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## Criminal Justice System Islamic Law Perspective <sup>(1)</sup>

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### *Abstract*

Islamic criminal law as well as the whole Islamic legal system is not codified or enacted by normal legislative bodies in the form of written articles. However, the basic principles and legal rules are delineated and clarified by the following sources: The Holy Book (Qur'an), The Prophetic reports (Sunna), The consensus of opinion (Ijma'), The analogy (Quyass), Equity (Istihsan), Textually unspecified interest of the people (Maslaha Mursala), Avoidance of harm (Sadd al-Dharar), Compatibility of the means and the ends (Istishab). However, Islamic law does not set forth any detailed system of criminal procedure, and there is no mandate in any source of Islamic Law emphasizing the existence of an investigation and prosecution stages in the Islamic criminal justice system. The historical precedents do not indicate clearly that the stage of criminal investigation was acknowledged in solving criminal cases. Thus, methods of the criminal justice administration in Islamic Law are considered to be a matter of policy and not of Shari'a. Consequently, the jurists "Ulama" and the legislative authorities of the Islamic countries are authorized to organize and maintain criminal procedural systems congruent with the particular circumstances of time and place, within the spirit of the general principles of Islam. The arrangements, mechanisms and administration of criminal justice system are purely political issues left to the discretion of the authorities. It is acceptable to divide legal jurisdiction into several offices or aggregate them in one. The only condition for one who is appointed to practice law is that he should be competent and should possess the legal qualifications prescribed by the Shari'a. Many Islamic countries have developed competent criminal

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2-**Biography:** Professor Mohammed Al Amin has joined Sudanese police force, and served till he became a major general. He held different positions, and attained his PhD from Kiyoo University – Japan. Professor Al Amin was the dean of Studies and Researches Center at Naif Arab University for Security Sciences, and an associate – professor at a number of Japanese Universities. He is currently an expert at Abu Dhabi Police G.H.Q. He published a host of researches in Arabic, English and Japanese languages.

justice systems consistent with many inevitable changes which have taken place in the field of crime prevention and criminal policies. Globalization of crime problem, concepts of the new world order, commitments to an international crime prevention, criminal justice programs (1) and growing cyber-crimes were of great impact on contemporary Islamic criminal justice system. This research is an attempt to examine Islamic criminal justice system, considering its capability in coping with changes and responding to the principles of human rights. The research may elaborate issues and elements of the Islamic criminal justice in the light of the contemporary criminal justice and the rules and guidelines adopted by the United Nations. Scholars in the western countries are of opinion that Islamic criminal justice system is rather punitive and does not respect the fundamental principles of the human rights. They are looking only to the penalties as stated in the Shari'a sources, without understanding the rules of Shari'a enforcement and rules of evidence. Muslim scholars have thoroughly explained rules and principles governing Islamic criminal justice. Innumerable textbooks, references and journals are available in the most famous libraries throughout the world; however, such references were not translated into popular languages, such as English, French or Chinese. Today, the international community is becoming more involved in administration of criminal justice and crime prevention at the national levels, due to the rapid growing of transnational criminality and its impact on human rights. Many efforts were made by the United Nations and other regional organizations to enhance administration of criminal justice, treatment of offenders and victim assistance programs. As members of the United Nations, Islamic countries are contributing in adopting criminal justice rules and crime prevention policies. The new emergence of Islamic legal system in many parts of the world and the escalation of transnational crime problems necessitate integration and reconciliation among various criminal justice systems prevailing in the world. This research is intended to bridge the gap between basic principles of Islamic criminal justice operations, procedures and rules of evidence on one hand and basic rules and methods of the modern criminal justice system operations and procedure known in western countries on the other hand. Observing Islamic rules of criminal justice system and maintaining its fundamental identity in the context of globalization may enhance realization of justice administration and rule of law. With due respect to the various views of Muslim jurists this paper, relying on the opinion of the majority (Rai al-jamhour), aims to identify. 1. Contemporary criminal justice system and Islamic criminal justice system. 2. Components of the criminal justice system and their functions and procedures. 3. Police role and powers in the criminal justice. 4. Rules of evidence in the Islamic Criminal Law. 5. Admissibility of scientific evidence before Islamic criminal law courts. 6. The role and powers of judges in Islamic Law Perspective.

**Keywords:** Criminal Justice – Criminal Legislation – Criminal Justice System – Police – Judiciary.

## نظام العدالة الجنائية

### منظور إسلامي (1)

الأستاذ الدكتور محمد الأمين البشري (2)

خبير بالقيادة العامة لشرطة أبوظبي - الإمارات

### مستخلص

رغم وفرة المؤلفات والمراجع التي تناولت مسألة العدالة الجنائية قل أن يجد القارئ بين طياتها تعريفاً واضحاً للعدالة الجنائية، إذ يلجأ الكتاب عادة إلى تحديد عناصر العدالة الجنائية ونظم إدارتها دون الخوض في نظريات العدل الجنائي ومبادئه العامة. وقد يعزى ذلك في المقام الأول إلى صعوبة الاتفاق حول مفهوم العدل الذي أخذ شرحه كثيراً من جهد الفلاسفة وفقاً للأيديولوجيات المختلفة التي ينبغي الإشارة إليها متى كنا بصدد تعريف العدالة الجنائية باعتبار الفلسفة هي باب المعرفة المختصة بتعريف وتحديد القواعد العامة لمختلف العلوم. ولعل من المناسب أن نتناول هنا بإيجاز آراء من لاحظنا فيما تقدم كيف أن فلاسفة القانون الوضعي قد اختلفوا فيما بينهم في تعريف العدل ومصادره وكيفية تحقيقه بين الأفراد والجماعات، ولعل عدم استقرار المذاهب السياسية وتعدد الأيديولوجيات والفلسفة الحياتية السائدة في المجتمعات المعاصرة كان وراء اختلاف الرأي واستبدال المواقف الفلسفية لدى أنصار القانون الوضعي. في الفقه الجنائي الإسلامي، للعدل تعريف متفق عليه ومصادر ثابتة لم يختلف حولها الفقهاء. وللإسلام نظرية ثابتة في العدل بمفهومه الشامل. وفي القرآن والسنة ما يقرر أسباب العدل وضرورة تأمينه باعتبار العدل هدفاً أساساً جاءت الرسالة المحمدية لتحقيقه في مجتمع انعدم فيه العدل وساده الظلم والفساد. لقد اشتمل القرآن الكريم على كثير من الآيات التي تدعو إلى العدل وتنتهي عن الجور والظلم. إن العدالة الجنائية في الفقه الجنائي الإسلامي جزء لا يتجزأ من مفهوم العدل الواسع، فالعدل في الإسلام هو التحلي بالأخلاق الفاضلة والورع والتقوى، والعدل بذلك يسع كل معاني الحق والصواب والسلوك السوي ويشمل العدل تمكين أصحاب الحقوق من حقوقهم ورد الأمانات إلى أهلها كما يشمل العدل في النفس ونفوس الآخرين وأعراضهم وأموالهم. وقد جاء العدل في القرآن الكريم مقروناً بالإحسان وإيتاء ذي القربى. ولضمان إقامة العدل نهى الإسلام عما تطويه الصدور

1- ورد هذا البحث إلى الدورية بتاريخ أكتوبر 2012 م وقيد تحت رقم 2012/64 وأحيل للتحكيم في نوفمبر 2012م

وأجيز للنشر في ديسمبر 2012م.

2- الأستاذ الدكتور محمد الأمين البشري محجوب عمل في الشرطة السودانية وتولى مناصب عديدة حتى رتبة لواء وحصل على درجة الدكتوراه من جامعة كمي يو اليابانية وعمل أستاذاً وعميداً لمركز الدراسات والبحوث في جامعة نايف العربية للعلوم الأمنية وأستاذ مشارك بالجامعات اليابانية وخبير بالقيادة العامة لشرطة أبوظبي وشارك في كثير من المؤتمرات الدولية وله العديد من البحوث المنشورة باللغات العربية والإنجليزية واليابانية.

المريضة من الحقد والحسد والكراهية وسوء الظن والتشفي والشماتة ونحو ذلك مما يضره غير العادل إزاء أخيه الإنسان. وكذلك أيضاً حرمت الشريعة القتل والزنا وقول الزور والكذب وأكل مال الناس فيما بينهم بالباطل ومن ثم فرضت العقوبات المشددة لمن يرتكب تلك الجرائم رحمة بالعباد وتوفيراً لأسباب العدل. في هذا البحث نحاول إلقاء الضوء على نظام العدالة الجنائية من منظور التشريع الجنائي الإسلامي وذلك من خلال : تعريف النظريات الوضعية للعدالة الجنائية وتعريف مفهوم العدالة الجنائية الإسلامي ودور أجهزة نظام العدالة الجنائية وإجراءاتها والأدلة الجنائية العلمية في نظام العدالة الجنائية الإسلامي ودور القاضي في نظام العدالة الجنائية الإسلامي

#### **مفردات البحث :**

العدالة – الجنائية – التشريع الجنائي – نظام العدالة الجنائية – الشرطة – القضاء.

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#### **Introduction:**

##### **The topic of the research:**

Islamic law does not set forth any detailed system of criminal procedure, and there is no mandate in any source of Islamic Law emphasizing the existence of an investigation and prosecution stages in the Islamic criminal justice system. The historical precedents do not indicate clearly that the stage of criminal investigation was acknowledged in solving criminal cases.

Thus, methods of the criminal justice administration in Islamic Law are considered to be a matter of policy and not of Shari'a. Consequently, the jurists "Ulama" and the legislative authorities of the Islamic countries are authorized to organize and maintain criminal procedural systems congruent with the particular circumstances of time and place, within the spirit of the general principles of Islam.

The arrangements, mechanisms and administration of criminal justice system are purely political issues left to the discretion of the authorities. It is acceptable to divide legal jurisdiction into several offices or aggregate them in one. The only condition for one who is appointed to practice law is that he should be competent and should possess the legal qualifications prescribed by the Shari'a.

Many Islamic countries have developed competent criminal justice systems consistent with many inevitable changes which have taken

place in the field of crime prevention and criminal policies. Globalization of crime problem, concepts of the new world order, commitments to an international crime prevention, criminal justice programs (1) and growing cyber-crimes were of great impact on contemporary Islamic criminal justice system. This research is an attempt to examine Islamic criminal justice system, considering its capability in coping with changes and responding to the principles of human rights. The research may elaborate issues and elements of the Islamic criminal justice in the light of the contemporary criminal justice and the rules and guidelines adopted by the United Nations.

**The problem of the research:**

Islamic criminal law as well as the whole Islamic legal system is not codified or enacted by normal legislative bodies in the form of written articles. However, the basic principles and legal rules are delineated and clarified by the following sources:

Firstly: Original sources known as:

- (1) The Holy Book (Qur'an)
- (2) The Prophetic reports (Sunna).

Secondly: Complementary sources including:

- (1) The consensus of opinion (Ijma').
- (2) The analogy (Quyass).
- (3) Equity (Istihsan)
- (4) Textually unspecified interest of the people (Maslaha Mursala).
- (5) Avoidance of harm (Sadd al-Dharar)
- (6) Compatibility of the means and the ends (Istishab).
- (7) Checking what is permissible and what is prohibited.(2)

Whereas, each type of crime in Islamic law requires certain handling and specific amount of proof, discussion of criminal justice administration should not be dealt with in isolation from the objective criminal law. In Islamic law, crimes are defined and classified into three categories:

- (1) Crimes punishable by fixed punishment hereafter known as "huddood" including:

- (a) Adultery (Zina).
  - (b) Defamation or false accusation (Qadhf).
  - (c) Drinking Alcohol.
  - (d) Theft (Sariqa).
  - (e) Dacoity, Highway Robbery (Qat al-Tariq).
  - (f) Apostasy (Ridda).
- (2) Crimes punishable by discretionary punishments, hereafter known by “Taazir”, including all forms of crimes, contravention, and negative social or religious behavior.

Many scholars in the western countries are of opinion that Islamic criminal justice system is rather punitive and does not respect the fundamental principles of the human rights. They are looking only to the penalties as stated in the Shari’a sources, without understanding the rules of Shari’a enforcement and rules of evidence. Muslim scholars have thoroughly explained rules and principles governing Islamic criminal justice. Innumerable textbooks, references and journals are available in the most famous libraries throughout the world; however, such references were not translated into popular languages, such as English, French or Chinese. This study attempts to answer the following questions: What is criminal justice system? Do we have Islamic criminal justice system? What are the characteristics of the Islamic criminal justice system and how far it differs from the contemporary criminal justice system? How far Islamic criminal justice is in conformity with the rules and guidelines of criminal justice adopted by the United Nations?

**Importance and aims of the research:**

Today, the international community is becoming more involved in administration of criminal justice and crime prevention at the national levels, due to the rapid growing of transnational criminality and its impact on human rights. Many efforts were made by the United Nations and other regional organizations to enhance administration of criminal justice, treatment of offenders and victim assistance programs.

As members of the United Nations, Islamic countries are contributing in adopting criminal justice rules and crime prevention policies.

The new emergence of Islamic legal system in many parts of the world and the escalation of transnational crime problems necessitate integration and reconciliation among various criminal justice systems prevailing in the world. This research is intended to bridge the gap between basic principles of Islamic criminal justice operations, procedures and rules of evidence on one hand and basic rules and methods of the modern criminal justice system operations and procedure known in western countries on the other hand. Observing Islamic rules of criminal justice system and maintaining its fundamental identity in the context of globalization may enhance realization of justice administration and rule of law.

With due respect to the various views of Muslim jurists this paper, relying on the opinion of the majority (Rai al-jamhour), aims to identify.

1. Contemporary criminal justice system and Islamic criminal justice system.
2. Components of the criminal justice system and their functions and procedures.
3. Police role and powers in the criminal justice.
4. Rules of evidence in the Islamic Criminal Law.
5. Admissibility of scientific evidence before Islamic criminal law courts.
6. The role and powers of judges in Islamic Law Perspective.

**Methodology of the research:**

This research is descriptive and analytical, based on readings of authenticated references as well as observation of practical applications and operations of criminal justice system in several Islamic countries. The research consists of this introduction covering the topic of the research, the problem of the research, its importance and two chapters:



- The Theory of the Criminal Justice
- Islamic Criminal Justice System

## **CHAPTER ONE**

### **The Theory of the Criminal Justice**

#### **1.1. The Criminal Justice: An overview:**

What is the meaning of criminal justice and what is the criminal justice system? Where does a study of criminal justice stand within the field of criminal law knowledge? To answer such questions, I have consulted many sources. However, only very rarely, attempts were made by experts to define the term “criminal justice system” or “administration of criminal justice”. Researchers of criminal justice commonly deal only with issues of criminal justice through traditional approach which emphasizes the importance or describing the structure and operation of criminal justice agencies. In great detail, they have discussed the system and the system’s components and their administration, cooperation, and coordination. Many writers identify the criminal justice system as police, prosecutor, judiciary and corrections. They ignore the element of the community and participation of the citizens and private defence sectors. On the other hand experts who have followed the legalistic approach have made remarkable efforts in the area of judicial process studies.

Indeed, here, definition of the term “criminal justice” is important, because people have various perceptions of what justice is and what behaviour may prejudice justice. Without doubt, the question of justice has been a philosophical issue since olden times. Daniel Webster has stated that: *“Justice is the chiefest interest of man on earth. But what justice is remains a matter of dispute in philosophy, ethics, and jurisprudence. It is significant that each of the four words used most in the science of law, namely ‘justice’, ‘rights’, ‘law’ and ‘morals’ are words for ideas at the very foundation of the scheme, words upon*

*whose meaning jurists have not been and are not now able to agree.”*  
(1)

### **1.2. Islamic Theory of Justice:**

In Islam, the sources of justice are known as revelation (Qur'an) and the divine wisdom which was uttered in the prophet's own words or acts and promulgated as "Sunna". Within and on the basis of these two authoritative sources early Muslim experts and philosophers made many interpretations and developed various theories. Among the Muslim experts who have contributed much in justice studies we have to mention first Imam Nu'man Bin Sabit Abu Hanifa (Baghdad, 660-730 A.D.), Imam Ahmed bin Hanbal (Baghdad, 724-801 A.D.), Imam Malik Bin Anas (Madina, 673-759 A.D.), and Imam Mohamed Bin Idris Al-Shafie (730-784) who developed the four main legal schools of Islam known by their names. Second, we must mention Al-Kindi, Elamwardi, Ibn Taymiya, and Ibn Khaldun for their philosophical researches in justice studies and practical contribution to justice administration. Although the first four experts' main concern was not only with justice, they did lay the ground for their successors to elaborate issues related to law and justice. (2)

Literally, the Arabic word for justice (ADALA) means equalization of modification, or balancing or to depart from a wrong path to a right one. Thus, anything which is not upright or in order is regarded as unjust or unfair. The meaning of justice (adala) is summarized in a letter reputed to be addressed to the Caliph Abd Al Malik (705) from Saeed Ibn Jubayr in reply to an inquiry about the meaning of justice, who wrote: "*Justice may take four forms: First, justice in making decisions in accordance with God's saying (when you judge among men you should judge with justice – Qur'an 4:61). Secondly, Justice in speech according to God's saying (When you speak, you should be equitable – Qur'an 6:153). Thirdly, justice in the pursuit of salvation in accordance with God's saying: (Protect yourselves against a day on which no person will give any satisfaction instead of another, nor will*

*an equivalent be accepted from him – Qur’an 2:117). Fourthly, justice in the sense of attributing an equal to God in accordance with his saying (Yet the unbelievers attribute an equal to Him – Qur’an 6:1). “Justice in the sense of weight and measurement means that a certain thing is equal to another in weight or size.”*

Therefore, the literal meaning of “justice” in classical Arabic is a combination of moral and social values denoting fairness, balance, temperance and straightforwardness. Such conceptual meaning of divine justice has been an issue of debate among theologians, jurists, and philosophers.

Muslim experts have considered justice from the following angles:

- (a) Political justice, which is regarded as the principal end of the state, is justice in accordance with the will of the sovereign. In Islam, in conformity with its public order, political justice proceeds from God whose will is exercised upon believers through the rulers. The believers are commanded to observe the laws and rules of the ruler as far as he is in conformity with God’s orders and the prophet’s teachings. But How to choose the ruler is the major issue in Islamic political justice yet to be resolved.
- (b) Theological justice is justice in accordance with the doctrines laid down by the theologians concerning God’s attributes of will and essence. Though theologians were in agreement that theological justice flows from God and that God is the final judge, they disagreed on whether it is an expression of his will and power or an expression of his essence and perfection. In this respect Muslim theologians are divided into two major schools, namely, the school of revelation and the school of reason. 8
- (c) Philosophical justice is justice defined and determined by philosophers not in accordance with revelation, but through reason. Muslim philosophers consciously tried to harmonize reason with revelation. However, philosophical justice is

rational justice and essentially naturalistic in character; therefore it is eternal and unchangeable, irrespective of time and place. Al-Kindi, who was known as the Arabs' philosopher was the first Muslim philosopher ,to discuss justice within the framework of both Greek and Islamic concepts.

- (d) Ethical justice is justice in accordance with the highest virtues which establish a standard of human conduct. Unlike legal justice under which man is commanded to observe a minimum standard of duties, ethical justice exhorts man to conform to the highest possible standard of good. Muslim writers have drawn their ethical standards from Islam as well as from Greek, Persian and other ethical sources. Abu Bakr Al-Razi, a famous Muslim philosopher, has stated that the supreme end for which man was created is not the gratification of physical pleasure but the acquisition of knowledge and practice of justice.
- (e) Legal justice is justice in accordance with the law. However, the meaning of justice has been considerably extended to imply not only legal but also other aspects. Thus, law and justice may coincide in the substance of the law, but law may or may not have justice as an objective. In Islam, law is closely intertwined with religion and both are expressions of God's will and justice. The aim of religion is to define and determine goals; the function of the law is to indicate the path by which God's justice is realized.
- (f) Social justice is justice in accordance with the operative norms and values embodied in the law, which the public is prepared to accept by habit or for other reasons. Social justice has been examined by Muslim experts within the framework of political law and public interest. Ibn Taymiya 9 (1263) and Najim Aldin Altawa (1259) were the pioneers in this field. Their writings laid the ground work, for other thinkers such as Ibn khaldun to formulate a new theory of social justice. He fought to rehabilitate the law in order to adopt justice and to stop corruption. He stated that: "*among some of man evil qualities*

*are injustice and aggression against one another. He who casts his eye upon his neighbor's property will lay his hand upon it to take it, unless he is held back by a deterrent, just as the poet (Almutanabi) said 'injustice is a human trait. 'If you find a good (fair) man, there must be a reason why he is not unjust.'"*

Therefore, Islamic justice, as such, is much higher than all other systems of justice, Greek, Roman or any other, because it searches the innermost motives. 'Acts of man are determined by motives is an authenticated saying of the prophet and we have to act at all time as if in the presence of God who is close to us than our jugular vein and knows even what we whisper. To render justice constitutes one of the most noble acts of devotion. Justice is the best act of devotion and one of the important duties of man after belief in the presence God. Justice is thus the duty imposed by God, and we have to stand firm for justice though it may be detrimental to our own interests. In many Quranic verses, believers are repeatedly commanded to observe justice and to act, speak, and think justly. ("O believers, stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety and fear of God." "Speak justly, even if a near relative is concerned; and fulfill the covenant of God").

### **1.3. Definition of the Criminal Justice System:**

Many writers have pointed out that a criminal justice system is elusive of any clear-cut definition. In Elmer Johnson's description, a criminal justice system is a loose federation of offices and agencies through which officials of various professional identities work.(3)

This may be true in the developed countries where there is an actual separation of governmental organs. However, in many developing Arab countries, there are a number of governmental organs each conducting all the functions of a criminal justice system. For instance, in some countries the police conduct investigation, arrest, detention and

prosecution, and control the correctional institutions. The meaning of criminal justice, like the meaning of crime is variable and symbolic. Criminal justice is symbolic in that the criminal law and its sanctions are expected to embody fundamental principles of the society; criminal justice is variable in that these symbols and principles are subject to change. Philosophers from Plato and Aristotle to Rawls have searched for those elusive principles that could give the idea of justice an absolute meaning. They have failed because the meanings of justice are derived from the changing social and political contents in which the pursuit of justice takes place.(4)

A literal definition of criminal justice, suggested by Joseph J. Senna and Larry S. Siegal, reads : “Criminal justice is a field of study that deals with the nature of crime in society, as well as analyzing the formal process and social agencies that have been established for crime control”.(5) According to Senna and Siegal, definition of criminal justice deals with the nature of crime, and to analyzes the process and agencies in charge of crime control. However, the first element is a function of criminology and the second is just an analytical approach. Thus, their definition does not consider the general problem of justice in the process of dealing with criminality.

Clemens Bartollas(6) has followed a unique criterion in defining criminal justice system by considering the criminal justice participants as actors upon a stage acting out their designated roles in different ways from identical positions. The actors are the offender, victim, police, defense council , prosecutor, judges, bail bondsman, probation officer, prison warden, correctional officer, parole officer, youth supervision and the social worker. Bartollas’s definition is elaborate, but it covers only what is known as an after-the-fact stage of a crime problem and it ignores the roles of the participants in the criminal justice system before the commission of a crime. Again, Peter Karatcoski and Donal Walker have stated that criminal justice focuses on the organization and the actions of legislative bodies, law

enforcement agencies, criminal courts and correctional agencies. Thus according to Peter Karatoski and Walker, the study of criminal justice requires an examination of the structure of each of the components as well as knowledge about their role and behaviour.(7)

Professor Atsumi Toyo,(8) an authority on Japanese and American laws of criminal procedure, has defined and criminal justice system as follows : “*A criminal justice system is an apparatus used to enforce the standards of conduct necessary to protect individuals and the community. It operates by apprehending, prosecuting, convicting, sentencing, and treating those who were sentenced.*”

Another controversial issue to be raised here is whether the criminal justice system is really a system or a non-system. Criminal justice has three separately organized parts - the police, the courts and correctional institutions and each has distinct tasks. However, these parts are by no means independent of each other. What each one does and how it does has a direct effect on the work of the others. The courts must deal and can only deal with those whom the police arrest; the business of correctional institutions is with those delivered to it by the courts. How successfully correctional institutions reform convicts determines whether they will once again become police business and influence the sentences the judges pass. Police activities are subject to court scrutiny and are often determined by court decisions. Thus reforming or reorganizing any part of procedure of the system changes other parts or procedures.

James A. Inciardi has pointed out that the notion of criminal justice operating as a “system” was, and still is, somewhat a myth. The unity of purpose and organized interrelationship among police, courts, and correctional institutions are at best inefficient.(9) He added that rarely does each segment of the criminal justice ‘system’ operate with a full awareness of the long-term cyclical implications of its activities. Not only is there a lack of unity of purpose and organized interrelationship

among police, courts and correctional institutions, but also, individual interpretations of crime, law, evidence, and culpability at every phase of the process create further inefficiency. Gary Hart(10) has characterized

criminal justice system agencies as established to implement rules of adjudication in legal systems. In this sense, justice systems and their agencies can be regarded as subsystems of the legal systems. That is to say, the only principal system is the legal system and each of the law enforcement agencies are participants in that legal system. In recent years many experts, instead of defining the criminal justice system, started to characterize the concept and principles of criminal justice through specific models or theories. To enhance our understanding, it may be sensible to discuss here some of those models, namely (1) the system mode, (2) the process model, (3) the organizational model and (4) the functional model.

#### **1.4. Models of Criminal Justice Systems:**

##### **The System Model:**

This model considers the administration of criminal justice to be a system of crime-control organizations namely, police, courts and correctional institutions. According to this model, the administration of criminal justice is an interrelated system of agencies beginning with arrest and concluding with the eventual release of the offender. The changes in any one part of the system affect the other parts. Thus the advocates of this model emphasize systems planning, coordination and cooperation between criminal justice institutions. Joseph Senna and Larry Siegel have observed that the efforts to bring criminal justice organizations together have been hampered by the multiplicity of their goals as well as by problems of agency isolation, conflict and independence.

##### **Process Model:**

Many writers perceive criminal justice not as system but rather as a process of series of decision-making function. The process model



emphasizes the offender and the stages through which he or she passes, beginning with arrest and ending with re-entry into the society. The main characteristics of this model are:(11)

- a. The concept of legal guilt and the presumption of innocence,
- b. The conception of the criminal process as an appropriate forum for the correction of its abuses, and
- c. The insistence on the state's duty to ensure that the accused is not deprived by poverty of the capacity to effectively invoke the protections that the process must afford.

### **The Organizational Model:**

The organizational model consists of three approaches:

- a. The regulatory model which is legalistic and based on the process of the arrest, trial and sentencing of the offender,
- b. The patient model which considers the offences in terms of personal pathology, and
- c. The community disintegration model where criminal justice is viewed within the context of the social community.

### **Functional Analysis Model:**

Donal Newman has recently suggested a model known as "functional analysis" which would provide a method for reviewing the entire structure of the criminal process; it considers the critical functions of police, courts and correctional personnel not singly but in union. Newman's approach seems to represent a combination of both the organizational model and the systems model.

### **Islamic Law Model:**

In defining the term "administration of the criminal justice system", a distinction should be made between the literal meaning and the philosophical meaning. If we consider the literal meaning, the term "administration" has two distinct meanings :

- a. To rule or govern.
- b. To give or realize.

**The Islamic Law Model of criminal justice is justice realization through :**

- a. Fair realization of crime control programs.
- b. Fair treatment of those who are involved in a criminal case.
- c. Establishment of a fair and peaceful society free of all sorts of social negativism and causes of criminality.

Therefore, administration of criminal justice in Islamic Law perspective is maintaining peace, realizing social justice, and impartial treatment of individuals, particularly, those who get involved in criminality as offenders, delinquents, victims or witnesses. Therefore, a criminal justice system may be identified as a formal and informal machinery for solving crime problems. The machinery is formal in that it employs legal procedures to punish or treat an offender for the sin he has committed. It is informal in that it takes care of children and adults through the social mechanisms of the family, the schools, Islamic teachings and strengthening traditional values.

## **CHAPTER TWO**

### **Islamic Criminal Justice System**

#### **2.1 Sources of Islamic Criminal Justice**

Islamic law does not set forth any detailed system of criminal procedure, and there is no mandate in any source of Islamic Law emphasizing the existence of an investigative stage in the Islamic Criminal Justice system. The historical precedents do not indicate clearly that the stage of criminal investigation is acknowledged in solving the criminal cases. Ibn al-Qiyam Al-Jowazia in his famous book titled “The Methods of Judgment”, Al-Turuq Al-Hukmiya”, has stated that there is no provision in the Sharia which prescribes that all legal matters be assigned to one particular person or office. The arrangement and administration of criminal justice system and mechanisms are purely political issue and are left to the discretion of

the authorities. It is acceptable to divide legal jurisdiction into several offices or aggregate them in one. The only condition for one who is appointed to practice law is that he should be competent and should possess the legal qualifications prescribed by the Shari'a.

Thus, methods of the criminal justice administration in Islamic law are considered to be a matter of policy and not of shari'a. Consequently, the jurists "Ulama" and the legislative powers of the Islamic countries are authorized to organize and maintain criminal procedural systems congruent with the particular circumstances of time and place, within the spirit of the general principles of Islam. In the early Islamic era, the Administration of criminal justice was distributed among several offices such as the Khalifa "Head of the State", the office of complaints "Diwan Al-mazalim", the Amir of the region, the military commander, the chief of police "Sahib Al-Shurta", and the inspector of markets. The chief of the police was concerned with the serious crimes "Hudood and Quissas" while other contraventions and simple crimes were in the jurisdiction of an official known as market inspector. However, Islamic criminal procedural system has developed gradually to meet the requirements of the innumerable political, social and scientific changes which has occurred in the Islamic countries and the world.

Many Islamic countries has developed competent criminal justice systems consistent with many inevitable changes which has taken place in the field of the crime prevention and criminal justice. Globalization of crime problem, concepts of the new world order, Commitments in an international crime prevention and criminal justice programs were of great impact on Islamic criminal justice system.

Islamic criminal law as well as the whole Islamic legal system is not codified or enacted by normal legislative bodies in the form of articles and sections. However the basic principles and legal rules were delineated and clarified by the following sources :(19)

**Firstly** : Original sources known as :

- (1) The Holy Book (Qur'an).
- (2) The Prophetic reports (Sunna).

**Secondly** : Complementary sources including :

- (1) The consensus of opinion (Ijma').
- (2) The analogy (Quyass).
- (3) Equity (Istihsan).
- (4) Textually unspecified interests of the people (Masalah Mursala).
- (5) Avoidance of harm (Sadd Al-Dharar).
- (6) Compatibility of the means and the ends (Istishab).
- (7) Checking what is permissible and what is prohibited.

Today, the new emergence of Islamic legal system in many parts of the world and escalation of transnational crime problems necessitate integration and reconciliation among various criminal justice systems prevailing in the world. This paper is intended to bridge the gap between basic principles of Islamic criminal procedure and evidence on one hand and basic rules and methods of the modern criminal procedure known in western countries on the other hand.

Whereas, each type of crime in Islamic law required certain amount of proof, discussion of criminal investigation and evidence should not be dealt with in isolation from the objective criminal law. In Islamic Law, crimes are defined and classified into three categories:

- (1) Crimes punishable by fixed punishment hereafter known as "Hudood" including:
  - (a) Adultery (Zina).
  - (b) Defamation or false accusation (Qadhf).
  - (c) Drinking Alcohol.
  - (d) Theft (Sariqa).
  - (e) Dacoity, Highway Robbery (Qat Altariq).

- (f) Apostacy (Ridda).
- (2) Crimes punishable by retaliation or blood money, (hereafter known by “Quissas” or “Diya”). Including all types of murder and injuries.
- (3) Crimes punishable by discretionary punishments, hereafter known by “Taazir”, including all forms of crimes, contraventions, and negative social or religious behaviors.

## **2.2 Islamic Criminal Justice system Components**

Contemporary Islamic criminal justice system components are almost similar to that of the western countries, in terms of organizational structure, quality of manpower, mechanisms and methods of law enforcement. However in Islamic criminal justice system, there are other community-based institutions that participate in realizing justice. The formal components of the Islamic criminal justice system are as follows :

### 1. Functions of Police :

Police functions are formally prescribed by legislation. These are :

- (a) Protecting life and property.
- (b) Preservation of peace.
- (c) Prevention of crime.
- (d) Detection and arrest of violators of the law.
- (e) Enforcement of laws and ordinance.
- (f) Safeguarding the rights of individuals.

### 2. Functions of the prosecution:

- (a) Investigation.
- (b) Charging.
- (c) Representing the state in criminal trials and present evidence as a public advocate.
- (d) Representing the government in civil actions to which the government is a party.
- (e) Providing legal advice to governmental organs.
- (f) On-the-job training of law enforcement personnel.

### 3. Functions of the criminal courts:

- (a) Provision of justice.

- (b) Adjudication of defendants charged with criminal offenses.
  - (c) Sentencing those convicted.
  - (d) Investigation on behalf of the public prosecutor.
4. Functions of correctional institutions:
- (a) Retribution or punishment of the offender for the crime he has committed.
  - (b) Deterrence which is either special (aimed at a particular offender) or more general.
  - (c) Incapacitation.
  - (d) Rehabilitation.
  - (e) Restitution.
  - (f) Reintegration of re-socialization.

The informal components are known as :

1. Organization for enjoining Al-Ma'ruf and forbidding al-Munkar.
2. Diwan Al-Mazalim.
3. Diwan Al-Zakat.
4. The Mosque.
5. Other volunteer groups.

### **2.3. The Islamic criminal Justice Process :**

Influenced by the inherited basic principles and guidelines of the Islamic criminal law, many Islamic countries have adopted modern criminal justice systems following the models developed in the western countries. Tremendous efforts were made to upgrade standards of the criminal justice personnel and improve the legal processes as well as the operational methods. Experts and governmental organizations from various Islamic countries have contributed in developing and formulating the United Nations standards and guidelines as well as international instruments of the criminal justice. Although it may be noted that the United Nations standards and guidelines are not yet included in the legislations of the criminal justice in many Islamic countries, but, the positive impact of such standards and guidelines on the mechanism of the criminal justice system is remarkable.

Today, there are three district criminal procedural systems that may be known throughout the world, namely:

- (a) The accusatorial system, which considers criminal action to be a common dispute between two equal parties, and their case is directly presented to the judge who should balance the claims of the litigants.
- (b) The inquisitorial system, where the criminal case proceeds through a pre-trial stage of investigation by judicial police bodies.
- (c) The mixed system which combines the aspects of both the accusatorial and the inquisitorial systems.

The criminal procedural systems known in Islamic countries are almost identified as a mixed system model. Unlike the accusatorial and inquisitorial systems the Islamic procedural system following the mixed model, has introduced the principle of the “Siyasat Al-Sharia”. According to this principle, it is the duty of the political authorities to establish a criminal justice system which serves the public interests. Thus, although, the procedural system is not a matter of Shari’a, it is governed by the general principles of Shari’a. Therefore, the criminal justice systems of the Islamic countries consists of the following components:(20)

- (a) The Police.
- (b) The public prosecutor.
- (c) The criminal courts.
- (d) The correctional institutions or penal institutions.
- (d) The Victims.

The police, being the most traditionally organized force in the Islamic countries conduct the main role in the criminal procedure. Usually, police officers detect crimes, gather evidence, make arrests and searches, conduct investigations, maintain forensic science laboratories and fingerprints bureaus. Police activities in the criminal justice system

in many Islamic countries may be extended beyond the stage of criminal investigation. Police may make charges against the accused persons and conduct prosecution before criminal courts. Moreover, the police are in charge of the penal institutions and juvenile justice in many Islamic countries.

Although the responsibility of criminal investigation and gathering of evidence is vested by law upon police officers, many other public officials are involved in the pre-trial stage of criminal procedure in the Islamic countries. A recent study conducted by Naif Arab Academy for Security Sciences has identified eight organizations involved in investigative activities, such organizations were classified according to the volume of their involvement as follows:

- (a) The police officers.
- (b) Public prosecutors.
- (c) Security directors.
- (d) Governors (Muhafiz).
- (e) Regional directors.
- (f) Chiefs of district police and guards.
- (g) Chiefs and sheikhs of villages.
- (h) Chiefs of air and sea transportation.

However, more involvement of public prosecutor at the stage of the investigation is an indication of maintaining human rights, particularly, during collection of scientific evidence by the police or any other security organization. In addition to the newly emerging role of the public prosecutor in the Islamic criminal justice system, it is noteworthy to point out the role of the victim in Islamic criminal procedure as another considerable indication of justice and equity. The victim as a witness or as an individual claiming compensation and revenge is given due consideration throughout the investigation, trial and execution of judgments. Finally, there is no doubt that the role of the judge remains the most vital in the Islamic criminal procedure. Methods of collecting evidence, admissibility and scrutinization of



every related fact are left to the absolute satisfaction and certitude of the Judge “Yaggin Al-Ghadi”

#### **2.4 Procedures Governing Criminal Investigations:**

Islamic criminal procedure is initiated by a complaint from the injured person, his legal representative, relatives or any other person who believes that an offense has been committed. It is the duty of the public officials to lodge accusation in cases of crime committed within their jurisdictions. Practically, such initiation of criminal procedure takes place through a verbal or written report given to a police officer, public prosecutor, security officer or judge in charge of the jurisdiction where the crime has been committed. The above-mentioned report, information or complaints should be registered by the police in a form of “First Information Report” and entered into a judicial book kept at every police station known as “Register of Crime Reports”. Following the registration of the information, the police commence the following investigative activities :

- (a) Arrest of the accused person or persons if they are known.
- (b) Visit the scene of the crime and collect evidence.
- (c) Interrogate witnesses and accused persons.
- (d) Conduct search of places and persons.

If in the course of such investigative activities, it appears to the police officer or the public prosecutor under whom the investigation is being made, that such investigation discloses reasonable grounds of suspicion against any person of having committed an offense, and that a trial should begin, he shall submit the case diary to the public prosecutor or magistrate competent to take cognizance of the crime.

Compared with the western countries, stages of criminal procedure in the Islamic countries are very brief. In the Islamic criminal procedure it is not essential to go through elaborate stages of investigation, booking, formal complaint, initial appearance, preliminary hearing, arraignment etc. as known in the western model of criminal procedure. It is a well known fact that the arrest of the accused person should not take place,

unless there is a reasonable ground or sufficient evidence to establish a criminal case against him. False or Wrongful accusation of another person is considered a serious crime (Qadhf).

Arrest is one of the most critical issues in the developing countries, because the police are authorized to arrest without a judicial warrant in a large number of serious crimes. It is very common to commence investigative activities by arresting many persons or any one found at the scene of the alleged offense. Following the arrest investigators tend to utilize scientific methods to collect evidence against the persons under arrest. Due to such rapid and doubtful arrests and releases, official crime statistics of many countries reveal very high clearance rates and a very low conviction rates, which is an indication of failure of the investigative methods and techniques.<sup>21</sup>

### **2.5 The Rules of Evidence in Islamic Criminal Justice:**

Whereas, each type of crime in Islamic law requires certain amount of proof, discussion of criminal investigation and evidence should not be dealt with in isolation from the objective criminal law. In Islamic Law, crimes are defined and classified into three categories:

- (1) Crimes punishable by fixed punishment hereafter known as “Hudood” including:
  - (a) Adultery (Zina).
  - (b) Defamation or false accusation (Qadhf).
  - (c) Drinking Alcohol.
  - (d) Theft (Sariqa).
  - (e) Dacoity, Highway Robbery (Qat Altariq).
  - (f) Apostasy (Ridda).
- (2) Crimes punishable by retaliation or blood money, (hereafter known by “Quissas” or “Diya”). Including all types of murder and injuries.
- (3) Crimes punishable by discretionary punishments, hereafter known by “Taazir”, including all forms of crimes, contraventions, and negative social or religious behaviors.

Evidence in Islamic criminal law is distinguished by the following characteristics

1. Certain crimes known as “Hudood” require specific amount of evidence, well prescribed by Qur’an and Sunna. If such prescribed quality of evidence is not available “Hudood” penalty should not be inflicted upon the accused person. However, the judge may instead of the “Hudood” penalty, convict the accused person with a less serious offense and sentence him with any other penalty prescribed by the judge, according to his knowledge and discretionary powers.
2. Crime “Quissas” including all types of culpable homicide and injuries may be altered if the victim pardons the offender. The evidence required by Sharia’ to prove guilty in “Quissas” crime is also prescribed by “Quran” as testimony and confession. However the scientific evidence here is indispensable to assess the degree of injury or identifying cause of death (e.g. scientific evidence may be essential to prove that the deceased person was or was not already dead, when the confessing accused attacked and stabbed him with the intention of murder).
3. Taazir Crimes are not provided explicitly in “Quran” or “Sunna”, but, they cover all acts of disobedience to “God’s” commandment and social misconduct. Taazir crimes represent all crimes currently identified by western penal codes. Several Taazir crimes are not being identified by disciplines and regulations “Anzima” in a form of definitions, sections or articles providing penalties and methods of detection and proof. Therefore, scientific evidence is accepted by the criminal courts as a direct or circumstantial evidence to prove guilty or acquittal in Taazir crimes without exemption.
4. In Islamic criminal procedure, normally, burden of proof lies upon the plaintiff whether an individual or a public authority, but, when no substantial evidence is procurable from the side of the plaintiff or complainant, the defendant should be asked to take a solemn oath that he has not committed the alleged crime; and accordingly he may be acquitted. In a prophetic report:” If people are allowed their way of having their claims, they will claim the lives and properties of

others, therefore, the defendant may take oath that he has not committed the crime for which he has been charged”.

5. A person who gives evidence before a court should be mature adult, sane, objective in his testimony and not involved or interested in the criminal case in issue.
6. Muslim jurists unanimously agree that the evidence given by a non-believer against a Muslim should not be accepted, unless the trial is taking place in a non-Muslim country.
7. Circumstantial evidence is well known in Islamic Criminal Law, and it is left for the free discretion of the judge as well as his intellectual alertness and sense of observation and judgment.

“If it be that his shirt is rent from the front, then is her tale true, And he is a liar, But if it be that his shirt is torn from the back, then is she the liar, And he is telling truth” (Sura 12, verses 26-27).

8. No doubt that Qur’anic and prophetic parables as well as legislations and legal judgments of Muslim predecessors remain as principal paragons and guidelines for criminal courts and judges to determine procedures and methods of proof.

Being governed and guided by the above-mentioned rules of evidence and procedures, evidence in Islamic criminal justice system may be classified into seven types:

1. Testimony (Shahada)
2. Confession (iqrar)
3. Circumstantial evidence (Qarina)
4. Oath by 50 persons (Al-Qassama)
5. Oath of the defendant (Yameen)
6. Scientific evidence.
7. Judge’s personal observations (Illmu Al-Qadi)

Each of the above-mentioned types of evidence has its own features and rules of admissibility detailed in the following pages :

### **(1) Testimony:**

Islamic criminology emphasized the individual’s inner characteristics which are related to the strength of his religious spirituality, belief and

faith in God. If the individual's faith is weak he may normally become selfish, shameless, unjust and deviant. Islam strives by various means to preclude circumstances that may lead to crime, sinful acts and unfairness. Due to such deep rooted concepts it is prospective that individuals are :

- (a) Aware with the rights of the other individual.
- (b) Obligated to maintain peace, security and justice for others.
- (c) Has an inner feeling that God knows and sees every deed.
- (d) Giving evidence or a testimony before a criminal court is an spiritual obligation for any individual. *ye who believe! Stand out firmly For Allah, as witnesses To fair dealing, let not The hatred of others To you make you aware To wrong and depart from justice, Be just, that is Next to piety, and fear Allah. For Allah is well acquainted with all that you do.*
- (e) Mindful that concealing evidence, giving false testimony or confessing a crime he has not committed is prohibited by God.  
We shall hid not The evidence before Allah, if we do, then behold!  
The sin be upon us. (Sura 6, verses 44)
- (f) Aware that individuals are encouraged to give evidence and disclose fact for the sake of justice.

A testimony in Islamic Criminal Law is defined as a verbal and oral report of what the witness has seen or heard about facts related to the alleged crime, provided that such report is made before a court of justice by a competent witness. Giving evidence by testimony is one of the principal Islamic obligations imposed upon the individuals, not only as a means of proof, but, it is one of the religious objectives of Islam. Many Qur'anic verses has emphasized the necessity of testimony. In the light of such Qur'anic verses basic features and rules of testimony may be outlined as follows: *Ye who believe! When ye deal with each other, In transactions involving future obligations in a fixed period of time. Reduce this to writing Let a scribe write down Faithfully as between The parties; Let not the scribe Refuse to write as Allah has taught him. And get two witnesses out of your own men, And*

*if there are not two men, Then a man and two women. Such as ye choose. For witnesses, So that if one of them errors, the other can remind her. The witnesses should not refuse when they are called on (for evidence). (Sura 3 verse 282)*

**Firstly : Conditions related to the witness:**

Jurists unanimously agree that admissible testimony should be given by an adult, male, sane, just (Aadil) and Muslim (In case of accused Muslim in Islamic country) witness, provided that he is not involved or interested in the alleged crime. However, jurists have controversial opinions on testimony given by a deaf, dumb, blind, youth or a female witness. Even though, the majority of the jurists tend to consider testimony of such witnesses whenever they are capable to convey their knowledge to the satisfaction of the judge or the court, in several minor crimes “Taazir”.

**Secondly: Conditions related to the testimony:**

It is agreed that the testimony should be introduced formally by its specific verb “I testify” “Ashhadu”, because of this verb, which is taken from the original Qur’anic source has great impact on the equitability of the individual who is spelling out his knowledge before a court of justice. Moreover, it is agreed that the contents of the testimony should be confirmative to the facts surrounding the alleged crime. On the other hand, there are two conditions related to the contents of the testimony known as “Shart Al-Asala” and “Shart Adem Al-Taquadum”. “Shart Al-Asala” means that the testimony should be given directly by the original person who has the information and not as a hearsay or on behalf of another. “Shart Adem Al-Taquadum” means that the contents of the testimony should be given before the judge or court of justice without delay and within a reasonable period of time.

The majority off Muslim jurists necessitate “Shart Al-Asala and Shart Adem Al-Taquadum” for a testimony if the alleged crime is related to one of the rights of God, such as “Hudood” crimes. However, both conditions of “Asala” and “Adem Al-Taquadum” may not be in issue if

the alleged crime is related to one of the rights of the people. That is to say, if the alleged crime is related to property or “Taazir” hearsay evidence may be admissible and there may be no conditions of time limitation required.

**Thirdly: Conditions related to female witnesses:**

Shari’a decrees that women’s testimony is admissible in civil property cases, provided that there should be more than one female witness and supported by competent male testimony. In criminal cases testimony given by a female witness is admissible only to prove facts related to female affairs which are not accessible to the males, such as pregnancy and deliverance. However, only female testimony can never prove guilty in cases of “Hudood” or “Quissas”. Many jurists are of opinion that scientific evidence prepared by a female expert is admissible as well as that of a male expert.

**(2) Confession (Iqurrar):**

Confession (Iqurrar) made by an accused person against himself is accepted in the Islamic Criminal Law to prove guilty in some crimes, provided that:

- (a) The accused person is held criminally responsible.
- (b) The confession is not given under any sort of threat or inducement.
- (c) Confession is given voluntarily by sane adult, and, under his own free will.

In addition to the above-mentioned provisions, confession is governed by further conditions in the following cases:

- a) In crimes of “Hudood” or “Quissas” confession should be:
  - i) Direct, obvious and explicit.
  - ii) Given before the court of justice.
- b) In crimes of adultery confession should be:
  - i) Given in detail showing the fact of the sexual intercourse known as penetration “Ealaj”.
  - ii) Made four times repeatedly before different court sessions.

- iii) Sexual intercourse was physically and practically possible by the two parties.
- iv) The confession was not denied by one of the two parties of adultery.
- c) In case of theft the offender should make his confession twice before the court, and, provided that the victim is claiming restoration of his stolen property.
- d) In case of drinking alcohol, the accused should confess twice before the court, while existence of an alcoholic smell around the accused.(22)

**(3) Circumstantial Evidence:**

Circumstantial evidence “Qarina” was illustrated in “Qur’an” by the story of Zulaikha who had attempted sexual assault on Prophet Joseph(23). Scorning Zulaikha’s love, Joseph tried to escape, but, she tugged at his garment and tore a piece of the garment. Zulaikha accused Joseph as the one who attempted the sexual assault. However, Joseph’s garment which was torn at the back side was considered as a circumstantial evidence to prove Joseph’s acquittal. This example reveals the importance and legality of circumstantial evidence as a subsidiary means of proof, extricated by judges who have acute sense of observation, knowledge and experience.

**(4) Al-Qassama:**

Al-Qassam is a unique method of proof accepted only in Quissas (murder) cases, where no other evidence is available. In Al-Qassama, fifty solemn oaths are taken by the claimants or the defendants. The Judge asks fifty of the defendants or the residents of the area where murder took place to swear that they didn’t commit the crime. If the defendant reject Al-Qassama the judge may ask the same from the claimants. If the number of those who taking oath is less than (50) some of them should repeat. Following Al-Qassama “Diya” blood money is paid to the claimants from the public funds (23).



**(5) Oath of Defendant:**

As a general principle, it is the responsibility of the claimant to produce substantial evidence to prove his allegation. However, if the defendant denies the allegation, he is obliged to take a solemn oath rejecting the claimant's charge. Oath in Islam as a broad concept has a great impact on judgements and decision making, because, oath reflects the spiritual feelings of the individual as well as his faith and strength of belief. Therefore, Islam-unlike the modern laws gives such privilege to both the claimant and defendant as a matter of equity.

**(6) Scientific Evidence:**

Scientific Evidence is the opinion and written reports produced by experts and scientists (Ahal al-Zikir). Scientific evidence is being utilized in many Islamic countries, particularly at the stage of the police investigations leading to substantial evidence. Tentatively, it should be noted that, whenever the conviction of any accused person is based upon a scientific evidence, then, the punishment imposed should be "Taazir" punishment and not "Hudood". Majority of jurists consider the scientific evidence as a circumstantial evidence.

**(7) Judge's personal observations and knowledge (Illmu Al-Qadi):**

The judge may utilize his own observations and knowledge for inference of facts and conclusions leading to conviction of the accused in case of offences related with people's rights (Taazir).(24) However, the judge is not authorized to use his own testimony to convict an accused person in the crimes of "Hudood".

**2.6 Admissibility of Scientific Evidence Before Islamic Courts:**

Islam is known as a religion of sciences and knowledge. It recognizes sciences and respects the scientists "Ulama" as leaders of their nations. Innumerable scientific facts which were manifested in "Qur'an" since the 7th Century are now being identified and adopted by modern sciences and technologies as new innovations. Therefore, Muslim jurists agree upon the inevitable role of science and technology in all aspects of life to maintain interests of mankind; provided that it does

not infringe the basic principles and objectives of Shari'a. Scientific and technological methods were most recommended in the field of criminal justice administration as one of the principal objectives of Islam.

In Islamic Law, judges are asked to examine and scrutinize all facts related to the crime or allegation pending trial. Doing such examinations judges are authorized to look for scientific and technological means in order to reactivate and assess various views. In Islam, judges are urged to call competent experts and scientist "Ulama" to give evidence related to their exclusive jurisdiction and professional "Ahal al-Zikir" *"And before thee also the apostles we sent were but men, to whom we granted inspiration: If ye realize this not, as of those who possess the message"* (Sura 16, verse 43).

With growing awareness of the validity of scientific evidence in the Islamic countries, techniques of fingerprints, blood grouping, hair analysis, voice examination, polygraph and DNA as well as the other techniques of forensic science and medicine are being well considered in solving crime problems. However, it is still difficult to put forward the ambitious objectives in eliminating criminality and realizing criminal justice. In fact the difficulties currently facing implementation of scientific methods of solving crimes are not a unique problem of Islamic countries, it is more debatable even in the western nations, due to either :

- (a) Mistrusting the abilities of the professionals who conduct detection and investigation or;
- (b) Misunderstanding the contemporary crime problem and seriousness of evading justice.

Police officers, public prosecutors and forensic science experts are part of the whole community, they have the same feelings, ethics and moralities of communities. They do understand the means of justice and respect the right of the accused as well as that of the victims.

Unlike the other members of the society, professional investigators have the opportunity to interrogate hazardous murderers and terrorists. They have opportunities to listen to crime victims telling harrowing stories about how they were robbed or raped. Such estimable experiences and many others should be considered in entrusting investigators and their scientific experts in the area of scientific evidence. In this respect, I am of opinion that criminal courts in Islamic countries are rather lenient than those of the western countries in utilizing scientific evidence. However, this conclusion is based on the assumption that, there are certain shared factors, namely: indisputable classification of crimes, systematic methods of proof and classification of the scientific evidence.

### **2.7 Classification of Scientific Evidence:**

In the light of the above mentioned distinction between crimes of “Hudood”, “Quissas” and “Taazir”, and concerned with views of “Ulama” on the free and limited methods of proof, scientific evidence may be classified into the following categories showing the legality and admissibility of each category:

**Firstly: Evidence acquired secretly without the knowledge of the accused person**, such as interception of communication. Here, there is no doubt that Islam gives due respect to the privacy of individuals. Several Shari’a sources have clearly restricted entry to premises of others or listening to their communication.

*“O ye who believe! Avoid suspicion as much(As possible): For suspicion In some cases is a sin: And spy not on each other, behind their backs, Would any of you like to eat The flesh of his dead brother? Nay ye would Abhor it. But fear God. (Sura 49, verse 12)  
O ye who believe! Enter not houses other than your own. Until ye have asked permission and saluted Those in them: that is Best for you, in order that may heed (what is seemly)If you find no one,*

*enter not Until permission is given to you; If ye are asked to go back, go back. (Sura 24, verses 27, 28).*

- It is virtue if ye enter your houses from the back: It is virtue if ye fear God. Enter houses through the proper doors And fear God: That ye may prosper. (Sura 2, verse 189).

Therefore, collection of evidence secretly by any means of illegal entry, bugging, electronic surveillance or any kind of interception is prohibited in Islamic Law. Such detective or investigative activities are classified as acts of spreading mischief in the community, and, may amount to a criminal behavior. However, if the people are facing serious crimes (organized crimes, terrorism, illegal trading in drugs etc.) or any other eminent danger which may not be solved without utilizing scientific means, shall we still ignore scientific evidence?

Governed by Shari'a rules the answer may be one of the following options:

- (1) Scientific evidence may be utilized if crime problem can be solved and interests of the people maintained as well as avoidance of spreading mischief.
- (2) If it is not possible to realize both objectives of solving crime problem and avoiding mischief, Muslim jurists agreed that:
  - (a) If the interests of people are greater than damages of mischief, the first should be taken and the latter ignored.
  - (b) If the spread of mischief is greater than the interests of people, the first should be avoided sacrificing with people's interests.
  - (c) If both mischief spreading and maintenance of interest are equal, then it is recommended to ignore one of the activities or both.

**Secondly: Evidence obtained openly with the knowledge of the accused person, including:**

- (1) Intimate samples of blood, semen or any other tissue fluid, urine, saliva or pubic hair or swab taken from the person's body orifice, fingerprints and photographs etc.
- (2) Non-intimate samples, such as hair other than pubic hair, samples taken from nail or under the nail, teeth impression, part of person's body other than a body orifice.

Bearing in mind the public interest and considering the right of the accused person in the context of the general principles of Shari'a, Muslim jurists agree upon the utilization of scientific evidence acquired from the accused person to detect and investigate all forms of crimes Such evidence may be used to :

- (a) Generate other admissible evidence (testimony or confession) in "Hudood" and "Quissas" cases.
- (b) To create and strengthen judge's satisfaction in all criminal cases.
- (c) Prove guilty in Taazir crimes in corroboration with other circumstantial evidence.

The above-mentioned utilization of the scientific evidence is recommended by Muslim jurists upon the following conditions:

- (1) The samples must not be taken without the consent or appropriate consent or judicial authorization.
- (2) The accused should be informed with the fact of the sample taking.
- (3) Samples should be taken by specialized expert or medical practitioner or medico- legal experts.
- (4) Taking of the samples should not be a probable cause of danger to the health or safety of the accused person.<sup>16</sup>
- (5) There must be a reasonable ground for suspecting the involvement of the person from whom the sample is to be taken.
- (6) There is need to solve the criminal case for the sake of the general public interest.

**Thirdly: Evidence collected from the scene of the crime**, includes, fingerprints, tool marks, paint flakes, forged documents or any other related physical evidence. Such materials may be examined by forensic science laboratory experts and compared with samples taken from the accused or previously registered information to cause identification and verification of facts related to crime. In this category, fingerprints are most reliable and authenticated because the fact that no two fingerprints are identical was revealed in “Qur’an” *Does man think we cannot assemble his bones? Nay, we are able to put together in perfect order The very tips of his fingers (Sura 29, Verse 3)*

Scientific reports made by forensic science laboratory experts are accepted by Shari’a court to prove guilty in serious “Taazir” crimes.

**Fourthly: Evidence or statement taken from the accused person or a witness through scientific means** such as, Lie Detector (Polygraph), Narco-Analysis (Truth-Serum), Suggestive hypnosis or Auto-hypnosis are not admissible as evidence before Islamic Criminal Courts. Because, such statement whether it is a testimony of a witness or a confession of an accused doesn’t comply with the requirements of either. Muslim jurists consider such evidence as a statement given involuntarily and without a free will of a person.

In fact, scientific evidence is being utilized in many Islamic countries, particularly at the stage of the police investigations leading to substantial evidence. Almost, Islamic countries are continuously developing forensic science laboratories equipped with the latest technologies including, automated fingerprints identification and comparison processes, Gas chromatograph, Laser spectrometer and D.N.A. analysis to improve the benefits from scientific evidence. Survey on Shari’a courts’ judgments in Arab countries has revealed that scientific evidence had been notably accepted to prove guilty in Taazir crimes and penal law crimes. Kingdom of Saudi Arabia ,as a

leading Islamic country, is an example in this case as detailed in the following judgments: *Riyadh High Court Judgment No. 69/1, 18/10/1403H “Theft”*. *Riyadh High Court Judgment No. 151/10, 26/4/1409H “Adultery”*. *Riyadh High Court Judgment No. 368/7/2, 2/9/1410H “Adultery”*. *Riyadh High Court Judgment No. 59/4, 26/2/1413H “Drinking Alcohol”*. *Riyadh High Court Judgment No. 114/2, 26/10/1413H “Theft”*.

Tentatively, it should be noted that, whenever the conviction of any accused person is based upon scientific evidence, then, the punishment imposed should be “Taazir” punishment and not “Hudood”.

It is most essential to emphasize here, the role of the judge of Shari’a criminal court. All type of evidence are left to the discretion of the judge and his absolute satisfaction. I believe Muslim jurists and judges in general tend to rely on well established scientific methods of criminal investigation and evidence.

It is noteworthy that, Muslim experts are profoundly aware that, if investigated crimes are urgently needed to establish justice, it should not be achieved abusively. Because, to abolish the divesting abuses of human dignity and all forms of criminality are one of the main principles and objectives of Islam as religion. Therefore, Islamic criminal law has provided the following safeguards guaranteeing protection of human rights during criminal investigation.

1. Every person is entitled to call upon the assistance of a Lawyer (known as “Wakeel Al-Khusuma”).
2. The right to speak freely or remain silent during interrogations.
3. Right to privacy:  
Ye who believe! Enter not houses other than Your own, until ye have Asked permission and saluted Those in them: that is Best for you, in order that may heed (what is seemly) (Sura24, Verses 28)
4. Right to initial presumption of innocence.
5. Right of interpreting any doubt in favor of the accused.

## **2.8 The Role of Judges in Islamic Justice System:**

According to the Islamic Law judges are free in defining the offences committed and sanctions on behalf of the head of the state; provided that the offence alleged to have been committed is not a Hadd or Quissas. Such sanctions are commonly known as Ta'zir. Ta'zir punishments range from a simple reprimand to any term of imprisonment, and from flogging to the capital punishment. Ta'zir punishment may include fines, seizure of property and confiscation of any substances related to any crime, contravention or immoral act. Ta'zir may be either the original punishment for crimes which have no fixed punishment or it may be an additional punishment for crimes of Hudood and Quissas. In this context, there is no restriction on the judge's authority to choose the punishment of Ta'zir he considers suitable for the accused person. However, the Judge must do his best to choose the proper punishment in each case by means of conscientious reasoning (Ijtihad) within what is expressed in the Qur'an and the Prophetic reports (Sunna), and guided by the other authenticated sources of Islamic criminal law legislation. The Qur'an and the Prophetic reports contain innumerable statements restricting or prohibiting several types of human activities classified as sins or transgressions against Islamic social system.

Examples of such statements may be helpful to clarify the judge's discretionary powers :

### **1) Usury:**

The Quran prohibits usury (Al-Riba) by the following verses:

- a) O ye who believe! Fear Allah, and give up What remains of your demand For usury, if ye are Indeed believers. (Sura 3, verse 278)
- b) If ye do it not, Take notice of war From Allah and His Messenger: But if ye repent Ye shall have Your capital sums: Deal not unjustly, And ye shall not Be dealt with unjustly'. (Sura 3, Verse 275)
- c) But those who repeat (The offence) are Companions Of the Fire: they will Abide therein (for ever). (Sura 3, Verse 275)



Therefore, usury is a prohibited activity and anyone who engages in such an act deserves punishment which is not determined by Quran or Sunna. It is the duty of the judge to select a proper punishment he thinks fit the accused person as well as the prohibited behavior, and in the light of the evidence provided and the circumstances of the case.

## **2) Breach of trust:**

The Quran states:

- a) O ye that believe! Betray not the trust Of Allah and the Messenger, Nor misappropriate knowingly Things entrusted to you. (Chapter 9, Verse 27)
- b) All doth command you To render back your Trusts To those to whom they are due: And when ye judge Between people That ye judge with justice: Verily how excellent Is the teaching which He giveth you! For Allah is He Who heareth And seeth all things. (Chapter 5, Verse 58).

The above mentioned two verses indicate that it is the command of the God to deliver back trusts, and disobedience of such a command by a Muslim is a serious sin. The judge should evaluate the volume of the seriousness of the sin by the verse (b) which prohibits firstly, betray of the God and secondly, betray of the messenger and thirdly betray of trust.

## **3) Bribery:**

As a dishonest means of gain, Quran has prohibited bribery by the following verse:

- And do not eat up
- Your property among yourselves
- For vanities, not use it
- As bait for the judges,
- With intent that ye may
- Eat up wrongfully and knowingly

A little of (other) people's property'. (Surar 2, Verse 188)

The above Quranic verse defines bribery as a sinful behavior. Any person who offers bribe, accepts bribe or facilitates bribery causes illegal loss of property as well as causing illegal gain of property or right by another. The volume of illegal loss of property and damages caused by bribery are considered in determining the Ta'zir punishment by the judge.

From the above mentioned examples, it is clear that there are extensive discretionary powers at the judge's disposal, in all civil and criminal cases except Huddood crimes. Such discretionary powers are not only procedural, but wide enough to cover legislative fields where the judge is authorized to define the offences and acts of transgression as well as determination of punishment. Western experts may deny the wide scope of discretionary powers given to the judge in Islamic Law, due to its contradiction with the universally accepted constitutional principles of "Nulla poenalege". The argument of Muslim experts for this view is that, Islam has also its universally accepted principles embodied in the Islamic constitution (Quran)(25). In fact, the discretionary powers of the judge are governed by the final end of Islamic Law which is the protection of religion, life, mind, lineage and property as well as realization of justice and maintenance of the public interests. According to Ibn Al-Qayyim, all acts of the judges and rulers are legitimate as far as those acts are to establish justice and prevent injustice (26).

The Islamic law of evidence is very clearly laid down in all books of Islamic Law, especially in the Hidaaya" and the Durrul Mukhtaar'. It is the duty of witnesses to bear testimony, and it is not lawful for them to conceal it, when the party concerned demands it from them.

In cases likely to result in corporal punishment, witnesses are at liberty either to give or withhold their testimony as they please; because in such cases they are distracted between two laudable actions; namely the establishment of the punishment, and the preservation of the

criminal's character. Concealment of an offence of others is moreover, preferable because the Holy Prophet (peace and blessings of Allah be upon him) said to a person that had borne testimony. "Verily, it would have been better for you, if you had concealed it".

The evidence required in a case of adultery is that of four men, as has been ordained in the Holy Quran, and the testimony of a woman in such a case is not admitted. Prophet Mohammed (peace and blessings of Allah be upon him), as the first judge in Islam, and with his judicial role in the first Islamic community is known as the best model of judges. During his time and his two immediate successors, it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation and also because the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men cannot be had, It is, therefore, not admitted in any matter liable to drop from the evidence of doubt.

The evidence required in other criminal cases is that of two men, according to the text of the Holy Quran; and the testimony of women is not admitted. In all other cases the evidence required is that of men, or of one man and two women, whether the case related to property or to other rights, such as marriage, divorce, agency or the like. The Imam al-Shafi has said that the evidence of one man and two women cannot be admitted, except in cases that relate to property, or its dependencies, such as hire, bail, and so forth; because the evidence of woman is originally inadmissible on a account of their weakness of understanding, their want of memory and incapacity of governing, whence it is that their evidence is not admitted in criminal cases.

In all rights whether of property or otherwise, the probity of the witness, and the use of the word "ashhadu" (I bear witness) is absolutely requisite, even in the case of the evidence of women. If, therefore, a witness should say, "I know" or "know with certainty".

without making use of the word “ashhadu”, in that case his evidence cannot be admitted. With respect to the probity of the witness, it is indispensable.

If the defendant throws a reproach on the witnesses, it is in that case incumbent on the Qadi to institute an enquiry into their character, because, in the same manner as it is probable that a Muslim abstains from falsehood as being a thing prohibited in the religion he professes, so also is it probable that a Muslim will not unjustly reproach another. It is not lawful for a person to give evidence on such matters as he has not actually seen personally. The testimony of a person that has been punished for false accusation (qadhf) is inadmissible.

If an infidel who has suffered punishment for Qadhf (false accusation) should afterwards become a Muslim, his evidence is then admissible; although, on account of the said punishment he had lost the degree in which he was before qualified to give evidence, yet by his conversion to the Islamic faith he acquires a new competency in regard to evidence (namely, competency to give evidence relative to Muslims), and which is not affected by any matter that happened prior to the new circumstances.

Testimony in favor of a son or grandson, or in favor of a father or grandfather, is not admissible, because the Holy Prophet (peace and blessings of Allah be upon him) has so ordained. Besides, as there is kind of communion of benefits between these degrees of kindred, it follows that their testimony in matters relative to each other is in some degree a testimony in favor of themselves, and is, therefore, liable to suspicion.

Also the Holy Prophet (peace and blessings of Allah be upon him) said, ‘We are not to credit (in civil cases) the evidence of a wife concerning her husband, or of a husband concerning his wife’s or of a hirer concerning his hireling.’”

The testimony of a convict or a person who has committed a great crime, such as induces punishment, is not admissible, because in consequence of such crime he is unjust. The testimony of a person who receives usury is inadmissible and so, also, of one who plays for a stake at dice or chess.

The evidence of a person who openly inveighs against the Companions of the Holy Prophet (peace and blessings of Allah be upon him) and their disciples is not admissible, because of his apparent want of integrity. It is otherwise, however, where a person conceals his sentiments in regard to them, because in such case the want of integrity is not apparent.

The Imam Abu Hanifa is of the opinion that a false witness must be stigmatized, but not chastised with blows. The two disciples are of the opinion that he must be scourged and confined; and this also is the opinion of the Imam al-Shafi'i'.

The mode of stigmatizing a false witness is this: If the witness be a sojourner in any public street or market-place, let him be sent to that street or market-place; or if otherwise, let him be sent to his own tribe or kindred, after the evening Prayers (as they are generally assembled in greater number at that time than any other); and let the stigmatized inform them that he has detected this person in giving false evidence; that they themselves, must therefore, beware of him and likewise desire others to beware of him.

If witnesses retract their testimony prior to the Qadi passing any decree, it becomes void; if, on the contrary, the Qadi passes a decree, and the witnesses afterwards retract their testimony, the decree is not thereby rendered void. The retraction of evidence is not valid, unless it be made in the presence of the Qadi.

As one of the methods of realizing justice and fairness, Islam has condemned giving false, testimony. Muslims are commanded to hear witness to the truth, as shown by the following Qur'anic verses: *O ye who believe stand out firmly! For justice, as witness To Allah, even as against Yourselves, or your parents. (Sura 5, Verse 135)*

Those witness no falsehood And, if they pass by futility They pass by it With honourable (avoidance) (Sura 18, Verse 72) It should be noted here, that the First International Conference on Protection of Human Rights in the Islamic Justice System, held in Siracusa, 28-31, May, 1979 and attended by 55 jurists from Islamic countries, as well as America, France, Italy, Belgium, Yugoslavia and Switzerland, was satisfied with the principles of the Islamic criminal justice system. The conference unanimously issued six resolutions, one of which was the following :(27)

The basic human rights embodied in the principles of the Islamic Criminal Law include the following rights of the Criminally accused, inter alia :

1. The right to freedom from arbitrary arrest, detention, torture, or physical annihilation.
2. The right to be presumed innocent.
3. The application of the principles of legality which call for the right of the accused to be tried for crimes specified in the Shari'a criminal law.
4. The right to appear before an appropriate tribunal previously established by law.
5. The right to a public trial.
6. The right not to be compelled to testify against oneself.
7. The right to present evidence and to call witnesses in one's defence.
8. The right to counsel of one's own choosing.
9. The right to a decision on the merits, based upon legally admissible evidence.

10. The right to have the decision in the case rendered in public.
11. The right to benefit from the spirit of mercy and goals of rehabilitation and re-socialization in the consideration of the penalty to be imposed.
12. The right of appeal.

Considering the above mentioned principles and rules, and recalling the standard rules and guidelines of criminal justice adopted by the United Nations, we may conclude that Islamic criminal justice system has adopted the following principles :

- (a) Crime prevention is the duty of all citizens without exception.
- (b) No act is an offence and no punishment shall be inflicted unless it is prescribed by a law in force.
- (c) The accused is presumed innocent until his guilt is proved, and he has the right of a fair investigations and trial.
- (d) The accused person shall not be assaulted in his body or property and he shall not be compelled to testify against himself and shall not take the oath except in offences other than “Hudood”.
- (e) Witnesses should not be subject to any injury or illegal treatment.
- (f) Public prosecutor is the guardian of any victim who has no guardian.
- (g) Any private loss caused by crime should be compensated.
- (h) All parts should be treated kindly during the investigations, and arrest should not take place unless it is necessary.
- (i) In any crime involving private rights the criminal case may be settled by forgiveness or compounding or reconciliation.

**Methods of proof before Islamic Criminal Courts:**

There are two methods of proof known as:

- (1) Free method of proof, where judges are left free to consider every type of evidence to prove the criminal case.

(2) Limited method of proof, where the crime is proved only by the evidence prescribed by “Qur’an” or “Sunna”.

This distinction between free proof and limited proof becomes an issue only in case the alleged offence is one of “Hudood” or “Quisas”. The majority of “Ulama” confine the legal methods of proof in testimony “Shahada” and confession “Iqurrar” as identified by “Qur’an” and “Sunna”. However, there are several jurists from Hambaly sect advocate the method of free proof in “Hudood” and “Quissas” crimes to maintain the rights of the victims, achieve deterrence and realize justice in cases where the complainant fails to provide evidence as prescribed by the fixed method of proof.

### **Conclusions :**

1. Realization of justice, eradication of injustice and aggression, protection of life and property, lineage, mind and religion are principal objectives of Islam. Therefore Islam has given the justice system and the judiciary a leading role to maintain such objectives.
2. The emergence of Islamic legal system as a political and social issue in many parts of the world, escalation of national and transnational crime problems are strong elements necessitating integration and reconciliation among various crime detection and investigation policies known throughout the world. Mutual understanding and exchange of knowledge and experiences among all professionals and experts is one way of developing and promoting global methods and techniques of criminal justice activities.
3. According to Shari’a, re-organizing and developing methods of criminal justice system is a matter of politics
4. left to the jurists “Ulama” and governments of the Islamic countries. Governors are authorized to maintain criminal procedural systems suitable for particular circumstances of time and place, within the spirit of the general principles of Islamic justice.

The world is changing at a rapid pace both politically and socially, therefore, professions of criminal justice system require well educated



personnel to meet the needs of solving global and multi-cultural crime problems. In this context I would like to submit the following recommendations :

- (1) Islamic Criminal Law and the Islamic Criminal Justice should be included in the educational syllabus of law faculties and school of criminal justice.
- (2) Joint and comparative researches should be conducted by experts from Islamic countries and western nations to bridge the gap between different legal systems known in the world.
- (3) International cooperation is urgent to develop global methods of investigation, techniques of evidence and realization of criminal justice.
- (4) International convention on exchange of evidence and criminal courts proceedings may be vital for treatment of transactional crime problems.

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