

**DISPELLING MYTHS, MYSTERIES, AND  
MISCONCEPTIONS OF A LEGAL SYSTEM  
MISUNDERSTOOD:  
A COMPARATIVE ANALYSIS ON THE ISLAMIC AND  
PHILIPPINE CRIMINAL JUSTICE SYSTEMS**

*Nesrin B. Cali\**



**OUTLINE**

- I. INTRODUCTION
- II. NATURE AND SOURCES OF ISLAMIC AND PHILIPPINE LAWS
  - A. Philippine Criminal Law: *A Product of Human Ingenuity*
  - B. Islamic Criminal Law: *A Law and A Way of Life Conferred by the Divine Hand*
- III. CRIMES DEFINED
  - A. Philippine Criminal Law
    - Law as the Determiner of What Acts and Omissions Are Criminalized*
  - B. Islamic Criminal Law:
    - Religion as the Ultimate Definer of Crimes*
- III. FORMS OF PUNISHMENT
  - A. Philippine Criminal Justice System
    - “Only Those Prescribed Under the Law and Sanctioned Under the Constitution May Be Imposed”*
  - B. Islamic Criminal Justice System
    - The Four Categories of Punishments*
      - i.) *Haad*
      - ii.) *Quissas*
      - iii.) *Diya*
      - iv.) *Tazeer*
  - C. The Age-Old Question on the Supreme Penalty: Does It Exist in Either System?

---

\* '10 LL.B., candidate, University of Santo Tomas Faculty of Civil Law. *Associate Case Law Editor* UST Law Review.

## IV. RIGHTS OF THE ACCUSED

A. Philippine Criminal Justice System: *“Those Who Have Less in Life Should Have More in the Law”*

B. Islamic Criminal Justice System: Does the Accused Have Rights?

*The Accused under Islamic Criminal Justice System and His Rights at the Investigative Stage*

*The Rights of the Accused During Trial*

## V. ANALYSIS AND CONCLUSION

## I. INTRODUCTION

*“Ye shall know them by their fruits.  
Do men gather grapes of thorns, or figs of thistles?”*  
– The Holy Bible, Matthew 7:16

*“But if the thief repent after his crime, and amend his conduct,  
God turneth to him in forgiveness; for God is Oft-Forgiving, Most  
Merciful.”*  
- The Holy Qur’an 5:39

Since the infamous 9/11 attacks shook the world, the Muslim cultural hemisphere has been put into limelight. Issues and misconceptions about Islam, which were then merely topics passionately debated upon in academic halls and podiums, have moved to the arena of public interest.

Even before the events of 9/11 took place, however, Islam has always been one, if not the, of the most misunderstood religions in the world<sup>1</sup>. Misconceptions attached to it are numerous, nay, even myriad, stretching from the dress code established for its women adherents to the recognition of polygamy as an allowable practice for men. With the prevalence of global terrorist attacks, the perpetration of which have often been directed upon Islamic extremist groups, these misconceptions which then were but a flicker of fire, have now evolved into

---

<sup>1</sup> A. SHEHATA, DEMYSTIFYING ISLAM: YOUR GUIDE TO THE MOST MISUNDERSTOOD RELIGION OF THE 21<sup>ST</sup> CENTURY (2007), at 3.

a colossal blaze that is almost impossible to quell. It is now but commonplace that Muslims in every corner of the world are stereotypically identified as people living by the principles of a religion that tolerates and advocates violence to promote its interests and ends. The widening of the schism as well as the aggravation of the polarization between Muslims and non-Muslims has become an inevitable reality.

It is interesting to note, in passing, that the act of terrorism is not a monopoly of any religion including Islam. In fact, all religion preach against killing innocent lives. However, for some reason or another, the LTTE/Tamil Tigers of Sri Lanka, the FARQ of South America, the IRA of Ireland, the ETA of Spain and the Ergun of Israel who are Hindus, Christians and Jews respectively have all committed acts of terrorism by terrorizing and killing innocent people. The sad fact is that they are not tagged as “terrorists”. Even if they are, they are not demonized. On the other hand, only Muslims are labeled as “terrorists” with all the worst inherent connotations imaginable.

The particular perception of Muslims as brutal people and of Islam as a religion of violence is further reinforced by the misapprehension of the religion’s criminal justice system and its system of penology. In fact, this is one aspect of Islam that has always been a point of controversy and subject to criticisms, even condemnation. Its adoption of severe forms of punishments—decapitation, amputation of the limbs, stoning to death and flogging—has been viewed as cruel and in violation of human dignity and other universally accepted human rights.

But this judgment stereotypically imputed to the Islamic criminal law system is, unfortunately, often a result of an erroneous understanding of its principles. It too is often based on looking at the system on its superficial facet rather than perceiving it beyond the seemingly ugly or brutal faces of the prescribed penalties imposed upon transgressors of the law.

It is in this light that the author deems it important to dispel these myths about this commonly criticized aspect of Islamic law. This article will endeavor to unravel what lies beneath the mound of misconceptions attributed to Islamic criminal law and to achieve such, the author deems it appropriate to use the Philippine criminal system as a lens to obtain a clearer understanding and a different but objective perspective of the former. In analytically comparing the systems, the author has adopted four points of comparison as follows:

1. *The nature and the sources of the law which constitute them*
2. *The acts or omissions which are defined as crimes*
3. *The forms of punishment prescribed under each system and*
4. *Rights conferred to the accused tried and convicted under either system*

## II. THE NATURE AND SOURCES OF BOTH LAWS

### A. Philippine Criminal Law: *A Product of Human Ingenuity*

One important basis for comparison that would not only show the distinct characteristics of the Islamic and Philippine criminal laws but also to obtain a better understanding of the latter is the nature of each. By surveying their essence, the philosophy behind them and the very kernel of their existence, one would understand why each has adopted the principles, doctrines and rules on which they are built and, thus, would less likely to draw erroneous conclusions on either of the two systems. An in-depth examination of the matter at hand is thus deemed appropriate.

The Philippine legal system as a whole is purely secular in nature, considering its strict observance of the non-establishment clause of the constitutional guarantee of freedom of religion<sup>2</sup> and the principle of separation of church and state<sup>3</sup>. Moreover, the statutes comprising the system of laws in the Philippines are man-made as they are enacted by the Philippine Congress<sup>4</sup> and as such do not arise from religious sources.

As above-stated, the legislative branch of the government is the arm that has the authority to give life to all types of laws in the Philippines, including criminal laws. It is the legislative branch that has the power to categorize crimes according to their nature, define what acts or omissions are deemed criminal and prescribe the penalties thereof. In the exercise of this power, the Legislature has enacted several penal laws which serve as the sources of the country's criminal laws. Specifically, these are the Revised Penal Code<sup>5</sup>; special penal laws passed by the Philippine Commission, Philippine Assembly, Philippine Legislature,

---

<sup>2</sup> 1987 PHILIPPINE CONSTITUTION (hereinafter CONSTITUTION) ART. III, § 5: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercised of civil or political rights.

<sup>3</sup> Aside from the provision on freedom of religion, the Constitution also expressly declares, in thunderous tone: "The separation of church and state shall be inviolable." (ART. II, § 6)

<sup>4</sup> The power of the State to enact laws in the exercise of its police power has been constitutionally vested on the Philippine Congress in this provision: "The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum." (ART. VI, § 1).

<sup>5</sup> ACT NO. 3815, as amended. It is the general law governing crimes and punishments in the Philippine legal setting. It took effect on January 1, 1932.

National Assembly, the Congress of the Philippines and the Batasang Pambansa; and penal Presidential Decrees issued during the Martial Law<sup>6</sup>. In connection with this, there is neither crime nor criminal liability incurred by its commission under the subject criminal legal system, unless there be a particular provision in the penal code or special penal law that defines and punishes the act, even if it be socially wrong or shocking to the morals<sup>7</sup>. Thus, under the Philippine legal milieu, criminal laws can only spring from the enactments by Congress. In other words, acts or omissions are not crimes unless the law says so pursuant to the maxim *nullum crimen, nulla poena sine lege*.

### **B. Islamic Criminal Law: A Law and A Way of Life Conferred by the Divine Hand**

Unlike most established legal systems which are secular, the Islamic legal system is of a religious nature<sup>8</sup>. Islam is not merely a set of divine revelations or commandments enjoining man as to what or what not to do with respect to his relationship with his Creator. It is in itself a law, a comprehensive system covering the human being's relationship with his Creator, his fellow human beings, and with his society and nation. This is one of the reasons why under Islamic law, the doctrine of separation of state and religion does not exist.

Islamic jurists and scholars have generally categorized Islamic law or *Shari'a*<sup>9</sup> into two, namely, Devotional Law and Transaction Law<sup>10</sup>. This division is justified upon the premise that the injunctions dealt with by each of the two categories have different and distinct primary objectives.

Devotional Law deals with the injunctions that have as their principal purpose the attainment of man's nearness to his Creator. This generally includes what is termed as the five pillars of Islam namely, the *Shahadah*<sup>11</sup>, praying five times a day, fasting during the Islamic month of Ramadhan, *zakah*<sup>12</sup> and the

---

<sup>6</sup> L.B. REYES, THE REVISED PENAL CODE, BOOK I (6<sup>th</sup> ed. 2006) at 1.

<sup>7</sup> *U.S. v. Taylor*, 28 Phil. 599 at 604.

<sup>8</sup> M. MATTAR, COMPARATIVE LAW: THE ISLAMIC LEGAL SYSTEM, (2004).

<sup>9</sup> Literally, it means "way" or "path to the water source".

<sup>10</sup> <http://www.ediscoverislam.com/sharia.asp> (last accessed on December 21, 2007).

<sup>11</sup> *Shahadah* is the first pillar of Islam. It is the declaration that there is no god but Allah and that Muhammad is His messenger.

<sup>12</sup> <http://zakat.al-islam.com/def/default.asp?l=eng&filename=def/desc/item1/item1/desc>

performance of the *Hajj*<sup>13</sup>, and the fulfillment of covenants. It also includes injunctions governing man's relationship with himself like those dealing with dietary laws, those regulating personal dress and all other rules set forth in the *Qur'an*, the Holy Book of the Muslims, for the purpose of protecting the individual, his mind and his body. Transaction Law, on the other hand, is the body of laws regulating human activity, both on the individual and societal level. This embraces civil laws (*mu'amalat*), personal laws (*munakhat*), penal laws (*'ukubat*) and commercial laws.

As mentioned earlier, Islam, as a legal system, is of a religious nature as its principles, rules and tenets generally emanate from the *Qur'an*<sup>14</sup>, being the

---

(last accessed on December 21, 2007).

*Zakah* is the third core aspect of Islam. Literally it means "to purify" or "cleanse". Technically, it is that determined portion taken from wealth and allocated to those deserving it, by a Qur'anic injunction. *Zakah* is the giving of a specific share of one's wealth and savings to the needy or causes that Allah (God) mentions in the Qur'an.

Every Muslim, male or female, who, at the end of the year, is in possession of approximately fifteen dollars or more, in cash or articles of trade, must give *Zakah* at the minimum rate of two and one-half percent. In the case of having the amount in cash the matter is easy. But when a person has wealth in business stocks or trade articles, he must evaluate his wealth at the end of every year according to the current value and give *Zakah* at the same rate of two and one-half percent of the total value of the wealth. If his investment is in immovable property like revenue buildings and industries, the rate of *Zakah* should go by the total net of the income, and not of the total value of the whole property. But if he puts up buildings and houses for trade or selling, *Zakah* rate should go by the total value of the entire property. Also if someone is a creditor and the indebted person is reliable one should pay *Zakah* for the amount he has lent because it is still a portion of his guaranteed wealth.

In all cases it should be remembered that one pays only for his net balance. His personal expenses, his family allowances, his necessary expenditures, his due credits-all are paid first, and *Zakah* is for the net balance.

<sup>13</sup> *Hajj* is the fifth pillar of Islam which reinforces brotherhood and unity among mankind. It is the annual pilgrimage to Makkah, Saudi Arabia, which every able-bodied Muslim is obliged to perform at least once in his lifetime. The pilgrimage occurs from the 8th to the 12th day of Dhul Hijjah, the 12th month of the Islamic calendar. During the *Hajj* period, pilgrims from all walks of life don the same unsewn simple white clothes and carry out several rituals. Each person would walk counter-clockwise seven times about the Kaaba, the cubical building towards which all Muslims face as a unifying direction for their prayers, walk back and forth between the hills of Al-Safa and Al-Marwah, go to the plains of Mount Arafat to stand in vigil, then proceed to Muzdalifah, an open level area, to gather pebbles, which they would throw at rocks in Mina, a desert area, situated some five kilometers east of Makkah, to symbolize the Stoning of the Devil. The pilgrims would then shave their heads, perform an animal sacrifice, and celebrate the four day global festival of Eid ul-Adha.

<sup>14</sup> Islamic nation-states, however, are allowed to legislate on matters not covered by the *Qur'an*

primary source of Islamic Law along with the *Sunnah* and *Hadith* of the Prophet Muhammad<sup>15</sup>.

The *Qur'an* is the origin of all Islamic legislation. It establishes the fundamentals of the *Shari'a*, clarifying its principle teachings. Aside from setting forth the individual's devotional obligations, it also touches, in very general terms, on legal matters relating to his relationship with the society and the nation. It analogously fulfills the role in Islamic law as a constitution fulfills for the man-made laws of nations<sup>16</sup>.

The *Sunnah*, which is the ways, deeds and customary practices of Prophet Muhammad<sup>17</sup> in conformity to the commands of the *Qur'an* and which the Muslims must follow as their way of life, and *Hadith*<sup>18</sup>, which is the sayings of the Prophet or a collection of oral traditions relating to his words and deeds, both supplement the injunctions of the *Qur'an*. Their significance lies in the fact that the *Qur'an* discusses matters in general terms and as such the *Hadith* fills in the details. They clarify what the Holy Book leaves ambiguous or difficult to understand and qualify what it has left unqualified<sup>19</sup>. An illustration of the interpretative role of *Sunnah* and *Hadith* in Islamic law is the subject regarding the inheritance of a grandmother. The *Qur'an* does not specify how much a grandmother may receive by way of inheritance. The Prophet thus ruled that

---

or the other primary or secondary sources of Islamic law. For example, Islamic states are permitted to enact their own constitutions to govern the relations between the government and the people as well as to institute the form of government which they would adopt. Nevertheless, they must still be within the bounds of the Holy Book and the traditions of Prophet Muhammad.

<sup>15</sup> T.W. LIPPMAN, UNDERSTANDING ISLAM: AN INTRODUCTION TO THE MUSLIM WORLD (2d ed. 1995) at 29.

<sup>16</sup> There are, however, certain matters which the *Qur'an* deal with in particularity such as those relating to inheritance, the divorce procedure due to an accusation of adultery, certain prescribed punishments, and the prohibited degrees of marriage. The *Qur'an* treats of these matters in specific terms as they do not change with the passage of time.

<sup>17</sup> In Islam, Prophet Muhammad is the last Prophet of God. He was born in 570 CE in Makkah, Saudi Arabia. According to Islamic convictions, it was to him that God revealed through the Archangel Jibril (Gabriel) the Holy Book of *Qur'an* to guide mankind.

<sup>18</sup> When the era of prophetic relation ended with the death of Prophet Muhammad, the *Sunnah* has been transmitted to later generations by way of narrators. Only the narrations whose authenticity can be established according to the most stringent conditions are acceptable as proof for legislation.

<sup>19</sup> T.W. LIPPMAN, *supra* note 8 at 32.

she receives one-sixth of the estate and this is the rule followed by Muslims around the world.

*Shari'a* is also drawn from juristic consensus (*ijma*) and juristic analogical reasoning (*qiyas*)<sup>20</sup>, but both are only recognized as secondary sources<sup>21</sup>.

Juristic consensus refers to the unanimous agreement of the Islamic jurists of a given era on a legal issue. It is a strong source of evidence for establishing the rules of Islamic law and has been recognized by the *Qur'an*<sup>22</sup> and the *Hadiths* as a valid basis for setting a rule on a certain legal issue. An example of the application of this principle is when prominent Muslim jurists around the world condemned the 9/11 attacks. Their condemnation forms a juristic consensus (*ijma*) against the perpetrators' actions. This condemnation thus renders the attackers' actions outside the penumbra of *Shari'a* and thus un-Islamic.

On the other hand, juristic analogy refers to taking a rule that applies to a certain case and employing it in the resolution of another case, both cases sharing a characteristic that is the effective cause of the rule being applied in the first case<sup>23</sup>.

With the growing complexities of human society, however, the aforementioned sources of Islamic law are not enough to cover all changes, matters, issues and needs that arise with the passage of time. Thus, the *Qur'an* and the *Hadiths* have recognized supplementary wellsprings of Islamic law, to wit, the consideration of general welfare or necessity (*al-istisla*) and the customs of an area (*al-'urf*).

Notably, the taking of public interest as a basis for legislation must remain within the confines of the general principles laid down in the *Qur'an* and in the *Hadiths*. The injunctions created based thereon must not have already been covered or expressly rejected by the sacred texts for them to be valid<sup>24</sup>.

The Arabic word *al-'urf* refers to that which is well-known, widely-accepted, and deemed as correct among those of sound mind. For a practice to be considered as embraced in this source of Islamic law, it is understood that

---

<sup>20</sup> Juristic consensus or *ijma* ranks third in the hierarchy of sources of Islamic law while juristic analogical reasoning or *qiyas* ranks fourth.

<sup>21</sup> T.W. LIPPMAN, *supra* note 8 at 35.

<sup>22</sup> *Holy Qur'an* Ch 42, Ver 38

<sup>23</sup> T.W. LIPPMAN, *supra* note 8 at 42.

<sup>24</sup> T.W. LIPPMAN, *supra* note 8 at 46.

it must have been consistently applied to all or most of the members of a given population. The majority of the people must take it into consideration and act on its basis<sup>25</sup>. And like the other sources of Islamic law, both the *Qur'an* and the sayings of the Prophet have acknowledged the validity of customs as an underpinning for legislating Islamic laws<sup>26</sup>.

### III. CRIMES DEFINED

#### A. Philippine Criminal Law

##### *Law as the Determiner of What Acts and Omissions Are Criminalized*

Before venturing into the different crimes demarcated as such under Philippine penal laws and Islamic criminal laws, it is necessary to first understand what the term “crime” generally means in the context of each system.

In Philippine criminal law, the definition of the term “crime” can be found in Article 3 of the Revised Penal Code. Under that article, it is provided that “acts and omissions punishable by law are felonies (*delitos*)”. From this definition, it is clear that only those acts or omissions, i.e., failure to perform a positive duty which one is legally bound to do<sup>27</sup>, which are expressly punished by law can be considered as crimes or felonies. Therefore, as remarked earlier, any commission or omission of an act by a person which is not treated under the law as crime and thereby punishable cannot make him criminally liable.

The bulk of the crimes defined under the Philippine penal laws are laid down in the Revised Penal Code with its amendments, being the general criminal law. Particularly, they can be found in Book II of the Code and they have been grouped into the following general headings: Crimes Against National Security and the Law of Nations; Crimes Against the Fundamental Law of the State; Crimes Against Public Order; Crimes Against Public Interest; Crimes Relative to Opium and Other Prohibited Drugs<sup>28</sup>; Crimes Against Public Morals; Crimes Committed by Public Officers; Crimes Against Persons; Crimes

---

<sup>25</sup> A.A. AN-NAIM, AN INTRODUCTION TO ISLAMIC FAMILY LAW 19 (1990).

<sup>26</sup> The *Qur'an* recognizes good customs as basis for creating rules to guide daily human activities in Chapter 7, Verse 199 as follows: “Show forgiveness, enjoin what is good (*al'urf*), and turn away from the ignorant ones.”

<sup>27</sup> L. B. REYES, *supra* note 6 at 32.

<sup>28</sup> Repealed by Republic Act 9165, otherwise known as “Comprehensive dangerous Act of 2002.”

Against Personal Liberty; Crimes Against Property; Crimes Against Chastity<sup>29</sup>; Crimes Against the Civil Status of Persons; Crimes Against Honor; and Quasi-Offenses<sup>30</sup>.

Aside from the Revised Penal Code, there are innumerable special penal laws which supplement or amend certain provisions of the said Code<sup>31</sup>. Moreover, there are special provisions of non-criminal laws which declare certain acts as criminal offenses<sup>32</sup>.

## B. Islamic Criminal Law

### *Religion as the Ultimate Definer of Crimes*

The term “crime” under the Islamic legal system is, on the other hand, defined in a theological sense since the laws under this system have religious underpinnings. In Islamic criminal law, therefore, it is the *Qur’an*, the *Sunnah* or *Hadith* which define the crimes and prescribe penalties for their commissions, in stark contrast with the set-up in the Philippine legal scene. Thus, a “crime” consists in legal prohibitions imposed by God, the infringement of which entails punishment prescribed by Him. Everything prohibited by God and the Prophet Muhammad is a crime<sup>33</sup>.

---

<sup>29</sup> The crime of rape, which was under this classification, has now been categorized under Crimes Against Persons with the enactment of R.A. 8353 or the Anti-Rape Law of 1997. The making of the subject crime as one of against persons legally rendered it as a public crime, not a private crime as it used to be. Therefore, the crime can be prosecuted by the State itself and the private offended party’s complaint is not necessary to put the prosecution process in motion.

<sup>30</sup> These are offenses committed through imprudence and negligence.

<sup>31</sup> For instance, Republic Act 6968 entitled “An Act Punishing the Crime of Coup d’etat” amended Articles 134, 135 of the Revised Penal Code which define the crimes of Rebellion and Coup d’etat but did not repeal them. The special law merely qualified the said articles of the Code.

<sup>32</sup> An example is of this is Presidential Decree 442, as amended also known as the Labor Code, which makes the act of violating the employees’ or workers’ right to self-organization a crime under Article 246 thereof. Under Article 288 of the same statute, where an act is declared “unlawful”, it is deemed as a criminal offense.

<sup>33</sup> K. ABDUSAMED, *CRIME AND PUNISHMENT IN ISLAM* (1994) at 3.

However, Islamic countries especially those which have pluralistic forms of government, i.e., a combination of the Islamic legal system and democracy such as Malaysia and Indonesia, may legislate penal laws to address issues on crimes and other social problems. In such cases, religious codes are not the only sources of criminal laws.

Being the primary sources of Islamic law<sup>34</sup> the *Qur'an* and *Sunnah* enumerate the crimes that are punishable and prescribe the punitive measures to be meted out against transgressors of the law. Accordingly, those mentioned in the *Qur'an* are identified as the most severe. They are considered as sins against God and thus, carry with them serious, mandatory punishments<sup>35</sup>. These crimes are adultery<sup>36</sup>, highway robbery<sup>37</sup>, theft<sup>38</sup>, slander<sup>39</sup>, drinking wine and the consumption of other intoxicants<sup>40</sup>, apostasy<sup>41</sup>, and rebellion<sup>42</sup>. Crimes against persons include murder<sup>43</sup> and bodily injury<sup>44</sup>. Other crimes mentioned are gambling<sup>45</sup> and bribery<sup>46</sup>.

#### IV. FORMS OF PUNISHMENT

##### A. Philippine Criminal Justice System

##### ***“Only Those Prescribed Under the Law and Sanctioned Under the Constitution May Be Imposed”***

The penalties prescribed for the commission of crimes under the Philippine legal setting are provided for in the particular laws which define them. But the general forms of punishment recognized under Philippine criminal law

---

<sup>34</sup> See discussion on the sources of Islamic laws.

<sup>35</sup> M. TAHIR, *CRIMINAL LAW IN ISLAM* (1996) at 62.

<sup>36</sup> *Holy Qur'an* Ch 17, Ver 32

<sup>37</sup> *Id.* Ch 60, Ver 12

<sup>38</sup> *Id.* Ch 60, Ver 12

<sup>39</sup> *Id.* Ch 24, Ver 23

<sup>40</sup> *Id.* Ch 5, Ver 90

<sup>41</sup> *Id.* Ch 47, Ver 25

<sup>42</sup> *Id.* Ch 47, Ver 25

<sup>43</sup> *Id.* Ch 5, Ver 32

<sup>44</sup> *Id.* Ch 9, Ver 120

<sup>45</sup> *Id.* Ch 2, Ver 219

<sup>46</sup> Hadith: “Allah curses the person who bribes, the recipient and the go-between”

are set forth in the Revised Penal Code.

Under Article 70 of the said Code, the principal penalties that may be imposed upon the lawbreaker are the death penalty, imprisonment<sup>47</sup>, *destierro*<sup>48</sup>. These penalties, except for *destierro*<sup>49</sup>, further carry with them accessory penalties<sup>50</sup>. These penalties mentioned under the law are the only forms of

---

<sup>47</sup> The penalty of imprisonment has been divided and put in order according to the length of their periods. These are:

- 1.) *Reclusion Perpetua* - 20 years and one day to 40 years
- 2.) *Reclusion Temporal* - 12 years and one day to 20 years
- 3.) *Prision Mayor* - 6 years and one day to 12 years
- 4.) *Prision Correccional / Destierro* - 6 months and one day to 6 years
- 5.) *Arresto Mayor* - 1 month and one day to 6 months
- 6.) *Arresto Menor* - 1 day to 30 days

These penalties have further been divided into three periods, i.e., minimum, medium and maximum period. See Article 77 of the REVISED PENAL CODE.

<sup>48</sup> The penalty of *destierro* imposes upon the convicted not to enter a particular place specified in the sentence. Article 87 of the REVISED PENAL CODE provides "Any person sentenced to *destierro* shall not be permitted to enter the place or places designated in the sentence, nor within the radius therein specified, which shall be not more than 250 and not less than 25 kilometers from the place designated." An example of a crime the commission of which is punished by this penalty is that defined under Article 247 of the REVISED PENAL CODE. Under said article, any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of *destierro*. The concubine of a husband convicted of the crime of concubinage under Article 334 of the same CODE shall also suffer the penalty of *destierro*.

<sup>49</sup> L.B. REYES, *supra*. note 6 at 664.

<sup>50</sup> Section 3 of the Revised Penal Code provides for the accessory penalties inherent in principal penalties as follows:

Art. 40. *Death; Its accessory penalties.* — The death penalty, when it is not executed by reason of commutation or pardon shall carry with it that of perpetual absolute disqualification and that of civil interdiction during thirty years following the date sentence, unless such accessory penalties have been expressly remitted in the pardon. Art. 41. *Reclusion perpetua and reclusion temporal; Their accessory penalties.* — The penalties of reclusion perpetua and reclusion temporal shall carry with them that of civil interdiction for life or during the period of the sentence as the case may be, and that of perpetual absolute disqualification which the offender shall suffer even though pardoned as to the principal penalty, unless the same shall have been expressly remitted in the pardon.

Art. 42. *Prision mayor; Its accessory penalties.* — The penalty of prision mayor, shall carry with it that of temporary absolute disqualification and that of perpetual special disqualification from the right of suffrage which the offender shall suffer although pardoned as to the principal penalty, unless the same shall have been expressly remitted in the pardon.

punitive measures that may be imposed by the judge upon the transgressor and no other. He has no discretion whatsoever in inflicting a penalty not legally sanctioned, following the general principle that only the legislative body of the government may delineate what acts constitute a particular crime and fix the penalties thereof. The restriction on implementation of penalties expressed in the statute is reinforced further by the constitutional provision against the imposition of cruel punishments. Specifically, the Constitution provides that “excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted.”<sup>51</sup> Thus, under the Philippine criminal justice system, there are two restrictions on the infliction of penalties: first, that it must be prescribed by law, and second, such penalty provided for by the law must not defy the constitutional proscription of imposing excessive fines, and cruel, degrading or inhuman punishment. In other words, for the penalty to be legally imposable, it must conform to these two requisites.

## B. Islamic Criminal Justice System

### *The Four Categories of Punishments*

Islamic penal law consists of four systems or categories. These are *Haad*

---

Art. 43. *Prision correccional; Its accessory penalties.* — The penalty of prision correccional shall carry with it that of suspension from public office, from the right to follow a profession or calling, and that of perpetual special disqualification from the right of suffrage, if the duration of said imprisonment shall exceed eighteen months. The offender shall suffer the disqualification provided in the article although pardoned as to the principal penalty, unless the same shall have been expressly remitted in the pardon.

Art. 44. *Arresto; Its accessory penalties.* — The penalty of arresto shall carry with it that of suspension of the right to hold office and the right of suffrage during the term of the sentence.

Art. 45. *Confiscation and forfeiture of the proceeds or instruments of the crime.* — Every penalty imposed for the commission of a felony shall carry with it the forfeiture of the proceeds of the crime and the instruments or tools with which it was committed.

Such proceeds and instruments or tools shall be confiscated and forfeited in favor of the Government, unless they be property of a third person not liable for the offense, but those articles which are not subject of lawful commerce shall be destroyed.

<sup>51</sup> In full, the constitutional provision reads: “(1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*.

(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law. (ART. III, § 19).

or *Houdoud* (crimes with fixed punishments), *Quissas* (crimes where retaliation is permitted), *Diya* (crimes where payment of “blood money” may be allowed), and *Tanzeer* (crimes where discretionary punishment may be administered).

### *Haad*

The first category, termed as *Haad* or *Houdoud* (loosely translated to mean the “limit” or “bound”), consists of important crimes deemed to threaten the very existence of Islam. They are punishable pursuant to penalties set by the *Qur’an* itself, or by the *Sunnah*<sup>52</sup>.

The punishment prescribed for the crimes falling under this category have been criticized for being cruel. But one must understand that the underlying concept in this kind of punishment is to prescribe, define and fix the nature, quantity or quality of the penalty for particular offense, which the society regards as contrary to the common interests of its members or contravening the commandments of God. As its designation conveys, the *haad* punishment cannot be varied, increased and decreased<sup>53</sup>. Moreover, the injured party, unlike in crimes penalized under the *quissas* category, cannot remit or compound the subject punishment and choose to accept *diya* instead. The judge has no discretion in the matter; he is duty-bound to award the fixed punishment when warranted by the circumstances.

In contrast to *quissas* punishments, which have for their purpose revenge or retribution against the wrongdoer, *haad* punishments have the objective of deterring and preventing persons from committing crimes which are detrimental to the existence of Islam and the society.

The crimes meted out with *haad* penalties are *adultery*, which is punished by stoning the offenders to death; *theft*, where the convicted thief’s right hand or left foot is cut off; *defamation* or falsely accusing a married woman of adultery, which is penalized by eighty lashes; *drunkenness*, the violator punished by flogging; and *apostasy*, penalized by death.

It being very severe and cumbersome in nature, an offender cannot just be sentenced to suffer a *haad* punishment without the judge strictly complying by the rules of evidence established in the trial of each crime encompassed by this kind of punishment. Hence, in the case of adultery, an offender can only be convicted of the felony and subjected to the corresponding *haad* punishment

---

<sup>52</sup> M. SCHALLAL, ISLAMIC CRIMINAL LAW AND PENOLOGY (1995) at 25.

<sup>53</sup> M. TAHIR, *supra* note 35 at 30.

if its commission can be proven based on the testimony of four eye witnesses of credible reputation<sup>54</sup>. It is not only the non-conformity to technical rules of evidence which can prevent the imposition of a *haad* punishment; the smallest amount of doubt can preclude its application. Islamic jurists proceeded on to pronounce that since the rules of *haad* are very strict and inflexible, it is only in rape cases that this form of penalization may be applied<sup>55</sup>.

### *Quissas*

The term *Quissas*<sup>56</sup> is an Arabic word which means “equal punishment” or “retaliation”. It deals with intentional crimes against the person. Its fundamental premise is the *lex talionis*, that is, “eye for eye, tooth for tooth”. It is a rule that gives the victim or his heirs the right to inflict the same injury or damage suffered upon the wrongdoer. *Quissas* punishments are only imposable in crimes of premeditated murder and intentional crimes which involve the loss of a limb or organ<sup>57</sup>. Thus, in the crime of murder, the male next of kin to the victim has the right to avenge the latter’s death by having the culprit executed after his trial and conviction, usually by beheading with the use of sword. And where the offender deliberately injures the victim and results to the loss of an organ by the latter, say, an eye, the offended party can inflict the same damage upon the criminal, which

---

<sup>54</sup> *Holy Qur’an* Ch 25, Ver 5.

<sup>55</sup> M. SCHALAL, *AN EXAMINATION OF ISLAMIC CRIMINAL LAW* (1996) at 54.

The *haad* punishment is the aspect of Islamic criminal law which has been the subject of vociferous criticism especially in the West as it is cruel and violates human dignity. But as discussed, it is not imposed without restrictions. It is not prescribed for all kinds of crimes defined under Islamic criminal law, contrary to what Western critics believe or say.

<sup>56</sup> The following are the Qur’anic verses which give the victim or his heirs the right to retaliate in certain criminal cases:

“O believers, prescribed for you is retribution in case of murder. A freeman for a freeman, a slave for a slave. A female for a female. But if his brother pardons a man caught, let the pursuing be honourable and let the payment be with kindness. That is a lightening granted you by your Lord. And a mercy; and for him who commits aggression after that. For him there awaits a painful chastisement.” (*Qur’an*, Chapter 2, Verses 178 and 194).

“In retaliation there is life for you men possessed of mind haply you will be God fear in.” (*Qur’an*, Chapter 2, Verse 179).

“And therein we prescribe for them: 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.” (*Qur’an*, Chapter 5, Verse 45).

<sup>57</sup> *Holy Qur’an* Ch 5, Ver 45.

of course presupposes conviction of the offender<sup>58</sup>. According to the *Qur'an*, it is the victim or his heirs who are to inflict the punishment, although the same is done under the supervision of public authorities<sup>59</sup>.

Considerably, in the exercise of this right of retaliation, one must do so within the ambit of the *rule of exactitude*<sup>60</sup>, i.e., that the retaliator must inflict upon the same amount of damage or loss to the offender. This rule not only serves as a regulation in the exercise of this right but also discourages its practice for determining the same degree of damage as that which was caused by the culprit with precision is rather a difficult task, if not impossible. If the retaliator causes injury, even inadvertently, the magnitude of which is more than what the offender caused to the victim, he himself violates the law and can, therefore, be subject to punishment. In view of this difficulty, instead of asking for the imposition of *quissas* punishment, the victim or his heirs opt and agree to receive *diya*, which consists of money or a thing of value, as compensation for the loss or damage caused and as a way of retribution.

### *Diya*

*Diya*, as already mentioned, is commonly known as “blood money”. In sentencing the offender to suffer this penalty, the latter is made to pay a certain amount of money on a fixed scale<sup>61</sup> or to give a thing of value to the victim or his heirs. This form of punishment is applicable in cases where the crime is committed unintentionally or through imprudence, negligence or accident<sup>62</sup>. It can also be applied where *quissas* punishment obtains, i.e., the victim or his heirs may accept blood money instead of exercising the right of retaliation. But in this

---

<sup>58</sup> S. SAID, *FIQH AL SUNNAH*, (1953) at 330. The *Sunnah* says: “If someone lost the sight of an eye in an attack, he could retaliate by putting a red-hot needle into the eye of his attacker who had been found guilty by the law”.

<sup>59</sup> W. SCHABAS, *ISLAM AND THE DEATH PENALTY* (2000) at 228.

<sup>60</sup> M. AL-AWABDEH, *HISTORY AND PROSPECT OF ISLAMIC CRIMINAL LAW WITH RESPECT TO HUMAN RIGHTS* (2005), at 27.

<sup>61</sup> The amount varies from country to country and from case to case. The amount of compensation is based on the percentage of responsibility. In Sudan, for example, the *diya* for one life is the price of a hundred camels. Some other countries may have a range of US\$ 1,000 – 3,000.

<sup>62</sup> M. AL-AWABDEH, *supra* note 60 at 29.

instance, the choice is still entirely left to the victim or his successors<sup>63</sup>.

### *Tazeer*

Unlike the principle in the Philippine criminal justice system that only those penalties duly prescribed by law may an offender be subjected to suffer, the Islamic legal system allows the judge to exercise his discretion and determine the kind of punishment with which to sentence the wrongdoer. In other words, in case of offenses governed by *tazeer* or discretionary punishments, it is the judge who has the say on what kind of penalty shall be imposed. In fact, the judge can even invent new punishments according to his wisdom<sup>64</sup>. These penalties usually consist of imprisonment, exiles and corporeal punishments.

The crimes which have been affixed with *tazeer* punishments are bestiality, sodomy, offenses against public peace and tranquility, against decency, against morality, forgery or deeds or letters with fraudulent design<sup>65</sup>. In cases where *quissas* or *haad* penalties are applicable but the proof available does not satisfy the quantum of evidence required by the *Qur'an* or *Sunnah* but nevertheless is enough to establish guilt, the judge may make the offender to suffer *tazeer* punishment.

### **C. The Age-Old Question on the Supreme Penalty: Does It Exist in Either System?**

In discussing the modes of punishments sanctioned in the two criminal justice systems, one cannot escape touching on the subject matter of death penalty. Precisely put in the interrogative form, is it allowed in the respective legal systems and to what extent?

The questions and issues surrounding the imposition of the capital punishment—its moral implications, the wisdom or advisability on its infliction and its ramifications on universally recognized human rights—may be as old as the supreme penalty itself. The circumstances of its imposition and administration, as well as the wisdom of its use altogether, have preoccupied jurists, scholars, philosophers, and theologians for many centuries<sup>66</sup>.

---

<sup>63</sup> *Id.*

<sup>64</sup> M. TAHIR, *supra* note 35 at 97.

<sup>65</sup> *Holy Qur'an* Ch 7, Ver 80.

<sup>66</sup> On December 18, 2007, the United Nations General Assembly adopted a resolution calling

### *Death Penalty in the Philippines Legally Inexistent*

In the Philippine legal setting, capital punishment has been a contentious subject matter debated among different sectors of society—church, government, human rights activists and the public in general. Aside from questions on its morality and the wisdom of its imposition as a deterrent to commissions of crimes, the issue on its constitutionality has not escaped discussion.

Under Section 19, Article III of the Constitution, it can be implied that the supreme penalty can be provided for by Congress<sup>67</sup>. But this constitutional provision does not terminate and settle the matter with finality. The aforesaid constitutional provision lays down condition precedents that must be fulfilled before death penalty may be imposable under the law, i.e., that there be compelling reasons and that it is for heinous crimes<sup>68</sup>. The problem that crops up now is the determination on what constitutes “compelling reasons” and defining what “heinous crimes” are. Again, even if one has succeeded in doing so, there remains the question as to whether the manner or method of execution violates constitutionally guaranteed rights, or whether it is within constitutional limits to apply the death penalty to certain types of persons<sup>69</sup>.

In 2006, however, all these discussions and contentions regarding death penalty have been reduced to academic exercises only, in view of the enactment of R.A. 9346, which prohibits the infliction of the capital punishment<sup>70</sup>. The

---

for moratorium on death penalty. It called on all States that still permits death penalty in its judicial system to “progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed”. They were also called on to provide the Secretary-General with information on their use of capital punishment and to respect international standards that safeguard the rights of condemned inmates. The resolution was passed by a vote of 104 in favor to 54 against, with 29 states abstaining. ([http://www.esteri.it/MAE/doc/testo\\_moratoria.pdf](http://www.esteri.it/MAE/doc/testo_moratoria.pdf), visited on December 22, 2007).

<sup>67</sup> R.B. GOROSPE, CONSTITUTIONAL LAW (2006) Vol. 2 at 668.

The Constitution merely suspended the imposition of the death penalty (*People v. Munoz*, 170 SCRA at 120-121). The Congress revived it with the passage of R.A. 7659 entitled “AN ACT TO IMPOSE THE DEATH PENALTY ON CERTAIN HEINOUS CRIMES, AMENDING FOR THAT PURPOSE THE REVISED PENAL LAWS, AS AMENDED, OTHER SPECIAL PENAL LAWS, AND FOR OTHER PURPOSES”, which took effect on December 31, 1993 (*People vs. Godoy*, 250 SCRA 676 [1995] at 732).

<sup>68</sup> See note 51.

<sup>69</sup> R.B. GOROSPE, *supra* note 67 at 669, citing *Atkins. V. Virginia*, 536 US 304 (2002).

<sup>70</sup> “AN ACT PROHIBITING THE IMPOSITION OF DEATH PENALTY IN THE PHILIPPINES”. It took effect on June 30, 2006.

pertinent provisions of the law are as follows:

**“Section. 1.** The imposition of the penalty of death is hereby prohibited. Accordingly, Republic Act No. Eight Thousand One Hundred Seventy-Seven (R.A. No. 8177), otherwise known as the Act Designating Death by Lethal Injection is hereby repealed. Republic Act No. Seven Thousand Six Hundred Fifty-Nine (R.A. No. 7659), otherwise known as the Death Penalty Law, and all other laws, executive orders and decrees, insofar as they impose the death penalty are hereby repealed or amended accordingly.

**Section. 2.** In lieu of the death penalty, the following shall be imposed:

- (a) The penalty of *reclusion perpetua*, when the law violated makes use of the nomenclature of the penalties of the Revised Penal Code; or
- (b) The penalty of life imprisonment, when the law violated does not make use of the nomenclature of the penalties of the Revised Penal Code.”

Thus, upon the effectivity of this law, the imposition of death penalty has thus, been rendered legally inexistent. However, the Congress, in the exercise of its authority to enact laws, may revive and reincorporate death penalty in the Philippine penal system, with the presupposition that it does not contravene the constitutional requirements.

### ***Death Penalty in Islamic System Penology***

There is no doubt that Islamic criminal law allows the imposition of the capital punishment as can be gleaned from the discussions on the forms of punishments it allows. But the fact that it is allowed does not necessarily mean that it mandatorily favors capital punishment and allows its indiscriminate application, an alarming blunt pronouncement made by critics of the religion.

A stereotypical image of Islam, especially with regard to its criminal law, depicts that it is a conservative, misogynistic and retributive religion, and that as such, it permits the imposition of such brutal, degrading and cruel penalties, including the capital punishment. This view, however, is more conjectural than real. Contrary to this impression, Islamic criminal law is characterized by a strong undercurrent of clemency and sympathy for the oppressed<sup>71</sup>. Punishment is ordered to be free of any spirit of vengeance or torture.

---

<sup>71</sup> *Holy Qur'an* Ch 4, Ver 98

Islam upholds the basic principle that every human being has the right to life. However, the *Qur'an*, where this principle is inscribed, has carved out an exception. Killing is allowed only when a court of law demands it: *Do not kill a soul which Allah has made sacred except through the due process of law*<sup>72</sup>. This exception authorizes the administration of capital punishment when Islamic law so dictates. The general rule therefore under Islamic law is the preservation of the individual's right to life, contrary to the widely held belief that it has no regard for human life. Incidentally, this position is similar to that declared in the Fifth Amendment of the US Constitution<sup>73</sup>, international human rights instruments such as the European Convention on Human Rights, and the Philippine Constitution.

Although essentially, Islamic law allows the administration of death penalty, its practice, however, varies among different Islamic states. For instance, some Islamic states like Iran and Iraq are strict practitioners, while Tunisia prescribes the subject penalty only in the rarest of cases<sup>74</sup>. Sudan has taken the position that offenders may be executed for crimes committed while under the age of eighteen, "in accordance with the provisions of Islamic law". On the other hand, Yemen has banned the juvenile death penalty, although it was argued that it was done "despite Islamic law"<sup>75</sup>. This specific instance, i.e., the diversity of practice illustrates that there is no consensus even among Islamic states. It is thus erroneous to declare that Islam requires the administration of the capital punishment in a mandatory character<sup>76</sup>.

---

<sup>72</sup> *Id.* Ch 17, Ver 33.

<sup>73</sup> In full, it reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>74</sup> W. SCHABAS, *supra* note 59 at 230.

<sup>75</sup> *Id.*, at 231.

<sup>76</sup> International Islamic organizations and states have adopted several human rights instruments. On September 19, 1981, the Islamic Council of Europe adopted a Universal Islamic Declaration of Rights, which states: Human life is sacred and inviolable and every effort shall be made to protect it. In particular, no one shall be exposed to injury or death, except under the authority of the law." The last sentence appears to allow the imposition of the death penalty, which is consistent with the practice of all Islamic states.

The Organization of Islamic Conference (OIC), an organization of 56 Muslim

## V. RIGHTS OF THE ACCUSED

Having presented and examined the nature of Islamic criminal law and the forms of punishment it permits and sanctions, an interesting question arises: Does the accused under the *Shari'a*, have legally protected rights, similar to those conferred to an accused in the Philippine criminal law? This question surfaces in view of the biased and harsh perception of Islamic law.

### A. Philippine Criminal Justice System

#### *“Those Who Have Less in Life Should Have More in the Law”*

The inquiry does not obviously present an issue or problem under the Philippine legal system as the accused is afforded with rights which are spelled out in the fundamental law of the land itself, the Constitution. These rights are constitutionally guaranteed and protected. Particularly, Article III of the Bill of Rights of the Constitution enumerates these rights and they are as follows: 1.)

---

states, on the other hand, adopted the Cairo Declaration of Human Rights in Islam on August 5, 1990 to serve as a guide of the member-states in the matter of human rights. Article 2 of the instrument provides:

“(a) **Life is a God-given gift and the right to life is guaranteed to every human being.** It is the duty of individuals, societies and states to safeguard this right against any violation, and **it is prohibited to take away life except for a Shari’ah prescribed reason.**

(b) It is forbidden to resort to any means which could result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari’ah.

(d) **Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari’ah-prescribed reason.** (Emphasis supplied).”

Again, under this Declaration, the exception, grounded on *Shari'a*, to the general rule of preservation of human life is provided for.

The Arab League, on the other hand, adopted the Arab Charter of Human Rights on September 15, 1994, but has not yet been ratified by any of the members of the League. The instrument proclaims the right to life in the same manner as in the previously stated two instruments. But there are three distinct provisions—Articles 10, 11 and 12. Article 10 recognize the legitimacy of the death penalty but only for the “most serious of crimes”. Article 11 prohibits the imposition of the capital punishment for political offenses, while Article 12 prohibits the infliction of death on a person under 18 years of age, on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth.

right to adequate legal assistance<sup>77</sup>; 2.) right, when under investigation for the commission of an offense, to be informed of his right to remain silent and have counsel<sup>78</sup>; 3.) right against the use of torture, force, violence, threat, intimidation, or any other means which vitiate the free will<sup>79</sup>; 4.) right against being held in secret, *incommunicado*, or similar forms of solitary detention<sup>80</sup>; 5.) right to bail and against excessive bail<sup>81</sup>; 6.) right to due process of law<sup>82</sup>; 7.) right to presumption of innocence until proven guilty<sup>83</sup>; 8.) right to be heard by himself and counsel<sup>84</sup>; 9.) right to be informed of the nature and cause of the accusation against him<sup>85</sup>; 10.) right to have a speedy, impartial, and public trial<sup>86</sup>; 11.) right to meet the witnesses face to face<sup>87</sup>; 12.) right to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf<sup>88</sup>; 13.) right against self-incrimination<sup>89</sup>; 14.) right against detention by reason of political beliefs and aspiration<sup>90</sup>; 15.) right against excessive fines<sup>91</sup>; 16.) right against cruel, degrading or inhuman punishment<sup>92</sup>; 17.) right against infliction of death penalty except with the existence of compelling reasons and for heinous

---

<sup>77</sup> ART. III, § 11.

<sup>78</sup> ART. III, § 12 (1).

<sup>79</sup> ART. III, § 12 (2).

<sup>80</sup> *Id.*

<sup>81</sup> ART. III, § 13.

<sup>82</sup> ART. III, § 14 (1).

<sup>83</sup> ART. III, § 14 (2).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> ART. III, § 17.

<sup>90</sup> ART. III, § 18 (1).

<sup>91</sup> ART. III, § 19 (1).

<sup>92</sup> *Id.*

crimes<sup>93</sup>; and 18.) right against double jeopardy<sup>94</sup>. Any violation of any of these rights will have prejudicial consequences on the prosecution of the crime and may lead to the dropping of charges against the accused<sup>95</sup>. The accused also has statutory rights, such as the right to appeal his case to higher tribunals in the manner prescribed by law<sup>96</sup>.

In addition to these rights, the Philippine criminal justice system still endeavors to take into consideration that which is favorable to the interests of the accused. For instance, although the State, through the Congress, has the power to define crimes and punish commissions thereof, the Constitution restricts such authority by enjoining the enactment of *ex post facto*<sup>97</sup> laws or bill of attainder<sup>98</sup>. A penal law cannot also be given a retroactive effect as it would render it an *ex post facto* law and hence, null and void for being unconstitutional<sup>99</sup>. A recognized exception to this rule is that whenever a new statute dealing with crime establishes conditions more lenient or favorable to the accused, it can be

---

<sup>93</sup> *Id.*

<sup>94</sup> ART. III, § 21.

<sup>95</sup> For example, when the right of the accused against double jeopardy is violated, the prosecution of the second charge against him must be dropped. He cannot be made to undergo trial for the second time for the same offense.

<sup>96</sup> Rule 115, § 1, 1997 REVISED RULES ON CRIMINAL PROCEDURE.

<sup>97</sup> In the case of *In Re: Kay Villegas Kami, Inc.* 35 SCRA 429 at 431, the Supreme Court defined an *ex post facto law* as one which:

- (a) makes criminal an act before the passage of the law and which was innocent when done, and punishes such an act;
- (b) aggravate a crime, or makes it greater than it was, when committed;
- (c) changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed;
- (d) alters the legal rules of evidence, and authorizes conviction upon less or different testimony than the law required at the time of the commission of the offense;
- (e) assuming to regulate civil rights and remedies only, in effect imposes penalty or deprivation of a right for something which when done was lawful; and
- (f) deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation of amnesty.

<sup>98</sup> ART. III, § 22.

In *People v. Ferrer*, 48 SCRA 382 at 395, the Supreme Court defined a bill of attainder as a legislative act which inflicts punishment without trial. Its essence is the substitution of a legislative act for a judicial declaration of guilt.

<sup>99</sup> *People v. Villaraza*, 81 SCRA 95 at 99.

given a retroactive application<sup>100</sup>. A scrutiny of this exception will reveal that it has been carved out in favor of the accused<sup>101</sup>.

It is also a well-established rule in the construction of penal laws that, should there be doubt or ambiguity in the provision of the law, the same should be strictly interpreted against the State and liberally in favor of the accused<sup>102</sup>. From all the foregoing, it can be concluded that the Philippine criminal justice system, though its laws are passed to penalize transgressors but nevertheless lenient on the accused, has taken measures to ensure that his rights are protected and not violated to his prejudice. Indeed, the Philippine Criminal Justice System is least incapsulated in the late President Ramon Magsaysay's statement: Those who have less in life should have more in the law.

### **B. Islamic Criminal Justice System: Does the Accused Have Rights Under The Islamic Criminal Justice System?**

If one will follow the line of thought of those who present Islam and its laws as harsh and cruel and without regard to universally recognized human rights, it necessarily follows that the accused, who is tried under the Islamic system, does not have the same rights as those conferred to one under the Philippine criminal justice system or any other Western-based system for that matter, given its seemingly strict and unsympathetic imposition of severe penalties. But is this view well-founded? Can anyone readily conclude that Islamic criminal law defies the principles of human rights particularly those that pertain to the accused?

Contrary to the widely held belief that Islam breeds laws of despotism and cruelty, it includes among its most important objectives the realization of justice and the eradication of injustice<sup>103</sup>. Justice in Islam is an ideal under all circumstances and at all times. It is a goal to be achieved. The way it is described or defined in the *Qur'an* or the *Sunnah* or *Hadith* of the Prophet should not be altered by one's own preferences or dislikes. Further, it should not be administered

---

<sup>100</sup> L.B. REYES, *supra*. note 6 at 13. See also ARTICLE 22 of the REVISED PENAL CODE.

<sup>101</sup> However, this exception does not apply in the following instances:

- 1.) Where the new law expressly made inapplicable to pending actions or existing causes of action (*Tavera v. Valdez*, 1 Phil. 463, at 470-471)
- 2.) Where the offender is a habitual criminal under Rule 5, ARTICLE 6 OF THE REVISED PENAL CODE (ARTICLE 22, REVISED PENAL CODE).

<sup>102</sup> *US v. Abad Santos*, 36 Phil. 243; *People v. Yu Hai*, 99 Phil. 728.

<sup>103</sup> T. J. AL'ALWANI & Y. T. DELORENZO, THE RIGHTS OF THE ACCUSED IN ISLAM, ARAB LAW QUARTERLY, Vol. 10, No. 1 (1995) at 3.

in a manner to suit one's self-vested interests<sup>104</sup>.

### *The Accused in Islamic Criminal Law and His Rights at the Investigative Stage*

Before discussing the different rights accorded to an accused under the Islamic criminal justice system, it is important to understand who an accused is under the said system.

The term "accused" as used in Islam is given its ordinary meaning. However, what sets it apart as a concept from how it is used in other legal systems is that Islamic jurists have formulated three categories of those accused in criminal cases, *viz*: 1.) someone well-known for his piety and integrity and thus unlikely to have committed the crime of which he is accused; 2.) someone notorious for his wrongdoing and profligacy and who is thus not unlikely to have committed the crime of which he is accused; and 3.) someone whose circumstances are unknown, so that nothing may be surmised concerning the likelihood of his committing the crime of which he is accused<sup>105</sup>.

This categorization is significant because it determines the requisites, conditions and circumstances when accusation against an accused may be accepted, and also determines the question on detaining the accused during investigation.

In regard to the first category, the accusation will not be accepted unless it is buttressed by legally valid evidence. No legal action may be taken against those accused falling under the first classification on the basis of accusation alone. In this way, decent and honorable people may be protected from the unfounded deprecations of those seeking to bring dishonor upon them. The one who falsely accuses such honorable person may be subjected to punishment<sup>106</sup>.

With respect to the second category, the principle of considering the circumstantial evidence and following the principle of conforming to what is

---

<sup>104</sup> The relevant Qur'anic provisions are as follows:

“Surely, God commands justice and the doing of good” (Chapter 16, Verse 90)

“Allow not your rancor for a people to cause you to deal unjustly. Be just, for that is closer to heeding” (Chapter 5, Verse 8).

<sup>105</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 5.

<sup>106</sup> There is a difference in opinion, however, among Islamic scholars. The majority of the jurists say that the accuser should be punished under all circumstances. On the other hand, there are those who hold that punishment should only be inflicted upon such person if it can be proven that in falsely accusing another, he intended to harm or otherwise discredit the latter.

most prudent, the accused may be deprived of personal freedom and detained. Thereafter, investigation must be conducted to determine the veracity of the accusation. The denial of the accused of the charges or his sworn oath is not sufficient as evidence. It is rather necessary to prove or disprove the truth of the accusation. Under these circumstances, the court authority (the ruler or the judge) has the right to detain the accused for the duration of the investigation<sup>107</sup>.

In reference to the third category of the accused, one whose circumstances are unknown, the ruler or the judge may detain<sup>108</sup> the accused until his circumstances are better known<sup>109</sup>. Thereafter, investigation and trial then ensue to determine whether or not the accusation should be upheld or rejected<sup>110</sup>.

---

<sup>107</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 6.

<sup>108</sup> The meaning of detention as understood under Islamic law is to hinder and to limit freedom, regardless of whether this is accomplished by confinement in a prison, by surveillance, or by being required to stay within a defined area.

<sup>109</sup> This is the opinion accepted by majority of the Islamic scholars. It is based on a *hadith* in which it is related that the Prophet Muhammad detained someone accused of a crime for a day and a night.

<sup>110</sup> This categorization of accused may be criticized as in violation of the right of the accused to be presumed innocent until proven guilty as it prejudices a person's guilt or innocence based on his reputation. In regard to this question, Taha. J. Al-Alwani, Chairman of the *Fiqh* Council of North America and President of the International Institute of Islamic Thought, had this to say:

"The *Shari`ah* is concerned with the circumstantial state of a person's innocence, and jurists have based several legal rulings based on their understanding of that principle. Moreover, this principle may only be overruled due to irrefutable evidence or, in other words, an evidence about which there is no doubt. Thus, it is connected closely with the principle that certainty may not be overridden by doubt. Indeed, the relationship of one principle to the totality of all the others is like the relationship of a branch to a tree-trunk, for the two are found together throughout jurisprudence literature. In addition, they must be reconciled to the principle of protecting society, by implementing preventative measures, from perceived dangers with a high likelihood of occurrence. The same is true with regard to the protection of what is considered essential to society.

May the principle of circumstantial innocence be superseded by something that is likely to harm society if the principle is abandoned? Part of that answer can be found in the threefold division of the accused. And perhaps the rest of the answer may be found in the principles of opting for what is most prudent; for limiting opportunities for wrong, and for doing away with what is detrimental.

Islam, which seeks to protect the rights of the individual, also seeks to protect the rights of society as a whole. Therefore, no individual may presume to overstep the rights of society while hiding behind the veil of personal rights and freedom, and society may not trample on the rights of the individuals or deprive him/her of his/her rights on the pretense

Like the rights of the accused under the Philippine legal system, the accused under Islamic penal law is afforded rights even at the investigative stage.

The first of this is the limitations placed upon the authority of the investigating body. The authority of the investigating body in relation to a person—concerning whom there is doubt—is restricted in the sense that if it invades on some of the rights of the accused, it certainly does not encompass the latter's other basic rights. The investigating officer is not allowed to enter into the person's home without permission, open the mails of the accused or snoop into private conversations on the pretense of exercising his authority to inspection. This is in violation of the rights given by Islam to the individual and the sacredness that it has placed upon a person's home<sup>111</sup>. Accordingly, the authority of the investigating official is subject to the rights of the accused,

---

of some alleged peril. Islam honors and exalts humanity and has given human beings many rights, above all the right to life, physical well-being, honor and respect, individual freedom, freedom of movement, and many others. Thus, an individual's home and personal life are sacred. No one has the right to enter another person's home without permission or to look inside his/her home, to eavesdrop on private conversations, to open one's mail, or to do anything else that infringes upon those rights.

Society, in its capacity as society, enjoys similar rights. It is essential that peace and security be maintained for society, that its interests be upheld, and that crime be eradicated. If it becomes necessary to maintain these rights by curtailing or suspending temporarily the rights of an individual, then such an act will be done based on the nature of what is dictated by necessity, which, in turn, is determined by the extent of the necessity. What is dictated by necessity represents the limit of power, set by the authorities, given to the investigator over the accused. Thus, the power of the investigator is essentially a departure from a legally established principle for the purpose of realizing another legally established principle, which cannot otherwise be realized.

If the *Shari'ah* allows the investigator or the judge to place certain restrictions on the rights of the accused to maintain the principle of the rights of the society, it has also placed restrictions on the power of the investigator, which represents guarantees to the accused." (T. J. AL'ALWANI & Y. T. DELORENZO, THE RIGHTS OF THE ACCUSED IN ISLAM, ARAB LAW QUARTERLY, Vol. 10, No. 1 (1995) at 6-7).

<sup>111</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 6.

The *Qur'an* also says:

"O ye who believe! Enter not houses other than your own without first announcing your presence and invoking peace upon the folk thereof. That is better for you, that ye may be heedful. And if ye find no-one therein, still enter not until permission hath been given. And if it be said unto you: Go away again, then go away, for it is purer for you. Allah knoweth what ye do." (24:27-8.)

"O ye who believe! Shun much suspicion; for lo! Some suspicion is a crime. And spy not, neither backbite one another." (49:12).

particularly his right to privacy<sup>112</sup>. The privacy of the individual must be respected and preserved under any and all circumstances. This holds true unless necessity requires otherwise such as when there is reason to believe that the person to be inspected committed a crime to the detriment of the society.

At any rate, preventive detention is allowed but not without restrictions. Islamic jurists have pronounced that detention should not be effected on the basis of suspicion alone as they consider it as within the same class of *haad* (severe) punishments. In fact, as a general rule, the individual is guaranteed personal freedom and the right of free movement. The *Qur'an* says: "He it is Who hath made the earth subservient unto you, so Walk in the paths thereof and eat of His Providence"(Chapter 67, Verse 15). Thus, a person cannot be deprived of his freedom of movement without a legally valid reason<sup>113</sup>.

Additionally, Islam imposes upon the State the responsibility of providing ample food, clothing and medical treatment for all prisoners and of ensuring that their other needs as well as their rights are protected and this can be gathered from the *Sunnah* or *Hadith* of the Prophet Muhammad<sup>114</sup>.

As to the length of imprisonment, there is a divergence of opinions among Islamic scholars and jurists. One opinion states that detention should not exceed one month, while the other supports the view that it is left to the legal discretion of the judge or concerned official<sup>115</sup>. The latter position, however, is deemed by scholars as the more reasonable one<sup>116</sup>.

As a final note on this matter, i.e., the rights of the accused during the investigative phase, especially those where conflicting opinions exist, is not something which is permanently fixed. The court official or State authorities adopting the Islamic judicial system may organize things in consonance with the dictates of the legal policies of a particular time or place. Stated succinctly, these

---

<sup>112</sup> Aside from taking into consideration the right of privacy of the individual, the investigating officer must also observe proper Islamic behavior in the exercise of his power. For example, if the person in authority is male, he should not conduct a body search on a woman or enter a house where women are present. In addition, personal property that has no relation to the alleged crime should not be destroyed or confiscated.

<sup>113</sup> IBN AL-QIYYAM, *AL-TARUQ AL-HUKMIYAH*, at 101.

<sup>114</sup> In one instance the Prophet left a prisoner in the care of a certain individual. He instructed the latter to take care of the needs and to respect the prisoner. Thereafter, he often made visits to the man to inquire of the prisoner's welfare. (IBN HAZM, *AL-MUHALLA*, Vol. 11 at 141).

<sup>115</sup> IBN AL-QIYYAM, *supra* note 95 at 103.

<sup>116</sup> ABU YUSUF, *KITAB AL-KHARAJ: COMMENTARY ON FIQH AL-MULUK*, Vol. 2, at 238.

are not matters that are closed to all change or development, for as long as such change or development is undertaken for the proper administration of justice.

### *Rights of the Accused During Trial*

#### *Right to Defend Himself*

Under Islamic criminal justice system, the accused is afforded the right to defend himself against any accusation. This he may do by proving that the evidence against him is invalid or by presenting other evidence that debunks the strength of such accusation. In any case, the accused must be given the opportunity to exercise this right, otherwise, the accusation will turn into conviction, which is palpably contrary to the principle of justice that Islam seeks to uphold at all times<sup>117</sup>.

A larger consideration has to be taken into account in granting this right to the accused. The right to defend oneself is not only a right that relates to the accused; it is also the right and duty of the society as a whole. Islam imposes upon the Muslim community or *Ummah* to see to it that the commands of God are carried out and one of these is the proper administration of justice. Thus, it is the society's concern that the innocent are not convicted and that the guilty be punished accordingly. It is for this reason that *Shari'a* guarantees the right to defense, and prohibits its denial under any circumstances and for any reason so that justice may be properly realized<sup>118</sup>. The basic rule regarding this right is that it should be undertaken by the accused, as it is his right, if he is capable of defending himself. Otherwise, he may not be convicted of the charges against him<sup>119</sup>. In connection with this, some Islamic jurists are of the opinion that a dumb mute cannot be punished for *haad* crimes, despite the fact that all of the requisites regarding evidence have been complied with. The reason, according to them, is that if the mute were capable of speaking, he might be able to raise the sort of doubts that would prevent the imposition of a *haad* punishment<sup>120</sup> for a lesser punishment, i.e., *tazeer* penalty. Thus, in that case, if the *haad* punishment is administered, justice will not be served because such severe punishment will be inflicted despite the presence of a doubt.

---

<sup>117</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 9.

<sup>118</sup> *Id.*, at 10.

<sup>119</sup> *Id.*

<sup>120</sup> See discussion on *hadd* crimes and punishments.

### *Right to Counsel*

There is no existing opinion from the early Islamic jurists that an accused has the right to seek the assistance of a counsel. Early written works dealing with Islamic procedural law and the conduct of judges do not make any mention regarding this matter. According to contemporary Islamic jurists, this omission might be due to the fact that trials then were held publicly. As these public sessions were widely attended by legal scholars and experts, whose presence signified a true and responsible legal advisory board that actively assisted the judge in dispensing justice, there was no need for professional lawyer to represent the parties specifically the accused.<sup>121</sup>

But the fact that there exists no legal opinion or specific *Qur'anic* provision or *hadith* giving this right to the accused does not necessarily translate to the non-existence of such right under Islamic law. He does have this right and it is justified under the doctrine of necessity. There are many *Shari'a* texts which emphasize the need to settle disputes by any conceivable means necessary. The employment of any method to ensure the resolution of the case is therefore, valid under this principle<sup>122</sup>. Corollarily, if the right to seek the assistance of a counsel would lead to the appropriate settlement of a dispute and thereby lead to the realization of justice, there is no logical reason for the denial of such right. The necessity of granting this right becomes apparent when the great disparities in talent and ability, particularly the ability to argue and debate effectively, between the parties are taken into consideration. In such case, the dispute would not be settled properly and justice then would not be served, thereby defeating one of the principal objectives of Islam, i.e., the realization of justice and the elimination of injustice. Not only will granting this right to the accused be of interest to the apposite disposition of the case; the same is favorable to the accused, especially in defending himself because with the counsels' assistance, he would acquire a better understanding of the charges against him, of what the law says, of the quantum of evidence required to sustain his innocence, what and how such evidence may be used to rebut the charges against him. When all these considerations are taken in its entirety, the inevitable conclusion is that, as a consequence of the right of the accused to defend himself, he can also ask the help of someone to represent his case more effectively<sup>123</sup>.

---

<sup>121</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 11.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

As to the question of at what stage the accused in Islamic criminal law may seek the

### ***Right to Remain Silent***

Similar to the right of an accused under the Philippine justice system, an accused in the Islamic penal system has the right to remain silent and choose not to answer questions of the investigating authority that would incriminate him. He has the right to freely express himself without fear of reprisal or of truth serums, drugs and the like to extract information from him which he would otherwise not give.<sup>124</sup> The decision lies with him, as to whether or not to respond to inquiries.

### ***The Accused's Free Admission of Guilt and Right to Retract***

Essentially, an accused may be allowed to make a confession but such confession cannot be validly effected under coercion or duress. Islam has prohibited this. Indeed, the Prophet Muhammad said, "Verily, your blood, your wealth, your reputations, and your skins are sacred to you." So when Allah made both the body and the reputation sacred, He prohibited the physical and verbal abuse of Muslims, except when required by law as prescribed in the *Qur'an* and the *Sunnah*.<sup>125</sup> Likewise, deceit cannot be employed to extract confession from the accused. A confession that has been made under duress and without freedom of choice cannot be accepted under the Islamic penal system as the probability of it being false is high, considering that the accused might have made it to avoid a more imminent evil, for instance, the infliction of physical pain upon him. As a consequence, Islamic jurists have ruled that admissions made under such schemes are invalid and legally inadmissible as Islamic law does not tolerate falsity<sup>126</sup>.

---

help of a counsel, Islamic jurists are of the opinion that he may exercise this right both at the investigative stage and during the trial. On this point, al-Alwani wrote: "If the question is subjected to *ijtihad* (process of making a legal decision by independent interpretation of the legal sources, i.e., the *Qur'an* and *Sunnah*) and it is determined that the accused is allowed to seek legal counsel, then it may be best for the accused to have legal counsel at both stages. This also would help to establish the facts of the case. In addition, if one is to prepare an effective defense, it is necessary to acquire a complete understanding of the alleged crime and the evidence so that the charges can be refuted. In addition, information proving the accused's innocence must also be gathered and then presented effectively. This would indicate that the accused should be allowed to seek legal counsel from the time that charges are filed."

<sup>124</sup> AL SUYUTI, AL-FATH AL- KABIR, Vol. 3 at 256.

<sup>125</sup> S. AL-JANZURI, RESEARCH ON AL-MAJALLAH AL-ARABIYA, No. 7 (1978), at 238.

<sup>126</sup> IBN HAZM, AL-MUHALLA, Vol. 11 at 141.

Correspondingly, the accused is conferred the right to retract what he may have confessed out of his own volition. But the validity and acceptability of such retractions would depend on the nature of rights involved which the accused violated<sup>127</sup>.

First, there are rights for which the retraction of an admission is valid. These involve *haad* crimes, in which the rights of God are violated. In this case, such rights may be waived whenever doubts arise in relation to them. As a result, if a person accused of a *haad* crime retracts, there is the likelihood that the original admission was a sham and that the retraction is true. As *haad* penalties may not be imposed when doubts arise, one who has confessed adultery, for example, can prevent the imposition of such punishment in the event that he/she retracts his/her confession. There is consensus among classical Islamic jurists on this<sup>128</sup>.

The second variety of rights includes the rights of the people, which may be proprietary or otherwise, for which the retraction of a confession is not valid. Clearly, the one confessing has no right of disposal over another's property. However, since the confession has the effect of establishing such a right for someone else, it follows that its retraction invalidates someone else's right. For this reason, such a retraction, either by declaration or indication, may not be accepted<sup>129</sup>.

### *The Accused's Right to Compensation for Mistakes in Judgment*

The authorities responsible for adjudicating disputes, needless to state, are human beings and are thus apt to make mistakes in rendering their judgments. It is not impossible that a judge may wrongfully, through mistake or otherwise, convict an accused when he is innocent. In such case, if it can later be proven that verily, the accused is innocent, Islamic law allows recovery of damages or compensation<sup>130</sup>.

---

<sup>127</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 15.

<sup>128</sup> IBN HAZM, *supra* note 109 at 142.

<sup>129</sup> T.J. AL'ALWANI & Y.T. DELORENZO, *supra* note 86 at 16.

<sup>130</sup> AL-NAWWAWI, AL-MUHADHAB, Vol. 2 at 364.

## VI. ANALYSIS AND CONCLUSION

The most visible difference between the Islamic criminal justice system and that of the Philippines is with their nature, i.e., the former is of religious character while the latter is purely secular<sup>131</sup>. There are other distinctions, such as the forms of punishments imposable under each system and how each system perceives the accused. In the Islamic system, the welfare of the society is given more weight. As such, it consents to the infliction of punishments which are inadvertently regarded by many as harsh. On the other hand, the Philippine legal system is more centered on the individual component of the society.

But other than those differences in principles, the two systems bear a resemblance, i.e., both were established for a common purpose—the effective administration of justice. Each was created for the suppression of crimes and for the interest of those who are subject to it. But in either case, both protect the rights of the accused.

The dissimilarities between the two systems should not be taken to mean that one is better than the other. Rather, they should be understood in the light of their nature and the philosophy underlying them.

The common biased portrait painted of Islam, especially its criminal justice system is that it is barbaric, despotic, ruthless and cruel. It has been criticized for its harshness and its alleged disregard for human rights. Obviously, the prejudice of these critics—Western critics particularly—stems from their bigoted concept of human dignity that evokes a twisted measure of pity, if not sympathy, for law offenders.

True enough, the Islamic legal system is objectively strict when it comes to the punishment of crimes. It shows relatively lesser sympathy in making criminals suffer the consequences of their acts and tolerates the infliction of such severe penalties such as the amputation of the hands and decapitation. However, this does not justify the conclusion that the Islamic criminal justice system is barbaric and it does not make it so. One must understand first the philosophy behind the system before one can draw a rational conclusion.

First and foremost, one has to realize and keep in mind that Islam is both a religion and a legal system. The unavoidable implication of its nature is that punishment is perceived as a necessary requisite of divine justice<sup>132</sup>. Any judicial

---

<sup>131</sup> Owing to such nature, the Islamic legal system does not recognize the principle of separation of church and state. In said system, there is undoubtedly the amalgamation of the two entities instead.

<sup>132</sup> D.F. FORTE, *STUDIES IN ISLAMIC LAW* (1999) at 236.

proceeding operates on the ground of divine affirmation; justice is pronounced in the name of God. According to Islamic convictions, all penalties following the accusation and trial of a transgressor of the law are measured with a divine balance of justice<sup>133</sup>.

Punishment, as understood in the religious context of Islam, is not merely for the purpose of making the offender suffer the consequences of his wrongful acts but is also intended to reduce his liability in the Hereafter and therefore thus receive lesser punishment. As such, punishment is perceived rather as a merciful act upon the wrongdoer<sup>134</sup>. It must be remembered that in Islamic law, there is a strong connection between the religious and worldly affairs of the Muslims. Thus, a crime committed in this world is a sin against God that deserves divine punishment as well. This too is one of the reasons why Islam prescribes harsh penalties for crimes as violations of God's commandments, being the highest law, deserve severe punishments.

Secondly, although under the Islamic criminal justice system the rights of the individual, specifically that of the accused, are protected, nonetheless it gives more importance to the general welfare of the society. This is based on the presupposition that man is essentially weak and therefore incapable of rising above personal failings<sup>135</sup>. Therefore, it imposes a rigid code of punishment for the microscopic minority of criminals and ensures an atmosphere of peace and security for the rest of the society. Generally speaking, one could conclude that Western-based systems of penology focus on the individual and take measures to ensure that his rights are protected against the society or State even if he has offended the law. On the other hand, the Islamic criminal justice system makes sure that the interests of the society prevail and that it rather sacrifices an individual's welfare on behalf of the community. In other words, Islamic penal laws were conceived in larger interests of society.<sup>136</sup>

The objective of punishment under the Islamic legal system is not vengeance against the culprit.<sup>137</sup> Rather, its aim is to protect the society from the

---

<sup>133</sup> M. AL-AWABDEH, *supra* note 60 at 22.

<sup>134</sup> *Id.* at 23.

<sup>135</sup> *Id.* at 21

<sup>136</sup> A.A.K SHERWANI, *IMPACT OF ISLAMIC PENAL LAWS ON THE TRADITIONAL ARAB SOCIETY* (1993) at 264.

<sup>137</sup> Although *Quissas* punishments are said to have the purpose of retaliation against the wrongdoer, this however, pertains only to the point of view of the victim or his heirs. For the society as a whole or the State, it is an action taken against the offender to deter others from

aggressions of law offenders and halt transgression and crime. It seeks to prevent further crime commissions by the offender and serves as means of dissuading others from following suit. It warns others of the adverse consequences of perpetrating crimes. In sum, the aim of the Islamic criminal law and the penalties allowed therefor is the prevention of crime, achievement of a peaceful, secure society, and, ultimately, protecting the dignity of the individual member of the society.

Islam as a legal system centers on the administration of justice in its most ideal sense. It enjoins the people to dispense it in the manner stipulated in the *Qur'an* or other sources of Islamic law; otherwise, it may be subject to the whims and caprices of people and thereby rendering its true purpose defeated. Thus, the *Qur'an*, in the case of adultery, ordains: "As for the adulteress and the adulterer, flog each of them with a hundred stripes, **and let not compassion for them keep you from (carrying out) this law of God**, if you truly believe in God and the Last Day; and let a number of believers witness their punishment" (*Holy Qur'an* 24: 2). It is erroneous therefore to equate its noble purpose of carrying out justice effectively to barbarism.

It should be noted that these misconceptions about Islam do not come about for the mere purpose of maliciously tarnishing its image in the sight of other communities. There are at least two reasons why these wrong connotations about Islam exist.

The first reason is that people obtain their understanding of Islam and all its aspects based on how some Muslims practice the religion and carry out its supposed injunctions. This may be one way to get a grasp on the religion but it is not reliable. It can, as it does in the status quo, generate misconceptions, which unfortunately would define Islam for the many. A classic example is the 9/11 attacks and similar terrorist violence being spearheaded and proliferated by Islamic extremist groups. After the ill-fated events of 9/11 took place, Muslims around the world were placed in a rather precarious state. They were generalized as terrorists, even brutal, vicious people who make violence as their way of life. The manner in which some Islamic states implement Islamic criminal law has also been a source of misconceptions in the religion. For instance, we have seen how the Taliban regime in Afghanistan enforced Islamic laws in their country before they were ousted: conducting executions in a sports stadium in between breaks of a soccer game, flogging any woman caught without being swathed in

---

committing crimes.

a concealing *burqa*, depriving girls of all education, and precluding women from obtaining health care or working outside the home. Unfortunately, many people have used this as basis for forming their beliefs about Islam—it is tantamount to tyranny, brutality and disrespect for human decency.

It is quite inevitable to make generalizations as it is human nature. However, that should not justify the holding of specious beliefs and present them as the truth about a certain thing. As rational animals, we should incline ourselves more towards being open-minded for what good have we earned from judging a large community based on the evils committed by a small fragment thereof? It has only brought in our midst hatred, suspicion, mistrust and hostilities to the prejudice and detriment of all of us.

It is unfair to define Islam on the basis of the acts of people who claim to live by its true principles when in fact their acts defy what it truly espouses. Their acts do not truly present what it ordains. Verily, as one American journalist put it, “*an idea isn’t responsible for the people who believe in it.*”<sup>138</sup> And it is even more unjust and repugnant to label all Muslims as terrorists, violent, brutal beings on the basis of the acts of a small and belligerent group.

Another reason why Islam is widely misunderstood is that people generally have no knowledge of the realities of the *Shari’a*. Indeed, misconceptions and erroneous beliefs owe their existence from and are manifestations of ignorance. This should be a concern for all, Muslims and non-Muslims alike, because misunderstandings can seriously threaten co-existence. Both sides should endeavor to educate themselves about each other’s system of beliefs. It is only through genuine understanding that peaceful co-existence may be viable and differences reconciled. Indeed, “*a little knowledge is a dangerous thing.*”<sup>139</sup> It is only through opening our minds and looking beyond what is apparent that we can gather true understanding of the things around us.

It is the opinion of this writer that the best way to understand objectively any system is to delve deeply into its primary and secondary sources. In the case of Islam, one can be enlightened about it - both as a religion and legal system - by intelligently examining the Holy Qur’an, Hadith and the Sunnah of the Prophet Muhammad.

---

<sup>138</sup> Don Marquis, *New York Sun*.

<sup>139</sup> *In Re: Joaquin T. Borromeo* 241 SCRA 405 (1995), citing *An Essay on Critique*, Alexander Pope.

The writer fervently hopes that the subject at hand, Islamic and Philippine criminal justice systems, is analyzed and compared fairly. Moreover, it is hoped that the cobwebs of misconceptions which were heaped upon the Islamic justice system for so long by Western critics be wiped out so that fairness and justice will finally prevail.