UNIVERSITY OF SOUTHAMPTON

THE VICTIM'S ROLE IN THE ISLAMIC JUSTICE PROCESS

A COMPARATIVE STUDY

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ABSTRACT

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A Comparative Study

by Hassan L. Al-Mohahannadi

This is a comparative study of the victim's role in the Islamic justice process compared with modern Western laws. The study analyses and evaluates the Islamic approach towards crime victims in terms of their roles and rights in the justice process. It covers the key stages of the criminal process such as the prosecution and sentencing process. It also investigates the Islamic attitude towards the victim's right to compensation either from the offender or from the State. The study attempts to explain the underlying philosophy of the extreme Islamic pro-victim approach in which crime victims are placed in an incomparable influential position that allows them to effectively guide the justice process. It stresses the link between such an approach and the Islamic law view on the civil-criminal dichotomy which plays a less significant role than in modern Western laws.

The study adopts a dual comparative methodology. On the one hand, it compares the Islamic approach with its modem Western counterparts trying to discover their common grounds and differing points in order to explore the ways in which they can benefit from each other. On the other hand, the study compares the attitude of modern Muslim states, particularly Egypt and the Sudan, with an attempt to measure their compliance with the principles of Islamic approaches or to evaluate the effectiveness of the alternative approach.

The dissertation is based essentially on library materials in both English and Arabic. It also depends on in-depth personal interviews held with Muslim scholars and senior Egyptian and Sudanese judges. The dissertation promises to be the first systematic study in English of the Islamic approach towards an important growing area in legal studies i.e. crime victims.

Contents

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Chapter (1) **Introduction**

1) Introduction

In Western legal systems, the development of the victim's position in criminal process has taken the shape of a complete circle. Through three stages the victim has experienced different treatments by criminal justice agencies. In the first stage, when private vengeance prevailed during medieval times and maybe earlier, crime victims are believed to have enjoyed their 'golden age' where they had been in a much better position as they were involved directly in the criminal process and compensated for any injury or loss caused by the crime.[1] At later stages, the victim's position entered a period of decline as he gradually lost a prestigious position in favour of the organised authorities. These authorities such as over-lords, kings and later the state, in representing the society as a whole, claimed to have been affected by the crime, and as such they competed with the real victims in the same space. The competition was not fair, and therefore, it ended with the victim being excluded from the process, and dealt with, at best as a witness. With the turn of this century, it was realised that crime victims should no longer be excluded from the criminal process, as their active presence is in the interest of justice as a whole. Ever since, this view has gained more support which has been translated into a series of legislation and an increasing number of supportive organisations, both at governmental and voluntarily levels spreading all over the Western world, particularly in north America, Europe and New Zealand.

The development of the victim's position in the Western legal systems has been the subject of considerable research; empirical, historical and analytical. The discussion, however, between the defenders and the opponents of the victim being reintroduced into the criminal process, has never stopped. Disagreement has spread even among the members of each side of the argument as they are motivated by different orientations.

Islamic law, on the other hand, as a different legal system, has its own approach to victim-related issues. Such an approach stems from a different philosophy, though it may at some points comes close to many ideas and trends which are presently being discussed among Western scholars. Islamic law represents a victim-oriented ideology in which the crime victim, or his family, enjoys an influential role in the criminal equation. In this respect, there are two essential principles which govern Islamic law policy toward crime victims; firstly, crime victims are recognised as parties to the criminal proceedings, and as such they have an essential role to play, and are entitled

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[1] See S. Schafer, "The Victim and Criminal." Random House. New York. (1968).

to some significant procedural rights just as any other parties. Secondly, crime victims are dealt with as the favoured party in the criminal process, and consequently, achieving their satisfaction should take priority even sometimes at the expense of, what are considered in Western legal thinking as, the offender's essential rights.

In this study, the criminal process is divided into several stages in order to show how crime victims are dealt with by Islamic law at each stage, and the extent to which his role is influential and powerful.

2) Civil-Criminal Dichotomy And The Victim's Role In The Islamic Criminal Process.

Although the distinction between crime and tort as separate legal fields is relatively a recent development and its theoretical basis has not yet been fully settled[1], it is considered one of the cornerstones of modern Western legal systems. Generally speaking, the classification of a certain misdeed as a crime denotes that it threatens a particular public interest and that gives rise to the community's right to respond, in order to protect its interest. Whereas categorizing a certain wrongdoing as a tort signifies that it only endangers an individual interest which does not provoke a public response since the individual has the right to defend his own interest in the way prescribed by the law. Consequently, modern Western laws have come to consider 'the State', as a representative and protector of the community's interest, as the victim of the crime. Therefore, while the conflict in tort is between individuals, the criminal conflict is deemed to be between the offender and the State. Thus, it is consistent with such an arrangement that the real or material victim of the crime be subordinated in favour of the State. Therefore, crime victims in western laws have no significant role to play in the criminal proceedings save as witnesses.

In Islamic law, things are viewed differently. Rights as a whole are divided into public rights or '*Huquq Allah*' and private rights or '*Huquq Al-ibad*'. Accordingly, when a misdeed endangers or harms a public right, it is considered as a crime and when it threatens the right of individuals, it is deemed as a tort. The sphere of public right in Islamic law, particularly in its early stages, is much more restricted than in modern Western laws. Thus, it will be demonstrated in this dissertation that apart from a few specific religious public misdeeds which can be deemed as crimes in the modern sense, there is no clear-cut distinction between what can be described as a crime or a tort. The strict civil-criminal dichotomy is largely de-emphasized in Islamic law. That is to say, despite the availability of some punitive remedies prescribed for certain wrongdoings such as violent offences, the

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[1] See for details in this subject and some suggested criteria to distinguish between the two systems. Hall, D. "Interrelations of Criminal Law and Torts." Columbia Law Review. vol. 43. (1943). pp, 753-966.

overall approach of Islamic law suggests that it places far less significance on the classification of the wrongdoing than on its outcome. Islamic law follows what can be called a 'problem resolve' approach which focuses on the consequences of the misdeed, particularly on the victim, rather than on its classification. Therefore, when a wrongdoing is committed, the top priority of Islamic law is to remove, as far as possible, its harmful effects on the victim. This is true even if the wrongdoer cannot be blamed for the committed illegal behaviour because of his incapacity or infancy. The process of removing the harmful effects of a misdeed may include the infliction of punitive sanctions but it is largely fulfilled through civil means.

The de-emphasis of the civil-criminal dichotomy in Islamic law affects its view on criminal conflicts so that it conceives it largely as a conflict between private individuals in which the State has a far less important role to play save as a regulator or administrator. This is true even if the proceedings lead to punitive remedies being inflicted on the wrongdoer. Therefore, it is consistent with such a view of the criminal conflict that Islamic law accords crime victims a 'party status' just as in civil litigation. This dissertation argues that it is largely due to the de-emphasis of the civil-criminal dichotomy that Islamic law has been able to provide an extreme pro-victim system that places crime victims in a full party status and equips them with a wide range of incomparable procedural rights that allows them to effectively guide or direct the proceedings. It will be made evident throughout this dissertation how such an approach helps Islamic law to provide its own pro-victim approach.

3) The Aims of the Study

The issue of crime victims has been a major concern of criminal policy all over the world, particularly in Europe and North America. The discussion over the proper position of the victim in the criminal justice process has never stopped. An enormous amount of research has been accomplished and still more is underway. Several conferences on victim-related issues are run every year. However, what is striking while reviewing such materials is that Islamic law and its approach towards victim-related issues is not mentioned. This is still true even in respect of some extensive comparative studies on victimology, such as the work of Schafer in which Islamic law was referred to once in a short sentence.[1] There are of course extensive works in English on Islam as a whole from different aspects undertaken by leading orientalists. The legal side of Islam has also received substantial attention as manifested in many studies by Muslims as well as non-Muslim scholars.[2] Islamic criminal

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1 See, Stephen Schafer, "Restitution to Victims of Crime." London (1960). p, 4. [hereinafter, Schafer, Restitution].

2 See for example, the works of Joseph Schacht, "The Origins of Mohamadan Jurisprudence." Oxford (1950). "An Introduction to Islamic Law." Clarendon Press. Oxford (1964). [Hereinafter, Schacht,

law, in particular, has also been the subject of several studies, either by non-Muslims or sometimes translated from Arabic sources.[1] Nevertheless, none of these studies makes a specific reference to the victim's position and role in Islamic criminal proceedings.

Such negligence or even ignorance of Islamic law in respect of its approach towards the crime victim may be ascribed to three factors: Firstly, an interest in victim issues is a relatively recent phenomenon even in Western legal systems. Secondly, even among Muslim scholars, the Islamic perspective of victims has not been properly explored. The third factor is the cultural and linguistic barriers that have made the exploration of Islamic law extremely difficult for non-Muslim and non-Arabic researchers. Even if researchers managed to overcome the cultural and linguistic obstacles, they would be faced with the difficulties which face contemporary Muslim scholars who are not accustomed to the medieval treatises which were written in a difficult language and different arrangement.[2]

In the light of the above considerations, this research is intended to be a modest attempt to build a bridge between Western and Islamic cultures, at least in the area of victimology. It is hoped that such an attempt will provide a starting point for further research. Accordingly, this research is aimed at addressing some important questions, such as, how Islamic law deals with crime victims? What are the main features of its approach? What are the role and the position of the victim in the criminal process? To what extent does the Islamic law approach, in this respect, differ or resemble those of modern legal systems? How is Islamic law approach applied by contemporary Muslim states?

Although the dissertation is confined to a single issue which is the victim's role in the criminal process, it will discuss the underlying philosophy of Islamic criminal law in general. In the process, it will be shown how different legal systems may differ in their approaches to such a single issue which is in effect an outcome of a whole philosophy. It represents the surface of an iceberg.

An Introduction]. And the works of Gibb, H. A. R. "Mohammadanism: A Historical Survey." Oxford University Press (1969). [Hereinafter, Gibb, Mohammadanism]. And the works of N. J. Coulson, "History of Islamic Law." Islamic Survey, No 2. Edinburgh: At The University Press (1964). [Hereinafter, Coulson, History of Islamic Law]. See also, Abdur Rahim, M. A. "Principles of Muhammadan Law." London(1911)[Hereinafter, Rahim, Islamic law]. Fyzee, Asaf A. A, "Outlines of Muhammadan Law." Oxford University Press. Oxford (1964). [Hereinafter, Fyzee, Muhammadan Law].

[1]See, for example, El-Awa. Mohammed Salim, "Punishment in Islamic Law, A comparative study." Indianapolis American Trust Publications (1993). 'Ali, Badr-Al-Din, "Islamic Law and Crime: The Case of Saudi Arabia. International Journal of Comparative and Applied Criminal Justice. (1985). 9. p, 45-57. Matthew Lippman, et al. "Islamic criminal law and procedure: an introduction." Chicago. University of Illinois Press(1988).

2 The difficulty of dealing with the medieval Islamic treatises has been pointed out by some leading Islamists such as 'Abdul-Qader 'Oda, "*Al-Islam Byn Jahl Abna`Yh Wa Ajz Aulama`yh*", or "Islam Between Its Followers' Ignorance And Its Jurists' Inactivity." *Al-Mukhtar Al-Islami*. Cairo(1994).

4) The Significance of the Study

The significance of this research lies in many aspects. On the one hand, the research has the quality of novelty in terms of subject matter. In dealing with the Islamic law perspective of the crime victims, this research should be considered the first of its kind, since, to the best of my knowledge, there is no previous single study in English dealing with such a subject. Thus, such research fills a gap in legal studies and, it is hoped, will enrich the on-going discussion over victim-related issues. Even in Arabic, the few available studies on the subject tend to be either restricted or over general.[1] They are at best a reproduction of the medieval treatises. However, their value at facilitating subsequent research should be acknowledged.

Another point regarding the significance of the research stems from the fact that Islamic law is not studied here as a historical system, but rather as a one of the major non-Western legal systems in the world today.[2] Muslims, at the best estimate, comprise one sixth of the world population, and although not all Muslims live under political systems in which Islamic law is recognised, it is at least considered theoretically that Islamic law should govern Muslims` lives and social conditions wherever they are. This may be true particularly for the Islamic law of personal status and family law. Therefore, Islamic law has been described by professor René David as one of the '*grandes systemes de droit contemporains*'[3], and rightly appears as a separate family in the classification of the world's legal systems.[4] This may account for the increasing interest of Western scholars in Islamic law which, although it started long time ago, appears to be constantly growing. As a sign of this growth, a recent bibliographical study shows that 1900 materials were written in English on Islamic law between 1980-1993.[5]

5) Resources and Research Methodology

This study is primarily based on library materials. Thus, its sources depend on books, articles, reports and all other similar materials in both Arabic and English. The research depends on both original medieval Arabic sources on Islamic law, and also recent sources in the field. In addition, English sources

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1 See for example, some selected papers of the third conference of the Egyptian Society Of Criminal Law On "The Right Of The Victim In The Criminal Process." Cairo(1989). Mahmude Mustafa, "*Huquq Al-Majni 'Aliyhu Fi Al-Qanun Al-Muqaren.*" or "Victim's Right In Comparative Laws." Cairo University Press. Cairo (1975). [Hereinafter, Mustafa].

2 Ian Edge, "Islamic Law and Legal Theory." Aldershot(1996). p, xv.

3 R. David, "Les Grands Systèmes De Droit Contemporains." 8th edition(1982). Review. Jaffret-Sp. Dalloz, Paris. Quoted in Edge, op. cit. p, xvi. See also, Zagday, "Modern Trends In Islamic Law In Near, Middle And Far East." Who said that Islamic law could be considered as legitimate third system of law which stood on the same footing as the Roman or Civil Law and the Anglo-Saxon or Common law. The Current Legal Problem, (1948). vol. 1. p, 206

4 Edge, op. cit. p, xvi.

5 Laila Al-Zwaini & Rudolph Peter, "Bibliography Of Islamic Law." Brill(1994).

on Islamic law by both Muslims and non-Muslims are also referred to, due to their valuable contents.

As to case law, which constitutes part of the research's sources, it should be noted that it has far less legal importance as a source of law in both Sudanese and Egyptian laws than in English law. In these two systems, great importance is attached to codes and the commentaries on them written by academic jurists. Therefore, the courts' decisions come far behind legislation, noting that Sudanese law, influenced by English law, pays more consideration to case law than Egyptian law.

Personal interviews also form part of the research sources. These interviews were held in-depth with eleven scholars in Islamic law as well as senior judges from both Egypt and the Sudan. Most interviews held in Qatar where the interviewees came to give lectures, to participate in conferences or to work.[1] It should be noted that interviews are hardly used in Arabic legal studies.

This research is intended to be a descriptive and analytical comparative study of the Islamic law approach to a specific issue of criminal policy, namely the crime victim. Thus, there will be three approaches in dealing with this subject, each of which has been employed to serve the aims of the research. The descriptive approach is a necessary tool to familiarise the readers with the theme of the research. Since it is written in English, presumably the bulk of research readers will be non-Muslim English speakers who have little, if any, knowledge of Islamic law as a whole and its components. So, for such readers an initial description is essential before any further steps are taken. On the other hand, Islamic law has been out of use for more than a century from almost all Muslim states, so even Muslim readers who are not specialists in the field, would find it difficult to read a study on Islamic law without an introductory descriptive account.

Having described the main features of Islamic law institutions under investigation, the subsequent step will be to subject these institutions to an analytical review. Appreciating the sensitivity of the research theme, the analysis will aim at exploring the underlying philosophy of each institution, discovering its advantages and disadvantages and subsequently examining and evaluating its validity to be applied at the present time. Another point which should be mentioned here is that, the theme of crime victims and their roles and rights, has never been subject to such an extensive and precise research, so it is not a matter of translation or rearrangement of what already exists, but rather an elaborate search of a wide variety of medieval and contemporary literature in order to understand and clearly analyse how crime victims are dealt with in Islamic law. Medieval treatises never viewing crime

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[1] For a list of the interviewees, see appendix (2).

victims as a separate theme, so no systematic work has been undertaken in this area.

After an institution has been described and analysed, the third stage will be the comparative approach. The comparison in this research will be at two levels; on the one hand, between Islamic law and modern Western legal systems, and on the other hand, between selected contemporary Islamic states. Regarding the first level, such a comparison should be cautiously conducted for two important reasons. Firstly, as mentioned earlier, Islamic law is fourteen centuries old; however, it has not been in force for more than a century. This period in particular has witnessed unprecedented consequential changes and developments in all life fields which have been reflected on legal thinking. Thus, Islamic law has missed the opportunity to share such valuable experiences which would have been a real test, especially with the process of judicial adjudication which helped modern legal systems to be more precise, relevant and intelligible. Secondly, unlike modern positive or secular legal systems, Islamic law has an attached religious character. Such a character has inevitably stamped its influence on the development of Islamic law which is particularly manifested in the irrationality and immutability elements of Islamic law. Therefore, it appears that direct comparison between Islamic law and modern Western legal systems may not be the right method since one cannot start from equal grounds. Alternatively, the comparison will be indirect, and will aim at exploring, generally speaking, how both systems can learn from each other rather than in terms of which is better.

The second level of comparison is between two selected contemporary states, namely the Sudan and Egypt. As Islamic states, the comparison is aimed at examining how these countries apply Islamic law in the area covered by the research, and what contribution, if any, they have made to the Islamic approach towards crime victims in order to bring it in harmony to the existing circumstances. If the Islamic approach was not adopted, the task then is to investigate the alternative solutions chosen instead of Islamic law. The significance of choosing Egypt and the Sudan lies in the fact that, although both have been influenced by their colonial experience, each one has chosen a different approach in terms of applying Islamic law. The Egyptian legal system, as will be described below, was the first of its Middle Eastern counterparts to depart from Islamic law. The process which started gradually in the first half of the last century and concluded with Egyptian law being substantially modelled after the French legal system with almost no influence of Islamic law, save the area of personal law. In contrast, Sudanese law, after more than half a century of applying an English-inspired legal system, turned, from the early 1980s, towards Islamic law, a trend which was confirmed by the codes of 1991 in both civil and criminal justice. This level of comparison will be conducted throughout the dissertation by devoting a separate section to it in each chapter.

6) Difficulties

Undertaking such research is in no way an easy task. In particular, there are three main difficulties posed a real challenge for me which were, the language, the sensitivity of the theme and references.

As the bulk of the research references are in Arabic, there is a great deal of translation from Arabic to English. Translation is at best a difficult task, especially from languages as different in grammar, syntax and cultural background as Arabic and English. The difficulties are even more obvious when the task is.related to sensitive areas, such as religious and legal terms, where every single word has its own individual meaning which seems impossible to be translated in a single word.[1] Such a mission requires the translator to posses a deep knowledge of both languages as well as a full understanding of the theme being translated. To overcome such difficulties, I have depended on the help of my supervisor through his comments on any unclear or misleading use of wordings. In addition, I have resorted to some authoritative translations of the Qur'an and Hadith, and also consulted some experts in the field where necessary. To facilitate the readers' task in understanding the dissertation, a glossary of Arabic and Islamic law terms has been added as an appendix.

The second difficulty is the sensitivity of the research theme itself. For Muslims, Islamic law is regarded as an integral part of Islam, and as such, it is part of every Muslim's belief and covered by the same character of holiness. Therefore, where the law commands, whether stated in the Qur'an or Hadith, are explicit and unambiguous, these should be taken for granted as the words of God. Muslims can and should articulate them in order to pave the way for their application, but avoid criticising them directly. Direct criticism of the sacred commands may open a Muslim's faith to question, and for narrow-minded persons it may even make one liable for the charge of apostasy. Luckily, the bulk of Islamic law, including criminal law, commands are stated in general or ambiguous expressions which makes it possible for successive Muslim generations to offer their own understanding according to their own circumstances. As a Muslim, I believe that the validity of Islamic law and its continuity is contingent on its ability to respond to the needs of the ever-changing society and keep pace with the development of society. Nevertheless, the essential features of Islamic law, as any legal system, should be observed. As will be shown, Islamic law over the centuries has revealed its dynamic quality which manifested itself in the diversity of opinions among Muslim jurists. This diversity led to the emergence of several schools of law

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1 For this particular reason almost all translators of the Qur'an and Hadith or the saying of the prophet insist on that they are translating not the exact words of the text but rather its meaning. See for example, "The Holy Qur'an: English Translation of the Meanings and Commentary." King Fahad Holy Qur'an Printing Complex. Riyadh (1985). Also, Ezzeddin Ibrahim & Denys Johnson-Davies, "An-Nawawi's Forty Hadith: Translation Of Their Meanings." Beirut(1967).

each of which has its own understanding of the sacred commands. Moreover, several institutions within the Islamic legal system have been created and others have been abolished in response to certain developments in a given period of time. On the other hand, the study of Islamic law by Muslim researchers may carry the risk of one-sidedness which is undoubtedly an unhealthy phenomenon in academic research. However, every effort has been made to make the dissertation as objective and critical as possible.

The third difficulty is research references. Being in Britain, and researching Islamic law obviously results in difficulty in obtaining relevant references. At the University of Southampton, in particular, where there is no department interested in Islamic study, the main library can offer little to solve such a problem. Therefore, to overcome such difficulty, I have resorted to several resources such as the inter-library loan service in the Hartley library. In addition, I have made a subscription to the library of School of Oriental and African Studies (SOAS) in which a wealth of Islamic and Arabic references are located. Furthermore, I have relied largely on Arabic libraries during my visits to both Qatar and Egypt.

In addition, interviews with some Muslim scholars and Egyptian and Sudanese legal parishioners constitute an important part of the research sources. The interviews have helped greatly to overcome the shortage of references particularly on the Sudanese law. The interviewees include some Islamic scholars and senior Egyptian and Sudanese judges. The use of interview has its own difficulties particularly in religious and legal studies as some of the interviewed scholars were reluctant and reserved whereas others refuse to be interviewed despite the fact that the subject of the dissertation is not so politically sensitive. Some interviewed judges have little to add to what has already stated in relevant written references.

Note on gender-neutral language.

It should be noticed that the gender-neutral language is not used in this dissertation. The use of gender specific language i.e. he and his, should be understood to apply to both females and males. The reason for following such a language is that gender-neutral language is a very western style which has not yet been followed in Arabic and Islamic writing. It, however, should not imply any suggestion of gender discrimination or disparity in Islamic law.

7) Outline of the Dissertation

The dissertation is divided into eight chapters.

Chapter (1): Introduction.

This chapter describes my reasons for undertaking this research problem. It also contains the aims and objectives of this study. In addition, it explains the methodology on which the research is carried out, and the main sources on which it depends.

Chapter (2): Islamic law: An Overview.

It is expected that most of the research readers will be non-Muslims and non-specialists in Islamic law, so this chapter serves as a broad introduction to Islamic law as a whole with the prime objectives of familiarising readers with the basic features of Islamic law. Furthermore, any move towards restoring Islamic law in Muslim states means the application of the Islamic approach towards crime victims. Thus, this chapter concentrates on clarifying the essential characters of Islamic law, such as its sources, nature and developments. It also shows to what extent human reasoning participates in interpreting the religious texts as main sources of Islamic law. In addition, it sheds some light on the degree of flexibility of Islamic law and its ability to develop and respond to the needs of ever-changing societies particularly in modern times. It also attempts to provide a historical analysis of the development of Islamic law; its decline and its resurgence with particular emphasis on the attitude of legal experts towards Islamic law and its restoration.

Chapter (3): The Victim's Role in the Islamic Prosecution System.

This chapter is devoted to illustrating the prosecution system of Islamic law. How can such a system be situated among the present prosecution systems such as the accusatorial or the inquisitorial procedure? How can a prosecution be inaugurated? What is the role of the victim in the prosecution process? What is the effect of the victim's involvement on the prosecution process? To what extent does such an involvement comply with or contradict the aims of criminal justice? To what extent are the existing Egyptian and Sudanese laws influenced by the Islamic law prosecution system?

Chapter (4): Restitution in Islamic Law.

Islamic law recognises a set of legal measures such as '*Diyya*' and '*Daman*' which are prescribed to ensure that crime victims are compensated by their offenders. This chapter focuses on these

institutions and others in order to analyse their nature, and their relevance to modern systems of restorative justice. What is the extent of *Diyya* and *Daman* in terms of crimes and victims? What is Islamic law's philosophy on restorative justice? How can such institutions be applied in modern Islamic states?

Chapter (5): The State Responsibility to Compensate Crime Victims.

The principle of the state's responsibility to compensate crime victims seems to be a recent development in Western legal systems. Given the history of fourteen centuries age, does Islamic law recognise such a principle? If, so, what are its theoretical justifications? How was it applied previously? What are the circumstances which give rise to the state being responsible in this respect? To what extent is such a responsibility recognised by the modern Islamic states?

Chapter(6): Reconciliation, Mediation And Forgiveness In Islamic Criminal Law.

Islamic law in its original form considers, with some exceptions, the conflict emerging from the crime as exclusively the business of the involved parties, namely, the crime victim and his offender. Consequently, it imposes no legal restriction on the victim's ability to transact, by himself or through a mediator, an informal deal with the perpetrator of the crime. The victim may offer his free forgiveness, the offender in turn can compensate his victim or it may suffice to just apologise.

This chapter examines the role of reconciliation, mediation and forgiveness in solving criminal conflicts in Islamic law away from formal justice. To what extent can crime victims participate in such methods and how effective such participation? How are such methods applied in Islamic law? To what extent are they considered by Islamic law as a supplement or an alternative to the official justice? How are such institutions dealt with in existing Islamic states?

Chapter (7): The Role of Crime Victims In The Sentencing Process.

Apart from their role or rather duty to testify as witnesses, crime victims, in almost all modern laws, have no role to play in the court proceedings particularly in the sentencing process, as it is considered a matter of public interest. On the contrary, Islamic law, not only allows

the crime victims to participate in the criminal trial, but also gives them the power to have a say in the sentencing decision. This chapter explores such a right, its extent and nature. Under which circumstances are crime victims allowed to use this power? What is the underlying philosophy of such a practice? Can the victims carry out the sentence themselves? How can such an involvement of the victims in the sentencing process be judged by modern legal standards? To what extent can the crime victims use such power under the Egyptian and the Sudanese laws?

Chapter (8): Conclusion.

In conclusion, an attempt is made to explain the main results of the dissertation and to suggest further research. As a comparative study, it is hoped that this research will provide policy makers in Islamic states with new thoughts and ideas as to the application of Islamic law especially in respect of the victim's role in criminal proceedings.

Chapter (2) Islamic Law: An Overview

1) Introduction

This chapter is intended to serve as a broad introduction to the subject of the present research, and to help understand the background of the issue of the victim's role in the Islamic criminal justice system. Hence, the purpose of this chapter is to briefly outline the main principles of Islamic law, its nature, sources and characteristics. It also aims at exploring the capability of Islamic law to respond to the needs of contemporary Muslim societies. On the other hand, the recent developments in Muslim states with regard to the restoration of Islamic law means that Islamic approach towards crime victims as a component of Islamic law may be brought to life again. Therefore, it is essential to explore the potential of such a possibility and the expected reaction towards it especially from legal experts. Thus, after a brief introduction, this chapter starts by explaining the major terms of Islamic law in an attempt to eliminate confusion and controversy over their exact significance. Then, attention is then paid to illustrate the environment in which Islamic law was born, i.e. a brief historical account of the pre-Islamic Arabian era. The next step is to examine the concept of law in Islam by exploring its sources and objectives and how the latter has been influenced by its religious origins. Furthermore, this chapter examines the legislative policy of Islamic law, and the degree of its flexibility to meet the needs of an ever-changing society. Finally, this chapter traces and analyses the historical development of Islamic law and the recent phenomenon of the decline and resurgence of Islamic law and the attitude of Muslim legal experts towards Islamic law.

Islamic law is a unique system inasmuch as it has distinguishing characteristics which make it quite different from its contemporary counterparts. It is a particularly instructive example of a sacred law where God is the only law-giver and His will is the only source of law for believers. A law which is fundamentally different from those existing particularly in the west. It represents the ideal of divine sovereignty, it is 'an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects: it comprises on an equal footing ordinances regarding worship and ritual, as well as political and legal rules.'[1]

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1 Schacht. "An Introduction to Islamic Law." op. cit. p, B.

The great difference between Islamic law and modern positive laws account for the misconception about the former especially by some Western scholars. Bernard Lewis highlighted such a misconception and pointed out that 'Muhammad is not the Muslim Christ, the Qur'an is not the Muslim Bible, the mosque is not the Muslim church, Friday is not the Muslim Sabbath, the *ulama* are not the Muslim clergy, and *sunnism* is not the Muslim orthodox'.[1]

The study of Islamic law has become increasingly important. Its significance stems from the fact that Islamic law was the dominant law in Islamic states for more than fourteen centuries, and it is still playing a leading role in modern Muslim countries. Although it was abolished in its most part from most Muslim states, it remains the basis for both family and personal laws in almost all Muslim countries. In addition, being closely attached to the religion of the majority of the population, Islamic law is considered as one of the influential factors in law making policies. It draws red lines or limits for the policy makers even in secular Muslim states. Finally, what has really increased the interest in Islamic law is the emergence of the recent phenomenon of the so-called Islamic resurgence or the movement which calls for the restoration of Islam and the application of Islamic law in Muslim states.

2) Terminologies And Their Significance In Islamic Law(Shari'a, Fiqh and Usul Al-Fiqh)

Terminology is undoubtedly important, and any field of study which lacks a determined meaning for its terms will inevitably result in confusion among its researchers. Within Islam, there are very closely related terms which cause confusion among the researchers of Islam, both Muslims and non-Muslims. This is particularly true in the field of Islamic law where the terms were changed and modified in the early stages as a result of the rapidly growing society, the mix of Muslims with non-Muslims in the conquered territories, and the growth of the education system. Hence, some principal closely-linked terms such as *Shari'a*, *Fiqh* and *usul al-Fiqh* can be confused and misused. Therefore, it seems essential to shed some light on their meaning, and to clarify the difference between them and the importance of such differences.

a) Shari'a

Shari'a is a term used to describe the sacred law of Islam.[2] It literally means the road to the watering place which was permanently used and

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1 Bernard Lewis, "Islam from the Prophet Mohammed to the capture of Constantinople." vol. 1. Oxford university press (1987).

2 Schacht, "An Introduction" op. cit, p, B.

consequently marked out to the eye and hence, it is the clear path to be followed by believers.[1]

In the very early stages of Islamic history, in the time of *Makka* or Mecca while the Prophet was primarily concerned with issues of belief, the word Shari'a denoted the essence of the Islamic creed, the method that God described for the believer to follow.[2] In this sense, the Qur'an states that "Then we put thee on the right way (Shari'a) of religion: so follow thou that way, and follow not the desire of who know not."[3] At a later stage the term was developed to indicate all God's commandments as revealed to the Prophet, including the Qur'an and the Sunna or the tradition of the Prophet. This was because the Prophet was the only one responsible for explaining God's commands to believers, in other words Shari'a at this stage corresponded to Islam as a whole.[4]

It was not before the death of the Prophet that the terminological meaning of Shari'a began to be realised. The companions recognised that the commands of God as revealed in the Qur'an and elaborated by the Prophet should be maintained in an independent status from their understanding. That is to say, after the death of the Prophet no one had exclusive authority to determine the exact meaning of any sacred command unless it was self-evident in the Qur'an or fully explained by the prophet in a way that was no longer controversial[5]. Otherwise, the companions' work was an attempt to discover the law or the will of God, and they may have succeeded and they may not have. Therefore, the declarations of their efforts are not characterised by absolute inventiveness. At most, they are statements of jurists' opinions, expressions of what jurists think to be the law of God. Consequently, Muslim jurisprudence insists very strongly that the result of interpretation or *ijtihad* must be classified as *zann*, or opinion, and that *zann* must be carefully distinguished from *ilm* or knowledge.[6] This awareness was

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1 "The Encyclopaedia of Islam." Prepared by a number of leading orintalists. Edited by; M. Th. Houtsma, A. J. Wendsinck, H. A. R. Gibb, W. Heffening And E. Levi-Provencal. vol. 2. S-Z. p, 320. [Hereinafter, The Encyclopaedia Of Islam]. Ahmad Hasan, "The Early Development Of Islamic Legislation." Islamic Research Institute. Islamabad (1962). p, 7. [Hereinafter, Hasan., Islamic Legislation]. Yousif Al-Qaradawy, "*Madkhal le-derasat al-sharie'a al-islamiya*" or "Introduction to Study Islamic Law." *Maktabat Wahbah*, Cairo (1990).

2 Mohammed, S. Al-Ashmawy, "*Usul Al-Shari'a.*" or "The Origins of Islamic Law." *Sinai Le-annasher*, Cairo (1992). p. 29. [Hereinafter, Al-Ashmawy, *Usul*].

3 The Qur'an, 45:18. This verse is the only one in which the word Shari'a is mentioned, whereas the derivation of the word is referred to three times, see the Qur'an: 42:13, 4:48, 12:21.

4 Omar .S. Al-Ashqar, "*Tariekh Al-Tashrie Al-Islami.*" or "History of Islamic law." *Maktabat Al-alfalah*. Kuwait (1991). p, 18 [Hereinafter, Al-Shqar, *Al-Tashrie*].

5 Mahmud Shlatute. "*Al-Islam Aqedah wa Shari'a.*" or "Islam: Creed and Law." *Dar Al-Shoruq*. Cairo. 15th edition(1988). p, 476. [Hereinafter, Shaltute]. 'Abdul-Halim Al-Gendi, "*Nahwa Taqnien Jadied Lelmu'amlat Wa Al-Aukubat*", or "Towards A Codification of Islamic Civil and criminal law." Journal of *Idart Qadaya Al-Hukomah* (State Litigation Department) July-September. Cairo (1973). p, 635. [Hereinafter, Al-Jendi, Taqnien].

6 Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad." The American Journal of Comparative Study. vol. 26. (1978). p, 201-203. [Hereinafter, Weiss]. An example of this realization

passed to the immediate next generations of scholars who were responsible for constructing the basic principles of Islamic jurisprudence and thereafter established the major schools of law or *madhab*. Their remarkable tolerance towards their opponents' opinion was a hallmark in classical Islamic jurisprudence.[1] Muslim scholars very often end their work with the phrase: "But God alone really knows."[2]

After the major schools of law were settled and prevailed all over the Islamic world, the later jurists of each schools tended to follow the opinions or the trends of their teachers rather than offering their own views. From there on the confusion between the two terms, *Fiqh* and Shari'a began to take place. The reasons behind this attitude of the late generation jurists were that they received Shari'a through the elaboration of previous scholars. That is to say, the work of the former generation became the vehicle by which Shari'a could be understood, and eventually there arose a trend that the doctrine must not be derived from the Qur'an and Sunna but it must be accepted as being taught by one of the recognised schools.[3] Taking into account their great respect and admiration for their teachers, some later generation scholars were not able to distinguish Shari'a as an independent body from their teachers' opinions.[4] From then on Islamic jurisprudence entered its deterioration era which is commonly called "*Usr Al-taqlied*," or imitation era, which lead eventually to the so-called closing of the gate of independent reasoning or *Ijtihad*, where its origins can be traced to the middle of the

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during the time of the companions is the report that the second *Caliph Omar Ibn Al-khatab* (d, 23 AH, 644 AD) was informed of a judgement passed by the fourth *Caliph 'Ali* bin *Abi-Talib* (40 AH, 661 AD). He said that if he had been the judge he would have ruled in a different way. He then was asked why he should not since he was the head of the believers, *Omar* said "I would do so if I was supported by the Qur'an or the Sunna, but it was only a matter of my own judgement which is not obligatory." See 'Abdul-Wahab Khallaf, "*Masader Al-Tashrie Al-Islami fima la nass fihi.*" or "Non-textual Sources of Islamic Law." Dar Al-Qlam, Kuwait. (1972). p, 12. [Hereinafter, Khallaf, Masader].

1 Ann E. Mayer, "Law and Religion in The Middle East." The American Journal of Comparative Law. vol. 35(1987). p, 154. [Hereinafter, Mayer, Law and Religion].

2 Justin Leites, "Modernist Jurisprudence as a Vehicle for Gender Role Reform in The Islamic World." Columbia Human Rights Law Review. vol. 22. (1991). p, 265. [Hereinafter, Lites, Modernist Jurisprudence]. Thus such a great scholar as *Abu-Haniefa* (d, 150 AH, 767 AD)"the founder of *Hanafi* school" is reported to have repeatedly declared that "what I am saying is just an opinion, and whoever comes up with better than this I would accept." Another example is that when *Abu-ja'far al-Mansure* a *Caliph* of *Abbasids* state (founded in 132 AH, 750 AD) offered *Malik* (d, 179 AH, 795 AD) "the founder of *Maliki* school of law" to copy his book "a*l-mewatta'* " in order to make it the binding law over the state, *malik* refused, saying "do not do so, and leave people with who they have chosen." See for more example Taha. J. Al-'Alwani, "*Adab Al-Ikhtelaf Fi Al-Islam*" or "The Civility of Disagreement in Islam." *Ketab Al-Umah*, Doha (1985). [Hereinafter, Al-'Alwani, *Adab*]. 'Abdul-Jalil Easa, "*Mala Yajuze Fih Al-Khilaf.*" or " What Is Beyond Disagreement Among Muslims." *Maktabat Al-Sha'ib*. Cairo, (1974). [Hereinafter, Easa].

3 'Abdul-Wahab Khallaf, "*Khulasat Al-Tashrie Al-Islami.*" or "Outline of the History of Islamic Law." *Dar Al-Qalam*. Kuwait(1996). p, 96. [Hereinafter, Khallaf, *Khulasat*].

4 They may give the teaching of the previous jurists priority over the Shari'a itself. For example, a noted *Hanafi* scholar *Abu Al-hassan Al-karkhy* (d, 340 AH. 944 AD) is reported to have said that "any Qur'anic verse or Prophetic Hadith which conflicts with what our jurists have declared is either misinterpreted or abrogated." See Easa, op. cit. p, 56.

third century (ninth century AD).[1] This trend has continued to affect scholarship to this date. This has provoked many scholars in different eras to call for reopening the gate of *ijtihad* and claim the right to exercise their independent reasoning, the same as the jurists of earlier generations by returning directly to the basic sources i.e. the Qur'an and the Sunna, without being restricted by the conclusions of equal men, namely the previous jurists.[2]

On the above considerations, Shari'a may rightly be defined as the comprehensive system of personal and public behaviour or the corpus of injunctions concerning belief as well as practical rules which should be implemented so that the message of Islam can be practised, or it is the constituent elements of Islam as they are explicitly established in the Qur'an or the Sunna.[3] Thus, Shari'a comprises three major parts:

(1) The tenet of Islam *"ilm al-kalam"* which consists of the rules related to the belief in God and His unity, His Messengers, His Holy Books, the day of judgement and other related issues.

(2) Ethics, *"ilm Al-akhlaq"* or the injunctions which define and encourage Islamic values which should prevail in Muslim society, like honesty, bravery, generosity, fidelity, co-operation, fraternity and also discourage bad deeds and attributes like dishonesty, selfishness.

(3) Practical rules *"Al-ahkam Al-amaliyah"*, or the rules which organise Muslim life which involve two kinds of rules: (A) The rule organising the relation between the Muslim and his God "*ibadat*", which include ritual duties like prayer and fasting and *Haj* or pilgrimage. (B) The second category are the rules organising the mundane matters of daily life i.e. the relations between Muslims with each other, with the state and with non-Muslims, which in fact covers almost all aspect of modern legal systems.[4]

In this latter sense, Shari'a is distinguished from what would later be termed as *Fiqh*. That is to say, Shari'a is claimed to provide clear principles in almost all aspects of human life. When such principles are clear and unambiguous they are called Shari'a and the work of Muslim scholars on them which either elaborates or supplements them is called

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1 Schacht, "An Introduction." op. cit. p, 69-75.

2 This trend has been led by many scholars in different eras, for example, Al-Ghazali (d, 505 AH, 1111 AD), Ibn Taymiyya (d, 728 AH, 1328 AD), Ibn Al-Qayyim, (d, 751 AH, 1350 AD), Mohammad Abdu (d, 1905 AD).

3 N. J Coulson. "Conflicts and Tension In Islamic Jurisprudence." Chicago: Chicago University Press, (1969). p, 3. [Hereinafter Coulson, Conflicts]. 'Abdul-Wahab Khallaf, "*Al-ssiyasa Ashar'iyah.*" or "Public Policy." *Dar Al-Ansar.* Cairo (1977). p, 7. [Hereinafter ,Khallaf, Al-ssiyasa].

4 For details see ,'Abdul-Karim Zedan, "*Al-Madkhal Lederast Al-Shari'a Al-Islamiyah*", or "Introduction To The Study of Shari'a." *Al-Maktba'ah Al-Arabiyah*, Baghdad (1964).p, 58.[Hereinafter ,Zedan]. 'Ali Hasab-Allah, "*Usul Al-tashrie Al-Islami*" or "The Basis of Islamic Legislation" *Dar Al-fikr Al-Arabi.* Cairo (1976). p, 89. [Hereinafter, Hassab Allah]. Fazlur-Rahman, "Islam." 2d Ed, Chicago, Chicago University Press, (1973). [Hereinafte ,Rahman, Islam].

Fiqh. The former are the commandments of Allah, and the latter is the work of human beings.[1]

b) Fiqh

The original meaning of the term *Fiqh* in Arabic tongue is understanding or intelligence[2], and from it the term *Faqih(*plu, *Fuqaha)* or jurist is extracted which means the one who possesses the ability to exercise his intelligence. In this meaning i.e., the general understanding, the word Fiqh was used by pre-Islamic Arabs[3] as well as in the Qur'an[4].

With the advent of Islam, the term Fiqh started to be specified and used exclusively to signify the knowledge of Islam as whole. At this stage the term Fiqh implied a wide range of subjects including theology, or (*ilm al-kalam*), and ethics as well as legal issues. Thus, besides purely intellectual understanding, the word Fiqh denoted the depth and intensity of faith, knowledge of the *Qur'an*, laws relating to rituals and the general injunctions of Islam.[5] Thus we find a great scholar like *Abu-Hanifah* defined *Fiqh* as "a soul's recognisance of its rights and obligations."[6]

Gradually as Islamic law was developed, its terminology was steadily modified in meaning. Thus, by the middle of the second century, when Islamic law seemed to have reached its peak and became mature enough to settle its own terminology, the scope of the term Fiqh, as well as all other related terms, became narrower. It eventually came to be applied to the legal problems or '*al-ahkam al-'amaliyah*'. Thus, the prominent jurist Al-Amdi defined *Fiqh* as "the knowledge of practical legal questions derived from its detailed sources."[7] Almost the same definition was adopted by Muslim scholars from the second century onward. Some jurists stressed the religious and moral features of Fiqh by defining it in terms of its basic constituents. For example, the modern jurist *Fyzee* defines *Fiqh* or the science of Islamic law as "the knowledge of one's rights and obligations derived from the Qur'an or the Sunna of the Prophet, or the consensus of opinion among the learned (*ijma*), or

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1 Al-Shqar, "*Al-Tashrie.*" op. cit. p, 18. Al-Ashmawy, "*Usul.*" op. cit p, 30. Jamal Al-Banna, "*Alhukm Be-Alqur'an.*" or "Ruling By Qur'an." *Dar Al-Fikr Al-Islami.* Cairo(1968). p, 123. [Hereinafter, Al-Banna, *Alhukm*]

2 Al-Ashqar, "*Al-Tashrie.*" op. cit. p, 9.

3 Subhi Muhamasani, "*Falsafat Al-Tashrie Fi Al-Islam.*" or "The Philosophy of Islamic law." *Dar Al-ilm Lel-malayen*, Beirut (1961), p, 21.[Hereinafter Muhamasani, *Falsafat*].

4 See for example the Qur'anic verses, 20:27-28, 11::91, 9:122, 4:78, 18:93.

5 Ahmad Hasan, "The Early Development of Islamic Jurisprudence." Islamic Research Institute, Islamabad (1962). p, 3. [Hereinafter, Hasan, Islamic Legislation].

6 Asaf. A. Fyzee, "Outline of Muhammadan Law." Oxford University Press. Oxford (1964). p, 17. [Hereinafter, Fyzee, Muhammadan Law]. Abu-Hanifa wrote a book called "*al-Fiqh al-akbar*", meaning the greater understanding devoted to discuss issues in *din* or religion such as the oneness of God or *Allah*, His attributes, the life hereafter and other related subjects. See, Hassan, "Islamic Legislation." op. cit. p, 3.

7 Al-Amidy, Sayf-Al-dien (d, 631 AH, 1234 AD). "*Al-ihkam fi usule Al-ahkam.*" 2 vols. *Dar Al-ma`arif.* Cairo (1914). p, 5.

analogical deduction (*qiyas*)."[1] Other modern attempts to define Fiqh seem to have stressed its legal characteristics, and in the meantime broaden its sources by leaving the door open for any potential acceptable source. The Ottoman *Mejlle*[2] for example, defined *Fiqh* as "the knowledge of practical legal questions."[3]

By stressing the word knowledge, the above definitions which attempt to define *Fiqh* seem to have captured the main feature of this term. In other words, Fiqh according to these definitions is merely the knowledge of Islamic law but not the law itself. Invoking the original meaning of the word, one should conclude that Fiqh reflects the jurists' understanding of Islamic law or it is only an opinion or "*opinio Prudentium.*"[4]

c) <u>The Significance of Distinguishing Shari'a from Fiqh</u>

The difference between Shari'a and Fiqh is of such paramount importance that a contemporary author, Ramadan, considered the confusion between the two terms to be one of the major impediments facing the contemporary Islamic world.[5] The effect of such a distinction can be illustrated in the following points:

Shari'a as defined earlier is the commandment of Allah, and therefore it is considered infallible. That is to say, Shari'a is always presumed correct and convenient since it is promulgated by Allah the prime law-giver to His subjects. Fiqh, on the other hand, is always considered fallible since it is by its nature a result of human effort.[6] The only exception to this assumption is when all scholars of a certain era agreed upon a certain point of Islamic legislation. Such a consensus, which called *ijma*, is considered infallible.[7] Its authority stems from many Prophetic Hadith or reports such as: "My followers *umah* would never agree on error."[8]

Shari'a, as the law of Allah is binding on all Muslims who must follow the sacred commandments in fulfilling their commitment to surrender to the will of God, whereas Fiqh has no obligatory force upon Muslims who

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1 Fyzee, "Muhammadan Law." op. cit. p, 17.

2 The *Mejelle* or "*Mejallat Al-Ahkam Al-Adliya*" was the official codification of Islamic civil law according to Hanafi school of law laid down in 1851 articles by a group of *Ulama* or scholars of the Ottoman Empire 1869-1876. See 'Ali Hader, "*Durar Al-Hukam Sharh Mejallat Al-Ahkam.*" or "Elucidation of the Mejelle." Translated into Arabic by Fahmy Al-husainy. *Dar Al-kutub Al-ilmiyah.* Beirut (1936).

3 Art. 1 of the Mejelle.

4 The Encyclopaedia of Islam, op. cit. p, 101.

5 Sa'id Ramadan, "Three Major Problems Confronting the World of Islam." Geneva. Islamic Centre (1961). p, 9-10.[Hereinafter, Ramadan, Major Problems].

6 Shaltute, op. cit. p, 476. Al-Shqar, "*Tashrie.*" op. cit. p, 19.

7 Al-Amidy, "*Al-ihkam fi usule Al-ahkam.*" op. cit. vol. 1. p, 256. Abu-Hamid Mohammad Al-Ghazali (d 505 AH, 1111 AD), "*Al-Mustasfa Min ilm Al-usule.*" Cairo (1907), reprinted by *Dar Ihya Al-turath Al-Arabi.* Beirut(n.d). vol. 1. p, 145-150. [Hereinafter, Al-Ghazali, *Al-Mustasfa*].

8 See for more detail on the concept of Ijma, Ahmad Hasan, "The Doctrine Of Ijma." Islamic Research Institute, Islamabad (1977). Schacht, Introduction. op. cit. p, 59-60

can follow the interpretation that they believe is the most sincere manifestation of the will of God. Thus, while the individual jurist might come to a definite conclusion regarding a point of law, that decision in itself is not meant to bind later jurists. It is not even binding on the same jurist who could at any stage change his own opinion.[1]

Shari'a, according to Islamic belief, is the eternal divine message to humankind and as such, its conjunctions are unchangeable or immutable.[2] Fiqh, on the contrary, is flexible and hence subject to be modified, reshaped or even altered as a whole according to the political, social, and economic circumstances of different time and place.[3]

Unlike Fiqh, Shari'a is considered to be part of Muslim belief. Therefore, the denial of all or some of its prescriptions may affect one's belief in a way that may make him liable to apostasy. The case is not the same with Fiqh which by no means is immune to criticism or can even be refuted all together.[4]

d) Usul al-Fiqh

Usul al-Fiqh literally means the roots of the principles of jurisprudence. It is also called *ilm al-usul*, or the science of the roots "sources."[5] It can be defined as the rules by which Islamic law can be derived from its acceptable sources or roots.[6] It is described as the theoretical basis of Islamic law[7] since it is concerned mostly with the essential methodological questions such as, What are the legitimate roots of Islamic law? What establishes the authenticity of the Qur'anic text and Hadith reports? What are the types and nature of rules contained therein in terms of generality and particularisation? What about their injunctions? How can they be interpreted? Are they all absolute or precise "*qa'ti*" or are they presumptive or probable "*zanni*"? What is the precise significance, in terms of social behaviour and conduct, of the norms which are contained therein? By what authority is that significance determined and expressed in the form of legal rules which a court of law must observe, and legal remedies provide.[8] The discussion within the

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1 Leites, Modernist Jurisprudence. op. cit. p, 265. Rahim, "Muhammadan Jurisprudence." op. cit. p, 54.

2 Al-Ashqar, "*Tashtrie*." op. cit. p, 20. Jamal Al-Banna, "*Al-Hukm Bel-Qur'an*." op. cit. p, 126.

3 'Awad Mohammad 'Awad, "*Drasat Fi Al-Fiqh Al-Jena'i Al-Islami*." or "Studies in the Islamic criminal thinking." Cairo (1979). p, 15. [Hereinafter, 'Awad, *Derasat*]. Kamal. A. Al-Juhari, "*Al-Qusure Al-Tashre'i*." International Academic Centre. Cairo(1994). p, 76.[Hereinafter, Juhari].

4 Abu-Hamid Mohammad Al-Ghazali, "*Fasl Al-Tafriqah Bayn Al-Islam Wa Al-Zandaqah*." Quoted in Easa, op. cit. p, 124. Banna, op. cit. p, 125-127. Ashmawy, op. cit. p, 30.

5 Muhamasani. op. cit. p, 19.

6 Mohammad Al-Khudari, "*Usul Al-Fiqh*." *Dar Al-hadith*. Cairo (1988). p 14. [Hereinafter, Khudari]

7 Schacht, "An Introduction." op. cit. p, 48.

8 Elsiddig, Abdel-Azim. M, "An Examination of the Problems of Islamisation of Law: Issues in Contemporary Islamic Legal Systems." Unpublished Ph.D. Temple University, (1993). p 81.

field of Usul al-Fiqh covers many subjects relating to the law-giver or (*hakim*), the law or (*hukm*) the objectives of law or (*mahkkum bihi*) i.e. acts, rights and obligations, and the subjects of law, or those to whom the law applies (*mahkkum 'alayhi*) i.e. persons or case.[1]

The importance of *Usul al-Fiqh* is derived from the fact that the death of the Prophet means the cessation of the revelation of the law and the absence of the person who has the absolute authority and ability to interpret the law of Islam. Therefore, it is only through 'Usul al-fiqh' that Islamic law can be both found, interpreted and extended. The importance of Usul al-fiqh is even more obvious in the present age as any attempt to apply, interpret and modernise Islamic law would not be possible without depending on the comprehension, development and adoption of Usul al-fiqh.[2]

The credit for inventing the science of *Usul al-Fiqh* is given to Shafi'i who laid down the basic definition and rules of this science[3] in his famous work "*Al-Resalh.*"[4] In fact, the work of Shafi'i was not an entire innovation since similar rules and principles had governed the deduction process in pre-Shafi'i era. Hence, he is not seen as having completely invented the rules of Usul, but rather, as having extracted and codified them[5]. Shafi'i's legal theory as embodied in his work had a principal objective which was to compromise between the Qur'anic text and human reason with a view to bring about complete uniformity in Islamic jurisprudence, and to prevent any further disagreement upon legal questions[6] with a tendency to favour the tradition i.e. the Qur'an and the Sunna which received a considerable amount of his attention.[7] To achieve this end Shafi'i strictly determined the basic roots from which Islamic law can legitimately be extracted and he then set up the methodology which should be followed.[8]

However, his work established the basic elements for *usul al-Fiqh,* the science which became the basis of Islamic law, and received great

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[Hereinafter, Azem]. 'Abdul-Wahab Khallaf, "*Usule Aal-Fiqh.*" *Dar Al-Qalam*, Kuwait (1978). p. 44. [Hereinafter Khallaf, Usul].

1 Muhamasani. op. cit., p, 20. Kudari, op. cit. p, 16.

2 Imran Ahsan Nyazee, "Theories of Islamic Law." Islamic Research Institute, Islamabad: Publication no. 97.(1996). p, 25. [Hereinafter, Nyazee].

3 Schacht, "An Introduction." op. cit. p, 48. Coulson, "History of Islamic Law." op. cit. p, 81.

4 See for English translation: Majid Khadduri, "Islamic Jurisprudence, Shafi'i Resala." Baltimore. John Hopkins Press.(1961). .

5 John Burton, "The Source of Islamic Law: Islamic Theory of Abrogation." Edinburgh University Press (1990). p 15. [Hereinafter , Burton, The Source].

6 Sayed H. Amin, "Islamic Law in the Temporary World." Roystcn Limited. London (1985). p. 6. [Hereinafter, Amin, Islamic Law].

7 Schacht, "An Introduction." op. cit. p, 47. Coulson, "History of Islamic Law." op. cit. p, 83.

8 Shafi'i however failed to achieve his main end in unifying Islamic jurisprudence since many law schools arose after his death such as *Hanbali* school, founded by Ahmad Ibn Hanbal (d, 241 AH, 855 AD), and *Daheri* School, founded by Dawud Ibn Khalaf (d, 270 AH. 884 AD). Ironically the Shafi'i's own teaching was adopted as a new school of law.

attention from Muslims jurists[1] who further developed its concept and perfected its conditions, to the extent it became an indispensable tool in the derivation process, and played a leading role in advancing Islamic law.

In later stages, however, the science of Usul Al-fiqh, according to some modernist jurists, became one of the obstacles contributing to the crisis of Islamic jurisprudence as it set strict boundaries which branded any attempt to ignore or overstep them as illegitimate. One of modernist jurists, Mr. Hassan Al-Torabi has strongly called for a reconstruction of the science of *Ilm Al-Usul* in order to bring it into more harmony with the present circumstances which are undoubtedly utterly different from those at the time of Al-Shaf'i.[2] Many other modernists shared a similar view to Mr. Al-Torabi.[3]

3) Pre-Islamic Arabic Customs

There is a need to consider pre-Islamic Arabic life and customs because such research helps us understand the circumstances in which Islamic law was born. The importance of such a consideration stems from the fact that Arabian custom has and still plays a significant role in many aspects of Islam as a whole including its approach towards crime victims. This is simply because Islam was revealed in Arabia, so it is natural that Arabs happened to be the first carrier of its message to the rest of the world and be the first teachers of its law. Such teaching must have been coloured by their social and cultural background. Moreover, Islam has never attempted to totally abolish pre-Islamic Arabic customs.[4] On the contrary, all Arabic customs are implicitly accepted or even sometimes adopted save those customs that have been expressly rejected.[5] In the field of law, there are certain legal institutions from ancient Arabic customs which have been incorporated into Islamic law particularly in criminal law. In the field of Victimology, many legal concepts which

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1 In addition to the aforementioned works of Abu-Hamid Al-Ghazali and Al-Amidy other examples of a noted work in Usul Al-fiqh are: Abu-Mohammad 'Ali Ibn Hazm (d, 456 AH. 1065 AD), "*Al-Ihkam Fi Usul Al-Ahkam.*" 8 Vols. Cairo (n.d). Mohammad Ibn 'Ali Al-Shawkani, "*Irshad Al-Fuhule Ila Ilm Al-Usul.*" *Al-Babi Al-Halabi*, Cairo (1937).

2 Mr. Hassan Al-Torabi, the speaker of the Sudanese Parliament, a personal interview, Doha, February 1991. Mr. Al-Torabi is widely considered as the spiritual leader of the current Sudanese Islamic regime.

3 Mohammad A'bid Al-Jabri, "*Al-dien Wa Al-Dawlah Wa Tatbieq Al-Shari'a.*" or "The Religion, the State and the Application of Islamic law." *Markaz Dirasat Al-Wihdah Al-Arabiyah*. Beirut (1996). p, 185. [Hereinafter, Al-Jabri, *Al-dien*]. See for more radical view 'Abdulla A. Ana'im, "Towards an Islamic Reformation: Responses and Reflections." In Tore Lindholm & Kari Vogt, "Islamic Law Reform and Human Rights: Challenges and Rejoinders." Proceedings of the Seminar on Human Rights and Modern Application of Islamic Law. Oslo 14-15 February 1992. Nordic Human Rights Publications, Oslo (1993). p, 97-117. Also His Article, "Civil Rights In Islamic Constitutional Tradition: Shared Ideals, Divergent Regimes." John Marshal Law Review (1992). vol. 25. p, 267.

4 Shaltute, op, cit. p, 495. Rahim, "Islamic Jurisprudence." op. cit. p, 3.

5 Rahim. "Islamic Jurisprudence." op. cit. p, 2. Zedan, op. cit. p, 34.

greatly determine the victim's role and rights in Islamic law were adopted from pre-Islamic Arabian customs such as the doctrine of "*Qisas*" or retribution, "*Qasama*" and the principle of *Diyya* or blood money.[1]

The influence of Arabic customs upon Islamic law is being stressed nowadays by some modern Muslim authors in order to pave the way for a fresh interpretation of Islamic law from a historical perspective. The bottom line of such a trend, as shall be shown later, is to reach a conclusion that the observance of pre-Islamic customs was a temporary measure aimed at reducing the rejection of Islam among Arabs. Consequently, since the original motive is no longer applicable, contemporary Islamic jurisprudence should have the authority to emancipate Islamic law from this influence.[2]

a) <u>The Social Structure</u>

Arabian society before Islam or "*Asr Aljahilyya*"[3] was, generally speaking, a nomadic one. Most of the population lived in the desert and hence were called the *Bedouin* or the sons of the desert since it left upon their character unmistakable marks.[4] The Bedouin had familiarised themselves with what a hard environment like the desert could offer them, which is essentially a combination of burning sun, hot sands, and an extreme lack of water. Such a hard life has made the *Bedouin* great migrants, as they have to rove about in search for a drop of water for both themselves and their animals. A fixed provincial society was unknown in Bedouin society, so it is rare that a Bedouin tribe has a permanent base. Temporary settlement is the rule and their home is where the water exists. To overcome the hardship of the desert the Bedouin have to show a great deal of hospitality, bravery and self-restraint which constitute the three Arabian virtues extolled universally by the ancient Arab poets[5]. The rest of the Arabian population called *Hadar*, or town-dwellers, who led more settled forms of life and performed more organised activities like trade in *Makka*[6], and agriculture in *Madina.*[7] Besides their common origins, *Bedouin* and *Hadar* were best noted for the quality of their poetry, fiction

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1 Ashmawy. op. cit. p, 71. Schacht. "An Introduction." op. cit. p, 8. Zedan. op. cit. p, 36.
2 The prominent of such trend is Mahmod M Taha, "The Second Message of Islam." Syracuse. Syracuse University Press (1987). See also Husain Ahmad Amin. "*Hawl Al-Da'wa Ila Tatbieq Al-Shari'a.*" or "About The Call For Implementing Islamic law." Cairo (1978). p, 185. [Hereinafter ,Husain, *Sahri'a*]. Ashmawy, op. cit. p, 70.
3 It is the Islamic term used to describe the pre-Islamic period. It literally means ignorance, however, in this regard its meaning is derived from *jahl* as contrary to *hilm* (kindness, consideration) and not to *ilm* (Knowledge). See Ahmad Amin, "*Fajr Al-Islam.*" or "The Dawn of Islam." *Maktabat Al-nahdah Al-Misriyah*. Cairo(1933). vol. 1. p, 3. .Fyzee, "Mohammadan law." op. cit. p,
4 For More Details See: H. R. B. Dickson. "The Arab Of The Desert." London, 1949.
5 Fyzee, op. cit. p, 6.
6 The place in which the Prophet Mohammed was born and started his Prophethood.
7 The place to which the Prophet migrated and built up the Islamic state.

and all arts related to the Arabic language. These were the brightest aspects of their lives. Poetry in particular was the medium in which their history was embodied, and therefore it is called "*Dewan Al-Arab*" or the book of Arab.[1]

b) Law and Custom

It is remarkable that despite the fact that the Arabian peninsula was surrounded by two of the former greatest civilisations, namely the Ester Roman Empire or Byzantine and the Persian or the Susanna Empire, they had no significant effect on the Pre-Islamic Arabian legal system, probably because of continuous warfare between the two empires.[2] However, despite the absence of any legislative authority, the legal institutions of Arabia of the time of the Prophet were not altogether elementary.[3] There were some forms of customary law with varying degrees of advancement from one area of law to another. Thus, in the area of constitutional law, pre-Islamic Arabic society was chiefly a tribal one, consisting of tribes, each of which was composed of blood-relatives. The notion of the state or even any settled form of government was unknown. Instead, each tribe had its own self-governing political community led by its chief, who exercised great political and social powers, and who had an influence upon all the members of the tribe. He was elected largely because of the nobility of the birth, age, or reputation for wisdom or courage and his post was most likely to be inherited by his oldest son.[4] The absence of an organised government led as corollary to the absence of an organised judicial system or police force. Consequently, enforcement of the law was the general responsibility of private individuals who had suffered injury, with the assistance of his tribe.[5] However, some form of limited customary arbitration was found and fairly respected.[6]

Due to the lack of resources, the inter-tribal relations were marked by conflicts and long lasting wars, mostly upon grasslands or as a result of individual fighting. Although mediation was resorted to in some cases, it was based on consistent rules of procedures. Whereas in Mecca and

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1 Ibn-Khaldun 'Abdul-Rahman Abu-Zayd Ibn Mohammad. (d, 808 AH, 1467 AD), "*Al-Muqaddima.*" *Dar Al-Qalm*, Beirut (1984). p, 125. [Hereinafter, Ibn-Khaldun].

2 It is later that an allegation has been made that Islamic law had been influenced by Roman Law. See, S. V. Fitzgerald, "The Alleged Debt of Islamic Law to Roman Law." The Law Quarterly Review. vol. 67. (1951). p, 81-102.

3 Schacht, "An Introduction." op. cit. p, 6. Mahmud Shukri Al-Alosi, "*Blogh Al-Irab Fi Ma'refat Ahwal Al-Arab.*" 2d edition. Cairo,(1924). vol. 1. p, 15. [Hereinafter, Al-Alosi].

4 Fyzee, "Muhammadan Law." op. cit. p.7.

5 Schacht, An Introduction, op. cit, p, 7. Al-Alosi. op. cit. vol. i. p, 308.

6 Some of the noted judges were, Aktham Ibn Sayfi, Qas Ibn Sa'idah, 'Abdul-Mu'talib Ibn Hashim, Al-Alosi, op. cit. vol. 1. p, 344. Recourse sometimes made to soothsayers. Zedan, op. cit. p, 25.

other settled communities, conflicts were less frequent and mediation was more organised.[1]

In the field of personal law, the status of women compared to men was very low, mostly for economic reasons.[2] Marriage and divorce were male decisions in which women were hardly consulted.[3] Among the prevalent forms of marriage, one in particular was recognised by Islam with some modification, by which a woman became a party to the marriage contract rather than an object. Subsequently the dower, as a necessary condition in marriage, became the bride's gifts, not a price payable to her guardian. Termination of marriage was the unrestricted right of the husband. In all events, the husband had the absolute right not only to dissolve the marriage at any time at his discretion, but also to revoke the divorce and resume marital connection. In the model adopted and modified by Islamic law, although the right of divorce remained mainly in the hands of the husband, it was restricted and conditioned. Above all, the wife was given the right to divorce either by having this right initially "*ismah*" or to get divorced thorough the court by "*tatlieq*" or "*khul'*".[4] Polygamy was prevalent in pre-Islamic society. In addition to their slave-girls, men were allowed to have as many wives as they could afford without any restriction.[5] Islamic law did not completely abolish polygamy, but rather it restricted it to four wives and conditioned it in a way that many modern Muslims jurists believe that monogamy is the rule and polygamy is the exception.[6] Inheritance was another field in which men asserted themselves as the dominant gender. When a person died, his estate would be distributed among his male heirs who were qualified as fighters. All females and minors were excluded, they were even considered as part of the deceased estate. Therefore, it was a revolutionary step when the latter classes were vested with the right of inheritance later on by Islamic law. Even though their share was inferior compared with men since the principle of agnation or (*ta'sib)* still plays a leading role in the Islamic law of inheritance.[7]

In the field of criminal law, as one can imagine, in *Bedouin* society where there were such few belongings, and with the absence of an organised political system, there were few crimes which could be committed. Most of these crimes were against persons or their properties.

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1 Coulson, "History of Islamic Law." op. cit. p, 9-10. Kara, M 'Abdulmajid, "The Philosophy of Punishment in Islamic Law." Unpublished PhD. Clarmont(1977). p, 27. [Hereinafter, Kara].
2 Zedan. op. cit. p, 18.
3 Fyzee, "Muhammadan Law." op. cit. p, 8
4 Coulson, " History of Islamic Law." op. cit. p, 33. Zedan, op. cit. p, 26.
5 Rahim, "Muhammadin Jurisprudence." op. cit. p, 7.
6 Yosef Qasim, "*Hukoke Al-Usrah."* or "Family Rights." *Maktbat Jami'at Al-Qahirah*. Cairo 1987. p 234. [Hereinafter, Qasim].
7 Qasim. op. cit. p, 235. Fyzee, "Muhammadan Law." op. cit. p, 7.

Therefore, there was no need for a comprehensive criminal code. Instead, a simple customary law was responsible for defining the crime and setting its punishment. In fact, there was no such clear distinction between criminal and civil law. The most serious crimes or rather wrongdoings were murder and theft which could be settled through restorative means such as compensation or by severing punishments depending on the circumstances and the attitude and the social rank of the victim and the criminal and their families.[1] Thus, retaliation, restitution based on compensation and blood-money were the general principles of punishment for all crime against persons.[2] The cutting off thieves' hands was recognised in some communities, and stoning to death was meted out to adulterous among the Jewish community in *Madina.*[3] Due to the lack of an organised law enforcement agencies, the performance of the punishment was of private responsibility, which often led to a series of vendetta.[4]

Most of aforementioned forms of punishments continued to constitute a major part of the Islamic criminal system. The main modification made by Islamic law was the principle of personality of punishment and the adding of the religious character which manifested itself in concepts like *Kaffara* expiation and *Tawba* or repentance.[5] More importantly, the individuality of criminal law and the de-emphasis of civil-criminal dichotomy of the pre-Islamic Arabian customary law continued to prevail in Islamic law and, as will be demonstrate later on, to strongly affect its approach towards crime victims and their roles in the judicial proceedings.

The criminal procedures were both few and simple, and mainly concerned with proof rules. The burden of proof was, in general, upon the victim or plaintiff who had to substantiate his claim. Investigation procedures depended largely on men's intelligence and was based mostly on oral and presumptive evidence which was obtained through either witness's testimony on oath, or the criminal's confession which may have been obtained voluntarily or sometimes through coercive means.[6] Such simplicity and the individualist of the criminal proceedings continued in Islamic law in which individual litigants play significant roles in the criminal process.

In the area of private law ownership was, in general, recognised for all people. Even women enjoyed, to some extent, the right to own, buy and

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1 Rahim, "Muhammadan Jurisprudence." op. cit. p15
2 Zedan. op. cit. p, 36. Schacht. "An Introduction." op. cit. p, 6.
3 Ashmawy. "Usul." op. cit. p, 70.
4 Rahim, op. cit. p, 6.
5 See the Qur'an . 17:32, 2:178-179, 5:45, 16:126.
6 Fyzee, "Muhammadan Law." op. cit. p 8. Zedan. op. cit. p, 37.

sell. The only exception was slaves as they themselves were part of their masters' property. In the Bedouin society, there were very few commercial transactions and these were mainly in the form of exchanging goods for goods. In cities, notably *Makka* as a trade centre, many sorts of commercial activities and financial transactions were recognised. These included partnership or "*sharikah*", speculation "*mudaraba*", loans or "*qard*", and also several types of sale like, sale of goods for goods or "*muqa'yda*", sale of goods for money "*bai'*", sale in which the price was paid in advance, the article being delivered on a future date "*salam*". Many of these transactions were adopted by Islamic law and some were prohibited, especially those which contained the use of interest or usury "*riba*," or excessive risk "*gharar.*"[1]

This was, in brief, the social and legal environment in which Islamic law was born and which left its inevitable stamp upon the general character of Islamic law. Therefore, the pre-Islamic Arabian influence has been and still constitutes an area of study which deserves more investigation in order to provide a better understanding of Islamic law and to answer many important questions regarding the nature and development of Islamic law. Some of the consequential questions in this connection are: would Islamic law be the same if it had been revealed in a different global region with different customs and social life? How does the Arabic influence affect the declared universality of Islam?

4) Sources and Nature of Islamic Law

The nature of Islamic law can be determined from its sources, content, objectives and its history. Exploring these dimensions may reveal clearly the differences between Islamic law and other 'man-made' modern legal systems.

a) The Sources of Islamic Law

It is often said that Islamic law has several sources, some of which are agreed upon and others are controversial. The first category consists of the following four sources:

- The *Qur'an*, or the holy book of Islam
- The *Sunna*, or the authentic tradition of the Prophet of Islam
- *Ijma,* or the consensus of the jurists upon particular issues.
- *Qiyas*, or a judgement upon juristic analogy.

In addition, there are several other controversial sources such as:

- *Al-Urf*, or the custom and usage.

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1 For more details see Zedan. op. cit. p, 34.

- *Al-istihsan*, or the deviation from certain rules based on precedents derived from other rules based on relevant legal reasoning.
- *Al-istislah*, or the *Al masalih*, or public interests.
- *Sadd al-dhara'i'*, or blocking of the way to actions which may lead to transgression even though those acts are, under certain circumstances, lawful.
- *Shar`u man qablana*, or pre-Islamic revelations.

The above list appears in almost all Islamic law treatises[1]. However, a closer consideration will reveal that such a list of sources is rather misleading, or at least not accurate. The fact of the matter is that the only source of Islamic law is the *Will of God*. God or *Allah* according to Muslim belief is the only legislator, the prime lawgiver. It is God and not man whose Will is the source of law in Muslim society.[2] Thus, *Al-amdi* said "no ruler save Allah, and no rules except what he commands."[3] Similarly, *Al-Ghazali* said "no sovereignty or rule except for Allah."[4] Humankind, however, as the God's trustee or vicegerent on the earth, may be qualified as a lawmaker.[5] Thus most of what has been listed above as sources are not in fact the sources of Islamic law, rather they are either material sources, like the Qur'an and the Sunna, in which the will of God can be found, or procedural devices by which God's will can be determined.

This concept of law and its sources in Islam stems from the notion of life as viewed by Islam. This notion of life is based on the belief that every movement and inactivity in the universe is governed by its creator, namely God or Allah. It follows a set course of law and functions according to an intelligent and well-laid-out plan. The Earth on which we live is just a small part of the universe and, like all other parts therefore, it also functions completely under the control of God.[6] As the creator, Allah knows what is best for His subjects who should submit to His will if they seek happiness in this life and the hereafter. Thus, Islamic law as a whole is, in the word of Schacht, "the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."[7] The Qur'anic verses consistently assert this concept by stating that God has absolute power over everything "*Knowest thou not*

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1 See Al-khudari, "*Usul al-fiqh*." op. cit. 239-410. Khallaf, "*Usul al-fiqh*." op. cit. p, 20-94. M. Cherif, Bassiouni, "The Islamic Criminal Justice System." Ocean Publications, INC. New York (1982). p. 9. [Hereinafter, Bassiouni].
2 Abul A'la Maududi, "The Islamic law and Institutions." Islamic Publication Limited. Lahore. 7th edition(1977). p, 46. [Hereinafter, Maududi, Islamic Law]. Gibb, "Mohammadanism." op. cit. p. 67.
3 Al-Amidy, "*Al-Ihkam*." op. cit. p, 41.
4 Al-Ghazali, "*Al-Mustasfa*." op. cit. vol. 1. p, 6.
5 Bassiouni, "Islamic Criminal Justice System." op. cit. p, 10.
6 Maududi, "Islamic law." op. cit. p, 44.
7 Schacht, "An Introduction." op. cit. p, 1..

that to Allah belongeth the domain of the heavens and the earth? And besides Him ye have neither patron nor helper."[1] He knows everything, "*With Him are the secrets of the heavens and the earth: how clearly He sees, how finely He hears, every thing!.*"[2] He regulates everything, "*Say, 'Mohammad to the people' who is that sustains you, in life, from the sky and from the earth? Or who is it that has power over hearing and sight? And who is it that brings out the living from the death and the death from the living? And who is it that rules and regulates all affairs? They will soon say Allah. Will ye not then show piety "to Him.*'"[3] In performing all these functions He is always alone and Has no partner, "*And He is Allah: there is no God but Him. To Him belongs all Praise, from the first and to the last. For He is the command, and to Him shall ye, all, be brought back.*"[4] Man has not escaped this overall divinely dominance since he is a part of God's kingdom. The major part of human activities are governed by the will of God. The modern Muslim theorist *Maududi* explains the Islamic view in this regard by saying that, "a human being is nothing more than God's 'born-subject'. It is He, who created us, sustains us and causes us to live. Hence, every notion of our *absolute independence* is nothing but sheer deception and misjudgement. God controls every fibre of our being and non can escape His grip."[5]

Nevertheless, this does not mean that man is completely helpless in controlling his destiny. He still possesses a considerable amount of freedom which is restricted to the moral and social sphere of life, in which he is bestowed with a free will and independence of choice, in respect of individual as well as in collective affairs and behaviour.[6] The purpose of this freedom is to allow human beings to choose between being God's appreciative subjects or being disobedient of His commandments and thus rebelling against Him and his own nature.[7] The Qur'an also asserts this space of freedom by stating several times that "*We showed him "human being" the way: whether he be grateful or ungrateful.*"[8] It also says "*by the soul, and the proportion and order given to it; and its inspiration as to its right and its wrong; truly he succeeds that purifies it, and he fails that corrupts it.*"[9]

It should be noted that the degree of commitment of believers required in Islam is considered to be very high to the extent that once the will of

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1 The Qur'an, 2:107. See also the Qur'an 3:40, 119. 22:64.
2 The Qur'an, 18:26. See also the Qur'an 21: 4.
3 The Qur'an, 10:31. See also the Qur'an 6: 12-14.
4 The Qur'an, 28: 70.
5 Maududi, "Islamic law." op. cit. p, 44.
6 'Abdul-Qader 'Oda, "*Al-tashri' Al-jena'I Al-islami.*" or "Islamic Criminal Legislation." *Maktabat Dar Al-turath.* Cairo (1982). vol. 1. p, 30. [Hereinafter, 'Oda].
7 Maududi, "Islamic law." op. cit. p 45. See also 'Oda, op. cit. vol. 2. p, 707-718.
8 The Qur'an 67: 3.
9 The Qur'an, 91: 7-10.

God is understood, believers have no alternative but to obey and follow. In this regard the Qur'an declares that "*It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger, to have any option about their decision: if any one disobeys Allah and His Messenger, he is indeed on a clearly wrong path.*"[1] Such disobedience may be regarded as a great sin which may result in the believer to be deemed to have desisted from Islam, especially if he seriously discards a generally accepted injunction with a belief that it is not applicable[2]. The Qur'an states, "*If any do fail, intentionally, to judge by what Allah hath revealed, they are unbelievers.*"[3]

To state that the only source of Islamic law is the will of God raises many questions, such as: Where can such a will be found? If the Qur'an and the Sunna are the only textual material sources of this will, what sort of law do they offer, and how comprehensive it is? How can this law be extracted? Who has the authority to perform such a task? What should be done if the will of God cannot be determined in a certain case? Can Islamic law be modified in response to social, political and economic changes, or is it immutable? The following discussion will be devoted to answer these questions.

The source of the will of God is *the divine revelations*[4] which, according to Islamic doctrine, encompass all the previous Books and messages of God which carry through Islam the eternal message of God.[5] However, the most reliable source of the will of God, from the Islamic point of view, is the revelation which was received by Mohammed, the Prophet of Islam, as it contains the final and most perfect solutions for all questions regarding belief and conduct.[6] This revelation has been of two kinds: direct, or the revelation conveyed to the Prophet both as to its meaning and wording i.e. the Qur'an, and the indirect revelation, or God's inspiration to the Prophet i.e. the Sunna. At this point, it seems important to explore these two kinds of revelation in order to examine their legal content and thereafter, to find out what sort of legal theory they offer.

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1 The Qur'an, 33:36. see also the Qur'an, 4:60.

2 'Abdul-Qader 'Oda, "*Al-Islam byn Jahl abna'ah wa ajz aulama'ah.*" or "Islam: Between Its Followers' Ignorance and its Scholars Disability." *Al-Mukhtar Al-Islami.* Cairo (1994). p, 26. [Hereinafter, 'Oda, Al-Islam].

3 The Qur'an, 5:44-47.

4 'Abdul-Hamid Metwali, "*Al-Shari'a Al-Islamiyah Kamasdar Le-Addisture.*" or "Islamic Law as a Source of the Constitution." *Munsha'at Al-ma'arf.* Alexandria, 2ed (1975). p, 7.[hereinafter, Metwali, *Al-Shari'a*]. Rahim, "Muhammadan Jurisprudence." op. cit. p. 69.

5 Maududi, "Islamic law." op. cit. p 44. Khallaf, "*Usul.*" op. cit. p, 23. According to the principle of *Shar`u mun qablana*, or the pre-Islamic revelations, the will of God as the source of Islamic law can be found in the Old Testament, "*it was we who revealed the Torah, to Moses: therein was guidance and light.*" The Qur'an, 5:44.

6 Gibb, "Mohammadanism." op. cit. p, 62.

b) The Qur'an

For Muslims, the Qur'an is unquestionably accepted as the unchanged words of God (Allah) revealed to the Prophet Mohammed through the archangel Gabriel (the Holy Spirit)[1]. The essential purpose of the book is to guard the previous revelations, to restore the eternal truth of God, to guide humanity along the straight path, to awaken the human conscience, and enlighten human kind.[2] It is God's final message to human beings which contains the tools by which they may achieve the ultimate purpose of this life i.e. to gain the satisfaction of their Creator.[3] The Qur'an was not revealed all at once, but rather in fragments during the prophetic career of Mohammed which lasted for twenty-three years. The reason for that was, as the Qur'an states, to render its memorisation easier[4], and more importantly to meet the believers' needs and answer their questions on all matters.[5]

The Qur'an as a book is quite short. It consists of 6236 verses[6] (or *Ayah. Pl Ayat*), divided into 114 chapters or (*Surra.Pl Suwar*) in various portions.[7] In terms of their subject matter, the Qur'anic verses can, in theory, be divided into two main categories; *Makky* or the verses which were revealed in *Makka,* and *Madany* or the verses that were revealed in *Madina.* The former verses are primarily concerned with the issues of belief in God (Allah), His oneness, angels, the previous revelations and messengers, the day of judgement, the life hereafter and the unity of believers. The latter verses are basically designed to provide the newly constructed Muslim society in Madina, and the Islamic state thereafter, with what it needed to organise its inner life and the relations with outsiders. This comprises injunctions about worship, ethical covenants in the believers' community, and injunctions related to legal issues such as

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1 In the Qur'an Allah has made a promise to preserve the Qur'an "We have, without doubt, sent down the message 'the Qur'an' and we will assuredly guard it 'from corruption', the Qur'an 15:9. However, the collection and the arrangement of the Qur'an passed many stages before its final phase. Initially, under the Prophet's instructions the Qur'an was written down during his lifetime on fragmentary materials such as leather skins, palm-leaves, and stones. In addition, the whole Qur'an was memorized by most of the Prophet's companions, a habit which continues among Muslims to date in response to divine encouragement. After the death of the Prophet, the first Caliph *Abu-Bakr Al-sidiq* (d, 13 AH, 634 AD) ordered that the Qur'an be collected from both men's hearts and the fragmentary renditions. The existing version was arranged and ordered in the reign of the third Caliph *Othman Ibn Afan* (d, 35 AH, 656 AD) who sent a copy of this version to all Muslim territories to be the formal and genuine version of the Qur'an, and then ordered that all previous texts be destroyed so that one standard copy would exist.

2The Qur'an ,17:82, 39:41, 16:64-65, 81:26.

3 The Qur'an, 5:119, 38:49-52.

4 The Qur'an, 17:106, 25:32.

5 Manna Al-Qatan, "*Tarieq Al-Tashrie Al-Islami.*" or "The History of Islamic Law." *Mu'asasat Al resalah*. Beirut(1987). p, 52. [hereinafter, Qatan, *Altashrie*]

6 Al-gendi, op. cit. p, 663. .

7 The longest *Surra* is Al-Bakarah, 286 verses, and the shortest is just three verses such as *Annas.*

family law, legal transactions, crime and punishment, politics and government.[1]

i) The Legislative Nature of the Qur'an

The Qur'an approaches a variety of subjects. Its content ranges from determining the essence of Islamic belief to encouraging Muslims to act with propriety. The greater part of the Qur'an is devoted to religious discourse which includes religious exhortation, admonition, doctrine or parables, an account of creation and Adam and Eve, stories of past Prophets, an appeal to charity and good acts, a threat of eternal punishment of evil-doers, and a portrayal of the day of judgement. The legal content of the Qur'an is quite limited. In addition to the general injunctions which apply to both religious and legal fields of Islam such as justice and equity, there are just a few verses which can be described as legal provisions. Thus among the 6236 verses contained in the Qur'an, there are at most 500, others restricted them to 190 verses[2] which are believed to be correct after excluding the verses which deal with issues of worship and rituals. Some jurists[3] attempt to classify them as following:

- 70 verses on family law which include, marriage, divorce, will and inheritance.
- 70 verses dealing with civil and commercial transactions such as partnership and sale.
- 30 verses concerning criminal law, defining crimes and determining punishments and rules of proof.
- 10-30 verses dealing with matters of judicial systems and procedures.
- 25 verses concerning international relations.
- 10 verses on administrative and constitution laws.
- 10 verse regulating economic and financial activities.

These verses, however, are not compiled in order. They are rather scattered all over the Qur'an in different chapters (*surra*). Sometimes, more than one verse confirms the same prescription such as the principle of retribution or (*Quasas*) which is stated in four different verses[4]. Moreover, many of these verses are stated in general terms. It is through the efforts of late Muslim scholars that these verses were analysed and divided into sections according to their relevance.

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1 There are 20 *Madany* surra, 82 *Makky* and other 12 controversial. See for more details, Qatan, "*Al-Tashrie*." op. cit. p 68-69.

2 Gamal Moursi Badr, "Islamic law Its Relation to other Legal Systems." The American Journal of Comparative Law. vol., 26. (1978). p 188. [Hereinafter, Badr, Islamic law]. Others claimed that there are only 80 verses dealing with legal issues, Coulson, History of Islamic Law. op. cit. p, 31.

3 Jadd Al-Haq 'Ali, "*Al-fqh Al-Islami, Muronatih wa tataworh.*" or "Islamic Jurisprudence: Its Flexibility and Evolution." Al-Azhar. Cairo(n.d). p, 36. [hereinafter, Jadd, *Al-Fiqh*]. Khallaf, "*Usul.*" op. cit. p, 32-33.

4 The Qur'an, 17:32, 2:178-179, 5:45, 16:126.

c) The Sunna

The Sunna is the second most authoritative source of Islamic law. Unlike the Qur'an, the Sunna is not regarded as the direct expression of the Almighty but rather consists of indirect expression inspired to the Prophet. It literally means "beaten path," and in general, the method or way of conduct.[1] In pre-Islamic Arabia, the word meant whatever corresponded with the tradition and ideals of tribes which were handed down as the fabled deeds of tribal forefathers[2]. With the advent of Islam the word was used by the early schools of law to denote the "ideal" or the well-established traditional practice of the community. It was not before the time of Shafi'i, that the term Sunna referred exclusively to the practice of the Prophet[3]. By this latter meaning the Sunna is interchangeably used with the term "*Hadith*" which literally means "report" or the precedents of the Prophet. As such Sunna is divided into three types: the verbal expression of the Prophet (*Sunna qawlia*), acts of the Prophet (*Sunna fi'lia*), and the tacit assent of the Prophet, i.e. his refrain from expressing his disapproval on hearing or observing certain things said or done by others especially his companions(*Sunna taqrireyya*).[4]

The authority of the Sunna as a source of law is extracted from the Qur'anic injunctions which order the believer to obey the Prophet's commands such as, "*O ye who believe! Obey Allah and obey the Messenger.*"[5] Thus, belief in the Prophet and obeying his commands is part of Islamic faith '*Iman*'.[6] Nevertheless, not all the sayings and acts of the Prophet are considered as a Sunna in a legal sense. Islamic jurisprudence has from the very beginning distinguished between different types of Prophetic practice. Accordingly, as far as its validity as a source of Islamic law is concerned, the Sunna has been divided into three types: non-legislative practice, temporary legislation, and general or permanent legislation. Although such classification is generally agreed upon, the content of each category has been a controversial issue.[7]

- The non-legislative Practice comprises all the Prophet's acts and saying as a human being, such as his way of eating, drinking and sleeping etc. This also includes his social behaviour and experience, such as his

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1 Kamali, op. cit. p, 44.
2 Vogel, Frank. E, "Islamic Law and Legal System, Study of Saudi Arabia." Unpublished Ph.D. Harvard University. 1993. p, 85. [Hereinafter, Vogel, Islamic law].
3 Schacht, An introduction, op. cit. p, 47. Norman Anderson, "Law Reform In The Muslim World." The Athlone Press. London(1976. p, 8. [hereinafter, Anderson, Law Reform].
4 Al-khudari, op. cit. p, 274-277. Khallaf, "Usul." op. cit. p, 36.
5 The Qur'an, 4:59. See also the Qur'an, 4:80, 24:63, 53:3-4., 59:7.
6 Ibn-Qudama, Abi Mohammed 'Abdullah(d, 620 AH, 1223 AD) "*Alughni.*" 12 vols. *Maktabat Al-Riyadh Al-Haditha.* Riyadh(1981). vol. 10. p, 85. 'Oda, op. cit. vol. 2. p, 708.
7 Al-Qarafi Shihab Al-din Abu-Al-'Abbas Ahmed. (d, 648 AH, 1285 AD), "*Al-Furuq.*" 4 vols. *Dar Ihya Al-kutb Al-Arabia.* Beirut. vol. 1. p, 205-209.

way of dressing, visiting and shopping. Such practice is not binding on Muslims as obligatory legislation though it is religiously recommended.[1]

• The temporary legislation consists of the prescriptions that were enacted in order to face momentary needs of the community at the time, or to deal with particular problems. In general, injunctions are considered as such whenever there is a sign which indicates their temporary character[2]. Such prescriptions comprise:

1. The exclusive legislation which consists of certain injunctions containing special prohibitions or permission applying only to the Prophet and his family.[3]

2. The injunctions which emanated from the Prophet as the head of the Muslim community. This includes setting up the state budget, signing treaties with outsiders, commanding the army, shuffling official posts and other related functions which might cover the area of constitutional and administrative law.[4]

3. What came forth from the Prophet as a Judge, in the professional meaning of the word, since rulings in litigation vary from one case to another depending on different circumstances such as the availability and validity of the evidence.[5]

•The permanent legislation, i.e. the injunctions which have an obligatory feature and are subsequently binding on Muslims as divinely inspired law, encompassing all acts and sayings which were promulgated by the Prophet as a Messenger of God conveying His message to Mankind. The 'legal' Sunna in this section contains far more explicit legal matters than does the Qur'an. The legal content of the Sunna or "*Ahadith Al-Ahkam*" is estimated at 4500 "*Hadith*."[6] These prescriptions, in turn, can be divided into three sections.[7]

1. Confirmatory Sunna: which contains injunctions stressing similar principles established by the Qur'an, such as confirming the prohibition of theft or murder.

2. Interpretative Sunna: Since many Qur'anic injunctions are mentioned in general and sometimes vague and ambiguous terms, it was the assignment of the Prophet to explain and specify them to the believers. This can be exemplified by the ritual injunctions to pray and paying charity(*Zakah*) which were conditioned and regulated by the

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1 Shaltute, "*Al-Islam.*" op. cit. p, 513.
2 Jadd, "*Al-Fiqh.*" op. cit. p, 131.
3 See for example the Qur'an, 15:8817:79, 24:11-21-63, 33:3-5-33-34, 49:1-5.
4 Jadd, "*Al-Fiqh.*" op. cit. p130. Shaltute, op. cit. p, 513.
5 Jadd, op. cit. p, 130. Shaltute, op. cit. p, 513. The Prophet is reported to have said that "when I do not receive a revelation, I adjudicate among you on the basis of my opinion." Related by Abu-Dawud, no. 3578.
6 'Abdul-Wahab Khallaf, "*Khlasat Al-tashrie Al-Islami.*" op. cit p. 24. Jadd, "*Al-Fiqh.*" op. cit. p, 36.
7 Khallaf, "*Massader.*" op, cit. p, 162. Ibn Al-Qaym, Shams-Aldien,(d, 751 AH, 1352 AD). "*I'lam al-muwaqien an rab al-alamin.*" *Dar Al-jiel, Beirut* (1973). vol. 2. p 308.

Prophet in a way in which seems difficult to be performed without such elaboration.

3. Rule establishing or legislative Sunna: Although the bulk of the Sunna falls into the previous two sections[1], there are a few cases where the Sunna was able to establish its own rules independently from the Qur'an, though not in contradiction with it. For example, there is the prohibition of wearing golden products for men and the prescription of punishment for fornication.

Unlike the Qur'an, the authenticity of the Sunna, or Hadith reports are rather problematic. Therefore, the normative force of the Sunna is relatively less than the Qur'an to the extent that some Muslim sects refused to consider the Sunna as an independent source of Islamic law unless it was proven in practice.[2] Several reasons have accounted for this problem. The Prophet, in his efforts to preserve the purity of the Qur'an, prevented his companions from writing down his Sunna. Although some companions had some written record of the Sunna[3], the bulk of the Sunna was primarily transferred to the later generations through oral means depending on men's memory. Worse than that, some sects invented so-called spurious "*Ahadith Mawdo'a*" which they forged and attributed to the Prophet in order to support their religious or political objectives, though not necessarily as a result of bad faith.[4] To face this challenge Muslim jurists developed a complex science to determine the authenticity of Hadith reports by using an advanced and complicated technique that often appeals even to those of present times.[5] This technique relied on carefully tracing the chain of narrators of each *Hadith* up to the Prophet (this is called "*Isnad*"or support.). The piety and honesty of the narrators of each *Hadith was* essential to the validity of his account, therefore they kept note of narrators character, memory, skills, knowledge, belief, partisanships, and chronology. Then, they used this data to scrutinise the testimonial worth of each Hadith by evaluating each narrator's credibility.[6] The efforts of centuries resulted in the Sunna being graded into several classes according to their reliability as follows: the most authentic Hadith is called "*mutawatir*" or "successive" which was held to convey absolute truth. A lesser status called "*Sahih*" or valid, and "*da'ief*" or weak and finally "*mawdo*" or spurious.[7]

1].Khallaf, "*Al-tashrie.*" op. cit. p, 25

2 See the discussion over this attitude, Shaltute, op. cit. p, 508. Ibn Al-Qaym, "*I'lam.*" op. cit. p 294.

3 Like the so-called "*Al-Sahefah Al-Sadiqah*", or "The Truthful Document." which contains one thousand Hadith. See , Al-Qatan, "Al-Tashrie." op. cit. p, 94. Al-Alshqar, "*Tashrie.*" op. cit. p, 56.

4 Coulson, "History of Islamic law." op. cit. p41.

5 Vogel, "Islamic law." op. cit. p, 91.

6 Vogel, "Islamic law." op. cit. p, 91. Gibb, "Muahamadanism." op. cit. p, 63.

7 The most credible collection of Hadith and commentary on them are: Mohamad Ibn-'Ali Al-Shawkani (d, 1250 AH), "*Nayl al-awtar sharh montaqa al-akhbar.*" *Dar Al-jiel.* Beirut (1973). Abu-

5) Non-Textual Sources and the Development of Islamic Law

Muslim jurists usually state a number of sources as non-textual sources of Islamic law. This includes *Ijma,* or the consensus of the jurists upon particular issues, and *Qiyas*, or a judgement upon juristic analogy. In addition, there are several other controversial sources such as: *Al-Urf*, or the custom and usage; *Al-istihsan*, or the deviation from certain rules based on precedents derived from other rules based on relevant legal reasoning; *Al-istislah*, or the *Al masalih*, or the public interests; *Sadd al-dara'i,* or the blocking of the way to actions which may lead to transgression even though those acts are under certain circumstances lawful; *Shar`u mun qablana*, or the pre-Islamic revelations; *Qawl al-sahabi* or the saying of the Prophet's companions. However, a close examination reveals that all these sources are just different aspects of Ijtihad or the use of reasoning. That is to say, after the death of the Prophet, Muslims had to find ways to define the will of God through consulting, interpreting and supplementing the textual sources of Islamic law i.e. the Qur'an and Sunna. Depending on the jurist's orientation, such processes may be achieved by literal or strict interpretation, seeking previous precedents or resorting to analogy. The various secondary sources adopted by a jurist or a school of law manifest the character of his/its methodology and the degree of respect he/it gives to the use of reasoning. Therefore, all sources next to the Qur'an and Sunna should be viewed as a manifestation of Ijtihad as they are largely procedural in character.[1]

As such, Ijtihad is a vehicle devised by or rather for Muslim jurists in order to discover and to expand Islamic law and to bring it into more harmony with actual life in order to ensure its vitality and ability to respond to the needs of successive Muslim communities. Therefore, instead of studying all the secondary sources we shall focus on the notion of Ijtihad to explore its significance for the development of Islamic law and its relevance to the present movement of Islamisation. The word Ijtihad means to exert or endeavour, and technically it means exertion by a jurist of the faculties of his mind to the best of his ability and capacity in order to form an opinion in a case of law in respect of a doubtful,

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alfadl Ahmad ibn 'Ali ibn Hajar Al-asqalany(d, 852 AH). "*Fath Al-bari.*" *Al-maktabah Al-salafiyah.* Cairo. Sahih Al-bukhari, by Al-bukhari, Mohammad Ibn Isma'l (d, 256 AH, 869 AD).
Sahih Muslim, by Muslim Ibn Al-Hajjaj Al-Quhayri Al-Nisabouri (d, 261 AH, 875 AD).
Sunan Abu-Dawud by Abu-dawud Sulayman bin Al-alsh'ath Al-azdi(d, 275 AH, 889 AD).
Sunan Ibn-Maja, by Ibn Maja, Mohammad Bin Yazid Al-qazwini (d, 275 AH, 889 AD).
Sunan Al-tirmidi, by Al-termithi, Mohamma Ibn Easa (d, 279 AH, 892 AD).
Sunan Al-nisa'i, by Al-nisa'i, Ahmad ibn Shuiayb (d, 303 AH, 915 AD).
1 Of this opinion, Hasab-Allah, op. cit. p, 89. Kamal, "Principles of Islamic Jurisprudence." op. cit. p, 464.

unprecedented or complicated problem.[1] Thus, Ijtihad is a highly intellectual process aimed at interpreting and expanding the available textual sources. Despite there being a minority of jurists who believed that there was no need for Ijtihad, as the textual sources contain answers to all questions, the overwhelming majority of jurists endorsed Ijtihad as based on human reasoning of variable degrees.[2] In fact, reasoning in Islamic law should occupy a far more important place than in modern legal systems. That is to say, while statutes, as the main body of modern laws can be modified, repealed or replaced upon the will of the legislative body, such a process is impossible in Islamic law as textual sources are regarded sacred and therefore immutable. What is possible is that successive Muslim communities may offer their own understanding of the texts which appeal to their actual needs. Both the Qur'an[3] and the practice of the Prophet,[4] highly honour and praise reasoning and its significance for Islam as a religion and as a legal system even if the results are not right or successful.[5]

6) Ijtihad and the Flexibility of Islamic Law

One of the dilemmas facing any legal policy is how to ensure the stability of the legal system and at the same time its flexibility to respond to the needs of change according to the requirements of the society. Islamic law has been widely accused of being immutable or inflexible[6]. Such an accusation cannot be taken as a whole for granted. Islamic law has a certain degree of inflexibility that relates to some explicit sound provisions which according to the majority of Muslim scholars cannot be changed. Although these provisions are controversial in their number, they are the minimum amount that gives Islamic law its character and

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1 Hasab-Allah, op. cit. p, 87. Al-Khudari, op. cit., p, 422.

2 See for details, Ibn Al-Qayyim, "*I'lam Al-muwaqi'en.*" op. cit. vol. 1. p, 175. Hasab-Allah, op. cit. p, 88.

3 There are many verses in the Qur'an which state clearly that it has been revealed to those who are able to properly use their reasoning whereby the Qur'an can be appropriately understood. For example, the Qur'an says "therein 'in the universe' are signs for people who use their reasoning and understanding." The Qur'an, 13: 5, and see also 2:164, 16:12, 29-35, 30:24, 45:5.

4 The obvious example was when the Prophet intended to send *Mu'ad Ibn jabal* to Yemen to act as a judge, he asked how will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked what would you do if you do not find guidance in Allah's book? He replied: I would act in accordance with the Sunna of the Prophet. He then asked: what will you do if you do not find guidance in the Sunna or in the Qur'an? He replied: I shall do my best to form an opinion and spare no pain. The Prophet patted him on the breast and said: praise be to Allah who helped the messenger of the Prophet to find a thing that pleases Allah and His Messenger. Related by Abu-Dawud, op. cit. no 3585.

5 The Prophet is reported to have said that "If a jurist or a judge exercises Ijtihad and gives the right judgement, he will have two rewards, but if he errs in his judgement he will still have earned one reward." Related by Abu-Dawud. op. cit. *Ketab Alaqdiyah*, Hadith no, 3103.

6 See for example Gibb, "Mohamadanism." op. cit. p, 61. Schacht, " An Introduction." op. cit. p, 5, 199.

flavour without which there would be no 'Islamic' law. Nevertheless, it will be demonstrated that on some occasions Muslim jurists have restricted or even suspended some sound explicit texts for the sake of people's interests. In addition, there are some trends in Islamic jurisprudence, though not popular, which plainly declare that reasoning and people's interest should always be given priority over the texts. On the other hand, Islamic law has proven in its hey day its ability to evolve and progress according to the needs of ever-changing societies. There are elements of Islamic law which if rightly utilized, Islamic law would acquire even more flexibility. In particular three interrelated factors shall be emphasised which are the limitation of the legal textual sources, the multi-interpretation process of the texts and the ability of the law to be expanded. Ijtihad has an essential role in identifying and utilising these and other factors. The failure to correctly seize these elements has been held responsible for the centuries-old phenomena of inflexibility in Islamic law.

a) The Limitations of the Texts

Islam is claimed to be an all-inclusive system of life containing religion, ethics and a legal system. However, while Islam as a tenet is considered as a completed process, Islam as a law is not. That is to say, Islamic belief and rituals are largely inventive laid down by God in definite and permanent terms that do not allow any change or modification. Therefore, no one is authorised to modify or change any ritual such as the number of prayers or the time of fasting.[1] As for Islamic law, it is clearly noticed that it is not a complete invention of Islam since Islam explicitly and implicitly adopted many legal institutions from other cultures such as the pre-Islam Arabic custom. In addition, Islamic law is not intended to be an all-inclusive legal system. Rather, Islam has followed what can be called a policy of 'necessary interference or intervention'. That is to say, no legal provision would be provided unless there is, from an Islamic view, an essential interest to be protected. Therefore, in fields which are considered to be closely connected to Islam as a religion and lifestyle, detailed provisions are provided such as in the area of personal status[2]. In other fields, Islamic law provides a mixture of detailed and general provisions in a way that gives more room for Ijtihad, such as in criminal law.[3] In some areas, only general principles are

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[1] Thus the Qur'an says, "this day have I perfected your religion, completed my favour upon you and have chosen for you Islam as a religion." The Qur'an, 5:3.

[2] In addition to Prophet's Hadith, it is estimated that there are nearly 70 Qur'anic verses in this field covering marriage, divorce, inheritance and will. See Khallaf, "*Usul Al-tashri.*" op. cit., p, 28.

[3] There are only thirty verses in this field less than half of which prescribe punishments. See, Khallaf, ibid. p, 29.

provided giving even further room for human reasoning such as administrative and international law.[1] The more details are provided, the less freedom is given for Ijtihad or legal reasoning to function. Islamic legislative policy of necessary interference is, according to some Muslim jurists, deliberately intended to give Islamic law the flexibility that allows successive Muslim societies to devise their laws according to their own needs without being bound by detailed rules.[2] Thus, during the lifetime of the Prophet, Islamic law was revealed in a piecemeal approach according to the actual needs of the society and very often in the form of answering questions raised by the believers.[3] In addition, both the Qur'an and the Prophet urged the believers not to ask too many detailed questions lest they be bound by them as well as successive Muslim generations.[4]

The limitation and vagueness of the texts confronted the Muslim community immediately after the death of the Prophet and prompted the use of Ijtihad in choosing the first caliph or leader.[5] As the community got larger and developed, the limitation of the texts becomes more obvious.

b) <u>The Multiplicity of Interpretation</u>

As has been demonstrated above, textual sources do not provide specific answers for all questions of law and when they do, they give either a general principle or a specific answer which in turn may be sound and clear or vague and ambiguous. When the text is specific and clear the task of Ijtihad is simply to find the text in question and apply it to the case. It is when the text is general or vague that Ijtihad shows its significance. Muslim scholars have made an extraordinary effort in this field over the centuries leading to a wealth of elaboration and commentary that have been embodied in hundreds and maybe thousands

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[1] There are only ten verses in the Qur'an related to intentional and administrative laws. Jadd, op. cit. p, 36. Khallaf, "*Usul.*" op. cit. 33.

[2] Al-Qaradawy, op. cit. p, 152.

[3] Thus many Qur'anic verses start with a phrase "They ask thee concerning…say…" "They ask you thee what is lawful to them? Say: lawful unto you are all good and pure…" The Qur'an 5:4. See similar verses, 2:186, 189, 217, 219, 221, 222, 273, 4:153, 7:187, 8:1, 33:20, 33:63, 51:12, and many others.

[4] The Qur'an for example says, "Oh ye who believe! Ask not questions about things which, if made plain to you may cause you trouble." The Qur'an, 5:101. The Prophet is also reported to have said that "What Allah has made lawful in his book is *Halal* (permissible), and what He has made forbidden is *Haram* (illegal) and that concerning what He is silent is permitted as his favour for Allah is not forgetful of anything." Related by Al-Hakim, vol. 2. p, 375. This Hadith reveals a centre argument to endorse Ijtihad which is that the textual sources are not intended to provide all-inclusive legal system and allow for expansion through Ijtihad.

[5] Neither the Qur'an nor the Sunna provides a clear method for the succession of power. Therefore, after the death of the Prophet the question of the Prophet's successor was the first test for Ijtihad in the absence of the Prophet.

of treatises which assert the notion that Islamic law is an extreme case of a 'jurist law'.[1] The science of Usul al-Fiqh plays an essential role here as it grades the value of the text and its significance in a particular case. With vagueness and ambiguity, disagreement is naturally expected and it was one of the leading factors in the expansive diversity of opinions in Islamic jurisprudence. Although there were several schools of law, each has its own methodology of interpretation; there are broadly two main trends in Islamic jurisprudence which started to appear before the end of the first Islamic century. The first trend or school is called '*Ahl al-Ra'y*' or 'people of opinion' and the second is called '*Ahl Al-hadith*' or 'people of text'. As their names may suggest the school of opinion or the methodologists led by Abu-Hanifa (d, 150 AH, 767 AD) strongly advocate personal reasoning in interpreting textual sources. Their central argument is that Islamic law is rational and based on people's interest. Therefore, text must be interpreted in the way that most achieves people's interests. To that end, they may restrict the obvious meaning of the text or even, in case of the Sunna, reject any doubtful Hadith (*Ahad*) if it contradicts the people's interest.[2] Whereas, the school of text gives priority to the immediate meaning of the text and strives to find a precedent to explain vague texts rather than resorting to personal reasoning. Such a precedent may be a saying of a companion, the practice of people of Madina[3] or even a doubtful Hadith of the Prophet.[4]

c) Expanding Islamic Law

Islamic law is an expandable legal system. Given the limitation of the texts, expanding Islamic law is the paramount task for Ijtihad. The expansion can be achieved through different methods. The first rule here is called '*Istishab*' which means that unless otherwise prohibited everything is permissible. This rule is significantly important as it declares that all deeds and actions that have not been regulated by Islamic

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[1] See Schacht, "An Introduction." op. cit. p, 209.

2 See, Khallaf, "*Khulasat Al-Tashri*." op. cit. p, 175.

3 Imam Malik for example regarded the practice of the people of Madina as one source of Islamic law on the grounds that Madina was the city of the Prophet and the revelation and therefore the practice of its people particularly in the early period, should be considered as a living example of the Prophet practice. See, 'Abdul-Hamid Metawlli, "*Mabadi Nnizam Al-hukm fi Al-Islam*." or "The Principles of the Islamic Political System." *Dar Al-ma'arif*. 1st edition. Cairo (1966). p, 315. [Hereinafter, Metawlli, *Mabadi*].

4 Khallaf, ibid, p, 76. A simple example of the methodological difference between the two schools can be illustrated with the Prophet Hadith that says regarding *Zakah* or charity, "A goat is to be levied on every five camels." Related by Abu-Dawud. no. 1562. The school of opinion interpret this Hadith with reference to its purpose which is the interest of the poor and therefore they allow for the owner of the camels to pay for the goat or its value whichever is more beneficial for the poor. The people of the texts stick to the surface meaning of the text and do not allow the payment of money. See for more examples, Shaltute, op. cit. p, 506-542.

law should remain at their original status.[1] This rule precisely covers unregulated legal transactions and status which existed at the Prophet's time.[2] It can also be extended to '*Urf*'' or custom. Any custom whether local or general that does not contradict the principles of Islamic law is valid and must be observed by courts.[3] The pre-Islam Arabic customs, or any other custom, which had not been denounced by the Qur'an or the Prophet is presumed valid.[4] The recognition of custom as a source of Islamic law means that in civil or commercial transactions for example there is no need to include the conditions that are customarily recognized.[5] To be qualified as a source, custom must be well-established and must not contradict the clear principles of Islamic law. Unlike *Ijma*, *Urf* has no binding authority over successive generations; its authority confines it to where it is recognised and it may be changed from one place to another and from time to time.[6] Another method of expanding Islamic law is by recognising some legal institutions which were prescribed in previous revelations particularly the Judaism-Christian tradition.[7] The Qur'an and the Sunna may expressly upheld or abandon a specific legal institution from the previous revelation.[8] In some cases, a legal institution or ruling may be mentioned in the Qur'an with no clear

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[1] See Khallaf, "*Usul Al-fiqh.*" op. cit. 91. Al-Khudari, op. cit. p, 409.

[2] The rule of *Istishab* has significant implications in all legal fields. In criminal law for example it declares that a person is presumed innocent unless his guilt is undoubtedly proven. Similarly, in civil law a person is presumed debt-free unless it is proven otherwise.

[3] Custom or *Urf* is a recognized secondary source of Islamic law. Some Qur'anic verses instruct the Prophet to enjoin custom (the Qur'an, 7:199). Others Qur'anic verses while establishing a legal principle leave the detail to be determined by the custom of each society. For example, the verse no 2:233 establishes the husband's duty to pay maintenance to his divorcee but leaves the quantum of the maintenance to be determined by the custom. See also the Qur'an, 2: 241. See for details, Al-Qaradawy, op. cit. p, 167-171.

[4] As proof of the significance of custom in Islamic law, the prominent jurist Al-Shafi'i, the founder of Al-Shafi'i school of law, when he moved from Iraq to Egypt changed many of his previous Ijtihad in order to bring them into harmony with the local customs of Egypt. See, Khallaf, "Non-Textual Sources." op. cit. p, 48.

[5] Muslim jurists have utilized custom as a source of Islamic law. One of the rule based on Urf is that "What is proven by Urf is like that what is determined by Islamic law." Ibn Najeem, Zayn Al-Abdeen Ibn-Ibrahim, (d, 970 AH, 1563 AD) "*Al-ashbah wa Al-naza'r Ala Madhab Abu-Hanifa Al-nu'man.*" *Dar Al-kutub Al-ilmiyah*. Beirut(1980). p, 46-53. See also arts. 43-45 of the Ottoman Mejelle. Hader, "*Sharh Mejallat Al-Ahkam.*" op. cit. p, 46.

[6] Khallaf, "*Usul al-fiqh*" op. cit. p, 91. For more details see Ibn-Abden, Mohammed Amin (d, 1252 AH, 1836 AD) "*Nashr Al-arf fi bina al-ahkam ala al-Urf.*" *Majmo'at Rasa'l Ibn-Abdien. Dar Ihiya Al-turath Al-Arabi*. Beirut.(no-date.)

[7] In principle, Muslims believe that all divinely revealed laws emanate from one and the same source, namely Almighty God or Allah and convey a common message which is the oneness of Gad and the need for divine authority and guidance to regulate human conduct and the values of morality and justice. many Qur'anic verses and Prophet teaching confirm such a belief. The Qur'an for example says, "He (Allah) has established for you the same religion as that which He enjoin upon Noh, and we revealed to you that We enjoin on Abraham, Moses and Jesus." The Qur'an, 42:31, 5:44, 6:90. See, Kamali, op. cit. p, 229-233.

[8] Such as some Hudud and Qisas penalties which expressly adopted by Islamic law. See Mohammed Abu-zahrah, "*Al-jarema wa Al-'ukoba fi Al-fiqh Al-Islami.*" or "Crime and Punishment in Islamic law." *Dar Al-fikr Al-arabi*. Cairo (1976). vol. 2. p, 335-336.

indication as to whether it should be abandoned or upheld such as in the case of punishment for non-fatal violent crimes.[1] As will be shown in chapter seven, the majority of Muslim jurists assert that in such cases, previous revelations should be upheld as part of Islamic law whereas a minority of jurists hold that unless expressly stated in the Qur'an or Sunna, previous revelation should not be considered as part of Islamic law.[2]

As for the future, if an unprecedented question of law is raised, Muslim jurists of a certain time may discuss the issue and reach a decision they unanimously agree upon. Such an agreement which is called '*Ijma*' or conscious opinion has a legal authority derived from the Prophet's teaching and may have a binding power over the next generations[3]. The other method used to face the unprecedented case or question is by searching for a similar precedent or case in the textual sources or Ijma and applying its legal status to the new case. This method is called *Qiyas* or analogy, and involves extending the textual ruling '*hukm'* of a regulated case '*Asl'* to an unregulated case '*far*`" because they have the same effective cause '*Illah'*. A simple example for Qiyas is the Prophet Hadith that says, "the killer shall not inherit (from his victim)", by analogy Muslim jurists extended this ruling to bequests, which means that the killer would not benefit from the will of his victim either.[4]

However, the most significant method of expanding Islamic law has been the theory of *Maslaha Mursalah* or *Istislah* which means consideration of public interest. The basic concept of this theory is based on the notion that Islamic law aims primarily at securing the welfare of the people by promoting their benefit or protecting them from harm.[5] The ways and means which may bring benefits to the people are virtually endless. Public interest is a relative concept which changes from one community to another and from one time to another even for the same community. Therefore, Muslim jurists strove to formulate a clear theory

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[1] The Qur'an for example says, "We ordained therein (in Torah) for them (the suns of Israel): A life for a life, an eye for an eye a nose for a nose an ear for an ear, a tooth for a tooth, and wounds equal for equal." The Qur'an, 5:45.

[2] Of the latter opinion are Al-Amidy, Al-Razi and most of Shafi'i school and Mu'tazela. See Shaltute, op. cit. p, 384.

[3] The Prophet is reported to have said that, "My community shall never agree on error." The principle of *ijma* or consensus causes a controversy over its conditions and possibility in practice, see, Al-khudari, op. cit. p, 314-332.

[4] For other examples see, Ibn-Al-Qayym, "*Ilam Al-muwaqi'en.*" op. cit. vol. 2. p, 242. Kamali, op. cit. p, 198.

[5] Jurists usually refer to several Qur'anic verses which declare that the revelation is intended to be a mercy but not a hardship on people. For example the Qur'an says, "and We have not send thee but as a mercy for all people." the Qur'an 21:107 and "Allah never intends to impose hardship on you." The Qur'an, 5: 6. The Prophet has also said, "No harm shall be inflected or reciprocated in Islam." Related by Ibn Majah, no. 2340. Accordingly, one of the basic rules of Islamic law is "Hardness brings ease." See Ibn-Najeem, op. cit. 37.

of interests or *masaleh* by dividing, grading and conditioning them as to facilitate the job of successive rulers and jurists to expand Islamic law.[1]

Thus, if there is a need to establish or to adopt from other legal systems a certain legal institution such as to establish a high court or to increase the age of marriage, Muslim jurists should authorise such a move providing that it achieves a real interest to the people and in the meantime does not contradict the sound principles of Islamic law. In the case of adopting from foreign legal systems, some modifications may be needed to fit Islamic criteria. Thus, through this method, Islamic law could be, and has been, expanded endlessly just as any other positive or secular legal system. Relevant to present study on victimology, there have been many developments based on *Maslaha* and Ijtihad such as deactivating the victim's forgiveness to have its original legal effect as the terminator of the criminal the proceedings and involving the state as a party in proceedings of violent crimes.

The pressing question to be asked is, "What should be done if public interest requires the establishment or the adoption of a legal institution which contradicts an explicit text or principle of Islamic law?" The majority of Muslim jurists assert that the scope of *Istislah* just as any sort of Ijtihad is limited to those matters which are not regulated by Islamic law. In other words, *Istislah* must not contradict an explicit text or Ijma.[2] The only cases where istislah may be given priority over the text are where there is a necessity[3]' or in the case of *Sadd al-darai'*, the principle which suspends the application of a provision if its application leads to evil.[4] However, a closer examination of the precedents of the Prophet's companions, notably the first four Caliphs, reveals that on the grounds of public interest they have restricted or even suspended some clear explicit sound textual provisions. Caliph *Omar Ibn Al-Khatab*(d, 23AH, 644AD) for example suspended the prescribed punishment for theft in a year of

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[1] Muslim jurists stated examples of general interests as objectives which should be maintained by Islamic law, such as religion '*dien*', life '*nafs*', intellect reason '*akl*', offspring '*nasl*', property '*mal*', honour '*ard*', and the recently suggested justice or '*adl'*. Aljabri, op. cit. p, 191. These interests are not equal, and they are arranged into many types according to their relative importance. In the case of conflicting interests, an attempt to reconcile them should be made, and if not successful, the priority should be given to the interest which is seen to be more important. See for details of conditions and types of interest '*Maslaha'*, Al-Ghazali, "*Al-mustasfa.*" vol. 1. p, 139-50. Al-Shatibi, "*Al-I'tisam.*" op. cit. p, 129-143. Hasab-Allah, op. cit. p, 169-195.

[2] Al-shatebi, "*Al-I'tisam.*" op. cit. vol. 2.p, 129-135. Al-Ghazali, op. cit. vol. 1. p, 293. Khallaf, "Non-textual Source." op. cit. p, 100. Hasab-Allah, op. cit. p, 183.

[3] A general rule in Islamic jurisprudence is that 'Necessity permits unlawful acts." This rule derives from the Qur'anic verse that says, "But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then is he guiltless, for Allah is oft-forgiving most merciful. 2:173. And see the Qur'an, 5:3. For more details and examples see, Al-Ghazali, ibid, p, 294. Al-qaradawy, op. cit. p, 196.

[4] For example the Prophet suspended the execution of the punishment of theft in wartime lest the offender desert to the enemy. Ibn-Al-Qayym, "*I'lam.*" op. cit. vol. 3. p, 5.

famine, and ceased the payment of *Zakah* or charity to a certain group stated in the Qur'an.[1] The grounds for such a suspension was that the application of the text in question in the given circumstances might not have achieved the intended interest, which was eventually the people's interest. Therefore, is it possible for modern Muslim communities, on the same grounds, for example, to abolish a certain penalty such as corporal punishments, or to eliminate the principle of polygamy. The majority of Muslim jurists would reject such a move. However, there are some modern as well as old trends in Islamic jurisprudence which may go along with such a way of interpretation. In the following paragraphs, three of these trends will be briefly highlighted.

7) Exceptional Trends

Besides the traditional trends which dominated the process of interpreting and expanding Islamic law, there have been some trends which can be called exceptional because they offer innovative approaches in dealing with Islamic law and its development. Although such trends were formally rejected, their innovations come out from time to time in different forms. Three of these trends will be briefly illustrated.

a) *Al-Mu'tazela* and Reasoning

Although reasoning is widely utilised and encouraged in the Islamic legal process and recognised by almost all recognised schools, the main champions of reasoning in Islamic jurisprudence come from the so-called school of '*Mu'tazela*'.[2] What makes *Mu'tazela* an exceptional trend is not just their enthusiastic advocacy for the use of reasoning in the legal process but because they consider reasoning as the first source of Islamic law even before religious texts. They claim that it is only through reasoning that the texts can be understood and applied. They added that reasoning is the vice-regent of God on earth through which one could distinguish between what is good and what is evil. The purpose of revelation then, according to their theory, is to confirm the result reached by reasoning but not to establish it. The school of Mu'tazela enjoyed its golden era during the period of the *Abasiyya* state when its doctrine was embraced by the Caliphs themselves.[3] Regrettably, *Mu'tazela* later on suffered from repression which led eventually to its disappearance as an

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[1] Those who are newly Muslim or about to convert to Islam. The Qur'an' 9:60. See for more examples, Ibn-Al-Qayym, ibid. vol. 3. p, 5-30.

[2] Mu'tazela is a an early school of Islamic thought founded by a jurist called *Wasel Ibn Ata*(d, 131 AH, 699 AD).

[3] Particularly Al-Ma'mone (d, 118 AH, 833 AD), Al-Mu'tasim (d, 228 AH, 842 AD) and Al-Wathik (d, 233 AH, 847 AD).

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organized school, yet its doctrine appears from time to time through some jurists especially those of latter generations.[1]

b) *Al-Tofy* and The Theory of Istislah (Interest).

In his commentary on the aforementioned Hadith which says, "No harm shall be inflected or reciprocated in Islam" on which the theory of *Istislah* is based, the Hanbali Jurist, Najm Al-dien Al-Tofy, (d, 716 AH, 1318 AD), referring to similar Qur'anic verse, adopted a different view from other jurists. He asserted that this Hadith and other similar Qur'anic verses are clear in declaring the purpose of Islamic law which is securing the well-fare of people. Thus, he claimed that except for devotional matters (*Ibadat*), in legal and earthly matters a jurist must seek the declared purpose of the law i.e. the people's interest. If the texts or Ijma appear to support such a purpose, they must be applied, but if they seem in conflict, the jurists must strive to reconcile them. If the reconciliation attempts failed, then the people's interest must be given priority over any other source even the texts and Ijma. Al-Tofy stressed that the conflict is not actually between the texts and the people interest, but rather between some sources and others. The aforementioned Hadith and Qur'anic verses declare the purpose of Islamic law in general and the specific texts are only a means to achieve such a purpose. Therefore, when in certain circumstances the means fall short of achieving their intended goal, they must be restricted or reinterpreted so as to achieve their goals stated by the general rules.[2] In effect, the theory Al-Tofy amounts to saying after each textual command, 'provided public interest does not require otherwise.'[3]

It is unexplained why such a daring and valuable theory which was produced six centuries ago had little if any effect on the development of Islamic jurisprudence. Had it been fully accepted, Al-Tofy's theory would have had a far-reaching effect on the evolution of Islamic law. It is remarkable that the theory has not been discussed or countered by Al-Tofy's contemporaries or latter jurists.[4] This is partly because the theory was suppressed in its cradle and so was its founder. In addition, with the immobility or slow development of the society at the time, such a theory was not desperately needed. Nowadays the theory seems more attractive

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[1] See for details on Mu'tazela and their contribution to Islamic thought, Mohammed Ammara, "*Tayarat Al-fikr Al-islami*." or "The Trends of Islamic Thought." *Dar Al-shoruke*. Cairo (1991). p, 43-97.

[2] For details see Hassan Hamid, "*Nazariat Al-Maslaha Fi Al-Fiqh Al-Islami*." or, "The Theory of Public Interest in Islamic Law." *Matba'at Jami'at Al-Qaherah*. (Cairo University Press). Cairo (1971). p, 528-543. For the texts of the Al-Tofy's theory, see Khallaf, "Non-textual Sources." op. cit. p, 105-144.

[3] See Kamali, op. cit. p, 267.

[4] Such as Ibn-Taymiyya (d, 728 AH, 1328 AD), and his disciple Ibn-Al-Qayym (d, 751 AH, 1350 AD), Ibn-Najeem (d, 970 AH, 1563 AD) and Ibn-Abdien, 1252 AH, 1836 AD).

as it facilitates the application of Islamic law by largely extending its flexibility. Regrettably, the theory has not been utilised yet, rather it has been widely criticised by traditional jurists as contradicting the essential principles of Islamic law.[1] The theory however has attracted more attention from some modern lawyers and high rank jurists.[2]

c) Historical and Secular Interpretations of The Texts

The interpretation of the religious texts i.e. the Qur'an and the Sunna is governed by the principles of the science of Usul Al-fiqh. There is always a possibility for differences between one scholar or one method of interpretation and another. Such differences are acceptable as long as they are bound by the recognised rules of interpretation. However, there have been some scholars or rather thinkers who tried to offer interpretations which are considered radical or even unacceptable according to the established Islamic criteria of interpretation. Most of these interpretations appeared recently in the twentieth century. The bottom line of all these attempts is that Islamic law, or most of it, is no longer applicable because, they alleged, it has already achieved its mission stated in the texts and according to the texts themselves Islamic law can be replaced with other modern laws. In the following paragraphs, two methods of such radical interpretation namely, the historical and the secular interpretations will be sketched with no attempt to subject them to further analysis as the aim is simply to show examples of some extremist trends within Islamic jurisprudence.

The first radical method is the so-called historical interpretation. Although historical circumstances, particularly '*Asbab Al-nozuol*' or the occasions of the revelation have always been observed by traditional interpreters and jurists, the trend of historical interpretation has gone much further. Mahmod M. Taha (the founder of *Al-ikhwan Al-jumhorien* or the Republican Brother movement in the Sudan), as a leading thinker of this trend, claimed that Islamic law was formulated to meet the needs of the society at the time of formulation. He asserted that this is evident from the clear mark of the seventh century Arabic society. Therefore, the codification of Islamic law at the present time must not keep the outdated

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[1] Mohamed Abu-zahrah for example has launched a severe attack on Al-Tofy's theory and even questioned his own belief. See, Metwalli, "*Mabadi.*" op. cit. p, 347-349.

[2] Shakh Al-Maraghi, the former rector of Al-Azhar, held a similar view of al-Tofy as he asserted that Islamic law never intends to put hardship on people, therefore, whenever it is found that the application of a certain command causes a hardship it should be avoided in the people interest. Mohammed Mustafa Al-Maraghi, "*Al-Ijtihad fi Al-Islam.*" or "Ijtihad in Islam." Quoted in Metwalli, "*Al-share'a.*" op. cit. p, 135. Shakh, Khallaf, A leading Muslim jurist (d, 1956), although did not fully agree with Al-Tofy's theory, he described it as a daring and valuable theory and deserved to be further examined and scrutinised. Whereas, contemporary jurists such as Abulhamid Metwalli defended the theory as worth discussing and contemplating, op. cit. p, 349-351.

historical elements of Islamic law. He went on to say that what was revealed was the first message of Islamic law which was concerned with belief, and he tried to formulate the second message of Islamic law in his book.[1] Taha was charged with apostasy and sentenced to death during the Nemeri Islamisation programme.[2] Of a similar view is Abdullah Ana'im, a disciple of Mr. Taha.[3]

Another attempt in the trend of historical interpretation was made by Husain Ahmed Amin who departed from the same stand as Mr. Taha and criticised Islamic jurisprudence for neglecting historical factors while trying to revive Islamic law. He claims that Islamic law was meant to meet the immediate needs of the freshly constructed Muslim society. Therefore, it took into account the difficulties of introducing radical measures for the newly converted Muslims who had been accustomed to their own customs for a long time. Thus, instead of prohibiting polygamy which was widely practised in the pre-Islam Arabia, Islamic law restricted the number of wives only as a temporary measure or a first step which should have led to the prohibition of polygamy later on.[4] Of a similar view is Mohammed Sa'id Al-ashmawy.[5]

The other radical method of interpretation is what can be called 'the secular interpretation' of the texts. Such an interpretation attempts to prove that Islam is a mere religious call or message which aims at regulating the relationship between people and their God with no attempt to establish a legal or political system. Therefore, when it comes to temporal affairs, it should be left to the people of each time to regulate their own affairs in the best way that serves their interests. Although such a trend has become more popular among a spectrum of thinkers and politicians, a prominent leading figure of such a trend is Ali Abdulraziq who claimed that a distinction must be clearly made between Prophecy and royalty. The Prophet Mohammed, he claimed, was solely an apostle of a religious call, who never attempted to establish a state or to be a political leader. The Prophet, Abdulraziq asserted dictated himself to purely religious propaganda without any tendency whatsoever towards temporal sovereignty, since he made no appeal in favour of a government and established no kingdom in the political sense of the word. However, the Prophet, according to Abdulraziq, had what can be called a prophetic

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[1] Mahmod M. Taha, "The Second Message of Islam." Syracuse University Press. Syracuse (1987).
[2] Sudan Government v. Taha and other. For more details and criticism on the trial see, 'Abdulla A. Ana'im, "Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan." Religion. vol. 16. (1986). p, 197-224.
[3] See, Ana'im, "Towards an Islamic Reformation: responses and reflections." op. cit. p, 97-117.
[4] Husain A. Amin, "*Hawl Al-Da'wa Ila Tatbieq Al-Shari'a.*" or "About The Call For Implementing Islamic law." op. cit. p, 167-225.
[5] Mohammed S. Al-Ashmawy, "*Al-shari'a Al-islamya wa al-qanune al-masry.*" or "Islamic law and the Egyptian law. " *Maktabat Madboli Al-saghir*, Cairo (1996.)

primacy which is a form of authority over his people to assist his religious mission and had nothing in common with the primacy of temporal sovereigns.[1] To support his argument, Abdulraziq, cited several Qur'anic verses and Hadith reports of the Prophet with his own reinterpretation. He also claimed that Islam does not provide a clear theory of political thought and institutions.[2] Despite the severe reaction to the publication of this book[3], many thinkers have adopted or supported, with variation, the idea of separating religion from the political system or the secular approach.[4]

d) The Recognition of Ijtihad

The rejection of the above attempts raises a significant question related to the role of Ijtihad in Islamic law. The question is: Who is authorised to perform Ijtihad and how can the results of such Ijtihad be recognised? To start with, Islamic law, unlike other religions, is a decentralised legal system. That is to say, there is no Church-like formal organisation in Islamic law which is responsible for interpreting and expanding the law or appointing and grading jurists who are authorised to perform such tasks. Therefore, Islamic law does not recognise a formal or religious group which is assigned with the task of Ijtihad. There is also no formal ranking or titles given by formal organisations like the Church, upon certain qualifications.[5] Instead, Ijtihad is open for any one who possesses the required qualifications for performing Ijtihad which are related primarily to the character and knowledge of the potential *Mujtahid*(the scholar who performs Ijtihad).[6] Once a person acquires these conditions, he normally would get the recognition from his fellow jurists, his students and the general public as a whole.[7] On the other hand, although the result

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[1] 'Ali 'Abdulraziq, "*Al-Islam wa Usul Al-hukm.*" or "Islam and the Bases of Power 'Ruling'." Cairo (1925). Reprinted by *Maktabat Al-Haya.* Beirut(1966).

[2] ibid. p, 78-80.

[3] The publication sparked a political and religious row resulting in the condemnation of the book by the Council of *Ulama Al-Azhar*. The author was at first forbidden from holding any public office but later the discipline was lifted. The timing of the publication played a leading factor in inflaming the row as it came shortly after the abolishing of Caliphate in 1924 and the expulsion of the last Caliph from Turkey and the ambition of king Fo'ad of Egypt to be a Caliph. See Metwalli, "Shari'a." op. cit. p, 29.

[4] Khalid Mohammed Khalid wrote a book entitled "*Min Hona Nabda.*" or "From Here we Start." Mu'assasat Al-Khargi. Cairo(1950), in which he echoed the main ideas of 'Abdulraziq. Later on, however, he reversed his ideas and asserted in his subsequent book that Islamic law is both religion and state. See his book, "*Al-Dawlah Fi Al-Islam*" or "The State in Islam." Cairo, (1980)

[5] Except for *Shiy'a*, a minority Islamic sect prevails primarily in Iran, which recognizes a set of religious ranks and titles.

[6] While the upright character is always required, the required degree of knowledge depends on the sort of Ijtihad. Unlimited Ijtihad '*Mutlaq*' requires far more knowledge than limited Ijtihad '*muqayd*'. See for details on conditions of Ijtihad and Mujtahid. Ibn Al-Qayym, "*I'lam Al-almuwaqi'en.*" op. cit. vol. 4. p, 156-267. Al-Khudari, op. cit. p, 426-439. Hasab-Allah, op. cit. p, 102-103

[7] The phenomenon continued to date, that while some jurists occupy the highest religious jobs in a Muslim country such as *Almuft*, they could not acquire the recognition for their Ijtihad the same as other jurists who might hold no formal religious job

of Ijtihad performed by a qualified Mujtahid through the recognised process should be seen as a manifestation of the will of God[1], it is not binding on the people unless it takes the form of Ijma.[2] The decentralisation of Islamic law poses a real challenge for the process of Islamisation when it attempts to choose a certain Ijtihad or to perform a new Ijtihad. For example the Sudanese Islamic Penal Code, based on a respectable Ijtihad in Islamic jurisprudence, has excluded the southern Sudan from its application since the majority of its population is non-Muslim.[3] Yet, some extremists claimed that such an exclusion is a wrong Ijtihad and accused the law as being non-Islamic.[4] Similarly, the codification of Islamic criminal law by both Al-Azhar and the Egyptian Parliament has been criticised for its alleged conflict with the principles of Islamic law.[5]

The best solution to overcome such a problem is by setting up a council of prominent jurists of Islamic law either at national or Islamic level in order to perform collective Ijtihad. Decisions reached by such councils would have more authority and credibility than individual Ijtihad. The existing Councils of Ulama (Muslim scholars) have not been greatly successful in overcoming the problem of recognising Ijtihad. The two main reasons for their ineffectual experience are firstly the governmental involvement which, due to the corrupt political systems in most Muslim states, is often looked at with great suspicion. The other reason is that, jurists are not acting on a full-time basis because they usually hold other time-consuming positions. Therefore, if such councils are to be effective they must be non-governmental institutions with full-time qualified jurists who must be chosen in a way that makes the council representative of the whole spectrum of Islamic jurisprudence.

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[1] Muslim jurists defer on whether the will of God is one or can be more than one. Some jurists hold the view that only one of the several opposing views on a certain topic may be said to be correct since it is impossible to say that one thing at the same time concerning the same person could be both lawful and unlawful. Whereas other jurists argue that there is no pre-determined truth in regard to Ijtihad matters and therefore, the result of Ijtihad may vary and various judgments may be considered as a truth on their merit. See, Kamali, op. cit. p, 384-386. Hasab-Allah, op. cit. p, 104-105.

[2] Shaltute, op. cit. p, 448.

[3] See 'Abdul-Rahman Sharfy who explained in detail the how such exclusion is based on a well-known Ijtihad in Islamic jurisprudence. "*Mawa'z min Qadiat masjid Al-thawrah*" or "Lessons From the Case of Al-Thawrah Mosque." *Dar Jami'at Efreqya*, Khartoum (1994).

[4] The Supreme Court, Sudan Government v. Mohammed Al-khulafi and others. No. 45. (1994). Unpublished ruling handed by the Supreme Court judge Mr. 'Abdul-Rahman Sharfy, who presided over the first trial court.

[5] For the code prepared by the Egyptian parliament see Safwat Hassan Lutfi et al, "*Tatbiq Al-shari'a*" or "The Application Of Islamic Law." Cairo (1987). For the code prepared by Al-Azhar see, Mohamed Akeda, "*Tatbiq Al-Tashre Al-Jena'i Al-Islami Fi Mesr*" or "The Application of Islamic Criminal Law in Egypt." *Dar Al-Fikr Al-Arabi*. Cairo (1988).

8) The Decline and The Resurgence of Islamic Law

Just as any other legal or social system, Islamic law has enjoyed periods of prosperity and recession. Deep analysis of the historical development of Islamic law and the underlying factors behind each development is beyond the scope of this introductory chapter. A historical sketch of the development of Islamic law can be provided by dividing, for the purpose of this chapter, the legal history of Islamic law into two main stages i.e. before and after the secularisation process.

a) The Application of Islamic Law In The Pre-Secularisation Era

The question whether Islamic law had been in full application before the implementation of Western codes in Islamic states is repeatedly raised whenever a call for the restoration of Islamic law is launched. Some voices claimed that Islamic law had not been in application except for the time of the Prophet and the righteous caliphs, while on the contrary other voices claimed that Islamic law had been applied throughout until it was forcibly removed.[1] The discussion is not a mere quest for historical facts but it goes far beyond that as it is being utilised in the debate over the legitimacy of restoring Islamic law. The bottom line of the former view is that a law which was applied only for fifty years should not be reinstated after a pause of fourteen centuries, while on the contrary the latter view rested its call for the restoration of Islamic law on the basis that it was the law of the nation for fourteen centuries until it was overthrown.

In fact, both views are inaccurate. Islamic law had been continuously, at least in theory, the law of the land for Muslim states until it was replaced in the late nineteenth century with Western-inspired codes. However, the application of Islamic law was not always faithful to its theoretical ideal. In general, the development of Islamic law in terms of its application took a descending course. Thus, during the first stage which lasted for approximately half a century (the time of the Prophet and his immediate successors 'the four righteous Caliphs' and ended in (40 AH 661 AD), which was the golden era for Islamic law during which it enjoyed its highest level of harmony between theory and practice. The next stages can be originated with the establishment of the *Umayyad* state (41-132 AH, 661-750 AD) and continued through the first two centuries

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[1] The first view has been voiced by some writers such as Ahmed Baha-Aldien, lawyers such as Mohammed Nor Farahat and even some Muslim scholars who called for the reinstatement of Islamic law such as Sayyd Qutb and Mohammed al-Najjar whereas most pro-Islamic law are in favour of the other view. See Tariq-Albishri, "*Al-Wad' Al-Qanuni Al-Mu'asir Bayn Al-Shari'a Al-Islamiyah Wa Al-Qanune Al-Wad'i*" or "The Current Legal Situation Between Islamic Law And Posittive Law." *Dar Al-Shuruq*. Cairo (1996). p, 71-84. Mohammed Nor Farhat, "*Al-Mujtama Wa Al-Shari'a Wa Al-Qanune*" or "Society, Islamic Law And The Law." *Kitab Al-Helal*. Cairo (1986).

of the Abbassid state (established in 132 AH, 750 AD). This period witnessed the first real deflection from the ideal of Islamic law when it shifted from the principle of *Shura*, as a method of assuming power based on consultation, to the principle of family ruling or hereditary system. This period however was the formative era of Islamic law as it witnessed the emergence of all schools of law and the distinguished scholars who built the basis of Islamic jurisprudence and who were still quoted in contemporary Islamic legal treatises as authoritative references.[1] This stage also witnessed the great expansion of the Islamic State which covered a huge area span from Spain to China. The infringement of Islamic law at this stage was minimal compared with the next stages which witnessed the fall *Abbassid* state and the emergence of small scattered states all over the Islamic world.

Many reasons can be accounted for the partial disuse of Islamic law, such as the weakness of the central government or *Khilafa*, and the power struggle. However, the most important factor that contributed to the partial withdrawal of Islamic law was the so-called phenomena of 'closing the gate of Ijtihad.' It meant the conviction of Muslim jurists at later stages (approximately by the turn of the fourth century AH, ninth century AD) that all essential questions of law had been thoroughly discussed and settled and the belief that Muslim scholars at that time onwards no longer had the necessary qualifications to perform independent reasoning and their essential function should be confined to the application and interpretation of what had already been established by previous prominent scholars.[2] As a result, Islamic law lost its vital mechanism which enabled it to expand and keep pace with the developments of society. Consequently, rulers had to resort to other means, which may or may have not complied with Islamic law, to regulate and accommodate the socio-political and economical developments.

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[1] For example Ibn Abi-Laiyla (d, 148 AH, 765 AD), Abu-Hanifa (d, 150-767) the founder of Hanif school, Al-Awza'i (d, 157-774), Sufiyan Al-Thawri (d, 161-778), Malik (d, 179-795) the founder of Maliki school, Abu-Yousif (d, 182-798) a prominent disciple of Abu-Hanifa and the first grand judge or chief of justice, Al-Shybani (d, 189, 805) a prominent disciple of Abu-hanifa and writer of the several authoritative handbooks of Hanafi school, Al-Shafi'i(d, 204-820) the founder of Al-Shafi'i school and the forefather of the science of Usul Al-fiqh, Abu-Thawr (d, 240-854) the founder of a school which did not survive, Ibn-Hanbal (d, 241-855) the founder of Hanbali school, Dawud Ibn Khalaf, (d, 270-884) the founder of Al-Zahri school and Al-Tabari (d, 310-932) the founder of a no longer existing school of law.

[2] See Schacht, "An Introduction." op. cit. p, 71. It should be noted that such a conclusion did not prevent the emergence of a great number of Mujtahid who even challenged such a tendency and performed independent reasoning but it was not the same as it was in the formative era and therefore no additional school of law emerged. Examples of latter Mujtahid Jurists are, Al-Mawardy (d, 450-1058), Ibn-Hazm(456-1065), Al-Juwayni (d, 478 AH, 1085 AD), Al-Ghazaly (d, 505-1111), Al-Kassany (d, 587, 119), Ibn-Taymiyya (d, 728-1403), Ibn-Al-Qayyim (d, 751-1350), Al-Shatiby (d, 790-1388), and lately Al-shawkany (d, 1255-1841).

The best test to examine to what extent Islamic law was in application is by following the development of the office of *Qadi* or Islamic Judge. The jurisdiction and the influence of Qadi determine the degree of respect that the state or the ruler pays to Islamic law. Thus, when Islamic law was in its hey day, judges had jurisdiction over most conflicts and their judgements were highly respected and enforceable. In latter stages, the office of Qadi was highly restricted and confined to only those matters which were traditionally regulated by explicit privations of Islamic law such as personal law and Hudud. Parallel to the office of Qadi there existed many quasi-judicial institutions and officials who had extensive jurisdiction such as *Muhtasib* (market inspector), *Wali Al-mazalim*(the investigator of complaints), *Sahib al-shurta* or the (head of the police force), *Al-hajib* (the doorman of the ruler), and even the rulers themselves. Although some of these institutions existed as early as the time of the righteous caliphs such as Muhtasib, their role had varied from one era to another. *Al-Hajib,* for example, which was established in the *Umayyad* state as a guard or a doorman became at some stages one of the most influential officers in the Islamic state next to or even more influential than the ruler, with extensive judicial jurisdiction.[1] The restriction of the Qadi's jurisdiction and the expansion of other institutions intensified during the period of socio-political weakness such as the period leading to the Mamluki State in Egypt or the last two centuries of the Ottoman Empire. Such periods witnessed various forms of diversion or deflection from the ideal of Islamic law.[2] Nevertheless, between the periods of deterioration, Islamic law had enjoyed intervals of revival during which it was reinforced largely by virtue of the religious zeal of some rulers[3].

Nevertheless, despite all the diversions from Islamic law and the restriction over its institutions, Islamic law had been always considered,

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[1] See Ibn khaldoon, "a*l-muqaddimah.*" op. cit. p, 168-171.

[2] 'Abdul-Rahim 'Abdul-Rahman, "*Al-qada Fi Misr Al-othmaniyah* 1517-1798." or "Judiciary in Ottoman Egypt 1517-1798." Matba'at Jameiat *Ein Shams*. Cairo (1976.). Shafiq Shahata, "*Al-itejahat Al-tashrie'ya fi Qwanin Al-belad Al-Arabiya.*" or "Legislative Trends in the Laws of Arab States." Institute of Higher Arab Education. Arab League. Cairo (1954). In these two books and others, references are usually made to the works of noted historians Al-Maqriezi and Al-Jabarti who recorded the decay of Islamic law which they had witnessed during Mamluki and Ottoman States.

[3] This is particularly true for the state of *Murabeten* in north-west Africa (447-541 AH, 1055-1146 AD) and the early days of the Ottoman Empire during which the Ottoman sultans, particularly *Selim* I (1512-20) and *Suleyman* I (1520-60), and their immediate successors, were even more serious than the first *Abbasides* in their desire to be 'pious' rulers, and they endowed Islamic law with the highest degree of efficiency which it had ever possessed in a society of high material civilization since early Abbassid time. According to Schacht, they based the whole administration of justice on the Shari'a, they even made the smallest unit of their civil administration coextensive with the Qadi, and put the local chief of police under the order of Qadi. The grand Mufti (the highest rank of scholars became one of the highest officers of state, and he was charged with assuring the observance of the sacred law and he was often consulted by the Sultan on whether the action of the government is in accordance with Islamic law. See Schacht, "An Introduction" op. cit. p, 89-93.

at least in theory, the superior law of the state which had not been publicly challenged. Seizing power through non-*Shura* methods i.e. without consultation, compelled the rulers to seek legitimacy by declaring their loyalty to Islam and submitting to the supremacy of its law.[1] Such a declaration would not have been credible enough without the support of the *Ulama* (the religious scholars). From then on, a new formula emerged to govern the theo-political relationship between the rulers and the Ulama as a representative of Islamic law. Such an 'organic' relationship had characterised most of the political history of Muslim states especially when the central government (*Khilafa*) lost its firm grip over its remote provinces. The theo-political relation was based on mutual dependence; the rulers secured the legitimacy of their power and the Ulama preserved the recognition of the supremacy of Islamic law including their monopoly of its interpretation. The relation was not always in balance; Ulama often had to make more compromises than the rulers did. However, no ruler dared to publicly challenge the supremacy of Islamic law nor to formally abandon its provisions. Rulers always sought justifications for their diversion from Islamic law based on *fatwa* (religious opinion) or Ijtihad even if it did not completely comply with Islamic rules.

b) <u>Secularisation and the End of the Shari'a's Supremacy</u>

The process of secularisation, which has its origins back at the beginning of the nineteenth century, was the fatal bullet which eventually led to the abolition of the bulk of Islamic law and its declared supremacy. The process of secularisation took different forms from one Muslim country to another. It was a dramatic and decisive process in some countries such as Turkey whereas it has been a gradual and incomplete process in other countries such as Egypt. For the purpose of this chapter, the discussion over the secularisation process will be confined to Egypt as an example for most Arab countries. It was ironic that Mohammed Ali's secularisation programme came immediately after the Ulama of Egypt, especially Al-Azhar, asserted themselves as the leading social and political power in Egypt when they led the resistance against the Napoleon campaign (1798-1801) and later successfully managed to compel the Ottoman Sultan to appoint their favourite man, which happened to be Mohammed Ali, as a *Wali* (ruler) of Egypt which proved

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[1] Although Islamic jurisprudence considers that Shura or *Bay'a* based on the people's consent is the only legitimate method of assuming power, it also recognizes, under the fear of *Fitna* or social unrest and guided by some Prophetic Hadiths, other forms of government de facto as long as they do not publicly defy Islamic law. See Al-Mawardy, op. cit. p, 8-32. Subhi Sa'id, "*Al-sultah Al-Siyasya Fi Al-Mujtama Al-Islami*" or "Political Powers in the Muslim Society." Cairo University Pres. Cairo (1991).

to be their fatal mistake.[1] Realising the extent of their socio-political influence, soon after assuming power, Mohammed Ali strove to undermine the autonomy of Al-Azhar as the main congregation of the Egyptian Ulama and to put it under his control. He used different methods to achieve his target such as the expulsion of the active Ulama, Shakh Omar Makram, home-arrest of shakh Al-Sharqawy or by weakening their self-coherence and unity. However, the most effective method used to undermine the autonomy of Ulama was by depriving them of their main revenue which came essentially from *Waqf* (pious foundations alienated in perpetuity) and *Iltezam* (tax farming).[2] This method rendered Al-Azhar unable to fund its educational programme and put it in desperate need of state financial support. Parallel to the decay of Al-Azhar educational institutions, Mohammed Ali set up his own modern educational programme which was based on establishing new high schools for medicine and engineering and also sending Egyptian students to study in Europe. Thus instead of reforming the existing institutions, Mohammed Ali and his successors preferred to leave the traditional institutions particularly the religious establishments untouched and duplicate their functions with newly established Western-inspired institutions. This dual education led to the emergence of a new class in Egyptian society which would become the elite that undertook the process of secularisation even further. What helped the secularisation programme was the massive and unprecedented expansion of the state administration beyond the traditional domain of the Muslim state.[3] For these new institutions, Mohammed Ali and his successors found themselves free of the duty of consulting the Ulama. The trend towards secularisation was continued by Mohammed Ali's successors. The British occupation of Egypt 1882, the defeat of the Ottoman Empire in the First World War 1918, the rise of nationalism and the independence of Egypt 1923, all at the same time were contributing and resulting factors in the course of secularisation.

If we concentrate on the effect of secularisation on the Egyptian legal system, it will demonstrate how big the loss of Islamic law was. In fact, the enactment of a series of laws was the obvious sign of the secularisation process which gradually departed from the principles of Islamic law until it eventually took over, except the field of personal law. Just as they did in education, Mohammed Ali and his successors followed

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[1] For details on the socio-political role of Ulama role see, Sa'id Isma'il 'Ali, "*Dawr Al-Azhar Fi Al-Siyasa Al-Misriyah.*" or "The Role of Al-Azhar in the Egyptian Politics." *Kitab Al-Helal.* Cairo (1986). p, 86-131.

[2] See, Daniel Crecelius, "The Course of Secularization in Modern Egypt." In John L. Esposito, "Islam and Development: Religion and Sociopolitical Change." Syracuse University Press. Syracuse (1980). p, 55. [Hereinafter, Crecelius].

[3] See Crecelius, "The Course of Secularization." op. cit. p, 60.

the strategy of duplicating the functions of the traditional institutions by keeping the traditional (Islamic) courts as they had been and establishing new courts with new codes to apply. Thus, parallel with the Ottoman *Tanzimat* and even before, Mohammed Ali enacted his first code i.e. *la'hat zira'at al-fallah* (1829) and then '*qanun Alfilaha*' (1830) which dealt primarily with agricultural activities and their related offences. Although the code made frequent reference to Islamic law, it did diverge from its rules in some aspects particularly on punishment for theft. The diversion continued as the legislative process progressively continued. The next code was enacted in 1837 called '*qanun al-iyassa al-malakiyyah*', which regulated some administrative activities and their related crimes.[1] Constitutionally, Egypt was part of the Ottoman Empire and according to '*faraman al-wiratha*' 1841[2] all Imperial laws must have applied in Egypt. However, the first Ottoman Criminal Code 1840 was never applied in Egypt.[3] A series of codes in diffident fields were promulgated[4]among which was a rather comprehensive code called '*jam'iyya al-haqaniyya*' 1844 which even went further than any previous laws in its departure from Islamic law.[5] A collection of Mohammed Ali Codes was re-promulgated in 1945 entitled '*qanun al-muntakhabat.*'[6] In 1845, special courts were established in Alexandria and Cairo to settle commercial conflicts between Egyptians and foreigners and in 1856, the Ottoman Commercial Code of 1850 was made applicable to these cases.[7] Sa'id pursued the process of enacting new codes such as the comprehensive Penal Code called '*qanun-nameh sultani*' which was published in 1855 based on the Ottoman Penal Code 1851 and the Land Law 1858.[8]

After a period of legislative activities during the reign of Sa'id and his successor Isma'il, one of the most significant steps as far as Islamic law was concerned, was the establishment of the Mixed Court and the

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[1] '*qanun Alfilaha'* was originally the criminal part of the ' *la'hat zira'at al-fallah*' which contained fifty five articles dealing with crimes and offences relating to agricultural activities. See, Baer Gabriel, "*Tanzimat* in Egypt: The Penal Code." Bulletin of the School of Oriental and African Studies. University of London (1963), 26. Part. 1. p, 29. [hereinafter, Baer, Tanzimat].

[2] '*faraman al-wiratha*' or the decree of inheritance issued by the Ottoman Sultan in the wake of the Mohammed 'Ali's defeat, confirming that the government of Egypt would be vested hereditary within his family and asserting in the same time that all laws of the Empire should be applied in Egypt. See, Baer, op. cit. p, 31.

[3] J. N. D. Anderson, "Law Reform in Egypt: 1850-1950." In P. M. Holt, "Political and Social Change in Modern Egypt." Oxford University Press. London (1968). p, 210. [Hereinafter, Anderson, Law reform].

[4] Such as '*la'hat al-jusur*' (1842) and '*qanun-namah siyasiyya*' (1843).

[5] Anderson, "Law Reform." op. cit. p, 210.

[6] For the text of the law of Al-muntakhabat see Filib Jallad, "*Qamus Al-idara Wa Al-qada.*" or "A Dictionary of Administration and Judiciary." *Al-matba'a Al-tejariya.* Alexandria(1891). vol. 3. p, 1323-1350. [Hereinafter, Jallad].

[7] Anderson, "Law Reform" op. cit. p, 211.

[8] For the text of the '*qanun-nameh sultani*' see Jallad, op. cit. p, vol. 3. p, 494-515.

promulgation of comprehensive French-modelled Codes in 1875 to govern conflicts involving foreigners and to replace the system of Capitulations according to which foreigners (Westerners) were tried before their Consuls rather than national courts.[1] The significance of this move was not confined to its obvious infringement of both the national sovereignty and Islamic law[2], but also to its future implications as it paved the way for the next decisive move towards ousting Islamic law almost entirely. Having been well-funded, well-managed, independent and prestigious, Mixed Courts being of a European style showed a sharp contrast to local Islamic courts which were kept untouched in their centuries-old traditional form. Moreover, the Egyptian legal experts who participated in the Mixed Courts as judges, lawyers or clerks became the human resources who would later enthusiastically undertake the task of transferring the Mixed Courts' European standards and traditions to the National Courts.

The most significant and far reaching step which determined the fate of Islamic law, not just in Egypt but even in other Arab countries, was accomplished in 1883 by the establishment of the National Court and the promulgation of six comprehensive Codes. These codes were substantially French in origin and all were modelled on those promulgated in 1875 for the use of Mixed Courts. Both the Commercial Code and the Code of Maritime Procedure were almost identical with the Codes of 1875 whereas the Civil Code, the Penal Code and the Codes of Criminal and Civil Procedure contained minor lip-service modifications.[3] Such a move left the Islamic courts, just as any other minor religious courts, with limited jurisdiction over the law of personal status. The straw that broke the camel's back came more than half a century later when Islamic courts were also abolished in 1955 and incorporated into

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[1] For details on the Capitulatory System see, Herbert J liebeany, "The Development Western Judicial Privileges." In M Khadduri and Herbert J liebeany, "Law in the Middle East." Washington, D.C. (1955). p, 309-330.

[2] The Penal Code for example went further in its departure of Islamic law than the French-modeled Ottoman Penal Code 1858 on which it was based. Unlike its Ottoman counterpart, the Egyptian code made nor reference to Islamic law and explicitly contrasted it in a number of articles dealing with murder (Art. 204) and adultery (Arts. 242-246). See for more details Baer, "*Tanzimat*" op. cit. p, 49. such a significant departure of Islamic law was justified on the fact that these codes were to apply to foreigners, however almost the same codes were made also applicable to Muslims later on in 1883.

[3] Such as the provision which stated that before capital punishment is executed the Mufti 'the state official Islamic jurist' must confirm that such a sentence is in conformity to the principles of Islamic law. This provision is still in force (Art. 381 Code of Criminal Procedure 1950). In fact, this provision is ineffective as the court is not obliged by the Mufti's opinion and it could even ignore it with no need to give reason. See the Supreme Court, ruling no. 3. 9 January 1989. p, 21 and ruling no 135. 28 May 1990. p, 780..

the main 'secular courts', yet an Islamic codified personal law was to be applied.[1]

The National Courts and six main Codes have become the basis of the Egyptian legal system up to date. What adds to the significance of the 1883 legal transformation is that due to the Egyptian influential role in the Arab world, the Egyptian legal scheme was copied by almost all Arab countries. This is thanks to the Egyptian legal experts, judges, lawyers and scholars who spread all over Arab countries carrying with them their home experience.

Without trying to offer an assessment of the content of the new Codes, there should be no doubt that they, as a manifestation of the European advanced legal thinking, contained valuable legal principles and guarantees which may even have contributed to the development of Islamic law itself. In addition, the establishment of the National Courts helped to unify the Egyptian judiciary maybe for the first time and to modernise the legal system as a whole. Nevertheless, the point which needs to be stressed here is that the legal transformation of Egypt, as it was in most Muslim states, was a decision of a single man (the ruler) or at best a small elite class. It was never a popular desire and people were never consulted. It was a choice of the Egyptian elite, who either studied in Europe or in European-style local educational institutions, and gave themselves the right to act on behalf of the Egyptians who were at the time by large an illiterate population.[2] It was not sensible, at least from the comparative point of view, to transform a whole legal system, whatever its success, which is designed for another utterly different society. It is needless to say that the success of a certain social or legal institution in a given society does not guarantee its success in other even similar societies, let alone different societies. The negligence of the local social prerequisites and conditions was so obvious that the codes were drawn up in French and then translated into Arabic. The translation was not even totally accurate so that the Supreme Court often referred to the French text, as the authentic source, for clarification.[3] As an expected corollary, the teaching of law has also been modelled on the European

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[1] The codification of Islamic law of personal status started officially in Turkey by the enactment of the Law of Family Rights (1917). The first Egyptian version of Islamic law personal law was first promulgated in 1920 which had been repeatedly amended in 1929, 1931, 1943, 1946, 1979. The existing Islamic personal law was enacted in 1985.

[2] It was estimated that 91.2% of males and 99.4% of females in Egypt by the end of the nineteenth century were illiterate. British Sessional Papers 112 1899: 1003, 1007. Quoted in Crecelius, "The Course of Secularization in Modern Egypt." op. cit. p, 61.

[3] Al-Bishri, op. cit. p, 43.

and particularly the French style and French legal texts and scholars become the basic material for law teaching in Egyptian law institutions.[1]

Given its extraordinary implications, the legal transformation of Egypt deserves more investigation and intensive studies which yet to be undertaken. It is not yet absolutely clear why such a transformation was carried out in such a hasty way. The formal justification for such a transformation was that by adopting the Codes of the Mixed Courts there should be no need for such Courts and therefore Egypt could regain its legal and judicial independence.[2] Even such an objective had to wait more than sixty years to be achieved when the Mixed Courts were abolished on 15 October 1949. The official documents state that there was a suggestion for a legal reform based on Islamic law and local customs.[3] The suggestion was rejected on the grounds that it is difficult to accomplish without stating in which way.[4] Contemporary Muslim jurists are highly suspicious of the circumstances leading to the legal transformation of Egypt.[5] Some jurists blame the influence of the British occupation in 1882, and others highlight the role of S. E. Nubar.[6] In fact, the Egyptian government at the time, except for the government of the revolution, had no desire to reinforce Islamic law. That was clear from Cabinet discussions over legal reforms and from the formation of the Commission vested with the task of establishing the National Courts and Codes. In addition to the Minster of Justice, the Commission consisted of eight members, four of which were non-Egyptian and four Egyptian

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[1] The first law teaching institution was set up in 1868 which in 1925 become a faculty of law in the first Egyptian University. The teachers, the teaching language and the syllabus were mostly European and especially French. The English influence intensified after the British occupation. Mr. Victor Vidal 1868-19-891, who incidentally was brought by Isma'il as an engineer, was the first Dean of the law institution. Among the ten deans of the institution until it become a faculty were only two Egyptians. The influence of the French jurisprudence, was still, though less than before, observable on the Egyptian law since the French law is regarded as the historical source of the Egyptian law and because of the large number of the France-graduate Egyptian scholars. For the history of the faculty of law, see Mohammed Kamel Mursy, "*Kuliyat al-huquq*" or "The Faculty of Law." In "*Alkitab Al-Zahabi Li-Almahakim Al-Ahliyahi.*" or "The Golden Book of the National Courts." Edited in the fiftieth anniversary of the National Courts. Al-matba'a Al-Ameriyya. Cairo (1937). p, 409-423

[2] See the Cabinet discussion on the legal reformation. The Cabinet Record. 2 November 1882. Cited in "The Golden Book of the National Courts." op. cit. vol. 1. p, 103.

[3] The suggestion was made during *'Orabi* Revolution (1881-1882). Qadri Pasha who was the Minster of Justice during the revolution government (September 1881-February 1882), had managed to codify two codes in Islamic civil and personal laws. See Al-Gendi, op. cit. p, 698.

[4] See the report of Husain Fakhri, the Minster of Justice, submitted to the Cabinet in 7 December 1882 on the legal reform. Cited in "The Golden Book of the National Courts." op. cit. vol. 1. p, 103.

[5] This applies for the majority of pro-Islamic law jurists. for example, Mohammed El-Awa, "*Usul Al-Nizam Al-Jena'i Al-Islami.*" or "The Basic of Islamic Criminal Law." *Dar Al-Ma'arif.* Cairo (1978). p, 13-33. Al-Gendi, op. cit. p, 693-699.

[6] An Armenian Christian who was the Foreign Minster during the reign of khedive Isma'il and he who suggested and negotiated the establishment of the Mixed Courts. He became the Minister of Justice before and after the British occupation (April 1878- June 1878. December 1883- June 1888).

among of which there were two non-Muslims and there was no representative of Islamic law or Al-Azhar.[1]

c) The Resurgence of Islamic Law

The resurgence of Islamic law is related and connected with the resurgence of Islam itself and this is beyond the scope of this chapter.[2] The focus here will be on the legal side and precisely on the reaction of some legal experts towards the idea of restoring Islamic law. For the aforementioned considerations, the focus will continue to be on the case of Egypt.

With the turn of the twentieth century, it seemed that the new legal system had firmly established itself. In general, there was no reported hostility among the legal experts towards the new legal system. On the contrary, there was observable enthusiastic support for the new system which was viewed as a big leap in modernising Egypt. The supportive atmosphere manifested itself in the prestigious position vested upon the legal experts which in turn made the faculty of law one of the most popular faculties that was reserved for the noble class of the society. The fiftieth anniversary of the National Court in 1933, was an excellent occasion for the legal professionals to show their determined support of the new system.[3]

Nevertheless, a noticeable phenomenon started in the thirties and made a significant contribution to the later call to restore Islamic law. It was the inclination of many leading legal experts to write in Islamic law, not necessary accompanied with calls for its restoration. Their writing was obviously different from the traditional writing of Muslim jurists. Influenced by the Western style in legal authorship, they strove to produce Islamic jurisprudence in a well arranged easy to understand form. The have also followed a comparative approach which tried to help the reader to compare the concepts and institutions of Islamic law with their counterparts in Western legal systems.[4] The theo-legal authorship

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[1] See names and positions of the Commission's members. "The Golden Book of the National Courts." op. cit. p, 100.

[2] For valuable studies in the phenomena of Islamic resurgence see Ibn Yusuf, Ahmad, "The Politics of Islamic Resurgence through Western Eyes: A Bibliographic Survey." North Springfield, Va.: United Association for Studies and Research. (1992). Ali E. Hillal Dessouki, "Islamic Resurgence in the Arab World." New York, N.Y. Praeger, (1982).

[3] See supportive articles in "The Golden Book of the National Courts" written by high rank judges and lawyers who described with pride how successful the legal transformation was. See also in the same book how the occasion of the fiftieth anniversary of the National Courts was festively celebrated. op. cit. p, 254-282.

[4] See for example 'Ali Badawy, a prominent scholar of criminal law, "*Usul Al-shara'i*" or "The Origins of The Legal Systems." *Majalat Al-qanun wa Al-iqtisad* or Journal of Law and Economic. The Faculty of Law. Cairo University. vol. 5. (1935). p, 200. 'Ali Sadiq Abu-haif, "*Al-diyya fi Al-shari'a Al-Islamiyya*" or "Criminal Compensation in Islamic law." Ph.D. thesis. Cairo University. (1932).

of the thirties has become the model for Islamic law studies and has largely facilitated the task of the pro-Islamic law movement as it produced Islamic law, at least in its outer appearance, in a new accessible form similar to modern Western laws.

Parallel to the theo-legal writing there were some cautious voices calling for the restoration of Islamic law coming from some leading scholars such as Adbul-Razzaq Al-Sanhuri[1] who called for the abolition of the existing Civil Law and replaced it with a national law which "must be based on Islamic law as far as possible since it was the law of Egypt before the legal transformation and as it is one of the distinguished legal systems."[2] The emergence of several theo-political societies, notably the movement of *Al-Ikhwan Al-Muslimun* or Muslim Brothers[3], which included many legal experts, has strengthened the pro-Islamic law movement. The apparent illustration of the attitude of the pro-Islamic law legal experts came when the new civil law was under consideration in parliament. A group of law professors, high rank judges and Ulama of Al-Azhar strongly criticised the civil law bill and offered another bill based entirely on Islamic law.[4]

d) <u>The Constitutionality of the Revival of Islamic Law</u>

The movement towards restoring Islamic law had been until 1971 based on religious and historical foundations, but from 1971 it found its legal basis in the second article of the Egyptian Constitution (1971)[5] which provided unprecedented provision which states that Islamic law is 'a chief source' of the legislation.[6] The introduction of the constitutional clause, which paralleled with the phenomenon of Islamic resurgence, has

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'Abdul-qader 'Oda, "*Al-tashri' Al-jena'I Al-islami.*" or "Islamic Criminal Legislation." *Maktabat Dar Al-turath.* Cairo 1st edition(1949) reprinted (1982). This book was a pioneering experiment as it was the first book in Islamic criminal law which followed the same arrangement of criminal law text-books which are studied in the Egyptian faculties of law.

[1] Al-Sanhuri was a Professor of civil law and is widely deemed as Dean of Arab legal jurisprudence and the father of the civil law as he undertook the task of drawing up the Egyptian Civil Law in 1948 which has become the basis of almost all Arab Civil Codes. Among his several writings he is noted for his authoritative multi-volumes treatise on civil law "*Sharh Al-qanun Almadany*" or "Elucidation Of The Civil Law." (1952), and also his notable six-volumes treatise on Islamic civil law entitled "*Masadir al-haqq fi Al-fiqh Al-islami*" or "Obligations in Islamic law." (1967) He also actively participated in the making of civil law in several Arab countries such as Iraq, Libya and Kuwait.

[2] He also laid down a practical approach on how Islamic law can be utilized as source of the civil law. 'Abdul-razzaq Al-sanhuri, "*Ala Ay Asas Yakun Tanqieh Al-Qanun Al-Madani Almasri*" or "On Which Basis The Egyptian Civic Law Should Be Amended." "The Golden Book of the National Courts" op. cit. p, 106-143.

[3] Founded by Hassan Al-Banna (1907-1949).

[4] Among this group were some the Supreme Court judges, the precedent of the Court of Appeal of Alexandria and representatives of the four Islamic schools of law. See Al-Gendi, op. cit. p, 700.

[5] Promulgated on 11 September 1971.

[6] Previous Egyptian constitutions such as of 1923 and 1964 stated that Islam is the official religion of the state with no reference to its Legal connotation. See for details, Mayer "Law and Religion in Middle East." op. cit. p, 135-139.

posed legal controversy, up to now, over its legal significance and its effect on 'non-Islamic' laws. At the judicial level, the Supreme Court has been careful not to be involved in such a theo-political rather than a legal issue. Therefore, it has taken a taken a firm stand that the constitutional clause is not executable on its own as it is only a call to the legislative body to observe the principles of Islamic law. Thus, without being embodied in acts enacted by the legislator, courts have no right to implement it.[1]

Being constitutionally supported, the pro-Islamic law movement has intensified its pressure for the restoration of Islamic law. In 1976 the rector of Al-Azhar set up a committee to revise the 'secular' existing laws in order to amend them in accordance with Islamic law[2]. Meanwhile the Ministry of Justice was making its own efforts in this field when it set up a a High Committee under the chairmanship of the president of the Supreme Court in order to bring the Egyptian legal system in harmony with Islamic law.[3]

In 1980, the Egyptian Constitution was amended so as to make Islamic law 'the chief source' instead of 'a chief source' of Egyptian legislation.[4] Whatever the motive behind such an amendment, it was followed by general discussion in parliament in order to consider the implications of such an amendment and to contemplate the necessary measures to bring the legal system into harmony with Islamic law. Consequently, five sub-committees were set up, each for a branch of law. The bulk of the members were law professors and high rank judges mostly from the Supreme Court. After fourteen months, the Islamic codes were ready but the government was highly reluctant to take any concrete measures towards implementing such codes and therefore no modification was achieved. The restoration of Islamic law was brought again to the surface in 1985 when parliament accepted a private member's request to open a general discussion over the re-application of Islamic law. The discussion this time attracted more publicity as it was not confined to parliament but was transferred also to the mass media. Nevertheless, the outcome of this discussion was the same as the previous one and no legislative amendment was accomplished.[5]

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[1] The Supreme Court, ruling no. 27. 18 January 1990. p, 182.

[2] The committee consisted of six members, four of which were from Al-Azhar whereas the rest were high rank judges. In fact, Al-Azhar started its efforts in codifying Islamic laws earlier in 1967 but it was reinforced after the promulgation of the new Constitutional. See, Al-Sayd 'Abdul-Aziz Hindy, "*Adwa Ala Taqnin Al-Shari'a Al-Islamiya.*" or "Lights on the Codification of Islamic Law." *Dar Al-Sahwah.* Cairo (1987). p, 8-9. [Hereinafter, Hindy].

[3] The Decree of the Minster of Justice no. 1642(1975).

[4] The amendment was based on the result of a referendum held on 22 May 1980.

[5] The request was handed in 26 January 1985 and the discussion was closed in 20 May 1985 with the assurance of the chairman of the Parliament that it did not reject the application of Islamic law but

Despite the popularity of the pro-Islamic law movement in Egypt as in many other Muslim states[1], the decision to restore Islamic law is not an easy task for any government. In addition to the economic and international concerns, there are at least three main obstacles or challenges, with variable significance from one state to another, that need to be tackled before considering the restoration of Islamic law. The obstacles are the legitimacy of the political regimes, the concern for non-Muslim minorities, and lastly the issue of human rights.

Elsewhere in the Muslim world, many Islamisation programmes have been successfully adopted either in full such as in Pakistan, Iran and the Sudan or partially as in the Emirates, Kuwait[2] and most recently in Qatar.[3]

e) Legal Experts and the Revival of Islamic law

As has been demonstrated above, legal experts, along with religious jurists and politicians, are playing an essential role in the battle over the restoration of Islamic law. Just before leaving this issue, it would be of great benefit to survey the current orientations among selected prominent Egyptian legal experts. Generally speaking, as far as the restoration of Islamic law is concerned, legal experts can be divided into three sections or groups: those who are enthusiasts, sympathetic and reluctant. Legal experts in all groups are graduates from either French universities or local French-modelled law faculties. In the following paragraphs, a number of

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there is no need to rush with such an important issue and further research is needed. The Parliament Record no. 70. See for more details 'Ali Hassanain, "*Hatta la Tazal Al-Shari'a Nassan Shakliyan*" or "Lest Islamic Law Stay a Nominal Text." *Al-Zahra Lil-I'lam Al-Arabi*. Cairo(1985.

[1] An opinion pool covers all Egyptian provinces conducted by The National Institute for Social and Criminal Research revealed a remarkable popularity of Islamic law among the Egyptians both Muslims and non-Muslims. The pool revealed that 98% of Muslim would, in general, support the application of Islamic law, and surprisingly 63% of non Muslim, mainly Christian would also endorse such an application of Islamic law. For more details, see "An Investigation Of The Public Opinion In Egypt About The Application Of Islamic Law." An opinion pool conducted by The National Institute for Social and Criminal Research. Cairo (1985). Supervised by Ahmed Al-Majdub.

[2] See for details in Islamisation programmes, Norman Anderson, "Law Reform In The Muslim World." The Athlone Press. London (1976). Schacht, "Islamic law in Contemporary States." op. cit. p, 132-147. Fred R. von der Mehden, "Islamic Resurgence in Malaysia." In Esposito, "Islam and Development" op. cit., p 163-181. Daniel. P. Collins, "Islamization of Pakistani Law: A Historical Perspective." Stanford Journal of International Law. Spring(1988). p, 518. John L. Esposito, "Voices of Resurgent Islam." Oxford University Press (1983).

[3] Islamic law in Qatar, the same as in other Gulf States, was not abolished altogether. Islamic Court (*Al-Mahakim Al-Shari'yya*) has a complete jurisdiction over the law of personal status and limited jurisdiction over other criminal and civil cases which are tried before Courts of Justice(*Al-Mahakim Al-Adliyya*). The most recent development has been the promulgation of the Law of Judicial Power no. 6 (1999) on 9 May 1999 whereby Islamic courts have been given a general jurisdiction over the bulk of criminal, civil and commercial cases whereas Courts of Justice are given limited jurisdiction mostly over cases which involve foreigners and administrative conflicts. Arts. 13-14. For the text of the law see Al-Raya Newspaper. 10 May 1999.

prominent legal experts, along with their positions and examples of their publications will be cited as examples for each group.[1]

The enthusiastic group includes for example, Abdul-Naser Al-Atar, the Dean of the Faculty of Law, The University of Assute[2]; Abdul-Halim Al-Gendi, the former head of the "State Legal Department"[3]; Abdul-Hamid Metwali, a prominent professor of constitutional law[4]; Mahmude Al-Shirbeny, a former vice-president of the Supreme Administrative Court[5]; Faruq Mursi, a former president of the Court of Appeal[6]; Mohamed Mohy-Aldien Awad, a prominent professor of criminal law, a former dean of the Faculty of Law, Cairo University In Khartoum, and the president of Al-Mansora Univesity[7]; Tawfiq Al-Shawy, a prominent professor of criminal law[8]; Al-Sayd Abdulaziz Hindy, a Supreme Court judge[9]; Sufi Abu-Talib, a leading professor of history and philosophy of law, a former Chairman of the Egyptian Parliament and the president of Cairo University[10]; Ali Ali Mansour, a former vice-president of the Supreme Administrative Court and the director of Islamisation programmes in Libya and UAE[11], Mohammed Salim El-Awa, a well-known professor of criminal law and a member of the Egyptian Society for Human Right[12]; and Tariq Al-Bishri, the former president of the Administrative Court.[13]

The sympathetic group includes some scholars who show great interest in Islamic law studies and who sympathise with the calls for its restoration without expressly asserting their views. It includes for example, Ali Rashid, a former dean of the Faculty of Law, the University

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[1] Although the number in each group is not based on accurate survey, it gives a suggestive or approximate indication of the legal experts' orientations.

[2] See his book, "*Tatbiq Al-Shariea Fi Al-'Alim Al-Islami*" or "The Application of Islamic Law In The Muslim World." *Dar Al-Fadela*. Cairo(1993),

[3] Al-Gendi, "*Nahwa Taqnien Jadied Lelmu'amlat Wa Al-Aukuba.t.*" op. cit. p,. 629-800.

[4] 'Abdul-hamid Metwali, "*Al-Shari'a Al-Islamiyah Ka-masdar li-al-dustur.*" or "Islamic Law As A Source of The Constitution" *Munsha'at Al-ma'arf.* Alexandria, 2ed (1975).

[5] See his book Mahmude Al-Shirbeny, "*Ta'mulat fi al-shari'a al-islamiyya.,*" or "Contemplating Islamic Law." *Al-Hai'a Al-Ama Lil-Kitab*. Cairo (1987)

[6] See his book, Faruq Mursi "*Al-Shari'a Asl Ahkam Al-Qada.*" or "Islamic Law The Basis Of Judicial Decisions." *Dar Al-Aqsa*, Cairo (1987)

[7] See his book, Mohamed Mohy-Aldien 'Awad "*Al-Qanun Al-Jena'i fi Al-shari'a Al-islamiya.*" or "Criminal Law In Islamic Law." Cairo University Press(1986),

[8] See his book, Tawfiq Al-Shawy "*Siyadat Al-Shari'a Fi Misr*" or "The Supremacy of Islamic Law in Egypt" *Al-Zahra Lil-I'lam Al-Arabi*. Cairo (1986).

[9] See his book Al-Sayd 'Abdulaziz Hindy "*Adwa Ala Taqnin Al-Shari'a Al-Islamiya*" or "Lights On The Codification Of Islamic Law." *Dar Al-Sahwah*. Cairo (1987).

[10] See his book Sofy Abu-Talib, "*Tatbiq Al-Shari'a Al-Islamiya Fi Al-Bilad Al-Arabiya.*" or "The Application of Islamic Law in Arab States." Dar-Al-Nahda. Cairo (1978).

[11] See his book, 'Ali 'Ali Mansure "*Nizam Al-Tajrim Wa Al-Iqab Fi Al-Islam.*" or "The System Of criminalisation And Penalization In Islam." Cairo(1976)

[12] See his book, Mohammed Salim El-Awa "*Usul Al-Nizam Al-Jina'i Al-Isdlami*" or "The Basis Of Islamic Criminal Justice System." *Dar Al-ma'arif.* Cairo(1978).

[13] See his book Tariq Al-bishri, "*Al-Wad'Al-Qanuni Al-Mu'asir Bayn Al-Shari'a Al-Islamiyah Wa Al-Qanune Al-Wad'i*" or "The Current Legal Situation Between Islamic Law And Positive Law." *Dar Al-Shuruq*. Cairo (1996).

of Ein Shams[1]; Najib Husni, a prominent professor of criminal law and formerly a Dean of the Faculty of Law and the president of Cairo University[2]; Ma'moun Salama, a distinguished professor of criminal law and formerly the president of Cairo University[3]; Husni Al-gendi, a professor of criminal law and currently the Dean of Faculty of Law, University of Hilwan.[4]

The third group consist of some scholars who are very reluctant to accept the idea of restoring Islamic law, but they never say that publicly or expressly. Instead, they offer different reasons why Islamic law should not be restored and strive to make their justification as religiously acceptable as possible by offering a new interpretation or referring to some abandoned trends in Islamic jurisprudence such as the aforementioned school of *Al-mu'tazela* or the theory of *Al-tofy*. Giving the difficulty of declaring such a view, this group includes for example, Mohammed al-'Ashmawy, an Appeal Court judge and the president of the State Security Court[5]; Mustafa Mar'i, a leading civil law professor[6]; Mohammed Nor Farhat, the chairman of the department of the History and Philosophy of Law, the University of Zeqazeq.[7]

9) Conclusion.

It has been shown how Islamic law is quite different from any other modern legal system. This difference is not only in the content of Islamic law as even modern laws differ largely on many points of their content. The real character which distinguishes Islamic law is its religious nature that casts its shadow over all the Islamic legal process. Being conceived as a revealed law, Islamic law has, more than any legal system, rigid boundaries or limits that cannot be exceeded. The sacred texts i.e. the Qur'an and the Sunna, as they are the main body of Islamic law, are the main boundaries. The fact that they are unchangeable and un-expandable has posed a real challenge for Muslim jurists over the centuries. For modern lawyers it may seem strange and also difficult if not impossible to

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[1] See his book, 'Ali Rashid "*Al-Qanun Al-Jina'y Al-Islam*i" or "Islamic Criminal Law." Cairo (1969).
[2] See his article, Najib Husni "Islamic Fundamentalism and The Criminal Law." L'egypte Contemporaine. 1988. No. 411-412. p, 5-23
[3] See his article, Ma'moun Salama, "General Principles of Criminal Evidence in Islamic Law." In M. Cherif, Bassiouni, "The Islamic Criminal Justice System." Ocean Publications, INC. New York (1982). p. 109-127.
[4] See his book, Husni Al-Gendi, "*Ahkam Al-Mar'ah Fi Al-Tashrie Al'jena'i Al-Islami*" or " Woman And Islamic Criminal Law." *Dar Al-Nahdah Al-Arabiyah*. Cairo (1993).
[5] He has articulated his view in his several books in Islamic law. See for example Mohammed Al-shmawy "*Usul Al-Shari'a*", or "The Origins of Islamic law." 3ed. Edition. *Sinai Le-annasher, Cairo(1992).*
[6] See his interview, Mustafa Mar'i, Al-Musawer Magazine. 25 January 1984.
[7] See his book, Mohammed Nor Farhat "*Al-Mujtama Wa Al-Shari'a Wa Al-Qanune*" or "Society, Islamic Law And The Law." *Kitab Al-Helal*. Cairo (1986).

deal with unchangeable law. However, it has been demonstrated in this chapter that despite the religious character of Islamic law which imposes a certain degree of inflexibility, this must not preclude its development and progress just as with any other legal system. Reviewing the legal content of the Qur'an and Sunna, it has been proved that such content, for its most part, is both general and limited. With the strong encouragement for reasoning, Islamic law as has been demonstrated, is both renewable and expandable. This however cannot be achieved without a creative utilisation of Ijtihad and reasoning based on open-minded thinking and a great deal of bravery and self-confidence.

For the first four centuries, Muslim jurists showed a great deal of legal proficiency as they managed to prove the ability of the limited unchangeable texts to accommodate the socio-political changes which were accelerated by the great and rapid expansion of Islamic states with the incorporation of many divergent cultures and civilisations under Islamic law. The basic feature of the success of earlier jurists resided in their good comprehension of Islamic law and its own special mechanism for development. They managed to minimise as far as possible the religious character of Islamic law, to exploit the quality of Ijtihad to its limit and they were able to distinguish between the permanent and the temporary, the general and the specific rules of Islamic law. They were self-confident and brave enough to declare the limitation of the texts and had the ability to devise additional sources to supplement the limited text. The result was that they created a real legal system based on reasoning and logic with as little as possible irrational religious elements. In the word of Gibb, the prominent orientalist, their works are considered "from the view of logical perfection, one of the most brilliant essays of human reasoning."[1]

The later generations of jurists lacked the same legal skills and the courage to push the work of the earlier jurists even further. Thus, the bulk of their work was much less inventive and concentrated largely on illustrating and detailing the product of the previous jurists rather than inventing their own. However, if we take a wider view, the weakness of Islamic law in these stages should not be attributed solely to the law itself nor the jurists since such weakness was a logical reflection of the general weakness of the society as a whole. Law, just as any social institution, influences and is influenced by the whole socio-political and economic development. Therefore, Islamic law was no exception as it deteriorated along with other Islamic socio-political institutions which entered a long period of decline particularly after the fall of Baghdad the capital of the Islamic state '*Al-khelafa*'. On the other hand, the Western legal systems

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[1] Gibb, op. cit. p, 61.

were progressively advancing as part of the Western development. The Islamic-Western encounter, largely through the European invasion of most Muslim countries, was an occasion to show the contrast between the advanced Western legal system and the Islamic jurisprudence which had been standing still for a long time. The ambitious Muslim rulers of the nineteenth and the beginning of the twentieth century, as they were trying to modernise their countries following the Western style, had neither the confidence nor the patience to revive Islamic jurisprudence. Instead, they have tried to import Western civilisation as a whole package with its culture and legal system. The fact that the legal transformation was accomplished while Muslim states were under occupation casts doubt on whether or not such a transformation was imposed from outside.

The total or partial removal of Islamic law in the second half of the Nineteenth century for more than a century deprived it from interacting with the most dynamic era in human history which witnessed unprecedented developments in all fields including law. Therefore, any attempt to restore Islamic law must consider such points carefully and take into account that Islamic law, or at least its most part, has become a historic rather than a living legal system. What makes light of such an obstruction is the extensive writing of modern Muslim jurists who are trying keep Islamic law alive and bring it to date and confront it with the latest developments.

Nevertheless, any move towards restoring Islamic law should not be an emotional move and it should instead provide answers to many serious questions. There are in particular certain steps which may help to provide such answers and facilitate the reinstatement of Islamic law. Firstly, the quality of Ijtihad should be used to its full capacity without being bound by the Ijtihad of previous scholars which was devised for a different society. Moreover, the novel and unprecedented genuine methods of interpretation of the texts should be received with more tolerance. The collective Ijtihad through councils consisting of knowledgeable, open-mined independent scholars is the best way to offer a recognised Ijtihad in modern times. In addition, Western legal systems and jurisprudence are products of admirable and valuable legal thinking which should not looked at with hostility but should be utilised to their limits without undermining the basis of Islamic law. Finally, Islamic law should not be restored under any form of undemocratic government which takes it as a cover for its regression and oppression. The game previously played between Ulama or jurists and rulers to legitimise an unjust government for the sake of declaring Islamic law as the law of the land should not be performed anymore. If Islamic law is claimed to have been removed

unfairly and against the will of the people, it similarly should not be restored without the free will of people.

On the other hand, by providing a brief background of Islamic law and the mechanism according to which it works, this chapter helps to understand the different factors which affect Islamic approach towards crime victims. It shows how the religious character with its immutability and clemency, the pre-Islamic Arabian custom with its simplicity and individuality, and the juristic work over the years have all contributed in designing and shaping the Islamic approach towards crime victims. It also explains how and to what extent can such an approaches be modified and developed. Being part of a religious law does not mean such an approach, or most of its components, is unchallengeable. In fact, as demonstrated in the coming chapters, Islamic approach has developed in many aspects over the centuries and is still able to be developed further.

Chapter (3) The Victim's Role in the Islamic Prosecution System

1) Introduction.

Prosecution is one of the most consequential stages in the criminal process. It draws a line between two stages, investigation and trial. During the former stage, there is only an allegation or suspicion that a person has committed a crime, but once the decision to prosecute has been taken a new phase has been entered into which the alleged offender is strongly believed, at least in the prosecutor's mind, to have committed the crime. In other words, being prosecuted means that there is sufficient evidence to convince the prosecutor that there is a reasonable or a realistic prospect of the alleged offender being convicted. Subsequently, the prosecuted person has to pass a turbulent route leading to an uncertain destination, and to undergo a long process during which he is more likely to suffer from worry, anxiety, fear and stress. The worst end of the prosecution is a conviction followed by a punishment, but even if the consequence is an acquittal, the person prosecuted should be seen as a loser of time, money and above all self and social esteem, particularly when the familiar expression "no smoke without fire" is put to use.[1]

The seriousness of the prosecution process raises a question about who should be assigned with its responsibility, the victim, the state or both. There is a reasonable argument for each of them. In modern Western legal thinking, the role of the victim in the prosecution process still poses a controversy. Apart from English law, almost all Western criminal justice systems adopt the principle of public prosecution in which case the victim has no formal role to play in the process. English law, on the other hand, retains a model of private prosecution, in which the duty of prosecution rests, at least in theory, on the private individuals and indeed the victim. Nevertheless, the establishment of public prosecution bodies, such as The Director of Public Prosecutions (1879) and the Crown Prosecution Service (1985), the restrictions over the individuals` right to prosecute and the reluctance of individuals themselves to undertake prosecutions have raised questions over the proper character of the English prosecution system.[2]

Much the same can be said about the jurisprudential attitude, with some jurists regarding the prosecution as a function of the state in which

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[1] See, Andrew Ashworth, "The Criminal Process. An Evaluation Study." Clarendon Press. Oxford (995). p.161. [hereinafter, Ashworth, Criminal Process].

[2] See, Alec Samuels, "Non-Crown Prosecutions: Prosecution by Non-Police Agencies and by Private Individuals." Criminal Law Review (1986). p, 33. [hereinafter, Samuels].

case victims are excluded from the process.[1] At the other extreme, some jurists endorse the reintroduction of the victim's participatory role in the criminal process, including the prosecution[2] or even exclude the state itself from the process and return to the original arrangement of the process where the victim and his offender were seen the only parties to the conflict[3]. In the middle, there are those jurists who content with the victim being well consulted, informed and respected.[4]

In this chapter, the concern is precisely directed towards the victim's role in the Islamic prosecution system; its nature, extent and implications. How has this role developed over the centuries? To what extent has it been influenced by the latest legal developments in Muslim countries? As a preparation to answer such questions an overview of the Islamic prosecution system is reviewed.

2) The Islamic Prosecution System

Prosecution as an independent stage was not as clear in Islamic law as it is in modern legal systems. It was often incorporated within either the trial or investigation stage. The few available mediaeval authoritative treatises treating judicial procedural subjects often dealt with judicial proceeding as a whole with no special reference to criminal proceedings especially prosecution.[5] This was probably because Islamic judiciary, in its early era, did not recognise specialisation, and judges therefore held a general jurisdiction which included all sorts of litigation. On the other hand, the area of prosecution, like many other areas of procedural matters, has not been systematically organised by the formal sources of Islamic law. It is held that Islamic law has deliberately avoided establishing a detailed or a fixed system of prosecution which would have

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[1] Andrew Ashworth, "Punishment And Compensation: Victims, Offenders And The State." Oxford Journal for Legal Studies. vol. 6. (1986). p, 112-[hereinafter, Ashworth, Punishment And Compensation]. Peter Duff, "The 'Victim Movement' And Legal Reform." In "Victims Of Crime: Anew Deal.." Edited by, Mike Maguire and John Pointing. Philadelphia(1988). p, 147. [hereinafter, Duff].

[2] Hudson, P. S. "The Crime Victim And The Criminal Justice System." Pepperdine Law Review(1984), vol. 11.[hereinafter, Hudson]. Schafer, S. "The Victim And His Criminal: A Study In Functional Responsibility." New York(1968).[hereinafter, Schafer, "The Victim And His Criminal"].

[3] Nils Christie, "Conflicts as property." The British Journal of Criminology. vol. 17(1977). [hereinafter, Christie].

[4] Joanna Shapland, John Willmore and Peter Duff, "Victims In The Criminal Justice System." Cambridge studies in criminology. Gower (1985). p, 191. [Hereinafter, Shapland, Victims In The Criminal Justice]. Also, Shapland, "Fiefs and Peasant: accomplishing change for victims in the criminal justice system." In Maguire, Mike & Pointing, John, "Victims Of Crime: A New Deal." Philadelphia, Open University Press(1988). p, 187. [hereinafter, Shapland, "Fiefs and Peasant."].

[5] Al-Mawardy, Abu Al-Hassan 'Ali, (d, 450 AH, 1058 AD). "*Al-ahkam Al-sultanya.*" *Dar Ibn-Khaldune,* Cairo (1984). [hereinafter, Al-Mawardy]. Ibn-Farhun, "*Tabserat Alhukam.*" vol. 2. p, 78. Ibn Al-Qayyim, Shams Al-din, (d, 751 AH, 1350 AD) "*Al-turuq Alhukmeyah Fi Assiyasa Alshar`eyah.*" *Dar Al-kutub Al-'ilmiyah.* Beirut(1995). p, 99. [Hereinafter, Ibn Alqayyem. Al-turuq].

a permanent obligatory characteristic.[1] Rather, it provides a set of general rules stated in the Qur'an and Sunna, such as those regarding the rights of the litigant parties, the rules of evidence and the role of the community or the state. As has been demonstrated in the previous chapter, the underlying philosophy of such a scheme is to give the community the opportunity to adjust the divine rules according to their needs in a given time and place.[2] Thus, the developments of the prosecution system established by Islamic criminal law have been achieved largely by what is called '*Siyasa*'[3], whereby the competent authority of the state is granted broad discretion to determine that which constitutes good and sufficient procedure, as well as their methods of application and consequences[4]' as long as it observe the original meaning of justice[5], and does not contradict the explicit principles of Islamic law.[6]

Therefore, it will be clearly noted that the Islamic prosecution system has been influenced by the prevailing mode dominating the legal arena in a given era. So, during the earlier stages, prosecution in Islamic law was a mere private system in which the duty of initiating legal proceeding against the alleged offender was at the hands of private individuals, and the most likely candidate was the victim himself. At this stage, private prosecution was the predominant principle in all criminal justice systems as a developmental step from the private vengeance doctrine.[7]

In a later era, with the concept of public interest being expanded, the state gradually claimed more controlling powers over the criminal justice system and its mechanism, especially in the area of prosecution. The result was inevitably further decline in the position of the victim which eventually was taken over by the state through its public prosecutor. A similar development was mirrored in Islamic law, when the extension of the state authority in the field of criminal justice led to the emergence of

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[1] Alqaradawy, Yusif, " *Madkhal Lederast Al-share`a Al-Islamiy*", or "Introduction to Islamic Law." *Maktabat Wahbah*. Cairo (1990). p, 152. [hereinafter, Alqaradawy].

[2] See, 'Awad, "*Derasat fi Alfiqh Al-jena`I Al-Islami.*" op. cit. p, 103.

[3] '*siyasa*' literally means 'policy', in Islamic law's context signifies, a means by which the political system of Islamic community can administer its affairs, especially in the field of criminal justice, in areas where 'Shari'a' is silent. See. Schacht. op. cit. p, 54. Ibn Al-Qayyim, "A*l-turuq Al-hukmeya.*" Op. cit. p, 10-11.

[4] Al-Awwa. op. cit. p, 142. See also, N. J. Coulson, "The State and The Individual in Islamic Law." International And Comparative Law Quarterly (1957). vol. 6. p, 51. [Hereinafter, Coulson, Sate And Individual].

[5] The prominent scholar Ibn al-Qayyim stated, "God Almighty has sent his Prophets and revealed His Books so that people might carry out justice, the same justice in which the earth and heaven were created. Therefore, if the sign of justice appears any way, then God's law and religion are realised. God Almighty is more wise and just than to ascribe something to the way of justice and its manifestation and then to deny what is even more obvious. Therefore, any method through which justice and equity can be achieved is in compliance with religion of Islam and not opposing to it." See "*Al-truq Al-hukmeya.*" op. cit. p, 11.

[6] Ibn Khaldun, "*Almukadimah.*" op. cit. p, 215.

[7] Martin Wright, "Justice For Victims And Offenders: A Restorative Response To Crime." Waterside Press. Winchester 2ed edition (1997). p, 11-12. [hereinafter, Wright, Justice For Victims].

the Islamic equivalent to the modern public prosecutor which is called '*muhtasib*'. The emergence of *Muhtasib*, however, as will be seen, did not result in the victim being deprived from all his prosecutorial rights.

Arriving at the contemporary time, with Islamic law being replaced, at least in the area of criminal law, with Western-modelled laws, the prosecution has been shifted, in almost all Islamic states, to a public system in which victims have no effective role to play in the prosecution process.

Following these developments, this chapter will be divided into four sections followed by a conclusion. Each development is elaborated in a separate section. Because of its importance, the first section focuses on the crime classifications in Islamic law, and their relationship to the victim's prosecutorial rights.

3) Crime Classification and the Victim's Prosecutorial Role

The nature and the extent of the victim's role in the prosecution process vary largely, depending on the character of the crime. Among several crime classifications recognised by Islamic law, the most relevant one to this study is that based on the infringed right. Accordingly, crimes in Islamic law are broadly divided into two main categories: public crimes, which violate the public interests, and private crimes which infringe the rights of private individuals.[1] In both categories of crimes the principle of private prosecution is adopted. However, public crimes may be prosecuted by any private individuals, whereas private crimes can only be prosecuted by the victim who enjoys far more effective roles and powers.

Although such a simple crime classification was not an invention of Islamic law, it was coloured by its religious character. The criteria by which a crime is considered public or private is different in Islamic law to modern Western laws. The difference lies in the concept and the nature of rights viewed by Islamic law, which leads to brand a certain value as a public or private right. Such a conceptual difference leads to a contradiction between the Islamic and Western views, for example, adultery in Islamic law is conceived as a public crime for it violates the public morality, and hence, it will be the right or rather the duty of every individual to prosecute the offenders, whereas in modern laws, adultery is merely a private crime against the family or the husband. It even no longer constitutes a crime in many modern laws as in English law. On the other hand, murder is seen nowadays in all legal systems as one of the most serious public crimes against the state or the community as a whole, whereas in classical Islamic jurisprudence murder is viewed as a private

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[1] 'Oda, "*Al-tashrie Al-jena`i Al-Islami.*" op. cit. vol. 1. p, 98. A`la Al-dien Al-Kasany (d, 587 AH, 1191 AD) "*Bada`i Al-sana`i fi tartieb al-shara`i.*" *Dar Al-Ketab Al-Arabi.* Beirut (1982). vol. 7. p, 33.

infringement, and hence it is up to the successors of the deceased to decide whether to prosecute the murderer or to drop the case against him.

Muslim scholars, over the centuries, developed a concept of public and private rights, in general as well as with regard to penal law. This concept is based basically on the religious distinction between what belongs to God '*haq Allah*', or the right of Allah, and what pertains to His subjects '*haq al-abd*', or the right of individuals. The former denotes public rights, and the latter is used to signify private rights. The significance of this distinction is of paramount important to the right of the victim to prosecute. When the concept of public rights in relation to criminal law is narrowly defined, it means that the number of public crimes is consequently reduced, and corollary the number of the private crimes is increased. As a result, the victim's special prosecutorial powers given by Islamic law can be exercised in a larger number of crimes. Thus, the more widely the concept of public right is defined, the less rights the victim has to prosecution and vice versa. It is a reverse relation between the concept of public right and the victim's prosecutorial role. Therefore, it is essential to distinguish between public crimes and private crimes in order to define the nature and the extent of the victim's prosecutorial rights.

a) <u>Public Crime</u>

The notion of public crime in Islamic law was originally narrowly defined, and closely related to the violations of religious values and duties. It was defined as the wrongdoing against the right of God 'Allah' as opposed to the right of private '*abd*'[1]. The right of Allah is of two kinds: absolute or '*khalis*', and combined or '*mushtarak*'. The absolute is the exclusive right of Allah, and the combined right is of a mixed nature i.e. divine and temporal with the former being predominant.[2] These rights include those values for which the punishment for their violation is specifically prescribed in the Qur'an and Sunna. This definition covers a certain number of crimes such as, adultery, highway robbery and drinking

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[1] Al-Kasany, op.cit, vol.7. p, 237. Fakher Al-dien Othman Al-Zayla'i (d, 743 AH, 1343 AD). "*Tab'ien Alhaka'ik Sharh Kanz Al-daka'ik.*" *Al-matba'ah Al-Ameriya.* Cairo(1947). vol. 3. p, 97. [hereinafter, Al-Zayla'i]. The attribution of public right to Allah is explained by Muslim scholars as a way of honouring these rights by adding a sense of holiness upon them, so that people pay more respect to them. Besides, they belong to no specific individuals but to the society as a whole. See Mohammed Abu-Zahrah, "*Al-Jariema Wa Al Aukubah Fi Al-Islam.*" or "Crime And Punishment In Islam." Cairo (1976). vol. 1. p, 62. [hereinafter, Abu-Zahrah]. Another possible justification for such attribution may lies in the fact that the earliest Muslim community was small and simple and the concept of the 'state' was still not clear enough to be associated with rights and duties. It is worth mentioning that even English law, at a stage of its development, "society came to be personified by the Crown: the king, in whom centres the majesty the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community." Blackstone, W. "The Sovereignty of the law." (1778). Quoted in Wright, "Justice For Victims." op. cit. p, 16.

[2] Khallaf, "*Ilm Usul Al-Fiqh.*" op. cit. p, 210-216.

alcohol. Also, a crime may be considered as such if it is deemed by the Muslim society, at a given time, as an aggression against the right of Allah or the interest of the community. Thus, public crime can be defined as 'the crime which harms the interest of the society as a whole in a way that its punishment will be in the interest of the whole community'[1], or if its presumed to be so in the Qur'an and Sunna.

In earlier Islamic society, the number of public crimes was very low, and in fact there are only seven crimes prescribed in the Qur'an. Such a relatively modest assertion of the state's interest and powers can be justified with reference to the broad social framework within which the law functioned. The newly constructed Muslim society consisted mainly of the pre-Islamic Arabian tribes who had been living in the desert, in remote small communities, closely connected by kinship, neighbourhood and interdependent relations. Therefore, the desire of the litigant parties to pursue their complex relationship encouraged them to develop some private conciliatory procedures to resolve their litigation away from formal authority. This tendency continued, with some modifications, throughout the early period of Islamic society. In addition, the newly emerged state at this stage, which had not been fully institutionalised, had little resources and powers to make the law enforceable all over its land. This was associated with the lack of an effective means of communication between the remote communities and the central government.

b) Private Crimes

Crime is conceived private if it constitutes a violation against the rights of private individuals. These rights are those values which are adherent to one's life and property. Private rights might be absolute or '*khalis*' such as the right to personal safety, or combined '*mushtarak*' with a divine right with the private right being predominant, like the inviolability of one's property.[2] In both cases the infringement will be considered a private crime. This definition covered a wide range of crimes, which are by no means considered private by present laws, such as murder, manslaughter, and all types of assault either intentionally or by negligence or recklessness

c) Hudud, Qisas and Ta'azir

Hudud, Qisas and Ta'azir are three specific categories of crime which are in fact an application or manifest of the aforementioned general crime classification. *Hudud* represents public crimes, whereas *Qisas* denotes

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[1] 'Oda, op. cit. vol. p.99.
[2] Khallaf, "*Al-fiqh.*" op. cit. p, 212. 'Abdul-Wahab Al-Ashmawy, "*Al-itiham Alfardi*", or "Private Prosecution." Unpublished PhD thesis. Cairo University (1953). p, 345. [hereinafter, Ashmawy].

private crimes, and *Ta'azir* is of a mixed nature i.e. contains both sorts of crimes.

Hudud (plural of *Had*), means limits or constraints in the case established by Allah, to prevent the commission of acts He has forbidden.[1] The list of *Hudud* crimes includes, theft, fornication, false accusation of fornication or defamation and highway robbery. There are also three other controversial *Hudud* crimes, apostasy, drinking wine and rebellion.

Hudud crimes are characterised by their severe punishment and their complex system of proof which makes the application of their punishments highly restricted or even, sometimes, unforeseeable.[2] Hudud crimes are considered an infringement of the right of God, hence they are public crimes. However, because of their personal nature, theft and defamation cannot be prosecuted without a demand or complaint from the victim.[3]

Qisas crimes include all acts involving bodily harm ranging from minor assault to homicide. They are divided into five sections: murder, voluntary killing (voluntary manslaughter), involuntary killing, intentional bodily harm and unintentional bodily injury. The word Qisas means equality, or equivalence, and it implies that a person who has committed a given violation will be punished as far as possible, in the same way and by the same means that was used in harming the other person.[4] Thus, if Qisas crime was committed intentionally, the victim or his successors will have three options, namely, an exact retaliation, fixed compensation '*Diyya*' or forgiveness. In the case where there is no intention but only negligence or recklessness, the victim only has the last two choices.[5]

The third specific category is *Ta'azir*[6], which means in its legal sense the discretionary punishment imposed by a judge for violations of public or private rights for which neither the Qur'an nor Sunna has prescribed any sanction.[7] It is the area of criminal law which has been left open in

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[1] Ghouti Benmelha, "Ta'azir crimes." In Bassiouni, "The Islamic Criminal Justice System." op. cit. p, 212. [Hereinafter, Benmelha].

[2] So, a leading orientalist comments that, "the Shari'a criminal law was so mild that most pre-modern Muslim rulers felt bound to save their subjects from the results of applying it intact." Hodgson Marshal, "The Venture of Islam." Chicago, University of Chicago Press. (1974). The author apparently to the

[3] See, Benmelha, op. cit. p, 212. 'Ali 'Ali Mansour, "Hudud crimes." In "The Islamic Criminal Justice System." Edited by Bassiouni. p, 197[hereinafter, Mansour]. Schacht, "Introduction to Islamic Law." op. cit. p, 178.

[4] See, Bassiouni, "Qisas Crimes." In "The Islamic Criminal Justice System." Edited by Bassiouni. op. cit. p, 203.

[5] Mohammed Na`em Farahat, "*Al-Tashree Al-jena`I Al-Islami*", or "Islamic Criminal law." *Maktabat Al-khidmat Al-haditha.* Riyadh (1984). p, 233.[hereinafter, Farahat]. 'Oda, op. cit. vol. 2. p, 4.

[6] See, 'Abul-'Aziz 'Amer, "*al-ta`zir fi al-share`a al-islamiya*", or "Ta'azir in Islamic law." A PhD Thesis. Cairo University (1956). [Hereinafter, 'Amer]. Abu-Zahrah, op. cit. vol. 2. p, 112.

[7] Benmelha, op. cit. p, 211

order to serve the ever-changing needs of successive Muslim generations.[1] Therefore, historically, it was up to the judge to decide in every individual case whether the act constituted a crime or not, and to choose the most appropriate punishment to match the offender's delinquency bearing in mind, at the same time, the seriousness of the act, the circumstances under which it had been committed and the personality of the delinquent.[2] The theory of Ta'azir is, therefore, seen by some Muslims as well as non-Muslim scholars as a system of individualised punishment.[3] Although, Muslim judges applied conventional sorts of punishments like flogging and imprisonment, the theory of Ta'azir is qualified to accommodate any sort of corrective punishment or even non-criminal disciplines.[4] However, in recent applications of Islamic criminal law, it seems that judges have been deprived of their extensive discretionary powers since all the Ta'azir crimes and their punishments have been set in advance.[5]

Ta'azir crimes can be private or public. The status of the crime is decided individually according to the type of right it infringes. For example, disparaging is a private crime, and damaging or disrupting public transport is a public crime.

4) The first stage: The Prosecutorial Role Of The Crime Victim during the Classical Theory

This stage can be dated from the beginning of the Islamic state (roughly, 622 AD), when Islamic law was gradually revealed to govern the newly formulated Muslim community, and ended at the point when the first Islamic equivalent Grand Judge or Chief Justice was formally appointed in the early reign of the '*Abbassid*[6] State. During this stage, crime victims enjoyed very effective prosecutorial powers, especially in the area of private crimes. Public crimes could also be prosecuted by the victim but only as a member of the community and hence with less effective powers. Therefore, the position of the victim in the prosecution

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[1] So it is possible that a certain act can be treated differently with regard to its criminality status in two contemporary Muslim societies or even in the same society at different times according to the prevailing criminal policy.

[2] To see how such procedures comply with the principle of legality, see Taymour Kamel, "The Principle of Legality And Its Application In Islamic Criminal Law." In "The Islamic Criminal Justice System." Edited by Bassiouni. op. cit. p, 149.

[3] 'Abd Al-Salam, "The Social Aspect of the New Penal Code of the United Arab Republic." Revue De Sciences Criminelles Et De Driot Penal Compare. p, 101 (1967). References cited in Benmelha, op. cit. p, 213.

[4] See, Ibn-Farhun, op. cit. vol. 2. p, 221.

[5] See, the Sudanese Penal Cod (1991), and the draft of the Egyptian Islamic Penal Law, which was drafted in (1982) in the wake of the aforementioned constitutional amendment (1981) by which Islamic law has become the principal source of Egyptian legislation.

[6] The *Abbassid Khilafah* is the Islamic state which succeeded the *Ummayah* state in (132 AH, 750 AD).

process in both private and public crimes will be discussed in the following pages.

a) Public Crime.

The general principle regarding public crime in Islamic law is that every private individual has the right, or rather a duty, to initiate criminal proceedings against the offender as a fulfilment of the collective responsibility to maintain law and order in the community, or in the Islamic term to enjoin good '*Ma`ruf*' and prohibit wrong or evil '*Munkar*'. Thus the potential prosecutor of public crime may be an ordinary person, usually who witnesses the occurrence of the crime. The most likely candidate, however, would be the crime victim. According to some jurists the judge himself may perform as a prosecutor.[1]

The principle of collective responsibility in Islamic law is established by several Qur'anic verses and the practice of the Prophet. The Qur'an asserts this principle many times as a character of the community it hopes to create, so it says, "*..the believers, men and women are protectors one of another, they enjoin what is just and forbid what is evil.*"[2] The Prophet is held to have said that, "whosoever of you sees an evil action, let him change it with his hand; and if he is not able to do so, then with his tongue; and if he is not able to do so, then with his heart."[3] Moreover, many of the injections in the Qur'an which declare the illegality of an act and prescribe its punishment, address the community as a whole in a way leading to the deduction that all the community should take part in the criminal process, including prosecution and punishment of the offender of public crimes.[4] For example, Qur'an states, "*the woman and the man guilty of fornication, flog each of them with hundred stripes...*"[5]

Public crimes are seen here as wrongdoings which affect the interest of the whole community, Muslims, therefore, are encouraged to prevent the occurrence of this wrongdoing in the first place by all possible means including, if necessary, the use of force. However, with the presence of the state and its legal system agencies, the proper way to right the

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[1].Al-Kasany, op. cit. p, 52. However, some prominent jurists like *Abu-hanifa* and *Al-Mawardy* opposed any role of the judge in the prosecution process, and insisted that criminal action must be initiated by a person other than the judge who is going to try the same crime. See Al-Mawardy, op. cit. p, 67. Ashmawy, op. cit. p, 348. It worth mentioning that the Sudanese law has adopted the view which allows the judge to initiate a criminal proceedings. See, Mohammed Mohy-Al-dien 'Awad, "*Hukuk Almajni Alay Fi Aldawa Alaumomy.*" or "The Victim's Rights In The Criminal Proceedings." A paper presented to The Third Conference of The Egyptian Society of Criminal Law (ESC) op. cit. p, 37. [Hereinafter, Mohy].

[2] The Qur'an 9:71. Another verse states that "*let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong.*" The Qur'an 3:104. See also the Qur'an, 9:112, 22:40-41, 5:78-89, 3:110, 7:157.

[3] Relate by Abu-Dawud, vol. 4. no. 2156. p, 123.

[4] Sa`ed. op. cit. p, 162. Madkur, op. cit. p, 148.

[5] The Qur'an, 24:2. Also, 24:4, 5:38.

wrongdoing is to ensure the prosecution of the wrongdoer.[1] Thus, every member of the community has to act as a prosecutor of the public crime, and if one does so, he will be acting, although on behalf of the community, at his own responsibility and expense.[2]

Modern Muslim scholars see the principle of collective responsibility with regard to the prosecution as an effective method utilised by Islamic law in its battle against crime. It is claimed to promote the sense of responsibility among the general public, creating a common attitude against passivity, bearing in mind that acting positively towards public crime by determinedly initiating criminal proceedings against their perpetrators will drastically diminish the likelihood of any of them being a potential victim.[3] Thus, the participation of private individuals in the enforcement of law and order will redress the insufficiency, inaction or the total absence of law enforcement agencies.

If the victim of a public crime undertakes the prosecution, he is seen as a volunteer acting on behalf of the whole community rather than representing himself as a crime victim. Therefore, he has no more rights than any other private individuals; he for example has no right to drop the prosecution, to mediate with the offender, or to veto criminal proceedings initiated by any other person. In addition, the death of the victim of a public crime does not give his successors any particular prosecutorial powers other than their rights as private individuals.[4] Therefore, unlike the situation in private crimes, public interest necessitates that no one should have the right to deprive the society of the opportunity to express its condemnation to the aggression it has suffered.

Nevertheless, in the case of two particular public crimes, a victim still retains some of his extensive prosecutorial rights which he enjoys in private crime. So, although theft and defamation (false accusation of fornication) are considered public crimes in Islamic law, the majority of Muslim scholars agree that the right to prosecution is reserved only for their victims, and no one could instigate a criminal action without an explicit complaint from the victim.[5] This exception is justified, in the case of theft, on the grounds of practicality, as the proof of the crime is too difficult without the real owner, of the allegedly stolen things, protesting his ownership.[6] Concerning defamation, it is preferred to leave the prosecution decision to the victim himself since the prosecution may turn against his own interest as the publicity of the crime and trial may

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[1] Fawziyah 'Abdul-Sattar, *"Al-Ide`a Al-Mubasher."* or "Private Prosecution." A paper presented to the third Conference of The Egyptian Society of Criminal Law. op. cit. p, 95. [Hereinafter, Fawziyah].
[2] Abu-Zahrah. op. cit. vol. 2. p, 17.
[3] Maher, op. cit. p, 43. Al-Nowaibit, op. cit. p, 174.
[4] Al-Zayla'i, op. cit. vol. 3.p, 97. Al-Kasany. op. cit. vol. 7. p, 52.
[5] Al-Kasany, op. cit. vol. 7. p, 292. Ibn-Qudama, op. cit. vol. 10. p, 209.
[6] 'Oda, op. cit. vol. 2. p, 205. Al-Kasany. op. cit. vol. 7. p, 83.

bring more agony to the victim and his family.[1] Once the prosecution has been commenced by the victim in these crimes, he has passes his privileged area and returns to his original position as any other individual with no right to stop the proceedings or to drop the case.[2] This principle applies to all public crimes where once the prosecution is commenced, the court must reach its final judgement regardless of the involved parties attitudes. Neither the victim nor anyone else has any right to stop or to drop the case.[3]

Fearing or worrying that ordinary people are too hesitant to undertake public crime prosecutions, some ordinary Muslims called '*mutatawa*', who are religiously motivated, devoted themselves to maintaining the enforcement of Islamic values in society by promoting what is good and prohibiting what is wrong, and if the wrong constitutes a public crime the case would be brought before the judge.[4] This development was the origin of what would be called '*Muhtasib*'[5], which was a combination of several jobs including public prosecution, policing and municipal functions.[6]

b) Private Crimes

If the crime is deemed private, as has been defined earlier, the '*da`wa*' or the criminal proceeding against the offender is an exclusive right vested by Islamic law with the aggrieved party. It is seen as his own property that he, within the law, is entitled to use at his will. Accordingly, the victim has the right to commence a criminal action, or to take no action at all. In the former case, easy access to court with few, if any, formalities is provided, with the power to drop the case at any stage. If the victim decides not to prosecute, no one could legally or practically force him to do so.

This victim's extensive prosecutorial powers find their reference directly in the formal source of Islamic law i.e. Qur'an and Sunna. The Qur'an, for instance, states that "*Nor take life-which Allah has made sacred-except for just cause. And if any one is slain wrongfully, We have given his heir authority (to demand Qisas or to forgive) but let him not*

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[1] Al-Kasany, op. cit. vol. 7. p, 52. Al-Mawardy, op. cit. p, 229.
[2] Sai`ed. op. cit. p, 56.
[3] Ashmawy, op. cit. p, 351.
[4] Al-Nowaibit, op. cit. p, 170. Al-Mawardy, op. cit. p, 247.
[5] Al-Ghazali. op. cit. vol. 1. p, 211-214. Al-Mawardy. op. cit. p, 245. The original meaning of *Hisba* comes from the Arabic verb *ihtasab,* its general meaning is, doing public services for the sake of God without anticipating earthly reward. See, Al-Mawardy, op. cit. p, 227. It developed from an informal duty to be one of the formal religious task in charge with maintaining law and order in the society. See Ibn-Khaldun, op. cit. p, 586.
[6] See Al-Mawardy, op. cit. p, 256. Al-Qadi, 'Abdulah M., "*Alsyasa Al-Shar`Ya Masdar Al-Taqnien.*" or "Islamic Policy As A Source of Codification." *Matba'at Dar Al-kutub al-ilmiyah al-hadithah.* Tanta (1989).p, 598-616. [Hereinafter, Al-Qadi].

exceed bounds in the matter of taking life: for he is supported (by law)."[1] Also the Qur'an asserts the victim's right to forgiveness in case of murder and bodily harm by stating that "*...any one remits the retaliation by way of charity, it is an act of atonement for himself*".[2] The injunctions of theses verses were confirmed by the saying as well as the practice of the Prophet and his companions.[3] The Prophet is reported to have said "whoever was murdered or wounded he, or his successors, has three choices: exact punishment '*Qisas*', compensation '*Diyya*' or forgiveness or mercy."[4]

Although these references are confined only to murder and assaults, the principle they established regarding the victim's prosecutorial position spans all other crimes which are branded private.[5] Besides, given the seriousness of the aforementioned crimes, the victim should be in the same prosecutorial position, if not stronger, with regard to less serious crimes.

c) Philosophies and Justifications

The underlying philosophy of giving the victim the right to prosecute his offender is explained by Muslim scholars in a similar way that this power has been justified in other systems. Thus, the main argument is based on the assumption that the victim is the most harmed party of the crime, being the person who has suffered direct and concrete damage: in crimes against personal safety, he who has received bodily harm; in crimes against property he who has suffered a patrimonial loss; in crimes against honour, he who has suffered an injury against his honour.[6] Therefore, it is fair or rather natural to give the victim the opportunity to quench his thirst for justice by providing him with the right to prosecute his offender. Any attempt to exclude victims from the prosecution process, and assume a public body to act on his behalf on the grounds of public interest, or on the assumption that the victim is unqualified to undertake this mission himself will result in what is known in Western legal thinking as the "secondary victimization."[7] In other words, when the criminal justice system denies the victim's justifiable desire to

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[1] The Qur'an. 17:33.
[2] The Qur'an, 5:45. 17:33
[3] Abu-Zahrah, op. cit. vol. 1. p, 101. Adel Al-Fiqi. "*huquke al-majni alyh fi al-qanun wa al-shari`a al-islamiya.*" *Dar Al-nahdah.* Cairo(1984). p, 392. [Hereinafter, Adel].
[4] Related by Abu-Dawud. *Ketab Al-diyyat.* Hadith no. 3898.
[5] Mohammed Sa`ied, "*haq almajni alyh fi tahriek al-da`wa al-jina`ya*", or "The Victim's Right To Prosecution." *Dar Al-Nahdah.* Cairo.(1982). p, 51.[hereinafter, Sa`ied].
[6] Sa`ied, op. cit. p, 56. Shultute, op. cit. p, 312. This argument is also used in other legal systems. See Girolamo Taraglione, "The victim in judicial proceedings." Paper presented to The First International Conference on Victimology. Jerusalem (1973). Edited in "Victimology: A New Focus." by Israel Drapkin and Emilio Viano. London 1975. vol. 3. p, 6. [Hereinafter, Taraglione].
[7] See, Maguire & Pointing, "Victims Of Crime: A New Deal." op. cit. p, 11.

participate in an affair that he, rightly, believes belongs largely to him, the result would be considerable disappointment and a lack of confidence in the legal system as a whole.

Furthermore, a victim's full participation to the prosecution proceeding is seen by Islamic jurisprudence as the preferred method which could guarantee the healing of his personal grievance, and ensures his satisfaction.[1] This argument is quite obvious for Islamic law since the early Islamic community consisted mainly of pre-Islam Arabians, where murder or assault may have resulted in a long-lasting vendetta and bloodshed. Thus if the wounded, or the family of the murdered, was denied an accessible route to seek vengeance through the criminal justice system, he might have tried other methods. Employing the criminal justice system as a vehicle to seek retaliation seems to have advocacy even in modern Western thought.[2]

Some Muslim jurists claim that providing the victim with a full participatory role in the criminal proceedings, places him in an encouraging position which makes it easier for him to exercise his religiously recommended right to forgive his criminal.[3] This can be explained from a psychological point of view as most victims get satisfaction from the feeling that they have been given a say in their offender's fate, and hence they are more likely to ask for no further action to be taken.

In addition, it can be added, to support the principle of private prosecution, that it can work as a safeguard for the citizens against inaction, incompetence, bias and corruption on the part of the public prosecution authorities.[4] Also, it encourages the role of private individuals in the enforcement of criminal law, which promises to fill the vacuum left by the law enforcement agencies.[5]

However, the main argument for the private prosecution has not been mentioned by Muslim jurists. It is the lack of clear distinction between the criminal and civil proceedings. Such a distinction which has been

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[1] Abu-Zahrah. op. cit. vol. 2. p, 48.

[2] Morris Cohen for example, claims that the law should provide avenues of satisfaction for vengeance and retribution, which are deeply grounded in the human nature, and it was sentimental foolishness to disregard the prevalent retribution motive which prevails in relation between men and nations. Morris Cohen, "Moral Principles of the Criminal Law." Yale. L. J (987). p, 110-1112. (1940). [Hereinafter, Cohen]. Other scholars suggested that vengeance is a justifiable end of criminal law. Holmes, "The Common Law." p, 39-42. (1881). See "Private Prosecution: A Remedy For District Attorney' Unwarranted Inaction." Notes. Yale Law Journal. vol. 56. No. 2. (1955). p, 227. [Hereinafter, Private Prosecution].

[3] Abu-Zahrah, op. cit. vol. 1. p. 104.

[4] Abu-Zahrah, op. cit. vol. 2. p, 48. This argument has also been presented by Western scholars, see, Samuels, op. cit. p, 33. Stephen, J. F, "A history of the criminal law of England." London (1883). p, 496. [hereinafter, Stephen].

[5] Mohammed Maher, *"Al-Kefah Did Al-Jariema Fi Al-Islam."* or "Fighting Against The Crime In Islam." Cairo (1975). p, 43. [Hereinafter, Maher]. This point was also highly emphasised by some American Scholars, see, "Private Prosecution." op. cit. p, 214.

presented by modern Western scholars as one of the strongest arguments against any participatory role of victims in the prosecution decision[1], has not been explicit in Islamic law, particularly in early stages.[2] This can be deduced from the different status given to the crime victim from one set of crimes to another. Thus, in Hudud crimes which is dealt with as crimes in modern legal sense, the crime victim is placed in a similar position to other individuals. Whereas in Qisas crimes, which are dealt with more as torts than crimes, the crime victim is given an influential participatory role similar to that given to plaintiff in civil litigation. Tracing the leading Islamic legal treatises, it could be noticed that the first emphasis of such a distinction between civil and criminal proceedings is ascribed to *Ibn Al-Qayyim* (d, 751 AH, 1350 AD) who differentiates between criminal and non-criminal proceedings or '*da`wa*'.[3] Even though, the distinction was more to do with the rules of proof rather than the prosecution process, which were almost the same for all wrong acts wither civil or criminal. What helped to conceal such a distinction was the practice of Muslim judges who in general held comprehensive jurisdiction over all sorts of litigation.

d) Procedures of Private Prosecution

As can be conceived during such an early stage, the procedures of the prosecution were rather simple and uncomplicated. It involved little if any paperwork, as the bulk of the procedures were orally conducted.[4] The normal picture would be that following the crime incident the victim would go directly to the judge[5], submitting a complaint against his alleged offender. This submission of the victim's complaint is not a mere report of the crime as in most modern laws but rather a formal request to initiate criminal proceedings against the offender including a request for both punishment and restoration or compensation. If the offender was known to his victim he may come along voluntarily, if he refused to do so, the victim could arrest him and usually he would be assisted by the people who had witnessed the incident.

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[1] Ashworth, "Criminal Process." op. cit. p, 184.

[2] It is generally held that this distinction is a recent development even in Western laws. See R. Laster, "Criminal Restitution: A Survey Of Its Past History And Analysis." Richmond. L. Rev. (1970). p, 71-98.

[3] Ibn Qayyim, "*Al-turuq Alhukmeyah.*" op. cit. .p, 71.

[4] Fo`ad 'Abdul-Mon'em, "*Al-Tanzeem Al-Qada`E Fi Al-Fiqh Al-Islami.*" or "Judiciary In Islamic Jurisprudence." *Mo'asast Shabab Al-jame'ah.* Cairo (1992). p, 53. [Hereinafter, 'Abdul-Mon'em]. Al-Qadi, op. cit. p, 582.

[5] The head of the state '*Caliph*', is considered in Islamic jurisprudence as the supreme judge, as part of his general commitment to administer the believers affairs. He who delegates his power '*inaba*' to the appointed judges. See Al-Mawardy, op. cit. p, 71. Ibn Khaldun, op. cit. p, 22. This practice continued despite the official appointment of judges which started from the reign of the second *Caliph*. Judges usually sat at their homes or at the mosques, and later special courtrooms were established. Al-Qady, op. cit. p, 585.

The police, who were at this stage largely informal, were not supposed to deal with the prosecution directly. Their major duty was to maintain peace and order in society. They may intervene at the judge's request to help investigate the crime, to search premises or to arrest alleged offenders. They may also be asked to provide a safe keeping for the accused in case the judge decides to remand him. They were often held responsible for the execution of the judgement, especially if it included corporal punishment.[1]

e) The Implications of The Victim's Right To Prosecution

The Islamic law's view that the prosecution is a property owned by the victim has many implications, some of which seem to be unfamiliar to present criminal laws. Just as his other legal rights, a victim has an exclusive power over his prosecutorial rights. So, he could commence criminal proceedings against the offender or simply take no action, and meanwhile prevent others, including public authorities, from taking action on his behalf. Also, a victim's right is extended to the conduct of the prosecution, either by himself or represented by another. Regarded as the victim's property, the prosecution right can be inherited by the victim's successors. In the following some light will be shed on these implications.

i) Exclusive Authority

As part of his ownership, a victim has an exclusive authority to use his right to prosecute his offender. No legal obstacles shall preclude him from seeking justice by putting forward his case before the judicial authority.[2] At this stage, Islamic law did not recognise any sort of public body who could assess the victim's prosecution before permitting him to go before the court. The court, for its part, could not deny the victim's right to have his case properly examined, since it should play the role of arbitrator between the disputant parties. The prosecution, however, may have been rejected on the grounds of maliciousness or incredibility.[3]

The victim's right is not restricted only to the commencement of the prosecution as he is also entitled to conduct it until it reaches its final destination. Therefore, he is empowered to substantiate his claim by all

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[1] For more details, see Ibn-Khaldun, "*Almukadima.*" op. cit. p, 176. Al-Qadi, op. cit. p, 627. The role of the police as such was a common feature among private prosecution systems including English law before the establishment of the first paid uniformed police force i.e. the Metropolitan Police Act(1829). See David Philips, "Crime And Authority In Victorian England." Croom Helm. London(1977), p, 54-97. [Hereinafter, Philips].

[2] 'Amer, op. cit. p, 5. 'Abdul-Wahab Al-Shaishany, "*Huqoq Almajni Alyh Fi Alkhusuma Wa Al-Hukm Fi Al-Sharie`A Al-Islamiya.*" or "Victim's Rights In The Criminal Proceeding In Islamic Law." A paper presented to The Third Conference of the Egyptian Society of Criminal Law, "Rights Of Victims in The Criminal Process." Cairo (12-14. Mars 1989). The conference proceedings. p, 489. [Hereinafter, Shaishany].

[3] Al-Mawardy, op. cit. p, 228.

available legal means which were predominantly oral evidence. Thus, the victim could examine and cross-examine the witnesses, bring his own witnesses or experts, ask the court to order the offender to answer the allegation under oath, or he may exceptionally be required to swear an oath as a means of proof.[1] After the judge reaches his verdict the victim is vested with the power to appeal if he is not satisfied with the verdict.[2] In other words, in initiating and conducting the criminal proceedings, the victim was in a similar position, if not more powerful, to the public prosecutor of the present legal system.

Once the criminal proceedings had been initiated, the course of justice would be carried out under the administration of the court. The victim, however, had the right to terminate the proceedings at any time. Unless the accused insisted on continuing the proceedings in order to protest and prove his innocence, the court should follow the victim's desire.[3] Unlike public crimes, doing so means the end of the trial, and there are no legal obligations upon the victim to continue. As will be explained in next chapters, the victim's decision to drop the case may be religiously motivated as he is encouraged to offer forgiveness. Sometimes, it may be as a result of mediation, by reaching an agreement with the offender to drop the case in exchange for money, services or even an apology. In all cases, the court has no alternative but to witness and confirm the case termination.[4]

ii) Right To 'Veto'

If the victim's right to inaugurate a prosecution is one side of the coin, the other side is his right to *veto* any criminal proceedings undertaken by any one else including the public authority. The general rule here is 'no criminal proceedings without a victim's claim.'[5] A few exceptions may be mentioned here such as in the cases where the victim is unable to disclose his desire because of the injury resulting from the crime, legal incapacity, immaturity, or mental conditions. In such cases the prosecution may be commenced, irrespective of the victim's consent, by either, his legal guardian, the judge or the appointed public body

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[1] Ibn-Farhun, "*Tabserat Alhukam.*" op. cit. vol. 2. p, 78. Ibn-Qayyim, "*Alturuq Alhukmeyah.*" op. cit. p, 99.

[2] Ibn-Farhun, op. cit. vol. 2. p, 55. Al-Nowaibit, "*Al-da'wa Al-jena`ya.*" op. cit. p, 116.

[3] Al-Nowaibit, op. cit. p, 97. Madkur, op. cit. p, 17.

[4] Provided that the parties to the agreement enjoy a full legal capacity and no unlawful means or pressure has been practised. Ibn-Farhun. op. cit. vol. 2. p, 54.

[5] Al-'Awwa, op. cit. p, 89. Ibn-Qudama, Abi-Mohammed 'Abdullah (d, 620 AH, 1223 AD) "*Almughni.*" Cairo (1982). vol. 7. p, 735. [hereinafter, Ibn-Qudama]. 'Isam Ahmed, "*Haq Al-Majni Alyh Fi Tahriek Al-Da`wa Aljina`iyah.*" or "Victim's Right To Commence Criminal Proceeding." A paper Presented To The Third Conference Of The Egyptian Society Of Criminal Law. op. cit. p, 182. [Hereinafter, Isam].

following the principle that states "The Sultan is the guardian for whoever has no guardian."[1]

The victim's right to veto in Islamic law corresponds to what it is known in present laws as the 'complaint offences', in which the public prosecutor is legally barred from initiating criminal proceedings without an official complaint from the victims. This system is found in almost all modern criminal laws including European.[2] The existence of such a right in modern laws may be explained as a survival feature of the individuality which predominated ancient laws. The crucial difference between Islamic and present laws in this regard is that the extent of the 'complaint offences' in the latter is restricted to the infractions or minor crimes against personal safety or property[3], whereas in Islamic law this right is extended to span all private crimes with its wide definition, including serious crimes like murder and serious assault.

The right to veto, in Islamic law as well as in modern laws, can be justified on the grounds of practicality. The victim can easily prevent the offender from being arrested and subsequently prosecuted by simply abstaining from reporting the crime to responsible officials. Recent studies showed that this option is widely practised by victims.[4] In addition, the victim is usually the chief prosecution witness, so without his full co-operation, it will be very difficult, if not impossible, for the public prosecutor to successfully conduct the prosecution before the court. Therefore, as studies have demonstrated, reluctant victims are held responsible for influencing the public prosecutor not to prosecute many cases especially rape allegations.[5]

iii) Power Of Attorney

In the modern Western legal system where private prosecution is allowed, private individuals have the right to hire a private attorney to conduct the prosecution on their behalf, either as a prime or a subsidiary prosecutor. This system is recognised in the United States in some jurisdictions.[6] In England and Wales, even the police, prior to 1985, could employ an experienced solicitor to represent them as they prosecuted as an ordinary citizen.[7]

The same principle applies to Islamic law in which the victim can be represented before the court by another. This does not mean that a

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[1] Abu-Zahrah. op. cit. vol. 2. p, 506. See Art. 32/3 of the Sudanese Penal Law (1991).
[2] P. J. P. Tak, "The Legal Scope of Non-Prosecution in Europe." (1986). p, 53. [Hereinafter, Tak].
[3] Taraglione, op. cit. p, 7.
[4] Donald .J. Hall, "The Role Of The Victim In The Prosecution And Disposition Of A Criminal Case." Vanderbilt Law Review. vol. 28. No. 5 (1975). p, 935. [Hereinafter, Hall].
[5] See, Hall p, 955.
[6] Hall. p, 974.
[7] Andrew Sanders, "An Independent Crown Prosecution Service." Criminal Law Review (1986). p, 16. [hereinafter, Sanders].

professional legal attorneyship was recognised in early Islamic law nor the appointment of the attorney was on the grounds of experience. Rather it was a matter of convenience because of illness, distance and other difficulties in presenting the case. Such a service was usually unpaid, and carried out as a fulfillment of religious duty to help others in the community. Common examples are, a victims being represented by his servants or employees. In the case of a woman, she might be represented by her father (if single) or husband (if married). Occasionally, a woman may prosecute, either on behalf of her husband or indeed against him.[1]

iv) Legal Assistance

There exists some evidence that crime victims may by entitled to have legal counselling as to how the case should be presented and conducted.[2] The concept of legal counselling for crime victims does not seem to be well-built into Islamic jurisprudence. It is rarely mentioned, and if so, it would be under another title, like the prerequisites of the legal proceedings. There is no mention of any organised body which may deliver such a service, and it was usually done by an expert ordered by the victim, or even by the judge himself.[3] Nevertheless, it is quite significant that such a principle was recognised at this early stage of Islamic jurisprudence.

v) Principle of Inheritance

The principle of inheriting the prosecution right seems unfamiliar or even strange to modern Western legal thinking. In Islamic law, however, this principle is a consistent consequence of its view to prosecution as a part of the victim's property which should be passed to his successors in the eventuality of his death. Accordingly, in the case of murder, or if the victims of other private crimes pass away before deciding the fate of his prosecution, it is then his successors who would take over the right to consider this decision.[4] In this case, the role of the victim is played not by the person who was the material object of the crime, but by those who, because of his death, suffered financially and emotionally as they may lose the source on which they depend for their living and education, or may suffer an irretrievable loss in the cases where the victim was a father, a mother or a husband and so on. Islamic law, at the time, was no exception, such transference of the qualification of 'victim' to other persons was recognised by almost all its contemporary laws of other

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[1] Ibn-Farhun, op. cit. vol. 1. p, 132-135. Shaltute, op. cit. p, 368. This picture is quite similar to the situation in England in the last century as illustrated by Phillips. See Philips, "Crime and Authority." p, 100.

[2] Zayn Al-'Abdeen, Ibn Najeem, "*Albahr Al-ra`iq Sharh Kanz Al-daqa`iq.*" *Dar Al-kutub Al-ilimiyah.* Beirut (1980). vol. 7. p, 202. [hereinafter, Ibn Najeem].

[3] Ibn-Najeem, ibid. p, 202.

[4] Ashmawy, op. cit. p, 375. Abu-Zahrah, op. cit. vol. 2. p, 502. 'Oda, op. cit. vol. 2. p, 237.

ancient civilisations which had particular strong sensibility towards the solidarity of the family and its relation within the group.[1]

In this context, the widely discussed example in Islamic jurisprudence is the case of murder. That is to say, when someone is killed, with whom is the prosecution right entrusted? As with most of its contemporaries, Islamic law transferred the victim's prosecutorial rights to his successors or '*waliyyal-damm*' (literally, avenger of the blood, or the next of kin)[2] who would be assigned with the authority to determine the prosecution decision. The argument arose, however, concerning which of the successors would be qualified to be '*waliyy al-damm*' and on which grounds. Part of the Islamic jurisprudence maintains that the right to a prosecution is given initially to the victim but because of his death, he is unable to use this right, hence it will be passed to his heirs. Consequently, the prosecution right is divided among all the heirs in proportion to their shares of the inheritance which can be determined by referring to the Islamic law of inheritance.[3] Another side to the argument claimed that the successors of the deceased have an original right to prosecute and not by transmission from the victim, since they themselves are regarded the victims in this case. Accordingly, every inheritor has his own independent right to the prosecution not just a share of the right. The latter opinion appears to have its reference in the Qur'anic verses which in determining the owner of the prosecution right, addresses directly the inheritors of the victim "*...and if anyone is slain wrongfully, We have given his heir authority (to demand Qisas or forgive).*"[4]

In either case, the successors of the victim have the right to prosecute, but the question is which of them should decide? Briefly, there are three opinions in Islamic jurisprudence: the first opinion argued that the right is owned by all relatives of the victims since they all share the grief and the financial loss of his death.[5] This opinion is favoured by some modern scholars for it ensures the enforcement of the law by securing the prosecution of the offender.[6] The second trend inclined to confine the meanings of 'heirs' to its legal meaning defined in the law of inheritance i.e. those who are specifically given a fixed share of the victim's estate irrespective of their gender.[7] The last thought tended to impose more restriction on the concept of successors to include only the '*asaba*' or the agnates or '*agnati*'. This restriction is justified by reference to the fact

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[1] Taraglione, op. cit. p, 6.
[2] Schacht, op. cit. p, 184.
[3] This is the opinion of the *Hanafi* law School. See, Ashmawy, op. cit. p, 371. Abu-Zahrah, op. cit. vol. 2. p, 503.
[4] The Qur'an, 17:33.
[5] Ibn-Hazm, Abi-Mohammed 'Ali (d, 456 AH, 1064 AD) "*Almuhala.*" *Maktabat Al-jumhuriyyah.* Cairo (1967). vol. 10. p, 482. [hereinafter, Ibn-Hazm].
[6] Abu-Zahrah, op. cit. vol. 2. p. 502. Al-Fiqi, op. cit. p, 404.
[7] Al-Kasany, .cit. vol, 7. p, 242. Al-Zayla'i. op. cit. vol. 6. p, 114.

that *asaba* often receive the bulk of the victim's estate, and equally it is they who will receive the bulk of the stigma if the murderer is not prosecuted.[1] This theory disqualifies husband and wife from the right to prosecute as they are not *asaba.*[2] Although this theory may have the virtue of restricting the number of potential prosecutors, it seems to have been highly influenced by the pre-Islam Arabian tribal society, in which the notion of kinship played a crucial role in establishing rights and duties and where women were widely subordinated.

This variety of opinion extends to the processing of the prosecution right among the heirs. If there is only one heir or more than one but they are in agreement with regard to the prosecution decision there is no trouble. However, if the heirs are more than one and they disagree, that raises a problem to be resolved. In short, there are two views here; one said that every heir has his own right to prosecute, hence he is able individually to institute a criminal proceeding regardless of the others inheritors' attitudes.[3] The other view asserted that the heirs collectively shared the prosecution right. Consequently, unless they reached an agreement on the decision to prosecute, the offender would benefit from their disagreement, since none of them could initiate a prosecution on his own.[4] In this case, with the absence of the public prosecution at this stage, the only option available to the heirs was to seek compensation or *Diyya.*[5]

In the cases where the deceased has no successors, the rule, which has been mentioned earlier, is that "the Sultan is the guardian for whom who has no guardian."[6] The Sultan in this context means the head of the state, but it can also be the judge or the public prosecutor. Muslim scholars went further into detailing the different cases and circumstances regarding the inheritance of the prosecution, such as the case of one of the successors being underage 'immature', insane, missing or indefinitely absent. Investigating such issues may lead to a discussion of particulars beyond the scope of this research.[7]

f) Discussion

Thus, as it can be clearly seen, Islamic criminal law in its classical theory adopted a prosecution system which placed the crime victim in a

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[1] Al-Hattab, 'Abullah Ibn Mohammed, (d, 897 AH, 1491 AD). "*Mawahib al-jalil sharh mukhtasar Khalil.*" *Dar Al-sa`ada.* Cairo(1979). vol. 6. p, 250. [Hereinafter, Al-Hattab .]

[2] Though, they are not *asaba*, in some cases women like sisters and daughters may be qualified as prosecutor. See, Abu Zahrah, op. cit. p, 504.

[3] Ibn-Hazm, op. cit. p, 482.

[4] Ibn-Qudama, op. cit. vol. 9. p, 458. 'Oda, op. cit. vol. 2. p, 142. Ashmawy, op. cit. p, 375.

[5] This view was adopted by The Commission set up by the Islamic law code drafted by The Egyptian Parliament. See (Arts. 194-221, 228/2) of the code. See also, Akeda, op. cit. p, 109-112.

[6] Abu-Zahrah. op. cit. vol. 2.p, 506.

[7] See, Farahat, op. cit. p, 275. 'Oda, op. cit. vol. 2. p, 140.

very powerful position. In fact, the victim is perceived as the master of the prosecution process. This view stemmed from the presumption that a prosecution is regarded as a property belonging to no one but the victim and his successors. The only case in which a victim may have to share such a right with another is when the crime is considered public according to Islamic law criteria. Even here, the victim may enjoy some of his exclusive rights, that is when the public crime is either theft or defamation. Thus, a victim can initiate, conduct and drop criminal proceedings. Also, he can employ an agent to conduct his prosecution, getting legal counselling and passing his right (in the case of death) to his successors.

With all these privileges provided for victims, Islamic law seems to an extreme case for a pro-victim legal system. It even exceeds the ambitions or the expectations of Western pro-victims movements which seek a more effective participatory role for crime victims[1], an 'active consultation[2]' or more room for private prosecution to redress the inefficiency of the public prosecution.[3] It may, however, get close to the view that calls for the place of the victim to be restored as it was before it had been stolen by the state which has taken over the function of prosecution and sentencing and totally excluded the victim from the process.[4]

The victim-oriented approach adopted by the Islamic classical theory was no exception as the predominant atmosphere at the time was dominated by the concept of private vengeance which was the corner stone of criminal law. In most contemporary legal systems the victim was treated in a similar way.[5]

5) The Second Stage: The Need For Public Prosecution

Since such a subject has not been emphasised, Muslim scholars had not specified a single decisive date in Islamic history which can be referred to as a landmark with regard to the transition of the criminal policy into the area of the prosecution. Also, the transition was not a definite and universal but rather a gradual process which varied from one region to another. However, this stage can be dated from the early era of *'Abbassid* state (roughly, by the end of the second Islamic century, the beginning of the eighth century AD). This date has been chosen because it witnessed the appointment of the first Chief Justice '*Qadi Al-qudah*' in Islamic

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[1] Maguie & Pointing, op. cit. p, 10.
[2] Shapland, "Victims In The Criminal Justice System." op. cit. p, 191.
[3] See Notes, "Private prosecution." op. cit. p, 218.
[4] Christie, op. cit. p, 14.
[5] See for the old English law Stephen, op. cit. vol. 1. p, 445. See also for the old African laws, Stanley Z. Fisher "The Victim's Role in Criminal Prosecution in Ethiopia." A paper presented to The First International Conference on Victimology. Jerusalem (1973). Drapkin and Viano, op. cit. p, 73.

law.[1] Such an appointment should be seen as a turning point, inasmuch as it marked the beginning of what can be described as an organised central criminal policy in Islamic history. The chief justice was assigned with the responsibility for the general administration of justice, selecting and dismissing local judges all over the state, and also, was considered one of the most important counsellors of the *Caliph*.

The transition of the prosecution policy in Islamic law towards public prosecution appears to be part of a universal move. It was felt that mere private prosecution systems were more appropriate to the earlier human societies where simplicity was a common feature. With societies becoming more complex, and the concept of the state and public interest being crystallised and expanded, such prosecution systems were deemed inadequate, and needed to be either supplemented or replaced. Some legal systems have chosen the latter solution, and shifted almost entirely to a public prosecution system like the French or the Inquisitorial procedural model. Other systems were reluctant to take such a radical step[2], and insisted on keeping, at least in theory, the principle of the private prosecution and supplemented it with the public prosecution service. This solution has been adopted by both English and Islamic law. In English law, it is held that the need for public prosecution was first felt during the reign of *Henry* VIII in (1534) who proposed that "Sergeants of the common weal" should act as prosecutor. This proposal, like those that followed until 1879, was not put in force.[3] After a series of committees, and detailed debates over a long period of time, the unsatisfactory consequences of leaving prosecution entirely in private hands was confirmed.[4] This assertion was followed by two major steps towards a public prosecution system, namely, the establishment of the office of the Director of Public Prosecution in 1879[5], and, after more than a century, the creation of the Crown Prosecution Service (CPS) in 1985.[6] The presence of such institutions married with the individuals` reluctance

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[1] He is called Abu-Yosuf, a prominent disciple of Abu-Hanifa, the founder of *Hanafi* school of law. He was appointed by the caliph Harun Al-Rashid (170-193 AH, 786-809 AD). Abu-Yosuf, on the caliph's request wrote a book called *Al-kharaj* on public finance, taxation, criminal justice, and connected subjects. See Schacht, op. cit. p, 49.

[2] This reluctance is justified in Islamic law by reference to its religious nature that shed a sense of mutability on its rules. In English law, however, the principle of private prosecution is seen as a constitutional safeguard. Sir Thomas Hetherington, "Prosecution and The Public Interest." London (1989). p, 153. Or as a point of national pride, as the great English legal historian F. W. Maitland said that "To speak of the English system as one of *private* prosecution is misleading. It is we who have *public* prosecution, for any one of the public may prosecute, abroad they have *state* prosecution or *officials* prosecution." quoted in Philips, op. cit. p, 96.

[3] Hetherington, op. cit. p, 4.

[4] Hetherington, op. cit. p, 7.

[5] It was established by The Prosecution of Offences Act (1879).

[6] It was created by The Prosecution of Offences Act (1985).

to undertake private prosecutions have brought the English system closer to the public prosecution model.[1]

A similar development has taken place in Islamic law in which the necessity for a public body to act as a prosecutor on behalf of all the community was dictated at this stage, in my view, by two factors: firstly, the insufficiency of the mere private system and secondly, the state's desire to exercise more powers over the prosecution function in order to bring it into harmony with its general policy.

a) Assessment of the System

Some questions should be raised over the validity of the Islamic victim-oriented prosecution system. Should such a system be replaced altogether or it should be modified and developed? To what extent could such a system successfully function in the present time? And it has been criticised for some of its features which are seen to be in contradiction with proper criminal policy. Other features, however, have been praised. It should be pointed out that the following assessment might be applied to any other similar system including English law.[2]

As far as criminal policy is concerned, such a prosecution system should be praised for its advocacy of the victim's rights. This system envisages the criminal conflict as it is in reality. That is to say, the criminal conflict, in the case of private crime, is seen as a property belonging only to those who were party to it i.e. the victim and his perpetrator. It seems, therefore, as an artificial presumption to exclude the victim from the process and to put the state in his place as a 'victim'. In the words of Christie, the criminal proceeding "is converted from something between the concrete parties into a conflict between one party and the state...the victim has lost his case to the state."[3] In addition, it is desirable to widen the scope of crimes which can be resolved away from the formalities of judicial procedures. Therefore, giving the victim the right to institute and to abandon the prosecution opens the door for a more reconciliatory-oriented system. In such a system there will be no legal obstacles imposed by the state-dominated system restricting the

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[1] For details on the gradual emergence of public prosecution in England and Wales, see, Hetherington, op. cit. ch, 1-3. J. L. J, Edwards, "The Law Officers Of The Crown." London (1964). For the status of the individuals' prosecution, see Samuels, op. cit. p, 33.

[2] The criticism here is not directed at the system of the private prosecution as a whole but only to its extreme version which lacks any sort of public prosecution. The English private system, before the establishment of the public prosecution, had been under attack from, lawyers, scholars and judges. An example of bitter criticism came from the Royal Commission on County Rates which said "No measure of improvement, it is believed, would be more generally acceptable than that of committing the duty of prosecution to public officers...It is a strange and discreditable defect in our system of criminal law, that it makes no provision on this subject, and, consequently, throws the burthen of proceedings on the party injured." Report of RC on County Rates (1836), p, 33. Quoted in Philips, op. cit. p, 96. See also, Hetherington, op. cit. p, 4-26.

[3] Christie, op. cit. p, 1-11. See for a similar views, Hall, op. cit. p, 936.

parties of the criminal conflict to meet and discuss on their own, or with the assistance of entrusted mediators, in order to reach an agreeable deal which achieves their satisfaction.[1]

On the other hand, the system could not escape criticism. One of the foremost important criticisms is that such a system lacks a consistent prosecution policy by which all offenders are treated equally and objectively. Leaving the prosecution decision in the hands of private individuals means that there will be no guidelines to follow and it will be entirely up to the desire of individual victims. Although in public prosecution systems disparity between offenders is always possible, it is kept to its minimum as there is common criteria and basis for prosecution decisions which are lacking in private prosecution systems.

In addition, widening the victim's prosecutorial rights opens the door for individuals, particularly the victims, the offenders and their families, to manipulate the criminal justice system and misuse it to achieve illegitimate personal gains. Using his right to cease the criminal proceedings, the victim may for example conduct a deal with the offenders by which a serious criminals, as in the case of grievous bodily harm or murder, can be set free in exchange for money or services. Such a deal is by no means in the public interest; it would encourage the criminal to reoffend, and indeed would send the wrong message to potential criminals. It also undermines the general deterrent effect of punishment on which Islamic criminal law, in particular, heavily depends as one of its prime weapons in the battle against crime.[2] In some cases, the misuse of the victim's right in ceasing the process may even harm the interest of the offender himself since he might be in desperate need of rehabilitation or treatment to curb his criminal disposition in order to avoid future reoffending. Such a need would not be revealed without a proper fair trial and examination of the offender's needs and disorders.

Moreover, the victim's right to veto may be turned into a disadvantage. When the victim is being intimidated or threatened by his offender, especially in the case of organised gangs, he is likely to be deterred from prosecution in fear of reprisal against himself or his family. Meanwhile, on the understanding that he is using his discretion, the victim would miss valuable assistance from others including public bodies.

The principle of inheriting the prosecution right and passing it to the '*waliyy al-damm*' or the victim's next of kin is open to be questioned in its validity. It has the merit of recognising the right of the victim's family to seek justice through prosecution. However, successors are not always,

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[1] The tendency towards victim-offender mediation and reconciliation schemes have experienced significant growth in the last decade. It will be discussed in detail later in the sixth chapter of this dissertation.

[2] The public deterrence is highlighted by many Muslim jurists as one of the most important objectives of punishment in Islamic law, see Abu-Zahrah, op. cit. vol. 2. .p, 28. 'Awad, op. cit. p, 30.

as it is often assumed, very close to the victim, and hence, they may prefer to conduct a deal by which they can secure a source of funds to redress their financial loss resulting from the victim's death. Thus, again a serious offender may walk unpunished in exchange for some cash, hurting the public interest and upsetting the course of justice. Furthermore, passing the victim's exclusive prosecutorial rights to his successors leads to unsuitable consequences. For example, if the only available *walyy al-damm* was himself the murderer, the consistent answer should be that no prosecution would be initiated, unless the murderer prosecuted himself. The majority of Muslim jurists, at this stage, accepted this answer and justified it in different ways.[1] The most elaborated examples are when a father killed his own son, or when one of two sons killed his father, and the other son died later, the murderer in both cases will be the only '*waliyy al-damm*' who is vested with the right to demand punishment, and hence he would escape prosecution. This view, although seemingly odd, has been adopted by the draft of the Egyptian draft of Islamic criminal law.[2]

Finally, there are many practical obstacles which make private prosecution an unpopular option for many victims. Legal costs, inconvenience, the complications of court proceedings and the waste of time and effort would deter victims particularly of trivial crimes from pursuing private prosecution. With the absence of public prosecution, the individuals' aversion from using private prosecution would pose a grave threat for the law enforcement process which has necessitated and eventually led to public intervention. Thus, although legal costs did not constitute a real obstacle in Islamic law as it imposed no judicial fees on the victim[3], other obstacles were enough to render private prosecution an undesirable option and to raise the need for public prosecution.

If the aforementioned theoretical and practical obstacles have necessitated public involvement in the prosecution of private crimes, then the need for public intervention in the prosecution of public crimes is even more obvious. If the crime victims of private crimes are disinclined to take the initiative to protect their own interests, then other members of the general public would be even more reluctant to incur expenses and effort in the cases of others. Thus, public intervention in the prosecution

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[1] 'Oda, op. cit. vol. 2p, 115. Shaltute, op. cit. p, 372.

[2] See Art. 194 B. However, the criminals in such cases are subject to be prosecuted and punished under the principle of Ta'azir according to Arts. 510-512.

[3] Ibn-Farhun, op. cit. vol. 1.p, 30. This attitude has adopted by the Egyptian draft of Islamic law which provides that crime victims, or their families, are exempted from paying any judicial fees, Art. 211. On contrary, In English law cost was held as a principal obstacle to private prosecution in England last century. Philips, op. cit. p, 97. By 1826, it became possible for prosecutors to recover many of their costs. Shapland, "Victims In The Criminal Justice." op. cit. p, 174.

process became an imperative measure not only for the sake of public interest but also for the victim's own interest.

b) The State Desire To Control the Prosecution Process

The aforementioned considerations which promoted public involvement into the prosecution process had accompanied the state desire to have more control over one of the most influential stages in the criminal process. Islamic society in the early era of the *Abbassid* State reached its peak. It stretched over a huge land from Spain to China. Islamic thought and practice were confronted by and married with various heritages of great civilisations, like the Persian and the Roman empires. The Muslim community, at this stage, was no longer a group of believers, or a simple association of people but it became a real state with a strong stable central government, which increasingly become more developed, complex and institutionalised. Therefore, in order to safeguard its people's well-being, or to protect its own interest, such a state had, just as any other state, a crucial interest in ensuring stability, peace and order in society, and to keep a firm grip over the mechanism of the criminal justice system. These objectives would not be achievable without the state being able to function as a public prosecutor whenever the public interest, in its wide scope, was under threat.

The state desire to control the prosecution process was challenged by the powerful role of the crime victims endowed upon them by the explicit sacred commands. Proclaiming its program to establish the rule of God on earth[1], the *Abbassid* State was not in a position to defy such commands. Any move to impose restrictions upon the victim's prosecutorial role may have made the legitimacy of the state open to question. It was, therefore, the task of the Muslim jurisprudence to devise new methods of interpretation that brought the prosecution rules into accordance with the state's desire.

c) The Jurisprudential Response

Islamic jurisprudence was, at this stage, in its heyday; it was involved in developing a systematic legal theory of Islamic law out of its original sources i.e. the Qur'an and the Sunna. As has been explained in the previous chapter, this was achieved by prominent scholars who by their intensive work formulated the major schools of Islamic law which continue to exist to date. Relying on the principle of 'public consideration' or '*Maslaha Mursalah*' Islamic jurisprudence was able to provide a solution for the state involvement in the prosecution process without conflicting with the victim's textual prosecutorial rights.

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[1] Schacht, "Introduction to Islamic Law." op. cit. p, 49.

As has been demonstrated earlier, the principle of '*Maslaha Mursalah*' was the main vehicle to expand Islamic law. Its two main foundations are that Islamic law's prime aim is the interest of people and that any modification or expansion of Islamic law should be presumed legitimate unless it contradicts a sound explicit rule. In cases of conflicting interests, priority should be given to interest which benefits most people. Accordingly, public interests have priority over private interests.[1] The fulfilment and the protection of the declared interests of Islamic law are rested with the competent government of a given Islamic state.[2]

Applying these principles to the area of prosecution, Islamic jurisprudence, sharing the state anxiety or expressing its own worrying, declared a principle which marked a turning point in the Islamic theory of prosecution in particular and in criminal law in general. This principle embodied in the doctrine that says 'in every private right there is a public right or element.'[3] This means that the concept of public rights '*haq Allah*' has been expanded to occupy the space previously reserved for private rights. Hence, with the new concept of public right, the concept of private crime has decayed, and it is no longer seen as a mere private conflict between the victim and his offender. The added public elements made the conflict more public than private in a way that the state becomes an essential party in the conflict in order to defend the public interest. Thus, in the light of these developments, in the case of a private crime, the community as a whole is seen as a victim, and hence is given the right to defend its infringed interest by prosecuting the offender. The '*Imam*' or the head of the state, as part of his general duty to ensure the public well-being and enforcing the Islamic law, is assumed to act as a prosecutor on behalf of his people.[4] He, in turn, is entitled to delegate his prosecutorial authority to a state agent which acts under his supervision.[5]

Seeking divine support to their argument in involving the state in the criminal process, Muslim scholars[6] referred to the relevant Qur'anic verses and made a distinction between the verses which were revealed in Mecca and those revealed in Madina. While addressing the same issue i.e. the prosecution, the former verses (the *Meccan*) are directed towards the victim or his successors[7], whereas the latter (the *Madinan*) address the

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[1] Al-Qaradawy, op. cit. p, 69-70. Ibn-Najeem. op. cit. p, 43-44. Khallaf, op. cit. p, 205.
[2] Al-Mawardy, op. cit. p, 7. Shaltute, op. cit. p, 365.
[3] Al-Shatibi, "*Al-Muwafiqat.*" op. cit. vol. 1. p, 14.
[4] Al-shishany, op. cit. .p, 483.
[5] The Qur'an, 4:59, 5:109. Shaltute, op. cit. p, 366. Al-Qurtubi, Abu 'Abdullah Mohammed, "*Aljam` le-ahkam Al-Quraani.*" *Dar Alkitab Al-mesri.* Cairo.(1968). p, 623. [hereinafter, Al-Qurtubi].
[6] Sa`ied, op .cit. p, 158. 'Amer, op. cit. p, 37-38. Al-Qurtubi. op. cit. p, 623.
[7] See, the Qur'an ,2:178 which states that, "And if any one is slain wrongfully, we have given his heir authority (to demand *Qisas* or to forgive) but let him not exceed bounds in the matter of taking life: for he is supported (by law)."

whole community.[1] The difference in the verses` address is explained by reference to the fact that in Mecca the Muslim community was still at its beginning in a simple form of aggregation and therefore the *Meccan* verses dealt with a group of individual believers rather than a collective body. Whereas in Madina, the Muslim community had started the first steps towards establishing the Islamic state and therefore the *Madinan* verses use a more general address which established the principle of collective responsibility of the whole community.[2] Consequently, while prosecution was the responsibility of individuals during the Meccan period which is a temporary stage, it become in the Madinan period, which established the permanent rules of Islamic law, the responsibility of the whole society represented by the state.

The above argument which is based on a logical interpretation seems to have a case for public prosecution of private crimes; however, it is not persuasive enough to deprive crime victims and other individuals from exercising their prosecution right established by explicit sacred commands. Consequently, public prosecution should be seen in Islamic law, not as a substitute for private prosecution, but rather as a complementary measure to overcome its shortcomings.[3] Thus, despite the establishment of equivalent bodies to public prosecution, individuals continued to exercise their prosecutorial functions all through Islamic history before the European influence which will mark the advent of the third stage.[4]

6) Prosecutors and Their Jurisdiction

Thus, at this stage there were three parties concerned with prosecution, namely, *Imam* or the state, victims and private individuals. Each has a certain jurisdiction to act within, and is restricted by conditions and qualifications. In the following, it will be explained how the introduction of the public prosecution affected the position of the other two classical prosecutors i.e. crime victims and private individuals.

The *Imam* as the head of the state and the guard of Islamic values is held responsible to initiate and conduct criminal proceedings in all crimes which he sees as threatening the public interest.[5] He carried out this duty as a representative of the whole community, and meanwhile, he is entitled

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[1] See, The Qur'an, 2:179. "O ye who believe, the law of quality '*Qisas*' is prescribed to you in case of murder."

[2] Shaltute, op. cit. p, 343. Sa`id, op. cit. p, 48.

[3] See the opposite view, Sa`ied, op. cit. p, 163.

[4] Historian treatises such as of Al-Jabarty and Ibn Aiyas assert that the individuals continued their prosecutorial functions up to the legal transformation by the end of the nineteenth century. Mohammed Nor Farahat, "*Al-qada Al-shar'I fi Misr Fi Al-asr Al-Othmani.*" or "Islamic Judiciary In Ottoman Egypt." *Al-Haiy'a Al-Amah Lil-ketab*. Cairo (1988). p, 17.

[5] See, Ibn Taymiyya, Taqy Al-dien (d, 728 AH, 1323 AD) "*Alsyasah Al Shar`Yah Fi Islah Al-Ra`Y Wa Al-Ra`Yah.*" *Dar Al-sha`b*. Cairo(1971).

to delegate his power to an agent which was, for most of the time, what is called a *Muhtasib.*[1] *Muhtasib*, as has been shown earlier, emerged as a mere volunteer, who was motivated by his religious zeal to protect Islamic values, and gradually evolved to be at this stage one of the most important figures in the Islamic criminal justice system. Usually, he was appointed by the *Caliph* himself, to be responsible for maintaining law and order in society. His duties were not restricted to prosecution, but also extended to many other services. The primary task of the *Muhtasib* was to ensure the fulfillment of religious duties such as prayers, the observance of Islamic values and to prevent any violations of God's commands.[2] Markets were usually his popular jurisdiction (probably because it was the main gathering place), where he checked the accuracy of scales, the quality of goods and generally the compliance with Islamic law. When a crime is committed, the *muhtasib* should initiate a criminal prosecution before a judge.[3] In time, the *muhtasib* was empowered with some judicial authorities to examine minor disputes and to try to reconcile the disputants. In later stages, he was able to deliver swift enforceable judgements, including imposing petty punishment.[4] However, where the case was serious or complicated it had to be referred to the judge.[5] In general, the office of *Muhtasib* was a combination of the modern public prosecution, the police force, municipal service and sometimes the judiciary.[6]

In performing his duty as a public prosecutor, a *muhtasib* should only seek the public interest according to Islamic law. However, it is too difficult to say either that there existed a consistent prosecution policy in Islamic history or to say that the office of Muhtasib was always a well-defined and organised job. The office of Muhtasib, its powers, jurisdiction and policy varied from one era to another and from one place

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[1] Islamic history witnessed a variety of offices which to some extent played the role of prosecutor such as *'wali al-mazalim'*, *'Sahib al-shurta'*, *'Alhajib'*, *'wali aljara`m'*. These offices were initially established to serve aims other than prosecution, but in time they took over some prosecutorial and judicial functions, see, Al-Mawardy, op. cit. p, 228. AL-Nowaibit, op. cit. p, 167-186. The *Hisba*, though not restricted to prosecution, was more directly involved in prosecution. Therefore it is seen by many Muslim modern writers as an equivalent to the modern public prosecutor. See, Al-Qadi, op. cit. p, 605. Sa`ied, op. cit. p, 62.

[2] Al-Mawardy, op. cit. p, 10. It should be noted that, in Islamic law, the violation of God's commands might constitute crimes against religion which are punished by Ta'azir.

[3] Here some jurists considered muhtasib as an agent of the office of judge. Ibn Khaldun, op. cit. p, 576.

[5] See Al-Mawardy, op. cit. p, 256. Al-Qadi, op. cit. p, 598-616.

[6] The office of Muhtasib has been the subject to intensive research down the time to date. The oldest chapter is believed to be written by Al-Mawardy (d, 450 AH, 1058 AD) in his treatise "*Al-ahkam Al-sultanyah*", op. cit. p, 247. In addition there are more than seventeen manuscripts, and thirty printed treatise come to us from medieval ages. This subject continues to interest modern Muslim writers in law and history. See, Al-Qadi, op. cit. p, 619.

to another according to the socio-political circumstances prevailing in a certain society.[1]

As far as the procedure is concerned, both discretionary and obligatory principles were in force. Concerning *Hudud* crimes, *muhtasib* has no discretion and the crime must be prosecuted either by his own initiative, or at the request of any private individual. Such a prosecution must be proceeded irrespective of the victim's attitude.[2] Exceptionally, a victim may veto the prosecution if the crime was theft or defamation, since such crimes, as has been shown earlier, may not be prosecuted without the victim's formal complaint. In respect of any other public crime, the *muhtasib* has an expansive discretion power. Hence, on considering all circumstances, *muhtasib* has the right to take the decision which he considers to be in the most public interest.[3] However, if he decided not to prosecute, the door would be open for private individuals, including the victim, to undertake the prosecution which will be at their own responsibility and expense.

In the area of 'private' crimes, the emergence of the *muhtasib* as a public prosecutor seems to have negatively affected the classical position of the crime victim. As they both had to share the responsibility, or the right, for prosecution, a compromise has to be made. Thus, the *muhtasib* has less discretion than he enjoyed in public crimes, meanwhile, victims lost many of their previously entitled privileges. Accordingly, if the victim initiated the criminal proceedings, the *muhtasib* has no right to object to it or stop it, which means that the obligatory principle will be applied. If he sees a public interest in pursuing such a prosecution, he could join, but not take over, the victim's action to avoid the possibility of the case being dropped.[4] On the other hand, if the victim decided to take no action, the *muhtasib* has a discretionary right to inaugurate a prosecution if he considered it to be in the public interest. In other words, unless of cases of complaint crimes, the victim in this case had been deprived of exercising his right to veto as a result of the *muhtasib* emergence.[5] In practice, however, Muhtasib would not intervene in such cases of private offences. In comparison, the *muhtasib* as a public prosecutor had less power than his counterpart of modern Western laws. Even in English law where private prosecution remains, at least in theory, the basis of the prosecution system, the public prosecutor or the Attorney-General is in more powerful position than its Islamic counterpart. He

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[1] See for the development of the office of muhtasib. Ibn Khaldun, op. cit. p, 576.
[2] Al-Zayla'i, op. cit. vol. 3. p, 97. 'Isam, op. cit. p, 179. Sa`id, op. cit. p, 161.
[3] This view is endorsed by Shafi'i. See, 'Oda, op. cit. vol. 1.p, 259. 'Amer, op. cit. p, 41.
[4] Sa'id, op. cit. p, 172. The public prosecution would be functioned in such cases by the court itself as it was authorised to impose supplementary punishment even in cases which previously could be terminated upon the victim's forgiveness.
[5] Al-Kasany, op. cit. vol. 7. p, 33. Ibn-Farhun, op .cit. vol. 2. p, 222. 'Oda, op. cit. vol. 1. p, 130.

may, for example, enter a '*nolle prosequi*' which stops the proceedings even if was initiated by the victim. In addition, for his part, the Director Of Public Prosecution may take over any private prosecution for whatever reason and at any stage.[1]

Thus, the introduction of the *Muhtasib* as a public prosecutor in Islamic law meant more declines in the victim's prosecutorial role. However, unlike other legal systems, the introduction of public prosecution in Islamic law has not led to exclusion of the victim from the process. The victim is still recognised as a party to the criminal process, and hence has a legitimate right to participate. The criminal process is seen in Islamic law, at this stage, as a tripartite system observing the relationship between its three parties, including the victim, the offender and the state. Whereas in modern prevailing criminal justice systems, the 'bipartite approach' whereby the criminal conflict has been confined to only the offender and the state. The victim as a result was excluded from the process. His 'interests' and 'wishes' may be taken in account, but it is always the public interest which should be dominant.[2] By contrast, in Islamic law, the victim is a recognised party to the prosecution process, and the involvement of the state does not steal his conflict, but only to defend its legitimate interests, and to overcome any possible shortcomings resulting from the victim's monopoly of prosecution.

7) The Third Stage: The Role of the Victim in the Prosecution Process in Modern Muslim States

This stage commenced when the Western legal thinking began to flourish over the Islamic states. It originated from the first contact between the modern Europeans and Muslims at the end of the Eighteenth century. A single event that is often referred to as the starting point of this stage is the Napoleon campaign on Egypt (1798-1801).

The Egyptian and the Sudanese legal systems have been chosen to demonstrate how the European influence has affected the Islamic theory of prosecution. Two reasons accounted for this choice; firstly, these two legal systems were among the first to be affected by European legal thinking in the Muslim world. Secondly, each of which has followed a different method of Europeanisation; the Egyptian system has been modelled after the French pattern, whereas the Sudanese law has been chiefly inspired by English law, and recently it has entered into a process

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[1] The Prosecution Of Offences Act (1985) sates that "Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage." (s. 6 '2' replacing the prosecution of offences act (1979), s. 4.), see, Samuels, op. cit. p, 41.

[2] Ashworth, "Punishment and Compensation." op. cit. p, 112. Duff, "The 'Victim Movement." op. cit. p, 147.

of Islamisation. First the Egyptian prosecution system will be examined followed by it Sudanese counterpart.

a) The Victim Role in the Egyptian Prosecution System

By (20 AH, 640 AD), Egypt became one of the Islamic state's provinces. Consequently, Islamic law became the law of the land, and was applied to all matters including criminal proceedings. All the developments of Islamic law in the area of prosecution were reflected in Egyptian law. Apart from the political influence, the legal arrangement continued to be almost the same[1]; the prosecution began as a mere private system, which gradually moved towards being more public with the emergence of the *muhtasib* and other officials who played, among other functions, the role of the public prosecutor. The office of *muhtasib* continued in Egypt in its traditional form, and changed with the Ottoman rule to be in the form of '*Iltizam*' or delegation, until it was abolished in (1234 AH, 1819 AD), and the *muhtasib* became an employee in the government of the *Khedive* or *Wali* (the ruler of Egypt). His duties and functions were distributed among other officials of the state notably the police.[2]

As has been explained earlier, the wind of changes blew with the advent of Muhammad Ali, the ambitious ruler of Egypt, who is seen as the founder of modern Egypt. Among his reforms in different areas, the legal arena received an important share of his attention. His series of codes, in particular, are considered a far-reaching step, which marked the commencement of a long term drive resulting in the decline of Islamic law in favour of Western influenced laws. Although, Egypt was part of the Ottoman Empire, it preceded it in Westernising its legal system, especially in the field of criminal law with the promulgation of the first Egyptian law, the so-called '*qanun al-filaha'* (1245 AH, 1830 AD).[3] This law, although chiefly dealing with agricultural affairs, contained many offences and punishments. Despite the official claim that this was consistent with Islamic law, some of its offences were in clear contradiction to it, particularly the punishment prescribed for theft.[4] It was followed by a series of penal laws '*qanuns'*, which were enacted by Muhammad Ali and his successors.[5] These laws gradually departed from Islamic law, especially the code of 1855 '*qanun-namah al-sultani*', and the code of 1875, which were both based on the Ottoman codes of 1851 and 1858 respectively, which in turn were modelled after the French

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[1] Abu-haif, "*Al-Diyya fimAl-sharie`a Al-islamiya.*" op. cit. p, 90.
[2] Al-Qadi, op. cit. p, 618.
[3] Anderson, "Law Reform In Egypt: 1850-1950." op. cit. p, 210.
[4] Baer, "*Tanzimat* in Egypt: The Penal Code."op. cit. p, 29.
[5] For a list of these laws see the second chapter of this dissertation.

criminal code.[1] However, the area of criminal process and prosecution received less attention than the substantive law and there was no autonomous law for criminal procedures until 1883.

The period between 1840 and 1883 was characterised by uncertainty with regard to the prosecution system. On the one hand, all the criminal laws enacted in this period were claimed to be consistent with Islamic law, and insisted on retaining the rights of individuals bestowed upon them by its rules.[2] This indicates that, despite the move towards Westernisation or secularisation, the right to a private prosecution was supposed to be preserved as it is in Islamic law. There existed certain provisions scattered over different laws which seemed to support this notion.[3] However, this period witness the early tentative steps towards a system of public prosecution. These steps manifested in the establishment of some councils to play some functions of public prosecution, for example '*Majlis Al-mashura'* or the 'Advisory Council' in (1234 AH 1818 AD), which was, by far, a judicial council, and '*Majalis Al-aqalim'* or 'Provincial Councils' (1288,1872), which were, at one time, responsible for crime investigation, prosecution and trial.

The year of 1883 marked a new era in the Egyptian legal system; it witnessed the establishment of the National Courts, and the promulgation of a main six Codes[4]including for the first time the Code of Criminal Procedure (C. C. P) to be applied by the National Courts. All these codes were substantially of French origin.[5] Islamic law was to be applied only in '*Mahakim Al-Shar`iya*' or the Islamic courts, with restricted jurisdiction confined only to personal law.[6]

The enactment of the (C. C. P) was a decisive move towards the system of public prosecution, ending thirteen centuries of private-oriented prosecution system. Article (2) of the code, following Art. (1) of the French code(1808), stated that "criminal proceedings may not be instituted except from the public prosecutor on behalf of *Khedive.*" This step was further asserted by the existing Egyptian Criminal Procedural Law of 1950[7]. The principle of public prosecution became even a

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[1] Baer, "*Tanzimat.*" op. cit. p, 127. Anderson, op. cit. p, 220.

[2] See, Baer, "*Tanzimat.*" op. cit. p, 110. Ashmawy, op. cit. p, 23.

[3] The law of "*qanun-nameh syasiyya"* (1258 AH, 1843 AD) gave crime victims the right to prosecute their offenders, (Section 3, Chapter 8). See Hassan Nash`at, "*Sharh Qanun Tahqieq Al-jinayat.*" or " Elaboration Of Crime Investigation Law." Cairo (1918). vol. 1. p, 95. [hereinafter, Nash`at]. Also, many articles dealing with Infanticide, murder, manslaughter and other offences referred to as included in the Islamic court's jurisdiction or 'Mahakim *Shar`iya*', which means that Islamic Procedures would be applied. See (Arts, 26,28, 30) of "*qanun al-filaha"* (1245 AH, 1830 AD), and (Arts, 1, 2, 11, 12) of "*qanun namah al-sultani*" (1855).

[4] The Commercial Cod, The Code of Maritime Procedure, The Penal Code, The Code of Criminal Procedure, The Civil Cod and The Code of Civil Procedure.

[5] See, Anderson, "Law Reform." op. cit. p, 219.

[6] In its broader sense including, marriage, divorce, paternity, guardianship, and succession.

[7] Art. 2 as amended in 1953.

constitutional principle when it was included in the current Egyptian constitution of 1971 (Art. 70). It has also been included in the Judicial System Law of 1972 (Art. 21).

Consequently, private individuals have been denied any participatory role in the criminal prosecution process. The only right available to them is to report the crime, and to bear witnesses if applicable. Much the same can be said of crime victims. They have lost their prestigious position which they previously enjoyed. Nevertheless, being a crime victim gives rise to some prosecutorial privileges. Following the French model, the Egyptian law provides crime victims with two measures by which they can have a role in the prosecution process. These measures are the system of complaint offences and the system of civil action, or '*Partie civilie*' which shall be examined in the following pages.

i) Complaint Offences

Considering the private nature of some crimes like adultery and defamation, Egyptian law states that, in the cases of such crimes, no criminal action may be inaugurated without an official complaint from the victims (C. C. P. Art. 3). The underlying philosophy of such a system is that such crimes are envisaged more private in a way that the decision to prosecute should be left to the victim himself. He may want to avoid the scandal that would arise from widespread publicity of the proceedings, as in the case of offences against honour. In other cases such as in defamation, it is up to the victim to evaluate if the action of the other person has effectively injured his interest. It is worth noting that, despite the fact that the Egyptian law followed the French law, the scope of complaint crimes is wider in the former than the latter.[1] This may be regarded as a trace of the influence of Islamic law or due to the social difference between the two societies.

Characterised as a legal restriction upon the Public Prosecutor's ability to take action, submitting a complaint by a crime victim does not mean an automatic institution of criminal proceedings, and indeed it does not make the victim a party to the criminal process. Its ultimate effect is to remove the restriction, and restore the public prosecutor's discretion to consider the proper action.[2] However, once the case has been transferred to the trial court, the complainant is empowered with a right to cease the proceedings at any stage, even after the final judgment in some offences, by withdrawing his complaint.[3]

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[1] See the scope of the complain crimes in the Egyptian criminal law, 'Awad, op. cit. p, 64. See, Hassanane 'Obade, "*Shakwa Almajny 'Alayh.*" or, the "The Victim's Complaint." A paper presented to the Third Conference of the Egyptian Society of Criminal Law. op. cit. p, 122-191.

[2] The Egyptian Supreme Court, ruling no. 45. 19 February 1968. p, 263. Sa'id, op. cit. p, 39. Isam, op. cit. p, 177

[3] Art. 10/1. of (C. C. P) and see, The Supreme Court. Ruling no. 98. p, 527. 13 May 1971.

ii) Partie Civilie

The other provision provided for the victim is the so-called 'civil action'. It is an alternative means by which criminal proceedings can be initiated through a claim for compensation being submitted, often by the victim, before the criminal court. Accordingly, the initiator will be joined to the criminal action as a 'civil party' or '*partie civilie*'. Although such a measure is hoped to ensure a swift redress for the victims away from the overloaded civil courts, its justifications in the Egyptian law are based largely on practical considerations. Unlike the English law, the French and Egyptian laws[1] adopt the doctrine of "*la chose jugee au criminel a autorite sur le civil*", which means that "if a criminal action has been commenced against the wrongdoer in respect of the same facts, then not only the civil case be adjourned until after the criminal trial has been completed, but in addition the civil judge must not reach a decision which contradicts that of the criminal court."[2] Hence, the victim has a real interest in ensuring the conviction of his offender. In addition, very often, there is a case of interdependence between the investigation of the crime, and the claim for compensation or restitution. Therefore, the victim will benefit from the inquisitorial nature of the process to improve his chance of obtaining compensation especially in the case of the offender being unknown. Some Egyptian scholars emphasise the importance of the system of Partie civilie as a safeguard against any bias, inaction or corruption on the part of the public prosecutor.[3]

As for the procedural issues, the victim can be *partie civilie* by one of two methods. He could request to be joined as a party to criminal proceedings already inaugurated by the public prosecutor at any stage up to the closing speech. Alternatively, if no prosecution has been initiated, the victim can instigate proceedings for compensation as *partie civilie* by means of '*la citation directe*' (C. C. P, Art. 232). The latter action automatically starts the criminal proceedings since any civil claim cannot be heard on its own by a criminal court.[4] In practice, as Mr. Al-Menyawi asserted, crime victims do not submit their application for compensation directly to the court but to the Public Prosecutor or one of his deputies who are obliged to submit the application to the court as part of the criminal proceedings.[5]

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[1] Arts. 265, 456 of the Egyptian Cod of Criminal Procedure

[2] Andrew West et al, "The French Legal System: An Introduction." London (1992). p, 231.[hereinafter, West, The French Legal System]. Mahmud Mustafa "*Hukuk Al-Majny Alyh Fi Al-qanun Almukaran*", or "Victim's Right In the Comparative Law." *Matbaiat Jame'at Al-Qaherah* (Cairo University Press) Cairo (1975). p, 121. [Hereinafter, Mustafa].

[3] See for details, Fawziyah, op. cit. p, 106. 'Awad, op. cit. p, 58.

[4] Fawziyah, op. cit. p, 193. West, "The French Legal System." op. cit. p, 232. Sa`id, op. cit. p, 515.

[5] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview. Cairo, February 1999.

Being a *partie civilie* by either way means that the victim is recognised as a 'quasi-party' to the criminal proceedings, and as such has certain rights. He, for instance, has a right to attend all the investigation process in person, or through legal representation by a lawyer, (C. C. P, Art. 77, 170), to cite witnesses and to examine them (C. C. P, Arts. 271,272), to be informed of the case developments and the procedural decisions especially those which concern him most, like the decision not to prosecute(C. C. P, Arts. 62,78,153,154,157). The victim is also given the right to appeal against certain decisions and judgements, such as the decision not to prosecute (C.C. P, Arts. 162,167,210).

Although it seems to provide the victim with a favourable position, the system of *Partie civilie* in Egyptian law delivers another picture in practice. First of all, the system is highly restricted. For example, being a crime victim is not enough to be entitled to use such a measure; it must be proven that the victim has been harmed by the crime in a way that there is a real prospect of being compensated, since this measure is not designed for the 'victim', but literally 'the harmed party' (C. C. P, Art. 232).[1] Furthermore, partie civilie is confined only to those crimes which are considered to be misdemeanour or minor. It is not applied to the more serious crimes or felony (C. C. P, Art. 232). In addition, the victim is not allowed to use this right when the offender is a police officer acting in the course of his duty (C. C. P, Art. 232/ 2). Crime victims, are also be obliged to pay the cost of the proceedings, with the risk of being compelled to pay damages to the alleged offender if the latter is acquitted (C. C. P, Arts. 256, 260, 319, 320).

Moreover, once the civil claim is transferred to the criminal court, the Public Prosecutor, as Mr. Al-Menyawi asserted, must take over the prosecution ending the victim's role as a prosecutor. However, the victim, Mr. Al-Menyawi added, could participate indirectly through substantiating his claim for compensation. Therefore, the victim has no right to appeal against the court decision regarding the punishment but he is allowed to challenge the court decision with regard to his civil application.[2]

Further to the aforementioned restrictions, even if the victim is involved as a *partie civilie*, his prosecutorial rights are, in practice, often neglected or even ignored by the public prosecution authorities. The

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[1] This term has raised many questions in both French and Egyptian jurisprudence about who has the right to be partie civilie, the victim, his family, or the insurance company who has paid the victim an indemnity for his loss. See, West, "The French Legal System." op. cit. p, 229. Fawziyah, op. cit. p, 103. Mr. Samir Naji, asserted that the crime victim is always eligible to use the system of *partie civlie* as he is always included in the term 'harmed party' since even if he has not been physically injured he is always harmed by the crime at least psychologically. Mr. Naji, a former Supreme Court judge and deputy of the Minster of justice. A personal interview. Cairo, February 1999.

[2] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview.

victim is hardly notified of the developments on 'his case' and his wishes or needs are rarely met.[1] In general, the treatment of the victim as a party to criminal proceedings is taking little account of his trauma and victimisation. There is no doubt that the shortage of funds, the overloaded criminal courts, and the lack of trained staff all contribute to the victims being poorly treated. However, the main obstacle towards a more participatory role and better treatment for the crime victims resides in the mentality of the legal staff who have been taught and trained to perceive the criminal proceedings as a state inclusive function. For some staff, especially within public prosecution agencies and the police, the victim's participatory role is conceived as a threat for their monopoly of the prosecution process. This may interpret their negligence of the victim's procedural rights as stated in the law. For this reason and others, there was a move, according to Mr. Al-Menyawi, among some legislative bodies as well as legal parishioners to abolish the system of 'partie civilie' altogether which would eliminate the limited role for crime victims in the criminal proceedings. Mr. Al-Menyawi asserted that he and others supported the retention of the system of partie civilie not just for the victim's sake but also because its abolition may contradict the constitution. He explained that on one hand, the Constitution declares Islamic law as the main source of legislation and depriving crime victims from participating in the criminal proceedings conflicts with Islamic law principles in this regard. On the other hand, Article 71 of the Constitution explicitly gives crime victims the right to 'partie civilie' in certain crimes, such as the crime of torture by a public officer.[2] Therefore, instead of abolishing the system of partie civilie it should be enhanced, bearing in mind that any policy attempts to elevate the victim's prosecutorial right should not focus only on changing the law but more important changing the mentality of staff who are in contact with the victims from police officers to judges.

To sum up, the Egyptian prosecution system had been for several centuries a private-oriented system following the Islamic model. During the last century, as part of a general move for modernisation and secularisation, the Egyptian legal system as a whole, underwent a process of alteration ending up with being almost completely separated from its Islamic origins to be a copy of the Western model particularly the French one. As a result, the prosecution has become entirely a public system with little chance for the victim to participate in its process.

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[1] Al-Bishry Al-Shurbaji, *"Dawr Al-Nyabah Al-Aama Fi Kafalat Hukuk Al-Majni Alyh"*, or "The Role Of Public Prosecutor In Safeguarding The victim's Rights." A Paper presented to the Third Conference Of The Egyptian Society Of Criminal Law (Cairo, 12-14 Mars, 1989). op. cit. p, 205. [Hereinafter, Al-Shurbaji].

[2] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview. Cairo, February 1999.

b) The Victim's Prosecutorial Role in the Sudanese Law

In the same manner as in Egypt, Islamic law continued to prevail in the Sudan as the law of the land for centuries during which the Islamic principles in prosecution were followed.[1] However, unlike the Egyptian law which was renowned for it stability, the Sudanese law has experienced a series of changes and alterations moving it from one extreme to another, from Islamic law in its traditional form to Ottoman laws, English law and back again to Islamic law in some modern formula. During the reign of the Egyptian rule (1821-1884 AD), the application of Islamic law in the Sudan continued almost intact and was slightly affected by the promulgation of several Ottoman criminal laws (*Tanzimat*[2]) which were in practice confined to major cities.[3] The application of Islamic law had been even reconfirmed by the *Mahdist* movement (1883-1898) which declared Islamic law as the law of the land.[4] The radical change in the Sudanese legal systems was brought about by the British rule or British-Egyptian Condominium Rule by which, with the exception of personal law[5], the whole Sudanese legal as well as administration systems were redirected towards Europeanisation or rather 'Englishisation'. Thus, before the end of the first year of the British rule, the first Sudanese Penal Code (P. C) and the Code of Criminal Procedure(C. C. P,) were enacted copying their Indian counterparts of 1881, which in turn was inspired by English Law.[6] The

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[1] In fact before the Egyptian rule of the Sudan there was no such a unified country known by the name Sudan, rather there were several kingdoms and sultanates such as Sinnar sultanates along the river and Darfore Sultanates in the west (15th century-1820 AD). Galal. A. Lutfi, "The Future of the English Law in the Sudan." The Sudan Law Journal and Report (S. L. J. R). p, 221

[2] See Baer, "*Tanzimat.*" op. cit. p, 127.

[3] For more details, see Mustafa Zaki, "The Common Law in the Sudan." Andre Deutsch, London (1974). p, 34-38. Henry Riyadh, "*Mojaz Tariekh Al-sultah Al-tashrie`yah Fi Al-Sudan.*" or "A Summary of the History of the Legislative Power in the Sudan." Khartoum (1967), p, 12. [hereinafter, Riyadh].

[4] See for more details, Alfahl Altaher 'Omar, "*Alsulta Alqadaya Fi Aser AlMahdiyya.*" or "Judiciary Under Mahdist Rule." The Sudan Law Journal and Reports (S. L. J. R) (1964). p, 167. Major-general Sir F. R. Winggate gave an eye-witness account as how the Mahdi strictly applied the principles of Islamic law. See for details his book, "Ten Years' Captivity in Mahdis' Camp 1882-1892." Sampson Low, Marston & Co. London(1893). Quoted in Lutfi, "The Future of the English Law in the Sudan." op. cit. p, 222.

[5] All aspects of personal laws were governed by either customary law or Islamic law where applicable. According to Art. 5 of Civil Justice Ordinance 1929, "when in any suit or other proceeding in a civil court when any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of Wakfs, the rule of the decision shall be: (a) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience ...and has not been declared void by the decision of a competent court; (b) The Mohammedan Law in cases where the parties are Mohammedan, except in so far as that law has been modified by such custom as is above referred to." See Laws of the Sudan, (10), p, 12 (1955). See, Sayyid Mohammad Abu Rannat, "The Relationship Between Islamic And Customary Law In The Sudan." Journal of African Law. vol. 4. (1960). p, 9. [Hereinafter, Abu Rannat]

[6] The Indian criminal code was an adoption of English law to the needs of British India and it was achieved by Lord Macaulay. The Sudan version of the codes was accomplished by Sir W. Brunyate. See, Allots, A. N., "Essays in African Law." Butterworth's African Law Series no. 1. London (1960).

code of criminal procedure was replaced with almost the same one in 1925.[1] In 1974, following the promulgation of the Sudanese Constitution of 1973, new codes of penal and criminal procedure were enacted in Arabic with little modifications and keeping all main lines of the criminal policy. A fundamental change was brought about in 1983 when Nemeri decided to Islamize the whole Sudanese legal system. Consequently, all laws, including penal and criminal procedure laws, were modified, or replaced, to be in accordance with Islamic principles. In the wake of the 1989 military coup by the National Salvation Revolution, the Revolutionary Council declared Islamic law as the prevailing law claiming a new understanding and a better application from the Nemeri experiment.[2]

As far as the prosecution system is concerned, being either modelled after the English law or following Islamic law, the Sudanese prosecution system represents one of the rare examples of private prosecution system in all Arabic countries.[3] The later developments of the Sudanese prosecution system show further a great deal of similarity to English law. Thus, as will be demonstrated shortly, the Sudanese law has experienced similar developments which transferred the English prosecution from a mere private system to a near-public system. In addition to the office of the Attorney-General which known in both laws, a similar institution to the Crown Prosecution Service was also established in the Sudan. .

Thus, examining the role of the victim the Sudanese prosecution system requires dividing this section into three subsections: the era of private prosecution, the trend towards public prosecution and finally effect of the application of Islamic law on the victim's role in the prosecution process.

i) The Era of Private Prosecution

From the first Code of Criminal Procedure 1899 up to the latest one 1991, the Sudanese law seems, with variation, faithful to the principle of private prosecution. For a long time the Sudanese law adopted a private prosecution system in which the initiation and the conduction of the prosecution process had been rested almost entirely with private

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[1] Act no 17 1925.

[2] Mr. Hassan Al-Torabi, the speaker of the Sudanese Parliament, a personal interview. Doha, February 1991. Mr. Al-Torabi is widely regarded as the spiritual father of the National Salvation Revolution in the Sudan.

[3] In fact, the Sudanese and the Iraqi previous Criminal Procedure codes were the only two Arabic laws which adopted the system of private prosecution. Both laws were modelled after the English system of prosecution and the Iraqi law was a modified version of the Sudanese law laid down after the British rule of Iraq after the First World War. It worth noting that the existing Iraqi Cod of Criminal Procedure no. 23 (1971) has discarded the system of private prosecution and adopted a rather mixed prosecution system. See for details, Mahmood Mustafa, "*Tatawer Al-Ijra'at Al-jena'ya fi fi miser wa ghayraha men al-dowal al-arabiya.*" or, "The Development Of Criminal Procedures In Egypt And Other Arab Countries." Cairo University Press. 2ed edition. Cairo (1985). p, 36-38.

individuals particularly the victims. Accordingly, despite the availability of the office of the Attorney-General and other public prosecutors, individuals has been given a right to initiate and conduct a criminal prosecution. The private prosecution, whether by the victim or other individuals, is inaugurated by submitting a complaint before a respective judge.[1] A complaint here is meant to be 'an oral or written accusation that a crime has been committed, to be submitted before a judge in order to allow him to proceed with the subsequent criminal proceedings'.[2] The complaint should be however distinguished from a mere crime 'report' which may passed to any judge or police officer and unlike the complaint has no binding effect on the recipient who could take no further action without being obliged to give reasons.[3] Thus, once a complaint has been submitted, the judge has to question the complainant and his witnesses, if any, under oath. If the judge is convinced that that there is enough reasons to proceed with the complaint he must question the alleged offender and set a date for a trial.[4]

The prosecutorial role of the complainant, whether the crime victim or any other individual, does not confined only to the inauguration of the prosecution, but he has also a right to conduct the prosecution and to stand in almost the same footing as the public prosecutor. Thus, during the trial, the complainant has a right to question the defendant, examine, and cross-examine the witnesses of both sides.[5] In order to enhance his role as a party to the criminal proceedings, the complainant is also given a right to submit a petition against the judge's decision not to proceed with the complaint or if the judgement has not been to his satisfaction.[6] The Supreme Court has strongly endorsed such a conclusion and confirmed that the individuals' prosecutorial rights extend also to public crimes. In a crime of illegal entry into the country in which the court of appeal, relying on the nature of the crime as connecting to the state's sovereignty, rejected the complainant involvement into the conduction of the prosecution and denied his right to appeal against the Province Judge's ruling. The Supreme Court quashed the appeal court's verdict ruling that "Its generally agreed that any ordinary citizen may initiate criminal proceedings against any accused person in relation to most offences, including illegal entry into Sudan by an alien." It continued saying "Section 211 of the Code of Criminal Procedure 1974 allows the

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[1] Arts. 5, 135/1, 211 of C. C. P, (1974), and Art. 5. of the C. C. P, (1983). Art. 34/2, 3 C. C. P, 1991.
[2] Art. 5, C. C. P, 1983.
[3] Art. 139. C. C. P, (1974).
[4] Art. 135, C. C. P, (1974), Art. 150, C. C. P, (1983). See also, The Supreme Court, the Sudan government v. 'Omar Mohammad Fadl. S. L. .J. R (1978). p, 136.
[5] Arts. 164-170, C. C. P, (1983). In cases where the complainant fails to turn up on the trial day, the court has a choice between cancelling the proceedings or to proceed with the trial in it consider that to be in the public interest Art. 171, C. C. P, (1983).
[6] Arts. 230, 239, C. C. P (1983).

complainant to appoint an advocate to conduct the prosecution without obtaining the prior permission of the Attorney-General.[1]

Providing the complainant, particularly the victim, with such powerful prosecutorial rights is justified, as Mr. Alob states, on practical as well as theoretical grounds. In terms of practicality, it is essential for a huge country with little means such as the Sudan to allow ordinary people to undertake criminal prosecutions to recompense the lack or even the absence of public prosecution authorities in every region particularly remote areas. In addition, theoretically, the people's participation in the prosecution process can be seen as a guarantee against any possible inaction or misuse in the part of public prosecution.[2] It can be added that the English-modelled private prosecution system was similar to the Islamic prosecution system which had been in place for centuries. Thus, the Sudanese found little, if any, difficulties in adopting the 'new' system.

In addition to his prosecutorial rights as an ordinary individual, the crime victim is provided with special additional prosecutorial privileges. According to the system of complaint crimes, there are certain crimes which no one has the right to prosecute save the crime victim or his guardian. If the victim initiates the prosecution he also has the right to terminate it at his own will at any stage before the final judgement.[3] Moreover, there are certain 'compoundable crimes' to which the crime victim is given the right to mediate with his offender and to settle their conflict away from the court or even during the trial. As will be detailed in the coming chapter on mediation in Islamic law, the Code of Criminal Procedure of 1974 (Art. 286) specified certain compoundable crimes and listed them in an appendix table. The laws of 1983 and 1991 have even expanded the field of compoundable crimes by making all private crimes compoundable and have given the trial judge the discretion to determine whether the crime is private 'compoundable' or not.[4] If the mediation is successful, the proceedings may be terminated and the offender may be acquitted.[5]

Nevertheless, despite the open invitation for people and particularly crime victims to take the initiative and to participate in the criminal prosecution, in practice, the bulk of prosecutions have been brought by public authorities, notably the police. Most people prefer to report a

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1This, however, does not prevent the Attorney-General from intervening to stop the complainant or his advocate from conducting the prosecution, and appoint someone to take over the private prosecutor." The Supreme Court. Sudan Government v. Rajab 'Ali and others. Sudan Law Journal and Reports S. L. J. R. 1980. p, 65.

[2] Mr. Hassan Alob. A Sudanese Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

[3] Arts. 133, 134/1 C. C. P, (1974), Arts, 433-437, 425, 427, 429-431 C. C. P, (1974). Art. 36/1,2,3 C. C. P, (1991).

[4] Art. 270, C. C. P, (1983) and Art. 4/1, C. C. P, (1991).

[5] Art. 286/4/6, C. C. P, (1974) and Art. 36, C. C. P, (1991).

crime but not to stand as a complainant and undertake the subsequent process. Even some victims prefer to report to the police rather than directly to the judge.[1] Such attitude has accounted for the Sudanese law subsequent move towards more public prosecution.

ii) The Trend towards Public Prosecution

The Sudanese prosecution system has not been a mere private system; public prosecution has been always available. However, the role of public prosecution has evolved and enlarged gradually over the years from being concerned only with serious public offences to end up having prime responsibility for prosecuting all crimes with more powers to control and to curb private prosecution. Thus, even though the Sudanese prosecution system has relied on private prosecutions as the main method of initiating criminal prosecutions, it has also provided from early on for public prosecution. The successive Sudanese laws of criminal procedure allow the respective judges to commence criminal proceedings upon several methods such as, police report (Arts. 112, 122 C. C. P, 1974)[2], crime report or even upon the judge's own initiative relying on his own knowledge (Art. 135/4,C. C. P, 1974).[3] Although such prosecutions are brought by public figures, they are largely considered as private prosecutions as judges and police officers act as private citizens rather than as competent authorities.[4]

The person who is assigned by law to act as a public prosecutor and therefore poses a threat or competition to the victim's prosecutorial role is the Attorney-General. The office of the Attorney-General was first created by the Code of Criminal Procedure (1899), but no one was appointed for the post which was taken over by the British Legal-Secretary and later after the independence by the Minister of Justice. Therefore, the functions and the jurisdiction of the Attorney-General were not clearly defined and practised. As far as the prosecution is concerned, the Attorney-General is assigned with the task of defending the state's interests and to have an overall supervision over the whole prosecution process (Art. 211 C. C. P 1974). In practice, the Attorney-General hardly used his full legal capacity. He had been concerned largely with serious public crimes such as murders, smuggling and crimes against the state's security.[5] Nevertheless, concerning the victim, the Attorney-General is authorised with a special power which may undermine the victim's

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[1] Mr. Ma'mun A. Hammur. A Sudanese Supreme Court judge. A personal interview. Doha, April 1998. Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

[2] Corresponding to Arts, 133, 151, C. C. P, 1983.

[3] Corresponding to Art. 133/1, C. C. P, (1983)

[4] Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

[5] Mohy-Aldien, op. cit. p, 40.

privileges to private prosecution. According to Art. 215 C. C. P, (1983)[1], the Attorney-General, just as his English counterpart, is entitled to either enter a '*nolle prosequi*' which stops the proceedings irrespective of who has initiated the prosecution, or takes over any private prosecution.

Giving the Attorney-General such a consequential powers pushes the Sudanese system more towards public prosecution as it makes the Attorney-General the real master of the prosecution process and significantly restricts the victim's prosecutorial role. Such powers however, may be justified on the public interest as it allows the Attorney-General to control the process in order to prevent any misuse or abuse of private prosecutions. To that end, the Attorney-General's decision to halt or to take over a private prosecution must be in the public interest or for the sake of justice.[2] Thus, in order to save the victim's prosecutorial rights and to ensure that the Attorney-General's decision has been taken in the public interest, should the victim be allowed to challenge the Attorney-General's decision to stop or take over private prosecution. The Sudanese laws before 1991 provided nothing to answer such a question and therefore it was the task of courts to provide an answer. First of all, it should be noted that the Attorney-General's decision to enter a '*nolle prosequi*' is not equal to an acquittal and therefore can be reversed by the Attorney-General himself.[3] The question whether such a decision can be challenged at court depends largely on the nature of the decision, Judicial or administrative, and the extent of Attorney-General's discretionary power, absolute or restricted. The Supreme Court has encountered the problem and set an important precedent that gave the victim a right to challenge the Attorney's decision. It ruled in 1965 that, "An order of *Nolle prosequi* by the Attorney General is a quasi-judicial order and therefore subject to review by the court on writ of certiorari."[4] Such a ruling was a step forward as it has rebalanced the Attorney-General's authority in away that makes sense of the victim's private prosecution and prevents any arbitrary misuse of the Attorney's powerful decisions. Regrettably, the Supreme Court reversed its decision later on in another precedent set in 1980 ruling that the Attorney's right to enter a *Nolle prosequi* is an absolute and therefore is not subject to review by any higher judicial authority.[5]

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[1] Corresponding to art. 231 C. C. P, (1925) and Art. 211 C. C. P, (1974). This article was first introduced by Criminal Act no 5 1940, and modified by Act no 3 (1951) and Act no 19 (1968). See, Yasin 'Omar, "*Sharh Qanun Al-Igra`at Al-jena`ya.*" or "Elucidation of The Law of Criminal Procedure." *Dar Wa Maktabat Al-Hilal.* Beirut, 2ed Edition (1996). p, 141. [hereinafter, 'Omar].

[2] Mohy-Aldien, op. cit. p, 41.

[3] Mustafa, op. cit. p, 24.

[4] The Supreme Court, the Sudan Government v. Zahra Adam 'Omar. S. L. J. R (1965). p, 31.

[5] The Supreme Court, the Sudan Government v. Ahmed Ismael Mosa. S. L. J. R (1980). p, 121.

In order to settle the issue, the new code of criminal procedure 1991 has successfully managed to resolve the problems by restricting the Attorney-General authority in halting private prosecutions. It states that the Attorney General decision to halt the criminal proceeding is final and absolute and not subject for any revision, (Art. 58/1 C. C. P, 1991). However, unlike previous laws, the Attorney-General under the current law is not entitled to use such a power in cases of Hudud and Qisas crimes or any other crime which the victim is given the right to abandon or waive the prosecution i.e. private crimes (Art. 58/2. 1991).

The trend towards public prosecution has been pushed further with the enactment of the first law which precisely defines the functions and the jurisdictions of the Attorney-General in 1983 by which the Attorney-General has been vested with a variety of influential legal as well as political functions and duties.[1] The trend has also received a vital boost by the promulgation of the Code of Criminal Procedure of 1991 which establishes for the first time in the Sudanese legal history the system Public Prosecutors who work as deputies for the Attorney-General all over the Sudan. Previously the Attorney-General had a single office in the capital and only involved in serious prosecutions which were often carried out on his behalf by appointed lawyers or police officers. With the new law, a deputy of the Attorney-General should be available in all jurisdictions of the Sudan (Arts. 17, 18. C. C. P, 1991) with an overall task to supervise and conduct all crime investigations, prosecution, charging and presenting criminal cases before criminal courts (Art. 19).[2] This article is unprecedented in the Sudanese law as it clarifies, organizes, and increases the tasks and jurisdictions of the Attorney-General and his deputies.[3] Nevertheless, in practice, the lack of the required staff to work as public prosecutors particularly in remote provinces has compelled the Attorney-General to continue the previous practice by delegating his prosecutorial powers to appointed police officers, judges and even other unprofessional public servants.[4] Judges

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[1] The Attorney-General Act of 1983 was enacted with reference to Art. 197 of the Constitution of 1973, which states that the president shall appoint the Attorney-General to be the legal representative of the state and to exercise any other special functions, defined by the law. Compared with its Egyptian counterpart, the Attorney-General in the Sudanese law has far more powers and authorities. While the Egyptian Attorney-General performs primarily judicial functions, his Sudanese counterpart perform judicial and political roles as he is also an ex officio member of the cabinet (Art. 197) of the constitution (1974).

[2] Art. 19 states that, "Public Prosecutors shall supervise and conduct all crime investigations, prosecution, charging and presenting criminal cases before criminal courts." See the Laws of the Sudan, Code of Criminal Procedure. vol. 1. p, 126. 6th edition (1992). The Sudanese Ministry of Justice.

[3] 'Omar, op. cit. p, 72. .

[4] Mr., Hammur, a Sudanese Supreme Court judge. A personal interview. Doha, March 1998. See Art. 20, C. C. P, 1991, which authorises the Attorney-General to delegate some of his prosecutorial powers to officials other that public prosecutors.

also continued, in remote areas, their previous roles as prosecutors and recipients of the complaints.[1]

Despite the clear trend towards public prosecution, the Sudanese law could not completely abandon its long history of attachment to private prosecution. One of the most influential factors which have helped the survival of private prosecution is because it constitutes an essential part of Islamic prosecution system to which the Sudanese law adhered.

iii) The Effect of Islamic Law on the Sudanese Prosecution System

The Sudanese prosecution system seems, even before the Islamisation process, to be more consistent with Islamic law than its Arabic counterparts. This is probably because the English-inspired prosecution system which was applied previously in the Sudan had much more common ground with Islamic law than the French-model applied in most Arabic countries. Therefore, the process of Islamisation has little effect on the prosecution system. In an interview with Mr. 'Awad Al-Jeed,[2]who was one the of master lawyer of Islamisation process, he asserted that "while trying to bring the code of criminal procedure in accordance with Islamic law we found little to be changed". "We even", he continued, "tried to keep the numbers of the articles as they were as far as possible in order to avoid any legal destabilisation." "The field of the prosecution system, in particular, was in harmony with Islamic principles in prosecution." "Giving all citizens the right to prosecute public crimes and giving crime victims special prosecutorial rights in private crimes is the common ground between Islamic law and the Sudanese law". "Therefore", Mr. Al-Jeed concluded, "we consider that keeping the prosecution system as it was responded to both Islamisation process and legal stability."

As for the Code of Criminal Procedure of 1991 which is considered as a significant step towards the system of public prosecution, Islamic principles in prosecution have played an essential role in preserving the right to private prosecution. Therefore, despite the introduction of the system of public prosecutors, the law could not ignore the victims' prosecutorial rights, particularly in Qisas and private crimes, vested upon them by Islamic law. Thus, the victims of violent or property crimes have been given a right to initiate private prosecution which is, unlike other prosecutions, immune from the Attorney-General special measure of entering *Nolle prosequi* (Arts, 34/2, 58/2 C. C. P, 1991). Moreover, the crime victims are given also the right to waive their right to

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[1] Mr. Salah Al-Sharif, a former Sudanese Supreme Court Judged(1988-1989). A personal interview. Doha, April 1998. Mr. 'Awad Al-Jeed, a former Attorney-general (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998.

[2] Mr. 'Awad Al-Jeed, a former Attorney-general (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998

prosecution as a result of forgiveness or mediation at any stage before the final judgement with an effect of terminating the criminal proceedings in case of exclusive private prosecution or mere private crime (Art. 36/1,2 C. C. P, 1991). In addition, the victim is not given only the right to initiate the prosecution but also to conduct it either exclusively or jointly with the public prosecutors (Art. 136. C. C. P, 1991). The recent application of the victim's right to conduct the prosecution before the court was personally experience by a Supreme Court judge Mr. Abdul-Rahman Sharfy, who presided over a trial of two defendants charged with intentionally causing death and injuries punishable according to Arts. 130, 168, 175 of Penal Code 1991. The injured victims and the families of dead victims asked the court to participate in the proceedings independently as separate parties. The court, referring to Art. 136 C. C. P, 1991, allowed them to participate in co-operation with the public prosecutors. Mr. Sharfy added that despite the practical difficulties of having two different prosecutors representing different and sometimes conflicting interests, the trial went on smoothly and the victims and their families were extremely satisfied with their experience and with the outcome of the trial.[1] In another precedent, the crime victim was allowed to appeal against the court's verdict before the Supreme Court individually as the public prosecutor did not appeal.[2]

Thus, despite the general move towards public prosecution in the Sudanese law, its adherence to Islamic law on one hand and the similarity between the Islamic and English-inspired Sudanese prosecution systems on the other hand has helped to preserve the victim's prosecutorial rights and maintained the quality of the Sudanese prosecution as the most victim-oriented prosecution system among Arabic States.

8) Conclusion

Islamic law can be portrayed as an extreme case for victim-oriented systems. Its theory of prosecution takes an initial stance that the crime victim is an essential party to the prosecution process, and hence his role is indispensable. This stance manifested itself in the wide range of prosecutorial powers vested in the victim, which may lead one to say that Islamic law heavily backs the victim in the prosecution equation, possibly at the expense of the other parties.

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[1] Mr. 'Abdul-Rahman Sharfy, a Sudanese Supreme Court judge and the head of the Technical Office of the Supreme Court. A personal interview, Doha, Mars 1998.

[2] The Supreme Court. SC. 61/1995. Sudan Government v. Ahmed balil and others. This ruling has not yet been published; it has been kindly handed by Mr. Ma'mun A. Hammur. A Sudanese Supreme Court judge.

Because of its religious nature, Islamic law is widely associated with immutability.[1] As has been demonstrated in the previous chapter, Islamic law has a certain degree of inflexibility which has not, and should not, prevented its development. In the field of prosecution, it has been shown how the concepts of crime, rights and consequently prosecutorial positions have been developed and modified over the centuries. At its early stages, the Muslim society was simple and uncomplicated and the idea of an organised public body holding the responsibility of prosecution was unknown. Therefore, the prosecution was principally seen as a private matter for individuals, who would undertake this duty, essentially as a fulfilment of the religious commands to enjoin what is good and to forbid what is evil and as a social duty to maintain law and order in the community. Hence, the prosecution was primarily a bipartite system, involving only the offender and the victim, or sometimes other individuals in the cases of public crimes. As the favoured party to the prosecution, the victim was armed, by Islamic law, with an extensive range of prosecutorial powers making him the real master of the prosecution process.

The state's involvement in the prosecution process seemed to be inescapable. Islamic jurisprudence, realising the public elements of the private crimes, or responding to the state's desire, declared a principle which turned the Islamic prosecution into being more public system. This principle, which claimed that 'in every private right there is a public right or element', opened the door for the state, representing the interest of the whole community, to be a party to the criminal process.

The fact of the matter is that Islamic law was no exception and almost all legal systems have experienced a similar development. However, unlike other laws, Islamic law has not excluded the victim from the criminal process as a result of the state presence. In fact, the public prosecution has been introduced, not as a substitute to the private prosecution, but to supplement it and to remedy its shortcomings. Thus, Islamic prosecution became in its new face a 'tripartite' system, including, almost in equal footing, the state, the victim and the offender.

It has been shown that despite the strong arguments in favour of more participatory role for the crime victims in the prosecution process, the underlying explanation for giving the victim a 'party status' in some crimes is that Islamic law envisages such crimes as more like civil misdeeds rather than criminal offences. A short comparison between Hudud and Qisas crimes proves such a view. Islamic law provides the victim with two different statuses depending on the crime's nature. Thus, irrespective of the degree of his suffering, the victim of Hudud crimes,

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[1] This is the view of many orientalists, see, Schacht, "An Introduction.", op. cit. p, 5, 199. Gibb, "Muhammadanisim." op. cit. p, 61.

compared to the victim of Qisas crimes, is placed in a far less influential position in the prosecution process. The reasons accounted for such a distinction is that Hudud are considered as crimes in the modern legal sense whereas the criminality of Qisas and other private crimes are far less emphasised. The emphasis is even less in unintentional violent crimes where there is no punitive remedies. It is such a view that could explain why the victim of Qisas crimes, unlike the victim of Hudud crimes, are given the right to initiate, conduct and terminate the prosecution at their will just as in civil proceedings.

The contemporary Muslim states have followed different ways in determining the victim's role in the prosecution process. The Egyptian law has followed the Latin model of criminal process in which the criminal proceedings are seen primarily as a state affair in which the crime victim should have no part to play save as a witness. However, the victim is not completely ignored as he is provided with opportunities to involve in the prosecution process. Yet, such involvement is still limited and practically troublesome. There is therefore, a disparate need to review the victim's role in the Egyptian prosecution system in order to increase the victim's presence in this early yet important stage of the criminal process. The Egyptian jurisprudence endorses such a call to improve the victim status in the criminal proceeding. Professor Fawziyah has urged the Egyptian legislator to widen the victim's right to '*la citation directe*' or 'private prosecution' to cover all crimes and to be detached from the application for compensation.[1] Mr. Al-Menyawi, has also called for the widening of the range of complaint crimes to cover all private crimes as it gives the victim an exclusive right not just to initiate prosecution but also to prevent others from initiating prosecution. He stressed that there are some trivial and personal offences such as minor assaults and family offences which should be dealt with according to the victim's wish without overstressing their public elements.[2] Mr. Al-Shurbaji has suggested appointing a deputy Attorney-General to be responsible for maintaining and elevating the victim's role and rights in the prosecution process.[3] What should be noticed that most senior Judges, as Mr. al-Menyawi and Mr. Naji asserted, believe that applying

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[1] Fawziyah, op. cit. p, 113. This view however has been challenged by other senior judges who oppose any extension of private prosecution to cover serious crimes or felonies as such crimes need to be carefully investigated and should not be left to possible malicious prosecutions. Samir Naji, A personal interview. Mr. Naji is a former Egyptian Supreme Court judge and the deputy of the Minister of justice. He was also a director of "*Al-markiz Al-qawmi Lidderassat Al-qadaiyah*" or The National Centre For Judicial Studies (1982-86).

[2] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview. This is also the opinion of some Egyptian scholars such as professor Hassanin 'Obade, "*Shakwa Al-majny Aly.*" or "The Victim's Complaint." A paper presented to the third Conference of the Egyptian Society of Criminal Law entitled. "Rights of Victims in the Criminal Process." Cairo (12-14. Mars 1989). p, 134. [hereinafter, 'Obade].

[3] Al-Shurbaji, op. cit. p, 215.

Islamic principles in this regard would greatly enhance the victim's prosecutorial role in the Egyptian law and accords the victim with the position that he deserves in the criminal proceedings. They, however, consider that the victim's influential role should be restricted in cases of serious crimes such as murders as to give the Public Prosecutor the right to proceed with the prosecution even if the victim, or his family, decides not to do so[1]. Nevertheless, these calls and others have not yet formed a unified effort to constitute a real pressure to promote the victim's status in the Egyptian prosecution system.

The Sudanese law on the other hand has adopted the system of private prosecution as a result of its adherence to English law. Therefore, from the victim's point of view, the Sudanese prosecution system seems to be the most favourite among its Arabic counterparts. It views the private individuals and indeed the victims as essential players in the prosecution process. The move towards Islamisation process has not negatively affected the victim's prosecutorial role, on contrary, Islamic law has saved the victim's status from being washed by the tide of the trend towards public prosecution. Should such a trend had not been coincided with the Islamisation process, the victim could have been utterly taken over by the public prosecutor. Sticking to Islamic law has even enhanced the victim's prosecutorial role as he has been vested with all the victim's rights in Islamic prosecution system. The Sudanese law has also observed the late developments in Islamic jurisprudence which have called for the state involvement in the criminal process even in private crimes but without taking over the victim position. Thus, it has established the system of public prosecutors to work solely in public crime as a representative of the whole community and to work jointly with the victim in private crimes if such intervention is required by a real public interest.

Although there is no survey or statistical studies have been conducted to measure the victim's satisfaction with the latest developments in the Sudanese law, the interviewed judges have asserted that most victims if not all as well as their families were very pleased with their experience in the criminal proceedings under the new law. Mr. Alob pointed out that involving the victim in the prosecution process has helped him and other colleagues to delivered the justice that responds to the people's notion of justice.[2]

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[1] Mr. Badr al-Menyawi, the former Attorney General, and Mr. Samir Naji, a former Supreme Court judge, personal interviews.

[2] Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

Chapter (4) The Victim's Restitution in Islamic Law

1) Introduction.

Restitution in its wider definition[1] has not been always a familiar concept in criminal law. Its existence and development within criminal law is closely connected with and affected by the position of crime victims in the criminal proceedings, the more the victim is recognised as a party to the criminal conflict the more the concept of restitution is recognised and supported. Thus at the time when the victim and his offender were seen as the only parties to the criminal conflict, compensation and other components of the restorative justice constituted a major part of the concept of criminal justice. Historically, the idea of compensation was recognised by almost all ancient systems and civilisations. Traces of the concept of composition was found for example in the 9th book of the Iliad, Ajax, the code of Hammurabi, the creed of Manu, the Indian Hinduism, the Law of Moses, the law of the Twelve Tables, the code of Ur-Nammu, the code of Lipit-Ishtar and the African and Asian tribes.[2] Restoration as a major reaction toward criminal activities gained more importance over the time since it served as an alternative to blood feud which largely for economic reasons could not be afforded by settled communities who became increasingly more willing to accept monetary compensation.

As time went by and communities in many parts of the world particularly in northern Europe became more settled, some sort of central governments began to emerge paving the way for the emergence of the concept that the crime is a misdeed against the whole community not only the victim. Therefore, governments (Kings, tribe leaders or overlords) claimed a share of the compensation handed over to the victim. In Saxon England for example, the *Wer* or compensation for homicide and the *Bot* or indemnity for injury, lived alongside the *Wite* or fine paid to the king or overlord.[3] Consequently, the victim lost some of his rights in the criminal process as he had to accept the invasion of some of his own space by the community represented by the state prosecution agents. As

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[1] Restitution, restoration and reparation are interchangeably used in many victim-related studies. For the purpose of this chapter restitution is meant to be the effort or actions taken by, or imposed on, the offender in order to remove the bad effect of his criminal act and to restore, as far as possible, the pre-crime situation. It includes compensation (material or symbolic), reparation of the damage caused by the crime where applicable and the restoration of goods and money gained by the crime.

[2] See for more details, Stephen Schafer, "Restitution To Victims Of Crime." London (1960). p, 5 [hereinafter, Schafer, Restitution]. Daniel W. Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice." Criminal Law Forum (10993). vol. 4. no. 2. p, 251.[hereinafter, Daniel & Ness "Challenges of Restorative Justice"].

[3] Schafer, op. cit. p, 12.

the state became stronger and more stable, it started to control the course of justice, and substituted the overlord in demanding the *Wite* which is defined as a fine to be imposed as a formal punishment alongside other sorts of punishments. As a result, a victim's claim for restitution was gradually transferred away from the criminal justice system to be regarded as a civil claim. So, the same misdeed is tried twice before two different courts according to different rules. Such a differentiation between civil and criminal liability has grown over time and gained a theoretical justification. It is this distinction which is responsible for the victim's exclusion from the criminal process and transferred him from an equal party to a stranger or at best a witness. Currently, such a distinction continues to be one of many obstacles precluding the reintroduction of restitution into the criminal justice system.[1]

At the turn of this century, it was realised that crime victims had been ignored for too long, and therefore they should not be absent any more as their presence in the criminal proceedings is not just in their interests but in the interest of the whole criminal justice. Thus, calls were initiated by leading European criminologists to reintegrate the victim into the criminal process, and to meet his justifiable rights or needs for help and restitution. The issue of victim and restoration were discussed in a number of International Prison Congresses held in Stockholm (1878), Paris (1895), Brussels (1900). The interest in the victim's rights and needs for compensation has grown tremendously in this century particularly in the second half. The idea of victim's compensation was revived, developed and defended by many enthusiast scholars such as Margery Fry[2], Eglash[3] and Schafer.[4] The outcome has been embodied in various legislation and schemes such Compensation Order in English whereby criminal courts are allowed and encouraged to order offenders to compensate their victims.[5] Similar developments have been undertaken in other Western legal systems.[6]

Currently, the victim's restitution as part of the victim's position in the criminal justice constitutes one of the major concerns of criminal policy. However, restorative justice as an alternative to the existing criminal justice has not reached its final destination yet. The various schemes of

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[1] P. S. Atiyah, "Compensation Orders And Civil Liability." Criminal Law Review(1979). p, 504.[hereinafter, Atiyah]. Duff, op. cit. p, 150.

[2] Fry, M. "Arms Of The Law." Gollancz, London(1951).

[3] Eglash, A. "Creative Restitution." Journal of Criminal Law, Criminology and Police Science. 48(6). (1958). p, 619-622.

[4] Stephen Schafer, "Compensation and Restitution to victims of crime." Montclair, NJ: Patterson Smith (1970). [Hereinafter, Schafer, Compensation].

[5] See Write, "Justice for Victims and Offenders." op. cit. p, 51-53.

[6] Burt Galaway and Joe Hudson, "Restorative Justice: International Perspectives." Monset, N.Y. Criminal Justice Pr. (1996). Schafer, "Compensation and Restitution to victims of crime." Montclair, N.J: Patterson Smith(1970). [Hereinafter, Schafer, Compensation].

compensation at both levels, official and voluntary, still largely work at the margin of the existing 'traditional' system. The coming years will witness the outcome of the struggle between the restorative justice advocates and the sceptics who constantly throw doubts over any move to enlarge the victims space in the criminal process.[1]

2) Restitution In Islamic Law

Restorative justice constitutes an essential part of the Islamic criminal justice system. However, it does not necessarily match the restorative justice models suggested by modern Western scholars, and is not certainly based on the same philosophies and justifications. The theoretical basis for the concept of restorative justice in Islamic law resides in its view of the crime and criminal conflicts. As has been emphasised in the previous chapter, Islamic law particularly at its early stages, conceived criminal conflicts, except for few religious public crimes, as private or individual conflicts between the offender and the victim. Although the public elements of the crime are not entirely ignored, the bulk of the attention is directed towards the real victim who was the material subject of the crime. A closer look reveals that Islamic law did not emphasise the distinction between criminal and civil liability as it is in modern Western laws. Consequently, despite of the availability of punitive measures, crimes or 'wrongdoings' are also confronted with mere civil remedies such as compensation which can stand as a sole reaction. In some cases, serious crimes such as grave assaults or manslaughter are confronted with symbolic measures such as an apology. What matters for Islamic law is the victim's satisfaction which stands as the ultimate objective of all remedies prescribed for the majority of 'crimes'. Therefore, in most cases, the victim, not the court, is authorised to choose, from several remedies prescribed for a crime, the remedy that achieves his satisfaction. Due to theoretical and practical considerations in the majority of cases, restoration and compensation, either material or symbolic, are the only options available for the victims, or their families. Thus, restorative justice in Islamic law constitutes an essential part of Islamic criminal justice. It works along with other retributive and rehabilitative principles of which consists the Islamic holistic criminal policy.

The two most relevant major rules in this respect are, "*la darar wala derar.*"[2] (there should be neither harming nor reciprocating harm), and "*a`darar yuzal*" (harm must be removed). These two rules, as many

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[1] See for example, Andrew Ashworth, "Some Doubts About Restorative Justice." Criminal Law Forum (1993). vol. 4. no. 2. p, 277. Duff, op. cit. p, 147.

[2] Related by Ibn-Majah. *Ketab Al-ahkam*, Hadith no. 2331.

others[1], have a general application in all fields of life, but they are especially utilised in the legal arena, particularly in criminal law. The first rule means that harm should not occur in the first place, so every effort should be made to avoid the occurrence of harm, any harm. This rule establishes a religious duty upon every individual to exert himself to avoid committing any harmful deed, and meanwhile preventing others from committing such deeds. However, the occurrence of harm is inevitable in any human society, so, here the other rule comes into effect by stating that harm must be removed as far as possible. The removal of harm means the recovery of the original situation before the incident of the harmful act, or at least eliminating all its evil consequences. The application of these rules in criminal law is embodied in two systems of criminal restitution, namely, *Diyya* and *Daman*. *Diyya* is a system of a fixed monetary compensation applying only to homicide and bodily injuries. *Daman* carries the meaning of restoration, understood in its broader sense as restoring the original situation as far as possible, including restoring goods and money or any other benefits gained by the crime, and also compensating the victim for any other loss or harm.

The role of the community is essential in repairing crime damages. As has been shown earlier, the community plays an essential role in preventing the crime incident in the first place by the means of enjoining what is good and prohibiting what is evil. Therefore, if community-based crime prevention fails, then the community has to take part in repairing the damage. Thus, not only is the offender obliged to repair the damage caused by his own act, but also his own community in its smaller sense such as his immediate family, relatives or neighbours, and also in its wider sense as the whole society or even the state. This involvement is intended to be motivation for the community to show support to both offender and victim, and to raise the awareness of the crime's widespread danger.

Now it is time to explore the components of Islamic model of restorative justice. This section will be divided into two parts. The first one will focus on the elements of the Islamic model of restorative justice such as the extent of restitution in terms of crimes, the amount of compensation, the burden of paying compensation or doing restoration and the beneficiary of the restitution. The second part will explore the

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[1] The system of general rules or '*Al-Qwa`id al-kulliyya al-fiqhyyah*', in Islamic law consists of a number of universal rules of jurisprudence from which particular legal provisions may be induced. The earliest *Hanafies* compiled 17 such rules, which were subsequently increases to 37, and then to 86. See Ibn-Najeem, "*Al-ashbah wa Al-naza'r.*" ibid. Most of these rules was embodied in the first codified Islamic civil law or the Ottoman Civil Code '*Mejelle*' Arts. 2-99. (1293 AH, 1876 AD). Haider, op. cit. vol. 1. p, 15-88. It is worth noting that most these articles have been included in the new Civil Codes of Syria, Iraq and Jordan. Examples of these rules are, "In contract, effect is given to intention and meaning and not to words and phrases." and "freedom of obligation shall be deemed the original state of things." See Jamal J. Nasir, "The Islamic Law of Personal Status." London(1986). p, 22.

application of this model in two modern Islamic states i.e. Egypt and the Sudan.

3) Historical Background

When Islamic law was revealed at the beginning of the sixth century (AD), the transformation in criminal law from vengeful retaliation to composition was underway in almost all ancient societies.[1] As shown earlier, traces of restitution embodied in the death fine and compensation for injuries both to person and property was found in almost all ancient laws. The pre-Islam Arabian nomadic society was no exception as here the principle of compensating crime victims was quite well-built, especially in cities. This society was essentially tribal, and therefore there was no single organised political authority or state, rather each tribe constituted a state of its own, and had its own legal institutions. Generally speaking, in the nomadic society, crime was more likely to be followed by revenge leading to blood-feud which may have lasted for years. Not taking revenge may have brought disgrace on the victim and his tribe. When compensation was introduced to serve as a substitute to blood feud, it was a significant development in tribal societies which gradually transferred to more economically settled life. The lack of an organised central government precluded the establishment of a general theory of compensation, therefore, procedures of compensation varied from one tribe to another. It was generally voluntary, and decided by an arbitrator who estimated it according to the seriousness of the harm, the social evaluation of the aggrieved party, his relative class position, his gender and the strength of his tribe. This estimation was always subject to negotiation, and it was paid for by all members of the offender's tribe to the victim or his family.[2]

4) The Extent of Restitution in Terms of Crimes

All crimes in Islamic law are restorable. However, as crimes are considered different from the view of restoration, they will be divided into three sections, violent crimes, non-violent crimes and public crimes.

a) Violent Crimes

The normal field of compensatory justice in Islamic law is the area of violent crimes which result either in death or bodily harm. Compensation is called *Diyya* in cases of homicide, and *Arsh*, which is fixed percentages of Diyya, for injuries. Compensation in violent crimes may be either a

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[1] Schafer, "Victimology." op. cit. p, 11.
[2] See, Idries, op. cit. p, 52. Abu-Haif, op. cit. p, 20.

substitute to the original punishment, or the only sanction imposed for the crime.

Compensation as a substitute sanction. Violent crimes in Islamic law are broadly divided into two categories, intentional and unintentional.[1] In the case of intentional crimes, the original punishment is Qisas, or the exact harm to be inflicted upon the offender. So, if the crime results in death, the offender will be executed upon the request of the victim's family, and the same is applied to injuries. Sometimes, such a punishment is inapplicable because it is impossible to impose the exact harm upon the offender, especially in the case of injuries, for example if a head injury resulted in mental disability.[2] Moreover, the victim, or his successors, has the right to drop his claim for Qisas. In these cases, the offender will be ordered to pay compensation as a substitute for the original punishment.[3] In this regard the Qur'an says "*O ye who believe, the law of quality 'Qisas' is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made... then grant any reasonable demand and compensate the victim with handsome gratitude, this is a concession and mercy from your Lord.*"[4] Thus, compensation would be the most possible remedies in intentional violent crimes.

Compensation as an original sanction. If the crime is unintentional, then the only sanction prescribed by Islamic law is compensation. This applies even if the consequence of the crime is the victim's death[5]. The crime list in this category contains some crimes of significant seriousness in present laws such as manslaughter and wounding. In this respect the Qur'an states that "*Never should a believer kill a believer except by mistake, and who ever kills a believer by mistake is ordained that he should free a believing slave and pay Diyya to the deceased's family, unless they remit it free.*"[6]

The purely civil remedy of Islamic law towards such serious crimes may seem unfamiliar for modern lawyers.[7] The fact of the matter is that

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[1] This is particularly right for the *Maliki* school whereas other schools grade the culpability in four degrees i.e. deliberate intent, quasi-deliberate, mistake, indirect homicide. See, Al-Zayla'i, op. cit. vol. 6. p, 98. 'Oda, "*Al-tashri'*." op. cit. vol. 1.p, 403.

[2] Most intentional injuries cannot be subjected to the principle of Qisas as it is extremely difficult to measure the degree of harm caused by the offender's act. Therefore, in the majority of cases, the principle of compensation '*Arsh*' is operated. 'Oda, op. cit. vol. 1.p, 668. Abu-Haif, op. cit. p, 36.

[3] Unless the victim dropped his right for compensation and offer his forgiveness. See Ibn Rushd, Mohammed Al-Qurtubi (d, 595 AH, 1199 AD) "*Bedayat Almujtahid wa nehayat Al-muqtasid.*" 2 vols. *Dar Al-ma'refa*. Beirut (1982). vol. 2. p, 450. Abu-Zahrah, op. cit. vol. 2. p, 564.

[4] The Qur'an, 2:178.

[5] Ibn-Rushd, op. cit. vol. 2.p, 443. Abu-Haif, op. cit. p, 37

[6] The Qur'an, 4:92.

[7] In Britain for example the Criminal Justice Act 1988 which provides for the compensation order to be given priority over fine has, as Wright asserts, made it possible for the first time in English law that compensation order can stand alone as a sufficient sanction, without being accompanied by another sanction however, in practice this barely happens. See Wright, op. cit. p, 51.

such an approach proved what had already been stressed that Islamic law does not emphasise the distinction of civil and criminal liability. This may disclose an early tendency toward decriminalisation in Islamic law whereby civil measures are seen as being sufficient to achieve the objective of Islamic law which is to get the victim's satisfaction and to restore peace in society. Social peace, as Mr. Mohey-Aldien asserted[1], is the prime motive behind Islamic policy in ensuring the victim's satisfaction by providing the remedies that most beneficial for him. Besides, from the religious point of view, there is a point in differentiating between intentional and unintentional crimes as to their morality and the offender's state of mind. Thus, the Qur'an says, "*there is no blame on you if ye make a mistake therein: what counts is the intention of your heart*"[2]. This tendency, however, has not been fully realised by Muslim scholars who have insisted in calling such wrongdoings '*Jynaya*', which means crimes. At latter stages, judges have been authorised to impose further punishment if they believe that the civil measure is not adequate.[3]

b) Non-Violent Crimes

Non-violent crimes are studied in Islamic law under the principle of Ta'azir, where there are no prescribed crimes or punishments. Instead, the court, governed by fairly loose rules[4] is endowed with an extensive power to determine the illegality of the act, and to decide the best course of reaction or measures to be taken.[5] Although modern Muslim jurists insist on the criminal nature of the principle of Ta'azir[6], a closer consideration may reveal its civil nature or at least undecided nature. In fact, Ta'azir is even more evident than Qisas in showing the lack of emphasis on the distinction between crime and tort in Islamic jurisprudence. Reviewing most medieval authoritative legal treatises confirms such a conclusion.[7] They allowed the trial-judge to examine

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[1] Professor Mohammed Mohy Al-Dien Awad, an Egyptian leading scholar of criminal law and a former Dean of the faculty of law, Cairo University, branch of Khartoum. A personal interview. Riyadh, March 1998.

[2] The Qur'an, 33:5.

[3] 'Oda, op. cit. vol. 1. p, 687. Ibn-Farhun, op. cit. vol. 2. p, 264.

[4] For example, the act must be proven to be a sin in its religious sense, or causes harm to individuals or the public interest. See, 'Oda, op. cit. vol. 1. p, 148.

[5] Muslim scholars insist that extensive power of judges does not amount to arbitration, since judges in Islamic law must have certain qualifications regarding character, knowledge and specialisation in order be appointed as such, see, Al-Baker, op. cit. p, 399. However, if this may be held true for the early stages of Islamic history, the late stages witnessed a great deal of corruption in the judiciary which was influenced or even manipulated by the political system. Therefore, modern Muslim jurists call for the adoption of the codification of Islamic law in which case judges' jurisdiction will be extremely reduced. See, Al-Qaradawy, op. cit. p, 306.

[6] Abu-Zahrah, op. cit. vol. 1. p, 120. Shaltute, op. cit. p, 294.

[7] See, Ibn-Qudama, "*Almughni*", op. cit. vol. 4-7. Ibn-Rushd, "*Bedayat Al-Mujtahid.*" op. cit. vol. 2. Al-Kasany, "*Bada`a Al-sana`a*", op. cit. vol. 7. p, 64. Al-Mawardy, op. cit. p, 243-247.

each case on its own, and consider the misdeed itself in terms of its harmful consequences, the degree of culpability and the victim's attitude. Upon these considerations, the judge has the power to decide the best remedy for the case which might be either a punitive or non-punitive measure. In other words, the judge is authorised to order a tailor-made remedy that best suits the offender as well as the victim, irrespective of its punitive nature. Broadly speaking, there were two deductive criteria used as a guidance to differentiate crime from tort within Ta'azir. The first criterion was related to the infringed right, so if the offence is against religious or public interests, it is more likely to be faced with punitive measures, but if the victim was a private individual, civil remedy would be the most favourable response. The second criterion is related to the offender's state of mind. If the wrongdoing was intentional, it is likely to be considered as a crime in terms of its sanctions, whereas unintentional wrongdoings were likely to be seen as torts.[1]

Whatever the classification of the wrongdoing is, it makes no difference to the victim who must be satisfied in all circumstances. With regard to restoration and compensation, Muslim jurists apply the same rules for both crimes and torts, which is simply that harm must be removed. Under, the titles of *Ghasp* and *Daman*, jurists detailed a lengthy list of misdeeds and explained the duty of the wrongdoers in compensating their victim. For example, if an item has been illegally seized from the victim's possession, it must be restored whether the act is classified as theft or civil tort. Similarly, if the item has been damaged, its real value must be paid back to its owner. Compensation and restoration may be ordered with or without accompanied punishment, and it always made by the same court. Illegal seizure and causing damage to other's properties were the most elaborated examples in Islamic jurisprudence. Muslim jurists went into the minute details of each case which are beyond the scope of this research.[2]

c) <u>Public Crimes</u>

As has been explained in the preceding chapters, Islamic law recognises a set of crimes which corresponds to the concept of modern public crimes, though not necessarily containing the same crimes. Such crimes, which include fornication and theft, are seen as an infringement of God's right or the public right, and therefore, the victim's interests are subordinated. However, the victim is entitled to be compensated if he

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[1] Thus, the Muslim leading jurist, Ibn-Taymiyya, demonstrated a number of acts which might be punished according to the principle of *Ta'azir*, all of which are intentional, such as forgery, breach of trust, perjury and other religious sins which are regarded as public crimes. "*Al-syasa Al-shari'ya.*" op. cit. p, 120.

[2] See, Ibn-Rushd, op. cit. vol. 2. p, 340. Ibn-Qudama, op. cit. vol. 5. p, 238.

successfully proves his loss. Basically, public crimes are not covered by the principle of Diyya which is reserved only for violent crimes. Compensation in these crimes is awarded according to the principal of *Daman*. This principle rules that the victim of the public crime, just the same as any other victim of misdeed, must be restored, as far as possible, to his original position. Thus, the criminal court which tries public crimes should, on the application of the victim, order the restoration of goods, money and any other items taken by the offender[1]. In addition, on the victim's application, the court should also appoint a referee to determine the amount of compensation for any other loss or expenses. Thus, in the case of theft, for instance, which is considered a public crime, the offender must return the stolen goods if available or otherwise their value.[2] In addition, in the case of rape, in addition to the prescribed punishment, the offender must compensate his victim.[3]

5) The Amount of Compensation.

The separation of civil and criminal liability in the modern legal system has made the determination and subsequently the estimation of the amount of compensation a complex issue.[4] Generally speaking, in deciding the amount of compensation, modern courts take into account dual criteria i.e. the subjective guilt of the offender and the consequences of his wrongdoing. Therefore, all relevant circumstances should be considered before the court concludes the amount of compensation due to the victim or his family. Modern laws follow more than one scheme. Some legal systems leave the issue entirely to the discretion of the court whereas other systems set up some elements that the court should consider to decide the amount of compensation. The Sudanese law for example, specifies some of these elements such as, pain and suffering, loss of amenities of life, loss of expected future happiness, shortened expectancy of life, disfiguration, medication expense, loss of earning, and funeral expenses.[5]

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[1] See, Mohammed Mohy Al-dien "*Bada`il Aljaza`at Aljena`ya Fi Almujtama Al-Islami.*" or "Alternatives for Criminal Sanctions in Islamic Law." *Markiz Al-Derassat Al-Amniya,* Riyadh (1991), p, 28. [hereinafter, Mohy, Bada'l].

[2] Shaltute, op. cit. p. 415. Mohy, op. cit. 24. Farghali, Hilal, "*Al-nizam Al-Isalmi Fi Ta`weed Al-madrure men Al-jarema*", or "Compensation In Islamic law." *Markiz Al-Derassat Al-Amniya,* Riyadh (1981). p, 52. [hereinafter, Farghali].

[3] According to some medieval jurists, compensation in this case should be equal to the victim's possible dower, and also if the rape led to pregnancy the child must be related to his father. Al-Qarafi, "*Al-foruq*", op. cit. vol. 4. p, 160. Ibn-Rushd, op. cit. vol. 2. p, 350.

[4] See, Atiyah, op. cit. p, 508. Martin Wasik, "The Place of Compensation in the Penal System." Criminal Law Review (1978). p, 604. [hereinafter, Wasik].

[5] See the Sudanese Supreme Court, Allah-Ma'ana v. Alroda bent Mohammed. The Sudan Law Journal and Reports. p, 29.

Islamic law follows a different approach in determining the sum of compensation due to the crime victim or his family. Such an approach is based largely on the consequence of the crime on the victim. The degree of culpability on the part of the offender, although not entirely neglected, receives a less significant emphasis. As has been stressed in the first chapter, Islamic law adopts what can be called a 'problem resolve' approach which gives priority to the removal of the harmful effects of the unlawful act particularly on the victim rather than concentrating on the classification of the act itself. Therefore, for the sake of the victim's interest, compensation can be determined in some cases with no reference to the offender's state of mind.

As to non-violent crimes, the principle of *Daman* is applied, by which courts are given a discretionary power to decide on the amount of compensation. Accordingly, the court should match the sum of compensation to the real value of the loss caused to the victim as a result of the misdeed.[1] In determining the real value, the court is entitled to appoint an expert referee '*hukumat adl*' (or fair judgement). If the illegally seized items, goods or money are available, restoration to their owner must be ordered.[2] In addition to restoration, the offender must compensate the victim for any loss resulting from the illegal use of his item, or from preventing him from utilising it, especially if he depends on it for a living[3], such as a car used as a taxi. Muslim jurists have also elaborated cases in which the value of the illegally seized items or property is increased. Such an increase might take place naturally, or as it is called 'by the act of God', such as if the captured goat gives birth, or by the act of the wrongdoer himself as if he cultivated the illegally seized land, or trained the stolen horse. Among the diversity of opinions, some jurists said that the wrongdoer might be compensated for the increase he has contributed to.[4] Thus, for non-violent crime Islamic law adopts a similar approach to Western laws. The difference however resides in the fact that in Islamic law, compensation and punishment are determined and ordered by the same court.

With regard to violent crimes, Islamic law has established a different approach by which a detailed tariff is provided determining the amount of compensation due for death and most bodily injuries. If the injury is not prescribed, then recourse should be made to '*hukumat adl*' by which an

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[1] Farghali, op. cit. p, 66. Al-Zayla'i, op. cit. vol. 5. p, 223.
[2] Ibn-Rushd, op. cit. vol. 2. 343. Shaltute, op. cit. p, 417.
[3] Muslim jurists tend to speculate and deliver legal solutions for possible incidents which may give rise to compensation. See, Ibn-Rushd, op. cit. vol. 2. p, 340. Shaltute, op. cit. p, 296.
[4] See for more details, Ibn-Qudama, "*Almughny.*" op. cit. vol. 5. p, 272. Ibn-Rushd. op. cit. vol. 2. p, 346. Ibn-Qudama for example, explained in detail the diversity of opinions among Muslim jurists regarding a lengthy list of cases about the increase and decrease of the stolen or illegally taken items.

appointed expert should decide the amount of compensation.[1] The first feature of such an approach is that the evaluation of compensation for prescribed death and injuries it is set at a fixed sum which pays little attention to personal considerations and other circumstances which are taken into account in modern laws. The second feature is that the estimation is made with reference to a camel's value. Therefore, in the case of death for example, Diyya amounts to 100 camels. Apparently camels were used as a continuation of the pre-Islam Arabia tradition in which the use of money was scarce, and camels were deemed as one of the most valuable items of a desert man's wealth. Nevertheless, modern Muslim jurists agree that a camel was used as an example since it is reported that the Prophet allowed the use of money, gold, silver or any other items of equal value as an alternative for camels.[2]

It is worth shedding light on the list of tariffs set by Islamic law for criminal injuries. In the case of death for example a whole Diyya is due which amounts to one hundred camels of a determined quality.[3] However, as a sign of considering the degree of the offender's capability in determining the amount of compensation, in the case of intentional killing the offender must pay a heavier Diyya '*Diyya mughallaza*' which although amounts to the same number of camels (one hundred), their quality, and consequently their value, is higher.[4] In the case of bodily harm, Muslim jurists developed a detailed list of tariffs by relating the injured part to the whole Diyya. For example, a full Diyya is due for the loss of organs which exist singly, such as a tongue, nose, and penis. A half Diyya is payable for the loss of each of the organs which exist in pairs, such as hands, legs and eyes. A quarter of the Diyya is payable for the loss of organs which exist in fours, such as eyelashes. One-tenth of the Diyya is payable for the loss of organs which exist in tens, such as fingers and toes. If the injury results in the loss of one of the five senses such as hearing, or the loss of mind or sexual power, a full Diyya is due. In the case of partial loss, the compensation will be determined by calculating the percentage of the loss or the injury. Muslim jurists over the centuries have developed a very detailed list of compensation covering almost all possible criminal injuries.[5]

The amount of compensation in Islamic law for death or bodily harm is the same for all victims. Personal status such as age, sex professional and

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[1] Abu-Haif, op. cit. p, 58. Idries, op. cit. p, 330. Ibn-Qudama, op. cit. vol. 7. p,

[2] Abu-Zahrah, op. cit. vol. 1. p, 576. Ibn-Rushd, op. cit. vol. 2. p, 443.

[3] Camel's value in the present time varies from one county to another. Also, the use of camel may affect its value, for example racing camel is more expensive than other kinds. Therefore, the Sudanese Penal Law (1991) has authorised the Chief Justice to review the amount of Diyya according to the average value of camels (Art. 42/1). Whereas the Egyptian draft of Islamic criminal law has determined the Diyya by reference to the value of gold, which amounts to 4250 gm (Art. 258).

[4] Al-Zayla'i, op. cit. vol. 6. p, 127. Al-Kasany, op. cit. vol. 7. p, 254.

[5] See Abu-Haif, op. cit. p, 62. Al-Zayla'i, op. cit. vol. 6. p, 127. Al-Kasany, op. cit. vol. 7. p, 254.

other circumstances have no effect in determining the amount of compensation in this set of crimes. The underlying philosophy behind this perspective is to achieve equality. That is to say, compensation is regarded here as a substitute or a price for the 'blood', or the human life, which, from the Islamic point of view, must have an equal value for all human beings.[1]

This rigid determination of the victim's compensation may have a virtue of standardising the amount of compensation, and eliminating the long-practised tradition of pre-Islam Arabia in which human life was subject to bias and impartial evaluation. Nevertheless, taking no notice of personal circumstances which undoubtedly varies largely from one person to another is a point which should be addressed if the Islamic compensation system is to be put into force in modern times. Due to its religious character, Muslim jurists have taken the list of tariffs for granted, so they have never questioned its appropriateness, nor raised the idea of modifying it, or even left the whole matter to the courts discretion.[2] Nevertheless, a comprehensive and closer look at the concept of Diyya in Islamic law may disclose that it is possible[3] to leave the matter of compensation in the hands of the court to decide upon the circumstances of each case. The term 'Diyya' is mentioned in the Qur'an, which is the principal source of Islamic law, without a definite article, which means that it only establishes, in principle, the doctrine of criminal compensation without stating any estimation.[4] When it came into practice, a list of tariffs for homicide and some injuries had been established in Arabian customary law which was, with some modifications, adopted by Islamic law.[5] This adoption should be understood as an observation of Islamic law into the customs of the early Muslims to ease their conversion to the new religion, and therefore, it is of a temporary nature.[6] The over emphasis of Muslim jurists over the centuries, on detailing the list of tariffs, rather than elaborating the

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[1] Abu-Zahrah, op. cit. vol. 1. p, 571. Farghali, op. cit. p, 162.

[2] Abu-Haif, op. cit. p, 32.

[3] The possibility here is from the religious point of view, as any modification in Islamic law which is not supported by the general rules of interpretation in Islamic jurisprudence, may not be religiously accepted.

[4] This interpretation is ascribed to Mohammed Abdu, a leading religious reformer in modern Egypt, see, Shaltute, op. cit. p, 416. Although, such interpretation was not clearly suggested by medicval scholars, some indications can be inferred from their discussion over the possibility of compensating the victim for, medical expenses, loss of earnings during the healing period, or even the possibility of compensating the moral harm for the injury. Shaltute, op. cit. p, 417.

[5] For, example, Diyya for homicide was 10 camels, and then increased to 100 just before the advent of Islam. See, Idries, op. cit. p, 230. Note(1).

[6] Muslim jurists insist that the policy of gradual change and observing the customary law as far as it did not contradict Islamic rules, constituted one of the most important factor of the success of Islam. This policy has been followed in respect of many of the Islamic rules, such as the prohibition of drinking alcohol. See, Al-Qaradawy, op. cit. p, 129. See also the discussion in chapter (2) over the effect of pre-Islam Arabian custom on Islamic law.

principle or theory, has overshadowed the real concerns of Islamic law in this regard, and led to multi-volume treatises detailing how much is due for each injury.[1] Therefore, it should be concluded that, unlike the principle of compensation itself, the customary list should have no obligatory character. It is, hence, up to Muslim society in a given time to adopt or create its own method of compensation. Without such an interpretation, it would be very difficult for the principle of Diyya, as a component of Islamic system of criminal compensation to be introduced in present times. Such a proposition has further benefit in resolving other controversial issues in Diyya such as the status of women and non-Muslim.[2] By adopting an individualised approach based on the actual loss, religion and gender should have no effect on determining the amount of compensation.

Unfortunately, the recent applications of Islamic criminal law do not seem to have the same view. Instead, they codify the traditional list of tariffs with all its minute details, which the court has to apply in the same conventional method. For example, the draft of the Egyptian Islamic criminal law has listed the tariffs in more than fourteen articles (Arts, 257-271).[3] Similarly, the list is also codified in articles (42-46) of the Sudanese Penal Law of 1991. Under these codes, courts have no power to alter the list either by decreasing or increasing the stated amount.[4]

6) The Burden of Payment

The main principle in Islamic law governing the criminal and civil liability is that everyone is responsible for his own act, and no one shall be liable for other's acts.[5] It is stated in the Qur'an, "No bearer of burdens shall bear the burden of another."[6] Also, full legal capacity is required before the question of liability is raised, hence, infancy, insanity, intoxication, duress, necessity and all other general defences of modern laws have the same effect in Islamic law in terms of ruling out the

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[1] For example, some jurists studied the amount due to compensate the injury of almost each part of the human body, including, eyelashes, eyebrows, each tooth, each hair of the head and beard. See, Ibn-Rushd, op. cit. vol. 2. p, 460. Al-Zayla'i, op. cit. vol. 6. p, 130.

[2] In terms of the amount of compensation, Muslim jurists are not in full agreement with regard to three categories of victims namely, women, slaves and non-Muslims. The Egyptian draft of Islamic criminal law embraces the view that Diyya must be the same for Muslims, non-Muslims and women, (Art. 234/2).

[3] See, 'Aqeda, op. cit. p, 249.

[4] In Saudi Arabia where Islamic criminal law is applied without codification, the Cabinet Resolution No 734(1976), ordained that if the victim or his family had obtained any compensation from their employer or insurance company for the same crime, this sum must be deducted from the *Diyya*. Falih Al-Sagher, "*Ahkam Al-Diyya Fi Alsharai`a Al-Islamiya.*" *Al-Markaz Al-Arabi Lederassat Al-Amniyah.* Riyadh(1990). p, 236. [hereinafter, Falih]. See also Art. 225 of the Egyptian draft of Islamic criminal law.

[5] See, 'Oda, op. cit. vol. 1. p, 115. Ahmed Bahnassi, "Criminal Responsibility in Islamic law." In Bassiouni, "Criminal Justice System in Islamic law." op. cit. p, 171. [hereinafter, Bahnassi].

[6] The Qur'an, 17:15.

question of criminal liability.[1] These principles function with no exceptions in the arena of criminal law, to the extent that Islamic law does not even recognise what is called in modern laws, vicarious and strict criminal liability.[2] Nevertheless, within Islamic victim compensation scheme, the victim must be compensated in all cases. To ensure such compensation, Islamic law has to make exceptions to the aforementioned principles. Thus, compensation is made due to the victim despite the offender being unfit for criminal or civil liability, and in other cases persons are made to compensate the victim despite that they are not the actual offenders. These exceptions are manifested in three concepts of Islamic law which are, the so-called '*Akila*', '*Qasama*', and the liability of the criminally irresponsible. In the following pages, some light will be cast on these exceptions.

a) Akila

According to the general rules of liability in Islamic law, the offender is the one who should compensate his victim. This rule is followed in the cases of non-violent crimes where the offender on his own is obliged to restore all what he has illegally taken, and pay compensation for any damages caused by his act. Similarly, in the case of intentionally violent crimes, the victim alone carries the burden of paying Diyya to his victim. However, in the case of unintentional violent crimes where compensation stands alone as the only 'sanction' for the crime or misdeed, Islamic law adopts the principle of collective responsibility. This principle called '*Akila*', by which the tribe, family, neighbours or the community of the offender as a whole, must participate in the payment of compensation. Historically, this institution has its roots in the pre-Islamic Arabian customary law, where the culprit could be ransomed from retaliation by his tribe.[3]

The accommodation of such a principle in Islamic law is justified in different ways. It is regarded as an effective means to ensure the victim's interests in securing his compensation. That is to say, the amount of Diyya is quite high, and most offenders are not well-off enough to afford it. Hence, relying solely on the offender's means suggests that victims are more likely to face difficulties in obtaining their compensation, if at all.[4] So, by enforcing the principle of *Akila* the victim's compensation will be ensured since the community as a whole, will be involved in repairing the

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[1] Ibn-Al-Qayyim, *"I`lam Al-muwaqi`en."* op. cit. vol. 2. p, 214. Al-Ghazali, *"Al-mustasfi."* op. cit. vol. 1. p, 83. Ma'mon Salama, "The Criminal Responsibility In Islamic Criminal Law." In Bassiouni, "Islamic Criminal Justice System." op. cit. p, 112.

[2] 'Oda, op. cit. vol. 1. p, 388.

[3] Schacht, op. cit. p, 186. Abu-Haif, op. cit. p, 55.

[4] This difficulty is seen as a challenge for the introduction of criminal compensation in modern laws, see Duff, op. cit. p, 148.

damages caused by the crime.[1] Furthermore, *Akila* is considered as a capable crime prevention method. That is to say, to avoid paying compensation, the community's members would conceivably help to prevent any circumstances which may ease or encourage any criminal incident.[2] Moreover, it has been shown in the preceding chapters that the members of Muslim societies are religiously recommended to enjoin what is good and prohibit what is evil, so by adding the principle of *Akila*, the doctrine of collective responsibility of the whole society will be enhanced, and the relationship between the community members will be improved in a way that should reduce the risk of crime. Finally, the participation of the community is meant to be a sign of showing sympathy for both the offender and his victim.[3] For the offender, such a sympathetic response is promised to play a significant role in his rehabilitation programme as he is likely to acknowledge the community's support by abstaining from reoffending, or at least by showing a more co-operative attitude. For the victim, getting his compensation sufficiently and promptly will help him to overcome his trauma and regain his faith and confidence in society.

It should be noted that not all community members are required to pay, only those who can afford it. So, children and the unemployed, for instance, are exempted. In addition, the share required is very low. It is estimated by Muslim jurists, as little as 3 *Derhim*[4] out of 1000 *Derhim* is due as a full Diyya, and it is payable in installments over three years.[5]

Given the aforementioned justifications for the principle of Akila, it may be asked why it is not extended to intentional violent crimes which have the same result for the victim. The answer comes from the fact that, unlike unintentional crimes, the victim or his family, in intentional crimes has the right to choose between a prime punishment which is Qisas, or to accept a substitute which is Diyya. In choosing the latter, it is supposed that a deal has been reached by which the victim's full compensation is secured. Besides, Akila is meant to be an indication of assistance to an unfortunate person who involuntarily committed the crime or misdeed, whereas he who premeditatedly perpetrated his crime does not deserve such assistance.[6]

The question to be asked is "to what extent is the institution of *Akila* workable in modern life?" In fact, historically, the principle of Akila has

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[1] 'Oda, op. cit. vol. 1.p, 676.

[2] See Ahmed Al-Alfi, "Punishment In Islamic law." In Bassiouni, op. cit. p, 230. [hereinafter, Al-Alfi]. 'Oda, op. cit. vol. 1. p, 677

[3] Al-Kasany, op. cit. vol. 10. p, 466.

[4] *Derhim* is an old currency used by early Muslim state and it is still used in some Arabic countries such as Morocco.

[5] Ibn-Qudama, "*Almughni*", op. cit. vol. 7. p, 777. Ibn-Rushd, op. cit. vol. 2. p, 443.

[6] 'Oda, op. cit. vol. 1. p, 675.

developed over time. As the concept of collective co-operation and responsibility on which the Akila is based has gradually faded away, the burden of paying compensation has been transferred from the whole community to close relatives, and then to the offender's fellow workers in his craft or his federate.[1] In the case where the offender has no Akila or his Akila are poor, this gives rise to the Sate having responsibility to compensate the victim which will be the subject of the next chapter. At the present time, because of the dramatic changes in the social life and the disintegration of family ties, the principle of Akila cannot be put into force as it was previously. However, the principle of Akila, as a way of involving the community in repairing the damage of crimes, is a promising idea which may have potential if it is improved to fit modern life. For example, it can be replaced by a financial box or a fund supplied by members of society, federate, village or any other group of people, or by the state through its taxation system.[2] As shall be demonstrated shortly, the recent codification of Islamic law has embraced the view that Akila is the offender's colleagues in his work or any other profession organization.[3]

b) Qasama

Qasama is a similar institution to Akila by which Diyya may be paid by the inhabitants of an area where a killed person is found. Qasama is in fact an ancient method of proof which was known in pre-Islamic customary law.[4] In brief, if a person is found killed in a village or a specific quarter of a city for example, and the investigation failed to discover the perpetrator, then fifty members of the village's inhabitants must testify on oath that they did not kill the victim and they do not know the killer. Although, doing so will clear the villagers from the charge of murder, they are still obliged to pay Diyya for the victim's family.[5] Some Muslim jurists justified Qasama as a process to achieve twofold aims: firstly, it encourages the community to preserve the security of their area, and enhances the sense of collective responsibility. Secondly, it secures revenue for compensating the victim's family.[6] However, the authority of the principle of Qasama is debatable. There is only a single ambiguous Hadith or saying related to the Prophet which does not seem to convince some jurists who see Qasama as a contradiction to the principles of proof in Islamic law.[7]

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[1] Schacht, op. cit. p, 168. Al-Kasany, op. cit. vol. 7. p, 256. Al-Zayla'i, op. cit. vol. 6. p, 177.
[2] See, 'Oda, op. cit. vol. 1. p, 679.
[3] See the Egyptian code of Islamic Criminal Law, (Arts. 269/1,2).
[4] Al-Nowaibit, op. cit. p, 188. Ibn-Qudama, op. cit. vol. 10. p, 2.
[5] Abu-Zahrah. op. cit. vol. 2. p, 548-563.
[6] Al-Kasany, op. cit. vol. 7. p, 290.
[7] See, Ibn-Rushd, op. cit. vol. 2 . p, 357. Ibn-Qudama, op. cit. vol. 7. p, 757.

It worth noting that the principle of Qasama continues to prevail in most Islamic law areas. It was even codified in the first Egyptian criminal law "*qanun alfilaha*" 1830[1]. However, it has not been mentioned in the recent codes of Islamic criminal laws, such as the Sudanese or the Egyptian draft[2].

c) Compensation by the Excusable Wrongdoers

In Islamic law, causing a certain state of affairs which is prohibited by the law is not enough to hold one responsible, unless he had a defined state of mind in relation to causing the event. In other words, the Latin maxim "*actus non facit reum nisi mens sit rea*"[3] is applied perfectly to Islamic criminal law. Therefore, the insane and children for example cannot be held criminally liable for whatever they do.[4] However, if the wrongdoing, committed by excused persons, caused harm to the victim, the latter must be compensated. In this respect, Muslim scholars apply, exceptionally, the

principle of objective liability, by which it is enough to attribute the act materially to a person to be held responsible, in other words, '*mens rea*' is not necessary. This exception is justified in the interest of the victim. It is claimed that it is unfair to hold someone responsible who is incapable of having a guilty mind, but it is also equally unfair to leave the victim uncompensated. Muslim scholars believe that the victim's interests should be given priority. Hence, unless the wrongdoing can be attributed to an act of God or to '*force majeure*', the perpetrator must compensate his victim whatever his state of mind.[5]

Such an exception may be compared to what is called 'strict liability' in modern laws, whereby one can be held, not only civilly but also

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[1] Arts. 26, 29.

[2] However, a rare judgement by the Sudanese Supreme Court argued that despite that Qasama had not been codified by the Sudanese Islamic Criminal Codes of 1983, there is no prohibition over its use as a way of proof as well as to secure compensation for the victim in cases where the offender is unknown. The Sudanese Supreme Court. Sudan government v. Abrahim Adm Othman and another. Sc. 83. 1984. p, 118-124.

[3] Smith and Hogan, "Criminal Law." Butterworths. London(1992.). p, 29. The Prophet is related to have said, "Allah has pardon for me my people for their mistakes, forgetfulness and for what they have done under duress." Related by Ibn-Majah, *Ketab Al-talaq*. Hadith no, 2033. He is also related to have said, "No liability on a child until he grows up, a sleeping until he awakes and a person who is insane until he is cured." Related by Abu Dawud, *Ketab Al-Hudud*. Hadith no 2823. He is also held to have said, "Actions are but by intention and every man shall have but that which he intended." Related by Al-Bukhari, *Ketab Bed' Al-wahi*. Hadith no 1. 'Oda, op. cit. vol. 1.p, 388. A leading Muslim medieval scholar said that, according to Islamic law, law provisions are aimed only at those who could fully understand them, so materials and animals cannot be held responsible for defying the law. He added, although, children and other excused persons, may have the ability to partly understand, they still have no comprehensive perception to realise the full meaning of the law's commands, therefore they cannot be held responsible. Al-Amidy, "*Al-ihkam fi usule Al-ahkam*." op. cit. vol. 1. p, 215.

[4] See, Abu-Zahrah, op. cit. vol. 1. p, 392.

[5] Ibn-Rushd, op. cit. vol. 2. p, 340. Shaltute, op. cit. p, 392.

criminally liable without the need of *mens rea* being proved.[1] However, what casts light on the exception in Islamic law is that, a misdeed committed by a person who is considered incapable of knowing the difference between right and wrong, or having an acceptable defence is always regarded as unintentional 'crime'. This classification invokes the community's responsibility to participate in the payment of compensation according to the principle of Akila. Thus, such an exception may be seen as a legal device by which the victim's interests can be saved without harming the excused person who has to pay nothing. The Egyptian draft of Islamic criminal law holds the Akila directly responsible for compensating the victim of a crime committed by a person who lacks the required legal capacity (Art. 176/2).

7) The Beneficiary of Diyya

Diyya or compensation in Islamic law is an exclusive right of the victim himself. In the case of his death, this right is transferred to his successors. Compensation is divided between the successors according to their shares in the victim's estate, and this can be determined by reference to the law of inheritance[2]. If the victim has no successors, the Diyya is still payable to the state on behalf of the community. Some jurists suggested that Diyya in this case should go to charity for religious causes.[3]

If compensating the victim himself is understandable, the question to be asked is why Diyya is automatically payable to the victim's family in the case of his death? And could Diyya be paid to other people if they could prove their emotional or financial loss as a result of the victim's death? Muslim jurists never raised such a question. On the one hand, Diyya is initially payable to the victim, so, upon his death it becomes part of its estate which should be distributed among his family accordance to the Islamic law of inheritance. On the other hand, Muslim scholars presume that the victim's family, as they are his immediate relatives, suffer more than any one else, therefore, they should be automatically regarded as victims and compensated for his death. Nevertheless, such a presumption is not always accurate. There are some cases in which the victim's family does not suffer financially or emotionally as a result of his death. It might be sometimes quite the reverse, for example, if the victim suffers a hopeless chronic disease which costs his family much of their earnings, they cannot claim that his death causes financial loss. Even emotionally, the family relationships are not always tight and full of love. So, the victim's death may mean nothing for some of his family, or may

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[1] Smith & Hogan, op. cit. p, 99.
[2] Ibn-Hazm, op. cit. vol. 1. p, 477. Al-Kasany, op. cit. vol. 7. p, 248.
[3] See, Idries, op. cit. p, 362.

even bring them some relief. On the other hand, there may be some people who are not members of the victim's family but they depend on him financially such as orphans sponsored by the victim, or emotionally such as the victim's fiancé or fiancée. These considerations have never been discussed in Islamic jurisprudence. Therefore, people such as orphans and a fiancé or a fiancée, despite their suffering and loss, are not eligible in Islamic law to be compensated or to have a share from the victim's Diyya. Whereas, the victim's family members are always qualified to have their share of the Diyya whatever their real sentiment to the victim.[1]

It was hoped that the recent application of Islamic criminal law will overcome such shortcomings by giving the court a discretionary power to decide who should share the victim's Diyya irrespective of their family relationships. Regrettably, both the Egyptian draft of Islamic law and the Sudanese Penal Code (1991), pay no attention to this issue. Instead they codify the traditional rules by which the Diyya is given to the victim's family in proportion to their shares according to the law of inheritance.[2]

8) The Legal Nature of Diyya

Having stated the main features of the principle of Diyya in Islamic law, the question to be raised is what is its legal nature. In other words, is Diyya classified as compensation or as punishment? This question has never been addressed by Islamic classical jurisprudence. Such negligence is further proof of the lack of emphasis in Islamic jurisprudence on the distinction between criminal and civil liability. However, this subject has invoked some attention from modern Islamic jurisprudence without reaching a consensus.[3]

The fact of the matter is that, it does not seem appropriate to classify Diyya as either compensation or punishment. Doing so means subjecting Islamic law to foreign criteria of modern laws. In Islamic law, concepts such as tort, crime, punishment and compensation have different meanings. As the difference between criminal and civil liability has little significance, the concept of crime often interchanges or overlaps with the concept of tort, and compensation is used in place of punishment. In fact, the term *Daman* which is translated as compensation has a more significant meaning in Arabic. It carries the idea of repairing or ensuring the restoration of the original situation. Crime and tort have certain things in common, which is after all the suffering of victims and public

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[1] The only case in which a member of the victim's family is deprived from his share of Diyya is when he is the offender. See 'Oda, op. cit. vol. 2. p, 200.

[2] See (Art. 44) of the Sudanese Penal Code (1991), and (Art. 206) of the Egyptian Draft of Islamic criminal law .

[3] See, Mohy, op. cit. p, 48. Abu-Haif, op. cit. p, 30. Farghali, op. cit. p, 37.

disorder. This is what Islamic law is primarily concerned with. The objective of any prescribed remedy is to get the victim's satisfaction and to restore public order. In most cases, achieving the former automatically resolves the latter or at least partly resolves it. The reaction to a misdeed (crime or tort) might be punitive or non-punitive depending on what best achieves the aforementioned goals. This policy is particularly evident in the case of intentional homicide where the remedy is graded from the most serious punishment i.e. death penalty, to compensation, or even forgiveness.

If Diyya is considered, from a modern point of view, it features both punishment and compensation as it contains elements of both concepts. The punitive elements of Diyya are manifested in many aspects such as: firstly, Diyya, is like a fine, its sum is pre-stated, so, judges have no right to modify it or at least to exceed certain limits. Secondly, Diyya is due, in the case of intentional crimes, as a substitute of the original punishment which means that it is a secondary or auxiliary punishment. Thirdly, the fixed estimation of Diyya for all victims, irrespective of their personal circumstances, distinguishes it from compensation which varies from one case to another depending on many circumstances including the seriousness of the crime and its effect on the victim. On the other hand, Diyya has many civil aspects such as, firstly, the participation of the *Akila*, as defined earlier, should rule out its punitive nature, since the rule in Islamic law, as in any other law, is that punishment is individualised. Secondly, Diyya is due even if the offender is criminally irresponsible, such as in the case of insanity. Thirdly, Diyya can be paid by the state if Akila is not applicable. Finally, Diyya is paid to the victim or his family, whereas a fine is due to the state. Hence, a victim can remit his offender from paying Diyya.

On the above considerations, Diyya should not be conceived as either punishment or compensation but as a mixed-nature remedy used by Islamic law to achieve many objectives notably the victim's satisfaction.

9) The Application of the Islamic restorative approach in Modern Islamic States

In this section, Egyptian and Sudanese laws will be examined to see how and to what extent they apply the Islamic restorative approach. It also aims at exploring the alternative approach adopted instead of Islamic law.

a) Restitution In Egyptian Law

As has been shown earlier in previous chapters, Islamic law continued to prevail in Egypt as the law of the land until the advent of Mohammed

Ali who pioneered the far-reaching step towards Westernising the Egyptian legal system. Before Mohammed Ali, the system of Diyya as part of Islamic criminal law had been applied with all it classical features. As to the era of Mohammed Ali and after, it should be, for the purpose of this study, divided into two stages, before and after 1883.

During the reign of Mohammed Ali and his immediate successors, a series of criminal laws were enacted such as '*qanun al-filaha'* 1830[1], '*qanun-namah al-sultani*' 1855, and the code of criminal law of 1875 which was applied only in the Mixed Courts. Both of the latter laws were based on the Ottoman Codes of 1851 and 1858 respectively, which were, in turn, modelled after the French criminal code[2].

All these laws, although they brought about significant changes in the Egyptian legal system, they dealt with homicide and bodily harm'Qisas' in accordance with Islamic law. For instance, '*qanun al-filaha*' contained instructions to the courts to refer directly to Islamic law in the cases of violent crimes (Arts, 7, 26, 28,29). Instead, '*qanun-namah al-sultani*' codified the rules of Islamic law regarding these crimes.[3] Thus, Diyya and *arsh* continued to play their original roles as compensation for criminal injuries. What the new laws did, however, was it give the courts a statutory right to impose punishment, primarily imprisonment or flogging in addition to compensation. In fact, this development was not so new as earlier Muslim jurists had authorised such a supplementary punishment as recognition of the public nature of what were previously deemed to be private crimes. The innovation of the new laws was the codification of such development in Islamic jurisprudence which also asserted the criminal nature of unintentional violent offences which, as has been shown, were not emphasised enough by traditional Islamic jurisprudence.

Nevertheless, glancing at the application of these laws reveals that Egyptian courts, which were still in their traditional form, took no notice of them. It seems that the enactment of these laws did not prevent the courts from continuing their traditional manner in dealing with compensation in homicide and non-fatal assaults. They even ignored, or were not aware of the provision of imposing additional punishment to the compensation. These conclusions can be easily inferred from the few available judgements of this period. For example, in one case the court, on the victim's family request, ruled that the murdered be condemned to death, but when the family dropped their case and offered forgiveness, the court ratified this remission and set the offender free without imposing any further punishment, ignoring (Art. 11) of the Code of

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[1] See, Anderson, "Law Reform In Egypt." op. cit. p, 210.
[2] Baer, "*Tanzimat.*" op. cit. p, 127. Anderson, op. cit. p, 220.
[3] , (Arts, 1, 2, 3, 11, 12, 13, 14)

1855[1]. Also, the record reveals that all the features of the Islamic system of criminal compensation were in force, such as imposing *Diyya* in the case of unintentional killing, *Arsh* in the case of bodily harm[2], the principle of *Akila*[3], and so forth.

The year of 1883 marked a new era in the Egyptian legal system; it witnessed the establishment of National Courts and the promulgation of new Codes including penal law and the law of criminal procedure to be applied by the new courts. As has been stated earlier, all these codes were substantially of French origin. Islamic law was to be applied only in '*Mahakim Al-Shar`iya*' or the Islamic courts, with limited jurisdiction which covered only the area of personal law.

Nevertheless, the new Egyptian penal law could not entirely ignore the fact that Islamic law had been the law of the land for centuries. Hence, an entire abolition of its rules may have been seen in the public eye, and by the religious institutions such as Al-Azhar, as a violation of their beliefs, which may have led to some sort of unrest that the palace could not risk.[4] Therefore, the Egyptian legislator was quite cautious, and tried to justify its move on the grounds that the new codes were in accordance with Islamic law, and would observe all its rules. To do so, it followed the method of its Ottoman counterpart whereby an Islamic flavour was added to the law. So, the Penal Code contained an opening article which stated that "the state has the right to punish crimes committed against individuals as well as those committed against the state, but the penalties it imposes do not prejudice individual rights as laid down by the *shari`a* 'Islamic law."[5] In actual fact, a great deal of the law's provisions can be justified, from the Islamic point of view, by utilising the principles of *Ta`azir* and *siyassa.*[6] This, however, dose not alter the fact that the law was substantially French and took very little from Islamic law. The Islamic flavour in the law was embodied in scattered articles, such as Art. 32, which required two witnesses in the case of homicide, and Art. 230, which required that the ruling of capital punishment be ratified by the Mufti.[7] These provisions seemed to have achieved their task as there is no report of widespread opposition against the new codes.

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[1] See, The record of "*Al-Dywan Al-Aali*", or the "High Council", No. 12 (1280-1284 AH. 1865-1869 AD). Quoted in Abu-Haif, op. cit. p, 118.

[2] See, Judgement of the court of the city of *Mansura*, 31/7/1858. Quoted in Abu-Haif, op. cit. p, 121.

[3] See, the judgement of the court of the city of *Jiza* in 12 March 1859. Quoted in Abu-Haif, op. cit. p, 121.

[4] Just a year before the enactment of the new laws, an uprising lead by military general *'Orabi* broke out against the palace. The subsequent interference of the British army which overpowered this uprising upset the Egyptians who blamed the king for the British invasion.

[5] Article. 1. See, Baer, "*Tanzimat.*" op. cit. p, 129.

[6] See, Abu-Zahrah, op. cit. vol. 1. p, 119.

[7] As has bee stated earlier, this provision is just a lip-service as the court is not obliged by the Mufti's opinion. See the Supreme Court, ruling no. 3. 9 January 1989. p, 21, and ruling no 135. 28 May 1990. p, 780..

With regard to the issue under investigation i.e. victim's restitution, Art. 216, of the new law stated that "without dismissing any additional prescribed punishment, in all circumstances in which Diyya is due, it shall be estimated and ordered according to Islamic law." Such a provision means that in the case of homicide and bodily harm, the victim, or his family, has the right to stand before the criminal court and claim compensation according to Islamic tradition rules. The law did not specify how such a claim could be made, and what sort of procedures should be followed. Egyptian jurisprudence tended to include such a claim in the Islamic court's jurisdiction '*Mahakim Al-Shar`iya*' on the grounds that these courts are qualified to examine such issues.[1] What is really remarkable is that since 1883, the provision of Diyya has never been used even before the '*Mahakim Al-Shar`iya*'. Instead, victims and their families usually took civil action before the civil courts. Consequently, this provision was entirely abolished from the current Egyptian penal law of 1937 which is devoid of any influence of Islamic law.

b) Restitution in the Existing Egyptian Law

The abolition of the Islamic restorative system was a real loss for crime victims who have to live with the inadequate and complicated restorative measures of the new laws. The current Egyptian criminal justice system provides crime victims with two options by which they may be compensated. The first option is the civil action, which is open to everyone who has been harmed by a misdeed, whether criminal or not. The second option has been copied from French law, and is especially designed for those who have been victims of crimes. It is a system by which a victim could seek compensation from the accused by being joined to the criminal proceedings as a 'civil party' or '*partie civilie*' (Art. 251/2). As has been shown in the preceding chapters, the victim can be *partie civilie* by one of two methods. Either he requests to be joined as a party to the criminal proceedings already inaugurated by the public prosecutor, or he can instigate proceedings for compensation as *partie civilie* by means of '*la citation directe*' (C. C. P, Art. 232). Since civil claim cannot be heard on its own by a criminal court, the latter action automatically starts the criminal proceedings.[2] Being a partie civilie, the victim is entitled to claim damages, restitution and judicial fees.

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[1] In an old judgement by Egyptian court under the penal law of 1883, it was ruled in 1901 that Diyya can only be claimed before Islamic courts. See, Abu-Haif, op. cit. p, 146.

[2] Fawziyah, op. cit. p, 193. West, "The French Legal System." op. cit. p, 232. Sa`id, op. cit. p, 515.

i) Damages.

Unlike Islamic law in which Diyya is due as a direct result of the crime, being a victim is not enough to be compensated in Egyptian law. The victim has to prove that he personally has suffered loss as a direct result of the crime. The law does not mention the word 'victim'; rather it gives the right of '*partie civilie*' to the 'harmed party' (C. C. P, Art. 232).[1] With regard to the victim's family, the case is even harder. In Islamic law, it is sufficient for the victim's family to prove their relationships to the victim in order to qualify for compensation according to their shares in the victim's estate. In contrast, in Egyptian law, being an heir is irrelevant to being a civil party to the criminal proceedings and is subsequently compensated. An heir could claim compensation not merely as such, but because he personally suffered a direct loss as a result of the victim's death.[2] However, if the victim died after starting the proceedings, his successors could pursue the case as it is considered part of his inheritance.[3]

In deciding the amount of compensation, the criminal court has no list of tariffs as it has in Islamic law, but rather, it must examine each case on it own, taking into account all relevant circumstances, including the seriousness of the actual harm caused by the crime. Also, the potential harm should be considered, for example, if the injury may prevent the victim from pursuing his normal career. These rules apply to all sorts of crimes, violent or non-violent. In practice, As Mr. Naji asserted, victims are usually awarded temporary compensation which serves as the basis in the subsequent civil action which must not be determined before the total effect of the crime is realized.[4] Mr. Al-Menyawi explained the underlying reason for such a practice with reference to the fact that the victim's losses, particularly in violent crimes, cannot be conclusively calculated before the passage of quite a considerable time for which criminal trials must not be held. So, it is sufficient that criminal courts set the basis for the victim's compensation leaving the determination of the amount to the civil court[5].

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[1] This term has raised many questions in both French and Egyptian jurisprudence about who has the right to be *partie civilie*, the victim, his family, or the insurance company who has paid the victim an indemnity for his loss. See, West, the French legal system. op. cit. p, 229. Fawziyah, op. cit. p, 103. Ashmawy, op. cit. p, 289. Mustafa, op. cit. p, 93. As explained earlier that Mr. Naji, A former Supreme court judge believe that all crime victim are included in the term 'harmed party' as any crime would always cause the victim to suffer at least psychologically. Mr. Samir Naji, An Egyptian Supreme Court Judge. A personal interview. Cairo, February 1999.[1]

[2] The Egyptian Supreme Court, no. 44. 13 October 1950. p, 111.

[3] Ra`of 'Obade, "*Mabadi Al-ijra`at Al-jyna`ya*", or "The Principles of The Egyptian Criminal Procedure Law." Cairo(1985). p, 206. [hereinafter, 'Obade].

[4] Mr. Samir Naji, An Egyptian Supreme Court Judge. A personal interview. Cairo, February 1999.

[5] Mr. Badr Al-Menyawi, the former Egyptian Attorney-General (1986-1990). A personal interview. Cairo, February 1999.

Another area of difference between Egyptian and Islamic law, is the degree of culpability required to order the payment of compensation. As explained earlier, in Islamic law the major defences such as insanity may be used as excuses for criminal liability, but they do not preclude the victim from obtaining compensation. In contrast, Egyptian law, requires full legal capacity for both criminal and civil liability, so, for example, no compensation will be awarded if the wrongdoer is insane. However, in certain cases, his guardian may be held liable and ordered to pay compensation but this only happens before a civil courts.[1]

Finally, unlike Islamic law, the payment of compensation in Egyptian law is always the responsibility of the offender himself. There is no provision in the law which promotes the principle of collective responsibility as in the Islamic system of *Akila*.

ii) Restitution

Restitution aims at restoring, as far as possible, the state of affairs to its pre-crime status. With regard to material restitution i.e. restoring goods or money or any other illegally taken items, Egyptian criminal law seems to be consistent, in general, with Islamic law. The law of criminal procedure contains several articles dealing with this issue (Arts. 100, 101, 103, 104, 105, 106, 107. C. C. P). The investigative authorities as well as the courts have the right to order the restoration of money or goods to the victims or their owner. In addition, all the crime's consequences should be eliminated, for example, the illegally constructed building should be demolished, or the forged document destroyed. Getting the restoration order issued requires the victim to prove two things, his ownership of the items and that it they have been lost or damaged by the offender's crime.

iii) Judicial Fees

Crime victims are entitled to apply to the criminal court to get back all the expenses they have incurred in their civil action. This application is conditioned by three requirements: the offender must be convicted, the civil claim must be accepted and the expenses must be justified (Arts. 320, 321. C. C. P).

In the light of these considerations, it is clear that Egyptian law, following the French model, provides a method of criminal compensation for the victim that is rather complicated, limited and surrounded by many challenges which has made it an uneasy option for most victims.

Most of these challenges are related to the judicial proceedings and to the mechanism of the system itself. To start with, it is not easy for the restorative justice measures to work and live in an essentially retributive and punitive atmosphere such as the Egyptian criminal justice system

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[1] Art. 73, Civil Law. Also, Arts, 174, 175, 176, 177 Civil law.

which puts a great emphasis on traditional punishments, such as imprisonment and even the death penalty.[1] Judges, prosecutors and police officers in retributive systems are often reluctant to change their age-old retributive attitudes and to adopt or to accept the measures of restorative justice. Therefore, allowing criminal courts to examine claims of compensation is seen in Egyptian law as an exception which must be dealt with in a very restrictive way.[2] There is also practical difficulties which complicate the combination of restorative and retributive justice such as the ranking of priorities. Given the retributive nature of the law, judges have to decide which is to be given priority punishment or compensation as they are likely to be in conflict. For instance, if the offender were to serve a long-term imprisonment, or to pay a high fine, he would be very reluctant, or even unable to compensate his victim.

Furthermore, as with most modern laws, the sharp distinction between criminal and civil liability hardens the task of the criminal courts which have to deal with a dual system regarding the objectives, evidentiary and proof matters. The complexity of civil liability and its possible interference with criminal liability has enforced criminal courts to avoid being involved in such research. Therefore, unless the victim's claim is clear and indisputable the Egyptian criminal courts would rather refer the case to the civil courts where the claim can be carefully and thoroughly dealt with.[3]

In addition, it should be always remembered that the system of *partie civilie* (civil party) has not been established for the sake of the victims as such, but, as has been shown, is designed for any person harmed by the crime which could be an insurance company.[4] The system is not justified on the interest of the victims so much as on practical ground which is to prevent any clashing judgements in respect of the same facts. That is to say, according to the French law principle of "*la chose jugee au criminel a autoritie sur le civil*" the civil court must not reach a decision which contradicts that of the criminal court, and if a civil action has been inaugurated before a civil court, and subsequently a criminal action has been launched regarding the same fact, the civil proceedings must be adjourned until the criminal court reaches a decision "*le criminel tient le*

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[1] The death penalty is prescribed for many crimes other than murder(Arts, 77, 89, 168, 230, 233, 234, 257, 295. Penal Code).

[2] See, the Egyptian Supreme Court. Ruling no. 36. 5 March 1963. p, 169. Ruling no. 175. 17 December 1963. p, 954.

[3] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview. Cairo, February 1999. In fact, the problem of conflicting liabilities prevails in most legal systems in which criminal courts are given power to award compensation. See in English Law, Wasik, op. cit. p, 605. For other laws, see Schafer, op. cit. 107.

[4] As explained earlier that Mr. Naji, A former Supreme court judge believe that all crime victim are included in the term 'harmed party' as any crime would always cause the victim to suffer at least psychologically. Mr. Samir Naji, an Egyptian Supreme Court Judge. A personal interview. Cairo, February 1999.

civil en etat" (Art. 265. C. C. P).[1] This may explain why criminal courts, in practice, are generally, very reluctant to accept civil claims unless the applicant is personally and directly harmed by the crime.[2]

Finally, there are many practical difficulties connected with the state of affairs in Egyptian legal life which makes the system of *partie civilie* undesirable. It has been pointed out that by adding compensation claims to the already over-loaded criminal courts, it will only worsen the situation in the criminal justice system, and will divert the attention of the judges from dealing with their prime objectives. Meanwhile it will do very little to benefit the victim.[3] Moreover, even if the victim succeeded in getting his application for compensation considered by the court, compensation cannot be always secured as not all offenders are caught, and even if they are, it is more likely that they would be in financial difficulties which prevent them from paying compensation in any case.

There is no comprehensive empirical research to show to what extent this method is used in Egypt. But one should expect that victims will not be so enthusiastic to go along such a difficult route, and may prefer to seek compensation through civil justice, especially where studies have revealed that the victim's rights in criminal proceedings are often disregarded by the investigation authorities and prosecution services.[4] The system of *partie civilie* through which crime victim may be compensated by criminal courts is, as explained in the preceding chapter, is rather an uneasy method for most victims. However, Mr. Al-Menyawi affirmed that despite its difficulty, a considerable number of victims resort to the system of *partie civilie* to benefit from the criminal procedures to establish the offender's guilt and in the meantime his liability to compensate the victim. Mr. Al-Menyawi could not offer any statistic to show the popularity of such a system among crime victims.[5]

It is worth mentioning that the Egyptian draft of Islamic criminal law prepared by the Parliament has adopted, in full, the Islamic restitution system. Arts. 257-271 of the draft provide for all the traditional features and components of Islamic compensation schemes such as *Diyya*, *Arsh* and *Akila*. This draft, as has been mentioned earlier, has not been reconsidered since 1985, when it was discussed in the Egyptian parliament, and there have been no subsequent steps towards its implementation.

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[1] See The Supreme Court. Ruling no. 175. 23 June (1958), p, 693.
[2] See for example, the Supreme Court. Ruling no. 122. 28 February (1950), p, 364. No. 8. 15 January(1974), p36.
[3] Fawziyah, op. cit. p, 89.
[4] See, Al-Shurbaji, op. cit. p, 252.
[5] Mr. Badr Al-Menyawi, A former Attorney General (1986-1990). A personal interview. Cairo, February 1999.

c) Restitution in Sudanese Law

As asserted earlier, Islamic law prevailed in Sudan for centuries during which the principles of Diyya and Daman as systems of criminal compensation were in force. Starting from the British Occupation in 1898, the Islamic system of compensation, particularly Diyya, entered a period of decline concluding with it being replaced with another system of compensation, similar to the British. From the fifties, the system of Diyya, as an Islamic as well as customary method of victim compensation, gradually gained more ground until it was fully revived in 1983 and then confirmed in 1991. Thus, the application of Diyya as part of the criminal compensation system of Sudanese law can be divided, for the purpose of this study, into three phases; the pre-British rule, during the British rule and after the independence.

i) Restitution before British Rule

For centuries before the British occupation, the principle of Diyya, along with other components of the Islamic restitution system, had been applied as part of Islamic law. It was administered in the same manner as in Egypt, with all its traditional characteristics according to the *Hanafi* law school. In 1820 the Sudan was conquered by Mohammed Ali, and in 1841 it officially became part of Egypt which in turn was part of the Ottoman Empire. The promulgation of the new criminal laws in Egypt between 1840 and 1883 had little effect on the traditional application of Diyya in the Sudan. Diyya was even reinforced as part of Islamic law which was revived by the *Mahdist*[1] which ruled the Sudan from 1881 until it was defeated by the British Egyptian joint army in 1898, the year which marked a new era in the Sudanese legal system.[2]

ii) Restitution under English-modelled Laws

Following the conquest of the Sudan, the Anglo-Egyptian Condominium Rule was declared in 1899, whereby the Sudan was given a separate political status in which sovereignty was jointly shared by the Khedive of Egypt and the British Crown.[3] According to the agreement, Egyptian laws had no longer any jurisdiction over Sudanese land.[4] In the area of criminal law, Egyptian laws were replaced by two modern laws i.e. the Sudanese Penal Code (P.C), and the Code of Criminal Procedure(C. C. P), which were amended in 1925. These laws were

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[1] See for more details, Alfahl Omar, "*Alsulta Alqadaya Fi Aser AlMahdiyya.*" op. cit. p, 167.
[2] See, Riyadh, "The History of the Sudanese Legislative Power." op. cit. p, 17.
[3] The Anglo-Egyptian Condominium Agreement was signed in 19 January (1899), and lasted with some modifications until 11 January (1956) when the Sudan became independent. In reality, there was no equal partnership between Britain and Egypt in the Sudan. From the first the British dominated the condominium and had the upper hand in almost all matters. See, Encyclopaedia Britannica (1996) The Sudan, History.
[4] Article 5 of the Agreement.

modelled after their Indian counterparts which in turn were based on English law. The new laws contained no provision for Diyya as it is envisaged in Islamic law. Diyya, however, continued to predominate in remote areas.[1]

The new laws, nevertheless, established a new restricted system of criminal compensation, whereby criminal courts were allowed to order the payment of compensation in several cases. For instance, to the victim in the case of frivolous accusation or if he is arrested by the police in no sufficient grounds (Arts. 155, 263. C. C. P, 1899).[2] Besides, the Sudanese law recognised from a very early stages the system of compensatory fine, whereby the criminal courts were provided with the power to devote the whole or some of the ordered fine to be paid as compensation for the victim (Art. 256.C. C. P, 1899).[3] As it was amended in 1925, Art. 311, stated that a fine can be ordered to compensate the victim for the loss caused by the crime, the victim's widow and family and the judicial expense.[4] In 1949[5], medical expenses were added to that article as a further purpose for compensatory fines.[6] The system of compensatory fines, although providing good revenue for compensating crime victims, was rather restricted as the compensation is contingent on the fine order. In other words, there will be no compensation if the court imposes custodial punishment which is most likely in violent and serious crimes where compensation is disparately needed. However, the system provided a sound basis for the concept of restorative justice. Since the amount of the fine is not defined (discretionary) in Sudanese law[7], the court has the power to adjust it to match the victim's needs. The subsequent applications of (Art. 311/I/c) revealed that it was not meant to be full recognition of Diyya as was conceived from native customs. Thus, an attempt was made in 1927 by a Major Court to order payment of Diyya under this article but it was rejected by the Supreme Court.[8]

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[1] Idries, op. cit. p, 421.

[2] These two articles were re-enacted with some modification in Art. 155, 317 of C. C. P, 1925.

[3] It was ruled that "by section 256 of the Criminal Procedure Code (1899) in force at the time of the criminal proceedings ....the court had power to order the whole or any part of the fine to be applied in defraying expenses properly incurred in the prosecution and, or alternatively, in compensation for the injury caused by the offence." Ac-APP. 27-1025. Sudan Law Report (S. L. R) vol. 1. (1901-1931). p.274.

[4] Art. 311(I) provided that "Whenever under any law in force for the time being, a Criminal Court imposes a fine, the Court when passing judgement orders the whole or part of the fine recovered to be applied....(c) in compensation to the widow, children or other heirs of a person his death has been caused by the offence committed."

[5] By the amendment of articles 311 (C. C. P). Ordinance No. 23.(1949).

[6] Mustafa, op. cit. p, 55.

[7] Akolawin, O. Natale, "Compensation in the Criminal Proceedings: Comparative Study." The Sudan Law Journal and Reports. (1969). p, 33.

[8] The then CJ, G. Hamilton ruled, "It is also pointed out that the order of the court as to 'dia' 'Diyya' is incompetent. If it is desired to award compensation to the deceased's family, the court should order a

From 1889, Diyya was never mentioned in Sudanese laws. In fact, it was even criticised as an uncivilised phenomenon which contradicted the modern concept of justice.[1] Nevertheless, the pressure to reintroduce it had never stopped.[2] The Sudanese society was primarily tribal, and the customary law for these tribes, even for non-Muslim Sudanese, has adopted for centuries the principle of solving criminal conflicts through civil means, principally compensation or Diyya. Such a state of affairs compelled the justice administration authorities in the Sudan to consider the reintroduction of Diyya. The then Chief Justice B. H. Bell sent, on request of the Governor General, letters to the Judicial Administrators in the tribal areas enquiring about the effect of Diyya in solving criminal conflicts. He stated, "In criminal cases the question is continually arising as to whether a case of homicide ought or ought not to be settled by the payment of blood money." He added, "The tribal view is that Diyya is a comprehensive settlement for criminal conflicts, but the government can not accept this view entirely." He suggested that it is necessary for the sake of public order to impose further punishment. He proposed that the payment of Diyya should be permitted to satisfy the concept of tribal justice, and in this case imprisonment would be shortened in proportion to the compensation, but not to the extent that it deprived the punishment of its deterrent effect.[3]

Depending on the responses and in recognition of local social conditions, the Legal Secretary issued a statement which was to be circulated as guidance for all presidents of major courts, in which he acknowledged reconciliation according to native ideas and specified its legal effect on criminal proceedings. The Legal Secretary wrote that "although it is essential that serious crimes and particularly homicide must be tried by a major or minor court and not by Chief's Courts, there is no objection in proper cases to the sentence being made to conform to native ideas of what is just." "There are, the Legal Secretary continued, two methods by which compensation according to native customs may be embodied in, or substituted for, the legal sentence of imprisonment and fines: (a) To try the case out and impose the sentence which is thought proper under the code, e.g., seven years, and then to recommend to the confirming authority that compensation should be assessed according to native customs and if paid that the sentence of imprisonment should be

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fine as part of the sentence and direct it to be paid to the family of the deceased by way of compensation. It would be advisable to state to what particular member of the family it should be paid." Sudan Government v. Abdulla Abakuk and others, Ac. CP. 242-27

[1] This was particularly the opinion of the then deputy Chief Justice Babker Awad. See, Sudan Government v. Sa`id Hassan. S. L. R. J. (1966). p, 39-40.

[2] Idries, op. cit. p, 390.

[3] See the letter of the Chief Justice on 28 April 1928. Sudan Law Project (S. L. P). Arch. M. 101-B (306-307). Robert A. Cook, "Blood Money and the Law of Homicide in the Sudan: a Documentary Survey." Sudan Law Journal and Reports (1962). p, 475

reduced or cancelled: (b) To try the case out as far as the finding but in assessing the sentence to take native custom into consideration (either by consulting Chiefs or referring the point to the Chief's Court), and then to embody the result in the sentence in the form of a fine with imprisonment in default, e.g., the court considers the proper sentence seven years; compensation by native customs 20 pounds or its equivalent; the sentence might be three years imprisonment and a fine of 20 pounds[1] with four years imprisonment in default of the payment of the fine.[2]

The applications of the Legal Secretary's Statement and other relevant provisions showed a reluctant attitude of the criminal courts to accommodate the compensation as envisaged in local custom. Thus, courts tended to add more restrictions in ordering compensation for the victims or their families. Compensation for example was not awarded unless the deceased was the sole breadwinner of his family.[3] Also, it was ruled that the litigants or their families must submit an application to the trial court claiming Diyya.[4] In other words Diyya was not automatically payable to the victim's family as in Islamic law.

A significant step as to the proper place of reconciliation in the Sudanese criminal justice system was brought about by the Criminal Court Circular No 18.[5] The Circular came after three years of repealing Art. 311.(I).(c). The Circular was an achievement for the customary methods of settling criminal conflicts and further evidence of its validity to the people of the Sudan. It allowed the use of Diyya as a reconciliatory settlement within the formal legal proceedings. It set out the circumstances in which Diyya was payable and the extent to which it could be a complete settlement.[6] However, the circular contained many restrictions that along with its inappropriate subsequent applications had distorted its customary concept and functions. In general, recourses to Diyya were rather a matter of necessity than a matter-of-course, and when

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[1] This fine is to be paid to the victim or his family according to Art. 311/1 of the Code of Criminal Procedure (1925) which has been cited above.

[2] Nigel. G. Davidson, the then Legal Secretary of the Sudan Government. A letter written on 14 June 1949. S. L. P. Arch. M. 106. p, 33-34. It is interesting that Mr. Davidson tried to assert the conformity of the two mentioned methods to English law, saying in the same letter that, "I might add that there is nothing contrary to English law and English procedure in either of the processes mentioned above. Although the question of compensation or restitution is not allowed to affect the verdict of the jury, in a large proportion of cases it is recognised as most material in fixing the sentence."

[3] In a case where an accused was convicted of causing the death of a thirteen year old girl with the intention of causing harm only, the then Chief Justice rejected a recommendation for payment of Diyya ruling that "it is not understood why the suggestion that compensation might be paid is made. This child of thirteen years leaves no person dependent on her for his livelihood." Sudan Government v. Abuker Idris. AC. CP. 25-1942. Also, Sudan Government v. Ahmed Isagah. AC. CP. 262-1942. See Natale, op. cit. p, 211.

[4] Occasionally the trial court, considering the interest of the victim's dependants, can take the initiative in asking the litigant to reconcile. Sudan Government v. Ali Mohamed Saleh, AC. CP. 97-44.

[5] Issued on 15 June 1952.

[6] See Abu-Rannat, "The Relationship between Islamic and Customary Laws in the Sudan." op. cit. p, 15.

Diyya was resorted to, its application was highly restricted. Diyya for example was applicable only if it was part of an established custom of the crime-victim. Thus, it was ruled, "*Dia* should only be permitted when its payment is customary in the tribe of the deceased and the custom is deep rooted."[1] Another restriction was that Diyya was barred where the accused was sentenced to death.[2] In addition, it was decided that Diyya is not applicable where the accused is ordered to be sent to a reformatory school[3]. On the other hand, there were some judgements which seemed to be in favour of a wider application of Diyya by introducing a more flexible interpretation of the Circular in question. An example of such a judgement was delivered by the then Chief Justice Mr. Abu Rannat, who applied the circular and accepted the payment of Diyya despite the fact that the offender was non-tribal and the crime was committed in a town. He ruled, "As the deceased belonged to a tribe which recognises and accepts the dia, though the offence took place in a town, I shall allow the reduction of the sentence when the dia is finally settled."[4] This means that the payment of compensation according to local customs was regarded as a mitigating factor. However, the further application of the Circular showed that it did not aim to apply Diyya as it is in Islamic or customary laws. It was obvious that the policy was to restrict the usage of Diyya as far as possible, as in the words of the then Chief Justice, "the idea of exchanging punishment for money should not be allowed to prevail."[5]

iii) Restitution After Independence

All the relevant laws of restitution which were in force during British rule continued to be effective after the independence of the Sudan in 1956. In 1974, a new Penal Code and a Code of Criminal Procedure were enacted in Arabic with no noticeable change in the policy towards Diyya and criminal compensation. Both Art. 77B and the Criminal Court Circular of 1950 were included in the new laws.

The radical step came in 1983 when the whole Sudanese legal system was re-modelled after Islamic law. Consequently, new criminal laws

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[1] Para. 2 (a) of the Circular Court Circular. It was also ruled, "As it is not custom that *dia* should be paid, it should not be arranged." Sudan Government v. Ahmed Isagha. AC. CP. 262-42. See, Natale. op. cit. p, 202

[2] The Criminal Court Circular No. 18. Para 2 (b). This restriction seems to go along with Islamic law in which Diyya serves as a substitute for an aggrieved party's right to Qisas. The difference is that unlike the Sudanese law, in Islamic law the choice between punishment and compensation is given not to the court but to the victim or his family.

[3] Sudan Government v. El Deig Adams Abbas. S. L. J. R. (1968). p, 103.

[4] Sudan Government v. Kamal Al-jak Ahmed. S. L. J. R. (1965). M. A. Abu Rannat CJ added in this judgement that "I submit that the view put forward by Creed L. S... is the correct interpretation of the Circular that it is the tribal law of the deceased that determines whether *dia* is payable or not." See also, the Supreme Court. Sudan Government v. Kwat Anwar Jong. Sc. No. 278. S. L. J. R. (1972). p, 241.

[5] See, Sudan Government v El-dieg Adam Abbas. S. L. J. R. (1968). p, 103.

were introduced codifying the principles of Islamic criminal law and meanwhile keeping most of the previous laws which were consistent with Islamic law. The whole system of Diyya was reintroduced in its traditional form, Arts. 77A, 296, 308, 271 Penal Law (1983). This step was further confirmed in the present penal law of 1991 which was enacted in the wake of a coup which brought the National Salvation Movement. Both laws have dealt with restitution in the same way by adopting traditional Islamic approach despite Mr. Al-Torabi's assertion that that the law of 1991 provides more forward-looking interpretation of Islamic law.[1] The focus below will be on the compensation scheme of the laws of 1991.

As Mr. Al-Jeed affirmed, the system of Diyya included in the new law as part of a comprehensive regulation of criminal compensation which gives criminal courts extensive powers to compensate crime victims and any other harmed parties.[2] As one of the leading figures in the Islamisation programme which accomplished the law of 1983, Mr. Al-Jeed asserted that the issue of providing crime victims with a comfortable means of compensation was strongly present during drafting sessions. Therefore, in addition to the codification of the Islamic restitution system, the new Islamic Code of Criminal Procedure of 1983 provided the criminal courts with unprecedented 'civil powers' whereby they were able to respond swiftly and effectively to the victim's restorative needs.[3]

In terms of Diyya and its features, it does not seem that the Sudanese criminal laws of 1983 and 1991 have made any noticeable modification of what is established by traditional Islamic jurisprudence. Thus, Diyya as fixed compensation for death and bodily harm was dealt with in Arts. 42,43, 44, 45 (P. C 1991). The determination of Diyya follows the same traditional method which amounts in the case of homicide to 100 camels, or an equal value determined by the Chief justice (Art. 42/1).[4] The traditional list of tariffs for injuries was also included (Art. 42/2). In the case of death, Diyya is awarded to the victim's family and divided among them according to the law of inheritance. The principle of *Akila* has also been enforced in the case of unintentional crimes in which the offender's relatives participate in paying the sum of Diyya (Art. 45/1,2).[5] To keep pace with modern life, the concept of *Akila* has been enlarged to comprise modern institutions such as insurance companies (Art. 45/3). The

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[1] Mr. Hassan Al-Torabi, the speaker of the Sudanese Parliament, a personal interview. Doha, February 1991.

[2] Mr. 'Awad Mohammed Al-Jeed, a former Attorney-General (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998.

[3] Mr. 'Awad Al-Jeed, a personal interview

[4] The Egyptian draft of Islamic criminal law uses gold in determining the sum of Diyya. It made equal to 4250 gm, Art. 258/1

[5] It was ruled under the law of 1983 that "It is confirmed, Diyya must be paid by the offender and his Akila." The Supreme Court Sc/crim. No. 103/1405. (1987). S. L. J. R.. p, 99.

Sudanese law has gone even further in adopting Islamic principles in this regard as it makes Diyya due to the victim even if the offender is unfit for criminal and civil liability, or if he has a legitimate defence.[1]

Besides, for non-violent crimes, criminal courts are authorised to order the offender to compensate his victims with a sum that he might get in a civil action (Art. 296 C. C. P, 1983). In addition, the offender is obliged to restore any goods, money or benefit obtained by the crime (Art. 46 P.C 1991).

To encourage the offenders to pay Diyya or other forms of compensation, the courts use a carrot and stick approach whereby if the offenders pay the compensation they are more likely to get a largely reduced punishment or even no punishment at all, whereas defiant offenders get a harder punishment.[2] While praising the first measure or the 'carrot', Mr. Ja'fer criticised the other or the 'stick'.[3] He maintained that reducing or excluding the punishment for compensating offenders, especially in unintentional crimes, helps to persevere the social peace in the community and to secure the victim's compensation. As to the 'stick', Mr. Ja'fer asserted that the courts have fallen prey to the confusion between fines and Diyya. While fine can be enforced and substituted with other forms of punishment such as imprisonment, Diyya is compensation payable to the victim and cannot be substituted with punishment.[4] Therefore, as a Judge of the Court of Appeal, he quashed many judgements based on such confusion.[5] The confusion stemmed from misinterpreting Art. 313. P. C (1983) which provided that compensation could be collected as if it was a fine. This article while making Diyya enforceable as a fine did not propose that Diyya could be substituted with imprisonment. Therefore, if the offender was imprisoned until compensation was paid, no part of the Diyya should be omitted in proportion to the spent term of imprisonment as in the case of a fine. Instead of eliminating such confusion, the laws of 1991 have even added to it. Art. 107/2. C. C. P,. (1991), provides that "where Diyya or any other compensation is due, the offender must not be discharged before depositing the whole sum to the court." Although such a provision increases the victim's chance of being swiftly and sufficiently

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[1] The Court of Appeal ruled that "Blood and money Diyya are safeguarded in Islamic law, therefore, the availability of defences such as infancy should not affect the victim's right to obtain his full compensation, and thus the guardian of the young offender and his akela should pay Diyya or any other compensation ordered." The Court of Appeal . Cp/Crim. No. 56. 1406. S. L. J.R (1987). p, 100.

[2] Mr. Salah Al-Sharif, a former Sudanese Supreme Court Judged (1988-1989). A personal interview. Doha, April 1998.

[3] Mr. Ja'fer Hamed, A former Sudanese Supreme Court Judge (1986-1992). A personal interview, Doha, April 1998.

[4] Mr. Ja'fer Hamed, a personal interview. Doha, April 1998.

[5] See in particular, Sudan Government v. Mukhtatr Al-Taj Abu-Nagesah. The Court of Appeal. Eastern province. No. 456. 1985. S. L. J. R. p, 156.

compensated, it failed to distinguish between offenders who do not want to pay and those who cannot do so. The latter group in expected to be a substantial majority in a country such as the Sudan. Therefore, such a provision should be either repealed or modified as it is both injustice and inconsistent with Islamic law to make poverty a justification for depriving people of their freedom or as an aggravating factor in determining the punishment.[1]

As regard to the nature of Diyya, it is evident that the Sudanese law holds the view that Diyya is a civil remedy awarded by criminal courts. Thus, there are many provisions which assert the civil nature of Diyya along with other forms of compensation ordered by the criminal courts. For instance, (Art. 77. P. C 1983) states that, "for the purposes of compensation, the criminal court is regarded as a civil court." This notion is further confirmed by Art. 204. C. C. P (1991) which states that the criminal court, in respect of compensation, must follow the civil procedures. Finally, Art. 3012 C. C. P (1983), was more evident in determining the civil nature of Diyya as it provided that "the criminal court's decision in awarding compensation is a civil decision."

The Sudanese law, in its latest developments, has tried to reconciliate the principles of Islamic law with the modern arrangement of legal systems particularly English law which had been in force for almost a century. Such an attempt deserves to be commended since, as has been recommended in previous chapters, the application of Islamic law should take advantage of the latest developments in modern Western legal systems as it represents the most advanced legal thinking. The reconciliation has also an advantage of minimising the legal disturbance since the whole legal system along with its personnel had been accustomed for a long time to English-inspired law. However, the reconciliation should be cautiously administered as to take into account the real differences between Islamic law and modern Western laws. Particular attention should be paid to the philosophical and theoretical bases of each system such as the concept of the separation of civil and criminal liability which led to some confusion among Sudanese judges.

In all events, Sudanese law seems to have adopted an expansive scheme for victim compensation which provides criminal courts with extensive powers to get the victim's ultimate satisfaction. Most of the interviewed judges expressed their comfort with the new arrangement that allows them to deal with the case as a whole i.e. to punish the offenders and to compensate crime victim swiftly and sufficiently. They

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[1] Relying on the Prophet practice, some Muslim jurists made it clear that poor offenders must not be obliged to compensate his victim especially in unintentional crimes. See Al-Shawkani, "*Nayl Al-awtar.*" op. cit. vol. 7. p, 244.

also noticed the satisfaction of both crime victims and their families, especially in violent crimes.[1]

10) Conclusion

It has been shown in this chapter that Islamic law has its own model of restorative justice. The significance of such a model is not just historical but also practical since Islamic law is still claimed to be valid for application in present time, and it is already in force in some countries.

The Islamic model of restorative justice is manifested in two principles i.e. "there should be neither harm nor reciprocating harm," and "harm must be removed." As a religious law, Islamic law endeavours to establish a crime-free society. To this end, it lays down a series of measures which starts with building the good character of its followers and ends with a strong recommendation to act to prevent any harmful incident. However, realising and predicting that such a society will not exist on earth, Islamic law provides a contingency plan to eliminate the harm as far as possible.

Once a crime has been committed, Islamic law strives to eliminate, as far as possible, its harmful effects particularly on the victim. Thus to ensure that the victim is compensated and restored, as far as possible to his pre-crime situation, Islamic law pays less attention to the act and the perpetrator who has caused the harmful effects. Therefore, the victim's compensation is secured in Islamic law in all cases, even if such compensation requires a sacrifice of some established principles. Thus, the victim must be compensated even if the offender is mentally unfit, has a legal defence, or is insolvent as they do not have to pay themselves since compensating the victim is the collective responsibility of the offender's community. To facilitate the victim's application for compensation, he, as has been demonstrated in the preceding chapter, is placed in a very influential prosecutorial position whereby he can instigate the criminal proceedings and compel the court to order the offender to compensate him. In addition, unlike in modern Western laws, in Islamic law the victim has to deal with only one court which is authorised to punish his offender and to compensate him.

The ability of Islamic law to provide the crime victim with such a swift and effective restitution scheme resides in the Islamic approach to criminal conflicts. As has been shown in the preceding chapter, it puts little emphasis on the distinction between criminal and civil liability. Therefore, the difference between crime and tort has little significance. What really counts is what they have in common, which is the harm that they cause to the victim. By contrast, when the Egyptian law departed

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[1] Mr. Alob, Mr. Al-Sharif and Mr. Al-Jeed, personal interviews.

from Islamic law and adopted the Western view, with the sharp distinction between crime and tort, it became extremely difficult for the victim to be compensated by criminal courts which had to deal with two different and sometimes conflicting systems i.e. civil and criminal liabilities.

Nevertheless, given that the Islamic restitution scheme is centuries-old, there is a desperate need for it to be modernised to meet the latest developments in this field. Some of its components such as Diyya and Akila which were perfectly suitable for the past may not be appropriate, in its traditional form, for the present time. Therefore, the quality of Ijtihad, as has been explained in the previous chapters, must be utilised to its limit to update and improve such components. For example, the pre-stated list of tariffs which have claimed tremendous time and effort from Muslim jurists can be substituted with the court's discretionary power to determine the proper compensation for each case.

It was hoped that the recent application of Islamic criminal law would come up with new methods to crystallise the concept of restitution in Islamic law. Regrettably, what they have managed to achieve has been only the codification of Islamic criminal law with all its traditional features. The reason might be that, the application of Islamic law has been highly politicised, and therefore, any move towards modernisation may open the regime's loyalty to the established Islamic jurisprudence to question. The Islamic governments present Islamic law in its popular form, not in what it should be. Mr. Al-Torabi, confirmed such a view saying that he had been calling for renewing and updating Islamic law, but once he was in power the outcome was not satisfactory. He claimed that the introduction of updating steps must be carefully and gradually conducted, lest it be considered un-Islamic innovation.[1]

However, by adopting the Islamic approach of victim restitution, the Sudanese law provides probably the most extensive restitution scheme among other Arabic laws. Compared with its Egyptian counterpart, Sudanese law, even before Islamisation, seems to offer the crime victim a better position which increases their chance to be swiftly and effectively compensated.

As the Egyptian draft of Islamic criminal law might have a chance to be applied in the future, it is hoped that such a draft and others would realise that a strong belief in the validity of Islamic law is not enough for it to be applied. It should be combined with a sincere desire to bring it up-to-date in order to meet the needs of the modern society. To this end, a brave open-minded utility of Ijtihad is needed.

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[1] Mr. Hassan Al-Torabi, the speaker of the Sudanese Parliament, a personal interview. Doha, February 1991.

Chapter (5) State Compensation for Crime Victims

1) Introduction

It has been shown in the previous chapter that Islamic law provides its own model of restorative justice which aims to restore crime victims to their pre-crime status as far as possible. Islamic restorative justice, just as its modern counterparts, has its own shortcomings which prevent the achievement of all its declared objectives. The shortcomings of all restorative schemes stem from the fact that they depend on the offenders to undertake the restitution. This does not mean that restorative justice should be discarded, but rather its concept broadened by including the state in the process of restoring the crime victims to their previous status. Thus, where the offender is not caught or unable to satisfy his victim according to restorative justice principles, the state should intervene to provide the means by which restoration can be achieved. The obvious role which the state could play here is to provide a fund for the victims to meet their urgent needs such as medical and legal expenses, and also the long term needs in order to enable them to restart their life normally.

In this chapter, it will be explained why the state has to intervene in helping crime victims financially, and how such intervention can be rationalised in both Islamic and modern Western laws. Then, some light is cast on the procedural issues of state compensation schemes regarding their scope in terms of eligibility and restrictions. Finally, both the Egyptian and Sudanese legal systems will be examined to see to what extent they apply Islamic law principles in this regard.

Islamic jurisprudence has taken the state's responsibility to compensate crime victims in certain cases for granted and therefore offers little theoretical research as to its rationalisation and development. Medieval Muslim jurists usually discussed the state's responsibility in this connection as an extension to the principle of Akila and devoted the bulk of the discussion for procedural issues.[1] Therefore, it would be very useful for the purpose of this research to subject Islamic law scheme to the same methodology which is used in analysing modern state schemes particularly in relation to their rationalizations and the eligibility criteria. Doing so would hopefully facilitate the reader's understanding and provide new inspiration for Islamic scholarship. So, the study of the elements of the Islamic scheme in this chapter will be introduced by brief accounts of their modern corresponding systems.

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[1] Ibn-Qudama, "*Al-Mughny.*" op. cit. vol. 8. p, 784-892. Al-Shawkani, "*Nayl Al-awtar.*" op. cit. vol. 7. p, 242-248.

2) The Need For State Compensation Schemes

State intervention to compensate crime victims is compelled in Islamic as well as in Western laws by the deficiency of traditional remedies particularly in the area of restitution or compensation made by criminals to their victims. It has been demonstrated in the preceding chapter how restitution provides a useful means for the victims to be compensated for the loss and the injuries inflicted upon them by the crime. As such, restitution should be credited for its valuable advantages. It places the burden of aiding the crime victim on the appropriate party who has caused the suffering of the victim. It therefore, satisfies the social sense of justice which is reinforced by economic interests.[1] It also allows the offender himself the opportunity to rectify his misdeed, paving the way for his repentance and subsequent rehabilitation.[2] In addition, restitution in some legal systems as well as in Islamic law, is used as a vehicle to provide the victim with some legitimacy for his involvement in the criminal proceedings by which he may have a say in some relevant key decisions such as the decision to prosecute or sentence the offender. Also, restitution increases the victim's feeling of vindication as well as his confidence in the criminal justice system when the criminal is obliged to pay him compensation.

Nevertheless, restitution has not escaped criticism which has compelled the advocates of crime victims' rights to search for another solution to overcome its shortcomings. The first and foremost defect which limits the utilisation of any restitution programme is that this system cannot function without the offenders being identified and arrested and subsequently convicted, so its efficiency depends on the arrest rate which, as statistics show, is very low. Therefore, the potential beneficiaries of restitution are a small number of crime victims. In addition there is another factor which adds more limitation to the restitution programme, that is even those offenders who are arrested are almost always in financial difficulties, in which case they either fail to make any restitution at all or what they do is inadequate. In some jurisdictions only 1.8% of victims ever collect damages from their offenders.[3] Furthermore, if restitution is perceived as a prerequisite for leniency, it may result in injustice as only wealthy offenders may benefit from it, leaving poor offenders to serve harsher punishments. On the other hand, if poor offenders were to be obliged to pay compensation from their prison allowances, this may affect their

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[1] Leroy L. Lamborn, "Remedies For The Victims Of Crimes." Southern California Law Journal. vol. 43. No 1, p, 27. [hereinafter, Lamborn].

[2] See, Eglash, "Creative Restitution: Some Suggestions For Prison Rehabilitation Programmes." 20 American journal for correction Nov Dec 1958. Lamborn 27.

[3] Gross, "Crime Victim Compensation in North Dakota: A Year of Trial And Error." North Dakota Law Review. vol. 7. p, 53. (1976)

rehabilitation programmes, as prison work is meant to be a rehabilitative instrument aimed at training the offenders and providing them with some money to start their new post-prison life with. It is feared that such objectives may be overlooked by the offenders in this case. Finally, some commentators are concerned that giving crime victims an influential role to play in the criminal process through restitution may allow them to abuse the criminal justice system.[1]

In the light of the above considerations, the need for supplementing or improving the system of restitution is obvious. Solutions to making restitution more effective include increasing the rate of arrests which would automatically enhance the victims' chance of being compensated. Another solution would be to increase the prisoners allowance so they can then pay compensation to their victims as well as saving for themselves. However, a more practical way to overcome the deficiencies of restitution seems to be by redefining the restitution concept itself by including the state as a potential restorer of the victim to his pre-crime position. Unlike restitution, the state funded compensation programme can provide an instant and sufficient financial aid to crime victims irrespective of the offender's circumstances. However, such inclusion of the state in the restitution process has not been an easily achieved mission. The main obstacle which has delayed such intervention for centuries has been narrowed down to one overriding factor: the financial commitment and its implications. Even when crime victim compensation schemes have eventually been set up, public finances have played, and still play, a significant role in restricting the scope of such programmes by imposing strict eligibility criteria.[2] In fact crime victims were no exception; the fear of budgetary crisis was so predominant that it constrained the state from aiding any other unfortunate groups who were similarly in need of financial support, such as the poor, the disabled and the unemployed.

3) Historical View

Public victim-compensation is not a recent development in legal history. As will be manifested shortly, it was recognised, at least in principle, by Islamic and possibly other laws a longer time ago. Here in the west, the concept has been an intellectual concern of many scholars for more than a century. It was emphasised by some leading thinkers of the nineteenth century such as Bentham who noticed the inequitable treatment of the offender and his victim, and argued that the state had a

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[1] Lamborn, op. cit. p, 29. Note 33.

[2] See, David T. Austern, et al, "Crime Victim Compensation Programmes: The Issue of Costs." Victimology. vol. 5. no. 1. (1980). p, 68-78.

duty to aid the victimised citizen it had failed to protect.[1] With the turning of the twentieth century, the issue was further advanced to proceed from the phase of an individual scholar's interest to be a concern of an international organisation. The successive International Prison Conferences made reference to the need of state compensation. Notably at the 1900 conference in Brussels during which a major manifesto for compensation was presented by the then Secretary of the Howard Association, William Tallack, who urged the replacement of prisons with state-administered schemes in which offenders should make reparation to their victims.[2]

After a period of silence, the idea of state compensation began to flourish throughout the twentieth century. Although quite a number of reformers in both social, political and legal arenas have contributed to such efforts, Margery Fry has been widely regarded as the most influential single person in the battle of the victim's recognition.[3] She spent most of her life as a Magistrate and as the first secretary of the Howard League campaigning for the victim to be compensated by the state. Unfortunately she died a few years before seeing her dream come into reality.

The state's recognition of its responsibility to compensate crime victims came only after the concept of collectivism, and after the welfare state acquired ground after the Second World War. These principles have extended and maximised state care policy to include aiding almost all those who are in need, such as the disabled, and the unemployed. So, it became more acceptable and justifiable to extend the state care to other aggrieved groups such as crime victims. Thus, the idea gained increasing support, and eventually it materialised into several sate compensation schemes in many Western countries. The first was in New Zealand where it enacted the first Criminal Injuries Compensation Act 1963[4], and then in Britain in 1964[5] followed by Austria 1972; Finland 1973; Germany 1976;

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[1] He asked, "Had A Crime Been Committed? Those who have suffered by it either in their person or their fortune are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them indemnity when its protection has been ineffectual." See, J. Browning, "The Work of Jeremy Bentham." Edinburgh, Tait(1843). p, 386-388.

[2] See, William Tallack. "Reparation For The Injured, And The Right Of The Victims Of Crime To Compensation." Wertheimer, Lea. London (1900). Quoted in Rock, "Helping Victims of Crimes." op. cit. p, 50.

[3] She is so frequently cited as such, see, Charlene L. Smith. "Victim Compensation: Hard Questions And Suggested Remedies." Rutgers Law Review. vol. 1717. 51. (1985). p, 62. [hereinafter, Smith, Victim Compensation]. Stephen Schafer, Victim Compensation And Responsibility. Southern California Law Review. vol. 43. no. 1. (1970). p, 57. "Compensation For Victim Of Crime Of Violence.". HMSO. London (1964) p, iii.

[4] See for details, Kent M. Weeks, "The New Zealand Criminal Injuries Compensation Scheme." Southern Carolina Law Review. vol. 43. no. 1. p, 107-121.

[5] See, Compensation for victims of crimes of violence. Command Papers (CMND). 1406, London (1961). Se also, Paul Rock, "Helping Victims of Crime: The Home Office and The Rise Of Victim Support In England And Wales." Clarendon Press. Oxford (1990). p, 46-90.

Denmark 1976; France 1977; Sweden 978; Norway; 1981.[1] Also more than forty states in America have enacted similar schemes.[2]

4) Islamic Law and Public Victim-Compensation

Given that Islamic law is a centuries-old legal system, one should not expect to find a sophisticated comprehensive state victim-compensation scheme. One may agree that it is sufficient to give Islamic law the credit of being a pioneer in this field if it contains the basic principles of public compensation on which a modern compensation scheme could be based. Yet, Islamic law has been completely ignored when speaking about the past history of public compensation despite the possibility that it may have a link with modern public compensation schemes.[3] References are usually made to the Code of Hammurabi and Mosaic Law.[4] The task now is to explore if Islamic law recognises any sort of public financial commitment to crime victims, and if so, what is its theoretical basis and scope. The focus will then turn upon the contemporary applications of such principles.

a) The principle of Public Compensation in Islamic Law

It may seem remarkable for modern lawyers to learn that the state's responsibility to compensate the crime victim is a well-established principle in Islamic law, and it has been continuously applied for more than fourteen centuries. The principle is embodied in the expression which says, "*no blood shall be abandoned in Islam.*"[5] This expression declares in short the philosophy adopted by Islamic law with regard to victim compensation. Life in Islam, just as in many other religions, is greatly honoured as the most valuable gift vested upon a human being. Therefore, preserving and protecting life is a gravely important duty

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[1] See, Michel Boland & Daniel Martin, "Victim Compensation Schemes And Practice: A Comparative Approach." Victimology. vol. 10. (1985). p, 672.

[2] See Jerry Chargeoff, "Victim Compensation and Restitution: Legislative Alternatives." Law And Water Law Review. vol. XX. No. 20. [2]. (1985). p, 684. See for more details of American compensation programs, William E. Hoelzel "A Survey Of 27 Victim Compensation Programs." Judicature. vol. 10. (1980). p, 485-496.

[3] According to, Fry's biographer, the idea of public compensation was the result of Margery Fry having been "set on fire by a wandering spark from another mind." This mind was of a friend who told Fry that he found in Uganda a tribe in which there had been a practice of collecting money from the murderer and his extended family to the widow of the deceased and his children. Enid Huws Jones, "Margery Fry: The Essential Amateur." Oxford University Press. London (1966). p, 232. Given the similarity of this practice to the concept of *Akila* in Islamic law and the existence of Muslim in Uganda may lead to a conclusion that Fry was indirectly influenced by Islamic law in her campaign for public victim-compensation.

[4] Artur J. Goldberg. "Preface." Southern California Law Review. vol. 34. no. 1. p, 1.(1970). H. Edelhertz And G. Geis, "Public Compensation To Victims Of Crime." New York. Praeger 1974. p, 7. D. Carrow, "Crime Victim Compensation Program Model." Washington DC. National Institute Of Justice. 1980. p, 2.

[5] This expression is ascribed to *'Ali Ibn Abi Talib*, the second caliph after the Prophet.

placed on every individual and on the whole community or rather humanity. Blood, which denotes life, must not be shed. The Qur'an says, "*We ordained ... .that if one slew a person... it would be as if he slew all the people, and if any one saved a life, it would be as if he saved the life of all the people.*"[1] If blood however is shed as the result of a crime, it must not be forsaken; the offender must be punished and the victim must be compensated. Compensation ought to be made by the offender or his Akila (his extended family). If, for any reason, this is not applicable, Islamic law makes victim compensation a duty of the state.

As a sacred law, any legal principles in Islamic law should have their direct origins in the main textual sources or at least could be deduced from them by means of interpretation. Legal principles, as explained earlier, may also be adopted from other legal systems on condition that they do not contradict an explicit sound rule of Islamic law. Accordingly, it appears that there is no explicit reference to public victim-compensation in the Qur'an, (the principal source of Islamic law). The principle hence finds its roots in the Sunna, (the sayings and practice of the Prophet), and the subsequent applications of his Caliphs. The first recorded incident in which state responsibility was established took place in the Prophet's time, when a man was found killed and his family came to the Prophet asking for justice. Upon the failure of the investigation to identify his killer, the Prophet ordered that the deceased's family had to be compensated with a full D*iyya* to be paid from public funds.[2] Accordingly, the family was given a hundred camels which is the full *Diyya* that ought to have been paid by the killer or his *Akila* had he been captured.[3] The Prophet is related to have said on this occasion, "*I am an inheritor for he who has no inheritor, and the surety 'Akila' for he who has no surety.*"[4] The Prophet here signified the state as he was seen as the spiritual as well as the political leader of the then newly constructed Muslim community. His authority and duties as a political leader, but not as a prophet, were conveyed to his successors who continued the practice of state victim-compensation. A well-known incident often cited in Islamic jurisprudence took place at the time of the second Caliph *Omar Ibn A-lkhatab* (d, 23 AH, 644 AD) when a person was found dead in Mecca during *Haj*. The Caliph consulted his companions who, relying on the above Prophet's practice, told him that the victim's family had to be compensated by the state. The Caliph followed the advice and the victim's family was awarded a full *Diyya.*[5] The fourth Caliph *Ali Ibn Abi*

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[1] The Qur'an, 5:32. See also, the Qur'an 4:93, 25:68-70, 6:151, 17:31-32,

[2] This *Hadith* or account is related by *Al-bukhari*, vol. 12. p, 229.

[3] The *Diyya* was paid from the charity fund which along with the *Zakah* was the main source for the then Islamic state budget.

[4] Related by Abu-Dawud, *Ketab Al-Diyyat*. Hadith no, 2955.

[5] Musnad 'Abdulrazeq, vol. 10. p, 51, quoted in Faleh, op. cit. p, 157.

Talib (d, 40 AH, 661 AD), is also reported to have said that if a person has no *Akila* he, as a Caliph, would be his *Akila* and would pay, on his behalf, compensation to his victim.[1] The practice has continued to date in the countries where Islamic law is applied such as Saudi Arabia which, as will be shown, follows the traditional rules with regard to their eligibility criteria.[2]

Upon these precedents Muslim scholars from very early on declared that the Islamic state, under certain conditions, has a duty to compensate crime victims from public funds.[3] They, however, did not attempt to build a comprehensive theory of public compensation for crime victims but rather they strove to collaborate the available incidents in which crime victims were compensated by the state, trying to set the conditions under which the victim might be entitled to be compensated. These conditions are related to the type of crime, the offender's financial status and the role of the victim in the crime incident. They paid little attention to clarifying the justification of state involvement. This attitude may be attributed to the religious character of Islamic law according to which sacred commands are taken for granted.

The circumstances in which the principle of public compensation was established in Islamic law set the first difference between the approach of Islamic law and modern Western laws. As has been shown earlier, the emergence of public compensation schemes in modern laws came after years of struggle and tremendous effort in both time and money undertaken by professional reformers and organisations in many fields particularly in the criminal justice arena. Crime victims, however, as some writers rightly noticed, played an insignificant role, if any, in this struggle[4]; "they were not banded together, and they did not form a corporate group. Little was known about their needs, hopes, or character; there was no consultation about what they might want. There was never much evidence that victims were urgently seeking change of the kind proffered or that substantial monetary compensation was what they actually sought."[5] In Islamic law, things went differently. There was no such campaign for victims' rights which might have placed any sort of pressure on the state to set up a compensation scheme. On the other hand,

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[1] This was included in a letter sent by the Caliph to his deputy in the city of *Mosil* in Iraq. See, Idries, op. cit. p, 353.

[2] See the Book of Legal Instruments. p, 121-125. Ministry of Justice. Saudi Arabia.

[3] Al-Kasany, op. cit. vol. 10. p, 474. Ibn-Qudama, "*Almughni.*" op. cit. vol. 7. p, 781. Ibn-Rushd, "*Bedayat Almujtahid.*" op. cit. vol. 2.p, 482.

[4] Unless Margery Fry is regarded as a victim as she herself had been a victim of a street robbery in the 1940s, see Enid Huws Jones, "Margery Fry: The Essential Amateur." op. cit. p, 232, and so she campaigned as a victim not as a reformer. However, the fact is that she started her campaign for crime victims long before this date. In addition, it is true that the overwhelming majority of victim campaigners have not been crime victims in the technical meaning.

[5] Paul Rock, "Helping Victims of Crime." op. cit. p, 87.

although the first claim for public compensation was submitted by a crime victim's family, it couldn't be said that victims formed any organisation or lobby as it was only a single individual action. From the Islamic law view of point, divine commands cannot be revealed under pressure as God creates the occasion in which He wants to reveal His commands.[1]

5) Justifications of Public Victim-Compensation

Although victims' advocates warmly welcome state financial support for crime victims as a significant initiative which ought to be welcomed [2], they lack an agreement upon the justification of state involvement. In other words, what is the legal ground for state victim-compensation schemes? From the legal technical point of view such a question have attracted a great deal of lawyers' attention. Defining the justification is not merely a theoretical question; it has serious implications reflected on the scope and the extent of state compensation programmes in terms of eligibility, the amount of the award and the categories of crime and victims covered by the scheme. This may account for the fact that most state compensation programmes explicitly determine their legal ground as will be shown shortly.

The main two rationales offered by Western jurisprudence for state victim-compensation are the rights theory and the needs theory[3]. With regard to Islamic law, as stated earlier, Muslim scholars paid little attention to the idea of justification of the public victim-compensation scheme, hence there is no clear statement clarifying the legal basis of the victim's eligibility to state compensation. However, by analysing the conditions and the eligibility criteria set by Islamic medieval treatise, it

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[1] Some modern Muslim commentators attempt to distinguish between reason and occasion for the sacred commands. This distinction is quite significant since if Islamic sacred law was revealed upon reasons, then it is not supposed to have permanent validity as it was meant to deal with the actual circumstances of the time of revelation. Whereas saying that Islamic law was revealed upon occasions means that it had been enacted by God from the beginning of existence, and it was revealed in chosen times upon circumstances created by God to be occasions for it revelation. As such Islamic law is supposed to have a permanent validity. See Mohammed Ashmawy, "The Origins of Islamic Law." op. cit. p, 54-62.

[2] Although some scholars cast some doubt on the overall outcome of such schemes. See for example, Schafer, "Restitution to Victims of Crime: An Old Correctional Aim Modernised." Minnesota Law Journal. vol. 15. p. 243.

[3] Some writers suggest more justifications, such as the shared-risk theory which is based on the idea that crime is a social problem resulting from the weakness of society to prevent crime, and so every citizen shares almost the same risk of being a victim and thus he equally should share the expense of compensating crime victims. See Schlultz, "The Violated: A Proposal To Compensate Victims Of Crime." St Louis University Law Journal. vol. 10.(1965). p, 242. This theory is still based on the same premises of the welfare principle, and the crime victim here is just like the elderly or sick citizens. The other theory is the law enforcement theory, which is based upon the idea that state victim-compensation schemes by requiring the full co-operation of crime victims with the law enforcement agencies in order for victims to be compensated is promised to facilitate crime detection and prevention. See Robert Elias, "The Symbolic Politics Of Victim Compensation." Victimology, vol. 8. (1983). p, 213.,

may be possible to deduce the ground upon which Islamic public victim-compensation was established. In the following paragraphs the two main theories will be discussed in order to examine to what extent they may serve as a rationale for Islamic state victim-compensation schemes.

a) The Rights Theory

The 'rights theory' based on the notion that crime victims must be compensated by the state. In other words they, as crime victims have a right to be compensated. Prominent supporters of this theory were Jeremy Bentham[1]and Margery Fry.[2] The advocates of this theory claim that the state's responsibility to compensate crime victims is based on both contractual and tortuous liabilities. The state, they argue, has a duty to protect its citizens against criminal activities and failing to do so provokes its liability of negligence.[3] On the other hand, the idea of a social contract is also utilised here by saying that upon signing the contract, citizens have to give up their right to defend themselves and restrain their natural rights and desires to take revenge on those who criminally harm them, and to leave the whole matter to the state who in turn promises to protect them. Falling short of achieving its contractual obligations, the state ought to be considered in breach of the contract and consequently liable to compensate crime victims.[4]

Such a rationale for victim-compensation achieves better conditions for crime victims. It places them in a powerful position in their relation with the state; they do not ask for charity but for their right. However, the 'rights theory' carries consequential implications regarding the state's responsibility and the victim's eligibility which makes it difficult to be accepted and drives its opponents to question its foundations. On the one hand, there is no such political system in which the citizens are promised to be immunised completely from criminal activities. Even if there were such a system, it would still be the responsibility of the victim to prove the element of negligence on the part of the state which is a difficult and complex task. Also, such a rationale means that the state would be liable to compensate victims of all crimes not only crimes of violence which would constitute a huge financial burden on the state budget. Furthermore, the state's responsibility would also be unlimited, so there would be no maximum or minimum sum of compensation as each case would be decided on according to its own circumstances. On the other

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[1] J. Browning, "The Work Of Jeremy Bentham." op. cit. p, , 386-388.
[2] Margery Fry, "Justice for Victims." An article in the Observer. Reprinted in Miler(eds), "Compensation For Victims of Criminal Violence of Criminal Violence: A Round Table." Journal of Public Law. vol. 8. (1959). p, 191.
[3] See, A. Karmen. op. cit. p, 211-212. McAdam, "Emerging Issues: An Analysis Of Victim Compensation In America." Urban Lawyers. vol. 8.(1976). 364
[4] Schultz, "The Violated." op. cit. p, 239.

hand, the concept of a social contract is claimed to be just fictitious and attenuated because the standard prerequisites of a contractual relationship are patently absent.[1] For these reasons and others, most contemporary public victim-compensation schemes rule out the presumption of state liability. Thus, in the English scheme compensation is regarded as *ex gratia.*[2] Similarly, the New Zealand scheme presumes no fault on the part of the state, and compensation is awarded only because it is socially desirable to compensate crime victims.[3]

The only compensation scheme which appears to adopt the rights theory is New Jersey's Criminal Compensation Act of 1971 which, although it does not articulate any specific rational, in its First Annual Report 1982/1983, the Violent Crime Compensation Board stated that "governments have an obligation to protect the rights, property and physical welfare of its citizens...when a government fails to protect a citizen, it could be argued that society has an obligation to punish the wrong-doer, and to indemnify the loss and repair the damage to the victim."[4]

b) The Needs Theory

The other rationale for state victim compensation is the needs theory which is based upon the principle of the welfare state. The argument stems from the analogy between crime victims and other similar social groups who suffer from illness, unemployment and disability. So, as the humanitarian principle compels the state to provide aid for such vulnerable categories, the crime victim should also be assisted.[5] Here the state has no legal duty to intervene but rather a willingness to aid misfortunate citizens, so victims are aided by the grace of the government. Some schemes may alleviate the state willingness to a social obligation by which the state should, but without obligation, set up a programme whereby crime victims who are unable to afford their victimisation are aided by the state.[6] Hence, this rationale requires a needs test to be administered before any compensation is awarded. Therefore, bearing in mind the limitations of such schemes, the amount of compensation will be measured according to the real needs of the victim. Accordingly, some

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[1] David Miers, "Victim Compensation as A Labelling Process." Victimology. vol. 5. 1980. p, 4.
[2] See, "Compensation for Victim of Crime of Violence." Cmnd. 2323. London. HMSO. 1964.
[3] Kent M. Weeks, "The New Zealand Criminal Injuries Compensation Scheme." Victimology. vol. 5 (1980). p, 109. The same can be said also for New South Wales and Queensland in Australia. Sce Dancan Chappell, "The Emergence of Australian Scheme to Compensate Victims of Crime." Southern California Law Review. p, 69. vol. 43. no. 1. 1970
[4] Report no. 27. p, 6. Se also, Elias, "The Symbolic Politics Of Victim Compensation." op. cit. p, 217. Smith, "Victim Compensation." op. cit. p, 61. note. 53.
[5] Schafer, "Victim Compensation." op. cit. p, 59. Milers, op. cit. p, 5.
[6] Smith, "Victim Compensation." op. cit. p, 63.

victims would be excluded if they, despite their suffering, have the financial ability to care for themselves.[1]

This theory has also been the subject of criticisms which are directed at its theoretical basis as well as its applications. Some commentators argue that singling out crime victims has no solid basis and the analogy with disabled and sick people is incorrect. The trauma of the latter group unlike the former has not been caused by criminal activities.[2] Other opponents emphasise that, depending on state aid would encourage the notion of collective responsibility at the expense of the individual's responsibility of the offenders. It is also feared that a program based on the welfare theory may foster the so-called 'welfare attitude'. This attitude stems from the fact that such compensation programmes are usually concerned with the issue of cost, and hence the relation between crime victims and bureaucracy is dominated by suspicion and even hostility.[3] Also, it can be added that such a rationale overshadows the symbolic significance of compensation schemes, that is to say that such schemes should not aim merely to provide money but also to reassure the crime victims of the fact that they have been wronged and ought to be compensated. It is hard for well-off crime victims to be deprived of the compensation just because they can afford the financial consequences of their victimisation. Even worse, if the offender of a wealthy victim has not been caught and according to the needs theory such a victim would therefore not be entitled to be compensated by the state; he would have to absorb his victimisation and consequently lose her/his confidence in both the society and its criminal justice system.

6) The Justifications of the Islamic Law Scheme

Regarding Islamic law, as explained earlier, Islamic jurisprudence paid little attention to articulate the rationale underlying the state involvement in compensating crime victims. Examining the examples set by Muslim jurists and analysing the recorded applications reveal that the Islamic compensation scheme adopts more than one rationale depending on the circumstances of the offender and the crime. Elements of both rights and needs theories are embraced in a way that it might be called the socio-

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[1] This was criticised by the Massachusetts special commission which rejected the need based criteria. Report of the special commission on the compensation of victims of violent crimes. H. R. Rep. 9(1967). See, Smith, "Victim Compensation." op. cit. p, 56. Note 72.

[2] Miller, "Compensation For Victims of Criminal Violence: A Round Table." Journal of Public Law. vol. 8. (1959). p, 203.

[3] Also "some eligibility requirements may foster an adversarial attitude, as they require more aggressive investigations...if authority for the program is given to a state board of claims more adversarial posture may be encouraged." US Department Of Justice, Crime Victim Compensation (1981). p, 131. See, Smith, op. cit. p, 66.

legal principle. It will be seen whether such rationale can avoid some of the criticisms which have been targeted at the contemporary schemes.

As shown in the preceding chapters, Islamic law follows a comprehensive crime prevention policy which consists of a series of circles. The first circle aims at building the good character of the believers who should have self-discipline which deters them from committing crimes which are seen as sinful rather than illegal acts. If this ability has failed, then the second circle takes effect. This circle depends upon the collective responsibility of the whole community to prevent any harmful acts. The believers are encouraged to enjoin what is good and prohibit what is evil by any means that they can afford, by heart, words or even by hands. As it is expected such measures would not entirely prevent crime, so when a crime occurs, both the wrongdoer and the community must take responsibility for removing the harmful effects of the misdeed. The wrongdoer is not merely considered as a criminal but rather as disobedient of God's commands, so he should be helped and given an opportunity to repent and repair the damage he has caused.[1] On the other hand, as crime prevention is a collective responsibility so is the removal of the crime's bad effects. Hence, the community is invited to participate in helping both the victim and the perpetrator of the crime. As shown in the preceding chapters, the so-called *Akila* or members of the criminal's extended family are obliged, within their ability, to participate in the payment of *Diyya*, and how the concept of *Akila* itself has developed over centuries to denote the whole community or the state in its modern form.

In the light of such a policy, we are able to understand the theoretical basis of Islamic compensation schemes. Accountability for compensating the victim lies primarily with the person who caused the victim's tragedy i.e. the perpetrator. From the criminal policy point of view this assertion of the offender's liability should be appreciated. It helps victims to satisfy their natural desire for revenge through peaceful means which also restores their confidence in society and the criminal justice system. It, furthermore, gives the offender the opportunity to declare his repentance and repair the damage he has caused, and this may play a significant role in his rehabilitation. However, if the offender lacks the means to do things right, then it would be in no one's interest to leave things deadlocked. The victim almost certainly would feel that he is being victimised for the second time not by the same criminal but through the

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[1] As shall be explained in the following chapter repentance constitutes an essential element in the ideology of Islamic criminal law. Thus, most the Qur'anic verses which lay down crimes and their punishments are followed by a statement declaring that punishment should be dropped if the wrongdoer has proven his sincere repentance. For example, after laying down punishment for theft, the Qur'an says, "But if the thief repents after his crime and amends his conduct, Allah turns to him in forgiveness." The Qur'an 5:39.

weakness of the criminal justice system. Being harshly sentenced as a result of failing to compensate his victim, the offender would surely be let down by society which in one way or another made him a criminal and left him unaided. Therefore, community involvement is vital for the sake of all parties including the community itself.

In order to define the rationale of the Islamic scheme, it is necessary to distinguish between several assumptions as each of which is governed by different principles. In the following paragraphs all the assumptions will be examined and their rationales will be explained.

a) The First Assumption

This assumption supposes that a crime has been committed and the offender apprehended and he or his *Akila* (his extended family) can afford to compensate his victim. In this case, the court will order the offender to do so as has been explained in the preceding chapter. The state liability to compensate the victim is never discussed here. The only duty on the state here is to enforce the court's ruling with regard to compensation.

b) The Second Assumption.

This assumption presumes that a crime has been committed and the offender has been apprehended but neither he nor his *Akila* can afford to pay the compensation to his victim, or indeed the offender has no *Akila* at all. Muslim scholars here agree that compensation in this case must be made by '*Byt Almal*' or the state treasury.[1]

Relying on the principle of collective responsibility set by Islamic law which requires that crime cost be shared by all members of the society through the public treasury, some contemporary Muslim scholars based public victim-compensation in this case on the welfare theory ascertaining that the state has a social not a legal duty to provide compensation.[2] This opinion may also be supported by the fact that state intervention comes only after proving the insolvency of the offender and his *Akila*, and hence if the offender or his *Akila* manage to offer partial compensation, the state should intervene only to supplement the rest of the compensation.[3]

Nevertheless, considering public victim-compensation in this case as a social obligation on the state requires that compensation is awarded only if the victim is in genuine need of financial support which in turn should match the actual need as far as possible. This is however not the case in Islamic law. Muslim scholars assert that the sum of compensation to be paid by the state to the victim should be equal to what the court might

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[1] Ibn-Qudama, "*Almughny.*" op. cit. vol. 7. p, 788. Abu-Zakarya, Al-Nawawy (d, 676 AH, 1278 AD). "*Rawdat Al-Talibeen.*" vol. 9. p, 354. Abu-Zahrah, op. cit. vol. 2. p, 588.

[2] Abu-Zahrah, op. cit. vol. 2. p, 589. Faleh, op. cit. p, 162.

[3] Al-Nawawy, "*Rawdat Al-Talibeen.*" op. cit. vol. 9. p, 354-355. See also, Idries, op. cit. p, 354.

order the offender to pay irrespective of the victim's financial status. This means that in the case of murder the state must pay a full *Diyya* to the deceased's family irrespective of their actual needs.[1] This assertion, which makes compensation more as the right of the victim, is justified on the grounds that the victim's right to be fully compensated should not depend on the criminal's financial status. In other words, it aims at avoiding the inequality which exists in some modern compensation schemes resulting from the situation in which some victims are fully compensated by their wealthy offenders, and other victims have to beg the state to provide them with the necessary compensation because their offenders are insolvent.[2]

This confusion over the nature of public compensation stems from the way that the state is regarded by Muslim scholars. It is viewed as an *Akila* for the offender who has no *Akila* or his *Akila* is not in a position to help him in paying the compensation. It has been shown in the previous chapter how the concept of *Akila* has evolved from the offender's family to his federation or the public body which he works for, and with the increase of social disintegration the state has also been assigned to stand in as an *Akila*. As such, the state is not seen here as a separate party but rather as a representative of all members of the community, and so is required to pay what the offender has to pay. So, the state is not paying for the victim but in fact paying on behalf of the offender. This is obviously in some Muslim jurists' minds when they justify public compensation by reference to the relationship between the state and the offender but not the victim, saying that the state is advantaged when it takes over the estate of the deceased who has no inheritors, so it should equally be disadvantaged by contributing in compensating crime victims when the offender is poor or has no *Akila*.[3] Those jurists are apparently referring to the Prophet who is reported to have said, "I am an inheritor of whoever has no inheritor, and the *Akila* for whoever has no *Akila*."[4] Viewing the state as a substitute for the offender and his *Akila* is crystallised in the fact that the state's obligation to compensate crime victims is not provoked before first establishing the obligation of the offender and his *Akila*. Therefore, when the latter are not obliged to compensate the victim, such as in the case of intentional violent crimes in which the victim or his family insist on Qisas (punishment), the state is under no obligation to compensate the victim.

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[1] As medieval Muslim scholars said, that the state should pay the full Diyya or the rest of it if the offender or his family had paid some of it. Al-Kasany, op. cit. vol. 7. p, 256. Abu-Haif, "*Al-Diyya.*" op. cit. p, 56.

[2] See the recommendations of the 'Fourth Week of The Islamic Jurisprudence'. Tunis, 14-19 December(1974).

[3] Ibn-Qudama, op. cit. vol. 7. p, 788. Al-Kasany, op. cit. vol. 7. p, 256.

[4] Related by Abu-Dawud, *Ketab Al-diyyat*, Hadith no, 2955

It is worth noting that this case was codified in the Egyptian Draft of Islamic Penal Law. Article (214) of this draft provides that if the offender has no *Akila*, the *Diyya* must be paid by the state. Article 215 provide that, if the offender could not afford to pay the full *Diyya*, the rest must be paid by the state. Also, in Saudi Arabia, the chief justice issued a decree providing that, following the principles of Islamic law, the state is liable to pay the *Diyya* to the victim or his family if the offender has no *Akila* or his *Akila* is insolvent.[1]

c) <u>The Third Assumption</u>

This assumption presumes that a crime has been committed but its offender is unidentified. Muslim scholars distinguished here between two cases depending on the place in which the crime has been committed. If the crime has been perpetrated in a village, a ward or an area belonging to a person or a certain group of people, then, as stated in the preceding chapter, the inhabitants of this area may be held liable for the compensation thorough the institution of *Qasama* which has become largely inapplicable.[2] But if the murdered person for example was found in a place which belongs to no one, or it is regarded as state domain land in terms of preserving law and order, then the state is held responsible for compensating the victim or his family.[3] Examples of such places were mentioned in Islamic medieval treatises including, mosques, city markets, and main streets and also during crowded religious festivals such as *Haj* or pilgrimages.[4]

Most Muslim jurists justified public compensation in such cases only by reference to the precedents set by the Prophet and his Caliphs.[5] Some jurists however, tried to offer theoretical justification by saying that such public places are established in the interests of the whole community, so it is the responsibility of the community to ensure the safety of such places. Therefore, when a crime has been committed, it means the community has failed to fulfil its duty and has to compensate the crime victim.[6]

Does this mean that Islamic law, in this particular presumption, explicitly adopts the right theory with all its implications? Some

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[1] The Decree of the Chief Justice, the Book of Legal Instruments. op. cit. No. 260(1983). This decree was later amended and confined only to the cases in which the offender is a Saudi national. The Ordinance of the Under-Secretary of the Ministry Of Justice. No. 74(1985). See the Book Of Legal Instruments. op. cit. p, 125.

[2] It has been explained in the preceding chapter that Muslim jurists are not in agreement over the validity of *Qasama* as a method of proof. In addition, with the social disintegration and the lack of the sense of collective responsibility, the application of *Qasama* in present time is highly difficult.

[3] Al-Kasany, "*Bada'e Al-sana'e.*" op. cit. vol. 10. p, 474. Ibn Abden, "*Alhashiya.*" op. cit. vol. 5. p, 554. Ibn Abdu-Assalam, "*qawa'd al-ahkam.*" op. cit. vol. 1. p. 295.

[4] Ibn Abden op. cit. vol. 5. p, 556.

[5] Ibn-Qudama, op. cit. vol. 7. p 789. Ibn Abden, op. cit. vol. 5. p, 555.

[6] Al-Kasany, op. cit. vol. 10. p, 474. Ibn Abden, op. cit. vol. .5. p.554.

contemporary Muslim writers seem to endorse such a conclusion ascertaining that the state in Islamic law has a duty to ensure the safety of its citizens by entirely protecting them from being victimised. In attempting to further justify the state duty, they tried to draw attention to what is called '*Bay'at Al-akaba*', in which, they claim, that such a duty was confirmed.[1] This means that Islamic law makes the state responsible for entire crime prevention in which case the commission of any crime in any circumstances invokes the state liability to compensate the crime victims on the grounds of negligence?

This opinion does not have enough evidence to hold its argument. It has been shown earlier that because of its serious implications, the notion of the right theory has been ruled out by modern compensation schemes as the state is supposed to do its best to prevent crimes but cannot ensure 100% crime prevention. The same conclusion can be reached in Islamic law. If we go back in history, to the moment in which the first Islamic state was established to explore its obligations, it is interesting to discover that a similar concept of the so-called social contract was in fact the cornerstone of the establishment of the Islamic state in the sixth century. Having been unsuccessful in promoting the principles of the new religion in his home city Mecca, the Prophet tried to persuade the pilgrims, who come annually to Mecca, to convert to Islam. At the beginning he managed to convince twelve people to follow the new religion. In the next pilgrimage season, the number increased to seventy-three men and two women all from Madina, the city which would become the first capital of the Islamic sate. The conversion to Islam in theses two meetings which are called '*By'ata Al-akaba*' took the form of a declaration of fealty in which mutual promises were pledged by both the Prophet and the converters to protect and fight for each other and to promote the message of Islam. The consequence of these fealties was the so-called *Hegira* or the emigration of the Prophet from Mecca to Madina which is envisaged as the real start of the Islamic state.[2] These loyalties were supplemented with the relevant Qur'anic verses and the practice of the Prophet and his Caliphs to set up mutual obligations between the state and its citizen.

Nevertheless, nothing in the wording of the two fealties nor in the Qur'an nor in the practice of the Prophet seems to sustain the doctrine of the state commitment to ensure entire crime prevention. *Al-Mawardy*, a prominent medieval Muslim jurist said that maintaining law and order and preventing crime according to Islamic rules is one of the most important

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[1] Farghaly, op. cit. p, 86-87. 'Awad Ahmed Idries, "*Hukuq almajny 'alyh fi al-qanune al-sudani.*" or "Victim's Rights In The Sudanese Law." The Third Conference Of The Egyptian Society Of Criminal Law (1989). op. cit. p, 277.

[2] Mahmud Hilmy, "*Nizam Alhukm Al-Islami Muqarnan Bel-Anuzm Al-Mu'Asera.*" or "Islamic Political System Compared With The Modern Systems." *Dar Alfikr Al-Arabi*. Cairo. (1973). p, 22.

functions of the Islamic sate.[1] But neither he nor any other medieval Muslim jurists claimed that such a duty might extend to ensure 100% crime prevention. On the other hand, if the Islamic state has such a duty, it would be responsible for compensating the victims of all crimes, whereas in fact, as will be explained later, only violent crimes and murder, in particular, may be compensated by the state. Moreover, not even all violent crimes invoke the state's direct responsibility, only those where the offender is unknown or not apprehended.[2]

It appears that the most likely justification for state compensation here is the desire of Islamic law to avoid the situation in which the victim or his family is left alone to face not only the crime but also the failure of the criminal justice system to bring the offender to justice. As a religious law, Islamic law greatly values life, so if the blood shedder could escape punishment, the bloodshed should not be denied compensation. It is a moral duty in nature upon the state to provide compensation in such cases, but Islamic law elevates it to a legal duty giving the victim the right not only to get necessary but full compensation. On the other hand, if the state cannot be asked to prevent the crime entirely, it could be asked to ensure that the perpetrator of the crime is brought to justice. So, in this case the state may be obliged to compensate the victim not because of its failure to prevent his victimisation but because of its failure to apprehend the offender for the victim's fate should not depend on the state's ability and willingness to arrest the offender. For the same justifications, this assumption extends to the case in which the alleged offender has been acquitted on the grounds that he had not committed the crime. If the acquittal is based on other reasons such as time limitation, the offender would still be liable to compensate his victim, and depending on his financial status, he might fall into the first or the second assumption.

The Egyptian draft of Islamic penal law asserts the nature of the state's duty to compensate crime victims, in this case as the right of the victim who ought to be awarded a full Diyya. Article (215) of the draft provides that "if the murderer has not been identified, Diyya is due from the state treasury." This nature is further confirmed by Saudi Arabia's Islamic law. The decree of the Chief Justice states that a full Diyya is payable to the victim by the state if the murderer has not been arrested.[3] What also ascertains the nature of compensation as the right of the victim is that it is ordered by the court against the public treasury on the application of the victim or his family.[4]

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[1] Al-Mawardy, "*Al-Ahkam Al-Sultanya.*" op. cit. p 15.

[2] More examples were given by Ibn Abdu-Al-ssalam such as, if a person is found murdered during an uprising or a riot and the killer could not be identified. "*qqwa'ed Al-Ahkam.*" op. cit. vol. 1. p, 295.

[3] See, the Chief Justice Decree no. 260(1983). See also, Farghay, op. cit. p, 159.

[4] See, Art. 210, of "*Nizam Tarkeez Masolyat Al-qada Al-shar'y,*" or "Shar'ya Court's Jurisdiction Act." (1952).

d) The Fourth Assumption

This assumption presumes that a crime has been committed by a public servant who works for the government. The majority of Muslim scholars agreed that the state is directly liable to compensate the victim of a crime committed by one of its employees or agents.[1] Although such a principle is not confined to Islamic law and has became increasingly a common feature of modern legal systems, the state recognition of its responsibility in such ceases is for most legal systems, a recent development. Until a few decades ago, some legal systems were still under the influence of certain survival ancient principles which dictate that the King could do no wrong, and the King could not be sued in his own court.[2] However, what may make Islamic law a pioneer in this regard is that it does not confine the state's liability only to executive servants but also establishes from early on the state liability for the miscarriage of justice done by the judiciary. For centuries, the immunity of the court's judgements was taken for granted and as a rule the state accepted no liability for faults made by judges. However, in the last few decades this principles has been the subject of revision, and eventually it was almost abandoned by some legal systems in a way that the state has become, as a rule, liable for judicial errors.[3] In Islamic law, it is almost the opposite; the state liability for judicial errors has been taken, from early on, for granted. *Al-Zayla'i*, a prominent Muslim medieval jurist, for instance said that if a judge unintentionally made a mistake, it is the state's duty to compensate those who had been harmed by the defective judgement.[4] This principle is justified on the grounds that judges, just as any other civil servants, works in the interest of the whole community, therefore, the cost of their faults should be shared by all community's members.[5] After compensating the victims of faulty judgements, the state has no right to refer to the judge who had issued the judgement to extract the compensation, so that judges would not be intimidated or constrained during their duties.

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[1] Ibn-Qudama, "*Almughn.i.*" op. cit. vol. 7. p, 781. Imad-aldien Abi-Alfida Ibn-Kathier, "*Tafser Al-Qur'an Al-Azem.*" or, "Interpretation Of The Great Qur'an." *Easa Albaby Alhalabi*. Cairo (1977). vol. 1. p, 535.

[2] This is particularly true for the English legal system which until 1947 was governed by the above principles. By the Crown Proceedings Act 1947, the Crown have become subject to the same liabilities in tort as if it were a private person of full age and capacity. See for more details, E. C. .S. Wade and A. W. Bradley, "Constitutional and Administrative Law." Longman. London (1993). pp, 732-733.

[3] In France for example, by the law the state has become liable for the errors of the judiciary in much similar method to its liability to the errors of the executive power. Art. 505 of the Civil Proceedings Act(1975). The same principle has been also included in the Algerian Constitution enacted in 22 November (1976), Art. 47.

[4] Al-Zayla'i, "*Albahr Al-ra'iq.*" op. cit. p, vol. 6. p, 281. See also, Ibn-Najeem, "*Al-ashbah wa al-naza'r.*" op. cit. vol. 9. p,.411.

[5] Al-Kasany, op. cit. vol. 9. p, 411. Ibn Abdu-Assalam, "*qawa'id al-ahkam.*" op. cit. vol. 2. p, 155.

7) Compensation Eligibility And Restrictions In Islamic Law

As a result of the financial concern, modern state compensation schemes are, generally speaking, keen on determining clearly their limitations which are clarified by answering a series of questions. These questions are meant to determine the most deserving victim. Examples of questions frequently asked in this regard are: what crimes should be included in the scheme? All crimes, or only specific types of crime such as violent crime? Who should be entitled to be compensated, the direct victims who were themselves the object of the crime, or also secondary victims who are indirectly affected by the crime, or those dependants on the crime victims for their living? What about the character of the victim and his role in the crime incident? How much should the victims be awarded? How should such money be spent? Who should decide the victim's eligibility: the administrative or judicial body? Usually these questions are answered in the laws regulating the management of the schemes.

Given its age, the Islamic law scheme does not seem to have the same clear arrangement as those of modern Western schemes. In the following pages, the limitation of the Islamic law schemes will be discussed in terms of the crimes and victims as well as the amount of compensation. In Islamic law the character of the offender in terms of his guilt and his mental status are irrelevant to the state's commitment to compensate crime victims. The only relevant character of the offender is his financial capability which has been explained earlier. So, the focus in this section will be on the characteristics of both the crime and the victim, and the restrictions over the amount of the compensation.

a) The Characteristics of the Victim

Modern Western state compensation schemes usually contain restrictive criteria relating to the characteristic of the victim who deserves public compensation. Emphasis is usually put over the culpability of the victim and his relationship to both the crime and the criminal. Regarding the victim's culpability, most schemes if not all require that in order to qualify for compensation, the crime victim must prove his innocence. In other words, he must not have contributed to his own victimisation. Victim's contribution to his own victimisation ranges from invitation, facilitation, provocation, preparation, consent, co-operation to active encouragement.[1] Depending on the scheme's criteria, some or all of these conditions may constitute disqualifying factors precluding the victim from being compensated. Reading through the Islamic treatise, there are only two controversial conditions which may be discussed in this regard as

[1] This gradation is suggested by Lamborn, op. cit. p, 44-45.

disqualifying factors; the victim's consent and his own exacerbation of his injury. The victim's consent to be criminally hurt is usually discussed in Islamic treatises within general defences. Generally speaking, consent is not considered as a general defence unless it rules out one of a particular crime's main elements such as in theft.[1] In the area of violent crimes, Muslim jurists unanimously agree that victim consent does not legalise the crime[2], but they however disagree on other effects of the consent. Some scholars maintain that a soul is owned by God not by the people, hence one's consent to be hurt or killed must not be considered as it has no effect at all, and the offender must be tried as though there was no consent.[3] Other scholars assert that the victim has some legal effect as it waves the punishment of *Qisas* or 'equality' which is the death penalty in case of murder, but it does not wave *Diyya* or other compensation.[4] A minority of Muslim scholars gives the victim consent its full legal effect claiming that although the victim and the offender are still regarded as being religiously sinful, the victim's consent is legally effective and thus waves both punishment and compensation.[5]

The first opinion is apparently the most consistent with modern legal thinking as well as serving the victim's rights with regard to public compensation. It may be justifiable to deny compensation to the victim who has consented to his victimisation, however, if the crime resulted in the victim's death, consent should not be considered, rather the attention should be directed towards those who should be regarded as the real victims such as the victim's dependants. Fortunately, the Egyptian draft of Islamic penal code adopted this opinion by excluding the victim's consent as defence.[6]

As to the effect of the victim's relation with the perpetrator of the crime on his eligibility to being compensated by the state, most modern schemes exclude the offender's family or his household particularly his partner.[7] Islamic law goes even further, as has been explained in the previous chapter that Islamic classical jurisprudence argued that no punishment and indeed no compensation is due if the criminal was father of the victim.

As to the victim's connection to the crime, Islamic law follows a different arrangement from modern schemes. Apparently, if the victim himself was injured by the crime, he will be the beneficiary of the compensation. But if the crime leads to the victim's death, who should be

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[1] 'Oda, op. cit. vol. 1. p, 440. Farahat, op. cit. p. 300.

[2] It is usually referred to the Qur'anic verses in this regard which says "Oh ye who believe....do no kill yourselves, for verily Allah have been to most merciful." The Qur'an, 4:29.,

[3] Al-Hattab, "*Mawahib Al-jalil.*" op. cit. vol. 6. p, 235.

[4] Al-Kasany, op. cit. vol. 7. p, 237. Abu-Zahrah, op. cit. vol. 2. p ,486.

[5] See 'Oda, op. cit. vol. 2. p, 82-85..

[6] See the Egyptian draft of Islamic penal law, Art. 14-16.

[7] Twenty-two states in the United States exclude family members from state compensation. See for more details, Hoelzel, "A Survey of 27 Victim Compensation Programs." op. cit. p, 489.

compensated. Modern schemes tend to target those who are genuinely affected by the victim's death such as those who depend on him for their living like his young children. So, there must be a demonstrable relationship between the claimant and the crime to justify the compensation. In Islamic law, the list of beneficiaries of the state compensation is not decided by the state nor does the state have the right to perform a test to determine who should be compensated. Islamic law regards the state compensation, the same as has been shown for the Diyya, part of the victim's estate which consequently should be distributed among his inheritors according to the rules of the law of inheritance.[1] Such an arrangement is based on the Islamic view which considered compensation as the right of the victim himself in the first place, so if he died, compensation would be part of his wealth which should be transferred to his legal successor.[2] Such a view seems to favour the presumption that the victim's inheritors are always the most affected by his death and therefore they are always qualified to be compensated. This presumption offers the victim's inheritors who have been genuinely affected by his death untroubled access for state compensation without being subjected to any further test. However, Islamic law made no provision to compensate those who are not legally members of the victim's inheritors, though they are closely attached to him emotionally such as the victim's fiancée or fiancé, or financially like the victim's sponsored orphans. The exclusion of such classes is an issue which should be looked at by modern Muslim jurists to offer new interpretation for the rules in question, by which only those who are genuinely affected by the victim's death are compensated irrespective of their blood relation to him.

b) <u>The Characteristics of the Crime</u>

Most modern state compensation schemes tend to narrow down their scope by covering only violent crimes.[3] This is even obvious from some schemes' titles, such as the English scheme which is called Compensation for Victims of Crimes of Violence, and the New Jersey's Violent Crimes Compensation Board.[4] Exceptionally, some schemes however extend their coverage to some property crimes, for instance the French Scheme as amended in 1981.[5] The prime reason for such an exclusion of non-violent

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[1] Al-Kasany, op. cit. vol. 7. p, 248. Ibn-Hazm, op. cit. vol. 1. p, 477.
[2] See for instant The Sudanese Penal Law (1991) Art. 44. Which provides that "Diyya is due initially to the victim and then transferred to his inheritors."
[3] Smith, "Victim Compensation." op. cit. p, 79.
[4] Set up by the New Jersey Criminal Injuries Compensation Act(1971).
[5] This extension was introduced by the Security and Order Act No 81-82, 2ed February 1981. See, Michal Boland & Daniel Martin, "Victim Compensation Schemes and Practices: A Comparative Study." Victimology. vol. 10 (1985). p, 673.

crimes is obviously related to the huge potential financial burden on the state budget of such a commitment. Also a few more reasons may be added such as; violent crimes are seen, particularly if resulting in death, as the more serious and personal than property crimes. In addition, unlike violent crimes, property loss can always be retrieved or replaced particularly if they were insured. Finally, compensating property loss may open the door for fraudulent claims which require costly thorough investigation which in turn would add more burdens on the scheme.[1]

Islamic law seems to offer even more limited cover than modern compensation schemes. Reading through Islamic writings in this field, one could easily notice that the only cases discussed are those of violent crimes which result in the victim's death or injuries. The reason behind this limitation seems to lie in the rigid interpretation of the Prophet's action. As has been shown earlier, the reference for the Islamic compensation scheme is the precedent set by the Prophet. This precedent dealt with an incident of death in which state compensation was given to the victim's family. So, Muslim scholars strictly adhered to this precedent and did not attempt to widen the principle of state compensation to cover other crimes. In fact, from the religious point of view, nothing appears in the Qur'an or in the Sunna to prevent such steps. Also, if it seems defensible to exclude property crimes for the aforementioned reasons, it is unjustifiable to differentiate between violent crimes which lead to the victim's death and those which not. Bearing in mind the priceless value of life, some serious injuries are equal to death or more costly and detrimental, and deserve state compensation. For instant, an injury may render the victim disabled or paralysed so that he would not be able to pursue his business and he would be dependant on others for living and care. So, the more likely justification for such a rigid interpretation of the Islamic scheme is the realisation of Muslim jurists of the social-political circumstances in which the state has shown its unwillingness or inability to take this initiative any further.

It would be a pioneering step if the recent applications of Islamic law had properly seized the significance of the precedent set by the Prophet and taken it only as a starting point for a more comprehensive scheme of state compensation with maximum coverage. This would be even more appropriate in those Islamic states such as Saudi Arabia which can afford to accommodate the financial burden of such an expensive scheme. Unfortunately, the current application of state compensation in Saudi Arabia as well as the Egyptian draft of Islamic criminal law seems to firmly stick to the traditional interpretation offered by Muslim medieval

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[1] See McAdam, "Emerging Issue." op. cit. p, 357.

jurists by which the state is only committed to compensating the victim's family if the crime result in his death.[1]

8) The Amount of Compensation

The ideal method to determine the amount of state compensation ought to be a tailor-made approach. This arrangement means that the victim would be compensated upon a fair and swift evaluation which takes into account all his losses and injuries. Such an approach would be extremely costly and time-consuming method, so it has not been dreamed of. Instead, modern state compensation schemes follow a different arrangement that allow them to set beforehand the approximate potential expenses so that they can rule out the possibility of run-away costs. The plan is based on determining a minimum and a maximum limit for the compensation amount beyond which the state would have no further financial commitment to the crime victims. The plan goes even further in limiting the compensation award by breaking it down into several sub-amounts which should be paid only for specific allocated purposes. The more frequent purposes are: medical expenses, lost earnings, loss of services of a family member and funeral and burial expenses.[2]

Islamic law in turn follow its own arrangement in this regard by which a fixed sum of compensation is given to the victim's family irrespective of their emotional or material losses. As said before, the state in the Islamic compensation scheme is seen as a replacement for the so-called *Akila* who would have to pay *Diyya* to the victim's family. In the previous chapter it has been shown that *Diyya* in Islamic law is perceived as a fixed sum of money paid by the offender or his *Akila* to his victim's family as compensation. It has been argued that fixing the same sum of money, as compensation, may not match the needs of each individual case. So, through an acceptable interpretation of the Islamic commands in this regard, the determination of the amount of Diyya could be left to the court to decide, upon the circumstances of each case. The same can also be said for state compensation which ought to be left to the body assigned with the compensation-awarding task. If necessary, the traditional fixed sum of Diyya may serve as a maximum or preferably a minimum limit.

9) State Compensation In Egyptian law

State compensation for crime-victims has never been a preoccupation of Egyptian legislature. No attempt has been made by the state to introduce any similar schemes which may involve public compensation

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[1] See, Art. 213-215 of the Egyptian draft. And see for Saudi Arabia, the Chief Justice Decree no. 260(1983).

[2] Smith, "Victim Compensation." op. cit. p, 80. Hoezle, op. cit. p, 488.

for crime victims. This attitude is shared by many of the third world states who simply could not afford such a move. Egypt is no exception. It is the most populous country in the Middle East with over sixty million inhabitants and it is facing various economic and social difficulties ranging from a high rate of unemployment to inflation, illiteracy and national debts. Therefore, there are many national schemes which have priority over a victim compensation scheme. With an insufficient welfare system, singling out crime victims as a misfortunate class, which deserve special public financial aid would not be understood by other grieved groups such as the sick, disabled and elderly people who receive little if any state financial aid.

Therefore, the state resorted to other methods to overcome the problem of cost. The main alternative to state compensation was compulsory insurance by which certain private citizens, companies and governmental departments are statutory obliged to be insured against their liability towards others, or to be compensated in case they themselves become victims. For example, as the victims of car accidents increased dramatically, the state issued a law by which car insurance became compulsory.[1] Also, as a result of poor building quality which led to many buildings falling into ruin, the government, unable to afford the high cost of such incidents, enacted in 1983 a law by which building permission is given only upon the presentation of an insurance policy which covers the contractor and the engineering liability for a total or partial destruction.[2] In addition, there are some laws which aim at providing compensation to some aggrieved classes whose victimisation is not necessarily the result of criminal activities such as the law of social security (1975) which covers employment casualties.[3] The significance of such laws is that they work as alternatives to state compensation for a considerable number of victims especially those of car related incidents. They may also provide an incentive for victim's advocates to promote victims rights by comparing them with other covered groups such as injured workers.

Nevertheless, these scattered provisions do not reflect a comprehensive move towards finding a real alternative to state compensation. At best, they may be described as reactive measures to serve specific events or to allay certain popular outcries. Also, with all its advantages as an alternative for public-victim compensation, private insurance is not the most suitable solution for a state like Egypt. If the government cannot afford the high cost of victim compensation, most citizens much the same, cannot afford the insurance premiums. In addition, claiming compensation for insured losses is in no way an easy task; it involves

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[1] Motor Compulsory Insurance Act. no 652. (1952).
[2] Building Regulation Act. no 106(1976) amended by Act no 30(1983). Art. 8.
[3] Social Insurance Act. no 79(1975). Art. 46-71.

complicated legal and administrative processes. This may account for the fact that private insurance is a rare choice for Egyptian citizens. In this connection, Mr. Al-Menyawi, suggested the creation of the so-called cooperative insurance whereby all citizens should contribute with redeemable little sums of money to tackle the problem of victim's compensation.[1] Whereas, Mr. Naji believes that the State should complies with Islamic law which is the main source of legislation and declares its liability to compensate, at least, the victims of violent crimes. He affirmed that financial difficulties must not preclude the state from taking such a crucial initiative asserting that establishing public compensation scheme would encourage law enforcement agencies to be more vigilant and maximise their effort to prevent violent crimes and bring offenders to justice and therefore, there would a fewer number of victims to compensate.[2]

Even at a non-governmental level, public victim-compensation constitutes no real preoccupation for Egyptian lawyers and academics. Unless there is a special occasion such as a conference, this issue is rarely raised with depth and seriousness. The reason is not simply the lack of interest, but more so the realisation of the difficulties in setting up such costly schemes. Professor Mahmude Mustafa, a prominent Egyptian criminologist, for example was the first Egyptian lawyer to write on the subject in 1975.[3] His pioneering effort, however, was not motivated by the author's own anxiety but rather as a result of his participation in the International Congress On Penal Law in Budapest (1974), which was devoted to the subject of crime victim compensation. In his introduction to the book, the author said that "this book is the fruit of my participation in the academic activities of The International Association Of Penal Law[4] and after attending and participating in the congress and its preliminary symposium I have decided to write this book in the interest of the readers and also so that it to be considered in any subsequent revision of criminal law."[5] In the chapter dedicated to public compensation, the author made no direct call or invitation to the Egyptian State to join other countries that have adopted victim compensation schemes. In the third conference of the Egyptian Society of Criminal Law on victim's rights in the criminal process (1989), Professor Mustafa, who was then the president of both the society as well as the conference, made only a general statement for all

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[1] Such an insurance, Mr. Al-Menyawi asserted complies with Islamic principles. Mr. Badr Al-Menyawi, a former Attorney General (1986-1990). A personal interview. Cairo, February 1999.

[2] Mr. Naji, a former Supreme Court judge and deputy of the Minster of justice. A personal interview. Cairo, February 1999.

[3] His book which was entitled "*Huqoq Almajny Alyah fi Alqanune Almuqaren*" or "The Victim's Rights In Comparative Laws." Cairo (1975), became the leading reference for any subsequent study in the field not just in Egypt but also in the Arab world.

[4] The author was at the time the vice president of the association.

[5] Mahmude Mustafa, "*Huqoq Almajny Alyah.*" op. cit. p, 3-4.

Muslim states to apply Islamic principles regarding victim compensation.[1] During this conference some Egyptian lawyers called reservedly for a public victim compensation scheme suggesting that such schemes can be funded by the social security reserve[2], or by the state and charities.[3]

Beyond the conference, some Egyptian lawyers rely on a constitutional provision which they view as a good starting point for setting up a duty upon the state to compensate crime victims.[4] However, the provision in question falls far short of their expectations. The provision provides that, "any violation of personal freedom or the sanctity of the private life of the citizens is a crime and is not subject to the law of limitations, and the state shall ensure a just compensation for the victims of such crimes."[5] This provision is very limited; it covers only a very few number of crimes which are only related to personal freedom excluding violent crimes, and it is only applicable if the offender is a public servant. Furthermore, even with all its limitations, this provision provides a vague general statement which needs further clarification and specification. It, for example, says nothing about eligibility and the amount of the award and sets no procedures to be followed by the victim in order to be compensated. Finally, there is no record of any judicial application of this provision since its enactment in 1971.

The development which would be considered as a landmark of public victim-compensation came in the draft of the Islamic penal law which was discussed in 1981 and 1985 but has not been enacted. It contains a number of provisions which assign the state with a legal duty to pay the victim of violence full compensation in the cases where the offender is insolvent or has not been caught. As has been shown earlier, many Egyptian lawyers and judges have called for the application of such measures, especially those relating to victim compensation.[6] In the above-mentioned conference on victim's rights, a recommendation was made in line with these calls. The recommendation no (7) provides that

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[1] Mahmude Mustafa, "*Huquq Almajny Alyah Kharij Al-Ijra'At Al-Jena'Ya.*" or "Victim's Right Outside Criminal Process." A paper presented to the Third Conference Of Egyptian Society Of Criminal Law On Victim's Right In The Criminal Law (1989). Conference Proceedings. op. cit. p, 443.

[2] See, Sery Seyam, "*kafalut hak al-dahaya fi al-husole ala ta'wied.*" or "Ensuring Victim's Right To Be Compensated." A paper presented to the Third Conference Of Egyptian Society Of Criminal Law On Victim's Right In The Criminal Law (1989). The Conference Proceedings, op. cit. p, 470.

[3] Ramsis Behnam, "*Mushkelat ta'wied al-majny alyh.*" or "The Problem Of Compensating Crime Victims." A paper presented to the Third Conference Of Egyptian Society Of Criminal Law On Victim's Right In The Criminal Law (1989). The Conference Proceedings. op. cit. p, 450.

[4] Mohammed 'Aqeda, "*Himayat Dahaya Al-Jariema Fi Al-Tashrie'At Al-Arabiya.*" or "Protecting Crime Victims In Arabic Legislation." *Majalat Al-Aulum Alqanunya Wa Al-Iktisadya*, or Journal of Legal And Economic Science. Cairo (1993). p, 123. Al-Fiky, "*Hukuk Almajny Alyah.*" op. cit. p, 355.

[5] Art. 57 of The Egyptian Constitution enacted on 11 September 1971.

[6] See, Mustafa, op. cit. p, 433. Khayri Al-kabash, "*Masolyat Al-dawla an Ta'wied Almajny Alyh.*" or, "The State responsibility to Compensate Crime Victims." A paper presented to the Third Conference of The Egyptian Society of Criminal Law(1989). The conference proceedings. op. cit. pp, 570-602.

"according to Islamic law, the state must recognise its duty to compensate crime victims and their families particularly if it fails to bring the offender to justice."[1]

To sum up, it seems that public victim-compensation has not yet gained any priority in the criminal policy agenda of the Egyptian legal system. There is no political desire to involve the state in such a costly scheme which would add more pressure on an already overloaded budget. Besides, the Egyptian State does not appear to be under any sort of pressure to undertake such a move. There exists no formal or informal associations or movement which aim primarily to promote the position of crime victims or to advocate the idea of state compensation.[2] Even within the legal profession, despite their concerns for the victims, lawyers seem to accommodate the state view, and hence they either rule out any state involvement or call for different methods to fund such a scheme excluding the state. In short, the time is still not yet ripe for the crime victim to be compensated by the state in Egypt.

10) State Compensation In Sudanese Law

If the situation in Egypt does not encourage the state to take any steps toward setting up a public victim-compensation scheme, it is so much the same in the Sudan. It is even worse. The Sudan is a poor country with a huge land and continuous war in the south in which famine is not unusual.

It is assumed that the Sudan, as an Islamic society, had recognised the state's responsibility to compensate crime victims according to Islamic law. With the advent of the Condominium Rule of the Sudan by the Egyptians and the British, an English-inspired criminal law was applied in 1889. This law was amended several times in 1925 and 1950 and then replaced in 1974 by almost the same law but in Arabic. During the application of these laws, the state never committed itself to such a duty of compensating crime victims.

In 1983 the Sudanese penal law was replaced with an Islamic penal law which in turn was replaced which another similar one in 1991. Although these laws have expressly applied Islamic principles, they however, made no reference to the state's liability to compensate crime victims as is commanded in Islamic law. Thus, chapter three of the Sudanese Penal Law 1991 which is entitled 'compensation' contains the Islamic conventional principles regarding *Diyya* and *Akila* (Art. 43-46), though, it does not mention the state responsibility in this regard. This clearly manifests the awareness of the Sudanese legislator of the economic difficulties preventing the state from standing for such a costly

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[1] See the conference recommendations and resolutions. The conference proceedings. op. cit. p, 611.

[2] Although there are some organisations which are concerned with the issue of human rights in general including crime victims.

commitment. However, some judicial precedents under the law of 1983established the state duty to compensate the victim according to the general principles of Islamic law. Thus the Supreme Court ruled that "it is confirmed, Diyya must be paid by the offender and his Akila or by the government if they are unable to do so."[1] In addition, according to Mr. Abdul-Rahman Sharfy, a Sudanese Supreme Court judge[2], under the law of 1991, the Sudanese Supreme Court, in an unpublished judgement the state was ordered to pay a full Diyya to a victim's family as the offender was insolvent and so was his Akila. The court relied on Islamic rules in this regard and also referred to Art. 32/3 of the Penal Law which provides that "the state shall be considered a guardian for whoever has no guardian." So, it deemed the state as an *Akila* for the offender, and thus '*Sunduq Al-Zakat*' or Religious Charity Fund was obliged to compensate the victim's family. This precedent being followed by other courts, Mr. Sharfy continued, would of course constitute a huge burden on the state budget. So, after deep consideration, a group of Supreme Court judges came up with an initiative to set up an organisation to deal with the problems of compensating crime victims. This self-motivated effort by the judges was further compelled by the fact that there were hundreds of offenders kept behind bars just because they have failed to pay compensation to their victims ordered by criminal courts.[3] Eventually, the Insolvent Prisoners Aid Board was founded in 1989. The board which consists of a number of Supreme Court judges presided by the deputy chief justice is funded primarily by charity from the Sudan and outside as well.[4] It is obvious from the scheme's title that it is aimed at aiding prisoners not the victims who are not mentioned and not allowed to apply to be compensated by the board. However, as Mr. Sharfy explained, the scheme has a twofold objective: helping the victims through aiding the offenders. So, as a pragmatic approach the scheme tries to use the scarce available funds productively by paying

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[1] The Sudanese Supreme Court. Sc/crim. No. 103/1405. 1987. S. L. J. R. (1987). p, 99. See also the Supreme Court Sc/Crim. No. 56/1406. 86. S. L. J. R. (1987). p, 100.

[2] Mr. 'Abdul-Rahman Sharfy, a Sudanese Supreme Court judge and the head of the Technical Office of the Supreme Court. A personal interview, Doha, Mars 1998.

[3] Art. 271/1. C. C. P,.(1983) provided that "Where Diyya or any other compensation is due, the offender must not be discharged before depositing the whole sum to the court." As explained in the preceding chapter that the Sudanese law tries through such a provision to secure the victim's compensation, however such a method is inconsistent with both justice as well as Islamic law which declares that poor offenders must not be obliged to pay compensation.

[4] Mr. Sharfy revealed that there are some religiously motivated donors from outside the Sudan especially Saudi Arabia who have frequently made generous donations, Mr. 'Abdul-Rahman Sharfy, a Sudanese Supreme Court judge and the head of the Technical Office of the Supreme Court. A personal interview, Doha, Mars 1998. Mr. Hammur also said that he and other judges used to employ their personal relationships with the officials to convince them to allocate more funds to help prisoners to pay compensation to their victims in order to be set free. Mr. Ma'mun A. Hammur. A Sudanese Supreme Court judge. A personal interview. Doha, April 1998.

compensation on behalf of the insolvent prisoners, this will enable them to be freed and in the mean time to have their victims compensated.

As a secretary at the beginning and as president later on, Mr. Sharfy explained the scheme framework as being quite informal. It takes the form of field visits to prisons all over the Sudan. The next step is studying the prisoners' files. The criteria for choosing prisoners are related to the characteristics of the crimes and the length of imprisonment. The scheme only deals with violent crimes in which offenders have been imprisoned because they failed to fulfil the court order to compensate their victims. So, prisoners who committed other crimes or who have been confined for civil debts are excluded. And then the priority is given to the prisoners who served longer terms of imprisonment. In some cases the board accepted an application made by the prisoners or their families to pay compensation to their victims in order to be freed. As the members of the board are also Supreme Court judges they usually after considering the case, make a recommendation to the Board to compensate the victim on behalf of the insolvent offender.

The assessment of the scheme requires more details and statistics about the number of prisoners freed due to victims being compensated by the board. Unfortunately, Mr. Sharfy and also the other judges could not provide such information. It is apparent that the scheme has been quite limited in its means and objectives. Relying on charity as a main fund source subjects the scheme to a great deal of financial instability which may affect its efficacy and reliability. In addition, depending on field visits to regional prisons in a large country such as the Sudan by the board's member reveals the severe limitations of the scheme. It is not a nation-wide scheme which has local branches or offices in different parts of the country. However, as a way of adapting to circumstances, this attempt to set up a voluntary programme to help crime victims be compensated is worth praising and ought to be copied by other Arabic countries.

11) Conclusion

After years of struggle, not necessary by crime victims themselves, state compensation schemes have become reality in most Western countries. Despite criticism of the criteria of eligibility and other procedural issues, state victim schemes are, no doubt, another significant achievement in the victim's battle to get their fair rights back and to occupy the position they deserve in public agenda. State compensation schemes have filled a gap resulting from the inefficiency and insufficiency of other remedies available to crime victims such as restitution. Also one should not lose sight of the symbolic significance of

state compensation, that is by compensating crime victims, the state is not merely paying money out to a needy group, but it also should be regarded as public recognition that a victim has been wronged and the public willingness to make this wrong right, not just by punishing the wrongdoer but also by getting the victim back to his pre-crime situation as far as possible.

Islamic law in turn provides its own scheme of state compensation for crime victims. Despite its simplicity and limitation, the Islamic scheme has the credit of pioneering this field when a victim's family was compensated by the state fourteen centuries ago. Islamic schemes should be understood within the context of its time, and therefore one should not expect a comprehensive or complicated scheme, but rather it provides a starting point for a modern public scheme. Such a point was in need for forward-looking thinking to take it ahead in order to build up a solid theoretical basis for a more comprehensive and thorough scheme. Despite their admirable efforts to elaborate and detail the principles of state compensation, Muslim scholars, conceivably because of the religious character of Islamic law, stuck to the precedents set by the Prophet and his immediate Caliphs, and thus made no attempt to expand the scope of the state compensation to include more crimes or to modify the eligibility criteria. Thus, the scheme has remained with all its conventional setting for centuries.

One of the most commendable features of the Islamic state compensation scheme is that, unlike Western schemes which have been set up as a separate body, it constitutes an integral part of the Islamic criminal justice system. As such, it is conceived as an integrated component of the Islamic approach towards crime victims. Therefore, state compensation can be decided in Islamic law by the same trial court which determines the efficiency of other prescribed remedies such as the offender's restitution. Thus, when the state duty to compensate crime victims was codified it was laid down in the heart of the penal law alongside other forms of compensation such as Diyya. This is obvious, for example, from the Egyptian draft of Islamic criminal law in which state compensation is stated in the same section along with *Diyya* and *Akila*.

With the emergence of contemporary Muslim countries, in which the state has become more visible and powerful than ever, it was hoped that such a development would create an ideal environment to achieve most of the Islamic compensation scheme and accomplish the long-waited improvements and modifications. Ironically, what happened was quite the opposite; the scheme was abandoned in almost all Islamic countries. The few countries which still apply Islamic law are sticking to the conventional rules of state compensation, such as in Saudi Arabia. Other

countries, although applying Islamic law, exclude the state compensation scheme altogether and resort instead to an informal voluntary alternative, such as in the Sudan. The unwillingness or inability to apply the Islamic compensation scheme has further weakened the victim's position and missed a great opportunity to preserve one of their essential rights vested upon them by Islamic law.

The chance is still there for the application of a modern Islamic state compensation scheme which combines ancient Islamic principles with the modernity and the sophistication of contemporary schemes. Such a scheme would have every potential if it were applied in those Islamic states which have the financial capability to face the cost of the scheme. It would be even more efficient if it were as part of a pro-victim philosophy or programme which could offers crime victims a better position in the criminal justice system.

Chapter (6) Reconciliation, Mediation And Forgiveness In Islamic Law

1) Introduction

Victim-offender mediation is increasingly claiming more ground, particularly in Western legal systems. It has been introduced as an alternative dispute resolution method which may help to overcome the shortcomings of the traditional justice systems. However, for crime victims, victim-offender mediation is another achievement of the victim movement. It means more recognition and more attention of the victims' needs and rights. In this chapter, the focus will be on the Islamic approach towards victim-offender mediation; its theoretical basis, scope, development and effect on the criminal proceedings. Furthermore, the Egyptian and the Sudanese laws will be examined in order to grasp their attitudes towards victim-offender mediation in general and their standpoint towards the Islamic approach in this field in particular. As in the previous chapters, the start will be with an overview of the development of the victim-offender mediation schemes in Western legal systems. Such an overview will help to enlighten the examination of the Islamic approach as it presents the latest development in this field.

2) The Revival of Mediation in Western Legal Systems

Mediation can be defined as a process through which litigants are provided with the opportunity to meet each other face to face, in a safe and peaceful setting, with the aim of resolving the conflict by holding the offenders directly accountable for their behaviour, with the possibility of providing assistance and compensation for the victims.[1] As such, mediation is an ancient method of resolving conflicts; it was used to resolve family, commercial, civil and even international conflicts. Mediation has continued to date to play its essential role in many fields particularly within family disputes. Even in international conflicts, the United Nations, and other international and regional organisations, tend to send their special envoys or mediators to resolve conflicts through negotiation.

Criminal conflicts were no exception. When the system of private dispute settlement prevailed many centuries ago mediation was an important mechanism of settling criminal conflicts. After settling down, human communities realised the need for a work force and the expensive

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[1]See, Mark S. Umbreit, "Fact Sheet: Victim/Offender Mediation: Restorative Justice Through Dialogue." Centre For Restorative Justice & Mediation.
http://www.che.umn.edu/ctr4rjm/People/Umbreit.htm

price of a long-lasting vendetta that had been the main way of settling conflicts. Therefore, a sense of justice was developed to accept the concept of restitution as an alternative or in addition to the traditional sense of justice i.e. life for life. Mediation was the mechanism by which restitution was negotiated and agreed upon.[1] In later developments, a set of tariffs that determines the amount of restitution due in each case was devised. Parallel to the gradual emergence of the concept of the state, was the gradual transmission from the private dispute settlement to a public criminal one which stimulated the process of distinguishing crimes and torts which eventually led to the emergence of two separate systems of dispute settlement i. e. the law of tort and criminal law.[2] This development meant that disputants' freedom in settling their disputes through mediation depended on how the law classified their litigation. That is to say, if the illegal act was classified as a tort, its parties retained their right to negotiate the settlement away from state institutions. Whereas if the act was described as a crime, it implied that a certain public interest was hurt, therefore, it was up to the public institutions (courts, police) to decide on the settlement according to the pre-prescribed procedures in criminal law.

Adopting mediation, as a mechanism of resolving criminal conflict, is closely connected to the position bestowed upon the victim in the criminal litigation. When the victim is seen as a party to the litigation who has the right to have a say in the progress of the proceedings, he is then in a position to negotiate the settlement with the offender through mediation. Whereas when the victim is excluded from the process on the grounds that the conflict is essentially between the state and the offender, the latter would not be encouraged to mediate with the victim as such mediation is not recognised as having a legal effect because one of its party, the victim, is not conceived as a party to the conflict.

Thus, the revival of mediation in the last few decades has been associated with the victim movement which has been appealing for a better deal for crime victims in the criminal justice system. There are also some other factors which contributed to the revival of mediation as a reconciliatory method of resolving criminal conflicts. The most important of which is the crisis in the administration of criminal justice which was a global phenomenon.[3] The crisis generated essentially from the world-wide trend towards the policy of over-criminalization which in turn led to more prosecutions and more trials and at the end over-loaded

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[1] Steven Schafer, "Compensation for Victim of Criminal Offences." Criminal Law Bulletin. vol. 10. (1974). p, 606.

[2] For more details, Theodore Plucknett, "A Concise History of the Common Law." London, Butterworth, 5th edition (1965). 455-466. Davis, "Making Amends." op. cit. p, 1-6.

[3] See the documentation of the fifth United Nation Congress on the Prevention of Crime and The Treatment of Offenders. A/Confer/56/4. p, 3.

and over-crowded courts. Given such circumstances, criminal litigation became a costly, time consuming and complicated process. Police, courts, and other law enforcement agencies could not cope with the increasing number of criminal cases without sacrificing the proper standards of the criminal justice system. This situation affected the crime victims as well as the offenders. The search for an alternative to the traditional remedies of criminal justice systems coincided with the gradual emergence of the victim's movement which offered a more informal model of justice. This involves the idea of reintegrating crime victims into the legal proceedings as individuals with justified claims. In addition, it involves the utilisation of social institutions such as the family and neighbourhood in the process of resolving criminal conflicts. Thus, the idea of mediation was introduced as a remedy for the inefficiency of conventional criminal justice and in the meantime to offer a better deal for crime victims.

Inspired by the experience of other cultures, particularly tribal and primitive societies[1], the trend towards mediation programmes started in North America. The victim-offender reconciliation project (VORP) in Kitchener, Ontario in Canada is often recognised as the forerunner of mediation schemes.[2] It was initiated as a pilot from Fall 1975 until June 1976. It was a joint venture of the Mennonite Central Committee of Ontario and the Province of Ontario Ministry of Correctional Service and was located in Kitchener, Ontario, Canada[3]. In the USA, the first VORP was initiated in 1978 in Elkhart, Indiana[4]. An increasing number of similar projects were soon inaugurated in almost all states. It was not long before the idea crossed the Atlantic to spread all over Europe as well as Australia and New Zealand. In Britain, it was as early as 1979 when the first mediation project was launched in the small city of Exeter[5]. The idea has flourished with hundreds of projects and schemes of all sizes and levels with various aims, and the number is constantly increasing[6]. The

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[1] For example, the Tanzanian province of *Arusha* in Christie, "Conflict As Property." op. cit. p, 235-. The Mexican *Zapotec* in Nader L and Todd H, "The Disputing Process: Law in Ten Societies." New York. Columbia University Press (1978). The traditional '*Marion*' values in Australia and New Zealand upon which the idea of Family Group Conference has been drawn. See, Umpriet M. and A. W. Roberts, "Mediation In Criminal Conflicts In England: An Assessment Of Service In Coventry And Leeds." Centre For Restorative Justice and Mediation. School Of Social Work. University Of Minnesota. St. Paul, MN, USA.

[2] Dean E. Peachey, "The Kitchener Experiment." In Wright, "Mediation and criminal justice." op. cit. p, 14.

[3] Dorthy Edmonds Mcknight, "The Victim-Offender Reconciliation Project." In Galaway. B & Hudson, J, "Perspective On Crime Victims." (1981) C.V Mosby Company. St Louis. p, 292.

[4] Gwynn Davis, "Making Amends: Mediation And Reparation In Criminal Justice." Routledge, London (1992).p, 16. [Hereinafter, Davis, Making Amends].

[5] Marshall, "Restorative Justice." op. cit. p, 16.

[6] See, Mark S Umbriet and Jean Greenwood, "National Survey of Victim Offender Mediation Programme in the Us." Centre For Restorative Justice And Mediation. University of Minnesota (1998). http://ssw.che.umn.edu/ctr4jm. Mark Umbriet, "Victims Meet Offenders: The Impact Of

new trend has been the subject of extensive research on its validity as an alternative to the traditional criminal justice system. As with many other innovations, it has been received with different impressions varying from enthusiastic support, scepticism to total rejection.[1]

After sketching the development of mediation in Western societies, it is time to turn to the focus of this chapter which the concept of mediation in Islamic law: how is it conceived? What is its underlying philosophy? How has it been practised? How is it being practised today in Muslim countries? To what extent does it suit the existing setting of modern criminal justice systems?

3) The Theory of Victim-Offender Mediation In Islamic Law

Mediation, reconciliation and forgiveness are common terms in Islamic law. The Qur'an and the Sunna are full of verses urging the believers to peacefully resolve their conflicts through mediation and reconciliation. The Qur'an says, "*The believers are but a single brotherhood: so make peace and reconciliation between your contending brothers.*"[2] The Prophet is reported to have said, "*Whoever reconciles disputing parties he will be freed from the hellfire.*"[3] Accordingly, as a principle, mediation is a recognised dispute resolution mechanism in Islamic law in all types of conflicts including, family, commercial and even in the field of international relations.[4] For example, in family disputes, the Qur'an is explicitly in favour of a reconciliatory process, it says, "*If you fear a breach between them (wife and husband) twain, appoint two arbiters, one from his family and the other from hers; if they seek to set things right: Allah will cause their reconciliation.*"[5]

Criminal conflicts are no exception. Except for a few specific crimes, which are considered as an aggression against the right of God (Allah), all other offences are mediatable or reconcilable. The list contains most offences that are codified in modern criminal laws, ranging from minor assault to murder. Mediation is seen as the most desirable way of resolving criminal conflicts irrespective of their gravity. Therefore, it is

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Restorative Justice And Mediation." Criminal justice press, Monsey, NY, (1994.). Wright, "Justice for Victims And Offenders." op. cit. p, 66-132.

[1] See for example the following evaluative studies, Davis, "Making Amends: Mediation and Reparation in Criminal Justice." Routledge. London (1992). Martin Wright, "Can Mediation Be an Alternative to Criminal Justice." In B Galaway & J Hudson, "Restorative Justice: International Perspective." Criminal Justice Press, Monsey, N.Y., USA.(1996). Marshall, T, And Walpole M, "Bringing People Together: Mediation And Reparation Projects In Great Britain." Research and Planning Unit, Paper 33. London (1985). Home Office. Messmer & Otto, "Restorative Justice On Trial." op. cit.

[2] The Qur'an, 49:10. It also says, "*Make peace and reconciliation ... with just and be fair for Allah loves those who are fair and just.*" The Qur'an, 49:9.

[3] He also is reported to have said, "*The best charity that Allah and His messenger love is reconciling disputants.*" Related by Malik. See, 'Awad, op. cit. p, 191.

[4] Al-Zayla'i, op. cit. vol. 3. p, 245. Ibn-Qudama, op. cit. vol. 9. p, 298.

[5] The Qur'an, 4:35.

not just the disputants who are urged to reconcile, but even judges are commanded to recommend and encourage (without pushing) the litigants to resolve the conflict through mediation.[1] Some scholars even allow the judge themselves to take part in the mediation process as mediators, whereas other scholars do not sanction such involvement lest it affects the judge's impartiality.[2]

4) The Underlying Philosophy of Mediation In Islamic Law

The underlying philosophy of such an Islamic approach is based on two main foundations: the way that criminal conflict is envisaged in Islamic law, and the effectiveness and capability of reconciliation as a dispute resolution method. As to the first, it has been stated before that there are only several exceptional offences in which the conflict is regarded as a matter of public issue since they threaten certain public interests. Consequently, victim-offender mediation for these crimes, although still recommended, has no legal effect on the litigation. Beyond that, 'criminal' conflicts in Islamic law, particularly in its classical period, are considered essentially personal matters that should only concern the parties involved. Yet there is a recognised public element in all private crimes, but the personal side is viewed overwhelming since punishment for these crimes is set primarily to satisfy the victims.[3] In fact, a public element can be traced, at least in theory, in almost all misdeeds or unsound behaviour, yet they are not all penalised. The logical consequence of the Islamic law's view of criminal conflicts is that mediation and reconciliation become legally possible, since the victim has the right to drop his complaint at any time just as if it were a civil claim. In fact, as explained earlier, Islamic jurisprudence put little emphasis on the distinction between crime and tort. The only difference visible in this connection is that if the litigants do not reach a settlement through mediation, the offender or the wrongdoer of some intentional violent crimes may be punished.

As to the second foundation, mediation is seen as the best dispute resolution mechanism that can achieve the objectives of Islamic law. That is to say, Islamic law is not just a law in the strict legal sense; it is rather a combination of religious, moral and legal rules. Its functions and objectives too are larger in their scope than those of legal systems. This is because Islamic law is not an isolated set of rules but rather one component of a larger system that is the religion which provides its followers with a whole system of life. Just as Islamic rituals, ethics and morality, Islamic law is envisaged as a device used to achieve the

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[1] Al-Mawardy, op. cit. vol. p, 70. Al-Kasany, op. cit. vol. 7. p, 13.
[2] Ibn Abden, "*Alhashiyah.*" op. cit. vol. 2. p, 256.
[3] See, Abu-Zahrah, op. cit. vol. 1. p, 18-19.

objectives of Islam as a religion. As an eminent orientalist says, "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life."[1] A major objective of Islam, as Professor Mohy Al-Dien asserted[2], is the social peace and the preservation of unity of the community and the maintenance of social peace. The Qur'an says, "*And hold fast altogether ... and be not divided among yourselves*"[3] and says, "*Fall no in disputes.*"[4] Therefore, in attempting to resolve any conflict among the members of the community, Islamic law strives, as far as possible, to preserve the good relationship between the litigants by providing a resolution which ensures the pursuit of their previous normal relationship. To achieve this end, the adopted method of dispute resolution should not be aimed at a losing or winning outcome. Rather, both litigants should be satisfied in a way that enables them to resume their relationship. Ensuring the litigants' satisfaction is an extremely difficult task; it is even more difficult if the resolution is imposed by an outsider without consulting the conflicting parties. Therefore, the ideal method to achieve the litigants' satisfaction is through mediation in which both disputants can negotiate the suggested resolution. Thus, the second Caliph, *Omar Ibn Al-khatab* (d, 23 AH, 644 AD), addressed Muslim judges saying, "recommend litigants to seek reconciliation since judicial judgement leads to hatred." Commenting on this statement, medieval Muslim scholars agreed on the effectiveness of mediation as a swift, low cost method, and above all it saved social bonds.[5] Whereas adhering to prolonged judicial proceedings is a time-wasting and expensive process which is more likely to deteriorate the already damaged relationships between the litigants.

However, negotiation after all is a sort of compromise. That is to say, each litigant must make a concession that is not always equal for each party. This means that mediation on its own is not adequate to ensure equality and satisfaction, which are required to persuade the conflicting parties to resume their previous relationship. Islamic law, therefore, relies largely on the litigants' religious and moral sentiment to ensure their satisfaction even if they get less than their expectations. Hence, mediation in Islamic law is closely associated with forgiveness on the grounds that the litigants' ability or willingness to forgive is a cornerstone to any meditative process. Mediation can work without forgiveness if it aims only to settle the conflict, but it is not enough if the resumption of the previous relationship is also called for. Thus, Islamic law follows a strategy based on promoting forgiveness as a basis for mediation. To this

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[1] Schacht, "Introduction to Islamic law." op. cit. p, 1.
[2] Professor Mohy Al-Dien 'Awad, a personal interview. Riyadh, April 1998.
[3] The Qur'an, 3:103, 6:159, 30:31-32.
[4] The Qur'an, 8:46.
[5] Al-Sarkhasi, "*Almabsute*." op. cit. vol. 2. p, 136. Al-Kasany, op. cit. vol. 7. p, 13.

end, forgiveness in Islamic law is promoted not only as a moral and religious value, but even as an activated legal instrument by which the crime victim can end the litigation. Therefore, there are two distinguishable methods of mediation in Islamic law, namely forgiveness-based mediation or '*Afo*' and restitution-based mediation or '*Solh*'. In the following pages, the two methods will be explored and analysed with more focus on the former with an aim to examine the principle of forgiveness in Islamic law; its concept, scope and effectiveness.

a) Forgiveness-based Mediation '*Afo*'

Forgiveness as a moral or religious value can be generally defined as a process of ceasing or relinquishing one's right to feel resentment against someone, or giving up one's right to hurt back in response to injury.[1] As such, forgiveness has a long established association to both social and religious life. It constitutes an essential value for all established religious beliefs like Judaism and Christianity.[2] In the field of criminal law, forgiveness is conceived to have little relevance and is not allowed to play any significant role in deciding the fate of criminal proceedings. This may be attributed to the doctrine, which has dominated the field for a long time, that a crime victims` wishes and feelings should not affect the criminal process which is designed to preserve the public interest. Therefore, forgiveness continues to be studied and treated only as a religious or philosophical inspiration, but not as a legal concept. Nevertheless, with the advance of the trend of restorative justice in the last two decades, forgiveness has started to receive more attention particularly in mediation and reconciliation programmes. Forgiveness, however, is still a relatively understudied phenomenon.[3] It has the potential to be an incorporated institution of the criminal justice system for both victims and offenders, and the legal process has yet to be explored.

In Islamic law, forgiveness has always been conceived as both a religious and a legal concept. Thus, forgiveness is studied in Islamic literature not just as part of the moral and ethical values of Islam which ought to be possessed by every Muslim, but also as a legal instrument,

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[1] Pingleton, J. P. "The Role and Function of Forgiveness in the Psychotherapcutic Process." Journal of Psychology and Theology. vol. 17. (1989). p, 30. [Hereinafter, Pingleton]. John R. Gehm, "The Function Of Forgiveness In The Criminal Justice System." In Heinz Messmer and Hans-Uwe Otto. "Restorative Justice On Trial: Pitfalls and Potentials of Victim-Offender Mediation- International Research Perspectives." Nato Asi Series. vol. 64. Kluwer Academic Publisher. London (1991). p, 548.

[2] Se for example, Louis, E. Newman "The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition." Journal Of Religious Ethics. (1987). vol. 15. p, 155-172. [Hereinafter, Newman, Forgiveness]. For Christianity see, H. R. Mackintosh, "The Christian Experience of Forgivencss." Nesbet & Co. Ltd. London (1944).

[3] Gehm, op. cit. p, 541.

which is vested upon the crime victim empowering him with authority to direct the criminal proceedings. Yet, forgiveness in Islamic law has not been fully explored particularly in its legal aspects and there is still a need for further investigation. Reviewing Islamic legal writing over the centuries, little can be found specifically written on the subject. One of the few treatise which could be mentioned here is a medieval manuscript which is called '*Resalat Al-afo'* or 'The Message of Forgiveness' written by a scholar of the Islamic fifth century, or 12 AD.[1] This phenomenon i.e. the lack of specialisation in the subject is largely attributed to the writing methodology which was embraced by medieval Muslim scholars who tended to be mainly encyclopaedists rather than specialists. Hence, forgiveness was usually discussed in the same chapter that was devoted to crime and punishment as one of the victim's rights in the criminal process. Likewise, in modern Muslim scholarship, very little is written on forgiveness, in particular, as a legal institution in Islamic law.[2]

i) Defining Forgiveness

The Arabic term for forgiveness is '*Afo*', which has the literal meaning of removing, erasing or purposely overlooking the offence. It also has the meaning of dropping or extinguishing one's right to hit back.[3] In defining *Afo*, most scholars blended its religious, social and legal connotations. *Ibn-Al-Qayyim* (d, 750 AH, 1350 AD), a prominent medieval Muslim scholar, for example, defined *Afo* as "dropping one's right with generosity, hospitality and charity while having the ability to retaliate."[4] Whereas for *Al-Ghazali* (d, 505 AH, 1111 AD) the legal connotation of forgiveness is more obvious as he defined it as "absolving the offender from being punished or fined."[5]

Forgiveness constitutes a highly honoured value in Islamic culture. As a religion, Islam encourages its followers to show a great deal of forgiveness to those who have harmed them. However, forgiveness is not an easy mission for an ordinary person who may legitimately feel that there is no moral duty to forgive those who have intentionally caused his suffering. As Lauritzen explains, it can never be one's moral obligation to preserve or restore a relationship which the other party has previously violated.[6] Such an attitude, according to Lauritzen, is utterly justifiable where the wrongdoing is substantial or left the victim with irrevocable

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[1] This manuscript was written by "Ali Ibn Mungib Al-Sayrafi(d, 542 AH, 1148 AD). The library of King Abdul-Aziz University. Manuscripts section, no 810/M-19/1.
[2] See For Example Zayd 'Abdul-Karim "Ali, "*Al-'Afo 'an Al-Auqoba Fi Al-Fiqh Al-Islami.*" or "Forgiveness In Islamic Jurisprudence." *Dar Al-Asiema.* Riyadh.(1988).
[3] Ibn Manzore, "*Lesan Al-Arab.*" op. cit. vol. 15. p, 72. Al-Qurtubi, op. cit. vol. 1. p, 397.
[4] Ibn Al-Qayyim, op. cit. p, 325.
[5] Al-Ghazali, "*Ihya 'ulume Al-dien.*" op. cit. vol. 3. p, 183.
[6] Paul Lauritzen, "Forgiveness: Moral Prerogative or Religious Duty." The Journal of Religious Ethics. vol. 15. 2. Fall (1987). p, 147. [Hereinafter, Lauritzen, Forgiveness].

loss, in which case the victim has every right to end an already undermined relationship.[1] It is also, Lauritzen adds, morally justifiable for the victim not to forgive his perpetrator even when the offence is minor as he may rightfully feel that an offender who could commit such an offence is just not the sort of person with whom it would be fit and fruitful for him to maintain a close association.[2] However, Lauritzen, maintains that in the latter case forgiveness may morally be praised but could not be required as a duty.[3]

Islamic law seems to be consistent with this argument in recognising that as a rule, it is justifiable for an unaided human being to feel uneasy to forgive a person who has caused his suffering, or to ignore his natural resentment towards him. The task is even more difficult within Islamic law as forgiveness has a wider definition. It is not merely a negative feeling of "setting aside or the giving away of one's natural impulse to strike back or exact revenge,"[4] but rather an active psychological process which needs a tremendous mental and emotional effort to overcome the natural human weakness in demanding retaliation with an aim of restoring the previous normal relationship. Thus the Qur'an says, "*Nor can goodness and evil be equal. Repel evil with what is better: then will he between whom and thee was hatred become as if it were thy friend and intimate, and one will be granted such goodness except those who exercise patience and self-restraint, none but a person of the greatest good fortune.*"[5] From the religious point of view, forgiveness is a high standard moral attitude that can only be reached by the exercise of the highest patience and self-restraint. All human weakness and counsels of pseudo-wisdom and 'self-respect' will keep breaking in but they must be resisted as suggestions of evil. If you reach anywhere near that high standard you will indeed be most fortunate in a spiritual sense, for Allah's revelations have made you great and free.[6] Thus, the Islamic principle in this regard is that wrongdoing should be punished, or as the Qur'an states, "*Whoever does evil will be requited accordingly.*"[7] This means that Islam does not conceive forgiveness as a duty that must be fulfilled but rather a highly recommended character that should be possessed by those who wish to be members of God's community. So, a person who is not

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[1] Lauritzen, "Forgiveness." op. cit. p, 148.
[2] Lauritzen, "Forgiveness." op. cit. p, 149.
[3] Lauritzen, "Forgiveness." op. cit. p, 149.
[4] Pingleton, "The Role and Function of Forgiveness." op. cit. p, p, 28.
[5] The Qur'an, 41:33.
[6] 'Abdullah Yosif 'Ali, "The Holy Qur'an: English Translation of the Meaning and Commentary." Revised and Edited by the Islamic Researches, Ifta, Call and Guidance. King Fahad Holy Qur'an Printing Complex (1990). p, 1488. [Hereinafter, Yosif]. Mohammed 'Ali Al-Sabony, "*Safwat Al-tafasir.*" or "The Best of the Interpretations." *Dar Al-Qur'an Al-karim.* Beirut (1981). vol. 3. p, 123. Al-Qurtubi. op. cit. vol. p, 361.
[7] The Qur'an, 3:123. Also, the Qur'an, 42: 40, 41.

able to forgive will not be in sin but he will lack the full divine character. That is to say, a person in the Islamic definition is not seen as an individual but as a member of one closely connected community that has common objectives and conveys the same message. This community was created by the divine revelation that always addresses the believers as one community or '*Ummah*' but not as separate individuals. The Qur'an says, "*Verily, this Ummah 'the believers' community is a single Ummah and I am your Lord.*"[1] Within this context forgiveness functions as a mechanism of restoring broken relationships which ought to be maintained in order that the *Ummah* could achieve its divine mission. Thus, just after asserting the victims right in demanding justice, the Qur'an urges him to forgive. It says "*The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah: for Allah loveth not those who do wrong.*"[2] Interpreting this verse, a Muslim scholar says, "when you stand up for rights, either on private or public grounds, it may be through the processes of law, or by way of a private defence in so far as the law permits private action. Nevertheless, in all cases you must not seek compensation greater than the injury suffered. The most you can do is to demand equal redress i.e. a harm equivalent to the harm did to you. Even this may serve to curb your unregenerate soul, or a community bent on revenge. However, the ideal mode is not to slake your thirst for vengeance but to follow a better way leading to the reform of the offender or his reconciliation. You can take steps to prevent repetition, by physical or moral means; the best moral mean is to turn hatred into possible friendship by forgiveness and love. In that the compensation or reward (if we must use such terms) is infinitely greater, for it wins the good pleasure of Allah."[3] The Qur'an is filled with similar verses promoting forgiveness with the ability to punish, in fact the word forgiveness and its derivatives is mentioned more 35 times in the Qur'an.[4]

The ability of believers to forgive is largely conceived as a way of showing obedience to God's commands. In addition, the believers are encouraged to show their forgiveness as a way of enhancing their relationship with God as well as with the members of the community. At the level of the divine relationship, the believers are convinced that obtaining God's forgiveness in this life and the hereafter are the ultimate objectives. One way of achieving such an aim is to imitate God's attitude towards His disobedient servants. Allah for the believers is the most forgiving for, despite His full ability to punish, He forgives all sins, "*Say:*

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[1] The Qur'an, 21:92, 23:52.
[2] The Qur'an, 42: 40. See also, 10:27, 40:40,
[3] Yosif, op. cit. p, 1488. See also, Al-Sabony, "*Safwat Al-tafasir.*" op. cit. vol. .3. p, 143.
[4] See for example, the Qur'an, 2:187, 3:152, 9:43, 9:66, 24:22, 3:134.

O my servants who transgressed against their souls! Despair not of the mercy of Allah: for Allah forgives all sins: for Allah is oft forgiving, most merciful."[1] He therefore invites His servants to imitate him in order to deserve His forgiveness, "*Let them 'the believers' forgive and overlook, do you not wish that Allah should forgive you.'*[2] He also describes the believers as those who own the characteristics of forgiving, "*Those who spend (charity) freely whether in prosperity or in adversity, who restrain anger, and forgive (pardon) all people, for Allah loves those who do well (good)*[3]". At the level of earthly relationships, the believers are taught that the human being is subject to making mistakes against each other not necessarily because of their wickedness, thus the Prophet says, "*All the sons of Adam are mistakable, and the best of whom are those who repent.'*[4] Such realisation of human nature increases the willingness for forgiveness as the offended realises that he is subject to making a mistake in the future, so by forgiving the offender, he can expect to be forgiven. Thus, forgiveness can be justified on pragmatic grounds and can contribute to the social solidarity among members of the community.

In the teachings of the Prophet, forgiveness is likewise regarded as a highly honoured and promoted value which every follower is encouraged to possess. Whenever a crime was reported to the Prophet, he usually urged the victim or his family to show their ultimate mercy to the offender by offering forgiveness.[5] The Prophet is reported to have said that, "*Pardon one another (concerning Hudud crimes) before coming to me.'*[6]

ii) <u>Repentance as a Prerequisite for Forgiveness</u>

Although forgiveness is something that all people would agree in a principle as being socially important and acceptable, it can be made out to be socially objectionable attitude. This occurs when forgiveness is transformed into being a sort of condonation by it being offered without requiring the offender's sincere repentance. Forgiveness in such cases gives the impression that the wrongdoing has been accepted and confirmed. Consequently, an unrepentant or insincere repentant offender may be encouraged to pursue his wrongdoing on the grounds that his action was accepted and he was not asked to rectify it. To avoid such an unacceptable result, Islamic law adopts a doctrine that can be called 'deserving forgiveness'. That is to say, forgiveness should be granted

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[1] The Qur'an, 39: 52. See also similar verses: 2:248, 3:31, 3: 129, 5:18-40, 3:135, 4:48.
[2] The Qur'an, 24:22. See, Al-Sabony, op. cit. vol. p, 315.
[3] The Qur'an, 3:134.
[4] Related by *Al-Termithi, Ketab sefat al-qeyamah, Hadith no, 2423.* .
[5] Ibn-Abdul-Salam, "*Qaw'id Al-ahkam.*" op. cit. vol. 1. p, 140.
[6] Related by Abu-Dawood, vol. 4. p, 133. He is also reported to have said, "On the day of judgement, those who forgave in this life will go into heaven without being examined." Al-Qurtubi, op. cit. vol. 2. p, 1448.

only if the offender deserves it. In order to qualify, the wrongdoer ought to show his sincere repentance, as it is conceived in Islamic law. As both a religious and moral value as well as a legal institution, repentance in Islamic law occupies an expansive area in the relationship between God and the believers as well as in the inter-personal relationships. It is regarded as the price which ought to be paid by the wrongdoer in order to get the offended's (in its broader sense including God) forgiveness and to restore the usual relationship with him. For both purposes, repentance in Islam is more than just an apology, its psycho-physical process starts with a change of heart and confession which leads to a sincere desire to redirect one's lifestyle to be more in accordance with God's commands.[1] It is defined as an honest regret over what happened in the past that generates a faithful intention towards abstaining from doing any misdeeds in the future.[2]

Therefore, repentance has three elements: regret, discarding the past, and determination towards the future. These three elements are applied to both divine and personal relationships. However, such elements are internal and difficult to prove. Therefore, where there is an offended person involved, a fourth element is required which is to amend the damage, to compensate loss, or in general to restore the original situation as far as possible.[3] The Qur'an pays special attention to repentance as a religious as well as a legal concept. It contains a chapter '*Sora*' entitled '*Al-tawba'* meaning repentance. The word *Tawba* or repentance and its derivative is mentioned in the Qur'an more than 87 times. These verses set up the Islamic view of repentance, promoting it and urging the believers to practise it. They also state its conditions and draw its role in maintaining the relationships between the believers and God and among the believers themselves in their social and legal life. Thus, the Qur'an asks the believers to repent whenever they did wrong, "*And o ye believers! Turn ye all together towards Allah in repentance ye may be successful*[4]," for repentance is regarded one of the believers' characteristics when they are described as "*Those who turn (to Allah) in repentance*[5]." Allah in turn accepts repentance, "*He is the one that accepts repentance from his servants and forgives sins: and He knows all that ye do.*"[6] However, repentance, the Qur'an stresses, must be sincere in order to be accepted, it says, "*Of no effect is the repentance of those*

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[1] See more in that, Al-Harth Ibn Asd Al-Muhasebi,(d, 243 AH, 867 AD) "*Al-tawba.*" or "Repentance." *Dar Al-I`tesam*. Cairo (1977).

[2] Al-Ghazali, "*Ihya 'ulum Al-dien.*" op. cit. vol. 4. p. 3. Abu-Zahrah, op. cit. vol. 2. p, 249.

[3] Ibn-'Abdul-Salam, "*Qawa`d AL-ahkam.*" op. cit. vol. 1. p, 178. Al-Ghazali, op. cit. vol. 4. p, 7. Ibn-Qudama, op. cit. vol. 8. p, 127.

[4] The Qur'an, 24:31. See similar verses, the Qur'an, 11:3, 2:54, 24:31, 66:8.

[5] The Qur'an, 9:112.

[6] The Qur'an, 42:25. It says also, "*Know they not that Allah doth accept repentance from his votaries... and that Allah is verily He the oft-returning, most merciful.*" The Qur'an, 9:104, and 40:3.

who continue to do evil until death faces one of them, and says 'now have I repented indeed.'"[1] Therefore, the Qur'an requires that repentance must be accompanied with the amendment of the repentant's conduct to stand as proof for his sincerity, it provides that "*And whoever repents and does good has truly turned to Allah in repentance.*"[2] It also, on other occasions, states that punishment is due "*Except for those who repent and amend their conduct'... to them I turn: for I am oft-returning, most merciful.*"[3] Some Muslim scholars require that there should be a passage of time between the offender's declaration of his repentance and its acceptance.[4] This time is to confirm the offender's determination to upright his conduct. It is estimated by some scholars as six months or one year whereas other scholars say that the length of the time should be left to the offended person, or to the court if it is applicable, to decide[5]. Even with the offender's sincere repentance and possible restoration, it cannot be said that Islamic law imposes a duty on the believers to forgive their perpetrators. Forgiveness however is still a highly endorsed action. It is in fact recommended or '*Mandub*' in Islamic law terminology.[6]

The requirement of repentance as a prerequisite for forgiveness complies with the concept of forgiveness in Islamic law. Defining forgiveness, as giving away one's right to strike back or to relinquish his resentment is an incomplete definition of forgiveness. It only describes the negative side of forgiveness. The other part is the positive side that materialises in the victim's effort to restore the original relationship with the offender or at least to remove the psychological barrier which may prevent such restoration. This wider definition of forgiveness in Islamic law implicitly rejects the modern Western (or rather the universal) notion of individuality, autonomy and separate entity of members of society. It also rejects the dichotomy of modern laws between moral and ethical values and legal rules. It, in facts reflects the Islamic view of society as having one entity derived from its common objectives.

Inspired by Qur'anic verses and the practice of the Prophet, Muslim jurists concluded that pardoning the offender should always be considered as one of the most favoured options by the crime victim or his family. Muslim jurists promote forgiveness not only, because Allah commands it but also because they realise its benefits to the victim, the offender and to society as a whole. The offender being pardoned by his victim prevents the publicity of the crime especially if the pardon occurs

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[1] The Qur'an, 4:18.
[2] The Qur'an, 25:71. See also, the Qur'an, 4:16, 6:54, , 7:153.
[3] The Qur'an, 2:161. See also the Qur'an, 5:39, 3:89, 4:146, 5:34, 19:60, 20:82, 25:70, 28:67.
[4] Ibn-Qudama, op. cit. vol. 8. p, 296. Al-Kasany, op. cit. vol. 7. p, 96.
[5] Abu-Zahrah, op. cit. vol.2.p, 250. Ibn-Al-Qayyim, "*I`lam Al-mowaq`en.*" op. cit. vol. 2. p, 197. 'Oda, op. cit. vol. 2. p, 662.
[6] See, Zayd, op. cit. p, 62.

before the trial as the publicity of the crime may lead sometimes to further criminal activities and may spread the feeling of insecurity.[1]

In terms of its deterrence, forgiveness, according to many Muslim jurists is just as effective as punishment. What could punishment achieve with a repentant offender who expresses his sincere regret and willingness to right his wrongdoing? Punishing such a person may even demolish the positive effect of forgiveness and make him feel angry towards the society that denies him a second chance.[2]

iii) The Legal Role of Forgiveness in Islamic Law

Most, if not all, modern laws do not recognise any legal effect for forgiveness. Forgiveness is seen only as a moral or religious value that has no legal definition and consequently is given no role to play in legal proceedings. Forgiveness may, however, affect some procedural decisions where the interests and the views of crime victims are considered. For example, a victim's forgiveness may be taken into account when the decision to prosecute for some minor personal offences is considered. It is also possible that the victim's forgiveness has some effects in the sentencing process as a conceivable mitigating circumstance. However, neither the prosecutor nor the sentences are bound to consider the victims' forgiveness, it is left totally to their discretion. In *Dravill* (1987) the court of appeal affirmed that the offender must be sentenced for the offence he has committed but adding that "forgiveness can in many cases have an effect, albeit an indirect effect, on the task of the sentencing judge. It may reduce the responsibility of the reoffending, it may reduce the danger of public outrage which sometimes arises when a defendant has been released into the community unexpectedly early."[3]

In Islamic law, on the contrary, forgiveness is given its full legal effect. It is recognised in Islamic jurisprudence that forgiveness is not merely a moral or religious value but it is also and primarily a legally effective device. This upgrading of the value of forgiveness is meant to be primarily in the interest of the crime victims empowering him with the ability to end or even manipulate the criminal proceedings at his will. Accordingly, once the victim, for whatever motivation, feels that there is no need for further action against the offender, his should be respected and no one should decide on his behalf, just as in civil proceedings.

For some Muslim jurists, the activation of forgiveness as a legal institution is justified in many different ways. For some scholars, it is seen as a way of God's blessing in order to save social and family

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[1] Zayd, op. cit. p, 55.
[2] See, Abu-Zahrah, op. cit. vol. 2. p, 536. Al-Sarkhasi, op. cit. vol. 17. p, 5.
[3] (1987) 9 Criminal Appeal Report (s) 225. Quoted from, Ashworth, "Sentencing and Criminal justice." op. cit. p, 312.

relationships from being further broken.[1] The basis for this justification is to be found in the Qur'anic verse which after setting the punishment for murder, says, "*but if any forgiveness is offered by the brother of the slain, then grant any reasonable demand... this is a concession and mercy from your lord.*"[2] Noticing that despite the killing the verse still calls the murderer a brother of the slain, Muslim scholars stress that the long term social benefits of forgiving a repentant offender and restoring the proper relationships between the members of the community outweigh the short-term advantages of punishing the offender. That is to say, given the victim's forgiveness, punishing the offender would only deteriorate an already damaged relationship between the victim and his perpetrator. It may even get worse if the communities of both parties are involved in the conflict, which is the case in many developing societies. Therefore, without God's mercy in activating the victim's forgiveness, an opportunity to restore a broken relationship in society would be lost.[3]

From the point of view of deterrence, it is argued that forgiveness may achieve what the actual punishment fails to achieve.[4] Granting forgiveness to a sincere repentant offender would certainly make him feel appreciated and thankful to the victim and the society that gives him another opportunity to assert himself.[5] So, there is no point in punishing an already deterred offender, it may even drive him to despair and diminish the good effect of his repentance. On the other hand, forgiveness should not undermine the general deterrence of the punishment since it is not granted automatically but only upon the victim's will with the existence of the offender's sincere repentance. Therefore, prospective offenders should always expect to be punished, as the victim's forgiveness is only a remote possibility in the normal course of life.[6] Even if forgiveness is granted, Muslim scholars assert that certain offenders will still be liable to be punished under the principle of *Ta'azir* if it is in the public interest.[7]

As for rehabilitation purposes, forgiveness can do the job. What else can be achieved from any rehabilitation programme other than the offender's realisation of his own fault and his sincere regret for what he had done and an honest willingness to upright his conduct in the future.

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[1] Zayd, op. cit. p, 60. Al-Qurtubi, op. cit. vol. 1. p, 236.
[2] The Qur'an, 2: 178.
[3] See, Abu-Zahrah, op. cit. vol. 2. p, 535. Ahmed F. Bahnasi, "*Al-Qisas.*" *Dar Al-shoruq.* Cairo (1989). p, 179.
[4] 'Oda, op. cit. vol. 1. p, 667.
[5] See, Hassan Shargawy, "*Nahwa Ilm Nafs Islami.*" or "Towards Islamic Psychology." *Al-hay`a Al-misrya Al-ama Lil-ketab.* Alexandria (1984). p, 148.
[6] Abu-zahrah, op. cit. vol. 2. p, 536.
[7] Al-Zayla'i, op. cit. vol. 7. p, 5.

This is exactly what repentance means upon which forgiveness is granted.[1]

In addition, activating forgiveness has the virtue of avoiding judiciary mistakes or miscarriages of justice. It should be agreed that forgiving an undeserving offender is much better and safer than punishing an innocent person. Following such a principle, Muslim scholars argue that, from a religious point of view, it is even safer for the victim himself to forgive than to claim the punishment lest the offender, for one reason or another does not deserve it. The Prophet himself endorsed this attitude when he urged the victim's guardian not to claim punishment if he was not entirely sure that the alleged offender had committed the crime since he may be sinful for his ill-founded allegation.[2]

iv) The Psychological Role of Forgiveness

Further to the above justifications for legally active forgiveness in Islamic law, there are psychological benefits that Muslim scholars did not usually stress. Recent research reveals how forgiveness can be useful as a healing and rehabilitative process for both the crime victim and his offender. In addition to its physical harm, crime, depending on its gravity, leaves its victims with a deep long-term feeling of insecurity, vulnerability, helplessness, dependency and inadequacy. To ward off such a wound, the ego adapts by projecting the self's internal fear, guilt and outrage onto the violator via anger and resentment[3]. Anger is a strong feeling of displeasure and antagonism that may develop into a destructive emotional power that generates an uncontrollable desire for revenge. Such damaging power may not just be harmful to others but primarily to the victim himself who will be obsessed by his desire to take revenge which would exacerbate his victimisation. Punishing the offender may not even be enough to heal the victim as research in psychotherapy suggests that anger often remains even after economic reparation and expressions of revenge have been made.[4] Anger and its associate desires for revenge do not diminish until the existence of anger itself is recognised and subsequently released. Without this recognition and release, the anger would not be displaced before some years or even decades later.[5] Therefore, anger must be discharged. There are three possible mechanisms which may be suggested here i.e. denial, expression or forgiveness which is the most effective one for "anger is not fully

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[1] See 'Abdu-Al-Salam, "*qawa'id al-ahkam.*" op. cit. vol. 2. p, 161.
[2] For the full story see, Al-Termithi, "*Sunnan Al-termeth.*" op. cit. vol. 2. p, 431. *Hadith* no (1428).
[3] Pingleton. op. cit. p, 30.
[4] Gehm. op. cit. p, 548.
[5] Fitzgibbons, R. P. "The Cognitive and Emotive Uses of Forgiveness in the Treatment of Anger." Psychotherapy. vol. 23. (1986). p, 629. [Hereinafter, Fitzgibbons].

dissolved until a conscious decision is made to let go of the desire for revenge or to forgive."[1]

Forgiveness is recognised as a powerful therapeutic tool that clears offended people from anger and its associated unwanted emotions and desires. In particular, forgiveness is used to achieve many objectives: firstly, it helps individuals forget the painful experience of their past and frees them from the subtle control of individuals and events of the past. Secondly, it facilitates the reconciliation of relationships more than the expression of anger. Thirdly, it decreases the likelihood that anger will be misdirected into later loving relationships and lessens the fear of a person being punished because of unconscious violent impulses.[2]

v) The Scope of Forgiveness in Islamic Criminal Law

After exploring the concept of how forgiveness is conceived and justified in Islamic law, the questions now are: how does it function? Who should perform it? When should it be sought or offered? Does it span all crimes? What is its effect on the criminal process and its parties?

Stating the scope of forgiveness in Islamic law is quite significant because it defines at the same time the scope of mediation and reconciliation. That is to say, where forgiveness is allowed, mediation, and reconciliation can take place and vice versa.

It has been explained in the previous chapters that crimes in Islamic law are categorised into three sections according to special criteria, namely *Hudud*, *Qisas* and *Ta'azir*. Each section has its own procedural and substantial arrangement. Briefly, Hudud is a set of crimes that are regarded as aggression against the rights of Allah whereas Qisas crimes are seen largely as aggression against individuals' rights. Ta'azir crimes are those unprescribed offences which are left to the community to decide. In general, crimes in Islamic law can be divided into two broad categories i.e. public crimes and private crimes. The general principle is where the crime is conceived public; the victim's forgiveness has no legal effect, whereas in private crimes it is given its full legal effect. However, due to some practical considerations, a victim's forgiveness can be activated even where the crime is deemed public. In the following paragraphs, a brief explanation is given to the legal effect of forgiveness on each category.

Hudud Crimes

As established earlier, *Hudud* crimes are regarded as public crimes in Islamic crime classification. As such, they are not affected by the victim's forgiveness which is not allowed to have any effect on the

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[1] Fitzgibbons, op. cit. p, 629.
[2] Fitzgibbons, op. cit. p, 630.

progress of the proceedings. In fact, the victim's forgiveness is utterly irrelevant, as the courts are not allowed to consider it even as a mitigating circumstance. It is agreed among Muslim scholars that when the court considers the case of a Hudud crime, the crime victim must not be involved in the process save as a witness, he should not have a say in deciding the direction of the case nor should his wills or passions be considered.[1] Deactivating the victim's forgiveness in these crimes is justified by the nature of the conflict, which is conceived in this case as a public affair. Punishment in these crimes is prescribed in the public interest to protect some essential social values in a way that the victim's interest and views must be sacrificed.[2] Even the court itself is restricted and has little discretion to exercise. Once the crime is proven, the court has no alternative but to impose the prescribed punishment with no authority to modify its length or severity.[3] Consequently, mediation is also prohibited in this regard since its outcome would not be considered.

Nevertheless, all these restrictions on the effectiveness of a victim's forgiveness take place only when the case is transferred to court to be tried. During the pre-trial process including the police investigations, a victim's forgiveness could have the effect of ceasing the criminal process against the offender. Muslim scholars often refer to a well-known *Hadith* (saying) of the Prophet in which the victim of theft brought the perpetrator to the Prophet, and when the punishment was announced the victim offered his forgiveness. The Prophet then said, "Forgiveness would have been accepted had it been granted before you came to me."[4] On another occasion the Prophet addressed his companions saying that, "forgive Hudud amongst yourselves; for whatever reaches me of them has to be executed."[5] It seems that the reason that forgiveness is allowed in the pre-trial stages for Hudud crimes lies in the fact that, unlike the trial, in the early stages of the proceedings, the crime receives little publicity and it is more likely to be unknown to the majority of the public. Thus, forgiving the offender at these stages is unlikely to undermine the deterrent effect of the Hudud punishment. It also gives the offender a better chance to repent and amend his conduct, as he would be an offender in the eyes of a smaller number of people. Accordingly, victim offender mediation is allowed in the pre-trial stages and if successful, it may prevent any future trial.

Moreover, despite the fact that Hudud crimes are deemed public crimes and hence a victim's forgiveness is given no consideration, Muslim scholars could not ignore the fact that some Hudud crimes obviously

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[1] Ibn Abdu-Al-Salam, op. cit. vol. 1. p, 174. Al-Shawkani, op. cit. vol. 7. p, 303.
[2] 'Oda, op. cit. vol. 1. p, 613. Abu-Zahrah, op. cit. vol. 2. p, 66. Shaltute, op. cit. p, 216.
[3] Al-Shawkani, op. cit. vol. 7. p, 25. Farahat, op. cit. p, 21.
[4] Related by Abu-Dawud, op. cit. vol. 4. p, 138. *ketab al-Hudud*, Hadith no, 3819.
[5] Related by Abu-Dawud, op. cit. vol. 4. p, 133. *ketab al-Hudud*, Hadith no, 3804.

constitute violation against a victim's personal interest. Therefore, theft and defamation, both Hudud crimes, were subject to controversy among Muslim scholars as to whether to allow a victim's forgiveness at the trial stage. The controversy centred on determining the crime's category. For those who consider defamation as primarily a public crime, a victim's forgiveness is rejected at all stages. Whereas those who regard defamation as a violation of both public and personal interests stood in the middle and allowed the victim's forgiveness only in the pre-trial stages.[1] Likewise, in the case of theft, considering that the theft is essentially harm against the victim's interests, some Muslim scholars claim that a victim's forgiveness could have a legal effect in ending the process against the offender for practical reasons. That is to say, continuing the proceeding against the offender requires the victim's assistance as a witness, so by declining to co-operate with the court he could greatly weaken the case.[2] This, however, is the opinion of the minority of Muslim jurists as the majority insist on the public nature of theft as one of the Hudud crimes.[3]

Qisas Crimes

As shown previously, Qisas crimes are a set of crimes comprising all offences against a person which span from minor assaults to murder. They are divided into two main categories, namely intentional and unintentional crimes. The former are punished by either exacting the same harm or by diyya or compensation, whereas the latter are prescribed with compensation only. Although such crimes undoubtedly harm public interest and security, Islamic law, especially in its early form, gives priority to the victim interests and categorises them as private crimes.[4] Consequently, the victim is given extraordinary authority to manipulate the criminal proceedings at his will. His forgiveness is fully activated and has the power to cease the process once it is granted. It can be granted at any stage of the proceedings, during the first trial, the appeal and even after delivering the final verdict and before the execution.[5] Once the qualified victim has voluntarily offered his unconditioned forgiveness, the court, or indeed any other pre-trial authorities, have no alternative but to comply with the victim's will by ending the proceedings

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[1] See for more details, Ibn-Rushd, op. cit. vol. 2. p, 440. Ibn-Qudama, op. cit. vol. 10. p, 204.
[2] Some scholars even suggest that the victim could endow the stolen items to the offender or deny his own ownership of them in order to save the offender. See, Al-Kasany, op. cit. vol. 7. p, 86. Ibn-rush, op. cit. vol. 2. p, 452.
[3] See 'Oda, op. cit. vol. 2. p, 630.
[4] 'Oda, op. cit. vol. 1. p, 98. Al-Kasany, op. cit. vol. 7. p, 146.
[5] Al-Kasany, op. cit. vol. 7. p, 246. Ibn-Rushd, op. cit. vol. 2. p, 401. Ibn-Qudama, op. cit. vol. 7. p, 752.

and taking no further procedures against the offender.[1] Such extraordinary powers vested upon the victim by Islamic law is directly endorsed by Qur'anic verses and the practice of the Prophet. For example the Qur'an states, "*We ordained... life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remit the retaliation by way of charity, it is an act of atonement for him.*"[2] Likewise, the Prophet on several occasions urged the victim or his family to forgive the offender, and once they did so he let the offender walk free with no further action.[3]

Ta'azir Crimes

Ta'azir is an expression used to describe all crimes which are not included in either Hudud or Qisas crimes. It constitutes the bulk of crimes codified in any modern penal code. The theory of Ta'azir authorises the community, represented by the head of state or courts, to decide what acts threaten its interests or the interests of its individual members.[4] The right of the victim to offer his forgiveness and the effectiveness of such an act depends on the nature of each Ta'azir crime. If the crime, according to the interests it violates, is regarded public, the victim's role in the proceedings as a whole will be very restricted just the same as his role in Hudud crimes. Accordingly, his forgiveness would be irrelevant and would not have any legal binding effect on the progress of the case. Whereas if the crime is deemed private, the victim will have an even more influential role than in Qisas crimes.[5]

vi) Evaluating the Islamic Concept of Forgiveness

It is remarkable to notice that while Islamic law is accused of severity as it prescribes some of the harshest punishments for certain crimes particularly Hudud offences, it encourages the victim's forgiveness and gives it an effective role to play in the criminal proceedings. On the other hand, while modern secular laws are sometimes blamed for their softness and leniency in dealing with the offenders, they reject any involvement of the victim's forgiveness in the legal process.

Mediation and reconciliation, which are based on forgiveness, are undoubtedly more effective and have longer lasting results. Also, including the victim's forgiveness as an integral active part of Islamic criminal law adds a human dimension to the criminal justice system that

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[1] This is the case in the Islamic classical jurisprudence, see Ibn-Rushd, op. cit. vol. 2 p, 404. Ibn-Qudama, op. cit. vol. 7. p, 752. As will be shown later, things had changed thereafter by giving courts the authority to impose further punishment despite the victim's forgiveness.

[2] The Qur'an, 5:45. 2:178. 42:40.

[3] See, Abu-Dawud, op. cit. *ketabAl-diyyat*, Hadith no, 3979, *ketab al-adab*, Hadith no, 4273 and *ketab al-aqdiyah*, Hadith no, 3120.

[4] 'Oda, op. cit. vol. 2. p, 82. Al-Mawardy, op. cit. p, 81.

[5] Al-Kasany, op. cit. vol. 7. p, 64. Al-Zayla'i, op. cit. vol. 3. p, 211. Al-Hattab, op. cit. vol. 6. p, 320.

is usually seen as abstract and rough. In addition, such integration gives crime victims a more influential role to play in the litigation and thus escapes the criticism aimed at the existing criminal justice systems which neglect or even ignore the victim and his interests. Moreover, the Islamic approach to forgiveness encourages and goes along with recent developments in criminal policy in turning more towards a reconciliatory process in resolving criminal conflicts. It essentially creates the imperative culture or environment in which the concept of restorative justice and its associated ideas can be accepted and successful. The process of creating such a culture is rooted down in the ordinary people's minds as well as within the community of criminal justice institutions. Without creating such a proper culture in which mediation can work, it would be extremely difficult to insert such a mechanism into a conventional criminal justice system. As research has indicated, one major difficulty that is facing the introduction of mediation in criminal conflicts is how to reconcile mediation with the existing criminal justice system. The lack of a supportive culture often manifests itself in the confusion and misuse of mediation. Consequently, research has asserted, mediation is often used not to fulfil its own objectives but rather to achieve the traditional aims of the criminal justice system.[1] Research has also revealed that where there is a supportive culture for the concept of mediation, the prospect of success is much higher.[2]

However, it should be noticed, that Islamic law is not unique in giving crime victims such a powerful position in the criminal proceedings as most medieval legal systems followed a similar approach. Traces of such approaches can still be found in modern criminal laws. That is particularly true in the so-called 'complaint crimes' which are a set of seemingly private crimes in which prosecution cannot be initiated without the victim's complaint. The victim in these crimes also has the right to cease the litigation once he withdraws the complaint. In addition, according to the principle of discretionary prosecution that is adopted by most legal systems, public prosecutors have the right not to prosecute the offender despite the availability of sufficient evidence. An essential consideration for such a decision is the victim's wish or willingness to drop the case as a result of his forgiveness or reconciliation with the offender.

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[1] See in this topic, Tony F. Marshall, "Restorative Justice In On Trial In Britain." In Messmer &Otto, "Restorative Justice On Trial." op. cit. p, 21. John Harding, "Reconciling Mediation with Criminal Justice." In Martin Wright, "Mediation and Criminal Justice: Victims, Offenders And Community." Sage Publication Ltd. London (1989). p, 27. Davis, "Making Amends." op. cit. p, 148. John A, Haley, "Victim-Offender Mediation: Japanese And American Comparisons." In Messmer & Otto, "Restorative Justice On Trial." op. cit. p, 105-131.

[2] See, John, O. Haley, "Confession, Repentance and Absolution." In Wright, "Mediation and Criminal Justice." op. cit. p, 195.

On the other hand, the concept of forgiveness as envisaged by Islamic law implies a degree of idealism which hardly exists in reality. Relying on people's religious sentiment and faith means that only those who can be described as true believers are addressed which adds more restrictions to the concept of forgiveness in Islamic law. In addition, there are four particular obstacles which may preclude the full use of forgiveness as seen by Islamic law, especially if it is to be implemented in modern times.

Firstly, despite the requirement of sincere repentance as a prerequisite for forgiveness, there is the possible assumption in which the crime victim grants his forgiveness to an unrepentant offender. Some victims, largely religiously motivated, even grant forgiveness without being asked to do so. Such an attitude indeed turns forgiveness into socially objectionable behaviour for it sends the wrong message that his misdeed has been accepted. It is feared that forgiveness might even collapse into a sort of condonation that would have far-reaching implications on prospective offenders. Undeserving forgiveness is even more risky in Islamic law than other laws, for such forgiveness has the effect of ceasing the proceedings against the offender. Also, forgiveness in Islamic law, as has been shown, is an active process that implies the victim's willingness to resume his previous normal relationship with the offender in which case the risk of condonation is highly increased.

In addition, is repentance enough to qualify the offender for a 'deserving forgiveness'? Islamic law seems to oversee the offender, his character, and needs. There is no clear mention of the effect of the offender character on the victim's forgiveness. The respective Qur'anic text and the Prophet practice are quite general. Should the victim's forgiveness be deactivated if the offender is of a particular character such as a recidivist or if the way he committed the crime reveals a dangerous criminal disposition? As will be demonstrated shortly, Indian law for example prevents recidivist criminals from benefiting from the victim's forgiveness or mediation. Therefore, the trial court should be authorised to examine the offender's suitability before allowing the victim's forgiveness to have its legal effect.

Secondly, even with the requirement of the offender's sincere repentance, the scope of the victim's forgiveness is still huge. Allowing the victim's forgiveness to have the effect of terminating the proceedings against the offender may endanger public security. It may be acceptable or even desirable to activate the victim's forgiveness in some trivial offences such as minor assaults or property crimes, but it is barely agreeable to let the offenders of serious crimes such as murders or grave assaults to walk free just because his victim has forgiven him. It is definitely an essential public interest to know why such crimes were

committed and how they could be prevented in the future. This could not be achieved without a full investigation followed by a trial that decides the best treatment for the offenders. Unconditional release of such offenders poses a threat to society as a whole and even for themselves who could be in need of help.

The third objection over unrestricted victim's forgiveness is that the right to forgive is not always given to the real victim. That is to say, in cases where the crime victims are unable to express their wishes either because of their age, disability, or death, Islamic law gives the right of forgiveness to the victim's guardians or heirs '*Wailyy al-damm.*'[1] This means that the quality of the victim, with all its influential procedural powers, will artificially be transferred to other people who are not necessarily a casualty of the crime. Muslim scholars relying on Qur'anic verses and the practice of the Prophet, take for granted the principle of transferring the quality of the victim to his inheritors. However, as explained in the third chapter, they differ on who among the victim's relatives should be given such quality. Some scholars narrow down the number of qualified artificial victims, whereas others tend to expand this number. The quality of the victim, according to some scholars, should be given, upon the victim's death, not only to those who are genuinely close to the victim emotionally or financially but to all his relatives whatever their number. Following such opinions means that too many people would be involved in the proceedings not necessarily for the sake of justice. Consequently, criminal justice along with the offender's fate will hang on the wishes of people who may have no real relationship with the victim. It may be agreeable that losing a child or parent makes one suffer to the extent that it justifies widening the definition of who is to be included as a victim. Because it is a Qur'anic provision, the principle of involving the victim's heirs in the proceedings cannot, according to Islamic law's rules, be ignored. However, it is always possible to introduce a reinterpretation of the Qur'anic text in question, by which only a restricted number of the victim's inheritors, could be given some of the victim's powers in the proceedings. The criteria should be the degree of genuine suffering because of the victim's death. However, the position of medieval Muslim scholars can be justified on the grounds of practicality. At the time of the Qur'an revelations and many centuries later on, Islamic criminal justice system did not recognise any organised prosecutorial authority. Mainly private citizens, therefore, brought prosecutions. Fearing people's reluctance to take the initiative, it was wise to enlarge the number of qualified prosecutors to guarantee that offenders were brought to justice. This argument is largely weakened

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[1] Al-Shawkani, op. cit. vol. 7. p, 149. Ibn-Qudama, op. cit. vol. 7. p, 744. Al-Kasany, op. cit. vol. 7. p, 242.

nowadays by the existence of organised public prosecutors on which society depends to bring wrongdoers to justice. On the other hand, widening the definition of victims to include the dead victim's relatives has the virtue of reducing the death penalty rate. According to the majority of Muslim jurists, the forgiveness of any of the victim's qualifying relatives is enough to save the offender's life and force the judge to replace the death penalty with another punishment (often imprisonment or compensation).[1]

The fourth challenge to the legally activated forgiveness in Islamic law rests on the fear that it may turn criminal justice into a sort of commercial transaction with the risk of intimidation and blackmail. That is to say, realising his power to end the proceedings against the offender, the victim would be at risk of using such power to blackmail the offender or being intimidated by the latter. For some victims, and indeed their relatives, it seems a good idea to sell their forgiveness to the offender in return for a sum of money or service. It would be even worse if such transactions were undertaken without any form of supervision. Driven by his victimisation and anger, the victim may blackmail the offender or his family by requesting unattainable ransoms. On the other hand, the victim himself may be subject to the offenders' intimidation; especially where there is a difference in social classes and influence. Having experienced victimisation, the victim could easily be threatened with similar consequences if he goes ahead with the proceedings. Some offenders may think that they have been punished not because of their own faults but as a result of the victim's unwillingness to forgive.

This dilemma was recognised early on by some Muslim scholars who realised the need to restrain the legal effect of a victim's forgiveness in cases where it may hurt the public interest. Just as it happened in the development of Islamic private prosecution into a near-public prosecution system, Muslim scholars had to crystallise and emphasise the public elements in private crimes as to allow the public or the state to intervene to protect these elements. The intervention was attained through the theory of Ta'azir that is designed to deal with unprescribed crimes with unlimited treatments ranging from rebuking to death penalty. Although there is no specific sacred textual source supporting the punishment of the forgiven offender, most Islamic law schools endorse the court's right to impose 'supplementary' punishment on forgiven offenders of all crimes whenever it feels it is in the public interest to do so.[2] Some jurists even make it compulsory to impose the supplementary punishment in all cases

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[1] See, 'Oda, op. cit. vol. 2. p, 159.

[2]. Ibn-Qudama., op. cit. vol. 9. p, 467. Ibn-Rushd, op. cit. vol. 2. p, 404. Al-Kasany, op. cit. vol. 7. p, 246

particularly in serious crimes.[1] Contemporary Muslim jurists favour the latter opinion.[2] In fact, a closer look at the Qur'anic verses prescribing punishment for Qisas crimes reveals that while they all give the victim the right to forgive they are different in their linguistic construction. The verse revealed in Mecca, when the Islamic community was still under creation, addresses the believers individually, it starts with "*And if any one is slain....*"[3] Whereas the verse revealed in Madina, after the Islamic community was settled as a kernel for the would be Islamic state, addresses the whole community as one body, it says "*Oh ye who believe! The law of Qisas is prescribed to you.....*"[4] This difference means that the community in Islamic law is, like the victim, also considered in the process of criminalising Qisas crimes, and indeed private Ta'azir crimes. This consideration is enough to justify giving the community the right to be involved in the process of inflicting the prescribed punishment on the forgiven offenders to defend its own interests irrespective of the victim's position. Accordingly, if the victim forgives his offender, it should be understood that he is giving away his own rights without affecting the community rights to defend its own interests. The victim's forgiveness may however be regarded as a mitigating factor when sentencing the perpetrator.

The above development in Islamic law resembles the evolution experienced by almost all legal systems resulting in the community or the state becoming a party to the criminal proceeding in all crimes including what had previously been called private crimes. However, the essential difference is that in Islamic law unlike other modern laws, such development was not at the expense of the crime victims who still occupy their influential position.

b) Restitution-based Mediation '*Solh*'

Mediation based on a victim's forgiveness is the most desirable dispute resolution method in Islamic law. However, the victim's forgiveness is not always possible and it is not always required in order to achieve the mediation's objectives. Therefore, Islamic law recognises mediation and reconciliation processes that are not based on the victim's forgiveness, but at the same time have an equivalent legal effect in resolving the conflict and terminating the litigation. In this connection, the Prophet is

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[1] This is particularly the scholars of the *Malik* school, see Al-Hattab, "*Mawahib Al-jalil.*" op. cit. vol. 6. p, 268. Some medieval scholars however insisted on the conventional opinion which gives the victim's forgiveness its full legal effect in all cases whatever the seriousness of the crime is. See, Ibn-Hazm, "*Al-muhlla.*" op. cit. vol. 10. p, 461.

[2] 'Amer, op. cit. p, 164. 'Oda, op. cit. vol. 1. p, 245. Abu-Zahrah, op. cit. vol. 2. p, 536. Farahat, op. cit. p, 298.

[3] The Qur'an, 17:33.

[4] The Qur'an, 2:178. See, Shaltute, op. cit. p, 331

reported to have said, "All reconciliation are permissible among Muslims providing it does not legalize what is unlawful or vice versa.[1]" Thus, if the victim, or his family, did not voluntarily offer their unconditional forgiveness, the offender would seek such forgiveness. The victim may not forgive the offender either because he is unable or does not want to do so, but at the same time he is willing to resolve the conflict if the offender is ready to compensate him with a sum of money or services. If a deal is reached between the victim and the offender, it means that their conflict has been resolved at least at a personal level. Being satisfied with the deal, the victim might voluntarily 'psychologically' forgive his offender.

Mediation based on restitution is called '*Solh*' as opposed to "*Afo*" or forgiveness. Although their legal effect is the same, *Afo* and *Solh* are legally distinguishable. *Afo* is a one-sided act performed by the crime victim or his family with no need for the offender's approval, whereas Solh is considered as a reciprocal contract in which the offender's consent is essential.[2] Thus, medieval jurists defined mediation as a reciprocal contract based on full consent and aimed at resolving conflicts.[3] Therefore, it must comply with all contractual legal requirements such as legal capacity, consent, and documentation if applicable. In addition, as a contract, Solh has its own obligatory power so that the parties involved must fulfil its provision[4]. Also, the reconcilement agreement or '*Solh*" is studied as a general dispute resolution method. That is to say, when *Solh* is discussed, criminal conflicts along with other conflicts are studied under one heading and equally treated.[5] This supports that which has already been stressed which is, in Islamic classical jurisprudence, apart from Hudud crimes, there is no clear-cut line between criminal and civil disputes. Moreover, reconcilement agreements are given the power to resolve conflicts with no need for further procedures. Concerning criminal conflicts, just as with forgiveness, this was also true for the classical period when reconciliation, whether based on forgiveness or restitution, had the legal effect of ending the litigation. Latter on, the need to impose further or supplementary punishment was realised.

i) <u>Nature and Extent of Restitution</u>

To what extent do the mediation parties have the freedom to determine the quality and quantity of the restitution or compensation? It actually depends on the nature of the crime. Reconcilable crimes are divided in

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[1] Related by Abu Dawud, op. cit. *ketab al-aqdiyah*, Hadith no, 3120.

[2] Some Muslim scholars, while agreed on the contractual nature of such an agreement, said that it is not a principal contract on its own but rather an accessory contract. See, Al-Zayla'i, op. cit. vol. 5. p, 31.

[3] See, Ibn-Qudama, op. cit. vol. 4. p, 476. Similarly, Ibn-Najeem defined Solh as "a contracts which resolve conflicts." op. cit. vol. 7. p, 278.

[4] Ibn-Najeem, "*Al-ashbah wa Al-naza'ir.*" op. cit. p, 336.

[5] See for example, Ibn-Farhun, op. cit. vol. 2. p, 54. Ibn-Rushd, op. cit. vol. 2. p, 294.

this regard into two sections. The first section is the unintentional violent crime in which the crime victims have to choose between either forgiving the offender or accepting a sum of money which is pre-determined from the fixed tariff list. So, victims are not allowed to claim more than what is listed.[1] However, such fixed compensation is regarded as the maximum, so that through the mediation process, the crime victim may accept less than what is stated in the tariff.

As regards to other crimes, it seems that the mediation's parties, or rather the victims retain the right to demand whatever achieves their satisfaction whether it is material or non-material.[2] The offender, for example, may be required to pay money, do service or as a medieval jurist said, to leave the village where he had been living in return for the victim's agreement to drop his case.[3] However, Muslim scholars, realising the need to restrain such expansive freedom, asserted that the crime victim should be reasonable in his demands. First, any demand that contradicts Islamic binding rules is utterly rejected.[4] Thus, demanding a sum of money however high it is, may be morally objectionable but still lawful, whereas demanding religiously prohibited items such as wine however little, is illegal. In addition, there are some suggested criteria connected to this. For example, the victim should consider the customs in similar cases, the offender's financial ability, and general Islamic principles that forbid overburdening the offender.[5] Nevertheless, apart from the first restriction, all the others are generally of moral values. Therefore, being victimised, and realising the powerful effect of his reconciliation, the crime victim might be in a situation where he would not be able curb the desire to get the most out of his victimisation or to respond to his natural voice of revenge. There is a conceivable chance for the victim to exploit the offender's desperation to avoid trial and severe punishment of Qisas. Such an assumption is even more likely when, in cases of the victim's death or incapacity, his family or guardians negotiate on his behalf. The case could be even worse when mediation takes place after the punishment is announced which might be as severe as the death penalty in murder. Given the powerful effect of the victim's, or his family's, acceptance to drop his rights, the offender would have no alternative but to comply with the victim's demands. In such a situation, the essential feature of mediation as a self-voluntarily initiative is undermined.

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[1] Al-Sarkhasi. op. cit. vol. 21. p, 9. Al-Zayla'i, op. cit. vol. 6. p, 113. Ibn-Qudama, op. cit. vol. 8. 363.
[2] See, 'Oda, op. cit. vol. 1. p, 774.
[3] Ibn-Farhun, op. cit. vol. 2. p, 56.
[4] See, Al-Sarkhasi, op. cit. vol. 20. p, 137-138. Al-Zayla'i. op. cit. vol. 4. p, 131.
[5] Al-Kasany, op. cit. vol. 6. p, 42

5) Mediation In Practice

Although mediation has been practised in Islamic law for centuries and is recognised as the main method of resolving all sorts of conflicts, little if anything is written describing its operational or procedural process. However, some features of mediation in Islamic law can be more clarified by comparing them with modern Western mediation schemes. The emphasis will be upon some important points such as the setting, timing, scope, and the legal effect of mediation in both systems.

As stated earlier, the operational side of mediation in Islamic law is left entirely to the parties concerned to be performed according to their own cultures as long as it is in line, or does not conflict, with the general principles of Islamic law. Thus, as will be shown later, when the Sudanese law embraced Islamic principles of forgiveness and mediation, it made no attempt to regulate any mediation arrangement and left it entirely to the culture of the parties concerned. Consequently, informality of variable degrees from one culture to another became a distinguishing feature of mediation in Islamic law. Such informality manifests itself in the way that mediation is arranged. There is no record of any special organisation that undertakes the task of bringing litigants together. So, mediation can be initiated by the victim, the offender, or the tribe's chief, and can be held anywhere that is felt to be convenient, with no specific patterns to be followed. Mediators are chosen according to their age, social or religious rank or their relation to the litigants. Whereas, widespread mediation schemes in modern Western legal systems over the past few decades have helped to create a new field of study that provides a comprehensive guide to the mediation process. That includes all subjects related to mediation sessions, such as methods of mediation, psychological preparation, and even instructions about the timing and location of mediation sessions. Consequently, a long list of mediation guides is becoming increasingly widespread in Western libraries. In short, mediation has been professionalised, and has become a career for some mediators who should be qualified by being trained and taught before assuming any role in the mediation process.[1]

The scope of mediation in Islamic law is wider in terms of the number of reconcilable offences. Except for the seven crimes of *Hudud*, all other crimes are reconcilable. Whereas, in Western mediation schemes only

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[1] See for example in UK, mediation U K, "Victim/Offender Mediation: Guidelines for Starting A Service." Bristol. Mediation UK (1994). And in the USA, Rothmans, John. D "A Lawyer's Practical Guide to Mediation." Kearney, Morris Publisher (1995). Phillips, Barbara Ashley, "Finding Common Ground: A Field Guide To Mediation." Austin, Texas. Hells Canyon Publisher(1994). Leonard, Sam, "Mediation: The Book: A step-by-step Guide For Dispute Resolvers." Evanston Publisher.(1994). Lisa, Jo-Marie, "Exploring Mediation As A Career: A step-by-step Guide." Running Bear Press (1995). In Australia, Pelican, C, "The Australian Juvenile Justice Act 1988: A New Practice and New Problems." In H. Messmer and H-U Otto, "Restorative Justice On Trial." op. cit. p, 163-179.

minor crimes and mainly youth crimes are referred to mediation projects. However, over the past few years, victim-offender mediation in north America and Europe has been expanded to cover some severe violent crimes including sexual assaults, attempted homicide and even murder. There is already at least one state-operated programme which deals with such serious crimes, the Victim Service Unit of the Texas Department of Criminal Justice. Research has revealed that both victims and offenders have welcomed such expansion.[1]

Regarding its legal effect, mediation is far more powerful in Islamic law than in Western laws. Successful mediation may be regarded in Islamic law as a final settlement which rules out any further penal action, or at least will be considered as a substantial mitigating factor. In Western mediation schemes, the picture is different. Mediation rarely has the effect of avoiding trials except for some minor or juvenile offences. If mediation takes place before sentencing, although officially it does not affect the sentence, in practice it may be taken into account.[2]

Another point of difference between Islamic law and Western mediation schemes appears in the enforcement of the mediation agreement. Considering that Western mediation schemes are essentially voluntary and have little legal effect, there is no conceivable way to enforce the mediation agreement. Unless the agreed restitution is incorporated in the judgement through compensatory fines for example, or embodied in a legally binding contract, the crime victim has no alternative but to trust the offender's word. However, research suggests a high rate of successful completion of restitution agreements in the range of 79-98%.[3] In contrast, mediation agreement in Islamic law is regarded as a binding contract. So, if the offender fails to fulfil his obligation, the victim can take him to court to face either the original punishment which was reduced or waived upon the mediation agreement, or to be forced to accomplish his obligation. However, in the case of murder, if the offender fails to complete his obligation, the effect of the mediation as a waiver of the death penalty cannot be removed. So, the court can enforce the agreement by imposing another punishment or by civil procedures.[4]

As to the timing of mediation, Islamic law and Western schemes are in a similar position as mediation can be conducted at any stage in both systems. Thus, depending on the scheme's orientation, cases can be referred to a mediation centre before prosecution, after police cautioning, before sentencing or even after the sentencing stage. Although the situation is similar in Islamic law as mediation can take place at any

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[1] Umbriet, "Violent Offender And Their Victims." in Wright, M. and Galaway, B. "Mediation And Criminal Justice." op. cit., p, 137.
[2] Wright, "Justice for Victims and Offenders." op. cit. p, 170.
[3] Umbriet, "Victim meets offender." op. cit. p, 34.
[4] Al-Sarkhasi, op. cit. vol. 21. p, 11.

stage, the big difference lies in the fact that mediation at all stages is legally effective. That is to say, even after sentencing and just before, or even during, the execution of the sentence, victim-offender reconciliation has the power to cease the execution and return the case to the trial court to alter its decision according to the new circumstances. Muslim scholars, therefore, prefer the victim or his family to attend the execution, especially in corporal punishment, anticipating he may change his mind and accept reconciliation.[1]

Now it is time to turn the attention to the application of the Islamic approach to mediation in modern Islamic states.

6) Mediation in Egyptian Criminal Law

With the advent of Western-inspired laws in the second half of the last century, the Egyptian legal system as a whole experienced an immense transformation. In the field of criminal law, along with other changes, the concept of dividing crimes into two sections namely, private and public, was abandoned to be replaced with the doctrine that considers all crimes to be an aggression against the whole society and hence they must be seen as public offences. Therefore, the crime victims were denied their previous position enjoyed under Islamic law which had been the prevailing legal system for centuries. Thus, criminal proceedings in the Egyptian legal system are public issues. Therefore, according to the Egyptian Code of Criminal Procedure (C. C. P), in principle, initiating and managing the criminal litigation is the exclusive responsibility of a public body which is the public prosecutor who represents society or the public interest before criminal courts.[2]

Mediation being defined as an organised effort or programme, officially or non-officially, aiming to bring the victim and his perpetrator face to face in order to resolve their conflict, is not recognised in the Egyptian criminal justice system.[3] Likewise, forgiveness as it is conceived in Islamic law with its legal effect is entirely an alien concept in the Egyptian criminal law. Consequently, the Egyptian Supreme Court has taken a firm stand against any role or influence of mediation on the criminal proceedings. It ruled that any reconciliation between the offender and his victim aimed at reducing the offender's liability is

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[1] Al-Kasany, op. cit. vol. 7. p, 243. Al-Sarkhasi, op. cit. vol. 21. p 12.

[2] Art. 1/1 of (C. C. P) states that " Inaugurating and managing criminal litigation are exclusively exercised by the public prosecutor." See also, Art. 21 of Judiciary Law (1972). The Supreme Court has always asserted this principle, see, Ruling No. 40, 15 February 1965. p, 124. Ruling no. 1250. 18 February 1979. p, 130.

[3] The only Egyptian law in which mediation is recognised as an integral mechanism is the Law of Personal Status (no. 44. 1979) as it contains provisions which direct the court to appoint arbiters to resolve the conflict between a wife and her husband (Art. 6,7,8,9,10,11). The reason for this is that the Egyptian Law of Personal Status, the same as its counterparts in almost all Muslim states, is derived directly from Islamic law in which family mediation process is explicitly provided by the Qur'an 4: 35.

legally invalid.[1] It also ruled that any such reconciliation should not affect the court's sentencing decision as it changes none of the crime's legal requirements.[2] The court asserted that mediation could have an effect only on the victim's claim for compensation. It ruled that victim-offender mediation can only be valid with regard to the victim's application for compensation and has no effect on the criminal sides of the proceedings.[3]

On the other hand, while rejecting victim-offender reconciliation, Egyptian law recognises the reconciliation between the offender and the prosecution authority as a representative of society. The first introduction of such a system was as early as 10 February 1892, and later it was included into the existing Code of Criminal Procedure (Arts. 19-20).[4] Another similar system is the so-called Criminal Order which replaced the system of reconciliation.[5] The prime reason behind the introduction of such a system was to reduce the caseload of an overloaded criminal justice system.[6] The system of reconciliation still exists in many laws such as Traffic Law, (Art. 80, of Law no. 66, 1966), Taxation Law, Customs Law and Anti-smuggling Law. In all these laws, a certain public authority which represents the specific public interest is given the right to mediate with the offender by offering to drop the case against him often in return for a sum of money.

Such a negative attitude of Egyptian law towards victim-offender mediation has been under attack by Egyptian lawyers and academics. They see mediation, especially in minor and private crimes, as a way of giving the victim a voice in the criminal proceedings as well as a way of avoiding a long complicated legal process.[7] Other lawyers suggest that, as a temporary measure, the number of complaint crimes should be increased as a way of enhancing the role of the victim and to allow more space for mediation.[8]

The question is: is victim-offender mediation legally possible? If so, would it have any effect on the criminal proceedings? In reality, many offenders would not seek to meditate with the victim if the result would

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[1] The Supreme Court. Ruling No. 56. 22 December 1980.
[2] The Supreme Court. Ruling no 95. 11 May 1989. p, 574. Ruling no, 67. 16 Mars 1989. p, 399.
[3] The Supreme Court. ruling no. 194. p, 1209. 13 December 1989.
[4] Al-sa'ed Mustafa Al-sa'ed, "*Tabseet Al-ijra'at Al-jina'ya.*" or "Simplifying Criminal Procedures." *Majalat Al-kanune wa Al-iktesad*, or Journal of Law and Economy. The University of Cairo. No. 5. Year 11(1941). p, 592. [Hereinafter, Al-sa'ed].
[5] Introduced by amendment no. 252, 1953.
[6] Al-sa'ed, op. cit. p, 592.
[7] Mr. Badr Al-Menyawi, a former Attorney-General (1986-1990). A personal interview, Cairo, February 1999. Ahmed F. Sorur, "*Al-Wasiet Fi Al-Ijra'at Al-Jena'iya.*" or "Principles of The Law Of Criminal Procedure." *Dar Al-nahda.* Cairo (1989). p, 233. [hereinafter, Sorur]. Al-sa'ed, op. cit. p, 592
Isam Ahmed, op. cit. p, 146.
[8] Mustafa, op. cit. p, 39.

be irrelevant to the outcome of their trial. How could the reconciliation's outcome affect the formal criminal proceedings?

In fact, mediation, whether based on forgiveness or restitution, could have an effect on the criminal proceedings through three indirect methods namely, the system of complaint crimes, the principle of discretionary prosecution, and the discretionary sentencing power of the court. The effects of such methods vary range from ending the litigation to the possibility of reducing the severity of the punishment.

a) Complaint Crimes

Complaint crimes are a set of crimes in which the decision to initiate prosecution is exceptionally left to the crime victims. Such exceptions are justified on the grounds of family and personal interests which may be hurt or damaged further by the prosecution and subsequent trial. It is also justified on practical grounds as it reduces the burden of the public prosecution authorities.[1] These crimes can be described as personal and most of them are minor, for example, defamation (Art. 303 Penal Code 'P. C'), theft within the same family (Art. 312 P. C), adultery for both wife (Art. 274 P. C) and husband (Art. 277 P. C).[2]

Before a formal complaint is submitted by the victim, the public prosecutor, as well as any other public authorities, has no right to take any action against the offender including inaugurating prosecution.[3] Any such actions would be considered invalid and even illegal.[4]

Within three months of the crime incident, the victim, supposing his knowledge of the offender's identity, has the full right to consider whether to launch a prosecution or not.[5] The passage of such a period without any action being taken expresses the victim's definite unwillingness to use his procedural right to bring the offender to justice.[6] Consequently, the offender becomes immune from any prosecution regarding the crime in question whether from the victim or the public prosecutor. On the other hand, submitting the victim's complaint to the respective public authority does not mean the automatic initiation of criminal proceedings as the right of complaint is not, in actual fact, a victim's right as much as a restraint on the public prosecutor' discretion in starting the criminal process. That is to say, upon receiving the victim's complaint, the public prosecutor retains his original discretionary

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[1] 'Obade, "*Shakwa Almajny 'Alayh.*" op. cit. p, 121-131.
[2] See also, (Art. 185, 292, 307, 308 P. C).
[3] Art. 3/1 C. P. C.
[4] However, in some cases such as if the offender was caught red-handed, the police are allowed to take some imperative procedures which do not include arresting the offender, in order to preserve the evidence for a possible subsequent prosecution, Art. 9/2 C. C. P.
[5] Art. 3/2 C. C. P.
[6] The Egyptian Supreme Court, Rule no. 131. 6 April 1970. p, 552.

prosecutorial power according to which he, following specific formal criteria, could take the decision to initiate prosecution or close the case. If the prosecution is inaugurated, the crime victim has no part to play save as a witness. If he would like to be involved, he would be able to do so by means of the so-called 'civil action' in which he would submit a request for compensation before the criminal court. Being *Partie civilie* or civil party, the crime victim does not become a party to the criminal litigation and thus has no authority in the management of the action.[1] Nevertheless, while a civil action is available for all victims of minor crimes or misdemeanours[2], the victims of complaint crimes have a privilege by which they are provided with a procedural right of bringing an end to the criminal litigation during the process of the trial. According to Art 10/1 C. C. P the victims of complaint crimes are allowed to withdraw his complaint at any stage before the final judgement. Concerning crimes of adultery (Art. 274, P. C) or theft within the same family (Art. 312, P. C), the victim is given the right to withdraw the complaint event after the final judgement.[3] Such a withdrawal has the effect of ending the litigation and even ending the punishment if it has already started by releasing the imprisoned offender. Thus, if victim-offender mediation took place, its outcome would be vital on any subsequent criminal process.

b) <u>The Principle of Discretionary Prosecution</u>

According to Arts. 61, 63[4], 214/1[5], 107 and 232/1 C. C. P. the Egyptian prosecution system explicitly adopts the principle of discretionary prosecution by which the Attorney-General retains wide discretion as to inaugurate criminal proceedings, fine the offender if applicable or drop the case altogether.[6] One major justification in deciding the last option is the victim-offender reconciliation.[7] As a former Attorney-General, Mr. Al-Menyawi asserted that he frequently issued explicit instructions to his deputies to cease prosecutions upon the victim-offender mediation. This however applied only to trivial and personal offences such as minor assaults and offences among the same family and after ensuring that reconciliation had been conducted with the victim's full consent.[8] This

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[1] The Egyptian Supreme Court, no. 259 19 May 1941. p, 471.
[2] Art. 251/2 C. C. P.
[3] The Supreme Court. Ruling no. 7. 9 January 1990. p, 61.
[4] As amended by Law no. 121 (1956).
[5] As amended by Law no. 107 (1962).
[6] According to Arts. 323, 324 C. C. P. as amended by Law no. 170 (1981), the public prosecutor, or one of his deputies, has the right to issue the so-called criminal Order. This system allows the public prosecutor to fine offenders of minor crimes to a maximum of one hundred Egyptian pounds.
[7] Sa'id, op. cit. p, 309.
[8] Mr. Badr Al-Menyawi, a former Attorney-General (1986-1990). A personal interview, Cairo, February 1999.

view is endorsed by other Egyptian judges and scholars who affirm that the public prosecutor's decisions in this connection should be consistent with the victim's wish as far as possible.[1] Whereas other judges are more reluctant as to the legal effect of the victim-offender mediation, asserting that although such mediation is crucial in restoring the social peace, it should not take priority over the public interest in punishing offenders, particularly of serious crimes and recidivists.[2] There is no statistical evidence to show to what extent victim-offender mediation affects the prosecution decision. However, providing the crime is minor and the offender is not a recidivist, the victim's wish not to prosecute is more likely to be respected by the public prosecutor particularly if the crime was committed within the victim's family.[3]

c) The Court's Discretionary Sentencing Power

Just as its modern counterparts, the Egyptian sentencing policy is based on judicial independence in determining the length and the severity of the sentence.[4] The only restraint is the binding minimum and maximum ranges of punishment set for each crime. Within these limits judges retain wide discretion to set the appropriate sentence which they consider right for the offender. According to Art. 17 of the Penal Code, the availability of mitigating factors gives criminal courts the right to substitute the punishment for felony with the punishment for misdemeanour. Although victim-offender reconciliation has no legal binding effect on the sentencing process, the fact of the matter is that, upon the availability of such reconciliation, the judges are usually inclined to be more lenient.[5]

7) Victim-Offender Mediation in Sudanese law

The Sudan is the largest country in Africa. Its population is characterised by its religious and racial diversity. From northern Arab-Muslim dominated tribes and the southern paganism and Christian-African tribes, to the Bedouin in the desert and the agricultural communities along the Nile. Realising such facts, one cannot ascribe a single attitude of the whole of Sudan towards a particular concept. This applies to mediation and reconciliation as a dispute resolution method in criminal conflicts. However, according to several Sudanese judges

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[1] Al-Shurbaji, op. cit. p, 207.
[2] Mr. Samir Naji, a former Supreme Court judge and assistant of the Minister of justice. A personal interview, Cairo February 1999.
[3] Interview with Mr. Suliman Ayob, a former president of the Court of Appeal of Cairo. A personal interview, Doha March 1998.
[4] The Supreme Courts, ruling no. 81. 30 April 1965. p, 393. Also ruling no. 256. 17 November 1969. p, 1307. Ruling no 183. 4 November 1979. p, 351. Ruling no. 147. 19 September 1990. p, 849.
[5] Mr. Samir Naji, a personal interview. Mr. Suliman Ayob, a personal interview.

interviewed, who served all around the Sudan, mediation and reconciliation in all matters including criminal conflicts are an indivisible part of the people's customs in the whole of Sudan.[1] Of course, there are differences from one tribal law to another in the way the mediation and reconciliation process is conducted, the degree of acceptance, the extent of its popularity and the method of enforcement. The popularity of mediation and reconciliation are largely associated with tribalism. This is due to the fact that the lack of a strong central government which can reach all parts of the Sudan effectively compels remote tribes to establish their own dispute resolution systems. Thus, over the years each tribe has developed its own customary 'legal' system, which has its own distinguishable features. Some of these customary laws have been subject to a great deal of study such as Dinka[2], Nuer[3] and other tribes.[4] Whereas, being adhered to Islam, the people of northern cities apply Islamic rules in mediation and forgiveness.[5]

The existence of a mediation supportive culture among Sudanese communities should pave the way to integrate a mediation process into the formal justice system. In comparison, advocates of victim movements in Western societies who are concerned with mediation have a more difficult task. While promoting mediation and reconciliation they have to undertake two tasks. Firstly to persuade the parties concerned i.e. victims and offenders, to participate in the mediation process and secondly to convince the formal legal institutions to recognise the outcome of such a process, if not include the process itself in the formal setting. In the Sudan, since mediation and reconciliation are already part of the people's customs, the battle has been over the protection of such a custom and its integration into any suggested new form of 'civilised' justice being imposed by non-tribal people. The legal battle between the supporters of the native laws (including Islamic law) and the advocates of modern laws has taken many years and no side could claim an absolute victory. Being the main way of settling criminal conflicts in the cases of death and bodily harm, blood money constituted a symbolic feature over which the battle was centred. In the following pages, the roots of the

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[1] For example, the Supreme Court Judges, Mr. Ma'mun Hammur and Mr. Salah Al-Sharif, who have served in more than ten different provisions all over the Sudan, asserted the above information. Mr. Ma'mun Hammur, A Sudanese Supreme Court Judge. A personal Interview. Doha, March 1998. Mr. Salah Al-Sharif, a former Sudanese Supreme Court Judged (1988-1989). A personal interview. Doha, April 1998.

[2] Stubbs, J. N. "A short Note on the Customary Law of the Aweil District Dinkas." The Sudan Law Journal and Reports (1956). Hartland. E. S., "Dinka Laws and Customs." Man. vol. 12. 1912. p, 25.

[3] P. P. Howell, "A Manual of Nuer Law." Oxford University Press. London (1954). p, 27-34. [Hereinafter, Howell].

[4] See Lyall, C. E. "Rights, Dues and Customs Prevailing among Arab Tribes in the White Nile Province." Sudan Notes And Records vol. 4. (1924). p, 119-203.

[5] It is claimed that the tribal communities were largely influenced by Islamic law. Idries, op. cit. p, 419.

battle are traced, since the Egyptian rule until the advent of Islamisation process, in order to analyse how it developed over the years and what the conclusion is.

a) Victim-Offender Mediation Under The Egyptian Rule

The first significant development which disturbed the centuries-old application of native laws (Islamic and customary laws) and hence largely affected the development of mediation in the Sudanese criminal justice system was the emergence of a strong central government. This development commenced with the Egyptian rule of the Sudan during the reign of Mohammed Ali, and was then followed by the Mahdiya revolution to be succeeded by the Condominium rule of Anglo-Egyptian rule which lasted until the independence of the Sudan. The successive governments took different stands towards native laws with their institutions and in particular reconciliation as a dispute resolution process. The stance ranged from complete rejection to partial recognition and finally with the integration of reconciliation as an inseparable component of the criminal justice system.

During the Egyptian rule of the Sudan from 1821-1884, the official penal laws were the Ottoman Criminal Codes which were applied in Egypt and were primarily based on their French counterparts. However, Islamic law in its traditional setting was the prevailing law. The Judicial record confirmed that Sudanese courts paid little, if any, attention to the Ottoman laws and continued the application of Islamic law especially in accepting the victim-offender reconciliation in its full legal capacity as a conflict resolving method even in serious crimes such as murder.[1] The period of the *Mahdiya* revolution 1884-1899 was another opportunity for Islamic law to assert itself as the revolution declared Islamic law as the only law of the land.[2] The next phase started with the implementation of the English legal system into its Indian version.

b) Victim-Offender Mediation under English-Sudanese Law

The Penal Code and the Code of Criminal Procedure 1899 took from the onset a negative attitude towards victim-offender mediation as it was envisaged by native laws.[3] Thus, no provision for reconciliation was made; instead it was declared that all criminal conflicts must be tried before courts of law according to the prescribed rules. As to other conflicts particularly in the area of personal law, Islamic and native laws

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[1] See, *Al-fatawa Al-mahdiyya.* op. cit. vol. 6. p, 15-146. Quoted in Idries, op. cit. p, 402.

[2] See Mohammed Ibrahim, "*Manshurat Al-Mahdiya.*" or "Al-Mahdiya's Documentation." Cairo (1969). p, 209-. Al-Fahal Al-Tahir Omar, "The Administration Of Justice During Mahdiya." The Sudan Law Journal And Reports (1964). p, 167-170.

[3] These laws were promulgated on 2 October 1899, and applied in stages. See Lutfi, "The Future of English Law in The Sudan." op. cit. p, 224.

were allowed, in variable degrees, to function either in the formal courts[1], or tribal courts such as Chiefs' Courts[2] and Native Courts.[3]

However, in 1925 when all ordinances dealing with criminal procedure were consolidated and amended and promulgated as the code of criminal procedure 1925 a provision was made by section 311/i/(c) stating that compensation could be ordered by criminal courts by way of a fine paid to the widow, children and other dependants of the victim in case of his death.[4] Although this article was to a certain extent a partial recognition of the native custom of diyya, the award was discretionary and granted only in cases where the accused had been convicted, and was payable only in money.[5] The subsequent application of (Art. 311/I/c) proved that it was not aimed to be recognition of diyya as it was envisaged in native customs. Therefore, when a major court attempted in 1927 to order payment of diyya under this article, such an attempt was rejected by the High Court.[6]

The implementation of new laws and the partial application of some components of native customs, being modified and adjusted to suit the 'formal' setting of justice, was in fact an imposition of a different meaning of justice. Therefore, the inevitable result was the existence of two conflicting views of justice i.e. informal and formal justice. For example, while the new laws found it imperative to inflict punishment as a means of accomplishing immediate objectives of public order, it was adequate for local customary justice in most crimes to settle the conflict through reconciliation based on restitution. It is even a foreign idea for some tribes to impose criminal penalties by an independent arbitrator backed by force.[7] Commenting on this state of affairs a Supreme Court Sudanese judge Mr. Alob said," being brought up in a society where reconciliation is a norm of daily life, it was extremely difficult for the Sudanese judges, who had to apply the new laws to ignore their own culture. "There was a feeling", he added, "that applying foreign laws

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[2] Set up by Chiefs' Court Ordinance of 1931 which was to be applied in the southern provinces. Laws of the Sudan. (10). p, 165. (1955) to which a jurisdiction which covered

[3] Set up by Native Court Ordinance of 1932 which was to cover the remaining northern provinces. Laws of Sudan. (10). p, 170.. p, 170.

[4] Art. 311(I) provided that "Whenever under any law in force for the time being, a Criminal Court imposes a fine, the Court when passing judgement orders the whole or part of the fine recovered to be applied....(c) in compensation to the widow, children or other heirs of a person his death has been caused by the offence committed."

[5] See, Natale, "Compensation in the Criminal Proceedings." op. cit. p, 205.

[6] The then CJ, G. Hamilton, ruled, "It is also pointed out that the order of the court as to 'dia' is incompetent. If it is desired to award compensation to the deceased's family, the court should order a fine as part of the sentence and direct it to be paid to the family of the deceased by way of compensation. It would be advisable to state to what particular member of the family it should be paid." Sudan Government v. Abdulla Abakuk and others, Ac. CP. 242-27. S. L. R. vol. 1. p, 245.

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might lead to opposite results."[1] A non-Sudanese observer also reached such a conclusion when he noticed that the role of the government paradoxically had caused deterioration in tribal discipline among the Dinka tribe and a concomitant difficulty in the enforcement of customary norms.[2]

In light of the above considerations, it was felt that accommodating the native reconciliatory customs based on the payment of diyya, served not only as a means of compensating the aggrieved victims and their dependants, but contributed also to suppress blood feud.[3] It was also found that the measures of the Penal Code as they did not offer the sense of justice expected by native people, did very little to curb tribal fights and thus did not much serve the ends of justice nor public security, therefore, "the traditional tribal solution appeared more effective, if not on the side of justice then for security purposes."[4] This realisation of the failure of the new laws to satisfy the people's sense of justice was noticed by the highest judicial hierarchy i.e. the then Chief Justice. He sent a Circular to the Provinces' Governors enquiring about an answer for the "continually arising question as to whether a case of homicide ought or ought not to be settled by the payment of blood-money"[5]according to

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[1] Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

[2] Stubbs, op. cit. p, 75.

[3] See the letter written by the Governor of Upper Nile Province addressed to the Chief Justice in which he said, "at the moment severe sentences in homicide cases will only increase our difficulties. My present idea is that where the accused can be induced to come in of his own accord the case will be settled by blood money with as light a sentence as possible for the guilty party." AC/Gen/ 2-6-9, sub-file 10. Sudan Law Project(S. L. P). Arch. M. 116(59). See Cook, "Documentary Survey." op. cit. p, 475.

[4] Natale, op. cit. p, 206. Mr. Natale was a professor of law in Khartoum University who stood as an enthusiastic advocate of native and customary law and in particular the payment of Diyya. He was in favour of authorising criminal court the power of awarding victims and their families full compensation so that they do not have to recourse to long complicated civil proceedings. See the introduction of the Arabic translation of his current study. op. cit. p, 8-9.

[5] This circular is quite significant in revealing the degree of confusion over the meaning of justice between the formal authority and the local customary norms. Therefore, it is useful to cite the document. "In criminal cases the question is continually arising as to whether a case of homicide ought or ought not to be settled by the payment of blood-money.

His Excellency the governor-general has directed me to ascertain the view of the Governor on the question generally. The native view is that the payment of *dia* amounts to complete settlement of the case. But the Government, considering that in the interests of law and order it is necessary to impose a penalty on the offender, does not accept this view in entirety except in a limited classes of cases. The result therefore very often is that the court imposes a term of imprisonment which is subsequently reduced if a settlement by blood-money is effected. The settlement is allowed partly to satisfy the native idea of justice. It is also in many cases amply justified as affording compensation to women or children who may have lost their bread-winner. There is a danger, however, that the sentence of imprisonment is so far reduced that it fails to act as a deterrent.

The points upon which an opinion would, I think, would be of value are

In what classes of cases should payment be allowed as a complete settlement?

In what classes of cases should payment be allowed as part of the penalty?

Where payment is so allowed what proportion of the sentence should be remitted?

Ought settlement wholly or in part by payment of money be restricted to limited classes of persons?

native customary law. The responses revealed a degree of confusion over the real function of diyya as a component of the reconciliatory process of local customs and the proper role of such customs as a whole within the new legal setting. One respondent for example acknowledged the need to consider the native norms saying that "payment as complete settlement should be allowed only in cases of accidental death or accidental injury."[1] Meanwhile he tried to assert his view that Diyya, as a customary settlement should not affect the sentencing decision and no portion of the sentence should be remitted. The payment to his mind is "purely in the nature of compensation and not part of the punishment."[2] This view seems to contradict both customary law and even the Chief Justice's notion of diyya when he stated that, "It is desirable to regard the payment of money rather as satisfaction of the native view of justice than as compensation to persons injured by the offence."[3] On a separate later occasion, the then Chief Justice, while acknowledging the ability of local customary law to maintain peace among conflicting tribes or members of the same tribes, described it as an uncivilised law which ought to be replaced with more civilised measures. He asserted, "Ultimately blood-money must give way to the advance of civilisation. It may be desirable for some years to recognise this custom in order to keep the peace between tribes or between different factions of the same tribes."[4]

It is realised that it is not possible to lay down inflexible rules for the determination of these points, and it is not desired that you restrict your comment to these points. It is also realised that conditions vary very greatly in different provinces.

I think that in considering the question it is desirable to regard the payment of money rather as satisfaction of the native view of justice than as compensation to persons injured by the offence. As a matter of interest, I append examples of cases which have occurred in different places in recent years.

(a) The accused walking along a path met a man who was dumb and had a withered arm and leg and walked lame. The accused thought the man was *afrit*(ghost or devil); the accused spoke to him and when he did not answer he became afraid and tried to avoid him; the man apparently wishing to communicate something got hold of the accused's clothes. The accused became terrified, hit him with a stick, and killed him.

(b) An accused hanged his daughter on the ground that she was a harlot and brought shame on him.

(c) Two boys aged about fourteen had a quarrel. One hit the other on the head with a stick and killed him.

(d) An accused killed a man because he was a sorcerer and caused his sister to fall ill.

(e) X murders Y because Y had killed X's brother five years previously

(f) Two sections of a tribe were in enmity. No killing had occurred but section X had come of the worse in a previous encounter. Two or three men of each section had a fight, and a man from section X was killed in circumstances which do not amount to murder.

(g) A villager having a grievance against the Sheikh comes to the village's *Meglis*(a gathering place) and attempts to kill the Sheikh but kills a villager instead. The brothers of the dead man take the murderer, tie him up and at once kill him." (Signed) B. H. Bell, Chief Justice. Khartoum, 5 March 1928. S.L.P. Arch. M. 101-B (306-307).

[1] The reply of the District Commissioner, Latuka District. Sudan Law Project (SLP) Archive. M. 101 B, p 306-307.

[2] He added that "the issue of blood-money and imprisonment of individuals must be kept separate." Ibid. p, 307

[3] The letter of the Chief Justice B. H. Bell. op. cit. p, 307.

[4] The Chief Justice letter, 16 May 1949. S. L. P. Arch. M. 116. p, 61.

Depending on the responses and in recognition of the local social conditions, the Legal Secretary issued a statement to be circulated as guidance for all presidents of major courts in which he acknowledged reconciliation according to native ideas and specified its legal effect on criminal proceedings. He asserted that in assessing the sentence, native customs should be taken into consideration (either by consulting Chiefs or referring the point to the Chief's Court). However, the legal effect of the reconciliation according to local customs was not considered as a complete settlement but rather as a 'major' mitigating factor[1]. Nevertheless, the following application of these recommendations showed a degree of confusion over the appropriate role of native methods of reconciliation and its effect on legal proceedings.[2]

Another significant step in the development of the customary reconciliation in the Sudanese criminal justice system was brought about by the Criminal Court Circular No 18[3] which allowed the use of diyya as a reconciliatory settlement within the formal legal proceedings. It sets out the circumstances in which diyya is payable and the extent to which it can be a complete settlement.[4] However, the circular contained many restrictions that along with its inappropriate subsequent applications had distorted its customary concept and functions.[5]

On some occasions, diyya was even subject to direct criticism from some leading judicial and legal figures. Thus, the then Chief Justice Sir Humphrey Bell said, "the general attitude is that dia is a bad thing and should only be allowed in exceptional cases."[6] The hostility to diyya was not confined to those who were alien to tribal life and its local customs but was even spread among some Sudanese judges. The then deputy Chief Justice Babiker Awadalla said, "dia 'Diyya' is an archaic form of expiation of crime which in my view is highly inconsistent with the modern conception of criminal punishment and its indiscriminate recognition should be curtailed."[7]

Such an unjustifiable attack on diyya as a customary reconciliatory dispute resolution method stems from a misunderstanding of the function of the law in certain societies which is a large issue and beyond the scope of this chapter. However, it can be said briefly that a certain legal

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[1] Nigel. G. Davidson, the then Legal Secretary of the Sudan Government. A letter written on 29 April 1929. S. L. P. Arch. M. 106. p, 33-34.
[2] Sudan Government v. Ali Mohamed Saleh, AC. CP. 97-44. S. L. R. vol. 2. p, 99.
[3] Issued on 15 June 1952.
[4] See Abu-Rannat, "The Relationship Between Islamic and Customary Laws in the Sudan." op. cit. p, 15.
[5] Sudan Government v. El Deig Adams Abbas. S. L. J. R. (1968). p, 103. Sudan Government v. Kamal Al-Jak Ahmed. S. L. J. R. (1965). p, 66.
[6] See Sudan government v. Ahmed Isagah. AC. CP. 262-42.
[7] Sudan government v. El Dageil Saeed Hassan. S. L. J. R. (1966). 39-40. It is interesting that Mr 'Awad Allah, as will be shown shortly, would later on be one of the prominent defenders of reinstating Sudanese law against Common Law.

institution should be judged within the context of the society in which it is proposed to function. Any outsiders attempting to evaluate such an institution without considering the relevant social, economical and political circumstances would fail to reach the right conclusion. Thus, concepts such as modern and primitive are hardly helpful in such an evaluation. Whether it is primitive or modern, the law should be judged by its effectiveness in achieving its proposed tasks as a system of social control. As was rightly noted, among other common mistaken beliefs about tribal law held by some Europeans, whether missionaries, administrators, anthropologists or judicial officials, one error constantly re-occurred in the criticism of the judges and administrators against the payment of blood-money in homicide cases; namely the assumption that tribal law does not concern itself at all with criminal punishment but is obsessed solely with the tortuous aspect of homicide. This view or attitude does not give a balanced picture of tribal law. Tribal law is just as concerned with breaches of peace as any other law. The difference between customary law and any other legal systems, if any, is found in the means used in order to prevent breaches of the peace. The effectiveness of these means has to be determined according to the social set-up of each society.[1]

Likewise, any attempt to regulate customary law should be carefully carried out. There is a slender line between regulation and distortion. Regulation is required as it gives customary law a formal recognition and at the same time provides it with an opportunity to be properly studied and developed. However, regulation should not deprive customary law from its essential features beyond which it may lose its identity. When losing its identity it might not be recognised by the people whom it is supposed to function for. Consequently, such a regulated custom would not be able to achieve its original tasks or at least would be less effective. Thus, despite the partial adoption of some components of local customs and laws, Sudanese law was still at this stage in the words of a Western expert on Sudanese law, "a Western law and thus not fully reflective of Sudanese life[2]". He suggested that "A purely Sudanese law could be conceived, drafted and promulgated successfully it were the work of a representative group of citizens who were motivated by the goal of writing a Code which is derived from and suited to Sudanese life. The group of legal professionals who might do this is gradually emerging."[3] Responding to such a call, the former Chief Justice of the Sudan and the

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[1] Elias. T. O. "The Nature of African Customary Law." Manchester University Press (1956). p, 25-36.

[2] Carolyn Fluehr-Lobban, "An Analysis of Homicide in the Afro-Arab Sudan." Journal of African Law. vol. 20. no. 1 (1976). p, 22. [hereinafter, Fluehr]. See also for the same author, "Islamic law and Society in the Sudan." Frank Cass and Company Limited, London (1987).

[3] Fluehr, op. cit. p, 22.

then Vice-President of Nemeri's Revolutionary Command Council[1] said that the "law must be in conformity with the social life of the people."[2] This movement was primarily against Common Law as an alien system. The alternative, however, was not always agreeable.[3]

c) Reconciliation under the Criminal Law of 1974

The first post independence Penal and Criminal Procedure Codes were promulgated some 20 years after independence in 1974. The new laws did not bring about any major changes in criminal policy, they were and by large an Arabic translation of their predecessors.[4] As to mediation and reconciliation, the new laws offered more space for such a process without relying on the local customs or the rules of Islamic law in this area. Instead, they followed a method adopted by the Indian Penal Code.[5] The method is based on a pre-determined set of compoundable crimes in which the victim (or the person specified by the law) has the right to reconcile or to mediate with the offender. These crimes are tabled in Art. 286 (C. C. P, 1974). This article provided that "The offences punishable under the sections of the Penal Code specified in the first two columns of the following tables may be compounded by the person mentioned in the third column of that table". The table includes more than 24 crimes which ranged from crime against the person such as assault (Arts. 275, 277 P. C); the use of criminal force (Arts. 296, 297 P. C); offences of damage to property such as destroying the property of another (Arts. 364, 365 P. C) or burglary (Arts. 387, 389); and sexual offences such as adultery (Art. 431 P. C).

It is remarkable that the law of 1974 gets nearer to Islamic law and local customs in recognising the full effect of reconciliation as a complete settlement for some criminal conflicts. Hence, it empowered reconciliation under Art. 286 with its full legal effect as it regarded reconciliation equivalent to acquittal. Thus, Art. 286/6. provides that "The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded." As a way of regulating any reconciliation agreement, a

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[1] General Ja'far Mohammed Nemeri seized power in a coup in May 1969 and proclaimed a new revolutionary era for the republic of the Sudan until s/he was disposed in 1985.

[2] Abstracted from a public speech delivered 31st August, 1970 by Mr. Baiker 'Awadalla who was also the Minster of Justice. See Fluehr, op. cit. p, 22.

[3] There were four groups calling for a 'Sudanese law' each with different aspirations, the Continental system-trained professional, the Arab-pan trend, Muslim Brotherhood and the communist party. See for details, Cliff F. Thompson, "The Formative Era of the Law of the Sudan." The Sudan Law Journal and Reports. 1965. p, 474-508. [Hereinafter, Thompson]. See also, Lutfi, "The Future of the English Law in the Sudan." op. cit. p, 219-

[4] See more in the trend of Arabicisation of the Sudanese Law, Thompson, "The Formative Era of the Law of The Sudan." op. cit. p, 501.

[5] Art. 320 of Code of Criminal Procedure (1973).

very important restriction is imposed over the parties' freedom in conducting and administrating the reconciliation agreement. Thus, Art. 286/4 requires the court's permission as an essential prerequisite if the reconciliation is to have its effect. Due to their seriousness, the court's permission was only required for the crimes in the second tables whereas those in the first table can be compounded without the court's permission.[1]

The requirement of the court's permission was a commendable step in regulating reconciliation as an alternative dispute resolution. As has already been explained in relation to Islamic law, judicial supervision is essential where reconciliation has the effect of ending the criminal proceedings. Such supervision ensures that the reconciliation agreement is fair to both sides and has been reached with their full consent. Therefore, the court's permission should be required for all compoundable crimes since the possibility of intimidation and injustice in a reconciliation agreement exists in all cases. However, the requirement of the court's permission in Art. 286/4 came in a vague statement, it did not declare its objectives or state whether the courts have the power to modify or reject the agreement on the grounds of injustice or lack of consent. The judicial precedents in this regard do not offer much help. In a case tried by the Court of Appeal, the accused appealed against the decision of a Province Court in refusing to grant him leave to compound the case despite the complainant's application to such leave. The court of appeal ruled that, since the charge is compoundable the accused should have been given leave, and it did so.[2] Thus, the only thing that the court was concerned with was the category of the charge and whether it fell within the crimes tabled in Art. 286. It was an opportunity for the court to clarify the purpose of judicial leave and to exert itself in examining the content of the reconciliation agreement in order to make judicial supervision more effective. Failing to do so makes the judicial leave pointless or at least to have little significance.

On the other hand, it would be a commendable step if the Sudanese law went further in regulating reconciliation in criminal conflicts as did its Indian counterpart. Art. 320 of the Indian Code of Criminal

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[1] The court's leave to the complainant's request to compound the case has the effect of terminating the litigation and cancelling the conviction and repaying the offender the money he had paid as a fine. This conclusion was asserted in the Supreme Court judgement in which an appeal against a decision of a Province Judge who refused to grant the complainant leave to compound the case of drawing a dishonoured cheque. The court ruled that "The last part of sub-section 4 of S.286 C. C. P gives him (the Province Judge) power to compound cases where a conviction was passed by a magistrate subordinate to him. The learned judge has not considered that....the trial judge affirmed that the money was paid to the complainant out of court. The complainant has applied to compound. I therefore should grant leave and at the same time compound the case, thereby cancelling the conviction and fine passed by the trial magistrate. The fine should be repaid to the accused." The Supreme Court. Sudan Government v. Martyn Makur Alam. AC./ Cr. Rev. / 472. S. L. J. R. (1978). p, 81.

[2] Sudan Government v. Martyn Makur Alam. AC./ Cr. Rev. / 472. S. L. J. R.(1978). p, 81.

Procedure, on which its Sudanese counterpart was based, imposed a logical restriction related to the offender's status. It prevented reconciliation from having its legal effect where the offender's record is not clean. It provided that "No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such an offence."[1] This restriction helps to prevent reconciliation from serving wrong clients such as recidivists who need to be dealt with in a different manner to tackle their problems. Sudanese law seems to prefer leaving such matters to the trial court to decide on each case individually with regard to whether the offender deserve to benefit from reconciliation. If so, this means that the courts cannot exercise such power where the crime falls within the first table as litigants can perform mediation with no requirement to get leave of the court.

In general, by declaring a certain number of private crimes as compoundable offences, the criminal laws of 1974 were a further step towards incorporating mediation as a part of the formal criminal justice. It also implies an acknowledgement of the importance of mediation as a popular method of resolving criminal conflicts.

d) Reconciliation under the Criminal Law of 1983

In the wake of Nemeri's Islamic movement in 1983, the whole Sudanese legal system was modelled on Islamic principles. A committee was appointed to draft new codes of penal and criminal procedure, which were promulgated in accordance with traditional Islamic jurisprudence.

In an interview with Mr. Awad Al-Jeed[2], the president of the Islamisation Committee he said, "while drafting these laws, crime victims have always been in mind." He added, "We thought that the best way to serve crime victims was to revive the long-ignored local laws i.e. Islamic and customary laws in which the victim is offered a much better deal." "Mediation," he continued, "is a meeting point between Islamic and customary laws as both prefer reconciliatory method in resolving all conflicts including those which carry the label 'criminal.'" "Thus", he added, "We simply applied Islamic principles of mediation and forgiveness with all their legal effects. Meanwhile, we embrace the settled trend in Islamic jurisprudence that the trial court has the power to implement a supplementary punishment if it sees it appropriate to do so. In this connection, we provided guiding punishments for each

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[1] "The Indian Penal Code (Act XL V of 1860): with exhaustive notes, comments, case-law references, state amendments, along with schedule of classification of Offences and forms as prescribed under Code of Criminal Procedure, 1973." 26th ed. Revitalised by M. Hidayatullah & R. Deb. Thakore, Dhirajlal Keshavlal. Nagpur, India. Wadhwa, (1987). p, 369.

[2] Mr. 'Awad Al-Jeed, a former Attorney-General (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998.

reconcilable crime which, upon the court's discretionary power and depending on each case's circumstances, can be reduced or even eliminated altogether". On the other hand, Mr. Al-Jeed asserted that to avoid any legal instability, he and the rest of the committee were keen to preserve the rich legal tradition of the Common law which had been applied for nearly a century. "Luckily", he added, "our experience showed that there is a great deal of similarity between Common law and Islamic law." Thus, unless there was a contradiction, provisions were kept as before in previous laws."

As expected, the new laws provided more space for reconciliation within the criminal justice system. They followed a different method in determining reconcilable crimes. The selective method was discarded in favour of a more flexible arrangement. The new arrangement was based on the Islamic doctrine of dividing crimes into public and private ones. Accordingly, reconciliation is admissible where the crime is deemed private, and prohibited where the crime is regarded public. According to these criteria, the trial court is assumed a discretionary power to determine the nature of the crime and to act accordingly. Thus, Art. 270. C. C. P 1983 provided that "Apart from crimes against the state and public crimes, reconciliation is admissible in all crimes providing such reconciliation does not contradict Islamic law."

When applying this Article, the court of appeal in the Eastern province upheld the judgement of the lower court in rejecting the offender-victim reconciliation since the crime in question (abuse of power Art.136 Penal Code 1983) was a public crime in which reconciliation was barred from having its legal effect in ending the proceedings.[1]

As to the effect of reconciliation according to Art. 270 C. C. P, the Supreme Court seems to accept victim-offender reconciliation as a full settlement of the conflict. This was the case even with the most serious crimes such as murder. In the case of murder, the deceased's family engaged in a mediation process with the offender which resulted in the latter's acceptance to pay the full diyya. The Supreme Court ruled that, "given the victim's family's acceptance of the diyya and considering that the offender has been remanded for a year and a half, the court sees no need to impose any further punishment and order the offender to be freed."[2] However, in other cases, the victim-offender mediation serves only as a significant mitigating factor. Thus, in deciding the legal effect of the victim –offender reconciliation in the cases of murder, the Supreme

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[1] Sudan Government v. Jafar Mahmode Hassan and other. The Court of appeal of the Eastern Province. CA. CR. Sudan Law Journal and Reports (1984). p, 152.

[2] The Supreme Court. Sudan Government v. Juma Mohammed Al-tahir. SC. MC. 111. S. L. J. R. (1986). p, 146. It is significant that in this case, the court rely not only on Art. 251 of the Penal Code, but also on treatise of Islamic traditional jurisprudence ending almost a century of judicial tradition by which English precedents constituted an aspiration for Sudanese judges.

Court stated that, "but having recognised the settlement in the present case (murder) shall we set the convicted accused free immediately? The Islamic jurists differ in this respect. Imam *Malik* and *El-Laieth* submit that after the pardon has been legally accepted the sovereign has the power to punish the murderer by way of temporal punishment (Ta'azir). But *El Shafie*, *Ahmed*, and *Abu-thawr* maintain that the sovereign, the ruler or the judge, have no power to impose a penalty on the murderer because there is no provision in that respect. The Sudanese Law generally adopts the former school and the Criminal Circular No. 94/1983 directs that if the guardians of the deceased pardon the killer, this does not affect the right of God and the state in imposing penal punishments of imprisonment or whipping." Eventually the convicted was imprisoned for one year.[1]

The above judgement reveals the extent to which the application of Islamic law has affected the whole legal process and thinking, even references are being made directly to traditional treatises of Islamic law. Another aspect of the Sudanese law's conformity to Islamic law principles in mediation is what has been explained earlier whereby judges in Islamic law are recommended to encourage litigants to seek reconciliation. Thus, it is ruled, "The court must first enquire from the deceased's blood guardians whether they are ready to grant a pardon or to accept a settlement.[2]. For non-Muslims, reconciliation or *Sulh* according to the Chief Justice Circular No. 83/91 must be an established custom in order to be accepted as a settlement before the trial court.[3]

e) <u>Reconciliation under the Criminal Laws of 1991</u>

In 1991, new penal and criminal procedure codes were enacted in the wake of the National Salvation Revolution (1989). These laws are claimed to be a better expression of Islamic principles than Nemeri's laws (1983).[4] In general, they take the same stand towards mediation and

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1 Sudan Government v Abu Kalam El Obeid and others. SC/crim. /61. S. L. J. R. (1983). p, 17. In this judgement also, the Supreme Court, in order to expand such legal effects of reconciliation, extended the application of Art. 270. C. C. P 1983 to be applied retrospectively. So, it ruled that, "The general rule of law that the penal laws do not operate retrospectively is subject to exception. The most significant of which is that a new law is applicable in case of preceding crimes where such application is more beneficial to the accused and the judgement has not become final. Henceforc in so far as the finding and sentence in this case had not become final before the cancellation of the laws of 1974, the accused is entitled to benefit from any amendment or innovation brought by the new section 251 of the Penal Code 1983. Therefore, this court recognise the *Sulh* (reconciliation) reached by the two sons of the *Hameed's* tribe according to their tribal custom"

2 Sudan government v. Abu Kalam El-Obeid and others Sclcrim/61. S. L. J. R. (1980). p, 20.

3 It was ruled that, " The Chief Justice Circular directs that the courts must recognise the way and procedure of reaching the *Sulh* and persons who conclude settlement on behalf of the deceased's family in case where the custom is well-establishedSudan Government v Abu Kalam El Obeid and others. SC/crim./61. S. L. J. R. (1980). p, 21.

4 Hassan Al-Torabi, the Speaker of the Sudanese Parliament. A personal interview, Doha, February 1999.

reconciliation; they follow the same scheme in determining reconcilable crimes. Thus, Art. 4/I C. C. P (1991)[1] provides that "Except for Hudud crimes, reconciliation or forgiveness are permissible in every crime which involves a private right and in proportion to that right." This general statement means again, as under C. C. P 1983, that courts are assumed a discretionary power to decide the nature of each crime, and accordingly to allow reconciliation or not.

What is remarkable about the new laws is that for the first time the word forgiveness (*Afo*) is mentioned in Sudanese law as a legal term. This stands as further proof for the full adoption of Islamic principles in this regard. Forgiveness is given its full legal effect as in Islamic law. Thus, Art. 31/b P. C. declares the victim's forgiveness as one reason to waive the punishment of Qisas. This means that a victim's forgiveness is effective as a waiver of punishment in all bodily harm crimes ranging from minor assault to murder. Furthermore, Sudanese law has adopted the procedural issues regarding the victim's expression of his forgiveness. For example, Art. 32 P. C. states the rules that define who has the right to forgive in the case of the victim's death or incapacity.

As to the effect of reconciliation or the victim's forgiveness, Sudanese law discards the classical view of Islamic law that views Qisas crimes as primarily private crimes and hence the victim's forgiveness or reconciliation is looked upon as a final settlement with no need for any further procedures. Instead, it goes along with the latter trend in Islamic jurisprudence that classifies bodily harm crimes as of mixed nature i.e. private and public. Therefore, the victim's attitude should affect his own right without affecting the public's rights. Consequently, all bodily harm crimes are punishable in the Sudanese Penal Code, chapter 14 Arts, 129-144. Nevertheless, the victim's forgiveness or reconciliation, just as under the laws of 1983, is always considered as mitigating factors within the court's discretion. In the case of murder, in particular, the victim's forgiveness compulsorily waives the original punishment which is the death penalty (Art. 130/2 P. C).

Recent applications for the victim's forgiveness asserted its legal effect. In the case of murder, the offender was sentenced to death under Art. 130/2 (P. C) by a Criminal Court. While the Supreme Court was examining the case, the victim's family offered their forgiveness 'for the sake of God'. Consequently, the Supreme Court waived the death penalty and returned the case to the criminal court to decide on a suitable punishment.[2]

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[1] Promulgated on 12 November 1991.

[2] The Supreme Court. Sudan Government v. Al-Jazoly Idries 'Abdulmajied. Unpublished Judgement, SC/51/1995. This judgement along with others has been handed to the author by Mr Ma'mun 'Abdul-Aziz Hammur, a Supreme Court Judge who was one of the judges who delivered this judgement. He told me that when upholding the death penalty as punishment for murder the Supreme Court usually

f) Concluding Remarks.

Finally, a few points can be noted in the development of mediation in Sudanese law. Firstly, it seems eventually after years of struggle, mediation, reconciliation, and even forgiveness have won the battle. The victory is manifested in the full incorporation of these reconciliatory methods into the formal criminal justice system just as in Islamic law.

In addition, while acknowledging the victim-offender reconciliation, no attempt has been made by a formal, legal or social, institution to arrange or to manage the reconciliation process. No public or private schemes have been set up to undertake the task of bringing litigants together. The whole operational process of mediation is left to the individual or tribal initiatives.[1] The reluctance of the formal justice institutions to interfere with the mediation's process can be ascribed to two factors: the first is the lack of resources to fund such schemes. This is more obvious if we know that, as a Supreme Court judge said, "one incentive to accommodate mediation into the criminal justice system is that it costs less."[2] Secondly, arranging mediation is a difficult task, and it is even more complex in the Sudan in particular. This is because the Sudan is essentially a diverse society made up of different tribes, religions and races and each has its own established culture which determines the way they conduct mediation and reconciliation. Therefore, it seems that Sudanese law accepts the outcome of reconciliation agreements regardless of their content or the way in which they were reached.

Being out of application for almost a century, Islamic law has been granted an excellent opportunity to assert itself and prove its ability to suit the needs of modern life. Failing to do so would have a far-reaching effect in any future attempt to Islamize any national legal system of Muslim states. I believe that the judicial process accompanied with enlightened jurisprudence is the best way to test Islamic law against the challenges of an ever-changing society. Such a test would reveal the ability or inability of Islamic law to evolve and to keep pace with social, political and economic developments. Giving the aforementioned special status of Sudanese society, time will tell how successful the Sudanese experience is in applying Islamic law. As regards mediation, although it is quite early to comprehensively evaluate the implications of

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states that the victim's family must be informed in case they may accept Diyya or offer their forgiveness. See for example, the Supreme Court. Sudan Government v. Idries Khalifa Al-ajab. SC/86/95. Unpublished ruling handed by Mr. Hammur.

[1] According to Mr. Ja'fer Hamed, in middle and west Sudan where he served, mediation is arranged by the so-called '*Ajaweed*' who are a group of respectable volunteers. Sometimes, mediation may be arranged by the regional rules or head of police force particularly in serious tribal fights. Mr. Ja'fer Hamed, A former Sudanese Supreme Court Judge(1992). A personal interview, Doha, April 1998.

[2] Mr. 'Abdul Al-Rahman Sharfy. A Supreme Court judge. A personal interview, Doha, March 1998.

incorporating mediation and forgiveness in a criminal justice system, some impressions of the Sudanese judges experiences can be put forward.

The judges who were interviewed confirmed at least three results of integrating reconciliation and forgiveness. The first noticeable effect is that the victims' satisfaction has increased since they feel that they are recognised as parties to the process and they have an influential role to play. However, there are no surveys or field-studies to confirm such results or to state the extent of the victims' satisfaction.

Another consequence also claimed by the judges is that as a result of giving the victims the opportunity to exercise their right to forgive or to reconcile with the offender, they often chose the soft option and accept reconciliation or even forgive the offender. Consequently, judges noticed a considerable decrease in the number of death penalties being executed.[1] That is to say, among crimes that are punishable with the death penalty, murder is the most committed crime, and with the victim's forgiveness and reconciliation in murder cases, death penalties are waived and substituted with other punishments. Again, the judges could not provide any statistics to confirm the exact percentage of the reduction of the number of death penalties.

Finally, Mr. Alob asserts that integrating mediation in the criminal process was a relief for the judges themselves. As he explained earlier, most judges grew up in communities in which mediation was an integral part of their customs. Hence, denying or decreasing the importance of reconciliation before the courts of law had created an uncomfortable feeling among some judges who thought that they were not delivering the justice they believed in.[2]

8) Conclusion

In conclusion, it has been demonstrated how the widespread victim-offender mediation schemes all over Europe, North America, Australia and New Zealand are closely associated with the revival of the victim perspective in the criminal justice system. It is also connected with the search for an alternative for the traditional remedies of conventional criminal justices systems. In contrast, victim-offender reconciliation in Islamic law has always been an integral part of its criminal justice system. Islamic law, however, is not unique in this connection since most, if not all, medieval laws shared the same view and relied largely on mediation and reconciliation as main dispute resolution methods. The survival of reconciliation in Islamic law over the centuries is ascribed

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[1] This observation has been emphasised by Mr. Salah Al-Sharif, a former Sudanese Supreme Court Judged (1988-1989). A personal interview. Doha, April 1998.

[2] Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

primarily to its religious character which preserved all its essential features.

Although the concept of victim-offender mediation is similar in both Islamic and modern Western laws, Islamic law has developed its own theory or concept of mediation which serves its objectives not as an isolated law but as a component of a wider system, namely the religion of Islam. As a religious law, Islamic criminal law aims not only to resolve interpersonal conflicts but also to ensure the pursuit of the previous normal relationships between disputants. Therefore, it favours reconciliatory methods since they reduce any further harm to already damaged relationships and increase the possibility of resuming such relationships in the future. To ensure such a result, Islamic law does not only encourage mediation based on restitution, but also strongly promotes mediation and reconciliation based on the victim's forgiveness as the best method to achieve its objectives. It therefore pays considerable attention to the concept of forgiveness which is conceived not only as a moral value but also as a legally effective instrument which has the effect of the termination of the criminal proceedings.

Integrating mediation, reconciliation and forgiveness into the Islamic criminal justice system adds a human dimension to the criminal process which is often seen as rough and abstract. However, such integration is not without downsides which Muslim scholars have managed, to some extent, to overcome with more work needed in order to make such integration as successful as it is hoped.

Although Islamic law offers its own theoretical perspective of mediation, it offers very little on the operational side. There is no record of any practical guide concerning the management of mediation sessions. This was a wise policy, since mediation management is an ever-changing technique, and with the religious character of Islamic law, any operational schemes may be taken as binding commands which would prevent any progress in this field. Thus, it is up to communities and individuals to practise mediation in the way that matches their specific needs and cultures. In this connection, Islamic law can benefit hugely from the latest developments in Western mediation schemes in which the administration of mediation sessions has been professionalised and has become an increasingly growing field of study which offers techniques and instructions in all matters concerning victim-offender mediation.

Although mediation and reconciliation constitute an integrated part of people's customs in most Islamic countries, either as a result of Islamic teaching or due to their own tribal customs, no organised mediation scheme has been set up in any Muslim country. The striking example is the Egyptian law in which there is no provision for victim-offender mediation, let alone the victim's forgiveness. However, victim-offender

mediation can have an indirect effect on the criminal proceedings through different procedures such as complaint crimes. The irony about Egyptian law is that it abandoned Islamic law in the last century in search for a modern flexible European legal system, namely the French law. However, while Egyptian law has remained almost at a standstill, European legal thinking, including the French, has developed over the years until it, or rather a major trend within it, has reached a point at which it shares to some extent a comparable view to Islamic law concerning crime-victim's related issues. Thus, by adopting and encouraging victim-offender reconciliation, Egyptian criminal law would simultaneously keep pace with the latest developments in the field of criminal justice, complying with the principles of Islamic law, and tackling the problems of the slow, costly and overloaded criminal justice. Therefore, the interviewed Egyptian senior judges expressed their full endorsement for the application of Islamic law affirming that such a step would largely enhance the victim's role in Egyptian law and would fill the gap between the people's practice which honour reconciliation and mediation and the existing legal system which gives little consideration to such methods.[1]

The Sudanese law, unlike its Egyptian counterparts, has undergone a extensive experience of mobility and instability. In addition to the native or customary law, the Sudan has experienced the application of three major legal systems i.e. Islamic law, Latin law and Common law. Victim-offender mediation has received different receptions depending on the applied law. Victim-offender mediation and other reconciliatory methods have always been an indivisible component of Sudanese law. Both Islamic and tribal customary laws embrace a similar view towards mediation and reconciliation. Whereas English law, which was the formal law of the Sudan for almost a century, held a different view that was imposed for a period. The struggle, however, between the conflicting views continued for a long time. Despite some concessions made to appease native law, it was not before the application of Islamic laws in 1983 and 1991, that native (Islamic and customary laws) views have won the struggle. However, the long and rich experience of Common Law in the Sudan has left its significant influence even after the application of Islamic law.

In applying the Islamic theory of mediation, Sudanese law has followed the traditional view adopted by medieval Muslim jurisprudence with no attempt for modernisation. It has also made no effort to set up

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[1] Mr. Badr Al-Menyawi, a former Attorney-General (1986-1990). A personal interview, Cairo, February 1999. Mr. Samir Naji, a former Supreme Court judge and assistant of the Minister of justice. A personal interview, Cairo February 1999.

any mediation scheme or at least any guidelines to be followed in mediation sessions. Instead, it has left the situation as it was in Islamic law i.e. leaving the operational aspects of mediation to the litigants themselves and their own cultures. Although such an approach has brought some relief to crime victims and even to a group of judges and legal professionals, it was, and still is, a worthy opportunity to marry Islamic principles of mediation and forgiveness with the advanced operational and technical developments in this field in modern Western legal systems with all their promising progress. Had such a marriage been arranged, Sudanese law would have taken the lead as a pioneer for other Muslim countries.

Chapter (7) The Victim's Role in the Sentencing Process

1) Introduction

It has been clearly demonstrated in the previous chapters that crime victims in Islamic law enjoy several privileges. They have the right to initiate prosecution; to receive restitution and compensation from the offender; to be compensated by the state; and to solve their conflict away from the court by means of mediation and reconciliation even in the most serious crimes. What remains is one of the most critical stages in the criminal process namely the sentencing process. Does Islamic law grant the victim any role in the sentencing process? If so, how influential is such a role? What are the benefits and pitfalls of giving such a role to the victim?

For the purpose of comparison it seems essential to have a brief look on the latest developments in modern Western legal systems with regard to the victim's participation in the sentencing process. Such a look will reveal the similarities and differences between the two approaches and the underlying philosophies behind such distinctions. Likewise, it is also important to examine the current applications of the Islamic sentencing approach in modern Islamic states. Is it applied at all? If yes, how does the application reconcile Islamic principles with modern life? If not, what is the alternative and how has it been working?

Thus, this chapter is divided into three sections. The first section focuses briefly on the modern Western view regarding the victim's right to participate in the sentencing process. The second section is devoted to analyzing the victim's role in sentencing in Islamic law whereas the final section compares the victim's role in the sentencing process in two contemporary Muslim states, namely Egypt and the Sudan.

2) The Victim's Role in the Sentencing Process in Modern Western Legal Systems

There was a time in history during which crime victims were vested with a more influential role in the sentencing process. During the time of private vengeance, the course of justice was the exclusive domain of the victim, or his kinship, who was supposed to undertake the whole process from the initial prosecution to the final stages including the sentencing process.[1] Such a powerful role for the victim in the sentencing process has eroded over the years along with all other victims' privileges in

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[1] See, Schafer, "The Victim and his Criminal." op. cit. p, 20-31.

criminal litigation. The fundamental argument to exclude crime victims from the sentencing process has resulted from the change in the concept of crime and the administration of criminal justice. Criminal conflicts have come to be regarded as a conflict between the offender and the state as the representative of the public interest. Accordingly, crime victims were deprived of any significant role in the criminal proceedings particularly in the sentencing process.[1]

Having noticed with concern the failure to include the victim in the criminal proceedings, the emergence of the victim rights movement in the last few decades has attempted to shake the above belief. However, participating in sentencing was understandably not at the top of the movement's agenda as it was preoccupied with the victim's economical and educational needs. Thus, calls for the victim's greater role in the sentencing process came after a series of achievements in the field of victims' rights which were accomplished over a remarkable few years. Succeeding in turning more attention to the crime victims and pointing out the victim's long plight, the movement has managed, with various degrees of success from one jurisdiction to another, in gaining more support and appreciation for the victim's situation. Thus, the number of victim support schemes and organizations has considerably grown; compensation orders have been introduced in order to authorize and encourage criminal courts to make the offender compensate his victim; state compensation to the victim has been recognized by the introduction of criminal injuries compensation schemes; mediation and reconciliation schemes (governmental and voluntarily) have been spreading rapidly. In addition, several measures have been adopted to encourage the victim's procedural rights. At government level, victims' charters and bills of rights have been declared promising to offer a better deal for crime victims in the criminal process. Similar moves have been adopted at continental and international levels, such as the Council of Europe's recommendations on 'The Position of the Victim in the Framework of Criminal Law and Procedure' in 1985, and The United Nations Declaration on Basic Principles of Justice for Victims of Crimes and the Abuse of Power in 1985.

Such achievements have paved the way for victims' advocates to advance their attack on the traditional criminal justice systems aiming at gaining more ground for the victim. The target has been a greater role for the victim in the sentencing process. It is logical that such a demand came late after the previous achievements since sentencing is one of the most consequential stages in the criminal process which has been held for a long time a prohibited area for the crime victim.

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[1] See, Ashworth, "Punishment and Compensation." op. cit. p, 91-92.

To promote the victim's right to participate in the sentencing process, the movement started by expressing the victim's frustration and dissatisfaction of their experiences with the criminal justice system especially with court processes and the effect of such a discouraging feeling on their lives and on criminal justice itself.[1] By focusing on the victim's status once the case has been transferred to court, it was clear that while the victims see the case as their own, the court regards them as observers or at best witnesses. It was difficult for victims to understand that they are not considered a party to the trial of their offenders and that they have no control over the process.[2] The proposition suggested by victims' supporters to overcome such shortcomings of criminal justice, has been that the victim's view must be heard and considered by the sentencing authorities to remind them that behind the 'state' is a real person with an interest in how the case is resolved.[3]

The defenders of victims' participation in the sentencing process have increased their pressure for a change in favour of their demands. Strong theoretical and practical arguments have been put forward to show that giving the victim more space in the court processes would be beneficial for all: the victims, the offenders and criminal justice.[4]

The amounting pressure resulted in official recognition of the victim's right to be considered in court processes. The President's Task Force on Victims of Crime (1982) acknowledged, in its report, the victims' plight in the criminal process. The victims of crime, the report says, have been transformed into a group oppressively burdened by a system designed to protect them. The report calls for equality between the victims and the defendants. It claims that, "Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized."[5]

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[1] See for example Deborah P. Kelly, "Victim's Perception of Criminal Justice." Pepperdine Law Review. vol. 11 (1984)..

[2] Aldo S. Raineri, "Re-Integrating the Victim into the Sentencing Process." QUTLJ. vol. 11. (1990). p, 82.

[3] Deborah P. Kelly, "Victims." The Wayne Law Review. vol. 34 (1987. p, 76.

[4] See examples of these arguments in, A. S. Goldstein, "Defining the Role of Victim in criminal prosecution." Mississippi Law Journal. vol. 52. (1982). p, 515. Raineri, "Re-Integrating the Victim." op. cit. p, 79-96. Howard C. Rubel, "Victim Participation in Sentencing Proceedings." Criminal Law Quarterly. vol. 28. (1986). p, 226-236. Kelly, "Victims." op. cit. p, 69-76.

[5] The President's Task Force on Victims of Crimes: Final Report (Washington D. C).1982, p, 76-77. The proposed amendment would add the following clause at the end of the Sixth Amendment, "Likewise, the victims, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

Being persuaded that the victim's views ought to be considered in the sentencing process, how can such views be introduced to the sentencing court without demolishing the delicate balance of the criminal justice system? The answer has come with the introduction of the Victim Impact Statement (VIS), a device by which the victim's view can be delivered to the sentencing court. It was first introduced in the United States by the enactment of The Victim and Witness Protection Act of 1982 which provides that "Before sentencing a criminal defendant, the judge must be informed of the crime's impact on the victim."[1] It was not so long before the VIS had spread to cover most states. At least 48 states have codified provisions authorizing some form of victim participation in conjunction with the sentencing imposition, most of which by means of a written VIS.[2] The VIS has also been adopted by other jurisdictions; New Zealand enacted legislation in 1987 permitting the use of VIS as part of the sentencing process. Canada also adopted the VIS in the following year. In Australia, the South Australian Government has adopted the VIS process in legislation[3]while other States and Authorities have been hesitant on the issue.[4] In Britain VIS has not yet been adopted, however, similar statements have occasionally been considered by English courts.[5] The new National Standard for Pre-Sentence Reports contemplate that PSRs should include 'an assessment of the consequences of the offence including the impact on the victim.'[6] Victim Support in Britain has also called for the adoption of a modified version of VIS to be handed to the Crown Prosecution Service instead of the sentencing court.[7]

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[1] Public Law no 97-291. This law amended the Rule 32 of Federal Rules of Criminal Procedure to require a VIS as part of the Pre-sentence report supplied by the Untied States Department of Probation to the sentencing judge. The amended Rule read as follows: (2) Report-the pre-sentence report shall contain.....(c) Information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offence; and (d) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offence. See for details, Amy K. Posner, "Victim Impact Statement and Restitution." Brooklyn Law Review. vol. 50.(1984). p, 301-338. Some writers claim that VIS date back to 1979 when information regarding the impact on the victim was first provided for the sentencing judge in Federal Court for the District of Maryland in May 1979. See, Hoffman, Martha "Victim Impact Statement." Western State University Law Review. vol. 10, (1983). p, 221.

[2] See the list of these states, Phillip A. Talbert, "The Relevance of Victim Impact Statement to the Criminal sentencing Decision." UCLA Law Review. vol. 36. (1988). p, 200. Footnote no 12. Maureen McLeod, "An Examination of the Victim's Role at Sentencing: result of A Survey of Probation Administrators." Judicature, vol. 71. No. 3. (1987). p, 162. Some writers claim that VIS dated back to 1979 when information regarding the impact on the victim was first provided for the sentencing judge in Federal Court for the District of Maryland in May 1979. See, Hoffman, "Victim Impact Statement." op. cit. p, 221.

[3] The Criminal Law Act (1988).

[4] Raineri, op. cit. p, 84.

[5] See for example, Hobstaff (1993) 14 Cr App Rep (S) 605. Quoted in Ashworth, "Sentencing and Criminal Justice." op. cit. p, 310

[6] Ashworth, "Sentencing and Criminal Justice." op. cit. p, 310.

[7] Victim Support, "The Victim's Charter." December 1990. Paragraph 18.

The VIS varies across jurisdictions in the way it is produced for the court as well as its contents. Firstly, VIS may be attached to the pre-sentence report prepared by the probation service. The second method allows the victim to give an oral statement at the time of sentencing. The last method is to give the prosecution service the task of taking into account the impact of the crime on the victim.[1] The content of the VIS also varies, ranging from a simple checklist in some jurisdictions to lengthy descriptive statements. They generally include the physical and emotional harm as well as material losses suffered by the victim.[2] Some jurisdictions, supported by some victim's advocates, have gone further in activating the victim's role in sentencing by allowing him to express an opinion about an appropriate sentence for the offender by giving him the right to allocution.[3]

The birth of the VIS as a way of involving the victim in the sentencing process has not been achieved without resistance from loyalists to the traditional set up of the criminal justice system who consider such involvement as a threat to the delicate balance of the criminal justice system. Theoretical as well as practical arguments have been advanced by opponents of the move for a greater role for the crime victims in the sentencing process, in order to counter the arguments of pro-victim movement.[4] A significant setback for VIS came from the Supreme Court ruling in Booth v. Maryland in which the court held that the introduction of a victim impact statement during the sentencing phase of a capital murder trial violated the eighth amendment and could "create a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[5]

Thus, the position has been reached in Western states that the victim is allowed to make an oral statement to the sentencing court explaining the crime effects on him and expressing his opinion as to how the offender should be punished. While restitution may be ordered in response to the victim's application, the court is under no obligation to consider the victim's view on the intended sentence.

Let us now move to Islamic the law's approach towards the victim's participation in the sentencing process.

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[1] Andrew Ashworth, "Victim Impact Statement and Sentencing." Criminal Law Review (1993). p, 500. McLeod, op. cit. p, 163.
[2] Raineri, op. cit. p, 84.
[3] Goldstein, op. cit. p, 557.
[4] See examples of the counter arguments, C. J Sumner, "Victim Participation in the criminal justice system." Australia and New Zealand Journal of Criminology. December (1987). vol. 20. p, 208-209. Ashworth, "Victim Impact Statement." op. cit. p, 505-507. Rubel, op. cit. p, 237-242.
[5] The Supreme Court. Booth v. Maryland, 107 S. Ct. 2529(1987). See for details in the effect of the above ruling on the VIS in the USA. Hellerstein, "The Victim Impact Statement" op. cit. p, 409-430. Kelly, "Victims." op. cit. p, 77-81.

3) The Victim's Role in the Islamic Sentencing System

In comparison to modern Western legal systems, Islamic law goes even further in giving the crime victim a right to participate in the sentencing process. Islamic law, as will be explained shortly, places the crime victim in an incomparable position in the sentencing process; he is not only allowed to address the court at the sentencing stage to express his view about the intended sentence, but he has the power to compel the court to impose the punishment that he chooses from the pre-prescribed punishments. The victim may even, according to some scholars, be allowed to carry out the punishment himself.

Although such an approach may seem odd to modern Western legal thinking, it is based, at least from the Islamic point of view, on logical justifications stemming from the Islamic concept of criminal conflict and the administration of criminal justice and the aims of sentencing.

The nature and the extent of the victim's role in the sentencing process can be affected by many factors. Within Islamic law the focus will be on two major closely connected factors: the aims of sentencing and the concept of criminal conflict. The first factor is concerned with the victim's position in the sentencing policy. If the victim's satisfaction is considered, depending on the degree of such consideration, the sentencer would have to contemplate the victim's wishes and desires. Such a consideration would also require providing the victim with opportunities to deliver his view to the sentencing court. Consequently, if the victim is denied the opportunity to represent himself or if the sentence fails to meet his satisfaction, then he should be vested with a right to appeal against the unsatisfactory sentence. Thus, evidently, the more the victim is considered in the sentencing aims, the more powerful his position is in the sentencing process.

With regard to the concept of criminal conflict, drawing upon the principle that crimes are "a breach and a violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity,"[1] it has become one of the essential foundations of modern Western criminal justice systems that criminal conflicts are primarily between the state and the offender. Consequently, prosecuting and sentencing the offender are seen as an exclusive public function to which the crime victim should play no part. Thus, deciding whether to prosecute or not, and in the case of conviction, determining the sort and amount of the sentence, must be considered in the public interest. The notion of public interest includes the victim's interest just as

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[1] Sir W. Blackstone, "Commentaries on the Law of England." Apollo Edn, (1813). iv, 5. See, Ashworth, "Punishment and Compensation." op. cit. p, 91.

a member of the community but not as having a special position. Thus in the case of conflicts between the public interest and the victim's interest the priority would be given to the former. Whereas if the criminal conflict is envisaged as a conflict between the victim and his offender, the picture would be quite the opposite. Logically, the victim would be assumed a more influential role in all stages from the initial prosecution, investigation and charging to sentencing. In the latter stage, the victim may be consulted as to which punishment should be inflicted on the offender or may be given the right to choose the punishment that attains his satisfaction within a limited range.

Let us now see how the above factors affect the victim's position or role in the Islamic sentencing system. To that end, the Islamic sentencing system will be examined in order to determine to what extent it honours the victim's satisfaction. Then, the Islamic concept of criminal conflict will be analyzed to see how it affects the victim's role in the sentencing process.

a) <u>The Islamic Sentencing System</u>

It is beyond the scope of this chapter to explore the whole sentencing process in Islamic law. It should be noted from the outset that the analysis would not attempt to measure the effectiveness, the efficiency or the appropriateness of different sorts of punishments in Islamic law.

Punishment in Islamic law, the same as in any other legal systems, is one measure of social control used to preserve certain interests or values in society. However, it can be said that Islamic law follows a utilitarian sentencing philosophy as a justification for its punishments. Thus, punishment is seen as '*mafsada*' or an evil which must be avoided as far as possible. Imposing such evil may not be justified unless it is certain to achieve greater good or to protect an essential public interest.[1] A Muslim medieval jurist compared a sentencing court with a doctor who sometimes must sacrifice part of the patient's body in order to save the rest of his body.[2] A careful calculation however is imperative to insure that the amount of evil imposed is adequate to achieve its goal without being excessive. Such a consequentialist approach is expected to lead to harsher sentences for the prescribed crimes which is the case in Islamic law.[3]

There are some general features of Islamic sentencing policy which could be deduced from the writings of Muslim jurists, namely:

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[1] 'Oda, op. cit. vol. 1. p, 68. Abu-Zahrah, op. cit. vol. 1. p, 7.
[2] Ibn 'Abd-Al-salam, op. cit. vol. 1. p, 12.
[3] Islamic sentencing philosophy can be compared with Bentham's utilitarian theory in punishment. Jeremy Bentham, "Principles of Moral and Legislation." London, (1789).

- Punishments must be adequate in terms of their amount and severity to deter prospective offenders from committing crimes, and to prevent punished offenders from reoffending.[1]

- The limitation of punishment should be adjusted to the needs of the society. Therefore, the severity of punishment can be increased or decreased according to the real needs of a given society. Likewise, irremediable offenders can be incapacitated indefinitely if such a measure is the only way to protect the public interest.[2]

- Most codified crimes are punishable with mandatory corporal punishments. However, beyond these specific crimes, any punishment, which could achieve the Islamic sentencing aims, may be adopted.[3]

- Punishments should not aim at retaliation or humiliation of the offender. *Ibn Taymiya* (d, 728 AH, 1328 AD), a leading medieval Muslim jurist, asserted that, "punishments have been authorized by God for the benefit and the goodness of people, so it is a duty upon the executor of such punishments to perform with compassion like a father when disciplining his children."[4]

- The religious character of Islamic law casts its shadow over its sentencing policy. Besides its conventional punishments, Islamic law recognizes a set of attached religious measures such as repentance, forgiveness, expiation and the notion of punishment in the hereafter. These measures may be used on their own or in addition to the prescribed punishments.

- The personality of punishment is strictly observed. However, concerning non-punitive remedies, some sort of collective responsibility is recognized in Islamic law. For example, according to the principle of Akela, an offender's family or federation may be obliged to make a contribution to the payment of diyya or compensation to the victim.

- Legality of punishments is highly respected in Qisas and Hudud crimes, whereas in Ta'azir crimes judges are vested with wider discretion to tailor individual punishments that suit the offender's needs even if the punishment is not codified.

b) <u>The Aims of Sentencing in Islamic Law</u>

As has been mentioned in earlier chapters, crimes in Islamic law are divided into three categories, namely Hudud, Qisas and Ta'azir. Islamic

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[1] Ibn Al-Humam, op. cit. vol. 4. p, 112.
[2] Ibn Abden, op. cit. vol. 5. p, 480. Al-Mawardy, op. cit. p, 206.
[3] Ibn Abden, op. cit. vol. 4. p, 480-481.
[4] Ibn Taymiya, "*Al-ikhtiyarat.*" op. cit. 178. See, 'Oda, op. cit. p, 610.

medieval treatises used a language of general terms when speaking about the aims of sentencing which gives an impression that punishment in all categories aims for the same objectives. However, it is so difficult to declare one primary aim of sentencing in Islamic law as crimes in each category are punished for different purposes. Thus, instead of declaring one aim for all punishments, a closer examination leads to the appointment of a principal sentencing aim for each category. There are also supplementary or secondary aims.

In the following paragraphs, an attempt will be made to disclose the principal sentencing aims of each category in order to see to what extent such a sentencing policy affects the victim's role in the sentencing process.

i) Sentencing Aims in Hudud crimes

Hudud crimes are a set of crimes which are considered to be against Allah's right as denoting public rights. This category constitutes the smallest one with a controversial number of crimes ranging from five to seven crimes including theft, fornication and armed rebellion.

One of the striking features of Hudud crimes is that they are prescribed with one or more mandatory fixed punishments for each one. No mitigating or aggravating factors are admissible. Once the trial court concludes that the offender is guilty of a Hudud crime, it has no option but to impose the fixed punishment. The other striking feature of Hudud crimes is the severity of the punishment which includes some of the harshest sanctions such as mutilating the hand for theft and flogging for fornication. Hudud crimes are also considered as immutable crimes in the sense that their punishment may never be changed. Such immutability is justified with reference to the interests they are intended to protect. That is to say, these penalties are intended to protect some basic interests and values of Muslim society such as public and personal property (theft and highway robbery), family structure, conjugal and family relations (fornication) and personal reputation (defamation).[1] These interests in Islamic view are of a permanent nature which ought to be protected by the prescribed severe penal measures and there is no authority for successive Muslim societies to change the value of these interests or to modify their punishments let alone to abolish them.[2]

Apparently the prime objective of Hudud punishments lies in their preventive capability. They represent an extreme case of the use of sentencing as a method of crime prevention. Both general and individual

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[1] Al-'Awa, "The Basic Of Islamic Penal Legislation." op. cit. p, 127. Ali Mansour, "Hudud crime." op. cit. p, 195.
[2] 'Oda, op. cit. vol. 1. p, 613.

or specific deterrence is intended with more emphasis on the former. Although deterrence is still recognized as one of the sentencing aims in modern criminal justice systems, the severity of Hudud punishments coupled with the elimination of the use of mitigating factors means that Islamic law relies heavily on the deterrent effect of the punishment more than any modern law. It tries to increase the use of fear and threats to convey a strong message to prospective offenders. A medieval Muslim jurist summarized the aim of Hudud punishment as "preventive or a deterrent before the act and suppressive after it; thus knowledge of punishment is intended to prevent the commission of the criminal act, and its execution thereafter should prevent the criminal and others from engaging in similar conduct in the future."[1]

In line with the general deterrent policy, most Hudud punishments are carried out publicly in order to increase the amount of threat and fear and effectively make the punishment known to a larger number of people. Thus the Qur'an says, "*and let a party of the believers witness their punishment.*"[2] It also serves for the individual deterrent as it intensifies the feeling of embarrassment and disgrace of the offender being publicly punished in Hudud crimes.

As for the individual deterrent, it also occupies a proper place in Hudud punishments. They aim at preventing the offender from reoffending in the future. The extreme example of achieving such an aim through Hudud punishments is in the case of theft where the offender is punished with the amputation of his right hand in order to effectively prevent him from reoffending. Some medieval scholars even supported the idea of indefinite incapacitation of recidivist irremediable offenders by keeping them away from the public until they are proved to amend or otherwise die.[3]

As a clear indication of its religious character, Islamic law pays considerable attention to the expiation of the offender as an essential aim of Hudud punishments. As Hudud crimes are considered to be an aggression against God's commands, the execution of their punishments is intended to absolve the offenders from his sins. Thus, on many occasions the Prophet said after punishing an offender of Hudud crimes that Allah has accepted the offender's repentance.[4] In line with this

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[1] Ibn Al-Humam, "*Sharh fath Al-qader.*" op. cit. vol. 4. p, 112.
[2] The Qur'an, 24:2.
[3] Ibn-Abden, op. cit. 5.p, 480. Ibn-Taymiyya, op. cit. p, 178.
[4] Related by Al-Termithi, *Bab Al-Hudud*, Hadith no, 1373. It is remarkable to mention that despite their knowledge of the punishments' severity, some Muslims who committed Hudud crimes came, on several occasions, to the Prophet asking him to punish them in order to be expiated from their sins. See, Ibn Al-Qayyim, "*I'lam Al-mowaq'en.*" op. cit. vol. 3. p, 21. See also Al-Bukhari, *Ketab Al-Hudud*, Hadith no, 6325-6326

policy, expiation may be achieved without punishment if the offender is found to be sincerely repentant.[1]

It is clearly noticeable that in Hudud punishments deterrence is given such a priority that it overrides other important sentencing aims such as the reformation and rehabilitation of the offender. By setting one mandatory punishment it means that no element of proportionality is allowable. In other words, the trial court is deprived of any discretion into measuring the degree of the seriousness of the offence, or the culpability of the offender in order to tailor the best-fit the punishment for the offender. Thus, previous convictions and the social background of the offender for example have no significance in determining Hudud punishments.[2] The justification given here is that Hudud crimes are punished to protect essential public interests which deserve the sacrifice of the offender's interests or even the public interest in resocializing the offender.[3]

Now what is the role of the victim in determining Hudud punishments? As has been shown above when listing the aims of Hudud punishments, the victim's interests and feeling are completely neglected. The victim, consequently, is not allowed to have any role whatsoever in determining the offender's fate or at least to influence the sentencer. Even the victim's forgiveness has no effect on the sentencer's decision.[4] The only possible way that the victim could practically affect the outcome of the sentencing process in Hudud crimes is by abstaining from reporting the crime in the first place or by altering his testimony. On the other hand, it is not just the victim's role which is deprived from affecting the criminal proceedings in Hudud crimes, but even the victim's status in terms of his age, gender and social background has also no significance on the sentencing process. Moreover, even the effect of the crime on the victim has no effect on the sentences. It makes no difference if the victim suffers more or less than expected or if the crime affects more than one victim.

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[1] On one occasion, a man came to the Prophet and said, I have committed a Hudud crime and I want to be absolved. The Prophet did not respond. Then they all prayed with other believers. The man then repeated his statement. The Prophet then said, have you prayed with us. The man replied yes. The Prophet then said, you could go as Allah has forgiven you. See, Ibn-Al-Qayyim, op. cit. vol. 2. p, 197-198.

[2] It should be noticed however that the offender's character is highly considered in determining his criminal liability as he must be of the age of discretion and be able to exercise choice and having all the mental requirements which are demanded by any modern laws. See for details, Bahnassi, "Criminal Responsibility In Islamic Law." op. cit. p, 171-193.

[3] 'Oda, op. cit. vol. 1. p, 613.

[4] As has been explained in earlier chapters, victim's forgiveness may have an effect in cases of theft and defamation if it is offered before the trial stage.

The justification of such complete exclusion of the victim in the Hudud sentencing process seems to be that Hudud punishments are intended to protect essential public interests for which personal interests including that of the victim should be sacrificed. The victim is seen however as one of the general public who is covered by the term, public interest.

Thus, the sentencing policy in Hudud punishments pays no attention to the satisfaction of the crime victim. Therefore, it is expected as a corollary to such negligence that the victim is utterly excluded from the sentencing process. This policy is similar to the position taken by modern Western legal systems in which punishments are prescribed not for the sake of the victim but primarily to safeguard certain public interests. Thus, in both systems the crime victim has no role to play in the sentencing process.

ii) The Aims of Sentencing in Qisas Crimes

The second category of crimes in Islamic law is Qisas crimes which encompasses a large number of offences including all sorts of homicide as well as all non-fatal offences against person. Qisas crimes are further divided broadly into two main sections namely, intentional and unintentional. Qisas crimes are dealt with in Islamic law in a different approach to that used in Hudud crimes. The crime victim is allowed a far more influential role in determining the outcome of the proceedings in Qisas crimes than in Hudud crimes.

Generally speaking, Islamic law responds to Qisas crimes by distinguishing intentional crimes from unintentional crimes. As to the former, there are three options available namely, the equivalent infliction of physical or bodily harm against the person who committed the act, the payment of Diyya 'compensation', or an unconditional discharge upon the victim's, or his family's, forgiveness. With regard to unintentional Qisas crimes there are only two options which are diyya and forgiveness. In addition, there are some other supplementary religious duties or exercises which aim at absolving the offender from his sins such as setting a slave free, or alimentation of a certain number of the poor. However the main sentencing aim for Qisas punishments is to achieve the victim's satisfaction. In the following paragraphs, this aim will be analyzed to see to what extent it affects the victim's role in the sentencing process.

•The Satisfaction of the Crime Victim

Qisas crimes are considered as private wrongdoings which cause harm primarily and foremost to the victim who suffers the direct effect of the

aggressive act.[1] Unlike other offences which may harm the victim's property or reputation, Qisas crimes threaten the victim's being itself which is in most cases irrecoverable. Even if the victim recovers, Qisas crimes, unlike any other crimes, leave their strong long-lasting effects on the victim. In addition, violent crimes which result in the victim's death or injury affect the feelings of his immediate relatives and friends more than any other crimes.[2] For all this, Qisas crimes in Islamic law are profoundly regarded as individual offences to the extent that they, as will be explained later on, come close to civil wrongdoings particularly in the case of unintentional offences for which no criminal punishment is prescribed.

The individuality of violent crimes in Islamic law necessitates that the victim's satisfaction should be given priority when considering the aims of Qisas punishments. The Qur'anic verses and the prophetic practice are clear in giving the victim's satisfaction priority over any other sentencing aims. While in Hudud crimes, punishments are set in general terms and addressing the community as a whole, in Qisas crimes, the address is directed to the victim or his heirs.[3]

The direct effect of setting the victim's satisfaction as the prime aim of Qisas punishments is that the victim is placed in a remarkably influential position in the sentencing process. Accordingly, the victim is given effectively the ultimate say in determining the outcome of the criminal proceedings in Qisas crimes. He has the right to choose which sanction is to be inflicted on the offender. Thus, once the trial court concludes the offender's liability of a Qisas crime, it should ask the victim to choose the sanction that vindicates his victimization. His freedom however is limited to choosing from three options i. e the equivalent infliction of the physical harm if applicable[4], the payment of Diyya or to waive the punishment altogether. In unintentional violent offences, the choice is further limited as it is confined to be chosen from the last two options.

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[1] 'Oda, op. cit. vol. 1. p, 614.

[2] Shaltute, op. cit. p, 317.

[3] See for example, The Qur'an, 2: 178, 17:33.

[4] The Qur'an states "We ordained therein (in Torah) to them (the sons of Israel) that life for life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and wounds equal for equal, but if any one waives his right by way of charity, it is an act of atonement for himself." (the Qur'an, 5:45). In a rigid interpretation of this verse, most Muslim jurists were so strict in applying the principle of equivalent physical harm that a complete equality must be ensured between the harm suffered by the victim and that to be inflected on the offender. Accordingly, whenever there is doubt that the equivalent physical harm cannot be exactly accomplished, then Qisas must not be carried out, and the victim has to either accept compensation or to waive his right. In practice, apart from murder, the physical harm cannot be calculated in the vast majority of violent crimes particularly if the violence causes pain without an evident measurable injury. Medieval Muslim treatises devoted lengthy and detailed essays addressing the application of principle of equivalent harm. See for example, Ibn-Qudama, "*Almughny*", op. cit. vol. 7. p., 683-756. Ibn-Rushd, op. cit. vol. 2. p, 395. Al-Kasany, op. cit. vol. 9. p, 297-.

The principle of "equivalent harm" in intentional violent crimes coupled with the victim's right to waive it is considered in Islamic law as the ideal method to achieve the natural justice which responds to the people's notion of justice.[1] That is to say, whoever caused someone to suffer; he must be made to suffer the exact harm. The Qur'an repeatedly says, "*The recompense for an injury is equal thereto.*"[2] Such strict sense of equality is meant to satisfy the victim and vindicate his vengeful sentiment. Thus, the only person who could alter this conclusion i. e an eye for an eye is the one who suffers the harmful effect of the offender's act i.e. the victim by either offering his forgiveness or agreeing to accept diyya as compensation. Thus, the Qur'anic verses which set the above principle were always followed with the recommendation to the victim to waive his right to Qisas. It for example says, "*but if a person forgives and makes reconciliation, his reward is due.*"[3] The principle has claimed support from some modern lawyers and criminologists in many Islamic states as the most suitable weapon to fight crimes in their countries and to achieve the popular notion of justice. Thus, Professor Ahmed Al-Alfi[4] commented on the principle of Qisas saying, "punishment must seek justice for the victims of crimes. This is not to imply that punishment is nothing more than the thoughtless impulse of revenge. Rather, the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the victim and his family is a necessary part of that search, which in turn plays an important role in the process of social control."[5]

To modern Western eyes such a concept of justice may seem strange or unacceptable, however, to properly understand the theory of Qisas punishment it should be considered in its historical context. On the one hand, in the pre-Islamic Arabic tribal system, the killing of one person would have resulted in holding the whole tribe of the offender responsible, placing every member, especially the vulnerable, at risk of being killed. The degree of retaliation depended largely on the social and economic status of the victim. Very often the result would be a long-lasting war. So it was a step forward when Islamic law prescribed the principle of Qisas by which it declared many rules, such as only the person who committed the crime must bear the consequence of his act or the principle of personal liability[6], and only the equivalent harm or less

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[1] See Abu-Zahrah, op. cit. vol. 2. p, 46.
[2] The Qur'an, 42:40. See also similar verses, 2:194, 5:45, 16:126.
[3] The Qur'an, 42:40
[4] Professor of Criminal Law and the Dean of the Faculty of law. University of Zagazig, Egypt.
[5] Ahmed Al-Alfi, "Punishment In Islamic law." In M. Bassiouni, "The Islamic Criminal Justice System." op. cit. p, 231.
[6] It is established by many Qur'anic verses for example one verse says "every soul draws the deed of its acts on none but itself, no bearer of burdens should bear the burdens of another. "

but not greater should be inflicted on the victim, and finally the rule that established the equality between all people before the law irrespective of their social, political or racial status.[1] On the other hand, the principle of Qisas in Islamic law is seen as a continuation of the tradition of the Judeo-Christian teaching concerning the talion or the law of an eye for an eye and a tooth for a tooth. The addition or innovation of Islamic law in this regard is that it allows the victim to choose between exacting the same harm on the offender or to forgive him with a clear indication to preferring forgiveness.[2]

The Islamic retributive sentencing approach in Qisas crimes meets in some ways with the 'Just deserts theory', as a modern form of retributive philosophy, which re-emerged in the 1970s and 1980s in Western criminal justice systems especially in United States.[3] However, the Islamic retributive approach seems clearly to have gone too far in applying the 'desert principle' using it as a vehicle to achieve the victim's satisfaction. On the other hand, the possible use of the victim's forgiveness appears to fail to seize the target of 'just desert' since it may render Qisas punishments very lenient for the offenders of some extremely serious crimes, at least from the modern point of view, and crimes such as murder may go unpunished. This is however not the case as the 'just desert theory' in Islamic law is measured by the victim's not the public criteria, accordingly if the victim voluntarily waives his right to Qisas punishment that means the 'just desert' objective has been accomplished.

iii) <u>The Aims of Sentencing in Ta'azir Crimes</u>

Ta'azir crimes are the third category in Islamic criminal law. In fact there is not a specific set of crimes under the term Ta'azir. Ta'azir

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[1] This rule is established by a number of Qur'anic verses and the practice of the Prophet. The Qur'an says, "Oh mankind! Lo, We have created you male and female and have made you nations and tribes...Lo, the noblest of you in the sight of Allah is the best in conduct." The Qur'an, 49:13. Also, in a well-known report, the Prophet is reported to have said to some of his companions who interceded for mercy when a noble woman was charged with theft, He responded with anger saying that the people before you declined and vanished because of their injustice; if a noble committed a crime no punishment would be imposed on him, but if a humble person was the offender he surely would be punished. I swear if my daughter *Fatema* (his daughter) stole I would punish her." Related by Al-Bukhari, *Ketab al-maghazi*, Hadith no, 3965. In other Hadith the Prophet is reported to have said, "people are equal like the teeth of a comb." This ideal practice continued during the time of the immediate successive caliphs. It is reported that *Omar Ibn-A-Khatab* (d, 23 AH, 644 AD) the second caliph said in a message sent to one of his judges that, "make people equal before you in your session and your justice, lest no noble may look forward to your injustice and no humble person may despair of your justice." See Al-Mawardy, op. cit. p, 76. Relying on these sayings and practice, a contemporary Muslim jurist claims that Islamic law rejects all sort of immunity from the application of the criminal law including, diplomatic, parliamentary and judicial and the immunity granted to the head of states. See 'Oda, op. cit. p, 307-340.

[2] See, Bassiouni, "Qisas Crimes." op. cit. p, 204.

[3] See Ashworth, "Sentencing and Criminal Justice." op. cit. p, 69. f

literally means discipline or chastisement in their broadest connotation. In its legal sense it means a variety of sanctions which can be inflicted for wrongdoings for which no punishment is prescribed in the main sources of Islamic law namely the Qur'an and the Sunna. In practice, Ta'azir has been used as a vehicle by which judges have been authorized with discretionary powers to impose a variety of sanctions to face any misdeeds which are considered to threaten public or private interests. Thus, going back to the time of the Prophet, one could imagine that Hudud and Qisas crimes covered almost all serious wrongdoings, so Ta'azir is intended to work as a provisional measure to meet the needs of the growing Muslim society to defend both public and individual interests.

Offences listed under Ta'azir can be classified as private or public crimes according to the interest it aims to protect. Such classification serves to identify the prime aim of the sentence as well as the possible role of the victim in the sentencing process.

Generally speaking, the two main aims of Ta'azir punishments are reformation of the offender and the satisfaction of the victim. Ideally, Ta'azir strives to achieve both aims, however, where the crime is classified as a public offence, priority is given to the reformation of the offender as the prime aim of the sentence, whereas in private crimes the satisfaction of the victim is given precedence. To achieve the rehabilitation of the offender, judges are authorized to devise a tailor-made sentence that best fits the specific needs of the offender in each case.[1] Thus, various remedies have been used including corporal punishment such as flogging[2], deprivation of liberty, pecuniary penalties, rebuking and others.[3] In fact, the range of Ta'azir punishments are so extensive that judges can impose the best remedy to treat the offender's specific criminal disposition.[4] The only two restrictions are that punishment must be in proportion with the seriousness of the offence and

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[1] Such an extensive discretionary power raises the question of legality. Muslim scholars, particularly the contemporaries, assert that there is nothing in Islamic law to prevent a competent authority in any Muslim society to codify Ta'azir offences and so to restrict the judge's authority by prescribing certain measures to be used as punishments. Taymour, "The Principle Of Legality And Its Application In Islamic Criminal Justice." op. cit. p, 149-171.

[2] The use of death penalty in Ta'azir crime is controversial. See 'Oda, op. cit. vol. 1. p, 688.

[3] See, Ibn-Farhun, op. cit. vol. 2. p, 217.

[4] Thus other remedies mentioned by Muslim jurists includes, exhortation or warning, ostracising the offender by excluding him from interacting with others until he recognise his misconduct and show a sincere willingness to amend his conduct, dismissing the offender from his job or publicising his misdeed to be publicly known. See, Benmelah, "Ta'azir Crimes." op. cit. p, 218. Al-Mawardy. op. cit. p, 206.

the culpability of the offender, and it should not aim at humiliating or degrading the offender.[1]

As to the satisfaction of the crime victim, Muslim jurists are in agreement that this aim should be given precedence whenever the victim's interests have been harmed by the offender's act. Examples of such crimes are perjury and criminal fraud. In such crimes, the crime victim is recognized as having legitimate interests in the outcome of the criminal proceedings leading to the offender's punishment or acquittal. As such the victim is expected to launch a prosecution and to be present at the trial to prove his case. Once the conviction has been secured the victim is allowed to make an oral statement explaining the effect of the crime on him in an attempt to influence the court in the sentencing decision. However, unlike Qisas punishment, the victim is not allowed to direct the court as to which punishment should be inflicted. On the other hand, the victim's forgiveness does not have the same effect as in Qisas crimes at least in theory. It may constitute a major mitigating factor, but it is not enough to terminate the proceedings according to the majority of Muslim jurists.[2] The power to end the proceedings upon the victim's forgiveness is rested with the trial judge who should consider the public interest in his decision.[3] In practice however, the victim's forgiveness usually leads to the offender being discharged and the termination of the proceedings, particularly in trivial offences.

In light of the above considerations, it has been clearly demonstrated that the more the victim's satisfaction is considered in the sentencing aims, the more influential role is given to the victim in the sentencing process. Thus, in Qisas crimes where the victim's satisfaction is declared as the prime sentencing aim, the victim is vested with the ultimate right to effectively manipulate the sentencing process. Such a right is less effective in Ta'azir crimes in which the victim's satisfaction is a major sentencing aim but it is in competition with another major aim i.e. reforming the offender and protecting the public interest. Finally, in Hudud crimes where the victim's satisfaction is not listed in the sentencing aims, the victim's right to participate in the sentencing process is totally withdrawn.

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[1] Abu-Zahrah, op. cit. vol. 1. p, 78. Surveying Islamic medieval legal treatises, one could notice that specifying what constitutes Ta'azir offence and its suitable punishment is largely made by process of precedents. Unless the misdeed is unprecedented, jurists are likely to refer to previous judgements or jurist opinions as to whether certain acts should be consider as an offence and its appropriate sanction. See for example of medieval jurists, Ibn-Farhun, op. cit. p, 212-241. Ibn-Qudama, "*Almughny.*" op. cit. vol. 8. p, 326-345.

[2] See, Al-Mawardy, op. cit. p, 245.

[3] Ibn-Farhun, op. cit. p, 224.

c) The Concept of Criminal Conflict in Islamic Law

The criteria according to which a certain wrongdoing may be considered as a crime or a tort and dealt with accordingly are quite problematic even for modern Western laws bearing in mind that the criminal-civil dichotomy is a recent development in legal history.[1] In Islamic law, the distinction is even more problematic. It has been pointed out in previous chapters that Islamic law does not emphasize the distinction between criminal and civil wrongs particularly for Qisas or private crimes. Islamic jurisprudence usually studies Hudud and Qisas crimes separately from civil disputes. However, crimes are not the same in Islamic law and are dealt with differently according to the interests they infringe. Thus, crimes are divided into two main categories, private and public crimes. The former comprises mainly all Hudud crimes and some Ta'azir crimes whereas the latter consists of Qisas crimes and some Ta'azir offences. When it comes to the former, the criminal-civil dichotomy is highly stressed. Thus, the criminal conflict is seen to be between the offender and the state or the community as a whole. Corollary to this belief, Muslim scholars assert that the state alone representing the whole community has an exclusive right or rather duty to defend public interests by undertaking all criminal proceedings from initial prosecution until the execution of punishments.[2] Consequently, the crime victim is completely excluded from the whole criminal process, save as a witness. Whereas if the crime is deemed private, the criminal-civil dichotomy is clearly de-emphasized.[3] The way that such crimes are dealt with gives the impression that Islamic law pays little significance to the distinction between civil and criminal wrongs. Thus, despite the possible infliction of criminal penalties, the whole process surrounding private crimes follows similar procedures that are adopted in civil litigation. Unintentional private crimes are even met with purely civil remedies such as compensation with no possibility of imposing punitive sanctions. The state, at least at the earliest stages of Islamic jurisprudence, was almost excluded from the process, as it was not considered as a party to the conflict. The victim, as a result, is put in almost the same footing as a civil litigant, and perhaps is even more powerful.

To be precise, the Islamic approach of differentiating between private (Qisas) and public (Hudud) crimes will be briefly tested against some criteria which are suggested to differentiate between crimes and torts.

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[1] See, Sebba, "The Victim's Role in the Penal Process." op. cit. p, 225.

[2] As explained in earlier chapters, private individuals, including victims, can initiate criminal prosecution in public crime as a representative of public interest.

[3] It should be noted that private crimes in Islamic law particularly at the Prophet's time constituted the bulk of the Islamic criminal code.

These criteria are: the standard of proof, the accessibility of the victim as a witness, the discretion to enforce the sanction, the effectiveness of the victim's forgiveness, and the nature of the sanction.

i) The Standard of Proof

If we apply the test of the standard of proof, it would be easily noticed that the standard of proof required in Islamic criminal law is not the same for all crimes. Instead, it adopts a descending system of proof which varies from one category of crime to another. Thus, it reaches its peak in Hudud crimes in which the required standard of proof is far stricter than in Qisas crimes which in turn require tougher standards than in Ta'azir crimes. Even within the same category, the standard varies from one crime to another according to the severity of its punishment. Thus, in Hudud crimes the guilty verdict cannot be declared unless the offender is proved beyond any reasonable doubt to have committed the crime. Fornication, for example, can only be proved by one of two methods. The first method is the testimony of four eyewitnesses who must have seen the actual sexual intercourse. The quality of the witness' character is of paramount importance, and they must meet certain qualities before their testimony can be permitted.[1] Besides, witnesses in fact are discouraged to come forward since they may be punished for committing defamation if they fail to meet the required number, or if one or more of them fails to meet the required qualities or retract his testimony.[2] The second method of proving fornication is confession which must also meet certain conditions[3] and can be retracted at any stage even at the execution of the punishment in which case the proceedings must be terminated and the offender unconditionally discharged.[4] In addition, according to the principle of '*Shubha*' Muslim jurists are in agreement that Hudud

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[1] Possibly because testimony was the main method of proof, Muslim scholars highly emphasised the quality (*Adala*) of witness. In addition to the general qualities for any witness in civil or criminal disputes, there are special qualities which must be met for certain crimes especially in Hudud crimes. Acknowledging the difference between Muslim jurists, the following qualities are generally required in witnesses whose testimony can be accepted to prove the case of fornication: maturity, reason, memory, speech, visual and audible perception, good character and Islam. Furthermore, witnesses can be disqualified because of blood relations, enmity, or partiality. Testimonies must be also presented in the same legal session and to be identical or at least not contradictory. Finally, testimony must convince the trial court. see for details, 'Oda, op. cit. vol. 1. p, 395-435. Ma'moun Salama, "General Principles Of Criminal Evidence In Islamic Jurisprudence." In Bassiouni, op. cit. p, 116-119.

[2] Al-Kasany, op. cit. vol. 7. p, 48. Ibn-Qudama, op. cit. vol. 10. p, 187.

[3] Presuming the confessor is of age, sane, mature, capable of self-expression and acting of his own free and conscious will, confession must be certain, unequivocal and expressed with free will before a judge who must question the confession to ensure that it has not been gained by torture or any other pressure which may have affected the offender's free will. According to some jurists, confession in fornication must be repeated four times in different sessions. See, Ibn-Qudama, op. cit. vol. 10. p, 167-170. Al-Kasany, op. cit. vol. 7. p, 50.

[4] Al-Kasany, op. cit. vol. 7. p, 61.

punishments must be avoided whenever there is any reasonable doubt.[1] In this connection the Prophet is reported to have said that "drop the Hudud in cases of doubt as far as possible. If there is a way out, then clear the way, for in penalties, if the Imam (judge) makes an error on the side of leniency, it is better than making an error on the side of severity."[2]

In Qisas crimes, the standard of proof required is less strict than in Hudud crimes in terms of the number of witnesses and also the admissibility of other evidence such as presumptions. Generally speaking, Muslim jurists distinguish between Qisas crimes which incur corporal punishments and those which do not. For the former, most jurists require at least two witnesses[3], whereas other jurists are satisfied with only one witness.[4] In Qisas crimes which are punishable with non-corporal punishments such as fines, the standard of proof is further relaxed as it can be fulfilled with a testimony of one witness.[5] In addition, although the offender's confession must meet the aforementioned qualities, it, unlike in Hudud crimes, cannot be retracted providing that it was not gained by any sort of pressure.[6] Furthermore, some scholars assert that presumptions can, on some occasions, be accepted as proof especially in non-corporal punishments.[7]

It should be noted that many Muslim scholars believe that the standard of proof in Qisas crimes is the same as the standard required in civil disputes.[8] Such a trend manifests how Islamic jurisprudence came to regard offences against the person as if they were civil wrongdoings.

In Ta'azir crimes particularly those considered private, the standard of proof is even further relaxed. According to the *Hanafi* school, the standard of proof required for Ta'azir crimes can be even less than that required in civil cases.[9]

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[1] The principle of *shubha* opens a wide door for offenders to avoid punishments particularly in Hudud crimes by raising doubt regarding the elements of the crime or the standard of proof. See for a recent detailed study of the principle of *shubha*. See Mansour Al-Hefnawy, "*Al-Shubhat Wa Athurha Fi Al-'Okuba Al-Jena'ya Fi Al-Fiqh Al-Islami*", or "Shubha And Its Effects On The Criminal Punishments In Islamic Law." *Maktba'at Al-Iman*, Cairo (198).

[2] Al-Shawkani, op. cit. vol. 7. p, 118.

[3] Some jurists insist that witnesses must be male whereas others accept female witnesses. See, Ibn-Qudama, op. cit. vol. 10. p, 41. Ibn-Farhun, op, cit. vol. 1. p, 241.

[4] Ibn-Al-Qayyim, "*Al-Turq Al-Hukmiya.*" op. cit. p,

[5] Ibn Abden, op. cit. vol. 3. p, 258. 'Oda, op. cit. vol. 1. p, 318. However, some jurists assert that all Qisas crimes must be proved according to the same standard of proof which is the testimony of two witnesses. See Ibn-Qudama, op. cit. vol. 12. p, 9.

[6] Al-Kasany, op. cit. vol. 7. p, 232

[7] Ibn-Qudama, op. cit. vol. 10. p, 7

[8] This trend is lead by some prominent medieval jurists such as Al-Auza'i and Al-Zuhri as well as some late jurists such as Al-Kasany. See Al-Kasany, "*Nayl Al-awtar.*" op. cit. vol. 6. p, 311.

[9] See 'Oda, op. cit. vol. 2. p, 321.

ii) The Accessibility of the Victim as a Witness

The crime victim is considered by modern Western legal systems as a prime witness and sometimes the only witness. On the contrary, Islamic jurisprudence does not recognize the crime victim in Qisas and private crimes as a witness and hence he is not allowed to give evidence in court. His account however may be exceptionally considered in some cases but it is not adequate on its own to hold a conviction verdict. The reason behind such exclusion is that Muslim scholars regard the crime victim as a party to the conflict and someone who has an interest in ensuring the conviction of the offender.[1] A recent application of the rule that the victim cannot be a witness is found in the Sudanese Islamic penal law 1983, in which the Supreme Court rejected the testimony of the victim considering him as a plaintiff who has a special interest in convicting the alleged offender and therefore his testimony cannot be admitted.[2]

iii) The Discretion to Enforce the Sanction

According to Austin, the distinction between private wrong and public wrong rests upon whether the sanction is enforced at the discretion of the sovereign or at the discretion of the party whose right has been violated.[3] According to Islamic jurisprudence the victim of a Qisas crime has the discretion to enforce the sanction or to waive it. Thus, whether the punishment is corporal or pecuniary, the victim not the state has the right to have the punishment enforced or to waive it completely. Moreover, as will be discussed shortly, the crime victim, according to some scholars, is even allowed in principle to carry out the punishment himself if applicable.

iv) The Effect of the Victim's Forgiveness

It has been suggested that the only criterion to differentiate between a crime and a tort is that the sanction for a crime is remissible only by the state.[4] As has been explained in the previous chapter, in Qisas crimes, the victim but not the state has the right to forgive the offender. Such forgiveness is legally effective as it terminates the proceedings ands end the case. Whereas in Hudud crimes, just as in modern laws, the victim's forgiveness is not recognized even as a mitigating factor.

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[1] 'Oda, op. cit. vol. 2. p, 316.
[2] The Supreme Court, Sudan government v. James Akiyomdot. Sc. no. 68. (1986). S. L. J. R. p, 85. see also Sudan government v. Mohammed Arbab and others. Sc. no. 65. (1985). S. L. J. R. p, 68.
[3] J. Austin, "Lectures on Jurisprudence." vol. 2p, 72 and 190-2, quoted in Ashworth, "Punishment and Compensation." op. cit. p, 91.
[4] Kenny, "The Nature of A Crime." In Turner edition, "Kenny's outline of criminal law." (1952). p, 539. Quoted in Sebba, "The Victim's Role in Penal Process." op. cit. p, 226.

v) The Nature of the Sanctions

The nature of sanctions prescribed for the wrongdoing may stand as an important criterion to distinguish a crime from a tort. In general, crimes are sanctioned with mainly punitive remedies whereas torts are prescribed with civil remedies such as compensation. In Islamic criminal law this is not always the case as most private crimes are handled with purely civil remedies. This is particularly true in unintentional violent crimes which are prescribed only with compensation or the victim's forgiveness. As to intentional private crimes, they are prescribed with both punitive and civil sanctions. However, the punitive sanction is, in the majority of cases, substituted with compensation because it is technically unattainable or as a result of the victim-offender mediation. Thus, in practice compensation is the main remedy to tackle all private crimes in Islamic law. Hudud crimes, on the contrary, are punishable with purely punitive penalties.

Thus, viewing Qisas crimes in Islamic law as private crimes and dealing with them accordingly makes it logical to give the victim of such crimes a more influential role in the sentencing process. There might be legitimate controversy over the extent of the victim's role. Whereas in Hudud crimes, which are conceived as a public crimes, the victim is rationally excluded from the sentencing process.

d) Can the Victim Execute the Punishment Himself?

It might seem extremely odd to modern legal thinking to raise such a question, but it is a fact that such a question has always been on the table for discussion in Islamic jurisprudence. Following the crime categorization mentioned above, the possibility of the crime victim executing the punishment is only discussed in Qisas crimes. Whereas in Hudud crimes such a question has not been raised since they are deemed public crimes and the victim is not consequently specifically considered in the sentencing policy. Thus, it is agreed in Islamic jurisprudence that Hudud punishments must be executed by a public authority.[1]

As to Qisas crimes the situation is different. It has been explained above that based on the Islamic classification for Qisas crimes as private or near-tort crimes, the crime victim is given extensive power in the sentencing process. Thus, the question to be asked is not 'can the victim execute the punishment himself?' but 'should the victim be allowed to do so?'

[1] Ibn Al-Humam, op. cit. vol. 4. p, 130. 'Oda, op. cit. vol. 1. p, 756.

Considering the Qur'anic verses[1] and Prophetical practice, most medieval Muslim scholars agree that crime victims have a 'right' to execute the prescribed punishments themselves.[2] The only condition required here is that the victim must have the ability or the skill to inflict the punishment without causing greater harm to the offender. This condition stems from the principle of 'equivalent harm' that requires the infliction of the same harm done to the victim. Accordingly, in the case of murder where the punishment is the death penalty[3], the victim's heir or '*Waliyy al-damm*' has the right to perform the punishment himself. If the victim's heir could not, or does not want to, perform the punishment he, he is allowed to employ a professional executor to perform the punishment on his behalf.[4] Whereas in other intentional violent crimes, the majority of Muslim jurists believe that the exact harm to be inflicted upon the offender is to difficult to measure even for professionals, so giving the victim's vengeful sentiment, he would not be able to safely perform such a delicate operation. Consequently, the victim must not be allowed to do so even if he has the required skill.[5] Thus, the suspension of the victim's right to execute the punishment in this case is due simply to practical considerations. Therefore, some jurists assert that if the victim has the skill to perform the punishment he should be allowed to exercise his 'right'.[6]

On the other hand, Muslim scholars are in agreement that the execution of Qisas punishments must be administered under the supervision of public authorities in order to ensure that all the required conditions are met to prevent any possible abuse.[7] However, what would the case be if the victim carried out the punishment without such supervision? Would he be held liable for committing a crime of causing death or injury? Muslim jurists addressed such a question and concluded that providing that the offender has been proved guilty of a Qisas crime, the victim cannot be held liable for exercising his own 'right'[8]. However, they

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[1] For example the Qur'an says, "Do not take life which Allah has made sacred except for just cause, and if any one is slain intentionally, we have given his heirs authority: but let him not exceed bounds in the matter of taking life." The Qur'an, 17: 33.

[2] Al-Kasany, op. cit. vol. 7. p, 246. Al-Hattab, op. cit. vol. 6. p, 256.

[3] Presuming that the victim's heirs do not accept compensation and offer no forgiveness.

[4] See Shaltute, op. cit. 368.

[5] Al-Hattab, op. cit. p, 253. 'Oda, op. cit. vol. 1. p, 758.

[6] This opinion is attributed to *Hanafi* school, see Al-Kasany, op. cit. vol. 7. p, 246.

[7] Abu-Zahrah, op. cit. vol. 2. p, 512. Ibn-Qudama, op. cit. vol. 7. 690.

[8] According to the Islamic classical jurisprudence all souls and properties are legally protected. However, such protection may be removed totally or proportionally for certain reasons. For example, an intentional unlawful killing of a protected soul is one proportional reason for which the protection of the offender's soul may be removed just for the benefit of the victim's legal heirs. The removal of the legal protection commences from the moment that the removing reason has arisen, the subsequent judgement is to confirm but not to establish such removal. See for more detail, 'Oda, op. cit. vol. 1. p, 529-557. Al-Hattab, "*Mawahib Al-jalil*" op. cit. vol. 6. p, 233.

distinguished between two cases; the first is that if the victim or his heir carried out the punishment in accordance with the Qisas principles of inflicting the equivalent physical harm. Here the victim could not be punished for carrying out the punishment because he practised his own right which would not be practically altered even if the punishment was administered under the supervision of a public authority, but the executor must be punished for overriding the jurisdiction of public authority[1]. The second case occurs when the victim or his heir carried out the punishment but failed to comply with its requirements and so caused greater harm to the offender. If the excessive harm were inflicted intentionally, the executor would be held liable for committing a Qisas crime as well as overriding the state authority. But if the excessive harm were unintentionally inflicted, he would be liable to compensate the offender or rather the victim.[2]

In Ta'azir crimes the question of the victim's right to execute the punishment himself is not imaginable as such crimes and their punishments have never been codified and are mainly reformatory in nature so they are left to the discretion of the trial judges.

4) Assessing the Victim's Participation in the Sentencing Process

It is expected that many victims and victim's proponents would welcome the Islamic approach in including the crime victims in the sentencing process and giving them a powerful role to the extent that it makes the victim as 'the master of the process'. Such an approach may be seen to achieve the victim's ultimate satisfaction and increase his confidence in criminal justice. This may also be reflected in the victim's attitude to render him more cooperative and consequently would help the effort to tackle crimes. In fact most of the arguments put forward to support the VIS as a method of involving the crime victim in the sentencing process can be used to support the Islamic approach. However, it seems that the Islamic approach has gone too far in its support and protection of the crime victim' interests at the expense of other legitimate interests. Thus, if the modern Western approach in comparison is criticized for its unbalanced approach towards the victim in favour of the offender, the Islamic approach may be noted for its over-enthusiastic support for the victim at the expense of the offender's rights.

There are some specific notices which may be directed towards the Islamic approach. In the following paragraphs some of these criticisms will be discussed along with Muslim jurists view on them.

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[1] Providing that the offender is proved guilty of a Qisas crime. Ibn-Qudama. op. cit. vol. 7. p, 690-691.
[2] Ibn-Qudama, op. cit. vol. 7. p, 727. Farahat, op. cit. p, 348.

a) Exchanging the Roles

Giving the crime victims a right to choose between certain prescribed sentences means that the victim is placed in a similar position to the trial judge, and it is even more powerful as he could compel the court to impose the punishment he wishes. Such an exchange of roles undermines the independence of the court, the principle that is considered in modern Western legal thinking as a cornerstone to the whole legal proceedings[1]. Such a principle allows the court to impose, depending on its experience and free from any external pressure or influence, the best remedies that fit the offender and the offence.

Such criticism has not been encountered in Islamic treatises; however, there is no doubt that the victim's right to choose affects the independence of the court. Nevertheless, it should be pointed out that the independence of the court is fully maintained up to the sentencing stage. The victim's right to choose is given only after the conviction verdict has been reached. In addition, the victim's right to choose is not unlimited but it is confined to certain pre-stated options which are in the majority of cases of civil rather than of punitive nature. This is particularly true in unintentional violent crimes where the victim has only two options, i.e. compensation or forgiveness. Even in intentional crimes the victim's options are often the same two options. The third option which is the infliction of the equivalent harm is often practically inapplicable due to the difficulty in calculating the amount of harm. On the other hand, giving the victim the right to choose the punishment can sometimes be in favour of the offender himself. That is to say, murder in modern laws for example is punishable with the mandatory death penalty or lifetime imprisonment, whereas in Islamic law the death penalty is the least preferred option since the victim is strongly recommended to waive such an option in favor of compensation or even forgiveness. Moreover, the death penalty is compulsorily waived in many cases such as if the victim's family disagrees on what punishment to choose, or if any member of them accepts compensation or expresses his forgiveness.

b) Neglecting the Offender

As to the offender's side of the punishment, Muslim jurists made it clear that in private crimes especially violent crimes, the prime aim of the sentence is to achieve the victim's satisfaction even if it was at the expense of the offender's interests. However, in latter stages, Muslim scholars felt the need to supplement the principle of Qisas to enable it to

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[1] See, E. A. Fattah, "Public Opposition to Prison Alternative." Canadian Journal of Criminology, (1982). vol. 24. p, 371.

address the offender's circumstances. Thus, according to such developments, the trial court is authorized to impose an extra reformatory punishment particularly in cases where the offender ought to be set free due to the victim's unconditional forgiveness.[1]

c) Risking the Victim's Safety

As has been explained in previous chapters, it is feared that giving the crime victim the right to choose between certain punishments and forgiveness may put him at risk of being intimidated or threatened by the offender. On the other hand, the victim may attempt to sell his effective forgiveness in return for money or service. This is more likely if the right to forgive rests with the victim's family in its wider context in Islamic law.

d) Increasing the Severity of Sentences

Giving the crime victim such a powerful position in the sentencing process raises the concern of filling the court proceedings with a vengeful atmosphere which puts pressure upon the sentencing court to impose more severe punishments. However, such a criticism might be more accurate in other laws where the trial judges are vested with wider discretion to choose between different sorts of punishments or to vary the severity of the same punishment.[2] The case is different in Islamic law where Qisas crimes are faced with one of three certain pre-fixed, and so often just two, remedies. So, there is no discretion left to the trial judges, as the right to choose is given to the victim. In addition, Muslim scholars assert that the victim's involvement here should be viewed as a way of encouraging him to choose the recommended choice which is forgiveness or at least compensation. It is claimed that the more influential role the victim is given, the less vengeful he becomes, and thus he is psychologically more likely to offer his forgiveness when he feels that the criminal justice system has placed him in a powerful position in the

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[1] Ibn-Farhun, op. cit. vol. 2. p, 367. Al-Kasany, op. cit. vol. 7. p, 33. Al-Mawardy, op. cit. p, 247.

[2] Even within these laws, the link between the victim's participation in the sentencing process and the increase in sentences' severity could not be firmly established. Recent surveys and studies in western legal systems where the victim is allowed more space in the sentencing process through VIS for example could not confirm such a conclusion. Some studies even indicated the opposite as the victims were found much less vindictive that expected. Victims have not been found to be more punitive than the general public. In the USA for example less that 10% of victims report crime in order to see an offender punished. See E. Erez and P. Tontodonato, "The Effect of Victim Participation in Sentencing on Sentencing Outcome." Criminology (1990). vol. 24. No. 3. p, 452. Aldo, "Re-Integrating the Victim into the Sentencing Process." op. cit p, 79-96. Research by the New York Victim Service Agency indicated that less than one-half of the total number of victims engaged in the Victim Involvement Project in the Brooklyn Criminal Courts wanted the defendant incarcerated. See, Davis, Kunreuther and Connick, "Expanding the Victim's Role in the Criminal Court Dispositional Process: The Result of an Experiment." Journal of Criminal Law and Criminology. vol. 75 (1984). p, 493.

sentencing process.[1] There are no any statistical studies or surveys to support such a conclusion. However, the introduction of the supplementary punishment in Qisas crimes suggests an excessive use of the victim's soft choices, forgiveness and compensation.

e) Sacrificing Fairness and Consistency

It is feared that placing the offender's fate in the hands of the victim would lead to inconsistency in the sentencing practice and to disparity in the treatment of offenders. Thus instead of following a consistent policy in treating the offenders based on objective criteria, the offender's fate would depend on luck rather than his actual needs. Consequently, the victim's character, merciful or vindictive, but not the offender's criminal disposition or culpability, would be the sentencing determinant. The paradox is that by adopting the principle of 'equivalent harm', Islamic law aims to achieve the highest level of equality by offering the victim the opportunity to make the offender suffer the same harm that he had caused the victim. However, giving the choices to the victim and not the court, works against the achievement of the proposed aim, at least on the part of the offenders.

What makes light of such criticism is that, as has been mentioned earlier, Muslim scholars in latter stages, realizing the threat of releasing offenders of serious crimes upon the victim's forgiveness or acceptance of compensation, agreed that in such cases the trial court should be authorized with a power to impose supplementary punishments. Thus, within such extra measures some sort of consistency could be achieved.

f) Hardness

Allowing the victim, or his family, to perform the punishment himself is difficult to accept, particularly in violent crimes, where the punishment is the infliction of the same physical harm. Even if an objective professional official body carries them out, corporal punishments are widely regarded as cruel and inhumane penalties and they have been abolished in most modern laws. Thus, giving the crime victim the right to execute corporal punishments adds to their own cruelty another negative element which is the lack of objectivity and impartiality as the victim's vengeful sentiment cannot be effectively controlled.

Without discussing the appropriateness of corporal punishments in Islamic law which is beyond the scope of this study, it is disappointing to notice that most contemporary Muslim jurists take this principle i.e. allowing the victim or his family to execute the punishments of Qisas, for

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[1] 'Oda, op. cit. p,

granted and even defending it enthusiastically without observing its suitability for the present time.[1] In fact, a closer examination of the religious texts in question reveals that such a principle has no binding authority. What is needed is an open-minded interpretation of the religious texts in question and better understanding and appreciation of the whole circumstances surrounding their enactment. The adoption of such a principle at the Prophet's time was compelled by two factors. The first is simply the absence of any organized body to undertake such a task. The second factor is that such a method was meant to be a transitional stage from the pre-Islamic customs in which the victim's satisfaction was necessary to prevent long-lasting blood shed. Following such an interpretation, such methods ought to have disappeared in the course of time as the new generations were detached from the pre-Islam customs, and the Islamic community developed into an organized state. Thus, religious texts in question should be interpreted as to giving the victim a right to participate in the sentencing process by claiming the punishment but not in carrying it out. Without offering such an interpretation, this conclusion was actually reached by some open-minded medieval scholars who considered the victim's right to execution as a real threat to public order and people's safety and may lead to social disorder. So, they concluded that carrying out all sort of punishments must rest with the public authorities only.[2]

It should be noted that quite a number of Muslim jurists have rejected from early stages the whole principle of 'equivalent harm' claiming that such a principle was mentioned in the Qur'an as part of the Judaism-Christian tradition with no indication that it was to be adopted by Islamic law.[3]

5) The Victim's Role in the Sentencing Process in Islamic Contemporary States

Having discussed the victim's role in the sentencing process in both, modern Western legal systems and Islamic law, it is time to shed some light on the victim's sentencing role in some Islamic contemporary states. The states, as in the previous chapters are Egypt and the Sudan.

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[1] See, 'Oda, op. cit. vol. 1. p, 548-549. However, 'Oda admits that the victim should not be allowed to exercise the punishment himself, not because he has no right to do so, but because people in modern time are not qualified to undertake such a task which requires special qualifications and therefore ought to be assigned to a public authority.

[2] See Al-Qurtubi, "*Al-jami'*." op. cit. vol. 2. p, 245-256. This opinion has some support from contemporary jurists such as, Shaltute, op. cit. p, 360-361.

[3] This opinion is embraced by Al-Amidy, Al-Razy, the scholars *Mu'tazela* and some of *Asha'ra* schools. See, Khallaf, op. cit. p, 94. Shaltute, op. cit. p, 384.

It should be noticed from the outset that talking about the victim's role in the sentencing process in the Egyptian and the Sudanese criminal justice systems should not be taken as to give the impression that the sentencing process is a separate stage as it is envisaged in the Western legal systems. In fact, the term 'sentencing process' is hardly used in legal discourse in both jurisdictions.[1] Sentencing is not thought of as a separate stage, therefore, no pre-sentence report is required and usually the sentence is announced along with the conviction verdict. All interviewed judges in both jurisdictions have confirmed such a conclusion adding that the length and sort of sentence are determined by the judge's own practice and based largely on the available information as there is no legal requirement to call for particular information.[2]

Thus, the questions which have been raised in the introduction of this chapter regarding the victim's role in the sentencing process have not attracted significant attention in the legal discourse neither at jurisprudential nor at practical levels. It has been stated in the previous chapters that neither in the Sudan nor in Egypt, the victim's rights and needs have not yet gained the support that can form a lobby or a victim's right movement. The scarce available writings about victims stem from personal interests in victim's rights rather than that of an organized effort to pressure or to promote a better deal for victims. Moreover, these writings are still in the 'first phase', which is occupied with providing the victim with economical and educational needs rather that procedural rights. There is, however, some development in this regard especially in Sudanese law which by being transformed to Islamic law is becoming more victim-oriented than any other Arabic legal system.

a) The Victim's Role in the Sentencing Process in Egyptian Law

In the following pages the Egyptian sentencing system will be tested against the two factors used in Islamic law to see to what extent it honours the victim's role in the sentencing process. The two factors are the concept of criminal conflict and the victim's position in the sentencing policy.

i) The Concept of Criminal Conflict

As far as the victim's procedural rights in the criminal proceedings is concerned, the Egyptian criminal justice system holds the 'traditional' belief that criminal proceedings are a public function to which the crime

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[1] This also applies to most, if not all, Arabic criminal justice systems.

[2] Mr. Samir Naji, a former Egyptian Supreme Court judge and assistant of the Minister of justice. A personal interview, Cairo February 1999. Mr. Badr Al-Menyawi, a former Egyptian Attorney-General (1986-1990). A personal interview, Cairo, February 1999. Mr. Salah Al-Sharif, a former Sudanese Supreme Court Judged (1988-1989). A personal interview. Doha, April 1998.

victims should have no part. Since the adoption of the French penal and criminal procedure laws, the Egyptian criminal justice system has stuck to the position that favours the conventional concept of criminal conflicts. Despite the enactment of the post-independence Criminal Procedure Law (1950), criminal conflict is still held as an affair between the state and the offender. No place, in principle, is offered for the crime victim in the criminal proceedings save as a witness or a 'partie civilie'. Such a concept constitutes a fundamental foundation for the modern Egyptian criminal justice system which has been confirmed even by the highest judicial institutions such as the Supreme and Constitutional Courts.[1]

In the light of the above considerations, it is expected that the Egyptian criminal justice system gives little attention, if any, to the victim's view in the sentencing process. Thus, once the court concludes the offender's guilt, it has wide discretionary powers to impose the appropriate sentence within the legal limitations. The court is under no obligation to listen to the victim's view on the intended sentence, nor is the public prosecutor required to give an account about the effect of the crime on the victim. However, as Mr. Al-Menyawi asserted, the court may consider the victim's view which may be introduced by the victim while testifying or when submitting his application for compensation. The Public Prosecutor may also explain the harmful effect of the crime on the victim and his family to convince the court to increase the severity of the punishment.[2] Thus, the victim's view or situation may be considered in the sentencing process not for the sake of the victim himself but either accidentally or to serve other purposes.

One interviewed judge asserted that despite his sympathy with the crime victim he does not endorse any move towards involving the victim in the criminal process. His objection is not based on theoretical foundation but on practical reasons. He explained that the caseload in the Egyptian judiciary is so enormous that judges are required to work beyond their normal effort to cope with it. So adding legal requirements to consider the victim's view would only exacerbate the problem.[3] A similar view is also held by other judges who affirm that the sentencing process must be kept under the exclusive jurisdiction of the trial court

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[1] See, 'Obade, "The Principle of Criminal Procedures." op. cit. p, 35-37. And see the ruling of the High Constitutional Court, No. 2. Year, 14. 3 April 1993.

[2] Mr. Badr Al-Menyawi, a former Attorney-General (1986-1990). A personal interview, Cairo, February 1999.

[3] Mr. Suliyman Ayob. A former president of the Court of Appeal of Cairo. A personal interview, Doha February 1998.

which has the required impartiality and technical ability to impose the most appropriate punishment.[1]

ii) The Victim's Position In The Egyptian Sentencing Process

Punishment in the Egyptian criminal justice is regarded as the public response to a criminal action which has threatened or harmed a public interest. As such, punishment is prescribed primarily in the public interest and not in the victims' interest.[2] Thus, nothing in the Egyptian Penal and Criminal Procedure Codes indicates that the victim's view or satisfaction should be considered in the sentencing process. Therefore, the sentence cannot be challenged on the grounds that it has failed to satisfy the victim or to observe his view. At the jurisprudential level, the victim's satisfaction is hardly mentioned as one of the sentencing aims. The traditional sentencing aims such as general and public deterrent and the reformation of the offender are highly emphasized. The victim's satisfaction is however mentioned occasionally as a subsidiary objective for the victim.[3] Likewise, in discussing the judge's discretion in determining the punishment, neither the victim's views nor the effect of the crime on the victim have been mentioned as a possible factor for sentencing consideration.

Nevertheless, a closer look at Egyptian criminal law reveals that it does not entirely ignore the victim's view in the sentencing process. There are many ways in which the victim could effectively affect the outcome of the criminal proceedings. In particular, the system of complaint crimes and the discretionary sentencing power can be seen as indications of the Egyptian law's recognition of the victim's role in sentencing process. In the following paragraphs, these two methods will be briefly examined to see to what extent they offer the victim a role in the sentencing process.

•Complaint Crimes

As has been explained in the previous chapters, the system of complaint crimes in Egyptian law, as well as in other laws, should be viewed as recognition of the private character of some crimes in which the victim's interest is given priority over public interest. As such, the victims of complaint crimes are given special procedural rights in the criminal proceedings. It has been previously illustrated how the victims of complaint crimes enjoy an effective role in the prosecution and mediation process and they are similarly vested with an influential role to

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[1] Mr. Samir Naji, a former Supreme Court judge and assistant of the Minister of justice. A personal interview, Cairo February 1999.

[2] Najib Husni, "*Sharh Qanune Al-oqubat.*" or, "Elucidation of The Penal Code." Dar Al-Nahdah. Cairo (1985). p, 667.

[3] Husni, op. cit. p, 680.

play in the sentencing process. This role is centralized essentially on the complainant's ability to end the criminal proceedings at his will at any stage even, in some offences, after the final judgement and during the serving of the punishment. Once the complainant declares his desire to end the proceedings, neither the trial court nor the Public Prosecutor has any option but to follow the complainant's desire and terminate the criminal proceedings (Art. 10/1 C. C. P.).[1] In addition to such a direct effect, there is also an indirect effect of the complaint crimes on the sentencing process. That is to say, in order to utilize his rights as a complainant or to manage his application for compensation, the crime victim is expected to be present throughout the criminal proceedings. Such a presence married with the victim's special procedural rights would create the perception in the victim's mind that the case is his own. Such a perception is more likely to produce a pressure over the sentencing court to satisfy the victims feeling in either way i.e. by reducing or increasing the severity of the sentence.

Such an extraordinary power given to the crime victim can be comparable in some ways to the Islamic law approach as it stems from a realization of the private nature of a specific category of crimes. The main difference however resides on the extent of such category of crimes. As has been shown above, Islamic law regards all Qisas or violent crimes as well as most Ta'azir offences as private crimes whereas in the Egyptian law, complaint crimes are around ten offences with none of them belonging to violent crimes. However, the Egyptian Supreme Court has been rightly attempting to widen the extent of complaint crimes by way of analogy and a wider interpretation of articles in question. For example, Art. 312 P. C. makes theft within the same family a complaint crime; the Supreme Court in an established precedent states that by analogy all property crimes within the family should be considered as complaint crimes such as criminal damage, deception and breach of trust.[2]

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[1] See the Supreme Court, Ruling no. 7. 9 January 1990. p, 61. Such effect of the withdrawal of the victim complaint may affect the offender who may have a legitimate right to continue the proceeding to gain an acquittal verdict. It is feared that such a powerful effect of the complaint may encourage malicious accusation, and once the alleged victim sense that the alleged offender may be acquitted, he simply would withdraw his complaint and such a withdrawal would prevent the offender from suing him for the malicious accusation.

[2] The Supreme Court, Ruling no. 219. 10 November 1959. 19. p, 891. Ruling no. 95. 11 May 1989. p, 574. The Court held that 'the law gives the victim of a theft committed within the same family a right to end the criminal proceedings against the offender has been justified on the interests of the victim and his family. Thus, for the sake of the same justification the victim's right should be extended to all crimes involving illegal possession of money which are committed within the family.

•Mitigating Factors

Sentencing courts in the Egyptian criminal justice system are vested with wide discretionary sentencing powers which are not confined only to the court's ability to determine the sentence between its cardinal and ordinal limits, but also to substitute the sentence of felony with a sentence prescribed to misdemeanors (Art. 17 P. C). In using such discretionary powers the sentencing court should consider many factors and circumstances related to the crime and the offender. Some of these circumstances are also related to the effect of the crime on the victim and the victim's attitude against the offender.[1] In some circumstances the sentencing court must listen to the victim request to suspend the sentence. For example, Art. 291 of the Penal Code provides that if the victim of abduction accepted the abductor's offers to marry her, the court must suspend the sentence at the victim's request.

b) The Victim's Role in the Sentencing Process in Sudanese Law

As has been demonstrated in the second chapter, the Sudanese prosecution system places the crime victim in a significantly influential position in the prosecution process. It gives the victim the right to initiate the prosecution and to conduct it solely or jointly with the public prosecutor. The Islamisation process has even intensified the significance of the victim's prosecutorial role. Similarly, the victim's role in the sentencing process has been recognized in Sudanese law as an extension to his prosecutorial role. Before the Islamisation process the victim was allowed to some extent to influence the sentencing decisions, but it is after Islamisation that the victim has become a real participant in the sentencing process particularly in private crimes or Qisas. Thus, to avoid repetition, the focus below will be on examining how Islamisation has affected the approach of the Sudanese law towards the victim's role in the sentencing process, showing at the same time the differences and similarities with previous laws.

The Penal and Criminal Procedure Codes of 1991 have been intended, as Mr. Al-Torabi has asserted, to be a real translation of Islamic principles of criminal justice. Thus, sketching these laws one could easily notice how the drafting committee has striven to codify not just Islamic principles but even Islamic language and terminology which seems unfamiliar to temporary Muslim lawyers who qualified in secular laws. Mr. Al-Torabi added that in addition to codifying Islamic law, the Islamisation process is also aimed at two additional targets. First, to

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[1] Mr. Samir Naji, a former Supreme Court judge and assistant of the Minister of justice. A personal interview, Cairo, February 1999. See also, The Supreme Court, ruling no. 56. 7 Mars 1989. p, 56.

respond, as far as possible, to the calls for *Ijtihad* or a new interpretation to meet the needs of current society. The other target is to benefit from the long Sudanese history of attachment to English law in those matters that do not contradict with Islamic law to avoid legal instability.[1]

Analyzing the Sudanese law approach towards the victim's involvement in the sentencing process, it can be noticed that the above targets have been met with variable degrees of success. Thus, the Sudanese law has codified the traditional Islamic approach towards the victim taking account of some developments in Islamic jurisprudence and at the same time has preserved the Sudanese previous legal history as far as possible. This conclusion can be reached through the analysis of the Sudanese law approach below.

The Sudanese law approach towards the victim's participation in the criminal proceedings, in general, and in the sentencing process, in particular, depends largely on its view of the nature of crimes. For the purpose of this chapter, crimes in Sudanese law will be divided into three categories: public crimes, semi-private crimes and private crimes.[2] The extent of the victim's role depends therefore largely on the crime which he has suffered.

As for the first category i.e. public crimes, the victim, if any, is denied any role to play in the criminal proceedings save as a crime reporter or as a witness. This category comprises all Hudud crimes as specified in Islamic law and also other crimes against the state or the public interest as a whole. The Attorney-General and his deputies are exclusively assigned with the task of prosecuting and conducting the prosecution (Art. 136/1 C. C. P 1991). It should be noted that previously, individual citizens were allowed to prosecute and conduct criminal prosecutions in public crimes with the possibility that the Attorney-General may enter a '*nolle prosequi*' or take over the prosecution (Art. 211 C. C. P 1974). The Supreme Court has even endorsed the complainant's right to appeal against the court decision in public crimes.[3]

The second category is semi-private crimes. It covers all violent crimes, intentional and unintentional, which result in the victim's death, including murder and manslaughter (Arts. 129, 130, 131, 132, 130. P. C,

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[1] Mr. Hassan Al-Torabi, the speaker of the Sudanese Parliament, a personal interview. Doha, February 1991. He added that *ijtihad* or a new interpretation cannot be introduced all at once but gradually depending on the needs of the society social. Mr. Al-Jeed asserted that his committee was also anxious not to cause any legal destabilisation and therefore they strove to keep the previous laws in their original form as far as possible. Mr. 'Awad Al-Jeed, a former Attorney-General (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998

[2] It should be noted that this classification is not mentioned in the Sudanese law.

3 The Supreme Court. Sudan Government v. Rajab 'Ali and others. Sudan Law Journal and Reports (S. L. J. R). 1980. p, 65.

1991). These crimes constitute part of the Islamic category of Qisas crimes. Their punishment varies according to the offender's culpability. If they are committed with intention to cause illegal death the punishment may be one of three options i. e death penalty, compensation (diyya) or forgiveness. Unintentional crimes are prescribed only the last two options. As has been explained above, it is the victim's family '*Waliyy al-damm*' not the court that decides which option should be implemented. The Sudanese law did not alter this rule as it gives the victim's family the right to claim Qisas (death penalty), or compensation (Art. 32, 130/2 P.C. 1991- Art. 136/2 C. C. P 1991). Accordingly, the victim's family is expected to participate in the criminal proceedings in order to deliver their view to the sentencing court. In practice, in most cases the victim's family would prefer to work with the public prosecution rather than be involved directly in the proceedings. However, the court still has to consult with the victims regarding the intended punishment.[1] On some occasions, the victim's family is keen to be involved in the court proceedings personally or through appointed lawyers. In an unpublished ruling, the victims' families asked the court through their advocates to participate in the trial independently. The court refused their request and allowed them to participate jointly with the public prosecutor according to Art. 36/2 C. C. P 1991.[2]

The victim's family is also entitled to waive their claim for Qisas or Diyya by offering their forgiveness or accepting any other settlement at any stage even after the final judgement.[3] In this case the trial court must consider such a settlement as a legally effective procedure. However, the Sudanese law has not followed the classical theory that considers such a settlement as a conflict resolving method. Instead, it has responded to the late development in Islamic jurisprudence that recognized a public interest in Qisas crimes and therefore called for state involvement in the criminal proceedings of such crimes. Accordingly, the victim's family settlement with the offender does not mount to the final settlement and the release of the offender. The settlement however must be considered by the court as a mitigating factor which compulsorily waives the original punishment of death penalty for murder and replaces it with a discretionary term of imprisonment. The imprisonment term varies from one crime to another ranging from three to ten years.[4] If the court fails to consider such a settlement, the victim's family has a right to appeal

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[1] The Supreme Court. no. 2/1995. The Sudan government v. Jamal 'Abdullah Ahmed. Unpublished ruling handed out by Mr. Ma'mun A. Hammur. A Sudanese Supreme Court judge.
[2] The ruling of a special court in 14 July 1994 presided by the Supreme Court judge Mr. 'Abdul-Rahman Sharfy who personally handed out this ruling which has not yet been published.
[3] Art. 32/4 P. C 1991.
[4] Arts. 129-132 P. C 1991.

against the court's decision.[1] If the settlement or the forgiveness has been reached after the final judgement and before the execution, the punishment must be suspended and the case must be returned to the court to modify its decision accordingly.[2] In the previous law, the above crimes were considered public crimes and therefore the victim had no part to play in the proceedings. However, it has been demonstrated in the earlier chapter how the Sudanese courts have resigned, at least in part, to local customs and accepted the settlement between the victim's family and the offender as a significant mitigating factor.[3]

Thus the victim's family in semi-private crimes is given the quality of the victim and placed in a powerful position that allows it to effectively influence the sentencing process.

The third category is private crimes. It comprises all Qisas crimes in Islamic law which covers all non-fatal violent crimes against the person such as assault and attempted murder (Arts. 139, 140, 141, 142, 143, 144 P. C 1991). The Sudanese law has even widened the field of private crimes by adding other personal crimes to the list including most money and property related crimes not mounting to theft such as fraud, obtaining property by deception and breaking trust (Arts, 111, 112, 114, 116, 177, 178, 179, 180, 182/1 P. C 1991) and defamation and related offences (Arts. 157, 159, 160 P. C 1991).[4] In fact, the notion of private crimes is not completely a new concept in Sudanese law. Before the Islamisation process, the Sudanese previous criminal laws recognized similar concepts such as 'complaint crimes'[5] and 'compoundable crimes.'[6] Before and after Islamisation the notion of private crimes represented a belief that some offences are so personal that it is better for both the victim and the society to give the victim the discretion to decide when to bring such a

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[1] The Supreme Court, no 51/1995. The Sudan Government v. Aljazoly Idries 'Abdul-majied. Unpublished ruling handed to me by Mr. Ma'mun A. Hammur. A Sudanese Supreme Court judge.
[2] Art. 192/1/2. C. C. P 1991.
[3] Sudan Government v. El Degeil Saeed Hassan. S. L. J. R (1966). p, 39. Sudan Government v. Kamal Al-Jak Ahmed. S. L. J. R. (1965). p, 81.
[4] There are also other crimes listed in a special table indexed to the code of criminal procedure including abstaining from helping endangered person (Arts. 75,76), abduction and related crimes(Arts. 163,164,165,166 C. P 1991).
[5] The complain crimes are a set of crimes in which criminal prosecution may not be initiated without a prior complaint of the victim. The complaint crimes include defamation and related crimes (Arts. 433-437), marital crimes (Arts. 425, 427, 429-431 P. C 1974).
[6] As has been explained in earlier chapters, the compoundable crimes are a pre-determined set of crimes in which the victim (or the person specified by the law) has a right to reconcile or to mediate with the offender. These crimes are tabled in Art. 286 (C. C. P 1974). This article provided that "The offences punishable under the sections of the Penal Code specified in the first two columns of the table next following may be compounded by the person mentioned in the third column of that table." The table includes more than 24 crimes which ranged from crime against the person such as assault (Arts. 275, 277 P. C); the use of criminal force (Arts. 296, 297 P. C); offences of damage to property such as destroying the property of another (Arts. 364, 365 P. C) or burglary (Arts. 387, 389); and sexual offences such as adultery (Art. 431 P. C).

misdeed to the public's attention. Almost all legal systems recognize such a notion through various means; the difference lies essentially in the extent of what is regarded as personal crimes and the victim's role.

Influenced by Islamic law, private crimes in Sudanese law are treated in the same way that Qisas crimes are dealt with in classical Islamic jurisprudence. The victim of a private crime is bestowed with incomparable powers at all critical stages of the criminal proceedings; from the initial prosecution to the final judgement. The victim has the right to decide whether or not to inaugurate a criminal prosecution and in the meantime to prevent the public prosecutor from taking such an action without his permission.[1] The victim may conduct the prosecution before the court and prove his case in order to get the offender convicted and punished thereafter without the involvement of the public prosecutor (Art. 136 C. C. P 1991). Moreover, unlike other crimes, the victim's private prosecution is immune from the Attorney-General's special right of entering a '*nolle prosequi*' or taking over the prosecution (Art. 58/2 C. C. P 1991). In addition, to confirm the private nature of such crimes, the Sudanese law states that if the victim of one of the above crimes fails to turn up on the trial date, the court should, just as in civil cases, cancel the proceedings.[2]

With regard to the execution of the punishment, the Sudanese law seems to endorse the late opinion in Islamic jurisprudence that prevents the victim from executing the punishment himself. So, although the Sudanese law provides for the Qisas principle or the inflection of the equivalent harm if it is practically possible (Arts 27-32 C.P), it does not give the victim any role in inflecting the Qisas punishment which is carried out by an official body. The Supreme Court tended, under the law of 1983, to reject applications for the implementation of the 'equivalent harm' as it is practically inapplicable.[3] However, Sudanese law provides a symbolic measure to indicate that the victim, or his family, is also considered in the inflection of the punishment. It requires that the victim or his family must be notified to attend the execution of the punishment Art. 192/1 C. C. P. Such a measure is aimed at satisfying the victim's feeling of vengeance. Also, as Mr. Al-Jeed asserts,[4] it encourages the victim to offer his forgiveness. Mr. Al-Jeed explains that when the victim feels that the legal system has met his expectations that releases most of his vindictive sentiments. The rest of such sentiments may also be

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[1] Art. 35/B/3 C. C. P 1991.
[2] Art. 141/2. C. C. P 1991. Corresponding to Art. 154 C. C. P 1974.
[3] It ruled for example that, "no Qisas in broken bones as it is impossible to impose the equivalent harm." Sudan government v. James Akiyomdot. Sc. no. 68. S. L. J. R. (1986). p, 100.
[4] Mr. 'Awad Al-Jeed, a former Attorney-General (1985) and the head of the Islamisation committee of 1983. A personal interview. Doha, March 1998.

released when the victim feels, at the time of execution, that his offender's fate is in his hands. The result is often that the victim is satisfied and grants his forgiveness or accepts the offender's offer of settlement.[1] Therefore, the law provides that if the victim decides at the time of execution to waive the punishment, the execution must be ceased and the case be returned to the court to modify or quash the punishment (Art. 192/2 C. C. P).

In light of the above considerations, Sudanese law clearly represents a rare example of a victim-oriented criminal justice system that gives the victim such an influential role in the sentencing process. Compared with its Egyptian and other Arabic counterparts, Sudanese law is far ahead in placing the victim in an incomparable position in one of the most consequential stages in the criminal process. Even before the Islamisation process, the Sudanese law offered the crime victim more space in the criminal proceedings particularly through the adoption of the system of private prosecution. Its adherence to Islamic law has made it even more supportive to the victim's involvement in the criminal proceedings especially in the prosecution and sentencing process. The comments and notices appointed at the Islamic approach towards the victim's role in the sentencing process may likewise be aimed at the Sudanese law approach. However, Sudanese law has managed to overcome some of these notices by adopting a more liberal view in applying Islamic law. Mr. Al-Torabi asserted that he is always on the side of open-minded thinking in interpreting and applying Islamic law in the belief that Islamic law has the capability and vitality to meet the needs of modern life if it is correctly interpreted and applied. He added that modification of the Sudanese Islamic criminal laws would be undertaken whenever it is needed.[2]

Although Islamic criminal laws have been in force for more than nine years, there are no statistical or field studies to measure their success or effectiveness in general and to show the attitude of the victim and their families towards their involvement in the sentencing process. However, the interviewed judges asserted that the vast majority of the victims and their families were extremely pleased with their experience especially when they are directly consulted, in Qisas crimes, on the punishment. Mr. Alob affirmed that it was not only the victims who were pleased but also a greater number of judges and legal professionals.[3] They believe that having the victim present in the proceedings helps them to listen to

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[1] Mr. Al-Jeed, an interview. Ibid.

[2] Mr. Hassan Al-Torabi, the Speaker of the Sudanese Parliament. A personal interview. Doha, February 1991.

[3] Mr. Hassan Alob. A Supreme Court Judge, and formerly the head of judiciary in Algazera Province. A personal interview. Doha, April 1998.

the real victim instead of the public prosecutor who has not been personally harmed by the crime and at the end of the day he is a public servant doing a specific job. Mr. Hammur, pointed out that even non-Muslims, particularly tribal communities, victims and their families were pleased because they also have a similar custom which tends to deal with crimes in a more private way. For them, the state's involvement sometimes causes more harm than good and hurts the social peace of the tribe or community.[1]

6) Conclusion

While lawyers in modern European legal systems are reluctantly debating the appropriateness of giving the victim more space in the sentencing process through VIS or other methods, the victim's influential role in the sentencing process, at least in Qisas crimes, is taken for granted in Islamic law. Although the Islamic approach may sound unfamiliar to Western and even some Muslim lawyers, it seems consistent with Islamic criminal policy. The difference between Islamic law and modern Western laws lies in their perception of the 'crime'. While modern laws regard all crimes as an aggression against the state or the community as whole, Islamic law differentiates between those crimes that constitute a real threat to public interests and those which only concern the victim or his immediate relatives. For the former crimes, the victim is denied any role in the proceedings as a whole, and in the sentencing process in particular as the outcome of such proceedings must be decided only in the public interest. As for the latter crimes (private crimes), although certain public interests may be harmed, the greater part of the crime's harm is suffered by the victim or his family in a way that justifies their full involvement in the sentencing process. It has been shown that Islamic law largely de-emphasizes the distinction between crime and tort. With such a de-emphasis, it becomes more acceptable that Islamic law deals with private crimes in a similar way that modern laws deal with tort. As a result the victim is expected to have the same footing as a civil litigant. Some modern laws share such a view by adopting the system of complaint crimes. The difference is still however in the extent of such crimes. While complaint crimes are usually trivial personal offences, private crimes in Islamic law include some of the most serious crimes such as murder.

The victim's involvement in the sentencing process in Islamic law is so extensive. It is not just allowing the victim's view to be considered but

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[1] Mr. Ma`mun A. Hammur. A Sudanese Supreme Court judge. A personal interview. Doha, April 1998.

rather imposing his view on the process in a way that threatens the delicate balance of criminal justice and conflicts with some basic principles of human rights at least from the Western point of view. Therefore, the victim's sentencing role should be restricted and re adjusted as to provide the victim with a reasonable opportunity to participate in the sentencing process without risking the essential rights of other parties and of justice as a whole.

As the Islamic state developed over the centuries, the sense of public interest enlarged in such a way that more wrongdoings transferred from civil law to criminal law, and more previously private crimes became public crimes. Such a development has been experienced by nearly all legal systems and lead eventually to the victim's disappearance from the criminal process save as a witness. In Islamic law, thanks to its religious character, the state involvement in the criminal proceeding was not at the expense of the victim's role, which although has been affected, is still essential in the proceedings. Although calls for the state involvement has received support from Islamic jurisprudence to protect the public interest, the explicit verses and Prophetical practice that define the victim's role in the criminal process could not be overlooked. Therefore the state engagement was not a substitute for the victim's role but rather a sort of a partnership through which each party defends its own interests. Thus, the victim is still recognized as an essential party to the proceedings and retains all his power and influence on the sentencing decision. The state involvement is only significant if the victim decides to waive his claim for punishment; the offender in the new setting will not be automatically discharged, instead the court is given the right to inflict an appropriate punishment if it is considered in the public interest.

Contemporary Islamic states have followed different routes with regard to the proper role of the crime victims in the sentencing process. Egyptian law, the same as many other Arabic laws, provides an extremely limited role for the victim by which he could influence the sentencing process. It follows the French model in which punishment, as part of the criminal proceedings, is a public function to which the crime victim is an alien party. Even the limited access for the victim is not meant primarily to be as a gateway for the victim to participate in the sentencing process. The Sudanese law, on the contrary, by adhering to Islamic law provides the crime victim with a powerful position by which he, just as in traditional Islamic law, not just participates but also guides or even directs the sentencing process. The Sudanese law has managed to overcome some of the criticisms aimed at the traditional Islamic jurisprudence. However, the Sudanese experiment with Islamic law is still far from perfect. There is still so much to be done in modernizing

and updating Islamic law through a full utilization of *Ijtihad* which has not yet been fully exploited.

Chapter (8) **Conclusion**

It has been shown throughout this dissertation that Islamic law has its own approach towards crime victims and their roles in the criminal process. This dissertation may be the first of its kind to cover this area of Islamic law in English and even in Arabic where the Islamic approach is rarely studied in depth. This approach represents an extreme case of a pro-victim legal system. It may have certain common features with some modern Western laws, at least in principle, but its support for crime victims is incomparable with any modern law. From the initial proceedings until the execution of the punishment, the crime victim is the centre of attention of Islamic law. While the victim's position and role in the criminal proceedings constitutes a major concern of criminal policy in modern Western laws and poses unsolved controversy, Islamic law takes the significant and influential role of the victim for granted.

Thus, in modern laws the victim's role in the prosecution process is highly de-signified even in those systems which adopt the principle of private prosecution. The victim's wishes and interests may be sacrificed if they conflict with the public interest. On the contrary, in Islamic law the victim is given an extraordinary prosecutorial role allowing him to initiate and conduct criminal prosecutions in the majority of crimes including some of the most serious offences such as murder. He is also authorised to stop the proceedings at any stage even after the final judgement or before the execution of the prescribed punishment.

Another field in which Islamic law manifests its concern for crime victims, is restitution. In Western legal systems the concept of restorative justice has been slowly developed, and measures to compensate victims by the criminal court such as, compensation orders, have been reluctantly adopted and used. On the contrary, Islamic law provides a whole system of restitution which ensures the recovery of the pre-crime situation as far as possible. It compels the offender to pay for his crime and compensate his victim for all losses and injuries. To secure the victim's compensation, Islamic law makes exception for its own recognised rules and principles in criminal and civil liabilities. Therefore, it embraces the principle of collective responsibility whereby it is not only the offender who has to compensate the victim but also his family, neighbours, work-fellows and his community as a whole. Moreover, the victim must be compensated even if his offender is not fit for either criminal or civil liabilities. Crime in Islamic law is a social phenomenon which cannot be ascribed to a single person. Therefore, its prevention is the responsibility of the whole of society and if they fail, they must share the responsibility in repairing the damage it has caused particularly to the victim. In addition, in Islamic law it is not only the victim who is to be compensated

but also his family and dependants. To facilitate his task in obtaining compensation, the victim has to deal with one court only which is authorised to deal with all his requirements regarding compensation as well as the punishment of the offender.

Realising that in some cases personal or even communal restitution is not adequate to meet the victim's requirements, Islamic law is one of the first, if not the first law to establish the state's responsibility to compensate crime victims. Unlike modern Western public compensation schemes, public compensation in Islamic law must match what the offender ought to have paid. In Islamic law, the victim's compensation must not be affected by the offender's financial status.

Mediation and reconciliation are also other fields in which crime victims enjoy a special status in Islamic law. Despite that Islamic penal law prescribed some of the harshest punishments, it also opened a wide door for alternative dispute resolution methods. It relies heavily on mediation which based on restitution or preferably on the victim's forgiveness. Although mediation schemes have been increasingly growing in the west, mediation in Islamic law is deeply rooted as a preferable conflict-resolution approach as it ensures the resumption of the normal relationships between the litigants and secures social peace as an ultimate objective of Islamic law. Therefore, forgiveness in Islamic law, unlike modern laws, is legally effective as it has the power to cease the criminal proceedings at any stage in most crimes including some serious crimes such as murder. Since the outcome of any mediation session is a compromised solution, forgiveness plays an essential role in satisfying both the victim and the offender. Unlike modern mediation schemes, mediation, whether based on restitution or forgiveness, is an integral part of the Islamic criminal justice and works alongside its traditional retributive remedies to achieve the objectives of Islamic law as a whole.

If the above measures are not enough to prove the Islamic law support for crime victims, it is the victim's role in the sentencing process which makes Islamic law an extreme champion of crime victims. In Western laws, the sentencing process is regarded as a prohibited area to which the crime victim is not allowed to enter. The ultimate achievement of the victim movement in this connection has been the controversial introduction of the so-called victim impact statement (VIS) which only allows the victim to inform the court about the effect of the crime and at best it may allow the victim, in some jurisdictions, to express his opinion as to the intended punishment. On the other hand, Islamic law has gone even too far as it provides the victim with total control of the sentencing process in most crimes. In effect, for these certain crimes, Islamic law places the victim, as far as sentencing is concerned, at the same footing as a trial court. It is the victim not the court who decides which remedy,

among pre-stated options, should be inflicted upon the victim. The victim, according to some voices in Islamic jurisprudence, may even execute the punishment.

What allows Islamic law to embrace such a supportive attitude towards crime victims is not only its belief that they deserve such a position but also and primarily its view on criminal conflict and its concept of crime and tort. Although the distinction between crime and tort still poses a controversy in modern Western legal thinking, it is regarded as one of the cornerstones of modern legal systems. In Islamic law, as has been demonstrated throughout the dissertation, such a distinction is highly de-emphasised. Apart from a few public religious offences which can be described as crimes in the modern legal sense, the bulk of the offences usually listed in the Islamic penal code are dealt with in a similar if not the same way as tort. This approach is not confined to trivial misdeeds but extends to most serious crimes especially violent crimes such as homicides and assaults. This should not mean that Islamic jurisprudence makes no distinction at all between crime and tort since Islamic law recognises a separate law for each and Islamic legal treatises usually study tort and crime separately. However, tort and crime have many more features in common in Islamic law than in modern Western laws and sometimes it is difficult to see the barrier which separates them particularly in the field of violent crimes; notably unintentional offences in which there are no punitive remedies at all even if the crime results in the victim's death. Their proceedings and remedies are very similar. They are even examined by the same court since a separate court has never been established for either of them in the history of Islamic law. The victim has almost an equal footing as the plaintiff in civil litigation. Islamic law, in this context, adopts a practical and consequentialist approach which can be called 'problem resolve' method, as it is primarily concerned with the outcome of the illegal action rather than the action itself. Whether classified as a tort or a crime, the effect of the misdeed must be removed and the sufferer must be satisfied. Islamic law goes even further in its consequentialist approach to decide that the effect of a misdeed on the victim must be removed even if such a misdeed cannot be classified as a tort or a crime as in the cases where the wrongdoer is not mentally fit for either criminal or civil liability.

The de-emphasis of the distinction between crime and tort results in Islamic law viewing the criminal conflict an affair belonging to its parties i.e. the victim and the offender. The state, as a representative of public interest, has no right to intervene except as an organiser and administrator just as in civil litigation. The absence of the state in the criminal proceedings necessitates giving the crime victim an influential role as the only recognised party to defend the infringed interests.

The Islamic supportive approach towards crime victims may be commended for its recognition of the victims' essential role and its response to their needs and aspirations. However, as has been explained throughout the dissertation, there is a desperate need for reform in many areas of Islamic approach. In general there should be a balance between the victim's and the offender's rights. The public interest should also be recognised and given proper consideration. As has been shown, favouring the crime victims at the expense of the other parties may be against the victims themselves. In addition, there are some specific areas in the Islamic law approach which need to be considered for reform or modification. For example, the fixed list of compensation should be replaced with court discretionary powers to decide the amount of compensation upon the actual needs of the victim and taking into account all the relevant factors and circumstances. In addition, unrestricted legally effective forgiveness should be restrained and conditioned. The victim's extensive sentencing role should be reconsidered as to give the court more power to decide the best remedy for the offender, taking into account the victim's feelings and attitudes and so forth. .

Despite its religious character, which certainly increased its immutability compared to modern positive laws, Islamic law was able to respond to some of these notices. By utilising the quality of Ijtihad (personal reasoning), Islamic jurisprudence was able to recognise public elements and interests in all private crimes particularly violent offences and therefore endorsed state intervention into the criminal proceedings to protect such interests. The state intervention has overcome some of the problems of the Islamic private prosecution system and restricts the effect of the victim's forgiveness and his sentencing role. Unlike modern laws, state intervention in the criminal process has not led to the victim's exclusion from the proceedings. The retention of the victim's special status is due largely to the religious characteristic of Islamic law since such a status is established by sound explicit Qur'anic verses and Prophetic practices which, according to Islamic rules, cannot be altered.

However, a further reform is still needed now and will be needed in the future. Thus, the development of Islamic law as a whole and with regard to the victim's role must be a continuous process which ensures harmony between the legal system and the social, economic and political changes in a given society. It has been illustrated how Islamic law has the characteristics which makes it both an expandable and renewable law. These characteristics were recognised in the formative era of Islamic law in which Islamic jurisprudence was able to keep pace with the development of the society. When these characteristics were overseen in later stages, Islamic jurisprudence entered a long period of decline and ceased to respond to the needs of the society. The result was the

emergence of parallel quasi-judicial institutions, which adopted a piecemeal approach to fill the legal vacuum with no attempt to establish a systematic legal theory. With discontinuous periods of revival, the decline of Islamic jurisprudence continued and led eventually, among other factors, to the abolition and the replacement of Islamic law with Western laws.

The Islamic approach towards crime victims is characterised by two important features: Informality and the lack of theoretical foundation. As to the informality of the Islamic approach, it is noticeable that the components of Islamic approach such as Diyya and Akila have not been embodied in organised institutions with defined functions and jurisdiction. It was left to local customs and depended on the socio-political circumstances of each society. As to the lack of a theoretical foundation, Muslim jurists usually pay more attention to detail the practical sides of legal concepts than scrutinise their underlying philosophy. This attitude is largely ascribed to the religious character of Islamic law. The analysis of the theoretical justification of the legal concept is a cornerstone in its development. Therefore, Muslim jurists who care about the philosophical aspects of Islamic law show a great deal of flexibility since they were able to distinguish between the permanent aims of a certain legal concept and its temporary measures. This was obvious regarding Diyya as a way of compensating the crime victim. While most jurists spared no effort in producing a fixed list of tariffs which itemise the minute details of each injury and the amount of compensation due for each, other jurists were daring enough to declare that Diyya is only a means of compensation that can be modified or even replaced according to the whole situation of a given society.

Contemporary Islamic states have taken different and even contrasting approaches towards crime victims. The two examples examined in the dissertation i.e. Egypt and the Sudan have been chosen to show such a contrast.

Egyptian law has adopted or even copied the French legal system. The circumstances in which such a legal transformation was accomplished is still not quite clear. The Egyptian approach towards crime victims departs from a starting point that criminal proceedings are essentially a public function in which crime victims should have no role to play. Although it allows some forms of limited involvement for the victims through the systems of compliant crimes, and the 'partie civilie', crime victims has never occupied a significant place in Egyptian criminal policy. The victim's issue has not even been a concern of the non-governmental sector. The scattered voices among Egyptian lawyers and scholars which promote and raise the victim's issue have not yet formed an organised movement which may constitute any pressure for a move

towards a better deal for the victim. According to Mr. Al-Menyawi, he participated in an attempt in the beginning of the 1990s to establish an informal society or organisation to promote the victim's issues. The society consisted of a group of various orientations and represented different interests as its members came from different professionals such as doctors, judges, policemen and so forth. Regrettably, the society was short-lived and lasted only for few years with little if any achievement.[1] In addition, the Egyptian Society for Criminal law organised a conference in (12-14 March) 1989 devoted for the issues of crime victims and their roles in the criminal proceedings. Despite that many participants were influential governmental figures[2] who were in position to change the victim's status in Egyptian law, the conference was highly concerned with theoretical issues and brought about no subsequent changes in the victim's status.[3] To put it in context, the lack of interest in the victim's issues is not an Egyptian unique phenomenon as it is shared by the majority of non-European countries who probably considers that there are many issues such as education and health have priority over the victim's issues

Nevertheless, Egyptian approach towards the crime victim' needs to be reviewed and replaced with a more comprehensive approach which stems from a clear ideology that provides crime victims with a proper role in the criminal proceedings which recognises their needs and rights. Egyptian law could have adopted the Islamic approach, or some of its features, as it was embodied in the Egyptian draft of Islamic criminal law or could have observed the latest pro-victim developments in French law from which it was adopted. In fact, the Egyptian criminal laws as a whole suffered from a near-motionless state. The existing Penal Law was promulgated in 1937 based on its predecessor of 1904 with few changes.[4] Whereas the existing Criminal Procedure Law was promulgated in 1950. Both laws have not been substantially modified despite the immense changes and development both in Egyptian society and at the level of criminology and criminal policy.

The Sudanese law on the contrary has witnessed a dynamic development moving it from one extreme to another. It has experienced Islamic law in its traditional form, followed by the Ottoman French-inspired laws, and from 1899 it entered its modern formative era under

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[1] Mr. Badr Al-Menyawi, A former Egyptian Attorney-General. A personal interview, Cairo, February 1999.

[2] Such as the Minister of justice, senior judges, professors of law, and senior policemen.

[3] See the Conference's proceedings, "*Huquq Al-majny 'Alyhu fi Al-ijra'at Al-jena'iyah.* " *Dar Al-Nahdah Al'Arabiyah*. Cairo (1990).

[4] The changes were made to face the abolition of the Mixed Court and transferred its jurisdiction to the National Court.

English law until it was brought back to Islamic law in 1983 and 1991, without entirely losing its connection with English law. The Sudanese law even before the Islamisation process was the most victim-supportive Arab Stats law. This was evident from its adoption of some institutions such as the systems of complaint crime, compoundable crimes, private prosecution, and its partial-recognition of the local reconciliatory customs. The Islamisation process has even strengthened the victim's position and role in criminal proceedings particularly in the fields of sentencing, compensation and mediation which have confirmed the position of Sudanese law as the most victim-supportive among other laws of contemporary Islamic states. However, despite the assertion of Mr. Al-Torabi and other Sudanese jurists and judges, that the laws of 1991 would be a better expression of Islamic law and thought and would be an example for modern Islamic law, there are few indications which support such a declaration. Apart from a few innovations, the laws were a mere codification of the Islamic approach with all its traditional features. There has been an inadequate utilisation of Ijtihad in bringing Islamic law up to date with the latest developments at the present time. It was hoped that the modern application of Islamic law would take account of the fact that Islamic law had been out of application since the second half of the Nineteenth century for almost a century during which unprecedented developments in all fields have been witnessed. So, a tremendous effort should be made to bring Islamic law up-to-date. However, being in application, Islamic law will be subjected to real challenges to meet the needs of modern society. The existence of an active judiciary and open-minded legislative body should ensure a gradual and smooth development of Islamic law just as any other legal system. It is still too early to assess the success of the application of Islamic law in the Sudan. It should be noted however that poverty, power struggles and the continuous southern war in the Sudan do not provide a healthy environment for any law to assert itself, let alone a revived law such as Islamic law.

The comparative approach utilised in this dissertation has been very helpful in illustrating the similarities and differences between Islamic law and Western legal systems regarding the subject under investigation. Such a comparison provides Western lawyers with a clear idea of Islamic law in one significant area away from stereotyping and misunderstanding. It also provides some ideas and inspirations from different schools of legal thinking. However, the comparison has been particularly beneficial for Islamic law itself as it provides an excellent opportunity to discover more of its special features. It is one of the aims of comparative studies that one could appreciate his own legal system before discovering another system. Thus, it is only through comparison that the advantages of Islamic law can be appreciated and its disadvantages can be realised. For

example, the moral and religious characters had not been emphasised before Islamic law was studied by orientalists. In this dissertation the comparative approach has helped to identify the underlying rationale of the Islamic supportive attitude towards crime victims which resides in its de-emphasis of the distinction of criminal and civil liabilities. The comparison has also helped to crystallise many components of Islamic approaches such as *Diyya*, *Akila*, *Qasama* and to reveal their downsides and potentials.

It is hoped that this dissertation has been able to offer an objective analysis of the Islamic law approach towards crime victims and to bring to light its pitfalls and potentials. It is also hoped that this dissertation provides a clear picture of one important area of Islamic law to non-Muslim Western readers away from misconception and stereotyping. It is also expected that this dissertation will serve the current and future Islamisation programmes with inspiration for developing and updating Islamic law in a significant field i.e. the victim's role and position in the criminal proceedings. It is anticipated that this study would only be a start which would be followed by further research in this and other areas of Islamic law.

Appendix (1)
Glossary of Arabic Terms

'Adalah: justice, uprightness of character which is required for witnesses.

'Adl: justice, upright and just.

'Afo: forgiveness in its moral and legal sense.

Ahl al-hadith: literally people of text. Technically a trend in Islamic jurisprudence that gives priority to textual sources and precedents rather than reasoning.

Ahl Al-ra'y: literally the people of opinion. Technically a trend in Islamic jurisprudence which advocate personal reasoning in interpreting and expanding Islamic Law.

Ahliyyah: legal capacity.

Al-hajib: literally doorman, guard. At some stages of Islamic history the office of *Hajib* as a secretary of the ruler became one of the most influential post in the Islamic state with extensive administrative as well as judicial jurisdiction.

'Amd: deliberate intent or 'mens rea'.

Amir Al-mu'meneen: literally the commander of the believers. Technically the head of Islamic state. It was first adopted by the second Caliph *Omar Ibn Al-Khattab* (d, 23 AH, 644 AD).

'Aqd: contract.

'Aql: intellect, reason.

Akila: the offender's extended family or tribeswho

Arsh: compensation for non-fatal injuries resulted from violent crimes. It is considered as a part from diyya.

'Asaba: kinship, agnatic relations.

'Asb: an agnate.

Asl: literally root. Technically a source of law. It also means the original case on which a ruling is given in the text and which analogy seeks to extend to a new case.

Ayah: sign, verse as sub-section of the Qur'an.

Baghy: rebellion. One of the Hudud crimes.

Batil: void, null and unacceptable.

Bayt Almal: the public treasury from which Diyya and other form of public compensations may be paid to crime victims.

Bayyina: evidence.

Da'wa: law suit, claim.

Dalil: proof, evidence.

Darura: necessity. One of the general defences in Islamic criminal law. It however does not affect the victim's right in compensation.

Dhaman: compensation in its broadest sense including restoration and reparation.

Diyya: a fixed sum of compensation paid by the offender, his extended family 'Akila', or the state to the victim's family in case of his death.

Faqih (pl, *fuqaha*): a Muslim jurist specialised in Islamic Law.

Fard: obligatory.

Fiqh: literally understanding or comprehension. Technically the knowledge of Islam as a whole and Islamic law in particular.

Ghasb: illegal appropriation of other's possessions.

Hadd (pl, *Hudud*): literally limit and technically one of the specific prescribed penalties for crimes that are considered an aggression on the right of God (Allah) denoting the public interests.

Hadith: literally speech, technicality means narratives and reports of deeds and saying of the Prophet. As such it is considered as the second textual source of Islamic law next to the Qur'an.

Halal: permissible, lawful.

Haqq Al-abd: right of individual or private right.

Haqq Allah: right of God as opposite to the rights of *abd* or individual. The concept of *haqq* Allah was first narrowly defined as closely connected to religion but later expanded to denote public interest or public right as a whole.

Haqq: right.

Haram: prohibited, illegal.

Hijrah: the migration of the Prophet from Mecca to Madina signifying the beginning of the Islamic calendar. (AH) which appears in this dissertation means after *hijrah*.

Hirabah: highway robbery as one of Hudud crimes.

Hisba

Hukm al-shar': the ruling of Islamic law in general or in specific case.

Hukm: ruling, law.

Ijma': consensus of opinion which is largely considered as the third source of Islamic law.

Ijtihad: literally exertion or endeavour. Technically means the use of reasoning to interpret unclear text or to provide a '*hukm*' or ruling for unprecedented or unprescribed case. As such it encompasses all non-textual sources of Islamic law.

Ilm: knowledge, especially of religious truth, the highest form of knowledge

Istihsan: juristic preference to avoid the result of strict analogy 'Qiyas'. A source of Islamic Law in some schools such as *Hanafi* and *Maliki*.

Istishab: the presumption of continuation of the status quo ante. As a source of Islamic law it means that unless clearly stated, acts should be deemed lawful.

Istislah: the principle that calls for the consideration of public interest when interpreting or expanding Islamic law. As such it is considered a rich source of Islamic law.

Itiham: prosecution.

Jabr al-darar: making amend, reparation.

jald: flogging. A form of punishment prescribed for some Hudud crimes.

Jany: an offender.

Jarima: a crime.

Jinaya (pl. *jinayat*): a crime in its wider sense.

Kaffarah (pl. *kaffarat*): expiation. *Kaffarah* is an incorporated concept in Islamic criminal law as a religious remedy for some crimes such as unintentional violent crimes.

Kafir: unbeliever.

Khasm: a party to lawsuit.

Khusuma: litigation.

Ma`ruf: Known, good.

Madhab: a juristic school.

Majny 'alayuh: a crime victim.

Makruh: reprehensible, disapproved.

Mandub: recommended.

marsum: a decree.

Mubah: permissible, indifferent.

Mudda'a aliyh: defendant.

Mudda'i: plaintiff, claimant.

Mufti:a a specialist in Islamic law who gives authoritative opinion. In contemporary Muslim states *Mufti* holds the highest religious office which gives the official religious opinions that should be followed in a given state.

Muhtasib: inspector of the market. At some stages, *muhtasib* became the official officers responsible for enforcing the law and protecting public interest in a similar position as modern public prosecutors.

Mujtahid: a jurist who perform Ijtihad as opposite to *muqalid* who only imitate the opinion of previous Mujtahids.

Munkar: evil, prohibit wrong.

Muqalid: a jurist who imitate rather than performing Ijtihad.

Murtad: apostate.

Mutaham: a suspect.

Nahy: prohibition.

Niyyah: intent.

Nizam: order, ordinance, used in some modern Muslim state to denote regulatory laws promulgated by a government outside the sphere of Islamic law.

Qadhf: a false accusation of fornication as one of Hudud crimes.

Qadi al-qudah: the grand judge or chief justice.

Qadi: judge.

Qanun: a law or statute in its secular sense used usually as opposite to Islamic law. The term was often used during Ottoman Empire for administrative laws and later for all laws which gradually departed from the principles of Islamic law.

Qasama: an ancient controversial method of proof particularly for suspicious death. It serves also as a way of compensating the victim's family in cases where his killer could not be identified.

qawd: the infliction of Qisas physical punishment.

Qiyas: analogy as a source of Islamic law in some schools of law.

Qisas: just retaliation, the infliction of the equivalent amount of harm on the wrongdoer of violent crimes.

Rajm: stoning to death. A controversial penalty of a Hudud crime of fornication.

Reddah: apostasy. One of the controversial Hudud crimes.

Rida: consent.

Sahib al-shurtah: the head of the police force who at some stages of Islamic history enjoyed an extensive judicial jurisdiction over non-Hudud offences.

Sahih: legally effective, valid.

Sariqah: theft. One of the Hudud crimes.

Shahadah: testimony.

Shahid: a witness.

Shari'a: the law of Islam.

Shubha: doubt, uncertainty upon which Hudud punishments may be nullified or substituted.

Shurb al-khamr: intoxication, alcohol drinking. One of the controversial Hudud crimes.

Siyasa: literally policy, technically administrative justice. The concept of *Siyasa* allows a Muslim competent government to take measures which help to administer the public life of a Muslim state providing that such measures do not contradict the explicit principles of Islamic law.

Solh: reconciliation, mediation based on restitution or compensation.

Sultan: authority, a title for some rulers of Muslim states.

Sunna: literally means a beaten path. Technically means the tradition of the Prophet including his sayings or '*sunna qawlia*', acts '*sunna fi'liya*', and the tacit assent of the Prophet, i.e. his refrain from

expressing his disapproval on hearing or observing certain things said or done by others especially his companions or '*sunna taqrireyya*'. As such Sunna is the second most authoritative source of Islamic law next to the Qur'an. If the term is used to evaluate a certain action in terms of its legality it means recommended.

Surra: a chapter of the Qur'an.

Ta'wed: compensation.

Ta'zir (pl. *Ta'azir*): discipline, discretionary remedies determined by the trial court for unprescribed wrongdoings.

Tashri': legislation, the Islamic religious texts i.e. the Qur'an and Sunna.

Tawba: repentance. As a legal concept, *tawba* in certain cases may be accepted as a defence by which the offender may not be punished.

Ttaqlid: imitation, the juristic practice of following the views of the previous jurists with no attempt to provide their own opinion through 'Ijtihad'.

Ulama: Muslim scholars specialised in Islamic law.

Ummah: nation, technically the faith-community of Islam.

'Uqubbah: punishment

'Urf: custom as a secondary source of Islamic law.

Usul al-fiqh: literally means the roots of the principles of jurisprudence. Technically means the science that contains the rules by which Islamic law can be derived from its established sources or roots.

Wahy: divine revelation.

Wajib: obligatory, a duty.

Wakalah: power of attorney, agency.

Wali al-mazalim: an investigator of complaints who primarily concerns with complaints made by individuals against the state and its agents. *Walyyi al-mazalim* had a wider judicial jurisdiction with extensive discretionary powers.

Wali: a guardian.

Waliyy al-damm: the victim's next of kin who in case of the victim's death is given the right to prosecute the offender and to have all the victim's procedural rights.

Wasi: a guardian appointed by a court.

Wilaya: jurisdiction, competence.

Yamin: oath.

Zina: adultery, fornication as one of Hudud crimes.

Zann: an opinion or speculation as oppose to *ilm* or established knowledge.

Appendix (2)

List of Persons Interviewed for the Study

Abdul-Rahman Sharfy, A Supreme Court judge, and the head of the technical department of the Supreme Court. He is an author of several books including, "*Istiqlal Al-Qada Bayn Al-Manzur Al-Islami Wa Al-Waqi' Al-Sudani.*" or "Judicial Independence Between Islamic Perspective And Sudanese Status." *Dar jame'at ifrieqiya al-alamiyyah.* Khartoum (1995).

'Awad M. Al-Jeed, A former Sudanese judge and Attorney-General of the Sudan (1985). He was also the head of the Islamisation Committee of 1983.

Badr Al-Menyawi, A former Egyptian Attorney-General (1986-1990). Currently teaching at The National Centre for Judicial Studies.

Hassan A. Al-Torabi, A scholar of Islamic law. he is currently the Speaker of the Sudanese Parliament. Dr Al-Torabi is widely recognised as the spiritual leader of the current Sudanese regime. He is an author of several books and articles including "*Tajdid al-fikr Al-islami.*" or "Reviving Islamic Thought." *Al-dar al-Suadia lil-nasher.* Riyadh(1987).

Hassan M. Alob, A Sudanese Supreme Court judge, and formerly the chief justice of the al-Jazera district Judiciary. He is an author several articles including, "*Alwad' Al-Qanuni li Takwin Niqabat Al-Amelin.*" or "Legal Status of Establishing Employees' syndicate." Sudan law journal and reports. (1971). 160-183.

Ja'fer A. Hamed, A former Sudanese Supreme Court Judge (1986-1992). He also an author of several articles and studies including, "*Mulahazat Fi Mashru' Al-Qanun Al-Jena'i Al-Islami.*" or "Notices on the Draft of Islamic Criminal Law." The Sudan Law Journal and Reports. (1988). 309-

Ma'mun A. Hammur, A Sudanese Supreme Court judge 1995. He previously held several senior judicial posts all around the Sudan including the Chief Justice of the East Equator Province (1994).

Mohammed Mohy Al-Din 'Awad, An Egyptian professor of criminal law. Formerly the Dean of the Faculty of Law at Cairo University 'Khartoum branch', and the Dean of the faculty of law at the University of Mansura. He has written extensively on criminal law of both Egyptian and the Sudanese. Lately he has shown an interest in Islamic law and written a book entitled "*Al-Qanun Al-Jena'i fi Al-*

shari'a Al-islamiya." or "Criminal Law in Islamic Law." Matba'at Jame'at Al-Qaherah(Cairo University Press). Cairo (1986).

Salah H. Al-Sharif, A former Sudanese Supreme Court Judge (1988-1989).

Samir Naji, A former Egyptian Supreme Court judge, deputy of the Minister of Justice and a former director of "*Al-markiz Al-qawmi Lidderassat Al-qadaiyah*" or The National Centre For Judicial Studies (1982-86).

Suliyman Ayob, An Egyptian senior judge and a former president of the Court of Appeal. Cairo(1989-93).

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