THE PHILOSOPHY OF PUNISHMENT IN ISLAMIC *FIQH* (DOCTRINE)

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The principle of punishment is accepted in every society and is almost one of man's natural instincts. Punishment is a logical reaction against wrongdoing, though punishing a criminal is not an end in itself but a means to an end – that is, preventing a crime from taking place or, if it should take place, preventing it from happening again. However, a number of factors need to be taken into account before a penalty can be imposed. These factors are known as the purposes of the punishment.

Examining those purposes is not an "intellectual luxury" but a necessity of the utmost importance, because it is only possible to devise a viable penal policy in the light of the purpose the legislator seeks to achieve. If the purpose is clear, it becomes possible to identify the type of punishment, its degree of severity and the means of implementing it.

Throughout the whole of history punishment has

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never had one sole purpose but several. Modern criminological thinking is inclined to reject the idea of a single purpose and prefers to use it to work towards a number of different objectives including justice and deterrence – in the sense of deterring the individual offender as well as society as a whole. The first purpose is a strictly moral one, while the second is designed to produce a practical benefit. Each of these purposes is important and relevant to its respective field and it is the legislator's task to ensure that one does not predominate at the expense of the other. If there should be a conflict between them in some circumstances, the legislator should resolve it and – according to the modern criminological view – give preponderance to deterring the individual offender rather than society as a whole or the cause of justice. In the opinion of modern criminologists, deterring the individual offender should be given a higher priority than the cause of justice because it has a positive practical effect and produces a real benefit for the community, while justice – although important – is only of value from a moral point of view. As they see it, priority should be given to deterring the individual offender rather than to "general deterrence" because "individual deterrence" is a response to a crime that has already been committed by a criminal and is designed to prevent it from happening again, while "general deterrence" aims to make it improbable that such a crime will occur in the first place. If one compares the two, preventing the possibility of a repetition of a crime that has already been committed should be given preference over countering the danger of something possibly happening in the future.

For our part, we do not share this view. In our opinion, justice should take precedence if there is a clash, because accepting that there is a clash, then sacrificing the principle of justice means that what is not just has been given preference over what is just, and this is not an acceptable maxim for a legislator to follow.

If there is a conflict between various different purposes, then it has to be either apparent or real. If it is apparent, while at the same time the individual is deterred, then the cause of justice is being served and justice has been achieved. However, if the conflict is a real one and the individual is deterred at the expense of justice, then – whatever the justification – we

cannot give preponderance to what is unquestionably unjust over what is unquestionably just.

It is not true that giving top priority to justice over all other considerations will only serve the cause of morality while failing to protect society. This position is due to a misunderstanding of what precisely justice is. Justice is a practical concept with practical benefits, not just an ideal. Regardless of its function of reinforcing moral values, a just punishment properly implemented and administered will deter the population as a whole from committing crimes and prevent the criminal himself from reverting to criminality. "General deterrence" is achieved partly through the threat of a just punishment and partly by actually applying it to those who commit crimes, while a wrongdoer is deterred by the imposition and application of an appropriate punishment that will stop him as far as possible from reoffending. In seeking to achieve these two objectives, the legislator must never under any circumstances leave justice out of the equation. If he reckons that deterrence (whether general or specific) requires a penalty that is incompatible with justice because it would be excessive, he should respond to the demands of justice and either cancel the punishment or adjust it appropriately. Having done so, he should then look for other ways of achieving his objective.

A just punishment is based on two considerations – the seriousness of the crime and the circumstances of its perpetrator. The first of these is objective in that it is always the same, regardless of the person who commits it, and the penalty is designed to act as a general deterrent. The second consideration, which is subjective, varies from one offender to another and is aimed at deterring a specific offender. With sound penal policy the letter of the law should be sufficiently flexible to meet both objectives. This can be achieved if the legislator sets a punishment for every crime that is commensurate with its level of seriousness, while allowing the person imposing it a degree of flexibility that will enable him to strike a balance between the sentence and circumstances of the offender.

Since the Islamic Shariah's rulings are revealed by Allah or attributable to Him, there should never be any doubt about the purpose of punishment

for a crime. The purpose is first and foremost to ensure justice and, while this does not exclude other purposes as well, they are all secondary. Like other Divine and "positive" (i.e.man-made) legal systems, the Shariah of Islam aims to protect society and promote its happiness by guaranteeing its security, stability and progress, while safeguarding its members and their rights. In other words, its aim is to "repel the bad and attract the good". And as good and bad cannot always be disentangled from each other, bad needs to be repelled in order to achieve, or promote, good with sufficient pressure to achieve that objective, and the only instrument that can decide how much pressure should be applied is justice. Justice is one of the *maqasid* (objectives) that the Shariah's rulings are designed to achieve. Indeed, it should perhaps be regarded as the most important of all those *maqasid*, because the Shariah's provisions consist of commands and prohibitions with each command and each prohibition carrying its own reward or punishment, and justice cannot be seen in isolation from rewards and punishments. That is why the *fuqaha* (scholars of doctrine/ jurisprudence) always maintain that justice is the mainstay of the Shariah, just as belief in the One God is the mainstay of the Faith. A sense of justice is fundamental to human nature; if the body has senses, then so does the mind, and one of these (i.e. the mind's senses) is a sense of justice. So as Islam is the "Natural Religion", it is natural that its rulings should be in harmony with the concept of justice.

This is neither the time nor the place to make a detailed study of the provisions which confirm that the Shariah is designed to serve the cause of justice. However, we shall endeavour to show how the objective of justice plays a vital role in determining many of the Shariah's rulings.

Firstly, the principle of legitimacy

This principle is cited repeatedly in present-day constitutions. It is endorsed by the Shariah of Islam and is one of the basic rules stipulated by textual injunction, as in these verses from the Qur'an: "…nor would We visit with out wrath until We had sent a messenger (to give warning)" (*Al Isra'*, 15), and "Nor was thy Lord the one to destroy a population until He had sent to its Centre a messenger, rehearsing to them Our signs…

"(*Al Qasas,* 59). This principle is dictated by justice; all actions were originally permitted and no obligations were imposed before the Law appeared, so when justice determined that an action should be prohibited or obligatory, the party concerned had to be notified of the fact in advance. If punishment were sprung on him and imposed without warning, this would be unjust and alien to the practice of Allah the Most High. The Shariah requires notice to be given before inflicting punishment, thereby allowing wrongdoers no excuse for their misdeeds. Hence the Qur'an says: "Messengers who gave good news as well as warning, that mankind, after (the coming of) the messengers, should have no plea against Allah". (*Al Nisa',* 165), and "And if We had inflicted on them a penalty before this, they would have said: 'Our Lord! If only Thou hadst sent a messenger, we should certainly have followed the signs before we were humbled and put to shame'". (*Ta Ha,* 134). This means that if a person were to be held to account for something he had not previously been commanded to do, or not to do, justice would be overturned; indeed, it would be more appropriate to inflict the punishment upon the one who imposed it.

This rule has been applied strictly to a whole class of crimes – the *hudud* (limits of acceptable behaviour) and *qisas* (*lex talionis*) categories. They and their penalties have been clearly defined and it is not permissible to increase either the number of crimes covered by them or the punishments they entail.

It has been said that, as according to this rule there are no specific textual injunctions defining *ta'zir* offences (misdemeanours or offences outside the *hudud* and *qisas* categories) and their respective punishments, it is therefore up to the *wali al amr* (person vested with authority) to discipline "whom he pleases, how he pleases and for what he pleases". However, this view is not compatible with the principles and spirit of the Shariah.

It is agreed that offences should only be classed as being in the *ta'zir* category if they amount to misdemeanours or neglecting to perform a duty. And as commands and prohibitions are covered by textual injunction, nothing can be defined as a serious crime unless it is specified in a text, so the first half of this rule stands. However, with regard to the second half –

defining the punishment –"persons vested with authority" have not – in practice - given the relevant parties prior notice of the penalty for each *ta'zir* offence, even though the letter of the Shariah does not forbid them to do so or authorise them to impose a punishment without prior warning. Indeed, the spirit of the Shariah – as well as the letter – requires the penalty to be clearly stipulated, firstly because this is what justice demands so that everyone can know where he stands, and secondly, to ensure that the scales of justice do not become unbalanced if the "person vested in authority" is the sole and final judge in every individual case; such a situation would lead to the accused being subjected to inconsistent treatment, depending on where they happened to be and the whims and opinions of the respective "persons vested with authority" over them.

Hence we find that the first half of the above rule confirmed by the Shariah, while the second half – definition of punishment – would hold true only of certain categories of crimes. However, if it were applied to all offences, this would be compatible with the Shariah and more in keeping with the objectives of justice.

A secondary principle – the inadmissibility of retroactive legislation - has been derived from the principle of legitimacy and is also endorsed in the Islamic Shariah. It is based essentially on justice. Justice refuses to punish a person for something he has done or failed to do, unless an order or prohibition has already been issued prior to his doing or failing to do it. To punish a person despite this would be unjust in the extreme and this is confirmed by the texts. According to the Qur'an (*Surat al Nisa'*, 22): "And marry not women whom your fathers married, except what is past…" and (*Surat al Nisa'*, 23): "Prohibited to you (for marriage) are your mothers……and two sisters in wedlock, except for what is past…". This indicates that what had happened in the past was neither criminal nor punishable.

Secondly: Conditions of responsibility

Responsibility is a burden that not everyone is able to bear and it should be borne by those who are competent to do so. It is therefore not out of the question for a person to commit a criminal act and not be held responsible for it, since there need not always be an inseparable correlation between

perpetrating a crime and culpability for it. While justice demands that a criminal should be punished, it also demands that the criminal should be responsible for his actions. Therefore a person is not automatically culpable on the strength of having committed a crime; he must also be competent to take responsibility for it. The conditions of responsibility under positive law state that a person must be able to distinguish between right and wrong and exercise freedom of choice. This is also the case in the Islamic Shariah, which stipulates "reason" and freedom of choice as conditions of culpability. The criteria for determining "reason" are puberty and a sound mind, while the criteria for choice are free will and an ability to comply. Accordingly, a child below the age of puberty is not held responsible because his powers of reasoning are as yet unformed, while an insane person is not held responsible because he lacks the power of reason. The same principle applies to a person who commits a forbidden act because he is forced to do so for reasons beyond his control.

So the mere perpetration of an act is in itself insufficient grounds for punishment, since justice rejects the idea of punishing someone who lacked the power of reason or freedom of choice at the time he committed it.

A person may suffer from an ailment or defect that weakens his ability to understand or choose without depriving him of it completely. Some positive laws consider such a weakness a mitigating circumstance and grounds for a less severe punishment, while others ignore it and treat the perpetrator as a person of sound mind. Some *fuqaha* maintain that the Shariah only accepts the principle of mitigation for *ta'zir* offences, while in the case of *hudud* and *qisas* crimes no mitigation or alternative penalties can be considered.

The second part of this view is debatable. It is a commonly held position among the *fuqaha* that "*hudud* and *qisas* are pure punishments demanded for pure crime" – that is, that there should not be the slightest element of uncertainty about the crime and, in the event of any uncertainty whatsoever, the punishment should not apply. There can be no doubt that weak understanding and a weak will place the perpetrator in the "uncertain category" so that the conditions necessary for imposing the punishment are not fully fulfilled. For this reason, we are inclined towards the view that,

in the interests of justice, *hudud* and *qisas* will not apply in such circumstances.

Thirdly: Knowledge is a condition for culpability

Experts in positive law class knowledge in two categories - knowledge of the law and knowledge of objective reality. In the first case, it is assumed that everybody should know the law from the moment it is published in the official gazette, after which ignorance of it will be no excuse. This means that there is no difference between the status of *actual* knowledge of it and ignorance of it. However, knowledge of objective reality is not assumed and must be proved. Otherwise the penalty will not apply.

Shariah scholars also recognise that there are different categories of knowledge, which they classify as knowledge of the Shariah ruling and knowledge of the 'ain – i.e,. reality. The objective of justice is clear in the solutions they propose for cases where there is ignorance of the two and this highlights the difference between their position and the position of the positive law experts on some issues.

Shariah scholars maintain that knowledge of the relevant Shariah ruling is a condition of responsibility, because to demand compliance with a legal ruling from someone who is unaware of it is unacceptable and incompatible with Allah's justice. (The assumption here is that everybody has knowledge of the Shariah ruling unless there is evidence to the contrary, so the question revolves around the issue of proof). However, the ignorance that is taken into account in denying responsibility is ignorance solely of the Shariah ruling – that is, the command or prohibition; knowledge of the ruling and ignorance of the penalty does not confer exemption from punishment. There is no conflict between this and the objective of justice since - in the view of the *fuqaha* – the violator is aware of the prohibition and is expected to eschew the perpetration of forbidden acts; if he fails to do so, he is a wrongdoer and deserving of punishment. In other words, a knowledge of the type of punishment is irrelevant here, since all the violator is expected to know is that a certain act is forbidden. This is the reasoning behind the implementation of a *fiqh* (doctrine/ jurisprudence) rule which states that ignorance of the consequences will be of no avail to a person who knows something is prohibited.

So much for ignorance of the Shariah ruling. With regard to ignorance of the 'ain, the *fuqaha* agree that if the perpetrator is ignorant of a basic fact or condition for establishing prohibition status, he will not be liable for punishment. This is also a requirement of justice, because a person who commits a wrongful act in good faith is not in the same class as someone who commits it knowingly, even if the consequences in both cases are the same. In the second case the perpetrator is culpable, while in the first he is not, so they should not be treated as equals when it comes to punishment. It is on this basis that the *fuqaha* say: "If someone other than his wife is brought to him in a bridal procession and he is told 'This is your wife' and he copulates with her believing her to be his wife, he will not be liable for the *hudud* penalty. The same will apply if he calls his wife and another person comes to him instead and he believes her to be the one he called and he copulates with her…". The *fuqaha* also say: "If he drinks what he thinks is water or medicine, then it turns out to be an intoxicant, he will not be liable for the *hudud* penalty".

However, if ignorance of the 'ain saves a person from punishment for premeditated crimes – such as those in the *hudud* and *qisas* categories – because of an absence of criminal intent, it will not save him from a lesser penalty for a non-premeditated crime unless it is proven 1) that the perpetrator is not culpable due to ignorance, 2) that he has made every effort to establish the true circumstances and 3) that the average person would be likely to act in the same way if he found himself in a similar situation. However, if his ignorance is due to recklessness, carelessness or negligence, he will be liable for punishment, though justice would demand that the penalty should be lighter than it would have been if he knew exactly what he was doing – since there is a difference between knowledge and ignorance and they are not subject to the same rulings.

Fourthly: Personal accountability

To the modern way of thinking, the principle of personal accountability may be obvious and in no need of explanation or proof. However, this has not always been the case, even until quite recently. Some legal systems

found it acceptable to extend the punishment to include people other than the perpetrator. Sometimes they allowed members of his family to be punished as well and sometimes his entire clan, whether or not they were complicit in the crime or had knowledge of it, or had power or authority over him.

This is patently incompatible with justice, since justice refuses to penalise anyone but the perpetrator. This principle is enshrined in the Islamic Shariah, which only allows the offender to be punished. The Qur'an has several injunctions on the subject including: "That was a people that hath passed away. They shall reap the fruit of what they did. And ye of what ye do. Of their merits there is no question in your case". (*Al Baqarah,* 134 *and* 141), "Every soul draws the meed of its acts upon none but itself. No bearer of burdens can bear the burden of another". (*Al An'am,* 164) and "Each individual is in pledge for his deeds". (*Al Tur,* 21). And the Prophet (PBUH) said to Abu Rumtha when he saw him with his son: "He will not bring harm upon you and you will not bring harm upon him".

Some texts might appear to hint that it could sometimes be permissible to penalise a person for an offence that he has not committed and which has actually been committed by somebody else. However, closer consideration will show that this is not really the case and that the punishment was appropriate and not a result of someone else's actions. For example: "Curses were pronounced on those among the Children of Israel who rejected Faith, by the tongue of David and of Jesus, the son of Mary, because they disobeyed and persisted in excesses. Nor did they (usually) forbid one another the iniquities which they committed. Evil indeed were the deeds which they did". (*Al Ma'idah,* 78-79) and "And fear tumult and oppression, which affecteth not in particular (only) those of you who do wrong". (*Al Anfal,* 25).

There is no evidence in these verses to undermine the principle of the person who bears the responsibility being responsible, because the punishment concerned was either for committing the offence itself or for condoning and not resisting it, which is also an offence.

Fifthly: Equality

All the basic principles of legislation – whether in positive law or the Shariah – are "general" ones. That is to say, they apply to everybody who fulfils their conditions. The conditions laid down in the Islamic Shariah for the applicability of its rulings make no distinction between one person and another on the grounds of gender, origin, language, social status or even religion, but stipulate equal treatment for all.

The principle of equality is firmly rooted in the Shariah and its provisions. The reason for this is clearly stated in numerous texts, which reaffirm that mankind has a common origin; accordingly, since all people are created from a single father and mother, Allah's justice rejects discrimination between them on the basis of physical or other characteristics or the fact that they belong to a particular family or group which might entitle them to certain rights that are denied to others. In Allah's eyes, what distinguishes people from one another – whether in this world or the next - is their deeds. The countless Qur'anic texts which emphasis the principle of equality include: "O mankind! Revere your Guardian Lord, Who created you from a single person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women". (*Al Nisa'*, 1) and "O mankind! We created you from a single (pair) of a male and female, and made you into nations and tribes that ye may know each other, (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is the most righteous of you". (*Al Hujurat,* 13). And in the Farewell Sermon the Prophet (PBUH) said: "O mankind! Truly your Lord is One and your fathers are one, and all of you are from Adam and Adam is from earth. The most honoured of you in the sight of Allah is the most righteous of you. An Arab has no superiority over a non-Arab, nor has a non-Arab superiority over an Arab, nor red over white, nor white over red, except by piety and good action". The Prophet (PBUH) also described people as being "equal, like the teeth of a comb" and said: "Those before you perished because if a noble committed theft they let him be, and if a poor man committed theft they punished him severely. By Allah, if Fatimah the daughter of Muhammad were to steal, I would cut off her hand".

To the casual observer, some rulings might appear to the casual observer to discriminate in the way people are treated and violate the principle of equality. However, a closer examination will reveal that no group or class is given preference over any other group, nor is any human being preferred to any other human being. Rather, any difference in treatment is due to a violation of some of the conditions of the Shariah. However, the immutable principle of the Shariah of Islam is equal treatment whenever the "active elements" are the same. This rule puts justice at the pinnacle of the Shariah's *maqasid*, since the scales of justice would be defective if there were discrimination in favour of one person over another without a rational and convincing cause that the human mind could accept as justified.

It may happen that there are different penalties for the same offence, not because of bias towards the perpetrator – which is of course prohibited – but because commission of the offence is less excusable for some people than others. Thanks to the blessings Allah has bestowed upon them, certain of His servants are expected to comply even more rigorously than others with the commands and prohibitions of the Shariah. Justice therefore demands that they should be more severely punished than most, because they are more culpable than their fellow men.

The question of guilt should be considered not only in relation to the wickedness of the offence, but also the circumstances of the offender. This is the essence of justice – that the punishment should first be commensurate with the wickedness of the crime and then increased in proportion to the degree to which the perpetrator has abused his privileged position. This is supported by textual injunction such as the following verse from the Qur'an: "O Consorts of the Prophet, if any of you were guilty of evident unseemly conduct, the punishment would be doubled to her" (*Al Ahzab,* 30). This also applies to illicit sexual intercourse in the case of a married person, whose punishment is harsher in recognition of his abuse of his blessed marital status.

Some people may cast doubt on the claim that there is total equality under the Shariah, since it does not grant absolutely equal rights and duties to Muslims and non-Muslims. It is true that, if this allegation were

correct, it would reflect negatively upon the objective of justice. However, we do not accept it.

A Believer's Islam can only be complete if he believes in all Allah's previous messengers and the holy books that were revealed to them. Thus Islam's recognition of the previous religions means that it recognises the Oneness of the Faith, which in turn means that the Shariah of Islam cannot be accused of discrimination between people with regard to their rights and duties merely on the grounds of their religious affiliations. Hence the principle that non-Muslims enjoy what we enjoy and incur the same duties that we do. According to al Sarkhasi, in accepting the 'aqd al dhimmah (contractual agreement of protected status for non-Muslims), non-Muslims agree that their property and rights should be the same as those of Muslims. The fundamental principles of Islam do not therefore permit non-Muslims in an Islamic state to be humiliated and treated with contempt. While this accusation may be found in some books, they are the result of a wrong interpretation resulting from certain specific historical circumstances and are alien to the True Faith.

The *fuqaha* differ over the ruling on a Muslim killing a *dhimmi* (non-Muslim with protected status) and there are three views on this question. Some say a Believer may not be killed for killing an Unbeliever, while others – including Abu Hanifah, the Hanafis and Ibn Abu Laila - say he should be killed. Some scholars say he should not be killed unless he kills a *dhimmi* as an act of murder – that is, that he overpowers him and kills him – particularly for his money or property. According to Ibn Rushd, the Hanafis base their position on the Traditions, including a report attributed to 'Umar that the Messenger of Allah killed a man of the "people of the *qiblah* (the direction towards which Muslims turn when at Prayer)" because he killed a man of the "people of the *dhimmah*". The Hanafis also base their position on *qiyas* (analogy) and say there is consensus among Muslims that a Muslim's hand will be cut off if he steals the property of a *dhimmi*. Accordingly, they say, if his property is sacrosanct to the same degree as a Muslim's, his life must also be sacrosanct to the same degree.

In our view, if each of the different views is supported by the same level of evidence, the principle of equality must incline us towards the Hanafi

position. It is reported that when a funeral procession passed by the Messenger of Allah while he was sitting down, he stood up. When he was told it was a Jew's funeral, he said: "Is it not a soul?" This shows that all human souls are equal and that the sanctity of any soul is equal to that of any other.

The *fuqaha* differ over the amount of *diya* (blood money) to be paid for a non-Muslim. The Hanafis say that there should be no difference between the *diya* for a Muslim or an Unbeliever and the *fidya* (compensation) for a *dhimmi*, a *harbi* (person from a community at war with Islam) and a *musta'man* (person from a hostile country but entitled to Muslim protection) is the same as it is for a Muslim. It is reported that the Prophet (PBUH), Abu Bakr and 'Umar ruled that the *diya* for the People of the Book (Jews and Christians) should be the same as it was for Muslims; this is attributed to Ibn Mas'ud and sources regarded as reliable by the *fuqaha*. However, the Three Imams maintain that the *diya* for a *Kitabi* (one of the people of the Book) should be half as much as the *diya* for a Muslim. The Hanafis base their position on the verse from the Qur'an: "If he should belong to a people with whom ye have a treaty of mutual alliance, compensation should be paid to his family" (*Al Nisa'* 92), which means that Allah, Glory be to Him, the Most High, has ordained *diya* for all classes of killing without discrimination.

We have already pointed out that if there is a difference of opinion and a conflict of supporting evidence, preponderance should be given to the opinion that is most in tune with the *maqasid* of the Shariah. Since all souls are equal, then in our view the *diya* for a non-Muslim should be the same as the *diya* for a Muslim. This is also the position of numerous scholars. Sheikh Mahmud Shaltut states that the theory of everyone being entitled to the same amount of *diya* is based on the principle that the *diya* is strictly a payment for blood, and only blood, and that in the Shariah's view all people share the same attribute in this respect. Sheikh Mohammed Abduh is reported to have said that the liability incurred by killing a *dhimmi* is the same as it is for killing a Believer, while Sheikh Mohammed Abu Zahra supports the Hanafi position of all innocent blood being equal.

Doubts may also have arisen over the question of male and female equality, since it is established that there are differences between men and

women in some of the Shariah rulings such as witness testimony and inheritance. Numerous explanations have been given of the reasons behind these differences and we do not intend to go into them now. However, we should point out that – generally speaking – the fact that women differ from men with regard to some rulings does not mean that they are inferior to men in the eyes of the Shariah. Rather, the differences are due to certain objective considerations that are endorsed - indeed required – by justice. It makes no sense intellectually for the Islamic Shariah to "take sides" with men against women for no other reason that the fact that a man is male and a woman is female. If it were really the case that the Shariah supported men at the expense of women, it would be unjust and an infringement of their rights and humanity such as was the case during the Time of Ignorance. No-one who reads the Book of Allah could accept such an allegation, when the Book says: "If any do deeds of righteousness – be they male or female – and have faith, they will enter Heaven and not the least injustice will be done to them" (*Al Nisa'* 124) and "And their Lord hath accepted of them and answered them: 'Never will I suffer to be lost the work of any of you, whether male or female; ye are members, one of another'". (*Āl 'Imran,* 195).

We cannot see how a male can be superior to a female, when he is a part of her and from her. How can he be better than her when they each receive their reward from Allah for their deeds according to the same yardstick? This is why the vast majority of scholars (in fact, there is probably consensus on this point) agree that a male should be killed if he kills a female.

The *fuqaha* disagree over the *diya* payable for a women. The majority maintain that it should be half the *diya* for a man on the grounds that this was what 'Ali, 'Umar and Ibn Mas'ud ruled should be the case, and that a woman's inheritance and witness testimony should be half that of a man. Others say that a woman's *diya* should be the same as a man's on the basis of the Qur'anic verse which states: "...if one kills a Believer by mistake, (he should) free a believing slave and pay compensation to the deceased's family ..." (*Al Nisa'* 92), and that as there is consensus that this verse refers to men and women, the ruling should apply equally to both sexes. Sheikh Abu Zahra considered the two views and gave preponderance

to the second, which he justified on the grounds that most of the texts on which the former view is based are reports from a single source and, while it is possible to reconcile them with each other, it is not possible to give preference to one report over another. On the other hand, the Qur'anic verse gives a clear general ruling on the *diya* for an unintentional killing.

As the Four Imams agree that for *qisas* a woman's life is equal to a man's and that killing is the correct penalty in both cases, it seems inconsistent to claim that the *diya* for a woman should be half that for a man, since it is recognised that the *diya* is compensation for a life (Arabic *nafs*). Logically, then, all lives should be entitled to the same *diya*. To draw an analogy between a woman's *diya* and her witness testimony and inheritance is defective, since the two latter rulings have rational explanations which do not apply in the case of *diya*. If an analogy is really necessary, then it should be drawn between the *diya*, which is payment in compensation for a life, and *qisas*, which is the destruction of a life in compensation for a life. This would be more apt than an analogy with witness testimony and inheritance.

So if the conditions of the ruling apply equally to the two, then the ruling itself should also apply equally to the two. Thus the view most consistent with the "roots" of the Shariah is that the *diya* for a woman should be the same as the *diya* for a man.

Sixthly: Conditions of punishment

Most *fuqaha* maintain that the *wali al amr*'s authority to determine punishments is limited to penalties for *ta'zir* offences, while *hudud* and *qisas* penalties are laid down in the Shariah for specific crimes and the *wali al amr* has no powers to decide what they should be. This view is generally correct. If the conditions for *hudud* and *qisas* are fulfilled and there are no valid objections to them, the penalty the *wali al amr* must impose can not be the result of an independent decision on his part; he may not increase or reduce it, nor may he substitute an alternative penalty or pardon the offender, though if circumstances should arise in which the *hudud* and *qisas* punishments may not be applied, he may use his right to impose some kind of corrective punishment on him.

A *wali al amr* has the power to order specific punishments in the case of *ta'zir* offences. In such a situation his position will be similar to that of a positive law legislator. Generally speaking, he may decide on a lesser penalty or impose a punishment that befits the offence, or he may set maximum and minimum limits. He may sentence the offender to a single punishment for his crime or crimes or to a number of separate punishments. He may decide to impose harsher or more lenient sentences if there are mitigating or aggravating circumstances, or he may allow the judge the power to suspend a sentence or grant a pardon if he feels such courses of action would be appropriate under the circumstances. In certain situations the *wali al amr* may review the penalty he has imposed and either increase it, reduce it or substitute an alternative punishment. All these courses of action are consistent with the Shariah and his role as upholder of the public interest.

According to one view among modern *fiqh* scholars, the Islamic Shariah allows the judge to impose only limited penalties for a limited number of specific *ta'zir* offences. This view requires some investigation. If it is established through practical experience that certain types of disciplinary penalties are appropriate, then this in itself is sufficient evidence that they are legal from the point of view of the Shariah; however, it does not offer evidence that other penalties are illegal, so the punishments specified in texts or on the basis of consensus are not designed for a single particular instance but to serve a general purpose. Hence to assert that these penalties should have a restricted applicability is unjustified. Everyday life - and the public interest - requires that the *wali al amr* should be free to consider other punishments if he considers them to be more appropriate and more effective. A punishment, after all, is a means to an end and its essence is in the *maqasid*, not in the way it is carried out, if it is not specified in the Shariah, so every punishment that achieves its objective must be legally acceptable as long as it is not in conflict with any of the fundamental principles of the Shariah.

This means that a *wali al amr* does not enjoy absolute power. He is restricted partly by the Shariah's textual injunctions, partly by its general principles and partly by its two basic criteria – legality and appropriateness –

both of which determine the nature and severity of disciplinary punishment. Disciplinary action exists for a purpose – that is, to prevent the spread of immorality and corruption and reform the guilty – and it should always seek to serve that purpose.

a – Legality. One condition of legality is that the *wali al amr* should not introduce into law a penalty that is prohibited by the Shariah. With the exception of killing for a crime other than those specified in the *hudud* and *qisas* – and there are some differences of opinion about this – a punishment may not destroy life. In a case of capital punishment for something other than a *hudud* offence, the sentence must be carried out in a way that causes the minimum of suffering to the person upon whom it is inflicted. He may not be tortured or mutilated, because Islam forbids such practices and enjoins kindness and good deeds in everything - even killing, or slaughter in the case of an animal – so cutting off the nose, the ear, the tongue, the lips, the fingertips or other parts of the body is prohibited. If a case involving life or limb should cease to be subject to *qisas*, either as a result of a pardon or agreement to pay a *diya*, and the *wali al amr* decides that punitive action is still appropriate, he may not impose a penalty in the *qisas* category.

Moreover, a punishment may not be humiliating, even if the action that gave rise to it was dishonourable or humiliating, because the preservation of human dignity is one of the *maqasid* of the Shariah. Allah has bestowed dignity upon mankind, so it is not permissible for one of His creatures to debase that dignity, even in the case of a person who has debased the honour and dignity of others. Therefore it is forbidden to dishonour a person in retaliation for his having committed a crime of that nature. Nor is it permissible to shave off a person's moustache or beard or besmirch his face, because this would be an affront to his dignity. While this may occasionally have been the practice in earlier times, it is not acceptable from the point of view of the Shariah.

Also prohibited is punishment in the form of damage to property, such as destruction of houses, uprooting crops and cutting down trees, because this is tantamount to destroying the resources of the community as well as the wealth of the culprit and brings no benefit to anyone. What would be

beneficial would be to preserve those assets and make use of them – unless, that is, such a course of action would cause more harm to the community than the harm that would result from their destruction.

Another condition of legality is that a *wali al amr* may not impose the full *hudud* penalty for a wrongful action of the "*hudud* type". For example, it would not be permissible to cut off a person's hand or some of his fingertips if he is apprehended when about to commit theft or has stolen something with a value less than the amount determined by the Shariah. Not would it be acceptable to punish a married person by stoning if that person has been caught preparing to engage in illicit sexual intercourse. Nor would it be legal to impose capital punishment on someone who is about to commit murder. That is to say, there are conditions attached to amputation, stoning and execution, as *hudud* or *qisas* punishments, and it is forbidden to carry them out if any of those conditions are absent.

b – Appropriateness. A condition of appropriateness is that there should be compatibility between the penalty inflicted upon the perpetrator and the impact of the crime upon its victim and society. This – the principle that the original injury should be commensurate with the penalty - is one of the requirements of justice and is expressed in this verse from the Holy Qur'an: "The recompense for an injury is an injury equal thereto…." (*Al Shura,* 40). If the crime and punishment are mutually incompatible, the scales of justice will become unbalanced and the penalty will be either unacceptably harsh or excessively lenient. In neither case will the objective be achieved.

However, appropriateness – or compatibility – between "injury and injury" does not necessarily mean that the punishment has to be identical to the crime. Rather, the penalty should be determined with the aim of preventing the perpetrator from committing the offence again, purifying his soul from evil and deterring others from succumbing to temptation. This objective is achieved when the criminal loses some of his rights and tastes a sufficient amount of pain to restrain him and set him on the right path. If legality is the condition that determines which rights are affected by the penalty and which are not, appropriateness determines the type and severity of the punishment and the way in which it is implemented in order

to ensure that it achieves its objective without going too far one way or the other. The notion of appropriateness can be clearly seen in *qisas*, particularly *qisas* with respect to human life, in which the killer's life is taken in compensation for the life of the victim.

The *fuqaha* regard *qisas* as inflicting the same injury upon the perpetrator – not only with regard to the objective but also the way it is inflicted and the instrument used – provided that there is no Shariah objection to this. The idea of appropriateness also requires the killer's psychological state at the time of the killing to be taken into account – whether he intended to kill the victim or killed him unintentionally – because *qisas* in its precise sense demands equivalence not only with regard to the action but also with regard to the intention. If the perpetrator did not intend to kill the victim unjustly, neither the *wali al damm* (person entitled to compensation) nor the *wali al amr* is entitled to kill him unjustly as an act of *qisas*, since a disparity between intentions invalidates the *qisas*. That is why the Shariah stipulates *qisas* for intentional killing and *diya* for killing unintentionally. This is the essence of justice.

For those who accept it, there are questions over *qisas* in cases involving less than a life – with regard to both its legality and its conditions.

As far as legality is concerned, there is no clear text in the Qur'an or definitive Hadith in the Sunnah which sanctions *qisas* for injuries. Sheikh Mahmud Shaltut has examined the specific and general texts on this question and concludes that they do not categorically stipulate *qisas* in situations that do not involve the loss of a life. However, he says that there is another reliable source for this category of *qisas* – *ijma'*, or consensus.

As far as the conditions for ensuring its validity are concerned, it should be noted that all the *fuqaha* stress that the fundamental principles forbid this type of *qisas*, while exceptional circumstances render it permissible. For it to be valid they have laid down conditions that are in practice hard to satisfy. For example, the Hanafis stipulate that it is possible to fulfil the conditions provided that there is no injustice involved and provided that the limb selected for *qisas* is identical in every respect to the limb injured by the perpetrator; this must be true of its state of health,

whether it is complete or incomplete etc., to ensure that there is no attempt at equivalence between – for example - a sound limb and a damaged limb, a hand with all its fingers and a hand with fingers missing, a male limb and a female limb. They also state that *qisas* for injuries to the head and the face cannot comprise more than a single, clearly defined injury.

The *fuqaha* are agreed on the stipulation that *qisas* may only be implemented if its implementation does not entail any injustice. In practice, this is hard to achieve, which is why we have said that the fundamental principles almost forbid *qisas* for anything other than a life. However, when no *qisas* is exacted for something less than a life, payment of the *diya* is obligatory and, moreover, there should be nothing to prevent the *wali al amr* from imposing a corrective penalty, because in our view the *diya* is not a punishment but a form of compensation.

There are differences over the issue of *hudud* in this respect, including disagreements over the appropriate balance between the harm done and the penalty. Disputes between scholars focus on both the types of punishment and the Sharia rulings covering them. It is known and recognised that *hudud* punishments are enshrined in the Shariah and that they may not be applied in a "piecemeal" manner. They must either be imposed in full or – if they are not applicable – not at all. One thing to note is that *hudud* penalties vary in severity and leniency depending on the degree and type of damage resulting from the actions that gave rise to them, while the degree to which they are influenced by the perpetrator's state is limited. Since *hudud* penalties are specified by textual injunctions, they are in the "acts of worship" class and it would be true to say that they are not reason-based. It is true that they vary in severity according to the harm caused by the crimes for which they are imposed, but their type and degree cannot be analysed on a rational basis.

Shariah *fiqh* does not adopt a "hands-off" attitude towards harsh *hudud* punishments and the *fuqaha* have worked out a set of rules which seeks to establish a balance between the severity of the *hudud* provisions and the general principles of the Islamic Shariah. According to these rules, *hudud* are limited to the crimes covered by specific texts and *qiyas* has no role to play in them. The *fuqaha* apply the conditions governing *hudud*

injunctions with the utmost strictness, to the point that certain texts may not be accepted at face value. The same approach applies to establishing proof of guilt.

The principle of *shubha* ("dubiousness" or ambiguity) is one factor which makes the *fuqaha* extremely "economical" about imposing *hudud* – as well as *qisas* – upon a perpetrator. *Shubha* is a broad category that makes it possible to avoid exacting penalties – particularly penalties such as execution, stoning and amputation – in numerous circumstances, despite the fact that their conditions appear on the face of things to have been satisfied.