the guidance of the Universal Declaration of Human Rights. From the practical or utilitarian point of view, [the United Nations has] called only for the eventual abolition of capital punishment."

3.2.3. Socialist Argument

When it comes to the death penalty and the attitude of the Socialists, one can say without any hesitation that the Socialists, although theoretically they support its abolition, they use it frequently. Karl Marx and Friedrich Engels had pointed out that "crime was a product of a social system based on private property and that it could be eradicated only by social reform."[79] Furthermore, these socialists, for political purposes, before the revolution, "formulated a minimal program: abolition of the death penalty for all political offenses."[80] Indeed, when the communist party took over in 1917, the leadership of the new revolution considered it prudent to abolish the death penalty in one of its decrees, on March 12, 1917. Yet four months later, the same government had issued another decree in which the death penalty became one of the ways to cover up its counter- revolution policies. Strangely enough, four months after the restoration of the death penalty, the Soviet of People's Commissars (Sovanarkom) voted to abolish capital punishment on November 8, 1917. However, the leaders of the revolution, especially Lenin, used many ways and

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[79] Jankovic, p.110.

[80] *ibid.* p.111.

justifications to issue many decrees to resume the death penalty, for instance in an amendment of the decree of February 12, he opposed that an authorized possession of weapons be punished by death . And finally, Lenin reinstated the death penalty on July 16, 1918.[81]

Although many people made many attempts to abolish the death penalty, they failed miserably. In fact, some of them were put to death. Later on, Lenin made it very clear that the government must resort to the death penalty in order to survive.

"The revolutionary who does not want to be a hypocrite cannot reject capital punishment . There has never been a revolution or a civil war without shootings . . . . It is a bad revolutionary who, in the heat of fierce struggle, stops before the majesty of the law."[82]

Yet, in January 1920, Lenin himself gave instructions to his aides that the death penalty must be abolished under the justification that Soviet victories in the civil war had reduced the dangers threatening the

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[81] *ibid.* p.117.

[82] *ibid.* p.115.

Soviet state and made it possible to reduce repression. This order did not live long though. Four months later, specifically May 22, 1920, the death penalty was restored once again .

During Stalin's regime (1930-1953), the death penalty was very common. In fact "a secret instruction was issued by the VICK and Sovnarkom, there was to be no hesitation in applying the most extreme measure of punishment [shooting] against Kulaks . . .ones who were active counter-revolution."[83] Obviously, all the offenses that were punishable by the death penalty were political crimes. After Stalin's death in 1953, use of the death penalty once again grew rapidly and the list of offenses that were punishable by death increased tremendously. For example, treason, espionage, counterfeiting money, taking of bribes by an official, and theft were all punishable by death. [I] t was the first time that murderers were subject to execution.

Generally speaking, Socialists maintain that the revolution was a sacred entity against which the individual must not rebel. Therefore, such states inflict great penalties, including the death penalty, on

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[83] *ibid.* p.117

individuals who rebel against the state (revolution). Socialists relate offenses to politics and economics, no more no less. They believe that a society which suffers from economic disorder cannot foster virtues. Therefore, criminals should not be punished. Consequently, criminals could commit capital crimes against the community and could get away with it; but when it came to individual aggression against the state--revolution--the punishment must be death [shooting] Socialist attitudes, generally, were erratic.

3.2.4.. Islamic Argument

Westerners too often ask, "Why do the Muslims apply today the same barbarous punishments which were applied 14 centuries ago in the desert?" Is it permissible to use the death penalty in the 20th century? As has been pointed out previously, retaliation (*qisas*) is not part of the Islamic system alone; it is part of Judaism and Christianity as well. Those who reject retaliation (*qisas*) punishment are rejecting divine revelation as a whole. Moreover, the objections raised by the opponents of retaliation (*qisas*) are not well informed; rather, the objections contain deceptive words which hide the truth. It is amazing

to hear that the normal values of the 20th century are "advanced and progressive."

The heartlessness shown by the "civilized" man of our century to his fellow human beings hardly finds a parallel, not even in the darkest ages of history. He does not punish by stoning to death, but he can kill indiscriminately with the atom bomb. Muslims did not initiate the first World War, which claimed over 30 million lives. They did not drop an atom bomb on Hiroshima, burning innocent men, women, and children with chemicals, and gas. In fact, those who object to the application of retaliation (*qisas*) as it is described in the divine legal system are either prejudiced of its proponents or ignorant of the basic concept of punishment in this system, indeed, the basic premise of Islamic penal law is that crime is a case of individual aggression against the society and that the task of law is to protect the society from such aggression. The concept of crime and punishment is closely attached to the socio-cultural life of society and to its perspective on the relationship between the individual and society. Not surprisingly, Western nations are heavily inclined towards respecting the rights of the individual. They tend to regard the individual as the centre of

human social life and to value his personal interests and welfare highly.

Consequently, their legal systems incline toward the interests and well-being of the individual even if he is a criminal. That is why the Western nations treat criminals with great sympathy, and it is the reason that crimes against morality are often not punishable. For example, homosexual acts may not be a punishable crime. They can be viewed as part of the exercise of personal freedom. Premarital sex is not against the law as long the parties involved are consenting adults.

According to Islamic law, however, these are serious crimes. The Islamic judicial system maintains the balance of justice and examines all conditions and circumstances involved or connected with the offense. Thus, the Islamic judicial system imposes preventive punishments which, if viewed superficially, may appear cruel and brutal. However, if they are viewed carefully and closely, they can be seen to reflect equity and impartial justice.

To examine the Islamic penal system under the aspect of fairness, consider the victim whose eye is gouged out. Is it fair to him to live the

rest his life one-eyed while the offender enjoys his two eyes? It might be argued that it is in the interest of the community to sustain one - eyed person instead of two. But the facts, based on experience, prove that it is delinquency in executing deterrent punishment which monopolies the victims, not the other way around. Some opponents of retaliation (*qisas*) imagine that such punishments have no practical significance. This is not true. In prescribing these deterring punishments, the Islamic judicial system meant to accomplish two objectives. One of these is to protect the society from the crime by imposing upon the criminal such severe punishment that he will not commit the same or a similar crime again, nor will those who saw or heard about such punishment. The second objective is to satisfy the feelings of the victim by enabling him to retaliate or to receive just and equitable treatment. Thus, opponents of the implementation of the (*qisas*) often give evidence of not having studied the Islamic concept of crime and punishment. Because of this fact, they consider the punishment prescribed to be cruel and degrading to human dignity. They imagine that the execution of the death penalty is conducted on a daily basis. But the fact is that such deterrent punishments are rarely carried out.

CHAPTER FOUR

THE SOCIO-RELIGIOUS DIMENSIONS OF CAPITAL PUNISHMENT IN THE SECULAR ERA

As a social process, capital punishment can be explained with reference to the socio-religious categories of world-construction and world-maintenance. Throughout much of the history of our world, religion has been intimately involved in both of these functions of the social process. Therefore, religion has, historically, been partially responsible for the definition of capital crimes and for the justification of capital punishment. But, ever since ancient times, when the divine king embodied both the religious and the political power, a bifurcation of the social process has developed. This was first reflected in the differentiation of the political-military elite from the cultural-religious

elite. Depending on the particular historical situation, capital punishment has been administered under the auspices of either one of these elite groups with the other group acting in a secondary legitimating capacity. In most recent times the principle agency of capital punishment has tended to be the political-military elite as embodied in the modern nation-state. Religion has continued to supply legitimations for the death penalty, but its involvement has tended to remain secondary to that of secular politics. It is the purpose of this chapter to examine the phenomenon of capital punishment as an aspect of a social reality which has become less dependent on religion for its construction and maintenance. This will entail a certain sociological understanding of what is called the process of secularisation.

Of the many "catchword" phrases which have been employed to convey the meaning of the term "secularisation", two are most appropriate for the discussion of capital punishment: 1) the disengagement of politics from religion and 2) the transposition of religious beliefs and institutions. The first phrase refers to a process already discussed with regard to historical changes in the relationship

of religion and capital punishment.[84] In this sense, secularisation is by no means a new historical development and the term "secular era" cannot be applied only to modern times. If the process of secularisation originated with the first disengagement of politics from religion then it began the first time a priest-king failed to monopolise both aspects of socially defined authority. Secularisation, as the disengagement of politics from religion, is a process which leads to a change in the conceptualisation of social reality. Thomas O'Dea has described this ideational change:

"Secularisation may be said to consist fundamentally of two related transformations in human thinking. There is first the "desacralization" of the attitude toward persons and things - the withdrawal of the kind of emotional involvement which is to be found in the religious response to the sacred. Secondly, there is the rationalisation of thought - the withholding of emotional participation in thinking about the world. Rationalisation implies both a cognitive attitude relatively free of emotion, and the use of logic rather than an emotional symbolism to organise thought. The secularisation of culture,

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84 See chapter III

combining both desacralisation and rationalisation, means that a religious world-view is no longer the basic frame of reference for thought."[85]

The disengagement of politics from religion manifests itself in the social conception of reality no longer exclusively dependent on the terminology of the sacred. But the social construction of reality, in order to remain plausible, must appeal to some ultimate symbol system. Therefore, the functions of world-construction and world-maintenance shift, at least partially, from the sphere of the religious to that of the secular. Hence, the second phrase which describes the secularisation process is "the transposition of religious beliefs and institutions".

The second aspect of the definition of secularisation conveys the positive counterpart of the disengagement of politics from religion. If the social reality is no longer defined with reference to an ultimate, sacred world-view, it must stand on another ultimate, secular world-view. Therefore, the religious functions of world construction and

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85 Thomas O'Dea, The Sociology of Religion, Englewood Cliffs, New Jersey, Prentice Hall, 1966, p.81

world-maintenance must be transposed to the secular sphere. Berger has proposed a brief definition of secularisation as "the process by which sectors of society and culture are removed from the domination of religious institutions and symbols".[86] Alternate institutions and symbols are necessary in the secular society for the definition and maintenance of a particular reality. That sector of society which is involved in the punishment of crime has found alternate symbols such as law and order, rehabilitation, and the death penalty.

Capital punishment in the secular era, as in earlier eras, is administered as a response to the marginal situation which major deviance creates. Those acts which constitute a threat to the secular reality are designated as capital crimes. With the process of secularisation it is no longer possible to ascertain the boundaries of human behaviour by referring to specifically religious symbolisations. It is the nature of modern religion to function as only one symbol system among others; "the symbolisation of man's relation to the ultimate conditions of his existence is no longer the monopoly of any

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86 Berger, p. 107

groups explicitly labelled religious".[87] The symbolisation of behavioural boundaries in the secular era is primarily the function of the political order. Therefore, the designation of capital crimes is the responsibility of the state. Capital crimes are those actions which most threaten the secular reality, that is, the predominance of the nation-state. The modern shift towards the political definition of capital crime began at the end of the period of religious hegemony in Europe. An increasing awareness of broad political affiliations and a growth in the incidence and power of national monarchies contributed to the shift from religious to political predominance. This shift meant a "substantial change in the structure of the criminal law with political crimes displacing religious ones, particularly on the list of capital offences. Death was still the punishment for those who challenged the basis of authority in society but the secular state had displace the Church as the authority that might be offended.[88] One aspect of the shift from religious to political crimes was the essential redefinition of crimes against dogma.

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87 Bellah, p.80

88 Bowers, pp. 167-168.

The process of secularisation was partly responsible for a decrease in the number of executions for apostasy and heresy. In fact, the rulers of numerous jurisdictions had been heretics themselves in rebelling against the old order and seeking independence from ecclesiastical control. Of course, new authorities often continued to employ the maximum sanction against what they defined as heresy. The capital nature of acts of apostasy is evident even into the nineteenth century. In England, for instance, it was still a capital crime to associate with gypsies.[89] But, secularisation brought about a new understanding of crimes against dogma. Dogma was given a political definition so that, in the secular era, it became a capital crime to espouse a political ideology that was abhorrent to those in power. Political leaders executed their rivals for power in great numbers; these purges were responses not only to overt acts of treason but also to the advocacy of treasonous ideological views. At times the line between overt acts and "dogmatic" crimes has become blurred. Thus, Ethel and Julius Rosenberg, according to their sons, were execute by the United States government in 1953 on trumped-up charges of conspiracy to commit espionage and were actually only "guilty" of holding subversive

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89 Block, p.16

opinions.[90] Crimes against political "dogma" merge with crime against power; executions of political prisoners are performed in the nem of a particular ideological reality. In such situations the functions of world-construction and world-maintenance have been transposed from the religious to the political sphere. Dogma has been replaced by political ideology.

By no means does religion disappear altogether from involvement in the secular administration of capital punishment. Residual religious symbolisations and legitimations are carried forward even to today. Some aspects of the modern execution are similar to what were originally religious phenomena. At this point the distinction between expiation and propitiation becomes blurred, the execution reflects a sacrificial mode. The condemned person is give a special diet and, if necessary, is forced to eat it because "the animal that is going to be killed must be in the best condition".[91] Like the preparation of an

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90 Robert and Michael Meeropol, We Are Your Sons, New York: Ballantine Books, 1976, pp. xvii, 3, 36ff., 267. If in fact the Rosenbergs were innocent of the charges for which they were executed, then they were not the only condemned persons to have died unjustly. See Jerome and Barbara Frank, Not Guilty, Garden City, New York: Doubleday, 1957 and Arthur Koestler, Reflections on Hanging, New York: Macmillan, 1957.

91 Camus, p.201

animal sacrifice in earlier times, the criminal must participate in this "part of the ritual....(the) last meal".[92] A further aspect of the ritual preparation of the condemned prisoner is the putting on of a new set of clothes which will serve their function of covering a living person for only a few hours. There is a customary last visit by a member of the clergy. The role of the priest has evolved somewhat from the earliest times when the priests performed the execution itself. Now the priest can but offer the traditional religious legitimations for the impending event, perhaps some words about repentance and salvation. Interesting in this regard is the story related by Camus of the Russian prisoner on the verge of execution. The condemned man rebuked the priest saying, "Go away and commit no sacrilege".[93] Understood in the context of capital punishment as a type of propitiatory rite, these words carry a special religious meaning: "do not follow tradition by making religion a party to this unholy sacrifice".

After the material and spiritual preparations have been made the criminal is led to the place of execution. The secular executioner

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92 Barry Satlow, "Witness at an Execution", Juris Doctor, 2 (November 1971), No.2, p.13

93 Camus, p.224

represents not the deity but every member of the society which has passed the judgement. Hence, the curious custom of concealing the identity of the executioner in order to avoid the mysterious power released in the killing of another person. The "black mask" has been replaced in the secular execution by multiple mechanisms for the activation of the electric current or lethal gas. Not even the executioners themselves know exactly who has done the killing. Similarly, one of the members of a firing squad is secretly supplied with a blank cartridge. Anthony Amsterdam, an opponent of the death penalty, has likened the ritual of the "blank cartridge" to the larger social process of modern capital punishment. Amsterdam sees a "diffusion of responsibility" given the fact that lawyers, jurors, judges at various levels of appeal, and executives at different levels of government all have a part in the contemporary American execution; "at the end somebody's dead and nobody killed him".[94] Finally, a physician is present at the execution to pronounce the final words of the ceremony, "This man is dead".[95]

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94 Anthony G. Amsterdam, "The Case Against the Death Penalty", Juris Doctor, 2 (November 1971), No.2, pp. 11-12.

95 Satlow, p.13

The execution having taken place, the religio-magical mode of capital punishment is continued through the use of "ritual language" used in public communications. This language includes stereotyped phrases (e.g. "He has atoned for his sins") and a certain "timidity" of expression which conveys a sense of awe, a psychological awareness of the *mysterium tremendum* implied in death.[96] In the secular era, capital punishment is explained with a combination of religious and political legitimations. Sometimes, the religious legitimations are explicit, with a view of both the crime and the punishment as having a religious quality. Thus, a bishop appearing before the British House of Lords spoke of murder as a "profane" act. "Human life is sacred; he who wilfully destroys it commits sacrilege. His impious act is fitly countered by a punishment which also has some 'numinous' character."[97] Religious understandings of crime and punishment are not usually so recognisable, however. In most cases, the traditional religious legitimations have undergone a transformation to blend with the unwritten corpus of popular knowledge. Regarding such implicit legitimations, Camus referred to capital punishment as a "primitive

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96 Camus, p. 176

97 Sir Walter Moberly, The Ethics of Punishment, Hamden, Connecticut: Arcon Books, 1968, pp. 285-286.

rite" the survival of which depends upon "the thoughtlessness and ignorance of the public which reacts only with the ceremonial phrases that have been drilled into it".[98]

The socio-religious dimensions of capital punishment have been manifest on many different levels in the secular era. First, there have been residual religious symbols and actions which originated in a time of much greater religious power but which have been inherited by the execution ceremony of today. Second, religious legitimisations have continued to function as one aspect of the maintenance of social reality. But, for the most part, both the world-construction and world-maintenance components of the process of capital punishment have been transposed from the religious to the political sphere. This means that the role once played by religion with regard to capital punishment is now fulfilled by secular means. Executions in the secular era have now become almost the exclusive concern of the political sector of society. The over-arching reality which was once defined in terms of the sacred is now based on this-worldly foundations. The national god is replaced by the nation itself in demanding the execution of the

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98 Camus, p.177

criminal. Society has become an ultimate symbol and the nation-state fulfills the world-construction and world maintenance functions in its name. Thus, the secular society defines its capital crimes with the aid of legislatures and courts. The vengeful god(s) and the earthly representatives of deity in the earlier era have been replaced by one social entity, the state. The secular state is both the ultimate symbol in the name of which criminals of today are executed (e.g. "For the sake of law and order") and the agent of the execution itself, the executioner. It is in the understanding of secularisation as "transposition", namely, the displacement of religion by the state as both deity and executioner, that capital punishment in our day can be best understood.

4.1.The Deification of the State as Executioner

One aspect of the process of secularisation has been the decline of religion and the religious world-view or sacred reality. Religion's ultimate symbols which once served as nomizing devices for socially perceived reality have been replaced in the secular era by other symbols. The predominant symbol of this era is the state. To further

the interests of one's nation has often been praised but to oppose the state has constituted an act of major deviance, many times requiring the death penalty. According to Camus, society has sought, since the nineteenth century, for a "substitute for religion" and has found it in itself "as an object of adoration"; it has adopted an absolute value in the idea of a future "political utopia", thus it is a "sacrilege" to stand in society's way.[99] The absolutising of society accounts for the elevation of state to the ultimate position of power and sanctity. To threaten the power of the nation-state is to commit the cardinal sin of secular times. A clue to the importance of the state can be found in the fact that the term "state", like "god", is often capitalised, "State". It is the state which defines capital crimes and the state which imposes the ultimate penalties.

In defence of the state it is often said that the state acts against crime for the sake of higher ideals than its own self-preservation and interests. If the state could strive for such self-transcendence it might be applauded but, in fact, it seldom sees beyond itself as absolute. Witness the case of conflicting claims to the authority to execute. An

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99 Camus, p.226

Eskimo tribal council had convicted a murderer under due process of tribal law. The sentence of death was carried out, then a short time later the executioners were arrested and charged with murder. Under Canadian law, the execution was illegal; the two Eskimo executioners were themselves hanged for murder.[100] This story illustrates the absolute demand of the nation-state to control the world-construction and world-maintenance functions within the territory which it possesses.

The death penalty has been used as a tool of the state to eliminate those who constitute a threat to political power-spies, subversives, revolutionaries, opposition party leaders etc. Crimes against the authority of the state have been severely punished, especially in times of dramatic political change. In Russia, for example, revolutionary periods reflected striking increases in the use of capital punishment. More than 500 executions per year were carried out for the period 1906-1909 with a peak of 1,340 in 1908. Then in the period of the resurgence of the revolutionary spirit (1917-1922) approximately

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100 Lewis Lawes, Man's Judgement of Death, (New York: G.P. Putnam's Sons, 1924), p.3 The story, of course, involves the whole question of the definition of "community". At issue is the ability of the state to discern the legitimacy of subcultures within its borders.

600,000 persons were executed. Even after the revolution mass executions were not unknown; tens of thousands were put to death during the purges of 1929-1935.[101] Situations of intense political conflict tend to lead to the absolutising of certain ideological goals. "One kills for a nation or a class that has been granted divine status - or for a future society".[102] This "divine status" is what leads the state to the point of employing unquestioned means to achieve its ends. One might expect that the excesses of the Inquisitions and the religious wars brought on by the Reformation were worse than anything the secular era might have seen. But it is only in the twentieth century that there were mass executions of the proportions witnessed in such places as the Soviet Union and Nazi Germany. Political differences have often combined with racial tensions to create a social rationale for mass executions.[103] In the secular stage of history the racial factor has replaced the religious factor in defining the boundaries of the social group; acts which threaten the racial purity of

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101 Bowers, pp. 168-169. Cf. Yuri P. Mironenko, "The Re-emergence of the Death Penalty in the Soviet Union", Soviet Affairs Analysis Service No.28 (1961-1962) and The American Jewish Committee Institute of Human Relations, "The Death Penalty for Economic Offenses in the Soviet Union", 1962.

102 Camus, p.228

103 Bowers, p.177

the nation are perceived as a serious threat and punished accordingly by the state.[104]

In secular *society*, there are residual manifestations of capital punishment as a religious rite; but, more significantly, the death penalty has retained a "religious" meaning, if this term is understood to signify the concern with ultimates or absolutes. Society, not deity, now lays claim to absolute power and authority. The absolute nature of the power of the state legitimates its use of the absolute punishment; "to assert ... that a man must be absolutely cut off from society because he is absolutely evil amounts to saying that society is absolutely good, and no one in his right mind will believe this today".[105] In the minds of citizens the state is an awesome force which imposes its wrath on those who attack the basis of its power. The state is not above the use of the most violent means to insure this power. "Heads are cut off not only to punish but to intimidate, by a frightening example, any who might be tempted to imitate the

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104 Particularly pertinent in this regard is the abundance of information about racial discrimination in capital punishment for rape in the southern United States. See Marvin E. Wolfgang, "Racial Discrimination in the Death Sentence for Rape", in Bowers, pp. 109-120

105 Camus, pp. 225-226.

guilty".[106] The deification of the state provides the socio-religious basis for the use of capital punishment in a secular society: "capital punishment represents all that is violent and irrational in our society. It shows our terrible propensity to deal with complex social problems by violence".[107] Violence and killing exercised by society itself for the maintenance of the social reality are, thus, established as necessary parts of the human, social enterprise. "Once killing is sanctioned by the State and Society, it tends to become accepted as a legitimate solution to extreme difficulties".[108] Killing is the solution of the deified states for extreme threats to the continuation of the political status quo. The state and those who control it profit, in terms of both power and wealth, from maintaining the social structures with minimal change. But the status quo includes social conditions which actually contribute to the development of crime and criminals.[109] Camus noted the high incidence of alcohol related crimes of violence and the fact that some persons whose fortunes were made in the lucrative French

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106 Ibid, p.179

107 Amsterdam, p.11

108 Richard M. Werkheiser and Arthur C. Barnhart, Capital Punishment, New York: The National Council of the Episcopal Church, 1961, p.16

109 Knudten, p.317

spirits industry were the same ones who signed execution orders.[110]

Capital punishment is legitimated in the secular era not by reference to religious symbolisation but by appeal to the ultimate concern of the secular society, the politically defined reality. The kind of religious concerns which occasionally led to the tempering of the official exercise of violence in the past no longer seem to offer a challenge to the right of the state to execute. The state, the executive, and the executioner have merged into one symbol:

"Whoever thinks he has omniscience imagines he has omnipotence. Temporal idols demanding an absolute faith tirelessly decree absolute punishments. And religions devoid of transcendence kill great numbers of condemned men devoid of hope."[111]

By "transcendence" Camus does not mean the ontological and cosmological doctrine which evolved in religion to offer a legitimation of capital punishment as a means of salvation. Rather, he means the

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110 Camus, p.207

111 Camus, p.228

quality or awareness of self-criticism which allows one to question every absolute. This critical view has been crucial for many who have opposed the state in its most violent and dehumanising aspects. It is this self-transcendent and self-critical view which accounts for those attempts from within religion to challenge the state's authority to execute.

One final, but not insignificant, result of the process of secularisation with regard to capital punishment is the opposition to the death penalty which has been voiced in some sectors of religion. Given the origins of capital punishment as a means of maintaining the sacred reality, this is a startling and ironic occurrence, a reversal of the usual relationship of religion and capital punishment. Berger has described the effect upon religion itself of secularisation as:

"....a sever rupture of the traditional task of religion which was precisely the establishment of an integrated set of definitions of reality that could serve as a common universe of meaning for the members of society. The world-building potency of religion is thus restricted to the construction of sub-worlds, of fragmented universes of

meaning.'[112]

In the secular world, the "common universe of meaning" is established by political definitions of reality while religion is free to establish "sub-worlds" which may differ from the larger view of reality. One such sub-world is the attack on capital punishment which has been launched by some religious groups. By no means have all religious groups or persons suddenly abandoned the traditional religious legitimations of the death penalty. But some sectors of religion, once religion was relieved of the primary social responsibility of world-maintenance, began to see the ultimate penalty in a new light. Even such an Establishment-type denomination as the Episcopal Church reflects this dramatically new religious perspective; Richard Werkheiser and Reverend Arthur Barnhart present the opinion that, while secular thinkers may defend capital punishment with the protection-of-society argument, the Christian's "basic concern is not the perpetuation of the State, but the transformation, the redemption, of all human relationships".[113] The concept of redemption has been

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112 Berger, p.134.

113 Werkheiser and Barnhart, p.4

mentioned elsewhere as disallowing previous moral legitimations of the death penalty. John Yoder compares capital punishment to slavery as a practice which some societies allow but which does not conform to the gospel; "I have come that they might have life was not spoken only of mens souls".[114] Elsewhere critics of capital punishment have cited as support the Sixth Commandment, "Thou shalt not kill",[115] the creation (imago dei) , and the command of Jesus, Judge not, that ye be not judged".[116] Of course, numerous other religious concerns have been suggested by critics of capital punishment.[117] It is instructive with regard to the secularisation process that recent religious thinkers would re-evaluate ancient scriptural texts and develop arguments against the use of the death penalty. Up until fairly recent times religion, at least in its institutional manifestations, was so closely allied with those social progresses which functioned to construct and maintain reality that it almost always justified the execution of those

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114 John Howard Yoder, "Capital Punishment and the Bible", Christianity Today, 4 (February 1, 1960) No.9, p.6.

115 Curtis Bok, Star Wormwood, (New York: Alfred A. Knopf, 1959), p.196

116 Werkheiser and Barnhart, pp. 2-3, 17

117 See, in addition to the above works, Israel J. Kazis, "Judaism and the Death Penalty" and Charles S. Milligan, "A Protestant's View of the Death Penalty", both in Bedau, pp. 171ff.

whose actions threatened that reality. But, in an era when the state has become an ultimate symbol, religion has occasionally taken on different, perhaps more prophetic, responsibilities.

4.2. Ideological Flux and the Future of Capital Punishment

The sociology of religion provides a certain understanding of the social process which can inform speculation about the future of capital punishment in Western societies. Based on the thesis of this study, that capital punishment is a propitiatory rite for the maintenance of the socially constructed reality, one might conclude that the death penalty will continue to be used in a way which is concomitant to the development of social reality. In other words, those actions which present the most serious threat to the reality of future social groups will evoke the maximum punishment. If the power and social predominance of the nation-state continues as it is or increases, we might expect the definition of capital crime to match the salient features of the politically defined reality. It is easy to imagine that treason, for instance, will be a capital crime, at least in theory, long after other acts are not. Political assassinations and terrorist activities,

as well, seem to evoke most rigorous responses from contemporary societies. In 1957, Camus noticed an apparent shift towards the use of capital punishment as a political mechanism; "there are fewer and fewer condemned by common law and more and more condemned for political reasons".[118] The more deified the nation-state becomes the less questioned and the less questionable will be its tactics to maintain power.

The state as executioner continues to be a powerful symbol in our world, the deification of the nation-state has a continuing effect on the social process.

If the future of capital punishment depended entirely on public opinion, executions would probably not only continue but, perhaps, increase in number. It is for this reason that some reform-minded jurists have been reluctant to join the supporters of abolition. The Royal Commission on Capital Punishment of Great Britain expressed a fear of such an action; "though reform of the criminal law ought sometimes to give a lead to public opinion, it is dangerous to move too

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118 Camus, p. 227

far in advance of it".[119] Societies support capital punishment as a means of maintaining the social reality. Therefore, the incidence of executions tends to increase with those factors which reflect weaknesses in the definition of that reality. For example, extreme ideological flux, ethnic diversity coupled with discrimination, and the coercive dominance of an elite political group are each factors which may predictably affect an increase in executions.[120]

The use of the death penalty on a world-wide scale has decreased markedly since World War II. A survey of 128 countries for the period 1958-1962 revealed only 40 countries which had performed an average of more than one execution per year, although 89 countries provided for capital punishment by law. Four countries accounted for about half the total number of executions for the period - from greatest to least, South Africa, Korea, Nigeria and the United States.[121] But the

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119 Royal Commission on Capital Punishment 1949-1953, Report, (London: Her Majesty's Stationers Office, 1953). Reprinted in Gertrude Ezorsky (ed.), Philosophical Perspectives on Punishment, (Albany: State University of New York Press, 1972), p.251.

120 Bower, p. 181. William Bowers pinpoints five variable societal characteristics and uses them to provide a thorough empirical analysis of the propensity of nations to use the death penalty. See pp. 181-190.

121 Ibid. pp. 179-180. This data does not include many former communist bloc nations which did not respond to the survey and which do not appear in the list of countries where capital punishment has been abolished or abandoned. See p. 178.

recent global trend towards abolition carries no guarantee that the death penalty will cease to be a tool of social maintenance. The flux of history can be expected to bring about situations in which social reality is seriously threatened. Therefore, given the necessary social conditions, capital punishment will continue as an aspect of the world-maintenance function of society. And, to the extent that the interests of religious groups are tied to those of the modern state, legitimations of the death penalty will be given by religion. Where religion has become differentiated from politics, on the other hand, secular ideologies will be the principle source of legitimation.

The future of capital punishment may also be affected by a growth in global political awareness. Political developments which enhance the possibilities of international cooperation tend to create a view of the social reality which is more stable and less susceptible to the threat of anomy; at the very least a truly global social reality cannot perceive threats from 'outside' the social context. An increase in the degree of non-violent influence which groups of nations exert over others can contribute to the movement to abolish capital punishment. In 1971, even such totalitarian governments as the Soviet Union and Spain

were being pressured by world opinion to commute death sentences.[122] Camus expressed a hope that international cooperation would lead to the elimination of capital punishment: 'in the unified Europe of the future the solemn abolition of the death penalty ought to be the first article of the European Code we all hope for".[123] But, given the uncertain status of internationalism as a viable political option for our times, perhaps one should look to the individual nations for progress towards abolition.

Up until this year, 1976, the future of capital punishment in the United States seemed doubtful. The last execution was carried out in 1967 by the State of California under the authorisation of Governor Ronald Reagan; since then, complex legal developments have resulted in a growth in the nationwide death row population which has exceeded some 600 inmates.[124] Some observers have wondered about the future of the maximum penalty under United States law. Amsterdam

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122 Amsterdam, p.12

123 Camus, p.230

124 Michael Meltsner, "Capital Punishment: The Moment of Truth", Juris Doctor, 2 (November 1971) No.2, pp. 4-5. An account of these legal developments and the wider social context which contributed to the moratorium on executions is available in Burton H. Wolfe, Pileup on Death Row, (Garden City, New York:: Doubleday, 1973

remarked that the moratorium on the death penalty had " taken the edge of abolitionist statements".[125] Michael Meltsner, a Columbia Law School professor, noted that "American society is in fact ambivalent about capital punishment: we can neither employ it on a systematic basis nor reject it as an unnecessarily harsh and degrading penalty".[126] Optimism for abolition was possible in 1971 when Amsterdam asserted:

"There can be no doubt in any of our minds that within most of our lifetimes capital punishment will be dead. Abolition may come next year, in 1980 or in 2000; but, as surely as night follows day, it will come. What that means is that the ritual that remains to be played out is no longer justifiable in historical terms. How much more cruel, how much more barbarous is it to wipe out, to burn, to gas a few poor souls in the name of principles which the executioners themselves no longer believe in".[127]

Then, in 1976, the United States Supreme Court ruled that the death

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125 Amsterdam, p.12

126 Meltsner, p.12

127 Amsterdam, p.12

penalty is not incompatible with the Constitution; this probably means that executions will resume after a nine-year period of abandonment of capital punishment.[128]

The maintenance of the social reality requires that some acts be designated capital crimes and that the punishment should actually be carried out. Presumably, direct attacks upon the power of the political-military elite will continue to evoke the capital punishment response, although executions for these kinds of treasonous acts are relatively rare. The most prominent capital offence in the United States will continue to be murder, especially the murder of a representative of the state - a police officer, a prison guard, or a political leader. "Life for life," the simple retributive model of justice, has become the primary legitimation of the contemporary application of the death penalty. Thinkers whose legal and penal philosophy is informed by an uncompromising commitment to the reform of the criminal see capital punishment as a contradiction of the social ideal;

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128 "The Death Penalty Revived", Time, 108 (July 12, 1976) No.2, p.35. Subsequent to the ruling a stay of execution was issued which will be in effect until the court reviews its decision.

"the death penalty discredits the whole reformative process".[129] Such idealism can never accept the judgement that an individual should be cut off from the community of the living.

Existentialist philosophy, as it is reflected in the thought of Camus, provides a new understanding of the criminal as an individual-in-society. This new view of the human as a social creature tends to defuse the absolute culpability of the criminal. Because of the genetic and environmental factors influencing crime, "the real responsibility of an offender cannot be precisely measured.... we come into the world laden with the weight of an infinite necessity".[130] As it is not the nature of an individual to be absolutely responsible, so also it should not be the nature of society to render absolute judgements of the individual - justice and compassion cannot be separated. "Compassion does not exclude punishment but it suspends the final condemnation. Compassion loathes the definitive, irreparable measure that does an injustice to mankind as a whole because of failing to take into account the wretchedness of the common condition".[131] Even for

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129 Werkheiser and Barnhart, p.13

130 Camus, p.209

131 Ibid, p.212

the person whose actions are perceived as the greatest threat to the social reality, the right to live is a "natural" right without which "moral life is utterly impossible".[132] This existentialist understanding of the human person, to the extent that it becomes a philosophy of the future, will affect the future of capital punishment as a mechanism of social maintenance.

4.3. Summary

In the secular era, the relationship of religion and capital punishment is less direct than in earlier times. Whereas religion had previously performed the world-construction and world-maintenance functions of the social process, this role had been transposed, because of secularisation, to the sphere of politics. Hence, capital punishment was provided for, administered and legitimated by the state and undergirded by political idealogy.

Traditional religious symbols and legitimations continue to characterise the administration of the death penalty in secular

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132 Ibid, p.221

societies. In a symbolic sense, capital punishment is still a propitiatory but it is secularised in contemporary society; criminals are put to death for the sake of maintaining the political order and the predominance of the state. In fact, the state has achieved a deified status. If propitiation is understood as a means of appeasing divine wrath, then the state is both the propitiator-executioner and the object of propitiation for which the deviant is executed.

The future of capital punishment is somewhat ambiguous on the global level as in the United States. The social process surrounding the death penalty as world-maintenance can be expected to continue, in which case ideological flux and the characteristics of particular societies will determine the necessity and extent of executions. Finally, changing philosophical perspectives on society and the individual will likely have an effect on the future of capital punishment within society.

CHAPTER FIVE

THE DEATH PENALTY AROUND THE WORLD

The death penalty is not a controversial issue in the Muslim world, but it is in many other nations of the world. The purpose of this chapter is to review briefly the use and non-use of the death penalty in a variety of nations of the world, and then to discuss the death penalty and the United Nations, and cultural relativism as well as the current international law.

In 1971, the United Nations General Assembly passed Resolution 2857 (XXVI):

"In order to guarantee fully the right of life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries." Like other

United Nations resolutions, this resolution is not acceptable to all nations. Some members of the United Nations have shown a sustained interest in abolishing the death penalty; others will not abide by it and consequently, they do not want to abolish the death penalty, and yet some other members wish to retain and use the death penalty only for serious crimes. Since 1971, the United Nations has had published periodical reports about the countries that use or do not use the death penalty. Accordingly, the United Nations has classified countries into two major groups: Retentionist and Abolitionist.

Retentionist refers to countries that retain and use the death penalty for ordinary crimes such as murder, rape, robbery, or embezzlement of very large amounts of money. Certainly the list of capital crimes in some countries is short, while in others it is long.

Abolitionist, on the other hand, is classified into three categories: (a) Abolitionist which means the countries whose laws do not provide for the death penalty for any kind of crimes; (b) Abolitionist for ordinary crimes only, which means countries whose laws provide for the death penalty only for exceptional crimes such as crimes committed under

military law or crimes committed in exceptional circumstances, such as wartime; and © Abolitionist De Facto, which means the countries which retain the death penalty for ordinary crimes, but have not executed anyone during the last 10 years or more.[133]

Amnesty International (AI), the Nobel prize-winning human rights organization, keeps information on the death penalty around the world. Their most recent report on the death penalty tells us that most of the nations have abolished the death penalty for all crimes or for ordinary crimes.

World approaches to the Death penalty:

5.1. North America

5.1.1. United States.

The United States of America, the federal government and 37 states, still have the death penalty as part of their legal system. Indeed, Amnesty International reported that 23 prisoners were executed in

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[133] "United Nations Action in the Field of Capital Punishment," in *United Nations Crime Prevention and Criminal Justice Newsletter*, 12 & 13, Nov..1986, pp.2-4.

1990. At the end of that year, more than 2,300 people were under the sentence of death in 34 states and under United States (U. S .) military law. In fact, the majority of Americans strongly favour the death penalty. Although the U.S. has increased usage of lethal injection as a method of execution, there are many methods of execution; electrocution; lethal gas; hanging; shooting by firing squad. In most states (37), the only capital offense is aggravated murder (usually first-degree murder).[134]

5.1.2. Canada.

Although Canada has abolished the death penalty for ordinary crimes its laws do provide for the death penalty for exceptional crimes, such as crimes committed under military law, or crimes committed in exceptional circumstances, such as wartime. In 1976 the death penalty was abolished for capital murder and replaced with a mandatory 25-year prison sentence without parole. Because of the nature of its capital offenses (mutiny and treason), Canada's method of execution is shooting by firing squad.

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[134] US Department of Justice, *Source Book of Criminal Justice Statistics*, 1986, pp.100-1.

5.2. Western Europe

5.2.1. United Kingdom.

In 1965 Great Britain abolished the death penalty (The Murder Act) for murder for a 5-year experimental period, but the final law was passed in 1969. Although some members of the House of Parliament have tried many times to reintroduce the death penalty, the British Parliament has overwhelmingly defeated the measures. "In June 1988, the eighteenth attempt in the British Parliament to introduce capital punishment for some classes of murder was defeated by 341 votes to 281."[135] Amnesty International reported that "the last executions--of two men convicted of murder--were on 13 August 1964" (AI , p. 226). The method of execution was hanging. But the death penalty has been retained (under the Treason Act of 1914) only for exceptional crimes, such as high treason, both in peacetime and in wartime, and piracy with violence (under the piracy Act of 1837) in England and Wales.

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[135] Hood, R. *The Death Penalty*, Oxford, 1989, p.10.

5.2.2. Greece.

Greece is one of the countries which is classified as abolitionist de facto. It retains the death penalty for ordinary crimes, but it has not carried out the death penalty during the last year or more. Indeed, the last execution was in 1972. The method of execution was shooting by firing squad.[136]

5.2.3. Germany.

The Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) were unified in October 1990. The name of the united country is the Federal Republic of Germany. The FRG is one of the Western Europe states that have signed the six protocols to the European Convention on human Rights, article 1 of which states: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."[137] Germany has abided by that treaty and has abolished the death penalty. Indeed, the Council of the State in July

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[136] Bedan, J. *Capital Punishment in Europe*, CUP, 1989, p.11.

[137] Hood, p.10.

1987 issued a law stating clearly that the abolition of the death penalty was in accordance with the recommendations " . . . of the United Nations for the gradual removal of the death penalty from the lives of nations" (AI, 136).

5.2.4. Hungary.

Until recently, Hungary was a retentionist country. But in 1990, Hungary abolished the death penalty for all crimes. Before that, Hungary had many offenses that were punishable by death. The execution methods were hanging and shooting by firing squad.

5.2.5. Turkey.

Although Turkey is a full member of the European community, and in spite of all entreaties from the other European countries to the Turkish government to abolish the death penalty, Turkey still retains the death penalty. Indeed, in 1988 the European Parliament called on the government of Turkey "to take the necessary steps to commute all death sentences pending in the country until such time as this

abominable penalty is abolished"(AI, p. 221). The method of execution is hanging.

5.2.6. Netherlands.

The Netherlands, has abolished the death penalty. The Netherlands is a full member of the European Parliament and is one of the countries that has signed the six protocols, indicating its intention to ratify it and to abolish the death penalty.

5.2.7. Norway.

Norway abolished the death penalty for all offenses in 1979. In its proposal to parliament to abolish the death penalty for all offenses, the government stated that it is an inhumane, punitive measure, [and] that the government was taking a principled stand against the death penalty for humanitarian reasons (AI, p. 187). The last execution was carried out in 1876 and the method of execution was beheading.

5.2.8. Spain

While Spain has abolished the death penalty for ordinary crimes, it retains this penalty only for exceptional crimes, as offenses against the state and offenses of a military nature during time of war. The last execution was 1975. The method of execution was shooting by firing squad.

5.2.9. Austria.

Austria abolished the death penalty for all crimes in 1968. Article 85 of the Austrian Constitution states, "The death penalty is abolished" (AI , p. 103). The last execution was in 1950.

5.2.10. Denmark.

This country abolished the death penalty for ordinary crimes in 1933, but its laws provided for the death penalty to be enacted for murder and crimes against the state. In 1954 Denmark reintroduced the death penalty, but in 1978 its parliament abolished the death penalty for all

crimes.

5.2.11. Italy.

The death penalty has been abolished for ordinary crimes only. However, Italy retains the death penalty for a wide range of offenses against the state. The last execution was in 1947. The method of execution was shooting by firing squad.

5.2.12. Luxembourg.

Abolished the death penalty for all offenses in 1979. However, "the constitution does not explicitly rule out its use" (AI, p. 170). The last execution was 1949. and the methos of execution was beheading.

5.2.13. San Marino.

San Marino abolished the death penalty for all crimes in 1865. The last execution was carried out in 1968.

5.2.14. Sweden.

Sweden, did abolish the death penalty for all offenses until 1972. In fact, the Swedish Constitution states, "No law or other regulation may imply that a sentence for capital punishment can be pronounced" (AI, p.211). Interestingly, the Swedish law applies not only to Swedish citizens, but to alien residents as well.

5.2.15. Switzerland.

Switzerland has abolished the death penalty for ordinary crimes only, but the death penalty is applicable for "desertion to the enemy" (AI, p. 211). The last execution was in 1944.

5.2.16. Other Western European Nations.

Iceland has abolished the death penalty for all offenses in 1928, and the last execution was in 1930. In Portugal, the Constituent Assembly abolished the death penalty for all crimes in 1976. The Portuguese constitution states clearly that " 1.That Human life is inviolable. 2. In

no case will there be the penalty of death" (AI, p. 193). The last execution was in 1849. The death penalty was abolished for all crimes in Finland in 1972. The last execution was in 1942. Belgium, on the other hand, has abolished the death penalty only in practice. Although Belgium retains the death penalty for ordinary crimes, no execution has been carried since 1950. The methods of execution were beheading by caladenia or shooting by firing squad.[138]

5.3. Eastern Europe.

Many countries in Eastern Europe have abolished the death penalty. This is but one indication of the sweeping political changes taking place in these countries as the Communist (authoritarian) forms of government supported by the former Soviet Union give way to democracies. For example, in 1989, Romania abolished the death penalty for all offenses. Also, the Czech and Slovak Federated Republics (formerly Czechoslovakia) abolished the death penalty; it was an "exceptional measure." This was before the civil war. Russia,

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[138] Hood, p.11-14.

once the keystone of the former Soviet union, has restored the death penalty after previously having abolished it .

5.4. Australia and New Zealand

In 1984 the death penalty was abolished in Western Australia, the last Australian state to retain the death penalty for ordinary offenses (Queensland, 1922; Tasmania, 1968; Victoria, 1975; South Australia, 1976). New Zealand, on the other hand, abolished the death penalty for all crimes in 1989. The last execution was in 1975.

5.5. Africa

Most African countries have maintained the death penalty. For examples, Algeria, Angola, Botswana, Cameroon, Central African Republic, Chad, Congo, Egypt, Ethiopia, Gambia, Ghana, Kenya, Libya, Mauritania, Morocco, Nigeria, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, Tonga, Tunisia, Uganda, Zaire, Zambia, and Zimbabwe. The methods of execution are hanging,

shooting by firing squad, and beheading by guillotine. Yet there are a few African countries whose laws do not provide for the death penalty for all crimes. For example, Mozambique abolished the death penalty for all offenses in 1990; Seychelles abolished the death penalty for all the crimes in 1979; and Cape Verde abolished the death penalty for all the crimes in1981. Also, there are a few countries whose laws provide for the death penalty for ordinary crimes, but which have not executed anyone during the last 10 years or more. Examples are Niger, Madagascar, Mali, Senegal, and Togo.[139]

5.6. The Middle East

Most of the countries in the Middle East retain and use the death penalty for ordinary crimes. The list of the capital crimes varies from one country to another, depending on the form of the government and its legal system. Certainly, there are "no official initiatives or plans to abolish the death penalty for any. . . offenses."[140]

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[139] Hood, pp.19-20.

[140] *ibid.* pp.16-17.

Indeed, some of these countries, such as Iraq, Iran, and Syria, use the death penalty daily. Others, like Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen have maintained the death penalty for a wide range of crimes--sometimes over 25 offenses. The methods of execution in these countries are hanging (public executions usually are attended by government officials); shooting by firing squad; and beheading by sword, especially in Saudi Arabia and Yemen (public execution). Bahrain is the only country in the Middle East that retains the death penalty for ordinary crimes but has not executed anyone since 1977. Israel, on the other hand, has abolished the death penalty for crimes against the Jewish people.

5.7. Asia and the Pacific

Japan, in spite of its relatively low crime rate, retains and uses the death penalty for ordinary crimes. The law in Japan gives "several criteria for the imposition of a death penalty: that more than one person is killed; that the murderer does not show any repentance and has not been forgiven by the family of the victim"(AI, p. 158). Consequently, there has been a significant decrease in the number of

executions to one or two a year.

"Japan . . . retains the death penalty at the same time that it manifests decreasing crime rate . . . . It is widely accepted among Japanese citizens that the safe, secure environment in which they live is very much a product of the deterrent effect brought by the retention of capital punishment."[141] The method of execution is hanging. Something worth mentioning here is that usually no public announcement is made of the executions and they are not reported in the press. Such secrecy [is necessary to protect] the family of the prisoner from the shame of having it known that their relative has been executed (AI, p, 158).

China (People's Republic) retains and uses the death penalty for all ordinary crimes. Unlike Japan, in China executions are widely "publicized in the national and local media and mass sentencing rallies attended by thousands of people have been held to expose offenders condemned to death to the public before being executed" (AI, p. 121). Usually, the method of execution is shooting by firing squad in public.

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[141] McCuen & Baumgart, *Capital Punishment in Asia*, Mentor 1995, p.111.

Fiji abolished the death penalty for ordinary crimes in 1979, but retains the death penalty for the crimes of treason and genocide. The last execution was in 1964.

Papua New Guinea abolished the death penalty for ordinary crimes in 1974, but retains the death penalty for treason and attempted piracy with personal violence. The last execution was in 1950.

The Philippines abolished the death penalty for all crimes is 1987. The law in Philippines states: "Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless, for compelling reasons involving heinous crimes, the congress hereafter provides for it" (AI, p. 191).

Bhutan retains and uses the death penalty for ordinary crimes, but has not executed anyone since 1874. Likewise, Sri Lanka has not carried out any execution penalties. The method of execution is hanging. But Malaysia and Indonesia both retain and use the death penalty for ordinary crimes. The method of execution in Malaysia is hanging, while the method of execution in Indonesia is shooting by firing squad.

Nepal has abolished the death penalty for ordinary offenses, but reintroduced the death penalty in 1985 after bomb explosions in which several people were killed. India, on the other hand, retains and uses the death penalty for ordinary crimes. The methods of executions are hanging or shooting by firing squad.

5.8. The Caribbean

Haiti abolished the death penalty for all crimes in 1987. Indeed, in "Article 20 of the section relating to the fundamental rights of citizens states." The death penalty " is abolished in all cases" (AI, p. 144). Cuba, on the other hand, retains and uses the death penalty for ordinary crimes. The method of execution is shooting by firing squad. Although Bermuda retains the death penalty for ordinary crimes, it has not executed anyone since 1977. Like Bermuda, Grenada retains and uses the death penalty for ordinary crimes. The execution method is hanging. Guyana retains and uses the death penalty for ordinary crimes. The method of execution is hanging. Barbados retains and uses the death penalty for ordinary crimes since 1976. Trinidad and Tobago

retain and use the death penalty for ordinary crimes. The method of execution is hanging.

5.9. South and Central America

The death penalty issue is a controversial issue in Latin America. Indeed, for years the region was sharply divided. But recently, most of the countries of the region either have abolished the death penalty for all crimes or have not executed anyone for the last 10 years or more. In fact, only two countries retain and use the death penalty now. Seven nations have abolished the death penalty for all crimes: Colombia in 1910; Costa Rica in 1877; Dominican Republic in 1966; Ecuador in 1906; Honduras in 1958; Nicaragua in 1979; Panama in 1972;Uruguay in 1907; and Venezuela in 1863. Five other countries have abolished the death penalty for ordinary crimes only, but retain and use the death penalty only for exceptional crimes against the state.

5.10. Trends and Conclusions

Trends and Conclusions of the 176 nations in the world, only 92 retentionist nations use the death penalty as possible punishment for

ordinary crimes (see Table 1). In most of these retentionist countries, especially the Republic of China, which experienced violent student demonstrations in the summer of 1989, Iraq after the Gulf War, Iran and its struggle with the Mojahedine Khelg Organization, and Yemen after the recent civil war, executions have become a daily routine. The 44 abolitionist nations have abolished the death penalty for all crimes (see Table 2). There are 17 abolitionist nations that have abolished the death penalty for ordinary crimes only (see Table 3). and 25 abolitionist de facto nations have not carried out any execution at all for the last 10 years or more (see Table 4).

On average, at least two nations each year have legally abolished the death penalty, or had abolished it earlier for ordinary crimes, and then went on to abolish it for all crimes. Indeed, only Belgium and the United States (the federal government and 37 states) are among the Western nations that still retain and use the death penalty. Amongst these Countries are : Argentina in 1984; Brazil in 1979; EL Salvador in 1983; Mexico in 1971; Nepal in 1990; and Peru in 1979. Only two countries retain the death penalty for ordinary crimes, but have not carried out any executions for the last 10 years or more. They are

Bolivia and Paraguay. The other states that still use the death penalty for ordinary crimes are Chile and Guatemala. The methods of execution are hanging and shooting by firing squad.

TABLE 1

RETENTIONIST

Countries and territories which retain and use the death penalty for ordinary crimes.*			
Afghanistan	Cuba	Lebanon	Singapore
Albania	Dominica	Liberia	Somalia
Algeria	Egypt	Malawi	South Africa
Angola	Equatorial Guinea	Malaysia	Sudan
Antigua and Barbuda	Mali	Suriname	Ethiopia
Mauritius	Swaziland	Bahamas	Gabon
Mongolia	Syria	Bangladesh	Gambia
Morocco	Taiwan	Barbados	Grenada
Tanzania	Belize	Guatemala	Nigeria
Thailand	Benin	Guinea	Oman
Tonga	Botswana	Guinea-Bissau	Pakistan
Trinidad & Tobago	Bulgaria	Poland	Burkina Faso
Guyana	Qatar	Tunisia	Burundi
India	Russia	Turkey	Cameroon
Iran	Rwanda	Uganda	Central African Republic
Iraq	United Arab Emirates	Jamaica	Japan
USA	Chad	Jordan	Saint Lucia
Chile	Kenya	Saint Vincent and the Grenadines	Vietnam
China (People's Republic)	Korea (North)	Korea (South)	Yugoslavia
Kuwait	Saudi Arabia	Zaire	Congo
Laos	Sierra Leone	Zambia	Zimbabwe
Yemen			

Total: 85 countries and territories

. . . . . .

* Most of these countries and territories are known to have carried out executions during the past 10 years. One some countries Amnesty International has no record of executions but is unable to ascertain whethere or not executions have in fact been carried out.

Source: Amnesty International, January 30, 1991

TABLE 2

ABOLITIONIST FOR ALL CRIMES

. . . . . .

Countries whose laws do not provide for the death penalty for any crime

. . . . . .

Country	**Date of Abolition**	**Date of Last Execution**
Andorra	1990	1943
Australia	1985	1967
Austria	1968	1950
Cambodia	1989	----
Cape Verde	1981	1935
1910		1909

Costa Rica	1877	----
Czech & Slovak	1990	1988
Denmark	1978	1950
Domincan Republic	1966	----
Ecuador	1905	----
Finland	1972	1944
France	1981	1977
Federal Republic of Germany	1949/1987***	1949***
Haiti	1987	1972*
Honduras	1956	1940
Hungary	1990	1988
Iceland	1928	1830
Ireland	1990	1954
Kiribati	----	**
Liechtenstein	1987	1785
Luxembourg	1979	1949
Marshall Islands	----	**
Micronesia	----	**
Mozambique	1990	1986
Namibia	1990	1988*
Netherlands	1982	1952

(Continued on next page)

Table 2, continued

Country	**Date of Abolition**	**Date of Last Execution**
New Zealand	1989	1957
Nicaragua	1979	1930
Norway	1979	1948
Panama	----	1903*
Philippines	1987	1976
Portugal	1976	1849*
Romania	1989	

San Marino	1865	1468*
Sao Tome and Principe	1990	**
Solomon Islands	----	**
Sweden	1972	1910
Tuvalu	----	**
Uruguay	1907	----
Vanatu	----	**
Vatican City State	1969	----
Venezuela	1863	----

Total: 44 countries

. . . . . .

---- Date is not known

* Date of the last known execution

** No execution since independence

*** The death penalty was abolished in the Federal Republic of Germany (FRG) in 1949 and in the German Democratic Republic (GDR) in 1987. The last execution in the FRG was in 1949; the last date of execution in the GDR is not known. The FRG and GDR were unified in October 1990. The name of the united country is the Federal Republic of Germany.

Source : Amnesty International, January 30, 1991.

TABLE 3

ABOLITIONIST FOR ORDINARY CRIMES ONLY

Countries whose laws provide for the death penalty only for the exceptional crimes such as crimes under military law or crimes committed in exceptional circumsatnces, such as wartime.

Country	**Date of Abolition**	**Date of Last Execution**
Argentina	1984	----
Brazil	1979	1855
Canada	1976	1962
Cyprus	1983	1962
El Salvador	1983	1973*
Fiji	1978	1964
Israel	1954	1962
Italy	1947	
Malta	1971	1943
Mexico	----	1937
Nepal	1990	1979
Papua New Guinea	1974	1950
Peru	1979	
Seychelles	----	**
Spain	1978	1975
Switzerland	1942	1944
United Kingdom	1973	1964

Total : 17 countries. Date is not known

* Date of last known execution

** No executions since independence

Source: Amnesty International, January 30, 1991.

TABLE 4

ABOLITIONIST DE FACTO

. . . . . .

Countries and territories which retain the death penalty for ordinary crimes but have not executed anyone during the past ten years or more.

Country	Date of Last Execution	Country	Date of Last Execution
Anguilla	1920s	Hong Kong	1966
Bahrain	1977	Madagascar	1958*
Belgium	1950	Maldives	1952
Bermuda	1977	Montserrat	1961
Bhutan	1964*	Nauru	**
Bolivia	1974	Niger	1976*
British Virgin Islands	----	Paraguay	1928
Brunei Darussalam	1957	Samoa, Western	**
Cayman Islands	1928	Senegal	1967
Comoros	**	Sri Lanka	1976
Cote d'Ivoire	----	Togo	----
Djibouti	**	Turks & Caicos Islands	----
Greece	1972		

Total: 25 countries and territories

. . . . . .

* Date of last execution

** No execution since independence

---- Date is not known

(In keeping with the system of classification used by the United Nations in its quinquennial reports on capital punishment, all of these countries and territories can be considered abolitionist de facto in that they have not carried out executions for the past 10 years or more. However, death sentences have continued to be imposed in a number of these countries and territories, and not all of them have a policy of regulalry commuting sentences).

Source : Amnesty International, January 30, 1991

Many countries have wavered back and forth. For example, Brazil abolished the death penalty in 1890, restored it in 1969, and abolished it again in 1979. Likewise, Spain abolished the death penalty in 1932, returned it in 1934, and abolished it again in 1978. This succession of abolitions and restorations is a good indication of changing governmental styles: from democratic to dictatorship forms of governments and back again. The sweeping political changes that have taken place in Eastern Europe [from authoritarian (Communist) forms of government supported by the former Soviet Union to democracies] have helped these countries to change their positions on the death penalty.

TABLE 5

	Nations Studied	**Nations with a death penalty**
Patrick Study (1958-62)	128	107 (86%)
Amnesty International (1979)	156	136 (87%)
Wiechman (1980-85)	163	126 (77%)
Amnesty International (1987)	172	110 (64%)

In fact, most of them have abolished the death penalty recently. No doubt the majority of nations have supported the death penalty. In comparing the usages of the death penalty from a historical viewpoint, the following data show consistent support for the death penalty.[142]

Which Crimes Carry a Death penalty ? Capital crimes vary from one country to another, depending on culture, religion, economics, politics, and form of government. In some countries the list of offenses punishable by death is short, while in some other countries the list is longer. For example, in Iraq and Iran, offenses that are punishable by death comprise over 25 crimes. In Saudi Arabia, however, the list is very short .

Which Nations have the Death penalty ? Obviously, in general most of the nations in Africa, the Middle East, Asia and the Pacific, and in the Caribbean retain the death penalty. Indeed, most of the nations that have used the death penalty have less freedom of the press, less concern with the value of human life, and more political instability.

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[142] Wiechmann & Bae, *The Penalty for Capital Crimes, Macmillan*, 1991, p.134.

5.11. The Death penalty and the United Nations.

At the beginning, the United Nations's position on death penalty was a product of compromise among those nations that wanted to abolish it for all crimes; those countries that wanted to abolish it for ordinary crimes, but wanted to retain and use it for exceptional crimes against the state; and those that wanted to use it for all crimes. In 1966, the UN General Assembly adopted Resolution 2200 (XXI), Article 6 of the Covenant, which reads:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death penalty may be imposed only for the most serious crimes in accordance with the law enforce at the time of the commission of the crime and not contrary to the provisions of the present Covenant and of the Convention on the prevention and punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way for any obligation assumed under the provisions for the convention on the prevention and punishment of the Crime of Genocide.

4. Anyone sentenced to death penalty shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present covenant.

The United Nations has dealt with the issue of the death penalty in several documents. Indeed, in the last three decades, many resolutions

have been passed. Among them is General Assembly Resolution 2393 (XXIII), passed on November 26, 1968, which includes certain conditions which every nation that uses the death penalty as possible punishment should follow:

(I) A person condemned to death shall not be deprived of the right to appeal to higher judicial authority or, as the case may be, to petition for pardon.

(ii) A death sentence shall not be carried out until the procedures of appeal or, as the case may be, of petition for pardon or reprieve have been terminated.

(iii) Special attention shall be given in the case of indigent persons by the provision of adequate legal assistance at all stages of the proceedings.

In 1971, the General Assembly passed resolution 2857 (XXVI):

In order to guarantee fully the right to life, provided for in Article 3 of

the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.

The Economic and Social Council Resolution 1574 (L) of the same year made a similar declaration. The report of the Secretary General on Capital Punishment (February 8, 1980) pointed out that, The United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed, on the question of the death penalty, to a position favouring the eventual abolition of the death penalty. From the moral standpoint, the United Nations has followed the guidance of the Universal Declaration of Human Rights. From the practical or utilitarian point of view, [the United Nations has] called only for the "eventual abolition of capital punishment.

As a result of these resolutions, and the work of the Amnesty International organization, which is unconditionally opposed the death penalty, the United Nations has had periodic conferences and has issued reports concerned with the status of the death penalty around

the world.

5.12. The Death Penalty and Cultural Relativism

In 1947 the newly formed United Nations' agency UNESCO was given the task of drafting an international bill whose sole purpose was to state a concept of human rights that could accommodate the differing political beliefs, economic systems, religions, and cultures of the member states of the United Nations. A year later, the manifesto was given the name of the Universal Declaration of Human Rights and proclaimed by the General Assembly of the United Nations in December 1948. The Universal Declaration of Human Rights includes a list of 15 specific rights that it grouped under three headings:

(a) rights to live,

(b) rights to live well,

(c) rights to social participation .

This historic document was based on the general agreement that

claims protected by human rights derive from the requirements of "human dignity," but it largely left open the question of what human dignity requires and how to best to secure it. Consequently, the member states of the United Nations are classified into three groups--first-, second-, and third-world nations.

The first-world nations (liberal, demoratic, developed) stress the priority of individual rights and powers that protect the autonomous choices of individuals free from interference by governments. Thus, in these nations, rights as freedom of religion and freedom of speech are given great weight, whereas economic rights are given less weight.

The second-world nations (socialist, authoritarian, developed), there are no fixed individual rights; instead, an individual's nature is as a social or communal being whose particular characteristics are formed by her social, economic, and historical conditions of his or her society. These nations stress economic rights more than liberty and freedom rights.

The third-world nations (mixed economy, little or no ideology, but

developing) stress group rights and rights of national or ethnic self-determination. Indeed, rights in these nations are neither the natural possession of individuals nor are they historically conditioned goods granted by governments; rather, derive from the relationship between individuals and the cultures they inhabit and from the interaction between them. Because these countries have defined themselves in terms of ethnic, racial, religious, or linguistic nations, great emphasis is placed on the individual's relation to traditionally defined communal groups and the rights of these groups to cultural self-determination. Consequently, the major compromise of the United Nations' Universal Declaration of Human Rights was to include all three of these categories.

The drafters of the Universal Declaration of Human Rights confronted a serious problem to formulate a universal notion of human rights that could be accepted by all the member states of the United Nations, not merely a statement of rights reflecting Western culture and political values. Consequently, as part of its contribution to the human rights bill, the American Anthropological Association issued a statement on human rights that emphasizes culture rights. The statement asserts that

the rights of human individuals "must be based on a recognition of the fact that the personality of the individual can develop only in terms of the culture of his society" and urges that "respect for cultural differences" be a guiding principle in formulating any statement of human rights.[143] The statement goes on to point out that, "respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered."[144] Thus, the Universal Declaration of Human Rights embraces and recognizes the validity of many different ways of life:

> "Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole."[145]

Rather than imposing a single, rigid standard of ethical and political values, the relativism, pluralism of values, and cultural tolerance must

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[143] Winston, S. *The Philosophy of Human Rights*, 1989. p.104.

[144] *ibid.* p.104.

[145] *ibid.* p.119.

be adopted as the universal standard.

From moral obligation, the United Nations has followed the guidance of the Universal Declaration of Human Rights. Through Amnesty International, the Nobel Prize-winning human rights organization, and other organizations, the United Nations maintains information on the use and non-use of the death penalty throughout the world. Regularly the United Nations monitors death sentences and executions around the world and sometimes appeals for clemency whenever it learns of an imminent execution. By doing so, the United Nations recognizes the fact that some regional differences in capital crimes occur. "Homicide is most likely to be found as a capital offense in Africa, the Mediterranean, and Eurasia; stealing, in Africa and the Mediterranean; sacrilegious acts, in North America, Africa, and Oceania; and treason, in Oceania."[146]

The laws vary from culture to culture; therefore, it is natural to assume that what is considered a capital crime will vary from culture to culture. For example, in the Arab world in general and in the Muslim

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[146] Otterbein, K.F. *The Ultimate Coercive Sanction*, Haraf, p.43.

in particular, the issue of the death penalty is not matter of data or statistics or the opinions of sociologists and criminologists; it is a matter of following God's law. For Muslims, no amount of negative data makes disobedience of God's word an acceptable alternative. Furthermore, the Muslims recognize that the Quran teaches that the fear of punishment does deter.

5.13. The Death penalty Under the Current International Law.

For the last half-century, the effort to transform the universal Declaration of Human Rights into real rights has taken the form of international treaties and covenants, which when ratified by sovereign countries acquire the status of international law. Indeed, "the international law of human rights derives principally from contemporary international agreements in which states undertake to recognize, respect, and promote specific rights for the inhabitants of their own countries."[147] The major treaties for the international protection of human rights are the International Covenant on Civil and

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[147] Winston, p.131.

Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966). These two treaties together "legislate essentially what the universal Declaration had declared."[148]

Among the rights protected by the Covenant on Civil and Political Rights are the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Under this agreement, countries are "required to report on their compliance to a Human Rights Committee. As regards states that agree to optional provisions, the committee may also receive complaints of violation from other states or from individuals."[149] Thus, any individual whose rights is being violated has the right to send a petition directly to the International Human Rights Movement or to any international organization for that matter, such as the European Human Rights Commission, Amnesty International, for help. Basically, these organizations have the power to "inquire, intercede, quietly seek redress, later expose unrepaired violations to publicity."[150]

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[148] *ibid.*

[149] *ibid.* p.132.

[150] *ibid.*

CHAPTER SIX

ISLAMIC LAW: SHARI'AH

O ye who believe Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) yourselves, or your parents, or your kin, and whether it be (against) rich or poor: For (against) rich or poor: for Allah can best protect both. (*Quran, 4:135)*

In today's Muslim world there is overwhelming public demand for reviving the Islamic judicial institution and re-enforcing the jurisdiction or the Islamic penal system. Islam is not only a religion which is concerned with the spiritual side of human life. It is, rather, an all-encompassing system of life which has adequate rules and regulations for all aspects of human life. The purpose of this chapter is to present

a brief overview of Islamic law (*shari'ah)*, including its characteristics as well as its objectives.

6.1. Islamic Law: Shari'ah

For Westerners, law means a set of rules and regulations which govern relations among people; it is a set of rules and regulations which mirrors the ideas and ideals of a society, and is enacted by some authority like a legislative body; it is a code of regulations behind which stand the courts and the police force. But in the Muslim world, there is a concept of "certitude" (*'ilm-Al Yaqin*) in matters of Good (*hassn*) and Evil (*qabih*) Muslims strongly believe that man, because of his limitations, cannot understand what Good and Evil are.[151] Therefore, man-made law is unacceptable; besides his limitations, man is incapable of rising above his evil propensities. Thus, just the idea that man has the ability and the capability to legislate for others is scarcely acceptable. Western laws are admittedly imperfect, and Western countries endeavour to perfect them by a continuing process of legislation. Islamic law, on the other hand, proceeds from a divine

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[151] Fyzee, A. *Outlines of Muhammadan Law* , Oxford, 1974, p.15.

source. It derives partly from the Quran, the very word of Allah (the Arabic word for God), and partly from the Prophet Muhammad's utterances, inspired by Divine Wisdom. It is regarded as perfect and eternal, designed for all people and for all time and places. Indeed, Muslims call their eternal law simply the "pathway": *shari'ah*. In fact, the *shari'ah* embraces all human actions. Consequently, the *shari'ah* is not 'law' in the modern sense; it contains an infallible guide to ethics. It is fundamentally a Doctrine of duties, a code of obligations. Thus, the *shari'ah* combines the secular and spiritual aspects of life simultaneously. The purpose of the *shari'ah* is to help all people to attain happiness in both worlds (in this world and the hereafter). Any violation of the *shari'ah* invokes two punishments: one in this world and the other in the afterlife. For example, if one does bad deeds, he will be punished by the state for his action. But suffering a penalty, for instance going to jail or paying a fine, does not abolish his sin in the afterlife, unless he repents and asks Allah's forgiveness. Thus, Islamic law is different from Western law in that it combines religion with secular deeds and promulgates precepts not only for this worldly life but for the afterlife as well.[152]

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[152] Hasan, A. *The Early Development of Islamic Jurisprudence*, Islamic Research Academy, Pakistan. 1988, pp.2-3.

Islam in Arabic denotes submission, specifically to the will of Allah. The doctrine of total submission to Allah may be traced to Hagar's encounter with Most High: "And she called the name of the LORD that spoke unto her, Thou God seest me: for she said, have I also here looked after him that seeth me?"[153] Islam stresses the unity and sovereignty of Allah. However, since Allah is remote and invisible, man can only submit to His Will and not to His person.[154]

Islam is a way of life with a clear set of universally binding beliefs which designate every aspect of conduct. In spite of division among its adherents, Islam unifies every Muslim, binds them to each other with a common faith, and unites them around certain explicit tenets and practices.

The basis of all Islamic law (*shari'ah*) is the Quran, which is understood by Muslims to contain the last precise words of Allah, which were revealed to the Prophet Muhammad in Arabic by Angel

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[153] *Gen.16:13*

[154] Surah *Ikhlas*.

Gabriel over a period of 22 years (A.D. 610-632). As the word of Allah, the Quran is immutable. Since its revelation, the text of the Quran has not changed even in minutest detail. The Quran is divided into 114 *surahs* (chapters), which are in turn comprised of *ayah*, which is equal to a verse, and its exclusive content is instructions from Allah. For example, the Quran teaches that human beings are utterly responsible to Allah for all that they do or say. Disobedience can be forgiven through confession and prayer directly to Allah. Allah is the Creator and sustainer of His creation, and He defines right and wrong by decree. Only submission to the will of Allah is the norm for the Muslims to secure eternal salvation.[155]

The Quran contains two kinds of rules, general and specific. The general rules are far more numerous. The specific rules tend to deal with matters of worship or with matters relating to family, commercial, or criminal law. Other matters, including those in the area of constitutional law, governed by general rules. Since general rules, by their very nature, require interpretation before they can be applied to specific contexts, they are the source of a fair amount of

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[155] Doi, A. R. *Introduction to the Quran*, Islamic publications, Nigeria, 1971, pp.40-45.

flexibility. Therefore, the Quran's predominant reliance on general rules has been viewed by *faqih* (jurists) as an indication of divine mercy and a wish to facilitate for Muslims the practice of their laws throughout the ages.[156]

A *faqih* is a jurist or a person skilled in Islamic law (*shari'ah*). One needs to distinguish between *'ilm* which means knowledge, and *fiqh,* which requires both intelligence and independent judgment. Thus, a man may be an *'alim* (learned one), but to be a qualified *faqih*, he must possess the capacity to distinguish the correct and binding rules of Islamic law from the weak and non binding opinions. A *faqih* not only addresses such basic matters as distinguishing between specific and general rules, but goes farther to derive from the general rules, of the Quran and the other sources of Islamic law the rules best suited to the relevant epoch and community. A noteworthy classical example of how the *faqih* derives and follows the instructions of the Quran and the prophet's Tradition (*hadith*) is as follows: "The Prophet sent Mu'adh, one of his Companions, as governor of a province and also appointed him as the distributor of justice. No trained lawyers existed

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[156] Hasan, A. *op.cit.*

then and the Prophet asked:

"According to what shalt thou judge?" He replied:

"According to the Tradition of the Messenger of God."

"And if thou findest nought therein?"

"Then I shall strive to interpret with my reason."

And thereupon the prophet said: "praise be to God who has favoured the Messenger who is willing to approve." This is an excellent example that shows and emphasizes the principle that the exercise of independent judgment, within certain limits, is not only permissible but praiseworthy.[157]

According to this example, the Quran is the first and the main source of Islamic law. Every human action without exception has its qualification in Islamic law and would fall under one of the five rules *(al-ahkam al-khamsah*). These five rules cover all human actions and deeds, whether they are devotional, civil, criminal, private or public.

The Islamic theory, God is the Sovereign of the Community of believers; He is its ultimate Ruler and Legislator. The Revelation and

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[157] Fyzee, *op.cit.* p.19.

Divine Wisdom are the primary sources of the developing public order, presuming to meet the community's growing needs and expectations.[158]

These legal norms (*al-ahkam al-khamsah*) are as follows:

1. Strict Command (*fard* or *wajib*), which means an obligation which is strictly enforced by law (for example: prayer, fasting, pilgrimage, etc.). If a person avoids it willfully, he will be punished however he or she performs it regularly, he or she will be rewarded.

2. Strictly forbidden (*haram*), which means unlawful. These are actions which should be avoided if at all possible (for example stealing, lying, drinking alcohol, using drugs, etc.), if they are done without extenuating circumstances, Allah's punishment will be earned; if avoided, there will be reward.

3. Approved action (*mustahab*), which means recommended. Included are all acts which individuals are advised to do for their

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[158] Khuddari, M. *The Islamic Conception of Justice*, John Hopkins, 1984. p.3.

personal benefit. Examples of this kind would be: washing the mouth out when making ablution, rinsing the nose, additional prayers during Ramadan, etc.

4. Refrain, dislike (*makruh*), which means to be discouraged. It is better to avoid these actions; if avoided, a person receives a reward; yet if committed, there is no punishment either. It includes all acts which individuals are advised to refrain from for their personal benefit.

5. Indifferent (*mubah*), which means permissible. It includes all acts about which *shari'ah* is neutral. Muslim *faqihs* (jurists) have agreed upon a number of basic principles of *shari'ah*.

6.2. Change in Time, Place and Circumstance

A major principle of Islamic jurisprudence is that laws may change with the passage of time and the change of place or circumstance. Properly understood, this principle permits a *faqih* (jurist) to examine a specific *ayah* (verse) in light of both the attendant circumstances of

its revelation and its meaning to determine the scope and significance of the *ayah* in general, or with respect to a specific situation at hand. A corollary of this principle is that a change in law is permitted whenever a custom on which law is based changes.[159]

6.3. Necessity/ Avoidance of Haram

This principle has also been stated in terms of choosing the lesser of two evils. Several Quranic *ayats* (verses) as well as the *hadith* clearly permit otherwise prohibited actions in the case of necessity or threat of severe harm. Some *ayats* (verses) state that Allah will forgive anyone who breaks the law under duress. A famous saying of the Prophet is that Islam is a religion of facilitation and not complication.

6.4. Cessation of Cause

Whereas Islamic law applies to specific factual situations, the

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[159] Hasan, A. *op.cit*. p.13.

existence of the law itself is dependent on the continued existence of that factual situation. For example, the Quran encouraged Muslims to give a certain group of Arabs, called *al-muallafutu qulubuhum,* a share of the charitable donations paid by Muslims. This group consisted of leaders of local communities who were either not Muslims or whose belief in Islam was weak. The share was assigned to them in order to bring them closer to Islam. But after the death of the Prophet, Khalifah Umar Ibn AL-Khatab refused to continue the practice on the basis that it was predicated on Islam's initial weakness. Since Islam had become strong, the Khalifah Umar concluded that the practice was no longer justifiable.[160]

6.5. Public Interest[161]

Islamic laws must remain in accord with public interest. If they do not they must be re-examined and re-formulated. Furthermore, if the public interest changes, Islamic laws must do so accordingly. Despite

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[160] *ibid.* pp. 23-67.

[161] Ibn Taymiya, *Public Duties in Islam: The Institution of Hisba*, Islamic Foundation, 1982. pp.19-59.

the fact that from its dawn, Islamic law caused a clear change in the Arabian Peninsula's religious life, Islam is not a religion of abrupt change. Islam itself professes to be a continuation of the teachings of Abraham, Moses, Jesus, and other prophets. Islam also proclaims that the Prophet Muhammad is the last of these prophets. Furthermore, the Allah of Islam is the same as the God (Jehovah, Yahweh) of Judaism and Christianity.

The Quran was not revealed all at one time. Rather, it was revealed gradually in accordance with the needs and capabilities of society. For example, Arabs consumed substantial amounts of alcohol in pre-Islamic times. Hence, the Quranic prohibition was only advisory: they ask thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; But the sin is greater than the profit." They ask thee how much they are to spend. Say: "What is beyond your needs." Thus doth Allah make clear to you His signs: in order that ye may consider." (Quran 2:219). Then it was made binding, but only at the time of prayer, "O ye who believe! Approach not prayers in a state of intoxication, until ye can understand all that ye say" (Quran 4:43).

Later the prohibition became absolute. "O ye who believe! Intoxicants and gambling, sacrificing to stones, and (divination by) arrows, are an abomination of Satan's handiwork: Eschew such (abomination) , that ye may prosper" (Quran 5: 90).

Gradualism is an important feature of Islamic law. It applies to many aspects of Islamic life, but not all. There was no gradualism, for example, in Islamic rejection of idol worship or the belief in more than the one god. These matters are so fundamentally inconsistent with Islam that a gradual approach was inapplicable to them. From this, one can conclude that legislative power rests initially with Allah, but only in sofar as general principles, creeds and rituals are concerned. Some of these general principles are:

<u>The principle of Justice.</u>

Legal norms are to be applied equally for everybody regardless of race, religion, colour, and social status. "Allah commands justice, kindness and giving their due to kinsfolk. And He forbids all shameful deeds (lewdness, indecency), and abomination (anything which normal

human nature rejects) and wickedness. He instructs you in order that you may take heed" (Quran 16:90). Again, Allah through His Holy Book instructs the judge to be just: "Allah orders you to restore things entrusted to you to those to whom they are due; and when you judge between man and man, that you judge with justice" (Quran 15:58). Indeed, Allah orders judges to stand out firmly; "0 you who believe! Stand out firmly for justice as witnesses to Allah, even as against yourselves or your parents or your kin, and whether it be against rich or poor--Follow not the lusts (of Your hearts) lest you swerve. And if you distort justice, verily Allah is well acquainted with all that you do" (Quran 49: 13).

Respect for life and human dignity.

According to Islamic law, everybody is born innocent and remains in this status until proven otherwise. "0 mankind, we have created you from a single [pair] of a male and a female and made you into nations and tribes, that you may know each other. Verily, the most honoured among you in the sight of Allah is [he who is] the most righteous of you. And Allah had full knowledge and is well acquainted with all

things" (Quran 39:13).

"And do not take life, which Allah has made sacred, except for a just cause" (Quran17:33). Thus Islamic laws are prescribed in the interest of the people and for their own protection. Their goal is to preserve not only their own lives and dignity, but also their properties and freedom. Generally speaking, all Muslims believe that Islamic laws were provided by Allah through His Messenger, the Prophet Muhammad, to govern the life of the people individually and collectively, meaning, in respect of personal and communal affairs. One can conclude that the most important characteristic of Islamic laws is that they are part and parcel of the religion itself. It comes from within--from the depth of the Muslims' faith and their sentiments concerning Islam.

Unlike the Western legal system, where legislators write the laws and the people comply with the laws only to avoid penalties and punishment, Islamic laws are self-motivating; they must be observed by the Muslims internally. This means that Muslims must obey these laws because the legislator is Allah Himself; and the punishments are

not earthly, but in Heaven. This factor also leads Muslims to refrain from violating these laws. Consequently, unlike in the Western societies, the rate of crimes is usually very low. Thus, it is not the police, or jail, or for that matter any kind of punishment, that counts; Muslims demonstrate without doubt that the internal observance of these laws is the most effective way to protect society from any kind of crimes. Certainly, such strict observance of these laws is the outcome of a strong faith in Allah and a strong belief in the idea that all these laws for the benefit of all people and that they are divine laws. Khadduri (1984) points out that:

> The principle and maxims of justice derived from the Revelation and Divine Wisdom were considered infallible and inviolable, designed for all time and potentially capable of application to all men. In principle, the law laid down by the Divine legislator is an ideal and perfect system.[162] Submission to these laws comes from the meaning of the word Islam. Islam means submission to Allah. Consequently, the notion of submission to Allah, through accepting the fact that Allah is the Creator, is the most fundamental requirement of Islam. Indeed,

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[162] Khadduri, p.3.

Muslims strongly believe that all things between earth and heaven are Muslims by the nature of their submission to divine laws. Yet man is different from the rest of the creatures in one respect. Unlike animals and other creatures, man possesses free will to a large degree. Therefore, man has the ability and capability to observe the unity of the universe while submitting to Allah. To do so completes that unity and integrates all into the concerted movement of things toward Allah in accordance with His Will. Characteristics of the Islamic Law: *Shari'ah.*

Divinity

Allah has disclosed Himself through revealed law and communicated His will and justice to all people through His Messenger, the Prophet Muhammad, while the Western laws in general have been made by men (legislators). Each part of Islamic law reflects with clarity the genius of its legislator, whereas the Western laws reflect the limitations, weaknesses, and the shortcomings of their legislators. Consequently Western laws are constantly in a state of change and modification, or what is usually called legislative evolution in response

to certain changes in society and communities. Although Islamic law has been in existence for more than fourteen centuries, during which time philosophical ideas, sciences, and societies have changed greatly, yet this law is still valid and perfect, due to the fact that it reflects its creator. It reflects Allah's inimitable knowledge of all that is in being. It was compiled by the All-knowledgeable, the All-capable Allah in a way that not only suited the past, but also suits the present, and will suit the future.

Despite all the changes that have occurred during the past fourteen centuries, Islamic law, owing to its excellence, continues to be applicable, and has proven to be in advance of any social standard at any time. Quranic injunctions are still more convincing when viewed today. For instance, Allah says: "And consult the people [Islamic laws] in their affairs . . . . " (Quran 3:159). And "Their affairs are [conducted] by mutual consultation" (Quran 42:38). Further: "Help you one another in righteousness and piety, but help ye not one another in sin and rancour" (Quran 5: 2).

These verses from the Quran show the extent of generality and

elasticity beyond which one cannot go. Islam declares that there is no sovereignty except that of Allah. Consequently, it does not recognize any law-giver other than Him. The concept of Oneness (*tawhid*). Which is found in Holy Quran, is not limited to reciting an article of faith, performing rituals, or defining dogmas. These have a place in Islam, but the concept of oneness embodies Allah's absolute legal sovereignty in the same sense in which that term is understood in jurisprudence and political science. This aspect of legal sovereignty of Allah is clearly emphasized in the Quran by its insistence that *tawhid,* the concept of oneness, embodies both the dogmatic aspect of the divine unity and the recognition of Allah's absolute legal sovereignty. These two aspects are so vitally interrelated that negating either of them ends in the negation of both.

Islam leaves no room for the impression that the divine law means merely the law of nature and nothing more. On the contrary, Islam builds the entire edifice of its ideology on the basis that man should derive his ethical and social life from the law which Allah has communicated through His prophets. It is this submission to the divinely revealed injunctions and the surrender to its injunctions which

distinguishes the Islamic legal system from the Western legal systems. It denies, from the beginning, that man is right to conduct his ethical and social life apart from the divine will. Nasr (1981), one of the Muslim scholars, writes: "Divine law is an objective transcendent reality, by which man and his actions are judged, not vice versa . . . ."

To attempt to shape the Divine law to the "times" is, therefore, no less than spiritual suicide because it removes the very criteria by which the real value of human life and action can objectively be judged and thus surrenders man to the most infernal impulses of his lower nature.[163] In the Islamic view, opting for the divine legal system frees man from being a victim of other men's desires, weakness, and self-interest. It is geared to protecting him from being prey to any attempt of others to gain advantage by means of legislation for the benefit of a certain individual, family, class, race, or party. The ordainer of the Islamic legal system is Allah, the Lord of all. He does not legislate for His own sake or for that of one class of mankind in preference to another, one race in preference to another, or one party in preference to another. In the Islamic penal system all punishments and retribution

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[163] Nasr, H. *Islamic Thought and Life*, George Allen, 1981. p.26.

derive ultimately from Allah. Human agencies may be entrusted with authority to inflict punishments in certain cases, but Allah's overriding power to punish remains unaffected. The ways and means of divine punishment are numerous and varied. The divine penal system differs from man-made penal systems in its nature. In man-made penal systems the threat of penalty is physical, while in the divine penal system, physical and metaphysical punishments are combined. The latter warns offenders who could escape the eyes of the law in this world that Allah's surveillance is everywhere, and a severe punishment awaits them on the day of judgment.

This is innate in the individual--his conscience--prior to his external or physical form. Unlike man-made laws, therefore, the impact of Islamic law on those who believe in it beyond the physical experience of punishment, beyond the feeling of being observed by policemen or any other agencies. The impact of Islamic law on the community consists in an internal observance of the law as a safeguard against committing violations against it. The law itself addresses consciences and spiritual sensitivity rather than being a matter of orders and commands regarding this temporal life. Islamic law purports to prevent evil acts

not only by the observation of man by fellow man, but also by the observation of man by Allah. That is because hiding violations is easy, but Allah, who knows what man conceals in his heart, is aware of every violation as it occurs against His law.

A Muslim man who is in a position to make mischief without being caught and punished almost always will abstain from such deeds for fear of punishment in the afterlife and in order not to provoke the anger of Allah upon himself. Such a belief helps in curtailing crimes and maintaining security and order in society. Man can be deceived, but the situation is different when the one who intends to violate the divine law remembers that Allah is observing him wherever he goes. Thus, if somebody is capable of committing a crime without being subjected to any legal prosecution, he will have no restraint, either moral or religious, to stop him from commiting his crime. This is a reason why in Western nations applying man-made legislation, crimes rates are very high. The basic concept of law in Islam is very much related to its concept of good (*hussnn*) and evil (*qabih*). Muslims believe that man, in his weakness, cannot understand what is good and evil without being guided by divine revelation. Good and evil, as

Muslims define them, must be taken into consideration in deciding any legal matter in Islam.

Who has the right to determine what is good and what is evil? The people's opinions in determining this matter differ from one to another according to their different philosophical and ideological beliefs. This matter is solved, as far as Muslim jurists are concerned, by divine inspiration, not by human beings alone. That is to say, good and evil are determined only by Quranic and prophetic texts. From these two major sources, the injunctions of the Quran and the Sunnah, whatever Muslims consider good or evil is deduced either directly or by way of inference.

Universal and Comprehensive

Islamic law is characterized by its unique universality and comprehensiveness. It was disclosed by Allah to His Messenger Muhammad for the propagation of Islam to all peoples, Arabs and non-Arabs, Easterners and Westerners. It's a system of legislation

relevant to each family, each community, each nation, and in fact, it is the universal legislation which human canons of law could perceive but could not make. Allah says: "Say [ye, Muhammad]: O men! I am sent unto you all as the Apostle of Allah" (Qruan 7: 158), and "It is He who hath sent His Apostle with guidance and the Religion of Truth to proclaim it all Religion" (Quran 9: 33). Although Allah revealed the Quran in a short period or time, His law is complete and comprehensive. If any judge, Eastern or Western, scrutinizes the Islamic law, he or she will find it complete and comprehensive. Indeed, the four main divisions of Islamic law embrace and organize all aspects of life: (a) *ibadat*, or rituals; (b) *mu'amalat*, civil law (commercial activities, acquiring, holding and disposal of property, etc.); (c) *munakahat*, or family law (marriage, divorce, inheritance, etc.); (d) *'uqubat*, or penal law. In fact, Islamic law was not revealed just for certain cases; and certain laws were not revealed just for certain cases or certain times. It is intended for all people, regardless of their religion, colour, language, or origin. It was valid fourteen hundred years ago; it is valid today, and it will be valid until the end of this world.

Code of life

In order to comprehend the elasticity of the Islamic laws, it is necessary to understand, to some extent, how much such a system impinges upon Muslim social life. Is its influence limited only to fundamentals and basic principles, or does it control all details and routine matters of the life of Muslims ? It is a fact that no one who possesses deep knowledge about Islam will claim that the Quran and Sunnah cover all the minute details of the Muslim's social life. The role of the two main sources of the Islamic law is to outline fundamental principles and to demarcate ideological boundaries. Having done that, the sources allow full freedom to pursue lives within that framework, keeping strictly in view the true spirit of Islam which leads towards its ultimate objectives.

The most important principles embodied in the Quran and the Sunnah are:

(a) equality and human brotherhood;

(b) forbidding aggression and promoting peace;

© protecting human free will in business and promoting the role of private ownership and the obligation to fulfill contracts; and

(d) distinguishing between public and private rights in matters relating to penal systems.

The unalterable elements of Islamic law are those unambiguous laws revealed in the Quran as reported in the authentic Sunnah, for example, those in which drinking alcohol, interest-taking, gambling, stealing, and killing are prohibited.

Muslims believe that Allah is the only perfect Being and that His law participates of His perfection. It cannot be otherwise, for it is impossible. Allah is the knower of all things. His law is comprehensive, universal, and for all times. It combines not only what law is, but also what law ought to be. The Islamic law is a complete code of life. It embraces the legal and social orders, which take into consideration not only the well-being of humanity in this world, but

also in the hereafter. It deals with all aspects of life. It is, thus, an organic whole, parts of which cannot be treated or dealt with in isolation from one another. To function successfully, the whole system must be applied to human life in order that its merits may be demonstrated.

Muslims claim that Islamic law has its own ethical norms of good and evil, virtue and vice, and standards by which it assesses and evaluate all human actions and transactions, thereby ensuring the uniformity of the society. It has the character of a religious obligation to be fulfilled by its followers voluntarily without external enforcement. Believers in Islam comply with its commands even if they reside outside of the Islamic countries. They believe that its jurisdiction cannot be limited by geographical boundaries. Islamic law takes into consideration, primarily, the rights of the community. The personal rights of individuals are protected in so far as they are not in conflict with the rights of the community. In the case of the antinomies (paradoxical contradictions) which surround human life, Islamic law always adopts the middle course. It brings about reconciliation between such antinomies which otherwise would obstruct the operation of the law

and interrupt the social order.

6.5. Objectives of the Islamic Law

Generally speaking, the objectives of Islamic law are numerous: to organize and guide the community, to show the people the right way to behave and the right way to treat each other, and to establish order and security.

Furthermore, Islamic law organizes matters concerning individuals, societies, governments and administrations, and political affairs as well as other matters concerning nations and their relations with others during war and peace. Because of this, the provisions of Islamic law were far more advanced than the standards of other communities at the time Islamic law was inspired. It is still ahead of our time. It is exemplary of perfection; its main objective is to lead all people, regardless of their origin, race, religion, or language, to do good deeds (*'amal salih*) and to avoid bad deeds (*'amal quabih*) in order to achieve happiness and a noble standard that is required by Allah's law. There are two kinds of objectives: general and specific.

General Objectives

Islamic law, as a integrated body consisting of social and spiritual factors, seeks to accomplish tranquillity and peace of mind for its subjects. Its approach to achieving its goals differs from that of Western legal systems, incorporating both spiritual and social means. The former represents the internal sentiment of human motives which govern and control the latter, because the social aspects of any society are, presumably, a reflection of its internal spiritual and moral norms. Thus, the main and overall objective of Islamic law is to construct human life on the basis of purity and virtue by eliminating and preventing social vice. That is to say, the major objective of Islamic law is in joying what good (*al 'amr_bi al-ma'ruf*), and forbidding what is evil (*al -' amr Al - munkar*). The term *ma'ruf* denotes all the virtues and good qualities which have always been accepted by the human conscience. Conversely, the term *_munkar* denotes all the sins and evils which have always been condemned by human nature.

Islamic law gives a clear view of what is virtue and what is vice and

describes them as norms according to which the behaviours of individuals are categorized. The objective of the law is to construct the entire scheme of human life in a manner which makes virtues flourish and vices die. To accomplish this end, Islamic law embraces within its code all the factors that encourage growth of the good and the virtuous, and it strongly recommends the removal of impediments thereto.

Muslims believe that through His revealed laws, Allah has provided man with regulations to guide him in living and associating with others properly and peacefully. The objectives of Islamic law are based upon the fact that man has the right to fulfill all of his genuine needs and desires and to make every conceivable effort to promote his own interests to achieve success and happiness. All this he should do in a manner compatible with Allah-revealed laws, a manner that does not jeopardize of their rights and duties. Islamic law does not only make demands. There should be all possible social cohesion, mutual assistance, and cooperation among human beings in the achievement of these objectives. The basic approach of Islamic law, in respect to matters in which good and evil, gain and loss are inextricable

intertwined, is the choice of little loss for the sake of greater gain and the sacrifice of a small benefit to avoid greater harm.

Specific Objectives

According to Muslim belief, the ultimate objectives of Islamic law are known to Allah alone. However, jurists who have carefully studied Islamic jurisprudence have determined five basic objectives which enshrine basic values and are to be protected by the law. These are: life, intellect, property, honour, and conscience. Islamic law, generally speaking, seeks to protect and promote these five values as basic human rights.

Protection of Human life.

The first and foremost value is human life. All sources of Islamic law strictly prohibit transgression against human life, whether in the form of unnecessary killing, suicide , infanticide, or abortion. Islam regards life as a trust of Allah granted to a human being; hence, a person cannot rightfully destroy it, whether it is his own or someone else's

life. In fact, Islamic law prohibits the unecessary destruction even of animal life. Thus, killing or mistreating animals just for sport or amusement is against the spirit of Islamic law. Further, Islamic law does not allow capital punishment except within the framework of the due process of law, thus protecting the life of the greatest portion of society. Therefore, if a person has committed murder knowingly and willingly, he should receive capital punishment for the benefit of society.

Protecting of Human Intellect.

The second value which is emphatically protected by Islamic law is the human intellect. The human mind and intellect are the highest values after life; they are the characteristics which distinguish human beings from the lower animals. The intellect is, again, an Allah-given gift that should not be destroyed or weakened. Subjecting it to destruction or weakening violates Islamic law and is legally and religiously punishable. This is the reason that Islamic law strictly prohibits intoxication. All addictive substances, intoxicating drugs, and alcoholic beverages are totally forbidden by the law. Ironically,

many societies in the modern world have recognized the resultant evils because of which Islamic law prohibits all addictive drugs, but they lack the willpower and courage to forbid them. In the United States of America, for instance, it is estimated that there is one death every 20 minutes which may be attributed to alcohol. More than $120 billion is lost every year on alcohol and alcohol-related problems. Alcohol and other intoxicants are drastically destroying many lives, minds, families, and resources, but few have the courage to say "no" to them. Legislators, instead of totally banning these devastating substances, have only restricted drivers from operating motor vehicles while being intoxicated. It is to be hoped that this recent step will lead to further effective ones, not only through moral and motherly perorations, but also by forceful legislation.

Protecting of Human Property

The third value which is objectively protected by Islamic law is property. Islamic law tends to protect possessions of all kinds. Sources of Islamic law vehemently condemn misdealing with one's own wealth and property, let alone that of someone else. Stealing, pickpocketing,

robbery, gambling, and cheating are taken to be outrageous crimes. The goal of Islamic law in punishing those who are found guilty of committing these crimes is to create a healthy atmosphere for economic and commercial development and competition without resorting to dubious means.

Protecting of Human Honour.

The fourth value which Islamic law stands to protect is honour. Human dignity and decency are highly regarded, morally and legally. Man by definition, regardless of his origin, colour, race, or belief, has been honoured by Allah. Man inherited this honour merely by Allah's vicegerent on earth. Undermining human dignity is a violation of the divine will.

"We have honoured the sons of Adam; provided them with transport on land and sea; Given them for sustenance things good and pure; and conferred on them special favours, above a great part of our Creation." (Quran 17:70). Islamic law prohibits all types of depreciation or degradation of human dignity. From this perspective, Islamic law

demands and stresses proper dress and proper behaviour both in public and in private for men and women. Marriage, Islam is convinced, is the only honorable outlet for the human sexual urge. Sex outside marriage is a depreciation of the humanity of the human being. It is vehemently condemned by decent people and is punishable by law in Islam.

Islamic law is also opposed to pornography and the exploitation of the female. Those who deal in pornography are viewed as evil-minded and avaricious. They make a living at the expense of human dignity by destroying the moral fabric of the society. They commit crimes in the name of freedom and art, claiming that society will be dull and devoid of pleasure unless such behaviour is allowed. In fact, they destroy families and promote violence, delinquency, rape, and murder in plying their trade. Islam forbids these immoralities and calls for honorable and dignified enjoyment, and healthful and moral entertainment.

Protecting of Human Conscience.

Islamic law seeks to protect the human conscience. The word conscience in this regard stands for freedom of religion and worship. Islamic law is against imposing any dogma of faith upon human beings. It is against compulsion and coercion in religious matters. Islamic law wishes to create an atmosphere of freedom, for whenever there is freedom, there is a greater chance for the teachings which Islam espouses to reach the masses.

These are the basic values that Islamic law objectively stands to protect. Anyone who studies Islamic Law will find that, basically, all of its sources are oriented either towards protecting these rights or towards promoting and perpetuating their existence. It is also remarkable that within each and every branch of Islamic law, there are specific objectives. The objective of Islamic penal law, for example, is to deter those who have a tendency towards committing crimes. Thus it puts away the evil from the midst of society. While such putting away of evil is applied in the case of the most effective and total elimination, namely capital punishment, the principle underlying

the elimination of evil provides a theory of punishment applicable to all criminal sanctions. It means that the act of punishment is not so much directed toward the individual offender, who is not unavoidably its victim, as it is a demonstration of disapproval of that particular mode of conduct.

Retribution (*qisas*) is inflicted on the offender not so much for his own sake as for the deterrence of others. From the viewpoint of the divine penal system, the deterrent aspect of *qisas* is the most important. People who hear and see or read about an individual heavily punished or being executed for his offense are supposed to be deterred from committing the same or a similar offense, thereby incurring the risk of receiving similar punishment. Hence, the need for the criminal to be executed in a particular place in front of the masses, or to be placed on a stage after having been put to death, and to publicize the execution as widely and impressively as possible.

Every legal system is necessarily a purposeful enterprise. According to the theological school, law is but the product of human reason and is intimately related to the notion of purpose. Although this is not quite

true as far as divine law is concerned, all divine legal systems regard justice as the supreme task for human life. Public morality is one of the most important of human elements to be protected by law. Any legal system which is heedless of morality is not worthy of enduring and cannot survive for long; it will ultimately be cast aside.

The Islamic laws are meant to help all people to obtain happiness in this life and in the life hereafter. Thus, all deeds in life have their connection to worship. Any worship or civil, penal, constitutional, or international act has its repercussions on this life; it might be the fulfilment of a task, the establishment or nullification of a right, the imposition of a penalty, or incurring a responsibility. Yet, any such act which has its effects in worldly life has another consequence in the life hereafter. For instance, a criminal is punished by death or by the chopping off of his limbs, or by any other kind of punishment, all these are worldily punishments to be added to even more severe punishment on the Day of Judgment.

"Allah says, The punishment of those who wage war against Allah and His Apostle and strive with might and aim for mischief through the

land is; execution, or crucifixion, or cutting off hands and feet from opposite sides, or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter" (Quran 5: 33).

Further, scandalous tale bearing, and the accusation of a chaste woman are punishable both in this world and in the hereafter. Allah says, "Those who love [to see] scandal published broadcast among believers will have a grievous penalty in this world and in the Hereafter" (Quran 24:19).

And again, Allah says:

"Those who slander chaste women, indiscreetly but believing, are cursed in this life and in the Hereafter: For them is a grievous penalty. On the day when their tongues, their hands and their feet will bear witness against them as to their actions. On that day Allah will pay them back [all] their just dues, and they will realize that Allah is the [very] Truth, that makes all things manifest" (Quran 24:23-25).

Intentional murder has two penalties: retaliation in this world and torture in the hereafter. Allah says, "ye who believe, retaliation is prescribed to you in cases of murder" (Quran 2:178). And "If a man kills a believer intentionally, his recompense is hell, to abide therein [forever]" (Quran 4: 93). Indeed, one cannot find a judgment in accordance with Islamic law without entailing a consequence in the hereafter. Such a law that combines the secular and religious has not been haphazardly legislated. It is, in fact, a result of the general logic of Islamic law, which considers this world merely a temporary one, while the hereafter is the eternal one. Islamic law assumes that man is solely responsible for his actions in this life and that he shall always have his recompense for the same at least on the Day of Judgment. If he does a good deed, it is for his own credit, and if he does bad, he shall pay for it in both worlds. Once Ali Ibn Abi-Talib asked the Prophet Muhammad about his lifestyle. The Holy Prophet answered: Knowledge is my capital; intellect is the basis of my religion; the love of Allah in my foundation; the yearning after Him is my vessel; remembering Him is my companion; confidence in Him in my treasure; science is my armament; patience is my garb; satisfaction is my booty; Truth is my intercessor; obedience is my love; striving along Allah's

way is my ethics; and the delight of my heart lies in prayer.

When all Muslims acquire such a personality that they all behave in a certain recognizable manner, the society so formed would have a collective Islamic personality and would be distinguished by its high moral standards. In such a society, crime would be extinct and people would need no police force or any kind of coercive agency to enforce the law.

CHAPTER SEVEN

Application of Islamic Law in Saudi Arabia

7.1. The Role of Usul al Fiqh in Saudi Decision-making

Saudi Arabian law is based on Islamic law, therefore it is impossible to separate the two. This chapter therefore provides the basic principles which underpin the decision-making process in Saudi Arabia. The process has evolved over a period of fourteen hundred years since the advent of the Prophet Muhammad's mission. Essential to the process is *usul al fiqh,* which has been most mis-understood in the West.

Usul al fiqh, or the roots of Islamic law, expound the indications and methods by which the rules are deduced from their sources. These indications are found mainly in the Quran and Sunnah, which are principal sources of the *shari'ah*. The rules of fiqh are thus derived from the Quran and sunnah in conformity with a body of principles

and methods which are collectively known as *usul al fiqh*. Some writers have described *usul al fiqh* as the methodology of law, a description which is accurate but incomplete. Although the methods of interpretation and deduction are of primary concern to *usul al fiqh*, the latter is not exclusively devoted to methodology. To say that *usul al fiqh* is the science of the sources and methodology of the law is accurate in the sense that the Quran and Sunnah constitute the sources as well as the subject matter to which the methodology of *usul al fiqh* is applied. The Quran and Sunnah themselves, however, contain very little by way of methodology, but rather provide the indications from which the rules of *shari'ah* can be deduced. The methodology of *usul al fiqh* really refers to methods of reasoning such as analogy (*qiyas*), juristic preference (*istihsan*), presumption of continuity (*istishab*), and rules of interpretation and deduction. These are designed to serve as an aid to the correct understanding of the sources and *ijtihad*.

To deduce the rules of *fiqh* from the indications that are provided in the sources is the expressed purpose of *usul al fiqh*. *Fiqh* as such is the end product of *usul al fiqh*; and yet the two are separate disciplines. The main difference between *fiqh* and *usul al fiqh* is that

the former is concerned with knowledge of the detailed rules of Islamic law in its various branches, and the latter with the methods that are applied in the deduction of such rules from the sources. *Fiqh*, in other words, is the law itself whereas *usul al fiqh* is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to a language, or logic (*mantiq*) to philosophy. *Usul al fiqh* in this sense provides standard criteria for the correct deduction of the rules of *fiqh* from the sources of the *shari'ah*. An adequate knowledge of the *fiqh* neccessitates close familiarity with the sources. This is borne out in the definition of *fiqh*, which is 'knowledge of the practical rules of *shari'ah* acquired from the detailed evidence in the sources.' The knowledge of the rules of *fiqh*, in other words, must be acquired directly from the sources, a requirement which implies that the f*aqih* must be in contact with sources of the *fiqh*. Consequently a person who learns the *fiqh* in isolation from its sources is not a *faqih*. The *faqih* must know not only the rule that misappropriating the property of others is forbidden but also the detailed evidence for it in the source, that is, the Quranic *ayah* (2:188). This detailed evidence, as opposed to saying merely that theft is forbidden in the Quran.

Knowledge of the rules of interpretation is essential to the proper understanding of a legal text. Unless the text of the Quran or the Sunnah is correctly understood, no rules can be deduced from it, especially in cases where the text in question is not self-evident. Hence rules by which one is to distinguish a speculative text from the definitive, the manifest (*zahir*) from the implicit (*nass*), the general (*'amm*) from the specific (*khass*), the literal (*haqiqi*) from the metaphorical (*majazi*) etc., and how to understand the implications (*dalalat*) of a given text are among the subjects which warrant attention in the study of *usul al fiqh*. An adequate grasp of the methodology and rules of interpretation also ensures the proper use of human reasoning in a system of law which originates in divine revelation. For instance, analogy (*qiyas*) is an approved method of reasoning for the deduction of new rules from the sources of *shari'ah*. How analogy should be constructed, what are its limits, and what authority would it command in conjunction, or in conflict, with the other recognised proofs are questions which are of primary concern to *usul al fiqh*. Juristic preference, or *istihsan*, is another rationalist doctrine and a recognised proof of Islamic law. It consists essentially of giving preference to one of the many conceivable solutions to a

particular problem. The choice of one or other of these solutions is mainly determined by the jurist in the light of considerations of equity and fairness. Which of these solutions is to be preferred and why, and what are the limits of personal preference and opinion in a particular case, is largely a question of methodology and interpretation and therefore forms part of the subject matter of *usul al-fiqh.*

The principal objective of *usul al fiqh* is to regulate *ijtihad* and to guide the jurist in his effort at deducing the law from its sources. The need for the methodology of *usul al fiqh* became prominant when unqualified persons attempted to carry out *ijtihad*, and the risk of error and confusion in the development of *shari'ah* became a source of anxiety for the Ulema. The purpose of *usul al fiqh* is to help the jurist to obtain an adequate knowledge of the sources of *shari'ah* and of the methods of juristic deduction and inference. *Usul al fiqh* also regulates the application of *qiyas*, *istihsan*, *istishab*, *istislah*, etc., whose knowledge helps the jurist to distinguish as to which method of deduction is best suited to obtaining the *hukm shar'i* of a particular problem. Furthermore, *usul al fiqh* enables the jurist to ascertain and compare strengths and weaknesses in *ijtihad* and to give preference

to that ruling of *ijtihad* which is in close harmony with the *nusus*.

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7.2. Classification of Hadd in Saudi Arabia

Saudi Arabian criminal law recognises seven major offences, each of which has a penalty prescribed in fixed terms in the Quran or the Sunnah. These offences are known to the *faqih* as the offences of *hudud*. In Islamic law all duties and obligations are divided into two categories: one is known as *haqq Allah*, and the other as *haqq adami*. As used in the Islamic legal sense, the word *hadd* (pl. *hudud*) means a punishment which has been prescribed by God in the revealed text of the Quran or the Sunna, the application of which is the right of god or *haqq Allah*.

In the penal context, a punishment which is classified as *haqq Allah* embodies three main aspects. The first is that this punishment is prescribed in the public interest; the second is that it cannot be lightened nor made heavier; and third is that, after being reported to the *Qadi*, it is not to be pardoned either by him, by the political

authority, or by the victim of the offence. The unchange ability of the *hadd* punishment is supported by the interpretation of the Quranic verse, "these are the limits of Allah. Do not transgress them." (Quran 2:229).

The offences generally recognised as offences of *hudud* are the taking of a life, intoxicants (including drugs), theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity, and opostasy.

7.3. Retribution and Hadd Punishments

In Saudi Arabia punishments have a clear retributive characteristic. The retributive function of *hadd* punishment is the one most commonly discussed by Saudi jurists, in addition to its deterrent function, to which we will shortly refer. Retribution is mentioned in the Qur'an as the purpose of punishment both in this world and in the Hereafter.[164] It is interesting to note that the Arabic word for retribution, *jaza*, in Quran'ic usage means both punishment and

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[164] Quran. 5:33.

reward.[165] This indicates that both punishment and reward are used as means for the same end, an approach which may be compared with a similar function of punishment and reward in modern philosophy.

In the Saudi Arabian penal system two points should be noted in respect to retribution as a feature of the *hadd* punishments: the severity of the punishment, and the prohibition of any mediation in respect to it; in other words, its mandatory infliction when the crime has been proved.

The penalties prescribed in Islamic law for the crimes of *hudud* are the most severe punishments known to mankind for such crimes. Still more severe punishments, however, were prescribed in English law, during the eighteenth and nineteenth centuries, for example, although today they no longer exist. The punishments described in Islamic law, on the other hand, which are still accepted by hundreds of millions of people, are implemented in Saudi Arabia, and, what is more, the demand of their application in other Muslim countries becomes stronger from time to time. According to some scholars, the severity

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[165] Quran 3:45.

of punishment is based on psychological considerations. In order to combat the criminal's inclination to break the law, Islam prescribed severe punishments which draws attention to the consequences of the crime, acting as a deterrent to its commission. The same explanation is given by 'Uda in his book on *Islamic Criminal Legislation*.

However, severity of punishment is a controversial point. On the one hand, some philosophers hold that "treatment" rather than punishment is what the criminal needs; on the other, some judges demand the reintroduction of severer penalties, including corporal punishment, in Western countries as the only means of controlling the increasing crime rate. No matter what view one holds on this point, there is no doubt that retributive punishment can be nothing but severe. It is for this reason, I think that the Muslim jurists justify the *hadd* punishments in terms of retributive penalties.

Nevertheless, the degree of severity is not and cannot be agreed upon. Saudi Arabian jurists justify the severity of the *hadd* punishments because they are prescribed by God; consequently, they cannot be objected to and are eternally to be considered the most suitable

punishments for the crimes for which they are prescribed. To emphasize the fact that God created people, defined what is right and what is wrong for them, and determined the suitable punishments for wrong-doing, they quote the Qur'anic verse."Should he not know what He created? And He is the Subtle, the Aware" (LX:14). Hence, to try to justify the *hadd* punishments in secular or, in other words, modern terms would take us beyond the scope of this study and might fail to achieve any meaningful consensus.

The second aspect in which *hadd* punishments seem to be retributive is the obligatory nature of the execution once the crime has been proved. In a well-known Hadith, the Prophet prohibited any meditation in carrying out the *hadd* punishments and indicated that even if his daughter Fatimah had committed a *hadd* crime, he would impose punishment on her like anyone else.

We interpret this prohibition of mediation or the requirement of obligatory implementation of the punishment as a retributive feature in *hadd* punishment. In other words, if mediation were allowed of the *hadd* punishments could be replaced by any other punishments,

their retributive effect would no longer exist. Hence, it may be said that the severity of the punishment and the requirement that it must be carried out, combine to give the punishment as full a retributive effect as possible.

Thus far only the role of retributive theory in relation to the general rules regarding *hadd* punishments has been discussed. But its clearer and more important influence appears in the approaches and views of jurists concerning some more detailed aspects. One of these relates to the question of imposing cumulative sentences on one offender *(ta'adud al-'uqubat*). Sentences may be cumulative when the same person has committed various offences before he stands trial or before being punished for any one of them. The offences committed by the same individual may either be of the same kind, e.g. theft, highway robbery and housebreaking, or of a different kind, e.g., theft, adultery, and drinking alcohol. In the first case it is agreed that the offender deserves one punishment for all his offences, while in the second case such agreement is lacking. Three schools, the Hanafi, Maliki, and Hanbali hold one position on this matter, while the Shafi'i school takes a different view. With its non-recognition of the practice of abrogation

(*jabb)*, to which we will return later, the Shafi's school understands the primary role of retributive theory in this context, maintaining that the offender deserves as many sentences as his offences. All the sentences earned are to be carried out, starting with those imposed for offences classified as *haqq adami*.

If, however, the offender has been sentenced to death for homicide (which likewise is *haqq adami*), then this sentence is to be carried out last; that is, the death penalty should be the last punishment, disregarding the classification of the offence for which it has been imposed. To explain this view, the Shafi'i scholars give the hypothetical example of an unmarried man who makes an unproven accusation of fornication and who commits *zina*, theft, armed robbery and homicide (for which two latter charges he has been sentenced to death). In this case, they say, the punishments are to be imposed starting with the lightest. Thus the offender should be punished first for the unproved accusation of fornication, second for *zina*, third for theft, and then he is to be executed for homicide, his execution covering the crime of armed robbery as well.

The Shafi's' view reflects their strong belief in retribution as the philosophy underlying the concept of *hadd* punishment. Their view is an application of the principle of *jus talionis* as explained by the retributionists, that is, "A man must be punished if he has performed an act for which he deserves a penalty. Further, he must not be given a lesser penalty than he deserves for his action."

The retributive theory also predominates in the Shafi'i and Hanbali positions relating to punishing an insane man whose guilt has been established by testimony. The assumption is, of course, that the offender has committed the offence while in full possession of his faculties and that he was sane when tried and sentenced. The onset of his insanity was after the pronouncement of the sentence but prior to its implementation. The Shafi'is and Hanabalis hold that in such a case the offender should be punished because he committed the offence while sane and therefore responsible for his action.

7.4. The Concept of Expiation

It has been said that retribution is often confused with expiation. The

expiatory view reflects the belief "that in suffering his punishment the offender has purged his guilt, has 'paid for' his crime, and that his account with society is therefore clear. This is the attitude for example which lies behind the commonly expressed reluctance to hold a man's record against him after his discharge from prison." The concept of expiation in Islamic law however has a different aim. Its purpose is not to clear the person's account with society but with God. The Arabic word for expiation is *kaffara*, which is mentioned in the Qur'an in relation to such matters as accidental homicide, swearing a false oath, and failing to observe religious duties during the hajj or pilgrimage. But these cases, except for that of accidental homicide, are clearly not connected with the penal system of Islam; rather, they are all concerned with mans relationship to his Creator. Even in the context of the *hadd* punishments, when expiation is mentioned, it refers to man's relationship with God and not with his fellow citizens or society. It is narrated that the Prophet said "Whoever commits a crime deserving hadd and receives its punishment, this will be its expiation," that is to say, the offender who has been punished in this world will not be punished in the Hereafter. Thus it is obvious that the concept of expiation known in Western law, for it is one which is

essentially religious and which cannot be considered as part of the theory of punishment in its legal context.

7.5. Deterrence and Hadd Punishments

According to Professor Blanshard, "Whatever else it may be, punishment is commonly supposed to be a deterrent of crime."[166] Deterrence is often characterized as a justification for punishment which looks to the future, i.e., to the prevention of crime. In this respect it is in contrast to the theory of retribution, which is often said to be a justification for punishment which looks to the past, i.e. to the offence as an event isolated from possible future events. Retributionists, however, may argue that their theory does not hold that an individual's punishment is wholly justified by an event in the past. It includes the contention that a man's punishment provides satisfaction to the victim of his offence and to others. This satisfaction, in the deterrence theory, is of relatively small importance. What is taken to be of supreme importance is that punishment prevents offences.

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[166] Blandshard, B. "Retribution Revised," in *Philosophical Perspectives on Punishment*, Madden, p.59.

The deterrent effect is known to have a dual impact. There is the general deterrent, i.e., the preventive effect of a penal system (or a particular aspect of it) on criminality in the population at large, as well as the particular deterrent, i.e., the inhibitive effect of the punishment of an individual. General deterrence is achieved by giving the actual punishment when it is inflicted, the widest possible publicity; individual deterrence involves making the offender reluctant to offend again, rendering it difficult to distinguish it from reformation which is supposed to achieve the same end. In some theories, a line is drawn between moral improvement or reformation which induce the offender to repudiate crime on moral grounds, and prevention which merely frightens him off. But others regard this frightening-off process as coming under the heading of deterrence.

Be that as it may, this is one instance of the lack of clarity of the boundary lines between the different theories of punishment, and it is this question of the frightening-off of the individual as a means of protecting society from crimes which raises major criticism against deterrence. It can also be suggested that the aim of deterrent punishment is to instil in the individual a respect for the law based on

his fear of the punishment which will follow if he transgresses. It can also be raised that the critical question of whether legally correct behaviour maintained for such reasons is worth having. The element of fear does already enter to a very considerable extent into the social training of all humans. This point was emphasized by Archbishop Temple when he said that this fear in no way derogates from the value of the sentiments we afterwards build on these foundations. They may begin as rationalisations for our real motives of fear, but they develop into sincerely held moral principles, to which, when they are matured, we cling in the face of the most appalling temptations and difficulties.

However, this is only one objection to the deterrent theory; philosophers often are engaged in putting forward and replying to many other objections. Although it may be interesting to participate in some of these arguments, It is the inclination of this researcher is to conclude that, in spite of all the objections against the deterrence theory, it is still widely recognized as a valid justification for punishment.

The recognition of the deterrence aspect in the Islamic penal system

is deeper and stronger than in other systems. Here deterrence is recognized as the predominant justification for punishments, particularly for *hadd* punishments. Mawardi, certainly influenced by the place given to the deterrence theory in Islamic legal works, defined the *hudud* as "deterrent punishments which God established to prevent man from committing what He forbade and neglecting what He commanded". If, as it was argued, deterrence is to be achieved by means of severe punishments, then we need not say much about the deterrence theory as the justification of punishment in Islamic law. But the fact is that punishment is justified because, according to the deterrence theory, it prevents the commission of further offences, both by the offender and by other members of the society. The dual notions of general and special deterrence are known to Muslim jurists and supported as one of the basic motivations behind the *hadd* punishments.

The most common example given by contemporary Muslim writers as evidence of the deterrent effect of the *hadd* punishments is the enormous decrease in the crime rate in Saudi Arabia since their reintroduction in that country. During the Ottoman administration of

the Arabian Peninsula, the *hadd* punishments were not applied. In the late 1920's, when the Saudis took over, they reintroduced them, ordering judges to implement the teachings of the Hanbali school in entirety, including those relating to penal law. Soon after this order, the crime rate fell noticeably. It is said, for example, that official figures, as presented at the end of this chapter indicate that the *hadd* punishments are extremely low in Saudi Arabia.

In this context it is interesting to note that a punishment similar to that prescribed in the Qur'an for theft has halted all types of theft in the Irish province of Ardoyne (Belfast). This was administered by the IRA and reported, understandably, as 'Rough Justice' in *The Times*. Moreover, and rather astonishingly, an American philosopher stated that touching a hot stove and getting painfully burned causes one automatically to refrain from touching a hot stove again. So, if pick-pockets were similarly painfully burned or cut by the purse they reach for, they would similarly stop picking pockets. It is the need for deterrent punishments and the belief in the validity of the deterrence theory which underlies both the American philosopher's view and the experience of the Irish Republican Army. The success of the Saudi

Arabian experience is also frequently cited as evidence of the effectiveness of *hadd* punishments.

Leaving aside the practical aspects, the jurists of all schools of Islamic law have laid great stress on the deterrence theory. According to Ibn al-Humam, the well-known Hanafu jurist, the *hadd* punishments are prescribed as general deterrents; but when an individual experiences punishment for one of the *hadd* offences, the aspect of individual deterrence comes into play. The same view is expressed by many of the commentators on the Qur'an. It is also agreed in Saudi Arabia, that all *hadd* punishments should be carried out in public in order to achieve the fullest deterrent effect. Because the Qur'an commands that the punishment for adultery be carried out in public, the jurists extend this command to all other *hadd* punishments. This, as mentioned above, is a clear application of the deterrence theory.

7.3. The Punishment For Theft

The punishment for theft is prescribed in the Quranis verse, "As for

thieves, both male and female, cut off their hands. It is the recompense of their own deeds, an exemplary punishment from Allah..." (5:38).

The jurists have defined theft as taking someone else's property by stealth. There is almost complete agreement on this definition among jurists, but they are not so unanimous concerning the value of the stolen property, how the hand should be cut off, and the question of the places from which the property is stolen, i.e. the problem of location. However, in Saudi Arabia these issues have been determined by the *Qadis*.

Statistics from a limited number of Saudi records suggests that capital punishment in Saudi Arabia is certainly a deterrent, over a period of ten years the number of thefts/rapes number 765 in a population of 17 millions, with 562 of those being carried out by non-citizens. When the figures are compared against educational class it is noticeable that those with the least education commit the most crimes, although amongst Saudis, those with average education commit the most crimes. Most drugs are found at seaports (50%), then comes boarders (40%), and lastly airports (15%). It is noticable that the figures reflects

that 66% of all crimes are committed by Muslims, 14% by Christians, and 20% by those of other religions.[167]

7.4. Drugs

By analogy Saudi Arabia has designated the taking, or being in possession of drugs a capital offence. Therefore it is surprising that the highest penalties in the Kingdom is for drugs, both among Saudis and non-Saudis, although, non-Saudis certainly commit more offences.

7. 5. Murders

Statistics reveal that the level of murders in Saudi Arabia remains the lowest, although recently it has began to rise because of the large numbers of refugees entering the country.

Unboubtedly the greatest crime known to mankind is murder. It has been punishable under all systems of law since early in the history of mankind and throughout the ages up to the present. The punishment

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[167] Information obtain from records of Saudi Arabian Ministry of Information.

prescribed in Saudi Arabia is in accordance with Islamic law which account for the low homocide rate. The penalty as mentioned in previous chapters is referred to as *qisas*; that is inflicting on a criminal an injury exactly equal to the injury that was inflicted on the victim.

In studying the law of *qisas*, the most important point is the classification of the act of homocide; that is, is it a crime in which the state must intervene by means of punishment, or is it a civil wrong or tort, for which a remedy is available to the wronged individual if he so requests? The place given in Islamic law to the individual's wishes in the context of *qisas* distinguishes the Islamic treatment of homocide from its treatment under modern legal systems. For, under Islamic law homocide appears to be essentially a civil wrong, the remedy for which is the concern of the victim or his relatives, rather than a crime in the strict sense. Such is one's first impression of the subject when one reads the Islamic law texts. But a close investigation may lead to a slightly different conclusion.

In the Quran:

"...and if anyone is slain wrongfully, we have given his heir

authority..." (Quran 17:33)

To explain this authority which pertains to the heir, the majority hold that it is the authority to kill the murderer. On the other hand, some of the commentors on the Quran explain it as the heir's right to demand the execution of *qisas* or to remit it. But the execution itself is the state's responsibility and not anyone else's. From this point of view *qisas* is also the duty of the Muslim community, which cannot carry it out except through a representative, who would be, in this case, the judge or ruler. To explain this concept, the duties of the community are two-fold. First, there are the duties obligatory for each individual, such as prayer, fasting and the payment of zakat; second, there are those carried out by a representative acting on behalf of the community, since it is impossible for each Muslim to perform them individually. One such duties is the carrying out of *qisas* when it is demanded.

7.6. Law of Evidence

The relationship between the infliction of punishment and the evidence required to prove crimes is a very clear one. Where the court is not

absolutely certain of the guilt of the accused, the punishment cannot be inflicted. Methods of proof in Saudi Arabia reflect the legislator's desire to widen or limit the number of cases in which a particular punishment may or may not be inflicted.

The aim of the law of evidence in Saudi Arabia is based on Islamic legal theory in general which is the establishment of the truth of claims with a high degree of certainty. Thus the usual evidence is the oral testimony of two adult Muslims who must be known to the judge as having the highest degree of moral and religious probity (*'adala*). This common standard of proof should be, as a general rule, complied with all criminal and civil cases. However, there are some recognised alternatives to it in both civil and criminal procedures.

The alternative methods of proof in criminal cases are the criminal's admission or confession (*iqrar*), the judge's personal observation (*'ilm al-qadi*), and circumstantial evidence (*al-qara'in*). The pre-Islamic method of proof in cases of homocide known as oath (*qasamah)* is not a recognised system under Islamic law. The most important exception to the ordinary standard of proof in criminal cases is that of requiring

four males witnesses to prove the offence of adultery of fornication (*zina*).

Testimony (shahada)

Most criminal charges are to be proved by the oral testimony of two adult male Muslims. Among *hadd* crimes, this rule applies to the crimes of *sariqa qadhf* and *hiraba*, and it applies to the most serious *ta'zir* offences. *Qisas* for crimes of homocide cannot be applied unless the crime is proved in the same manner.

Confession (iqrar)

An alternative method of proof in criminal cases is the confession by the criminal. It is agreed that the criminal's confession is sufficient for the establishment of his guilt and that, on the basis of the confession, the appropriate punishment can be inflicted. A single confession is sufficient in all criminal cases other than *zina*.

Confession should be made in detail, showing that the confessor is

aware of what he has done and proving that his action was in fact the crime for which a punishment is prescribed. If a summarised confession were acceptable, someone might confess that he had, for example, committed *zina* while he actually had not, resulting in his being punished unjustly. Accordingly, a detailed confession is required and it is the judge's duty to ask the confessor about the minute details of his offence. Associated with this principle is the rule that a confession must be made in clear and explicit words since an indirect confession is not accepted as proof in criminal cases.

A confession in criminal, but not in civil, cases can be withdrawn even after sentence has been passed or during its execution. In cases of its withdrawal after sentencing, a *hadd* punishment should no longer be carried out, although a *ta'zir* punishment may be imposed even after withdrawal of the confession. The reason is that the withdrawal of the confession causes doubt (*shubha*), rendering the *hadd* punishment non-applicable. Therefore, judges usually gives the confessor a chance to retract the confession particularly if it a crime considered to be *haqq Allah*.

The recommendation is based on the fact that in such cases the criminal's repentance is better than his punishment.

Judge's personal observation (*'ilm al-qadi*)

The Hanafi, Maliki, and Hanbali schools forbid the judge to give judgement according to his personal observation in all criminal cases (with the exception of *ta'zir* cases, according to some), holding that he cannot act except according to the evidence delivered before him; his own observations are no more valuable than those of any single witness. At the same time, the judge is not allowed to add his own testimony to that of other witnesses in order to complete the number of witnesses required in a given case, because it is impossible to be judge and witness at the same time.

7.7. Conclusion

Thus far we have dealt with the theory of punishment in Islamic law in an attempt to understand its main characteristics and underlying principles. The findings of this research may be summarised by saying

that Islamic law possesses a unique concept of punishment, a concept which in a sense cares very little for the criminal and his reform, anc concentrates on preventing the commission of offences. This relates to that part of the penal system in Islamic law known as *hadd* punishments. In this area nothing is left to the legislator in the Muslim society; he cannot add anything to, subtract anything from, any of the rules laid down in the Qur'an and the Sunna relating to these punishments. Equally noteworthy is the Islamic manner of dealing with the crime of homicide, with its dualistic notion of punishment for a crime and compensation for a tort. Thus, the concept of *ta'zir*, or discretionary punishments, with the wide authority given to the ruler or legislator to establish crimes and their punishments, and with its direct concern with public morality, presents a permanent base on which the needs of the Muslim society can be met.. On the other hand the restrictions relating to inflicting the punishments, especially *hadd* punishments, in terms of difficulty of proof, recommendation of forgiveness, and the possibility of repentance, greatly limit the number of cases in which these punishments can be applied. It can be generally said that punishment in Islamic law is primarily based on the concept of deterrence and retribution, but scope exists for reformative

elements as well, particularly within the provisions of *ta'zir*.

However, in connection with the theory of punishment, the most controversial aspect discussed in contemporary Islamic circles is whether it is not the possibility of applying the Islamic penal system in modern societies. Those who are involved in the dispute comprise two groups, one of which may be called "the advocates" of the application of the Islamic penal system, and the other may be called "the opponents". The discussion has not always been objective, for the opponents often accuse the advocates of being backward, narrow-minded, reactionary even barbarous. At the same time, the advocates are not less aggressive than their attackers; their list of accusations includes lack of faith, ignorance, and being under foreign, particularly Western, influence.

Apart from this exchange of accusations, both parties present a considerable variety of evidences for and against this case. The advocates, to defend their view, adduce many arguments, of which the two most important are the following; that the Islamic penal system is a part of the law of God which must be obeyed and enforced: and that

the application of this system has proven to be successful in the past, as well as in modern times. Here they usually quote the example of Saudi Arabia, to which we have already referred. As a matter of fact, both these arguments are correct, but the question is whether or not they justify the application of the Islamic penal system in contemporary Muslim societies.

On the other hand, the most important arguments against the case are that the penal system known to Islamic law is not, like other Islamic legal rules, of any use to present-day society because of its antiquity and lack of sophistication; and that the Islamic penal system in particular cannot be applied today as it is very severe, barbarous and inhuman. No doubt the punishments recognised in Islamic law are very sever, but all the other allegations have been adequately replied to by the other side. However, it is not my intention here to go through all the details of this discussion, but simply to state briefly its main points in order to approach the problem.

In dealing with the application of the Islamic penal system, the starting point is the understanding of its place within the Islamic legal

framework as a whole, or rather within Islam itself. It is very well known that Islam provides a complete system for regulating every aspect of human life. The rules, obligations, injunctions and prohibitions laid down by, or derived from, the Quran and Sunna produce a complete picture of the Muslim community from which no part can be removed without the rest being damaged. Equally, no isolated part of this scheme can make any sense or be of any use.

Within any legal system the philosophy of punishment is an integral part of the system which cannot be understood or applied except within its principles, in order to protect the values recognised by it. If this is correct, and its is undoubtedly correct, then it must be completely wrong to borrow the penal philosophy of one legal system and adapt it to another which is based on different principles and values, or, in relation to the issue at hand, to apply the concept of punishment laid down by Islamic law to a community in which any part of the Islamic scheme of life is lacking.

To turn to contemporary Muslim societies, one can hardly say that the Islamic way of life is adopted among them, or even well-understood.

There is no exception to this statement, even in the widely-cited examples of some Muslin countries. Again, this is not the place to go into details, but anyone who has even a superficial knowledge of Muslim societies would agree with this.

It is therefore nonsense to say that we must apply the Islamic penal system to present-day Muslim societies in their present circumstances. It is nonsense to amputate the thief's hand when he has no means of support but stealing. It is nonsense to punish in any way for *zina* (let alone stone to death) in a community where everything invites and encourages unlawful sexual relationships. Above all, it is nonsense to say that the penal code now in operation in a country such as Egypt is almost legitimate, under the doctrine of *ta'zir* recognised in Islamic law. Such a code simply has no connection with Islamic law and does not seek its legitimacy in the recognition of it, but in its suitability to the present circumstances of society. Those who try to justify some of the current systems in Muslim countries only prove their lack of understanding in the Islamic concept of life as laid down in the Quran, the Sunna, and the Scholars' teachings.

From this perspective, i.e. the impossibility of isolating any part or parts of the Islamic scheme of life, one can say that the application of the Islamic penal system under present circumstances would not lead to the achievement of the ends recommended by this system. This leads us to consider two points made by the advocates of its application. The first is that the Islamic penal system has proved to be successful in the past as well as in the present in preventing crime, or at least in minimising the crime rate. As for the past, although one of its great advocates claims that the Islamic penal code was in vogue up to the beginning of the nineteenth century, this claim can hardly be proved. Abu Yusuf, the second founder of the Hanafi school tells us in his famous text, Al-Kharaj, about the extent of the application of the Islamic penal system during the era of Harun al-Rashid, the Abbasid Caliph. His statement leaves the reader with the clear understanding that by his time, the Islamic penal system was far from being enforced. Abu Yusuf died in the year 182 A.H. This means that in less than two centuries after the Prophet's time circumstances had made it necessary to relax the enforcement to the Islamic penal system. This was due to the fact that the society for which this system was framed no longer existed after the widespread expansion of Islam

among peoples of totally different values. It is the very same consideration, that is, the non-existence of the society visualised by Islam, which leads us to say that the application of the Islamic penal system today would not achieve its aim. The well-known example of its successful application in Saudi Arabia can only be used as evidence for this view.

The second point we may consider is the claim that the Islamic penal system is preferable to any other because Islam, and the Muslim jurists, discovered and legalised all the theories known to modern penal codes and legislations. This early advancement, say the advocates, is a point in favour of the application of the penal system. This point has often inspired articles, speeches and even text books. To me, it has no relevance to the application of the penal system of Islamic law. It may be of great value in research concerned with legal or social history, but it certainly has nothing to do with the application of a legal system. The only justification for adopting one legal system and not another is that the one in force provides the community with all possible "good" and protects it from all possible "bad". Without doubt the Islamic legal system had such qualifications in the past,

when circumstances were appropriate for its enforcement. More over there is doubt, at least to Muslims, that the will of God as revealed in the Quran and the trustworthy Sunna has an eternal value and the capacity to safeguard the community's interests. But first, before we can demand the enforcement of the Islamic penal system, it must be proved beyond the slightest shadow of a doubt that the Islamic society visualised in the Quran and the Sunna has become an existing fact. Furthermore, it must be remembered that Islamic law is an ideal legal system, i.e., it is not a law of custom which grew up within the society in which it was applied; rather it is a legal system which was formulated in order to realise an ideal society, the Islamic society. This idealism is clear enough from the Quranic injunctions and prohibitions concerned with the social life of Muslims. Nevertheless, it is even clearer in the jurists' works, not only social but also on legal and even political issues. Islamic law measures the realities in society according to Islamic standards and approves or disapproves them. This is not because of what people do or abstain from doing, but because things are intrinsically "good" or "bad". Apart from the rules of public interest *(maslaha)*, necessity *(darorah*), misuse of right *(isaat ist'mal al-haqq)*, and other similar rules, this emphasis on ideal

concepts is the general tendency in Islamic law. One can therefore say again that if an ideal society does not exist, Islamic law as expressed in the jurists' manual cannot be applied. Even historically this was so, as for example, in the establishment of the court of the official in charge of crimes *(wali al-jara'im)* who was to deal with criminal cases on a different basis both in matters of procedure and substance than the usual court of the *qadi*.

We conclude, therefore, that the Islamic penal system, or rather Islamic law, is to be applied only within the above-mentioned Islamic society. Whenever that society comes into existence, the Islamic legal system will be able to operate without any need for "the advocates" and in spite of all the objections of the opponents. Whether or not this society will come in to being is a matter beyond any personal judgement, but is the duty of every capable Muslim to work as hard as he can to achieve a state of affairs in which Islamic law governs every Muslim society.

CHAPTER EIGHT

FINDINGS AND CONCLUSIONS

Capital punishment, the execution of deviant persons by the members of a social group, has been part of the social process from the time of the first human community up until today. Viewed from the perspective of the sociology of religion, capital punishment is the response of a society to perceived threats to the all-encompassing sacred reality on which that society is based. The death penalty is justified by religion for the sake of world-maintenance. Both capital crime and capital punishment create marginal situations which must be righted through the means available to society. Historically speaking, execution has been one such means in almost every age and every social grouping. It is the purpose of this study to offer an interpretation of the historical manifestations of capital punishment from the scholarly perspective of sociology of religion.

The construction and maintenance of social reality, through the definition of capital crime and through the infliction of capital

punishment, has been a hedge against real and imagined threats to the human community. In the sense that the social reality has been granted absolute status it has become a sacred reality and the executions which have been performed for the sake of its maintenance have been religious acts. Hence, it is the thesis of this study that Capital punishment, in its origins, development, and present ideological dimensions, is a type of propitiatory rite which serves to maintain a socially constructed reality. An execution is, in a sense, a "propitiation for the sake of a social order.

Chapter One of this study presents three broadly conceived questions for an inquiry into capital punishment from the perspective of the sociology of religion. A restatement of each of these questions with the findings and conclusions resulting from the study will serve as a summary of the foregoing chapters.

(1) *What theoretical insights into the relationship of religion and capital punishment in society are available from the perspective of sociology of religion?*

The sociology of religion, as an academic discipline, constitutes a conceptual framework and vocabulary within which various aspects

of social interaction can be understood. Through this discipline, it is possible to construct a socio-religious or politico-religious definition of capital punishment. The execution of persons creates a marginal situation as does every human confrontation with death. The members of a society must be motivated to kill, to put to death one who is in their midst, for the sake of an all-encompassing sacred reality. Religion helps to provide this motivation be justifying and legitimating the execution as a collective deed which can be understood within that sacred reality. This function is one aspect of the maintenance of the social world in the face of threats to its continuity. Deviance, in modern terms either sin or crime, presents such a threat and, therefore, evokes the response of punishment. In addition to the world-maintenance function, religion sets the boundaries of the social reality by defining the limits of human behaviour; divine laws determine which acts are serious enough to be deemed capital crimes. Religion, therefore, functions within the social process surrounding capital punishment in two ways:

1) world construction: the definition of capital crimes and

2) world maintenance: the legitimation of capital punishment.

(2) *In what sense is capital punishment related to the religious phenomenon of propitiation?*

The earliest historical records show evidence that societies first executed sinners or criminals in order to appease the divine wrath which their deviant behaviour had evoked. In terms of the social process, death is the ultimate symbol in relation to which reality is defined. Capital punishment, in its origins, was a type of propitiatory death for the sake of deity. Actions which contravened divine laws were considered mysteriously charged with evil power. The deviants, whose actions were thought to have brought on a curse which might affect the entire social world, were ritually executed as a means propitiating the wrath of the god(s). Criminals were first put to death for the sake of maintaining the sacred reality and defending the community from the evil consequences of deviant behaviour. Priests served to facilitate the ritual death by acting as the first judges and the first executioners. Later, during the stage of the great universal religions, this type of propitiatory death became a means of delivering the violater to the cosmic judgement in the transcendent realm. Still later, the process of secularisation affected a shift in the symbolisation of propitiation, the ritual execution was performed <u>for</u> the sake of the

state as deity and by the state as executioner.

(3) *How has capital punishment developed historically especially in the secular era, as a social mechanism which serves to maintain collectively defined sacred reality?*

From its origins as a type of propitiatory rite, capital punishment has developed historically in ways which correspond to the changing social construction of reality, as sacred reality has changed so have the religious phenomena which buttress that reality changed. Generally, those acts which have constituted the greatest threat to the sacred or absolute reality have been deemed capital crimes. Certain crimes have been more prominent at certain times for particular societies. Thus, crimes against religious and political power, crimes against dogma and ideology, and crimes against life and property have all been punished by death. In the secular era, the historical period for which the most data is available, the use of the death penalty has reflected the particular needs of political groups for social maintenance. Race, ideology, and especially direct challenges to the power of the state have been factors in the widespread use of capital punishment. Finally, based on the socio-religious definition of capital punishment, one can

predict that the future of the death penalty will be determined by the flux of the social processes of world construction and world-maintenance which define the sacred or absolute reality.

The socio-religious insights into the nature of capital punishment presented in this study suggest some implications for further research. For instance, the numerous mythical and historical records of earliest times which are concerned with the killing of human persons could be subjected to analysis within the conceptual framework of sociology of religion. Comparative studies of this type might reveal much regarding the social processes at work in the first cultures and thereby offer clues to the origins of other societal phenomena. Myths could also be examined for a clearer understanding of propitiation as social maintenance, the ritual trappings of mythical executions could be analysed as examples of religio-magical phenomena. In addition, a vast amount of historical evidence regarding capital punishment is available for the analysis of execution as a social response to marginal situations. The definition of capital crime is itself an indicator of the social characteristics which were predominant at various points in history. The changing nature of the social process is reflected in

changes in the types of acts which are designated as capital crimes. Furthermore, there is an abundance of data available regarding capital punishment in recent times. Accurate lists of capital crimes and thorough descriptions of socio-political situations make it possible to chart in detail the patterns of the social construction of reality in various nations. Extensive data also provides for comparative and cross-cultural analyses of capital punishment. For example, the empirical study of William Bowers[168] could be duplicated for a wider sampling of social groupings and for some other time periods.

As well as the implications for the sociological analysis of the relationship of religion and capital punishment, there are implications for the ethical debate regarding the death penalty. The view of the origin of capital punishment as a type of propitiatory rite raises the question of the morality of religious modes of thinking which offer seemingly unverifiable justifications for killing. This is an aspect of the larger ethical issue of the interplay of religion with other sectors of society. How thoroughly should religion be integrated into a social process which requires the legitimated, official exercise of violence?

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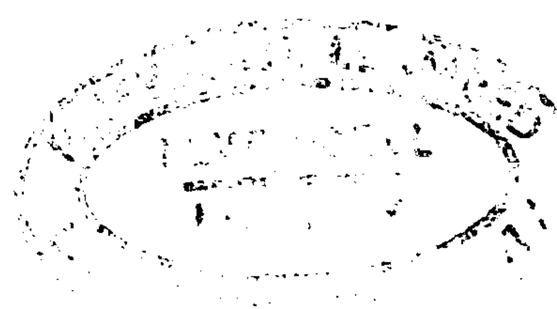
[168]Bowers, W.J. Executions in America, Lexington, USA, 1974..

At the very least, religionists who argue in favour of the death penalty could be challenged with the fact of the extensive complicity of religion in the administration of capital punishment. Those who exercise religious power and who offer religio-ethical judgements of capital punishment should be heard as the vocational descendants of the original priest-executioners. Traditional religious legitimations of capital punishment should be explicitly located and, so also, the popular, secular extensions of these legitimations. Furthermore, ethical discussion of capital punishment should be connected with the larger issue of the status of the nation-state in the contemporary world. Religious ethics should be concerned to evaluate the effects of the deification of the state and its use as an ultimate symbol. Finally, the ethical debate might return to the basic question of the nature of the human person for afresh view of the rationale of punishment, especially irreparable punishment, in the social world. If capital punishment is, indeed, a propitiatory rite for the sake of a social order, then ethics must attempt to decide if the social gain of execution outweighs the loss - if such a propitiatory death is efficacious.



BIBLIOGRAPHY

Acton, H.B. The Philosophy of Punishment, St. Martin's, 1969

Al-Ghazali, A. H. Ihya 'Ulum ad-Din, Al-Maktaba at-tijara al -Kubra, Cairo 1936

Al-Yassin, A. Religion and State in the Kingdom of Saudi Arabia, Westveiw 1985

Amin, S. H. Islamic Law in the Contemporary World, Royston, 1985

Anderson. J.N.D. Islamic Law in the Modern World, New York Press, 1959

Awa, M.S. Punishment in Islamic Law, ATP, 1982

Barnes, H. The Repression of Crime, Montclear, 1969

Bedau, H.A. The Death Penalty in America, Oxford Univ. Press, 1882

Bedan, J. Capital Punishment in Europe, CUP, 1989

Berger, P. The Sacred Canopy, Anchor Books, 1969

Blumberg, A.S. Criminal Justice, Quadtrangle Books, 1967

Bok, C. Star Worwood, Knopf, A.A. 1959

Brinner, W. M. & Ricks. S.D. Studies in Islamic Judaic Tradition, Scholars Press, 1986

Browning, R. The Byzantine Empire, The Catholic Univ. America Press, 1980

Camus, A. "Reflections on the Guillotine," reprinted in Resistance, Rebellions, and Death, Vintage Books, 1974

Cahn, E. The Sense of Injustuce: An Anthropomorphic Vie of Law, New York Univ. Press, 1949

Cahn, l. Confronting Justice, Little Brown, 1966

Conrad, J. Crime and its Correction, Univ. of California, 1965

Coulson, N. J. The State and the Individual in Islamic Law, ICLQ, 1957

Coulson, N. A History of Islamic Law, Edinburgh, 1964

Coulson, N.J. Conflict and Tension in Islamic Jurisprudence, Univ. Chicago Press, 1969.

Dahlan, A.H. Politics, Administration, and Development in Saudi Arabia, Dor Al-Shoroug, 1990

Erikson, K.T. The Wayward Puritans: A Study in the Sociology of Deviance, John Wiley, 1966

Ewing, P.K. Shariat and Ambiguity in South Asia Islam, Univ. California Press, 1988

Ezorsky, G. Philosophical Perspectives on Punishment, Albany State Univ. Pree, 1972

Foda, E. The Projected Arab Court of Justice, Mortinus Nijhoff, 1957.

Fyzee, A. A. Outlines of Muhammadan Law, Oxford Univ. Press, 1974

Glueck, S. Crime and Correction, Cambridge Mass. 1952

Hart, H. L. Punishment and Responsibility, Oxford Univ. Press, 1968

Hastings, J. Encyclopedia of Religion and Ethics, T&T Clark, 1911

Heinrich, O. The Rationale of Punishment, Patterson Smith, 1975

Hidayatallah, A.M. Principles of Mohammadan Law, Tripathi Ltd. 1971

Hitti, P.K. The Arab: A Short History, Affliated Publishers, 1970

Hood, R. The Death Penalty: A World Wide Perspective, Oxford Press, 1990

Hospers, J. "Free will and Psychoanalysis," in Philosophy and Phenomenological Research, 1950

House, H.W. & Yoder, J.H. The Death Penalty Debate, Word Publishing, 1991

Islahi, A., Islamic Law: Concept and Codification, Islamic Publication, Lahore, 1971

Jankovic, I. "Socialism and Death Penalty", in Research in Law, Deviance and Social Control, Vol.6, pp.109-133

Kant, I. Philosophy of Law, T & T Clark, 1887.

Khadduri, M. Muslim World, 41

Khadduri, M. Islamic Jurisprudence: Shafii's Risalah, John Hopkins, 1961

Khadduri, M. Islamic Law of Nations: Shaybani's Siyar, John Hopkins, 1966

Khadduri, M. The Islamic Concept of Justice, John Hopkins, 1984

Knudten, R.D. Crime in a Complex Society, Dorsey Press, 1970

Lawes, L. Man's Judgement of Death, Putman's Sons, 1924

Lester, D. The Death Penalty: Issues and Answers, 1987

Linder, R.M. Stone Walls and Men, Doubleday, 1958

Lobban-Fluehr, C. Islamic Law and Society in the Sudan, Frank Cass, 1987

Madden, E. Philosophical Perspectives on Punishment, C.C. Thomas, 1968

Martin, R.P. The Death Penalty: God's Will or Man's Folly? Simpson, 1992

Meeropol, R.M. We Are Your Sons, Ballantine Books, 1976

Moberly, W. The Ethics of Punishment, Arcon Books, 1968

Morris, P. Prisoners and Their Families, Geoge Allen Unwin, 1965

McCuen, G.E. & Baumgrat, R. A. Reviewing the Death Penalty, Gary Mc Cuen Pub. 1985

McCuen, G.E. & Baumgrat, R.A. Capital Punishment in Asia, Mentor, 1995

Mueller, S.O. Crime, Law, and the Scholars, Univ. of Washington, 1969.

Nasr, S.H. Islamic life and Thought, George Allen Unwin, 1981

Otterbain, K.F. The Ultimate Coercive Sanction, Haraf Press, 1986

Qutb, M. Islam the Misunderstood Religion, 1978

Power's , D. Studies in Quran and Hadith: Formation of the Islamic Law of Inheritance, Univ. Of California Press, 1986

Roberts, R. The Social Laws of the Quran, London, 1925.

Rosenthal, E.I.J. Islam in the Modern National State, Cambridg Univ. Press, 1965

Schacht, J. The Origins of Muhammadan Jurisprudence, Oxford Univ. Press, 1950

Schacht, J. Islamic Law in the Contemporary States, JCL, 1959

Schacht, J. An Introduction to Islamic Law, Clarendon Press, 1964

Schwed, S. Abolition and Capital Punishment, MS Press, 1983

Scott, R. G. The History of Capital Punishment, Torchstream Books, 1950.

Siyar, S. The Islamic law of Nations, John Hopkins, 1966

Thomas, D. A. Principles of Sentencing, Heineman, 1970

Thomas O'Dea, The Sociology of Religion, Englewood Cliffs, 1966

Werkheiser, R.M. and Barnhart, A.C. Capital Punishment, The National Council of the Episcopal Curch, 1961

Wiechmann, D. Kendall, J. & Bae, R. "The Death Penalty: An International View," The Howard Journal Criminal Justice, 2, pp.124-137

Winston, N.E. The Philosophy of Human Rights, Wadsworth, 1989

Wiechmann, K. & Bae, P. The Penalty of Capital Crimes, MacMillan, 1991

Winston, S. The Philosophy of Human Rights, Collins, 1989