

Paper Presented at

AMSS 34th Annual Conference
“Muslims and Islam in the Chaotic Modern World:
Relations of Muslims among Themselves and with Others”

Cosponsored by
Temple University, Philadelphia, PA
September 30 – October 2, 2005

“Muslim Modernists and New Hermeneutic
Approach to the Prophetic Tradition:
Special Reference to the Injunction of *Sariqah* and *Hirabah*”

By: Habeeb Rahman Md. Ibramsa, Ph. D.
(Department of Qur’an and Sunnah Studies
International Islamic University Malaysia)

ABSTRACT

Statements, particularly sacred verses, are never ever free from the possibilities of misinterpretations. This includes messengers of God’s statements consisting precise meanings what mere of ambiguous wordings. People dealing with Prophet Muġammad’s traditions, for example, during his absence had faced problems of interpretations due to the different hermeneutic approaches.

Educational and cultural backgrounds contribute a great deal to hermeneutic process of the religious texts. Interpretation and understanding the Qur’Ēnic injunctions have been from its early time, bound by clear and invariable legal criteria of exegesis. This remained so up to the twentieth century, whereby most of the Muslim nations were caught under the colonial hegemony, followed thereupon by the wide prevalence of colonial methodologies and philosophical theories that led to intellectual confusion for the Muslim world. Consequently, the Muslim minds started to question what were their sacred truths and axioms, and eventually ended up conceiving them as mere postulations and man’s mental speculations that are not in line with the prevailing modern approaches.

This paper is an attempt to examine and evaluate the opinions of the Muslim Modernists by analyzing their interpretation and understanding regarding the injunctions of the *sariqah* and *ĪirĒbah*, scrutinizing their ideas, and a cross-examination thereof. This is for the purpose of testing the degree of harmony and coherence of these scholarly inputs, and also to know the extent of the soundness of their interpretation, and whether it is, all through, consistent or not. Thereafter, we relate these inputs to their inherent historical context in order to discover their future tendencies and real objectives.

Introduction

Execution of *×udĒd*, legal punishments according to Islam, is not a cruel and barbaric act. It never, in any way, transgresses human rights. Therefore interpreting the Qur'Ēnic injunctions and the Prophetic traditions to discredit the well accepted legal system is unethical and will be unacceptable to Muslims unless it is based on a hermeneutic of the Qur'Ēn and the traditions of the Prophet. Muslims, since the early days of Islam believe that all commandments in both the Qur'Ēn as well as in the Prophetic traditions never neglected human rights. Although an Islamic state may be set up in any part of the earth, Islam does not seek to restrict human rights or privileges to the geographical limits of its own state. Islam has laid down some universal fundamental rights for humanity as a whole, which are to be observed and respected under all circumstances whether such a person is resident within the territory of the Islamic state or outside it, whether he is at peace with the state or at war. The Qur'Ēn very clearly states:

“O believers, be you securers of justice, witness for God. Let not detestation for a people move you not to be equitable; be equitable - that is nearer to the god-fearing.”¹

Human blood is sacred in every way and cannot be spilled without justification. And if anyone violates this sanctity of human blood by killing a soul without justification, the Qur'Ēn equates it to the killing of entire mankind.

“Whoso ever slays a soul not to retaliate for a soul slain, nor for corruption done in the land, should be as if he had slain mankind altogether.”²

It is not permissible to oppress women, children, old people, the sick or the wounded. Women's honor and chastity are to be respected under all circumstances. The hungry person must be fed, the naked clothed, and the wounded or diseased treated medically, irrespective of whether they belong to the Islamic community or are from among its enemies.

When we speak of human rights in Islam we really mean that these rights have been granted by God; they have not been granted by any king or by any legislative assembly. The rights granted by the kings or legislative assemblies can also be withdrawn in the same manner in which they are conferred. The same in the case with the rights accepted and recognized by the dictators. They can confer them when they please and withdraw them when they wish; and they can openly violate them when they like. But since in Islam God has conferred human rights, no one on earth has the right or authority to make any amendment or change in the rights given by Him. No one has the right to abrogate them or withdraw them. Nor are these basic human rights that are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like philosophical concepts that have no sanctions behind them.

The proclamations and the resolutions of the United Nations are incomparable with the rights sanctioned by God. The former is not applicable on anybody while the latter is applicable on every believer. They are a part of the Islamic Faith. Every Muslim, or

¹ SĒrat al-MĒ'idah : 8.

² SĒrat al-MĒ'idah : 32.

administrators who claims to be Muslim, will have to accept, recognize and enforce them. If they fail to enforce them, and start denying the rights that have been guaranteed by God, or make amendments and changes in them, or practically violate them while paying lip service to them, the verdict of the Qur'Ēn for such men is clear: *"Those who do not judge by what God has sent down are the disbelievers."*³ Human Rights in Islam encompass all aspects of life. In regard to the security of life and property, for instance, the Prophet said:

*"Your lives and properties are forbidden to one another until you meet your Lord on the Day of Resurrection."*⁴

He has also said about the *dhimmi* (non-Muslim citizens of the Muslim state):

*"One who kills a man under covenant (i.e. dhimmi) will not even smell the fragrance of Paradise."*⁵

As for the Protection of Honor: The Qur'Ēn states:

*"O you who believe! Let not some men among you laugh at others: it may be that the (latter) are better than the (former): Nor let some women laugh at others: it may be that the (latter) are better than the (former): nor defame nor be sarcastic to each other nor call each other by (offensive) nicknames: Ill-seeming is a name connoting wickedness (to be used of one) after he has believed: And those who do not desist are (Indeed) doing wrong. O you who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay ye would abhor it...but fear Allah: for Allah is Oft-Returning Most Merciful."*⁶

Among the rights that Islam has conferred on human beings is the right to protest against tyranny. Referring to this, the Qur'Ēn says: *"God does not love evil talk in public unless it is by someone who has been injured thereby."*⁷

In Islam all power and authority belongs to God, and with man there is only delegated power, which becomes a trust. Everyone who becomes a recipient of such a power has to stand in awful reverence before his people towards whom and for whose sake he will be called upon to use these powers. This was acknowledged by AbĒ Bakr al-ØiddĒd, who said in his very first address as Caliph:

*"Cooperate with me when I am right, but correct me when I commit error; obey me so long as I follow the commandments of Allah and His Prophet; but turn away from me when I deviate."*⁸

³ SĒrat al-MĒ'idah : 44.

⁴ Al-BukhĒri, MuĀammad ibn IsmĒnĒl, *Khalq AfĒl al-NĒbĒd*. Riyad: DĒr al-MaĒĒrif, 1978, vol. 1, p. 90.

⁵ Al-NĒsqalĒnĒ, Ahamd ibn xajar, *FatĀ al-BĒrĒ bi SharĀ ØaĀĒl al-BukhĒri*. Cairo: al-Maktabah al-Salafiyah, 1976, vol. 6, p. 269.

⁶ SĒrat al-xujurĒt : 11-12.

⁷ SĒrat al-NisĒ' :148.

Accountability of Rulers to the legal system is another important aspect of Islamic human right. A woman belonging to a high and noble family was arrested in connection with theft. The case was brought to the Prophet Muḥammad (s.a.w), and it was recommended that she might be spared the punishment of theft. The Prophet replied, "The nations that lived before you were destroyed by God because they punished the common-man for their offences, and let their dignitaries go unpunished for their crimes. I swear by Him who holds my life in His hand that even if FĒlīmāh, daughter of Muḥammad, had committed this crime, I would have amputated her hand."⁹

Islam attempts to achieve these human rights and many others not only by providing certain legal safeguards, but also mainly by inviting mankind to transcend the lower level of animal life to be able to go beyond the mere ties fostered by the kinship of blood, racial superiority, linguistic arrogance, and economic privileges. It invites mankind to move on to a plane of existence where, by reason of his inner excellence, man can realize the ideal of the brotherhood (*ukhuwwah*) of man. Therefore, clear understanding on the Islamic concept of human rights is an essential criterion for those scholars and exegesis, including the Muslim modernists, engaging in both the Qur'Ēnic texts and the Prophet traditions.

Muslim Modernists' Concept of the Prophetic Tradition

Islamic Modernism is both unique in its term and yet so clearly, in all its dimensions, a Western product. Like Western modernism, Islamic modernism is difficult to define: it is rather the general label for a number of movements using heuristic trends. Muslim Modernists, even though acquainting less knowledge on technical Islamic sciences, are very much devoted to Islamic oriented research works. The principal thrust of Islamic modernism has been an attempt to find new interpretations to the law or construct new hermeneutics that facilitate interpretations consistent with the demands of modern society. This approach to the study of Islam is not without its critics. The Saudi scholar, SalmĒn ibn Fahd al-'Audah, for example, defines what he calls the "Intellectual School" (*al-Madrasat al-'Aqliyyah*) as the tendency in thought "that seeks a synthesis between texts of the SharĒḤah (*nuĒĒl al-sharĒĒ*) and western civilization or contemporary western thought." This effort, according to 'Audah, takes the form of "interpretation (*ta'wĒl*) of the texts in a new manner consistent with the established perspectives of the West, and the new scientific and technological discoveries of the present time."¹⁰ Members of this school are said to "go to excess" in their hermeneutic of the texts, be those texts theological or legal, or straight traditions. Everything that does not meet with their view is given a new "spin" in the name of interpretation.¹¹

'Audah's analysis of this school is essential, not just because his criticism underscores the difficulty facing Muslim thinkers. His brilliant and insightful comments highlight the importance of authenticity and help to explain why many attempts at finding this elusive synthesis have been met with resistance in the Muslim

⁸ Al-SijistĒnĒ, AbĒ DĒwĒd SulaymĒn ibn al-AshĒḤath, *Sunan AbĒ DĒwĒd*. Beirut: DĒr ĪyĒ' al-TurĒth al-ĒArabĒ, nd., vol., 4, p. 132.

⁹ Al-NajjĒr, ĒAbd al-WahhĒb, *al-KhulafĒ' al-RĒshidĒn*. Beirut: DĒr al-Kutub al-ĒIlmiyyah, 1979, p. 33.

¹⁰ SalmĒn ibn Fahd al-ĒAudah, *iwĒr HĒdi' MaĒa Muḥammad al-GhazĒĒ*, p.9.

¹¹ Ibid

world. He lists what he calls the most obvious attributes (*abraz al-maÑÉlim*)¹² of this school as the basis for his critique of Islamic modernists, with few exceptions.

1. Rejection of the traditions of the prophet in total or in part.
2. Broad scope in the Qur'Énic exegesis even if it results in interpretations in conflict with the rules of the Arabic language or reports from the earlier pious generations (*salaf al-ÎÉliÍ*).
3. Reducing the importance of consensus (*ijmÉÑ*) either by discounting it completely (as with Ahmad Khan) or imposing new limitations on its scope that were non-existent among scholars of the *uÎÉl*, or legal theory (as we find for instance in MuÍammad ÑAbduh).
4. Great freedom in making legal rulings (*ijtihÉd*) without attention to the conditions (*shurÉÏ*) required in an independent jurist (*mujtahid*) leading them to pronouncements at variance with every one else's.
5. Tendency toward limiting the scope of metaphysics (the scope of the unseen - *umËr al-ghaibiyyah*) as much as possible, and this is a result of the predominance of materialism in modern thought.
6. Insistence that the practical application of the *sharÉÑah* must be circumscribed by the reality of existence. This covers questions such as usury, national unity (i.e. citizenship and brotherhood not based on religion, but on nationality) and freedom of thought or conscience etc.

Muslim modernists espouse various approaches to deal with the Prophetic traditions due to their diverse spectrums of thought. Nevertheless, all these approaches come to terms with one target, namely, relegating the status of the Prophetic traditions, and nullifying its hermeneutic role to understand the holy Qur'Én. "The Prophetic traditions are the prophet's personal reasoning (*ijtihÉd*) in executing the injunctions of the holy book, namely, penalties (*×udÉd*), worships, ethics while reckoning for the realistic world wherein he lives".¹³ The term "*ijtihÉd*" discards the peculiarity of the true concept of the Prophetic tradition becomes just a mental speculation similar to other human's reasoning that succumbs to the objective fact. This fact was to be yielded within a specific space-time factor that comprehends the economic, social, and political circumstances of the Arab peninsula in the seventh century. Thus, the Prophetic tradition is only an initial response of Islam to a very primitive environment that completely differs from our contemporary age.¹⁴ Moreover, from a functional

¹² Ibid. p. 11.

¹³ ShahrËr, MuÍammad, *al-KitÉb wa al-Qur'Én: QirÉ'ah MuÑÉÍarah*. Damascus: al-AhÉÍÉ Publication, 1990, p. 548.

¹⁴ Ibid., pp.546-549. ×Éj ×amad, MuÍammad AbË al-QÉsim, *al-ÑÑÓlamiyyah al-IslÉmiyyah al-ThÉniyyah*. Beirut: DËr Ibn ×azm Publication, 1996, vol. 2, pp.487-488.

perspective, the Prophetic tradition appeared to be a crucial factor in the early time of Islam; “the vivid relation, and the effective meddling between the realities of the Qur’Énic awareness in its absolute sense, and the conceptions of human awareness in its historical proportion”.¹⁵ So, according to the modernists’ perception, the holy Qur’Én had emerged within an environment of animism, which lacks the characteristics of “Direct dealing, and conspicuous feasibility of the Qur’Énic methodology through analysis”.¹⁶ From such a perspective, the Prophetic tradition had effectively acquired its historical worthiness. As asserted by the modernists, who claimed that the leading role of the Prophet arose mainly because “he is the role model, and the practical example that the Arabs are to follow in the instance of the theoretical absence of the methodological awareness”.¹⁷

The eminent Prophetic tradition is not suitable for our modern time. In this regard, the modernists contend that the Prophetic tradition is eventually the Prophet’s reasoning in a very particular space and time, and by corollary, those who come after the Prophet are not bound to adhere to it. “The big fallacy is that we want to understand Islam by shifting our way of thinking from the 20th century to the 7th century. That is we want to think as they (Muslim ancestors), themselves, used to think, and this impossible. Then, after that we (want to) leap back from the 7th century in order to present Islam of that (distant) age in the 20th century.”¹⁸ According to the modernist perception, the orthodox definition of the Prophetic tradition, as acknowledged by Muslim scholars in the past and the contemporary era, is basically clear distortion of history and development and leaping over the space-time dimension, as well as being a stroke of illusion that disregards the reality of the facts and concrete life.¹⁹

Hence, according to the modernist advocates, the solution is: “We must be confident and trust ourselves, and then we should say that we are in the 20th century capable of transforming the Qur’Én from an absolute state to a relative one like our Prophet had done; but not what he had literally done”.²⁰ The latter statement signifies that the modernists put themselves on an equal footing with the past prominent Muslim scholars, and they even rate themselves to be a par with the Prophet (s.a.w) himself. Yet the modernists enunciate that their understanding is superior to the Prophet’s understanding, who had to live in a pastoral age that consisted of very primitive means of production compared to the modernists who belong to the cutting edge technology and computer era; it is the age of the second globalization.²¹ In other words, due to the tremendous scientific advances achieved by man in the 20th century, both on the technical and epistemic levels, the Prophetic tradition has accordingly lost its expository role in dealing with the Qur’Én. Such an explanatory role came to an end with the demise of that traditional hermeneutic mentality that emphasizes only the surface (of the reality), and looks at a great multitude of figures without being capable of analyzing them.²²

¹⁵ Ibid., p.68.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ ShahrÉr, op. cit., p.566.

¹⁹ Ibid.

²⁰ Ibid., p. 567.

²¹ ×Éj ×amad, op.cit., vol. 2, pp. 487-488.

²² Ibid., p. 507.

Prophetic Traditions on *Sariqah* and *×irÉbah*

Several narrations are found in the six canonical *ÁadÉth* collections (*al-kutub al-sittah*) in regard to *sariqah* and *ÍirÉbah*. In regard to the former, ÑÓ'ishÉ r.a. reported that the Prophet MuÁammad s.a.w. said: "*The hand of a thief should be cut off for a quarter of a dinar²³ and what is above that.*"²⁴ In another version it is found AbÈ Hurairah reported that the Prophet s.a.w said: "*God curses the thief who steals an egg,²⁵ for which his hand is to be cut off, or steals a rope²⁶ for which his hand has to be cut off!*"²⁷

As for the later, Anas ibn MÉlik narrated that a group of people from the ÑUkl (or ÑUraina) tribe came to Madinah and (they became ill, so) the Prophet ordered them to go to the herd of camels and told them to go out and drink the camels' urine and milk (as a medicine). So they went and drank it, and when they became healthy, they killed the camel herder and drove away the camels. This news reached the Prophet early in the morning, so he sent (some) men in their pursuit and they were captured and brought to the Prophet before midday. He ordered their hands and legs to be cut off and their eyes to be branded with heated iron pieces and they were thrown at al-×arra, and when they asked for water to drink, they were not given water. (AbÈ QilÉbah said, "Those were the people who committed theft and murder and reverted to disbelief after being believers (Muslims), and fought against Allah and His Apostle").²⁸

Sayings, actions, and tacit approvals of the Prophet MuÁammad expound precise and concise meaning of the Qur'Én. Muslim jurists regard the above narrations as elaboration to the Qur'Énic verdicts for the *sariqah* and *ÍirÉbah*²⁹. They indicate that the penalty cannot be explained away as anything but literal and physical. They also indicate that the penalty could be imposed for trivial thefts. Anas ibn MÉlik's narration refers to the case of *ÍirÉbah* in which the people who came to the Prophet (s.a.w) were Muslims and they were sick. The Prophet advised them to go to the herd of camels and to drink their milk and urine (as a medicine). When they became healthy, they killed the herder of the Prophet and drove away all the camels that were allocated for *Íadaqah* (charity).

When the Prophet (s.a.w) came to know about this, he applied the Qur'Énic punishment for the *ÍirÉbah* on them. As for branding their eyes, the Prophet (s.a.w) branded the eyes of the people of ÑUkl or ÑUraina with iron because they killed the herder and branded his eyes with iron. ImÉM Ibn ×ajar stated the differences of opinions among scholars and he said, "The killing that took place (that is, in reference

²³ A dinar, a word taken from the Roman denarius, was not a small sum, but not exorbitant, either.

²⁴ Al-BukhÉrÉ, MuÁammad ibn IsmÉÑÉl, *ØalÉÍ al-BukhÉrÉ*. Beirut: DÉR Ibn KathÉR, 1987, vol. 6, p. 2493.

²⁵ Some commentators say that an "egg" was really a helmet.

²⁶ The rope here means a ship's rope, which was sizable and costly.

²⁷ Al-NÈsÉbÉRÉ, Muslim ibn al-×ajjÉj, *ØalÉÍ Muslim*. Beirut: DÉR ÍyÉ' al-TurÉth, nd., vol. 3, p. 1314.

²⁸ *Ibid.*, vol. 6, p. 2496.

²⁹ "The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom" (SÈrat al-MÉ'idah: 33).

to the above *ĪadĒth*) was in retaliation and Allah Almighty says, 'And one who attacks you, attack him in like manner as he attacked you'³⁰."

Prevailing Muslim View on Injunction of the *Sariqah* and *ĪirĒbah*

Prophetic penalty for stealing is clear. Based on many *ĪadĒth*, explaining the *SĒrat al-MĒ'idah* verse 38, traditional scholars agreed on the verdict, that a thief's hand should be cut off, based on very specific conditions and circumstances. First, the theft must be within the set limit. Second, the stolen item must be under lock and proper protection. Third, if the theft situation is only a suspicion, or if the reason for theft is real and justified such as hunger [or real poverty], in such a case, the hand of the thief will not be amputated.³¹

The traditional scholars differ in regard to the *ĪirĒbah* verdict. Even though the supposed historical context of *SĒrat al-MĒ'idah* verse 33 deals with renegade tribesmen, during a raid, which happened often enough in Arabia at the time, some scholars interpret the clause "*wage war against God and His messenger*" as an armed rebellion against an Islamic ruler. However, most jurists agree that the tribesmen's crime comes under the category of highway robbery or brigandage.³² This crime is committed outside of the city along the trade routes or highways, not in a city by an ordinary thief.

When and how are the punishments of execution, crucifixion, mutilation, or banishment applied? The *ShĒfiĒ* School has several applications. (1) If the robbers kill someone, but do not take his property, then they are executed (presumably beheaded). (2) If the robbers kill someone and steal his property, then they should be asked to perform the ritualistic bath for repentance, then they will be hanged and after death the funeral rites and burial will take place. (3) If they robbed property, but did not kill anyone, then their right hand and left foot are to be amputated. (4) If they only threaten, but do not kill or rob, then they are to be punished by imprisonment (substitute for banishment) and according to the judge's discretion. The *ĀanafĒ* School agrees with this explanation of the *ShĒfiĒ* School. The *MĒlikĒ* School says that the punishments are applied as follows: (1) if the robbers commit murder, they are to be put to death, either by execution or crucifixion. (2) If they stole property, but did not murder, then the penalty is exile, but the judge has discretionary authority to execute, crucify, or amputate the alternative hand and foot. (3) The least punishment is flogging and exile, depending on the circumstances. Sometimes exile can be replaced with imprisonment.³³

³⁰ *SĒrat al-Baqarah*: 194.

³¹ *ĀAudah, ĀAbd al-QĒdir, al-TashrĒn al-JinĒ'Ē*. Beirut: DĒr IĒyĒ' al-TurĒth al-IslĒmi, 1985, vol. 2, pp. 518-544.

³² *Ibid.*, pp. 639-640.

³³ *Ibid.*, pp. 643 - 660

Muslim Modernists' Interpretation on Injunction of the *Sariqah* and *ẖirÉbah*

Islamic modernist movements stand as an insensitive antithesis to traditionalism. Islamic liberalism, among the many Muslim modernist movements, is characterized by its understanding of revelation “as both text and context.” It insists that interpretation of texts must consider “the spirit and broad intention behind the specific language of texts”, since the connection between the text and modern society does not turn “upon a literalist hermeneutic” that ignores contexts.

Few Muslim modernists hermeneutic approaches are presented in this paper. MuÁammad ShahrÉr, a Syrian liberal Islamic figure, promoted the theory of limits (*naÐariyyat al-ÁudÉd*) in his controversial works, *al-KitÉb wa al-Qur'Én: QirÉ'ah MuÑÉÍarah*. ShahrÉr asserts that the theory of limits is an approach within *ijtihÉd* to interpret the *ÉyÉt al-muÁkamÉt* (obvious legal verses) of the Qur'Én. The term limit (*ÁudÉd*) used by ShahrÉr refers to the meaning of “the restrictions of God which should not be violated, contained in the dynamic, and flexible area of *ijtihÉd*.”³⁴

The key elements of Shahrur's theory, is as far as I understand it, are the following. The Qur'an is God's speech revealed to the prophet but addressed to all mankind in every generation; it is a “Remembrance” (*dhikr*), which God has taken upon himself to preserve.³⁵ What this means is that every generation must interpret the Qur'Énic verses in a manner that makes it relevant to its circumstances and we are not bound by the understanding of other (previous) generations. Their understanding was correct for their own time but we must arrive at an understanding that is relevant to our own lived reality. The preservation of the “Remembrance” makes it our property as much as that of earlier generations and confers upon us the right to interpret it based on our own reality.

The second key element of the theory is the dual concept of constancy (*istiqÉmah*) and flexibility (*ÍanÉfiyyah*). This Islamic flexibility is within the frame of theory of limits, which he perceived as the restrictions that God has placed on man's freedom of action. The analytical framework of the theory of limits is based on two main Islamic characters (the constant and the flexible), which will lead to Islam's survival. Those two contradictory things will deliver dialectic movement (*al-Íarakat al-jadaliyyah*) in knowledge and social science. Here the new paradigm is expected in the formation of the Islamic legal system (*tashrÉÑ*), therefore it will result in a continual dialectic and progress of the Islamic legal system.

³⁴ ShahrÉr, op. cit., pp. 550 - 561.

³⁵ Please refer SÉrat al-IsrÉ' : 9.

ShahrËr applies his theory to a number of instances in Muslim law and some of the examples are directly relevant to human rights law. I will restrict myself to his interpretation on the penalty for theft. ShahrËr considers the verse 38 in the sËrat al-MË'idah: "as for the thief, male and female, cut off their hands" and considers this verse to be an upper limit standing alone. Here the stipulated penalty is an upper limit that may not be exceeded. In other words amputation is the maximum penalty for theft and it is for every generation to define the nature and magnitude of theft that calls for this maximum penalty. Its minimum limit is to be forgiven as stated in the verse 34 of the same sËrah. Here ShahrËr assumes that a judge may perform *ijtihËd* by observing the objective conditions of the thief. Besides giving the punishment of hand amputation to enforce the legal verdict, the judge may perform *ijtihËd* around those maximum and minimum limits, such as giving a prison verdict. The dismissal penalty for a corrupt officer is also still between both limits. ShahrËr argues that the essence of a legal punishment is daunting for the offender. Therefore state or government, which do not execute hand amputation, stoning, *qiËâl* (death sentence) and several other legal verdicts in the Qur'Ën and the Prophetic traditions, should not be accused as being infidel states as claimed by the fundamentalists.³⁶

ShahrËr's theory therefore leads to conclusions that are the opposite of other modernists. Whereas other modernists would have the Muslim world drop the limit of amputation from its statutes as "cruel and inhuman", ShahrËr would retain it as a maximum punishment subject to proportionality. The Amputation is one possible punishment for theft, certainly the maximum and the society may choose not to invoke the maximum penalty for reasons of, say, general poverty. However, where it is inflicted there should be proportionality so that those who commit the same offence with more gravity are not given a more lenient penalty than petty thieves. In my view this position addresses the concerns of Muslim critics of the manner of sharËhah implementation and represents a more just and proportionate interpretation of the law, which remains faithful to the text.

ØËdiq al-BilËd's interpretation of the *ËirËbah* verdict is the second example representing the Muslim modernist hermeneutic approach. ØËdiq al-BilËd, an Egyptian Muslim modernist wonders over the prevailing Muslim jurists' view on the penalty for *ËirËbah* and *sariqah* and its implementation in practical life. In his book, *al-Qur'Ën wa al-TashrËh: QirË'ah JadËdah fË ÓyËt al-AËkËm*, ØËdiq claimed that the two verses of sËrat al-MË'idah indicating the verdict of *ËirËbah* were revealed due to the Prophet MuËammad's command to arrest a group of people who stole the cattle of the shepherd and killed him. The Prophet was very angry as he was generous to them and treated them nicely. The Prophet ordered to amputate their legs and hand in addition to burning their eyes with fire, out of which they died. The two verses were revealed and brought quite different verdict from that of the Prophet.³⁷

ØËdiq further explain the verdict in the *ËirËbah* verses. To him the verdict should be applied only to that particular case and restricted to the Prophet and the time in which he lived. He agrees with the view of MuËammad SaËad AshmawË, who believed that such a judgment is no longer suitable after the demise of the Prophet. *Al-ËirËbah* is

³⁶ Ibid.

³⁷ Sadiq al-BilËd, *al-Qur'Ën wa al-TashrËh: QirË'ah JadËdah fË ÓyËt al-AËkËm*. Tunis: Markaz al-Nashr al-JËmiË, 1999, pp. 194-195.

associated to the event in which the Prophet witnessed and is appropriate to restrict the application of the verdict to his period, since he is the only one upon whom the revelation was sent down. Therefore the prevailing view of the Muslim jurists on the *ÍirÉbah* is incorrect and should be rejected.³⁸

General application of the *ÍirÉbah* verdict would be problematic. ØÉdiq argues that the verse 34 of the sĒrat al-MĒ'idah, does not contain direct object (*mafĒĒl*) if we generalize the *ÍirÉbah* verdict in the preceding verse. Therefore the verses show the historicity of the *ÍirÉbah* verdict and represent a conditional legislation and not an absolute one. According to him the expression in the verse (i.e., *illallahĒna tĒbĒ min qabli 'an taqdirĒ Ēalaih*, meaning except those who repent before you seize them) indicates clarification of the exception and links it to conditions surrounding the event. This exception is valid as long as there is regret from the criminal. It is also absolute, not open for any discussion, due to its condition to the criminal's regret, and it's legality that should be obeyed.³⁹

The criminal is free when he repents. According to ØÉdiq it was the practice of the ĪalÉbah and some great jurists to discard the verdict on the criminal after his repentance. This indicates that he has control over his fate and could avoid penalty if he decided to.⁴⁰

Nature of the verdict for theft should be the same to that of the *ÍirÉbah*. ØÉdiq argues that the *ÍirÉbah* is a much severe crime compared to the *sariqah*. After his repentance, the former escapes from the punishment. Whereas, in spite of his repentance, the criminal of the later could not avoid penalty. Therefore he interpretes the words *tĒba* (repent) and *Ēulmihi* (his transgression) not in accordance to that of in the Arabic dictionaries. He interpreted the former as "to return the stolen item" while the later as "after stealing".⁴¹

Amputation of the hand of theft is a penalty practiced during the jahilayah time. ØÉdiq claims that the Prophet MuĒammad had adopted this pre-Islamic penalty in his legislation. The Prophet's attitude in accepting such a severe punishment appears to be logical considering the nature of the society of that time i.e., dominance of power, mercilessness, and lack of stable judicial institutions. Amputation then was the effective way to maintain peace and protect people's property.⁴²

Muslim jurists' methodology in dealing with the *ÍirÉbah* and *sariqah* verses is incoherent. ØÉdiq condemns the way traditional schools dealing with the verdicts of these issues. They treated differently the two crimes of the same nature. Ibn al-ArabĒ, for example, had absolutely ignored to comment verse 39, as if it does not consist of any injunction, compared to his 14 pages of comment for the verse 38. He supposed to explain, at least, the reason for not mentioning repentance in *sariqah* verse but mentioning it in the *ÍirÉbah* verse.

Some other orthodox scholars acted the same as that of Ibn al-ĒArabĒ. ØÉdiq further wonders about the reason behind this juristic disagreement in dealing with both the cases of *ÍirÉbah* and *sariqah*. They have not been objective as well on the subject. Al-Shaykh al-SĒyis, for instance, though he accepts the different views of the jurists in this matter, he simply reasserts, without thorough discussion or comment, the

³⁸ Ibid., pp. 197-199.

³⁹ Ibid.

⁴⁰ Ibid., p.200.

⁴¹ Ibid., pp. 200-203.

⁴² Ibid.

prevailing view of the jurists that repentance does not guarantee that the thief will be spared the penalty. ØÉdiq makes a final remark that the jurists usually misinterpret the Qur'Énic verses in line with their personal views although it goes against the logical as well as the clear meaning of the Qur'Énic verses.⁴³

Conclusion:

Traditional Muslim thought rejects completely the Muslim modernists' hermeneutic approaches. In most instances the rejection is based on the sources of these approaches and their root in secular paradigms. Acceptance of these paradigms is seen as undermining the authenticity of Muslim identity. Muslim modernists are faced with a number of complex issues that must be addressed for their contribution to succeed in providing an authentic interpretation of Muslim law that is more relevant to the dictates of the modern world in which Muslims live. First they must reject the genetic fallacy of traditional scholarship. While doing so, however, acceptance of foreign concepts must be based on a critical analysis of their truth claims, and not the reverse fallacy of attributing truth to arguments because they come from the West. Secondly, the interpretations they make of Muslim legal system should be based on a rigorous theory, a coherent hermeneutic that may be applied to interpretations of the Islamic law, particularly the Qur'Én and the Prophetic traditions. Any suggestion that the Qur'Én be abandoned, or that the Prophet, in his leadership of the early community implemented an essentially barbaric and cruel law, would not be an intellectual exercise within the Islamic tradition. The intellectual product of such an exercise would have no affiliation to Islam and remain counter-productive to the objective of reform.

Muslim modernists' new interpretations of the Islamic criminal laws accusing them to be barbaric in nature is unethical and remain problematic. This is mainly because the Qur'Én explicitly covers them and, with one or two possible exceptions, a consensus has been built upon them for generations. How can issues related to this criminal law be addressed on the basis of a new hermeneutic that still remain faithful to Islamic authenticity? It is my view that Muslim modernists have failed in this regard. Who decides that amputation is barbaric but that the electric chair is not? Who decides that stoning to death is barbaric but facing the firing squad is not? Who decides that life in prison is humane and civilized? The Muslim modernists have failed to understand the attributes of God who revealed this legal system to the merciful Messenger Muáammad (s.a.w). Will not the Muslim modernists sincerely comprehend the meaning of the verse *"Indeed Allah is the Most Merciful and the Most Beneficent"* (*inna AllÉha raÍÊmun wa raÍmÉn*), which is stated in almost every page of the Qur'Én in which they believe in? In addition, the modernists' hermeneutics reflect lack of depth, even at times, lack of minimum understanding of Islam and the methodology of hermeneutics in Islam, which are essential for an objective analysis on the Qur'Énic and the Prophetic injunctions.

It is very important to note that whenever danger threatens the whole Ummah, it should be addressed. The Prophet (peace and blessings be upon him), who is a fountain of mercy for mankind, never tortured his enemies for personal vengeance. Islam cares much about individuals' rights and rights of the society. In order to preserve these rights, Islam has prescribed punishments for theft, ÍrÉbah and etc., to maintain the world's security, block all the avenues leading to oppression, and prevent

⁴³ Ibid.

people from spreading mischief in the land. If someone is proven to be guilty of any crime and all the conditions for the punishment are fulfilled, there is no leniency or pardon for the perpetrator, for the sake of the society as a whole.

References:

- Al-ÑAsqalÉnÊ, Ahamd ibn ×ajar, *FatÍ al-BÉrÊ bi SharÍ ØaÍÊÍ al-BukhÉri*. Cairo: al-Maktabah al-Salafiyyah, 1976.
- Al-NawawÊ, YaÍyÊ ibn Sharaf, *Sharh ØaÍÊÍ Muslim*. Beirut: DÉr al-Qalam, 1929.
- AmÊn Husayn Ahamd, ×awla al-Dañwah Ila TaÍbÊq al-SharÊÑah. Cairo: DÉr SuÑÉd al-ØabbÉh, 1992.
- ÑAudah, ÑAbd al-QÉdir, *al-TashrÊÑ al-JinÉ'Ê. BeirÊt*: DÉr ÍÍyÉ' al-TurÉth al-IslÉmi, 1985.
- Al-BukhÉrÊ, MuÍammad ibn IsmÉÑÊl, *ØaÍÊÍ al-BukhÉrÊ*. Beirut: DÉr Ibn KathÊr, 1987, vol. 6.
- Khalq AfÑÉl al-ÑibÉd*. Riyad: DÉr al-MañÉrif, 1978, vol. 1.
- ×Éj ×amad, MuÍammad AbË al-QÉsim, *al-ÑÓlamiyyah al-IslÉmiyyah al-ThÉniyyah*. Beirut: DÉr Ibn ×azm Publication, 1996.
- Al-NajjÉr, ÑAbd al-WahhÉb, *al-KhulafÉ' al-RÉshidËn*. Beirut: DÉr al-Kutub al-ÑIlmiyyah, 1979.
- Al-NÊsÉbËrÊ, Muslim ibn al-×ajjÉj, *ØaÍÊÍ Muslim*. Beirut: DÉr ÍÍyÉ' al-TurÉth, nd., vol. 3.
- Sadiq al-BilÑÊd, *al-Qur'Én wa al-TashrÊÑ: QirÉ'ah JadÊdah fÊ ÓyÉt al-AÍkÉm*. Tunis: Markaz al-Nashr al-JÉmiÑÊ.
- SalmÉn ibn Fahd al-ÑAudah, ×iwÉr HÉdi' MaÑa MuÍammad al-GhazÉlÊ.
- ShahrËr, MuÍammad, *al-KitÉb wa al-Qur'Én: QirÉ'ah MuÑÉÍarah*. Damascus: al-AhÉlÊ Publication, 1990.
- DirÉsÉt Islamiyyah MuÑÉÍarah fÊ al-Dawlah wa al-MujtamaÑ*, Damascus: al-AhÉlÊ Publication, 1994.
- Al-SijistÉnÊ, AbË DÉwËd SulaymÉn ibn al-AshÑath, *Sunan AbË DÉwËd*. Beirut: DÉr ÍÍyÉ' al-TurÉth al-ÑArabÊ, nd.