



INTENTIONAL AND UNINTENTIONAL HOMICIDE ACCORDING TO THE FOUR SUNNI SCHOOLS OF JURISPRUDENCE

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Background

The Islamic law jurists agree that all the legal rules are based upon the interests (*masalih*) of man. They also agree that the preservation of life forms one of the five basic values that must be preserved in any civilization¹. These values sum up the ultimate purposes of the law (*maqasid al-shari'ah*). It is also an established legal maxim under Islamic law that intention is the ingot of all matters (*al-umuru bi maqasidiha*).² This article sets to primarily identify those instances that represent the determining factors of intentional and unintentional homicide within the framework and perspectives of the legal theories of our Sunni jurists. This, no doubt, will require a look into the effect of varying circumstances and set situations upon the final verdict of the court. This is imperative because intention by itself is not concrete (*mudabit*) or manifest (*zahir*). It is hidden and latent. This is the main reason why we look to the act and also to the circumstances surrounding the act in order to find traces of intention.

The Problem with Intention

Several contemporary writers have written extensively about the matter of *ta'leel al-ahkam* (tracing the reason behind legal rules).³ Usually a legal rule comes about because of a tangible reason. For example, minority is, clearly, a tangible and concrete reason for the appointment of a guardian over the minor's property, or the killing of a relation clearly bars the offender from the estate of the deceased. The uttering of defamatory words can be safely said to be a reason for punishment.

But in some instances the reason for the legal rule is not, by itself, tangible or manifest. A good example of this is the reason for validating a contractual agreement. Trade is supposed to be based upon mutual consent.⁴ How then do we establish consent in trade? We are forced to look beyond the idea of consent because consent, by itself, is not tangible. We therefore use a detour by looking to other alternative attributes of the transaction which point to the existence of consent. Thus, we look to pronouncements made such as that of the offer and the acceptance; or to the general circumstances of the case and the conduct of the parties to the contract which are indicative of consent.⁵

¹ Al-Shatibi (n.d) *al-Muwafaqat fi Usul al-Ahkam*, Dar al Rashad al-Hadithah, Vol.II, pp.2-4.

² Ahmad Abu Sanah, et al, (1965) *Madkhal al-Fiqh al-Islamiy*, Jami'atul Azhar, p.142.

³ See al-Shatibi, op. cit. p.4.

⁴ Al-Qur'an, ch.4 V.29.

⁵ Hasaballah, A. (1971) *Usul al-Tashri' al-Islamiy*, Dar al-Ma'arif, p.141.



In the same way, under the matter of intentional homicide, the relevant attribute (*wasf al-munasib*) for the application of *qisas* (retaliation) is that the act must have been committed intentionally. This, however, is not a manifest attribute. We then search for a relevant, cognate, decoding element which can stand in for intention or point to it. There are several of such elements; the weapon used is critical especially to the Hanafis who insist on the *muhaddad* alone (i.e. a weapon made for the sole purpose of killing).⁶ The Shafi'is and Hambalis stress on the weapon that has the intrinsic potential of causing death but will allow other tools if the strike were repeated several times. By repetition these jurists are looking, not to the weapon, but rather to the circumstances of the case.⁷ The Malikis also look to the weapon used but this consideration is over shadowed by their high regard to circumstances which they refer to as *wujuh*.⁸ These points shall be thoroughly discussed at the appropriate place.

The Problem of Legal Inclination (*madhhab*)

The fact that this article intends to deal with the perspectives of the forms of Sunni Schools requires the understanding of the style of thinking of the jurists. The Hanafis are known for their inclination towards *rukhsah* (concession in their legal reasoning). This is why they are the most prominent in the use of *istihsan* (equity) which they have applied freely in the matter of the criminal law (*jinayat*). They have chosen to resort to the *ta'zir* more than any other school. This implies their jettisoning of the strict application of the *hudud* and the *qisas* in several cases. This principle of theirs is again reflected in the matter of homicide by the fact that proof of intentional homicide is most cumbersome under Hanafi jurisprudence because of their insistence on the *muhaddad* alone, thereby setting aside the *qisas* in case of the *muthqil* (the heavy but blunt object) and the *qatl bil tasabbub* (i.e. the indirect killing). Thus they have invented the *jaryu majral khata* (the quasi mistake).

The Malikis are clearly influenced by their taking to strict adherence (*'azimah*) in legal rules and their application of *sadd al-dhari'ah* which applies to block inroads to laxity or mischief. Their stress on the relevance of circumstances points to the respect they give to the fluidity of *maslahah* and the ultimate purposes of the law (*maqasid al-Shari'ah*).⁹

The Shafi'is and Hambalis tend to allow legal proofs if they are based upon sound authority. They are not inclined to *maslahah*, generally, and this is why they incline more to the weapon than to the circumstances.

⁶ Audah, A. (1968), *al-Tashri al-Jina'iy al-Islamiy, Muqariran bil Qanun al-Wada'iy*, vol.II, p.29.

⁷ Ibid, pp.27-28.

⁸ See the *Mudawwanatul-Kubra* of Ibn al-Qasim, Vol.XV, p.308.

⁹ Al-Nubhan, M.F. (1977) *al-Madkhal lil Tashri' al-Islamiy*, Dar al-Qalam, Beirut, pp.256-258.



The Problem of Interweaving between the Various forms of Homicide.

Despite the fact that there may be a crop of homicides that may be clearly intentional and also a crop of homicides that may be clearly unintentional, there is perhaps the wider scope which still tends to be a subject of juristic argument. Prominent in this regard is the *shibh al-'amd* that is not recognized by the Maliki jurists. This has produced a result of misunderstood concepts and fictitious nomenclatures as far as the Malikis are concerned. But to the other schools the *shibh al-'amd* is a reality which enjoys sound legal backing and authority.

A necessary effect of the Maliki rejection of the matter of *shibh al-'amd* is that all those cases brought under it by the other schools will necessarily have to be sandwiched into the narrower Maliki notion of homicide.

Another dimension to this issue is how the line dividing the categories of homicide can be so thin and how a slight twist in circumstances may have grave or mitigating consequences upon the actor.

Nature of the Homicide

Homicide (*al-qatl*) has been defined to mean the causing of loss of life of a human being by the act of another.¹⁰

But for a better perception, homicide may be classified into grades according to the reckoning of the jurists. In this respect, the jurists have broadly categorised homicide into four classes:

(a) The Dual Category:

Some of the jurists recognize only two types of homicide: '*amd* (intentional) and *khata*' (mistaken). And according to Ibn Rushd, there is a consensus among the jurists which recognises the above mentioned types of homicide, and that what the jurists differ over is whether there exist any intermediary types of homicide between that of '*amd* and *khata*'.¹¹

The jurists who recognise only '*amd* and *khata*' stress that there is no intermediary type of homicide between them.

The Maliki jurists are the proponents of this view. It is said that Laith bn Sa'ad also held this view.¹²

b) The Tripple Category:

Another group of jurists divides homicide into three – '*amd*, *khata* and *shibh al-'amd* (quasi intentional).¹³

¹⁰ Audah, A. (1968) *al-Tashri al-Jina'iy al-Islamiy, Muqarinan bil Qanun al-Wada'iy* Vol.II, p.6.

¹¹ Ibn Rushd, (n.d) *Bidayatul Mujtahid wa Nihayatul Muqtasid*, Dar al-Fikr, Vol.II, p.297.

¹² Al-Qurtubiy, (n.d) *al-Jami' al-Ahkam al-Qur'an*, Dar al-Kitab al-Arabiyy, (al-Qahirah) Vol.V, p.329.

¹³ Audah, A. op. cit. Vol.II, pp.87-88.



c) **The quadrupled Category:**

This group of jurists reckon four types of homicides; '*amd*, *khata shibh al-*amd** and what they refer to as "*ma jara majra al-khata* (i.e. the quasi mistaken).

d) **The fourth type is the reckoning of five classes of homicide.**

Thus, *al-qatlu bit-tasabbub* (the indirect homicide) is recognised by some jurists such as Abu Bakr al-Razi. It also appears very similar to what the Hanafis have proposed.¹⁴

Al – Qatl al- '*amd* (Intentional Homicide)

Generally stated, intentional homicide entails the intentional causing of death. It is a necessary condition that the offender must have intended the strike and also the effect of death by the use of a deadly weapon up or means that may bring about the result of Death.¹⁵ Intentional homicide is prohibited by the *Qur'an*, *Sunnah* and '*Ijma*'.¹⁶

Abdulqadir Audah has summarized the conditions to be fulfilled as follows:

- i) that the deceased must have been a human being possessed of life and protection ('*ismah*) thereof before the act;
- ii) that the death of the deceased was brought about by a deliberate act of the offender; and
- iii) that the offender designed the result of death.¹⁷

It is essential, at this juncture, to discuss the opinion of the schools as regards what amounts to *qatl al-*amd**.

The opinion of Imam Abu Hanifah

Al-Shafi'iy has reported in his *Kitab al-Umm* that according to Abu Hanifah, the *qisas* will not apply except upon the one who kills with a deadly weapon (*salah*).¹⁸ Al – Sarkhasiy, a later Hanafi theologian, says in his *Kitab al-mabsut*

"It has reached us that the Messenger of Allah, (SAW) said: 'There is no right of retaliation¹⁹ (*qawad*) except (in homicides committed) with the sword; and this is

¹⁴ Ibid p.9.

¹⁵ Ibid. See also al-Bahnasiy, A.F. (1989), *al-Qisas Fil-Fiqh al-Islamiy*, Dar al-Shuruq, p.71.

¹⁶ Al-Tasuliy, (n.d) *Kitab a-Bahjatu Fi Sharh al-Tuhufah*, Ahmad Ahmad Abu Sa'ud wa Uthman al-Tayyib (kano) Vol.II p.363; al-Qutubiy, op. cit. Vol.V, pp.328-329; al-Sha'raniy, (n.d) *al-Mizan al-Kubra* Mustafa al-Babiy al-Halabiy (Misr) Vol.II p.141.

¹⁷ Audah, op. cit. Vol.II, p.10. For further details see al-Bahnasiy, A.F., op. cit. pp.72-74.

¹⁸ Al-Shafi'iy, (1990), *al-Umm Ma'a Mukhtasar al-Muzaniy*, Dar al-Fikr (Beirut) Vol.VII, p.348.

¹⁹ It should be understood that retaliation (*qisas*) only applies to intentional homicide.



textual authority prohibiting the application of retaliation in cases that do not involve the sword. And we understand the word sword (*saif*) to mean weapon (*silah*)... The companions of Ibn Mas'ud have said 'there is no retaliation except in cases of the deadly weapon and verily the only reason why the words *saif* and *silah* have been used interchangeably is that the sword is what is reserved specifically for killing among all the other weapons'.²⁰

This does not mean, however, that the sword is the only weapon capable of drawing liability for retaliation. Abu Hanifah recognises other deadly weapons which are made for the purpose of killing. These are objects used to cut, spear or pierce the body. Therefore, use of knives, lances spears, fire and glass may amount to intentional homicide according to Imam Abu Hanifah. On the other hand, where the object used does have a potential of causing death but does not, by its nature, cut or pierce or wound the body, the punishment to be given, according to Abu Hanifah, will be that of *shibh al-'amd* only. This applies even if the means used were repeated successively.²¹

Imam Abu Hanifah stressed that intentional homicide (*qatl al-'amd*) will not be established by the use of a heavy and blunt object (*muthqil*), such as a large stone or a big log of wood even though his disciples, Abu Yusuf and Muhammad, did not support this opinion of his.²²

Abu Hanifah, therefore, insists that the facts of the case should clearly display the intention of the offender to cause death to the victim. Thus only deadly weapons – weapons sharpened and reserved for killing – can satisfy the rule.²³ Other blunt objects introduce doubt into the matter and it is well known that Abu Hanifah is the most active of jurists in upholding the doctrine of *shubhah*. This is probably why he refused to recognise intentional homicide in the case of death resulting from imprisonment or exposure where the victim dies of hunger, thirst or extreme weather. To the great Imam, death was brought about, not by the bare act of imprisonment but by hunger, thirst or extreme weather. The death was caused indirectly (i.e. by means of *tasabbub*) which, as far as Abu Hanifah is concerned, fails to arouse ascertained considerations of intent.²⁴ The matter of *shubhah* is

²⁰ Al-Sarkhasiy, S.D. (n.d) *Kitab al-Mabsut*. Matba'ah al-Sa'adah, (Misr), Vol. XXVI, p.122.

²¹ Audah, A., op. cit. Vol.II, p.20.

²² Al-Sarkhasiy, op. cit. vol.XXVI, p.122

²³ Al-Sha'raniy, (n.d) *al-Mizan al-Kubra*, Mustafa al-Babiy al-Halabiy, Vol.II, p.141.

²⁴ Ibid pp.141-142; See al-Sarkhasiy, op. cit., Vol.XXVI, p.122; al-Bahnasiy, (1969), *Nazariyyat Fi Fiqh al-Jina'iy al-Islamiy*, Mu'assasah al-Jaliy (Cairo), p.24.



introduced and the Prophet (SAW) has instructed that *hudud* penalties be put aside in cases of *shubhah* (doubt).²⁵

The Opinion of al – Shafi'iy and Ahmad

In the Muhadh-dhab of al – Shirazi, it is said that intentional homicide is brought about by the deliberate strike upon the deceased with an object that is known ordinarily to be likely to cause death.²⁶ This is really a summary of what Imam al – Shafi'iy expressed. He said "Intentional homicide is a deliberate strike by the offender with a deadly weapon (*hadid*) and from which survival is not expected because of the successive blows dealt or by the great impact of the blow such as crushing the head and similar acts".²⁷

This position is very similar to that of the Imam Ahmad. In the Mugniy of Ibn Qudamah, intentional homicide is of two types: -

a) that the offender should strike the deceased with a deadly weapon (*hadid*) which is the weapon that cuts and pierces into the body such as the sword, knife, teeth and other objects which have the same disposition because of their propensity to injure because they are made of iron, lead, brass, gold, silver, glass, stone, stalk, (*qasab*), or wood. All these are capable of realizing intentional homicide if they cause a big wound or injury (*jarhan kabiran*) and the victim suffers death. And according to Ibn Qudamah, "there is no difference of opinion among the scholars as far as we know over this type of intentional homicide".²⁸

However, if the offender causes a small injury or wound such as the hole made for cupping (*hijam*) or a hole made by a needle or thorn then the point attacked becomes of the utmost relevance; if it is a sensitive spot such as the eye, the heart, the testicles, the temples or the ear lobes, and the victim dies, then the act will be said to amount to intentional homicide because the points mentioned amount to the same impact received from a stab with a knife to the body; on the other hand, if the

²⁵ It has been reported by Abu Hurairah (R.A) that the Prophet (SAW) said "Do not enforce the hudud in cases of doubt (*shubhah*)" This tradition is reported by Ibn Majah and is widely accepted by the jurists except for what the Zahiris have said. According to them al-Bukhariy classified it as "munkar" (See Ibn Hazm (n.d) al-Muhalla, al-Maktabah al-Tijary, (Beirut) Vol.XI, p.153). But there are several traditions which are cognate to this tradition. For example Aishah (RA) narrated that the Prophet (SAW) said "Put off the hudud punishments on Muslims as much as you can. If he (suspect) has a way out then let him off...." This tradition is reported by al-Tirmidhiy in his compilation.

²⁶ Al-Shirazi, (n.d) al-Muhadh dhab Fi Fiqh Madhhab al-Imam al-Shafi'iy, Iysa al-Babiy, (Misr) Vol.II, p.172.

²⁷ Al-Shafi'iy, op. cit. Vol.VII, p.348.

²⁸ Ibn Qudamah, (n.d)al-Mugniy, al-Maktabah al-Jumhuriyyah al-Arabiyyah wa Maktabah al-Riyadh Vol.VII, p.637.



strike were to be landed upon a not so weak/sensitive part of the body then investigation will be made. If the injury sustained was deep or excessive (*balaga fi idkhaliha fil badan*) then the apparently slight injury will be classified under intentional homicide because of the far reaching and agonizing effect of the injury.

If, on the other hand, the injury is only slight or even where the object is deadly but the injury is negligible such as the implement used in cupping, the Hambalis are of the opinion that if the victim survived for a time and died incidentally, then the *qawad* will apply because the apparent presumption is that he died as a result of the attack.²⁹ But if the victim dies on the spot (*fil hal*), there are two scenarios:

- i) that the *qisas* shall not apply. This is the opinion of Ibn Hamid because the circumstances clearly show that the victim did not die of that injury and also because the weapon used is not ordinarily known to cause death. It, therefore, occupies the same legal effect as causing death with a cane or whip.
- ii) that the *qisas* will apply because in the case of the *muhaddad* (deadly object) the consideration of propensity or likelihood (*gabalat al-zann*) of causing death does not even arise at all. And, conversely, if we cannot tie its rule to the propensity or likelihood rule (*galabat al-zann*) then we must tie it to that of its falling under the deadly weapon consideration and this case should not hide under the general and commonly applied consideration of propensity or likelihood of causing death. This is the opinion of al-Kharqi.³⁰
- b) This is where homicide is committed without the use of the *muhaddad* but the object used does have the propensity and likelihood to cause the loss of life. This type also obligates the *qisas*. Ibn Qudamah claims that this is the opinion supported by al-Nakha'iy, Amr bn Dinar, Ibn Ali Layla, Malik, al-Shafi'iy, Ibn al-Musayyib, Ata and Tawus.³¹

From the above discussion it appears that, generally put, the Hambalis tend to follow the opinion of the Shafi'iys. The difference in terminology should not be a reason to infer difference. To the Shafi'iys, the most important factor in determining intentional homicide is the use "*bi mal-aglabu annahu la yu'ashu min mithlih* (what usually kills victims by common knowledge); and the Hambalis stress on the same condition which is the principle of using a weapon with the propensity to cause death. The philosophy is the same and the framework is also the same.

²⁹ Ibid p.638.

³⁰ Ibid.

³¹ Ibid.



Shibh al-'amd

It is obvious that the opinion of the three leaders discussed above entails a subtle vacuum which must be discussed at this point. Imams Abu Hanifah, al-Shafi'iy and Ahmad all accept the intermediate category of *shibh al 'amd* (the quasi-intentional homicide).

According to Muhammad bin al-Hasan al-Shaybaniy, whoever says that the *qisas* should apply in the case of the whip and the cane has verily abandoned the tradition of the Prophet (SAW) which is well known (*mashhur*) and recognized which he (SAW) declared on the day of the conquest of Makkah as follows:

"Hearken! Verily for one who is killed by quasi intentional (*khata'ul-'amd*) means such as the whip and cane shall have collected on his behalf, one hundred camels out of which forty of them shall be pregnant.³²

According to al-Sarkhasiy, this tradition establishes the rule that homicides committed with the whip and cane amount to mistaken cases of homicide done in a deliberate way and that the penalty that is due in such cases is the payment of *diyyah* (compensation).³³

Furthermore, it has been argued in the *Kitab al-Umm* of al-Shafi'iy that if the *qisas* is really the penalty to be applied in cases of the whip and the cane, then the tradition reported by al-Numan bin Basheer (RA) is void. Then, according to al-Muzanniy, the tradition will have no significance and the *diyyah* would have been rejected as a penalty for the *shibh al-'amd* and people will be killed for every aggression whether grave or small.³⁴

Imam al-Shafi'iy has explained that *shibh al-'amd* occurs where the strike is intended and such strike is weak and not by means of a deadly object such as a strike with a cane, whip or hand, but death results from that blow or strike. He goes on to say that this act, no doubt, is deliberate or intentional infact, but certainly mistaken in the effect of death. This type of act is punishable with the intensified version of *diyyah* (*diyyah al-mugallazah*)³⁵

Ibn Qudamah has explained this type of homicide to be the intentional strike but by means which does not ordinarily cause death such as by the use of a whip, cane, a small stone, a blow or by other similar means if such attack should extend to causing the death of the victim. In such case the penalty will not be the *qisas*, and

³² Al-Shafi'iy, op. cit. vol.VII, p.348

³³ Al-Sarkhasiy, op. cit. Vol.XXVI, p.124

³⁴ At-Shafi'iy. Op. cit. Vol.VII, p.348

³⁵ Ibid.



the associates (*aqilah*) of the offender will be saddled with the responsibility of paying the blood money.³⁶

The Opinion of Imam Malik

Imam Malik held that there are only two types of homicide: '*amd*' (intentional); and '*khata*' (mistaken). It is reported that the great Imam said: "There is no other category of homicide in the Book of Allah except the '*amd*' and '*khata*'; the '*shibh al-amd*' is not applicable with us."³⁷

According to Ibn Rushd, the tradition reported from al-Nu'man bin Basheer (RA) which the proponents of '*shibh al-amd*' quote, is infested with problems relating to its chain of transmitters.³⁸

According to Malik, intentional homicide is brought about where the offender intends to cause death by using a deadly weapon (*muthqil*), or by doing some other act which is capable of causing death such as burning, drowning, strangulating, poisoning and so forth.³⁹

To Malik and his disciples, mistaken homicide occurs where the offender did not intend the strike and also did not intend the effect of death such as where one aims at an animal and misses and shoots a man; or where one mistakenly falls upon another person and causes his death. In such cases the retaliation will not be applied. Only the blood money will apply.⁴⁰

The Malikis will treat the cases the other jurists refer to as '*shibh al-amd*' in the following ways:

In cases where the offender apparently intended the strike but not the effect of death, the Malikis will reckon intentional homicide where the act was done in a fit of anger, fight, aggression or strife. This is what they refer to as '*wajh al-ghadab*'.

However if the act was done by way of jest or play, the Malikis will concede mistaken homicide. They refer to this situation as '*wajh al-la'ib*'.

Where death was caused out of lawful correction by parent, teacher, husband or the state, using conventional means of discipline, the Malikis will hold for mistaken homicide. They refer to this situation as '*al-wajh al-ta'deeb*'.⁴¹

It is important at this point to state that surrounding circumstances are essential in the determination of intentional homicide to the Malikis, Shafi'iyis and Hambalis. These variables are worth examining. The Malikis give surrounding

³⁶ Ibn Qudamah, op. cit. Vol.VII, p.650

³⁷ al-Naysaburiy, M.I. (1986) *al-Ishraf ala Madhahib ahl al-Ilm* Dar al-Arabiyyah, Vol.II, p.106.

³⁸ According to Ibn Rushd, Ibn Abdul-Barr mentions the hadiths deficiency in its chain of transmitters but he acknowledges that Abu Dawud and others have also reported the tradition (See Ibn Rushd, (n.d) *Bidayah al-Mujtahid Vol.II, p.298*)

³⁹ Ibn Juzay, (n.d) *al-Qawanin al-Fiqhiyyah*, Dar al-Fikr, p.295.

⁴⁰ See Ibid; See also al-Ja'liyy, (n.d) *Siraj al-Salik, Sharh Ashal al Masalik*, al-Halabiy Vol.II, p.208.

⁴¹ See Ibn Juzay, op. cit. p.295. See Malik, (n.d) *Mudawwanatul Kubra*, lil Imam Malik bin Anas, Mu'assasah al-Halabiy (Cairo) vol.xv, p.308; al-Talusiyy, *al-Bahjah*, Vol.II, p.364.



circumstances greater weight in cases that drift between intentional and unintentional homicide. These cases are discussed below;

a) *The Case of Lawful Punishment (ta'deeb)*

According to the Malikis, for the penalty for intentional homicide to be awarded, it has to be shown that the parent or teacher, who executed the penalty, must have used conventional means of correction. Therefore, if a gun had been used to shoot the victim, or a sword to slaughter the victim, or the attack had been done whilst in a state of aggression or ferocity, intentional homicide will be presumed and the *qisas* will be enforceable according to the popular opinion.⁴²

b) *Death Caused by the Refusal of Food or Drink*

Here, according to the Malikis, and also the Shafi'iys and Hambalis, the *qisas* will apply only if the offender knew that if no food or drink were given the victim would perish or that by common sense the victim could die within the period of imprisonment. But if he merely intended to punish, the *diyyah* will be payable.⁴³

c) *Throwing the Deceased Into a Pool or Exposing him to Dangerous Conditions*

According to the Malikis, if the offender pushes one who is not a good swimmer into a pool, the *qisas* will apply whether or not there was aggression. However if he pushes in one who is a good swimmer, who dies as a result, the *qisas* will apply only if there was aggression. Where the offender did not know of the swimming expertise or otherwise of the deceased, the application of the *qisas* will depend on the existence of aggression.⁴⁴

According to the Shafi'iys and the Hambalis, if the offender throws the victim into water or fire in circumstances where escape is impossible because of the degree of water or inferno, or because of the weakness of the victim, or because the victim had been tied up, then the retaliation becomes obligatory because the means used to kill is one that will normally cause death. However if the victim had had the capability of escaping but before so acting, a fish eats him up, then the retaliation cannot be said to be due because the means used does not normally cause death. Al-Shirazi, interestingly, raises the question of a victim being thrown into water, too deep to escape from, but before hitting the water, a shark devours him. Here the Shafi'iys hold two views: one argues that there would be retaliation because the victim was thrown into the dangerous condition by the offender and the victim perished because of that circumstance; and the other argues that there would be no

⁴² al-Sawiy, A (n.d) *Bulugat al-Salik ila Aqrab al-Masalik*, al-Halabiy, Vol.II, p.353. see also ibn Juzay, op. cit, p.296.

⁴³ al-Sawiy, A. op. cit. Vol.II, p.355. See also Ibn Qudamah, al-Mugniy, Vol.VII, p.643.

⁴⁴ al-Sawiy, A. op. cit. Vol.II, p.356



retaliation because the victim did not perish merely because of the fall. He perished by an act of the shark.⁴⁵

Ibn Qudamah has analyzed the position of the Hambali school where the offender places the victim in a vast arena together with a wild beast such as a lion or leopard. In such cases the act is, with no doubt, intentional homicide if the beast mauls the victim to death. He is quick to add, however, that if the animal gives the victim an injury which does not normally have fatal results, then the *qisas* is not due because, in this case, the beast is nothing other than a tool of the actor.⁴⁶

The Shafi'iys do not understand this type of act to draw the penalty of retaliation because, according to them, this case is not like that of the one arraiging another before a killer who kills the victim. To them, there will be no *qisas* even if the victim is fettered. But, even to them, if the victim is placed in an enclosed room or a trap meant for a wild beast together with a wild beast, then the *qisas* will become due if the beast mauls the victim to death.⁴⁷ Their reason for this ruling is that wild carnivorous animals tend to kill humans if imprisoned together but in other situations tend to run away from men.⁴⁸ They also hold that if a fettered man is placed at a place infested with snakes, the *qisas* is not due if a snake bites the victim to death, and in this case it is immaterial whether or not the place is vast or narrow.⁴⁹ It should be stressed that what the Shafi'iys mean by snake, here, is a little snake or a snake that does not carry venom in its fangs. This must be interspersed into the words of al-Shirazi because he later on mentions that "if a wild animal or snake bites the victim to death, and such bite is ordinarily known to cause death, then the *qisas* becomes due."⁵⁰

According to the Malikis, intentional homicide will be reckoned where the offender leaves slippery substance on the pathway of the victim, or leaves a voracious animal that is apt to attack people, or he digs a trap along the path of the victim, and the intended victim actually falls therein and dies as a result of the act. But where someone other than the intended victim falls therein only the *diyyah* will apply.⁵¹

Where someone sets the trap within his own premises or in waste land, or where he leaves the animal after obtaining due authorisation, there will be no liability if a victim is injured. It appears from this discussion that what really draws liability for the payment of *diyyah* is negligent or reckless behaviour.⁵²

⁴⁵ al-Shirazi, op. cit. Vol.II, p.176.

⁴⁶ Ibn Qudamah, op. cit. Vol.VII, pp.641-642.

⁴⁷ al-Shirazi, op. cit. vol.VII, pp.176.

⁴⁸ This argument is recorded in Ibn Qudamah's al-Mugniy, see Vol.VII, p.642.

⁴⁹ Al-Shirazi, op. cit. Vol.II, p.176.

⁵⁰ Ibid.

⁵¹ Al-Sawiy, op. cit. Vol.II, p.356.

⁵² Ibid.



The Malikis have held that if the offender throws a live snake at the victim who dies of fright and without being bitten by the snake, intentional homicide will be presumed where the act was done in a state of aggression. Where the snake is large and deadly, the *qisas* will apply irrespective of the presence of aggression or jest. Conversely, if the snake is small and not a deadly one, only the *diyyah* will apply and if the act was done in a state of aggression then the *qisas* will apply.⁵³

The Malikis will hold for the *qisas* if the offender chases the deceased with a drawn sword or dagger and the victim dies before being caught by the chaser. In such case there is no requirement for recourse to the *qasamah* procedure. However, if the victim falls down and dies, then recourse will be had to the *qasamah* to prove that death arose not from the fall but, rather, as a result of fright.⁵⁴ Where the offender merely pointed the sword at the victim without a chase and also without the element of aggression, only the lesser *diyyah* will be paid. The case is the same for situations where there was a chase without the element of aggression.⁵⁵

d) *Setting up the Victim to Consume Poisonous Food, Drink or Clothing*

It appears that the position of the Malikis is that if one prepares poisonous stuff and sets up the victim to consume or use it either directly or through the agency of an innocent person, the preparer will suffer the retaliation unless he did not know of the poisonous content.⁵⁶

According to the Shafi'iys, if the poison was administered by force, then the offender would suffer the retaliation because he had done an act which ordinarily causes death and this, according to Ibn Qudamah, is just like the case of a direct attack with a deadly weapon. Furthermore, if the poisonous stuff is prepared and left for an intended victim but someone else consumes it, there shall be no retaliation because, according to them, this is just like the case of one who digs a hole or pit in his yard. It seems that this opinion will find acceptance under Maliki principles as well.⁵⁷ But where the intended victim actually consumes the substance, there are two opinions; one states that there will be no retaliation because the victim voluntarily ate the substance and he is just like the one who kills himself with a knife; The other view holds that the retaliation will apply.⁵⁸ This latter view is similar to that of the Malikis and it also appears to be the opinion of the Hambalis (if the poisonous substance tends to ordinarily kill).⁵⁹

e) *Cases of Abetment*

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid, p.357.

⁵⁶ Ibid, p.356.

⁵⁷ See Ibid. But see Ibn Qudamah, op. cit. Vol.VII, p.644.

⁵⁸ Al-Shirazi, op. cit. Vol.II, pp.176-177.

⁵⁹ Ibn Qudamah, *al-Mugniy*, Vol.VII, p.643.



According to the Malikis, where one holds down the victim in order to facilitate the act of homicide, both the killer and the one who held down the deceased (*mumsik*) will be subjected to the *qisas*; the killer for his direct act, and the *mumsik* for his indirect act.⁶⁰ Furthermore, the Malikis hold that where two persons attack the victim and one uses a deadly weapon and the other uses an object which is not deadly, the court shall verify whom among the assailants had used the deadly weapon and that one will be subjected to the *qisas*. However, if this cannot be verified, then both of them will be subjected to the *qisas*.⁶¹

The Malikis also hold that the father or teacher that instructs a child to kill shall be subjected to the *qisas*. They also opine that where one instructs another to kill, the killer will have to suffer the *qisas*; and if the instructor had real authority over the killer, he also will be subjected to *qisas*. If there was no such authority, then the killer alone will be subjected to *qisas*.⁶² This is also the opinion of the Hambalis.⁶³

The opinion of the Shafi'iy, here is slightly different. They hold that the instructor is definitely subject to the retaliation and he is just like the one who uses a lance to kill another.⁶⁴ There is no difference among the Shafi'iy in this respect. However they differ as to the position of the killer; one opinion states that the *qisas* shall not apply because he killed the victim in order to save himself; the other opinion holds that the *qisas* becomes due because he killed him wrongly and selfishly in order to save himself and thereby resembles the one who, out of hunger, kills another in order to eat him up. This latter opinion is preferred by al-Shirazi because it is not lawful to obey the unlawful instructions of a leader as the Prophet (SAW) has said "It is not lawful to obey any human in disobedience to the almighty Creator."⁶⁵ Al-Shafi'iy is also reported to have said "Do not obey the leader who instructs you to disobey Allah."⁶⁶ However, where the killer did not comprehend that the order to kill was unlawful, then only the instructor will be subjected to the retaliation.⁶⁷

It is clear that from the discussion on the *shibh al-'amd*, the Maliki jurists give high regard to circumstances surrounding the act. If the act were committed in

⁶⁰ Ibn Juzay, op. cit. p.295.

⁶¹ Al-Sawiy, A. Op. cit. Vol.II, p.357. It should be noted, though, that this type of case depends on the victim dying without regaining consciousness, or by being hit mortally; where the victim dies later on, the *qasamah* is required to prove that death arose from the act of the offender(s). Where the *Qasamah* is used, only one person is to be executed by way of *qisas*.

⁶² Ibn Juzay, op. cit. p.295; See also al-Sha'raniy, op. cit. Vol.II P.142.

⁶³ Ibn Qudamah, al-Mugniy, vol.VII, p.645.

⁶⁴ Al-Shirazi, op. cit. Vol.II, p.177.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.



a state of aggression then most of the so-called *shibh al-'amd* or *khata'ul 'amd* or *'amd al-Khata* cases by the other three schools will amount to *'amd* under the rules of the Maliki school. To the Malikis, there is no *shibh al-'amd*. According to one jurist, the Malikis do not give as much recognition to the 'intention to kill' as they give to the "state of aggression."⁶⁸ They also do not see anything wrong with the notion of killing by intentional means with a slap or a whip. They quote the Qur'anic verse "*fa wakazahu musa fa qada alaih*"⁶⁹ According to the *kitab al-Bahjah*, intentional homicide is achieved when there is intention to kill; and also when there is intention to strike if the act is accompanied by anger and enmity (*ghadab wal-adawah*) ... and if he only intended the strike without intending to actually kill and the act was done in a state of anger, then the popular opinion of Malik in such cases is that intentional homicide is achieved and the *qisas* shall apply except in the case of the father or mother."⁷⁰

Mistaken homicide is understood by the Malikis in three forms: firstly, by the mistake theory which is where the act was done whilst the offender was in a state of jest or play. The circumstances must clearly point to this, otherwise the presumption will be that of intentional homicide unless the contrary is established.⁷¹

In the same way, where two riders collide and the circumstances cannot be ascertained, intentional homicide will be presumed because the riders are predisposed to swerve and avoid the collision. But the presumption of intentional homicide will not be upheld where two ships collide at sea because of the overriding influence of wind and tides.⁷² There is no responsibility in such cases because the mishap will be treated as an act of God. Al-Dasuqi, refers to this as *ajz*, i.e. helplessness which implies, as well, the absence of negligence or recklessness.

Where, however, the ship captains were predisposed to avoid the collision but preferred to risk the crash, the mishap will be treated as an accident and the *aqilah* (comrades) of the surviving ship will undertake the payment of blood money to the heirs of the lost members of the sunk ship.⁷³

In the words of al-Dardir,

"... except their collision was caused by an overbearing act of God (*ajz haqiqi*) such as the drivers or the riders not being able to avoid the crash,.... and

⁶⁸ Audah, op. cit. Vol.II, p.30-31.

⁶⁹ Quran, ch. 28 v.15

⁷⁰ Al-Tasuliy, (n.d) *Kitab al-Bahjah Sharh al-Tuhufah*, Ahmad Ahmad Abu Sa'ad wa Uthman al-Tayyib, (Kano) Vol.II, p.364.

⁷¹ Ibid.

⁷² Ibid. But for a detailed analysis, see al-Sawiy, op. cit. Vol.II, p.358; al-Dasuqi, (n.d) *Hashiyah ala Sharh al-Kabir Lil-Dardir*, Ihya at-Kutub al-Arabiyy, Vol.IV, p.248.

⁷³ See al-Sawiy op. cit. Vol.II, p.358, al-Dasuqi, op. cit., Vol.IV, p.248.



the predominant principle is that riders who collide by mishap are only subject to the payment of *diyyah*...⁷⁴

This rule can be said to apply to our present day means of transportation such as trains automobiles and planes. It should however be stated that the intentional colliding of the days of our classical jurists such as Khalil, and the Commentators upon his work, is not really traceable to our times. During that time riders on horseback were given to dueling or jousting with lances and spears (*al-tajadhub*) and this is what they probably meant by intentional collision of riders. Where this happens, the *qawad* will await the survivor of the duel and, if they both die, then they are said to both cancel their acts of liability.

This raises several key issues: can we safely say that exceeding the speed limit, or breaking the established traffic rules are tantamount to drawing the *qawad* if death is caused? Is recklessness, by itself, without accompanying traces of hostility or enmity between the offender and the deceased enough to clamp the penalty of *qisas* upon the offender, is the one who speeds into an overcrowded street subject to the *qisas* if he kills someone? What of the case of one over speeding on the highway in order to meet an appointment if he hits an unimpaired crosser of the road? To al-Ja'li, the author of the *Shari'at al-Salik*, a commentary on the *Ashal al-Masalik*, a famous Maliki text, this type of behaviour is subject to *qisas* if a rider or driver of a beast should cause the death of a victim because, according to him, the driver or rider of the beast is the actor and the beast a mere tool. It appears that this opinion is based upon the cases of the quack-doctor; the unqualified doctor; the qualified doctor who operates without due authorization, or the one who starts a bush fire on a windy day.

This opinion appears to be very strange. Do not suppose, and Allah knows best, that the *qisas* is the appropriate penalty to be given in the above mentioned cases. It is quite clear that al-Ja'li misconstrued the meaning of the term *damin*.

The fact that Malik and Ibn al-Qasim, in the *Mudawwanah*, use the phrase *ja huwa damin*⁷⁷ as regards the driver and rider of a beast if it tramples upon a victim, does not mean that the rider (*rakib*) or driver (*sa'iq*) is liable to the *qisas*. It means, quite simply that he shall pay compensation, and if the liability is to be shared by the rider and the driver and, in some cases, the one who leads the beast from the front (*qa'id*); the three of them sharing in the payment by paying a third of the *diyyah* each. In the *Tabisiratul-Hukkam* of Ibn Farhun, this is clearly stated in several places. For example "And if a child is upon the horse and it bolts away whilst the child is not

⁷⁴ Al-Dasuqi, op. cit. vol.IV, p.248.

⁷⁵ See Azhari, (n.d) *Jawahir al-Ikhlil*, Dar al-Fikr (Kano) Vol.II, p.258. The author of the *Ashal al-Masalik* holds that these offenders are liable (*damin*) and does not go further to say they be subjected to the *qisas*.

⁷⁶ Al-Ja'li, op. cit. pp.247-248.

⁷⁷ See the *Mudawwanah*, op. cit. Vol.XV p.447-448.

able to hold it back, then such child is "*damin*" i.e. liable to pay one third of the *diyyah* from his own property and that which is above one-third shall be borne by the child's comrades ("*aqilah*").⁷⁸ It is reported by Ibn al-Qasim that Malik held that if the recalcitrant horse bolts away and the rider is not able to control it then the rider will nonetheless be "*damin*".⁷⁹ It would be absurd to hold that the rider will be held subject for the *qisas* penalty.

Furthermore, al-Azhari, al-Sawiy, and al-Dasuqi, all commentators upon the *Mukhtasar*, the summary of Ibn al-Qasim's *Mudawwanah al-Kubra*, have cited several examples of worse cases that are punishable by the *diyyah* and not the *qisas*. It is established under Maliki jurisprudence that intention is still relevant in the determination of intentional homicide and these principles are well formed. Imam Malik (RA) has revealed the faint and subtle line of this argument in the *Muwatta*. He says;

As for the case of the one who holds down the deceased for a killer (his case may fall under either of the following two cases:

- a) he may know of the intention of the killers to kill and, in this case, both of them will be killed (by *qisas*); and
- b) if he had held him down under the supposition that the attacker only intended to beat the victim in the normal way, and not envisaging or apprehending the deadly intentions of the killer, in such case, only the killer will be killed (by *qisas*) and the *mumsik* will be given a severe chastisement and will be imprisoned for a year because he merely pinned him down, he shall not be executed.⁸⁰

By these arguments we come to understand that

- (a) the mere causing of death does not necessarily mean the execution of *qisas* even under the Maliki law,
- b) that negligence or recklessness where the offender ought to have been careful or meticulous, is not, by itself, a reason for the execution of *qisas*;
- c) that road mishaps i.e. cases that do not envisage hostility between the offender and the deceased should be left to the scope of mistaken

⁷⁸ Ibn Farhun, (1958); *Tabsiratul-Hukkam Fi Usul al-Aqdiyah wa Manahij al-Ahkam*, al-Babiy al-Halabiy, (Cairo) Vol.II, p.353.

⁷⁹ The *Mudawwanah al-Kubra*, vol.XV, p.447

⁸⁰ Please refer to the arguments over the cases of the ship captains who refused to swerve the one who keeps a ferocious dog for an intended victim but an unintended victim falls into the jaws of the animal or trap dug, the case of the *mumsik* who holds down the victim but without knowledge of the intentions of the killer, the case of the one who participates in the beating up of the deceased but who uses non-deadly strikes. Abdul Baqi, M.F. (n.d) *al-Muwatta Li Imam al-A'immat Malik bin Anas (RA)* (editing and commentary) al-babiy at Halabiy, p.682.



homicide unless the circumstances clearly show that the offender intended to hit the victim;

- d) that the offender can be subjected to severe chastisement for being reckless. This type of *ta'zir* is most suitable and most appropriate.⁸¹

To sum up the arguments of the jurists as to intentional and quasi-intentional homicide, we believe that the position of the Malikis is less cumbersome than that of the other three schools. The Hanafis tend to be lax and thereby almost encourage people to commit homicide, intentionally, by choosing their means of acting. By selecting to use the *muthqil* or other indirect forms of homicide, they are guaranteed escape from the *qisas* penalty. This negates the words of the Qur'an "in the law of retaliation there is saving of life for you, O men of understanding."⁸²

And since it is one of the ultimate purposes of the law to preserve life, the Hanafi way of reasoning in this respect, certainly does not allow for the realization of this goal of the law.

The Shafi'iys are closer to the Hanafis than the Hambalis. They allow technicality to interfere with sound logic. Their opinion over the case of the victim, tied up and thrown into a lion's den, proves this. How can it be said that the *qisas* will not apply because lions and snakes tend to run away from humans? The position of the Hambalis lies between the Maliki position and that of the Shafi'iys. This has been noted in several cases discussed in this article.

On a general note, however, the crux of the matter and the source of division between Imam Malik and the other leaders is the tradition justifying the *shibhul 'amd* which is relied upon by the Hanafis, Shafi'iys and Hambalis but rejected by the Malikis.

Another source of division between the Shafi'iys and Hambalis on the one hand, and the Malikis, on the other, is the weight given to the weapon or means that ordinarily kills by the former and the circumstances surrounding the case by the latter.

The standard adopted by the Malikis is still more reliable because a person could use a means which ordinarily causes death but by mistake. Allah knows best.

Mistaken Homicide

The term "Unintentional homicide," for all practical purposes, must be taken to be a misnomer and a source of confusion. The discussion on *qatl al-'amd* and *shibh al-'amd* will prove this. The jurists all accept the mistaken homicide category of homicide (*al-qatl al-khata*).

Mistaken homicide occurs where the offender intends the act but not the strike on the victim such as where the offender aims at game or a target but misses

⁸¹ Audah, A. op. cit. Vol.II, pp.290-291.

⁸² Al-Qur'an, Ch. 2 V.179.



and hits a man; or the offender could have aimed at the victim but with the supposition that the victim was an enemy or a *muharib* (bandit).⁸³

Mistaken homicide could also occur where the offender does not intend the act and, also, does not intend the strike on the victim. This type of mistake could be committed directly or even indirectly. An example of the former is where a sleeper rolls over a child thereby killing him, or mistakenly drops something he is carrying upon another. An example of the latter is where the offender digs a pit and another falls therein and dies, or one who leaves a leaning wall without repair until it collapses upon a victim who dies as a result.⁸⁴

According to the majority of jurists, there is no legal effect of grouping the different types of mistaken homicides.

However, the jurists who recognize the effects in the distinction argue that whereas, in the direct type of mistaken homicide, the offender actually intends to do the act he does, but he does not so intend in the indirect act. This is why they refer to this category of mistaken homicide as "*al-jaryu majra al-khata* i.e. the mistake in meaning. According to these jurists, expiation (*kaffarah*) applies to the direct type of homicide but not to the indirect type. They also hold that the incidental penalty of the offender being barred from the inheritance of the deceased does not apply to homicides committed indirectly.⁸⁵ The jurists who hold this opinion are the Hanafis and Abu Bakr al-Razi.⁸⁶

According to Ibn Qudamah, there is another subtle but significant distinction which applies to the mistaken homicide. He states that mistaken homicide is of two types.

- a) where the offender acts by doing something which is lawful for him but this act leads to the death of the victim. In such cases the *diyyah* shall apply and the *aqilah* of the "offender" will pay the blood money.⁸⁷ He quotes the statement of Ibn al-Mundhir:

"It is the consensus of opinion of all the jurists that we have been able to study from that mistaken homicide occurs where one shoots at something but (misses and) hits a person. I do not know of any difference of opinion over this. Infact it is the opinion of Umar bin Abdul-Azeez, Qatadah, al-Nakha'iy, al-Zuhriy, Al-

⁸³ Audah, A. op. cit. Vol.II, p.104.

⁸⁴ Ibid.

⁸⁵ Ibid, p.186.

⁸⁶ Ibid, p.9.

⁸⁷ Ibn Qudamah, op. cit. Vol.VII, p.650.

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Thawriy, Malik, al-Shafi'iy and the Ashab al-Ra'y (Iraqis)".⁸⁸

- b) However, where the act committed was unlawful and, by that, caused the death of the victim, such as where one, in an attempt to kill an innocent person, misses and hits another person, this is also mistaken homicide (*qatl al-khata*) according to al-Shafi'iy.

It is surprising that Ibn Qudamah limits this opinion to al-Shafi'iy and not the other jurists as well. This distinction is unnecessary and irrelevant except if Ibn Qudamah intended to counter the opinion reported from Abu Bakr (RA) that this type of homicide amounts to intentional homicide.⁸⁹

The report above, even if authentic, has not been relied upon by the jurists. Allah knows best.

Understanding Mistaken Homicide

It will be of immense benefit to recall two general principles respected by all the jurists in determining what amounts to mistaken homicide⁹⁰

- a) All acts that result in injury to the victim and which display liability upon the actor if the actor could have helped the situation by being more diligent. He will not be held liable if he cannot be shown to have been negligent or careless;
- b) If the act is not lawful to the offender because of its being unauthorized and the offender does that act without any justifiable reason, then he will be answerable for any damage resulting from his act whether he was diligent or not.⁹¹

CONCLUSION

The matter of homicide under Islamic law is very complex. This is because the jurists have relied upon various standards in referring to the intentional and quasi-intentional homicides. The matter of mistaken homicide is not so controversial.

The effort spent by the classical jurists over the matter of homicide is probably due to the sacredness of the soul and the fear of the jurists to subject the offenders to the *qawad* where there are no reasons for this. The general principle of *shubhah* can also be said to have influenced the shaping of the opinions of jurists.

In many parts of northern Nigeria, attempt has been made to codify the Islamic criminal law in order to make it applicable to the territory. Most of the states have

⁸⁸ Ibid., p.651.

⁸⁹ Ibid.

⁹⁰ These points are recorded in the work of al-Kasaniy, (n.d) *Bada'i' al-Sana'i', Fi Tartib al-Shara'i'* Vol.VII, pp.271-272.

⁹¹ For a broader discussion of these general principles see Audah, op. cit. Vol.II, pp.105-108.



adopted the Maliki approach to the matter of homicide, and have limited its scope to that of intentional homicide and unintentional homicide. The Zamfara state Shari'a Penal Code, being the model followed by the other states, provides under section 199, that intentional homicide is committed where a person "in a state of anger causes the death of a human being; (a) with the intention of causing death or such bodily injury as is probable or likely to cause death with an object either sharp or heavy; or (b) with a light stick or whip or any other thing of that nature which is not intrinsically likely or probable to cause death." Section 201 simply defines unintentional homicide as the causing of death by mistake or accident. This code attempts to capture the Maliki categorization of the dual division and also to stress on the Maliki notion of deeming acts that will fall under the *shibh al amd* under the other schools to fall under intentional homicide if they were done in a state of aggression or fight. One observer,⁹² however, noted that the words "in a state of anger" apply to both paragraphs and therefore make the presence of anger an ingredient for all the shades of intentional homicide. This clearly could not have been the intention of the drafters or that of the law.

It appears that the error was corrected by the drafters in subsequent laws. In the Kaduna state Shari'a Penal Code, section 192 provides:

"Except in the circumstances mentioned in section 197, whoever being a *mukallaf* causes the death of a human being;

- (a) with the intention of causing death or such bodily injury as is probable or likely to cause death with an object either sharp or heavy; or
- (b) in a state of anger, with a light stick, a whip or any other thing of that nature which is not intrinsically likely or probable to cause death; or
- (c) by doing an act if the doer of the act knew or had reason to know that death would be the probable or likely consequence of the act or of bodily injury which the act was intended to cause.⁹³

This improvement has provided a much better perception of the matter because anger as an ingredient is limited only to category (b).

The "Harmonised" version of the code which is about to be adopted by Zamfara state, replaces the term "anger" and the

⁹² Professor Muhammad Tabiu, unpublished contributions to a paper presented by A.H. Yadudu, *An Overview of the Sharia Penal Codes at the National Workshop on*

Harmonization of the Sharia Penal Code, Organised by the Centre for Islamic Legal Studies, A.B.U., Zaria and held at the Kongo Conference Hotel (3-5 September, 2001).

⁹³ Kaduna State Shariah Penal Code Law No. 4 Vol.36, 2002.



phrase "a light stick, a whip or any other thing of that nature which is not intrinsically" with the words "in a state of fight, combat, strife or aggression using means which are not likely

.....⁹⁴

It appears that the drafters of the code had to grapple with a way to really capture the essence of the classical juristic position of the Malikis. This can be attributed to the novelty in the Islamic criminal justice system which has been abandoned for so long until only recently when the Shari'a reforms started in 1999.

⁹⁴ The Draft Harmonised Sharia Penal Code prepared by the Centre for Islamic Legal Studies, A.B.U., Zaria (March 2002).