Articles

Rearguing the Principles of Qisas and Diyat in Criminal Jurisprudence of Islam

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CONTENTS

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I.

INTRODUCTION

The initiation of Islamic law hardly bears any semblance to that of the evolutionary path taken by other systems of law.[1] It did not have to undergo the same historical course that has been trailed by rest of the systems.[2] However, Islamic system does not claim to be original in its precepts and deems itself to be the continuation of the earlier religions of Moses and Christ[3]. In this way, Islamic law embodies in itself a unique paradox. It has been compacted through the experience of centuries and generations, yet it is divinely revealed, bestowed and completed in one series of revelation.[4]

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[1] The term system of laws has been used to represent the man made systems of law and it does not include religious systems. Here the expression of Islamic law has been taken as a combined token to signify the laws of Abrahamic religions.

[2] RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 456 (John E. C. Brierley trans., Stevens & Sons, 3rd ed. 1985).

[3] There are numerous verses in Quran that recognize Judaism and Christianity as divinely inspired religions. It has been recognized by the Quran that the project assigned to Prophet Muhammad(pbuh) is the continuation of the tasks of Moses and Christ. For e.g. Ch. LXI: 6 in Quran, states, 'And remember, Jesus the son of Mary, said: O children of Israel! I am the Apostle of Allah (sent) to you confirming the Law (which came) before me.' Most of the interpreters of Quran and jurists also, agree that the phrase 'law before me' was referring to the message of Moses and previous apostles. The books revealed to these prophets, Bible and Torah have also been mentioned in Quran. There exist complete chapters narrating the story and message of Moses and Jesus. For further reference see generally AL QURAN, Ch. III (The Family of Imran) and Ch. XVII (The House of Israel). At various places, Muslims have been commanded to do certain acts since they were obligatory upon previous people as well. For e.g. Quran, Ch. II:183 states: 'the fasting in the month of *Ramdhan* has been made compulsory upon you, the way it was enjoined upon the previous people.'
See also JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (Indian Reprint 1997) at p.1-3 (comparing Islamic law with Jewish and Canon law).

[4] MOHAMMED QASIM NANOTAVI, HIJJAT-UL-ISLAM 41-45 (stating that the Quran is the only book of Divine Origin which has been compiled in a written form during the life time of its Prophet(pbuh)).
The Quran itself indicates this fact by saying that: "Only the clean should touch it." The possibility of touching only arises if it is in the tangible form and not mere a thing in memory. Further Allah says: "We are responsible for its compilation." At some other place, God addresses the Holy Prophet (peace be upon him): "And have you not written it (the Quran) with your right hand."
There are traditions narrated about the manner in which the Quran used to be compiled. Different surahs used to be revealed on the Prophet (peace be upon him), and when something was revealed on him he used to send for some of his stenos and dictate to write a particular verse in a particular Surah in the context of particular verses. The whole of the Quran was in the written form in the Prophet's

Islamic Law did not originate in the form of some scattered principles to be compiled later, neither was there any later addition to the preliminary doctrines. The conception of Islamic system essentially precedes or at least coincides with the existence of Muslim *ummah*,[5] and basic Islamic Law as found in the Quran was complete and compiled on the closing of its revelation process.[6]

Thus scholars who read the content of Islamic Law in isolation to its whole belief and value system commit an error that would only result in misperceptions and incomplete understanding of the substance and spirit. Islamic law is only but a small part of a much bigger paradigm. The Islamic system simultaneously operates on multiple dimensions. There is a dual conception of life, life in this world and life herein after.[7] Besides, it regulates the relationship of a human with God, with his own self, with other human beings, with other living objects, environment and other non-living beings.[8] The scope of Islam is to regulate human life and its interactions, and one aspect of which is to demarcate boundaries through the enforcement of laws.[9]

The concept of crime in Islam is not a synonym to the contemporary notion of crime in positive law, even though it is inclusive of the crimes as we know them in the present day world. The word 'crime' when used in an Islamic context, is a more encompassing expression, devised to include at least three forms of deviances, sins, vices and so called positive crimes.[10] In

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period. The people were at liberty to read the Quran in their own dialects. However, after the demise of Prophet and spread of Islam, people from different areas upon embracing Islam, started writing it in their own dialects. To avoid confusion, the third Caliph Usman prepared numerous copies of the Quran prepared by Abu Bakr and sent them to all the provinces. He forbade the people to write the Quran in the dialects other than that of the Qureish. It must be noted that none of the other Divine Books was written in the lifetime of the prophet to whom it was revealed.

[5] See ASLAN REZA, NO GOD BUT GOD: THE ORIGINS, EVOLUTION AND FUTURE OF ISLAM, Ch. 3 (Random House Publication, 2005).

[6] AL QURAN, Ch. V: 3. It says, "This day have I perfected your religion for you and completed My favor unto you, and have chosen for you as religion al-Islam.' [The translation of the verses of the Holy Quran appearing in this article have been taken from ABDULLAH YUSUF ALI, THE HOLY QURAN: TEXT, TRANSLATION AND COMMENTARY, (Sh. Muhammad Ashraf Publishers & Booksellers, Lahore, 1988)]; See also supra note 3.

[7] All monotheistic religions, or at least three main Abrahamic religions, Islam, Judaism and Christianity believe in the concept of life hereinafter death, and in the Day of Judgment.

[8] N.J. COULSON, A HISTORY OF ISLAMIC LAW 6 (1964) (comparing the concept of Islamic law to *ius naturae*, but also recognizing that Islam is an 'interesting amalgam' of *ius naturae* and Dean Pound's 'social engineering').

[9] See Schacht supra note 2 at 1, 112 and 201.

[10] ABDUL QADER ODEH, AL TASHREEH AL JINAI AL ISLAMI, Vol. I at 117, (Prof. Sajid ur Rehman Siddiqui, trans., 1977).

the theory of Islamic criminal law, there are found many crimes based upon an isolated violation of the moral code of Islam.[11] The moral principles of Islamic law are the nucleus of the proposed legal system. It is the harm caused by the violation of those principles that confirm the precise status of each breach of rule.[12] At the same time, the object or victim of the deviant behavior will also be a determining factor.[13] In this context, Islamic law recognizes the variety of crimes. Sometimes they are leveled against an individual, sometimes against society and sometimes even against the God Himself.[14]

In Islam, therefore, it is the good of society that has the preference over an individual's interest. It is for this reason that the collective moral principles hold a pivotal place in Islamic system, and their violation may be deemed as a crime. Contrary to the Islamic principle, in modern western law, the primary test for the criminalization is the amount or possibility of actual harm that an act in question may cause to the individual or to the law and order of the society.[15] However, as a common observation, most of the deviant acts are neither completely harmful nor fully harmless. Even the criminal who commits certain crime, gets some sort of satisfaction out of his act. Therefore, most acts are a combined embodiment of benefit and harm. In this context, it is natural for an individual to choose for those acts which are beneficial to him, even if they contain harm for the society at large. And similarly, he will like to avoid those acts which are difficult for him even if there be a huge benefit for the society. It is with this rationale that Islamic law has been devised to carefully incorporate the moral element into the realm of law, so that the benefit of society can be closely guarded. For, it is the benefit of the society that will ultimately transpire into the benefit of an individual. Hence, the individual is viewed by Islam both as a single and unique unit and also the part and parcel of a composite

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[11] For e.g. sexual intercourse between consenting unmarried adults is a crime of fornication. It is punishable as a Hadd offence with 100 lashes. (for further reference see Al Quran, Ch. XVII:32, Ch. XXIV: 2, Ch. XXXIII: 30 and Ch. IV: 15). The primary thrust of this offence is upon the protection of societal morals. Otherwise, consensual intercourse between consenting adults do not cause any specific physical injury to any person. It is the assumption of harm to the collective morality of the society that this act of fornication has been criminalized in Islamic law.

[12] See Odeh, supra note 10 at 119.

[13] Ibid.

[14] Muhammad Salim Al Awwa, *The Islamic Penal Legislation*, in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 127-129 (1982).

[15] H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 22 (5th ed. 1982). The author suggests that society may impose punishment on an offender only where society has been harmed. He has further identified two types of possible harms to society: 1) where the authority of law is challenged and 2) where a member of society is injured.

unit, i.e. society in the narrow sense and mankind in a broader perspective. The individualistic feature of Islamic law rests in part in 'the fact that Islamic law generally aims at the public good [which] does not detract from its fundamental and individualistic character.'[16]

At present, the Islamic law and Islamic criminal justice system in specific, face two kinds of criticism. First, it is popularly propagated that the criminal justice system proposed by Islam has become outdated[17] and cannot conform to the contemporary standards of justice. Second, it is also commonly portrayed as a rigid and oppressive system[18] which does not afford the fundamental guarantees and protections to the individuals who are subjected to it. The scope of this article extends to the explanation of *Qisas* and *Diyat* theory of Islam (hereinafter mentioned as QD theory), which is chosen as a specimen to compare with the existing models of justice for dealing with the offences against human person. It is submitted that Islamic criminal justice is essentially a policy-oriented system,[19] at least in contemporary terms. It is not a rigid and repressive system as it has been represented,[20] or for that matter even practiced by some states which purport to apply Islamic law.[21] If any, it is the opposite. In fact, many of the most forward looking concepts in today's criminal justice have been the mainstay of the Islamic approach for centuries.[22] Consider for example the ideas of victim compensation, restitution and diversions, work release, shaming punishments, periodic imprisonment and others which have been the part of Islamic criminal justice system since its inception.

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[16] Salah Eldin Abdel Wahab, *Meaning and Structure of Law in Islam*, 16 VAND. L. REV. 115 (1962).

[17] See generally Graeme Newman, *Khomeini and Criminal Justice: Notes on Crime and Culture*, 73 J. CRIM. L. & CRIMINOLOGY. 561.

[18] Ibid.

[19] See Odeh, supra note 10 at Ch.1. The author discusses Islamic criminal law in comparison with positive criminal law as enacted in modern criminal codes and reveals the strong policy-oriented approach of the Islamic criminal law. See also A. HASSABALLAH, USUL AL TASHRII AL ISLAMI (1977). The author discusses the principles of legislation in Islamic criminal jurisprudence and refer to the policy of preserving social morals and order as a priority of the criminal justice system in Islam.

[20] M. CHERIF BASSIOUNI, THE CRIMINAL JUSTICE SYSTEM OF ISLAM at p. xvii (1982). It is discussed that regrettably the understanding of Islamic criminal justice policy is not sufficiently widespread in the Muslim world. And those who make claims for the Islamic resurgence only refer to certain specific periods of Islamic history without understanding the circumstances and requirements for the adoption of such policies.

[21] Author reserves the right to disagree with the criminal legislations in place within some Islamic states purporting them to be based upon the Islamic criminal law principles.

[22] See Bassiouni, supra note 20 at p. xviii. See also Bassiouni, infra note 112 quoting *Qadi* Abu Youssef.

The premise of this article is also a return to the fundamental basics. The primary focus would be upon the basic values of an Islamic criminal justice system and the type of orthodox interpretation given to textual sources in the days of Prophet (PBUH) and his companions[23], though not ignoring subsequent developments which relied on the same historical period and the methodology of analysis employed then. In essence it is a return to the origins which gives the inquiry a more pristine quality. It is on the basis of this approach that I have concluded that Islamic criminal justice system and mainly the law of *qisas* and *diyat* can be construed and applied in contemporary times. If applied in its true form and spirit, it would be perfectly compatible with the civilized and modern systems of justice of today.

This article has been divided into six parts. Although each part has its own thesis and agenda to fulfill, however there is an attempt to maintain a tone of comparison throughout the article. A comparative dialogue of western law especially common law as the representative system and the Islamic law on the other hand, will be used to demonstrate the similarities and differences between the two different systems of justice. Part-II of the article has been confined to the explanation of main principles of Islamic criminal justice system. It will elaborate upon the primary scheme of classifying crimes in Islamic criminal law and at the same time it will briefly introduce the QD theory in Islam. Along with this, this part will also entail the basic punitive doctrine as expounded in classical law of Islam. While introducing the fundamentals of Islamic law, the Part-II will conclude with the observations that the rights and protections granted in contemporary western law are also available in Islamic law, in fact they have been present since the earliest period of Islamic law and therefore, are not a subsequent insertion influenced by the rights related movements in the West.[24]

Part-III of the article has been reserved for the detailed analysis of the provisions of QD theory. I will discuss this theory from at least three

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[23] The term textual sources have been in use for the Quran and Sunnah. The compilations of the Sunnah of Prophet in the form of Hadith are also taken as a textual source of law in Islamic law. For further reference upon the scheme and priority of the legal sources in Islamic Jurisprudence, see generally MUHAMMAD IBN IDRIS AL-SHAFEI, AL RISALA (1951-52).

[24] This refers to the post seventeenth century egalitarian movements in the West. At present the primary human rights document is *Universal Declaration of Human Rights* (1950) which certainly is of recent origin. However, some reference may be drawn from the *French Declaration of the Rights of Man* (1789) passed in France as the result of the successful revolution. As far as England is concerned, some writers like Luis Jimnez de Asua traces the origins of the protection of rights (in the criminal law context) to the *Magna Carta* issued by King John of England in 1215. See also the footnotes of Osman Abdel Malek Al-Saleh, *The Rights of the Individual to the Personal Security in Islam* in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 57-58 (1982).

perspectives. First of all, I will examine the historical context of the QD theory as found in the ancient law of *lex talionis* and the pre-Islamic Arabian customs. The next perspective deals with the primary layout of the QD theory and the modifications made to *lex talionis* and customary laws. The next section of Part III will attempt to provide a comprehensive description of the liability paradigm drawn by QD theory. In this section, I will elaborate upon the integrated use of punishment and compensation in QD theory, and the role of victim, community and state. This part of my article will rely mainly upon the primary sources[25] of Islamic law to enunciate the precise nature of *qisas* and *diyat* in Islam. At the same time, it will make an attempt to compare the contemporary concepts used in western homicidal laws.[26]

Part-IV of the article will attempt a normative inquiry into the question of justice involved in the crimes against the person. I will analyze the historical evolution of the processes of justice, to reconcile the contemporary questions with those which were there previously. Further, a discussion will be held upon the focus and application of the three corresponding models of justice in order to locate their responses to the primary questions of justice.

After highlighting the distinctive approaches adopted by the different contemporary theories, Part-V will revisit and reform the questions of justice in the context of homicidal and injury related laws. It will focus upon two aspects: first, what precisely should be the purpose of justice in context of such offences? And second, which remedy would adequately serve the specified purpose of justice? While answering these questions, this part will argue that the principles of *qisas* and *diyat* are comprehensive in their nature and their application in criminal law can resolve many issues confronted by all contemporary criminal justice systems. It will also conclude that at least in the realm of offences against person the contemporary criminal jurisprudence is moving towards similar findings, if not identical, as those presented by QD theory of classical period of Islam.

Consequently, three purposes are intended through this article. The first purpose is to closely examine the core concepts of Islamic QD theory, making it clearer for the scholars with little or no back ground in Islamic law. The second objective is to question the contemporary models of justice[27] and scrutinize their normative position against the principles of *qisas* and *diyat* as presented by Islam. Last but not the least, will be to claim

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[25] See supra note 23.

[26] The main focus in this respect would be upon the theory of Homicide as enunciated in the Anglo-Saxon law, but of course with some references from the traditional common law doctrine itself.

[27] There are at least three recognized contemporary models for justice in criminal law: Retributive, Utilitarian and Resititution models. For discussion and comparison see generally Jennifer J. Llewellyn and Robert Howse, *Restorative Justice – A Conceptual Framework*, (1999) paper prepared for the Law Commission of Canada.

that Islamic law, even in its orthodox form, is neither outdated nor rigid or repressive. Even after more than fourteen centuries, it is compatible and rather in some senses, a more advanced model of justice which sufficiently addresses the contemporary questions relating to offences against the human person.

Moreover, it is not my purpose to propose or speculate upon the accuracy or soundness of existing legislations of *qisas* and *diyat* laws in various Islamic states.[28] This article does not intend to evaluate the statutes enforced in these Islamic states. Besides, I consider such questions as secondary to the foundational work of establishing the underlying principles of QD theory and projecting the usefulness and practicality of these principles. Similarly, there may be interpretational issues involving some rules developed in the later period of Islamic *fiqh*.[29] Nevertheless, the main thrust of this article would be upon the direct adoption of the rules from the primary texts. Therefore, any such discussions would be beyond the scope of this article.

II.

FUNDAMENTAL CONCEPTS OF ISLAMIC CRIMINAL JURISPRUDENCE

Since this is an article in comparative criminal jurisprudence, it will be desirable to provide the reader, who may not be acquainted with the basic notions of criminal justice in Islam, with some preliminary materials in order to understand the ulterior reasoning of the key concepts used in the article. For those who have fluent knowledge of Islamic law, this will only

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[28] Islamic law is applicable, at least in part, in fifty-three Muslim countries and a number of non-Muslim countries such as India. However, few countries apply traditional Islamic criminal law. Of those that do, at least two, Pakistan and Sudan, have systems that are blended with the civil or common law systems. Saudi Arabia is unique in that it has applied Islamic criminal law in its traditional form since the advent of Islam. Presently, the other major countries that purport to apply Islamic law in their criminal justice system are Iran, Libya, Kuwait, Afghanistan, Iraq, Malaysia, Qatar and United Arab Emirates.

[29] There may be found contradictory rulings on at least two main issues regarding the Law of *qisas* and *diyat*, the fixation of *diyat* and admissibility of evidence. The first issue deals with the amount of *diyat* and its ruling in case of the female victim. Some of the scholars from the orthodox schools have ruled that the *diyat* for a woman is half of that prescribed for man. However, there is found no application of this rule in the contemporary legislations of the *qisas* and *diyat* law. For e.g. see Qisas and Diyat Ordinance of 1990 of Pakistan. It prescribes the same amount of *diyat* for males and females. Similarly, in reference to the admissible evidence, there are issues relating to testimony, witness and circumstantial evidence.

be an overview of the fundamental concepts of crime, punishment and individual protections granted in Islamic criminal justice system.

A. *Classification of Offences in Islamic Criminal Law*

The criminal system of Islam is characterized by direct reliance, for its general foundation, universal principles and many summary provisions upon divinely inspired text of Quran and Sunnah.[30] Thus Islamic law is a collection of legal provisions divinely revealed to the Prophet (PBUH). In this regard the words of Al-Shafei are instructive: 'for every thing that affects the life of a Muslim, there is a prescribed guide in the Quran to lead him on the right way.'[31] It is evident from this that Islamic legal decisions, including those of a penal nature, are religious judgments based explicitly on divine inspiration or reached indirectly through divinely inspired and sanctioned methods of deduction.[32] It is this specification of a source into direct or indirect[33] that determines one of the basic distinctions of crimes as categorized under Islamic law.

In Islamic law crime has been defined as acts whose commission is prohibited by Islamic law or those omissions whose performance has been made obligatory upon the individual by the same law.[34] This definition reflects the principle of legality[35] in stressing that no act can be criminal unless it has been declared so by Islamic law. In this respect, the Islamic definition of crime is in complete consonance with the modern conception of crime. However, the primary distinction in the Islamic theory of crime and those prevalent in the West is the classification scheme of crimes by

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[30] For detail discussion of the sources and their implementation in criminal legislation see Teymour Kemal, *The Principle of Legality and its Application in Islamic Criminal Justice* in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 150-57 (1982).

[31] A. SHAKIR, RISALAT AL-SHAFEI USUL AL-FIQH [The Message or Philosophy of Al-Shafe'i in the Jurisprudence of Islam] (1937) at 20, 477.

[32] Kemal, supra note 30 at 151.

[33] Only Quran and Sunnah of the Prophet are considered to be the direct sources for legislation. However, there are number of indirect sources used, such as *qiyas*, *ijma*, *ijtihad*, opinion of the companions of Prophet, rulings of jurists, policy of public good, etc. All these sources are dependant upon either Quran or Sunnah for the ratification of their status as a source. Unless, there is found a proof in Quran or Sunnah, no source can be adopted for arriving at the rulings of *Shari'ah*. In this context, the crimes that are defined and penalized by Quran and Sunnah are considered different from those crimes for which the authority is in the form of *qiyas* or public policy of the state or ruler. See generally Kemal, supra note 30.

[34] See ALI IBN MUHAMMAD AL-MAWARDI, AL AHKAM AL SULTANIYAH 192 (1880-81).

[35] For detailed discussion on Principle of Legality in Islamic law see Kemal, supra note 30.

Islam. Unlike western laws, Islamic criminal theory encompasses both torts and crimes.[36] Islam emphasizes on fulfilling the rights of all individuals as well as the public at large. The violations of these rights are given a remedy, which if provided to the public would refer to a crime and if to an individual would refer to a tort. Consequently, most of the offences against person in Islamic criminal law fall into this hybrid sphere of crime and tort principles.

It is a popular but incorrect perception that Islamic criminal law only subscribes to one classification of crime,[37] and that is to divide them in the categories of *hadd*,[38] *qisas*[39] and *tazir*[40] offences. Although, it is the primary division adopted in Islamic law, however, it is not the only one.[41] This primary classification is important since it organizes crime in accordance with its defining source. It must be noted that it is the status of the source that determines the quality of offence and its complementary punishment.[42] Therefore, since *hadd* offences and *qisas* offences have been prescribed by the text of the Quran, their characteristics and their compulsion would be of distinctive nature compared to *tazir* offences prescribed by the state. Hence, Islamic law identifies primarily two forms of crimes: those that have been preset by primary sources and others that have been left to the discretion of state authority. Detailed analysis of these offences in subsequent paragraphs would show that this division is not very different from the common law division of *mala per se*[43] and *mala prohibitum*.[44] Most of the preset offences

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[36] ABDUR REHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 220 (1984).

[37] However, there is a consensus of all jurists that this classification of crimes into *hadd*, *qisas* and *tazir* is the primary classification adopted by the Quran for the proscription and punishment of offences.

[38] See Doi, supra note 36 at 221. He explains that the word *hadd* is an Arabic expression which means prevention, restraint or prohibition, and for this reason, it is restrictive and preventive ordinance, or statute of God concerning things lawful and things unlawful. For further discussion on h*add* offences, see Aly Aly Mansour, *Hudud Crimes*, in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 195 (1982).

[39] Ibid at 222. The word *qisas* is derived from an Arabic word *qassa* meaning he cut or he followed his track in pursuit, and it comes therefore to mean the 'law of equality' or equitable retaliation for the murder already committed. For further discussion on *qisas* offences, see M. Cherif Bassiouni, *Quesas Crimes*, in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 203 (1982).

[40] Id at 221. The offences and punishments that are left to the discretion of state and the judge are known as *tazir* offences in Islamic criminal jurisprudence. For further discussion on *tazir* offences, see Ghaouti Benmalha, *Tazir Crimes*, in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 211 (1982).

[41] Odeh, supra note 10 at 109.

[42] Ibid.

[43] The Latin term *mala per se* stands for those crimes which are wrong in themselves and no one needs any formal legislation to realize the wrongness of these acts. For e.g. killing, theft or violation of property rights are considered *mala*

in Islamic criminal theory are *mala per se* in nature and therefore have been eternally prohibited. Further, there is no restriction in Islamic criminal theory in construing crimes on the basis of its victims, the quantum of harm and the proposed procedure. In his major treatise on Islamic criminal law, Odeh has recognized more than ten different kinds of crimes in Islamic criminal theory.[45] According to him, crime can be sorted at least on five different bases: sources, punishment, mens rea, actus reus and the victim of offence.[46]

In context of the aforementioned division of crimes into preset offences and discretionary offences,[47] the preset offences are those crimes which have been prescribed by the text of Quran or the Sunnah of the Prophet. In these prescribed criminal acts, both the form of criminalized conduct and its assigned punishment are specifically determined. This determination of punishment is both in the form and quantum of punishment. The crimes of this first category are of two: crimes of *hadd*, and crimes of *qisas* and *diyat*.[48] Their classification has been supported by a theory of rights proposed by various Islamic scholars.[49] According to these scholars, for every violation there is a corresponding right to punish the offender. Therefore, in Islamic law the violation of rights can be of three kinds. First, where an offence violates the right of God, second, the right of individual and in the third place, the violation is against the right of society and state.[50] They further construe the offences of *hadd*, *qisas* and *tazir* as violation of the rights of God, individual and the state or the society at large, respectively. Since, the *hadd* offences have been prescribed by God as a

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per se. See generally JEROME HALL, THE GENERAL PRINCIPLES OF CRIMINAL LAW (1947).

[44] This term is a counterpart of *mala per se*. *Mala prohibitum* are those offences in criminal law which are not wrongs in themselves but are prohibited only by the virtue of the prohibition ordained by the state.

[45] Odeh, supra note 10 at 150.

[46] Ibid.

[47] See Kemal, supra note 30. See also M. ANCEL, LA DEFENSE SOCIALE NOUVELLE (1971). He emphasizes that Islamic law has further organized for the adult a system which might to a certain extent already be called a system of social defense. Aside from the seven major crimes which are defined and foretold by the Quran, a certain number of offences were left to the discretion of the judge, who must bear in mind, all at once, the infraction committed, and circumstances under which the crime has been committed, and the personality of the delinquent. See further Abd al Salam, *The Social Aspects of the New Penal Code of the United Arab Republic*, REVUE DE SCIENCES CRIMINELES ET DE DROIT PENAL COMPARE 101 (1967).

[48] For further detail upon the discretionary and determined offences, see Al Awwa, supra note 14 at 127. See also Schacht, supra note 3 at 175.

[49] See IMRAN AHSAN KHAN NYAZEE, THE GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 60 (IIIS, Islamabad, 1998). See also Schacht, supra note 3 at p. 176.

[50] Ibid.

violation of His right; it will be the right of God to determine the kind and amount of punishment for such offences. However, the term 'right of God' should not be construed simply to conclude that a human being in some respect has a power to hurt the rights of God.[51] By specifying certain acts as violations of the rights of God, the main object has been to determine the parameters of individual liberties and the preservation of the interests and moral fabric of Muslim society.

Thus, it can be argued that the crimes included in the *hadd* category, in one way or the other, protect the primary welfare of society. It is merciful of God Almighty that He has taken the violations of these prescribed offences as violations against Himself and hence, has issued the highest form of deterrence for their control. Therefore, the primary function of the *hadd* offences is to protect public interests[52] in a Muslim society, public property and security (theft and banditry),[53] family structure, conjugal and familial relations (adultery and fornication),[54] personal reputation (defamation or false accusation of unchaste behaviour)[55] and psychological welfare and moral conduct of the individual (drinking wine).[56]

The next category of preset criminal offences in Islamic law is those of *qisas* and *diyat*. Similar to the crimes of *hadd*, these offences have also been prescribed by the Quran and Sunnah. However, they differ in that the victim or the political authority of the state may not grant pardon for the crimes of *hadd*.[57] The punishment for the Hadd crimes has been fixed either within the Quran,[58] i.e. God Himself, or for some offences referred to in the Sunnah of the Prophet(PBUH)[59] or consensus[60] of the companions of Prophet(PBUH).

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[51] See Odeh, supra note 10, Vol. II at 16.

[52] See Kemal, supra note 30 at 159-161. For further discussion upon the purposes of Islamic law see generally IMRAN AHSAN KHAN NYAZEE, PRINCIPLES OF JURISPRUDENCE IN ISLAM (IIIS, Islamabad, 2000). There is a complete chapter in the book upon Maqasid al Sharia and it also discusses the use of public interests as a basis for criminalizing certain undesirable conducts in society.

[53] See Mansour, supra note 38 at 198; See generally Odeh, supra note 10, Vol. II at 31-58.

[54] See Mansour, supra note 38 at 199.

[55] Ibid.

[56] Id at 199-200.

[57] Id. There is a consensus of jurists that once the hadd offence is duly proved against the defendant, the judge or state authority has no authority to mitigate, aggravate or suspend the penalty prescribed for the offence.

[58] Id. The hadd crimes for which the penalty has been provided by Quran are fornication, theft, *harabaah*. For the punishment of fornication see Al Quran, Ch. XVII:32, Ch. XXIV: 2, Ch. XXXIII: 30 and Ch. IV: 15. For the offence of theft see Al Quran Ch. V: 38, and for *harabaah* see Al-Quran, Ch. V:33.

[59] For e.g. the punishment of adultery is considered to be stoning to death. This punishment does not find any reference in Quran. However, the jurists concede that there is ample evidence that Prophet has sentenced the convicts of adultery to be stoned to death. Therefore, the source of this punishment is found in the Sunnah of

The *qisas* and *diyat* offences include homicide, bodily injury, abortion or willful miscarriage of a fetus, or other offences that are against the physical integrity of a person. They are called *qisas* and *diyat* offences because of the application of specific principles of punishment. Therefore, if there is a commission of such offence, the victim or his representatives will get a choice of either punishing the offender in accordance with the principle of *qisas* or to obtain compensation for the injury in accordance with the *diyat* principle. And these are not the only options available to the victim or his representatives. Additional to the punishment and compensation, he/they can also pursue a settlement with the offender. Such a settlement can be based on multiple considerations ranging from monetary payment to the transfer of tangible or intangible right to the victim or his heirs.[61] However, the concept of settlement should not be confused with that of *diyat*. *Diyat* is the monetary compensation awarded by the courts where the offence has been proved against the defendant and the victim or his heirs have decided to relinquish their right of *qisas* or where retribution is not executable[62] or enforceable[63] according to *fiqh*. Nevertheless, settlement can be made by the victim and the offending party at any time during the court proceedings. This can be done out of court.[64] Further, besides the coercive measures of punishment or payment, the victim or his heirs has another option and that is to waive all their rights against the offender and to forgive him for his offence. Hence, the underlying principle of *qisas* and *diyat* becomes

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Prophet. After the promulgation of Hudood ordinance in Pakistan, the question was raised as to the justification of stoning as a punishment for adultery since there is no specific mention of this form of punishment in Quran. However, it was decided by the Supreme Court of Pakistan that since Sunnah is a primary source of law in Islam, therefore the punishment provided in Sunnah is binding and compulsory to follow. For complete discussion see *Huzoor Bukhsh v. Federation of Pakistan*, PLD 1984 SC 267.

[60] See Kemal, supra note 30 at 165. Although the prohibition of drinking wine is present in Quran, there is no mention of the corresponding punishment. The determination of punishment for drinking wine at eighty stripes is referred to the time of Umar, the second caliph. This decision was arrived by the consensus of the then living companions. However, there is a conflict of opinion regarding the number of stripes to be inflicted. Imam Shafei held the punishment to be forty stripes instead of eighty.

[61] However, there are certain settlements that have not been recognized by the contemporary legislations upon *qisas* and *diyat* principles. For e.g. PAKISTAN PENAL CODE, § 309 provides that any settlement which stipulates the giving of a woman in marriage as consideration of the contract will not amount to the valid settlement.

[62] See PAKISTAN PENAL CODE, § 306.

[63] See PAKISTAN PENAL CODE, § 307.

[64] However, generally speaking, courts are keen to inquire upon the grounds of settlement to verify the absence of any threat or use of force to arrive at any settlement. See also supra note 61.

apparent in that. Since the offences listed in *qisas* and *diyat* are offences against the individual, it is the right of individual to choose the proper form of justice for himself. It is in this context that the options available to the victim range from that of punishment to the complete exoneration of the offender.

Discretionary offences, commonly known as *tazir*[65] are numerous in Muslim states. All criminal acts, omissions and their corresponding punishments that are outside the framework of *hadd* and *qisas* are discretionary. They differ from the preset offences on at least three grounds.[66] Firstly, all preset offences are predetermined offences in Islamic criminal system. Any further insertion into the list of these offences is not possible. Similarly these offences can also not be omitted. Secondly, for every *hadd* offence there is a fixed penalty prescribed in the primary sources for Islamic law. Likewise, the extent of the penalty or compensation for *qisas* and *diyat* offences has also been determined by the Quran and Sunnah. However, the discretion in *tazir* continues from the defining of the offence up to the prescription of penalty for that offence. The punishments that a state can enforce, array from the admonition of the offender to the death sentence. Along with that, a judge also wields a large amount of discretion and can construct a sentence keeping in view the circumstances, mental state and character of the convict. Lastly, the difference between the preset offences and Tazir offences is the recognition given to the state as the ultimate punishing authority. Therefore, the state is authorized to waive off the punishment or substitute it with some other form of penalty. In the case of *hadd*, no person, victim himself, his heirs, judge or the state, has the right to waive or alter the sentence. Similarly in *qisas* and *diyat*, this right to waive or alter the punishment vests in the victim and his heirs exclusively.

Hence, the system of discretionary crimes in Islamic criminal law represents the means through which society protects its political, social and economical system, and preserves its cultural continuity by prescribing penalties for infringement or disruption of the system. Islamic penal history is abound with examples of *tazir* penalties.[67] But of greater importance is the conclusion reached by some contemporary studies,[68] which argue that the Quran and Sunnah prescribes the general rule of a *tazir* system, suggesting thereby an integrated theory of criminal law covering the legislative sources, societal functions and judicial application of *tazir*. This theory has put to rest the widespread view that the *tazir* system in Islam is one of incrimination

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[65] For definition and meaning of the term '*tazir*', see supra note 40.

[66] See Odeh, supra note 10, Vol. II at 167-68 for detail discussion on the first two grounds of distinction.

[67] See Benmelha, supra note 40 at 215-225.

[68] These include the contemporary writers like Abdel Qader Odeh, Cherif Bassiouni, Salmi Al Awwa and Teymour Kemal.

and punishment totally governed by the unrestrained discretion of the ruler.[69]

B. *Punishment and its Purpose in Islamic law*

Till the end of eighteenth century, in western societies, especially in Europe, a criminal was viewed with repulsion and austerity. The punishments enforced were also the reflection of the severity of societal attitudes towards the crime and criminal. The forms of punishments that had been acknowledged in the historical accounts[70] of the European criminal justice system included burning, crucifixion, hanging, amputating bodily parts, uprooting the ears and nails, stamping flesh with hot irons, transportation or exile, life imprisonment and flogging.[71] Most of the modern human rights concepts of criminal justice, such as presumption of innocence or proportionality of punishment, were unknown to the state criminal codes. At closing of the eighteenth century, there were around two hundred crimes in English law for which the prescribed punishment was death.[72] Similarly, the subjects of those punishments were not human beings alone. The list of the possible accused and convicts included the dead, animals, trees, and many non-living objects.[73] Criminal prosecutions could

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[69] See M. A. AL-AWWA, FIL USUL AL-NIZAM AL-JINNAI AL-ISLAMI [THE SOURCES OF THE ISLAMIC PENAL SYSTEM], Ch. 4 (1979).

[70] MICHEL FOUCAULT, DISCIPLINE AND PUNISH (1975). In his famous account of Damiens, the Regicide, Foucault recounts how on March 2, 1757, when taken to the Place de Grave and placed on a scaffold, his 'Flesh is torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.' It took renewed efforts before the tugging horses finally quartered Damiens's bodily parts; the horrors recounted by Foucault were operated under the overview of a Christian iconography.

[71] Ibid.

[72] Id. Included in those crimes was the theft of anything above the value of one shilling. Similarly in the French penal code, there were two hundred and fifteen crimes worthy of death penalty.

[73] EDWARD P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 140 (Farber & Farber 1987); See for e.g. Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97 (2003). At p. 98 the author describes the sentencing of a pig who had killed a child. She writes: 'the court sentenced the infanticidal malefactor [pig] first to be maimed in her head and upper limbs and then to be hanged. A professional hangman carried out the punishment in the public square near the city hall.' See also Joseph P. McNamara, *Curiosities of the Law: Animal Prisoners at the Bar*, 3 NOTRE DAME LAW 30, 32 (1927); Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of*

be brought and convictions could be made against subjects who as non-rational agents could not even understand the moral significance of the concept of accountability and deterrence. One of the reasons for applying such punishments was the imbalanced approach towards the purposes of punishment, in which deterrence as a purpose had precedence over all other functions that punishment was capable of performing. However, modern human rights based revisions of criminal laws in the last two centuries of western history should not go without acknowledgement. The consequence of rapid advancement in intellectual thought and reasoning is itself reflective of the urgency and dissatisfaction with the then existing systems. Conversely, though, one of the aftermaths of the post-seventeenth century egalitarian movement was the rejection of religious dogmas. This in the context of the role of religion[74] in Europe was fairly cautious. Nevertheless, it was because of this super-skepticism towards religious thought that Islamic doctrines were dismissed as well on the ground of being predetermined. Though, Islamic law since its advent, i.e. early seventh century, has taken a principled approach towards the functions, requirements and forms of punishment. In Islamic criminal justice, there is recognition of proportionality principle, doctrine of legality and presumption of innocence from the onset.[75] Similarly, the punishment in the form of mutilation of the body has also been prohibited.[76] Furthermore, the subject of criminal justice system can only be living human beings, and not animals or trees.[77] It has

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Cultural Narratives in the Prosecution of Animals and Inanimate Objects, 69 N.Y.U.L. REV 288, 298 (1994).

[74] See *The End of Europe's Middle Ages* available at http://www.ucalgary.ca/applied_history/tutor/endmiddle/church.html (last visited on 12 February, 2006); See also *Protestant Reformation* available at http://en.wikipedia.org/wiki/Protestant_Reformation (last visited on 12th February, 2006).

[75] M.Cherif Bassiouni, *Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System* in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 19, 25-29 (1982). See also M. Cherif Bassiouni, *Islam: Concept, Law and Habeas Corpus*, 1 RUTGERS-CAMDEN LAW JOURNAL 163 (1969) (referred hereinafter as Islam and Habeas Corpus). For detailed discussions upon principle of legality and presumption of innocence see Al-Saleh, supra note 24 and Kemal, supra note 30.

[76] It is a popularly narrated Hadith, relating from the Prophet Muhammad (pbuh) that he said, "Do not mutilate a body even if it is a mad dog." On the basis of this hadith, it has been concluded by the scholars of Islamic criminal law that any punishment involving mutilation of body cannot be awarded under Islamic law. The acts of mutilation have been disallowed even in the times of war and against the enemy soldiers.

[77] It has long been recognized that the concept of individualized punishment has a central place in Islamic penal theory. See R. CHARLES, LE DROIT MUSULMAN 22 (1965), he writes that: 'Preceding Europe by twelve centuries, Islam acknowledges

been an undisputed rule in Islamic law that the punishment cannot exist or cannot be enforced without serving a corresponding purpose, which could be deterrence, vengeance, and protection of society or reformation of the criminal. Hence, punishing an animal, tree or non-living being could not be of consequence since they cannot be held accountable for their actions. It was at the end of eighteenth century that western societies have started viewing crime and punishment in the light of similar principles that were present in Islamic law from its very inception.[78]

The general word for punishment in Islamic law is '*uqubah*' derived from the Arabic word '*aqb*' which means 'one thing coming after another.'[79] This refers to the fact that punishment follows transgression of the limits set by God or the state. Therefore, the general expression employed for Islamic penal law is *Al-Uqubat*. It should be emphasized that all violations of the limits set by God or state cannot be the subject of the punishment, since punishment can only be inflicted where there is a violation of the right of an individual or society. Thus, if someone neglects his prayers, or does not observe fasts or fails to perform pilgrimage, there is no punishment for it, even though it is violation of the right of God. Therefore, crimes that are punishable in Islamic law are those which affect the individual or society. The Quran, while providing a general rule for the punishment of offences, says: "and the recompense of the injury (*sayyiah*) is punishment (*sayyiah*) equal thereto, but whoever forgives and amends, his reward is due from Allah, for Allah loves not those who do wrong."[80] This Quranic principle is the key to understand the status, form, quantum and most importantly the purpose of punishment in Islamic law. Its application is universal and it is so for all crimes, may those be committed against an individual or for that matter, against society at large. This is even more evident when one considers number of other guiding verses in the Quran concerning the punishment of offenders: "And if you punish, then punish with the like of that with which you were affected; but if you are patient, it will certainly be best for those who are patient."[81] Further, it is said: "And he who punishes evil with the like of that with which he has been afflicted and he has been oppressed, Allah will certainly help him."[82] And also, there is Quranic consent: "Whoever acts aggressively against you, inflict injury on him."[83]

In the verses quoted above and other similar verses in Quran, there are a number of rules laid down for the individual wronged, referring to the punishment of the offender. These rules suggest that the victim should in the

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the criminal and personal liability of single individual endowed with intellect.' See generally, R. CHARLES, HISTOIRE DU DRIOT PENAL (1963).

[78] Ibid at 25.

[79] See Doi, supra note 36 at 220.

[80] AL QURAN, Ch. 42:40.

[81] Ibid at Ch.16:126.

[82] Id at Ch.22: 60.

[83] Id at Ch.2:194.

first instance try to forgive the offender, provided the offender amends as a consequence of the act of forgiveness. Therefore, punishment should not be taken as the first option, rather as the last resort, because God has clear preference for those who show patience and mercy when a wrong or offence has been committed against them. Secondly, if punishment has to be executed against the offender then the rule is that the punishment must be equal to the act committed. Through this verse, the Quran has devised a principle of proportional punishment which is part of every civilized penal code existing within the contemporary world.

A further point deals with the unique linguistic adoption of the Quran regarding punishment. Doi has observed that if the above mentioned verses are read in Arabic, one would note that the Quran uses the same word for punishment, as that for the particular crime. Thus in the chapter 42:40, both the evil and its punishment are called *sayyiah*; in chapter 16:126 and chapter 22:60 the word used for evil is the derivative of *uqubah*, the expression that itself stands for punishment in Islamic law.[84] Similarly, the word used in chapter 2:194 is *'itida* which means aggression. These multiple instances of employing the same expression for the evil act and its punishment suggest, at least, that the punishment itself, though justified by circumstances, is representing nothing but a necessary evil.[85] It is for this reason that people are asked to claim their rights either public or private through the due process of law, by taking the contentious matter before a competent authority rather than taking the law into their own hands, otherwise, they shall be amongst the wrongdoers.[86] It should be stressed that in all cases, the punishment sought must not be greater than the injury caused. Therefore, the maximum amount would be to seek equal retribution, i.e. harm equivalent to the harm done and no more. But the most favored method is not to seek vengeance at all but try to achieve peace through reconciliation, forgiveness and by making the offender aware of the gravity of the offence that he has committed. However, this thinking is not permissible in the cases where the crime is committed against the public at large and is injurious to the entire society. In such cases, the deterrent punishment in the form of *hadd* or *tazir* should follow. The Quranic injunctions regarding this point are as follows: "Nor can goodness and evil be equal. Repel evil with what is better; then between whom and you was hatred will become as if he was your friend and intimate."[87] This goodness will only be granted and benefit those who are patient and forbearing towards the wrong doing against them. And their

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[84] See Doi, supra note 36 at 222.

[85] See Odeh, supra note 10, Vol. I at 83. He has also described punishment as a necessary evil which cannot be justified without any corresponding purpose.

[86] See AL-QURAN, Ch. V:42.

[87] Ibid at Ch. XLI:34

reward will be due from God since they have preserved and have tried to avert evil with good.[88]

Muslims are thus directed to be forbearing, but they are equally asked to prevent a repetition of crime by applying both physical and moral means. The best moral mean is to turn hatred into a friendship by forgiveness and love, as the Quran says: "But if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loves not those who do wrong."[89] This active correction of wrongs, whether by physical force or by moral or spiritual means, which is commanded as better,[90] is an antithesis to the Christian doctrine, which states that when you are hit on one cheek, turn the other also.[91] It is contended that this would not suppress but encourage the wrong doing which would be an inconsistency acting against the rational and coherent performance of a preventive system. Therefore, a system that has an interest in its sound working should not be suggestive of a self-destructive repetition of an offence. Besides, an application of this doctrine would impose an unnecessary burden of bearing the wrong again, upon the victim.[92] Further, it must be noted that it is a Quranic injunction to strive against the aggression and injustice, for such striving is one of the collective duties of a Muslim society.

Thus, the concept, purpose and employment of punishment in Islamic law cannot be clearer. The complete shape of Islamic punishments will emerge for comprehension, only when they are analyzed in the context of the classification of offences made in Islamic criminal jurisprudence. The degree and compulsion of punishments vary for each class of offences. For the offences of *hadd* category, the punishment is fixed and harsher without any option available to the victim or state to forgive or mitigate. These punishments are severe and rigid[93] in their form as they do not adjust

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[88] Id at Ch. XXXIII:96.

[89] Id at Ch. XLII:40.

[90] See ABU ALA MAUDOODI, TAFHEEM AL-QURAN. Especially see the commentary upon Ch. XLII: 40.

[91] See infra note 206; See also BERNARD S. JACKSON, THE PROBLEM OF EXODUS 21: 22-5, ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 75 (Brill Academic Pub. 1975).

[92] See Raymond B. Marchin, *Tolstoy and the Christian Lawyer*, 52 CATH. U. L. REV. 327, 340 (discussing St. Augustine's narrowing of the application of the Christian principle of 'hit the other cheek')

[93] It must be noted that even though these punishments are harsh in their form, however, they are equally difficult in their requirement of proof. The harshest punishment for *hadd* is *rajm*, i.e. stoning to death for the offence of adultery. In accordance with the verse 4 of Surah Al-Nur of Quran, the offence of adultery may not stand proved against any person in society unless four witnesses of the crime are presented in the court of law. Furthermore, those witnesses must be of impeccable character. Now, it seems very unlikely that four people of staunch moral character would witness the act of adultery and would not try to stop it. This is enough to reflect that the objective of this law is not to execute stoning or other harsh

themselves in accordance with the personality traits or circumstances of the offender. The consideration for these *hadd* punishments is the protection of society at large because in Islamic preview these offences are detrimental to the very basics of an Islamic society. According to socio-political theory of Islam, there are three elements fundamental for the creation of a civil society; they are formation of a family unit, protection of private property and assurance as to the sound working of a collective system (social or administrative).[94] These components are recognized as the primary basis upon which all contemporary societies have been erected and their protection has been the first agenda of any state system. Society requires a government of such nature that could provide security to these elementary factors,[95] because all other concepts that we recognize today as basic human rights, have in fact emanated from the rights attached to these concepts. Since a sole individual is weak, and has many basic needs with limited resources at his disposal, the requirement of the cooperation of other individuals in society is indispensable for his survival. The state system, rather government is a necessity to regularize and formalize the relations of one individual with the other in society. This way the socially designated rights and duties can be duly enforced and the life of an individual can be given its fullest meaning. This is a concept which forms the substance and spirit of Islamic criminal jurisprudence. On the basis of this, it is contended that the crimes of *hadd* are punished severely because they meddle with the foundations of a civil society as proposed by socio-political theory of Islam. However, it is incorrect to assume that since in *qisas* and *diyat* the victim or his representatives have been given the right to choose between obtaining punishment, compensation or forgiveness, hence they are considered less grievous in Islamic jurisprudence. In fact, no other religion or system in the

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punishments upon people, rather to protect the society from the commission of open adultery and fornication. The focus is upon the preservation of the moral fabric of the society and not upon punishing people. Mere from the proof standard it can be deducted that this law intends to target open lewdness in society and not the private acts (however, it must not be inferred that private acts of immorality are acceptable in Islamic law, but relevant only for defining the limits of criminal justice system in Islam). Therefore, if the proof is less than the required four eye witnesses, the command is to impose the punishment of *qazf* upon complainant, which is an offence in which a person alleges a woman of unlawful sexual intercourse and fails to produce four witnesses in support of his allegation. *Qazf* is also an offence of *hadd* category and the punishment is 80 stripes and rejection of testimony in future. It is in the correspondence of *zina* (unlawful sexual interscourse) and *qazf* that one finds the maintenance of delicate balance between the enforcement of criminal law and enforcement of morality.

[94] See generally Mohammed A Bahmey, *Civil Society and the Islamic Experience*, ISIM REVIEW 15-16 (Spring 2005).

[95] See John Kelsay, *Civil Society and Government in Islam* in SOHAIL HASHMI, ED., ISLAMIC POLITICAL ETHICS: CIVIL SOCIETY, PLURALISM AND CONFLICT (Princeton, 2002).

world considers human life as sacred as it has been described in this verse of Quran: "That if any one slew a person, unless it be for the murder or for spreading mischief in the land, it would be as if he slew the whole people of world and if anyone saved a life, it would be as if he saved the life of the whole people of world."[96]

The reason for the difference between punishment for crimes of *hadd* and *qisas* is that of the effects of these two categories of crimes. Although crimes of killing and injury are detrimental to society, however, the direct harm is caused to the individual victim and his family. In the case of *hadd*, the harm caused to the society is of a greater magnitude, since these offences attack the basic foundations of civil society. Although, in offences against the person, the harm caused to an individual is significant, however, sometimes the harm to a society is also present in it. Therefore, in such situations the right of the state to enforce *tazir* punishment is also provided alongside *qisas* and *diyat* options, as a protection to the indirect harm caused to society.

In line with the previous argument, it is pertinent to enquire as to the reason for placing the offence of theft, in the category of *hadd* offences, with no option of compensation or forgiveness by the victim, whereas, at least apparently, the offence of stealing seems of lesser gravity than killing of a human being. The answer to this becomes evident when one considers that the object of theft is to deprive a person of his property and this offence can be committed against every person who is holding property in society. In this context, every one possessing property is a potential victim and theft can be committed against him. Whereas in the offence of murder, it is observed that the purpose of the offender is not to kill anyone but a specific person. And his purpose would not be achieved by killing any other individual in lieu of that particular victim. Similarly, an offender who wants to kill one person also does not want to kill as many people as he could get his hands on. Besides, if a person has a general drive to kill and he takes pleasure in killing without any specific grudge against the victim or any fault of him, such offender is suffering from a diseased state of mind[97] and such events cannot be of common occurrence. Besides this, by applying the punishments of QD theory in the case of theft will only result in absurdity. It will be not be a punishment if an equal amount of property is taken back from the thief or theft is committed against the thief. Thus, theft is treated as a *hadd* crime, because it spreads a feeling of insecurity amongst all those who hold property. And since holding of property is one of the basic incidents of societal living, it is inevitable to construe the offence of theft as an offence against society than against the individual.

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[96] See AL-QURAN, Ch. V:32

[97] For e.g., serial killers are generally believed to be psychos.

Therefore, consequently the principles upon which the punitive doctrine of Islamic law rests are of two kinds.[98] First, those principles in which the focus of punishment is upon the nature of the crime and its detrimental effects and, second, those where the punishments concentrate directly upon the individual offender and indirectly upon the crime committed. Collectively these principles represent the main objectives of imposing punishments in Islamic law. When punishment is focused upon the crime and ignores the offender, the ultimate purpose is deterrence, specific and general. That is why such punishments are harsher and rigid in their application, and less flexibility is allowed to the society and system in their implementation. On the other hand, when the punitive principles recognize the victim, offender and circumstances of the offence, the ulterior rationale is to create a balance between the redress of the harm, prevention of further crime and the moral reformation of the offender. It is agreed that these objectives are not easy to achieve, since they are contradictory to each other; to consider the welfare of society, sometimes it is inevitable to sacrifice the welfare of the individual and vice-versa. However, Islamic theory of punishment attempts to locate that unique balance where the apparent contradictions of these incongruous principles can be removed or at least lessened. Hence, there is the theory of classifying offences into *hadd*, *qisas* and *diyat*, and *tazir*. Consequently, the main purpose of punishment in Islamic punitive theory is to prevent the commission of crime in society. It is the dominant position of this objective that qualifies the placement of moral theory at the core of Islamic system of criminal justice. However, if still an individual violates through that protective moral sheath, the next objective is that of protecting society and the reformation and deterrence of the individuals.

Finally, it will be useful to consider the basic principles[99] for the imposition of *tazir* punishments. While determining a *tazir* sentence the state must consider that firstly the punishment should be such as to repel people from the commission of crime in the society. Secondly, the regulating factors for punishment should respond to the need of the society.[100] Therefore, if collective good of society demands that certain

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[98] See Odeh, supra note 10 at p.7.

[99] See Benmelha, supra note 40 at p.219.

[100] As far as the regular objectives of the punishment are concerned, Islamic law in no terms convey any denial of such principles. However, it emphasizes upon the requirement to understand these principles in the context of the dynamics of a societal system. The societal systems are constructed and then control by a combination of visible and invisible manipulative mechanisms. These mechanisms are of multiple sorts. Some are defensive such as punishment, whereas some are proactive like the incentive and reward systems of the society. Therefore, it is sometimes undesirable to confine these mechanisms into straight-jacket definitions. It is, hence, another reason for leaving *tazir* offences and their punishment upon the will of state authority.

offences should be punished on the basis of deterrence, the state can impose such punishments. At the same time, if it is required that certain offenders, such as juveniles, be dealt leniently and the reformation method should be adopted, the state should be able to implement such measures. Thirdly, the purpose of Tazir punishment, ideally, should not be to seek revenge from the offender. The status of the state is not that of an individual and also it is not at par with the individual victim in any respect, therefore, vengeance by the state cannot be a lawful ground. The focus of the *tazir* punishment should be mainly prevention, deterrence or reformation, because society in general and individual in particular are both ultimately the responsibility of the state.

C. *The Rights of an Accused in Islamic Criminal Justice*

Of all the rights accorded to an individual human being,[101] it is perhaps the right of the accused that are the ones most often transgressed. It is important to state the position of Islamic system on this point. The question of the right of an accused stretches over the entire criminal justice system. The various rights that are covered under the holistic approach towards protection of an accused deals with different stages of procedure, from the time of accusation up to the final judgment including investigations, evidence and the primary presumption of innocence.

An historical survey of the Islamic criminal justice system[102] would indicate that there is no specification of a particular juridical framework[103]

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[101] See generally ABU AL ALA' MAUDOODI, HUMAN RIGHTS IN ISLAM (1977). He discusses in detail the human rights granted in Islam and compare them with those given in western laws.

[102] See HASAN IBRAHIM, TARIKH AL ISLAM AL SIYASI, Vol. I ; IBN AL QAYYIM, I'LAM AL MUWAQQUI'IN, Vol.I at 85; AL MAWARDI, AL AHKAM AL SULTANIYAH, 71-2; AL BAYHAQI, AL SUNAN AL KUBRA, Vol. X at 115.

[103] The scholars of the criminal procedure systems have divided these systems into three main categories: accusatorial system, investigation system and a mixed system based on the combined principles of last-mentioned two systems. In the accusatorial system, the criminal cases are heard on the basis of their involving a dispute between two equal parties. Such cases are brought directly to the judge, who has conducted no prior investigation, so that he can weigh the evidence of both sides, decide which argument seems stronger, and rule in accordance with his findings. Whereas, in an investigative system, the accusation is investigated before the start of an actual trial. It resembles the present system, under which the state apparatus (i.e., the police in cooperation with the district attorney) undertakes these responsibilities. The authorities are given enough power to discharge their responsibilities. The defense of the accused consists of gathering evidence to refute the charges.

in Islamic law. Rather, it focuses on the establishment of principles, general foundations, objectives, and the sources of legislation. The 'organizational' details[104] i.e., the extent of a judge's jurisdiction,[105] limitations of his authority in terms of time and place, the role of police, investigation processes, were to be determined by customs, needs, and circumstances of the prevalent time and place. Since there is no direct edict in Islamic law to entrust the juridical process to an individual or an institution, it was also left to the Muslim leadership to decide. As long as the sole requirement of competence was met, the responsibility could be spread amongst several officials or confined to one. The appointing authority must ensure that those entrusted with this responsibility meet the preconditions stated in Islamic law.[106]

It is further clear that the responsibility for judging criminal cases was divided amongst such different authorities as the ruler, the appellate authority, the military authority, the police commissioner, the market authority, and the judge.[107] Indeed, the responsibilities of each were not always exclusive or well-defined; rather, they differed in scope and overlapped, so that sometimes certain responsibilities associated with one would be charged to another in accordance with the desires of the ruler or as a result of his policies.[108]

In this context of the administrative and procedural system, the primary rights granted to the accused are at least four in kind. First of all, there should be a presumption of innocence in favor of each accused person;

The system that combines the principles from both accusatorial and investigative systems, involves an investigation in its first (pretrial) stage and an accusation at the final, courtroom stage. Modern systems of legal procedure combine, to a greater or lesser extent, aspects of these systems. At some stages of criminal process, features of one system will appear dominantly, while at others, features of another will appear dominant.

It will be important to reiterate that Islamic system does not provide a specific procedural system, but rather left such details to the ijtihad and understanding of those responsible for ensuring that justice is done. History shows that one or a combination of these systems was employed at different times by various Islamic states. And even though the Islamic law did not specify details of a legal system, it did put forth general principles, the most obvious being that its laws must be enforced and that justice must be done in accordance with it.

[104] See generally MAHMUD ARMUS, AL QADA' FI AL ISLAM; IBRAHIM NAJIB MUHAMMAD AWAD, AL NIZAM AL QADA'I (for the detail analysis of the judicial system in Islam).

[105] See IBN-QAYYIM, AL-TURUQ UL HUKMMIYAH 215-6.

[106] Ibid. According to Ibn-Qayyim, these conditions are faith in Islam, maturity, ability to reason intelligently, freedom and trustworthiness, having all of one's faculties, and knowledge of the Shari`ah's sources.

[107] AL MAWARDI, AL AHKAM AL SULTANIYAH 69-73; HASAN IBRAHIM, TARIKH AL ISLAM AL SIYASI, Vol. IV at 377-86.

[108] See Ibn Qayyim, supra note 105 at p. 215-6.

secondly, there should be no retroactive effect of criminal law; thirdly, no one shall be condemned unheard and without a fair opportunity to defend himself; and finally, no accused person should be tortured or put under duress for the extortion of a confession or evidence. All other rights (as depicted in modern day constitutions and criminal procedures) would emanate from these primary rights. These included the right of an accused being warned[109] regarding the evidentiary value of his statements made to the interrogating authorities which is an extension of his right that no duress should be exercised upon him for extracting evidence or confession. In fact in Islamic law, detaining a person for the purposes of investigation has also been considered a form of duress.[110] It is also important to note that as far as the rights of an accused are concerned there is no distinction on the basis of a classification of the offence committed by the accused. In Islamic law all accused persons, regardless of the category of crime involved, are entitled to the right to life, liberty and property, the right to petition, and the right to fair trial without any distinction of color, creed or origins.[111] Protection against any unreasonable deprivation of this right is subject to judicial scrutiny, and prompt legal determination is demanded.[112]

Under Islamic law, the right to be considered innocent until proven guilty has been an inherent right of all people.[113] Therefore, the burden of proving innocence is not imposed on the accused, since the presumption of innocence necessitates that the accuser shall be charged with the duty of proving his accusations. The defendant is not required to produce negative evidence. The Prophet (PBUH) stated that 'Had men been believed only according to their allegations, some people would have claimed the blood and properties belonging to others, but the accuser is bound to produce

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[109] For e.g. Miranda warnings in US criminal justice system based upon the celebrated case *Miranda v. Arizona* 384 U.S. 436 (1966). In this case, US Supreme Court decided that persons in custody must be warned prior to an interrogation of their constitutional rights, "You have the right to remain silent, Anything you say can and will be used against you in a court of law, You have the right to an attorney and if you cannot afford an attorney, one will be appointed for you". In U.S. law, the sanction for failing to deliver a Miranda warning prior to a custodial interrogation is quite severe. This failure raises an irrebuttable presumption that statements made by a suspect during such an interrogation were involuntary.

[110] See Odeh, supra note 10, Vol. III at 438. The author has quoted from Omar ibn al Khattab, that he said, 'A man would not be secure from incriminating himself if you made him hungry, frightened or confined him.'

[111] See Maudoodi, supra note 101 at 55.

[112] See Bassiouni, supra note 20 at p. xvii [quoted: Abu Youssef pioneered the protection of human rights long before the subject was ever broached by writers in other legal systems. Indeed what he advocated then is today compatible with many of the rights enunciated in the Universal Declaration of Human Rights and other international human rights instruments.]

[113] A. MAHDI, SHARH AL QUAWAED AL-AMA LI-QANUN AL-UQUBAT [The Explanation of the General Principles of Islamic Law] 37-40 (1979).

positive proof of his allegation.'[114] Along with the determination of burden of proof, another effect of this presumption is that the doubt is strictly construed against the prosecution. In Islamic law, a conviction must be founded upon assurance and certainty of guilt and not on a mere probability. It is quoted from the Prophet (PBUH): 'Prevent punishment in the case of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing.'[115]

Similarly, the principle that criminal laws and punishment shall not be applied retroactively is considered as a 'basic principle'[116] and finds express support in the Quran. It is stated, 'And nor shall we be punishing until we had sent them an Apostle.'[117] At another place in Quran it is said, "Nor was your Lord the one to destroy a population until we had sent to it an Apostle who shall divulge upon them our commands.'[118] And also, 'God forgives what is in the past.'[119] In the same context, it is narrated from Prophet (PBUH) that he said to Amr ibn al-A'as on the occasion of his embracing Islam, that, 'the religion of Islam cuts off any conduct that preceded it.'[120] Muslim jurists have further pointed that this principle of non-retroactivity demands the presence of fair notice on the behalf of state or ruler before imposing any penalty for the said crime.[121] Therefore, the position of Islamic criminal law upon the principle of non-retroactivity of punishment and the principle of legality is comfortably compatible with the modern conception of these rights.

Another right granted to the accused is to defend himself against any accusation. This may be accomplished by proving that the evidence cited is invalid or by providing contradictory evidence to the one presented. In any case, the accused must be allowed to exercise this right so that the accusation does not turn into a conviction. An accusation means that there is a possibility of doubt, and just how much doubt is there, will determine the amount and parameters of defense. By comparing the evidence presented by the defense with that of the party making the accusation, the truth will come to surface, which is, after all, the objective of the investigation and trial. Therefore, the opportunity to defend is not only the right of the accused to use or disregard evidence as he pleases, but is also the right and the duty of society as a whole. It is the society's concern that

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[114] Transmitted from Ibn Abbas by al Bukhari, Muslim, Ahmad and the authors of Al-Sunnan.

[115] Ibid. For further discussion upon the application of the principle of avoiding the execution of *hadd* by doubt, see ABU ZAHRAH, CRIME AND PUNISHMENT IN ISLAMIC JURISPRUDENCE 218 (1974).

[116] See Bassiouni, *Islam and Habeas Corpus*, supra note 75 at 25.

[117] AL QURAN, Ch. XVII: 15.

[118] Ibid at Ch. XXVIII: 59.

[119] Id at Ch. V: 98.

[120] See Abu Zahrah, supra note 115 at 323.

[121] See Al-Saleh, supra note 24 at 56.

the innocent are not convicted and that the guilty do not escape punishment. It is for this reason that Islamic law guarantees the right to a defense, and prohibits its denial under any circumstances and for any reason.[122] In a well-known hadith, the Prophet (PBUH) is reported to have told Ali, who he has just appointed as governor of Yemen :

> 'O `Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favor of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth."

It is related that `Umar ibn `Abd al `Aziz said to one of his judges: "When a disputant comes to you with an eye blinded, do not be quick to rule in his favor. Who knows, maybe the other party to the dispute will come to you with both eyes blinded!'[123]

As far as an accused's right to counsel is concerned, there exists no particular mention of the question in the works of the early Islamic jurists.[124] However, it must not be forgotten that the development of complex procedure and intricate evidence principles are of recent origins. Therefore, most of the books on Islamic procedural law written before the seventeenth century do not mention this issue. Another reason for this apparent omission might be due to the fact that, historically, court sessions were public and were widely attended by legal scholars and experts. The presence of such scholars and experts in court sessions represented a true and responsible legal advisory board that actively assisted the judge in dispensing justice. Thus, there was felt no need for professional counsel.

Nonetheless, it was the opinion of Abu Hanifah that the one who appoints another to represent him before the court is responsible for whatever ruling is passed, even though the one being represented may not be present when the ruling is made. Other jurists have given similar opinions. In an authentic hadith, it was related that the Prophet (PBUH) said:

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[122] The basic rule in regard to defense is that it should be undertaken by the accused, as it is his right, if he is capable of doing so. If not, he may not be convicted. This is why some jurists have opined that dumb mute cannot be punished for *hadd* crimes, even when all of the conditions regarding evidence have been satisfied. Because if the mute were capable of speaking, he might be able to raise the sort of doubts that negate the *hadd* punishment and by means of sign language only, he may not be able to express all that he may want to. So, under such circumstances, if the *hadd* punishment is administered, justice will not have been served, because the *hadd* will have been administered in the presence of doubt.

[123] Awad M. Awad, *The rights of Accused in Islamic Criminal Procedure* in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM at 96.

[124] Ibid.

> "I am only human, and some of you are more eloquent than others. So sometimes a disputant will come to me, and I will consider him truthful and judge in his favor. But if ever I have (mistakenly) ruled that a Muslim's right be given to another, then know that it is as flames from the hellfire. Hold on to it or (if you know it belongs to another) abandon it."[125]

There are Islamic texts that stress upon the need to settle disputes by whatever means necessary. When we consider the great disparities in talent and ability (particularly the ability to argue and debate effectively) that exist between the disputants, even those brought before the Prophet (PBUH), we realize that any method that will lead to a just settlement may be considered legally valid. Therefore, the accused's decision to ask for help in defending himself may also be considered valid. With the help of such counsel, the accused may acquire a proper understanding of the charges against him, of what the law says, of the weight of the evidence presented, and of what may be used (and how it may be used) to rebut that evidence. When taking all of this into consideration, it may be assumed safely that the accused has the right to defend himself and also to seek the help of someone else.[126]

The right of an accused that he should not be subjected to any kind of torture or duress and he should not be compelled to make a confessional statement is a right belonging to the investigative stage of a criminal case.[127] It is universally agreed among Islamic jurists that the accused cannot be forced to admit guilt. It has been suggested that neither the Quran, nor the Sunnah, nor *Ijma* allow the examination of an accused by the use of beatings, imprisonment or threats.[128] Further, the *Malikis* require that the admission be voluntary, otherwise it is invalid even if it led to the recovery of the body of a victim in a murder case or the stolen goods in the case of theft. The *Hanafis* also reject as unjust, an admission obtained by torture or threats even though it might be true.[129]

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[125] See IMAM ABU ISA TIRMAZI, JAMIA TIRMAZI, VOL. II (Badee uz Zaman, trans.) (Zia Ehsan Publisher, 1988).

[126] See Awad, supra note 123 at p.98-99.

[127] Ibid. However, the author disagrees with the existence of any stage of investigation in Islamic law.

[128] See generally IBN HAZM, AL-MUHALLA.

[129] However, some later Hanafi jurists have permitted coerced admissions. Ibn' Abidain in his *Hashiyya Usul Al Jinai Al Islami* relates that Hassan ibn-Zayad allowed the beating of the accused to force him to admit the guilt as long as the beating was not severe and would not cause a wound or expose the bone. But this was positively prohibited in the case of Hadd. Besides, it is a minority opinion and there are hardly any other jurists in this school who would allow such practice. Besides, some jurists such as Ibn Hazm and Ibn Qayyim adopt a middle view by not permitting involuntary confessions but admitting its true results, except in cases of Hadd. For detail discussion on these issues see Awad, supra note 123 at 106-7.

With this brief narration upon the rights of an accused in Islamic criminal justice system, at least two conclusions can be reached safely. First of all, that criminal justice in Islam is not devoid of the concepts relating to the rights of the individual accused. Secondly, most of these rights granted to an accused have their basis in the Quran and Sunnah of the Prophet (PBUH). Though, it is agreed that many procedure-related rights may not have existed in the early period of Islamic law; however, the reason lies in the simplicity of the encountered situations and the concentration of focus upon the development of substantive rules than the procedural ones. However, at the same time, there is nothing in the Quran and Sunnah against constructing these principles in the favor of the rights of an accused, rather the scope for such construct is inherent in the basic theory of Islamic criminal law.

III.

THE ISLAMIC QISAS AND DIYAT THEORY

The Quranic verse, '[N]or take the life –which God has made sacred, except for the just cause,'[130] reflects the Islamic stand upon offences against human beings. It has been stated at various places in the Quran[131] and the Hadith,[132] in no ambiguous terms, that the respect of the human life has been made obligatory upon all believers. It is this inviolable status of human life and body that has placed offences against the person in the class of determined offences with determined punishments. The following sections of this part of the article will exclusively focus upon the construction of Qisas and Diyat theory or in contemporary terms, the homicidal law of Islam.

A. *Historical Context*

Legal historians generally identify four phases in the historical evolution from a system of retaliation to one based on victim's compensation. The four phases are commonly identified with reference to their most salient features, namely: (1) the original absence of generally agreed-upon rules regarding the punishment of wrongs ('discretionary retaliation');[133] (2) the gradual emergence and articulation of a rule of proportional retaliation (*lex talionis* or 'regulated retaliation') (3) the transformation of the punitive entitlement of a victim's retaliatory right into

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[130] AL-QURAN, Ch. XVII: 33

[131] See Doi, supra note 36 at 229-234.

[132] See IBN ISHAQ, SIRAT RASUL ALLAH 651 (A. Guillaume, Trans.) (OUP Karachi, 1990).

[133] The main reason for this has been the absence of centralized power.

pecuniary compensation ('blood-money'); (4) the gradual replacement of *lex talionis* and blood-money with a system of fixed pecuniary penalties ('fixed penalties').[134] If this phase-wise construction of the evolutionary process may be deemed as correct, the conceptual pieces of the Quranic law of *qisas* and *diyat* belongs to the second and third phase of this division.

It is agreed among the scholars that the Quranic law of *qisas* is the continuation of the prior Jewish tradition[135] and ancient Mesopotamian *lex talion*. Along with these sources, some writers have remarked the Quranic law of *qisas* as a mere adoption and reformation of the pre-Islamic Arabian customs. Therefore, historical analysis of this law lies in the examination of these two different contexts. The primary context of this law is an inquiry into the sources of *lex talionis* within the ancient code of Hammurabi, Talmud laws and Biblical books. The comparatively secondary context is to investigate the customary principles of tribal law existing in pre-Islamic Arabia.

1. *The Ancient Principle of Reciprocity: Lex Talionis*

Ancient societies had different ways of dealing with wrongs, depending on whether the harm was occasioned by a member of the clan or by an outsider.[136] If the harm was caused by the member, the loss was treated as a misfortune. Where the circumstances indicated that the harm was not merely accidental, the chief of the clan was likely to punish the tortfeasor, although physical retaliation was rarely implemented to avoid duplicating the loss to the group. The situation was quite different in the case of harm occasioned by an outsider. In such a case, retaliatory rules specified the measure of acceptable retaliation to reestablish the equilibrium between the two clans.[137]

The most important and anciently acceptable measure of damage is measure for measure: the rule of proportional damages, which in its most

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[134] F. Parisi, *The Genesis of Liability in Ancient Law*, 2001 AM. LAW ECON REV 3, 82-124.

[135] AL-QURAN, Ch.V: 45. In this verse, the God proscribed, "life is for life, and eye for eye, and nose for nose, and ear for ear, and tooth for tooth...reprisal in wounds...." This verse is almost identical to the verses found in the biblical Book of the Covenant in Exodus 21:22-25, the rule states that where two men fight and in the course of their fight a pregnant woman and her fetuses are killed the penalty shall be "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, stripe for stripe."

[136] See infra Part-IV-A-2.

[137] See Francesco Parisi and Giuseppe Dari-Mattiacci, *The Rise and Fall of Communal Liability in Ancient Law*, 24 INT'L REV. L. & ECON. 489, 492 (2004).

famous iteration is the rule 'an eye for an eye.'[138] The earliest human legal systems were almost universally forms of *lex talionis*,[139] or 'the law of retaliation.' The *lex talionis* is a law of equal and direct retribution; in the words of the Hebrew scripture: 'an eye for an eye, a tooth for a tooth, an arm for an arm, a life for a life.'

This law of *lex talionis* belongs to a set of anciently recognized reciprocity principles that measure how a person is to be treated by how he treated others. One of the other more congenial rule of the same genre is the Golden Rule: "Whatsoever ye would like that men should do to you, do ye even so to them."[140] Its positive stance, aiming at the production of good or charitable action, won this principle a permanent place in the human moral consciousness. Aristotle reports that this reciprocity principle was part of the moral common sense of his day and was recognized by the Pythagoreans of the sixth and fifth centuries, B.C.[141] Along with the Golden Rule, the best known reciprocity principle and the one most associated with punishment theory is talion as reported in the Old Testament.[142] The Leviticus 24:10, records the oracular response to Moses' consultation in the case of the blasphemer.[143] After determining the offender's fate, God issues a series of commands which narrates the law of retaliation for the people of Israel. The referred passage says:

> "God commanded: 'He who blasphemes the name of the Lord shall be put to death; all the congregation shall stone him; the sojourner as well as the native, when he blasphemes the Name, shall be put to death. He who kills a man shall be put to death. He who kills a beast shall make it good, life for life. When a man causes a disfigurement in his neighbour, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured. You shall have one law for the sojourner and for the native; for I am the Lord your God.' So Moses spoke to the people of Israel; and they brought him who

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[138] Andrew R. Simonds, *Measure for Measure: Two Misunderstood Principles of Damages, Exodus 21:22-25, "Life for Life, Eye For Eye," and Matthew 5:38-39, "Turn the Other Cheek"*, 17 ST. THOMAS L. REV. 123.

[139] See generally Calum M. Carmichael, *An Eye for an Eye, and a Tooth for a Tooth: The History of a Formula*, in ALAN WATSAON, ED., LAW, MORALITY AND RELIGION: GLOBAL PERSPECTIVES (A Robbins Collection Publication 1996).

[140] MATTHEW 7:12; see also 1 CONFUCIAN ANALECTS 15:23 ("What you do not want done to yourself, do not do to others."); THE BABYLONIAN TALMUD: TRACTATE SHABBAT 31a ("What is hateful to you, do not to your neighbor.").

[141] ARISTOTLE, NICOMACHEAN ETHICS, PART-V, CH. 4. Aristotle himself preferred a modified principle of reciprocity that would mete out different penalties depending upon such matters as whether it was an official or an ordinary person who was assaulted.

[142] EXODUS 21:24-25; see also GENESIS 9:6; DEUTERONOMY 19:21.

[143] The apparent problem of this case was that the blasphemer was the son of the Israelite woman, however, his father was an Egyptian.

had cursed out of the camp, and stoned him with stones. Thus the people of Israel did as the Lord commanded Moses."

Despite its seniority over the Golden Rule, the talion has not been treated as kindly by contemporary legal commentators. The accepted wisdom is that the principle is archaic and uncivilized.[144]

The most ancient account[145] of this law has been found in the code of Hammurabi.[146] In the code the rule 'eye for eye' and its associated rules appear in rules 196 et seq.[147] as follows:

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[144] See HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE, Ch. 9 (1979); TED. HONDEREICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 414, 457 ('the primitive idea of a harm for a harm'); JOHN KLEINIG, PUNISHMENT AND DESERT 50 (1973); VLADMIR S. SOLOVYOF, THE JUSTIFICATION OF THE GOOD 302 (N.A. Duddington trans., 1918) (Retribution is 'incompatible with any degree of developed human feeling.'); see also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 234-35; HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 44 (1957); THEOPHILE J. MEEK, HEBREW ORIGINS 66, 68 (1936).

[145] See Bernard S. Jackson, *Models in Legal History: The case of Biblical Law*, 18 J.L. & RELIGION 1, 6 (2002). It is mentioned that the pre-Hammurabi codes, both Sumerian (Ur-Nammu) and Akkadian (Eshnunna), indicated the presence of a compensation scheme for bodily injuries. It is provided in the Laws of Ur-Namma §18-22, commencing: 'If [a man] cuts off the foot of [another man with ...], he shall weigh and deliver 10 shekels of silver' (§.18); similar provisions follow in respect of the 'bone' (§.19), 'nose' (§.20), '??' (text damaged) (§21), and 'tooth' (§22).. Similarly, in the Laws of Eshnunna §42: 'If a man bit and severed the nose of a man,--1 mina of silver he shall weigh out. An eye--1 mina; a tooth--1/2 mina; an ear--1/2 mina. A slap in the face--10 shekels silver he shall weigh out.' For further references, See MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 19 (Scholars Press 1995).

[146] Hammurabi was the sixth ruler of the Amorite (First) Dynasty of Babylon (circa 1750).

[147] The Code of Hammurabi, Mesopotamia, available online at http://www.wsu.edu/~dee/MESO/CODE/htm (last visited June 12, 2005). See also CHARLES F. HORNE, THE CODE OF HAMMURABI: AN INTRODUCTION (1915) available online at http://www.yale.edu/lawweb/avalon/medieval/hammint.htm (last visited June 16, 2005). He writes: [Hammurabi] was the ruler who chiefly established the greatness of Babylon, the world's first metropolis. Many relics of Hammurabi's reign [1795-1750 BC] have been preserved, and today we can study this remarkable King . . . as a wise law-giver in his celebrated code. . .

. . . [B]y far the most remarkable of the Hammurabi records is his code of laws, the earliest-known example of a ruler proclaiming publicly to his people an entire body of laws, arranged in orderly groups, so that all men might read and know what was required of them.....

..... Yet even with this earliest set of laws, as with most things Babylonian, we find ourselves dealing with the end of things rather than the beginnings. Hammurabi's code was not really the earliest. The preceding sets of laws have disappeared, but we have found several traces of them, and Hammurabi's own code

'EYE
196- Eye for an eye among upper class.
197- Bone fracture for bone fracture among upper class.
198- Eye or bone injury among commoners, compensation 60 shekels.
199- For slave, less compensation, 20 shekels.
TOOTH
200- Tooth for tooth among upper class.
201- Tooth injury among commoners, compensation 20 shekels.
CHEEK
202- Strike the cheek (insult) among upper class by lesser to higher status-flogging with an ox hide whip 60 lashes.
203- Strike the cheek among upper class equals, compensation 60 shekels.
204- Strike the cheek among commoners, compensation 10 shekels.
205-Slave of upper class strikes the cheek of upper class, slave's ear cut off.
BRAWLING RECKLESSNESS
206-Among upper class unintentional wounding in brawl, pay doctor's fees.
207-Among upper class unintentional homicide in a brawl, compensation 30 shekels.
208- If victim was a commoner, compensation 20 shekels.'

The thing to note in the above passage from the laws of Hammurabi is that: (1) there are provisions for both retaliation and compensation for injuries; (2) there are strikingly different penalties based upon class (upper class, lower class or slave);[148] and (3) the penalties among the upper class, the conqueror warriors, were on their face physical and brutal, while, seemingly ironic, the penalties set for the lower class were merely

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clearly implies their existence. He is but reorganizing a legal system long established.

[148] The Code of Hammurabi contemplates the whole population as falling into three classes, the amelu, the muskinu and the ardu. The amelu was a patrician, the man of family, whose birth, marriage and death were registered, of ancestral estates and full civil rights. He had aristocratic privileges and responsibilities, the right to exact retaliation for corporal injuries, and liability to heavier punishment for crimes and misdemeanours, higher fees and fines to pay. To this class belonged the king and court, the higher officials, the professions and craftsmen. The term 'muskinu' came in time to mean 'a beggar' and with that meaning has passed through Aramaic and Hebrew into many modern languages; but though the Code does not regard him as necessarily poor, he may have been landless. He was free, but had to accept monetary compensation for corporal injuries, paid smaller fees and fines, even paid less offerings to the gods. He inhabited a separate quarter of the city. The ardu was a slave, his master's chattel, and formed a very numerous class. He could acquire property and even hold other slaves. His master clothed and fed him, paid his doctor's fees, but took all compensation paid for injury done to him.

monetary and less onerous.[149] For example, for a slap in the face or on the cheek (i.e. insult), the upper class penalty for lesser to higher status was a very harsh penalty of 60 lashes with an ox hide whip, while insult amongst commoners entailed a penalty of only 10 shekels. Yet unintentional wounding or homicide in a brawl or fight, irrespective of class, was punished relatively lightly--suggesting that fighting or a martial tradition was acceptable.

Hence, pecuniary compensation governed injuries to the lesser strata of society, and talion was applied when both the victim and the perpetrator were members of the upper stratum.[150] Since, this stratum controlled the state and plainly was the stratum with which the state identified, the offenses involving the upper stratum would be expected to be identified as offenses against the state rather than merely as private wrongs. From this it can be assumed that talion in Babylon was closely connected with the development of criminal law. Although, contradictory explanations have been offered in response to this differentiation in legal rules based upon class distinction.[151]

Along with the rule of proportionality, at least under Hammurabi's code, the talion probably also operated as a maximum limit on the

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[149] However, it is a mistake to assume that a physical punishment is necessarily worse than a monetary punishment. A person who did not or could not pay the monetary amount could be sold into slavery, which was an extremely harsh penalty.

[150] CLAUDE H.W. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 74 (1904).

[151] See Simonds, supra note 138 at 128-129. He writes:

> "It is common in the history of the law, after a conquest, for the conquerors to keep their own laws and the conquered to keep theirs. Such was the case, for example, among the Normans and the English, and the Lombards and Romans. The law of the tribe, particularly, the conquering tribe, is the right of the men of the tribe. The tougher, more physical rules among the conquerors were a badge of their (perception of their own) superior character demonstrated by their military tradition, success, achievement and toughness. Conquests produce a very fertile situation for the development of law because at once it becomes important to know what the pre-conquest laws of the conqueror and conquered people were, and with the passage of time after the conquest it becomes increasingly unclear what those laws were. In this way, great, productive and innovative legal fiction can develop, such as in the Common Law that the Magna Carta derives from the Old English Laws of King St. Edward the confessor before the Norman conquest. Hence, it is largely beside the point to what extent the Babylonians circa 1750 punished literally by removing eyes, teeth or other body parts. The brutal laws of the conqueror were the badge of honor. And the lesser penalties among the conquered were a mark of their inferior character. There laws were meant as a manifestation of character, class status and the social order, regardless of the fact that the upper class wished for some reason, to be subject to harsher treatment than the lower class."

punishment that can be awarded for personal injury claims,[152] although, historical materials are not crystal clear on this point. Hence, the maximum limit was imposed upon the victim's or his kin's claim to compensation or their emotion to retaliate. There is some evidence that the Roman use of talion shared this limiting, non-mandatory character.[153] Similarly, the Bible is forceful in its admonition that the proper limit on criminal penalties must not be exceeded: "Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee."[154]

For the Hebrews, the talion originally may have been mandatory,[155] but later became non-mandatory.[156] The Sadducees believed that talion should be interpreted literally.[157] The Talmudic rabbis, by contrast, interpreted non-capital talion as calling for monetary compensation designed to make the victim whole.[158] They made capital punishment largely a dead letter through evidentiary restrictions.[159] Humanistic impulses were no doubt of central importance in these Talmudic developments, but it is tempting to speculate that the movement away from the criminal concepts toward tortious concepts was a reflection of the eroding Hebrew state power.[160]

These laws of talion in the code of Hammurabi were enormously influential and much copied throughout the ancient Near East and Egypt. Not only that, but it has been commented by the scholars of Biblical laws

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[152] See HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 19, fn. 5 (1952); See also J.M. SMITH, ORIGIN AND HISTORY OF HEBREW LAW 237 (1931) (Assyrian Code).

[153] TABULA 8:2; COHN, PUNISHMENT IN THE PRINCIPLES OF JEWISH LAW 524, (Menachem Elon ed., 1975).

[154] DEUTERONOMY 25:3.

[155] See NUMBERS 35:19, 21; DEUTERONOMY 19:21; Goldin, supra note 152 at 19 fn.5.

[156] JOSEPHUS FLAVIUS, ANTIQUITIES OF THE JEWS, IN THE WORKS OF FLAVIUS JOSEPHUS IV:280 (William Whiston trans., 1920).

[157] Ibid at 610.

[158] See THE BABYLONIAN TALMUD: TRACTATE BABA QAMA 83b.

[159] See Cohn, supra note 153 at 521.

[160] See JACOB NEUSNER, A HISTORY OF THE JEWS IN BABYLONIA I:212, III:221 (1965-1970). The hegemony of the Talmudic interpretation was not immediate. Philo, in the first century A.D., still supported talion. He warned that any other method of punishment would "subvert rather than uphold legality." Moreover, the written Talmud apparently continues to endorse a form of reciprocity. "[T]he measure by which man measures is that measure by which he will be measured" [The Babylonian Talmud: Tractate Sotah 1:7; Tosefot Sotah 3:1]. Presumably this means at least that the severity of a criminal penalty ought to depend in some way upon the seriousness of the offense, as was expressly biblically ordained in the case of flogging: "And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number." [Deuteronomy 25:2.]

that the rules in ancient Biblical Book of the Covenant are in numerous instances similar to, and appeared to be derived from, earlier Mesopotamian laws.[161] Though, it must be noted that the period of Hammurabi and previous Sumerian and Akkadien codes,[162] was a post-Abrahamic period.[163] And in religious context, the continuous reiteration of these laws in Testaments, Book of Covenant and then lastly in the Quran, is suggestive of the fact that the religious origin of these laws might be the revelations upon Abraham, and it is from there that they were adopted and inducted in the Mesopotamian codes.[164] Furthermore, the uniformity of rules among these ancient societies should not be surprising if we keep in mind that the Hebrew people had been subjected to both Egyptian and Babylonian control at different times in history.[165]

Consequently, the answer to the question of the adoption of *lex talionis* by the Arab tribes can be searched into the impressions left by these previous laws upon the Arabian people. It has been noted that the Arabs were exposed to the monotheistic religions.[166] Judaism and Christianity existed among the population of southern Arabia. Judaism was particularly influential in the city of Yathrib. Nestorian Christians, driven from the Byzantine Empire in the 5th century over differing opinions of doctrine, settled in the Persian as well as in the northern Arabian Peninsula and

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[161] RAYMOND WESTBROOK, WHAT IS THE COVENANT CODE? in THEORY AND METHOD IN BIBLICAL AND CUNEIFORM LAW: REVISION, INTERPOLATION AND DEVELOPMENT 15, 21 (B.M. Levinson ed., Sheffield Academic Press 1994); CYRUS H. GORDON & GARY A. RENDSBURG, THE BIBLE AND THE ANCIENT NEAR EAST 89 (W.W. Norton & Co., 1997) (stating that the Ugaritic tablets contain "so many striking literary parallels to the Hebrew Bible that it is universally recognized that the two literatures are variants of one Canaanite tradition"). It has been further commented that the Bible appears to be very much in the pronounced legal tradition of the ancient Near East, while such emphasis upon law is not found in other Mediterranean cultures until the Romans .

[162] See supra note 145.

[163] The time period of Abraham is 2000-1900 BCE (circa), whereas the Mesopotamian codes are reported to be written from 2000 to 1700 BCE (circa). The Hammurabian code was written in 1750 BCE (circa).

[164] But see Jackson, supra note 145 at 29-30. He comments that in fact, the continuous narratives of the talion principle from pre-Judaism period to the post-Christianity period appear to indicate that, whatever the religious /secular status of the principle may be in human justice, the talionic principle was regarded also as a measure of divine justice; and since these accounts of the talion law have come through the hands of religious editors, they could have been fairly manipulated to be in that direction.

[165] The law of ancient Israel was put into its definitive form during the Babylonian Exile and thus reveals the influence of both Egyptian principles and the more explicit precepts of the Code of Hammurabi. See also infra note 289.

[166] See http://www.ucalgary.ca/applied_history/tutor/islam/beginnings (visited June 16, 2005)

converted some Arabs there. Besides, Zoroastrian traders from Persia also passed through Mecca and other trading centers often enough to exert a small religious influence. Therefore, it is not difficult to trace the roots of the *lex talionis* appearing in the customs of pre-Islamic Arabia.

2. *Tribal Law of Pre-Islamic Arabia*

The history of the pre-Islamic Arabia is one filled with feuds, enmity and warfare.[167] Majority of the population of Arab at that time existed in the forms of tribes although there were also existent the settled communities of Mecca[168] and Medina.[169] However, the limited civic life of those city-centers was still characterized with tribal identification.[170] Without tribal identity, the existence of an individual was next to impossible.[171] It was one of the reasons that amongst various forms of punishment, the punishment of confiscation of the tribal identity (in the form of exile or transportation or the severance of tribal ties) was considered a harsher one.

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[167] Robert Stockman, *Notes on Islam from a Bahai'i Perspective*, at http://bahai-library.com/unpubl.articles/islam.bahai.html (last visited on 15th June, 2005).

[168] The settlement of Mecca originated in the 5th century, when an Arab nomadic group called the *Quraysh* gave up their nomadic traditions to live permanently in the western Arabian foothills. The site was not an oasis, and was indeed located in a harsh desert environment. Although it was not a major trading centre, goods sometimes passed through it from the kingdom of Yemen in the south, to Syria in the north, and across the Red Sea to Ethiopia. It mostly gained settlers and rose in population because of the presence of the *Ka'ba* in the city. The *Ka'ba* was a cubic monument that the Arabs used to pray to many of their gods, and they erected idols around the structure for that purpose. In Islamic times it became the most important monument for Muslims. The *Ka'ba* is the direction towards which Muslims face when praying, a practice begun by Muhammad in 624. At the time of Muhammad's birth in Mecca about 570, the city was controlled by a powerful group of merchant families who had brought great wealth and prestige to Mecca. It would become even more prestigious after Islam was accepted there about 630, and the city became the holiest city in the Islamic faith.

[169] See Coulson, supra note 8 at 10.

[170] See for e.g. Schacht, supra note 3 at 6-10.

[171] IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 27-28 (1988). See also Lino J. Lauro and Peter Samuelson, *Towards Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 95 quoting from Lamin Sanneh, *Pre-Islamic Arabia* (unpublished paper, Sept. 1993). The authors write that according to Lamin Sanneh, the *hayy*, or clan, was the fundamental unit of social organization in pre-Islamic Arabia and fostered unity through conformity and allegiance to the tribal god. Epics of heroic exploits demonstrated the clan's superiority over other clans. The clan drew a sharp line between clan- members and non-members, responding severely to any threat to clan unity or orthopraxy.

Although tribal life was of a rudimentary form, however, it was not devoid of, at least, some kind of order. It has been recorded by different historians that the everyday life in pre-Islamic Arabia was controlled and regulated by customary laws of the tribe.[172] Since the population of Arabia was basically divided into urban residents and Bedouins (desert-wanderers), thus the laws enforced in urban areas were comparatively more developed than those of the Bedouin tribes. The reason for this was the greater exposure of citizens to outside civilizations and information derived from their trade related interactions.[173] Due to the central position of the tribe in the life of individuals, the customary rules of the tribe were also considered sacred by its members. There were no means available for any systematic redress or protections for a person who was considered an outsider to the protections afforded by the private tribal system. This semi-formal tribal system considered different tribes as singular units whose standing was marked either by their wealth, influence upon other tribes or their reputation in the battlefield. There was found no serious consideration of the notion of a centralized authority by this collection of tribes.[174]

Therefore, the life in tribal Arabia, before the birth of the Prophet (PBUH), was characterized by a strong sense of affiliation with one's tribe. The disputes or wrongs committed against the individual were generally of two kinds: the inter-tribal disputes and intra-tribal disputes. Understandably, in comparison to the inter-tribal matters, the solution to the intra-tribe issues was much more convenient to find due to the authority exerted by the chief or *shyeikh* of the tribe. The operative justice system for the intra-tribal matters was clearly private, with less external pressure and, usually, quite informal in procedure. Though, there is an identification of a number of distinct kinds of laws,[175] however, there is not much finding as to the similar formatting of those laws by different tribes.[176] Each tribe had

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[172] P.M. HOLT, ET AL, ED., THE CAMBRIDGE HISTORY OF ISLAM, VOL. I at 23 (Cambridge University Press, 1970). See also Iraj Bashiri, *Samanid Renaissance and Emergence of Tajik Identity*, 1997 at <http://www.iles.umn.edu/faculty/bashiri/Samanid%20folder/Samanid.html> (last visited on 15th June, 2005).

[173] Ibid at 6. It has been commented that Mecca and Medina, before the birth of Prophet, were considered to be a trading opportunity and route amongst the Byzantine and Sassanian states.

[174] But see ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE 3-5 (Kausar Brothers). Although he agreed that there was no such thing as a settled government in Pre-Islamic Arabia, however, the things were moving towards the creation of one central government in Mecca. The reason for this development was recorded as the influential position enjoyed by the tribe of Quraysh and secondly, the importance achieved by Mecca as the commercial center of the Arabian Peninsula.

[175] Ibid at 4-15.

[176] See for e.g. Schacht, supra note 3 at 7 (identifying that the law of marriage existing in Mecca was different from the one existing in Medina.).

its own law to follow. Obviously, the problems arose in regard to the inter-tribal matters. As the perceptions of pride, courage and revenge were almost religious to the Arabs and especially Bedouins, the solution of most inter-tribal disputes was long term warfare,[177] one effect of which was a further organization or segregation of those tribes into allies or enemies, resulting into another series of feuds. However, the exact outcome of a particular dispute would, mainly depend upon the status of the involved tribes.[178] It is in this setting that the response of a tribal community to the offences against the person, has to be analyzed.

The tribal understanding of the value of human life was twofold. The Arabs were not only polytheists but were also humanists.[179] They valued human life for the duration of its time on earth, and they did not subscribe to a belief in any sort of afterlife. The main reason for their rejection of Judaism and Christianity was the concept of resurrection. Arabs believed only in the existence of present and the prayers they offered to their gods also pertained to the earthly world and not for salvation or redemption in heaven. Within this context it is not difficult to appreciate the sensitivity that may exist in Arabs regarding human life. However, the description of these traits does not end here. There was another concept existing amongst the Arabs that was even larger than the value of a human life or the lives of all tribe-members and it was the pride of 'tribal association.'[180] As said before, since the association with the tribe was considered to be the primary incident in the life of an individual, thus life could be taken and could be given in order to protect that pride. Therefore, if a murder or even accidental killing was committed at the inter-tribal level, it seemed a responsibility of the victim's tribe, in order to extend social support to the claim of the victim and to strengthen his ability to retaliate because this was what mattered ultimately.

It has been recorded in the historical accounts of Arabia that in the matters of homicide and injury, the ancient *lex talionis* was applied as law.[181] The principle of talion seemed suitable in the tribal context because it served a variety of purposes, such as revenge, demonstration of social power and restoration of tribal honor.[182] There has been more evidence as

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[177] Matthew Lippman, *Islamic Criminal Law and Procedure*, 12 B.C. INT'L & COMP. L. REV. 30 (1989). See also M.J.L. HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST 24 (1963).

[178] PATRICIA CRONES, MECCAN TRADE AND THE RISE OF ISLAM 231-32 (Princeton University Press 1987).

[179] See http://www.ucalgary.ca/applied_history/tutor/islam/beginnings (visited June 16, 2005)

[180] See supra notes 136-137 and accompanied text.

[181] See Holt, supra note 172 at 23.

[182] Hossein Esmaeili and Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 163 (2000).

to the application of *lex talionis* in inter-tribe context than the intra-tribe one. In inter-tribe matters, there was no strict application of talion and many a times, matters were solved with the payment of compensation. On the other hand, in the inter-tribal disputes, the principle of talion was applicable only to the form of punishment but not to the extent of punishment. Therefore, if the victim belonged to a higher rank, the execution may be that of more than one person inclusive of the offender, or if the offender is of the lower rank, the execution of a high ranking person from the offender's tribe may be demanded. This demonstration of Arab understanding of the retaliation principle does appear similar to the *lex talionis*, however, it was not strictly the lex talionis since there was no strict adherence to the principle of proportionality. The rule of 'a life for a life' could be altered into 'lives for a life' depending upon the status of the victim and his tribe.[183] Another distinguishing feature was the abhorrence of compensation. The primary focus was on retaliation and compensation was generally reserved for those tribes that could not enforce retaliation upon the offender due to his tribal status. [184] From these details one may conclude, that there was enough awareness of *lex talionis* amongst tribal Arabia, however it was difficult to strictly apply that law in the absence of any central enforcement authority.[185] This centralization of power and enforcement system was achieved with the surfacing of Islam in Arabia.

B. *The Islamic Modification of Lex Talionis and Pre-Existing Arabian Customs: A Quranic Theory of Qisas and Diyat*

The emergence of Islamic theory of Qisas radically altered the legal incidents of offences against the human body[186] ordained by previous Judeo-Christian laws and the customary practices of tribal Arabia. It will not be incorrect to state that the Islamic theory of Qisas is a blended edition to the former principles pertaining to homicide and related offences. However, this blended edition has come out with some fresh prescriptions.[187]

One of the foremost difficulties faced by previous laws of retaliation had been the scope of its application. It was assumed that retaliation as a form of punishment had been ordained for all kinds of crimes and the penalty should be imposed with uncompromising symmetry, replicating the harm suffered by the victim or his family. In a regime of impersonal-

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[183] See *Gul Hassan Khan v. Government of Pakistan*, PLD 1980 Peshawar 1, 4.
[184] See Coulson, supra note 8 at 18.
[185] See Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, COLUMBIA HUMAN RIGHTS LAW REVIEW 433, 444 (1992).
[186] Ibid.
[187] Id.

injuries,[188] this mirror-image symmetry produced some paradoxical rules. The Code of Hammurabi required that if an ox killed a child, the owner's child shall be put to death. In the same Babylonian code we observe that if a man strikes a woman and then she dies, the daughter of the offender shall be put to death.[189] Similarly, in the Biblical tradition several passages stress the importance of replicating the punishment with symmetrical identity to the circumstances of the offence. Thus, for example, in Exodus Moses is sent to warn Pharaoh to let Israel, God's first-born, go, or else Pharaoh's first-born would be killed.[190] Generally, however, the later Biblical sources grant the victim's family a right to inflict harm on the wrongdoer, by means of proportional retaliation, by directing such talionic penalty only towards the specific wrongdoer rather than the wrongdoer's family as a whole.[191]

The Quranic theory of Qisas confirmed the position of divine law on the issues relating to personal injury offences by reemphasizing and then redefining the previous versions of this law. First, it limited the principle of talion only to homicide and bodily injury offences, and therefore, excluded the possibility of any illogical conclusions emanating from this law. Where a person has committed theft, of course, it is no punishment that theft should be committed against him or that equal amount of fine to be exacted from him. Secondly, in far clearer terms, it presented a list of possible actions that can be taken against the offender. Further, it has attached a scheme of preference to those actions by permitting some and appreciating others.

The Quranic theory is based upon the three verses of Quran. The first verse is in the chapter II: 178 -9. It reads:

> "O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude; this is

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[188] In the realm of personal injuries also, the offence of rape can not be equally retaliated.

[189] See for example, Roth, supra note 145 at 174-175. He mentions in paragraph 55 that the laws of the ancient near east give three more clear examples of this peculiar dispensation of punishment. In the Assyrian Laws of the eleventh century BCE, the wife of a rapist must be given over to the victim's family to be raped. And again, for builders whose structures fall down, the Code of Hammurabi prescribes that if the owner of the building dies, the builder shall be put to death. If the owner's son is killed, the builder's son shall be put to death.

[190] EXODUS 18: 11. Likewise, in the second book of Samuel 14:1-7, we find the narrative of a person who has killed his childless brother. In order to simulate the gravity of the harm occasioned (death of a person who will have no descendants), the avenger of blood threatens to kill the murderer and his son.

[191] This transition from the communal to individual responsibility is irreversibly achieved in the 6th century BCE, through the work of Prophet Ezekiel as anticipated in Deuteronomy 24:16. It reads: "the fathers shall not be put to death for the children, neither shall the children be put to death for the fathers."

a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. In law of equality there is (saving of) life to you, O ye men of understanding! That ye may restraint yourselves."

The second verse is found in Chapter IV: 92. The Quran says:
"Never should a believer kill a believer; but (if it so happens) by mistake, compensation is due. If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely."

And in chapter V: 45, it has been ordained in the following words:
"We ordained therein for them, 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal.' But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if anyone fails to judge by what Lord has revealed they are the wrongdoers."

The collective impression of these above written verses, formulate the Quranic law of *qisas* and *diyat*. It is evident from these verses that this law only deals with homicide and personal injury offences. The Quran differentiates between the two kinds of killing, murder and killing by mistake.[192] The rule of punishment for both killings is different. As mentioned in chapter IV: 92, there is no physical retaliation for the unintentional killing. The prescription in the form of compensation has been commanded in cases of unintentional killing and for all those injuries as well, where equality cannot be reached by executing the same amount of hurt upon the defendant. The Quranic theory has adopted the 'eye for eye' principle for the offences of murder and intentional hurt only. Because the retaliatory punishment against the defendant would be executed with the intention of inflicting harm upon him, therefore, it will not equate with the offence where the original killing has been committed without intention of inflicting any harm. Thus, the respect for an individual is reinforced through the Quranic distinction of killing. It must be noted, that in the Bible there are no words that distinguish between, criminal homicide, justifiable homicide, and execution.[193] They are all described through the same word: Kill (*razach*).[194] This usage is also reflected in the language of Rabbinate. Similarly, passages in the Jerusalem Talmud have employed the same typology as the Biblical language. Thus, the language of ancient Israel made no distinction between types of killing. No matter their posture,

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[192] See infra Part-IV-C-1.
[193] Steven Davidoff, *A comparative Study of the Jewish and the United States Constitutional Law of Capital Punishment*, 3 ILSA J. INT'L & COMP. L. 93, 111 (1996).
[194] Ibid.

justified or criminal, they are all described by the same word with the equal moral imprint, kill.[195]

Furthermore, due to the literal interpretations offered to the 'eye for eye' principle in biblical law, whether the scriptures were referring to physical retaliation for the loss of limb has been doubted.[196] Such literal reading of the text was followed by the assumptions that: (a) it applies to whatever the circumstances of the injury; (b) it applies irrespective of the relative bodily conditions of the offender and victim; and (c) the remedy is mandatory.[197] The difficulties met by linguistics and the interpretations of earlier scriptures, were consequently solved by the Quranic injunctions. The Quran, in verse 5 of *Surah Al-Maida* acknowledges the provision of 'eye for eye' principle in the earlier versions of divine laws. However, the Quran has changed the prescription from *qisas*, to that of '*qisas* with *diyat*.' The insertion of *diyat* (compensation) as an alternative has removed the possibility of such assumed conclusions relating to disputes where taking equal retaliation from the accused is not possible.[198] Also, the distinction made between intentional and unintentional acts has clearly opened the door for allowing circumstances of the act to be considered while determining liability. Although, *diyat* was a popular method of justice in pre-Islamic Arabian tribes, however, it was not mandatory in its application and the guiding principles in this regard, were more in the realm of socio-political factors then the legal ones. Quran has made *diyat* a compulsory institution as far as unintentional killings and injuries are concerned. Also, where *qisas* is impossible to execute, *diyat* takes over as a mandatory provision, only subject to waiver by heirs of the victim.

The rule in chapter II: 178-9 of Quran is reiteration of the proportionality principle for the equation of punishment with the crime. In

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[195] Gerald G. Blidstein, *Capital Punishment –The Classic Jewish Discussion*, in MENACHEM MARE KELLNER ED., CONTEMPORARY JEWISH ETHICS 310, 317 (1979).

[196] DAVID DAUBE, THE NEW TESTAMENT AND RABBANIC JUDAISM 255-59 (Athlone Press 1956). He presents antithetical examples relating to the interpretation of Matthew 5:38-39, commenting further that Jesus was not arguing against the retaliation for bodily injury but rather against suing for damages for insult.

[197] See Jackson supra note 145 at 21-22. He argues that in what circumstances talonic punishment may be demanded? Should the literal interpretation be adopted and since the circumstances of the offence do not fit in the literal formula therefore they should be ignored. He argues further that in the biblical text and Old Testament itself, the physical retaliation was discretionary and it was always possible to settles the dispute by monetary compensation, since the victim's desire to inflict bodily injury in retaliation would reflect the circumstances in which the injury was caused.

[198] *Muhammad Riaz v. Federal Government*, 1980 FSC 1, 41. In paragraph 149, Aftab Hussain notes that in many situations it is not possible to cause equal harm to the assailant as caused to the victim. Therefore, different principles have been evolved to mitigate the probable inequality, one of which is to place emphasis upon compensation as the alternate sentence.

context of customary practices in pre-Islamic Arabia,[199] it has been ordained that no person whether he is free, slave or woman can have immunity from punishment. In tribal Arabia, it was customary to fix the count arbitrarily in cases of murder. Often it happened that the victim's kin and his tribesmen were not satisfied with taking the life of the murderer alone. If the victim was a person of higher status in his tribe, his representatives would take hundreds of lives, instead of or including offender. Conversely, if the murdered victim was lesser in status than the murderer, it was a practice to give compensation instead of retaliation. Although the Quran has an established preference for compensation but it has been made clear in this verse that the right of demanding the death of an offender is available to the heirs of the victim.[200] Hence, this verse in the Quran clarifies that each life has the same value and there is no consideration of status in this regard. Thus, for the offence of intentional killing, only the offender shall be slain, may that offender be a free man, slave or woman.[201]

Moreover, in order to mitigate the horrors of the talion principle in pre-Islamic laws and customs and also to meet the strict claims of justice, the Quran has ordained retaliation but with a strong recommendation for forgiveness and mercy. Therefore, it deems incorrect to translate the Quranic term '*qisas*' as retaliation. The term 'talion' might come closer to it in meaning and application, however, '*qisas*' is a term with wider connotation. Not only that it is reflective of the talion principle rather it is also inclusive of the concepts of mercy and forgiveness. The term 'retaliation' stands for returning evil for evil. In retaliation there is no prescription of the limits of evil. To illustrate it further, if A does offensive act o to B under situations $s_1.....s_n$ then it is prima facie not unfair for B to do o to A under situations $s_1.....s_n$. This is a simple application of reciprocity principle where the initial action of the defendant to commit an offence against the victim, forfeits his immunity to (at least) morally complain against the equal punishment.[202] Therefore, it is fair for the state to impose a penalty upon the offender to the extent of the harm that the offender has imposed upon society. However, as in the above mentioned illustration, if A does o to B, assume that B has a capacity to do o, o_1 and o_2 (where o_1 and o_2 are both harsher than o) to A. Now if in return of o, B does o_2 to A, it still would be retaliation, in reaction to the initial act of A. It must be acknowledged that in almost all modern penal codes, quite often, the excuse that 'he started it' gets situation-based recognition in relation to

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[199] See ante Part IV-A-2.

[200] MAULANA MUHAMMAD SHAFI, MARIF-UL-QURAN, VOL. I at 435-7.

[201] MAULANA ABUL A'ALA MAUDOODI, TAFHEEM-UL-QURAN.

[202] See Alan Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 45; See also Alan Goldman, *Toward a New Theory of Punishment*, 1 LAW & PHIL. 57, 59 (1982).

the determination of criminal liability.[203] The Quranic concept of *qisas* functions to justify criminal punishment and to set its upper most limit. It is not retaliatory alone. First of all, it is retaliatory only to the extent permitted by the reciprocity principle. Secondly, it has been further toned down by insertion of the possibility of settlement and forgiveness and with the mention of preference for these amicable measures over the coercive ones.

Consequently, the Quran has put to rest the controversy between the scripts of Old Testament and New Testament.[204] The Jewish scholars have expended a great amount of effort in reacting to the criticism of 'eye for eye' in the phrase 'turn the other cheek' found in the Christian teachings.[205] In order to oppose the common perception that the Old Testament was somehow summed up in the literal notion of vengeance in an eye for eye, (while in contradistinction the New Testament was summed up by the merciful rule of 'turn the other cheek,' that embodied the Christian doctrine of 'Love'), there has been a tendency since the late nineteenth century to try to give a humane interpretation to 'eye for eye.'[206] In this context, the Quran has adopted a middle-ground approach. In the Quran, the main passage with tangential application to the efficacy of *qisas* punishment concerns the moral righteousness of mercy: 'But if anyone remits the retaliation by way of charity, it is an act of atonement for himself.'[207] The validity of mercy over punishment and primacy of forgiveness also finds expression in the various hadiths quoted from the Prophet (PBUH). Although, the case for the employment of *qisas* in Islamic law is still certain. Yet there is an explicit principle of mercy that is present; a principle that is unambiguously applicable to those convicted of murder. It will, at least, permit a moral judgment concerning the prescription of *qisas*, appealing directly to the conscious of the victim[208] or his heirs. It is the valuing of human life by

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[203] For e.g. there is a defense available in modern penal codes about exceeding the right of private defense.

[204] See supra note 87.

[205] Matthew 5: 38-39. It has been narrated from Jesus that he said: 'You have heard it said 'eye for eye,' well I say to you turn the other cheek.'

[206] See Jackson, supra note 87 at 75. He comments that such revisionism was unnecessary and in any event incorrect. In fact, the notion that 'turn the other cheek' represented 'mercy' in contrast to the vengeance of an 'eye for an eye' is wrong. 'Face slapping' laws, from which 'turn the other cheek' derives, are generic for the ancient law of insult. The idiomatic expression of a grave insult as a 'slap in the face' is what is referred to in the phrase 'turn the other cheek.' Dating back to the laws of Hammurabi, there has been a dichotomy between proportionate damages awardable for physical injury and the lack of, or lesser damages, or mere fine awardable for mere insult unaccompanied by lasting physical injury. The reason why the rule of 'eye for eye' does not apply to face slapping (insult) is because a rule of proportionality, of 'insult for insult' would provide neither an effective sanction or a remedy. See the text accompanying supra note 87.

[207] AL-QURAN, Ch. V:45.

[208] In the case of hurt where victim is alive.

Islamic law that offers a plausible explanation for the insertion of this mercy clause in the verse describing the punishment for capital offence. This clause and its appeal has been structured in such a manner that when combined they operate towards controlling the liberal use of death punishment in Qisas, and also give an expression to the moral concerns of Islamic law. The presence of this mercy clause is a direct incorporation of morality into Islamic law. For in Islamic law, there is a merger of morality, law and religion.

C. *The Important Legal Trends of Qisas and Diyat Theory*

It is a fair demand of an article written largely for lawyers that it should have some relevance to what some lawyers actually practice. That an article is, as this one, theoretical in character does not make it immune to this demand. To the author of criminal codes, the judge, the prosecutor, or the defense counsel, this part of the article primarily offers a conceptual framework for understanding the legal incidents of Qisas and Diyat theory. It presents some specific details of the liability paradigm in application of this criminal justice theory to the real world.

1. *The Concepts and Classification of Homicide and Physical Injury*

It is commonly commented in reference to Islamic law that it does not recognize the strict distinction between criminal and civil law.[209] However, this notion is not completely accurate. The reason for the continuous placement of this concept, sometimes as an appreciated innovation but mostly as a drastic deviation from the regular procedural layouts, lies in the Islamic law of *'Jinnayah.'* Unlike common law or other western laws, the Islamic law combines all physical injuries against human beings in one category of law.[210] It is only in the law of *'Jinnayah'* that one finds a merger of criminal and civil principles in Islamic law. However, besides this, there is nothing in Islamic law that commands the fusion of the civil and criminal principles of law.

It is under the law of *'Jinnayah'* that Muslim jurists have discussed, and constructed the meanings of the verses relating to killing and physical injury. According to the majority of jurists the word *'jinnayat,'* stands for those acts that cause the loss of human life or the injury or harm to the

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[209] See Schacht, supra note 3 at p. 187. Joseph Schacht writes: 'there exists, therefore, no general concept of penal law in Islam. The concepts of guilt and criminal liability are little developed, that of mitigating circumstances does not exist; any theory of attempt, of complicity and concurrence is lacking.'

[210] Ibid at 177-78. He comments: '..the whole attitude of Islamic law [in cases of *jinayyat*] is the same as in its law of property.'

human body.[211] In this context, there are three kinds of *'jinnayah'* upon which there exist the consensus of jurists.[212] The first kind of *'jinnayah'* is called *'jinnayat al nafas'* and it includes all those acts that cause death of the victim. Therefore, all homicides, intentional or unintentional, fall in this category of offences. All those acts that do not result in the death of the victim but instead they cause some physical injury or loss to victim are considered as *'madun al nafas jinnayat,'* literally meaning, the act that does not cause loss of life. All physical injuries that offend bodily integrity of a human being are included in this class. The third category of *'jinnayah'* is determined in accordance with the different nature of the object/victim of the crime: the unborn child. Islamic law and jurists acknowledges the singular status of the fetus in the *'jinnayah'* laws. Although offences against the fetus are considered to be in the class of injuries, however, they are seen as dual injury: injury against the pregnant woman and injury against the fetus itself,[213] *jinnayat al nafas dun al nafas.*

Furthermore, the offences of *'jinnayah'* are of both kinds: intentional and unintentional. In all two conditions, they are but different forms of harm resulting from the same act committed against the human body. For example, if A hits B with a stick, there can be more than one effect caused by this act. It is possible that nothing may happen to the victim, or he may have a fractured face, some broken bones, or even die due to the blow. In every case there will be a different offence committed by the defendant.[214]

One of the primary functions of any criminal theory is that it must define and announce the conduct that is prohibited (or required for conviction) by criminal law.[215] Such 'rules of conduct,' as they have been called, provide ex ante direction to members of the community as to the conduct that must be avoided (or that must be performed) to evade the pain

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[211] AL SHAFAE, AL-UMM, VOL. VI at 230 (Cairo, 1910); See also IBN QUDAMAH, AL-MUGHANI, VOL. IX at 318 (Egypt, Matbaat al-Islam, 1974).

[212] See Odeh, supra note 10, Vol. II at p. 180.

[213] Ibid at 477-481.

[214] The culpability will depend upon the result of the act and the intention or mental element of the accused. However, Diyat will still be payable, even if the harm caused by the accused is not an intended one.

[215] Paul H. Robinson, *A Functional Analysis of the Criminal Law*, 88 NW. U. L. REV. 857. According to the author there are three primary functions of the criminal law: rule articulation, liability assignment, and grading. When a violation of the rules of conduct occurs, criminal law takes on a different role. It must decide whether the violation merits criminal liability. This second function, setting minimum conditions for liability, marks a shift from prohibition to adjudication. It typically assesses ex post whether the violation is sufficiently blameworthy "to warrant the condemnation of conviction." Finally, where liability is to be imposed, criminal law doctrine must assess the relative seriousness of the offense, usually a function of the relative blameworthiness of the offender. This sets, in a general sense, the amount of punishment that is to be imposed.

of criminal sanction. Even Islamic law is no exception to the performance of this legality requirement.

Since the first century of Islam, jurists have pondered over the verses of Quran and the relevant Hadith to derive substantive definitions of the different forms of killing and injuries. All jurists agree that homicide may be justifiable and culpable.[216] This difference is recognized by *Sharia'h* as well, which states that there is no liability *inter alia* for the execution of legal punishment unless the offence is proved to be culpable in a court of law. Islamic jurisprudence recognizes three basic kinds of culpable homicide: *qatle amd, qatl shibeh amd* and *qatle khata.*[217] The only kind of homicide for which, the death punishment as Qisas can be awarded is *qatle amd.* It is somewhat equivalent to the common law concept of premeditated murder. The main requirement of *amd* is the intention to cause death and the establishment of the causation.[218] Traditionally, the intention to cause death was gathered from the kind of act committed and quality of the weapon used in the killing. In Islamic law, there is no specification for the act of the defendant. Any act that is committed with the intention to kill and

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[216] The Holy Quran provides this division in Ch. 5:32, 17:33 and 6:152. In 5:32 the proposition to kill a human being is subject to the exception 'for other than manslaughter and corruption in the earth.' In 6:152 such exception is 'save in the course of justice'. In 17:33 the prohibition is save with the right to kill.' It is further emphasized that it will only be culpable homicide that will give the right of retaliation to the heirs of the victim.

[217] AL RAMLI, NAHAYA AL-MUHTAJ, VOL. VII at 235 (Cairo, Al Maktabbah Al-Islammiyah, 1939); See also Ibn Quddamah, supra note 211 at p. 320.

This division of culpable killing into three kinds is done by Hanafi jurists. However, this is not the only division. There are jurists who have divided *qatl* into four or five kinds. The other two less agreed upon kinds of *qatl* are *qatl majri al-khata* and *qatl bis sabab*. The majority opinion considers *qatl majri al-khata* as a component of *qatle khata* and therefore does not deal with it separately. *Qatl bis sabab* on the other hand, has found comparatively more recognition in the works of later hanafi jurists. *Qatl bis sabab* is a *qatl* where the act of the defendant is an indirect cause of the death of a victim. The *qatl bis sabab* has been included in Pakistani criminal law. In Qisas and Diyat Ordinance of 1992 of Pakistan, there are four kinds of qatl: *Amd, Shibeh Amd, Khata* and *Bis Sabab*.

According to Imam Malik, there are only two kinds of *qatl*: *Amd* and *Khata*. He based his argument upon the layout of Quranic verses. According to him *Surah Al-Nisaa*, verse 92-3 mentions only two kinds of qatl, therefore dividing it into categories such as *shibeh amd* and *sabab* is incorrect and rather a mere jurisprudential extention and not the true Quranic division.

[218] In Islamic fiqh, there are three basic requirements for establishing *qatl-i-amd.* First of all, the deceased should be living at the time when the offence has been committed upon him. Secondly, the causal link of the act of defendant and the death of victim must be established. And finally, the act of killing shall be committed with the intention to kill. These requirements as can be seen, are not very different from the elements of murder in common law or first degree murder in American criminal jurisprudence.

that results in the death of the victim will be sufficient to construct liability against the defendant. However, there is found a huge amount of discussion in Islamic jurisprudence regarding the weapon used for the killing.[219] It must be noted that the key difference between different kinds of homicide is the mental element involved. Since it is difficult to establish intention to kill beyond any shadow of doubt, therefore jurists have stressed upon the kind and nature of the weapon of killing to facilitate the assessment of the defendant's state of mind. After all, the mens rea of a defendant can only be manifested through his acts. The choice of weapon by the defendant will reflect the relevant state of mind enjoyed by the defendant at the time of crime. The stress upon the weapon of crime is, therefore a stress upon its use as external evidence for establishing the mens rea of the crime. It must be noted that there is a disagreement between jurists as to the definiteness of this evidence.[220] The weapon alone may not be enough proof of the defendant's state of mind.

It is also pertinent to realize that the modern methods of retrieving circumstantial evidence are of recent origin only. In earlier times, the prosecution mainly relied upon the weapon used in the offence and testimony, if available. In Islamic jurisprudence, the weapon of offence constitutes the primary evidence and all other evidence including testimony will be corroborative only.[221] The main doctors of Islamic criminal jurisprudence define it as a precautionary policy of Islamic criminal law. Imam Abu Hanifa[222] maintains the most restrictive opinion regarding the

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[219] See Odeh supra note 10, Vol. II at 202-09. Except for Imam Malik, all three of the main sunni Imams agree that in premeditated murder a lethal weapon should be used. Malik, however, does not impose any such condition. In his opinion, if the defendant has killed the victim with intention to cause his death, the medium or choice of weapon is irrelevant. The death caused intentionally by a fatal punch is as good as the one caused with sharp knife. Against Malik, the most restrictive opinion is that of Imam Abu Hanifa. The other two Imams have taken a middle-ground approach. According to them the weapon should be of such kind that will cause death in the ordinary course of nature. Odeh has also provided an interesting discussion regarding the kinds of weapons, their salient characteristics and their classification in accordance with their fatality.

[220] Ibid. This difference between the schools, reflect their individual strategy for determination of the mens rea of a defendant. Where other three Imams find it pertinent to rely upon the weapon of offence, Malik feels that other evidence should be given equal weight with the weapon of offence.

[221] Id at 209. This is the opinion of Hanafi school mainly. It is conceded in traditional Islamic fiqh that the evidence for murder or *qatle amd* should be of three kind: first, the weapon which has been used for causing death; secondly, the confession of the accused and thirdly, the testimony of the witnesses, if any.

[222] See Doi, supra note 36 at 88. The Hanafi school of Fiqh was the first school of Islamic jurisprudence and was found in Kufa by a non-Arab Numan bin Thabit, commonly known as Imam Abu Hanifa.

weapon of offence.[223] In his view, the weapon of killing should not only be naturally capable of killing in the ordinary course of things, but should also be made or prepared for the purpose of killing.[224] The rationale of such a narrow specification, he provides, is to establish the intention of killing, and hence the guilt of the offender beyond any reasonable doubt. Since, in the cases of intentional homicide or murder, punishment is that of death by Qisas, therefore, the most careful and stricter evaluation of evidence is recommended.

Consequently, if there is any doubt regarding the 'intention to kill,' then the resulting offence can only be *qatl shibeh amd* and not that of *amd*. In *shibeh amd*, the victim dies as a result of injury from something which is neither a weapon nor weapon-like, for example, a whip, stick or a small stone.[225] According to Abu Yusuf,[226] when death is caused as a result of a hurt by such thing or object from which death is usually not caused, it is *shibeh amd*.[227] This means where the intention of causing death cannot be inferred from the nature of the object used for killing, the imputation of *amd* is not possible. In an interesting debate between Imam Abu Hanifa, Qazi Abu Yusuf and Imam Ahmed bin Muhammad,[228] Imam Abu Hanifa holds that the death caused by hitting a victim with some heavy object will still be short of *amd* as long as it could not be established that such object

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As a point of information, there are four main Sunni schools of Muslim jurisprudential thought: Hanafi, Maliki, Shafae and Hanbali. If one will closely examine the fiqh or jurisprudence of these schools, he will not come across any difference of opinion upon the basic principles of Islam. Their differences basically center around secondary issues. There exists no major contradiction as far as the belief system is concerned.

[223] See supra note 219.

[224] See Odeh supra note 10, Vol. II at 210. According to Imam Abu Hanifa, killing done by the object that is not used for killing ordinarily or is otherwise not capable of killing is reflective of the lack of premeditation on behalf of the defendant. Since the punishment is death in case of *qatle amd*, Abu Hanifa holds that absence of a weapon creates a doubt in favor of the accused that he did not killed with premeditation.

[225] Ibid at 272. This definition is given by jurists of the Hanafi school. According to them, *shibeh amd* literally means 'like of *amd*' but not exactly *amd*. Therefore, technically, this class of homicide should be lacking on the mens rea standard.

[226] Abu Yusuf or popularly known as Qazi Abu Yusuf was the disciple of Imam Abu Hanifa and belonged to the Hanafi school of jurisprudence. After Imam Abu Hanifa's death, Abu Yusuf was appointed as the chief judge (qazi) in the year 166 A. H., and hence, came to be known as Qazi Abu Yusuf. He has written many books that were listed by Ibn Nadim in his famous Kitab al-Fehrist.

[227] See Odeh, supra note 10, Vol. II at 271.

[228] Imam Ahmad is the founder of fourth school of fiqh, the Hanbali school. He was the disciple of Imam Shafae who used to remember him 'as the most learned man in the affairs of Hadith.'

has been normally used or usable for killing.[229] However, this reference to the use of weapon is merely illustrative and should not be taken in too literal a sense, since the literal application of this principle would result in many paradoxical propositions. For e.g. where a person has been killed by drowning, or by strangulation or by throwing off from top of a building, such events then can never be prosecuted as *qatle amd* due to the lack of weapon. Hence, it is safe to conclude that the purpose of this principle is to establish intention in its most manifested form and to enlarge the scope of doubt for the benefit of the accused, so that a death sentence may only be used sparingly.[230]

This stricter view for the establishment of an 'intention to kill,' results in the corresponding narrower construction of a concept of 'causation'[231] in Islamic jurisprudence. It is one of the ingredients of homicide that a causal link between the act of the defendant and the death of the victim shall be proved.[232] Although it is not essential that the act of the defendant should be the only cause of death, however, the act should be the most substantive and operative cause. It is doubtful that common law principles such as 'people must take their victims as they find them,' will have similar import in Islamic criminal jurisprudence.[233] It must be appreciated that *qisas* is a punishment of equality and if it is proved that the victim in some substantive way has contributed to his own death,[234] it will be difficult to impose *qisas* punishment against the defendant. Accordingly, the scope of *'novus actus interveniens'* will also be limited.[235] Still, it is open to be interpreted in accordance with prevalent practice and advancements in technology and procedure.[236]

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[229] See Odeh, supra note 10, Vol. II at 211.

[230] See also IBN TAIMIYYA, ON PUBLIC AND PRIVATE LAW IN ISLAM 164 (Khyats, Beirut 1960) (Dr. Omar Farrukh, ed).

[231] According to jurists, the acts resulting in death are of three kinds: acts that cause the death directly, those acts that cause the death indirectly and those acts that are the condition for the death though they do not directly cause death.

[232] See supra note 218.

[233] Government of Pakistan, Council of Islamic Ideology, *Offences against Body (Enforcement of Qisas and Diyah) Ordinance,* 1981, section 4. The acts that do not cause the death of the victim directly have to be established as the cause or condition for the death of the victim. In this context, many jurists agree that if the victim has been thrown into water with the intention to kill and where victim knows how to swim, in case if he drowns, it shall not be considered *qatle amd.* Since the victim could have saved himself by swimming which he failed to do, therefore he has contributed towards his death and *qisas* cannot be applied.
See also supra note 231.

[234] See Ibn Qudamah, supra note 211 at 362.

[235] Ibid.

[236] HAFIZ IBNE QAYYUM, ILAM UL MAUQQIEEN, VOL. II at 822, 843. Ibne Qayyum writes that it is the recognized principle of the major scholars of Islamic

The second category of homicide in Islamic criminal law is 'unintentional homicide' or as popularly known *'qatle khata'*. It is related from ch.IV:92 of the Quran, that there is no punishment in the case of such killing.[237] The only prescription is in the form of *diyat*. The *qatle khata* is generally considered to be a killing that has resulted through the mistake committed by the defendant.[238] However, it is a literal and thus, quite limited interpretation of the term *qatle khata*. Primarily, *qatle khata* is the killing where the defendant has not intended any harm to any person. It is the absolute negation of 'intention' that differentiates the *'khata'* from *'amd.'* The term *'khata'* imports wider interpretation[239] and hence, is not confined to its plain connotations, mistake of fact or mistake of act. The *qatle khata* is inclusive of common law concepts of constructive manslaughter[240] and manslaughter by gross negligence.[241] It has been commented by Abdel Qadir Odeh in his masterwork on Islamic criminal jurisprudence that the concept of *qatle khata* is quite compatible with the common law doctrine of involuntary manslaughter. Generally, a defendant will be held guilty if he has caused the death of a person, directly or indirectly, by his negligence, recklessness, or blatant violation of law. In all

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jurisprudence that with the change in customs and usages of the time, the doctrinal opinion may also change. While commenting on this principle, in *Muhammad Riaz v. Federal Government*, 1980 FSC 1, Aftab Hussain writes: 'this principle highlights the importance of change of custom and also the change of era and change in society, in the context of evolution and dynamism in the field of law, which is taken care of by the principle of Ijtihad.' See also Odeh, supra note 10, Vol. II at 211.

[237] This verse reads as: 'it is not for a believer to kill a believer unless it be by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood money to the family of slain, unless they remit it by charity.'

[238] According to Hanafi jurisprudence, the *qatle khata* is named as homicide by error. In it, death is a result of error made by defendant, for example, a hunter fires on something considering it to be an animal but which happens to be a human being and is thereby killed.

[239] See Odeh, supra note 10, Vol. II at 213.

[240] Constructive manslaughter is committed where the defendant has caused the death of a person by an unlawful and dangerous act. There are three elements which have to be established before a person is liable for constructive manslaughter: 1)There must have been an unlawful act; 2) This act must have caused the death; and 3) The unlawful act must have been a dangerous one.
For further reference see J.C. SMITH, CRIMINAL LAW 379-385 (Butterworths, 10th Edition).

[241] Ibid at 385-388. This is the second form of involuntary manslaughter under common law. The defendant may be charged because his behavior has been so grossly negligent that it has brought about the death of another person. In such manslaughter by gross negligence, the actus reus of the offence is the death which resulted from the negligent act and the mens rea is the defendant's grossly negligent behavior.

such situations where death has occurred as a result of defendant's conduct without him intending so, he will be liable for the payment of *diyat* to the heirs of the victim. However, unlike *qatle amd* and *qatle shibeh amd*, and also contrary to the western criminal laws, the scope of causation is quite stretched in *qatle khata*. According to the majority of scholars, two sets of different principles have been adopted for the construction of a causal link in a case of killing. There is considered no factual difference between a person who has intended death and a person who has brought death by being negligent in foreseeing a probable result. Therefore, where in the case of involuntary manslaughter, western laws allow liability only in the cases of 'direct causal link', the Islamic criminal jurisprudence recognizes the 'indirect causal links' also. This is, to a larger extent, an understandable variation in the Islamic law. There are two main reasons for this. Firstly, the ensuing consequences for the conviction of *qatle khata* are, mostly, only limited to the payment of *diyat*. Secondly, as mentioned in the beginning of this part, this theory of *'jinnayat'* merges the principles of civil and criminal law, due to which the heirs of victim will not have any separate right to sue the defendant for the claim of damages. It is, therefore, viable for Islamic jurisprudence to stretch the scope of causation in *qatle khata* and to allow indirect deaths to be included in the ambit of homicidal liability.

It is confirmed from the above discussion and references mentioned in the previous section, that the pre-meditated homicide is the only offence in Islamic law of *jinayyah* for which death penalty can be awarded. This death penalty will be awarded in the form of *qisas* punishment. However, except for pre-meditated offences, there are number of other homicides and injuries that are recognized as offences in Islamic criminal jurisprudence. For them, the primary rule is in the form of *diyat*.

2. *Defined Roles for the Victim, his Heirs and State*

In ancient times the victim held a central role in dealing with a crime and restitution to the victim was an important goal of legal proceedings.[242] For example, a requirement of restitution to the victim of crime for resulting loss, damage, or injury is found in the Code of Hammurabi; in provisions of the Old Testament; in Greek and Roman Penal Codes.[243] The victim's entitlement to restitution was accepted as inherently investing him

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[242] See Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 25-26.

[243] Ibid. See also the discussion in ante Part III-A-1; See also Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 52 n1. (1982) (quoting Exodus 22:1 "If a man steals . . he shall make restitution . . . .").

with the right to participate in criminal proceedings.[244] However, recognition of the role of a victim was general and due to the prevalent private justice system, it was rather inevitable. It is to the credit of Islamic criminal jurisprudence that it has redefined the role of a victim by limiting it to cases of homicide and injury only.

Before proceeding with the entitlements of a victim or his heirs in QD theory, it is important to be clear about who is considered a victim in the QD offences. Overall, the QD theory recognizes three different classes as victims.[245] The victims of class one are the actual victims. Those upon whom crime has been committed. It is simple to understand that the victims in this class cannot be those against whom any homicide has been committed. Therefore, in all analysis, these will be the victims of hurt or related offences. In class two, the heirs of the victim are designated as victims in cases of homicide. The ostensible victim of homicide is, of course, the decedent. But since dead victims do not suffer, the next best candidate is the family of the decedent. However, there is some problem determining contours of the affected parties who are still living, and one wonders whether it should matter whether the putative victim's sentiments toward the decedent be positive or negative. Are the relatives still victims if they are happy to see the decedent gone? Presumably not, but then it seems as if the victims in homicide are simply those who are unhappy about the killing. If this approach were accepted, the notion of victimhood in QD theory would lose its conceptual contours. Therefore, in QD theory, the question that which family members of the decedent should represent him as the victims, is decided in light of the Islamic theory of inheritance.[246] According to Imam Abu Hanifa, Imam Shafei, Imam Ahmad and Qazi Abu Yusuf, all family members that are legal heirs, [247] which means those who will inherit from the decedent, will qualify as victims of

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[244] See Randy E. Barnett, *The Justice of Restitution,* 25 AM. J. JURIS. 117, 118 (1980).

[245] See Odeh, supra note 10, Vol. II at 322-24. The author has not classified the victims into categories, however, he has recognized the existence of these three classes of people as the victims in offences relating to *jinnayah* in Islamic criminal law.

[246] However, there exist two different approaches for granting the right of Qisas to the heirs of the victim for the purposes of QD theory. The first approach is taken by Imam Abu Hanifa and Imam Malik. In their opinion the right of qisas (claiming death of the offender) belongs to heirs ab initio. Since, there could be no qatl if the victim had not died, therefore, this right is not of the victim but of the offender. At no point, decedents had any claim to that right. Against them is the opinion of Imam Shafei and Imam Ahmed. They treat qisas as the right of the decedent and believe that the right has been transferred to the heirs.

[247] Odeh, supra note 10, Vol. II at 323. According to these jurists the only condition for the right of qisas is the entitlement of the right of inheritance.

the offence.[248] The underlying rationale is the transferable nature of the right of *qisas* and *diyat*.[249] Therefore, if the victim of hurt has died, (due to any other reason not related to the hurt caused to him), the right of Qisas or Diyat will not die with him, rather, it will be transferred to the legal heirs of the victim, that is, it will shift from the class one to the class two of victims.

The class three victims constitute the public at large represented by the state.[250] Here, it is crucial to reiterate the two tiered application of QD theory. The first preference is of course attached with the first two classes of victims, however, it is recognized that after all, crime is an action that causes disturbance and insecurity to the public at large. Therefore, the role of the state as the 'victim' of the offence is maintained, though only at a secondary level. Besides this, it is conceded by majority of scholars in Islamic jurisprudence that in case the decedent of a homicide does not have any legal heirs, the state will step into the shoes of the 'legal heirs' and will represent the decedent as a victim of the crime.[251] It is important to differentiate between the role of the state as a victim of class two and as the victim of class three. Originally, the state as a victim belongs to class three of victims. In this capacity, the state does not have any right to enforce *qisas* or claim *diyat* against the offender. The only right available to the state is to punish the offender in *tazir*.[252] This punishment in tazir will be justified through the objective of protecting public good and security. However, this right to enforce *tazir* is not available, where it could not be proved that the offence has in some sense generated considerable amount of harm to the public or state.[253] Accordingly, role of the state as the victim

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[248] But see KABEER, AL SHARAH AL KABEER, VOL. IV at 229. The contrary opinion is that of Imam Malik. According to him, female legal heirs do not become victim for the purposes of *qisas*. There is an additional requirement for women to be qualified as heirs of the victim for claiming *qisas*. A woman would qualify only if there is no male heir of equal strength existing. Therefore, a sister in the presence of a brother will not become an heir for the purposes of *qisas*.

[249] Odeh, supra note 10, Vol. II at 323.

[250] Ibid at 324.

[251] Id.

[252] Id.

[253] Except for Imam Malik, all jurists agree that if heirs of victim have compounded with the offender, the punishment of *tazir* will become optional for the state. However, Malik considers it imperative for state to impose *tazir* punishment, if the *malafide* of the offender has been established in the case. See, e.g. Qisas and Diyat Ordinance of Pakistan, § 311. This section provides:

> '.....where all walis do not waive or compound the right of *qisas* or keeping in view the principle of *fasad-fil-arz*, the court may, in its discretion having regard to the facts and circumstances of the case, punish the offender.....with imprisonment...which may extend to fourteen years as *tazir*.'

The concept of *'fisad-fil-arz'* protects the right of state to punish in *tazir* where the offence has caused a great damage to public peace and security.

of class two will be of a different nature. Being the representative of a decedent, who was the real victim of the offence, the state can demand and enforce *qisas* against the offender.[254] Also, it can claim *diyat* for the offence.[255] Though, there exists some difference of opinion amongst scholars upon the claim of *diyat* by the state as a victim of class two,[256] however, the majority view is that as a victim of class two, the state can only demand *qisas* and cannot opt for *diyat* in the place of *qisas*.[257] The apparent explanation for this is the obvious preference of the state for *diyat* against *qisas*.

Furthermore, previously generalized version of a victim's rights has been sufficiently revised by Islamic criminal jurisprudence. In Islamic law, the occurrence of the right of a victim is ancillary to the classification of the offence. Victims have a defined place in the definite interests protected by Islamic criminal law, however, this specific recognition of the rights of a victim is limited only to offences of personal injury. In this context, it can be fairly remarked that the system devised by Islam is a shift from the previous systems of private or community justice. The division of crimes into three categories of *Hadd*, *Qisas* and *Diyat*, and *Tazir* reflects this differential ordination. It is only in cases of *qisas* and *diyat* that the principles of private justice have been preserved. Rest of the offences and their respective punishments are heavily grounded in the principles belonging to the public justice paradigm.

The QD theory recognizes at least two sets of rights belonging to a victim in the context of homicide or personal injury offences. The first set of rights deals with procedural aspect of the issue. The QD theory grants a pivotal role to a victim in the prosecution process. The offence of homicide or injury is primarily a harm to the victim and its effects upon the public or state are only consequential, hence, secondary. Therefore, it is the right of a victim to initiate or abandon prosecution.[258] The victim has the right to settle with the offender at any stage of the trial. Once settlement has been reached, the victim can withdraw his prosecution. The right of the state will only accrue, once the victim has decided not to proceed with prosecution

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[254] See Odeh, supra note 10, Vol. II at 324.

[255] Ibid.

[256] Id.

[257] But see Qisas and Diyat Ordinance of Pakistan, Ss. 309 and 310. The proviso of subsection (1) of section 309 provides: 'Provided that the right of qisas shall not be waived –

(a) where the Government is the *wali*; .....'

The section 310 which deals with the compounding of qisas offences, provides in subsection 3:

'(3) where the Government is the wali, it may compound the right of qisas: Provided that the value of badl-i-sulah shall not be less than the value of diyat.'

[258] See Bassiouni, supra note 39 at 207.

and state finds it imperative to follow the prosecution, subject to its establishing that the offence has in some way harmed social security and public good. Thus, in the procedural context, this would mean that the victim of an offence shall have the rights to notice of and not to be excluded from proceedings of the case, even if he is not a material witness. Also, he is to be heard and allowed to make statements in matters such as determining the release of an offender from custody.

The second set of rights focuses upon the victim's right in the final stages of a criminal trial. This is probably the most striking difference between Islamic QD theory and other contemporary theories of justice. If, at the conclusion of a trial, the offender has been judged guilty, it will be the right of a victim to decide upon the desired consequences of the prosecution.[259] In this respect, the victim will have the option to claim *qisas* (death in the cases of *qatle amd* and equal injury in hurt cases), compensation in the form of *diyat*, or complete forgiveness of the offender.[260] In this context, Islamic QD theory emphasizes heavily upon the individual viewpoint of a victim for the determination of an appropriate sentence for the offender. Obviously, a collective viewpoint is necessary when the crime harms general interests protected by the state. Examples of such crimes include espionage, corruption, counterfeiting, or crimes against environment. It is characteristic of such offenses that the wrongdoing does not harm specific individuals. Counterfeiting, for example, is the production of false bills, however, this act does not by itself, inflict financial harm on any individual.[261] Although, proponents of a collective viewpoint do not limit its application to crimes against only collective interests, but extend it to crimes against individuals. But, Islamic QD approach questions this version of a collective viewpoint.[262] There are two major objections to viewing crimes from a collective viewpoint. The first is

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[259] AL-QURAN, Ch II: 178-9.

[260] Ibid.

[261] See PETER F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 4 (1974).

[262] The choice between a collective viewpoint and an individual viewpoint has substantial practical consequences. For example, any reference to collective interests allows one to take cumulative effects into account. Imagine a town frequented by groups of juveniles who play noisy music and commit offenses like petty thefts or inflicting other minor property damage. Although each of these incidents is not very serious, the accumulation of petty offenses and nuisances can damage the community if, as a result, the other inhabitants find themselves in a situation of permanent distress and anxiety. When the juveniles appear in court for small property damages, one could, therefore, opt for the community perspective and assess the offenses as more serious. The assessment of the community and of a victim can differ in other ways as well. If, for example, the offender has been a benefactor to the community, the collective viewpoint may require a less serious sanction as against a victim's perspective.

pragmatic and the second goes back to theoretical underpinnings of the censuring feature of punishment.

In the first place, a collective viewpoint is difficult to apply in practice because it is impossible to measure the degree to which crime disturbs the social and legal order. The legal and social orders are empirical concepts that should be capable of measurement. However, social order is a vague notion that is difficult to estimate.[263] As it is not possible to define even a normal state of legal or social order within a certain society, variations are beyond measurement.[264] Thus, such pseudo-sociological definitions only obscure the issue.

In the second place, although the fact that censure is directed at an offender is undisputed,[265] however, there exists another recipient of the censuring message: the victim of the crime.[266] The QD approach identifies that an important function of the sentence lies in its message to the victim. The formal disapproval embodied in the imposition of hard treatment confirms that the victim has been wronged through the act in question. The sentence contains a judgment about the extent of the victim's rights and about the demarcation between his sphere and that of the offender. It signifies that the act has infringed on the rights of the victim and that the act is neither permissible nor justified by unusual circumstances. Thus, the sentence recognizes that the victim need not accept the offender's conduct. It is not sufficient to express disapproval to the general public (in addition to the offender). The recipient with the greatest interest in the declaration of wrongdoing is the person injured through the crime. Therefore, for the crimes that impose a direct injury upon the victim, it shall be safer to rely upon the individual viewpoint of the victim(s) of crime against the collective viewpoint of the public at large.

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[263] Tatjana Hörnle, *Distribution of Punishment: The Role of a Victim's Perspective,* 3 BUFF. CRIM. L. REV 175, 178 (1999).

[264] Ibid.

[265] See JOEL FEINBERG, THE EXPRESSIVE FUNCTION OF PUNISHMENT, IN DOING AND DESERVING 100 (1970); R.A. DUFF, TRIALS AND PUNISHMENTS 236 (1986). Several authors have developed more detailed concepts about how to utilize censure to reform and reintegrate the offender. For instance, one could try to encourage the offender to reflect on his crime in the hope that he would accept blame, condemn himself, and thus, modify his future conduct. The trial can be seen as a means to shame the offender and to reintegrate him into the community through this emotional process.

[266] See Bernd Schünemann, *The Role of the Victim within the Criminal Justice System: A Three-Tiered Concept*, 3 BUFF. CRIM. L. REV. 33 (1999).

3. *Making Punishment Fit the Crime: Qisas as Retribution*

The policy of Islamic criminal justice is to enforce the principle of proportionality in matters of punishment. The most profound example observed of this principle is in the QD theory of personal injury offences. As explained in the previous parts of this article, *qisas* has been ordained in the Quran for the offence of pre-meditated killing (known as murder in western criminal law and *qatle amd* in Islamic criminal law) and premeditated hurt.

Qisas, by virtue of its very definition[267] embodies the principle of proportional punishment. The primary function of *qisas* is to define the upper most limit of the sentence that can be passed against the offender. This rule of proportionality, as enunciated in the Quranic verses relating to *qisas*,[268] is twofold in its application. First of all, proportionality in *qisas* requires that the punishment shall only be visited upon the offender. In respect of this first aspect, *qisas* demands that identical symmetry shall be followed. The punishment of any other person but for the offender will be in stark violation of *qisas*. Evidently, it will eliminate the possibility of punishment on utilitarian grounds, providing exceptionless protection to the innocent from conviction. This absolute prohibition upon knowingly punishing the innocent is easy to explain: it is an implication of the retributive justification for punishment of anyone. Where there has been no disturbance of the pattern of equilibrium, there is no disorder to be remedied, no order of justice to be restored. It is, in reality, impossible to knowingly 'punish' an innocent person, as it is impossible to knowingly trick yourself. 'Punishing' Z, who happens to be available and is powerless to defend himself, for a crime committed by someone else may satisfy the desires of some people for atonement, people who either believe Z is guilty or do not care whether he is guilty or not. But no one, knowingly, can honestly believe that the order of justice has been restored as a consequence. In reality, they cannot but think that the order has further been disrupted by their oppressive imposition upon the hapless Z.

The second part of this twofold application of proportionality principle in *qisas* deals with the amount and form of punishment. In an idealistic version of the *qisas* principle, the stance is to replicate the punishment with the offence.[269] Therefore, if an offender has killed V with bullet-shots, he

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[267] See supra note 38.

[268] See ante Part-IV-B.

[269] See Odeh, supra note 10, Vol. II at 333-338. The author has offered a very interesting discussion regarding the execution of *qisas*. Relating from Imam Abu Hanifa, he writes, the only method for the execution of death sentence in *qisas* is killing the offender by sword, i.e, beheading. However, there exist a variety of contradicting opinions of other jurists. For example, Imam Malik, Imam Shafei and Imam Ahmad have agreed that the same method of punishment shall be adopted for

shall be executed with the same weapon and with same number of bullet-shots to the same body parts. However, this symmetrical execution of Qisas can result in a number of paradoxical situations. Assume that for the death of V, the offender has been shot with an equal number of bullets and to the same body parts. What if the offender does not die, whereas V died immediately when shot. Would not the aggravated pain of the offender bring this execution outside the spheres of proportionality? Similarly, there can be an instance, where the act by which the death has been caused by the offender, is overly gruesome.[270] Shall *qisas* replicate that gross act or not? The solution to these paradoxes lies in the original offence's point of emphasis. Should the point of emphasis for the purpose of punishment be the act (in its form and amount) of the offender or the effect caused by his act? By answering in the favor of the act, the dilemmas of matching act for act will continue, sometimes even at the expense of the effect. On the other hand, the option of effect will allow the symmetrical duplication without the cost of failing the effect or becoming savage. *Qisas* allows this preference while adhering to the primary notion of proportionality. It has been quoted that the Prophet (PBUH) forbade mutilation of the body.[271] Besides, it is not always possible for the victim or his heirs to execute *qisas* personally. The official executioner may be permitted rather asked to execute *qisas* in the place of a victim or his heirs. This replacement of executioner for the victim or his heirs is also a deviation from strict equality. Therefore, keeping the reality and practicality high on priorities, the replication of punishment with the effect will be the soundest application of the second tier of proportionality rule in the *qisas* theory.

4. *Restitution of Victim: the Option to Accept 'Diyat'*

Furthermore, the QD theory provides the victim or his heirs with the option to accept compensation. It offers a supplemental mechanism through

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the offender. The offender shall be put to death, the way he had caused the death of the decedent. For this ruling they have relied upon the Ch. II:194 of Quran.

[270] A recent example is that of the Javed Iqbal case. The offender confessed to the killing of 100 children and then disposing their dead bodies in acid. The session court sentenced Iqbal to be strangled to death with the same chain he used to kill the children. The judge further ordered that his body "will then be cut into 100 pieces and put in acid," the same concoction of hydrochloric and sulfuric acids that killer used to dispose off the bodies of his young victims.
For details see Seamus McGraw, *All About Javed Iqbal* at http://www.crimelibrary.com/serial_killers/predators/javed_iqbal/10.html (last visited on 3rd August, 2005).

[271] See Tirmazi, supra note 125 at 422-23; See also MAULANA SHAH MUHAMMAD JAFFAR PHULAWARI, MUHAMMAD: PEGHAMBAR-I-INSANIYAT 203 (Idara Saqafat-i-Islamiyyah, 1990).

which a defendant, who has wrongfully injured a victim, is required to compensate for the injuries. In this respect the underlying philosophy of QD theory is conceptually closer to the ideals of corrective justice. Corrective justice theory is based on a simple and elegant idea: when one person has been wrongfully injured by another, the injurer must make the injured party whole.[272] In western jurisprudence, this idea of justice presupposes the Aristotelian idea of normative equilibrium.[273] Certain occurrences, such as when one party wrongfully injures another, disturb this equilibrium. Corrective justice consists of the restoration of this equilibrium. Moreover, in stricter terms,[274] the inclusion of *diyat* in the QD theory is the embodiment of a deontological, rather than a utilitarian, set of values.[275] One who causes a wrongful injury to another is obligated to compensate the other for the injury caused. The existence of such an obligation, quite apart from the law, flows from the fact that a wrongful injurer is responsible for the injury wrongfully inflicted on another person.

Being a comprehensive approach, the elements of restitution have been suitably incorporated in the QD theory. The differentiating point is the concentration and subjection of this option to the desires of the victim. It is recognized in the QD theory that the victim or his heirs can claim enforcement of punishment against the offender. However, it is preferable for them to relinquish their right to enforce punishment and instead take compensation in the form of *diyat*.

This introduction will lead adequately towards the definition and analysis of the concept of *diyat* as employed in the QD theory. Equating *diyat* with compensation as its synonym is a common perception. It is generally believed that *diyat* is a civil compensation that has been inducted in criminal theory by Islam. However, the channels for the restitution of a victim in QD theory are not confined to *diyat* alone. Another mode for such restitution of the victim is the settlement between parties i.e. '*sulh*.' It is permissible in accordance with the verses 178 and 179 of the chapter II of the Quran that the heirs of victim can settle with the offender. This settlement can be made any time, before the trial, during the trial or after

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[272] See, e.g., JULES L. COLEMAN, RISKS AND WRONGS (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW (1998); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

[273] See Aristotle, supra note 141. The suggestion that there is an equilibrium or form of equality between private parties that is restored by private law is Aristotle's, but the idea that the rectification of gains and losses is normative, rather than factual, is Weinrib's Kantian adaptation of Aristotle. For further reference see Weinrib, supra note 272, at 80-84 and 114-36.

[274] See the discussion in infra Part V.

[275] Ibid.

conviction. It is incorrect to mix this option of settlement with *diyat*. *Diyat* is that fixed value,[276] which is paid to the victim or his heirs by the offender or his community[277] as a punishment for the offence. As a form of punishment, *diyat* belongs to a category of monetary penalties. The modern day example of such penalty is a fine. *Diyat* is a different from of fine because it is paid to the victim or his heirs instead of the state treasury. It is erroneous to equate it with civil compensation for at least two reasons. First of all, had *diyat* been civil compensation, there would not have remained any right of the state to punish, once the claim of *diyat* has been relinquished by the victim or his heirs. It must be noted that d*iyat* as a punishment is available for all kinds of homicide except for the premeditated murder (*qatle amd*).[278] Also, it is a mandatory punishment for majority of hurt offences. However, the amount of *diyat* for all these offences differs in its value which is in accordance with the nature and grievousness of the offence. Along with *diyat*, there exists a right of the state to further punish the offender in *tazir*. Now if *diyat* had been a purely civil concept, then renunciation of the claim of *diyat* would have cleared all claims against the offender. In civil cases, where a plaintiff abandons his claim to compensation, no further civil action can be taken against the defendant. Such is not the case with *diyat*. Therefore, *diyat* is not truly compensation.

Secondly, *diyat* as a monetary compensation is solely confined to personal injuries in the form of hurt and homicide.[279] This exclusive use of *diyat* for these offences preserves an element of stigma[280] contained in any

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[276] Traditionally, the value of *diyat* has been fixed at 100 camels. This Arabic practice was followed by the Prophet (PBUH) and his followers as well. In present day, however, the amount of *diyat* has been fixed with leniency, keeping in view the limitedness of means and absence of large and formal family systems. In Qisas and Diyat Ordinance of Pakistan, the minimum amount of *diyat* has been fixed at the equivalent of the value of thirty thousand, six hundred and thirty grams of silver (making it around three hundred thousand rupees, depending upon the market value of silver).

[277] See infra Part III-C-6 (providing detail discussion upon the concept of *'aqillah'* in Islamic QD theory).

[278] However, in the case of *qatle amd*, *diyat* is an alternative sentence. There could be more than one situation where recourse to *diyat* can be made. Besides the option taken by the victim or his heirs, it is possible that *qisas* may not be enforceable or executable in a particular case. In such a situation, the option left is enforcement of *diyat* as a punishment for the restitution of a victim or his heirs. It must be remembered that this mandatory application of *diyat* in default of *qisas* does not hamper the right of the state to impose *tazir* punishment if warranted by the circumstances of the case.

[279] See Odeh, supra note 10, Vol. II at 293-94.

[280] Stigma draws upon its definitions in social and legal contexts. In a social context, stigma means reduced influence among family and friends. In a legal context, stigma includes reluctance to interact with someone with a criminal record.

regular form of punishment. It is established that there exist a normative difference between a penal fine and civil compensation.[281] Therefore, a fine of ten thousand rupees cannot be equivalent to the award of the same amount of damages in any civil suit. The reason being the stigma of 'conviction for offence' attached to the fine. It is the absence of this stigma that makes civil compensation morally less hard on civil defendants. Since, *diyat* as a fine has been exclusively used in personal injury offences, therefore, there is no reason why an efficient system of stigmatization of the offender cannot be applied in this context. Where it is known in society that a particular person has been asked (by court or by victim) to pay *diyat*, it will be equally known that there has been a commission of an offence. Thus, the condemnation of society against the offender who has paid *diyat* on account of a personal injury caused to someone, will keep it distinguished from the ordinary civil compensation that is not accompanied with such stigmatization.

5. *Settlement between the Victim and the Offender*

Continuing from the previous section, restitution of the victim (or his heirs) in case of QD theory is not limited to the provision of *diyat* only. Along with *diyat*, an extra-judicial settlement has also been included in the list of possible solutions. This proposed settlement derives its authority from the Quran and Sunnah. In the Quran, Allah ordains in the following words:

> "O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude; this is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty."[282]

All jurists agree that the expression 'grant any reasonable demand' stands for the option of settlement. Since, the amount of *diyat* shall be fixed by the judge, therefore there cannot be any specific demand on behalf of the victim's heirs. Thus, this mention of 'demand' in this verse of the Quran signifies that demand, which is made by the heirs of the victim in order to settle with the offender. Furthermore, it has been related from Umaro bin Shoaib, who quoted his father who heard his grandfather narrating what the Prophet (PBUH) said regarding a murderer to be handed to the heirs of the victim, whose choice could be to kill him in qisas or to take *diyat* from him or to settle upon any demand that the victim's heirs

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[281] See GLANVILLE WILLIAMS, TEXT BOOK OF CRIMINAL LAW 27 (First Indian Reprint, 1999).

[282] AL-QURAN, Ch.II: 178-79.

and offender mutually decide.[283] There is no disagreement amongst all major jurists of Islamic law that the punishment of *qisas* stands rescinded once the victim's heirs and offender have reached a settlement.[284] This permission to settle in QD theory goes well with the broader lay out of this approach. Since the execution of *qisas* will be severe and irreversible punishment, therefore, all possible options have been availed to allow favorable chances to an offender. The policy of Islamic law is to avoid capital punishment. It explores all possible methods of reconciliation between the victim (or his heirs) and the offender.

Such use of reconciliatory methods to settle disputes is older than the process of civilization.[285] Unfortunately, these positive techniques have been subdued a growing formalism and reservations within the dominant legal approaches. The natural and moral quality of peacemaking after wrongdoing has been suppressed by artificial limits of formal legal systems. Most of all, the reconciliatory methods have remained relatively unexplored with regard to its negative side, i.e. as a response to criminal behavior. There is no doubt that these private justice methods were successful in early societies because people realized the benefits of non-violent conflict resolution.[286] The use of reconciliation guaranteed more social safety, stability, and progress than continuing reactions in a cycle of violence. Acceptance of responsibility and victim compensation by the offender fulfills the goal of punishment through norm affirmation and victim rehabilitation, so that repressive measures become superfluous in the process of sanctioning.

Furthermore, it is not to be concluded that the QD theory intends abolition of state control and idealizes private justice methods. This proposed (rather permitted) conflict resolution by settlement does not obstruct state control of crime or establish an informal 'shadow justice.' It is in fact an alternative to retributive punishment within the general Islamic penal system, which is based on principles of human rights.

6. *Transformation of Communal Responsibility*

The transformation was also brought to the principle of communal liability by Islamic law. In the ancient world, a clan was collectively responsible for the damage caused by any of its members even if the damage was caused involuntarily. A classic example of communal responsibility is found in the Bible, according to which mankind suffers for

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[283] See Odeh, supra note 10, Vol. II at 350.

[284] Ibid.

[285] See FRANS DE WAAL, PEACEMAKING AMONG PRIMATES (1989).

[286] See James W. Zion, *The Use of Custom and Legal Tradition in the Modern Justice Setting*, in DENNIS SULLIVAN, ED., THE PHENOMENA OF RESTORATIVE JUSTICE 133 (1998).

the sins of Adam and Eve,[287] and collective guilt continues to be passed on from generation to generation.[288] The collective responsibility of the whole clan or family for the sins of one of its members continued to permeate the laws of early societies.[289] At a later stage, as an effect of the ethical revolution brought about by later prophets, Jewish law developed a different theoretical ground for collective responsibility: blame was placed specifically on the wrongdoer, but sanctions could still affect the other members of the wrongdoer's community.[290] When talionic penalties were being replaced by blood-money payments, communal liability remained under the form of communal pecuniary liability.[291] The clan was collectively responsible for the blood-money owed by one of its members to the victim belonging to another clan. By the same logic, the clan was the collective recipient of blood-money due to any of its members.[292]

In this context, there exists a confirmed role for the community within the traditional QD theory. However, certain reformations are brought to the previous principles of communal liability. Instead of making the tribe or entire family responsible, the responsibility for the payment of diyat has been confined only to the *'aqilah'* i.e. the male members of the paternal family of the offender.[293] All jurists agree that this responsibility of *aqilah* to pay on behalf of the offender should not be overly burdensome[294] because the liability on *aqilah* is without any culpable behaviour on their part. Therefore, where a concession is made for the offender who is primarily responsible for everything by arranging *aqilah* to be paid instead, it is plain that any unnecessary burden on the family members should be avoided. There are different formulas adopted by the different jurists to

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[287] GENESIS: 3.

[288] EXODUS 20:5-6; DEUTERONOMY 5:9-10.

[289] The uniformity of rules among these ancient societies should not be surprising if we keep in mind that the Hebrew people had been subjected to both Egyptian and Babylonian control at different times in history. The law of ancient Israel was put into its definitive form during the Babylonian Exile and thus reveals the influence of both Egyptian principles and the more explicit precepts and of the Code of Hammurabi.

[290] D. DAUBE, *Communal responsibility* in D. DAUBE (ED.), STUDIES IN BIBLICAL LAW 169, (Cambridge, England: University Press, 1947) (an ancient rule stated that "a man who causes the death of another man's child is to lose his own."); THE CODE OF HAMMURABI, supra note at 147, paragraph 210 (stating that if a man strikes a woman with child and she dies, his daughter shall be put to death).

[291] F. Parisi, supra note 134 at 82-124.

[292] See generally L. T. Hobhouse, *Development of justice* in ALBERT KOCOUREK & JOHN H. WIGMORE (EDS.), PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS 139 (Boston: Little, Brown & Co. 1915).

[293] See Odeh, supra note 10, Vol. II at 68.

[294] Ibid.

determine the extent of the liability of *aqilah*.[295] It is important to note that the primary principle is that of an individual and personal responsibility as stated in the Quran: 'No one shall bear the burden of another but his own.'[296] This deviation in the form of shared communal responsibility has number of advantages due to which it was able to sustain the reformatory regime of Islamic law. In the first place, it protects the rights of the victim and his heirs to receive *diyat* for the loss endured by them. The presence of *aqilah* assures that the victim or his heirs have a choice to opt between *qisas* and *diyat*. Otherwise in the cases of destitute offenders, the victims would always choose *qisas*, since there will be no possibility of *diyat*. This permission of contribution by *aqilah* is a merciful deviation in favor of the offender. Secondly, it furthers the influence of family upon the offender, which could lead to his future supervision. Thirdly, it will also bring shame to the offender in his community. Collectively, it will become a good bargain as it might lessen the deterrence that could have been imposed by individual responsibility but would also substantially enhance the role of community in crime prevention. Since, *aqilah* know it to be ultimately their pecuniary responsibility, they will be more vigilant of the behaviour of related family members.

Furthermore, and most importantly, the shared responsibility of *diyat* is placed on *aqilah* only in the cases of *khata* i.e. causing personal injury (killing or hurt) by mistake or negligence. In cases of intentional offences, sharing the payment of *diyat* can be done only voluntarily.[297] This is an interesting and meaningful development by Islamic law since there was no such previous bifurcation of communal responsibility on the basis of mental element involved in the offence.[298] However, since in Islamic theory there has been a complete distinction drawn between intentional and

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[295] Id. The author has provided formulas adopted by various jurists. For e.g. according to Imam Abu Hanifa, each member of the community will only be responsible for up to 5 dirhams. Whereas, according to Malik the standard of minimum amount of *diyat* payable by each member of *aqilah* shall differ in accordance to their respective means and wealth.
Furthermore, according to Imam Malik, the two third of the total amount shall be paid by the offender himself and one third shall be the responsibility of the family of the offender. In opinion of Imam Abu Hanifa the minimum amount paid by the offender shall exceed the minimum amount paid by any one member of the *aqilah*.

[296] AL QURAN, Ch. LIII: 38. It is on the interpretation of this verse that later doctors have dismissed the doctrine of *'aqilah'* and has considered it as a mere tradition of older times.

[297] Therefore, if a family member or any other person wants to contribute towards the payment of diyat voluntarily, he cannot be stopped from doing that. The key principle is absence of compulsion. It is understood that generally the close relations such as parents or siblings help offenders in the payment of *diyat*.

[298] Islamic law has evidently stressed on the mens rea element of the offence. All classifications in personal injury offences have been subjected to the mens rea of the offender.

unintentional injuries and killings,[299] this distinction of communal responsibility in such two situations is only consequential. Where an offender has committed killing with intention, and instead of *qisas* punishment, *diyat* has been demanded, *aqilah* will not have the compulsion to share the responsibility of the payment of *diyat*. This is only sensible. Any compulsorily shared responsibility for the payment of *diyat* in the case of murder will take away the penal aspect of *diyat*. Similarly, the non-payment of *diyat* in such cases will allow the state to proportionally enhance the *tazir* sentence of the offender. On the other hand, the compulsion of shared responsibility in unintentional killing or hurt protects the victim's right to receive monetary compensation in the form of *diyat*, since the basic determined sentence in all unintentional killings and hurts is only *diyat*. However, *tazir* in such cases is a supplementary penal provision and is subject to certain conditions.[300]

On a critical note, there is no positive injunction in the Quran for the establishment of a communal responsibility system in cases of *diyat*, although some moral persuasions can be derived where God has enjoined upon family members to be kind, helpful and supportive of each other.[301] In fact, the formal system of communal responsibility existed only as a tradition that suited the dynamics of its time.[302] The historical evolution from communal liability to individual responsibility, suggests that the rise and fall of communal liability was potentially driven by changes in the economic and social structure of society.[303] Societies naturally tended to grow larger, whereas the families shrunk to a few close members only. Many factors are considered to be responsible for this development.[304]

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[299] See ante Part IV-C-1.

[300] See supra note 251 and accompanied text.

[301] See AL-QURAN, Ch-XVII:26 (And render to the kindred their due rights, as (also) to those in want, and to the way-farer...); Ch-XVI:90 (Lo! Allah enjoineth justice and kindness, and giving to the kinsfolk..); Ch-VIII:75 (But kindred by blood have prior rights against each other in the Book of Allah..); Ch-XXIV:22 (Let not those among you who are endued with grace and amplitude of means resolve by oath against helping their kinsmen, those in want....)

[302] See Francesco Parisi and Giuseppe Dari-Mattiacci, *The Rise and Fall of Communal Liability in Ancient Law*, 24 INT'L REV. L. & ECON. 489. While making the economic analysis of the communal liability system the authors concluded that the communal liability was the byproduct of the economic structure of the earlier societies.

[303] Ibid.

[304] Id at 504. The authors have noted two primary factors for this erosion of communal liability system. First, the disappearance of clan control system. Originally, the members of the clan were considered to be the property of their chief and all decisions relating to clan security were made directly by the chief. The concentration of the control and residual interest in the hands of the clan chief helped control opportunistic behavior of clan members. The transfer of this power from the clan chief to the state was one of the responsible factors. Secondly, these

Nevertheless, the issue at hand is the application of this doctrine of communal responsibility in contemporary times. Since the close family and clan system has substantially corroded, it is extremely difficult to establish the *aqilah* system in its original form. Therefore, the remaining options are two: either to impose the burden of *diyat* solely upon the offender, or where the offender is insolvent, the liability shall be shifted to the state. In many juristic opinions the state has been considered as a liability reservoir of the last resort.[305] The ultimate principle is that the right of a victim shall not be frustrated due to financial condition of the offender. Besides, making state an ultimate liability reservoir will also eliminate the possibility of discriminatory treatment of a rich offender in comparison to a poor offender. Therefore, a victim would not necessarily insist upon the execution of *qisas* since he would know that irrespective of the financial condition of an offender, the victim's claim to *diyat* can be fulfilled. Furthermore, it is possible for the state to create a common fund by way of taxation that will be used for the payment of *diyat* where an offender cannot pay from his own pocket. Especially, since the concept of 'welfare state' has commanded a great appreciation worldwide, it will only be an additional welfare activity for the state.

IV.

MAIN THEORIES OF JUSTICE FOR HOMICIDE AND HURT, ETC. OFFENCES

It is evident from the examination of Islamic QD theory of justice that this doctrine is fundamentally concerned with the creation of balance in society, preservation of morals and restoration of social relationships with establishing or re-establishing social equality. That social equality, wherein each person's rights to equal dignity, concern and respect are satisfied. In taking the social dimension seriously, Islamic QD theory captures an idea of transformation, of orientation towards the future. While the starting point for the micro application of QD theory will be the state of wrong that has disrupted the balance in society, its endpoint may be quite different

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societies were characterized by a substantial lack of privacy and this facilitated the opportunities for cross-monitoring members within the group. Because of the limited extent of personal privacy, detection of crimes was high and so was the probability of punishment. This in turn serves to keep the required level of sanctions low and to moderate the lack of individual incentives to contribute to the common good. Analysis shows that when communities grow bigger and wealthier, besides having more difficulty keeping privacy at a very low level, individuals tend to loosen their cooperation for the public good, both in terms of crime reduction and of provision of security for the group.

[305] See generally, Odeh, supra note 10, Vol. I.

than the *status quo ante*. What is ultimately achieved through the concepts of victim empowerment and victim-offender settlement in QD theory, is not the facticity of balance before disruption but an ideal of a relationship of equality in society, an ideal that survives at least *qua* ideal when basic rights such as security of person are respected even within a basically unjust framework of social equality.

Examining the history of the idea of justice, and the layout of some popular and applied contemporary models will offer a backdrop for the conceptual comparison between these models and Islamic QD theory of justice. A review of these models will also help us understand that what factors had influenced the move away from one conception in favor of other conceptions of justice.

A. *Historical Conception of Justice*

The majority of problems that we find rooted in present day systems of justice are the problems that are rooted in our understanding of justice. We have somehow come to believe that our particular understanding of justice is probably or in fact, the only one possible way of doing justice. The only paradigm, whilst others are impossible. Whereas others are possible, and 'they have been lived out and have actually dominated most of our history.'[306] These present paradigms of justice are in fact quite recent in origin. The hardcore punitive criminal law is a rather late development in western history and, in its present form, is a construction of recent modern times. Many scholars in this field dogmatically believe that the present punitive structure of crime control depends on some kind of natural law, having always existed, though in a cruder form, and having survived because it turned out to be more suitable.[307]

When faced with evidence of the presence of other historical responses to crime, these scholars, due to their restrictive imagination, not only ignore it, rather seek passionately for the remnants of a punitive model in history.[308] The role played by these mythical relics and anachronism in the historiography of criminal justice is regrettable.[309] Professional historians,

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[306] Howard Zehr, *Restributive Justice- Restorative Justice*, in NEW PERSPECTIVES ON CRIME AND JUSTICE –OCCASIONAL PAPERS SERIES 12 (Kitchener, 1985).

[307] HERMAN BIANCHI, JUSTICE AS SANCTUARY: TOWARD A SYSTEM OF CRIME CONTROL 10 (Bloomington: 1994).

[308] Ibid.

[309] Id at 9. Bianchi defines anachronism as a problem of historical interpretation. 'Anachronism is the tendency to make a false reconstruction of history by attributing our own models of thought, customs, and social structures to a period of history to which they could not have belonged.' Among the anachronisms developed in support of our current conception of justice is the use of the idea of criminal law with respect to ancient societies. Bianchi claims that '[t]he mere use of

precautious of the risks embedded in anachronism, have until recently ignored the history of criminal policy. They have left its study to jurists, who were often insufficiently trained.[310] This effort to recreate a history supportive of the current justice system has partly lead to the portrayal of

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the terms *criminal law* and *crime control* in reference to ancient law and legislation is already an anachronism. After using the modern word *crime* in a historical study of ancient law, we then apply it to a culture which, like all ancient cultures, had no official public prosecutors and not special criminal trials, a culture in which criminal policy was not even a part of public law.' In particular Bianchi points to the fact that neither the Romans nor the Greeks had any word meaning crime or punishment. Perhaps the most widely believed anachronism with respect to concepts of justice is the use of the bible and Hebrew law as justification for retribution. The *lex talion*, of the Old Testament, 'an eye for an eye' is repeatedly cited as justification for retribution. As a result many assume that the primary theme of the Old Testament and Hebrew justice generally is retribution. This has served as powerful support for our retributive system. However, there are serious problems with the use of the *lex talion* for these purposes. As Zehr reminds us, this phrase, taken as central to the concept of justice in the Old Testament, actually only appears three or four times. (Zehr, supra note 306). Perhaps most problematic, however, is not the infrequency with which it appears but the inaccuracy with which it is translated. While Zehr suggests that the translation of an 'eye for an eye' as a retributive demand is an oversimplification, Bianchi is much stronger in his censure. 'We are here concerned with a gross example of intentional 'error' in the translation of a Biblical text.' (Bianchi, supra note 307 at 29). He explains '[i]n nearly all passages in the Old Testament where English and European translations use such terms as *retribution, retaliation, Vergeltung* (German), and *vergelding* (Dutch), we find in the Hebrew text the root *sh-l-m*, well known as *shalom*, signifying 'peace'. 'An eye for an eye" was intended as a limit not a call to retribution. German Theologian Martin Buber has translated the passage as 'an eye for the compensation of an eye and a tooth for the compensation of a tooth.' This suggests, as Zehr does, that the *lex talion* was intended to bring peace through compensation aimed at maintaining the power balance between groups. When the constituent elements of society were families and tribes as was the case in the time of the Old Testament, it was possible to conceive restoration of social equality as entailing the sacrifice of a member of the perpetrator's tribe in compensation for the loss of the victim from her tribe. The focus however, was compensation, re-establishing the balance disturbed by the loss of a member of ones tribe. The idea of *shalom*, restoration and not retribution was central to the concept of justice in the Old Testament. 'Restitution and restoration overshadowed punishment as a theme because the goal was restoration to right relationships.' (Zehr, supra note 306 at 11.) This entire discussion is quite supportive of the Quranic stance upon such issues. Clearly, the Quran is not advancing the case for retaliation although there is a recognition of its existence and furthermore, the profound limitations upon the application of Qisas has made it more viable for any advocate of human rights or restorative justice, whatever the case may be. Besides, there is a visible tilt in the Quran in favor of compensation and forgiveness.

[310] Ibid.

pre-modern justice as less or uncivilized to the extent of being barbaric.[311] In contrast to which, the modern criminal justice system has been portrayed as a more rational and humane approach towards meting out justice. This presentation of history has served proponents of the state controlled/public criminal justice system quite helpfully. Hence, the public justice system has become a necessary antonym for the otherwise inevitable alternative of private vengeance and blood feuds. However, an impartial and deeper look at the history of justice reveals that throughout most of western history, other models have preoccupied the scene.[312]

That period of history, when the justice system was not the exclusive monopoly of the state, is often referred to as a time of 'private justice'. However, this term, due to its literal as well as legal connotations, does sometimes create misunderstandings. To a lay person, the simple term 'private justice' conjures images of personal vendetta, private evening of scores, vengeance and unregulated or unfettered, mostly violence oriented responses to wrongdoings. Unfortunately, this is not a completely fair picture of the time when private justice was the norm of the realm. In the pre-modern times, prior to state administered justice systems, on the flip-side, the institute of 'private justice' also denoted a process of mediation and negotiation where rules were product of unanimity and justice was reached peacefully.[313] According to Zehr, the term 'community justice' would be a more appropriate descriptor for this early period of dispute resolution by the community.[314] Community justice recognized that harm had been done to people, that the people involved had to be central to a resolution, and that reparation of harm was critical.

Community justice placed reconciliation and maintaining of relationships high on the priority list.[315] According to Van Ness and Strong the '...goal of the justice process was to make things right by repairing the

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[311] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 106 (Waterloo: Herald Press, 1990).

[312] Ibid at 6-7. The author writes:

> 'It is difficult to realize that the paradigm which we consider so natural, so logical, has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. ... Instead, community justice has governed understandings throughout most of our history. ... For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state's role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.'

[313] Id at 100.

[314] Id at 107.

[315] Id.

damage to those parties, whether the damage was physical, financial or relational.'[316] Hoebel in his leading work on primitive justice systems has equated the work of primitive law with that of a doctor. The purpose of law in primitive times was to keep the social body in good health by 'bring[ing] the relations of the disputants back into balance,'[317] just as a medical doctor will keep the human body in a healthy balance.

It should not suggest that other methods to solve disputes and conflicts did not exist during this time. It is known that retribution and formal judicial resolution were both exercised. [318] However, these were used only as mechanisms of last resort.[319] They were options only when community justice failed, where negotiation was not forthcoming or possible. Resort to retribution or forced resolution was met with regret as an unfortunate necessity in exceptional cases, not the norm as we have come to believe. According to Zehr, in pre-modern times, retribution was '...a means as much as an end in itself.' Moreover, as he explains '...the meaning and function of retribution often reflected a compensatory vision. The system rested first on the necessity of compensating victims and repairing relationships.'[320]

The scholars have admitted that while there have been many theories attempting to explain the origin of our retributive justice system, none have succeeded in offering a 'plausible and satisfying theory of its origin.'[321] There does seem to be agreement that the move from community justice to what we know today as public, state centered, retributive justice began as early as the eleventh and twelfth centuries. For centuries to follow, however, '...the old systems of conflict resolution, repair, and dispute settlement survived, openly or covertly, in many countries.'[322] It would take until the nineteenth century for this new model of justice to gain prominence.[323] Whatever other factors may have prompted this change, it is clear, at least in part, that it was motivated by the desire for political power

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[316] DANIEL VAN NESS AND KAREN HEETDERKS STRONG, RESTORING JUSTICE 6 (Cincinnati: Anderson Publishing Co., 1997).

[317] E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 279 (New York: Atheneum, 1973).

[318] See Zehr, supra note 311. The author notes that even when these options were used they were limited. Vengeance was tempered through the existence of sanctuaries where individuals accused of wrongdoing could seek shelter and protection from retribution. Courts too were limited in their powers. They were not able to initiate or continue prosecution without a victim pressing the accusation. The courts actually operated within the context of community justice, fulfilling a referee-like function aimed at balancing the power between the two parties so that they might come to some agreement.

[319] Ibid; See generally Bianchi, supra note 307.

[320] Zehr, supra note 311 at 104.

[321] Bianchi, supra note 307 at 15.

[322] Ibid at 16.

[323] Zehr, supra note 311 at 107.

both in the secular and religious spheres.[324] Legal historians argue that this change in the viability of legal systems tantamount to a 'legal revolution.'[325] This revolution resulted in a reconceptualization of the nature of disputes. By the end of nineteenth century, the crown had proclaimed itself 'keeper of the peace' and as such would be the victim whenever the peace was violated. Correspondingly, the role of the courts also changed. They were no longer referee between disputing parties requesting their involvement. Instead, their new role was to defend the crown. They began to play an active role in prosecution, taking ownership over those cases in which the crown was deemed a victim.[326] Justice as the work of these courts came to mean 'applying rules, establishing guilt, and fixing penalties.'[327] This new role of the crown resulted in devastating and lasting effects for the real victims harmed by wrongful acts. They were no longer parties in their own cause, their disputes having been effectively stolen from them.

Till to date, this politically transformed conception of justice is dominating legal theory and practice. It is from this transition of private justice into public that the compartmentalization of civil and criminal has emerged, and the state has received an unfettered right to use and control the coercive power at its disposal. It is a legally ratified form of civilized police state. The enlargement of the role of the state has reduced real victims to a simple symbology of harm in a crime. Now victims have little or no power with respect to their case. They can not initiate or stop or settle a prosecution without the permission of the state, and can often be locked out of the process altogether if they are not useful as a witness in a criminal case. Furthermore, the evidence of this change in focus from victim-centered to state-centered justice can be found in the preference for fines (payable to the crown) instead of restitution and for punishment over settlement, and indeed more recently by the possibility of an award of punitive damages in some not conventionally 'criminal', or even legislated entitlement to them. Punishment serves the interests of the state, serving as a show of power and authority while doing less to address the harm caused

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[324] See Van Ness & Strong, supra note 316 at 7-8. They argue that 'countries which trace their legal heritage to England can point to the reign of William the Conqueror as the turning point from restitution-centered justice to state-centered justice. William and his descendants used the legal process to increase their political power, competing with the growing influence of the church over secular matters under canon law, and with local systems of dispute resolution controlled by the barons.'

[325] Id at 110; See also Daniel Van Ness, *Restorative Justice* in BURT GALAWAY AND JOE HUDSON, EDS., CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 7-8 (Monsey, New York: Criminal Justice Press, 1990).

[326] See generally HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (Cambridge, Mass.: Harvard University Press, 1983).

[327] Zehr, supra note 306 at 110.

by the wrongdoing. Now, crime is largely and effectively, about the 'law breaking' and not precisely about 'harm'.[328]

B. *Contemporary Conceptions of Justice*

The above discussion has sufficiently led us to analyze the contemporary conceptions of criminal justice. For the purposes of analysis these contemporary theories have been divided into two camps: conventional and non-conventional.[329] Conventional theories or models are those which subscribe, firstly, to the division of criminal law and civil law as two distinct paradigms; and secondly, these conventional theories believe that 'punishment' (in whatever form it may be) is the only possible response to a crime. The non-conventional models on the other hand do not agree on these primary premises.

1. *Conventional Models of Justice*

The conventional theories of justice have been erected upon two pillars: the distinction of civil and criminal forms of justice, and recognition of punishment as a reactive phenomenon to crime. This section of the article will briefly assess the significant and reality of these primary pieces of the criminal justice empire.

a. *Distinction between Criminal and Civil Law Paradigms*

In discussing the particular nature of civil and criminal paradigms, it is assumed that as with every system of sanctions there must exist definitions of wrongs, purposes, procedures, and remedies. This section intends to reveal the general aspects of these dimensions by examining the different characteristics found in criminal and civil paradigms. The following analysis focuses on criminal law and the common law of torts rather than on contract law, although the problems identified in this section are also found in contract law.[330]

The early English (as well as American) judges and commentators adopted a language that was loaded with twofold images of the law of sanctions. They wrote about 'criminal law' and 'civil law' in spite of the

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[328] Ibid at 112.

[329] This distinction is only made for the purposes of this analysis and author does not intend otherwise to propose any broad-based distinction on the basis of these elements.

[330] For example, even in contract law, there is growing concern for the employment of punitive measures as a remedy for bad faith bargaining and willful breach of contracts.

fact that many middle-ground actions, such as punitive damages in tort, always existed.[331] Describing the law of the fourteenth and fifteenth centuries, it has been observed that it was 'in this period that the foundations of our present law as to wrongs, criminal and civil [were] laid.'[332] The differences apparently became quite well-established.[333] Out of this historic division between the two main categories of legal process, emerged the deeply ingrained language distinguishing criminal penalties from civil remedies.[334] These terms reflected the development of a dominant ideology that attempted to abstract a set of traits from the complex and multifaceted nature of sanctions to create important normative focal points in jurisprudence:[335] the criminal and civil law paradigms.[336] Thus, a sanction may be viewed within the criminal law paradigm as a

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[331] The use of bipolar concepts to describe empirical facts that do not fit well into only two categories has continued over a prolonged period. It is a form of overgeneralization that speaks to the need for order more than it presents an accurate description of the field of sanctions.

[332] WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOL. III at 276 (reprint 1977).

[333] *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147 (27 K.B. 1775). Lord Mansfield said, 'Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.'

[334] Civil and criminal law are both sanctioning processes. In its broadest and most neutral sense, the term 'sanction' implies not the imposition of punishment, but rather the use of power to determine rights that necessarily constrain behavior. English legal historians used the term in this way. According to Holmes, for example, Austin regarded the '[civil] liability to an action as a sanction.' OLIVER W. HOLMES, JR., THE COMMON LAW 82 (Boston, Little, Brown & Co. 1881); See also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 23, 31 (1968) (describing sanctions as 'those rules of the legal order that prescribe the consequences of violating the primary norms that are meant to govern behavior'). Packer defines four types of sanctions: punishment, treatment, compensation, and regulation.

Generally the term 'remedy' is associated only with civil cases. See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973) (implying that punishment is not a remedy).

[335] The leading article on fundamental differences between civil and criminal law is Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUMB. L. REV. 753, (1943). On p. 967, Hall reviews much of the relevant writing on the subject, contrasting with his own position Bentham and Austin, who found almost no differences between criminal and civil law, and Holmes, who minimized the differences. Drawing on Blackstone and Stephen, Hall argues that there have always been fundamental distinctions between the two forms of law and focuses mainly on the concepts of 'social harm' and 'morally culpable conduct' in the criminal law, as opposed to 'individual harm' and objective responsibility in tort. See, e.g., ibid at 974.

[336] The term 'paradigm' indicates a set of norms, abstracted from specific factors to form a model.

penalty, or within the civil law paradigm as a remedy. However, as argued below, the substantial areas of overlap exist between civil and criminal law.

First of all, in distinguishing these paradigms, two features of prohibited acts are prominent: the required mental element and the effect produced by the wrongful act.[337] The presence of mens rea (generally in subjective terms) for the construction of crime is a well known requirement of the paradigmatic criminal law.[338] This distinctive feature of criminal law is deeply rooted in English legal sources and such requirement is generally not imposed upon the civil liability paradigm. While criminal law and civil law are similar in that both require voluntary acts, civil law depends principally on the notion of objective liability, either disregarding the mental element in conduct or requiring only negligence. The civil law imposes a sanction when there is 'a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes.'[339] It is only after the seventeenth century that the use of 'negligence' as a standard for the imposition of liability has acquired importance in the law of torts.[340]

A second typical difference in the key elements of wrongful conduct concerns the effect of the act to which a sanction applies. In a criminal

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[337] This dimension of the paradigms deals with only two of the many elements that define the full range of prohibited conduct in the substantive law of wrongs. Definitions of conduct also vary as to whether an omission and/or an act satisfy their legal requirements, and as to whether special circumstances must exist that characterize the wrongdoer or the injured party.

[338] Crimes of strict liability and negligence are deviant forms from the normative perspective of the paradigms. Their deviant characteristics rose out of the dominant role of the paradigms.

[339] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 4 at 22 (5th ed. 1984). Empirically, civil and criminal laws overlap. Civil law includes causes of action for intentional acts; criminal law includes strict and negligent liability. Therefore, no true empirical difference exists between civil and criminal law with respect to the range of mental states resulting in liability. However, most criminal cases require proof of subjective and objective liability, whereas most civil cases require proof only of objective liability. Therefore, we say that the paradigmatic task of the civil law is to compensate for damages caused in the normal conduct of everyday life, usually without regard to actual knowledge or intent. Thus, the distinctive character in the division in the paradigms lies in the requirement of attention to the subjective state of mind in the conventional criminal type.

[340] JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 455 (3d ed. 1990). According to Baker, the negligence approach of the modern law determines liability by focusing on the quality of the defendant's act rather than on the kind of harm done to the plaintiff. The rearrangement of so much of the modern law of tort around the concept of negligence is partly a result of that shift of focus. But there is nothing modern about the concept of negligence in itself; what has changed is its primacy.

paradigm, wrongful acts are punished because they are considered to be public wrongs, violating a collective rather than individual interest.[341] Even if there be an absence of a direct injury to the individual interest, criminal sanction may still apply. On the other hand, civil sanction applies to a conduct that causes actual damage to an individual interest; this is generally a prerequisite to civil liability. Thus, a private person cannot initiate a civil suit unless he can show a special grievance in terms of *locus standi*, whereas the state can place the charge generally; a suit by a private person results in damages, whereas a suit by the state ends in punishment of the guilty party.[342] These generalizations accurately describe distinctive correlations between characteristics of wrongs subject to sanctions and the sanctioning paradigm in which they are found.[343]

A third common element that distinguishes civil and criminal law prototypes is purpose. Purpose defines the reason or motivation for constructing and using a sanctioning system.[344] In modern legal theory criminal and civil law share the purpose of social control; however, in the conventional paradigms, which predate the modern overlapping of civil and criminal law, it was inappropriate to label civil law as an instrument of social control. Before the language of social science infused the law of sanctions, only criminal law was associated with punishment, both as a

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[341] See, for example Jules L. Coleman, *Crime, Kickers, and Transaction Structures*, in J. ROLAND PENNOCK & JOHN W. CHAPMAN EDS., NOMOS XXVII: CRIMINAL JUSTICE 313, 323 (1985) (observing that 'key moral notions of criminal responsibility-of guilt and fault-are simply absent from the economic infrastructure'). But see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

[342] See Holdsworth, supra note 332, Vol. 2 at 453; See also WILLIAM BLACKSTONE, COMMENTARIES, VOL. II at 2. According to Blackstone, wrongs are divisible into two sorts or species: private wrongs, and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors.

This distinction between private and public injury was prevalent in early Anglo-American law and provided the basis for Blackstone's classification of law.

[343] Jerome Hall, supra note 335. Hall puts the difference this way: '[I]n torts, 'effects' almost invariably include actual damage to some person, whereas in crimes, damage is not essential-instead the notion of a 'social harm,' supplies the requirement there.'

[344] Purpose is sometimes confused with remedy and in many instances may bear the same name. For instance, incapacitation has often been described as the purpose of a sanctioning system, although it is more properly classified as a means to an end. It can be used as a means to achieve deterrence, punishment, or compensation. The problem of distinguishing means and ends is most palpable in the law of contempt.

form of vengeance and as an instrument for protecting the public.[345] Substantial normative disagreement has long characterized the debate about the primary justification for criminal sanction.[346] Yet despite the different emphases and the evolution of different philosophies on this central issue, most would agree that either as a means or an end, punishment is a distinctive characteristic of criminal law, even though it is not exclusive to it.[347] The convicted defendant and the community understand that the state uses criminal law to condemn publicly the offender, who experiences shame because of the notoriety of his punishment. These conventional views regarding criminal law are borne out in the law of torts, where the direction of law is to compensate the individuals, rather than the public for the losses of legally recognized interests of the victim.[348]

The fourth generic comparison lies in the remedies provided. Throughout the history of sanctioning law, commentators have argued that the distinctive remedy of criminal law is imprisonment or the threat thereof. In modern criminal law, the stigma of a criminal sanction has become a special kind of remedy because of its burdensome and sometimes destructive consequences for the individual. Though, other remedies in criminal cases, such as fines and probation, may actually be imposed more often than imprisonment, imprisonment and the special stigma associated with convictions are the core remedies used to achieve the purposes of criminal sanction. Two paradigmatic remedies exist in civil law, each closely linked to the purpose of the particular civil law.[349] The first is the court order mandating a return to a *status quo ante*, so as to make the injured party whole, or enjoining the continuation of injury. The second is the order to pay money as compensation for damage caused.[350]

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[345] On the purposes and justifications for punishment, see generally FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25-41 (1964) (explaining rehabilitative ideal); See also Hart, supra note 144 at 1-27 (defending mixed theory combining retributivist and utilitarian elements).

[346] See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 113-65 (5th ed. 1989).

[347] See HART, supra note 15 at 401, 405. He discusses that criminal sanctions 'take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction'.

[348] See Prosser, supra note 339 at 5-6. See also Blackstone, supra note 342 at 5-6. Blackstone said: "[A] civil satisfaction in damages, constitutes compensation for a 'private wrong'; whereas 'a public mischief' is punished to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws and operates through the terror of punishment or the sword of the public magistrate."

[349] Within the paradigmatic framework, civil law was meant to provide remedies specifically designed to repair damage or provide money to enable the victim to obtain the value of the damage caused.

[350] Blackstone, supra note 342 at 116. Blackstone succinctly described remedies of civil law: "Now, as all wrong may be considered as merely a privation of right [in

However, despite this distinguishing lay out of criminal and civil paradigms, almost every attribute associated with one appears in the other. Imprisonment, associated with the criminal process, also exists in the civil arena; civil contempt, for example, is punishable by incarceration. Payment of money, distinctively associated with civil law, takes the form of fines in the criminal law. These paradigms as used in contemporary legal framework, misrepresent the field of actual legal processes because they ignore a large variety of hybrid sanctions. For example, they fail to identify the central role of punitive civil sanctions in the broader arena of legal sanctions.[351] In many instances, the correlation of an attribute with its paradigmatic context is an empirically valid reflection of the attribute's primacy in one paradigm rather than the other. In other instances, the paradigmatic co-option of attributes stems from historical conventions that are now eclipsed, and thus the paradigms contradict the actual development of attributes in sanctioning arrangements.

Consequently and contextually, this is to further the viability of QD theory as a convergence point of civil and criminal paradigms. It is fairly correct to assume that there exist no water-tight distinction between criminal and civil paradigms and both utilize the same paradigmatic features in either primary or advance form in their respective spheres. Therefore, the construction of a theory of justice that hopes to amalgamate these features, merging the advance usages with the primary ones, should not be treated as a conceptual contradiction, far less to say, an impossibility.

b. *Theories of Punishment*

The second important component within the prevalent conceptions of justice is 'punishment'[352] and its theorization. As discussed in the previous section, punishment is considered to be a primary and exclusive tool for the exercise of coercive state power upon its subjects. Besides, it is taken as a natural corollary to the criminal administration of justice. Though, there is a widespread recognition of these aspects of punishment, still there exists a

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the civil law], the one natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject- matter in dispute to the legal owner; ... or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages .."

[351] See generally Kenneth Mann, *Punitive Civil Sanctions: The Middleground between Criminal and Civil Law*, 101 YALE L. J. 1795, 1804 (1992).

[352] Punishment entails the intentional infliction of pain or some type of deprivation that individuals would generally prefer to avoid, making it insufficient to simply declare that state-imposed sanctions are a necessary adjunct of a criminal justice system.

huge amount of debate upon the recognized purposes of punishment. These debates upon the justifiable purposes of punishment, has clad themselves in a more academically feasible form of 'theories.' It is now the scope of these different 'theories' of punishment to discuss and more often rebuff each other's conception of these purposes. The primary object of this section of the article is to briefly explain contemporary theories of justice and their relevant criticism. Hence, it will be easier for the reader to assess stance taken by these contemporary concepts against the background of Islamic QD theory. Although, it is agreed that QD approach is a somewhat a 'hybrid' theory but the basic issue with these prevalent theories is their over-emphasis upon one isolated purpose at the expense of the other. It will be argued later in the article that in the realm of sanctions and restitution, every concept, from revenge to control and from compensation to social restoration, begs acknowledgement.

i. *The scope of a punishment theory.*

"Punishment theory" is a term fraught with queries. It typically raises at least five questions against any state system that proposes to sanction human behavior: [353]

(1) Why the concepts of crime and punishment?
(2) What is the justification for punishment?
(3) What are the appropriate principles of criminal liability?
(4) How should the appropriate amount of punishment be determined?
(5) What are the appropriate methods of punishment?[354]

The first question challenges the presumed demand for a state-defined crime and state-imposed punishment.[355] In contrast, the final question involves the limits on particular forms of punishment--whether, for example, the state can brand or whip offenders. This obviously implicates hotly debated issues in modern society (e.g., abolition of death penalty), but lets assume for present purposes that current methods of punishment lie within a continuum of acceptability. The middle three questions constitute the core issues for the distribution of criminal sanctions--what justifies punishment, who should be punished, and what amount of punishment is appropriate. Any decent theory of criminal sanction should have an answer for each question (or so it is argued), derived in whole or in part from the

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[353] See, e.g., Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987) (giving five questions that must be answered "[i]n order to have a theory of punishment").

[354] Ibid at 510-12.

[355] Although contemporary abolitionists reject the use of penal institutions to resolve interpersonal disputes and the subsequent divide between crime and tort, assume for present discourse that there is a need (however ill-defined) for publicly prohibited conduct and attached penalties.

response to the previous question(s). A coherent theory must offer some interest that is served by criminal sanctioning beyond the gratuitous infliction of pain, as well as principles for determining individual liability and the proper amount of punishment in particular cases.[356]

Punishment theories are generally divided into three philosophical factions—teleological theories, deontological theories, and hybrid theories containing both teleological and deontological elements. It is the determination of their goals and focus that differentiate one faction from another. For example, teleological theories are generally forward-looking, concerned with the future consequences of punishment. On the other hand, deontological theories are backward-looking, and are solely interested in past acts and mental states. Evidently, mixed theories are both forward and backward-looking, with each hybrid bringing out a different equation between the culpable past conduct and its future consequences.

The following sections will briefly examine the two dominant teleological and deontological theories of criminal punishment--utilitarianism and retributivism, respectively, as well as leading hybrid theories.

ii. *Utilitarian theory.*

Utilitarianism imposes criminal penalties only to the extent that social benefits (utility) outweigh the costs of punishment. In particular, the imposition of criminal sanctions might serve a number of distinct utilitarian goals, such as deterrence (general and specific), rehabilitation and incapacitation.[357]

Deterrence, in its specific form, assumes that the offender is a (sufficiently) rational actor to weigh the costs and benefits of committing crime and that the imposition of painful consequences such as imprisonment will tip his cost-benefit analysis against future offending. General deterrence suggests that punishing a particular criminal will serve as a poignant example to potential offenders, affecting their assessment of the advantages and disadvantages of illicit behavior and persuading them against committing crime in the future. Rehabilitation views the criminal as suffering from a disorder that prevents him from conforming his behavior to the dictates of law. Through concerted treatment, it is argued that an offender can be rehabilitated and later released into society as a law-abiding citizen. In turn, incapacitation supposedly prevents future

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[356] See, for e.g., Kent Greenawalt, *Punishment*, in SANFORD KADISH ED., ENCYCLOPEDIA OF CRIME AND JUSTICE, VO. 4 at 1336-38 (1983).

[357] Incapacitation might be further divided into selective incapacitation--choosing offenders based on certain predictors of future criminality--and general incapacitation--immobilizing offenders en masse. The former can be analogized to a surgical military strike while the latter more resembles "carpet bombing."

offending by definition; an offender placed in a correction facility, for instance, cannot commit crime whilst behind bars.

Whatever goal is espoused, utilitarian-based punishment is always forward-looking, seeking to reduce the intensity and gravity of crime in society. In other words, utilitarianism takes the position that "bygones are bygones,"[358] and that future consequences should be the sole guide for sanctioning decisions. With this objective in mind, utilitarianism provides an apparently sensible approach to the ends and means of punishment: Society punishes crime to enhance the "common good" (i.e., increase aggregate social utility); the common good is served by preventing future crime (where crime is a type of social "disutility"); and potential offenders are warded off by, for example, the threat of imprisonment (general deterrence).

Against this background, critics maintain that utilitarian-based punishment is, at best, ineffective or even counterproductive and, at worst, terribly unjust. The litany of grievances begins with the failure of utilitarianism to justify the very concepts of crime and punishment, as critics argue that utilitarians gloss over the abolitionist charge that civil or informal means of increasing social utility could avoid the painful machinery of state-imposed sanctions.[359] But even if it is assumed that utilitarianism could justify the existence of a criminal justice system, how is it possible to weigh the various costs and benefits of punishment, either in general or in specific cases? Utilitarians must aggregate all of the physical and emotional costs and benefits directly associated with the detection, prosecution, and punishment of crime, as well as the indirect effects on liberty and security.[360]

Critics also attack the efficacy of specific means to achieve greater social utility. They point to studies suggesting that treatment programs are largely ineffective at behavior modification.[361] To make matters worse, rehabilitation programs frequently exacerbate the offender's connection to the crime. Social psychology's "self-categorization" theory suggests that labeling an offender as "sick," "demented," "delinquent," and so on, may

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[358] John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955).

[359] See for e.g., R.A. Duff, *In Defense of One Type of Retributivism,* 24 MELB. U. L. REV. 411, 415, (2000).

[360] Ibid at 422. "[W]hen we try seriously to think what this would involve, we will realize that such a utilitarian calculus is a fantasy……It is not just one that it would in practice be very difficult to carry out--it is one that it would be absurd even to think of trying to carry out."

[361] See DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975); Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974).

actually cement his negative identity and connection to a criminal lifestyle.[362]

Opponents of utilitarian punishment also question the performance of incapacitation and deterrence at achieving their alleged goals. The idea that incarcerating or otherwise disabling an offender will decrease crime and thereby raise social utility is premised on a number of assumptions--specifically, the offender would otherwise be committing crimes if not incapacitated, he would not be replaced by a new set of criminals, and crime does not occur in incapacitative facilities. However, each of these propositions can be challenged. First, the current state of scientific knowledge makes selective incapacitation little more than guesswork, producing intolerable levels of false positives (incapacitated offenders who would not otherwise be committing crimes) and false negatives (non-incapacitated offenders who do, in fact, commit more crimes).[363] Second, critics argue that some categories of crime have more potential culprits than the criminal "marketplace" can bear,[364] creating a virtual queue of replacements for incapacitated offenders.[365] Finally, illegal conduct is

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[362] See John Braithwaite, *Reintegrative Shaming, Republicanism, and Policy*, in HUGH P. BARLOW ED., CRIME AND PUBLIC POLICY: PUTTING THEORY TO WORK 191, 193 (1995) (discussing implications of labeling theory); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 46-53 (1999); see also ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG 23 (1955) (presenting portrait of delinquent subculture); DAVID MATZA, DELINQUENCY AND DRIFT 28 (1964) (discussing how delinquents drift between criminal and conventional behavior). See generally JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 42-68 (1987) (setting forth and discussing self-categorization theory).
Moreover, critics note that traditional treatment methodologies focus on the medical antecedents to illegal behavior while largely ignoring the social motivations to commit crime such as poverty, pervasive discrimination, dysfunctional family life, and the like. For more details see MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12-38 (1973); M.D. McShane & F.P. Williams, *Radical Victimology: A Critique of the Concept of Victim in Traditional Victimology*, 38 CRIME & DELINQ. 258, 262 (1992).

[363] See PETER W. GREENWOOD & SUSAN TURNER, SELECTIVE INCAPACITATION REVISITED: WHY THE HIGH RATE OFFENDERS ARE HARD TO PREDICT 34 (1987); JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 22 (1995); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 105-14 (1985); Duff, supra note 359 at 11; Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 40 n.57 (1987).

[364] Arrest one street-level drug dealer, for instance, and another will step up to take his place.

[365] See, e.g., George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1897, 1907 (1999) ("[The] war against the 'criminal class' cannot be won: There is a permanent supply of potential offenders and particularly of drug users.").

rampant in jails and prisons, forcing proponents of incapacitation to cling to a hypothetical corrections facility or simply define away crime behind bars as non-criminal.[366] Deterrence theory fairs no better, critics argue. If we assume that criminals act rationally--pursuant to an assessment of the advantages and disadvantages of criminality--the potential cost of committing a particular offense is not, as some politicians maintain, the allowable punishment under law. Instead, it is a mere fraction of the prescribed sanction, given that potential punishment must be discounted by the probability of apprehension and conviction for the given offense.[367] Critics contend that deterrence-based analysis may fail even with a more sensitive formula, as criminals do not always fit within the classic rational actor model. Many offenders, particularly those from deprived socio-economic or familial backgrounds, commit crime in pursuit of intangible, non-quantifiable ends, such as respect, glory, or attention.[368] Other offenders are driven by "impulsive, irrational, or abnormal" desires.[369]

Beyond the alleged failure of utilitarianism to achieve its asserted goals, critics are especially concerned about the injustices that utilitarian-based punishment either tends to perpetuate or would expressly allow. It is argued, for example, that the alleged benevolence of the "rehabilitative ideal"[370] can mask invidious discrimination against disempowered

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[366] See, e.g., Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 683-92 (1997) (describing horrific conditions in modern prisons); J.C. Oleson, *The Punitive Coma* , 90 CAL. L. REV. 829, 849-61 (2002) (describing antisocial world of modern prison).

[367] See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968); Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909, 1915-16 (1999); Erik Luna, *Race, Crime, and Institutional Design,* 66 LAW & CONTEMP. PROBS. 183, 194-96 (2003) (discussing deterrence formula).

[368] E.g., JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 80-110 (1988); Julie Leibrich, *The Role of Shame in Going Straight: A Study of Former Offenders*, in BURT GALAWAY & JOE HUDSON EDS., RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 283, 283 (1996); Howard Zehr, *Restorative Justice*, in F.W.M. MCELREA ED., RE-THINKING CRIMINAL JUSTICE: JUSTICE IN THE COMMUNITY, VOL. I at 1, 11-13 (1995); Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 81, 81-94;

[369] The enraged husband may kill his wife's lover with total indifference to possible punishment. Similarly, many drug addicts seek out illegal narcotics without (sufficient) regard to possible criminal consequences. See also JAMES Q. WILSON, THINKING ABOUT CRIME 118 (rev. ed. 1983); But see, John Braithwaite, *Shame and Modernity*, 33 BRIT. J. CRIMINOLOGY 1, 2 (1993) ("Most of us refrain most of the time from crimes like murder not from any rational calculation of costs of incarceration or the costs of the electric chair, but because murder is ... unthinkable as a way of solving our problems of daily living.").

[370] See Francis A. Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal,* 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226 (1959).

groups.[371] Likewise, deterrence and incapacitation are portrayed as wholly indifferent to the disproportionate punishment of minority groups, the young, and the poor.[372] Most importantly, utilitarian punishment apparently rejects the idea of individual rights and the inviolability of certain liberty and security interests. Instead, individual rights and interests can be sacrificed in service of social utility, however defined.[373] Procedural safeguards are secondary concerns at most, given that the ends of increased social utility will necessarily defeat notions of due process.[374]

Finally, the strongest criticisms of utilitarian punishment, however, implicate the Kantian categorical imperative to never use individuals as means to other ends but to treat them as ends in and of themselves.[375] There may not be a necessary correlation between crime and sanction under utilitarian theory; however, it is argued, there exists one between sanction and increased social utility.

iii. *Retributive Theory.*

In contrast to utilitarianism, retribution theory focuses on the "right" rather than the "good." In other words, institutions should produce morally correct decisions regardless of ultimate effects on society. It argues for punishment as "just deserts," that penalties are inflicted on the offender solely because he deserves it. This conception of justice punishes not for the sake of some greater social goal but in proportion to the criminal's moral blameworthiness and the harm caused by his offense. Therefore, penalties must be corresponding to the degeneracy of the offense rather than the danger posed by the offender. Retributivism does not condone, for example, disproportionate punishment based on a heightened risk of recidivism. Conversely, an offender deserves to be punished even if he is unlikely (or unable) to commit future crimes and regardless of the

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[371] Andrew von Hirsch & Lisa Maher, *Should Penal Rehabilitationism Be Revived?*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 25, 29. She writes: "[T]he cultural presumption that women are less 'rational' often results in their lawbreaking being perceived as symptomatic of social (or biological) pathology. Women found guilty of relatively minor offenses thus may be subjected to substantial treatment interventions."

[372] See, e.g., Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1883-93 (1999).

[373] See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 46 (1990) (detailing harms, such as "boiling oil for bicycle thieves," that result from focusing too narrowly on social utility).

[374] GABRIELLE M. MAXWELL & ALLISON MORRIS, FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND 165-66 (1993).

[375] See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (H.J. Paton trans., 1964) (1797).

consequences for others.[376] As such, retribution is inherently backward-looking in focus, concerned with past acts and mental states rather than future conduct.

Over the past few decades, a substantial body of retributivist scholarship has emerged as a response to the critics who had marked this theory as oversimplified. From amongst the various attempts to provide content for the distinct theories of just deserts, at least three dominant theoretical strains can be identified. The first "unfair advantage" theory advocates the stance of retributivism by proposing that it provides a system of mutual benefits and constraints. This criminal justice system of mutual restraints accrues to the benefit of all citizens and assures them freedom from harmful conduct and the protection of personal property. The commission of crime upsets this balance, with the offender renouncing his obligations under law while still free-riding on the benefits from a system of mutual restraints. By imposing a painful disadvantage on the criminal in the form of punishment, this type of reciprocal retributivism allegedly restores a fair balance of benefits and burdens in society.[377]

The second theoretical exposition of retributive approach recognizes the emotional response to crime. It considers the notion of 'revenge' as only natural and appropriate. Humans are emotional beings, after all, and to deny genuine feelings of anger and resentment toward criminals is to deny an unavoidable manifestation of humanity. Therefore, punishing an offender in response to the desire of the victim will satiate the victim and/or society's "retributive hatred."[378]

Finally, the contemporary retributivist thought argues that punishment is a kind of message to the offender, the victim, and society at large. Since crime depicts the illegitimate expression of an offender's superiority and

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[376] See IMMANUEL KANT, THE PHILOSOPHY OF LAW 194-98 (Augustus M. Kelley 1974) (W. Hastie trans., 1887) ("Even if a civil society resolved to dissolve itself, the last murderer lying in prison ought to be executed.").

[377] See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 263-64 (1980); ALAN GEWIRTH, REASON AND MORALITY 294-98 (1978); HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31-73 (1976); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 82-115 (1979); WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 253 (1985); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 38 (1974); Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, CRIM. JUST. ETHICS, Winter/Spring 1997, at 13, 13.

[378] Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, CRIM. JUST. ETHICS, Summer/Fall 1998, at 3; Jeffrie G. Murphy, *Retributive Hatred: An Essay on Criminal Liability and the Emotions*, in R.G. FREY & CHRISTOPHER W. MORRIS EDS., LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 351, 352 (1991).

the diminution of the victim's moral value,[379] it is important to communicate the renunciation of an offender's position. Furthermore, the punishment of an offender will reconfirm the inviolable moral worth of the victim and ultimately, of society.

But like utilitarianism, retributive punishment has also received a harsh examination from critics of this theory. The challenge begins by questioning the practical ability of retribution to "do justice." The dominant form of punishment, available to the proponents of retributive approach is incarceration. Critics have held 'incarceration' a questionable method for holding offenders accountable for their offences in any meaningful sense. Moreover, it is claimed that retributivism can be skewered with its own sword, as retribution, no less than utilitarian-based punishment "uses" the offender in violation of the Kantian imperative. After all, the practice of criminal justice is inevitably fallible; factually innocent individuals, as well as legally justified or excused defendants, will be subject to undeserved punishment as long as the criminal process is administered by imperfect beings lacking full information.[380] In this context, the application of retribution as a main theory of punishment raises the more general question of whether it is appropriate for society to meet violence with violence. Not only is incarceration itself a form of coercion against human instinct, but it often facilitates the caged offenders to produce levels of assault, rape, and murder among inmates that would be unthinkable in the outside world.[381]

Retributivists might retort that the controlled violence of a system of justice is vastly superior to personal revenge or blood feud. But this response raises its own problems, namely, the intentional exclusion of interested parties in the sanctioning process.[382] The state and its justice machinery determine the appropriate amount of desert for an offender's crime, irrespective of the needs or wishes of the corporeal victim. In this

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[379] Jean Hampton was a leading proponent of the expressive theory of punishment. E.g., Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661-85 (1992); Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J.L. & JURIS. 23, 36-41 (1998).

[380] E.g., Duff, supra note 359, at 3 n.3; George Schedler, *Can Retributivists Support Legal Punishment?*, 63 MONIST 185, 189, 196 (1980).

[381] See, e.g., Fried, supra note 366 at 682-88; Oleson, supra note 366 at 849-61.

[382] See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977) (critiquing exclusion of victims from criminal process); see also John Braithwaite, *Restorative Justice and a Better Future*, 76 DALHOUSIE REV. 9, 16 (1996) ("The way that western legal systems handle crime compounds the disempowerment that victims feel, first at the hands of offenders and then at the hands of a professional, remote justice system that eschews their participation.").

sense, government prosecutions steal the conflict between victim and offender.[383]

Furthermore, the critics censure retributivism as being completely indifferent to the causes of crime and the consequences of punishment. Retribution largely ignores the causal roots of offending, preferring to place the full weight of condemnation on the offender--although most scholars recognize that "the problem of crime cannot be simplified to the problem of the criminal."[384] This objection then generalizes into an attack on a core command of retribution--treating like cases alike. Assuming like cases can be identified with some degree of precision, retributivism would demand equivalent punishment for each offender. What this leaves out, however, is the vastly different effects punishment can have on different criminals. It may be a crime for both rich and poor to sleep under a bridge[385] or in a public park, yet equal punishment would certainly have incongruent consequences between the wealthy and the impoverished. In this sense, retributive punishment cannot even guarantee "equality of suffering."[386] On the flip side, two otherwise identical crimes can have vastly different effects on the victims. A burglary of an old lonely widow's home, for instance, will likely impose greater emotional stress on the victim than a similar invasion of a college cricket player's room in a hostel.[387] In the end,

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[383] Id at 3. Author notes, "the victim is so thoroughly represented [by the state] that she or he for most of the proceedings is pushed completely out of the area, reduced to the trigger-off of the whole thing."

[384] LESLIE T. WILKINS, PUNISHMENT, CRIME AND MARKET FORCES 312 (1991); ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 122 (1995). After analyzing decades of delinquency data collected by Sheldon and Eleanor Glueck, sociologists Robert Sampson and John Laub concluded that socioeconomic deprivation was directly correlated to juvenile crime through the mediating force of "harsh, unreasoning, and punitive discipline combined with a rejection of the child."

[385] But see ANATOLE FRANCE, THE RED LILY ch. 7 (1894) ("The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread."), quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 550 (Justin Kaplan ed., 1992).

[386] See NORVAL MORRIS & MICHAEL H. TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 84 (1990).

[387] See Kate Warner, *Family Group Conferencing and the Rights of the Offender,* in CHRISTINE ALDER & JOY WUNDERSITZ EDS., FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 148-49 (1994). While it is true that apparently similar offenders may receive disparate sanctions through restorative processes, there are a number of reasons why such inconsistencies are not necessarily an affront to justice. The current approach to criminal sanctioning seeks equality of punishment for similar offenders grounded in the ideal that like crimes should receive like punishments. What this theorem misses, however, is that two ostensibly identical crimes can have widely different harms and consequences for their victims. Compare, for example, armed robbery of a college cricket player

critics contend that no two crimes, criminals, or victims will be identical, thereby defeating the entire project of treating like cases alike.[388]

A final, arguably fatal criticism of retribution is the inherent ambiguity of imposing only "just deserts" in punishment--no more, no less. There is, of course, no grand, pre-positive conversion chart of crime-to-punishment.[389] If there cannot be available a yardstick or quantifier for the measurement of utility, in same genre of argument, there is no measurement device to predict the proportionality of the harm against the punishment. The argument further from this is rather more appealing. If a random scale is permissibly adopted for the purposes of retribution than similar assumption should also be made in favor of a utilitarian analysis. The discrediting of one theory would weaken the normative position of the other.

iv. *Hybrid Theories.* The hybrid approach is the outcome of the apparent stalemate situation between utilitarianism and retributivism. By adopting an amalgam of teleological and deontological principles, these theories try to sidestep the puritan exclusivity to the criminal sanction adopted by them. This analysis would, however, show that these hybrid approaches are generally of two kinds: utilitarian theory with the retributive constraints, and the retributive theory with the utilitarian concerns.

One of the prominent examples of such hybrid approach has been proposed by H.L.A. Hart. Hart maintained that neither absolute retributivism nor absolute utilitarianism could provide a defensible theory of punishment. Instead, a compromise must be struck. For Hart, that compromise took utilitarianism as the "general justifying aim" of punishment limited by certain retributive side-constraints.[390] Specifically, the broader aim of 'deterrence' must be constricted by imposing prohibitions against sanctioning the innocent, punishing out of proportion to blameworthiness, or placing vicarious liability on family members.[391] Consequently, Hart agrees that these constraints could not be derived from

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with an otherwise identical offense against an elderly widow. The cricket player, although possibly shaken by the attack, is likely to recover from the encounter and continue his life without permanent scars. The widow, however, might avoid the public as a consequence of crime-related anxiety and fear, sequestering herself in the safety of her home.

[388] See for e.g., Duff, supra note 359 at 58-61; Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 270-71 (1993).

[389] See GERALD V. BRADLEY, RETRIBUTION AND THE SECONDARY AIMS OF PUNISHMENT, 44 AM. J. JURIS. 105, 114.

[390] See Hart, supra note 144 at 8-13.

[391] Ibid at 11-13.

pure utilitarianism but instead they must be located and imported from the retributive principles.[392]

Paul Robinson, however, adopts precisely the opposite position. In his 1987 article,[393] he proposes that retributive principles should generally determine punishment, limited at the edges by utilitarian concerns: "Desert is to be given priority over the combined utilitarian formulation, except where it causes an intolerable level of crime that the utilitarian formulation could avoid, at this point utilitarian adjustments can be made, but no utilitarian adjustment can be made if it generates a formulation that imposes an intolerably unjust punishment."[394] Although Robinson admits that his hybrid distributive principle is still somewhat general and abstract,[395] he nonetheless offers a basic formula for achieving just outcomes: "[T]he utilitarian formulation would be followed only where it is consistent with desert or where it is shown (with an acceptable level of certainty) that the desert formulation would cause an intolerable crime level and that the utilitarian formulation would not cause intolerable injustice."[396]

Over the years, various other hybrid models have been proposed.[397] Although many scholars have great sympathy for such efforts, critics have still found them sufficient for criticism. In general, strict utilitarians attack retributive-based hybrids as containing all of the drawbacks of pure retributivism while denouncing utilitarian-based hybrids as succumbing to the sirens' call of "just deserts."[398] Conversely, steadfast retributivists berate utilitarian-based hybrids as still sacrificing justice for social utility and reject retributive-based hybrids for allowing utilitarian concerns to infect the sanctioning process.[399]

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[392] Id.

[393] Robinson, *Hybrid Principles*, supra note 363 at 38.

[394] Ibid.

[395] Id.

[396] Id at 39.

[397] See, e.g., NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 129-209 (1982) (articulating punishment model).

[398] See, e.g., Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 49 (1979).

[399] See e.g., von Hirsch, *Doing Justice*, supra note 377 at 47-56; Mirko Bagoric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 131 (2000). For example, these two Australian theorists reject Hart's concession to retributivist charges, such as the possibility of punishing the innocent or vicarious familial liability.

2. *Non-Conventional Model of Justice: Restorative Approach*

In the context of contemporary theories of justice, there have been some developments in the last few decades of the twentieth century that have deviated from conventional models. This deviation, as said before, beside other factors, is more grounded in the rejection of contradistinctive paradigms of civil and criminal law. Similarly, scholars adopting this atypical approach have also renounced punishment as a sole response to crime in society. At some levels, the proposal has been of reversion to the earlier models of private justice. However, from amongst these non-conventional approaches[400] the theory of restorative justice has been the most important and noteworthy. This section of the article, will briefly examine the main postulates of this approach and its criticism.

Restorative justice is defined as a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future.[401] Analyzing this description, restorative justice would seem to incorporate a number of substantive principles. First of all, declaring crime as a public wrong would limit its canvas. It is not a violation just against the state, rather it is a breach of social relationships. The locus of crime control mechanisms should be the community (including victim, offender, families, etc.) instead of the state and its justice machinery. Restorative model seeks the active participation of victims, families, and community representatives to address the causes and consequences of offending. Moreover, the foremost objective of a sanctioning process should be amending the harms and disturbance caused by the offence, particularly the harm caused to the victim, rather than inflicting pain upon the offender. Accountability is evidenced by recognizing the wrongfulness of one's conduct, expressing remorse for any resulting injury, and taking steps to repair damaged social relationships. Crime creates positive obligations, this approach argues, that require affirmative action on the part of the offender.

So defined, restorative justice raises some key questions: Why should crime be viewed primarily as a violation against victims and communities; why should making amends for the offense be a central goal of sanctioning; and why should the process involve various private parties concerned with the offense and the offender? Although various theories have been

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[400] For e.g., abolitionist approach in contemporary criminal theory.

[401] Tony Marshall quoted by John Braithwaite, *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory,* at 5. Review Essay Prepared for University of Toronto Law Course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation. This article is also available on the World Wide Web, Australian Institute of Criminology Home Page-- http://www.aic.gov.au at 3.

forwarded, the most appealing amongst them have been presented by John Braithwaite. Braithwaite proposes an approach to successful sanctioning through a "reintegrative" shaming process. In essence, reintegrative shaming involves: (1) disapproval of the deviant conduct while supporting the offender's character or identity as essentially 'good' and (2) incorporating the offender into the community without accompanying badges of dishonor. By denouncing the crime without stigmatizing the criminal, reintegrative shaming reaffirms normative boundaries and attempts to bring the offender within the confines of society by praising his positive identity. Braithwaite contrasts this approach to the traditional process of "disintegrative" shaming, where offenders are personally denounced as "bad" and then physically or symbolically segregated from lawful society.

Braithwaite recognizes, however, that his sociologically based theory of reintegrative shaming lacks a "normative theory of when it is morally right to apply it."[402] For this, he joins forces with the philosopher Philip Pettit in constructing a "republican theory" of criminal justice.[403] The target of republican theory is not merely promoting freedom from state interference but the more comprehensive value described as "dominion."[404] Dominion is a social, relational conception of liberty as opposed to liberty as the status of simply being left alone by others. You only enjoy republican liberty when you live in a social world that provides you with a set of subjective assurances of liberty. To fully enjoy liberty, you must have an equality of liberty prospects with other persons.[405]

The republican theory of criminal justice seeks to maximize the dominion of individual citizens, for which Braithwaite and Pettit offer a series of theorems that advance this goal.[406] The first is a presumption in favor of parsimony,[407] that is, a preference for less intervention by the

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[402] See Braithwaite, *Reintegrative Shaming*, supra note 362 at 194.

[403] See Braithwaite and Pettit, supra note 373; John Braithwaite & Philip Pettit, *Republican Criminology and Victim Advocacy*, 28 LAW & SOC'Y REV. 765, 775 (1994).

[404] Ibid at 61.

[405] Id. He argues:

> [T]hink of dominion as a conception of freedom that by definition incorporates the notions in the republican slogan: liberté, égalité, and fraternité. Accordingly, dominion offers an interpretation of freedom acknowledging that an individual cannot enjoy liberty outside of society and in isolation from all others. Rather, society provides the basis for liberty and, in turn, must assure equal prospects of republican liberty among the citizenry as well as popular knowledge of the same.

[406] Ibid at 87-92.

[407] Id.

criminal justice system.[408] The second presumption is to impose larger checks upon the powers of criminal justice actors, and thereby provide assurance to the people that individual dominion will not be subject to capricious or prejudicial limitations.[409] The third presumption is in favor of effective community disapproval of criminal behavior. In essence, the criminal justice system should focus on moral reasoning with the offender, bringing home the wrongfulness of his conduct and evoking a sense of shame for the resulting harm to others.[410] The final presumption is that victims and offenders should be reintegrated into the community by having their dominion restored.[411]

Braithwaite and Pettit's republican theory provides an apparent justification for restorative justice. While the conventional system relies heavily on state actors in determining and imposing punishment, restorative justice shifts control over sanctioning processes and outcomes to the community and its members. In turn, restorative justice tends to focus on non-incarcerative options, which Braithwaite and Pettit believe to be less injurious to individual dominion. Restorative justice thus embodies a more parsimonious approach, both in procedures and substantive results, than the traditional criminal justice system.

Like the other conventional theories of punishment, heavy criticism has been leveled against restorative justice also. For instance, some have challenged Braithwaite and Pettit's critique of classic liberalism as an unfair caricature without supporting evidence,[412] while others have attacked Braithwaite's assumption that the success of reintegrative shaming in one culture (e.g., Japan)[413] can be applied to otherwise disparate societies.[414]

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[408] See Braithwaite and Pettit, supra note 373 at 87. They argue that the activity of state officials--whether it be criminalization, surveillance, arrest and prosecution, or punishment-- involves immediate, tangible costs for individual dominion with only distant and uncertain benefits for society and its members.

[409] Ibid at 88. According to authors the review procedures, complaint mechanisms, methods of self-regulation, and so on, all reduce the potential of arbitrary interference with liberty.

[410] Id. It is argued that community-based reprobation does not diminish individual dominion in the way that harsh punishment does, while additionally providing a more effective means of reducing crime than the traditional approach.

[411] Id at 91.

[412] See C.L. Ten, *Review Essay: Dominion as the Target of Criminal Justice*, CRIM. JUST. ETHICS, Summer/Fall 1991, at 40, 40-46.

[413] See Braithwaite, supra note 373 at 194. Braithwaite's theory draws upon sociological analysis and non-Western approaches to criminal sanction. According to him, Japan, for instance, has an integrated system of shaming individuals who deviate from codified or widely held social norms. Breaches in conformity are met with swift condemnation by an interdependent web of families, coworkers, and community members, followed by a process of reassimilating offenders into the fold. Braithwaite contrasts this method of social control to those of contemporary Western cultures that celebrate individualism, place fewer restraints on

Critics also question the usefulness of dominion as a conceptual tool, with its inherent vagueness and the near impossibility of aggregating the gains and losses of dominion from specific policy choices, both for a given individual and across the entire body of rights-bearing entities.[415] Moreover, some have argued that republicanism is nothing more than utilitarianism under a different name and therefore carries all the baggage of a teleological theory.

VI.

QISAS AND DIYAT: A COMPREHENSIVE THEORY OF JUSTICE

The purpose of this article has been to explain and thus highlight the main features of the QD theory of justice. Parallel objective was to overview the contemporary theories of justice and to examine their respective position in context of the offence of homicide. The completion of these above mentioned tasks has culminated in the reexamination of the conception of justice in reference to homicidal offences. The question is simple: in the case of homicide (murder or other related offences) what should be the agenda for a theory of justice? Or in other words, what does justice demand in homicidal cases? It will be useful to attempt an answer to this question firstly in terms of contemporary theories of punishment and then in the light of QD theory.

A. *Determination of Goals: A Question of Justice Revisited*

The analysis of these different approaches, make it evident that we continue to face a dilemma over how to react to wrongful harm. From an ethical perspective, a reaction to an offense is an inevitable evil, but not necessarily causing a new harm or pain to the wrongdoer.[416] Therefore,

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nonconformity, often eschew communal values, and anesthetize feelings of shame. A primary example of a shameless society, the United States, consequently suffers the highest crime rate among industrialized nations.

[414] See for e.g., David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 335-37; Jon Vagg, *Delinquency and Shame: Data from Hong Kong*, 38 BRIT. J. CRIMINOLOGY 247, 248 (1998); Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholarship*, 63 U. COLO. L. REV. 521, 556 (1992).

[415] See for e.g., Andrew Ashworth & Andrew von Hirsch, *Desert and the Three Rs*, 5 ISSUES IN CRIM. JUST. 9, 9-10 (1993).

[416] Dieter Rossner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, 3 BUFF. CRIM. L. REV 211, 212.

punishment as retribution has been the traditional response on the basis of common sense as well as in criminal theory. It is supposed to be the natural and logical consequence of wrongdoing. Consequently, with uprising of economic theory, emerged utilitarian criminal law where every punishment has to establish its worth in terms of utility. Instead of the previous imperative in form of 'must,' criminal law 'may' violate the offender if some benefit can be derived from that pain. And ultimately it is objected to that criminal law in present times has only become an apparatus for the violation of an offender and is not meant to heal wounds (as, for e.g., restitution in civil law).[417] According to the proponents of restorative approach, is not justice better served by healing harms, putting right the wrongs, and finding constructive ways of conflict resolution?[418]

The dilemma faced by such different criminal law theories, in different periods of legal history, corresponds to their prevalent conceptions of justice. Hence, the reason for dissatisfaction in western societies regarding the existing justice systems, is their dissatisfaction with their very definitions of crime and justice. To understand it fully, it is important to analyze the underlying conception of justice in criminal jurisprudence, which means asking: What is the nature of justice? What does justice demand?

Justice is a response to a powerful moral intuition that 'something must be done,' that something or someone has disturbed the way things ought to be and something must be done to right the wrong, to make things right. In fact, this sentiment many a times is expressed as the imperative notion: justice must be done. The contemporary systems/models of justice make an assumption about that 'something', which must be done in order to do justice. From the social dimension of criminal conflict to the peacemaking perspective of criminology, to the obligations and liabilities of the offender and the victim's loss, criminal theory is confronted with an old question of new urgency. With regard to the significance of this question for social life, it cannot be overlooked that contemporary criminal theory tries to immunize itself against social reality by ignoring the often complex conflict between a victim and an offender.[419] Thus, criminal law disregards the fact that launching an information report to the criminal justice system does not always mean a desire for retaliation. Especially, in violent family conflicts, we realize that the traditional criminal law response often creates rather than resolves conflicts. Protection for the victim means not only the immediate isolation of violence and assessing such behavior as intolerable, but also attempting to resolve the conflict within the context of a particular social situation. Especially in cases of close victim-offender relationship, crime control does not exclude peacemaking by social conflict resolution,

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[417] Ibid at 213.
[418] See Zion, supra note 286 at 7.
[419] See Rossner, supra note 416 at p. 213.

as criminal theory tries to make us believe. Broadly speaking, both ways of social control are required.[420]

B. *The Response of Contemporary Theories*

The agenda of this section is to locate the answer to the above raised questions in terms of contemporary theories of punishment. The next section will discuss the position of QD theory in this regard. This investigation, although complex in nature, may not be difficult to conduct since these theories have already been explained at some length in this article.

In a retributive theory of punishment, the obvious response to the offence of murder will be awarding of death sentence to the offender. In accordance with the historical principle of *lex talionis*, the punishment must correspond to the offence in its quality and quantum. The strict application of retributive theory in homicidal matters will render the transformation of punishment impossible. Therefore, in cases of premeditated killing the only sentence that can be given is death and not imprisonment. Since, as a matter of principle, by his act of killing, the defendant has established himself worthy of capital punishment. Any transformation of capital punishment into a sentence of different form will pose a normative inconsistency of multiple varieties. Why should sentence be converted into imprisonment and not any other form of punishment?[421] Or how should one determine the length of the alternative imprisonment sentence? Should the life expectancy of the offender have anything to do with the length of sentence? Besides, in reference to the victim, retributive theory presumes that 'retaliation' is the primary objective of a criminal justice system.[422] This fixation of the purposes of justice upon 'retaliation' can be true in some or perhaps many cases. Yet, it is not universally true. Rather, contextually, retributive approach poses an interesting paradox. In conceptual terms, it operates quite favorably for the victims of the offence. However, in practice, it takes away the favor by predetermining the goals of justice and thus, taking back from victim the opportunity to translate his wishes into the goals of justice. It is this preset objectivity of justice that it opts to preserve against possible subjective conceptions. The difficulty, as one may argue on behalf of retributists, lies in carving a uniform shape of justice, the shape that can confirm the standardization of the criminal justice process. The answer to this intricacy can be found in examining the

[420] See generally, Braithwaite & Pettit, supra note 370.

[421] For example, flogging or monetary compensation.

[422] Although other objective such as restoration of balance in the society has also been included in the list of valid objectives for retributive approach, however, the satisfaction of the emotion of vengeance holds as the oldest recognized goal for this theory. See also Murphy, *Forgiveness, Mercy, and the Retributive Emotions,* supra note 378 at 3-5.

utilitarian theory where deterrence is one of the objectives. Such open ended objectivity in some sense can enhance deterrence value of the reactive justice paradigm.

When confronted with the question of punishing a murderer, the response of utilitarian approach will be based upon the usefulness of the sentence. It is not difficult to assess that capital punishment will not be the first choice unless it assures the enhancement of utility in society. Therefore, in utilitarian analysis, the criminal act itself (even in the case of murder) does not constitute a full-fledge justification of the punishment. The popular utilitarian justifications or goals of punishment are deterrence, prevention and rehabilitation.[423] However, the realization of these justifications is done, predominantly, either in terms of the offender's perspective or society's, whereas the viewpoint of a victim receives almost no attention. A victim is counted just as any other member of society without any individual or preferential standing. Besides, it will be difficult to argue that in the context of these specific objectives, utilitarianism will serve a purpose over and above the retributive approach. At least in terms of deterrence and prevention, both purposes can be achieved through the adoption of retributive calculus. The awarding of death sentence to murderer in terms of retribution will simultaneously achieve the goals of general deterrence and prevention. Although, the goal to rehabilitate an offender may stand out as an unsolved proposition. One may wonder about the fate of a murderer in a paradigm strongly favoring reformation of criminals instead of punishment. Besides, a question remains, is rehabilitation theory truly a punishment theory? Or is it merely a socio-medical cum legal approach visibly tilting in favor of the offender.

The third dimension of this inquiry deals with the response of restorative justice. In an ideal paradigm of restorative justice the object will be to restore the victim of the offence, physically, monetarily and emotionally. [424] In the major restorative experiments conducted in Germany and Australia and other European countries,[425] the offence of murder has not been in the list of compoundable offences. However, for the sake of an academic inquiry, an answer can be reached by making a conjecture located within the

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[423] See ante Part-IV, B 1(b).

[424] MARK S. UMBREIT, ET AL., VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION, (1994); John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WESTERN CRIMINOLOGY REVIEW 1 (1) available at http://wcr.sonoma.edu/v1n1/gehm.html; See also *Program for Victims of Violent Crime* at www.cor.state.pa.us/victim/cwp/view.asp?a=460&q=131666; See also Crime Prevention Projects in Quebec, canada.justice.gc.ca/en/news/nr/2002/doc_29897.html.

[425] Gehm cited above, has noted that victim offender mediation programs were reported operating in at least 42 different jurisdictions across the United States and also in Canada, West Germany, England, and New Zealand.

primary principles of restorative theory. In case of murder specifically, the aim of restorative justice shall be to repair the harm done to the victims (heirs of decedent) through the process of conferencing and negotiation.[426] The aims of that conferencing will be to make the offender admit his guilt and then make up for the damage. The problem is that restorative justice does not include hardcore punishments in its list of possible outcomes.[427] Although some restorative purpose can be achieved by incorporating more sophisticated definitions of punishment and declaring conferencing with the victim as punishment, or for that matter, mere compulsion to attend conferences with the victim's heirs as a punishment.[428] However, on several moral grounds, the offence as severe as murder requires more options than mere counseling and admission of the offender. No wonder that murder has not been included in the list of compoundable offences by any of the major restorative justice projects. It is understandable that the emotional and physical loss posed by the offence of murder is too huge to be settled by mere conferencing. It will at least require for the victims a satisfaction of knowing that hardcore punishments are available. It will help in accommodating their feelings that justice should be done.

C. *The Response of Qisas and Diyat Theory*

The Islamic QD theory of justice forces one to revisit these very upfront questions of justice and asks exactly what ought to be done in response to a crime, such as murder or personal injury. The QD theory, if properly understood means much more than a mere trifling with the existing models of justice. It requires a re-examination of the very idea of justice. The QD theory enlarges the canvass for the enforcers of the legal system and operators of justice in society. First of all, it creates a hybrid approach that settles somewhere in the middle of private justice and public justice system. This theory does not discard private justice mechanisms as archaic or uncivilized. It rather uses these methods carefully to employ them efficiently at the appropriate levels. Secondly, the wide choice available to the victim in QD cases is reflective of the important underlying principles, such as recognition of a victim as a party to the proceedings, or restoration of the victim as the primary task of a justice system.

Hence, the QD approach skillfully handles the complexity of the assignment by combining principles of retribution, utilitarianism and restoration. In this reference the scheme of QD theory is to first define the possible limits of available options and then to attach a moral cum religious

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[426] Ibid.

[427] See Kathleen Daly, *Does Punishment has a Place in Restorative Justice?* 2-5, 11 at www.gu.edu.au/school/ccj/kdaly_docs/kdpaper7.pdf (last visited on 24th of August, 2005).

[428] Ibid.

judgment with the respective options. It is agreed that QD theory allows capital punishment. Therefore, in the cases of premeditated murder, the possibility of execution is available. In this sense, hardcore coercive punishment has been maintained. However, a broad array of options has been laid down to attract the victim (heirs of victim), so that death as a consequence can be avoided. The incorporation of *diyat* in QD theory has enhanced the attractiveness of options allowed to a victim. Instead of satisfying the sentiments of a victim through mere admission of guilt by an offender, something more substantive in terms of value has been offered. Therefore, in homicidal matters, the options available to a victim are multiple. As discussed previously in this article, these options consist of executing the offender, acceptance of *diyat* money by the victim, settlement in some other form and, forgiveness and complete waiver of the rights of a victim against the offender.

Thus, in matters of homicide and personal injury, QD theory acknowledges justice primarily as a mechanism to reinstate the victim. No doubt, this prioritization of the victim in determining the shape of justice makes it subjective. It may be argued that as a result, sentences for similar offenses often vary considerably depending on individual attitudes. Thus, a subjective standard raises concerns about uniformity and equity in sentencing. This problem has been dealt within QD theory through two different channels. The first channel deals with the victim and the other with criminal administration. In the first channel, the victim has been allowed only to choose from amongst the objectively settled options. The victim can choose for death punishment (if it is a murder case), however, he cannot negotiate the length of imprisonment since it is not an allowed option. Also, the options available to the victim are specific (and not unlimited) to protect at least some predictability of the outcome of a crime. Besides, in a different direction, this limited unpredictability may operate as an effective deterrence for the offender since he will be dependant upon the wishes of the victims. This phenomenon does raise questions from the offender's perspective. It is at this stage that the second channel to avoid subjectivity comes into play. In Islamic criminal theory, it is required that courts and administration should play a supervisory role to minimize the abuse of power by the victims.[429] Along with this, there will be a *tazir* system operating parallel to the QD theory. The *tazir* system has been developed in such a fashion that it will serve as a supplementary device to the main QD system. To illustrate further, if the victim and offender has settled and subsequently, the offender has failed to perform the terms of settlement, then state *tazir* system can award imprisonment or can force offender to comply through other coercive methods. In another example, where an offender has settled with the victims but the crime is of such a nature that a

[429] It is also in conformity with the Quranic verses where victim's heirs are ordained to be reasonable and charitable. See AL QURAN, Ch-II: 178-179 & Ch-V: 45.

state finds it important to assert its right of social protection, it can award a penal sentence in the form of *tazir*.

Interestingly, if analyzed closely this set of methodology as proposed by QD theory will open channels for courses such as victim-offender mediation. In this sense, this theory may appear to create a duality of focus as far as an offender is concerned. Apparently, the offender has to attend to the demands of a criminal justice system as well as to the demands of a victim in specific. However, in practice, it is arguably the restoration of the victim that takes priority over the demands of public justice system.

VI.
CONCLUSION

In this article, I have attempted to offer an elaborative critique of Islamic Qisas and Diyat theory. The emphasis has been specifically made upon the original and primary sources of Islam. It is worthwhile to note that one of the most outstanding efforts of Islam in the realm of criminal justice has been in establishing the *qisas* and *diyat* paradigm. However, as a part of jurisprudential inquiry launched upon the doctrines of Islamic law in recent times, the concept of Qisas and diyat has also been questioned, examined and discarded as archaic and uncivilized. The analysis of QD theory and its comparison with different contemporary approaches makes it clearer that there is a pressing need to make an original and unbiased study of the QD theory of Islam as it can offer much to contemporary criminal justice systems. QD theory not only incorporates different dimensions of criminal justice in the context of homicidal and personal injury offences, rather it highlights the different scheme of ordination for the participants of criminal justice paradigm. Therefore, if crime is evaluated by not only the actions and intentions of the offender but also the injury to the victim, the QD approach towards sanctioning is arguably more congruent with a broader conception of eqsuality than the one-size-fits-all regime administered by traditional criminal justice systems.