THEORIES OF PUNISHMENT IN ISLAMIC AND WESTERN LEGAL THOUGHTS: A COMPARATIVE AND ANALYTICAL STUDY

A thesis submitted in partial fulfilment

of the requirements of the degree of

PhD in Islamic Law and Jurisprudence

Faculty of Shariah and Law

In The International Islamic University Islamabad

1443/2021

Salman Farooq

Reg No: 64-FSL/PHDIJ/S16

PhD (Islamic law & jurisprudence)

Supervisor: Dr. Muhammad Mushtaq Ahmad

Associate Professor

Director General Shariah Academy

Department of Shariah --- Faculty of Shariah & Law

International Islamic University Islamabad


بسم الله الرحمن الرحيم

ACCEPTANCE BY THE VIVA VOCE COMMITTEE

THESIS TITLE:

THEORIES OF PUNISHMENT IN ISLAMIC AND WESTERN LEGAL THOUGHTS: A COMPARATIVE AND ANALYTICAL STUDY

Submitted by:

SALMAN FAROOQ

Reg No: 64-FSL/PHDIJ/S16

1. Dr Muhammad Mushtaq Ahmad
   Associate Professor
   Supervisor

2. Dr Naseem Razi
   Associate Professor
   Internal Examiner

3. Dr. Ikram-ul-Haq
   Secretary; Council of Islamic Ideology, Islamabad
   External Examiner

4. Prof. Dr. Mohyuddin Hashmi
   Dean, Islamic Studies, AIOU, Islamabad.
   External Examiner

Dedication

This thesis is dedicated to:

The sake of Allah, the only Lord of the Universe, my Creator, my Master and my ultimate aspiration.

My great teacher, Mohammad (May Allah bless and grant him), Who taught me the purpose of life.

& finally this research is for you **Dad**

Though you could not see this thesis completed,
I can imagine your shining eyes and smiling face - with pride, joy, love and satisfaction.

May your soul rest in eternal and peaceful vallies of paradise.
You will always be in our memories, for whatever we achieve, is backed by your tired less efforts, when the value of all your sweating hard work was a mere smile on our faces, when you taught and encouraged us to achieve success in this world and more importantly in the actual everlasting life of *Ākhirah*.

May the Most-Merciful, the Ever-Beneficent, the Loving and Caring, the Lord of the Universe & the Almighty God shower His endless blessings upon you.

*Ā*amīn

Acknowledgment

In the Name of Allah, the Most Merciful, the Most Compassionate, all praise be to Him, the Lord of the worlds; and prayers and peace be upon Mohammad, His servant and messenger.

First and foremost, I must acknowledge my limitless thanks to Allah, the Ever- Magnificent; the Sublime & Ever-Grateful, for His help and blessings.

I owe a deep debt of gratitude to my university for giving me an opportunity to complete this work.

I am extremely grateful to my supervisor Sir Dr Muhammad Mushtaq Ahmad, who was always there to help, guide, encourage and stand by me during the entire period of my research and whatever he did can only be best acknowledged by remembering him in my prayers and this is what I do.

I must say warm thanks to my mother who helped me rise again after the demise of my beloved father and to my wife, whose sole objective was to provide me comfort and peace.

I would like to take this opportunity to say special thanks to Professor Thom brooks, Dean Durham Law School UK, to host me for a six month fellowship and extended every possible help which helped me in having the latest and modern approach about the topic.

Thank you, Allah, for always being there for me.

This thesis is only an added step in my journey.

Table of Contents

Abstract

Western criminal jurisprudence presents few theories of punishment in order to provide the logical justification and philosophy of punishment. The effort resulted in the emergence of two main schools naming the utilitarian and retributive schools of thought. The retributivism asserts for the proportional punishment of wrongdoer whereas the utilitarian school aims for crime reduction in the future. The retribution looks backward to the crime happened in past and demands to impose the punishment to achieve the ends of justice where as the utilitarianism looks forward towards future consequences and benefits, in the infliction of punishment which may result in pardoning an offender or in the infliction of less or more punishment than what the intensity of crime might need, in order to achieve the ultimate goal of crime reduction. The utilitarian school gives birth to several theories starting from deterrence (harsh punishment to make offender an example for likely offenders), to incapacitation (eliminating the offender's capacity of recidivism) and rehabilitation (reforming the offender into a law abiding citizen). The western penal philosophy witnessed the birth of another theory called restorative justice which targets the restoration of broken relationship among the offender, victim and the society. However the western penal philosophical discourse recognized the impracticability of one theory for the entire corpus of penal laws. This fact influenced the philosophers to bring together all these theories into a single legal framework to provide a compelling penal theory incorporating all penal goals, to overcome the shortcomings of every single theory and to benefit from the positivity of each theory. The effort carried out by John Rawls, H.L.A Hart, R.A Duff and Thom Brooks resulted into the emergence of several hybrid theories in the shape of 'Negative Retributivism', 'Expressivism' and 'Unified Theory'. All these western hybrid theories are still looking for the practical application of their legal framework.

On the contrary the Islamic penal discourse provides a comprehensive coherent legal framework which incorporates every single penal goal presented by western penal philosophy rather it moves forward by including few more penal goals that are unknown to the western criminal law such as giving punishment the status of mercy and compassion for the society as well as the offender. More Importantly the Islamic penology provides the practical application of every single penal goal it presents. This unique feature is so highly regarded by Islamic law that any penal goal which ceases its applicability is negated ab-initio and likewise every punishment which fails to provide a philosophical justification by meeting the basic characteristics of Islamic punishments, becomes null and void. The philosophy and the practical laws are so strongly interconnected in Islamic penal discourse that the presence of one ultimately necessitates the other. In this regard the Islamic theory of punishment is a single unified theory which gives due weight to every single penal goal in a coherent framework where no penal goal contradicts with other rather they are so elegantly placed that each goal strengthens the others. The western criminology and penology lacks such interconnectivity which builds a sky-high wall between the philosophy and the penal codes.

Preface.

The very basic instinct of the human being compels him to establish a society, to live in. The needs of a human being can only be satisfied in a strongly interconnected social relationship. This requires the constitution of a community where people live together in order to fulfil the needs of the soul and body. Laws are inevitable for the continuation of any political and social community because there will be conflicts between the members of every society. The conflicts will demand an agreed upon procedure for conflict resolution. These procedures give birth to a legal system. These regulations declare some acts dangerous for the society which needs to be avoided at any cost. These acts result in harm to the society, which makes life unpleasant for the people. These acts are termed as crimes. Every society rejects such harmful acts and replies to it. This reply is called punishment.

Punishment protects the legal rights of the members as well as that of the society. Punishment is so important that no society can survive without

incorporating it in its legal system. Without punishment the entire body of law seems useless because it is the punishment which ensures the application of law. The one who violates the law is exposed to punishment in order to make people obey the law, perform their duties and to respect the rights of others. This is called the rule of law which ultimately results in happier and prosperous society.

The scholars and philosopher throughout the history have studied the very important topic of Crime and Punishment. They tried to explain the areas which are considered as injurious to the society, to call them crime. They also have done a lot on the nature and need of punishment for those illegal acts. The punishment and its philosophy have been keenly discussed by the philosophers in both Islamic and western legal thoughts. The scholars like Plato and Aristotle discussed the philosophy of punishment in detail. The Muslim jurists also discussed the punishment and its philosophy in substantial detail. The Islamic law gave such momentous importance to the punishment that most of the punishments in Islamic Criminal law are sanctioned in the Holy Quran by the Almighty himself.

Introduction

Introduction.

The Islamic and Western criminal law differ on defining crime and punishment just like both differ on the types of the punishment because the Islamic law calls every that act a crime which violates the divine laws of Almighty God and replys to it with punishment, the type of which differs based upon the act affecting the individual or society where as the western law, notwithstanding its lacking consensus upon the definitions, terms every violation of law as crime and responds to it with pain inflicted upon the offender called punishment which is mostly in the shape of fines and imprisonment, limiting the area of bodily punishments and excluding death penalty. This chapter provides the definitions of the "Punishment" and "Crime" in both Islamic and Western law along with the comparative analysis of both terms. The types of "Punishment" as explained and applied in both these legal systems are also discussed in detail.

0.1. Research Methodology.

The research was conducted following the methodology given below.

- *The research followed the qualitative method of research. Qualitative method includes documents and also research work which is conducted on the same issues. This contains books, research article, journals and reports. So following steps were taken in this research by going through Qualitative method of research.*

- *This is a descriptive yet comprehensive research, based on use of library and material in the shape of books, research articles and reports issued by various international organizations.*
- *The verses of Holy Quran and the Sunnah of Holy Prophet (s.a.w) has been quoted while analyzing the theories of punishments in Islamic law, where the English translation is taken from the work done by former Emiritus Professor Dr. Zafar Ishaq Ansari.*
- *Original texts are quoted wherever and whenever needed.*
- *The viewpoint of Islamic legal thought is not confined to any specific school of thoughts; rather the opinion of scholars from all four schools of thought as well as that of other scholars has been quoted.*
- *The western legal thought means the legal discourse on the philosophy of punishment by the European & American philosophers as the sources of law in these legal discourses is almost same.*
- *The research focused on analyzing the single theories and their detailed penal goals one by on, and the collective approach (hybrid theories) in western legal philosophy, followed by the application of these penal goals on Islamic punishments and presenting a holistic view of Islamic punishments as a unified theory.*
- *By the help of this material the research analyzed the philosophy behind the punishment in both Islamic and western law. Relying upon the above mentioned material the research compared the theories of punishment in Islamic and western penal laws.*
- *The comparative analysis approach was used to obtain the appropriate results in the research. Comparative research is a research*

methodology that aims to make comparisons between two or more theories, ideas or approaches to draw a result. This approach addresses research problems to analyze similarities and dissimilarities among different theories and approaches.

0.2. Thesis Statement:

The 'thesis statement', stated by the the research proposalis as belows.

The difference in the nature and intensity of crimes, because of difference in their shapes, requires the application of different theories of punishment for each separate crime. Neither all these theories can be applied in one situation, nor is one theory alone capable of making a crime free society. Hence there is a great need to critically evaluate the theories of punishment in a comparative manner to identify the specific spheres for the application of each theory of punishment.

1.1. Research Questions.

2. What is the philosophical justification of the punishment in western & Islamic penal law?
3. Is any single theory of punishment in western penal jurisprudence, sufficient to eliminate the crime?
4. Is any mixed theory of punishment in western penal philosophy, provide any practical implementation of its legal framework?
5. Do the Islamic Punishments Justify any theory of punishment presented by western penal philosophy?

6. Does Islamic penology possess any single legal framework (hybrid theory), incorporating all penal goals of western penal theories?
7. Is there any comparative study done by any scholar on the philosophy of punishment in Islamic & western legal thoughts?

0.4. Objective of the Study.

The main objective of this research was

"To present a single legal framework of Islamic Penal Laws, bringing together all penal goals as presented by the western penal philosophy, in a coherent order, keeping each penal goal at its adequate place by highlighting the Quranic penal philosophy for dealing with different nature of crimes and to structure a ***Unified theory*** *which deals with all kinds of crimes for any society in any era."*

0.5. Definition of Crime and Punishment in Islamic Criminal Law.

0.5.1. Crime.

The word crime in Arabic is called as *Jarīmah,* which means guilt, fault, misdeed, sin or deviation from the right path. The Quran says:

سَيُصِيْبُ الَّذِيْنَ اَجْرَمُوْا صَغَارٌ عِنْدَ اللهِ وَعَذَابٌ شَدِيْدٌ بِمَا كَانُوْا يَمْكُرُوْنَ[1]

> *Soon shall these* ***wicked ones*** *meet with humiliation and severe chastisement from Allah for all their evil plotting*[2].

---

[1] *The Holy Quran.* 6-124.

[2] The translations of the verses of the Holy Quran are taken from the work done by 'Zafar Ishaq Ansari', a former Emeritus Professor and President of the International Islamic University, Islamabad. In his early career he served as Director General of Islamic Research Institute, Islamabad and the editor of the world renowned research journal 'Islamic Studies', where he translated the urdu version of *Tafhīm-ul-Qurān,* by *Abul Ā 'la Maudūdi,*. Zafar Ishaq Ansari, *Towards Understanding Al-Quran.* (London: The Islamic Foundation, 2014), 207.

وَيٰقَوْمِ لَا يَجْرِمَنَّكُمْ شِقَاقِيٓ اَنْ يُّصِيْبَكُمْ مِّثْلُ مَآ اَصَابَ قَوْمَ نُوْحٍ اَوْ قَوْمَ هُوْدٍ اَوْ قَوْمَ صٰلِحٍ[3]

My people! Let not your opposition to me lead you to ***guilt*** *that would bring upon you the chastisement that struck earlier the people of Noah, and the people of Hud, and the people of Salih.*[4]

So literally *Jarīmah* is considered to be an act which is disapproved. It is unaccepted and considered as a wrong by the Almighty Allah. It includes both the actions and omissions, done illegally. But the Muslim jurists try to give a definition of crime which is to be considered illegal by the law or state[5] and is dealt accordingly to have its legal consequences in the shape of punishment etc.

The term crime, as defined by the Imam Abu Y'ala Al-Fara' Al-Hanbali in his renowned book of AL-Ahkam Al-Sultania, is:

الجرائم محظورات بالشرع, زجر الله عنها بحد او تعزير[6].

Crimes are acts prohibited by Shariah, deterred by Allah, with Hadd or Ta'zir.

Imam Al-Mawardi defines the crime as:

الجرائم محظورات شرعية زجر الله عنها بحد او تعزير[7].

Crimes are legally prohibited acts, deterred by Allah with Hadd or Ta'zir.

---

[3] *The Holy Quran.* 11-89.
[4] Ansari, 336.
[5] Muhammad Abu Zahra, *Al-Jarīmah.* (Cairo: Dar AL-Fikr AL-Arabi, 1998), 20.
[6] Abu Y'ala Muhammad Ibn al-husayn Ibn Al-Fara', *Al-Ahkam AL-Sultania.* (Kuwait: Dar Ibn-i-Qutaeba, 1989), 257.
[7] Abu Al-Hasan Ali Bin Muhammad Al-Mawardi, *Al-Ahkam AL-Sultania.* (Kuwait: Dar Ibn-i-Qutaeba, 1989), 285.

The prohibition includes the commission of a forbidden act as well as the omission of a mandatory act. The prohibition must be by legal authority, pre-announced because no act can be called as crime if that is not termed illegal by the Islamic law[8]. It is also clear from this definition that an act cannot be termed as crime if there is no prescribed punishment for that.

The term *Jināyah* is also used for illegal acts in Arabic language. Most of the Muslim jurists use it in the sense of "assault". To deal with offences against human body i.e. murder and hurt. But in a broader perspective, it is same as to term *Jarīmah*. Both terms are used to define crime in Islamic criminal law[9]. Imam *Jurjāni* defines it as:

الجنابة هو كل فعل محظور يتضمن ضررا على النفس او على غيرها[10].

Any illegal act which contains harm to the body or anything else is Jinayah.

0.5.2. Punishment.

The term punishment (*Uqūbah*), defined by Dr Abdul Qadir Awdah shaheed is:

العقوبة هى الجزاء المقرر لمصلحة الجماعة على عصيان امر الشارع[11].

> *Punishment is the fixed penalty, against the violation of Law Givers' orders, in the interest of the society.*

Dr Ahmad Fathi Bhannasi defines the punishment as:

العقوبة هى جزاء وضعه الشارع للردع عن ارتكاب ما نهى عنه و ترك ما امر به[12].

> *Punishment is the penalty, sanctioned by Law Giver, to deter (people) from doing what is prohibited and from omitting what is ordered (to do).*

---

[8] Dr Abdul Qādir Awdah, *Al-Tashri' Al-Jinai Al-Islami*, 1 (Beirut: Dar Al-Katib al-Arabi, 2000) 66.
[9] Ibid., 67.
[10] Ali bin Muhammad Al-Jurjani, *Al-ta'rifat*, (Beirut: Dar al-Kutub al-Ilmia, 1983), 79.
[11] Awdah, 609.
[12] Dr Ahmad Fathi Bhanassi, *Al-Uqūbah fil Fiqh al-Islami*, (Beirut: Dar al-Shurooq, 1983), 13.

It is defined by Sheikh Muhammad Abu Zahra, as;

العقوبة اذى شرع لدفع المفاسد[13].

Punishment is the harm, warranted to repel the evil.

Punishment in itself is a harm that is inflicted upon the offender or criminal due to his outrageous act which offends the society. But it is deemed of much importance because it paves the way to safeguard society's interest and results in peace and stability of the every pillar of the society. The almighty Allah sent His messenger to have his mercy upon the people by ordaining them an absolute just law. Punishments are among those divine laws. It is considered a replica of God's mercy for the society because the punishments make people obey the law, prevent them from committing wrongs, help them stay on right path, make them an ideal law abiding citizens and to prevent them from harming themselves and the other members of the society[14]. Imam Mawardi is also of the opinion that the punishments in Shariah are to make the people obey the law because the human nature gets defeated by his desires and lust which make him disobey the law and to infringe the rights of others. In this regard, punishment deters a person to avoid his ill-favoured desires. Punishment saves an individual from indulging in corrupt deeds[15].

The comments of Imam Ibn-i-Taymiyyah give a very clear picture of the concept of the punishment in Islamic criminal law. He says that the punishments in Islamic law are decreed with compassion and clemency from almighty Allah towards His people. These punishments are ordained by Him

---

[13] Abu Zahra, *AL-Uqūbah* . (Cairo: Dar AL-Fikr AL-Arabi, 1998), 8.
[14] Awdah, 609.
[15] Al-Mawardi, 325.

due to His sympathy and favour for humans, which is why whoever (state) inflicts these punishments upon the wrongdoers, should do it feeling pity, just like a father who sometimes punishes his son to make him more disciplined and the doctor who treats a patient to cure his disease[16]. The institute of punishment is so vital that in its absence the entire body of law becomes worthless, at once. It is the punishment which ensures the rule of law, peace and order in the society, obedience to law and safeguards the society from chaos, lawlessness, anarchy and disorder[17]. The proper application of punishment upon the violation of law is the most important key to build a model, prosperous, peaceful and ideal community.

0.6. Definition of Crime and Punishment in Western Criminal Law.

0.6.1. Crime.

The most important and famous books of "Smith & Hogan's Criminal Law" states it difficult to provide a definition of law due to the diverse nature of illegal acts, the number of which may exceed 10000 in England & Whales.[18] However Jeremy Horder thinks that the "offences **against the person** - rape, murder or assault, for example- and the offences **against property** such as fraud or theft" are regarded as criminal by the society[19]. It is mostly considered that the conduct which is not permissible due to certain moral

[16] Ibn-i-Taymiyyah, *AL-Fatawa Al-Kubra. 5* (Beirut: Dar al-kutub Al-Ilmia, 1987), 521.
[17] Dr Taha Faras, *Maqasid Al-Tashri Al-Jinai.* ([Sharjah: Sharjah University, 2014), 42.
[18] Smith & Hogan, *Criminal Law.* (Oxford: Oxford University Press, 2015), 3.
[19] Jeremy Horder, *Ashworths' Principles of Criminal Law.* (Oxford: Oxford University Press, 2018), 1.

principles and political policies, are the crimes. Those moral principles and social policies are mostly concerned with the injuries to property or persons[20].

Following the difficulty in defining a crime in Western criminal law, there are some scholars who tried to provide a proper definition of crime and Benjamin E. Hermalin is one of them. He states:

> *"I take a crime to be a wrong doing in which the enforcement is entrusted to the state, (Public enforcement). Other wrong doings, in which enforcement is left to the victim, such as tort or contract enforcements, such, are considered not to be the crimes.[21]"*

The definition states that only those acts would be considered as crimes where the redressing authority lies with the state. He thinks so because in his view the 'commitment' to enforce the right against a wrong doing may not be available in private redress by an individual against a wrong doer. It is because the victim may think that the offender is unable to provide him the remedy. In case, if the offender agrees to compensate, the victim may refuse to go to court as if he thinks the offender is providing him the remedy, so no need to inflict punishment on him in this case[22]. Michael J. Allen defines the crime by stating, "A crime may be defined as an act (or omission or a state of affair) which contravenes the law and which may be followed by prosecution in criminal proceeding with the attendant consequences, following conviction

---

[20] T.H. Jones & M.G.A Christie, *Criminal Law.* (Edinburge: W. GREEN / Sweet & Maxwell, 2000), 1.
[21] Benjamin E. Hermalin, "What is Crime?" *Journal of Institutional and Theoretical Economics,* Vol. 161, No. 2, 2005. 303.
[22] Ibid., 304.

of punishment[23]". In this regard crime is considered an act which is socially condemnable[24] and the society rejects that by empowering the state to make the offender feel guilty for his breach of social order. According to criminologists, criminal law has a social dimension and the crime is related to the violation of social values, remembering the fact that these social values are the pillars to constitute a society, whereas to lawyers, crime is simply, the violation of law of land.

Some scholars say that the act i.e *actus reus* becomes crime when it concurs with the intention i.e. *mens rea.* But in case of mistake how can that be called a crime because of the absence of *mens rea*[25]. That is why there has been an unending debate over the definition of crime and we can say that the western criminal law has not reached to a consensus on having a uniform definition of crime which fits for every violation of law even if those are more than 10000 in number. However it is somewhat agreed by the jurists that *"Crime"* is any action or omission that is prohibited by law. It is against the society. It causes harm to the society which is punishable by the state to safeguard the society. Crime is usually considered as public wrong where as the private wrong falls in the circle of torts and contracts. The crime is an act against the public at large along with it being against the individual victim.

There are some other terms related to the term 'crime', one of which is usually used as synonym of crime, i.e. offence. Few other terms, like felony,

---

[23] Michael J. Allen, *Criminal Law,* (Oxford: Oxford university press, 2007), 1.
[24] Grant Lamond, "What is a Crime?" *Oxford Journal of Legal Studies,* Vol. 27, No. 4, 2007. 610.
[25] Ibid., 610.

misdemeanour and infraction are also used. It is considered that crime is that violation of law where there is a punishment against it, whereas the offence is a more general term and it is every violation of law, no matter that is replied by punishment or mere restitution by the legal system. The felony is considered the serious kind of criminal offence which usually results in imprisonment or heavy fines[26]. Misdemeanour is considered less criminal than felony which is usually punishable by local jail or moderate fines. The infraction is the pettier offence which is usually a violation of administrative regulations[27].

0.6.2. Punishment.

Punishment is an act which is done by the legal authority, against an act which breaks the law. Punishment must be imposed by the legal system and it must involve a loss[28]. Punishment is considered a response to the crime[29], which is why it should have some loss or pain. It is the response of the society, administered by the state or a proper judicial system, to express its unwillingness to that act (crime). Punishment is also considered a "systematic, organized community action against the deviant (Crime)[30]." This shows that the force behind, legalizing an act as crime, is the society and its opinion.

---

[26] https://criminal.findlaw.com/criminal-law-basics/felonies.html
[27] https://criminal.findlaw.com/criminal-law-basics/infractions.html
[28] Thom Brooks, *Punishment,* (Oxon: Routledge, 2012), 2.
[29] Ibid., 3.
[30] Richard R. Korn & Lloyd W. Mckorkle, *Criminology and Penology,* (New York: Holt, Rienhart & Winston, Inc, 1964), 359.

Punishment is usually defined in a connection with illegal act, called crime. It is said that punishment must logically be imposed on an offender, for an illegal act (offence), by a duly constituted authority (state or a legal system) and must inflict pain and suffering on the offender[31]. These definitions of punishment highlight different elements of punishment. It clearly states that there is no crime and no punishment unless declared by the law. The imposition of the punishment is not left to the victim or to the private revenge, rather it is the duty of the state to inquire into the matter, following the entire procedure for the proof of crime and to define the limits and nature of punishment, as prescribed by the law. The role of state further continues to inflict the pain, allowed by law, upon the offender in a way described by the law. In short we can say that punishment, imposed by state is the pain, suffering or loss, inflicted or imposed upon a person because he his violation of the law of the land.

0.7. Types of Punishment in Islamic Criminal Law.

The punishments in Islamic law are derived from the Law giver, almighty Allah. These punishments are derived either from the text of Quran & Sunnah or by analogy (*Qiyas*) and interpretation (*Ijtihad*), of these primary sources following the rules of interpretation. The rule was embodied in a legal maxim;

لا جريمة ولا عقوبة بلا نص[32]

"There is no crime and no punishment beyond law"

---

[31] R. A. Duff, *Trails and Punishments,* (Cambridge: Cambridge university press, 1986),151.
[32] Awdah, 118.

This maxim is same to the Latin legal maxims, *Nulla crimen sine lege* and *Nulla peona sine lege*. The Islamic criminal law has adopted this principle ever since. The punishments prescribed in Islamic law as described by Imam Mawardi are of two main types. Al-Mawardi says:

فالزواجر ضربان: حد وتعزير[33].

"Punishments are of two types: *Hadd* and *Ta'zir.*"

Imām Māwardi has given the two main types of punishments. *Hadd* is the pre-fixed punishment in Islamic criminal law. The state has to implement these punishments. It cannot be changed as these are fixed by law giver, i.e. Almighty Allah. According to the definition of *Al-Māwardi, Hadd* punishment includes *Qisās* because *Qisās* is also fixed by the law giver. It can only be exercised within the prescribed limits and no one has the authority to go beyond that limits. Ta'zir are the non-fixed punishments. This does not mean that it has no limits rather its nature has been ordained with the flexibility. This flexibility allows having two boundaries (minimum & maximum), already fixed by the legislature, where the judge enjoys the right to announce any punishment, inbetween these two limits, whichever is most adequate to the intensity of crime[34]. The types of punishment are crystal clear in Islamic criminal law as we have mentioned earlier that no act can be termed as crime and no punishment can be considered legal, unless that is approved by law.

[33]Al-Mawardi, 325.

[34] Dr Ahmad Fathi Bhanassi, *Al-Uqubah fil Fiqh al-Islami,* (Beirut: Dar al-Shurooq, 1983), 43.

In Islamic criminal law the punishments are divided into two ways. Punishment related to crime and punishments as to the area of infliction are discussed below.

0.7.1. Punishment with respect to crime.

It has following types.

0.7.1.1. Primary Punishments.

Hadd is the first and main type of punishment which is defined by Imam *Jurjāni* as follows:

الحدود: جمع حد، وهو في اللغة المنع، وفي الشرع: عقوبة مقدرة وجبت حقًا لله تعالى[35].

"Hudu ̄d is plural of (term) Hadd, the dictionary meaning of which is to block / prevent and in Islamic law, it means: The fixed punishment which is obligatory as the right of almighty Allah."

الحُدُود: جمع حدّ في اللغة: المنعُ، وفي الشرع: عقوبةٌ مقدرةٌ وجبت حقاً لِلّهِ تعالى زجراً[36].

Hudu ̄d is the plural to Hadd. Literal meaning is to block or prevent. In Islmic law it is: the fixed punishment obligatory as the right of Allah, to deter.

والحدود زواجر وضعها الله تعالى للردع عن ارتكاب ما حظر، وترك ما أمر[37].

Hudu ̄d are the punishments, prescribed by Almighty Allah to deter from doing what is prohibited and from omitting what is demanded.

According to Hanafi school of thought *Hudūd* are only those punishments which are fixed, unchangeable and stated as the right of Allah. So they

---

[35] Al-Jurjani, 83.
[36] Muhammad Ameem Al-Ihsan Mujaddidi, *Al-Ta'rifat Al-fiqhiya,* (Beirut: Dar al-Kutub Al-Ilmia, 1986), 77.
[37] Al-Mawardi, 325.

exclude *Qisās* from *Hudūd,* as *Qisās* in Islamic law is considered as the right of aggrieved party and exclude *T'azir*[38] too because of its flexible and changeable nature[39].

الْحَدُّ فِي اللُّغَةِ: عِبَارَةٌ عَنْ الْمَنْعِ، وَمِنْهُ سُمِّيَ الْبَوَّابُ حَدَّادًا؛ لِمَنْعِهِ النَّاسَ عَنْ الدُّخُولِ، وَفِي الشَّرْعِ: عِبَارَةٌ عَنْ عُقُوبَةٍ مُقَدَّرَةٍ وَاجِبَةٍ حَقًّا لِلَّهِ تَعَالَى - عَزَّ شَأْنُهُ - بِخِلَافِ التَّعْزِيرِ فَإِنَّهُ لَيْسَ بِمُقَدَّرٍ، قَدْ يَكُونُ بِالضَّرْبِ وَقَدْ يَكُونُ بِالْحَبْسِ وَقَدْ يَكُونُ بِغَيْرِهِمَا، وَبِخِلَافِ الْقِصَاصِ فَإِنَّهُ وَإِنْ كَانَ عُقُوبَةً مُقَدَّرَةً لَكِنَّهُ يَجِبُ حَقًّا لِلْعَبْدِ، حَتَّى يَجْرِيَ فِيهِ الْعَفْوُ وَالصُّلْحُ[40].

According to Hanafi School of thought *Hudu d̄* are five in number. Imām *Al-Kas ā ni* mentions there types as: Theft, extramarital sexual intercourse, drinking alcohol, drinking intoxicants and false accusation of extramarital sexual intercourse[41]. The robbery and dacoity is included in theft[42]. Whereas the other school of thoughts *(Jamh ū r)* relates the *Hadd* with fixed punishments, even if that possess the right of an individual. That is why they include *Qisās* and apostasy in the definition of *Hadd.* So according to the *Jamhūr* school, *Hudūd* are seven[43] in number and these are: Apostasy, *Qisās,* Theft, extramarital sexual intercourse, false accusation of extramarital sexual intercourse, Drinking alcohol andHighway Robbery[44].

Ta'zir is second type of punishment with flexible nature, which is not fixed by the God. According to Muslim jurists, *Ta'zir* is "The unfixed punishment

---

[38] Muhammad Bin Ahmad Al-Sarakhsi, *Al-Mabsoot, 9* (Beirut: Dar alma'arifa, 1993), 36.
[39] Abu Bakar Al-Marghinani, *Al-Hidayah,* 2 (Beirut: Dar Ihya al-Turas al-Arabi, 1986), 339.
[40] Alauddin AL-Kasani, *Bida'i Al-Sanai' fi Tartib al-Sharai',* 7 (Beirut: Dar alkutub Al-Ilmia, 1986), 33.
[41] Ibid., 33.
[42] Dr Wahba Zuhaili, *Fiqh al-Islami wa Adillatuhu,* 6 (Damascus: Dar Al-Fikr, 1985), 13.
[43] Muhammad Bin Yousaf, *Al-Taj wa al-Iklil,* 8(Beirut: Dar al-Kutub Al-Ilmia, 1994), 365.
[44] Zuhaili, 13.

which needs to be imposed, both, as a right of Allah and the individual.[45]" *Ta'zir* is "the legal punishment for an offence or wrong done, for which there is neither *Hadd* punishment nor *Kaffārah.*[46]" In *Ta'zir* punishments, the legislature defines the two limits (minimum and maximum), in between both is the discretion of judge to impose any punishment, he thinks suitable to the intensity of crime. *Ta'zir* is the most wide and open field of punishments in Islamic criminal law. It includes every crime, even if that falls in the sphere of *Hadd* or *Qisas,* because there are situation in which the imposition of *Hadd* or *Qisas* becomes impossible[47]. The court possesses the right to turn it into *Ta'zir* punishment in such cases. Even when the application of *Hadd* or *Qisās* is possible, the state can add *Ta'zir* punishment to that, if deemed necessary, keeping in view the situation and nature of crime[48].

Qisās, the third main type of punishment, means *Retaliation*[49]. In Arabic the literal meaning of the word *Qisās* is equality and justice[50]. It is based upon the concept of retribution, where punishment must be inflicted upon the wrongdoer in *proportionality.* The famous doctrine of Blood for blood, eye for an eye, nose for nose and ear for ear, works here. It is related to the Homicide and wounding[51]. The punishment must be same and in proportion to the crime. The aggrieved party (Victim or his hiers), possess the right to waive off

---

[45] Dr Abdul Aziz Aamir, *AL-Ta'zir fi al-Shariah al-Islamia,* (Cairo: Dar al-fikr al-Arabi, 2007), 48.
[46] Zuhaili, 197.
[47] Dr Ahmad Fathi Bhanassi, *Al-Ta'zir fil Fi al-Islam,* (Cairo: Arabic gulf Company, 1988), 19.
[48] Bhanassi, *Al-Uqūbah,* 56.
[49] Rodulf Peters, *Crime and Punishment in Islamic Law,* (Cambridge: Cambridge University Press), 7.
[50] Dr Ahmad Fathi Bhanassi, *Al-Madkhal ila al-fiqh il-jinai al-Islami,* (Beirut: Dar al-Shurooq, 1989), 147.
[51] Peters, 7.

the punishment or take the financial compensation, called *Diyyah. Qisās* is only implementable if the wrong done was associated with wilful intention. In case of absence of wilful intention, i.e. mens rea, the *Qisās* ceases its implementation and turns into *Diyyah*[52].

Diyyah is the term used for the money on account of Homicide or bodily injuries[53]. It is originally imposed where the wrong done was without wilful intention, so *Qisās'* implementation becomes impossible. Also in cases where the wrong was done by a juvenile because he also lacks the complete intention. It is alternately imposed if the victim waives off his right of *Qisās* and just demands *Diyyah*[54]. It is the fixed punishment. The amount of *Diyyah* for both Homicide and wounding is predetermined in Islamic law. The victim possesses the right to waive off this money with free consent. The state or the judge has no authority to waive it off or change its amount.

There is a simple rule in Islamic law that the offender and only the offender is subject to the consequences of his wrong done. *Diyyah* is an exception to this rule as it is the only kind of punishment which extends to people other than offender. That is called *Ā'aqila*[55]. Usually the male relatives are considered to be the *Ā'aqila*[56]. The *Ā'aqila* doctrine is applicable only in case of unintentional *Qisas* offence.

---

[52] Bhanassi, *Al-Madkhal*, 157.
[53] Dr Ahmad Fathi Bhanassi, *Al-Diyyah fi al-shariah al-Islamia,* (Beirut: Dar al-Shurooq, 1988), 9.
[54] Bhanassi, *Al-Madkhal*, 157.
[55] Bhanassi, *Al-Diyyah*, 12.
[56] Peters, , 8.

Kaffārah (Atonement) is the type of punishment which is fixed for a sin committed, in order to annul the guilt incurred with that offence[57]. It is a ritual in its nature as it is imposed in the shapes of setting free a captive, feeding the needy, providing clothes to those in need or fasting. When these are imposed in association with an offence then it becomes a punishment. The nature of *Kaffārah,* being a ritual makes it directed towards the legal person. The specific status rules out its jurisdiction over non-Muslims, juveniles and those lacking sanity[58]. It is related mainly to six offences. Spoiling the Fast, Spoiling the rules related to *Ihram* during pilgrimage, Murder, Sexual Intercourse during menstrual periods, *Zihar* and violating the oath[59].

0.7.1.2. Consequent Punishments.

These are the type of punishments where the offender becomes subject to it, by default, in some specific crimes. The first type of consequent punishments is the **Prevention from Judicial Testemony** which is specific for the person, who commits slander; the one who falsely accuses other, of illegal sexual intercourse. This is considered such heinous crime that along with the punishment of 80 lashes, the criminal is permanently barred from testifying in the court of law. He falsely blames a person in his repute which has been given so importance in Islamic law that the criminal is considered at the extreme of lying as if he loses his trust in the community forever.

---

[57] Awdah, 683.
[58] Bhanassi, *Al-Uqubah,* 165.
[59] Awdah, 684.

وَالَّذِيْنَ يَرْمُوْنَ الْمُحْصَنٰتِ ثُمَّ لَمْ يَأْتُوْا بِاَرْبَعَةِ شُهَدَآءَ فَاجْلِدُوْهُمْ ثَمٰنِيْنَ جَلْدَةً وَّلَا تَقْبَلُوْا لَهُمْ شَهَادَةً اَبَدًا ۚ وَاُولٰٓئِكَ هُمُ الْفٰسِقُوْنَ[60].

Those who accuse honourable women (of unchastity) but do not produce four witnesses, flog them with eighty lashes, and do not admit their testimony ever after. They are indeed transgressors[61].

The *Hanafi* school of thought is of the view that the testimony of the person who commits *Qazf* will never be accepted, even if he repents to Allah[62]. Whereas *Imām Mālik* and *Imām Shāfi'* are of the opinion that upon his repentence, he will be allowed to testify in courts which is strongly denised by *Imam Abu-Hanīfa.*[63].

The second type is **Blocking from inheritance** where the person killing another, from whom he is about to receives a share in inheritance as his or her legal hier, is blocked from receiving anything, as inheritance from the property of the deceased[64] because the murder, by-default bars the killer to get any share[65]. The Holy Prophet Muhammad (peace be upon him) said:

ليس للقاتل من الميراث شئ[66].

The murderer is not entitled to any share in inheritance.

Likewise if the person killed has made a will in favour of the murderer, the murderer will be blocked from having any kind of share in the inheritance of the deceased[67].

---

[60] Al-Quran. 24-4.
[61] Ansari, 336.
[62] Al-Kharaj, *Abu-Yusuf,* (Cairo: Al-Matba' al_Salfia), 181.
[63] Ibn-i-Rushd, *Bidaya tul Mujtahid,* 4 (Cairo: Dar al-Hadees, 2004), 226.
[64] Abu-Zahra, *Ahkam al-Tarikat wal Mawarees,* (Cairo: Dar alFikr al-Arabi, 1963), 94.
[65] Muhammad Ali Saboni, *Al-Mawarees fi al-Shariah al-Islamia,* (Cairo: Dar al-Hadees), 42.
[66] Abu Abdurrehman AL-Nisai', *Al-Sunan Al-Kubra, Hadees No 6333,* 6 (Aleppo: Maktaba Matbo'at al-Islamia, 1986), 120.
[67] Bhanassi, *Al-Uqubah,* 173.

0.7.2. Additional Punishments.

Besides the primary punishment, the Islamic penal law presents few more punishments of secondary nature which are mostly left to the prudence and discretion of the judge. These punishments are usually awarded additionally to the primary punishments. The first kind is the ***Exile or banishment*** which is sometimes added with another punishment as we see in case of illegal sexual intercourse by an unmarried person where he is subject to 100 lashes as well as banishment. The place exiled can vary and it is the discretion of judge whereas the time limit cannot exceed one year[68]. The crimes in which exile can be ordered are extramarital sexual intercourse, highway robbery, social interest and exile of transgender[69]. The minimum distance for exile should be the same as required for *Qāsr* (shortened) prayers. The second type of additional punishments is the ***Hanging of the cut hand in the neck*** of the theif. This discretionary punishment can be awarded if the judge sees it important. The hand of the thief, after being cut, is tied into his neck so that the public could watch it and eventually deter from stealing. This method is used to increase the deterrent effect of the punishment. *Hazrat A'li (R.A)* awarded this punishment once which is narrated by Imam *Abū Yusuf* in his famous book *Al-Kharāj*[70].

0.7.3. Punishment with respect to its area of infliction.

The division of punishment with respect to the area of its infliction includes the corporeal, psychological, preventive and financial punishments. The

---

[68] Bhanassi, *Al-Uqūbah*, 174.
[69] Ibid., 174.
[70] Abu-Yusuf, 185.

Corporal Punishments are inflicted upon the body of the offender, in different situations are, 1. Death Penalty. *Al-Qatl.* 2. Whipping. *Al-Jald.* 3. Slapping. *Al-Darb.* 4. Stoning to death. *Al-Rajm.* 5. Crucification. *Al-Salb.* 6. Amputation of a body part, i,e. Hand, leg etc. *Al-Qat'*[71].

The second type is that of **Psychological Punishments** which is imposed in the shape of, 1. Blaming. *Al-Taubikh.* 2. Frightening. *Al-Tahdid.* 3. Advice. Counselling. *Al-Wa'z.* 4. Defamation. *Al-Tashheer.* 5. Warning. *Al-A'lam.* 6. Boycott. *Al-Hajr.*

The third type are the **Preventive Punishments** which has following shapes.

1. Prison. *Al-Habs.* 2. Exile. *Al-Taghrib.* 3. Removal from office/Job. *Al-Azl.*

The last and forth type of punishment with respect to the area of infliction, are the **Financial Punishments** which are mostly imposed in shapes of, 1. Fine. *Al-Gharama.* 2. Destruction of property. *Al-Itlaf.* 3. Changing the nature of property. *Al-Tagh'ir.* 4. Confiscation. *Al-Musādara*[72].

1.5. Types of Punishment in Western Criminal Law.

The punishments awarded in western law are briefly discussed as under.

1.5.1. Physical Punishments.

The punishments inflicted upon the body of a human being are in the shapes of capital punishment, prison and Community sentences. The capital punishment is a legal punishment in the US; however it has been abrogated in the Canada and most of the European countries. In UK, the Murder

---

[71] Bhanassi, *Al-Uqūbah,* 197.
[72] Aamir, 398.

(Abolition of the Death Penalty) Act 1965 abolished the death sentence for murder and changed it with life imprisonment[73]. It was still in practice for treason and some other cases. In 1998 it was completely abolished in the UK for all kinds of crimes including High treason. Capital punishment is illegal in France, Germany, Spain, Italy and Turkey. It was legal in USSR[74] but in present day Russia the capital punishment is no more functional.

Prison is another form of corporal punishment, widely exercised in the world. The results of prisons are not very cherishing as most of the prisoners are found to indulge in crimes soon after release from prison. Secondly it is the most expensive kind of punishment, putting much pressure on country's economy. The annual cost, per prisoner is estimated to be about $23876 in USA and 39600 pounds in the UK[75]. Another kind is that of community sentences, imposed in the shape of unpaid work or clearing overgrown area[76]. It can be awarded partially in prison and the rest in community.

1.5.2. Psychological Punishments.

The second category of punishment awarded in western criminal law is to punish the offender psychologically. These punishments are in the shape of Shame punishments. The philosophy here is to make the offender guilty of his illegal act which may teach him to obey the law in future[77].

---

[73] Davick Pannic, *Judicial review of Death Penalty,* (London: Duckworth, 1982), 109.
[74] United Nations, *Capital Punishment,* (New York: UNO, 1962), 12.
[75] Brooks, 64.
[76] https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/community-sentences/
[77] Thom Brooks, *Shame Punishments,* (Farnham: Ashgate, 2014), 31.

1.5.3. Financial Punishment.

Financial punishments are very common now days, in the entire world. These punishments are imposed in the shapes of Fine[78], which is usually considered for small crimes. It is also imposed in the shape of Restitution, which is supposed to compensate the wronged party in cases like theft or damages to the property. Another shape of it is the forfeiture of the property.

1.5.4. Preventive Punishments.

Preventive punishments are also imposed in several shapes. The famous picture of this punishment is to ban a driver from further driving[79] or cutting his points from licence etc. This punishment can be awarded in the shape of banning a person to enter certain area. Putting ban on travelling abroad and removing the officer from his post due to corruption etc are other examples of preventive punishment. Another form of preventive punishment is denial of some rights. In the United States the prisoners are denied to vote. [80] Likewise a student can be denied to get loan from the bank upon his multiple drugs convictions etc.

---

[78] Dubber & Hornle, *The oxford Handbook of Criminal law,* (Oxford: Oxford University Press, 2014), 956.
[79] Ibid., 959.
[80] Ibid., 961.

Conclusion.

The definition of the basic terms 'crime & punishment' are well defined by the Muslim jurists. In Islamic criminal law, one can find the uniform definitions of both crime and punishment, agreed upon by the jurists. However the western criminal law lacks such uniformity in defining crime and punishment. However the western criminal law is agreed that crime is an act which is banned by law where as punishment is the pain inflicted upon the offender as a response to that crime.

The types of punishments in Islamic criminal law are crystal clear, divided into three categories which shows the most important areas of human life where the first category is treated with utmost care and vigilance. These laws are unchangeable and are called *Hudu ā.* The division of punishment for most important and less important crimes, for crimes concerning individual's right and society's right, is so logical that it provides a unique shape of the body of punishment including all theories of punishment , putting each theory at its proper place. The philosophers of western law have defined punishment and its types but there is no such consensus among them. The punishments in western laws are changeable and every few decades where the practicing punishments are altered with new ones[81]. On the other hand the Islamic law, being a divine law and knowing the unchangeable human psychology, is firm and clear upon the definition, types, nature and philosophy of punishment.

---

[81] Stephen P. Garvey, "*Can Shaming Punishment Educate?*" *University of Chicago Law Review,* Vol. 65, 1998. P. 733.

***Ch** 5: The western penal theories find their epic practical application in the Hudūd punishments of Islamic penology, making the utilitarian yet proportional deterrence its primary penal goal along with retributive concept of excluding any chance of pardon because of the specific nature of Hudūd crimes where the offender attacks the foundations of the society in the shape of High treason, murder, adultery, theft, robbery and insurgency, which needs to be responded with harsh punishments, however the extreme deterrent punishments are added with other penal goals, at appropriate place, in the shape of rehabilitation and incapacitation.*

***Ch** 6: Qisās and Ta'zir, the further two main types of Islamic punishments, which mostly deal with the crimes affecting the individual rather than society, are dealt with the appropriate theories of pure retribution in Qis ā s and proportional utilitarian approach in Ta'zir punishments because of their less or limited harmful nature, keeping these different from Hudūd by keeping the doors of pardon and negotiation open which paves the way for the restorative justice as well as reformation.*

***Ch** 7: The corpus of Islamic penal laws provide a comprehensive coherent legal framework, incorporating all different penal goals presented by western penal philosophy, rather it moves forward by putting the punishment at the last stage in its fight against crime by starting from cutting the root causes of crime and eliminating any possible reason for crime, by providing all basic necessities of life, lacking which waives off the punishment, along with applying each penal goal to its needed and sufficient extent.*

***Ch** 8: The two global legal systems in the shape of Islamic and western law presents different approach towards the criminal and penal law because of difference in their sources where one relies upon the human intellect and the other considers the God Almighty as source of all laws, which results in difference in the definitions, types, philosophy and practical laws related to crime as well as punishment.*

***Con:** The research, as outlined in the thesis statement, has evaluated the different theories of punishment in order to ascertain the area which best suites each single different theory and has found that the 'Islamic Unified Theory' presents a complete legal framework which incorporate all different penal goals with coherence along with providing the possible practical application of that coherent legal framework whereas the western legal philosophy is still in need of presenting a coherent theory of punishment which may find its practical model too.*

Chapter One

Literature Review

Introduction.

The philosophy of punishment is discussed by the Muslim as well as by western legal philosophers, thourgh ages, which resulted in the emrgence of few philosophical theories of punishment in western penal philosophy, justifying the aim of punishment whereas the Islamic penal discourse lacks such primary theories rather it explains the philosophy of already set laws by the Almighty God.

The chapter reviews the Islamic and western literature on the criminal and penal philosophy to understand the viewpoint of both legal discourses on the philosophy of punishment and whether these two world renowned penal discourses present any inter-connected single theory of punishment? At the beginning the chapter reviews the western literature starting from greeck philosophy including Aristotle and Plato till the twentieth century philosophers like Rawls and Hart along with the present day philosophers like Thom Brooks. In the second part, the chapter reviews the literature on Islamic penal laws to find out whether any Muslim jurist has ever tried to present any single inter-connected theory of punishment? The review of Islamic literature starts from the forth century hijri scholar *Al-Mawardi* and ends with twentieth century jurists like *AbuZahra, Awdah* and *Ahmad Fathi Bhanassi* who have very elegantly presented the philosophy of Islamic punishments to prove that the Islamic punishments are fit enough for the modern age too.

2.1. Literature Review of Islamic Criminal Law.

Al-Um, by Imām *Muhammad Bin Idrīs Al-Shafi'* is a well renowned book in Islamic legal discourse. It is considered to be the first book on Islamic Jurisprudence. The Imām has written extensively on theIslamic punishments where he is of the view that the *nisāb* for the theft is ¼ of the dinar and no more[82]. He presents the sayings of the Holy prophet (PBUH) in favour of his opinion but the Imām has not elaborated the philosophical holistic view of the punishment in Islamic Criminal Law.

Al-Asl, by Imām *Muhammad Bin Hasan Al-Shībāni* is the book on Islamic law in the Hanafi school, where the Imām has compiled the opinions of Imām *Abu Hanīfa*. In his view the *Qisās* must only be inflicted by sword[83]. He is of the opinion that in case of a murder by multiple offenders, waiving off the *Qisās* for one murderer does not negate he implementation of *Qisās* on the other offenders[84]. The author has not written any thing on the theories of punishment as presented in western penal jurisprudence.

Al-Ahkām Al-Sultānia, written by Imām *Al-Māwardi* (972 - 1058 AD), contains his opinion regarding the punishments and its purpose. He writes;

والحدود زواجر وضعها الله تعالى للردع عن ارتكاب ما حظر[85] والتعزير: تأديب على ذنوب لم تشرع فيها الحدود.

[82] Imām Muhammad Bin *Idrīs Al-Shafi', Al-Um,* 6(Beirut: Dar Al-Ma'rifa, 1990) 140.
[83] Imām Muhammad Bin Hasan Al-Shībāni, *Al-Asl,* 4Karachi: Idarat-ul-Qurān wal Ulūm Al-Islamia, 2014), 511.
[84] Ibid, 4, 511.
[85] Al-Mawardi, 322.

The Hudūd punishments are prescribed by Allah, the almighty, to deter (the public) from committing what is prohibited and *Ta'zir is the punishment for offences other than Hudūd.*

In his opinion, the punishment fulfils the purpose of deterrence as well as reformation. But the author has not discussed the theories or objectives of the punishments in detail.

Bidāi' al-Sanāi' is a well reputed book of Islamic law authored by Imām *Al-Kāsāni* (1191). He discussed the different kinds of punishments in Islamic law like *Hudūd, Qisās* and *Ta'zir.*

He writes about the difference of individual's rights and Almighty Allah's rights in punishments [86] which shows that there is delicate yet balanced difference in different kinds of punishments in Islamic criminal law. According to the author the theories of prevention is working in *Ta'zir* punishments where as the *Hudūd* fulfil the prevention theory following the deterrence caused by its punishments. The author has not discussed the reformative nature of these theories of punishments.

Al-Hidāyah is the renowned book of Hanafi School of thought, written by *Imām Burhānuddīn Al-Marghinānī* (1135 - 1197 AD) where he discussed the punishment and its philosophy by saying that the purpose of *Hudūd* is deterrence, to minimize the harm to common people. He writes;

الحد لغة هو المنع والمقصد الأصلي من شرعه الانزجار عما يتضرر به العباد[87]

The philosophy of punishment was left unattended by the author.

[86] Al-Kasani, V 7, 33.
[87] Al-Marghinani, V 2, 339.

Al-Siyāsa Al-Shar'iah is *Ibn-i-Taymiyyāh's* (1263 – 1328) famous book, where he discussed the punishments in Islamic criminal law. He was well aware of the importance of *Hudu ̄d* punishments, which is clear from his opinion that these punishments are to be inflicted even without a formal plaint from a person. The government itself is a party and if no one asks for the evidence, the state must go for it in order to know the truth and enforce *Hudu ̄d* punishments in response.

وهذاالقسم يجب على الولاة البحث عنه، وإقامته من غير دعوى أحد به، وكذلك تقام الشهادة فيه من غير دعوى أحد به[88]

But he has not paid attention towards the philosophy or logic of every single punishment. Further he has not discussed unifying nature of the punishment in Islamic law.

Al-Tashri' al-Jinā'i' al-Islāmi by Dr. *Abdul Qādir Awdah* (1906 - 1954) is a master piece. It is considered an authority on the subject of Islamic criminal law. For our topic is concerned, he has briefly yet comprehensively written on it. He said that the doctrine of punishment in Islam is based upon the interest of both the individual and that of the society. He says; apparently this looks contradictory but there is a unique balance between both. The society is above the individual. The unique feature in his writings is that he has given a comprehensive philosophy behind the complete body of punishments.

فالجماعات مهما اختلفت على المبادئ أو اختلفت عليها العصور تشترك في أنظمة معينة تعيش عليها الجماعة ويقوم كيانها عليها، ولو بحثنا كل الأنظمة التي تقوم عليها الجماعات في كل أقطار الأرض لوجدنا كل الجماعات تشترك في أربعة أنظمة هي الدعائم التي يقوم عليها فعلاً كل مجتمع على وجه البسيطة، وهذه الأنظمة الأربعة هي:

[88]Ibn-i-Taymiyyah, *Al-Siyasa Al-Sharia.* (Beirut: Dar al-Ilm, 2000) 46.

(1) نظام الأسرة. (2) نظام الملكية الفردية (3) النظام الاجتماعي للجماعة (4) نظام الحكم في الجماعة[89].

He said that human society is divided into four spheres i.e. (i) Family, (ii) Property, (iii) Society, (iv) State. If anyone inflicts harm to these institutions of human's life, he is a criminal and deserves punishment. He further relates adultery and slander (*Qazf*) to the institute of family. Theft, Robbery, Dacoity and Trespass are related to property. Killings and woundings endangers the society whereas revolt and insurgency are a threat to the state. So the punishment is directly proportional to the danger and harm to these institutions of human life[90]. The lesser the harm the slighter the punishment, and the gravest the harm the excessive the punishment is. But the author has very briefly described all this philosophy in just 10 - 11 pages. Moreover it only gives the idea. The practical application of this idea upon the complete skeleton of Islamic punishments was not done by the professor. So this brief idea needs detailed explanation and the practical application over complete system of punishments in Islam.

Al-Uqūbah, written by *Sheikh Abū-Zahra,* (1898 - 1974) a renowned egyption Muslim scholar and a legal philosopher where discussed the laws as well as the philosophy of punishment. To him the Islamic punishments are the epic model of justice. He says that Islamic law takes preliminary steps to increase harmony and to educate the society in order to eliminate the crime. It helps people to have the basic needs of life which leaves no space for crime by valuing Charity, banning interest, motivation for granting loans to needy

[89] Awdah, 616.
[90] Ibid., 620.

fellows and most importantly, *Zakāt* etc[91]. But if even then the crime happens, *sharī̄ah* turns toward the punishments as a protective measure in order to finish it at first sight and to stop its spreading in the society. However the scholar has not mentioned the unifying nature of all theories of punishment.

"The Theory of Punishment in Islamic law, A comparative study" by Dr. Muhammad Salem El-Awa is his doctoral research in 1972 from university of London. The author discloses the area of his research in the very first sentence of his thesis, writing:

"This thesis deals with the theory of punishment in Islamic law[92]*"*

This statement clarifies that the research was confined to the Islamic law only which is seen further in the entire body of thesis. The western theories of punishment were not discussed in this research. The author has given a brief overview of the deterrent and reformative character of the *Hadd* punishments only. He has not discussed the each single *Hadd* punishment with respect to these theories because as we see that each *Hadd* punishment contains different theory of punishment. Moreover he has completely neglected the application of these theories of punishment in *Ta'zir* and *Qisas* punishments. The collective application of theories of punishment was also lacking in the book.

"Strategies for the Justifications of Hudu d̄-ul-Allah and their Punishments in the Islamic Tradition" is written by *Rana H. Alsūfi*. The research is confined to *Hudūd* punishments only, leaving untouched, the

---

[91] Abu Zahra, *Al-Uqubah*, 24.

[92] Dr. Salem El-Awa, *The theory of punishment in Islamic law.* (London: University of London, 1972), 2.

maximum portion of punishments in Islamic criminal law i.e. *Qisās* and *Ta'zir* punishments. Furthermore even in *Hudūd* the author has not mentioned the theories related to each and every *Hadd* separately. Along with this brief discussion the author has not done the comparative study of English theories of punishments with that of Islamic punishments.

Al-Ta'zir fi al-Shariah al-Islamia is very famous book written by Dr. *Abdul Azīz Āmir*. Dr. *Azīz* has discussed the status of *Ta'zir* in Islamic criminal law stating the punishment prescribed for these crimes by Shariah, in detail[93]. According to the author the purpose of *Ta'zir* punishment is deterrence[94]. He says that the punishment in Islamic law fulfils the reformative purpose. The gap in this book is that the author confined himself to Ta'zir punishments paying very less attention towards the philosophy of *Hudūd* punishments.

General Principles of Criminal Law, Islamic and Western is a book authored by Professor Imran Ahsan Khan Nyazee, a well known Pakistani jurist. He has discussed the aims and objectives of punishments in Islamic law in the light of *Maqāsid-al-Shar'iah*[95]. These interest mentioned by the author are the same as mentioned by *Imām Ghazāli*. But the author has not dealt with the philosophy behind *Ta'zir* punishments. The author has not discussed the collective application of theories of punishment in western or Islamic law.

Islamic Philosophy of punishments is a book written by Dr Tahir-ul-Qādri where he discussed the theories of punishments with respect to Islamic

---

[93] Aamir, 305.
[94] *Ibid.*, 295.
[95] Imran Ahsan Nyazee, *General Principles of criminal law.* (Islamabad: Shariah Academy, 2007), 29.

law. He has mentioned the deterrent and preventive character of the punishments of *Hud ū d.* But the respected author has not done the comparative analysis of western theories of punishment with that of Islamic criminal law. He has confined his research to the Islamic law only. The unified theory of punishment was also lacking.

Punishments in Islamic Law, written by Al-Say ī d S ā diq Mahdi. According to the author the main purpose of punishments is 'Justice' which is based upon the concept of equality[96] and selflessness. The author rather than emphasizing on the philosophy of punishment, discussed the helping injunctions of Islam which facilitates elimination of crime pripor to the punishment. These teachings are, like *Emān,* which compels a Muslim to not disobey the law. But the author has not discussed the philosophical approach of Islam penal laws.

Implementation of penal laws upon criminal, authored by Dr. Saeed Jibāi, discusses the purpose of punishments in Islamic law which are two, i.e, the deterrence and safeguarding the society[97]. The interest of society is far important than the pain received by one person. But the author failed to give comprehensive approach of the philosophy of Islamic punishment as in Islam there are punishment which are retributive and expiatory in nature which were not discussed by the author.

---

[96] Sayid Sadiq Mahdi, *Punishment in Islamic Law.* (Cairo: ZuhralilAalam Al-Arabi, 1987), 33.
[97] Dr. Saeed Jibai, *Implementation of penal laws upon criminal.* (Cairo: Dar al-nahza Al-Arabia, 1993), 15.

Punishment in Islamic & Positive Laws by Dr. *Usāma Abdullah Quaid* talks about the philosophy of punishments in Islamic law which according to him is the 'deterrence' alone[98]. The author neglects the very famous retributive character of Islamic law punishment which is based upon the concept of "eye for an eye" and "tooth for tooth". Moreover the author compared the Islamic punishment with the criminal law of Egypt. But no comparison was made to the western legal philosophy of punishments.

Islamic Criminal Laws by Justice (r) Dr Tanzil-ur-Rehman thoroughly discussed the different ordinances related to *Hudūd*, like offences against property, adultery and fornication (*zinā*) and *Qazf* (False accusation of Adultery) etc[99]. But respected Dr. Tanzil has not attended the topic of philosophy of these punishments neither he compared these punishments with western law of punishments. The unified approach of different theories was also not paid attention.

The Criminal law of Islam by Prof. Dr Anwār-Ullah deals with the various concepts of Islamic criminal law. The author discussed the crimes in Islam, their logical divisions in different kinds, like Murder, offences liable to Hadd & offences liable to Ta'zir. Most importantly, he discussed the elements of the crime like the need of an explicit verse of *Qurān* or *Hadith* to term an act as a crime[100]. The author has not touched the theories the punishment. He

---

[98] Dr. Usama Abdullh, *Punishments in Islamic and Positive law.* (Cairo: Dar al-nahza Al-Arabia, 1997), 7.

[99]Dr.Tanzil-ur-Rehman, *Islamic Criminal Laws.* (Islamabad: Printing Corporation of Pakistan, 1990), 61.

[100]Dr.Anwarullh, *The criminal law of Islam.* (Islamabad, Shariah Academy, 2005), 5.

neither discussed its philosophy in Islam, nor compared it with western theories of punishment.

Criminal law in Islam is written by *Tūqir M. Khan*, where he discussed the philosophy of the punishment in Islamic law. He admits that the Shar'iāh has taken into account both the interest of society and the criminal i.e. the individual, but where the social interest contradicts with that of the individual interest; it is the social interest that prevails[101]. The author is also of the view that Islamic punishments serve to deter the society and at the same time reforms the offender. The author has generally and very briefly presented this view in few pages. The author failed to discuss the application of all theories of punishment in a collective way. Moreover, he neglected to discuss that all this difference in punishment is based upon the difference in the nature of crime.

Law of Crime in Islam by Dānish Yusuf deals with various concepts of crime & criminal laws in Islam along with the criminal law in contemporary Muslim world with special reference to Taliban regime[102]. But the author has not discussed the theories working behind these punishments. He just paid attention to the jurisprudential issues and neglected the topic which we are going to discuss.

Crime and Punishment in Islamic Law by Rudolph Peters is a famous book around the globe on the topic of Islamic criminal law. He also covered

---

[101]Tauqir M. Khan, *Criminal law in Islam.* (New Delhi: Pentagon Press, 2007), 179.
[102] Danish Yousaf, *Law of crime in Islam.* (New Delhi: Random Publications, 2012), 244.

our topic and wrote about the theories of punishment in Islamic law. He is of the view that almost every theory of punishment is justified by Islamic criminal law[103]. He is of the view that the *Hadd* punishment, which must be carried out in public, actually fulfils the purpose of deterrence. The retribution is evident in the Qisas punishment and bodily injuries. He says that Islamic punishments fulfil the incapacitation and rehabilitation purpose, as the punishment is meant to reform the criminal and bring him back to the right path.

The gap in this book, related to our topic, is that the author has not given a compressive model of the application of all theories of punishment. Why retribution works in Homicide and not slander. Why the right to waive off the punishment is available in bodily injuries and not in theft. The unified theory of punishment, which this research tries to find out, was lacking in this book.

Al-Siyāsah Al-Jināiya fi al-Islam, written by Dr *Ahmad Fathi Bhanassī* has some unique features. It discusses the jurisprudence of Islamic criminal law. The book discussed the practice of pious Caliphs related to implementation of criminal laws. He also mentioned the philosophies of Islamic punishment but lacking collective approach. He mentioned the reason behind every punishment separately[104].

Al-Hudūd wa al-Sultān, authored by Dr *Abdullāh Bin Ahmad* states the role of state or the ruler, called *Imam,* in the enforcement of *Hudūd* in the

---

[103] Peters, 30.

[104] Dr Ahmad Fathi Bhanassi, *Al-Siyasa Al-Jināiya fil Islām.* (Beirut: Dar al-Sharooq, 1983), 270.

Islamic state. The topics like, the obligation of enforcement, whose duty is to enforce and how about the enforcement by more than one people are discussed in the book[105]. The topic of our research was not even touched by the author.

Al-Uqūbah fi al-Fiqh al-Islāmi is a famous book written by Dr *Ahmad Fathi Bhanassī*. In this book he stated the most important topics of Islamic criminal law. He discussed the development of *Hudūd* and *Qi*sās along with discussing the types of punishments in detail. The author paid attention to the philosophy of punishment which he thinks is the interest of society and administration of justice[106]. The theories of punishment and the connection in between these theories was not discussed by the author.

Muhazirat-i-Fiqh is a book compiled from the lectures of Dr *Mahmūd Ahmad Ghāzi*, a renowned scholar of Islamic studies. He discussed the Islamic criminal law briefly in a chapter of this book. He related the philosophy of punishment with objectives of Shar'iāh[107]. The author has not discussed the theories of punishment or their application in Islamic Criminal law.

Al-Jarā'im fi al-Fiqh al-Islāmi is another master peace by Dr *Ahmad Fathi*. He has thoroughly discussed almost all types of crimes in Islamic law. The additional feature is that the author has done comparative study of the concepts of punishment in Islamic law with that of western law[108]. In this

---

[105] Dr Abdullah Bin Ahmad, *Al-Hudūd wa al-Sultan,* (Jeddah: Dar al Jam', 1986), 101.
[106] Bhanassi, *Al-Uqubah,* 23.
[107] Dr Mahmood Ahmad Ghazi, *Muhazirat-i-Fiqh,* (Lahore: Al-Faisal Nashiran o tajiran, 2005), 392.
[108] Bhanassi, *Al-Jara'im,* 148, 181, 196.

book the author restricted himself to answer the question of "What is the law?" rather than "Why is this law?" which is our topic of research and that is neglected by the author completely in this book.

Islami Hudūd or Unka Falsafa, written by *Syed Matīn Hāshmī* throws light on both practical and philosophical sides of *Hudūd*. The book lacks discussion on *Qisās* and *Ta'zir*. The author mentioned the philosophy behind each and every *Hadd* punishment whereas he also stated the main principles and doctrines of Islamic criminal law[109]. However the author has not presented the unified approach of Islamic punishments, comprising all theories of punishments.

Al-Madkhal li al-Fiqh al-Jināi al-Islāmi is an informative book by Dr *Ahmad Fathi Bhanassī*. The author focused on giving an overview of the entire body of Islamic criminal law in this book. The part of Islamic criminal law is the smallest one because it is un-stretchable as the main part of it is already fixed by the law giver[110]. The book does not contain any material related to the topic of research which is the theories of punishment or the philosophical connection among these theories.

Nazriyat fi al-Fiqh al-Jināi al-Islāmi, written by Dr *Ahmad Fathi Bhanassī* contains the philosophical discussion on various topics of Islamic criminal law.

---

[109] Syed Mateen Hashmi, *Islami Hudūd or unka Falsafa,* (Lahore: Diyal singh trust library, 1999), 101.

[110] Dr Ahmad Fathi Bhanassi, *Al-madkhal lil Fiqh al-Islami.* (Beirut: Dar al-Sharooq, 1989), 18.

These topics are limitation, doctrine of intention and start of criminal activity, doctrine of criminalizing the victim only[111] and etc. But the doctrine of change in punishments with change in nature of crime was not discussed in this book.

Qisās or Diyyat by *Muhammad Mian Siddique* is an extensive book on the topic, in Urdu language. The author restricted his research to the bodily injuries i.e. *Qisās* and financial compensation, called *Diyyah*. The book focuses on the laws (Homicide[112] and wounding) rather than philosophy. The theories of punishment are not discussed at any point of the book.

Moqif al-Shari'ah min Nazriyyah al-Difa' al-Ijtimāi' is authored by Dr *Ahmad Fathi Bhanassi* where he carried on the debate on comparative and historical study of how Western and Islamic law defend the Interest of society from the criminal activities[113]. The discussion is somewhat related to our topic but the author did not discuss how could, the theories of punishments be combined to have a uniform comprehensive single theory of punishment.

Al-mas'oli'ah al-Jinā'iyah fi al-Fiqh al-Islāmi by Dr *Ahmad Fathi Bhanassi* throws light on the concept of criminal liability in Islamic law,

---

[111] Dr Ahmad Fathi Bhanassi, *Al-Nazriyat fil Fiqh al-jinai al-Islami.* (Beirut: Dar al-Sharooq, 1988), 163.
[112] M Mian Siddique, *Qisās or Diyyat,* (Islamabad: Islamic research institute, 1982), 83.
[113] Dr Ahmad Fathi Bhanassi, *Moqif al-Shariah min Nazriya al-difa al-ijtimai'.* (Beirut: Dar al-Sharooq, 1984), 21.

comparing the subject matter with western criminal law. The doctrine of *Mens Rea* was discussed in offences like bribery[114] and apostasy etc.

Al-Fiqh Al-Jināi Al-Muqāran Bi al-Qānūn, written by Dr *Abdul Latif Salih* has discussed some topics of Islamic criminal law. But the book, contrary to its topic, is just confined to the offence of *Zinā*. The rest of *Hudu ̄d* and *Ta'zir* punishment were completely left untouched by the author. At some points, the author compares the Islamic law of adultery with that of the Egyptian criminal law[115]. The theories of punishment are totally neglected in this book.

Maqāsid Al-Tashri' Al-Jināi is an excellent book written by Dr *Tāhā Fāris*. In this book he explained the philosophy behind the entire body of Islamic Criminal law including the philosophy of all kinds of punishments in Islamic law like *Hudu ̄d, Qisās* and *Ta'zir*. The sole purpose of the punishment according to the authgor is to safeguard the both pairs of the humanity, i.e. Society and the individual human[116]. But the author neglected to point out the connective theory of punishment in Islamic law which explains the philosophy of each punishment at its place.

---

[114] Dr Ahmad Fathi Bhanassi, *Al-mas'oli'a al-Jina'iya fil Fiqh al-Islami.* (Beirut: Dar al-Sharooq, 1988), 99.
[115] Dr Abdul Latif Salih, *Al-fiqh al-Jinai al muqaran bil qanon,* (Damascus: Al-Hikmah, 1994), 63.
[116] Dr Taha Faris, *Maqasid al-Tashri' al-Jinai,* (Sharjah: Sharjah Univerity), 48.

2.1. Literature Review of Western Criminal Law.

Aristotle (384 - 322 B.C) is among the most prominent scholars in the history of western philosophy. In his book *Ethics,* he talked about the philosophy of punishments. Aristotle believed in the equality of people. He says "and the some equality will exist between the persons and between the things.[117]" Then he says that the unjust (which he also terms as unequal) may be compensated by proportion of this inequality in order to bring it to just. He says, "this then, is what the just is the proportional; the unjust is what violates the proportion[118]." He was of the view that the crime alone must be rectified by the way of penalty and that penalty or punishment must be based upon the concept of equality. He says, "The law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and other is being wronged, and if one inflicted injury and other has received it. Therefore this kind of injustice being an inequality, the judge tries to equalizes it, for in the case in which one has relieved and the other has inflicted a wound, or one has slain and the other been slain, the suffering and the action have been inequality distributed, but the judge tries to equalize by the means penalty taking away from the gain of assailant[119]".

This statement of the great philosopher shows that he was in the favour of what we call today as retribution, which is based upon the concept of equality. But Aristotle totally neglected the other important features of

---

[117] Aristotle, *Ethics* (London: Encyclopaedia Britannica, Inc 1952), Book-V. Note 1131a, 378.
[118] Ibid., 379.
[119] Ibid., 379.

punishment i.e. the deterrence, reformation or incapacitation. He only emphasized on "retribution" and is of the view that retribution or retaliation can only do the proper justice.

Thomas Aquinas (1225 - 1274 A.D) discussed the philosophy of punishments. He discussed it in his writings, called as "Treatise on Law". First of all, he mentioned the 4 objections of the critiques on the concept of punishment and then answers them one by one. There he states the philosophy of law. He imparts the concept of reformation but not by the ways of counselling or education. He believes that punishment can reform a person in a proper way as the punishment makes a man obey the law which is the ultimate justice, as said by Aristotle. He says, "Accordingly, law, even by punishing, leads men on the being good.[120]"

He further says that reward on advice to the criminal instead of punishment is against the purpose of law. According to him the very purpose of law is to put fear in the minds of people. This means he also believed in deterrence and considered it an integral part of the philosophy of punishment lacking which demolishes the need of law. He says, "To punish pertains to none but the framer of the law, by whose authority the pain is inflicted. Therefore to reward is not put as an effect of law, but only to punish.[121]" He further says, "From becoming accustomed to avoid evil and fulfil what is good, through

[120] Thomas Aquinas. *Treatise on Law.*(London: Encyclopaedia Britannica, Inc 1952), 215.
[121]Ibid., 215.

fear of punishment, one is sometimes led on to do so likewise with delight and of one's own will.[122]"

Nicola Machiavelli (1469 - 1527) in his famous book "Prince" writes about the benefits of deterrence in order to maintain peace and order in the state. He strongly advocates the concept of fear and favours even, the need of cruelty. He says, "therefore a prince, so long as he keeps his subjects united and loyal, ought not to mind the reproach of cruelty; because with a few examples he will be more merciful than those who through too much mercy, allow disorders to arise, from which follows murders or robberies; for these are won't to injure the whole people whilst those executions which originate with a prince, offend the individual only.[123]" He further says that, "it is much safer to be feared than loved."

These words of Machiavelli show that he strongly believed in the philosophy of deterrence and according to him no other philosophy like expiation, incapacitation, retribution or reformation can help reduce crime rate and maintain peace & order in the society. But this approached is also unfair because the nature of one crime differs the other and it is not justice to punish cruelly even on account of minor offences. The history shows that deterrence alone is unable to maintain justice among the citizens.

Thomas Hobbes (1588 - 1679) is the first known person in western legal & political philosophy who has academically defined the punishment.

---

[122] Thomas Aquinas, 215.
[123]Nicola Machiavelli, *Prince.*(London: Encyclopaedia Britannica, Inc 1952), 23.

He says, "A punishment is an evil inflicted by public authority". He believes that punishment is vital for the social harmony and peace that even inflicting it, upon an innocent man for the good of community, is not a breach of law. He says, "But the infliction of what evil so ever on an innocent man that is not a subject, if it is for the benefit of commonwealth, and without violation of any former covenant, is no breach of the law of native.[124]" Thomas Hobbes then discussed the punishment and what is not punishment. He also discussed various kinds of punishment by dividing it in different kinds like Human punishment, pecuniary, ignominy, exile and imprisonment etc. but he did not discussed the philosophy of punishment whether that is retaliation, incapacitation, rehabilitation of the deterrence. The purpose which he wants to attain by means of punishment, is the happiness and benefit of society, as we discussed in his early mentioned quote, where he legalized the infliction of injury upon an innocent man, if that is for the good of society and community.

Jean Jacques Rousseau (1712 - 1778) discussed the theories of law and death penalty in his book 'The Social Contract.' He discussed the issue of death penalty in light of social contract theory that how a person may willingly transfer, the right of killing himself, to someone else, in some specific situations. He said that by violating the law, the criminal ceases to remain the member of society and punishment becomes his fate. He writes, "he must be removed by exile as a violator of the compact, or by death as a

[124] Thomas Hobbes, *Leviathan.*(London: Encyclopaedia Britannica, Inc 1952), 147.

public enemy.[125]" He also believes in the remission of the punishment by the sovereign authority of state. But in his whole discussion he neither emphasized on any theory of punishment nor discussed these philosophies. He merely talked about need and importance of punishment in maintaining public peace and harmony. His writings show that he believed in most kinds of punishment which means he understood the need of different situations, changing with the change in nature of crime.

Emmanuel Kant (1724 - 1804) is a strong advocate of retribution. He discussed this theory in his book *'The Science of Right'*. He thinks that to achieve the highest standard of justice, there is only one path to go on, and that is the path of equality. The one who commits a crime should go through the same pain, he has inflicted. He strengthens the principle of "eye for an eye" & "life for life". He writes, "But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of the justice is made to no more to the one side than the other. It may be rendered by saying that the undeserved evil which anyone commits on another is to be regarded as perpetuated on himself. Hence it may be said; if you strike another, you strike yourself; if you kill another you kill yourself. This is the right of retaliation (Jus talioris).[126]"

---

[125] Jean Rousseau, *The Social Contract.* (London: Encyclopaedia Britannica, Inc 1952), 398.
[126] Emmanuel Kant, *The science of Right.* (London: Encyclopaedia Britannica, Inc 1952), 446.

Kant is of the view that no means other than retaliation or retribution can fulfil the purpose of punishment. It is only the equality which gives a lesson to criminal as well as to the society to not repeat the crime. He says, ".... and properly understood, it is the only principle (retribution/equality). Which is regulating a public court, as distinguished from more private judgment, can definitely assign both the quality and the quantity of just penalty. All other standards are wavering and uncertain, and on account of other consideration involved in them, they contain no principle conformable to the sentence of pure and strict justice.[127]" By presenting the theory of retribution, Kant rejects all other philosophies of punishment which indeed possess the potential to minimize the crime from the society, if applied equitablely.

Georg Wilhelm Friedrich Hegel (1770 - 1831) discussed the philosophy of punishment very briefly where he explicitly negated the deterrence and reformation. He is of the view that the punishment can only be given by retribution. He writes, "The annulment of crime is retribution.[128]"

Then he defines retribution in detail and here he defers with Kant in defining retribution. Hegel is of the view that the equality in the retribution does not mean to inflict the same pain upon criminal as he inflicted. If it is done, the criminals as well will be losing their eyes and hands. He says that imputation of hand for cutting a hand is not appropriate punishment. The appropriate punishment in the philosophy of 'retribution' is the 'VALUE'. He says, "Value

---

[127] Emmanuel Kant, 446.
[128] Friedrich Hegel, *Philosophy of Right.* (London: Encyclopaedia Britannica, Inc 1952), 38.

as the inner equality of things which in their outward existence are specifically different from one another in every ways, is a category which has appeared already in connexion with contracts and also in connexion with injuries that are the subject of civil suits.

So, in this view retribution is dispensable but its nature may be changed with change in the nature of crime. But is the retribution only that fulfils the purpose of crime and not the deterrence or reformation etc. He wrote, "Still least does he receive it if he is treated either as a harmful animal that has to be made harmless, or with a view to deterring and reforming line.[129]"

The philosophy of Hegel is also focuses a single theory and that is retribution though not in the strict sense of retribution. We can say that he tried to give a collective theory of punishment or which we call it now days as "Negative retribution".

David Brooke is a senior lecturer in law and jurisprudence at Leeds Metropolitan University. He in his book "Jurisprudence" narrated the views of few philosophers like Emmanuel Kant and Jeremy Bentham. He posted that Kant was in favour of retribution theory whereas Bentham believed that deterrence is the only way to eliminate crime. Moreover he just presented the views of professor Hart regarding his mixed theory[130].

David Brooke did not give any new idea about punishment theories. Moreover his book contains only the views of two philosophers. He failed to

---

[129] Friedrich Hegel, 38.
[130] David Brook, *Jurisprudence.* (London: Routledge, 2011), 104.

present any kind of comprehensive approach regarding philosophy of punishment.

Josef Kohler, a German legal philosopher is of the view that the ancient theory of retribution must be connected with modern approaches. He gives a new approach regarding punishment that it should be made conditional in favour of criminal that if he reforms and changes himself, be pardoned. He says, "For this reason, he must remain unpunished for the present; not even being subject to a criminal judgment, but rather the deed must be simply covered up and forgotten.[131]" He actually presents a completely new view regarding crime and punishment, but he fails to mention the situations in which a criminal might be pardoned. Further he also failed to mention the conditions which may be asked to be fulfilled by the criminal. In this regard, his approach is too brief that to have a view about the philosophy of punishment.

Sir John Salmond's approach in the philosophy of punishment is well balanced. He wrote about all five theories i.e. prevention, retribution, reformation, deterrence and expiation. The unique feature is Salmond's writing is the collective approach that he presents by accepting the usefulness and utility of all the theories. He does not deny the benefit of any theory. He vows for a working compromise among all these theories[132]. He said that retribution and expiations should not be disregarded.

---

[131] Joseph Kohler, *Jurispredence.* (Newyork, Augustis M. Kelly, 1969), 287.
[132] P. J. Fitzgerald, *Salmond on Jurisprudence.* (London, Sweet & Maxwell, 1966), 95.

As Salmond talks about the collective and compromising approach but he has not presented any such approach where every theory is planted in its specific garden and where it can give more benefit rather than generalizing any one theory over the entire body of criminal law.

John M. Seheb has written a detailed book naming 'Criminal law and procedure.' He also discussed the theories of punishment, but very shortly. He just elaborated the basic concepts of different theories and neglected to give a comprehensive approach regarding the philosophy of punishment. He just defined the theory of Retribution, Deterrence, Incapacitation and rehabilitation[133].

The different types of punishment as well as each criminal act were discussed in detail but the purpose of punishment was not given importance in the book.

Norman Baird serves at the University of London. His book 'Criminal law' discusses the various concepts of western criminal law. The author has discussed the concepts like vicarious liability, offences against property[134] and general principles as well, but he has not paid attention towards the topic we are concerned with i.e. the theories of punishment. He directly entered in to the legal discussions and left to mention the philosophy behind these laws.

---

[133] John M. Seheb, *Criminal Law and Procedure.* (London, Sweet & Maxwell, 2000), 14.
[134] Norman Braid, *Criminal Law.* (London, Routledge, 2011), 5.

Professor V.D Mahajin discussed in detail almost all theories of criminal justice[135]. He elaborated these theories and quoted the opinion of ancient philosophers. But like most of authors the philosophical connection between these theories lacks in his book as well.

Michael J. Allen has written a comprehensive book on Criminal law. He has discussed the crime and related topics along with elaborating the available defences to a crime. The author has not written anything about the theories of punishment[136].

Smith and Hogan's Criminal law is a famous and well known book on the topic. The book elaborates the crime and its related topics in such an elegent way that it has become the most consulted source on western criminal law. The book relates the case laws with every topic. In few cases it mentions the sections of the relevant law along with the punishments prescribed for that crime[137]. The authors have not discussed the topic of our research. The theories of punishment were completely missing in this book.

Phillip Montague has written on punishment and its philosophy. He discussed the theories of punishment in his book. The author thinks that the punishment is necessary to protect the society and he termed it as "Societal defence." He says that society has the right to punish the offender[138], to defend it. He has critically evaluated the theories of judgment but has not

---

[135] V. D. Mahajin, *Jurisprudence.* (Lahore: Mansoor book House, 2006), 136.
[136] Michael J. Allen, *Criminal Law,* (Oxford: Oxford university press, 2007), 309.
[137] Smith & Hogan, *Criminal Law,* (Oxford: Oxford university press, 2014), 546.
[138] Phillip Montage, *Punishment as societal defence,* (Maryland: Rowman & Littlefield Publishers, Inc 1995), 109.

provided the philosophical connection between different punishments for different crimes.

Professor Thom Brooks has written an excellent book, 'Punishment'. The book is a master piece on the philosophy of punishment. It is specific and confined to the philosophy of punishment, discussing all theories of punishments in detail. The author has discussed the single as well as mixed theories of punishment. He has critically discussed all the theories, elaborating their merits and demerits. This was the only book, which I found, closely related to our topic of research because its entire focus is on providing a mixed theory of punishment, incorporating all theories of punishment.

The author has discussed the need of a collective single theory of punishment. He has provided one of his own, for which he was awarded by the government and his theory was included in 100 ideas which will have an impact on the future of the world. He named his theory as the "Unified theory".

The author has just presented the philosophy, in which he focuses on the "right" of an individual. According to him, the punishment is proportional to the intensity of right infringed by the criminal[139]. However the author has not provided the detailed practical application of his Unified theory of punishment.

---

[139] Brooks, 130.

Richard R. Korn and Lloyd W. Mckorkle have authored "Criminology and Penology". The book is comprehensive and discusses almost all areas of crime and punishment in western legal thought. It elaborates the theories of punishment from sociological point of view, stating the psychological, ethnical and constitutional theories of crime along with the philosophy of punishment. The book started discussing the penal rational from the code of Hammurabi [140]. However no discussion was found on the mixed and combined philosophy of punishment.

R. A. Duff has authored a book named "Trails and punishments." His main focus was on procedural details of trails. He also discussed the theories of punishment such as deterrence[141]. The topic of our research was not discussed by the author as the book does not contain any material on a single comprehensive theory of punishment.

Piers Beirne & James Messerschmidt have authored a book on Criminology. They have discussed the philosophical as well as practical aspect of crime, defining types of crime in property, white collar, public-order, interpersonal, syndicated and political crimes[142]. The book has never discussed the theories of punishment which is the topic of our research.

Thom Brooks has edited a book on the topic of punishment, named as "Sentencing". The book is a comprehensive collection of articles collected

---

[140] Richard R. Korn & Lloyd W. Mckorkle, *Criminology and Penology,* (New York: Holt, Rienhart & Winston, Inc, 1964), 374.
[141] R. A. Duff, *Trails and Punishments,* (Cambridge: Cambridge university press, 1986),164.
[142] Piers Beirne & James Messerschmidt, *Criminology,* (New York: Harcourt brace college publishers, 1995), 285.

from several writings. It includes discussion on the model penal code[143], where the philosophies of punishment be combined are resulted in a mixed approach towards punishment.

Though it is a comprehensive book on the legal discourse on the punishment, however it lacks to writing upon the issue of combining the theories of punishment to understand the desert between crime and punishment.

[143] Thom Brooks, *Sentencing*, (Surrey: Ashgate, 2014), 137.

Conclusion.

The extensive literature review has concluded that the discussions on the penology and penal philosophy in western penal discourse frevolves around few theories of punishment which usually try to answer the question of "Why punish?" The scholars in western as well as Islamic legal philosophy have been trying to answer this question, which resulted in the emergence of theories like deterrence and retribution. Most of the answers were globally accepted. Yet, there is a dire need to answer few more questions, related to the original question. These questions are, "Why a single theory is unable to meet every crime? What are the circumstances which necessitate the application of deterrence? How to present a single theory, combining all theories by giving them due weight and proper place? Which crimes can be met most efficiently by the application of Preventive theory? Why retribution is helpful in only a specific sphere, and why it is impossible to generalize it over the entire body of punishments?

The existing literature is unable to answer these questions as no jurist or scholar has successfully provide such promising and compelling theory which answers these questions and provide a comprehensive single theory of punishment which will principally define the intensity and type of punishment which best fits specific nature of crime. This research intends to do the same.

Chapter Two

Discourse on Theories of Punishment in Islamic Jurisprudence

Introduction.

The discussion on Islamic penal laws in the classical Islamic legal discourse is very short as compared to the discussions on other legal issue like financial or rituals laws. This is because the nature of Islamic criminal law does not allow so as the major part of it is already defined and fixed in the *Quran* and *Sunnah* making the *Hudu ̄d* and *Qisas* laws, stable and unchangeable which narrows the area of *Ijtihad* in Islamic criminal law. The only area, open to *Ijtihad,* is the category of *Ta'zir.* The Muslim jurists have had detailed discussions, elaborating *Ta'zir* along with explaining the philosophy of *Hudu ̄d* and *Qisas.*

This chapter aims to study the legal discourse on the Islamic criminal law in both the classical and modern literature on Islamic penology in order to understand the viewpoint of few prominent Muslim jurists.

In this research the "classical literature" includes the juristic opinions of the scholars till the fifteenth century whereas the second portion (Contemporary literature) possesses the opinion of few prominent scholars from 19th century onwards who have paid special attention to the Islamic Criminal law.

2.1. Punishment in the Classical Literature of Islamic Law.

The Muslim jurists have paid due attention to the criminology as well as penology in Islamic criminal law. Though the topic of punishments in Islamic criminal law is too concise to allow *ijtihad* because the maximum parts of Islamic punishments are clearly and explicitly defined and fixed in the primary sources of Shariah, the *Quran* and the *Sunnah.*

2.1.1. Abul Hasan Habīb Al-Māwardī. (972 - 1058 AD)

Imām Māwardī is a well known Islamic political philosopher who has authored an evergreen book on Islamic political and legal system called *Al-Ahkām al-Sultānia.* He has discussed the penal system of Islamic state and considers the implementation of *Hudūd* mandatory. His view supports utilitarian and deterrent approach. His view of punishments is consequentialist where he argues that the punishments are to prevent the crimes by deterring the public even before it takes place[144]. He also presents the view like *Ibn-i-Taymiyyah* that the punishments are a shape of the clemency of almighty Allah. This is why he says that the Islamic punishments are to protect people from indulging in ignorance and sinful activities along with helping them obeying their Allah[145]. Imam *Mawardi* argues that to omit a duty is same as to commit a crime. He says that if a person denies performing a duty which is related to the right of another individual, must be held accountable. He must be forced to obey the legal duty to protect the legal right of another individual of the society[146].

Imām Māwardi slightly differs with other jurists on the issue of imprisoning the accused during trail or until his position gets clarified. He also says that an accused can never be punished to be forced to confess. He believes that doing so is completely illegal for the judge whereas if it permissible for the

---

[144] Al-Mawardi, 325.
[145] Ibid., 325.
[146] Ibid., 327.

head of the state, alone, to do so[147]. The contemporary Muslim jurists are of the view that an accused can be put in lock up even by the judge, if it seems important for the case. He also differs with majority of jurists in the case of *Qazf,* (Slander) or false accusation of adultery. *Al-Māwardi* considers it the right of the individual who was accused of adultery and so he can forgive the offender in this case[148]. Whereas the majority of Muslim scholars are of the view that it cannot be waived of in any case, as it is considered *Hadd* punishment which can never be pardoned by anyone as said by *Ibn -i-Taymiyyah* earlier[149].

In the chapter of *Ta'zir,* he argues that it is way different in its structure from punishments of *Hudu ̄d* and *Qisas. Ta'zir* varies for same crime with respect to the status of different criminals whereas this was not the case in *Hudu ̄d* where everyone was subject to same unchangeable punishment despite his social or religious status. He says that if an act other than *Hudu ̄d* is committed by a habitual offender he will be treated harshly. But if the same is committed by a law abiding citizen who does not usually commit crimes, will be treated differently. Likewise the respectable persons of the society like the teachers or religious clerics, who commits an offence very rarely, will be treated with slight punishment and the shape may also vary for each case[150]. It can be by threatening or shaming or just advising to refrain from illegal activities in future, whichever is considered most appropriate by the judge. He further

---

[147]Al-Mawardi, 323.
[148] Ibid., 335.
[149] Ibn-i-Taymiyyah, *Al-Siyasa,* 53.
[150] Al-Mawardi, *Al-Ahkam,* 344.

writes that in cases of *Ta'zir,* which are forgivable in its nature, can be waived off by the judge if he seems it beneficial but that right can be exercised only in cases where there is no individual's right involved. In that case the judge cannot waive off the right of individual if the plaintiff demands the punishment[151].

Al-Māwardi raised another very important point of extra lost, in imposition of punishment. He says that in *Hudūd* cases the extra loss vanishes. There isn't any remedy for that. Whereas in *Ta'zir* cases the extra judicial lost is always compensated like in the case of second pious Caliph *Umar (may Allah pleased with him)*, where he summoned a lady who lost her fetus with intense fear when she heard the call of the caliph[152].

2.1.2. Imām Alāuddīn Al-Kāsāni. (died - 1191 AD)

Imām kāsāni in his well known books presents the *Hanafi* viewpoint of *Hadd* punishment and its types. He differentiates between *Hadd* and *Qisās* (as both are fixed unlike *Ta'zir*) by declaring *Hadd* as the right of almighty and *Qisās* as the right of the victim[153]. This view differs with that of *Shafi'* viewpoint where *Qisās* is also defined as *Hadd*[154] punishment based on the fact that it is a fixed punishment. He mentions the number of *Hudu ̄d* as five where he included two punishments for drinking, dividing it into, *Hadd* for drinking wine

---

[151] Al-Mawardi, 346.
[152] Ibid., 347.
[153] Al-Kasani, 7, 33.
[154] Muhammad Bin Idrees Al-Shafi, *Al-Um'*, 7 (Beirut: Dar al-Ma'rifa, 1990), 59.

extracted out of grapes and *Hadd* for drinking alcoholic beverage made of other than grapes. There he presents the view of *Hanafi* school where it differes with other schools of legal thought argures for only one kind of *Hadd* for every kind of alcoholic drink. While discussing the punishment of adultery, *Imām Kāsāni* philosophically elaborates the logic behind not declaring the anal sex as *Hadd* of *Zinā*. He clearifies the difference between *Hanafi* and *Shafi'* school of thought, who consider anal sex as a crime of *Hadd*. According to him, the crime of *Zinā* is confined to the concept of vaginal sex only. The anal sex has never been considered as *Zinā* because there are different terminologies and names for these two acts which are never used alternatively. The person who committs vaginal sex is never called as *Lūtī (Gay)*[155].

Discussing the *Ta'zir* punishment in defamation, he mentions that it is applicable only where the statement might be wrong and not in the case where the statement is clearly false *ab-initio*. Like a person calls someone a lair or drinker. In this case, if proved, *Ta'zir* punishment will be imposed, whereas if someone is called a dog or donkey, the *Ta'zir* is not applicable because the statement is *prima facie* false. This is because in first case he dishonours the addressee whereas in the second case he actually dishonours himself by telling a lie[156].

---

[155]Al-Kasani, 7, 34.
[156] Ibid., 63.

The *Ta'zir* punishment is applicable in all those cases where no fixed punishment of *Hadd* or *Qisās* is available. It can be imposed in cases where *Hadd* or *Qisās* punishment is available but due to some procedural issues it ceases to be applicable, like in the case of doubt in *Hudu ̄d* and in the case of pardon of *Qisās* by the victim. In these cases the primary punishment of *Hadd* and *Qisās* ceases to exist but the act demands some punishment to teach a lesson to the offender which is done by applying *Ta'zir.*

2.1.3. Ibn-i-Rushd Al-Hafīd. (1126 - 1198 AD)

Ibn-i-Rushd is a famous philosopher and jurist of *Maliki* school of thought. He has authored a master piece named *Bid ā ya-tu-Mujtahid wa Nih ā ya-tul-Moqtasid.* He relates the entire structure of Islamic punishments with a single word, *Jināyah* i.e. offence. He divides the offences into five main types which are as follows:

1. Offending the human body which are Homicide and wounding.
2. Offending the sexual organ which is adultery.
3. Offending the property which is theft, insurgency, robbery and extortion.
4. Offending the human dignity which is *Qazf* (false accusation of adultery).
5. Offending (intellect) by taking illegal food or drink which is intoxication[157].

[157] Ibn-i-Rushd Alhafeed, *Bidaya-tul-Mujtahid,* 4(Cairo: Dar al-Hadees, 2004), 177.

Ibn-i-Rushd, philosophically and systematically discusses the issues related to Islamic criminal law by mentioning the opinion of almost all school of thoughts. He argues that only intentional murder is liable to *Qisās* i.e. death[158]. He also mentions that there are only two types of murders i.e. Intentional and unintentional. According to him there is difference of opinion among the Muslim jurists upon the third kind of murder called *quasi intentional murder.* He says that *Imām Mālik* negates it where it is considered a separate permanent type, in other schools of thought, which entail different legal consequences. He strongly advocates the equality of all citizens before the law. He clarifies that the free person will be killed for a slave because the rule of law prevails and the same is ordered by the Holy Prophet Muhammad (peace be upon him).

While discussing slander in Islamic law, he presents the opinion of all school of thoughts regarding the right to forgive the *Qazf.* This issue is related to another issue of considering *Qazf* as the right of almighty Allah or an individual. *Shafi* School of thought says that the right of individual is stronger than the right of Allah so a *Qazf* victim can be pardoned by the plaintiff whereas other jurists negate this view[159]. While discussing the various punishments of Highway robbery which are, death, imputation and banishment, he presents the views of Muslim jurists of *Hanafī & Shafi'* school of thought which says that a robber is killed only if he kills during robbery and imputuion of hand and leg takes place only if he takes property from

[158] Ibn-i-Rushd Alhafeed, 179.
[159] Ibid., 226.

people during robbery and exile is decreed when he neither kill nor takes money and only threatens the people[160].

2.1.4. Imām Izz-ud-din Ibn-i-Abdus Salām. (1181 - 1262 AD)

The human beings around the globe are looking for the happiness. The core centre of the activities of the mankind is to get satisfaction and to be happy all the time. That is what, the nature of the human being demands. That is why the Shariah addresses the "utility" in every law. The Islamic law tend to achieve the wellbeing of the mankind. For the purpose, it has imposed the punishments, to secure the interest and rights of the individuals and the society, in the broader perspective of the theory of utility, i.e, *Maslaha.* The renowned Muslim Jurist *Imam Izz' Ibn-i-AbdusSalām* has discussed the issue as below:

> *The punishments in Islamic law are not meant to inflict mere harm; rather the Shariah imposed it to achieve the utility, (Maslaha). Like the imputation for thief and robber, capital punishment for murderer and adulterer, flogging and banishment*[161].

The above paragraph clearly mentions that the sole purpose of the entire penal system in Islam is to serve the human society. This service to the individual as well as the society is provided to protect them from the violation of their legal rights, harm, and turpitude. The punishments are an

---

[160] Ibn-i-Rushd Alhafeed, 239.

[161] Imam Izz' Ibn-i-AbdusSalam, *Qawaid al-Ahkam fi Masalih al-Anaam,* 1(Cairo: Maktaba kuliyat al-Azharia, 1991), 14.

important source to bring peace and prosperity in the society as well as in the life of an individual. Shariah ensures to protect the *utility* in the life of a human being, for which Shariah often commands the acts which, sin itself, are a *loss,* but are actually a *utility (Maslaha),* to safeguard the interests and the rights of the people. Punishment is a kind among many of the like acts, e.g: fighting the enemy in battlefield, Jihād[162]. This approach shows the utilitarian side of the punishments in the Islamic law. To achieve the maximum utility from an act, even if that is wicked in itself, justifies the pain and loss as inflicted in punishing a criminal.

2.1.5. *Imām Ibn-i-Taymiyyah. (1263 - 1328 AD)*

Im ā m Taqi-uddin Ibn-i-Taymiyyah has discussed the philosophy of the punishments in his various books. He says that, in Islamic law, Allah almighty has decreed the punishments as His sympathy, grace and mercy[163] for the mankind. The infliction of pain upon the criminal is not to show the hatred towards him, but to reform him. The punishments in Islamic law are to annul the wrong done by the offender so it must be imposed by the feeling of compassion and clemency.

The state should impose the punishment upon the criminal as like the father sometimes punishes his children or the doctor when he operates the

[162] Izz' Ibn-i-AbdusSalam, 14.

[163] Imam Ibn-i-Taymiyyah, *Al-fatāwa al-Kubra,* 5(Beirut: Dar al-Kutub Al-Ilmia, 1987), 521.

patient[164]. The parents, while punishing their child never feel hate in their hearts rather they feel it hard and difficult to punish their child, but they do so to achieve a far most important objective to make their child more disciplined and successful person in his life. Likewise is the situation of the doctor, who operates the patient, cuts his body and gives him medicines which the patient is uneasy with, but the doctor does so with a broader goal of the protection of the health of that patient. According to Imam *Ibn-i-Taymiyyah* the state should also do the same, to achieve the broader goal of peace and prosperity in the society by punishing the criminals in order to teach them to not infringe the rights of the society. The imposition of *Hudūd* are so important that it does not need the plaintiff from public to bring the case to the court rather the state itself is a party, *ab-initio* and must take the cognizance of it[165]. *Ibn-i-Taymiyyah* says that the removal of evil and wrong from the society cannot be achieved but only after imposing Islamic punishments[166]. He says that the removal of wrong from the society is done by the state authority in cases where it isn't done by the *Qurān*. *Ibn-i-Taymiyyah* is very clear on the importance of the punishments for the protection of legal rights of the people. He says that imposing *Hudūd* is obligatory upon the state officials[167] and can never be waived off[168]. The society's need for the punishments can be understood in the view of *Ibn-i-Taymiyyah* when he says that if the government of the state is not legitimate

---

[164] Ibn-i-Taymiyyah, *Al-fatāwa al-Kubra,* 521.
[165] Ibn-i-Taymiyyah, *Al-Siyāsah,* 51.
[166] Imam Ibn-i-Taymiyyah, *Al-Hisba fil Islam,* (Beirut: Dar al-Kutub Al-Ilmia, 1995), 45.
[167] Ibid., 45.
[168] Ibn-i-Taymiyyah, *Al-Siyāsa,* 53.

even then it is of worth importance because the body of government, even illegitimate, is needed to impose the punishments upon the criminals to make the community safe and the society peaceful[169].

The *Imām* considers the punishments in Islamic law as proportional to the crime. He presents the retributive nature of the Islamic punishments and says that the intensity of the punishments vary with the change in the nature of crime as well as that of criminal. The grave the crime, the graver its punishments is and the pity the crime the pettier its punishment is[170].

He divided the punishments into three categories. The first one is named as the right of Allah. These are called *Hudu ̄d ul Allah.* The second category includes the rights of individuals which comprises of the murder and bodily injuries. The third category comprises those crimes which neither falls in *Hudu ̄d* nor *Qisās.* It includes both the rights of God as well as that of individuals but not as serious as the main two categories of *Hudu ̄d* and *Qisās.* This category is called *Ta'zir.*

The *Imām* considers the financial punishments as legal in Islamic law. He advocates the necessity for that and negates the people who claim the illegality of financial punishments. He presents the acts of Prophet Muhammad Peace be upon him and the acts of his companions and pious caliphs as an evidence to prove his view. E.g. he presents the evidence of *Umar* (R.A) when he ordered, as head of the state, to burn the palace built by

---

[169] Ibn-i-Taymiyyah, *Al-Siyāsa*, 51.
[170] Ibn-i-Taymiyyah, *Al-Hisba*, 45.

Sa'ad bin Abi-Waqās, who was the governor of a state[171]. This shows that Imam believed that the financial punishments, if they are in proportion to the wrong done, are legitimate and are vital to be included in the penal laws.

2.1.6. Imām Ibn-i-Qayyim Al-Jawziyyah. (1292 -1350 AD)

Imām Ibn-i-Qayyim is a strong proponent of punishments in the shape of deterrence and retribution[172]. On the other hand this view negates the theories like rehabilitation, restorative justice and community sentences etc. He strongly advocates the need of punishment by saying that by excuding punishment, the society will face bloodshed, anarchy and unrest. The status of mankind would be worse than that of animals[173]. That is why it is needed to inflict pain and loss to the criminals to make the offender an example and to deter the likeminded people from committing the same in future.

Ibn-i-Qayyim describes the structure of punishments in Islamic law by dividing it into two sub categories of corporal and financial punishments. He correlates this divison with Islamic rituals which are also divided into corporal and financial rituals like *Salāh* as example of corporal ritual where as *Zakah* as example of financial ritual. Like his mentor, *Ibn-i-Qayyim* is also a proponent of financial punishments and he also negates its illegality[174]. He says that financial punishment can be by destroying the illegal property like demolishing the idols or by changing its nature or by giving that in the

---

[171] Ibn-i-Taymiyyah, *Al-Hisba,* 50.
[172] Ibn-i-Qayyim, *Al-turuq al-Hukamia,* (Beirut: Dar al-kutub al-Ilmia, 1991), 229.
[173] Ibn-i-Qayyim, *A'lam ul-Mo'aqieen,* 2(Beirut: Dar al-kutub al-Ilmia, 1991), 79.
[174] Ibn-i-Qayyim, *Zad-ul-Ma'ad,* 5(Beirut: Dar al-kutub al-Ilmia, 1991), 50.

possession of some other person[175]. Imam very logically discusses the concept of proportionality, which is very strongly presented by the *retributivism,* in the punishments. He says same punishments for different crimes are illogical. This may result in punishing for grave wrong with pity punishment and harsh punishment for pity crimes. Both are unjust. Likewise imposition of different punishments for same crime is also illogical and injustice[176].

So according to *Ibn-i-Qayyim Shari'āh* has always kept in mind the *utility* of punishment which is far more in Islamic punishments, than the harm of crime. He argues that the strict proportionality is not sought by the Islamic law that is why the Islamic criminal law did not opt for cutting of tongue in case of slander or making the adulterer impotent, because Islamic punishments possess consequentialist approach. It looks at both the ends of a crime, the individual and the purpose of punishment. It does not make a person useless by cutting his tongue or genital organs and also achieves the ultimate goal of deterrence[177]. In his renowned book, *Zād al-Ma'ād, Ibn-i-Qayyim* discussed the judgments of Prophet Muhammad (peace be upon him). There he claims the imposition of *stoning to death* punishment in case of adultery by a married non-muslim. He presents the evidence of Jews of *Madīnah,* where Prophet Muhammad (peace be upon him) ordered to murder a women in the same case[178].

---

[175] Ibn-i-Qayyim, *Al -Hukamia,* 229.
[176] Ibn-i-Qayyim, *A'lam ul-Mo'aqieen,* 2, 79.
[177] Ibid., 73.
[178] Ibn-i-Qayyim, *Zad-ul-Ma'ad,* 5, 32.

According to *Imam Ibn-i-Qayyim,* the Islamic law, being a complete code of life, first of all, demolishes the root causes which compel a person to commit a crime and side by side it connects a person to his God by awakening and strengthening *Taqwā* inside his soul. The strong connection with his Allah and fulfilment of financial and other requirements of a person provides him satisfaction and eventually results in reduced crime rate. But even after all these precautionary measures, taken by state, to satisfy the needs of its citizens, if a person indulges in criminal activity, he is dealt with punishments, often deterrent e.g. imputation of hand and leg, whipping, killing, exile, shame sentences, fines, forfeiture of property and stoning to death etc[179].

2.2. Punishment in the Contemporary Literature of Islamic Law.

2.2.1. Tāhir Ibn-i-A'āshūr.

Shēikh Tāhir Ibn-i-A'āshūr has discussed the philosophy of punishments in Islamic criminal law in his fabolous book *Maq ā sid al-Tashri' al-Jin ā i'*. According to him the philosophy of punishments is to reform and enhance the life standard of the people. He describes his argument by explaining the nature of Islamic punishments which are mostly related to the body of the human being. He said that the fines and other types of financial punishments cannot better serve the purpose of punishments as to some people it might become over harsh while to other it seems an easy option while some may

[179] Ibn-i-Qayyim, *Al-Da' wa al-Dawa'* (Beirut: Dar al-kutub al-Ilmia, 1991), 110.

even don't care for the amount of fine. That is why *Shar'iah* has mostly focused on the infliction of punishments, directly on the body of the criminal. We can find these in the case of death, imputation of different body parts like hand and leg in *Hudu ̄d* punishments. Same is the case with the punishments of whipping in the crimes of drinking wine and *Qazf.* We can find the same philosophy in the punishments of *Qisās* in both homicide and woundings. The philosophy behind this approach is to make the body feel the pain which almost everybody feels it in these punishments[180]. The financial punishments cannot be ruled out especially in the cases where the person commits the crime to achieve more financial gains. He further mentions that the primary purpose of Islamic laws are to safeguard the society that is why Islamic law from the beginning has demolished the idea of private justice, operated by the victim himself. He says that, in order to protect the peace of the society the *Shariah* practices the punishments only by the authority of state[181].

2.2.2. *Abdul Qādir Awdah.*

According to *Dr. Abdul Qādir Awdah,* punishments in Islamic law are, to safe guard the society from the violation of the laws of Allah almighty. It saves the society by reforming the offender, preventing him from the harm of offence and to guide him towards the right path[182]. That is why the entire body of punishments in Islamic law is standing upon the base of those rules and

[180] Tahir Ibn-i-A'ashur, *Maqasid al-Shariah al-Islamia,* (Oman: Dar al-Nafais, 2001), 338.
[181] Ibid., 338.
[182] Awdah, 1, 609.

regulations which serves the purpose well. These rules are briefly discussed as under.

The first aim of the penal law is to make the crime disappear from the society. This purpose is achieved by announcing the punishments to the public and to propagate the deterrent effect of it. This aim is achieved by eliminating the causes of crimes from the society by educating the people, providing employments etc. After all these precautionary measures, if the crime occurs, the state punishes the criminal. In this way the punishment serves two main purposes. First is to reform the criminal and secondly to give a silent message to the general public especially to ill minded people, thinking of such acts, to learn a lesson and refrains from doing the same.

Dr. Abdul Qādir Awdah is of the view that the limits of the punishment, with regard to its length, nature, intensity and severity are directly proportional to the need of the society. The more the interest of society is hurt by the crime, the more severe the punishment will be. The smaller the harm to the society, the lighter the punishment will be. It is same to the retribution in English penal philosophy. He further adds that if the interest of the society demands the incapacitation of the offender, he will be imprisoned for the period which best suites his reformation. Likewise if a person (criminal) becomes so dangerous that the society can only be safeguarded by his permanent removal from it, he will be executed[183], in the best interest of the society.

---

[183] Awdah, 1, 610.

He presents the view that every punishment, which serves the purpose of protecting and safeguarding the society from the crimes, acts, is a legitimate punishment and there is no need to stick to some specific kinds of punishments. The rationale of punishments is not the vengeance; rather it is inflicted upon the criminal with the feeling of mercy, sympathy and pity. In is imposed in the same way as the father punishes his child to make him disciplined.

According to *Abdul Qādir Awdah,* the punishment in Islamic law deals with the two very important aspects which apparently gives a contradictory look. The *Shari'ah* considers both the interest of society and that of an offender. *Shari'ah,* while awarding punishment, cares for the interest of the society but this does not mean that it neglects the criminal. This looks in contradiction because the interest of society demands the negligence towards the criminal, whereas considering criminal's interest results in lost to that of society's interest which is more important. But Islamic law keeps a unique balance in considering both these important pillars of the penal system. Obviously the more importance is given to the society. Safeguarding its rights and interest are considered the foremost priority of the penal system. On the other hand the criminal is given importance in cases where it does not clashes the interest of the society[184]. The right of society prevails in the crimes of *Hudu ̄d,* where the criminal's interest is neglected at once. This shows that the criminal's interest will never be considered in cases where the pillars of the society are

[184]Awdah, 1, 611.

attacked. These pillars of the society are safeguarded by Islamic law by means of *Hudu ̄d* punishments. These crimes are intolerable because violating *Hudu ̄d* results in the dismemberment of the very strong basis of the society which needs to be preserved and saved at any cost, even at the cost of a life i.e. of a criminal. But in cases where the offence does not disturb the foundations of the society, the individual is given favour and the court awards the punishment, taking into consideration the circumstances of the offender. This principle is mentioned by the Holy Prophet Muhammad (peace be upon him) by saying:

أقيلوا ذوي الهيئات عثراتهم الا الحدود[185]

> *Forgive (minimize) the people of good qualities their slips (wrongs), except Hudu ̄d (punishments)"*

The crimes which invades the foundations of a society are the crime of *Zin ā* (adultery), *Qazf* (false accusation of adultery), *Shurb* (Drinking intoxicants), *Sariqah* (theft), *harā bah* (highway robbery), *riddah* (High Treason) and *Baghi'* (Insurgency)[186]. The punishments for these crimes are not discretionary. The judge or even the legislature has no authority, whatsoever, to change or alter the punishments prescribed for these crimes. These are firm and pre-fixed punishments; this is why the criminal has never been given any favour in these crimes. Whereas in the offences of *Qisā s* and *Ta'zir*, the possibility to waive off or reduce or pardon the punishment exists. Though

---

[185]Imam Nisai', *Sunan Al-Kubra*, Hadees No 7253. (Beirut: Moassas tu al-Risalah, 2001)
[186] Awdah, 612.

the victim is given the complete authority to have his right fulfilled and to get the criminal punished.

2.2.3. *Shēikh Abū Zahra.*

According to *Shēikh Abū Zahra,* every act is a crime if that is done against the rules of Islam[187]. The declaration of some acts as illegal are based upon the interest of the society. But the declaration of the "interest" or "utility" for the society is not left to be decided by the human being. This utility or the right is declared by the almighty Allah[188]. Any declaration of right or utility by anyone other than Almighty is rejected and can never be the correct option for the prosperity of the human society.

The punishment is a kind of harm that is inflicted upon the criminal. At the same time it affects the society as well, when a person is executed, it results in the loss to the society. But the philosophy of law demands to accept this harm in order to avoid the larger amount of harm[189] in the shape of criminal. To achieve the greater benefit, we accept the minor loss. This is the philosophy of punishment because by committing an offence, the offender crosses his limits and invades upon the right of the society and leaving him unattended with punishment, results in the harm to all individuals of the society[190]. Islamic

---

[187] Abu Zahra, *Al-Jarīmah,* 25.
[188] Ibid., 26.
[189] Abu Zahra, *Al-Uqūbah,* 7.
[190] Ibid., 8.

punishments are awarded to remove the harm which is actually to safeguard the rights and interests of the society.

Shēikh Abū Zahra mentions three very important aspects of the penology. First is to ascertain the quantity of harm received by the victim. Secondly to ascertain the fear propagated and spread in the society by that crime and thirdly to measure the extent of defaming the law of almighty Allah. Because the primary purpose of punishment in Islamic law is to deter the public from committing a crime or from infringing the rights of other individuals. This logic can easily be understood from the penalty of theft where the punishment is never meant to be in proportion to the money stolen, rather it is to remove and eliminate the effect of theft which penetrates into the hearts of the people by making them afraid for their property[191] even when they are supposed to have peaceful sleep. For the same reason Muslim jurists used to measure the *Hudu ̄d* punishment in proportion to the defilement and infringement of the sacredness and holiness of the laws of Allah almighty because of the nature of the *Hudu ̄d* as the rights of Allah almighty[192]. Whereas in crimes where right infringed was solely the right of an individual or was dominant as to that of God's right, the punishment would be proportional to the harm received by the victim.

Shēikh Abū Zahra presents the view that the punishments in Islamic law are mercy and sympathy for the community. This ensures justice in the society

[191] Abu Zahra, *Al-Uqūbah*, 9.
[192] Ibid., 10.

and the distribution of justice is mercy and clemency for the society because it ensures safety from the harm and anarchy along with ensuring the peace and harmony in the community. He correlates the crime with the five basic pillars of human life. These five necessities must be preserved and safeguarded to flourish.

These five necessities are as follows;

1. Protection to Religion, (*Deen*).
2. Protection to life, (*Nafs*).
3. Protection to Intellect, (*Aqal*).
4. Protection to Lineage, (*Nasab*).
5. Protection to Property, (*Maal*).

Whoever invades these foundations of a human society is treated as a criminal and punished accordingly. This is why *Shari'ah* has ensured the safety of these important spheres of human life by legislating severe punishments with no chance of pardon or reduction. The *Shari'ah* punishes the drinker, the thieves, punishes the adulterer and the one who commits slander in order to safeguard the important sphere of lineage[193]. *Shēikh Abū Zahra* considers the implementation of *Hudu ̄d* punishments as a ritual which is going to be rewarded by Allah almighty. He also calls it a *Jihad* where the ruler fights against the invaders upon the rights of the society just like he saves his society and public from foreign invasion by fighting with his army

[193] Abu Zahra, *Al-Uqubah*, 34.

against the invaders[194]. He writes that the public should help the ruler in the implementation of Islamic punishments, if needed.

Shēikh Abū Zahra argues for the need of retribution in the crimes related to the body of an individual like homicide and wounding. He thinks that these issues must be dealt with the proportional punishment which must be equal to the crime[195]. *Qisas* as a punishment was present in all previous religious legislations.

With respect to *Ta'zir* punishments, *Shēikh Abū Zahra* is of the view that there can be two limits of punishments for these crimes. The maximum and the minimum limit of the punishment which will help the judge to award the adequate punishment needed for the crime. The judge will have discretion in awarding punishment related to *Ta'zir*. The change in the nature of crime as well as difference in the situation of offender needs different punishment which can be awarded with flexible punishments of *Ta'zir*.

2.2.4. *Dr. Ahmad Fathi Bhanassī.*

Professor Dr. Ahmad Fathi Bhanassī is considered an authority on the criminal and penal laws of Islam. He has authored more than ten books on the criminal and penal laws of Islam. He presents the view that the punishment has two main objectives. The objective which is soon achieved by imposing

---

[194] Abu Zahra, *Al-Uqūbah*, 61.
[195] Ibid., 63.

punishment is to inflict pain upon the criminal[196]. This reforms the criminal and teaches him a lesson. Whereas the objective which is achieved in long run, is to safeguard the society from the crimes and to make a peaceful community where everyone feels safe.

Dr. Ahmad Fathi Bhanassi presents a different view from *Dr. Abdul Qadir Aoda* in discussion upon the right of community and that of criminal. He argues that the Islamic penal laws have always provided real consideration to the criminal. The criminal's position in crime is taken into consideration in every kind of crime, whether that is a *Hadd, Qisas* or a *Ta'zir* crime[197]. He provides the examples in favour of his opinion by saying that in case of adultery, which is always considered a right of Allah, the criminal's situation and position is given due consideration. If he is unmarried and commits adultery, his punishment differs from a married adulterer. An unmarried adulterer is punished with one hundred lashes where as a married adulterer is executed by stoning until dead[198]. This shows that despite the strong rejection of adultery in Islamic law and providing a most deterrent punishment for it, *Shari'ah* never neglects the position of criminal in any case[199]. Same is the case with the punishment of drinking alcohol. If a person drinks a small amount of it due to lack of water, to save his life, he will not be punished because the crime he committed was in a distressful situation. He denies the retrospective

---

[196] Bhanassi, *Al-Uqubah*, 18.
[197] Ibid., 23.
[198] Malik Bin Anas, *Al-Mudawwanah*, 4(Beirut: Dar al-Kutub al-Ilmia, 1994), 504.
[199] Bhanassi, *Al-Uqubah*, 24.

effect of Islamic penal laws which does not try the cases, happened before its legislation[200].

Dr. Bhanassī discusses the issue of the punishment of a criminal who has committed a crime for more than one time. He says that if a person commits a crime of *Hadd* more than one time, he will be awarded only one punishment, because the purpose of *Hudu ā* punishments are to deter and that purpose is served with one punishment. But in the cases of *Qisās* and *Ta'zir* crimes, the person will be punished for each and every crime separately. This means that if he has committed a crime for more than once, he will be punished for that crime for more than once or equal to the times he has offended[201]. He further discusses the issue of limitation in *Hudu ā* offences. He presents the view of *Imām Abū Hanafi* that the *Hudūd* crimes become time barred except *Hadd* of drinking alcohol, whereas his student *Imām Muhammad Bin Hasan* differs with him and is of the opinion that every crime becomes time barred including *Hadd* of drinking alcohol[202]. Usually the punishment is considered to be completed after its infliction and imposition upon the criminal. In Islamic law there are some other ways which ends the imposition of punishment. These situations are, the death of criminal, pardon granted by victim to the criminal in cases other than *Hudūd,* when case becomes time barred under limitation

[200] Bhanassi, *Al-Siyasa Al-Jinaiyah*, 69.
[201] Bhanassi, *Al-Nazriyat*, 123.
[202] Ibid., 210.

rules, by expiation before the court takes the cognizance of the case and by mutual conciliation between plaintiff and defendant[203].

2.2.5. *Dr. Abdul Azīz Ā'amir.*

Dr. Abdul Azīz Ā'amir has discussed the Islamic punishments in his very famous books, *Ta'zir in Islamic law.* This main focus of the book is on the crime and punishment of *Ta'zir. Dr. Ā'amir* discussed the basics of *Hudu ā* and *Qisās* punishments in the introductory part of his book. He has divided his book into two main parts where in first one he discussed the crime of *Ta'zir* and the second part elaborates the punishments of *Ta'zir* in Islamic law[204]. He says that the *Ta'zir* Punishments can be awarded in addition to any other *Hadd* or *Qisās* punishment, where the interest of society demands so except for in one case that is the death penalty as *Qisās* for intentional murder[205], where any additional *Ta'zir* punishment seems useless. The author then discussed the issue of implementation of *Ta'zir* punishment in case of intentional murder, where the victim or his legal heirs have waived off the *Qisās* punishment. He has presented the opinions of Muslim jurists on the issue. According to *Imām Mālik* he is still liable to the punishment of 100 lashes along with one year prison. *Imām Abu-Hanīfa* & *Imam Shāfi'* are of the view that the judge has the right to punish that person if he is a known habitual offender. In few situations, related to the *Hadd* of *Zin ā*, the

[203] Bhanassi, *Al-Uqubah* , 223.
[204] Aamir, 519.
[205] Ibid., 147.

punishment prescribed for the adultery ceases to be enforced due to the presence of uncertainty or doubt. It is clear that the *Hadd* punishment can only be enforced if it is proved with evidence beyond doubt. In those situations the court can award *Ta'zir* punishments because of the presence of illegal act which needs to be punished. These situations can be like, sexual intercourse during *Iddah* period with wife after third divorce, sexual intercourse with dead female, anal sex or sex with other than male, like lesbianism etc. All these acts are illegal, demands punishment for the offender but posses some doubts which negates *Hadd* punishment[206]. These are serious crimes and cannot be let off, that is why the court is given the authority to award *Ta'zir* punishment in order to make sure the offender gets the reward for his illegal act and the procedural doubts may not let the offender go without any punishment. Same is the case in theft and defamation where the proof cannot be established to announce *Hadd* punishment, the court is allowed to award *Ta'zir* punishment taking into consideration the nature and intensity of the crime. In cases other than *Hudu ̄d*, if the act is illegal in *Shari'ah*, the offender will be punished with *Ta'zir*. Like in case of kissing or hugging an unknown female, calling a Muslim a non-muslim or Christian or Jew, are offences liable to *Ta'zir*. The author considers the act of masturbation an offence liable to *Ta'zir*[207].

Dr. Abdul Azīz Ā'amir is of the view that if the highway robbery or dacoity is performed by a women or a child, will not be punished with *Hadd* and in

---

[206] Aamir, 169.
[207] Ibid., 176.

result they will be awarded *Ta'zir* punishment[208]. Acording to *Dr. Ā'amir* there are some more offences punishable with *Ta'zir* and these are the offences of false testimony in court, false claim of something in court, illegal trespassing to others property, killing or punishing animals, bribery, espionage, etc. Likewise eating or drinking openly in the month of *Ramadhan* is a crime, musical concerts, fashion shows, hoarding, selling pork and other illegal edible things are crimes and are punished with *Ta'zir* punishment. According to *Dr. Ā'amir*, the purpose of punishment in Islamic law is deterrence[209]. The punishments is meant to teach the offender to obey the law by omitting the illegal, respecting the rights of others and performing the duties. He is also of the opinion that the punishment must be in proportion to the crime. That is why it varies. It will be severe for habitual offenders and pity for others.

2.2.6. Imran Ahsan Khan Nyazee.

Professor Imran Nyazee has authored a book on comparative study of criminal law in Islamic and western jurisprudence. He believes that the primary aim of Islmaic criminal law is the protection of the five basic necessities of human life, as highlighted by *Imām Ghazāli.* These basic necessities are; religion, life, family, intellect and wealth. The lack of such foundations in positive law results in continuous change in its basic ideas[210].

---

[208] Aamir, 223.
[209] Ibid.,, 271.
[210] Nyazee, 29.

The honourable Professor is of the view that the entire body of Islamic criminal law revolves arounf d these five necessities. The Islamic punishments fulfil the job of protecting these necessities from outside. These punishments serve the purpose of security to these necessities. The professor argues for the need of taking steps by the state to make these necessities flourish and strengthen from within, by means of providing suitable environment where each necessity may grow well.

These internal steps for the well being of these necessities may take the shape of education, eradicating poverty, ensuring human dignity and honour etc. In this way the basic foundations of human life will get internal strength in the shape of these steps as well as external protection in the shape of punishments[211].

The honourable professor further argues that not all these interests are same in importance. There are priorities within these necessities and interests. The one follows other and likewise the upper or most important interest must be given priority and extra favour over the rest of following interests. In this regard the interest of *Dīn* or *Religion* is top of the list following by the interest of *life* at second category whereas the interest of *intellect* finds its place at third number[212] followed by *lineage* at fourth and *wealth* at fifth and last category among these five necessities.

[211] Nyazee, 30.
[212] Ibid.,31.

This categorization shows that the last four interest may not be regarded if the protection of the foremost and top interest of *Dīn* demands so. Likewise the protection to *life* may be ensured at any cost even at the cost of the interest of *wealth* and *intellect* but never at the cost of the its ascendant interest, i,e. the *Dīn*.

Conclusion.

The Muslim jurists have elaborated the philosophy as well as the practical laws of punishment while discussing Islamic criminal law. In the classical literature of Islamic law, the focus was on the laws relating to punishment and crime leaving the philosophy except for few scholars who have discussed the philosophy of punishment too. Most of the discussion was focusing on answering the question of "What is Islamic penal law?"

Whereas in modern literature on Islamic criminal law, the discussion is made to answer the question of "What is Islamic penal law?" as well as to answer the most important question of "What is the Philosophy of Islamic punishments?" Answering this question, the Muslim jurists have very elegantly mentioned the hidden logics of Islamic punishments. These scholars are *Dr. Abdul Qādir Awdah, Shēikh Abū Zahra* and *Dr. Ahmad Fathi Bhanassī.*

Chapter Three

General Theories of Punishment in Western Jurisprudence

Introduction.

The western penal philosophy presents several theories which provides the justifying aim of the punishment starting from utilitarian deterrence and retribution and moving forward, adding rehabilitation, restorative justice and incapacitation, rembering the fact that the advocates of each theory consider that single theory sufficient and enough to meet the ends of justice.

The chapter elaborates the basics of five theories of western penal philosophy, naming retribution, deterrence, rehabilitation, restorative justice and incapacitation. The study defines each theory; explain its basic elements along with discussing the criticism on each theory and its possible reponse at some places. The retribution and utilitarianism in the shape of deterrence have been the two oldest and rival theories since greek philosophy however with the passage of time the western penal philosophy witnessed the birth of few more theories extending the scope of penal theories. The twentieth century has witnessed the warm welcome to the theory of rehabilitation whereas the sun of the twenty first century rose with the emergence of restorative justice.

3.1. Retribution.

The word "Retribution is derived from the Latin term *retribuere,* which means to 'repay' or 'pay back'[213]. "The theory of "Retribution" is considered the most popular and oldest theory of punishment. Aristotle was a proponent of the

[213] Anthony Amatrudo, *Criminology and Political Theory,* (Chennai: Sage, 2009), 67.

retribution[214]. The universality of this theory shows that, people at most times and in all areas of the world have felt to reply the wrong with retributive response[215].

Retribution is based upon two main pillars of *Desert* and *proportionality*[216]. It claims that the punishment should only be inflicted upon those who deserve it and the punishment must also be in proportion to the wrong done. The person, who has committed a crime, deserves the punishment. This punishment must not exceed the seriousness of the crime rather it needs to be in equality with the harm caused by the criminal. This means that innocent is not liable to punishment in any case and the punishment can never be on any extreme of being too harsh or too lenient. This is called the standard view of retribution[217]. The expression called, *lex talionis,* explained in the "Exodus" chapter of Bible states;

> *"But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.[218]"*

This text from Bible which laid down the foundation for the retribution shows the presence of the element of revenge in punishment. It demands the punishment not only to be in same proportion but to be in the same way, the offence was committed. The retribution is considered to have the backward looking approach[219] because its main focuses is on those crimes that happened

---

[214] Aristotle, *Ethics* (London: Encyclopedia Britannica, Inc, 1952), Book-V. Note 1131a, 379.
[215] Rob Canton, *Why Punish,* (London: Palgrave, 2017), 14.
[216] Thom Brooks, *Retribution.* (Surrey: Ashgate publishing, 2014), xi.
[217] Brooks, *Punishment,* 33.
[218] Bible, the Book of Exodus (21: 23-25)
[219] Amatrudo, 67.

in past[220], neglecting the future consequences of the punishment. The offender brings the punishment to himself, by inflicting harm to others, which needs to be dealt with the same harm and pain, of what he has inflicted upon the other person by not performing his own duty of respecting others rights and cutting the, agreed upon, mutual-cooperative bond of the society[221].

3.1.1. **Desert.**

The retribution has given central place to *desert.* The element of *desert* demands to punish only the wrong doers. This closes the doors of punishing the innocent. The retribution seeks to give the criminal, what he deserves. To them the consequences are irrelevant. They just deal with the past. Retribution answers the question of 'what happened?' If we come to know that a person has broken a law, this means that he deserves the punishment. Desert may have the two shapes of rewards and punishments. Reward is the universalized gratitude where as the punishment is the universalized resentment [222]. The theory of retribution, extracted from the *'Code of Hammurabi'* is not based upon the mere idea of vengeance, as it refuses the private redress. It demands the violation of a law and in result the retribution punishes the offender by a criminal justice system[223].

---

[220] Ian Marsh, *Criminal Justice,* (London: Routledge, 2004), 12.
[221] Amatrudo, 66.
[222] Ibid., 101.
[223] Brooks, *Punishment,* 17.

The retribution strongly rejects the idea of pardoning or reducing the punishment because the essence of retribution is 'to punish' the offender. There are no exceptions for punishment in retribution. The strongest proponent of retribution, Immanuel Kant argues to punish the murderer even if killing him results in a bloody revolution[224]. It is accepted if we meet a revolution by fulfilling justice, than avoiding it by doing injustice. This view is criticized based upon the argument that by punishing the offender, one cannot undo the wrong done[225].

The *desert* in the retribution is based upon the concept of morality. The source of law, in the retribution is moral values. The 'wickedness' of an act constitutes a crime. The relation of retribution to the very essence of morality makes it difficult for it to present a practical approach in modern day plural societies. Whose morality do we consider to judge the illegality of an act[226]? An act considered immoral by a specific group of people, might be commendable to another group of people. This needs a universal standard of morality which needs to be accepted to all ethnic and religious groups, living in a plural society.

Another problem may arise for *desert* to deal with, is the crimes which have no relation with morality or wickedness, like a traffic offence on an empty road on countryside by a highly skilled motorist. This may be replied with the answer of considering every illegal act as immoral too.

---

[224] Immanuel Kant, *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996), 105.
[225] Andrew Von Hirsh, *Principled Sentencing*, (Oxford: HART Publishing, 2009), 112.
[226] Brooks, *Punishment*, 21.

3.1.2. **Proportionality.**

Retribution not only answers to 'who we punish' but also answers to the most important question of 'how much do we punish'? Proportionality has been playing an important role in the discourse on penology as some legal systems have adopted a constitutional bar against the excessive punishments[227]. The rationale behind the proportionality is that if a crime is punished severely, this shows the highest degree of disapproval for that act as compared to the crime punished less seriously. It also makes the wrongdoer feel the disapproval of his act[228]. In the old ages, retribution was considered the paying back of the debt[229]. To answer the most important question of proportionality, three divisions to measure the seriousness of the crime were set out in 1991, to make the punishment proportional to the crime. The division made, is; the crimes so minor that a fine or discharge is appropriate, serious enough to impose a community sentence and so serious that only imprisonment is appropriate[230]. The punishment in retribution changes with change in the nature and seriousness of the crime because of having its bases in the wickedness of an act. E.g. A commits murder and B commits theft. Both have offended intentionally. Both are morally responsible and deserve the punishment. But the punishment of A will not be the same to the punishment for B, because the wickedness or seriousness of the crime of murder has made it to be punished more severely than theft. Immanuel Kant says;

---

[227] Von Hirsh, 118.
[228] Christopher Bennet, "The varieties of retributive experience", *Philosophical Quarterly*, Vol 52, 2003, P-153.
[229] Marsh, 12.
[230] Ibid., 14.

> *"Whatever undeserved evil you inflict upon another within the people, you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.*[231]*"*

This passage of Immanuel Kant makes it clear that the retributivists believe in strict equality. They argue less punishment for small offences, so that the offender may not get more punishment than deserved. Likewise the grave offences must be dealt with harsh punishments, so that the offender may not escape from what he deserved. The punishment should fit the crime[232].The theoretical aspect of retribution looks so compelling that regardless of being so primitive; it never lost its importance in the legal debate on punishment and crime because its proponents believe that it includes corrective justice of torts, natural right concept of property and theories of contracts[233]. However the practical justification of this theory needs a bit more from its proponents because if they consider retribution to be the best aim of punishment, they would have to present a logical and practical framework for this continuously and rapidly changing modern world.

Furthermore, the retributive theory is considered as 'primitive' to some of the philosophers. They argue that proportionality cannot be achieved in each case of punishment[234]. The concept of strict equality is also criticized by the opponents of the retribution that it is unachievable in every case. The crime of

---

[231] Kant, *The Metaphysics of Morals*, 106.
[232] Michael Davis, "How to make the Punishment Fit the Crime", *Ethics*, Vol 93, 1983, P-727.
[233] Michael S. Moore, *Placing Blame: A theory of Criminal law*, (Oxford: Oxford University Press, 2010), 104.
[234] Brooks, *Punishment*, 28.

theft, rape, high trason, revolt and defamation cannot be dealt with retribution.

3.1.3. Other aspects of Retribution.

There are some other aims of retribution, presented by its advocates over the period of time. The first aspect is that retributive punishment actually makes the criminal to 'pay back[235] the debt' which he owed to the society[236]. It is further said that the retributive punishment aims to remove the unfair advantage, obtained by the criminal. It is also said that the main purpose of retributive punishment is to annul the crime. Hegel says;

> *"The cancellation of crime is retribution in so far as the latter, by its concept, is an infringement of an infringement.[237]"*

This means that the response to crime is not confined to the concept of inflicting pain; rather it actually cancels the crime and effect of the crime. The crime if not annulled would remain a valid act and annulling it restores the right too[238].

The most important version of retribution is the theory of 'negative retribution.' Nigel walker calls the negative retribution as the "distributive retribution"[239]. The negative retribution focuses on the first aspect of standard view of retribution, i.e. the *desert*, where as it refuses to bind itself with the

---

[235] Amatrudo, 67.
[236] John Cottingham, "Varieties of Retribution", *Philosophical Quarterly*, Vol 29, 1979, 238.
[237] Friedrich Hegel, *Elements of the philosophy of right*, (Oxford: Oxford University Press, 1967), 127.
[238] Cottingham, 244.
[239] Nigel Walker, *Punishment, danger and stigma*, (Oxford: Basil Blackwell, 1980), 26.

second aspect of 'proportionality.' They argue that the severity or seriousness of the punishment may be linked with the consequential approach[240] rather that to the strict proportional approach. This means that the negative retribution may punish a criminal more or less than what he deserved. This version of retribution presents a mixed theory of punishment which will be discussed in detail, in next chapter.

In a nut shell the retribution repays (*repayment theory*) the criminal with punishment (*penalty theory*) because he deserves the punishment (*desert*) for being guilty and not innocent (*minimalism*). The punishment by society satisfies (*satisfaction theory*) the victim, regards the law abiding citizen (*fair play theory*), disapproves the crime (*denunciation theory*) and cancels it to restore the right (*annulment theory*)[241].

3.2. Deterrence.

Deterrence is the second most popular justification of punishment. It is considered as the primary alternative to the very basic theory of punishment, 'the retribution'. As we discussed earlier that the retribution is a backward-looking theory, deterrence is opposite to that. It is based upon the consequential approach, looking-forward to reduce the future criminality, if not ending it[242].

---

[240] Brooks, *Punishment*, 33.
[241] Cottingham, 238-46.
[242] Brooks, *Punishment*, 35.

The very essence of the deterrence makes it favourable to be advocated by the utilitarians[243]. The utilitarians argue to seek utility (have pleasure and avoid pain) from every act and in case of punishment it takes the shape of avoiding pain and having crime free society. That is why they focus on looking into the consequences of the punishment in the future rather than sticking to the past act like retributivists. The deterring effect stops a thinking individual from committing an offence[244]. The deterrence with a consequential approach was described by the renowned criminologist, *Cesare Beccaria,* in his famous book by saying;

> *"... The purpose of punishment is not to inflict pain on a sentient being, nor to undo the crime that has already been committed. .....the purpose then is none other than to prevent the actions from doing further damage to our citizens and to prevent others from doing the same thing. Thus, punishment, and the method of inflicting them must be chosen according to the amount needed to make an impression more useful and more lasting on the minds of men, and less to torment the body of the offender.*[245]*"*

The foundation of deterrence lies in the human psyche which is considered to be selfish and this selfishness inspirits the individual to astray from the wrong path and to abide by the law, which results in securing himself from the pain of punishment. According to some authors the incapacitation or imprisonment is also a sub-version of deterrence[246]. The fear of imprisonment would make the individual to avoid the violation of the law because he would never want to seize his freedom. This means that the deterrence deal with the

---

[243] Brooks, *Punishment,* 35.
[244] Paul H. Robinson & John M. Darley, 'The Role Of Deterrence In The Formulation Of Criminal Law Rules: At Its Worst When Doing Its Best', *Georgetown Law Journal,* Vol 91, P-950.
[245] Cesare Beccaria, *On crime and punishment,* (New Jersey: Transaction publishers, 2009), 33.
[246] Brooks, *Punishment,* 37.

crime even before it occurs. It creates the fear for violation of law in the society, in order to make the people obey the law. The deterrent effect of the punishment compels a person to not commit a crime because of the fear of the pain of the punishment which might be inflicted on him in case of violation of law[247].

3.2.1. Desert.

The punishment in the deterrence, as a utilitarian theory, is linked to the very important aspect of future benefits of punishment. The consequential approach, at one hand, requires the punishment of the criminals, but on other hand the forward-looking approach or the future utility of the punishment in deterrence does not rule out the punishment of innocent (telishment), if punishing him results in crime control in the future[248]. This approach constitutes a very strong objection on the deterrence, which is always presented by the retributivists. The retribution strongly believes in *desert,* which seems more compelling whereas the philosophy of deterrence demands the future deterrent effect even if that is achieved by punishing an innocent.

Hegel criticizes deterrence by saying;

---

[247] Raymond Paternoster, 'How much do we really know about criminal deterrence', *Journal of criminal law & Criminology,* Vol 100, 2010, P-782-783.
[248] Brooks, *Punishment,* 39.

> *"to justify punishment in this way is like raising one's stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom*[249]*. "*

The notion of punishing the innocent is never argued by any proponent of deterrent theory rather this seems to be extracted from the writing of the famous advocate of deterrent theory, i.e. *Cesare Beccaria,* who discussed the need of punishing a person who has not committed a crime but keeping him alive in the situation of anarchy may result in danger to the state security. He says;

> *".... when deprived of liberty the citizen still has relationship and power that may concern the security of the nation; since his very existence could produce a dangerous revolution in a stable form of government*[250]*."*

The other main proponents of deterrence like Fichte denied the punishment of any innocent. Fichte says; 'in a well governed state, no innocent person should ever be punished[251].' Secondly the consequential nature of deterrence, apparently justifies the innocent's punishment, as the very basis of future utility may accept this if the essence of deterrence (future-utility) is justified. The *desert* demands the justification of punishment. Retribution fulfils it by focusing on past crime regardless of any other aim. Deterrence faces problem with its *desert.* That is to deal with undeterrable[252]. Retribution completely neglects it whereas the deterrence finds it hard to deal with this. If the consequences of punishment are not helping in reducing the crime in future

---

[249] Hegel, *Philosophy of right,* 99.
[250] Beccaria, 71.
[251] J. G Fichte, *Foundation of Natural Right,* (Cambridge: Cambridge University Press, 2000). 232.
[252] Brooks, *Punishment,* 40.

then the deterrence loses its justification. The objection of punishing innocent is replied by presenting deterrence as self defence by the society against the crime. The self defence shows threat when it feels to be attacked. The fear of aggression allows for a person to show force in return, in order to threaten the aggressor and to avoid the coming harm[253]. The show of threat can result in use of force as self defence, against the aggressor when the assault is just about to begin. In this case the person attacked in self defence has not yet committed a crime, which means he is innocent. But if this 'innocent' is left unattended, may cause severe harm and grave loss[254]. Jeremy Bentham, a leading proponent of deterrent theory writes about the quantity of punishment in deterrence by saying;

> *"The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.*
>
> *Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.*[255]*"*

Cesare beccaria argues for the punishment to be equal to the harm done to the society along with the degree of temptation faced by the criminal[256].

3.2.2. Criticism.

The retribution argues for the proportional punishment. The deterrence neglects the proportionality and presents a forward-looking approach. The

---

[253] Anthony Allis, 'A Deterrent theory of Punishment', *Philosophical Quarterly,* Vol 53, P-343-344.
[254] Victor Tadros, 'Punishment and Duty', *The ends of Harm, The moral foundations of criminal law,* (Oxford: Oxford University Press, 2011), 269.
[255] J Bowring, 'The Principles of Penal Law', *The Works of Jeremy Bentham* (1838-43), (Oxford: Oxford University Press, 1983) 396.
[256] CBeccaria, 19.

deterrence finds a major issue here. This is the answer to the questions of, 'how to measure the deterrent effect for different people and different times?' Because what may deter A, may not deter B. Likewise what may deter today may not deter tomorrow[257]. The studies are showing that the punishments are not having the deterrent effects. The ratio of reoffending of the punished criminals is huge. Most of the criminals reoffend upon release. The data confirms that 64.5% of criminals punished with 12 months or less imprisonment, reoffended[258]. The same can be experienced with financial punishments. Peopel reoffend even after being subject to fines for several times. The most alarming issue in the punishments of imprisonment is that the prisons produce better criminals rather than ending the crime. Prisons help the less experienced criminals to transform them into professional offenders[259]. The proponents of deterrence answer to this problem, that punishment can never have the absolute and complete deterrent effect, neither it is totally un-deterrent. The best punishment is that which can show a substantial deterrent effect[260].

The deterrence is considered as a form of self defence, against crime. Countering the aggression may have following responses; doing nothing, which is to be opted in case of slight threat. The second response may be in shape of using force, will be used to counter the grave harm[261]. This view tries

---

[257] Brooks, *Punishment*, 41.
[258] Proven Reoffending Statistics Quarterly Bulletin, October 2016 to December 2016. Ministry of Justice. UK.
[259] Brooks, *Punishment*, 43.
[260] Ibid., 45.
[261] Anthony Allis, 'A Deterrent theory of Punishment', *Philosophical Quarterly*, Vol 53, P-343.

to provide the answer to the question of desert. The slighter the harm is the minor the deterrence will be. The graver the harm is the massive the deterrence will be. The deterrence as self defence fights against the crime and relies upon the limit which fulfils the sole objective of eliminating crime. Secondly this also justifies punishing the innocents. Linking deterrence with the self defence paves the way for the punishment of the innocent, who has not yet committed the crime but is likely to commit it. The punishment in deterrence needs to be slightly higher as compared to retribution because it has to achieve future utility too[262]. But the proponents of deterrent have failed to provide any compelling model of the required punishment to deter for different criminals and different times. Deterrence is further criticized, that seeking the future-utility from the punishment looks at the offender as a mean to be used to achieve the deterrent effect. Looking at the criminal as a tool is against the honour and dignity of a human being. This behaviour further results in treating the criminal with disgrace and cruelty and harms the offender. This view was replied by the advocates of deterrence by saying that the state harms the law abiders, even, while seeking future utility. Harming is not confined to punishment. He presents the example of the construction of highway, which may result in benefiting people in future but is harming them at present and especially those who are living nearby are more likely to be harmed by noise etc of the highway[263]. However the

---

[262] Matthew Haist, 'Deterrence in a Sea of Just Deserts ', *Journal of criminal law and criminology,* Vol 99, 2009, P-819.

[263] Zachary Hoskins, 'Deterrent Punishment and respect for Persons', *Ohio State Journal of Criminal law,* Vol 8, 2011, P-371.

deterrent effect in punishment is inevitable as the studies shows that the ratio of juvenile offenders is increasing at rapid pace which demands, lowering the age for adult prosecution along with longer term of imprisonment[264]. Deterrence is capable of playing useful role in coping with increased number of crimes.

Deterrence theory is applicable in every field of law. It is applicable in the corporate sector too. The court can punish a corporation with deterrence by imposing heavy fines, which eventually results in the end of that corporation. This is called corporate death penalty[265].

3.3. Incapacitation.

The theory of Incapacitation is another kind of utilitarian theory. It aims to prevent the future crime by disabling the criminal[266]. This theory is also known as 'preventive theory or theory of prevention.' The incapacitation focuses to eliminate the criminal's opportunity for crime[267]. This elimination of opportunity to crime can take several shapes, the most famous of which are imprisonment and death penalty. The famous utilitarians like *Bentham, John Stuart Mill* and *Austin* supported the preventive theory[268] because of its

---

[264] Paul H. Robinson, 'Punishing Dangerousness', *Harvard law Review,* Vol 114, 2001, P-1434.
[265] Assaf Hamadani & Alon Klement, 'Corporate crime and deterrence', *Stanford Law review,* Vol 61, 2008, P-278.
[266] Shikha Mishra, 'Theories of Punishment; A Philosophical aspect', *Imperial Journal of Interdisciplinary Research,* Vol 2, Issue 8, 2016, P-76.
[267] Terance D. Miethe & Hong Lu, *Punishment,* (Cambridge: Cambridge University Press, 2005), 18.
[268] Mishra, 76.

consequential effect in the future. This theory prevents crime by removing the physical power of the offender to commit the crime again[269]. It is based on the idea of simple restraint which puts the criminal in walled prisons, house arrest or exile. This theory works against the predicted reoffending, but to measure the prediction of reoffending is quite difficult. Number of studies and researches were conducted which suggested the existence of very limited capacity to predict future reoffending[270].

3.3.1. Prison.

Imprisonment is the most common form of incapacitation and this is so common that it makes the incapacitation the main goal of the punishment. This further helps in achieving other penal goals such as rehabilitation of the offender[271]. The theory of restorative justice also demands the presence of prisons where the criminal is kept until the goal of restoration is achieved. The Long precautionary sentences like imprisonment, results in overloaded prisons[272] which puts considerable pressure on the economy of the country. This overcrowded prisons along with the poor conditions in the prison results in disturbance in the prisons. The most extreme form of this disturbance is the increased number of suicide in the prisons[273]. The prisons are considered as training centres for minor criminals, which help them into transforming into

---

[269] Canton, 125.
[270] Von Hirsh, 75.
[271] R. A. Duff & David Garland, *A Reader on Punishment*, (Oxford: Oxford University Press, 1995), 238.
[272] Nigel Walker, *Why Punish?* , (Oxford: Oxford University Press, 1991), 36.
[273] Marsh, 199.

professional criminals, that is why the ratio of reoffending is extremely high in recently released prisoners[274].

The critics of imprisonment argue that the imprisonment of a criminal affects not only the criminal but it engulfs the entire family of that criminal who equally suffer from pain and continuous feelings of loneliness[275]. In such case the imprisonment not only results in harm to the family of the offender but eventually results in the harm to the society and community. The prison is considered to be the most expensive kind of punishment where a criminal is kept for a long period of time and is provided with all the necessities of life which are paid from the taxpayer's money[276]. The taxpayer's saves themselves from the danger of the offender but at very high cost. The high crowded prisons raised the issues of security. It is seen that the increased number of prisoners and lack of adequate staff results in escapes from the prisons[277]. The 2003 data on the ratio of male and female prisoners show that the 94 %of criminals were male which resulted in the male domination in prison system. This male domination makes the female stay in prison, way difficult[278], though the number of female prisoners is rapidly increasing in recent years. The use of prison as incapacitation seems unsuccessful when it fails to stop crimes because the criminals successfully commit crime, even in jail[279]. Despite all these objections, the penologists have still to find any better

[274] Proven Reoffending Statistics Quarterly Bulletin, October 2016 to December 2016. Ministry of Justice. UK.
[275] Javed Ahmad Ghamidi, *Al-Burhan,* (Lahore: Al-Mawrid, 2009), 144.
[276] Brooks, *Punishment,* 42.
[277] Marsh, 200.
[278] Ibid., 200.
[279] Canton, 125.

alternative to the prisons. Imprisonment is so compelling that no penal system in world can deny its presence.

3.3.2. Capital Punishment.

Capital punishment is most famous kind of incapacitation. The unreformable criminals, those who become a substantial danger to the society and those who invade on the existence of individual as well as the community (state) are supposed to lose their right to life and are subject to capital punishment. The capital punishment as incapacitation, due to its deterrent effect[280], has been a proving very useful penalty in reducing crime rate. The critics of capital punishment call it a barbaric and cruel punishment. The defenders of it consider it very important and indispensible part of a penal system. Immanuel Kant is one of them, who consider it not only morally justifies but even required. It is considered the only kind of punishment which can treat the most heinous crimes like murder, terrorism and high treason. Most of the countries in Europe have illegalized the capital punishment from their penal systems but there are some other countries like USA and china where it is still a legal penalty. The studies have shown the importance of capital punishment as it is said that one death penalty in United States have saved eighteen murders[281]. This confirms the deterrent effect along with the usefulness of capital punishment in fight against crime.

---

[280] Cass R. Suntein & Adrian Vermeule, 'Is Capital Punishment morally required?', *Stanford Law Review*, Vol 58, 2005, P-703.

[281] Cass R. Suntein & Adrian Vermeule, 'Is Capital Punishment morally required?', *Stanford Law Review*, Vol 58, 2005, P-706.

John Stuart Mill very strongly argues in favour of the death penalty, in a speech made in the parliament. A short Para from his speech is given below to understand the logic behind the capital punishment. He says;

> *"When there has been brought home to any one, by conclusive evidence, the greatest crime known to the law; and when the attendant circumstances suggest no palliation of the guilt, no hope that the culprit may even yet not be unworthy to live among mankind, nothing to make it probable that the crime was an exception to his general character rather than a consequences of it, then I confess it appears to me that to deprive the criminal of the life of which he has proved himself to be unworthy – solemnly to blot him out from the fellowship of mankind and from the catalogue of the living – is the most appropriate, as it is certainly the most impressive, mode in which society can attach to so great a crime the penal consequences which for the security of life it is indispensible to annex to it.*[282]*"*

3.3.3. Other shapes.

Incapacitation or prevention possesses a variety of punishments. In past the tribal banishment to the wilderness, the English transportation of different criminals to other colonies and the citizen's exile in ancient Greek society are the examples of preventive punishments. The modern day exile is imposed with same philosophy of disabling the offender by removing him from the society. Incapacitation as financial punishment can be in the shape of restraint of trade agreements, (الحجر على السفيه) restraining orders in domestic violence, cancellation of licences, seizing of bank accounts. It can be imposed as

[282] John Stuart Mill, 'Speech in Favour of Capital Punishment', in Peter Singer (ed) *Applied Ethics,* Oxford; Oxford university Press, P-98. Reprinted from *Hansard's Parliamentary debates, 1868.*

administrative punishment by removal from an official capacity. The most exercised form of punishment is imprisonment which is supposed to remove the criminal from the society and results in the reduction of crime from the society[283]. The sexual offences used to be punished by the castration of sex offenders[284]. This punishment prevents the sexual offender from doing any sexual activity in future which is actually based upon the theory of incapacitation. Most of the administrative penalties are preventive in nature. The removal from office, demoting to lower scale and changing the portfolio are some of the examples of incapacitation. The maiming of thieves in ancient societies is another example, which shows the consequential and utilitarian approach of punishment because maiming of the hand of the thieve results in disabling him from committing theft in future[285]. The preventive nature of punishment is so useful that it never gets excluded from the penal system of the world since ages.

3.4. Rehabilitation.

Rehabilitation aims to reform the offender. It holds that the purpose of punishments should be to change the offender from being a criminal to a law abiding citizen[286]. The rehabilitation has two general views. One is called the moral or deontological view of rehabilitation. This view holds that the rehabilitation of an offender must be sought just for being it morally good. Transforming a criminal into a good human being is a virtue in itself

[283] D. Miethe & Hong Lu, 18.
[284] Duff & David Garland, 238.
[285] Ibid., 238.
[286] Brooks, *Punishment*, 51.

regardless of its positive consequences for the society. Every individual has a moral importance and he needs attention and care which necessitates it to reform him. The other view is based upon the consequential approach that reforming a criminal may result in a general good to the society in various aspects of peace, saving money, harmony and reducing crime[287]. Reformation is useful when a criminal considers his past actions, wrong. Guilt and regret is there on the part of criminal.

3.4.1. Types of Rehabilitation.

The rehabilitation works in various forms, varying from person to person, based upon the criminal's mental, educational, domestic, health and financial background. The drug related crimes, alone, are costing about £330 million[288]. The rehabilitation can be in the shape of therapy because the UK drug commission report mentions that every 8th arrestee in drug cases is found to have heroin addiction. The criminals with mental problems are dealt with CBT (cognitive behavioural therapy) to rehabilitate them as the studies confirm the excessive rate of mental health issues in prisoners[289]. Another form of rehabilitative treatment is recreational therapy where the offender is reformed by engaging him into the positive activities like sports and arts etc

---

[287] Brooks, *Punishment*, 52.
[288] https://www.ukdpc.org.uk/wp-content/uploads/Policy%20report%20-%20Reducing%20drug%20use,%20reducing%20reoffending%20(summary).pdf P-2.
[289] N. Singleton, H.Melzer, and R. Gatward, *Psychiatric Morbidity among prisoners in England and Whales*, (London: Office of National Statistics, 1998)

which can have a significant positive impact on the offender's personality[290]. Training and education are also considered a useful form of rehabilitation. The lack of qualification and skills results in the minimum options to get settled in the society. This situation sometimes forces them to indulge in criminal activities because studies have proved that about 70% of prisoners were unemployed[291]. The rehabilitation process may prolong for some offenders who need to get involved in counselling session and continuous monitoring even after they got released from the prison. This helps them in gaining social integration[292]. In complex cases the criminal's rehabilitation requires diverse approach to treatment which may result in combination of several types of rehabilitation like therapy, teaching skills and counselling sessions.

The nature of rehabilitation requires dealing the each case differently even though the crimes are same. It is criticized that if rehabilitation is considered as a punishment, then why two same criminals are punished differently, one among them is punished harder than the other. This seems illogical and against justice to treat two thieves differently whereas in few cases to treat a murder and traffic offence the same way[293]. The proponents of rehabilitation argue that the criminal is treated based upon his background which brought him to the crime, which definitely needs difference in reformation process.

---

[290] Briege Nugent & Nancy loucks, 'The Arts and Prisoners', *Howard Journal of Criminal justice,* Vol 50, 2011, P-367.
[291] Kevin McGrath, 'Ready for the real World of Work' in Sadiq Khan (ed), *Punishment and Reform; How Our Justice SYtem Can Help Cut Crimes* (London: Fabian Society, 2011), 73.
[292] Canton, 113.
[293] Brooks, *Punishment,* 58.

3.4.2. Judging Success.

The rehabilitation has been successful in reforming the criminals and reducing future crimes. The studies have shown that the reconviction of the reformed criminals has reduced to 5 – 10 % by the rehabilitative programs[294]. The cognitive training and medical treatment along with extra support after release from prison can result in big difference in reducing crime. Despite all success, the theory of rehabilitation has its own limitations. It only works where the offender feels guilty and agrees to cooperate in the process of rehabilitation. In opposite cases this won't work. Likewise the rehabilitation is only a short portion of dealing with criminals due to its specific nature. It gets much harder when the number of reported crime becomes much less than the actual occurrence of crime. This method of treating requires political commitment along with extra investment[295], which may result in extra budget form the taxpayers' money.

The other problem with this theory is that it believes in the reformation of the offender, but what if a criminal is unreformable? He becomes habitual or serial offender. The rehabilitation finds itself in hot waters to deal with this. It looks like it has failed. The constant danger posed by the serial and habitual offender needs deterrent punishment. As argued by Jean-Jacques Rousseau:

---

[294] S. McMullen and D. Ruddy, *Adult Reconviction in Northern Ireland 2001: Research and statistical bulletin 3/2005* (Belfast: Northern Ireland Office, 2005)
[295] Thom Brooks, *Punishment*, (New York: Routledge, 2012), 60.

> *"There is not a single wicked man who could not be made good for something. One has the right to put to death, even as an example, someone who cannot be preserved without danger.*[296]*"*

The core idea of rehabilitation is nothing but to look at the criminal as an ill person who needs to be cured from this illness. This theory has less to deal with the moral values or ethical aspect of the punishment, instead it focuses to make the offender a useful citizen of the society who plays his positive role in making the community prosper and flourish. However moral education can play an important part in the reformation of a criminal[297]. It needs trained support officers for mentoring and monitoring after release. It required the criminal to be kept in the prison during the period required for the rehabilitation process. That is why it is called as a punishment which keeps the offender in prison. It is offender centric theory.

3.5. Restorative Justice.

The restorative justice is considered as an alternative to the theories of punishment. The restorative justice aims to restore the relationship, damaged by the crime, between all the stake holders of the society, i.e. the offender, the victim and the community[298]. The first country to legislate the restorative justice system is New Zealand when the Families Act 1989, introduced the

---

[296] Jean-Jacques Rousseau, *The Social Contract and other later Political Writings,* (Cambridge: Cambridge University Press, 1997), 65.
[297] Brooks, *Punishment,* 56.
[298] Ibid., 64.

idea of family group conferences[299]. It rejects the idea of imprisoning the offender (though it does not completely rule out the use of prisons) rather it is based upon the communication, using the *restorative conference,* rejecting the idea of trail where one party emerges as losser and the other as winner. The restorative process may be conducted in the shape of victim-offender indirect mediation, victim-offender direct mediation and victim-offender group mediation for those who feel frightened to meet their offender[300].

Restorative justice aims to end up with all parties winning, if possible, as it is a forward-looking consequential theory. It restores the offender's dignity, restores the communal bond and prevents the future injustice[301]. The victim is acknowledge that he was wronged by someone who seeking to amend that, along with receiving the compensation of damage done to his property[302]. The restorative justice works only where the criminal feels guilty and takes responsibility for his actions [303] . Restorative justice may include the therapeutic and mental health treatment just like rehabilitation[304]. But in case the offender fails to cooperate, he may face real consequences. The proponents of restorative justice agree that it is not applicable in each and every case. They believe that its applicability is possible only in minor cases. It may be a part of larger general penal process. Restorative justice is operated

---

[299] David J Cornewell, *Criminal Punishment and Restorative Justice,* (Winchester: Waterside Press, 2006), 119.
[300] Roger Graef, *Why Restorative Justice?* (London: Calouste Gulbenkian Foundation, 2002), 18.
[301] Andrew Ashworth, *Sentencing,* in *The Oxford Handbook of criminology,* (Oxford: Oxford University Press, 1994), 822.
[302] Graef, 46.
[303] Ibid., 18.
[304] Brooks, *Punishment,* 66.

by a trained facilitator[305] where the process is carried on after signing a mutual contract between victim and offender which is agreed on in 98% of restorative conferences but to opt for the restorative justice is entirely discretionary. Parities are free to join or deny it. The Restorative Justice gives the victim an opportunity to have more central role in the judicial process to bring victim back into the heart of the criminal justice system[306].

In the restorative justice the victim has the opportunity to tell the offender, the impact of the crime the victim faces. It is believed to be more helpful in making the criminal understand the harm caused by his acts and in accepting the responsibility for his crime. Eventually sharing the experience helps in preventing future crimes[307].

3.5.1. Community Sentences.

Sometimes the mediation or the restorative conferences identify a practical way to amend the harm received by the victim. This is called the community sentencing. The community sentences are also considered as punitive rehabilitation and can be in shape of unpaid work[308]. Repairing of broken windows, doors and fences are various kinds of community sentences. Some victim shopkeepers required the offender to work for them to repay them the debt and to see the impact of harm done by them[309]. Along with the tangible

---

[305] Restorative Justice Council Website https://restorativejustice.org.uk/becoming-restorative-practitioner-0
[306] Graef, 18.
[307] Ibid., 33.
[308] Brooks, *Punishment*, 73.
[309] Graef, 47.

reparation, the most important part of feeling apology for the victim by the offender is deemed necessary. This symbolic reparation must be sincere. It can be in the shape of a letter of apology, box of chocolates or bunch of flowers. The offender will have to act accordingly If the victim demands the offender to work for the community instead of him in shape of cleaning the parks, working in old age houses, looking after the disabled children or serving in hospital for a specified period of time[310].

3.5.2. Shame Punishments.

The most controversial form of restorative justice is the concept of shame punishments. In this punishment the offender's feelings are targeted with the view to make him understand the pain of his offence. The offender may be ordered to paste the statements about his offence, on his car etc or to publish his photo in the newspapers[311] with captions, like; *'Dangerous Sex Offender – No Children allowed'* or wearing T-Shirts, stating, *'I am a child sex offender'*. The proponents of shame punishment argue that it plays an educative role in recognizing guilt and help in future reformation. It is said that shame punishment aims to make the offender feel the guilt where the offender refuses to accept the responsibility for his crime[312]. Restorative justice faces several limitations in its applicability. The first problem is that it is applicable in very limited cases.

---

[310] Graef, 48.
[311] Dan M. Kahan and Eric A Posner, 'Shaming White Collar Criminals; A proposal for reform of the Federal Sentencing Guidelines', *Journal of Law and Economics,* Vol 42, 1999, P-365-91.
[312] Brooks, *Punishment,* 77.

Secondly the stake holder community, whose trust and relation is restored, needs to be identified. Which restoration of relation of which members of the community is required?[313]. The identification of the community can be related to those who received the effect of crime just like family, friends, neighbours and co-workers etc. Thirdly the restorative justice requires the participation of all the stake holders including victim and the members from the community. Now what if the victim or the community is not interested in this process? Fourthly the guilt involved at the part of the criminal requires the apology. This apology is usually directed to the victim. Here the question arises that if the purpose of restorative justice is to restore the damaged relationship among the criminal and the other stake holders, which includes the community too, then why not to make it compulsory that the apology must be from the community too, along with victim[314]. However the numbers show the usefulness of restorative justice. 85% of victims and 80% of offenders were satisfied with their experience of restorative justice[315].

[313] Ashworth, 94.
[314] Brooks, *Punishment*, 81.
[315] https://restorativejustice.org.uk/resources/ministry-justice-evaluation-implementing-restorative-justice-schemes-crime-reduction-2

Conclusion.

There are two main schools of thought in the philosophy of punishment. One sticks itself to the past offence and is called the backward-looking school. This school of thought seeks to impart justice by punishing the offender in accordance with his crime, regardless of the future consequences of the punishment. Theory of 'Retribution' is the famous example of this school of thought. Expiatory theory is another example of it related to the past act. This school emphasizes on the administration of justice, by punishing the culprit, at any cost.

The second school of thought is called the forward-looking school, which focuses on the crime reduction in the future and designs the punishment in such a way that it best benefits in the upcoming days. This school is also called the utilitarian school which focuses on not mere infliction of pain but on achieving the more benefit and utility from the punishment to help eliminating crime in future. The consequences of punishment are given foremost importance by this school of thought. 'Deterrence' theory is representing this school since ages. Negative retributivism, incapacitation or prevention, reformation, shame punishments, community sentences and restorative justice are other famous examples of this school.

Chapter Four

Hybrid Theories of Punishment in Western Jurisprudence

Introduction.

Each single theory of punishment in western penal philosophy contains some specific penal goals in the shape of *'deserved proportional punishment'* of retribution, consequential approach of *'crime reduction'* in utilitarian theories of deterrence, incapacitation and rehabilitation along with *'restoration of broken relationship,* among society's stake holders in restorative justice theory but none of above theories is sufficient alone which compelled the scholars to provide a single coherent framework, incorporating all these penal goals in one unified theory.

This chapter studies the attempts of several western philosophers who tried to combine the different penal golas of different theories in one single penal theory which may overcome the shortcomings of the single theories along with benefiting from the useful penal goals of all theories which may get neglected if stuck to a specific single classic theory of punishment. In this regard the works of Professor John Rawls, Professor Herbert Hart and the recently presented unified theory of Professor thom Brooks have been discussed in detail.

4.1. Professor John Rawls' Mixed Theory of Punishment.

John Rawls (1921 - 2002) was an American political and moral philosopher. He has written extensively on the philosophy of punishment. He is considered to be the first philosopher who tried to present a mixed theory of

punishment by combining the two main stream theories of punishment, i.e. the retribution and the utilitarianism in his article entitled 'Two Concepts of Rules'[316]. It was looking quite difficult to combine the two opposite concepts. The retribution as a backward-looking theory focuses on the wrong done and utilitarian deterrence, as a forward-looking theory focuses on the future benefits of the punishment. His work resulted in inspiring other legal philosophers to present the hybrid theories in the shape of Herbert Hart and in the evolution of negative retribution[317]. Rawls explains his view by presentation the example of a father and son. He writes;

> *"We might try to get clear about this distinction by imagining how a father might answer the question of his son. Suppose the son asks, "Why was I put in jail yesterday?" The father answers, "Because he robbed the bank at B. He was duly tried and found guilty. That's why he was put in jail yesterday." But suppose the son had asked a different question, namely, "Why do people put other people in jail?" Then the father might answer, "To protect good people from bad people" or "To stop people from doing things that would make it uneasy for all of us; for other- wise we wouldn't be able to go to bed at night and sleep in peace."[318]"*

In this example he tried to explain the philosophy of the two opposite theories of punishment, i.e. deterrence and retribution, in a way that one justifies the punishment for an act committed (retributive theory) and the other justifies the need for a institution of justice (utilitarian theory). The first question deals with a specific person where everyone looks back, including the judge, the jury and the law. Whereas the second answer elaborates the need for an

---

316 John Rawls. 'Two Concepts of Rules', *The Philosophical Review*, Vol. 64, No. 1 (Jan., 1955), 3-32.
317 Brooks, *Punishment*, 90.
318 John Rawls. 'Two Concepts of Rules', 5.

institution of punishment. The application of this institution results in the consequences, which benefits the interest of the society[319]. He further explains his view by presenting the example of judge and legislator. He says that the judge looks back to what happened and what is the punishment for that wrong. The legislator looks forward, to reduce the crime in the future, while legislating. The action of judge makes him justifying the retributivists view whereas the legislator looks like a utilitarian[320]. By presenting these examples the Rawls tried to justify his mixed theory of punishment. The example explains that in one case of criminal violation, we can justify both views of retributive desert and utilitarian consequential benefits, which apparently looks in complete contradiction. This further means that while deciding the person to be punished, we should answer to the first question of the son and we should act like a judge. This means that we should look at back that whether any wrong is done? Or any law violated? If answer to this question is 'Yes' then the person who committed the wrong and violated the law is subject to punishment. Looking in the past, while deciding 'whom we punish?', excludes the objection of punishing innocent. Looking back, just like a judge, as exemplified by Rawls, and we found no violation of law, enables us to stop imposing any kind of punishment. The innocent will never be punished, though the utilitarians have never argued for innocent's punishment and they believe that only guilty is subject to punishment, as

[319] Rawls, 6.
[320] Ibid., 6.

appears from the term punishment, which is always used to deal with any crime or offence[321].

The answer to second question of the son to his father or the office of a legislator deals with the future aspects of the punishment. The punishment will be inflicted only upon the guilty (backward-looking) but to achieve the maximum future utility by reducing the crime (forward-looking). This looks like the view which resulted in the emergence of the mixed theory of 'negative retribution'[322]. Rawls excluded the retributive proportionality, which strictly demands the distribution of punishment in equality with the severity of the wrong done. Instead Rawls considered the consequential deterrent effect of the punishment more useful in crime reduction that is why he opted for it in his mixed theory.

In short Rawls mixed theory takes the desert (justifying aim of punishment) from retribution whereas he goes for utilitarian approach of consequential benefits in the quantity of punishment (distribution of punishment)[323].

4.2. Professor H.L.A Hart's Mixed Theory of Punishment.

Herbert Lionel Adolphus Hart (1907 - 1992), usually known as H.L.A Hart was a professor of jurisprudence at Oxford University and was a prominent legal philosopher. Herbert Hart got inspired from Rawls work and tried to

[321] Rawls, 7.
[322] Brooks, *Punishment*, 93.
[323] *Ibid.*, 92.

further promote the mixed theory of punishment. Like Rawls, Hart worked to combine different penal goals in one legal framework which could answer all the questions related to the philosophy of punishment because he believed that the past justification of 'fear' and 'desert' of deterrence and retribution is no longer satisfying in the modern world[324]. Hart believed that relying upon one theory of punishment and trying to get answers to all the questions related to the philosophy of punishment, is impossible. He states;

> *".... many are now troubled by the suspicion that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution, or Reform) in terms of which all questions about the justification of punishment are to be answered, is somehow wrong*[325] *.....;*

Hart further explains the need of mixed theory of punishment by stating;

> *"What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?*[326]*"*

Hart argues that the punishment needs to be in proportion to the crime, which is what retribution argues, but the modern criminal law will not be able to adopt the rule of 'an eye for an eye or a death for a death' because of its

---

[324] H.L.A Hart, *Punishment and Responsibility,* (Oxford: Clarendon Press, 1963), 1.
[325] Ibid., 2.
[326] Ibid., 3.

inapplicability in most of the offence[327]. It seems that Hart accepts the feature the retributive proportionality for punishment but this does not mean that he had ruled out the consequential aspect of punishment. He says;

> *"Finally it remains to be observed that most contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the utilitarian conception that the institution of criminal punishments is to be justified as a method of preventing harmful crime, even if the mechanism of prevention is fear rather than the reinforcement of moral inhibition.[328]"*

This passage explains that Hart combined the two basic aspects of different theories but it looks very difficult to understand that at which point Hart extended and advanced the mixed theory presented by Rawls. Hart emphasizes on the retributive theory but in a utilitarian framework because he argued for proportional punishment imposed only on a person found guilty of an illegal[329] act which excludes the possibility of punishing innocent. Hart concludes that for a compelling mixed theory, it must have proportional punishment to crime's gravity and the justifying aim must be the retribution[330] (desert which being backward-looking theory punishes the past illegal act denying the possibility of punishing innocent) and After accepting the retributive theory, Hart wants to apply it in the utilitarian framework where the punishment must contain the element of fear for the future benefits.

---

[327] Hart, 233.
[328] Ibid., 235-6.
[329] Richard L. Lippke, 'Mixed Theories of Punishments and Mixed Offenders; Some Unresolved Tensions', *The Southern Journal of Philosophy*, Vol XLIV, 2006, P-281.
[330] Brooks, *Punishment*, 95.

Hart's mixed theory of punishment looks unclear. It includes both the basic features of justifying aim of punishment (desert) and the distribution of punishment (proportionality) from retribution, but he wants to apply it with consequential benefits to achieve more utility. The critics object that how the retribution can provide a consequential utility in future, from its punishment because it rejects the option of pardons. This means that the retributive punishment can also have a consequential benefit and if it so then what the utilitarian deterrence has to do?

The second objection can be the missing applicable framework of the combination of two contradictory theories. The punishment should be in proportion and at the same time it should aim to achieve future utility, looks inapplicable. In opposite, Rawls combined the two theories by taking the justifying aim of punishment from retribution and the distribution of punishment from utilitarianism. That is why his mixed theory looked very promising which is not the case with Hart's mixed theory.

4.3. Negative Retribution.

The vision of John Rawls and the effort of Herbert Hart resulted in the emergence of a mixed theory of punishment called, 'Negative Retribution'. This theory can most clearly be sensed in the idea of John Rawls. However Herbert Hart's conclusion of giving the utilitarianism, an important role in punishment, cannot be denied either. The standard view of retribution is

based upon the two basic notions of *'desert'* and *'proportionality'*. This view of retribution is called the standard or positive view of retribution[331].

The 'negative retribution' is the view which relies upon the desert but excludes the question of proportionality in punishment. This negative version of standard view is also called 'minimalism[332]' and 'weakened version of retribution'[333].

Negative retribution argues that only the wrong doer is subject to the punishment but it does not make it a core part of its theory. It relies upon the desert, just to the extent that the innocent need not to be punished[334]. Negative retribution argues that punishing a guilty (*desert*) is not injustice but it does not pay much attention in answering the question of 'why we should punish?', which is the most basic idea in the standard view of retribution. Negative retribution does so to avoid the chance of punishing the innocent, for which they need to rely upon the *desert,* to some extent.

Negative retribution believes that only the negative component of retribution is true. That negative component is to deviate and then relate the distribution of punishment from proportionality to other aims such as deterrence or incapacitation[335]. Desert or wrong doing is just the necessary but the ultimate component and the major one; just it does in the positive retribution. This

---

[331] Brooks, *Punishment,* 96.
[332] Cottingham, "Varieties of Retribution", 240.
[333] H. L. A Hart, *Punishment & Responsibility,* (Oxford: Clarendon Press, 1968), 233.
[334] R. A Duff, *Punishment, Communication and Community,* (Oxford: Oxford University Press, 2001), 12.
[335] Walen, Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = https: plato.stanford.edu/archives/win2016/entries/justice-retributive/.

means that desert or wrong done is not sufficient for punishment; rather they will only punish the deserving. Changing the vary basic idea of proportionality in retribution with the utilitarian idea of consequential good in the distribution of punishment, results in making the negative retribution, a mixed theory of punishment, relying upon the different penal objectives. It tries to finish the problems of retribution as well as the deterrence by combining both in to a new shape. The theory in which punishment is extended to the guilty only, determined with the view of future utility and consequences may prove a compelling theory of punishment[336], because it combines different penal goals like the retributive desert and the consequential utility. The mixed nature of negative retribution ends up in different results as compared to standard retribution. For example the standard retribution has no space for the idea of pardoning the offender where as the negative retribution, being a consequentialist theory, does not rule out the idea of pardoning the offenders, if pardon results in more good and benefit as compared to the imposition of punishment upon the offender. Negative retribution would justify the pardon on the grounds of future utility but will not justify punishing innocent on the grounds of future utility[337].

Negative retribution is criticized by different scholars. It is said that the negative retribution looks like a form of rule utilitarianism[338] where the greatest happiness for greatest number of people is sought within the

---

[336] Brooks, *Punishment*, 96.
[337] Ibid., 97.
[338] Brad Hooker, *Ideal Code, Real World*, (Oxford: Oxford University Press, 2000), 2.

constraint of set rules. Now the objection is that, if the consequences are justified then why be constrained by the rules. Why not to act to achieve the maximum utility from the punishment by any means even if that follows the deterrent model.

The other objection is that if negative retribution considers the desert so important that it cannot be ruled out and it is only the desert that decides[339], who should be punished then why not make it a central part and relate the punishment to it, in the shape of proportional punishment. Sticking to the desert raise another objection on the negative retribution, that is to explain the supposed moral connection between punishment and crime, which the notion of desert is meant to capture[340]. However the theory of negative retribution, being a mixed theory, as presented by Martin Golding[341] in his book philosophy of law[342], is a useful addition to the philosophy of punishment which tried to overcome the so-called shortcomings of existing theories of punishment by providing a theory which contains different useful penal goals, placed at different positions to present a compelling theory of punishment.

4.4. Expressivism.

Expressivism argues that the punishment should be viewed as an expression of public disapproval to the crime. This expression of disapproval should be

---

[339] Brooks, *Punishment,* 99.
[340] Duff, *Punishment, Communication,* 12.
[341] Cottingham, "Varieties of Retribution", 240.
[342] Martin Golding, *Philosophy of Law,* (New Jersey: Prentice-Hall, 1974)

by public and should be popular. Expressivists argue that punishment should not be mere infliction of pain rather it should be considered as a statement of denunciation[343]. Some scholars call it communicative instead of expressive theory because in their opinion the expression of something usually involves only one side of the expresser and in that case the expressee looks like a passive object or recipient. While the communication requires someone as a recipient of what is communicated and this looks more rationale[344]. The recipient will know that he is communicated something and will respond in return.

Expressivism is considered as a mixed or hybrid theory of punishment because it addresses more than one penal goal. It includes the general deterrence to violate law, rehabilitation of an offender and the retributivists' desert[345]. The Expressivism includes the consequential approach as it not only tries to understand the present condition but it try to have an effect on the future conduct, too. The censure of the punishment as a communication helps the offender to understand the public denunciation of his act and in result communicates him to repent from his previous wrong and at the same time to reform his conduct in future[346]. This makes the Expressivism a hybrid theory which incorporates the penal goals of retribution, deterrence and reformation.

Expressivism is based upon the popular denunciation, i.e. what is rejected by the majority of the community. In this regard the proportionality of the

---

[343] Brooks, *Punishment*, 101.
[344] Duff, *Punishment, Communication*, 79.
[345] Brooks, *Punishment*, 101.
[346] Duff, *Punishment, Communication*, 80.

punishment is connected with the strength of public condemnation[347]. The leading proponent of the communicative theory of punishment, *Duff* relates this theory with liberal polity differentiating it from the criminal law as part of common law in a political community[348]. That is why it rejects the pure deterrence. This theory argues that the polity gains the obedience and rule of law by moral appeal to its rational moral agents and in case someone fails to abide by law, will be treated with coerce to bring him in conformity to what he ought to obey[349]. This is how the deterrence works in expressive theory of punishment.

Expressivism believes in the disapproval of the wrong act and not the person who committed the wrong that is why the offender, in prison, is considered to be reformed by giving him time to think over his wicked act and to not repeat it again[350]. The moral agent of the society is believed to know the moral goods, violating which constitutes crime. The occurrence of crime shows either ignorance or defect in the moral understanding of that of the offender. This requires the re-education of the person to teach him the moral good and to reform him in to a better moral law abiding agent in future. This results in the reformation of offender along with the restoration of the breached relationship of the offender[351]. In this way the Expressivism incorporates the theories of reformation and restorative justice. This is best explained by *Duff* while mentioning the three R's of punishment. Those three R's are

[347] Brooks, *Punishment,* 103.
[348] Duff, *Punishment, Communication,* 80.
[349] Ibid., 83.
[350] Brooks, *Punishment,* 103.
[351] Duff, *Punishment, Communication,* 89.

repentance, reform and reconciliation.[352] The repentance is sought from criminal after his act is disapproved by the society. The repentance should result in reformation of the offender which is self-reform. The criminal by repentance seeks reconciliation with those he has wronged[353]. In this way Expressivism includes the reformation and restorative justice.

The expressivism believes in the retributive proportionality, arguing that the punishment must be in proportion to the crime. Small offences require less punishment, whereas serious offences need serious punishment[354].

Likewise the expressivists believe in punishment as prison or hard treatment. The imprisonment is considered as censure for the crime[355]. Confining the punishment to imprisonment narrows down the applicability of Expressivism because not all cases lead to conviction and among those only a small proportion of that end with imprisonment as punishment. This makes the expressive theory a very narrow theory which addresses only a small number of criminal cases[356]. Moreover the prison has never been helpful in the reformation of the moral agent of the society which initiates another objection on Expressivism.

---

[352] Duff, 107.
[353] Ibid.,108-109.
[354] Ibid., 133.
[355] Brooks, *Punishment*, 114.
[356] Ibid., 115.

4.5. Professor Thom Brooks' "Unified Theory" of Punishment.

As discussed earlier in this chapter, the philosophers along with the legal scholars have been struggling to provide a grand theory of punishment, incorporating different penal goals and objectives as presented in the different theories of punishment.

Professor Thom Brooks, a contemporary American legal and political philosopher has presented a mixed theory of punishment, which he named as the *'Unified theory'*[357]. The unified theory of punishment aims to bring the different penal goals, together to provide a more compelling and practical hybrid theory of punishment. It is always considered impossible to combine all theories of punishment with their basic structure like desert and proportionality of retribution, the consequential approach along with fear of utilitarian deterrence, the preventive nature of incapacitation, the reformative character of rehabilitation and the rebuilding of relations of restorative theory. This is because of the fact that the components of one theory negate the presence of component of any other theory, like the proportional character of retribution is strictly contradictory to the consequential approach of deterrence and this is because each theory presents a one-sided and one-dimensional approach[358] leaving no space for any other theory. The unified theory accepts the abovementioned fact and in results argues to not combine the existing theories but to bring together the objectives of these theories, in a

[357] Brooks, *Punishment,* 126.
[358] David Garland, *Punishment and Modern Society: A study in Social Theory,* (Oxford: Clarendon, 1990), 9.

coherent framework which provides a new compelling altogether coherent mixed theory of punishment[359]. The idea behind this theory is not that the different theories are compatible rather the different penal goals and objectives are compatible and can be brought together.

Hegel is considered to be the first philosopher who argued for the unified theory of punishment. He explains his idea in his book 'Science of logic' where he writes as:

> *"Punishment, for example has various determinations; it is retributive, a deterrent example as well, a threat used by the law as a deterrent, and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the ground of punishment, because each is an essential determination, and therefore the other as distinct from it, are determined as merely contingent relatively to it. But the one which is taken as ground is still not the whole punishment itself.[360]"*

This passage clarifies that according to Hegel the different theories of punishment are not against one another. The idea that these theories are totally in contradiction and in result believing in one theory ultimately means the rejection of other theories of punishment. This was actually negated by Hegel in this paragraph.

Secondly these theories can be brought together as different components of a unified theory but that will be in an unequal way, where one theory may contribute more that other in the formation of the unified theory.

---

[359] Brooks, *Punishment*, 126.
[360] G. W. F. Hegel, *Science of logic*, trans A.V. Miller (London: George Allen, 1969), 465.

4.5.1. What is the "Unified Theory"?

The unified theory is based upon the concept of *'legal rights'*. The sole purpose of the punishment is to protect and safeguard the legal rights of an individual. The punishment is always considered to be a response to crime because if we are unable to justify a crime, we cannot impose punishment because punishment is sought only where the crime exists. To justify the need of punishment along with its severity and seriousness requires the understanding of crime [361] . Punishment is connected with the fair criminalization within a legal system. Legal system is necessary for any political community for the smooth and fair progress of the society. The legal system helps the continuation of the society by resolving the inevitable conflicts, arising among the members of the community. To resolve the conflicts the legal system has to regard some acts as impermissible, committing which constitutes an illegal act, which is called a crime. This illegal act, called crime was the act which interferes into the authoritative circle of any other individual, which is called the victim's legal right. This means that crime is the act which violates the legal rights of the individuals of the community. The legal system of that political community protects the legal rights of the members of its community with the help of criminal law. Thus punishments are supposed to protect the legal rights of the members of the society because the protection of legal rights of an individual is the

[361] Brooks, *Punishment*, 127.

expression of his freedom granted to him as a member of that political community[362].

The unified theory, based upon the notion of legal rights, is aware of the fact that not all legal rights are same. Some rights are more important than others. There are some rights which are so important that the absence of which results in disappearance of several other rights, sometimes all. Right to life is the example of that, which is more important than the right to private property because the right to private property may simply disappear in case of no life. The existence of life may provide a chance for the right to private property. The more importance of few rights over others neither undermines the status nor the protection of less important rights by law. This simply means that some rights are more central than others[363].

The aim of legal system is to protect and safeguard every kind of right. The entire body of the legal system exists only for the purpose of protection of legal rights. However the legal system will give much importance to the more central rights like right to life, as compared to other rights like right to property. The protection of legal rights, being the fundamental objective of a legal system, has resulted into criminalizing the acts which violates the legal rights of the members of the political community. The legal system uses *Punishment* to respond the crime, in order to best ensure the safety of the legal rights of individuals. Punishment inflicts pain on the violation of 'legal' rights

---

[362] Brooks, *Punishment*, 127.
[363] Ibid., 128.

only and not 'moral' rights. Punishment is meant to protect the *'legal rights'* only[364]. Here, the unified theory rejects the legal moralism where the moral wrong is considered as crime. This view of punishment explains it as a form of self defence. The society exercises its right to defend itself against the offenders in the shape of punishment, in order to safeguard its legal rights. The Unified theory considers crime, a necessary condition for the punishment but not as a sufficient condition. This means that mere happening of an illegal act does not necessitate the imposition of punishment, unless that crime violates a legal right or that illegal act creates a threat to the legal rights. Without rights' violation, a punishment is not justified in the view of the unified theory of punishment. The unified theory interconnects the rights, crime and punishment[365].

4.5.2. Key Features of 'Unified Theory' of Punishment.

The key features of unified theory as presented by Professor Thom Brooks[366] are explained here;

1. Legal Rights are those important aspects of human's freedom that are protected by law. The protection provided to the legal rights is by criminalizing that vary act, which infringes any of that right. The rights are supposed to be respected in ordinary situations. The first layer of protection around legal rights it, is by criminalizing its violation.

---

[364] Brooks, *Punishment*, 128.
[365] Ibid., 129.
[366] Ibid., 130.

2. The second protective layer around the legal rights is that of punishment. If criminalizing an act fails to stop a person from violation, it is dealt with the punishment because punishment always acts as a response to crime. Punishment is directly proportional to the importance of right because, we mentioned earlier, that there are some rights which are more central than other, i.e. right to life.

   The more central rights needs more protection that is why the punishment, as a protection, is going to be more severe for the violation of more central rights. The less central rights are protected with less punishment. This shows the proportional nature of punishment in the unified theory.

3. The punishment will be awarded in cases where it violates the rights. This means that if the protection of a right is not in need of punishment, then it becomes unnecessary. The punishment will be inflicted in those cases only where it helps protecting the right because punishment in itself is not the main objective, but the main objective is the protection of right, which is sought by means of imposing punishment. The importance must be given to the legal right of an individual.

4. The unified theory argues for the punishment of legal wrongs and not moral wrongs. The unified theory argues for punishing crimes. It neglects the immorality in the body of criminal law. Though it accepts the fact that some crimes can be immoral at the same time, but we even

> punish for those just for being their criminality and not immorality. If an act is considered immoral but that is not illegal in the eye of law, then there will not be any punishment for that act in the unified theory, no matter how wicked that acts is[367].

These basic features of the unified theory reveal the fact that the relation between punishment and crime is under continuous change. This changing nature of relation is based upon the changing nature of rights. Change in the nature of right means change in the crime because crime in the unified theory is connected with the violation of legal right. Change of right means change of crime. This is because of the changing behaviour of rights as a notion of human freedom that violation of an act, which once used to be dealt with capital punishment is no longer considered, even a crime today.

This relation makes it clear that any act which does not put any threat to any legal right of an individual, that act is not a crime and subsequently will not be punished[368]. This aspect of unified theory keeps the doors of pardon, open, in its penal system.

4.5.3. Unification of Different Penal Goals in the 'Unified Theory'.

As we discussed earlier that different theories present different penal goal. The retribution demands the punishment in 'proportion' to the crime and for the 'guilty' only. Likewise deterrence focuses on 'crime reduction' by promoting fear to achieve consequential benefit in the future. Rehabilitation

---

[367] Brooks, *Punishment*, 130.
[368] Ibid., 130.

requires the behavioural 'reformation' of an offender from being a criminal to a useful citizen of the society. Restorative justice concentrates on the 'remaking of the damaged relation' among the criminal, the victim and the society. The Expressivism focuses on the communication of public disapproval of the act committed by the offender. The unified theory claims to bring together multiple penal goals in one framework[369]. These goals are discussed in following lines;

1. The unified theory incorporates the backward-looking penal goal of *'desert'* as its first penal goal. It requires the punishment only for the previously committed crimes. This makes it a theory which excludes any possibility of punishing innocent. The justifying aim of punishment in the unified theory is the actual crime committed in past and the crime in the view of unified theory is more restricted as compared to that of retribution. The unified theory confines the definition of crime to the legal wrongs only[370] instead of moral wrongs as the classical retribution demands.

   In its view not all moral failures are crimes and not all crimes are moral failures. The unified theory draws a sharp line between moral and legal wrongs.
2. The unified theory includes the second most important penal goal of proportional punishment. The punishment is in proportion to the

[369] Brooks, *Punishment,* 130.
[370] Ibid., 130.

crime at the same time where the seriousness of crime is proportional to the importance of right.

The violations of more important and central rights are punished seriously and that of less central are punished less seriously. Any punishment not in proportion to the crime will be considered unjust.

3. The unified theory incorporates the expressive goal of punishment. It considers the punishment as an expression of community's disapproval. Now punishment as a response to crime, communicates to the criminal that the community has rejected his act. The greater the punishment the greater the expression of the denunciation of his act will be. The smaller the punishment, the lighter the expression of disapproval will be. The intensity of expression of disapproval by the community, in shape of punishment, communicates to the offender about the importance of rights that which rights are more important and needs more respect.
4. The utilitarian goals and objectives of punishment like deterrence, rehabilitation and restorative justice, form an important part of the unified theory. The utilitarian goal of punishment is explained in the framework of restorative justice.

   The unified theory argues for the need and importance of the restorative justice. It emphasizes to restore and reshape the damaged relationship among the stakeholders of the community. The unified theory focuses on the need of the restorative conferences. It argues to

make the restorative conferences a substantive and compulsory part of the penal system[371].

The unified theory demands to include the prisons as a part of restorative process. The restorative process may include the deterrent aspect of punishment wherever needed. It argues to include the rehabilitation of the offender in the restorative process, in case the offender is in need of that.

The restorative process may have the form of punitive restoration where the deterrence may play an important role in the protection of legal rights. The punitive restoration element may include the community sentences.

The important penal goals of prevention is also endorsed and included by the unified theory in its framework. It rejects the idea of restorative justice where there is no place for prisons. This is why the unified theory, in its restorative process requires the imprisonment and suspended sentences wherever applicable and beneficial[372].

The above discussion make it clear that the unified theory bring together the different penal goals of desert, proportional punishment (retribution), deterrence, Expressivism, rehabilitation, incapacitation and restorative justice. It combines the long standing so-called rival theories of retribution, which relates its essence to the legal moralism and the utilitarian theory, which is based upon the consequential approach to seek more pleasure and avoid

[371] Brooks, *Punishment,* 131.
[372] Ibid., 132.

pain. The unified theory combines the forward-looking and backward-looking theories in a single model.

The unified theory claims that it brings multiple penal goals in a coherent theory which makes it a compelling theory of punishment which best responds to the crime in the process of protection and restoration of legal rights, of the members of the community to best provide them the opportunity to enjoy their freedom.

4.5.4. Criticism.

The unified theory of punishment faced criticism from some academicians which need some satisfactory answers to prove that the unified theory can be a compelling hybrid theory.

- The first objection is that how it brings altogether apposite penal goals together in a coherent way, like that of proportional punishment and deterrence. The unified theory answers to that criticism by considering these penal goals all attractive and coherent in a larger unified framework[373]. Suppose an offence is punishable with few different terms of imprisonment, starting from less to longer term where the deterrence requires the longest. This means that awarding deterrent punishment which is the longest period does not negate the proportionality because that was already achieved by the punishment falling in a specific limit of which the longest is deterrence. But this

[373] Brooks, *Punishment*, 133.

answer needs more explanation as it looks unsatisfactory. The two contradictory aspects of backward and forward looking retribution and deterrence are so far away from each other that bringing them in a coherent mixed theory; require a satisfactory practical explanation of this claim.

- The second objection made upon the unified theory of punishment is, that it may punish the citizens to protect the rights of the state. Or it may punish the citizens to maintain the authority and power of the state at the expense of its citizens. The unified theory rejects this criticism by making it clear that the rights of the citizens are more important than the rights of the state. The punishment is meant to protect the rights of the members of the society alone. It does not protect the rights of the state by punishing the citizens of that state[374]. This answer also looks not so compelling because the crimes of high treason can result in destabilizing a political community which may result in an anarchic situation faced by the individuals.
- The third objection made on the unified theory is that it may punish the like crimes with different punishments. The answer is that the unified theory punishes the offender based upon the crime relevant circumstances. For a like crime, one offender may require more rehabilitative process where as the other may need to be dealt with deterrence.

[374] Thom Brooks, *Punishment,* (New York: Routledge, 2012), 133.

- The forth objection is that the unified theory may not prove compelling in different political societies where the meaning of crime and punishment differ from other societies. The unified theory answers to this by rejecting the concept of universal morality because as we mentioned earlier it rejects the legal moralism. In the absence of a universally accepted system, their remains the problem of difference in different societies which is not a big problem in the view of the unified theory[375].

The time will prove the applicability of the unified theory of punishment which apparently looks so compelling that it can be much helpful in crime reduction if provided by a practical implementation.

[375] Thom Brooks, *Punishment*, (New York: Routledge, 2012), 138.

Conclusion.

The philosophers' effort to find a coherent mixed theory of punishment over the years resulted in the emergence of various hybrid theories of punishment. The first attempt made by an American philosopher Prof John Rawls was outstanding. He opened this debate and showed a path to the legal philosophers to go on and to provide the answer to those various questions which each single theory was unable to answer. Later on the effort of John Rawls inspired the oxford university's professor of jurisprudence, Herbart Hart when he tried to further promote the idea of Rawls and to provide a mixed theory of punishment but except for some useful philosophical discussion; he could not present a combined theory of punishment. The efforts of Rawls and Hart resulted in the emergence of the theory of 'negative retribution' which combined the retributive desert and utilitarian distribution of punishment. The attempt to provide a mixed theory also resulted in the emergence of Expressivism which combined multiple penal goals in one theory, as presented by Duff.

The most important and fruitful effort was made by contemporary Durham University's philosopher, Professor Thom Brooks, who presented a 'Unified theory' of punishment based upon the concept of legal rights, incorporating almost all penal goals of different single theories. His theory proved to be an award winning effort, prized by the government of UK and regarded as one of those hundred ideas which will have a considerable effect on the future of the country.

Chapter Five

Application of Theories of Punishment in *Hudūd* Punishments

Introduction.

Hudūd are the punishments which are awarded for the gross misconduct where the offender attacks the foundations of the society in the shape of High treason, murder, adultery, theft, robbery and insurgency, which needs to be responded with harsh punishment in the shape of deterrence in order to safeguard the basic pillars of the society that is why Islamic penal law opts for *proportional deterrence* which at the same time remains harsh but proportional, changing its intensity with change in the effect of crime upon the foundations of the society.

In this chapter the *Hudūd* punishments and the application of different theories of punishments in those *Hudūd* punishments are discussed in detail. The chapter discusses the punishment of unlawful sexual intercourse, its false accusation, drinking intoxicants, revolt, theft, robbery and high treason. The application of western penal theories is also studied in all of these *Hudu d* crimes.

5.1. Definition & Types of Hadd.

Hadd is the term used for both the crimes and punishment of a specific category which are considered, the right of Allah. *Hudūd* is its plural. As defined earlier in first chapter, *Hadd* is the fixed punishment, which is considered the right of Allah almighty[376]. The rights of Allah almighty are considered to be the rights of society in general. This shows the love and

[376] Awdah, 2, 343.

affection of Allah almighty towards the human beings that in order to protect their society, He regarded their basic rights as His rights, which should never be violated at any cost, and if violated, be punished with severe penalties with no chance of pardon[377], reprieve, respite or remission. There is difference of opinion upon the definition of *Hadd,* which results in difference in number of *Hudūd* in various schools of thoughts in Islamic law. According to *Hanafi* School, *Hudūd* are five[378] where as *Jamhūr* count it as seven in number[379]. The Jamhoor include the punishments of *Qisās* in the *Hudūd* because of the fact that these are also pre-fixed and unchangeable where as the *Hanafi* school excludes it from *Hudūd* because *Qisās* is considered as individual's right. Ignoring the difference of opinion on the number of *Hudūd* punishments, it appears to be seven. These are the offences of theft, highway robbery, unlawful sexual intercourse, false accusation of unlawful sexual intercourse, drinking alcohol, apostasy and revolt[380]. In the following lines we will discuss the application of western theories of punishment, as discussed earlier in chapter four and five, in the above mentioned list of *Hudūd* offences.

5.2. Offence of *Zinā* (Unlawful Sexual Intercourse).

Zinā in Islamic law is defined as "extra marital, vaginal intercourse with a living female[381] excluding doubts and ownership"[382]. The extra marital sexual

---

[377] Abdur Rehman Al-Juzairi, *Al-Fiqh ala al-Mazahib al-Arba'*, 5(Beirut: Dar al-Kutub al-Ilmia, 2003), 8.
[378] Dr Wahba Zuhaili, *Fiqh al-Islami wa Adillatuhu,* 6 (Damascus: Dar Al-Fikr, 1985), 13.
[379] Al-Juzairi, 5, 12.
[380] Aamir, 13.
[381] Al-Juzairi, 5, 48.
[382] Zuhaili, 6, 26.

intercourse between a male and female is called *Zinā*. The cohabitation must be in the vagina of female[383] and this excludes the anal[384] or oral sex[385] from the definitions of *Zinā*. The act must be free from any kind of doubts like cohabiting with irrevocably divorced wife during *iddah* period[386]. Copulating with one's legitimate maid is also beyond the definition of *Zinā*[387]. *Zinā* (unlawful sexual intercourse) is strictly prohibited in Islamic law. The Islamic law announces different punishments for the offenders, based upon their marital status. The unmarried adulterer is punished with 100 lashes[388], where as the married adulterer is punished with death sentence[389] which is executed in a specific manner, i.e. stoning till death[390]. The offence of *Zinā* can be proved either by confession of the offender or by four male witnesses who testify the clear witnessing of the penetrated penis into the female vagina[391].

5.2.1. The Dark Side of *Zinā*.

The Islamic law considers the *Zin ā* by an unmarried person as an infringement of society's right, even if that is consensual[392]. The *Zinā* by

---

[383] Awdah, 2, 349.

[384] Excluding *Hanābilah as they* include the anal sex in the definition of *Zinā*. Abu Muhammad Ibn-i-Qudamah al-Maqdisi, *Al-Mughni*, 9(Cairo: Maktaba al-Qahira, 1968), 54.

[385] Awdah, 2, 351.

[386] Al-Juzairi, 5, 81.

[387] Zuhaili, *Fiqh al-Islami*, 6, 29.

[388] There is a difference of opinion among *Hanafi* & Jamhoor school of Islamic law. According to *Jamhūr*, the punishment for unmarried adulterer is 100 lashes along with one year of exile. They base their argument on the sayings of the Holy Prophet (s.a.w). The *Hanafi* school differ with *Jamhūr* & declares that punishment of unmarried adulterer is only 100 lashes and no more. They deny the additional punishment of exile of one year, arguing that the Holy Prophet (s.a.w) never awarded this punishment to the unmarried adulterers, during his entire lifetime and the *Hadith* of exile was terminated by the verse of Quran.

[389] Muhammad Bin Ahmad Al-Sarakhsi, *Al-Mabsoot, 9* (Beirut: Dar alma'arifa, 1993), 36.

[390] Al-Kasani, 7, 33.

[391] Al-Sarakhsi, *9*, 38.

[392] Saleem Al-Ewa'273.

unmarried couple results in devaluating the need of legal marriage and causes decrease in the number of population of the society. The decreased number of active members of the society is not welcomed anywhere as this weakens the society[393]. The purpose behind the presence of hyper sexual desire in the human body is nothing but to force him to fulfil it (legally by marriage) and in result helps the society, growing and moving forward[394]. Studies have shown the increased number of sexual diseases like STI's (sexually transmitted infections) in societies where sex is open and excessive[395]. The World Health Organization has confirmed that every day humans acquire more than one million sexually transmitted infections. The annual ratio of STI's is about 376 million, worldwide[396]. In extra marital sexual relationship, the unmarried female partner has either to take contraceptive medicines which are more likely to result in infertility[397] or to choose the abortion which is again quite dangerous for the health of a female. In case of impregnation and delivery, the possibility for the child, of losing father, is quite high, in a society where the fulfilment of sexual desires does not force you to stay in a legal relationship and bear the responsibilities. This may be the extreme situation where the child along with her mother is usually left unattended and one can imagine the emotional and mental breakdown of that child which results in shaken and weak personality of the future of the

[393] Awdah, 2, 347.
[394] Al-Juzairi, 5, 50.
[395] Dr Fazal Ilahi, *Zina ki sangini,* (Islamabad: Dar al-Noor, 2014), 222.
[396] https://www.who.int/en/news-room/fact-sheets/detail/sexually-transmitted-infections-(stis)
[397] Awdah, 2, 348.

nation. Moreover the weak and broken marital relationship forces the female to search for a permanent livelihood for herself, for which she starts working. The increased number of female workers in the market results in job scarcity[398] and at the same time disturbs the lonely child who gets very little care, love and attention from his parents. In case of married adulterer, the repercussions are even worse. A person cannot accept the reality of extra marital affair of his or her spouse. This arouses the immense anger, hatred, jealousy, envy and enmity in the heart which often results in either breakup or in some other offence like murder, assault, abuse or domestic violence. In either case the related people in the shape of husband, wife and children, if any, suffer from emotional distress, depression and other mental, social and economic problems.

Zina may result in uncertainty about the actual father of a child[399]. This can be disastrous for an infant whose parents aren't sure about him in accepting him as their own child. This situation can finish the love & affection for an innocent child. Moreover, why would a person spend his money on someone else's child? Likewise it may result in the breakup of a married couple and eventually the entire responsibility of the child lies on the shoulders of just one person, which is too tough of a job. *Zina* offends the ardency of the human being[400]. It is defamatory. Human nature of honour and dignity finds it very hard to accept the illegal lustful sexual relation with their Children or

---

[398] Awdah, 2, 348.
[399] Zuhaili, *Fiqh al-Islami* 6, 23.
[400] Al-Juzairi, 5, 50.

siblings. The ultimate result of *Zina* is nothing else but the abuse of women, treating her like a toy and using her for the lustful desires of men. This is simply unacceptable in Islamic law as the Islamic law shows utmost importance, respect and care for the women. The dark side of this dirty offence is the excessive number of patients having STD's (sexually transmitted diseases). It has gifted to the mankind, the incurable disease of AIDS.

5.2.2. Deterrence.

The offence of *Zina* is strongly rejected in Islamic law and is dealt with extreme deterrence[401]. The intensity of its disapproval is so high that *Qurān* cautions the Muslims to stay far away from it. *Qurān* says;

"Do not even approach fornication for it is an outrageous act and an evil way[402]."

That is why the Islamic law treats it with extreme 'deterrence' and severe punishments of 'death by stoning' and 'flogging'[403], because the offence of *Zinā*, destroys the very basic and fundamental units of the society. *Zinā* invades the society by invading the family system[404], the lineage and the status of legal marital relationship. These are the supporting pillars of the society. If the marriage system vanishes and the lineage gets disturbed, the entire family system would break down, which eventually result in the demise of the society itself. Due to its disastrous and lethal effects for the

---

[401] Abu Zahra, *AL-Uqubah*, 78.
[402] The Quran, *Al-Isra'*, 32.
[403] Abu Bakar Al-Marghinani, *Al-Hidayah*, 2 (Beirut: Dar Ihya al-Turas al-Arabi, 1986), 341.
[404] Abu Zahra, *Al-Uqubah*, 78.

mankind, Allah almighty has regarded its punishment as His right, which shuts the doors of any possibility of pardon or reduction in the punishment. This further means that the right of society is the right of Allah (s.w.t)[405]. This is why the Islamic law wages war against *Zinā* by imposing extreme painful deterrent punishments[406]. The punishment of married adulterer is 'stoning till death' which is the most extreme version of deterrence. The society, family and the unit of legal marriage is so powerfully regarded and safeguarded that its violation results in not only the capital punishment but in the extreme form of it. The deterrent effect in the punishments of 'stoning till death' and flogging of 100 lashes is considered highly effective in teaching the offender as well as the other people a bitter lesson and to respect and safeguard the vary basic units of human society. The punishment of *Zinā* contains the consequential approach of eliminating the future crime by its deterrent effect which makes it quite useful in pursuit of crime reduction.

5.2.3. Expressivism.

The punishment in Islamic law, for the offence of *Zinā* includes the expressive character of denunciation of the act of *Zinā* by the society. The Holy *Qurān,* while announcing the punishment for fornication, says;

> *"Those who fornicate - whether female or male - flog each one of them with a hundred lashes. and let a party of believers witness their punishment.*[407]*"*

[405] Zuhaili, *Fiqh al-Islami,* 6, 23.
[406] Faras, , 89.
[407] The Quran, *Al-Nur,* 2.

The Islamic law demands to make the imposition of punishment of *Zina,* public[408], to be watched by the members of the society and general public. This is ordered to achieve two main goals of spreading deterrence and expressing the disapproval of the act of *Zinā*[409]. The expressive character of punishment of *Zinā* helps to restore the dignity and honour of the family of the victim[410], in case the act is performed forcefully and without the will of the partner e.g rape.

5.2.4. Incapacitation.

The punishment of *Zinā* for the married adulterer possesses the preventive nature. The criminal ceases the right to live because he had a legal way to fulfil his sexual desires, which he neglected and invaded the society by his misconduct, which worths permanent incapacitation of that person from the society because by committing so grave crime[411], with the fact of having the legal way out, the adulterer becomes a permanent threat to the dignity, honour and rights of the society. The permanent threat must be executed in order to provide an unbreakable protection to the very basic unit of the society. The society's right of protection against offenders is exercised as needed by removing the culprit permanently from the society. The fair approach of Islamic law differentiated among the punishment of *Zinā* giving regard and consideration to the status of the offender[412]. The unmarried

---

[408] Al-Marghinani, 2, 341.
[409] Saleem Al-Ewa', 274.
[410] F*ā*ras, , 90.
[411] Abu Zahra, *AL-Uqubah,* 78.
[412] Bhanassi, *Al-Uqubah,* 24.

adulterer is sentenced to '100 lashes' whereas the married adulterer is sentenced with capital punishment[413], considering the available legal way for him in shape of spouse, expressing that his violation of law is extreme.

5.3. Offence of Theft.

Property is one of the basic needs of human life. The Islamic law has regarded it one of the most important features of human life. It is enlisted in the five basic objectives of the Islamic law[414]. The importance of right to property can be understood by the sayings of Holy Prophet (PBUH) where he regarded the person as martyr, who got killed while saving his own property[415]. That is why the Islamic law encourages to earn the property by legal ways and protects the legally earned property by announcing the punishments for theft[416] and robbery. The offence of theft, as defined by Ibn-i- Rushd, is;

> *"taking the property of some other person, by way of stealth, when the theif was not entrusted with it*[417]*"*

When a sane and sound adult person steals something, the value of which amounts to ¼ dinar[418] equivalent to 4.25 gm of gold[419], from the custody of

---

[413] Bhanassi, *Al-Madkhal*, 65.
[414] Abu Hamid Al-Ghazzali, *Al-Mustasfa min Ilm al-Usool*, 1(Beirut: Dar al-kutub al-Ilmia, 1993), 174.
[415] Muhammad Bin Esa Al-Tirmizi, *Al-Jami' Al-Kabir*, 3 (Beirut: Dar Al-Gharb Al-Islami, 1998), 80.
[416] Faras, , 97.
[417] Ibn-i-Rushd, 4, 229.
[418] Ala-ud-Din Samarqandi, *Tuhfat-ul-Fuqaha*, 3(Beirut: Dar al-Kutub Al-Ilmia, 1994), 150.
[419] The value of *nisab* according to *Hanafi* school is one *dinar* which is equal to 4.25 gm of gold, where as the according to *Jamhoor*, value of *nisab* is 1/4th of *dinar* which is counted as 1.0625 gm of gold.

another person, secretly, is said to commit the crime of theft[420]. The offence of theft, fulfilling all the above mentioned conditions is liable to *Hadd* punishment of amputation of hand. This means that taking the property of another by an insane person, child, a person having share in that property or a person having partly ownership of that property (like father's theft from son) is not liable to *Hadd*[421]. Likewise the acquisition of others property by force[422] etc or if the value of property is below *nisab,* the offence is not liable to the *Hadd* punishment of amputation of hand[423]. In such cases the offender may be awarded *Ta'zir* punishment, if deemed necessary[424].

5.3.1. Why focus on a Specific form of theft.

The focus of Islamic law on a specific kind of theft, as discussed above, is because of the wide spread scary effect of this act on the society. Only one act of theft terrifies the entire community that its members can no longer have the peaceful sleep at nights. The one act alerts the entire community to keep awake at nights, put heavy locks on the doors and to hire the guards for the security and even then the fear remains[425]. The long lasting effect of this act makes it extremely disturbing and dangerous for the society. Moreover this act mostly results in assault to the people, sometimes results in killing[426] because the thief usually breaks into the house being armed. The act of theft is

---

[420] Al-Juzairi, *5*, 141.
[421] Zuhaili, *Fiqh al-Islami*, 6, 101.
[422] Bhanassi, *Al-Hudu ̄d*, 69.
[423] Burhan-ud-Din Al-Marghinani, *Bidayat-ul-Mubtadi,* (Cairo: Muhammad Ali Sabh), 110.
[424] Muhammad Bin Ibrahim Al-Tuwaijiri, *Mosoat-ul-Fiqh al-Islami*, 5 (2009), 154.
[425] Abu Zahra, *AL-Uqu ̄bah*, 78.
[426] Al-Juzairi, 5, 151.

not confined to mere stealing of something; rather it invades the right of ownership of property along with invading the right of privacy and the right of protection of the community by unwilling illegal trespass to the place which is meant for the safety of property. It breaks the doors, horrifies the children and specially women who gets targeted in this act for being in the possession of jewellery[427]. This may also result in disgracing the women too[428]. Moreover the thief takes the property of another, which he might have gained after hard work of years and decades. This is extreme injustice to deprive a person from his legally earned property in a moment.

This entire terrifying effect of the secretly done theft makes it unacceptable for Islamic law which deals it with extreme harsh punishment to ensure the peace in the society[429], to honour and safeguard the legally earned property and to teach the offender and other, thinking of it, a lesson to never commit theft ever in future[430].

5.3.2. Deterrence & Incapacitation in the *Hadd* of theft.

The offence of theft is dealt by Islamic law with deterrence and incapacitation. The widespread scary effect of this act needs to be dealt with extreme deterrence. Though the proof of this act is quite difficult but once proved, is punished with extreme punishment of amputation of that hand which committed the theft. It needs most deterrent punishment because the most

---

[427] Abu Zahra, *AL-Uqūbah*, 78.
[428] Al-Juzairi, 5, 151.
[429] Zuhaili, *Fiqh al-Islami*, 6, 16.
[430] Faras, , 99.

developed nations are failed in ending theft by ordinary punishments, as the statistics show that about 5 million reported theft and related offences occurred in just one year, in the UK[431]. Islamic law looks at this case with having two options, either to announce mild punishment and leave the entire community in continuous fear and danger or to impose the severe punishment to deter the criminals, finish the crime and provide the community, peace and protection to their properties. The Islamic law opts for the second choice and imposes the severe punishment to cut the infectious part from the society's body to ensure that the rest of the body of society remains healthy[432]. The Holy Quran is very clear about the consequential deterrent effect of the punishment of imputation, by saying;

> *"As for the thief -male or female - cut off the hands of both.[60] This is a recompense for what they have done, and an* ***exemplary punishment*** *from Allah. Allah is All-Mighty, All-Wise[433]."*

In this verse, the Holy Quran specifies the punishment of theft to be exemplary and deterrent. Furthermore the verse confirms the preventive nature of the punishment by ordering to ampute that vary hand which assisted the offender in the act of theft[434]. In order to stop the criminal from doing the same act in future, he must be disabled by cutting of his most important part of his body for the act of theft, i.e. his hand.

---

[431] Office of National Statistics, *Crime in England and whale; Year ending June 2019,* (NewPort: Gov of UK, 2019), 5.
[432] Abu Zahra, *AL-Uqubah,* 79.
[433] Al-Quran, *Al-Maida,* 38.
[434] Al-Juzairi, 5, 139.

If the offender commits the crime of theft even after imputation of his hand, the Islamic law further incapacitates his capability by imputing his alternate feet[435] to already cut hand. This will further reduce his powers to commit the theft. This approach shows that in Islamic law the offence of theft is dealt with utilitarian and consequential concepts of incapacitation and deterrence which helps in crime reduction, the most sought objective of utilitarian theories[436].

5.4. Offence of Drinking Intoxicants / Wine.

The dignity and integrity of mankind is due to his intellect. It is the brain and power of reason which differentiates the human being from animals. That is why the Islamic law has regarded the intellect of mankind as one among the five basic objective of *Shari'ah*[437] and protects it by encouraging the learning and education, while punishing the one who loses it by drinking wine etc. Drinking intoxicant beverages contains too many problems. It does not only affect the intellect but also harms the dignity, wealth and health of drinker[438]. The Holy Quran declares:

> *"They ask you about wine and games of chance. Say: "In both these there is great evil, even though there is some benefit for people, but their evil is greater than their benefit.*[439]*"*

---

[435] Awdah, 2, 623.
[436] Al-Tuwaijiri, 5, 156.
[437] Al-Ghazzali, 1, 174.
[438] Awdah, 2, 496.
[439] Al-Quran, Al-*Baqarah*, 219.

This verse of Quran clearly mentions that the wine contains more harm for the mankind, so it is better for the human to avoid it and the harm it contains. Drinking wine is prohibited in Islam by virtue of the following verse of the Holy Quran.

> *"Believers! Intoxicants, games of chance, idolatrous sacrifices at altars, and divining arrows are all abominations, the handiwork of Satan. So turn wholly away from it that you may attain to true success.*[440]*"*

Islamic law bans the every kind of intoxicant beverages, whether that is extracted from grapes or anything else. Taking of anything, by which human being loses its intellect and becomes unable to differentiate between male and female, earth and sky[441] and does not know about what is he saying or doing. The punishment for the offence of *Shurb* is eighty lashes according to *Hanafi, Hanbali* and *Maliki* schools of thought[442], whereas the *Shafi'* school argues for the punishment of fourty lashes for drinker[443]. The *Shafi'* school derives their argument from the *Sunnah* of the Holy Prophet (PBUH) whereas the *Jamhoor* rely upon the act of the second pious caliph, *Hazrat Umar (RA),* who awarded the eighty lashes and the other companions agreed with him in this view[444]. The offence of *Shurb* can be proved by two witnesses or by confession of the offender[445].

---

[440] Al-Qurān, Al-*Māidah,* 90.
[441] Al-Juzairi, 5, 18.
[442] Aamir, , 25.
[443] Abu Zahra, *AL-Uqubah,* 149.
[444] Zuhaili, *Fiqh al-Islami, 6,* 151.
[445] Al-Juzairi, 5, 18.

The *Jamhoor* (*Maliki, Hanbali & Shafi'*) are of the opinion that any beverage having intoxicant effects is prohibited whether that is extracted from grapes or dates or wheat etc. It is prohibited ab-initio. Even the small amount of any of these drinks is prohibited which may not results in losing the reason and intellect[446].But the *Hanafi* school differs on this opinion and they declare the alcoholic drink extracted from grapes are prohibited, ab-initio whether the person takes large or a small amount. But the prohibition of alcoholic drink extracted from things other than grapes, like dates or honey etc, is subject to the intoxicant effect. If the small amount of it does not results in losing of mind, that drink is not prohibited but if the amount taken resulted in losing mind, the drinker will be punished with *Hadd* punishment[447].

5.4.1. Deterrence in the punishment of *Shurb.*

The offence of *drinking (Shurb)* is dealt with deterrence in Islamic law. The punishment of eighty lashes is intended to inflict the maximum degree of pain[448]. The drinker is taught the lesson to stay away from intoxicants which results in the infringement of the rights of the society like abuse, killing, fighting and sexual offences. The drinker being incapable of understanding the status of his actions, usually acts in disturbing ways. The punishment of drinking is inflicted upon the entire body of the offender by distributing the lashes to each part so that every organ feels and receives the share of pain. The other reason for not inflicted the lashes on a single part of the body is

---

[446] Abu Zahra, *Al-Uqubah*, 147.
[447] Awdah, 2, 499.
[448] Faras, , 82.

because it can paralyze that part of the body which is not what *shariah* wants[449]. Moreover the reproductive organs are also excluded from infliction of lashes.

The Islamic law wants to deter the offender to stay away from this crime in the future as well as the community to see the person punished and to choose for them to refrain from taking alcoholic beverages. The addiction along with the apparent temporary joy of the wine attracts the drinker time and again to drink it. This attractive and addictive taste is only to be dealt with severe punishment in order to safeguard the society. Studies show the increased number of patients admitted in the hospitals of UK due to drug misuse[450]. This clarifies the fact that it is an ultimate harm, which mostly results in offending other people of community along with affecting the health of the drinker like stomach deseases etc[451]. This is why, in Islamic law, it is called the 'mother of all evils'. That is why it is dealt with the utilitarian concept of deterrence to achieve the consequential benefits of crime reduction in the future.

5.5. Offence of False Accusation of Zinā (*Qazf*).

The Islamic law has ordained the mankind the highest degree of honour and respect. It is based upon the moral standards of the divine guidance of the all-

[449] Al-Juzairi, 5, 31-32.
[450] https://files.digital.nhs.uk/publication/c/k/drug-misu-eng-2018-rep.pdf
[451] Ahmad Bin Hajar, *Sharab ki Muzirat*, (New delhi), 92.

knowing, God. The basic principle in case of verbal offences is to prohibit every kind of lie and slander along with encouraging the truth and fair speech[452]. That is why the Islamic law rejects the every shape of slander and comes up with the extreme punishment of flogging in case of *Qazf, i.e.* the accusation of illegal sexual intercourse[453] without having the required evidence.

The legal definition of the Qazf is; *"passing the charges of Zina, about someone, without having the witnesses to prove it or negation of someone's descent (nafy al-nasb).*[454]*"*

The prohibition of slanderous accusation of extramarital sexual intercourse is derived from the following verses of the Holy *Qurān.*

> *"Those who accuse honourable women (of unchastity) but do not produce four witnesses, flog them with eighty lashes, and do not admit their testimony ever after. They are indeed transgressors.*[455]*"*

The Muslim jurists have consensus that the verse is not confined to the females rather it includes the *Qazf* for innocent males too[456]. The burden of proof lies upon the accuser who has to prove the truth of his statement by presenting four eye witnesses[457] against the accused, failing which will result in imposition of punishment of *Qazf* upon him (accuser)[458] in return. The

---

[452] Awdah, 2, 459.
[453] Ministry of Religious Affairs Kuwait, *Al-Moso'a al-Fiqhiyyah al-Kuwaitiyah,* 2(Kuwait: Ministry of Religious affairs, 1427H), 227.
[454] Ibn-i-Rushd 4, 224.
[455] Al-Quran, *Al-Nur,* 4.
[456] Abu Zahra, *AL-Uqubah,* 96.
[457] Al-Tuwaijiri, 5, 135.
[458] A-Kasani, 7, 40.

punishment for this offence is eighty lashes inflicted upon the entire body of the accuser in such way that every part of body receives the pain. The intensity and severity of the crime subsequently turns the offender into a transgressor who is declared a liar and unsuitable to testify ever[459] in the future[460]. The conditions for the imposition of punishment are that the accuser must be sane and adult[461], the accused must be free, chaste, adult and sane muslim[462].

5.5.1. Deterrence.

The primary objective of the *Qazf* punishment is deterrence[463]. The offender is punished severely to make him feel the extreme pain, which is inflicted with intendion of teaching him a lesson to avoid doing the same in future[464]. The deterrent effect of *Qazf* punishment is supposed to teach the general public too, a lesson to respect the dignity of every individual and to not talk about the honour of any person without any concrete evidence. Only a deterrent punishment can achieve the goal of maintaining chastity and modesty in the society [465] for those who feel pleasure in abusing and insulting others, specially the women.

---

[459] This is the view of *Hanafi* school, where as the *Jamhoor* argue that if the offender rectifies his deeds and reforms himself, will be allowed to testify in future.
[460] Faras, , 92.
[461] Bhanassi, *Al-Hudu ā*, 130.
[462] Aamir, , 22.
[463] Faras, 94.
[464] Al-Juzairi, 5, 186.
[465] Ibid., 187.

5.5.2. Expressivism.

The second main purpose of *Qazf* punishment is to express and declare the chastity and innocence of the accused[466]. The slanderous accusation puts doubts on his character along with humiliation and insult to the accused. The punishment expresses to all stake holders of the society, the offender, victim and the community, that the accused is innocent, chaste and a dignified person[467]. The offender tried to humiliate the accused but the punishment negates the insult to accused and transfers it from the accused to the accuser[468]. The Islamic law expresses its will to have a society free from the indecency[469] through its deterrent punishment of *Qazf* and by including it into the basic objectives of *Shari'ah* and *Hudu ̄d*. It even rejects the discussion and talk on these issues[470]. The Expressive character of *Qurān* in disapproving the indecency can be sensed from the following verse;

> *"Verily those who love that indecency should spread among the believers deserve a painful chastisement in the world and the Hereafter.[471]"*

5.5.3. Reformation.

The punishment of *Qazf* keeps the doors of hope, for the reformation of the offender, open. It intends to reform and rehabilitate the offender and provides him an opportunity to become a law abiding respected citizen and he will enjoy his rights like other citizens including restoration of his right of

---

[466] Al-Kasani, 7, 40.
[467] Faras, 92.
[468] Muhammad Bin Abdullah Al-Zahim, *A'sar tatbiq al-Shariah,* (Dar al manar, 1992), 113.
[469] Ibid., 112.
[470] Abu Zahra, *AL-Uqu ̄bah,* 96.
[471] Al-Quran, *Al-Nur,* 19.

testimony in courts according to *Shafii'* school of thought. However the reformation, according to *Hanafi* School does not extend to the restoration of right to testify in courts. The term 'ever after' excludes this right forever even after repentence[472]. The Quran says;

> *"except those of them that repent thereafter and mend their behaviour. For surely Allah is Most Forgiving, Ever Compassionate."*

5.6. **Offence of *Baghi'* (Revolt).**

The sole purpose of Islamic law is to protect the rights of society and its members. The crimes which harm the society in a greater extent are taken with due attention and importance. The prosperity and continuity of the society is based in a safe, peaceful, strong, happy and generous society. That is why the rights of society are declared as the right to almighty Allah, to show the importance of societal rights. The violation of the societal rights is countered with severe punishments of *Hudu ̄d*. The offence of revolt is one of those offences which pose a great threat to the peace and safety of the society. The offence of revolt is defined as;

> *"The forced (armed) opposition and resistance to the authority of head of the state[473]."* & the insurgents are;
>
> *"who illegally defies and opposes the legitimate head of the state[474]"*

---

[472] Ammar Khan Nasir, *Hudu ̄d o Ta'zirat*, (Lahore: Al-Mawrid, 2008), 175.
[473] Awdah, 2, 674.
[474] Awdah, 2, 673.

The revolt or insurgency against the de-jure head of Islamic state is strictly prohibited because this act usually result in anarchy and lose to human wealth, lives, dignity and peace[475] of the society. It disturbs and paralyzes the normal life, the effects of which are disastrous for any community[476]. The act of revolt by insurgents is like waging war against the state which is the ultimate authority to maintain law and order in the society and runs the affairs and institutions of the state like judiciary etc which helps people to abide by the law, fulfil the duties and enjoy the rights[477]. The Holy Quran says;

> *"If two parties of the believers happen to fight, make peace between them. But then, if one of them transgresses against the other, fight the one that transgresses until it reverts to Allah's command. And if it does revert, make peace between them with justice, and be equitable for Allah loves the equitable.[478]"*

The punishment of revolt is to fight the insurgents until they surrender. Fighting may result in killing them if the war becomes indispensible which shows that actual punishment is killing until the peace is restored.

5.6.1. Restorative Justice.

The Islamic law orders the head of the state to negotiate with the insurgents[479] and if they have any genuine reason or complaint, he should resolve that[480] and let them continue their normal life with no extra punishment whatsoever.

---

[475] Al-Tuwaijiri, 5, 177.
[476] Saleem Al-Ewa', 159.
[477] Al-Zahim, , 127.
[478] Al-Quran, *Al-Hujrat*, 9.
[479] Awdah, 2, 679.
[480] Al-Tuwaijiri, 5, 180.

The restorative approach in dealing revolt in Islamic law bars the state from seizing or attaching the property of insurgents[481] or to fine or punish them further after the dispute finishes, rather if focuses on settling the dispute by winning the confidence of the insurgents in the legal system and law of the land. The Islamic law waives off any liabilities of the acts of insurgents, committed during fight in shape of killing etc. They will not be punished with any *Hadd* or *Qisas* for the acts committed during revolt[482]. This approach is adopted to make it easy to restore the broken relation of the society and the insurgents.

5.6.2. Deterrence & Incapacitation.

In case of starting armed fight from insurgents (as the state is not allowed to start fight from their side), the state deals the wrongdoers with the deterrent approach of counter fight[483] and to kill them as transgressors or to defeat them in the fight by use of force and arms[484]. Though the Islamic law prohibits the state from starting the war against insurgents[485], but when the fight is started by insurgents, Islamic law, being realistic and logical, enters into the armed fight when all efforts of negotiation fails. The incurable part of the society in shape of insurgents is incapacitated by killing in order to remove them from the society, to let the healthy part of society, flourish and live a peaceful life.

---

[481] Zuhaili, *Fiqh al-Islami*, 6, 144.
[482] Ibid., 151.
[483] Awdah, 2, 679.
[484] Faras, 80.
[485] Al-Zahim, 128.

5.7. Offence of Highway Robbery/ *Harābah.*

The offence of *Harābah* (Highway Robbery or Banditry) is *"the act of taking money forcefully which cannot be assisted against.*[486]*"* It is prohibited in Islam based upon the objective of protecting public's lives, wealth and state's order. The offence of highway robbery is committed by mere emersion of it[487]. It is done by use or show of force[488] in remote areas[489] where the state institutions are too far to know about it and to stop it[490]. The use of force in this offence usually results in killing of innocent travellers. That is why the Islamic law has treated this offence with extreme attention and severe punishments. The holy Quran says;

> *"Those who wage war against Allah and His Messenger, and go about the earth spreading mischief -indeed their recompense is that they either be done to death, or be crucified, or have their hands and feet cut off from the opposite sides or be banished from the land. Such shall be their degradation in this world; and a mighty chastisement lies in store for them in the World to Come except for those who repent before you have overpowered them. Know well that Allah is All-Forgiving, All-Compassionate.*[491]*"*

The graveness of this offence can be sensed from the first words of the above-mentioned verse which declare it a 'war' against the Islamic state. Indeed this act wages war by challenging the righteous order of the state which ensures

---

[486] Zuhaili, *Fiqh al-Islami* 6, 129.
[487] Awdah, 2, 639.
[488] Bhanassi, *Al-Madkhal,* 49.
[489] According to *Imam Abu Hanifa* the offence will be called *Harabah* only if committed in remote areas because the people are unassisted there where as in city areas the state can act quickly to assist the subjects and to stop the offenders. Where as the *Jamhoor* are of the opinion that no matter where the offence is committed, if it fulfils the other conditions it will be liable to *had* punishment of *Harabah. Jamhoor's* view include the city areas as well in the definition of *Harabah.*
[490] Aamir, , 16.
[491] Al-Quran, *Al-Maidah,* 33-34.

the protection of life and property to its inhabitants[492]. The different punishments described in this verse are regarding difference in the nature of act. It the offender kills an innocent during robbery, he will be killed[493] and his corpse will be publicly hanged for three days[494]. If he only takes money or any property from people without killing anyone, he will be subject to the punishment of amputation[495] of hand and leg from opposite sides and if he only frightens the people without taking property or killing anyone, he will be exiled[496]. The last part of verse declares that if any robber before committing any offence, repents and surrenders himself before the state starts its action, will be released without awarding *Hadd* punishment to him[497].

5.7.1. Deterrence & Incapacitation.

Islamic law deals this offence with the utilitarian concept to achieve the consequential benefits of the punishment in future. The most famous utilitarian theories of deterrence and prevention are applied here in order to achieve the goal of 'crime reduction'. Like all other *Hudu d̄* punishments, *Harabah* punishment is also a forward-looking punishment. The offence of *Harabah* is not only confined to highway robbery rather it extends to any act which is meant to overthrow the order established by the Islamic state for the

---

[492] Syed Abul A'la Maududi, *Tafheem ul- Quran.* 1(Lahore: idara Tarjuman ul-Quran, 2000), 465.
[493] Al-Juzairi, 5, 362.
[494] Awdah, 2, 654.
[495] Abu Muhammad Biha ud Din al-Maqdisi, *Al-Idda sharh al-umdah,* (Cairo: Dar al-Hadees, 2003) ,609.
[496] Al-Tuwaijiri, 5167.
[497] Awdah, 2, 660.

well being of the people[498]. That is why it is also called *fasad fil Ardh* (corruption or mischief on earth).

The Islamic law counters this grave and massive danger to the society by extreme deterrence[499] and incapacitation. It is declared to be the right of God which, once proved, must be enforced. This crime is treated with extreme punishment of *Hadd* because it mostly happens in a situation where the victim founds himself in no position to defend himelf[500]. The deterrence in the shape of capital punishment warns the offenders to never commit this heinous crime. The person, who wages war and kills an innocent armless non-combatant, deserves the deterrent punishment of killing.

The capital punishment serves the purpose of prevention too. The offender is considered a massive danger that must be eliminated to safeguard the society from the kind of mentality which deprives a human being from the most precious right of life. The punishment of banishment and amputation of hand and leg from opposite sides serves both deterrent as well as preventive function. These extreme punishments are intended to convey the deterrent effect to the people to stay away from the grave misconduct of *Harabah*[501] and to respect the lives, honour and property of other people. Failing which can result in application of deterrent and preventive punishments, keeping in view the intensity of crime, in shape of exile or imputation[502]. The most

---

[498] Maududi, *Tafheem ul- Quran*. 1, 465.
[499] Faras, 76.
[500] Shah Waliullah, *Hujja-tul-Allah al-Baligha*, 2(Beirut: Dar al-Jabal, 2005), 245.
[501] Abu Zahra, *AL-Uqubah*, 80.
[502] Al-Juzairi, 5, 360.

deterrent part of this punishment is hanging of the corpse of the offender in a public place for several days.

5.7.2. Expressivism.

The punishment for *Harabah* contains an expressive aspect. Generally the punishment itself is an expression of the denunciation and disapproval of the offence of *Harabah* but here it is more than that. The Islamic law orders to hang the corpse of the offender who receives capital punishment for *Harabah,* in a public place where it can be viewed by the general people of the community[503]. This act is intended to express the extreme disapproval of this offence as we see that this kind of punishment having publicly propagated deterrent effect is not awarded by Islamic law for any other offence. The graveness of this crime necessitates the extreme expression of its disapproval which is achieved by hanging the corpse for several days[504].

5.7.3. Restorative Justice & Reformation.

The philosophy of Islamic penal law is to stop the offence before it occurs. In the case of *Harabah,* Islamic law announces its favour for those who want to quit the gang but are afraid of punishment. Islamic law welcomes them by announcing general pardon if they do so before committing any crime[505] and before being captured[506]. In this way Islamic law intends to restore the broken relationship between *Muharib* and the community by giving them clean chit.

---

[503] Al-Kasani, 7, 95.
[504] Ibid., 95.
[505] Dr Shehzad Iqbal Sham, *Pakistan mein Hudūd Qawaneen,* (Islamabad: Shariah Academy), 306.
[506] Abu Zahra, *AL-Uqūbah,* 81.

Moreover Islamic law rehabilitates and reforms the offender by announcing that if they repent before being captured, their offence will be forgiven. The repentance includes the presence of guilt on the part of offender which pushes him to reform himself from a criminal to a law abiding citizen.

5.8. Offence of Apostasy (*Riddah*).

The Islamic law intends to establish a state which strives to spread the righteous code of human life in the shape of Islam. That is why it imposes its law along with cutting the roots of any movement which aims to overthrow the Islamic order and establish an alternate to the divine system of God[507]. That is why it is strictly prohibited for a Muslim to revert from Islam to any other religion[508]. However, at the same time, it is illegal to force a non-Muslim to accept Islam, but once accepted by free will and choice; he has no right to disbelieve again, otherwise executed[509].

The apostasy is a kind of 'High Treason' in Islamic law[510]. The people who wilfully accepted Islam without being enforced to accept it, are supposed to obey and follow the ultimate truth, forever[511]. Apostasy expresses the rejection to the Islamic law and order, which is why it is treated as high treason where a citizen rejects the state's constitution (*Quran* & *Sunnah*)[512] and

---

[507] Syed Abul A'la Maududi, *Murtad ki Saza.* 1(Lahore: Islamic Publications, 1970), 36.
[508] Al-Tuwaijiri, 5, 185.
[509] Dr Muhammad Israr Madni, *Apostasy and Blasphamy,* (Lahore: Idara Islamiat, 1995), 84.
[510] Maududi, *Murtad ki Saza.*, 48 + 53.
[511] Abu Zahra, *AL-Uqubah*, 154.
[512] Awdah, 2, 709.

this rejection resulting in High treason demands capital punishment[513].The offender in this case is detained for some time[514] in which he will be convinced to revert back to Islam[515]. The offender is provided the opportunity to think in these three days and if he accepts his wrong and returns back to Islam, he will be released. But in case the offender stands firm on his stance of disbelieving, the Islamic law orders to impose the punishment on it[516].

The reason for which Islamic law deals this offence with an extreme sentence of capital punishment is that Islam is not just an ideology with mere meta-physical beliefs; rather it is a complete code of life which guides human being in every field of life, to achieve the perfect utility in his life. It provides comprehensive guidelines and regulations for politics, economics, foreign policy, commercial laws, civil laws, international relations, belief, rituals, criminal laws, education, family system, social festivities, culture and civilization[517]. In this regard Islam differs from other conventional religions which only discuss the beliefs and few rituals. Because of the complete and comprehensive nature of Islam, the apostasy is considered 'high treason' and apostate is dealt severely because his act is considered as an insurgency against this entire system along with doubting the certainty and perfectness of

---

[513] Dr Tanzeel-ur-Rehman, *Islami Qanon-i-Irtidad,* (Lahore: Anjuman Khudam ul Quran, 2001), 41.

[514] Mostly classical Muslim jurists are of the opinion that the offender should be given three days and in that time he should be kept in lockup. However few scholars are of the view that the time period should not be fixed to three days. It should be left flexible keeping in view the circumstances of the case.

[515] Zuhaili, *Fiqh al-Islami* 6, 187.

[516] The *Hanafi* school declares it discretionary to provide three days to apostate where as *Jamhūr* declare this obligatory and the state is bound to provide three days to the offender for reformation and thinking.

[517] Maudūdi, *Murtad ki Saza.*, 45.

the divine system of life, i.e. Islam. The penalty for apostasy in Islamic law is capital punishment[518]. The offender is sentenced to capital punishment for committing the 'high treason' against the constitution of the state religion. This punishment is general for all criminals including women[519].

5.8.1. Deterrence & Incapacitation In the punishment of Apostasy.

The capital punishment with no other option of alternate punishment, excluding the chance of pardoning by declaring it a *Hadd* is indeed a deterrent punishment[520]. The graveness of the danger posed by the act of apostasy to the entire culture, order, civilization and system, maintained by the Islamic law necessitates the deterrence in the punishment to achieve the consequential goal of 'crime reduction' in the future because the act of offender is considered as war against the state[521]. Removal of deterrence from the punishment of apostasy can result in a disastrous situation for the state religion of an Islamic state[522]. The offence of 'High treason' is dealt with the most extreme punishments in most of the states state round the globe.The punishment of apostasy contains the philosophy of preventive theory by removing the capability of that person, to commit the crime, by executing and removing him from the face of the earth[523].

---

[518] Zuhaili, *Fiqh al-Islami*, 6, 186.
[519] Excluding *Hanafi* school, which declares to not impose *Hadd* of apostasy upon female, the rest of schools of thoughts of Islamic law are agreed upon the fact that the *riddah* punishment will be equally imposed upon women, if found guilty, las it is imposed upon men.
[520] Faras, , 73.
[521] Al-Zahim, , 124.
[522] Al-Zahim, 126.
[523] Maududi, *Murtad ki Saza*, 47.

5.8.2. Restoration and Reformation.

The Islamic law imposes its punishments after the crime is proved beyond any doubt. The philosophy is to refrain from imposing punishments by whatever legal means. That is why the offence of apostasy is also dealt with the same philosophy by trying to convince the offender, to bring him back to the community by saving him from imposition of punishment.

The Islamic law provides three days[524] to the offender in which he is intended to be reformed by educating him about his misconceptions[525]. The philosophy is to rehabilitate and reform the offender which shows the application of the theory of reformation in this punishment[526]. Furthermore, by providing three days for education and thinking in making any decision, the objective is to restore the broken relation of the offender with the community. In this period the offender is provided guidance by the state which resembles the restorative conferences as explained in the restorative justice earlier.

---

[524] The Limit of three days is changeable, subject to the condition of offender.
[525] Al-Juzairi, 5, 373.
[526] Abu Zahra, *AL-Uqubah*, 157.

Conclusion.

The Islamic law of crime and punishments has given much importance to *Hudūd*. These are the crimes which pose immense threat to the society and its peace. The primary objective of Islamic law is to ensure a model society where the life, honour, property, family and social system are intact. This is because the prosperity and development of any society lies in the shelter and security to the basic spheres of life, property, family, society and state.

The *Hudūd* punishments in Islamic law contain various penal goals of the western penal philosophy. These punishments uniformly apply the 'theory of deterrence' which shows that the primary objective of the *Hud ū d* punishments is deterrence. The utilitarian approach of punishments looks dominant in *Hudūd* punishments which can be seen in the deterrent as well as preventive character of these punishments. *Hudūd* punishments contain some other penal goals too, like that of reformation, expressivism and restorative justice. This character of *Hud ū d* punishment shows that each single punishment is not confined to one single penal goal rather each single *Hadd* presents the shape of a mixed or hybrid punishment, comprising several penal goals. This hybrid nature of *Hudūd* punishments turns it into plausible and compelling framework which perfectly results in crime reduction. This is why the Holy Prophet of Islam, Muhammad (PBUH) regarded the imposition of one *Hadd* punishment much better than having forty days of rain (which results in economic prosperity in agricultural economies).

Chapter Six

Application of Theories of Punishment in *Qisās* & *Ta'zir* Punishments

Introduction.

Qisās and *Ta'zir* are the further two types of Islamic punishment which mostly deal with the crimes affecting the individual rather than society and because of this nature the lawgiver has kept the door of pardon and negotiation open in these two punishments which can be sensed in making the proportionality and restorative justice, the ruling penal goals of *Qisās* as well as *Ta'zir*.

This chapter includes the definitioan and ecxplaination of the basic concepts of *Qisās* and *Ta'zir* punishments followed by the practical application of western penal theories in these Islamic punishments. This partof the thesis also discusses the punishment of *diyyah* as alternate punishment for *Qisās* and explains that how *diyyah* punishment is an epic model of restorative justice.

6.1. Basics of *Qisās* and *Ta'zir*.

The Muslim jurist have been discussing *Qisās* under the topic of *Jināyāt* which is further divided in to two sub-categories, *Jin ā yah ala al-nafs* (Homicide) and *jin ā yah ala ma don al-nafs* (Bodily Harm)[527]. The *Ta'zir* punishments are discussed separately. The term *Qis ā s* is used for the punishments related to the body of human being. *Qisās* is based upon the concept of retaliation[528]. This concept has been a vital part of every legal system since before Islam. The famous *"code of Hammurabi"* issued by the Babylonian king *Hammurabi* around 1750 BC, which was discovered in year

[527] Awdah, 2, 4.
[528] Peters, 7.

1902, contains the specific law of "*lex talionis*[529]" which is based upon the concept of equality in crime and punishment both in kind and degree.

Ta'zir, in Islamic law are those punishments which are not fixed by the law giver, i.e. Allah (s.w.t)[530]. These are the discretionary punishments which unlike *Hudu ̄d* and *Qisās*, are subject to change. It comprises a wider range of offences which may include or exclude some offences with change in the time and place. The state is free to legislate the adequate *Ta'zir* punishments to deal with the crimes[531]. It is the flexibility of *Ta'zir* which makes Islamic penal law, a more compelling legal system which possesses the capability of dealing the crimes no matter what era or part of the world it is.

6.2. Application of Theories of Punishment in *Qisās* Offences.

In Islamic law, the primary punishment for intentional physical assault is *Qisās*[532] based upon the concept of equality in the punishment and crime[533]. The punishment must be equal in kind and degree to the crime[534], which is also termed as 'Battery' in torts law. The murderer will be sentenced to death

---

[529] Brooks, *Punishement*, 17.
[530] Aamir, 48.
[531] Aamir, , 309 -310.
[532] Dr Wahba Zuhaili, *Nazriya al-Daman*, (Damascus: Dar al-Fikr, 1998), 272.
[533] Abu Zahra, *AL-Uqūbah*, 298.
[534] The muslim jurists differ on the method of death penalty as *Qisas*. *Hanafi* School is of the view that the *Qisas* as death penalty, may only be imposed by killing the convicted offender with sword. They argue from the *Sunnah* where the Holy Prophet (peace be upon him) laid the principle as expressed by the *Hanafi* school. The Shafi' & Maliki schools are of the view that the death penalty be imposed in the same way as the offender did to the victim. They argue from the general verses regarding *Qisas*, which demands equality between crime and punishment. The detailed discussion about the issue can be found in Book Al-Uqūbah P 455 - 458, a famous book by the renowned scholar Abu Zahra & in the famous book of Abdul Qa ̄dir Awdah Shaheed, Al-Tshri' Al-Jinai Al-Islami volume 2 p 150 - 151.

in the same way he killed the victim[535]. Likewise the hand, finger, ear, leg, eye or nose of the offender will be amputated in the same way happened to the victim[536]. Furthermore the *Qisās* punishment will only be inflicted, if the offence was committed intentionally[537]. To impose *Qisās* the offence must be proved in court through any means of two male witnesses, confession of offender himself, *Qasāmah*[538] or by circumstantial evidences according to *Hanafi* School[539]. The Islamic law grants the discetion of infliction of *Qisās*, as the right of the victim or his legal heirs[540]. The offence, once proved, in the court of law, following due procedure, be left to the choice of victim in case of bodily injuries or to the heirs of victim in case of homicide[541]. The victim or his heirs have the choice either to demand the imposition of punishment[542] or to pardon the offender in exchange of financial compensation called *Diyyah* or waive off the punishment without demanding anything[543].

The amount of *Diyyah* in Islamic law, in homicide offence, is one hundred camels with specific ratio[544], one thousand gold *dinars* or twelve thousand

---

[535] Al-Tuwaijiri, 5, 11.
[536] Al-Zahim, 129.
[537] Abu Zahra, *AL-Uqūbah*, 366.
[538] Bhanassi, *Al-Qisas*, 193. *Qasamah* is a legal term meant to define the situation where the murderer is unknown and the plaintiff pointout 50 suspects who have to swear that they have not committed the murder.
[539] Zuhaili, *Fiqh al-Islami* 6, 396.
[540] Mian Masood Ahmad Bhutta Advocate, *Qawaneen-i-Qisas o diyat*, (Lahore: Ahan, 2002), 114.
[541] Abu Zahra, *AL-Uqūbah*, 445 - 446.
[542] Malik Riaz Khalid, *Qanoon-i-Fojdari*, (Lahore: Sanh-imeel Publications 1993), 18.
[543] Faras, 52.
[544] The *Diyyah* is sub divided in to two sub categories, *Mughalladha* which is 25 each she-camels of 2 years, 3 years, 4 years and 5 years of age and *Mukhaffafa* which is 20 she-camels, each of 2 years, 3 years, 4 years and 5 years along with 20 he-camels of 2 years age. *Diyyah Mughalladha* is for intentional offences wheras *Mukhaffafah* is for unintentional offences.

silver *dirhams*[545]. *Diyyah* is the secondary punishment for the offence of *Jinayah.* It is payable in the case of intentional harm where victim or his heirs waives off *Qisās* and demands *diyyah* or in case the offence is un-intentional or quasi-intentional. In the last two cases *diyyah* becomes the primary punishment because of lack of intention in the offence which excludes the original *Qisās* pnishment[546].

In bodily harms the amount of *diyyah* is distributed in proportion to the number of body part in the human body. The amount of *diyyah* for nose, beard, tongue and penis etc will be full where as for one hand, eye, leg or ear, it will be half of *Diyyah.* Likewise the *diyyah* for eyelid will be 25 % of full amount because of the presence of four eyelids in the human body. Furthermore the amount of *diyyah* for one finger is 10% of total *diyyah* because of number of fingers being ten in both hands and feet[547]. This amount is payable either on amputation of that part of victim's body or by destroying the use, benefit or utility of that part like paralysing the hand or tongue[548]. The body part remains attached to the body but becomes useless because the victim loses the utility of that very part. The full amount of *diyyah* is payable in case of losing any sense among the senses of hearing, speaking, touching, smelling or speaking etc[549]. The original punishments of *Qisās* or *diyyah* may be altered as a result of conciliation among the parties on any amount other

---

[545] Awdah, 2, 178.
[546] Al-Zahim, , 133.
[547] Abu Zahra, *AL-Uqubah*, 523.
[548] Awdah, 2, 274.
[549] Al-Tuwaijiri, 5, 84.

than *diyyah*[550]. The final option in the offence of *Jinayah* is to completely pardon the offender for the sake of God without any exchanging compensation[551].

6.2.1. *Qisās* in the *Holy Qurān.*

The Holy *Qurān* categorically penalizes the homicide and other bodily injuries. It decides the punishment for that offence too, that is why some jurists consider *Qisās* not different from *Hadd* because of its being fixed by the almighty God[552]. In this part we will highlight the verses of Holy *Qurān* penalizing homicide and bodily injuries along with announcing the punishments for that.

> *"Believers! Retribution is prescribed for you in cases of killing: if a freeman is guilty then the freeman; if a slave is guilty then the slave; if a female is guilty, then the female. But if something of a murderer's guilt is remitted by his brother this should be adhered to in fairness, and payment be made in a goodly manner. This is an alleviation and a mercy from your Lord; and for him who commits excess after that there is a painful chastisement. People of understanding, there is life for you in retribution that you may guard yourselves against violating the Law*[553]*".*

This verse sets the principle of punishing the guilty only, regardless of his social, racial and financial status. This verse also enacts the law of *Diyyah,* which should be paid if the victim waives off *Qisās* punishment and demand it.

---

[550] Zuhaili, *Fiqh al-Islami, 6,* 293.
[551] Al-Juzairi, 5, 234-235.
[552] Awdah, 2, 344.
[553] Al-Qurān, *Al-Baqarah,* 178 - 179.

"Therefore We ordained for the Children of Israel that he who slays a soul unless it be (in punishment) for murder or for spreading mischief on earth shall be as if he had slain all mankind; and he who saves a life shall be as if he had given life to all mankind. And indeed again and again did Our Messengers come to them with clear directives; yet many of them continued to commit excesses on earth.[554]"

The most powerful and bright verse highlighting the value of human life and showing respect to the human being. It strongly condemns and prohibits the unlawful murders and considers it invasion on the entire humanity and their very basic 'right to life.'

"It is not for a believer to slay another believer unless by mistake. And he who has slain a believer by mistake, his atonement is to set free from bondage a believing person and to pay blood-money to his heirs, unless they forgo it by way of charity. And if the slain belonged to a hostile people, but was a believer, then the atonement is to set free from bondage a believing person. And if the slain belonged to a (non-Muslim) people with whom you have a covenant, then the atonement is to pay the blood-money to his heirs, and to set free from bondage a believing person. But he who cannot (free a slave) should fast for two consecutive months. This is the penance ordained by Allah. Allah is All-Knowing, All-Wise. And he who slays a believer wilfully his reward is Hell, where he will abide. Allah's wrath is against him and He has cast His curse upon him, and has prepared for him a great chastisement.[555]"

These verses categorically negate the intentional murder. Even the unintentional murder, keeping in view the importance and value of human life, is penalized with financial compensation.

"And therein We had ordained for them: 'A life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for all wounds, like for like. But whosoever forgoes it by way of charity, it will be for him

---

[554] Al-Quran, *Al-Maidah*, 32.
[555] Al-Quran, *Al-Nisa*, 92 – 93.

an expiation. Those who do not judge by what Allah has revealed are indeed the wrong-doers.[556]"

This verse provides the law for bodily harms and injuries. These harms must also be treated with equality in kind and degree. It also encourages the victim to pardon the offender by offering him the reward in hereafter.

"Do not kill any person whom Allah has forbidden to kill, except with right. We have granted the heir of him who has been wrongfully killed the authority to (claim retribution); so let him not exceed in slaying. He shall be helped.[557]"

This verse puts bar on the concept of private vengeance. It clearly mentions that the right to impose the punishment of *Qisas* vests in the state only.

"If you take retribution, then do so in proportion to the wrong done to you. But if you can bear such conduct with patience, indeed that is best for the steadfast.[558]"

"Thus, if someone has attacked you, attack him just as he attacked you, and fear Allah and remain conscious that Allah is with those who guard against violating the bounds set by Him.[559]"

The abovementioned two verses provide the general rule of equality in the *Qisās* punishments. Moreover it shows the nature of an ideal human's conduct in his everyday life.

6.2.2. Retribution.

As mentioned earlier, the Islamic law of *Qisas* is based upon the concept of complete equality in kind and degree of the crime and punishment[560]. The

---

[556] Al-Quran, *Al-Maidah,* 45.
[557] Al-Quran, *Al-Israa,* 33.
[558] Al-Quran, *Al-Nahl,* 126.
[559] Al-Quran, *Al-Baqarah,* 194.
[560] Zuhaili, *Fiqh al-Islami* 6, 218.

doctrine of 'retaliation' and 'proportionality' for the 'deserving guilty'[561] makes *Qisās*, a pure retributive punishment.

The western theory of retribution is mere philosophical idea. The western world has yet to provide a logical and practical application of any single as well as hybrid theory of punishment, with its complete details. The entire philosophy of theories of punishment, in western legal discourse, is just an academic discussion and no one has provided a practical version of any single theory of punishment. The theory of retribution is based upon the two ideas of *'desert'* and *'proportionality'*[562]. The punishment of *Qisās* fulfils it. *Qisās* provides a perfect and unique practical application of the theory of retribution as it fulfils both requirements of 'desert' and 'proportionality' of the retributive justice[563]. The Holy *Qurān* sums up the entire theory of retribution in a half line, not even in a complete verse, rather a small portion of it. It says;

> *"The recompense of evil is evil the like of it.*[564]*"*

6.2.3. Desert.

The Islamic law categorically declares that the punishment be imposed on the guilty alone and no more than him[565]. Before the revelation of the law of *Qisās*, it used to be inflicted with the strong feelings of vengeance. The tribes used to take it as a matter of pride and shame. If a common man was killed by

---

[561] Al-Juzairi, *5*, 221.
[562] Brooks, *Punishement*, 15.
[563] Bhanassi, *Al-Uqūbah*, 71.
[564] Al-Shuraa, Verse 40.
[565] Awdah, *1*, 385.

another tribe, they used to take revenge by killing either the chief of the tribe or any other notable person in exchange of a common man of their tribe. Likewise for one murder, the tribes used to kill more than one, to better ensure the strong revenge. For the murder of a woman they used to kill men and for a slave of their own tribe they strive to kill a free man from the offender's tribe[566]. The punishment was not confined to the offender, instead the innocent have to receive the pain of what he has noting to do with[567].

Islamic law prohibited this ugly practice at once, to ensure that the innocent may never get punished of what he has not done. Islamic law clearly mentioned that the punishment must not exceed the wrongdoer. It is the offender who needs to be punished and no one else[568]. The verse of *Qurān* is very clear on this issue saying that the response to the crime must be confined to the offender alone. Moreover the desert in *Qisās* was not only made related to the guilt but it was further given the perfect and unique form by limiting the infliction of punishment to the effect of crime. This means that Islamic law not only saved innocent and punished the offender but also helped the offender to not get punished more than what he deserved[569]. The desert required to punish the guilty alone which is applied in *Qisās* with elegance. It inflicts the punishment only after wrong is proved in the court beyond any

---

[566] Aamir, 87.
[567] Bhanassi, *Al-Uqubah*, 63.
[568] Al-Tuwaijiri, 5, 13.
[569] Abu Zahra, *AL-Uqubah*, 311.

doubt[570]. In case of any doubts in its proof it suddenly diverts from primary punishment to the secondary punishments[571].

This is the uniqueness of *Qisās* where we can find the secondary and alternate punishments like *diyyah* and *Kaffārah*[572]. The contemporary legal systems are unaware with this concept of alternate punishments and opting for it in absence of conclusive evidences. This shows the presence of the primary aspect of 'retributive desert' in *Qisās* with perfection. *Qisās* punishment provides the practical application of the concept of retributive desert with such minute details. *Qisās* isn't mere philosophical theory rather it a living practical example of exclusive justice which positively effects on the entire community by eliminating crime, saving the lives of mankind, ensuring peace and harmony and providing an environment where every one can exercise his right freely.

6.2.4. Proportionality.

Qisās is the epic example of proportional punishment[573]. In the entire history of mankind, no penal system except Islamic, can provide even a relatively nearer example of proportional punishment that *Qisās* has presented and applied. The second aspects of proportionality of the retributive theory can be found, completely and elegantly applied in the *Qisās*[574].

---

[570] Saleem Al-Ewa', 356.
[571] Zuhaili, *Fiqh al-Islami, 6*, 274.
[572] Yahya Bin Sharf Al-Nawawi, *Raodat-ul-taliban*, 9(Beirut: Al-Maktab Al-Islami, 1991), 380.
[573] Al-Zahim, , 130.
[574] Abu Zahra, *Al-Uqubah*, 312.

The *Qurān* sets the rule of blood for blood, eye for an eye and nose for nose[575]. The punishment for Homicide is death sentence[576]. The offender alone is subject to the punishment irrespective of his status, gender, age and caste. Likewise the punishment for intentional bodily injuries will also be inflicted in same manner and up to same extent to that of crime. For cutting finger, the finger of offender will be cut. For damage to sense of smell, the sense of smell of the offender will be damaged and so on. For every part of body and any ability or function of any part, the same will be done to the offender[577].

The principle of proportional and same punishment demands to punish the offender only if the application of punishment same in kind and degree is certain. In case of clear impossibility of proportional punishment or where it becomes doubtful, the punishment would not be inflicted because of uncertainty where it may result in less or more punishment as compared to the severity of crime[578]. That is why Islamic law has denied the imposition of *Qisās* for broken or fractured bones because it seems impossible to implement exactly proportional breakage of bones[579]. Likewise the *Qisās* won't be imposed for the already paralyzed hand of victim, to the healthy hand of offender[580]. *Qisās* is not applicable to the healthy eye of offender where he damaged the already blinded eye of victim because the proportionality disappears here. Damaging the seeing eye for blind eye and the healthy hand

---

[575] Al-Quran, *Al-Maidah*, 45.
[576] Maududi, *Tafheem ul- Quran*. 1, 138.
[577] Al-Juzairi, 5, 294.
[578] Zuhaili, *Al-Daman*, , 290-291.
[579] Bhanassi, *Al-Qisas*, 124.
[580] Aamir, 114.

for already paralyzed one is not proportional punishment, instead it is excessive punishment which is injustice and against the spirit of retribution[581]. The application of proportional punishment demands the presence of intent. That is why Islamic law has ruled out the imposition of same proportional punishment in shape of death penalty where the intent was lacking and the offence happened unintentionally or due to negligence[582]. This is because the Islamic law has divided the offence of homicide into three categories of intentional, unintentional and quasi-intentional murder where the death penalty is specified for the intentional murder only excluding unintentional and quasi-intentional murder[583].

In all above cases where due to lack of proportionality the original primary punishment of *Qisās* is denied, the Islamic law provides the alternate sentence of financial punishment in the shape of *diyyah*[584]. The alternate or secondary punishment of *diyyah* is to serves the purpose of safeguarding the dignity of human life and body which should never be left unattended, if hurt. Moreover it penalizes the offender with the most loving and important thing after the life, i.e. the money.

The punishment of *diyyah* in unintentional, quasi-intentional offence or in case of commutation of punishment from *Qisas* to *diyyah* will also be imposed following the principle of proportionality[585]. Islamic law regards the each

---

[581] Abu Zahra, *Al-Uqubah*, 344 - 350.
[582] Awdah, 2, 78.
[583] Al-Juzairi, 5, 220-221.
[584] Zuhaili, *Al-Daman*, , 279.
[585] Bhanassi, *Al-Diyyah*, 115.

part, sense or ability of human being as equal to the entire body. That is why the *diyyah* for damaging one sense is equivalent to that of the whole body. *Diyyah* for damaging the sense of smelling, listening, seeing and tasting will be 100 camels, 1000 golden dinar or 12000 silver dirham[586], which is same to the *diyyah* for murder[587].

The distribution of *diyyah* for body parts is also proportional to the value of each part. *Diyyah* for damaging one hand, one leg, one eye, one lip, one hip, one breast and one ear is half of the complete value because of the fact that each of these organs have two parts, thats the why the *diyyah* for one part is half which means it is full for one kind of organ in human body. Same philosophy is applied in case where offender causes sexual debility, cutting nose or tongue, damaging senses etc which will be punished with full *diyyah* because these parts are olone and single paired in the body[588]. Likewise the *diyyah* for the fingers of hands and feet is one tenth of full *diyyah* because of the number of fingers being ten[589].

This unique distribution of proportional punishments in the *Qisās* makes it the perfect law to resolve the human disagreements and to best help the crime reduction. Moreover the extremely fair and just application of proportional punishment makes *Qisās*, a compelling system which can never be presented with an alternate.

---

[586] Muhammad Mian Siddique, *Qisas o Diyat*, (Islamabad: IRI, 1982), 57.
[587] Awdah, 2, 178.
[588] Zuhaili, *Fiqh al-Islami*, 6, 342.
[589] Bhanassi, *Al-Diyyah*, 127.

Qisas contains both the aspect of retributive theory. It not only accepts the 'desert' and 'proportionality' but perfectly applies it in a unique way which best meet the ends of justice. We can say that *Qisas* is the only system which provides a practical shape to a mere philosophical theory of retribution.

6.2.5. Restorative Justice.

The doctrine of *Qisās* covers the theory of restorative justice too. As we know that the *Qisās* punishment is regarded as the right of victim or his legal heirs[590]. We also discussed that the victim in case of hurts and heirs of victim in case of homicide [591], are accorded the right of implementation of punishment, pardoning it or commuting it for any consideration[592] which may exceed the amount of *diyyah*[593]. This powerful right, which cannot be denied by any authority, gives birth to the possibility of restoration of broken relationship by negotiation between the offender and sufferer[594]. This is what the theory of restorative justice vows for. It argues for restorative sessions and meeting between the offender and victim to restore the broken relationship.

Qisās applies the restorative justice with more useful and result oriented approach. Unlike restorative justice in western legal discourse, where the victim enjoys no special rights, the *Qisās* puts the victim in a strong position where the entire punishment depends upon his will[595]. In this way the

---

[590] Al-Tuwaijiri, *5*, 37.
[591] Faras, , 65.
[592] Zuhaili, *Fiqh al-Islami* 6, 278.
[593] Muhammad Bin Hasan Al-Shibani, *Al-Asl*, 4(Karachi: Institute of Quranic & Islamic Studies), 485.
[594] Al-Zahim, 132.
[595] Al-Juzairi, *5*, 235.

offender has to try his best to restore the broken relationship by feeling guilty and compensating the damage done. It is a best option for offender to save his life and body parts in exchange of paying some money. As we discussed earlier that the alternate punishment in the shape of *Diyyah,* which is left to the sweet will of victim, isn't unlimited rather it is fixed and best ensures the proportionality[596].

The victim or his legal heirs have four options. To demand *Qisās,* commute it with *diyyah;* commute *Qisās* with any other amount of financial compensation or to waive off the punishment in exchange of nothing[597]. These discretionary powers given to the victim paves the way towards restorative justice. Leaving the first option, the rest three options are the practical shape of restorative justice. The Holy *Qurān,* while ordaining the right of waiving off the *Qisās* punishment to the victim, uses the term 'brother' for the victim[598]. The offender and victim both are reminded that despite the offence and feeling of vengeance, they are still brothers. This teaching, at the very critical movement of the case encourages the victim to remit the punishment for his brother. This verse is the best example of restorative justice. Both parties are encouraged to enter into the brotherly relation, once again. Both should restore the broken relationship. The victim should remit the punishment and the offender must adhere to that honestly and fairly. This was in case of commutation of *Qisās* into *diyyah* or where they both agree upon any financial compensation other

---

[596] Bhanassi, *Al-Diyyah,* 86.
[597] Al-Juzairi, 5, 321.
[598] Al-Quran, *Al-Baqarah,* 178.

than *diyyah*. In case where the victim or legal heirs completely waive of the punishment without any undue influence or coercion, best restores the broken relationship among the victim, offender and the community[599].

In short the *Qisās* provides a very compelling application of the theory of restorative justice where the offender recognizes his guilt; the victim's feeling are respected by enabling him to impose the punishment as his right against the offender which calms down his anger[600] as well as ensures the justice. By doing so, at the end of the day everyone gets satisfied without having any anger and jealousy at all. The relationship gets restored, justice been done and the society flourishes with the supremacy of rule of law along with the love, peace and harmony among its members[601].

6.2.6. Rehabilitation.

The theory of rehabilitation is based upon the concept of reformation of a criminal into a useful person for the society[602]. Rehabilitation relies upon the tools of education, skilful training, healthcare and therapies. The primary objective of this theory is to transform the criminal into a useful citizen rather than mere infliction of pain unto him.

The Islamic law of *Qisās* includes the rehabilitative approach too. The Holy *Qurān* declares the murder as an invasion on the 'right to life' of entire

---

[599] Faras, , 66.
[600] Abu Zahra, *Al-Uqubah*, 344 - 300.
[601] Faras, , 66.
[602] Brooks, *Punishement*, 51.

humanity[603]. That is why it warns the person committing intentional murder to be in the hell forever[604]. This verse terrifies the likely offender which may help him in reforming his character by refraining from his vicious act of killing. Furthermore it lays down the rule named *Kaffārah* where the offender has to observe fast for continuous two months[605]. The holy Quran clearly mentioned the purpose of fast as it makes a person 'God fearing'[606]. 'God fearing' is the highest degree of reformation. If a person becomes 'God fearing' he will be performing his duties, respecting the rights of others and live like a law abiding citizen. So *Qurān* plans to expiate the wrong by keeping fast for continuous two months, in case of un-intentional murder which does not merely focus on inflicting pain rather to rehabilitate the offender. This process of rehabilitation ensures to make the offender recognize his guilt and wrong and to ensure the permanent internal change in his heart and mind[607].

In this way the Islamic law reforms the offender along with the financial compensation paid to the heirs of victim. In addition to redressing the harm done to the victim's family, the Islamic law, keeping in view the larger interest of the society, never forgets to rehabilitate the offender whose negligence resulted in a grave loss to the society.

---

[603] Al-Quran, *Al-Maidah*, 32.
[604] Al-Quran, *Al-Nisa* 93.
[605] Al-Quran, *Al-Nisa* 92.
[606] Al-Quran, *Al-Baqarah* 183.
[607] Maududi, *Tafheem ul- Quran*. 1, 383.

6.3. Application of Theories of Punishment in *Ta'zir* Offences.

Ta'zir punishment deals with an offence, for which there is no *Hadd*, *Kaffārah*[608] or *Qisās* punishments is prescribed by Islamic law[609]. *Ta'zir* punishments are the discretionary punishments where the judge is not bound to award a fixed punishment for every crime unlike *Hudūd* and *Qisās*[610]. *Ta'zir* includes much wider range of offences which may be changing with change in time and place. The punishments for *Ta'zir* offences may also vary from one place to another[611].

The judge or the legislature of an Islamic state has the authority to fix any kind of appropriate punishment for the offences other than *Hudūd* and *Qisās*[612]. It can also be awarded for the offences of *Hudūd* and *Qisās* where to doubt or any other considerable issue, the imposition of *Hadd* or *Qisas* becomes impossible[613]. It differs from *Hadd* and *Qisās* in a way that it can be forgiven unlike *Hudūd*. Secondly it is not fixed[614] where as *Hadd* and *Qisās* punishments are already fixed and no one has the authority to change these punishments. *Ta'zir* is the symbol of the eternity and universality of Islamic criminal law because it is *Ta'zir* which makes Islamic law capable of dealing with new kind of crimes[615].

---

[608] Mansoor Bin Younas, *Al-Raoz ul Murbi' Sharh zad al-mustaqni,* (Al-Risalah Publishers), 671.
[609] Faras, , 65.
[610] Aamir, 48.
[611] Saleem Al-Ewa', 310.
[612] Zuhaili, *Fiqh al-Islami, 6,* 198.
[613] Al-Tuwaijiri, *5,* 193.
[614] Al-Zahim, 141.
[615] Saleem Al-Ewa', 310.

In the following lines we will analyze the application of theories of punishment in Islamic law of *Ta'zir.*

6.3.1. Retribution.

The Islamic law of *Ta'zir* is based upon the doctrine of proportional punishments[616]. That is why it is prohibited by majority of jurists to penalize any *Ta'zir* offence, same with the nature of *Hudu ā,* with lashes more in number to that of *Hudu ā* punishments because we discussed earlier in previous chapter that *Hudu ā* are the most severe type of punishments in Islamic penal laws [617]. The most plausible justification of proportional punishments in *Ta'zir* is the *Qurānic* verse which declares the principle for *Ta'zir,* as follows;

> *"The recompense of evil is evil the like of it.[618]"*

This verse justifies pillars of retributive theory, the desert and the proportionality. It rules out the chance of punishing innocent by laying down the rule of imposing punishment only against evil, wrong or an offence[619]. This necessitates the 'desert' where only guilty is going to be punished. It looks like a backward-looking approach where punishment is connected to a past illegal act. The verse justifies the second and most important feature of retribution, i.e. 'proportionality'. It enacts the eternal principle of proportional punishment for a crime. It outlaws the possibility of excessive punishments in

---

[616] Zuhaili, *Fiqh al-Islami 6,* 205.
[617] Al-Tuwaijiri, 5, 196.
[618] Al-Quran, Al-Shuara', 40.
[619] Zuhaili, *Fiqh al-Islami,* 6, 205.

Ta'zir offences[620]. The verse demands the punishment which is proportional to that of crime and which best suites to eliminate and reduce the crime. This is the miracle of the *Qurān* that the idea of retribution elaborated by the political and legal philosophers, after decades of studies and hundreds of books, was perfectly defined by the Holy *Qurān* in just four words comprising only a small part of a single verse.

The financial punishments, as part of *Ta'zir,* must also be in proportion to the intensity of the crime. The Islamic law discourages the punishments of fines and regard it a kind of corruption where a citizen is deprived of his legally earned money[621]. However the monetary punishment in shape of destroying the property which is either illegal (*ghair mutaqawwim*) in itself or is used for illegal purposes like bars, pubs, casinos, alcohol producing factories etc[622]. The destroying of this property is based upon the concept of proportional punishment.

Though the majority of punishments in Islamic penal law are related to infliction of pain on the body of offender, however the Muslim jurists consider imprisonment as an important part of punishment. The Muslim jurists emphasize on the proportionality of 'imprisonment' with the severity of crime.

The Holy Prophet (peace be upon him) has set a compelling rule for the *Ta'zir* punishments, which at one hand shows the flexible and discretionary nature

---

[620] Saleem Al-Ewa', , 313.
[621] Zuhaili, *Fiqh al-Islami,* 6, 201.
[622] Bhanassi, *Al-Ta'zir,* 38.

of *Ta'zir* punishments and on the other hand the proportional behaviour of it. The Holy Prophet Muhammad (peace be upon him) said;

> *"Forgive (minimize) the people of good qualities their slips (wrongs), except Hudu ā (punishments)*[623]*"*

This saying declares that in *Ta'zir* punishments the habitual offenders and the dignified law abiding citizens will not be treated alike because the common noble people must be given the favour of their usual good behaviour, in case of unexpected pity crimes[624]. The *Hudu ā* are excluded from this rule because of its devastating effect on the society which may not be tolerated at any cost.

6.3.2. Deterrence.

The *Ta'zir,* as a promising model, incorporates deterrence in its punishments[625]. As we mentioned that *Ta'zir* is applied for a wide range of offences which are subject to change with changing circumstances. This is because it has to counter the newly rising dangers to a society which never remain same all the time[626]. That is why deterrent punishment cannot be excluded by any penal system which needs to best cope with the changing circumstances. *Ta'zir* punishments may have deterrent effect where the ordinary or proportional punishments may not work[627]. These offences may

---

[623] Abu Dawood, *Sunan, Kitab al-Hudu ā,* hadith no 4375.
[624] Bhanassi, *Al-Ta'zir,* 52.
[625] Faras, , 106-107.
[626] Al-Zahim, , 141.
[627] Aamir, 275.

have greater devastating effect on the society that is why they must be dealt with extra care and attention[628].

The Muslim scholars have consensus upon the fact that the deterrent sentence of capital punishment is not confined to *Hudūd* and *Qisās*. Death penalty may form a part of *Ta'zir* punishments[629]. It can be awarded in cases where the graveness of crime and its disastrous impact on the society necessitates dealing it with the most deterrent punishment, to best ensure the safety of the society[630]. These crimes may be like espionage, homosexuality, blasphemy and prostitution etc[631].

The *Sunnah* allows the death penalty in case where the offender becomes unreformable. It declares to impose death penalty upon the person who commits the crime of theft etc several times[632] on third or fifth time[633]. This means that the habitual offenders involved in grave crimes may be awarded the usual punishment few times but if they continue indulging in the crimes despite the usual punishment, they may be exposed to the deterrent punishments which may lead to death penalty[634]. This is a general rule. The deterrent effect in *Ta'zir* punishment may also vary for different offenders. One kind of deterrent punishment may help stopping an offender from repeating the offence but may not suit another offender who must be dealt

---

[628] Bhanassi, *Al-Ta'zir fi al-Islam*, 44-45.
[629] Zuhaili, *Fiqh al-Islami* 6, 200.
[630] Al-Zahim, 141.
[631] Zuhaili, *Fiqh al-Islami*, 200-201.
[632] Aamir, , 289.
[633] AbdurRehman Abdul Aziz al-Dawood, *Islam ka Nizam-i-Ta'zirat*, (Faisalabad: Tariq Academy, 2000), 134.
[634] Bhanassi, *Al-Uqubah*, 195.

with extreme deterrent punishment[635]. This is related to the problem of recidivism and as a utilitarian approach of punishment. Islamic law also revolves around the future benefits from deterrent *Ta'zir* punishment.

The deterrent punishment in *Ta'zir* is not confined to death penalty rather it is one kind of it. It may take several shapes among which is flogging[636]. The Muslim jurists argue that the intensity or harshness of a flog should be severe than that of its intensity in *Hudu ā* because usually the number of lashes in *Ta'zir* are less than that in *Hudu ā*. That is why the infliction must be forceful for less number, to achieve the deterrent effect of *Ta'zir* punishment[637].

6.3.3. Rehabilitation.

The Islamic law, being a divine revealed legal system, gives very importance to the character of the human being. It is clear from the basic definition of crime in Islamic law when any disobedience to the divine teachings of God is termed as an offence [638] .That is why the basic purpose of the *Ta'zir* punishment too, is reformation and rehabilitation of the offender[639]. To achieve this objective the *Ta'zir* punishment adopts different approaches[640]. The Islamic law not only punishes for pure legal acts but also for acts related to the rituals. The person who never offers the daily prayers or the person who does not observe fast in the month of *Ramadan* without any reasonable

---

[635] Saleem Al-Ewa', 321.
[636] Al-Zahim, 141.
[637] Bhanassi, *Al-Ta'zir*, 55-56.
[638] Faras, 37.
[639] Aamir, 278.
[640] Al-Zahim, 141.

excuse, will be sentenced to *Ta'zir* punishment in order to force them to obey the basic teachings of Islam[641]. This is the pure rehabilitative punishment.

Secondly the offender may not be exposed to punishment in *Ta'zir* offence where the offender repents and the authorities get satisfied with his repentance [642]. This shows that the basic purpose of punishment was rehabilitation and if that purpose is achieved by repentance then there is no need of punishment. Likewise the Islamic law puts the dangerous or habitual offender into jail for a prolonged period of time with the intent of rehabilitating that offender. That is why if the prisoner repents and ensures from his conduct that he is not going to reoffend, he may be set free. In that case the imprisonment was not for a fixed period of time rather it was for the rehabilitation and as soon as that objective is achieved, the punishment finishes[643].

The Islamic law educates the offender about the teaching of Islam regarding respecting others rights with intent to reform the criminal into a law abiding citizen. For this person the judge or the authorities may adopt several different techniques keeping in view the situation of the offender[644]. This may take the shape of educating him in prison or providing him health facilities if he was found suffering from any mental health issues etc. The offender may also be taught some useful skills which may help him in making livelihood for himself.

---

[641] Zuhaili, *Fiqh al-Islami* 6, 197.
[642] Bhanassi , 86-87.
[643] Aamir, , 330-331.
[644] Saleem Al-Ewa', 320.

In order to best rehabilitate the offender, the judge may use one of following ways. He may advice the offender in a polite way to not indulge in crimes again. He may also warn and threaten the offender to refrain from violating law if it seems working[645]. All these approaches may be adopted respectively looking in to the psychology and character of the offender along with examining his past criminal record. Whatever helps in reformation of the offender, be adopted as this eventually results in the very basic outcome of crime reduction[646].

6.3.4. Incapacitation.

The *Ta'zir* punishment includes the application of the theory of incapacitation or prevention. In case where the objective of crime reduction demands the removal of offender's capability to avoid recidivism, *Ta'zir* adopts the preventive aspect of punishment[647]. The Islamic law deals with the administrative offences by preventive approach[648]. The officer using undue influence, coercion or abuse of his official capacity for his legal acts will be punished with his removal from office[649]. Likewise it may help in transferring or changing the official desk of an officer to ensure the recidivism vanishes.

Capital punishment is one of most famous example of preventive punishment where the unreformable habitual offenders are dealt with removing them permanently from the society in order to safeguard the society from their

---

[645] Al-Tuwaijiri, 5, 197.
[646] Bhanassi, *Al-Uqubah*, 129.
[647] Zuhaili, *Fiqh al-Islami* 6, 201.
[648] Aamir, 417.
[649] Faras, 105.

crimes[650]. *Ta'zir* includes capital punishment for the most heinous crimes which may not fall in the category of *Hudu d̄* or *Qisās*. As discussed earlier, the teachings of *Sunnah* are clear in this regard. Moreover the monetary punishments in shape of damaging the property which is used for illegal activities like casinos, bars and pubs, brothels, wine producing factories are also a kind of preventive punishment which aims to destroy the ability and chance of recidivism[651].

Likewise the punishments of exile and banishment used to serve the purpose of preventive punishment, which seems quite impractical in contemporary world due to modern day state system because even the exile from one state to another state of a country may not eliminate the expected harm due to which the offender is exiled because of his living inside the people no matter which area of the state he is in. But the same objective can be achieved by prisons. The jails and prisons are an important kind of *Ta'zir* punishment[652]. The second pious caliph Umar (may Allah be pleased with him) laid down the foundation of prison system in Islamic law. He bought a house and specified it for imprisonment of offenders[653]. The conduct of *Hazrat Umar (R.A)* clarifies the inclusion of prison system in the *Ta'zir* punishment. And it is well known among the legal scholars that one important purpose of imprisonment is to stop recidivism by disabling the offender from further crimes.

---

[650] Zuhaili, *Fiqh al-Islami*, 6, 201.
[651] Bhanassi, *Al-Ta'zir*, 38.
[652] Saleem Al-Ewa', 332.
[653] Bhanassi, *Al-Uqūbah*, 206.

6.3.5. Restorative Justice & Shame Punishments.

The *Ta'zir* punishment serves the philosophy of restorative justice. Just like *Hudu ̄d* and *Qis ̄a ̄s*, the *Ta'zir* punishment is also divided into two sub categories of 'right of Allah' and 'right of individual'[654]. The crimes which harms the society most, as compared to the individual victim, falls in the category of 'right of Allah' (like *Hudu ̄d*). However the crimes where the individual is affected more than that of society are declared as the infringement of right of victim (like *Qisās*)[655]. Just like *Qisās*, the *Ta'zir* also grants the right of pardoning etc to the victim which actually opens the gates of restorative justice[656]. The discretionary nature of *Ta'zir* punishment allows the victim and offender to go for option other than imposition of punishment, which can help in restoring the broken relationship among the victim, offender and the society[657].

As we mentioned in chapter five that shame punishments are considered a kind of restorative justice which makes the offender feel the guilt and sometimes pain in order to recognize the painful effect of his offence on the victim's mind and body. Shame punishment may take the shape of reintegrated shaming where the offender is shamed in a respectful manner to make him feel guilty and to restore his relation to the society[658]. It is

---

[654] Al-Tuwaijiri, 5, 196.
[655] Zuhaili, *Fiqh al-Islami* 6, 208.
[656] Bhanassi, *Al-Uqūbah*, 138.
[657] Aamir, 477.
[658] Brooks, *Punishement*, 75.

considered to educate the offender and help him restore the broken relationship with other stake holders after recognizing his guilt.

Islamic law provides the practical approach of shame punishments to serve the purpose of making the offender feel the guilt and to reform him. This shaming is usually in a respectful manner where the sole purpose is to restore the offender and the broken relationship among the stake holders of the society. But in severe cases it may take the shape of disintegrative shaming where the objective is to defame the offender and that vary offence.

This type is usually adopted in case of extreme offences. That is why *Ta'zir* includes the punishment of 'blackening of face' as shame punishment[659]. It includes the punishment of advertisement about the offender or about his crime specifically which may help in letting the people know his reality and to ensure their safety from him[660]. This punishment is called *Tash'hir* where the public announcements are made to defame the offender in society[661]. This punishment may be awarded for the offence of 'perjury' in the court[662].

The perjury or the false testimony is considered a heinous crime in Islamic law which is considered equal to the crimes of murder and fornication because of its graveness as this may result in the punishment of innocent which is never tolerated by any legal system.

---

[659] Aamir, 426.
[660] Saleem Al-Ewa', 325.
[661] Aamir, 426.
[662] Faras, 105.

These punishments are implemented to teach the offender a lesson to respect the rights of other members of the society which is indeed the process of restoration of the broken relation among the stake holders in shape of victim, offender and the community.

Conclusion.

The Islamic penal laws of *Qisās* and *Ta'zir* justify different theories of western penal philosophy. *Qisās* provides a perfectly compelling application of the most ancient and famous theory of 'retribution'. Though *Qisās* adopts the rehabilitative, restorative as well as preventive penal goal but its major objective is retribution. In *Qisās* the rehabilitative penal goal is achieved by imposing the penalty of *Kaffārah* where in case of intentional murder, the offender has to fast for continuous two months. Fasting is considered the most useful ritual in the reformation of one's character in Islamic law. It also includes the punishment in the hereafter when an intentional killer will be burnt in to hell fire, as mentioned in *Qurān*. Likewise the preventive penal goal in the shape of death penalty is not absolute rather it lies upon the free will of the heirs of the victim in the case of intentional murder only which makes it a secondary option in the objective of punishment. The primary and central position is granted to retribution whereas the restorative justice makes a big part of the punishment of *Qisās*, after retribution.

The *Ta'zir* punishment serves each and every penal goal due to its diverse and flexible nature. We can say that the primary objective of *Ta'zir* punishments is to spread love, harmony and peace in the society and to eliminate the wrongs. For achieving this basic objective it transforms itself into a kind of mixed theory of punishment, which gives each and every theory a proper place where it can best serve the purpose of crime reduction. *Ta'zir* takes help from all theories but at the proper time and place.

Chapter Seven

"Unified Theory of Punishments" in Islamic Penal Philosophy

Introduction.

The Islamic theory of punishment provide a comprehensive coherent legal framework which incorporates all different penal goals presented by western penal philosophy, rather it moves forward by putting the punishment at the last stage in its fight against crime because the *Islamic Unified Theory* starts from cutting the roots of crime by providing all basic necessities of life and creating a society where any minor reason for crime vanishes, abscense of which removes the burden of punishment from the offender.

This chapter presents the *'IslamicUnified Theory of Punishment'* where the basic characteristics of Islamic punishments are discussed. These characteristics shows that the Islamic punishments are legally predefined and serve as mercy which protects the boundries of its legal system by imposing it upon the guilty alone, regardless of his status in the society and in proportion to the crime. The Chapter further provides the framework of Unified Theory by explaining the precautionary measures it takes to eradicate the crime by connecting it with the basic necessities of life in the shape of belief, life, intellect, lineage and property. At the end the Unified theory provides the proper practical application of each penal goal in its legal framework and shows that this is not mere a philosophical idea though some penal goals find a large area of application than the others. The study presents the complete coherence of the 'Islamic Unified Theory' within itself with all different penal goals as well as with outer body of other laws in the shape of torts, family, mercantile, constitutional, taxation and international laws.

7.1. Characteristics of Punishment in the Islamic "Unified Theory".

The human psychology testifies the possibility of violation of the rights of humans by their fellow humans. Further study confirms the need of legislation to avoid or minimize such violations[663]. However, the entire human history is evident that human being does not possess the capability and intellect, required to legislate for himself and his society. Even The continuosly changing laws are not helping in the reduction of crime rate at considerable ratio. Human legislator may free himself from any physical oppressive force but is most likely to fall prey to his own wishes and desires, most probably to the desires of vote casting public, in a populist democratic state. That is why the glorious and compassionate God has provided mankind a legislation which guides human being in every walk of life including the penal system explaining crimes and punishments.

7.1.1. Punishments as God's Boundries.

The all-knowing God has termed the crimes, prescribed by Him, as 'the boundaries'. The logic behind this term from the all-knowing God is to convey the message that these are the outer most protective layers, protecting the interests of His vicegerents. People must respect and regard these as the boundaries of a mighty King, the God and one is better stay away from it. Crossing these limitations result in the infringement of the rights of the people which must be avoided at any cost. The most Exalted says;

---

[663] Dr. Abdul Karim Zedan, *Al-Mufassal fi Ahkam al-Mar'aa,* 5(Cairo: Nahzat Misr, 2006), 15.

"These are the bounds set by Allah; do not, then, draw near them.[664]*"*

The punishments only come into force when a person trespasses these boundaries of the One and Only King of the universe. In other words the Ultimate King of the universe has protected the interests of His vicegerents by means of Islamic punishments. The primary purpose of punishment in Islamic criminal law is to safeguard the interest of the vicegerent of the Exalted God, the human being. The most Compassionate law giver has ordained to the humanity, being His most loved creation, a perfect system of life, of which punishment is an important part and a tool to safeguard the entire 'divine world order'. This basic and primary function of punishment necessitates to criminalize every that act which might harm the interest and well being of the mankind, the Almighty's vicegerent[665]. These boundaries warn the public at large to observe there limitations along with ordering to punish those who disrespect and violate these boundaries.

The protection of human's interests, which at the same time are God's boundries, demands the upbringing of moral values and norms of the society in order to make people stay away from these boundries with their own choice and reason because dwelling near it may result in crossing it, intentionally or unintentionally. The human interest and the ethical values are so closely integrated that the decline of one results in the disappearance of other[666]. For this reason, the Islamic criminal law safeguards the moral and

---

[664] Al-Baqarah-187.
[665] Tahir Ibn-i-A'ashur, *Maqasid al-Shariah al-Islamia,* (Oman: Dar al-Nafais, 2001), 515.
[666] Abu Zahra, *Al-Uqubah*, 27.

ethical values of the society, by providing the adequate penalties for each misdemeanour, to create a social order and practice where the obedience to law becomes easy for the common public.

7.1.2. Punishment as Mercy "*Al-Rahmah*".

The ruling principle in the "Unified theory" of Islamic penal philosophy is mercy, compassion and love. This is called *Al-Rahmah.* Being mercy for society as well as for offender, the punishment in "Unified theory" protects the interest of society and more precisely the victim and on the contrary it deals with the offender with same feeling of affection by letting him know that he is way above in honour and dignity than what he portrayed by his criminal act. Protection to the interest of human being, demands the reformation of the offender, being a valuable and honourable member of the society. In this regard the offender is punished with the feeling of love, mercy and care, just to let him know that his act, at first, was a curse for himself and then a discomfort for his brothers. The punishment never accompanies hatred, disrespect or the feeling of fun for the offender.

The Islamic criminal law never achieves its target of protecting human's interests by making the offender a scapegoat. Though the offender is exposed to experience the pain of his offence however only after meeting the ends of justice, proving him a wrong doer who exceeds his limits and harms his brother. The punishment is imposed only after establishing the offence beyond any doubt. The extreme the punishment, the more tough its proof is

as we see in the evidence law for the offence of illegal sexual intercourse where four male eye witnesses are required against the maximum deterrent punishment[667] of stonning to death (for married adulterer) and 100 lashes (for unmarried adulterer).

This ruling principle of *Al-Rahmah* demands different punishment for different offenders that is why the punishment, once the offence is proved, is phenomenally equitable and amazingly just. The punishment equals the intensity of the crime for which it is meant[668]. That is why punishment for adultery (*zina* by married) differs from fornication (*zina* by unmarried). Likewise the punishment of theft is different from the punishment for highway robbery.

7.1.3. Legality of Punishment in the "Unified Theory".

The punishment in Islamic law strictly follows the rules of "Nullum crimen sine lege" and "Nulla peone sine lege". In Islamic law, the maxim is;

لا جريمة ولا عقوبة الا بنص.

The *Hudūd* & *Qisās* punishments are pre-defined. No one possesses the authority to change it however the *Ta'zir* punishments are flexible where the legislature is free to formulate the laws as per changing circumstances.

---

[667] Dr. Abdul Karim Zedan, *Nizam ul-Qada fil Islam*,(Oman: Risalah Publishers, 1989), 187.
[668] Zedan, *Ahkam al-Mar'aa*, 5, 18.

The *Ta'zir* punishment, being flexible does not mean that the judge is free to award any kind of punishment based upon his sweet will[669]. The legislature has to enact the quality and quantity of *Ta'zir* punishment, most probably by fixing the two ends, minimum and maximum, giving an opportunity to the sitting judge, to award adequate penalty befitting the circumstances of the crime and the criminal. The misconception of considering the judge, an absolute authority, in *Ta'zir* punishment, is completely baseless.

It is the *Imām,* substituted by the modern day legislature, which possesses the limited authority of formulating the kind and nature of *Ta'zir* punishment, which is to be strictly followed by the judge. This is called the legitimacy of punishment in Islamic criminal law where every crime and punishment is pre-defined, well-known, fixed and passed by an authority and not left to the sweet will of a single judge or person.

7.1.4. Individuality of Punishment.

The other important feature of punishment in Islamic law is that it addresses the offender and none else[670]. This is called the selfdom or personality of the punishment. The punishment engulfs the guilty alone, neglecting his family, friends and associates. This is the basic need of administration of justice where the innocents are never exposed to the heat of punishment. In this regard, the concept of *Ā'aqilah* in Islamic penal law faces criticism. The doctrine of *Ā'aqilah* deals with unintentional murder where the blood money

---

[669] Bhanassi, *Al-Uqubah,* 43.
[670] Al-Zahim, 182.

is levied from the family of murderer and not from the murderer alone[671]. This rule apparently negates the principle of justice and the individuality of punishment because the family is innocent here and imposing blood money on the family members is like punishing innocents. In fact the argument arises by judging the said doctrine in separation from the entire interconnected body of Islamic law, of which *Ā'aqilah* is just a small part. However the Muslim jurists explain the philosophy of *Ā'aqilah* with its multi dimensional approach. The person (murderer) is part of a family where all family members strengthen each other in numerous ways, most importantly in financial matters[672]. Different family members inherit each other whereas the wealthy family members are under an obligation to help the poor members of his family even in normal circumstances. Now understanding the *Ā'aqilah* in this scenario is quite easy and sounds equitable.

7.1.5. Punishment being General.

The most glorious and splendid feature of Islamic penal laws, is its generality. The legal maxim of 'no one is above the law' is applied in Islamic law in letter and spirit. Any citizen, regardless of his social, political or religious status, if found guilty, faces the application of law. Neither the ruling class not the religious elite is exempted from the law. The maxims like, 'the king can do no wrong' has no space in the body of penal laws of Islam.

---

[671] Ahmad Bin Muhammad Al-Qudoori, *Mukhtasar al-Qudoori, 1*(Beirut: Dar al-kutub al-Ilmia, 1997), 194.
[672] Zedan, *Ahkam al-Mar'aa*, 5, 22.

The rule found its validity from the practice of Holy Prophet Muhammad (peace be upon him), who strongly denied the requests of the tribal leaders to waive off a *Hadd* upon a female who committed theft. The Holy Prophet Muhammad (peace be upon him) laid the foundation of this rule by his remarkable statement, saying; *'if Fatima the daughter of Muhammad had committed the theft, I would have cut her hand, even.*[673]*'*

This rule includes the application of law upon all citizens regardless of their religion and ethnicity giving regard to the specific laws of each religion.

7.1.6. Proportionality of Punishment.

The other distinguishing feature of punishments in Islamic law is proportionality. This rule will be explained in detail in the next topic however briefly, the rule limits the punishment to not exceed the intensity of crime even though the punishment follows the forward looking utilitarian approach. It finds its roots in the verse of Holy Quran which says;

"The recompense of the evil is the evil the like of it.[674]*"*

The entire body of penal laws, whether that is the part of *Hudūd, Qisās* or *Ta'zir,* the punishment equalizes the crime, its intensity and effect on the society. That is why the punishments of one *Hadd* offence difers the punishment of any other *Hadd* offence and we never find same punishment for any of two *Hudūd* offence knowing the fact that all *Hudūd* punishments are the rights of God and so unchangeable, unforgivable and undeniable. It is

---

[673] Sahih Muslim, *Kitab-ul-Hudud.*
[674] Al-Shura, Verse 40.

not like the punishment for every crime is either imprisonment or fine as we see in the penal codes of countries following positive law as a source of legislation.

In short, the punishment in Islamic law, aims to protect the interest of human being, both individually and socially, by inflicting pain upon the offender, in order to reform him, along with satisfying the psychological needs of victim and issuing a general warning to the other members of the society to refrain from doing the same[675]. The punishment in Islamic law is general, addressing each and every individual of the society. It is same to the intensity of crime and wrong done and at the same time it extends to the culprit alone and none else. Likewise the punishment is Islamic law must be within the principles fixed by the law giver, exceeding which turns the punishment illegal, ab-initio.

7.2. Unified theory of Punishment in Islamic Law.

The *Allah* Almighty expresses the sole purpose of the prophet hood of his last messenger Muhammad (Peace be upon him), in the *Quran,* saying;

وَمَآ اَرۡسَلۡنٰكَ اِلَّا رَحۡمَةً لِّلۡعٰلَمِيۡنَ[676].

"We have sent you forth as nothing but mercy to people of the whole world."

The love and mercy of the Almighty for the mankind, His vicegerent, demands the establishment of a peaceful, prosperous and just society where

[675] Al-Zahim, 160-180.
[676] Al-Anbiya, Verse-107.

every servant of God enjoys His clemency by living a comfortable, relax and happy life. This verse clarifies that the well being and prosperity of the human being is what the entire *Shari'ah* is revealed for. The ultimate demand for the wellbeing and prosperity of human being is to preserve, protect and develop the 'interet' of mankind. Now the protection of the interest of the human being lies in the protection to the foundations of the society, he lives in. Punishment in Islamic law serves the purpose of protection to these foundations of society. This philosophy was further explained by the Holy Prophet (PBUH) in his golden words, saying;

> *"Help your brother, whether he is an oppressor or he is an oppressed one. People asked, "O Allah's Messenger (ﷺ)! It is all right to help him if he is oppressed, but how should we help him if he is an oppressor?" The Prophet (ﷺ) said, "By preventing him from oppressing others.*[677]"

It clarifies that the Grundnorm for the punishment, like entire *Shariah,* is "compassion, clemency, mercy and kindness". The Quran terms it as *'Al-Rahmah'* (الرحمة)[678]. The numerous characteristics of punishment, as discussed earlier, are the ingredients of the Grundnorm of *'Al-Rahmah'*. However the ruling principle in the philosophy of punishment in Islamic law is to safeguard the 'interest of the human being'. The punishment is directly proportional to the safety required to protect the interest of human being. If the safety to the interest requires delaying, postponing, decreasing, increasing, waiving off or a must infliction of the punishment, it will be done accordingly in order to best serve the primary objective of well being of the

---

[677] Sahih Bukhari, *Kitab-ul-Mazalim*, 2444.
[678] Zedan, *Ahkam al-Mar'aa*, 5, 16.

interest of the human being. In this regard the approach of Islamic law resembles the "utilitarian theory of punishment" in western penal jurisprudence.

The safety to the interest of human being is best insured by protecting the basic necessities of his life[679]. These basic necessities are that of religion (Islam), life, intellect, lineage and property. The extensive study of human sociology has ended up in declaring these five aspects as the inevitable necessities of human life regardless of the place or era in which a human being is living, which is why the Islamic law has regarded these five necessities with so importance that the entire body of Islamic law revolves around these. The punishment as mercy is best described by the example of a doctor operating a patient, treats the patient in an unpleasant way, based upon the waste experience and more knowledge he possess, but with the intent of love and compassion in the heart for him, to eventually benefit the patient by that apparently harsh looking or unpleasant treatment. Furthermore the doctor does not hesitate to cut that specific body part which becomes a threat to the rest of body or becomes incurable[680]. Likewise the patient gets isolated and quarantined when infected with an epidemic in order to save the others from his infection but he is treated with love and dignity. Likewise the God the Exalted, knowing more than the human being, treats the wrong done, by appropriate treatment of punishment, with love, mercy and compassion, for the benefit of human being and the mankind. For

---

[679] Abu Zahra, *Al-Uqūbah*, 27.
[680] Zedan, *Ahkam al-Mar'aa*, 5, 17.

this, if the offender becomes a continuous threat to the society or becomes unreformable, he would be eliminated from the society to save the rest of the members of the community[681].

7.2.1. Precautionary measures against crime.

The Islamic penal philosophy, as a 'Unified Theory' of punishment, opts for the punishment as the last option in fight against crime. Punishment being the last option is only inflicted when the offender crosses all limits without having any reasonable defence. The foremost step taken in fight against crime is the character building of the general public based upon the divine teachings of *Qurān* and *Sunnah*[682]. The state has to take necessary steps in the upbringing of the moral values of the society which eventually results in crime reduction. The Islamic penal philosophy, being a small portion of the greater sphere of the entire *Shariah,* gets help from the vital concept of 'God is all watching and all knowing' and the belief of the 'life after death' in its fight against crime by increasing the awareness regarding it which surely stops most of the likely offenders from indulging into the crime.

The second precautionary step taken by the executive of an Islamic state is to eradicate and cut the root causes of the crimes. The infliction of punishment with not eliminating the factors of crime is extremely unjust. That is why the Unified theory of punishment in Islamic law finishes those factors which increases the chance of offending[683]. It constructs a pro law-abiding society

---

[681] Awdah, 2, 610.
[682] Al-Zahim, 69.
[683] Syed Abul A'la Maududi, *Rasail-o-Masail,* 4(Lahore: Islamic Publications, 1975), 273.

where crime remains having no justification. For this purpose the 'Unified theory' takes steps related to each basic necessity (daroriāt) in order to provide these *daroriāt* to each individual, the lack of which may not compel him to go for illegal activity as the legal maxim of *Shariāh* states;

The necessities allow the prohibited acts. الضرورات تبيح المحظورات-

Keeping in view the about legal maxim which is actually derived from Qurānic verses clearly mentions that the crime which is caused by the lack of the very basic needs of the life, will never be responded with the punishment.

The basic necessity of property (economy) is protected by eradicating the causes of theft and robbery by prohibiting usury (*Ribā*), gambling, hoarding and other illegal means of income, by enforcing the law of inheritance, *Zakah,* right to personal property etc and encouraging the interest free loan, which provides a balanced approach between the two extremes of socialism and capitalism. Likewise the basic necessity of lineage (family) is helped by the obligation of veil (*Hijab*) for women, separating the working spheres of male and female with no interaction among them, laws related to marriage and divorce etc, conditional permission of polygamy, rights and duties of husband, wife, children and parents etc[684]. This also provides a balanced approach between western sex free society and the fictitious piousness of the church. Furthermore the intellect is protected by banning the production of all kinds of intoxicants and by providing free education to the students.

---

[684] Syed Abul A'la Maududi, *Tafheem Ahkam-ul-Quran,* 4(Lahore: Idara Ma'arif Islami, 2014), 27.

The unified theory never punishes a person for theft if it fails to maintain an economic balance in the society. Where the interest (usury) sucks the money from the market and reduces the economic growth, making the rich richer and the poor more poorer, where the labour doesn't receive adequate wages, where the high taxes devours entire income, where the utility bills are more than monthly income, where no financial security is provided to a common man neither by the state nor by the rich class of the community and where the disease of hunger kills more than a pandemic virus every day[685]. Likewise if the intoxicant beverage companies are licensed by the government to produce intoxicants and alcohol, and the intoxicant drinks are more easily available than coffee or water, then punishing a person for driving while drinking seems illogical as well as illegal.

This idea can be best explained by referring to the judgements of second pious caliph *Hazrat Umar (R.A)* who stopped the execution of the *Hadd* of theft in the time of food scarcity[686]. Like wise he waived off the *Hadd* punishment of theft from the slaves of *Hatib bin Abi Balta'*, who were forced by the extreme hunger to steal and then kill the camel in order to eat it. In reply *Hazrat Umar (R.A)* ordered the master, i.e. *Hatib bin Abi Balta'*, to pay the damages to the owner of the camel[687].

---

[685] Syed Abul A'la Maududi, *Tafhimaat*, 2(Lahore: Islamic Publications, 2001), 322.
[686] Ibn-i-Qayyim, *A'lam ul-Mo'aqieen*, 3, 17.
[687] Ibid, 3, 17.

The 'Unified theory of punishment' in Islamic law steps towards the third option of punishment[688] only after successfully achieving the first two targets of 'character building' and 'creating a dignified and balanced environment'. Now if the crime occurs after the first two targets being in practice, the punishment becomes justified as well as required. In such case the punishment is pure "compassion and mercy" for the defendant as well as the society and in such case the denunciation of punishment in the name of reformation is nothing but cruelty and injustice.

The 'Unified theory' punishes the offender only when the offence is proved beyond all reasonable doubts. The major defences available to every accused are that of being minor, insane, coerced or influenced by unavoidable circumstances called as *ikrah, Daroorah* and *Idtirar*[689]. If, even at the third and last stage of punishment, after 'character building' and living in a 'balanced society', the offender falls in any of the category of the defences available, the punishment discontinues.

7.2.2. Basic Necessities & the "Unified Theory".

As discussed earlier the entire body of Islamic law is based upon the five basic necessities of religion, life, intellect, lineage and wealth. The punishment and its philosophy also revolve around these necessities where punishments are specifically meant to protect these basic necessities from outer

[688] Al-Zahim, 89.
[689] Zedan, *Ahkam al-Mar'aa*, 5, 19.

transgression[690]. These basic necessities are considered as the pillars of society which remain unchanged for any society living in any part of the world, in any age (agricultural, industrial or information age of global village). Life becomes meaningless without regarding and protecting [691] the mental capabilities (intellect), property and economy (wealth), family and social structure (lineage), belief about the world on which the entire world view of a society is based (religion) and the human body including the life itself (life). These are the inevitable parts of the human life. The mere existence of human being means the pre-existence of these five necessities.

The 'Unified theory' divides the skeleton of punishments according to these five basic necessities. The crimes that directly invade the foundations of these five basic necessities are countered with the pre-defined extreme punishments of *Hudu ̄d*[692]. Whereas the crimes, indirectly infringing these basic necessities are treated with the flexible punishments of *Ta'zir (as shown in the table on page 293)*, where the variable punishment befits the crime based upon its intensity and effect.

First and most important necessity of religion is protected with the capital punishment[693]. The extreme punishment of death for apostasy throws light on the importance of the 'protection of religion' in Islamic law. The Islamic law is

---

[690] Umi Abd-i-Muneeb, *Hudu ̄d ki Hikmat, Nifaz or taqazy*, (Lahore: Mushariba ilm o hikmat, 1430H), 15.

[691] Here we mean the Shafii definition of *Hudūd*, considering Qisas as a part of *Hudūd*.

[692] Awdah, 2, 612.

[693] The Muslim jurists agree to provide a reformation period to that offender in which he may think over his decision along with provided with scholar meetings who try to logically resolve his misconception and help him to turn back to the truth.

clear on imposing this punishment only against a Muslim who changes his religion. The non-Muslims have never been the subject of this punishment as the *Shariah* never enforces any one to embrace Islam. The philosophy behind confining this punishment to Muslims only is the concept of High treason. The Islam, as a religion, is totally different from all other religions followed on the face of the earth. The other religions mostly deal with rituals and salvation after resurrection. However Islam, being a complete code of life and acting as a state, covers every aspects of life, providing its rules and philosophy related to crimes and punishments, civil rights and duties, torts, marriages and divorce, commerce, economy and banking, constitution and administration, international relations and more. With this nature of religion, if a person excommunicates himself, his act resembles High treason where he entered the membership with no coercion or undue influence. Leaving Islam, as a constitution and state religion raises questions upon the credibility of entire system, as mentioned above, which no state allows. High treason is a universal punishment adopted by all sates in the world. The western countries allow changing the religion but never allow standing against the constitutional and state pillars of 'democracy' and 'capitalism'. The democracy and capitalism being the state religion (worldview) resembles Islam in the punishment of apostasy as High treason[694]. That is why Islamic law announces the most extreme punishment of death to protect its very existence. Moreover, the religion of Islam, being the origin and protector of all other necessities named; life, intellect, property and lineage, needs the

[694] Maududi, *Murtad ki Saza.*, 48 + 53.

strongest protection for itself in order to subsequently ensure the protection for all the other necessities, rights and obligations which may perish with the demolition of the religion of Islam, the fountain of all.

Secondly, the importance and value of 'life' needs no discussion that is why it is protected by the *'Unified Theory'* with the *Qisās* punishment. The 'Unified theory' in Islamic law protects the body and the life of human being following the rule of 'lex talionis', i,e, perfect proportionality. The *'Unified theory'* recognizes the psychological need of vengeance and confines its application to the state authority alone but at the same time considers it the inevitable right of the aggrieved party[695]. The offender is also psychologically addressed by warning him that his body and life worth same as the body and life of any other member of the society, so if he kills someone, he himself will be no more in this beautiful world. This warning and its application, when needed, ensures the safety and dignity of the lives of the entire community. The society which keeps the murderer alive by ruling out death penalty presents itself to be a criminal favouring society where the law abiding citizens may get killed but the killer not.

Thirdly, the intellect is what distinguishes among animals and humans. It is the ability of mind and reason that glorifies and dignifies the children of Adam. The most dignified creation of God, loses his honour and respect when loses his mind by falling prey to the alcoholics. Islamic law protects it by

[695] Dr Ahmad Fathi Bhanassi, *Al-Siyasa Al-Jinaiya fil Islam*. (Beirut: Dar al-Sharooq, 1983), 270.

banning the intoxicants and punishing the drinker with 40 lashes[696]. The studies have confirmed the increased number of crimes as a result of drinking intoxicants[697]. That is why the punishment of 40 lashes inflicts the pain on his entire body[698], of which he dreamt of enjoyment and fantasy.

Fourthly, the pillar of family and lineage is protected by banning the unlawful sexual intercourse along with the capital punishment (stoning to death)[699] as well as 100 lashes[700], if committed[701]. The filthiness of unlawful sexual intercourse by a married person is beyond any doubt where an honoured person cracks the wall of dignity of another respectable member of the community along with cheating his partner by trespassing into the illegal property when he himself has a legal way to go. This dirty act endangers the genealogy of a child, leaving him in an unclear position about his parents. This extreme violence with no logical justification deserves extreme response for a person who after getting married and understanding the importance of the very basic unit of human society, i,e. Family, attacks and destroys it. His act shows that he is the enemy of the society who invades its foundations and becomes unbearable, that is why he needs to be eliminated by an extremely unpleasant way of stoning to death[702] to express the extreme denunciation of his act by the society.

---

[696] Abu Ishaq Al-Shirazi, *al-Muhazzab*, 3(Beirut: Dar al-Kutub Al-Ilmia), 371.
[697] Dr. Muhammad Ali, *Al-khamr fil al-fiqh wa al-tibb*, (Jeddah: Dar al-saudia li al-nashr al-taozi, 1984), 18.
[698] Abu al-Barakt Abdullah bin Ahmad al-nasafi, *Kanz-ul-Daqaiq*, 1(Dar al-Bashair, 2011), 355.
[699] Dr Khalil Ahmad Thanwi, *Islam, Hudūd or Ta'zirat*, (Lahore: Asraf ul Tahqiq, 1424H), 167.
[700] 100 lashes for unmarried adulterer where as capital punishment for married adulterer.
[701] Mufti Nazir Ahmad, *Hudūd Ordinance or Tehzibi Tasadom*, (Karachi: Al-Nibras, 2005), 79.
[702] Dr Abu Adnan Sohail, *Inkar-i-Rajam 1 fikri gumrahi*, (Lahore: Maktaba Qodossia, 2005), 34.

However the unmarried adulterer has a somewhat logical justification, although he is also guilty of the same offence. That is why he is excused from stoning to death and punished with infliction of 100 lashes[703], distributed upon his entire body, teaching him that the joy and pleasure he sought to his entire body by illegal sexual intercourse is annulled by the infliction of same amount of pain to every that part which was meant to enjoy. The illegal sexual intercourse by unmarried offenders mostly results in the use of contraceptive methods to avoid impregnation which eventually results in impotency among male partners and barrenness and infertility among females. In case of impregnation, it mostly leaves the female with the responsibility of child which is an extremely difficult task for a women alone to fulfill.

In addition it deprives the child from the attention, care, love and protection of father which leaves him with so many complexities in his personality. Likewise it devalues the need of marriage which as a family is the basic unit of the society. Moreover the illegal sexual intercourse is cause to numerous diseases effecting millions of people across the globe, roughly one million infections per day according to world health organization[704]. Due to all these negative effects on the society, it is considered a crime against the humanity which needs to be responded with extreme punishments in order to protect the society at large.

---

[703] Bhanassi, *Al-Uqubah*, 24.
[704] World Health Organization, *Report on Global sexually transmitted surveillance 2015.* (Geneva: WHO document production services, 2016), 1.

The other major crime hitting the foundations of the family is that of defamation regarding illegal sexual intercourse. This is also responded both logically and psychologically. The logical punishment is 80 lashes[705] where as the psychological response is to declare him a liar forever when he tried to dishonour the victim, in result he himself will be dishonoured by declaring his testimony, non-admissible in the court of law, forever[706].

Fifthly, another inevitable necessity of human life, i,e. The money is regarded as the support for life[707] in the Holy Quran. The money or the property of human being is protected with the punishments of theft and robbery. The *Shariah* warns the offender with amputation of the body part which most assisted him in this offence, i,e. the hand. The legally earned money after hard work and labour is regarded highly by the 'Unified theory' in Islamic penal law, which is why whosoever deprives its legal owner from it, is punished severely to ensure the safety of personal property.

These five necessities frame five categories of crimes, including several offences falling in each category. The offences discussed above are the one which directly demolishes the very base and foundation of these categories, which is why these are dealt with extreme harshness. However the offences touching these boundaries slightly are punished with minor punishments under the name of *Ta'zir*. A graph is presented below to show how these necessities include crimes and punishments.

---

[705] Khalil Bin Ishaq, *Mukhtasar Al-Khalil,* (Cairo: Dar alHadees, 2005), 242.
[706] According to Hanafi school of thought.
[707] Al-Nisa, Verse 5.

Note: Table of crimes falling in these five basic categories - *Hudu ̄d* & Qisas can be found at page - 246, 247 & 248.

7.2.3. Western Theories of Punishment & the Islamic Unified Theory.

The two main schools of thought in the western penal philosophy, the utilitarianism and the retributivism resulted in the emergence of various theories named; deterrence, retribution, reformation, prevention and the restorative justice.

7.2.3.1. Deterrence.

Deterrence being a forward looking approach focuses on the 'crime reduction[708]' mostly by means of creating fear where as the retribution follows the rule of 'lex talionis' and focuses on the 'desert' and 'proportionality' of punishment, demanding the 'absolute justice' and 'out questioning the chance of pardon', which make it a backward looking theory. However the reformation theory revolves around the 'rehabilitation of offender' by education and trainings where as the restorative justice aims to 'restore the broken relationship' among the offender and the victim by means of restorative conferences. The preventive theory, however, 'disables the offender' from reoffending by means of imprisonment, amputation of body parts, administrative orders and capital punishment. These theories also discuss the two approaches of 'society's interest' and the 'offender's interest'

[708] Saleem Al-Ewa', 93.

in the discourse of philosophy of punishment, i,e. Which one should override the other or whether a balance can be created among these? [709] The impracticality of a single theory compelled several prominent western philosophers to combine these different penal goals in a coherent framework in order to present a compelling mixed theory, comprising all or most of these penal goals.

In short the western philosophy in its all different theories presents the following penal goals; Crime reduction, deterrence, penal utilitarianism, proportionality, desert, absolute justice, no pardons, reformation, restoration of relationship, incapacitation, safeguard to society's and offender's interest.

The 'Unified theory of punishment' in Islamic law embraces all these penal goals, not just philosophically rather practically, in such a coherent framework that each and every penal goal gets the deserved and justified place. The 'Islamic Unified theory' neither sticks to one penal goal nor does it reject any other. It puts each penal goal at the most appropriate place with considering adequate weight of application for each penal goal.

The 'Unified theory' in Islamic law adopts the utilitarian approach as an umbrella which covers all kinds of punishments and theories. The utilitarianism in the Islamic punishments is aimed to protect the 'Human interest'[710]. The punishment befits the human interest. Wherever the 'human interest' demands its suspension or abrogation, it would be dealt accordingly.

---

[709] Bhanassi, *Al-Uqūbah*, 23.
[710] Abu Zahra, *Al-Uqūbah*, 27.

That is why we see that even unforgiveable *Hudu ā* punishments were ordered to be suspended by the Holy Prophet (PBUH) at the time of war. Likewise the pious caliph *Umar (R.A)* also suspended *Hudu ā* at the time of food scarcity in the state, which may force a needy to commit theft[711]. However the sole purpose of the ruling 'utilitarian' approach in 'Unified theory' is 'crime reduction', which is best achieved by addressing all components of punishment, i.e, i) by punishing the offender, ii) giving a silent message to likely offenders and iii) most importantly cooling down the vengeance of the victim. The positive results of first two components are obvious however the victim's psychological need of vengeance is never neglected in the Islamic 'Unified theory'. In case of murder and physical assault, the right to avenge or forgive is bestowed to the victim. Likewise, along with punishing the offender, the victim is fully remedied as we see in the case of defamation; the offender is punished and labelled permanently and legally, as a lair which satisfies the victim. In the theft and robbery, the property stolen will be returned and in torts the damages are paid to the victim. Combination and fulfilment of all these three components of 'crime reduction', eradicates the probable causes of future crimes.

The utilitarian process of crime reduction gets started only after the 'desert' is confirmed[712]. In this way the utilitarianism in Islamic 'Unified theory' may differ that of western. Though not even one philosopher, advocating the western utilitarian penal philosophy, has asked for the punishment of

---

[711] Ibn-i-Qayyim, *A'lam ul-Mo'aqieen*, 3, 17.
[712] Zedan, *Ahkam al-Mar'aa*, 5, 21.

innocent however it may not be ruled out too. Notwithstanding, the utilitarianism in western penal philosophy, the Islamic penal philosophy has strictly ruled out any chance of punishing innocent. That is why the 'law of evidence' varies side by side with variety in the punishment. The more severe the punishment, the more tough its proof is. Numbers of witnesses in defamation are two, for 80 lashes against it, but it jumps to four eye witnesses in case of adultery, for 100 lashes against it. This example clearifies that the Islamic utilitarianism may opt for pardoning of an offender just like western utilitarianism but will never go for punishing an innocent unlike western penal utilitarianism.

After discussing the general penal goals of utilitarianism, crime reduction and desert, we now move forward to the remaining penal goals of different theories, i,e, proportionality, deterrence, reformation, incapacitation, restoration of relationship, society's and individual's (offender) interest.

7.2.3.2. Societal and Individual's (offender's) rights.

The Islamic 'Unified theory' has divided the crimes and punishments into three categories based upon the effect of that crime on the society and individual. As discussed earlier, the crimes that directly and severely hit the foundations of the society are summed into the category of *Hudu ̄d*, whereas the crimes injuring the body of an individual member of the society are categorized as *Qisas*[713]. The crimes damaging the apparent building of the society and not its foundations, with less severity, are dealt in the category of

[713] Awdah, 2, 612.

Ta'zir. This division helps in drawing a line between society's interest and individual offender's interest.

The *Hudu ā* offences, termed as the society's right, needs more protection that is why there is left no space for pardons etc and the individual's (offender's) interest is neglected to higher extent though not completely. The interest of unmarried adulterer was given the possible favour by making his punishment 100 lashes and not death penalty as it is in the case of married adulterer. Moreover the offender's interest in theft is regarded by removal of punishment if the theft was committed in *Idtirar* (extreme need) to buy some food etc in order to save his life or in case a descendant steals something from his parents. But in case of *Qazf* (false accusation of illegal sexual intercourse), the offender's interest was completely neglected based upon the fact of lacking any kind of minute justification for the act[714]. In *Qisās*, the interest of murderer in unintentional homicide is preserved by saving him from death penalty unlike the punishment of murderer in intentional homicide who is subjected to capital punishment. However, in *Ta'zir*, the interest of society never overlaps that of the individual's interest. Both go side by side.

7.2.3.3. Proportionality.

The 'Unified theory of punishment' in Islamic law declares the 'proportionality' as its basic rule[715]. The Quran says:

---

[714] Bhanassi, *Al-Uqūbalı*, 25.

[715] Dr Abdul Karim Zedan, *Al-Qisas wa al-Diyyat fil al-sharia al-islamia*,(Beirut: Risalah Publishers, 2013), 14.

"The recompense of the evil is the evil, the like of it.[716]*"*

The practical application of this rule resulted in proportional punishment for each category, collectively and for the each crime, singularly. The seriousness of *Hudu ̄d*, being the society's foundation, was responded by the proportional penal goal of 'deterrence'. We must keep in mind that the 'Unified theory' goes for deterrence only when the crime is directed towards the foundations of the society. The retribution's 'lex talionis' is not applicable in *Hudu ̄d* offences, otherwise it would demand the theft with theft alike, rape with rape or cutting of reproductive organs, defamation with defamation. That is why the perfect 'proportionality' for *Hudu ̄d* is 'deterrence' as a whole but variable deterrence for single *Hadd,* with variation in intensity and nature of crime. This philosophy was transformed into the shape of 'proportional deterrence' of amputation of hand for theft and the amputation of hand plus alternate[717] leg for robbery. Likewise the adultery by unmarried was deterred proportionally by 100 lashes as compared to the proportional deterrence of 'stoning to death' for married adulterer. This further shows that the intensity of deterrence, being proportional, increases and decreases with increase and decrease in the effect of crime on the foundations of the society.

The '*Qisās*' offences befit strict retributive proportionality because the 'lex talionis' i.e, 'an eye for an eye and tooth for tooth' can only be applied in the bodily injuries. Life for life, hand for hand, leg for leg and finger for finger

---

[716] Al-Shura, Verse 40.

[717] The alteration of side also denotes proportionality as one sided amputation may lead to inactivity of entire body.

presents the epic practical application of the philosophy of proportional punishment by the 'Unified theory'. Moreover the extremely perfect application of 'proportionality' demands the alteration of physical punishment where it ceases to become possible and practical. e.g the head injury where the skull gets fractured to some extent may not be replied with the same length of fracture due to impossibility of applying the exactly same force to obtain the same result, equalizing the crack in millimetres with that equal 1 strike. That is why such offences are proportionally responded with fiscal punishment called *Diyyah*[718].

The *Ta'zir* offences, following the main categories of *Hudu ̄d* and *Qisas* follow the same criterion but due to decreased intensity of offence and its effect the deterrence and retributivism decreases too. The proportionality in *Ta'zir* punishments was explained by the Holy Prophet (PBUH) saying;

أقيلوا ذوى الهيات عثراتهم إلا الحدود[719].

> *Forgive (minimize) the people of good qualities their slips (wrongs), except Hudu ̄d (punishments)*[720]"

The practical application of 'proportionality' in *Ta'zir* results in the infliction of punishment different in kind and nature for a usually law abiding citizen and habitual offender. Here the difference in punishment is what proportionality demands.

---

[718] Abu Zahra, *Al-Uqubah*, 499.
[719] Sunan Abu Dawood, *Kitab al-Hudu ̄d.*
[720] Abu Dawood, *Sunan, Kitab al-Hudu ̄d*, hadith no 4375.

7.2.3.4. Restorative Justice.

The 'Unified theory' in Islamic penal law includes the restorative justice and puts it at its proper place. The basic formula for the restorative justice in the 'Islamic Unified theory' of punishment is to opt for it wherever the offence is intended to harm a specific person. That is why the 'Unified theory' applies restorative justice in *Qisās* where mostly the victim is pre-targeted. The deceased remains on the list of murderer before the crime and same is the case in bodily injuries which are mostly targeted to specific person instead of vague assault. The moment the assault becomes vague and general; targeting not a specific person but anyone who passes by, it jumps from the category of *Qisas* to *Hudu ̄d* and becomes *Harabah* (Highway robbery). That is why the restorative justice is limited to *Qisās* and not extended to *Hudu ̄d*. The common homicide remains negotiable under restorative justice but the homicide in *Harābah* (highway robbery) remains a closed door room for the restorative justice conference.

The practical shape of restorative justice in 'Islamic Unified theory' has several options of financial compensation called *Diyyah* or pardon against money called *Sulh*[721] or with no money called *Afw*[722]. The upper hand is given to the victim or his heirs[723] being the aggrieved party, in order to attain the ends of justice by addressing the psychological needs and satisfaction of the aggrieved party. However the victim centred approach of restorative justice

---

[721] Ibn-i-Qudamah, *Al-Kafi fi Fiqh al-Imam Ahmad*, 3(Beirut: Dar al-kutub al-Ilmia, 1994), 278.
[722] Abu Zahra, *Al-Uqubah*, 499.
[723] Dr. Abdul Karim Zedan, *Ahkam al-zimmiyin wal-musta'minin*, (Baghdad: Moasasat al-risalah, 1982), 212.

in 'Islamic unified theory' puts the fixed barriers of a pre-defined amount which protects the offender from facing excessive penalty along with providing the discretionary power to the victim or his hiers[724].

Though the restorative justice needs more practical and detailed framework in the category of *Ta'zir* offences, however where the 'mens rea' of crime contains a targeted personality, the victim should be given the upper hand in the negotiation under restorative justice. the idea is obvious in the application of the said concept in *Hudu ̄d* and *Qisas* punishments, by the God, the all knowing.

7.2.3.5. Incapacitation.

The theory of prevention also founds its place in the 'Unified theory'. The philosophy of incapacitation in Islamic "Unified theory" necessitates its application when criminal seems to become unreformable though the prevention will remain proportional to the crime.

The practical application of this philosophical doctrine can be seen in the punishment of theft where the thief proves himself to be unreformable to the extent of theft that is why the proportional preventive punishment of amputation of hand is imposed, addressing the theft alone. The person is considered unreformable because he had no economic problems; he didn't steal from anywhere where he could have a tiny fraction of share like from

[724] Abu al hasan Ali Bin Muhammad Al-Mawardi, *Al-Hawi Al-Kabeer*, 12(Beirut: Dar al-Kutub al-Ilmia, 1999), 95.

parents, children, spouse or national treasury[725]. Likewise the state would have eradicated the other causes of financial disaster like usury etc along with the doors of *Zakat* being open which outquestions any minute need of theft. This shows that his act was pure transgression with no logical defence. Same is the case with highway robbery. In these cases the preventive approach is confined to a specific part giving a chance of complete reformation to the offender in the future. However the 'Islamic Unified theory' applies the preventive punishment in the shape of death penalty in the situation where the offender becomes a continuous threat with no hope of reformation. The examples are apostasy (High treason), adultery by married person, revolt (mischief in the society) and habitual offender of grave crimes etc. In apostasy the person is tried to be reformed by educating him and removing his misconceptions. In case of failure in reformation, he may be eliminated to save the society from his gross misconduct. The married adulterer, by taking the illegal path despite having a legal way to fulfil his desires, proves himself to be unreformable, hence prevented permanently from reoffending. The offence of *Qazf* (defamation) is responded with proportional preventive punishment of declaration of permanent disability to testify in the court of law. The base of this idea is found in the *Hadith* of the Holy prophet (PBUH) who ordered to execute the thief and drinker on his fourth or fifth time of

[725] Zedan, *Ahkam al-Mar'aa*, 5, 212.

theft[726] or drinking intoxicants because his continuous recidivism proves him to be unreformable[727].

Likewise the preventive approach in *Ta'zir* offences may also be applied where the offender seems to be unreformable but the preventive approach may suffice the intensity and nature of the crime. That is why the Muslim jurists are of the opinion that a person, who commits grave mischief in the society, may be executed though his act may fall outside *Hudūd* category but because he becomes a continuous threat which shows he is unreformable. The minor proportional preventive *Ta'zir* punishment may be imposed in the shape of firing from office, disqualifying from driving and permanent ban.

7.2.3.6. Reformation.

The reformation of offender is an integral of the 'Islamic Unified theory'. Though it has never been given the central part in 'Islamic Unified theory', however it is adopted as an additional punishment for some offences e.g in the offence of homicide the reformative punishment called *Kaffārah* (sitting a slave free or consecutive 60 days fasting instead) is added with the original punishment of *Diyyah,* if applicable in unintentional as well as in intentional murder.

Islamic penal law being a part of a divine legal system focuses on the character reformation of offenders. That is why the doctrine of punishment is

[726] This is the opinion of al-Zahiriya where as Hanafi school calls for amputation of left foot on second occasion and imprisonment on third time. However the Shafi school of thought calls for amputation of remaining hand and foot on third and forth occasion and imprisonment in case of the offender commits theft for 5th time.
[727] Bhanassi, *Al-Siyasa Al-Jinaiya,* 84.

strongly linked with the life after resurrection[728]. The 'Unified theory' teaches the offender to confess his offence and get himself purified and reformed by punishment. Whereas along with worldly punishment, the moral sin of crime vanishes only with repentance and reformation of character. That is why the Muslim jurists present the view of repentance and character reformation for the pure nullification and denunciation of a crime (الحدود زواجر ام جوابر). Even for the offences where the specific additional punishment of *Kaffa ̄rah* isn't imposed, the basic philosophy remains the same that for every misdemeanour the offender must feel guilty and ashamed and eventually reforms his character to avoid recidivism. The Holy Quran confirms that good deed of repentance and guilty feeling removes the crime from the account of a believer. It says;

"Indeed the good deeds drive away the evil deeds.[729]"

Note: Table of application of western theories in Islamic "Unified theory" can be seen on page - 246, 247 & 248.

7.3. Types of Punishment in the "Islamic Unified Theory".

The 'Unified theory of punishment' in Islamic law accepts every kind of punishment which may help in achieving its target of crime reduction and that punishment befits the crime in order to ensure the very basic rule of proportional punishment. However most of the punishments are related to

[728] Bhanassi, *Al-Siyasa Al-Jinaiya*, 77.
[729] Hud, Verse 114.

the body of the offender though the possibility of punishments other than those related to body are not ruled out.

The 'Unified theory' adopts the death penalty as a major punishment in its fight against the crime. It may take the form of 'stoning to death' as well as crucifixion. The second famous kind of punishment is 'flogging' which is used for so many offences like fornication and drinking etc[730]. Flogging has been considered as main stream punishment for *Ta'zir* offences. As most preferred form of punishment, flogging proved to be cheaper than imprisonment which along with saving millions of tax payer's money, reduces the chances of recidivism, for prisons have been proving to be the crime learning academy for prisoners. The 'Unified theory' of punishment includes imprisonment in its penal hierarchy however it has never been the most favoured kind of punishment. The entire skeleton of punishment in Islamic law gives a tiny portion to imprisonment or exile. Moreover even this tiny portion couldn't find its place in the list of basic and primary punishments like amputation, flogging or death penalty. It is used as an additional punishment with flogging in the case of fornication[731], which shows the less-favoured nature of imprisonment as a punishment in the 'Islamic Unified theory' of punishment. The studies have confirmed that the imprisonment increases recidivism and makes normal offenders, trained and habitual offenders.

---

[730] Bhanassi, *Al-Uqūbah*, 181.

[731] Dr Muhammad Ijaz, *Qaid o Band ka Islami Tasawwwur*, (Lahore: Sheikh zaid Islamic centre, 2009) , 146.

The 'Islamic Unified Theory' opts for the financial punishments in a limited proportion. *Diyyah* being its best example shows its nature as a secondary punishment replacing the primary punishment of *Qisas*. The practice of Holy Prophet and pious caliphs explains its nature where money had never been collected as modern type of fines rather the property in almost all cases was destroyed which had been used in the illegal businesses or acts. The modern form of fines opens the door of excessive fines as a tool of collecting money for state treasury which deprives the people from their legally earned money after hours of hard work. This is considered as wrong and illegal in Islam under the principle of آكل اموال الناس بالباطل. The sayings of Holy Prophet throw light on this issue where he condemned the illegal excessive fines and declared it even worst than fornication[732]. Since the 'Islamic Unified Theory' has not banned it explicitly, fines may be imposed for some offences where the other kind of punishment like flogging ceases its practicability. The 'Islamic Unified theory' includes community sentences as well as shame punishments where the offence befits the nature of crime[733]. It seems that shame punishments may be imposed against the crimes where the moral and ethical values of the society are offended. This can be sensed in the punishment of *Zinā* and *Qazf*. Likewise the community sentences in the shape of unpaid work may be imposed against small offences of financial tortuous misconduct, as part of damages, wherever feasible.

---

[732] Sahih Muslim, *Kitab al-Hudu ̄d, Chapter Hadd al-Zina.*

[733] Dr Abdul Aziz Aamir, *Al-Ta'zir fi al-Shariah al-islamia,* (Cairo: Dar al-Fikr al-Arabi, 2007), 426.

Conclusion.

The 'Islamic Unified Theory' presents an epic model of application of the penal philosophy. Ages ago, all the western theories of punishment, even before there emergence, were embodied in the skeleton of 'Islamic Unified theory'. More importantly the apparently contrast theories of deterrence and retribution, reformation and incapacitation are so elegantly and delicately combined together that if looks like different parts of one singular body.

This extremely flawless and balanced coherence shows that it must be presented by someone who's knowledge has no limits and who is All-knowing, All-aware and Ever-Lasting, otherwise His 'Unified Theory' would not befit each and every era, culture and continent. The practical application of the 'Unified Theory' has given tremendous results in crime reduction and making a society stable, prosperous, developed and peaceful. Saudi Arabian deserts are the practical example where in the first 24 years of King Abdul Aziz, by cutting only 16 hands[734], the entire Arabian Peninsula becomes the most peaceful land where the thefts suddenly disappeared. Cutting of 16 hands in 26 years saved hundreds of lives and hands along with protecting the honour and dignity of females and money which used to get stolen in these robberies. Studies show that usually a robbery in the deserts, before the application of Islamic punishments, resulted in the loss or injury of more than 16 people in one day.

[734] Dr Muhammad Baltaji, *Al-Jinayat wa Uqubah tuha fil Islam,* (Cairo: Dar al-Salam, 2003), 98.

Table showing the crimes falling in the five basic necessities (*Maqāsid*) of human life.

Interest / Necessity	Religion	Body	Intellect	Lineage	Wealth
Characteristics	State – Constitution – Society	Life – Health – Physical well being	Reason – Education	Family – Honour – Dignity	Property – Money – Economy
Respective Hadd	*Riddah – Baghi' – Harabah*	*Qisas – Diyyah – Kaffa ̄rah*	*Shurb*	*Zina – Qazf*	*Sariqah – Harabah*
Crimes	Waging war	Homicide	Alcohol	Fornication	Theft
	Piracy	Bodily Injuries	Intoxicant beverages	Adultery	Extortion
	Revolt - Insurgency	Wrongful Restraint	Heroine	Marriage related offences	Dacoity
	Highway Robbery	Wrongful Confinement	Harmful Drug Addiction	Defamation - Slander – Libel	Robbery
	Public disorder	Assault	Cheating	Insult	Bribery
	Unlawful Assembly	Kidnapping	Fraud	Sexual Harassment	Hoarding
	Affray	Abduction	Mischief	Revenge Porn	Usury – Interest
	Contempt of state authorities & Institutions	Slavery	Annoying	Offence related to public morality & decency	Hoarding
	False testimony in court	Forced Labour	Intoxicant Food	Rape	Gambling
	Offences to Government Stamps & Coins	Harmful or expired drugs	Criminal Intimidation	Other Sexual Offences	Criminal damage to the property
	Blasphemy	Harmful Food			Forgery
	Terrorism	Human Trafficking			Counterfeit
	Offences against armed forces	Criminal Force			Fake Currency – trade marks
	False Evidence				Arson
					Burglary
	Defiling Religious Books, Places & Personalities				Offences related to weights & measures

Table showing different crimes to be dealt with different appropriate theories in Islamic "Unified Theory"

Theory	Retribution	Deterrence	Rehabilitation	Restorative Justice	Incapacitation
Philosophy	Bodily Harm	Social Peace & Order	Offence Started but resulted in no damage yet	Targeted offence. Mens Rea to target a specific victim	No chance of Restoration or Rehabilitation
Crimes	Intentional Homicide	Human Trafficking	Apostasy	Assault	Apostasy
	Unintentional Homicide	Waging War	Highway Robbery	Intentional Bodily harm	Blasphemy
	Quasi intentional Murder	Highway Robbery	Revolt	Kidnapping,	High Treason
	Intentional wounding to a body part	Blasphemy & Apostasy	Offences related to public morality	wrongful restraint	Insurgent
	Loss of a sense	Espionage	Insurgency	Abduction	Terrorism
	Damaging a body part's utility	Fornication, Adultery & Rape	As a divine legal system, restoration follow every offence in Islamic penal law	Wrongful Confinement	Continuous misuse of authority
	Battery	Qazf		Forced labour	Habitual Offender be punished proportional to his misconduct
		Sexual harassment		Simple defamation	
		Unlawful Assembly		Arson	
		False evidence		Insult	Highway Robbery

Theory	Philosophy	ISLAMIC UNIFIED THEORY OF PUNISHMENT				
Retribution	**Bodily Harm**		Homicide – Bodily injury – Battery – Forced Labour -			
Deterrence	**Social Peace & Order**	Waging war - Highway Robbery - Affray – Blasphemy & Apostasy = High treason – Espionage – Offences against state institutes & Stamps + Coins	Human Trafficking -	Drinking Alcohol & other intoxicant liquors – Liquor selling -	Fornication – Rape – Homo sexuality – False Accusation of Unlawful sexual intercourse - Revenge Porn -	Theft – Highway Robbery -
Reformation	**Offence Started but resulted in no damage yet**	Revolt – Unlawful Assembly – offences related to public morality - Apostasy	Unintentional Homicide -	Un-ethical literature – Porn Addiction -	Sexual Harassment –	
Restorative Justice	**Targeted offence. Mens Rea to target a specific victim**		Wrongful Restraint & confinement – Kidnapping – Assault – Abduction -	Damages during being sense-less – Cheating - Fraud -	Simple Defamation – Insult – Marital issues -	Arson – tortuous misconduct to property – Highway Robbery -
Incapacitation	**No chance of Restoration or Rehabilitation**	Revolt – Apostasy + Blasphemy = High Treason – Terrorism – Insurgency – Continuous Misuse of administrative authority		Cancellation of driving licence - Imprisonment for medical treatment – Demolishing beverage factories -	Adultery by a married person -	Highway Robbery – Theft -
	Necessity	**Religion**	**Body**	**Intellect**	**Lineage**	**Wealth**
	Characteristics	**State – Society - Constitution / Quran**	**Life - Health - Physical Well being**	**Reason - Education**	**Family - Honour – Dignity**	**Property – Money - Economy**
	Respective Hadd	***Apostasy – Revolt – Highway Robbery***	***Qisas – Blood Money – Atonement***	***Shurb / Drinking Intoxicants***	***Unlawful sexual intercourse – Qazf (Defamation)***	***Theft – Highway Robbery***

Chapter Eight

Comparative Analysis

Introduction.

The two global legal systems in the shape of Islamic and western law presents different approach towards the criminal and penal law because of difference in there sources where one relies upon the human intellect and the other considers the God Almighty as source of all laws, which results in difference in the definitions, types, philosophy and practical laws related to crime as well as punishment.

This chapter conducts the comparatively analysis of different aspects of criminal law, especially related to the philosophy and theories of punishment, in Islamic and western legal thoughts. It compares the definitions of the 'crime' and 'punishment', the two basic terms of criminal law, in Islamic and western legal discourse along with comparing the types of punishment in the two systems. The comparison further extends to study the general theories as well as the hubrid theories of punishment in both different systems.

8.1. On definition and types of crime and punishment.

The Islamic and Western legal discourses are the two most important yet contrary doctrines in the present day modern world. Both with a specific worldview have different approaches towards the criminal law. The very difference in the practice and theory of both systems can better be understood by glancing at the definitions of crime and punishment.

The Islamic law, based upon the doctrine of legal moralism, relates the crime to the immorality and to the disobedience of God's rules and laws[735]. Notwithstanding the 'crime reduction' as the very objective of the Islamic law, it also focuses on strengthening the relationship of mankind with their creator which necessitates the award of punishment to those who violates His commandments. That is why the crime in Islamic law is defined as the violation of divine rules sanctioned by God[736]. In western legal thought, the same view of legal moralism is presented by the "Retribution" which terms every immoral act as crime however the other theories and definitions reject the legal moralism and term every violation of land law, as a crime.

Excusing *Hudu ̄d* and *Qisās,* (which are specifically decreed and fixed by the God himself[737]), even the discretionary punishment of *Ta'zir* incorporates the same philosophy where any act of moral or religious disobedience is termed as illegal which may possess some degree of punishment against it[738]. Consequently the definition of crime in western criminal law rejects legal moralism[739]. The legislation as the primary source of western law has resulted in the declaration of only those acts as 'crimes' which violated the legislated laws of the land. Though the western legal discourse lacks the consensus upon the proper definition of crime however the majority of jurists and legal

---

[735] Aamir, 48.
[736] Abu Zahra, *Al-Uqubah,* 13.
[737] Abdullah Bin Mahmood Bin Modood, *Al-Ikhtiar li Talil al-Mukhtar,* 4(Cairo: Al-Habla Press, 1937), 79.
[738] Shahab ud Din Al-Qarafi, *Al-Zakhirah,* 12(Beirut: Dar alGharb Al-Islami, 1994), 118.
[739] Brooks, *Punishment,* 9 + 10.

scholars relate the crime with the violation of law[740]. Furthermore some of the scholars define the crime an act which violates the legal rights of the public whereas some scholars further narrows it down to the act which is corresponded with the physical punishment and where state becomes a party[741]. In fact the western criminal law aims not to make the people morally good besides its primary objective is to protect the legal rights whether that of individuals or the society. The latter are considered as the rights of state.

Both the legal doctrines divide the crime into the crime against society or state and the crime against individuals however the practical division of crimes and punishment in Islamic law is more comprehensive, detailed and based upon the division of rights of society and rights of individual. Whereas the western criminal law lacks the practical division of crime on the basis of considering it violation of societal right and individual's right, though both agree in principle.

The definition of crime in Islamic law entails to safeguard the peace and integrity of the society in addition to provide protection to the legal rights of the individuals however the more importance is given to the rights of society by declaring their status as *Hudu ̄d* crimes[742]. The Islamic criminal law agrees with its western counterpart in considering the punishment as a response to crime only. This further means that both systems adopt the two important legal maxims which are *"Nullum crimen sine lege"* and *"Nulla Peona sine lege"*.

---

[740] The Open Univesity of Hong Kong, *Criminal Law,* (Hong Kong: Printing Hilstory, 2012), 3.
[741] Japp Hage & Bram Akkermans, *Introduction to law,* (Switzerland: Springer's, 2014), 122.
[742] Abu Zahra, *Al-Jari ̄mah,* 43.

The first one necessitates criminalizing an act before considering it as crime where as the second argues for no punishment for an act not criminalized[743].

Notwithstanding the agreement of the two opposite criminal philosophies on some principles, the types of punishment are in contradiction. The Islamic law incorporates the death penalty for various crimes, giving it the status of unchangeable, unforgivable, non-reducible and non-compoundable punishment by making it a part of *Hudu ̄d* punishments[744]. On contrary the western law rejects it by abolishing it in almost entire Europe including UK[745], Canada and several states of USA. Similarly the flogging makes an integral part of the punishments under Islamic law whereas the same is absolutely negated by the western criminal law[746]. Furthermore the imprisonment forms a most dominant part of the punishments in western penal system however it is a discouraged form of punishment if not prohibited though.

The nature of financial punishments in the penal system of Islam and contemporary western legal system is in contradiction altogether. The western legal system imposes the financial punishment in the shape of fines for numerous crimes. It may form the second major part of the punishments in western penology, after imprisonment. The approach of Islamic law is totally different in this regard which consider the imposition of excessive fines as usurpation by the government, which is never entitled to take the legally earned money from the people who may have worked hard enough to

[743] Saleem Al-Ewa', 73.
[744] Bhanassi, *Al-Hudu ̄d*, 162.
[745] Crime and Disorder Act, 1998, Section 36.
[746] Criminal Justice Act 1967, Section 65.

earn that[747]. However it entails the financial punishment in the shape of *Diyyah* for *Qisās* offence alone.

The Islamic law as well as western law, subject to their nature, provide complete freedom to their subjects to enjoy their legal rights. Both systems agree that the criminal conduct initiates as soon as the exercise of right of a right holder starts annoying the rights of other. It can be said that the beginning point of the criminal activity is the time when the act starts resulting in harming the other legal entities. It is called the harm principle which limits the exercise of right to the extent it doesn't affect other people. The moment the act starts harming other people or resulting in the infringement of the rights of other individuals, the act ceases its legality and eventually, be treated as a crime. The issue is same in Islamic as well as western criminal law.

8.2. General theories of Punishment.

The western criminology presents different theories to explain the philosophy of punishment. These theories explain the extent of punishment too. They actually answer the two basic questions of "Why punish?" and "How much?" These theories are named as; Retribution, Deterrence, Prevention, Rehabilitation and restorative justice[748].

---

[747] Zuhaili, *Fiqh al-Islami, 6*, 201.
[748] D. Miethe & Hong Lu, 15.

Islamic law, on the other hand does not propose any of these theories as its basic philosophy in the penal laws however almost all these theories are present in the punishments prescribed by Islamic law[749].

Notwithstanding the philosophical aspect of these theories in both penal systems, the practical implementation is way different in each system. The legislated law in the west or especially in United Kingdom fails to provide the practical implementation of these theories. It looks quite strange that the philosophy of punishment has least to do with the practical laws, which shows the weak connection between the theory and practice of these theories. On the contrary, the Islamic law presents an epic model of the philosophy as well as its application which any other system has failed to provide[750]. The bond between the philosophy and the practical laws in Islamic criminology is so strong that wherever it fails to justify any law, the law itself ceases to exist. The holy Quran is extremely clear on this issue. It mentions the philosophy of the punishment the moment it declares any punishment for an offence. The verse which defines the punishment for fornication also declares the deterrent and expressive character of that punishment[751]. In addition, the verse which defines the punishments for revolt and banditry also explains the different penal goals[752].

The scholars in western legal discourse usually advocate a single theory of punishment, assuming it to be sufficient to 'maintain justice' or achieve the

[749] Nyazee, *General Principles*, 39.
[750] Dr Noor Ahmad Shahtaz, *Tafreekh-i-Nifaz-i-Hudu ̄d*, (Karachi: Fazli Sons, 1998), 38.
[751] Al-Quran, Chapter 24, Verse 2.
[752] Al-Quran, Chapter 49, Verse 9.

goal of 'crime reduction'. The proponents of deterrence reject the usefulness of retribution or restorative justice meanwhile the utilitarian school endorses the deterrence by negating the positive aspects of rehabilitation and retribution. Moreover the scholars, who believe in rehabilitation, simply reject the deterrence. For the said reason the theories of punishment failed to prove their effectiveness because each theory contains some very useful and effective ideas which can help in crime reduction but at the same time each theory is not perfect.

Islamic law is quite developed and more stable on this issue. It has endorsed each theory of punishment from its very beginning along with incorporating these theories into its penal code in such unique and coherent way that each theory got its proper place with the extent it is needed. The crimes of *Hudu ̄d* are dealt with the utilitarian consequential approach of deterrence[753]. Though the *Hudu ̄d* punishments include other penal approaches too, however the basic approach in dealing the *Hudu ̄d* crimes is deterrence. Besides deterrence the *Hudu ̄d* include the rehabilitation, restorative justice and expressivism but these theories have never been the basic objective of *Hudu ̄d* punishments. Likewise the *Qisās* punishment is based upon the concept of retribution and retaliation[754] as a backward looking approach where the primary focus is to maintain justice despite the consequences of that punishment. The *Qisās* in murder as well as in bodily injuries is entirely a retributive punishment which

[753] Muhammad Ameem Al-Ihsan Mujaddidi, *Al-Ta'rifat Al-fiqhiya,* (Beirut: Dar al-Kutub Al-Ilmia, 1986), 77.
[754] Peters, 7.

imposes the punishment exactly same in kind and degree to that of the offence. More surprisingly, the subsequent financial punishment of *Diyyah* is also based upon the retributive philosophy where the compensation for each organ is divided solely according to the concept of proportional. Nonetheless the *Qisās* punishment includes restorative justice as well as rehabilitation[755]. Relying upon retribution does not mean to reject all other penal goals that is why *Qisās* includes the theory of prevention where the offender is subjected to execution and amputation etc.

Similarly the *Ta'zir* punishment, being so wide ranged and discretionary, adopts the principle of proportional punishment as its first and basic principle[756] however it does not exclude the other theories of deterrence, rehabilitation and prevention. *Ta'zir* punishment welcomes each theory. It adopts prevention when it comes to dealing with administrative offences where an officer may be prevented to use his authorities by the way of his expulsion from the office. The preventive approach may be adopted while dealing a dangerous offender which necessitates his execution[757]. Similarly the *Ta'zir* punishment is big on rehabilitation. It deals each and every offender with respect to his mental, emotional and psychological approach. The noble and law abiding citizens are dealt with more leniency if they fell in to crime accidentally. They are dealt with rehabilitative approach by mere advice or so, based upon their longstanding good character and peaceful behaviour.

---

[755] *Diyyah* is an example of restoration where as the *Kaffa ̄rah* is imposed with the intent of rehabilitation.
[756] Bhanassi, *Al-Ta'zir*, 135.
[757] Zuhaili, *Fiqh al-Islami*, 6, 200.

Consequently the habitual offenders may be dealt a bit harshly keeping in view their usual problematic behaviour[758]. The *Ta'zir* punishment never undermines the deterrence. The social disorder crimes like terrorism etc may be dealt with deterrent punishments.

With regard to practical body, shape and implementation of these theories, the western criminal law has yet to do a lot. The western law has not provided any example of its deterrent punishment. The abolition of death penalty has made it far difficult to provide a deterrent punishment which is of much importance for any criminal law. Likewise the exclusion of the famous rule of 'lex talionis', (eye for an eye), has ended the retributive punishment and the western legal discourse has to provide a practical shape of retributive punishment.

Measuring the deterrence and retributive proportionality with regard to the length of imprisonment period is not a proper explanation of these theories. Though the restorative justice and community punishment as form of expressivism provides clearer picture of the theoretical philosophy however it is a fact that the restorative justice has never been at the core centre of the penal system. It needs the consent of all the parties which if not attained may result in turning down this approach[759].

On the contrary, the Islamic law provides the practical shape of each theory of punishment. The capital punishment, amputation of hand, stoning to death

---

[758] Saleem Al-Ewa', 320.
[759] Graef, 18.

and flogging are the most epic examples of deterrent punishment. Likewise the implementation of the rule of 'eye for an eye, nose for nose and life for life' in its very letter and spirit provides the most complete form of retribution. The exile and amputation are examples of preventive approach whereas the *Diyyah* proves to be an extraordinary example of the restorative justice where the victim or the aggrieved party has been given the central part unlike western restorative justice conference where the victim plays very limited role[760]. The victim has a driving seat in the case of *Diyyah* where the consent of offender has no importance[761], which makes *diyyah* a compelling theory of punishment.

8.3. Hybrid theories of punishment.

The western legal philosophers have ended up the discussion on the theories of punishment to the need of combined or mixed theory of punishment. They realized the truth that one single theory of punishment alone is incapable of reducing crime as well as administering justice. This fact forces them to bring together different theories of punishment to have a comprehensive theory of punishment which provides a compelling philosophical framework in fight against the crime[762].

---

[760] Bhanassi, *Al-Diyyah*, 57.

[761] Though there is a difference of opinion among Muslim jurist upon the question that can offender be compelled by the victim to pay *diyyah* or the offender's will is necessary, however the majority of jurists are of the opinion that it solely depends upon the will of aggrieved party.

[762] Brooks, *Punishment*, 89.

Each single theory of punishment is comprised of several different penal goals. The most ancient theory of retribution is based upon the two main pillars of proportional punishment and 'desert', i.e. punishing the guilty. They argue to punish the guilty alone and that the punishment must be adequate and equal to the intensity of crime[763]. Similarly the contrary view of deterrence builds its idea on the utilitarian approach which emphasizes on the consequential benefits rather than that of administering justice[764].

Prevention or incapacitation was also considered a part of utilitarian theory where the main objective of restraint[765] works, to achieve the future benefits instead of focusing on the crime. The remaining theories emerged way after the emergence of the idea of mixed theories. The first two people who tried to bring together these two opposite theories were Professor John Rawls of America and then Professor H.L.A Hart of England. Both these professors tried to combine the two major theories of retribution and utilitarianism[766]. They combined these two theories by choosing the 'desert' rule which demands the punishment for guilty only, from the retribution and the consequential utilitarian approach of punishment from utilitarian deterrence. This means that the punishment may not be proportional to the crime however it must only be inflicted upon the offender alone[767].

---

[763] D. Miethe & Hong Lu, 16.
[764] Walker, 13.
[765] Von Hirsh, 75.
[766] Brooks, *Punishement*, 89.
[767] Richard L. Lippke, 'Mixed Theories of Punishments and Mixed Offenders; Some Unresolved Tensions', *The Southern Journal of Philosophy*, Vol XLIV, 2006, P-276 + 280.

The effort to combine different penal goals in one legal framework resulted in emergence of a 'unified theory' of Professor Thom Brooks[768]. The time he presented his theory, the number of theories of punishment increased. The two main theories of deterrence and retribution were joined by several other theories like rehabilitation, restorative justice, prevention and expressivism. To combine all these theories with a variety of penal goals into one legal framework was a tough job to do. However the professor successfully provided a compelling theory where he brought together almost all theories of punishment in a one coherent legal framework. His unified theory includes the retributive desert which excludes the possibility of punishing the innocent. As we know that the unified theory rejects legal moralism and revolves around the concept of 'legal right'. The main objective of the punishment in the unified theory is the protection to the legal rights that is why it relates the degree of punishment with the importance of right. The violation of more important right is punished with extreme punishment and vice versa. This aspect shows that the unified theory incorporates the retributive 'proportionality' in its framework. The unified theory adopts the utilitarian theories of deterrence and prevention in the sphere of restorative justice. The focus is on restorative justice which may take the form of punitive restoration applying the deterrence whenever needed. The restorative justice in unified theory is implemented by means of prisons which show the inclusion of preventive theory in its framework. It includes the communicative theory, community and shame punishments as well. It also

[768] Brooks, *Punishment*, 126.

includes the rehabilitation which helps in transforming the criminal into a law abiding citizen.

The unified theory as a mixed or hybrid theory has provided a very compelling approach which even throws light on the types of punishment it includes. This feature was missing in the other mixed theories of professor Rawls, Hart and negative retribution.

The most prominent feature of this theory is the placement of each and every single theory at its proper place. Each theory helps in achieving the primary goal of 'protection of legal rights[769]' by playing its role which may differ for every theory. One theory may play an active role in dealing a specific crime while it may be a kind of sleeping theory while protecting another right which is best protected by any other theory. However the unified theory has still to provide a more compelling practical approach by designing the punishments as well as the quantity and degree of punishment for each crime and theory.

The Islamic law presents a unique combination of all theories of punishment. It not only provides philosophical explanation for all the theories, it additionally presents an amazing practical implementation of all the theories. The punishments of Islamic law were never dominated by any theory alone nor does it ignore any theory at all. The unified Islamic theory of punishment is a complete theory which proves to be a compelling option in fight against crime. The legal framework of this theory is so coherent that each theory fits

[769] Brooks, *Punishment*, 127 + 128.

in it with needed proportion and demanding place. The crimes which can best be sorted out with retribution are dealt with the epic implementation of retribution as we see in the case of *Qisās*[770]. Similarly the crimes which put an increased threat to the society and endanger the rights of society as a whole are dealt with deterrence but even that deterrence is proportional.

The deterrence applied for adultery differs from the deterrence applied for fornication[771]. Furthermore the deterrence in the punishment of theft is different in degree from the deterrence in the punishment of banditry. Even the application of deterrence is associated with extremely contrast theories like rehabilitation but nothing looks vague. The deterrence for apostasy is regarded as second option, preceded by rehabilitation where the offender is reformed by teaching the truth in order to wash out his misconceptions. Same is the case with revolt where the deterrence is kept as second option preceded by restorative justice. The state tries to restore the broken trust and relationship, success in which rules out the deterrence[772]. The two above mentioned examples help in understanding the unified nature of Islamic punishment. Primary punishment for both offences of apostasy and revolt is deterrence but the one which suited rehabilitation was accompanied with rehabilitation, i,e. Apostasy, while the nature of revolt demanded the restoration that is why deterrence for revolt was helped with restorative justice. This shows that the unified theory of Islamic law places each and

---

[770] Bhanassi, *Al-Qisas*, 117.
[771] Bhanassi, *Al-Uqubah*, 24.
[772] Abu al-Qasim Al-Gharnati, *Al-Qawaneen al-Fiqhiyyah*, (), 238.

every theory at the most proper place and with the required extent only. Moreover it also helps one theory with another in order to achieve both the goals of proportional punishment as well as crime reduction.

The unified theory of Islamic punishments allocates a single penal goal, as a primary and dominant philosophy, for each category of *Hudu ̄d, Qisas* and *Ta'zir,* though each category may include other theories as secondary theories alongside the primary theory.

The primary penal goal for *Hudu ̄d* is deterrence[773] which dominates the *Hudu ̄d* punishments although it is occasionally accompanied by other theories like rehabilitation and prevention. Similarly the primary theory for *Qisas* punishment is retribution[774] however it is strongly connected with the restorative justice. Likewise the *Ta'zir* is based upon the utilitarian penal goal, which is often accompanied by proportionality which may name it 'proportional utilitarianism', as the primary penal goal of *Ta'zir*[775]. However the primary penal goal for *Ta'zir* is often accompanied by other theories like deterrence, prevention, rehabilitation, communicative theory and shame punishments.

---

[773] Mujaddidi, 77.
[774] Peters, 7.
[775] Bhanassi, *Al-Ta'zir,* 135.

Conclusion.

The 'theories of punishment' is an important topic in the western legal jurisprudence. The Islamic penal discourse has no such philosophical debate of these theories however it never rejects these theories. It defines the crime as the disobedience to Allah's commandments. This definition accepts the idea of legal moralism where as the western law defines the crime as the violation of legislated law and not that of morality which rejects legal moralism. The Islamic law divides the crime into three different categories based upon the effect of crime upon the stakeholders of the society. The *Hudu ̄d* crimes are placed at the top for their devastating effect on the community as a whole, followed by *Qisas* where the injury incurred by individual is more than that of community. The *Ta'zir* is placed at the end. The western law is divided on the basis of criminal and civil violations.

The western legal discourse contains single theories of punishment which were later combined in different ways by various legal philosophers into mixed or hybrid theories. The intention was to overcome the short comings of each theory and to combine their useful aspects to provide a compelling legal framework for the punishment. The Islamic law on the other hand has no such philosophical debates to reject some ideas and accept others. Islamic law, being a divine law, from the very beginning presents a "unified theory' of punishments with unique equilibrium where every theory is used against the crime which can best be dealt with that theory and none else.

Conclusion

&

Recommendations

Introduction.

The research, as outlined in the thesis statement, has evaluated the different theories of punishment in order to ascertain the area which best suites each single different theory and has found that the *'Islamic Unified Theory'* presents a complete legal framework which incorporate all different penal goals with coherence alongwith providing the possible practical application of that coherent legal framework wheres the western legal philosophy is still in need of presenting a coherent theory of punishment which may help the practical laws too.

Before the final concluding remarks, I would like to restate some important aspects of research, which I presented in my synopsis, to analyze whether this research has successfully addressed those importants aspects. These aspects are *Thesis Statement* and *Hypothesis* where as the *Research methodology* and *Objectives* are given in the first chapter which can be analyzed with the findings of this resecrch, i.e. *"The Islamic Unified Theory"*.

- **Thesis Statement:**

Before the formal concluding arguments of this research, I would like to restate the 'thesis statement', I made while presenting the research proposal of this topic.

> *The difference in the nature and intensity of crimes, because of difference in their shapes, requires the application of different theories of punishment for each separate crime. Neither all these theories can be applied in one situation, nor is one theory alone capable of making a*

crime free society. Hence there is a great need to critically evaluate the theories of punishment in a comparative manner to identify the specific spheres for the application of each theory of punishment.

The 'thesis statement' explains the objective of this research to find out a hybrid theory, incorporating all theories of punishment, to apply each theory against that crime alone which may best be eliminated by that theory. The statement explained that application of a single theory alone; never eliminate the crime from the society. In fact the 'thesis statement' argued for a mixed or hybrid theory of punishment which may possess the ability to deal each and every crime, efficiently.

- **Hypothesis.**

The hypothesis of the research as presented at the time of proposal is given below which seems to be justified by the research conducted.

After the extensive literature review it was observed that the Islamic law gives a detailed approach of penal laws, in which the core centre of the entire body of the philosophy of criminal law is the society as a whole. The crime which harms the society with larger extent is punished severely. The slighter the harm to the society, the minor the punishment is. Moreover the Islamic criminal law possesses a unique balanced approach among all these theories, giving every theory its due weight and proper place. The crime which needs deterrence is dealt with extreme harshness e.g. stoning to death of a married adulterer. Likewise the crime which needs retribution, is dealt with the

approach of equality e.g. murder and bodily injuries which are dealt under the doctrine of Qisas. The crime which needs prevention is dealt accordingly e.g. imputation of hand on account of theft. These examples shows the "unique, balanced and harmonised" connection among all these theories in the body of Islamic criminal law.

The western philosophers on the other hand, give the concept of single theory. They believe that a single theory whatever that may be can fulfil the purpose of punishment. This concept of 'single theory based criminal law' cannot eliminate the crime from the society as any single theory does not have the potential to address each and every kind of problem. Because there are some problems which need deterrence while other may need retribution. Likewise some crimes need to be dealt with the approach of prevention while some other may be eliminated only if dealt by reformative approach. That is why it is believed that one theory with a specific confined approach can never be useful to create a crime free society.

- **Key Points of the Research.**

The concept of 'theories of punishment' has very strong philosophical roots in western legal discourse. The scholars have been paying much attention in addressing the doctrine. Therefore the continuous discussion on the topic helped in understanding the reality of inapplicability of a single theory of punishment in entire penal system. As a matter of fact, the twentieth century

has witnessed the birth of few new theories of punishment like 'Rehabilitation[776]' and 'Restorative Justice' along with the expressivism and the concept of community and shame punishments. The presentation of these new theories of punishment was an effort to replace the ancient theories of retribution and deterrence.

The new theories witnessed very warm welcome in the western societies but that could not last for very long. Though these new theories are still advocated and practiced however they failed to completely replace the long standing theories. The western legal philosophers realised the fact that sticking to a single penal goal is never going to help, which forces them to combine different penal goals into one single coherent framework. This effort resulted in the emergence of mixed theories of punishment presented by Professor John Rawls and Professor Herbart Hart.

The idea of mixed theories as presented by Professor John Rawls and Professor Herbart Hart resulted in the birth of a mixed theory called 'Negative retribution'. 'Negative retribution' took the idea of 'desert' from classical or positive retribution whereas it incorporated in its body the idea of 'consequential utilitarian' punishment from the deterrence[777]. Therefore the negative retribution became a theory which punishes only the guilty but the punishment may not be proportional. The punishment in the negative retribution may vary in order to achieve the consequential future benefit of

---

[776] Brooks, *Punishment*, 51.
[777] Ibid, 96.

'crime reduction'. The western philosophers continued working on the idea of hybrid theories but where each theory got its admirers, it faced the objection by critiques. The latest and more compelling hybrid theory was present by Professor Thom Brooks, named as 'The Unified Theory'. It includes almost every theory of punishment but is applied in a non-proportional way, against the crime where it best fits.

Notwithstanding the above discussion, the fact remain still, that all these theories of punishment, whether single or hybrid, are a mere philosophical discussion with no practical application. No penal code in any western country provides a practical application of these theories however in few countries special departments are working related to few of these theories like restorative justice and rehabilitation but even these are either discretionary or very low profile theories. The western criminal laws are unable to identify the laws where the retribution is applied by the legislature. Similarly no penal code can figure out the laws which are legislated with the intent to make them a deterrent punishment. There is no process which may help a researcher to measure the proportionality of the punishment with the seriousness of the crime. The rejection of the divine law of 'lex-talionis' which necessitates the implementation of famous doctrine of 'eye for an eye and nose for nose', has further negated the idea of proportional punishment. Disabling a human sense or a part of body may be punished with imprisonment which in no ways can be a proportional punishment. Even the victim is not provided any compensation for that loss. Similarly how imprisonment, no matter how long

it might be, can be a proportional punishment for killing an innocent human being. Therefore the standard form of retribution with strict proportional punishment is left for the philosophical discussions.

In addition to that, the deterrence is dealt in no different way. The abolition of death penalty has almost finished the concept of deterrence[778]. The deterrence for murder is usually measured with the term of imprisonment. It is considered that the longer the term of imprisonment, the most deterrent effect it would have. But this logic seems irrelevant where a person feels comfortable with prisons just like in the case of habitual offenders. Same is the case with the theory of prevention which is just another form of utilitarian concept of punishments.

Both the theories of rehabilitation and restorative justice find it very difficult to have their proper permanent place in the penal system. The restorative justice is totally dependent upon the mutual consent of both the parties[779] and in addition to that it still finds it difficult to have a concrete specification of its third stake holder, i.e. the society. The rehabilitation is entirely connected with prison which is the worst place for the rehabilitation because of the fact of increased recidivism by the previously imprisoned offenders.

The hybrid theories are also unable to make their impact on the penal laws of land. The negative retribution looks around to find the consequential benefits of the punishments because the studies have shown the increased ratio of

---

[778] Crime and Disorder Act, 1998, Section 36.
[779] Graef, 18.

recidivism for prisoners along with being an extremely expensive option for tax payers[780], which is one of the major types of widely implemented punishment.

The expressivism or communicative theory is also not presently applied anywhere. The concept of rehabilitation presented by expressivism contradicts with both the original theory and the practical laws. The expressivism argues that the offender is rehabilitated by punishment and not by educational or recreational reformation, which is contrary to the doctrine of rehabilitation as the theory states.

The 'unified theory' combines all penal goals but has yet to provide a practical implementation of its philosophy in any state.

The entire problem of impracticality of these theories in the practical penal law of the western counties is because of the fact these laws were never framed with the intent of implementing these theories. The legislature have never legislated the laws with keeping in mind any single or hybrid theory. This is why these theories are unknown to the penal laws of western countries.

The gap between the legislated penal law and the theories is punishment is not the only issue rather the big issue is the gap between the penal law and the reasons for the crime. The western legal discourse fights the crime by only implementing laws but it pays no heed to eliminate the reasons which leads a

[780] Ministry of Justice, *Costs per place and costs per prisoner by individual prison,* (London: Ministry of Justice Press, 2019), 2-5.

person to the crime. This is no place to discuss this issue however pointing out it briefly will not be meaningless.

The western legal discourse criminalizes the sexual offenses like rape and child abuse but pays no attention to minimize the indecency, sexually arousing half naked dress, pornography and extramarital sex. Likewise it punishes the offender for drug abuse but allows the shopkeepers and stores to sell alcohol and drugs openly. The death penalty was abolished on the grounds of human rights but the murdered human and his aggrieved family is neither provided complete justice nor helped to have their vengeance.

On the contrary, the approach of Islamic law in fighting the crime seems more logical and practical. The Islamic law begins from eradicating the factors that give birth to the crime[781]. Islamic law never impose its punishments in unusual circumstances where the situation may force the people to indulge into the crime. In case of financial crises the theft *Hadd* will not be imposed[782]. The *Hadd* of intoxication will not be imposed upon the person who drinks it in extreme thirst to save his life, when he failed to find water.

The basic strategy of Islamic law against the crime, even before the imposition of punishments, is to establish a model welfare society where the rights of human being are secured, the basic necessities of the human being are fulfilled and provided to every individual of the society and eventually there remains no logical justification for crime. To achieve this primary goal in fight

---

[781] Al-Zahim, 69.

[782] Dr Muhammad Baltaji, *Manhaj Umar Ibn-i-Khattab fi al-Tashri'*, (Cairo: Dar al-Fikr al-Arabi, 1970), 244.

against crime, the Islamic law teaches and preaches the basic belief of oneness of God almighty and convince its public to believe in Him. The Islamic law safeguards the state religion by *Jihad* against the invaders and to rehabilitate the apostate by removing his misconceptions. The punishment is kept as a last option in fight against the offence of apostasy. Likewise the 'life' of the human being is safeguarded by encouraging and making the marriage easy where as it is protected by administrating the justice which may eliminate the vengeance at its very first level. However the likely offenders are deterred by announcing the death penalty for murder and if happened, imposing the death penalty to safeguard the right to life for the entire humanity. The Islamic law apply the punishments for sexual offences only after maintaining a decent and chaste society by imposing modest dress code for male and female along with ensuring the separate working places for male and female. The state has to encourage and facilitate early marriages and help the poor members of the society in this regard. After all these precautionary measures if a person indulges into fornication or adultery, is prosecuted and if found guilty, be punished.

Same is the strategy of Islamic law with all other crimes[783]. The Islamic law has never neglected the individual offender against the rights of the society that is why it has announced different punishment for married and unmarried offender while the offence remains the same, i.e. sexual intercourse[784]. Likewise the murderer is not always treated alike; he is

[783] Al-Zahim, 70.
[784] Bhanassi, *Al-Uqubah*, 24.

subjected to difference in punishment with change in his position. The death penalty is for wilful intentional murder only. The importance of the *Hadd* of drinking is obvious in Islamic law but the situation of individual is never neglected here too. Same is the case with theft where the offender's situation is never underestimated by Islamic law.

The above discussions clarify the fact that the punishments in Islamic law are considered as the last option in crime reduction[785] where as in the western law the punishments are the first option in achieving the goal of 'crime reduction'. Notwithstanding the sentence of imprisonment as a part of punishments in Islamic penal law, it has never been the appreciated or most desired kind of punishment. Most of the Islamic law punishments are related to the body of human being which ensure the infliction of equal pain on the offender. Same is the philosophy of Islamic law in the monetary punishments where fines etc are highly discouraged because of the fact that it may lose the sense of punishment when imposed upon a rich person and may become over burdened for an ordinary worker[786].

The other important point in the Islamic punishments is that the punishments which are dealt with extreme deterrence are subjected to very tough evidence law. Not only the proof of those crimes is made hard but the plaintiff is also declared highly responsible for his claim. If he brings a case to the court of law, he has to prove it, otherwise the plaintiff himself may face the

---

[785] Al-Zahim, 89.

[786] Muhammad Waqas and Humdia Qaiser, 'A Comparative Analysis of Punishment awarded in Islamic legal system and western legal system', *International Research Journal of Social Sciences,* Vol. **3(11),** 51-54, November **(2014),** P-53.

consequences because of wasting the time of court along with disturbing and accusing a law abiding innocent citizen.

The other major characteristic found in Islamic penal law, is its exceptionally extraordinary rehabilitative character. The ex-convicted people are dealt with love, affection and dignity. His is not treated as an evil rather accepted by the society as a brother same as he was before offence. The saying of the Holy Prophet (peace be upon him) is famous where he warned the companions who made some unaccepted remarks for the ex-convicted by saying

لا تعينوا عليه الشيطان

This rehabilitative character not also reforms the offender but restores the broken relationship among the community stakeholders.

The Islamic penal laws present a comprehensive coherent unified theory of punishment comprising all penal goals by applying them at the most suitable areas in order to have a compelling approach which may best help in 'crime reduction' as discussed in chapter eight. Each theory helps the other and even if a specific theory is dominant foe a specific category if does not out question the need of other theories.

- **Recommendations.**

The research has examined the theories of punishments and their application in western as well as Islamic legal thoughts. The research recommends the following;

- Any legal system should have a philosophical justification for any criminal and penal legislation.
- The legislation related to the criminal and penal laws must be according to its philosophy, agreed upon by the legislature, representing the society.
- The state must educate the people regarding the bad effects of crimes. It should focus on the character building of the masses to make them avoid the crime not because of the fear of punishment rather because of its being immoral and unjustifiable.
- The legislation, while criminalizing and penalizing an act, must address the causes for that act.
- The state should eliminate the factors which result in occurrence of crimes.
- The punishment for a crime may only be inflicted if the causes and factors for that crime were completely eradicated by the state and there was no reasonable factor justifying crime.
- The fountain of social, economic as well as penal structure of a society or state must be same, otherwise it will resut in chaos.
- The punishment for financial offences should be imposed only after saying good bye to the interest based economy and inflation which exploites the lower class of the society and force them to commit theft. Instead the economy should be based upon the doctrine of *Zakat*. Likewise measures should be taken by the government to ensure the

equitable distribution of wealth and to maintain complete economic balance, keeping in view the golden words of Holy Quran which says;

so that it (wealth) may not merely circulate between the rich among you.

- The punishment for sexual offences should only be imposed when the modest dres code as per the teachings of *Quran* is adopted along with separating the co-culture from the society. The marriage should be made easy and cheap where no one may indulge into Satan's trap because of lack of legal way to fulfil his natural desires.
- The death penalty in *Qisas* along with the deterrent punishment of *Hudu ā* should be imposed in order to eliminate the crime from the society. The state should leave the apologetic a pproach towards these devine punishments rather it should impose these punishments because of being the only option to success against crimes.
- The procedural law should also be derived from the same fountain which ordains the punishments in practice. Otherwise the punishments will cease their utility. E,g, the *Hadd* of *Zina* may only be imposed after following the procedural and evidence law of the same philosophy, i,e. Four male eye witnesses.

Chapter Six = Application of theories of Punishment in Hudūd

The primary penal goal of the Hudūd punishments is utilitarian approach of deterrence which solely aims for crime reduction. However each Hadd punishment presents an example of hybrid theory because each Hadd punishment contains several penal goals accompanying deterrence. In order to achieve the ultimate goal of crime reduction, the deterrence of each single Hadd is assisted with other penal goals but with appropriate ratio and suitable place. That is why a Hadd may contain deterrence along with reformative character or incapacitation etc.

Chapter Seven = Application of Theories of Punishment in Qisās & Tazir

The basic penal goal in the punishment of Qisas is 'Retribution.' The Qisas applies strict retributive punishment in bodily harms where the proportionality becomes the primary penal goal in the distribution of punishment. However Qisas is not confined to retribution alone as it applies the theories of restorative justice, incapacitation and rehabilitation. On the other hand Tazir, being widely applied with flexible nature, presents an example of hybrid theory where every theory finds its place keeping in view their need and the nature of crime.

Chapter Eight = Unified Theory of Punishment in Islamic Law

The Islamic Unified Theory of punishment provides an epic example of harmonized hybrid theory which includes each and every penal goal with neither any contradiction nor any impracticability. It provides some basic rules and then few precautionary measures which must be observed and regarded before infliction of punishment. The Islamic Unified Theory explains the nature of crime which can be best dealt and eradicated with any specific penal goal. Like the crimes with against the society are dealt with deterrence whereas the crimes with targeted individual are negotiated with restorative justice. Likewise the crimes which show the impossibility of rehabilitation are dealt with the theory of incapacitation.

Chapter Nine = Comparative Analysis

The comparative analysis shows that the western penal philosophy presents few theories of punishment to help the legislators in law making by providing the best remedy in fight against crime though these philosophical theories has less to do with practical laws. On contrary, Islamic law has never presented such theories rather it presents a single and still Unified theory from the beginning although it incorporates all penal goals presented by western penology. The Islamic and western law differ as western penal philosophy is continuously changing with no binding effect on practical laws whereas Islamic law is clear and has a very strong binding effect on practical laws.

The research concludes that the Islamic Unified theory present an epic model of a hybrid theory which incorporates every single penal goal with proper application and recommends that the governments should eliminate the causes of any crime before inflicting the punishments for that along with providing sufficient facilities, specially the basic needs of life after knowing the fact that the lack of basic needs is the major cause of crimes.

Bibliography

Abbasi, Manzoor Ahsan .*Jurm-i-Irtidad* .Lahore: Islamic Mission, 1974.

Abd-i-Munib, Umi .*Hudud ki Hikmat Nifaz or Taqazy* .Lahore: Mushariba Ilm-o-Hikmat, 1430.

Abdu Rehman Al-Juzairi .*Al-Fiqh Ala al-mazahib al-Arba* . Beirut: Dar al-Kutub al-Ilmia.2003 ‹

Abdul Qadir Awdah .*Al-Tashri' Al-Jinai Al-Islami* .Beirut: Dar Al-Kutub Al-Arabi.2000 ‹

Abdullah bin Mahmud bin Mudud .*Al-Ikhtiar li Ta'lil al-Mukhtar* .Cairo: Matba' Al-Habla.1937 ‹

Abu Al-Hasan Ali Bin Muhammad Al-Mawardi .*Al-Ahkam Al-Sultania* .Cairo: Dar Al-Hadith.1998 ‹

Abu Hamid Al-Ghazali .*Al-Mustasfa min I'lm al-usul* .Beirut: Dar Al-Kutub Al-Ilmia.1993 ‹

Abu Ibrahim Al-Muzani .*Mukhtasar Al-Muzani* .Beirut: Dar Al-Ma'rifa.1990 ‹

Abu Ishaq Ibrahim bin Ali bin Yusuf Al-Shirazi .*Al-Muhadhab fi Fiqh al-Imam al-Shafi* . Beirut: Dar al-Kutub al-Ilmia.'

Abu Muhammad Bihauddin Al-Maqdisi .*Al-Uddah Sharh al-Umdah* .cairo: Dar Al-Hadith.2003 ‹

Abu Qasim Al-Gharnati .*Al-Qawanin Al-Fiqhiya.*

Abu Qasim Umar Bin Hussain bin Abdullah Al-Khiraqi .*Mukhtasar Al-Khiraqi* . Beirut: Dar Al-Ma'rifah.1993 ‹

Abu Umar Yusuf Bin Abdullah Al-Namari Al-Qurtubi .*Al-Kafi fi Fiqh Ahl Al-Medinah* .Maktaba Riyadh Al-Hadisiyyah: Riyadh.1980 ‹

Abu Y'ala Al-Fara Al-Hanbali .*Al-Ahkam Al-Sultania* .Kuwait: Dar Ibn-i-Qutaiba.1989 ‹

Abu Zahra .*Ahkam Al-Tarikat wal Mawarees* .Cairo: Dar Al-Fikr Al-Arabi.1963 ‹

.—*Al-Jarimah* .Cairo: Dar Al-Fikr Al-Arabi.1987 ‹

.—*Al-Uqubah* .Cairo: Dar Al-Kutub Al-Arabi.2000 ‹

Abu zakaria Muhayuddin yahya Bin Sharf Al-Nawawi .*Radht ul-Talibin wa Umdat ul-Muftin* .Beirut: Al-Maktab Al-Islami.1991 ‹

Abul Barakat Abdullah Bin Ahmad Al-Nisafi .*Kanz al-Daqaiq* .Dar al-Bashair al-Islamia.2011 ‹

Abul Hasan Ali Muhammad Al-Mawardi .*Al-Hawi Al-Kabeer* .Beirut: Dar al-Kutub Al-Ilmia.1999 ‹

Acquinas, Thomas. *Treatise on Law.* London: Encyclopedia Britannica, Inc, 1952.

Ahmad Bin Muhammad Al-Quduri .*Mukhtasar Al-Quduri* .Beirut: Dar Al-Kutub Al-Ilmia.1997 ‹

Akkermans, Jaap Hage & Bram. *Introduction to Law.* Switzerland: Springer's, 2014.

Alauddin Abu Bakr Bin Masud bin Ahmad Al-Kasani .*Bidai' Al-Sanai' fi tartib Al-Sharai* . Cairo: Dar Al-Kutub Al-Ilmia.1986 ‹

Alauddin Al-Samarqandi .*Tuhfah tu al-Fuqaha* .Beirut: Dar al-Kutub Al-Ilmi'a ‹ .1994

Al-Awa, Dr. Saleem. *The Theory of Punishment in Islamic Law.* London: University of London, 1972.

Al-Daud, Abdur Rehman Abdul Aziz .*Islam Ka Nizam-i-Tazirat* .Faisalabad: Tariq Academy, 2000.

Ali Bin Muhammad Bin Ali Al-Jurjani .*Al-Tarifat* .Beirut: Dar Al-Kutub Al-Ilmia.1983 ‹

Allen, Michael J. *Criminal Law.* Oxford: Oxford University Press, 2007.

Allis, Anthony. "A Deterrent Theory of Punishment." *Philosophical Quarterly,* 2003: 337-351.

Al-Syid Saqdiq Al-Mahdi .*Al-Uqubah fi Al-Shariah* .Cairo: Al-Zahra li al-I'lam Al-Arabi.1987 ‹

Amatrudo, Anthony. *Criminology and Political Theory.* Chennai: SAGE, 2009.

Aristotle. *Ethics.* London: Encyclopedia Britannica, Inc, 1952.

Ashworth, Andrew. "Departure from sentencing Guidelines." *Criminal Law Review,* 2012: 81-96.

Ashworth, Andrew. "Responsibilities, Rights and Restorative Justice." *British Journal of Criminology*, 2002: 578-95.

—. *Sentencing and Criminal justice, 6th edition.* Cambridge: Cambridge University Press, 2015.

—. *Sentencing, in The Oxford Handbook of criminology.* Oxford: Oxford University Press, 1994.

Baird, Norman. *Criminal Law.* London : Routledge, 2011.

Barkow, Rachel E. "Sentencing Guidelines at the cross roads of politics and Expertise." *University of Pennsylvania Law Review*, 2012: 1599-1630.

Beccaria, Cesare. *On crime and punishment.* New Jersey: Transaction publishers, 2009.

Bedau, Hugo Adam. *Killing as Punishment.* Oxford: Oxford University Press, 2004.

Bennet, Christopher. "The Varieties of Retributive Experience ." *Philosophical Quarterly*, 2003: 145-163.

Bennet, Yvonne Jewkes & Jamie. *Dictionary of Prisons and Punishment.* London: Willan Publishing, 2008.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation.* London: Encyclopedia Britannica Inc, 1907.

Bhutta, Mian Masood Ahmad .*Qanoon-i-Qisas o Diyat* .Lahore: Aahan, 2002.

.—*Qawaneen al-Hudood wa al-Tazirat* .Lahore: Aahan, 2005.

Bottomley, A. Keith. *Criminology in Focus.* Oxford: Martin Robertson, 1979.

Bowring, J. *The Works of Jeremy Bentham (1838-43).* Oxford: Oxford University Press, 1983.

Braithwaite, Jonathan. "Setting standards for restorative Justice." *British Journal of Criminology*, 2002: 563-77.

Brooke, David. *Jurisprudence.* london: Routledge, 2011.

Brooks, Thom. *Punishment.* Oxon: Routledge, 2012.

—. *Retribution.* Surrey: Ashgate Publishing Limited, 2014.

—. *Sentencing.* Farnham: Ashgate, 2014.

Brownlee, Ian. *Community Punishment.* Esswx: Addison Wesley Longman Limited, 1998.

Brudner, Alan. *Punishment and Freedom; A liberal theory of penal Justice.* Oxford: Oxford University Press, 2009.

Burhanuddin Al-Marghinani .*Al-Hidayah fi Sharh Bidaya tul-Mubtadi* .Beirut: Dar Ihya al-Turas al-Arabi.2000 ‹

Burhan-ud-Din Al-Marghinani .*Bidayat-ul-Mubtadi* .Cairo: Maktaba o Matba' Muhammad Ali Subh.

Canton, Rob. *Why Punish.* London: Palgrave, 2017.

Carlton, Eric. *Treason.* Hants: Ashgate, 1998.

Christie, T.H. Jones & M.G.A. *Criminal Law.* Edinburge: W. GREEN / Sweet & Maxwell, 2000.

Committee of Authors .*Asr Tatbiq Al-Hudud ala Al-Mugtama* .Riyadh: Idara tu al-Saqafi li al-Nashr bi Al-Jamia.1984 ‹

Committee of Scholars .*Al-Moso'a Al-Fiqhiyyah Al-Kuwaitiyyah* .Kuwait: Ministry of Religious Affairs Kuwait 1427 ‹h.

Cornewell, David J. *Criminal Punishment and Restorative Justice.* Winchester: Waterside Press, 2006.

Cottingham, John. "Varieties of Retribution." *Philosophical Quarterly,* 1979: 238-246.

Cragg, Wesley. *The Practice of Punishment.* Oxford: Routledge, 1992.

Cross, Rupert. *The English Sentencing System.* London: Butterworths, 1981.

Darley, Paul H. Robinson & John M. "The Utility of Desert." *NorthWestern University Law Review,* 1997: 453-99.

Davis, Michael. "How to Make the Punishment Fit the Crime ." *Ethics,* 1983: 726-752.

Dignan, Michael Cavadino and James. *The Penal System.* London: SAGE Publications, 2007.

Dolinko, David. "Three Mistakes of Retributivism." *UCLA Law Review,* 1992: 1623-57.

Dr Abdul Aziz A'mir .*Al-Tazir fi al-Shariah Al-Islamia* .Cairo: Dar Al-Fikr Al-Arabi.1976 ‹

Dr Abdul karim Zedan .*Ahkam Al-Dhimmiyin wal-Musta'minin* .Baghdad: Maktaba Al-Quds.1982 ‹

.—*Al-Mufassal Fi Ahkam Al-Mar'a wal Bait al-Muslim fi Al-Shariah Al-Islamia* . Beirut: Moasasat al_risalah.1993 ‹

.—*Al-Qisas wa Al-Diyaat* .Beirut: Moasasat ul-Risalah.2013 ‹

.—*Nizam Al-Qadha Fi Al-Shariah Al-Islamia* .Beirut: Moasasat Al-Risalah.1989 ‹

Dr Abdullah bin Ahmad Al-Qadri .*Al-Hudud wa al-Sultan* .Jeddah: Dar al-Jam' li al-Nashr wal-Tawdi.1986 ‹'

Dr Abdullatif Salih Farfur .*Al-Fiqh Al-Jinai al-Muqaran bil Qanun* .Damascus: Al-Hikmah.1994 ‹

Dr Ahmad Fathi Bhanassi .*Al-Diyyah fi Al-Shariah Al-Islamiah* .Cairo: Dar Al-Shuruq.1988 ‹

.—*Al-Hudud fil-Islam* .Cairo: Moasasat ul-Matbo'at Al-Hadeesah.2003 ‹

.—*Al-Jara'im fil-Fiqh Al-Islami* .Cairo: Dar Al-Shuruq.1988 ‹

.—*Al-Ma'olia Al-Jinaiyah fil-Fiqh Al-Islami* .Cairo: Dar Al-Shuruq.1988 ‹

.—*Al-Qisas Fil-Fiqh Al-Islami* .Cairo: Dar Al-Shuruq.1989 ‹

.—*Al-Siyasah Al-Jina'iyah Fi Al-Shariah Al-Islamiah* .Beirut: Dar Al-Shuruq ‹ .1983

.—*Al-Tazir fi al-Shariah Al-Islamia* .Cairo: Moasasat al-Khalij Al-Arabi.1988 ‹

.—*Al-Uqubah fil-Fiqh Al-Islami* .Cairo: Dar Al-Shuruq.1983 ‹

.—*Madkhal Al-Fiqh Al-Jinai Al-Islami* .Cairo: Dar Al-Shuruq.1989 ‹

.—*Muqif Al-Shariah min Nazriyat Al-Difa Al-Ijtima'i* .Cairo: Dar Al-Shuruq ‹ .1984

.—*Nazriyat fil-Fiqh Al-Jinai Al-Islami* .Cairo: Dar Al-Shuruq.1989 ‹

.—*Nazriyat ul-Isbat fil-Fiqh Al-Islami* .Cairo: Dar Al-Shuruq.1989 ‹

Dr Muhammad Al-Baltaji .*Al-Jinayat wo Uqubatuha fil Islam wa Huquq al-Insan* . Cairo: Dar al-Salam.2001 ‹

Dr Muhammad Baltaji .*Manhaj Umar Ibn-i-Khattab fi al-Tashri* . Cairo: Dar al-Fikr al-Arabi.1970 ‹

Dr Muhammad Bin Abdullah Al-Zahim .*A'sar Tatbiq Al-Shariah Al-Islamia fi Man' al-Jarimah* .Dar Al-Manar.1998 ‹

dr Muhammad Saleem Al-Ewa .*Fi Usul al-Nizam Al-Jinai Al-Islami* .Al-Jeeza: Nahzat Misr.2006 ‹

Dr Rauf Ubaid .*Al-Sababiyyah Al-Jinaiyyah* .Cairo: Matba' Al-Istiqlal Al-Kubra ‹ .1984

Dr Saeed al-Jibai .*Tatbiq al-Uqubah ala al-Jani* .Cairo: Dar al-Nahza al-Arabia ‹ .1993

Dr Saeed Jibai .*Tanfiz al-Qanun al-Jinai Ala al-Junat* .Cairo: Dar Al-Nahdha Al-Arabia.1993 ‹

Dr Taha Faris .*Maqasid Al-Tashri' Al-Jinai* .Sharjah: Sharjah University.

Dr Usama Abdullah .*Al-Uquba fi Al-Shariah Al-Islamia wal Qanun Al-Wadha* .' Cairo: Dar Al-Nahza Al_Arabia.1997 ‹

.—*Al-Uqubat fi Al-Shariah al-Islamia wal-Qanun al-wadhi* . Cairo: Dar Al-Nahdha Al-Arabia.1997 ‹

Dr Wahba Al-Zuhaili .*Al-Fiqh Al-Islami wa Adillatuhu* .Damascus: Dar Al-Fikr ‹ .1987

.—*Nazriyah al-Zaman* .Damascus: Dar al-Fikr.1998 ‹

Duff, R. A. *Punishment, Communication and Community.* Oxford: Oxford University Press, 2001.

Duff, R.A. *Trails and Punishment.* Cambridge: Cambridge University Press, 1986.

Edwards, Ian. "'Sentencing Councils & Victims." *Modern Law Review*, 2012: 324-46.

Feinberg, Joel. *Doing & Deserving.* Princeton, New Jersey: Princeton University Press, 1970.

Feinberg, Joel. "The Expressive function of punishment." In *Doing and Deserving: Essays in the Theory of Responsibility*, 95-118. Princeton : Princeton University Press, 1970.

Fichte, J. G. *Foundation of Natural Right.* Cambridge: Cambridge University Press, 2000.

Fitzgerald, P.J. *Salmond on Jurisprudence.* London: Sweet & Maxwell, 1966.

Gardner, John. "Crime: in Proportion and in Perspective." In *Sentencing Theory: Essays in Honour of Andrew Von Hirsch* , by Andrew Ashworth & Martin Wasik, 31-52. Oxford: Clarendon, 1998.

Garland, David. *Punishment and Modern Society: A study in Social Theory.* Oxford: Clarendon, 1990.

Garland, R. A. Duff & David. *A Reader on PUNISHMENT.* Oxford: Oxford University Press, 1995.

Garvey, Stephen P. "Can Shaming Punishment Educate?" *University of Chicago Law Review*, 1998: 733-794.

Ghamidi, Javed Ahmad .*Al-Burhan* .Lahore: Al-Mawrid, 2009.

Ghazi, Dr Mahmaood AhmAd .*Qawaid Kuliyyah Ka Aaghaz o Irtiqa* .Islamabad : Shariah Academy , 1992.

Ghazi, Dr Mahmood Ahmad .*Muhazirat-i-Fiqh* .Lahore: Al-Faisal Nashiran o Tajiran, 2005.

Glazebrook, P. R. *Blackstone's Statutes on CRIMINAL LAW.* Oxford: Oxford University press, 2015.

Golding, Martin. *Philosophy of Law.* New Jersey: Prentice-Hall, 1974.

Government, UK. *Restorative Justice Council Website* . 10 December 2019. restorativejustice.org.uk/becoming-restorative-practitioner-0 (accessed December 10, 2019).

—. *Sentencing Council.* Friday Nov 2019. https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/community-sentences/ (accessed Nov 1st November., 2019).

Graef, Roger. *Why Restorative Justice?* London: Calouste Gulbenkian Foundation, 2002.

Grant, Claire. *Crime and Punishment in Contemporary Culture.* Oxon: Routledge, 2007.

Haag, Ernest Van Den. *Punishing Criminals.* new York: Basic Books, 1975.

Haist, Matthew. "Deterrence in a Sea of Just Deserts." *Journal of criminal law and criminology*, 2009: 789-822.

Hajr, Ahmad Bin .*Sharab ki Muzrat* .New Delhi: Islamic Research Academy.

Hall, Jerome. *General Principles of Criminal Law.* Indiana: The Bobbs-Merril Company Inc, 1960.

Hart, Herbert Lionel Adolphus. *Punishment and Responsibility.* Oxford: Clarendon Press, 1963.

Hashmi, Mateen .*Islami Hudud or u nka Falsafa* .Lahore: Diyal Singh Trust Library, 1999.

Hegel, Georg Wilhelm Friedrich. *Elements of the philosophy of right.* Oxford: Oxford University Press, 1967.

—. *Philosophy of Right.* London: Encyclopedia Britannica, Inc, 1952.

—. *Science of Logic.* London: George Allen, 1969.

Hermalin, Benjamin E. "What is Crime?" *Journal of Institutional & Theoritical Economics*, 2005: 303 - 318.

Hirsch, Andrew Von. *Censure and Sanction.* Oxford: Clarendon Press, 1993.

Hirsh, Andrew Von. *Principled Sentencing.* Oxford: HART Publishing, 2009.

Hobbes, Thomas. *Leviathan.* London: Encyclopedia Britannica, Inc, 1952.

Hogan, Smith &. *Criminal Law.* Oxford: Oxford university Press, 2014.

Hogan, Smith and. *Criminal Law.* London: Butterworths, 1983.

Holder, Jeremy. *Ashworths' Principles of Criminal Law.* Oxford: Oxford University Press, 2018.

Hooker, Brad. *Ideal Code, Real World.* Oxford: Oxford University Press, 2000.

Horder, Andrew Ashworth & Jeremy. *Principles of Criminal Law.* Oxford: Oxford University Press, 2013.

Hornle, Dubber &. *The oxford Handbook of Criminal law.* Oxford: Oxford University Press, 2014.

Hoskins, Zachary. ",Deterrent Punishment and respect for Persons." *Ohio State Journal of Criminal law, Vol 8, 2011, P-371.*, 2011: 369-384.

Hostettler, John. *Cesare Beccaria.* Hampshire: Waterside Press, 2011.

House of Lords, UK. *Crime and Disorder Act 1998.* London: UK govenment, 1998.

Husak, Douglas N. "Why Punish the Deserving?" *Nous*, 1992: 447-64.

Ibrahim Ahmad Al-Waqfi .*Tilka Hudud ul-Allah* .Islamabad: Dar Al-Ilm.1980 ‹

Ibrahim Bin Musa Bin Muhammad Al-Shatibi .*Al-Muwafiqat* .Beirut: Dar Ibn-i-Affan.1997 ‹

Ijaz, Dr Muhammad .*Qaid-o-Band Ka Islami Tasawur* .Lahore: Skheikh Zaid Islamic centre, 2009.

Ilahi, Dr Fazal .*Zina ki Sangini* .Islamabad: Maktaba Noor, 2014.

Ishaq Bin Khalil .*Mukhtasar Khalil* .Cairo: Dar Al-Hadith.2005 ‹

Izz ibn-i-Abdu a-Salam .*Qawaid al-Ahkam fi Masalih al-Anam* .Cairo: Maktaba Kulyat-i-Azhariyah.1991 ‹

Kahan, Dan M. "What do alternative sanctions mean?" *University of Chicago Law Review*, 1998: 591-653.

Kant, Immanuel. *The Metaphysics of Morals.* Cambridge: Cambridge University Press, 1996.

—. *The Science of right.* London: Encyclopedia Britannica, Inc, 1952.

Khalid, Malik Riyaz .*Qanun-i-Fojdari* .Lahore: Samg-i-Meel Publications, 1993.

Khan, Mufti Nazir Ahmad .*Hudud Ordinance or Tahzibi Tasadum* .Karachi: Al-Nibras, 2005.

Khan, Tauqir M. *Criminal Law in Islam.* New Delhi: Pentagon Press, 2007.

Klement, Assaf Hamadani & Alon. "Corporate crime and deterrence." *Stanford Law review*, 2008: 271-310.

Kohler, Joseph. *Philosophy of Law.* Newyork: Augustus M. Kelley, 1969.

Kong, The Open University of Hong. *Criminal Law.* Hong Kong: Printing Hilstory, 2012.

Lamond, Grant. "What is a Crime?" *Oxford Journal of Legal Studies*, 2007: 609 - 632.

Lippke, Richard L. "Mixed Theories of Punishment and Mixed Offenders; Some Unresolved Tensions." *The Southern Journal Of Philosophy*, 2006: 273-295.

—. *Rethinking Imprisonment.* Oxford: Oxford University Press, 2007.

loucks, Briege Nugent & Nancy. "The Arts and Prisoners; Experiences of Creative Rehabilitation." *Howard Journal of Criminal justice*, 2011: 356-370.

Lu, Terance D. Miethe & Hong. *Punishment.* Cambridge : Cambridge University Press, 2005.

Machiavilli, Nicolo. *Prince.* London: Encyclopedia Britannica, Inc, 1952.

Madni, Muhammad Israr .*Irtidad or Tuhin-i-Risalat* .Lahore: Idara Islamiat, 1995.

Mahajin, V. D. *Juriprudence.* Lahore: Mansoor book house, 2006.

Mahmood, Tahir. *Criminal Law in Islam And Muslim world.* New Delhi: Institute of Objective studies, 2015.

Malik Bin Anas .*Al-Mudawanah* .Cairo: Dar Al-Kutub Al-Ilmia.1994 ،

Mansoor Bin Younas .*Al-Rauz al-Murbi' Sharh Zad al-Mustaqni* . Beirut: Moasasah tu al-Risalah.

Marsh, Ian. *Criminal justice.* London: Routledge, 2004.

Maududi, Syed Abul A'la. *Towards Understanding Al- Quran.* London: UKIM, 2014.

Mawdudi, Sayyid Abul A'la .*Murtad ki Saza* .Lahore: Islamic Publications, 1970.

.—*Rasail-o-Masail* .Lahore: Islamic Publications, 1975.

.—*Tafheemat* .Lahore: Islamic Publications, 2001.

.—*Tafhim Ahkam-ul-Quran* .Lahore: Islamic Research Academy, 2014.

.—*Tafhim-ul-Quran* .Lahore: Idara Tarjuman-ul-Quran, 1999.

McGrath, Kevin. "Ready for the Real World of Work." In *Punishment and Reform*, by Sadiq Khan, 71-78. London: Fabian Society, 2011.

McGuire, James. *What Works: Reducing Reoffending.* West Sussex: John Wiley & Sons, 1995.

Mckorkle, Richard R. Korn & Lloyd W. *Criminology and Penology.* New York: Holt, Rienhart & Winston, Inc, 1964.

Messerschmid, Piers Beirne & James. *Criminology.* New York: Harcourt brace college publishers, 1995.

Mill, John Stuart. *Speech in Favour of Capital Punishment.* Oxford: Oxford University Press, 1868.

Montage, Phillip. *Punishment as Societal defense.* Maryland: Rowman & Littlefield Publishers, Inc., 1995.

Moore, Michael S. *Placing Blame: A Theory of Criminal Law.* Oxford: Oxford University Press, 2010.

Muhammad Ali Al-Sabuni .*Al-mMawaris fi al-Shariah al-Islamia* .Cairo: Dar al-Hadith.

Muhammad Amin Al-Ihsan Al-Mujaddidi .*Al-Tarifat Al-Fiqhiyyah* .Beirut: Dar Al-Kutub Al-Ilmia.1986 ‹

Muhammad Bin Abdullah Bin Ibrahim Al-Tuwaijiri .*Mosoah al-Fiqh al-Islami* . .2009

Muhammad Bin Ahmad Al-Sarakhsi .*Al-Mabsoot* .Beirut: Dar al-Ma'arif.1993 ‹

Muhammad Bin Ahmad Bin Rushd Al-Hafeed .*Bidayat-ul-Mujtahid wa Niyahat-ul-Muqtasid* .Cairo: Dar Al-Hadith.2004 ‹

Muhammad Bin Hasan Al-Shibani .*Al-Asl* .Karachi: Idara tul-Quran Wal Uloom Al-Islamia.

Muhammad Bin Idrees Al-Shafi .'*Al-Um* .Beirut: Dar al_ma'rifah.1990 ‹

Muhammad Bin yousaf Al-Gharnati .*Al-Taj wa Al-Iklil li Mukhtasar Al-Khalil* . Beirut: Dar Al-Kutub Al-Ilmia.1994 ‹

Mulgrew, poisin. *Towards the development of International Penal System.* Cambridge: Cambridge University Press, 2013.

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs,* 1973: 217-43.

Mustafa Ahmad Al-Zarqa .*Al-Madkhal al-Fiqhi al-A'am* .Damascus: Dar Al-Qalam.2004 ‹

Muwafiq-d-Din Abdullah bin Ahmad bin Muhammad bin Qudamah .*Al-Kafi fi Fiqh Ahl al-Medinah* .Beirut: Dar Al-Kutub Al-Ilmia.1994 ‹

.—*Al-Mughni* .Cairo: Maktaba tul-Qahirah.1968 ‹

N. Singleton, H.Melzer and R. Gatward. *Psychiatric Morbidity among prisoners in England and Whales.* London: Office of National Statistics, 1998.

Nagin, Steven N. Durlauf & Daniel S. "Imprisonment & Crime: Can Both Be Reduced." *Crimonolgy & Public Policy*, 2011: 13-54.

Nathanson, Stephen. "Does it matter if the death penalty is arbitrarily administered?'." *Philosophy & Public Affairs*, 1985: 149-64.

Nations, United. *Capital Punishment.* New York: Department of Economic and Social Affairs , 1962.

Niyazi, Imran Ahsan. *General Principles Of Criminal Law.* Islamabad: Shariah Academy, 2007.

Norrie, Alan W. *Law, Ideology and Punishment.* Dordrecht: Kluwer Academic Publishers, 1991.

Nussbaum, Martha C. *Sex and Social Justice.* Oxford: Oxford University Press, 1999.

Packer, Herbert L. *The Limits of The Criminal Sanction* . Stanford: Stanford University Press, 1969.

Pannic, Davick. *Judicial review of Death Penalty.* London: Duckworth, 1982.

Pannick, David. *Judicial Review of the Death Penalty.* London: Duckworth, 1982.

Paternoster, Raymond. "How much do we really know about criminal deterrence." *Journal of criminal law & Criminology*, 2010: 765-824.

Paul H. Robinson. "Punishing Dangerousness; Cloaking Preventive Detention as Criminal Justice." *Harvard law Review*, 2001: 1429-1456.

Paul H. Robinson, Geoffrey P. Goodwin And Michael D. Reisig. "The Disutility of Injustice." *Newyork University Law Review*, 2010: 1940-2033.

Peters, Rodulf. *Crima and punishment in Islam.* Cambridge: Cambridge University Press, 2005.

Pettit, John Braithwait & Phillip. *Not just Desert.* Oxford: Clarendon Press, 1990.

Posner, Dan M. Kahan and Eric A. "Shaming White Collar Criminals; A proposal for reform of the Federal Sentencing Guidelines." *Journal of Law and Economics*, 1999: 365-91.

Qadhi Abu yusuf .*Kitab Al-Khiraj* .Cairo: Al-Matb'a Al-Salfia.

Qadri, Dr. Muhammad Tahir ul. *Islam and Criminality.* Lahore: Minhaj ul Quran Publications, 2005.

—. *Islamic Penal System and Philosophy.* Lahore: Minhaj ul Quran Publications, 2018.

Qaiser, Muhammad Waqas & Humdia. "A Comparative Analysis of Punishment awarded in Islamic legal system and western legal system ." *International Research Journal of Social Sciences*, 2014: 51-54.

Rawls, John. *A Theory of Justice.* Oxford: Oxford University Press, 1999.

Rawls, John. "Two Concepts of Rules." *The Philosophical Review*, 1955: 3-32.

Rehman, Dr Tanzeel ur .*Islami Qanoon-i-Irtidad* .Lahore: Anjuman Khuddam-ul-Quran, 2001.

rehman, Dr. Tanzil ur. *Islamic Criminal laws.* Islamabad: Printing corporation of Pakistan Press, 1990.

Reiman, Jeffrey H. "Justice Civilization and Death Penalty: Answering Van den Haag." *Philosophy & Public Affairs*, 1985: 115-48.

Roberts, Andrew Ashworth & Julian. "Sentencing: Theory, Principle and Practice." In *Oxford Handbook of Criminology*, by Rod Morgon and Robert Reiner Mike Maguire, 866-94. Oxford: Oxford University Press, 2012.

Robinson, Paul H. & John M. Darley. "The Role Of Deterrence In The Formulation Of Criminal Law Rules: At Its Worst When Doing Its Best." *Georgetown Law Journal*, 2003: 949-1002.

Robinson, Paul H. "Competing Conception of Modern Desert: Vengeful, Deontological and Empirical." *Cambridge Law review*, 2008: 145-75.

Rousseau, Jean Jacques. *The Social Contract.* London: Encyclopedia Britannica, Inc, 1952.

Ruddy, S. McMulland and D. *Adult Reconviction in Northern Ireland 2001 Research and statistical bulletin.* Belfast: Northern Ireland Office, 2005.

Seheb, John M. *Criminal law & Procedure.* London: Sweet and Maxwell, 2010.

Sellers, Ronald L. Akers & Christine S. *Criminological Theories.* Oxford: Oxford University press, 2009.

Shah Waliullah Al-Dihlawi .*Hujjatullah Al-Baligha* .Beirut: Dar al-Jabal.2005 ‹

Shahabuddin Al-Qarafi .*Al-Zakhira* .Beirut: Dar al-Gharb al-Islami.1994 ‹

Shahtar, Dr Noor Ahmad .*Tarikh Nifaz-i-Hudud* .Karachi: Fazli Sons, 1998.

Sham, Dr Shehzad Iqbal .*Pakistan mein Hudud Qawanin* .Islamabad: Shariah Academy.

Shamsuddin Muhammad bin Abu Bakr ibn Qayyim Al-Jawziyyah .*Al-Da' wa Al-Dawa* . Beirut: Dar Al-Kutub Al-Ilmia.1991 ‹

.—*Al-Turuq Al-Hukamia* .Beirut: Dar Al-Kutub Al-Ilmia.1991 ‹

.—*Zad ul Ma'ad* .Beirut: Dar Al-Kutub Al-Ilmia.1991 ‹

Shamsuddin Muhammad bin Abu-Bakr ibn Qayyim Al-Jawziyyah .*A'alam al-Mu'aqi'een* .Beirut: Dar Al-Kutub Al-Ilmia.1991 ‹

Shute, Stephen. "The Place of Public Opinion in Sentencing Law." *Criminal Law Review,* 1998: 465-77.

Siddique, Muhammad Mian .*Qisas-o-Diyat* .Islamabad: Islamic Research Institute, 1982.

Suhail, Abu Adnan .*Inkar-i-Rajam* .Lahore: Maktabah Qudusiah, 2005.

Tadros, Victor. *'Punishment and Duty', The ends of Harm, The moral foundations of criminal law.* Oxford: Oxford University Press, 2011.

Tahir Ibn A'ashur .*Maqasid Al-Shariah Al-Islamia* .Oman: Dar Al-Nafais.2001 ‹

Taqiuddin Ibn Taymiyyah .*Ahadees Al-Qisas* .Beirut: Al-Maktab Al-Islami ‹ .1998

.—*Al-Fatawa Al-Kubra* .Beirut: Dar Al-Kutub Al-Ilmia.1987 ‹

.—*Al-Hisbah fil Islam* .Beirut: Dar Al-Kutub Al-Ilmia.1995 ‹

.—*Al-Siyasah Al-Shariah* .Riyadh: Ministry of Religious Affairs, KSA.1999 ‹

Ten, C. L. *Crime, Guilt & Punishment.* Oxford : Oxford University Press, 1987.

Thanwi, Khalil Ahmad .*Islam or Hudud o Tazirat* .Lahore: Ashraf ul-Tahqiq, 1424.

Tonry, Micheal. *Why Punish? How Much?* New York: Oxford University Press, 2011.

UK, Ministry of Justice. *Costs per place and costs per prisoner.* Statistics, London: Ministry of Justice Press, 2019.

ullah, Dr. Anwar. *The Criminal law of Islam.* Islamabad: Shariah Academy, 2005.

Vermeule, Cass R. Suntein & Adrian. "Is Capital Punishment morally required?" *Stanford Law Review,* 2005: 1-48.

Walker, Nigel. *Punishment, Danger and Stigma.* Oxford: Basil Blackwell, 1980.

—. *Why Punish?* Oxford: Oxford University Press, 1991.

yousaf, Danish. *Law of Crime Under Islam.* New Delhi: Random Publications, 2012.

Zaibert, Leo. *Punishment and Retribution.* ALdershot: Ashgate, 2006.

Zedner, Lucia. *Criminal Justice.* Oxford: Oxford University Press, 2004.