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ISLAMIC LAW ACROSS CULTURAL BORDERS: THE INVOLVEMENT OF WESTERN NATIONALS IN SAUDI MURDER TRIALS

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I. INTRODUCTION

On 11 December 1996, a 51-year-old Australian nurse, Yvonne Gilford was found dead in her room in the King Fahd Military Medical Complex in Dhahran, Saudi Arabia.[1] Within days, two British nurses, Deborah Parry and Lucille McLauchlin, were detained by Saudi authorities and later tried and convicted for Gilford's murder.[2] These incidents spawned a familiar tale of international diplomacy: two governments, facing conflicting domestic pressures when the nationals of one country are subjected to the laws of another, solve their problem at the executive level once the criminal justice system proceeds to the punitive stage. This culminated in the release of both nurses and their deportation to Britain on May 19 1998.[3]

However, the outcome of the Gilford trial also turned on an unusual legal circumstance: the eventual resolution was dependant on a decision by a citizen of a third country, Frank Gilford, a resident of Australia, whose only connection to the events was that he was the victim's

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1. Trudy Harris, *Envoy Investigates Nurse's Murder*, AUSTRALIAN (Sydney), Dec. 16, 1996, at 2.

2. Des Burkinshaw, *British Nurses Held Over Saudi Hospital Murder*, TIMES (London), Dec. 23, 1996, at 1; Bill Frost et al., *Nurses Could Face Public Execution*, TIMES (London), Dec. 24, 1996; Roger Maynard et al., *Nurse's Killers Should be Beheaded*, TIMES (London), Dec. 26, 1996, at 1; Michael Theodoulou & Joanna Bale, *Saudi Judges Urges 'Blood Money' Deal for Nurses*, TIMES (London), May 26, 1997, at 1; Michael Theodoulou et al., *British Nurse Sentenced to 500 Lashes*, TIMES (London), Sept. 24, 1997, at 1; Jojo Moyes, *King Fahd's Dilemma: Islamic Justice Verses Western Values*, INDEP. (London), Sept. 24, 1997, at 1.

3. Peter Foster & Annie Flury, *Saudi King's Pardon Frees Murder Nurses*, TIMES (London), May 20, 1998, at 1. Steve Boggan & Paul McCann, *Nurses Fly in to 'Blood Money' Row*, INDEP. (London), May 21, 1998, at 1.

brother. In a country where the death penalty had long been abolished, Gilford was involuntarily required to exercise the power of life or death over a British citizen. A further step in the nurses' release involved the movement of $A 1.7 million ($US 1.3 million) between a number of other non-Saudis.

In this article, we examine the Saudi law of murder and the way in which non-Saudis can become involved in the punishment stage of a criminal trial. The significance of these principles extends beyond the facts of the Gilford trial and the jurisdiction of Saudi Arabia, because they arise from general features of Islamic law, the world's third legal system after common and civil law. The Gilford trial demonstrates a number of ways in which Islamic law can affect foreigners, including non-Muslims who have no connection to any Islamic nation.[4] There are now more than six million foreigners, including tens of thousand of Westerners, living in Saudi Arabia. A consideration of the plight of the non-Muslims drawn into the Gilford trial suggests that the potential for Islamic law to operate across national and cultural borders is problematic.

We will begin by briefly setting out the salient aspects of the Saudi criminal justice system. Then, we will consider the issues that governed the convictions of McLauchlan and Parry and discuss Islam's unique provisions for the punishment of convicted murderers. Finally, we will assess the cross-cultural operation of Islamic criminal justice and suggest a preferred approach.

II. THE SAUDI CRIMINAL JUSTICE SYSTEM

A. *The Saudi Legal System*

Article 1 of the Saudi *Nizam Al-Assasy* (Basic Law of Government)[5]

4. That the circumstances discussed in this article are not unique to the Gilfords, Saudi Arabia or ex-patriot employees of a foreign of a foreign government is demonstrated by a report of an incident in 1998. An Italian citizen, Maria Pepe Calo, has been asked by the Taliban to send a close male relative to behead two Punjabis convicted of killing the woman's husband, who was serving as a United Nations peacekeeper in Kabul. Jason Burke Peshawar & Philip Willan Rome, *Agony for Widow as Taliban Asks if Killers Should Die,* OBSERVER, Oct. 25, 1998. Calo's reaction to the request was to say, "We do not want revenge, but justice. And we are not ready to forgive, I'd like to see them dead. But I wouldn't have the courage to give the order to take their lives." *Id.* The law applied in this instance is likely to be slightly different to that discussed in this article, because Afghanistan follows the Hanafi, rather than the Hanbali, school of jurisprudence.

5. The NIZAM AL-ASSASY was enacted by a Royal Decree on March 1 1992. *See* Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia,* 42 INT'L. & COMP. L. Q. 295, 303-04 (1993) [hereinafter Aba-Namay]; GEORGE N. SFEIR, MODERNIZATION OF THE LAW IN ARAB STATES 165-74 (1998); Ahmed A. Al-Ghadyan, *The*

declares that the Kingdom of Saudi Arabia is an Arab Islamic state with the *Quran*, the holiest text of Islam, and the *Sunna*, the sayings and practice of the Prophet, as its constitution.[6] By Western standards, Saudi Arabia is a non-constitutional monarchy. The *Majils Al-Shura* (consultative council),[7] the closest Saudi equivalent to a parliament, is limited to expressing opinions on general policy matters, such as the interpretation of laws.[8] The traditional subjects of law, such as family law, inheritance, trusts, contract and criminal law are exclusively defined by the *Sharia* (traditional Islamic law). All other matters, including modern legal subjects such as corporations and broadcasting law, are regulated by royal decrees.[9]

The Islamic legal system differs from both common law and civil law in that it is based on divine revelation and is neither subject to development through a hierarchy of judicial decisions nor developed primarily by written law.[10] Although it is based in principle on set texts, it is nonetheless a detailed juristic system, which has developed over the centuries through the work of Muslim jurists.[11] The main sources of Islamic law are the *Quran*, the *Sunna* (sayings and practice of the Prophet), the *Ijma* (consensus of Muslim jurists) and the *Qiyas* (juristic analogy).[12] Although the *Quran* is considered the most important source

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Judiciary in Saudi Arabia, 13 ARAB L. Q. 235-51 (1998).

6. International Constitutional Law's English translation of the NIZAM AL-ASSASY [IRAN CONST.] is, *reprinted in* (visited Feb. 11, 2000) <http://www.uni-wuerzburg.de/law/sa00000_.html> [hereinafter NIZAM AL-ASSASY].

7. The *Majils Al-Shura* is provided for in Article 68 of the NIZAM AL-ASSASY. International Constitutional Law's English translations of the various statutes concerning the *Majils Al-Shura*, enacted by royal decree simultaneously with the NIZAM AL-ASSASY. *Id.* *See also* Aba-Namay, *supra* note 5, at 303.

8. Article 15 of the CONSULTATIVE COUNCIL ESTABLISHMENT ACT provides:
The *Shura* Council will express opinions on the general policy of the state, which will be referred to it by the Council of Ministers. In particular, it can do the following: (a) Discuss the general plan of economic and social development. (b) Study international laws, charters, treaties and agreements, and concessions and make appropriate suggestions regarding them; (c) Interpret laws; (d) Discuss annual reports submitted by ministries and other government bodies, and make appropriate suggestions regarding them.
See CONSULTATIVE COUNCIL ESTABLISHMENT ACT (visited Feb. 11, 2000) <http://www.uni-wuerzburg.de/law/sa01000.html>.

9. Article 48 of the NIZAM AL-ASSASY states, "The courts will apply the rules of the Islamic *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Book and the *Sunnah*, and statutes decreed by the Ruler which do not contradict the Book or the *Sunnah*." *See* NIZAM AL-ASSASY, *supra* note 6.

10. RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 456 (John E. C. Brierley trans., Stevens & Sons, 3rd ed. 1985).

11. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 5 (1964); C. G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 46 (1988) [hereinafter WEERAMANTRY].

12. *See generally* Farooq Hassan, *The Sources of Islamic Law*, 76 PROC. OF ANNUAL MEETING – AM. SOC. OF INT'L L. 65 (1982). Supplementary sources of Islamic Law include

of law, fewer than 100 of its roughly 6300 verses deal with legal issues (in the Western sense) such as family and criminal law. The bulk of its prescriptions concern Islamic rules such as prayer and fasting, and subjects such as theology, morality and history.

Islamic law is applicable, at least in part, in fifty-three Muslim countries and a number of non-Muslim countries such as India.[13] However, few countries apply traditional Islamic criminal law. Of those that do, two, Iran and Sudan, have systems that are blended with the civil or common law systems. Saudi Arabia is unique in that it has applied Islamic criminal law in its traditional form since then advent of Islam.[14]

Modern Islam and, hence, its legal system is not monolithic. Saudi Arabians, together with nearly ninety% of Muslims, are Sunnis; the remainder are Shia, notably the majority of Iranians.[15] Within Sunni Islam, there are four jurisprudential schools: the *Hanafi*, the *Shafe'i*, the *Maliki* and the *Hanbali*.[16] Saudi Arabia follows the least popular of these schools, the *Hanbali*.[17] Saudi judges must refer first of all to six

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Istihsan (equity), *Maslaha Mursalah* (consideration of public interest) and *Urf* (custom and usage). *See* MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE chs. 12-14 (1991).

13. For the role of Islamic law in India, see M. HIDAYATULLAH & ARSHAD HIDAYATULLAH, MULLA'S PRINCIPLES OF MAHOMEDAN LAW (19th ed. 1990); DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW (3rd ed. 1998).

14. In light of these unique circumstance, it has been noted that Saudi Arabia has, according to some claims, one of the world's lowest crime rates. *See* Sam S. Souryal, *The Role of Sharia Law in Deterring Criminality in Saudi Arabia*, 12 INT'L J. COMP. & APP. CRIM. JUSTICE 1 (1988); Badr-El-Din Ali, *Islamic Law and Crime: The Case of Saudi Arabia*, 9 INT'L J. COMP. & APP. CRIM. JUSTICE 45 (1985); FREDA ADLER, NATIONS NOT OBSESSED WITH CRIMES ch. 9 (1983).

15. Shia Muslims are also a majority in Iraq, Azerbaijan and Bahrain. *See* YANN RICHARD, SHI'ITE ISLAM, POLICY, IDEOLOGY AND CREED 2-5 (A. Nevill trans., Blackwell, 1995).

16. *See generally* CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E (1997); Daura Bello, *A Brief Account of the Development of the Four Sunni Schools of Law, and Some Recent Developments*, 2 J. ISLAMIC & COMP. L. 1 (1968) [hereinafter Bello]; George Makdisi, *The Significance of the Sunni Schools of Law in Islamic Religious History*, 10 INT'L. J. MIDDLE EAST STUD. 1 (1979); A. M. Haj Nour, *The Schools of Law: Their Emergence and Validity Today*, 7 J. ISLAMIC & COMP. L. 54 (1977); George Makdisi, *Hanabalite Islam, in* STUDIES ON ISLAM 216 (M. Swartz ed., 1981); Abdurrahman A. Doi, *The Muwatta of Imam Malik on the Genesis of the Shari'a Law: A Western Scholar's Confusion*, 4 HAMDARD ISLAMICUS 27 (1981); SEYED MOHAMMAD HOSSEIN TABATABA'I, SHI'ITE ISLAM (Seyed Hossein Nassr trans., 1975).

17. SOBHI MAHMASSANI, THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM, 32 (Farhat J. Ziadeh trans., 1961) [hereinafter MAHMASSANI]; Bello, *supra* note 16, at 1. The legal system of Saudi Arabia is also guided by the principles of the *Wahhabi* doctrine, which calls for a return to *The Quran* and the *Sunna* as the exclusive sources of law (although some other sources can be used where the *Quran* and *Sunna* are silent). *Id.* The *Wahhabi* doctrine does not recognize non-textual sources of law such as *Qiyas* and strongly rejects any innovation in Islam. *Id.* The *Wahhabi* movement emerged from the *Hanbali* School and was influenced by the *Hanbali* jurist, Ibn Taymiyya. *See* JOHN L. ESPOSITO, THE OXFORD

prescribed *Hanbali* jurisprudence texts.[18] Then, if those texts do not provide adequate guidance, they may refer to other *Hanbali* texts and to the other schools.[19]

B. The Saudi Criminal Courts

The organisation of courts in Saudi Arabia was established by a 1927 royal decree and is administered by the Saudi Ministry of Justice.[20] Murder trials are initially the province of the general courts, which have jurisdiction over all civil and criminal matters except for minor matters. In cases involving the death penalty, stoning or amputation, the court consists of a three-judge panel.[21] The trial of Parry and McLaughlin was commenced in the general court in Al-Khobar.

The 1927 royal decree also created appeals courts, which hear appeals from general courts. At the apex of the Saudi court system is a further body, the Supreme Judicial Council, which, amongst other matters, reviews all penalties involving death or amputation.[22] If the Council confirms the lower court's verdict, then the case is submitted to the King for his endorsement as the King is Saudi Arabia's supreme judicial authority.[23] For reasons to be discussed below, in capital murder trials the courts only review the determination of guilt or innocence; no government body, including the King, has authority to commute a death sentence in a murder trial.

Traditional Islamic law provides for a very simple criminal proce-

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ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 307-08 (1995); MAHMASSANI, *supra* note 17, at 32-33. *See also* AYMAN AL-YASSINI, RELIGION AND STATE IN THE KINGDOM OF SAUDI ARABIA (1985); MUHAMMAD ASSAD, THE ROAD TO MECCA (1954); H. ARMSTRONG, LORD OF ARABIA: IBN SAUD (1934).

18. Six *Hanbali* texts, including Ibn Qudamah's *Al-Mughni* [The Enrichment] were made mandatory for courts by a 1928 resolution of Saudi Arabia's Supreme Judicial Council. *See* S. H. AMIN, MIDDLE EAST LEGAL SYSTEMS 312-13 (1985) [hereinafter AMIN].

19. *Id.*

20. *Id.* at 319; MOHAMED M.J. NADER, ASPECTS OF SAUDI ARABIAN LAW 3 *(1990)* (Article 71 of the SAUDI JUDICATURE LAW provides that "without prejudice to the neutrality of the judiciary and independence of judges, the Minister of Justice shall have the right of supervision over all courts and judges.")

21. AMIN, *supra* note 18, at 320.

22. NADER, *supra* note 20; Mohammad Ibrahim Al-Hewesh, *Sharia Penalties and Ways of Their Implementation in the Kingdom of Saudi Arabia, in* THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA: SYMPOSIUM PROCEEDINGS 351, 376 (1980) [hereinafter Al-Hewesh].

23. Article 44 of the NIZAM AL-ASSASY declares that the King is the point of reference for the executive, regulatory and judicial authorities. NIZAM AL-ASSASY, *supra* note 6. There is no separation of powers under Islamic law. However, Art. 46 of the NIZAM AL-ASSASY states that: "The judiciary is an independent authority. There is no control over judges in the dispensation of their judgements except in the case of the Islamic *Shari'ah*." *Id.*

dure. There is no jury system. There is no prosecutor, in the common law sense.[24] Instead judges conduct the investigation, the examination and, finally, issue the verdict. The *Sharia* sets down the qualifications of judges.[25]

Legal representation for defendants is neither required nor prohibited under the *Sharia*. However, the *Sharia* generally entitles individuals and legal entities to a *wakil* (representative), who may be a lawyer.[26] It appears that Parry and McLaughlin are the first defendants in Saudi legal history to be defended in court by a lawyer.[27] Not surprisingly, the defendants' lawyer, Salah Al-Hejailan, had a much more limited role than his counterparts in Western trials. For instance, he complained to the Western press that he was not permitted to present the court with any evidence collected by the defence.[28]

Islamic law provides for open trials and, ordinarily, Saudi criminal trials are public.[29] However, the trial of Parry and McLaughlin was closed and the proceedings before the appeal court were so secretive that the court's verdict, if there was one, remains unknown. It seems likely that the court closed the proceedings to protect public morals and individual privacy which, under Islam, would be offended by the disclosure of sexual matters, such as the alleged lesbian relationship that was offered as a motive for the murder.[30] The media and, indeed, ourselves, when writing this article, have been forced to rely exclusively on the

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24. In Iran, which also applies Islamic criminal law, the separation of the roles of prosecutor and judge was considered consistent with Islamic law until 1994, when it was abrogated by the 1994 *Law For the Formation of the Revolutionary and Public Courts*, ROOZNAMA RASMI JOMHOORI ISLAMI IRAN [THE OFFICIAL GAZETTE OF THE ISLAMIC REPUBLIC OF IRAN] No. 14383, July 25, 1994. The abrogation of this approach and the transferal of the prosecutor's role to the judge is a matter of current controversy in Iran and possible law reform, as a result of the public attention given to the trial of the Mayor of Tehran under the post-1994 law. *See Pishnehad Mo'awen Egra'i Qovva Qadhaiya Bara'ye Rafe Naqa'es Qanoon Dadgaha'ye Aam [The Proposal of the Executive Deputy of the Judiciary to Reform the Law of Public Courts]*, HAMSHAHRI (Tehran), Oct. 4, 1998, at 2.

25. A *Qadhi* (judge) has to be a Muslim, mature, sane and just person who has a sound knowledge of Islamic *Sharia*. According to majority of traditional Muslim scholars, a judge has to be male. However, Imam Abu-Hanifa permits judgments by women in matters related to property. Al-Tabary permits a female to be a judge in all courts and in all legal matters. *See* 2 SEYED SABIQ, FIQ AL-SUNNI [THE SUNNI JURISPRUDENCE] 224 (1981) [hereinafter SABIQ]; Joseph Schacht, *Law and Justice*, *in* 2 THE CAMBRIDGE HISTORY OF ISLAM 539-68 (P. Holt et al. eds., 1970).

26. WEERAMANTRY, *supra* note 11, at 77; NADER, *supra* note 20, at 14.

27. *Wealthy Lawyer is Key Player in Trial*, TIMES (London), Sept. 25, 1997, at 5; Kathy Evans, *In the Shadow of Chop Square*, GUARDIAN (London), Aug. 17, 1997, at 23.

28. Evans, *supra*, note 27, at 23.

29. SYED ABUL ALA MAWDUDI, HUMAN RIGHTS IN ISLAM 26 (1980).

30. *The Quran* 24:19 (" Those who love to see sexual scandal circulate among the believers will have a grievous chastisement in this life and in the hereafter"); *See also The Quran* 4:148; 24:4; 24:23. *Cf.* NIZAM AL-ASSASY, *supra* note 6, at art. 163.

statements of the defendants themselves, their lawyer and the Saudi ambassador in London for details of the trial. There is no public record where these assertions can be verified.[31]

During the murder investigation, the trial and its aftermath, much Western media attention was focussed on the rights of the accused under Saudi law in comparison to common law trials.[32] The Islamic concept of human rights differs philosophically from its Western counterpart..[33] Nonetheless, Islamic law does provide for some of the procedural safeguards familiar in Western trials: the presumption of innocence,[34] a high standard of proof in criminal matters,[35] a right to cross-examination[36] and a right to appeal.[37] Additionally, under Saudi law, compelled confessions are forbidden[38] and accused persons have a right

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31. The only official Saudi document published on the matter is a press release consisting of two short paragraphs from the office of the Saudi Ambassador in London dated May 19, 1998:

In response to a petition from the family of the two British persons convicted of murder in Saudi Arabia the Custodian of the Two Holy Mosques, King Fahd bin Abdul Aziz, issued an order commuting the sentence of the two nurses to the period they have already spent in jail and ordering their release. According to the judicial laws of Saudi Arabia, when the next of kin in a murder case waives the right to retribution, the Court can impose a discretionary jail sentence, which the King can commute. This is what happened in this case.

Peter Foster & Annie Flury, *Saudi King's Pardon Frees Murder Nurses*, TIMES (London), May 20, 1998, at 6; *The Saudi Embassy's Announcement that the Nurses Would Be Released*, ADVERTISER (Adelaide), May 21, 1998, at 6.

32. *See, e.g.*, Ross Dunn, *Justice Goes On Trial In Saudi Arabia*, SYDNEY MORNING HERALD, Dec. 28, 1996, at 16; Kathy Evans, *Saudi Justice*, OBSERVER (London), June 15, 1997, at 7; Lin Jenkins & Shirley English, *Relatives Claim Saudis Misled Them Over Trial*, TIMES (London), Sept. 24, 1997, at 3; Robert Fisk, *What is yhe House of Saud Really After?*, INDEP. (London), Sept. 24, 1997, at 5.

33. In Islam, the life and dignity of individuals, the family and property of each individual and certain freedoms are protected. However, the individual and the state are not separated. Rather, they are combined in the concept of the *Umma* (the Islamic nation). Thus, "the individual does not stand in an adversary position vis a vis the state but is an integral part thereof." M. Cherif Bassiouni, *Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 3, 23 (M. Cherif Bassiouni ed., 1982) [hereinafter Bassiouni]. A defined list of rights against the state does not exist. Rather, the appropriate question under Islamic criminal law is "what qualitative standards of administration of justice are required?" *Id.* For a discussion of the areas of conflict between Sharia and universal standards of human rights see ABDULLAH AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 161-81 (1990).

34. The Arabic principle is *'Bara'at Al-Dhimma'*. *See* SHARAF AL-DIN, TARIKH AL-TASHRI'A AL-ISLAM [HISTORY OF ISLAMIC JURISPRUDENCE] 323 (1978); M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L. L 609, 622 (1980).

35. *See infra* text accompanying notes 79-6.

36. Saleh I. M. Al-Laheidan, *Means of Evidence in Islamic Law*, *in* THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA: SYMPOSIUM PROCEEDINGS 151, 161 (1980); Bassiouni, *supra* note 333, at 29.

37. Bassiouni, *supra* note 33, at 31.

38. Al-Laheidan, *supra* note 36, at 183; R. Moore, *Courts, Law, Justice and Criminal*

to confront those who testify against them.[39] The real divergence from Western criminal procedure, and the basic weakness of Saudi law's protection for accused persons, is the absence of any mechanism to ensure that these procedural safeguards are enforced in practice in a meaningful way. In particular, the simplicity of Saudi trial procedure and the lack of a formal role for lawyers in both the trial and appeal courts leaves the protection of accused persons entirely in the hands of *Sharia* judges and the Saudi King.

C. *The Structure of Islamic Criminal Law*

Islamic criminal law has a crucial structural difference from the criminal law in the common law system. Under the common law, substantive, evidential and sentencing law are largely independent doctrines. However, under Islamic criminal law, the definition of crimes, their proof and the punishments that are available are intimately related. The most important determinant of the legal rules that govern an Islamic criminal trial is the type of punishment under consideration.

There are three broad categories of punishment set out in the *Sharia*.[40] The first, *Hudud*, are punishments that are fixed by the *Quran* and *Sunna* and cannot be altered by any judicial authority.[41] Such punishments include lashing, life imprisonment, hand amputation and stoning to death.[42] Although this category receives most media attention in the West, it only attaches to a limited set of crimes.[43] The gravamen of this category of crimes is that, under Islamic law, they are regarded as crimes against God.[44]

The second type of punishment is *Qisas* (retaliation), the prescribed

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Trials in Saudi Arabia, 11 INT'L. J. COMP. & APP. CRIM. JUST. 61, 66 (1987).

39. Moore, *supra* note 38, at 66.

40. *See generally* 5 ABDURRAHMAN AL-JAZIRI, KITAB AL-FIQ ALA AL-MAZAHIB AL-ARBA'A [BOOK OF JURISPRUDENCE ACCORDING TO THE FOUR JURISTIC SCHOOLS] (1999) [hereinafter AL-JAZIRI]; Mohammed El-Awa, *Ta'azir in the Islamic Penal System*, 6 J. ISLAMIC & COMP. L. 41 (1976); SAYYID A. N. SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI'A 50 (1991).

41. AL-JAZIRI, *supra* note 40, at 9.

42. Four of the punishments are set by *The Quran*: §5:41 (hand amputation for theft), 5:32 (death penalty for armed robbery); 24:2 (100 lashes for fornication); S24:4 (80 lashes for slander). The remaining punishments are set by the *Sunna*. *See* 3 AHMAD HASAN, SUNAN ABU DAWUD: AN ENGLISH TRANSLATION WITH EXPLANATORY NOTES 1212 (1984) (other punishments include 80 lashes for drinking and death for apostasy).

43. These are theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity, drinking alcohol and apostasy. The number of *Hudud* crimes is a matter of controversy amongst the various Islamic schools. *See id.* at 8-9; 4 MUHAQIQ AL-HELLI, SHARAI AL-ISLAM [LAWS OF ISLAM] 149-89 (1983).

44. *The Quran* 2:229 ("These [*Hudud*] are the limits ordained by Allah, so do not transgress them.").

response to personal crimes, such as murder and assault. Like *Hudud*, *Qisas* is provided for in the *Sharia* and, accordingly, the courts have no initial sentencing role (although, as will be seen, they may have a residual role in some circumstances). *Qisas* will be discussed in detail in Part IV, below.

The third category is *Tazirat* (discretionary punishments). This category, which applies to the balance of crimes, is Islamic criminal law's closest analogy to common law sentencing. In theory, *Tazirat* punishments are dispensed by the *Hakim* (state leader). However, in the case of Saudi Arabia, *Tazirat* punishments are dispensed by the King. In practice, a list of *Tazirat* crimes and their associated punishments, which can include lashing, prison, banishment or capital punishment, is specified in written form. [45] However, *Sharia* judges can also, at their discretion, punish any person considered to have committed a sin under Islamic law.[46]

The same crime may be subject to several categories of punishment. This is because the definition of crimes attracting certain *Hudud* and *Qisas* punishments and the rules governing their proof are more stringent than those attracting *Tazirat* punishments. Thus, a criminal who is deemed not liable to receive a *Hadd*[47] or *Qisas* punishment may still be found guilty of a *Tazir*[48] crime and sentenced to a discretionary punishment. For example, a person may be found not guilty of the *Hadd* crime of theft, because of the stringent conditions that Islamic law attaches to the fixed penalty of hand amputation, but may nonetheless be found guilty of sinful conduct and receive the *Tazir* penalty of lashing. In the case of murder, the crime the defendant may be subject to the *Qisas* punishment of retaliation, if strict definitions and rules of proof are satisfied, or a *Tazir* penalty, such as imprisonment, if less strict conditions are met. This complication is crucial to understanding the Islamic law of murder and the outcome of the trial of Parry and McLauchlin.

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45. In Saudi Arabia, *Tazirat* crimes are gleaned from the prescribed texts of Islamic jurisprudence or through the *fatwas* (juristic opinions of religious scholars) based on the *Quran* and the *Sunna*. Also, they may be prescribed by royal decrees for the breach of rules related to modern issues such as tax, immigration and banking. In Iran a list of *Tazirat* crimes, from the Shia Jurisprudence texts, have been codified in 231 articles by the *Majlis* (parliament) as *Qanoon Mojazat Islami, Tazirat wa Mojazat'haye Baz Darranda* [the *Islamic Punishment Act: Tazirat and Preventive Penalties*] in 1996. ROOZNAMA RASMI JOMHOORI ISLAMI IRAN [THE OFFICIAL GAZETTE OF THE ISLAMIC REPUBLIC OF IRAN], No. 14943, (June, 26 1996).

46. *Ithm* (sin), also termed *dhanb*, *khati'a* and *sayye'a*, consist of both acts prohibited under Islam (*Haram*) and omission of acts required by Islam (*Wajib*). However, people can only be held accountable if they commit a sin intentionally. *See generally* AL-DHAHABI, KITAB AL-KABA'IR [THE BOOK OF GRAVE SINS] (1993).

47. Singular of *Hudud*.

48. Singular of *Tazirat*.

Even though the distinction between a defendant's guilt and the defendant's sentence, central to the common law criminal justice system, is blurred under Islamic law, we nonetheless find it convenient to divide our discussion of the application of Saudi murder law into these two stages. We will be careful, however, to indicate the inter-relationship between the two stages in the discussion below.

III. PROOF OF INTENTIONAL MURDER

A. *Definition of Intentional Murder*

Like other legal systems, Islamic law recognises that there are degrees of homicide, only some of which attract the highest available penalties. The *Hanbali* school, followed in Saudi Arabia, divides *Qatl* (murder) into three categories: *Qatl Al-Amd* (intentional murder), *Qatl Al-Shabih Al-Amd* (non-intentional murder) and *Qatl Al-Khata* (accidental murder.)[49] Only the first of these categories attracts the possibility of the *Qisas* retaliatory measure of capital punishment, although the other categories may still result in the lesser *Qisas* remedy of *Diyya* (monetary compensation).

The *Hanbali* school defines *Qatl al-Amd* as occurring when a killer intends to kill and uses *mimma taqtulu ghaliban* (some means likely to lead to the killing).[50] The requirement that the killer use a means likely to kill is, presumably, a safeguard to ensure that the killing was, indeed, intentional. Thus, modern Saudi courts are occasionally faced with the problem of defining which weapons are 'deadly', even when they are otherwise certain that a killing was intentional. In the Parry and McLauchlin trial, there is no doubt that the murder alleged, which reportedly arose through the use of a knife, a hammer and suffocation, satisfies the *Hanbali* school's criteria for intentional murder.

B. *Evidence of Intentional Murder*

Islamic law restricts the free proof of facts in criminal trials to a much greater extent than the common law. Whereas evidence law in common law jurisdictions consists of a set of limited exclusionary rules and, otherwise, permits all evidence that satisfies the low threshold of

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49. MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 74 (1982). *Cf.* (describing the *Maliki* School's position). Ahmed I. Ali, *Compensation in Intentional Homicide in Islamic* Law, 9 J. ISLAMIC & COMP. L. 39 (1980).

50. EL-AWA, *supra* note 49, at 75; 2 SABIQ, *supra* note 25, at 346. BAHA AL-DIN A. IBN IBRAHIM, AL-UDDAH SHAR AL-UMDAH FI FIQ IMAM AL-SUNNAH AHMED IBN HANBAL [THE PREPARATION, A COMMENTARY ON JURISPRUDENCE OF IMAM AHMED IBN HANBAL] 560-61 (no date).

relevance, Islamic law exhaustively defines all categories of evidence that can be used to sustain a criminal conviction.

The Islamic rules of proof in criminal trials are greatly complicated by the intersection between Islamic sentencing and trial law, which can mean that the boundaries of each category of permissible evidence will vary according to the punishment being contemplated in court. For some crimes, the restrictions are a practically insurmountable barrier to any conviction, for example the preconditions for the proof of *Zina* (adultery), a *Hadd* crime that attracts the fixed penalty of stoning.[51] Because murder can result in beheading, there are tight (though not impossible) restrictions on the evidence that can be used to prove a murder charge. A further complication is that there is a high degree of controversy, both between and within the various Islamic juristic schools, about the details of these restrictions.

1. Testimony of eye-witnesses

The classic method for proof of criminal charges under Islamic law is the oral testimony of two pious Muslim males.[52] The required content of such testimony varies according to the punishment being sought. To justify a conviction for capital murder, considerable detail is required. Each witness must describe the precise nature of the murder, including such facts as the portion of the victim's body that was struck by the murder weapon.[53] If the witnesses contradict each other on these details, then their testimony is not acceptable.[54] If the witnesses can only specify a lesser degree of detail, then murder may still be proved, but capital punishment will be unavailable.[55]

The requirement of *Adala* (piety) of each witness provides a further obstacle for use of this category of evidence in Saudi courts. [56] The *Hanbali* school requires the court to make a positive inquiry into the good

51. *The Quran* 4:15. *Zina* exceptionally requires either four confessions in open court or the testimony of four Muslim males who must testify that they had a full view of the precise act of sexual penetration. *Id.* If one of the witnesses fails to testify satifactorily, then the remaining witnesses will be found to have committed the *Hadd* crime of slander. *The Quran* 24:4 (and those who launch a charge against chaste women and produce not four witness [to support their allegations] flog them with eighty strips). *See also* BAHA AL-DIN A. IBN IBRAHIM, AL-UDDAH SHAR AL-UMDAH FI FIQ IMAM AL-SUNNAH AHMED IBN HANBAL [THE PREPARATION, A COMMENTARY ON JURISPRUDENCE OF IMAM AHMED IBN HANBAL] 560-61 (n.d.).

52. *The Quran* 2:282 ("and get two witnesses out of your own men").

53. AL-JAZIRI, *supra* note 40, at 242.

54. *Id.* at 244.

55. *Id.* at 245.

56. *The Quran* 65:2 ("and take witness two persons from among you possessing justice").

character of every witness.[57] Witnesses must have obeyed the demands and prohibitions of the religion of Islam and have a sense of honour.[58]

It is not surprising, therefore, that there are no reports that eyewitness accounts were considered by the court in the Gilford trial. In sex-segregated Saudi Arabia, and especially in the sheltered environment of foreign nursing quarters, pious Muslim men would have no business being in the company of three unmarried foreign women.

2. Confession

Perhaps the most practical and effective method of proof allowed under Islamic law is confessional evidence. It seems certain that this category of evidence was crucial in the trial of Parry and McLauchlin, because it was widely reported that both women provided a detailed confession to the crime of intentional murder.[59] The two nurses signed written confessions after being held in custody by the Saudi police for several weeks. However, Islamic law provides two significant barriers to the use of confession as evidence in criminal trials.

First, nearly all Islamic schools, like common law courts, require a *voluntary* confession.[60] Accordingly, a confession that resulted from torture, beating, threats, deception or any inhumane treatment will not be accepted, even if the court has reason to believe that the confession is true.[61] At the Gilford trial, the two defendants insisted that their confessions were coerced, as they followed threatened and actual violence from the police and the police's false promise that a confession would result in the defendants' immediate deportation. The British media published expert analyses of the written confessions which concluded

57. Ma'amoun M. Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 109, 117 (M. Cherif Bassiouni ed., 1982).

58. EL-AWA, *supra* note 49, at 125. The *Maliki* school requires that a witness be Muslim, mature and wise, not do immoral things, not innovate in religious matters, not interpret religion to suit personal needs, be generous and be of good character. Training homing pigeons, playing chess and musical instruments, saying silly things or committing minor sins will disqualify a witness. AL-JAZIRI, *supra* note 40, at 242.

59. The media obtained copies of the confessions when they were submitted as part of the defendants' proceedings against Frank Gilford in the Supreme Court of South Australia. *See, e.g.*, Mark Steene, *Confessions Tell of Rift in Lesbian Love*, DAILY TELEGRAPH (Sydney), Sept. 25, 1997, at 4.

60. Some schools allow the use of coerced confessions in exceptional cases where the defendant is known for acts of inequity or immorality. *See* Ahmad Fathi Bahnassi, *Criminal Responsibility in Islamic Law, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 171, 191 (M. Cherif Bassiouni ed., 1982); Al-Laheidan, *supra* note 36, at 189-90.

61. SANAD, *supra* note 40, at 102 (If a judge accepts a confession without investigating whether or not it was issued by free will, then the judge may be charged with a *Tazir* crime).

that the confessions must have been coerced, although it is extremely unlikely that such evidence was brought before the Saudi court.[62] The Al-Khobar court investigated the defendants' claims and, according to some reports, received medical evidence that contradicted some of the defendants' assertions.[63]

A second limitation on confessional evidence under Islamic law goes well beyond the protections offered to accused persons subject to police interrogation in Western countries. A general principle of Islamic criminal law is that an accused person can withdraw a confession, even a voluntary one, at any time. Much of the juristic writings on this point concern crimes that attract the *Hudud* punishments. The prevailing view is that a confession to a *Hadd* crime can be withdrawn up until the moment of punishment.[64] Thus, for example, a defendant's retraction of a confession to theft, instants before her or his hand is amputated, will prevent the completion of the punishment unless other permissible evidence was available to prove the crime. Indeed, even the defendant's abscondment from legal custody can be regarded as an implicit withdrawal of a confession.[65] These principles are clearly of potential importance in the trial of Parry and McLauchlin, who explicitly withdrew their confessions on receiving legal advice.[66] However, the position of withdrawn confessions in relation to *Qisas* crimes such as murder, as opposed to *Hudud* crimes, is uncertain. One view is that the same rules should apply in both cases.[67] Arguably, withdrawn confessions should not be available to justify the application of the death penalty, which generally attracts the strictest rules of proof. On the other hand, some of the aspects of the Islamic law of withdrawn confessions, for example the recommendation that *Sharia* judges positively encourage defendants not to confess or to withdraw their confessions in relation to some crimes, seem to sit more comfortably with *Hudud* crimes, seen as crimes against God or society, than *Qisas*, personal, crimes.[68]

It is not known whether the Al-Khobar court ultimately relied on the defendants' confessions to the police in reaching its verdict. If the confessions were used, then the court must have rejected the claims that the confessions were coerced and refused to apply the Islamic law

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62. Evans, *supra* note 27, at 23; Steve Boggan, *Saudi Nurses Say They Were Tortured Into Confessing*, INDEP. (London), May 22, 1998, at 1.

63. *Doctor's Deny Nurses' Torture*, DAILY TELEGRAPH (Sydney), May 25, 1998, at 6.

64. AL-JAZIRI, *supra* note 40, at 66; Salama, *supra* note 577, at 120.

65. AL-JAZIRI, *supra* note 40, at 66; Salama, *supra* note 57.

66. Philip Cornford & Agencies, *Murder Victims Brother Holds Fate of Two Nurses in His Hands*, SYDNEY MORNING HERALD, May 22, 1997 at 4.

67. M. Cherif Bassiouni, *Qisas Crimes*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 203, 208 (M. Cherif Bassiouni ed., 1982) [hereinafter Bassiouni , *Qisas Crimes*].

68. This approach is based on a *Hadith* where the Prophet tried to encourage a woman not to confess to adultery. *See* AL-JAZIRI, *supra* note 40, at 66.

of withdrawn confessions to the crime of murder.

3. Other evidence

According to media reports, the case against the defendants in the Gilford trial was not based solely on their confessions. The two defendants were targeted for police interrogation after security cameras at an automatic banking machine revealed that they had used the victim's credit cards to withdraw cash on several occasions days after the murder.[69] Also, accounts of the night of the incident provided some support for an opportunity for the defendants to murder Gilford and, perhaps, were consistent with the apparent motive detailed in their withdrawn confessions, a dispute involving a sexual relationship between the victim and defendants.[70] Finally, given that expatriates in Saudi Arabia live in small, isolated compounds, guarded by Bedouins who double as informers for the police, and that movement between the compound and the outside world is restricted, a murder by outsiders would have been difficult.[71] Clearly, in a Western trial, these matters would have been crucial in establishing a circumstantial case against Parry and McLauchlin.

However, the use of evidence other than eyewitness testimony and confession is controversial in Islamic law. A number of jurists take the view that to permit other methods of testimony would be to allow a judge to become a witness in a trial where he is supposed to reach a verdict. In particular, the *Hanbali* school, followed in Saudi Arabia, specifies that *Ilm Al-Qahdi* (the judge's personal observation) cannot be evidence of serious crimes, including murder.[72] This prohibition extends to the judge's use of inferences from *Al-Qrain* (circumstantial evidence) where they are unfavourable to the accused.[73] (The Hanbali school does permit the use of such evidence in a murder trial to reach a verdict that would result in a non-capital punishment, such as the payment of blood money).[74]

A minority of Muslim scholars reject the ban on personal observation, citing a *Quranic* verse.[75] Some jurists argue that it is wrong to re-

69. Daniel McGrory, *Confused Defendants Baffled by Court Rules*, TIMES (London), Sept. 24, 1997, at 2.

70. Steene, *supra* note 59, at 4.

71. Ziauddin Sardar, *The Saudi Judges Are Not Fools*, NEW STATESMAN, May 29, 1998, at 9.

72. El-AWA, *supra* note 49, at 129.

73. Bassiouni, *supra* note 33, at 26.

74. *Id.*

75. "O ye who believe! Stand firmly for justice, as witnesses to God, even as against yourself, or your parents, or your kin, and whether they be rich or poor." *The Quran* 4:135.

strict evidence in criminal trials to testimony and confession.[76] Other jurists argue that the ban on the use of the judge's personal observation should be limited to *Hudud*, the most serious crimes in the Islamic calendar, and should be permitted to prove *Qisas* crimes such as murder.[77] Indeed, in Iran, one of the main modern jurisdictions that practice Islamic criminal law, the judge's personal observation can support any criminal charge.[78]

It seems clear that, if the defendants' disputed and withdrawn confessions were not used, then the judges that heard the Gilford trial must have relied upon circumstantial evidence to support Parry's conviction for capital murder. That would mean that the judges followed a minority juristic view on the use of circumstantial evidence in murder trials.

C. *Doubts About Guilt*

All Muslim jurists agree that *Shubha* ('semblance of doubt'), will result in *Dar'a* (nullification) of *Hudud* punishments. In one *Hadith* (saying), the Prophet said: "Nullify the *Hudud* if there is doubt and lift the death penalty as much as you can."[79] In another, the Prophet said (long before common law jurists)[80]: "If the judge makes a mistake in amnesty it is better than a mistake in punishment."[81] The jurists do not specify a particular degree of doubt that will result in nullification, such as the common law standard of reasonable doubt. Rather, the texts speak in terms of examples, such as a man accused of adultery, who thought his sexual partner was his wife or did not realise that adultery was a crime.[82] (This example indicates that Islamic law lacks the common law's delineation between exculpatory defenses and deficiencies in the evidence. *Shubha* may, thus, also an analogous role to some common law criminal defences.)

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76. Salama, *supra* note 57, at 110-11 (These include Ibn Taymiyya, a famous jurist from the *Hanbali* school).

77. Salama, *supra* note 577, at 111-12.

78. According to Iran's ISLAMIC PUNISHMENT ACT 1991, Article 105, "the Islamic judge can decide in *Hudud* based on his knowledge in criminal cases related to both crimes against God and people. However, the judge is required to mention the basis of his knowledge in the judgment." *See* GHOLAMREZA HOJJATI ASHRAFI, MAJMU'A KAMIL QAWANIN WA MUQARRAT JAZAE'I [THE COMPLETE COLLECTION OF CRIMINAL LAWS AND REGULATIONS] 26M (1997).

79. AL-JAZIRI, *supra* note 40, at 70.

80. *See* Alexander Volokh, *'n' Guilty Men*, 146 U. PA. L. REV. 173 (1997), for a discussion of common law pronouncements of this sort.

81. AL-TERMAZI, SUNAN [THE TRADITIONS], sec. H*udud*, *Hadith* no. 1344; AL-JAZIRI, *supra* note 40, at 70.

82. ABU AL-HASSAN AL-MAWARDI, THE LAWS OF ISLAMIC GOVERNANCE 317 (Abdullah Yate trans., 1996).

Despite the circumstantial case against the defendants, a number of other features of the evidence in the Gilford trial appear to raise factual doubts about the defendants' guilt. In particular, the defendants' account of police coercion and their denials of any involvement in the murder would be the central planks in a defence to the charge. In addition, the murder lacks a plausible motive. It is unclear why the mere fact of a sexual relationship between the defendants and the victim, as detailed in the disputed confession, would amount to a motive for murder. The motive of theft, suggested by the use of the credit cards, is also unconvincing, given that the defendants would have been generously paid to be nurses in Saudi Arabia and would have had few outlets to spend money in that country. The alleged behaviour that led to the defendants' arrest, the use of the victim's credit cards days after the killing, suggests that, if the defendants did kill Gilford, they were improbably foolish. Obviously, in a Western trial, such matters would be discussed at length by the lawyers, the judge and the jurors. However, given the lack of formal status for lawyers' arguments in Saudi courts, we cannot be sure to what extent such arguments were aired at the Gilford trial.

In any case, like the ban on withdrawn confessions and circumstantial evidence, there is controversy about whether *Shubha* has a role in non-*Hudud* crimes, such as murder. The first of the Prophet's sayings, above, was limited to *Hudud*. However, it could be argued that his use of this Arabic word was equivocal, as it can be to refer to both the limited set of crimes with fixed punishments and the general concept of criminal sanction, which would include *Qisas*.[83] Arguably, its concluding words mean that Shubha should apply all cases concerning the death penalty, so that the doubts in a capital murder case will limit the *Qisas* penalty to lesser forms of retaliation. Finally, it could be argued that the second *Hadith*, above, while not as explicit as the first, nonetheless implies a role for *Shubha* in all crimes.

One option for *Sharia* judges faced with doubts in the evidence is the possibility that weak evidence can be supplemented by a procedure called *Qasama* (oath). *Qasama* has no parallel in the West. The procedure requires that the judge have a high, albeit not itself sufficient, degree of certainty that an accused person is guilty. In this circumstance, termed *Lawth*, the judge may ask fifty members of the family of the victim to swear that the defendant murdered their relative.[84] Where fifty

83. In most Islamic Jurisprudence texts the *Kitab Al-Hudud* generally means the chapter on punishments (*Uqubat*) which consists of *Hudud*, *Qisas* and *Tazirat*. *See* AL-JAZARI, *supra* note 40, at vol. 9.

84. ALA AL-DIN I. M. AL-DEMESHQI, AL-AKHBAR AL-ILMIYYA MIN AL-IKHTIYYARAT AL-FIGHHIYYA MIN FATAWI SHEIKH AL-ISLAM IBN TAYMIYYA [A SELECTION OF THE LEGAL IDEAS OF IBN TAYMIYYA] 295 (n.d., n.pub.); 6 MUHAMMAD AL-SHAFIE, KITAB AL-UMM [THE

relatives are unavailable, the oath of just one, made fifty times, will suffice. This procedure can apply even when the evidence falls short of the strict requirements of proof set out above, for example because a confession has been withdrawn and there was only one eyewitness. However, *Qasama* was not applied in the Gilford trial. It is likely that Frank Gilford, the sole competent relative connected to the proceedings, would have refused to make the oath, as he repeatedly denied having any opinions about the defendants' guilt, instead declaring that he would simply accept any verdict that the court brought down.[85] In addition, some Muslim jurists have argued that *Qasama* should not be used in a trial for a capital crime.[86] Indeed, some other jurists do not consider it to be a part of Islamic law.[87]

D. Parry's Conviction For Capital Murder

In September 1997, the media reported rumours that the Al-Khobar court had pronounced Deborah Parry guilty of intentional murder and declared her subject to the *Qisas* death penalty.[88] It should be obvious from the above discussion that this is a surprising result given the applicable Islamic law, especially the *Hanbali* school followed in Saudi Arabia. Assuming the media accounts of the evidence before the court were accurate and comprehensive, the judges must have followed a minority juristic viewpoint in relation to the applicability in capital trials of either the law governing withdrawn confessions or the law governing the use of circumstantial evidence. Also, the court must have rejected, on either factual or legal grounds, the arguments that Parry's guilt was doubtful. Further, if circumstantial evidence was not used, then the court must also have rejected the defendants' assertions about the coercive circumstance of their confessions.

Clearly, if the accounts of the trial are correct, then Parry was unlucky to be convicted by a *Sharia* court. Whether this misfortune arose from the idiosyncratic views of the judges of the Al-Khobar court or domestic pressures that demanded the appearance of strict justice for foreign nationals is a matter for speculation.

BOOK OF MAIN SOURCES] 79 (1968); AL-HELLI, *supra* note 43, at 224; Al-Laheidan, *supra* note 36, at 159.

85. Anthony Keane & John Ferguson, *Show Them No Mercy, Brother's Verdict on Death Sentence for Nurse's Killers*, ADVERTISER (Adelaide), Dec. 27, 1996, at 1; Clare Kermond, *No Budging on Death Penalty, Says Brother*, AGE (Melbourne), June 6, 1997, at A3.

86. Al-Laheidan, *supra* note 36, at 187.

87. SABIQ, *supra* note 25.

88. Michael Theodoulou et al., *Death Penalty Fears for Colleague as Saudi Court Verdict is Condemned*, TIMES (London), Sept. 24, 1997, at 1.

IV. PUNISHMENT FOR MURDER

A. *The Death Penalty*

Capital punishment is available for a number of crimes under Islam, both as a fixed punishment (for example, for adultery) and, occasionally, as a discretionary *Tazir* punishment. However, its role under Islam as a punishment for murder arises from the wider principle of *Qisas*. *Qisas*, from the Arabic, *qassa* (to follow) describes a method of punishment whereby the offender is punished in the same way, and by the same means, as the crime that she or he committed.[89] If the crime is murder, then the punishment is the death penalty, *Qisas-al-Nafs* (*Qisas* for life.) For lesser personal injuries, *Qisas Ma Doon Al-Nafs* (*Qisas* for less than life) is available. However carrying out the lesser punishment is sometimes difficult because of the strict requirement that the retaliatory wound be exactly the same as the original injury. [90]

Some Islamic schools have held that, like *Qisas* for non-fatal injuries, the death penalty for murder should be performed in a way that matches the original method of killing.[91] If this applied in Saudi Arabia, then Parry would have been liable to be killed by a combination of stabbing, assault with a hammer and suffocation. However, the *Hanbali* school, following a *Hadith* that "there is no *Qisas* except by the sword", requires that all executions be carried out by beheading, regardless of the method of the murder.[92] At present, Saudi Arabia is alone in performing executions by beheading.

Qisas is a refinement of the biblical and pre-Islamic Arab notion of punishment for personal crimes. In pre-Islamic Arab culture, revenge for murder often involved escalating tribal warfare where, typically, several lives were taken in response to a single killing.[93] The advent of

89. AL-JAZIRI, *supra* note 40, at 182; A. SHARABASI, AL QISAS FI AL-ISLAM [QISAS IN ISLAM] 17 (1954); Bassiouni, *Qisas Crimes*, *supra* note 67, at 203; EL-AWA, *supra* note 49, at 69; ABDURRAHMAN A. DOI, SHARI'AH, THE ISLAMIC LAW 232 (1984). The principle of *Qisas* is based on *The Quran* 2:178, 5:48 and a *Hadith* that "the life of a Muslim is sacred except if he commits adultery after marriage, kills somebody or abandons Islam." *See* AL-JAZIRI, *supra* note 40, at 185.

90. *The Quran* 5:45 states, "We ordained therein for them, life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal."

91. AL-JAZIRI, *supra* note 40, at 225-27. This view is based on *The Quran* 16:126, "if you punish, let your punishment be proportionate to the wrong that has been done to you."

92. *The Quran* 16:126; EL-AWA, *supra* note 499, at 72. The sword is favored because, at the time of the Prophet, it was regarded as the quickest and most efficient method of execution. Ahmad Abd Al-Aziz Al-Alfi, *Punishment in Islamic Criminal Law*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 227, 232-33 (M. Cherif Bassiouni ed., 1982).

93. EL-AWA, *supra* note 49, at 70.

Islam limited this pattern in two ways. First, *Qisas* was restricted to "a life for a life" and could only be used against an intentional killer. Second, the death penalty could only be applied at the request of the victim's heirs, who are provided with and encouraged to utilise alternative methods of retaliation.

1. A life for a life

In Western countries, the principle of 'a life for a life' is a popular rationale for the introduction or maintenance of the death penalty for murder. However, in common law jurisdictions where capital punishment is available, this principle has no formal role in individual sentencing decisions. In Islam, on the other hand, the 'life for a life' principle plays an everyday role in the administration of capital punishment.

The Gilford murder provides an example of the special role of the 'life for a life' principle in Islamic criminal justice. In that case, two defendants were on trial for a single murder. A number of juristic Muslim schools, including the *Hanbali* school, require strict equality between the number of people murdered and the number put to death under *Qisas*.[94] To accommodate this requirement, the courts distinguish between primary and secondary parties to a crime, even though Islamic criminal law contains no formal rules governing participation in crimes. For example, one text declares that, if one person holds the victim while the other deals the fatal blow, the latter will be put to death, while the former will be subject to life imprisonment.[95] When the Al-Khobar court held that Parry, but not McLauchlin, was subject to the *Qisas* death penalty, it presumably relied upon the confessional or forensic evidence before it to find Parry primarily responsible for Gilford's death.

A further complication of the 'life for a life' principle is that some jurists, including the *Hanbali* school, are not prepared to equate a Muslim life with a non-Muslim one.[96] This principle caused no difficulty in the Gilford trial, as both victim and convicted murderers were non-Muslim. However, it is interesting to note that, under the law prevailing in Saudi Arabia, the option of capital punishment would not have been available if a Muslim had been found guilty of killing Yvonne Gilford.[97]

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94. AL-JAZIRI, *supra* note 40, at 219.

95. SABIQ, *supra* note 25, at 223-24.

96. *Id.* at 354; *but, cf.* at 355; EL-AWA, *supra* note 499, at 79.

97. AL-JAZIRI, *supra* note 40, at 210. *Qisas* would be available if a Muslim was killed by a non-Muslim. By contrast to the *Hanbali* approach, the *Hanafi* school, the most popular juristic school, distinguishes between *Harbi*, enemies of Muslims, who are treated as not equal to a Muslims, and *Mustamans* (non-Muslims granted asylum by an Islamic State) and *Dhimmis* (Jews or Christians living in an Islamic territory). Modern examples of *Harbi* are few, although the Soviet Union soldiers who once occupied Afghanistan

2. The rights of the victim's heirs

The right of *Qisas* is held exclusively by the heirs of the victim.[98] This means that *Sharia* judges' involvement in *Qisas* capital punishment is limited to reaching a verdict that the death penalty is available. Even the Saudi King has no power to commute the death penalty in these circumstances. The procedural requirement that all such matters be referred to the King does not connote the need for approval of the sentence, only confirmation of the guilty verdict pronounced by the courts.[99] In theory, the victim's heirs even have the right to perform the death penalty personally. However, in Saudi Arabia, lay persons' lack of expertise in efficient beheading means that, in practice, the sentence will always be carried out by a headman appointed by the Saudi government.[100]

Where the victim is Muslim, the heirs are defined by the *Sharia*. However, the position in the Gilford trial was more complicated. The lawyers for Parry and McLauchlin at one stage reportedly challenged the right of Frank Gilford, Yvonne's next of kin, to exercise *Qisas*, because he was not mentioned in his sister's will. This argument would not have been tenable if the Gilfords were Muslim, because Islamic law does not permit a property holder to bar heirs from inheritance.[101] However, because the Gilfords were not Muslim, the *Sharia* court would have had to apply South Australian succession law to resolve this issue. Given his continuing role in the proceedings, it must be assumed that the *Sharia* court satisfied itself of Frank Gilford's status as the victim's legal heir under South Australian law.

Under the *Hanbali* school, the victim's heirs have three options under *Qisas*.[102] First, they can ask for the death penalty. Second, they can seek monetary compensation. Third, they can ask for forgiveness. Leniency is preferred as a matter of principle under Islamic law, which de-

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would have been considered *Harbi* if an Afghan Islamic state had existed at the time. *See* SOBHI MAHMASSANI, AL-QANUN WA AL-ALAQAT AL-DOWLIYA FI AL-ISLAM [INTERNATIONAL LAW AND RELATIONS IN ISLAM] 89-124 (1982); MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 162-69 (1955).

98. *The Quran* 17:33 states "and if anyone is slain wrongfully, we have given his heir authority [to demand Qisas or to forgive]." An exception permitted under some schools, including the *Hanbali* School, is that the dying victim can forgive the killers. AL-JAZIRI, *supra* note 40, at 200. It is even possible that this forgiveness can be given prospectively, by a legal will. Also, under the *Hanbali* School, if the victim has infant heirs, then the defendants must be imprisoned until the infant reaches puberty. *Id.* at 203-04.

99. Al-Hewesh, *supra* note 22, at 376.

100. *Id.* at 377.

101. A Muslim can only dispose of one third of her or his property by will. The remaining two-thirds of the property is distributed to the heirs as defined by Sharia inheritance law. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 244 (1986).

102. AL-JAZIRI, *supra* note 40, at 194.

mands that Muslims respect all life.[103] Both the *Sharia* and Saudi authorities are committed to trying to convince the victim's family to waive their right to the death penalty.[104] In the past, the Saudi Royal family itself has interceded in such matters and, sometimes, has succeeded where other attempts at persuasion failed.[105] However, ultimately, the decision remains a personal matter for the victim's heirs. Where there is more than one heir and they disagree, the most lenient position is applied.[106]

The defendants' lawyer repeatedly petitioned Frank Gilford to waive the option of the death penalty before, during and after the trial.[107] Gilford resisted these pleas at various times, arguing that the verdict should precede the determination of any punishment.[108] After it was reported that Parry was liable to beheading, Gilford formally waived the death penalty.[109] However, as will be discussed below, this did not conclude the defendants' punishment.

B. Monetary Compensation

1. Non-capital murder

As discussed earlier, a defendant may be convicted of murder under conditions that fail to satisfy the requirements for capital punishment. For example, the murder may not have been intentional or not committed with a deadly weapon, or it may have been proved by eyewitnesses who nonetheless could not give sufficiently detailed accounts of the murder. Under such circumstances, the victim's heirs' rights under *Qisas* are limited to two options: to forgive the defendant completely or to receive a fixed amount of monetary compensation, termed *Diyya* (blood money.)[110] *Diyya* has a dual role in Islamic law: as a punishment in some criminal matters and as a compensation device in civil mat-

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103. *The Quran* 5:32 states, "[I]f anyone saved a life it would be as if such a person saved the life of the whole people."

104. Al-Hewesh, supra note 22, at 377.

105. *Id.*

106. AL-JAZIRI, *supra* note 40, at 197.

107. The defendants' lawyers provided Gilford with a seventeen-page document setting out moral, philosophical and religious objections to the death penalty and appealing for mercy for female defendants. Andrew Ramsey, *Slain Nurse's Brother Rejects Clemency Plea*, AUSTRALIAN (Sydney), Apr. 2, 1997, at 8.

108. *Id.*

109. Dominic Kennedy, *Saudi Nurse is Spared After Death Right Waived*, TIMES (London), Nov. 17, 1997, at 1.

110. *The Quran* 4:92 provides, "Never should a believer kill a believer, except by mistake, and whoever kills a believer by mistake it is ordained that he should . . . pay blood money to the deceased's family, unless they remit it freely."

ters.[111] Under the *Hanbali* school, *Diyya* is payable from the defendant's estate if the defendant dies before punishment.[112]

The value of *Diyya* is usually one hundred camels. Under the *Hanbali* school, this can be paid in gold or silver, rather than camels.[113] In 1987, the Saudi government, by royal decree, set the value of one hundred camels in Saudi currency as 140,000 Saudi riyals (about £17,000).[114] However, this amount would not be applicable in the Gilford case, because *Diyya* is halved for women.[115] Indeed, under non-Saudi versions of Islamic law, the amount would be further halved because the victim was not a Muslim.[116] However, the *Hanbali* school sets the payment of *Diyya* as equal for Muslims and non-Muslims.[117]

2. Capital murder

The prescribed value of *Diyya* nominally applies to all murders. However, under the *Hanbali* school, where capital punishment is available, the victim's heirs have the right, under *Qisas*, to bargain with the accused for any monetary amount.[118] Obviously, the defendant in such a circumstance will be in an extremely poor bargaining position. Thus, only the defendant's financial resources and the heirs' desires will limit the amount of *Diyya* payable.

Frank Gilford fully utilised his rights under the *Hanbali* school. Before waiving the death penalty, he entered into a contract with the defendants' lawyer requiring the defendants to pay approximately A1.7 million ($US 1.2 million).[119] Gilford formally waived the option of capital punishment once the money was deposited with the Supreme Court of

111. Bassiouni, *Qisas Crimes*, *supra* note 67, at 206.

112. AL-JAZIRI, *supra* note 40, at 197 (The obligation to pay *Diyya* does not survive death under the *Hanafi* and *Maliki* schools).

113. *Id.* at 271.

114. Jeffrey K. Walker, *The Rights of the Accused in Saudi Criminal Procedure*, 15 LOY. L.A. INT'L. & COMP. L. J. 863, 881 (1993).

115. SABIQ, *supra* note 25, at 378.

116. *Id.* at 379-80.

117. AL-JAZIRI, *supra* note 40, at 274. This accords with a verse of the *Quran* and the practice of the Prophet and the Righteous Caliphs. *The Quran* 4:92 orders Muslims to pay blood money to the family of a non-Muslim with whom they have a treaty of mutual alliance. The Righteous Caliphs ruled the Islamic Caliphate for 29 years after the Prophet's death. *Muaawiya*, founder of the Omayyed Dynasty in 661 AD, ordered that half the *Diyya* of non-Muslims be paid to the *Bait al-Mal* (treasury). AL-JAZIRI, *supra* note 40, at 274.

118. AL-JAZIRI, *supra* note 40, at 201. The situation is different under the *Hanafi* and *Maliki* schools, which limit the family's rights to demanding the death penalty or forgiving the killer. *Diyya* is only provided if the defendant agrees to pay. *Id.* at 201.

119. Daniel Mcgrory & Michael Theodoulou, *Nurses Agree to Pay $1.2m Blood Money*, TIMES (London), Sept. 25, 1997, at 1.

South Australia by the defendants' lawyers.[120] Shortly after the defendants were released, the money the defendants authorised the payment of the money to Gilford.

C. *Other Punishments*

As noted earlier, *Qisas* capital punishment is not available for accessories to murder under the *Hanbali* school. There is considerable debate over the punishment to be given to secondary parties. Most jurists leave the punishment of lesser accomplices to judicial discretion[121], though some dissenting schools maintain that all accomplices should be executed.[122] The Al-Khobar court apparently followed the majority approach when it sentenced McLauchlan to eight years jail and 500 lashes.[123]

Additionally, under the *Hanbali* school, where the victim's heir has waived the right to the death penalty, a *Sharia* court may sentence a murderer to a discretionary, non-capital, punishment if it feels that the killers are wicked, of bad character or lack a sense of honour.[124] Clearly, the purpose of this rule is to provide for heirless victims, to compensate for what might be regarded as an overly forgiving heir or, perhaps, to provide a more flexible punishment option than those permitted under *Qisas*. It is not known whether Parry received an additional sentence for the crime of murder once Frank Gilford waived the death penalty.[125]

D. *Review Proceedings*

Saudi appeal courts may overturn *Tazirat* sentences pronounced by the general court and substitute their own sentence. In the Gilford trial, no details of court proceedings following the general court trial are available.

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120. Paul Ravenscroft, *Blood Money for Murdered Nurse Sent to Australia*, TIMES (London), Oct. 3, 1997, at 3.

121. *Id.* Co-operation criminal and sinful acts is prohibited by *The Quran* 5:2 ("help ye one another to righteousness and piety, but help ye not one another in sin and rancour"). Thus, participation in crime is subject to a *Tazir* punishment.

122. AL-JAZIRI, *supra* note 40, at 217-18.

123. Michael Theodoulou et al., *supra* note 2, at 1.

124. AL-JAZIRI, *supra* note 40, at 196. In Iran, the ISLAMIC PUNISHMENT ACT 1993, Article 205, provides, "In intentional cases where there is no complaint or the family of the victim has waived the demand for *Qisas*, if the act of the killer has endangered the public order of society or promotes the killer or others to commit further crimes, then the killer should be sentenced to a discretionary jail sentence from three to ten years." *Id.*

125. It is also possible that both McLauchlan and Parry were convicted and sentenced for a number of crimes other than murder. Given some of the evidence before the court, both parties might have received discretionary *Tazirat* sentences for the crimes of theft and lesbianism. Again, whether or not this occurred is presently unknown.

However, according to the Saudi Ambassador to Britain, Parry and McLauchlan's sentences were commuted by King Fahd to the period they had served in jail.[126] It is obvious that this followed diplomatic efforts by the British government. It is important to recognise that the King's right to commute sentences, like the appeal courts, is limited to *Tazirat* punishments. So long as a guilty verdict for *Qisas* crime stands, no-one other than the victim's heirs can determine whether or not the defendant is to be executed. Accordingly, King Fahd's release of Parry, and the accompanying diplomacy, were dependent on Frank Gilford's decision to waive the death penalty for his sister's murder.

V. CONCLUSION

In the Gilford matter, there were many non-Muslims who were affected by the operation of Islamic criminal law.

Obviously, the two British nurses were the most directly affected. Despite perceptions of arbitrary justice in some Western circles, the trial of Parry and McLauchlan was governed by a complex set of legal rules. Although the procedural standards of the trial obviously fell below those that the defendants would have received had they been tried for murder in Britain or Australia, many of the substantive and evidential rules demanded by Islamic criminal justice in fact worked in their favour. Parry was unfortunate as it would seem that she ultimately was made subject to a punishment that was only be justified under a minority approach to the Saudi version of Islamic law. It could be argued that, in light of this, Parry may have been the victim of a Saudi court's desire to demonstrate that all persons, foreign or Saudi, Muslim or non-Muslim, are equally subject to Islamic criminal justice for acts performed in Saudi Arabia.[127]

While unfortunate for Parry, this circumstance does not suggest a particular critique of Islamic law. Similar doubts about the overly strict application of criminal justice arise throughout the world whenever foreigners are alleged to have committed crimes when visiting another country. Given that all criminal laws are open to judicial interpretation, this situation is probably unavoidable, although the opaqueness of Parry's trial certainly contributed to the appearance of injustice. It should be noted, however, that, ultimately, Parry and McLauchlan cannot complain too loudly. It is obvious that their status as British sub-

126. Peter & Flury, *supra* note 3, at 1.

127. Reportedly, in response to British media portrayals of the Saudi judicial system as barbaric, the Al-Khobar judge declared, "this case is an appropriate occasion to acquaint the non Muslim world with the basic characteristics of *Sharia*...law in healing wounds and in ensuring fairness between disputing parties." Theodoulou & Bale, *supra* note 2, at 1.

jects in the end caused them to be released after serving a much lesser punishment than would have been experienced by Saudi citizens in the same position.

On the other hand, the application of Islamic criminal justice to non-Muslims other than defendants does support a compelling critique.[128] We believe that the Gilford trial raises important questions about the desirability of involving non-Saudi, non-Muslims in the punishment stage of the Islamic criminal justice system.

The prime difficulty is most clearly demonstrated by the plight of Frank Gilford, who was given the extraordinary role of arbiter of life or death of Deborah Parry. This role was inconsistent with the approach to criminal justice in Gilford's own country, Australia, for three reasons. First, sentencing in Australia is the responsibility of judges, applying legislative and common law rules. Second, despite recent reforms increasing the involvement of victims of crime in the criminal justice process, victims are never given any decision-making role in Australian criminal trials.[129] Third, Australia's states abolished the death penalty in practice three decades ago and the country is a signatory to the 1989 second optional protocol to the 1966 *International Convention on Civil and Political Rights*, which bans capital punishment. In the aftermath of his sister's murder, these legal incongruities translated into a very real nightmare for Frank Gilford.

Because of the gap between Islamic and Australian sentencing law in relation to intentional murder, Frank Gilford was required to perform a legal role predicated on a culture and law that he did not understand. When first asked to comment on his role in the potential punishment of Parry and McLauchlan, Frank Gilford told the media that he desired no involvement in the matter and would not intervene to save the defendants from an Islamic sentence.[130] In making these remarks, he incorrectly assumed that Islamic law, like Australian law, placed the primary responsibility for sentencing in the hands of the courts or legislators. Thus, he assumed that any decision-making role given to him would be of a compassionate nature, pardoning or commuting the strict legal punishment. Once he had been informed of the correct position, he found himself reluctantly involved in the sentencing process without his consent because, if he had continued his 'hands off' approach, Parry would have received no *Qisas* punishment. In this situation, Frank Gilford repeatedly stated his desire that both defendants receive a pun-

128. For a discussion of the status of religious minorities under Islamic law see, Abdullahi Ahmed An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987).

129. *See* Jeffrey Miles, *The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused*, 19 CRIM. L. J. 193 (1995).

130. Keane & Ferguson, *supra* note 85, at 1; Maynard et al., *supra* note 2 at 1.

ishment of approximately twenty years in prison or life imprisonment, equivalent to what they would have received if the murder had been committed in Australia.[131] This assumption, that sentencing under Islamic law would have the same range of options as sentencing under Australian law, was a further error. Confronted with the reality that a prison sentence, being a state punishment, was unavailable under *Qisas*, he then openly contemplated demanding capital punishment to ensure that Parry did not escape with what would be regarded in Australia as an inadequate punishment.[132] Frank Gilford's difficulties were compounded by hostile media and public opinion in both the United Kingdom and Australia, galvanised by the possibility of punishments regarded in both countries as cruel.[133] He repeatedly complained of intrusive media coverage at a time of considerable personal grief and anguish.[134] However, the media could hardly ignore the issue, given the possibility of a beheading of a British subject and the doubts about the procedural standards of the trial and the defendants' guilt. Gilford's repeated statements that he would accept the verdict of the Al-Khobar court and consider all the lawful options for punishment under *Qisas* correctly stated the appropriate stance of the victim's heirs under Islamic law.[135] However, given that Gilford, in setting Parry's punishment, was performing a role that, in Australia and other Western countries, would be performed by a judge, it is not surprising that the Western media expected him to also adjudicate on the propriety of the convictions and the appropriateness of the available punishments

Equal to the difficulties caused by the availability of the death penalty were those posed by the alternative punishments for murder provided by Islamic law. Despite the availability of victim's compensation in Australia, the Australian public understandably regarded the payment of 'blood money' by the defendants as macabre and a wholly inappropriate financial gain as a result of tragedy. Gilford found himself with a choice between the death penalty and two remaining options, blood money and forgiveness, that, in the view of the majority of Australians, would sully the memory of his sister. Thus, unlike Saudi citizens, who would regard all these options as generally acceptable, Gilford was faced with a choice between the lesser of three evils. Muslims are required to exercise *Qisas* by following the *Quranic* principles of

131. Alex Kennedy, *Eye for an Eye*, SYDNEY MORNING HERALD, Jan. 11, 1997, at 33.

132. *Id.*

133. *E.g.*, Colin James & Paul Starik, *Gilford 'Cash for a Life' Blood Money*, DAILY TELEGRAPH (Sydney), Sep. 26, 1997, at 4; Pamela Bonne, *Choosing Mercy is Better than Deadly Vengeance*, AGE (Melbourne), June 6, 1997, at A15; Daniel McGrory, *Nurses Afraid of 'Bullying Tyrant,'* TIMES (London), Sep. 24, 1997, at 2.

134. Kermond, *supra* note 85, at 3.

135. Keane & Ferguson, *supra* note 130, at 3 (Gilford's position would have been less tenable if he had agreed to participate in a *Qasama* proceeding).

compassion and respect for life. However, it is like that Gilford's choice was based on a combination of personal grief and beliefs, pressure from the public, the media and diplomats, and, significantly, his own possible financial exposure.

The defendants' lawyers primarily pursued their clients' case through legal avenues in Saudi Arabia and, presumably, British diplomatic circles. However, they also pursued court actions against Frank Gilford himself in the Supreme Court of South Australia including (as mentioned earlier) disputing his status as heir.[136] At one stage, the defendants' lawyer suggested that Frank Gilford may be personally sued in Australia for his conduct.[137] Facing a possible risk of personal liability and also the burden of understanding Saudi criminal law, Gilford hired his own lawyers, both in Australia and Saudi Arabia. The resultant legal bills must have influenced him in choosing the option of *Diyya*. Eventually, $A700,000 ($US 434,000) of the money he received from the defendants was used to meet his personal legal expenses.[138]

Frank Gilford resolved the dilemma of the Australian distaste for the notion of 'blood money' by donating the bulk of the remaining payment, $A1 million ($US 620,000) to an Adelaide hospital, as a memorial to his sister.[139] Oddly, in an apparent attempt to comply with the *Diyya* principles, he also reserved for himself the amount of $A50,000 ($US 40,000) and $A9,000 ($US 5580) for his invalid mother, which total to roughly the same amount that is fixed for non-capital murder cases in Saudi Arabia.[140]

It is possible to speculate that Frank Gilford's solution to his dilemma may have left further Australians with an unwanted quandary concerning the clash between Islamic and Australian notions of criminal justice. Surely, the board of the Adelaide hospital, selected by Frank Gilford as the recipient of the *Diyya*, did not feel uncomfortable with accepting would have felt uncomfortable in accepting 'blood money' for use in an institution devoted to preserving life. However, presumably, there was overwhelming pressure on the hospital to accept the donation, given the impact of a refusal on its own fund-raising programmes and the sense that such a rejection would involve disrespect towards Yvonne Gilford, who was to have a hospital wing named in her

136. Mark Steene, *Beheading May Be Averted by SA Court*, ADVERTISER (Adelaide), Aug. 9, 1997, at 1.

137. Philip Cornford, *Nurses Sue Gilford's Brother for Damages*, SYDNEY MORNING HERALD, Aug. 19, 1997, at 3.

138. John Huxley, *Frank Gilford Has Been a Media Victim*, SYDNEY MORNING HERALD, June 10, 1998, at 2.

139. Nick Paps & Paul Starik, *With Relief, Gilford Hands Over $1m to Finally Put His Sister's Murder behind Him*, ADVERTISER (Adelaide), June 10, 1998, at 2.

140. Huxley, *supra* note 138.

memory.

The Supreme Court of South Australia, drawn into the events because of the defendants' efforts at securing their freedom, almost found itself at the centre of a diplomatic storm because of its role as the custodian of the *Diyya* payment, pending the defendants' release from prison. Following the defendants' return to Britain, the nurses' Saudi lawyer called on Parry to refuse authorising the payment to Frank Gilford and to instead sue him for causing her mental anguish.[141] The Australian Foreign Affairs Minister condemned the lawyer's suggestion and called on the British High Commissioner in Canberra and the Australian High Commissioner in London to lobby for the prompt payment of the money.[142] Saudi authorities would probably have responded similarly, as the lawyer's call is contrary to the Islamic principle of *Awfu bil-Uqud* (fulfillment of agreements) and the Arab tradition of *Wafa bil-Ahd* (keeping of promises).[143]

One reason the Supreme Court was spared a controversial legal decision was because the ultimate source of the money deposited in the court was not the defendants, but British industrial interests. Their obvious motivation was to prevent the diplomatic tension that would have resulted from the execution of a British subject.[144] These final non-Saudis involved in the proceedings obviously deserve little sympathy. Their role was, uniquely amongst the various non-Muslims drawn into the Gilford trial, a voluntary one. It is of interest to note that these companies' cynical motivations are unlikely to be regarded by *Sharia* courts as compatible with the compassionate purpose of *Diyya*.

In total, a consideration of the plight and motivations of the various non-Saudi individuals involved in the punishment phase of the Gilford trial suggests that the application of the Islamic law of *Qisas* to non-Muslim foreigners is unsatisfactory. We do not intend to criticise the continued use of the ancient tradition of *Qisas* in Saudi criminal justice

141. Roy Eccleston, *Nurse Frees Blood Money for Gilford*, AUSTRALIAN (Sydney), May 27, 1998, at 1. The basis for refusing the payment was not specified, although it is possible that Salah Al-Hejailan was contemplating arguing that the contract between Frank Gilford and the defendants was illegal or immoral under Australian law or vitiated by duress or pressure. The position of the tort of intentional infliction of emotional harm in Australia is doubtful. *See* FRANCIS A. TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTL. 72-76 (2nd ed. 1993).

142. Eccleston, *supra* note 141, at 1. The Minister described the lawyer's suggestion as "disgraceful" and said, "Frank Gilford did do the right thing . . . he did negotiate an agreement which led to those women being spared. The fact is he still hasn't had his part of the bargain fulfilled." *Id.*

143. *The Quran* 17:34. "and fulfill [every] agreement; for every agreement will be inquired into [on the day of judgment]." *Id.* at 2:177 ("it is righteousness . . . to fulfil the contracts which you have made"); *compare id.* at 5:1; 23:8; 4:90; 8:55-56; 8:73; 9:4; 9:7.

144. Lin Jenkins & Shirley English, *Defense Contracts Worth Billions Could Be at Risk*, TIMES (London), Sep. 24, 1997, at 2.

that is predicated on the particular tribal and religious culture and familial and social structure of Saudi Arabia. However, for exactly this reason, we doubt whether the purpose of *Qisas* is fulfilled in circumstances where neither victim nor defendant is Saudi nor even Muslim, so that religious, social, cultural and familial predicates of Islamic retaliatory punishment are almost certainly lacking. Indeed, it is evident that imposing the right of *Qisas* on a foreign victim's non-Muslim heirs, where they have no knowledge or understanding of Islamic law and principles, will almost always represent an unwanted and weighty burden at a time of personal grief. Far from showcasing Islamic justice, such an imposition will feed the West's negative perception of Islamic law. Additionally, those heirs' performance of their role under Islamic law will inevitably be corrupted by personal and external pressures from their own culture.

Accordingly, we recommend that this situation be reformed. One approach would be for those countries that prohibit the death penalty or impose due process requirements on its application to legislate to prevent their nationals from exercising a retaliatory right of capital punishment arising from a foreign legal system. However, this approach would probably lead to diplomatic tensions between Islamic and Western governments, difficult legal quandries for non-Islamic courts and uncertainty about the penalty for murder of foreign nationals in countries such as Saudi Arabia.

The better solution is that Muslim scholars re-interpret the law to restrict the role the victim's family in murder trials where the victim's heirs live outside of the Islamic world.[145] In practice, this would create a different result only in the rare circumstance when non-Muslims were convicted of murdering non-Muslim foreigners in an Islamic country.[146] In such trials, discretionary *Tazirat* punishments should be the primary response to a murder. This approach is consistent with the principle of *Qisas*, which the *Quran* makes clear has the purpose of saving life.[147] In a global economy where international travel is commonplace, Islamic

145. It should be noted that, in the Gilford trial itself, the judges of the Al-Khobar court saw the involvement of non-Muslims as a reason to break with certain Saudi legal traditions. *See* Theodoulou & Bale, *supra* note 2. As mentioned earlier, they allowed the defendants to be represented by a lawyer in court, presumably in deference to British procedural standards. *Id.* In addition, they also took the unprecedented step of adjourning the trial (for three weeks) *prior* to the verdict to urge Frank Gilford to waive the death penalty and settle the matter contractually with the defendants. *Id.* This latter step is significant as it specifically took into account the fact that the victim's heir was non-Muslim. Indeed, the defendants' lawyer described this procedure as one that accords "to the spirit and dictates of Islam which are relevant to settle cases and disputes between non-Muslims living in the Islamic world". *Id.*

146. As noted above, Saudi law already bars non-Muslims from the right to *Qisas* if the murderer is a Muslim. KHADDURI, *supra* note 97, at 162.

147. *The Quran* 2:179 ("In the law of *Qisas* there is [saving of] life").

authorities should apply the law with *Hikma*[148] (wisdom) and reconsider the application of Islamic criminal justice across national and cultural borders.

148. *The Quran* 3:81 ("Allah took the covenant of the Prophets saying: I give you a Book and Wisdom"); *compare id.* at 54:5; 3:8; 17:39; 16:125; 43:63; 2:23; 33:44; 2:269; 31:12; 38:20; 2:251; 3:48; 3:164; 4:54; 4:113; 5:110; 62:2.